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**

## SUPPLEMENTAL 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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*Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), rejects the reasoning of the Ninth Circuit opinion below, including, specifically, each of Intervenor-Respondents' efforts to align the cases. Accordingly, Intervenors claim this Court's most recent government-speech case is not "relevant" to the Ninth Circuit's government-speech holding; or, if *Shurtleff* is applied, additional considerations it raises, but which were *not* addressed below, establish the Court should let the opinion stand. Int. Opp'n 23. Intervenors offer no plausible reason this Court should not grant, vacate, and remand.

Regarding plenary review, Intervenors largely rehash the Government-Respondents' Opposition. What they add supports rather than undermines the Petition. Intervenors argue the government-speech doctrine should distinguish between compelled subsidies and other forms of speech. Int. Opp'n 22. That is not the law, but it is one of the reasons Petitioner suggests the Court should grant the writ, to consider whether the doctrine is properly applied to compelled subsidies of nongovernmental speech. *E.g.*, Pet. 31-33. Thus, if the Court does not grant, vacate, and remand, it should take the case to address this distinction both Intervenors and Petitioner contend it should make.

### I. *Shurtleff* Refutes the Opinion Below.

A grant, vacate, and remand is warranted because this Court's intervening decision in *Shurtleff* undermines the Ninth Circuit's opinion. *Shurtleff* states that government speech exists when the "government speaks for itself." 142 S. Ct. at 1587. As a result, government "control over [the speech's] content and meaning … is key." *Id.* at 1592. For example, the

government produced government speech where it "always selected which monuments" it would display, or where it "'maintain[ed] direct control' over license plate designs by 'actively' reviewing every proposal and rejecting" some. *Id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470-73 (2009), and *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-08 (2015), respectively). Without a "comparable record," speech cannot be government speech. *Id.*

Therefore, *Shurtleff* held the determinative "feature of" that case was that the government did not "actively control[]" the speech at issue. *Id.* Put another way, the government's "lack of meaningful involvement in" "select[ing]" or "crafting" the speech was dispositive; such statements were "private, not government, speech." *Id.* at 1593.

In contrast, the Ninth Circuit held "[m]aterials produced" and issued by private advocacy groups, funded by the noncontractual transfers of Beef Checkoff funds, are government speech, even though the statements "need not be pre-approved" by the government. Pet. App. 5; *see also* Int. Opp'n 14 (admitting same, and that this makes this case "unlike" the Court's government-speech precedent). The Ninth Circuit held it sufficient that speakers commit to "abide by the principles of the Beef Act—promoting beef without being unfair, deceptive, or political"—and report back in "annual accounting[s]" regarding the expressions they generated, after the expressions are issued. Pet. App. 5. Even though the government had no role in crafting the messages (let alone a meaningful one), the Ninth Circuit held the compelled

subsidies produced government speech. That determination cannot be squared with *Shurtleff*.

Intervenors point to three facts they claim shoehorn this case in, but none brings *Shurtleff* and the decision below into line. First, Intervenors claim that because "the Act and regulations prescribe the *basic* message" to be produced—that it must promote beef, without being unfair, deceptive, or political—the noncontractual transfers must produce government speech. Int. Opp'n 14 (emphasis added); *see also id.* at 25 (claiming because the speech must be "beef-promotional" that is sufficient). But, in addition to *Shurtleff*'s holdings above, *United States v. United Foods, Inc.* explains simply "forc[ing] [a] subsidy for generic advertising" violates the First Amendment. 533 U.S. 405, 409 (2001). Otherwise, merely creating a compelled subsidy would establish it is government speech, and the exception would swallow the First Amendment. Were there any doubt that government speech requires the government to engage with the specific expressions, and not just direct that speech serve a general purpose, *Shurtleff* highlights that the government did not "request[] to review [the speech]," "request[] changes to" it, or "see [the speech] before" it issued, contributed to its conclusion the speech was private, not government speech. 142 S. Ct. at 1592.

Second, Intervenors emphasize that prior to the noncontractual transfers, the government reviews a "general description" of the "anticipated expenses and disbursements" and can participate in meetings where those distributions are discussed. Pet. App. 12-13 (Ninth Circuit opinion); Int. Opp'n 14, 25. But, the record confirms this review merely ensures the distributions will "enhance domestic marketing" of beef.

