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.

ANSWER TO PETITION FOR REVIEW

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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STATEMENT OF ISSUES PRESENTED

1. Whether the Court of Appeal correctly rejected petitioners' Free Speech challenge to mandatory assessments payable to the California Table Grape Commission ("Commission") where:

(a) the Commission's promotion program is effectively controlled by the California Department of Food and Agriculture ("CDFA");

(b) as an alternative basis for the judgment, the Commission is itself a government entity whose Commissioners are all appointed and subject to removal by CDFA's Secretary; and

(c) as an alternative basis for the judgment, the summary judgment record establishes that the Commission's promotion work is narrowly tailored to the State's important interest in preserving and expanding demand for California table grapes.

2. Whether the Court of Appeal erred where—in adjudicating the government speech doctrine under the Free Speech Clause of the California Constitution—it gave respectful consideration to the Ninth Circuit's interpretation of the same doctrine under the First Amendment for its persuasive value.

INTRODUCTION

The California Legislature created the California Table Grape Commission ("Commission")—whose members are all appointed, and subject to removal, by the Secretary of the California Department of Food and Agriculture ("CDFA")—to conduct a variety of activities designed to benefit the State by promoting California table grapes. Petitioners assert that being required by statute to pay for the Commission's promotional activities violates their constitutional rights to free speech. The Court of Appeal and Superior Court carefully considered this argument and rejected it on the ground that the Commission's speech is "government speech." The Superior Court also concluded that, independent of the government speech doctrine, the statute authorizing the Commission is constitutional under intermediate scrutiny because it directly advances California's important interest in strengthening its agricultural economy and does so in a narrowly tailored fashion. There is no reason for this Court to review these well-reasoned decisions.

Petitioners do not identify any disagreement in the courts of appeal that requires the attention of this Court. Indeed, in the ten years since the U.S. Supreme Court relied on the government speech doctrine to reject a First Amendment challenge to the federal beef promotion program in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, not a

single commodity promotion program has been found unconstitutional under the Free Speech Clause of the U.S. or California Constitutions.

Petitioners nonetheless strain to create a basis for review by misreading precedent, mischaracterizing the decisions below, and ignoring the Superior Court's intermediate scrutiny findings. In the process, petitioners veer from incorrectly accusing the lower courts of deferring to the U.S. Court of Appeals for the Ninth Circuit on a question of state law to inviting this Court to split with the Ninth Circuit on a question of federal law.

Petitioners' entire argument for review boils down to a theory that government speech requires day-to-day micromanagement of the Commission's work by CDFA. That contention is doubly wrongly. *First*, as the Court of Appeal correctly concluded, government accountability does not depend on whether a CDFA official attends a particular meeting. The relevant question is whether CDFA has the *legal authority* to control the Commission, as it plainly does. *Second*, because the Commission is itself a *government entity*, it would make no sense to condition the applicability of the government speech doctrine on oversight by *another government entity*.

Petitioners' insistence on day-to-day CDFA control over the Commission's advertisements is especially puzzling because petitioners' claims have nothing to do with the content of the Commission's work. In

their words, petitioners are "basically oblivious to what the Commission does." (Clerk's Transcript on Appeal "CT" 8:1869.)[1] Their only objection is to paying for the Commission's generic advertising of table grapes—i.e., the very message that the California Legislature selected when it enacted the Ketchum Act. Petitioners' claims thus run head-on into the core premise of the government speech doctrine: "'Compelled support of government'—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest." (*Johanns*, *supra*, 544 U.S. at 559.)

Petitioners have failed to show any error in the well-reasoned decision of the Court of Appeal. But even if they had, review would still be inappropriate. As the Superior Court correctly concluded, the Ketchum Act is constitutional under intermediate scrutiny. That alone would be fatal to petitioners on remand and thus obviates the need for this Court's review.

This litigation has been pending for fifteen years. It is time to bring it to a close. Whether commodity promotion programs are good or bad policy is a question for the Legislature, not the courts. The Legislature has spoken, and there is no basis for overturning its judgment.

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[1] In citations to the CT, the number preceding the colon is the relevant volume and the number following the colon is the relevant page.

STATEMENT OF THE CASE

A. THE CALIFORNIA TABLE GRAPE COMMISSION

The Commission was created by the Legislature in 1967 following a period of steadily declining per capita consumption of California table grapes. (Food & Agric. Code §§65550, 65551; CT-2:361 [Def. CTGC's Separate Statement of Undisputed Material Facts ["CTGC SSUMF"] ¶48].) Its purpose is to serve the "interests of the welfare, public economy and health of the people of [the] state" by maintaining and expanding demand for California table grapes. (Food & Agric. Code §65500(f); *see also id.* §63901.4.)[2]

The Legislature authorized the Commission to engage in a range of demand-expanding activities, including "promot[ing] the sale of fresh grapes by advertising and other similar means"; working with "the wholesale and retail trade"; working with "state, federal and foreign agencies on matters which affect the marketing and distribution of fresh grapes"; and "conduct[ing] and contract[ing] with others to conduct[] scientific research" related to fresh grapes. (Food & Agric. Code

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[2] The Ketchum Act, which created the Commission, authorized it to begin operations once approved in a referendum of California table grape growers. (Food & Agric. Code §65573.) The Act also requires California table grape producers to vote every five years on whether to continue the Commission. (*Id.* §65675.) Growers have voted to do so by overwhelming majorities. (CT-3:487 [Nave Decl. ¶6].)

§65572(h), (i), (k).) Based on this statutory direction, the Commission conducts a variety of activities to maintain and expand demand for California table grapes. Advertising—the focus of petitioners' claims—is just one of those activities; in 2011-2012, it accounted for only about 20% of the Commission's expenditures. (CT-3:492 [Nave Decl. ¶34]; *see generally* CT-8:1717-1734 [Joint Statement of Stipulated Facts ["SF"] ¶¶16-72 [describing activities]; CT-3:491-527 [Nave Decl. ¶¶33-150].)

The Commission's efforts have been highly successful. Econometric analysis demonstrates that the Commission's advertising and other promotion activities significantly increase demand. (CT-2:373-376 [CTGC SSUMF ¶¶124-141]; CT-7:1365, 1369-1375 [Alston Decl. ¶¶9, 23-34].) The Commission's international trade and issue management activities have helped open foreign markets, like India and China, to California table grapes and keep markets open. (CT-8:1729-1733 [SF ¶¶54-61].) The Commission's research efforts have contributed to the development of numerous new grape varieties. (CT-8:1719 [SF ¶¶23-24]; CT-2:372-373 [CTGC SSUMF ¶¶118-123]; CT-3:496-499 [Nave Decl. ¶¶43-56].)

