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.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S226538 - DELANO FARMS COMPANY v. CALIFORNIA TABLE GRAPE COMMISSION

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
California Table Grape Commission	[✓]	[ ]	
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Submitted by: Thomas G. Saunders

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STATEMENT OF ISSUES PRESENTED

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 its persuasive value.

As stated in the 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.

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 advertising of California table grapes 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. Both holdings are correct and independently warrant affirmance.

When this litigation began more than fifteen years ago, the law governing claims like Petitioners' was undeveloped. But in the intervening years—while these cases were largely stayed or dormant—the law has become clear. In 2005, the U.S. Supreme Court in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, rejected a First Amendment challenge to the federal beef promotion program, holding that the

program's speech was "government speech" that could be funded from mandatory assessments. In the ten years since *Johanns*, not a single commodity promotion program has been found unconstitutional under the Free Speech Clause of the U.S. or California Constitutions. Indeed, in 2009, the U.S. Court of Appeals for the Ninth Circuit applied *Johanns* to reject a federal First Amendment claim by Plaintiff Delano Farms against the Commission based on the same allegations at issue here. (*Delano Farms Co. v. California Table Grape Comm'n* (9th Cir. 2009) 586 F.3d 1219, 1220.) The Ninth Circuit held that the speech of the Commission is government speech immune from First Amendment challenge because (1) the Commission is itself a government entity, and (2) the message of the Commission is subject to the control of CDFA.

Petitioners by and large concede that *Johanns* defines the contours of the government speech doctrine under the State Constitution as well. Yet they take issue with the Ninth Circuit's straightforward application of *Johanns* to the Commission and ask this Court to take state law in a different direction. They do so on the theory that, in their view, government speech requires day-to-day micromanagement of the Commission's work by CDFA.

Petitioners' theory is doubly wrong. First, because the Commission is itself a government entity, oversight by *another government entity* is unnecessary. Moreover, even if the Commission were not a government

entity, Petitioners still ask the wrong question. Government accountability does not depend on whether a CDFA official attends a particular meeting. The relevant question is whether the State has the *legal authority* to control the Commission. It indisputably does. As the Court of Appeal and the Ninth Circuit correctly held, the Commission simply implements the State's generic-advertisement message—a message that the Legislature defined in extraordinary detail in the Ketchum Act. The Commission, moreover, carries out this statutory mandate through Commissioners who, among other safeguards, are each subject to a clear form of government accountability and control: CDFA's undisputed power of appointment and removal. The Court of Appeal's judgment on government speech should be affirmed.

Petitioners' arguments under intermediate scrutiny are even more insubstantial. While the Court of Appeal did not reach intermediate scrutiny, the parties briefed the issue at every stage of this litigation, and the Superior Court decided the question in detail. It correctly held that the Commission satisfies intermediate scrutiny. And no wonder: On summary judgment, the Commission "produced ample evidence of the effectiveness of" its work, whereas Petitioners "produce[d] no evidence contesting the evidence of the Commission's effectiveness." (CT-13:3168.) Although this case should begin and end with the holding that the Commission's speech is government speech, this Court is also perfectly positioned to

affirm the judgment on intermediate scrutiny based on the lopsided summary judgment record already reviewed by the Superior Court.

This litigation has been pending for fifteen years. It is time finally 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.

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.)[1]

[1] 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].)

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"; "instruct[ing] 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 §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 21% 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 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.[2] (CT-8:1734 [SF ¶75].) As a government agency, the Commission is also subject to numerous laws governing public entities, including the Bagley-Keene Open Meeting Act (Gov't Code §11121), the Public Records Act (*id.* §§6252(f), 6276.08), and the Political Reform Act of 1974 (*id.* §82049). (*See also* CT-8:1735-1736 [SF ¶85]; *infra* pp. 27-28.)

CDFA has broad authority to oversee the Commission's operations. The Secretary of CDFA appoints and can remove all board members of the Commission. (CT-8:1735 [SF ¶76].) 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].) Although Petitioners have filed grievances with CDFA challenging other Commission activities, Petitioners have never filed a grievance

[2] 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].)

challenging the Commission's advertising. (CT-2:357 [CTGC SSUMF ¶20]; CT-3:489-490 [Nave Decl. ¶¶19-21].) 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].) Even without a grievance, CDFA "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)].) The Commission is also subject to audit by CDFA and the Department of Finance. (CT-8:1736 [SF ¶89]; Food & Agric. Code §65572(f).)[3]

The Legislature established the Commission's promotion program to address a significant structural problem in the table grape industry. (CT-7:1365-1369 [Alston Decl. ¶¶11-22].) Advertising and other efforts to promote unbranded commodities—like table grapes—benefit the entire industry, yet growers who do not wish to fund them cannot be excluded from their benefits. (CT-7:1367 [Alston Decl. ¶¶16-17].) The table grape industry is "particularly susceptible" to this problem. (CT-7:1368-1369 [Alston Decl. ¶20].) "[B]rand names play virtually no role in shoppers'

[3] The Department of Finance conducted a fiscal and compliance audit in 2009 (CT-8:1736 [SF ¶89]); CDFA-approved independent auditors have subsequently conducted such audits pursuant to CDFA procedures (CT-3:488-489 [Nave Decl. ¶16]).

decisions about what fresh grapes to buy." (CT-4:880 [Jolly Decl. ¶8]; CT-8:1716 [SF ¶12] [stipulation that "Consumers do not shop for grapes with brand names in mind"].) Moreover, with approximately 475 growers and 100 shippers, the table grape industry "has one of the most fragmented structures of California fresh produce commodities." (CT-7:1368-1369 [Alston Decl. ¶20]; *see also* Food & Agric. Code §63901(c).)

These features of the industry make it economically irrational for individual growers and shippers to undertake meaningful consumer advertising—either branded or generic. (CT-7:1368-1369 [Alston Decl. ¶20].) The Commission's activities address this "inability of individual producers to maintain or expand present markets or to develop new or larger markets," which the Legislature found "results in an unreasonable and unnecessary economic waste" and threatens critical state interests. (Food & Agric. Code §65500(c); *see also id.* §65500(d)-(e).)

The Commission's efforts have been highly successful. Econometric analyses presented in the Superior Court—which included three different studies undertaken by the leading expert in the field using almost 40 years of data—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 table grape revenues that far exceed the cost

of funding the Commission's activities and in significant net benefits to the State's economy as a whole. (*See* CT-2:375-376 [CTGC SSUMF ¶132, 139-141]; CT-7:1373-1375 [Alston Decl. ¶¶29-34].) The Commission's international trade and issue management activities have likewise helped open foreign markets, including India and China, to California table grapes and keep markets open. (CT-8:1729-1733 [SF ¶¶54-61].) And 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].)

