Case No. S226538

IN THE SUPREME COURT OF CALIFORNIA

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

v.

CALIFORNIA TABLE GRAPE COMMISSION
Defendant and Respondent.

SUPREME COURT
FILED

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AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The actions of accountable government officials are subject to the discipline of the electoral process, and the actions of private business are subject to the discipline of the market. Mixing the two has an unhappy history. Some of the worst abuses occur when governmental power is delegated to private parties, who have neither the obligation nor the incentive to pursue the public interest, but instead can use the power of the state to advance their own private interests at the expense of their competitors and the general public. When the power delegated to private interests has to do with speech, and is not subject to the active supervision and control of accountable officials, the protections of the speech clauses of the California and Federal Constitutions come into play.

Petitioners, grape farmers in California, object to paying forced assessments that fund generic advertisements of California table grapes, imposed by a commission effectively chosen by private interests and dominated by their competitors.[1] In doing so, petitioners do not break new ground, but rely on established free speech protections of this Court and the

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[1] Citing only one year of data, respondent asserts that advertising accounted for only "about 21% of the Commission's expenditures." (Resp. Br. at 7.) In many years between 1994 and 2012, however, that number was closer to 50 percent. (3 CT 492.) Moreover, this constitutional challenge extends to promotional activities such as educational outreach, which often accounts for almost as high a sum as advertising.

U.S. Supreme Court. In Respondent's Answering Brief on the Merits, however, the Table Grape Commission (the "TGC" or the "Commission") proceeds as though writing on a blank slate under California law. It urges this Court to ignore its own precedent and adopt the Ninth Circuit's erroneous interpretation of federal law for purposes of the California Constitution, pressing a "government entity" theory to immunize from judicial scrutiny the TGC's compelled subsidy of commercial speech.

But this case does not present a question of first impression for this Court. Respondent conveniently glosses over *Gerawan II*, which held that the promotional advertising of an industry board—*even one whose members are formally appointed by the government*—is not "government speech" unless a politically accountable government official has the legal obligation to review and approve the messages, and does so in fact. (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 6 ("*Gerawan II*").) Respondent does not even attempt to claim that the California Department of Food and Agriculture ("CDFA") does that, resting its argument on the far weaker claim that the CDFA has authority in "exceptional" cases to ensure that the TGC does not violate the law.

When not ignoring *Gerawan II*'s holding outright, the Commission suggests it has been supplanted by the U.S. Supreme Court's subsequent interpretation of the First Amendment of the U.S. Constitution in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550. But *Johanns* is in

full accord with *Gerawan II* (and in any event could not call into question *this* Court's interpretation of *California* constitutional law). Far from endorsing respondent's "government entity" theory, both *Gerawan II* and *Johanns* conclusively demonstrate that the CDFA must exercise actual, de facto control over the TGC's messaging for those advertisements to be considered government speech. Because the Secretary of CDFA is not *required* to approve the content of the TGC's advertisements before they are promulgated, and *in fact* the Department has not done so, the decision below must be reversed.

ARGUMENT

I. *GERAWAN II* CONTROLS THIS CASE AND MANDATES REVERSAL

It is telling that respondent does not address *Gerawan II*, the controlling precedent in this case, until page 30 of its brief. *Gerawan II* answered the precise question at issue here: how the government speech doctrine applies under the California Constitution to commodity advertisements published by agricultural industry boards. Such speech, the Court held, may "be considered government speech if *in fact* the message is decided upon by the Secretary or other government official *pursuant to statutorily derived regulatory authority*." (*Id.* at 28 (emphasis added).) The Commission cannot square its position with *Gerawan II*, and it thus attempts to sideline the decision instead. But *Gerawan II* is squarely on

point, and rejected both primary arguments that respondent claims independently support a government speech defense: (1) that the Commission is a "government entity," (Resp. Br. at 16); and (2) that the Commission's speech is "effectively controlled" by the State, even though CDFA has never reviewed or approved a single TGC advertisement, (*id.* at 17.)

A. The Government Speech Defense Does Not Turn on Whether the TGC is Labeled a Government Entity

The TGC takes pains to demonstrate that the TGC is classified as a government entity or treated as such for a number of purposes under California law. But for all the ink spilled, this argument does not get the TGC anywhere for purposes of the government speech doctrine. As explained in Petitioners' Opening Brief on the Merits, this "government entity" argument is foreclosed by *Gerawan II.* (Pet. Br. at 38-42.) By remanding the case for further proceedings, *Gerawan II* rejected the Secretary's argument that the Plum Board's generic advertising was by definition "government speech" on account of the Board's status as a legislative creation with government appointees. (*Gerawan II*, 33 Cal.4th at 27-28.) Like the TGC, all Plum Board members were appointed and removable by the Secretary. Respondent has not provided any reason to conclude that the TGC is any more of a "government entity" than the Plum Board, whose status alone could not sustain a government speech defense.

