

**In the Supreme Court of the State of California**

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

Plaintiffs and Appellants,

v.

**CALIFORNIA TABLE GRAPE  
COMMISSION,**

Defendant and Respondent.

Case No. S226538

SUPREME COURT  
FILED

FEB 17 2016

Frank A. Molloy - Clerk

Fifth District Court of Appeal, Case No. F067956

Deputy

County Superior Court, Case Nos. 636636-3 (lead case), 642546,  
01CECG1127, 01CECG2292, 01CECG2289, and 11CECG0178

Hon. Donald S. Black, Judge

**APPLICATION OF THE CALIFORNIA DEPARTMENT OF  
FOOD AND AGRICULTURE FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF IN  
SUPPORT OF RESPONDENT**

KAMALA D. HARRIS  
Attorney General of California  
JANILL L. RICHARDS  
Acting Solicitor General  
MARK J. BRECKLER  
Chief Assistant Attorney General  
\*LINDA GÁNDARA  
Deputy Solicitor General  
ROBERT W. BYRNE  
Senior Assistant Attorney General  
RANDY L. BARROW  
Supervising Deputy Attorney General

KATHLEEN VERMAZEN RADEZ  
Associate Deputy Solicitor General  
ALI A. KARAOUNI  
Deputy Attorney General  
State Bar No. 194667  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550  
(916) 445-4853  
Linda Gandara@doj.ca.gov

*Attorneys for Amicus Curiae  
California Department of Food and  
Agriculture*

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## APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Department of Food and Agriculture respectfully requests leave to file the attached amicus curiae brief in support of respondent, the California Table Grape Commission.<sup>1</sup>

The California Department of Food and Agriculture is the state agency charged with protecting and promoting California's agricultural industry. (Food & Agr. Code, § 401.)<sup>2</sup> The Department's mission is to promote a safe, healthy food supply, and to enhance agricultural trade. (CDFA, Mission Statement.)<sup>3</sup> As part of its charge, the Department oversees 52 agricultural marketing programs administered by California agricultural advisory boards, commissions, and councils.<sup>4</sup> These marketing programs are funded by assessments paid by the regulated industry, and most administer educational and promotional programs designed to increase demand for specific commodities. The California Table Grape Commission administers one of the largest of these marketing programs. In 2013, the table grape crop alone was valued at \$1.5 billion. (USDA, California Agricultural Statistics 2013 Crop Year, p. 52 (April 2015))

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<sup>1</sup> No party or counsel for any party in the pending case authored any portion of the proposed amicus curiae brief, or contributed financially to the preparation of the brief.

<sup>2</sup> Statutory references are to the Food and Agricultural Code unless otherwise indicated.

<sup>3</sup> Available at <<https://www.cdfa.ca.gov/CDFA-Mission.html>> [as of Feb. 5, 2016].

<sup>4</sup> The Department uses the term "oversee" to refer generally to the relationships between the Department and each of these various entities, which are set forth in statute.



(hereafter USDA 2013 Report).)<sup>5</sup> These programs play a major role in assisting the Department to protect and promote California agriculture, in part through programs aimed at maintaining present markets and developing new or larger markets for California’s agricultural products. Collectively, the programs cover approximately 67 percent of the State’s agricultural commodities by value. (CDFA, California Marketing Programs, p. 2 [“In 2013, the farmgate value of traditionally tracked agricultural commodities covered by State marketing Programs was approximately \$31 billion; representing 67% of California’s \$46 billion agricultural industry”].)<sup>6</sup>

The Department’s ability to achieve its mission relies in part on the efforts of the State’s agricultural advisory boards, commissions, and councils and their continued ability to assist the industry through commodity-specific research, educational, and promotional programs. While this case focuses on the authority of the California Table Grape Commission, the legal principles established may also apply to other marketing programs, to the extent their authorizing legislation, purpose and function, and messages are similar. Several of these programs have already faced free-speech challenges. The Department expects that the Court’s decision regarding the scope of government speech in this case may be cited in future challenges to programs overseen by the Department.

The Department has direct experience with the regulatory role played by California’s marketing boards, commissions, and councils, such as the

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<sup>5</sup> Available at <[https://www.cdfa.ca.gov/Statistics/PDFs/CropYearStats2013\\_NASS.pdf](https://www.cdfa.ca.gov/Statistics/PDFs/CropYearStats2013_NASS.pdf)> [as of Feb. 5, 2016].