In contrast, Petitioners' own stipulations establish that they conduct *no* consumer advertising. In the Superior Court, Petitioners stipulated that:

- "Plaintiffs conduct no advertising directed at consumers of table grapes";
- "Plaintiffs conduct no television, radio, online or newspaper advertising";
- "The only advertising conducted by each Plaintiff is the placement of a single print advertisement once a year in a single issue of a trade publication called The Packer or a trade publication called Produce News at a cost of less than $1,000 per year";
- "Plaintiffs' limited advertising in trade publications noted above is directed at the trade: retailers, food service providers, and/or wholesalers ..."; and
- "Other than the limited advertising in trade publications noted above, the only promotional or marketing activity undertaken by Plaintiffs is directly contacting their potential trade customers (retailers, foodservice providers, and/or wholesalers) and selling some of their grapes in packaging that identifies the name of the grower/shipper."

(CT-5:1106 [Stipulation at 2].)

B. PETITIONERS' 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." (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 federal 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 presented in their petition for review relate exclusively to Petitioners' free speech claims under Article I of the California Constitution. (Pet. 1; Pet. Reply 2 n.2.)

C. THE SUPERIOR COURT'S ORDER

In May 2013, Judge Black granted the Commission's motion for summary judgment. (CT-13:3127-3180.)[4] 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,

[4] Petitioners did not cross-move for summary judgment.

3168.) 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 to be narrowly tailored, concluding that 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-13:3168-3169.)[5]

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.)

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[5] Judge Black rejected petitioners' liberty, privacy, and due process claims. Judge Black also denied various motions to strike the 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 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. (*Delano Farms*, *supra*, 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.)

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.

SUMMARY OF THE ARGUMENT

Petitioners' free speech claims fail as a matter of law. The U.S. Supreme Court's decision in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, governs the analysis. Applying that decision, the Court of Appeal correctly held that the Commission's speech is government speech. That holding—which joins the unanimous consensus of every court and judge to have considered the issue under the U.S. or state constitution—should be affirmed for two independent reasons.

First, the Commission is itself a government entity. It was created by the California Legislature as a public corporation to further governmental objectives. Its board members are appointed by the Secretary of CDFA and subject to removal at her discretion. The Commission is subject to CDFA's extensive oversight authority, which includes the power to reverse the Commission's actions. It is expressly treated as a government entity under multiple provisions of the Government Code—including the Public Records Act and the Bagley-Keene Open Meeting Act—which guarantee the Commission's transparency and accountability. Indeed, California law vests the Commission with an array of quintessentially governmental powers, including the power to issue rules

and regulations, "investigate and prosecute civilly" violations of the Ketchum Act, and "file complaints with appropriate law enforcement agencies or officers for criminal violations." (Food & Agric. Code §65572(b), (g).) These provisions establish that, under any standard, the Commission is a government entity. For that reason, the Commission's speech is by definition government speech.

Petitioners' primary response to this straightforward argument is that the government speech doctrine always requires day-to-day and ad-by-ad micromanagement—even when, as here, the message is generated by a government-created entity that is controlled by politically accountable appointees and fulfills statutorily defined objectives through quintessentially governmental powers. Nothing in this Court's or the U.S. Supreme Court's jurisprudence countenances such an illogical result. The manner in which *another* governmental entity oversees the Commission's efforts is simply beside the point because the Commission is *itself* governmental.

Second, the Commission's speech is "effectively controlled" by the State. As the Court of Appeal and the Ninth Circuit both held, the Legislature itself defined the Commission's generic-promotion message with extraordinary precision. The Ketchum Act, moreover, provides CDFA with ample means to ensure that the Commission strictly adhere to that well-defined message. For example, unlike other California commissions

and federal programs, *every* member of the Commission is appointed, and removable, by a senior government official. Moreover, CDFA has the ability to correct or reverse actions of the Commission in grievance proceedings and to review the content of the Commission's advertising. The Commission is also subject to audit by the State. These safeguards are more than adequate to ensure that the Commission's message remains faithful to the generic-promotion mandate imposed by the Legislature—as has undisputedly been the case. Contrary to Petitioners' assertions, neither the Free Speech Clause nor *Gerawan II* nor *Johanns* mandates a particular bureaucratic structure or compels a government agency to engage in direct micromanagement of generic-advertising programs.

Petitioners' newly-minted contention that government speech requires "attribution" to the government fares no better. The U.S. Supreme Court expressly rejected an identical theory under the First Amendment in *Johanns*. The Court of Appeal has since done the same under the California Free Speech Clause in *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948. There is no merit to Petitioners' attempts to revive an "attribution" requirement based on dicta from *Gerawan II*, which, in fact, only described what "other courts" had erroneously done at the time.

Because the Commission's speech is government speech, the Court should affirm the Court of Appeal. In the alternative, Petitioners' claims also fail under intermediate scrutiny. As the Superior Court correctly

concluded, the Ketchum Act easily satisfies intermediate scrutiny, because the Commission's program directly advances important government interests—strengthening California's economy and improving the health and welfare of its citizens—and is narrowly tailored. Indeed, Petitioners barely contend otherwise. Instead, they focus on persuading this Court not to reach the issue under any circumstances. But there is no plausible reason to prolong this fifteen-year-old litigation—especially where Petitioners produced "*no* evidence" in response to the Commission's "ample evidence" demonstrating the "effectiveness of" its work. (CT-13:3168 [emphasis added].)

ARGUMENT

I. 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. They also do not dispute that—with the exception of a newly minted attribution argument that is both waived and meritless, *see infra* pp. 48-52[6]—the U.S. Supreme Court's decision in *Johanns v. Livestock Marketing Association* applies to government speech questions under the California

[6] The U.S. Supreme Court expressly rejected a similar attribution argument in *Johanns*, *supra*, 544 U.S. at 564 n.7.

Constitution. Petitioners nonetheless attempt to turn *Johanns* on its head by arguing that the particular procedures the U.S. Supreme Court considered "*more* than adequate" to establish government speech in that case actually define a constitutional floor. (*Johanns*, *supra*, 544 U.S. at 563 [emphasis added].) Petitioners' arguments are premised on a fundamental misunderstanding of *Johanns* and a misapplication of this Court's pre-*Johanns* precedent.

In *Johanns*, *supra*, 544 U.S. 550, the U.S. Supreme Court rejected a First Amendment challenge to the federal Beef Promotion and Research Act, which requires beef producers and importers to pay assessments used to fund generic beef advertising. (*Id.* at 554, 560-565.) As the Court explained, the compelled funding of government speech does not violate the First Amendment: "Compelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest." (*Id.* at 559 [internal quotation marks omitted].)

In the ten years since *Johanns*, not a single commodity promotion program has been found unconstitutional under the Free Speech Clauses of the U.S. or California Constitution.[7] To be sure, each of these cases arose

[7] *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.*

under its own statute and addressed the particular government speech theories presented by the parties. But the sheer consistency in result makes clear that the government speech doctrine is not a narrow, fact-bound exception requiring day-to-day micromanagement, as Petitioners suggest.

