No. 21-918

In the Supreme Court of the United States

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, PETITIONER

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Beef Checkoff Program is a federal commodity-marketing program that requires cattle producers and importers to pay a one-dollar-per-head assessment on cattle sales to generate funding for beef promotion. A portion of those assessments funds federal promotional activities, while the remainder funds parallel activities by qualified state beef councils. In *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550 (2005), this Court examined the federal component of the checkoff program and held that because the federal government maintains "effective[] control[]" over those promotional activities, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources." *Id.* at 560-562. Petitioner conceded below that the promotional speech of the state councils, and of third parties contracted to assist the state councils, is equivalent to the speech at issue in *Johanns*.

The questions presented are as follows:

1. Whether speech funded by noncontractual transfers of checkoff funds from state beef councils to organizations that engage in activities to promote the message prescribed and governed by the Beef Checkoff Program is likewise government speech.

2. Whether the Court should overrule *Johanns*.

ADDITIONAL RELATED PROCEEDING

United States District Court (D. Mont.):

Ranchers-Cattlemen Action Legal Fund v. *Perdue*, No. 16-cv-41 (June 21, 2017)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 6 F.4th 983. The order of the district court (Pet. App. 17-42) is reported at 449 F. Supp. 3d 944. The findings and recommendations of the magistrate judge (Pet. App. 45-64) is not published in the Federal Supplement but is available at 2020 WL 2477662.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2021. On October 12, 2021, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 24, 2021, and the petition was filed on December 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Beef Promotion and Research Act of 1985 (Beef Act or Act) established the Beef Checkoff Program, "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace." Pub. L. No. 99-198, Tit. XVI, Subtit. A, sec. 1601(b), § 2(b), 99 Stat. 1598 (7 U.S.C. 2901(b)). This program, administered by the U.S. Department of Agriculture (USDA), finances "promotion and advertising, research, consumer information, and industry information," 7 U.S.C. 2904(4)(B), designed to "advance the image and desirability of beef and beef products" and "stimulat[e] sales of beef and beef products," 7 U.S.C. 2902(13). To fund these projects, every cattle producer and importer must pay a one-dollar-per-head assessment, or "checkoff," on cattle sold in the United States. 7 U.S.C. 2901(b); 7 C.F.R. 1260.172(a).

b. The Beef Checkoff Program is administered in significant part by two entities established by the Secretary of Agriculture pursuant to the Beef Act. See 51 Fed. Reg. 26,132 (July 18, 1986) (implementing 7 U.S.C. 2904(1)-(5)). The Beef Promotion and Research Board (Beef Board or Board) oversees the Beef Checkoff Program, and the Beef Promotion Operating Committee (Operating Committee) designs the Board's promotional campaigns. 7 U.S.C. 2904(2), (4)(B) and (C); see 7 C.F.R. 1260.141-1260.169.

As detailed in *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550 (2005), these campaigns are subject to significant governmental oversight. See *id.* at 560-562. Half of the Operating Committee and the entirety of the Beef Board are appointed by the Secretary of Agriculture, 7 U.S.C. 2904(1) and (4)(A), and all members of both entities are subject to removal by the

Secretary, 7 C.F.R. 1260.213. Like all recipients of checkoff funds, both entities are constrained by the overarching promotional framework established by the Beef Act and implementing regulations, including that advertisements must "strengthen the beef industry's position in the marketplace," 7 C.F.R. 1260.169(a); support the beef industry as a whole, 7 U.S.C. 2904(4)(B)(ii); 7 C.F.R. 1260.169(a) and (d); "take into account" different types of beef products, 7 U.S.C. 2904(4)(B)(i); omit references "to a brand or trade name of any beef product," 7 C.F.R. 1260.169(d); avoid "unfair or deceptive acts or practices," *ibid.*; and not seek to influence "governmental action or policy," 7 U.S.C. 2904(10). All research and promotional projects developed by the Operating Committee are subject to approval by the Secretary. 7 U.S.C. 2904(6)(B); 7 C.F.R. 1260.169. This Court thus held in *Johanns* that "[t]he message of the promotional campaigns" developed by these entities "is effectively controlled by the Federal Government" and therefore constitutes government speech. 544 U.S. at 560-561.

c. The Beef Checkoff Program is also administered through qualified state beef councils. Prior to the Beef Act's enactment, most States had established their own beef-marketing programs administered by state agencies or private industry associations. See H.R. Rep. No. 271, 99th Cong., 1st Sess. 187 (1985). Recognizing that these state-level organizations play an "invaluable" role in "promoting the consumption of beef and beef products," 7 U.S.C. 2901(a)(5), Congress incorporated them into the new regulatory scheme, 7 U.S.C. 2902(14).

