No. 03-1164

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

2. Whether the district court erred in issuing a nationwide injunction against the collection of all assessments under the Beef Act, including those from cattle producers who support the generic advertising and those used to fund activities other than generic advertising.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Ann Veneman, Secretary, United States Department of Agriculture; the United States Department of Agriculture, and the Cattlemen's Beef Promotion and Research Board. The respondents are:

Livestock Marketing Association
Robert M. Thullner
John L. Smith
Ernie J. Mertz
John Willis
Pat Goggins
Herman Schumacher
Jerry Goebel
Leo Zentner
Nebraska Cattlemen, Inc.
Gary Sharp
Ralph Jones

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The Solicitor General, on behalf of the Secretary of Agriculture, the United States Department of Agriculture, and the Cattlemen's Beef Promotion and Research Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 335 F.3d 711. The opinion of the district court (App., *infra*, 31a-61a) is reported at 207 F. Supp. 2d 992.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on October 16, 2003 (App., *infra*, 62a). On January 5, 2004, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 13, 2004. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech.

2. The Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, is reproduced at App., *infra*, 65a-83a.

3. The Beef Promotion and Research Order, 7 C.F.R., 1260.101 *et seq.*, is reproduced in relevant part at App., *infra*, 84a-119a.

STATEMENT

This case presents a First Amendment challenge to the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, which requires beef producers and importers to pay assessments to fund generic promotion, research, and industry and consumer information conducted under the supervision of the Secretary of Agriculture. The Eighth Circuit held in this case that the Beef Act violates the First Amendment rights of producers who object to sharing the costs of such advertising, rejecting two grounds of defense of such statutes that this Court did not consider in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). The Eighth Circuit then affirmed a nationwide injunction directing the Secretary to cease collecting *all* assessments under the Beef Act, thereby effectively terminating a program that not only has engaged in generic advertising such as the "Beef: It's What's For Dinner" campaign, but that has funded research and public education on food safety issues, including bovine spongiform encephalopathy (BSE) or "mad cow" disease. The Sixth Circuit recently resolved substantially similar issues against the government in *Michigan Pork Producers Association* v. *Veneman*, 348 F.3d 157

(2003), in which the government also intends to file a petition for a writ of certiorari.

1. The United States extensively regulates the production, processing, and marketing of beef. Federal law establishes a comprehensive beef inspection program, see 21 U.S.C. 601 *et seq.*; prohibits price manipulation and deceptive marketing, see 7 U.S.C. 181 *et seq.*; mandates price reporting, see 7 U.S.C. 1635 *et seq.*; and imposes requirements for organically produced beef, see 7 U.S.C. 6501 *et seq.* In addition, the United States Department of Agriculture (USDA) operates a system of meat grading that, while voluntary, encompasses most beef processed in the United States. See 7 U.S.C. 1621 *et seq.*; Trial Tr. 319. One of the federal laws regulating the beef industry is the Beef Act, at issue in this case.

a. In the Beef Act, Congress found, among other things, that "production of beef and beef products plays a significant role in the Nation's economy"; that "beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment"; and that "maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation." 7 U.S.C. 2901(a)(2)-(4). Accordingly, Congress declared as its purpose in enacting the Beef Act "to authorize the establishment * * * of an orderly procedure for financing * * * and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b).

The Beef Act directs the Secretary of Agriculture to promulgate an order implementing such a program, 7 U.S.C. 2903; defines the terms "consumer information," "industry

information," "promotion," and "research," 7 U.S.C. 2902(6), (9), (13), and (15); and specifies the provisions that are required to be contained in the order, 7 U.S.C. 2904. The Act provides for the order to remain in effect only if approved by a majority of cattle producers voting in a referendum. 7 U.S.C. 2906(a). The Act also authorizes the Secretary to conduct subsequent referenda on the continuation of the program at the request of "a representative group" consisting of at least 10% of cattle producers. 7 U.S.C. 2906(b).

In 1986, the Secretary promulgated the Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260. See 51 Fed. Reg. 26,132. In 1988, the Beef Order was approved by nearly 80% of cattle producers voting in a referendum. C.A. App. 580.

b. The Beef Act and the Beef Order establish two entities to assist in conducting the program of beef promotion, research, and consumer and industry information. See 7 U.S.C. 2904(1)-(5); 7 C.F.R. 1260.141-1260.151, 1260.161-1260.169.

