APPENDIX

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Appendix A

IN THE SUPREME COURT OF CALIFORNIA

No. S226538

DELANO FARMS COMPANY, et al.,
Plaintiffs-Appellants,
v.
CALIFORNIA TABLE GRAPE COMMISSION,
Defendants-Appellees.

Filed: May 24, 2018

OPINION

Pursuant to the Ketchum Act (Food & Agr. Code, § 65500 et seq.; sometimes hereafter referred to as the Act), the activities of the California Table Grape Commission (sometimes hereafter referred to as the Commission) are funded by assessments on shipments of California table grapes. Plaintiffs and appellants are five growers and shippers of these grapes. They contend that the collection of assessments under the Act I to subsidize promotional speech on behalf of California table grapes as a generic category I violates their right to free speech under article I, section 2, subdivision (a) of the state Constitution (sometimes hereafter article I, section 2). Specifically, plaintiffs believe that the table grapes they grow and ship are exceptional, and cast the assessment scheme as infirm

insofar as it requires them to sponsor a viewpoint (promoting all California table grapes equally) with which they disagree.

The Commission responds that the Act's compelled-subsidy program does not violate article I, section 2 because the promotional messaging it underwrites represents government speech, as opposed to private speech. Both the Commission's position and that of plaintiffs recognize this court's prior determinations that a government program that compels market participants to subsidize generic promotional speech over their objections implicates article I, section 2 (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 509-510 (*Gerawan I*)) and is subject to intermediate scrutiny (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 6 (*Gerawan II*))—if these communications represent *private* speech. *Gerawan II* also indicated, however, that significantly more deference would be accorded to a compelled-subsidy scheme that funds only *government* speech. *(Id.,* at pp. 26-28.) In *Gerawan II,* whether the challenged program produced government speech was left for development and determination on remand. *(Id.,* at p. 28.) This proceeding picks up where *Gerawan II* left off, presenting the question whether promotional speech generated by a compelled-subsidy program amounts to government speech and for that reason avoids heightened scrutiny under article I, section 2.

We conclude that the Commission's advertisements and related messaging represent government speech, and hold that the Ketchum Act's compelled-subsidy scheme does not violate plaintiffs'

rights under article I, section 2. The government speech doctrine recognizes that a properly functioning government must express potentially controversial viewpoints as a matter of course, and that payers of taxes and fees may be required to subsidize this speech, even when they disagree with it, without implicating their constitutional right to free speech. Yet, as the United States Supreme Court recently cautioned, although "the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse." *(Matal v. Tam* (2017) 582 U.S.__ [137 S.Ct. 1744, 1758] (*Matal*).) Therefore, courts must take care in distinguishing government speech from private speech, and apply the government speech doctrine in a manner mindful of its potential impact on protected free speech interests.

Here, the relevant circumstances establish sufficient government responsibility for and control over the messaging at issue for these communications to represent ' government speech that plaintiffs can be required to subsidize without implicating their rights under article I, section 2. Meanwhile, no triable issue of fact exists that the Ketchum Act violates plaintiffs' article I, section 2 rights under a different theory, such as one asserting that the statute's compelled-assessment scheme effectively prevents them from speaking. Accordingly, we hold that plaintiffs have advanced no viable claim under article I, section 2. Because the Court of Appeal rejected plaintiffs' challenge to the Ketchum Act on similar grounds, we affirm the judgment below.

I. Factual and Procedural Background

California leads the nation in the production of agricultural commodities, with its farms and ranches generating more than $47 billion in value in the 2015 crop year. (Cal. Dept. of Food and Agriculture, California Agricultural Statistics Review 2015-2016 (2017) pp. 1-2 (Agricultural Statistics Review).) Table grapes are among the agricultural products for which this state is well known. Table grapes are distinguished from other types of grapes, such as raisin grapes and wine grapes, in that they are generally eaten while fresh instead of being consumed only after being dried or turned into wine. (See Food & Agr. Code, § 65523.)[1] This opinion therefore sometimes refers to table grapes as "fresh grapes." The 2015 harvest of California table grapes had an estimated total value in excess of $1.7 billion. (Agricultural Statistics Review, at p. 12.) The parties have stipulated that as of 2012, there were approximately 475 growers of table grapes in California.

A. The Ketchum Act and Its Implementation

The Ketchum Act responded to challenging market conditions encountered by the state's producers of fresh grapes in the 1960s.[2] As will be

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[1] All subsequent statutory references are to the Food and Agricultural Code unless otherwise noted.

[2] The Ketchum Act, enacted in 1967, revived the Commission, which was first established pursuant to a statute enacted in 1961. (Stats. 1961, ch. 1391, § 1, p. 3167, repealed by Stats. 1967, ch. 15, § 1, p. 44.) Like the Ketchum Act, the 1961 statute responded to difficult market conditions by creating a California

explained in more detail below, the Act created the California Table Grape Commission, a public corporation vested with the power and duty to engage in activities intended to increase consumer demand for California fresh grapes. These activities are funded by assessments imposed upon shippers of these grapes, which are passed along to their producers.

1. Legislative Findings

The Ketchum Act begins with a series of findings by the Legislature. Several of these findings concern the importance assigned to the production and marketing of California fresh grapes, and the challenges faced by growers of these grapes. These findings include, "[g]rapes produced in California for fresh . . . consumption comprise one of the major agricultural crops of California, and the production and marketing of such grapes affects the economy, welfare, standard of living and health of a large number of citizens residing in this state" (§ 65500,

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Table Grape Commission and vesting this agency with authority to promote fresh grapes through advertisements and other promotional efforts, to be paid by assessments imposed on market participants. (See former Agr. Code, §§ 5500, 5572, 5600.) The state's fresh grape producers failed to timely ratify this law through the statute's referendum procedure, however, which led to the suspension and winding down of the Commission's operations. (Foytik, Agricultural Marketing Orders: Characteristics and Use in California, 1933-1962 (1962) p. 66.) The provisions of the 1961 law diverged from the Ketchum Act's terms in certain respects. Among these differences, the 1961 law provided that "no action of the [C]ommission, or any member thereof . . . shall be valid unless first approved by the director" (now Secretary) of what was then the Department of Agriculture, now the Department of Food and Agriculture. (Former Agr. Code, § 5572.) No comparable provision appears in the Ketchum Act.

subd. (a)); and "[i]ncreased plantings of vineyards and improved cultural practices for the production of California grapes for fresh . . . consumption have increased and will continue to increase the production thereof and unless the fresh . . . consumption of California grapes is increased by the expansion of existing markets and the development of new markets, the interests of the fresh grape industry of California, and the public interest of the people of this state, will be adversely affected" *(id.,* subd. (b)). Furthermore, the Legislature found that "[t]he inability of individual producers to maintain or expand present markets or to develop new or larger markets for such grapes results in an unreasonable and unnecessary economic waste of the agricultural wealth of this state" (*id.,* subd. (c)); and "[s]uch conditions and the accompanying waste jeopardize the future continued production of adequate supplies of fresh grapes for human consumption for the people of this and other states, and prevent producers from obtaining a fair return for their labor, their farms and their production. As a consequence, the purchasing power of such producers has been in the past, and may continue to be in the future unless such conditions are remedied, low in relation to that of other people engaged in other gainful occupations within the state, and they are thereby prevented from maintaining a proper standard of living and from contributing their fair share to the support of the necessary governmental and education functions, thus tending to increase unfairly the tax burden of other citizens of the state" (*id.,* subd. (d)).

Other findings relate the state's response to these challenging conditions, endorsing measures perceived

as developing and expanding markets for California fresh grapes. These findings provide, "The[] [aforementioned] conditions vitally concern the health, peace, safety and general welfare of the people of this state. It is therefore necessary and expedient in the public interest to protect and enhance the reputation of California fresh grapes for human consumption in intrastate, interstate and foreign markets, and to otherwise act so to eliminate unreasonable and unnecessary economic waste of the agricultural wealth of this state" *(id.,* subd. (e)); "[t]he promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in consuming markets, research respecting the health, food and dietetic value of California fresh grapes and the production, handling, transportation and marketing thereof, the dissemination of information respecting the results of such research, instruction of the wholesale and retail trade with respect to handling thereof, and the education and instruction of the general public with reference to the various varieties of California fresh grapes for human consumption, the time to use and consume each variety and the uses to which each variety should be put, the dietetic and health value thereof, all serve to increase the consumption thereof and to expand existing markets and create new markets for fresh grapes, and prevent agricultural waste, and [are] therefore in the interests of the welfare, public economy and health of the people

of this state"(§ 65500, subd. (f)); "[i]t is hereby declared to be the policy of this state to aid producers of California fresh grapes in preventing economic waste in the marketing of their commodity, to develop more efficient and equitable methods in such marketing, and to aid such producers in restoring and maintaining their purchasing power at a more adequate, equitable and reasonable level" (id., subd. (g)); and "[t]he production and marketing of grapes produced in California for fresh human consumption is declared to be affected with a public interest; the provisions of this chapter are enacted in the exercise of the police power of this state for the purpose of protecting the health, peace, safety and general welfare of the people of this state" (id., subd. (h)).

2. The California Table Grape Commission

The Act created the California Table Grape Commission to effectuate the policies set forth in the statute's findings. (§ 65550.)[3] The Commission is a

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[3] State law recognizes multiple frameworks for collective marketing within the agriculture sector. The two most commonly utilized are marketing orders—the subject of our decisions in *Gerawan I, supra,* 24 Cal.4th 468, and *Gerawan I, supra,* 33 Cal.4th 1—and commissions.

Under state law, marketing orders are issued pursuant to the California Marketing Act of 1937. (§ 58601 et seq.; sometimes hereafter referred to as the CMA.) This statute authorizes the Secretary of the Department of Food and Agriculture (sometimes hereafter referred to as the Secretary; the Department of Food and Agriculture is sometimes referred to as the CDFA) to issue marketing orders pertaining to specific agricultural commodities. (§ 58741.) These orders may provide for production limits (§ 58883), grading standards (§ 58888), research studies (§ 58892), and advertising and sales promotion (§ 58889), among

other subjects. In general, any provision within a marketing order concerning advertising and sales promotion "shall be directed toward increasing the sale of the commodity without reference to any private brand or trade name that is used by any handler with respect to the commodity regulated by the marketing order." (*Id.,* subd. (b).) As with the scheme prescribed by the Ketchum Act, funding for activities under a marketing order comes from assessments on producers or handlers of the commodity subject to the order. (§ 58921.)

The governance of a marketing order is somewhat different from that associated with actions undertaken by a commission. Each marketing order must provide for the establishment of an advisory board to assist the Secretary in the administration of the order. (§ 58841.) Members of an advisory board are appointed by, and serve at the pleasure of the Secretary. (*Ibid.*) Except for a member who may be appointed to represent "the department or the public generally" (§ 58843), members of an advisory board must be involved in the production or handling of the subject commodity (§ 58842). An advisory board's duties are "administrative only." (§ 58846.) Among its responsibilities, an advisory board may, "[s]ubject to the approval of the [Secretary], administer the marketing order," and "[r]ecommend to the [Secretary] administrative rules and regulations which relate to the marketing order." (*Id.,* subds. (a), (b).)

Commissions were developed as an alternative to marketing orders. In addition to the California Table Grape Commission, other commissions that have been authorized by statute include the California Iceberg Lettuce Commission (§ 66501 et seq.); the California Rice Commission (§ 71000 et seq.); the California Wine Commission (§ 74501 et seq.); the California Egg Commission (§ 75001 et seq.); the California Sheep Commission (§ 76201 et seq.); the California Forest Products Commission (§ 77501 et seq.); the California Sea Urchin Commission (§ 79000 et seq.); the California Nursery Producers Commission (§ 79401 et seq.); the California Apiary Research Commission (§ 79601 et seq.); and the Olive Oil Commission of California(§ 79800 et seq.), among many others.

The terms of the statutes that have created these and other commissions and vested them with authority vary in some

public corporation. (§ 65551.) Its membership consists of three producers from each of the state's six operational fresh grape growing districts (§§ 65533, 65550, 65554), as well as one "public" member not engaged in the production, shipment, or processing of fresh grapes in this state (§ 65575.1). The Legislature has determined that the commissioners drawn from the state's producers "are intended to represent and further the interest of a particular agricultural industry concerned, and that such representation and furtherance is intended to serve the public interest." (§ 65576.) The public member "shall represent the interests of the general public in all matters coming before the commission." (§ 65575.2.)

After the Commission's inception and initial elections, producers have been selected for service on the Commission through a two-part process. First, each year each district conducts an election in which the district's qualified grape producers cast votes. (§ 65556.) The Secretary of the Department of Food and Agriculture then tabulates these votes, identifies the two leading vote-getters, and appoints one of these two nominees as a member of the Commission. (§ 65563.) The public member of the commission, meanwhile, is selected by the Secretary from a list of

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respects from the provisions of the Ketchum Act. One difference is that other statutes commonly provide for a different form of engagement by the CDFA with the relevant commission's activities, from that contemplated under the Ketchum Act. (E.g., § 66561.3 [authorizing the Secretary to require the California Iceberg Lettuce Commission "to correct or cease any activity or function which is determined by the [Secretary] not to be in the public interest or is in violation of' that commission's authorizing statute].)

three nominees proposed by the Commission. (§ 65575.1.) If the Secretary disapproves of all nominees for the public member position, "the [C]ommission shall continue to submit lists of nominees until the [Secretary] has made a selection." (*Ibid.*) Each commissioner serves a three-year term. (§ 65555.)

3. The Commission's Powers and Duties

The Ketchum Act confers upon the Commission "powers and duties" (§ 165572) that include responsibility to "administer and enforce [the Act], and to do and perform all acts and exercise all powers incidental to or in connection with or deemed reasonably necessary, proper or advisable to effectuate the purposes of' the Act. (§ 65572 subd. (c).) The Commission may hire officers and other personnel to assist with these responsibilities. (Id., subd. (d).)[4] The Act specifically vests the Commission with the "power[] and dut[y] . . . [¶] . . . [¶] . . . [t]o promote the sale of fresh grapes by advertising and other similar means for the purpose of maintaining and expanding present markets and creating new and larger intrastate, interstate, and foreign markets for fresh grapes; to educate and instruct the public with respect to fresh grapes; and the uses and time to use the several varieties, and the healthful properties and dietetic value of fresh grapes." (§ 65772, subd. (h).) In the Commission's discretion, it also may "educate and instruct the wholesale and retail trade with respect to

[4] As of July 2012, when the Commission moved for summary judgment, it had 22 employees.

proper methods of handling and selling fresh grapes; . . . arrange for the performance of dealer service work providing display and other promotional materials; . . . make market surveys and analyses; and . . . present facts to and negotiate with state, federal and foreign agencies on matters which affect the marketing and distribution of fresh grapes; and . . . undertake any other similar[activities which the [C]ommission may determine appropriate for the maintenance and expansion of present markets and the creation of new and larger markets for fresh grapes. (*Id.*, subd. (i).) The Commission also is authorized to "conduct, and contract with others to conduct, scientific research . . . respecting the marketing and distribution of fresh grapes, the production, storage, refrigeration, inspection and transportation thereof, to develop and discover the dietetic value of fresh grapes and to develop and expand markets, and to improve cultural practices and product handling so that the various varieties may be placed in the hands of the ultimate consumer in the best possible condition." (*Id.,* subd. (k).) These and other provisions of the Act are to be "liberally construed." (§ 65674.)

To pay for the Commission's activities, the Act authorizes an assessment on shipments of fresh grapes. This assessment is set annually by the Commission, but by statute may not exceed .6522 cents per pound of shipped grapes. (§§ 65572, subd. (*l*), 65600.) These assessments are paid to the Commission by shippers, each of which is in tum authorized to collect the assessments from the responsible producers. (§§ 65604, 65605.) In the event of nonpayment of an assessment, or if the Commission

believes a violation of the Act, or any rule or regulation promulgated under the Act, has occurred, it may bring an action in its name for collection, civil penalties, or injunctive relief. (§ 65650.) Violations of the Act, including a shipper's refusal to supply the Commission with certain information regarding its supplier or suppliers of grapes, are punishable as misdemeanors. (§ 65653.) The Act provides that "[t]he State of California shall not be liable for the acts of the [C]ommission or its contracts." (§ 65571.)

The Commission assumed its responsibilities under the Ketchum Act only after a referendum among producers. (§ 65573.) The Commission's operations may be suspended through a similar process. If 11 members of the Commission make a finding that the Act "has not tended to effectuate its declared purposes," or 20 percent of producers file a petition with the Secretary requesting suspension of the Commission's activities, the Secretary shall cause a producer referendum to be conducted. (§ 65660.) If a sufficient number of producers participate in this referendum and vote for suspension, "the [Secretary] shall declare the operation of the provisions of [the Act] and of the [C]ommission suspended, effective upon expiration of the marketing season then current." (§ 65661.) Furthermore, the Act provides for a referendum among producers every five years to determine whether the Commission's operations will continue. (§ 65675.) To date, all of these referenda have led to the continuation of the Commission and its operations.

4. The Commission's Activities Under the Act

The Commission divides its activities into five general categories - research, trade management, issues management, advertising, and education and outreach.[5] Since the Commission's inception, its programmatic efforts have included facilitating the opening of new international markets for California table grapes, funding and implementing research efforts to produce new varieties of table grapes and develop improved pest-control practices, promoting the use of table grapes among food service providers and in home cooking, collaborating with retailers to enhance the presentation and sale of fresh grapes to consumers, and developing generic advertising that promotes the consumption of California fresh grapes.

The Commission's advertising appears in print media and on radio, television, and the Internet. This advertising does not specify or endorse any one type of California fresh grape or any single producer of these grapes. Instead, it promotes California fresh grapes in general as being flavorful, convenient, and healthful. The Commission's advertising has not promoted any products other than California fresh grapes. Past themes of Commission advertising have borne the taglines, "Good things come in bunches," "Share some California grapes," "Life is complicated. Grapes are

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[5] Per the record developed below, in 2010-2011, the last fiscal year for which data appear in the record, the Commission spent $1,902,770 in assessment funds on research activities, $1,352,222 on trade management, $1,375,654 on issue management, $2,103,311 on paid advertising, and $1,949,374 on education and outreach.

simple," and "California grapes. The Natural Snack." These advertisements bear no express attribution Ito the State of California. Their recurring elements vary across media. Print advertisements include the Commission's website address and its logo, which reads "Grapes from California."

5. Oversight of the Commission

By all accounts, neither the Secretary nor her employees have directly participated in the development or approval of the Commission's advertising, or other promotional speech by the Commission. The Department of Food and Agriculture's "Policies for Marketing Programs" manual, the pertinent provisions of which are not captured in any promulgated regulation, states that the "CDF A reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted," which "may include intervention in message development prior to placement of messages in a commercial medium or venue." This manual also relates the Department's expectation that advertising and promotional messages be "(t]ruthful," "[i]n good taste," "[n]ot disparaging," and "[c]onsistent with statute."

The Ketchum Act incorporates a mechanism to challenge Commission actions, providing that "(a]ny person aggrieved by any action of the (C]ommission" may appeal that action to the Secretary. (§ 656505.)[6] The Secretary "shall review the record of the proceedings before the [C]ommission." (*Ibid.*) Upon

[6] The Act refers to the Secretary of the CDFA as the "Director," the Secretary's former title. (See§ 50.)

such review, the Secretary shall dismiss the appeal if she finds that the Commission's action "was not an abuse of discretion or illegal," but may reverse the Commission's action if it was "not substantially sustained by the record, was an abuse of discretion, or illegal." (*Ibid.*) Any decision by the Secretary dismissing an appeal or reversing an action of the Commission is subject to judicial review upon petition of the Commission "or any party aggrieved by the decision." (*Ibid.*) This appeal mechanism has been invoked in the past, leading to the Secretary's reversal of a Commission action, albeit not in the context of advertising or other promotional speech.

As another form of oversight, the Act provides that the Commission must "keep accurate books, records and accounts of all of its dealings," which "shall be open to inspection and audit by the Department of Finance . . . or other state officer charged with the audit of operation of departments of the State of California." (§ 65572, subd. (f).)

B. Proceedings Below

In 1999, plaintiffs Delano Farms Company (Delano Farms) and Gerawan Farming, Inc., filed separate but substantively similar complaints in Sacramento Superior Court, in which they alleged (among other claims) that the Ketchum Act's compelled-subsidy program violates their right to free speech under article I, section 2.[7] Plaintiffs Four Star Fruit, Inc., Bidart Bros., and Blanc Vineyards, LLC

[7] Plaintiffs' operative complaints also allege other violations of their constitutional rights. These allegations are not at issue at this stage of the litigation.

(Blanc Vineyards) have since joined the litigation, raising similar claims.

All plaintiffs assert that the Ketchum Act is unconstitutional insofar as it requires them to subsidize promotional speech that advances a viewpoint with which they disagree. Delano Farms and Blanc Vineyards, for example, each allege that "[t]he Commission's advertisements, promotions, and other expressive activities are largely designed to promote table grapes as though they were a generic commodity with generic quality," whereas these plaintiffs "promote and market their own brands and labels of table grapes to distinguish to [their] buyers [their] product[s], grade, quality and [their]I service from that of [their] competitors in order to secure a higher price and repeat business." The other plaintiffs make analogous allegations. Plaintiffs also claim that a conflict exists between the Commission's messaging regarding fresh grapes and the message that plaintiffs support. Delano Farms and Blanc Vineyards assert that "[t]he generic advertising and promotion activities engaged in by the Commission [are] not at all helpful to [p]laintiffs and [are] indeed harmful to [p]laintiffs' message which is to buy [p]laintiffs' table grapes because they are better, a better consumer value, and that [p]laintiffs provide better service." All plaintiffs seek declaratory and injunctive relief, as well as a refund of the assessments they have paid.

