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1 **ARGUMENT**

2 This case turns entirely on the issues surrounding government speech. But for that  
3 potential defense, there is no credible argument that the Beef Act survives *United Foods*. The  
4 USDA’s attempt to apply *Central Hudson* is no more than a disingenuous repudiation of  
5 Supreme Court precedent and the government’s own past representations, and is not an adequate  
6 basis for summary judgment in any event.

7  
8 **I. THE SPEECH FUNDED UNDER COMPULSION OF THE BEEF ACT IS PRIVATE, NOT GOVERNMENT, SPEECH.**

9 One of the central decisions for this Court is whether the government, through the Beef Act,  
10 is acting as a viewpoint-discriminatory speech facilitator or as a speaker in its own right. Those two  
11 roles, while quite similar in many respects, form the two sides of the essential dichotomy assumed  
12 by any supposed government-speech doctrine as a distinct concept from government-compelled  
13 support for private speech.<sup>1</sup> Assuming some sort of coherent line between government speech and  
14 viewpoint discriminatory government-compelled support for speech, the Beef Act plainly falls on  
15 the compelled support side of the line.

16 The government identifies several factors that it claims create government speech rather  
17 than government-compelled support for private speech. None of those factors, either singularly  
18 or in combination, supports its argument.

19 ***Checkoff-funded speech would not exist absent government.*** That the Beef Act is a but-  
20 for cause of checkoff-funded speech, USDA SJ Opp. at 1, is an irrelevant tautology. No  
21 compulsorily supported speech would exist absent a law compelling the support, and this factor  
22 does nothing to distinguish the compelled-support cases. The Beef Act is no different than any

23 \_\_\_\_\_  
24 <sup>1</sup> It is precisely because those two government roles are so similar that petitioners would apply  
25 the same test to both compelled support for speech and government speech. To the extent that  
26 there is a material difference in the constitutional tests, however, there must likewise be a  
material difference in the characteristics of the two types of speech.

1 other compelled-support requirement where elimination of the compulsion would eliminate  
2 speech funded through such compulsion.

3       ***Congressional prescription of message content.*** The claim that Congress prescribes the  
4 message content under the Beef Act, USDA SJ Opp. at 1, is both misleading and once again fails  
5 to distinguish government speech from viewpoint-discriminatory compelled support for speech.  
6 It is misleading in that it suggests that government commands the occurrence of certain speech  
7 rather than merely limits its facilitating role to a certain class of speech. The Beef Act  
8 *commands* no speech whatsoever. It instead gives producers the *option* of speaking collectively  
9 on certain subjects, and compels support for such collective speech. The private nature of the  
10 ensuing speech is seen in the exclusive choice of private cattle producers to invoke the  
11 facilitating authority of the Beef Act, their ongoing authority to terminate the checkoff program,  
12 and the complete absence of statutory authority for the USDA to force the continuation of the  
13 program contrary to the collective decision of the producers. Furthermore, even while the Beef  
14 Board exists, the government cannot force it to speak at all. All speech is a function of an initial  
15 private decision to speak, with the government having only veto power over such speech, not any  
16 affirmative authority to generate speech. The claim, therefore, that the “government made, and  
17 continues to make an *affirmative* decision to speak out,” USDA SJ Opp. at 3 (emphasis added),  
18 is simply false. Rather, there is a decision to allow private producers to speak collectively and to  
19 support that decision through government compulsion. While the Beef Act places negative  
20 constraints on the amount of support the government will provide such collective speakers, it is  
21 ultimately neutral on whether there should be any speech at all, leaving it fully up to the decision  
22 of private parties, just as in any other case of government-compelled support for speech.  
23 “Although Government restrictions on the length and content of the [speech] are relevant to  
24 ascertaining the Government’s intent as to the nature of the forum created, they do not negate the  
25 finding that the [speech] implicates interests protected by the First Amendment.” ***Cornelius v.***

1 *NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). Actual government  
2 speech, by contrast, is not contingent on such private decisions.