<sup>6</sup> Available at <[https://www.cdfa.ca.gov/mkt/mkt/pdf/ABOUT\\_MARKETING\\_PROGRAMS.pdf](https://www.cdfa.ca.gov/mkt/mkt/pdf/ABOUT_MARKETING_PROGRAMS.pdf)> [as of Feb. 5, 2016].

Table Grape Commission, and the goals, operations, and effectiveness of their programs. In addition, the Department has been party to a substantial portion of the state and federal litigation in this area, and thus understands how the law has evolved and how a ruling in this case may affect California's regulatory structure. The proposed brief reflects the Department's particular expertise and knowledge, providing additional background on the "boom and bust" challenges facing the State's agricultural industry; describing how the Legislature addressed these challenges through a variety of commodity-specific, generic marketing programs; and providing additional analysis supporting the view that the Commission's message—"buy California table grapes"—and similar, legislatively mandated marketing messages constitute government speech.

Dated: February 5, 2016

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
JANILL L. RICHARDS  
Acting Solicitor General  
MARK J. BRECKLER  
Chief Assistant Attorney General  
ROBERT W. BYRNE  
Senior Assistant Attorney General  
RANDY L. BARROW  
Supervising Deputy Attorney General  
KATHLEEN VERMAZEN RADEZ  
Associate Deputy Solicitor General  
ALI A. KARAOUNI  
Deputy Attorney General



LINDA GÁNDARA  
Deputy Solicitor General  
*Attorneys for Amicus Curiae*  
*California Department of Food and*  
*Agriculture*

## **BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

The Department agrees with the Commission that this Court should affirm the decision of the Court of Appeal upholding the constitutionality of the California Table Grape Commission's marketing program against a free-speech challenge. The Department writes separately to address three topics. First, this brief discusses the importance of agriculture to California and the unique challenges this "boom and bust" industry faces. Second, it explains the vital role California's diverse agricultural marketing programs play in addressing these challenges by delivering the Legislature's programmatic message encouraging consumption of California's agricultural products. Third, it provides additional analysis supporting the view that the Commission's marketing activities constitute government speech both because the Commission is a government entity, and because its expressive activities are limited to conveying the Legislature's defined, public policy-based message. Either of these bases is sufficient to satisfy the government speech doctrine as defined by this Court and the United States Supreme Court.

### **I. LEFT UNADDRESSED, AGRICULTURE'S DESTABILIZING "BOOM AND BUST" CYCLES COULD PUT THE STATE'S INTERESTS AND ECONOMY AT RISK**

California leads the nation in agricultural production. (USDA, Economic Research Service, FAQs.)<sup>7</sup> California produces more than 400 commodities, including more than one-third of U.S.-grown vegetables, and two-thirds of this country's fruits and nuts. (CDFA, California Agricultural

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<sup>7</sup> Available at <<http://ers.usda.gov/faqs.aspx#10>> [as of Feb. 5, 2016].

Production Statistics.)<sup>8</sup> California is the leading domestic producer of 82 different crop and livestock commodities and is the sole domestic producer of several products, including almonds, artichokes, raisins, pomegranates, and walnuts. (USDA 2013 Report, *supra*, at p. 2.) California also leads the nation in agricultural exports, valued at more than \$21.59 billion in 2014. (CDFA, California Agricultural Statistics Review 2014-2015, p. 7.)<sup>9</sup> In all, California's 76,400 farms and ranches received approximately \$54 billion for their output in 2014. (CDFA, California Agricultural Production Statistics, *supra*.)<sup>10</sup>

It is thus not surprising that the Legislature has described agriculture as California's "most vital industry." (*Hess Collection Winery v. California Agr. Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1591, quoting Stats. 2002, ch. 1145, § 1.) California's agricultural industries are critically important to the State's economy. (§ 63901.) But the industry's importance extends beyond its financial contributions. A healthy and productive agricultural economy is necessary to ensure that domestic farms are able to produce an adequate food supply for the State's citizens. (Gov. Code, § 51220, subd. (a); see also Looney, *The Changing Focus of Government Regulation of Agriculture in the United States* (1993) 44 Mercer L.Rev. 763, 773 (hereafter Looney).)

Agricultural production, however, is subject to biological processes, such as weather conditions and pests, that cannot be controlled by farmers.

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<sup>8</sup> Available at <<https://www.cdfa.ca.gov/statistics/>> [as of Feb. 5, 2016].

<sup>9</sup> Available at <<https://www.cdfa.ca.gov/statistics/PDFs/2015Report.pdf>> [as of Feb. 5, 2016].

