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IN THE

Supreme Court of California

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

v.

CALIFORNIA TABLE GRAPE COMMISSION
Respondent.

ON APPEAL FROM THE COURT OF APPEAL, FIFTH DISTRICT, CASE NO. F067956

APPLICATION OF DKT LIBERTY PROJECT FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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In accordance with Rule 8.520(f), the DKT Liberty Project requests permission to file a brief as *amicus curiae* in the matter of *Delano Farms Co. v. California Table Grape Commission*, Case. No. S226538.

The DKT Liberty Project is a non-profit organization founded to promote individual liberty against encroachment by all levels of government. The DKT Liberty Project advocates vigilance over government overreach of all kinds, including restrictions on civil liberties, commerce, and excessive regulation. It is particularly focused on protecting the freedom of all citizens to engage in expression without government interference.

The Project has appeared as *amicus curiae* in many cases, including *Riley v. California* (2014) 134 S.Ct. 2473 [189 L.Ed.2d 430], *Horne v. Department of Agriculture* (2013) 133 S.Ct. 2053 [186 L.Ed.2d 69], and *United States v. United Foods* (2001) 533 U.S. 405 [121 S.Ct. 2334, 150 L.Ed.2d 438]. As demonstrated below, the Project can assist the court in evaluating the validity of *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550 [125 S.Ct. 2055, 161 L.Ed.2d 896] and the appropriate contours of the

government speech doctrine under Article 1 of the Constitution of California.

The proposed brief argues that the Court should decline to adopt *Johanns* as the standard for the government speech doctrine under the California Constitution, and, in the context of targeted subsidy and generic advertising programs, should apply the doctrine only to speech that can actually be attributed by a listener to the government. If the request is granted, the DKT Liberty Project respectfully submits the following brief in support of Petitioners.

In accordance with Rule 8.520(f)(4), the undersigned certifies that no party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. California's Government Speech Doctrine Protects Targeted Assessment Programs From Constitutional Scrutiny Only Where The Advertising They Produce Is Attributable To The Government By The Listener. 4

A. *Johanns* Was An Unprecedented Expansion Of The Government Speech Doctrine. 5

B. *Johanns* Was Flawed And Disregarded The Importance Of Citizens Being Able To Attribute Speech To The Government. 9

C. California And Recent U.S. Supreme Court Precedent Show That Attributability Is An Important Component Of The Government Speech Doctrine Analysis. 13

D. This Court is Not Bound By *Johanns* Or By Ninth Circuit Authority On The Federal Government Speech Doctrine. 18

II. The TGC Produces Non-Attributable Speech, Making Its Assessments On Appellants Suspect Under The California Constitution. 22

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 27

TABLE OF AUTHORITIES

CASES

Abood v. Detroit Board of Education (1977) 431 U.S. 209 [97 S.Ct. 1782, 52 L.Ed.2d 261] 6

Beeman v. Anthem Prescription Management, LLC (2013) 58 Cal.4th 329 [165 Cal.Rptr.3d 800, 315 P.3d 71] 16

Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal.3d 392 [188 Cal.Rptr. 891, 657 P.2d 383] 10

Board of Regents of University of Wisconsin System v. Southworth (2000) 529 U.S. 217 [120 S.Ct. 1346, 146 L.Ed.2d 193] 6, 11

Central Hudson Gas & Electric Corp. v. Public Service Commission (2004) 447 U.S. 557 [100 S.Ct. 2343, 65 L.Ed.2d 341] 25

Choose Life Illinois, Inc. v. White (7th Cir. 2008) 547 F.3d 853 21

Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252 [172 Cal.Rptr. 866, 625 P.2d 779] 19

Delano Farms Co. v. California Table Grape Commission (9th Cir. 2003) 318 F.3d 895 8

Delano Farms Co. v. California Table Grape Commission (9th Cir. 2009) 586 F.3d 1219 .... 18, 22, 24

Duarte Nursery, Inc. v. California Grape Rootstock Improvement Commission (2015) 239 Cal.App.4th 1000 [191 Cal.Rptr.3d 776] 16

Fashion Valley Mall, LLC v. NLRB (2007) 42 Cal.4th 850 [69 Cal.Rptr.3d 288, 172 P.3d 742] 14

Gerawan Farming, Inc. v. Kawamura (2004) 33 Cal.4th 1 [14 Cal.Rptr.3d 14, 90 P.3d 1179]........................ 2, 15, 16, 22, 24

