No. 18-300

In The
Supreme Court of the United States

DELANO FARMS CO., FOUR STAR FRUIT, INC., GERAWAN FARMING, INC., BIDART BROS., AND BLANC VINEYARDS,
Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of California

BRIEF OF CATO INSTITUTE, REASON FOUNDATION, INSTITUTE FOR JUSTICE, AND DKT LIBERTY PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When an agricultural producer is compelled by law to make payments into a collective organization that uses the money for speech aimed at benefiting the group, but the producer objects to subsidizing the group's speech and disputes that they are a "free rider," should that claim be treated any differently than an agency-fee payor's claim under *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018)?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the es-

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[1] Rule 37 statement: All parties were given timely notice and have consented to the filing of this brief. No party's counsel authored this brief in any part. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

sential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute for Justice challenges laws across the nation that regulate a wide array of both commercial and noncommercial speech.

The DKT Liberty Project is a non-profit organization founded to promote individual liberty against encroachment by all levels of government. The DKT Liberty Project advocates vigilance over government overreach of all kinds, including restrictions on civil liberties, commerce, and excessive regulation. It is particularly focused on protecting the freedom of all citizens to engage in expression without government interference. The DKT Liberty Project has appeared as *amicus curiae* in many cases before this Court, including *Riley v. California*, 134 S. Ct. 2473 (2014), *Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2013), and *United States v. United Foods*, 533 U.S. 405 (2001).

This case concerns amici because it involves widespread compulsion of agricultural producers to fund speech with which they disagree, namely generic advertisements aimed at promoting their agricultural industry as a whole, regardless of whether an individual producer wishes to establish its own identity. As the Court recently observed in *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448, 2464 (2018), and as *amici* strongly agree, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." Moreover, the Supreme Court of California embraced the notion that speech by the California Table Grape Commission constituted "government speech." Amici oppose expansion of the nascent, yet growing, government speech doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Supreme Court decided this case on the unlikely grounds that the California Table Grape Commission engages in "government speech" when it publishes commercial advertising urging consumption of table grapes. This despite the fact that no person employed by the California government has ever written, produced, or even *reviewed* the speech.

It should be obvious enough that the California Table Grape Commission's commercial messages encouraging greater consumption of table grapes is not the sort of "government speech," without which "government would not work." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). It is indeed "easy to imagine how [California] government could function" *see Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), if the Table Grape Commission weren't declaring that "Good things come in bunches," or "Life is complicated. Grapes are simple."

The point of this brief is to examine how we got to this unusual place and to propose that the Court treat forced subsidies for generic advertising the same way it treats other forced subsidies for speech.

Indeed, until *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), proposed treating checkoff program advertising as "government speech," this Court and other courts reviewed claims by objecting payors under *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). *Abood*, of course, controversially sanctioned forced agency fees to subsidize public-employee unions over the objection of non-

members. And as shown below, these "checkoff" programs closely resemble agency-fee regimes: both enterprises exist mainly to engage in speech activities for the benefit of a collective group, and both (it has long been claimed) require mandatory participation to avoid the so-called "problem" of "free riders." Ironically, the California Supreme Court in this case was the last court in America to favorably cite *Abood* as controlling precedent—just 34 days before it was overruled by this Court in *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018).

Amici respectfully submit that *Janus* and the Court's other recent compelled speech cases control here, and they offer a solution to the stream of checkoff litigation that is far preferable to expanding the government speech doctrine.

ARGUMENT

I. Agricultural Interests Have Convinced State and Federal Legislators to Authorize "Checkoff" Programs That Conscript Nearly Every Producer of Commodities to Support Generic Advertising for Their Industry.

