Case No. S226538

IN THE SUPREME COURT OF CALIFORNIA

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

v.

CALIFORNIA TABLE GRAPE COMMISSION
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

Petitioners' Opening Brief on the Merits

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

ISSUES ON REVIEW

As stated in our Petition for Review, the issues on review are as follows:

1. Whether, consistent with free speech principles under Article I of the California Constitution, state-empowered industry boards may compel unwilling parties to contribute to their commercial advertising without serious constitutional scrutiny, even if they are not themselves subject to actual supervision and control by democratically accountable officials.

2. Whether state courts should adhere to precedent of the California Supreme Court, rather than defer to lower federal courts on questions of state constitutional law.

As stated in the Answer to Petition for Review, the issues on review are as follows:

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 persuasive value.

INTRODUCTION

Both this Court and the United States Supreme Court have long recognized the threat to freedom of speech when essentially private industry groups are delegated the power to legally compel *all* participants in the industry to support advertising that serves the interests only of *some*. The U.S. Supreme Court has held one such program unconstitutional and this Court has required that such programs be held to heightened constitutional scrutiny. (*United States v. United Foods* (2001) 533 U.S. 405; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 (*Gerawan I*); *Gerawan*

Farming, Inc. v. Kawamura (2004) 33 Cal.4th 1 (*Gerawan II*).) Entities like the California Table Grape Commission ("TGC" or "the Commission") occupy a dangerous middle ground between public and private; they are able to pursue essentially private objectives, but with the full power of the state to enforce their will. They are subject to the discipline neither of the market nor of the ballot box. This Court has made clear that the only way this kind of program can be conducted consistently with the free speech clause of the California Constitution is to subject the conduct of the program to active supervision and genuine control by democratically accountable officials. The U.S. Supreme Court similarly upheld the constitutionality of compelled contributions to advertising of the national Beef Board precisely because of active control by federal officials over "every word" of the advertising. (*See Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550.)[1]

The court below did not see it that way. Misled by a Ninth Circuit opinion upholding the TGC's actions under the federal Constitution, based on a patently erroneous interpretation of *Johanns*, (*see Delano Farms v. California Table Grape Commission* (9th Cir. 2009) 586 F.3d 1219, 1229), the court below held that the TGC may compel these plaintiffs to contribute to its advertising program, which benefits TGC members but hurts these

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[1] Similar concerns about such entities exist under the antitrust laws. (*See North Carolina State Bd. of Dental Examiners v. FTC* (2014) 135 S.Ct. 1101.)

plaintiffs, even when the relevant politically accountable body, the California Department of Food and Agriculture ("CDFA") exercises no actual supervision or control.

Much of this brief will be devoted to a detailed description of the operations of the TGC and the CDFA, to make clear that the TGC, in actual practice, is effectively autonomous. But this is undisputed. The court below acknowledged that, "[u]nlike the [federal] Beef Order [upheld in *Johanns*], [California law] does not require any type of review by the Secretary over the actual messages promulgated by the Commission." (*Delano Farms Co. v. California Table Grape Commission* (2015) 185 Cal.Rptr.3d 771, 779.) "The Beef Board and the Operating Committee submit all plans to the U.S. Secretary of Agriculture for final approval"; the Table Grape Commission does not. (*Ibid.*) In point of fact, the CDFA does not even see the advertising before it is run, and has no way to know whether it is promoting the private interests of the dominant players of the TGC to the injury of independents like the plaintiffs. The court below held that this does not matter: "Even if the Secretary does not exercise this authority and intervene in message development," the constitutional requirements were satisfied. (*Ibid.*)

That is the issue presented. Plaintiffs contend that unless the CDFA is required to review and approve TGC's messages and in fact (not in theory) does so, the free speech inquiry demanded by *Gerawan I* and *Gerawan II* is applicable. The TGC, defending the court below, contends that no

constitutional scrutiny is necessary so long as the members of the TGC are appointed by the CDFA and the CDFA has authority to review the message in exceptional cases, even if that authority is never exercised. The governing precedents of both this Court and the U.S. Supreme Court show that the TGC is wrong.

STATEMENT OF THE CASE

A. Plaintiffs and the Table Grape Commission

Plaintiffs Delano Farms Company, Blanc Vineyards, LLC, Gerawan Farming, Inc., Four Star Fruit, Inc., and Bidart Brothers, are independent grape farmers and shippers who do business in the competitive agricultural industry of California. All are family businesses, and some have been operating in the state for decades. All of the plaintiffs grow, market, and ship their own grapes. (13 CT 3106:25-3107:1; 1 CT 158:12-14; 1 CT 195:2-6; 1 CT 246:2-7.)[2] Delano Farms, for example, grows table grapes on 6,000 acres in Kern County, California. It ships only the grapes it grows and harvests itself, and sells under its own brand name. (13 CT 3106:25-3017:1.) Currently, Delano Farms ships more than six million boxes of table grapes every year, throughout the United States and in the export market. (13 CT

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[2] Plaintiffs filed separate complaints that were consolidated below. While the facts specific to each company differ slightly, the allegations pertinent to this appeal are materially the same. For ease of citation, this petition will hereinafter cite the Delano Farms' Amended Complaint, filed February 20, 2013.

3107:1-2.) As independent producers and marketers, Delano Farms and the other plaintiffs expend time, energy, and money to distinguish their fruit from that of other table grape growers and shippers in the industry. (13 CT 3107:1-6; 1 CT 159:7-14; 1 CT 195:6-16; 1 CT 246:9-13.) From their point of view, table grapes are not a commodity; they are products reflecting the distinctive *terroir*, care, and skill of their growers.[3]

Defendant-Respondent Table Grape Commission is a public corporation created under the Ketchum Act of 1967. (*See* Cal. Food & Agric. Code § 65550, *et seq.*) It is governed by a board composed of eighteen table grape growers—three from each of the state's six active grape-growing districts—and one "public member." (*See id.* § 65575.1.) These board members are elected by the table grape producers of each district, and then appointed by the Secretary of CDFA. (*See id.* § 65550.) The Ketchum Act empowers the commissioners to impose assessments on all producers of table grapes in California, which they use in their discretion for generic advertising, education, marketing, research, and government-relations efforts. (*Delano Farms*, 185 Cal.Rptr.3d at 773.)

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[3] This case was decided on summary judgment below, so all facts must be construed by the appellate court in the light more favorable to the plaintiffs. (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.)

California produces 400 agricultural crops, but only fifty three are regulated at all by a marketing order or commission. (8 CT 1746:2-8.) The authorities and degree of autonomy of each of these commissions is different. (*See* 8 CT 1746:12-19.) Only a handful of California's crops are subject to a mandatory generic advertising regime; tomatoes and oranges, for example, are not. (8 CT 1746:16-23.) Some advertising programs—like the California Pear Marketing Program—are conducted by an essentially advisory industry board that merely makes recommendations to CDFA, which in turn decides what policies to pursue.[4] On the other end of the spectrum is the TGC, which, as a practical matter, functions with near-total autonomy. Other than the sole public member, the TGC commissioners are, by definition, competitors of these Plaintiffs, whose interests necessarily diverge. Nothing in the statutory scheme under which they operate precludes the commissioners from voting their own private interests.