After the expiration of lengthy stays pending the resolution of related litigation,[8] the Commission

[8] Those cases included federal proceedings initiated by three California table grape growers—one of which, Delano Farms, is among the plaintiffs here—that attacked the Ketchum Act's

moved for summary judgment in 2012. In doing so, the Commission argued that the advertisements and other communications subsidized through the Ketchum Act represent government speech that plaintiffs could be required to subsidize without violating their right to free speech under article I, section 2. The Commission advanced two rationales for treating its messaging as government speech. First, it cast itself as a government agency capable of generating government speech on its own. Second, the Commission asserted that even if it was not itself a government speaker, its communications qualified as government speech because they are effectively controlled by the government. As an alternative ground for summary judgment, the Commission argued that if its advertising and other speech did not represent government speech, the Act's compelled assessment program nevertheless survived intermediate scrutiny.

The superior court granted the Commission's motion for summary judgment, reasoning that the Commission represents a government agency for purposes of the government speech doctrine. Providing an additional basis for its holding, the court determined that the Act's compelled-subsidy program directly advances a substantial government interest and is not more extensive than necessary to serve that

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compelled-assessment program as violating their rights under the First and Fourteenth Amendments to the United States Constitution. (See *Delano Farms Co. v. California Table Grape Com'n* (9th Cir. 2009) 586 F.3d 1219.) As will be discussed in more detail *post,* that litigation concluded with the rejection of the plaintiffs' claims.

interest, and therefore withstands intermediate scrutiny.

When plaintiffs appealed, the Court of Appeal affirmed. The Court of Appeal determined, first, that article I, section 2 does not demand a more constrained construction of the government speech doctrine than the one adopted by the United States Supreme Court in *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550 (*Johanns*) as a matter of federal law. The Court of Appeal then reviewed pertinent provisions of the Ketchum Act and concluded therefrom "that the Commission's promotional activities are effectively controlled by the state and therefore are government speech." This: conclusion, the Court of Appeal reasoned, meant that the Commission's promotional activities are "immune to challenge under the California Constitution."

We granted review.

II. Discussion

This is not the first time this court has considered the relationship between article I, section 2 and the compelled subsidy of speech. Through our previous encounters with this subject, we have concluded that a standard of intermediate scrutiny applies under article I, section 2 when the government compels the subsidization of *private* speech. (*Gerawan II, supra,* 33 Cal.4th at p. 6.) We also have indicated that greater deference would be accorded to state action that subsidizes only *government* speech. (*Id.,* at pp. 26-28.) We have not yet determined for ourselves, however, whether a particular compelled-subsidy program in fact generates government speech under article I, section 2.

This case presents that issue, requiring us to decide whether speech developed and promulgated under the auspices of the Ketchum Act represents government speech. According to plaintiffs, the Commission—being overwhelmingly populated by market participants, each of whom is appointed by the Secretary from a pair of nominees proposed by growers themselves—is essentially a private entity incapable of generating government speech on its own. Plaintiffs also assert that the Ketchum Act does not otherwise ensure sufficient governmental accountability to the public regarding the messaging it contemplates for these communications to qualify as government speech. Here, plaintiffs emphasize the absence of active engagement by the CDF A in the review and approval of the Commission's promotional speech, and the fact that the Commission's advertisements are not explicitly attributed to the state. For its part, the Commission maintains that it is a state agency capable of generating government speech, even without oversight by the CDF A or other government actors. Furthermore, the Commission adds, the extent of governmental control over the messaging promulgated under the Ketchum Act also leads to a finding that these communications represent government speech.

In evaluating these positions, we begin with an overview of two principles this case calls upon us to mediate: the free speech guarantee enshrined in article I, section 2, and the government speech doctrine. We then review a series of decisions in which this and other courts have evaluated assertions that compelled-subsidy programs do not implicate constitutional free speech protections because they

subsidize only government speech. Applying principles gleaned from the relevant precedent to the communications authorized by the Ketchum Act, we conclude that the promotional messaging under the Act constitutes government speech.

A. Article I, Section 2

Article I, section 2 of the California Constitution contains our state's counterpart to the free speech provision found in the First Amendment to the United States Constitution. Article I, section 2, subdivision (a) declares, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[9]

This court has held that the free speech guarantee within article I, section 2 "'is "at least as broad" as [citation] and in some ways is broader than [citation] the

comparable provision of the federal Constitution's First Amendment.' [Citation.] Unlike the First Amendment, California's free speech clause 'specifies a "right" to freedom of speech explicitly and not merely by implication,' 'runs against . . . private parties as well as governmental actors' and expressly 'embrace[s] all subjects.' [Citation.] However, ' [m]erely because our provision is worded more

[9] A substantively identical provision formerly appeared at article I, section 9 of the state Constitution. (See *DeGrassi* v. *Cook* (2002) 29 Cal.4th 333,339 [explaining that article I, section 2, subdivision (a) "was added to the state Constitution through Proposition 7 on the November 1974 ballot," prior to which the state Constitution had "long contained a substantively identical clause set out in former article I, section 9"].)

expansively and has been interpreted as more protective than the First Amendment . . . does not mean that it is broader than the First Amendment in all its applications.' [Citation.]" (*Beeman v. Anthem Prelcription Management, LLC* (2013) 58 Cal.4th 329, 341 (*Beeman*); see also *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 168.) Furthermore, although the state Constitution is an independent source of fundamental rights (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352,365; see also Cal. Const., art. I, § 24), "our case law interpreting California's free speech clause has given respectful consideration to First Amendment case law for its persuasive value" (*Beeman*, 158 Cal.4th at p. 341). Thus, in appropriate situations we have construed article I, section 2 in a manner congruent with prevailing interpretations of the First Amendment. (See, e.g., *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 959-963.)

B. Government Speech

Although individuals have a right to speak freely, they do not have the right *not* to fund *government* speech. To recognize such a right would make effective governance impossible.

"Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources. In short, government expression is a necessary and

healthy part of the system." (Emerson, The System of Freedom of Expression (1970) p. 698.) And when it speaks, the government inevitably will express viewpoints that some members of the body politic not only disagree with, but indeed find highly objectionable. This purposive messaging represents an integral and, on the whole, beneficial part of the government's basic functioning.

These principles undergird the government speech doctrine, whereby state action that generates or constitutes government speech, rather than private speech, is regarded as outside the purview of the First Amendment to the United States Constitution.[10] (See, e.g., *Pleasant Grove City v. Summum* (2009) 555 U.S. 460,467 (*Summum*) ["The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech"].) The doctrine also finds support in the fact that the electorate and the political process ultimately will determine what the government does and does not say. (*Board of*

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[10] Some of the intuitions behind the government speech doctrine have informed free speech jurisprudence under the First Amendment for decades. In *Board of Education* v. *Barnette* (1943) 319 U.S. 624 (*Barnette*), for example, the United States Supreme Court recognized that a state *could* prescribe a general public school curriculum (*id.,* at p. 631), even as it held that the state *could not* require students to participate in a flag salute that involved an "affirmation of a belief and an attitude of mind" (*id.,* at p. 633), upon pain of expulsion and possible treatment as a delinquent (*id.,* at pp. 629-630, 642). Only more recently, however, has the government speech doctrine coalesced into a discrete theory. As previously noted, the doctrine's ongoing elaboration and significant implications have led the high court to caution against its "misuse." (*Matal, supra,* 582 U.S. at p.__ [137 S.Ct. at p. 1758].)

Regents of Univ. of Wis. System v. Southworth (2000) 529 U.S. 217,235 ["When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."].) As the United States Supreme Court recently explained, "When the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. [Citation.] That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. [Citation.] Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. [Citation.] Instead, the Free: Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect this electoral mandate. [Citation.] [¶] Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful !recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?" (*Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015) 576 U.S.__, __ [135 S.Ct. 2239, 2245-2246] (*Walker*)*;* see also *Summum,* at p. 468 ["it is not easy to imagine how government could function if it lacked this freedom"].)

C. Case Law Involving Free Speech Challenges to Compelled Subsidy Programs and the Government Speech Doctrine

The right to free speech and the government speech doctrine have intersected in prior cases in which the plaintiffs have alleged that state action has unconstitutionally compelled them to subsidize viewpoints with which they disagree. In some of these matters, the defendants have responded that the plaintiffs are paying only for government speech, rather than private speech, making the challenged action lawful. The discussion below reviews how these arguments have been presented and addressed in prior decisions by this court, as well as other courts.

1. Keller

The United States Supreme Court's first extended discussion of the relationship between compelled subsidies and government speech occurred in *Keller v. State Bar of California* (1990) 496 U.S. 1 (*Keller*). The high court had laid the foundation for the *Keller* litigation some time before, in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 (*Abood*). There, the court reviewed a challenge brought under the First and Fourteenth Amendments to the United States Constitution to a requirement, authorized by statute, that public employees pay a union fee as a condition of employment. (*Id.,* at pp. 211-213.) The court in *Abood* concluded that, notwithstanding the plaintiffs' objections to the fee, the assessment was permissible to the extent that it subsidized activities that "'promote[d] the cause which justified bringing the group together'" (*id.,* at p. 223, quoting *Machinists v.*

Street (1961) 367 U.S. 740, 778 (conc. opn. of Douglas, J.)), i.e., collective bargaining, contract administration, and grievance-adjustment duties undertaken by the union (*Abood,* at p. 232). However, the fee could not be extracted over the employees' objections to pay for other speech, such as "the expression of political views . . . or . . . the advancement of other ideological causes[,] not germane to [the union's] duties as collective-bargaining representative." *(Id.,* at p. 235.)

The Supreme Court applied a similar analysis in *Keller, supra,* 496 U.S. 1. The compelled subsidy in *Keller* involved the California State Bar's exaction of compulsory dues from its members. The plaintiffs in *Keller* argued that the use of these assessments to fund political or ideological activities that they opposed violated their rights under the First and Fourteenth Amendments. *(Id.,* at p. 4.)

In proceedings below, this court had rejected the bulk of the plaintiffs' free speech claim, invalidating the fee only insofar as it subsidized electioneering by the State Bar outside of its statutory authority. *(Keller v. State Bar* (1989) 47 Cal.3d 1152, 1168, 1172.) In an early application of the government speech doctrine, we reasoned that the State Bar's status as a public corporation and other aspects of its composition and treatment under state law established that it was a government agency *(id.,* at pp. 1161- 1164),[11] and that

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[11] Although our decision in *Keller v. State Bar, supra,* 47 Cal.3d 1152, recognized "certain similarities between a bar and a labor union which would support imposing upon the bar those restrictions which limit union expenditures," we emphasized that "[t]he California Constitution, statutes, and judicial

as a government agency, the State Bar could "use dues to finance all activities germane to its statutory purpose, a phrase which we construe broadly to permit the bar to comment generally upon proposed legislation or pending litigation." (*Id.*, at p. 1157.)

The United States Supreme Court reversed, concluding that the State BJ should not be considered a government actor in this context. The unanimous decision in *Keller, supra,* 496 U.S. 1, acknowledged that this court "is the final authority on the 'governmental' status of the State Bar of California for purposes of state law." (*Id.*, at p. 11.) But, the high court continued, this determination of status, to the extent that it "entitled [the State Bar] to the treatment accorded a governor, a mayor, or a state tax

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decisions . . . appear to envision the bar as a governmental agency." (*Id.,* at p. 1162.) In particular, we observed that under state law, the State Bar was a public corporation (see Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6001), and that "all other public corporations in California—water districts, school districts, reclamation districts, etc.—are clearly considered governmental entities." (47 Cal.3d at p. 1163.) We also regarded the following facts as significant: (1) the State Bar Board of Governors included six public members appointed by the Governor (*id.,* at p. 1163, citing Bus. & Prof. Code, § 6013.5); (2) all of the State Bar's property had been "'declared to be held for essential public and governmental purposes'" and was exempt from taxation (47 Cal.3d at p. 1163, quoting Bus. & Prof. Code, § 6008); (3) by statute, the State Bar's meetings were open to the public (47 Cal.3d at pp. 1163-1164, citing Bus. & Prof. Code, § 6026.5); and (4) other statutes, as construed by the courts, either appeared to consider the State Bar a government agency (47 Cal.3d at pp. 1163-1164, citing Bus. & Prof. Code, § 6001, subd. (g)) or would be constitutionally suspect if the State Bar was not considered a government agency (47 Cal.3d at p. 1164, citing Bus. & Prof. Code, § 6031, subd. (b)).

commission, for instance, is not binding on us when such a determination is essential to the decision of a federal question." (*Ibid.*)

Significantly, the Supreme Court in *Keller, supra,* 496 U.S. 1, recognized that there was no broad First Amendment right *not* to fund speech by government officials and agencies. Chief Justice Rehnquist's opinion for the court observed that "[g]overmnent officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. 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. [Citation.]" (*Keller,* at pp. 12-13.)

Keller, supra, 496 U.S. 1, nevertheless disagreed with our application of this general principle to the State Bar. The high court explained that "the very specialized characteristics of the State Bar of California . . . serve[] to distinguish it from the role of the typical government official or agency." (*Id.,* at p. 12.) These characteristics included the "essentially advisory" nature of the State Bar's responsibilities, and the fact that attorneys, not the general public, provide the bulk of its funding. (*Id.,* at p. 11.) The *Keller* court observed, "The State Bar of California was created, not to participate in the general government

of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers." (*Id.,* at p. 13.) The court therefore applied to the State Bar a distinction similar to the one recognized in *Abood, supra,* 431 U.S. 209: "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." (*Keller,* at pp. 13-14.)

2. Glickman

The present litigation forms part of a continuum of cases that have built upon the holdings in *Abood* and *Keller*. The plaintiffs in these lawsuits have challenged compelled-subsidy programs within the agricultural sector as violating their right to free speech by forcing them to pay for generic advertising to which they object.

Initially, the government speech doctrine did not play a large role in this body of litigation, which proceeded on the assumption that these programs funded private, not government speech. The government speech doctrine was not invoked at all in *Glickman v. Wileman Brothers & Elliott, Inc.* (1997) 521 U.S. 457 (*Glickman*), which rejected a First Amendment challenge to compelled assessments for advertising under marketing orders issued pursuant

to the federal Agricultural Marketing Agreement Act of 1937. (7 U.S.C. § 601 et seq.; see *Glickman,* at p. 482, fn. 2 (dis. opn. of Souter, J.) [observing that the defendant had not argued "that the advertisements at issue represent so-called 'government speech'"].) Even without the government speech doctrine being interposed, the *Glickman* court upheld the assessments because the charges represented "part of a broader collective enterprise in which [the plaintiffs'] freedom to act independently is already constrained by the regulatory scheme." (*Id.,* at p. 469; see also *id.,* at pp. 473-474, 476-477.) The court also noted that the marketing orders did not impose any restraint on producers' freedom to communicate any message to any audience, or compel producers to engage in any actual or symbolic speech. (*Id.* at pp. 469-471.) To the *Glickman* court, the plaintiffs' challenge implicated only "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." (*Id.,* at p. 477.)

3. *Gerawan I*

The government speech doctrine was invoked, but only belatedly, in *Gerawan I, supra,* 24 Cal.4th 468. The plaintiff in *Gerawan I* challenged a marketing order issued by the CDF A pursuant to the California Marketing Act. (*Gerawan I,* at pp. 479-480.) This order established the California Plum Marketing Board, and required plum growers to finance generic advertising and other activities by the board through an assessment on their produce. (*Ibid.*) Comparably to the allegations here, the plaintiff in *Gerawan I* objected to the marketing order on the ground that it

required the plaintiff "to fund commercial speech in the form of generic advertising" against its will, with thel advertising reflecting "'viewpoints'" with which the plaintiff "'vehemently disagree[d].'" *(Id.,* at p. 481.) This directive, the plaintiff argued, violated its rights under both the First Amendment to the United States Constitution and article I, section 2 of the state Constitution. *(Gerawan I,* at p. 480.)

Gerawan I, supra, 24 Cal.4th 468, followed the United States Supreme Court's decision in *Glickman, supra,* 521 U.S. 457, in rejecting the plaintiffs First Amendment claim. (*Gerawan I,* at pp. 507-508.) But with regard to article I, section 2, we determined that "article l's right to freedom of speech, without more, would *not* allow compelling one who engages in commercial speech to fund speech in the form of advertising that he would otherwise not, when his message is about a lawful product or service and is not otherwise false or misleading." (*Id.,* at pp. 509-510.) The plaintiffs allegations were therefore "sufficient at least to implicate its article I right to freedom of speech against the California Plum Marketing Program for compelling funding of generic advertising." (*Id.,* at p. 510.) *Gerawan I* added, however, that "[o]ur conclusion . . . brings no conclusion to this cause. That the California Plum Marketing Program implicates [plaintiffs] right to freedom of speech under article I does not mean that it violates such right." (*Id.,* at p. 517.) Whether the program had that effect was left for determination in subsequent proceedings. (*Ibid.*)

At oral argument in *Gerawan I, supra,* 24 Cal.4th 468, amici curiae on behalf of the government sought

to characterize the advertisements funded by the program as government speech. (*Id.,* at p. 515, fn. 13.) We rejected this belated effort to inject the government speech doctrine into the case, observing that the plaintiff had not alleged facts within its complaint that, if true, would show that the advertising amounted to government speech, and that the CDF A had not premised its motion for judgment on the pleadings before the superior court on this ground. Amici curiae's arguments to this court were therefore "[t]oo little, too late." (*Ibid.*) Earlier, in discussing the *Glickman* case, *Gerawan I* had described government speech as "somewhat tautologically, speech by the government itself concerning public affairs" and surmised that this characterization "does not appear to cover generic advertising under a federal marketing order, which is not so much a mechanism of regulation of the producers and handlers of an agricultural commodity by a government agency, as a mechanism of self-regulation by the producers and handlers themselves." (*Id.,* at p. 503, fn. 8.)

4. United Foods

The government speech doctrine also was raised too late to factor into the analysis in *United States v. United Foods, Inc.* (2001) 533 U.S. 405 (*United Foods*), another case that involved the relationship between compelled subsidies for generic advertising and the right to free speech under the First Amendment. In *United Foods,* the court addressed a challenge to mandatory assessments imposed upon mushroom growers pursuant to the Mushroom Promotion, Research, and Consumer Information Act. (7 U.S.C.

§ 6101 et seq.; hereafter Mushroom Act.) The statute authorized the use of these assessments for "projects of mushroom promotion, research, consumer information, and industry information." (*Id.,* § 6104(c)(4).)[12] It was undisputed in *United Foods* that most of the funds collected through the assessments were used for generic advertising. (*United Foods,* at p. 408.)

In finding that the imposition of these assessments violated the plaintiffs' First Amendment rights, the court in *United Foods, supra,* 533 U.S. 405,

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[12] The Mushroom Act was designed to effectuate Congress' policy "to authorize the establishment . . . of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—[¶] (1) strengthen the mushroom industry's position in the marketplace; [¶] (2) maintain and expand existing I markets and uses for mushrooms; and [¶] (3) develop new markets and uses for mushrooms." (7 U.S.C. § 6101(b).)

The statute authorized the Secretary of Agriculture to "propose the issuance of an order," or "an association of mushroom producers or any other person that will be affected by this chapter" to "request the issuance of'" an order (7 U.S.C. § 6103(b)(l)), that would, among its terms, provide for a Mushroom Council, constituted of mushroom producers and importers (*id.,* § 6104(b)(l)(A)-(B)). This council would "propose, receive, evaluate, approve and submit to the Secretary for approval . . . budgets plans, and projects of mushroom promotion, research, consumer information, and industry information .... " *(Id.,* § 6104(c)(4).) Under the Mushroom Act, "[n]o plan or project of promotion, research, consumer information, or industry information, or budget, shall be implemented prior to its approval by the Secretary." (*Id.,* § 6104(d)(3).)

distinguished *Glickman* on the ground that in the earlier case, "[t]he opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." (*United Foods,* at p. 412.) The mushroom program, in contrast, did not mandate similar collectivism, and "almost all of the funds collected under the [statute's] mandatory assessments are for one purpose: generic advertising." (*Ibid.*) With "no broader regulatory system in place" concerning subjects other than speech, the court declined to uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." (*Id.,* at p. 415.)

In unsuccessfully defending the assessment program in *United Foods, supra,* 533 U.S. 405, the government tardily asserted that the advertising subsidized by the assessments constituted "government speech" that was insulated from the scrutiny that otherwise would adhere under the First Amendment. (*United Foods,* at p. 416.) Because the government had not presented this argument in proceedings below, the Supreme Court declined to address it. (*Ibid.*) The court noted that the government's failure to raise the argument below deprived the plaintiffs of an opportunity "to address significant matters that might have been difficult points for the Government," such as the fact that "although the Government asserts that advertising is subject to approval by the Secretary of Agriculture,

respondent claims that the approval is *pro forma."* (*Id.,* at pp. 416-417.) This issue and others, the court observed, "would have to be addressed were the program to be labeled, and sustained, as government speech." (*Id.,* at p. 417.)

