

1 **KELLY J. VARNES**  
2 **HENDRICKSON, EVERSON,**  
3 **NOENNIG & WOODWARD, P.C.**  
208 North Broadway, Suite 324  
4 Billings, MT 59101-1984  
(406) 245-6238

5 **ERIK S. JAFFE**  
6 **ERIK S. JAFFE, P.C.**  
5101 34th Street, N.W.  
7 Washington, D.C. 20008  
(202) 237-8165

8 **RENEE L. GIACHINO**  
General Counsel  
9 **CENTER FOR INDIVIDUAL**  
10 **FREEDOM**  
901 N. Washington Street, Suite 402  
11 Alexandria, VA 22314  
(703) 535-5836

12 Attorneys for Petitioners

13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE DISTRICT OF MONTANA**  
15 **BILLINGS DIVISION**

16 JEAN CHARTER and STEVE CHARTER, )  
17 Petitioners, )

18 vs. )

19 THE UNITED STATES DEPARTMENT OF )  
20 AGRICULTURE, )  
Respondent. )

) Cause No. CV 00-198-BLG-RFC

) **PETITIONERS' MEMORANDUM IN**  
) **SUPPORT OF CROSS-MOTION FOR**  
) **SUMMARY JUDGMENT AND IN**  
) **OPPOSITION TO RESPONDENT'S AND**  
) **INTERVENORS' MOTIONS FOR**  
) **SUMMARY JUDGMENT**  
)  
)  
)

23  
24  
25  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES..... ii

ARGUMENT ..... 1

    I.    THE BEEF ACT FAILS THE *UNITED FOODS* TEST..... 1

    II.   THE SPEECH FUNDED UNDER COMPULSION OF THE BEEF  
          ACT IS PRIVATE, NOT GOVERNMENT, SPEECH..... 2

    III.  COMPELLED SUPPORT FOR GOVERNMENT SPEECH IS  
          SUBJECT TO THE SAME FIRST AMENDMENT SCRUTINY AS  
          COMPELLED SUPPORT FOR THIRD PARTY SPEECH..... 12

    IV.   COMMERCIAL SPEECH..... 17

    V.    REMEDY ..... 20

CONCLUSION ..... 20

**TABLE OF AUTHORITIES**

**CASES**

*American Bankers Mtg. Corp. v. Federal Home Loan Mtg. Corp.*, 75 F.3d 1401, 1409-10 (9<sup>th</sup> Cir.), cert. denied, 519 U.S. 812 (1996)..... 3

*Block v. Meese*, 793 F.2d 1303 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986)..... 15, 16

*Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000)..... 5

*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980)..... 17

*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U. S. 788 (1985) ..... 3

*Cox v. New Hampshire*, 312 U.S. 569 (1941)..... 8

*Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9<sup>th</sup> Cir. 2000), cert. denied, 532 U.S. 994 (2001) ..... 5, 14

*Fleming v. Jefferson Cty. School Dist. No. 1*, 170 F. Supp.2d 1094 (D. Colo. 2001)..... 6

*Freedom from Religion Found. v. McCallum*, 179 F. Supp.2d 950 (W.D. Wisc. 2002)6, 15

*Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997)..... 18

*Hall v. American National Red Cross*, 86 F.3d 919 (9<sup>th</sup> Cir.), cert. denied, 519 U.S. 1010 (1996)..... 11

*Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8<sup>th</sup> Cir. 2000), cert. granted in part, 531 U.S. 1124 (2001)..... 18

*Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988)..... 8

*Knights of the KKK v. Curators of the Univ. of Missouri*, 203 F.3d 1085 (8<sup>th</sup> Cir.), cert. denied, 531 U.S. 814 (2000) ..... 6, 15

*Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995)..... 11

1	<i>Legal Services Corporation v. Velazquez</i> , 531 U.S. 533 (2001) .....	10, 14
2	<i>NAACP v. Hunt</i> , 891 F.2d 1555 (11 <sup>th</sup> Cir. 1990) .....	6, 15
3	<i>NEA v. Finley</i> , 524 U.S. 569 (1999) .....	3, 13, 16
4	<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	18
5	<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991).....	14
6	<i>San Francisco Arts &amp; Athletics, Inc. v. United States Olympic Comm.</i> , 483 U.S. 522	
7	(1987) .....	3
8	<i>United States v. Frame</i> , 885 F.2d 1119 (3d Cir. 1989), <i>cert. denied</i> , 493 U.S. 1094	
9	(1990).....	passim
10	<i>United States v. Sperry Corp.</i> , 493 U.S. 52 (1989) .....	7
11	<i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001) .....	1, 13, 18
12	<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	5
13		
14	<b>STATUTES</b>	
15	7 U.S.C. § 2905(b).....	10
16		
17	<b>OTHER AUTHORITIES</b>	
18	Reply Br. for the Petitioners, <i>United States v. United Foods, Inc.</i> , No. 00-	
19	276 (Apr. 9, 2001) .....	18
20		
21		
22		
23		
24		
25		
26		

1 **ARGUMENT**

2 There is no credible dispute that if *United States v. United Foods, Inc.*, 533 U.S. 405  
3 (2001), applies to this case, the Beef Act fails constitutional scrutiny. The only significant  
4 questions for the Court at this stage are whether the speech funded by the compulsion of the Beef  
5 Act is government speech, and if so, whether compelled support for government speech is  
6 nonetheless subject to the same First Amendment standards as compelled support for third-party  
7 speech. It is petitioners’ view that, as a matter of law, the speech funded by the compelled  
8 contributions of private beef producers, generated by a subset of private beef producers, and  
9 attributed to all private beef producers is not government speech at all, but rather represents  
10 third-party speech, with government oversight that constrains, but does not dictate, such speech.  
11 It thus falls squarely within the parameters of *United Foods*. Furthermore, even were the speech  
12 here viewed as government speech, petitioners maintain that such speech is subject to precisely  
13 the same “germaneness” analysis applicable to other forms of compelled support for speech.