The TGC operates independently of CDFA in a variety of ways. The statute grants the Commission the authority "[t]o adopt and from time to time alter, rescind, modify and amend all proper and necessary rules, regulations and orders for the exercise of its powers and the performance of its duties, including rules for regulation of appeals from any rule, regulation or order of

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[4] (*See* California Pear Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/ordslaws.html.)

the commission." (Cal. Food & Agric. Code § 65572(b).) The Commission may "enter into any and all contracts and agreements, and to create such liabilities and borrow such funds in advance of receipt of assessments as may be necessary," (*id.* § 65572(e)), and it is a corporate entity that "shall have the power to sue and be sued, to contract and be contracted with, and to have and possess all of the powers of a corporation," (*id.* § 65551). Tellingly, the statute proclaims that "[t]he State of California shall not be liable for the acts of the commission or its contracts." (*Id.* § 65571.)

The Commission also has discretion, within a statutory cap, to set the rate of assessments that table grape growers are required to pay to fund the Commission's speech-related activities, including its promotional advertisement campaigns. (*Id.* §§ 65572(*l*), 65500(f).) The expenditure of these funds for promotional campaigns or "any other similar activities which the commission may determine appropriate for the maintenance and expansion of present markets and the creation of new and larger markets for fresh grapes," is left to "the discretion of the commission." (*Id.* § 65572(i).) In effect, the Commission requires all table grape growers to devote a portion of the resources available to product advertising to collective promotion of grapes as an undifferentiated commodity. The Commission has the power to sue producers for payment, civil penalties, or injunctive relief in the event of nonpayment of any assessment. (*See id.* §§ 65572(g), 65650.)

Over the past several years, the Commission has imposed an assessment on plaintiffs of about 13¢ per box of table grapes, which (depending on the plaintiff) has amounted to tens of thousands or hundreds of thousands of dollars a year in assessments, and, in some cases, millions of dollars aggregated over the entire term of the assessment regime. (13 CT 3108:1-14; 1 CT 158:24-160:6; 1 CT 196:7-14; 1 CT 246:14-247:10.) In the 2010-2011 fiscal year, table grape producers and shippers paid $11,414,755 in assessments, a large portion of which was spent on speech-related activities, including paid advertising, education outreach, consumer research, and international marketing. (8 CT 1715:27-1718:27.) Delano Farms has been paying at least $600,000 in assessments each year beginning with the 2000-2001 crop season. (13 CT 3108:5-9.)[5] Any advertising or promotion of its own product is on top of this—and to the extent that Delano Farms' business strategy is to differentiate its product from that of its generic competitors, the Commission's generic message conflicts with Delano Farms' own message. (13 CT 3112:3-20.)

Most relevant to this lawsuit, the Commission has discretion over the content of promotional campaigns and is not required to seek the approval of

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[5] By agreement of the parties, plaintiffs' assessments since the beginning of this litigation have been deposited in plaintiff-specific and segregated escrow accounts, pending the outcome of the case. (*See, e.g.*, 1 CT 177:9-12.)

the Secretary of CDFA before running its assessment-funded advertisements. (*See* Cal. Food & Agric. Code § 65572(h-k).) In fact, under the Ketchum Act, CDFA has authority to review the TGC advertising messages *only* upon petition from an "aggrieved party" and only for narrow legal defects: to determine whether the Commission's action is "not substantially sustained by the record, was an abuse of discretion, or illegal." (*See id.* § 65650.5.) Similarly, CDFA's own policy manual, under the heading "*Non-routine* Review," claims no general oversight power over the Commission but merely "reserves the right" for CDFA to "exercise exceptional review" of the Commission's advertisements. (3 CT 686 (emphasis added); *see also Delano Farms*, 185 Cal.Rptr.3d at 773-74.) But CDFA has *never* exercised even this non-routine, exceptional review. It is undisputed that "the Secretary and the CDFA have, in practice, performed virtually no supervision" of the Commission's activities generally, and have never overseen or approved the content of the Commission's advertisements. (*Delano Farms*, 586 F.3d at 1229-30.)

The record is also clear that the ads the Commission publishes are neither attributed to the State of California nor to the CDFA. (*See* 8 CT 1743:25-1744:2; 9 CT 2045:6-2046:7.) The ads all bear the same circular logo with the name "Grapes from California" on the perimeter, and a bundle of grapes in the middle. This logo gives the impression that the ads are the commercial message of California grape producers, or of a private company

whose branding emphasizes the homegrown character of its product. Many of the ads direct viewers or listeners to "grapesfromcalifornia.com," the TGC's website. (2 CT 448-467.) Tellingly, the URL for this website is .com—not ca.gov, as one would expect if the messages were governmental. There is no reason consumers would infer these messages flow from the state.

Moreover, the TGC's ads are entirely generic, making no distinction among the varieties and quality of grapes produced in California. This advances the notion that California grapes are all the same. (*See* 2 CT 448-467.) As the record demonstrates, some growers benefit and others lose from this sales approach, depending on whether they wish to differentiate their products from those of their competitors. (13 CT 3112:3-20.)

B. The Proceedings Below

Plaintiffs filed six complaints that were later consolidated in the Superior Court of California, County of Fresno, Central Division. Plaintiffs alleged that the "statutes authorizing the existence of the Commission, and the assessments imposed in accordance with the same," violated their rights under the free speech and free association clauses of Article I, Sections 2 and 3 of the California Constitution. (*See, e.g.*, 13 CT 3115:14-16.) They asserted that the assessments to fund the Commission's advertisements were an unconstitutional compelled subsidy of speech, which forced them to spend money in support of a message they did not agree with and that damaged

their business, which depends on developing and marketing table grapes of higher quality than those of their competitors. (13 CT 3112:3-20.)

During discovery, plaintiffs presented evidence to support their claim that the Commission's generic ads, by marketing all California table grapes collectively, and thus generically, harm their ability to promote and distinguish their own high-quality products. (*Cf. United States v. United Foods* (2001) 533 U.S. 405 (holding unconstitutional a federal statute that required mushroom handlers to fund a generic message inconsistent with their emphasis on the importance of the differences among branded products).) Plaintiffs argued that they should not be "forced to pay money to a group of competitors" to spend as those competitors wish even if "counterproductive" to plaintiffs' aims. (8 CT 1744:22-1745: 4, 1782:19-1783: 2.)

On May 22, 2013, the Superior Court granted the California Table Grape Commission's motion for summary judgment on the grounds that the Commission is a "government entity" whose speech is therefore government speech, the compelled subsidy of which does not violate the free speech clause. (*See Delano Farms,* 185 Cal.Rptr.3d at 774.) The California Court of Appeal, Fifth District, affirmed on alternative grounds. (*See id.* at 775-80.) The court deferred to the Ninth Circuit's decision in *Delano Farms Co. v. California Table Grape Commission* (9th Cir. 2009) 586 F.3d 1219, which had recently held that the same subsidies were immune from constitutional

review under the First Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550. In *Johanns*, the Supreme Court held that the national Beef Board could compel subsidies of its promotional campaigns without First Amendment review because the messages conveyed in those campaigns were government speech.

