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 ET AL.
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 1985, the Beef Act created a producer- and importer-funded marketing program—The Beef Checkoff Program—to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." Pub. L. 99-198, § 1601(b), 99 Stat. 1597 (1985).

The Beef Checkoff Program requires that cattle producers and importers pay a $1-per-head assessment to fund beef promotions. Part of the assessment funds federal promotions, and the remainder funds promotions by Qualified State Beef Councils ("QSBCs").

Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005), analyzed and upheld against a First Amendment challenge the federal component of the Beef Checkoff Program. It held that the government "is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources" so long as the government maintains "effective[] control[]" over messaging. *Id.* at 560-62.

It is undisputed here that the promotional speech of the QSBCs, and of third parties *contracted* to assist the QSBCs, is equivalent to government speech under *Johanns*. The questions presented are:

1. Whether speech funded by non-contractual transfers of checkoff funds from QSBCs to third-parties that assist in promotional activities under the Beef Act is likewise government speech.

2. Whether the Court should overrule *Johanns*.

CORPORATE DISCLOSURE STATEMET

Non-governmental respondents Montana Beef Council, Nebraska Beef Council, Pennsylvania Beef Council, and Texas Beef Council are each non-profit corporations that do not issue stock and have no parent corporations.

Non-governmental respondents Lee Cornwell, Gene Curry, and Walter J. Taylor, Jr., are individuals.

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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The court of appeals' opinion (Pet. App. 1-16) is reported at 6 F.4th 983. The district court's order (Pet. App. 17-42) is reported at 449 F. Supp. 3d 944. The magistrate judge's findings and recommendations (Pet. App. 45-64) is unpublished but available at 2020 WL 2477662.

JURISDICTION

The court of appeals entered judgment on July 27, 2021. Justice Kagan extended the original time to file a petition for a writ of certiorari up to and including December 24, 2021, and petitioner timely filed on December 17, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case is another First Amendment challenge to the Beef Checkoff Program, which the Court most recently found constitutional in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). Via statute and regulations, and then further effectuated by memoranda of understanding ("MOU(s)") between the United States Department of Agriculture and its Secretary of Agriculture (collectively, "USDA"), on one hand, and twenty-one Qualified State Beef Councils ("QSBCs"), on the other—including all fifteen named in petitioner's amended complaint—USDA regulates QSBC activities, including their marketing and promotional activities and those of third-party industry organizations.

I. THE BEEF ACT AND THE BEEF CHECKOFF PROGRAM

Congress passed the Beef Promotion and Research Act, 7 U.S.C. § 2901 *et seq.* (the "Beef Act" or "Act") in 1985, creating a producer- and importer-funded promotion and marketing program (the "Beef Checkoff Program"). Pub. L. 99-198, § 1601(b), 99 Stat. 1597 (1985). The purpose of the Beef Checkoff Program is to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." *Id.*

The Act provided USDA with oversight authority of the Beef Checkoff Program and directed USDA to promulgate a "beef promotion and research order," which nearly 80 percent of voting cattle producers approved in a referendum. 7 U.S.C. §§ 2903(a), 2906(a); 51 Fed. Reg. 26,132 (July 18, 1986); C.A. S.E.R. 115. The Beef Promotion and Research Order, 7 C.F.R. § 1260 *et seq.* (the "Order"), established a regulatory scheme and general content parameters of the Beef Checkoff Program.

Every cattle producer and importer must pay a $1-per-head assessment (a "checkoff") on cattle sold in the United States. 7 U.S.C. § 2901(b); 7 C.F.R. § 1260.172(a). Under the Act and Order, these assessments may be used only for beef promotion, research, consumer information, and industry information. 7 U.S.C. § 2904(4)(B); 7 C.F.R. §§ 1260.168(j), 1260.169, 1260.181(b).

II. THE BEEF BOARD AND OPERATING COMMITTEE

Two entities administer the Beef Checkoff Program: the Cattlemen's Beef Promotion and Research Board (the "Beef Board") and its operating committee, the Beef Promotion Operating Committee (the "Operating Committee"). 7 U.S.C. §§ 2904(1)-(5); 7 C.F.R. §§ 1260.150, 1260.161, 1260.168. The Beef Board oversees the Beef Checkoff Program, and the Operating Committee designs the Board's campaigns. 7 U.S.C. § 2904(2), (4)(B) and (C); *see* 7 C.F.R. § 1260.141-1260.169.