Gerawan Farming, Inc. v. Lyons (2000) 24 Cal.4th 468 [101 Cal.Rptr.2d 470, 12 P.3d 720].................. 1, 14, 18, 19, 20, 22

Glickman v. Wileman Bros. & Elliott, Inc. (1997) 521 U.S. 457 [117 S.Ct. 2130, 138 L.Ed.2d 585] 7

Golden Gateway Center v. Golden Gateway Tenants Ass'n (2001) 26 Cal.4th 1013 [111 Cal.Rptr.2d 336, 29 P.3d 797]... 19-20

Johanns v. Livestock Marketing Ass'n (2005) 544 U.S. 550 [125 S.Ct. 2055, 161 L.Ed.2d 896]................................ *passim*

Keller v. State Bar of California (1990) 496 U.S. 1 [110 S.Ct. 2228, 110 L.Ed.2d 1].. 6, 13

Michigan Pork Producers Ass'n v. Veneman (6th Cir. 2003) 348 F.3d 157, judg. vacated (2005) 544 U.S. 1058 [125 S.Ct. 2511, 161 L.Ed.2d 1106]...................................... 8

People v. Garcia (2006) 39 Cal.4th 1070 [48 Cal.Rptr.3d 75, 141 P.3d 197]... 16

People v. Teresinski (1982) 30 Cal.3d 822 [180 Cal.Rptr. 617, 640 P.2d 753]... 5, 18, 19

Pleasant Grove City v. Summum (2009) 555 U.S. 460 [129 S.Ct. 1125, 172 L.Ed.2d 853]................................. 1, 5, 16, 17

Reno v. Flores (1993) 507 U.S. 292 [113 S.Ct. 1439, 123 L.Ed.2d 1] 12

Roach v. Stouffer (8th Cir. 2009) 560 F.3d 860 21

Romer v. Evans (1996) 517 U.S. 620 [116 S.Ct. 1620, 134 L.Ed.2d 855] 10

United States v. United Foods, Inc. (2001) 533 U.S. 405 [121 S.Ct. 2334, 150 L.Ed.2d 438]... 7, 8

Walker v. Texas Division, Sons of Confederate Veterans, Inc. (2015) 135 S.Ct. 2239 [192 L.Ed.2d 274] 4-5, 17, 18

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 9, cl. 3 10

Cal. Food & Agric. Code § 65650.5 25

Ketchum Act of 1967, Cal. Food & Agric. Code § 65500, *et seq.* 24

OTHER AUTHORITIES

Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 Hastings L.J. 983 (2005) 20-21

Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 Denv. U. L. Rev. 899 (2010) 20

Jennifer Williams Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That The Legal Battles Have Quieted*, 14 Drake J. Agric. L. 149 (2009) 7

SUMMARY OF ARGUMENT

Article 1 of the California Constitution zealously protects individuals from being forced to subsidize speech with which they do not agree. As this Court explained in *Gerawan Farming, Inc. v. Lyons* ("*Gerawan I*"), "article I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.'" (2000) 24 Cal.4th 468, 491 [101 Cal.Rptr.2d 470, 12 P.3d 720]. This case presents an opportunity for the court to apply its broad interpretation of California's free speech clause to the government speech doctrine, an area of law that is "relatively new, and correspondingly imprecise." *Johanns v. Livestock Mktg. Ass'n* (2005) 544 U.S. 550, 574 [125 S.Ct. 2055, 161 L.Ed.2d 896] (Souter, J., dissenting).

For most of its history, the government speech doctrine has existed as a background principle preventing citizens from wielding a First Amendment "heckler's veto" against speech by the government with which they disagree. *See Pleasant Grove City v. Summum* (2009) 555 U.S. 460, 468 [129 S.Ct. 1125, 172 L.Ed.2d 853] (quoting *Johanns*, 544 U.S. at 574 (Souter, J., dissenting)). But in recent years, the U.S. Supreme Court has expanded the doctrine's reach far beyond

First Amendment challenges of everyday speech by government officials. In *Johanns v. Livestock Marketing Association*, a deeply divided Court applied the doctrine to block a First Amendment compelled subsidy challenge to a statute that forced a small subset of companies to fund advertisements produced by an industry board. 544 U.S. at 566-67.

