

# IS A GRAPE JUST A GRAPE? CALIFORNIA TABLE GRAPE COMMISSION'S MANDATORY ASSESSMENT FUNDED GENERIC ADVERTISING SCHEME VS. GROWER'S FIRST AMENDMENT RIGHTS

## I. INTRODUCTION

*To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical*  
– Thomas Jefferson<sup>1</sup>

In 1996, Delano Farms, a table grape producer, challenged the validity of mandatory assessments that fund the generic advertising scheme of the California Table Grape Commission (“CTGC”) on the grounds that its First Amendment rights were violated because they did not agree with the advertising message.<sup>2</sup> The district court granted summary judgment for the CTGC, and the grower appealed.<sup>3</sup> The Ninth Circuit Court of Appeals reversed and remanded, finding that the grower’s First Amendment rights had been violated.<sup>4</sup> While on remand, the CTGC amended their complaint to include a government speech defense.<sup>5</sup> The district court once again granted summary judgment in favor of the CTGC.<sup>6</sup> In 2009, the case made its way back to the Ninth Circuit, where it affirmed the lower court’s decision without addressing the grower’s First Amendment concerns.<sup>7</sup> The conflicting decisions from the Ninth Circuit

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<sup>1</sup> *Aboud v. Detroit Board of Educ.*, 431 U.S. 209, 234 n. 31 (1977) (quoting I. Brant, James Madison: The Nationalist 354 (1948)).

<sup>2</sup> *Delano Farms v. Cal. Table Grape Comm’n*, 586 F.3d 1219, 1221-22 (9th Cir. 2009).

<sup>3</sup> *Id.* at 1220.

<sup>4</sup> *Id.* at 1222.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1223.

<sup>7</sup> *Id.*

warrant a closer examination of the adversarial relationship between compelled speech and government speech in relation to agricultural marketing orders.

This Comment will discuss the doctrines of government speech and compelled speech as applied to agricultural marketing orders. First, this Comment will give a general overview of agricultural marketing orders and the CTGC. Next, case law for each doctrine of protected speech will be analyzed. The CTGC will be assessed to determine if there is a sufficient connection between it and the government to invoke the government speech category. Additionally, the CTGC will be examined to verify whether its speech is germane to a broader regulatory program designed to restrict market autonomy so as to warrant First Amendment protection. The government speech doctrine will be analyzed with a critical eye, and a new judicial standard which unifies the analysis of the two doctrines will be recommended. Finally, this Comment concludes with recommendations to resolve the First Amendment implications of the compelled subsidization of the CTGC.

## II. AGRICULTURAL MARKETING ORDERS: A BRIEF OVERVIEW

The concept of agricultural marketing orders<sup>8</sup> was developed during the Great Depression to combat distribution insufficiencies, “unfair and discriminatory trade practices,” and low consumer confidence in perishable goods from distant sources.<sup>9</sup> In 1935, as part of President Roosevelt’s New Deal, the Agricultural Adjustment Act was passed in an attempt to thwart the deflationary effect of the Great Depression by regulating agricultural commodities.<sup>10</sup> In 1937, the Agricultural Marketing Agreement Act (“AMAA”) was passed empowering Congress to broadly establish federal agricultural marketing orders with the primary goals to reach “parity prices”<sup>11</sup> and to maintain “orderly marketing conditions.”<sup>12</sup>

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<sup>8</sup> See CHARLES A. BOWSER, OFFICE OF THE COMPTROLLER GENERAL, *THE ROLE OF MARKETING ORDERS IN ESTABLISHING AND MAINTAINING ORDERLY MARKET CONDITIONS* 2 (1985) (“A marketing order is a marketing plan that the growers and handlers of a particular agricultural industry design and operate to work out solutions to general industry problems regarding supply and demand.”).

<sup>9</sup> *Id.* at 1.

<sup>10</sup> Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 5 (1995).

<sup>11</sup> INVESTOPEDIA, <http://www.investopedia.com/terms/p/parityprice.asp> (last visited April 25, 2011) (“The Agricultural Adjustment Act of 1938 states that the parity price formula is ‘average prices received by farmers for agricultural commodities during the

Some of the characteristics of marketing orders passed under the AMAA are that they are expressly exempt from antitrust laws;<sup>13</sup> include mechanisms to “avoid unreasonable fluctuations in supplies and prices”;<sup>14</sup> limit the quality and quantity of the commodity;<sup>15</sup> determine the grade and size of the agricultural product;<sup>16</sup> and establish standardized packaging requirements.<sup>17</sup> Currently, federal marketing orders exist for approximately thirty-five types of fruits, vegetables, and specialty crops.<sup>18</sup>

To coincide with the AMAA, many states passed similar legislation allowing the establishment of local marketing orders.<sup>19</sup> In 1937, California passed the California Marketing Act<sup>20</sup> enabling the state legislature to pass its own agricultural marketing orders and agreements.<sup>21</sup> One such piece of legislation was the Ketchum Act, which established the CTGC.<sup>22</sup> There is currently fifty-three commodity marketing programs in California.<sup>23</sup> Marketing orders are generally funded through mandatory assessments collected from the commodity growers and producers.<sup>24</sup> The funding schemes are mandatory in order to prevent “free-riding,” i.e., non-paying producers “who benefit economically from programs” that are funded by others.<sup>25</sup> Proponents of marketing orders claim that potential benefits are: expanded commodity demand; optimized marketing activities by coordinating supply and demand; reduction of oversupply by lengthening the marketing season; enhanced promotional and research

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last 10 years and is designed to gradually adjust relative parity prices of specific commodities.”).

<sup>12</sup> 7 U.S.C. § 602(1) (1970).

<sup>13</sup> 7 U.S.C. § 608b (1993).

<sup>14</sup> 7 U.S.C. § 602(4) (1970).

<sup>15</sup> 7 U.S.C. § 608c(6)(A) (2008).

<sup>16</sup> *Id.*

<sup>17</sup> 7 U.S.C. § 608c(6)(H) (2008).

<sup>18</sup> *Delano Farms v. Cal. Table Grape Comm’n* 546 F.Supp.2d 859, 866 (E.D. Cal. 2008) (including “blueberries, beef, cotton, dairy, eggs, milk, Hass avocados, honey, lamb, mangoes, mushrooms, peanuts, popcorn, pork, potatoes, soybeans, and watermelons.”).

<sup>19</sup> Bensing, *supra* note 10, at 7.

<sup>20</sup> See CAL. FOOD & AGRIC. CODE §§ 58601-59293 (West 1967).

<sup>21</sup> See RAYNE PEGG, U.S. DEPT. OF AGRIC., READY-TO-EAT OR NOT: EXAMINING THE IMPACT OF LEAFY GREEN MARKETING AGREEMENTS 3 (2009) (“Marketing agreements only apply to handlers who voluntarily sign an agreement, while marketing orders set regulations on all handlers in a specified region once the program is approved in a grower referendum.”).

<sup>22</sup> CAL. FOOD & AGRIC. CODE §§ 65502, 65550 (West 1968).

<sup>23</sup> *Delano Farms*, 546 F.Supp.2d at 866.

<sup>24</sup> See GEOFFREY S. BECKER, CRS REPORT FOR CONGRESS, FEDERAL FARM PROMOTION (“CHECK-OFF”) PROGRAMS, 95-353, CRS-2 (2008).

<sup>25</sup> *Id.*

activities; and the provision of quality and labeling standards.<sup>26</sup> Opponents claim marketing orders waste commodities through supply regulation,<sup>27</sup> stifle competition and innovation, and infringe on Constitutional rights through the compelled subsidization of generic promotional messages with which they disagree.<sup>28</sup>

### III. THE CALIFORNIA TABLE GRAPE COMMISSION

California provides ninety-eight percent of commercially grown table grapes in the United States.<sup>29</sup> In 2005, there were 110,000 acres of vineyards in California producing approximately ninety-four million nineteen-pound boxes of table grapes.<sup>30</sup> There are currently approximately 550 table grape producers in the state.<sup>31</sup> There is no question that the table grape industry is important to California's economy.<sup>32</sup>

The CTGC was established in 1967 by an act of the California legislature known as the Ketchum Act.<sup>33</sup> The legislative policy behind this enactment is explained in Section 65500 of the California Food and Agriculture Code:

(a) Grapes produced in California for fresh human consumption comprise one of the major agricultural crops in 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 . . . .