This is the latest challenge to the constitutionality of compelled-subsidy programs designed to fund promotion and marketing of commodities. Commonly called "checkoff" programs, they are funded by government-mandated assessments on the sale of agricultural goods, which funds are then transferred to industry-led organizations and used for generic marketing programs. *See* Sarah Milov, *Promoting Agriculture: Farmers, the State, and Checkoff Marketing, 1935–2005*, 90 Bus. Hist. Rev. 505, 507–08

(2016); Jennifer W. Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That The Legal Battles Have Quieted*, 14 Drake J. Agric. L. 149, 150–52 (2009).[2]

The point of a "checkoff" program is to support the collective profitability of an agricultural industry segment by promoting demand for that segment's product:

> Commodity checkoff programs are primarily cooperative efforts by groups of suppliers of agricultural products intended to enhance their individual and collective profitability. . . . The term "checkoff " refers to the collection of a fee and comes from the concept of checking off the appropriate box on a form, like a tax return, to authorize a contribution for a specific purpose, such as the public financing of election campaigns, or, as in this case, the financing of programs to enhance producer welfare.
>
> The funds collected by checkoff groups are used primarily to expand demand (both domestic and foreign) through both generic advertising efforts and the development of new uses of the associated commodities. Although many checkoff programs also fund research intended to reduce production costs and/or enhance yields, the share of their

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[2] Contrary to the suggestion in the title of Professor Zwagerman's article, the "legal battles" over checkoff programs continue to this day.

> total budgets spent on research is generally much smaller than the share spent on demand-enhancement activities.

Gary W. Williams & Oral Capps, Jr., *Overview: Commodity Checkoff Programs*, 21 Choices, no. 2, 2nd Quarter 2006, at 53.

Agricultural checkoff programs date back to the Great Depression, when Florida established a commission to promote citrus consumption. *See* Milov, 90 Bus. Hist. Rev. at 515 ("Checkoffs originated at the state level, where legislatures saw them as a means to boost consumption during the Great Depression."). Several other states followed suit in Florida's wake. *See id.* at 516–17 (noting that Idaho (vegetables), Michigan (apples), Iowa (milk), and North Carolina (tobacco) all established commodity marketing programs between 1937 and 1947).

The federal government established its first agricultural commodity board in 1966, and Congress established a dozen boards before granting the USDA independent authority to establish programs in 1996.[3] These organizations instituted several memorable advertising campaigns in the 1970s, 80s, and 90s; some of their oldies but goodies include the American Egg Board's "The Incredible, Edible Egg," the National Pork Board's "Pork, The Other White

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[3] United States Dep't of Agric., *Agricultural Marketing Service's Oversight of Federally Authorized Research & Promotion Board Activities*, Audit Report 01099-0032-HY, at p. 3 (March 2012). Congress granted USDA broad authority over commodities boards in the Commodity Promotion, Research and Information Act of 1996, 7 U.S.C. §§ 7411–7425.

Meat," and the Cattlemen's Beef Promotion and Research Board's "Beef. It's What's for Dinner."[4]

To be sure, the impetus for these sorts of marketing programs originates from within the industry, not from the halls of the legislature or the general citizenry. *See* Williams & Capps, Jr., *supra*, at 53 (noting effort by supporters "to pressure state, and later federal, legislators to provide them with legislative authority for mandatory checkoff contributions"); Milov, 90 Bus. Hist. Rev. at 507–08 ("Checkoffs target consumer demand, and so producer groups have reached for them during market slumps. In the 1970s, egg producers lobbied Congress for a checkoff as American egg consumption reached all-time lows in the wake of concerns about cholesterol; in the 1980s, pork and beef producers did the same thing in response to evergrowing chicken consumption and the farm crisis of the 1980s."). To the extent an ordinary citizen ever learns about such a program, it can be sold as a no-cost proposition: taxpayers aren't paying for it, so what's the big deal?

And the drive to conscript producers into promoting their industry as a whole is not limited to just a few agricultural commodities. Checkoff programs have grown to the point that nine out of ten U.S.

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[4] *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 554 (2005). Other programs have yet to achieve the same level of popular significance. The National Mango Board, founded in 2004, suggests that you "Go Mango! The Super Fun Superfruit." The United Sorghum Checkoff Program, established this year, is pushing "Sorghum: The Smart Choice."—and its promotional efforts have extended to a partnership with NASCAR driver Austin Wayne Self. United Sorghum Checkoff Program, Press Release, *Austin Wayne Self Enhances Partnership With Sorghum Checkoff*, Sept. 27, 2018.

farmers contribute to commodity marketing programs. Milov, 90 Bus. Hist. Rev. at 508; Geoffrey S. Becker, CRS Report for Congress, *Federal Farm Promotion ("Check-Off") Programs* 2 (2008).