Petitioners cogently explain why even if *Johanns* governs here, reversal of the Court of Appeal is still required, because under *Johanns*, the government speech doctrine applies only if government approves "every word used" in the advertisements at issue. *See Johanns*, 544 U.S. at 561. For the reasons set forth in Petitioners' brief, that standard is not met in this case. But in developing the government speech doctrine under the California Constitution, this Court should look first not to *Johanns*, but rather to this Court's own precedent, *Gerawan Farming, Inc. v. Kawamura* ("*Gerawan II*") (2004) 33 Cal.4th 1 [14 Cal.Rptr.3d 14, 90 P.3d 1179]. *Gerawan II* shows that in cases involving targeted assessments for generic advertising, the government speech doctrine should not apply unless the advertisements at issue can actually be attributed to the government by the listener. Such a standard is only logical.

Government cannot be held democratically accountable for speech it compels if the listener does not even realize it is the government that is speaking, and indeed, has no reason even to suspect that the government is the speaker.

By ignoring the guidance of *Gerawan II*, the Court of Appeal set a dangerous precedent. If the government speech doctrine under the California Constitution covers advertising funded by targeted assessments that the listener does not know and has no reason to suspect is actually attributable to the government, then "there is no check whatever on government's power to compel special speech subsidies." *Johanns*, 544 U.S. at 571 (Souter, J., dissenting). This Court should reverse the Court of Appeal and conclude that because the California Table Grape Commission (the "TGC") compels the subsidy of speech that is not attributable to the government, its assessments on Petitioners are subject to scrutiny under the California Constitution and violate Article 1.

ARGUMENT

I. California's Government Speech Doctrine Protects Targeted Assessment Programs From Constitutional Scrutiny Only Where The Advertising They Produce Is Attributable To The Government By The Listener.

In applying the government speech doctrine to the compelled subsidy/generic advertising program at issue here, the Court of Appeal looked solely to the U.S. Supreme Court's decision in *Johanns v. Livestock Marketing Association*, in which the U.S. Supreme Court specified that generic advertising programs produce government speech if the government exercises overall control and approval authority. 544 U.S. at 561; *see Delano Farms Co. v. Cal. Table Grape Comm'n* (Cal.Ct.App. 2015) 185 Cal.Rptr.3d 771, 777-78, review granted and superseded by (2015) 189 Cal.Rptr.3d 854 [352 P.3d 417]. The majority in *Johanns* apparently rejected the theory—expounded upon by Justice Souter in his dissent—that the advertisements must be publicly attributed to the government in order to constitute government speech.

The *Johanns* majority's apparent rejection of the attribution theory of government speech is inconsistent with this Court's teaching in *Gerawan II* and has even been called into question by more recent U.S. Supreme Court precedent in *Walker v. Texas Division, Sons of*

Confederate Veterans, Inc. (2015) 135 S.Ct. 2239, 2248 [192 L.Ed.2d 274] and *Summum*, 555 U.S. at 473. Moreover, as an interpretation of the U.S. Constitution, not the California Constitution, *Johanns* is not binding precedent. Unlike the majority in *Johanns*, this Court should embrace the concept of attribution and conclude that in cases involving targeted assessments for generic advertising, the government speech doctrine does not apply unless the advertisements at issue can actually be attributed to the government by the listener. Such a standard comports with the democratic theory underlying the doctrine and is fully applicable under this Court's precedents governing the circumstances in which deviation from federal precedent is appropriate. *See People v. Teresinski* (1982) 30 Cal.3d 822, 836-37 [180 Cal.Rptr. 617, 640 P.2d 753].

A. *Johanns* Was An Unprecedented Expansion Of The Government Speech Doctrine.

The government speech doctrine exists to protect the government's ability to speak freely on matters affecting public policy. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically

transformed." *Keller v. State Bar of Cal.* (1990) 496 U.S. 1, 12-13 [110 S.Ct. 2228, 110 L.Ed.2d 1]. The U.S. Supreme Court's precedents identifying a First Amendment right to be free from compelled subsidies thus implicitly recognize the government speech doctrine as a limiting principle.