Respondent's "government speech" argument ignores the fact that the members of the TGC are elected on a district basis by table grape producers. (*See* Cal. Food & Agric. Code §§ 65550, 65556.) Although as a formal matter, the Secretary "appoints" the winners of this intra-industry election to their positions on the TGC, she is not free to choose her own commissioners (except one). The very point of this method of selection is to ensure that private industry, not agents of the public, have control of the program. That brings constitutional speech protections into play because, as *Gerawan I* pointed out, this kind of state power can be, and is, used for private ends, and manipulated to benefit some growers (those who benefit from generic advertising) over their competitors, who focus on differentiating their fruit from others. (*See Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 504 ("*Gerawan I*").) The essentially private nature of a marketing board can be overcome if there is active oversight by politically accountable officials, but not if oversight is merely theoretical or pro forma. If the TGC's argument were accepted, there would be no limit to the ability of legislators to vest the power of the state in persons accountable to private rather than public interests.

The Commission has no coherent explanation of *Gerawan II* that salvages its "government entity" theory. The TGC claims that the Court's remand "in no way rejected 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." (Resp. Br. at 31 (internal citation and quotation marks omitted).) That, however, is *exactly* what it did. Respondent tries to explain the remand away by stating that the Court "unsurprisingly accorded the parties the opportunity to resolve the factual issues upon which *they* had clearly joined issue." (Resp. Br. at 31, 43-44 (emphasis in original).) But it would be surprising—indeed inexplicable—to remand for factual development if, as respondent contends, further facts were wholly unnecessary to resolve the government speech question. By "remand[ing] plaintiffs' Free Speech challenge for further development of the government speech question in the lower courts," (*id.* at 31), the Court was perforce holding that the statutory origins and powers of the Plum Board were inadequate to shield its compelled subsidies from constitutional challenge.

Brushing past *Gerawan II*, respondent insists that at least "under *Johanns*, the speech of a promotional program is government speech if ... the entity that designs the ads is itself a government entity." (*Id.* at 22.) But this reliance on *Johanns* fares no better. For starters, petitioners do not, as respondent misrepresents, "by and large concede that *Johanns* defines the contours of the government speech doctrine under the State Constitution." (Resp. Br. at 4.) Rather, *Johanns* is instructive insofar as it is in harmony with *this* Court's controlling precedent in *Gerawan II*. *Johanns* stands for the same proposition that government-empowered

industry boards may not compel unwilling parties to contribute to their commercial speech unless accountable government officials control the message "from beginning to end." (*Johanns*, 544 U.S. at 560.) To the extent respondent suggests otherwise or presses the Ninth Circuit's erroneous interpretation of *Johanns*, California precedent from this Court plainly controls. (*See* Pet. Br. at 27-31.)

In any event, *Johanns*'s reasoning is of no help to respondent. Respondent concedes that *Johanns* was not decided on the basis of its "government entity" theory, but insists that is because it was unclear whether the Beef Operating Committee (the entity that designed the beef advertisements and whose members were not all chosen by the Secretary of Agriculture) was in fact a government entity. Without quoting *any* corroborative language from *Johanns*, respondent claims that "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." (Resp. Br. at 22.) Nonsense. The footnote respondent cites assumed nothing of the sort, instead making clear that the status of the Operating Committee was *irrelevant* to the constitutional analysis. As the Court stated:

> We therefore need not label the Operating Committee as "governmental" or "nongovernmental." The **entity to which assessments are remitted is the Beef Board, all of whose**

> **members are appointed by the Secretary pursuant to law.** The Operating Committee's only relevant involvement is ancillary—it designs the promotional campaigns, which the Secretary supervises and approves—***and its status as a state actor thus is not directly at issue.***

(*Johanns*, 544 U.S. at 560 n.4 (emphasis added).)

Under *Johanns*, the relevant entity for the First Amendment analysis is not the one designing the ads, but the entities exercising legal authority: the Beef Board and the Secretary. Respondent's contention that "[h]ad the Operating Committee qualified as a government entity, there would have been no basis to dispute that the speech at issue was government speech," (Resp. Br. at 22), is thus flatly contradicted by *Johanns*. The status of the Operating Committee was immaterial to the First Amendment question, while the status of the Beef Board—an industry board with a structure similar to the TGC—was not dispositive.[2] Although the members of the Beef Board were appointed by the Secretary, and its mission defined by statute, that was not enough to resolve the case. The Court cared only whether the "message set out in the beef promotions is from beginning *to*

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[2] Even if one were to accept respondent's distortion of *Johanns* and focus on the architects of the advertisements, rather than the entities exercising legal authority, it would not move the needle. Like the Beef Board, the TGC does not design its promotional campaigns. And like the Operating Committee in *Johanns*, the designers of the TGC's ads are not appointed by the Secretary—the TGC hires private, third-party contractors to draft the TGC's marketing promotions. (*See* 2 CT 432:23-26.)

end the message established by the Federal Government." (*Johanns*, 544 U.S. at 560 (emphasis added).)

Clinging to its position, the TGC argues that "[n]o 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." (Resp. Br. at 23.) But this "double entity" theory is plainly not the principle that petitioners advance here. Courts have steered clear of this "government entity" analysis entirely because not all government-created entities are created equal; some operate too independently of politically accountable government officials to speak on behalf of the electorate or with the assumed imprimatur of the government. (*See* Pet. Br. at 38-39.) There is no one-size-fits-all solution based on whether the "government entity" label might apply. Petitioners, for example, agree that no one expects the Department of Health and Human Services to review and approve the messages of the Federal Drug Administration as a condition of treating the FDA's speech as the government's own. (Resp. Br. at 23.) But that is not because it suffices that the FDA is classified as a government entity—it is because the FDA bears all the hallmarks of a politically accountable government agency that the TGC lacks. Respondent's logic simply does not hold.