(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.

The CTGC's primary duty is:

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<sup>26</sup> Bobby Mixon et al., *An Empirical Analysis of a Marketing Order Referendum for a Specialty Crop*, 15 W. J. OF AGRIC. ECON. 144, 144 (1989).

<sup>27</sup> See Michael McMenamain, *Tedious Fraud: Reagan Farm Policy and the Politics of Agricultural Marketing Orders*, Cato Policy Analysis No. 30, December 6, 1983, available at <http://www.cato.org/pubs/pas/pa030.html>.

<sup>28</sup> See Clement E. Ward & Robert J. Hogan, Jr., *Beef and Pork Checkoffs: Challenges, Impacts, Alternatives*, 588 Okla. Coop. Extension Serv. 1(2003).

<sup>29</sup> *Delano Farms v. Cal. Table Grape Comm'n* 546 F.Supp.2d 859, 865 (E.D. Cal. 2008).

<sup>30</sup> *Id.* at 865-866.

<sup>31</sup> *Fun Facts*, CAL.TABLE GRAPE COMM'N, <http://www.tablegrape.com/funfacts.php> (last visited Sept. 3, 2010).

<sup>32</sup> *Delano Farms*, 546 F.Supp.2d at 866.

<sup>33</sup> CAL. FOOD & AGRIC. CODE § 65502 (West 1968).

[T]o promote the sale of fresh grapes<sup>34</sup> 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.<sup>35</sup>

The CTGC also has discretionary power to educate the wholesale and retail grape industry on proper handling methods; provide “display and other promotional materials” to dealers; conduct market surveys and analysis; “negotiate with state, federal and foreign agencies” to open new markets;<sup>36</sup> and to conduct scientific research in furthering its promotional goals.<sup>37</sup> The CTGC is composed of twenty-one fresh grape producers<sup>38</sup> who are nominated by popular vote by members of their district<sup>39</sup> and appointed by the Director of Agriculture, and one elected member of the public.<sup>40</sup>

The CTGC is a statutorily established corporation.<sup>41</sup> It possesses all of the powers of a corporation, including the power to contract and the ability to sue and be sued.<sup>42</sup> The State of California is not liable for the acts of the CTGC or its contracts.<sup>43</sup> Recovery against the CTGC is capped to the amount of funds collected by the CTGC.<sup>44</sup> The CTGC’s activities, including generic advertising, are funded by mandatory assessments imposed on the sale and shipment of all fresh grapes.<sup>45</sup> During the 2004-2005 growing season, the Commission collected \$8,367,429 from assessments on fresh grapes.<sup>46</sup> During that same period, \$8,137,984<sup>47</sup> was

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<sup>34</sup> “‘Fresh Grapes’ also designated ‘table grapes’ means any and all varieties of grapes produced in the state of California shipped for fresh human consumption, but does not include grapes delivered to a processor for processing or grapes processed by a processor or grapes delivered to a winery for winemaking or grapes produced for use in the making of wine.” CAL. FOOD & AGRIC. CODE § 65523 (West 1967).

<sup>35</sup> CAL. FOOD & AGRIC. CODE § 65572(h) (West 1967).

<sup>36</sup> CAL. FOOD & AGRIC. CODE § 65572(i) (West 1967).

<sup>37</sup> CAL. FOOD & AGRIC. CODE § 65572(k) (West 1967).

<sup>38</sup> CAL. FOOD & AGRIC. CODE § 65550 (West 1967).

<sup>39</sup> CAL. FOOD & AGRIC. CODE § 65556 (West 1967).

<sup>40</sup> CAL. FOOD & AGRIC. CODE § 65550 (West 1967).

<sup>41</sup> CAL. FOOD & AGRIC. CODE § 65551 (West 1967).

<sup>42</sup> *Id.*

<sup>43</sup> CAL. FOOD & AGRIC. CODE § 65571 (West 1967).

<sup>44</sup> *Id.*

<sup>45</sup> CAL. FOOD & AGRIC. CODE § 65600 (West 1967).

<sup>46</sup> *Delano Farms v. Cal. Table Grape Comm’n* 546 F.Supp.2d 859, 866 (E.D. Cal. 2008).

spent by the Commission for activities related to advertising, promotion, and the opening and maintaining of domestic and foreign markets for fresh grapes.<sup>48</sup>

The Ketchum Act itself does not outline a particular message to be disseminated by the generic advertising scheme, but it does outline the type of information that should be disseminated.<sup>49</sup> The Act also does not employ any mechanisms to seek approval by the California Department of Food and Agriculture or any other agency to review or approve particular advertising messages.<sup>50</sup> Any person aggrieved by an action of the Commission may appeal to the Director of Agriculture whose decisions are subject to judicial review.<sup>51</sup>

### A. *The Grower's First Amendment Challenge*

In *Delano Farms v. Cal. Table Grape Comm'n*, 586 F.3d 1219 (9th Cir. 2009), several table grape growers, including Delano Farms, challenged the validity of being compelled to subsidize the CTGC.<sup>52</sup> The Growers alleged that requiring them to pay assessments to the CTGC for speech, expressive and associational purposes violated their First Amendment rights.<sup>53</sup> They opposed “being forced to associate with and financially support the [CTGC] and its expressive efforts, including its

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<sup>47</sup> See *id.* at 869-870.

<sup>48</sup> *Id.*

<sup>49</sup> CAL. FOOD & AGRIC. CODE § 65500(f) states:

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 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.

<sup>50</sup> See CAL. FOOD & AGRIC. CODE §§ 65500-65675 (West 1967).

<sup>51</sup> CAL. FOOD & AGRIC. CODE § 65650.5 (West 1967).

<sup>52</sup> Brief for Appellant at 1-2, *Delano Farms v. Cal. Table Grape Comm'n*, 586 F.3d 1219 (9th Cir. 2009) (No. 08-16233).

<sup>53</sup> *Id.* at 7.

lobbying, litigation, advertising, promotion, and marketing efforts.”<sup>54</sup> The Growers further objected to the CTGC’s use of assessment funds for irrelevant and seemingly wasteful purposes such as “travel expenses, expenditures for bird sanctuaries, scholarship funds, dinners, charter planes, lavish parties, limousines, [and] payoffs to buyers of table grapes.”<sup>55</sup> In 2008, Delano Farms alone paid annual assessments to the CTGC of approximately \$600,000.<sup>56</sup>

In addition to disagreeing with the manner in which the CTGC was expending the assessments, Delano Farms vehemently objected to the message being disseminated by the CTGC’s generic advertising scheme.<sup>57</sup> Delano argued that they spent substantial resources on developing and promoting their own unique varieties of table grapes.<sup>58</sup> They employ a sales force that creates and maintains markets for their branded grapes, which are marketed as a “higher end” alternative to generic grapes for discerning markets and consumers.<sup>59</sup> However, the CTGC’s generic advertising scheme equates all table grapes as being generic, fungible, and all the same quality.<sup>60</sup> Delano claimed that this type of message is not only worthless to the promotion of their distinctive products, but harmful to their efforts by misrepresenting to the public that their grapes are exactly the same as all the others.<sup>61</sup> Not only is the generic message harmful, but the payment of the assessments restricts Delano’s ability to disseminate its own message by greatly reducing their promotional budget.<sup>62</sup> The basis of their argument was that with the CTGC in place, innovative producers are not realizing the financial return that they would if they were not compelled to fund generic advertising schemes and that they receive little to no benefit from the existing scheme.

