CASE NO. S226538

IN THE SUPREME COURT OF CALIFORNIA

DELANO FARMS COMPANY, FOUR STAR FRUIT, INC., GERAWAN FARMING, INC., BIDART BROS., and BLANC VINEYARDS,

Petitioners,

v.

THE CALIFORNIA TABLE GRAPE COMMISSION,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT THE CALIFORNIA TABLE GRAPE COMMISSION PURSUANT TO RULE 8.520(d)

After Decision by the Court of Appeal, Fifth Appellate District,
Case No. F067956

On Appeal from the Superior Court for the State of California,
County of Fresno, Case Nos. 636636-3 (lead case), 642546, 01CECG1127,
01CECG2292, 01CECG2289, and 11CECG0178, Hon. Donald S. Black

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Pursuant to Rule 8.520(d)(1) of the California Rules of Court, Respondent The California Table Grape Commission respectfully submits this supplemental brief responding to the Petitioners' June 27, 2017 supplemental brief regarding the U.S. Supreme Court's recent decision in *Matal v. Tam* (2017) 137 S. Ct. 1744.

In *Matal*, the U.S. Supreme Court concluded that the First Amendment bars the government from refusing to register trademarks that the government considers disparaging. One of the arguments that the Court rejected in reaching that conclusion was that trademarks are a form of government speech. Respondent agrees with Petitioners that *Matal* is "instructive" (Petitioners Supp. Br. 2), although not in the ways that Petitioners claim.

The Court in *Matal* began by explaining why "'the Government's own speech ... is exempt from First Amendment scrutiny.'" (*Supra*, 137 S. Ct. at 1757.) "'[I]t is not easy,'" the Court explained, "'to imagine how government could function' if it were subject to the restrictions that the First Amendment imposes on private speech." (*Ibid.*) "When the government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others." (*Ibid.*) The government-speech doctrine is thus "essential" because it preserves the "ability" of "government entities ... to speak freely." (*Id.* at 1757-1758.)

The Court then offered "a simple example" of government speech: "millions of posters" that the federal government produced and distributed during the Second World War "to promote the war effort." (*Matal, supra*, 137 S. Ct. at 1758.) These posters delivered a government-selected set of messages—"urging enlistment, the purchase of war bonds, and the conservation of scarce resources." (*Ibid.*)

The poster campaign described in *Matal* closely resembles the work of the California Table Grape Commission at issue in this case. Like the federal government promoting enlistment, war bonds, and conservation, the State of California is delivering a government-selected promotional message: the generic promotion of California table grapes. (*See* Answer Br. 36-37 [quoting Food & Agric. Code § 65500(f)].) Of course, the California Legislature has created a commission to carry out that promotional task. But no one could seriously contend that the federal government's poster campaign in support of the war effort would have become private speech had the government created a commission to produce and distribute its posters—especially if, as here, that commission were *itself* a government entity. The wartime poster example described in *Matal* thus reinforces the conclusion that the Commission's speech is government speech.

Petitioners nonetheless contend that *Matal*'s conclusion that "[t]rademarks are private, not government, speech" (*Supra*, 137 S. Ct. at

1760) bolsters their argument that the government exercises too little control and oversight over the Commission's messages for those messages to qualify as government speech. (Petitioners Supp. Br. 3-4.) But the private trademarks at issue in *Matal* are nothing like the State of California's efforts to promote California table grapes. As the Supreme Court explained in *Matal*, trademarks are names and phrases that private parties "dream up" and use to promote their businesses and products. (*Supra*, 137 S. Ct. at 1758.) They do not in any way represent messages created by the federal government. The government does not initiate their creation, has no authority to edit or reject them based on the viewpoint expressed (other than if they are found to be disparaging), and cannot remove them from the register unless a party moves for cancellation. (*Ibid.*)

In contrast, it was the California Legislature that created the message promoting California table grapes that is specified in the Ketchum Act. (Answer Br. 36-37). Moreover, this governmental message is conveyed by a governmental entity that was specially created by the Legislature for that purpose and is itself subject to further government oversight. The Commission's board members are all appointed and subject to removal by the Secretary of the California Department of Food and Agriculture ("CDFA")—which is particularly important since the power to appoint and remove has long been recognized as the lynchpin of governmental control.