Johanns itself highlighted two distinct paths to government speech in the compelled subsidy context. These paths mirror the two separate entities at issue in that case: (i) the Beef Board, which was a full-fledged "government entity" on the basis of the Secretary's authority to appoint its

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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].

members but which was not involved in developing the ads at issue; and (ii) the Beef Operating Committee, which actually designed the ads but was not necessarily a "government entity" for government speech purposes because the Secretary of Agriculture appointed less than a majority of the board (and then only indirectly). (*Johanns*, *supra*, 544 U.S. at 560 n.4.)

Had the Operating Committee qualified as a government entity, there would have been no basis to dispute that the speech at issue was government speech. But the plaintiffs in *Johanns* argued that the Operating Committee that designed the ads at issue was "a nongovernmental entity" because "only half of [its] members are ... appointed by the Secretary" of Agriculture. (*Supra*, 544 U.S. at 560.) In response, the Supreme Court held that *even if* the Beef Board's Operating Committee was not itself a governmental entity, the speech of the program still constituted government speech because it was "effectively controlled" by the government. (*Id.* at 560 & n.4.)

Thus, under *Johanns*, the speech of a promotional program is government speech if *either* (1) the entity that designs the ads is itself a governmental entity, *or* (2) the message is "effectively controlled by the ... Government." (*Supra*, 544 U.S. at 560.) The Commission's purpose, structure, and relationship with CDFA establish that the Commission's speech is government speech under both rubrics.

A. THE COMMISSION IS A GOVERNMENT ENTITY

The speech of the Commission is necessarily government speech because, as the Ninth Circuit and the trial court correctly held, the Commission is itself a governmental entity.[8]

1. 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 the Federal Drug Administration is not government speech merely because its parent agency, the Department of Health and Human Services, does not engage in prior review and approval of that speech. Nor did the U.S. Supreme Court suggest in *Rosenberger v. Rectors & Visitors of the University of Virginia* (1995) 515 U.S. 819, 833, or *Board of Regents of the University of Wisconsin System v. Southworth* (2000) 529 U.S. 217, 229, that speech of a public university would not be government speech unless some other government agency exercised oversight over the university. Likewise, here, the government speech defense applies because the Commission is a government entity.

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[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.)

2. The U.S. Supreme Court's decision in *Lebron v. National Railroad Passenger Corp.*, (1995) 513 U.S. 374, provides an instructive framework for identifying entities that are governmental for speech purposes. In *Lebron*, the Supreme Court addressed whether Amtrak should be regarded as part of the government and subject to First Amendment restrictions. Congress created Amtrak to serve a public purpose—averting "the threatened extinction of passenger trains in the United States," (*id.* at 383)—and it gave the President authority to appoint a majority of the board of directors, (*id.* at 385). Congress, however, also provided that Amtrak should be incorporated under the law of the District of Columbia, (*ibid.*), and "its authorizing statute declares that it will not be an agency or establishment of the United States Government," (*id.* at 391 [internal quotation marks omitted]). Looking beyond Congress' characterization, the Court held 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." (*Id.* at 399.)

The U.S. Supreme Court reaffirmed and extended the core holding of *Lebron* just last Term. In *Department of Transportation v. Association of American Railroads* (2015) 135 S. Ct. 1225, the Court considered whether Amtrak constitutes a government entity for purposes of the

nondelegation doctrine. Relying heavily on *Lebron*, the Court reasoned that "[t]reating Amtrak as governmental for these purposes ... is not an unbridled grant of authority to an unaccountable actor" because "[t]he political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget." (*Id.* at 1233.) The Court reached this conclusion even though Congress had directed that Amtrak "is not a department, agency, or instrumentality of the United States Government" and even though the Court cited no evidence of day-to-day approval of Amtrak's operations by any member of the Executive Branch. (*Id.* at 1231-1232.) The Court nonetheless concluded that "Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional [separation of powers] issues presented in this case." (*Id.* at 1233.)

3. The Commission easily qualifies as a government entity, whether under the *Lebron/Association of American Railroads* test or any other metric. *First*, the Commission was created by the California Legislature as a public corporation to further governmental objectives. (Food & Agric. Code §§65500(a)-(g), 65551, 63901(a).) The Legislature stated that "[t]he production and marketing of grapes produced 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).)

Second, the Secretary of CDFA appoints and retains the power to remove every Commissioner. (*See supra* p. 8.) This is no small matter: Under both federal and California law, the power to appoint and remove is a 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; *Morrison v. Olson,* 487 U.S. 654, 692 (1988); *Delano Farms*, *supra*, 586 F.3d at 1229.)[9]

[9] Petitioners note the Commission members are appointed by the Secretary after receiving recommendations made by table grape producers

Third, CDFA has extensive oversight authority over the Commission, including the power to hear petitions and "reverse" the Commission's actions. (*See supra* pp. 8-9; *infra* pp. 39-40.) In fact, in the course of overruling a Commission decision on a Public Record Act issue, CDFA noted: "The Secretary takes official notice of the long time position of the California Department of Food and Agriculture that the CTGC is a government entity, implementing through its various programs strong and long term statewide policies with respect to preserving a fair marketplace and promotion of farm product." (CT-4:795-796.)

Fourth, numerous California laws expressly treat the Commission as a government entity and guarantee its transparency and accountability. 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 &

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in an election process. (*See* Food & Agric. Code §§ 65550, 65563, 65566, 65575.1.) But that appointment process is not meaningfully different from the one upheld in *Lebron*. There, "the statute [creating Amtrak] restricts most of the President's choices [for appointment] to persons suggested by certain organizations or persons having certain qualifications," and yet the Court held that Amtrak was a governmental entity. (*Supra*, 513 U.S. at 397-398.) Far from diminishing accountability, the Ketchum Act properly ensures that the Commission's members have the appropriate expertise in the industry. (*Cf. infra* p. 58.)

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.) Individual commissioners submit disclosure statements to the Fair Political Practices Commission each year. (CT-3:491 [Nave Decl. ¶32].) And, contrary to Petitioners' suggestion that Commissioners are "able to pursue essentially private objectives" (Br. 3), the State's conflict-of-interest laws apply to the Commission (Gov. Code §87103; Food & Agric. Code §65576 [referencing Gov. Code §87103]).

These transparency requirements easily exceed those found sufficient by the U.S. Supreme Court in upholding Amtrak as a government entity. (*See Association of Am. R.R., supra*, 135 S. Ct. at 1232 [relying, in relevant part, on applicability of FOIA and the Inspector General Act]).[10]

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[10] 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 for its contracts.'" (Br. 35 [citing 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

Fifth, California law vests the Commission with an array of quintessentially governmental powers. 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." (Food & Agric. Code §65653.)

The Commission also 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).) 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 purpose of enforcing" the Ketchum Act. (*Id.*

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to permit suits against a particular government entity without waiving the sovereign immunity of the State as a whole somehow negates the Commission's government entity status.

§65654.) It may also waive fixed, statutory penalties for late payment of assessments. (*Id.* §65605.)

