No. _____

In The
Supreme Court of the United States

DELANO FARMS COMPANY, THE SUSAN NEILL COMPANY, AND LUCAS BROS. PARTNERSHIP,
Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether compelled contributions to fund the unsupervised commercial speech of the California Table Grape Commission are immune from First Amendment scrutiny pursuant to the government speech doctrine where the government has virtually no authority over or involvement in generating or reviewing such speech?

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PARTIES TO THE PROCEEDINGS BELOW

Petitioner Delano Farms Company grows table grapes in California and is forced to pay approximately $600,000 each year for generic advertising and other speech by respondent, California Table Grape Commission. Petitioners The Susan Neill Company and Lucas Bros. Partnership were a shipper and grower, respectively, of California table grapes and have previously been forced to pay assessments on such grapes. Petitioners were the plaintiffs in the district court and the appellants in the Ninth Circuit.

None of the petitioners is publicly traded or owned in whole or in part by any publicly traded corporation.

Respondent California Table Grape Commission is a corporate entity that collects fees on table grapes and engages in generic advertising and other speech promoting table grapes. Respondent was the defendant in the district court and the appellee in the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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The opinion of the District Court for the Eastern District of California is published at 546 F. Supp.2d 859 and is attached at Appendix C1-C214. The decision of the Ninth Circuit that is the subject of this petition is published at 586 F.3d 1219 and is attached at Appendix A1-A25. An earlier decision of the Ninth Circuit remanding the case back to the district court is published at 318 F.3d 895 and is attached at Appendix B1-B8.

JURISDICTION

The Ninth Circuit issued its opinion on November 20, 2009. The Ninth Circuit denied rehearing *en banc* on January 5, 2010. App. E1-E2. Justice Kennedy granted petitioners an extension of time to file this petition through June 4, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

Per Supreme Court Rule 29.4(c), because this petition draws into question a statute of the State of California, 28 U.S.C. § 2403(b) may apply and this petition has been served on the Attorney General of California. In the district court, the Attorney General of California was served with the complaint and entered an appearance in the case.

STATUTORY PROVISIONS INVOLVED

The sections of the California Food and Agricultural Code relevant to this case include, in relevant part:

§ 65550. Creation; composition; appointment

There is hereby created the California Table Grape Commission to be thus known and designated. The commission shall be composed of 21 fresh grape producers appointed by the director from the nominees selected as provided by this article and one public member appointed pursuant to Section 65575.1.

§ 65551. Body corporate; seal; records as evidence

The California Table Grape Commission shall be and is hereby declared and created a corporate body. It shall have the power to sue and be sued, to contract and be contracted with, and to have and possess all of the powers of a corporation. * * *

§ 65571. Liability

The State of California shall not be liable for the acts of the commission or its contracts. Payment of all claims arising by reason of the administration of this chapter or acts of the commission shall be limited to the funds collected by the commission. * * *

§ 65572. Powers and duties of commission

The powers and duties of the commission shall include the following:

(a) To elect a chairman, and from time to time such other officers as it may deem advisable, and to delegate to such officers such administrative duties as may appear advisable.

(b) To adopt and from time to time alter, rescind, modify and amend all proper and necessary rules, regulations and orders for the exercise of its powers and the performance of its duties, including rules for regulation of appeals from any rule, regulation or order of the commission.

(c) To administer and enforce this chapter, and to do and perform all acts and exercise all powers incidental to or in connection with or deemed reasonably necessary, proper or advisable to effectuate the purposes of this chapter.

(d) To employ, and at its pleasure discharge, a manager, treasurer, secretary, employees and necessary personnel, including attorneys engaged in the private practice of the law, fix their compensation and terms of employment, prescribe their duties, and to incur such expenses as it may deem reasonably necessary and proper to properly perform such of its duties as are authorized herein. The Attorney General shall aid and assist the commission on its request and shall undertake such judicial proceedings as requested by the commission to undertake on its behalf.

