No. S080610

IN THE

Supreme Court of the State of California

GERAWAN FARMING, INC.,

Appellant,

v.

ANN M. VENEMAN, *et al.*,

Respondents.

After Decision by the Court of Appeal, Fifth Appellate District No. F031142
Superior Court of Tulare County (Hon. Howard R. Broadman), No. 167877

APPLICATION AND BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF APPELLANT

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APPLICATION OF CENTER FOR INDIVIDUAL FREEDOM FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

To the Honorable Ronald M. George, Chief Justice of the California Supreme Court:

Pursuant to Rule 14(b) of the California Rules of Court, the Center for Individual Freedom ("CIF") respectfully requests leave to file an *amicus curiae* brief in support of Appellant Gerawan Farming, Inc. CIF's counsel are familiar with the issues in this case and the scope of their presentation by the parties.

CIF is a nonprofit corporation with the mission to investigate, explore and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to CIF are constitutional protections for the freedom of speech, including the right of each citizen not to speak and the application of the constitutional bar on compelled speech.

CIF believes that it can add to the analysis of this case by focusing on two basic principles of free-speech jurisprudence that are often overlooked or misunderstood, as they were in this case. Those principles are (1) that

speech is different and more valuable than conduct such that a government goal is not less intrusively realized by regulating speech than it is by regulating conduct; and (2) that the viewpoint-discriminatory compelled funding of speech undermines the structural role played by freedom of speech in the same manner as does compelled direct speech. CIF also believes it can add to the discussion of the recent U.S. Supreme Court case-law in this area by addressing *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) and the oddities of the opinion in that case. Although the parties before this Court have understandably addressed that decision mostly by reference to secondary sources, CIF believes that a succinct summary of the problems with the *Glickman* decision will assist the Court in deciding whether to rely upon that flawed opinion when interpreting California law.

For the foregoing reasons, CIF respectfully requests that the *amicus curiae* brief lodged herewith be filed for the Court's consideration.

Respectfully Submitted,

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INTEREST OF *AMICUS CURIAE*

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SUMMARY OF ARGUMENT

Basic constitutional principles often get lost when the regulation of commerce turns into the regulation of speech. In this case, the court below reached the wrong result by overlooking two fundamental tenets concerning freedom of speech. First, both the First Amendment to the U.S. Constitution and Article I, Section 2 of the California Constitution establish that *speech is different*. The very existence of these constitutional guarantees places speech on a higher plane, with a higher value and greater protection, than nonspeech conduct. The constitutional pecking order thus dictates that speech regulation is more offensive than ordinary conduct regulation serving the same end. The court below inverted the constitutional hierarchy when it suggested that the speech regulation at issue here is somehow a *less* intrusive alternative to unused conduct regulations and that the mere rational basis that will support most conduct regulation can also support speech regulation.

Second, constitutional free-speech protections forbid government from compelling expression of a particular viewpoint regardless of whether the expression is to be made *in propria persona* or by third-party proxy. Because free speech plays an essential structural role in our society of ensur-

ing that private ideation and decision-making processes remain free from government manipulation, government may not seek to impose an orthodoxy of viewpoint or belief – even regarding commercial or economic matters – despite whether it might otherwise compel uniformity of conduct. An inevitable consequence of the structural role of free speech is the extreme constitutional antipathy towards viewpoint-based regulation of speech. The federal and state constitutions prohibit viewpoint-discriminatory compulsion of speech regardless of whether the final expression is to be made in person or by proxy. In either instance, the person being compelled is forced to contribute to the dissemination of a particular viewpoint and the government acts to manipulate the marketplace of information and ideas. The type of contribution – physical versus monetary – is less important than the viewpoint-discriminatory nature of the compulsion and the *expressive* nature of the result. The court below misunderstood basic free-speech principles when it suggested that compelled advertising is acceptable merely because the speech is made by third-party proxy rather than *in propria persona*. Both forms of compulsion manipulate public debate and decision making and hence offend the state and federal constitutions.

Finally, *amicus* will address the U.S. Supreme Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). That case is highly unusual in its treatment of both the facts and the law. Upon examination, the case is either *sui generis* or is simply wrong as a matter of first principle and historic construction of the freedom of speech. Although lower federal courts may be bound by *Glickman* when construing the First Amendment, this Court certainly is not bound by it when interpreting Article I, Section 2. This Court should stay with a principled approach to free speech rather than follow *Glickman* into doctrinal difficulty.