5. *Gerawan II*

The brief discussion of government speech in *United Foods, supra,* 533 U.S. 405, informed the analysis in *Gerawan II, supra,* 33 Cal.4th 1. In *Gerawan II,* we clarified that notwithstanding the constrained view of government speech suggested in *Gerawan I, supra,* 24 Cal.4th 468 at page 503, footnote 8, generic advertising produced under the auspices of an agricultural marketing order *could* represent government speech, and on that basis not be subject to heightened scrutiny under article I, section 2.

Among the issues that *Gerawan I, supra,* 24 Cal.4th 468, had reserved for further proceedings was the standard or test that would be used to ascertain the lawfulness of compelled funding schemes such as that contained within the California Plum Marketing Program. We addressed this subject in *Gerawan II, supra,* 33 Cal.4th 1, which came to this court after another grant of judgment on the pleadings. We determined that under article I, section 2, the constitutionality of the California Plum Marketing Program's financing scheme for advertising would "be tested by the intermediate scrutiny standard articulated by the United States Supreme Court in *Central Hudson Gas & Elec.* (*Public Serv. Comm'n*

(1980) 447 U.S. 557 [65 L.Ed.2d 341, 100 S.Ct. 2343] *(Central Hudson)." (Gerawan II,* 33 Cal.4th at p. 6.)[13]

The decision in *Gerawan II, supra,* 33 Cal.4th 1, also acknowledged—the argument now having been properly placed before the court—the government's contention that the marketing program generated government speech. (*Id.,* at p. 26.) *Gerawan II* determined that the character of the speech could not be resolved on the pleadings, but the government would have the opportunity on remand "to prove that the speech at issue was in fact government speech." (*Id.,* at p. 27.) It continued, "The kind of showing the government would be required to make has been suggested by the United States Supreme Court," then referenced and quoted the brief discussion of government speech that had appeared in *United Foods.* (*Gerawan II,* at p. 27.) After also reviewing the Supreme Court's analysis of government speech in *Keller,* and observing that "other courts considering the issue have found significant whether the commercial speech in question is attributed to the government or to the agricultural producers" (*Gerawan II,* at p. 28, citing *Cochran v. Veneman* (3d Cir. 2004) 359 F.3d 263, 273-274), we determined, "In the present case, the marketing board is comprised of

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[13] The intermediate scrutiny test "asks (1) 'whether the expression is protected by the First Amendment,' which means that the expression 'at least must concern lawful activity and not be misleading'; (2) 'whether the asserted governmental interest is substantial'; if yes to both, then (3) 'whether the regulation directly advances the governmental interest asserted'; and (4) 'whether it is not more extensive than is necessary to serve that interest.'" (*Gerawan II, supra,* 31 Cal.4th at p. 22, quoting *Central Hudson, supra,* 447 U.S. at p. 566.)

and funded by plum producers, and is in that respect similar to the State Bar. But, 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. Because there are factual questions that may be determinative of the outcome - for example, whether the Secretary's approval of the marketing board's message is in fact pro forma, whether the marketing board is in de facto control of the generic advertising program, and whether the speech is attributed to the government - this issue cannot be resolved on the pleadings and requires further factfinding." (*Gerawan II,* at p. 28.)

6. *Johanns*

Shortly after our decision in *Gerawan II, supra,* 33 Cal.4th 1, the United States Supreme Court decided *Johanns, supra,* 544 U.S. 550, another First Amendment challenge to a federal program that financed generic advertising for an agricultural product or products through mandatory assessments levied on producers of the commodity.

Johanns, supra, 544 U.S. 550, involved the Beef Promotion and Research Act of 1985 (Beef Act), which provides for the promotion of beef and beef products." (7 U.S.C. § 2901(b); *Johanns,* at p. 553.) This statute directs the federal Secretary of Agriculture to advance the statutory goal of promoting the marketing and consumption of beef products by issuing a Beef Promotion and Research Order. (7 U.S.C. § 2903.) Through this order, the Secretary of Agriculture appoints the members of a promotional board

(hereafter the Beef Board), comprised of beef producers and importers who have been nominated by trade associations and importers. (*Id.,* § 2904(1).) The Beef Board elects 10 of its members to a Beef Promotion Operating Committee (hereafter Operating Committee), who serve together with 10 representatives named by a federation of state beef councils. (*Id.,* § 2904(4)(A).) The Operating Committee designs promotional campaigns relating to beef, funded by assessments imposed on cattle sales and on the importation of beef products and cattle. (7 U.S.C. § 2904(4)(B) & (C), (8).)[14] As described by the *Johanns* court, these campaigns received substantive review by the Secretary of Agriculture or his or her designee, who approved each project and the content of all promotional materials. *(Johanns,* 544 U.S. at p. 561.) At the time of the *Johanns* decision, many of these materials bore the attribution "Funded by America's Beef Producers." Some also bore the promotional

[14] In describing this promotional speech, the Beef Act provides that "[t]he [Operating] Committee shall develop plans or projects of promotion and advertising, research, consumer information, and industry information, which shall be paid for with assessments collected by the Board. In developing plans or projects, the Committee shall —[in (i) to the extent practicable, take into account similarities and difference~ between certain beef, beef products, and veal; and [,1] (ii) ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment under this chapter." (7 U.S.C. § 2904(4)(B).) These programs are in furtherance of Congress's I objective of "carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." *(Id.,* § 290 r (b).)

board's logo, consisting of a: check mark together with the word "BEEF." *(Id.,* at p. 555.)

The plaintiffs in *Johanns, supra,* 544 U.S. 550, were two associations that represented beef producers. (*Id.,* at p. 555.) They alleged that the Beef Act violated the First Amendment by requiring their members to fund generic promotional speech to which they objected. (*Id.,* at pp. 556-557.) The high court disagreed. Writing for the court in *Johanns, supra,* 544 U.S. 550, Justice Scalia first distinguished earlier precedent as being concerned with the compelled subsidy of *private* speech. "In all of the cases invalidating exactions to subsidize speech," *Johanns* explained, "the speech was, or was presumed to be, that of an entity other than the government itself. [Citations.] Our compelled-subsidy cases have consistently respected the principle that ' [c]ompelled support of a private association is fundamentally different from compelled support of government.' [Citation.] 'Compelled support of government'—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position." (*Id.,* at p. 559.)[15]

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[15] *Johanns, supra,* 544 U.S. 550, also distinguished between the gravamen of a *compelled-speech* claim and the gist of a *compelled-subsidy* claim as follows: A "compelled-speech argument . . . differs substantively from [a] compelled-subsidy analysis. The latter invalidates an exaction not because being forced to pay for speech that is unattributed violates personal autonomy, but because being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy. [Citation.] Such a violation

Johanns, supra, 544 U.S. 550, then conducted a careful review of the communications generated under the Beef Act, and determined that they represented government speech that was "not susceptible to First Amendment challenge." (*Johanns,* at p. 560.) The court stressed that "[t]he message of the [beef and beef products] promotional campaigns is effectively controlled by the Federal Government itself," being "from beginning to end the message established by the Federal Government." *(Id.,* at pp. 560-561.) *Johanns* explained what this effective control entailed. The court observed that the speech was promulgated pursuant to Congressional endorsement of a coordinated program of promotion, " 'including paid advertising, to advance the image and desirability of beef and beef products'" *(id.,* at p. 561, quoting 7 U.S.C. § 2901(b)), and that Congress had "specified, in general terms, what the promotional campaign shall contain . . . and what they shall not." *(Johanns,* at p. 561.) This message was then fleshed out by "an entity [the Operating Committee] whose members are answerable to the Secretary [of Agriculture] (and in some cases appointed by him as well)," with the secretary or his or her designees attending meetings at which advertising proposals were developed, reviewing all promotional messages and even rewriting some of thein, and then exercising "final approval authority over every word used in every

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does not occur when the exaction funds government speech. Apportioning the burden of funding government operations (including speech) through taxes and other levies does not violate autonomy simply because individual taxpayers feel 'singled out' or find the exaction 'galling.'" *(Id.,* at p. 565, fn. 8.)

promotional campaign."[16] (*Johanns,* at p. 561.) *Johanns* summarized, "the beef advertisements are subject to political safeguards *more than adequate* to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and the specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required." (*Id.,* at pp. 563-564, fns. omitted, italics added.)

In upholding the federal beef promotion program, *Johanns, supra,* 544 U.S. 550, rejected the contentions that the subsidized advertisements could not represent government speech because they were "funded by a targeted assessment on beef producers, rather than general revenues" (*id.,* at p. 562), and

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[16] To the court in *Johanns, supra,* 544 U.S. 550, "[t]his degree of governmental control" distinguished the beef promotion program from the speech involved in *Keller, supra,* 496 U.S. 1, in which the State Bar's communicative activities "were not I prescribed by law in their general outline and not developed under official government supervision." *(Johanns,* at pp. 561-562.) "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated," *Johanns* observed, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." (*Id.,* at p. 562.)

were not explicitly attributed to the state but rather, in at least some instances, to" 'America's Beef Producers'" (*id.,* at p. 564). The court deprecated an attribution requirement, whereby promotional speech funded by targeted assessments would have to be explicitly ascribed to the state in order to satisfy the First Amendment, as a "highly refined elaboration" of constitutional jurisprudence that represented an unprecedented and clumsy response to the question before the court: "the correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights." (*Johanns,* at p. 564, fn. 7.) At root, the court concluded, plaintiffs "enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and whether or not the reasonable viewer would identify the speech as the government's."[17] *(Johanns,* at p. 564, fn. 7.)

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[17] In dissent, Justice Souter argued that the targeted nature of the assessments on beef and beef products—with funding coming only from producers, and not from the general public fisc—dictated a more constrained construction of the government speech doctrine. (*Johanns, supra,* 544 U.S. at pp. 575-576 (dis. opn. of Souter, J.).) To Justice Souter, "the relative palatability of a remote subsidy shared by every taxpayer is not to be found when the speech is funded with targeted taxes. For then, as here, the particular interests of those singled out to pay the tax are closely linked with the expression, and the taxpayers who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say." (*Ibid.*)

These circumstances, Justice Souter believed, meant that for the Beef Act's promotional messaging to qualify as government speech, the challenged advertisements had to disclose that the

Johanns, supra, 544 U.S. 550, did acknowledge that "[i]f the viewer would identify the speech as [that of plaintiffs' members], however, the analysis would be different." (*Id.,* at p. 564, fn. 7.) In explaining this caveat, *Johanns* speculated that "[o]n some set of facts," an adequately supported allegation that the advertisements were in fact attributed to beef producers might provide grounds for an as-applied challenge to the beef promotion program, framed under a compelled-speech theory. (*Id.,* at p. 566; see also *Wooley v. Maynard* (1977) 430 U.S. 705 (*Wooley*)*; Barnette, supra,* 319 U.S. 624.) Yet the court did not perceive any basis in the record for concluding that the plaintiffs' members in fact would be associated with advertisements bearing the text, "America's Beef Producers." This tagline alone, the court concluded, was not "sufficiently: specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad." (*Johanns,* at p. 566.)

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government was the speaker. Such a requirement was needed, he wrote, "to ensure that the political process can practically respond to limit the compulsion" associated with the funding scheme. (*Johanns, supra,* 544 U.S. at p. 576 (dis. opn. of Souter, J.).) It meant "nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them. . . . Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it." (*Id.,* at pp. 578-579, fns. omitted.)

7. Post-*Johanns* Case Law Involving Compelled Subsidies and the Government Speech Doctrine

Since *Johanns* was decided, its analysis has been applied in several cases to rebuff free speech challenges to compelled-subsidy programs. (E.g., *Paramount Land Co. LP v. California Pistachio Com'n* (9th Cir. 2007) 491 F.3d 1003, 1009-1012 (*Paramount Land*); *Avocados Plus Inc. v. Johanns* (D.D.C. 2006) 421 F.Supp.2d 45, 50-54; *Cricket Hosiery, Inc. v. US.* (Ct. Internat. Trade 2006) 429 F.Supp.2d 1338, 1343-1348.) Two particularly pertinent decisions are discussed below.

a. Delano Farms Co.

In parallel federal litigation over the very assessments that are at issue here, the United States Court of Appeals for the Ninth Circuit determined that the Commission's promotional messaging represented government speech and that the Ketchum Act's compelled-subsidy program therefore did not violate the First and Fourteenth Amendments. (*Delano Farms Co. v. California Table Grape Com'n, supra,* 586 F.3d at pp. 1228-1230.) The Court of Appeals' analysis first applied the framework set forth in *Lebron v. National Railroad Passenger Corporation* (1995) 513 U.S. 374 (*Lebron*) for ascertaining whether an entity is a government actor for First Amendment purposes, and) determined therefrom that the Commission was a government entity that could generate government speech on its own.[18] (*Delano*

[18] The plaintiff in *Lebron, supra,* 513 U.S. 374, alleged that Amtrak had violated his First Amendment rights by rejecting a billboard display because of its political content. (*Id.,* at p. 378.)

Farms Co. v. California Table Grape Com'n, at p. 1226.) Although one member of the appellate panel would have stopped there (*id.,* at p. 1230 (cone. opn. of Reinhardt, J.)), the remaining judges also concluded that "the Commission's activities are effectively controlled by the State of California, also rendering them government speech" (*id.,* at p. 1226). On this point, the majority emphasized that with the Ketchum Act, "[t]he California Legislature was quite specific about its expectations for the Commission and its messaging" (*id.,* at p. 1228); that the Secretary of the CDFA appoints and can remove all members of the Commission; and that the state may audit the Commission's books, records, and accounts (*id.,* at pp. 1228-1229).

The Ninth Circuit in *Delano Farms Co. v. California Table Grape Com'n, supra,* 586 F.3d 1219, acknowledged some differences between the regime established by the Ketchum Act and the federal beef promotion program upheld in *Johanns*—most notably, in the court of appeals' view, the fact that CDFA personnel do not review and approve advertisements

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In its ruling below, the federal court of appeals had determined that Amtrak was not a government entity. (*Ibid.*) The United States Supreme Court reversed, concluding that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." (*Id.,* at p. 394.) Phrasing its ultimate holding more broadly, the high court held that "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." (*Id.,* at p. 400.)

prepared by the Commission, whereas United States Department of Agriculture officials were directly engaged with the advertising copy involved in *Johanns*. (*Delano Farms Co. v. California Table Grape Com 'n,* at p. 1229.) The court of appeals nevertheless considered these differences insufficient to invalidate the Ketchum Act's compelled-subsidy program on First Amendment grounds. (*Id.,* at p. 1230.)

b. *Gallo Cattle*

In *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948 (*Gallo Cattle*), the court adopted *Johanns's* analysis of government speech in rejecting a challenge brought under article I, section 2 to the compelled-subsidy provisions of a CMA marketing order for milk. (*Gallo Cattle,* at pp. 959-963.) In doing so, the Court of Appeal disagreed with the plaintiff's argument that under the state Constitution, subsidized communications must be expressly attributed to the state to qualify as government speech.[19] The court expressed skepticism "that . . . a special disclosure requirement would, as a practical matter, provide a significantly greater assurance that . . . speech will be subject *to* effective democratic checks." *(Gallo Cattle,* at p. 963.) The plaintiff in *Gallo Cattle* also asserted that the subsidized speech

[19] Although some advertisements produced under the marketing order involved in *Gallo Cattle, supra,* 159 Cal.App.4th 948, "included taglines identifying the [Milk Producers Advisory] Board as an instrumentality of the State of California," these "taglines appear[ed] very briefly in the advertisements, too briefly to alert the average viewer to the fact that the commercials are being presented on behalf of a government agency." (*Id.,* at p. 955.)

"drown[ed] out" its own voice, and violated its right to free speech for that reason. (*Id.,* at p. 966; see also *Miller v. California Com. on Status of Women* (1984) 151 Cal.App.3d 693, 702 (*Miller*) [explaining that activities upheld by the court as government speech did not have the effect of drowning out dissenting voices].) The Court of Appeal determined that for government speech to implicate constitutional safeguards under a "drowning out" rationale, "the government [must] speak in such a way as to make private speech difficult or impossible, such that opponents do not truly have the opportunity to communicate their views even to those who might wish to hear them." *(Gallo Cattle,* at pp. 967, 966.) With the plaintiff in *Gallo Cattle* admitting that it could present its own viewpoint to the public, the court concluded that the government's communications did not have this sort of effect. (*Ibid.*)

D. Synthesis

The foregoing authorities establish certain basic principles relevant to the analysis here.

First, the case law reflects an evolving understanding of how the government speech doctrine relates to a compelled-subsidy claim. Notwithstanding some skeptical language in *Gerawan I, supra,* 24 Cal.4th at page 503, footnote 8, it is now established that speech generated through a compelled-subsidy program in which market participants are involved in the development of the messaging may represent government speech. (See *Gerawan II, supra,* 33 Cal.4th at pp. 27-28.)

Second, we have looked toward federal precedent interpreting the First Amendment for guidance

regarding the government speech doctrine's bearing on a compelled-subsidy claim brought under article I, section 2. *(Gerawan II, supra,* 33 Cal.4th at pp. 27-28.) Consistent with this approach, we regard the majority opinion in

Johanns as persuasive, and we adopt its reasoning as applicable to compelled-subsidy claims brought under article I, section 2.[20] (See *Beeman, supra,* 58 Cal.4th at p. 341.) We construe *Johanns,* and other high court pronouncements regarding government speech, as centrally concerned with the presence or absence of the requisite indicia of government responsibility for and control over the substantive content of these communications, reflecting political accountability for their overall message. (See, e.g., *Johanns, supra,* 544 U.S. at pp. 560-561; *Gerawan II, supra,* 33 Cal.4th at pp. 27-28.) In some instances - such as standard communications by "a governor, a mayor, or a state tax commission" *(Keller, supra,* 496 U.S. at p. 11)—speech may be recognized as that of the government without extended analysis. In other scenarios, such as with the

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[20] The government speech doctrine can provide a framework for analyzing, a broad variety of First Amendment claims. Among them, it is sometimes perceived as an alternative to conventional forum analysis. (See, e.g., *Walker, supra,* 576 U.S. at p. _ [135 S.Ct. at pp. 2251-2252]; *Summum, supra,* 555 U.S. at pp. 469-470.) Invocation of the government speech doctrine in lieu of a forum analysis, or in other settings, may implicate considerations under article I, section 2 that are different from those associated with the doctrine's application in this case. The discussion here should not be construed as expressing a view concerning the applicability of the government speech doctrine in contexts not involving compelled subsidies.

speech involved in *Gerawan II* and *Johanns,* a more comprehensive inquiry may be necessary to ascertain whether the requisite degree of governmental control and, thus, political accountability exist.

Third, when addressing a challenge to a compelled-subsidy program, if such issues are appropriately raised and developed by the plaintiff the court's analysis also must consider whether the state's actions impact free speech rights in a manner distinct from the bare fact of the subsidy requirement itself. In *Johanns, supra,* 544 U.S. 550, for example, the court implied that a different standard of review could apply to the subsidy program if the advertisements it generated were attributed to the plaintiffs' members. (*Id.,* at p. 566; see also *Walker, supra,* 576 U.S. at p._ [135 S.Ct. at p. 2246] ["the Free

Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech"]; *Wooley, supra,* 430 U.S. at p. 717; *Barnette, supra,* 319 U.S. at p. 642.) Likewise, *Gallo Cattle, supra,* 159 Cal.App.4th 948, and other decisions suggest that government speech might warrant heightened scrutiny if its exercise made "private speech difficult or impossible." (*Id.,* at p. 966; see also *Miller, supra,* 151 Cal.App.3d at p. 702; *NAACP v. Hunt* (11th Cir. 1990) 891 F.2d 1555, 1566 ["the government may not monopolize the 'marketplace of ideas,' thus drowning out private sources of speech"]; *Warner Cable Communications, Inc. v. City of Niceville* (11th Cir. 1990) 911 F.2d 634, 638 ["the government may not speak so loudly as to

make it impossible for other speakers to be heard by their audience"].)

E. Application to the Ketchum Act

Application of these principles to the Ketchum Act leads to the conclusion that promotional messaging under the statute is subject to sufficient governmental direction and control to qualify as government speech. The Legislature has developed, and endorsed the dissemination of, the central message promulgated by the Commission. This message communicates a specific view (promotion) regarding a single commodity (California fresh grapes). The articulation and broadcasting of this message has been entrusted in the first instance to market participants, but only acting through an entity, the Commission, that is subject to meaningful oversight by the public and other government actors. This oversight includes mechanisms that serve to ensure that the Commission's messaging remains within the parameters set by statute. These circumstances establish that the communications involved here represent government speech for purposes of article I, section 2.