14 **I. THE BEEF ACT FAILS THE *UNITED FOODS* TEST.**

15 The application of *United Foods* to the Beef Act has already been fully briefed, and the  
16 government adds nothing further on the matter. There is no genuine dispute that petitioners are  
17 forced to fund expressive activities – including generic and branded promotion, industry and  
18 consumer information, and related research in support of speech – with which they disagree. *See*  
19 *Petitioners’ Statement of Uncontroverted Facts (“Pet. Facts”)* ¶¶ 6, 8-17. There is also no  
20 dispute that cattle producers operate in a competitive market and are not compelled to engage in  
21 collective activity other than the funding of speech. *Pet. Facts* ¶¶ 7. Given those facts,  
22 petitioners are entitled to summary judgment on the proposition that the Beef Act fails the  
23 *United Foods* test. *United Foods* requires that compelled support for collective speech must be  
24 germane to economic regulation compelling similarly collective conduct that can be  
25 accomplished only through the incidental compulsion of speech regarding such conduct.

1 Because the overwhelming thrust of those laws is to *reinforce* competition between producers  
2 and to *suppress* various forms of collective action and monopolistic behavior by other beef  
3 industry players, the Beef Act's compelled support for collective speech is antithetical to the  
4 regulatory regime in place for the beef industry, it is not germane to that regime, and is thus  
5 unconstitutional.<sup>1</sup>

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

8 As explained in petitioners' Reply Memorandum in support of their motion for preliminary  
9 injunction ("PI Reply"), at 22-27, the only appellate court to consider whether the Beef Act results  
10 in government speech has concluded that it does not. See *United States v. Frame*, 885 F.2d 1119,  
11 1132 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The factors described in *Frame* are the  
12 proper considerations for whether government speech exists. Those factors include: (1) the nexus  
13 between the expression and the person objecting thereto; (2) the attribution, or lack thereof, of the  
14 expression to the government; (3) the source of funding for such expression; and (4) the persons  
15 generating the content and viewpoint of the expression. Application of these factors demonstrates  
16 that the Beef Act compels support for collective private speech, not government speech.

17 Before addressing the details of the *Frame* analysis, however, a general overview will  
18 clarify the fundamental misconception underlying the claim of government speech in this case.

---

19  
20 <sup>1</sup> Intervenors do little more than repeat arguments previously briefed by the USDA and do not address  
21 petitioners' responses thereto. The issue of whether to focus on the Beef Act alone or on other statutes as  
22 well, Intervenors/Respondents Memorandum at 15-17, is a straw man not raised by petitioners. *Nothing*  
23 *in any* government statute compels the type of collective conduct that is the touchstone of the  
24 germaneness inquiry. Every statute cited by intervenors was addressed and disposed of in the prior  
25 briefing. PI Reply at 9-13. As for intervenors' citation to ¶ 22 of the Declaration of Ron Ward,  
26 Intenor/Respondents' Memorandum In Support of Summary Judgment (Int. SJ Mem."), at 17, 20, that  
paragraph confirms the lack of compelled collective conduct and otherwise repeats intervenors' redundant  
statutory citations. If this Court nonetheless thinks Mr. Ward's opinions are material to its ruling,  
however, petitioners are entitled to further discovery and to depose Mr. Ward on the matters asserted in  
his declaration, and hereby request such discovery pursuant to Rule 56(f) should the court find occasion  
to rely on Mr. Ward's claims.

1 Respondent’s central error is its confusing government *oversight* with government speech. While  
2 the government oversees and constrains numerous areas of private expression, in none of those  
3 instances does such oversight convert private speech into government speech. For example, the  
4 government oversees and must give final approval for arts grants through the NEA and charitable  
5 solicitation through the Combined Federal Campaign. *See, e.g., NEA v. Finley*, 524 U.S. 569,  
6 573-74 (1998) (describing oversight authority and broad discretion of NEA in providing  
7 government arts grants); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473  
8 U. S. 788, 793, 800 (1985) (charitable solicitations directed at federal workers and overseen by  
9 Civil Service Commission, with control over who may participate and government “restrictions  
10 on the length and content” of the solicitation). The government likewise oversees and regulates,  
11 through the FCC, the SEC, and the NLRB and Department of Labor, communications in  
12 television and radio broadcasting, speech related to publicly traded securities, and speech by  
13 labor unions. In each instance, the government oversees money spent on speech, exercises a  
14 negative veto on proposed speech outside the parameters of the relevant statutes or regulations, and  
15 has its own goals in regulating such speech. But its oversight activities in each of those areas, and  
16 under the Beef Act as well, is just that – *oversight* of private speech, not the *generation* of  
17 government speech. *Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*,  
18 483 U.S. 522, 544 (1987) (“Even extensive regulation by the government does not transform the  
19 actions of the regulated entity into those of the government.”); *cf. American Bankers Mtg. Corp. v.*  
20 *Federal Home Loan Mtg. Corp.*, 75 F.3d 1401, 1409-10 (9<sup>th</sup> Cir.) (same), *cert. denied*, 519 U.S.  
21 812 (1996).

22           When the government itself speaks, it is entirely obvious that it is the speaker: recruiting  
23 posters saying “Join the Army”; advertisements to “Buy U.S. Savings Bonds”; publications  
24 announcing the passage of “campaign finance reform”; USDA nutrition guidelines advising people  
25 to “Eat less red meat and more legumes for protein.” The content of such speech is plainly  
26

1 attributed to the government, and the government makes the affirmative decision to express itself.  
2 Conversely, where the government seeks to control private speech – even where it seeks to impose  
3 its own viewpoints on speech by others – it is just as plainly *not* government speech, but rather  
4 government regulation or censorship of speech by others, regardless of how overbearing or intrusive  
5 such government efforts may be. Indeed, the more overbearing the government’s efforts to shape  
6 the speech of others, the more they offend the First Amendment. A licensing and censorship  
7 scheme with extreme viewpoint-based restrictions and diligent bureaucratic support would simply  
8 be a First Amendment abomination, not an unregulated program of government speech.

