No. 21-____

IN THE

Supreme Court of the United States

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, a Montana Corporation,
Petitioner,

v.

THOMAS VILSACK, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondents,

MONTANA BEEF COUNCIL, NEBRASKA BEEF COUNCIL, PENNSYLVANIA BEEF COUNCIL, TEXAS BEEF COUNCIL, LEE CORNWELL, GENE CURRY, WALTER J. TAYLOR, JR.,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Counsel for Petitioner on Inside Cover

DAVID S. MURASKIN
Counsel of Record
PUBLIC JUSTICE, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
dmuraskin@publicjustice.net

WILLIAM A. ROSSBACH
ROSSBACH LAW, P.C.
MISSOULA, MT 59807-
(406) 543-5156

J. DUDLEY BUTLER
BUTLER FARM & RANCH LAW GROUP, PLLC
499-A Breakwater Dr.
Benton, MS 39039
(662) 673-0091

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether otherwise unconstitutional compelled subsidies of private speech are "government speech," free from First Amendment review, because Congress established the "general terms" of how the money should be spent, but the government is unaware of the specific expressions until after they enter the marketplace.

2. Whether the Court should overrule *Johanns v. Livestock Marketing Association,* 544 U.S. 550 (2005).

CORPORATE DISCLOSURE

Petitioner Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF") has no parent corporations and issues no stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *R-CALF v. Perdue*, No. 4:16-cv-41 (D. Mont. Mar. 27, 2020).
- *R-CALF v. Perdue*, No. 17-35669 (9th Cir. Apr. 9, 2018).
- *R-CALF v. Vilsack*, No. 20-35453 (9th Cir. July 27, 2021).

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JURISDICTION

The judgment of the court of appeals was entered on July 27, 2021. This Court, in an October 12, 2021 order by Justice Kagan, extended the time for filing a petition for writ of certiorari until December 24, 2021. No. 21A65. Thus, this petition is timely and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

INTRODUCTION

This case concerns a First Amendment challenge to the federal beef "checkoff" program. The Ninth Circuit upheld the challenged aspects, concluding they

produce government speech, which is free from First Amendment scrutiny. However, the government's involvement with the speech is far less than in *Shurtleff v. City of Boston*, No. 20-1800 (Arg. Jan. 18, 2022), which the Court granted to consider whether "perfunctory" governmental review of private speech can convert it to government speech. Petition for Writ of Certiorari, at ii-iii, *Shurtleff v. City of Boston*, No. 20-1800 (U.S. June 21, 2021), 2021 WL 2624327. Unlike *Shurtleff*, this case also presents important questions regarding, when, if at all, the government-speech doctrine should apply to speech outside of government forums and issued by nongovernmental actors. Thus, the Petition should be granted, or, in the alternative, this case should be held to await *Shurtleff*, with the Court then either granting review, or granting the petition, vacating the decision below, and remanding it for further proceedings consistent with *Shurtleff*.

The federal beef checkoff program is one of numerous such programs for agricultural commodities, for everything from cotton to Christmas trees. Checkoff programs impose "mandatory assessments upon" producers of goods to pay for promotions of the products, implicating the First Amendment's restriction on "compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods, Inc.*, 533 U.S. 405, 408, 410 (2001) (concerning the mushroom checkoff program).

In fact, this Court has stated the checkoffs serve no purpose except to exact money to fund "speech itself." *Id.* at 415; *see also Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 555, 561 (2005) (explaining the beef checkoff operates effectively the same as the mushroom checkoff). The entirety of the checkoffs'

exactions must be used to create "promotion[s], research, consumer information, [or] industry information" that constitute "advertising for the product" the payers make. *United Foods*, 533 U.S. at 408. The checkoffs have no "broader regulatory" objective. *Id.* at 415. Therefore, they do not fall within this Court's case law allowing the government to exact funds and produce speech if the speech is "ancillary" to a non-speech-based objective. *Id.* "[T]he principal object of the" checkoffs is generating speech. *Id.* at 412, 415.

Accordingly, the Court has explained, the government "compelling contributions" to facilitate the checkoffs' "advertising scheme" cannot be reconciled with the First Amendment's prohibition on compelled subsidies of speech. *Id.* at 415. In fact, the checkoffs' exactions are so clearly unconstitutional, this Court concluded they fail any potentially applicable level of First Amendment scrutiny." *Id.* at 410. It recognized the checkoffs may only produce "commercial speech" and thus the compelled subsidies may be subject "to lesser protection" under the First Amendment, but, it stated, even were that the case, there is "no basis … to sustain the compelled assessments." *Id.*

The checkoffs survive solely because the Court subsequently held the compelled exactions may be used for government speech. In *Johanns*, the Court considered whether beef checkoff funds transferred to two nongovernmental entities—who generate and issue speech using the funds without attributing it to the government—produce government speech. 544 U.S. 550. The Court held they did, and the compelled funding of that speech "does not alone raise First Amendment concerns," as government speech is

entirely outside the First Amendment's reach. *Id.* at 559.

This single holding has been used to maintain all of the checkoff programs, which operate similarly. *E.g.*, *Am. Honey Producers Ass'n, Inc. v. U.S. Dep't of Agric.*, 2007 WL 1345467, at *1 (E.D. Cal. May 8, 2007); *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45, 50-54 (D.D.C. 2006); *Cricket Hosiery, Inc. v. United States*, 30 C.I.T. 576, 584 (2006).

