**No. 02-36140**

# IN THE
# United States Court of Appeals
## FOR THE NINTH CIRCUIT

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**JEANNE CHARTER** and **STEVE CHARTER,**

*Petitioners-Appellants*, and

**DARRELL ABBOTT, DAVE J. ABELL,** *et al***.**

*Intervenors-Appellants*,

v.

**UNITED STATES DEPARTMENT OF AGRICULTURE,**

*Respondent-Appellee*, and

**CHARLES M. REIN,** *et al.*

*Intervenors-Appellees***.**

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On Appeal from the United States District Court for the District of Montana,
Billings Division, Dist. Ct. Docket No. CV 00-198-BLG-RFC

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## CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held corporations that own ten percent or more of the stock of any of the appellants.

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## JURISDICTION

The statutory basis of subject matter jurisdiction in the agency proceedings with the United States Department of Agriculture was pursuant to the Beef Promotion & Research Act of 1985, 7 U.S.C. § 2901 *et seq.* and regulations thereunder, 7 C.F.R. § 1260.101 *et seq.* The district court had jurisdiction over the petition for review of agency action and over the request for declaratory and other relief under 28 U.S.C. §§ 1331, 2201 & 2202. Final judgment was entered by the

District Court on November 1, 2002, and a timely joint notice of appeal was filed on December 16, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

## ISSUES PRESENTED FOR REVIEW

1. Whether the speech resulting from the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, constitutes "government speech."

2. Whether compelled support for "government speech" is immune from First Amendment scrutiny.

3. Whether compelled support of the speech in this case, regardless of how such speech is characterized, violates the First Amendment.

## STATUTES INVOLVED

Relevant provisions of the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, are set out in the Appendix at the end of this brief.

## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

This case involves a First Amendment challenge to the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* (the "Beef Act"). The program authorized by the Beef Act, commonly known as the beef checkoff, was established as a "self-help" program to allow the majority of ranchers to compel *all* ranchers to support collective advertising, promotion, and informational activities

for beef. The speech generated by the beef checkoff program was always intended and understood to be industry-generated, with government oversight of the program to assure program accountability. The challenge to the Beef Act in this case is being brought by various Montana ranchers who object to the speech funded by the Beef Act and who object to being forced to support such speech.

Over the past quarter century, various agricultural promotion programs have been subject to similar First Amendment challenges. While the success of those challenges has varied over the years, courts have routinely analyzed the underlying programs as involving government-compelled support for private speech.

With the Supreme Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), striking down the federal mushroom promotion program, however, First Amendment challenges to agricultural promotion programs received a significant boost, and the government was forced to switch gears. The new approach taken by the government was to claim that such promotion programs were not private-industry speech at all, but rather constitute government speech by Congress and the USDA. No court had ever accepted such a novel claim – until now. The decision below is the first ever to hold that an agricultural promotion program involved speech by the government and that compelled support for that speech was immune from First Amendment scrutiny. Both the reasoning and the result of that decision are in error and, if allowed to stand, will create a vast

loophole in the First Amendment and render meaningless several well-established lines of First Amendment case law.

### B. PROCEEDINGS BELOW

Appellants Steve and Jeanne Charter are independent Montana ranchers subject to assessments under the Beef Act. Because they have strongly held views regarding ranching, nutrition, food safety, and marketing that are considerably different – and often diametrically opposed – to the views expressed by checkoff-funded speech, they decided to challenge the constitutional validity of the Beef Act and the resulting beef checkoff. The Charters initiated that challenge by refusing to pay $250 in checkoff assessments on two cattle sales totaling 250 head of cattle that took place on October 9, 1997, and April 4, 1998.

On August 5, 1998, the USDA filed an administrative complaint against the Charters, seeking to collect the assessments, late fees, and a substantial fine. [Administrative Record ("AR") 6][1] After a hearing, the Administrative Law Judge ordered the Charters to pay $417.79 in assessments and late fees plus a $12,000.00

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[1] Record citation in this case will be from several sources. The record from the administrative proceedings before the USDA is designated "AR" and is sequentially paginated; the Clerk's Record from the district court is designated "CR" and is referenced according to docket-entry number; finally the Excerpts of Record filed along with this brief in this Court is designated "ER" and is sequentially paginated.

fine. [AR237] The ALJ rejected the Charters' First Amendment defense by relying on the Supreme Court's earlier decision in *Glickman* v. *Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997), which upheld marketing and promotion orders for certain California tree fruits. [AR237] The Charters appealed within the USDA and, on September 22, 2000, the USDA's Judicial Officer upheld the decision of the ALJ. [AR355]

On November 14, 2000, the Charters filed a petition for judicial review in the U.S. District Court for the District of Montana, Billings Division. [CR3] The district court proceedings were stayed, however, in order to await the Supreme Court's anticipated decision in *United States* v. *United Foods*. Following that decision striking down the mushroom program, the Charters amended their petition to seek additional declaratory and injunctive relief and a refund of unlawfully collected past assessments and then moved for a preliminary injunction. [ER1] The district court eventually directed the parties to file cross-motions for summary judgment and intervenors were allowed into the case on both sides. Intervenors on the side of the Charters, and co-appellants here, included numerous ranchers subject to the checkoff assessments who, like the Charters, strongly objected to the messages generated by the checkoff and to being compelled to support such objectionable messages. The motions were argued before the district court in Montana on April 16, 2002.

Following that argument and upon formal inquiry from the court regarding factual issues surrounding the government speech claim, the parties agreed to allow the court to take the case under final submission upon the record in this case and the trial transcript from another challenge to the Beef Act in the South Dakota case of *Livestock Marketing Association* v. *USDA*, Civ. 00-1032 (D.S.D. 2002). [CR99]

On November 1, 2002, the District Court issued an opinion rejecting the Charters' First Amendment challenge to the Beef Act, declared that Act constitutional, and ordered the Charters to pay $417.79 in assessments and late fees. The court dismissed the $12,000.00 penalty. [ER476]

On December 16, 2002, the Charters timely appealed to this Court.

