No. 21-918

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

REPLY BRIEF FOR THE PETITIONER

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CORPORATE DISCLOSURE

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

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The government's Opposition does not address, let alone defend, the Ninth Circuit's rule that the government-speech exception to the First Amendment expands when courts decide enforcing the Constitution will involve "micro-managing" government programs. Pet. App. 9-10. It repeatedly tries to craft a more limited holding. But, the Ninth Circuit was clear, for administrative ease, it requires "less" government control for speech to be government speech than any of this Court's precedents. *Id.* As a result, relying on the anti-"micro-managing" rule, the panel below classified speech as government speech when the government only learned of the expressions after they entered the marketplace. Despite the Opposition's claims otherwise, the panel held it sufficient that private speakers, funded through a government exaction, represented their speech would further a statutory objective. Since the government stated it broadly supported that type of speech, it was immaterial that the government did not review or approve the expressions before they were issued. *Id.* at 11-13. The Ninth Circuit favored regulatory flexibility over the First Amendment.

This holding creates a circuit split, violates this Court's precedent, and is in tension with the petitioner's and the government's own presentation of the government-speech doctrine in *Shurtleff v. City of Boston*, No. 20-1800 (U.S. arg. Jan. 18, 2022)—where the government repeatedly asks the Court to hold that government speech involves officials crafting the statements. Thus, this case either warrants review, or vacatur and remand in light of *Shurtleff*.

The Opposition tries to diminish the import of the Court weighing in on the decision below. It hides behind a lengthy discussion of the other ways in which the Beef Checkoff program may constitutionally expend exactions and tries to gain traction from the fact that Petitioner focused on the gravest misuse of the funds, rather than challenging the program as a whole—including, peculiarly, emphasizing a purported concession about the *contractual* transfers when the appeal focused on the *noncontractual* transfers. However, the Opposition rightly does not contest that each year millions of beef producers' dollars are distributed through the noncontractual transfers at issue, Pet. 15, and it acknowledges most of that money is funneled to two advocacy groups for the largest agricultural conglomerates, which undermine the independent ranchers Petitioner represents, Opp'n 4. This Court has repeatedly stated these are the precise circumstances in which it must intervene. "[T]hose 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." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *see also Knox v. Serv. Emps. Int'l Union, Loc. 1000,* 567 U.S. 298, 322 (2012) (similar).

The Opposition's passing suggestion that there is a vehicle problem because producers can opt out of subsidizing the noncontractual transfers, Opp'n 16, rests on an argument waived below and inconsistent with the First Amendment principles laid down in *Knox*, 567 U.S. at 321, and *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). This case's broad application of the Ninth Circuit's anti-micro-managing rule is an ideal foil against which to articulate needed

guardrails for the government-speech doctrine. *See Matal v. Tam*, 137 S. Ct. 1744, 1758, (2017) ("[I]t is a doctrine that is susceptible to dangerous misuse[] [i]f private speech could be passed off as government speech."). Indeed, it provides a path to limit the doctrine unavailable in *Shurtleff*, raising the question of whether it should ever protect government exactions for others' speech. *See Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 564 (2005).

For these reasons, this Court should either grant the petition, or, grant, vacate, and remand based on the government-speech analysis in *Shurtleff*.

I. The Decision Below Greatly Expands the Government-Speech Doctrine.

The Opposition initially tries to paper over the holding below by emphasizing the panel properly articulated this Court's standard for government speech: "that such speech is [] effectively controlled by the government." Opp'n 11. However, this elides how the Ninth Circuit undermined the meaning of effective control. *See also* Pet. 18-19.