However, this Court recently explained, rote applications of the government-speech doctrine can result in its "dangerous misuse." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). Because the doctrine places compelled subsidies and compelled speech beyond the First Amendment's protections, if improperly extended, the doctrine has the potential to "silence or muffle" competing expressions. *Id.* As a result, the Court instructed "great caution before extending our government-speech precedents." *Id.*

The checkoff programs, which have relied on *Johanns* to exempt all private entities who spend checkoff funds from First Amendment review, bare out *Matal*'s concern: broad applications of the government-speech doctrine manipulate the marketplace of ideas. For instance, because the speech funded by the Egg Board, an entity created by the egg checkoff, was assumed to be government speech unreachable by the Constitution, small egg producers were compelled to subsidize attack ads designed by "large, egg producing companies" to drive competition from the market, further concentrating market power. Sen. Mike Lee, *The Incredible, Unprofitable Egg Board* (Apr. 7, 2017), https://www.lee.senate.gov/2017/4/the-incredible-unprofitable-egg-board. Throughout the 2010s,

independent pork producers were required to send money to the nongovernmental Pork Board, which then used those compelled subsidies to pay for the rights to the slogan "The Other White Meat," even though the Board had retired the slogan from use. *Humane Soc'y of the United States v. Perdue*, 290 F. Supp. 3d 5, 13 (D.D.C. 2018), *rev'd on other grounds Humane Soc'y of the United States v. Perdue*, 935 F.3d 598 (D.C. Cir. 2019). That slogan is owned by the National Pork Producers Council, "the private industry trade association" of industrialized pork producers, which used the revenue to lobby for their interests. *Id.* at 7-9.

This case asked the lower courts to enforce limits on the government-speech doctrine. It challenged the use of beef checkoff funds to produce speech designed and vetted by wholly private entities, distinct from the nongovernmental entities the Court analyzed in *Johanns*. These nongovernmental entities use the money to produce speech antagonistic to the interests of the "domestic, independent cattle producers" whom Petitioner R-CALF represents—and who are compelled to pay for the statements. App. 49 (Magistrate's Findings and Recommendations). For instance, the Montana Beef Council used Montana beef producers' checkoff funds for advertisements issued in the council's name "without distinguishing between domestic and foreign beef products," undermining the features R-CALF's members rely on to sell their goods. *R-CALF v. Vilsack*, 2016 WL 9804600, at *1 (D. Mont. Dec. 12, 2016) (recommendations on motions to dismiss and for preliminary injunction).

The lower courts, however, held a Ninth Circuit rule that courts must not "micro-manag[e] legislative

and regulatory schemes" when applying the government-speech doctrine prevented them from enforcing limits on the compelled subsidies. App. 13-14 (Ninth Circuit opinion); *see also id.* at 37 (district court summary judgment decision). In other words, in the Ninth Circuit, constitutional limits bend to avoid the courts having to police whether the government is actually complying with the Constitution.

The lower courts explained that because the beef checkoff's statutes and regulations provide a role for nongovernmental entities to participate in the program, it was immaterial whether those entities actually generated speech the government would approve. The lower courts would assume nongovernmental entities were generating government speech to avoid micro-managing the program. *See* App. 10-13 (Ninth Circuit opinion).

In this manner, the lower courts disregarded this Court's directive in *Matal* to narrowly apply the government-speech doctrine, and in fact, acted in tension with *Johanns* and its application of the doctrine. Moreover, they applied the doctrine to effectively nullify this Court's prohibitions on compelled subsidies of private speech. Under their reasoning, simply by compelling that subsidy, the government establishes the speech will be government speech insulated from First Amendment review.

In so holding, the Ninth Circuit split with the Second Circuit in *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018). Its decision is also in tension with subsequent Second Circuit case law that built on *Wandering Dago*.

In fact, the decision below is inconsistent with the United States' own representations to this Court

regarding how to apply the government-speech doctrine. The government states in *Shurtleff* that the "[m]ost important" consideration is whether the government actually "exercise[s] any meaningful control over" the speech, to ensure it reflects the government's views. Brief for the United States as Amicus Curiae Supporting Reversal, at 15, *Shurtleff v. City of Boston*, No. 20-1800 (U.S. Nov. 22, 2021), 2021 WL 5507341; *see also id.* at 30 (government speech exists where government controls "ultimate [] design" of the speech).

Thus, the decision below highlights the need for this Court to clarify the doctrine, as commentators and the Court's own personnel have repeatedly requested. *E.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 227 (2015) (Alito, J., dissenting). As one commentator put it, "Until the Court offers clear factors limiting the conditions under which the government can claim that expression is government speech, the government will likely be tempted to classify more and more expression as government speech." Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 Hastings Const. L.Q. 37, 59-60 (2016) "[T]he political costs might be negligible, if only because the public might not even know that the government was speaking. But this will mean that there may be more and more contexts in which there will be no marketplace of ideas[.]" *Id.*

The decision below is an ideal vehicle for the Court to revisit the doctrine. This case concerns the same program the Court previously considered, allowing it to articulate clear distinctions between the use of

checkoff funds here and those the Court previously approved.

In addition, this case provides the Court an opportunity to reconsider whether it was ever correct to extend the doctrine to expressions "laundered through the mouths of nongovernmental speakers," as the Court authorized in *Johanns*. Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 Sup. Ct. Rev. 33, 36, 56–57 (critiquing the rule). In the two other instances the Court has held an entity was engaged in government speech, the speech was actually expressed by governmental actors. *Walker*, 576 U.S. 200; *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). As Justice Alito explained, the most natural test for government speech is whether a reasonable observer would "really think that the sentiments reflected … are the views of the State." *Walker*, 576 U.S. at 221 (Alito, J., dissenting). *Johanns*' holding that nongovernmental actors' speech can be exempt from the First Amendment remains an outlier. The decision below enables the Court to evaluate whether it should be reconsidered.

Therefore, the Court should either grant the Petition or hold it pending *Shurtleff*, so the Court can then consider reviewing or vacating the decision below.

STATEMENT OF THE CASE

A. *Johanns* held nongovernmental actors can produce government speech, but did not clearly establish when.

In *Johanns*, this Court reiterated that when "an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity" that is an unconstitutional compelled subsidy

of speech. 544 U.S. at 557. Nonetheless, it concluded nongovernmental entities could at times produce government speech, which is free from First Amendment review, and thereby avoid the prohibition on compelled subsidies of their speech. *Id.* at 559.

