

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
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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**

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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.¹

The California Department of Food and Agriculture is the state agency charged with protecting and promoting California's agricultural industry. (Food & Agr. Code, § 401.)² The Department's mission is to promote a safe, healthy food supply, and to enhance agricultural trade. (CDFA, Mission Statement.)³ As part of its charge, the Department oversees 52 agricultural marketing programs administered by California agricultural advisory boards, commissions, and councils.⁴ 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))

¹ 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.

² Statutory references are to the Food and Agricultural Code unless otherwise indicated.

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

⁴ 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).)⁵ 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"].)⁶

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

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

⁶ Available at <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,

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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.)⁷ 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

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

Production Statistics.)⁸ 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.)⁹ In all, California's 76,400 farms and ranches received approximately \$54 billion for their output in 2014. (CDFA, California Agricultural Production Statistics, *supra*.)¹⁰

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.

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

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

¹⁰ 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.)¹¹

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.)

¹¹ Available at <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.¹² 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;¹³ 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].)

¹² 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].)

¹³ 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’”