3       Insofar as the government constrains the speech that is *permitted* to reap support under  
4 the Beef Act to a specific viewpoint, that just establishes unconstitutional viewpoint  
5 discrimination, not government speech. To hold otherwise would nullify the entirety of First  
6 Amendment forum doctrine, converting every viewpoint-discriminatory forum into government  
7 speech, with results precisely the opposite of that dictated by current case law.<sup>2</sup>

8       *USDA role in overseeing beef promotion.* The government again overstates the facts by  
9 claiming a USDA role in generating and controlling the content and funding of speech under the  
10 Beef Act. USDA SJ Opp. at 1. The USDA, however, does not “generate” any speech under the  
11 Beef Act, and at best has a limited role in suggesting an occasional issue that the Beef Board is  
12 entirely free to pursue or reject in its own discretion. Pet. SJ Mem. at 9-10. Furthermore, even  
13 USDA’s restrictive authority over checkoff speech is substantially overclaimed. The USDA has  
14 nothing even approaching full discretion over the content of messages permitted under the Beef  
15 Act, but rather can only review for compliance with the general parameters of the Act and Order.  
16 7 U.S.C. § 2904(4)(B); 7 C.F.R. § 1260.169. Those parameters, however, merely serve to  
17 broadly define the scope of the speech-facilitating program and, in that respect, are no different  
18 than the parameters imposed and enforced in numerous limited public or non-public forum cases.  
19 *See, e.g., Cornelius*, 473 U.S. at 795, 798-99 (CFC guidelines limiting speakers to nonprofit

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20  
21 <sup>2</sup> The attempt to characterize the Beef Act as merely a “constituent-friendly” version of  
22 government speech, USDA SJ Opp. at 3, utterly misses the point and belies the distinction  
23 between government speech and government-compelled support for private speech. Favoring  
24 particular constituents by compelling others to support their speech may well be “friendlier” to  
25 those constituents than the government speaking for itself, but that plainly does not improve its  
26 First Amendment status. Indeed, it is the very fact that speech is controlled, albeit within the  
boundaries of the Beef Act, by a narrow group with common interests different from those of the  
citizenry as a whole that tends to confirm the non-governmental character of the speech in this  
case. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990); *Abood v. Detroit Bd. of Educ.*,  
431 U.S. 209, 259 n. 13 (1977).

1 groups offering health and welfare services, designed to encourage solicitation by such groups in  
2 order to lessen the government’s own burden in providing such services, and statements “must  
3 conform to federal standards which prohibit persuasive speech and the use of symbols ‘or other  
4 distractions’ aimed at competing for the potential donor’s attention. 5 CFR § 950.521(d)  
5 (1983).”); *NEA v. Finley*, 524 U.S. 569, 573-77, 586-87 (1998) (discussing numerous content  
6 based limitations on funding and noting that the NEA’s affirmative selection criteria are  
7 “inherently content-based”).

8         The government’s claim that this case is like *Downs v. Los Angeles Unified School*  
9 *District*, 228 F.3d 1003 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 994 (2001), involving messages  
10 “authored by third parties” with the government merely having “control over the general  
11 message,” USDA SJ Opp. at 3 n. 2, simply misreads the facts of that case. The messages in  
12 *Downs* were communicated through school property, were posted by school employees rather  
13 than third parties, and school officials had full authority– both affirmative and negative – over  
14 what would appear on the message boards in question. (Any third-party materials appearing on  
15 the school message boards were placed there by the affirmative decisions of a school employee,  
16 no different than if such employee chose to read from a textbook to his or her class.) In this case  
17 the “property” used in the beef checkoff does not belong to the government, the Board members  
18 are not government employees or contractors, and the USDA does not have such absolute  
19 discretion over content.

