IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and Brenda S. Cochran	)	
	)	
--PLAINTIFFS,	)	Judge James F. McClure, Jr.
	)	
VS.	)	No. 3:00CV-02-0529
	)	
Ann Veneman,	)	
As Secretary, United States	)	
Department of Agriculture	)	
and	)	
National Dairy Promotion Board,	)	
	)	
--DEFENDANTS.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Joseph S. Cochran and Brenda S. Cochran move this Court for an order of summary judgment pursuant to FRCP 56 and 57 declaring that the Dairy Promotion Program of the Dairy Stabilization Act of 1983, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128 and the resultant Dairy Promotion and Research Order found at 7 C.F.R. Part 1150 (Promotion Order and together the Dairy Promotion Program) violate the First Amendment to the

Constitution.

There is no genuine dispute as to material fact. Plaintiffs are required to speak when they wish to be silent because the Dairy Promotion Program exacts subsidies from them to support the speech of others. Such compulsion to speak infringes upon their right to free speech and freedom of association in violation of the First Amendment to the Constitution. Plaintiffs are entitled to judgment as a matter of law.

The Motion is supported by a Memorandum in Support of Plaintiffs' Motion for Summary Judgment and the Affidavit of Joseph S. Cochran.

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Joseph S. Cochran and Brenda S. Cochran --PLAINTIFFS, VS. Ann Veneman, As Secretary, United States Department of Agriculture and National Dairy Promotion Board, --DEFENDANTS.	)))))))))	Judge James F. McClure, Jr. No. 3:00CV-02-0529

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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June 5, 2002

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III. INTRODUCTION

The Dairy Stabilization Act of 1983, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C.§4501 *et seq*., ("Act"), unconstitutionally compels the Plaintiffs, Joseph S. and Brenda S. Cochran ("Cochrans"), to speak when they wish to be silent by exacting subsidies from them to support the speech of others. Silence is as protected as speech itself.

The Cochrans market their milk themselves. Under the Act, fifteen cents per hundredweight of that milk is assessed to support the speech activity of others. The sole object of the Dairy Promotion Program is speech. Compelled subsidy of speech is unlawful. The Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), has held that a similar mushroom promotion order violates the First Amendment because it exacts subsidies for promotion. ("We have not upheld compelled subsidies for speech in the context of a program *where the principal object is speech itself.*") *Id*. at 415. [emphasis added].

IV. PROCEDURAL HISTORY OF THE CASE

Cochrans commenced this case on April 2, 2002. Service was made. No Answer or other responsive pleading has yet been filed.

V. ISSUE PRESENTED

Whether the Dairy Promotion Act compels the subsidization of speech in violation of the First Amendment?

VI. BACKGROUND

A. The Dairy Promotion Act compels subsidies for speech.

Some dairy producers, not including the Cochrans, who support generic milk advertising wanted all other producers (whether they agree or not) to contribute financially to their speech efforts. In furtherance of this goal of universal participation in the funding of advertising, they convinced the Congress to replace voluntary regional, state and federal promotion orders, promulgated under the Agricultural Marketing and Agreement Act milk marketing orders (7 U.S.C. 608c) ("AMAA"), and other state laws with a universal and mandatory program at a higher level of contribution.

The resulting legislation, the Dairy Promotion Act, 7 U.S.C. §4501 *et seq.*, has speech as its sole purpose.

The challenged provision is found at 7 U.S.C. §4504(g),and reads as follows:

> (g) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board. * * * The rate of assessment prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof. * * *

The Secretary has interpreted this section to require that *all milk producers, even those objecting, must contribute.* 7 C.F.R. §1150.152 ("Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment *on all such milk handled for the account of the producer* at the rate of 15 cents per hundredweight of milk. . ."[emphasis added]. Milk is elsewhere defined as milk of any grade and a producer is defined as any one producing milk commercially. 7 C.F.R. §§1150.110,1150.111.

The Cochrans challenge the Act which compels them, along with other dissenters, to financially support other dairy farmers' speech.