The Commission's work is funded primarily through assessments imposed by the Ketchum Act on shipments of California table grapes. The assessment rate has been set at $0.006087 per pound of grapes since before petitioners filed these actions. (*See* CT-3:558-574 [Nave Decl. Ex. 2].)

Those assessments are paid by shippers who are authorized to collect the assessments from growers. (Food & Agric. Code §§65600, 65604, 65605.)

The Legislature created the Commission as a public corporation. (*See* Food & Agric. Code §65551; CT-8:1734 [SF ¶74].) Its governing board consists of 18 growers and one non-grower. All board members are appointed—and removable—by the Secretary of CDFA. (Food & Agric. Code §§65550, 65553-65554, 65563, 65575.1; CT-8:1735 [SF ¶76].) CDFA also supervises the nomination of producers eligible for appointment by the Secretary.[3] (CT-8:1734 [SF ¶75].) As a government agency, the Commission is subject to numerous laws governing public entities. (CT-8:1735-1736 [SF ¶85]; *see infra* pp. 21-22.)

CDFA has broad authority to oversee the Commission's operations. The Secretary of CDFA appoints and can remove all members of the Commission. (CT-8:1735 [SF ¶76].) The Commission is subject to audit by CDFA and the Department of Finance. (CT-8:1736 [SF ¶89]; Food & Agric. Code §65572(f).) The Department of Finance conducted a fiscal and compliance audit in 2009 (CT-8:1736 [SF ¶89]); CDFA-approved

[3] Under the Secretary's oversight, growers hold nominating meetings followed by elections to determine whom they will recommend for appointment; the Secretary then decides whom to appoint and appoints that person. (CT-8:1735 [SF ¶76].)

independent auditors have subsequently conducted such audits pursuant to CDFA procedures (CT-3:488-489 [Nave Decl. ¶16]).

On the petition of an aggrieved party, the Secretary of CDFA may "reverse [an] action of the commission" if the action was "not substantially sustained by the record, was an abuse of discretion, or illegal." (Food & Agric. Code §65650.5; CT-8:1735 [SF ¶79].) Petitioners have never filed a grievance challenging the Commission's advertising. (CT-2:357 [CTGC SSUMF ¶20].) Indeed, they stipulated that "[t]he Commission has not run political or ideological advertisements" and its "advertisements have not promoted products other than grapes." (CT-8:1721 [SF ¶28].) CDFA also "reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted." (CT-3:686 [CDFA, *Policies for Marketing Programs* C-3 (4th ed. 2006)].)

B. PLAINTIFFS' CHALLENGES

Petitioners are California table grape growers and shippers who object to paying assessments to fund the Commission's activities. The purported basis for petitioners' objection is that the Commission's advertisements are "designed to promote table grapes as though they were a generic commodity," whereas petitioners allegedly prefer to market their own table grapes. (CT-13:3112; CT-1:199-200; CT-1:163; CT-1:250-251.)

Petitioners' witnesses uniformly testified at their depositions that they are unfamiliar with the substance of the Commission's activities and

the content of the Commission's ads. (CT-2:358-360 [CTGC SSUMF ¶¶30-35 [citing depositions]].) In fact, in their Superior Court briefing, petitioners boasted that they "don't know what the Commission is doing, don't care what the Commission is doing, and have no use for the Commission." (CT-8:1854.) In their words, they are "basically oblivious to what the Commission does." (CT-8:1869.)

For years, petitioners' challenges were stayed or dormant while awaiting decisions in other cases involving similar free speech challenges to commodity promotion programs, including a parallel First Amendment challenge brought by Petitioner Delano Farms in federal court. In 2009, the Ninth Circuit resolved that challenge in favor of the Commission, holding that the Commission's speech is government speech. (*Delano Farms Co. v. California Table Grape Comm'n* (9th Cir. 2009) 586 F.3d 1219, 1220.)

Litigation in the Superior Court eventually resumed to address various combinations of claims under the First Amendment of the U.S. Constitution, the Free Speech Clause of the California Constitution, and the Liberty, Privacy, and Due Process Clauses of the California Constitution. The questions that petitioners present in their petition for review relate exclusively to petitioners' free speech claims under Article I of the California Constitution. (Pet. 1.)

C. THE SUPERIOR COURT'S ORDER

In May 2013, Judge Black granted the Commission's motion for summary judgment. (CT-13:3127-3180.) Applying relevant precedent, Judge Black rejected petitioners' federal and state speech claims. (CT-13:3139-3158.) He held that the Commission is a "governmental entity" and that its speech is thus necessarily "government speech" that can be funded with compelled assessments. (CT-13:3157-3158.)

In the alternative, Judge Black held that the Ketchum Act satisfies intermediate scrutiny. He concluded that there is a "substantial interest" in maintaining and expanding the market for California table grapes and the Commission's activities directly advance that interest. (CT-13:3162.) Judge Black noted that the Commission "produced ample evidence of the effectiveness of" its work. (CT-13:3168.) Petitioners, in contrast, "produce[d] *no* evidence contesting the evidence of the Commission's effectiveness." (*Ibid.* [emphasis added].) Judge Black also found the Ketchum Act narrowly tailored, concluding based on "undisputed facts that absent the Commission's work, the California table grape industry would engage in less than the economically rational amount of advertising and promotion." (CT-13:3163.)[4]

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[4] Judge Black rejected petitioners' liberty, privacy, and due process claims. Judge Black also denied various motions to strike the

D. THE COURT OF APPEAL'S DECISION

The Court of Appeal, Fifth Appellate District affirmed in a unanimous decision holding that "[t]he Commission's promotional activities constitute government speech." (*Delano Farms, Co. v. California Table Grape Comm'n* (2015) 235 Cal.App.4th 967, 971.) The court began by reviewing the statutory and regulatory provisions that govern the Commission's operations and the evolution of the case law from early challenges to the current consensus that the government speech doctrine applies under both the U.S. and California Constitutions. (*Id.* at 971-978.)