*E.g.*, C.A. E.R. 291-92. The descriptions do not identify the speech, and thus the government cannot consider it, and certainly cannot ensure the statements "convey[] a [government] message" regarding beef, as *Shurtleff* demands. 142 S. Ct. at 1592. Further, *Shurtleff* separately indicates that an expression aligns with the government's general "values" is not sufficient. *Id.* at 1592-93.

Third, Intervenors contend the government's ability to "decertify non-compliant" state councils is equivalent to controlling the speech produced through the noncontractual transfers. Int. Opp'n 14. However, by definition, this is not a means to provide input on the expressions, as *Shurtleff* requires, but, at most, a way to respond to them after they issued. *See also* Pet. 21 (explaining government cannot consider the message as part of evaluating compliance). Here too, *Shurtleff* confirms the government's ability to react to speech is not a control that renders it government speech, rather the government must have "shaped the messages." 142 S Ct. at 1592.

Faced with the stark rejection of the decision below, Intervenors claim *Shurtleff* does not apply to "compelled subsidies" of speech like the checkoffs. Int. Opp'n 22-23. Intervenors' entire basis for this assertion is that *Shurtleff* "never cites *Johanns* [*v. Livestock Marketing Association*, 544 U.S. 550 (2005)]," which applied the government-speech doctrine to compelled subsidies. *Id.*

Leaving aside the oddity of claiming this Court distinguished *Johanns sub silentio*, *Shurtleff* establishes compelled subsidies are governed by the same government-speech framework. In articulating its rules, *Shurtleff* incorporates the portions of every one

of this Court's other government-speech opinions that incorporated *Johanns*. *Shurtleff*, 142 S. Ct. at 1590 (discussing *Matal v. Tam*, 137 S. Ct. 1744, 1758-61 (2017), in turn relying on *Johanns*, 544 U.S. at 560-61); *id.* at 1589, 1592 (discussing *Walker*, 576 U.S. at 207-08, 213 (2015), in turn positively citing *Johanns*, 544 U.S. at 559, 560-61); *id.* at 1590, 1591, 1592 (discussing *Summum*, 555 U.S. at 470-73, in turn relying on *Johanns*, 544 U.S. at 560-61).

Relatedly, the Government-Respondents argued the writ here should be denied because the Court's other government-speech caselaw has "cite[d] *Johanns* approvingly and rel[ied] on its analysis," so the public has had no notice compelled subsidies could be treated differently. Gov. Opp'n 18. In arguing against plenary review, Intervenors themselves recognize "*Walker* and *Summum* … relied on *Johanns*," which they claim prevents revisiting *Johanns*, but which also confirms this Court has articulated a single government-speech doctrine. Int. Opp'n 26.

Further still, the Ninth Circuit follows numerous others in holding *Johanns*' government speech analysis as "instructive" when deciding whether any "message constitutes" government speech. *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964-65 (9th Cir. 2008). Thus, unless the opinion below is vacated, it will erroneously inform the government-speech analysis where even Intervenors concede *Shurtleff* should apply. *See* Int. Opp'n 22.

Arguing in the alternative, Intervenors finally contend that if the Court were to grant, vacate, and remand, the outcome would be the same based on *Shurtleff*'s "holistic inquiry." Int. Opp'n 23-25. *Shurtleff* calls on courts to consider factors beyond the

government's control over the speech—although it relied entirely on the absence of control to hold speech private speech. *Shurtleff*, 142 S. Ct. at 1589, 1592. Intervenors claim that were the Ninth Circuit to have applied the two additional factors identified in *Shurtleff*, it would have relied on them to hold the noncontractual transfers produce government speech.

However, the Ninth Circuit did not consider these factors, and the lower courts stated facts unrelated to the government's control over the speech were irrelevant. Pet. App. 35-37 (district court explaining it would not consider whether the public would perceive the speech as government speech). Thus, assuming the lower courts must weigh these additional factors, the proper course is to grant, vacate, and remand to allow them to do so in the first instance.

In addition, these other factors do not support the decision below. The "history of the expression" is one of the additional considerations. *Shurtleff*, 142 S. Ct. at 1589. Each of the state beef councils making the transfers at issue was formed as a private entity, and consistently held itself out as private. C.A. E.R. 86-88; *see also* Int. Opp'n 4 ("QSBCs operate under their own bylaws and/or charters[.]"). Further, the entities receiving the transfers and developing the speech are private "advocacy organizations." Pet. App. 11 n.5 (Ninth Circuit opinion).

