Case No. S226538

IN THE SUPREME COURT OF CALIFORNIA

DELANO FARMS COMPANY, ET AL.,

Plaintiffs and Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,

Defendant and Respondent.

After a Decision by the Court of Appeal, Fifth District
Case No. F067956

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF THE CATO INSTITUTE, INSTITUTE FOR JUSTICE, AND REASON FOUNDATION IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the Cato Institute, Institute for Justice, and Reason Foundation respectfully request permission to file the accompanying *amici curiae* brief in support of Petitioners Delano Farms Company, et al.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Institute for Justice is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual

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[1] No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. *See* Cal. Rules of Court, rule 8.520(f)(4)(A). *Amici* certify that no person or entity other than *amici* and their counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief.

liberty, including the free exchange of ideas. The Institute for Justice has litigated or participated as *amicus* in First Amendment cases in state and federal courts throughout the country, including cases involving the government-speech doctrine.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

Amici are interested in this case because the rapidly expanding government-speech doctrine threatens to limit the exercise of citizens' First Amendment rights. *Amici* believe that their public policy experience will assist this Court in its consideration of this case, and offer this brief to explain why this Court should exercise caution when defining the bounds of government speech.

Respectfully submitted,

Dated: January 08, 2016

By: *s/ Bradley A. Benbrook*
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AMICI CURIAE BRIEF

I. The Free Speech Rights Of Private Citizens Inevitably Contract When The Evolving Government Speech Doctrine Is Expanded.

The government is not just another competitor in the ideas arena of public discourse. "[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978)).

Time and again, the U.S. Supreme Court has cautioned that the First Amendment requires vigilance to ensure the government does not stack the public debate to favor its policy preferences. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction."); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."); *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 537–38 (1980) ("If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating.") (citation omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390

(1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

In other words, the system is quite intentionally stacked *against* the government so that freedom may be promoted and preserved.

California's protection of speech rights expands on this premise by providing that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." Cal. Const., art. I, § 2. As this Court has explained, "Article I's free speech clause is at least as broad as the First Amendment's, and its right to freedom of speech is at least as great." *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 490 (2000) (*Gerawan I*); *id.* at 492-93 (noting that Article I's right to freedom of speech is "unbounded in range" and "'unlimted' in scope"); *Beeman v. Anthem Prescription Mgmt., LLC*, 58 Cal. 4th 329, 341 (2013) ("The state Constitution's free speech provision is 'at least as broad' as and in some ways is broader than the comparable provision of the federal Constitution's First Amendment").

The relatively new and very much evolving government speech doctrine threatens to alter the fundamental balance between citizens

and the government in the ordering of speech rights. While "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995), "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). When a government entity "speak[s] for itself," "it is entitled to say what it wishes" and "to select the views that it wants to express." *Id.* at 467–68.

Treating the government as a participant in the marketplace of ideas under the government-speech doctrine is a relatively recent phenomenon. As this case shows, however, the doctrine's expanding scope incentivizes all manner of entities with some connection to the government to claim that they *are* "the government." They do so on the hope that such a designation will allow them to spend their big budgets on speech activities without regard to the beliefs or preferences of dissenting citizens that have been compelled by law—that is, by the *real* "government"—to pay for that speech.

This dynamic is a problem because expanding the boundaries of government speech necessarily causes citizens' speech rights to suffer. *See* Joseph Blocher, *Viewpoint Neutrality & Gov't Speech*, 52 B.C. L.

Rev. 695, 708–715 (2011) (arguing that "government speech limits private speech" because it "drowns out private speech," and that its market effects are analogous to direct regulation and compelled speech). As two scholars noticed as the doctrine was first being developed,

> the use of speech by government is expanding and taking new forms, which presents heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace, employing devices to conceal hidden government messages in private speech, or distorting the gatekeeping functions of private speakers through leverage, inducement, or direct government ownership of channels of expression.

Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1381 (2001).

We couldn't have come up with a better example of this point than the Table Grape Commission's invocation of *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995). TGC argues that *Lebron* shows the commission is "the government," so therefore its communications constitute government speech, which in turn means that long-established concerns about compelled speech simply do not apply. But *Lebron* was not a government-speech case—the words "government speech" never appear in the opinion. Rather, the inquiry in *Lebron* was whether Amtrak should be treated as a government actor so that it had

less power to censor advertisements under the First Amendment.

In short, this Court must exercise extreme caution when considering any claim by an entity that it is protected by the new doctrine. As Justice Souter stressed in his *Summum* concurrence, "[b]ecause the government speech doctrine . . . is 'recently minted,' it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." 55 U.S. at 485. *See also id.* at 481 (Stevens and Ginsburg, JJ., concurring) (noting that "our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit."); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."); *Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (Souter, J.) ("the [government speech] doctrine is still at an adolescent stage of imprecision"); Note, *Strict Scrutiny in the Middle Forum*, 122 Harv. L. Rev. 2140, 2154 (2009) ("[T]he distinctions the Supreme Court has drawn between when the government itself has spoken and when it has merely facilitated private expression are subtle at best.").

II. TGC Cannot Be Thought Of As A "Government Entity" In Any Traditional Sense; Its Commercial Nature Highlights The Risks To Individual Speaker's Rights Posed By Compelled Subsidies.

What do the above lofty concepts have to do with the generic promotion of table grapes by California's Table Grape Commission? This Court has already highlighted the substantial speech concerns inherent in agricultural promotion programs. In *Gerawan I*, the Court explained how generic advertisements manipulate the market to benefit some producers and harm others by forcing them to subsidize their competitors through marketing ostensibly aimed at benefiting the group:

> [W]hen some producers . . .develop and use brands in marketing their goods, and others do not, the former may find themselves disadvantaged by generic advertising in their competition against the latter. Generic advertising may portray goods as "indistinctive" in spite of brand, and may thereby "minimize[] consumer desire to distinguish" inter se. [Citation] 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.

