

IN THE SUPREME COURT  
STATE OF FLORIDA

CASE No. SC05-237

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STATE OF FLORIDA, DEPARTMENT OF CITRUS,

*Appellant,*

v.

GRAVES BROTHERS CO., TAMPA JUICE SERVICE, ET AL.,

*Appellees.*

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INITIAL BRIEF OF STATE OF FLORIDA, DEPARTMENT OF CITRUS

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On Appeal from the Second District Court of Appeal

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# TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	3
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	9
I. The Standard of Review .....	9
II. The Box Tax Levied Under Section 601.15, Florida Statutes, Used in Part to Fund the Department’s Generic Advertising Program, Is Constitutional.....	9
A. <u>The Florida citrus industry is sufficiently collectivized so that the Box Tax passes First Amendment scrutiny</u> .....	9
B. <u>The Box Tax funds a function that is germane to the overall purpose of Florida’s broader regulatory purpose respecting citrus</u> .....	22
III. The Speech Funded by Florida’s Box Tax Constitutes Government Speech .....	24
IV. The District Court Opinion is Contrary to Existing Florida Supreme Court Precedent Upholding the State’s Exercise of its Police Power to Advertise and Promote the Florida Citrus Industry .....	34
Conclusion .....	37

**TABLE OF CONTENTS**  
(Continued)

	<b><u>Page</u></b>
CERTIFICATE OF SERVICE.....	38
CERTIFICATE OF COMPLIANCE .....	38

## TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977) .....	19, 20, 21, 22
<i>Board of Regents of the Univ. of Wis. Sys. v. Southworth</i> , 259 U.S. 217 (2000) .....	27
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1985) .....	18
<i>City of Miami v. McGrath</i> , 824 So. 2d 143 (Fla. 2002) .....	9
<i>Coca-Cola Co. v. State, Dep’t of Citrus</i> , 406 So. 2d 1079 (Fla. 1981), <i>appeal dismissed sub nom. Kraft v. State, Dep’t of Citrus</i> , 456 U.S. 1002 (1982) .....	30, 31, 34, 35, 36
<i>Davis v. Washington County</i> , 670 So. 2d 136 (Fla. 1 <sup>st</sup> DCA 1996) .....	16
<i>Delano Farms Co. v. California Table Grape Comm’n</i> , 318 F.3d 895 (9 <sup>th</sup> Cir. 2003).....	33
<i>Downs v. Los Angeles Unified Sch. Dist.</i> , 228 F.3d 1003 (9 <sup>th</sup> Cir. 2000), <i>cert. denied</i> , 532 U.S. 994 (2001) .....	24, 25
<i>Duck Tours Seafari, Inc. v. The City of Key West</i> , 875 So. 2d 650 (Fla. 3 <sup>rd</sup> DCA 2004), <i>rev. denied</i> , 890 So. 2d 1114 (Fla. 2004) .....	16
<i>Florida Cannery Ass’n v. State, Dep’t of Citrus</i> , 371 So. 2d 503 (Fla. 2 <sup>nd</sup> DCA 1979), <i>aff’d sub nom. Coca-Cola</i> , 406 So. 2d at 1079, <i>appeal dismissed sub nom. Kraft v. State, Dep’t of Citrus</i> , 5456 U.S. 1002 (1982).....	31, 34, 35
<i>Florida Dep’t of Children and Families v. F.L.</i> , 880 So. 2d 602 (Fla. 2004) .....	9

**TABLE OF CITATIONS**  
(Continued)

	<u>Page</u>
<i>Florida Dep't of Citrus v. Graves Bros. Co., et al.</i> , 889 So. 2d 831 (Fla. 2 <sup>nd</sup> DCA 2004) .....	7, 9, 12, 13, 16, 29, 32, 34, 37
<i>Glickman v. Wileman Bros. &amp; Elliot, Inc.</i> , 521 U.S. 457 (1997) .....	10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 23, 25
<i>Haire v. Florida Dep't of Agriculture and Consumer Servs.</i> , 870 So. 2d 774 (Fla. 2004) .....	31
<i>In re Estate of Caldwell</i> , 247 So. 2d 1 (Fla. 1971) .....	9
<i>Keller v. State Bar of California</i> , 496 U.S. 1 (1990) .....	18, 19, 20, 21, 22, 23, 26, 27
<i>Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.</i> , 203 F.3d 1085 (8 <sup>th</sup> Cir. 2000), <i>cert. denied</i> , 531 U.S. 814 (2000) .....	24, 25
<i>Kraft v. Dep't of Citrus</i> 456 U.S. 1002 (1982)	30
<i>Livestock Marketing Ass'n v. United States Dep't of Agric.</i> , 335 F.3d 711 (8 <sup>th</sup> Cir. 2003), <i>cert. granted in part sub nom. Veneman v. Livestock Marketing Ass'n</i> , 124 S. Ct. 2389 (2004), <i>and cert. granted in part sub nom. Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n</i> , 124 S. Ct. 2390 (2004) .....	24, 27, 32
<i>Michigan Pork Producers Ass'n v. Veneman</i> , 348 F.3d 157 (6 <sup>th</sup> Cir. 2003), <i>pet. for cert. filed</i> , 72 U.S.L.W. 3059 (Jan. 20, 2004), <i>and pet. for cert. filed</i> , 72 U.S.L.W. 3539 (Feb. 19, 2004) .....	24, 31, 32
<i>Parker v. Brown</i> , 317 U.S. 341 (1943) .....	15

**TABLE OF CITATIONS**  
(Continued)

	<u>Page</u>
<i>Pelts &amp; Skins, LLC v. Landreneau</i> 365 F.3d 423 (5 <sup>th</sup> Cir. 2004), <i>pet for cert. filed</i> , 73 U.S.L.W. 3075 (June 30, 2004) .....	24, 26
<i>R.J. Reynolds Tobacco Co. v. Shewry</i> 384 F.3d 1126 (9 <sup>th</sup> Cir. 2004) .....	26, 33
<i>Rust v. Sullivan</i> 500 U.S. 173 (1991) .....	25
<i>Sons of Confederate Veterans, Inc. v. Commissioner</i> <i>Va. Dep't of Motor Vehicles</i> , 288 F.3d 610 (4 <sup>th</sup> Cir. 2002) .....	25
<i>Southern Motor Carriers Rate Conference, Inc.</i> <i>v. United States</i> , 471 U.S. 48 (1985) .....	15
<i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001) .....	10, 11, 12, 13, 15, 16, 17, 18, 19, 22, 25
<i>Wells v. City and County of Denver</i> , 257 F.3d 1132 (10 <sup>th</sup> Cir. 2001), <i>cert. denied</i> , 534 U.S. 997 .....	25
 <b><u>Constitutional Provisions</u></b>	
Art. III, § 19, Fla. Const. ....	28
Art. IV, § 6, Fla. Const. ....	28
 <b><u>Statutes</u></b>	
Ch. 20, Fla. Stat. (2004) .....	28
Ch. 581, Fla. Stat. (2004) .....	4
Ch. 600, Fla. Stat. (2004) .....	3, 4, 10, 15, 18
Ch. 601, Fla. Stat. (2004) .....	1, 4
§ 11.513, Fla. Stat. (2004) .....	29
§ 20.02(2), Fla. Stat. (2004) .....	28
§ 20.29, Fla. Stat. (2004) .....	28