The court then discussed the Ninth Circuit's decision in *Delano Farms* (*supra*, 586 F.3d 1219), which had held that the Commission's speech is government speech for purposes of the First Amendment of the U.S. Constitution for two different reasons: (1) the Commission is a government entity, and (2) the Commission's message is effectively controlled by the state. (235 Cal.App.4th at 978-980.) The Court of Appeal acknowledged that "California courts are not bound by decisions of the lower federal courts," but concluded that the Ninth Circuit's decision was "persuasive." (*Id.* at 980.)

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uncontradicted declarations of the Commission's expert witnesses (CT-13:3133-3138) and overruled petitioners' remaining "[b]lunderbuss [evidentiary] objections" as "procedurally improper on a number of grounds" (CT-13:3136).

The Court of Appeal explained:

> The detailed parameters and requirements imposed by the Legislature on the Commission and its messaging, the Secretary's power to appoint and remove Commission members, and the Secretary's authority to review the Commission's messages and to reverse Commission actions, lead us to conclude, based on the statutory scheme, that the Commission's promotional activities are effectively controlled by the state and therefore are government speech.

(*Ibid.*) The court then concluded that because the Commission's speech is government speech, petitioners' challenges under the U.S. and California Constitutions both fail.

Having concluded that the Commission's speech was effectively controlled by the state, the Court of Appeal did not need to "decide whether the Commission is a government entity or whether the Ketchum Act survives intermediate scrutiny." (*Delano Farms*, *supra*, 235 Cal.App.4th at 980.) The Superior Court had ruled for the Commission on both points, and each would have provided an independent ground for supporting the judgment.

REASONS FOR DENYING THE PETITION

A. THERE IS NO DISAGREEMENT IN THE LOWER COURTS

Petitioners do not even attempt to argue that review by this Court is necessary "to secure uniformity of decision" in the lower courts. (Cal. R. Ct. 8.500(b)(1).) In the ten years since the U.S. Supreme Court relied on the government speech doctrine to reject a First Amendment challenge to the federal beef promotion program in *Johanns* not a single commodity

promotion program has been found unconstitutional under the Free Speech Clauses of the U.S. or California Constitutions.[5]

Each of these cases arose on its own statute and addressed the particular government speech theories presented by the parties. Consistent with this variation, the cases have recognized that there are multiple ways for speech to qualify as government speech. But the absence of any decision invalidating a commodity promotion program since *Johanns*—and

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[5] *See Delano Farms*, *supra*, 586 F.3d at 1227-1230; *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 955-963; *Paramount Land Co. v. California Pistachio Comm'n* (9th Cir. 2007) 491 F.3d 1003, 1009-1012; *Felix Costa & Sons v. Kawamura* (Super. Ct. Sacramento County, 2010, No. 03AS03433, Dkt. 66), at 2-5 [applying *Gallo* and *Johanns* and granting summary judgment on free speech claims]; *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n* (Super. Ct. Sacramento County, 2010, No. 00AS02731, Dkt. 53) at 3-5 [applying *Gallo* and *Johanns* and granting summary judgment on free speech claims]; *LJT Flowers, Inc. v. California Cut Flower Comm'n* (Super. Ct. Sacramento County, 2010, No. 06AS02243, Dkt. 150) at 2-4 [applying *Gallo* and *Johanns* and granting summary judgment on free speech claims]; *Cochran v. Veneman* (3d Cir. Sept. 15, 2005, No. 03-2522), 2005 WL 2755711, at *1; *American Honey Producers Ass'n v. USDA* (E.D. Cal. May 8, 2007, No. 05-1619), 2007 WL 1345467, at *9, *11; *In re Wilson* (U.S.D.A. Nov. 28, 2005, No. 01-0001), 2005 WL 3436555, at *16-19; *Cricket Hosiery, Inc. v. United States* (Ct. Int'l Trade 2006) 429 F. Supp. 2d 1338, 1343-1346; *Avocados Plus Inc. v. Johanns* (D.D.C. 2006) 421 F. Supp. 2d 45, 50-55; *In re Gerawan Farming, Inc.* (U.S.D.A. May 9, 2008, No. 02-0008) 2008 WL 2213514, at *6-8; *In re Red Hawk Farming & Cooling* (U.S.D.A. Nov. 8, 2005, No. 01-0001) 2005 WL 3118142, at *8-13; *Dixon v. Johanns* (D. Ariz. Nov. 21, 2006, No. CV-05-03740) 2006 WL 3390311, at *12-13. *See also In re Tourism Assessment Fee Litig.* (9th Cir. 2010) 391 F. App'x 643, 645-646 [upholding mandatory assessments by Travel and Tourism Commission for promotion].

the absence of any dissent from the Court of Appeal's decision here—is compelling evidence that the lower courts already have sufficient guidance to decide the cases that come before them.

B. THE COMMISSION'S SPEECH IS GOVERNMENT SPEECH

Petitioners do not dispute that the government speech doctrine applies to free speech claims under Article I of the California Constitution and that the collection of assessments to fund government speech is lawful. Nor do they dispute that the U.S. Supreme Court's decision in *Johanns* applies to government speech questions under the California Constitution. Petitioners instead focus on arguing that the Commission's speech is not government speech *under Johanns*. But their attacks on the lower courts' application of *Johanns* in this case are both insubstantial and undeserving of this Court's review.

The Commission's activities qualify as "government speech" in two distinct ways. First, as the Court of Appeal correctly concluded, the Commission's message is effectively controlled by the State. Second, the Commission is itself a government entity and its speech is thus necessarily government speech. Each of these grounds is independently sufficient to support the judgment. Together, they conclusively rebut petitioners' attempt to manufacture an issue for review.

1. The State Of California Effectively Controls The Commission's Speech

The Commission's speech is "government speech" because the State effectively controls the Commission's message, as the Court of Appeal correctly held. The speech of a commodity marketing program is government speech—whether or not the marketing board is itself governmental—if "[t]he message of the promotional campaign is effectively controlled by the [government] itself." (*Johanns*, *supra*, 544 U.S. at 560.)[6] For example, in concluding that, in the beef program, the speech of the Operating Committee was subject to effective government control, the *Johanns* Court relied on the fact that "Congress ha[d] directed ... a 'coordinated program' of promotion, 'including paid advertising.'" (*Id.* at 561.) The Court further explained that "Congress and the Secretary [of Agriculture] ha[d] set out the overarching message"—promoting "the image and desirability of beef"—while "le[aving] the development of the remaining details to an entity whose members are *answerable* to the Secretary (and in some cases appointed by him as well)." (*Ibid.* [emphasis added].) In addition, Congress "retain[ed] oversight authority" over the

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[6] In *Johanns*, the Court assumed for purposes of its decision that the Operating Committee—which designed the beef ads—was "a nongovernmental entity." (*Supra*, 544 U.S. at 560 & n.4.)

beef program and "the ability to reform the program at any time." (*Id.* at 563-564.) Finally, the Court noted that the Secretary took the extraordinary step of reviewing the Operating Committee's advertisements, although it stressed that far from setting a floor that must be met in all cases, this degree of control was "*more* than adequate." (*Id.* at 563 [emphasis added].)