Gerawan I, 24 Cal. 4th at 504. In other words, generic marketing programs not only force some producers, like Petitioners, to subsidize speech to which they object, that speech can also hurt their bottom line—and benefit their competitors.

The Commission argues mainly that the Court of Appeal's decision should be affirmed on the superficial basis that TGC is a "government entity," so therefore its distribution of marketing and educational materials is "government speech"—case closed. (Resp. Br. at 23–34.)

In light of this headline argument, *amici* note that the parties have not briefed what seems like an important issue: The so-called government entity here can be *disbanded* based on a vote of the table grape producers. Food & Agric. Code §§ 65660–62. If 51% of the producers marketing 65% of the table grapes vote to "suspend," or if 65% of the producers marketing 51% of the table grapes so vote, then the TGC's 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." *Id.* at 65661(a), (b). But the statute goes on to provide that this "suspension" becomes permanent at the end of the marketing season during the vote:

> 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 . . . .

Id., § 65662 (emphasis added). *See also id.*, § 65675 (requiring referendum every five years "to determine whether the operations of the provisions of this chapter shall be reap proved and continued effective").

Gerawan II considered—in the context of a different legal issue—the impact of a vote by producers of whether to establish a marketing order in the first instance, but its analysis is important here. In that case the challenger argued that the Plum Commission couldn't establish a "substantial government interest" under *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), because the marketing order could not become effective until a majority of the growers voted to enact it. *Gerawan Farming, Inc. v. Kawamura*, 33 Cal. 4th 1, 23–26 (2004). The Court concluded that this feature did not preclude a finding that the "government interest" was substantial, but it did not analyze the effect of this feature on whether marketing order

was "government speech." *Id.* at 26-27.

Gerawan II's analysis as to why the government-interest showing was not impeded by the affirmative-vote requirement shows why TGC cannot prevail here on its argument that it is a "government entity." *Gerawan II* decided that the government interest was achieved because the "decision[] about how to accomplish that interest [was] *delegated* to those most affected by th[e] decisions." *Id.* at 26 (emphasis added). The very fact of a "delegation" shows that those accomplishing the government interest are not "the government" as claimed by TGC.

Here too, the TGC cannot commence its marketing operation without the vote of the affected producers. Food & Ag. Code § 65573. That the TGC can be wound up by the producers themselves should cement the conclusion that it is not "the government" as claimed in Respondent's brief.

III. Expanding The Government-Speech Doctrine Creates Additional Risks.

To be sure, an expanded "government speech" doctrine threatens to alter California speech rights in areas outside generic agricultural marketing. In the bedrock decision *Stanson v. Mott*, 17 Cal. 3d 206 (1976), for instance, this Court stressed in the context of a local school bond campaign that "[a] fundamental precept of this nation's

democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." *Id.* at 217. The Court further explained:

> A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office; selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

Id.

Stanson drew heavily from Justice William Brennan's opinion, as a member of the New Jersey Supreme Court, in *Citizens to Protect Pub. Funds v. Board of Educ.*, 98 A.2d 673 (N.J. 1953), where a school board expended public funds to print and distribute a booklet urging voters to "Vote Yes" on an upcoming bond election regarding a school building program. Justice Brennan explained that "public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint." *Id.* at 677.

In *Vargas v. Salinas*, 46 Cal. 4th 1 (2009), this Court re-affirmed *Stanson* and concluded that, while a public entity may play "an

informational role" by "analytically evaluating" a ballot measure and expressing an opinion on its merits, it remains "constitutionally suspect" for the government to "expend funds to mount a campaign on the measure." *Id.* at 36.

Two federal courts of appeals have recently relied on the "government speech" doctrine to reach quite different results. In *Kidwell v. City of Union*, the Sixth Circuit rejected, over a vigorous dissent, a challenge to a city's use of public funds to mount campaigns supporting and opposing several ballot measures. 462 F.3d 620 (2006). The court held that such advocacy was "government speech," and concluded that while there must be "*some* limit on the government's power to advocate during elections" the city was free to spend funds to advocate on "issues . . . germane to the mechanics of its function." *Id.* at 625–26. The dissent cited *Stanson* and *Citizens to Protect Public Funds* in concluding that, "when the government uses tax dollars to enter an electoral contest and advocate in favor of a position or candidate, it distorts the very check on governmental power so central to our constitutional design—the next election." *Id.* at 627 (Martin, J., dissenting).

The Fourth Circuit reached a similar result in *Page v. Lexington County School District*, where it held that a school district's wide-

ranging efforts to oppose a bill pending in the Kentucky state legislature was government speech. 531 F.3d 275 (2008). Relying on the U.S. Supreme Court's decision in *Johanns*, the court of appeals reasoned that the government's advocacy was immune from First Amendment scrutiny. *Id.* at 280–82.

Kidwell and *Page* are warning shots: examples of the inevitable tendency of government and government-related entities to rely on a malleable conception of "government speech" to maintain and expand their power.

CONCLUSION

An expansive view of the government-speech doctrine threatens to limit citizens' First Amendment rights. *Amici* urge the Court to exercise caution, and follow the lead of Justice Souter: "[G]o slow in setting its bounds, which will affect existing doctrine in ways not yet explored."

Respectfully submitted,

Dated: January 8, 2016

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CERTIFICATE REQUIRED BY RULE 8.204(c)(1)

The text of this brief is comprised of 2,586 words as counted by the Microsoft Word® software program used to prepare this brief.

Respectfully submitted,

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