#### IV. GOVERNMENT SPEECH VERSUS COMPELLED SPEECH

The First Amendment of the Constitution of the United States reads: “Congress shall make no law . . . abridging the freedom of speech.”<sup>63</sup> Typically, freedom of speech is associated with the concept that the gov-

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<sup>54</sup> *Id.* at 7-8.

<sup>55</sup> *Id.* at 14-15.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 15.

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See generally id.* at 15.

<sup>63</sup> U.S. CONST. amend. I.

ernment is prevented from prohibiting individuals from expressing themselves.<sup>64</sup> However, the First Amendment equally prevents the government from compelling individuals from expressing certain views that are not their own, whether it is schoolchildren required to salute the American flag,<sup>65</sup> or the displaying of a state's motto on an automobile license plate.<sup>66</sup> "[I]f there is any fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>67</sup> The Supreme Court has continually recognized the necessity of preventing compelled expression by applying strict judicial scrutiny.<sup>68</sup>

The Court has also drawn a separation between First Amendment cases dealing with compelled expression by forming two categories. The first is true "compelled-speech" cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government.<sup>69</sup> The second category is "compelled subsidy" cases, in which an individual is required by the government to pay for a message with which he disagrees.<sup>70</sup> In drawing this distinction, the Court has applied two exceptions to the heightened standard of review for compelled speech, applicable only to compelled subsidy cases; the germaneness test and the doctrine of government speech.<sup>71</sup>

## V. THE GERMANENESS TEST

The germaneness test is best illustrated by a pair of compelled speech cases, *Abood v Detroit Bd. of Educ.*, 431 U.S. 209, (1977) and *Keller v. State Bar of Cal.*, 496 U.S. 1, (1990). In *Abood*, a Michigan statute required all government employees to be represented by the union and pay dues.<sup>72</sup> If an employee failed or refused to meet this requirement, their employment was terminated.<sup>73</sup> The statute was challenged by a class of

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<sup>64</sup> *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 64 (1976) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

<sup>65</sup> *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

<sup>66</sup> *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

<sup>67</sup> *Barnette*, 319 U.S. at 642.

<sup>68</sup> *See id.* at 639; *Wooley*, 430 U.S. at 716-17.

<sup>69</sup> *Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550, 557 (2005).

<sup>70</sup> *Id.*

<sup>71</sup> *See generally id.* at 558-59.

<sup>72</sup> *Abood*, 431 U.S. at 1787-88.

<sup>73</sup> *Id.* at 1788.

public school teachers who claimed their First Amendment rights had been violated because funds from the union assessments were used to support economic, political, professional, scientific, and religious activities in which they did not particularly agree with.<sup>74</sup> The Court held that a union cannot constitutionally spend funds for the expression of political views, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representatives, if those funds are assessed from employees who object to those causes.<sup>75</sup>

In *Keller*, a number of practicing attorneys that were members of the State Bar of California challenged the compulsory assessment of membership dues as violating their First Amendment rights because their dues funded political and ideological activities to which they were opposed.<sup>76</sup> The payment of dues and membership in the State Bar of California was required as a condition of practicing law in the state.<sup>77</sup> The Court held that the State Bar could constitutionally fund activities germane to its goals out of the mandatory dues of all members.<sup>78</sup> The Court further clarified that if the “challenged expenditures were necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the state,” then they were constitutional.<sup>79</sup>

#### A. *Compelled Subsidization and Germaneness*

The Supreme Court first applied the compelled subsidization concepts of the germaneness test to agricultural marketing orders in *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997). In *Glickman*, a large producer of California tree fruits<sup>80</sup> challenged an agricultural marketing order established by the AMAA on compelled speech grounds.<sup>81</sup> The Court applied the germaneness test and found that: “(1) the generic advertising of California peaches and nectarines is unquestionably germane

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1800.

<sup>76</sup> *Keller v. State Bar of Cal.*, 496 U.S. 1, 5-6 (1990) (“Besides governing the profession of law in the state, the State Bar also files amicus curiae briefs in pending cases, held an annual conference at which issues of current interest are debated, engaged in a variety of education programs . . . .” *Id.* at 5. “. . . [A]s well as lobbied the Legislature and other governmental agencies on topics ranging from gun and ammunition control to guest-worker programs.” *Id.* at 15.).

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.* at 13-14.

<sup>79</sup> *Id.* at 14.

<sup>80</sup> For example: Nectarines, plums, and peaches. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 460 (1997).

<sup>81</sup> *Id.* at 460-61.

to the purposes of the marketing orders and, (2) in any event, the assessments were not used to fund ideological activities.”<sup>82</sup> The Court, however, stressed the importance of the statutory context in which the question arose.<sup>83</sup>

[The detailed marketing order that governed had] . . . displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.<sup>84</sup>

Four years later, the Court again addressed the issue, reaching a vastly different outcome. In *United States v. United Foods*, 533 U.S. 405 (2001), the United States and Department of Agriculture brought an action to recover statutorily mandated assessments owed by a grower of fresh mushrooms under the Mushroom Promotion, Research and Consumer Information Act.<sup>85</sup> The Court held in favor of the grower by distinguishing the statutory scheme of the Mushroom Council from that of the California tree fruit promotional council in *Glickman*.<sup>86</sup> “In *Glickman*, the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy.”<sup>87</sup> “Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.”<sup>88</sup> The Court came to this conclusion because almost all of the funds collected were used for the generic promotion and advertising of mushrooms, there were no marketing orders regulating how mushrooms are produced and sold, there were no exemptions from the antitrust laws, and the industry was not subject to a uniform pricing scheme or restrictions on supply.<sup>89</sup> Where the primary purpose of the compelled subsidization is speech itself, it is insufficient to say that the speech is germane to itself. Rather, the speech must be germane to the purpose of a more comprehensive program independ-

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<sup>82</sup> *Id.* at 473.

<sup>83</sup> *Id.* at 469.

<sup>84</sup> *Id.*

<sup>85</sup> *U.S. v. United Foods*, 533 U.S. 405, 408-9 (2001).

<sup>86</sup> *See generally id.* at 412.

<sup>87</sup> *Id.* at 411.

<sup>88</sup> *Id.* at 411-12.

<sup>89</sup> *Id.* at 412.

ent from the speech itself.<sup>90</sup> The Court also dismissed the requirement expressed in *Glickman* that the speech itself must be ideological in nature.<sup>91</sup>

### B. *Germaneness and the CTGC*

In *Delano*, the Ninth Circuit found that the generic advertising of the CTGC is government speech and thus, is immune from First Amendment scrutiny.<sup>92</sup> However, despite the established compelled subsidization guidelines, the court failed to address whether the generic advertising passes the First Amendment analysis outlined in *Glickman* and *United Foods*.<sup>93</sup>

A generic marketing scheme must be germane to a more comprehensive regulatory program in order to be constitutional or to pass the germaneness test.<sup>94</sup> If mandated assessments for speech are ancillary to a more comprehensive program restricting market autonomy, then the assessments are constitutional.<sup>95</sup> However, if the principal object of the regulatory scheme is the advertising itself, the assessments are unconstitutional.<sup>96</sup> The tree fruit regulatory board in *Glickman* was established under the AMAA and regulated many aspects of the industry including production and quality standards, packaging requirements, and quantity limitations.<sup>97</sup> It was also exempted from antitrust laws as well as displacing many aspects of competitive business activities such as advertising.<sup>98</sup> In contrast, the Mushroom Council in *United Foods* was established by legislation with the primary purpose of promoting mushrooms.<sup>99</sup> The Mushroom Council was not exempted from antitrust laws, did not limit production quantities, regulate quality standards, or establish packaging requirements.<sup>100</sup> The majority of assessment funds were spent on generic advertising.<sup>101</sup>

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<sup>90</sup> *Id.* at 415-16.

<sup>91</sup> *Id.* at 411.

<sup>92</sup> *See generally* *Delano Farms v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1230 (9th Cir. 2009).

<sup>93</sup> *See generally id.* at 1223-30.

<sup>94</sup> *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 473 (1997); *United Foods*, 533 U.S. 405, 415-416 (2001).