**TABLE OF CITATIONS**  
(Continued)

	<u>Page</u>
§ 20.051, Fla. Stat. (2004) .....	29
§ 20.055, Fla. Stat. (2004) .....	29
§ 119.011, Fla. Stat. (2004) .....	30
§ 119.07, Fla. Stat. (2004) .....	30
§ 286.011, Fla. Stat. (2004) .....	30
§ 542.20, Fla. Stat. (2004) .....	15
§ 581.182, Fla. Stat. (2004) .....	3
§ 581.183, Fla. Stat. (2004) .....	3
§ 581.184, Fla. Stat. (2004) .....	3
§ 581.1845, Fla. Stat. (2004) .....	3
§ 601.04, Fla. Stat. (2004) .....	29
§ 601.04(2), Fla. Stat. (2004).....	29
§ 601.05, Fla. Stat. (2004) .....	29
§ 601.10, Fla. Stat. (2004) .....	3, 29, 30
§ 601.10(1), Fla. Stat. (2004).....	30
§ 601.111, Fla. Stat. (2004) .....	4
§ 601.13(g), Fla. Stat. (2004).....	29
§ 601.15, Fla. Stat. (2004) .....	2, 3, 7, 28, 35
§ 601.15(2), Fla. Stat. (2004).....	4, 30
§ 601.15(2)(a), Fla. Stat. (2004) .....	6, 30
§ 601.15(2)(b), Fla. Stat. (2004) .....	5
§ 601.15(3)(a), Fla. Stat. (2004) .....	5
§ 601.15(7), Fla. Stat. (2004).....	6, 30
§ 601.15(10)(d), Fla. Stat. (2004) .....	29
§ 601.154, Fla. Stat. (2004) .....	3, 10, 15, 18
§ 601.16, Fla. Stat. (2004) .....	4
§ 601.17, Fla. Stat. (2004) .....	4
§ 601.18, Fla. Stat. (2004) .....	4
§ 601.19, Fla. Stat. (2004) .....	4
§ 601.20, Fla. Stat. (2004) .....	4
§ 601.21, Fla. Stat. (2004) .....	4
§ 601.22, Fla. Stat. (2004) .....	4
§ 601.23, Fla. Stat. (2004) .....	4
§ 601.24, Fla. Stat. (2004) .....	4
§ 601.25, Fla. Stat. (2004) .....	4

**TABLE OF CITATIONS**  
(Continued)

	<u>Page</u>
§ 601.27, Fla. Stat. (2004) .....	4
§ 601.28, Fla. Stat. (2004) .....	4
§ 601.281, Fla. Stat. (2004) .....	4
§ 601.29, Fla. Stat. (2004) .....	4
§ 601.31, Fla. Stat. (2004) .....	4
§ 601.32, Fla. Stat. (2004) .....	4
§ 601.33, Fla. Stat. (2004) .....	4
§ 601.34, Fla. Stat. (2004) .....	4
§ 601.35, Fla. Stat. (2004) .....	4
§ 601.36, Fla. Stat. (2004) .....	3, 4
§ 601.37, Fla. Stat. (2004) .....	4
§ 601.38, Fla. Stat. (2004) .....	4
§ 601.39, Fla. Stat. (2004) .....	3
§ 601.40, Fla. Stat. (2004) .....	4
§ 601.41, Fla. Stat. (2004) .....	4
§ 601.42, Fla. Stat. (2004) .....	4
§ 601.43, Fla. Stat. (2004) .....	3, 4
§ 601.44, Fla. Stat. (2004) .....	4
§ 601.45, Fla. Stat. (2004) .....	4
§ 601.46, Fla. Stat. (2004) .....	4
§ 601.47, Fla. Stat. (2004) .....	3, 4
§ 601.48, Fla. Stat. (2004) .....	4
§ 601.49, Fla. Stat. (2004) .....	4
§ 601.50, Fla. Stat. (2004) .....	4
§ 601.51, Fla. Stat. (2004) .....	4
§ 601.52, Fla. Stat. (2004) .....	4
§ 601.53, Fla. Stat. (2004) .....	4
§ 601.54, Fla. Stat. (2004) .....	4
§ 601.55, Fla. Stat. (2004) .....	4
§ 601.56, Fla. Stat. (2004) .....	4
§ 601.57, Fla. Stat. (2004) .....	4
§ 601.58, Fla. Stat. (2004) .....	4
§ 601.59, Fla. Stat. (2004) .....	4
§ 601.60, Fla. Stat. (2004) .....	4

**TABLE OF CITATIONS**  
(Continued)

	<u>Page</u>
§ 601.601, Fla. Stat. (2004) .....	4
§ 601.61, Fla. Stat. (2004) .....	4
§ 601.69, Fla. Stat. (2004) .....	4
§ 601.70, Fla. Stat. (2004) .....	4
§ 601.701, Fla. Stat. (2004) .....	4
§ 601.731, Fla. Stat. (2004) .....	4
§ 601.75, Fla. Stat. (2004) .....	3
§ 601.76, Fla. Stat. (2004) .....	3
§ 601.77, Fla. Stat. (2004) .....	3
§ 601.78, Fla. Stat. (2004) .....	3
§ 601.79, Fla. Stat. (2004) .....	3
§ 601.80, Fla. Stat. (2004) .....	3
§ 601.85, Fla. Stat. (2004) .....	3
§ 601.86, Fla. Stat. (2004) .....	3
§ 601.87, Fla. Stat. (2004) .....	3
§ 601.88, Fla. Stat. (2004) .....	3
§ 601.92, Fla. Stat. (2004) .....	3
§ 601.96, Fla. Stat. (2004) .....	4
§ 601.9904, Fla. Stat. (2004) .....	4
§ 601.9905, Fla. Stat. (2004) .....	4
§ 601.9906, Fla. Stat. (2004) .....	4
§ 601.9907, Fla. Stat. (2004) .....	4
§ 601.9908, Fla. Stat. (2004) .....	4
§ 601.9909, Fla. Stat. (2004) .....	4
§ 601.9910, Fla. Stat. (2004) .....	4
§ 601.9911, Fla. Stat. (2004) .....	4
§ 601.9913, Fla. Stat. (2004) .....	4
§ 601.9914, Fla. Stat. (2004) .....	4
§ 601.9916, Fla. Stat. (2004) .....	4
§768.28, Fla. Stat. (2004) .....	29

**Rules**

Ch. 20, Fla. Admin. Code.....	4
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## **INTRODUCTION**

Citrus represents a \$9 billion industry that employs 90,000 people and is crucial to Florida's economic welfare. As has been repeatedly recognized by this Court and the United States Supreme Court, Florida's interest in protecting and preserving the industry is paramount. To maintain a favorable atmosphere for its continued prosperity and to protect the economic welfare of the State of Florida as a whole, Florida has historically taken the necessary measures to maintain the health of the citrus industry. The end is achieved by a complex and pervasive regulatory scheme. The purpose of the regulatory scheme is to impose high standards on the citrus industry to maintain the high level of quality and wholesomeness of Florida citrus products and, to this end, to ensure uniformity in the growing and processing of Florida citrus. In fact, the regulatory scheme controls every aspect of the growing, processing, packaging, handling and shipping of Florida citrus. The adherence to the regulatory scheme and its requirements of uniformity is not voluntary. All citrus producers, handlers and distributors in Florida, without exception, are mandated to abide by the regulatory scheme.