(e) To establish offices and incur expense, and to enter into any and all contracts and agreements, and to create such liabilities and borrow such funds in advance of receipt of assessments as may be necessary, in the opinion of the commission, for the proper administration and enforcement of this chapter and the performance of its duties.

(f) To keep accurate books, records and accounts of all of its dealings, which books, records and accounts shall be open to inspection and audit by the Department of Finance of the State of California or other

state officer charged with the audit of operations of departments of the State of California.

(g) To investigate and prosecute civilly violations of this chapter and to file complaints with appropriate law enforcement agencies or officers for criminal violations of this chapter.

(h) To promote the sale of fresh grapes by advertising and other similar means for the purpose of maintaining and expanding present markets and creating new and larger intrastate, interstate and foreign markets for fresh grapes; to educate and instruct the public with respect to fresh grapes; and the uses and time to use the several varieties, and the healthful properties and dietetic value of fresh grapes.

(i) In the discretion of the commission, to educate and instruct the wholesale and retail trade with respect to proper methods of handling and selling fresh grapes; to arrange for the performance of dealer service work providing display and other promotional materials; to make market surveys and analyses; and to present facts to and negotiate with state, federal and foreign agencies on matters which affect the marketing and distribution of fresh grapes; and to undertake any other similar activities which the commission may determine appropriate for the maintenance and expansion of present markets and the creation of new and larger markets for fresh grapes.

(j) In the discretion of the commission, to make in the name of the commission contracts to render service in formulating and conducting plans and programs, and such other contracts or agreements as the commission may deem necessary for the promotion of the sale of fresh grapes.

(k) In the discretion of the commission, to conduct, and contract with others to conduct, scientific research, including the study, analysis, dissemination and accumulation of information obtained from such research or elsewhere respecting the marketing and distribution of fresh grapes, the production, storage, refrigeration, inspection and transportation thereof, to develop and discover the dietetic value of fresh grapes and to develop and expand markets, and to improve cultural practices and product handling so that the various varieties may be placed in the hands of the ultimate consumer in the best possible condition. In connection with such research, the commission shall have the power to accept contributions of, or to match, private, state or federal funds that may be available for these purposes, and to employ or make contributions of funds to other persons or state or federal agencies conducting such research.

(*l*) To determine, subject to the limitations provided in Section 65600, not later than May 1 of each year, the assessment for the following 12 months' period beginning May 1st and ending April 30th.

(m) In the discretion of the commission, to publish and distribute without charge a bulletin or other communication for dissemination of information relating to the fresh grape industry to producers and shippers.

§ 65600. Levy of assessment; exemption

There is hereby levied and imposed upon all fresh grapes shipped during each marketing season an assessment as fixed by the commission at that amount determined by the commission as reasonably necessary to pay all obligations incurred or to be incurred

in accordance with this chapter and as reasonably necessary to carry out the objects and purposes of this chapter. However, during any marketing season the assessment shall not exceed $0.006522 per pound ($0.6522 per 100 pounds), computed on net weight when shipped, whether in bulk or loose in boxes or in any other container or packed in any style package.

All shipments of 150 pounds or less of fresh grapes sold or shipped by a producer direct to the consumer are exempt from the assessments.

§ 65650.5. Appeal to director; judicial review

Any person aggrieved by any action of the commission may appeal to the director. The director shall review the record of the proceedings before the commission. If the director finds that the record shows by substantial evidence that the commission's action was not an abuse of discretion or illegal, he shall dismiss such appeal. If he finds such action is not substantially sustained by the record, was an abuse of discretion, or illegal, he may reverse the action of the commission.

Any such decision of the director is subject to judicial review upon petition of the commission or any party aggrieved by the decision.

STATEMENT OF THE CASE

This case involves a challenge to CAL. FOOD & AGRIC. CODE § 65500 *et seq.*, popularly known as the Ketchum Act, which requires growers of table grapes to pay an assessment to respondent the California Table Grape Commission for all table grapes sold. The Commission is authorized to use that money to,

inter alia, conduct generic advertising promoting California table grapes. § 65572(h).