Despite the fact that this Court had rendered two opinions setting forth the constitutional standards that govern compulsory agricultural marketing programs (*Gerawan I* and *Gerawan II*) the appellate court relied entirely on the analysis of the Ninth Circuit. The sole reference to this Court's decision in *Gerawan II* on the subject of government speech was one line stating: "As to the Secretary's government speech claim, the *Gerawan II* court concluded that it could not be resolved on the pleadings and required further factfinding." (*Delano Farms*, 185 Cal.Rptr.3d at 776.)[6] In Discussion Sections 3 and 4, which contain the appellate court's legal analysis regarding government speech, the court never even mentioned *Gerawan I* or *Gerawan II*. It relied entirely on the Ninth Circuit and that court's misconstruction of *Johanns*.

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[6] As discussed below, even that one line should have been enough for the appellate court to know that it could not decide this case, as it did, on the face of the statute, but needed to evaluate the facts about CDFA's actual practice—namely, whether the CDFA in fact supervised or controlled TGC's messages.

Following the reasoning of the Ninth Circuit, the Court of Appeal concluded that the "Commission's activities could be classified as government speech" under *Johanns* in one of two ways: "if the Commission is itself a government entity or if the Commission's message is effectively controlled by the state." (*Delano Farms*, 185 Cal.Rptr.3d at 778.) The court did not reach the question whether the Commission is a government entity because it held that the government effectively controlled the Commission's speech. (*Id.* at 780.) The court conceded that "[u]nlike the Beef Order [in *Johanns*], the Ketchum Act does not *require* any type of review by the Secretary over the actual messages promulgated by the Commission." (*Id.* at 779.) Notwithstanding this lack of oversight, which differentiated this case from *Johanns*, the court concluded that it was sufficient that CDFA selects members of the Commission, and in its own policy manual "retains the authority to review the Commission's advertising" in exceptional circumstances. (*Id.* at 773-74.) Acknowledging the CDFA had never in fact reviewed the advertising content of the Commission, the court concluded: "Even if the Secretary does not exercise this authority and intervene in message development, he or she does not relinquish the power to do so." (*Id.* at 779.)

Petitioners filed a Petition for Review before this Court, which granted the petition on July 22, 2015.

SUMMARY OF ARGUMENT

This Court and the U.S. Supreme Court have provided clear guidance about how to distinguish government speech from private speech in the context of agricultural promotion programs. (*Gerawan II*, 33 Cal.4th 1; *Johanns*, 544 U.S. 550.) Both agree that the government speech label, and the special exemption from constitutional supervision it affords, is warranted only where the democratic process provides an independent check on the content of that speech. (*See Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015) 135 S. Ct. 2239, 2245) ("[I]t is the democratic electoral process that first and foremost provides a check on government speech.").) After all, "the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." (*Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 259 n.13 (Powell, J., concurring).) As both courts also have held, this assurance of political accountability is present for a forced subsidy of commodity advertising *only* if the program's messaging content was *in fact* controlled by and decided upon by government officials. (*See infra* I.A.)

This Court's case law further suggests that a government speech defense is unavailing if the ads are not attributed to the government, and the viewer therefore does not associate the message with the government. (*See infra* I.B.)

The Court of Appeal thus erred by deferring to the Ninth Circuit's decision that CDFA's theoretical, but entirely unexercised, power to review the Commission's work made it government speech under the First Amendment. It is always problematic to defer to a lower federal court's interpretation of federal law on a question of state constitutional interpretation. That deference is all the more improper here because the Ninth Circuit's analysis is in plain conflict with this Court's *and* the U.S. Supreme Court's precedent. (*See infra* I.C.)

A straightforward application of controlling precedent compels the conclusion that the TGC's forced-subsidy advertising program must be reviewed under intermediate scrutiny to determine whether it violates the free speech clause of the California Constitution. (*See Gerawan II*, 33 Cal.4th at 6.) Here, it is undisputed that the Secretary of CDFA has performed virtually no supervision of the TGC in general, and exercised no oversight over its promotional campaigns in particular; moreover, the Commission's ads are publicly attributed to private industry and not to the government. The pursuit by industry members who serve on the TGC of their own private commercial interests, at the literal and figurative expense of plaintiffs, must therefore be scrutinized for the burdens it imposes on the free expression of the program's unwilling participants. (*See infra* II.)

An entity's power to coerce contributions to its speech is not immune from constitutional review merely because the entity was created by statute

and empowered by the government. Although the Table Grape Commission exercises coercive power delegated by the state, it is not a state agency, it is not under democratic control, and its speech is therefore not that of the California government. (*See infra* III.) The judgment of the Court of Appeal should therefore be reversed, and the case remanded for the Court of Appeal to consider plaintiffs' claim that the TGC's compelled subsidies cannot withstand constitutional review. (*See infra* IV.)

ARGUMENT

I. A COMMODITY ADVERTISING PROGRAM IS GOVERNMENT SPEECH ONLY IF THE CONTENT IS IN FACT CONTROLLED BY GOVERNMENT OFFICIALS AND ATTRIBUTED TO THE GOVERNMENT

A. For Commodity Advertising to Constitute Government Speech, the Case Law Requires that the CDFA In Fact Control the Promotional Content

Gerawan II and *Johanns* both hold that government-empowered industry boards may compel unwilling parties to contribute to their commercial speech only if democratically accountable government officials "*in fact* ... decide[]" the message of the commodity advertising at issue, (*Gerawan II*, 33 Cal.4th at 28), and control it "from beginning to end," (*Johanns*, 544 U.S. at 560). Absent genuine control by politically accountable government officials over the promotional message, a government-empowered industry board cannot claim the talisman of government speech.

The *Gerawan* cases involved plum growers seeking to differentiate their products, who challenged a marketing order requiring them to finance generic advertising of plums. (*Gerawan II*, 33 Cal.4th 1.) This Court expressly declined to follow the U.S. Supreme Court's then-recent First Amendment decision in *Glickman v. Wileman Bros. & Elliott* (1997) 521 U.S. 457, which held that the First Amendment "does not protect commercial speech against compelled funding." (*Gerawan I*, 24 Cal.4th at 503.) In an opinion by Justice Stanley Mosk, this Court held that the plum marketing order was subject to challenge under the free speech clause of the California Constitution. (*Id.* at 509.)