In *Board of Regents of University of Wisconsin System v. Southworth*, for example, the Supreme Court explained that "[i]t is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens." (2000) 529 U.S. 217, 229 [120 S.Ct. 1346, 146 L.Ed.2d 193]. The government speech doctrine protects such activities, according to the Court, so that "funds raised by the government [may] be spent for speech and other expression to advocate and defend its own policies." *Id.* Nonetheless, the First Amendment is always implicated when government forces an individual to subsidize the speech of another, particularly when it is speech with which the individual disagrees. *See Abood v. Detroit Bd. of Educ.* (1977) 431 U.S. 209, 234-36 [97 S.Ct. 1782, 52 L.Ed.2d 261].

Amicus does not dispute these fundamental tenets and applications of the government speech doctrine. In 2004, however, the U.S. Supreme Court extended the doctrine beyond its normal moorings to a new and problematic area: First Amendment challenges to targeted subsidy programs. Targeted assessment programs, also known as "check-off" programs, typically empower private industry boards or commissions to collect assessments from companies in an industry; the board then uses the assessments to subsidize generic advertisements on behalf of the entire industry. *See* Jennifer Williams Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That The Legal Battles Have Quieted*, 14 Drake J. Agric. L. 149, 150-51 (2009).

The Supreme Court first considered the constitutionality of targeted assessment programs in *Glickman v. Wileman Brothers & Elliott, Inc.*, and concluded that the particular program at issue did not give rise to a compelled speech violation under the First Amendment. (1997) 521 U.S. 457, 476-77 [117 S.Ct. 2130, 138 L.Ed.2d 585]. Four years later, in *United States v. United Foods, Inc.*, the Supreme Court considered another similar challenge to a targeted assessment system. (2001) 533 U.S. 405, 408 [121 S.Ct. 2334, 150 L.Ed.2d 438].

In *United Foods*, the Supreme Court clarified that such schemes *do* sometimes implicate First Amendment compelled speech principles. *Id.* at 411. The program at issue in *United Foods* unconstitutionally compelled speech, according to the Court, because its assessments "were [not] ancillary to a more comprehensive program restricting marketing autonomy," *id.*, and the advertising itself was the "principal object of the regulatory scheme," *id.* at 412.

The rule from *United Foods* quickly became the standard for adjudicating compelled subsidy/advertising cases in the lower federal courts. *See, e.g.*, *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 161-63 (6th Cir. 2003), judg. vacated (2005) 544 U.S. 1058 [125 S.Ct. 2511, 161 L.Ed.2d 1106]; *Delano Farms Co. v. Cal. Table Grape Comm'n* (9th Cir. 2003) 318 F.3d 895, 898. However, the Supreme Court upended this state of affairs when it decided *Johanns* in 2004. *Johanns* was a challenge to a targeted assessment scheme very similar to that in *United Foods*. *See Johanns*, 544 U.S. at 553-55. In a deeply divided decision, the Court upheld the assessments. *Id.* at 567. However, the *Johanns* court did not even reach the substantive First Amendment analysis prescribed by *United Foods*. Instead, it applied the government speech doctrine. *Id.* at 560-62.

The Court concluded that the subsidy scheme was immune from constitutional scrutiny entirely because the industry board at its center qualified as a government organ. *Id.* at 562. That was the case, according to the Court, because "the government set[] the overall message to be communicated and approve[ed] every word that is disseminated." *Id.* *Johanns* was the first, and to date the only instance in which the U.S. Supreme Court applied the government speech doctrine in a case involving targeted assessments.

B. *Johanns* Was Flawed And Disregarded The Importance Of Citizens Being Able To Attribute Speech To The Government.

The U.S. Supreme Court's decision in *Johanns* apparently rejecting the attribution theory should not be imported wholesale into this Court's interpretation of Article I of the California Constitution. It makes little sense to apply the government speech doctrine in a case involving targeted assessments where the speech at issue is not even recognized by listeners as attributable to the government, nor would listeners have any reason even to suspect that the government is the speaker. Doing so would contravene the very theory underlying the doctrine and threaten democratic accountability.

The government speech doctrine properly gives the government broad immunity from compelled speech challenges when the speech at issue is funded by general taxes levied on broad swaths of the population. However, situations in which the government funds speech by levying assessments on a small subset of citizens raise special concerns. The U.S. Constitution, and the Constitution of California, are skeptical of government actions that subject a minority of citizens to special hardship. *See* U.S. Const. art. I, § 9, cl. 3 (prohibiting bills of attainder); *Romer v. Evans* (1996) 517 U.S. 620, 633 [116 S.Ct. 1620, 134 L.Ed.2d 855]; *Berlinghieri v. Dep't of Motor Vehicles* (1983) 33 Cal.3d 392, 397 [188 Cal.Rptr. 891, 657 P.2d 383]. In the context of targeted assessments and generic advertising, "the particular interest[s] of those singled out to pay the tax are closely linked with the expression, and [those] who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say." *Johanns*, 544 U.S. at 575-76 (Souter, J., dissenting). When government singles out a small group of citizens to pay a special tax, it is thus especially important that the government be held accountable for its actions. Anything else risks majoritarian abuse.