20         ***The Beef Board is not the government.*** The USDA’s flogging of *Lebron v. National*  
21 *Railroad Passenger Corp.*, 513 U.S. 374 (1995), continues to ignore the distinction between  
22 governmental status for purposes of the constraints of the Constitution and governmental status  
23 for purposes of the privileges of government. Pet. SJ Mem. at 11. *Lebron* itself made this point,  
24 513 U.S. at 399, and neither respondent nor its intervenors offer a coherent response. The basic  
25 difference is reflected in numerous cases holding that certain entities are sufficiently  
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1 governmental for one purpose but not another. For example, in *Keller*, the California Supreme  
2 Court had authoritatively ruled the State Bar to be a “public corporation” and a “government  
3 agency.” 496 U.S. at 7. But while the Supreme Court surely found sufficient state action to  
4 apply the First Amendment to support for the Bar’s speech, and while the Bar may have been  
5 treated as the government for numerous other purposes such as taxes and the like, the Court  
6 definitively rejected the claim that the Bar constituted the government for purposes of the  
7 supposedly lenient treatment of government speech. *Id.* at 10-13; *see also Board of Regents of*  
8 *the University of Wisconsin System v. Southworth*, 529 U.S. 217, 230 (2000) (student  
9 referendum sufficiently governmental to trigger First Amendment, yet not sufficiently so to  
10 trigger government speech privileges).

11 That the Department of Justice acts as counsel for the Beef Board in certain instances is  
12 also not particularly telling given that the Board, unlike any actual government agency, is  
13 required to reimburse the Department of Justice for such a service.

14 The comparison by intervenor-respondents between the Beef Board and a media  
15 corporation is interesting in this regard. Interv.-Resp. SJ Opp. at 5. What is most notable is how  
16 many elements of the comparison intervenors actually get wrong. For example, while the Beef  
17 Board may be an instrumentality created by Congress, the same is true of such private  
18 organizations as the Red Cross, Daughters of the American Revolution, and the U.S. Olympic  
19 Committee. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483  
20 U.S. 522, 543 n. 23 (1987). Indeed, government creation is a characteristic of *every* corporation  
21 owing its existence to state or federal law. *Id.* at 543-44 (“All corporations act under charters  
22 granted by a government, usually by a State. They do not thereby lose their essentially private  
23 character. Even extensive regulation by the government does not transform the actions of the  
24 regulated entity into those of the government.”). The final decision of whether the Beef Board will  
25 exist pursuant to federal facilitating authority was and is in the hands of cattle producers acting  
26

1 through the referendum mechanism. In that respect the Board ultimately owes its existence to cattle  
2 producers no less than private corporations owe their existence to incorporators and shareholders.

3 As for who determines what speech the Board will utter, again, the analogy to corporate  
4 America holds firm. All checkoff speech springs from the decisions of the Board just as all  
5 corporate speech springs from the decisions of management and directors. Congress merely  
6 authorizes and limits the Board's speech, it does not *require* such speech. The same, of course,  
7 is true of corporations, whose speech is authorized and limited, but in general not required, by  
8 corporate charters and state and federal laws on subjects such as securities disclosures, labor-  
9 related speech, and campaign finance.<sup>3</sup> But the impetus to speak within the constraints provided  
10 by law comes from private parties, not the government. Tellingly, the Beef Board agrees with  
11 that analogy, characterizing itself as akin to a board of directors running a private business. *See*  
12 *Facts About Checkoffs*, [www.beefboard.org/organization/facts.htm](http://www.beefboard.org/organization/facts.htm) ("Checkoffs are funded  
13 entirely by their respective industries, NOT by taxpayers or government agencies. Checkoff  
14 programs operate much like corporate businesses, with oversight by the federal government to  
15 ensure program accountability."); *id.* ("These programs are similar to businesses funded by  
16 shareholders (producers, processors, handlers, importers, etc.) with a board of directors that is  
17 accountable to the shareholders.").

18 The final point of comparison offered by intervenors is the existence of a prior restraint  
19 upon the speech of the Beef Board and the lack of such restraint on private corporations. Aside  
20 from being inaccurate in certain securities contexts, where corporations are indeed required to  
21 submit certain proposed documents to the SEC prior to publication, corporations are subject to  
22 all manner of subsequent restraints on their speech. Such restraints exist with regard to the

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24 <sup>3</sup> In some instances, of course, corporate speech is indeed required by law, at least insofar as a  
25 corporation wishes to be able to sell its stock or otherwise conduct certain business. Detailed  
26 federal requirements for filing 10-Ks and initial public offering statements are but two obvious  
examples.

