No. 18-300

IN THE

Supreme Court of the United States

DELANO FARMS COMPANY, ET AL.,
Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION

ROBERT D. WILKINSON
BAKER MANOCK & JENSEN, PC
5260 North Palm Ave.
Suite 421
Fresno CA 93704

SETH P. WAXMAN
Counsel of Record
BRIAN M. BOYNTON
THOMAS G. SAUNDERS
ARI HOLTZBLATT
JACK STARCHER
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTIONS PRESENTED

1. Whether, in the absence of a federal claim, this Court has jurisdiction to review the California Supreme Court's interpretation of the California Constitution merely because that court cited this Court's government speech decisions as "persuasive" authority without considering itself bound by federal precedent.

2. If this Court has jurisdiction, whether the California Supreme Court was required to apply the rigid word-for-word review requirement Petitioners urge, where (a) that court did not purport to adopt such a requirement as a principle of state law, (b) this Court said in *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005), that the particular form of oversight in that case was "*more* than adequate," *id.* at 563 (emphasis added), and (c) the State of California retains effective control over the California Table Grape Commission's advertising in light of the fact that the California Legislature created the Commission as a state agency, the Commission conveys a message determined by the Legislature, and the Commission is subject to oversight by the Secretary of the California Department of Food and Agriculture, who appoints and can remove all of the commissioners and has authority to reverse Commission actions on petition from an aggrieved party.

3. If this Court has jurisdiction, whether the California Supreme Court was required to hold that the Commission's advertisements must on their face be specifically and explicitly attributed to the government, where (a) that court did not purport to adopt such a requirement as a principle of state law, (b) this Court rejected such a requirement in *Johanns*, and (c) no subsequent case has imposed such a requirement.

CORPORATE DISCLOSURE STATEMENT

As a governmental corporate party created by the State of California, the California Table Grape Commission is not required to file a corporate disclosure statement pursuant to Supreme Court Rule 29.6. In any event, the Commission has no parent corporation and has no outstanding stock held by any entity in any amount.

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BRIEF IN OPPOSITION

INTRODUCTION

The petition asks this Court to review the California Supreme Court's application of the California Constitution to a California law establishing a state commodity promotion program. This Court has no jurisdiction to review the California Supreme Court's decision, and there is no reason it should do so.

Over the last twenty years, Petitioners have unsuccessfully pursued an array of federal and state constitutional challenges to the California statute establishing the California Table Grape Commission. In 2010, this Court declined to review the Ninth Circuit's rejection of a First Amendment challenge brought by one of Petitioners here. *See Delano Farms* v. *California Table Grape Comm'n*, 586 F.3d 1219 (9th Cir. 2009),

cert. denied, 562 U.S. 837 (2010). The petition in that case raised the same arguments asserted here about the scope of the government speech doctrine but did so in a case involving federal claims.

In this case, Petitioners do not dispute that they raised, and the California Supreme Court decided, only claims under the California Constitution. That is reason enough to deny review here, since this Court lacks jurisdiction to review a decision by a state supreme court involving only a question of state law. Petitioners have a theory that because the California Supreme Court found the reasoning of this Court's decision in *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005), to be "persuasive" and voluntarily decided to adopt that reasoning, they can now seek review of that court's decision with respect to their state-law claims. But the cases Petitioners rely on make clear that jurisdiction is lacking where—as here—a state supreme court relies on federal cases merely for their *persuasive* value in deciding a question of state constitutional law. In any event, the significant jurisdictional concerns raised by the petition counsel strongly against review in this case.

Even if this case presented a question of federal law, it would not warrant review by this Court. There has been no divergence in the lower courts on the issue presented. Moreover, the opinion below does not conflict with any decision of this Court. Petitioners' assertions to the contrary rest on a misunderstanding of the California Supreme Court's decision, which found persuasive and adopted from *Johanns* only the high-level principle that the government must retain sufficient responsibility for and control over government speech to ensure political accountability. The petition also rests on flawed interpretations of *Johanns* and subse-

quent government-speech precedents of this Court. This Court in *Johanns* did not hold that word-for-word review of a commodity promotion program's advertisements is constitutionally mandated. To the contrary, the Court indicated that the level of review exercised in that case by the Secretary of Agriculture was "*more* than adequate" to establish the beef promotion program's advertisements as government speech. *See Johanns*, 544 U.S. at 563 (emphasis added). Nor has this Court ever stated that commodity advertisements must be expressly attributed to the government to constitute government speech. In fact, the Court reached the opposite conclusion in *Johanns*. *See id.* at 564 n.7.

The California Supreme Court's application of general government-speech principles to the particular facts of this case does not warrant this Court's review. That court correctly held that the Commission's advertising is government speech, where the California Legislature created the Commission as a state agency, the Commission conveys a message determined by the Legislature, and the Commission is subject to oversight by the Secretary of the California Department of Food and Agriculture (CDFA), who appoints and can remove all of the commissioners and has authority to reverse Commission actions on petition from an aggrieved party.

JURISDICTION

As explained below, this Court lacks jurisdiction over this case. The decision below did not adjudicate "the validity of a statute of any State" under "the Constitution … of the United States," nor did it assess "any title, right, privilege, or immunity … claimed under the [federal] Constitution" as required under 28 U.S.C. §1257(a). *See infra* Part I.

STATEMENT

1. In 1967, following a period of falling demand for California table grapes,[1] the California Legislature enacted a statute known as the "Ketchum Act" that created the Commission. *See* Cal. Food & Agric. Code §65550. The purpose of the Commission is to expand demand for California table grapes worldwide and thereby strengthen the State's economy and improve the welfare and health of its citizens. *See id.* §65500; *see also id.* §63901.4. The Commission was created as a public corporation. *See id.* §65551. It is considered a government agency under California law, and is subject to numerous state laws applicable to public entities.[2]

The Commission's governing board is composed of eighteen commissioners representing the six currently active grape growing districts in California and one at-large "public member"—all of whom are appointed and removable by the Secretary of the CDFA. *See* Pet. App. 10, 66; Cal. Food & Agric. Code §§65550, 65563, 65575.1; CT-8:1735 (SF ¶76).[3] Under the Secretary's oversight, growers hold nominating meetings followed by elections to determine whom they will recommend for appointment as a commissioner; the Secretary then

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[1] "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." Pet. App. 4.