B. <u>The Dairy Promotion Act is speech.</u>

The sole purpose of the Dairy Promotion Program is speech. The declared policy of the Program is to establish "an orderly procedure for financing and . . . carrying out a coordinated *program of promotion*. . ." 7 U.S.C. §4501(b) [emphasis added]. "Promotion" is defined as "paid *advertising*, sales *promotion* and *publicity* to advance the image and sales of and demand for dairy products." 7 U.S.C. §4502(i) [emphasis added]. Even the research being funded is for promotion of milk and milk products. The statute calls for plans or projects that promote "consumption of dairy products, for research projects *related thereto*..." 7 U.S.C. §4504(a) [emphasis added].

The speech is determined, produced and approved by a few dairy farmers on

the Dairy Promotion Board. The Dairy Promotion Board, comprised of producers nominated by groups in the promotion business, designs the media and print campaigns in furtherance of the promotional activities. 7 U.S.C.§4504. Under the mandate of the Act, the Secretary assesses all dairy farmers, including the Cochrans, at the rate of fifteen cents per hundredweight to subsidize those campaigns.

Producers who do not pay the assessment are subject to fines and penalties. The Act and resulting order require those that purchase or market a producer's milk to collect the fifteen cent per hundredweight assessment and remit it to the Board. Upon failure of a person to comply with the terms of the order, the Secretary can obtain a restraining order and levy a civil fine of up to $1000 for each violation and, if willful, a penalty equal to 100 percent of the assessment levied. 7 U.S.C. §4510. The power of the federal courts can be used to enforce compliance. *Id*. and 7 U.S.C. §4511. The ability to "opt out" or receive a refund under the AMAA was not provided. *Cf* 7 U.S.C. §608c(5)(I).

C. **The Dairy Promotion Program is not part of any other collective activity.**

The Dairy Promotion Program is a stand alone program for speech. Its authority is separate from, and its reach is broader than, the economic regulations found in other federal or state dairy programs. There is not one other dairy policy which is mandatory and so universal in its reach.

There is no required coordination between the Dairy Promotion Program and these other policies. Each operate under different statutes, regulations, administrative boards or commissions, each have different purposes and scopes, and each can be terminated separately.

1. <u>The AMAA milk marketing orders are a separate and voluntary program</u>.

The government may argue that since dairy producers may be subject to federal milk marketing orders under the AMAA, 7 U.S.C. §608c, the compelled speech is appropriate. Such orders do not speak or compel speech. They do not even compel economic activity on the part of producers. Their focus is on regulating *buyers* of milk with minimum prices, not regulating *producers.* 7 U.S.C. §608c(13).

The milk orders under the AMAA do not restrict a producer's production either in volume or means and nothing compels any producer to market to any specific market or market their milk at all. Currently the pricing formulae rely upon commodity prices. *See,* 7 C.F.R. §§1000.50 - 52. The minimum prices do not include the fifteen cent dairy promotion assessment. Class I prices (prices paid for beverage milk) are a fixed "differential" plus the monthly Class I mover. In setting these differentials, the Secretary identified the factors used and those factors do not include the producers' cost of advertising or costs associated with the promotion program. 64 Fed. Reg. 16026, 16109 - 16110 (April 2, 1999).

The eleven current milk marketing orders are not universal in their scope. 7

C.F.R. Part 1000 - 1136. Parts of Pennsylvania are in two separate orders, 7 C.F.R. §1002.01 (Northeast Area) and 7 C.F.R. §1033.01(Mideast Area). The rest of Pennsylvania is unregulated by federal orders. Some states are not subject to federal orders at all – *e.g.*, California, Virginia, Maine and Montana.

The voluntary milk marketing orders can be terminated by producers. 7 U.S.C. §608c(12). *See, also,* 62 Fed. Reg. 47923 (September 12, 1997) (termination of Tennessee Valley Milk Marketing Order). Termination of any one order does not impact the Dairy Promotion Program. Conversely, termination of the Dairy Promotion Program will not affect the milk marketing orders.

2. <u>The Dairy Price Support Program is a separate program.</u>

The Dairy Price Support Program is not part of either the AMAA or the Dairy Promotion Program. 7 U.S.C. §1446 and 7 C.F.R. Part 1430. It neither speaks nor compels participation in any collective economic activity. Manufacturers and processors of cheese, nonfat dry milk, and butter, but not dairy producers, can sell those finished products to the government as a buyer of last resort. The prices paid do not include any provision for advertising. That Dairy Promotion Program and the Price Support Program are separate programs is further supported by the Federal Agriculture Improvement and Reform Act (FAIR Act) of 1996 which provided for reduction and elimination of price supports but not the Dairy Promotion Program. 7 U.S.C. §7251. Since then, the Dairy Promotion Program has been renewed, most

recently with the Farm Security and Rural Investment Act of 2002, Pub. L. 107-171 §1501. Producers, including the Cochrans, have no direct voice in the Price Support Program either by boards or individually.