9         Despite the fundamental differences between government speech and government regulation  
10 of private speech, respondent and intervenors nonetheless get it precisely backwards when they  
11 suggest that USDA’s oversight role generates government speech free from First Amendment  
12 scrutiny. Even assuming, *arguendo*, all of their factual claims, those claims demonstrate nothing  
13 more than that USDA heavily regulates the collective speech of cattle producers through the  
14 exercise of *restrictive* control over private speakers and their speech, and through the attempted  
15 manipulation of messages collectively funded by and attributed to cattle producers. No speech is  
16 initiated or generated by the government, but rather exists solely due to the impetus and decision of  
17 private parties. While the USDA may occasionally restrict some of that private speech, and may  
18 sometimes suggest ideas to the speakers, it cannot itself compel any particular message without the  
19 collective approval of the cattle organization representatives, and indeed cannot even sustain the  
20 checkoff program at all should private producers collectively vote to end the program. Regardless  
21 of how extensive the oversight, and regardless of how much USDA tries to manipulate the  
22 messages, the speech comes from the collective action of cattle producers, is exclusively paid for  
23 by such producers, is expressly attributed to such producers, and therefore is the collective private  
24 speech of such producers, not the speech of the government.

1 Turning now to the details of the *Frame* analysis, each element of that analysis continues to  
2 support a finding that this case does not involve government speech.

3 Nexus to Objecting Party. The nexus between the speech and dissenting producers is amply  
4 established by the narrow source of funding and through the public attribution of all beef checkoff  
5 communications to cattle producers rather than to the federal government. See PI Reply at 23-25.  
6 The relevance of the nexus inquiry is confirmed by cases such as *Board of Regents of the*  
7 *University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), and *Wooley v. Maynard*,  
8 430 U.S. 705 (1977), and by the legislative history of the Beef Act. *Frame*, 885 F.2d at 1122 (Beef  
9 Act a “self-help” program for the beef industry); *id.* (legislative history explaining that Beef Act  
10 allows industry to ““devise its own strategies”” and avoids ““government regulation,””).<sup>2</sup> It is also  
11 confirmed by testimony from the Beef Board itself. See *infra* at 9-10.

12 Respondent has little to say about the nexus element except to cite to *Downs v. Los Angeles*  
13 *Unified School District*, 228 F.3d 1003 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 994 (2001), for the  
14 claim that the Ninth Circuit did not focus on attribution. Brief in Support of Respondent’s Motion  
15 for Summary Judgment (“Resp. SJ Br.”) at 6. But *Downs* was in the quite different context of a  
16 public school, and petitioners’ arguments concerning the market participant or proprietary role of  
17 government in running its own schools, PI Reply at 35, amply distinguish the school context from  
18 the case at bar. Furthermore, *Downs* most certainly *did* recognize the attribution element of the  
19 government speech question when it recognized that speech posted on a government bulletin board  
20 by a government employee acting in his official capacity as a teacher was attributable to the  
21 government rather than the employee, and that the government was entitled *not* to speak in a  
22 manner against its choosing. See 228 F.3d at 1011-12, 1014-15. *Downs* is thus fully consistent

---

23  
24 <sup>2</sup> See also, *Frame*, 885 F.2d at 1135 (citing “121 Cong. Rec. 31,439 (‘In keeping with their true free  
25 enterprise nature, cattlemen are asking only for enabling legislation’) (statement of Rep. Santini); 121  
26 Cong.Rec. 31,448 (1975) (statement of Sen. Baucus) (Montana ranchers historically unwilling to accept  
government handouts or interference).”).

1 with *Frame*'s nexus approach to determining who the speaker is in any given instance. The other  
2 lower court cases cited by respondent likewise support a focus on nexus and attribution when  
3 determining whether the government itself is the speaker, as each involves speech made by and  
4 attributed to the government, not speech attributed to private persons. See *Knights of the KKK v.*  
5 *Curators of the Univ. of Missouri*, 203 F.3d 1085, 1093-95 (8<sup>th</sup> Cir.) (state university is the speaker  
6 when university-owned and operated radio station acknowledges, through its own employees,  
7 contributions that it chooses to accept, notwithstanding that such acknowledgements are required by  
8 the FCC), *cert. denied*, 531 U.S. 814 (2000); *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11<sup>th</sup> Cir. 1990)  
9 (state flag flown on state capitol building is government communication not connected to private  
10 parties except through expenditure of general tax dollars); *Freedom from Religion Found. v.*  
11 *McCallum*, 179 F. Supp.2d 950, 980 (W.D. Wisc. 2002) (noting that state has contracted out  
12 performance of "its social services" and may *constrain* speech made in the performance of those  
13 services and relevant to those services); *cf. Fleming v. Jefferson Cty. School Dist. No. 1*, 170 F.  
14 Supp.2d 1094, 1107-08 (D. Colo. 2001) (rejecting claim of government speech in school-sponsored  
15 program, applying factors similar to *Frame* and distinguishing *Downs* because, *inter alia*, private  
16 citizens, rather than government employees were doing the actual speaking).

17 Finally, *Frame*'s reference to *Wooley* amply demonstrates the significance of attribution to  
18 private speakers even in a context in which the speech at issue self-evidently originated from the  
19 government rather than from the unwilling supporter of the message. 885 F.2d at 1132-33. *Wooley*  
20 does not turn on the fact that physical property was involved, but rather on the imputation of  
21 agreement with the state's message that resulted from the nexus between the speech and the  
22 individual. The burden on the property itself was no different with or without the state motto  
23 concealed (the license plate itself remained affixed), the only difference was communicative in  
24 nature. In the current case, the funding by the discrete group of cattle producers and the attribution  
25 of the message to that discrete group likewise impose a communicative burden of supposed support  
26

1 for the message, in addition to the material burden of financing the message. This case is thus no  
2 different from *Wooley* and presents a comparable compulsion of private speech.<sup>3</sup>

3 Non-Attribution to Government. In the end, this factor alone is sufficient to disqualify the  
4 speech facilitated by the Beef Act from being government speech. Petitioners maintain that  
5 attribution to the government is an absolutely necessary (though not sufficient) condition for speech  
6 to qualify as government speech. In this case, there is no genuine dispute that the relevant speech is  
7 not attributed to the government, but rather is attributed to beef producers. PI Reply at 23-24; *see*  
8 *also* Pet. Facts ¶¶ 10-11. And in each of respondent’s cases finding the existence of government  
9 speech, the relevant message was plainly attributable to the government. *See supra* at 5-6.  
10 Summary judgment on the proposition that the Beef Act does not generate government speech can  
11 be granted based on the lack of government attribution alone, even assuming, *arguendo*, the  
12 government’s description of its oversight role.