Johanns characterized two federal-level entities that produce speech funded by the beef checkoff—the Beef Board and Operating Committee—as "nongovernmental entit[ies]." *Id.* at 560. It held that given the facts and circumstances in *Johanns* they produced government speech. *Johanns* reasoned their speech must be government speech because "the promotional campaigns" the Board and Operating Committee produced are "effectively controlled by the Federal Government itself." *Id.*

However, the Court did not define, what it meant by "effective control." Instead, it pointed to a variety of factors that influenced its conclusion.

First, it stated, "Congress has directed the implementation of" the beef checkoff program, and through the statutes and regulations "specified, in general terms, what the promotional campaigns shall contain." *Id.* at 561. It elaborated it meant Congress had said the beef checkoff should fund speech that promotes "different types of beef products," without using "brand or trade names," unless the Secretary of Agriculture approves their use. *Id.*

Second, it explained, although Congress "left the development of the remaining details" of the speech produced with the funds remitted to the federal government to the Beef Board and Operating Committee, it also ensured all members of the Beef Board and Committee could be removed by the Secretary of

Agriculture, and "in some cases" would be "appointed by him as well." *Id.*

Third, it emphasized, "the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department." *Id.* Further, "Officials of the Department also attend and participate in the open meetings at which proposals are developed." *Id.*

Johanns summarized this confluence of factors as showing the speech of the Beef Board and Operating Committee funded by the checkoff carries "the message established by the Federal Government" from "beginning to end," which demonstrated the government's effective control over the speech. *Id.* at 560. The Court, however, declined to say whether each aspect of this control was essential to produce government speech. *Id.* It merely explained that "[w]hen, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because" the speech is developed and issued by "nongovernmental sources." *Id.* at 562.

B. *Johanns*' vague standard has allowed the government to compel subsidies of private speech.

In the proceedings below—which brought a constitutional challenge under 28 U.S.C. § 1331 and § 1343—this case established that for decades the federal government leveraged *Johanns*' imprecision to compel producers to fund private speech. In reaching

its conclusion that the Beef Board and Operating Committee were engaged in government speech, *Johanns* recognized they were not the only nongovernmental entities allowed to use beef checkoff funds to generate speech. State beef councils could also access and use the funds this way. *Id.* at 554 n.1. For the purposes of deciding *Johanns*, the Court assumed the checkoff's exactions were only given to the state beef councils as "voluntary contributions," with the government providing a credit for money sent to the councils, so a lesser amount could be "remitted" to the federal-level Beef Board and Committee. *Id.*

In actuality, since the start of checkoff program, the federal government has provided private state beef councils discretion to take checkoff funds and use them for speech of their choosing, so long as that speech is consistent with the general terms of the program's statutes and regulations. *R-CALF v. Perdue*, 2017 WL 2671072, at *2, *6 (D. Mont. June 21, 2017) (denying Defendant-Respondents' motion to dismiss and granting a preliminary injunction). That is, in any state where the government has certified a "qualified state beef council," that council is allowed to "collect[] the $1 per-head checkoff from a cattle producer," "send[] 50 cents from each dollar to the Beef Board," but "retain[] the remaining 50 cents to fund its own promotional activities." *Id.* at *2.

After this suit, the government promulgated a rule allowing "[c]attle producers who disagree with" the qualified state beef councils' use of the funds to "direct that the full amount of their checkoff assessment be forwarded to the Beef Board." *Id.* But, even under this new rule, the councils are allowed to hold and use the entirety of the assessments they collect for up to two

months after a producer requests their money be forwarded. *Id.* at *3. Put simply, the statutes and regulations allow the councils to take and spend producers' assessments.

In fact, the statutes and regulations allow the councils to spend checkoff funds on private speech. Unlike the Beef Board or Operating Committee, the councils whose activities are challenged in this case are not set up by the checkoff's statutes or regulations, but are wholly "private corporation[s]" that are independently "organized under the laws" of their state. *Id.* at *2.[1] They are merely "qualified" by the government to collect checkoff funds. *Id.* As a result, the government "lacks the authority to appoint or remove" any of those councils' members. *Id.* at *6. In fact, beyond requiring that these state councils' speech comply with the general terms in the statutes and regulations—that the checkoff be used to promote beef, subject to minor restrictions—the statutes and regulations do not provide the government any power to "supervise" the private councils' "promotional campaigns." *Id.* at *2. The only potential governmental review of their speech comes when the councils identify the speech the checkoff funded in their "annual reports of [their] expenditures," which summarize how the money they collected and retained was expended

[1] When R-CALF initially filed this litigation, it only challenged the use of beef checkoff funds by the Montana Beef Council. However, the government subsequently explained that there are fourteen other private-qualified state beef councils that are regulated in an identical manner to the Montana council. Thus, the case was later expanded to challenge the expenditures by those fourteen councils, as well as the Montana council. *See*, *e.g.*, App. 6 (Ninth Circuit opinion).

after it had been put to use. *Id.* (7 C.F.R. § 1260.181(b)).

In sum, for more than a decade, relying on the fact that this Court did not identify any single factor in *Johanns* as dispositive—and despite the fact that the Court stated it was assuming the state councils were only funded through "voluntary contributions"—the government allowed qualified-private state beef councils to take and use compelled subsidies for their own speech, merely because they complied with the "general terms" in the statutes and regulations. This was true regardless of whether the funder or government would agree with the speech.

