

Filed 12/17/01

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

GERAWAN FARMING, INC., et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA TABLE GRAPE
COMMISSION,

Defendant and Respondent.

F035605

(Super. Ct. No. 642546-6 &
636636-3)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Stephen J. Kane, Judge.

Brian C. Leighton, Mayer, Brown & Platt, Michael W. McConnell and Sharon Swingle for Plaintiffs and Appellants.

SEE DISSENTING OPINION OF LEVY, J.

Baker, Manock & Jensen, Robert D. Wilkinson, Kendall L. Manock, Linda Berg Othman; Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Walter E. Wunderlich, Edna Walz and Tracy L. Winsor for Defendant and Respondent.

Kahn, Soares & Conway, George H. Soares, Dale A. Stern and Robert S. Hedrick for California Avocado Commission, California Apple Commission,

California Asparagus Commission, California Cut Flower Commission, California Date Commission, California Egg Commission, California Forest Products Commission, California Grape Rootstock Improvement Commission, California Kiwifruit Commission, Lake County Winegrape Growers Commission, Lodi-Woodbridge Winegrape Growers Commission, California Pepper Commission, California Pistachio Commission, California Rice Commission, California Sheep Commission, California Strawberry Commission, California Tomato Commission, California Walnut Commission, and California Wheat Commission as Amici Curiae on behalf of Defendant and Respondent.

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In *Gerawan Farming, Inc. v. Lyons* (Dec. 17, 2001, F031142) ___ Cal.App.4th ___, filed this day, we have held that the California Plum Marketing Program (the Program), authorized and established pursuant to the California Marketing Act of 1937, as amended, Food and Agriculture Code section 58601 et seq., unconstitutionally deprives objecting plum producers of their right to freedom of speech under article I, section 2, subdivision (a) of the California Constitution (hereafter article I), insofar as the Program assesses the objecting producers for advertising and other speech-related functions.

Before us in the present case is a challenge to the similar advertising and speech-related activities of respondent California Table Grape Commission. Respondent's programs are not established pursuant to the California Marketing Act of 1937 but, instead, are authorized by the Ketchum Act, Food and Agriculture Code section 65500 et seq. We conclude that the Ketchum Act shares the constitutional infirmities of the California Marketing Act of 1937. Accordingly, we hold that objecting grape producers are entitled to withhold from the Table Grape Commission any amount assessed by it for use in advertising and other speech-related activities.

Facts and Procedural History

Appellants Delano Farms, Inc., and Gerawan Farming, Inc., filed separate actions seeking to prohibit respondent from compelling them to pay assessments for speech-related expenses of the Table Grape Commission. The complaints sought refunds of earlier assessments paid by appellants and, in the case of Gerawan's complaint, an order that respondent establish a mechanism for designating in advance the portion of funds that will be used for speech-related purposes. The complaints sought relief under various state and federal constitutional provisions, including article I.

The trial court struck certain portions of the complaints and granted respondent's demurrers to the complaints without leave to amend. The court entered judgment for respondent in each of the actions. Thereafter, the trial court granted the parties' joint motion to consolidate the two cases for purposes of appeal. Appellants filed a timely notice of appeal. We ordered the present appeal coordinated with *Gerawan Farming, Inc. v. Lyons, supra*, ___ Cal.App.4th ___ for purposes of briefing and argument.

As relevant here, both complaints alleged respondent engaged in a program of generic advertising with which appellants disagreed. In addition, the complaints alleged respondent used money generated from mandatory assessments to engage in lobbying and litigation to attain political and ideological goals. The complaints alleged each appellant had been assessed hundreds of thousands of dollars to support the speech-related activities of respondent.

Discussion

The activities of the Table Grape Commission are authorized by a different statutory scheme than those of the Plum Marketing Board. As alleged in the complaints in the present case, those activities are significantly more wide-ranging

than the generic advertising program implemented by the Plum Marketing Board. The complaints allege respondent engages in political lobbying and politically motivated litigation, in addition to a more traditional program of generic marketing and advertising.

In addition, the laws authorizing respondent's activities are buttressed by extensive and recent legislative findings concerning the importance of the table grape industry to the economic health of California and the physical health of Californians. (See Food & Agr. Code, §§ 63901, 65500.) Although similar findings undoubtedly could be made regarding plums, the existing findings arguably are weaker and more remote than those supporting the exercise of the state's police power in establishment of the Table Grape Commission. (See Food & Agr. Code, §§ 58651-58654.)