Florida's history of regulating the citrus industry extends back to 1935 when the Florida Legislature, after making specific findings that it was essential for the welfare of the Florida citrus industry and the people of the State of Florida as a whole, enacted what is now Chapter 601 of the Florida Statutes, known as the

Florida Citrus Code, to stabilize and protect Florida's citrus industry. Therein, the Department of Citrus ("Department") was created to carry out the Citrus Code's provisions. The Department is headed by the Florida Citrus Commission, which is appointed by the Governor and confirmed by the Florida Senate.

The Legislature established as part of Florida's broad regulatory scheme an excise tax under Section 601.15 Florida Statutes (2004), commonly referred to as Florida's "Box Tax." The tax is assessed against every box of citrus grown in Florida that enters the primary channel of trade in Florida. A portion of the revenue generated by the tax is used to fund a legislatively mandated advertising campaign, through which information is disseminated to the consuming public regarding the quality of Florida's citrus and the lengths to which Florida goes to preserve such quality and to ensure that the State's high standards are consistently and reliably maintained. The Box Tax is just one sliver of the comprehensive regulatory scheme which governs Florida's citrus production and which imposes uniformity in the industry.

The Department brings to the Court for constitutional review Section 601.15. The Second District Court of Appeal affirmed a circuit court decision declaring the statute unconstitutional. The Department seeks a reversal of this decision on the following grounds: (i) under United States Supreme Court precedent, inasmuch as the Florida Legislature, through the Florida Citrus Code

and other statutes and rules, imposes regulatory collectivization on the citrus industry, the Box Tax presents no First Amendment violation; (ii) under United States Supreme Court precedent, inasmuch as the Department uses a portion of the money collected under the Box Tax to fund a function that is germane to the overall purpose of Florida's broad regulatory purpose respecting citrus, there is no First Amendment violation; (iii) the Department is a state agency and its advertising campaign, to the extent that it is funded by the money collected under the Box Tax, constitutes government speech that is not subject to First Amendment scrutiny; and (iv) under Florida Supreme Court precedent, the Department may exercise the State's police power to advertise and promote the Florida citrus industry.

### **STATEMENT OF THE CASE AND FACTS**

To ensure that Florida's high standard for its citrus is safeguarded, Florida has in place a comprehensive regulatory scheme which touches upon every aspect of the citrus industry, including, but not limited to: advertising (§ 601.15, Fla. Stat.); production, marketing and price stabilization (§ 601.154 and Ch. 600, Fla. Stat.); boxing (§§ 601.85-88, Fla. Stat.); varieties of citrus plants (§§ 581.182-.183, Fla. Stat.); disease control (§§ 581.184-.1845, Fla. Stat.); dyes or coloring (§§ 601.75-.80, Fla. Stat.); canning and concentrating (§§ 601.36 and 601.47, Fla. Stat.); fertilizing (§ 601.92, Fla. Stat.); harvesting (§§ 601.10 and 601.88, Fla.

Stat.); grading (§§ 601.45 and 601.48, Fla. Stat.); inspections and seizure of immature or unwholesome fruit (§§ 601.27-.39, 601.43-.44 and 601.54, Fla. Stat.); juicing and use of sweeteners (§§ 601.9904-.9909, 601.9914 and 601.9916, Fla. Stat.); processing (§§ 601.47 and 601.53, Fla. Stat.); labeling (§§ 601.9905, 601.9907-.9909 and 601.9913, Fla. Stat.); licensing, registration and bonding (§§ 601.55-.61, Fla. Stat.); maturity standards (§§ 601.16-.23, 601.111 and 601.9910, Fla. Stat.); packaging (§§ 601.40-.42, Fla. Stat.); testing (§§ 601.24-.25, 601.43 and 601.96, Fla. Stat.); shipping (§§ 601.50-.52, 601.731 and 601.9911, Fla. Stat.); sales (§§ 601.46 and 601.49-.50, Fla. Stat.); and records (§§ 601.69-.701, Fla. Stat.). *See generally* Chs. 581, 600 and 601, Fla. Stat.; Ch. 20, Fla. Admin. Code; Sparks Aff. and Ex. thereto entitled “State Regulations of the Florida Citrus Industry” (R:5836-5919). As such, the regulatory scheme imposes uniformity on virtually all aspects of the growing, processing and handling of Florida citrus.

As part of the overall regulatory scheme imposing uniformity in the citrus industry, the Florida Legislature mandated that a citrus advertising campaign be conducted as follows: “The Department of Citrus shall plan and conduct campaigns for commodity advertising, publicity, and sales promotion, and may conduct campaigns to encourage noncommodity advertising, to increase the consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service.” § 601.15(2), Fla. Stat. (2004). Funding for the

advertising program derives in part from a tax assessed against each box of citrus that enters the primary channel of trade in Florida. § 601.15(3)(a), Fla. Stat. (2004). The Legislature included in the statute a chart for calculating the amount of the tax. *Id.*

To accomplish its legislative mandate, the Department expressly is empowered and obligated to promote the use of a “distinctive and suggestive trade name . . . to advertise Florida citrus,” § 601.15(2)(b), Fla. Stat. (2004), and to disseminate information regarding Florida citrus, as follows:

1. Citrus fruits and the importance thereof in preserving the public health, the economy thereof in the diet of the people, and the importance thereof in the nutrition of children;
2. The manner, method, and means used and employed in the production and marketing of citrus fruits and information relating to laws of the state regulating and safeguarding such production and marketing;
3. The added cost to the producer and dealer in producing and handling citrus fruits to meet the high standards imposed by the state that ensure a pure and wholesome product;
4. The effect upon the public health which would result from a breakdown of the Florida citrus industry or any part thereof;
5. The reasons why producers and dealers should receive a reasonable return on their labor and investment;
6. The problem of furnishing the consumer at all times with an abundant supply of fine quality citrus fruits at reasonable prices;
7. Factors of instability peculiar to the citrus fruit industry, such as unbalanced production, the effect of the weather, the influence of consumer purchasing power, and price relative to the cost of other

items of food in the normal diet of people, all to the end that an intelligent and increasing consumer demand may be created;

8. The possibilities with particular reference to increased consumption of citrus fruits; and

9. Such other, further, and additional information which tends to promote increased consumption of citrus fruits which fosters a better understanding and more efficient cooperation among producers, dealers, and the consuming public.

§ 601.15(2)(a), Fla. Stat. (2004).

The Legislature furthermore established procedures for administering the funds, providing that “[a]ll excise taxes levied and collected under the provisions of this chapter shall be paid into the State Treasury” and that “such moneys shall be accounted for in a special fund to be designated as the Florida Citrus Advertising Trust Fund, and all moneys in such fund are hereby appropriated to the Department of Citrus...” § 601.15(7), Fla. Stat. (2004). The moneys are then allocated for the following purposes: three percent shall be deposited into the General Revenue Fund, not more than twenty-four percent shall be expended for authorized activities and general overhead, and the balance shall be used for defraying additional costs, and after payment of such expenses the balance shall be used for commodity and noncommodity advertising, merchandising, publicity, and sales promotion of citrus products in both fresh and processed form. *Id.* Costs associated with Florida’s overall regulatory scheme for the citrus industry exceed

\$80 million annually, of which the generic advertising scheme expenditure is a small fraction. Sparks Aff. at Ex. A, pp. 79-83. (R:5915-19).

