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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

JEAN CHARTER and STEVE CHARTER, Petitioners, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent.	Cause No. CV 00-198-BLG-RFC **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR <u>PRELIMINARY INJUNCTION</u>**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

Shamelessly exhuming arguments laid to rest in ***United Foods***, and offering a new defense of checkoff programs that has never been accepted by any appellate court, the government pretends that there is no significant First Amendment issue in this case. But quite to the contrary, the beef checkoff program plainly violates the First Amendment under the analysis dictated by ***United Foods*** and under the government's own representations before the Supreme Court. Furthermore, the government's new government-speech defense is incorrect both in its characterization of the program and in its assumption that government speech is immune from the First Amendment scrutiny applicable to other forms of compelled support for speech.

Once it is recognized that compelled support for the speech at issue in this case is unconstitutional, the irreparable nature of the injury to petitioners becomes apparent and the need for a broad prohibitory injunction inexorably follows.

I. STANDARDS FOR PRELIMINARY INJUNCTION.

The government generally agrees with petitioners that where there is a likelihood of success and irreparable injury, a preliminary injunction is appropriate. USDA Mem. at 5. While cases in which that combination can be demonstrated may be few, where such is shown, an injunction is proper without further balancing of interests. That is particularly true in First Amendment cases where the injury is, by definition, irreparable. The government's claim that a court must always balance the public interest is overstated in that the case it cites for that proposition involved a situation where the chance of success was limited, no irreparable injury was shown, and hence where balancing of the hardships was appropriate. *See* ***Caribbean Marine Servs. Co.* v. *Baldridge***, 844 F.2d 668, 674-76 (9th Cir. 1988). But where irreparable injury is coupled with a high likelihood of success, no government interest could trump the balance. In this case ***United Foods*** establishes an extremely high likelihood of success, and petitioners are plainly suffering irreparable injury, as discussed in Part III, *infra*. To the extent

the public interest comes into play as an equitable matter, it is addressed in connection with the specific remedies sought and discussed in Part IV, *infra*.

II. LIKELIHOOD OF SUCCESS ON THE MERITS.

While the government leads with its new and novel government-speech argument, petitioners instead will begin by addressing the government's misguided attempt to revise existing case law on compelled support for speech. An accurate review of that law demonstrates that the beef checkoff has no chance of surviving the applicable scrutiny. Petitioners then will turn to the government's efforts to circumvent existing law through the guise of the so-called government speech doctrine.

A. *UNITED STATES* v. *UNITED FOODS*

In ***United States*** v. ***United Foods, Inc.***, the Supreme Court addressed the question "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." -- U.S. --, 121 S. Ct. 2334, 2338 (2001). It answered that question by applying its "precedents concerning compelled contributions to speech," *id*., referring, *inter alia*, to ***Abood* v. *Detroit Board of Education***, 431 U.S. 209 (1977). The Court further held that the analysis in its earlier decision in ***Glickman* v. *Wileman Brothers & Elliot, Inc.***, 521 U.S. 457 (1997), was limited to the (counterfactually) presumed context that the fruit producers in that case "were bound together and required by the statute to market their products according to cooperative rules," and that the forced collective advertising program "was the logical concomitant" of the regulations forcing such cooperative marketing. ***United Foods***, -- U.S. --, 121 S. Ct. at 2339.

Because the mushroom producers in ***United Foods*** were subject to "no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions," the mushroom checkoff assessments were "not permitted under the First Amendment." -- U.S. at --,

121 S. Ct. at 2339, 2341. In the present case, the Beef Act is materially indistinguishable from the Mushroom Act, as the government itself strenuously argued before the Supreme Court. *See* Pet. Mem. at 7-9 (discussing and citing government's arguments).

Notwithstanding its prior representations to the Supreme Court, the government now argues that the Beef Act is a part of a broader regulatory system to which the forced collective speech under the Beef Act is "germane." But nothing cited by the government compels a cooperative marketing scheme or any other form of collective action that would prevent beef producers "from making their own marketing decisions." ***United Foods***, -- U.S. at --, 121 S. Ct. at 2339. Indeed, the overwhelming thrust of those laws is to *reinforce* competition between producers and to *suppress* various forms of collective action and monopolistic behavior by other beef industry players – packers and stockyards. Because the Beef Act's compelled support for collective speech is antithetical to the regulatory regime in place for the beef industry, it is not germane to that regime and is thus unconstitutional.

1. Nature of the "Germaneness" Test

The "germaneness" test was developed in the context of compelled contributions to labor unions and integrated bar associations. *See* ***Abood***, 431 U.S. at 236 (contributions may be compelled for "collective-bargaining activities," but "such compulsion is prohibited" for "ideological activities unrelated to collective bargaining") (footnote omitted); ***Keller* v. *State Bar of Cal***., 496 U.S. 1, 16 (1990) ("Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative" but may be "spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession."). In ***Lehnert* v. *Ferris Faculty Association***, the applicable standards for the use of compelled contributions in the union context were summarized as follows:

> chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. 507, 519 (1991). That description identifies the germaneness inquiry as relating to specific conduct and as separate from the government's "policy interest" or motive in adopting the legislative scheme in the first instance. It is some specific compelled conduct that cannot be accomplished without a certain amount of speech incidental to that conduct – negotiation and implementation of collective bargaining agreements in the union context – that is both the permissible purpose of compelled support and the relevant *object* of the germaneness analysis.[1] And where the relation between particular speech and the "process of establishing a written collective-bargaining agreement" was uncertain, ***Abood*** suggested that the relevant inquiry would be whether the context of the speech "*might be seen as an integral part of the bargaining process*." *Id*. at 236 (emphasis added); cf. ***Ellis* v. *Railway Clerks***, 466 U.S. 435, 448 (1984) ("test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues").[2]

Non-germane speech, by contrast, was not integral to the primary conduct being compelled. While such speech may have been relevant to the overall *goal* of the program – and hence germane in the colloquial sense – it was not essential to the required conduct and thus was analyzed distinctly from such conduct. For example, in ***Lehnert*** the Court held that generic

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[1] *See* ***Railway Employees' Department* v. *Hanson***, 351 U.S. 225, 238, 235 (1956) (compelled "financial support of the collective-bargaining agency" does not violate the First Amendment but "a different problem would be presented if the assessments were "imposed for purposes not germane to collective bargaining"); ***Abood***, 431 U.S. at 225-26, 234 (following ***Hanson*** "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment"; agreeing with appellants that a union could not, over objection, spend fees on speech "unrelated to its duties as exclusive bargaining representative").

[2] While the collective bargaining process nominally involves speech, it is actually more a series of speech-acts – such as offers and acceptances – constituting the commercial transaction of contracting with the employer. Similarly with communications from the union to the employer and to the employees, those constitute the necessary elements of representation without which the union could not bargain, resolve grievances, or exchange information with those to whom it owes a duty of representation.

promotional advertising by the union was not "germane" to collective bargaining because it was not a necessary element of such bargaining.

> [P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

500 U.S. at 528-29 (Blackmun, J., for four Justices). That such promotion might have advanced the general interests of the teaching profession collectively was insufficient to render such promotional activities "germane." Rather, any permissibly chargeable speech had to be far more closely tied to the actual conduct being compelled in the first place.

The germaneness test is consistent with, and is in effect the compulsion flip-side of, the First Amendment test for restrictions on mixed speech and conduct. For example, in ***United States* v. *O'Brien*** the law forbade harmful conduct – the destruction of an official document – that at times was intertwined with expression. 391 U.S. 367, 376 (1968). The law in ***O'Brien*** was upheld where the impact on speech was "incidental" to the underlying regulation of conduct, was "no greater than is essential" to accomplishing the interests of regulating the conduct, and met additional conditions designed to safeguard First Amendment values. *Id.* at 377. In like manner, the germaneness test allows some burden on speech arising from compelled support of conduct where the speech burden is incidental and no greater than essential to achieve the otherwise properly compelled conduct. And finally, as in ***O'Brien***, the purposes and effect of government-compelled contributions must be imposed for the "noncommunicative impact of [the supported] conduct, *and for nothing else*." *Id*. at 382 (emphasis added).

The requisite interrelation between compelled speech and compelled conduct was fully confirmed in ***United Foods***. The Supreme Court reiterated that "a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy

for speech in the first place." -- U.S. at --, 121 S. Ct. at 2340. Reviewing the applicable case law, the Court characterized the associational purpose narrowly as the specific collective *conduct* to be achieved – "attain[ing] the desired benefit of collective bargaining" in the union cases – not as the more abstract and generic policy goals of labor peace or improving the lot of some segment of the economy. *Id*. Likewise regarding the integrated bar, the ***United Foods*** decision identified the underlying associational purposes as the narrow activities of "'disciplining members of the Bar or proposing ethical codes for the profession.'" *Id*. (*quoting* ***Keller***, 496 U.S. at 16). The threshold requirement was satisfied because bar members "already were required to associate *for other purposes*, making the compelled contribution of monies to pay for expressive activities *a necessary incident of* a larger expenditure for an otherwise proper goal requiring *the cooperative activity*." ***United Foods***, -- U.S. at --, 121 S. Ct. at 2340 (emphasis added). And in the checkoff context the Court explained that in ***Glickman***, the law had already "deprived producers of their ability to compete and replaced competition with a regime of cooperation." *Id*. Because "producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in ***Abood*** and ***Keller***, in furtherance of an otherwise legitimate program." *Id*. In every context in which it has addressed compelled support for collective speech, therefore, the Supreme Court has recognized that such speech must be germane not to some abstract goal or benefit, but rather to some specific anchor of compelled collective conduct.

