No. 09-1496

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

In finding that the Commission engaged in government speech based on the mere *potential* for state control of such speech, despite the State's "passivity" and the lack of any "actual level of control evidenced in the record," App. A23-24, the Ninth Circuit has decided an important First Amendment question contrary to this Court's decision in *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550 (2005), and contrary to the method employed in other circuits when considering a government-speech defense. This Court should grant certiorari to correct that erroneous legal standard and restore the requirement of actual government control before speech may be deemed government speech not subject to the First Amendment.

I. The Degree and Nature of Actual State Control Required for the Government Speech Defense Is Squarely Presented by Both the Decision Below and Petitioners.

Respondent begins its opposition, BIO 1-2, 10-15, with the seductive red herring that there is a purportedly independent and unchallenged basis for the decision below: that the Commission's status as a "government entity" for some purposes necessarily entitles it to the government-speech defense for First Amendment purposes.

The panel majority made no such *independent* holding, however, and recognized that the governmental status issue was intertwined with the degree of control exercised by the state *qua* state. And peti-

tioners certainly have not conceded that an entity's mere governmental status for some purposes is sufficient for it to engage in government speech absent the effective control required by *Johanns*.

Regarding the grounds of the decision below, only Judge Reinhardt thought mere government-entity status was sufficient to invoke the government-speech defense. App. A24-25. The panel majority, by contrast, recognized the "uncharted gap" in this Court's precedents concerning governmental status for some First Amendment purposes and deemed the "question * * * closely related to the government control question" under *Johanns*. App. A15.[1] Indeed, Judge Reinhardt recognized the limits of the panel's discussion of governmental status when criticizing the panel majority's "finding" of an "'uncharted gap'" and recognition of a "balance" that needed "tip[pping]." *Id.* Respondent's suggestion that the Ninth Circuit's holding is somehow independent of the question presented is simply incorrect.

Furthermore, the panel majority was certainly correct in recognizing that it needed more than government-entity status in order to resolve the government-speech question. Government entities come in

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[1] The panel's speculation on how it might rule "[w]ere we to decide this appeal based solely on whether the Commission is a government entity," App. A15, is not an independent and alternative holding. Though leaning in a particular direction, the panel felt the issues were sufficiently interrelated to require further analysis of effective control in order to "tip the balance." It's ultimate ruling "taking into consideration *both* avenues for classification," App. A8 (emphasis added), reflects its conjunctive analysis, not a disjunctive and independent pair of rationales.

many forms, exercising varying degrees of government authority. Many so-called government entities act sufficiently under color of state law to trigger constitutional restrictions, but do not thereby partake in all governmental immunities. That is precisely the lesson of the interplay between, and the "gap" created by, *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374 (1995), and *Keller v. State Bar of California,* 496 U.S. 1 (1990).

As this Court recognized in *Keller*, the characterization of a speaker as a government entity for some purposes does not resolve whether such entity is entitled to all the legal privileges of government – and, in particular, to the government-speech defense. There was no dispute in *Keller* that the California State Bar was a government entity – as held by the California Supreme Court – and this Court described it as a "regulated state agency" under California law. 496 U.S. at 10. But, according to this Court and like the Commission here, the State Bar was not a "typical" government agency because it had limited membership and member-based funding, lacked substantive regulatory authority, and was answerable to the narrow interests of its members rather than to the varied and competing interests of the citizenry as a whole. *Id.* at 11-13.

Thus, notwithstanding the Bar's government status under California law, this Court concluded that the

> differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not

> subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

Id. at 11-13. *Keller* thus confirms that mere status as a "government" entity does not resolve whether the government-speech defense applies.

Leebron likewise recognized the essential differences between government status for purposes of constitutional *restrictions* on conduct and government status for purposes of legal *immunities* for such conduct. Distinguishing previous statements rejecting Eleventh Amendment immunity for certain state-related corporations, this Court held that

> it does not contradict those statements to hold that a corporation is an agency of the Government, *for purposes of the constitutional obligations of Government rather than the "privileges of the government,"* when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.

513 U.S. at 399 (emphasis added). The level of government control in *Leebron* made Amtrak sufficiently governmental to trigger the constraints of the First Amendment, but not necessarily the "privileges of the government."[2]

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[2] Indeed, had Amtrak been a government speaker, its decisions concerning what advertising to accept on its property presumably would have fallen squarely within the editorial discre-

The panel majority correctly recognized that government status under *Leebron* was insufficient to resolve the government-speech issue, and necessarily proceeded to the effective-control question under *Johanns*. Indeed, this Court in *Johanns* recognized much the same point when it distinguished the speech of the governmental entity in *Keller* as subject to a lesser "degree of government control over the message" than existed under the beef program, where every word of its speech was "developed under official government supervision." *Johanns*, 544 U.S. at 561-62.