The Commission's program is also effectively controlled by the government. *First*, the Commission was created by statute. (*E.g.*, Food & Agric. Code §65551.) To this day, the Commission continues to exist solely by virtue of California Law, and its mandate could be changed at any time by the Legislature. (*Ibid.*)

Second, whereas USDA's Secretary had the power to appoint only half of the relevant entity (the "Operating Committee") in the beef program, (*Johanns*, *supra*, 544 U.S. at 560), "*[a]ll* of the Commissioners of the Commission are appointed and subject to removal by the Secretary" of CDFA. (CT-8:1735 [SF ¶76] [emphasis added]; *see also* Food & Agric. Code §§65550, 65556, 65563, 65566, 65575.1; *Delano Farms*, *supra*, 586 F.3d at 1228-1229 [CDFA's appointment power with respect to the Commission "is greater than … the Secretary of Agriculture's power in *Johanns*"].) This is no small matter: Under both federal and California law, the power to appoint and remove is the linchpin of executive control and governmental accountability across a variety of contexts. (*E.g.*, *Howard Jarvis Taxpayers' Ass'n v. Fresno Metro. Projects Auth.* (1995) 40

Cal.App.4th 1359, 1388 ["[T]he essence of [public] accountability includes the power to remove."]; *Bowsher v. Synar* (1986) 478 U.S. 714, 726; *Delano Farms*, *supra*, 586 F.3d at 1229.)

Third, while, in *Johanns*, the government had set out only "the overarching message" of the beef program "and some of its elements," (*Johanns*, *supra*, 544 U.S. at 561), the Legislature "was quite specific about its expectations for the Commission and its messaging." (*Delano Farms*, *supra*, 586 F.3d at 1228; *see, e.g.*, Food & Agric. Code §§65500(f) 63901, 65572(h).) Through this meticulous command, the California Legislature went "much further in defining the Commission's message than the Beef Order's general directive." (*Delano Farms Co. v. California Table Grape Comm'n* (2015) 235 Cal.App.4th 967, 979 [quoting *Delano Farms*, *supra*, 586 F.3d at 1228].)

Indeed, petitioners' rhetoric about government control and democratic accountability rings hollow in the face of this detailed mandate. Petitioners themselves are not complaining about the manner in which the Commission fulfills this Legislative mandate or any alleged deviation from the prescribed message. Nor could they, as none of the petitioners is even familiar with the contents of the Commission's advertising. (CT-2:358-360 [CTGC SSUMF ¶¶30-35 [citing depositions]].) Instead, it is precisely the message prescribed by the Legislature—promoting California grapes generically—that petitioners object to funding.

Fourth, a number of additional regulatory mechanisms confirm that CDFA has effective control over the Commission's implementation of the Legislature's message. The Ketchum Act provides that the Commission's "books, records and accounts shall be open to inspection and audit" by the Department of Finance or any other state officer charged with the audit of operations of departments. (Food & Agric. Code §65572(f); *see also* CT-8:1736 [SF ¶89]; *Delano Farms*, *supra*, 586 F.3d at 1229 [citing Food & Agric. Code §65572(f)].) Pursuant to this statutory mandate, the Commission undergoes annual "compliance audits" conducted by a CDFA-approved firm that verifies, among other things, the Commission's adherence with CDFA's procedures. (CT-8:1736 [SF ¶90].) The results of these audits are then provided to CDFA for its review. (CT-2:357 [Pls Reply to CTGC SUMF ¶23].)

The Ketchum Act's grievance procedure further cements CDFA's control over the Commission's message. The Secretary is empowered, on the petition of an aggrieved party, to "reverse [an] action of the commission" if she finds that it was "not substantially sustained by the record, was an abuse of discretion, or illegal." (Food & Agric. Code §65650.5; *see also id.* §63902.) This grievance authority has been utilized in the past, including in response to a petition by Petitioner Gerawan Farming unrelated to the Commission's advertising—which led to the Secretary's reversal of Commission action. (*See* CT-8:1735 [SF ¶¶78-79];

CT-8:1778 [Pl. Reply SSUMF ¶¶17-21].) The grievance mechanism "demonstrate[s] the Secretary's control over the Commission." (*Paramount Land, supra*, 491 F.3d at 1011.)[7]

Even in the absence of a grievance, CDFA retains the authority to review the Commission's advertising. CDFA's policy manual, *Policies for Marketing Programs* (4th ed. 2006), requires that Commission advertising be "Truthful," "In good taste," "Not disparaging," and "Consistent with statute." (CT-3:685 [Nave Decl. Ex. 8 at C-2].) In the manual, CDFA expressly "reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted"—which "may include intervention in message development prior to placement of messages in a commercial medium or venue." (CT-3:686 [*Id.* at C-3].)

Petitioners' sweeping assertions that "the Secretary of CDFA has performed virtually no supervision of the Table Grape Commission in general, and exercised no oversight over its promotional campaigns in particular" simply ignore these comprehensive mechanisms of control.

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[7] The Commission's authority to challenge a reversal in court does not differentiate this situation from others in which disputes between government agencies are litigated in court. (*See, e.g., County of San Diego v. State* (2008) 164 Cal.App.4th 580; *County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637.)

(Pet. 11; *see also id.* 19.) Indeed, far from being "undisputed" (*id.* 11, 19), petitioners' assertions as to a purported lack of oversight contradict their own stipulations. (*See, e.g.*, CT-8:1736 [SF ¶90] (annual audits).)

In light of this government-controlled structure, appointment and removal power, detailed statutory mandate, and governmental oversight, the Court of Appeal was clearly correct in holding that the "Commission's promotional activities are effectively controlled by the state and therefore are government speech." (*Supra*, 235 Cal.App.4th at 980; *Delano Farms*, *supra*, 586 F.3d at 1230.)