Applying the threshold germaneness test to the mushroom checkoff, the Supreme Court readily found that the program failed. It observed that "the statute does not require group action, save to generate the very speech to which some handlers object." *Id*. And as for the government's claim that the expression under the Mushroom Act was germane to the general "statutory purposes of 'strengthen[ing] the mushroom industry's position in the marketplace,' 'maintain[ing] and expand[ing] existing markets and uses for mushroom,' and 'develop[ing] new

markets and uses for mushrooms,'" Brief for the Petitioners, ***United States* v. *United Foods, Inc.***, No. 00-276 (Jan. 24, 2001), at 18, the Court dismissed the notion that germaneness was to be measured according to the policy goals supposedly furthered by the speech, finding that "[w]ere it sufficient to say that speech is germane to itself, the limits described in ***Abood*** and ***Keller*** would be empty of meaning and significance." -- U.S. at --, 121 S. Ct. at 2341. The Court thus concluded that because the "cooperative marketing structure relied upon by a majority of the Court in ***Glickman*** to sustain an ancillary assessment finds no corollary here[,] the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself." *Id*.

In light of controlling precedent, compelled support for collective speech must be germane to economic regulation compelling similarly collective conduct that can be accomplished only through the incidental compulsion of speech regarding such conduct.

Despite the resounding rejection of its arguments in ***United Foods***, the government now seeks to recoup lost ground by reasserting that the mere existence of other regulations sharing the same overall goal of enhancing the beef market is a sufficient anchor for the germaneness inquiry regardless of whether such regulations collectivize producers or otherwise replace competition with cooperation. In particular, the government claims that "there is nothing in the reasoning of either ***Wileman*** or ***United Foods*** that requires such preliminary collective action or other compelled association in order to sustain" assessments for collective expression. USDA Mem. at 26. As the discussion above demonstrates – and as this Court's own reading of ***United Foods*** will corroborate – that claim is absurd. While the government quotes the ***United Foods*** language that the compelled collective speech must be "'in furtherance of an otherwise legitimate program,'" USDA Mem. at 26, it studiously fails to acknowledge that the requisite "program" is the compelled collectivization of the relevant commodity market, not merely the abstract "ends of the regulatory system." *Id.* at 27. In short, compelled support for speech must

be germane to the *means* used by other regulations of conduct, not simply the ends. *Cf*. ***Lehnert***, 500 U.S. at 528-29 (Blackmun, J., for four Justices) (rejecting teacher promotional ads as not germane to union activities, despite obvious overlap in the ends of both).

The government's further effort to separate collective speech from the requisite collective conduct by reference to cases involving associational rights, USDA Mem. at 27 n. 16, is, in a word, confused. Though mostly correct in stating that First Amendment associational rights "are deriviative of" speech rights, the government mistakenly assumes that *all* forms of association are protected by the First Amendment. In actuality, only *expressive* association implicates the First Amendment, and *economic* association involves merely conduct that may be regulated subject to the more lenient constraints on most other government activities. *See* ***Roberts* v. *United States Jaycees***, 468 U.S. 609, 638 (1984) (distinguishing interference with an organization engaged in "protected expressive activity" and regulation of "economic transactions by or within a commercial association"). Where the regulation of economic association nonetheless inadvertently burdens expressive association, the test to be applied is the familiar ***O'Brien*** test, discussed *supra* at 6, bringing us full circle to the related germaneness inquiry.

It is the government's misunderstanding of the different forms of association that leads it to the misguided claim that "[t]o the extent that a government interest would be sufficient to justify compelled association in the name of economic regulation, and that compelled association would later be deemed sufficient to justify compelled contribution, there is no analytical reason to require the compelled association as a precursor to permitting compelled speech." USDA Mem. at 27 n. 16. But that logic falsely assumes that such interests as would justify economic regulation could independently justify direct regulation of speech, which the entire body of First Amendment, not to mention ***United Foods***, squarely refutes. Such interests allow for an incidental burden on speech only insofar as necessary to accomplish the underlying regulation of conduct, and even then with substantial additional First Amendment restraints. Once again, the

government is confusing the goal or ends of a regulation with the substantive means of the regulation and claiming that common abstract goals are sufficient to support compelled speech. But that is nothing more than a reiteration of the rejected claim that a program of compelled speech may be germane to itself so long as its goals are the same as the government's goals in enacting separate regulation having no other connection to the speech at issue. In the government's view, the requirement of pre-existing regulation serves no function other than to prove that the interest asserted is indeed important, rather than as the primary permissible governmental action that incidentally necessitates some burden on speech in order to go into effect. But that is not the law. If the compelled speech is neither integral nor necessary to regulations of conduct, the fact that they share the same broad goals is meaningless.[3]

2. Collective Expression Not Germane To Pro-Competitive Regulations

Because the germaneness test requires that compelled support for speech be integrally related to compelled conduct, and be functionally necessary for the operation of such conduct, the government must do far more than merely demonstrate the existence of other regulations covering the affected industry. Rather, it must show that the nature of the compelled speech matches up with the nature of the compelled conduct and is necessary to effectuate such compelled conduct. The regulations cited by the government, however, have absolutely nothing to do with the compelled collective speech at issue in this case and thus the compelled speech is not "germane" to such regulations. For example, the government, USDA Mem. at 29, disingenuously cites to several provisions of the Packers and Stockyards Act of 1921 ("PSA"), 7 U.S.C. §§ 181 *et seq*., for the notion that beef production is highly regulated. But the

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[3] The government's final claim in its footnote, USDA Mem. at 27 n. 16, that the uniformly contrary language in ***United Foods*** is merely *dicta* contrasting the ***Glickman*** case is utterly disingenuous. The differences between the program in ***Glickman*** and the Mushroom Act was the very issue litigated in ***United Foods***, and was essential to disposing of the government's position that ***Glickman*** controlled. For genuine *dicta*, the government need only look to the language it misrepresents as holdings concerning the so-called government speech doctrine. *See infra* at 28-29.

government chooses to overlook the fact that none of those provisions apply to the *producers* who pay the beef checkoff, only to – not surprisingly – packers and stockyards.

Furthermore, the PSA provisions cited by the government, unlike those thought to exist in ***Glickman***, are strictly pro-competitive, not cooperative or collectivizing. Sections 192, 206, 207, and 208 forbid discrimination and deception by packers and stockyards, and bars manipulation, control, or discrimination in prices. Those provisions are designed to suppress anti-competitive collective action and guard against the monopsony and monopoly tendencies of these market middlemen. Indeed, the government – seemingly oblivious – cites authority for this essential difference, noting that the purpose of the PSA, unlike the collectivist Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. § 601, *et seq.*, is intended to "foster, preserve, [and] insure an efficient, competitive public market" in livestock. 7 U.S.C. § 208(b)

As for the supposed price controls under the PSA, Section 212 creates only extremely limited authority for the Secretary to control certain rates and practice by packers and dealers, but there again, the situations allowing for such control are designed to prevent, rather than support, collective action. Such regulatory authority is thus the antithesis of the producer-collectivizing authority that was presumed to exist in the ***Glickman*** case. The limited regulatory authority under the PSA offers no control whatsoever over the prices or other marketing decisions of producers, and the government does not give a single instance in which such latent authority has been exercised in any event. Such latent authority is comparable to the *unused* regulatory authority under the AMAA, which was present in, and irrelevant to, the ***United Foods*** case. *See* -- U.S. at --, 121 S. Ct. at 2340 (recognizing that "greater regulation of the mushroom market might have been implemented under the" AMAA).[4]

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[4] The bonding and trust account requirements placed on packers and stockyards by 9 C.F.R. §§ 201.29 and 201.42 (though cited by the government to CFR Title 7) are merely basic transaction facilitation requirements meant to prevent abuses by the packer and stockyard middlemen. Such regulations do not constrain producers and have utterly nothing to do with the compelled speech at issue in this case.

Other legislation cited by the government is similarly pro-competitive and thus further undermines any case for compelling collectivized speech. The price-reporting requirements under the Livestock Mandatory Reporting Act of 1999 applies to packers, not producers, and is designed to "encourage[] competition," not cooperation or collectivization. 7 U.S.C. § 1635 (3). And as for the voluntary grading system under the Agricultural Marketing Act, 7 U.S.C. §§ 1621-27, that statute applies to *all* agricultural products (thus failing to distinguish mushrooms), is strictly voluntary, not regulatory, and it hardly requires any *collective* action. 7 U.S.C. § 1622 (h).[5] The notion that this voluntary system is somehow comparable to the mandatory grading system for fruit in ***Glickman***, USDA Mem. at 30-31, is preposterous. Not only were fruit producers in ***Glickman*** required to grade their produce according to collectively determined standards, they were also restricted from marketing low-graded produce at all. Beef grading, by contrast, is a wholly voluntary informational activity subject to individual choice, and producers remain free to market their goods regardless of the grade received.[6]

The Federal Meat Inspection Act, 21 U.S.C. §§ 601 *et seq.*, similarly offers no justification for the forced collective speech under the Beef Act. Meat inspection is a standard consumer safety requirement no different from health, safety, and misbranding regulations applicable to virtually all foods and drugs sold in the United States. Likewise with the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501 *et seq.*, which is applicable to all "agricultural

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[5] The nature of the grading system is also at odds with numerous other aspects of the Beef Act given that any generic advertising of beef would run counter to the product differentiation fostered by grading. The disconnect between grading and generic advertising – or worse, branded advertising promoting low-grade beef – goes to the issue of whether the Beef Act is "germane" to the voluntary grading system. And the government itself notes, USDA Mem. at 30, that the purpose of voluntary grading is to provide for a "privately operated system for distributing and marketing agricultural products," 7 U.S.C. § 1621, thus undermining the government's claims that beef promotion is government speech. *See infra* Part II.C.