The larger of the entities is the Cattlemen's Beef Promotion and Research Board (Beef Board), which is composed of 110 members, each of whom is a domestic cattle producer or an importer of cattle or beef. 7 U.S.C. 2904(1); 7 C.F.R. 1260.141(b). The members are appointed by the Secretary from among the nominees of state associations, which are certified by the Secretary as representing cattle producers within their States. 7 U.S.C. 2905. A person cannot serve on the Beef Board for more than two consecutive three-year terms. 7 U.S.C. 2904(3).

The Beef Promotion Operating Committee (Operating Committee) consists of 20 members, ten of whom are elected by the Beef Board from among its members and ten of whom are cattle producers "elected by a federation that includes as members the qualified State beef councils." 7 U.S.C.

2904(4)(A).[1] The federation-elected members must be certified by the Secretary to be "producers that are directors of a qualified State beef council" and to have been "duly elected by the federation as representatives to the [Operating] Committee." 7 U.S.C. 2904(4)(A). A person cannot serve on the Operating Committee for more than six consecutive one-year terms. 7 U.S.C. 2904(5).

The Beef Act and the Beef Order delineate the functions of the Beef Board and the Operating Committee. The Operating Committee is responsible for "develop[ing] plans or projects of promotion and advertising, research, consumer information, and industry information." 7 U.S.C. 2904(4)(B). It also is responsible for "developing and submitting to the [Beef] Board, for its approval, budgets on a fiscal year basis of its anticipated expenses and disbursements, including probable costs of advertising and promotion, research, consumer information, and industry information projects." 7 U.S.C. 2904(4)(C). The Beef Board, in turn, is responsible for, among other things, reviewing and approving the Operating Committee's annual budget and submitting the budget to the Secretary for her approval; administering the Beef Order and recommending amendments to it; and "encourag[ing] the coordination of programs of promotion, research, consumer information and industry information" conducted under the Beef Act. 7 U.S.C. 2904(2); 7 C.F.R. 1260.150(p).

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[1] See 7 C.F.R. 1260.112 (defining "federation" as the Beef Industry Council of the National Live Stock and Meat Board or any successor organization); 7 U.S.C. 2902(14) (defining "qualified State beef council" as "a beef promotion entity" that is authorized by state statute or that is "organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the [Beef] Board as the beef promotion entity within such State").

c. The activities of the Beef Board and the Operating Committee are funded by a $1 per head assessment (often referred to as a "checkoff") on all cattle sold in, or imported into, the United States. 7 U.S.C. 2904(8). The Beef Act prohibits the use of assessment revenues "in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the [Beef] [O]rder." 7 U.S.C. 2904(10). In States with a qualified state beef council, the state council collects the assessment, sending at least 50 cents of every dollar collected to the Beef Board and retaining the rest for activities authorized by the Beef Act. 7 C.F.R. 1260.172.

d. The Secretary, through USDA's Agricultural Marketing Service, exercises comprehensive control over the use of assessment revenues by the Beef Board and the Operating Committee. The Secretary approves their annual budget, and they may incur only those expenses that the Secretary finds to be reasonable. 7 U.S.C. 2904(4)(C); 7 C.F.R. 1260.150(f) and (g); 7 C.F.R. 1260.151. The plans, projects, and contracts of the Beef Board and the Operating Committee must be approved by the Secretary. 7 U.S.C. 2904(6)(A) and (B); 7 C.F.R. 1260.168(e) and (f). The Secretary may inspect and audit the books and records of the Beef Board and the Operating Committee at any time. 7 U.S.C. 2904(7)(A) and (B).

In practice, USDA exercises approval authority over all promotional materials, including advertising, and all producer communications in advance of their dissemination. C.A. App. 456; Tr. 307. Because USDA personnel work closely with the Beef Board and the Operating Committee from the inception of a project to resolve any potential concerns, USDA rarely has had to invoke its formal authority to prevent the implementation of a project. C.A. App. 455-456, 460-66; Tr. 202, 270, 303-308. USDA also reviews the projects undertaken by state associations using assessment

funds. C.A. App. 456-457; Tr. 206-207, 316. At times, USDA has instructed the Beef Board, the Operating Committee, and the state councils on certain projects that USDA expects them to undertake. Tr. 295-296, 299-300.