2. The Commission Is A Government Entity

The Ketchum Act passes muster under the Free Speech Clause for a more fundamental reason as well: Because the Commission is itself a government entity, its speech is necessarily government speech.[8]

First, the Commission was created by the California Legislature as a public corporation. (Food & Agric. Code §§65550, 65551.)

Second, the Commission was created to further governmental objectives. (Food & Agric. Code §65500(a)-(g); *id.* §63901(a).) The Legislature stated that "[t]he production and marketing of grapes produced

[8] Because it concluded that the Commission's speech was effectively controlled by the government, the Court of Appeal did not need to decide whether the Commission is itself a government entity. (*Delano Farms*, *supra*, 235 Cal.App.4th at 980.)

in California for fresh human consumption is declared to be affected with a public interest" and that the Commission was being created "in the exercise of the police power of th[e] state for the purpose of protecting the health, peace, safety and general welfare of the people." (*Id.* §65500(h); *see also id.* §65500(f).) In 2001, the Legislature reaffirmed that agricultural commissions, like the California Table Grape Commission, serve important state interests. (*Id.* §63901(a)). To serve those state interests, the Legislature instructed the Commission to "promote the sale of fresh grapes by advertising" and to "educate and instruct the public with respect to fresh grapes" including "the healthful properties and dietetic value of fresh grapes." (*Id.* §65572(h); *see also id.* §65572(i).)

Third, the Secretary of CDFA appoints and retains the power to remove every Commissioner. (*See supra* pp. 7, 16-17.)

Fourth, the CDFA has extensive oversight authority over the Commission, including the power to hear petitions and "reverse" the Commission's actions. (*See supra* pp. 7-8, 18-19.)

Fifth, numerous California laws expressly treat the Commission as a government entity. The Government Code includes "commission[s]" among California's "state agenc[ies]." (Gov. Code §11000(a).) In the Food and Agricultural Code, the Legislature described agricultural marketing commissions as "state-mandated regulatory programs that are funded by the public." (Food & Agric. Code §63901(a)). The Public

Records Act includes "commission[s]" within the definition of "[s]tate agency" and expressly exempts from disclosure "confidential[] ... information from shippers" in the possession of the "California Table Grape Commission." (Gov. Code §§6252(f), 6276.08.) California's Bagley-Keene Open Meeting Act applies to any "commission ... created by statute." (*Id.* §11121(a).) The Political Reform Act of 1974 includes "commission" within the definition of "[s]tate agency." (*Id.* §82049.) And, contrary to petitioners' suggestion that Commissioners "are free to advance their own private interests" (Pet. 3), the State's conflict-of-interest laws apply to the Commission (Gov. Code §87103; Food & Agric. Code §65576 [referencing Gov. Code §87103]).[9]

Sixth, California law vests the Commission with an array of governmental powers. The Commission has authority to "administer and enforce" the Ketchum Act and to "perform all acts and exercise all powers" appropriate to "effectuate" that statute. (Food & Agric. Code §65572(c).)

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[9] Petitioners stress that under the Ketchum Act the Commission can "'be sued'" and the State is "'not ... liable for the acts of the commission or its contracts.'" (Pet. 8-9 [quoting Food & Agric. Code §§65551, 65571].) But the State generally has sovereign immunity against damages claims absent waiver. (*E.g.*, *Country Eggs, Inc. v. Kawamura* (2005) 129 Cal.App.4th 589, 591.) Petitioners do not explain how the State's decision to permit suits against a government entity while retaining sovereign immunity in suits directed against the State as a whole somehow negates the Commission's government entity status.

It can "investigate and prosecute civilly" violations of the Ketchum Act and "file complaints with appropriate law enforcement agencies or officers for criminal violations." (*Id.* §65572(g).) It has a broad right to "inspect the premises, books, records, documents, and all other instruments" of growers, shippers, and others "for the purposes of enforcing" the Ketchum Act. (*Id.* §65654.) It is entitled to have the Attorney General provide aid and assistance and undertake judicial proceedings on its behalf. (*Id.* §65572(d).) It has the authority to waive fixed, statutory penalties for late payment of assessments. (*Id.* §65605.) And, perhaps most strikingly, California law makes it a criminal offense to "violate or aid in the violation of ... any rule or regulation of the commission"; to "willfully render or furnish a false or fraudulent report, statement or record required by the commission"; or to "[willfully] fail or refuse to furnish to the commission ... information concerning the name and address of the persons from whom [the shipper or seller of table grapes] has received table grapes ... and the quantity of such commodity so received." (*Id.* §65653.)

Seventh, the Commission's jurisdiction extends beyond California table grape producers. The Commission has authority to inspect railroads, trucking companies, and shipping lines. (Food & Agric. Code §65654.) Shippers are liable for failing to collect assessments from growers. (*Id.* §65605.) A wholesaler, supermarket, or corner grocery commits a criminal

act if it declines to provide to a Commission agent the source and quantity of table grapes in its possession. (*Id.* §65653(c).)

All of these provisions readily distinguish the Commission from trade associations, unions, and bar associations. They also rebut petitioners' contention that treating the Commission's speech as government speech would necessarily extend the same rule to all "corporations formed by the government." (Pet. 30.)

C. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH *GERAWAN II*, *JOHANNS*, OR ANY OTHER DECISION OF THIS COURT OR THE U.S. SUPREME COURT

Petitioners' challenge to the Court of Appeal's decision rests on their narrow vision of what constitutes government speech, derived from their misguided interpretation of this Court's decision in *Gerawan II* and the U.S. Supreme Court's decision in *Johanns*. Petitioners take statements from each case out of context and mistakenly treat them as the exclusive test for government speech. Along the way, petitioners also mischaracterize several other relevant decisions (including *Lebron v. National Railroad Passenger Corp.* (1995) 513 U.S. 374) and ignore others (including this Court's decision in *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329). Once petitioners' missteps are recognized, the entire rationale for their petition collapses.

