No. 18-300

In the
Supreme Court of the United States

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

Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,

Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Delano Farms Company is a wholly owned subsidiary of Anderson & Middleton, a Washington state corporation, which is privately held and does not issue shares to the public.

Four Star Fruit, Inc. is a privately held California corporation, has no parent corporation, and does not issue shares to the public.

Gerawan Farming, Inc. is a privately held California corporation, has no parent corporation, and does not issue shares to the public.

Bidart Bros. is a privately held California corporation, has no parent corporation, and does not issue shares to the public.

Blanc Vineyards is a privately held California limited liability company, has no parent corporation, and does not issue shares to the public.

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REPLY BRIEF FOR THE PETITIONERS

Under *Michigan v. Long*, the Court has jurisdiction to review the decision of a state court of last resort when that court "uses federal law to guide [its] application of state law." 463 U.S. 1032, 1039 (1983). Such is the case here. In the decision below, the California Supreme Court chose to "adopt [the] reasoning" of this Court's *Johanns* decision to define the contours of the government speech doctrine under the state constitution. Pet. App. 48. In so doing, the court did not distinguish between government speech analysis under California law and the analysis under the First Amendment, and issued no "plain statement" that its holding was based purely on state law or that "state-law sources" created "rights distinct from, or broader than, those delineated" under federal precedent. *Florida v. Powell*, 559 U.S. 50, 57-58 (2010). Because the court relied on federal precedents to interpret state law, this Court has jurisdiction under *Long*.

Imbued with jurisdiction, the Court should grant certiorari. Supreme Court Rule 10(c) provides that certiorari is appropriate where "a state court . . . *has decided an important federal question in a way that conflicts with relevant decisions of this Court*," and that is precisely the case here: the California Supreme Court purports to apply this Court's government speech analysis but turns that doctrine on its head. The case presents a clean legal question for the Court to decide, as the parties do not dispute facts relevant to the legal analysis. Addressing this issue will help correct already observable splits brewing in lower courts regarding how strictly to apply *Johanns*.

I. This Court Has Jurisdiction To Review the Decision Below

Respondent argues that this Court has jurisdiction only if the case includes a federal claim under the First Amendment. Opp. at 12. Tellingly, however, Respondent cites no cases applying that rule, *because no such rule exists*. To the contrary, on numerous occasions, the Court has exercised its jurisdiction to review state high court decisions arising under state law when the state court bases its analysis on federal case law. This is necessary to preserve uniform interpretation of federal precedent.

A. The Decision Below "Rests Primarily On" Federal Precedent

In *Michigan v. Long*, the Court held that it has jurisdiction to review decisions of the state high courts of last resort when they "use[] federal law *to guide* their application of *state law*." 463 U.S. at 1039 (emphasis added). That is precisely what the court below did, relying on *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550 (2005), and other federal decisions to set the contours of the government speech doctrine.

Indeed, the *Long* Court stated that where a "state court decision fairly appears to *rest primarily* on federal law, or *to be interwoven* with the federal law," this Court has jurisdiction to review that decision. *Long*, 463 U.S. at 1040 (emphases added). Subsequent cases have revisited and reaffirmed the standard set by *Long*. *See* Pet. at 15-18 (collecting cases). The decision below indisputably "rest[s] primarily on" its erroneous interpretation of federal law. In addition to *Johanns*, the court cites and applies other decisions of this Court in drawing its conclusions, including *Keller*

v. State Bar of California, 496 U.S. 1 (1990), *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 135 S.Ct. 2239 (2015). It cites no California precedent on any significant point independent of federal law regarding government speech doctrine. The decision thus relies primarily on federal precedent, or *at an absolute minimum* is deeply "interwoven" with federal precedent. By either metric, jurisdiction is secure.

B. The California Court Made No "Plain Statement" Asserting Its Decision Relied Solely Upon State Law

Had the state court wished to limit its holding to the interpretation of California law and avoid this Court's review, *Long* instructs that it should have issued a "plain statement" that its decision "rests upon *adequate and independent* state grounds." 463 U.S. at 1042 (emphasis added); *see also Powell*, 559 U.S. at 57 (noting that such an opinion must "indicate[] *clearly and expressly* that it is alternatively based on *bona fide separate, adequate, and independent* grounds") (emphasis added). It did not do so.

