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.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

The Commission has no coherent explanation of *Gerawan II* that salvages its "government entity" theory. The TGC claims that the Court's remand "in no way rejected the common sense proposition that entities that are created by the Legislature and governed through political appointment

and the power of removal are entitled to the government speech defense." (Resp. Br. at 31 (internal citation and quotation marks omitted).) That, however, is *exactly* what it did. Respondent tries to explain the remand away by stating that the Court "unsurprisingly accorded the parties the opportunity to resolve the factual issues upon which *they* had clearly joined issue." (Resp. Br. at 31, 43-44 (emphasis in original).) But it would be surprising—indeed inexplicable—to remand for factual development if, as respondent contends, further facts were wholly unnecessary to resolve the government speech question. By "remand[ing] plaintiffs' Free Speech challenge for further development of the government speech question in the lower courts," (*id.* at 31), the Court was perforce holding that the statutory origins and powers of the Plum Board were inadequate to shield its compelled subsidies from constitutional challenge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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