13 Exclusive Funding by Discrete Group. The *Frame* court recognized the significance of  
14 discrete funding for the question of who is the speaker in any given instance. Just as with union  
15 speech, paid for by the workers themselves, the speech here is producer speech. The cases cited by  
16 the government regarding the validity of imposing “user fees,” Resp. SJ Br. at 14, do not go to the  
17 First Amendment issues under this element of the *Frame* analysis. *United States v. Sperry Corp.*,  
18 493 U.S. 52, 60-62 (1989), was a Takings case involving imposition of a fee-for-service in  
19 connection with the costs of the Iran Claims Tribunal, not a speech case. While the analysis therein  
20 might apply to the governments provision of administrative and legal services to the Beef Board, it  
21 most certainly does not apply to the speech conducted by the Board itself. Indeed, the different

---

22  
23 <sup>3</sup> The significance of attribution can be seen by the hypothetical of the government publishing the  
24 following message: “Taxes are good. A message from the Rotary Club.” The false attribution to an  
25 unwilling private party of a message chosen by the government seems to plainly fall into the category of  
26 compelled speech, notwithstanding the government’s complete control over the content of the message.  
To suggest that such speech is government speech immune from First Amendment scrutiny is simply  
disingenuous. The speech generated by the Beef Act is no different as to its attribution.

1 treatment of reimbursable USDA expenses and the promotional activities of the Beef Board  
2 strongly supports petitioners’ position that the promotion is not government speech. And it is not at  
3 all clear that the checkoff fees would even survive *Sperry*’s takings analysis in any event. *See also*  
4 *Kadmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 461-62 (1988) (rejecting equal protection  
5 challenge to user fee for transportation service provided to persons riding public school buses; no  
6 mention of expression). And in *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941), the Supreme  
7 Court merely rejected the claim that a user fee charged to parade organizers for the added expenses  
8 of public services violated the First Amendment. It most certainly did not suggest that the payment  
9 of the parade fee converted the ensuing parade into government speech. Rather, it confirms that  
10 payments of user fees for discrete government services, even when in connection with speech, is  
11 very different than paying for the speech itself. Where user fees are for *conduct*, attribution of that  
12 conduct to the persons paying the fees is irrelevant to any legal issue, just as the attribution of  
13 compelled conduct itself is irrelevant to the validity of that compulsion. But speech is different, and  
14 application of the First Amendment is routinely a function of the communicative impact of a  
15 government restriction or compulsion.<sup>4</sup>

16 Content and Viewpoint Generation. As the *Frame* court correctly recognized, speech  
17 generated under the beef checkoff program does not express the views of the government as  
18 representative of its citizens, but rather only the collective views of cattle producer organizations.  
19 885 F.2d at 1133. The USDA’s extensive efforts to claim control over the operation do not

---

21 <sup>4</sup> Furthermore, if one accepts the premise that the fees are funding government speech rather than speech  
22 by the payors themselves, then the entire concept of a “user fee” collapses. Once the views being  
23 expressed are deemed those of the government itself, rather than of the entities doing the funding, the  
24 justification for imposing the cost on only a subset of the polity fails. Such a disconnect between the  
25 nature of the program and the nature of the taxation would implicate a wide array of additional  
26 constitutional restrictions, including Fifth Amendment Equal Protection and Takings constraints and the  
prohibition against direct, non-apportioned, taxation contained in Article I, § 2, cl. 3 of the U.S.  
Constitution. If the Court accepts the proposition that the speech at issue is government speech and  
survives First Amendment scrutiny as such, petitioners will then amend their complaint to raise such  
additional constitutional violations arising as a consequence of such recharacterization of the checkoff  
program.

1 change the source of the content and viewpoints facilitated by the Beef Act.<sup>5</sup> Indeed, even  
2 respondent's own declarants confirm that speech under the Beef Act is generated by private  
3 parties pursuing their private interests, and that the USDA's oversight and approval authority  
4 only serves as a negative check reviewing compliance with the Beef Act, not as an affirmative  
5 mechanism for compelling particular content or viewpoints. See Trial Transcript, *Livestock*  
6 *Marketing Assoc. v. USDA* (No. 00-1032, D.S.D.) ("LMA Tr."), at 222-23 (Reese Testimony)  
7 ("Notwithstanding the fact that it is a government established program and the restrictions on  
8 what can be done with checkoff dollars are established by the government and USDA has the  
9 final approval authority, if you look at the process ... there isn't an expenditure of checkoff  
10 dollars that I know of but what it had its genesis in the idea a producer had. That's why I think  
11 it's a producer led government supervised program."); *id.* at 246 ("no decision is implemented  
12 without first being approved by cattle producers"); *id.* at 250 (Reese, quoting letter from Beef  
13 Board to USDA) ("let there be no mistake about the fact that cattlemen and importers who pay  
14 for this program run this program"); *id.* at 252 (Reese, quoting the chairman of the Beef Board)  
15 ("We see USDA's role as protecting the program from mismanagement but not dictating what  
16 we do"); Barry Carpenter, "Checkoff Defense Promised," [http://www.beef.org/bbbonline/-](http://www.beef.org/bbbonline/-2001_stories/0108_archives/0108_8a.htm)  
17 [2001\\_stories/0108\\_archives/0108\\_8a.htm](http://www.beef.org/bbbonline/-2001_stories/0108_archives/0108_8a.htm) ("We don't second guess the industry's efforts to build  
18