3. Other government statutes insure producers the freedom not to be part of any collectivist activity.

Federal law guarantees that dairy producers need *not* participate in collectivist activities. The milk orders under the AMAA cannot be forced upon a dairy producer. The AMAA does not regulate producers. 7 U.S.C. §608c(13)(B). A producer benefits from the orders only if it chooses to deliver milk to a regulated handler or plant. *See, e.g.,*7 C.F.R. §1033.12 (definition of producer). Producers have the freedom to join or not join a cooperative. Agricultural Fair Practices Act of 1967, 7 U.S.C. §2301 *et seq*. (AFPA). *See, e.g., Michigan Canners and Freezers Ass'n., Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461 (1984).

4. The Cochrans are not part of a collective activity which markets their milk.

The Cochrans are engaged in the production of milk for commercial use on a dairy farm located in Tioga County, Pennsylvania. Cochran Declaration ¶2. Pursuant to the Act and regulations, they are required to subsidize the speech activities of the Dairy Promotion Program through the mandatory checkoff from their milk checks and through the attribution of the resulting speech to them as dairy producers. *Id.* ¶¶4-5,8.

The Cochrans operate a dairy farm using traditional farming methods. Their use

of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the Earth's resources, promotes the environment, and, in sum, provides a healthier animal, product, and planet. *Id.* ¶10. Their farming methods differ markedly from those generally found at other commercial dairies. *Id.* ¶11. They are not members of any marketing cooperative. Aside from being compelled to support the promotion of milk products, the Cochrans have full marketing autonomy and, in fact, they annually and individually negotiate with processing plants for the purchase of the milk produced on their farm. They alone determine how to sell their milk and to whom it will be sold, insuring compliance with sanitary regulations. *Id.* ¶¶15-19.

As milk producers, the Cochrans can decide not only whether to dairy, but whether to produce grade B milk (for manufacturing purposes only) or grade A milk (for fluid as well as manufacturing purposes), and whether to individually market their milk or, alternatively, join with other farmers to market their milk.

Under the Act, however, the Cochrans cannot choose whether or not to subsidize speech of others that promotes others' products nor can they decide whether to fund promotional material that counters, weakens, or does not further their own opinions as to the different nutritional values in their milk as contrasted with the milk generically promoted.

The fifteen cent per hundredweight assessment represents a significant portion

of the gross profit margin of the Cochran's dairy operation. In some years the total assessment prevents the Cochrans from implementing essential farm management practices. *Id.* ¶8. Failure to implement these practices impairs the Cochrans' ability to remain competitive in the ever changing dairy industry. *Id.* ¶9.

The generic advertising for milk and milk products, which the Cochrans are compelled to subsidize, denies the existence of the value of such alternative sources of milk by its implication that milk is a generic product and, thus, runs counter to the Cochran's own speech and views regarding the production and marketing of milk.

D. <u>The speech is created and directed by other producers.</u>

By design, the content of the speech the Cochrans are compelled to subsidize comes from groups, not entirely comprised of dairy producers, whose "overriding interest" includes "promotion of the nutritional attributes of fluid milk and dairy products." Under the Act, the National Dairy Promotion Board is empowered to promote milk products. 7 U.S.C. §4504(c). The membership of the Board comes from nominations by organizations who are already involved in dairy promotion and receive payments from the subsidy. In accordance with the Act, the Secretary takes nominations for Board Members from "certified organizations" under the Act. The Act specifies the requirements for certification as follows:

> The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk and whether the primary or overriding interest of the organization is in the production or

> processing of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

7 U.S.C. § 4505. The Cochrans are not members of any such group.

VII. SUMMARY OF ARGUMENT

The Cochrans are entitled to summary judgment in their favor declaring the Dairy Promotion Program unconstitutional and prohibiting the Secretary and the National Dairy Promotion Board from exacting subsidies from the Cochrans for its funding.