1 broadcast media and “indecent” communications, statements that would constitute unfair labor  
2 practices, and various forms of election-related speech. For purposes of determining  
3 governmental status, there is no material difference between prior and subsequent restraints if the  
4 supposed point is one of government control over content. What matters is that the government  
5 often *tries* to regulate the content of all sorts of private speech, but its efforts do not convert such  
6 speech into government speech. Rather, they subject the government to First Amendment  
7 scrutiny, both in the corporate context and in this case.

8 In the end, therefore, intervenor-respondents’ corporate comparison actually supports the  
9 opposite of its intended conclusion: This case does not involve government speech, but rather  
10 government regulation of private speech by a private association whose existence was facilitated  
11 by the government. The Beef Board is not materially different from corporations, unions, or  
12 other entities organized and constrained pursuant to state or federal authority but ultimately  
13 accountable to private persons.

14 ***Limited forum cases corroborate the private nature of checkoff speech.*** The  
15 government tries to distinguish cases like *Cornelius* and *Finley* by arguing that the government  
16 in those cases neither controlled the message nor claimed the message as its own. USDA SJ  
17 Opp. at 2. The first distinction is simply false, and the second no distinction at all. In both cases  
18 the government most certainly *did* exercise control over the content of the messages it supported,  
19 and had it exercised control over the viewpoint as well, that would have made the programs  
20 unconstitutional, not converted them into government speech. *See Cornelius*, 473 U.S. at 799,  
21 806 (discussing CFC’s “restrictions on the length and content” of the speech; noting that  
22 government control must be “viewpoint neutral”); *Finley*, 524 U.S. at 586-87 (upholding NEA’s  
23 “inherently content-based” criteria but noting that case would be different if process involved  
24 “viewpoint discrimination”). Furthermore, the government does not claim checkoff messages  
25 as its own any more than in *Finley* or *Cornelius*, but rather simply claims to be *facilitating* a  
26

1 certain category of private speech by cattle producers through compelling contributions to that  
2 speech. Indeed, the beef checkoff program expressly repudiates government funding or control  
3 and repeatedly claims control by private cattle producers. *See* Pet. PI Reply at 23-25.

4 That *Finley* and *Cornelius* proceeded to apply forum doctrine rather than compelled-  
5 support analysis was simply a function of the particular claims made and the public funding  
6 involved. The parties in those cases might well have been able to raise a claim of compelled  
7 support for speech, but chose not to, presumably because they faced difficult standing questions  
8 in bringing taxpayer suits, because the programs were viewpoint neutral, and because they  
9 merely wanted greater access to the programs involved, rather than declarations of overall  
10 unconstitutionality. *Cornelius*, 473 U.S. at 801 (“respondents seek access only to the CFC”). In  
11 *Southworth*, by contrast, the one viewpoint discriminatory forum – funds dispersed to expressive  
12 associations by student referendum – was challenged as compelled support for speech, and the  
13 Court held that the “student referendum aspect of the program for funding speech and expressive  
14 activities, however, appears to be inconsistent with the viewpoint neutrality requirement.” 529  
15 U.S. at 230.<sup>4</sup>

16 **Frame remains good law.** The suggestion, USDA SJ Opp. at 4, that subsequent legal  
17 developments have undermined the government-speech analysis in *Frame* is sorely misplaced.  
18 Not a single court since *Frame* has rejected its government-speech framework, and the Ninth  
19 Circuit has expressly approved of the analysis. *See Cal-Almond, Inc. v. USDA*, 14 F.3d 429,

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21 <sup>4</sup> The suggestion by USDA that *Southworth* supports funding of government speech through an  
22 assessment on a particular group, USDA SJ Opp. at 5, simply fails to appreciate the distinction  
23 between general tuition and a particularized assessment for speech. Tuition payments are a fee  
24 for the educational service being provided and become the University’s property in all respects,  
25 to do with as it pleases. The student activities fee, by contrast, was a targeted exaction for  
26 speech. *Southworth*, 529 U.S. at 229 (contrasting University’s right “to use its own funds” from  
University’s exaction of a fee to support speech). Furthermore, it simply ignores cases such as  
*Abood* and *Keller*, where the selective funding and influence over the program by a discrete  
subgroup drove the relevant finding of compelled support for speech.