We acknowledge these differences between the programs at issue in the present case and in *Gerawan Farming, Inc. v. Lyons, supra*, ___ Cal.App.4th ____.

Nevertheless, the programs share fundamental features that, we believe, make them indistinguishable under the guidelines established for us in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468. Those features are (1) the programs engage in speech-related activities; (2) the programs employ state power to compel payment of assessments from unwilling participants; and (3) the programs come into existence (and continue in existence) only upon a favorable vote by those to be regulated by the program. As discussed in our opinion in *Gerawan Farming, Inc. v. Lyons, supra*, ___ Cal.App.4th ____, the first two aspects result in the conclusion that the programs implicate the free speech rights of involuntary participants; the third aspect results in the negation of any asserted governmental interest in the programs that might otherwise be sufficient to justify impingement on the participants' free speech rights.

Formation of respondent was initially authorized by Food and Agriculture Code section 65550. The power of respondent to implement its programs and establish an

assessment upon producers, however, was made expressly dependent upon a favorable result in a referendum of producers. (See Food & Agr. Code, § 65573.) Further, respondent is required to conduct a referendum on its continued existence every five years, and to cease operations upon a negative vote of producers. (See Food & Agr. Code, § 65675.)

Under these circumstances, the Legislature's findings concerning the necessity and desirability of respondent's advertising and promotional programs are entirely illusory. It is not rational to conclude that:

-- conditions in the grape industry that respondent's programs are to address "vitally concern the health, peace, safety and general welfare of the people of this state" (Food & Agr. Code, § 65500, subd. (e));

-- it is "necessary and expedient in the public interest" to "protect and enhance the reputation of California fresh grapes" (Food & Agr. Code, § 65500, subd. (e)); and

-- the Table Grape Commission provides a "benefit to the entire industry and all of the people of this state" (Food & Agr. Code, § 63901, subd. (c)),

but only if a majority of growers agree to permit the program to exist. Accordingly, we conclude respondent's actions, under the current statutory authorization, in assessing and collecting from objecting producers funds to conduct commercial, political, ideological, or other speech-related activities, violate the article I free speech right of objecting producers.

Disposition

The judgment is reversed. The matter is remanded for trial or other proceedings necessary to establish the portion of respondent’s budget used for speech-related activities and to establish the nature and extent of the remedies to which appellants are entitled. Appellants are awarded their costs on appeal.

Vartabedian, Acting P. J.

I CONCUR:

Harris, J.

LEVY, J.

I respectfully dissent.

The majority opinion acknowledges that the scope of the authority granted to the California Table Grape Commission varies significantly from that granted to the California Plum Marketing Board. Nevertheless, based on its conclusion that the need for a favorable vote by the growers to implement a program negates any asserted governmental interest in that program, the majority reverses this case for the reasons set forth in *Gerawan Farming, Inc. v. Lyons* (Dec. 17, 2001, F031142) ___ Cal.App.4th ___.

As discussed in my dissent in *Gerawan Farming, Inc. v. Lyons, supra*, I disagree with the majority's premise. Permitting the growers to vote in a referendum on the provisions of the Ketchum Act pursuant to Food and Agricultural Code section 65573 does not dilute the government interest in aiding fresh grape producers in the marketing of their commodity. (Food & Agr. Code, § 65500.) Rather, the Legislature has merely recognized its own limitations and has therefore entrusted certain aspects of the regulation of the California fresh grape market to those who better understand the industry. However, this recognition does not undermine the governmental interest in, and justification for, the compelled association of the growers.

Thus, I disagree with the majority's disposition of this case. I also believe it is premature. A factual record must be developed below to enable the case to be properly evaluated. For example if, upon remand, it is determined that the Ketchum Act parallels the California Marketing Act with respect to the level of regulation of the industry, the compelled generic advertising component should be scrutinized under the intermediate test outlined in my dissent in *Gerawan Farming, Inc. v. Lyons, supra*. However, if these acts vary considerably on key issues, a different analysis might be needed. Additionally, it must be determined what impact, if any, the First Amendment has on this case. In sum,

without additional facts and legal argument, this court is not in a position to decide the constitutional validity of the Table Grape Commission's generic advertising program.

Levy, J.