Recognition of the promotional messaging produced under the Ketchum Act as government speech follows, first, from the Act's findings and charge to the Commission. As observed *ante,* in enacting this statute the Legislature found that "[i]t is . . . necessary and expedient in the public interest to protect and enhance the reputation of California fresh grapes for human consumption in intrastate, interstate and foreign markets" (§ 65500, subd. (e)), and "[t]he promotion of the sale of fresh grapes for

human consumption by means of advertising . . . is . . . in the interests of the welfare, public economy and health of the people of this state" (*id.,* subd. (f)). The Act thus expressly endorses the promulgation of advertising and similar speech that promotes California I fresh grapes as a general category. Consistent with these findings, the Act gives the Commission, upon becoming operational, the power *and* the duty "[t]o promote the sale of fresh grapes by advertising and other similar means for the purpose of maintaining and expanding present markets and creating new and larger intrastate, interstate, and foreign markets for fresh grapes; to educate and instruct the public with respect to fresh grapes; and the uses and time to use the several varieties, and the healthful properties and dietetic value of fresh grapes." (§ 65572, subd. (h).) These provisions leave no doubt that the I state, through the Ketchum Act, has prescribed in advance the basic message to be promulgated—the promotion of California table grapes—and selected the Commission as a messenger.[21]

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[21] It is true that the Commission only initiated operations upon an affirmative vote among growers. (§ 65573.) But the fact that the Legislature has, through this I mechanism, given market participants a say in determining how the message p*scribed by the Act will be promulgated is not fatal to the characterization of the Commission's communications as government speech. (See *Gerawan II, supra,* 33 Cal.4th at p. 26.) Likewise, although plaintiffs emphasize language within the Act providing that commissioners drawn from the state's fresh grape producers "are intended to represent and further the interest of a particular agricultural industry concerned" (§ 65579), the Act immediately adds, consistent with its general findings explaining the state's interest in the promotion of California fresh grapes, "that such

Moreover, in creating the Commission as a public corporation, the Legislature further aligned the state with the message to be articulated. Public corporations "are organized for the purpose of carrying out the purposes of the [L]egislature in its desire to provide for the general welfare of the state, and in the accomplishment of which legislative convenience or constitutional requirements have made them essential." (*In re Madera Irrigation District* (1891) 92 Cal. 296, 317 [describing municipal corporations]; see also *State Bar of California v. Superior Court* (1929) 207 Cal. 323, 329-332 [determining that the Legislature could designate the State Bar as a non municipal public corporation].) Many such corporations, such as school districts (see *Gateway Community Charters v. Spiess* (2017) 9 Cal.App.5th 499, 507), fulfill quintessentially governmental functions.

Of course, public corporations are not invariably regarded as units of the government for purposes of the government speech doctrine. The high court's analysis and decision in *Keller, supra,* 496 U.S. 1, discussed *ante,* instruct as much. We need not and do not decide here whether the Commission is, on its own, a state actor capable of producing government speech. At a minimum, however, the relevant circumstances here distinguish this case from *Keller* in that they underscore greater overall state responsibility for the message being communicated by the public

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representation and furtherance I is intended to serve the public interest" *(ibid.).* Given the totality of the relevant circumstances, neither of these provisions connote that the Commission's speech is somehow private speech.

corporation at issue. In *Keller,* the high court regarded the State Bar as having essentially advisory responsibilities, and there was no prior legislative charge that directed the State Bar to advance a specific viewpoint in its messaging. *(Keller,* at p. 11; see also *Johanns, supra,* 544 U.S. at pp. 561-562 [distinguishing *Keller*].*)* Those facts could be understood as diminishing the state's responsibility and accountability for the State Bar's communications, even granting that entity's status as a public corporation. Here, by comparison, the Legislature's prior specification of the central message to be communicated by the Commission, and its selection of the Commission as messenger, leave no doubt that the Commission, as a public corporation, echoes and advances a viewpoint endorsed by the state as it undertakes its duties.

Furthermore, the Commission operates subject to several statutes generally applicable to state agencies (see Gov. Code, § 11000, subd. (a)) that permit ongoing review of its operations and help ensure accountability for its actions. These laws include the Public Records Act (Gov. Code, § 6250 et seq.; see *id.,* § 6252, subd. (f)(l)),[22] the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.; see *id.,* § 1112d subd. (a)), and the Political Reform Act (Gov. Code, § 81000 et seq.; see *id.,* § 82049). The Ketchum Act also demands that the Commission "keep accurate books, records and accounts of all of its dealings, which . . . shall be open to inspection and audit b~ the Department of

[22] Section 65603 exempts from the Public Records Act information obtained by the Commission from shippers. (See also Gov. Code, § 6276.08.)

Finance . . . or other state officer." (Food & Agr. Code, § 65572, subd. (f).) These obligations all facilitate ongoing oversight of the Commission's activities, guarding against any deviation from statutory directives.

The Ketchum Act also incorporates an avenue for the Secretary to correct specific departures from the statutory message. Through the Act's appeal mechanism, the Secretary may reverse an action by the Commission if it is the subject of an appeal and she finds that it was "not substantially sustained by the record, was an abuse of discretion, or illegal." (§ 65650.5.) Were the Commission to endorse a message not authorized under the statute, or regarded as an abuse of discretion, an aggrieved party could challenge this action through an appeal. Although this case does not require us to identify the precise parameters of the Secretary's authority to reverse Commission actions, it stands to reason that speech that patently would *not* promote the sale of California table grapes could become the subject of a viable challenge. And regardless of whether such an appeal leads to reversal, the Secretary could be held politically accountable for the outcome. Although this review mechanism is somewhat different from the oversight responsibilities borne by the CDFA with other compelled-subsidy programs (see footnote 3, *ante),* it nonetheless provides a meaningful avenue for ensuring that the Commission's messaging remains within the parameters crafted by the Legislature.

Other provisions within the Ketchum Act also underscore the state's responsibility for and control over messaging promulgated under the statute.

Among them, the Act gives the Secretary of the Department of Food and Agriculture the duty to appoint commissioners from the set of nominees for each position on the Commission. (§§ 65555, 65563, 65575.1.) Having this power, the Secretary is in a weakened position to disclaim responsibility for promotional messaging that an appointee later may approve. Furthermore, as the officer who appoints the commissioners, the Secretary also has the power to remove them from office. (See *People ex rel. Atty. Gen. v. Hill* (1857) 7 Cal. 97, 102.) By statute, commissioners serve a term of years(§ 65555), which may circumscribe the Secretary's authority to remove them from office (see Gov. Code, § 1301 ["Every office, the term of which is not fixed by law, is held at the pleasure of the appointing power"]; *Brown* v. *Superior Court* (1975) 15 Cal.3d 52, 55; *Boyd* v. *Pendegast* (1922) 57 Cal.App. 504, 507 ["Appointments to hold during the pleasure of the appointing power may be terminated at any time and without notice; appointments to continue 'during good behavior,' or for a fixed term of years, cannot be terminated except for cause"]). Consistent with such a limitation, the parties have stipulated only that the Secretary may remove a commissioner "if necessary." Nevertheless, even a qualified power of removal provides another means of oversight by the Secretary, who is herself appointed by and holds office at the pleasure of the Governor. (Food & Agr. Code, § 102.)

In sum, the Commission was created by statute and given a specific mission to, among other things, promote in a generic fashion a particular agricultural product. In order for the promotional material of a body like the Commission to be considered

government speech under an" 'effectively controlled'" theory (*Johanns, supra,* 544 U.S. at p. 560), the government must have the authority to exercise continued control over the message sufficient to ensure that the message stays within the bounds of the relevant statutory mandate. The foregoing review of the totality of the relevant circumstances reveals such authority, and the resulting governmental accountability for the Commission's messaging. Moreover, nothing in the record suggests that the Commission has departed from its mission. In reaching the determination that the government effectively controlled the Commission's speech, we do not suggest that the specific indicia of government responsibility and control that appear here are essential to a finding of government speech in any compelled-subsidy case brought under article I, section 2. We simply conclude that, even acknowledging that the Commission is constituted primarily of market participants and that the Ketchum Act grants the Commission some latitude in articulating the viewpoint prescribed by law, the facts and law relevant to this case amply establish that the speech plaintiffs challenge is government speech.

Plaintiffs identify perceived deficiencies in the statutory scheme and its implementation that, in their view, prevent us from characterizing the subsidized communications as government speech. First, plaintiffs read the discussion of government speech in *Gerawan II, supra,* 33 Cal.4th at pages 27-28, as committing this court to the position that the Secretary or her staff must review Commission-approved advertisements in order for these materials

to constitute government speech. Such review, plaintiffs stress, did not occur here.

Plaintiffs' position rests on a misreading of *Gerawan II.* That decision described conditions that might provide an adequate basis for concluding that advertising produced under a CMA marketing order constituted government speech. (*Gerawan II, supra,* 33 Cal.4th at pp. 27-28.) But these conditions were not presented as, nor can they be fairly regarded as, invariably necessary elements for the recognition of government speech.[23]

Instead, the significance of these and other factors within a particular dispute over subsidized speech lies in their relationship to foundational issues of governmental control and accountability. Put another way, although participation by an executive officer or their staff in the development of promotional messaging can be relevant to the recognition of government speech, the absence of such engagement

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[23] Furthermore, an advisory board constituted under the CMA, the subject of our decision in *Gerawan II, supra,* 33 Cal.4th 1, is not necessarily situated identically to the Commission for purposes of generating government speech. Unlike the Ketchum Act, the CMA, on its own, does not direct the promotion of any specific agricultural commodity. Instead, as discussed *ante,* the CMA allows the Secretary to issue marketing orders that pertain to specific commodities. (§ 58741.) These orders may then contain terms calling for subsidized generic advertising. (§ 58889.) Market participants, acting through an advisory board, "administer" the terms of the order, "[s]ubject to the approval of the [Secretary]." (§ 58846, subd. (a).) Given these provisions, the facts most pertinent to a finding that a CMA marketing order generates government speech may be somewhat different from those most relevant to an evaluation of the Commission's speech under the Ketchum Act.

is not necessarily determinative of this issue. (See *Paramount Land, supra,* 491 F.3d at p. 1011.) Where, as here, the circumstances surrounding the development and dissemination of subsidized speech adequately establish government responsibility for and control over the messaging involved, a statutory scheme's failure to add a prophylactic layer of review by an executive officer is of no constitutional consequence. Even without line-by-line perusal by the CDF A, sufficient safeguards exist here for the promotional speech subsidized under the Act to be regarded as government speech. If the public, including an aggrieved grower, seeks to correct an errant articulation of the Ketchum Act's message, or replace the persons responsible for this message, avenues exist to accomplish these goals.

Plaintiffs advance a similarly flawed interpretation of *Johanns, supra,* 544 U.S. 550. There, the facts pertinent to a finding of government speech included the Secretary of Agriculture's review and approval of "every word" of the promotional materials at issue. (*Id.,* at p. 561.) But *Johanns* did not cast review and approval by an appointed executive officer or his or her staff as an absolute prerequisite for communications to represent government speech, regardless of other pertinent circumstances. (See *Paramount Land, supra,* 491 F.3d at p. 1011 [*"Johanns* did not set a floor or define

minimum requirements" for application of the government speech doctrine].) Quite the opposite is true: the *Johanns* court regarded the political safeguards involved with the Beef Act as "more than adequate" to distinguish the challenged

advertisements from private speech. (*Johanns,* at p. 563.) Likewise here, our review of the totality of the relevant circumstances establishes that the government has sufficient responsibility for and control over the Commission's messaging for these communications to represent government speech, even without direct participation by CDF A staff in the development of particular articulations of the statutory message.

Plaintiffs also ask this court to read into article I, section 2 a requirement that, to qualify as government speech, subsidized communications must on their face be specifically and explicitly attributed to the government. Plaintiffs claim that such disclosures, as urged by Justice Souter in his dissent in *Johanns, supra,* 544 U.S. 550, are necessary to ensure that reasonable observers will appreciate that the communications come from the state and can hold the government accountable for this messaging. Here, plaintiffs assert, the failure of the Commission's advertising to affirmatively disclose the state as the speaker forecloses the prospect that these communications represent government speech. But the court in *Johanns* rejected a categorical attribution requirement as unnecessary (*id.,* at p. 564, fn. 7), and plaintiffs provide no persuasive reason to adopt a different rule under article I, section 2. We agree that, when present, the fact that advertising or other communications are explicitly credited to the government may be relevant to a finding of government speech. Yet, as detailed *ante,* the totality of the circumstances pertinent to the generation of speech under the Ketchum Act incorporates sufficient mechanisms to ensure governmental accountability

for this messaging, even without such ascription. (See *Gallo Cattle, supra,* 159 Cal.App.4th at p. 963 [questioning the marginal utility of an express disclosure requirement].)

In short, the generation of speech under the Ketchum Act is attended by sufficient indicia of government responsibility and control for these communications to properly be regarded as government speech.

F. Consequences of Classification as Government Speech

Having determined that promotional messaging under the Ketchum Act represents government speech, it remains to consider the consequences of this designation.

The court in *Johanns, supra,* 544 U.S. 550, described government speech as "exempt" from scrutiny under the First Amendment. (*Johanns,* at p. 553.) Consistent with this view, and given the absence of a viable compelled-speech claim in that case, the *Johanns* court regarded its conclusion that the Beef Act subsidized only government speech as dispositive of the First Amendment claim before it.

We conclude that a similar result holds under article I, section 2. By itself, a state directive to pay taxes or fees to fund only government speech does not implicate, let alone infringe upon, protected free speech rights. As the court in *Johanns, supra,* 544 U.S. 550, observed, "'Compelled support of government'—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest" (*id.,* at p. 559), meaning that

subsidized government speech is "not susceptible to First Amendment challenge" on the bare ground that the subsidy requirement, by itself, violates the plaintiffs right to free speech (*id.,* at p. 560).

Of course, a determination that state action generates only government speech does not, by itself, necessarily address all of its possible constitutional implications. If the Ketchum Act's compelled-subsidy provisions did more than merely direct plaintiffs to fund government speech, additional analysis might be required under article I, section 2. (Accord, *Johanns, supra,* 544 U.S. at p. 564, fn. 7.) But plaintiffs have not shown that the statute, as implemented, has any effect on their constitutional right to exercise free speech.

For example, although at oral argument counsel for plaintiffs asserted that the Commission's promotional speech effectively prevents his clients from communicating their preferred message, the record below does not reveal a triable issue of fact on this point. (See *Gallo Cattle, supra,* 159 Cal.App.4th at p. 967; *Miller, supra,* 151 Cal.App.3d at p. 702.) Similarly, the record yields no basis for a triable claim that the Ketchum Act forges such a close connection between plaintiffs and the Commission's promotional speech that it conveys, inaccurately, their endorsement of the views expressed in these communications. (Cf. *Johanns, supra,* 544 U.S. at p. 565, fn. 8 [describing the character of a compelled-speech claim]; *Wooley, supra,* 430 U.S. 705; *Barnette, supra,* 319 U.S. 624.) On the contrary, the generic slogan "Grapes from California" does not convey a specific connection to plaintiffs, who are merely five of

the approximately 475 producers of fresh grapes in this state. Any argument that the Commission's advertisements are attributable to plaintiffs, or to producers of California table grapes in general, is even weaker here than the parallel contention was in *Johanns, supra,* 544 U.S. 550. There, the challenged advertisements were credited to "America's Beef Producers," yet the court regarded this reference as not "sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad." (*Id.,* at p. 566.)

Plaintiffs' contentions, as developed in the record, thus sound solely in fundamental objection to subsidizing speech with which they disagree. This bring the case, the determination *ante* that the Ketchum Act generates only government speech

disposes of plaintiffs' claims under article I, section 2.[24]

III. DISPOSITION

We affirm the judgment of the Court of Appeal.

CANTIL-SKAUYE, C.J.

WE CONCUR:
CHIN, J.
CORRIGAN, J.
LIU, J.
CUELLAR, J.*
RAMIREZ, J.**
AARON, J.

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[24] Our resolution of the government speech issue makes it unnecessary to address the Commission's alternative argument that the Ketchum Act's speech-generating provisions satisfy intermediate scrutiny under article I, section 2.

RAMIREZ, J.*

* Presiding Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to article IV, section 6 of the California Constitution.

AARON, J. **

** Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article IV, section 6 of the California Constitution.

Appendix B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

No. F067956

DELANO FARMS COMPANY, et al.,
Plaintiffs-Appellants,
v.
CALIFORNIA TABLE GRAPE COMMISSION,
Defendants-Appellees.

Filed: April 6, 2015

OPINION

Appellants, Delano Farms Company, Four Star Fruit, Inc., Gerawan Farming, Inc., Bidart Bros. and Blanc Vineyards, LLC, challenge the constitutionality of the statutory scheme that establishes respondent, the California Table Grape Commission (Commission), and requires table grape growers and packers to fund the Commission's promotional activities. Appellants assert that being compelled to fund the Commission's generic advertising violates their rights to free speech, free association, due process, liberty and privacy under the California Constitution.

The trial court granted summary judgment in the Commission's favor. The court held that the Commission is a "governmental entity" and thus its speech is government speech that can be funded with compelled assessments. Alternatively, the trial court applied the intermediate scrutiny test set forth in *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 22, and concluded that the compelled funding scheme did not violate the California Constitution.

Appellants contend the trial court erred in granting summary judgment. According to appellants, facts relied on by the Commission to demonstrate that the funding scheme passed constitutional muster under intermediate scrutiny were not proved by admissible evidence and are in dispute. Appellants further argue the court erred in finding the speech was government speech because the Commission did not demonstrate either that the Commission is a government entity or that the government controlled the Commission's activities and speech.

The Commission's promotional activities constitute government speech. Accordingly, we will affirm the trial court's grant of summary judgment on this ground.

BACKGROUND

1. The Table Grape Commission.

The Commission was created by legislation known as the Ketchum Act in 1967. (Food & Agr. Code,[1] § 65500 et seq.; *United Farm Workers of*

[1] All further statutory references are to the Food and Agricultural Code unless otherwise noted.

America v. Agricultural Labor Relations Bd. (1995) 41 Cal.App.4th 303, 312.) The Legislature explained that "[g]rapes produced in California for fresh human consumption comprise one of the major agricultural crops of California, and the production and marketing of such grapes affects the economy, welfare, standard of living and health of a large number of citizens residing in this state." (§ 65500, subd. (a).) Noting that individual producers are unable to maintain or expand present markets or develop new markets resulting in "an unreasonable and unnecessary economic waste of the agricultural wealth of this state," the Ketchum Act declared it was the policy of the state to aid producers of California fresh grapes. (§ 65500, subds. (c) & (g).) To carry out this policy, the Commission supports the fresh grape industry through advertising, marketing, education, research, and government relations efforts. (§ 65572, subds. (h), (i) & (k).) The Commission's duties are set forth in the legislation.

The Commission's work is funded primarily by assessments imposed on all shipments of California table grapes as required by the Ketchum Act. The Commission determines the amount of the assessment based on what is reasonably necessary to pay its obligations and to carry out the objects and purposes of the Ketchum Act, not to exceed a statutory amount per pound. (§ 65600.) These assessments are paid by shippers who are authorized to collect the assessments from the growers. (§§ 65604, 65605.)

The Commission's governing board is composed of 18 growers representing California's six currently active table grape growing districts and one non-grower "public member." (§§ 65550, 65553, 65575.1.)

The California Department of Food and Agriculture (CDFA) and the Secretary of the CDFA (Secretary) retain authority over the Commission's activities through a few key functions. (*Delano Farms Co. v. California Table Grape Comm'n* (9th Cir. 2009) 586 F.3d 1219, 1221 (*Delano Farms*).) The CDFA oversees the nomination and selection of producers eligible to be appointed to the Commission board. (§§ 65559, 65559.5, 65560, 65562, 65563.) The Secretary not only appoints, but may also remove, every member of the Commission. (§§ 65550, 65575.1; *Delano Farms, supra,* 586 F.3d at p. 1221.) Further, the Secretary has the power to reverse any Commission action upon an appeal by a person aggrieved by such action. (§ 65650.5.) Additionally, the Commission's books, records and accounts of all of its dealings are open to inspection and audit by the CDFA and the California Department of Finance. (§ 65572, subd. (f).)

The CDFA provides information and instructions to the Commission regarding marketing orders each month through the CDFA's "Marketing Memo." The CDFA also retains the authority to review the Commission's advertising. In its policy manual, the CDFA expressly "reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted. This may include intervention in message development prior to placement of messages in a commercial medium or venue." (Cal. Department of Food and Agriculture, Policies for Marketing Programs (4th ed. 2006) p. C-3.)

Moreover, as with other state government entities, the Commission is subject to the transparency, auditing and ethics, regulations designed to promote public accountability. (*Delano Farms, supra,* 586 F.3d at p. 1221.)

2. The underlying actions.

Appellants object to being required to pay assessments to fund the Commission's activities. They seek a judgment "declaring that the statutes establishing the Commission and defining its alleged authority, are unconstitutional in that they violate [appellants'] rights guaranteed under the Free Speech and Free Association Clauses of the California Constitution." Appellants further allege that the law establishing the Commission exceeds the state's police power.

Appellants filed their original complaints between 1999 and 2001. These actions were stayed or dormant while the parties awaited decisions in a number of state and federal cases involving similar claims. The parties filed amended complaints in 2011 and the cases were consolidated.

The Commission moved for summary judgment. The Commission argued that appellants' free speech and association claims were barred because the Commission's speech activities constitute government speech. Alternatively, the Commission asserted appellants' free speech and association claims were barred because the Ketchum Act satisfies intermediate scrutiny. Finally, the Commission argued that appellants' police power claims failed under the rational basis standard of review.

The trial court granted summary judgment in the Commission's favor. The court concluded that the Commission is a government entity and thus the government speech defense was established. The court did not rule on the Commission's alternative claim that the Commission's speech is government speech because it is controlled by the CDFA. The court further found that the Ketchum Act survives both intermediate scrutiny and rational basis review.