2. In December 2000, respondents Livestock Marketing Association, Western Organization of Resource Councils, and several individual cattle producers brought this suit against USDA, the Secretary, and the Beef Board. The suit sought, among other things, to enjoin the Beef Board from making certain statements in connection with a proposed referendum on the continuation of the Beef Order. After this Court's decision in *United Foods*, the plaintiffs amended their complaint to allege that the Beef Act and the Beef Order violate the First Amendment to the extent they require cattle producers and importers to pay assessments for generic advertising with which they disagree. Respondents Nebraska Cattlemen, Inc., and several individual producers intervened to defend the Beef Act and the Beef Order. See App., *infra*, 3a-5a.

The district court held, after a two-day bench trial, that the Beef Act "is unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object." App., *infra*., 48a. The court declined to analyze the Beef Act under the intermediate scrutiny analysis articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 563-566 (1980), which considers whether a regulation of commercial speech is narrowly tailored to advance a substantial governmental interest. The court viewed that standard as applying only to "restriction[s] on commercial speech" as distinguished from "compelled funding of speech." App., *infra*, 41a. The court held that the Beef Act could not be sustained under the alternative standard applied in *United Foods* and *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), stating that the Beef Act "is, in all material respects,

identical" to the Mushroom Promotion, Research, and Consumer Information Act of 1990 (Mushroom Act), 7 U.S.C. 6101 *et seq.*, which was held not to satisfy that standard in *United Foods*. App., *infra*, 47a.

The district court further held that the generic advertising conducted under the Beef Act is not government speech, which objecting persons may be required to fund without violating their First Amendment rights. App., *infra*, 49a-57a. The court accorded significance to the facts that the Beef Board is composed of members of the beef industry, not "government employees," and that its activities are funded by assessments on the beef industry, not "general tax revenue." *Id.* at 54a-55a. The court also expressed the view that the Secretary's oversight of the Beef Board's activities is generally confined to assuring compliance with the Beef Act and the Beef Order. *Id.* at 55a.

As relief, the district court entered a declaratory judgment stating that the assessment provisions of the Beef Act and the Beef Order "are unconstitutional and unenforceable" as well as a nationwide injunction prohibiting "any further collection of beef checkoffs." App., *infra*, 61-62a. Although the court recognized that the plaintiffs had raised no First Amendment objection to some of the Beef Board's activities —such as its research and information activities—the court declined to confine the injunction to the portion of assessments used for the generic advertising to which the plaintiffs objected. *Id.* at 57a-58. The court reasoned that a narrower injunction "would, in essence, rewrite the Act so as to make it a voluntary assessment." *Ibid.* The court also declined to limit the injunction to the collection of assessments from the plaintiffs in this case, stating that to do so "would only encourage * * * additional lawsuits in this and other federal jurisdictions." *Id.* at 58a. The injunction was stayed pending appeal. *Id.* at 10a.

3. The court of appeals affirmed. App., *infra*, 1a-30a.

The court of appeals rejected the proposition that the Beef Act does not violate the First Amendment because all of the speech funded by its assessments is government speech. The court acknowledged that the "government speech doctrine has firm roots in our system of jurisprudence." App., *infra*, 15a. The court reasoned, however, that the doctrine protects the government only against challenges to its "choice of content" of its speech, not against challenges, such as the one in this case, to "the government's authority to compel [persons] to support speech with which they personally disagree." *Id.* at 17a. Accordingly, the court concluded that the plaintiffs' claim was reviewable not under the categorical rule applied to insulate government speech from First Amendment challenge, but under "a balancing-of-interests test to determine whether or not the challenged governmental action is justified." *Id.* at 19a.

The court of appeals then purported to apply such a test to the Beef Act, in the framework of *Central Hudson*'s intermediate scrutiny standard. App., *infra*, 20a-28a. The court recognized that this Court had no occasion to apply the *Central Hudson* standard in *United Foods*. *Id.* at 20a; see *United Foods*, 533 U.S. at 410 (noting that the government had not urged that the statute at issue there be sustained under the *Central Hudson* standard). The court nonetheless treated *United Foods* as essentially dispositive of the *Central Hudson* analysis in this case. In particular, the court viewed *United Foods* as inconsistent with the proposition that the Mushroom Act in that case—or the textually similar Beef Act here—serves a sufficiently substantial governmental interest under *Central Hudson* to justify any infringement of objecting producers' First Amendment rights to avoid compelled contributions to support generic advertising. App., *infra*, 28a.