---

19 <sup>5</sup> For purposes of their cross-motion, petitioners will assume, *arguendo*, the government conduct  
20 described by respondent and intervenors and note merely that it is irrelevant to the characterization of the  
21 speech in this case. For purposes of respondent's summary judgment motion, however, petitioners  
22 vigorously dispute the claims and characterizations of USDA's role in the process. Statement of Genuine  
23 Issues ¶¶ 3-8, 11-13. While discussing its extensive contacts with and oversight of the Beef Board,  
24 USDA does not adequately identify the grounds on which it will override the independent decisions of  
25 that Board, or show any instance in which it has imposed content upon the Board that the Board did not  
26 generate on its own. Furthermore, the information asserted by the USDA is uniquely in the possession of  
USDA and the Beef Board, and the government's selective recitation of its role cannot be accepted  
without full information available to petitioners and the opportunity to cross-examine declarants and  
others to test the scope and truth of their claims. Insofar as the Court considered the government speech  
question to turn on such factual matters, petitioners assert their right to take discovery on those and  
related matters under Rule 56(f). Summary judgment for respondent and intervenors would thus be  
inappropriate at this stage.

1 demand for beef. We look at all activities and how they are presented to ensure they are  
2 conducted in the proper manner, then we allow the industry to set its own direction for checkoff  
3 programs and to be accountable.”).

4 That the USDA sometimes rejects certain content as being outside the scope of the Beef  
5 Act’s authorization shows merely an auditing and oversight function, not a speech-generating  
6 function. It is in fact no different than government oversight of numerous programs which  
7 support a limited category of private speech. *See supra* at 2-3.

8 Petitioners’ previous discussion of *Southworth* and *Legal Services Corporation v.*  
9 *Velazquez*, 531 U.S. 533 (2001), demonstrated that government supervision, even where  
10 extensive and speech-restrictive, does not convert private speech into government speech. *See PI*  
11 *Reply* at 27. Respondent’s claim that the “central message” under the beef checkoff is dictated  
12 by the federal government, Resp. SJ Br. at 2, 6-8, makes far too much of the general parameters  
13 imposed by the Act, and ignores Congress’s intent that the specific messages, viewpoints, and  
14 strategies be developed by private actors. *See Frame*, 885 F.2d at 1122. That the government  
15 has set the parameters for the speech at issue does nothing to distinguish this case from the union  
16 context, the NEA, legal services programs, or from limited public forums defined by their  
17 content. Furthermore, the Act does not *require* specific content – or any speech at all for that  
18 matter – but rather merely limits its permission for use of compelled collective funding to such  
19 content and then leaves it up to private parties whether or not to take advantage of the limited  
20 authorization provided. That is a far cry from the government itself making a decision to speak  
21 its proverbial mind on the matter of beef consumption.<sup>6</sup>

---

22  
23 <sup>6</sup> Finally, the USDA’s claim that it uses the beef checkoff to advance USDA’s own programmatic  
24 interests, Resp. SJ Br. at 12 n. 7, is unsupported by facts and, if true, would likely be a violation of the  
25 Beef Act itself. The Act authorizes spending to advance the supposed interests of cattle producers, not  
26 the USDA. *See Frame*, 885 F.2d at 1122; *cf.* 7 U.S.C. § 2905(b) (certification of nominating  
organizations that have a “primary or overriding purpose of the association or organization is to promote  
the economic welfare of cattle producers”). The USDA’s oversight exists to ensure that those private  
interests, and no others, are the focus of Beef Board expenditures. To the extent it has misused this power

1            Other Considerations. The government repeats its reliance on *Lebron v. National Railroad*  
2 *Passenger Corporation*, 513 U.S. 374 (1995), and the claim that the Beef Board is the government,  
3 but ignores petitioners’ earlier discussion of *Lebron*. PI Reply, at 26-27; *see also Lebron*, 513 U.S.  
4 at 399 (distinguishing “government” status “for purposes of the *constitutional obligations of*  
5 *Government rather than the ‘privileges of the government’*”) (emphasis added). That discussion is  
6 sufficient to dispose of the government’s misreading of *Lebron*. The Beef Board is not the federal  
7 government, but rather it is the representative of specific beef producer interests, much like a union  
8 is the representative of employees within its bargaining unit. That the Beef Board has immunity  
9 from taxes and is subject to various obligations imposed by the government does not make it the  
10 government for *all* purposes, and certainly not for constitutional purposes. *Cf. Hall v. American*  
11 *National Red Cross*, 86 F.3d 919, 922 (9<sup>th</sup> Cir.) (“Government-created corporations are often held  
12 to be tax-immune government instrumentalities, but courts have also frequently found them not to  
13 be subject to constitutional treatment as government actors.”), *cert. denied*, 519 U.S. 1010 (1996).  
14 Respondent’s further arguments regarding its certification of nominating entities and selection of  
15 Beef Board members neglects to acknowledge the limited *criteria* according to which it must make  
16 such judgments. Certification and selection, for example, are based on whether various groups and  
17 individuals represent the interests of beef producers, not whether they will hew to the views of the  
18 federal government. Such criteria confirm the private interests served by the checkoff program and  
19 the private nature of the speech arising from that program.

20            Finally, the suggestion, Resp. SJ Br. at 8, that the government’s supposed copyright in any  
21 materials under the Beef Act demonstrates government speech suffers from various factual and  
22 legal problems. First, it appears to be untrue that beef checkoff materials are copyrighted to the  
23 government. *See* PI Reply at 24 n. 19; LMA Tr. at 257, 259 (copyrights in name of NCBA alone or  
24

---

25 to substitute its own interests for those specified under the Act, it has only vividly demonstrated the  
26 dangers in a system of government censorship and coercion of private support for speech

1 with the Beef Board). Second, ultimate ownership of a copyright does not necessarily equate with  
2 authorship of the copyrighted materials. Copyrights are transferable, and the fact that the copyrights  
3 in this case are *issued* in the names of the NCBA and the Beef Board says more about authorship  
4 than do any subsequent ownership rights taken by the federal government. Indeed, if the federal  
5 government holds title to the copyrights, it likely does so in trust for the beef producers, rather than  
6 as purely discretionary federal property, and does so due to the lack of a mechanism for vesting  
7 ownership in another single entity that could hold it on behalf of such producers. Third, to the  
8 extent that such copyrights in fact are ultimately owned by the United States for its own account,  
9 rather than in trust, then the provision providing for such ownership would appear to constitute an  
10 uncompensated taking of property given that the materials were generated with exclusively private  
11 funds, not with government revenues. If the materials have any value, their uncompensated  
12 appropriation by the government would be independently unconstitutional.