Speech compelled is speech constrained. "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from ...compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods, Inc.*, 533 U.S. 405,410 (2001). In *United Foods*, the Court held unconstitutional a requirement that a mushroom producer subsidize, through mandatory assessments, a generic mushroom promotion order similar to the one challenged here.

In *United Foods*, the Court framed the issue as follows: "The question is 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." *Id.* That mirrors the issue in this case: Whether the Secretary may underwrite and sponsor speech for the sole purpose of promoting dairy products when that speech is funded by mandatory subsidies from dairy producers

some of whom object to the ideas the promotion program advances. Analysis of the two programs yields the same resolution - the programs are unconstitutional.

The constitutional analysis begins with a determination of whether the subsidy is for germane speech that arises out of legitimate associational activity, or, whether the speech is the reason itself for the subsidy and activity. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469 (1997) ("[i]n answering that question we stress the importance of the statutory context in which it arises.").

Forming a body (*e.g.* all dairy farmers) solely for speech does not permit compelled subsidy of speech. *United Foods*, 533 U.S. at 415. ("We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.") The National Dairy Promotion Board exists solely to create speech on dairy, nothing more. It does not derive its power or direction from any entity or collective body which includes the Cochrans as members. The Cochrans are not members of any association or participants in any collective activity which, incidental thereto, uses the fees of the Cochrans to subsidize speech. In this way, the issue in this case differs from those cases considering subsidized speech arising out of membership in associations, such as unions or bar associations. Thus, the cases of *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) (establishing a standard of germaneness to speech of unions using union dues) and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (holding that an attorney could be compelled to fund an integrated bar including the

speech of that bar association that was germane to the collective activity) are distinguishable.

The Cochrans have retained their market autonomy. They market their milk individually negotiate pricing. The *United Foods* Court distinguished between those cases in which "the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy" *United Foods*, 533 U.S. at 411, and those in which the speech is the essence of the activity. Thus, *Glickman, supra*, is not applicable to this case (held that promotion programs that were funded out of assessments for other collective marketing activity did not violate the First Amendment).

The Dairy Promotion Program requires the Cochrans and other producers, under threat of severe fines and penalties, to subsidize speech of others. Thus, the line of cases of *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), that addresses the ability of government to regulate and limit commercial speech in some circumstances, does not apply to this analysis. *See, United Foods*, 535 U.S. at 409-10, *Glickman*, 521 U.S. at 470.

That the speech at issue in this case is "commercial" in nature is of no moment, for the First Amendment provides protection even to commercial speech. *United Foods*, 533 U.S. at 409, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Nor does the fact that it is government coercion

to speak remove this matter from First Amendment protection. In *Riley v. National Federation of Blind, Inc.*, 487 U.S. 781 (1988), the Court held that to be forced to speak is no different than to be restrained from speaking. Silence is as much speech as speech itself. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Finally, the Court has held that being compelled to fund speech is no less intrusive than being restrained from speaking. *Abood*, 431 U.S. 209.

VIII. STANDARDS FOR REVIEW

In their motion for summary judgment the movants are entitled to judgment only if they meet the requirements of FRCP 56(c). Under this rule, the Cochrans, as the moving party, prevail because there is no dispute as to any fact which will change the outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Defendants, as the non-moving parties, must show specific facts underscoring a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574(1986). Upon a showing that the non-moving party cannot establish an essential element to its case and upon which that party bears the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

IX. ARGUMENT

United Foods held that a similar promotion order for mushrooms which exacts subsidies from those who disagree with the speech violates the First Amendment. That Court focused the inquiry as: "The question is 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." *United Foods*, 533 U.S. at 410.

In reaching the conclusion that the mushroom promotion order was unconstitutional, the Court distinguished its earlier decision in *Glickman* when it stated "The program sustained in *Glickman* differs from the one under review [i.e., mushroom program] in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy." *Id.* at 411. It went on to say, "The opinion and the analysis of the Court [in *Glickman]* 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 program with a particular message was the logical concomitant of a valid scheme of economic regulation." *Id.* at 412.

The Court then stated that the beginning of a First Amendment analysis for promotion order challenges is to determine if the challenged activity is compelled speech or forced association. *Id.* at 413 ("... for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place."). The speech to which the Cochrans object is not associational speech. The Cochrans are not members of any such group. Thus, further analysis need not consider associational activity.