C. The lower courts initially recognized such subsidies are unconstitutional.

At the motion to dismiss stage, the district court entered a preliminary injunction against the Montana Beef Council continuing to siphon off beef checkoff funds to pay for its speech.[2] The district court recognized numerous distinctions between the government's controls over the Montana council and the Beef Board and Operating Committee: (i) the government's inability "to appoint or remove any of the" members of the council; (ii) the absence of any direct government involvement in determining how the council "spends the checkoff assessments"; and (iii) that the statutes and regulations only provide the most general guidance for how the money should be spent. *Id.* at *6. Given that the compelled subsidy of "a private advertising program for the sole purpose of increasing demand for a product" fails all levels of

[2] Only that council's expenditures were at issue at the time, with the other councils added later.

First Amendment scrutiny, and the distinctions between the council's and Board's and Operating Committee's supervision, the district court concluded the compelled subsidies of the state council's activities likely violated the First Amendment. *Id.* at *7.

The Ninth Circuit affirmed the preliminary injunction, noting the deferential review in such appeals. *R-CALF v. Perdue*, 718 F. App'x 541, 542 (9th Cir. 2018) (unpublished). Nonetheless, the panel majority pointed out the differences between the facts in *Johanns* and the government's involvement with the state council. "Unlike prior cases" holding private entities produced government speech, under the statutes and regulations, "the Secretary does not appoint any members" of the qualified state beef council, "does not have pre-approval authority over" its speech, and "may only decertify" the council, creating a consequence for speech with which the government disagrees, "after an action has been taken." *Id.*

D. The government purported to remedy the program, while allowing the same constitutional violations to continue.

As the motions to dismiss and for a preliminary injunction "wound [their] way from the Magistrate Judge to the Ninth Circuit, [the government] began entering into memorandums of understanding with" the fifteen private state beef councils now at issue in this suit. App. 18 (district court opinion). The memorandums create the appearance of bringing the state beef councils' operation closer to the facts of *Johanns*. But, they provide a loophole that ensures the state councils can continue to use assessments to fund private speech.

The memorandums require the government to approve the state councils' "plans and projects," including those designed by the councils' contractors. App. 4 (Ninth Circuit opinion). They also require the councils to submit "budgets and marketing plans" to the government, which the government must approve before they can be implemented. *Id.* Further, the memorandums enable government officials to participate in council meetings. *Id.* Should the state beef councils fail to comply with the memorandums' terms, they provide the government may "decertify" the council so it can no longer collect beef checkoff funds. *Id.*

However, the memorandums do not cover an entire category of speech funded by the state beef councils with checkoff money. The councils can and do "make noncontractual transfers of checkoff funds to third parties to produce promotional materials." App. 5 (Ninth Circuit opinion). Indeed, the record below establishes that for the intervened state beef councils, these third-party expenditures are a significant percentage of the advocacy they fund with the checkoff; each year those councils distribute millions of producers' dollars through noncontractual transfers. Brief of Appellant, at 20-22, *R-CALF v. Perdue*, No. 20-3543 (9th Cir. Aug. 31, 2020), 2020 WL 5412617.

The noncontractual transfers are no different than the expenditures the lower courts previously held likely funded private speech. With the noncontractual transfers, money is taken from producers and used to produce speech, but it is not speech designed or supervised by the councils. Therefore, it does not fall within the memorandums' requirement that the government "pre-approve[]" the councils' and their contractors' speech. App. 5 (Ninth Circuit opinion). The checkoff

money funds the speech of the recipients, third parties selected by the state councils that act independently. *Id.*

As part of their annual "budgets and marketing plans" submitted to the government, the councils must identify that they will transfer checkoff money to each third-party. *Id.* at 4. The third parties must also comply with the checkoff's statutes and regulations. *Id.* at 5.

But, the budgets and plans reviewed by the government cannot and do not identify the speech the third parties will generate with the checkoff funds. The transfer recipients are only asked to "identify their expenditures in an 'annual accounting'" they submit after the money is put to use. *Id.*

Put another way, even under the memorandums, the government uses its power to extract money from beef producers for speech, where all the government knows is who is receiving the money. The only limit on how the independent-third parties use the funds is that the money must be spent consistent with the general terms of the checkoff's statutes and regulations. *Id.* Neither the government nor council is involved in the development or issuance of this speech. The government can only react to the speech after it is in the marketplace.

E. The lower courts then disclaimed any obligation to stop the unconstitutional compelled subsidies of private speech.

Invoking a Ninth Circuit rule against "micro-managing" legislative and regulatory schemes, the district court and Ninth Circuit determined they could not question the noncontractual transfers authorized by

the memorandums. App. 13-14, 37. They insisted the government would police the constitutional limits on private speech it had previously flouted. *Id.* at 39.

The district court recognized the memorandums set up a "shell game." App. 38-39. Under the memorandums, a private state beef council could escape government approval of the checkoff-funded speech by "creat[ing] another private entity, [and] transfer[ing] checkoff money to it to fund [that entity's] speech." *Id.* at 38. In doing so, the district court acknowledged the state beef council would "evade the First Amendment's prohibitions" by funding purely private speech. *Id.* In this manner, the memorandums allowed for the same uses of the checkoff the lower courts previously held likely violated the First Amendment.

However, the district court stated that given the Ninth Circuit's prohibition on "micro-managing legislative and regulatory schemes" when applying the government-speech doctrine, there was nothing it could do. *Id.* at 37-39. It candidly explained the consequences of this reasoning, so long as the government re-routes exactions for speech in a roundabout manner, Ninth Circuit courts will not ensure the "government must control all speech" generated by those exactions. *Id.* at 39. Compelled exactions under the checkoff can be used to fund private, not government speech. Nonetheless, the district court explained that under the Ninth Circuit's anti-"micro-managing rule" the government, which set up this scheme, would be left to "remedy any shell game that does exist." *Id.*

A Ninth Circuit panel affirmed the district court's analysis in full. It underscored the circuit's rule against "micro-managing" allows it to chip away at

the limits of the government-speech doctrine, nullifying this Court's First Amendment jurisprudence.