Sixth, although the Commission is represented by private counsel in this case pursuant to its express statutory authority "[t]o employ ... attorneys engaged in the private practice of the law," the Legislature also provided that "[t]he Attorney General shall aid and assist the commission on its request and shall undertake such judicial proceedings as requested by the commission to undertake on its behalf." (Food & Agric. Code §65572(d).) Indeed, the Attorney General's Office served for years as co-counsel for the Commission *in this very case*.

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 if they fail to collect assessments from growers. (*Id.* §65605.) A wholesaler, supermarket, or corner grocery commits a criminal act if it declines to provide the source and quantity of table grapes in its possession to a Commission agent. (*Id.* §65653(c).)

These provisions amply warrant the conclusion—reached by both the Ninth Circuit and the Superior Court—that the Commission is a government entity for purposes of the government speech doctrine.

3. None of Petitioners' contrary arguments have merit.

Petitioners note that *Gerawan II* did not conclusively decide that the entity

at issue in that case (the Plum Board) was entitled to the government speech defense as a matter of law even though it was a "legislative creation with government appointees." (Br. 39.) But this Court's remand in *Gerawan II* in no way "reject[ed]" (*id.*) the common sense proposition that entities that are created by the Legislature and governed through political appointment and the power of removal are entitled to the government speech defense. *Gerawan II* simply remanded plaintiffs' Free Speech challenge for further development of the government speech question in the lower courts—along with intermediate scrutiny and other potentially relevant issues. This course was hardly surprising: At the time this Court decided *Gerawan II*, the Supreme Court had not yet decided *Johanns*, the government speech doctrine was unsettled, the Court of Appeal had failed to decide the issue in the first instance (*see Gerawan Farming, Inc. v. Lyons* (2001) 94 Cal.App.4th 665, 678-679), and the State had effectively conceded that a remand would be appropriate (Secretary of Food & Agriculture Corrected Opening Brief on the Merits, *Gerawan II* (No. S104019), 2002 WL 1926510 at *22). It would be a mistake to extrapolate a rigid rule from that procedural posture.

Petitioners' attempt to analogize the Commission to the bar association at issue in *Keller v. State Bar of California* (1990) 496 U.S. 1, is equally unavailing. In *Keller*, the U.S. Supreme Court proceeded from the premise that the State Bar was more analogous to a labor union than to a

government entity. (*Keller*, *supra*, 496 U.S. at 12.) That is not surprising given that all practicing lawyers were required to actually "join" that "association of attorneys" in addition to paying dues (*id.* at 4-5), and only 6 of the 22 members of the State Bar's Board of Governors were appointed by the governor or officials of the legislature—with the remaining 16 elected by licensed attorneys without political oversight or power of removal (*Keller v. State Bar of Cal.* (1989) 47 Cal.3d 1152, 1161). The same is not true here, where growers do not "join" the Commission or any other "association"—they are just required to pay assessments—and *all* of the Commission's board members are appointed and subject to removal by the Secretary of CDFA, (*see supra* p. 8), and thus accountable to the electorate.[11] In addition, *Keller* involved expenditures on "activities of an ideological nature" that were not germane to the State Bar's mission of "regulating the legal profession and improving the quality of legal

[11] In *Keller*, this Court decided that the State Bar of California was a government entity entitled to invoke the government speech defense. (*Keller*, *supra*, 47 Cal. 3d 1152.) In reversing, the U.S. Supreme Court noted that although this Court's determination was "not binding" for purposes of deciding the "federal question" before it, "the Supreme Court of California is the final authority on the 'governmental' status of the State Bar of California for purposes of state law." (*Keller*, *supra*, 496 U.S. at 11.) This Court therefore remains free to adhere to *its* decision in *Keller* for purposes of determining whether an entity is a "government entity" under the government speech doctrine. However, it need not go nearly that far to decide the comparatively easy point that the Commission is a government entity.

services." (*Keller*, *supra*, 496 U.S. at 13-14.) The Commission's advertising program, in contrast, is both non-ideological and undisputedly germane to the Commission's statutory mission.

North Carolina State Board of Dental Examiners v. FTC (2014) 135 S. Ct. 1101, is even farther afield. That case involved only the "'disfavored'" antitrust doctrine of state-action immunity (*id.* at 1110)—a readily distinguishable context in which "established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern" (*id.* at 1111). Petitioners offer no plausible reason—and there is none—to extend that antitrust rationale to the free speech context. In any event, the Court did not endorse Petitioners' theory of day-to-day micromanagement of government appointees even in the antitrust context. The Court took pains to emphasize that only *one member* of the eight-person North Carolina Board of Dental Examiners was politically appointed and that none was removable "by a public official." (*Id.* at 1108.) It stressed that the North Carolina statute "sa[id] nothing" about the disputed policy adopted by the Board of Dental Examiners (i.e., teeth whitening). (*Id.* at 1116; *compare supra* p. 15; *infra* pp. 36-37 [Ketchum Act's detailed mandate to the Commission].) And it expressly rejected any notion that "[a]ctive supervision ... entail[s] day-to-day involvement in an agency's operations or micromanagement of its every decision." (*North Carolina State Bd.*, *supra*, 135 S. Ct. at 1116.)

In sum, the Commission does not merely "resembl[e] a 'government agency'" (Br. 42); it *is* a governmental entity created by the Legislature to carry out a legislatively defined governmental function through commissioners who are appointed and subject to removal by Secretary of CDFA. The Commission's speech is therefore government speech, and Petitioners cannot opt out of paying for it simply because they purport to disagree with the Legislature's message.

B. THE STATE OF CALIFORNIA EFFECTIVELY CONTROLS THE COMMISSION'S SPEECH

Even if the Commission were not itself a government entity, its speech would still qualify as "government speech" because the State effectively controls the Commission's message, as the Court of Appeal and the Ninth Circuit correctly held.

1. 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 campaigns is effectively controlled by the [government] itself." (*Johanns*, *supra*, 544 U.S. at 560.)

For example, in *Johanns*, the U.S. Supreme Court held that, even assuming the Beef Operating Committee that designed the beef ads was "a nongovernmental entity" (544 U.S. at 560 & n.4), its speech nonetheless qualified as government speech. The Court noted 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 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].)

2. The Court of Appeal correctly held that the Commission's speech is effectively controlled by the government. The Legislature has mandated the basic message to be conveyed by the Commission and through various mechanisms—several of which overlap with the "government entity" inquiry discussed above—created a structure to ensure that the Commission remains answerable to CDFA in the unlikely event it ever deviated from that message. For that reason, the Commission's speech constitutes government speech.

First, the Legislature created the Commission by statute, and the Commission continues to exist solely by virtue of California Law. (*E.g.*, Food & Agric. Code §65551.) The Legislature could abolish the Commission or change its mandate at any time.