### C. DISPOSITION BELOW

Although ultimately upholding the Beef Act, the district court began its analysis by holding that the Act failed the First Amendment test set out in *United Foods* because, like the mushroom program in that case, "the beef checkoff program is not germane to a larger regulatory scheme." [ER445] The district court also rejected the government's alternate theory that the Beef Act was valid under the commercial speech doctrine, holding instead that the commercial speech test from *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), was inapplicable. [ER471] The sole bases for the court's result,

therefore, were its holdings that the speech generated by the beef checkoff was "government speech" and that such speech was immune from First Amendment scrutiny. [ER470-71]

In deciding that the beef checkoff produced "government" speech, the court expressly rejected the Third Circuit's contrary conclusion in *United States* v. *Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), and likewise rejected two district court decisions that relied upon *Frame*. ER452-54 (rejecting holdings in *Livestock Mktg. Assoc.* v. *USDA*, 207 F. Supp.2d 992 (D.S.D. 2002), *appeals pending*, Nos. 02-2796 & 02-2843 (8th Cir.), and *Goetz* v. *Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd on other grounds*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). The district court instead turned to a variety of cases outside the agricultural promotions context and held that speech under the beef checkoff was government speech because the government exercised various forms of control over the content of that speech. [ER466] Such government involvement, the court reasoned, meant that the checkoff was actually the state using private speakers to convey a government message. Because the messages under the beef checkoff were not religious in nature, and because the court believed there to be no other First Amendment constraints on government speech, the court upheld the Beef Act.

## FACTS

The Charters own and operate a Montana ranch raising mainly grass-fed animals. [AR618; CR7] They produce a high-quality unadulterated wholesome beef without the use of artificial hormones, subtherapeutic antibiotics, chemical additives, extra water, or irradiation. Affidavit of Jeanne Charter. [ER111] Intervenors-Appellants are numerous other cattle producers subject to the beef checkoff assessments. As ranchers, the Charters and the intervenors-appellants are free to make their own decisions regarding how many cattle they produce, how they are raised, and when and for what price they are sold. *Id*.

The USDA does not set, determine or require that the Charters sell their cattle at any particular price or limit the quantity of cattle they produce. *Id*. The Charters are not compelled by the government to associate with or follow any collective program that controls production, sets a uniform price for that production, or otherwise interferes with their independent marketing decisions. *Id*.

The primary statutes affecting the U.S. cattle industry are the Beef Act at issue herein, the Packers and Stockyard's Act, the Livestock Mandatory Reporting Law of 1999, the Agricultural Marketing Act of 1946, the Federal Meat Inspection Act, and the Capper-Volstad Act. Beef production is not subject to a marketing order. Affidavit of Neil Harl. [CR79] Marketing orders involve a framework created by federal law used primarily in the marketing of fruits and vegetables, but

not livestock. *Id*. The Packers and Stockyards Act of 1921 was enacted to curb well-documented abuses by meat packers. *Id*. The Act limits meat packers in what they can do and enhances the free and open marketing of livestock subject to the Act. The Act does not in any way alter the competitive nature of beef production. *Id*.

The Livestock Mandatory Reporting Law of 1999 affects the reporting of livestock prices. This law was designed and enacted to enhance the free and open marketing of livestock and does not in any way diminish the competitive nature of beef production. *Id*.

The Agricultural Marketing Act of 1946 was enacted as an amendment to the Bankhead-Jones Act of 1935 and sought to rectify the shortcomings of that legislation and accomplish other purposes involving agricultural products. The 1946 Act had two major purposes: (1) broadening authorization to engage in and support agricultural research; and (2) authorization to set standards for agricultural products and authorization to inspect and certify conformity of those products on a voluntary basis. This Act does not limit competition. Affidavit of Harl; CR at 79.

The Beef Promotion and Research Act and regulations thereunder authorize the Secretary of Agriculture to promulgate a beef promotion and research order, establish a cattlemen's beef promotion and research board, and an operating committee. 7 U.S.C. §§ 2901-11; 7 C.F.R. § 1260 *et seq*. Together the Act and

regulations are known as the Beef Checkoff Program. This program imposes on cattle producers and importers an assessment of $1.00 per head on the sale of cattle. 7 C.F.R. § 1260.172. The Act and Order establish a cattlemen's beef promotion and research board and an operating committee to carry on the programs authorized under the Act. In fiscal year 2001, the Beef Checkoff revenues totaled approximately $86,990,403.00. [CR94 (p. 2)]

The Beef Promotion and Research Act was first passed in 1976 and later amended in 1985. 7 U.S.C. §§ 2901-2911. The legislation was structured as a self help measure for the beef industry so it could employ its own resources and design its own strategies to increase beef sales while simultaneously avoiding the intrusiveness of government regulation and the cost of government handouts. Report of Committee on Agriculture, Beef and Research Information Act, H.R. Rep. No. 452, 94th Congress, 1st Session 3 (1975). The Beef Promotion and Research Act receives no funding from the federal government; instead, its revenue is collected through the assessments prescribed by the Act and Order. 7 U.S.C. § 2904(8)(C).

Under the Act, the Secretary was required to promulgate a set of regulations called the Order. 7 U.S.C. § 2904(12). Once the Order was promulgated, the program was still not functional. Within 22 months after issuance of the Order by the Secretary, a referendum was required to be held by persons who were then

producers or importers. 7 U.S.C. § 2906. The Beef Promotion Research Act and Order only remained in effect if the Order was approved by a majority of those voting in the referendum. 7 U.S.C. § 2906(a). Had the Order not been approved by a majority of those voting in the referendum, the Secretary was required to terminate the collection of assessments and end the Order. 7 U.S.C. § 2906(a).

The producers and importers under the Act and Order retain the ability to conduct a referendum to terminate the Order provided a representative group comprising 10% or more favors termination. 7 U.S.C. § 2906(b).

The Cattlemen's Beef Promotion and Research Board consists of 111 individuals who pay the checkoff and are nominated by eligible organizations within the various states. [AR522; CR7] Members of the Beef Board are appointed by the Secretary in a slate fashion. 7 U.S.C. § 2904(1); Trial Transcript *Livestock Marketing Association* v. *USDA* (hereinafter "*LMA* Transcript") *LMA* Transcript at 290 [ER318]. The Act defines which state organizations the Secretary may certify for the nomination process. 7 U.S.C. § 2905(b). The Secretary on occasion has rejected applications of organizations that do not meet statutory criteria and decertified at least one organization. Respondent's Statement of Uncontroverted Facts ¶10, [CR68], Declaration of Barry Carpenter [ER25-26]; Intervenor Rein's Statement of Uncontroverted Facts at 4 [CR65]. The Secretary has, on at least one occasion, removed a member of the Board by seeking that

person's resignation. Carpenter Declaration [ER26]. The Beef Board elects 10 of its members to serve on the operating committee. 7 U.S.C. § 2904(4)(A). The operating committee is comprised of those 10 members and 10 beef producers elected by the qualified state beef councils. 7 U.S.C. § 2904(4)(A). The Secretary certifies that the producers elected by the federations are directors of a qualified state beef council. 7 U.S.C. § 2904(4)(A).