Intervenors argue this factor comes out differently if the Court considers the history of checkoffs more generally. Int. Opp'n 23. But *Shurtleff* instructs courts to consider the history of "*this*" particular speech, in that case examining "flag flying, particularly at the seat of government" and the flying of private flags on government poles, rather than the

history of flags generally. 142 S. Ct. at 1590-92. Moreover, the Government-Respondents admitted the Beef Checkoff program grew out of the speech of "private industry associations." Gov. Opp'n 3.

*Shurtleff* also stated "whether the public would tend to view the speech at issue as the government's" is relevant to the government-speech analysis. 142 S. Ct. at 1591. The record demonstrates the government allows private entities using the compelled exactions to label the speech as coming from private organizations. C.A. E.R. 109-14. Further, despite their claim that the holistic inquiry supports affirmance, Intervenors themselves state "the public's likely perception as to who (the government or a private person) is speaking is unclear." Int. Opp'n 24 (quotation marks omitted).

In sum, whether this Court believes the Ninth Circuit can follow *Shurtleff*'s approach and resolve the matter based on the absence of government control over the expressions, or that it should conduct the complete analysis described in *Shurtleff*, the opinion below cannot stand. The only plausible reason Intervenors give not to grant, vacate, and remand is if this Court wishes to craft distinct rules for compelled subsidies, which would require the plenary review Petitioner alternatively requests.

## II. The Decision Below Presents Issues Worthy of This Court's Full Consideration.

Indeed, this case is a valuable vehicle to rein in the government-speech doctrine. It presents whether third-party speech in nongovernment forums, such as that produced by compelled subsidies, should be analyzed in the same manner as other expressions—as is

presently the case—or if the Court should craft new rules or prohibit the doctrine's application altogether.

Numerous members of this Court recognize the government-speech doctrine should limit its application to third-party speech. *Shurtleff*, 142 S. Ct. at 1583 (Alito, J. concurring, with Thomas, J. and Gorsuch, J.) ("[T]he real question in government-speech cases: whether the government is *speaking*."); *see also Walker*, 576 U.S. at 221-22 (Alito, J., dissenting, joined by Roberts, C.J., Scalia, J., and Kennedy, J.) (if no one would "really think that the sentiments reflected" those of the government, they should not be government speech).

Literature also warns of the dangers in applying the doctrine to third-party speech. Helen Norton, *The Government's Speech and the Constitution* 6, 42-43 (2019) (government speech is justified by a "transparency principle" and thus the doctrine must "prevent[] the government from concealing itself" as the instigator of the speech or it will "muffle others' voices"); Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 Sup. Ct. Rev. 33, 36, 56-57 ("Government intervention in the marketplace of ideas is especially dangerous when it is nontransparent."); Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 Hastings Const. L.Q. 37, 59-60 (2016) (unless the Court requires the public "know that the government was speaking" "the government will likely be tempted to classify more and more expressions as government speech," "nullif[ying]" the Constitution).

This case vividly demonstrates these harms of applying the doctrine to compelled subsidies. *Johanns* assumed for the purposes of its holding that the

private state beef councils only received "voluntary contributions" of Beef Checkoff funds. 544 U.S. at 554 n.1. Nonetheless, because it held nongovernmental actors could use compelled subsidies to produce government speech, for more than a decade the government allowed the Beef Checkoffs' exactions to be taken and used by private councils, without the government weighing in on any of their expressions. Int. Opp'n 5. Even when the Government-Respondents were compelled to reform the program, they carved out the noncontractual transfers, so compelled subsidies could continue to flow to private parties and fund their speech. Int. Opp'n 5. Each year, millions of beef producers' dollars are distributed this way. Pet. 15.

Moreover, the decision below explains, if the government can craft programs to distribute compelled subsidies for others' speech, the Ninth Circuit will limit the First Amendment's protections to avoid the complexity of policing such regimes. Pet. App. 9-10, 13-14. Intervenors argue this anti-micro-managing rule does not exist because the decision below only mentions it in framing its analysis and as the basis of its conclusion. Int. Opp'n 14. Again leaving aside the head-scratching nature of that argument, the Ninth Circuit stated the outcome here depended on its prior checkoff caselaw, which required "'less control'" over government speech than this Court has ever endorsed so the Ninth Circuit could avoid "'micro-managing legislative and regulatory schemes.'" Pet. App. 9-10 (quoting *Paramount Land Co. v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1011-12 (9th Cir. 2007)); *see also Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1230 (9th Cir. 2009) (holding the "differences in" government control over the speech

"insufficient to justify invalidating" the program because the court did not wish to "micro-manag[e]").