<sup>10</sup> Available at <<https://www.cdfa.ca.gov/statistics/>> [as of Feb. 5, 2016].

(Looney, *supra*, 44 Mercer L.Rev. at pp. 767-768.) Additionally, many crops must be planted years before they will be productive. (See, e.g., *Duarte Nursery Inc. v. California Grape Rootstock Com.* (2015) 239 Cal.App.4th 1000, 1005 [grapevines].) When prices are high, farmers tend to invest to meet the demand, increasing future supply. Eventually, this excess supply creates a market glut and drives down prices, sometimes to a level that falls below the cost of production. (Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm"* (2000) 5 Drake J. Agric. L. 3, 5-7 (hereafter Lauck).) The result is market instability and "boom and bust" pricing cycles. (Looney, *supra*, 44 Mercer L.Rev. at p. 767; Lauck, *supra*, 5 Drake J. Agric. L. at pp. 6-7.

The ability of California's farmers to respond to market fluctuations on their own, without government intervention, is limited for a number of reasons. For example, the industry is still largely decentralized. (Coley, *Economic Factors Associated with the Growth and Development of Agricultural Cooperatives* (2000) 10 San Joaquin Agric. L. Rev. 7, 15 (hereafter Coley).) Agriculture is made up of widely dispersed small producers who, acting in isolation, cannot have a significant effect on the market. (Looney, *supra*, 44 Mercer L.Rev. at p. 767; see also § 63901, subd. (c) [recognizing that California agriculture is "decentralized with many small entities operating in diverse locations"].) In 2013, there were approximately 77,900 farms in California, averaging 327 acres each. (USDA 2013 Report, *supra*, at p. 2; see also CDFA, California Agricultural Production Statistics, *supra* [number of California farms was 76,400 in

2014].) Ninety-three percent of these farms are family owned. (USDA, 2012 Census of Agriculture Highlights, p. 1.)<sup>11</sup>

In addition, many categories of commodities are viewed by consumers as being substantially similar—giving buyers many choices—and these commodities are often perishable—providing little time for farmers to search for the highest market prices. These circumstances create uneven bargaining power between the farmers and the middlemen to whom they sell, leaving farmers at the mercy of the small number of buyers. (Shimomura, *A New Look at the California Marketing Act of 1937* (1972) 5 U.C. Davis L.Rev. 190, 194 (hereafter Shimomura); Lauck, *supra*, 5 Drake J. Agric. L. at p. 8.) “It is folly to suggest to the farmer with a carload of cattle on the market to ‘take them home’ or to ‘haul back his load of wheat’ or other commodity.” (*Nat. Broiler Marketing Assn. v. United States* (1977) 436 U.S. 816, 840 (dis. opn. of White, J.), quoting 59 Cong. Rec. 7856 (1920).) As a result, farmers must take—and cannot make—market prices, receiving lower prices than they would if bargaining power were more equal. (Coley, *supra*, 10 San Joaquin L.Rev. at p. 15; Lauck, *supra*, 5 Drake J. Agric. L. at p. 8; see also Forker and Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* (1993) p. 7.) At least one commentator has theorized that, in light of this unequal bargaining power, “[i]t is only through concerted marketing efforts that the state’s independent farmers will be able to preserve a role for the small but efficient farming unit within California agriculture.” (Shimomura, *supra*, 5 U.C. Davis L.Rev. at p. 195.)

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<sup>11</sup> Available at <[http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Highlights/NASS%20Family%20Farmer/Family\\_Farms\\_Highlights.pdf](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/NASS%20Family%20Farmer/Family_Farms_Highlights.pdf)> [as of Feb. 5, 2016].

Advances in technology have not eliminated the need for a programmatic solution to market fluctuations; instead, they have in some circumstances created a “technological treadmill” that exacerbates the boom-and-bust cycles faced by farmers. (Lauck, *supra*, 5 Drake J. Agric. L. at p. 5.) “Unlike other industries, where firms and their productive capacity exit the market when prices decline, farms continue to produce commodities, further depressing prices.” (*Id.* at p. 6.) Farmers have turned to new technologies to increase yields in an effort to make up for lower prices caused by increased supply. (*Id.* at pp. 5-6.) Increased supply then drives down the price of the product to the point where the farmers who adopted the new technology are back in a “no profit” situation. (*Id.* at p. 5, fn. 12; see also Farnese, *Remembering the Farmer in the Agriculture Policy and Obesity Debate* (2010) 65 Food & Drug L.J. 391, 393; Looney, *supra*, 44 Mercer L. Rev. at pp. 767-768.)