Having found a First Amendment violation to that extent, the court of appeals then sustained the district court's na-

tionwide injunction against the collection of all assessments under the Beef Act. App., *infra*, 28a-29a. The court rejected the government's arguments that any relief should be confined to the plaintiffs in this case, as well as to the portion of the assessment used to fund the generic advertising to which they objected. The court reasoned that "no remaining aspects of the [Beef] Act can survive," because the Beef Act (in contrast to a predecessor statute) contains no express severability provision, and because "the 'principal object' of the Beef Act is the very part that makes it unconstitutional (*i.e.*, compelled funding of generic advertising)." *Id.* at 29a.[2]

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional a central provision of an Act of Congress designed to protect the livelihood of cattle producers and others in the beef industry, to provide information to consumers, and to strengthen the national economy. That holding is incorrect, for the Beef Act is not a law "abridging the freedom of speech" under the First Amendment. The Beef Act promotes speech—by the government—through modest assessments on persons who voluntarily participate in the beef industry. Respondents produce the very product that the government has chosen to promote in the Beef Act, and respondents are not constrained by the Beef Act from communicating their own messages. Accordingly, whether analyzed under the First Amendment standard applicable to programs of government speech, the standard applicable to regulations of commercial speech, or the two in combination, the Beef Act does not abridge objecting producers' freedom of speech. Indeed, in the context of sustaining statutes such as the Beef Act against First Amendment challenge, the government-speech

[2] The court of appeals denied petitions for rehearing en banc, although two judges voted to grant rehearing (and another did not participate in the matter). App., *infra*, 62a.

and intermediate-scrutiny analyses are mutually reinforcing: Among other things, the importance of the governmental interests served by the Beef Act—which are not confined to the beef industry alone—confirms the conclusion that the message conveyed is a governmental one; moreover, the dissemination of the message by a governmental entity, under the supervision of the Secretary of Agriculture, confirms the conclusion that Act is appropriately tailored and assures that the connection between the message and any individual producer is too attenuated to interfere with producers' own ability to speak or refrain from speaking.

In holding that the generic promotion conducted under the Beef Act is not government speech—a question expressly reserved in *United States* v. *United Foods*, 533 U.S. 405, 417 (2001)—the Eighth Circuit has called into question the government's ability to convey its own message to the public. In also holding that the Beef Act cannot be sustained under the intermediate scrutiny generally applied to commercial speech regulations, the Eighth Circuit has rendered a decision that cannot be reconciled with the Third Circuit's decision in *United States* v. *Frame*, 885 F.3d 1119 (1989), cert. denied, 493 U.S. 1094 (1990). And, in sustaining a nationwide injunction against the collection of all assessments under the Beef Act, the Eighth Circuit has acted contrary to the principle that injunctions should be no broader than necessary to provide relief to the complaining parties.

Similar issues are raised in *Michigan Pork Producers Association* v. *Veneman*, 348 F.3d 157 (6th Cir. 2003), which invalidated the assessment provisions of a similar federal program for pork. This Court's review is warranted of the lower courts' "exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

I. GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS GOVERNMENT SPEECH, WHICH IS NOT CONSTRAINED BY THE FIRST AMENDMENT

The Beef Act and the Beef Order establish a program of government speech. The generic advertising of beef under that program serves public purposes identified by Congress, is confined to a message specified by Congress, and is disseminated by a governmental entity that was created by Congress and is subject to the supervision of the Secretary. The First Amendment does not constrain the government's ability to engage in its own speech, whether funded by general tax revenues or by "user fees" assessed against those who benefit most from the speech and who are members of an industry that Congress has chosen to protect.

A. The First Amendment Permits The Government To Engage In Its Own Speech And To Assess The Citizenry, Or A Segment Of The Citizenry, To Pay For That Speech

The First Amendment limits the government's interference with private speech rather than the government's own speech. Therefore, "when the State is the speaker, it may make content-based choices * * * [and] it is entitled to say what it wishes." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 & n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression.").

The First Amendment is inapplicable to government speech not only when the Government is itself the speaker, but also when the Government "disburses public funds to private entities to convey a governmental message." *Rosenberger*, 515 U.S. at 833. In *Rust* v. *Sullivan*, 500 U.S. 173,

192-193 (1991), for instance, this Court upheld regulations prohibiting private physicians from counseling patients about abortion when providing family planning counseling paid for with federal funds. Although "*Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech," subsequent cases "have explained *Rust* on this understanding." *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) (citing cases); see *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring) ("[I]t makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their (and, in a democracy, our) favored point of view by achieving it directly * * *; or by advocating it officially * * *; or by giving money to others who achieve or advocate it.").