The Court's "plain statement" requirement is not satisfied where, as here, a lower court makes passing reference to provisions in its own state's constitution while relying primarily on federal law in rendering its decision. *See Powell*, 559 U.S. at 57 (finding no "plain statement where "the court at no point *expressly asserted* that state-law sources gave Powell rights distinct from, or broader than, those delineated" under federal law despite "invoking" the state constitution) (emphasis added); *Harris v. Reed*, 489 U.S. 255, 266 n.13 (1989) ("It is precisely with regard to such an

ambiguous reference to state law in the context of clear reliance on federal law that *Long* permits federal review of the federal issue.").

Respondent observes that the court sprinkled a few unremarkable terms like "persuasive" and "guidance" through its opinion, Opp. at 16, but at no time in over sixty pages of analysis did the state court clearly and explicitly state that its decision was based on "bona fide separate, adequate, and independent grounds" under state law. Instead, the California court purported to simply "adopt [the] reasoning" of this Court's *Johanns* decision. Pet. App. 48. As such, it has invited this Court's review.

C. Rule 10 Explicitly Provides Justification for Granting Certiorari

Respondent claims that certiorari is unwarranted in this case because "there is no disagreement among the lower courts," Opp. at 19-20, but there need not be to warrant certiorari. Supreme Court Rule 10(c) provides that certiorari is appropriate where "a state court . . . *has decided an important federal question in a way that conflicts with relevant decisions of this Court*." U.S. Sup. Ct. R. 10 (c) (emphasis added). *Long* itself noted that "it cannot be doubted that there is an *important need for uniformity in federal law*, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion." 463 U.S. at 1040 (emphasis added and omitted).

Moreover, contrary to Respondent, there exists a serious split among the lower courts on precisely the question presented by this Petition: whether

compelled subsidies for speech are insulated from constitutional review by the government speech doctrine even when no government agent actually reviews and decides the content of the speech. In *American Honey Producers Ass'n v. USDA*, 2007 WL 1345467 (E.D. Cal. May 8, 2007), and *Avocados Plus, Inc. v. Johanns*, 421 F.Supp.2d 45 (D.D.C. 2006), both cited by Respondent, Opp. at 19, the courts found the advertisements at issue complied with *Johanns* because of the *actual*, substantial steps the government took to oversee and control them. *See American Honey*, 2007 WL 1345467 at *9-*11 (finding a "*high* degree of oversight" where the "USDA actively advise[d] the Honey Board in the development and promotion, research and information activities" and "retain[ed] final approval authority over every assessment dollar, editing promotions and advertising and not approving"); *Avocados Plus*, 421 F.Supp.2d at 50-55 (finding the "[s]ecretary's control over growers' and importers' associations is not merely theoretical," as he sent "delegates to all CAC and MHIA meetings," "formally review[ed] and edit[ed] proposed advertisements submitted by the associations" and "grant[ed] final approval to projects determined to be consistent with the Act."). These cases squarely conflict with the California Supreme Court's reasoning and decision, which held that these oversight mechanisms are "of no constitutional consequence." Pet. App. 58.

The limit and scope of the government speech doctrine is a critical constitutional question, and the decision below sweeps aside the guardrails of this Court's precedents. If this distortion of government speech doctrine goes unreviewed, lower courts in

California and elsewhere will regard the decision as controlling precedent regarding both federal and state limitations on what constitutes government speech, effectively reversing this Court's cases without saying so.

II. The Decision Below Conflicts With This Court's Government Speech Precedents.

Respondent, which is a trade group empowered by the legislature to coerce industry dissenters to subsidize its speech, understandably says almost nothing about the perils of cloaking private economic interests with government coercive power. But that is precisely what the decision below greenlights. The TGC's speech is not subject to the discipline of the ballot box because no one in government even *sees* what they propose to publish, and it is not subject to the discipline of the market because growers like Petitioners are coerced into contributing, whether or not there is a net economic benefit. This case is just about speech about table grapes. But in principle, if the decision below is correct, the legislature could empower almost any privately-controlled group to force dissenters to pay for their speech, with no actual government involvement or oversight. This is exactly what cases like *Keller*, *Janus*, and *United Foods* attempted to protect against.