[2] *See* Cal. Gov't Code §11000 (defining a "commission" as a "state agency"); *id.* §11121 (Bagley-Keene Open Meeting Act); *id.* §§6252(f), 6276.08 (Public Records Act); *id.* §82049 (Political Reform Act of 1974); Cal. Civ. Proc. Code §995.220 (posting bond).

[3] References to "CT" are to the Clerk's Transcript on Appeal. *See* Cal. R. Ct. 8-122. References to "SF" are to the Joint Statement of Stipulated Facts submitted by the parties.

decides whom to appoint and appoints that person. Cal. Food & Agric. Code §§65562, 65563; CT-8:1735 (SF ¶76).

The California Legislature authorized the Commission to engage in a variety of demand-generating activities including "promot[ing] the sale of fresh grapes by advertising and other similar means"; working with "the wholesale and retail trade"; and "conduct[ing] and contract[ing] with others to conduct[] scientific research" related to fresh grapes. Cal. Food & Agric. Code §65572(h), (i), (k). Advertising—the focus of Petitioners' claims—is just one of the Commission's activities. In 2010-2011, it accounted for less than 20% of the Commission's expenditures. Pet. App. 14 & n.5. The Commission's advertisements have emphasized "the health benefits of consuming grapes" and possible uses of table grapes. CT-8:1721 (SF ¶28). As Petitioners stipulated below, "[t]he Commission has not run political or ideological advertisements" and its "advertisements have not promoted products other than grapes." *Id.*

The Commission's work is funded primarily through assessments imposed by the Ketchum Act on all shipments of California table grapes. *See* Cal. Food & Agric. Code §65600. Econometric analyses have demonstrated that the Commission's promotion activities have a substantial, positive, and statistically significant effect on demand. CT-7:1370-1371, 1379. The enhanced demand generated by the Commission results in increased table grape revenues that far exceed the cost of funding the Commission's activities and in significant net benefits to the State's economy as a whole. *See* CT-7:1373-1375.

The CDFA oversees the Commission and has broad authority to control its speech. The Secretary appoints and can remove all of the members of the Commission. Cal. Food & Agric. Code §§65550, 65563, 65575.1; CT-8:1735 (SF ¶76). The Secretary is also empowered, on the petition of an aggrieved party, to "reverse [an] action of the commission" if the Secretary finds that it was "not substantially sustained by the record, was an abuse of discretion, or illegal." Cal. Food & Agric. Code § 65650.5. In addition, CDFA "reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted." CT-3:686 (CDFA, *Policies for Marketing Programs* C-3 (4th ed. 2006)). The Ketchum Act also subjects the Commission to audit by the California Department of Finance and other authorized agencies. *See* Cal. Food & Agric. Code § 65572(f).

2. Petitioners are California table grape growers and shippers who object to paying assessments to fund the Commission's activities. The purported basis for Petitioners' objection is that "the Commission's generic message conflicts" with the Petitioners' alleged (but never substantiated) efforts to "differentiate [their] product[s] from that of [their] generic competitors." Pet. 11 (citing Delano Farms' Second Am. Compl.); *see also id.* at 5 (citing complaint allegations but no evidence). In fact, Petitioners stipulated that they "conduct no advertising directed at consumers of table grapes" and conduct only extremely limited advertising directed at wholesale purchasers like retailers. CT-5:1106. Indeed, Petitioners further stipulated that "[c]onsumers do not shop for grapes with brand names in mind." CT-8:1716 (SF ¶12). Moreover, Petitioners' witnesses uniformly testified at their depositions that they are unfamiliar with the substance of the Commis-

sion's activities and the content of the Commission's ads. CT-2:358-360. As Petitioners explained in briefing below, they are "basically oblivious to what the Commission does." CT-8:1869. Petitioners have never filed a petition to the Secretary challenging the Commission's advertising. CT-3:489-490.

For years, Petitioners' challenges were stayed or dormant while awaiting decisions in other cases, including a parallel First Amendment challenge under the United States Constitution brought by Petitioner Delano Farms in federal court. Pet. App. 86. In 2009, the Ninth Circuit resolved that challenge in favor of the Commission, holding that the Commission's speech is government speech. *Delano Farms Co.* v. *California Table Grape Comm'n*, 586 F.3d 1219, 1220 (9th Cir. 2009). This Court subsequently denied cert. *See* 562 U.S. 837 (2010).

Following resolution of the federal *Delano Farms* case, litigation in Petitioners' state court cases resumed. Petitioners initially asserted various combinations of claims under the First Amendment to the U.S. Constitution, the Free Speech Clause of the California Constitution, and the Liberty, Privacy, and Due Process Clauses of the California Constitution. Pet. App. 85-86. In May 2013, the California Superior Court granted the Commission's motion for summary judgment, rejecting Petitioners' federal and state speech claims because the Commission is a "governmental entity" and its speech is thus necessarily government speech. *Id.* at 96-117. The Superior Court also ruled, in the alternative, that there is a substantial government interest in maintaining and expanding the market for California table grapes and that the Commission's activities directly advance that interest. *Id.* at 117-129.

Finally, the Court rejected Petitioners' Liberty, Privacy, and Due Process Clause claims. *Id.* at 129-136.

The California Court of Appeal affirmed in a unanimous decision holding that "[t]he Commission's promotional activities constitute government speech" because they are effectively controlled by the State of California. *Delano Farms, Co.* v. *California Table Grape Comm'n*, 185 Cal. Rptr. 771, 773 (Ct. App. 2015); *see* Pet. App. 65.