It characterized *Johanns*' conclusion that the federal-level Beef Board and Operating Committee were engaged in government speech as relying on three factors: (i) that statutes and regulations set up the program; (ii) that those statutes and regulations "specify the general content of the speech"; and (iii) that the government "exercises final approval authority over every word used in every promotional campaign." App. 8-9.

However, it acknowledged that due to the circuit's fear of "micro-managing," the Ninth Circuit has dropped the third consideration from its requirements. The panel explained in the circuit's first case applying *Johanns* to a checkoff program, it upheld the program where "the State had specified the overall goal of the program," but only reviewed "an annual statement of contemplated activities," not each statement the exactions funded. *Id.* at 9. Subsequently, the court upheld a checkoff program where there was a more detailed "legislative directive" for how the money should be spent, without requiring any further governmental review of "the actual messages promulgated." *Id.* at 10.

Given this background, the panel explained the Ninth Circuit requires "'less control'" over the speech than in *Johanns*. *Id.* at 9. In particular, the Ninth Circuit only requires the government have the "*ability* to control speech." *Id.* at 13 (emphasis in original). In the Ninth Circuit, government-speech does not require the government to "exercise" any authority over the speech. *Id.*

Riding this slippery slope, the Ninth Circuit then concluded the use of checkoff funds by entities which receive noncontractual transfers must be government speech and constitutional because Congress set up the checkoff's exactions and stated nongovernmental entities could have a role in generating the speech. *Id.* That Congress had directed the money be taken for a particular kind of speech and authorized private parties to generate that speech was sufficient government involvement to transform the speech into government speech. The panel particularly emphasized that under the memorandums, third parties that receive the transfers must abide by the general terms Congress set out to govern the program. *Id.* at 12. That, combined with the fact that the Beef Board is authorized to produce speech at the federal level—showing Congress "contemplated" nongovernmental entities would be involved in crafting the speech—meant no further "oversight [should] be required" for the noncontractual transfers. *Id.* at 11-13.

Allowing the exception to fully swallow the rule, the panel concluded that if there is an unconstitutional compelled subsidy that funds a private-entity's speech, the mere fact that Congress compelled this subsidy means the exaction is funding government speech. Otherwise, the Ninth Circuit insisted, courts risked "micro-managing legislative and regulatory schemes," and it believed enforcing the Constitution against those schemes is "a task federal courts are ill-equipped to undertake." *Id.* at 13-14.

Creating the façade of a more limited holding, the panel pointed to two other purported government controls over the noncontractual transfers, which it claimed helped establish the recipients put the

checkoff towards government speech; but the opinion itself demonstrates these controls are not actually present. First, the panel stated that the state beef councils must provide the government an annual plan containing a "general description" of the councils' anticipated expenditures and "give [the government] advance notice of all board meetings." App. 12-13. The panel suggested this would allow the government to weigh in on the independent-third-parties' speech. *Id.* However, as noted above, the panel also explained the third parties who receive noncontractual transfers are authorized to spend checkoff funds and only need to identify how they used that money *after* it is spent. App. 5. The only limit placed on those expenditures is that they must "promot[e] beef" consistent with the statutes' and regulations' general terms. *Id.* As a result, neither the annual plans nor the state beef councils' meetings are mechanisms for the government to have input on how the third parties spend the money, beyond confirming the speech would be consistent with the statutes' and regulations' "general terms."

Second, the Ninth Circuit panel suggested the expenditures were controlled by the government through the "threat" that the councils could be decertified from receiving checkoff funds if they violated the terms of the memorandums. App. 13. But, the panel recognized decertification would only occur if the government "disapprove[d] of the use of th[e] funds" *after* they were spent. *Id*. Decertification is not and cannot be a means to control the expressions and ensure they convey the government's views. *Id*. Decertification is merely a remedy after a compelled subsidy has been unconstitutionally used for private speech with which the government disagrees.

Moreover, the panel elsewhere recognized it was overstating the government's decertification authority. It earlier explained the memorandums only empower the government to "decertify a noncompliant" state beef council. App. 4. A council is compliant if it informs the government of how the checkoff money will be used, which only requires a council say to whom it will give the money to be spent consistent with the statutes' and regulations' general terms. *Id.* at 4-5. So, even if a third party uses the money in a manner with which the government disagrees, if the council had notified the government that it was giving that third party money ahead of time, the government would have no recourse.

At bottom, the panel concluded that because Congress created a system where nongovernmental entities could "implement[]" Congress' general goals for the program, that was sufficient to ensures any private party who obtains checkoff funds is engaged in government speech. *Id.* at 10, 12-13. Whether that party worked under the actual or theoretical direction of the government was irrelevant. *Id*.

REASONS FOR GRANTING THE PETITION

Assuming the Court agrees with the *Shurtleff* petitioners that the government speech analysis turns on the nature and extent of the government's actual review of the speech before it is issued, the decision below must be vacated as inconsistent with that holding. The petitioners in *Shurtleff* have argued the essential controls for government speech involve "*direct control* over the messages" with the government "*actively exercis[ing]* this authority." Brief for the Petitioners, at 49, *Shurtleff v. City of Boston*, No. 20-1800 (U.S. Nov. 15, 2021), 2021 WL 5404792 (emphasis in

original). "[T]he government cannot, merely by reserving itself 'approval' rights convert to government speech [] private speech." *Id.* at *51. The Ninth Circuit decision below held the government did not need to have approval authority (it did not), and it certainly did not need to exercise that authority for the speech to be government speech (it did not), it merely had to set up the scheme to exact money for private speech and that would be labeled government speech. App. 13. Therefore, a holding for the petitioner in *Shurtleff* requires vacatur here.

However, given the extreme expansion of the government-speech doctrine in the Ninth Circuit, the decision below is also worthy of this Court's intervention in its own right. The Ninth Circuit's decision splits with the Second Circuit because the latter has followed this Court's precedent in *Matal, Johanns*, and *United Foods*.