Petitioners grow and sell California table grapes that are sold under their own premium brands. Like many producers of high quality branded produce, they view generic advertising as undermining their branded advertising by minimizing the differences between their high quality branded produce and the lower quality produce sold by many of their competitors. They thus object to funding such generic commercial speech.

1. On September 16, 1996, petitioners brought suit against the Commission seeking a declaratory judgment, an injunction, and refunds on the grounds, *inter alia*, that their compelled contributions to the Commission to fund generic advertising violated their First Amendment rights.

While the case was pending, this Court issued its decision in *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457, 469 (1997), which held that assessments for generic advertising imposed in the context of a "broader collective enterprise" among tree-fruit growers did not violate the First Amendment.

Following that decision, the district court held that the compelled contributions in this case did not violate the First Amendment. App. A6 (discussing initial district court ruling). After further briefing regarding circuit court decisions interpreting and limiting *Glickman*, the district court denied reconsideration of its First Amendment ruling. App. C2-C4 (discussing procedural history).

2. On August 30, 2000, petitioners appealed to the Ninth Circuit.

3. While the appeal was pending, this Court issued its decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), which held that compelled contributions from mushroom growers for generic advertising violated the First Amendment. *United Foods* distinguished the tree-fruit program upheld in *Glickman* on the grounds that there was no broader collective enterprise restricting the sale of mushrooms and hence the compelled support for mushroom advertising was not "ancillary to a more comprehensive program restricting marketing autonomy." *Id.* at 410-411.

4. On January 27, 2003, the Ninth Circuit reversed and remanded, holding that the table-grape program was more like the mushroom advertising program in *United Foods* than the more broadly collectivized tree-fruit program in *Glickman*. App. B8.

5. On remand, the Commission argued, *inter alia*, that its generic advertising constituted government speech that was not subject to the First Amendment.

While the case was pending on remand, this Court issued its decision in *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550 (2005), which held that generic beef advertising under a federal marketing order constituted government speech and hence was not subject to a First Amendment challenge from the beef producers forced to contribute funds for such advertising. This Court identified a number of factors that caused it to conclude that the message conveyed by the beef advertising program "was effectively controlled by the Federal Government itself," and hence was government speech. *Id.* at 560. Of particular note was this Court's emphasis that the "Secretary [of

Agriculture] exercises final approval authority over every word used in every promotional campaign"; "All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department"; and "Officials of the Department also attend and participate in the open meetings at which proposals are developed." *Id.* at 561.

6. On March 31, 2008, the district court issued its memorandum decision granting defendant's motion for summary judgment and denying plaintiffs' cross-motions for partial summary judgment, holding that the table-grape program did not violate the First Amendment. App. C1-C214.

Regarding the government speech question at issue here, the court held that the Commission was a government entity and hence its speech was government speech. App. C123-C124. In the alternative, the court held that even if the Commission was not itself a government entity, it was sufficiently controlled and supervised by the government that its speech was still government speech. App. C145. Finally, the court held that even if the Commission's speech were private speech, compelled contributions to such speech satisfied the applicable test from *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), in that the speech was germane to various non-speech activities performed by the Commission. App. C212- C213.[1]

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[1] The court also held that the Susan Neill Company and Lucas Bros. Partnership lacked standing to seek prospective relief because they were no longer paying assessments, although Lucas Bros., but not the Susan Neill Company, continued to have

7. On April 16, 2008, the district court entered judgment for the Commission. App. D1-D3.

8. On May 14, 2008, plaintiffs again appealed to the Ninth Circuit.

9. On November 20, 2009, the Ninth Circuit affirmed. App. A1-A31.

The Ninth Circuit held that the speech by the Commission was "government speech that is immune to challenge under the First Amendment." App. A2. The court initially considered whether the Commission itself was a government entity, deeming it similar to Amtrak, as considered by this Court in *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374 (1995), and distinguishable from the State Bar at issue in *Keller v. State Bar of California,* 496 U.S. 1 (1990). App. A9-A15. The court recognized, however, that "there is admittedly an uncharted gap between *Keller* and *Lebron*," and that "this question is closely related to the government control question under *Johanns*. App. A15. The court thus proceeded to address the question under *Johanns* whether the government "effectively controlled" the Commission's speech both to resolve the government entity question as well as to determine whether such speech was government speech regardless of the nature of the Commission itself.