Government speech necessarily is paid for by citizens, some of whom may disagree with its message. But such disagreement provides no basis under the First Amendment to silence the government or to excuse objecting citizens from having to share the costs of its speech. This Court has recognized that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties," even when the government will spend the funds so raised "for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000). Indeed, "[i]f every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller* v. *State Bar*, 496 U.S. 1, 12-13 (1990); cf. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in the judgment) ("Com-

pelled support of a private association is fundamentally different from compelled support of government.").

B. Generic Advertising Under The Beef Act Is Government Speech Because Congress Specified The Message, Created A Governmental Entity To Disseminate It, And Vested Control In A Politically Accountable Official

This Court has not defined the precise contours of the government speech doctrine. The Court's cases suggest, however, that, when the government establishes a program to convey a specified message, in order to advance a public purpose, and retains ultimate editorial control over the message, the program is properly classified as one of government speech. See *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 303 (2000) (holding that an invocation delivered at school events by a student selected in a school election was government speech for Establishment Clause purposes because the invocation was "subject to particular regulations that confine the content and topic of the student's message"); *Velazquez*, 531 U.S. at 542 (contrasting a program designed "to promote a governmental message" with a program designed "to facilitate private speech" on an array of topics); *Southworth*, 529 U.S. at 229 (suggesting that, if a state university established a program "to advance a particular message" of its own and remained "responsible for its content," the program would involve government speech). And, although the government may choose to convey a message through private parties, it may be particularly evident that a program involves government speech when the speaker is itself a government entity. Applying those principles, the Beef Act's generic advertising is government speech.

First, Congress directed the establishment of the program at issue here. Congress identified several public purposes that were to be served by the Beef Act: advancing "the welfare of beef producers" and others in the beef industry,

stabilizing "the general economy of the Nation," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 2901(a)(3) and (4).[3] Congress specified the activities that could be conducted under the program—namely, "promotion and advertising, research, consumer information, and industry information," 7 U.S.C. 2904(4)(B)—as well as the content of the message to be conveyed through those activities.

In particular, through its definition of the term "promotion," Congress made clear that advertising and other promotional activities conducted under the Beef Act are to be directed solely to "advanc[ing] the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. 2902(13). Congress required that such activities "take into account similarities and differences between certain beef, beef products, and veal," and "ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment." 7 U.S.C. 2904(4)(B)(i)-(ii). At the same time, Congress prohibited the use of any funds collected under the Beef Act and the Beef Order from being used to "influenc[e] governmental action or policy, with the exception of recommending amendments to the order." 7 U.S.C. 2904(10). The Secretary imposed additional constraints on such activities in the Beef Order. See 7 C.F.R. 1260.169(d) (advertising and promotion shall not employ

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[3] Congress has sought to advance the same or similar purposes in other statutes directed at the beef industry, including those establishing a beef inspection program, see 21 U.S.C. 601 *et seq.*; prohibiting deceptive marketing and price manipulation, see 7 U.S.C. 181 *et seq.*; mandating price reporting, see 7 U.S.C. 1635-1636h; imposing requirements for organically produced livestock, see 7 U.S.C. 6501 *et seq*; and establishing a system of voluntary grading of beef and other meat products for marketing purposes, see 7 U.S.C. 1621 *et seq.*

unfair or deceptive practices and shall not, without the Secretary's and Beef Board's consent, refer to a brand or trade name).

Second, Congress created a governmental entity—the Beef Board—to carry out the Beef Act's program. Congress specified the composition of the Beef Board, and provided for appointment of its members by the Secretary. See 7 U.S.C. 2904(1) and (3). Congress defined the powers and duties of the Beef Board, see 7 U.S.C. 2904(2), and its Operating Committee, see 7 U.S.C. 2904(4)(B) and (C), which the Secretary elaborated upon in the Beef Order, see 7 C.F.R. 1260.149-1260.150 (Beef Board); 7 C.F.R. 1260.167-1260.168 (Operating Committee). Congress also specified the circumstances (aside from repeal of the Beef Act itself) in which the Beef Board would be required to cease operations. 7 U.S.C. 2906(a) and (b).

