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

JEANNE CHARTER and STEVE CHARTER, Petitioners, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent.	Cause No. CV 00-198-BLG-JDS **MOTION FOR PRELIMINARY INJUNCTION**

COME NOW Jeanne and Steve Charter, Petitioners herein, through counsel, and move the Court for a preliminary injunction directing (1) that all prospective assessments under the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* (the Beef Act) and its implementing Order and regulations be paid into escrow until the constitutionality of such assessments are finally determined; and (2) that all existing monies collected under the Beef Act

and its implementing Order and regulations, and in the possession of the USDA, its agents, or its contractors, be immediately frozen and placed into escrow so as to avoid further unconstitutional application of such monies and to preserve such monies for payment of future refunds. This motion is supported by the accompanying memorandum.

DATED this 7th day of August, 2001.

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I hereby certify that on the 7th day of August, 2001, a true and correct copy of the within and foregoing was served by mail upon all the parties or opposing attorneys of record at their address or addresses as follows:

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

JEANNE CHARTER and STEVE CHARTER, Petitioners, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent.	Cause No. CV 00-198-BLG-JDS **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

COME NOW Jeanne Charter and Steve Charter, Petitioners, through counsel, and submit the following memorandum in support of their Motion for a Preliminary Injunction.

This case raises a First Amendment challenge to the Beef Promotion and Research Act

of 1985, 7 U.S.C. § 2901 *et seq.* (the Beef Act). In its recent decision in ***United States*** v. ***United Foods, Inc.***, -- U.S. --, 121 S. Ct. 2334 (2001), the United States Supreme Court held that the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* (the Mushroom Act), violated the First Amendment. As the government itself argued to the Supreme Court, the Beef Act is materially indistinguishable, for First Amendment purposes, from the Mushroom Act struck down in ***United Foods***. Consequently, it is petitioners' position that the Beef Act is unconstitutional and that all past and prospective collections under the Act are unconstitutional. Petitioners currently seek a preliminary injunction directing (1) that all prospective assessments under the Beef Act be paid into escrow until the constitutionality of such fees are finally determined; and (2) all existing monies collected under the Beef Act and in the hands of the USDA, its agents, or its contractors be immediately frozen and placed into escrow so as to avoid further unconstitutional application of such monies and to preserve such monies for payment of future refunds.

BACKGROUND

Petitioners Steve and Jeanne Charter own and operate the Charter Ranch outside of Shepherd, Montana, where they raise cattle. Pursuant to the Beef Act and its implementing regulations, the Charters and others are subject to assessments of one dollar ($1.00) per head of cattle sold. The money from such assessments goes to the Cattlemen's Beef Promotion and Research Board (the Beef Board) and analogous state boards to be used for various advertising and promotional activities. Such promotional activities are conducted by the National Cattlemen's Beef Association (NCBA), a private organization under contract with the Beef Board. The assessments and promotional activities are commonly, though misleadingly, referred to as the beef "checkoff" program.

In the administrative proceedings below, the USDA held that the Charters had violated

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the Beef Act and its implementing regulations by failing to pay the required assessment on 250 head of cattle. The Charters admitted such failure to pay and raised a number of affirmative defenses, including that the assessments for promotional activities violated the First Amendment by compelling support for speech and other expressive activities with which the Charters disagreed. Such speech includes generic advertising for beef, branded advertising for beef products that compete with some of the products sold by the Charters, and industry and consumer "information" regarding beef and nutrition with which the Charters vehemently disagree.[1]

The ALJ and the Judicial Officer on administrative appeal both rejected the Charters' First Amendment challenge, relying primarily on the authority of the Supreme Court's decision in ***Glickman*** v. ***Wileman Brothers & Elliot, Inc.***, 521 U.S. 457 (1997), and on other cases applying that decision to various compelled promotional programs.[2] The Judicial Officer also