In considering whether the State controlled the Commission's message sufficiently to make it government speech, the Ninth Circuit relied exclusively

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standing to seek a refund as the grower who bore the ultimate cost of previous assessments on grapes shipped by the Susan Neill Company. App. C69-70.

on the legislative directive to promote table grapes for the supposed benefit of California's agricultural industry and its consumers, and on various indicia of the Secretary of the California Department of Food and Agriculture's *potential* control over the Commission's message. App. A19-A22. Such potential control was found in the Secretary's limited power to appoint and remove Commissioners, to adjudicate any complaints from persons aggrieved by the Commission's actions, and the State's power to audit the Commission's books and records. App. A21-A22.

The court of appeals did acknowledge, however, that the there were "some important differences between" the table grape program and both the federal beef program upheld in *Johanns* and a California pistachio program upheld in an earlier Ninth Circuit case, *Paramount Land Co. LP v. California Pistachio Commission,* 491 F.3d 1003 (CA9 2007). App. A22. Among those differences was the absence of a statutory requirement for "any type of review by the Secretary over the actual messages promulgated by the Commission," App. A22, and the absence of any power to require the Commission " 'to correct or cease any existing activity or function that is determined by the Secretary not to be in the public interest or to be in violation of this chapter,' " as exists under the pistachio program, App. A23 (quoting the broader authority given the Secretary over the pistachio commission). Finally, the court recognized that "the Secretary and the CDFA have, in practice, performed virtually no supervision of the Commission" and that "the Secretary does not attend meetings and does not review advertising and promotional activities, nor

does the State review the Commission's budgets." App. A23.

The court dismissed such differences, and the Secretary's failure to exercise any *actual* control over the Commission, by citing to its own earlier decision in the pistachio case:

> "passivity is not an indication that the government cannot exercise authority." 491 F.3d at 1011. Our focus in this case, as in *Paramount Land,* is the statutorily-authorized control the State has over the Commission, and not the actual level of control evidenced in the record.

App. A23-24. The court thus concluded that the differences between the table-grape program and the beef and pistachio programs "are legally insufficient to justify invalidating the Ketchum Act on First Amendment grounds" and affirmed the judgment of the district court. App. A24. [2]

Judge Reinhardt concurred in part and in the result, and would have found the Commission to be a government entity without reaching the question of "government control." *Id.*

10. On January 5, 2010, the Ninth Circuit denied plaintiffs' petition for rehearing *en banc*. App. E1-E2.

11. This petition for a writ of certiorari followed.

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[2] The court did not reach the question whether the program, if viewed as compelled support for non-governmental speech, was constitutional under this Court's competing precedents of *Glickman* and *United Foods*. App. A8 n. 2.

REASONS FOR GRANTING THE WRIT

This Court should grant the current petition for a writ of certiorari because the decision below conflicts with this Court's decision in *Johanns* regarding the criteria relevant to a finding of government speech and with the decisions of several circuits applying such criteria.

I. The Decision Below Conflicts with this Court's Decision in *Johanns* by Disregarding the Government's Failure to Exercise Control or Supervision Over the Purported Government Speech.

In *Johanns*, this Court reviewed a various factors relating to government control over generic beef advertising before concluding that such advertising constituted government speech not subject to the limits of the First Amendment. While this Court considered a number of factors relating to the statutory parameters of the beef advertising program and the Secretary of Agriculture's legal authority over different aspects of that program, it notably did not stop there. Rather, this Court discussed at length the actual and detailed supervision performed by the Secretary and specifically relied upon such actual supervision when concluding that the advertising constituted government speech.