Like the State Bar of California at issue in *Keller* and the Plum Board in *Gerawan*, the TGC "is a good deal different from most other

entities that would be regarded in common parlance as 'governmental agencies.'" (*Keller v. State Bar of Cal.* (1990) 496 U.S. 1, 11.) Respondent points out a number of differences between the State Bar and commodity industry boards, (Resp. Br. at 31-32), and to be sure, not every feature of the State Bar and commodity industry boards is identical. But it is not petitioners who "attempt to analogize the Commission to the bar association at issue in *Keller*," (*id.* at 31); this Court in *Gerawan II* already did that. (*See* 33 Cal.4th at 27-28.) This Court concluded that the fundamental similarities between the State Bar and commodity industry boards were decisive. Observing that "the [Plum] marketing board is comprised of and funded by plum producers, and is in that respect similar to the State Bar," (*id.* at 28), the Court rejected the "government entity" rationale advanced by the Secretary.

The "government entity" argument lacks persuasive force because as *Gerawan I* already observed, marketing order programs are "not so much a mechanism of regulation of the producers and handlers of an agricultural commodity by a governmental agency, as a mechanism of self-regulation by the producers and handlers themselves." (24 Cal.4th at 503 n.8.) Respondent is thus incorrect that the "State's conflict-of-interest laws" obviate any concerns that "Commissioners are 'able to pursue essentially private objectives.'" (Resp. Br. at 28 (quoting Pet. Br. at 3).) *Gerawan I* expressly cautioned that "[g]eneric advertising can be manipulated to serve

the interests of some producers rather than others, as by allowing some to develop a kind of brand by means of funds assessed from all and then use it for their own exclusive benefit." (24 Cal.4th at 504.) The Court noted that some producers "may find themselves disadvantaged by generic advertising in their competition against others" and a producer may object to coerced participation in generic advertising when "others … hijack[] his own funds as they drive to their own destination." (*Ibid.*)

Indeed, this Court perceived the Plum Board's composition as a hindrance, not a help, to its government speech argument, reasoning that *despite* the fact that the Board comprised private industry members, it still might be able to prevail on a government speech defense if certain, *other* conditions were met. The Court explained that though "the marketing board is comprised of and funded by plum producers," its "speech may *nonetheless* be considered government speech if in fact the message is decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority." (*Gerawan II*, 33 Cal.4th at 28 (emphasis added).) As was true of the State Bar's board of governors in *Keller*, the TGC is not composed of "[g]overnment officials … expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents." (*Keller*, 496 U.S. at 12.) This Court roundly rejected the idea that acting by virtue of statutory authority is sufficient to shield speech from any constitutional review.

Contrary to respondent's contention, the Supreme Court's decision in *Lebron v. Nat. Railroad Passenger Corp.* (1995) 513 U.S. 374, does not aid their "government entity" cause. (Resp. Br. at 24.) *Lebron* had nothing to do with the government speech doctrine. It held that Amtrak was a government entity "for purposes of determining the constitutional rights of citizens affected by its actions." (*Lebron,* 513 U.S. at 392.) Whereas here the "government entity" label would shield the promotional campaigns of the Table Grape Commission from constitutional review, in *Lebron* it was the opposite: only if Amtrak was a government entity could it be sued by an individual who was prevented from displaying a political message on a train station billboard. The Court held that "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." (*Id.* at 397.) As even respondent acknowledges, the question in *Lebron* was whether Amtrak was "subject to First Amendment *restrictions*," not First Amendment immunity under the government speech doctrine. (Resp. Br. at 24 (emphasis added); *see also Country Eggs, Inc. v. Kawamura* (2005) 129 Cal.App.4th 589, 597 ("Labeling an entity as a 'state agency' in one context does not compel treatment of that entity as a 'state agency' in all contexts.") (citation omitted).)

Confirming that *Lebron* is inapposite to the analysis here, *Johanns* did not cite *Lebron* but instead reinforced *Keller*'s holding that the speech

of a government-formed corporation is not exempt from First Amendment scrutiny if its message is "not developed under official government supervision." (*Johanns*, 544 U.S. at 561-62.) Likewise, the most recent case respondent cites, *Dept. of Transportation v. Assn. of Am. Railroads* (2015) 135 S.Ct. 1225, was about the nondelegation doctrine and not about government speech. (Resp. Br. at 25-26.) But even in that context, the Court considered "the practical reality of federal control and supervision" to determine whether Amtrak is a governmental entity. (135 S.Ct. at 1233.) TGC claims that the Court "cited no evidence of day-to-day approval of Amtrak's operations by any member of the Executive Branch," (Resp. Br. at 25), but at the same time respondent quotes the Court's observation that the political branches not only created Amtrak but "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." (Resp. Br. at 25 (quoting 135 S.Ct. at 1233).) That is a lot more than can be said for the TGC's relationship with CDFA.