Specifically, the Beef Act authorizes qualified state beef councils to collect checkoff assessments on behalf of the Beef Board. See 7 U.S.C. 2904(8); 7 C.F.R.

1260.181(b)(3) and (4). The Act further provides that producers can receive a 50-cent credit toward the one-dollar federal assessment for contributions made to a state council. 7 U.S.C. 2904(8)(C); 7 C.F.R. 1260.172(a)(2) and (3). Thus, a cattle producer may comply with the Beef Checkoff Program either by paying a full dollar to the Beef Board or by paying 50 cents to the Board and 50 cents to the appropriate state council. In practice, USDA accomplishes this allocation by permitting qualified state councils to collect the dollar-per-head checkoffs, retain 50 cents per dollar to fund state marketing efforts, and forward the remainder to the Beef Board. Except as provided by state law, cattle producers may direct that the full amount of their assessments go to the Board, see 84 Fed. Reg. 20,765, 20,766-20,767 (May 13, 2019), and state councils must honor such requests, see 7 C.F.R. 1260.172(a)(7), 1260.181(b)(8) and (9).[1]

State councils use checkoff funds to "conduct[] beef promotion, research, and consumer information programs" within a State. 7 U.S.C. 2902(14). Among other things, state councils may hire third parties to produce advertisements and other promotional materials. Many of these expenditures are governed by contractual agreements between the state council and third-party entity. Pet. App. 5. But state councils also make non-contractual transfers of checkoff funds to third parties—principally, through periodic contributions to two national organizations, the Federation of State Beef Councils (Federation) and the United States Meat Export Federation (USMEF). *Id.* at 5 & 11 n.5. Recip-

[1] Only a "few [S]tates" limit such redirections, 84 Fed. Reg. at 20,768, and petitioner has not claimed that any of the councils at issue here are so limited.

ients of these transfers must identify their expenditures in an "annual accounting." *Id.* at 5. And all third-party recipients of checkoff funds must adhere to the promotional message established by the Beef Act and applicable regulations. See *ibid.*; 7 C.F.R. 1260.181(b)(1); pp. 2-3, *supra*.

The federal government maintains significant control over the state councils and their promotional expenditures. State councils must be "certified by the [Beef] Board * * * as the beef promotion entity in such State" before they may collect assessments. 7 C.F.R. 1260.115; see 7 U.S.C. 2902(14). The Beef Board may deny certification—or revoke certification once granted—if a council does not satisfy various regulatory and administrative requirements, including ensuring that all campaigns funded by the council comply with the Beef Act promotional framework, 7 C.F.R. 1260.181(a) and (b); Pet. App. 4, 13, and allowing the Secretary access to board meetings and other such information as the Secretary shall require, see, *e.g.*, C.A. E.R. 55-56.

Since December 2016, USDA has confirmed its control over the state councils by entering individual memoranda of understanding (MOUs) with many of the councils. See Pet. App. 4. Under the MOUs, state councils must submit for USDA pre-approval "any and all promotion, advertising, research, and consumer information plans and projects." *Ibid.*; C.A. E.R. 59. "[A]ny and all potential contracts or agreements to be entered into by [the state councils] for the implementation and conduct of plans or projects funded by checkoff funds," and "any plans or projects developed under [these contracts or agreements]," are likewise subject to USDA pre-approval. Pet. App. 5, 10; C.A. E.R. 58. USDA also reviews and approves the councils' annual budgets,

which must outline their anticipated expenses and disbursements and describe "the proposed promotion, research, consumer information, and industry information programs contemplated." Pet. App. 10-11; C.A. E.R. 58-59. In addition, USDA officials must be invited to participate in council board meetings at which promotional and funding decisions are made. Pet. App. 13; C.A. E.R. 59-60. The councils must make their books available to USDA for audit and submit "appropriate accounting with respect to the receipt and disbursement of all assessment funds entrusted to [the council]." C.A. E.R. 59. And the councils must "prepare and make public, at least annually, a report of activities carried out and an accounting for funds received and expended." *Ibid.* Non-compliance can lead to de-certification. Pet. App. 13; C.A. E.R. 60.