The *Gerawan I* Court recognized that the free speech rights of growers are threatened where a commodity program forces them to fund "generic advertising about plums as a commodity—generic advertising that is intended not to prevent or correct any otherwise false or misleading message in the interest of consumer protection, but solely to develop markets and promote sales in the interest of producer welfare." (*Id.* at 510.) In particular, the Court cautioned that "[g]eneric advertising can be manipulated to serve the interests of some producers rather than others, as by allowing some to develop a kind of brand by means of funds assessed from all and then use it for their own exclusive benefit." (*Id.* at 504.) The Court noted that some producers "may find themselves disadvantaged by generic advertising in their competition against others." (*Ibid.*) And it accepted that a producer

may have genuine objections to coerced participation in generic advertising when "others ... hijack[] his own funds as they drive to their own destination." (*Ibid.*)

Between *Gerawan I* and *II*, the U.S. Supreme Court substantially cabined *Glickman*, holding that compelled generic advertising programs of this sort violate the First Amendment unless they are an integral part of a comprehensive regulatory scheme, in effect bringing federal law back into substantial alignment with this Court's interpretation of California law. (*United States v. United Foods* (2001) 533 U.S. 405.) Subsequently in *Gerawan II*, this Court clarified that the plum advertising program should be reviewed on remand under intermediate scrutiny. (*Gerawan II*, 33 Cal.4th at 6 (citing *Central Hudson Gas & Elec. v. Public Serv. Commission* (1980) 447 U.S. 557, which adopted intermediate scrutiny as the standard of review for restrictions on commercial speech).) The Court discussed favorably—several times and at length—the U.S. Supreme Court's decision in *United Foods*, which found the compulsory generic advertising program for mushrooms unconstitutional. (*See, e.g.*, *Gerawan II*, 33 Cal.4th at 16-20.)

But the Court also recognized an exception to this general principle: If the defendant could show that the subsidized speech was the government's own, then the compelled speech program would be exempt from constitutional review. (*Id.* at 26-27.) The Court remanded the case for

"further factfinding," in part because defendant's government speech defense could not be "resolved on the pleadings." (*Id.* at 28.)

In remanding the case, *Gerawan II* articulated the controlling standard for a government speech defense. The Secretary of CDFA argued that because "he must ultimately approve any generic advertising issued by the California Plum Marketing Board, which is itself organized pursuant to statute" the speech is "actually that of the State of California rather than of a private association." (*Id.* at 26.) The Court rejected that argument. It held that the Secretary's statutory obligation to sign off on the advertisements was not dispositive. Rather, the speech may "be considered government speech if in fact the message is decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority." (*Id.* at 28.) In other words, an approval process is not enough; the generic advertising messages must "in fact" be "decided upon" by an accountable government official.

The case would require further proceedings, the Court explained, because "there are factual questions that may be determinative of the outcome," including "whether the Secretary's approval of the marketing board's message *is in fact pro forma*," or "whether the marketing board *is in de facto control* of the generic advertising program, and whether the speech is attributed to the government." (*Ibid.* (emphasis added).)

Federal constitutional law—as authoritatively interpreted by the U.S. Supreme Court in *Johanns*—is in harmony with *Gerawan II*. This Court of course has recognized that Article I's free speech clause is sometimes "broader" and "greater" than the First Amendment's. (*Gerawan I*, 24 Cal.4th at 491.) But in this instance, *Johanns* stands for the same proposition as *Gerawan II*: that government-empowered industry boards may not compel unwilling parties to contribute to their commercial speech unless accountable government officials control the message in actual practice. To be sure, *Johanns* upheld the generic advertising program of the federal Beef Board as government speech; but, in doing so, it carefully distinguished between the speech of a democratically-controlled body and speech by an industry group that has been delegated the power to coerce unwilling parties to pay for its messages, without genuine supervision or democratic accountability. (*Johanns*, 544 U.S. at 560; *see also Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 957 ("*Johanns* holds that where commodity advertising is authorized and the basic message is prescribed by statute *and where its content is overseen and subject to the control of a politically accountable official*, it is government speech.") (emphasis added).)

Johanns involved a First Amendment challenge by beef producers to the compelled subsidy of beef-related promotional campaigns imposed under a federal program by the Cattlemen's Beef Promotion and Research Board. In deciding that the promotional messages of the Beef Board constituted the

"Government's own speech," the Supreme Court considered whether "[t]he message of the promotional campaigns [was] effectively controlled by the Federal Government itself" and concluded that "the message set out in the beef promotions [was] from beginning to end the message established by the Federal Government." (*Johanns*, 544 U.S. at 560-61.)

A number of features of the federal program at issue in *Johanns*, specifically the Secretary of Agriculture's comprehensive control over all stages of the advertising regime, established that the beef promotions were the government's message from "beginning to end." Not only did the Secretary of Agriculture appoint the members of the Beef Board, as is common in all these marketing order systems, but the Secretary specified in general terms what the promotional message should be and "*exercise[d] final approval authority over every word used in every promotional campaign.*" (*Id.* at 561 (emphasis added).) The *Johanns* Court concluded that, "[w]hen, as here, the government sets the overall message to be communicated *and approves every word that is disseminated*, it is not precluded from relying on the government-speech doctrine." (*Id.* at 562 (emphasis added).)

As in *Gerawan II*, in *Johanns* the centerpiece of the Court's analysis was the Secretary's actual oversight and control, to which the opinion returned time and again. It was not simply the case that under the statute any "plan or project" became "effective" *only* "on the approval of the Secretary." (7 U.S.C. § 2904(6)(B).) The Court also emphasized that in actual practice,

the "proposed promotional messages [were] reviewed by Department officials *both for substance and for wording*, and some proposals [were] *rejected or rewritten by the Department.*" (*Johanns*, 544 U.S. at 561 (emphasis added).) Like this Court in *Gerawan II*, the U.S. Supreme Court was interested in whether the Secretary practiced more than merely pro forma review. As it explained, "cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability." (*Id.* at 563.) In *Johanns*, the beef advertisements were "subject to political safeguards ... adequate to set them apart from private messages" only because the "Secretary of Agriculture, 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." (*Id.* at 563.)

These principles were reiterated just last Term in *Walker*, which involved the question whether Texas's specialty license plate system was an open forum for private speech (thus opening the door to a Confederate-flag-related plate) or whether it was government speech, not subject to private speech rights. (*See Walker v. Texas Division*, 135 S. Ct. 2239.) The court held that the specialty license plate designs were government speech in part because the Texas Department of Motor Vehicles "must approve every specialty plate design proposal before the design can appear on a Texas plate" and has "*actively exercised this authority*" to approve or reject the proposed

plates. (*Id.* at 2249.) Citing *Johanns* and referring specifically to the fact that the board had "rejected at least a dozen proposed [license plate] designs," the Court concluded that Texas "has effectively controlled the messages [conveyed] by exercising final approval authority over their selection." (*Ibid.* (internal quotation marks omitted).)

The holdings of *Gerawan II* and *Johanns* bear little resemblance to the decision below, which held that the table grape advertising program is government speech immune to constitutional review even if the TGC did *not* review the advertisements, let alone "decide[] upon" them, as *Gerawan II* required. (*Gerawan II*, 33 Cal.4th at 28.) The appellate court did not even mention *Gerawan II* in its legal analysis of the government speech issue.