DISCUSSION

1. Standard of review.

A party moving for summary judgment bears the burden of persuading the trial court that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525 (*Brown*).) Once the moving party meets this initial burden, the burden shifts to the opposing party to establish, through competent and admissible evidence, that a triable issue of material fact still remains. If the moving party establishes the right to the entry of judgment as a matter of law, summary judgment will be granted. (*Ibid.*)

On appeal, the reviewing court must assume the role of the trial court and reassess the merits of the motion. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) The appellate court applies the same legal standard as the trial court to determine whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. The court must determine whether the moving party's showing satisfies its burden of proof and justifies a judgment in the moving party's favor.

(*Brown, supra,* 171 Cal.App.4th at p. 526.) In doing so, the appellate court must view the evidence and the reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment motion. (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.) If summary judgment is correct on any of the grounds asserted in the trial court, the appellate court must affirm, regardless of the trial court's stated reasons. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.)

2. The constitutional validity of generic advertising assessments.

The United States Supreme Court provided the foundation for the law on the constitutional validity of compulsory fees used to fund speech in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 (*Abood*) and *Keller v. State Bar of California* (1990) 496 U.S. 1 (*Keller*). In *Abood* and *Keller*, the court "invalidated the use of the compulsory fees to fund union and bar speech, respectively, on political matters not germane to the regulatory interests that justified compelled membership." (*Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 955-956 (*Gallo Cattle*).) Thereafter, both the United States Supreme Court and the California Supreme Court applied these precedents to generic commodity advertising funded by compulsory fees.

In *Glickman v. Wileman Brothers & Elliott, Inc.* (1997) 521 U.S. 457 (*Glickman*), the United States Supreme Court considered the compulsory subsidy of commodity advertising for the first time. The *Glickman* majority found that compulsory fees for generic advertising under a federal marketing order

that regulated California grown nectarines, peaches, pears and plums did not violate the First Amendment. (*Glickman, supra,* 521 U.S. at pp. 472-473.) The majority noted that this generic advertising was unquestionably germane to the purposes of the marketing orders. Further, the assessments were not used to fund ideological activities. (*Id*. at p. 472.) The court reasoned that it was reviewing "a species of economic regulation that should enjoy the same strong presumption of validity" that is accorded "to other policy judgments made by Congress." (*Id*. at p. 477.)

When faced with a program very similar to the one at issue in *Glickman*, the California Supreme Court reached a different conclusion when it applied the California Constitution. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 (*Gerawan I*).) Noting that article I's free speech clause is broader and greater than the First Amendment, the *Gerawan I* court concluded that the California Plum Marketing Agreement's compelled funding of generic advertising implicated the plaintiff's right to freedom of speech under article I. (*Gerawan I, supra,* 24 Cal.4th at pp. 491, 517.) However, this holding did not conclude the case. "That the California Plum Marketing Program implicates Gerawan's right to freedom of speech under article I does not mean that it violates such right." (*Id*. at p. 517.) The court explained that there remained the questions of what test is appropriate for use in determining a violation and what precise protection does article I afford commercial speech. (*Ibid.*) Accordingly, the court remanded the matter to the Court of Appeal to address these questions. The court did not consider "[w]hether, and how, article I's free speech clause may accommodate government speech"

because the issue was not timely raised. (*Id.* at p. 515, fn 13.)

The case returned to the California Supreme Court in *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 (*Gerawan II*). However, in the interim, the United States Supreme Court decided *United States v. United Foods, Inc.* (2001) 533 U.S. 405 (*United Foods*).

In *United Foods*, the court considered the constitutional validity of a program that imposed mandatory assessments on handlers of fresh mushrooms. In practice, these assessments were spent almost exclusively on generic advertising to promote mushroom sales. The court concluded that compelled funding of commercial speech must pass First Amendment scrutiny. (*United Foods, supra,* 533 U.S. at p. 411.) Applying the rule in *Abood* and *Keller*, the court invalidated the mandatory assessments. Although *Abood* and *Keller* would permit the assessment if it were "germane to the larger regulatory purpose" (*id.* at p. 414) that justified the required association, the only regulatory purpose of the mushroom program was funding the advertising scheme in question. (*Id.* at pp. 414-415.) The court distinguished *Glickman* on the ground that in *Glickman* the "compelled contributions for advertising were 'part of a far broader regulatory system that does not principally concern speech.'" (*Id.* at p. 415.) Although the government argued that the advertising was immune from scrutiny because it was government speech, the court declined to consider the claim because it was untimely. (*Id.* at pp. 416-417.)

In *Gerawan II* the California Supreme Court held that, under the California Constitution, compelled funding of generic advertising should be tested by the intermediate scrutiny standard articulated by the United States Supreme Court in *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557. (*Gerawan II, supra,* 33 Cal.4th at p. 22.) The court noted that, despite the United States Supreme Court's holding in *Glickman*, *United Foods* seemed to be in agreement with *Gerawan I*. The *Gerawan II* court described *United Foods* as holding "that the compelled funding of commercial speech does not violate the First Amendment *if* it is part of a larger marketing program, such as was the case in *Glickman*, and *if* the speech is germane to the purpose of the program. But that being the case, compelled funding of commercial speech must be said to implicate the First Amendment, i.e., such compelled funding requires a particular constitutional inquiry along the lines of *Abood* and its progeny." (*Gerawan II, supra,* 33 Cal.4th at p. 17.) As to the Secretary's government speech claim, the *Gerawan II* court concluded that it could not be resolved on the pleadings and required further factfinding. (*Id*. at p. 28.)

3. Compelled generic advertising as government speech.

In *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550 (*Johanns*), the United States Supreme Court directly addressed, for the first time, the government speech argument that had been raised in both *Glickman* and *United Foods*. The court described the dispositive question as "whether the generic advertising at issue is the Government's own speech

and therefore is exempt from *First Amendment* scrutiny." (*Johanns, supra,* 544 U.S. at p. 553.) This case arose under the Beef Promotion and Research Act (Beef Act).

The *Johanns* majority delineated two categories of cases where First Amendment challenges to allegedly compelled expression have been sustained: "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." (*Johanns, supra,* 544 U.S. at p. 557.) The court then noted "We have not heretofore considered the *First Amendment* consequences of government-compelled subsidy of the government's own speech." (*Ibid*.) However, the court pointed out, "'[c]ompelled support of government' -- even those programs of government one does not approve -- is of course perfectly constitutional, as every taxpayer must attest." (*Id*. at p. 559.)

The Beef Act announced a federal policy of promoting the marketing and consumption of beef. The Beef Act directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order (Beef Order) and by appointing a Cattlemen's Beef Promotion and Research Board (Beef Board). At issue in *Johanns* were beef promotional campaigns designed by the Operating Committee of the Beef Board. These campaigns were funded by mandatory assessments on beef producers. (*Johanns, supra,* 544 U.S. at p. 553.)

The *Johanns* majority held that the beef promotional campaigns were the government's own speech. In reaching this conclusion, the court determined that the promotional campaigns' message was effectively controlled by the federal government itself. (*Johanns, supra,* 544 U.S. at p. 560.) First, Congress directed the creation of the promotional program and specified that the program should include "'paid advertising, to advance the image and desirability of beef and beef products.'" (*Id.* at p. 561.) Second, "Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain … and what they shall not." (*Ibid.*) "Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary …." (*Ibid.*) Although the Secretary did not write the ad copy himself, the Secretary appointed half the members of the Operating Committee and all of the Operating Committee's members were subject to removal by the Secretary. (*Id.* at p. 560.) Additionally, all proposed promotional messages were reviewed by Department of Agriculture officials both for substance and for wording, and some proposals were rejected or rewritten by the Department. Finally, Department of Agriculture officials attended and participated in the open meetings at which proposals were developed. (*Id.* at p. 561.) Therefore, the court held, the Beef Board and the Operating Committee could rely on the government speech doctrine to preclude First Amendment scrutiny. (*Id.* at p. 562.) Finding that the promotional campaigns were effectively controlled by the government, the court

declined to address whether the Operating Committee was a governmental or a nongovernmental entity. (*Id.* at p. 560, fn. 4.)

In *Gallo Cattle,* the Third District held that *Johanns* applies to the free speech clause under article I, section 2 of the California Constitution. (*Gallo Cattle, supra,* 159 Cal.App.4th at p. 955.) The *Gallo Cattle* court first noted that, in determining whether to follow the United States Supreme Court in matters concerning the free speech doctrine, the California Supreme Court has followed the reasoning set forth in *People v. Teresinski* (1982) 30 Cal.3d 822 (*Teresinski*). (*Gallo Cattle, supra,* 159 Cal.App.4th at p. 959.)

In *Teresinski*, the court explained that decisions of the United States Supreme Court "are entitled to respectful consideration [citations] and ought to be followed unless persuasive reasons are presented for taking a different course." (*Teresinski, supra,* 30 Cal.3d at p. 836.) These potentially persuasive reasons fall into four categories: (1) something in the language or history of the California provision suggests that the issue should be resolved differently than under the federal Constitution; (2) the high court opinion limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion; (3) there are vigorous dissenting opinions or incisive academic criticism of the high court opinion; and (4) following the federal rule would overturn established California doctrine affording greater rights. (*Id.* at pp. 836-837.)

Applying the four *Teresinski* categories, the *Gallo Cattle* court concluded that the United States Supreme Court's reasoning in *Johanns* should be

followed in California. The court determined that the language and history of the California free speech provision do not compel a different resolution from that under the federal Constitution. (*Gallo Cattle, supra,* 159 Cal.App.4th at pp. 959-961.) Further, there is no prior California holding concerning the application of the government speech doctrine. (*Id*. at p. 961.) Finally, the court found the majority's reasoning in *Johanns* to be more persuasive than the dissent.

We agree with the *Gallo Cattle* court's analysis of this issue. Accordingly, we will apply *Johanns* here.

4. The Commission's speech is government speech.

In *Delano Farms*, the Ninth Circuit analyzed the constitutional validity of the compelled funding of generic advertising levied through the Commission. The court considered both ways in which the Commission's activities could be classified as government speech, i.e., if the Commission is itself a government entity or if the Commission's message is effectively controlled by the state. The court concluded that the Commission's promotional activities constituted government speech under either avenue of classification and were therefore immune from a First Amendment challenge. (*Delano Farms, supra,* 586 F.3d at p. 1223.)

The *Delano Farms* court compared the framework of statutes governing the Commission to the scheme addressed in *Johanns*. (*Delano Farms, supra,* 586 F.3d at pp. 1227-1228.) The court first noted that the founding of the Commission, its structure, and its relationship to the State of California is strikingly

similar to the beef program at issue in *Johanns*. Like the beef program in *Johanns*, the Commission was established by a legislative act. (*Delano Farms, supra,* at p. 1228.) Also similar to the beef program, the Legislature provided an overriding directive for the sorts of messages the Commission should promote. (*Ibid.*) "[T]he Legislature intends that the commissions and councils operate primarily for the purpose of creating a more receptive environment for the commodity and for the individual efforts of those persons in the industry, and thereby compliment individual, targeted, and specific activities." (§ 63901, subd. (e).)

The *Delano Farms* court observed that the California Legislature's expectations for the Commission and its messaging were much more specific than the stated objectives of the Beef Act and Beef Order discussed in *Johanns*. (*Delano Farms, supra,* 586 F.3d at p. 1228.) The Legislature directed the Commission to focus on,

> "The promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in consuming markets, research respecting the health, food and dietetic value of California fresh grapes and the production, handling, transportation and marketing thereof, the dissemination of information respecting the

> results of such research, instruction of the wholesale and retail trade with respect to handling thereof, and the education and instruction of the general public with reference to the various varieties of California fresh grapes for human consumption, the time to use and consume each variety and the uses to which each variety should be put, the dietetic and health value thereof ….” (§ 65500, subd. (f).)

The court concluded that the Legislature’s directive went much further in defining the Commission’s message than the Beef Order’s general directive that the beef promotional campaigns should discuss different types of beef and should refrain from using brand names. (*Delano Farms, supra,* 586 F.3d at p. 1228.)

The *Delano Farms* court further noted that, like the Operating Committee in *Johanns*, “the Commission is tasked with developing specific messaging campaigns.” (*Delano Farms, supra,* 586 F.3d at p. 1228.) Importantly, the Secretary of the CDFA has the power to appoint and remove every member of the Commission. In contrast, the U.S. Secretary of Agriculture only appoints half of the Beef Board Operating Committee members. (*Id*. at pp. 1228-1229.) Further, the state possesses additional oversight powers over the Commission. The Commission’s books, records and accounts of all of its dealings are open to inspection and audit by the CDFA and the California Department of Finance.

The *Delano Farms* court acknowledged that there were some important differences between the

Ketchum Act and the program considered in *Johanns*. Unlike the Beef Order, the Ketchum Act does not *require* any type of review by the Secretary over the actual messages promulgated by the Commission. The Beef Board and the Operating Committee submit all plans to the U.S. Secretary of Agriculture for final approval. (*Delano Farms, supra,* 586 F.3d at p. 1229.)

Nevertheless, although not required, the CDFA retains the authority to review the Commission's advertising. As discussed above, the CDFA reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted. Even if the Secretary does not exercise this authority and intervene in message development, he or she does not relinquish the power to do so. (Cf. *Paramount Land Co., LP v. Cal. Pistachio Comm'n* (9th Cir. 2007) 491 F.3d 1003, 1011-1012.) Moreover, the Secretary has the power to reverse any Commission action upon an appeal by a person aggrieved by such action. (§ 65650.5.)

The *Delano Farms* court concluded that, while there are differences in the statutorily-prescribed oversight afforded to the government with respect to the Commission and the beef program, these differences are legally insufficient to justify invalidating the Ketchum Act on First Amendment grounds. (*Delano Farms, supra,* 586 F.3d at p. 1230.) In other words, under the *Johanns* analysis, the state exercises effective control over the Commission's activities such that "the Commission's message is 'from beginning to end' that of the State. [Citations.]" (*Delano Farms, supra,* at pp. 1227-1228.)

While California courts are not bound by decisions of the lower federal courts, they are persuasive and entitled to great weight. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58.) We find *Delano Farms* persuasive and will follow it in this case. The detailed parameters and requirements imposed by the Legislature on the Commission and its messaging, the Secretary's power to appoint and remove Commission members, and the Secretary's authority to review the Commission's messages and to reverse Commission actions, lead us to conclude, based on the statutory scheme, that the Commission's promotional activities are effectively controlled by the state and therefore are government speech.

As discussed above, the *Johanns* reasoning applies to free speech issues arising under the California Constitution. Therefore, the Commission's promotional activities, being immune to challenge under the First Amendment pursuant to *Johanns*, are also immune to challenge under the California Constitution. Accordingly, the Commission is entitled to summary judgment on the ground that its message is effectively controlled by the state. In light of this conclusion, we need not decide whether the Commission is a government entity or whether the Ketchum Act survives intermediate scrutiny under *Gerawan II*.

5. Summary judgment was proper on appellants' liberty and due process claims.

Appellants contend the trial court erred in granting summary judgment on their liberty and due process causes of action arising from their claim that the Ketchum Act exceeds the state's police power.

According to appellants, intermediate scrutiny, not rational basis, was the proper standard of review. Appellants further assert that there are disputed issues of material fact regarding this issue.

"Whether a law is a constitutional exercise of the police power is a judicial question." (*Massingill v. Department of Food & Agriculture* (2002) 102 Cal.App.4th 498, 504 (*Massingill*).) A law is presumed to be a valid exercise of police power and may not be condemned as improper if any rational ground exists for its enactment. (*In re Petersen* (1958) 51 Cal.2d 177, 182.)

The party challenging the law has the burden of establishing that it does not reasonably relate to a legitimate government concern. (*Massingill, supra,* 102 Cal.App.4th at p. 504.) Therefore, to prevail, that party must demonstrate that the law is manifestly unreasonable, arbitrary or capricious, and has no real or substantial relation to the public health, safety, morals or general welfare. (*Ibid*.)

In enacting the Ketchum Act, the Legislature declared that "the production and marketing" of California table grapes was "affected with a public interest" and that the Ketchum Act was "enacted in the exercise of the police power of this state for the purpose of protecting the health, peace, safety and general welfare of the people of this state." (§ 65500, subd. (h).) The Legislature has found, and indeed it is beyond dispute, that agriculture is the state's most vital industry and is integral to its economy. (§ 63901; *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1603.)

An act promoting table grapes, one of the major crops produced in California, for the purpose of protecting and enhancing the reputation of California table grapes is reasonably related to the goal of protecting the state's general welfare. Appellants have not demonstrated otherwise. They have not shown that the Ketchum Act is unreasonable, arbitrary or capricious and does not reasonably relate to the legitimate government concern of promoting and protecting California agriculture. Rather, appellants incorrectly argue that this particular exercise of police power requires a more stringent review. Appellants also erroneously attempt to place the burden on the Commission to demonstrate that that the Ketchum Act remains a valid exercise of the state's police power.

Since appellants did not meet their burden, the trial court properly granted summary judgment on their police power violation claims.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

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LEVY, Acting P.C.

WE CONCUR

_____

KANE, J.

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PENA, J.

Appendix C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FRESNO
CIVIL DIVISION, B.F. SISK COURTHOUSE

No. 636636-3

DELANO FARMS COMPANY, et al.,

Plaintiffs,

v.

CALIFORNIA TABLE GRAPE COMMISSION,

Defendant.

Filed: May 22, 2013

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiffs Delano Farms Co., Gerawan Farming, Inc., Four Star Fruit, Inc., and Bidart Bros. are California table grape growers and shippers who object to being required to pay assessments to fund the California Table Grape Commission's activities as required by the 1967 Ketchum Act (Food & Agr. Code §§ 65550 et seq.) The basis for the objection is that the Commission's advertisements are designed to promote table grapes as though they were a generic commodity" with generic quality", whereas plaintiffs prefer to promote and market their own table grapes.

There are six consolidated cases: *Delano Farms v. Cal. Table Grape Comm.* (Case No. 636636), *Gerawan Farming v. Cal. Table Grape Comm.* (Case No. 642546), *Four Star Frnit v. Cal. Table Grape Comm.* (Case No. OlCECGOl 127), *Cal. Table Grape Comm. v. Delano Farms* (Case No. 01CECG02292), *Cal. Table Grape. Comm. v. Gerawan Farming* (Case No. 01CECG02289), and *Bidart Brothers v. Cal. Table Grape Comm.* (Case No. 1 lCECGOOl 78).

Delano Farms, Gerawan Farming and Four Star Fruit separately filed First Amended Complaints by stipulation and order of the court on January 14, 2011. Though separately filed, the complaints are virtually identical, asserting the same three causes of action:

> 1. Violation of Free Speech and Free Association Clauses of the United States Constitution and Violation of Civil Rights; Declaratory and Injunctive Relief/ Refund of Assessment. Plaintiffs allege that the statutes authorizing the Commission and assessments imposed violate plaintiff's rights under the free speech and association protections of the First Amendment to the U.S. Constitution. Contends that the Commission's speech is not government speech.
>
> 2. Violation of Free Speech and Free Association Clauses of the California Constitution (Art. I, §§ 2 and 3); Declaratory and Injunctive Relief; Refund of Assessments. Plaintiffs allege the statutes authorizing the Commission and assessments imposed violate their rights under the free speech and association clauses of the California Constitution.

3. Violation of liberty interests pursuant to California Constitution's Liberty and Privacy Clauses (Cal. Const., Art. I § 1). Plaintiffs contend that the Commission's existence exceeds the State's police power.

Bidart Bros. filed its First Amended Complaint on March 11, 2011, asserting the following causes of action:

1. Violation of Free Speech and Free Association Clauses of the California Constitution (Art. I, §§ 2 and 3); Declaratory and Injunctive Relief; Refund of Assessments.

2. Violation of liberty interests pursuant to California Constitution's Liberty and Privacy Clauses (Cal. Const., Art. I § 1).

3. Declaratory and Injunctive Relief; Violation of Due Process Rights under California Constitution; Refund of Assessments.

On February 20, 2013 the parties stipulated to the filing of a second amended complaint, adding Blanc Vineyards as a plaintiff. This amended complaint does not impact the summary judgment motion, as it was stipulated that the motion would be deemed to apply to the second amended complaint. Additionally, if the case is not resolved at summary judgment, it was stipulated that Blanc Vineyards would not introduce separate or additional evidence. Therefore, the summary judgment motion, if granted, would dispose of Blanc Vineyards' claims as well.

For many years plaintiffs' challenges were stayed or dormant while the parties awaited decisions in a number of similar cases in state and federal court.

One, *Delano Farms* Co. *v. California Table Grape* Commission is a nearly identical action brought by plaintiff Delano Farms in federal court. It ended in the Commission being granted summary judgment, affirmed by the Ninth Circuit in 2009 (586 F.3d 1219), cert denied in 2010 (131 S.Ct. 159).

On July 12, 2012 the Commission filed a motion for summary judgment, or in the alternative, summary adjudication. The Commission contends plaintiffs' state and federal free speech and association claims are barred because the Commission's speech activities constitute government speech either because the Commission is itself a government entity or because its message is subject to the control of the Department of Food and Agriculture. The Commission also argues the undisputed facts show plaintiffs have not been compelled to fund private speech with which they disagree. The Commission also contends the Ketchum Act, pursuant to which the Commission was established, satisfies intermediate scrutiny, barring plaintiffs' free speech and association claims. Finally, the Commission claims that plaintiffs' claims under the Liberty and Privacy Clause of the California Constitution, as well as the California due process claim maintained by plaintiff Bidart Bros. are barred because the Ketchum Act passes rational basis review, the standard applicable to evaluation of these claims.