It is against this backdrop that the Legislature created, and has repeatedly reaffirmed the need for, the State’s agricultural marketing programs.

## **II. THE LEGISLATURE RESPONDED TO THE CHALLENGES FACING AGRICULTURE BY CREATING AGRICULTURAL MARKETING PROGRAMS**

The actions of the state Legislature “reflect a long-standing political judgment that ‘agriculture’—unlike bicycle manufacturing or clothing production, for example—cannot be allowed to disappear from the American economy because of untrammelled market forces.” (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 524 (*Gerawan I*) (dis. opn. of George, C.J.); see also *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 7 (*Gerawan II*)). The Legislature thus has developed a wide array of marketing programs to address the challenges facing California agriculture, in part by increasing demand through promotion. (§§ 58654,

subd. (d); 63901.3, subd. (e).) While these programs take many forms, all are designed to promote California agriculture by developing more efficient means of producing and marketing California commodities and respond to the challenges outlined above.

**A. Agricultural Marketing Programs Help Maintain Present Markets and Create New and Larger Markets for California Commodities**

California's agricultural marketing programs grew out of the chaotic conditions in California agriculture in the early twentieth century. (*Gerawan II, supra*, 33 Cal.4th at p. 7.) Small growers were competing in unstable and fluctuating markets, struggling to sell their products at prices that would cover at least their production costs. (*Shimomura, supra*, 5 U.C. Davis L.Rev. at p. 197.) This unregulated scramble gave rise to destructive trade practices that injured the market in the long run by reducing consumer acceptance of California produce. (*Gerawan II, supra*, 33 Cal.4th at p. 7; *Shimomura, supra*, at p. 197.)

Recognizing that governmental intervention was necessary to stabilize agriculture, the California Legislature passed the California Marketing Act of 1937. (§§ 58601 et seq.; Stats. 1937, ch. 404, § 1, p. 1329.) The Marketing Act authorizes the Secretary of the Department of Food and Agriculture to issue marketing orders—regulations—governing specific agricultural commodities. (§ 58741.) These marketing orders may cover a wide range of regulatory subjects, including volume, grade, size, and quality controls. (Stats. 1937, ch. 404, §1, pp. 1334-1335, [enacting former Agric. Code, § 1300.14(b)(2)-(6)]; see also §§ 58881-58897 [listing provisions that may be contained in marketing orders].) From its inception, the Marketing Act also provided for “the establishment of plans for advertising and sales promotion to create new or larger markets for agricultural commodities grown in the State of California.” (Stats. 1937,



ch. 404, § 1, p. 1335 [enacting former Agric. Code, § 1300.14(b)(7)]; see § 58889; see also *Gerawan II*, 33 Cal.4th at p. 8.)

The Legislature has recognized the continuing need for these programs. Since the 1930's, the Legislature has repeatedly reaffirmed the importance of generic commodity marketing programs and expanded the range of mechanisms that can be employed to address the evolving challenges facing agriculture. (§§ 63901, 63901.3 [findings and declaration reaffirming importance of marketing programs]; *People ex rel. Ross v. Raisin Valley Farms LLC* (2015) 240 Cal.App.4th 1254, 1258 (*Raisin Valley Farms*) [noting amendments to expand authority under the Marketing Act].) The Legislature has also developed new administrative structures for these programs, creating numerous commissions and councils. (*Raisin Valley Farms, supra*, 240 Cal.App.4th at p. 1266.)

#### **B. Agricultural Marketing Programs Operate Through a Variety of Means**

As noted, within this legislative framework, the Department currently oversees 52 marketing programs covering approximately 67 percent of the agricultural goods produced in California. (CDFA, California Marketing Programs, *supra*, at p. 2.) The administrative structures of these programs vary by industry and, as explained below, fall into three categories: advisory boards created pursuant to the Marketing Act, commissions, and councils. Together, these marketing programs assist the Department by stabilizing California agriculture through research and promotion. (See §§ 58654, subd. (d) [purposes of the Marketing Act include developing and maintaining markets for California agricultural products], 63901.3, subd. (e) [commissions' and councils' promotional programs stabilize "the flow of product to market through promotion"].)

## 1. Advisory Boards and Marketing Orders

The Department currently administers 27 marketing orders created pursuant to the Marketing Act.<sup>12</sup> These marketing orders range from large promotional programs, such as the California Milk Advisory Board's "Happy Cows" promotional campaign, to smaller research programs, such as the Garlic and Onion Research Program. (CDFA, Marketing Orders, Agreements, Councils and Commission Laws;<sup>13</sup> see also *People for the Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Bd.* (2005) 125 Cal.App.4th 871, 875 [describing program administered by the California Milk Advisory Board].)