B. Without Reviewing the Advertisements, the Secretary Does Not Exercise Effective Control of the TGC's Speech

The "government entity" defense aside, respondent seemingly agrees that the speech of the Commission would qualify as government speech if "[t]he message of the promotional campaigns is effectively controlled by

the [government] itself." (Resp. Br. at 34 (quoting *Johanns*, 544 U.S. at 560).) Conceding that the case law requires "lines of political accountability," (*id.* at 38), respondent nonetheless ignores what this Court and the Supreme Court have defined as "effective control" by a government official. Under *Gerawan II*, effective control exists "if in fact the message is decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority." (*Gerawan II*, 33 Cal.4th at 28.) Similarly, under *Johanns*, the Court concluded that, "[w]hen, as here, the government sets the overall message to be communicated *and approves every word that is disseminated*, it is not precluded from relying on the government-speech doctrine." (*Johanns*, 544 U.S. at 562 (emphasis added).)

But the Commission does not claim that the Secretary (or her designee) has ever *in fact* overseen, reviewed, approved, or vetoed the content of the Commission's generic advertisements of California table grapes. As the record shows, she has never altered a single word in a single one of those ads. (*See* 8 CT 1741-44.) For all we know, the Secretary has never even seen a TGC ad before it was published. (*See ibid.*) Respondent does not dispute this lack of actual oversight, but makes a number of arguments why it should not matter. Each is unavailing.

1. Respondent argues that the Secretary need not approve the individual advertisements because the Ketchum Act "mandated the basic

message to be conveyed by the Commission" and provides "meticulous commands" about the content of the ads. (Resp. Br. at 35-36 (citing Food & Agric. Code §§ 65500(f), 63901, 65572(h)).) If the mere terms of the authorizing legislation sufficed as government control, however, there would have been no need for a remand in *Gerawan II.* The statute establishing the Plum Board also mandated its basic message. But the fact that the statute provides general guidance about the promotional message does not relieve the Commission of its burden to show that the Secretary controls the advertising content on the backend. As *Johanns* held, the question is whether the "message set out in the [commodity] promotions is from *beginning to end* the message established by the Federal Government." (544 U.S. at 560 (emphasis added).) When the decisions about advertisements take place without CDFA oversight, the "marketing board is in de facto control of the generic advertising program" and it is not the case that "in fact the message is decided upon by the Secretary or other government official...." (*Gerawan II*, 33 Cal.4th at 28.)

2. Respondent relentlessly disparages this required oversight as unrealistic and unnecessary "day-to-day micromanagement" of the Commission's work by CDFA. (Resp. Br. at 4; *see also id.* at 17, 21, 33, 42, 45, 48, 50.) But petitioners do not argue that *Gerawan II* requires "nothing short of actual day-to-day involvement by CDFA" in the Commission's affairs. (*Id.* at 42.) Given the volume of advertisements, it

is safe to assume that they are not being generated on a daily basis or at a pace so rapid that Secretary oversight would be unsustainable.[3] Indeed, the fact that the Secretary of Agriculture in *Johanns* was able to review and either approve or veto every single one of the Beef Board's advertisements gives the lie to respondent's effort to make such a condition sound harebrained and impractical. (*See Johanns*, 544 U.S. at 561 ("[T]he Secretary exercises final approval authority over *every* word used in *every* promotional campaign.") (emphasis added).)

Respondent is similarly off base when it argues that because "[i]n the ten years since *Johanns*, not a single commodity promotion program has been found unconstitutional," that must mean there is no "fact-bound exception requiring day-to-day micromanagement" of the Commission's

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[3] Petitioners' position is thus perfectly consistent with *North Carolina State Bd. of Dental Examiners v. FTC* (2014) 135 S.Ct. 1101, which respondent claims "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.'" (Resp. Br. at 33 (quoting 135 S.Ct. at 1116).) The CDFA, if it were vested with the appropriate authority, would be capable of actively supervising the TGC's promotional campaigns without involving itself on a daily basis in the Commission's operations. Moreover, petitioners do not cite *North Carolina State Board* "to extend [the Court's] antitrust rationale to the free speech context," (Resp. Br. at 33), but rather to demonstrate that active supervision by the State is *already* the metric in a variety of contexts for whether a government-created entity run by private industry should receive certain protections or immunities reserved for the State. Whether in the free speech or antitrust context, the U.S. Supreme Court has consistently maintained that statutorily-empowered but realistically *private* entities are subject to constraint.

advertisements. (Resp. Br. at 20-21.) This "sheer consistency in result," (*id.* at 21), proves nothing except that most commodity programs (specifically, those courts have considered since *Johanns*) are designed like the Beef Board, and not like the TGC. In those cases, the program at issue shared the same key feature as that in *Johanns*: the Secretary was required to exercise final approval authority over the marketing campaigns. And *that* feature was the linchpin of these decisions. These cases took pains to emphasize, as did *Johanns*, the government's "meticulous, detail-oriented, sometimes intense, word-for-word process" of reviewing the advertisements at issue.[4] The same was true in *Gerawan II*, which