ARGUMENT

I. Compelled Speech Is More Constitutionally Intrusive and Burdensome than Compelled Action.

The overarching point of both the First Amendment to the U.S. Constitution and Article I, Section 2 of the California Constitution, is that *speech is different*. If speech and conduct were the same from a constitutional perspective then there would be no need for, and no sense to, those speech-specific protections. But both constitutions *do* place a higher value on speech than on conduct, and both constitutions take a dimmer view of speech regulations than they do of conduct regulations. As the U.S. Su-

preme Court noted in the seminal *West Virginia State Board of Education* v. *Barnette*:

> The right of a State to regulate, for example, a public utility may well include … all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

319 U.S. 624, 639 (1943) (emphasis added). That mere rationality is sufficient to regulate conduct, but much more is required to regulate speech, simply highlights the point that *speech is different*.

The heightened constitutional status of speech is due in large part to the unique role that speech and other expressive activities play in shaping people's views and impacting their decision-making processes at the most basic levels. "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood* v. *Detroit Bd. of Educ.,* 431 U.S. 209, 234-35 (1977). While the regulation of conduct limits whether people can put their views into effect, the regulation of speech can distort the views people hold in the first place. By manipulating what people know or believe, speech regulation is a much more insidious, intrusive, and effective means of controlling

behavior than is the direct application of government fiat to individual conduct. *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 509-10 (1996) (principal opinion) (Puerto Rico's "advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw") (citing *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting)). And these very characteristics of speech regulations are what make them anathema to a free society.[1]

The manipulation of popular opinion and belief that free-speech protections seek to prevent can result not only from prohibitions against disfavored speech, but equally from compulsions to disseminate a government-preferred orthodoxy. The constitutional guarantees of free speech cover both these forms of speech regulation. "[T]he essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public ex-

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[1] Where people are free to think and speak, government regulation of conduct will be recognized for what it is, and accepted or opposed according to the strength of the arguments for and against the regulation. But where government tries to achieve the same regulatory result by altering the information flow and hence altering the way people think about an issue to begin with, there is less chance that the government's coercion will be seen for what it is. The final substantive decisions being made may not even be

pression of ideas …. There is necessarily … a concomitant freedom *not* to speak publicly, one which serves the ultimate end as freedom of speech in its affirmative aspect." *Pacific Gas and Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) ("*PG&E*") (citation and internal quotation marks omitted) (emphasis in original). There is ultimately a symmetry in free-speech jurisprudence: That which may not be prohibited likewise may not be compelled. While "[t]here is certainly some difference between compelled speech and compelled silence, … in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988).

Despite the constitutionally preferred status of speech, courts and advocates occasionally invert the relative offensiveness of speech and conduct regulations. The court below, for example, argued that

> the advertising tool merely seeks to accomplish the same goals *as equally or more invasive tools*, such as price, quantity, quality, and la-

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recognized as the product of government coercion, but may be mistaken for the free exercise of choice.

> beling restrictions; no greater weight should be given to the fact that the advertising tool involves an activity that, in other contexts, is "commercial speech" protected by the First Amendment.

Gerawan Farming, Inc. v. *Veneman*, 85 Cal.Rptr.2d 598, 605 (Cal. App. 5th Dist. 1999) (emphasis added); *see also* Resp. Br. at 9, 46-47 (same). Respondents go further, arguing that the regulations of speech in this case "merit no greater scrutiny than" regulations of conduct. Resp. Br. at 48.

The twin contentions that compelled conduct is "equally or more invasive" than compelled speech and that speech regulations merit "no greater scrutiny" than conduct regulations turn the federal and state constitutions on their heads. The unavoidable import of both the First Amendment and Article I, Section 2 is that speech regulations are necessarily more invasive than ordinary conduct regulations designed to achieve the same end and that speech regulations always receive greater scrutiny than ordinary conduct regulations.[2]

The position taken by Respondents and the court below is reminiscent of the now-repudiated argument in *Posadas* that the power to ban conduct,

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[2] Extraordinary conduct regulations, such as racially discriminatory laws, may run afoul of other specific constitutional protections and thus also be subject to heightened scrutiny. But run-of-the-mill regulations of economic

even when unexercised, includes the supposedly "lesser" power to regulate speech concerning such conduct. 478 U.S. at 345-46. The U.S. Supreme Court has emphatically rejected that contention, holding that it is "well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone." *Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, 527 U.S. 173, --, 119 S. Ct. 1923, 1934-35 (1999); *see also 44 Liquormart*, 517 U.S. at 510 ("We also cannot accept the State's second contention, which is premised entirely on the 'greater-includes-the-lesser' reasoning endorsed toward the end of the majority's opinion in *Posadas*.").