Marketing orders are administered by advisory boards composed of industry members. The board members are appointed by, and serve at the pleasure of, the Department's Secretary. (§ 58841.) The boards are advisory only and have no powers independent of the Department. (§§ 58845-58846.) They recommend programs to the Department, and administer these programs subject to the Department's approval. (§§ 58845-58846; see also *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 954-955 [discussing oversight of the Marketing Order program administered by the California Milk Advisory Board].)

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<sup>12</sup> The Marketing Act also authorizes the Department to issue marketing agreements. Marketing agreements are voluntary programs that bind only those industry members who sign on to the agreement. (§§ 58745, 58750.) The Department currently oversees three marketing agreements: the Buy California Marketing Agreement, the Leafy Green Products Handler Marketing Agreement, and the Winegrape Inspection Marketing Agreement. (CDFA, Marketing Orders, Agreements, Councils and Commission Laws, available at <<https://www.cdfa.ca.gov/mkt/mkt/ordslaws.html>> [as of Feb. 5, 2016].)

<sup>13</sup> Available at <<https://www.cdfa.ca.gov/mkt/mkt/ordslaws.html>> [as of Feb. 5, 2016].

## 2. Commissions

There are 19 agricultural commissions in California, including the California Table Grape Commission. The Legislature created these commissions through commodity-specific legislation. (*Raisin Valley Farms, supra*, 240 Cal.App.4th at p. 1266; see also, e.g., §§ 65500 et seq. [Table Grape Commission], 67051 et seq. [Avocado Commission], 77401 et seq. [Strawberry Commission].) Unlike marketing order advisory boards, commissions are not part of the Department, but are instead separate government entities. (See, e.g., §§ 65550-65551 [Table Grape Commission], 77441 [Strawberry Commission].) However, the Department hears all appeals of grievances against commissions. (See, e.g., §§ 65650.5 [Table Grape Commission]; 67112 [Avocado Commission], 77172 [Walnut Commission].)

The purpose and function of the commissions vary according to the laws that created them. For example, the California Table Grape Commission is authorized to promote the sale of fresh grapes through advertising and dissemination of information regarding the varieties of grapes and their health benefits. (§§ 65500, subd. (f), 65572, subds. (h)-(i).) In contrast, the California Grape Rootstock Commission was created for the narrow purpose of funding research regarding pest-resistant and drought-resistant grape rootstock. (§§ 74702.5, 74761 [Grape Rootstock Improvement Commission]; see also *Duarte Nursery, supra*, 239 Cal.App.4th at pp. 1002-1003 [describing purpose of Grape Rootstock Improvement Commission's research].)

The Legislature provided the Department with a range of mechanisms for overseeing commissions. As discussed in the Table Grape Commission's brief, the Department has two primary mechanisms to oversee the activities of that Commission. (Answer Br. at 37-47.) First, as with all commissions, the Department has authority to review the

Commission's activities through the appeals process. (§ 65650.5.) Second, the Department has authority over the Commission through its statutory power to appoint the Commission members. (§ 65550.)

In contrast, the Department does not appoint the members of the remaining 18 commissions. Nonetheless, it has a range of other mechanisms to oversee these entities. The mechanisms include the Department's authority to suspend or discharge the executive officers of many commissions if the Department finds that these officers have engaged in any conduct that is not in the public interest. (See, e.g., §§ 75585 [Apple Commission], 78249 [Asparagus Commission].) The Department also has the authority to order these commissions to cease and desist any activity that is not in the public interest or that is inconsistent with their statutory authority. (See, e.g., §§ 67051.5 [Avocado Commission], 72052 [Wheat Commission].) And commissions are generally required to submit to the Department annual statements of contemplated activities and annual budgets, both of which require the Department's approval. (See, e.g., §§ 71087, 71088 [Rice Commission], 74765, 74766 [Grape Rootstock Improvement Commission], 75596, 75997 [Apple Commission], 79251, subs. (o)-(p) [Blueberry Commission].)

In short, while the precise mechanisms vary, all commissions are subject to oversight.