[6] Price reporting provides interesting counterpoint as to the type of compelled speech that might well be germane to underlying regulation. Compelled reporting of prices by packers and stockyards seems quite germane to the substantive requirement in the PSA that such middlemen do not discriminate in their pricing. But the further compulsion of *collective* speech by producers has nothing to do with discriminatory pricing and is akin to the non-germane teacher advertising rejected in ***Lehnert***.

products (thus failing to distinguish mushrooms from beef), merely establishes the preconditions for branding a product as "organic," but have nothing to do with collective or cooperative marketing. Forbidding the sale of unhealthful or misbranded products, and requiring accurate labeling in furtherance of that end, is akin to the type of disclosure requirements (and the underlying substantive ethical standards) discussed in ***Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio***, 471 U.S. 626 (1985), and distinguished by the Supreme Court in ***United Foods***, -- U.S. at --, 121 S. Ct. at 2341. Indeed, just as in ***United Foods***, there "is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers," *id.*, or otherwise necessary to implement meat inspection and labeling requirements.[7]

Finally, the government cites to the Capper-Volstead Act, 7 U.S.C. §§ 291 *et seq.*, as permission, though not compulsion, for collective action in the beef industry by granting an antitrust exemption for producers or others who voluntarily choose to market their beef through an agricultural cooperative. USDA Mem. at 31 n. 18. Once again, however, the government neglects to mention that this applies to *all* agricultural products and thus once again fails to distinguish beef from mushrooms. Furthermore, aside from offering no evidence that any such cooperative exists in the beef industry, the government fails to explain how the existence of such voluntary cooperatives would justify compelling support for speech from those who – like petitioners – are *not members* of such cooperatives. It is one thing to say that producers who in fact associate in such cooperative marketing systems could be compelled to subsidize the

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[7] Because beef (and other produce) must be inspected for basic health and safety, the government may also compel people to label their goods accordingly. Compelled speech – *i.e.*, labeling – regarding the underlying compelled inspections is plainly germane to the inspection regulations themselves, and fits hand-in-glove with the operative requirements of the Federal Meat Inspection Act. The speech compelled by the Beef Act, however, has nothing to do with such inspection requirements notwithstanding the abstract benefits that a safe beef supply may provide for consumer confidence.

promotional efforts *of the cooperative entity itself*. Cooperative promotion might well be germane to cooperative marketing that was exempt from antitrust laws. But it is an entirely different matter to require independent producers – fully subject to and protected by the antitrust laws – who have not joined such cooperatives to subsidize collective speech by their competitors. In the former instance collective speech is germane to collective conduct; in the latter instance, compelled collective speech is antithetical to the competition-preserving regulations applicable to the remainder of the market.

Once the pro-competitive nature of any beef-specific regulations is recognized, this case not only falls outside the scope of the earlier ***Glickman*** case, it is actually an even *more* compelling case for rejecting the compelled support for speech than was ***United Foods***. The government's claim that a valid programatic interest is sufficient to support compelled speech so long as such a general interest is reflected in other regulations, regardless of whether the compelled speech is integral or necessary to the operation of those regulations, is nothing more than a repackaged version of its failed argument in ***United Foods*** and should be rejected accordingly.

B. COMMERCIAL SPEECH

Ignoring the nature of the beef checkoff program, the government asserts that the speech at issue is commercial in nature and that compelled support for such speech is subject to, and would survive, the ***Central Hudson*** test for restrictions on commercial speech. USDA Mem. at 18 (*citing* ***Central Hudson Gas & Elec. Corp.*** **v.** ***Public Serv. Comm'n***, 447 U.S. 557 (1980)). The government's reasoning, however, is wrong on numerous counts.

First, the ***Central Hudson*** test does not apply to compelled support for speech, even if such speech might be characterized as commercial. ***United Foods*** recognized that "the Government itself does not rely upon ***Central Hudson***" in defense of the mushroom checkoff program. -- U.S. at --, 121 S. Ct. at 2338. As the government acknowledged in ***United Foods*** –

but conveniently ignores now – the Supreme Court has "made clear in ***Wileman*** that 'the ***Central Hudson*** test, which involved a restriction on commercial speech, should [not] govern a case involving the compelled funding of speech,'" after which the government concluded that the inapplicability of ***Central Hudson*** has now "been resolved." Reply Br. for the Petitioners, ***United Foods***, No. 00-276 (Apr. 9, 2001) at 9-10 n. 7 (*quoting* ***Glickman***, 521 U.S. at 474 n. 18) (brackets in government brief). Indeed, the Supreme Court in ***United Foods*** simply assumed that the speech in question was commercial speech and found that irrelevant, holding that "even viewing commercial speech as entitled to lesser protection, we find no basis under either ***Glickman*** or our other precedents to sustain the compelled assessments sought in this case." -- U.S. at --, 121 S. Ct. at 2337. In light of squarely controlling precedent and the position taken by the Solicitor General's office and accepted by the Supreme Court in ***United Foods***, it is disingenuous for the government to urge a contrary position upon this Court.

Second, much of the speech in this case is not "commercial speech" at all, but rather is political speech or opinion about economic subjects. For example, petitioners' initial memorandum identified numerous forms of objectionable speech that concerned subjects such as nutrition, legislation, the supposed value of the beef checkoff itself, and the use of checkoff funds to support policy initiatives favoring the viewpoints and economic interests of large processors. Pet. Mem. at 3 n. 1. Viewpoint based restrictions or compulsions of such speech are subject to full First Amendment scrutiny. In those cases where some lesser scrutiny has been applied to restrictions on commercial speech, such speech has been very narrowly defined as "speech that does no more than propose a commercial transaction." ***United Foods***, -- U.S. at --, 121 S. Ct. at 2337. Yet even the generic beef promotion in this case does not quite propose any commercial transaction, particularly given that the persons paying for the ads – cattle producers – typically do not sell to the consumer targets of the promotion. Generic beef promotion is no more commercial speech than are promotions by U.S. labor unions encouraging consumers to

favor American-made goods, to look for the union label, or to eschew goods made with child labor. Such speech is more accurately viewed as speech on broader economic subjects; it may be *about* commercial transactions, but it is does not propose a commercial transaction as does an advertisement reading "Case of Beer: $10 at Bob's convenience store."[8]

Third, even assuming some of the compelled speech at issue is "commercial speech," it is petitioners' view that the ***Central Hudson*** test is no longer viable and that such speech should be evaluated according to the heightened scrutiny applicable to all forms of protected speech. As the Supreme Court has recognized as recently as ***United Foods***, the ***Central Hudson*** test has been subject to "criticism" in recent years. ***United Foods***, -- U.S. at --, 121 S. Ct. at 2337 (*citing* examples). The Court, however, was understating matters. At least five Justices have suggested that ***Central Hudson*** may need to be narrowed or overruled. *See, e.g.,* ***Lorillard Tobacco Co.* v. *Reilly***, -- U.S. --, 121 S. Ct. 2404, 2421 (2001) (acknowledging doubts over commercial speech standards expressed by Justices Stevens, Scalia, Kennedy, Thomas, and Ginsburg).

Furthermore, since the adoption of the ***Central Hudson*** test over twenty years ago, the Supreme Court has overwhelmingly found commercial speech restrictions invalid under the ***Central Hudson*** analysis. *See, e.g.,* ***Lorillard Tobacco***, -- U.S. --, 121 S. Ct. 2404 (striking

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[8] Given that petitioners object to the underlying political, nutritional, and economic viewpoints favored in checkoff speech – including the promotional advertising – their First Amendment claim triggers heightened scrutiny regardless of how one characterizes the speech serving as a vehicle for such viewpoints. For example, while the government may properly proscribe obscenity or "fighting words," it may not selectively discriminate in favor of or against a subset of obscene materials based on the viewpoints contained therein. *See* ***R.A.V.* v. *City of St. Paul***, 505 U.S. 377, 383-84 (1992) (even unprotected categories of speech may not "be made the vehicles for content discrimination unrelated to their distinctly proscribable content"); *id.* at 386 ("[T]he power to proscribe [particular speech] on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements. … The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed."). Just so with commercial speech: Even if the government could require all producers to engage in some amount of commercial speech, it could not and cannot compel the support of commercial speech having only a particular favored viewpoint. *Cf*. *id.* at 388-89 (though a state may "regulate price advertising … because the risk of fraud … a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion")

down cigarette advertising ban for outdoor and point-of-sale advertising)[9]; ***Greater New Orleans Broadcasting Ass'n* v. *United States***, 527 U.S. 173 (1999) (striking down federal restriction on speech relating to casino gambling).[10] Remarkably, since 1995, the Supreme Court has only once upheld a regulation challenged before it under the ***Central Hudson*** test. ***Florida Bar v. Went for It, Inc.***, 515 U.S. 618 (1995) (5-4 Court upheld bar restrictions on attorney advertising). But in that case, as well as several cases preceding it, the speech restriction was incidental (and germane) to underlying restrictions on conduct – prohibiting certain contact with accident victims or their families for a period of time post-accident – and likely would have survived the more appropriate ***O'Brien*** test for restrictions on mixed conduct and expression.[11]

Fourth, even assuming, *arguendo*, the applicability of the ***Central Hudson*** test, the beef checkoff program fails that test. While the government relies primarily on the Third Circuit's decision in ***United States* v. *Frame***, 885 F.2d 1119, 1133 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), and the district court decision in ***Goetz* v. *Glickman***, 920 F. Supp. 1173, 1182-83 (D. Kan. 1996), *aff'd on other grounds*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), both of those decisions came down before the Supreme Court substantially ratcheted up the scrutiny under the ***Central Hudson*** test in cases like ***44 Liquormart***, 517 U.S. at

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[9] ***Lorillard*** did uphold one restriction on mixed conduct having potential communicative impact, but did so pursuant to the normal ***O'Brien*** test, not under ***Central Hudson***. -- U.S. at --, 121 S. Ct. at 2429.