Plaintiffs filed opposition to the Commission's motion and in addition filed, though did not separately calendar, a motion to strike the declaration of Julian Alston, offered in support of the motion. Included with

plaintiffs' opposition were evidentiary objections to virtually all of the Commission's evidence.

As will be seen below, after addressing plaintiffs' motion to strike and the parties' objections, the court will find that the undisputed fact that the Commission is a government entity establishes the government speech defense, barring plaintiffs' state and federal free speech and association claims. The court will therefore not address the Commissions alternative claim that the government speech defense is established because its speech is controlled by the Department of Food and Agriculture. The court will, however, find that the Ketchum Act survives both intermediate scrutiny and rational basis review. Accordingly, the motion for summary judgment will be granted.

II. Discussion

A. Plaintiffs' Motion To Strike.

Plaintiffs move to strike the declaration of Julian Alston ("Alston") filed in support of the motion for summary judgment. The declaration is offered in support of defendant's assertion that the Ketchum Act satisfies intermediate scrutiny, or specifically, that the Commission furthers California's interest in maintaining and expanding demand for table grapes by addressing the "free-rider" problem, that the Commission's activities have increased demand for table grapes and returned net positive benefits to California and California growers, and that the program is narrowly tailored to addressing the "free-rider" problem. Alston is a tenured professor in the Department of Agricultural and Resource Economics at the University of California, Davis, holds a master's

degree in agricultural sciences and a doctorate in economics, and is one of the world's foremost authorities on the economics of commodity promotion programs. He first summarizes and discusses the literature on the lack of sufficient investments in advertising and promoting in commodity markets caused by the "free-rider" problem, and applies these problems to the table grape industry. In the portion of the declaration plaintiffs primarily attack, he next provides an economic analysis of the impact of the Commission's advertising and promotion efforts. Over the last 15 years Alston has conducted three different studies to measure the effectiveness of the Commission's promotion activities. His equations have shown that the Commission's activities have a substantial, positive, and statistically significant effect on demand for grapes, the findings consistent across all three studies. Based on his studies, Alston opines that the Commission's program is narrowly tailored to addressing the free-rider program.

Though plaintiffs submit no evidence contradicting Alston's findings, either from another economist or an economic critique of Alston's work, they criticize the methodological approach taken by Alston in his economic analysis. Plaintiffs argue that his conclusions are devoid of certain critical facts, giving the declaration no evidentiary value. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 [expert opinion without explanation of why underlying facts led to the ultimate conclusion has no evidentiary value] ("*Bushling*").)

Plaintiffs contend that Alston cannot offer the expert opinions contained in his declaration based on certain statements in his declaration. Specifically, plaintiffs argue that Alston has never worked as a shipper, producer or retailer in the table grape industry; that his 2012 reports were not peer reviewed; that he used as his total advertising, promotion and marketing expenditures just those of the Commission, and not what retailers or shippers spent (which data he didn't have); and that he did not consider the existence of a greater number of varieties of table grapes being sold or the quantity of imports from Chile. Plaintiffs further argue Alston combined both domestic and export qualities together to measure total demand and he did not factor in the fact that the population is moving towards healthy diets with greater consumption of fruits and vegetables. Plaintiffs identify a number of other assumptions, hypotheticals, and failures to consider certain criteria. However, plaintiffs offer no contrary expert testimony pointing out that these are relevant considerations, or that they render Alston's studies, conclusions and expert testimony fatally flawed.

Plaintiffs contend that their separate statement shows that retailers and shippers spend a substantial amount of money promoting and advertising table grapes in retail stores, with the shipper providing the retailer with "cents-off' discounts for large shipments of table grapes being shipped in return for the retailer doing in-store demonstrations, point-of-sale material, advertising in in-store circulars, but Alston did not consider this. Accordingly, plaintiffs contend, Alston's declaration would not be of any assistance to the court

because it is based on assumptions of fact without evidentiary support, are speculative or conjectural.

The Commission argues that plaintiffs offer no evidence contradicting Alston's conclusions, and contend their challenges to the methodology used in his econometric analysis has no bearing on his other conclusions - that the Ketchum Act addresses an important economic problem and does so in a narrowly tailored fashion. The Commission points out that Alston clearly is qualified to testify in an expert in this case. That he has never worked in a hands-on business position in the table grape industry is irrelevant. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code § 720(a).) The Commission further contends that plaintiffs' objections are nothing more than disagreements with Alston's methodology in constructing the econometric models that he used. Plaintiffs offer no evidence that their criticisms are well-founded, and no evidence that the approach they advocate would have altered Dr. Alston's conclusions in any way.

The Commission points out that disagreements with the expert's reasoning and conclusions go to the weight of the evidence *if* a factual dispute exists, but are irrelevant to the threshold question of admissibility, citing *Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1519. The Commission points out that plaintiffs provide no actual data in support of their assertion that shippers and retailers make significant investments in the promotion of

table grapes. Plaintiffs and the Commission have previously stipulated to various facts, including: (1) the only advertising conducted by each plaintiff is the placement of a single print advertisement once a year in a single issue of a trade publication called The Packer or a trade publication called Produce Now at a cost of less than $1000 per year and (2) other than the limited advertising in trade publications noted above, the only promotional or marketing activity undertaken by Plaintiffs is directly contacting their potential trade customers . . . and selling some of their grapes in packaging that identifies the name of the grower/shipper. (Stipulation Regarding Plaintiffs' Advertising, Promotional, and Marketing Activities, Wilkinson Dec. Exh. B.)

The court finds Alston's declaration is not devoid of evidentiary value like the expert testimony in *Bushling, supra. Bushling* was a personal injury action brought by a patient who sued a surgeon and anesthesiologist for negligence after he experienced shoulder pain following gall bladder surgery. The defendants moved for summary judgment. In opposition to the motion, the plaintiffs filed declarations by doctors who opined, based on the fact of the injury to the shoulder, that the plaintiff had been dropped, his arm had been improperly positioned during surgery, or his arm had been stretched. The court found the declarations to be without evidentiary value, since there was no evidence that any of these scenarios occurred. The opinions were nothing more than statements that the injury could have been caused by the negligence in one of these ways. "An expert's opinion that something could be true if certain assumed facts are true, without any foundation for

concluding those assumed facts exist . . . has no evidentiary value." *(Bushling, supra.* at 510, citations omitted.) Here, plaintiffs have not shown that Alston relied on factual assumptions that are not supported in the record. Thus, the motion to strike is denied.

B. Objections To Evidence.

Plaintiffs submit written objections to the Spezzano and Ross declarations. Though plaintiffs did not submit separate written objections to the Alston, Lauber, Jolly declarations, in their responsive separate statement, plaintiffs assert objections to every single fact as presented by the Commission.

First, plaintiffs objections are procedurally improper on a number of grounds. Blunderbuss objections to virtually every item offered by the opposing party may lead to "informal reprimands or formal sanctions for engaging in abusive practices." *(Reid v. Google, Inc.* (1994) 50 Cal.4th 512, 532.) Moreover, raising objections in the separate statement violates Cal. Rule of Court, Rule 3.1354(b), which provides that "[o]bjections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, *but the objections must not be restated or reargued in the separate statement."* (Emphasis added.)

Here, as to the Alston, Lauber and Jolly declarations, the objections are only stated in the separate statements. And oftentimes the objection is in response to a material fact that references more than one declaration, and it cannot be determined what exactly plaintiffs are objecting to. These objections in the responsive separate statement do not

comply with the requirement in Cal. Rules of Court, Rule 3.1354(b) that each objection identify the name of the document in which the objectionable material is located, state the exhibit, title, page and line number of the material objected to, quote or set forth the objectionable statement or material, and state the grounds for each objection. They are overruled on that basis.

The objections to the Ross and Spezzano declarations also do not comply with Rule 3.1354(b) in that they are not sequentially numbered and do not quote or set forth the objectionable statement or material and are overruled on that basis as well as on the merits.

Spezzano is a produce industry consultant, having worked the last 14 years as a consultant in the produce industry. He discusses the market for table grapes, the Commission's promotional activities with retailers, and the free rider problem, providing his opinions about the effectiveness of these activities. Plaintiffs object to much of Spezzano's declaration on the grounds that he lays no foundation as to his familiarity with the Commission's activities, since he left his position with Vons (vice president of produce and floral) in 1997, and therefore that he provides improper opinion testimony. The objections are overruled because for 15 years Spezzano was the Vice President of produce for hundreds of grocery stores, making decisions about which types of products to sell, including supervising the procurement of table grapes. He routinely met and worked with table grape growers and shippers and with Commission staff members. After leaving Vons he started a consulting

practice in which he is involved in marketing and sale of table grapes and other produce in the California and Mexican table grape industries. This experience with produce and the table grape industry establishes Spezzano's qualification as an expert on the matters addressed in his declaration, including the Commission's work with retailers to promote table grapes.

Plaintiffs also object to most of the declaration of Karen Ross, Secretary of the California Department of Food and Agriculture ("CDFA"). In rather broad terms, she testifies about the importance of the table grape industry to the State of California, the "vital importance" of the Commission and its programs, and that the Commission's marketing program is a targeted way to expand markets and combat the "free rider" problem.

Plaintiffs object to paragraphs 4, 5, 7-12 on the grounds that they are speculative, conclusory, and not based on personal knowledge. The objections are overruled. Though Ross does not go into any detailed analysis, instead providing the broad picture view that would be expected from the head of a government agency, she does state that she has relied on CDFA's California Agricultural Statistics 2011-2012. There is therefore an underlying factual basis for her statements and conclusions. And as the leading government official responsible for regulating the State's agricultural industry, she is uniquely positioned to observe and assess the connection between the various programs and the vitality of the markets for those commodities, as well as the

incentives of producers and shoppers under her jurisdiction.

The Commission objects to a portion of Gerawan's deposition. Objection no. 1 (to Gerawan Depo. 84:18-25) is sustained. Gerawan's testimony that generic marketing activities are ineffective, a waste of money, and counterproductive, lacks foundation. Objection nos. 2 through 4 are overruled.

C. Free Speech And Association Claims Under United States And California Constitutions.

1. Government Speech Defense.

The Commission contends the government speech defense bars plaintiffs' first amendment free speech and association claims under both the United States and California Constitutions as a matter of law. Plaintiffs do not dispute in their opposition that the government speech defense, if established, would bar these claims. Instead, they argue that there are triable issues as to whether this is government speech.

In *Johanns v. Livestock Marketing Association* {2005) 544 U.S. 550 (*"Johanns"*), the Supreme Court considered the constitutionality of the Beef Promotion and Research Act of 1985 (the "Beef Act"). The Beef Act furthers a federal policy of promoting the marketing and consumption of beef and beef products and funds those activities through assessments on cattle sales and imports. (See *Id.* at 553.) "The statute directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order," and specifies that the Secretary should appoint a Beef Board that is to convene an Operating Committee that is composed of 10 Beef Board

members and 10 representatives named by state beef councils. (*Id.*) The Operating Committee is to design promotional campaigns, which are approved by the Secretary before their release. (*Id.*)

The Ninth Circuit had held that compelled funding of speech may violate the First Amendment even if the speech in question is the government's. The Supreme Court disagreed, clarifying that government-compelled subsidy of the government's own speech does not raise First Amendment concerns. On the other hand, compelled subsidization of a private message with which one disagrees implicates the first amendment. *(Id.* at 558.) "Compelled support of a private association is fundamentally different from compelled support of government." *(Id.* at 159, quoting *Abood v. Detroit Bd. of Ed.* (1977) 431 U.S. 209, 259, n. 13.) The court also stated that the First Amendment challenge requires the plaintiffs to show that their compelled assessments pay for speech with which they disagree. (*Id.* at 560.)

The Supreme Court rejected the argument that the beef program does not qualify as "government speech" because it is funded by a targeted assessment on beef producers, rather than by general revenues, thereby giving control to a narrow interest group that will not heed respondents' objections, a opposed to politically accountable legislators. (*Id.* at 562-564.)

The *Johanns* Court held that the Operating Committee's promotional activities constitute the government's own speech because the message is effectively controlled by the federal government. *(Id.* at 560-61.) The Court recognized three key factors about the program: (1) Congress directed the creation

of the promotional program and specified that the program should include "paid advertising, to advance the image and desirability of beef and beef products." *(Id.* at 560); (2) "Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain . . . and what they shall not ..." (*Id.* at 561) (internal citations omitted), i.e., the campaigns should not refer to brand or trade names of any beef product (*Id.*)*;* (3) Finally, "the record demonstrate[d] that the Secretary exercises final approval authority over every word used in every promotional campaign." (*Id.*) The Court, therefore, held that the Beef Board and the Operating Committee could rely on the government speech doctrine to deflect the cattle associations' challenge. (*Id.* at 562.)

In 2007, the Ninth Circuit overturned a district court's granting of a preliminary injunction in favor of pistachio growers against the California Pistachio Commission. *(Paramount Land Co., LP v. Cal. Pistachio Com'n* (9th Cir. 2007) 491 F.3d 1003 (*"Paramount"*).) The Ninth Circuit addressed "whether this generic advertising is 'the Government's own speech and therefore is exempt from First Amendment scrutiny' under the Supreme Court's analysis in *Johanns v. Livestock Marketing Association."* (*Id.* at 1005.) The state regulation of pistachios was described as follows:

> The California state legislature created the Pistachio Commission "to enhance and preserve the economic interests of the State of California,' by among other activities, '[i]mplement[ing] public policy through [its]

expressive conduct." Cal. Food & Agric. Code § 63901. The Pistachio Commission administers the Pistachio Act and supports the pistachio industry through advertising, marketing, research, and government relations campaigns. See Pistachio Act § 9051.

The Pistachio Commission is authorized to undertake a broad range of activity: (1) research into production, food safety, marketing, crop protection and production materials, (2) promotion of the elimination of trade barriers, (3) consumer education regarding the health benefits of pistachios, (4) demand-side regulation to stabilize the market, (5) analysis of relevant foreign, federal and state regulation, (6) cooperative crisis resolution, (7) cooperation with state and federal agencies in foreign negotiations, and (8) support of industry self-regulation. See Cal. Food & Agric. Code §§ 63901-63901.3. This regulatory scheme, which applies to all councils and commissions relating to agricultural or seafood markets in California, is designed to 'work subject to, and together with, the constraints placed on the agricultural industry by state and federal statutes and regulations and international restrictions.' *Id.* § 69301.4.

The Pistachio Commission has nine members, eight selected by California pistachio growers and one selected by the Secretary of the California Department of

Food and Agriculture ('CDFA') Pistachio Act § 69031. Acting through committees chaired by the commissioners, the Commission meets three times a year and employs a full-time staff to handle daily operations. In addition to appointing one member of the committee [sic], the Secretary of the CDFA (or a designee), may attend and participate in the Pistachio Commission or committee meetings as an ex officio member. *Id.* Like other entities in the state government, the Commission is subject to transparency and ethics regulations designed to promote public accountability.

The Secretary retains broad statutory authority to: (1) review and approve the Pistachio Commission's annual budget and planned activities, (2) conduct fiscal and compliance audits, (3) approve nomination and election procedures, (4) decide appeals from grievance petitions filed by growers, and (5) suspend or discharge the Commission's president. See *id.* §§ 69051, 69069, 69092. The Secretary may also require the Pistachio Commission to 'correct or cease any activity or function that is determined by the secretary not to be in the public interest or to be in violation of [the Pistachio Act].' *Id.* § 69032. Although the Secretary has ultimate authority over the Commission's budget, operations, and planning, the Secretary has declined to exercise many of his more specific statutory powers.

Paramount and its various affiliated entities are the largest producers of pistachios in California, together paying between 25 and 30 percent of the Pistachio Commission's total assessments in recent years. The expressive activity that has attracted Paramount's ire centers around generic print and public relations advertising campaigns for California pistachios. The most recent campaign features the logo 'California Pistachios' and the slogan 'Grab a Handful.' The campaign included print advertising in magazines, media mailings, a satellite tour, talk-show appearances by spokesperson Jane Seymour, and promotion at the retail level (including point-of-sale promotional materials, price recommendations, and advertising incentives). Paramount maintains that these campaigns are 'ineffective in augmenting pistachio sales,' 'do not adequately feature the nuts themselves,' and are 'antithetical to Paramount's interests,' which are to 'increase sales by differentiating its product from competitor's products.'

Paramount also targets the Pistachio Commission's government relations activities, which are coordinated by a political consultant who hires lawyers to represent the industry before the International Trade Commission and the Commerce Department, and to lobby government entities on behalf of the pistachio industry. Paramount complains that the Pistachio Commission has 'not done

> enough to protect the domestic pistachio industry from foreign pistachios.'
>
> These offending activities [of the Pistachio Commission complained of by Paramount] are funded by mandatory assessments paid by pistachio producers and importers (via processors who deduct dues from the amount they pay the producers). See *id.* §§ 69081 & 69085. Failure to pay invites financial penalties and possible enforcement action by the Pistachio Commission. *Id.* §§ 69088-93. The majority of the Commission's annual budget, which has fluctuated between $6.6 million and almost $8 million in recent years, is dedicated to the challenged expressive activity.

(Paramount at 1006-1007.) Based on the Supreme Court's decision in *Johanns,* the Ninth Circuit ruled that Paramount had not shown a likelihood of success on the merits of the First Amendment claim:

> The framework of statutes and regulations governing the Pistachio Commission and its activities essentially mirrors the scheme addressed in *Johanns*. Although the state of California may, in practice, exercise less oversight over the Pistachio Commission than the Secretary of Agriculture exercises over the Beef Board, on the record developed thus far, that distinction is not enough to differentiate the activities of the Pistachio Commission from those of the Beef Board. The structure of the Pistachio Commission and its relationship to the State

of California is nearly identical in design to that of the Beef Board at issue in Johanns. The Pistachio Commission consists of nine members, of which eight are elected by industry members and one is appointed by the Secretary of the CDFA. The Secretary must also concur in any nomination and election procedures adopted by the Pistachio Commission. Pistachio Act § 69069.

The Pistachio Commission is directed to 'promote the sale of pistachios by advertising and other promotional means,' id. § 69051 (i), while the Beef Board is tasked with 'carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for been and beef products.' 7 U.S.C. § 2901(b).

The Secretary of the CDFA is authorized to attend and participate in the meetings where promotional activities are planned, Pistachio Act § 69041, just as the Secretary of Agriculture or his designee may attend the meetings where the Beef Board develops marketing plans, see 7 C.F.R. § 1260.168(h). As a practical matter, the Secretary of the CDFA or his representative routinely attends Commission meetings.

The Secretary of Agriculture approves the Beef Board's detailed plans for promotional or marketing activities. See 7 C.F.R. §§ 1260.150(f)-(g) & 1260.169.

Similarly, the Pistachio Commission must submit to the Secretary of the CDFA, for his concurrence, 'an annual statement of contemplated activities authorized [by the Pistachio Act], including advertising, promotion, marketing research, and production research.' Pistachio Act § 69051(q).

Although there is no provision in the Pistachio Act allowing the Secretary of the CDFA to remove members of the Pistachio Commission, compare *Johanns,* 544 U.S. at 563, 125 S.Ct. 2055... , the Pistachio Act authorizes the Secretary of the CDFA to 'correct or cease any existing activity or function that is determined by the secretary not to be in the public interest or in violation of [the Pistachio Act].' Pistachio Act§ 69032. And, the Secretary may suspend or discharge the Commission's president if he has engaged in any conduct that the Secretary determines is not in the public interest. *Id.* § 69051(d).

Other factors also demonstrate the Secretary's control over the Commission. For example, growers dissatisfied with any Commission activity may file a grievance, which can be directly appealed to the Secretary. *Id.* § 69092. The Secretary also must approve the Commission's annual budget before the Commission may disburse funds, *id.* § 69051(p), and he may conduct a separate fiscal compliance audit whenever he deems such an audit is necessary, *id.*

§ 69051(h). Given the similarities to *Johanns* and the level of control vested in the Secretary, Paramount has not yet demonstrated that the Pistachio Commission should be classified as a nongovernmental entity.

Paramount argues that *Johanns* should not apply here because, in practice, the Secretary of the CDFA exercises 'no control' over the Pistachio Commission's promotional and marketing activities. In *Johanns,* the Court held that the speech at issue in that case more than met the requirements for qualifying as government speech. See 544 U.S. at 563, 125 S.Ct. 2055 . . . (holding that 'the beef advertisements here are subject to political safeguards more than adequate to set them apart from private messages'). However, *Johanns* did not set a floor or define minimum requirements. *Id.*

At this stage of the proceedings, we cannot say that Paramount is likely to overcome the barrier of *Johanns.* Paramount has not made a sufficient showing that the Secretary of the CDFA exercises inadequate oversight over the activities of the Commission. To be sure, the Secretary of the CDFA exercises less control over the Pistachio Commission than the Secretary of Agriculture exercised over the Beef Board. Nonetheless, the marketing and promotional plans submitted to the CDFA include a significant amount of detail. For example,

they include a general description of the advertisements, detail the themes to be emphasized, the actors to be used, the demographics to be targeted, and the media to be employed. Last year's budget noted that the 'proposed advertising campaign will feature three generations of [Jane] Seymour's family . . . making the connection that heart disease is not a discriminator of age, and that California pistachios can be an important part of lifetime heart health.' The proposal describes the specific magazines in which the advertisements will run, notes the approximate timing of their publication (in February, to coincide with the Super Bowl, for example), and often includes specific words and imagery to be used. The overall budget also includes specific line-item budgets for promotional, advertising, marketing, and research activities, a report from a retained private advertising agency that discusses the advertisements generally and each selected publication and promotional activity specifically, and a 15-page overview of the entire public relations strategy, including advertising, marketing, and promotions.

