No. 18-300

In the
Supreme Court of the United States

DELANO FARMS COMPANY, et al.,
Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the compelled subsidy of promotional advertising by an industry group may be deemed "government speech," and thus shielded from First Amendment scrutiny, where no government official exercises *actual* oversight or control and that speech is not attributed to the government.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amicus Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental First Amendment principles implicated by this case. The Center has previously appeared before this Court as party counsel in *National Institute of Family and Life Advocates, et al. v. Becerra*, 138 S. Ct. 2361 (2018) and as *amicus curiae* in several cases addressing compelled speech issues similar to those at issue here, including *Frank v. Gaos*, 138 S. Ct. 1697 (*cert. petition granted*, 2018); *Janus v. Am. Fed. of State, Cnty, and Mun. Emp.*, 138 S. Ct. 2448 (2018); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union Local 1000*, 567 U.S. 298 (2012). Amicus Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as a leading public interest advocate for individual rights, including the right to free speech. PLF has repeatedly litigated in defense of the right of

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[1] Pursuant to Rule 37.2, Amici Curiae gave notice to Petitioners and Respondents more than 10 days prior to the filing of this brief. Counsel for both parties consented to the filing.

Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

individuals not to be compelled to support political or expressive messages with which they disagree. Before this Court, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and have participated as amicus curiae in compelled speech cases from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448, including *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083.

SUMMARY OF ARGUMENT

This case strikes at the core of First Amendment principles and provides this Court an opportunity to clarify the boundaries of the "recently minted" government-speech doctrine. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring). The First Amendment was intended to protect individuals from compelled support for ideas and communication contrary to their own views. However, the California Supreme Court held that compelled-subsidy of generic marketing promoted by the California Table Grape Commission was government speech and therefore immune from scrutiny under the First Amendment. This Court has held time and again that the First Amendment was ratified to protect an individual's right to speak or not speak. As evidenced below, lower courts have inconsistently applied the government-speech doctrine in a range of cases, resulting in confusion and unpredictability about what constitutes government speech. Therefore, this case provides the Court with

the opportunity to provide guidance to state and lower federal courts concerning the scope of the government-speech doctrine and how to apply it.

REASONS FOR GRANTING THE WRIT

I. The Founders Intended The First Amendment To Protect Individuals From Being Compelled To Support Ideas They Oppose

The monetary assessments at issue in this case strike at the core principles of the First Amendment. These mandatory assessments are used to promote a generic message touting the virtues of *all* table grapes in California, despite the fact that Petitioners believe their particular table grapes to be unique and superior to competitors' product. This Court has time and again affirmed the principle that it is unconstitutional to force individuals to "mouth support for views they find objectionable." *See Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. at 2463; *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781 (1988). The best evidence is that the founding generation would agree, based on a review of the "practices and beliefs of the Founders." *See McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

In assessing the extent of First Amendment protections the Founders intended, this Court has relied upon Thomas Jefferson's assertion, "[t]hat to compel a man to furnish contribution of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), in *5*

The Founders Constitution 77 (University of Chicago Press (1987)) *quoted in Keller v. State Bar*, 496 U.S. at 1; *Chicago Teachers Union v. Hudson*, 475 U.S., 292, 305, n.15 (1986); *Abood*, 431 U.S. at 234-35 n.31; *Everson v. Bd. of Ed.*, 330 U.S. 1, 13 (1947). As Jefferson also noted, "even forcing [a man] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, *Religious Freedom*, *supra* at 77.

James Madison likewise inveighed against compelled subsidy of speech: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *5 The Founders Constitution* at 82, *quoted in Abood*, 431 U.S. at 234-35 n. 31.

Although these statements were made in the context of compelled religious assessments, the same principles apply to the compelled financial support from Petitioners to subsidize commercial messages anathema to their interests and beliefs. Requiring producers and shippers of California table grapes to subsidize the generic marketing of all table grapes undermines their "comfortable liberty" of spending that same money to market their products in a way that is consistent with their values and beliefs. The mandatory assessments therefore are at the heart of the First Amendment principles—the right to speak (or not) your conscience.

This Court has repeatedly recognized that freedom of speech "'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) and citing, *inter alia*, *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. at 796–97; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–257 (1974)).