3. Petitioners sought review from the California Supreme Court. Although some Petitioners had previously raised both federal and state claims in the lower courts, Petitioners did not seek review of their federal claims from the California Supreme Court. The questions that Petitioners presented in their petition for review related exclusively to Petitioners' free speech claims under Article I of the California Constitution. *See* Cal. Pet. 1 (framing question presented as whether, "consistent with free speech principles under Article I of the California Constitution, state-empowered industry boards may compel unwilling parties to contribute to their commercial advertising"). Petitioners reiterated in the reply in support of their petition that "[t]his petition arises under the California Constitution only." Cal. Pet. Reply 2 n.2. The California Supreme Court thus granted review only on Petitioners' free speech claims under Article I of the California Constitution. *See* Pet. App. 16 n.7.

On May 24, 2018 the California Supreme Court affirmed in a unanimous opinion, holding that "the Commission's advertisements and related messaging represent government speech" and that the Ketchum Act therefore "does not violate [Petitioners'] rights under

article 1, section 2 [of the California Constitution]." Pet. App. 2-3.

The California Supreme Court noted that this case was "not the first time [it] ha[d] considered the relationship between article I, section 2 and the compelled subsidy of speech." Pet. App. 19. But the court observed that it had never had to determine "whether a particular compelled-subsidy program in fact generates government speech under article I, section 2." *Id.* Thus, before considering whether the Commission's speech qualified as government speech for purposes of the California Constitution, the court provided an overview of "the free speech guarantee enshrined in article I, section 2, and the government speech doctrine." *Id.* at 20.

First, the court discussed the California Constitution's "counterpart to the free speech provision found in the First Amendment." Pet. App. 21. The court noted that the California Constitution provides "an independent source of fundamental rights" separate and apart from the First Amendment, but it observed that "'case law interpreting California's free speech clause has given respectful consideration to First Amendment case law for its persuasive value.'" *Id.* at 22 (quoting *Beeman* v. *Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 79 (Cal. 2013)).

Second, the court discussed the general concept of "government speech" and reviewed both federal and state court cases applying the government speech doctrine to compelled subsidy programs. Pet. App. 22-24, 25-47. From those cases, the court derived "certain basic principles relevant" to the court's government speech analysis. *Id.* at 47. In particular, the court "construed *Johanns*, and other high court pronounce-

ments … 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." *Id.* at 48. So construed, the court regarded "the majority opinion in *Johanns* as persuasive, and adopt[ed] its reasoning as applicable to compelled-subsidy claims brought under [the California Constitution]." *Id.* Noting that application of the government speech doctrine in other contexts "may implicate considerations under article I, section 2 that are different from those associated with the doctrine's application in this case," the court limited its holding to the compelled-subsidy context. *Id.* at 48 n. 20.

The court then applied the "basic principles" it had gleaned from "persuasive" authority to the Ketchum Act and concluded that the Commission's "promotional messaging under the statute is subject to sufficient governmental direction and control to qualify as government speech." Pet. App. 47, 48, 50. The court found a number of features of the Ketchum Act to be important in this regard, including the California Legislature's findings, the narrow charge given to the Commission by the Act, the fact that the Act created the Commission as a public corporation subject to several statutes generally applicable to state agencies, and the supervisory authority given to the Secretary of the CDFA—including her authority to appoint and remove commissioners and reverse any action by the Commission. *See id.* at 50-56. Those features, considered together, demonstrated that the State of California was responsible for, and had "authority to exercise continued control over[,] the message[s]" of the Commission pursuant to the Ketchum Act. *Id.* at 56; *see also id.* at 50 ("These circumstances establish that the communi-

cations involved here represent government speech for purposes of article I, section 2.").

Finally, the court rejected Petitioners' principal arguments against application of the government speech doctrine to the Commission. Reviewing both its own prior decision in *Gerawan Farming, Inc.* v. *Kawamura*, 90 P.3d 1179 (Cal. 2004), and this Court's decision in *Johanns*, the court concluded that article I, section 2 of the California Constitution does not require the Secretary of the CDFA to review and approve every word of the Commission's promotional materials for them to qualify as government speech. Pet. App. 56-59. The court similarly declined Petitioners' invitation 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." *Id.* at 59.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION TO REVIEW THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF THE CALIFORNIA CONSTITUTION

This Court's jurisdiction to review state-court decisions is set forth in 28 U.S.C. §1257. In relevant part, that provision grants the Court jurisdiction to review a state court decision addressing a challenge to the validity of a state statute under the U.S. Constitution or the assertion of a right or privilege under the U.S. Constitution. 28 U.S.C. §1257(a). It is essential to this Court's jurisdiction that a federal question "ha[ve] been both raised and decided in the state court below." *Illinois* v. *Gates*, 462 U.S. 213, 218 (1983). Petitioners, as the party seeking to invoke this Court's jurisdiction, bear the burden of showing that a federal question was

in fact properly raised and decided. *See Gorman* v. *Washington Univ.*, 316 U.S. 98, 101 (1942). As explained below, Petitioners have not met that burden and cannot do so.

A. The California Supreme Court Considered And Decided Only An Issue Of State Law

No federal question was raised before the California Supreme Court. The only question Petitioners asked that court to review was whether the collection of assessments under the Ketchum Act violated their rights *under the California Constitution*. *See* Cal. Pet. 1. Indeed, Petitioners stressed that their petition for review "arises under the California Constitution only." Cal. Pet. Reply 2 n.2. That was an intentional choice: two Petitioners (Gerwan Farming and Four Star Fruit) had asserted federal First Amendment claims in Superior Court and the Court of Appeal, but those claims were rejected, and Petitioners did not ask the California Supreme Court to review them. The other Petitioners (Delano Farms, Blanc Vineyards, and Bidart Brothers) never asserted a First Amendment challenge at any stage of this state court litigation. Delano Farms brought a First Amendment challenge in federal court and lost. *See Delano Farms Co.* v. *California Table Grape Comm'n*, 586 F.3d 1219 (9th Cir. 2009), *cert. denied*, 562 U.S. 837 (2010). Bidart Brothers also brought a First Amendment challenge in federal court, *see Bidart Bros.* v. *California Table Grape Commission*, No. 1:03-cv-5925 (E.D. Cal.), but it voluntarily dismissed that suit in 2011 and re-filed in state court without a First Amendment claim.