Moreover, because this case concerns the exact same program the Court previously reviewed in *Johanns*, it is a useful vehicle through which this Court can enforce the boundaries of the government-speech doctrine. The Court need not reason through comparison to other contexts, but can draw stark lines showing what renders the speech here private speech.

This Court has recognized the government-speech doctrine's hazy factors make its implementation suspectable to the manipulation below and that requires this Court's intervention. *E.g.*, *Matal*, 137 S. Ct. at 1758. Contrary to this Court's direction in *Matal*, the Ninth Circuit still relied on its view it could pick-and-choose among and accept pale approximations for the facts the Court identified as producing government speech. Therefore, particularly if the Court does not

specify limits on the doctrine in *Shurtleff*, it should take this clear opportunity to identify the limits on this carve-out to the First Amendment.

The decision below also presents an issue not in *Shurtleff*, whether in *Johanns* the Court properly extended the government-speech doctrine to speech issued by nongovernmental entities. This Court has increasingly indicated government speech should not exist where the government is not identified as the speaker. *E.g.*, *Walker*, 576 U.S. at 221 (Alito, J., dissenting). Commentators too have argued for this limit. The Court should take this case to rein in the doctrine in this manner.

I. The Ninth Circuit's Decision Splits with the Second Circuit.

The decision below requires review or vacatur because it cannot be reconciled with the Second Circuit's holding in *Wandering Dago*, 879 F.3d 20. Where the decision below held the government merely authorizing an exaction for private speech transformed that speech into government speech, the Second Circuit explained "speech that is otherwise private does not become speech of the government merely because the government … in some way allows or facilitates it." *Id.* at 34; *see also New Hope Fam. Servs., Inc. v. Poole,* 966 F.3d 145, 171 (2d Cir. 2020) (under *Matal* that the state has "authorize[d]" the speech is insufficient to convert speech to "government speech"). The additional governmental involvement the Second Circuit looked at to determine whether the speech was government speech included if there is: (i) "record evidence of a well-established history of [the government's] controlling the [speech]"; and (ii) a "record in this case [that] support[s] concluding" the speech

"express[es] [the government's] own message." *Wandering Dago*, 879 F.3d at 35, 36.

The Second and Ninth Circuits have articulated two opposing views of the limits on the government-speech doctrine. The Ninth Circuit has concluded congressional authorization of a compelled subsidy is all that is required for courts to find it funds government speech. The Second Circuit has held something more is necessary and—in particular tension with the Ninth Circuit—that the government's actual involvement with producing the speech *is* a central facet of government-speech.

Accordingly, in implementing its approach, the Second Circuit effectively rejected the Ninth Circuit's prohibition against "micro-managing" statutory and legislative schemes to enforce the First Amendment. The Second Circuit explained that under the Supreme Court's recent decision in *Matal* any expansion of the "government speech" doctrine must be done with "'great caution.'" *Id.* at 35 (quoting *Matal*, 137 S. Ct. at 1758). As a result, in evaluating whether something is government speech, the courts must test each form of speech funded with a compelled subsidy against each of the "factors" identified in the Supreme Court's decisions as relevant to the analysis—including the government's role in actively controlling the speech. *Id.* The absence of any factor counsels against holding speech is "government speech." *Id.*

In contrast, the Ninth Circuit explained it will allow the government to whittle away the controls over the speech, while still calling it government speech. App. 9-10, 12-13. In the Ninth Circuit, administrative flexibility is the primary concern rather than constitutional compliance, whereas the Second Circuit only

holds programs that truly meet the standards produce government speech.

The Second Circuit's application of its rules to the facts of *Wandering Dago* underscores just how distinct the circuits' approaches are. Unfettered by the Ninth Circuit's fear of "micro-managing," the Second Circuit examined each type of speech at issue separately, considering the government controls present over those particular expressions. First, it turned to whether the city-defendant's regulation of food trucks appearing in a public space converted the truck's branding into government speech, so that the government could deny trucks access because it disagreed with their expressions—viewpoint discrimination that would be unacceptable under the First Amendment, but which would be free from First Amendment review if the government-speech doctrine applied. The Second Circuit concluded the government's involvement with those expressions was insufficient to turn them into government speech. *Wandering Dago*, 879 F.3d at 35.

Next, digging into the complexity of the program, the Second Circuit explained it was "more than simply a grant of access" so that the trucks' branding could be displayed, but also involved government "assistance to vendors" in publicizing their presence. *Id.* at 36. It analogized this to using government exactions to fund speech. *Id.* at 36-37. Separately analyzing this speech, the Second Circuit concluded it was not government speech because the record showed the government did not "adopt" the speech as its own. *Id.* The absence of such engagement with the speech established it was not government speech.

Where the Ninth Circuit has determined that a program that carries out a generic governmental objective necessarily facilitates government speech, the Second Circuit examines the "structure of the program," and the government's actual involvement with the speech to determine whether it truly is government speech. *Id.* at 37. Relatedly, where the Ninth Circuit concluded that concerns with "micro-managing" means it will not be troubled by specific expressions that might exceed constitutional limits, so long as the program generally seems compliant with the Constitution; the Second Circuit determined it had to review the "design" of the program in detail to assess whether all of the expressions satisfied the Constitution's requirements. *Id.* At bottom, people in the Second Circuit have significantly greater protections against the government hiding behind the government-speech doctrine to manipulate discourse. The Ninth Circuit's indifference to First Amendment concerns requires this Court's intervention.