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[4] *In re Wilson* (U.S.D.A. Nov. 28, 2005, No. 01-0001) 2005 WL 3436555, at *16-19; *see also In re Red Hawk Farming & Cooling* (U.S.D.A. Nov. 8, 2005, No. 01-0001) 2005 WL 3118142, at *8-13 (same for National Watermelon Promotion Board); *Cochran v. Veneman* (M.D.Pa. 2003) 252 F.Supp.2d 126, 130 ("Advertising created by the Dairy Board ***must be approved***" by Department of Agriculture); *Am. Honey Producers Assn., Inc. v. USDA* (E.D.Cal. May 8, 2007, No. 05-1619) 2007 WL 1345467, at *9-10 ("Through the Honey Act, Congress provided for the USDA to exercise, ***and the USDA does exercise, close control over the messages*** that the Honey Board disseminates" and that control was not just "***pro forma***"); *Cricket Hosiery, Inc. v. United States* (Ct. Internat. Trade 2006) 429 F.Supp.2d 1338, 1343-1346 ("[T]he Cotton Board ***shall ... develop and submit to the Secretary for his approval*** any advertising or sales promotion ... and ... ***any such plan or project must be approved by the Secretary before becoming effective.***"); *Avocados Plus Inc. v. Johanns* (D.D.C. 2006) 421 F.Supp.2d 45, 52 ("***Most importantly*** for the First Amendment analysis, moreover, the Secretary ***must review and approve any promotion or advertisement ... before it can be disseminated to the public.***"); *Dixon v. Johanns* (D.Ariz. Nov. 21, 2006, No. CV-05-03740) 2006 WL 3390311, at *12-13. (All emphasis in footnote added.)

explained that remand was necessary because "there are *factual questions* that may be determinative of the outcome," including "whether the Secretary's approval of the marketing board's message is in fact pro forma" or "whether the marketing board is in de facto control of the generic advertising program." (33 Cal.4th at 28.)

Thus, what the Commission describes as the Secretary's "extraordinary step" in *Johanns* of reviewing the Beef Board's advertisements, (Resp. Br. at 35), is in fact an ordinary feature of commodity advertising programs. The TGC is an outlier—it has far greater independence from political accountability. And if anything, these decisions cited by the Commission illustrate that it is eminently practicable to design a commodity program with the government oversight necessary to confer constitutional immunity on the program's speech. The legislature simply did not do so here by failing to create any "statutorily derived regulatory authority" that would require, or even enable, the Secretary to oversee the TGC's promotional campaigns. (*Gerawan II*, 33 Cal.4th at 28.)

3. Respondent attempts to distinguish the Supreme Court's recent decision in *Walker v. Texas Division* (2015) 135 S.Ct. 2239 to no avail. *Walker* held that specialty license plate designs were government speech in part because the Texas Department of Motor Vehicles "must approve every specialty plate design proposal before the design can appear on a Texas plate" and has "*actively exercised this authority*" to approve or reject the

proposed plates. (*Id.* at 2249 (emphasis added).) Respondent claims that *Walker* is not instructive because it "was not a compelled subsidy case at all." (Resp. Br. at 46.) But *Johanns* was the foundation for the analysis in *Walker*: the Court quoted *Johanns* in holding that Texas "effectively controlled the messages" by "exercising final approval authority over their selection." (135 S.Ct. at 2249 (internal quotation marks omitted).) Respondent claims that "active review by the State" was required in *Walker* only because it involved a "privately designed message." (Resp. Br. at 46). But this distinction fails. *Johanns* and *Gerawan II* both required Secretary oversight precisely because without it, the promotional campaigns are effectively those of the dominant forces within private industry.

4. Recycling its "government entity" argument in another form, respondent points to the Secretary's power of appointment and removal as proof of the Secretary's effective control over the TGC's ads. As discussed *supra*, this was inadequate with respect to the Beef Board in *Johanns* and the Plum Board in *Gerawan II* and there is no reason it should be any different here. (*See supra*, at 4-6.) Although formally appointed by the Secretary, the board members are first elected by the table grape producers of each district. (*See* Cal. Food & Agric. Code §§ 65550, 65556.) Despite the formality of appointment by the Secretary, the commissioners are in no real sense accountable to the people of California, but only to the dominant interests in the table grape industry. It is thus easy to envision (as this

Court did in *Gerawan I*) how, without *ongoing* oversight from the Secretary, these private industry members might "hijack[]" the funds of other producers as "they drive to their own destination." (*Gerawan I*, 24 Cal.4th at 504.)

5. Respondent argues that "[n]othing in the Ketchum Act supports Petitioners' assertion that the grievance procedure is the '*only*' means of CDFA review." (Resp. Br. at 40 (quoting Pet. Br. at 10) (emphasis in original).) But this has it backward. Respondent has identified no *affirmative* authority empowering the Secretary to review the Commission's ads. Instead, respondent asserts that if CDFA has the power of appointment and removal, it "certainly enjoys the lesser power to exercise direct review of specific Commission activities and advertisements." (Resp. Br. at 40.) That is like saying that because Administrative Law Judges are appointed and may be removed by agency heads, the agency head may tell the ALJ how to decide a case.

With no support in the statute, respondent turns to the CDFA's own policy manual, which it claims "makes CDFA's authority explicit." (*Ibid.*). Putting aside the fact that a mere policy manual lacks the force of law, (*see Christensen v. Harris County* (2000) 529 U.S. 576, 587), the policy manual makes no such authority of review explicit. Under a heading "Non-routine review," the manual merely "reserves the right" for CDFA to "exercise exceptional review" of the Commission's advertisements. "Exceptional

review" is just that: an exception. Not only is the Commission incorrect that the "relevant question is whether the State has the *legal authority* to control the Commission," (Resp. Br. at 5) (emphasis in original), but its arguments come up short even under that standard.