The operating committee is made up of 20 producers who are charged with the responsibility of deciding what checkoff projects will or will not be funded. [AR559; CR7] The operating committee and qualified state beef councils make checkoff funding decisions exercising their best judgment on the use of the checkoff dollars. [AR523; CR7] The committee develops projects for the promotion and advertising of research and consumer and industry information regarding beef. 7 U.S.C. § 2904(4)(B). Those projects are submitted to the Secretary of Agriculture for approval. 7 C.F.R. § 1260.169.

State beef councils are promotion entities authorized by either state statute or a private sector beef promotion entity organized and operating within a state that receives voluntary assessments or contributions, conducts beef promotion research and consumer and industry information programs. 7 C.F..R. § 1260.115. The regulation does not specify that any state beef council be organized in any way by USDA but by the Cattlemen's Beef Promotion and Research Board. 7 C.F.R. §

1260.181. In states where beef councils exist, the council can retain 50 cents of each dollar collected. [AR523; CR7].

Projects for the Beef Board and operating committee are generated from cattle producer leaders. *LMA* Transcript at 222 [ER251]. Producers wind up serving on state beef councils and on the Beef Board on advisory committees, the operating committees, and the executive committee. There is no expenditure of checkoff dollars that does not have its genesis in the idea of some producer. *Id*. at 223 [ER252]. The beef checkoff program is a producer-led, producer-run program. *Id.* at 222 [ER251].

No tax funds are used at all in the Cattlemen's Beef Board or operating committee. *Id.* at 244 [ER273]. The Beef Board is required to reimburse USDA for any oversight it may provide. This is even billed to the Cattlemen's Beef Board. *Id*. No decision of the Beef Board is implemented without first being approved by cattle producers. *Id*. at 246 [ER275]. Cattle producers make the decision, but subject to USDA approval. *Id*.

Neither USDA nor any other government agency formulates projects for the Cattlemen's Beef Board. *Id*. at 247 [ER276]. The checkoff is producer controlled. *Id*. at 249 [ER278]. It is the cattlemen and importers who pay for the beef checkoff program that run the program. *Id*. at 250 [ER279]. The role of the USDA in the program is to keep the Board accountable and to act as a consultant.

*Id*. at 251 [ER280]. The checkoff program does not receive any government assistance. *Id*. at 254 [ER283].

As with most of the commodity checkoff programs, one organization becomes the recipient of the bulk of the checkoff funds. In the beef checkoff program, it is the National Cattlemen's Beef Association (NCBA) which is an industry organization created in 1995. [AR521, AR594; CR7] The NCBA claims to be completely separate from the Cattlemen's Beef Board with a separate organization, including board, executive committee, and staff. *LMA* Transcript at 254 [ER283]. The NCBA receives about 90% of the contracted funds raised by the assessments paid by producers. [AR534; CR7]

Under the terms of the Act and Order, USDA's oversight consists of merely approval or disapproval. 7 U.S.C. § 2904(4)(C), (6)(B), (6)(C). Nowhere do the Act and Order specify that funds cannot be spent without approval of the USDA nor is there any specification that final approval must be obtained from the USDA over every checkoff dollar. The Charters object to being compelled to fund collective programs for promotion and advertising, research, consumer and industry information. The Charters consider such as violative of their right of free speech and free association. [AR624, 629, 638-639, 673, 677; CR7]

Frequently, the NCBA, as primary checkoff contractor, uses its position to claim to speak for all one million cattle producers in the United States and

sometimes does so before Congress. [AR683; CR7] The NCBA has even submitted correspondence to Congress regarding a debate on mandatory price reporting legislation indicating the beef industry, all one million cattle producers, did not support price reporting, which is followed by a discussion of confusion about whether the NCBA represents the entire industry or just the views of a particular industry group. [AR686-87; CR7] The Charters are repeatedly caused to be associated with NCBA positions as it represents itself to the world as the marketing organization and trade association of America's one million cattle farmers and ranchers. [AR803; CR7] The checkoff program and NCBA support irradiation in beef processing and likewise are associated with heavily processed beef products which the Charters believe devalues the product they raise, which is high quality, unadulterated and hormone-free. Affidavit of Jeanne Charter [ER111]. Checkoff sponsored research dollars, consumer information and materials, industry information and materials, and producer communication materials are all objectionable to Charters as violative of their First Amendment rights. Affidavit of Jeanne Charter [ER111].

## SUMMARY OF ARGUMENT

1. The district court erred in categorizing the speech generated by the beef checkoff as government speech for purposes of immunizing it under the First Amendment. The Beef Act instead involves government facilitation of collective

industry speech through compelled support for and oversight of such speech. The analysis of the Third Circuit in *Frame*, rejecting a government speech defense of the Beef Act, was and remains correct, was adopted by this Court in *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429 (9th Cir. 1993) and thus is controlling in this case, and was disregarded by the court below based upon a complete misunderstanding of subsequent cases that have only strengthened, not weakened, the *Frame* analysis.

2. Even assuming that checkoff generated speech could be characterized as "government speech," it would still fail First Amendment scrutiny. Appellants contend that the proper analysis of compelled support for government speech should be precisely the same as that for compelled support for other types of speech, and is set forth in the Supreme Court's *United Foods* decision. Furthermore, even under a more lenient analysis of the adequacy of political checks on compelled support for government speech, the Beef Act would still fail because it short-circuits the ordinary mechanisms that facilitate scrutiny by the public as a whole, rather than merely by one narrow segment of the public.

3. The court below held that, but for the government speech defense, the Beef Act failed the First Amendment test set out in *United Foods* and should not be analyzed under the inapplicable commercial speech doctrine. Both of those decisions were manifestly correct and are not challenged here. To the extent that

the government might challenge those holdings in order to provide alternative bases for the judgment, appellants will respond accordingly.

## ARGUMENT

### I. COMPELLED SUPPORT FOR BEEF-RELATED SPEECH IS NOT PROTECTED BY THE SO-CALLED GOVERNMENT SPEECH DOCTRINE.

While the decision below suffers from a number of concrete flaws that ultimately undermine its conclusion, the greatest difficulty it faces is conceptual: It fails to offer a cogent theory of what constitutes government speech, how such speech is different from government-compelled and viewpoint-discriminatory support for, or restrictions on, speech. Such flaws and conceptual difficulties in the decision below are primarily legal in nature and thus subject to *de novo* review.