For example, in describing the program, this Court noted that while the Operating Committee of the Beef Board "proposes projects to be funded by" the assesssment or "checkoff" on cattle sales, the "Secretary or his designee * * * approves each project *and, in the case of promotional materials, the content of each*

communication." 544 U.S. at 554 (emphasis added). As this Court further noted,

> the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. App. 114, 118-121, 274-275. Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and participate in the open meetings at which proposals are developed. *Id.,* at 111-112.

Id. at 561.[3]

Based on those facts, this Court concluded that "[w]hen, as here, the government sets the overall message to be communicated *and* approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental

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[3] *See also* 544 U.S. at 560 n. 4 (the Operating Committee "designs the promotional campaigns, which the Secretary supervises and approves"); *id.* at 561 (discussing regulations issued by the Secretary restricting the content of the advertising); *id.* at 563 ("specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording.").

sources in developing specific messages." *Id.* at 562 (emphasis added).[4]

In contrast to this Court's decision in *Johanns*, the Ninth Circuit simply disregarded the absence of actual supervision or involvement by the Secretary concerning the speech of the Commission. Instead, the court of appeals relied on the control the Secretary theoretically might, but did not, exercise:

> "passivity is not an indication that the government cannot exercise authority." 491 F.3d at 1011. Our focus in this case, as in *Paramount Land,* is the statutorily-authorized control the State has over the Commission, and not the actual level of control evidenced in the record.

App. A23-24.

The Ninth Circuit's disregard of the actual level of control exercised by the Secretary conflicts with this Court's emphasis on precisely such actual control as one of the central indicia of government speech. While the *potential* for control certainly factors into the analysis, the failure to *exercise* control is a strong counter-indicator to the notion that the government itself is speaking and suggests that the table-grape program is instead designed merely to facilitate the

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[4] *See also* 544 U.S. at 560 ("The message of the promotional campaigns is effectively controlled by the Federal Government itself"; "The message set out in the beef promotions is from beginning to end the message established by the Federal Government."); *id.* at 561 (distinguishing speech by the state bar in *Keller* as "not prescribed by law in their general outline and not developed under official government supervision").

speech of the growers rather than the speech of the government.

Indeed, in this case, even the factors cited by the Ninth Circuit as providing the potential for control are largely illusory. For example, while the Secretary technically appoints Commission members, he has precious little discretion in exercising that nominal authority. Nominees for the Commission are selected by the growers themselves and subject to a vote of those growers. § 65556. The two highest vote-getters for each position on the Commission are then presented to the Secretary who must appoint one of them if they meet the basic qualifications for membership. § 65563. Similarly, while the Ninth Circuit touted the Secretary's supposed removal authority as a source of potential control, App. A21, the provisions the court cited do not provide such authority and the Secretary seems to have only the power to disqualify Commissioners if they cease to meet the basic statutory requirements for serving, such as being a member of the table-grape industry. *See* § 65567. There is nothing in the statute or in anything cited by the Ninth Circuit to suggest that the Secretary has discretion to remove a Commissioner merely based on disagreements over the discretionary content of the Commission's speech.[5]

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[5] The Secretary's limited authority is thus nothing at all like the authority of the chief executive to appoint and remove executive branch officials as a means of exerting policy control over such officials. In the governmental context, the chief executive is the principal and appointed officials are his agents. As between the Secretary and the Commission, however, the Secretary's role is at best that of an ombudsman or an administrative law judge – existing to enforce the outer boundaries of

Likewise, the Secretary cannot even review the decisions of the Commission on his own initiative, only upon complaint by a third party, and then only for abuse of discretion or conflict with the law. § 65650.5. And even then, if he seeks to override a Commission decision, he himself is subject to suit by the Commission. *Id.* [6]

Thus, notwithstanding the Secretary's limited appointment and removal power, he lacks the means to impose his own discretion on the Commission or to dictate the content of advertising within the broad parameters set out by the Ketchum Act. The broad discretion of the Commission and the limited authority of the Secretary to control the speech of the Commission are a far cry from the situation in *Johanns*, where this Court held that the government was effectively the principal directing the speech at issue, and the Beef Board was effectively its agent assisting the government in formulating the details of such speech.