C. Without Attribution to the Government, the TGC's Advertising Cannot Constitute Government Speech

In petitioners' opening brief, we argued that the TGC's advertisements cannot be government speech because they are not attributed to the government—meaning that voters will not be aware that the ads are subject to democratic control or know whom to hold accountable for them.

Respondent's first response is to claim, falsely, that the attribution issue has been waived. (*See id.* at 48-49). Not so. First in the Superior Court, (*see* 8 CT 1743:25-1744:2, 1780:16-19), and then in the Court of Appeal, (*see* Appellants' Opening Br., 2014 WL 2195465 (filed May 13, 2014), at *4, *47), petitioners argued that the TGC's advertisements do not mention the State of California or even hint that they are sponsored by the state. In any event, the assertion that the Commission's advertisements must be attributed to the government to be characterized as the government's speech is simply another argument in support of petitioners' government speech claim. And it derives from *Gerawan II*, which petitioners have been citing throughout this litigation, including for the

proposition that a factor to be considered is "whether the speech is attributed to the government." (Appellants' Opening Br., 2014 WL 2195465 (filed May 13, 2014), at *4; *see also, e.g., Yee v. City of Escondido, Cal.*, (1992) 503 U.S. 519, 534 ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

On the merits, respondent does not even address *Gerawan II*'s statement that another "factual question[] that may determinative of the outcome" includes "whether the speech is attributed to the government." (33 Cal.4th at 28.) Instead, respondent suggests that any attribution requirement in *Gerawan II* was overruled by *Johanns.* (Resp. Br. at 50.) Putting aside that *Johanns* does not override *Gerawan II*'s authoritative interpretation of the California Constitution, respondent entirely bypasses *Walker*, which revived the attribution theory of government speech under federal law. In *Walker*, the Court emphasized that the license plate designs "are often closely identified in the public mind with the [State]," (135 S.Ct. at 2248), and that the program "allow[ed] Texas to choose *how to present itself* and its constituency," (*id.* at 2249 (emphasis added).) The Court concluded that the messages were perceived as the government's own—motorists display such plates with the "likely inten[t] to convey to the public that the State has endorsed that message," and these designs in fact

"convey government agreement with the message displayed." (*Ibid.*) Respondent offers no answer.

The record is clear that the Commission's ads are not attributed to the State, nor even to the Table Grape Commission, but to "Grapes from California." (*See* 8 CT 1743:25-1744:2; 9 CT 2045:6-2046:7; 2 CT 448-467; Pet. Br. at 36.) The government cannot avoid democratic accountability by disguising its speech as nongovernmental, and then expect to avoid constitutional scrutiny by saying that its nonattribution does not matter.

II. THIS COURT SHOULD NOT REACH THE MERITS OF THE INTERMEDIATE SCRUTINY ISSUE, BUT IF IT DOES THE COURT SHOULD FOLLOW THE LOGIC OF *UNITED FOODS*

In the event this Court rejects the TGC's argument that its promotional program is insulated from free speech challenge as a form of "government speech," the TGC asks this Court to reach the merits of petitioners' free speech challenge, even though the Court of Appeals did not do so. As noted in our opening brief, this Court's usual practice—including in *Gerawan I* and *II*—is to remand unresolved issues to the lower court. (*See Gerawan I*, 24 Cal.4th at 517; *Gerawan II*, 33 Cal.4th at 6-7.) The TGC passes by these cases in silence. There is even more reason in this case to abide by that sound appellate practice and decline respondent's suggestion, because the TGC invites this Court to wade into hundreds of

factual disputes regarding the record in this case, without the benefit of appellate analysis or serious briefing.

If, however, the Court reaches the question, there is no basis to sustain the commodity advertising program. The U.S. Supreme Court has held that mandatory collective promotion programs for agricultural commodities can be justified only when they are ancillary to a broader regulatory scheme restricting marketing. (*See Glickman v. Wileman Brothers & Elliott, Inc.* (1997) 521 U.S. 457; *id.* at 477-504 (Souter, J., dissenting); *United States v. United Foods, Inc.* (2001) 533 U.S. 405; *id.* at 417-18 (Stevens, J., concurring).) This Court cited *United Foods* some two dozen times in *Gerawan II.* (*See generally Gerawan II*, 33 Cal.4th 1.) Like the mushroom program struck down in *United Foods*, and in contrast to the tree fruits program upheld in *Glickman*, the California table grape program is a pure compelled speech program, with no regulatory elements whatsoever. Under the analysis in *Glickman* and *United Foods*, it is virtually inconceivable that the California table grape promotion scheme could be sustained.

A. Respondent's *Central Hudson* Arguments Rest on a Multitude of Disputed Facts

Over the plaintiffs' vociferous objection, the Superior Court granted summary judgment to the Commission on whether the table grape program directly advances a substantial government interest in a narrowly tailored

fashion—issues on which the Commission bears the burden of proof. (*Gerawan II*, 33 Cal.4th at 26.) As this Court stated in *Gerawan II*, although the purpose of the table grape promotion program is substantial "in the abstract," (*id.* at 22), "the government must still show that the marketing program, as presently constituted, serves a substantial public interest and not merely private interests," (*id.* at 26).