[10] *See also* ***44 Liquormart, Inc.* v. *Rhode Island***, 517 U.S. 484 (1996) (striking down restrictions on price-advertising ban of alcoholic beverages); ***Rubin* v. *Coors Brewing Co.***, 514 U.S. 476 (1995) (striking down ban on alcohol content disclosures); ***Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation***, 512 U.S. 136 (1994) (reversing sanction relating to professional advertising); ***Edenfield* v. *Fane***, 507 U.S. 761 (1993) (striking down ban on personal solicitation of potential clients by accountants); ***Cincinnati* v. *Discovery Network, Inc.***, 507 U.S. 410 (1993) (striking down city prohibition of news racks devoted to commercial advertising); ***Bolger* v. *Youngs Drug Products Corp.***, 463 U.S. 60 (1983) (striking down prohibition on unrestricted mailings of advertisements for contraceptives); ***Central Hudson***, 447 U.S. 557 (striking down restriction on utility company advertising).

[11] *See, e.g.*, ***United States v. Edge Broadcasting Co.***, 509 U.S. 418 (1993) (upholding restrictions on broadcast of lottery advertisements by radiostation in state where lotteries were illegal); ***Board of Trustees of the State Univ. of New York v. Fox***, 492 U.S. 469, 471-72 (1989) (upholding university prohibition of Tupperware parties in dorms as incidental to ban on such commercial activities in general).

531-32, and ***Greater New Orleans Broadcasting***, 527 U.S. at 182. The government also neglects to mention that the district court in ***Goetz*** did nothing more than rely on ***Frame*** without further analysis, and that the Tenth Circuit on appeal not only relied upon alternative grounds (now rejected in ***United Foods***), but also affirmatively repudiated the district court's reliance on the ***Central Hudson*** analysis from ***Frame***. 149 F.3d at 1139 ("We find the district court erred in applying the ***Central Hudson*** test to Goetz' First Amendment claim.") And as for ***Frame***, the Court actually used the ***Abood*** test to uphold the Beef Act – with analysis that is now squarely rejected by ***United Foods*** – and only discussed the ***Central Hudson*** test as an afterthought. 885 F.2d at 1134 n. 12. Given the subsequent Supreme Court case law on both the ***Abood*** test and the ***Central Hudson*** test, ***Frame*** not only lacks authority on those issues, it must be considered a marker for precisely what is *not* the law.

If the ***Central Hudson*** analysis were conducted today, the Beef Act would fail spectacularly. Regarding whether the alleged government interest is substantial, not only does the government misidentify the true nature of the interest at stake, it ignores contradictions in government policy that demonstrate its alleged interest to be non-substantial for First Amendment purposes. For example, though claiming a desire to increase beef consumption in the United States, the government simultaneously warns the public of the hazards of overeating in general and encourages reduced consumption of meat as a way to reduce fat and cholesterol.[12]

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[12] *See, e.g.,* USDA, "Choose a diet low in fat, saturated fat, and cholesterol," www.nal.usda.gov/fnic/dga/-dga95/lowfat.html (noting that the "fats from meat, milk, and milk products are the main source of saturated fats in most diets"; that saturated fats should be reduced to less than 10% of calories; that the "fats in most fish are low in saturated fatty acids" and contain a preferable form of polyunsaturated fatty acids; and recommending that "[m]ono- and polyunsaturated fat sources should replace saturated fats" within the overall dietary limit on fat consumption); Mayfield, A Consumer's Guide to Fats, www.pueblo.gsa.gov/press/-nfcpubs/fatguide.txt ("The 'bottom line'," according to an FDA official is that we should be "removing as much of the saturated fat from our diet as we can. … In a nutshell, that means eating fewer foods of animal origin, such as meat and whole-milk dairy products, and more plant foods such as vegetables and grains."); Surgeon General's Report on Nutrition and Health (Extracts), www.mcspotlight.org/media/reports/surgen_rep.html ("[O]verconsumption of certain dietary components is now a major concern for Americans. … [C]hief among them is the disproportionate consumption of foods high in fats, often at the expense of foods high in complex carbohydrates and fiber"); *see also*

Speech funded by the beef checkoff program simply furthers this confusion, selectively reproducing the government's food pyramid while supposedly trying to increase the number of servings of beef consumed per household. And, ironically, the voluntary grading standards cited as underlying regulation, USDA Mem. at 30, encourage a message favoring high-fat beef that is at odds with the government's message about nutrition. *Compare* USDA, Agric. Fact Book 2000, www.usda.gov/news/opubs/fbook00/factbook2000.pdf, at 227 (beef graded "on attributes such as marbling (the amount of fat interspersed with lean meat), color, firmness, texture, and age" which are "a good indication of tenderness, juiciness, and flavor"), *with* Dietary Guidelines: Choose Sensibly, www.health.gov/dietaryguidelines/dga2000/document/choose.htm (suggesting that restaurant-goers "[l]imit ground meat and fatty processed meats, marbled steaks, and cheese"). Far from showing an important government interest, the incoherence of overall government policy regarding meat consumption suggests the lack of a substantial interest in promoting such consumption as opposed to the consumption of other agricultural products.[13]

Even other checkoff programs directly contradict the claimed interest in increasing beef consumption. The pork checkoff's promotion for "Pork – The Other White Meat" can be seen as nothing less than an attack on the consumption of "red" meat and an attempt to persuade consumers to shift their protein consumption from beef to pork.[14] That checkoff programs are

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Surgeon Gen. Rep. on Nutrition and Health (Extracts), www.mcspotlight.org/media/reports/-surgen_rep.html ("the more likely problem [than undernutrition] has become one of overeating"; *id*. ("Average levels of protein consumption in the United States … are well above the National Research Council's recommendations"); USDA, The Food Guide Pyramid, www.nal.usda.gov:8001/py/pmap.htm (grouping meat with poultry, fish, dry beans, eggs, and nuts; suggesting 2-3 servings of only 2-3 oz. each; and advising consumers to "try to pick the lowest fat choices from the food groups"); Dietary Guidelines: Choose Sensibly, www.health.gov/dietaryguidelines/dga2000/document/choose.htm (in protein category (which includes meat) recommending people "[c]hoose dry beans, peas, or lentils often").

[13] Lest there be any confusion, petitioners do not agree with the Food Pyramid and guidelines concerning meat and fat consumption. And they do not wish to support speech that touts those guidelines yet at the same time favors unwholesome pre-processed "convenience" beef.

[14] *See, e.g.,* Pork Rep., Summer 2001, www.porkboard.org/PorkReport/Summer2001/-ReachingConsumersSUM2001.htm ("The Other White Meat campaign, launched in 1987, has helped consumers associate pork as a white meat. This is critical because 54% of consumers believe white meat

working at cross purposes undermines any claim that the government has a "substantial interest" in enhancing beef consumption specifically. *See* ***Greater New Orleans Broadcasting***, 527 U.S. at 187 ("But we cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General.").[15]

To the extent that there is any substantial government interest in this case at all, it is at best an interest in promoting U.S. agriculture *in toto*, not in promoting beef specifically. That beef is currently a large segment of U.S. agriculture is irrelevant insofar as variable patterns of beef consumption reflect only a shifting of market share within U.S. agriculture, and not a reduction of total U.S. agricultural consumption. And even as to a total agricultural interest, it is still not clear whether the government interest is in increasing the *volume* of food consumed and produced or in increasing the *profitability* of some or all agricultural producers. If the latter, then the government must seek far more than increased demand *per se*, but must seek increased prices and an increased profit margin as well. While demand increases may sometimes lead to such result, that is far from a necessary or predictable consequence, particularly in a market such as beef where there are no supply side controls, an open import market for beef, and where the

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is healthier, tastes good, has less fat, is leaner and their families like it."); Pork Leader, Mar. 30, 2001, www.porkboard.org/-Pork%20Leader/PorkLeader033001.html (pork checkoff promotions have enabled some restaurants "to offer and price pork entrees to compete with beef offerings"); Pork Leader, Mar. 16, 2001, www.porkboard.org/Pork%20Leader/PorkLeader031601.html (pork checkoff has "started a new consumer communications strategy built on pork's position as the alternative to chicken and beef"); National Pork Board News Release, June 7, 2001, www.porkboard.org/-060701IncreasingDemand.html ("At the consumer level, pork competes with beef.").