Given that Petitioners expressly limited their application for review to state constitutional claims, it is not surprising that the California Supreme Court de-

cided only a question of state constitutional law. *See, e.g.*, Pet. App. 1 (describing the questions presented as whether "the collection of assessments under the Act … violate [Petitioners'] right to free speech *under article 1, section 2, subdivision (a) of the state Constitution*" (emphasis added)); *id.* at 19 ("This is not the first time this court has considered the relationship *between article I, section 2* and the compelled subsidy of speech." (emphasis added)); *id.* at 16 & n.7 (explaining that Petitioners asserted claims alleging that "the Ketchum Act's compelled-subsidy program violates their right to free speech under article I, section 2" and noting that "Plaintiffs' operative complaints also allege other violations of their constitutional rights" but that "[t]hese allegations are not at issue at this stage of the litigation"). Accordingly, Petitioners cannot show that any federal question was raised in and decided by the court below. That is fatal to this Court's jurisdiction under Section 1257.

B. The California Supreme Court Considered Federal Precedent Only For Its Persuasive Value In Interpreting The State Constitution

Petitioners do not dispute that they raised—and the California Supreme Court decided—only claims under the California Constitution. Instead, they seek to invoke this Court's jurisdiction because the California Supreme Court found this Court's reasoning in *Johanns* persuasive and voluntarily elected to apply that reasoning to compelled-subsidy claims under the free speech clause of the California Constitution. Petitioners' attempt to manufacture federal jurisdiction in this way fails.

Petitioners rely (at 16-19) on cases involving this Court's "*adequate, and independent* state law

ground[]" doctrine. But those cases are inapposite here. In each of the cases Petitioners cite, the question was whether a state court decision that plainly did consider and pass upon a federal claim was nevertheless unreviewable because the decision was *also* supported by an adequate and independent state law ground. *See Michigan* v. *Long*, 463 U.S. 1032, 1037 (1983) ("The [Michigan Supreme Court] referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law."); *Florida* v. *Powell*, 559 U.S. 50, 56 (2010) (explaining that the Florida Supreme Court held that the state had violated "[b]oth *Miranda* and … the Florida Constitution"); *Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996) (describing the opinion below as only "mention[ing] … the Ohio Constitution in passing"); *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 20 (2012) (per curiam) (noting that the employer had raised a federal-law basis under the Federal Arbitration Act for its contention that an arbitrator should decide the validity of a contract); *see also Oregon* v. *Guzek*, 546 U.S. 517, 523 (2006) (this Court has jurisdiction where "a 'State Supreme Court quite clearly rested its [decision] solely on the Federal Constitution'"); *Delaware* v. *Prouse*, 440 U.S. 648, 651-652 (1979) ("[T]he Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but was also impermissible under [the Delaware Constitution].").

The Court in *Michigan* adopted a presumption to apply when the presence of an adequate and independent state law ground is "'ambiguous'" or "'obscure.'" *Michigan*, 463 U.S. at 1041. In the present action, however, no such ambiguity can exist because the California Supreme Court did not decide *both* federal and state law claims. As explained above, only Petitioners' state constitutional claims were before the court. The state

law issue, therefore, was necessarily "adequate and independent"; it was the *only* issue before the California Supreme Court.

In any event, this Court lacks jurisdiction even under the standard applicable to cases (unlike this one) presenting both state and federal issues. The "adequate and independent state [law] ground" doctrine is driven by "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions." *Michigan*, 463 U.S. at 1040. In light of those important considerations, this Court has articulated a "plain statement" rule to distinguish between decisions that truly rest on independent conclusions of state law and cases where "the state court decided the case the way it did because it believed that federal law *required* it to do so." *Id.* at 1041 (emphasis added); *see also id.* at 1044 (exercising jurisdiction where it appears that the state court "'felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did'"). Review by this Court is foreclosed if a state court "make[s] clear by a plain statement in its judgment or opinion" that it is "merely [relying] on federal precedents as it would on the precedents of all other jurisdictions." *Id.* at 1041. In other words, this Court will not review a state court decision interpreting a state constitutional provision that indicates "federal cases are being used only for the purpose of *guidance*, and do not themselves *compel* the result that the court has reached." *Id.* (emphasis added).

The California Supreme Court could not have been clearer that it relied on federal precedents only for their "persuasive" authority (Pet. App. 48), not because it felt bound by federal precedent interpreting the First Amendment. The court noted that it had in the past "'given respectful consideration to First Amend-

ment case law for its *persuasive value*'"—not as binding precedent. *Id.* at 22 (quoting *Beeman*, 315 P.3d 71 (emphasis added)); *see also id.* at 47-48 (the court has "looked toward federal precedent interpreting the First Amendment for *guidance*" regarding questions of government speech under article I, section 2 of the California Constitution (emphasis added)); *id.* at 47 (extracting from federal and state law cases "certain basic principles relevant" to the court's evaluation of Petitioners' state law claims). "Consistent with th[at] approach," the California Supreme Court explicitly considered "the majority opinion in *Johanns* as *persuasive*" authority—not controlling authority. *Id.* at 48 (emphasis added); *see also id.* (also considering "other high court pronouncements regarding government speech," including a prior California Supreme Court decision).

In the context of this case, there is no indication that the California Supreme Court felt it was bound by federal law to rule as it did. As noted, the case involved only the interpretation of the California's Constitution's free speech protection, since the Petitioners had not even asserted federal law claims before the California Supreme Court. The federal Constitution certainly did not compel the particular outcome the court reached—*denial* of Petitioners' state constitutional claims. This was not a case like *Michigan* v. *Long* where the state court ruled in *favor* of the party invoking constitutional protections under federal and state law, and it was possible that the Court believed the federal Constitution required that result. Petitioners' abandoned First Amendment claims played no role in the decision.