Several of Florida's citrus growers (collectively "appellees"), in consolidated proceedings (R:82-83), challenged the constitutionality of Section 601.15 under the First Amendment to the United States Constitution. (R:1-8; 20-26; 27-33; 53-59). On May 14, 2003, the trial court entered a declaratory judgment, declaring that Section 601.15 violates the free speech rights of Florida's citrus growers under the First Amendment. (R:923-25). On October 20, 2004, the Second District Court of Appeal affirmed, holding that (i) the Box Tax does not constitute government speech such that it would be exempt from First Amendment scrutiny, and (ii) because the citrus industry is not "collectivized" and because the Box Tax is not part of a regulatory scheme that sets prices or restricts the quantity of citrus that can be produced or marketed, the Box Tax compels speech that is prohibited by the First Amendment. *Florida Dep't of Citrus v. Graves Bros. Co.*, 889 So. 2d 831 (Fla. 2d DCA 2004).<sup>1</sup> The court denied the Department's motion for rehearing/rehearing en banc, and this appeal ensued.

### **SUMMARY OF ARGUMENT**

The Second District Court of Appeal overlooked or misapprehended the crux of the Florida Citrus Code which essentially collectivizes, from a regulatory

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<sup>1</sup> A copy of the Second District Court of Appeal's October 20, 2004 decision is attached hereto as Appendix 1.

perspective, every aspect of the growing, processing and handling of citrus, and which also includes authorizations for issuing marketing orders for the purpose of stabilizing the production and marketing of citrus. The district court also overlooked the fact that the Florida citrus industry is exempt from antitrust laws. As such, the Florida citrus industry is sufficiently collectivized so that the Box Tax is exempt from First Amendment scrutiny.

Moreover, controlling United States Supreme Court precedent does not require “collectivization,” but requires only that compelled contributions be part of a broader regulatory scheme and germane to a substantial governmental interest.

Furthermore, advertising funded by state taxes, such as Florida’s Box Tax, is government speech where such advertising is disseminated by a government entity and the government entity exercises complete authority, control, and responsibility for the message conveyed, especially where the message conveyed is part of an overall regulatory scheme which advances a substantial governmental interest.

Because the citrus industry is necessary to Florida’s economic welfare, long-standing precedent of the Florida Supreme Court upholds Florida’s right to exercise its police power to advertise and promote the Florida citrus industry.

## ARGUMENT

### I. The Standard of Review

This Court reviews de novo the decision of a district court of appeal holding a statute unconstitutional. *E.g., Florida Dep't of Children and Families v. F.L.*, 880 So. 2d 602, 607 (Fla. 2004). The Court, of course, begins with the presumption that the statute is constitutional. *City of Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002). All reasonable doubts as to the validity of the statute are to be resolved in favor of constitutionality. *In re Estate of Caldwell*, 247 So. 2d 1, 3 (Fla. 1971).

### II. The Box Tax Levied Under Section 601.15, Florida Statutes, Used In Part to Fund the Department's Generic Advertising Program, is Constitutional.

#### A. The Florida citrus industry is sufficiently collectivized so that the Box Tax passes First Amendment scrutiny.

The district court found that the Box Tax compels speech that is prohibited by the First Amendment because the “Florida Citrus Code does not collectivize the citrus industry,” and because the Box Tax is not part of a regulatory program that “set[s] prices or restrict[s] the quantity of citrus that can be produced or marketed.” Appendix 1 at 6; *Department of Citrus v. Graves Bros.*, 889 So. 2d at 834. In arriving at its holding, the district court apparently overlooked or misapprehended the crux of the Florida Citrus Code which in fact does collectivize all aspects of the growing, processing and handling of citrus, and which in fact does include

authorizations for issuing marketing orders for the purpose of stabilizing the production and marketing of citrus. § 601.154, Fla. Stat. (2004) and Ch. 600, Fla. Stat. (2004).

The court based its decision on the United States Supreme Court decisions in *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). However, the district court's opinion cannot be reconciled with either of these cases or with the earlier Supreme Court precedent upon which these decisions were based.

In *Glickman*, the United States Supreme Court upheld an assessment imposed against growers, handlers and processors of California tree fruits under marketing orders promulgated by the Department of Agriculture. 521 U.S. at 477. The funds collected were used to pay for the expenses associated with administering the orders, "including specific projects undertaken to serve the economic interests of the cooperative producers," "joint research and development projects," and "generic advertising" of California nectarines, plums and peaches. *Id.* at 460-61.

In determining the constitutionality of the assessment, the Court "stress[ed] the importance of the statutory context" in which the assessment arises, as follows:

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 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. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

*Id.* at 469. The Court, observing that its prior decisions “provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group,” *Id.* at 472-73, concluded that:

Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme.

*Id.* at 476.

The Court revisited the issue in *United Foods*, reviewing a First Amendment challenge to marketing orders promulgated by the Department of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act. The act allowed the department, following approval in a referendum of affected mushroom producers, to impose mandatory assessments for “projects of mushroom promotion, research, consumer information, and industry information.” 533 U.S.

at 408. However, the department used the collected money almost exclusively for generic advertising. *Id.*

The Court determined that the marketing orders violated First Amendment protections, distinguishing the mushroom orders there at issue from the marketing orders upheld in the earlier *Glickman* decision, as follows:

The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

533 U.S. at 411-12. The Court also noted that “[m]ushroom producers are not forced to associate as a group which makes cooperative decisions,” *Id.* at 413, and that “[t]he mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program.” *Id.*

Essentially, whereas in *Glickman* the assessments used to finance commercial speech were but a part of a more comprehensive regulatory program which restricted market autonomy, in *United Foods* the advertising was the whole point of the regulation, giving rise to a First Amendment challenge. Finding that “it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place” and that no such purpose existed in the

context of the mushroom marketing order, the Court determined that the assessments violated First Amendment protections. *Id.* at 413, 417.

In the case at bar, the district court attempts to distinguish *Glickman* on the basis that the generic advertising of California tree fruit was “part of a broader collective enterprise” and also because the regulatory scheme included authorizations for exemptions from antitrust laws and authorizations for mechanisms implementing uniform prices in a particular market and for the quantity of the commodity to be marketed. Appendix 1 at 3; *Department of Citrus v. Graves Bros.*, 889 So. 2d at 832. However, in distinguishing *Glickman* from the case at bar, the district court failed to consider the full impact of the Florida Citrus Code and other statutes and rules which form the basis of Florida’s broad regulatory scheme protecting the Florida citrus industry and the people of the State of Florida as a whole.

First, the district court failed to consider that while Florida does not regularly set prices or limit production (although it has the statutory power to do so), the Florida citrus industry is most certainly collectivized in the regulatory sense. Even the most cursory look at the Florida Citrus Code and other statutes and rules governing the Florida citrus industry reveals that the Florida citrus industry is extensively regulated to the point that producers and handlers of Florida citrus can make virtually no independent business decisions with respect to most

aspects of their businesses. The Citrus Code, and the other statutes and rules, set the standards and mandate uniformity in essentially all aspects of citrus growing, processing, handling and distribution including fertilizing, harvesting, canning and juicing, dyes and coloring, juicing and use of sweeteners, maturity standards, packaging, labeling, boxing, and shipping. The end result of the mandated uniformity is that producers and handlers of Florida citrus are bound together in a collective enterprise so that there can be little variation in the taste and appearance of Florida citrus products so as to distinguish one producer or processor from another.