The authority to regulate speech is not a lesser included power encompassed within the authority to regulate conduct. Rather, the authority to regulate speech is a greater and more intrusive power – a power ordinarily denied to government. "As a matter of First Amendment doctrine, the *Posadas* syllogism is even less defensible. The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption

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conduct are subject to limited scrutiny by the courts, reflecting the fact that they are less constitutionally invasive than are regulations of speech.

accords with the essential role that the free flow of information plays in a democratic society." *Id.* at 512.

Because regulation of conduct is the lesser invasion of constitutional rights, the failure to use such conduct regulation before attempting to control speech casts grave doubt upon the alleged state interests being pursued. In *Greater New Orleans Broadcasting*, for example, the Court stated that "one would have thought that Congress might have at least experimented with" direct regulation of casino gambling, and that the "failure to institute such direct regulation … undermine[d] the asserted justifications for the restriction before us. … There surely are practical and nonspeech-related forms of regulation … that could more directly and effectively" accomplish at least some of the government's goals. 527 U.S. at --, 119 S. Ct. at 1934. The alleged interest in *Greater New Orleans Broadcasting* was in dampening consumer demand. Here the interest is in increasing consumer demand. In neither instance is it valid to use speech regulations where alternative nonspeech regulations are available and unused.

II. Compelled Funding of Viewpoint-Specific Speech Offends Constitutional Protections of Freedom of Speech.

Recognizing the constitutionally favored place of speech over conduct, and the structural role played by free-speech protections, it naturally follows that compelled viewpoint-specific speech by proxy is as unacceptable as compelled speech *in propria persona*. Respondents nonetheless seek to distinguish several compelled-speech cases by arguing that the only offense in those cases was due to the "direct connection" between the reciting party and the compelled speech and to the supposed "attribut[ion]" of that speech to the complainants. Resp. Br. at 12. Respondents then claim that there is no violation in this case because the compelled speech is done by proxy and supposedly is not attributed to Appellant. In addition to making some questionable factual assumptions, Respondents' limited view of the case law ignores the fundamental principle of free speech that the government may not make viewpoint-based judgments when regulating speech. *Cf. Rosenberger* v. *Rector and Visitors of the University of Virginia,* 515 U.S. 819, 829 (1995) (regarding access to a limited forum, the State may not "discriminate against speech on the basis of its viewpoint").

As noted above, constitutional free-speech protections play an essential structural role in our society by assuring free decision making. Compelled speech involves not merely a personal offense to the speaker, but also an offense to the constitutional scheme and to the myriad listeners attending such speech:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government … pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information *or manipulate the public debate through coercion rather than persuasion*.

Turner Broadcasting System, Inc. v. *FCC,* 512 U.S. 622, 641 (1994) (emphasis added). This objection does not turn on whether the words emerge from the mouth of the compelled speaker or from the mouth of some third party whose speech one is compelled to subsidize. In either event, if government compulsion discriminates as to the viewpoint being expressed then it offends the freedom of speech. Indeed, this Court itself has recognized Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Smith* v. *Regents of the University of California*, 4 Cal.4th 843, 852, 844 P.2d 500, 505, 16 Cal.Rptr.2d 181, 187 (1993) (citations and quotation marks omitted).

The U.S. Supreme Court likewise has recognized that the constitutional offense from compelled speech is similarly implicated by compelled funding of third-party speech. Although *Abood* and its progeny are the most frequently cited cases concerning compelled support for speech, other cases also have applied First Amendment scrutiny to forced support for third-party speech. *See, e.g.*, *Turner Broadcasting System, Inc.* v. *FCC,* 520 U.S. 180 (1997) (coerced carriage of broadcast signals over cable television facilities); *PG&E*, 475 U.S. at 4 (coerced inclusion of private messages in utility bill envelopes); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-58 (1974) (coerced right of reply to newspaper editorials).