<sup>95</sup> *See Glickman*, 521 U.S. at 469, 473; *United Foods*, 533 U.S. at 411.

<sup>96</sup> *United Foods*, 533 U.S. at 415-416.

<sup>97</sup> *Glickman*, 521 U.S. at 461.

<sup>98</sup> *Id.*

<sup>99</sup> *United Foods*, 533 U.S. at 408.

<sup>100</sup> *Id.* at 412.

<sup>101</sup> *Id.*

When *Delano* was originally before the Ninth Circuit Court of Appeals, the court held that the issue in *Delano* was easily classified.

. . . doubtless many cases will arise that are hard to place on one side or the other of the *Glickman-United Foods* distinction, but this isn't one of them . . . [the growers] sell brand name grapes and have an interest in promoting their brands rather than and to some extent at the expense of grapes in general.<sup>102</sup>

However, the court did not provide an in-depth analysis justifying its conclusion.<sup>103</sup>

First, in order for the speech to be germane to a comprehensive regulatory program, there must be such a program. As declared in *United Foods*, it is not sufficient for the speech to be germane to itself.<sup>104</sup> The Ketchum Act neither regulates table grape quality or quantity standards,<sup>105</sup> nor does the CTGC establish packaging standards.<sup>106</sup> The Act does not exempt growers from antitrust laws and does not replace any typical business functions other than the advertising and promotion of table grapes.<sup>107</sup> The Ketchum Act does not regulate the table grape industry to the degree that the AMAA regulates the tree fruit industry.<sup>108</sup> However, like the Mushroom Council, the majority of the CTGC's assessment funds are spent on generic advertising.<sup>109</sup> During the 2004-2005 growing season, the Commission's expenditures were \$12,015,653, of which \$8,367,429 was collected from mandatory assessments, with the remainder coming from carryover revenue and federal international marketing grants.<sup>110</sup> During that same period, \$8,137,984<sup>111</sup> was spent by the Commission for activities related to advertising, promotion, and the opening and maintenance of domestic and foreign markets for fresh

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<sup>102</sup> *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895, 899 (9th Cir. 2003).

<sup>103</sup> See generally *id.*

<sup>104</sup> *United Foods*, 533 U.S. at 415.

<sup>105</sup> See CAL. FOOD & AGRIC. CODE §§ 65500-65675 (West 1967).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See generally Brief for Appellant at 2, *Delano Farms v. California Table Grape Commission*, 586 F.3d 1219 (9th Cir. 2009) (No. 08-16233).

<sup>110</sup> *Delano Farms v. Cal. Table Grape Comm'n* 546 F.Supp.2d 859, 866-67 (E.D. Cal.2008).

<sup>111</sup> *Id.* at 869-70 (\$2,032,440 was spent on "top-of-mind" advertising; \$1,776,950 was spent on research activities including consumer, trade, and industry statistics; \$1,987,783 was spent on trade management which focuses on "working with the retail and wholesale produce trade"; \$1,493,192 was spent on issue management which focuses on "working with interested parties and decision makers to keep trade flowing"; and \$847,619 was spent on education and outreach).

grapes.<sup>112</sup> It is clear the CTGC more closely resembles the Mushroom Council in *United Foods* than the Tree Fruit Commission in *Glickman*. Therefore, CTGC's message is not germane to a broader scheme to restrict market autonomy, and strict scrutiny should apply.

## VI. GOVERNMENT SPEECH AND MARKETING ORDERS

Having originated only in the last few decades, government speech is a relative newcomer to the First Amendment rights discussion.<sup>113</sup> The doctrine is based on the concept that the government has the power to decide which programs and policies to support through the expenditure of taxes and other exactions levied upon the citizenry.<sup>114</sup> In doing so, the government speaks through its financial support of various governmental programs and policies.<sup>115</sup> Without a safeguard in place, the government would be bombarded with First Amendment claims by malcontents refusing to fund programs with which they politically and ideologically disagree.<sup>116</sup> The doctrine allows the government to exempt itself from First Amendment challenges of the spending power.<sup>117</sup> However, as a relatively new concept, it is correspondingly imprecise and undefined,<sup>118</sup> warranting further critical review.

The Supreme Court has only addressed government speech as pertaining to agricultural marketing orders in one case, which challenged the compelled subsidization of marketing in the beef industry.<sup>119</sup> In *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), two associations, whose members collected and paid the check-off, challenged the mandatory assessments used for promotional activities as a violation of the First Amendment.<sup>120</sup> The Secretary of Agriculture<sup>121</sup> argued that the promotional activities funded by the check-off were government speech because the speaker was a government entity and the message was the gov-

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<sup>112</sup> *Id.*

<sup>113</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

<sup>114</sup> *See Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

<sup>115</sup> *See generally id.* at 192-193.

<sup>116</sup> *See Johannis*, 544 U.S. at 559.

<sup>117</sup> *See generally Rust*, 500 U.S. at 192-193; *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)

<sup>118</sup> *Johannis*, 544 U.S. at 574 (Souter, J., dissenting); *see also R.J. Reynolds Tobacco Company v. Bonta*, 272 F.Supp.2d 1085, 1101 (E.D. Cal. 2003).

<sup>119</sup> *Johannis*, 544 U.S. at 559.

<sup>120</sup> *Id.* at 555.

<sup>121</sup> The Beef Promotion and Research Act of 1985 directed the Secretary of Agriculture to establish the Beef Board and to oversee its operation. *See* 7 U.S.C. §§ 2901-2903.

ernment's own.<sup>122</sup> As such, the Secretary was immune to First Amendment challenges.<sup>123</sup>

The Court held that determining whether the Beef Board's Operating Committee<sup>124</sup> was a nongovernmental entity was irrelevant if the promotional campaign was "effectively" controlled by the government itself.<sup>125</sup> The Court reasoned that the message promulgated by the Beef Board was from beginning to end the message established by the Federal Government, because the Beef Act itself established guidelines for promotional messages.<sup>126</sup> These guidelines included that paid advertising should progress the brand and desirability of beef and beef products, and that the Secretary has generally specified what the promotional campaigns shall and shall not contain, taking into account different types of beef products.<sup>127</sup> Furthermore, "all proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department."<sup>128</sup>

The majority opinion in *Johanns* raises three essential points of analysis: government entity status, effective control, and whether the speech is attributable to the producers.<sup>129</sup>

#### A. Government Entities

The opinion in *Johanns* does not define any criteria for determining if an entity is governmental in nature.<sup>130</sup> The Supreme Court sidestepped the question entirely.<sup>131</sup> In *Delano*, the Ninth Circuit performed a government entity analysis in accordance with the state action doctrine as

<sup>122</sup> See generally *Johanns*, 544 U.S. at 559.

<sup>123</sup> See *id.* at 553.

<sup>124</sup> See 7 U.S.C. § 2904 (directing the Beef Board to establish an Operating Committee which was tasked with designing the promotional campaigns).

<sup>125</sup> *Johanns*, 544 U.S. at 560.

<sup>126</sup> *Id.* at 561. It is noteworthy that although the majority held that the Beef Board was protected from First Amendment challenges, only four Justices based their decision on government speech grounds (Justice Scalia, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas). *Id.* at 567. Two concurred with the outcome but decided that the Beef Board's actions were permissible economic regulation and were immune to challenge (Justice Breyer, Justice Ginsburg). *Id.* at 568-69. The remaining three Justices dissented over whether the speech could meaningfully be considered government speech at all (Justice Kennedy, Justice Souter, Justice Stevens). *Id.* at 570. This begs the question to be asked of whether the government speech argument should apply to all similarly situated marketing orders.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *id.* at 559, 560, n. 7.

<sup>130</sup> See generally *id.* at 559-560.