2. a. Petitioner Ranchers-Cattlemen Action Legal Fund is a trade organization for independent cattle producers. D. Ct. Doc. 47, at 1 (June 21, 2017). Petitioner brought suit in May 2016 alleging that the distribution of funds to the Montana Beef Council pursuant to the Beef Act entailed a compelled subsidy of private speech in violation of the First Amendment. *Ibid.* In June 2017, without considering the recently entered MOU between USDA and the Montana council, the district court entered a preliminary injunction preventing the Montana Beef Council from using checkoff funds for promotional campaigns absent producers' affirmative consent. *Id.* at 22-23.

A divided panel of the court of appeals affirmed. *Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of Am.* v. *Perdue*, 718 Fed. Appx. 541 (9th Cir. 2018). The panel majority believed that because the district court articulated the correct legal standard, the

government's disagreement with the district court's conclusion was "insufficient to support reversal of a preliminary injunction." *Id.* at 542. Like the district court, the panel majority declined to consider the significance of the MOU. *Id.* at 542 n.1. The dissent would have held that the MOU "plainly grants the Secretary complete pre-approval authority over any and all promotion, advertising, research, and consumer information plans and projects of the" Montana Beef Council, thereby resolving the First Amendment question in the government's favor. *Id.* at 543 (Hurwitz, J., dissenting) (internal quotation marks omitted).

b. On remand, petitioner amended its complaint to seek relief against 14 additional state councils, all of which have now entered MOUs with USDA. Four councils and three producers intervened to defend the councils' use of checkoff funds. D. Ct. Doc. 62 (Nov. 14, 2018); D. Ct. Doc. 69 (Nov. 28, 2018).

The parties then cross-moved for summary judgment. The district court granted summary judgment for the government and intervenors, concluding that the recently entered MOUs—in combination with the Beef Act and its implementing regulations—make clear that the federal government effectively controls the promotional speech of state councils and third party affiliates. Pet. App. 33, 42.

c. On appeal, petitioner no longer disputed that promotional campaigns generated by the state councils—and by their contracted third parties—are effectively controlled by the federal government. See Pet. C.A. Reply Br. 1 (promotional activities of "the state beef councils, and their contractors," "are not at issue on appeal"); Oral Argument at 18:19-31, *R-CALF USA* v. *Vilsack* (No. 20-35453) (June 10, 2021), https://www.ca9.

uscourts.gov/media/audio/?20210610/20-35453 (petitioner's counsel: "for th[e] purpose of this appeal, R-CALF is agreeing that the state councils' own use of the money—[when] the state councils spend the money themselves, when they hire an ad agency to spend the money—that is now equivalent to what occurred in *Johanns*"). Instead, petitioner argued only that third-party promotional materials funded by noncontractual payments of checkoff funds, primarily to the national organizations, are not government speech. Pet. C.A. Reply Br. 1.

The court of appeals unanimously affirmed. Pet. App. 8. The court first observed that because the Secretary has pre-approval authority over all promotional campaigns by state councils and their contracted third parties, "[t]he parties agree that third-party speech generated pursuant to these contracts is government speech." *Id.* at 5; see also *id.* at 11.

The court then turned to "[t]he primary issue on appeal": "whether speech made by third parties" pursuant to "noncontractual transfers of checkoff funds" is "effectively government speech." Pet. App. 5. Concluding that this speech is "also 'effectively controlled' by the government," the court rejected petitioner's challenge. *Id.* at 11 (quoting *Johanns*, 544 U.S. at 560). Critically, the court explained, the promotional "message is firmly established by the federal government." *Id.* at 12. The Beef Act and its implementing regulations direct the content of "all third-party speech." *Ibid.* And under the MOUs, state councils "must submit annual budget and marketing proposals for the Secretary's approval that contain anticipated expenses and disbursements and a general description of the proposed promotion . . . programs contemplated," and then report all expenditures

in an "annual accounting." *Id.* at 5, 12-13 (internal quotation marks omitted). The state councils must also "give the Secretary advance notice of all board meetings, allowing participation by the Secretary or his designees in any discussions about payments to third parties." *Id.* at 13. Finally, "the Secretary has unquestioned control of the flow of assessment funds" to the state councils—"and the threat of decertification" if "he disapproves of the use of those funds." *Ibid.*

ARGUMENT

The central features of the Beef Checkoff Program are not at issue here. In *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550 (2005), the Court examined this very same commodity-marketing program and held that the promotional activities of the Beef Board and Operating Committee, funded by checkoff dollars, constitute government speech. Petitioner has failed to preserve any challenge to any promotional speech funded at the federal level. And petitioner further conceded on appeal that, subject to the MOUs, the use of checkoff funds by state councils and their contractors is consistent with *Johanns*.