It is appellants' position that insofar as there is any First Amendment difference at all between government speech and government-compelled support for speech, that difference must turn on the attribution of the speech and the funding for the speech, *not* whether government exercises control over the content or viewpoint of the speech. Making control over speech the touchstone for a government-speech doctrine yields the paradoxical result that as government increases its content and viewpoint control over speech it commits increasingly greater offenses to the First Amendment until, according to the government and the district court, the speech suddenly becomes the government's own and the government's increasingly unconstitutional conduct becomes virtually *immune*

from First Amendment scrutiny. And even assuming a control-based approach to defining government speech, the court below made the further error of conflating government *oversight* of speech with government *generation* of speech. Only the former is presented in this case.

The better approach is that any so-called "government speech" doctrine must be limited to speech that is (1) attributed to the government rather than to some third party so that the audience knows that it is the government speaking, and (2) paid for by general government revenues subject to the normal appropriations processes. Furthermore, regardless of how it is defined, even government speech does not receive a free pass under the First Amendment. Rather, programs compelling support for government speech should be scrutinized under the same standards as government-compelled support for all other speech or, at minimum, under standards that ensure enhanced political checks on such speech.

### A. Speech Under the Beef Checkoff Is Not Government Speech.

The district court held that the speech generated by the beef checkoff is government speech because Congress chose the theme of promoting beef consumption and the USDA exercises various forms of control over checkoff speech, including veto authority over advertisements. [ER463] The court rejected the directly contrary holding by the Third Circuit in *Frame*, which is the only

appellate court so far to rule on whether the Beef Act generates government speech. The district court's decision was wrong for a variety of reasons.

### 1. Frame *has been adopted by, and is controlling in, this Circuit.*

The starkest flaw in the district court's refusal to follow *Frame* is that *this* Court has expressly adopted the *Frame* analysis and hence the district court lacked any discretion to ignore such precedent. In *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429 (1993), this Court discussed *Frame*'s rejection of the government speech claim and adopted that analysis to find that the almond checkoff program implicated producers' First Amendment rights. This Court began with a detailed discussion of the *Frame* decision and, in particular, noted the Third Circuit's holding that "the promotional expression sponsored by the Cattlemen's Board could not properly be characterized as 'government speech.'" *Cal-Almond*, 14 F.3d at 435. This Court then proceeded to apply the *Frame* analysis to the case before it:

> The Board's almond promotion program closely resembles the beef promotion program at issue in *Frame.* In both cases, a "publicly identified group" (cattlemen or almond handlers) must contribute money to fund the "dissemination of a particular message associated with that group." For the same reason that the beef program implicated Frame's First Amendment right to be free from compelled speech and association, then, the Board's promotional efforts implicate appellants'.

*Id*. Insofar as the beef and almond programs were sufficiently similar for *Frame*'s analysis to control this Court's treatment of the almond program, this Court's holding as to almonds would necessarily be sufficiently on point to control the analysis of the beef checkoff now that such program is directly before this Court. No subsequent case from this Court or the Supreme Court has repudiated that holding, and consequently it remains binding on both the district court and on this panel.[2] The district court failed even to cite, much less follow, this Court's *Cal-Almond* decision. Given that precedent, the result in this case ought to be pre-ordained. Insofar as the USDA wishes to challenge the decision in *Cal-Almond*, such challenge is best directed to the *en banc* court or to the Supreme Court.

### 2. *Overview of Government Speech*.

Before addressing the details of the *Frame* analysis, however, a general overview will clarify the fundamental misconceptions underlying the claim of government speech in this case. The district court's central errors were in placing undue emphasis on governmental control over speech rather than on attribution and

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[2] The subsequent phases of the *Cal-Almond* litigation and its eventual remand in light of the Supreme Court's *Glickman* decision did nothing to undermine the Ninth Circuit's earlier holding regarding government speech. And while the Ninth Circuit's original application of the commercial speech doctrine was vitiated by subsequent case law, that change is consistent with the position taken by appellants. With the advent of *United Foods*, the original outcome in *Cal-Almond* has been vindicated.

funding, and in confusing government *oversight* of speech with government generation of speech. While the government oversees and constrains numerous areas of private expression, in none of those instances does such oversight convert private speech into government speech. For example, the government oversees and must give final approval for arts grants through the NEA and charitable solicitation through the Combined Federal Campaign. *See, e.g.*, *NEA* v. *Finley*, 524 U.S. 569, 573-74 (1998) (describing oversight authority and broad discretion of NEA in providing government arts grants); *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 793, 800 (1985) (charitable solicitations directed at federal workers and overseen by Civil Service Commission, with control over who may participate and government "restrictions on the length and content" of the solicitation). The government likewise oversees and regulates, through the FCC, the SEC, and the NLRB and Department of Labor, communications in television and radio broadcasting, speech related to publicly traded securities, and speech by labor unions. In each instance, the government oversees money spent on speech, exercises a negative veto on proposed speech outside the parameters of the relevant statutes or regulations, and has its own goals in regulating such speech. But its oversight activities in each of those areas, and under the Beef Act as well, is just that – *oversight* of private speech, not the *generation* of government speech. *Cf. San Francisco Arts & Athletics, Inc.* v.

*United States Olympic Comm.*, 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government."); *cf. American Bankers Mtg. Corp.* v. *Federal Home Loan Mtg. Corp.*, 75 F.3d 1401, 1409-10 (9th Cir.) (same), *cert. denied*, 519 U.S. 812 (1996).

When the government itself speaks, it is entirely obvious that it is the speaker: recruiting posters saying "Join the Army"; advertisements to "Buy U.S. Savings Bonds"; publications announcing the passage of "campaign finance reform"; USDA nutrition guidelines advising people to "Eat less red meat and more legumes for protein." The content of such speech is plainly attributed to the government, the speech is paid for by the government, and the government makes the affirmative decision to express itself. Conversely, where the government seeks to control private speech – even where it seeks to impose its own viewpoints on speech by others – it is just as plainly *not* government speech, but rather government regulation or censorship of speech by others, regardless of how overbearing or intrusive such government efforts may be. Indeed, the more overbearing the government's efforts to shape the speech of others, the more they offend the First Amendment. A licensing and censorship scheme with extreme viewpoint-based restrictions and diligent bureaucratic support would simply be a First Amendment abomination, not an unregulated program of government speech.