All of these payments add up: In 2016, the 22 federal commodity checkoff programs collected over $885 million in assessments. U.S. Gov't Accountability Office, Report GAO-18-54, *Agricultural Promotion Programs: USDA Could Build on Existing Efforts to Further Strengthen Its Oversight* 1 (Nov. 2017). Last year, California's farmers paid nearly $318 million in state and federal assessments. Hoy F. Carman, *Marketing California's Agricultural Production*, in CALIFORNIA AGRICULTURE: DIMENSIONS AND ISSUES, ch. 13, at p.13 (2018). The vast majority of these funds are spent on marketing and promotional efforts. *Id.* at 8; *see id.* 10–12 & tables 3–5 (collecting federal and state program expenditures showing that 66 percent of federal marketing order expenditures, 60 percent of California marketing order program expenditures, and 69 percent of California commodity commission expenditures were on advertising and promotion activities).

California has proved to be fertile ground for the growth of three basic types of forced commodity marketing programs. California has twenty-six different commodity boards established under the California Marketing Act of 1937; three "councils" (beef, dairy, and salmon), authorized by separate legislation; and twenty "commissions," which are also authorized by separate legislation for each.[5] *See generally* Cal.

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[5] These programs run the Golden State's agricultural gamut, from artichokes, avocados, and almonds, to salmon, sea urchin, and sheep. *See California Agricultural Marketing Programs: A*

Dep't of Food & Agric. Marketing Branch, *California Agricultural Marketing Programs: A Detailed Overview* (2008). The Table Grape Commission dates back to 1961, and its current iteration was established in 1967. *Delano Farms Co. v. Cal. Table Grape Comm'n*, 417 P.3d 699, 702 n.2.

II. Checkoff Programs Are Compulsory Because the Farmers Willing to Pay For Generic Advertising Don't Want "Free Riders" to "Benefit" Without Paying for It—Which Has Predictably Led to Constant Litigation.

Although their precise structure varies from industry to industry, checkoff programs all share one common feature. They require participation by every producer in the industry, regardless of whether they wish to contribute money for the benefit of their competitors. The scholarship confirms that mandatory participation is required to overcome concerns about "free riders":

> [W]hy do producers tend to promote their commodities collectively? The answer is relatively simple: free-riders and the cost of advertising. When advertising of a generic product by any specific producer in-

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Detailed Overview, *supra*, at 31 (appendix D). There seems to be no limit to the favored products the state and federal governments are willing to promote. Last year, California authorized the formation of the Spiny Lobster Commission. *Id.* Louisiana has established programs for both the alligator and fur industries. La. Stat. §§ 266 (establishing the Louisiana Fur Public Education and Marketing Fund), & 278–79 (the Louisiana Alligator Resource Fund). And in 2014, the federal government established the Christmas Tree Promotion Board. 7 C.F.R. § 1214.40.

> creases total demand for that commodity, the gains from one producer's advertising may be partially captured by other producers who do not share in the cost of the advertising. These producers get a "free-ride" in terms of increased demand from the promotional efforts by individuals or small groups of producers. This is the classic "free-rider problem" in which everyone shares in the benefits but only a few pay the costs. Also, the cost of sufficient advertising to have a perceptible effect on total demand is generally beyond the means of individual producers. Commodity checkoff programs were designed to deal with these two problems . . . .

Ronald W. Ward, *Commodity Checkoff Programs and Generic Advertising*, 21 Choices, no. 2, 2d Quarter 2006, at 56. *See also* Hoy F. Carman, et al., *Commodity advertising pays . . . or does it?*, 46 Cal. Agric. 8, 9 (March 1992) ("Once enacted, provisions of both state and federal marketing orders are binding on all producers of the affected commodity, thus avoiding the 'free riders' who can ultimately destroy voluntary industry marketing programs."); F. Bailey Norwood, et al., *Designing a Voluntary Beef Checkoff*, 31 J. Agric. & Res. Econ. 74, 83 (2006) ("Perhaps the greatest threat to the survival of a voluntary beef checkoff is free-riders. No producer will want to bear most of the checkoff cost when all producers share in its benefits.").