In most cases, government may be held accountable for its decisions on how to tax and spend through the democratic process. The Court in *Board of Regents of University of Wisconsin System v. Southworth* explained that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." 529 U.S. at 235.

However, in the context of targeted assessments funding advertising, government can be held accountable through the political process *only if the public knows the government is the source of the advertisements*. If the public is not aware that government is the source of an advertisement, it is impossible for citizens to decide whether the advertisement, and the assessments that pay for it, are good public policy, and impossible for citizens to pressure elected representatives or vote them out of office accordingly. And the public will be aware only if advertisements are attributable—that is, if they make clear their governmental origin. *See Johanns*, 544 U.S. at 576-77 (Souter, J., dissenting).

Accordingly, in cases in which advertisements are attributable to the government, it may sometimes be appropriate for the government speech doctrine to shield the targeted assessment schemes that fund them. But in cases in which targeted assessment-funded advertisements are non-attributable, the government speech doctrine should not apply at all. If government cannot be held accountable through the democratic political process, then the only way to prevent unconstitutional overreach is to force the government to actually justify its decisions under a heightened scrutiny standard, rather than invoking the shield of the government speech doctrine. *See Reno v. Flores* (1993) 507 U.S. 292, 318 [113 S.Ct. 1439, 123 L.Ed.2d 1] (explaining that the purpose of heightened scrutiny is to "ensure[] that government acts in [a] sensitive area with the requisite care"). Failure to apply such scrutiny risks there being "no check whatever on the government's power to compel special speech subsidies." *Johanns*, 544 U.S. at 571 (Souter, J., dissenting).

Some have suggested that attributability should be relevant to the government speech doctrine only insofar as there is *mis*attribution of the messages at issue to the plaintiff who disagrees with the message. The majority in *Johanns* suggested in this vein that a party

challenging a targeted assessment scheme that paid for advertisements with which that party did not agree might escape the government speech doctrine if it could show that listeners were mistakenly attributing the advertisements to the party itself. *Johanns*, 433 U.S. at 565-66. That approach is misguided. An advertisement that is unattributable but not misattributed to anyone almost certainly would escape democratic censure. Voters would not know who to hold responsible for such an advertisement and, in all likelihood, would hold no one responsible. Meanwhile, the party subject to the assessments still would suffer harm by being forced to pay for speech with which it did not agree. *Cf. Keller*, 496 U.S. at 17.

C. California And Recent U.S. Supreme Court Precedent Show That Attributability Is An Important Component Of The Government Speech Doctrine Analysis.

This Court's own precedents and recent cases in the U.S. Supreme Court suggest that the majority in *Johanns* was wrong to overlook the attribution theory. The proper standard under the California Constitution's Article 1 free speech clause is to identify the attributability of the speech being challenged before invoking the government speech doctrine.

This Court has recognized that compelled subsidy programs are an area of law where California is especially protective of incursions on individual liberty. In *Gerawan I*—the California Supreme Court's first major case involving a targeted assessment scheme—this Court considered both First Amendment and Article 1 challenges to the program. *Gerawan I*, 24 Cal.4th at 475. Applying the then-prevailing pre-*United Foods* standard, this Court concluded that no First Amendment violation existed, but it broke with U.S. Supreme Court precedent and concluded that the program did implicate rights under the broader provisions of the California Constitution. *Id.* at 497, 509. The court "reject[ed] the *Glickman* majority's construction of the First Amendment's free speech clause as [its] construction of article 1's." *Id.* at 515; *see also Fashion Valley Mall, LLC v. NLRB* (2007) 42 Cal.4th 850, 862-63 [69 Cal.Rptr.3d 288, 172 P.3d 742] (explaining that in general "the California constitution . . . has always been a 'document of independent force and effect particularly in the area of individual liberties.'" (quoting *Gerawan I*, 24 Cal.4th at 489-90)).