The revenue generated by Florida citrus producers and handlers is not pooled or collectivized. And producers and processors have leeway to market their products independently and they may achieve a separate identity in that regard. However, the regulatory collectivization of the other aspects of the industry ensure that the citrus products themselves maintain uniform characteristics reflecting the high standards imposed by the state to ensure pure and wholesome products. Here, as in *Glickman*, “[t]he 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.” 521 U.S. at 469; *see Sparks Aff. and Ex. thereto* (R:5836-5919).

Next, contrary to the assertion of the district court, the Florida Citrus Code does indeed contain authorizations for marketing orders for the stabilization of production and marketing of citrus. § 601.154 and Ch. 600, Fla. Stat. Such authorizations have the potential for displacing competition just as the similar authorizations at issue in *Glickman*. As here, the marketing orders in *Glickman*, while authorized, were not actually in place:

Both then-existing federal regulations and Justice Souter’s dissenting opinion make clear that, at least in respect to some of [*Glickman*’s] marketing orders, price and output regulations, while ‘authorized,’ were not, in fact, in place. See 7 C.F.R. pts. 916, 917 (1997) (setting forth container, packaging, grade, and size regulations, but not price and output regulations); 521 U.S., at 500, n. 13, 117 S. Ct. 2130 (Souter, J., dissenting) (noting that ‘the extent to which the Act eliminates competition varies among different marketing orders’).

*United Foods*, 533 U.S. at 420 (Breyer, Ginsburg, O’Connor, J.J., dissenting).

Also, the Florida citrus industry, when adhering to the requirements of the Florida Citrus Code and other Florida statutes and rules, is exempted from antitrust laws. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) (antitrust laws are not intended to compromise the states’ ability to regulate their domestic commerce); *Parker v. Brown*, 317 U.S. 341, 350-52 (1943) (establishing the state action immunity doctrine which permits anticompetitive conduct if authorized and supervised by state officials); § 542.20, Fla. Stat. (2004) (“[a]ny activity or conduct . . . exempt from the provisions of the antitrust laws of

the United States is exempt from the provisions of [the Florida antitrust law];” *Duck Tours Seafari, Inc. v. The City of Key West*, 875 So. 2d 650, 653 (Fla. 3d DCA 2004), *rev. denied*, 890 So. 2d 1114 (Fla. 2004); *Davis v. Washington County*, 670 So. 2d 136, 137 (Fla. 1<sup>st</sup> DCA 1996). Therefore, the district court’s attempt to distinguish *Glickman* on the grounds of “collectivization” and antitrust exemption is without merit.

The district court contends that “the statutory scheme in Florida under which the excise tax is collected and expended for advertising is strikingly similar to that which the Supreme Court struck down in *United Foods* . . . .” Appendix 1 at 5; *Department of Citrus v. Graves*, 889 So. 2d at 833. However, although it is acknowledged by Judges Casanueva and Salcines in their concurring opinion (Appendix 1 at 10; 889 So. 2d at 836), the district court’s opinion overlooked the fact that the mushroom growing industry at issue in *United Foods* was ***virtually unregulated*** and there was no regulatory scheme at issue in that case other than the enforcement of a regional mushroom advertising program. 533 U.S. at 413. Furthermore, the mushroom producers were not forced into a collective group in any way except for purposes of the advertising program. *Id.*<sup>2</sup>

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<sup>2</sup> Moreover, here, the compelled funding is pursuant to explicit legislative enactment and direction and not pursuant to a marketing order implemented after an industry referendum as in *United Foods*.

Much to the contrary, the Citrus Code, along with related agricultural statutes and rules, sets forth an extensive regulatory scheme that binds Florida producers and handlers together in uniformity in every aspect of the industry, ensuring that Florida's high standard for its citrus is safeguarded. The Box Tax is just one aspect of the broader regulatory scheme imposing uniformity on the citrus industry. However, the district court in the case at bar overlooked the extensive regulation of the Florida citrus industry and likened it to the unregulated mushroom industry at issue in *United Foods* where the mushroom growers were bound together, pursuant to referendum, simply for the sake of the generic advertising. In fact, the extensive regulation is the very thing that *distinguishes* the case at bar from *United Foods*.

When compared to the regulatory schemes at issue in *Glickman* and *United Foods*, Florida's regulatory scheme pertaining to the citrus industry is much more similar to the one reviewed in *Glickman* that collectivized the California tree fruit industry. See dissent of Justices Breyer, Ginsburg, and O'Connor in *United Foods*, 533 U.S. at 420. Like the regulatory scheme in *Glickman*, Florida's Citrus Code, and the rules thereto, also set forth container, packaging and grade regulations, *Id.*, but Florida's regulatory scheme goes much further and touches upon every aspect of the citrus industry. Furthermore, like the regulations reviewed in *Glickman*, the Florida Citrus Code also contains authorizations for the stabilization of production

and marketing of citrus. § 601.154 and Ch. 600, Fla. Stat. The regulatory scheme imposed on the Florida citrus industry is not significantly different from the one at issue in *Glickman*, except that it was enacted by the Florida Legislature in order to preserve and protect both the citrus industry and the State as a whole pursuant to the State’s police power.

An advertising assessment must be viewed in the “statutory context” of the “regulatory goals of the overall statutory scheme.” *See, e.g., Glickman*, 521 U.S. at 469, 476. As previously noted, costs associated with the Florida’s regulatory scheme for the citrus industry exceed \$80 million annually, of which the generic advertising expenditure is a small fraction. The district court, however, erroneously focused on the generic advertising sliver and the high percentage of the Box Tax dedicated to that sliver. The United States Supreme Court analysis of compelled generic advertising turns on a consideration of the *overall regulatory scheme*, and cannot be applied in a vacuum to each of its parts. In this regard, the Box Tax is just one element of a broader regulatory scheme and is not significantly different from the advertisement assessment at issue in *Glickman* to warrant being declared unconstitutional.<sup>3</sup>

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<sup>3</sup> Even if the district courts’ analysis of *United Foods* and *Glickman* had been accurate, the proper remedy would have been to strike the expenditure on the advertising, not the Box Tax itself. *See Keller v. State Bar of Calif.*, 496 U.S. 1, 14-17 (1990); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-310 (1985);

Both *Glickman* and *United Foods* relied upon the two decisions which are the cornerstones of United States Supreme Court's jurisprudence regarding government-compelled funding of private speech -- *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Abood v. Detroit Board of Education*, 431 U.S. 209, (1977). Aside from the reference to *Abood* in the concurring opinion, the district court in the case at bar overlooked these crucial Supreme Court cases pertaining to compelled advertising and the First Amendment.

In *Abood*, a teachers' union had a collective bargaining agreement which maintained a provision that the school district would be an "agency shop," so that any teacher who refused to join the union was required to pay a "service charge equal to the regular dues" paid by union members. 431 U.S. at 212. The Court determined that requiring the union to represent all employees did not violate the Constitution, but that spending some of the money the employees were required to contribute on political and ideological matters unrelated to collective bargaining violated First Amendment protections. *Id.* at 235-36. Thus, while the Court found no violation with the teachers being required to pay union dues, the Court found that the fact that the dues were spent for political purposes unrelated to the union's purpose made the mandatory funding unconstitutional. *Id.*

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*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237-242 (all cases pertaining to remedies involving the compelled funding of speech).