The panel began by explaining it applied the government-speech "factors" based on its anti-"micromanaging" rule. Pet. App. 9-10. On this basis, it concluded that because the Beef Checkoff's statute and regulations allow for "the participation of third parties," so long as they use the compelled exactions to "strengthen the beef industry"—without those statements being unfair, deceptive, or political—all third-party speech purportedly furthering those objectives is government speech. *Id.* at 11-12; *see also id.* at 5. The panel acknowledged this approach abandoned a core component of the government controls this Court relied on to uphold compelled subsidies of speech: that

an Executive Office "exercises final approval authority over every word used in every promotional campaign." *Id.* at 8-9. Nonetheless, it stated in the Ninth Circuit, government speech can exist where private "third parties [] produce promotional materials" containing a particular type of speech, but the government does not "approv[e]" the expression, and only learns of statements funded from "an 'annual accounting'" provided after the money was spent. *Id.* at 5. This is because any "contrary holding here risk[ed] micro-managing." *Id.* at 13.

The Opposition emphasizes the government reviews "annual budgets" identifying the noncontractual transfers and can "attend council meetings" where those budgets are discussed, implying this provides control over the third parties' messaging. Opp'n 5-6, 12. But these facts do not alter the description above. *See also* Pet. 19-20. The Ninth Circuit recognized the budgeting process merely identifies the "disbursement[]" of the funds alongside a "general description" of how the private-third-party recipient will use the money. Pet. App. 12. The "[m]aterials produced" are only identified after the fact. *Id.* at 5. The record below—which at this summary judgment stage must be taken in the light most favorable to Petitioner—demonstrates the "general description" in the budgets amounts to stating the private third party will use the money to promote beef. C.A. E.R. 291-92 (annual statement simply representing noncontractual transfers will be used to "enhance domestic marketing" of beef).

Similarly, the Opposition argues the government's ability to "decertif[y]" a council based on "report[s] of the activities carried out" with checkoff funds

amounts to a meaningful control over the speech funded. Opp'n 12. But, by definition, such authority only allows the government to "disapprove[] of the use of" the exactions after the speech has been issued. Pet. App. 13; *see also* Pet. 20-21. It is not a control to ensure a private speaker produces government speech. It is a mechanism to correct the constitutional violation of a compelled subsidy funding private speech, after the violation has occurred.

In sum, regardless of its lip service to this Court's precedent, in the Ninth Circuit if the government knows the category of speech funded, it can force individuals to pay for any private expressions claiming to fulfill those objectives. Despite the Opposition's hand waiving, this holding is not limited by other controls over the expenditures or the alternative ways the money can be spent. It is not even limited to the checkoffs. Were the government to create a tax to fund pro-democracy speech, based on the decision below, in the Ninth Circuit it could turn those funds over to wholly private entities simply because they claimed their ideologically-driven materials produced democratic ends, and none of the payers could object. The Ninth Circuit is so concerned the First Amendment will lead it to micro-manage, the decision below allows the government-speech exception to swallow the First Amendment's prohibition on compelled subsidies of private speech.

II. The Decision Below Conflicts with Second Circuit and this Court's Precedent.

The Opposition tries to reconcile the opinion below with decisions of the Second Circuit and this Court based on various factual distinctions. Opp'n 14-16.

That is because they clearly conflict on the law. *See also* Pet. 23-28.

The Second Circuit provides that "speech that is otherwise private does not become speech of the government merely because the government … in some way allows or facilitates it." *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018). This cannot be squared with the Ninth Circuit's position that if the government authorizes a compelled subsidy for a certain type of speech, that is enough to ensure it funds government speech. Indeed, the Second Circuit stated a court must be able to characterize each statement as "expressing [the government's] own views" in order for it to be government speech, whereas the panel below held the Ninth Circuit's anti-micro-managing rule allowed it to omit any requirement the government knows (let alone approves) of what speech will issue. *Id.* at 35.

Further, although this Court in *Matal* cited the Beef Checkoff as an example of how to generate government speech, its articulation of how it believed the checkoff operates stands in stark contrast to the workarounds the Ninth Circuit allowed. This Court stated the checkoff complied with its government-speech precedents because it thought the government "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." *Matal*, 137 S. Ct. at 1759. On this basis it stated the checkoff produced government speech because "the beef promotions [were] from beginning to end the message established by the Federal Government." *Id.* Yet, the second and third controls

identified in *Matal* are not present with the noncontractual transfers. Put another way, in contravention of this Court's precedent, the Ninth Circuit held it sufficient that the government controls the beginning of the speech, even if it has no say over the end message expressed.

