SUPREME COURT
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Deputy

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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

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' July 14, 2017 supplemental brief regarding the recent decision in *Ranchers-Cattlemen Action Legal Fund v. Perdue* (D. Mont. June 21, 2017) No. CV 16-41-GF-BMM, 2017 WL 2671072.

In *Ranchers-Cattlemen*, the U.S. District Court for the District of Montana preliminarily enjoined the U.S. Secretary of Agriculture from allowing a private corporation, the Montana Beef Council, to retain and spend half of the assessment that it collects on behalf of the federal Beef Checkoff Program without first obtaining affirmative consent from the producers paying the assessments. Contrary to Petitioners' contention, this requirement that the entire assessment go to the federal Beef Checkoff Program, absent consent, does not support their position in this case.

1. *Ranchers-Cattlemen* expressly confirms that the speech of the California Table Grape Commission is government speech. The decision explains that "the Ninth Circuit in *Delano Farms Co. v. California Table Grape Commission*, 586 F.3d 1219 (9th Cir. 2009), determined that promotions of the California Table Grape Commission qualified as government speech." (*Ranchers-Cattlemen, supra*, 2017 WL 2671072, at *5.) The court concluded that the speech of the Montana Beef Council was not government speech because the federal government has "less control"

over ads produced by the Council than does the State of California over those produced by the California Table Grape Commission. (*Id.* at *6; *see also ibid.* ["[T]he Beef Board does not exercise the level of control over the Montana Beef Council that proved compelling in ... *Delano Farms*."].)

The *Ranchers-Cattlemen* court highlighted several features of the Montana Beef Council that distinguish it from the California Table Grape Commission. (*See Ranchers-Cattlemen, supra*, 2017 WL 2671072, at *5-6.) For example, the Montana Beef Council was not created by the government, and "[t]he USDA lacks the authority to appoint or remove *any* of the Montana Beef Council's members." (*Id.* at *6 [emphasis added].) Also, "[t]he applicable statutes and regulations" provide little guidance about how the Montana Beef Council must spend its funds. (*See ibid.*)

By contrast, the Commission was created by the California Legislature as a public corporation to further governmental objectives (Food & Agric. Code §§65500(a)-(g), 65551, 63901(a)). The California "Secretary of Agriculture 'possesse[s] the power of nomination over all of the table grape commissioners,' and 'the power to remove a table grape commissioner.'" (*Ranchers-Cattlemen, supra*, 2017 WL 2671072, at *5 [quoting *Delano Farms, supra*, 586 F.3d at 1228-1229]; *see also* Respondent's Br. 37-38.) And, as the Ninth Circuit has explained, the Ketchum Act is "quite specific about [the California Legislature's] expectations for the [California Table Grape] Commission and its

messaging." (*Delano Farms*, *supra*, 586 F.3d at 1228; *see also ibid.* [the California Legislature went "much further in defining the Commission's message than the Beef Act and Beef Order's general directive" at issue in *Johanns*]).

Indeed, even Petitioners concede that "[t]he Montana Beef Council is a private corporation *not closely resembling* the [California Table Grape Commission]." (Petitioners' Supp. Br. 4 [emphasis added].) *Ranchers-Cattlemen* thus lends no support to Petitioners on the issue of government speech.

2. Petitioners also point to the district court's cursory conclusion in *Ranchers-Cattlemen* that the Montana Beef Council's use of compelled assessments could not be sustained under any level of scrutiny. (Petitioners' Supp. Br. 4.) But the court in *Ranchers-Cattlemen* applied "exacting First Amendment scrutiny rather than the intermediate scrutiny applied to commercial speech" and, regardless of the level of scrutiny, it appeared to conclude that compelled subsidies are *per se* unconstitutional unless (1) there is "a comprehensive regulatory scheme involving a mandated association among those who are required to pay the subsidy," and (2) the subsidies are a "necessary incident of [a] larger regulatory purpose which justified the required association." (*Supra*, 2017 WL 2671072, at *7 [internal quotation marks omitted; alteration in original].) That approach cannot be squared with this Court's conclusion in *Gerawan*

II that intermediate scrutiny applies where "generic advertising [i]s not self-evidently incidental to the functioning of some important, legislatively established institution, such as a union shop or an integrated state bar." (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal. 4th 1, 22.)

The court in *Ranchers-Cattlemen* also appears to have believed that in *United States v. United Foods, Inc.* (2001) 533 U.S. 405, the U.S. Supreme Court invalidated the federal mushroom program under intermediate scrutiny. (*See Ranchers-Cattlemen*, *supra*, 2017 WL 2671072, at *7.) But as explained in the Commission's Answer Brief (at 62-63), *United Foods* explicitly reserved judgment on the constitutionality of the mushroom program under *Central Hudson* because the government had failed to raise that argument. (*See also United Foods*, *supra*, 533 U.S. at 410 ["[W]e therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test."].)

Unlike in this case, moreover, defendants in *Ranchers-Cattlemen* neither argued nor offered unrebutted expert testimony that subsidizing the Montana Beef Council "directly advances" the government's substantial interests by ensuring that the industry engages in an "economically rational amount of advertising and promotion." (*Compare* Respondent's Answer Br. 59.) Defendants in *Ranchers-Cattlemen* instead made a different argument: that the Beef Act "directly advances the government's interests

by embedding ... established State organizations ... into its regulatory scheme." (*Ranchers-Cattlemen*, *supra*, 2017 WL 2671072, at *6.)

This difference reflects the fact that the injunction in *Ranchers-Cattlemen* does not actually affect the total amount that cattle producers must pay or the sums available to spend on advertising. Rather, the injunction merely redirects the entire amount of the assessment to the federal Beef Checkoff Program, absent consent for the Montana Beef Council to continue its practice of retaining half the assessment. This question of *who* spends assessed funds on beef advertising is fundamentally different from Plaintiffs' attempt to halt all assessments used for speech that the California Legislature found vitally important to the State. (Respondent's Answer Br. 55-56 [legislative findings].) A single district court's brief discussion of intermediate scrutiny in the context of different governing precedents, different arguments, a different record, and a different question sheds no light on the proper disposition of this case.

DATED: July 24, 2017

Respectfully submitted,

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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 1,019 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 24, 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 24, 2017, in the District of Columbia.

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