<sup>131</sup> *Id.* at 560, n. 4.

outlined in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), finding that the CTGC is probably a government entity, but declined to base its decision on those grounds.<sup>132</sup>

In *Lebron*, an artist sought to display a political message on a prominent billboard in Penn Station in New York City.<sup>133</sup> When Amtrak, the operator of the station, learned the content of the message, it rescinded its agreement to rent the space to the artist.<sup>134</sup> The artist in turn challenged the decision claiming that Amtrak was an agent of the government and suppression of the message violated his First Amendment rights.<sup>135</sup> The Court held that if “the government creates a corporation by special law, for the furtherance of government 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.”<sup>136</sup>

However, the *Lebron* analysis has the potential to label too many private entities as governmental. There is a fundamental difference between *Lebron* and *Delano* in determining government entity status. The *Lebron* analysis is “inclusive,” designed to maximize First Amendment rights by finding private actors who should be subject to the Constitution, but would not be without the doctrine. In contrast, the government speech doctrine by nature is “exclusive” in order to minimize First Amendment challenges. From a different perspective, the government speech determination of an entity’s status protects fundamental rights by not classifying private speakers as government entities, which would result in those entities being able to hide behind the lower standard of review. It is a fundamental concept in Constitution jurisprudence that the higher the potential for infringement of a fundamental right, the more narrow or concise the determination must be.<sup>137</sup> Therefore, a rule that requires a higher level of analysis as to the particular characteristics of the makeup and function of the entity is necessary.

Application of the *Lebron* standard in the government speech context results in absurdity. The very analysis that would make a private speaker

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<sup>132</sup> See *Delano Farms v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1225-26 (9th Cir. 2009).

<sup>133</sup> *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 376 (1995).

<sup>134</sup> *Id.* at 377.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 399.

<sup>137</sup> See *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963). (“Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”) See also *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Schneider v. State of N.J., Town of Irvington*, 308 U.S. 147, 161 (1939).

subject to constitutional accountability under the state action doctrine would also exempt it from First Amendment challenges. This would leave the state action doctrine toothless for its primary purpose of maximizing fundamental rights. Surely such an inequitable result cannot stand.

The Supreme Court seemed to recognize this in *Keller* where it found that the State Bar of California was not a government entity for First Amendment immunity purposes. In *Keller*, the Supreme Court of California found for the State Bar on government speech grounds.<sup>138</sup> The California court reasoned that since the State Bar was created by statute it was a government entity.<sup>139</sup> As such, the Court deemed the Bar could use collected dues for any purpose within the scope of its statutory authority.<sup>140</sup> However, the Supreme Court of the United States dismissed the argument, finding that the State Bar was “a good deal different from most other entities that would be regarded as ‘governmental agencies.’”<sup>141</sup> The Court reasoned that the State Bar was not a government entity because (1) its funding is primarily derived from member dues not general appropriations; (2) its members are solely lawyers, all of whom are required to join; (3) its role is primarily advisory; and (4) the organization was not created to participate in the general government of the State, but to provide specialized professional advice.<sup>142</sup>

Similarly, the *Delano* court failed to address several attributes of the CTGC which form a strong argument against government entity status. First, the CTGC was established as an independent corporation rather than a state agency.<sup>143</sup> As a corporate body, the CTGC has the power to sue and be sued, as well as the ability to contract, independently from the government forum.<sup>144</sup> Furthermore, the legislation immunizes the State of California for the acts of the CTGC or its contracts.<sup>145</sup> All of these characteristics indicate that the California legislature intended to separate the State and the CTGC. Ultimately, the court did not draw a conclusion as to the CTGC’s government entity status, but rather based its opinion on an “effective control” argument.<sup>146</sup>

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<sup>138</sup> *Keller v State Bar of Cal.*, 496 U.S. 1, 10 (1990).

<sup>139</sup> *Id.* at 6-7.

<sup>140</sup> *Id.* at 7.

<sup>141</sup> *Id.* at 11.

<sup>142</sup> *See id.* at 11-12.

<sup>143</sup> CAL. FOOD & AGRIC. CODE § 65551 (West 1967).

<sup>144</sup> *Id.*

<sup>145</sup> CAL. FOOD & AGRIC. CODE § 65571 (West 1967).

<sup>146</sup> *Delano Farms v. Cal. Table Grape Comm’n*, 586 F.3d 1219, 1226 (9th Cir. 2009).

*B. Effective Control*

The *Delano* court identified three factors used in *Johanns* to determine if the government had effective control over the message. The first factor asked whether 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.”<sup>147</sup> Second, “Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain . . . and what they shall not . . . .”<sup>148</sup> “Finally, the record demonstrated that the Secretary exercises final approval authority over every word used in every promotional campaign.”<sup>149</sup> However, unlike the Beef Order, the Ketchum Act does not require any type of review by the Secretary over the actual messages by the Commission.<sup>150</sup> It seems it would be difficult to determine that the government would have any control over a message when it is unaware what the message says. The *Delano* court determined that two factors out of three was sufficient to find effective control and thus, government speech rendered the growers’ claims moot.<sup>151</sup>

The government speech doctrine applied in *Johanns* and *Delano* has overreaching implications that have the potential to eliminate otherwise valid claims by not addressing the core issues. As applied, the potential for compelled subsidy cases to not be decided on their merits, but merely dismissed with a finding of government entity status, no matter how tenuous, is possible – if not likely.

The current government speech doctrine appears to hinge on one factor; whether the government is the speaker. This is an all or nothing determination, regardless of the challenger’s claim. Furthermore, it is a determination in which the Supreme Court has not given clear guidance. “The unsettling potential result of this doctrinal framework is that, with few obvious limitations, the government could essentially buy out large amounts of private speech simply by funding private enterprises.”<sup>152</sup>

The ill-defined doctrinal framework is evident in the post-*Johanns* application of government speech in the lower courts. For example, the Honorable Lawrence K. Karlton, Senior District Judge, United States District Court, Eastern California expressed his trepidation of the doc-

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1227.

<sup>150</sup> *Id.* at 1229.

<sup>151</sup> *See id.*

<sup>152</sup> Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 Harv. L. Rev. 2411, 2412 (2004).

trine by stating, “I cannot acknowledge the doctrine, however, without also expressing my serious reservations about its undefined and open-ended nature.”<sup>153</sup> In the Ninth Circuit government speech cases since *Johanns*, no structured rule of law has been applied to the merits of the claims; rather the respective marketing commissions have simply been analogized to the Beef Board, resulting in imprecise conclusions.<sup>154</sup> Seeking a more structured, applicable rule in non-marketing order cases, several circuits, including the Ninth Circuit, have adopted a test originating in the Fourth Circuit and which predates *Johanns* by several years.<sup>155</sup> It is clear that the lower courts are missing direction which is resulting in inconsistent and inequitable application of the law.

The current government speech doctrine is lacking essential electoral accountability. The *Johanns* majority reasoned that because the program authorized the basic message according to federal statute; the “Secretary of Agriculture, a politically accountable official,” oversaw the program; and that Congress retained “the ability to reform the program at any time,” the message was subject to more than adequate political safeguards.<sup>156</sup> However, as Justice Souter argued in his dissent, this electoral accountability was illusory.<sup>157</sup> The majority’s reasoning only concerns possible indirect electoral accountability, failing to indicate any actual political oversight. There cannot be accountability if the electorate does not know who is speaking.<sup>158</sup> In order for the government to rely on the government-speech doctrine, it must make itself politically accountable by indicating that the content is actually a government message. Without this disclosure, “there is no check whatever to compel speech subsidies and the rule of *United Foods* is a dead letter.”<sup>159</sup>

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<sup>153</sup> R.J. Reynolds Tobacco Co. v. Bonta, 272 F.Supp.2d 1085, 1102 (E.D. Cal. 2003).

<sup>154</sup> See generally *Paramount Land Co. LP v. Cal. Pistachio Comm’n*, 491 F.3d 1003, 1010 (9th Cir. 2007); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008); *Delano*, 586 F.3d 1219, 1227-1228; See also *Gallo Cattle Co. v. Kawamura*, 72 Cal.Rptr.3d 1, 1-2 (Cal.App.3d 2008).