Under the analysis applied by this Court to determine whether an entity is subject to the constraints of the First Amendment when it restricts the speech of others, the Beef Board qualifies as a governmental entity. In *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), which held that Amtrak is subject to the First Amendment when it regulates the advertising displayed at its facilities, the Court explained that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400. Here, the Beef Board is "creat[ed] * * * by special law," the Beef Act. The Beef Board is designed "for the furtherance of governmental objectives," including protecting an industry vital to the national economy. See 7 U.S.C. 2901(a)(3) and (4). And the

government, through the Secretary, appoints the Beef Board's members. 7 U.S.C. 2904(1).[4]

Third, Congress provided that a politically accountable official, the Secretary of Agriculture, would exercise control over the advertising and other activities conducted by the Beef Board and its Operating Committee. The Secretary has approval authority over the annual budget proposed by the Beef Board and the Operating Committee for the use of assessment revenues, 7 U.S.C. 2904(4)(C), 7 C.F.R. 1260.150(f) and (g), 1260.168(d), as well as over their plans and projects, 7 U.S.C. 2904(6)(B), 7 C.F.R. 1260.168(e) and (f). As noted above, the Secretary appoints all members of the Beef Board, whose terms are staggered so that one-third expire each year. 7 U.S.C. 2904(1). The Secretary thereby indirectly selects the ten members of the Operating Committee, including its chairman, who are required by the Beef Act to come from the Beef Board. See 7 U.S.C. 2904(4)(A); 7 C.F.R. 1260.166(a). (The remaining ten members are selected by the federation of qualified state beef councils and must be certified by the Secretary. See 7 U.S.C. 2904(4)(A); 7 C.F.R. 1260.161(c)). The Secretary may remove any member of the Beef Board or the Operating Committee for cause. 7 C.F.R. 1260.213. See *Bowsher* v. *Synar*, 478 U.S. 714, 726-727, 734 (1986) (noting significant control exercised through appointment and removal power). In practice, moreover, the Secretary, through USDA's Agricultural Marketing Service, exercises substantial control over the message conveyed by the Beef Board, the Operat-

[4] The United States has treated the Beef Board as a governmental entity. For example, the Internal Revenue Service has ruled that the Beef Board is exempt from federal income taxation as "an integral part of the Department of Agriculture." Gov't Tr. Exh. 224. And, with respect to requests from members of the public under the Freedom of Information Act, 5 U.S.C. 522, USDA has operated on the understanding that the Beef Board is a governmental entity subject to that Act. C.A. App. 537.

ing Committee, and the state beef councils. See, *e.g.*, C.A. App. 455-456.

In sum, because Congress enacted the Beef Act to serve public purposes, directed the message to be disseminated, created a governmental entity to disseminate it, and required the Secretary's continuing control over that entity, the Beef Act is properly understood as creating a program of government speech. A person does not have any First Amendment right to avoid taxes or other exactions to fund such programs. See *Southworth*, 529 U.S. at 229.

C. The Courts Of Appeals' Reasons For Refusing To Uphold The Beef Act And Similar Statutes Under The Government Speech Doctrine Are Invalid

Three courts of appeals have thus far considered the argument that the Beef Act and the similar Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. 4801 *et seq.*, establish a program of government speech for which objecting producers may be assessed without violating their First Amendment rights. (A fourth case, in which the district court sustained the Beef Act based on the government speech doctrine, is currently before the Ninth Circuit. *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1129, 1140 (D. Mont. 2002), appeal pending, No. 02-36140.) Although all three courts of appeals rejected that argument, they did not rely on any consistent rationale. Moreover, in the first of those cases, the Third Circuit acknowledged that "the issue [is] a close one," and that there are "sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute 'government speech.'" *Frame*, 885 F.3d at 1131-1132. Because the various grounds on which the courts of appeals relied in these cases are erroneous, this Court's review is warranted.

Here, the Eighth Circuit did not hold that the generic advertising at issue is not government speech. Rather, the

Eighth Circuit viewed the government speech doctrine as providing the government with categorical immunity only from one distinct variety of First Amendment challenge—namely, a "challenge based upon [the government's] choice of content" of its speech. App., *infra*, 16a-17a. In the court of appeals' view, if the challenge is instead directed at a requirement to contribute to the costs of government speech (albeit based on an objection to its content), the government is not entitled to categorical immunity. Instead, the court reasoned, the validity of the program must be determined by a balancing test that weighs the importance of the government's interest against the interest of those who object to making compelled contributions. *Id.* at 19a. The court then concluded, however, that such challenges are subject to an analysis similar to that applied in cases involving compelled funding of *private entities*' own message—in particular, *Keller*, which involved compelled payments to a state bar, which was held not to be engaging in government speech, see 496 U.S. at 13, and *Abood*, which involved compelled payments to a labor union, see 431 U.S. at 235-236. See App., *infra*, 19a-20a, 24a-28a. The Eighth Circuit thus effectively held that the government speech doctrine has no independent significance in cases challenging compelled assessments to support what would otherwise qualify as government speech.