III. The Ninth Circuit's Holding Is Likely To Be Overruled In *Shurtleff*.

Although the existing conflicts are sufficient to warrant this Court's attention, the decision below is also inconsistent with how the government, petitioners, and the Court indicated the government-speech doctrine should be applied in *Shurtleff*. *See also* Pet. 6-7, 21-22.

As the government put it during oral argument, if third parties participate in crafting government expressions, such speech is only constitutionally protected as government speech when the officials actually "curat[e]" the statements. Tr. of Oral Arg. 38:8-39:3, *Shurtleff*, No. 20-1800 (U.S. Jan. 18, 2022); *see also id.* at 49:9-12 (government arguing that "editorial control" is necessary for "government speech"). In its brief, the government gave an example of a program in which it engages in the requisite curating, the "pictorial-postmark program." Brief for the United States as Amicus Curiae Supporting Reversal, at 29, *Shurtleff*, No. 20-1800 (U.S. Nov. 22, 2021), 2021 WL 5507341. There, it stated, the Postal Service solicits "design[s]" from third parties reflecting their views of postmarks the agency should produce, but transforms this private speech into government speech by "strictly regulat[ing] the contents," namely "impos[ing] detailed requirements for what must be included in a design" *and also* maintaining "extensive

involvement in and control over the ultimate postmark design." *Id.* at 30. In other words, the government told this Court in *Shurtleff* that for third-party speech to be characterized as government speech it need not just be the product of government guidelines—the control relied on by the Ninth Circuit—the government must aid in the statements' development and ensure any speech actually reflects its views before the speech issues—precisely what the Ninth Circuit held was not required.

The petitioner in *Shurtleff* presented the doctrine similarly: government speech can only exist through "[t]he exercise of direct and effective government control" over the particular expressions. Brief for the Petitioners, at 49, *Shurtleff v. City of Boston*, No. 20-1800 (U.S. Nov. 15, 2021), 2021 WL 5404792. Therefore, the flag raising program at issue in *Shurtleff* could not produce government speech because the government did not "even look at a proposed flag before approving it" to fly. *Id.* Instead, it needed to review and approve those statements before they appeared. *Id.*

Members of this Court appeared to agree. Justice Barrett suggested "the degree of control that the government exercises" over selecting which flags to raise resolves the government-speech question in *Shurtleff*. Tr. of Oral Arg. 35:1-19, *Shurtleff*, No. 20-1800; *see also id.* at 11:13-20 (similar). Justice Kagan stated "if the government doesn't control" the specific expressions "that pushes strongly in the direction" of it being private speech. *Id.* at 29:6-8.

The Opposition tries to distinguish this case from *Shurtleff* by noting the Beef Checkoff does not have the same history or occur in the same forums as the

flag raising program. Opp'n 17. While such factors have at times informed this Court's government-speech analysis, as Justice Alito stated during the *Shurtleff* argument, this is only because control over the expressions "can't be the be all and end all" in every circumstance, but even in those instances where control over the expressions is not sufficient, whether the speech reflected the government's "own mind" remains central. Tr. of Oral Arg. 37:17-19, 58:19-24, *Shurtleff*, No. 20-1800; *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,* 576 U.S. 200, 213 (2015) (stating as part of the Court's multi-factor government-speech analysis that the government maintained "direct control over the messages conveyed" was core to establishing it "effectively controlled the messages conveyed").

Thus, it appears *Shurtleff* will at least call on the Ninth Circuit to revisit whether the lack of government control over the expressions allows the noncontractual transfers to be government speech, and it may in fact affirmatively overturn the Ninth Circuit's holding that government speech can exist if the government does not control the messaging. Certainly, the Opposition's suggestion that the Court should deny this petition before issuing *Shurtleff*, Opp'n 17, is baseless in light of the representations in that case.