13 In the final analysis, the speech facilitated by compelled contributions under the Beef Act  
14 is, as a matter of law, private speech and not government speech. *United Foods* therefore  
15 provides the controlling analysis and summary judgment should be granted to petitioners.

16 **III. COMPELLED SUPPORT FOR GOVERNMENT SPEECH IS SUBJECT TO THE**  
17 **SAME FIRST AMENDMENT SCRUTINY AS COMPELLED SUPPORT FOR**  
18 **THIRD PARTY SPEECH.**

19 Even were this Court to assume that the speech at issue is government speech, it should  
20 still enter summary judgment for petitioners because such supposed government speech is  
21 subject to and fails First Amendment scrutiny. Petitioners maintain that the proper test to be  
22 applied is the same as for compelled support of private speech, as set out in *United Foods*.

23 In claiming First Amendment immunity for government speech, respondent continues to  
24 rely on *dicta* from various Supreme Court cases, yet makes no attempt to defend the reasoning of  
25 such *dicta* or to square it with the authoritative First Amendment principles already discussed by  
26 petitioners. See PI Reply at 27-36. Such *dicta* is both non-authoritative and wrong on the merits,

1 and should not be relied upon by this Court. In each of the Supreme Court cases cited by  
2 respondent, the Court spoke without the benefit of adversary argument and issued mere advisory  
3 opinions on matters not before it. What is more telling, however, is that in the one case where  
4 government speech was argued expressly to the Court, and where the so-called government  
5 speech doctrine was openly challenged, the Court pointedly omitted the very *dicta* it had  
6 previously included in other cases not even raising the question. See *United Foods*, 533 U.S. at  
7 448-49. Such newfound reticence suggests that the Court does not consider the question  
8 resolved, or the doctrine to have been well-established, but rather that it will not decide the issue  
9 until all arguments are considered in a case properly presenting the issue.

10         Particularly misplaced is respondent’s reliance on Justice Scalia’s separate and non-  
11 authoritative opinion in *NEA v. Finley* for the notion that it is “the very business of government to  
12 favor and disfavor points of view,” *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the  
13 judgment). Government certainly implements the views of the polity, but it properly does so  
14 through its conduct implementing those views, not through speech in an effort to entrench those  
15 views. More telling, however, is that Justice Scalia made this point as an argument why  
16 viewpoint discrimination in government support of *private* speech should be immune from First  
17 Amendment constraints. That position was roundly rejected by the Court, though the strength of  
18 his related argument nonetheless remains: compelled support for private speech and compelled  
19 support for government speech are materially the same for First Amendment purposes and, if  
20 anything, speech “directly involving the government itself in the viewpoint discrimination (if it is  
21 unconstitutional) would make the situation even worse.” *Id.* (concurring in the judgment).  
22 Justice Scalia would use the equivalence to reject established principles regarding compelled  
23 support for private speech. But having lost that battle, his logic necessarily leads to the same  
24 First Amendment scrutiny for compelled support of government speech as is applied to  
25 compelled support for private speech.

1 Respondent also again cites to *Rust v. Sullivan*, 500 U.S. 173 (1991), claiming that the  
2 decision has been understood to involve government speech. But such claim is based on Justice  
3 Kennedy’s *dicta* in *Velazquez* and ignores Justice Scalia’s far more compelling contrary view.  
4 *Velazquez*, 531 U.S. at 541-42; *id.* at 554-55 (Scalia, J., dissenting) (noting that the speaker in  
5 *Rust* was not the government). While neither view represents a holding of the Court, petitioners’  
6 previous arguments on why *Rust* is not a government speech case, and how it is fully consistent  
7 with a germaneness inquiry, remain unanswered. PI Reply at 34.

8 As for the various lower court cases cited by respondent and intervenors in support of the  
9 supposed lack of First Amendment constraints on government speech, most of those cases  
10 involve the government *resisting* efforts by private parties to impose unwanted speech on the  
11 government, not the distinct question of a private party’s challenge to being forced to support  
12 speech engaged in by the government. And to the extent those cases touch upon that separate  
13 question in *dicta*, they do not contradict the First Amendment principles put forth by petitioners,  
14 nor petitioner’s construction of the “germaneness” inquiry, which would operate to allow  
15 considerable government speech that is germane to legitimate government conduct. In *Downs*,  
16 for example, the plaintiff did not even challenge the school district’s right to speak on its own  
17 property and through its employees on matters relating to its primary function of running a  
18 school. Rather, he merely sought to compel the school district to allow him, in his role as an  
19 employee of the school and using school resources, to impose his own conflicting message upon  
20 the district itself. 228 F.3d at 1013 (no First Amendment right for plaintiff to “speak as [the  
21 district’s] representative”); *id.* at 1015 (plaintiff cannot “compel [the government] to embrace a  
22 viewpoint”). But rejecting a First Amendment *obligation* for the district to adopt and express  
23 plaintiff’s views as its own does not resolve the different question of whether there are First  
24 Amendment *constraints* on what the district *does* choose to say. While *Downs* supports the  
25 notion that the government through the school district may use tax money to speak in connection  
26