In light of the "plain statement" by the California Supreme Court that it was considering the reasoning in a federal precedent only for its persuasive value, *see*

Michigan, 463 U.S. at 1041, granting Petitioners' request to review this case would run headlong into the very concerns that animate this Court's refusal to review state court judgments of state law. Were this Court to conclude that, despite the California Supreme Court's best efforts, the opinion below was insufficiently clear that it was based on "bona fide separate, adequate, and independent" state law grounds, *id.*, it would display a blatant disregard for the independence of state courts on matters of state law. Those courts would be disabled from following or even considering the reasoning of federal precedents lest they lose control over the proper interpretation of their state constitutions. Finding jurisdiction here would also erase the bright line this Court drew in *Michigan*, sowing substantial uncertainty in the high courts of every state.

The risk of rendering an advisory opinion is also particularly strong in these circumstances: The California Supreme Court made clear that it only found *Johanns* to be "persuasive" *as it construed that decision*. Pet. App. 48. Were this Court to remand this case back to the California Supreme Court with an indication that it had somehow misunderstood *Johanns*, there is no reason to think the court would cease to find the basic principle it applied—whether correctly or incorrectly extracted from *Johanns*—any less compelling. And the court would of course be free to adopt the same principle as a matter of state law without any reference to *Johanns*.

C. At Minimum, The Jurisdictional Question Presents A Serious Vehicle Problem

The complexity of the jurisdictional question raised by the petition, at a minimum, presents a serious vehicle problem. Before this Court could reach the First

Amendment question allegedly presented, it would have to engage in an extended analysis to ensure that it had jurisdiction. This exploration of the outer boundaries of this Court's jurisdiction to review state court decisions would touch on sensitive questions regarding the balance between state and federal authority. It could also have far-reaching, unintended consequences, encouraging a flood of petitions seeking review of state court decisions that merely consider federal precedents for their persuasive value. And were this Court to decide on further consideration that it did not have jurisdiction, the effort spent on this case would have been wasted.

The First Amendment question Petitioners seek to present in this case does not warrant review under any circumstances. *See infra* § II. But even if it did, this Court should await a case that directly presents a claim under the First Amendment. That is particularly true here given that Petitioners ask this Court both to apply a principle not actually found in *Johanns* and to overrule an aspect of *Johanns* with which they disagree. *See infra* § II.B. Petitioners' amici go even further, urging the Court to abandon *Johanns* altogether. Such a refashioning of federal First Amendment jurisprudence ought to await a case actually presenting a First Amendment claim.

II. EVEN IF THIS COURT HAD JURISDICTION, THE QUESTION PRESENTED WOULD NOT WARRANT REVIEW

Even if the petition presented a federal question, there would be no basis for review by this Court. Petitioners do not allege any disagreement in the lower courts, the decision below is consistent with this Court's precedents, and the California Supreme Court correctly decided the fact-bound question before it.

A. There Is No Disagreement Among The Lower Courts

Although they vaguely reference "confusion among lower courts," Pet. 15, Petitioners do not contend that review by this Court is necessary to resolve any split in the lower courts.[4] Indeed, Petitioners do not identify any disagreement in the lower courts regarding the proper standard for determining whether the speech of a commodity promotion program constitutes government speech. Although litigation regarding commodity promotion programs occupied the courts for many years, *Johanns* largely resolved those disputes. In the thirteen years since this Court rejected a First Amendment challenge to the federal beef promotion program in *Johanns*, courts have had no difficulty applying the principles articulated in that case to resolve challenges to numerous commodity promotion programs.[5] Each of these cases involved a different statutory scheme and addressed the particular government speech theories presented by the parties. Consistent with this variation, courts have recognized that there are multiple ways for speech to qualify as government speech. But no disagreement has arisen regarding how

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[4] Amici similarly demonstrate no divergence among the lower courts with respect to the issues presented in the petition. The only even arguable split amici identify is between two state courts and relates to the distinct issue of vanity license plates.

[5] *See, e.g.*, *Delano Farms*, 586 F.3d at 1227-1230; *Paramount Land Co.* v. *California Pistachio Comm'n*, 491 F.3d 1003, 1009-1012 (9th Cir. 2007); *Cochran* v. *Veneman*, 2005 WL 2755711, at *1 (3d Cir. Sept. 15, 2005); *American Honey Producers Ass'n* v. *USDA*, 2007 WL 1345467, at *9, *11 (E.D. Cal. May 8, 2007); *Cricket Hosiery, Inc.* v. *United States*, 429 F. Supp. 2d 1338, 1343-1346 (Ct. Int'l Trade 2006); *Avocados Plus Inc.* v. *Johanns*, 421 F. Supp. 2d 45, 50-55 (D.D.C. 2006).

to evaluate the constitutionality of commodity promotion programs.

In particular, there is no disagreement with respect to the principal legal question Petitioners claim to raise here: whether the government speech doctrine requires a politically accountable government official to engage in actual word-for-word review of commodity advertisements or whether the *authority* to control the messages at issue is sufficient. *See* Pet. 15 (describing the "pure legal question" they purport to raise), 20 (noting that in the beef program, USDA approved every word used in every advertisement). To date, two decisions in addition to the California Supreme Court's decision have expressly rejected Petitioners' view that *Johanns* mandates word-for-word review. *See Delano Farms*, 586 F.3d at 1230 ("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."); *Paramount Land Co.* v. *California Pistachio Comm'n*, 491 F.3d 1003, 1011 (9th Cir. 2007) ("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."). No court has reached a contrary conclusion.

The absence of any disagreement among the lower courts is compelling evidence that those courts already have sufficient guidance to decide the matters that come before them.

B. The California Supreme Court's Decision Does Not Conflict With This Court's Government Speech Precedents

Unable to identify any split in the lower courts, Petitioners primarily contend (at 19) that the California Supreme Court "[m]isintepreted and [m]isapplied this Court's [g]overnment [s]peech [p]recedent." As explained below, however, there is no conflict between this Court's precedents and the California Supreme Court's decision (even assuming that decision raised some question of federal law).

1. The decision below does not conflict with *Johanns*

Petitioners first argue that the California Supreme Court's decision conflicts with *Johanns*' supposed requirement that a politically accountable government official review and approve "*every word used* in *every* promotional campaign." Pet. 20 (quoting *Johanns*, 544 U.S. at 561). This argument misconstrues both the California Supreme Court's decision and the holding of *Johanns*.