IV. This Case Is a Good Vehicle To Resolve an Issue of National Import.

While it may be most appropriate to grant, vacate, and remand in light of *Shurtleff*, this case tees up issues worthy of this Court's attention. *See also* Pet. 30-35. It highlights how this Court's government-speech jurisprudence has been "badly misunder[stood]," enabling the exception to expand and "take[] a large and

painful bite out of the First Amendment." *Walker*, 576 U.S. at 223, 227 (Alito, J., dissenting). In addition, it would allow the Court to limit the doctrine not only by creating clearer requirements for its application, but also by narrowing the types of speech to which it applies. Unlike *Shurtleff*, the decision below presents the question of whether speech produced by third parties that the government can hold at arm's length should ever qualify for the exception. *Compare Johanns*, 544 U.S. at 564 (holding the government-speech inquiry was unaffected if the speech was "attributed to someone other than the government"), *with Walker*, 576 U.S. at 221 (Alito, J., dissenting) (stating government-speech should require that people "really think that the sentiments reflected" are those of the government); *Johanns*, 544 U.S. at 571 (Souter, J., dissenting) (similar).

The Opposition argues the Court should refrain from entertaining the latter issue because of stare decisis. Opp'n 18. But "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment," particularly when the public has long been on notice the existing precedent rests on shaky foundations. *Janus*, 138 S. Ct. at 2478.

The Opposition also claims that because beef "producers can redirect" their exactions so they do not fund the noncontractual transfers, no producer is compelled to support that speech, and thus this case is a "poor vehicle" to reach the questions presented. Opp'n 16. False. The ability to "opt out" is not a means to remedy an unconstitutional compelled subsidy of private speech. The Opposition concedes the Beef Checkoff allows state councils to automatically "retain 50 cents" of every dollar collected to put towards

beef-related speech, including the noncontractual transfers. *Id.* at 4. To avoid their money being used in this manner, producers must "direct" that the state councils send the money the councils already siphoned off elsewhere. *Id.* Through placing the burden on the payer, this "opt-out system creates a risk that the fees paid … will be used to further political and ideological ends with which they do not agree." *Knox*, 567 U.S. at 312. Since "individuals should not be compelled to subsidize private groups or private speech," the "general rule" is payers must "affirmative[ly]" opt in if their money could be used for private speech. *Id.* at 321-22. In other words, where a subsidy could violate the First Amendment, no "attempt [may] be made to collect such a payment, unless the [payor] affirmatively consents to pay," a post-hoc opt-out is not enough. *Janus*, 138 S. Ct. at 2486.

Further, even were the Opposition's reliance on the opt-out not meritless, the argument has been waived. The decisions below held "the MOUs [(Memoranda of Understanding)] gave the Secretary sufficient control over the promotional program to make" all the speech government speech. Pet. App. 6; *see also* Opp'n 7 (same). The Opposition's opt-out argument would render the exactions constitutional regardless of the MOUs' (or any government) controls. To raise this issue the defendants needed to cross-appeal, something which they failed to do. *See Ranchers-Cattlemen Action Legal Fund v. Vilsack*, No. CV-16-41-GF-BMM-JTJ, 2021 WL 461691, at *4 (D. Mont. Feb. 9, 2021) (Petitioner prevailed by requiring the government to institute the MOUs, over its objections).

Accordingly, the only basis on which to sustain the Ninth Circuit's opinion is to conclude it properly

applied the government-speech doctrine to protect the speech of private third parties, which the government never sees until the speech is issued. This position is at odds with this Court's and other circuit precedent, and the government's and petitioners' presentation of the issue in *Shurtleff*. It thereby raises important questions about the scope and application of the government-speech doctrine.

CONCLUSION

For the foregoing reasons, this Court should either grant the petition, or grant, vacate, and remand once it issues its government-speech analysis in *Shurtleff*, No. 20-1800.

Respectfully submitted,

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April 7, 2022