II. The Ninth Circuit's Decision Conflicts with This Court's Decisions in Numerous Ways.

As *Wandering Dago* suggests, the Ninth Circuit's holding also disregards this Court's government-speech precedent. In addition, it is inconsistent with *United Foods*' limit on compelled subsidies of speech. Thus, the Court should grant the Petition to ensure its directives are implemented by the lower courts.[3]

[3] Similarly, as noted above, should the Court adopt the petitioners' and United States' view in *Shurtleff*, that the focus of the government-speech analysis is on whether the government actually reviews the speech before it issues, it should grant the

Footnote continued on next page

Contrary to the Ninth Circuit's government-speech doctrine, which preferences regulatory convenience over enforcing First Amendment limits, in *Matal* this Court stated "we must exercise great caution before extending our government-speech precedents" 137 S. Ct. at 1758. Indeed, while continuing to apply the multi-factor test from earlier "government-speech" cases, the Court noted that its existing cases "mark[] the outer bounds of the government speech doctrine," *id.* at 1760, further counseling against the Ninth Circuit's laissez-faire approach.

Moreover, the Ninth Circuit's decision is not only inconsistent with the rule laid down in *Matal,* but this Court's application of that rule. In *Matal*, the Court explained that registered trademarks could not plausibly be characterized as government speech because "the Federal government does not dream up these marks," nor does it "edit marks submitted for registration." *Id*. at 1758. The government's only role is to enforce a statutory requirement that the mark be "viewpoint-neutral." *Id.* The Court explained this level of government involvement does not "remotely" compare to facts present in the prior government-speech cases and thus could not allow for the conclusion the speech is government speech. *Id.* at 1759.

Of particular note, the *Matal* Court stressed how distinct the government's role in reviewing trademarks is from its involvement with the Beef Board's and Operating Committee's speech as described in *Johanns*. In revisiting *Johanns*, the Court emphasized that, there, the government did not merely establish

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petition, vacate the decision below, and remand the case for further proceedings.

"guidelines for the content" of the speech via statutes and regulations, but also "'officials attended the [Beef Board and Operating Committee] meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad.'" *Matal*, 137 S. Ct. at 1758 (quoting *Johanns*, 544 U.S. at 561). This helped show in *Matal* that the mere application of the statutory rules and regulations governing trademarks was insufficient to convert that private speech into "government speech." *Id.* Therefore, particularly given this Court's determination that the government-speech doctrine should not be easily expanded, *Matal* held trademarks could not constitute "government speech." *Id.*

Under the Ninth Circuit's decision, however, the fact that the government is enforcing the general statutory and regulatory terms is sufficient to ensure the beef checkoff's speech is government speech. App. 13. The Ninth Circuit had no concern that the government did not determine the content of the speech, and was only able to review and react to the speech after it was issued. *Id.* This Court in *Matal* reiterated that the "government[-]speech" doctrine must be narrowly applied to ensure that each form of "government speech" is controlled by the government "from beginning to end," underscoring *Johanns*' emphasis on the government's actual involvement with reviewing and approving the speech. 137 S. Ct. at 1759. The decision below, building on Ninth Circuit precedent, allows courts to ignore the government's involvement at the end entirely, focusing solely on whether the government provided some direction for where private speech should begin.

For the same reasons, the decision below is also inconsistent with *United Foods*. In *United Foods*, this Court explained that there was "no basis" to sustain the checkoffs' compelled subsidies if they fund private speech. 533 U.S. at 410. The Court considered an essentially identical scheme to the beef checkoff, through which it recognized Congress directed "mandatory assessments upon handlers of fresh mushrooms" to promote the industry as a whole. *Id.* at 408. Just like here, the mushroom checkoff directed that the money be used for "generic advertising" of the goods, which led certain payers to object because they were subsidizing speech that failed to highlight the unique qualities of their products that made them more desirable. *Id.* at 408-09. The Court explained,

> 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. Therefore, it held the exactions unconstitutional. *Id.*

However, the Ninth Circuit sustained the exactions here when the government's limited role is identical to what was described in *United Foods*. As the Ninth Circuit explained, the only restriction on the use of the money by recipients of noncontractual transfers is the speech they craft must "abide by the principles of the Beef Act." App. 5. Nonetheless, the Ninth Circuit allowed the exactions to continue,

failing to acknowledge its holding is at odds with *United Foods*.

III. This Case Is a Good Vehicle to Rein in the Government-Speech Doctrine.

Because the Ninth Circuit applied the government-speech doctrine based on nominal government involvement—merely that Congress enacted a statute that allowed it to exact funds for a particular type of nongovernmental speech—this case allows the Court to establish a stark line beyond which the government-speech doctrine cannot reach. Given this case's similarities to *United Foods*, doing so would also enable this Court to make clear that it continues to establish limits on the compelled subsidy of private speech. Further still, because this case involves the same program as *Johanns*, it is an especially useful vehicle through which to articulate the facts necessary to establish government speech. The Court will not have to reason by analogy, but can state what is missing here that makes it distinct from *Johanns*. While government speech will arise in a variety of contexts, by articulating the necessary controls in similar circumstances, the Court will reduce the likelihood that confusion with and inconsistent applications of the doctrine will continue.

Such clarity is something commentators have requested. They have explained that because *Johanns* does not make clear which factors are required for government speech, courts have struggled with determining what controls render speech government speech. Jeremiah Paul, *Is A Grape Just A Grape? California Table Grape Commission's Mandatory Assessment Funded Generic Advertising Scheme vs. Grower's First Amendment Rights*, 21 San Joaquin

Agric. L. Rev. 207, 223–24 (2012). This lack of "direction [] is resulting in inconsistent and inequitable application of the law." *Id.*; *see also* Daniel E. Troy, *Do We Have A Beef with the Court? Compelled Commercial Speech Upheld, but It Could Have Been Worse*, 2004-2005 Cato Sup. Ct. Rev. 125 (warning *Johanns* allows for "boundless" expansion of the government-speech doctrine).

Perhaps more importantly, this case allows the Court to consider whether *Johanns* properly applied the government-speech doctrine to the expressions of nongovernmental entities in the first place. *Johanns* has always been an odd fit with the government-speech case law. The Court's subsequent government-speech decisions have been concerned with speech issued by and in the name of the government itself.