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[1] *See* [Charters'] Proposed Findings of Fact and Conclusions of Law before the USDA (Jan. 25, 2000), at 5 (noting objectionable nutritional guidelines that "recommend only restricted use of lean beef and other meats") [Administrative Record ("R.") at 208]; *id.* at 5-6 (noting advertising used for "branded product promotion for the biggest food processors" such as Sysco and Sara Lee) [R. 208-09]; *id.* at 11 ("Checkoff expenditures on producer communications influence governmental action in regard to a [then] current USDA petition for a referendum on the beef checkoff Order.") [R. 214]; *id* at 19-20 ("Respondents promote their product on the basis of the nutritional value of liberal use of their kind of beef, including its natural fat. Respondents are being compelled to finance consumer information products with whose content they disagree and which work to the disadvantage and detriment of their private beef business.") [R. 222-23]; *see also* NCBA Report to Beef Producers, Nov. 16, 1995 (Hearing Exh. C-1A) ("We will have separate checkoff and dues/policy divisions, but all of the work will be coordinated and managed within one consolidated organization. ... 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.") [R. 749]; NCBA Press Releases, June 25, 1997, Aug. 7, 1997, Oct. 22, 1997, Dec. 2, 1997, July 2, 1998 (Hearing Exhs. C-2 to C-9) (NCBA, in its capacity as beef checkoff contractor and funds recipient (purportedly representing "America's one million cattle farmers and ranchers"), taking numerous positions on subjects relevant to the beef industry) [R. 751-60].

[2] *See* Judicial Officer's Decision and Order (Sept. 22, 2000), at 16-17 (approving the ALJ's reliance on ***Goetz*** v. ***Glickman***, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), and ***Frame*** v. ***United States***, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), which rejected challenges to the Beef Act) [R. 370-371]; *id.* at 25 ("Respondents' objections to the use of assessments to fund beef promotion are not materially different from the objections raised by the cattle producers in ***Goetz*** and ***Frame***") [R. 379].

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rejected the position of the Sixth Circuit in ***United Foods, Inc.*** v. ***United States***, 197 F.3d 221 (6th Cir. 1999), which had held that the ***Glickman*** decision did not apply to a stand-alone promotional program for mushrooms that was not part of an overall regulatory program that collectivized the relevant industry segment. The Judicial Officer disagreed with the Sixth Circuit's analysis in ***United Foods*** and instead relied on other cases applying ***Glickman*** regardless of the absence of forced collectivization in the relevant industry segment.

Since the Judicial Officer's decision, and since the Charter's petition was filed, the Supreme Court granted certiorari in the ***United Foods*** case and affirmed both the result and much of the rationale of the Sixth Circuit. ***United States*** v. ***United Foods, Inc.***, -- U.S. --, 121 S. Ct. 2334 (2001). In doing so, it severely curtailed some of the stray and misleading analysis in ***Glickman*** and rejected ***Glickman***'s supposed applicability to programs such as that established by the Beef Act.

In this court, the Charters have sought review of the agency order rejecting their constitutional and other challenges to the beef checkoff program. The Charters moved for a preliminary injunction to stay execution of the USDA order to pay, and this court thereafter entered such a stay. *See* Order, Dec. 22, 2000 (barring execution of the USDA collection order until judgment on the Petition for Judicial Review).

In light of the recent Supreme Court decision in ***United Foods***, the Charters have amended their petition for review to seek the further relief of a declaration that the Beef Act and its implementing regulations are unconstitutional, an order barring further compelled payment of beef checkoff program assessments, and an order directing USDA to refund all past assessments against them under the program.

In connection with these requests for further relief, the Charters now seek a preliminary injunction directing that all future payments coming due during this litigation be paid into an

interest-bearing escrow account until such time as the unconstitutionality of the beef checkoff program is finally determined. They also seek an injunction barring the continuing expenditure of any funds collected through the checkoff program so as to avoid further violation of the Charters' First Amendment rights and to preserve such funds for refund.

ARGUMENT

A party is entitled to a preliminary injunction if it can show (1) a likelihood of success on the merits and the possibility of irreparable injury, or alternatively (2) that it raises a serious legal question and the balance of hardships tips in its favor. ***Gentala*** v. ***City of Tuscon***, 213 F.3d 1055, 1060 (9th Cir. 2000); ***Bay Area Addiction Research & Treatment, Inc.*** v. ***City of Antioch***, 179 F.3d 725, 732 (9th Cir. 1999). In this case petitioners can demonstrate an extremely high likelihood of success on the merits and irreparable injury as a matter of law. Furthermore, even were the court to discount the likelihood of success, it is beyond dispute that a serious question has been raised by petitioners, and the balance of hardships heavily favors petitioners in this case.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

In light of the Supreme Court's recent decision in ***United Foods***, striking down an analogous program for compelling support for mushroom promotion, plaintiffs' likelihood of success is extremely high. The Supreme Court in ***United Foods*** held that compelled support for mushroom promotion violated the First Amendment rights of objecting mushroom handlers. Addressing the question "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced," the Court held that the First Amendment barred such compelled support for speech. 121 S. Ct. at 2338.