The decision below allows the dominant elements in the table grape industry to levy assessments for advertisements that serve their own private interests, but are neither created, reviewed, nor in any way overseen by democratically accountable governmental officials. Pet. App. 12a. This Court has warned that "while the government-speech doctrine is important—

indeed, essential—it is susceptible to dangerous misuse" precisely because it could allow "private speech [to] be passed off as government speech." *Matal*, 137 S. Ct. at 1758. The protections this Court has carefully established through years of precedent—precedent the state court either neglected or misapplied—serve as the barriers against such abuse.

A. The California Court Misapplied *Johanns*, *Matal*, *Walker,* and *Keller*

Respondent offers no persuasive response to the Petition's showing that the decision below misinterpreted and misapplied the government speech doctrine, as set forth in *Johanns*, *Matal*, *Walker*, and *Keller*, among other cases.

Respondent claims that *Johanns* does not conflict with the decision below, but its defense of this argument reveals exactly why it is off-base. *See* Opp. at 21-24. Respondent underscores the court's use of the phrase "more than adequate" in an attempt to suggest that the comprehensive governmental oversight and control present in *Johanns* was somehow far beyond some theoretical base threshold that Respondent leaves undefined. *Id*. at 22-23. In flippantly claiming that "micromanag[ing]" speech and conducting "word-for-word review is unnecessary" to satisfy the government speech doctrine, however, Respondent entirely fails to address the *numerous* directives in *Johanns* regarding government speech that the Court made explicitly clear and that Petitioners identified. *See* Pet. at 20-25. The Court *explicitly* stated that the Secretary "approve[d] *every word that [was] disseminated*" by the beef board in that case, and "exercise[d] final approval authority

over *every word used* in *every* promotional campaign." *Johanns*, 544 U.S. at 561-62 (emphases added). If this genuinely *were* government speech, meaning speech emanating from a government agency, then the "micromanagement" requirement would be satisfied by definition. It is only because the speech here is generated by actors who are not government agents and are not answerable to the public that the oversight issue arises, and it is not satisfied by the mere abstract power of the government to prevent abuse or illegality. Speech is not "government speech" merely because the government can regulate it for offensiveness. It is government speech only when it is affirmatively crafted by the government to convey *the government's views* to the public.

Respondent attempts to distinguish *Matal* and *Walker* on the ground that they involved "private parties" and "entirely privately crafted messages," and are thus inapposite. Opp. at 26. What Respondent fails to recognize is that the TGC, too, is "private" in the most important sense that its members are chosen by private economic actors and answerable to those private interests, not the public. The statute itself states that the twenty-one industry-elected members "are intended to represent and further the interest of a particular agricultural industry." Only the one "public member" is charged with "represent[ing] the interests of the general public." Cal. Food & Agric. Code §§ 65575.2, 65576. The Secretary is not permitted to name anyone to the TGC who is not chosen by private industry, and is not permitted to interfere in the speech activities of the TGC except to remedy violations of law. In undisputed fact, neither

the Secretary nor her staff even sees the ads before they run, or has anything to do with crafting them.

The Commission's statutory setup and activity render it more akin to the state bar in *Keller*, 496 U.S. at 1, than the beef board in *Johanns*. As here, the speech of the state bar in *Keller* was financed not from tax dollars but from mandatory exactions from its members, who were "such not because they [were] citizens or voters, but because they [were] lawyers." 496 U.S. at 13. The speech was intended to convey the views and opinions of the majority of the bar members, much like the TGC's speech here, and its structure rendered it immune from the accountability of the "democratic process." *Id*. at 12. Despite acknowledging these similarities, Pet. App. 27-29, however, the California Supreme Court failed to follow *Keller* to its logical conclusion in this very similar case. *See* Pet. at 31-32.