Plaintiffs and the Commission hotly contested the factual underpinnings of that question. In its summary judgment papers, the Commission identified about 200 supposedly undisputed *material* facts in support of its *Central Hudson* argument, (*see* 2 CT 351-392), but the vast majority of these were in fact disputed, (*see* 14 CT 3283-3337, 8 CT 1769-1839). The plaintiffs filed their own separate statement of 129 undisputed material facts in opposition to the Commission's motion for summary judgment. (*See* 8 CT 1739-1763.) The Superior Court was required to view all of this evidence in the light most favorable to the nonmoving party, to liberally construe the plaintiffs' evidentiary submissions, and to scrutinize the Commission's own evidence strictly and resolve any evidentiary doubts or ambiguities in petitioners' favor. (*See Saelzler v. Adv. Group 400* (2001) 25 Cal.4th 763, 768.)

Plaintiffs contended in the Court of Appeals—and continue to contend—that the Superior Court failed in this duty, instead deferring to the Commission on every significant point. Rather than engage in the arduous

task of analyzing this extensive record to determine whether there were factual disputes warranting trial, the Court of Appeals decided the case on the basis of the "government speech" doctrine discussed in Section I of this brief, and did not reach any of the summary judgment issues relevant to the *merits* of the free speech argument.

TGC's Answer Brief asks this Court to affirm the grant of summary judgment, but it fails even to mention these unresolved disputes over the record. It presents not a single citation of evidence regarding how the TGC program is conceived and operated in actual practice—the very issues on which *Gerawan II* remanded. Instead, it rests on vague statements of legislative intent (mostly about the importance of the table grape industry rather than the need for, or value of, a collectivized advertising program) and on a single paid expert, whose testimony it describes as "undisputed." (Resp. Br. at 57.) But this Court already held that the statements of legislative intent, while establishing the substantiality of the government's interest "in the abstract," must be tested against the facts "as presently constituted," with the Commission bearing the burden of proof. (*Gerawan II*, 33 Cal.4th at 22, 26.) And as for respondent's lament that "structural problems ... threaten the viability of voluntary associations in fragmented and largely undifferentiated commodity markets," (Resp. Br. at 62), the U.S. Supreme Court only recently reiterated that a purpose to "prevent nonmembers from free-riding" is "generally insufficient to overcome First

Amendment objections." (*Harris v. Quinn* (2014) 134 S.Ct. 2618, 2627 (internal quotation marks and citation omitted).)

With respect to the expert, Julian Alston, his testimony was anything but undisputed. (*See* 8 CT 1877-1886 (challenging the basis for Alston's testimony).) Alston purported to show that the TGC's advertising has yielded large returns. Among the many flaws in Alston's analysis, however, was the fact that he was unaware of, and took no account of, the substantial private promotional expenditures by table grape growers and retailers, making it impossible to determine which portion of increased sales may be attributed to TGC promotions. (*See ibid.*)[5] This does not come close to satisfying the burden to justify regulation of speech under intermediate scrutiny. As the Supreme Court has repeatedly stressed: "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction

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[5] The Commission attempts to downplay these private promotional efforts by pointing to a stipulation that the plaintiffs do not engage in direct consumer advertising. In the table grape industry, producers and packers of table grapes, including petitioners, fund advertising and promotions conducted by retailers, such as grocery store chains. The record shows these promotional activities are substantial. (*See, e.g.*, 9 CT 2122:10-21; 10 CT 2429:20-2431:23, 2272:20-2273:23, 2274:5-17; 2281:8-49, 2362:17-2366:4, 2376:7-2377:20; 11 CT 2486:19-2488:23, 2489:8-17.)

will in fact alleviate them to a material degree." (*Edenfield v. Fane* (1993) 507 U.S. 761, 770-71 (citing numerous cases).)

TGC's discussion of the merits almost exactly replicates the Plum Board's arguments in *Gerawan II*: it cites legislative history about the importance of the industry coupled with an expert claiming that the collective advertising has been effective. Among the significant questions that go unaddressed are:

-- Why are some commodities, such as table grapes, subject to mandatory collective advertising, while others with similar economic characteristics are left to private promotion?

-- Why is collective advertising superior to private advertising?

-- What is the public, as opposed to merely the private, interest in compelling collective advertising?

-- Given that generic advertising ignores quality and type differences and thus reduces producers' incentives to improve quality and develop different types, how can it advance the public interest to force generic advertising?

-- Why doesn't the state use less restrictive alternatives, such as encouraging agricultural cooperatives to engage in collective marketing efforts, as has been done with great success for oranges (Sunkist), almonds (Blue Diamond), raisins (Sun Maid), cranberries (Ocean Spray), and butter (Land O'Lakes)?

-- Why have other mandatory collective advertising programs been discontinued, and what has been the effect?

This Court was unimpressed with the Plum Board's generalized, speculative, and out-of-date factual presentation in *Gerawan II*, remanding for factual findings regarding the present-day need for, and effect of, the program. Under respondent's approach, this Court would need to do the same.

B. The TGC's Promotional Program Cannot Survive Constitutional Review

In any event, respondent's open-ended version of intermediate scrutiny has been superseded by more specific cases analyzing compelled contributions to commodity promotion programs. Under current Supreme Court doctrine, mandatory collective advertising programs are constitutional only when they are "ancillary to a more comprehensive program restricting marketing autonomy." (*United Foods*, 533 U.S. at 411-12; *see also Glickman*, 521 U.S. 457.) The TGC labels *United Foods* "irrelevant," but this Court approvingly cited it over two dozen times in *Gerawan II*. (*See* 33 Cal.4th 1.) Given that the California Constitution's protections for free speech are as strong as, if not stronger than, those of the First Amendment, (*see Gerawan I*, 24 Cal.4th at 491), the Supreme Court's conclusion that mandatory programs of this sort violate the First Amendment is anything but irrelevant.