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The Court in ***United Foods*** distinguished its earlier decision in ***Glickman*** on a variety of grounds and rejected the government's expansive interpretation of some of the language in ***Glickman***. For example, the government had argued, based on some stray language in ***Glickman***, that the First Amendment was not even implicated by compelled support for advertising because it involved only "economic regulation." Brief for the Petitioners, ***United States*** v. ***United Foods***, at 19. The Supreme Court, however, corrected the misperception created by certain language in ***Glickman***: "Our precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection * * *. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree." 121 S. Ct. at 2338.

In an especially telling example, where the government – like the Judicial Officer here – had argued that regulation collectivizing the marketing of a commodity was irrelevant to ***Glickman***'s ruling, the Supreme Court disagreed, holding that

> [i]n ***Glickman*** we * * * emphasized "the importance of the statutory context in which it arises." 521 U.S., at 469, 117 S.Ct. 2130. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.*, at 469, 117 S.Ct. 2130. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.*, at 461, 117 S.Ct. 2130. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.*, at 469, 117 S. Ct. 2130. The opinion and the analysis of the Court *proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules*. To that extent, their mandated participation in an advertising

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> program with a particular message was the logical concomitant of a valid scheme of economic regulation.

United Foods, 121 S. Ct. at 2339 (emphasis added).[3] The Court then went on to identify the distinguishing characteristics of the Mushroom program:

> The features of the marketing scheme found important in ***Glickman*** are not present in the case now before us. * * * Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, there is no "heavy regulation through marketing orders" in the mushroom market. 197 F.3d, at 225. Mushroom producers are not forced to associate as a group which makes cooperative decisions. * * * "[T]he mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.*, at 222, 223.

121 S. Ct. at 2339.

The Beef Act at issue in this case is indistinguishable in all material respects from the Mushroom Act struck down in ***United Foods***. Aside from the compelled advertising itself, there are no laws or regulations forcing cooperative marketing within the beef industry and certainly none forcing such cooperation among the beef producers who must pay the fees under the Beef Act. Indeed, the government itself acknowledged as much in numerous filings before the Supreme Court in the ***United Foods*** case. For example, when the United States sought certiorari

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[3] Even in ***Glickman***, the collectivization of the tree-fruit industry was merely a "premise" upon which the case was argued and decided. It is not at all clear that such premise, suggested by the government and relied upon by the Supreme Court, was in fact *true*. *Compare* Brief for Petitioner, ***Glickman*** v. ***Wileman Bros. & Elliott, Inc.***, No. 95-1184, 1995 U.S. Briefs (Lexis) 1184 (July 29, 1996) ("regulatory framework uses monetary assessments to fund *collective activities* having an expressive component") (emphasis added) *with* Reply Brief for the Petitioners, ***United States*** v. ***United Foods, Inc.***, No. 00-276 (Apr. 9, 2001), at 2 (contention that ***Glickman*** "turned on the comprehensive nature of the marketing orders ... rests on an *erroneous premise* regarding the extent of regulation of the California tree fruit industries") (emphasis added). Although not directly relevant here, given the questionable nature of the government's assertions underlying the Supreme Court's "premise" of collectivization in ***Glickman***, that case's result is called into doubt and the entire opinion might eventually prove to be advisory *dicta* on a fact pattern not actually presented by the reality of the tree-fruit industry.

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in ***United Foods*** it argued that the Sixth Circuit's decision created a split with the Tenth Circuit's decision in ***Goetz*** v. ***Glickman***, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) (No. 98-607), which had upheld the Beef Act on the authority of the ***Glickman*** decision. *See* Petition for Writ of Certiorari, ***United States*** v. ***United Foods, Inc.***, No. 00-276 (August 18, 2000), at 11 ("the court of appeals' decision in this case conflicts with the Tenth Circuit's post-***Wileman Brothers*** decision in ***Goetz*** v. ***Glickman***, 149 F.3d 1131 (1998), *cert. denied*, 525 U.S. 1102 (1999), which rejected a First Amendment challenge to the generic advertising program established pursuant to the Beef Act").[4] The government was quite correct in its understanding that ***United Foods*** conflicted with ***Goetz***. And in light of the Supreme Court's affirmation of ***United Foods***, ***Goetz*** is no longer good law.