1. The Court Of Appeal's Decision Does Not Conflict With *Gerawan II*

Petitioners' principal contention (at 13-19) is that, under *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 ("*Gerawan II*"), nothing short of actual day-to-day involvement by CDFA in each communication issued by the Commission can establish "effective control" for government speech purposes. Petitioners' theory misconstrues *Gerawan II.*

Gerawan II did not set the metes and bounds of the government speech defense under the California Constitution. The Court merely identified potentially relevant considerations (*see Gerawan II, supra*, 33 Cal.4th at 27-28), and then remanded for further development (*id.* at 28). In the process, the Court simply noted that "[t]he kind of showing the government would be required to make has been *suggested* by the United States Supreme Court" in *United States v. United Foods* (2001) 533 U.S. 405 (*Gerawan II, supra*, 33 Cal.4th at 27 [emphasis added]), and that "there are factual questions that *may* be determinative" (*id.* at 28 [emphasis added]). It would make no sense to read *Gerawan II*'s illustrative overview of the "suggest[ions]" contained in *federal* decisions handed down prior to 2004 as defining an inflexible day-to-day control test for all future cases under California law. (*Id.* at 27-28.)

The *Gerawan II* Court's decision to remand in no way signals that the government speech defense cannot be resolved as a matter of law. In

Gerawan II, "[t]he Secretary's principal argument [was] that he must ultimately approve any generic advertising issued by the California Plum Marketing Board." (*Supra*, 33 Cal.4th at 26.) Gerawan countered (among other things) that "the Secretary's approval is a mere formality." (*Ibid.*) Faced with these dueling factual contentions arising from the particular theory of government speech argued in the case, the Court unsurprisingly accorded the parties the opportunity to resolve the factual issues upon which *they* had clearly joined issue. Indeed, in *Gerawan II*, this Court did not even have the benefit of the views of the Court of Appeal, which had conducted only a truncated analysis of the government speech doctrine and found it inapplicable on different (subsequently rejected) grounds. (*See Gerawan Farming, Inc. v. Lyons* (2001) 94 Cal.App.4th 665, 678-679.)

Moreover, *Gerawan II* was decided in 2004, *before* the U.S. Supreme Court first applied the government speech defense in *Johanns* in 2005. Since the *Gerawan II* decision, *Johanns*, *Paramount*, *Delano Farms*, and *Gallo* have all clarified the test that applies to determine whether generic commodity advertising is government speech. Those subsequent decisions have rejected petitioners' contention that *Gerawan II* sets forth the exclusive test for government speech. For example, as petitioners note (at 17), *Gerawan II* suggested that it might be relevant "whether the commercial speech in question is attributed to the government." (*Supra*, 33 Cal.4th at 28.) *Johanns*, however, expressly rejected such a requirement.

(*Supra*, 544 U.S. at 564 n.7 [rejecting "a requirement that government speech funded by a targeted assessment must identify government as the speaker"].) The Court of Appeal in *Gallo* followed *Johanns* on this precise issue under the California Constitution. (*Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 962-963.) Petitioners appear to agree (at 18), as they do not argue that the government must identify itself as the speaker.

Finally, there is no merit to petitioners' apparent suggestion that *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 ("*Gerawan I*") requires a "thumb on the scale" against the government speech doctrine under the California Constitution. *Gerawan I* addressed a different question and expressly *declined* to reach the issue of government speech. (*Supra*, 24 Cal.4th at 515 n.13). In addition, this Court has repeatedly rejected the notion that the Free Speech Clause is "'broader than the First Amendment in all its applications.'" (*Beeman, supra*, 58 Cal.4th at 341 [quoting *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366].)

2. The Court Of Appeal's Decision Does Not Conflict With *Johanns*

Petitioners' attempt to manufacture conflict between the Court of Appeal's decision and *Johanns* is equally unavailing. Petitioners contend that, in *Johanns*, it was "dispositive" that the "'message set out in the beef promotions [was] from beginning to end the message established by the

Federal Government.'" (Pet. 26.) But while the Court used those words to describe one aspect of the beef program, *Johanns* made clear that it did not require any particular means of ensuring that a message remains subject to government control. Instead, as noted, the Court stressed that the beef program's political safeguards were "*more* than adequate" to demonstrate effective control by the government. (*Supra*, 544 U.S. at 563 [emphasis added].) In fact, the very passage that petitioners quote elsewhere in their brief as capturing *Johanns*' holding makes no mention of day-to-day intervention, and instead uses words that could accurately describe the CDFA's oversight of the Commission: The "'Secretary ..., a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto *power* over the advertisements' content, right down to the wording.'" (Pet. 27 [quoting *Johanns*, *supra*, 544 U.S. at 563 [emphasis added]]; *see supra* pp. 15-20.)

Before the Court of Appeal's decision below, the Ninth Circuit had already twice rejected the argument that *Johanns* requires day-to-day oversight. In applying *Johanns* to the California Pistachio Commission in *Paramount*, the Ninth Circuit concluded that *Johanns* "did not set a floor or define minimum requirements." (*Supra*, 491 F.3d at 1011; *see also ibid.* [government speech established even though "the Secretary of the CDFA exercises less control over the Pistachio Commission than the Secretary of Agriculture exercised over the Beef Board."].) As the court explained,

"[t]o draw a line between [different levels of] oversight risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." (*Id.* at 1012.)

Similarly, in *Delano Farms*, the Ninth Circuit held that the California Table Grape Commission was constitutional under *Johanns* regardless of whether CDFA reviews and approves particular Commission ads. The court emphasized that its focus, like in *Paramount*, was on the State's "statutorily-authorized control," not the detailed history of bureaucratic intrusion or forbearance. (*Supra*, 586 F.3d at 1230; *see also id.* at 1227 ["*Johanns* did not set a floor or define minimum requirements." [internal quotation marks omitted]].)[10]

This Court should decline petitioners' invitation to split with the Ninth Circuit on the proper interpretation of *Johanns*. The Court of Appeal and the Ninth Circuit have adhered to the common-sense principle that the State's *authority to control* the message carries with it government

[10] To the extent petitioners suggest (at 26) that CDFA does not exercise control over the Commission's message because the CDFA has not rejected any of the Commission's advertising, their contention clearly fails. If anything, the absence of CDFA intervention indicates that the Commission is discharging its statutory responsibilities correctly—a point that is entirely consistent with petitioners' own lack of any objection to the content of the Commission's speech. (*See supra* pp. 8-9.) Petitioners have not identified any situation where the CDFA had cause to, but did not, overrule a Commission decision.

accountability: If growers or the public do not like the message, they can cast their votes accordingly. (*Board of Regents of Univ. of Wis. Sys. v. Southworth* (2000) 529 U.S. 217, 235.)