The California Supreme Court relied on authorities interpreting the First Amendment, including *Johanns*, only to "establish certain basic principles." Pet. App. 47. As noted, the California Supreme Court "construe[d] *Johanns* … 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." *Id.* at 48. It was this construction of *Johanns* that the California Supreme Court found "persuasive" and adopted. *Id.* That court did not agree with Petitioners' contention that *Johanns* requires word-for-word review. *See id.* at 58-

59. It thus obviously did not adopt that interpretation of *Johanns* as the standard under the California free speech clause. Because the California Supreme Court has the final say on the meaning of the California Constitution, it was perfectly within its rights to enshrine in California law whatever interpretation of *Johanns* it found persuasive. The decision below thus would not conflict with this Court's precedents even if Petitioners' view of *Johanns*, as a matter of federal law, were correct.

In any event, Petitioners are wrong to suggest (at 20) that this Court definitively held in *Johanns* that a politically accountable government official must review and approve "*every word used* in *every* promotional campaign" for the government speech doctrine to apply. In *Johanns*, this Court concluded that, even assuming the Beef Operating Committee that designed the beef ads at issue there was "a nongovernmental entity," 544 U.S. at 560 & n.4, its speech nonetheless qualified as government speech. The Court noted that "Congress ha[d] directed … a 'coordinated program' of promotion, 'including paid advertising[.]'" *Id.* at 561. The Court further explained that "Congress and the Secretary [of Agriculture] ha[d] set out the overarching message"—promoting "the image and desirability of beef"—while "le[aving] the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well)." *Id.* In addition, Congress "retain[ed] oversight authority" over the beef program and "the ability to reform the program at any time." *Id.* at 563-564. The Court noted that the Secretary took the extraordinary step of reviewing every word of the Operating Committee's advertisements. *See id.* at 561. But the Court stressed that, far from setting a floor that must

be met in all cases, this degree of control was "*more than* adequate." *Id.* at 563 (emphasis added).

Petitioners are unable to explain how controls that were "*more than* adequate" can be considered constitutionally mandated minimum requirements. In one place (at 24), Petitioners simply omit the words "more than" using ellipses. Where they address the phrase (at 20-21), they claim that "more than adequate" does not mean that the controls were "more than enough," but rather that they were "emphatically sufficient." Putting aside the problem that "more than adequate" and "more than enough" are clearly synonymous, it is unclear how "emphatically sufficient" is any better for Petitioners. If one set of government controls is "emphatically sufficient," then some lesser or different set of controls could well be "sufficient." By definition, if the Court concluded that level of control exercised over the beef advertisements was "more than adequate" to establish government speech, then no particular feature of that system was found necessary to establish government speech. Because this Court in *Johanns* was evaluating a program where USDA did review every word of every advertisement, the Court had no reason to address whether some other means of "effective control" would be sufficient. In fact, it would have been improper for the Court to resolve that hypothetical question. *See Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam) (courts should "avoid advisory opinions on abstract propositions of law").

Mandating word-for-word review is unnecessary to further the purpose of the government speech doctrine. The government may compel citizens to fund its speech because it is politically accountable to the voters. *See, e.g.*, *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000) ("When the gov-

ernment speaks … 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."). This accountability exists whenever the government has the legal authority to control the relevant speech and thus can be held responsible for its content. If, for example, the Commission ever were to run offensive advertising, the Secretary of the CDFA who appointed and can remove the commissioners would be hard pressed to explain to Californians why she did not put a stop to it. Pet. App. 55 (noting the difficulty the Secretary would have "disclaim[ing] responsibility for promotional messaging that an appointee later may approve"). Requiring actual word-for-word review is not necessary to ensure accountability to the public.

Indeed, this Court has never required the government to micromanage the dissemination of the speech it funds. *See Rust* v. *Sullivan*, 500 U.S. 173, 192-200 (1991) (upholding against First Amendment challenge program involving private doctors conveying family-planning information even though there was no indication that government reviewed and approved every word spoken by participating doctors); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) (characterizing program in *Rust* as involving government speech); *Rosenberger* v. *Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[w]hen the government disburses public funds to private entities to convey a governmental message," it need only "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee"). Petitioners' view that the government cannot subsidize speech unless a politically accountable government official pre-approves every word of the message would foreclose

most government grant programs involving the dissemination of government messages by private actors.

For all of these reasons, Petitioners fail to show a conflict with *Johanns*—the primary basis for their petition.

2. The decision below does not conflict with *Matal* and *Walker*

Petitioners next claim (at 25-27) that the California Supreme Court failed adequately to consider this Court's decisions in two government-speech cases outside of the commodity promotion context—*Walker* v. *Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), and *Matal* v. *Tam*, 137 S. Ct. 1744 (2017). *Walker* involved a First Amendment challenge to Texas' refusal to issue a specialty license plate proposed by a private party, the Sons of Confederate Veterans. This Court rejected that challenge on government speech grounds. 135 S. Ct. at 2246-2252. In *Matal*, this Court concluded that the First Amendment barred the Patent and Trademark Office from refusing to register a private trademark that it considered disparaging, rejecting a government speech defense (among others). 137 S. Ct. at 1757-1760. There is no basis to conclude that the California Supreme Court's decision conflicts with either case.

The California Supreme Court did not indicate that it found *Walker* and *Matal* persuasive or purport to adopt their reasoning as an authoritative guide to interpreting state law. Indeed, the court expressly stated that it was *not* addressing the application of the government speech doctrine to cases outside the compelled subsidy context. *See* Pet. App. 48 n.20 (citing *Walker* and noting that "[i]nvocation 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"). Accordingly, there is not even a conceivable basis for faulting the state court for failing to address these First Amendment cases.