[15] The government's repeated references to the importance of beef to U.S. agriculture, USDA Mem. at 19-21, do not demonstrate a unique government interest in beef promotion. Virtually identical statements can be found regarding numerous commodities, including both mushrooms and pork. The purported beef interest is really just a subset of what is presumably an overall interest in the health of American agriculture in general, not a preference for beef over pork or vegetables. Given that all checkoff programs are (theoretically) subject to the vote of the relevant industry, the government itself does not even take a formal position on whether any particular checkoff program ought to exist, and hence cannot assert a substantial interest in any such checkoff program *per se.* Having abdicated the choice whether to have any given checkoff, the government's interest might best be described as an interest in letting different commodities make their own choice whether to compel collective advertising and any incidental benefits

government's simultaneous efforts to create an efficient and competitive market for the benefit of consumers is likely to undermine any boost to profits from increased demand.

The government likewise fails to provide any evidence to suggest that the beef checkoff directly advances the supposed ends of the program, relying instead on bare assertions that must be subject to independent factual review by a court considering First Amendment claims. *See* ***Bose Corp*. v. *Consumers Union of United States, Inc.***, 466 U.S. 485, 499 (1984) (in First Amendment cases "an appellate court has an obligation to 'make an independent examination of the whole record'") (citation omitted). But even assuming that the beef checkoff program increases consumer demand for beef, there is absolutely no evidence that it improves the lot of beef producers – rather than packers and stockyards or retailers – or has a net positive effect on U.S. agriculture overall. Regarding beef producers, the government offers no evidence that any increase in consumption leads to an increase in *profits* for producers, and even the USDA itself admits that it lacks such evidence when it explains how it objected to an advertising claim that the checkoff program increased profits. USDA Br. Exh. B ¶ 9 (rejecting proposed communication claiming increased sales "means increasing profits").[16] Furthermore, if the real interest is in consumption of U.S. beef as opposed to foreign beef, the beef checkoff arguably undermines that goal by encouraging the consumption of beef imported by larger processors to the detriment of domestic beef. And lastly, if the interest is in promoting U.S. agriculture as a whole, which it seems to be, then beef promotion does nothing but attempt to shift market share

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perceived therefrom. But by not making that choice itself, the government offers distinctly tepid evidence regarding the strength of its own interest in such programs. Here inaction speaks louder than words.

[16] And as for the Ward study claiming that the beef checkoff increases demand, USDA Br. Exh. A2, the absence of any explanation of the underlying model and its numerous assumptions makes that dubious evidence at best and it will be subject to ample challenge in the event that it is even relevant on summary judgment. But even assuming the dollar multiplier suggested by Ward, the government neglects to note that such dollars represent *revenues*, not profits, and with a conservative assumption of a 10% profit margin in a competitive, high supply market, it would take a ten-to-one revenue impact just to break even. On the current record, therefore, the Ward study could just as easily show that the checkoff leads to a *net loss* of profits for beef producers, even if it increases demand and revenue.

away from competing agricultural products – such as chicken or pork – without any indication of an increase in total consumption of food. At most, therefore, the government is left to speculate whether the Beef Act directly advances whatever variation of government interest one might adopt. Such speculation is insufficient to satisfy the ***Central Hudson*** test. *See* ***44 Liquormart***, 517 U.S. at 507 ("any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. ***Edenfield***, 507 U.S. at 770." (footnote omitted)); ***Rubin***, 514 U.S. at 490 (Noting government's "anecdotal evidence and educated guesses" regarding existence of problem and beneficial effect of law and concluding that those "various tidbits" "cannot overcome the irrationality of the regulatory scheme and the weight of the record").

Finally, the centralized the message-generating function of the beef checkoff infringes on producers' First Amendment rights far more than necessary to achieve any supposed government interest in beef promotion. The existing program is far more repressive than one that allowed all producers to choose the content of the promotions supported by their checkoff dollars – either by direct advertising themselves or through voluntary association with other producers having shared viewpoints on what to say and how to promote their products. Indeed, the current program goes beyond mere generic advertising and the viewpoint contained therein, and actually supports *branded* advertising, albeit with only a select group of beef processors. Forcing independent ranchers to not only subsidize their competitors through generic ads, but also through branded ads expressly touting those competitors, is a stunning burden on free speech. And any type of compelled promotion is far more restrictive of First Amendment rights than would be a program of direct economic regulations – *constitutionally* less intrusive and subject only to the rational basis test – that either restricted supply or compelled demand as a means of propping up the beef industry. Where there are obvious means of achieving the government's

goals that involve either lesser or no restrictions on speech, the government fails the last element of the ***Central Hudson*** test. *See* ***44 Liquormart***, 517 U.S. at 507 ("The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."); ***Rubin***, 514 U.S. at 491 ("The FAAA's defects are further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech.")

C. GOVERNMENT SPEECH

Perhaps recognizing that their other arguments are specious in light of ***United Foods***, the government now places primary reliance – for the first time in the proceedings in this case – on the claim that the beef checkoff program, rather than being an industry *self*-help device, is instead *government* speech. USDA Mem. at 10-18. Such a claim has never been accepted in any appellate court, contradicts numerous other assertions by the government, and would not save the program under the First Amendment in any event.

1. The Checkoff Program Is Not Government Speech.

The novel defense of government speech immunity rests on the dubious initial contention that the expression subsidized by the Beef Act is government speech because the Beef Board is a government agency supervised by the USDA. The only appellate court to consider this contention, however, has held to the contrary. In ***Frame***, the Third Circuit accepted the government's arguments regarding the close supervisory relationship between the Beef Board and the USDA, but nonetheless held that "the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as 'government speech.'" 885 F.2d at 1132. It reached that conclusion based upon several related factors distinguishing government speech from government-compelled support for speech. Those factors include: (1) the nexus between the

expression and the person objecting thereto; (2) the attribution, or lack thereof, of the expression to the government; (3) the source of funding for such expression; and (4) the persons generating the content and viewpoint of the expression. As in ***Frame***, each of those factors demonstrates that the expression subsidized by the Beef Act is not government speech.

Nexus to Objecting Party. In ***Frame*** the court held that there was a close nexus between expression under the Beef Act and objecting producers because "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes." 885 F.2d at 1132.[17] The court also found that the "advertisements actually shown to the public reinforce the connection between the individual producer, the Cattlemen's Board, and the message itself." *Id*. at 1133 n. 11. The nexus between producers and speech under the Beef Act also is confirmed by the legislative history of the Act, identifying it as a "self-help" program for the beef industry to spread its own message. *See id*. at 1122 ("This legislation was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and *devise its own strategies* to increase beef sales, while simultaneously avoiding the intrusiveness of government regulation and the cost of government 'handouts.' *See* Report of Committee on Agriculture, Beef Research and Information Act, H.R.Rep. No. 452, 94th Cong., 1st Sess. 3 (1975).") (emphasis added).[18] The same is true today. Indeed, current advertisements

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[17] The court cited an earlier Third Circuit case discussing various student activity fees and their greater or lesser nexus to objecting students. 885 F.2d at 1132. Recently the Supreme Court decided ***Board of Regents of the University of Wisconsin System* v. *Southworth*** and found that *all* student activity fees used to fund speech had a sufficient nexus to trigger First Amendment scrutiny and imposed a viewpoint neutrality requirement on the use of such funds to support speech. 529 U.S. 217, 230 (2000). ***Frame***'s nexus determination would thus be even stronger today than it was when the case was decided.

[18] *See also*, ***Frame***, 885 F.2d at 1135 ("Congress intentionally structured this legislation as a 'self-help' measure so as to ensure the support, and respect the integrity, of the independent American cattlemen. *See, e.g.*, 121 Cong. Rec. 38,116 (only 'self-help' legislation proper for industry not traditionally recipient of government subsidies) (statement of Sen. Hansen); 121 Cong. Rec. 31,439 ('In keeping with their true free enterprise nature, cattlemen are asking only for enabling legislation') (statement of Rep. Santini);

reflect a much more direct attribution – and hence nexus – to cattle producers and are designed in a way that plainly leads listeners to believe that they represent the views of the Nation's cattlemen. *See, e.g.*, USDA Mem. Exh. B-2, at [3-4] ("Brought to you by the Nebraska beef producers through their beef checkoff"; "our beef checkoff"; "When you see promotions … you'll know that beef producers have teamed up with other segments of the food industry"; "You and I as cattle producers control the beef checkoff"; "half that money is directly controlled by Nebraska producers").[19]

Non-Attribution to Government. As ***Frame*** recognized, the beef checkoff materials contain no "mention of the Secretary or the Department of Agriculture, thus failing to communicate that the advertisements are funded through a government program." 885 F.2d at 1133 n. 11. Indeed, nowhere does the checkoff program *ever* attribute the views it expresses to the government, instead attributing them to beef producers. Unlike the views on nutrition and health expressed by the Surgeon General, the FDA, or the USDA, listeners have no basis for recognizing that they are (purportedly) being subjected to government propaganda rather than the claimed private views of beef producers. The lack of government attribution alone is sufficient to reject the claim that the expression in this case is government speech. Indeed, if it were government speech, it would be a most insidious form of covert domestic propaganda masquerading as private speech and would grossly offend the First Amendment. *See infra* part II.C.2.