3. The Superior Court's Holding That The Commission Is Itself A Government Entity Does Not Conflict With *Gerawan II* Or *Johanns*

Petitioners take issue with the proposition—expressly adopted by the Superior Court and the Ninth Circuit—that the Commission's speech is government speech because the Commission is itself a government entity. Petitioners' attention to the point is not surprising, because it provides an alternative ground to support the judgment below and, thus, yet another reason to deny review in this case. But petitioners' contentions again fail on the merits.

Petitioners assert (at 28) that "the proposition that the Commission's activities could be classified as government speech 'if the Commission is itself a government entity' is inconsistent with *Gerawan II*, and finds no support in *Johanns*." Petitioners cannot possibly mean what they say. Speech by a government entity is by definition government speech. No case has ever suggested that for a government entity's speech to constitute government speech, it must be overseen by a second, separate government entity. No one would contend, for example, that the speech of CDFA is not government speech merely because no other government agency, such as

the Governor, engages in prior review and approval of that speech—a result that could not be squared with the premise *Gerawan II* and *Johanns*.

The only question is whether the Commission can qualify as such a "government entity." On *that* issue, petitioners once again stretch *Gerawan II* and *Johanns*.

Gerawan II said nothing about the plum board's status as a "government entity." Undeterred, petitioners would construe the Court's silence on that issue as a holding that no commission or commodity board can ever qualify as a "government entity" for government speech purposes. But the reason for the Court's silence is plain: "The Secretary's principal argument [was] that he must ultimately approve any generic advertising issued by the California Plum Marketing Board"—not that the plum board was itself a government entity. (*Supra*, 33 Cal.4th at 26.) It is not surprising that the Court did not go out of its way to adjudicate an argument that it did not understand the Secretary to have squarely presented and that the Court of Appeal had not considered. (94 Cal.App.4th at 678-679; *see supra* pp. 25-26.)

Petitioners' analysis of *Johanns* (at 29-30) is even more flawed. Petitioners contend (*ibid.*) that if "government entity" status were sufficient to trigger government speech, the Supreme Court in *Johanns* would not have needed to consider the degree of USDA oversight involved. That is so, petitioners claim, because *Johanns* recognized "all of [its] members

[we]re appointed by the Secretary." (*Supra*, 544 U.S. at 560 n.4.) But petitioners misread *Johanns*. It is true that *Johanns* implied that the Beef Board was a full-fledged "government entity" for government speech purposes on the basis of the Secretary's authority to appoint its members—*without any inquiry into effective control by another government entity.* (*Ibid.*) But that finding was not itself sufficient to dispose of *Johanns* for a very specific reason: The governmental status of the Beef *Operating Committee*—the *separate* entity that designed the advertising program at issue—remained unclear, because only *half* of its members were appointed (and then only indirectly) by the Secretary of Agriculture. (*See Johanns*, *id.* at 560 & n.4.)[11] Instead of deciding whether the Operating Committee *also* qualified as a "government entity," the Court assumed for purposes of its decision that the Operating Committee was not a governmental entity and inquired into the USDA's control over the Operating Committee's message.

The implications of *Johanns* are clear: An entity that, like the Beef Board, is created by the government to further government objectives and

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[11] The Secretary appointed all the members of the Beef Board. (7 U.S.C. §2904(1); 7 C.F.R. §§1260.141, 1260.143, 1260.145 (2005).) The Beef Board then selected ten of its members to fill half the seats—but not a majority—on the Operating Committee. (7 U.S.C. §2904(2)(C), (4)(A); 7 C.F.R. §§1260.150(d), 1260.161(a) (2005).)

whose decision-makers are subject to the government's power of appointment and removal is a government entity for government speech purposes. In contrast, *Johanns* says nothing about the "government entity" status of an entity without a controlling majority of its board appointed by the government.[12]

Properly understood, *Johanns* is perfectly consistent with longstanding and recently reaffirmed Supreme Court precedent holding that a "corporation is part of the Government for purposes of the First Amendment" where "[1] the Government creates a corporation by special law, [2] for the furtherance of governmental objectives, and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation." (*Lebron*, *supra*, 513 U.S. at 399; *see also Department of Transp. v. Association of Am. Railroads* (2015) 135 S. Ct. 1225, 1233 [extending *Lebron* test beyond First Amendment].) Because the Commission easily satisfies that test, (*see supra* pp. 20-24), the

[12] The same is true of *Keller v. State Bar of California* (1990) 496 U.S. 1. There, sixteen of the twenty-two members of the State Bar's Board of Governors were *not* appointed by the Governor. *See Keller v. State Bar of Cal.* (1989) 47 Cal.3d 1152, 1161.

Commission qualifies as a government entity and its speech is necessarily government speech.[13]

D. PETITIONERS' QUIBBLES WITH THE COURT OF APPEAL'S "DEFERENCE" TO THE NINTH CIRCUIT HAVE NO MERIT

Finally, petitioners criticize (at 20) the Court of Appeal for using the words "'great weight'" in describing its consideration of the Ninth Circuit decision in *Delano Farms*. But, as petitioners themselves concede (at 20), the Court of Appeal also made clear that it was "not bound by decisions of the lower federal courts" and that it "followed" the Ninth Circuit's path only because it found *Delano Farms* "persuasive." (*Supra*, 235 Cal.App.4th at 980.) That is precisely the inquiry this Court has laid out: "Our case law interpreting California's free speech clause has given respectful consideration to First Amendment case law for its persuasive value, while making clear that 'federal decisions interpreting the First Amendment are not controlling.'" (*Beeman, supra*, 58 Cal.4th at 341.) Far from suggesting any improper "deference" to the Ninth Circuit, the fact that both the Court of Appeal and the Ninth Circuit considered and rejected

[13] Petitioners strain to find support for their theory of day-to-day supervision by citing an antitrust decision dealing with the doctrine of state-action antitrust immunity. (Pet. 30 [citing *North Carolina State Bd. of Dental Examiners v. FTC* (2015) 135 S. Ct. 1101].) The far more relevant precedent is *Association of American Railroads*, *supra*, 135 S. Ct. at 1233, which recently reaffirmed *Lebron*'s teachings in the context of the First Amendment and extended them to other corners of the Constitution as well.

petitioners' government speech theory only underscores how far petitioners' theory strays from the universally accepted contours of the government speech doctrine.