<sup>155</sup> *Brandborg v. Bull*, 276 Fed.Appx. 618, 619 2008 WL 1924947 (9th Cir. 2008) (The test distinguishes between private speech and government speech by examining, “(1) the central ‘purpose’ of the program in which the speech in question occurs; (2) the degree of ‘editorial control’ exercised by the government or private entities over the content of the speech; (3) the identity of the ‘literal speaker’; and (4) whether the government or the private entity bears the ‘ultimate responsibility’ for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.”).

<sup>156</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 561,563 (2005).

<sup>157</sup> *Id.* at 571 (Souter, J., dissenting).

<sup>158</sup> See *id.* (Souter, J., dissenting).

<sup>159</sup> *Id.* at 571 (Souter, J., dissenting).

The challengers in *Johanns* further argued that because the assessment funds were controlled by an interest group rather than politically accountable legislators, there was insufficient oversight.<sup>160</sup> The majority quickly dismisses this argument claiming that there is no real difference between general funds and targeted assessments.<sup>161</sup> However, in our representative form of government, legislative spending is generally subject to intense adversarial debate and oversight.<sup>162</sup> Targeted assessments do not go through this process, and in the case of the CTGC, the assessment funds are levied by the CTGC directly from the growers with minimal if any real budgetary oversight or accountability.<sup>163</sup>

### C. *The Johanns Exception: An As-Applied Challenge*

The *Johanns* court recognizes a possible exception to the government speech doctrine in compelled subsidization cases.<sup>164</sup> A court may determine that if individual advertisements were attributable to a particular producer as determined by a reasonable fact finder, an as-applied challenge might exist.<sup>165</sup> Generally, to determine whether speech attaches to a particular group, a court will examine the size of the group and inclusiveness of the language, as well as any extrinsic facts that would connect the speech to the individual or group.<sup>166</sup> The general rule is that the smaller the group, the more likely the message will be attributed to it.<sup>167</sup> In 2007, there were over one million ranchers and beef producers in the United States.<sup>168</sup> In contrast, there are only about 550 table grape growers and producers overseen by the Commission.<sup>169</sup> Although the comparison is inconclusive, it does illustrate that a generic message would be more likely to attach to a table grape producer than a beef producer.

The Court in *Johanns* examined a sampling of promotional materials distributed by the Beef Board and determined that no one provided any

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<sup>160</sup> *Id.* at 562.

<sup>161</sup> *Id.*

<sup>162</sup> See generally COMMITTEE ON THE BUDGET UNITED STATES SENATE, THE CONGRESSIONAL BUDGET PROCESS, AN EXPLANATION 10-14 (1998).

<sup>163</sup> See *Delano Farms v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1229-30 (9th Cir. 2009).

<sup>164</sup> *Johanns*, 544 U.S. at 565.

<sup>165</sup> *Id.*

<sup>166</sup> See *Rosenblatt v. Baer*, 383 U.S. 75, 81-2 (1966).

<sup>167</sup> See *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 315-16 (S.D. N.Y. 1952).

<sup>168</sup> CATTLEMEN'S BEEF BOARD AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION, BEEF MARKET AT A GLANCE, 1 (2009), available at [http://www.explorebeef.org/CMDocs/FactSheet\\_BeefMarketAtAGlance.pdf](http://www.explorebeef.org/CMDocs/FactSheet_BeefMarketAtAGlance.pdf). (last visited July 20, 2011).

<sup>169</sup> *Fun Facts*, CAL. TABLE GRAPE COMM'N, <http://www.tablegrape.com/funfacts.php> (last visited Sept. 3, 2010).

support for attribution to particular producers other than the tagline that the promotions were funded by “America’s Beef Producers.”<sup>170</sup> The Court determined “the funding tagline itself, a trademarked term that, standing alone, is not sufficiently specific to convince a reasonable fact finder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad.”<sup>171</sup> The Court’s conclusion seems to defy logic. It is most reasonable for a fact finder to take a short direct statement such as: “This ad is brought to you by America’s Beef Producers” to mean exactly what the plain language interpretation suggests.<sup>172</sup> The test is whether the speech is attributable to an individual producer or all producers as a group and on its face the statement seems to do so.<sup>173</sup>

The *Johanns* court determined there were insufficient facts to attribute the message of the Beef Board to individual producers;<sup>174</sup> however, an examination of the table grape promotional scheme yields different results.

Before examining whether a particular message promulgated by the California Table Grape Commission is properly attributable to particular producers, it is important to note some differences between how beef and table grapes are distributed and presented to the public for purchase. Beef is generally shipped to the retail location in larger portions that are in turn processed by the in-store butchery personnel and packaged for sale in that particular retailer’s branded packaging.<sup>175</sup> Normally, packaging used to distribute beef from the producers to the retailers is never seen by the public.<sup>176</sup> The only promotional information received by the end user is the efforts of the Beef Board’s advertising.<sup>177</sup>

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<sup>170</sup> *Johanns*, 544 U.S. at 565-66.

<sup>171</sup> *Id.* at 566.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at 577-78 (In his dissent opinion to *Johanns*, Justice Souter illustrates, “No one hearing a commercial for Pepsi or Levi’s thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak? Given the circumstances, it is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so.”)

<sup>174</sup> *Id.* at 566.

<sup>175</sup> *See generally Labor Market Information*, CAL. EMP’T DEV. DEP’T, <http://www.calmis.ca.gov/file/occguides/butcher.htm> (last visited Aug. 4, 2011); Kathryn Flagg, *Fingers To The Bone: As Demand For Local Meat Grows, Processors Feel The Crunch*, ADDISON COUNTY INDEPENDENT, <http://www.addisonindependent.com/200910/fingers-bone-demand-local-meat-grows-processors-feel-crunch> (last visited Aug. 4, 2011).

<sup>176</sup> *See generally Role Of A Butcher Explained*, GREENTOP MARKET BLOG (Dec. 3, 2010), <http://greentopmarket.com/blog/2010/12/role-of-a-butcher-explained> (last visited Aug. 4, 2011); *Butcher Shop Or Grocery Store*, ASK THE MEATMAN,

By contrast, table grapes are commonly displayed and sold in the grower's or shipper's packaging.<sup>178</sup> Table grapes are packed into plastic bags, clamshell packaging, or boxes designed to be displayed.<sup>179</sup> Retailers display and sell the table grapes in the very same packaging for convenience and cleanliness.<sup>180</sup> A growing number of producers are beginning to provide branding and grower information on the various types of packaging to create awareness.<sup>181</sup> End users have the potential to receive promotional messages from both the producer and the CTGC at the same time. The CTGC educates wholesalers and retailers on proper handling and effective displaying techniques for table grapes.<sup>182</sup> They suggest that table grapes be displayed in the original packaging so the consumer can see the country of origin.<sup>183</sup> The CTGC also provides to retailers point of purchase display materials promulgating the CTGC's promotional messages<sup>184</sup> to be displayed alongside the fresh product. It is reasonable to believe that a shopper could pick up a clamshell of their favorite branded grapes from a producer in California that is being displayed next to a CTGC produced "variety chart,"<sup>185</sup> under a CTGC produced "ceiling dangle,"<sup>186</sup> and pick up a recipe card for a grape and chicken dish which is also provided to stores by the CTGC.<sup>187</sup> This may seem like an over-

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<http://www.askthemeatman.com/difference%20art%20updated%209300%20830pm.htm> (last visited Aug. 4, 2011).

<sup>177</sup> See generally *Johanns*, 544 U.S. at 565-67.

<sup>178</sup> Cal. Table Grape Comm'n, Training Guide (2011), <http://www.tablegrape.com/docs/TrainingGuide2011.pdf>.

<sup>179</sup> *Id.*

<sup>180</sup> See generally *id.*; DULCICH FARMS, <http://www.dulcich.com/packaging.php> (last visited Aug. 4, 2011).