Exclusive Funding by Discrete Group. The ***Frame*** court also found particularly significant the fact that the checkoff program was funded only by producers, and not by general tax revenues.

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121 Cong.Rec. 31,448 (1975) (statement of Sen. Baucus) (Montana ranchers historically unwilling to accept government handouts or interference).").

[19] *See also* USDA Mem. Exh. A-1, at [7] (copyright attribution to NCBA and Beef Board); *id.* at 9 ("Funded by Beef Producers"; "Produced for the Cattlemen's Beef Board and State Beef Councils"); Certified Record ("R.") at 748 (describing NCBA reorganization as establishing a "new, unified industry-organization structure, focusing industry resources – both checkoff and dues resources – around a single long range plan"); *id.* at 749 ("The new structure means that, for the first time, we will speak with one voice on beef issues; … we will be able to focus all available resources around a single long range plan, with a single set of objectives and priorities"); *id*. at 753, 754, 756, 757, 761 (NCBA "is the marketing organization and trade association for America's one million cattle farmers and ranchers").

> This sort of funding scheme, with its close nexus between the individual and the message funded, more closely resembles the ***Abood*** situation, where the unions, as exclusive bargaining agents, served as the locutors for a distinguishable segment of the population, *i.e.*, the employees, or the ***Wooley*** case, where the state "require[d] an individual to participate in the dissemination of an ideological message by displaying it on his property in a manner and for the express purpose that it be observed and read by the public," 430 U.S. at 713, regardless of whether the state-issued license plates constituted "government speech."

885 F.2d at 1132-33. This selective funding illustrates that the views do not belong to the government where the speakers are accountable to those funding the program rather than to the taxpayers. *Cf.* Facts About Checkoffs, www.beefboard.org/organization/facts.htm ("Each checkoff program is supported entirely by its funders. NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED."); *id.* ("Checkoffs are funded entirely by their respective industries, NOT by taxpayers or government agencies. Checkoff programs operate much like corporate businesses, with oversight by the federal government to ensure program accountability.")

Content and Viewpoint Generation. As the ***Frame*** court correctly recognized, speech generated under the beef checkoff program does not express the views of the government as representative of its citizens, but rather the views of

> an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those … whose "primary or overriding purpose is to promote the economic welfare of cattle producers." 7 U.S.C. § 2905(b)(3) & (4).

885 F.2d at 1133. The checkoff program itself confirms that content generation remains a function of private, not government, decisions. *See* Facts About Checkoffs, www.beefboard.org/-organization/facts.htm ("A checkoff is directed by its funders and managed by a professional staff. Funders are responsible for allocating funds and approving business plans and programs."); *id.* ("These programs are similar to businesses funded by shareholders (producers, processors, handlers, importers, etc.) with a board of directors that is accountable to the shareholders.").

As for the supposed editorial oversight by the USDA, such review does not convert private speech into government speech. Rather, it casts the government into the unconstitutional role of censor. The USDA does not claim to create the content of views expressed, but rather it claims to exercise a wholly negative role, restricting selective content here or there within the very broad parameters of the Beef Act. But censorial control does not make the government the speaker. If it did, the government would then become the speaker every time it imposed viewpoint restrictions on communications in a government-created forum and vast swaths of First Amendment jurisprudence would be meaningless. Speech emerging from government review does not become the government's simply because it gets to say whether or not a particular message is appropriate. Rather, as ***Frame*** concluded, "the Secretary's extensive supervision … does not transform this self-help program for the beef industry into 'government speech.'" 885 F.2d at 1133.

Other Considerations. In addition to failing the ***Frame*** factors, the government's reliance on ***Lebron* v. *National Railroad Passenger Corp.***, 513 U.S. 374 (1995), for the claim that the Beef Board is a government speaker is strikingly misplaced. In ***Lebron***, the question was not whether Amtrak was a government entity for purposes of spreading a government message or enjoying government immunities, but rather whether Amtrak was sufficiently governmental to trigger the state-action doctrine and expose it to the *constraints* of the Constitution. Indeed, the government had denied that Amtrak was a government agent, and the Court recognized that such disavowal "deprives Amtrak of sovereign immunity" and the power to "pledge the credit of the United States" 513 U.S. at 392. But the state-action question, and the constitutional limits arising therefrom, are analytically distinct. "The Constitution constrains governmental action 'by whatever instrumentss or in whatever modes that action may be taken.'" *Id*. (citation omitted). Thus, while the coerced support for speech in ***Abood*** was government action for the purposes of First Amendment constraints, it most certainly was not, therefor, entitled to any supposed privilege for government speech. So too here. As in ***Lebron***, the USDA's involvement is plainly sufficient to trigger state-

action and hence constitutional scrutiny; but it does not confer any supposed government-speech immunity on the expression supported by the checkoff program.

Finally, cases from the Supreme Court dealing with government-created fora demonstrate why government supervision is not a hallmark of government speech. In ***Board of Regents of the University of Wisconsin System* v. *Southworth***, the distribution of student activity fees contained numerous substantive restrictions on the type of expressive activity to be funded, a restriction on lobbying, and was subject to "consultation with" and "final confirmation of" school officials. 529 U.S. 217, 222, 225-26 (2000). But the University's "justification for fostering the challenged expression" – like the justification for the beef checkoff – was that "it springs from the initiative of the students, who alone give it purpose and content," subject to the overall limitations imposed by the University. *Id*. at 229. Despite the University's control of the parameters of program, therefore, the Supreme Court held that the "standard of viewpoint neutrality found in the public forum cases" was "controlling." *Id*. at 230. Likewise in ***Legal Services Corporation* v. *Velazquez***, the Legal Services program involved a government-created and funded entity, substantial restrictions on the subject matter of the speech to be funded, and plenty of oversight. 531 U.S. 533, --, 121 S. Ct. 1043, 1046-47 (2001). But again, like the checkoff program, it was designed to fund speech and speakers "to represent the interests" of a particular group the government sought to help. *Id*. at --, 121 S. Ct. at 1049. The Legal Services program "was designed to facilitate private speech, not promote a governmental message," *id*., and in that sense is materially indistinguishable from the beef checkoff program.

The speech that petitioners are forced to subsidize in this case is not government speech at all, but rather government-facilitated private speech subject to the test set out in ***United Foods***.

2. Government Speech Is Subject to First Amendment Scrutiny.

Even assuming that the beef checkoff communications were to be characterized as government speech, they would still run afoul of the First Amendment. Where individuals are

compelled to subsidize the expression of viewpoints with which they disagree, the First Amendment test is the same regardless of whether the speaker being subsidized is a third party favored by the government or the government itself.

The government falsely claims that it is "long settled that the First Amendment does not constrain the government's ability to engage in speech of its own," regardless of funding source. USDA Mem. at 10. In fact, however, the Supreme Court has *never* so held, and the government relies exclusively on *dicta* for its novel assault on the First Amendment. For example, in ***Southworth*** the University expressly disavowed any government-speech defense, leading the Supreme Court to state that the "University having disclaimed that the speech is its own, *we do not reach the question* whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself." 529 U.S. at 229 (emphasis added).[20] Any commentary on the government's purported right to advocate its policies was admittedly unnecessary to the decision and thus classic *dicta.*

In ***Rosenberger* v. *Rector & Visitors of the University of Virginia***, the Supreme Court squarely rejected the notion that the University itself was speaking or subsidizing its own preferred message and instead held that the University was "expend[ing] funds to encourage a diversity of views from private speakers." 515 U.S. 819, 834 (1995). Again, commentary on what rules might apply to government speech was unnecessary to the decision and advisory.[21]

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[20] This passage does not claim that government speech is immune from First Amendment scrutiny, as the government now claims, but rather notes that it is an unresolved "question" whether political checks alone are "sufficient to overcome First Amendment objections" to viewpoint-discriminatory university speech. If anything, the passage seems to recognize that the First Amendment at a minimum *applies* to such government speech and leaves open how the First Amendment might be satisfied.

[21] The government's citation, USDA Mem. at 11, to a concurring opinion in ***Lathrop* v. *Donohue***, 367 U.S. 820, 857 (1961) (Harlan, J., concurring in the judgment), is self-evidently non-authoritative, as are its citation, USDA Mem. at 18, to the concurring commentary in ***Abood***, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment). And the repetition of the ***Southworth*** *dicta* in ***Velazquez***, discussed *supra* in

And in ***Keller* v. *State Bar of California***, the Supreme Court referred to the respondent's argument as the "so-called 'government speech' doctrine" and then, after describing many characteristics of the bar that are equally applicable to the Beef Board – funding from members rather than government, membership limited to those in a single profession, not created to participate in the general government of the state -- squarely held that the speech at issue was not government speech and thus "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. 1, 10, 12-13 (1990). Thus, not only was any discussion in ***Keller*** about possible immunities for government speech simply *dicta*, the case also strongly contradicts the government's claim in this case that the Beef Board engages in government speech in the first place.

The essential point here is that, far from there being a "long established" government-speech exception to the First Amendment, the Supreme Court has *never held* that government speech is immune from First Amendment scrutiny. While there is admittedly *dicta* opining on the topic, petitioners respectfully suggest that such *dicta* issued without benefit of a genuine adversarial clash on the issue must be viewed with skepticism, particularly where the reasoning of such *dicta* self-evidently conflicts with core First Amendment principles established in numerous Supreme Court holdings.