Second, while in *Johanns* the government had set out only "the overarching message" of the beef program "and some of its elements" (544 U.S. at 561), the Legislature here "was quite specific about its expectations for the Commission and its messaging" (*Delano Farms*, *supra*, 586 F.3d at 1228). For example, the Legislature provided:

> The promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in consuming markets, research respecting the health, food and dietetic value of California fresh grapes and the production, handling, transportation and marketing thereof, the dissemination of information respecting the results of such research, instruction of the wholesale and retail trade with respect to handling thereof, and the education and instruction of the general public with reference to the various varieties of California fresh grapes for human consumption, the time to use and consume each variety and the uses to which each variety should be put, the dietetic and health value thereof, all serve to increase the consumption thereof and to expand existing markets and create new markets for fresh grapes, and prevent agricultural waste, and is therefore in the interests of the welfare, public economy and health of the people of this state.

(*E.g.*, Food & Agric. Code §65500(f); *see also id.* §§63901, 65572(h).) Through these meticulous commands, the California Legislature went

"much further in defining the Commission's message than the Beef Order's general directive" at issue in *Johanns*. (*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, the Legislature's detailed mandate alone disposes of Petitioners' challenge in this case. For all Petitioners' rhetoric about CDFA control and democratic accountability, they are not complaining about the manner in which the Commission fulfills this legislative mandate or any alleged deviation from the message prescribed by the Legislature. 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].) Instead, to the extent Petitioners object to any message at all—as opposed to merely wishing to avoid the monetary cost of paying assessments—their qualms are directed precisely at the message prescribed by the Legislature: promoting California grapes generically. (Br. 12.) But the democratic process—not the Free Speech Clause—provides the remedy for Petitioners' disagreement with the Legislature: If they disagree with the Ketchum Act's message, they can seek to have candidates elected who will repeal the Ketchum Act and replace it with their preferred message (or no message at all).

Third, whereas USDA's Secretary had the power to appoint only half of 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 power gives CDFA tremendous control over the Commission, as it allows the Secretary to screen who will be permitted to serve on the Commission in the first instance and to hold the commissioners accountable.

The power of appointment and removal also ensures that the lines of political accountability run directly to the Secretary. For example, imagine if the Commission ever ran an offensive message or otherwise deviated from its statutory mandate. Any resulting public outrage would be politically embarrassing to the Secretary, who would have to answer for the fact that her office had appointed all of the commissioners. The Secretary could also face public pressure to take corrective action, up to and including exercising her undisputed power of removal. The fact that the Commission has never given the Secretary occasion to exercise this form of control in no way negates the fact that the Commission remains "answerable to the Secretary" (*Johanns*, *supra*, 544 U.S. at 561) for any deviation from the message set by the Legislature.

Fourth, the Ketchum Act's grievance procedure further cements CDFA's control over the Commission's message. (*Paramount Land Co. v. California Pistachio Comm'n* (9th Cir. 2007) 491 F.3d 1003, 1011 [analogous grievance mechanism "demonstrate[s] the Secretary's control over the Commission"].) 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.) Petitioners have utilized this grievance authority in the past on issues unrelated to the Commission's advertising; in fact, a petition by Petitioner Gerawan Farming led to the Secretary's reversal of Commission action. (*See* CT-8:1735 [SF ¶¶78-79]; CT-8:1778 [Pl. Reply SSUMF ¶¶17-21].)[12]

Fifth, 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

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[12] The Commission's authority to challenge a reversal in court does not differentiate this situation from others in which disputes between government entities 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.)

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].)

In their merits brief, Petitioners suggest that CDFA lacks authority to review the Commission's advertising messages absent a grievance. (Br. 10, 32.) Petitioners' contention is meritless. Nothing in the Ketchum Act supports Petitioners' assertion that the grievance procedure is the "*only*" means of CDFA review. (Br. 10; *see* Food & Agric. Code §65650.5.) Nor does it matter that CDFA's policy manual—which makes CDFA's authority explicit (CT-3:686 [Nave Decl. Ex. 8 at C-3])—may "lack[] the force of law" for purposes of *Chevron* deference or federal administrative law (Br. 32 [citing *Christensen v. Harris County* (2000) 529 U.S. 576, 587]). Because CDFA has the undisputed power to appoint and remove all of the Commission's board members, it certainly enjoys the lesser power to exercise direct review of specific Commission activities and advertisements.

Sixth, a number of additional regulatory mechanisms confirm that CDFA has effective control over the Commission's implementation of the Legislature's message. For example, 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].)

3. Petitioners' sweeping assertion 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 ignores these comprehensive mechanisms of control. (Br. 16; *see also id.* 32-33.)[13]

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[13] Far from being "undisputed" (Br. 16, 32), Petitioners' assertions about a purported lack of oversight contradict their own stipulations. (*See, e.g.*, CT-8:1736 [SF ¶90] [annual audits].) Similarly, while Petitioners cite to the 2006 deposition of CDFA's Marketing Branch Chief to suggest that the Commission has more "autonomy" than a marketing board (at 34), that testimony in fact explained that CDFA's "guidance and oversight ... with respect to the Table Grape Commission" is "[n]ot necessarily" less extensive than with respect to marketing orders. (CT 9:1941.) More fundamentally, Petitioners' unsupported contentions about lack of day-to-day control would fall flat even if Petitioners' theory of government speech had merit: Because Petitioners never moved for summary judgment, the

Petitioners also miss the mark when they suggest (at 23-24) that CDFA does not exercise control over the Commission's message because CDFA has not rejected any of the Commission's advertising. Petitioners have identified no instance in which the Commission has deviated from the Ketchum Act's generic-promotion mandate. Nor have they ever filed a grievance complaining to the Secretary about the Commission's advertising. In fact, they have 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].) Absent evidence that the Secretary ever had *cause* to override the Commission, the fact that the Secretary has done so only on matters unrelated to speech in no way diminishes the Secretary's authority and effective control over the Commission's message. To the contrary, it indicates that the existing controls have been more than sufficient to ensure that the Commission discharges its statutory responsibilities correctly.

This Court's decision in *Gerawan II* is not to the contrary. Petitioners assert (at 20, 27-29) that, after *Gerawan II*, nothing short of actual day-to-day involvement by CDFA in each communication issued by

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Commission has had no occasion to show that it would prevail even on Petitioners' theory.

the Commission can establish "effective control" for government speech purposes. But *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 prior cases (*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.)

Nor does the *Gerawan II* Court's decision to remand signal that the government speech defense cannot be resolved as a matter of law. (Br. 28.) 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." (*Gerawan II, supra*, 33 Cal.4th at 26.) Gerawan countered with the argument that, among other things, "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. In addition, the *Gerawan II* Court did not 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*, *supra*, 94 Cal.App.4th at 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. As explained above, those subsequent decisions are irreconcilable with the notion that *Gerawan II* set forth the exclusive test for government speech. There is no reason to rewind the clock to 2004 and pretend those developments never happened.