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the Commission's authority to engage in collective speech, but without power over discretionary or policy choices left to the Commission or to a vote of the producers.

[6] A number of other factors also cut against treating the Commission as a government speaker, including its being a corporation empowered to sue and be sued, the absence of State liability for its contracts and obligations, the primary role of the growers in deciding whether the entire program went into and remains in effect, and the fact that the Commission must return unspent assessments to growers if the program is terminated. *See* §§ 65551 (corporate body with power to sue and be sued); 65571 (State not liable for Commission's acts or contracts); 65573 (vote for initial operation of the program); 65660-65662 (suspension and termination by referendum and surplus funds returned to growers unless *de minimis*); 65675 (referendum every five years for continuation or termination of program).

Here, the Secretary lacks any authority even resembling that of a principal over its agent and, viewed in light of his failure to exercise any actual supervision and control whatsoever, the decision in this case conflicts with the decision in *Johanns* and the criteria set forth by this Court for classifying the beef program as government speech.

Because the decision below conflicts with *Johanns* by disregarding the failure (and inability) of the Secretary to exercise effective control over the speech of the California Table Grape Commission, this Court should grant certiorari.

II. The Decision Below Conflicts with Decisions in Other Circuits that Evaluate Actual Supervision and Control in Considering the Issue of Government Speech.

In addition to conflicting with this Court's decision in *Johanns*, the decision below conflicts with the criteria for identifying government speech applied in several other circuits.

For example, in *Pelts & Skins, LLC* v. *Landreneau*, 448 F.3d 743, 743-44 (CA5 2006), the Fifth Circuit considered whether Louisiana's alligator marketing program constituted government speech under the then-recently issued decision in *Johanns*. The court recognized that the "key inquiry" under *Johanns* is the "'degree of governmental control over the message'" *Id.* (quoting *Johanns*). Because the record before the court did "not contain sufficient evidence of control or lack thereof," the court vacated and remanded "to allow the parties to develop and present evidence with respect to the new standard and to allow the district court to assess in the first instance

the extent of governmental control over the speech at issue." *Id.*

Although the court obviously did not resolve whether there was sufficient government control in *Pelts & Skins*, its emphasis on the "degree" and "extent" of government control over the speech itself, not merely over the program in general, contrasts with the Ninth Circuit's emphasis on the mere possibility of control by the Secretary notwithstanding the Secretary's failure (and, often, inability) to exercise any control.

In *Roach* v. *Stouffer*, 560 F.3d 860, 864-68 (CA8 2009), the Eighth Circuit, in reviewing a specialty license-plate program to determine whether the messages on the plates were government speech, similarly understood *Johanns* as holding that "the more control the government has over the content of the speech, the more likely it is to be government speech." The court recognized that there were competing methodologies used for determining the existence of government speech in the wake of *Johanns*, and endorsed the approach taken by the Fourth Circuit and others that looks to, *inter alia*, "the degree of editorial control exercised by the government or private entities over the content of the speech," the identity of the "literal speaker," and who bears "ultimate responsibility" for the speech. *Id.* at 865 (quoting *Sons of Confederate Veterans, Inc.* v. *Commissioner of Virginia Dept. of Motor Vehicles*, 288 F.3d 610, 618 (CA4 2002) (internal quotation marks omitted)).