Justice Jackson famously wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *Janus*, 138 S. Ct. at 2468 (quoting *West Virginia Bd. of Ed.*, 319 U.S. at 642) (emphasis added)). And Justice Black noted, "I can think of few plainer, more direct abridgements of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting). This Court has mostly come to accept this view—holding that compelled support of ideological causes violates the First Amendment. *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *Keller*, 496 U.S. at 15-16; *Wooley v. Maynard*, 430 U.S. at 714; *West Virginia Board of Education v. Barnette*, 319 U.S. at 633-34.

The California Supreme Court's decision in this case is at odds with an original public understanding of the right to free speech. The Founders' conception of that right could not have encompassed a state mandate, like the one here, which subsidizes the

messages of an effectively private organization with contributions compelled from other private individuals or organizations who oppose the content of those messages.

II. Lower Courts Have Inconsistently Applied the Government-Speech Doctrine and Need Guidance from this Court

This Court has considered numerous cases involving state regulations that compel producers and handlers of various agricultural products to fund generic advertising of their products in coordination with other firms serving the relevant market. Some of these programs have been held to violate the First Amendment; others not. For instance, regulations to compel contributions from fruit tree producers were upheld in *Glickman v. Wilemon Bros. & Elliott*, 521 U.S. 457 (1997) (relying on an understanding of compelled speech endorsed by *Abood v. Detroit of Ed.*, 431 U.S. 209, *overruled* by *Janus*, 138 S. Ct. at 2460). A program compelling funding for generic advertising of mushrooms was voided on First Amendment grounds in *United States v. United Foods*, 533 U.S. 405. And most recently, this Court determined that a similar program involving advertising for beef did not violate the First Amendment. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005).

Whether a program is found constitutional or not has often turned on whether the advertising at issue is deemed "government speech" and therefore immune from First Amendment scrutiny. The Petitioners contend that the California Supreme Court misapplied *Johanns*, improperly expanding the government-speech doctrine. *Amici* write here to indicate that lower courts beyond California have

rendered conflicting or confused interpretations of the government-speech doctrine in a variety of contexts, meriting clarification by this Court now.

This Court has said that several factors are relevant to whether a particular message is private speech subject to First Amendment protection or government speech exempt from scrutiny: (1) a history of communication of messages by the State on the subject or the relevant form; (2) whether observers of the message would "appreciate the identity of the speaker" (as either the government or a private party) and; (3) government control over the content of the message. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. at 470-71, 473; *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015). The advertising program in *Johanns* was deemed government speech, for instance, in part because the U.S. Secretary of Agriculture or his designee approved the content of the promotional materials, thereby making it "from beginning to end the message established by the Federal Government." *Johanns*, 544 U.S. at 560. But lower courts have inconsistently applied these factors. Private organizations and government agencies are therefore reasonably uncertain today about the boundaries of "government speech" in numerous contexts. In *Summum*, Justice Souter warned, "it would do well for us to go slow in setting [the] bounds [of the emerging government-speech doctrine], which will affect existing doctrine in ways not yet explored." *Summum*, 555 U.S. at 485 (Souter, J., concurring). As he predicted, courts have struggled to reconcile the government-speech doctrine with other free speech

doctrines, including viewpoint neutrality principles, warranting clarification now by this Court.[2]

In *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314 (1st Cir. 2009), for instance, a citizens advocacy group brought suit against various town and school officials. The plaintiffs alleged that the government violated their First Amendment rights when the officials advocated for voter approval of government budgets and spending using newsletters, mail, and the town's website—while denying access to these communication channels to the advocacy group to express opposing views. *Id.* at 318. This was acceptable, according to the majority, because "the Town engaged in government-speech by establishing a town website and then selecting which hyperlinks to place on its website." *Id.* at 331. The court went on to note that, like the city in *Summum*, the Town "controlled the content of [the] message by exercising final approval authority over the selection of the hyperlinks on the website." *Id.* (citing *Summum*, 555 U.S. at 472) (quotation omitted). But a dissent from Judge Torruella strongly criticized the court's ruling, pointing to a lack of "any limiting principles" of the government-speech doctrine. *Id.* at 337. He expressed concern that lax application of the government speech doctrine "has the potential of permitting a governmental entity to engage in viewpoint discrimination . . . so long as it can cast its actions as

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[2] As scholar Joseph Blocher noted, viewpoint discrimination has long been considered a primary concern of the First Amendment, "and yet in some cases government-speech doctrine seems to allow—if not outright encourage—viewpoint discrimination in the extreme." Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. Rev. 695, 696 (2011) (internal citations omitted).

its own speech after the fact." *Id.* He warned that "it is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as 'government speech'," and queried how the doctrine might apply to a parade. *Id.* In such a circumstance, the government could choose who is permitted to march in a parade while shielding itself from charges of viewpoint discrimination by classifying the parade as government speech. *Sutliffe* is an example of a court struggling to navigate the scope and requirements of the doctrine.