In *Summum*, the Court considered whether a municipality's decision to place a monument in a public park to display the municipality's values was government speech. 555 U.S. at 465. The Court explained that while "[t]here may be situations in which it is difficult to tell whether a governmental entity is speaking on its own behalf," this was not one because the message was chosen and expressed by the government itself. *Id.* at 470. With this background, it held the monuments government speech. *Id.* at 481.

In *Walker*, the Court considered whether specialty license plates were government speech. 576 U.S. 200. It emphasized that they were because license plates "long have communicated messages from the States." *Id.* at 211. The Court went on to note that a license plate "is a government article" and bears the name of the state itself. *Id.* at 212. Those direct endorsements

of the speech by the government made the application of the government-speech doctrine logical.

Johanns is the outlier in this trilogy. There, the Court applied the government-speech doctrine not to speech identified as that of the government, but to speech of another that the government merely had a role in crafting. 544 U.S. at 560-61. The decisions below demonstrate the absurd result that can stem from expanding the doctrine in this manner: speech the government is unaware of and is being issued in the name of an independent-third party is identified as government speech, because the government had a narrow, technical involvement with its creation. While it might be necessary to limit First Amendment review of the government's expressions when it is making them—so that it can participate in society without its speech constantly being subjected to heightened scrutiny—it is entirely unclear why those same protections should extend to expressions the government does not wish to associate itself with.

Lest there be any doubt about the problem created by *Johanns* and that this case highlights, recent academic work on the government-speech doctrine has noted the Court was ill-advised to extend it to speech by nongovernmental entities. It explains, the government-speech doctrine is most sensibly justified based on a "transparency principle." Helen Norton, *The Government's Speech and the Constitution* 6 (2019). With speech truly issued by the government, "the public [can] identify" the speech as government speech, take account of it as such, and thereby better evaluate both its government and the speech itself. *Id.* Thus, exempting the speech from First Amendment scrutiny follows, as it enables discourse that furthers society.

With this understanding, *Johanns* was not correctly decided. The government was not merely using the Beef Board and Operating Committee to formulate speech to be issued in the government's name, but allowing those entities to issue speech so the governmental "source" was not apparent. *Id.* at 42-43. None of the benefits of protecting government speech from First Amendment scrutiny exist with the speech in *Johanns*, making the government-speech doctrine's application an unwarranted and dangerous protection of these expressions. Even if the government has a role in crafting the message, observers will not know that message comes from or should be associated with the government. *Id.* But, these expressions are insulated from First Amendment review, creating the potential to "muffle" rather than further debate, by flooding the market with speech funded by the government, but whose origins and associations are hidden. *Id.*

The concern with allowing nongovernmental actors to issue government-speech is hardly isolated. Others have questioned applying *Johanns*' logic of applying the doctrine when the public cannot attribute the speech to the government itself. *E.g.*, Hemel & Larrimore Ouellette, *supra*, 2017 Sup. Ct. Rev. at 56–57. This case presents the problem, and allows the Court to consider the recommendation that it prohibit the government-speech doctrine's application to expressions issued in the name of nongovernmental actors.

IV. Clarifying the Limits of the Government-Speech Doctrine Is of National Import.

The above citations demonstrate the import of the Court addressing the questions presented, but the

Court need not look that far to conclude the Petition should be granted. This Court's members have repeatedly called for it to revisit the scope of the government-speech doctrine—as it appears interested in doing in *Shurtleff*. In *Summum*, Justices Stevens and Ginsburg only concurred with the majority because the decision "signal[ed] no expansion of that doctrine," but the opinion calls the doctrine of "doubtful merit." 555 U.S. at 481 (Stevens, J., concurring). In particular, the concurrence noted discomfort with the fact that the doctrine did not ensure the public would actually associate "government speech" with the government, but rather the doctrine allows government speech to be filtered through other speakers, enabling the government to hide its expressions. *Id.*

More recently, Justice Alito writing for himself, Chief Justice Roberts, Justice Scalia, and Justice Kennedy, explained that the existing "capacious understanding of government speech takes a large and painful bite out of the First Amendment." *Walker,* 576 U.S. at 222 (Alito, J., dissenting). That opinion articulates an alternate test for government speech, which would not allow either *Johanns* or the lower courts' decisions here to survive: would an observer "really think that the sentiments reflected" are those of the government." *Id.* at 221. The dissent also highlighted the challenges of applying the Court's present multifactor test, noting that even in *Walker* it is "badly misunderst[ood]" and requires explication regarding what "factors" drive the conclusion that something is "government speech." *Id.* at 227-28.

In *Johanns* itself, Justice Souter, writing for himself, Justice Stevens, and Justice Kennedy, suggested the Court erred in applying the government-speech

doctrine in that case, proposing a similar rule to Justice Alito's dissent: "I take the view that if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message[.]" *Johanns*, 544 U.S. at 571 (Souter, J., dissenting).

This Court has made clear it will need to revisit the government-speech doctrine. This case allows it to do so by considering the same program from which the doctrine sprung. That will help ensure clarity regarding when something truly expresses the government's views. It also allows the Court to correct the course of the doctrine, walking back its decision to insulate speech created by nongovernmental actors and issued in their name from First Amendment review, which many have suggested is questionable.

CONCLUSION

The Court should grant the Petition or, in the alternative, hold the case for the decision in *Shurtleff*, No. 20-1800, and either grant, vacate, and remand, or consider whether certiorari is warranted in this case at that time.

Respectfully submitted,

DAVID S. MURASKIN
Counsel of Record
PUBLIC JUSTICE, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
dmuraskin@publicjustice.net

WILLIAM A. ROSSBACH
ROSSBACH LAW, P.C.
MISSOULA, MT 59807
(406) 543-5156

J. DUDLEY BUTLER
BUTLER FARM & RANCH LAW
GROUP, PLLC
499-A Breakwater Dr.
Benton, MS 39039
(662) 673-0091

Counsel for Petitioner

December 17, 2021