It wasn't always this way. The original programs were voluntary, but voluntarism eventually gave way to compulsion over "free rider" concerns. *See* Williams & Capps, Jr., *Commodity Checkoff Programs*,

supra, at 53 ("Contributions to the earliest check-off programs were voluntary. These voluntary programs, however, were plagued by the problem of free-riders, which motivated the supporters of some programs to pressure state, and later federal, legislators to provide them with legislative authority for mandatory checkoff contributions.").

Another common feature of checkoff programs is litigation brought by producers who don't appreciate being forced to pay for advertising designed to promote everyone else in the industry, including competitors. The history of dissenting producers challenging the constitutionality of compelled marketing subsidies dates back to their New Deal founding: In 1937, the Supreme Court of Florida rejected a challenge to the citrus advertising tax, holding that it was a constitutional exercise of the state's police power to protect and promote the citrus industry. *C. V. Floyd Fruit Co. v. Fla. Citrus Comm'n*, 175 So. 248, 253 (Fla. 1937).

Over the next few decades, dissenting producers continued to challenge the government's authority to compel subsidization of marketing programs—with little success. These challenges, however, typically involved questions about whether the checkoff arrangements fit within the states' taxing and police powers. *See, e.g.*, *Reynolds v. Milk Comm'n of Virginia*, 179 S.E. 507 (Va. 1935) (rejecting challenge to state fluid milk commission); *State v. Enking*, 82 P.2d 649 (Idaho 1938) (rejecting challenge to Idaho Fruit and Vegetable Advertising Commission); *Miller v. Mich. State Apple Comm'n*, 296 N.W. 245 (Mich. 1941) (rejecting challenge to state apple commission); *Louisiana State Dep't of Agric. v. Sibille*, 22 So.2d 202 (La. 1945) (rejecting challenge to Louisiana

Sweet Potato Advertising Agency); *Wickham v. Trapani*, 26 A.D.2d 216 (N.Y. App. Div. 1966) (rejecting challenge to state apple commission); *Dukesherer Farms, Inc. v. Ball*, 273 N.W.2d 877 (Mich. 1979) (rejecting constitutional challenges to compelled funding and advertising program for the Michigan Cherry Promotion and Development Program). The crux of these cases is that the government's police powers extended to stabilizing and protecting commodity markets (as through price or quantity regulations, and quality controls).

III. When Checkoff Litigation Turned to Speech Claims, the Battle Focused on the *Abood* Decision, With Side Debates Over Whether Compelled Subsidies for Commercial Speech Implicated Any First Amendment Interest.

Eventually the litigation over checkoff programs' compelled subsidies focused on a more potent constitutional theory: whether forcing agricultural producers to subsidize speech they do not support to avoid "free rider" concerns violated the First Amendment. This transition coincided with the programs' increasing focus on generic advertising (that is, speech) and with the Court's increasing development of First Amendment doctrine on commercial speech and compelled subsidies for speech.[6]

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[6] For instance, the American Egg Board was established in 1975, and began running its famous ad campaign the following year. The National Pork Board was established in 1985; "Pork. the Other White Meat" followed in 1987. The "Beef. It's What's for Dinner" campaign began in 1992, and the California Milk Processor Board started running "Got Milk?" ads in 1993. The California Raisins first appeared in 1986, released four studio albums over the next two years, and appeared in a primetime network special in 1988.