This case thus presents only an as-applied challenge to a limited aspect of the Beef Checkoff Program: whether qualified state beef councils may, consistent with the First Amendment, use checkoff funds for periodic noncontractual contributions to organizations that assist in promotional activities provided for by the Beef Act. The court of appeals held that they may, so long as the government effectively controls such speech. That decision is correct and does not conflict with any decision of this Court or any court of appeals. There is likewise no merit to petitioner's suggestion that the petition should be held for *Shurtleff* v. *City of Boston*, No.

20-1800 (argued Jan. 18, 2022), which raises a distinct question about Boston's latitude to exclude a religious flag from the city's flag-raising program.

1. The court of appeals correctly concluded that the speech at issue, which is part of the broader federal promotional program approved in *Johanns*, is government speech.

a. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009). The government is "entitled to promote a program, to espouse a policy, or to take a position," even though it thereby endorses some viewpoints and rejects others. *Walker* v. *Texas Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). Indeed, "it is not easy to imagine how government could function if it lacked this freedom." *Summum*, 555 U.S. at 468. "[S]ome government programs involve, or entirely consist of, advocating a position." *Johanns*, 544 U.S. at 559. And when the government speaks for itself, the check on such speech is the electoral process, not the First Amendment. *Walker*, 576 U.S. at 207; *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001).

In *Johanns*, the challengers argued that the federal-level promotional campaigns funded by the Beef Checkoff Program were not government speech because nongovernmental entities—the Beef Board and the Operating Committee—played a role in developing the campaigns. 544 U.S. at 560. This Court disagreed, holding that the government "is not precluded from relying on the government-speech doctrine" merely because the program at issue relies on "assistance from nongovernmental sources." *Id.* at 562. Rather, because "[t]he message of the promotional campaigns is effectively controlled by

the Federal Government itself"—through the Beef Act, its implementing regulations, and the Secretary's oversight authority and appointment and removal powers—those campaigns remain government speech. *Id.* at 560.

b. In the court of appeals, petitioner conceded that promotional speech undertaken by state councils and their contractors is subject to "equivalent" controls as the speech at issue in *Johanns*, see p. 7, *supra*, and petitioner failed to preserve any argument that the use of checkoff funds to support the speech at issue in *Johanns* or that of state councils and their contractors is inconsistent with the First Amendment.

The only disputed aspect of the Beef Checkoff Program on appeal, accordingly, was the state councils' periodic payments to organizations that assist in implementing promotional campaigns. Pet. App. 5 & 11, n.5. The court of appeals correctly concluded that such speech is also "effectively controlled by the government" and thus retains its status as government speech. *Id.* at 11 (internal quotation marks omitted).

As this Court did in *Johanns*, the court of appeals analyzed the specific ways in which the government controls the promotional speech at issue. The court explained that the Beef Act and its implementing regulations "firmly establish[]" the message of that speech. Pet. App. 12. To start, as this Court has already explained, the Beef Checkoff Program "is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment." *Johanns*, 544 U.S. at 563. Those requirements constrain the entities at issue here, just as in *Johanns*. See Pet. App. 12. Likewise, as in *Johanns*, the Secretary has oversight authority over the

promotional messages of those entities that are funded by checkoffs—by requiring the councils to submit annual budgets that describe all proposed expenditures and contemplated promotional activities of those entities; to account for all disbursements of checkoff funds and report the activities carried out; and to invite federal government representatives to attend council meetings at which funding and promotional decisions are made. *Id.* at 5, 12-13. And as in *Johanns*, the state councils and their affiliates are "answerable to the Secretary," 544 U.S. at 561: "[T]he Secretary has unquestioned control of the flow of assessment funds to the [state councils]—and the threat of decertification under the MOUs and the regulations if he disapproves of the use of those funds." Pet. App. 13.[2]

The court further observed that Congress "expressly contemplated" such assistance with the Beef Checkoff Program, "designating several 'established national nonprofit industry-governed organizations' with whom the Operating Committee could contract to 'implement programs of promotion.'" Pet. App. 11 (quoting 7 U.S.C. 2904(6)). And most of the funding at issue here goes to two national organizations—the Federation of State Beef Councils and the Meat Export Federation—"with established relationships with the Beef Board." *Id.* at 11 n.5. Indeed, Congress "gave the