In *Keller*, the Court clarified the *Abood* rule, explaining that it requires that activities funded from compelled association and mandatory dues must be “germane” to the purpose for which the compelled association is justified. 496 U.S. at 13. In *Keller*, the members of the California State Bar Association alleged that the mandatory attorney’s dues to the bar association constituted compelled funding of speech in violation of the First Amendment because the Bar allegedly used the money it collected in dues to finance lobbying efforts in the state legislature respecting gun-control and nuclear weapons freeze causes, filing amicus briefs in pending cases and speaking out against political candidates. *Id.* at 5, 15. The Bar, of course, also examined applicants for admission, formulated rules of professional conduct, disciplined members for misconduct, and engaged in other activities to improve the administration of justice. *Id.* at 5.

The Court found that:

[A] State may constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs.

*Id.* at 8 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 849 (1961)). In determining the constitutionality of the compelled funding of speech, the Court explained:

[T]he compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund

activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

\* \* \*

Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the State.

*Id.* at 13-14 (citations and internal quotations omitted).

Here, like the agency shop members in *Abood* and the bar association members in *Keller*, citrus producers and handlers are compelled to associate, and such association is not voluntary. Additionally, like the agency shop members and bar association members, citrus producers and handlers are not economically collectivized, but rather are collectivized in a regulatory sense. All are compelled to associate and to adhere to a regulatory scheme imposing compelled financial support involving speech. So long as the activities funded from compelled association and subsidized speech are “germane” to the purpose for which the compelled association is justified, such compelled funding of generic advertising is constitutional. *Id.* at 14. Certainly, citrus producers and handlers are as collectivized as the agency shop and bar association members in *Abood* and *Keller* so as to meet the constitutional standard set forth in those cases.

- B. The Box Tax funds a function that is germane to the overall purpose of Florida's broader regulatory purpose respecting citrus.

Moreover, there is really nothing about collectivization in the context of compelled funding of generic advertising that has any constitutional significance. Both of the decisions in *Abood* and *Keller* only required that subsidized speech be germane to a substantial state interest that justified the regulation of the industry in the first place. In both *United Foods* and *Glickman*, the Court equated the “overriding associational purpose” present with the union in *Abood* and the state bar in *Keller* with the mushroom and tree fruit marketing orders. *United Foods*, 533 U.S. at 406; *Glickman*, 521 U.S. at 473. In *Glickman*, the Court held that the tree fruit promotion program was germane to the justified associational purpose of the broader economic regulation. In *United Foods*, however, the Court observed that, unlike in *Glickman*, the mushroom marketing orders did not exist alongside other forms of economic regulation and served only to fund the advertising. The notable absence of a broader regulatory scheme in *United Foods* prompted the Court’s determination that the compelled funding was unconstitutional.

The notion of “collectivization,” as used by the United States Supreme Court in both *Glickman* and *United Foods*, merely represents a characterization of the comprehensive regulatory scheme’s effect. It is not an essential constitutional criterion. The core of the Supreme Court’s decision in *Glickman*, as restated in

*United Foods*, concerned whether the mandatory assessment was ancillary to a pervasive regulatory scheme and whether the funds collected pursuant to the program there under review were used to further its purpose. In *Glickman*, of course, it happens that the subject industry was, or was authorized to be, collectivized. But the Court's consideration of that fact did not alter the constitutional analysis by adopting "collectivization" as a constitutional requirement. Any conclusion to the contrary ignores the fact that the *Glickman* decision expressly relied upon *Keller*, in which the Court had recognized the validity of California's compelled bar dues, so long as they were expended on germane purposes, despite the fact that California lawyers certainly are not economically collectivized. There is no regulatory scheme in place pertaining to California lawyers of the nature required by the Court in the case at bar. Certainly Florida's regulation of its citrus industry is more extensive than California's regulation of its lawyers.

For the reasons set forth above, the district court in the instant case misapprehended the pertinent United States Supreme Court precedent and overlooked the key relevant principals embodied in those cases.

### **III. The Speech Funding by Florida's Box Tax Constitutes Government Speech.**

On the basis of *Michigan Pork Producers Association v. Veneman*,<sup>4</sup> and *Livestock Marketing Association v. United States Department of Agriculture*,<sup>5</sup> the district court held that the speech funded by Florida's Box Tax is not government speech. However, the general rule is that when advertising is disseminated by a governmental entity and such advertising promotes a governmental message and the advertising is completely within such entity's control, authority, and responsibility, it should properly be characterized as governmental speech. *E.g.*, *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1094-95 (8<sup>th</sup> Cir. 2000), *cert. denied*, 531 U.S. 814 (2000); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 994 (2001); *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 432 (5<sup>th</sup> Cir. 2004), *pet. for cert. filed*, 73 U.S.L.W. 3075 (June 30, 2004). Unlike the advertising at issue in *Michigan Pork* and *Livestock Marketing*, the messages funded by the Box Tax reflect a substantial governmental interest *and* are completely within the government's control, authority, and responsibility. As such, the messages funded

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<sup>4</sup> 348 F.3d 157 (6<sup>th</sup> Cir. 2003), *pet. for cert. filed*, 72 U.S.L.W. 3059 (Jan. 20, 2004), and *pet. for cert. filed*, 72 U.S.L.W. 3539 (Feb. 19, 2004).

<sup>5</sup> 335 F.3d 711 (8<sup>th</sup> Cir. 2003), *cert. granted in part sub nom. Veneman v. Livestock Marketing Ass'n*, 124 S. Ct. 2389 (2004), and *cert. granted in part sub nom. Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n*, 124 S. Ct. 2390 (2004).

by the Box Tax are governmental messages which should be characterized as government speech.

The gravamen of the government speech doctrine is that the government is free to make value judgments to convey particular messages without being subject to challenges based upon the First Amendment.<sup>6</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991); *Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001), *cert. denied*, 534 U.S. 997. It is well established, of course, that the “government is entitled to promote particular messages . . . [and] its policies and positions either through its own officials or through its agents.” *Sons of Confederate Veterans*, 288 F.3d at 616-17 (citing *Rust*, 500 U.S. at 194).

In *Knights of the Ku Klux Klan*, the court recognized that government speech may be identified based upon the central purpose of the program, the degree of editorial control exercised by the government over the content of the message, and whether the government bears the ultimate responsibility for the content of the message. 203 F.3d at 1094-95. To the same effect is *Downs*, in which the court determined that when the government speaks, “its control of its own speech is not

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<sup>6</sup> Appellant notes that in *Glickman*, the United States Supreme Court did not address the issue of government speech because it was not raised as an issue. 521 U.S. at 483, n. 2. Later, in *United Foods*, the Supreme Court reserved ruling on the issue of government speech. 533 U.S. at 416-17.

subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself.” 228 F.3d at 1013. *See also R.J. Reynolds Tobacco Co. v. Shewry*, 384 F.3d 1126, 1136 (9<sup>th</sup> Cir. 2004) (the Ninth Circuit, in upholding an excise tax targeted at the tobacco industry for the purpose of funding anti-tobacco advertising, stated that the key issue is not the targeted nature of the tax but the degree of governmental control over the message).