Four years later, in *Gerawan II*, this Court provided explicit guidance on the nature of the government speech doctrine. In *Gerawan II*, the California Secretary of Agriculture argued that the

court should reject Gerawan Farming's compelled subsidy claim because the advertising at issue was government speech. *Gerawan II*, 33 Cal.4th at 26. In addressing this argument, this Court accepted that the doctrine might apply to Gerawan Farming's claim, but it concluded that additional fact-finding was required and remanded to the Court of Appeal. *Id.* at 27. The court then discussed the kinds of facts that would justify a decision to apply the government speech doctrine: "[1] whether the Secretary's approval of the marketing board's message is in fact pro forma, [2] whether the marketing board is in de facto control of the generic advertising program, and [3] *whether the speech is attributed to the government*." *Id.* at 28 (emphasis added).

Thus, in *Gerawan II*, this Court outlined a government speech test even more demanding than that in *Johanns*. *Johanns* and this Court insisted on actual, not merely formal control by the government over the advertisements at issue. *See Johanns*, 544 U.S. at 562; *Gerawan II*, 33 Cal.4th at 28. But where *Johanns* largely ignored the importance of the attributability of speech to the government, this Court identified it as a major factor in whether a targeted subsidy

program produces government speech. *See Johanns*, 544 U.S. at 565-66; *Gerawan II*, 33 Cal.4th at 28.

Since *Gerawan II* was decided, it has become a foundational case for adjudicating compelled subsidy claims under the California Constitution. *See Beeman v. Anthem Prescription Mgmt., LLC* (2013) 58 Cal.4th 329, 345-46 [165 Cal.Rptr.3d 800, 315 P.3d 71]; *Duarte Nursery, Inc. v. Cal. Grape Rootstock Improvement Comm'n* (2015) 239 Cal.App.4th 1000, 1010-11 [191 Cal.Rptr.3d 776]. Familiar principles of judicial restraint and respect for precedent dictate that the court continue to follow *Gerawan II* and its broader conception of the right of free speech under the California Constitution. *See People v. Garcia* (2006) 39 Cal.4th 1070, 1080 [48 Cal.Rptr.3d 75, 141 P.3d 197] (discussing principles of stare decisis in California law).

Such an approach is also supported by the fact that the U.S. Supreme Court itself appears to have backtracked from the position it originally took in *Johanns* and has reemphasized the attributability of speech as an important factor in cases involving the government speech doctrine. For example, in 2010, in *Summum*, the Court assessed whether monuments placed in a city park constituted government speech. 555 U.S. at 473. Although the Court referenced

the *Johanns* test, it concluded that the monuments at issue were government speech, in large part, because the city government had claimed them as its own. *Id.* ("The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park . . ."). Justice Stevens, in his concurrence, further observed that the U.S. Supreme Court's recent decisions relying on the government speech doctrine, such as *Johanns*, were of "doubtful merit." *Summum*, 555 U.S. at 481 (Stevens, J., concurring).

Even more recently, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court reiterated the importance of democratic accountability in justifying the government's protection from First Amendment scrutiny. 135 S. Ct. at 2245. In evaluating whether a vanity license plate constituted government speech, the Court in *Walker* emphasized attributability, stating that the license plates were government speech, in part, because the plates "are often closely identified in the public mind with the [State]," *Walker*, 135 S. Ct. at 2248 (quoting *Summum* 555 U.S. at 472), and "a person who displays a message on a . . . license plate

likely intends to convey to the public that the State has endorsed th[e] message," *id.* at 2249.

D. This Court is Not Bound By *Johanns* Or By Ninth Circuit Authority On The Federal Government Speech Doctrine.

In fashioning the California government speech doctrine, this Court need not be bound by either *Johanns* or by *Delano Farms Co. v. California Table Grape Commission* (9th Cir. 2009) 586 F.3d 1219, in which the Ninth Circuit applied the federal government speech doctrine to the TGC. Both of these cases apply federal law, not the California Constitution.

