

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

JUL 17 2017

Jorge Navarrete Clerk

Deputy

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

**SUPPLEMENTAL BRIEF OF PETITIONERS PURSUANT TO
RULE 8.520(d)**

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TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
DISCUSSION	2
CONCLUSION.....	5

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Delano Farms v. California Table Grape Commission</i> (9th Cir. 2009) 586 F.3d 1219	4
<i>Johanns v. Livestock Marketing Association</i> (2005) 544 U.S. 550.....	1, 3, 4
<i>Ranchers-Cattlemen Action Legal Fund v. Perdue,</i> No. CV 16-41-GF-BMM, 2017 WL 2671072 (D. Mont. June 21, 2017)	1, 2, 3, 4
Rules	
California Rule of Court 8.504(d)(1)	6
California Rules of Court 8.520(d)(1)	1

INTRODUCTION

Petitioners Delano Farms Company, Blanc Vineyards, LLC, Gerawan Farming, Inc., Four Star Fruit, Inc., and Bidart Brothers (together “Petitioners”) respectfully submit this supplemental brief pursuant to rule 8.520(d)(1) of the California Rules of Court in order to address the relevance of *Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV 16-41-GF-BMM, 2017 WL 2671072 (D. Mont. June 21, 2017), to this case.

BACKGROUND

In *Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV 16-41-GF-BMM, 2017 WL 2671072 (D. Mont. June 21, 2017), the district court issued preliminary injunctive relief against a part of the mandatory collective advertising program for beef on grounds of free speech and association, rejecting a “government speech” defense similar to that invoked by Respondent in this case. In *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, 560, the U.S. Supreme Court upheld the federally-administered portion of this program on the ground that the active supervision of the beef advertising messages by the Secretary of Agriculture, a politically accountable official, rendered the program “government speech” not challengeable under the Free Speech Clause of the First Amendment. In *Ranchers-Cattlemen*, the district court reached the opposite conclusion with respect to a portion of the beef promotion

program administered by the “Montana Beef Council,” an industry group not actively supervised by a politically accountable official.

The decision underscores the importance of institutional details when determining whether government-compelled commercial speech programs are sufficiently subject to “democratic accountability” to be insulated from constitutional review under the government speech doctrine. Contrary to Respondent’s position (Resp. Br. 20-21), not all commodity promotion schemes are the same, and they were not all blessed by *Johanns*.

DISCUSSION

The *Ranchers-Cattlemen* plaintiffs challenged the portion of the federal beef promotion statutory scheme that empowers the Montana Beef Council, a non-governmental entity dominated by the major players in the industry, to use half of the mandatory assessment of \$1 per head of cattle for its own beef promotional activities – the other half going to the federal Beef Board. (*Id.* at *2.) Plaintiffs disagreed with the advertising promoted by the Montana Beef Council: specifically, where plaintiffs wanted the Council to promote only domestic beef, the Council’s advertisements did not distinguish between domestic and foreign beef. (*Id.* at *2-3.) The plaintiffs argued that the mandatory advertising program “violates the First Amendment because it forces its members to associate with the Montana Beef Council, and to subsidize the Montana Beef Council’s private speech (advertising), with which it disagrees.” (*Id.* at *3.) The district court

preliminarily enjoined the government “from continuing to allow the Montana Beef Council to use the assessments that it collects under the Beef Checkoff Program to fund its advertising campaigns” absent the payer’s prior affirmative consent. (*Id.* at *8.) Most significantly, the district court found persuasive plaintiffs’ argument that the government did not exercise sufficient review or control over the Council’s activities to render its advertising messages government speech. (*Id.* at *6.)

The *Ranchers-Cattlemen* decision supports Petitioners’ position on two of the three issues presented to this Court, although we emphasize that it was decided under the First Amendment of the U.S. Constitution, which is not as protective of freedom of speech as Article I of the California Constitution.

1. *Ranchers-Cattlemen* supports Petitioners’ argument that “[w]hether speech of a private entity constitutes government speech turns on whether government officials *exercise ‘effective control’* over the speech.” 2017 WL 2671072, at *5 (emphasis added). As the Supreme Court has held, such control is present where the content and messaging of ads is “established” by the government “*from beginning to end.*” (*Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, 560 (emphasis added).) Governmental control over the speech is critical because it ensures the speech is “subject to democratic accountability,” as “[p]eople and groups who disfavor government speech may use the political process

to compel the government to change its speech.” (*Ranchers-Cattlemen*, 2017 WL 2671072, at *5 (quoting *Johanns*, 544 U.S. at 562).) As the district court held, it is not sufficient that politically accountable officials have some residual authority to review the messages for conformity to the statute. To be insulated from review, the messages must be the government’s own speech.

2. The decision also supports Petitioners’ argument that if the Court reaches the merits of the program, it fails. “Compelled subsidies used solely to fund private speech remain unconstitutional under any level of scrutiny, even under the lesser scrutiny accorded to commercial speech.” (*Id.* at *7).

3. As to the character of the California Table Grapes Commission as a government agency, *Ranchers-Cattlemen* is unhelpful to both sides. The Montana Beef Council is a private corporation not closely resembling the CTGC. The district court’s conclusion that the Montana Beef Council is private does not tell us anything, one way or the other, about whether a legislatively chartered corporation whose board is elected by the industry is functionally private.¹

¹ The *Ranchers-Cattlemen* decision cited and accepted the Ninth Circuit’s decision in *Delano Farms v. California Table Grape Commission* (9th Cir. 2009) 586 F.3d 1219, 1229), which Petitioners have criticized for its inconsistency with *Johanns*. (See Pets.’ Merits Br. at 3-4, 27-28.)

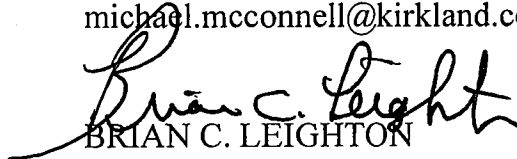
CONCLUSION

Petitioners respectfully request that the Court consider the recent decision of the federal district court in *Ranchers-Cattlemen*, insofar as its analysis of the federal First Amendment issues is relevant to state constitutional issues in this case.

Dated: July 14, 2017

Respectfully submitted,

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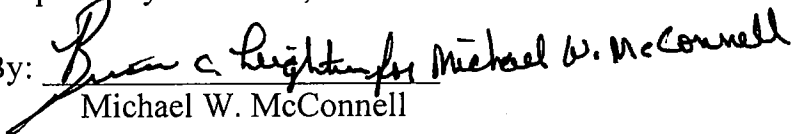
That reliance is unsurprising, since the district court is within the Ninth Circuit and is obliged to follow its decisions.

**CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.504(d)(1)**

Pursuant to California Rule of Court 8.504(d)(1), counsel for Petitioners hereby certifies that the number of words contained in this Petition for Review, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 904 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: July 14, 2017

Respectfully submitted,

By:  Michael W. McConnell
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PROOF OF SERVICE

I declare that:

I am employed in the County of Fresno, California.

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

On July 14, 2017, I served a copy of the attached **SUPPLEMENTAL BRIEF OF PETITIONERS PURSUANT TO RULE 8.520(d)** 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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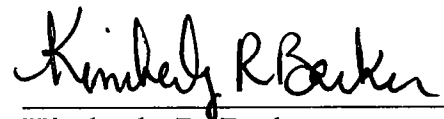
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I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was

executed this 14th day of July, 2017, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.



Kimberly R. Barker