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[2] Petitioner's contrary reading of the government's decertification authority (Pet. 21) is incorrect. The Beef Board may decertify a state council that fails to adhere to the requirements set forth in the Beef Act, implementing regulations, and MOUs, or lacks sufficient "internal controls to ensure proper expenditure of funds and sound program implementation." C.A. S.E.R. 120; see p. 5, *supra*; C.A. E.R. 56, 58. And the government has in fact exercised this authority by decertifying or otherwise disciplining state councils for such failures. C.A. S.E.R. 121.

Federation [of State Beef Councils] an express role in the beef checkoff program," both by "authorizing it to elect members of the Operating Committee" and by directing the Committee to enter into agreements specifically with the Federation of State Beef Councils in "'implement[ing] programs of promotion.'" *Ibid.* (quoting 7 U.S.C. 2904(4)(A) and (6)).

c. Petitioner's principal claim of error is premised on a misreading of the court of appeals' decision. Petitioner repeatedly asserts that the court of appeals held that "congressional authorization of a compelled subsidy is all that is required for courts to find it funds government speech." Pet. 24; accord, *e.g.*, Pet. 6, 30. That is not accurate. Rather, as explained above, the court of appeals asked the same question this Court asked in *Johanns*: whether the federal government "effectively controlled" the message of these promotional campaigns. To answer that question, the court of appeals considered the promotional speech at issue in this case and compared it to the speech the Court found to be government speech in *Johanns*. See pp. 10-11, *supra*. And the court of appeals correctly concluded on that basis that the speech implicated here is likewise subject to federal government control.

Petitioner further argues (Pet. 22) that *Johanns* is not controlling because the Secretary does not pre-approve every word of the promotional messages at issue here. To be sure, the mechanisms for federal government oversight are not identical to those at issue in *Johanns*. But as the court of appeals explained, the dispositive question is "the government's ability to control speech," which may be accomplished through a variety of means. Pet. App. 13 (emphasis omitted). The Act and regulations prescribe the basic message. And here, in

addition, the court of appeals properly concluded that the councils' extensive reporting obligations—combined with the Secretary's ability to participate in council board meetings and control over the flow of checkoff funds to the councils—establish, as in *Johanns*, effective control. See pp. 10-11, *supra*.

Moreover, any producers who object to the state councils' receipt of their checkoffs can direct that the entirety of their assessments go to the Beef Board to be used in the manner already approved by this Court in *Johanns*. See 84 Fed. Reg. at 20,766-20,767; p. 4, *supra*. Producers thus need not fund state councils or the third parties who assist them, further obviating petitioner's "compelled subsidy" objections here.

2. Petitioner asserts that the decision below conflicts with decisions from this Court and the Second Circuit. That is incorrect.

a. Contrary to petitioner's suggestion (Pet. 27-30), the decision below is consistent with both *Matal* v. *Tam*, 137 S. Ct. 1744 (2017), and *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001).

In *Tam*, this Court explained that federal trademark registration does not make a trademark government speech, because such marks do not "convey a Government message." 137 S. Ct. at 1760. But the Court expressly distinguished trademark registration from the speech at issue in *Johanns*, where "Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad." *Id.* at 1759. Here, the guidelines prescribe the promotional content, agency officials may attend meetings at which budgetary and promotional

plans are discussed, and the Secretary may decertify any state council that does not comply with the program terms and objectives. See pp. 10-11, *supra*; Pet. App. 11-12. Most importantly, the speech at issue here is undertaken as part of the same federal "program of paid advertising" at issue in *Johanns*, which is required by law to convey a specific message. *Tam*, 137 S. Ct. at 1759. The speech at issue here thus bears no resemblance to the trademarks at issue in *Tam*.