Half the Operating Committee, and all of the Beef Board, is appointed by the Secretary of Agriculture, 7 U.S.C. § 2904(1) and (4)(A), and each member is subject to removal by the Secretary, 7 C.F.R. § 1260.213. As described by this Court, "[t]he message of the promotional campaigns" developed by these entities "is effectively controlled by the Federal Government" and constitutes government speech. *Johanns*, 544 U.S. at 560.

III. QUALIFIED STATE BEEF COUNCILS

Before the Beef Act, most states established beef-marketing programs administered by state or private industry associations. *See* H.R. Rep. No. 271, 99th Cong., 1st Sess. 187 (1985). Recognizing that such associations were "invaluable to the efforts of promoting the consumption of beef and beef products," the Beef Act provided a role for QSBCs in the Beef Checkoff Program. 7 U.S.C. §§ 2901(a)(5), 2902(14).

QSBCs collect the $1-per-head assessments from producers in their respective states on behalf of the Beef Board. *See* 7 U.S.C. § 2904(8)(A); 7 C.F.R.

§ 1260.172(a). The Act provides that QSBCs must remit at least half of each assessment to the Beef Board but may retain any remainder for activities authorized by the Act and Order, subject to USDA's oversight. 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3).

A cattle producer can comply 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. 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(2) and (3). Additionally, unless otherwise provided by state law, producers may direct the full amount of their assessments to the Board, *see* 84 Fed. Reg. 20,765, 20,766-20,767 (May 13, 2019), and QSBCs must honor those requests, *see* 7 C.F.R. § 1260.172(a)(7), § 1260.181(b)(8) and (9).

QSBCs must be certified by the Beef Board before they collect assessments. 7 C.F.R. § 1260.181(a). While QSBCs operate under their own bylaws and/or charters, they must comply with the requirements of the Act and Order. 7 C.F.R. § 1260.181(b). Under the Act and Order, USDA has broad authority—including the power to investigate, subpoena, initiate enforcement proceedings, fine, and seek contempt—to ensure compliance with the Act and Order by "any person," including QSBCs and their officers. 7 U.S.C. §§ 2902(11) (defining "person"), 2908(a)-(b) (enforcement authority), 2909 (investigatory, subpoena, and enforcement authority). USDA's authority is both retrospective ("has engaged") and prospective ("is about to engage") as to its ensuring "any person['s]" compliance with the Act and Order. 7 U.S.C. § 2909. USDA also has the power, through the Beef Board, to deny or revoke certification if a QSBC fails to meet certain requirements, including ensuring that all campaigns comply with the Act's 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 information as the Secretary shall require, *see, e.g.*, C.A. E.R. 55-56.

QSBCs use checkoff funds to "conduct[] beef promotion, research, and consumer information programs." 7 U.S.C. § 2902(14). QSBCs may engage and involve third-party industry organizations. *See* 7 U.S.C. § 2904(6); 7 C.F.R. § 1260.168(b). These third-party industry organizations further the objectives of the Beef Checkoff Program—oftentimes as contractors to the Beef Board through annual contracts with the Operating Committee—by engaging in promotion and marketing activities that both the Beef Board and USDA review and pre-approve. *See* 7 U.S.C. §§ 2904(4)-(6); 7 C.F.R. §§ 1260.168, 1260.169.

Many of these expenditures are governed by contractual agreements between the state council and the third-party. Pet. App. 5. But QSBCs also make non-contractual transfers of checkoff funds to third parties, mainly through periodic contributions to the Federation of State Beef Councils ("Federation") and the United States Meat Export Federation ("USMEF"). *Id.* at 5 & 11 n.5. Recipients of these transfers must identify their expenditures in an "annual accounting," *id.* at 5, and stick to the promotional message established by the Beef Act and pertinent regulations, *see ibid.*; 7 C.F.R. § 1260.181(b)(1).

Beginning in December 2016, USDA executed individual memoranda of understanding ("MOUs") with many councils. *See* Pet. App. 4. The MOUs confirm that USDA may: (1) review and pre-approve the QSBCs' promotional and marketing materials prior to dissemination; (2) review and pre-approve the QSBCs' detailed annual budgets prior to implementation; (3) review and pre-approve the QSBCs' marketing plans

prior to implementation; (4) review and pre-approve all Beef Checkoff-related contracts prior to their execution; (5) attend and participate in QSBC board meetings; (6) require QSBCs to provide USDA with annual audited financial statements; and (7) obtain any other information it requests. *See, e.g.*, C.A. ER 281-83 (Montana Beef Council MOU). Non-compliance can lead to decertification. Pet. App. 13.