Because the parallels between checkoff programs and union agency shops were obvious,[7] the first two First Amendment challenges to checkoff programs to reach this Court largely turned on applications of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (overruled by *Janus v. Am. Fed. of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448 (2018)).[8]

In *Abood*, the Court held that compelling public employees to pay an "agency fee" to the union designated to represent them "impinges" on their speech rights, but "[t]he furtherance of the common cause"

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[7] Among other things, unions lobbied for legislative authorization of agency shop arrangements in which every worker, member or not, had to pay to support the union. *See Abood*, 431 U.S. at 214 & n. 7 (citing former Mich. Comp. Laws. § 432.210(1)(c)). And agency fee payments were mandatory, it was long contended, to avoid "free rider" problems. *Abood*, 431 U.S. at 221–22; *see also United States v. United Foods, Inc*., 533 U.S. 405, 431 (2001) (Breyer, J., dissenting) ("compelled contributions may be necessary to maintain a collective advertising program in that rational producers would otherwise take a free ride on the expenditures of others" (citing *Abood*)).

[8] Litigation over checkoff programs in the state and lower federal courts likewise evolved into disputes over *Abood*. *See, e.g.*, *Barber v. Bullard*, 93 A.D.2d 672 (N.Y. App. Div. 1983) aff'd, 459 N.E.2d 187 (N.Y. 1983) (rejecting *Abood*-based First Amendment claim to apple marketing order); *United States v. Frame*, 885 F.2d 1119, 1129–37 (3d Cir. 1989) (holding, based on *Abood*, that Beef Promotion Act implicated cattle breeder's First Amendment rights); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 434–40 (9th Cir. 1993) (holding that almond marketing program violated producers' First Amendment rights); *Cal. Kiwifruit Comm'n v. Moss*, 45 Cal.App.4th 769 (Cal. Ct. App. 1996) (upholding *Abood*-based challenge to kiwi marketing order; vacated by the California Supreme Court, 941 P.2d 54 (Cal. 1997), and remanded in light of *Glickman v. Wileman Bros. & Elliott, Inc*., 521 U.S. 457 (1997)).

justified this impingement. 431 U.S. at 222–23 (quoting *Machinists v. Street*, 367 U.S. 740, 778 (1961)). *Abood* tolerated this impingement for the "common cause" up to the point that the union's speech activities became nakedly partisan or "ideological." 431 U.S. at 232–36. It created the chargeable/non-chargeable distinction as the supposed "remedy" for improperly compelled speech on the non-chargeable side of the line. *Id*. at 237–40.

In *Glickman v. Wileman Bros. & Elliott, Inc*., 521 U.S. 457 (1997), a five-member majority rejected a First Amendment challenge to federal marketing orders requiring subsidies for tree fruit advertising. The majority rejected the challenge, largely on the grounds that the checkoff payments for speech were like "chargeable" agency fee payments in *Abood*:

> *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." . . . We held [in *Abood*] that compelled contributions to support activities related to collective bargaining were "constitutionally justified by the legislative assessment of the important contribution of the union shop" to labor relations. Relying on our compelled-speech cases, however, the Court found that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment[-]the notion that an individual should be free to believe as he will, and

> that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

521 U.S. at 471–72 (citations omitted). When it came to compelling commercial speech, the *Glickman* majority saw no similarity to non-chargeable agency fees. *Id.* at 472 ("requiring respondents to pay the assessments cannot be said to engender any crisis of conscience" since the ads merely "encourag[e] consumers to buy California tree fruit").

The majority otherwise viewed the challengers' First Amendment argument as a disagreement over the economic benefits of the "collectivist" policy (as if it were a *Lochner*ian attack on the rationality of a regulation). *See id.* at 475 ("The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. It is illogical, therefore, to criticize any cooperative program authorized by this statute on the ground that competition would provide greater benefits than joint action.").

And the majority rejected as inapposite the possibility that compelled "commercial speech" was subject to First Amendment protection. *Id.* at 474–75 ("The Court of Appeals' decision to apply the *Central Hudson* test is inconsistent with the very nature and purpose of the collective action program at issue here. . . . [T]he potential benefits of individual advertising do not bear on the question whether generic advertising directly advances the statute's collectivist goals."); *see also United States v. United Foods,*

Inc., 533 U.S. 405, 415 (2001) ("the majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns").