<sup>181</sup> See generally DULCICH FARMS, <http://www.dulcich.com/packaging.php> (last visited Aug. 4, 2011); See generally HMC FARMS <http://www.hmcfarms.com/fruit/table-grapes/grape-escape> (last visited Aug. 4, 2011); See generally GERAWAN FARMING INC., <http://www.prima.com/varieties/red-grapes.php> (last visited Aug. 4, 2011); DELANO FARMS, <http://www.delanofarms.com> (follow "pristine" hyperlink) (last visited Aug. 4, 2011); See generally SUNKIST GROWERS INC., <http://www.sunkist.com/products/grapes.aspx> (last visited Aug. 4, 2011).

<sup>182</sup> See Cal. Table Grape Comm'n, Training Guide (2011), <http://www.tablegrape.com/docs/TrainingGuide2011.pdf>.

<sup>183</sup> *Id.*

<sup>184</sup> See *Order Forms*, CAL. TABLE GRAPE COMM'N, [http://www.tablegrape.com/retailers/order\\_forms.php](http://www.tablegrape.com/retailers/order_forms.php) (last visited Aug. 18, 2010).

<sup>185</sup> See Cal. Table Grape Comm'n, *Variety Chart* (2011), <http://www.tablegrape.com/docs/VarietyChart2011.pdf>.

<sup>186</sup> *Ceiling Dangle*, CAL. TABLE GRAPE COMM'N, [http://www.tablegrape.com/images/order\\_forms/05\\_dangle.jpg](http://www.tablegrape.com/images/order_forms/05_dangle.jpg) (last visited July 20, 2011).

<sup>187</sup> *Recipe Card*, CAL. TABLE GRAPE COMM'N, [http://www.tablegrape.com/images/order\\_forms/2004\\_RecipeCard.jpg](http://www.tablegrape.com/images/order_forms/2004_RecipeCard.jpg) (last visited July 20, 2011).

the top illustration, but it is hard to conceive that a reasonable fact finder would not attribute the CTGC's promotional message concerning California grapes to the producer of the package of California grapes in their basket. There is little doubt that the CTGC's message is attributable to California's table grape producers.

## VII. A PROPOSED UNIFIED JUDICIAL STANDARD

For the above stated reasons, a precise, well-defined, and comprehensive test needs to be substituted for the government speech standard presented in *Johanns*. This Comment recommends that the following three factors should be examined and weighed equally in order to determine if the government speech exemption should apply.

### A. Entity Status

First, the organization must be classified as a government entity. Unfortunately, for the purposes of government speech, the Supreme Court has declined to present a clear rule set in order to make such a determination. However, an ideal test would incorporate the three-prong test proffered in *Lebron*<sup>188</sup> as a threshold, and involve a more particular analysis of the characteristics of the entity as per *Keller*.<sup>189</sup>

Following the *Lebron* analysis, at a threshold, to qualify as part of the government, the entity must (1) be established by an act of legislation; (2) further government objectives; (3) the government retains permanent authority to appoint a majority of its directors. If the entity satisfies these criteria, a court should then examine particular characteristics of the entity such as (4) source of funding;<sup>190</sup> (5) the makeup of its membership;<sup>191</sup>

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<sup>188</sup> *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

<sup>189</sup> *Keller v State Bar of Cal.*, 496 U.S. 1, 10 (1990).

<sup>190</sup> Funds from the general fund, rather than targeted assessments, have a higher degree of electoral accountability favoring a finding of government entity status. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 575-76 (2005) (Souter, J., dissenting).

<sup>191</sup> Membership of a general constituency, rather than a particular group, also has a higher degree of electoral accountability. See generally *Keller*, 496 U.S. at 12.

(6) whether membership is compelled;<sup>192</sup> and (7) its role in the participation in governing the state.<sup>193</sup>

### *B. Electoral Accountability*

Next, the court should factor the extent the message and entity are subjected to electoral accountability. The more they are subjected to electoral accountability, the more likely the application of the government speech exemption is appropriate. The court should not only factor traditional areas of political oversight such as the director being a publicly elected official or the existence of legislative oversight. As discussed above, the court should also heavily consider both whether the speech is attributed to the government, ensuring that the electorate is aware that the government is speaking, and whether there is budgetary accountability from general funding rather than targeted assessments.

### *C. Germaneness*

Finally, the court should apply the germaneness test. If the message is germane to a broader regulatory scheme restricting market autonomy, the more likely the exemption applies. In the germaneness test, a court will determine whether the message is closely related to a program that is controlled by the government.<sup>194</sup> Impliedly, the more heavily the program controls the industry, the more entwined the message will be with government control. The germaneness test will displace the “effective control” element as advocated by the *Johanns* Court by continuing to analyze governmental control of the messaging, however in a way that allows valid First Amendment claims.

### *D. Standard of Review*

In *United Foods*, the Court applied the germaneness test, operating under the assumption that the Mushroom Council was a private entity, which implied that the germaneness test was improper for a government-

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<sup>192</sup> In situations where membership is compelled, logically, there is also an increased potential for governmental coercion and violation of fundamental rights because the members cannot simply choose to remove themselves. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943) (“Compulsory unification of opinion achieves only the unanimity of the graveyard.”).

<sup>193</sup> The more essential the entity’s role in the general governance of state interests, presumably the more governmental control and safeguards will also be present. *See generally Keller*, 496 U.S. at 11-13.

<sup>194</sup> *See* *U.S. v. United Foods*, 533 U.S. 405, 415 (2001).

tal entity.<sup>195</sup> The Court confirmed this in *Johanns*.<sup>196</sup> Although the Court never states the relationship between the two doctrines, it is probably safe to assume that the Court was essentially creating a two-step analysis. First, the court would determine if it was a government entity, if so, the exemption would apply. If it was determined that it was a private entity, then the germaneness test would apply. If the message was found to not be germane to a broader system of control, then strict scrutiny would apply. The standard proposed by this Comment combines both of these steps into one. Upon factoring the entity status, electoral accountability, and germaneness, if the message is found to be government speech, then the government is exempt from challenge. Otherwise, strict scrutiny applies, maximizing the challenger's rights.

#### VIII. THE PROPOSED STANDARD AS APPLIED TO THE CTGC

Even though it was not controlling in its decision, the *Delano* court applied the *Lebron* factors to the CTGC and found that it was a government entity.<sup>197</sup> The CTGC was created by an act of the California legislature.<sup>198</sup> It was created to further the governmental purpose of strengthening the table grape industry.<sup>199</sup> And the Director of Agriculture had the power to appoint the members of the Commission.<sup>200</sup> However, as an entity, the CTGC more closely resembles the California State Bar in *Keller*.

Furthermore, there is a noticeable lack of electoral accountability. The CTGC is funded by targeted assessments rather than from the general fund.<sup>201</sup> The message disseminated by the CTGC is not attributable in any way to the government. None of the promotional materials mention the State of California or the California Department of Food and Agriculture.<sup>202</sup> As such, the electorate is not even aware that the government is

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<sup>195</sup> See *id.* at 416-17.

<sup>196</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005).

<sup>197</sup> See *Delano*, 586 F.3d at 1225.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1221.

<sup>202</sup> See generally Cal. Table Grape Comm'n, Training Guide (2011), <http://www.tablegrape.com/docs/TrainingGuide2011.pdf>; Cal. Table Grape Comm'n, Variety Chart (2011), <http://www.tablegrape.com/docs/VarietyChart2011.pdf>; Cal. Table Grape Comm'n, Sampling Guide (2011), <http://www.tablegrape.com/docs/SamplingGuideLines2011.pdf>; Cal. Table Grape Comm'n, Traffic Radio Tags (2010), <http://www.tablegrape.com/docs/TrafficRadioTags2011US.pdf>; *Ceiling Dangle*, CAL. TABLE GRAPE COMM'N, [http://www.tablegrape.com/images/order\\_forms/05\\_dangle.jpg](http://www.tablegrape.com/images/order_forms/05_dangle.jpg) (last visited

speaking, let alone holding it accountable for the message. Also, as the Ninth Circuit Court of Appeals determined, the CTGC resembled the Mushroom Council of *United Foods*, in that its message was not germane to any broader scheme.<sup>203</sup>

On balance, the entity status is in favor of government speech, however, electoral accountability and germaneness is not. Therefore, the CTGC's generic advertising scheme is not government speech and the challenger's First Amendment claims should be afforded strict scrutiny.