Accordingly, these decisions confirm the Court's prior attempts to limit the government-speech doctrine have been unsuccessful and it requires a new approach. The Ninth Circuit's anti-micro-managing rule cannot be reconciled with this Court's instruction to exercise "great caution before extending [] government-speech precedents." *Matal*, 137 S. Ct. at 1758.

Intervenors insist *Matal* is consistent with the opinion below because *Matal* endorsed the Beef Checkoff as government speech. Int. Opp'n 15-16. *Matal* only did so, however, based on its understanding that the checkoff operated as described in *Johanns*, particularly that the government could "edit or reject any proposed ad" funded with the compelled subsidies, which established it controlled the speech "'from beginning to end.'" 137 S. Ct. at 1759 (quoting *Johanns*, 544 U.S. at 560, 561). Thus, while Intervenors pretend the Ninth Circuit aligned with *Matal* and *Johanns* because each asked whether the government "effectively controlled" the speech, Int. Opp'n 13, the Ninth Circuit's interpretation of effective control, based on its anti-micro-managing rule, significantly undercuts this Court's teachings. *See also* Pet. 26-28.

Lest there be any doubt, the Ninth Circuit splits from *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018), because the Second Circuit follows this Court's direction. In recognizing it must cautiously apply the government-speech doctrine, the Second Circuit ensured each form of government "assistance" was truly used to communicate the government's "own message." *Id.* at 34-36. In contrast, the courts

below stated the anti-micro-managing rule prevents such an inquiry, explaining even if the government creates a "shell game" to hide its funding of private speech, the government must be allowed to regulate itself. Pet. App. 38-39 (district court opinion); *see also* Pet. 23-26. Intervenor's fact-bound distinctions between the cases do nothing to reconcile their approaches. Int. Opp'n 16-18.

Intervenors contend *stare decisis* prevents limiting the government-speech doctrine's application, Int. Opp'n 26-27, but their own caselaw explains it does not. Where "neither party defends" the present state of the law—here that the government-speech doctrine applies equally to compelled subsidies of third-party speech and other speech—"*stare decisis* is diminished." *Citizens United v. FEC*, 558 U.S. 310, 363 (2010). Moreover, that *Johanns* is a recent precedent, which the Court has consistently stated is infirm, further weighs against maintaining it. *Id.* So does the fact, ignored by Intervenors, that "this Court has not hesitated to overrule decisions offensive to the First Amendment." *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018).

Intervenors also claim the Court should look the other way in this case because beef producers can opt out of paying the exactions at issue. Int. Opp'n 20. Yet, they admit the lower court did not address the impact of the opt-out, meaning it is no barrier to this Court considering the government-speech analysis. Int. Opp'n 19. And Intervenors' notion that an opt-out mitigates First Amendment concerns is wrong. They cite *Chicago Teachers Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 302-03 (1986), for the proposition opt-outs can cure constitutional violation. But *Knox v.*

*SEIU, Loc. 1000*, 567 U.S. 298, 313 (2012), states *Hudson* cannot support that claim. Although Intervenors do not directly engage with *Knox*, they imply it has no bearing because it involves unions. Int. Opp'n 20. In fact, *Knox* relied on *United Foods*' discussion of the checkoffs' compelled subsidies to hold opt-ins are required, *Knox*, 567 U.S. at 322 (citing *United Foods*, 533 U.S. at 411). *Knox* also expressly identified the checkoffs as an example of where its "analysis and [] holding" would apply, and stated it was making opt-in the "default rule." *Id.* at 310, 312 (citing *United Foods*, 533 U.S. at 405).[1]

## CONCLUSION

For the foregoing reasons, this Court should either grant, vacate, and remand based on *Shurtleff*, or grant the petition for plenary review to consider and limit the current capacious application of the government-speech doctrine to third-party speech.

Respectfully submitted,

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[1] As Petitioner explained, this issue has also been waived. In contesting this argument, Intervenors fail to address the authority on which Petitioner relied, establishing the law of this case. *Compare* Reply 11, *with* Int. Opp'n 18-19.

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