(*Id.* at 26, 37-38.) And the Commission is subject to CDFA's oversight authority, which includes the power to reverse the Commission's actions (*Id.* at 27, 39-41)—a power that the Patent and Trademark Office notably lacked (*Matal, supra*, 137 S. Ct. at 1758). Together, these features establish that the Commission's messages are "effectively controlled" by the State. (*Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, 560.)

Petitioners also argue that *Matal* "confirms *Johann's* directive that advertisements must be 'established' 'from beginning to end' by the government to constitute government speech." (Petitioners Supp. Br. 4-5 [capitalization omitted].) But the passage that Petitioners highlight in *Matal* simply quotes language from *Johanns* and briefly describes some of the facts of that case. (*Matal, supra*, 137 S. Ct. at 1759.) The scant attention paid *Johanns* is unsurprising, given the Court's observation that "[t]he Government's involvement in the creation of these beefs ads *bears no resemblance* to anything that occurs when a trademark is registered." (*Ibid.* [emphasis added].) As for *Johanns* itself, the Commission has already explained that the Court in that case did not require line-by-line oversight for a promotional program to qualify as government speech. (Answer Br. 44-46.) The Supreme Court said the particular procedures in *Johanns* were "*more* than adequate" (*Supra*, 544 U.S. at 563 [emphasis added]), and the Ninth Circuit has likewise confirmed that *Johanns* "did not

set a floor or define minimum requirements" (*Paramount Land Co. v. California Pistachio Com.* (9th Cir. 2007) 491 F.3d 1003, 1011; *see also Delano Farms Co. v. California Table Grape Com.* (9th Cir. 2009) 586 F.3d 1219, 1227 [same]).

Finally, Petitioners wrongly contend that *Matal*'s discussion of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015) 135 S. Ct. 2239, supports their argument that CDFA insufficiently controls the Commission's promotional messages. *Walker* and *Matal* were not compelled subsidy cases, and neither involved a challenge to a *statutorily* predefined message. Rather, both cases involved messages "initially proposed by *private parties*." (*Walker*, 135 S. Ct. at 2244-2245 [emphasis added]; *see also Matal, supra*, 137 S. Ct. at 1758 ["Federal Government does not dream up these marks."].) It is that feature—which is missing here—that places *Walker* at "the outer bounds of the government-speech doctrine." (*Matal, supra*, 137 S. Ct. at 1760.) Whatever review by the State might be required before a privately designed message (such as a license plate design or a trademark) becomes government speech, no similar degree of government involvement is necessary when *the Legislature itself* defined the message. (*See* Answer Br. 46-47.)[1]

[1] After previously (and incorrectly) arguing that government speech requires attribution (Petitioners Merits Br. 25-27, 35-37), Petitioners now

In sum, nothing in *Matal* casts doubt on the conclusion that the Commission's promotional messages are government speech.

DATED: July 7, 2017

Respectfully submitted,

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concede that attribution "is of no consequence" (Petitioners Supp. Br. 7). The Commission agrees. (Answer Br. 48-52.) But even if the law were otherwise, the Commission's messages would be sufficiently attributed to the State to qualify as government speech. (*See id.* 51-52.)

CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c)(1) & (d)(2), I hereby certify that, including footnotes, the foregoing brief contains 1,153 words. This word count excludes the exempted portions of the brief as provided in Rule of Court 8.520(c)(3). As permitted by Rule of Court 8.520(c)(1), the undersigned has relied on the word count feature of Microsoft Word 2016, the computer program used to prepare this brief, in preparing this certificate.

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CERTIFICATE OF SERVICE

DISTRICT OF COLUMBIA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the District of Columbia. My business address is 1875 Pennsylvania Avenue, NW Washington, DC 20006.

On July 7, 2017, I served true copies of the following documents described as **SUPPLEMENTAL BRIEF OF RESPONDENT THE CALIFORNIA TABLE GRAPE COMMISSION PURSUANT TO RULE 8.520(d)** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am familiar with Wilmer Cutler Pickering Hale and Dorr's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 7, 2017, in the District of Columbia.

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