The boundary of the government-speech doctrine has long vexed courts in cases involving specialty license plates for motor vehicles. There was for years a split among the federal courts of appeal as to whether specialty license plates were or were not government speech. *See Choose Life Ill., Inc. v. White*, 547 F.3d 853, 860 (7th Cir. 2008) (discussing the split, *citing Arizona Life Coal., Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004); *Sons of Confederate Veterans*, 288 F.3d 610, 621 (4th Cir. 2002); and *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006)). During that long period, it was unclear whether regulation of specialty license plates was subject to First Amendment scrutiny. This Court's *Walker* decision effectively settled that conflict, holding that messages on specialty license plates consisting of a "selection of designs prepared by the state" are government speech. 135 S. Ct. at 2244; *see also Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (describing *Walker* as marking "the outer bounds of the government-speech doctrine").

Nonetheless, confusion remains as courts inconsistently apply the doctrine even after *Walker* to the closely related subject of personalized license plates—license plates that bear unique combinations of letters and numbers selected by the licensee. The Maryland Court of Appeals, for instance, has recently held that personalized license plates are private speech, applying a First Amendment analysis to government regulation of the plates. *See Mitchell v. Md. Motor Veh. Admin*, 148 A.3d 319, 328 (Md. 2016). By contrast, the Indiana Supreme Court deems messages on personalized license plates to be government speech, exempted from First Amendment scrutiny. *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E. 3d 1200, 1207 (Ind. 2015).

One can also point to recent decisions of the Eleventh and Second Circuits to show that the California Supreme Court is off base in its application of the government speech doctrine in the *Delano Farms* case at hand.

The Eleventh Circuit acknowledged in *Mech v. Sch. Bd. of Palm Beach Cnty., Fla.*, 806 F.3d 1070 (11th Cir. 2015), that "there may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.* at 1071 (quoting *Summum*, 555 U.S. at 470) (quotation omitted). *Mech* addressed the question of whether a banner created by a private tutoring company to advertise its services was private speech in a limited public forum or government speech when it was placed on the grounds of a public school. *Id.* at 1074-75. The advertisements were deemed to be public speech because the banners were actually controlled by the school in their "design,

typeface, and color." *Id*. at 1078. The court determined that the school was effectively endorsing the messages, making them government speech. *Id*. The decision was broadly consistent with this Court's ruling in *Johanns*, where the high degree of government control over the message played a key role. *See Johanns*, 544 U.S. at 561 (noting that a government official approved "every word used in every promotional campaign").

Using a similar kind of analysis, the Second Circuit recently considered New York State's attempt to ban a food truck from public property where the business advertised itself using an ethnic slur. *See Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018). The court held that the state's refusal to permit the food truck on the property constituted viewpoint discrimination, not government speech. *Id*. at 24. The crux of the analysis was that the state did not actually control the names of the vendors and those names were not closely identified in the public mind with the government. *Id*. at 35.

By contrast, the California Supreme Court below brushed aside the undisputed facts that the Table Grape Commission's advertisements are not attributed to the State of California and "neither the [California Secretary of Agriculture] nor her employees have directly participated in the development or approval of the" advertising. *Delano Farms Co. v. California Table Grape Comm'n*, 4 Cal. 5th 1204, 1217 (2018). The elements of government control and attribution in the public mind that were key elements of government speech according to this Court in *Johanns*, the Eleventh Circuit in *Mech*, and

the Second Circuit in *Wandering Dago* are absent in the California court's analysis.

The foregoing appellate decisions indicate significant confusion as to the correct application of the government-speech doctrine. The Court has recently warned that "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse." *Matal*, 137 S. Ct. at 1758. One source of that danger is uncertainty in its application or boundaries. This Court's guidance is needed to clarify and set the bounds of this doctrine.

CONCLUSION

This case presents the opportunity for this Court to make the government-speech doctrine more precise and resolve confusion amongst state and lower federal courts as to its application. The petition for writ of certiorari should be granted.

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Respectfully submitted,

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