IV. PETITIONER'S LAWSUIT AGAINST THE MONTANA BEEF COUNCIL

In May 2016, Petitioner Ranchers-Cattlemen Action Legal Fund, a trade organization for independent cattle producers filed suit against the Secretary, alleging that the per-head assessments to the Montana Beef Council were a compelled subsidy of private speech that violates the First Amendment. C.A. E.R. 422-58.

After a hearing on petitioner's motion for a preliminary injunction and summary judgment, the magistrate judge recommended that petitioner's motion for preliminary injunction be granted and its summary judgment motion be denied. D. Ct. Doc. 44 at 12 (Dec. 12, 2016). In recommending entry of a preliminary injunction, the magistrate judge found that, "[b]ased on the record before it," USDA "likely" does not exert effective control over the Montana Beef Council's speech. *Id.* at 10. In so finding, the magistrate judge noted that summary judgment was inappropriate on the undeveloped record as to USDA's level of effective control. *See id.* at 9. The magistrate judge recommended that USDA be preliminarily enjoined from allowing the Montana Beef Council to retain any portion of the assessment "unless a cattle producer provides prior affirmative consent," or, in other words, "opts-in." *Id.* at 12.

Following the findings and recommendations, USDA and the Montana Beef Council entered into the first of the MOUs discussed above. C.A. E.R. 281-83; *see also* p. 5, *supra*. The district court adopted the findings and recommendations in full and granted petitioner's preliminary injunction request *without* addressing the MOU. C.A. E.R. 3-29.

In an unpublished decision, the court of appeals affirmed. *Ranchers-Cattlemen Action Legal Fund United Stockgrowers of Am. v. Perdue*, 718 F. App'x 541, 542-43 (9th Cir. 2018). The majority noted that, "[u]nder our 'limited and deferential' review that 'does not extend to the underlying merits of the case,' we are unable to say the district court abused its discretion in granting the preliminary injunction." *Id.* at 542 (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011)). According to the majority, USDA's argument simply "takes issue with the district court's conclusion" and was therefore "insufficient to support reversal of a preliminary injunction." *Id.* The majority also concluded that USDA had waived reliance on the Montana Beef Council MOU by not challenging in its opening brief the district court's failure to address it. *Id.* at 542 n.1.

In dissent, Judge Hurwitz noted that the MOU "plainly grants [USDA] complete pre-approval authority over 'any and all promotion, advertising, research, and consumer information plans and projects' of the [Montana Beef Council]." *Id.* at 543 (Hurwitz, J., dissenting). Judge Hurwitz found the majority's conclusion that USDA waived any argument based on the MOU "mystifying" and noted that the MOU "plainly was designed to remedy the purported deficiencies in 'effective control' by the Secretary identified in the magistrate judge's submission." *Id.* at 544.

On remand, petitioner amended its complaint to make claims against 14 additional QSBCs that had entered MOUs with USDA. C.A. E.R. 400-21. Four QSBCs and three independent producers (the non-governmental respondents here) intervened to defend the program. D. Ct. Doc. 62 (Nov. 14, 2018); D. Ct. Doc. 69 (Nov. 28, 2018).

The parties cross-moved for summary judgment, and the district court entered judgment for the government and intervenors. The district court found that the Beef Act, its implementing regulations, and the MOUs cumulatively demonstrated that the federal government effectively controls the promotional speech of QSBCs and its third-party affiliates. Pet. App. 33, 42.

On appeal, petitioner narrowed its challenge to only QSBCs' non-contractual transfers to third-parties, dropping its broader challenge to speech generated by the QSBCs themselves and their contracted third-party affiliates. *See* Pet. C.A. Op. Br. 37-41 (complaining about third-party speech that "the government does not pre-approve" by organizations "such as the Federation and USMEF"); Pet. C.A. Reply Br. 1 (stating that promotional activities of "the state beef councils, and their contractors," "are not at issue on appeal"); *see also* 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 acknowledging this narrowing).

The court of appeals unanimously affirmed. Acknowledging petitioner's concession that it had narrowed its challenge, the court began with the observation that "[t]he parties agree that third-party speech generated pursuant to . . . contracts is government speech." Pet. App. 5; *see also id.* at 11. Turning to "[t]he

primary issue [left] on appeal," the court then held that "speech made by third parties" pursuant to "non-contractual transfers of checkoff funds" is likewise "effectively government speech." Pet. App. 5. This was so, the court explained, because the promotional "message is firmly established by the federal government": the Beef Act and its implementing regulations direct the content of "all third-party speech," *id.* at 12. Additionally, under the MOUs, QSBCs "must submit annual budget and marketing proposals for the Secretary's approval" and report all expenditures in an "annual accounting," *id.* at 5, 12-13 (internal quotation marks omitted). The QSBCs 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. And ultimately, the Secretary has the authority to decertify a council if "he disapproves of the use of those funds." *Ibid.* For these reasons, the court concluded that the Secretary "clearly" "has unquestioned control of the flow of assessment funds" to the QSBCs and the "ability to control" all messages they fund. *Id.* at 13-14.