### **3. : Councils**

The Department also oversees three councils: the Dairy Council, the Beef Council, and the Salmon Council. As with the boards that administer marketing orders, the councils engage in research, education, and promotion. (§§ 64181-64183 [Dairy Council], 64661-64663 [Beef Council], 76800-76802 [Salmon Council].) Like the boards, the councils lack statutory authority to independently design and carry out their

programs. Instead, councils make recommendations to the Department regarding research, education, and promotion programs for their respective commodities, and administer those programs subject to the Department's approval. (§§ 64151-64154 [Dairy Council], 64631 [Beef Council], 64661 [same], 76750 [Salmon Council].)

### **C. Agricultural Marketing Programs Deliver Legislatively Established Messages**

The Legislature has declared that California's marketing programs are intended to "[e]nhance the image of California agricultural . . . products to increase the overall demand for these commodities." (§ 63901, subd. (e).) Thus, these programs are intended to be a form of "[d]emand-side regulation that stabilizes the flow of product to market through promotion." (§ 63901.3, subd. (e).) The power of boards, commissions, and councils to speak in the marketplace is constrained by these purposes. (See Conf. Com. Leg. Report, Conc. in Sen. Amend. (2001-2002 Reg. Sess.) (AB 1612), as amended Sept. 7, 2001, p. 2 [stating that "the purpose of the amendments are to reflect that commissions and councils are operating under governmental authority, and therefor, their speech and actions are based upon that governmental authority"].) For example, promotional plans under the Marketing Act are authorized only to "maintain present markets," "create new or larger markets," or address "trade barriers that obstruct the free flow of any commodity to market." (§ 58889, subd. (a).) The programs are generic, meaning that they may not make reference to "any private brand or trade name that is used by any handler," and they may not make "false or unwarranted claims," or "disparage[] the quality, value, sale, or use of any other commodity." (*Id.*, subds. (b), (d).)

The commissions and councils, too, are subject to the specific purposes and powers set forth by the Legislature, which created these entities to "[i]mplement public policy through their expressive conduct."

(§ 63901.) The Commission’s brief addresses the powers and limitations of that entity. (Answer Br. at 34-47.) Other commissions and councils are similarly constrained. (See, e.g., §§ 64661 [setting forth the purposes of the Beef Council], 64662 [prohibiting certain promotional activities by the Beef Council], 67001-67003 [setting out legislative findings relating to the Avocado Commission], § 67091 [specifying the powers of the Avocado Commission].)

### **III. THE CALIFORNIA TABLE GRAPE COMMISSION’S MARKETING PROGRAM IS CONSTITUTIONAL GOVERNMENT SPEECH**

#### **A. The Commission’s Program Is Government Speech Both Because the Commission Is a Government Entity and Because It Conveys a Legislatively Established Message**

Delano Farms does not dispute that the government can use funds obtained through fees, taxes, and assessments to convey the government’s own message without violating the free-speech rights of the fee payer. Indeed, if the government could not speak in this way, it could not govern. “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 California* (1990) 496 U.S. 1, 12-13) The only question is whether the Commission’s promotional activities—its call to consumers to buy California table grapes—constitutes government speech.

There are two independent bases upon which an agricultural marketing program can be considered speech of the government. First, if the promoting speaker is itself a governmental entity, its speech is government speech. (*Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, 467-468 [“a government entity has the right to ‘speak for itself’”

and it may “select the views that it wants to express”].) Second, the government may enlist a private speaker to communicate the government’s own promotional message and retain effective control over that message. (*Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, 560-561; see also *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 833 [“we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message”].)

In this case, the Commission’s program is government speech for two separate reasons, each of which is sufficient on its own.

As discussed in the Commission’s brief, the Commission itself is a legislatively created government entity. (Answer Br. at 23-34; see also §§ 65550-65551; *Delano Farms Co. v. California Table Grape Com.* (9th Cir. 2009) 586 F.3d 1219, 1223.) Furthermore, the Commission is authorized to and does convey only the government’s own, legislatively prescribed promotional message. (See, e.g., §§ 65500, subd. (f), 65572, subd. (h) [setting out Commission’s overarching message].) The Legislature has oversight mechanisms in place to ensure that the Commission continues to express only the overarching message set out by the Legislature. (Answer Br. at 37-47.)<sup>14</sup> That is the end of the inquiry;

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<sup>14</sup> *Delano Farms* does not complain that the Commission operated in excess of its statutory authority or that any of its promotional activities contradicted the programmatic message defined by the Legislature. In any event, any such objection to the administration of a marketing program should be addressed to the Secretary for correction; any failure in administration would not call into question “the validity of the entire program.” (*Glickman v. Wileman Bros. & Elliot, Inc.* (1997) 521 U.S. 457, 467-468 & fn. 11; see also § 65650.5 [mechanism for challenging marketing activity].)

there is no constitutional right not to fund government speech. (*Johanns, supra*, 544 U.S. at p. 562.)