B. For Commodity Advertising to Constitute Government Speech, the Case Law Requires that the Promotional Content Be Attributed to the Government

In one respect, this Court's government speech jurisprudence may be more demanding than the U.S. Supreme Court's. For speech to be treated as "government speech" under the California Constitution, *Gerawan II* stated that another "factual question[] that may determinative of the outcome" includes "whether the speech is attributed to the government." (33 Cal. 4th at 28.) Over Justice Souter's vigorous objection in dissent, *Johanns* rejected such a requirement for purposes of analysis under the First Amendment. (544 U.S. at 564 n.7.) In keeping with this Court's commitment to stronger protections for free speech than the First Amendment provides, *Gerawan II* is thus aligned with the Souter dissent rather the *Johanns* majority on this point.

Justice Souter explained that where "the ads are not required to show any sign of being speech by the Government," the statute "does not establish an advertising scheme subject to effective democratic checks." (*Id.* at 576-77 (Souter, J., dissenting).) Specifically, it "means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them." (*Id.* at 578.) The dissent logically concluded that absent attribution, viewers would "most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit

when beef is on the table." (*Id.* at 577.) And "[u]nless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it." (*Id.* at 578-79.)

While this reasoning did not carry the day in *Johanns*, it seems to have been revived in *Walker*, which is the U.S. Supreme Court's most recent "government speech" case. (*See* 135 S.Ct. 2239.) The Court held that Texas's specialty license plate system constitutes government speech, not only because the Texas Department of Motor Vehicles actively controlled the content of the messages, but also because those messages were publicly associated with the government. The majority stated that the license plate designs "are often closely identified in the public mind with the [State]." (*Id.* at 2248.) The nature of the program "allow[ed] Texas to choose *how to present itself* and its constituency." (*Id.* at 2249 (emphasis added).) And those messages, the Court concluded, were perceived as the government's own—motorists display such plates with the "likely inten[t] to convey to the public that the State has endorsed that message," and these designs in fact "convey government agreement with the message displayed." (*Ibid.*)

The dissenters in *Walker* agreed with this principle though not with its application. They argued that the license plate designs communicated private, not government, speech because the viewer would associate the message with "the motorist displaying the plate," and *not* with the

government. (*Id.* at 2255 (Alito, J., dissenting).) It was common ground between majority and dissent that the public's ability to monitor its approval of the government's speech is stymied when it does not know that the government is speaking. If, as the majority stated, "[i]t is the democratic electoral process that first and foremost provides a check on government speech," (*id.* at 2245), then attribution to the government is a necessary ingredient of a government speech defense.

Whether or not federal constitutional law now embraces a requirement of government attribution for speech to be deemed "government speech," such attribution is germane under the California Constitution, as held in *Gerawan II*. Indeed, attribution or lack thereof may even be "determinative" of the government speech issue. (*Gerawan II*, 33 Cal. 4th at 27.)

C. The Court of Appeal Erroneously Deferred to the Ninth Circuit, Whose Interpretation of Federal Law is Inconsistent with *Johanns* and *Gerawan II*

Making only glancing reference to *Gerawan II*—and no reference at all in the two sections of the Discussion setting forth the legal analysis of government speech—the court below instead relied on the Ninth Circuit's flawed interpretation of federal law in *Delano Farms*, the federal challenge to this program. (*Delano Farms*, 185 Cal.Rptr.3d at 778; *Delano Farms*, 586 F.3d at 1230.) This is not the occasion for an extended critique of the Ninth Circuit's decision; suffice it to say that the panel interpreted *Johanns* as treating programs as government speech even in the absence of active

supervision and control. The panel "underscored that 'passivity is not an indication that the government cannot exercise authority,'" and held that CDFA's theoretical power to review the Commission's work—even if not required, and never exercised—was enough to shield the subsidies from constitutional review. (*Id.* at 1230.) The court below erred in following this federal decision when interpreting the state constitution; it should have hewed to this Court's teaching in *Gerawan II*.

Whatever the scope of CDFA's *ability* to review the Commission's advertisements, *Gerawan II* held that having "statutorily derived regulatory authority" is alone insufficient for the government speech exception to apply. The Secretary must exercise "de facto" control of the generic advertising program. (*Gerawan II*, 33 Cal.4th at 28.) Had the Secretary's statutory authority to review the advertisements been enough, there would have been no need for the court to remand. (*Ibid.*)

The differences between the Plum Board and the TGC make the *Gerawan II* holding all the more striking. In *Gerawan II*, the record was clear that the Secretary was not only *required* by statute to "ultimately approve any generic advertising issued by the California Plum Marketing," but also *did so in practice*. (*Id.* at 26.) Even that was not enough. This Court held that even the Secretary's actual approval of each advertisement was inadequate absent a showing that this was more than "pro forma" review. (*Id.* at 27.)

It is thus clear that the government speech exception does not protect an entity that can only show that when it speaks there is a possibility, or even a routine practice, of pro forma approval from the Secretary. A court must find that the message was "in fact ... decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority." (*Id.* at 28; *see also Johanns*, 544 U.S. at 561 (emphasizing that the "record demonstrates that the Secretary exercise[d] approval authority over every word used in every promotional campaign").)

Putting aside that the Ninth Circuit misapplied *federal* constitutional law as explicated by *Johanns*, the court below acted in error when it deferred to a Ninth Circuit decision about the federal Constitution that is plainly in conflict with this Court's interpretation of California law. The Court of Appeal reasoned that "[w]hile California courts are not bound by decisions of the lower federal courts, they are persuasive and entitled to great weight." (*Delano Farms*, 185 Cal.Rptr.3d at 780 (citing *Barrett v. Rosenthal* (2006) 51 Cal.Rptr.3d 55).) This observation inverts the rules of deference. While *Barrett* concerned state court deference to lower federal courts' interpretation of *federal* law, "state courts, in interpreting constitutional guarantees contained in state constitutions are independently responsible for safeguarding the rights of their citizens." (*People v. Teresinski* (1982) 30 Cal.3d 822, 835-36 (internal quotation marks omitted).) And only the

decisions of the U.S. Supreme Court, not those of lower federal courts, "are entitled to respectful consideration." (*Id.* at 836.)

The duty of state courts to independently interpret state constitutional law in accordance with the precedents of this Court is especially clear with respect to Article I, because this Court has already clarified that the California State Constitution affords greater protection to free speech than the First Amendment does. *Gerawan I* emphasized that "article I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.'" (24 Cal.4th at 491.) And in *Gerawan II* this Court held that although the compelled subsidies at issue there did not violate the First Amendment under *Glickman*, they required further review on remand under Article I's free speech clause. (33 Cal.4th at 27-28.)

In short, federal courts "must defer to the judgment of a state court on interpretations of state law," and not the reverse. (*Bui v. Alarcon* (9th Cir. 2000) 234 F.3d 1279.) Even the Ninth Circuit recognizes that "because interpreting state law is not a core function of the federal courts we lack the expertise to interpret state laws." (*Sarausad v. Porter* (9th Cir. 2007) 503 F.3d 822, 825.) That distinction is particularly pertinent here, where the Ninth Circuit declined to consider the Secretary's actual oversight for the reason that "*federal* courts are ill-equipped" to review the operation of a state program and "micro-mang[e] [state] legislative and regulatory schemes."

(*Delano Farms*, 586 F.3d at 1230.) It is simply not sensible for a state court to defer to a federal court on an issue that the federal court declares itself ill-equipped to undertake, and which the state supreme court has already declared to be necessary.