In a dissent joined by three other members, Justice Souter agreed about "the centrality of the *Abood* line of authority for resolving today's case," but disagreed about its application. *Glickman*, 521 U.S. at 483 (Souter, J., dissenting). Justice Souter wrote that "to survive scrutiny under *Abood*, a mandatory fee must not only be germane to some otherwise legitimate regulatory scheme, it must also be justified by vital policy interests of the government and not add significantly to the burdening of free speech inherent in achieving those interests." *Id.* at 485 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991)). As such, Justice Souter believed the mandatory support of generic advertising was more akin to using agency fees for union-image-enhancing advertising, a practice the Court found in *Lehnert*, 500 U.S. at 528–29 & 559, to violate *Abood*. *Glickman*, 521 U.S. at 485–86.

And Justice Souter rejected the notion that *Abood* protected only compelled subsidies for "ideological" speech. *Id.* at 487–88 ("*Abood* continues to stand for the proposition that being compelled to make expenditures for protected speech 'works no less an infringement of . . . constitutional rights' than being prohibited from making such expenditures. The fact that no prior case of this Court has applied this principle to commercial and nonideological speech simply reflects the fortuity that this is the first commercial speech subsidy case to come before us.") (citations omitted). Thus, Justice Souter and three other mem-

bers believed the familiar (if maligned) *Central Hudson* test should govern the analysis. *Id.* at 491 ("laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities").

The next checkoff case to reach the Court, *United Foods*, was fought along similar lines but reached very different conclusions. In *United Foods*, the majority held that the Mushroom Council's compelled subsidies violated mushroom growers' First Amendment rights because, unlike the program in *Glickman*, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *United Foods*, 533 U.S. at 412. Casting its decision in *Abood*ian terms, the majority stressed that "[t]he only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance." *Id.* at 415.[9]

And the *United Foods* majority marked a substantial departure from *Glickman* by emphasizing that the commercial nature of the speech did not change the analysis:

> The fact that the speech is in aid of a commercial purpose does not deprive re-

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[9] *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), of course, involved a challenge to the California Bar Association's use of mandatory dues for ideological or political activities. Unlike checkoff programs, however, bar associations do not exist primarily to promote and improve the generic image of lawyers—a hopeless task.

> spondent of all First Amendment protection. . . . The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

Id. at 410.

Justice Breyer dissented, arguing that the mushroom program, like the fruit program in *Glickman*, was "a 'species of economic regulation' which does not 'warrant special First Amendment scrutiny.'" *Id.* at 425 (quoting *Glickman*, 521 U.S. at 477 & 474); *see also id.* at 428 ("these circumstances lead me to classify this common example of government intervention in the marketplace as involving a form of economic regulation, not 'commercial speech,' for purposes of applying First Amendment presumptions").

Suffice it to say, these decisions did not stanch the flow of litigation over checkoff programs.

IV. The Possibility of Treating Checkoff Advertising As "Government Speech" Commanded Five Votes In *Johanns* Only Because It Offered a "Solution" To Justice Breyer's Concern That First Amendment Challenges Shouldn't Undermine Economic Regulation.

The litigation over checkoff programs returned to the Court in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). This time, the question involved

whether a checkoff program constituted "government speech." Petitioners here focus on whether the California Table Grape Commission fits within the *Johanns* decision, and we won't belabor the point here.

Rather, we emphasize the rickety foundation on which the *Johanns* Court based its conclusion that the Beef Council's speech was government speech. Specifically, the *Johanns* majority only reached five votes through Justice Breyer's reluctant concurrence, which left little doubt that he questioned whether the "government speech" theory was correct:

> The "government speech" theory the Court adopts today was not before us in *United Foods,* and we declined to consider it when it was raised at the eleventh hour. *See* [*United Foods,* 533 U.S.] at 416–17. I dissented in *United Foods,* based on my view that the challenged assessments involved a form of economic regulation, not speech. *See id.* at 428. And I explained that, were I to classify the program as involving "commercial speech," I would still vote to uphold it. *See id*. at 429.
>
> I remain of the view that the assessments in these cases are best described as a form of economic regulation. However, I recognize that a majority of the Court does not share that view. Now that we have had an opportunity to consider the "government speech" theory, I accept it as a solution to the problem presented by these cases. With the caveat that I continue to believe that my dissent in *United Foods* offers a preferable approach, I join

> the Court's opinion.