Turning to the specialty license plate program before it, the Eighth Circuit noted that "both the state and the sponsoring organization exercise some degree

of editorial control over the message on specialty plates" and that the State "retains the ultimate authority to approve or disapprove an application" based on a general description of the plate. 560 F.3d at 867. But, because the specifics of the plate are selected by the private sponsoring organization and the specialty plate is purchased and displayed by vehicle owners, it is those private parties that are the "literal speakers who bear the ultimate responsibility for the message." *Id.* at 867-68. Given the voluntary choice to create and purchase a specialty plate and its different appearance from standard license plates, the court concluded that "the plates bear sufficient indicia of private speech" that a reasonable and informed observer "would recognize the message on the 'Choose Life' specialty plate as the message of a private party, not the state" and hence was not government speech. *Id.* at 868.

The Eighth Circuit's emphasis on the limited extent the government exercises control over the speech once again conflicts with the Ninth Circuit's essential disregard for the lack of any such control exercised by the Secretary. Indeed, the speech in *Roach* was held to be private speech despite the fact that the State there *did* exercise some editorial control and had final approval over each application for a plate, unlike the lack of editorial control or approval authority over the speech of the Commission.[7]

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[7] *Roach*'s emphasis on the voluntary involvement of the sponsor and the vehicle owners is also present in this case if one considers table-grape growers as a group. California does not compel growers to adopt the marketing program, but rather left it to a vote of the private parties whether to do so and required a pe-

The Fourth Circuit likewise has applied its approach to defining government speech in a manner in conflict with the approach used by the Ninth Circuit below. In *West Viginia Ass'n of Club Owners and Fraternal Servs., Inc.* v. *Musgrave*, 553 F.3d 292, 298-300 (CA4 2009), the Fourth Circuit rejected a government speech defense of regulations involving video lottery advertising, finding that "[t]he speech at issue does not fit neatly into either category [private speech or government speech]: it is hybrid speech." In considering a situation, like ours, in which the government itself is not the "literal speaker[]" that designs and communicates the advertisements, the court held that because the government "is trying to convey its message through private speakers that it did not fund or provide with a means of communication * * * we cannot designate the speech at issue as pure government speech" and hence "neat categorizations cannot alone resolve" the First Amendment questions presented. *Id.* at 300. The court then proceeded to conduct a full First Amendment analysis before concluding that the regulations survived First Amendment scrutiny. *Id.* at 300-07.

Even where the Fourth Circuit has found the existence of government speech, its approach still con-

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riodic vote as to whether to continue with the program. §§ 65573, 65660-65661, 65675. While the program may be involuntary as to dissenting growers such as Delano Farms, the choice of the group to speak through the Commission and the compulsion to pay for that choice comes primarily from the collective vote of the majority of growers, which is merely enforced by the State. In such a situation, California acts to "facilitate expressive conduct on the part of the organization and its supporters, not the government." *Roach*, 560 F.3d at 868 n. 3.

flicts with the approach of the Ninth Circuit below in that it emphasizes the actual exercise of control by the government speaker. Thus, in *Page* v. *Lexington County School Dist. One*, 531 F.3d 275, 282-86 (CA4 2008), the Fourth Circuit applied *Johanns*'s "effective control" requirement by considering the School District's actual and comprehensive control over the content and dissemination of government speech via the District's e-mails and website. The court relied on the facts that the communications used "the School District's website, its e-mail facility, and its distribution channels to constituent schools – all channels of communications controlled by the School District," and the School District "adopted and approved all speech, even that of third parties, as representative of its own position for inclusion in its messages opposing the bill. Thus, it also *controlled* the message." *Id.* at 282; *see also id.* (as in *Johanns*, "the government established the message; maintained control of its content; and controlled its dissemination to the public"); *id.* at 285 ("we conclude that the School District established its own message and effectively controlled the channels of communication through which it disseminated that message, as required for application of the government speech doctrine under *Johanns*").[8]

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[8] In contrast, the Fourth Circuit in *Page* also held that a newsletter distributed by the school-affiliated PTA was not government speech, notwithstanding that the newsletter was subject to the school's "editorial control." 531 F.3d at 285-86 ("by editorially controlling the newsletter, the individual school may have created a limited public or nonpublic forum because the speech in the PTSA newsletter was not the government's own speech, but speech of the Association"). Under the Ninth Circuit's po-

Because the approach adopted by the Ninth Circuit below – focusing on potential, rather than actual, supervision and control – conflicts with the approach to government speech adopted in these other circuits, this Court should grant certiorari to resolve the split and correct the Ninth Circuit's overly broad standard for identifying government speech.