REASONS FOR DENYING THE PETITION

In *Johanns*, this Court examined the Beef Checkoff Program and held that the promotional activities funded by checkoff dollars are government speech. Petitioner failed to preserve any challenge to promotional speech funded at the federal level, and petitioner conceded before the court of appeals that the use of checkoff funds by QSBCs and their contractors is consistent with *Johanns*.

Petitioner's challenge is thus a narrow one: whether QSBCs may, consistent with the First Amendment,

use checkoff funds for periodic non-contractual payments to organizations that assist in promotional activities under the Beef Act.

The court of appeals' decision that QSBCs may use checkoff funds in that manner is consistent with this Court's and the courts of appeals' relevant decisions. It is likewise consistent with this Court's intervening government-speech decision in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). There is no basis for overruling *Johanns*, and indeed, the *stare decisis* analysis certainly favors retaining it. All-in-all, there are no credible grounds for either plenary review or a grant, vacatur, and remand.

I. THE COURT OF APPEALS' DECISION IS CORRECT, AND PETITIONER'S CHALLENGE IS FACT-BOUND

A. The speech at issue, as part of the federal promotional program approved in *Johanns*, is government speech

"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," endorsing some viewpoints and rejecting others. *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). "[S]ome government programs involve, or entirely consist of, advocating a position." *Johanns*, 544 U.S. at 559. Elections check government speech, not the First Amendment. *Walker*, 576 U.S. at 207.

In *Johanns*, the question was whether federal-level promotional campaigns were *not* government speech because non-governmental entities—the Beef Board

and the Operating Committee—helped develop them. 544 U.S. at 560. This Court answered "no," holding that the government "is not precluded from relying on the government-speech doctrine" merely because it uses "assistance from nongovernmental sources." *Id.* at 562.

Instead, 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 were still government speech. *Id.* at 560 (emphasis added).

The court of appeals correctly concluded that QSBCs' periodic non-contractual payments to organizations that assist in implementing promotional campaigns under the Beef Checkoff Program are also "effectively controlled by the government" and thus constitute government speech. Pet. App. 11 (internal quotation marks omitted).

The court of appeals considered the extent to which the government controls the promotional speech at issue. The Beef Act and its implementing regulations "firmly establish[]" the message of that speech. *Id.* at 12. Specifically, the Beef Checkoff Program's "basic message [is] 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 likewise constrain the third-party industry organizations at issue here. *See* Pet. App. 12.

As in *Johanns*, the Secretary has oversight over the promotions of entities funded by checkoffs, requiring that councils submit annual budgets describing those

entities' proposed expenditures and contemplated promotional activities; account for all disbursements of checkoff funds and report the activities carried out; and invite federal representatives to attend council meetings when funding and promotional decisions are made. *Id.* at 5, 12-13.

And also as in *Johanns*, the QSBCs 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 QSBCs—and the threat of decertification under the MOUs and the regulations if he disapproves of the use of those funds." Pet. App. 13.

The court further found that Congress "expressly contemplated" the assistance of third parties by "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)). Most of the non-contractual funding that petitioner challenges goes to two of those national organizations—the Federation and the USMEF—"with established relationships with the Beef Board." *Id.* at 11 n.5. Congress even "gave the Federation an express role in the beef checkoff program" by "authorizing it to elect members of the Operating Committee" and by directing the Committee to enter into agreements specifically with the Federation in "'implement[ing] programs of promotion.'" *Ibid.* (quoting 7 U.S.C. § 2904(4)(A) and (6)).

B. Petitioner's arguments that the court of appeals misapplied *Johanns* are unpersuasive and fact-bound

Petitioner complains that the court of appeals unlawfully 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. Petitioner's characterization is belied by the court of appeals' opinion. The court of appeals merely asked and answered the same question this Court posited in *Johanns*: whether the federal government "effectively controlled" the message of those aspects of the Beef Checkoff promotional campaigns that petitioner was challenging. The court of appeals then considered the speech at issue and compared it to the speech in *Johanns*. *See* pp. 8-9, 11-12, *supra*. Ultimately, the court of appeals concluded that the speech implicated here is likewise "effectively controlled" by the federal government. That decision is both legally correct, as explained above (pp. 11-12, *supra*), and turns entirely on the facts of this case. Although the petition dresses up this challenge in legal garb, the question whether the government effectively controls the speech at issue here is fact-bound.