Contrary to respondent's further suggestion, BIO 10-11, petitioners have never conceded that mere government status was sufficient to make the Commission's speech "government speech." Rather, distinguishing nominally "governmental" conduits for private group speech from genuine government speakers expressing the government's own message, petitioners have repeatedly emphasized the need to evaluate the degree of control by the State and its officers themselves. Although recognizing the Commission's governmental status for some purposes, petitioners have consistently argued that not all putatively governmental entities engage in government speech.[3] Respondent's own citations, BIO 11, to peti-

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tion of such a speaker, and hence been immune from, rather than subject to, First Amendment challenge.

[3] Reply Brief for Appellants (CA9), at 12-15 (distinguishing the Commission from typical arms of the State because it is a corporate body separate from the government proper, may sue and be sued, is composed of private competitors rather than government employees, hires its own non-government staff, may sue the Secretary himself, and cannot bind the State or create

tioners' supposed concessions amply demonstrate the qualified nature of petitioners' recognition of the Commission's limited government status.

Finally, the question presented in the Petition – whether the speech of the Commission is government speech "where the government has virtually no authority over or involvement in generating or reviewing such speech" – does not depend on whether the Commission is characterized as governmental or private, or whether the Ninth Circuit had dependent or independent rationales for its decision. It simply asks whether *actual* control by the State and its officers is necessary to make the Commission's speech that of the government itself, rather than the speech of the table grape producers who populate and fund the Commission. That question takes issue with all constructions of the Ninth Circuit's reasoning that would excuse the lack of actual, effective control as required by *Johanns*.

II. The Decision Below Conflicts with this Court's Decision in *Johanns*.

As the Petition notes, at 13-15, *Johanns* based its holding on extensive evidence of the Secretary's actual and detailed control over the speech generated by the beef program. The Secretary had discretionary authority over every word spoken through the

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state liability by its actions or contracts); cf, *Country Eggs, Inc. v. Kawamura*, 129 Cal.App.4th 589, 598 (Cal. App. 3 Dist. 2005) (California Egg Commission's "broad authority, independent of the Department [of Food and Agriculture]," meant that it was not an arm of the State and the State was not liable for claims arising from its activities).

program, initiated, vetoed, and/or edited the program's speech, and reviewed and approved all promotional messages. 544 U.S. at 554, 560-61, 563.

In this case by contrast, California's Secretary of Food and Agriculture is entirely uninvolved in the operations of the Table Grape Commission, has virtually no discretionary authority over the content of the Commission's speech, and in fact exercises no control whatsoever over the messages disseminated by the Commission. The differences could not be starker.

Respondent nonetheless argues that while *Johanns* discussed the detailed control by the Secretary there, it did not hold such control was actually *necessary* to establish government speech. BIO 17. According to respondent it is sufficient that the legislature established the general parameters for promoting table grapes and gave the Secretary limited oversight authority. BIO 15-17.

As described in the Petition, however, the Secretary's appointment, removal, and oversight authority are extremely constrained and provide him no ability to exert discretionary control over the content of the Commission's speech. Pet. 11-12, 16-17 (no authority to control Commission's speech on "public interest" grounds; no actual supervision or review of speech; must appoint elected representatives of table-grape industry; no discretionary removal authority, only to enforce minimum qualifications; Secretary can be sued for interfering with Commission's discretion within the parameters of the statute; existence, continuation, and termination of Commission determined by producers, not Secretary).

Virtually all discretion regarding the content of promotional speech remains in the hands of the growers' representatives on the Commission. Indeed, the Ketchum Act's appointment, removal, and review provisions are designed to *limit* the Secretary's authority and to enhance the discretion of those Commissioners. At best the Secretary can enforce the outer statutory boundaries of the program. Within those boundaries, however, the Secretary is largely powerless over the content of the Commission's speech and can be sued by the Commission if he interferes with its discretion.

Rather than dictate its own message that growers would help convey, the legislature instead merely authorized growers to collect industry-wide fees to convey the industry's own self-promotional message if a majority of the industry so chose. The choices whether to speak and what to say belong to the growers, not the State. That the legislature placed limits on the fee-collection power it offered to the growers and the general nature of the speech for which such coerced fees could be used does not convert that speech into government speech. It is, and remains, a limited facilitation of private group speech.[4]

While *Johanns* may not have established the level of control therein as the absolute minimum required

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[4] Limited public forum cases corroborate that content limitations on speech facilitated by the government do not avoid First Amendment scrutiny by converting private speech into government speech. See, e.g., *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 793, 800 (1985) (First Amendment challenge to content and source restrictions on charitable solicitations in a limited forum directed at federal workers).

to show government speech, it nonetheless rebutted any suggestion that wholly unsupervised speech would qualify when it distinguished *Keller* by emphasizing that the speech of the State Bar was "not developed under official government supervision." *Johanns*, 544 U.S. at 561-62. Under respondent's view and the Ninth Circuit's holding, this Court's extensive discussion of the Secretary's actual control and its grounds for distinguishing *Keller* are reduced to mere *dicta* and actual control or supervision are unnecessary. Such a view conflicts with and undermines this Court's decision in *Johanns*. Whatever the minimum degree of control for finding government speech, *Johanns* requires *some* actual control rather than the utter passivity evidenced in this case.