Despite the differences between government speech and government regulation of private speech, the district court gets it precisely backwards when it suggests that USDA's oversight role generates government speech free from First Amendment scrutiny. Even assuming, *arguendo*, the full panoply of oversight claimed by the USDA, those claims demonstrate nothing more than that USDA regulates the collective speech of cattle producers through the exercise of *restrictive* control over private speakers and their speech, and through the attempted manipulation of messages collectively funded by and attributed to cattle producers. No speech is initiated or generated by the government, but rather exists solely due to the impetus and decision of private parties. While the USDA may occasionally restrict some of that private speech, and may sometimes suggest ideas to the speakers, it cannot itself compel any particular message without the collective approval of the cattle organization representatives, and indeed lacked the power even to initiate the checkoff program without the consent of private producers. Regardless of how extensive the oversight, and regardless of how much USDA tries to manipulate the messages, the speech comes from the collective action of cattle producers, is paid for exclusively by such producers, is expressly attributed to such producers, and therefore is the collective private speech of such producers, not the speech of the government.

### 3. Frame *correctly focuses on attribution and funding*.

Even aside from the formal authority of the *Frame* analysis via *Cal-Almond*, that analysis also is correct on the merits. 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.[3] 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).[4] The same is true today. Indeed, current advertisements reflect a much

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[3] 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. 529 U.S. 217, 230 (2000). The Court imposed a viewpoint neutrality requirement on the use of such funds to support speech. *Frame*'s nexus determination would thus be even stronger today than it was when the case was decided.

[4] *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

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. in Opp. to Prelim. Inj. ("USDA PI 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"). [CR29][5]

***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

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keeping with their true free enterprise nature, cattlemen are asking only for enabling legislation') (statement of Rep. Santini); 121 Cong. Rec. 31,448 (1975) (statement of Sen. Baucus) (Montana ranchers historically unwilling to accept government handouts or interference).").

[5] *See also* USDA PI Mem. Exh. A-1, at 7 (copyright attribution to NCBA and Beef Board) [CR29]; *id*. at 9 ("Funded by Beef Producers"; "Produced for the Cattlemen's Beef Board and State Beef Councils"); AR748 (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"); AR749 ("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"); AR753, 754,

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.

***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.

> 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

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756, 757, 761 (NCBA "is the marketing organization and trade association for America's one million cattle farmers and ranchers").

> 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.").

Much the same point was made by the Supreme Court in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), which contains the only Supreme Court *holding* regarding a claim of government speech. There the Court relied upon the fact that the principal funding for the bar came "not from appropriations made to it by the legislature, but from dues levied on its members." 496 U.S. at 11. Surely the Supreme Court's use of that factor is ample corroboration of *Frame*'s earlier use of the same factor in its analysis of the Beef Act.

***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. That the government may see broader value in such speech, and may even endorse and support the beef industry's promotion of its product, still does not change the fact 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.").[6]

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[6] Were viewpoint-based support or endorsement the measure of government speech, then *all* viewpoint-discriminatory compelled support for speech would be converted to government speech. That would overturn an entire line of Supreme Court case law in support of a "doctrine" that has never been accepted in a Supreme Court holding.

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. 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.

As for the district court's claim that Congress prescribes the message content under the Beef Act, [ER468], it both overstates the matter and once again fails to distinguish government speech from viewpoint-discriminatory compelled support for speech. It overstates the matter in that it suggests that Congress commands the occurrence of certain speech rather than merely *limits* the Act's facilitating role to a certain class of speech. The Beef Act *commands* no speech whatsoever. It

instead gives producers the *option* of speaking collectively on certain subjects, and compels support for such collective speech. There is no suggestion, however, that the USDA has statutory authority to *require* the Board to express a particular viewpoint or run a particular advertisement or even to speak at all. Checkoff speech is wholly a function of an initial private decision to speak, with the government having only veto power over such speech, not any affirmative authority to generate speech. Actual government speech, by contrast, is not contingent on such private decisions.

Rather than evidencing an affirmative decision to speak out on beef issues, the Beef Act represents a decision to *allow* private producers to speak collectively and to support any majority decision to do so through government compulsion. While the Beef Act places negative constraints on the amount of support the government will provide such collective speakers, it is ultimately neutral on whether there should be any speech at all, leaving it fully up to the decision of private parties, just as in any other case of government-compelled support for speech. In a sense, such constraints are analogous to the creation of a limited purpose non-public forum. Such a forum may be subject to government-imposed content restraints defining the purposes of the forum, but that neither converts the resulting speech into government speech nor immunizes the forum from First Amendment scrutiny. "Although Government restrictions on the length and

content of the [speech] are relevant to ascertaining the Government's intent as to the nature of the forum created, they do not negate the finding that the [speech] implicates interests protected by the First Amendment." *Cornelius*, 473 U.S. at 799.

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

The district court's recitation of the various components of the USDA's authority, [ER463-65], suffers from the further flaw that it neglects to mention that such authority is not purely discretionary, but rather is limited to ensuring

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[7] The USDA's attempt in the court below to characterize the Beef Act as merely a "constituent-friendly" version of government speech, USDA SJ Opp. at 3 [CR84], highlights the problem with its theory in that it belies the distinction between government speech and government-compelled support for private speech. Favoring particular constituents by compelling others to support their speech may well be "friendlier" to those constituents than the government speaking for itself, but that plainly does not improve its 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*, 496 U.S. at 12-13; *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 259 n. 13 (1977).

compliance and accountability relative to the constraints of the Beef Act. While the USDA certainly may ensure that Board members are qualified and that funds are spent only for purposes authorized by the Act, there is nothing in the Beef Act that authorizes the USDA to withhold approvals strictly based on disagreement with the content or viewpoint of otherwise authorized speech. The USDA has nothing even approaching full discretion over the content of messages permitted under the Beef Act, but rather can only review for compliance with the general parameters of the Act and Order. 7 U.S.C. § 2904(4)(B); 7 C.F.R. § 1260.169. Those parameters, however, merely serve to broadly define the scope of the speech-facilitating program and, in that respect, are no different than the parameters imposed and enforced in numerous limited public or non-public forum cases. *See*, *e.g.*, *Cornelius*, 473 U.S. at 795, 798-99 (CFC guidelines limiting speakers to nonprofit groups offering health and welfare services, designed to encourage solicitation by such groups in order to lessen the government's own burden in providing such services, and statements "must conform to federal standards which prohibit persuasive speech and the use of symbols 'or other distractions' aimed at competing for the potential donor's attention. 5 CFR § 950.521(d) (1983)."); *Finley*, 524 U.S. at 573-77, 586-87 (discussing numerous

content based limitations on funding and noting that the NEA's affirmative selection criteria are "inherently content-based").[8]