Petitioner shifts focus in reply, relying primarily on the court of appeals' supposed "anti-micro-managing rule" as having been the basis for its decision, and asserts that, under that supposed rule, the court of appeals impermissibly permitted the "the government-speech exception to the First Amendment to expand[]" to accommodate "regulatory flexibility." Pet. Reply 1; *see also id.* at 3-5; *cf.* Pet. 24-26. But context makes clear that there is no such "rule" at issue here and that the court of appeals held nothing of the sort.

The first time the court of appeals mentioned micro-management, it did so merely in summarizing its prior compelled-subsidy decisions, remarking that "effective control" can be achieved in multiple ways and that "'[t]o draw a line between . . . approaches to oversight risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake.'" Pet. App. 9-10 (quoting *Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1009-10 (9th Cir. 2007)). The second time the court of appeals mentioned "micro-management" was at the tail of its government-speech analysis merely to underscore its actual holding that the Secretary "clearly" "has unquestioned control of the flow of assessment funds to the QSBCs" and thus the "ability to control" all resulting speech. *Id.* at 13; *see also id.* at 13-14 ("A contrary holding . . . 'risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake.'"); *accord Summum*, 555 U.S. at 473 (holding "the City has 'effectively controlled' the messages" because it had "final approval authority" over them). Petitioner is attacking a holding that is not present in the court of appeals' opinion.

It is true that, unlike in *Johanns*, the Secretary does not in fact pre-approve every word of the promotional messages at issue here. Pet. 22. But that is irrelevant. The decisive issue is "the government's *ability* to control speech." Pet. App. 13 (emphasis in original); *accord Summum*, 555 U.S. at 473. And here, the Act and regulations prescribe the basic message, and the councils' extensive reporting obligations, combined with the Secretary's ability to participate in council board meetings, control over the flow of checkoff funds to the councils, and power to decertify non-compliant QSBCs establish effective control. *See* pp. 4-6, *supra*.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANOTHER COURT OF APPEALS

A. The court of appeals' decision is consistent with *Matal* and *United Foods*

Contrary to petitioner's assertion, the court of appeals' decision does not conflict with this Court's decisions in *Matal v. Tam*, 137 S. Ct. 1744 (2017), or *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

In *Matal*, this Court held that the Patent and Trademark Office's ("PTO") registration of federal trademarks is not government speech because it does not "convey a Government message." 137 S. Ct. at 1760. The Court so held because the federal government has no role in the creation of a mark; an examiner may not examine a mark's viewpoint, except in limited circumstances in which the mark is "offensive"; registration is mandatory if the mark meets the Lanham Act's requirements; and the PTO is not authorized to remove a mark from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. *Id.* at 1758.

In doing so, the Court specifically distinguished trademarks from the speech 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.

Likewise here, guidelines prescribe *all* beef-promotional content, agency officials may attend meetings

when budgetary and promotional plans (including the planned use of non-contractual third parties) are discussed, and the Secretary may decertify any state council that fails to comply with the program's terms and objectives. *See* pp. 4-6, *supra*; Pet. App. 12-13. Unlike the trademarks in *Matal*, the speech here is part of a federal "program of paid advertising." *Cf. Matal*, 137 S. Ct. at 1759 (describing *Johanns*).

Petitioner's reply suggests that *Matal*'s endorsement of *Johanns* is irrelevant because, here, the government does not pre-approve every word of promotional materials before they are published. Pet. Reply 6-7. But this Court's cases do not follow the precise formula that petitioner's argument requires. The important, functional point of *Johanns* is that "[t]he message set out in the beef promotions [was] from beginning to end *the message established by the Federal Government*." *Matal*, 137 S. Ct. at 1759 (emphasis added). And the same is true here, even if some of the practical details are worked out differently.

Petitioner also wrongly contends that the decision below conflicts with *United Foods*, which was decided before *Johanns*. But *United Foods* did not even address the government-speech question because it was not properly preserved. *See United Foods*, 533 U.S. at 416-17. That case thus has no bearing on the questions presented here.

B. The court of appeals' decision also is consistent with the Second Circuit's decision in *Wandering Dago*

Similarly misplaced is petitioner's assertion (Pet. 23-26) that the court of appeals' decision conflicts with the Second Circuit's decision in *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018). That case asked

whether New York could deny a vendor's request to sell food on a public plaza because the vendor used offensive language in its branding.

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 [would] 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.