1 434-35 (1993) (discussing *Frame*'s rejection of the government speech claim, and adopting that  
2 analysis to find that the almond checkoff program implicated producers' First Amendment  
3 rights).<sup>5</sup>

4         The government's attempt to disparage the connection between the checkoff program and  
5 cattle producers compelled to fund it simply ignores the express attribution to such producers in  
6 checkoff speech, and ignores the identical degrees of proximity in cases such as union speech or  
7 bar association speech. Physical connection or individual identification were absent in those  
8 situations as well, yet the Supreme Court still found the compelled support for speech to be  
9 subject to First Amendment scrutiny. What was important is that the speech was attributed to a  
10 discrete group and that the complainant was a member of that group. (Indeed, in the union  
11 context, the objectors often are not even members of the union at all, but merely forced to pay a  
12 dues-equivalent fee.)

13         While the government and intervenors make a variety of other arguments, none merits  
14 further response. The existing briefing covers the relevant ground, and much of what might be  
15 thought new – particularly intervenors' seeming inability to distinguish raw majoritarianism  
16 from the "basic facts" of our *constitutional* democracy, Interv.-Resp. SJ Opp. at 11 – speaks  
17 poorly enough for itself without need of further assistance from petitioners.

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21 <sup>5</sup> The subsequent phases of the *Cal-Almond* litigation and its eventual remand in light of the  
22 Supreme Court's *Glickman* decision did nothing to undermine the Ninth Circuit's earlier  
23 decision regarding government speech. And while the Ninth Circuit's original application of  
24 *Central Hudson* was vitiated by subsequent case law, that change is precisely the position  
25 advanced by petitioners. With the advent of *United Foods*, the original outcome in *Cal-Almond*  
26 has been vindicated, despite the interim change in result based on an over-reading of *Glickman*.  
Similarly with *Frame*, the only parts of that case that have been repudiated over the years are its  
interpretation of *Glickman* and its analysis of commercial speech. The government speech  
portion of the case is the *only* aspect of that case that is still good law, and that portion has  
actually gained in strength over the ensuing years.

1 **II. GOVERNMENT SPEECH IS NOT IMMUNE FROM FIRST AMENDMENT**  
2 **SCRUTINY.**

3 There are several basic legal propositions in this case that remain undisputed, and that  
4 ultimately support application of the “germaneness” inquiry from compelled-support cases to  
5 government speech. The first proposition is the truism that speech is constitutionally different  
6 from conduct, which has never been challenged since it was first identified by petitioners. Pet.  
7 PI Reply at 32. That difference carries across all aspects of government behavior, whether it is  
8 restricting speech or conduct, compelling speech or conduct, or engaging in speech or conduct.  
9 Any constitutional theory that presumes an equivalence in the standards for evaluating speech  
10 and conduct is necessarily flawed in that it denies the essential difference mandated by the First  
11 Amendment.

12 The second proposition is that compelled support for speech is subject to heightened  
13 scrutiny – in particular the germaneness inquiry under the square holdings of cases ranging from  
14 *Abood* through *United Foods*. Once again, no party challenges the correctness or binding  
15 authority of those cases. Notwithstanding any permissive *dicta* regarding government speech,  
16 insofar as such a theory implicitly or explicitly contradicts the well-established *Abood* line of  
17 cases, it is the *holdings* of the Supreme Court that necessarily control over speculation and *dicta*  
18 regarding government speech.

19 The final undisputed proposition is that there is not a single appellate case on government  
20 speech – in the Supreme Court or elsewhere – that either rejects or reaches a result contrary to  
21 the germaneness test advanced by petitioners. And while there is certainly *dicta* from various  
22 cases suggesting a more lenient standard, such cases never considered the germaneness test  
23 proposed here. Whether the germaneness test applies to government speech is thus an open  
24 question of first impression. And the logic of authoritative Supreme Court *holdings* and bedrock  
25 First Amendment principles supports petitioners’ approach. Furthermore, the only Supreme  
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1 Court holding that clearly involved government speech is *Wooley v. Maynard*, 430 U.S. 705  
2 (1977), which fully supports petitioners’ approach here. Indeed, *Wooley* fits easily into the  
3 germaneness framework: the license plate number and the name of the State itself were plainly  
4 germane to the government’s substantive regulations and need regarding automobiles, but the  
5 state motto was simply not germane at all and hence an unwilling motorist could not be forced to  
6 support such speech by leaving it uncovered on the license plate.