The district court's misunderstanding of the nature of USDA's authority relative to checkoff speech is highlighted by the diametrically opposite conclusions drawn by the district court in the *LMA* case. Because the district court here relied on the trial record generated in *LMA*, the difference is particularly salient. The *LMA* court reviewed the same statutory provisions and listened first-hand to testimony from USDA and the Beef Board and found that: the Secretary's approval and appointment of Beef Board members "is merely *pro forma*"; "the Act itself only provides that the Secretary 'certify' that those elected are in fact qualified[,] 7 U.S.C. § 2904(4)(A)"; the USDA official who handles the beef checkoff "admitted that USDA oversight is more akin to ministerial review of the Board's compliance with the Order"; and the USDA's approval of checkoff contracts was "much like the Indian Gaming Commission [approval of] Indian casino contracts," which did not convert such contracts into government action. 207 F. Supp.2d at 1005-06. The *LMA* court, in a better position to evaluate the evidence than the court below,

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[8] That the USDA may on occasion in fact use its oversight authority as leverage to impose its views on the Beef Board, [ER437-38, 464-65], would not change its absence of legal authority to do so. Rather, it merely demonstrates that government oversight of speech activities is subject to abuse and that, as a practical matter, a regulated entity will often choose to accommodate such abuse rather than risk the ire of its primary regulator.

thus concluded that, as in *Frame*, "despite the Secretary's 'extensive' supervision of the checkoff program, 'it does not transform this self-help program for the beef industry into "government speech."' *Frame*, 885 F.2d at 1133. … The generic advertising program funded by the beef checkoff is not government speech and is therefore not excepted from First Amendment challenge." 207 F. Supp.2d at 1006.

Both *Frame* and *LMA* were correct. The speech that appellants are forced to subsidize in this case is not government speech at all, but rather government-facilitated private speech subject to the test set forth in *United Foods*.

#### 4. *Subsequent cases do not undermine* Frame.

In rejecting the *Frame* analysis, the district court relied upon subsequent cases which it imagined altered the test for what constituted government speech. None of those cases, when properly understood, conflicts with *Frame* or supports the program in this case.

***Santa Fe Independent School Disrict* v. *Doe***. Most startling among the cases relied upon by the district court was *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000). The district court opinion claims that in *Santa Fe* "the Supreme Court considered facts analogous to those in this case and decided that

the speech involved was government speech." [ER456] Nothing could be further from the truth.[9]

The *Santa Fe* case involved a First Amendment Establishment Clause challenge, not a Speech Clause challenge. The question before the Court was whether the school district's policy of allowing student-led prayer at football games constituted government "endorsement" of religion and hence violated the Establishment Clause. In order to avoid the charge that it was endorsing religion, the school district argued that the prayers were permissible private speech by a student made in a viewpoint-neutral forum, and counter-posed the example of impermissible government speech on religion as the opposite end of the spectrum.

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[9] The district court may have been misled by its faulty block quotation from the *Santa Fe* opinion. [ER457-58] In the first sentence of that quotation it alters the quote to refer to "[the government speech] principle." In fact, the "principle" referred to by the Supreme Court was from the immediately preceding paragraph which discussed the interaction between the Free Exercise Clause and the Establishment Clause and noted that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." 530 U.S. at 302 (citations and quotation marks omitted; brackets in *Santa Fe*). The last sentence of the district court block quote reads: "This level of state involvement rendered the prayer government speech." That sentence, unfortunately, does not appear in the Supreme Court's opinion.

The Supreme Court rejected the claim that the student prayers were "private" speech in a neutral forum and held that the school policy selectively allowing such prayers violated the Establishment Clause.

That holding, however fell far short of characterizing such prayers as "government speech" for purposes of the First Amendment's *Speech* Clause, and instead held that school district's involvement in the process constituted *endorsement* of student-led religious speech. The district court in this case simply failed to appreciate that such impermissible government endorsement occurs across a full range of government behavior, not merely through "government speech." Much of the behavior that would constitute impermissible "endorsement" under the Establishment Clause would, in a speech context, involve impermissible viewpoint *discrimination* by the government, not permissible "government speech." While the line between government speech and government viewpoint discrimination may sometimes be unclear, in *Santa Fe* there is ample evidence that the Court did not consider the speech at issue to be government speech that would have been permissible if only it were not religious in nature.

For example, in rejecting the school district's claim that the student prayer was merely the private product of a viewpoint-neutral forum, the Court cited its Speech Clause decision in *Southworth*, noting that "student elections that determine, by majority vote, which expressive activities shall receive or not receive

school benefits are constitutionally problematic" because they substitute "'majority determinations for viewpoint neutrality.'" 530 U.S. at 304 (quoting *Southworth*, 529 U.S. at 235). The Court continued the analogy not to permissible government speech, but rather to impermissible viewpoint discrimination: "Like the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority." 530 U.S. at 304.[10]

Most telling for purposes of this case, however, was the Court's express transposition of the facts of *Santa Fe* into the speech context and its suggestion that far from constituting permissible "government speech," it would be a violation of the First Amendment:

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[10] In *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. at 222. 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, 536-39 (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 542. 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.

> If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual.

530 U.S. at 304 n. 15.

In light of the Court's discussion of *Southworth* and express reliance on a speech analogy that would have invalidated even non-religious viewpoint discrimination in the circumstances of that case, it borders on the frivolous to suggest that *Santa Fe* supports the notion that the Beef Act is constitutionally *immune* government speech. Rather, it supports precisely the opposite conclusion and strengthens, rather than undermines, the conclusion in *Frame*.

***Downs* v. *Los Angeles Unified School District***. The district court's claim that this case is like *Downs* v. *Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001), in which this Court treated certain in-school messages as government speech, fails to recognize the dispositive facts of that case. The messages at issue in *Downs* were communicated through school property, were posted by school employees rather than third parties, and school officials had full authority– both affirmative and negative – over what would appear on the message boards in question. (Any third-party materials appearing on the school message boards were placed there by the affirmative

decisions of a school employee, no different than if such employee chose to read from a textbook to his or her class.) In this case the "property" used in the beef checkoff does not belong to the government, the Board members are not government employees or contractors, and the USDA does not have such absolute discretion over content.