## IX. OTHER RECOMMENDATIONS TO MAXIMIZE FIRST AMENDMENT RIGHTS

### A. *Dissolve the CTGC*

Marketing orders are archaic institutions originating in the 1930's as an attempt to solve the problems of that era, making their relevance questionable in the modern economic environment.<sup>204</sup> The CTGC was created in part because the legislature perceived that individual growers were incapable of marketing their products or expanding markets for their commodities.<sup>205</sup> Furthermore, fresh grapes were viewed as fungible goods, in which the typical consumer could not discern a real distinction between different varieties or differences in quality from individual producers.<sup>206</sup> Although these assumptions may have been true when the Ketchum Act was passed, neither is particularly compelling in the modern agricultural climate.

With advancements in technology, the trend of large corporate growers, and the accessibility of information, both growers and consumers are more sophisticated than ever. Individual growers are developing their own unique varieties of grapes.<sup>207</sup> Grapes that are larger, taste differ-

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July 20, 2011); *Recipe Card*, CAL. TABLE GRAPE COMM'N, [http://www.tablegrape.com/images/order\\_forms/2004\\_RecipeCard.jpg](http://www.tablegrape.com/images/order_forms/2004_RecipeCard.jpg) (last visited July 20, 2011).

<sup>203</sup> See *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895, 899 (9th Cir. 2003).

<sup>204</sup> See generally BOWSHER, *supra*, note 8 at 1.

<sup>205</sup> CAL. FOOD & AGRIC. CODE § 65500(c) (West 1967).

<sup>206</sup> See generally CAL. FOOD & AGRIC. CODE § 65500 (West 1967); Brief for Appellant at 15, *Delano Farms v. Cal. Table Grape Comm'n*, 586 F.3d 1219 (9th Cir. 2009) (No. 08-16233).

<sup>207</sup> SUN WORLD, *About Us – Our Story*, <http://www.sun-world.com/about-us,our-story> (last visited April 4, 2012) (For example, Sun World located in Bakersfield, CA has an extensive variety breeding program producing proprietary grape varieties such as SCARLOTTA SEEDLESS®, and MIDNIGHT BEAUTY®).

ently, have a longer shelf-life, and mature at different times of the year.<sup>208</sup> Growers spend large sums of money to develop and promote new varieties.<sup>209</sup> Currently, these grapes are being branded by the growers with unique names and packaging, and are being marketed to specialty or high-end retailers for purchase by the discerning customer.<sup>210</sup> Table grapes are no longer fungible and growers are more competent than ever to promote their own goods. However, with the CTGC in place, innovative producers are not realizing the financial return that they could if they were not compelled to fund generic advertising schemes from which they receive little to no benefit.<sup>211</sup> Proponents of the CTGC claim that the industry benefits from heightened “general awareness” advertising as well as expanding domestic and international markets, and viticulture research.<sup>212</sup> The reality is, however, that modern growers are adept at filling those shoes.

The question then becomes whether those benefits offset the negative First Amendment implications when the growers themselves are capable of serving the same function as the CTGC. This Comment suggests that they do not. Ideally, the CTGC should be dissolved, allowing the growers to promote their own goods on the free market, without any encumbrances created by the state. The Ketchum Act incorporates a provision that allows the member growers to suspend the CTGC’s operations.<sup>213</sup> To do this, either at least sixty-five percent of producers representing a minimum of fifty-one percent of total table grape production, or fifty-one percent of producers representing a minimum of sixty-five percent of total production, must vote for the referendum.<sup>214</sup> This Comment recommends that in order to maximize their First Amendment rights, the producers should support such a vote.

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<sup>208</sup> *Id.*; See also Sunlight International Sales, J. Dulcich & Sons, *Folder Insert* (2009), available at [http://www.dulcich.com/images/print/dulcich\\_inserts.pdf](http://www.dulcich.com/images/print/dulcich_inserts.pdf). (Dulcich & Sons located in Delano, CA is currently growing 15 varieties of table grapes which are marketed under 10 unique brands. Besides package branding, Dulcich provides training and information to retailers and run print advertising).

<sup>209</sup> See Brief for Appellant at 15, *Delano Farms v. Cal. Table Grape Comm’n*, 586 F.3d 1219 (9th Cir. 2009) (No. 08-16233).

<sup>210</sup> See generally *id.*; See also Sunlight International Sales, J. Dulcich & Sons, *Folder Insert* (2009), available at [http://www.dulcich.com/images/print/dulcich\\_inserts.pdf](http://www.dulcich.com/images/print/dulcich_inserts.pdf).

<sup>211</sup> See *Delano Farms v. Cal. Table Grape Comm’n*, 586 F.3d 1219, 1221-22 (9th Cir. 2009).

<sup>212</sup> See *Delano Farms v. Cal. Table Grape Comm’n*, 318 F.3d 895, 897 (9th Cir. 2003); *Delano Farms v. Cal. Table Grape Comm’n*, 546 F.Supp.2d 869-70 (E.D. Cal.2008).

<sup>213</sup> CAL. FOOD & AGRIC. CODE § 65660 (West 1967).

<sup>214</sup> CAL. FOOD & AGRIC. CODE § 65661 (West 1967).

*B. The CTGC's Assessments Should Be Voluntary*

Alternatively, the generic advertising arm of the CTGC should be separated from the rest of the Commission, thus making grower participation voluntary. This option would allow growers that wish to participate in the generic advertising to do so without forcing others to do the same. Research and other necessary activities unrelated to advertising would still be funded by mandatory assessments, thus minimizing the *free-rider* effect.

An example of an effective, voluntary agriculture marketing program is the Buy California Marketing Agreement (“Agreement”). The Agreement was founded by as a public-private partnership to promote California agricultural products among California consumers.<sup>215</sup> The Agreement’s primary purpose is promotion and advertising and is funded from voluntary member assessments.<sup>216</sup> The Agreement’s advertising activities promote all agriculture products grown in California regardless of participation.<sup>217</sup> Implementation of a similar voluntary system in place of the current CTGC would be operationally seamless, and would maximize the table grape growers’ First Amendment rights. This would allow the CTGC to continue operation without violating the Supreme Court’s declaration in *Abood* that “the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas . . . .”<sup>218</sup>

## X. CONCLUSION

In *United Foods*, the Supreme Court stated, “first amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.”<sup>219</sup> Yet, in the very next compelled subsidization case the Court did exactly that by applying the government speech doctrine.<sup>220</sup> Hence, there is a need for a method of determining entity status for government speech purposes that properly protects fundamental speech rights. Simply adopting the analysis presently used in the state action

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<sup>215</sup> *Program Overview*, BUY CALIFORNIA MARKETING AGREEMENT, <http://www.californiagrown.org/program/overview.asp> (last visited April 4, 2012).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

<sup>219</sup> *U.S. v United Foods*, 533 U.S. 405, 411 (2001).

<sup>220</sup> *See generally* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557-66 (2005).

doctrine fundamentally results in an absurdity. However, the expanded standard proposed in this comment appropriately addresses that void.

When there are two conflicting interests, it is difficult to balance both in order to draw an equitable conclusion. In the case of the California Table Grape Commission, the growers' fundamental right against subsidizing speech in which they do not agree, greatly outweighs the government's interest in being able to effectively fund the CTGC without being unnecessarily challenged. Naturally, the best solution would be to avoid the conflict altogether by making the assessments funding voluntary. This may be accomplished either legislatively by dissolving the Commission or judicially through a determination that the government speech doctrine does not apply to the CTGC. Under the current standard of government speech, the CTGC is arguably not exempted from First Amendment scrutiny. Furthermore, under the standard advocated by this Comment, the CTGC's generic advertising scheme is not categorized as government speech, finding the message unconstitutionally violative of the growers' First Amendment rights.

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