The government further represented to the Court that the Mushroom and Beef Acts were equivalent for First Amendment purposes because 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)." Petition for Writ of Certiorari, ***United Foods***, at 11 (emphasis added). The 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." Reply Brief for the Petitioners, United States v. United Foods, Inc., No. 00-276 (November 3, 2000), at 6 (*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

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[4] *See also* Reply Brief for the Petitioners, ***United States*** v. ***United Foods, Inc.***, No. 00-276 (November 3, 2000), at 6 ("the conflict that (quite aside from the holding of an Act of Congress unconstitutional) warrants this Court's intervention is * * * with ***Goetz*** v. ***Glickman***").

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in all pertinent respects. *Compare* 7 C.F.R. Pt. 1260 (Beef Order) *with* 7 C.F.R. Pt. 1209 (Mushroom Order).") (emphasis added).

In its briefs on the merits in ***United Foods***, the government continued to emphasize the similarity between the Beef and Mushroom Acts. In discussing the pre-***Glickman*** case of ***Frame*** v. ***United States***, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), the government represented that, like the program then before the Court, the Beef Act "does *not* extensively regulate the relevant 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 and importers. 7 U.S.C. 2904(4)(B)." Brief for the Petitioners, ***United States*** v. ***United Foods, Inc.***, No. 00-276 (Jan. 24, 2001), at 23 (emphasis added). The government then cited with approval the description of the Beef program in ***Frame*** that the Beef Act "'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 "hand-outs."'" Brief for the Petitioners, ***United Foods***, at 24 (*quoting* ***Frame***, 885 F.2d at 1122); *see also id.* (equating "'stand alone' generic advertising programs such as the ones here and in Frame").

Indeed, the government's brief in ***United Foods*** noted that the Supreme Court in ***Glickman***

> was made aware of the differences in regulatory scope between the orders in ***Wileman Brothers*** and ***Frame***. *See* Oral Argument Tr. at 26, ***Wileman Bros.*** (No. 95-1184) (government counsel explains that "[t]he beef program focuses almost exclusively on promotional programs and advertising"); ***Frame***, 885 F.2d at 1122-1124; *see also* ***Wileman Bros.***, 521 U.S. at 466-467 (discussing ***Frame***).

Brief for the Petitioners, ***United Foods***, at 24. Yet, as the Supreme Court subsequently noted

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in its ***United Foods*** decision, it was precisely those differences in the tree-fruit program that made all the difference to the result:

> The program sustained in ***Glickman*** differs from the one under review in a most fundamental respect. In ***Glickman*** the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

121 S. Ct. at 2338-39.[5] Thus, the very difference between ***Frame*** and ***Glickman*** identified by the government in its ***Glickman*** arguments were the differences the Supreme Court emphasized in its ***Glickman*** decision and that in ***United Foods*** it now describes as "fundamental" to its ruling regarding the Mushroom Act.

Finally, insofar as there is greater regulation in the beef industry than in the mushroom industry, it is regulation aimed at maintaining competition rather than cooperation or collectivization; precisely the opposite circumstances from those described in ***Glickman***. *See, e.g.*, Packers and Stockyards Act, 7 U.S.C. § 192(c) & (d) (unlawful for any packer to sell, buy, or transfer for another "any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly" or "for the purpose or with the effect of manipulating or

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[5] *See also* ***United Foods***, 121 S.Ct. at 2340 ("As noted above, the market for tree fruit was cooperative. To proceed, the statutory scheme used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. * * * Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in ***Abood*** and ***Keller***, in furtherance of an otherwise legitimate program."); *id.* at 2340-41 ("The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in ***Glickman***; here the statute does not require group action, save to generate the very speech to which some handlers object. * * * The cooperative marketing structure relied upon by a majority of the Court in ***Glickman*** to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of ***Abood*** extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.").