Regarding the claimed lack of attribution of the compelled speech to Appellant, that claim is both factually doubtful and constitutionally besides the point. The manipulation of public decision-making processes occurs whether the speech is attributed to Appellant or to the Plum Marketing Board. Indeed, in some ways, the manipulation would be worse if there were no attribution to the growers because it would involve greater deception, not merely confusion. In any event, the likelihood of attribution is as strong or stronger than it was in *Wooley* v. *Maynard,* 430 U.S. 705 (1977), where there was little chance that the state motto on a state license plate

would be mistaken for Mr. Maynard's own speech, or in *Miami Herald,* where the responsive political advertisement would plainly be attributed to the true speaker and would likely be critical of the newspaper, or in *PG&E*, where the envelope inserts would not only be correctly attributed, they would likely be accompanied by an express disclaimer from the utility. In the current case, the nominal attribution for any compelled advertising is to the Plum Marketing Board – an entity purporting to speak for the entire plum industry. That such speech would be further attributed to Appellant as a member of that industry is hardly a stretch of reasoning.[3]

It seems quite obvious that absent a disclaimer the speech will be attributed to Appellant along with all other members of the industry. Appellant thus "may be forced either to appear to agree with [the compelled speech] or to respond." *PG&E,* 475 U.S. at 15. Such compelled speech burdens core free-speech rights, particularly where "there is no customary practice whereby [Appellant can] disavow 'any identity of viewpoint' between" it-

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[3] Courts have often taken judicial notice of the possibility that particular speech would be attributed to an unwilling speaker. Thus, in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 575 (1995), the Court noted that the participation of a contingent of gay marchers "would likely be perceived as having resulted from the Council's

self and the Plum Marketing Board. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 576 (1995); *see also, PG&E,* 475 U.S. at 15 n. 11 ("a disclaimer … does not suffice to eliminate the impermissible pressure on appellant to respond").

Overall, the purported dichotomy between forced individual speech and forced support of third-party speech has no basis in underlying free-speech principles. The offense from the First Amendment and Article I, Section 2 perspectives is the same. While there may be a further individual liberty interest in the more personal aspect of forced individual speech, the structural interests at stake under the speech-specific constitutional protections are fully implicated by viewpoint-discriminatory compelled support of third-party speech.

III. The *Glickman* Decision Was Wrong and Should Not Be Followed as Persuasive Authority when Interpreting the California Constitution.

As a final matter, this Court must decide whether, for purposes of California law, to follow the lead of the U.S. Supreme Court's First Amendment analysis in *Glickman* and whether such analysis would control given

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customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."

the facts of this case. While *amicus* believes that *Glickman* is distinguishable because it assumed actual collectivization of the fruit market, even if this case were identical the Court should not follow *Glickman* for purposes of interpreting the California Constitution.

Counterfactual Assumption of Collectivization. In describing the facts of the case, the *Glickman* opinion made several essential factual assumptions as a predicate for its result. First and foremost it claimed that "[c]ollective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets." 521 U.S. at 461; *see also, id.* at 469 ("[W]e stress the importance of the statutory context in which [the question] arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy …. 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."). The Court's description of the degree of collectivization in the California tree-fruit industry actually had precious little to do with reality, but nonetheless was an essential compo-

nent of the opinion's analysis. For example, without the assumption of a highly regulated and collectivized industry it would have been impossible to hold that the compelled advertising was merely part of a more sweeping regulatory endeavor. *See* 521 U.S. at 469. Indeed, it is difficult to imagine how the *Glickman* opinion could have been written without this central assumption, and it is doubtful that it would have held five votes.

Despite the central role to the *Glickman* opinion of the assumed collectivization of the industry, Respondents here argue that the plum marketing order is not significantly different than the actual marketing orders at issue in *Glickman*, and hence the same result should follow. Resp. Br. at 47. But the marketing orders in this case *are* different from *Glickman*'s description of the federal marketing orders, and it is that *description* that drove the opinion, not the actual facts. To say that this Court should look to the reality of the underlying facts rather than to the fictional description contained in *Glickman* would render it impossible to glean sense from the results or to reconcile the results with other case law. As questionable an opinion as *Glickman* is on its own terms, it would be incomprehensible without the counterfactual assumptions it contains. This Court thus should not make a bad situation worse by applying the opinion to the actual facts when *Glick-*

man itself saw no need to acknowledge those facts, and expressly assumed facts to the contrary.