Petitioners' attempt to manufacture conflict between the Court of Appeal's decision and *Johanns* is equally unavailing. Petitioners make much of the fact that, in *Johanns*, the "'message set out in the beef promotions [was] from beginning to end the message established by the Federal Government.'" (Br. 22.) 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. (*Johanns*, *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 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.'" (Br. 23 [quoting *Johanns*, *supra*, 544 U.S. at 563 [emphasis added]].)

Before the Court of Appeal's decision in this case, 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." (*Paramount*, *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.)

Then, 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 the focus, as 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]].)

The U.S. Supreme Court's recent decision in *Walker v. Texas Division* (2015) 135 S. Ct. 2239—which *rejected* a First Amendment challenge on government speech grounds—casts no doubt on these holdings. (Br. 23-24.) *Walker* involved a challenge to Texas' refusal to issue a specialty license plate proposed by a private party, the Sons of Confederate Veterans. (*Supra*, 135 S. Ct. at 2244-2246.) *Walker* was not a compelled subsidy case at all, and it certainly did not involve a challenge to a *statutorily* predefined message. (*Compare id.* at 2244-2245, 2250 [challenge involved designs "initially proposed by private parties"], *with supra* pp. 36-37 [Ketchum Act's detailed promotional message].) This distinction matters. Regardless of whether active review by the State is required before a privately designed message (such as the Sons of Confederate Veterans' proposed license plate) becomes government speech, there is no reason to require the same degree of government

involvement when *the Legislature itself* has preset the message (here, the generic promotion of table grapes). (*See supra* pp. 36-37.) The simple prospect of CDFA review—coupled with CDFA's appointment and power to remove each Commissioner and countless other safeguards (*see supra* pp. 35-41)—more than adequately addresses any risk that the Commission might deviate from its statutorily defined message.[14]

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. (Br. 30.) *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.'" (*E.g.*, *Beeman v. Anthem Prescription Mgmt., LLC* (2013) 58 Cal.4th 329, 341 [quoting *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366].) Indeed, this Court has specifically stated: "In the compelled speech context, we have

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[14] Even in the specialty plate context, *Walker* did not purport to make active review by the State of each proposed specialty plate a necessary requirement of government speech. The State's review process was merely one of multiple "considerations" which, "taken together," convinced the Court that Texas' specialty plate program was constitutional. (*Walker*, *supra*, 135 S. Ct. at 2249.)

looked to *First Amendment* case law for persuasive guidance when confronted with a paucity of state constitutional doctrine." (*Id.* at 346.)

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 accountability, especially where the Legislature itself sets out the contours of that message. If growers or the public do not like the message, they can cast their votes accordingly. (*Southworth*, *supra*, 529 U.S. at 235.) But Petitioners cannot bypass that democratic process and decline to pay their statutorily imposed assessments simply because they purportedly disagree with the Legislature's conclusion that generic advertising of California table grapes benefits the State's economy. "Were the Free Speech Clause interpreted" to provide such an opt-out for dissenting taxpayers, "government would not work." (*Walker*, *supra*, 135 S. Ct. at 2246.)

C. GOVERNMENT SPEECH DOES NOT REQUIRE ATTRIBUTION

Perhaps recognizing the weakness of their day-to-day control theory, Petitioners now attempt to argue that the Commission cannot invoke the government speech doctrine because its advertisements are not clearly "attributed to the State." (Br. 36; *see also id.* 25-27, 35-37.) Petitioners never raised this attribution argument in their briefing before the Court of

Appeal. The argument is therefore waived. (*Galvaldon v. DaimlerChrsyler Corp.* (2004) 32 Cal.4th 1246, 1265 ["As a general rule, we address only issues that have been raised in the Court of Appeal."]; *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 Cal.4th 1, 6; Cal. Sup. Ct. Rule 8.500(c)(1).)

In any event, Petitioners' attribution theory fails on the merits. Petitioners point to *no* decision by this Court or any other California court applying their attribution theory in adjudicating a government speech defense. Instead, Petitioners' only support is a sentence of dicta in *Gerawan II* stating that "other courts"—i.e., *not* the U.S. Supreme Court and *not* this Court—"ha[d] found significant whether the commercial speech in question is attributed to the government or to the agricultural producers." (*Supra*, 33 Cal.4th at 28.) Tellingly, the single decision *Gerawan II* referenced on this point was later vacated by the U.S. Supreme Court in light of *Johanns*. (*Cochran v. Veneman* (3d Cir. 2004) 359 F.3d 263, 273, *cert. granted, judgment vacated sub nom. Lovell v. Cochran* (2005) 544 U.S. 1058.)[15]

[15] Petitioners also imply (at 25-26) that *Gerawan II* directly adopted the view of the government speech doctrine espoused by Justice Souter's *Johanns* dissent. That is of course pure misdirection, because *Gerawan II* was decided *before Johanns*.

As Petitioners concede, *Johanns* itself unambiguously rejected any attribution requirement under federal law: "The dissent cites no prior practice, no precedent, and no authority for this highly refined elaboration [i.e., its suggested attribution requirement]—not even anyone who has ever before thought of it. It is more than we think can be found within 'Congress shall make no law ... abridging the freedom of speech.'" (*Johanns*, *supra*, 544 U.S. at 964 n.7.)

The law is the same under the California Constitution. When, after *Gerawan II* and *Johanns*, the issue of attribution was finally presented for decision in *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal. App. 4th 948, the Third Appellate District squarely rejected Petitioners' theory: "We find the reasoning of the *Johanns* majority more persuasive than Justice Souter's dissent. We do not agree that the posited threat of a greater likelihood of outrage and intemperate response [in assessment cases] warrants creation of a novel special disclosure requirement." (*Id.* at 963.)

Petitioners do not even acknowledge that they are asking this Court to reverse *Gallo*—much less grapple with *Gallo*'s unassailable analysis of the *People v. Teresinski* (1982) 30 Cal.3d 822, factors, which require adherence to *Johanns*. (*Gallo*, *supra*, 159 Cal. App. 4th at 959-963.) It is ironic, moreover, that Petitioners ignore this central holding of *Gallo* while themselves relying on *Gallo* elsewhere in their brief as purported support for their day-to-day control theory. (Br. 34.) *That* issue—unlike the

attribution theory that *Gallo* rejected—was not even presented for decision in *Gallo*. (*Supra*, 159 Cal. App. 4th at 954 ["Gallo does not take issue with the trial court's resolution of issues of the Milk Board's status as a government entity and CDFA's control of the advertising and promotions."].)