Although the Secretary has not rejected or edited proposals, or taken a particularly active role in meetings, this passivity is not an indication that the government cannot exercise authority. See *Johanns,* 544 U.S. at 560, 125 S.Ct. 2055 . . . (focusing on effective control). The Secretary, through his staff, retains authority to control both the activities

> and the message. The fact that he has not played an active role cannot be equated with abdication of his role. Just as '[t]he Secretary of Agriculture does not write [the copy of the beef advertisements] himself for the Beef Board, neither should such oversight be required for the California scheme to pass constitutional muster. *Id.*
>
> We acknowledge that there are differences in actual oversight between the beef scheme and the pistachio scheme, but these factual differences are legally insufficient to justify the injunction. To draw a line between these two approaches to oversight risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake. 'The message set out in the [pistachio] promotions is from beginning to end the message established' by the state government. *Id.*

(*Paramount* at 1010-1012 (footnotes omitted, bold emphasis added).)

Delano Farms and other grape growers/shippers filed a federal action against the California Table Grape Commission. The plaintiffs and defendant filed cross-motions for summary judgment, which were decided in the Commission's favor. Regarding the government speech defense, the trial court held that "[t]he record and state and federal statutory schemes in this action undisputedly establish that the Commission is a governmental entity under California law." *(Delano Farms Co. v. California Table Grape Comm'n* (E.D. Cal. 2008) 546 F.Supp.2d 859, 912.) The

court then held that "[t]he statutory provisions governing the Commission, coupled with the Stipulated Undisputed Facts, demonstrate as a matter of law the CDFA has the effective control over the Commission required by *Johanns."* This was sufficient to dispose of the plaintiffs' First Amendment claims. The court then addressed the alternative argument- that if *Johanns* did not apply, whether the Ketchum Act is constitutional under the intermediate scrutiny test described in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557. The court found that this test does *not* apply. (*Id.* at 927.).

Plaintiffs appealed to the Ninth Circuit, where the court affirmed that that the Commission's promotional activities constitute government speech that is immune to challenge under the First Amendment. (*Delano Farms Co. v. California Table Grape Comm'n* (9th Cir. 2009) 586 F.3d 1219, 1220 *("Delano I")*.) The court noted that, under *Johanns,* "[t]he Commission's activities may be classified as government speech, unencumbered by the bounds of the First Amendment, in either of two ways: (1) if the Commission is itself a government entity, or (2) if the Commission's message is 'effectively controlled' by the State." (*Delano* lat 1223, quoting *Johanns, supra,* 544 U.S. at 560-61.) The court first held "[b]ecause the Commission's activities are effectively controlled by the State of California, also rendering them government speech, the bottom line remains the same- the Commission's advertising activities are government speech and thus beyond the restraints of the First Amendment." (*Id.* at 1226.)

Applying *Johanns* and *Paramount Land Co. LP v. California Pistachio Commission* (9th Cir.2007) 491 F.3d 1003, the court then held that "the State exercises effective control over the Commission's activities." *(Delano I* at 1227-28. Accordingly, the court found that the district court did not err in granting summary judgment to the Commission on the ground that its promotional activities constitute government speech and are thus immune to challenge under the First Amendment.

> The founding of the Commission, its structure, and its relationship to the State of California is strikingly similar to the beef program at issue in *Johanns* and the Pistachio Commission considered in *Paramount Land*. Like the beef program and the Pistachio Commission, the Commission was established by an act of the Legislature, the Ketchum Act. §§ 65500 *et seq*. The California Legislature intended for the Commission, like other commissions established by the State, to "(i]mplement public policy through their expressive conduct." § 63901 (a). The Commission is tasked with "[e]nhance[ing] the image of California agricultural and seafood products to increase the overall demand for these commodities."§ 6390l(e). Also similar to the beef program in *Johanns* and identical to the Pistachio Commission in *Paramount Land,* the Legislature provided an overriding directive for the sorts of messages the state commissions should promote: "[T]he Legislature intends that the commissions and

councils operate primarily for the purpose of creating a more receptive environment for the commodity and for the individual efforts of those persons in the industry, and thereby complement individual, targeted, and specific activities."§ 6390l(e).

The California Legislature was quite specific about its expectations for the Commission and its messaging. The Legislature declared that "[g]rapes produced in California for fresh human consumption comprise one of the major agricultural crops of California, and the production and marketing of such grapes affects the economy, welfare, standard of living and health of a large number of citizens residing in this state."§ 65500(a). The Legislature further defined the purpose of the Commission's work by declaring that the Commission should focus on:

> [t]he promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in consuming markets, research respecting the health, food, and dietetic value of California fresh grapes and the production, handling, transportation,

> and marketing thereof, the dissemination of information respecting the results of such research, instruction of the wholesale and retail trade with respect to handling thereof, and the education and instruction of the general public with reference to the various varieties of California fresh grapes for human consumption, the time to use and consume each variety and the uses to which each variety should be put, the dietetic and health value thereof ...

§ 65500(f). The specifics contained in§ 65500(f) go much further in defining the Commission's message than the Beef Act and Beef Order's general directive that the Operating Committee's programming should discuss different types of beef and that it should refrain from using brand names. *See Johanns,* 544 U.S. at 561, 125 S.Ct. 2055.

Like the Operating Committee in *Johanns* and the Pistachio Commission in *Paramount Land,* the Commission is tasked with developing specific messaging campaigns. Importantly, the Secretary of the CDFA possesses the power of nomination over all of the table grape commissioners. §§ 65550, 65575.1. The Secretary's power in this respect is greater than either the Secretary of Agriculture's power in *Johanns* (the Secretary has the power to appoint all Beef Board members, but only half of the Operating Committee, *see Johanns,* 544 U.S.

at 560, 125 S.Ct. 2055) or the Secretary of the CDFA's power in *Paramount Land* (eight pistachio commissioners are elected by industry and only one is appointed by the Secretary of the CDFA, *see Paramount Land,* 491 F.3d at 1006). The Secretary also has the power to remove a table grape commissioner. §§ 65550, 65575.1. The State possesses additional oversight powers over the Commission, as the Commission is required to "keep accurate books, records, and accounts of all of its dealings" and must make those records open to review by the State. § 65572(f).

Of course, there are some important differences between the Ketchum Act on the one hand and the programs considered in *Johanns* and *Paramount Land* on the other. Unlike the Beef Order and the Pistachio Act, the Ketchum Act does not *require* any type of review by the Secretary over the actual messages promulgated by the Commission. Under the Beef Order, the Beef Board and Operating Committee send all plans to the Secretary for final approval. 7 C.F.R. §§ 1260.68 & 1260.169. Likewise, the Pistachio Commission must "submit to the secretary, for his or her concurrence, an annual statement of contemplated activities . . . including advertising, promotion, marketing research, and production research."§ 69051(q). We recognize that final approval has been statutorily provided to the relevant

secretaries in other commodities programs that courts have approved since *Johanns*. *See Am. Honey Producers Assoc., Inc. v. U.S.D.A.,* 2007 WL 1345467, at *2 (E.D.Cal. May, 8, 2007) (determining that honey program funded by industry assessments involved government speech and was therefore immune to constitutional challenge, the court noted that the Act includes a provision that gives the Secretary final approval power over messages before they can be disseminated to the public); *Avocados Plus, Inc. v. Johanns,* 421 F.Supp.2d 45, 47-48 (D.D.C.2006) (same, for avocado program); *Cricket Hosiery, Inc. v. United States,* 30 C.I.T. 576, 429 F.Supp.2d 1338, 1346 (2006) (same, for cotton program). We do not discount the significance of the power over specific messaging.

An additional noteworthy difference between the Ketchum Act and the Pistachio Act, in particular, concerns the Secretary's power to "require the [Pistachio] commission to correct or cease any existing activity or function that is determined by the secretary not to be in the public interest or to be in violation of this chapter." Cal. Food & Agric. Code § 69032. The Ketchum Act does not grant a similar power to the Secretary. Rather, under Cal. Food & Agric. Code § 65660, the Commission may recommend to the Secretary that its operation be suspended, or producers may file a petition with the Secretary recommending the same. At that point, the Secretary causes a

referendum to be conducted among producers. § 65660. Although less direct, this route for review still involves the Secretary in the oversight process. And, of course, the ultimate power of review and oversight-the Secretary's authority to remove table grape commissioners-cannot be discounted.

The bulk of Delano Farms's remaining arguments distinguishing the State's effective control over the Commission as compared to the beef program and the Pistachio Act largely rely on pointing out that the Secretary and the CDFA have, in practice, performed virtually no supervision of the Commission. Delano Farms notes that the Secretary does not attend meetings and does not review advertising and promotional activities, nor does the State review the Commission's budgets. The record also reflects that the CDFA had very few documents in its possession related to the Commission's work. In any event, Delano Farms's laissez-faire argument is foreclosed by *Paramount Land,* in which we underscored that "passivity is not an indication that the government cannot exercise authority." 491 F.3d at 1011. Our focus in this case, as in *Paramount Land,* is the statutorily- authorized control the State has over the Commission, and not the actual level of control evidenced in the record. While we acknowledge that there are differences in statutorily-prescribed oversight afforded to the government in the case of the

> Commission, the beef program, and the Pistachio Commission, these differences are legally insufficient to justify invalidating the Ketchum Act on First Amendment grounds. In sum, we are mindful of *Paramount Land's* admonition that "[t]o draw a line between these . . . approaches to oversight risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." *Paramount Land,* 491 F.3d at 1012.

(*Delano I* at 1228-30.)

It is clear the government speech defense also applies to claims based on the California constitution. In *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, a milk and cheese producer sued the CDFA for relief from assessments for generic advertising of dairy products. The court first noted that decisions of the United States Supreme Court are entitled to respectful consideration in interpreting the State freedom of speech clause, and ought to be followed unless persuasive reasons are presented for taking a different course. (*Id.* at 959, quoting *People v. Teresinski* (1982) 30 Cal.3d 822, 836.) Applying a four-part test set forth in *Teresinski,* the *Gallo Cattle* court found that the reasoning of *Johanns* applies "in resolving free speech issues arising under the California Constitution." (*Id.* at 963.)

"A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot established, or that there is a

complete defense to that cause of action." (Code Civ. Proc. § 437c(p)(2).) Here, the Commission has met its burden of showing that it is a governmental entity, which requires the motion be granted.

Simply establishing that the Commission is a government entity is

sufficient to defeat plaintiffs' free speech claims because, if it is, its speech is necessarily controlled by the government. (*Delano I* at 1226.) Plaintiffs rely on *Gerawan Cattle* Co. *v. Kawarmura* (2008) 33 Cal. 4th 1 *("Gerawan I"*), where a plum grower brought an action against the Secretary of the CDFA to enjoin a marketing order requiring growers to finance generic advertising of plums. Plaintiff plum grower appealed grant of judgment on the pleadings in favor of the Secretary. The Supreme Court held that whether the program satisfied intermediate scrutiny could not be decided on the pleadings. On the issue of the government speech defense, the Court never addressed whether the California Plum Marketing Board was itself a governmental entity because that issue was not raised by the Secretary, who instead argued that the government speech defense applies because he must ultimately approve the advertising. (*Id.* at 26.) Thus, the issue addressed in the opinion was whether the Secretary's approval was real or pro forma, an issue that could not be decided on the pleadings. Because the Court addressed the issue in the context of a non-government entity, the case is thus not authority for the proposition that the Commission must show both that it is a government entity and that its speech is controlled by the government. Since the Commission has met its burden of showing that it is a governmental entity, summary

adjudication is granted on plaintiffs' First Amendment and California Constitution free speech and association claims.

2. Constitutionality Of The Ketchum Act.

Both parties agree that intermediate scrutiny applies to plaintiffs First Amendment and free speech claims under both the United States and California Constitutions. (See *Gerawan II* at 20-22.) Under that test, the court must determine: "(1) whether the expression is protected by the First Amendment,' which means that the expression 'at least must concern lawful activity and not be misleading'; (2) 'whether the asserted governmental interest is substantial'; if yes to both, then (3) 'whether the regulation directly advances the governmental interest asserted'; and (4) 'whether it is not more extensive than is necessary to serve that interest.'" *(Gerawan II at* 22, quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 566.)

The parties do not address the first prong of the test, but it is clear here that the speech is protected by the first amendment (See *Gerawan II, supra,* at 1192-1193).

As to whether the promotion of the table grape industry, is a substantial government interest, the Commission submits numerous expert declarations which establish that the table grape industry is an important part of California's important agricultural economy.

The Commission also relies on the findings made by the Legislature in enacting the Ketchum Act, Food & Agric. Code § 65500:

> (a) Grapes produced in California for fresh human consumption comprise one of the major agricultural crops of California, and the production and marketing of such grapes affects the economy, welfare, standard of living and health of a large number of citizens residing in this state.
>
> (b) Increased plantings of vineyards and improved cultural practices for the production of California grapes for fresh human consumption have increased and will continue to increase the production thereof and unless the fresh human consumption of California grapes is increased by the expansion of existing markets and the development of new markets, the interests of the fresh grape industry of California, and the public interest of the people of this state, will be adversely affected.
>
> (c) The inability of individual producers to maintain or expand present markets or to develop new or larger markets for such grapes results in an unreasonable and unnecessary economic waste of the agricultural wealth of this state.
>
> (d) Such conditions and the accompanying waste jeopardize the future continued production of adequate supplies of fresh grapes for human consumption for the people of this and other states, and prevent

producers from obtaining a fair return for their labor, their farms and their production. As a consequence, the purchasing power of such producers has been in the past, and may continue to be in the future unless such conditions are remedied, low in relation to that of other people engaged in other gainful occupations within the state, and they are thereby prevented from maintaining a proper standard of living and from contributing their fair share to the support of the necessary governmental and education functions, thus tending to increase unfairly the tax burden of other citizens of the state.

(e) These conditions vitally concern the health, peace, safety and general welfare of the people of this state. It is therefore necessary and expedient in the public interest to protect and enhance the reputation of California fresh grapes for human consumption in intrastate, interstate and foreign markets, and to otherwise act so to eliminate unreasonable and unnecessary economic waste of the agricultural wealth of this state.

(f) The promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in

consuming markets, research respecting the health, food and dietetic value of California fresh grapes and the production, handling, transportation and marketing thereof, the dissemination of information respecting the results of such research, instruction of the wholesale and retail trade with respect to handling thereof, and the education and instruction of the general public with reference to the various varieties of California fresh grapes for human consumption, the time to use and consume each variety and the uses to which each variety should be put, the dietetic and health value thereof, all serve to increase the consumption thereof and to expand existing markets and create new markets for fresh grapes, and prevent agricultural waste, and is therefore in the interests of the welfare, public economy and health of the people of this state.

(g) It is hereby declared to be the policy of this state to aid producers of California fresh grapes in preventing economic waste in the marketing of their commodity, to develop more efficient and equitable methods in such marketing, and to aid such producers in restoring and maintaining their purchasing power at a more adequate, equitable and reasonable level.

(h) The production and marketing of grapes produced in California for fresh human consumption is declared to be affected with a public interest; the provisions of this chapter

> are enacted in the exercise of the police power of this state for the purpose of protecting the health, peace, safety and general welfare of the people of this state.

The Commission also relies on Food & Agric. Code §§ 63901 and 63901.3 for further Legislative declarations of the importance of agriculture to the economy. The Legislature reaffirmed the importance of agriculture in California with the 1995 enactment, and 2001 amendment, of Food & Agric. Code § 63901:

> The Legislature hereby finds and declares that the agricultural and seafood industries are vitally important elements of the state's economy and are supported by state established commissions and councils specified in this division that are mandated to enhance and preserve the economic interests of the State of California and are intended to do all of the following:
>
> * * *
>
> (b) Reflect a continuing commitment by the State of California to its agricultural and seafood industries that are integral to its economy. These industries are a source of substantial employment for the state's citizens, produce needed tax revenues for the support of state and local government, encourage responsible stewardship of valuable land and marine resources, and produce substantial necessary food and fiber for the state, nation, and world.

The Legislature also declared that commission activities are essential to the goals and interests of the

State, including: "(c) Consumer education relatin to the health and other benefits of using and consuming agricultural and seafood products . . . . (e) Demand-side regulation that stabilizes the flow of product to market through promotion." (Food & Agric. Code § 63901.3.)

The declaration of Susan Foerster addresses the health problems faced by many Californians and the health benefits of eating more fruits and vegetables.

In light of the evidence presented through declarations and the Legislative declarations of the purpose behind the Ketchum Act, the court finds the Commission has established there is a substantial interest here. In fact, the *Gerawan II* court stated, "We do not doubt, in the abstract, that the objective of maintaining and expanding markets for agricultural products, thereby ensuring the viability of California agriculture, is a substantial objective." *(Gerawan II,* at 22-23.)

Rather than disputing the facts set forth by the Commission regarding the importance of the table grape industry to California, plaintiffs argue there is no substantial governmental interest in mandating the payment of assessments for generic advertising and promotion. However, that argument addresses only the method utilized to advance the substantial governmental interest, not whether there is a substantial interest in the first place. Accordingly, the court finds the Commission has shown the Ketchum Act advances an important government interest.

The next question is whether the regulation directly advances the governmental interest asserted. The Commission contends that the "free rider"

problem causes industries to under-invest in activities - like generic advertising and promotion - that benefit the industry as a whole. The Alston declaration describes this problem and the susceptibility of the table grape industry to this problem.

The Commission has established through undisputed facts that absent the Commission's work, the California table grape industry would engage in less than the economically rational amount of advertising and promotion. In fact, plaintiffs direct no advertising at consumers of table grapes, other than placement of a single print ad once a year in a trade publication at a cost of less than $1,000 per year. Other than that, plaintiffs' only promotional or marketing activity is to directly contact their potential trade customers (retailers, foodservice providers, and/or wholesalers and selling some of their grapes in packaging that identifies the name of the grower/shipper.

The Commission has shown that the Commission's other activities (Domestic Trade program, encompassing market research and working with retailers; International Marketing program; Consumer Education program, Viticulture Research and Technical Issues program), also overcome the free-rider problem. Nave concludes that individual growers lack the financial incentive to make such significant expenditures.

Alston's economic analysis shows that the Commission's promotion activities have in fact increased demand for California table grapes. Lauber's analysis showing that the Commission's advertising is effective in increasing demand.

Spezzano's, Nave's and Giumarra's analyses show that the Commission's non-advertising activities are also effective at increasing demand for grapes, including in foreign markets. This is substantial evidence supporting the effectiveness of the Commission's work.

Disputing that the program satisfies a substantial governmental interest, plaintiffs assert that most shippers conduct cooperative advertising with retailers for point of sale material, placement of advertisements, in-store circulars and radio. Plaintiffs work extensively with retailers to determine retailers' needs. The retailers' produce managers know what they are doing regarding promotion, so plaintiffs would not insult their intelligence by offering advice. Plaintiffs understand that the most important thing is to get fresh quality grapes into the grocery store because purchasing table grapes is an impulse purchase. Much of what the Commission does is offer incentives to retailers and run newspaper ads based on purchasing certain volumes, which is the same thing plaintiffs are doing. While the shippers promote their quality to retailers, the Commission does not advertise quality. Other federal and state institutions, as well as dieticians and other scientific reports promote the benefits of consuming fresh fruits and vegetables, including table grapes. In addition to the Commission, producers and shoppers do research into harvesting practices, cold storage practices, packing, viticulture, research and technology of production. Gerawan also utilizes a celebrity chef to provide Gerawan fruit to celebrities.

Despite this evidence, plaintiffs fail to show that they conduct a substantial amount of consumer-directed advertising or *demand-enhancing* activities. Plaintiffs' efforts are all designed to encourage the retailers to sell their grapes, with possibly some of it indirectly or directly geared towards reaching end consumers. But this is not the same type of demand-enhancing activities that the Commission primarily engages in with its generic advertising. Plaintiffs stipulated that other than limited advertising in trade publications, the only promotional or marketing activity they undertake is to directly contact their potential trade customers and selling some of their grapes in packaging that identifies the name of the grower/shipper.

Plaintiffs' additional facts are intended to show that there is no substantial governmental interest in compelling table grape producers and shippers to advertise table grapes. These facts address the relative size of the California agricultural markets and table grape market. In short, there are 53 different marketing programs in California, over 400 agricultural commodity crops in California, table grapes make up less than 4% of all farming and ranching acreage, only 13% of agricultural commodities produced in California have a marketing programs, and many programs do not include advertising and promotion.

Plaintiffs also contend that the free-rider problem is a red herring. They rely on *Gerawan I,* where the court stated that generic advertising may harm producers who develop and use brands in marketing

their own goods. *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 503-504 *(Gerawan I*):

> Even when no producers develop or use brands in marketing their goods, some may find themselves disadvantaged by generic advertising in their competition against others. Generic 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. Thus, in any given case, a producer who objects to generic advertising may not be attempting to ride free on the funds of others-a familiar charge-but may merely be making an effort to prevent others from hijacking his own funds as they drive to their own destination.