When interpreting provisions of the California Constitution that parallel the U.S. Constitution, this Court gives "respectful consideration" to U.S. Supreme Court precedent. *Teresinski*, 30 Cal.3d at 836. However, "[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution." *Gerawan I*, 24 Cal.4th at 490 (quoting Cal. Const. art. 1, § 24) (alterations in original). Deviation from federal precedent is appropriate where (1) "the language or history of the California provisions suggests that the issue . . . should be resolved differently than under the federal Constitution," (2) the high court has

"hand[ed] down a decision which limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion," (3) the parallel federal precedent was not unanimous or has been subject to academic criticism, or (4) following federal precedent would "overturn established California doctrine affording greater rights to the defendant." *Teresinski*, 30 Cal.3d at 836-37 (internal quotation marks omitted). Applying these factors compels the conclusion that the Court of Appeal erred in applying *Johanns* to Article 1 of the California Constitution.

First, the history of Article 1's free speech clause shows that it is more protective of individual liberty than the First Amendment. This Court has explicitly stated that Article 1 provides protections that the U.S. Constitution does not. Unlike the First Amendment, Article 1's free speech clause is "unlimited in scope" and "runs against the world," not just against state actors. *Gerawan I*, 24 Cal.4th at 492-93; *see also Comm. to Defend Reprod. Rights v. Myers* (1981) 29 Cal.3d 252, 293 [172 Cal.Rptr. 866, 625 P.2d 779] (noting that "[t]he California Constitution has traditionally embodied innovations and concerns for individual liberties"); *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n* (2001) 26 Cal.4th 1013, 1019 [111

Cal.Rptr.2d 336, 29 P.3d 797] (explaining that article I of the California Constitution is "more definitive and inclusive than the First Amendment . . .") (quoting *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658 [119 Cal.Rptr. 468, 532 P.2d 116]) (alteration in original). As the *Gerawan I* court indicated, the California Constitution was the product of a culture that presupposed "wide and unrestrained speech about economic [affairs] generally" and "'liberal, market-oriented, economic individualism.'" 24 Cal.4th at 495 (quoting David Alan Johnson, *Founding the Far West* 57 (1992)). In such a context, it is particularly important that the government speech doctrine's scope reflect its potential to cause a breakdown in the marketplace of ideas.

Second, *Johanns* was not unanimous and has been heavily criticized. The *Johanns* majority was joined by only five justices and provoked a strident dissent. Academic critics frequently have faulted the majority for failing to address Justice Souter's attribution argument. *See, e.g.*, Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 Denv. U. L. Rev. 899, 909 (2010) (characterizing the *Johanns* majority's failure to respond to Justice Souter's attribution argument as "the great unanswered question in the Court's government speech doctrine"); Gia B. Lee, *Persuasion,*

Transparency, and Government Speech, 56 Hastings L.J. 983, 991 (2005) (arguing that "government should not be able to assert [the government speech] defense unless it can show, at a minimum, that the reasonable recipient of the speech understands that speech to originate from the government").

Tellingly, lower federal courts often have read *Johanns* narrowly or ignored its apparent rejection of the concept of attribution to the government speech doctrine. For example, in *Choose Life Illinois, Inc. v. White*, the Seventh Circuit described the appropriate government speech test as whether "a reasonable person [would] consider the speaker to be the government or a private party." (7th Cir. 2008) 547 F.3d 853, 863; *see also Roach v. Stouffer* (8th Cir. 2009) 560 F.3d 860, 868.

Finally, applying *Johanns*' rejection of attribution in this case would, in fact, upset this Court's own precedents. In discussing the government speech doctrine, the *Gerawan I* court noted that it "does not appear to cover generic advertising under a federal marketing order, which is 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." *Gerawan I*, 24 Cal.4th at 503 n.8. And, as discussed above, *Gerawan II* identified attributability as a factor in whether the doctrine applies. 33 Cal.4th at 28.

II. The TGC Produces Non-Attributable Speech, Making Its Assessments On Appellants Suspect Under The California Constitution.

Under the guidelines set out in *Gerawan II*, the TGC's generic advertising program does not qualify for protection under the government speech doctrine. The TGC uses targeted assessments of grape growers to fund its advertisements, not general taxes. The assessments are substantial, often ranging in the hundreds of thousands of dollars per year for Petitioner Delano Farms. 13 CT 3108. And the TGC's generic advertisements hurt producers of specialty, high-quality grapes such as Petitioners because they suggest to the public that table grapes are a uniform product without differentiation. *See Delano Farms*, 586 F.3d at 1222.