Finally, even if an attribution requirement existed, it would not help Petitioners here. Petitioners do not advance an as-applied *mis*attribution theory—i.e., that any specific "'*individual* ... [table grapes] producer[]'" is actually "'associated with speech labeled as coming from ["Grapes from California."]'" (*Gallo*, *supra*, 159 Cal. App. 4th at 963 [quoting *Johanns*, *supra*, 544 U.S. at 566]; *see* Br. 36.)[16] Instead, Petitioners argue that the Commission's messages are not sufficiently attributed to the State. But Petitioners offer no evidence—based on surveys or otherwise—for their assertion that a tagline "Grapes from California" is inconsistent with attribution to the State of California. (Br. 37.) To the contrary, Petitioners concede (at 36-37) that the viewers of the Commission's ads are often directed to its website. That website clearly states:

[16] Nor could they. *Johanns* held that a funding tagline such as "America's Beef Producers" is "not sufficiently specific" to support an as-applied misattribution theory. (*Supra*, 544 U.S. at 566.) *A fortiori*, the same is true of the Commission's "Grapes from California" tagline.

> The California Table Grape Commission was established by an act of the state's legislature in 1967.... The commission's importance to the state and its mandate—to maintain and expand markets for fresh California grapes and to create new and larger intrastate, interstate, and foreign markets—was reaffirmed and its authorities broadened by the legislature in 1995, 1997 and again in 2001."

(Cal. Table Grape Comm'n, *About the California Table Grape Commission*, http://www.grapesfromcalifornia.com/aboutus.php (last visited Oct. 20, 2015).) Petitioners' observation that this clear description appears on a website with a ".com" as opposed to a "ca.gov" URL serves only to highlight the weakness of their argument.[17]

D. PETITIONERS' CRITICISM OF THE COURT OF APPEAL'S PURPORTED "DEFERENCE" TO THE NINTH CIRCUIT IS MERITLESS

Petitioners criticize (at 29-30) 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 29), 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." (*Delano Farms*, *supra*,

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[17] Under Petitioners' URL-based approach, various counties (http://www.ventura.org), cities (e.g., http://yucaipa.org), school districts (http://www.powayusd.com), water districts (http://www.mwdh2o.com), county clerks (http://www.sccoclerk.com/), courts (http://www.lacourt.org), police departments (http://www.lapdonline.org), and waste management commissions (http://oclandfills.com/) would be surprised to learn that they are no longer considered part of the government.

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

II. ALTERNATIVELY, THE JUDGMENT SHOULD BE AFFIRMED BECAUSE THE COMMISSION'S PROMOTION PROGRAM IS CONSTITUTIONAL UNDER INTERMEDIATE SCRUTINY

In the alternative, this Court should affirm because the Commission's promotion program satisfies intermediate scrutiny. On this point, Petitioners' brief is most striking for what it does *not* say: It never argues that this Court should declare the Ketchum Act unconstitutional. Instead, Petitioners request a remand to the Court of Appeal. But while the Court of Appeal did not reach intermediate scrutiny, the parties briefed the issue at every stage of this litigation, and the Superior Court did reach—and conclusively decided—the question. After a detailed analysis of the summary judgment record, the Superior Court found 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].) And the Superior Court also held that the Commission's program is 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.)

The Superior Court's analysis was thorough and supported by the overwhelming evidence presented on summary judgment. That detailed ruling makes intermediate scrutiny—a purely legal issue—fit for review by this Court. There is no need whatsoever for a remand. After more than fifteen years, it is time to bring this litigation to a close.

A. THE SUPERIOR COURT CORRECTLY HELD THAT THE KETCHUM ACT SATISFIES INTERMEDIATE SCRUTINY

Petitioners concede (at 45) that, if the Commission's speech is not government speech, the Ketchum Act's constitutionality under the California Free Speech Clause is reviewed at most 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. Under that test, courts must evaluate whether (1) "the asserted governmental interest" underlying the 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." (*Gerawan II*, *supra*, 33 Cal.4th at 22 [quoting *Central Hudson*, *supra*, 447 U.S. at 566].) The Superior Court correctly held that there is no triable issue of fact as to any of these elements. (CT-13:3158-3169.)

1. The Superior Court correctly concluded that the government interest at issue is "substantial." (CT-13:3158-3162.) 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 can there be any doubt that this is, in fact, the objective of the Ketchum Act and the Commission. (CT-13:3158-3162.)

The California Legislature made extensive findings in enacting the Ketchum Act. (*See* Food & Agric. Code §65500.) It recognized that "[g]rapes 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.* §65500(a).) The Legislature also found that it was "necessary and expedient in the public interest to protect and enhance the reputation of California fresh grapes for human consumption in intrastate, interstate and foreign markets, and to otherwise act so to eliminate unreasonable and

unnecessary economic waste of the agricultural wealth of this state." (*Id.* §65500(e).) The Legislature created the Commission to solve the structural problem created by "individual producers'" inability to "maintain or expand present markets or to develop new or larger markets" for table grapes. (*Id.* §65500(c).)

The Legislature has since reaffirmed the importance of supporting California's agricultural economy through generic research and promotion. Section 63901 of the Food and Agricultural Code (which was enacted in 1995 and amended in 2001) provides: "The Legislature hereby finds and declares that the agricultural and seafood industries are vitally important elements of the state's economy and are supported by state established commissions and councils specified in this division that are mandated to enhance and preserve the economic interests of the State of California[.]" The Legislature explained that commodity promotion programs such as the Commission reflect a "continuing commitment by the State of California to its agricultural and seafood industries that are integral to its economy" and "are a source of substantial employment for the state's citizens, produce needed tax revenues for the support of state and local government, encourage responsible stewardship of valuable land and marine resources, and produce substantial necessary food and fiber for the state, nation, and world." (*Id.* §63901(b).)

The Secretary of CDFA confirmed in her declaration that "[a]griculture is essential to the economy and productivity of California." (CT-2:417 [Ross Decl. ¶3].) The table grape industry in particular is an important part of California's agricultural economy. (CT-2:417 [Ross Decl. ¶4].) In 2010, over one million tons of table grapes were produced in the State (*ibid.*), accounting for 97-99% of table grapes currently grown commercially in the United States. (CT-8:1715 [SF ¶4].) In the 2011 season alone, shipments of California table grapes totaled approximately $1.4 billion. (CT-7:1365-1366 [Alston Decl. ¶11]; CT-3:496 [Nave Decl. ¶41].) As these figures indicate—and as Secretary Ross explained—the table grape sector remains both a significant employer and a critical part of the overall agricultural economy. (CT-2:417 [Ross Decl. ¶4].)

Petitioners brush aside (at 45) the Legislature's findings in the Ketchum Act because, in their view, they do not reflect present conditions. But the Legislature's subsequent enactments in 1995 and 2001, the data presented in Secretary Ross's declaration, and Dr. Alston's expert testimony all confirm that the need for the Commission's programs endures today.

Nor is there any merit to Petitioners' related observation (at 47) that California does not currently mandate a generic promotion program for every crop produced in California. Undisputed data establishes that mandatory promotion programs *do* cover the crops that account for most of

the value of California's agricultural output. (CT-7:1377-1378 [Alston Decl. ¶44].) California's connection to table grapes, moreover, is particularly strong because California accounts for 99% of the production in the United States. (CT-3:496 [Nave Decl. ¶42].) In any event, there is no genuine dispute on this record that "[n]umerous factors affect whether a mandatory commodity promotion program makes economic sense for an industry," including the industry's degree of fragmentation, product differentiation, and need for capital expenditures. (CT-7:1377-1378 [Alston Decl. ¶45].) The table grape industry is a poster child for each of these factors. (*See supra* pp. 9-10.)