The mushroom producers in *United Foods* were not prevented from "making their own marketing decisions." *Id.* at 412. Nor are the Cochrans. Additionally, neither was "forced to associate as a group which makes cooperative decisions." *Id.* at 413.

In contrast, in *Glickman,* the mandated assessments for speech "... were ancillary to a more comprehensive program *restricting marketing autonomy*." *Id.* at 411 [emphasis added]. In that case, the Court found that the producer of summer fruits was part of a larger collective marketing program in which the objector had given up its market autonomy. The issue was not whether the producer was compelled to speak, but whether the association could speak using part of the funds the producer paid for the marketing services. *Id.* at 412

Even in *Glickman* the Court emphasized the predicate of the collective activity when it first determined that the advertising arose out of the marketing orders. It framed the question in that case as "whether we should review the assessments used to fund collective advertising, *together with other collective activities*, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues." *Glickman*, 521 U.S. at 469 [emphasis added].

The Cochrans maintain market autonomy for their milk. They decide how to produce their milk, how much to produce, to whom it is marketed and at what price.

As the Supreme Court noted in *United Foods*, "The program sustained in *Glickman* differs from the one under review in a most fundamental respect." *United Foods*, 533 U.S. at 411. The subsidies instantly challenged address a program that is not part of collective economic activity. It is speech alone.

Further, like the mushroom order, the dairy promotion order "...does not require group action, save to generate the very speech to which some handlers object." *Id.* at 415. Compelled association for speech alone has never been upheld. *Id.* The Dairy Promotion Program does not price any product, it does not market any milk or establish quotas for production, it has no members.

In contrast, the generic advertising in *Glickman* was one part of a broader economic program. *Id.* The program set production quotas, allocated marketable quantities among its members, handled the surplus production, equalized the cost of such handling among producers and handlers, established reserve pools of products, provided inspection services, fixed the size, capacity, weight, dimensions, and packaging of the shipped containers, and, established production and marketing research. 7 U.S.C. §608c(6).

The statutory context in *Glickman* contrasts with that in the instant case. The Dairy Promotion Program is not part of such detailed marketing orders. Though there can be federal milk marketing orders under 7 U.S.C. §608c, these are neither universal nor uniform in their application. For example, much of Pennsylvania is unregulated

by the Federal Milk Marketing Orders. Tioga County, where Cochrans reside, is not located in any milk marketing order. *See,* 7 C.F.R. §§1001.2, 1033.2. The Cochrans choose to participate in a marketing order by where they choose to sell their milk. 7 C.F.R. §1033.12, 7 C.F.R. §1001.12.

Milk Marketing Orders do not promote milk. Dairy Promotion Programs are independent of the marketing orders. It is legally possible to have no federal milk marketing orders but still have the dairy promotion order. Conversely, the existence of the federal milk marketing orders does not mean the promotion orders continue. Termination of a federal milk marketing order is pursuant to 7 U.S.C. §608c(13) while continuation of the Dairy Promotion Program is based upon a separate statute. 7 U.S.C. §4507.

The Dairy Promotion Program is not part of any other statutory scheme. It is authorized by a separate statute unrelated in scope or purpose to the economic regulations such as the AMAA, 7 U.S.C. §§601-611. The Dairy Promotion Program is not an amendment to the AMAA, but a separate provision entirely at 7 U.S.C. §4501 *et seq*.

The Dairy Promotion Program is administered by a completely separate board. The Dairy Promotion Program is administered by the National Dairy Promotion and Research Board subject to the approval of the Secretary. The AMAA is administered at the market area level by a milk market administrator. The Dairy Board has no

power over milk marketing orders, nor do milk marketing orders have power over the promotion order.

The Dairy Promotion Program has an independent purpose– "the establishment. . . of an orderly procedure for financing. . . and carrying out a coordinated *program of promotion.*" 7 U.S.C. §4501 [emphasis added].. Congress declared the policy of the AMAA to "establish and maintain ... orderly marketing conditions," protect the interests of the consumer, provide an orderly flow of supply, and to avoid disruption of the markets of such commodity. 7 U.S.C. §602.