7 Application of the germaneness test leaves ample room for the most common forms of  
8 government speech because such speech is, in fact, germane to other government conduct.  
9 Senators and Presidents will remain free to speak regarding the performance of their duties,  
10 legislation that they support or oppose, and all other aspects of their jobs. What they may not do  
11 is appropriate public money to send a message not “germane” to the valid conduct of the  
12 government.<sup>6</sup> The union cases deal with precisely this sort of line, and union speech has  
13 certainly not ground to a halt under such restrictions. USDA’s suggested parade of horrors that  
14 will flow from use of the germaneness test is thus wildly overstated.

15 As for whether there are traditional political controls under the Beef Act to satisfy even a  
16 more lenient test for government speech, the government’s arguments merely prove the  
17 deficiencies of the Act. There is no accountability to the electorate as a whole, but rather only to  
18 beef producers. Nothing in even Supreme Court *dicta* has suggested that transferring primary  
19 control to a narrow special interest constitutes an adequate political check. Given the insular  
20 nature of the beef checkoff, its funding, and the occasional voting possibilities thereunder, the  
21 general public is largely cut out of the loop and given numerous incentives to ignore the program  
22 because it does not knowingly fund the program and, in fact, does not have even the slightest

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24 <sup>6</sup> Similar statutory limits exist on the use of congressional franking privileges and on the use of  
25 government funds for campaign activities by a current office holder. Those limits, though not  
26 expressed in constitutional terms, reflect an intuitive understanding of the problem with  
compelled support for non-germane speech.

1 idea that the program supposedly represents government speech at all. Finally, there is no case  
2 that supports the sufficiency of any such limited third-party checks on government speech.  
3 Certainly *United Foods* treated the matter as an open question, and there is nothing in other First  
4 Amendment case law to suggest that such checks are a sufficient means to satisfy the First  
5 Amendment. Indeed, the very point of the First Amendment is to act as a limit on political  
6 desires, and hence political checks are simply irrelevant to any First Amendment analysis.

### 7 **III. REMEDY**

8 The government suggests as an alternative remedy that this Court *order* the government  
9 to add express government attribution to the Beef Checkoff messages. USDA SJ Opp. at 6 n. 5.  
10 This suggestion is quite remarkable to say the least. Surely if the government has the authority it  
11 claims, it needs no order from this Court to take express credit for any checkoff speech. That it  
12 has not done so of its own volition is especially telling and has two possible explanations. Either  
13 USDA lacks the *legal* authority to force the checkoff program to attribute the speech to the  
14 USDA, or the government lacks the *political* support for such a move. Petitioners believe that  
15 both explanations are true. Nothing in the Beef Act allows USDA to compel the Beef Board to  
16 attribute its speech to the USDA or to any other part of the U.S. government. The government  
17 itself cites no authority for such a move, and an order of this Court *requiring* such attribution  
18 would likely be unlawful. Furthermore, even if the government could require such attribution,  
19 petitioners maintain that it will not do so on its own because such a move would kill support for  
20 the beef checkoff among producers and lead to the program's demise. After years of telling  
21 producers that this was a self-help measure that they controlled, a USDA edict claiming control  
22 over the program and attributing the speech to the government would be a radical shift in the  
23 program and likely enrage the cattle community and render the initial approval referendum  
24 fraudulent. The reason USDA would prefer this Court to order such attribution, therefore, is so  
25 that the Court can take the political heat, and the USDA can continue telling producers that it is

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1 their checkoff and that the attribution is just a technicality. This Court should not abet the USDA  
2 in talking out of both sides of its mouth. Rather, this Court should strike down the program as it  
3 currently exists, and if the government passes a new law attributing the speech to the USDA,  
4 then it can do so and face the appropriate constitutional challenges at that time.<sup>7</sup>