Even if the California Supreme Court had agreed to adhere to *Walker* and *Matal*, its decision still would not conflict with those cases. As noted, *Walker* and *Matal* were not compelled subsidy cases, and neither involved a challenge to a statutorily predefined message. Rather, both cases involved messages "initially proposed by *private parties*." *Walker*, 135 S. Ct. at 2250 (emphasis added); *see also Matal*, 137 S. Ct. at 1758 (the government "does not dream up these marks"). It was the role of purely private parties in crafting the messages at issue that placed *Walker* at "the outer bounds of the government-speech doctrine" and that pushed *Matal* over that line. *Matal*, 137 S. Ct. at 1760. Whatever might be required before an entirely privately crafted message (such as a license plate design) becomes government speech, no similar degree of government involvement is necessary when *the Legislature itself* defines the message and creates the entity to disseminate that message, as was the case here.

3. The decision below does not conflict with this Court's precedent regarding attribution

Perhaps most surprisingly, Petitioners also seek review of the California Supreme Court's refusal "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 at-

tributed to the government." Pet. App. 59. This Court in *Johanns* expressly rejected "a requirement that government speech funded by a targeted assessment must identify government as the speaker," explaining that the dissent in the case urging adoption of such a requirement "cites no prior practice, no precedent, and no authority for this highly refined elaboration—not even anyone who has ever before thought of it." 544 U.S. at 564 n.7; *see id.* ("It is more than we think can be found within 'Congress shall make no law … abridging the freedom of speech.'"). Petitioners nevertheless claim that in *Johanns* "the Court declined to address whether attribution was required for the government speech doctrine to apply, one way or the other." Pet. 28. But the language from *Johanns* that Petitioners cite (at 28) addressed a *different* attribution question: whether a person required to fund a government message may raise a First Amendment challenge if the message is incorrectly attributed *to that person*. It was this distinct argument—"which relates to compelled *speech* rather than compelled *subsidy*"—that the Court in *Johanns* declined to resolve. *See* 544 U.S. at 564-565.

Petitioners go even further and contend (at 28) that this Court has, in fact, "embraced" the "specific" position of the *Johanns* dissent with respect to attribution. Petitioners' sole argument in support of that assertion is that this Court cited Justice Souter's *Johanns* dissent in *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009). *See* Pet. 29. But that "[s]ee also" citation in *Summum* was merely for the general proposition that the government speech doctrine serves important purposes. *See* 555 U.S. at 468 ("'To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the "marketplace of ideas" would be out

of the question.'" (quoting *Johanns*, 544 U.S. at 574 (Souter, J., dissenting))). The Court in *Summum* did not purport to overrule the *Johanns* majority and adopt the position of the *Johanns* dissent with respect to attribution.

Indeed, *Summum* and *Walker* (which Petitioners also cite (at 29)) did not address whether attribution to the government is required in the context of a compelled-subsidy challenge. In those cases, the plaintiffs were challenging the government's refusal to convey the plaintiffs' preferred message—an alleged restriction on their speech. In that context, whether the speech was attributed to the government was important to determine whether the government had opened a forum for private speech or instead whether the government itself was speaking. *See Summum*, 555 U.S. at 470-472; *Walker*, 135 S. Ct. at 2246. Accordingly, there is no basis to assert that the California Supreme Court somehow bound itself to follow *Summum* or *Walker* (*see* Pet. App. 48 & n.20) or that its opinion addressing a compelled-subsidy challenge conflicted with those decisions.

Finally, contrary to Petitioners' assertion (at 28), the California Supreme Court did not indicate that attribution is "of no constitutional significance." Rather, the court agreed "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." Pet. App. 59. The court simply followed *Johanns* in "reject[ing] a *categorical* attribution requirement." *Id.* (emphasis added).[6]

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[6] The Commission's "[p]rint advertisements include the Commission's website address and its logo, which reads 'Grapes from California.'" Pet. App. 15. Petitioners have never offered

Petitioners thus cannot show that the decision below conflicted with any decision of this Court.[7]

C. The California Supreme Court Correctly Decided The Fact-Bound Question Presented

Because no precedent of this Court imposes the bright-line, word-for-word review requirement or the attribution requirement that Petitioners urge—and the California Supreme Court did not incorporate such requirements into state law—there is no basis for this Court to review the question Petitioners claim is presented. That is reason alone to deny the petition. But even if the petition were construed to raise a challenge

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any evidence that the tagline "Grapes from California" is inconsistent with attribution to the State of California. Nor do Petitioners dispute that the Commission's web site makes clear that the Commission was created and operates under the authority conferred by the California Legislature. *See* Cal. Table Grape Comm'n, *About the California Table Grape Commission*, http://www.grapesfromcalifornia.com/aboutus.php (visited Oct. 15, 2018).

[7] This Court's "compelled-subsidy cases have consistently respected the principle that '[c]ompelled support of a private association is fundamentally different from compelled support of government.'" *Johanns*, 544 U.S. at 559 (quoting *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (Powell, J., concurring in judgment)). Petitioners' claim (at 19) that *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), is "on all fours" with this case "[i]n all respects other than government speech" therefore speaks for itself. Both *United Foods* and this Court's recent decision in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), address subsidization of *private* speech and therefore are irrelevant to this case. Amici's reliance on *Janus* and other compelled private speech cases is similarly misplaced. The California Supreme Court did not treat *Abood* as "controlling precedent"; it merely discussed *Abood's* historical role in the development of the law in this area, much as amici themselves do.

beyond the narrow question presented, this case raises at most a fact-bound question of whether the State of California has retained sufficient control over the Commission to render its advertisements government speech. That type of challenge to the application of general principles to a specific set of facts would not be worthy of this Court's review. Whether the *particular* set of oversight mechanisms specified in the Ketchum Act provides the State of California with effective control over the activities of a single commodity promotion program is not an issue of broad or enduring consequence.

Moreover, even if this Court were otherwise inclined to engage in error-correction on matters of state law, there would be no error here to correct.

1. The Commission's speech is effectively controlled by the State of California

The California Supreme Court correctly held that the Commission's speech is effectively controlled by the State of California in numerous respects. *See* Pet. App. 50-56.