Johanns, 544 U.S. at 569 (Breyer J., dissenting).

Justice Ginsburg concurred in the judgment, but she expressly *rejected* the claim that the advertisements at issue in *Johanns* constituted government speech. 544 U.S. at 569–70. Instead, she concluded that "the assessments in these cases . . . qualify as permissible economic regulation." *Id.* (citing Justice Breyer's dissent in *United Foods*).

In short, *Johanns* is unstable footing for treating checkoff advertising as "government speech."

All the more so in light of the Court's recent warning that the government speech doctrine "is susceptible to dangerous misuse." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). The petition explains how the lack of actual government involvement here falls far short of the practice *Matal* warned would be insufficient to constitute government speech: "pass[ing] off" private speech "as government speech by simply affixing a government seal of approval." *Id.*

And the history above shows that checkoff advertising lacks the characteristics that justified treating Texas license plates as government speech in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), which decision the Court in *Matal* said "likely marks the outer bounds of the government-speech doctrine." 137 S. Ct. at 1760. In particular, there is no plausible argument that checkoff advertising is "'closely identified in the public mind' with the State," nor is there any argument here that California "maintained direct control over the messages conveyed" in the advertising. *Id.* (quoting *Walker*, 135 S. Ct. at 2249).

V. The Court's Recent Compelled Speech Cases Point to a Better Solution to Resolving This Stream of Agricultural Checkoff Litigation: Exacting (If Not Strict) Scrutiny.

Like so many courts before it, the California Supreme Court's decision began its analysis with *Abood*. This would be unremarkable but for the fact that *Abood* was overruled just 34 days after the California Supreme Court's May 2018 decision, in one of the most closely watched cases in recent memory. *Janus*, 138 S. Ct. at 2463–86. In fact, it was the last court in America to favorably cite *Abood*'s endorsement of compelled subsidies for speech that promoted collectivist ends: "notwithstanding the plaintiffs' objections to the fee, the assessment was permissible to the extent that it subsidized activities that 'promote[d] the cause which justified bringing the group together.'" *Delano Farms*, 417 P.30 at 710 (citing *Abood*, 431 U.S. at 223).

But *Janus* held that this fundamental underpinning of *Abood*—the same premise underlying the assumed validity of checkoff programs—cannot withstand modern First Amendment scrutiny. Indeed, *Janus* points the way to resolving multiple issues that have plagued checkoff litigation for decades:

First, *Janus* leaves no doubt that compelled subsidies of speech "raise[] similar First Amendment concerns" to compelled speech. *Janus*, 138 S. Ct. at 2464. In either case, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Id.*

Second, it confirms that compelled subsidy schemes are subject to at least "exacting scrutiny." *Id*. at 2464–65. Importantly, *Janus*, like *Harris v.*

Quinn, 134 S. Ct. 2618 (2014), and *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012), before it, applied the heightened scrutiny test applicable to commercial speech. *Janus*, 138 S. Ct. at 2464–65 (noting that the speech rights at issue in the agency fee context likely required greater protection); *Harris*, 134 S. Ct. at 2639 (discussing and applying commercial test, as in *Knox*). The question, at least, then, is whether a compelled subsidy "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465; *Knox*, 132 S. Ct. at 2289 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)); *see also Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375–76 (2018) (applying intermediate scrutiny to compelled disclosures in medical clinics).

Third, it clarifies once and for all that compelling speech to avoid "free rider" concerns—the core animating justification for mandatory checkoff programs—is not a compelling state interest. *Janus*, 138 S. Ct. at 2466–67. "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Id.* at 2467; *see also id.* n.4 (noting that the "collective-action problem cited by the dissent is not specific to the agency-fee context").

In this light, it should be apparent that checkoff programs' forced subsidies for speech cannot survive modern First Amendment scrutiny. Legislatures have other means at their disposal to support agricultural interests without compelling speech. And the Court has plenty to do besides continuing to ad-

judicate a stream of checkoff cases while lurching from one approach to another.

CONCLUSION

For these reasons, and those stated by the petitioner, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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