(*Id.* at 504.)

But as the Commission points out in the reply, the *Gerawan I* court's observation did not purport to reject the proposition that agricultural markets are often affected by the free rider problem. With their opposition plaintiffs produce no evidence that plaintiffs develop or use brands in marketing their goods, or have found themselves at a disadvantage by the generic advertising.

Plaintiffs then argue that when the Ketchum Act was passed in 1967, it made no mention of a free-rider problem. True, the words "free-rider" do not appear in any of the statutes. But § 65500(c) states that the Legislature sought to address "[t]he inability of individual producers to maintain or expand present

markets or to develop new or larger markets for such grapes [which] results in an unreasonable and unnecessary economic waste of the agricultural wealth of this state." There is also the reference in section 63901(c), which states that "[t]hese commissions and councils are particularly important for the continued success of California's unique agricultural and seafood industries which tend to be decentralized with many small entities operating in diverse locations." While these are not explicit references to the free rider problem, it is clear that it was part of the reason the Commission was created.

Plaintiffs also contend that there is no free-rider problem because they spend a substantial amount of money, time and effort promoting table grapes in the marketplace with their retailers. But as noted above, those efforts are not the same kind of demand-increasing activities conducted by the Commission. Plaintiffs have stipulated that they conduct no advertising directed at consumers, but only limited marketing directed at retailers/wholesalers. The apparently minimal promotional activities undertaken by plaintiffs does not negate the existence of the free-rider problem. "When parties have entered into stipulations as to material facts, our duty is to treat such facts as having been established by the clearest proof." *(T & O Mobile Homes, Inc. v. United California Bank* (1985) 40 Cal.3d 441, 451, quoting *Schlemmer v. Provident Life & Acc. Ins. Co.* (9th Cir. 1965) 349 F.2d 682, 684.)

The Commission has also produced evidence showing that the Ketchum Act is effective at increasing demand for table grapes. In *Central*

Hudson, the Supreme Court found that a ban on utility advertising directly advanced the substantial interest in reduced energy consumption solely on the basis that "[t]here is an immediate connection between advertising and demand for electricity." (*Central Hudson, supra,* 447 U.S. at 569.) The Commission has produced ample evidence of the effectiveness of the Commission's work, primarily from Alston, but also from Spezzano, Lauber and Nave. In opposition plaintiffs produce no evidence contesting the evidence of the Commission's effectiveness. Accordingly, the court finds there is no material issue of fact as to whether the regulation directly advances the governmental interest asserted.

Finally, the Commission has met its burden of showing that the Ketchum Act is narrowly tailored.

To satisfy intermediate scrutiny, "elimination of all less restrictive alternatives" is not necessary. (*Bd. of Trustees of State Univ. of New York v. Fox* (1989) 492 U.S. 469, 478.) Nor is it required that "there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests". (*Id.*)

Through UMF nos. 209 through 221 the Commission has shown the Ketchum Act is narrowly tailored towards addressing the free-rider problem. Table grape growers are permitted to vote in referenda regarding whether the program will remain in place. The Commission is authorized only to provide collective goods and services. Alston says that alternative approaches would be unlikely to be as effective as the Commission's program.

Plaintiffs contend that the Ketchum Act is not narrowly tailored because there exist voluntary trade associations in some agricultural industries (Wine Grape Growers, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association and the Wine Institute). But plaintiffs do not elaborate on whether these agricultural products are equivalents of table grapes, or what these organizations actually do. Merely pointing out the existence of these organizations fails to raise an issue of disputed fact.

The Commission has met its burden, plaintiffs have not raised a triable issue of fact, and the motion is granted as to the free speech claims on the basis that the Ketchum Act survives intermediate scrutiny.

D. Liberty, Privacy And Due Process Clause Claims.

Plaintiffs allege that the Ketchum Act exceeds the State's police power under Cal. Const., Art. I § 1. While the Constitutionality of the free speech claims is evaluated under an intermediate scrutiny standard, the police power claims are evaluated under a more deferential rational basis review.

> The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied.

(*Miller v. Bd. of Pub. Works of City of Los Angeles* (1925) 195 Cal. 477, 484.)

> Whether a law is a constitutional exercise of the police power is a judicial question. A law is a valid exercise of the police power unless the law is manifestly unreasonable, arbitrary or capricious, and has no real or substantial relation to the public health, safety, morals or general welfare.

(*Massingill v. Dep't of Food & Agric.* (2002) 102 Cal.App.4th 498, 504, citations omitted.)

For the relevant legal framework, plaintiffs rely on *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 159-160, a class action challenging a rent control amendment to the city's charter.

> In determining the validity of a legislative measure under the police power our sole concern is with whether the measure reasonably relates to a legitimate governmental purpose and "[w]e must not confuse reasonableness in this context with wisdom."

(*Birkenfeld*, supra, 17 Cal.3d at 159, quoting *Wilke & Holzheiser, Inc. v. Dept. o Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 359.)

Regarding the scope of police power, the *Birkenfeld* Court noted, "It has long been settled that the power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and 'is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.'" (*Birkenfeld, supra,* at 160, quoting

Miller v. Board of Public Works (1925) 195 Cal. 477, 485.)

The *Birkenfeld* Court found that rent controls are not automatically within the police power, stating that "the constitutionality of residential rent controls under the police power depends upon the actual existence of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a rational curative measure." *(Birkenfeld, supra,* at 160.)

"Although the existence of 'constitutional facts' upon which the validity of an enactment depends is presumed in the absence of any showing to the contrary, their nonexistence can properly be established by proof." (*Id.,* citations omitted.) "A law is presumed to be a valid exercise of police power. The party challenging the law has the burden of establishing it does not reasonably relate to a legitimate government concern." (*Hesperia Land Development Co. v. Superior Court* (1960) 184 Cal.App.2d 865, 870.)

Plaintiffs tie many of their arguments to *Birkenfeld,* where the court stated that the constitutionality of residential rent controls under the police power depends on the *actual existence* of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a rational curative measure. (*Birkenfeld, supra,* 17 Cal.3d at 160.) Plaintiffs repeat their argument that when the Legislature passed the Ketchum Act in 1967, there was no mention of any "free-rider problem". But as addressed above, Food & Agric. Code §§ 65500(c) and

63901(c) appear to reference or allude to a free rider problem.

Plaintiffs contend that if there was a need for the Commission when the Ketchum Act was enacted, there has been no determination of its continued necessity. In support of this contention, plaintiffs reference facts that even without a referendum the Secretary of the CDFA must suspend the Commission at the expiration of the current marketing season if recommended by 11 members of the Table Grape Commission. Every fifth year the Secretary is required to conduct a referendum amongst all producers to determine whether or not the producers favor approval of continuation of the Commission, or favor termination, and if termination is favored, the Act is suspended. (Food & Agric. Code §§ 65573, 65675.) No studies have been performed before the referendums to determine whether the Commission program is necessary.

But as plaintiffs have the burden on this issue, they must show *lack of necessity for the continuance of the Commission.* However, they have produced no expert testimony contradicting the evidence of the Commission showing that there is a free rider problem. They have failed to raise triable issues of fact as to the continued existence of the free rider problem.

Plaintiffs also note that not all commodities have marketing programs However, as the Commission points out in the reply, "[t]he wisdom of the legislation is not an issue in analyzing its constitutionality" and "neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (*Burg v.*

Municipal Court (1983) 35 Cal.3d 257, 267 (internal quotes omitted).)

The Commission relies on *Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 620, in which the California Supreme Court held that setting minimum wholesale and retail prices on milk is a valid exercise of police power. The Court held that demand-expanding activities less intrusive variation of supply-side regulations, like price and quantity controls, which had already been upheld by the state Supreme Court, and as such easily fall within scope of police power. (*Id.* at 638-640.) Similarly, the Commission argues, its demand-expanding activities are justified by the "legitimate and strong government interest in regulating agricultural markets to ensure an adequate and stable supply and demand. This was the finding of Judge Kane in this case, when 13 years ago he rejected plaintiffs' police power theory and sustained a demurrer to this very claim as previously asserted by plaintiffs Delano Farms, Gerawan and Four Star Fruit.

The complaints also allege that the Ketchum Act constitutes an unconstitutional delegation of authority. In dismissing Delano Farms' and Gerawan Farming's due process claims, Judge Kane previously noted that "[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (Exh. 1 at 6, quoting *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal. 3d 184, 190.) The opposition does not address the unconstitutional

delegation of authority issue. Plaintiffs make no showing that the Ketchum Act involves an unconstitutional delegation of authority.

The court is satisfied that the Ketchum act passes rational basis review. To the extent plaintiffs have a valid point about the need show that there is currently a free rider problem, if one existed when the Commission was created in 1967, the Commission has current declarations from experts stating that there is a free rider problem, and the Commission addresses that problem through its generic advertising and other activities which are effective at increasing demand. Moreover, the Legislature enacted Food & Agric. Code § 63901 in 1995, and amended it in 2001, which includes explicit findings about the continuing need for commissions in the agricultural industry. The continued necessity of the legislation is an issue for the legislature more so than it is for the court:

> As a corollary to this recognized principle of the capacity of the police power to meet the reasonable current requirements of time and place and period in history is the equally well settled rule that the determination of the necessity and form of such regulations, as is true with all exercises of the police power, is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's

> wisdom and necessity? Thus in *Miller* [*v. Bd. of Public Works of City of Los Angeles* (1925) 195 Cal. 477] this court said in 195 Cal. at page 490: "The courts may differ with the legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation . . . . [W]hen the necessity or propriety of an enactment [is] a question upon which reasonable minds might differ, the propriety and necessity of such enactment [is] a matter of legislative determination."

(*Consol. Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 522.)

Plaintiffs have failed to raise a triable issue regarding whether the Commission is still needed. "[T]he existence of 'constitutional facts' upon which the validity of an enactment depends . . . is presumed" unless the challenger carries its burden of proving that the legislation has no rational basis. (*Birkenfeld, supra,* 17 Cal.3d at 161.) Plaintiffs have not shown that the Commission's demand-enhancing activities do not bear a rational relation to the governmental interest in regulating agricultural markets to ensure an adequate and stable supply and demand. The

motion is thus granted as to plaintiffs' liberty, privacy and due process clause claims.

III. DISPOSITION

The motion for summary judgment is granted.

Dated: May [handwritten: 22], 2013

[handwritten: signature]
Donald S. Black
Judge of the Superior Court

Appendix C

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

California Constitution Article I, Section 2

(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

(b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

California Constitution Article I, Section 3

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by

Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

(7) In order to ensure public access to the meetings of public bodies and the writings of public officials and agencies, as specified in paragraph (1), each local agency is hereby required to comply with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), and with any subsequent statutory enactment amending either act, enacting a successor act, or amending any successor act that contains findings demonstrating that the statutory enactment furthers the purposes of this section.

Cal. Food & Agric. Code § 65500(f)

(f) The promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in consuming markets, research respecting the health, food and dietetic value of California fresh grapes and the production, handling, transportation and marketing thereof, the dissemination of information respecting the results of such research, instruction of the wholesale and retail trade with respect to handling thereof, and the education and instruction of the general public with reference to the various varieties of California fresh grapes for human consumption, the

time to use and consume each variety and the uses to which each variety should be put, the dietetic and health value thereof, all serve to increase the consumption thereof and to expand existing markets and create new markets for fresh grapes, and prevent agricultural waste, and is therefore in the interests of the welfare, public economy and health of the people of this state.

Cal. Food & Agric. Code § 65550

There is hereby created the California Table Grape Commission to be thus known and designated. The commission shall be composed of 21 fresh grape producers appointed by the director from the nominees selected as provided by this article and one public member appointed pursuant to Section 65575.1.

Cal. Food & Agric. Code § 65551

The California Table Grape Commission shall be and is hereby declared and created a corporate body. It shall have the power to sue and be sued, to contract and be contracted with, and to have and possess all of the powers of a corporation. It shall adopt a corporate seal. Copies of its proceedings, records and acts, when certified by the secretary and authenticated by the corporate seal, shall be admissible in evidence in all courts of the state, and shall be prima facie evidence of the truth of all statements therein.

Cal. Food & Agric. Code § 65552

The commission may appoint a manager, a treasurer and a secretary. The compensation of each officer shall be fixed by the commission and they shall serve at the pleasure of the commission with such powers

and duties as may be delegated to them by the commission. No such officer shall be a member of the commission.

Cal. Food & Agric. Code § 65556

Each member for each district shall be elected by a plurality of votes cast by producers in the district. Each producer who has grown fresh grapes in a district in the year preceding any election shall be entitled to two votes in such district, one for each of two nominees. In the first election after the effective date of this chapter, each producer entitled to vote in a district shall be entitled to six votes in such district, one for each of the six nominees, and the six nominees receiving the greatest number of votes shall be nominated for appointment as the members of such district for the initial terms hereunder. In the event of a tie vote which shall result in failure to nominate two persons for each commission membership available, there shall be another election held only between those nominees, the tie vote for whom resulted in such failure to so nominate required number of nominees.

Cal. Food & Agric. Code § 65563

Upon expiration of the voting period the director shall tabulate all votes and shall announce the names of those persons nominated for appointment as members of the commission from each district and shall appoint one of the two nominees from each district as a member of the commission; provided that in the appointment of the first members of the commission after this chapter becomes effective the director shall appoint three of the six nominees from each district as

members of the commission to serve in accordance with Section 65555.

Cal. Food & Agric. Code § 65571

The State of California shall not be liable for the acts of the commission or its contracts. Payment of all claims arising by reason of the administration of this chapter or acts of the commission shall be limited to the funds collected by the commission. No member of the commission or any employee or agent thereof shall be personally liable on the contracts of the commission nor shall a commissioner or employees of such commission be responsible individually in any way to any producer or shipper or any other person for errors in judgment, mistakes or other acts, either of commission or omission, as principal, agent or employee, except for their own individual acts of dishonesty or crime. No commissioner shall be held responsible individually for any act or omission of any other member of such commission. The liability of the commissioners shall be several and not joint, and no commissioner shall be liable for the default of any other commissioner.

Cal. Food & Agric. Code § 65572(b), (e), (h)-(*l*)

The powers and duties of the commission shall include the following:

* * *

(b) To adopt and from time to time alter, rescind, modify and amend all proper and necessary rules, regulations and orders for the exercise of its powers and the performance of its duties, including rules for regulation of appeals from any rule, regulation or order of the commission.

* * *

(e) To establish offices and incur expense, and to enter into any and all contracts and agreements, and to create such liabilities and borrow such funds in advance of receipt of assessments as may be necessary, in the opinion of the commission, for the proper administration and enforcement of this chapter and the performance of its duties.

* * *

(h) To promote the sale of fresh grapes by advertising and other similar means for the purpose of maintaining and expanding present markets and creating new and larger intrastate, interstate and foreign markets for fresh grapes; to educate and instruct the public with respect to fresh grapes; and the uses and time to use the several varieties, and the healthful properties and dietetic value of fresh grapes.

(i) In the discretion of the commission, to educate and instruct the wholesale and retail trade with respect to proper methods of handling and selling fresh grapes; to arrange for the performance of dealer service work providing display and other promotional materials; to make market surveys and analyses; and to present facts to and negotiate with state, federal and foreign agencies on matters which affect the marketing and distribution of fresh grapes; and to undertake any other similar activities which the commission may determine appropriate for the maintenance and expansion of present markets and the creation of new and larger markets for fresh grapes.

(j) In the discretion of the commission, to make in the name of the commission contracts to render

service in formulating and conducting plans and programs, and such other contracts or agreements as the commission may deem necessary for the promotion of the sale of fresh grapes.

(k) In the discretion of the commission, to conduct, and contract with others to conduct, scientific research, including the study, analysis, dissemination and accumulation of information obtained from such research or elsewhere respecting the marketing and distribution of fresh grapes, the production, storage, refrigeration, inspection and transportation thereof, to develop and discover the dietetic value of fresh grapes and to develop and expand markets, and to improve cultural practices and product handling so that the various varieties may be placed in the hands of the ultimate consumer in the best possible condition. In connection with such research, the commission shall have the power to accept contributions of, or to match, private, state or federal funds that may be available for these purposes, and to employ or make contributions of funds to other persons or state or federal agencies conducting such research.

(*l*) To determine, subject to the limitations provided in Section 65600, not later than May 1 of each year, the assessment for the following 12 months' period beginning May 1st and ending April 30th.

Cal. Food & Agric. Code § 65575.1

Not later than April 1 of 1979, and each third year thereafter, the commission shall submit to the director the names of three or more natural persons, each of whom shall be a citizen and resident of this state and not a producer, shipper, or processor nor financially

interested in any producer, shipper, or processor, for appointment by the director as a public member of the commission. The director shall, not later than April 30 of 1979, and each third year thereafter, appoint one of the nominees as the public member of the commission to serve a three-year term on the commission. If all nominees are unsatisfactory to the director, the commission shall continue to submit lists of nominees until the director has made a selection. Any vacancy in the office of public member of the commission shall be filled by appointment by the director from the nominee or nominees similarly qualified submitted by the commission not later than the first day of the second month following the month in which such vacancy occurs.

Cal. Food & Agric. Code § 65575.2

The public member of the commission shall represent the interests of the general public in all matters coming before the commission and shall have the same voting and other rights and immunities as other members of the commission.

Cal. Food & Agric. Code § 65576

It is hereby declared, as a matter of legislative determination, that producers or employees of producers appointed to the commission pursuant to this article are intended to represent and further the interest of a particular agricultural industry concerned, and that such representation and furtherance is intended to serve the public interest. Accordingly, the Legislature finds that, with respect to persons who are appointed to such commission, the particular agricultural industry concerned is tantamount to, and constitutes, the public generally

within the meaning of Section 87103 of the Government Code.

Cal. Food & Agric. Code § 65650.5

Any person aggrieved by any action of the commission may appeal to the director. The director shall review the record of the proceedings before the commission. If the director finds that the record shows by substantial evidence that the commission's action was not an abuse of discretion or illegal, he shall dismiss such appeal. If he finds such action is not substantially sustained by the record, was an abuse of discretion, or illegal, he may reverse the action of the commission.

Any such decision of the director is subject to judicial review upon petition of the commission or any party aggrieved by the decision.

Cal. Food & Agric. Code § 65660

Upon the finding of 11 of the members of the commission that the operation of the provisions of this chapter has not tended to effectuate its declared purposes, the commission may recommend to the director that the operation of this chapter shall be suspended; provided, that any such suspension shall not become effective until the expiration of the marketing season then current. The director shall, upon receipt of such recommendation, or upon a petition being filed with him requesting such suspension, signed by 20 percent of the producers, cause a referendum to be conducted among producers as certified by the commission in accordance with Section 65566, to determine if such operation and the operations of the commission shall be suspended, and shall establish a referendum period, which shall not

be less than 10 nor more than 60 days. The director is authorized to prescribe such additional procedure as may be necessary to conduct such referendum.

Cal. Food & Agric. Code § 65661

At the close of the referendum period established, the director shall tabulate the ballots filed during said period. If at least 40 percent of the total number of producers, as established by the director as marketing 40 percent of the total volume marketed by all producers on the list established pursuant to Sections 65559 to 65562, inclusive, during the last completed marketing season, participate in the referendum and the director finds either:

> (a) Sixty-five percent or more of the producers who voted in the referendum voted in favor of such suspension, and the producers so voting marketed 51 percent or more of the total quantity of table grapes marketed in the preceding marketing season by all of the producers who voted in the referendum; or
>
> (b) That 51 percent or more of the producers who voted in the referendum voted in favor of such suspension, and that the producers so voting marketed 65 percent or more of the total quantity of table grapes marketed in the preceding season by all of the producers who voted in the referendum;

the director shall declare the operation of the provisions of this chapter and of the commission suspended, effective upon expiration of the marketing season then current.

Cal. Food & Agric. Code § 65662

Upon and after the effective date of suspension of the operation of the provisions of this chapter and of the commission, as herein provided, the operations of the commission shall be wound up and any and all moneys remaining held by the commission, collected by assessment and not required to defray the expenses of winding up and terminating operations of the commission, shall be returned upon a pro rata basis to all persons from whom assessments were collected in the immediately preceding current marketing season; provided further, however, that if the commission finds that the amounts so returnable are so small as to make impractical the computation and remitting of such pro rata refund to such persons, any such moneys remaining and any moneys remaining after payment of all expenses of winding up and terminating operations shall be withdrawn from the approved depository and paid into the State Treasury as unclaimed trust moneys.

Cal. Food & Agric. Code § 65675

Between January 1 and March 31 of each fifth calendar year commencing with the year 1972, the director shall cause a referendum to be conducted by the commission among producers in the manner prescribed in Section 65573 to determine whether the operations of the provisions of this chapter shall be reapproved and continued effective. The vote for approval and continuation shall be the same as used for the original approval of the provisions of this chapter. If the commission finds that a favorable vote has been given, it shall so certify to the director and all provisions of this chapter shall remain effective. If

the commission finds that a favorable vote has not been given, it shall so certify to the director who shall declare the operation of the provisions of this chapter and the commission suspended upon the expiration of the current marketing season ending April 30. Thereupon, the operations of the commission shall be wound up and funds distributed in the manner provided in Sections 65662 and 65663. No bond or security shall be required for any such referendum.