1 with the performance of its legitimate function of operating a school, nothing in that opinion is  
2 inconsistent with the “germaneness” test applicable to other forms of compelled support for  
3 speech. That test would likely lead to the identical result as in *Downs* and allow compelled  
4 support for considerable government speech that is germane to valid government conduct just as  
5 *Abood* and its progeny allow compelled support for union speech that is germane to the union’s  
6 valid conduct.<sup>7</sup>

7         The other cases cited by respondent and intervenors likewise mostly address efforts to  
8 compel the government to speak rather than limitations on government speech, are not  
9 controlling in this Court in any event, and are simply wrong in their broad generalizations  
10 regarding government speech. *See, e.g., Knights of the KKK*, 203 F.3d at 1094 (university free  
11 to decline donations by outside parties and cannot be compelled to accept and acknowledge  
12 proffered donations; no discussion of permissible scope of speech not germane to university’s  
13 own primary conduct); *Hunt*, 891 F.2d at 1566 (sustaining state’s decision to fly state flag on top  
14 of state building, though recognizing some First Amendment limits on government speech;  
15 rejecting application of *Abood* based on misdescription of the holding of that case and without  
16 considering the scope of speech that would in fact be permissible under the germaneness  
17 analysis); *McCallum*, 179 F. Supp.2d at 980 (government allowed to limit its funding of  
18 messages to those related to the secular functions of its program and cannot be compelled to  
19 allow service providers to convey their own messages while engaged in providing government  
20 services). As for then-Judge Scalia’s views on government speech in *Block v. Meese*, 793 F.2d  
21 1303, 1312-13 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986), that discussion is the purest of  
22 *dicta*, the court just having rejected the factual predicate of the plaintiff’s claim. Furthermore,

---

24 <sup>7</sup> While petitioners thus do not view the holding in *Downs* as inconsistent with their arguments, to the  
25 extent that some language therein might imply a contrary view, such language is simply *dicta*, is  
26 inconsistent with the First Amendment holdings and principles discussed previously, and should be  
rejected where the question of the limits on government speech is properly presented.

1 given that now-Justice Scalia would apply much the same reasoning to government-compelled  
2 support for third-party speech, *see Finley*, 524 U.S. at 598, his reasoning is extremely suspect.  
3 Ultimately, however, the *Block dicta* gets it wrong, partly because it assumes that government  
4 could not speak at all, rather than that it would be limited to speaking in a fashion that is germane  
5 to its affirmative conduct. Thus, most of the examples of supposedly absurd results, 793 F.2d at  
6 1313, would likely survive the germaneness analysis. Where the government has prohibited  
7 certain conduct, it would generally be germane for it to speak to facilitate compliance with the  
8 prohibition. Similarly, the government plainly can speak to facilitate military recruiting or other  
9 government employment efforts and can advertise when it is selling or providing its own services  
10 or wares. Such speech seems plainly germane and integral to the primary conduct of running  
11 the military, providing various government services, and disposing of government property. And  
12 while individuals within the government can express their views on numerous issues – as such  
13 would be germane to their performance of their substantive jobs – what they may not do is  
14 appropriate the resources of the dissenting minority to amplify and entrench the views of a  
15 current political regime. By focusing on whether speech is germane to some underlying conduct,  
16 the compelled-support-for-speech line of cases strikes the proper balance between speech  
17 germane to implementing government conduct, and speech that merely represents an effort to  
18 entrench currently fashionable views by manipulating the marketplace of ideas through the  
19 compelled support for speech standing alone.

20 Finally, even were we to assume that the First Amendment test for government turned only  
21 on the availability of adequate political checks on government behavior, the Beef Act would still fail  
22 such scrutiny. In numerous ways, the Beef Act and its implementation undermine traditional  
23 political checks on government behavior. The Beef Act insulates itself from any true political  
24 check by the citizenry as a whole by compelling private funding, rather than providing  
25 government funding, thus reducing any direct incentive for taxpayers to scrutinize the program  
26

1 and eliminating the role of House appropriations in the ongoing existence of the checkoff. And  
2 assuming that this is in fact government speech, false attribution of the speech to the cattle  
3 producers prevents the public as well as the rank and file producers themselves from recognizing  
4 objectionable government conduct and rejecting it. Finally, by regulating speech alone, rather  
5 than as an incident to implementing some direct control over conduct, the government eliminates  
6 the political check of public resistance to government “intrusiveness.” *Cf. Frame*, 885 F.2d at  
7 1122 (congressional statements claiming to be avoiding intrusive government regulation and  
8 leaving matters up to the beef industry). Indeed, the very reason that regulations on conduct –  
9 which are more intrusive in a colloquial sense – are subject only to rational basis scrutiny, while  
10 regulations on speech – which are more intrusive in a constitutional sense – are subject to  
11 heightened scrutiny, is that it is the very intrusiveness of direct government regulation that  
12 ensures adequate attention by the polity. It is the insidious nature of controls on speech –  
13 whether compulsions or restrictions – that requires a constitutional, rather than a political, check  
14 on such controls.<sup>8</sup>

#### 15 **IV. COMMERCIAL SPEECH**

16 Respondent’s efforts to apply *Central Hudson Gas & Electric Corp. v. Public Service*  
17 *Commission*, 447 U.S. 557 (1980), to this case continue to be startlingly misguided. First, as the  
18 previous briefing amply demonstrated, and as the United States represented to the Supreme  
19 Court, ““the *Central Hudson* test, which involved a restriction on commercial speech, should  
20 [not] govern a case involving the compelled funding of speech,”” after which the government  
21 concluded that the inapplicability of *Central Hudson* has now “been resolved.” Reply Br. for  
22 the Petitioners, *United Foods*, No. 00-276 (Apr. 9, 2001) at 9-10 n. 7 (quoting *Glickman v.*

---

23  
24 <sup>8</sup> Intervenors’ claimed examples of political controls, Int. SJ Mem. at 10, actually support the opposite  
25 conclusion. The USDA’s involvement goes to enforcing the boundaries of the Beef Act, not providing a  
26 political check on the existence of the Act. Indeed, the USDA’s shifting characterizations of the  
government’s role in the program further undermines political accountability. And the USDA’s informal  
efforts to manipulate checkoff speech further serve to mask the government’s role from the polity.