Furthermore, *Downs* arose in the quite different context of a public school, where there must necessarily be choices among competing speech in order to accomplish the primary pedagogical functions of the institution. Such circumstances are very different from the context in which the beef checkoff operates, and the analysis from one may not be entirely appropriate for the other. In any event, *Downs* recognized the attribution element of government speech analysis when it determined that speech posted on a government bulletin board by a government employee acting in his official capacity as a teacher was attributable to the government rather than the employee, and that the government was entitled *not* to speak in a manner against its choosing. *See* 228 F.3d at 1011-12, 1014-15. *Downs* thus is fully consistent with *Frame*'s nexus approach to determining who the speaker is in any given instance.

In the end, the *Frame* analysis remains an appropriate method for analyzing whether a checkoff program involves compelled support for industry speech or government speech. The result of that analysis is the same today as it was over

two decades ago; the Beef Act forces support for industry speech, not government speech, and is thus subject to ordinary First Amendment scrutiny. Because the district court disregarded that controlling analysis, its decision to treat this as a government-speech case was in error and should be reversed.

### B. Compelled Support for Government Speech Should Be Subject to the Same First Amendment Scrutiny as Compelled Support for Third-Party Speech.

Even assuming that the beef checkoff generated government speech, it 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 should be the same regardless of whether the speaker being subsidized is a third party favored by the government or the government itself. Government speech would be permissible if it were germane to a non-speech government program and met the other requirements of the test set out by cases from *Abood* to *United Foods*. As a practical matter, that means that much government speech easily would survive First Amendment scrutiny, but that government speech conducted for its own sake or not sufficiently related to a government program would be unconstitutional. In this case, the *United Foods* analysis would be the same regardless of how the speech were characterized, and the Beef Act would be unconstitutional.

Appellants, of course, recognize that there is considerable language from the Supreme Court opinions suggesting more lenient treatment for government speech than for compelled support for non-government speech. Appellants also recognize that *this* Court in *Downs* has relied on such statements to hold that government itself cannot be compelled to include the dissenting views of others in its own speech. The Supreme Court language on the treatment of government speech, however, is entirely *dicta*, and has never been adopted in a holding of that Court. And notwithstanding this Court's reliance on such language in *Downs*, appellants maintain that their alternative approach to government speech is not necessarily inconsistent with the *result* in *Downs* and thus the panel would be free to apply a narrower path to that same result and treat the broader language in *Downs* as *dicta* as well. And insofar as this Court were unwilling to view the broader *Downs* language as non-controlling in this case, appellants then offer their alternative as a good-faith argument for a change in the law so as to preserve the issue for subsequent *en banc* or Supreme Court review.

### 1. *The Supreme Court has not immunized government speech*.

Most claims of immunity for government speech rely on language from a variety of cases in which the Supreme Court has stated that the government may say what it wants when speaking for itself and is not required to be viewpoint neutral. In each instance, however, the speech at issue was *not* government speech,

and hence any discussion of the test to be applied if government speech *were* at issue was *dicta*.

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).[11] Any incidental commentary on the government's right to engage in advocacy was 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.

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[11] This passage does not claim that government speech is immune from First Amendment scrutiny, but rather notes that it remains an unresolved "question." If anything, the passage seems to recognize that the First Amendment at a minimum *applies* to such government speech.

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 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. at 12-13. Any discussion in *Keller* about possible immunities for government speech was, again, simply *dicta*.

The essential point here is that the Supreme Court has *never held* that government speech is immune from First Amendment scrutiny. And while even *dicta* from the Supreme Court warrants a degree of attention from a lower court, appellants respectfully suggest that such *dicta* was issued without benefit of a genuine adversarial clash on the issue and thus must be viewed with skepticism.

### 2. *This Court has not immunized all government speech*.

Appellants acknowledge that, unlike the Supreme Court, this Court *has* used a government speech theory in an actual holding. This Court's decision in *Downs*, however, involved the government *resisting* efforts by a public employee to impose unwanted speech on the government, not the distinct question of a private party's challenge to being forced to support speech claimed to be the government's own. Viewed narrowly, *Downs* does not reach the challenge presented here and

did not consider the alternative approach of allowing only government speech that is "germane" to some government conduct. The proposed uniform application of the germaneness inquiry would still operate to allow considerable government speech and thus would not contradict any substantive aspect of this Court's holding in *Downs*. Indeed, the plaintiff there did not even challenge the school district's right to speak on its own property and through its employees on matters relating to its primary pedagogical function. Rather, he merely sought to compel the school district to allow him, in his role as an employee of the school and using school resources, to impose his own conflicting message upon the district itself. 228 F.3d at 1013 (no First Amendment right for plaintiff to "speak as [the district's] representative"); *id*. at 1015 (plaintiff cannot "compel [the government] to embrace a viewpoint"). But rejecting a First Amendment *obligation* for the district to adopt and express plaintiff's views as its own does not resolve the different question of whether there are First Amendment *constraints* on what the district *does* choose to say. While *Downs* supports the notion that the government through the school district may use tax money to speak in connection with the performance of its legitimate function of operating a school, nothing in that opinion is inconsistent with the "germaneness" test applicable to other forms of compelled support for speech. That test would likely lead to the identical result as in *Downs* and allow

compelled support for considerable government speech that is germane to valid government conduct.

### 3. *Compelled support for speech should receive uniform scrutiny regardless of the speaker.*

In considering whether compelled support for government speech – as opposed to government conduct – is subject to lesser or no First Amendment scrutiny, it is useful to review some bedrock First Amendment principles.

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 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*, the 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). 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. 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).

With these basic First Amendment principles in mind, we can examine the *dicta* typically cited in support of the government speech doctrine. One such passage comes from *Southworth*:

> 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).

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 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 regard to conduct.

That is the essential lesson of the First Amendment. Indeed, the very existence of that 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.[12]

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[12] The notion that it is "the very business of government to favor and disfavor points of view," *Finley*, 524 U.S. at 598 (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)

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." *Finley*, 524 U.S. at 598 (concurring in the judgment). While Justice Scalia 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.

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

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rather than respond to such views while leaving them to evolve without governmental manipulation.

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 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* v. *Donohue*, 367 U.S. 820, 853 (1961) (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)).

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 541; *see also id*. at 554 (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*.[13]

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[13] 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 suggested here. 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

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.

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public funds to support speech. The case ultimately was about what speech government chose *not* to fund, and upheld the government's properly chosen restraint.

### C. Even a Lower Level of Scrutiny for Government Speech Cannot Sustain the Compelled Support for Speech in this Case.