In *Pelts & Skins*, despite finding that the use of fees in Louisiana for the generic marketing of alligator meat and skins violated the First Amendment, the Fifth Circuit importantly recognized that it was not reviewing advertising disseminated by a governmental entity exercising complete authority, control and responsibility for the message conveyed as part of a broad regulatory scheme, such as Florida's citrus advertising campaign:

Nor are we dealing with a governmental message crafted, controlled, and expressed by an agency designed to represent state government.

365 F.3d at 432.

The United States Supreme Court specifically recognized in *Keller* that its finding of a First Amendment violation would be different if the State Bar of California were:

[A] “government agency,” and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance.... The State Bar of California is a good deal different from

most other entities that would be regarded in common parlance as “governmental agencies.”

496 U.S. at 11. Likewise, the United States Supreme Court recognized that its decision in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), would be “altogether different” had the university itself been the speaker:

The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.

\* \* \*

When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

529 U.S. at 235.

Even in *Livestock Marketing*, the case relied upon by the district court in the case at bar, the Eighth Circuit recognized that:

The government is constitutionally entitled to engage in its own speech without implicating the First Amendment. As this Court has recognized, [t]he First Amendment does not prohibit the government itself from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression.

335 F.3d at 718 (citations and internal quotations omitted).

Therefore, when advertising is disseminated by a governmental entity and such advertising promotes a governmental message and the advertising is completely within such entity's control, authority, and responsibility, it should properly be characterized as governmental speech.

The trial court below erroneously determined that “the Citrus Commission is more akin to the self-help boards and commissions . . . and, therefore, is not a government agency sufficient to warrant inclusion under the “Government Speech” exception to the First Amendment” and that “[i]t is also the Department of Citrus, and not the state government, which ‘shall administer the taxes levied and imposed’ by Section 601.15.” (R:644). Such a finding is clearly refuted by the undisputed fact that the Department of Citrus has been expressly established by the Legislature as an agency of the State of Florida, and the Legislature has mandated that the Department speak for the State on citrus related matters.

The Legislature sets out the organizational structure for the executive branch of Florida's government in Chapter 20 of the Florida Statutes, and creates therein State agencies under the powers granted by Article IV, Section 6, of the Florida Constitution. § 20.02(2), Fla. Stat. (2004). The Department is specifically created as a State agency by Section 20.29, Florida Statutes (2004). The Department is subject to the review of the Legislature and the Department's annual budget must be submitted to the Legislature and approved by the Legislature. Art. III, § 19, Fla.

Const.; §§ 11.513 and 20.051, Fla. Stat. (2004). The Department can bind the State through contracts and, like every State agency, is subject to audit by the State Auditor General's Office. §§ 20.055; 601.05; 601.13(g); 601.15(10)(d), Fla. Stat. (2004). The Department's employees all are: (i) employees of the State of Florida; (ii) paid by the State through the Chief Financial Officer; (iii) part of the State pension fund; and (iv) protected by sovereign immunity. See § 601.10, Fla. Stat. (2004); § 768.28, Fla. Stat. (2004).

The district court correctly noted that "the Florida Citrus Commission is designated the head of the Department of Citrus" and that the Commission's "membership is composed completely of those who earn their living in the Florida citrus industry." Appendix 1 at 5; *Department of Citrus v. Graves Bros.*, 889 So. 2d at 833. However, while the Commission is comprised of private citizens, it operates as a public entity and strictly within the confines of a statutory framework. The Commission is created by statute and the qualifications of the members are legislatively established. § 601.04, Fla. Stat. (2004). The Governor appoints the Commissioners who must be confirmed by the Florida Senate, and who serve at the Governor's pleasure. § 601.04(2), Fla. Stat. (2004). Significantly, the Commission operates pursuant to Florida's sunshine and public records laws, as well as numerous other laws governing how State agencies,

officers and their employees perform their statutorily-assigned tasks. *See, e.g.*, §§ 119.011; 119.07; 286.011, Fla. Stat. (2004).

While the Commission is the body put together to implement the government's programs, the Department is the state agency delegated to administer the Box Tax and disseminate the advertising. The Legislature delegated powers to the Department under Section 601.10 including the authority to promulgate rules, regulations and orders for the exercise of its powers and the performance of its duties, and stated that such rules, regulations and orders have the force and effect of law. § 601.10(1), Fla. Stat. (2004).<sup>7</sup>

The Legislature has specifically mandated an advertising campaign to be conducted by the Department. § 601.15(2), Fla. Stat. In addition, the Florida Supreme Court has specifically approved the Legislature's delegation of authority to the Department to advertise and promote Florida citrus. *Coca-Cola Co. v. State, Dep't of Citrus*, 406 So. 2d 1079, 1084 (Fla. 1981), *appeal dismissed sub nom. Kraft v. Dep't of Citrus*, 456 U.S. 1002 (1982). Furthermore, this Court has long recognized that the substantial governmental interest in the Florida citrus industry is a proper subject of the exercise of Florida's police power for advancing the

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<sup>7</sup> Neither the Commission nor the Department are given discretion with respect to the use of the Box Tax funds. It is the Legislature, not the Commission or the Department, that mandates the particular manner in which the funds are to be used and the message that is to be disseminated. 601.15(2)(a), Fla. Stat. The funds received from the Box Tax belong to the State and the Legislature controls the expenditures through its annual appropriations bill. § 601.15(7), Fla. Stat.

economic well-being of the industry, and thereby of Florida. *See Coca-Cola*, 406 So. 2d at 1079, 1084-86; *see also Florida Cannery Ass'n v. State, Dep't of Citrus*, 371 So. 2d 503, 514 (Fla. 2d DCA 1979), *aff'd sub nom. Coca-Cola*, 406 So. 2d at 1079 (both cases citing *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915) in which the U.S. Supreme Court took “judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida,” and upheld the State’s police power in regulating the industry).<sup>8</sup> A substantial governmental interest is never more clearly evidenced than by the government’s valid exercise of its police powers to support, protect and advance such an industry for the welfare of the government.

The promotion of Florida citrus, which is supported by funds collected under the Box Tax, has been legislatively and judicially determined to be crucial to the general economic welfare of the State of Florida. As such, Florida’s advertising of Florida citrus promotes an important governmental message.

The State of Florida’s advertising and marketing of citrus is very unlike the situation in *Michigan Pork* where the pork industry had extensive control of the advertising and the government exercised only limited oversight over the

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<sup>8</sup> *See also Haire v. Florida Dept. of Agriculture and Consumer Servs.*, 870 So. 2d 774 (Fla. 2004) (this Court finding that the Citrus Canker Law which allows the destruction of privately-owned citrus trees to prevent the spread of citrus canker is a valid exercise of the State’s police power notwithstanding a trial court’s determination that this law violated the United States and Florida Constitutions).

advertising programs. 348 F.3d at 162. Here, the advertising of Florida’s citrus industry is disseminated by the Department of Citrus and is completely within the Department’s control, authority, and responsibility. The opinion of the district court even recognizes that “DOC has extensive, if not exclusive, control over its generic advertising and promotional activities.” Appendix 1 at 5-6; *Department of Citrus v. Graves Bros.*, 889 So. 2d at 833.