Here, the *entire* purpose of the Beef Checkoff Program is to fund a specific government message. The government sets the message, oversees the use of the funds, and may withdraw certification if a state council's third-party expenditures do not comply with the program's requirements. *See* pp. 4-6, *supra*. And unlike the vendors in *Wandering Dago*, the beef councils and organizations they engage are selected specifically "because of their ability to help convey a coherent government message." 879 F.3d at 37.

Petitioner's reply focuses on the Second Circuit's statement 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," *id.* at 34, arguing that "[t]his 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," Pet. Reply 6.

Again, context matters: *Wandering Dago* had nothing to do with government messaging, and the state

there *had* "provid[ed] a forum for the speech or in some way allow[ed] or facilitate[d] it" by creating an outdoor space for lunch—which is the sum total of what the quote on which petitioner relies stands for in context. Petitioner's suggestion that this statement somehow conflicts with the court of appeals' decision below—which is *entirely* about government messaging and has *nothing* to do with any particular forum—is inapt. *See Wandering Dago*, 879 F.2d at 34.

Moreover, as already noted (pp. 12-13, *supra*), it is simply false that the court of appeals held below that "if the government authorizes a compelled subsidy for a certain type of speech, that is enough." Pet. 24. The government exercises vastly more control over Beef Act messaging than that, and the court of appeals relied on the totality of that "effective control" in its analysis.

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE PRIMARY QUESTION PRESENTED

This is also the wrong case for the Court to consider any First Amendment concerns raised by the QSBCs' use of checkoff funds. As explained above (p. 3-4, *supra*), producers can choose to redirect all their checkoffs to the national program. That contributions to the QSBCs are not actually compelled is another reason to reject petitioner's challenge.

In resisting this conclusion, petitioner first insists that respondents' "reliance on the opt-out . . . has been waived" because "[t]o raise this issue the defendants needed to cross-appeal." Pet. Reply 11. That assertion is meritless. The district court granted summary judgment for respondents with petitioner taking nothing. Pet. App 42-44. A prevailing defendant is always free

to seek "affirm[ance] on any ground supported by the law and the record that will not expand the relief granted below." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018) (citing *Thigpen v. Roberts,* 468 U.S. 27, 30 (1984)). Affirmance based on the opt-out was sought in the court of appeals, U.S. C.A. Br. 25-26, petitioner made the same waiver argument there, Pet. C.A. Reply Br. 24-25, and far from embracing petitioner's waiver argument, the court of appeals instead declined to reach it "[b]ecause we hold that the government effectively controls the speech at issue," Pet. App. 13 n.6.

Thus, neither this Court's precedent nor the record supports petitioner's assertion that a cross-appeal is necessary when, as here, the same relief—affirmance of summary judgment—is urged as an alternative basis for affirmance on appeal. *Compare Jennings v. Stephens*, 574 U.S. 271, 276-82 (2015) (cross-appeal was not required to permit habeas petitioner to urge affirmance of grant of habeas relief based on ineffective-assistance-of-counsel theory rejected by the district court because "[t]his Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*"), *with Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008) (government cross-appeal was required for the court of appeals to increase the defendant's sentence based on the government-appellee's arguments that the sentence was too low).

Petitioner's alternative suggestion that *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), invalidates respondents' opt-out argument, and that "the public has long been on notice" that *Johanns* is unreliable precedent due to *Janus*, is unconvincing. Pet. Reply 10-11. First, *Janus* is irrelevant to respondents'

opt-out argument because *Janus* was not about government messaging at all; in fact, it was the Governor of Illinois himself who initiated the lawsuit. 138 S. Ct. at 2462. At issue there were fees that public employees were compelled to pay Illinois unions that would then negotiate *against* the government. *Id.* at 2460. Whether and how union fees are assessed have no bearing on the constitutionality of the Beef Checkoff Program, an extensive and detailed program whose entire purpose is government messaging, and whose federal component this Court has already held constitutes government speech.

This Court has approved procedures for opting out of payments that support private speech when there is fair notice and individuals are able to make an informed choice. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302-03 (1986). Although the specific opt-out procedures provided for in any particular case may be inadequate, *see Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 315 (2012), *Janus* did not change the principle that opt-out procedures avoid compulsion when they give people a meaningful choice. *See Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020) (upholding, after *Janus*, procedures for opting out of state-bar dues that were "appropriate" under the circumstances); *see also, e.g.*, *id.* ("Nothing in the summary judgment record suggests that [the bar association's] fee statement is so confusing that it fails to give . . . members adequate notice of their" right to opt-out).

There has been no suggestion that cattle producers are unaware of the opt-out procedure or are unable to make an informed choice in that respect. Any subsidy provided to the state councils is thus voluntary.