Even assuming, *arguendo*, that government speech receives more lenient treatment under the First Amendment, the Supreme Court *dicta* on the subject does *not* suggest that such speech receives a free pass. Rather, it merely poses the "question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections" to a program claimed to be government speech. *Southworth*, 529 U.S. at 229. But the Beef Act would fail even such lenient scrutiny based on the adequacy of political checks.

In numerous ways, the Beef Act and its implementation undermine traditional political checks on government behavior. The Beef Act insulates itself from any true political check by the citizenry as a whole by compelling private funding, rather than providing government funding, thus reducing any direct incentive for taxpayers to scrutinize the program and eliminating the role of House appropriations in the ongoing existence of the checkoff. And assuming that this is in fact government speech, false attribution of the speech to the cattle producers prevents the public as well as the rank and file producers themselves from recognizing objectionable government conduct and rejecting it. Finally, by regulating speech alone, rather than as an incident to implementing some direct control over conduct, the government eliminates the political check of public

resistance to government "intrusiveness." *Cf. Frame*, 885 F.2d at 1122 (congressional statements claiming to be avoiding intrusive government regulation and leaving matters up to the beef industry). Indeed, the very reason that regulations on conduct – which are more intrusive in a colloquial sense – are subject only to rational basis scrutiny, while regulations on speech – which are more intrusive in a constitutional sense – are subject to heightened scrutiny, is that it is the very intrusiveness of direct government regulation that creates the political check. It is the insidious nature of controls on speech that requires a constitutional, rather than a political, check on such controls.

## II. THE BEEF ACT FAILS THE *UNITED FOODS* ANALYSIS.

The district court correctly recognized that the beef checkoff was indistinguishable from the mushroom program struck down in *United Foods* and therefore would likewise fail the First Amendment test set out in that case. Cattle ranching is a highly competitive industry characterized by an almost classic free market. There is no collectivization of ranchers, no restriction on their freedom to produce or sell cattle, and certainly no broader collective enterprise to which the beef checkoff would be "germane." The district court in the *LMA* case reached precisely the same conclusion for the same reasons as the court below. 207 F. Supp.2d at 1002. Indeed, even the United States has recognized that the Beef Act and the Mushroom Act were equivalent for First Amendment purposes when it

was petitioning for certiorari in *United Foods*. *See* Petition for Writ of Certiorari, *United States* v. *United Foods, Inc*., No. 00-276 (August 18, 2000), at 11 (the Beef Act "does *not* extensively regulate the relevant sector of the agricultural industry. The Beef Act, like the Mushroom Act, is concerned *solely* with 'promotion and advertising, research, consumer information, and industry information' funded through assessments on producers. 7 U.S.C. 2904(4)(B)") (emphasis added). Reply Brief for the Petitioners (Cert.), *United States* v. *United Foods, Inc.*, No. 00-276 (November 3, 2000), at 6 (Beef and Mushroom Acts "are *substantively identical*; both are concerned almost exclusively with the establishment of programs to promote an agricultural commodity that are funded by assessments on producers or handlers") (*comparing* 7 U.S.C. 2901 *et seq. with* 7 U.S.C. 6101 *et seq*.) (emphasis added); *id.* ("The Secretary's orders implementing those programs are also identical in all pertinent respects. *Compare* 7 C.F.R. Pt. 1260 (Beef Order) *with* 7 C.F.R. Pt. 1209 (Mushroom Order).") (emphasis added).

The manifest correctness of the decision below was recently corroborated by this Court's decision striking down advertising assessments under the California table-grape program. *Delano Farms Co.* v. *California Table Grape Comm'n*, 318 F.3d 895 (9th Cir. 2003). In that case this Court held it required "[c]ollectivization of the industry" to eliminate the constitutional problems of compelled speech. 318 F.3d at 899. This Court rejected suggestions that various incidental regulations

applicable to grapes could serve as the anchor for the germaneness analysis, noting that "consumer protection and information regulations apply to much of the economy, and are far from rising to the level of the collectivization that controlled the result in *Glickman*." *Id*.

In light of the that recent decision, as well as the plain import of *United Foods*, the USDA's previous reliance on food-safety regulations or pro-competitive laws targeting other portions of the beef industry was erroneous, and would lack credibility if revived in this Court. Unless and until the government takes such a dubious course, appellants will not waste this Court's time elaborating on the correctness of that portion of the decision below.

## III. THE BEEF ACT CANNOT BE SUSTAINED BY OTHER FORMS OF FIRST AMENDMENT ANALYSIS.

The court below correctly determined that the *Central Hudson* test was inapplicable in a case involving compelled support for speech. [ER471] That holding is demonstrably correct. As the United States itself represented to the Supreme Court in the *United Foods* case, "'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 (Merits), *United States* v. *United Foods, Inc.*, No. 00-276 (Apr. 9,

2001) at 9-10 n. 7 (*quoting Glickman,* 521 U.S. at 474 n. 18) (brackets in government brief). Furthermore, regardless whether this case involves commercial speech, *Central Hudson* would still not supercede the *United Foods* analysis. The Supreme Court in *United Foods 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." 533 U.S. at 410.

Insofar as appellees here might seek to revisit their claim that *Central Hudson* applies to this case, there were numerous factual and legal disputes over the application of that test that the court below did not even begin to address. Appellants challenged the characterization of the speech here as strictly commercial, noting that it involved political and economic viewpoints in addition to mere advertising, that the government's interests were neither substantial nor directly advanced by the checkoff program, that less restrictive programs would advance the government's claimed interests as well or better with less impact on First Amendment interests, and preserved a broader challenge to the viability of the *Central Hudson* test as a whole. While appellants will not burden this Court with such peripheral matters at this stage, those many issues can be discussed at length

in reply or through supplemental briefing should the appellees elect to pursue this inapplicable line of reasoning.

## CONCLUSION

For the above reasons, this Court should reverse the judgment below insofar as it upholds the constitutionality of the Beef Act, reverse the judgment insofar as it awards assessments and late fees to the USDA, affirm the judgment insofar as it dismisses the administrative fine against the Charters, and remand to the district court with instructions to enter a declaratory judgment that the Beef Act violates the First Amendment and to conduct further proceedings as to remedies.

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April 3, 2003

## STATEMENT OF RELATED CASES

There are no related cases in this Court.

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of April, 2003, I caused one copy of the foregoing Joint Brief for Appellants and one copy of the Excerpts of Record to be served by First Class Mail, postage pre-paid, on each of:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellants complies with the 14,000 word type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that it contains 13,618 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word XP. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

_____
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# STATUTORY APPENDIX