Also, the interest that Florida has in its citrus industry is significantly more substantial than the federal government’s interest in protecting the welfare of a particular industry as considered in *Livestock Marketing*. 335 F.3d at 725-26 (rejecting the governmental speech argument and concluding that the government’s interest in protecting the welfare of the beef industry by compelling all beef producers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on First Amendment rights). See Appendix 1 at 11, n. 1; *Department of Citrus v. Graves Bros.*, 889 So. 2d at 836, n.1 (Judge Casanueva, joined by Judge Salcines, recognizing the “virtually universal identification of Florida with the citrus industry” as opposed to national regulatory schemes which benefit only a particular industry with “limited, if any, promotion of any other legitimate governmental interest”). Therefore, the cases relied upon by the district court in the instant case should not be applied to Florida’s Box Tax.

Moreover, while the district court opinion relied upon the Ninth Circuit Court of Appeals decision in *Delano Farms Company v. California Table Grape Commission*, 318 F.3d 895 (9<sup>th</sup> Cir. 2003), it overlooked the Ninth Circuit's more recent decision in *R.J. Reynolds*, 384 F.3d at 1126, which if followed in this case would require reversal on the issue of government speech. In *R.J. Reynolds*, the Court reviewed the constitutionality of a 25-cent per pack excise tax on all wholesale cigarette sales in California. 384 F.3d at 1128-29. A portion of the funds generated from the excise tax goes to develop a media campaign designed to raise public awareness about the health risks of tobacco. *Id.* at 1129. The media campaign is funded exclusively from the proceeds of the excise tax. *Id.*

Among other pertinent statements relative to its holding in upholding the excise tax, the Court in *R.J. Reynolds* stated:

There is thus a long history of excise taxation directed at particular industries in the name of public health and welfare. Despite this history, not one court has upheld a right of an industry to block otherwise legitimate government activity simply because the industry pays an excise tax. The tobacco companies offer no reason why they should be entitled to such unique treatment here.

384 F.3d 1126 at 1139.

In summary, the court misapprehended or overlooked existing precedent and failed to distinguish the difference between generic agricultural assessment programs which fund speech by non-government or quasi-government industry groups for the collective benefit of contributing producers and advertising

disseminated by the government itself as part of an overall regulatory scheme which advances a substantial government interest.

The district court's opinion in the case at bar is supported in large part by its categorization of the State of Florida's citrus advertising campaign supported by the Box Tax, as "commercial speech." See Appendix 1 at 7; *Department of Citrus v. Graves Bros.*, 889 So. 2d at 834 (Casanueva and Salcines, J.J., concurring). That categorization overlooks the fact that speech that is otherwise "commercial" when spoken by the government in exercise and support of its police power becomes "government speech." The effect of the district court's ruling is that Florida may not exercise its undisputed right to speak in furtherance and support of its police power when that government speech is funded by a tax exacted from an industry that is indisputably the proper subject of the exercise of the government's police power. No case supports that conclusion. *Contra Florida Cannery Ass'n*, 371 So. 2d at 503, *aff'd sub nom. Coca-Cola*, 406 So. 2d at 1079.

#### **IV. The District Court Opinion is Contrary to Existing Florida Supreme Court Precedent Upholding the State's Exercise of its Police Power to Advertise and Promote the Florida Citrus Industry.**

The Florida Supreme Court in *Coca-Cola* affirmed a district court decision (*Florida Cannery*) which provided a comprehensive statutory history of the Department and the extent of its authority to advertise under the State's police power. The district court in *Florida Cannery* rejected a First Amendment

challenge against a Department rule that required the prominent use of the word “Florida” on all retail containers of processed grapefruit products packaged within the state. The court stated that “[w]e have no difficulty in concluding that the advertising purpose of [the rule], economic in nature, is a valid objective for the exercise of the police power of the State of Florida.” 371 So. 2d at 515. The court recognized that:

The Florida Supreme Court had an early opportunity to consider the value to the Florida citrus industry of advertising Florida citrus fruit. *C.V. Floyd Fruit Co. v. Florida Citrus Commission*, 128 Fla. 565, 175 So. 248 (Fla. 1937). In that case the excise taxes levied by the three 1935 legislative enactments establishing the orange, grapefruit, and tangerine advertising funds were attacked on the ground that the tax was not a public purpose. The court held that it was, saying “it cannot be reasonably contended that the protection and promotion of the citrus industry in Florida is not a matter of public concern or that the legislature may not determine within reasonable bounds what is necessary for the protection and expedient for the promotion of that industry. We are committed to the theory that advertising is a proper method for promoting the public welfare and that, therefore, the tax levied to provide funds for advertising serves a public end.”

*Id.*

In *Coca-Cola Co.*, in affirming the district court’s comprehensive decision in *Florida Cannery*, this Court specifically approved the Legislature’s delegation of authority to the Department to advertise and promote Florida citrus. The Court found that the rule was authorized pursuant to Section 601.15 as part of the Department’s advertising and publicity campaign designed to increase consumption of Florida citrus products and stated that:

The department has been given responsibility for advertising and promoting Florida citrus, and increasing the sales thereof. In delegating such authority to the department, the legislature has established guidelines and directives for implementation of the law. Should the need arise, the code provides a reviewing body an adequate basis for determining whether the department is properly carrying out the intent of the legislature. We therefore conclude that the delegation of authority to promulgate the rule is proper.

*Coca-Cola Co.*, 476 So. 2d at 1084.

The Court went on to determine that, in light of the indisputably important role that the citrus industry plays in Florida's economy, the required advertising was a proper exercise of the State's police power, despite First Amendment challenge. *Id.* at 1086. The Court held that the public's interest in protecting and promoting Florida's citrus crop justified "the slight infringement" on the First Amendment rights of members of the association where "the interest served great." 406 So. 2d at 1088. The Court noted that the State was "neither attempting to stop the free flow of information nor to prevent appellants from expressing themselves on any subject." *Id.*

The concurring opinion of Judges Casanueva and Salcines expresses concern regarding the State of Florida's right to the future exercise of its police power in support of an industry critical to the welfare of the State itself when they state:

It is likewise clear that these cases [relied upon by the court] restrict the choices of a government – whether state or national – in the economic regulatory field. In the case before this court, their rationale effectively operates to limit Florida's ability, through the exercise of

its police powers, to preserve and maintain an industry of critical importance to its very economic well-being.

Appendix 1 at 11; *Department of Citrus v. Graves Bros.*, 889 So. 2d at 836. The concurrence further emphasizes this point by stating in a footnote:

Arguably, the unique and premier importance of the citrus industry to the health, welfare, and economy of this state, as well as the virtually universal identification of Florida with the citrus industry, distinguishes this case from those in which a national economic regulation benefits only a particular industry (mushroom, beef, pork) with limited, if any, promotion of any other legitimate governmental interest.

Appendix 1 at 11, n.1; 889 So. 2d at 836, n.1 (Casanueva and Salcines, J.J., concurring).

### **Conclusion**

For the foregoing reasons, the Court is respectfully urged to reverse the decision of the district court.

Submitted this 29<sup>th</sup> day of March, 2005.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following this 29<sup>th</sup> day of March, 2005, to Ken Keck, Florida Department of Citrus, Post Office Box 148, Lakeland, FL 33802-0148, and to Michael P. McMahon, Akerman Senterfitt, P.O. Box 231, Orlando, FL 42802-0231

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**BARRY RICHARD**

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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**BARRY RICHARD**