Finally, *Janus* does not mention *Johanns*, so that decision hardly constitutes "notice" that *Johanns* is in jeopardy. *Cf. Fleck*, 937 F.3d at 1114-15 ("The majority in *Janus* did not . . . respond to the dissent's assertion that . . . 'today's decision does not question . . . case[s] involving compelled speech subsidies outside the labor sphere.'" (quoting *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting))).

Janus does not undermine the Beef Checkoff Program. Nor does it impact the government's or intervenors' "opt-out" argument. The fact that petitioner's members are *not* actually compelled to fund the speech of any QSBC provides an alternative basis for affirmance and makes this case a poor vehicle to resolve petitioner's primary question presented.

IV. THIS COURT'S INTERVENING DECISION IN *SHURTLEFF* DOES NOT AFFECT THIS CASE

The petition asserted that if this Court "agrees with the *Shurtleff* petitioners . . . the decision below must be vacated." Pet. 21; *see also* Pet. Reply 1, 3, 7-10, 12. Yet elsewhere, petitioner appears to concede that *Shurtleff* would have no impact on this case. *See* Pet. Reply 2-3 ("This case[] . . . . provides a path to limit the [government-speech] doctrine unavailable in *Shurtleff*."). In any event, this Court has since decided *Shurtleff*, and the Court's opinion confirms that petitioner's request for a grant, vacatur, and remand is misplaced.

At issue in *Shurtleff* was the City of Boston's flag-raising program, pursuant to which the City permitted groups to hold flag-raising ceremonies on one of the three flagpoles outside City Hall, had approved approximately 50 flags raised at 284 ceremonies over a

twelve-year period, and had never denied a flag-raising request until it denied the petitioners' request to raise a religious flag in 2017. 142 S. Ct. at 1587. The City defended the petitioners' challenge on the basis that its decision to approve or deny a request constituted government speech. *Id.* at 1589.

In concluding that the City's denial of the petitioners' request was not government speech, this Court framed its inquiry as a "holistic" one "driven by a case's context" and "designed to determine whether the government intends to speak for itself or to regulate private expression." *Ibid.* As that framing makes plain, *Shurtleff* involved a qualitatively different inquiry than the question presented here, which asks whether the use of compelled subsidies pursuant to a federal commodity-marketing program that this Court in *Johanns* already held is designed to convey a government message renders the government-speech doctrine inapplicable. 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).

In other words, because this Court already has held that promotional activities funded by checkoff dollars are intended to convey a government message, this case does not ask—unlike *Shurtleff*—whether there is a government intent to speak. Nor does this case involve any regulation of private expression; petitioner and others are free to speak about beef as they please, and they are free to redirect the entirety of their checkoffs to the national program if they disagree with the QSBCs' promotional campaigns (or for any other or no reason at all). *See* pp. 3-4, *supra.* To this end, it is unsurprising that this Court's decision in *Shurtleff*

never cites *Johanns* or references its qualitatively different analysis upholding the Beef Checkoff Program. *Cf. Shurtleff*, 142 S. Ct. at 1597-1600 (Alito, J., concurring in the judgment).

Nonetheless, petitioner insists that the assistance by national organizations closely integrated into the checkoff program in developing the QSBCs' beef-promotional campaigns is not covered by *Johanns* and that the government-speech doctrine is inapplicable to that particular use of checkoff funds. Even if *Shurtleff* was relevant to the compelled-subsidy context (which it is not), the considerations evaluated by *Shurtleff* confirm that the promotional campaigns prepared with the assistance of these national organizations constitute government speech.

Shurtleff's "holistic inquiry" looked to "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.* at 1584. These considerations, if applicable, clearly establish that the speech at issue here is government speech.

First, there can be no serious dispute that "the history of the expression at issue" weighs in favor of finding that the promotional campaigns at issue are government speech. Checkoffs, which highlight and promote the agriculture and farming industries central to the American story, have had a rich history in the commodity marketplace since at least the New Deal era. "Since the prototype Florida Citrus Advertising Tax was instituted in 1935, hundreds of mandatory farm commodity promotion programs have been legislated

by states or the federal government."[1] Geoffrey S. Becker, Cong. Research Serv., *Federal Farm Promotion ("Check-Off") Programs* 2 (2008).

Congress created the Beef Checkoff Program at issue here in 1985, and this Court held nearly 20 years ago in *Johanns* that beef-promotional activities funded by the checkoff are government speech even when they include "assistance from nongovernmental sources," 544 U.S. at 561-62, because "'[t]he government. . . may support valid programs and policies by taxes or other exactions'" and spend those funds "'for speech and other expression to advocate and defend its own policies,'" *id.* at 559 (citation omitted). That holding forecloses any assertion that the "history of the expression at issue" points to anything except that this is government speech.