In considering the novel proposition that compelled support for government speech – as opposed to government conduct – is subject to lesser or no First Amendment scrutiny, it is useful to begin by reviewing some bedrock First Amendment principles relevant to the inquiry.

It is a central First Amendment principle that the "freedom of speech" includes the complementary freedoms from both the restriction and compulsion of expression. As the Supreme Court recognized in ***Riley* v. *National Federation of the Blind***, while "[t]here is

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connection with the narrow scope of government speech, is likewise only *dicta* following the recognition that none of the parties ever asserted a government speech defense in that case.

certainly some difference between compelled speech and compelled silence, * * * in the context of protected speech, *the difference is without constitutional significance*, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." 487 U.S. 781, 796-97 (1988) (emphasis added). In ***Abood***, this Court likewise recognized such First Amendment equivalence as to monetary contributions in support of expression, holding that the "fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." 431 U.S. at 234.

The fundamental objection to government regulation of speech – whether by prohibition or by compulsion – is that it coercively manipulates public opinion:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government … pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information *or manipulate the public debate through coercion rather than persuasion*.

Turner Broadcasting Sys., Inc.* v. *FCC, 512 U.S. 622, 641 (1994) (emphasis added). Such government manipulation is constitutionally objectionable because at "the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Id.* While the government certainly has the authority to take numerous *actions* based upon prevailing points of view, such authority does not extend to manipulating public opinion. Rather, "[a]uthority here is to be controlled by public opinion, not public opinion by authority." ***West Virginia State Bd. of Educ.* v. *Barnette***, 319 U.S. 624, 641 (1943).

The concern that public opinion – the "public mind" – remain free from manipulation by the government retains force regardless of whether such manipulation is attempted by restriction or compulsion of speech:

> The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. * * * "The very purpose of the First Amendment is to foreclose public authority from

> assuming a guardianship of the public mind through regulating the press, speech, and religion." ***Thomas* v. *Collins***, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.

Riley, 487 U.S. at 790-91. Tilting the playing field of ideas, whether through compelled subtraction or compelled addition of particular viewpoints, necessarily clashes with the First Amendment. There is little constitutional difference between the government placing its thumb on the scale via a viewpoint-discriminatory, though moderate, burden on disfavored speech or via a viewpoint-discriminatory benefit amplifying the voice of the favored side of a debate. In both instances the debate continues, but it does so under the government's terms and direction.[22]

With these basic First Amendment principles in mind, we can examine the government's thin reliance on *dicta* for the erroneous proposition that government speech is immune from First Amendment scrutiny. The government places primary reliance upon a passage from ***Southworth*** purportedly stating that the government is entitled to engage in " 'speech and other expression to advocate and defend its own policies.' " USDA Mem. at 10 (*quoting* 529 U.S. at 229). The government's redacted passage from ***Southworth*** is, of course, *dicta* and the unredacted version is decidedly less conclusive regarding any supposed government speech rights:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. *See, e.g.*, ***Rust* v. *Sullivan***, 500 U.S. 173 (1991); ***Regan* v. *Taxation With Representation of Wash.***, 461 U.S. 540, 548-549 (1983).

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[22] Even absent complete suppression of particular views, the First Amendment is offended by efforts to skew public debate. *See, e.g.*, ***First Nat'l Bank of Boston* v. *Bellotti***, 435 U.S. 765, 785-86 (1978) (where speech restriction "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended") (footnote omitted); ***Buckley* v. *Valeo***, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

529 U.S. at 229. But noting that it "seems" inevitable for the government to speak in support of its substantive programs does not mean that every instance of government speech is inevitable or acceptable even then. Furthermore, even ***Southworth's*** more restrained suggestion of a potential government-speech doctrine turns on a mistaken parallel between government conduct and government advocacy. The error in that *dicta* is that it overlooks the constitutional fact that *speech is different* from conduct, and the government may not act in the speech arena as freely as it may with regards to conduct. That is the essential lesson of the First Amendment. Indeed, the very existence of this difference is both the substantive assumption and the legal consequence of the First Amendment. While the government may certainly adopt controversial policies opposed by a current minority, it may not properly tilt the marketplace of ideas to ensure continued public support for its programs or to counter a current minority's efforts to change public opinion. Government's role is to obey the changing popular will, not to play rearguard to give permanence to a temporal majority viewpoint.[23]

In the end, the relevant constitutional equivalence is not between government conduct and government speech, but rather between government speech and government-coerced support for third-party speech. The latter two raise the same concerns of government manipulation of the marketplace of ideas, viewpoint discrimination, and compelled support for objectionable advocacy. As Justice Scalia has observed regarding viewpoint discrimination in government *support* for third-party speech, to instead have speech "directly involving the government itself in viewpoint discrimination (if it is unconstitutional) would make the situation even worse." ***NEA* v. *Finley***, 524 U.S. 569, 598 (1998) (concurring in the judgment). While Justice Scalia

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[23] The notion that it is "the very business of government to favor and disfavor points of view," ***NEA* v. *Finley***, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment), is correct insofar as favored views are implemented through regulation of *conduct* rather than speech. But it is surely *not* the business of government to attempt to shape the public's views (or worse yet, entrench a currently fashionable view) rather than respond to such views while leaving them to evolve without governmental manipulation.

would allow viewpoint discrimination in *both* circumstances, the Supreme Court has imposed significant First Amendment limits on such discrimination in the subsidies and compelled-support contexts and such limits likewise must apply in the government speech context.[24]

One of the most telling arguments in favor of First Amendment limits on government speech comes indirectly from Justice Scalia himself, who allows that "it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party" and that "it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party," though he denies that such "unconstitutionality has anything to do with the First Amendment." ***Finley***, 524 U.S. at 598 n. 3 (concurring in the judgment). But no other source of unconstitutionality is readily apparent. And other Justices who have recognized constitutional difficulties with such openly partisan government speech have expressly identified the First Amendment as the source of those difficulties. *See* ***International Ass'n of Machinists* v. *Street***, 367 U.S. 740, 788 (1961) (Black, J., dissenting) (quoting the First Amendment and then stating: "Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate

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[24] Justice Powell's unsupported observation in his separate opinion in ***Abood*** that "[c]ompelled support of a private association is fundamentally different from compelled support of government," 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment), seems plainly incorrect in the context of *non*-expressive activities. While there perhaps ought to be some difference, petitioners are unaware of cases imposing a greater burden on government accomplishing a particular action directly or through the use of and payment to third parties. While third parties receiving funding for controversial conduct may be "representative of only one segment of the population," *id*., the decision to fund the non-speech activities of such parties is still made by the government just as much as if the government used its own agents to conduct the same activities. Furthermore, even if support for compelled *activity* by private organizations were more suspect than compelled support for direct government activity, the First Amendment inverts such suspicions in the context of expressive activity and association and government involvement in expressive choices makes matters worse, not better.

laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands."); ***Lathrop***, 367 U.S. at 853 (Harlan, J., concurring in the judgment) (agreeing that neither a state nor the federal government could " 'create a fund to be used in helping certain political parties or groups favored' by it 'to elect their candidates or promote their controversial causes' " (*quoting* ***Street*** dissent)).[25]

One staple of the purported government-speech doctrine is the citation to ***Rust* v. *Sullivan***. *See, e.g.*, ***Southworth***, 529 U.S. at 229; ***Finley***, 524 U.S. at 597 (Scalia, J., concurring in the judgment). In *Rust*, however, the issue of government speech was not necessary to the decision. Indeed, the Supreme Court recently recognized that ***Rust*** did not rely upon a claim that the government-financed medical activities at issue constituted government speech. ***Velazquez***, 531 U.S. at --, 121 S. Ct. at 1048-49; *see also id.* at --, 121 S. Ct. at 1055-56 (Scalia, J., dissenting) (noting that the speaker in ***Rust*** was not the government). ***Rust***'s observation about the government's ability "to fund one activity to the exclusion of" another, 500 U.S. at 193, views the activity in question as conduct, and does not address the different issues raised by the viewpoint-discriminatory funding of speech. As noted previously, however, *speech is different*.[26]

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[25] That the example involves political speech rather than commercial speech carries no dispositive weight given that the First Amendment protects both, albeit to a potentially greater or lesser degree. Petitioners' point is merely that compelled support for speech – whether such speech is made by the government or by third parties selected by the government – should be subject to the same scrutiny as restrictions on like speech. The degree of scrutiny may vary with the type of speech at issue, but the initial applicability of the First Amendment remains constant throughout.

[26] And even if the medical services funding addressed in ***Rust*** were viewed as support for mixed speech and conduct, it would fit neatly into the analytic paradigm established in the ***Abood*** line of cases. The program in ***Rust*** thus might well survive the germaneness analysis insofar as the only speech authorized was that necessary to provide the medical *services* being funded. In that context, the restriction on using government funded activities for abortion-related speech was not only permissible under the First Amendment, it was likely *required* by the First Amendment. Because Title X funds could not be used to provide abortion services, any speech promoting such services would not have been germane to the *conduct* properly funded by the government, and hence would have been an impermissible use of public

Some activities supposedly involving government speech, such as course selection at public universities, may pose a unique situation requiring somewhat different analysis than government advocacy to the public at large. Both ***Southworth*** and ***Rosenberger*** appear to have been moved to comment on government speech in order to dispel any implication that public universities might somehow be constrained in selecting their offerings or that academics might somehow be forced to offer viewpoint-neutral courses. That concern is legitimate, but does not support a government speech doctrine untethered to the unique concerns of the university environment, and may not be sufficient in any event to overcome First Amendment objections. But a public university's potential claims to being a market participant in the educational context, its traditions of academic freedom and independence, and the ready choice among a variety of schools within the public system offer no support for the type of government advocacy at issue in this case, which shares none of those potentially distinguishing features.