Counterfactual Assumption of Unified Views and Interests. Another factual anomaly in the *Glickman* opinion is its statement that for "the purpose of this case, we assume that … the generic advertising programs therefore further the interests of those who pay for them." 521 U.S. at 462 n. 3. The opinion likewise made the assertion that "since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program." 521 U.S. at 470; *id.* at 471 ("none of the generic advertising conveys any message with which respondents disagree"). The assumptions that the advertising served the interests of all who paid for it and that respondents in that case agreed with the message contained in the advertising are once again counterfactual, but nonetheless play a significant role in the opinion's ensuing analysis.

In distinguishing its compelled-speech precedent, for example, the opinion repeatedly relied on the falsely supposed lack of disagreement with the content of the speech. Thus *Glickman* claimed that the compelled financing of speech "does not require respondents to repeat an *objectionable*

message out of their own mouths," or require them "to convey an *antagonistic* ideological message," or "force them to respond to a *hostile* message." 521 U.S. at 471 (emphasis added). If one is to take the *Glickman* opinion at its word, then presumably the compulsion to support an objectionable, antagonistic, or hostile message would present a different case and very likely would lead to a different result. That the respondents in *Glickman* did in fact find the content of the forced advertising objectionable, antagonistic, and hostile is entirely besides the point. The opinion was written on the pretense that there were no viewpoint-based objections to the advertising, and its analysis can only be accepted on those terms. To argue that the description in the opinion is not reflective of the real facts is but another reason to decline to follow it, not a reason to apply its conclusion to facts contrary to those it described.

In the present case, of course, Appellants have plead their objection, antagonism, and hostility to the viewpoint expressed by the compelled generic advertising. At a minimum that distinguishes the opinion in *Glickman* and calls for a contrary result.

Erroneously Equating Speech and Conduct. The *Glickman* opinion at several points seems to forget that there is a difference between speech and

conduct. Although recognizing that essential difference when writing in *44 Liquormart*, Justice Stevens in *Glickman* claims that an advertising regulation involves no "First Amendment issue for us to resolve," just "simply a question of economic policy for Congress and the Executive to resolve." 521 U.S. at 468. The opinion concludes this point by stating that "decisions that are made by the majority, if acceptable for other regulatory programs, should be equally so for promotional advertising." 521 U.S. at 476.

Reading these statements in *Glickman* it is as if all prior case law regarding freedom of speech had never existed. It is so fundamentally incompatible with the First Amendment that it is hardly possible to fit the case into the body of free-speech precedent. It makes far more sense to consider the case an aberration that will hopefully be recognized as such over time, much the way *Posadas* was recognized as an aberration. In the mean time, this Court should construe the California Constitution along the somewhat more coherent lines of earlier precedent. Regardless of whether decisions "made by the majority" are adequate for regulations of conduct, constitutional protections for free speech are not subservient to the majority's desires:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638.

Erroneously Distinguishing Speech in Person and Speech by Proxy. Another of the legal quirks of the *Glickman* opinion is its effort to separate cases dealing with compelled speech *in propria persona* and compelled speech by proxy. For example, the Court argued that its compelled speech cases are inapplicable because "[r]espondents are not required themselves to speak, but are merely required to make contributions for advertising." 521 U.S. at 471; *id.* at 469 (the marketing orders "do not compel any person to engage in any actual or symbolic speech"). But the respondents in *Glickman* were not "merely" forced to pay for advertising, they were required to pay for viewpoint-specific advertising conveying a message they disputed. Such viewpoint-discriminatory compulsion should have put the case into the same class as other compelled-speech cases. Indeed, even the Court's counterfactual assumption that respondents agreed with the message in the advertisements would not have altered the viewpoint-

discriminatory nature of the compelled payments. *Glickman*'s purported dichotomy between compelled speech and compelled funding of third-party speech thus conflicts with basic principles concerning viewpoint discrimination.

When the opinion then turned to the *Abood* line of cases dealing directly with compelled contributions to third-party speech, it was somewhat cryptic in its attempted distinction of that line:

> *Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." 431 U.S., at 235.

521 U.S. at 471. While it is true that *Abood* and its progeny allow compelled financial support of organizations that engage in expressive activity, that permitted compulsion was for the organizations' non-expressive activities, not for the public promulgation of the organizations' viewpoints. And *Abood* recognized more than the right to avoid a conflict with one's "freedom of belief," it recognized a right to dissociate from third-party expressive activities regardless of whether an employee could establish that any particular expressive activity conflicted with his beliefs. 431 U.S. at 241; *see also Roberts* v. *United States Jaycees,* 468 U.S. 609, 637-38

(1984) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he constitutional inquiry … does not turn on an individual's ability to establish disagreement with the particular views promulgated by the union."). Rather, the employee merely had to object to the use of his funds for any form of expressive activity unrelated to collective bargaining itself. *Id.* at 638 ("It is enough if the individual simply expresses unwillingness to be associated with the union's ideological activities.")