Although the "the public's likely perception as to who (the government or a private person) is speaking" is unclear in this context, *Shurtleff*'s final consideration—"the extent to which the government has actively shaped or controlled the expression"—also weighs decidedly in favor of finding the speech at issue here to be government speech. 142 S. Ct. at 1589-90. In *Shurtleff*, Boston's record regarding "control over the flags' content and meaning . . . . [wa]s thin." *Id.* at 1592. It "told the public that it sought 'to accommodate all applicants'"; it "'never requested to review a flag or requested changes to a flag in connection with approval'"; it had never denied an application until the

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[1] On the federal side, the Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246, created the framework for federal marketing orders and agreements and checkoff programs. Rita-Marie Cain Reid, *Get Real: Organic Marketing Under USDA's Proposed Promotion & Research Agreement*, 72 Food & Drug L.J. 563, 564-65 (2017).

petitioners'; and it "had nothing—no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate." *Id.*; *cf. also Matal*, 137 S. Ct. at 1758.

That limited involvement contrasts with the extensive control that USDA has over the QSBCs' beef promotional efforts—even including those generated by non-contractual payments to third parties. As explained above (pp. 2-3, *supra*), Congress and USDA have defined the beef-promotional message "from beginning to end," *Johanns*, 544 U.S. at 560, which recipients of such payments must adhere to. *See* p. 4, *supra*. Those recipients must provide an annual accounting of their expenditures. *See* p. 5, *supra*. Among other things, USDA reviews and approves the QSBCs' budgets and marketing plans, which detail their anticipated expenses and disbursements, including any payments to third parties, and USDA officials must be informed of and may participate in QSBC board meetings at which promotional and funding decisions are made. *See* pp. 5-6, *supra*. USDA also retains the authority to enforce these requirements by decertifying a noncompliant QSBC and thereby terminating its access to checkoff funds. *See* pp. 4-6, *supra*.

Shurtleff is either irrelevant to this case, or compels affirmance (because this case bears hallmarks of government speech that case lacked). It assuredly does not "overrule[]" "the Ninth Circuit's holding," as petitioner purported to predict. Pet. Reply 7.

V. PETITIONER OFFERS NO GOOD REASON TO REVISIT *JOHANNS*

Petitioner's argument that the Court should overrule *Johanns* is likewise unpersuasive. Pet. 33. The court of appeals straightforwardly applied *Johanns* to

a closely-related aspect of the same program that this Court approved in *Johanns* nearly two decades ago. The lower courts have not struggled to apply that case, such that further consideration from this Court would be helpful.[2]

Stare decisis is a "principle of policy" that determines whether precedent should be overruled. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (2010). The Court considers the "workability" of the standard, "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

Even a "good argument" that the Court "got something wrong . . . cannot by itself justifying scrapping settled precedent." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). Nonetheless, that is the only reason petitioner actually offers for overruling *Johanns*. Pet. 30-33 ("With this understanding, *Johanns* was not correctly decided."); *see also* Pet. Reply 10 (arguing that *Johanns* should be overruled because it is a First Amendment case).

Petitioner ignores that both *Walker* and *Summum*—even more recent cases from this Court—relied on *Johanns* by asking whether the government "effectively controlled" the messages at issue in those cases to determine whether those messages constituted government speech. *See Walker*, 576 U.S. at 213; *Summum*, 555 U.S. at 473. When this Court most recently cited *Johanns* in a majority opinion, it was to reaffirm its principles and to emphasize that where "[t]he message

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[2] For example, even the Second Circuit's decision in *Wandering Dago* that petitioner invokes as supposedly splitting with the court of appeals here (Pet. 23-26) never mentions *Johanns*.

set out in the beef promotions [was] from beginning to end the message established by the Federal Government," the promotions were government speech. *Matal*, 137 S. Ct. at 1759. And *Shurtleff*, the Court's most recent government speech case, also does not undermine *Johanns*. *See* pp. 21-25, *supra*. In short, this Court has never suggested that *Johanns* should be overruled.

Petitioner also ignores the substantial reliance interests of multiple constituencies, including the vast majority of producers who favor, and that have relied on the presumed constitutionality of, the Beef Checkoff Program since 1985. *Cf. Janus*, 138 S. Ct. at 2484 (noting reliance considerations were less important where "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, *we* described *Abood* as a First Amendment 'anomaly.'") (emphasis added).

No stare decisis principle supports overruling *Johanns*.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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