B. This Court's Recent Precedent Raises Questions Regarding the Importance of Attribution in Government Speech

Respondent does not dispute that the TGC's ads contain not the slightest hint that they might be government speech. This seriously undermines any claim that they are government speech. If the public does not know that speech is coming from the government, there can be no democratic accountability.

Respondent attempts to side-step the attribution issue by claiming that two of the cases discussing it—*Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) ("*Summum*") and *Walker*—were not "compelled-subsidy challenge[s]" and are thus

inapplicable, and that *Johanns* declined to adopt an attribution requirement for compelled-subsidy cases. *Johanns*, 544 U.S. at 560. Respondent fails to see the forest for the trees. The Court clarified in *Johanns* that the compelled-subsidy analysis "invalidates an exaction . . . *because being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy*." *Id.* at 564-65 n.8 (emphasis added). That is precisely the point here: Respondent, composed of private table grape growers statutorily answerable only "the interest of a particular agricultural industry," Cal. Food & Agric. Code §§ 65575.2, selects its messages outside the knowledge or control of the Secretary. That the ads are not attributed to the state of California just further ensures that there can be no democratic accountability for messages with which Petitioners disagree but are forced to subsidize.

And Respondent's argument that compelled speech differs from compelled-*subsidy* analysis, Opp. at 27, entirely fails to acknowledge *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, where the Court noted that the same constitutional concerns are present in the analysis of compelled speech and compelled-subsidy cases. 138 S. Ct. 2448 (2018). The Court found that where "measures *compelling* speech are at least as threatening" to free speech protections as speech *restrictions*, "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* at 2464 (emphasis added). "Because the compelled subsidization of private speech *seriously impinges on First Amendment rights*, it cannot be casually allowed." *Id.* (emphasis added).

Significantly, Justice Souter's *Johanns* dissent is cited in *Summum* not simply for the narrow quote Respondent relays, but in support of the broader discussion about the importance that the public understand when a message is the government's own to ensure adequate democratic accountability. *See Summum*, 555 U.S. at 468–69 (noting that "a government entity is ultimately 'accountable to the electorate and the political process for its advocacy'") (internal citations omitted). This was a focal point of Justice Souter's *Johanns* dissent. *See* 544 U.S. at 577 (Souter, J., dissenting) (arguing that the application of the government speech doctrine must ensure "effective public accountability" and "an advertising scheme" like that at issue here must be "subject to effective democratic checks"). Taken together, *Walker* and *Summum* emphasize that compelled speech and compelled-subsidy cases implicate the same constitutional concerns.

C. This Case Presents a Purely Legal, Non-Fact-Based Question for Review.

Respondent's suggestion that this case is "fact-bound," Opp. at 29, is wholly unpersuasive. To be sure, there is no dispute about the relevant facts: the Ketchum Act does not *require* Secretarial oversight and control over the ads created and promulgated by Respondent, and the Secretary engages in no review or oversight over those ads in practice. Pet. at 9-10; Pet. App. 13. This cleanly presents an important question of law, which applies in principle to a broad range of cases: Are compelled speech subsidy programs immune from constitutional scrutiny on government speech grounds even if the government is

not required to review their content and does not do so in fact? The California court found the lack of a requirement of oversight and of actual oversight to be "of no constitutional consequence." Pet. App. 58; Opp. at 30. There is nothing "fact-bound" about that astonishing view of the law.

The question presented is whether private actors may constitutionally be empowered to tax their competitors to fund speech with which those competitors disagree, shielding themselves from scrutiny behind the government speech doctrine while the government itself turns a blind eye. And while Respondent injects an array of colorful rhetoric about the Secretary being "empowered" and having "tremendous control," Opp. at 31, it does not and cannot dispute what the court below conceded: No actual oversight is required and none happens in practice. Instead, Respondent is relegated to arguing that what it euphemistically calls "effective control" is sufficient even in the absence of *actual* control. This case presents an ideal opportunity for the Court to correct that dangerous misconception.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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