The proper construction of *Abood* and related cases is that the government may, for sufficient reasons, compel *non-expressive* association in furtherance of some specific conduct – such as collective bargaining – that it seeks to regulate, and that where speech is integrally related to the underlying compelled conduct the regulated persons may potentially be required to contribute to such activities as well. *Cf.* 431 U.S. at 236 ("The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions *might be seen as an integral part of the bargaining process*.") (emphasis added).

The only instances of speech ever found to be "germane" in the *Abood* line of cases are actually those inextricably intertwined with the primary conduct being regulated. Thus, while the collective bargaining process nominally involves speech, it is actually more a series of speech-acts – such as offers and acceptances – constituting the commercial transaction of contracting with the employer. Similarly with communications from the union to the employer and to the employees, those constitute the necessary elements of representation without which the union could not bargain, resolve grievances, or exchange information with those to whom it owes a duty of representation.

By contrast, the speech regarded as non-germane was not integral to the primary conduct being compelled. While such speech was almost invariable relevant to the overall *goal* of the program – and hence germane in the colloquial sense – it was not essential to the required conduct itself and thus was analyzed distinctly from such conduct. For example, in *Lehnert* v. *Ferris Faculty Association*, 500 U.S. 507 (1991), the Court held that employees could not be compelled to fund generic advertisements promoting teachers. There is no doubt that such promotional advertising of teachers was relevant to the overall *goal* of improving teacher salaries and advanc-

ing the collective interests of teachers. Much like the advertising in this case, the point of teacher promotion was to increase the demand for, or perceived value of, teachers' services – and hence increase the price. Yet generic promotional advertising by the union was not "germane" to collective bargaining because it was not a necessary element of such bargaining.

> [P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

Id. at 528-29 (Blackmun, J., for four Justices). That such promotion might have advanced the general interests of the teaching profession collectively was insufficient to render such promotional activities "germane." Rather, any permissibly chargeable speech had to be far more closely tied to the actual conduct – collective contract negotiation and administration – being compelled in the first place.

In the current case, the separation between the compelled speech and any supposedly collective conduct is particularly stark, but was ignored by the court of appeals. What distinguishes this case from many others is that there is no relevant conduct whatsoever being regulated. The only relevant regulation in this case is a regulation of pure speech – compelled advertis-

ing. Unlike other advertising regulations – for example, prohibitions on misleading statements or compulsory inclusion in an advertisement of certain information – the ads in this case are not tied to any particular sale of a good, do not form even an invitation to make an offer, and have essentially nothing to do with identifiable commercial transactions. Their only purpose is to increase demand for some unified and generic conception of "plums." Like generic promotion of the teaching profession in *Lehnert*, that use of speech is not germane to a particular regulation of economic conduct.[4]

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[4] It would be a different – though not necessarily constitutional – situation if the marketing order also compelled the collective sale of all plums by forcing producers to sell their fruit to the Marketing Board which would then be the only entity allowed to sell the fruit to others. Under such circumstances, collective advertising by the Marketing Board, and compelled support of such advertising, might be considered integrally related to the sale of fruit *by the Marketing Board itself*, and would be germane in the *Abood* sense to the compelled *conduct* of collective sales of plums. But where there is no such compelled conduct, compelled speech is not germane to anything and is not itself a valid government regulation. (It would also be a different case if the marketing order compelled producers to advertise their wares to increase demand, but did not compel the particular content or viewpoint of the ads. Such a viewpoint neutral requirement of promotional efforts, applied at the individual grower level, is at least arguably germane to the grower's own sales of the fruit, unlike the generic ads at a level different than the level of the sales.)

As the above discussion should help demonstrate, the *Glickman* opinion was a sharp deviation from a long line of cases that prohibited compelled financial support of viewpoint-specific speech in much the same way as cases prohibited the compulsion of speech *in propria persona*. Because those earlier cases are more faithful to the principles and the historical treatment of freedom of speech, this Court should reject the *Glickman* decision as a potential template for interpreting Article I, Section 2 of the California Constitution.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be reversed.

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Respectfully Submitted,

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