II. THE TGC CANNOT SATISFY THE STANDARD FOR GOVERNMENT SPEECH

It is clear that *Gerawan II's* standard governs here and that under either *Gerawan II* or *Johanns*, the Commission's compelled subsidies fund promotional messages that are private, not government, speech, and whose infringement on the free expression of grape grows must be subject to constitutional review.

As a threshold matter, unlike in *Johanns* and *Gerawan*, the CDFA has not even been granted the legal authority to review the Commission's advertising campaigns—meaning the table grape program would not be government speech even under the lax standard urged by Respondent. The Ketchum Act authorizes CDFA to review TGC advertising messages only upon petition from an "aggrieved party" and only for narrow legal defects: to determine whether the Commission's action is "not substantially sustained by the record, was an abuse of discretion, or illegal." (*See* Cal. Food & Agric. Code § 65650.5.) It is hard to see how these administrative law concepts could ever logically be applicable to ads for table grapes, let alone form the basis for the conclusion that "the Commission's message is effectively

controlled by the state." (*Delano Farms*, 185 Cal.Rptr.3d at 778 (citing *Delano Farms*, 586 F.3d at 1223).) That narrow standard of review no more makes the Commission's messages "government speech" than the Administrative Procedure Act makes routine agency action in Washington the "regulatory policy" of the D.C. Circuit.

The court also pointed to CDFA's policy manual, (*see Delano Farms*, 185 Cal.Rptr.3d at 773-74), but even there CDFA does not claim routine oversight power over the Commission. Under the heading "Non-routine Review," the manual states that CDFA "reserves the right" to "exercise exceptional review" of the Commission's advertisements. (3 CT 686.) Putting aside the fact that a mere policy manual lacks the force of law, (*see Christensen v. Harris County* (2000) 529 U.S. 576, 587), "exceptional review" is just that: an exception.

Furthermore, unlike in *Gerawan II* and *Johanns*, there is no uncertainty here that the Secretary *in fact* exercised no control over the Commission's promotional messaging, pro forma or otherwise. There is no statutory requirement that the Secretary of CDFA approve the Commission's advertising content—or even send an official to Commission meetings. There is no evidence that the Secretary, his designees, or any other governmentally accountable official has reviewed the messages in recent memory. (*Delano Farms*, 586 F.3d at 1229-30.) It is conceded that, in actual practice, the Secretary "does not review advertising and promotional

activities, nor does the State review the Commission's budgets," (*ibid.*), and it is undisputed that the CDFA possesses few, if any, documents that relate to the Commission's work, (*ibid.*). The "Secretary and the CDFA have, in practice, performed virtually no supervision of the Commission." (*Id.* at 1229.)

Critically, Respondent does not even assert that the Secretary (or her designee) has ever *in fact* overseen, reviewed, approved, or vetoed the content of the Commission's generic advertisements of California table grapes. Whereas the Secretary of Agriculture in *Johanns* exercised "final approval authority over every word" in the Beef Board's promotional campaigns, (*Johanns*, 544 U.S. at 561), the private industry members of the TGC run the advertisements without the Secretary of CDFA's sign off. (Cal. Food & Agric. Code § 65572(h-k).)

That distinction carries with it a world of difference—marking the line between a program that traces back to politically accountable officials and one that does not. Contrast the TGC, for example, with the California Milk Producers Advisory Board, whose promotional activity the Court of Appeal, Third District, held *was* government speech. (*See Gallo Cattle*, 159 Cal.App.4th at 948.) With respect to California milk products, private industry members acted essentially as advisors to the CDFA. The person ultimately answerable for the program's advertising and promotions was a "politically accountable official, the Secretary of the CDFA," who, among

other things, was "responsible for the preparation, issuance, administration and enforcement of plans for promoting the sale of any commodity" under the Milk Marketing Order and who "exercise[d] final approval over the specific content of all promotional campaigns carried out under the Milk Marketing Order." (*Id.* at 954-55.) There, the court was able to conclude that the speech under the Milk Marketing Order was the government's because the "content [was] overseen and subject to the control of a politically accountable official." (*Id.* at 952.)

Here, the Commission operates in all respects like an autonomous corporation, with independent authority to draft and disseminate its messages. Moreover, that autonomy extends to TGC operations even beyond its promotional campaigns. As the Marketing Branch Chief of CDFA acknowledged in her testimony, commissions are independent corporations that operate with even more autonomy than a marketing board. (*See* 9 CT 1939:14-1940:13.) Here, the Secretary of CDFA does appoint the members of the Commission, but is limited to choosing from a series of nominees preselected by the table grape producers of each district. (*See* Cal. Food & Agric. Code § 65550.) After that, the TGC is largely on its own. It sets the rate of the mandatory assessments on the State's table grape growers, (*see id.* § 65572(*l*)), collecting millions of dollars annually from other industry members and deciding how that money will be spent, (*see, e.g.* 8 CT 1715:25-1718:27). The TGC runs its own meetings without attendance from

anyone at CDFA, and unlike the milk advisory board, it has authority to adopt and alter its own regulations. (Cal. Food & Agric. Code § 65572(b).) On top of that, the TGC has the powers of a corporation, meaning it may enter its own contracts, as well as sue and be sued. (*Id.* § 65551.) The State of California is expressly *not* liable for the acts of the TGC or for its contracts. (*Id.* § 65571.) Tellingly, the TGC is represented in this litigation by a private law firm, not by the state Attorney General, and the CDFA is not even a party to this lawsuit. That makes it pretty clear that the TGC's advertisements are not the CDFA's speech.

For these reasons, it is apparent that the Commission operates merely as a "mechanism of self-regulation by the producers ... themselves," and not as an arm of the government. (*Gerawan I*, 24 Cal.4th at 503 n.8.) With no government oversight or accountability, it is easy to see how the money of table grape growers is "hijack[ed]" to fund generic advertising that "can be manipulated to serve the interests of some producers rather than others." (*Gerawan I*, 24 Cal.4th at 504.) Nothing prevents the growers who control the TGC, who are by definition competitors of the plaintiffs, from crafting messages that advance their own private interests—such as by portraying California table grapes as essentially a generic commodity, at odds with plaintiffs' messaging which emphasizes differences in product quality and type—and forcing the entire industry to pay for them. (*See* 13 CT 3112:3-20; *United Foods*, 533 U.S. at 411 (unconstitutional for Mushroom Council

to require "a discrete group of citizens[] to pay [] for speech on the side that it favors").)