**B. *Gerawan II* Did Not Impose Additional State Constitutional Requirements for Government Speech**

Delano Farms argues that this Court's 2004 decision in *Gerawan II* imposed additional state constitutional requirements before a program is deemed to be government speech. (Reply Br. at 4-23.) Petitioners misread *Gerawan II*, which was decided before the United States Supreme Court clarified the law as applied to agricultural marketing programs in *Johanns*.

In *Gerawan II*, this Court analyzed whether a plum grower's federal and state constitutional challenge to a marketing order could be decided on the pleadings. (*Gerawan II, supra*, 33 Cal.4th at pp. 6-7.) The Court held that it could not. (*Id.* at pp. 24, 28.) It further held, among other things, that the Department on remand must have the opportunity to establish that the marketing order was government speech. (*Id.* at pp. 26-28.) The law on government speech was at that time in flux. Approximately 15 years previously, in *Keller v. State Bar* (1989) 47 Cal.3d 1152, the Court concluded that, because the State Bar was a government entity, its speech was government speech and therefore immune from a compelled speech challenge. (*Id.* at pp. 1167-1169, revd. on federal law grounds (1990) 496 U.S. 1.) The United States Supreme Court, however, reversed the decision, holding that the Bar was not a governmental entity for First Amendment purposes. (*Keller, supra*, 496 U.S. at pp. 11-12, 17; see also *Johanns, supra*, 544 U.S. at pp. 561-562 [distinguishing bar associations from agricultural marketing boards and commissions because their speech is not "prescribed by law in their general outline and not developed under official government supervision"].) The *Gerawan II* Court therefore looked to U.S. Supreme Court dictum for guidance, concluding that "as *United Foods* suggests, the 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, supra*, 33 Cal.4th at p. 28, discussing *United States v. United Foods, Inc.* (2001) 533 U.S. 405, 417.) The *Gerawan II* Court also noted some of the factors discussed in the federal decisions that had considered whether federal marketing programs expressed government speech. (*Id.* at pp. 27-28.) Explaining that factors such as the degree of control exercised by the Secretary and whether the speech is attributed to the government, *may* be determinative of whether the plum marketing program was government speech, the Court in *Gerawan II* remanded the issue for further factual development. (*Id.* at p. 28.) But in doing so, this Court did not state that it was setting out a definitive test for determining when a program is government speech. (*Id.*)

In *Johanns*, the United States Supreme Court clarified the law regarding government speech that was left open at the time *Gerawan II* was decided. As discussed above, under *Johanns*, a generic marketing program is government speech if it is carried out by the government, or if the message is controlled by the government. (*Johanns, supra*, 544 U.S. at pp. 559, 561.) Because the Commission is a government entity, and because its program conveys the government’s programmatic message in furtherance of the State’s public policy goals, subject to Department oversight, its generic marketing program is government speech.

**C. There Is No Additional Constitutional Requirement That Speech Be Expressly Attributed to the Government to Constitute Government Speech**

Although Delano Farms acknowledges that state constitutional law is consistent with the rule of *Johanns*, it asks this Court to limit the application of the government speech doctrine to speech that is explicitly attributed to the government. (Opening Br. at p. 25.) This requirement was

expressly rejected by *Johanns*, and there is no basis for adopting it as an additional requirement under California law. (*Johanns, supra*, 544 U.S. at pp. 564-565 & fn. 7.)

Delano Farms argues that a more recent case, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015) \_\_ U.S. \_\_, 135 S.Ct. 2239 (*Walker*), imposes an express attribution requirement. (Opening Br. at p. 26, citing *Walker, supra*, 135 S.Ct. 2239.) It misreads this case. *Walker* does not involve the question of whether a market promotion message dictated by the Legislature is government speech. Instead, *Walker* addressed whether Texas could refuse to place messages proposed by a private party on specialty license plates based on the content of those messages. (*Walker, supra*, 135 S.Ct. at pp. 2243-2245.) The *Walker* court determined that the State's review and approval of the messages on the license plates, and the fact that the plates were associated with the government, transformed what were originally private messages into government speech. (*Id.* at pp. 2248-2249.)

This case, by contrast, does not present the question of whether a *private* message has been transformed into government speech through governmental approval. Instead, the Commission's marketing message—its speech—is set out by the Legislature and developed and delivered by a government entity. Because the Commission is conveying a programmatic message dictated by the Legislature, *Johanns* is controlling and express attribution to the government is not required.