This case also does not raise the same practical issues as when government acts in a proprietary manner as a consumer of, for example, art to put up in its own buildings, where it might have greater leeway than if it were purchasing art to inculcate a particular viewpoint among the public. Likewise, when the government is selling some product – surplus cheese, perhaps – the First Amendment would pose little obstacle to its advertising just as any other seller would. Such speech would be germane in that it is incidental to the accomplishment of permissible government conduct and is necessary to such conduct.[27]

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funds to support speech. The case ultimately was about what speech government chose *not* to fund, and upheld the government's properly chosen restraint. ***Rust*** thus easily fits within a framework subjecting government speech to the same First Amendment standards as viewpoint-based government-compelled support for third-party speech.

[27] Indeed, if the government actually did collectivize the beef industry and itself purchased all cattle and beef for resale then promotional advertising incidental to the government's sale of such beef would likely be acceptable if the underlying collectivization were valid.

Finally, regardless of whether there are sufficient political checks on other forms of conduct by the government, First Amendment protection of the freedom of speech is not subservient to such political processes:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638. If political checks are inadequate to replace the First Amendment where the government chooses to compel a dissenting minority to support third-party speech, there is no reason why such checks suffice when the government avoids the middleman and coerces support for the same speech out of the government's own mouth. In both instances the First Amendment should provide the same protection and the same heightened scrutiny.

III. IRREPARABLE INJURY

The government claims that there is no irreparable injury because there is no "chilling effect" from the First Amendment violations raised in this case, because petitioners must only pay money and are not forced to nor prohibited from speaking, and because there is no evidence that they will sell any cattle before trial. USDA Mem. at 6-7. Those objections are frivolous. Each of the cases cited by the government regarding a chilling effect involve situations where a "chill" was being alleged. And in ***Hohe* v. *Casey***, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989), cited by the government, the reason there was no injury was that the union had voluntarily established an escrow much like the one sought here. This case, of course, does not involve a restriction of that sort, but raises a direct and immediate infringement on petitioners' First Amendment rights. As the Supreme Court held in ***United Foods***, "First Amendment concerns apply here because of the requirement that producers subsidize speech with which they

disagree." -- U.S. at --, 121 S. Ct. at 2338.[28] Furthermore, a direct burden on First Amendment rights exists also in that petitioners are already being forced to support speech through a "loan" in the form of past unconstitutional assessments. Pet. Mem. at 12-13. And even aside from the financial-support component, the continuing creation of objectionable speech that is attributed to petitioners via the checkoff program's claim to speak for all beef producers constitutes an ongoing injury of false attribution, not unlike that at issue in ***Wooley* v. *Maynard***, 430 U.S. 705, 717 (1977) (First Amendment violated where individuals prevented from taping over State motto on license plate, even though presence of motto was costless). That the government has not imposed further impositions on petitioners' rights through prohibitions or compulsions of personal speech does not alter or excuse the constitutional violations that *are* being committed. ***United Foods***, -- U.S. at --, 121 S. Ct. at 2339 (lack of personal compulsion to "utter speech" does not eliminate violation).

As for the disingenous claim of ignorance over whether petitioners will even sell cattle and pay checkoff fees prior to trial, the government is fully aware that petitioners are, and have long been, full-time ranchers, they bring their cattle to market every year (generally in March), and have paid their checkoff fees both before and after the two instances of withholding that triggered the administrative proceeding in this case.[29] It is fully within the government's knowledge and records that the Charters have continued to sell cattle and pay the checkoff, albeit under protest up to the present time. While petitioners believe it unnecessary to demonstrate more, if the government chooses to continue its charade of ignorance, and the Court deems it

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[28] And if a "chill" were necessary, certainly the heavy fines the government seeks to impose in this case, plus the threat of even more draconian future fines against any further exercise of petitioners' right to withhold support for objectionable speech, would provide such a "chill."

[29] *See* R. at 619-20 (Testimony of Steve Charter: "Q. You had paid the checkoff before these two incidents, correct? A. Yes. Q. Okay. Have you paid if after those two incidents? A. That's right. … A. Well, basically, is, you know, we want to pursue this and this is really important to us, but I don't want to -- I am not -- I don't want to just completely go broke over the deal. I mean, I guess I want to live to fight another day, if I can.").

necessary, petitioners will happily provide an affidavit. But even aside from future sales, there is still present and continuing injury from unrefunded past assessments and from continuing producer-attribution of checkoff speech.

IV. REMEDY

The government effectively concedes that an escrow order for assessments from petitioners themselves would be an appropriate remedy if the other elements for a preliminary injunction were met. USDA Br. at 32, 35-36. It makes a faint attempt to argue that such portion of any assessments that go for research and health matters should not be escrowed, but ignores that petitioners object to the viewpoints being promoted by those expressive activities as well, particularly where the research is being conducted for the purposes of generating advertisments and other producer or consumer information. This effort is part and parcel of the objectionable expressive activities no less than is research by a public relations or advertising firm in preparation for a media blitz or an ad campaign. In any event, the government's own figures, USDA Br. at 9 nn. 3-4, suggest that the $32 million spent over the past 14 years on things such as health and nutrition, even if exempted, account for less than 3% of the $87 million per year checkoff collections.

As for previous amounts paid by petitioners, the government wrongly asserts that petitioners may only seek amounts covered by the administrative collection proceeding. That is incorrect. The amended complaint – to which the government did not object – goes beyond a mere challenge to the collection action and includes affirmative claims for declaratory and injunctive relief and reimbursement of past payments. There is no basis for restricting such relief to an offset of the underlying collection. The government's claim of waiver is equally unavailing. Their objection to the checkoff assessment has been unmistakable since at least 1997, when they risked heavy penalties by refusing to pay some of the assessment. And there is no basis for finding waiver of constitutional rights simply because it took time to mount a

challenge. If the Beef Board had established a procedure whereby objection would lead to escrow and remittence – as required in the union context – perhaps silence could be construed as waiver. But where objection to the assessments has led to nothing but harrassment and punitive sanctions, earlier silence does not amount to waiver or entitle the Beef Board to keep unconstitutional gains. The government's final passing suggestion of sovereign immunity is disingenuous given that petitioners are not asking for government money, but rather for reimbursement from checkoff funds. The USDA would pay nothing itself, but rather would, in its oversight role, direct the Beef Board to escrow the funds. The government cites nothing to show that Congress has conferred sovereign immunity on the Beef Board. Indeed, the Ninth Circuit has already rejected such claimed immunity regarding refunds of assessments paid to a checkoff board. *See* ***Cal-Almond, Inc.* v. *Department of Agriculture***, 67 F.3d 874, 878 n. 1 (9th Cir. 1995) ("The USDA does not, and indeed could not, contend that refund of assessments paid to the Board would be damages and therefore barred by sovereign immunity.") (*citing* ***Wileman Bros. & Elliott, Inc.* v. *Espy***, 58 F.3d 1367, 1386 (9th Cir.1995). Escrowing the amounts previously paid by petitioners is thus an appropriate way of ensuring that the funds are available and not subject to obstruction by the Beef Board at the close of the suit.

Turning to petitioners' request for broader relief restricting expenditures and escrowing other funds in the Board's possession or control, the government denies petitioners' standing to seek such relief and invokes a parade of doubtful horribles as to the consequences for the public interest. Regarding standing, petitioners have already noted the injury to them from false attribution of checkoff speech to all cattle producers. That First Amendment injury is independent of petitioners' financial contribution and gives them standing to challenge the entire program. Furthermore, in the First Amendment context, litigants do have standing to assert the rights of parties not before the court – that is the very essence of an overbreadth challenge and the same reasoning applies here. Finally, given the large numbers of individuals and

membership organizations seeking to intervene, the Court has ample reason to fashion a broader remedy and to allow further intervention if necessary to let additional parties take advantage of that remedy.

As to the parade of horribles regarding shutting down the program, the Court can easily craft an injunction that would mitigate such problems and at the same time offer ample relief. For example, the Court could require the escrow of funds (both prospectively and with a multiplier for potential reimbursement) only for those producers who so request on their checkoff forms. Insofar as the government's claims of wide support are true, that should leave ample voluntary funds coming in to sustain the program in its essentials and avoid contractual problems. As for all operations with the remaining funds, the injunction could simply prohibit them from being spent on speech attributed to all cattle producers. A simple statement on all future checkoff communications stating that they are brought to you by some of the nation's cattlemen who have voluntarily associated for that purpose would not only mitigate the attribution problem, it would make the speech truthful. There is no palpable public interest in allowing the Beef Board to continue to run false advertisements and make communications misrepresenting on whose behalf it is speaking,

Finally, the requirement of a bond is both ludicrous and overly burdensome. In even the broadest escrow arrangement described above, the government should have ample numbers of producers willing to have their assessments used by the Board – assuming the government's claims of support are true. In any event, there is no need for a bond where the Court itself will remain in possession of the money at stake until the matter is resolved.

CONCLUSION

For the above stated reasons, this Court should grant petitioners' motion for a preliminary injunction.

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Respectfully submitted,

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