What is more, the record is clear that the Commission's ads are not attributed to the State, nor even to the Table Grape Commission, but to "Grapes from California." (*See* 8 CT 1743:25-1744:2; 9 CT 2045:6-2046:7; 2 CT 448-467.) The corporate logo that marks each ad—with the words "Grapes from California" encircling a bundle of grapes—creates the impression that the ads are sponsored by California grape growers, or a private company whose branding emphasizes the homegrown character of its product, rather than of the State. Reinforcing the "Grapes from California" tag line, the ads direct viewers or listeners to the Commission's website, "grapesfromcalifornia.com"—a url that ends with ".com," and not ".gov" or "ca.gov." (2 CT 448-467.) Once there, site visitors are not informed of any supposed government marketing program, but can learn how to make California Grape Sushi Rolls or watch commercials for grapes that they might have missed on TV.[7] Nowhere does the website readily identify a

[7] (*See* http://grapesfromcalifornia.com/recipes/; http://grapesfromcalifornia.com/tvcommercials.php (last visited August 21, 2015).)

connection to CDFA or the Secretary, mentioning only in the "About Us" tab that the TGC was created by statute in 1967.[8]

As both the majority and dissent in *Walker* comprehended, the viewer's ability (or lack thereof) to discern the government as the speaker is significant to the government speech analysis. It is all the more germane in the context of a targeted subsidy program. Given the plainly commercial character of these ads, it is particularly unlikely any viewer would perceive them as the official message of the government absent their identification as such. (*See Johanns*, 544 U.S. at 577-78 (Souter, J., dissenting) ("No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?").) But absent attribution, there is no "effective public accountability" that establishes "an advertising scheme subject to effective democratic checks." (*Id.* at 577.) Where private grape growers are running the show, and the government is not even nominally responsible, constitutional review is the only restraint on their pursuit of private commercial interests at the expense of consumer welfare and the right to free expression of their competitors. Under these circumstances, the Commission is not deserving of the government speech mantle, but should

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[8] (http://grapesfromcalifornia.com/aboutus.php (last visited August 21, 2015).)

be subject to the traditional constitutional constrains that apply to the forced subsidy of a private message.

III. THE COMMISSION'S STATUS AS A GOVERNMENT-CREATED ENTITY DOES NOT MAKE ITS PROMOTIONAL CAMPAIGNS THE GOVERNMENT'S SPEECH

TGC has argued, and the trial court held, that the mere characterization of the Commission as a "government entity" is enough to make its compulsory advertising program government speech. The Court of Appeal did not reach that argument, but the TGC may be expected to press it here. It is not truly a different argument—it merely repackages the first argument in more extreme form.

The notion that the Commission's activities necessarily must be classified as government speech "if the Commission is itself a government entity" is self-evidently inconsistent with *Gerawan II* and *Johanns*. Both cases involved statutorily-created, government-appointed bodies, but that was not enough to make their messages "government speech." *Gerawan II* remanded for a factual inquiry into whether CDFA exercised actual, not merely pro forma, control. (33 Cal.4th at 27-28.) *Johanns* mentioned the government appointment in a footnote, (*Johanns*, 544 U.S. at 560 n.4), but the rest of the opinion delved into questions of control by the Department of Agriculture.

Not all government-created entities are created equal. Some operate too independently of politically accountable government officials to speak

on behalf of the electorate or with the assumed imprimatur of the government. This Court has long been sensitive to the reality that some government-*created* entities do not speak or act for the representatives of the people. *Gerawan II* held that the speech of the Plum Board was not necessarily government speech simply by virtue of being the message propagated by a government-created entity pursuant to a government program. The Secretary had argued that the Plum Board's generic advertising was "government speech" by definition, on account of the Board's status as a legislative creation with government appointees. But this Court rejected that proposition. This Court's decision to remand the case for further proceedings on its own demonstrates that the Plum Board's status as a government-created entity led by industry members appointed by the Secretary did not resolve whether the Plum Board's advertisement campaigns were government speech. (*Gerawan II*, 33 Cal.4th at 27-28.)

The Court relied primarily on the analysis in *Keller v. State Bar of California* (1990) 496 U.S. 1, in rejecting the Secretary's "government entity" argument. *Keller* held that the State Bar of California's mandatory dues, used to finance political and ideological activities with which members disagreed, were a compelled subsidy of private speech that violated the First Amendment. Rebuffing the suggestion that the State Bar was a government-created entity whose speech was therefore the government's own, *Keller* reasoned that the State Bar, even though formed by the State, "is a good deal

different from most other entities that would be regarded in common parlance as 'government agencies.'" (*Gerawan II*, 33 Cal.4th at 27 (quoting *Keller*, 496 U.S. at 11).) The State Bar's funds came from dues imposed on members, "not from appropriations made to it by the legislature," its members comprised a particular professional community that had no choice but to pay the dues, and it was formed "not to participate in the general government of the State," but to oversee a specialized professional sphere. (*Keller*, 496 U.S. at 11-13.) For these reasons, *Keller* concluded that State Bar's board of governors were not typical "[g]overnment officials ... expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents." (*Id.* at 12.)

Gerawan II held that the same was true of the Plum Board, which was "comprised of and funded by plum producers," and "is in that respect similar to the State Bar." (*Gerawan II*, 33 Cal.4th at 28.) The Court thus agreed with *Keller* that where a state-created entity is funded by a discrete professional circle and is not governed by state officials, but only by representatives of private interests selected by state officials, its speech will be deemed private unless there are additional measures of actual government control. (*Ibid.*) This Court roundly rejected the idea that acting by virtue of statutory authority is sufficient to shield speech from any constitutional review.

Johanns adopted the very same reasoning. In holding that the Beef Board's promotional campaigns were government speech, *Johanns* did not distinguish *Keller* on the basis that the Beef Board was a government entity, while the State Bar was not. If that were enough, the First Amendment claim in *Johanns* would have been summarily dispatched. Indeed, *Johanns* recognized that the "entity to which assessments are remitted is the Beef Board, all of whose members are appointed by the Secretary pursuant to law," (*Johanns*, 544 U.S. at 560 n.4), but that fact was relegated to a footnote and did not form the basis for the Court's conclusion that the "message of the promotional campaigns [was] effectively controlled by the Federal Government itself," (*id.* at 560.) Government control was not illustrated by the formation of the Beef Board under federal law, nor the appointment of its members by the Secretary of Agriculture, but by the Secretary's oversight and review of the Beef Board's messaging. And it was this fact—"[t]his degree of governmental control over the message funded by the checkoff"—that "distinguish[ed] [*Johanns*] from *Keller*," where the "state bar's communicative activities ... [were] not developed under official government supervision." (*Id.* at 561-62.)

Indeed, the U.S. Supreme Court has consistently maintained that statutorily-empowered but realistically *private* power to compel support for speech is subject to constitutional constraint (as well as constraint under other fields of law such as antitrust)—unless democratically accountable officials

maintain actual control, not merely theoretical veto or removal authority. For example, in *North Carolina State Board of Dental Examiners v. FTC* (2014) 135 S.Ct. 1101, 1111, the Court held that North Carolina's state agency for regulating the practice of dentistry could invoke state-action antitrust immunity only if it is subject to "active supervision by the State." What constitutes a necessary limit on an exemption from federal *statutory* liability is all the more important when it comes to exceptions from *constitutional* constraint. Otherwise, private interests armed with the power of the state could compel speech that serves the interests of dominant parties in the industry with no real democratic or constitutional oversight.