## CONCLUSION

The Department respectfully requests that this Court affirm the judgment of the Court of Appeal.

Dated: February 5, 2016

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
JANILL L. RICHARDS  
Acting Solicitor General  
MARK J. BRECKLER  
Chief Assistant Attorney General  
ROBERT W. BYRNE  
Senior Assistant Attorney General  
RANDY L. BARROW  
Supervising Deputy Attorney General  
KATHLEEN VERMAZEN RADEZ  
Associate Deputy Solicitor General  
ALI A. KARAOUNI  
Deputy Attorney General



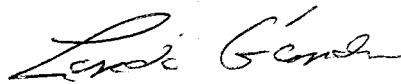
LINDA GÁNDARA  
Deputy Solicitor General  
*Attorneys for Amicus Curiae  
California Department of Food and  
Agriculture*

**CERTIFICATE OF COMPLIANCE**

I certify that the attached Application of the California Department of Food and Agriculture for Leave to File Amicus Curiae Brief and [Proposed] Amicus Curiae Brief In Support Of Respondent uses a 13 point Times New Roman font and contains 4,637 words.

Dated: February 5, 2016

KAMALA D. HARRIS  
Attorney General of California



LINDA GÁNDARA  
Deputy Solicitor General  
*Attorneys for Amicus Curiae  
California Department of Food and  
Agriculture*

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: *Delano Farms Company, Four Star Fruit, Inc., Gerawan Farming, Inc., Bidart Bros., and Blanc Vineyards v. California Table Grape Commission*

Case No.: California Supreme Court No. S226538  
Court of Appeal, Fifth Appellate District, No. F067956  
Fresno County Superior Court, No. 666636-3

I declare:

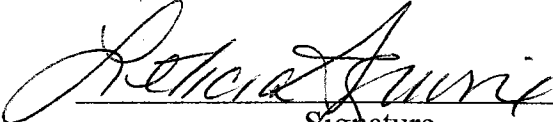
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 5, 2016, I served the attached **APPLICATION OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 5, 2016, at Sacramento, California.

Leticia Aguirre  
Declarant

  
Signature

## SERVICE LIST

Brian C. Leighton  
Attorney at Law  
701 Pollasky Avenue  
Clovis, CA 93612  
*Attorneys for Plaintiff and Appellant*

Howard A. Sagaser  
SAGASER & ASSOCIATES  
7550 N. Palm Avenue, Suite 201  
Fresno, CA 93711  
*Co-Counsel for Plaintiff and Appellant*

Seth P. Waxman  
WILMER CUTLER PICKERING HALE  
and DORR LLP  
1875 Pennsylvania Avenue, N.W.  
Washington D.C. 20006  
*Counsel for Defendant/Respondent California  
Table Grape Commission*

Bradley A. Benbrook  
Stephen M. Duvernay  
BENBROOK LAW GROUP LLC  
400 Capitol Mall, Suite 1610  
Sacramento, CA 95814  
*Attorneys for Amici Curiae, The Cato Institute,  
Institute for Justice, Reason Foundation*

COURTESY COPY:  
Clerk of the Court  
Court of Appeal, Fifth Appellate District  
2424 Ventura Street  
Fresno, CA 93721  
*Appellate Court*

Michael W. McConnell\*  
KIRKLAND & ELLIS LLP  
665 15<sup>th</sup> Street, N.W #1200  
Washington D.C. 20005  
*Attorneys for Plaintiffs and Petitioners*  
\*Admitted *Pro hac vice*

Danielle R. Sassoon\*  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, NY 10022  
*Attorneys for Plaintiffs and Petitioners*  
\*Admitted *Pro hac vice*

Robert Wilkinson  
BAKER, MANOCK & JENSEN  
5260 N. Palm Avenue, 4<sup>th</sup> Floor  
Fresno, CA 93704  
*Co-Counsel for Defendant/Respondent  
California Table Grape Commission*

Rick Richmond  
JENNER & BLOCK LLP  
633 West 5<sup>th</sup> Street, Suite 3600  
Los Angeles, CA 90071

Jessica Ring Amunson\*  
Samuel C. Birnbaum\*+  
JENNER & BLOCK LLP  
1099 New York Avenue., NW, Suite 900  
Washington, DC 20001

\**Pro hac vice* motions pending  
+Not admitted in Washington, DC.  
Practicing under the supervision of the  
partnership of Jenner & Block LLP

*Attorneys for Amicus curiae, DKT Liberty  
Project*

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