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

Unlike the decision below, cases in other circuits do consider the government's actual control over speech when considering a government-speech defense to a First Amendment claim. Pet. 18-23. Respondent seeks to distinguish such cases by arguing that they involve different programs without legislatively approved messages. BIO 20-22. Such distinctions do not bear upon the legal question presented by the Petition, and do not negate the conflicting approaches to evaluating government speech in other circuits.

That the government-speech issue arises in a variety of contexts in addition to agricultural promo-

tions merely demonstrates the broad reach and implications of the government-speech doctrine and does not change the essential legal standards for determining whether the government itself is speaking. Each conflicting circuit case cited *Johanns* and each considered the actual control exercised by the government.

In *Roach* v. *Stouffer*, 560 F.3d 860, 864-68 (CA8 2009), the State established content parameters for its specialty license-plate program, though it let private parties determine the details of the message within such parameters. The Eighth Circuit cited *Johanns*, recognized that government speech turned on the degree of control, and analyzed the actual control exercised by the State. Even in the face of some editorial control by the State and final approval authority over all applications, the court rejected the government-speech defense. See Pet. 19-20. Both the methodology and the result regarding government speech in *Roach* conflicts with the Ninth Circuit's decision below, notwithstanding that different programs were involved.

In *Page* v. *Lexington County School Dist. One*, 531 F.3d 275, 282-86 (CA4 2008), the Fourth Circuit applied *Johanns* control test by looking to the actual control exercised by the government when affirmatively conveying its own message by selecting materials to include on a school web-site. Pet. 22.

Respondent suggests, BIO at 22, that the message in *Page* did not originate with the government and hence the case is distinguishable. That is simply wrong. The overall message in *Page* – opposing a proposed tax credit/voucher proposal – in fact did ori-

ginate with, and was dictated by, the school district via a formal resolution. 531 F.3d at 278. The court nonetheless looked to the actual level of a district employee's control in the selection process of the speech included on the web-site in furtherance of that message. In our case, by contrast, the State does not *dictate* any message; it merely *authorizes* the growers to organize and to collect funds for a limited message if they so chose. It is the growers that decide whether and how to speak and they are not subject to any meaningful control within the limits of their authorization. *Page* is an example of the proper analysis for evaluating government speech and its approach conflicts with the Ninth Circuit's disregard for the lack of any actual control by the State.

Finally, even absent a split within the class of agricultural promotion cases themselves, this Court has granted several petitions for this Term that have not alleged any split – merely an important question or one with substantial economic significance. See, e.g., Petition at 5, *Schwarzenegger* v. *Entertainment Merchants Ass'n* (No. 08-1448) (May 19, 2009) (acknowledging lack of a split); Petition at 8, *Costco Wholesale Corp.* v. *Omega, S.A.* (No. 08-1423) (May 18, 2009) (same); Petition, *Flores-Villar* v. *United States* (No. 09-5801) (Aug. 3, 2009) (no split alleged); Petition at 11-12, *Chamber of Commerce* v. *Candelaria*, (No. 09-115) (July 24, 2009) (same). Given the size of the market even for commodities covered by California marketing commissions alone, this case is similarly significant and warrants this Court's consideration regardless of the scope or nature of the circuit conflict

IV. This Case Involves Recurring Questions of National Importance.

The Petition noted the importance of this case in terms of the number and economic importance of the programs affected, even just in California, and the widespread implications of a broad government speech standard that would eliminate First Amendment scrutiny across a variety of areas.

Respondent suggests, BIO 23-24, that the case is of limited impact because the Commission is atypical. BIO 23. But California has many similar commissions covering its largest commodities. See Marketing Orders Agreements, Counsels and Commission Laws, www.cdfa.cal.gov/mkt/mkt/ordslaws.html (last viewed Aug. 26, 2010) (listing California commodity commissions for Apples, Asparagus, Avocados, Blueberries, Dates, Cut Flowers, Forest Products, Grape Rootstock Improvement, Kiwifruit, Peppers, Rice, Sea Urchins, Sheep, Strawberries, Table Grapes, Walnuts, Wheat, and Winegrapes). The degree of actual supervision and control of these commissions by the State, while somewhat variable, is limited by design, and hence the decision below will likely impact all such commissions.

Respondent also suggests, BIO 24, that the decision below is too narrow to reach political speech or speech in other contexts, and hence is unimportant. Of course, nothing in the Ninth Circuit's approach to government speech turns on the commercial nature of the speech. And when the government *genuinely* speaks it routinely conveys political messages regarding legislation, international affairs, and government policy. The government-speech doctrine necessarily

reaches political speech because much of the business of government is, by definition, political. A broad government-speech doctrine allowing compelled support for private groups who convey a favored message will almost inevitably encompass political speech, with deeply troubling consequences for First Amendment freedoms. Furthermore, the political safeguards and accountability touted by respondent will be less than meaningless when the government can simply point to its non-involvement and the vast discretion afforded private speakers such as the Table Grape Commissioners. Without hands-on responsibility for the speech generated by promotion programs, there is no reason to imagine that the electorate will attribute such speech to the government rather than to the growers, and any political accountability justification for not applying the First Amendment simply evaporates.

CONCLUSION

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

Respectfully submitted,

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