Further, contrary to Petitioners' assertions, it simply does not matter under *Central Hudson* that the Legislature delegated the implementation of the Ketchum Act to the Commission's members, who are themselves table grape growers. (Br. 46.) *Gerawan II* squarely rejected the counter-intuitive notion that "a government interest becomes unimportant or less important when decisions about how to accomplish that interest are delegated to those most affected by those decisions." (*Supra*, 33 Cal.4th at 26 [Plum Board's referendum requirement did not render State's interest insubstantial].) The law announced in *Gerawan II* is clear: "[P]artial delegation of authority for the creation of generic advertising programs to agricultural producers does not by itself constitutionally invalidate such programs." (*Ibid.*)

Finally, there is no merit to Petitioners' suggestion (at 46) that CDFA must not care about the Commission's program because it is not formally a party to this litigation. Petitioners neglect to mention that Secretary Ross submitted a sworn declaration *in support of the Commission* in this case. (CT-2:416.) Among other things, the declaration explained that "[t]he California Table Grape Commission and other similar commodity marketing programs overseen by the CDFA are of critical importance to the State of California" (CT-2:417), and that "[w]ithout mandatory marketing programs like the California Table Grape Commission, the State of California's agricultural economy—and the state as a whole—would suffer" (CT-2:419).

2. The Superior Court also correctly concluded that the Ketchum Act "directly advances" California's interest in maintaining a thriving market for agricultural products like table grapes. (CT-13: 3168; *accord* CT-12:3164.) Dr. Alston's unrebutted expert testimony explained that the Commission's promotion program saved "the California table grape industry ... [from] engag[ing] in less than the economically rational amount of advertising and promotion" by solving the "problem [that] causes industries to under-invest in activities—like generic advertising and promotion—that benefit the industry as a whole." (CT-13:3163.)

Dr. Alston confirmed this conclusion through extensive statistical analyses showing that the Commission's activities "have ... increased

demand for California table grapes." (CT-13: 3164.) Those analyses—which included three different econometric studies using almost 40 years of data—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].)

In contrast, Petitioners produced "no evidence" suggesting that the Commission's activities were harming their own promotional efforts. (*See* CT-13:3166 [no evidence that Petitioners "develop or use brands in marketing their goods or have found themselves at a disadvantage by the generic advertising"]; CT-13:3168 ["In opposition, plaintiffs produce no evidence contesting the evidence of the Commission's effectiveness."].)

Petitioners now speculate that a conflict *could* arise "to the extent [their] business strategy is to differentiate [their] product from that of [their] generic competitors." (Br. 9.) But such speculation cannot cast doubt on Petitioners' stipulation that, *in fact*, they conduct no consumer advertising. (CT-5:1106 [Stipulation at 2].) And while Petitioners now claim to have offered relevant "evidence" "during discovery," they can point only to a self-serving assertion that generic advertising is "'counter-

productive'" in some unexplained way. (Br. 12.) Such unsupported assertions cannot even make a dent in the overwhelming, unrebutted evidence in the record.

3. The Superior Court also correctly concluded that 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].)

Nor are there any potential alternatives to mandatory assessments that would be likely to succeed in the table grape industry. Unrebutted evidence in the Superior Court establishes that the structural 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-2:419 [Ross Decl. ¶10]; 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].)

B. PETITIONERS' REMAINING ARGUMENTS LACK MERIT

Other than attacking the nature and importance of California's interest, Petitioners' only merits argument is to point to *United Foods*' invalidation of the federal mushroom program and assert that *Gerawan II* discussed *United Foods* "extensively." (Br. 44-45.) But Petitioners fail to mention that *United Foods* explicitly reserved judgment on the constitutionality of the mushroom program under *Central Hudson*, the test

that *Gerawan II* expressly adopted under the California Constitution in compelled subsidy cases such as this one (*Gerawan II, supra*, 33 Cal.4th at 22): "[T]he Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, and *we therefore do not consider whether the Government's interest could be considered substantial for purposes of the Central Hudson test.*" (*United States v. United Foods, Inc.* (2001) 533 U.S. 405, 410 [citations omitted; emphasis added].) For that obvious reason, *United Foods*—and its gloss on the collectivization test announced in *Glickman v. Wileman Brothers & Elliott, Inc.* (2000) 521 U.S. 457—are irrelevant to the *Central Hudson* inquiry that governs here.

Perhaps realizing the weakness of their *Central Hudson* contentions, Petitioners' principal argument on intermediate scrutiny is to dodge the issue by requesting a remand to the Court of Appeal. (Br. 43.) But the Superior Court's careful analysis—and the purely legal nature of the issues presented—ensure that this Court is in as good a position as the Court of Appeal to adjudicate the constitutionality of the Ketchum Act under intermediate scrutiny. (*See, e.g., Remo Hotel L.P. v. City & Cnty. of S.F.* (2002) 27 Cal.4th 643, 662-663 [deciding Takings Clause issue without remanding for additional factual findings]; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal. 3d 863, 868 ["We need not return the case to the trial court, however, for we are in as good a position as that court to make the required legal determination."].)

Indeed, a remand would be particularly inappropriate in light of the history of this litigation. Petitioners filed their first complaint in this case over fifteen years ago. In the intervening time, their claims have been heard—and roundly rejected—by state and federal courts alike. Petitioners' request for a remand on the intermediate scrutiny issue is nothing more than an effort to prolong this already ancient litigation. Permitting Petitioners' meritless case to continue to consume the resources of both the judiciary and the Commission would run contrary to bedrock values of finality, including "preserv[ing] the integrity of the judicial system, promot[ing] judicial economy, and protect[ing] litigants from harassment by vexatious litigation." (*Vandenberg v. Superior Court*, (1999) 21 Cal.4th 815, 829.) If this Court concludes that it cannot simply affirm on government speech grounds, it can and should bring this long-running litigation to a close by adopting the Superior Court's reasoning on the intermediate scrutiny issue.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

DATED: October 21, 2015

Respectfully submitted,

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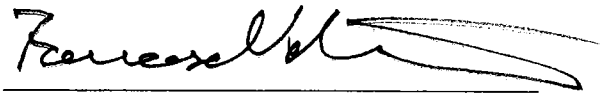
CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.504(d)(1), I hereby certify that, including footnotes, the foregoing brief contains 13,894 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: October 21, 2015 By: 

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CERTIFICATE OF SERVICE

DISTRICT OF COLUMBIA

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

On October 21, 2015, I served true copies of the following documents described as **RESPONDENT'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Wilmer Cutler Pickering Hale and Dorr LLP'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 October 21, 2015, in the District of Columbia.

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