There is likewise no substance to petitioner's contention that the court of appeals' decision conflicts with *United Foods*. That case was decided prior to *Johanns* and premised "on the assumption that the advertising was private speech, not government speech." *Johanns*, 544 U.S. at 558 (citing *United Foods*, 533 U.S. at 415-417). Indeed, the Court in *United Foods* expressly declined to decide the government speech question because the argument had not been raised on appeal. See 533 U.S. at 417. That case therefore has no bearing on whether the government effectively controls the promotional speech at issue here.

b. Petitioner's assertion (Pet. 23-24) that the decision below conflicts with the Second Circuit's decision in *Wandering Dago, Inc.* v. *Destito*, 879 F.3d 20 (2018), is likewise mistaken. *Destito* addressed whether the State of New York could deny a vendor's request to sell food as part of a lunch program on a public plaza because the vendor branded itself with offensive language. Explaining that "speech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some way allows or facilitates it," the Second Circuit determined that the State did not design the lunch program "for the purpose of conveying any message at all."

Id. at 34, 37. Rather, the program's "purpose was to provide casual outdoor lunch options to state employees and visitors to the capital," and the program contemplated that "participating vendors will bring some of their own diverse personal expression—not government messages—to Empire State Plaza." *Id.* at 37. Accordingly, the government-speech doctrine did not apply. *Id.* at 30.

By contrast, the entire purpose of the Beef Checkoff Program is to fund a specific government message—not to provide a forum for private expression. The government sets the message, oversees the use of the funds, and maintains the ability to withdraw certification if a state council's third-party expenditures do not comply with the program's requirements. See pp. 10-11, 13, *supra*. And unlike the vendors in *Destito*, the state beef councils and the organizations with which they engage are selected precisely "because of their ability to help convey a coherent government message." *Destito*, 879 F.3d at 37. There is thus no reason to think that petitioner's case would have come out differently in the Second Circuit.

c. This case is in any event a poor vehicle to consider any First Amendment concerns implicated by the state councils' use of checkoff funds. As explained above, see p. 14, *supra*, producers can choose to redirect the entirety of their checkoffs to the national program. That the contributions to the state councils at issue here are not in fact compelled provides an independent basis to reject petitioner's challenge. See Pet. App. 13 n.6 (declining to reach this alternative ground for affirmance). Further review is thus unwarranted.

d. Petitioner's suggestion (Pet. 21-22) that the Court should hold this case pending a decision in *Shurtleff*,

supra, likewise fails. This Court granted certiorari in *Shurtleff* to resolve whether the denial of a private group's application to raise a religious flag on a flagpole outside Boston City Hall violated the First Amendment. Resolution of that question turns on whether, given the specific history and factual context of the city's flag-raising program, the program is designed to convey a government message or instead to create a forum for diverse speech by private groups.

That analysis has no bearing on the outcome of this case, in which petitioner challenges the use of compelled subsidies pursuant to a federal commodity-marketing program that this Court has already held is designed to convey a government message. *Johanns*, 544 U.S. at 561 ("Congress has directed the implementation of a 'coordinated program' of promotion, 'including paid advertising, to advance the image and desirability of beef and beef products.'") (citation omitted). The narrow question presented here is whether the assistance by national organizations that are closely integrated into the checkoff program in developing those promotional campaigns renders the government-speech doctrine inapplicable to that particular use of checkoff funds. None of the considerations relevant to the First Amendment analysis in *Shurtleff*—the history of the flag-raising program, the city's physical involvement in hoisting flags, or its attempt to create a narrow exclusion from a government program otherwise open to the public—have any bearing on that question.

3. Petitioner's suggestion (Pet. 33) that the Court overrule *Johanns* lacks merit. The court of appeals straightforwardly applied *Johanns*, an oft-cited and recent precedent, to the facts of this case, which concerns a closely related aspect of the same commodity-

marketing program. Petitioner did not preserve any challenge to the bulk of the promotional speech contemplated by the Beef Checkoff Program—either the use of checkoff funds for the federal-level promotional campaigns expressly approved by this Court in *Johanns*, or the corresponding promotional activities by the state councils and their contracted third parties. Petitioner's suggestion now that this Court reconsider *Johanns* cannot be reconciled with petitioner's presentation below of an as-applied challenge to a limited aspect of the Beef Checkoff Program.

In any event, *Johanns* is no "outlier." Pet. 8. To the contrary, both *Walker* and *Summum* cite *Johanns* approvingly and rely on its analysis; both asked whether the government "effectively controlled" the messages conveyed in determining whether those messages constituted government speech—precisely the inquiry set forth in *Johanns*. See *Walker*, 576 U.S. at 213; *Summum*, 555 U.S. at 473. The petition offers no persuasive reason to reconsider *Johanns*, and petitioner does not even mention, much less seriously address, the stare decisis considerations inherent in that request.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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