First, the California Legislature created the Commission and prescribed the basic message to be disseminated by it with great specificity. *E.g.*, Cal. Food & Agric. Code §§65572(h) & (i), 65500(f), 63901; Pet. App. 50-51. The Commission is authorized to "promote the sale of fresh grapes by advertising" and to "educate and instruct the public with respect to fresh grapes" including "the healthful properties and dietetic value of fresh grapes." Cal. Food & Agric. Code §65572(h). Indeed, it is precisely the message prescribed by the Ketchum Act—promoting California grapes generically—that Petitioners object to funding. None of the Petitioners

is even familiar with the contents of the Commission's advertising. *See supra* pp. 6-7. At most, Petitioners take issue with the generic nature of the Commission's advertising, but that message, which is defined by the Ketchum Act, is indisputably government speech regardless of any further governmental oversight.

Second, all of the Commission's Board member are appointed and subject to removal by the Secretary of the CDFA. *See* Cal. Food & Agric. Code §§65550, 65563, 65575.1; CT-8:1735 (SF ¶76); Pet. App. 55. This power gives the Secretary tremendous control over the Commission, as it allows her to determine who will be permitted to serve on the Commission in the first instance and to hold the commissioners accountable.[8] It is well established that the power to appoint and remove is the power to control. *See Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986); *Morrison* v. *Olson*, 487 U.S. 654, 692 (1988).

Third, the Ketchum Act's grievance procedure further cements CDFA's control over the Commission's message. *See Paramount Land*, 491 F.3d at 1011 (analogous grievance mechanism "demonstrate[s] the Secretary's control over the Commission"). The Secretary is empowered, on the petition of an aggrieved party, to "reverse [an] action of the commission" if she finds that it was "not substantially sustained by the record, was an abuse of discretion, or illegal." Cal. Food & Agric. Code §65650.5; *see also id.* §63902; Pet. App. 54 ("Through the Act's appeal mechanism, the Secretary may reverse an action by the Commission

[8] While growers nominate candidates in elections held under the Secretary's oversight, the Secretary "determines who to appoint to the Commission" and "is authorized to remove a commissioner if necessary." CT-8:1735 (SF ¶76).

…."). "And regardless of whether such an appeal leads to reversal, the Secretary could be held politically accountable for the outcome." Pet. App. 54.

Fourth, a number of additional regulatory mechanisms confirm that the State has control over the Commission's implementation of the Legislature's message. For example, the Ketchum Act provides that the Commission's "books, records and accounts shall be open to inspection and audit" by the Department of Finance or any other state officer charged with the audit of operations of departments. Cal. Food & Agric. Code §65572(f); *see also supra* p. 6 (discussing CDFA's right to review Commission advertisements).

As the California Supreme Court explained, under the "effective control" standard of *Johanns*, "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." Pet. App. 56. The numerous control mechanisms described above provide that authority. As the court below observed, "nothing in the record suggests that the Commission has departed from its mission." *Id.*

2. The Commission is a government entity

Even if the CDFA did not exercise sufficient control over the Commission's speech, the Commission's speech would still be government speech because the Commission is a government entity. As the Ninth Circuit has recognized, this Court's decision in *Johanns* provides two bases for classifying the Commission's activities as government speech: "(1) if the Commission is itself a government entity, or (2) if the Commission's

message is 'effectively controlled' by the state." *Delano Farms*, 586 F.3d at 1223.

In *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court addressed whether Amtrak should be regarded as part of the government and subject to First Amendment restrictions, holding that a "corporation is part of the Government for purposes of the First Amendment" where "[1] the Government creates a corporation by special law, [2] for the furtherance of governmental objectives, and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation." *Id.* at 400. This Court reaffirmed and expanded that holding in *Department of Transportation* v. *Association of American Railroads* 135 S. Ct. 1225 (2015). There the Court concluded that "Amtrak is a governmental entity, not a private one," *id.* at 1233, even though Congress had specified that Amtrak "is not a department, agency, or instrumentality of the United States Government," *id.* at 1231, and even though the Court cited no evidence of day-to-day approval of Amtrak's operations by any member of the Executive Branch.

The Commission easily qualifies as a government entity under that standard. Each of the factors this Court identified as significant in *Lebron*/*Association of American Railroads* supports that conclusion. The Commission was created by the California Legislature by a special law as a public corporation to further governmental objectives. Cal. Food & Agric. Code §§65500(a)-(g), 65551, 63901(a). The Legislature stated that "[t]he production and marketing of grapes produced in California for fresh human consumption is declared to be affected with a public interest" and that the Commission was being created "in the exercise of the police power of th[e] state for the purpose of pro-

tecting the health, peace, safety and general welfare of the people." *Id.* §65500(h); *see also id.* §65500(f). In addition, the Secretary appoints and retains power to remove every Commissioner. *See supra* p. 4.

Indeed, numerous California laws expressly treat the Commission as a government entity and guarantee its transparency and accountability. *See, e.g.*, Cal. Gov't Code §§11000(a), 6252(f), 6276.08; Cal. Food & Agric. Code §63901(a). And California law vests the Commission with an array of quintessentially governmental powers. Perhaps most strikingly, California law makes it a criminal offense to "willfully render or furnish a false or fraudulent report, statement or record required by the commission" or to "[willfully] fail or refuse to furnish to the commission … information concerning the name and address of the persons from whom [the shipper or seller of table grapes] has received table grapes … and the quantity of such commodity so received." Cal. Food & Agric. Code §65653.

All of those factors make clear that the Commission is a governmental entity, which renders the Commissions activities government speech regardless of whether some sperate government entity exercise sufficient control of the Commission's message. *See Delano Farms*, 586 F.3d at 1226 ("Were we to decide this appeal based solely on whether the Commission is a government entity, *Lebron* and the strong indicia of governmental status and control would tip the balance to classifying the Commission as a governmental entity."). Although the California Supreme Court did not need to address whether the Commission is a government entity in light of its holding that the Commission's speech is effectively controlled by the State, that alternative basis for affirmance further renders this Court's review unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT D. WILKINSON
BAKER MANOCK & JENSEN, PC
5260 North Palm Ave.
Suite 421
Fresno CA 93704

SETH P. WAXMAN
Counsel of Record
BRIAN M. BOYNTON
THOMAS G. SAUNDERS
ARI HOLTZBLATT
JACK STARCHER
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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