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controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce"); *id.* §§ 192(e) & (f) (unlawful to "[e]ngage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce" or to "[c]onspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices"). Such regulation squarely repudiates any collectivist notions and only strengthens the First Amendment interest at stake in this case, making this an even more compelling case than ***United Foods*** for striking down the compelled subsidies for speech.

Overall, in light of the recent ***United Foods*** decision, petitioners' likelihood of success on the merits is virtually overwhelming. And while almost nothing is certain, petitioners' likelihood of success is certainly more than enough to satisfy the first element of the test for a preliminary injunction.

II. IRREPARABLE INJURY AS A MATTER OF LAW.

It is black-letter law that encroachments on First Amendment rights constitute irreparable injury for purposes of a preliminary injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." ***Elrod*** v. ***Burns***, 427 U.S. 347, 373 (1976).; ***Gentala***, 213 F.3d at 1061 (same). Given the exceedingly high likelihood of success in this case, foreshadowed and virtually conceded by the government in ***United Foods***, and the "unquestionabl[e]" irreparable injury produced by the beef checkoff program, petitioners are entitled to a preliminary injunction.

III. REMEDY

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The particulars of the preliminary injunction sought by petitioners are wholly appropriate to the First Amendment violation and injuries at issue. Because the Charters – and many others – object to their being forced to support speech with which they disagree, the proper interim remedy is to prevent the mandatory assessments from being spent on the beef checkoff program. In such circumstances, escrowing the funds accomplishes exactly that result, while simultaneously ensuring the program's ability to obtain those funds on the off-chance that the program is sustained. Indeed, an escrow remedy previously has been approved by the Ninth Circuit under similar circumstances. In ***United States*** v. ***Cal-Almond, Inc.***, 102 F.3d 999 (9th Cir. 1996), the Ninth Circuit upheld a district court's escrow order in similar litigation involving the almond promotion program. The Ninth Circuit expressly held that, even where administrative remedies had not yet been exhausted, the district court had "inherent equitable powers to stay distribution of the assessments pending the outcome of the administrative proceeding." 102 F.3d at 1005; *see also* ***United States*** v. ***Riverbend Farms, Inc.***, 847 F.2d 553, 559 n. 7 (9th Cir. 1988) ("While it is not clear that a mechanism for the refund of an improperly assessed forfeiture exists, the district court could exercise its equitable powers to stay distribution of the damage award until completion of the administrative proceeding."); *id.* at 560 ("[T]he district court itself noted that it could, upon proper application, order forfeiture to be paid to the court pending resolution of the administrative petition.").

The escrowing of funds already collected is likewise appropriate given that expenditure of such funds will continue and compound the First Amendment violation at issue. While petitioners will be entitled to a refund of past assessments if they eventually prevail in their First Amendment challenge, even a temporary use of funds collected in violation of the First Amendment is forbidden. The Supreme Court in ***Ellis*** v. ***Brotherhood of Railway Clerks***, 466 U.S. 435 (1984), made just this point in the analogous union dues context. Rejecting a pay-first,

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rebate-later approach adopted by a union, the Supreme Court held that by "exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. * * * Even [were the Union to pay interest on the amount refunded] the union obtains an involuntary loan for purposes to which the employee objects." 466 U.S. at 444. Addressing the Union's complaint regarding the administrative burden of a different scheme, the Court held that "there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation." *Id.*

Furthermore, placing previously collected funds in escrow will ensure the availability of a fund from which to make refunds without requiring that such refunds come from general USDA or federal government revenues. Indeed, as the law currently stands, the USDA may not *itself* spend any funds appropriated to it under the Beef Act on beef promotion programs by the Beef Board. 7 U.S.C. § 2911. The USDA thus arguably would be blocked from reimbursing ranchers for previously expended checkoff assessments because that would in effect have the USDA pay for past promotion activities from its own funds. Thus, in addition to the continuing violation that expenditure of existing funds would create, the uncertainty regarding USDA's refund abilities creates a compelling reason for assuring that existing checkoff funds remain available for reimbursement claims.

CONCLUSION

For the foregoing reasons, this court should grant petitioners' motion for a preliminary injunction and direct the escrow of funds as provided therein.

DATED this 7th day of August, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2001, a true and correct copy of the within and foregoing was served by mail upon all the parties or opposing attorneys of record at their address or addresses as follows:

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