1 **Wileman Brothers & Elliot, Inc.**, 521 U.S. 457, 474 n. 18 (1997)) (brackets in government  
2 brief). That position was not only correct on the merits, but it should also create a judicial  
3 estoppel against respondent taking the opposite position now. **New Hampshire v. Maine**, 532  
4 U.S. 742, 748-49 (2001) (judicial estoppel prohibits parties from deliberately changing positions  
5 according to the exigencies of the moment); **Iowa Utilities Bd. v. FCC**, 219 F.3d 744, 756-57  
6 (8<sup>th</sup> Cir. 2000) (FCC judicially estopped from changing position it had represented to the U.S.  
7 Supreme Court), *cert. granted in part*, 531 U.S. 1124 (2001).

8         Second, regardless of whether this case involves commercial speech, **Central Hudson**  
9 would still not supercede the **United Foods** analysis. The Supreme Court in **United Foods**  
10 *assumed* that the speech in question was commercial speech and found that irrelevant, holding  
11 that “even viewing commercial speech as entitled to lesser protection, we find no basis under  
12 either **Glickman** or our other precedents to sustain the compelled assessments sought in this  
13 case.” 533 U.S. at --, 121 S. Ct. at 2337.

14         Third, petitioners continue to maintain that the speech at issue in this case is not  
15 commercial speech at all, but rather is political speech or opinion about economic subjects, and  
16 that the **Central Hudson** test is no longer viable in any event. PI Br. at 14-15. The latter  
17 argument, of course, is simply being preserved for appeal should the case reach the Supreme  
18 Court.

19         Fourth, the Beef Act would not survive the **Central Hudson** test, particularly in the strict  
20 form in which the test is currently applied. Petitioners’ prior discussion of the individual  
21 elements of the **Central Hudson** analysis amply demonstrates the problems faced by the Beef  
22 Act under every step of that analysis. Ultimately, however, if this Court determines that **Central**  
23 **Hudson**, rather than **United Foods**, is controlling in this case, the issue cannot be resolved on  
24 summary judgment at this point. Rather, there would need to be substantial discovery on the  
25 conflicting interests pursued by the United States and the USDA with regard to beef  
26

1 consumption, the economic interrelationship between various commodity programs and whether  
2 they simply compete with each other for market share rather than generating a net gain to U.S.  
3 agriculture, and the economic impact of the checkoff program on producers. Each of these  
4 questions goes to the substantiality of the interests asserted, whether those interests are directly  
5 advanced, and whether alternative means would serve those interests as well or better with less  
6 burden to First Amendment interests. Each of the issues is also heavily fact dependent with  
7 considerable evidence under the control of respondent and subject to discovery. Respondent's  
8 selective production on summary judgment of information favorable to it cannot be evaluated  
9 absent more complete discovery into materials they inevitably left out and absent depositions and  
10 cross examinations of numerous witnesses. As but one example, both respondent and  
11 intervenors rely on Ron Ward and some of his prior studies for the proposition that checkoff  
12 promotions return over \$5 in revenue for every \$1 spent. But that claim is based on a host of  
13 assumptions, data, and undisclosed statistical models that can only be properly tested through  
14 competing expert testimony and cross-examination, following access to the supporting materials  
15 and models. Furthermore, even taking the testimony at face value, it does not answer the  
16 question of whether the checkoff yields a net profit for producers rather than a mere increase in  
17 gross revenue. In order for the alleged multiplier to actually advance any government interest,  
18 cattle producers would have to have an absurdly high profit margin of nearly twenty percent. A  
19 more realistic profit margin of ten percent would mean producers netted only fifty cents per  
20 dollar spent to increase sales, thus being left with an overall loss from their checkoff payments.  
21 *Cf.* Resp. PI Br. Exh. B ¶ 9 (rejecting proposed communication claiming increased sales “means  
22 increasing profits”).

23 In the final analysis, all of those issues should be irrelevant in that *United Foods*, not  
24 *Central Hudson*, provides the controlling analysis in this case. But if this Court finds otherwise,  
25 any possibility of summary judgment must await further discovery per Rule 56(f).

26

1 **V. REMEDY**

2 The proper remedy upon a finding that the Beef Act is unconstitutional would be to enter  
3 a declaratory judgment to that effect, invalidating the Beef Act and prohibiting the mandatory  
4 collection of beef checkoff money. The Court should further reverse the finding of the USDA  
5 that petitioners must pay the assessments, penalties, and interest at issue in the enforcement  
6 proceeding, order existing and unspent beef checkoff contributions to be placed into escrow with  
7 the Court, and order a refund of past assessments to the petitioners and other objecting parties in  
8 this case, pursuant to procedures to be determined by the Court upon subsequent briefing. The  
9 continued use of escrowed checkoff funds to fulfill non-avoidable obligations of the Beef Board  
10 should be subject to prior review by this Court of any requests for such use. For any unavoidable  
11 promotional obligations using the escrowed funds, the Court should prohibit the Beef Board  
12 from falsely attributing such promotions to beef producers as a whole.

13 **CONCLUSION**

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

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 Dated this 1st day of March, 2002

2

3

Respectfully submitted,

4

5

By: \_\_\_\_\_

6

**KELLY J. VARNES**  
**HENDRICKSON, EVERSON,**  
**NOENNIG & WOODWARD, P.C.**

7

208 North Broadway, Suite 324  
Billings, MT 59101-1984  
(406) 245-6238

8

9

**ERIK S. JAFFE**  
**ERIK S. JAFFE, P.C.**  
5101 34th Street, N.W.  
Washington, D.C. 20008  
(202) 237-8165

10

11

12

**RENEE L. GIACHINO**  
General Counsel  
**CENTER FOR INDIVIDUAL**  
**FREEDOM**  
901 N. Washington Street, Suite 402  
Alexandria, VA 22314  
(703) 535-5836

13

14

15

16

Attorneys for Petitioners

17

18

19

20

21

22

23

24

25

26