III. This Case Involves Recurring Questions of National Importance.

This case presents issues of national importance that should be resolved by this Court for a number of reasons.

First, as this Court is well aware, First Amendment challenges to agricultural marketing orders occur frequently and have often made their way up to this Court. That is because such programs are widespread, involve large and recurring assessments, and often pit different segments of a particular market against each other, for example, premium growers who prefer branded advertising and competition based on quality to other growers who would prefer to genericize the public's view of a particular agricultural product. In California alone, there are dozens of such programs at the state and federal level, and many more around the country. The decision of the Ninth Circuit effectively immunizes all of those programs in a large swath of the nation by categorizing them as involving government speech, regardless of the government's actual supervision of the messages generated therein.

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tential control test, even such private speech by a PTA would be deemed government speech.

If the Ninth Circuit's virtually non-existent bar for obtaining First Amendment immunity is allowed to persist, the First Amendment limits on compelled support for speech recognized in *Glickman* and *United Foods* are effectively dead letters. Given the significant First Amendment values implicated by compelled support for speech – as distinguished from compelled support for other non-speech conduct – the issue is one of national importance. *Cf. Johanns*, 544 U.S. at 572 (Souter, J., dissenting) ("In 1779 Jefferson wrote that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves * * * is sinful and tyrannical.' A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution, No. 37, p. 77 (P. Kurland & R. Lerner eds.1987), codified in 1786 at Va.Code Ann. § 57-1 (Lexis 2003). Although he was not thinking about compelled advertising of farm produce, we echoed Jefferson's view four years ago in *United Foods,* where we said that 'First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors * * *.' 533 U.S. at 411")

Second, the impact of the Ninth Circuit's minimal test for finding government speech is likely to extend well beyond commercial speech in the agricultural marketing area. Insofar as a finding of government speech *wholly eliminates* First Amendment scrutiny (rather than merely applies a more lenient level of scrutiny), it just as readily applies to political speech. The application of *Johanns* to restrictions on politically-themed specialty license plates such as discussed

by the Eighth Circuit in *Roach* demonstrates this point if such speech (and any compelled support for that speech) is deemed government speech. 560 F.3d at 863 (addressing the government's rejection of a "Choose Life" specialty plate and noting that if the plate constituted government speech it would not be subject to First Amendment constraints).

Third, because the government can restrict its "own" speech as well as compel support for such speech, a broad government speech doctrine threatens to turn the First Amendment on its head. Indeed, to the extent that the mere potential for government control over the content of a private party's speech serves as the test for converting such speech into government speech, the more content restrictions the government adopts or has the potential to apply, the more likely is a finding of government speech and immunity from First Amendment scrutiny. Such a perverse evolution of the government speech doctrine is precisely the path down which the Ninth Circuit is heading and presents a significant threat to the First Amendment.[9]

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[9] Insofar as some of this threat may stem from broad language in *Johanns* – further broadened by the Ninth Circuit's disregard for many of the factors driving *Johanns* – this Court should consider narrowing or potentially overruling *Johanns* if necessary. If the Ninth Circuit is correct in applying *Johanns* to the Commission in this case – despite the lack of actual control over the content of the speech being disseminated – merely because the potential for control by the government supposedly provides political accountability sufficient to render the First Amendment unnecessary, then the reasoning of *Johanns* goes too far. Particularly for speech funded by private assessments on a small group of producers, rather than by general revenues, political accountability is an illusory substitute for First

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Amendment protections. *Cf. Railway Express v. New York,* 336 U.S. 106, 112-113 (1949) (Jackson, J., conc.) ("The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.").

Respectfully submitted,

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