The Eighth Circuit's reasoning is in tension with premises underlying of this Court's decisions in *United Foods*, *Keller*, and *Southworth*. In *United Foods*, the Court held that the Mushroom Act's assessments for generic advertising could not be upheld under the analysis of cases such as *Keller* and *Abood* involving compelled funding of private speech. 533 U.S. at 415-416. But the Court treated as an entirely separate question whether the assessments could be sustained on the alternative ground that they finance a program of government speech. *Id.* at 416-417. And, while the Court

declined to resolve the government speech question in *United Foods* because it had not been raised or decided below, *ibid.*, the Court did not intimate that the resolution of that question in future cases would effectively be controlled by what it *did* resolve there, as the Eighth Circuit seemed to believe. See App., *infra*, 26a-28a. Nor did the Court intimate that the generic advertising program would be anything less than categorically outside the scope of the First Amendment if assessments of the sort at issue in *United Foods* were ultimately held to fund government speech.

In *Keller*, which presented a First Amendment challenge to the use of mandatory dues to fund a state bar's political speech, the Court analyzed at length whether the state bar was a governmental entity. See 496 U.S. at 10-13. It was only after concluding that the state bar was not speaking as the government when, for example, it endorsed a nuclear weapons freeze or a gun control initiative, see *id.* at 6 n.3, 13, that the Court turned to whether the disputed use of dues could be sustained as germane to the purposes that justified requiring lawyers to affiliate with the state bar, such as regulating the legal profession, see *id.* at 13-17. *Keller* thus proceeded on the understanding that the government speech doctrine would defeat a First Amendment objection to compelled contributions to a program of what, in contrast to the speech in *Keller* itself, is properly classified as government speech.

Finally, in *Southworth*, which involved a First Amendment challenge to a state university's mandatory student activity fee that was used to fund extracurricular student speech, the Court contrasted the program at issue there with a program of government speech. See 529 U.S. at 229 ("If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that

the government itself is the speaker."). The Court's discussion of the government speech doctrine in that context implies a recognition that, when a program does involve government speech, an individual cannot assert a valid First Amendment objection to being required to contribute to its costs.

The Eighth Circuit's reasoning is also in tension with the Third Circuit's decision in *Frame* and the Sixth Circuit's decision in *Michigan Pork Producers*. In both cases, the courts proceeded on the premise that, if the generic advertising programs conducted under the Beef Act and the Pork Act qualified as government speech, producers would have no First Amendment right to avoid assessments for those programs. Those courts' reasoning thus is inconsistent with the Eighth Circuit's view that the government speech doctrine applies only to challenges to the government's choice of the content of its speech, as distinguished from challenges to the government's choice to require the costs of its speech to be shared by persons who voluntarily participate in the industry that the government has chosen to promote.

The Third and Sixth Circuits nonetheless held—incorrectly—that the generic advertising programs for beef and pork are not government speech. The courts relied principally on the facts that the programs are funded by assessments on producers and importers, not general tax revenues, and are carried out by entities whose members, while appointed by the Secretary, are chosen from the affected industry. See *Michigan Pork*, 348 F.3d at 161-162; *Frame*, 885 F.2d at 1132-1133. Neither fact detracts from the character of the generic advertising as government speech. The government is entitled to fund its speech through whatever means it considers most appropriate —including through assessments on those who participate in the industry that Congress has chosen to promote and who

Congress has determined would "most directly reap the benefits of" the government speech. 7 U.S.C. 7401(b)(2) (making findings with respect to generic advertising programs, including the beef and pork programs). The assessments are a species of "user fees," which this Court has viewed as a permissible means of funding many government activities.[5] Moreover, the government is entitled to speak through whatever public *or private* entity it considers most appropriate, see, *e.g.*, *Rust*, 500 U.S. at 192-193, and thus may speak through a congressionally created body, which is composed entirely of members who are appointed and removable by the Secretary, and which acts under the Secretary's ongoing supervision and control.