Together, these cases teach us that resembling a "government agency" is not enough to claim the mantle of government speech. What matters are indicia of true political safeguards, including oversight and control by politically accountable officials. *Johanns*, like *Gerawan II*, turned not on corporate formality, but on whether the "promotional campaigns [were] effectively controlled by the Federal Government itself." (*Johanns*, 544 U.S. at 560-61.) That test furnishes a true measure of whether the commodity advertising is subject to sufficient democratic accountability to warrant the protections a "government speech" label affords. And the Commission has not, and cannot, pass this test here.

IV. THE COMMISSION'S COMPELLED SUBSIDIES OF ITS SPEECH CANNOT WITHSTAND INTERMEDIATE SCRUTINY

If this Court determines that the TGC's promotional campaigns are not government speech, it should reverse the judgment and remand the case to the Court of Appeal to consider in the first instance plaintiffs' claim that the forced subsidies cannot withstand intermediate scrutiny. Because the Court of Appeal concluded that the TGC's message was government speech, it did not reach the question "whether the Ketchum Act survives intermediate scrutiny under *Gerawan II*." (*Delano Farms*, 185 Cal.Rptr.3d at 780.)

It is customary for this Court to remand for the intermediate appellate court to consider in the first instance a separate legal question that was not yet considered below. (*See, e.g., Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1149 ("It is appropriate to remand for the Court of Appeal to resolve [the remaining] issues" at the appellate court level); *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031; *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal. 4th 368, 389.) That is precisely what this Court did in *Gerawan II*. After concluding that the compelled subsidy program there should be evaluated under intermediate constitutional review, this Court remanded the case for the court below to review the constitutionality of the program under the appropriate legal standard. (*Gerawan II*, 33 Cal.4th at 6-7.)

On remand, we expect the Court of Appeal to determine that the TGC's compelled advertising program violates the free speech clause of the California Constitution. In an opinion discussed extensively in *Gerawan II*, the Supreme Court in *United Foods* squarely held that compelled agricultural promotional programs of this sort violate the First Amendment unless part of a comprehensive regulatory scheme. (*See* 533 U.S. 405.) *United Foods* involved the same manipulation of an industry board to serve the interests of some industry members at the expense of others. (*See id.* at 410-11 ("First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.").) United Foods, a grower and distributer of mushrooms, objected to the same free speech infringement that plaintiffs do here: it "want[ed] to convey the message that its brand of mushrooms is superior to those grown by other producers," rather than promote "[t]he message ... that mushrooms are worth consuming whether or not they are branded." (*Id.* at 411.) Recognizing the "serious risk" when an industry board "can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors," the Court held that the Mushroom Council's compelled subsidies were unconstitutional. (*Ibid.*)

In providing guidance for remand, *Gerawan II* pointed to the analysis in *United Foods* that "*even viewing commercial speech as entitled to lesser protection*, we find no basis ... to sustain the compelled assessments sought

in this case." (33 Cal.4th at 16 (quoting *United Foods*, 533 U.S. at 410) (emphasis added).) Likewise here the TGC will not be able to show that the forced subsidies directly advance a substantial government interest under the *Central Hudson* test. (*Id.* at 31.) The Commission has pointed to the stated objective in the Ketchum Act to "enhance the reputation of California fresh grapes" in order to strengthen California's agricultural economy. (*See* Cal. Food & Agric. Code § 65500(e), *et seq.*) But we already know from *Gerawan II* that an "abstract" legislative goal to "maintain[] and expand[] markets for agricultural products" is insufficient absent evidence that the "statutory goals are in fact the goals of the marketing program at issue." (*Gerawan II*, 33 Cal.4th at 22-23.) Specifically, the TGC has the burden to show "that the marketing program, as *presently constituted*, serves a substantial public interest *and not merely private interests*." (*Id.* at 26 (emphasis added).)

The nature of the legislative authorization of the TGC demonstrates that the program does not serve a substantial public purpose. The Ketchum Act left the decisions concerning whether, in what manner, and how much to advertise, in the hands of members of the industry. That shows that, from a public point of view, the existence or non-existence of the program is a matter of indifference. Indeed, when asked whether the TGC needed CDFA's permission to abandon its advertising program entirely, CDFA's Marketing Branch Chief answered, "Not to my knowledge." (9 CT 1967:14-22.)

The government's indifference to the program is made all the more conspicuous by the fact that the CDFA has not come to the Commission's aid in this case. Whereas the Secretary of CDFA was the defendant in *Gerawan*, it is telling that the CDFA is not a party here and thus far has maintained its silence. If the government had a substantial interest to protect in this case, one would have expected CDFA to intervene.

The evidence also suggests that whatever perceived public need for commodity advertising programs may have originally undergirded the Ketchum Act has long since wilted. There are 400 agricultural crops produced in the State, and yet for the overwhelming majority of those crops—including many of the State's top commodities—the State currently does not mandate any programs for advertising or promotion. (8 CT 1746:2-23.) Even the Plum Board at issue in *Gerawan* has met the same fate as other State marketing boards and is no longer in existence. Whether the decline in commodity advertising programs indicates that the California agricultural economy is doing just fine without them, or that the State has concluded that they are not particularly well suited to the problem, either way the TGC cannot show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (*Gerawan II*, 33 Cal.4th at 23.)

The Commission has offered no explanation why an advertising campaign is more necessary for grapes than for the multitude of other crops that have no similar programs and no evidence that grapes present a unique

economic challenge in special need of a mandatory advertising program. The Commission has not "adequately shown that the economic health of [the grape industry] is in genuine jeopardy." (*Turner Broadcasting Sys., Inc. v. F.C.C.* (1994) 512 U.S. 622, 664-65.) There is no rhyme or reason why grape farmers should shoulder this unique economic burden that most agricultural producers in the State have been spared.

Plaintiffs did not ask this Court to resolve the underlying merits of the intermediate scrutiny issue, because the lower court did not do so. Although there is little chance this program can withstand heightened constitutional scrutiny, the best course is for this Court to remand.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed and the case remanded for further proceedings.

Dated: August 21, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), counsel for Petitioners hereby certifies that the number of words contained in this PETITIONERS' OPENING BRIEF ON THE MERITS, including footnotes but excluding the Table of Contents, Table of Authorities, Issues on Review, and this Certificate, is 10,456 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: August 21, 2015

Respectfully submitted,

By: Michael W. McConnell by Lisa C. Leyton
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PROOF OF SERVICE

I declare that:

I am employed in the County of Fresno, California.

I am over the age of eighteen years and not a party to the within action; my business address is 701 Pollasky, Clovis, California 93612.

On August 21, 2015, I served a copy of the attached **PETITIONERS' OPENING BRIEF ON THE MERITS** on the interested parties herein by placing a true copy thereof in a sealed envelope, fully prepaid, and addressed as follows:

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Client - Plaintiff/Petitioner

Honorable Judge Donald S. Black
Fresno County Superior Court
1130 "O" Street
Fresno, CA 93721-2220
Superior Court Judge

Clerk of the Court
COURT OF APPEAL
FIFTH APPELLATE DISTRICT
2424 Ventura Street
Fresno, CA 93721
Appellate Court

I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 21 day of August, 2015, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

Kimberly R. Barker