In any event, the potential or existence of industry regulation is insufficient to invoke exemption from First Amendment scrutiny for speech. The Court stated that *"[i]n answering that question we stress the importance of the statutory context in which [speech] arises." Glickman,* 521 U.S. at 469 [emphasis added]. The context consisted of two aspects. First, the speech arose out of marketing orders. "California nectarines and peaches are *marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws.*" *Id.* [emphasis added].

Second, the speech was part of a broader collective activity. "The business entities that are compelled to fund the generic advertising at issue in this litigation *do so as a part of a broader collective enterprise in which their freedom to act*

independently is already constrained by the regulatory scheme." *Id.* [emphasis added].

Since dairy promotion is not part of collective activity, the analysis turns to compelled speech cases. " Our precedents concerning compelled contributions to speech provide the beginning point for our analysis." *United Foods,* 533 U.S. at 410.

Commercial speech, too, enjoys First Amendment protection. *Virginia Bd. of Pharmacy,* 425 U.S. at 748. There is no need to explain why the Cochrans disagree or the degree of disagreement with the producer subsidized speech. What may seem trivial to one is paramount to another. That is the essence of freedom of speech, its value is not weighed by the courts or the government, but by the individual speaking or keeping silent. The *United Foods* court stated, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny." *United Foods,* 533 U.S. at 411.

Silence is speech. A producer has as much right to remain silent as she has to speak. *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943). Further, under First Amendment jurisprudence, she is free from being compelled to pay subsidies for

speech to which she objects. *Abood*, 431 U.S. 209 and *Keller,* 496 U.S. 1.

Regulation of the dairy industry does not remove the First Amendment protection. Regulation permeates all facets of our complex commercial world. To say the power to regulate is the power to compel speech renders the First Amendment a nullity. All activity is either regulated or subject to regulation. If economic regulation alone suffices to cloak the compelled speech from First Amendment scrutiny, then the government can compel speech in any event. Under this argument, where there is rent control, landlords could be compelled to promote cleanliness or support crime stoppers. The regulation of consumer credit would thus permit compelled speech by credit card issuers on the use of credit and instructions in personal budgeting. Exemption from antitrust would justify requiring Major League Baseball to promote government designed programs on physical fitness, sportsmanship, or competition, or whatever Congress wanted.

This is more than compelled speech, it is the enactment of subsidies for the *speech of others*. The Dairy Promotion Program is administered by the Dairy Promotion Board which is comprised of twelve dairy farmers. These dairy farmers are nominated by various "certified organizations" which, among other critiera, show they are interested in promoting milk in this fashion. These producers hire the talent that creates the media programs and these producers oversee the program. The Cochrans pay for it. It is the speech of these producers and groups, not the Cochrans.

X. CONCLUSION

Speech compelled is speech prohibited. The Congress has no more authority under the Constitution to compel the Cochrans, or any dairy farmer, to subsidize the speech of other dairy farmers than it has to keep the Cochrans silent while others speak. The compulsory assessment alone violates the First Amendment and it should be voided.

The Dairy Promotion Program is pure speech. It is not a part, integral or otherwise, of a broader collective enterprise. Rather it is speech for the sake of speech. Under *United Foods*, compelled subsidization of the speech of other dairy farmers is not permitted.

When some individuals of one opinion obtain the power of the federal government, the penalties of its laws, the prestige of its offices, and the enforcement of its courts to compel others who hold another opinion to, nonetheless, fund and endorse those very programs and ideas with which they disapprove or simply choose to disassociate, then the monopoly of the few has set aside the marketplace of competing ideas, the needed discourse ceases, and the premise of the First Amendment no longer serves its purpose.

That portion of the Dairy Promotion Program that compels the Cochrans to participate in government controlled speech against their will should be declared unconstitutional in violation of the First Amendment.

WHEREFORE, the Cochrans respectfully request that this Court find the compelled subsidies to the Dairy Promotion Program unconstitutional and enjoin the Secretary from enforcement of that provision.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Memorandum in Support of Plaintiffs' Motion for Summary Judgment contains 4988 words based upon a word count done by Wordperfect 9.

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CERTIFICATE OF SERVICE

This is to certify that on this 5th day of June, 2002, a copy of the foregoing was served by first class mail, postage prepaid on the following:

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