There is no real dispute that the TGC's advertisements are not attributable to the State of California or the California Department of Food and Agriculture ("CDFA"). TGC magazine advertisements bear only a single marking suggesting their origin: a circular seal containing a bundle of grapes surrounded by the phrase "Grapes From

California." 2 CT 454-56. The advertisements make no mention of the government of the State of California. 2 CT 448-67. Many of the print ads also direct viewers to "www.grapesfromcalifornia.com," the TGC's website. 2 CT 454-56. As Petitioners noted in their opening brief, the URL for this website is .com—a commercial URL, not a government one. No reasonable person looking at one of the Commission's advertisements would associate it with the Government of California; the logical inference, rather, is that the advertisements are produced by a private association of grape growers.

The TGC's advertisements thus are exactly the kind of non-attributable speech that Justice Souter warned against. The TGC produces messages that to the average citizen would seem of unknown origin, and it does so by levying a substantial burden on a small subset of California citizens, including citizens such as Petitioners who are actually harmed by the message they are forced to subsidize. In this circumstance, there is no opportunity for the political process to correct course. *Cf. Johanns*, 544 U.S. at 577 (Souter, J., dissenting). California citizens lack the information to judge whether the TGC's advertisements are worth their cost, and, as the TGC assessments affect only a small subset of citizens, there is no built-in constituency

to educate the public. Moreover, the TGC's authorizing statute, the Ketchum Act of 1967, Cal. Food & Agric. Code § 65500, *et seq*, is nearly half-a-century old and is the product of political processes of a different era.

As Petitioners detailed in their briefing, the other elements of the government speech doctrine standard outlined in *Gerawan II* also work in their favor. The *Gerawan II* court explained that in addition to attribution, the locus of actual control of the disputed messages is crucial to whether they constitute government speech. *Gerawan II*, 33 Cal.4th at 28. For the government speech doctrine to apply to a targeted assessment program, the government must take an active role in the messages' content. *Id.* All indications are that the CDFA's control over the TGC is illusory. Although CDFA claims authority to "exercise exceptional review" of advertising, it apparently has never once exercised this authority. *Delano Farms*, 185 Cal. Rptr. at 779; *see Delano Farms*, 586 F.3d at 1229. The Secretary of Agriculture "does not attend [TGC] meetings and does not review advertising and promotional activities, nor does the State review the [TGC's] budgets." *Delano Farms*, 586 F.3d at 1229-30. CDFA's statutory authority appears even more circumscribed. Under the Ketchum Act,

CDFA may reverse the TGC's action pursuant to a grievance only if the TGC's action was an abuse of discretion, illegal, or lacked an adequate factual basis in the record. Cal. Food & Agric. Code § 65650.5. Thus, as Petitioners described, even if the speech could be attributed to the government by a listener (which it cannot), the government speech doctrine still would not be applicable here.

***

Extending the government speech doctrine to cases where the speech is not attributed to the government would double down on the Supreme Court's erroneous disregard of the importance of attribution in *Johanns* and contradict this Court's own precedents. This Court should find that speech cannot be government speech unless the listener can actually attribute that speech to the government. Because the TGC's speech cannot be attributed to the government, the Court should decline to invoke the government speech doctrine and instead apply the intermediate scrutiny test from *Central Hudson Gas & Electric Corp. v. Public Service Commission* (2004) 447 U.S. 557 [100 S.Ct. 2343, 65 L.Ed.2d 341], as mandated by *Gerawan II.*[1]

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[1] For the reasons set forth in Petitioners' opening brief, the TGC's assessment scheme does not survive the *Central Hudson* test.

CONCLUSION

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

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January 11, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court Rule 8.520(c)(1), I certify the following:

This brief contains 4,937 words, excluding the parts of the brief excluded under California Rules of Court Rule 8.520(c)(3).

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PROOF OF SERVICE

I declare that:

I am employed in the County of Los Angeles, California.

I am over the age of eighteen years and not a party to the within action; my business address is 633 W. 5th Street, Suite 3600, Los Angeles, CA 90071.

On January 11, 2016, I served a copy of the attached **APPLICATION OF DKT LIBERTY PROJECT FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER** 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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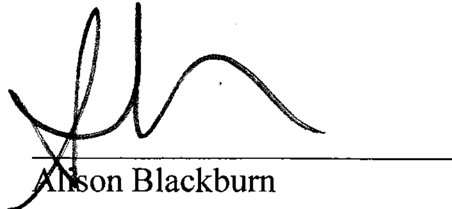
I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 11th day of January, 2016, at Los Angeles, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.



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