E. THE QUESTIONS PRESENTED BY PETITIONERS WILL NOT AFFECT THE ULTIMATE OUTCOME IN THIS CASE BECAUSE THE KETCHUM ACT IS INDEPENDENTLY CONSTITUTIONAL UNDER INTERMEDIATE SCRUTINY

On top of the other reasons for denying review, petitioners' petition should be denied because the questions it presents will not affect the ultimate outcome in this case. Petitioners predict that "if the appellate court's holding about government speech is reversed and proper free speech scrutiny is applied, this program cannot possibly survive constitutional review" under "intermediate judicial scrutiny." (Pet. 12.) But petitioners' speculation that the program cannot survive intermediate scrutiny ignores a critical fact: It already has. Although petitioners omit any reference to it, the Superior Court already conducted a detailed analysis and concluded that the Commission's speech easily satisfies intermediate scrutiny. (CT-13:3158-3169.) The Superior Court's conclusion is well supported and fully resolves this case regardless of whether the Commission's speech qualifies as government speech.

Under the intermediate scrutiny test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980) 447 U.S. 557 and *Gerawan II, supra*, 33 Cal.4th 1, courts must evaluate whether (1) "the

asserted governmental interest" underlying a regulation "is substantial"; (2) "the regulation directly advances the governmental interest asserted"; and (3) the regulation "is not more extensive than is necessary to serve that interest." (*Id.* at 22 [quoting *Central Hudson Gas*, *supra*, 447 U.S. at 566].) The Superior Court correctly held that the Commission prevails on all three elements as a matter of law.

First, there is no "doubt, in the abstract, that the objective of maintaining and expanding markets for agricultural products, [and] thereby ensuring the viability of California agriculture, is a substantial objective." (*Gerawan II*, *supra*, 33 Cal.4th at 22-23.) Nor is there any doubt that this is, in fact, the objective of the Ketchum Act. The extensive findings of the California Legislature—as well as the testimony of Secretary Ross and petitioners' own stipulations in the Superior Court—confirm as much. (*See, e.g.*, Food & Agric. Code §65500(a) ("Grapes produced in California for fresh human consumption comprise one of the major agricultural crops of California, and the production and marketing of such grapes affects the economy, welfare, standard of living and health of a large number of citizens residing in this state."); *id.* §63901(b); CT-2:417 [Ross Decl. ¶3-5]; CT-8:1715 [SF ¶¶1-5].)

Second, the Commission's promotion activities directly advance the government's substantial interest in maintaining and expanding demand for table grapes. Although empirical evidence is not needed under *Central*

Hudson (*supra*, 447 U.S. at 569), the Commission submitted an extensive and unrebutted econometric analysis establishing the effectiveness of its promotional activities. That analysis—which included three different econometric studies undertaken by the leading expert in the field using almost 40 years of data to measure the effectiveness of the Commission's promotion activities—demonstrated that the Commission's promotion activities have a substantial, positive, and statistically significant effect on demand. (CT-2:373-374 [CTGC SSUMF ¶¶124, 129]; CT-7:1370-1371, 1379 [Alston Decl. ¶¶24, 26-28, 47].) The enhanced demand generated by the Commission results in increased revenues for table grape growers that far exceed the cost of funding the Commission's activities. (*See* CT-2:375 [CTGC SSUMF ¶132]; CT-7:1373 [Alston Decl. ¶¶29-30].) This showing stands unrebutted, for petitioners submitted "*no* evidence contesting the evidence of the Commission's effectiveness." (CT-13:3168 [emphasis added].)

Third, the Ketchum Act is narrowly tailored. A law is narrowly tailored under *Central Hudson* if it "is not more extensive than is necessary to serve [the government] interest." (*Gerawan II*, *supra*, 33 Cal.4th at 22 [internal quotation marks omitted].) A law does not have to be the "least restrictive means" for achieving the government's purpose; it only has to "not 'burden substantially more speech than is necessary to further the government's legitimate interests'"—a legislative judgment that courts

"have been loath to second-guess." (*Board of Trustees of S.U.N.Y. v. Fox* (1989) 492 U.S. 469, 477-478.)

By its nature, the Ketchum Act is narrowly tailored. It does not limit in any way a grower's ability to speak on any subject. It does not require any grower "to engage in any actual or symbolic speech." (*Glickman v. Wileman Bros. & Elliott, Inc.* (1997) 521 U.S. 457, 469.) And it does not "compel the [growers] to endorse or to finance any political or ideological views." (*Id.* at 469-470.) Indeed, the parties have stipulated that the Commission has never run political or ideological advertisements. (CT-8:1721 [SF ¶28].)

Finally, potential alternatives to mandatory assessments are unlikely to succeed in the table grape industry. Unrebutted evidence in the Superior Court establishes that the collective action problems that threaten the viability of voluntary associations in fragmented and largely undifferentiated commodity markets virtually ensure the failure of any such initiative in the table grape industry. (CT-2:390 [CTGC SSUMF ¶215]; CT-7:1365-1369 [Alston Decl. ¶¶11-22]; CT-7:1375-1377 [Alston Decl. ¶¶37-43]; CT-4:880 [Jolly Decl. ¶8]; CT-8:1716 [SF ¶12]; Food & Agric. Code §65500(c), (d) [noting "inability of individual producers to maintain or expand present markets or to develop new or larger markets for such grapes" on their own].) Petitioners' own stipulations in this case confirm this point: Save for a single print advertisement once a year in a single

issue of a trade publication at a cost of less than $1,000 per year, petitioners conduct no television, radio, online, or newspaper advertising whatsoever. (CT-5:1106 [Stipulation at 2].) The Commission's promotion work is narrowly tailored to the State's important interest in preserving and expanding demand for California table grapes.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED: June 8, 2015

Respectfully submitted,

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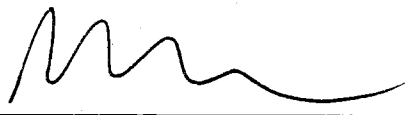
By: 
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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.504(d)(1), I hereby certify that, including footnotes, the foregoing brief contains 8,398 words. This word count excludes the exempted portions of the brief as provided in Rule of Court 8.504(d)(3). As permitted by Rule of Court 8.504(d)(1), the undersigned has relied on the word count feature of Microsoft Word 2010, the computer program used to prepare this brief, in preparing this certificate.

DATED: June 8, 2015

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Fresno, State of California. My business address is 5260 North Palm Avenue, Fourth Floor, Fresno, CA 93704.

On June 8, 2015, I served true copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) 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 readily familiar with Baker Manock & Jensen, PC'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 June 8, 2015, at Fresno, California.

Barbara Tippie

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