5 Finally, on the question of whether and how much of a refund is available, petitioners are  
6 entitled to a refund of at least 6 years of checkoff payments from the time that they refused to  
7 pay the assessments that led to this case. Furthermore, petitioners maintain that the absence of a  
8 procedure, as in the union context, for allowing producers to opt out of payments for speech to  
9 which they object should allow them to recover for all past payments. While the burden may  
10 well be on producers to object, there is a comparable burden on the government to require a  
11 reasonable mechanism for objecting without risking sanctions. In any event, however, once this  
12 Court resolves the constitutionality of the Beef Act as a whole, the specific amounts of any  
13 refund for individual claimants can be the subject of further proceedings and proof of claims.  
14 Such details need not detain the Court at this stage.

#### 15 **IV. FACTUAL ISSUES**

16 For purposes of petitioners' motion for summary judgment, the only facts this Court need  
17 find undisputed are that petitioners are required to pay the checkoff and that they disagree with  
18 the speech funded by the checkoff. Both of those facts are indisputable and any suggestion to the  
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20 <sup>7</sup> The current Beef Act, unlike its predecessor, lacks a severability clause. 7 U.S.C.A. § 2901  
21 (Historical and Statutory Notes) (“Section 19 of Pub.L. 94-294, which provided that if any  
22 provision of this Act [enacting this chapter and provisions set out as notes under this section] or  
23 the application thereof to any person or circumstances is held invalid, the validity of the  
24 remainder of the Act and of the application of such provision to other persons and circumstances  
25 shall not be affected thereby, was omitted in the general revision of sections 2 through 20 of  
26 Pub.L. 94-294 by Pub.L. 99-198, Title XVI, § 1601(b), Dec. 28, 1985, 99 Stat. 1597.”). Under  
the current Act, therefore, the failure of one part of the Act would invalidate the entirety of the  
Act and thus eliminate the possibility of selective redrafting by the courts. It would be up to  
Congress to pass a new Act if it sought to establish a different program that might or might not  
also fail constitutional scrutiny.

1 contrary is frivolous. The remainder of petitioners' arguments can be resolved in their favor as a  
2 matter of law even assuming the government's version of the facts. As for the respondent-side  
3 motions, however, there are numerous factual issues that would prevent summary judgment  
4 *against* petitioners.

5 The government's continued attempts to apply *Central Hudson* simply rewrite history  
6 for the sake of expedience. The government's concessions and the Supreme Court's holdings on  
7 this point have been well documented in the briefs to date and this Court can judge for itself  
8 whether the government's current rendition is fact or fiction. It is petitioners' view that *United*  
9 *Foods* provides the exclusive analytical framework for this case aside from any disputes over  
10 government speech. Under that framework, there is no government regulation of beef  
11 production to which the speech facilitated by the Beef Act would be germane. Such  
12 determination turns solely on an analysis of other government laws and regulations, and thus  
13 does not present any disputed factual issues.

14 Even assuming the applicability of *Central Hudson*, however, the government is wrong  
15 to suggest that the Beef Act can be sustained on such grounds at the summary judgment stage.  
16 The cases it cites, USDA SJ Opp. at 12, do not indicate whether the government interest was  
17 challenged on factual grounds and did not present the type of inconsistent government interests  
18 presented in this case. *See* Pet. PI Reply at 17-21. In this case, there is a considerable dispute as  
19 to the definition and scope of the interest, its substantiality, and whether the Beef Act  
20 substantially advances any such interest. All of those issues are fact-bound and not resolved by a  
21 mere congressional statement asserting an interest that is contrary to numerous other facts and  
22 laws. While the evidence presented thus far may well be sufficient to *disprove* the government's  
23 interest, and at a minimum to raise a factual question, it is surely not sufficient to establish such  
24 an interest or any of the other elements of the *Central Hudson* test.

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**CONCLUSION**

For the above stated reasons, this Court should grant petitioners' cross-motion for summary judgment and deny the motions for summary judgment by respondent and intervenors.

Dated this 2<sup>nd</sup> day of April, 2002

Respectfully submitted,

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