In *Glickman*, the Ninth Circuit found that the federal mandatory collective advertising program for tree fruits violated the intermediate scrutiny test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980) 447 U.S. 557, because the program was not sufficiently tailored to, and did not directly advance, an important government interest. (*Glickman*, 521 U.S. at 465-66 (citing *Wileman Brothers & Elliott, Inc. v. Espy* (9th Cir. 1995) 58 F.3d 1367, 1375-76).) On certiorari to the Supreme Court, no Justice disagreed with the Ninth Circuit's *Central Hudson* analysis. Four Justices, led by Justice Souter, fully embraced that analysis and would have affirmed. (*See Glickman*, 521 U.S. at 491-92 (Souter, J., dissenting) ("[T]he Secretary has failed to establish that the challenged advertising programs satisfy any of [the] three prongs of the *Central Hudson* test"); *id.* at 504 (Thomas, J., dissenting, joined by Scalia, J.) ("[T]he regulation at issue here fails even the more lenient *Central Hudson* test").) Five Justices, in an opinion by Justice Stevens and joined by Justice Kennedy, upheld the tree fruits program, but only because that program was ancillary to a broader regulatory program. (*Id.* at 469.)

When confronted with a free-standing collectivized advertising program (this time for mushrooms), Justices Stevens and Kennedy joined the four dissenters from *Glickman* to hold the program unconstitutional. Noting that the *Central Hudson* test, which provides "less protection to

commercial speech," "has been subject to some criticism," (*United Foods*, 533 U.S. at 409), the Court stated it need not "enter into the controversy" over the continued vitality of *Central Hudson*, because "even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." (*Id.* at 410.) That constitutes a *holding* that the program fails even the *Central Hudson* test.

Citing *Keller* and other precedent, the Court reasoned that mandatory contributions to speech are constitutional only in furtherance of a larger regulatory purpose. (*Id.* at 414.) In *United Foods*, however, "[t]he only program the Government contend[ed] the compelled contributions serve[d] [was] the very advertising scheme in question." (*Id.* at 415.) The Court reasoned that "[w]ere it sufficient to say speech is germane to itself, the limits observed in ... *Keller* would be empty of meaning and significance." (*Ibid.*) Distinguishing *Glickman*, the Court explained that it had "not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." (*Ibid.*) In other words, even if the "lesser protection" of *Central Hudson* continues to apply, the mandatory advertising program fails that test unless it is part of a broader regulatory scheme.

That rationale applies equally here, where the table grapes promotion program is admittedly unrelated to any broader marketing

restrictions. As Justice Stevens, the author of *Glickman*, wrote in a separate concurrence: "[s]urely the interest in making one entrepreneur finance advertising for the benefit of his competitors . . . is insufficient" when it is not ancillary to a broader regulatory program. (*United Foods*, 533 U.S. at 418 (Stevens, J., concurring).)

To be sure, the Solicitor General did not trouble to raise the open-ended *Central Hudson* arguments that had been so singularly unsuccessful in *Glickman*, and the Opinion for the Court therefore did not comment on the substantiality of the government's interest. (*Id.* at 410.) Nonetheless, five Justices—the *Glickman* dissenters plus Justice Stevens—expressly found the governmental interest insufficient under *Central Hudson*, (*see Glickman*, 521 U.S. at 491 (Souter, J., dissenting); *United Foods*, 533 U.S. at 418 (Stevens, J., concurring)), and the *United Foods* majority found "no basis … to sustain the compelled assessments" under the "lesser protection" of *Central Hudson*, (*id.* at 410).

Accordingly, if this Court were to accept the TGC's invitation to address the merits issue that the Court of Appeals did not reach, Supreme Court precedent establishes that free-standing mandatory commodity advertising programs are unconstitutional.

CONCLUSION

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

Dated: December 10, 2015

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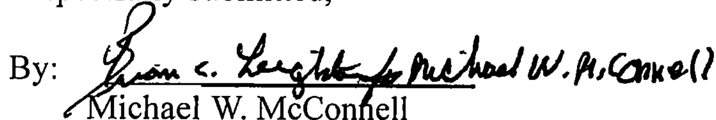
CERTIFICATE OF WORD COUNT
PURSUANT TO RULE RULE 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), counsel for Petitioners hereby certifies that the number of words contained in this Reply to Respondent's Answer Brief on the Merits, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 7,635 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: December 10, 2015

Respectfully submitted,

By: 

Michael W. McConnell

PROOF OF SERVICE

I declare that:

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

On December 10, 2015, I served a copy of the attached **REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS** on the interested parties herein by placing a true copy thereof in a sealed envelope, fully prepaid, and addressed as follows:

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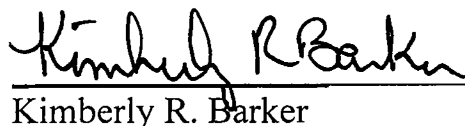
I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 10th day of December, 2015, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.



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