D. The Question Whether The Program Established By The Beef Act Involves Government Speech Warrants This Court's Resolution

The question whether the government speech doctrine defeats First Amendment challenges to assessments for

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[5] See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-62 (1989) (upholding, as a permissible "user fee," a requirement that successful claimants before the Iran-United States Claims Tribunal pay a portion of any award to the United States Treasury as "reimbursement to the United States Government for expenses incurred in connection" with the Tribunal); *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 461-462 (1988) (observing that "[i]t is manifestly rational" for a State "to allow local school boards the option of charging patrons a user fee for bus service" rather than funding such service out of general revenues); *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941) (observing that a State may require payment of a "reasonable" parade license fee to compensate local government for its administrative and law-enforcement expenses); cf. *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 141 (1981) (White, J., concurring) ("No one questions * * * that the Government, the operator of the [postal] system, may impose a fee on those who would use the system, even though the user fee measurably reduces the ability of various persons or organizations to communicate with others.").

generic advertising programs under the Beef Act and similar statutes is an important one for American agriculture and American consumers. This Court's intervention is warranted in this case, as it was in two recent cases, *United Foods* and *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), raising First Amendment challenges to similar government programs. Indeed, in *United Foods*, the Court expressly left unresolved the question whether the generic advertising program at issue there could be sustained as one involving government speech. See 533 U.S. at 416-417.

In addition to the generic advertising programs for beef and pork, Congress has authorized, and the Secretary has implemented, similar generic advertising programs for a number of other agricultural commodities. See, *e.g.*, 7 U.S.C. 2101 *et seq.* (cotton); 7 U.S.C. 2611 *et seq.* (potatoes); 7 U.S.C. 2701 *et seq.* (eggs); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 6401 *et seq.* (fluid milk).[6] Moreover, Congress has enacted a statute, 7 U.S.C. 7411 *et seq.*, that authorizes marketing programs for any agricultural commodity, under which generic advertising programs have been established for peanuts, 7 C.F.R. Part 1216, and blueberries, 7 C.F.R. Part 1218. Several States have established their own commodity marketing programs, some of which may resemble the beef program at issue here.

There is also the risk that the lower courts' treatment of the government speech doctrine in the present context will be extended to other contexts. A restrictive understanding of that doctrine has the potential to undermine the ability of

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[6] See also, *e.g.*, 7 U.S.C. 4601 *et seq.* (honey); 7 U.S.C. 4901 *et seq.* (watermelon); 7 U.S.C. 7401 *et seq.* (mangos); 7 U.S.C. 7481 *et seq.* (popcorn). Additional such programs, although authorized by Congress, are currently inactive. See, *e.g.*, 7 U.S.C. 6001 *et seq.* (pecans); 7 U.S.C. 6201 *et seq.* (limes); 7 U.S.C. 6801 *et seq.* (fresh cut flowers).

the United States and the States more generally to disseminate a governmental message using revenues collected from the public or a segment of the public.

II. THE ASSESSMENT PROVISIONS OF THE BEEF ACT ARE CONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY APPLICABLE TO REGULATIONS OF COMMERCIAL SPEECH

Aside from the government speech question, this Court's review is warranted on the question whether the Beef Act's assessment provisions withstand intermediate First Amendment scrutiny under the standard articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), for regulations of commercial speech. The Eighth Circuit's holding that the Beef Act cannot be sustained under that standard is incorrect and inconsistent with the Third Circuit's holding in *Frame* sustaining the Beef Act under stricter scrutiny. See *Frame*, 885 F.2d at 1134-1137.

Under *Central Hudson*, a regulation of commercial speech will be upheld against a First Amendment challenge if the regulation (1) promotes a "substantial" governmental interest, (2) "directly advances the governmental interest asserted," and (3) is "not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. As the Court has explained, that standard does not require a legislature to employ "the least restrictive means" of regulation or to achieve a perfect fit between means and ends. *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989). It is sufficient that the legislature achieves a "reasonable" fit by adopting regulations "in proportion to the interest served." *Ibid.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). The Beef Act satisfies that standard.[7]

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[7] In *Wileman Brothers*, the United States urged the Court to evaluate the generic advertising program at issue under the analysis applied in cases, such as *Abood* and *Keller*, involving compelled funding of speech,

The Beef Act advances "substantial" governmental interests specifically identified by Congress: enhancing "the welfare of beef producers" and other members of the $50 billion beef industry, stabilizing "the general economy of the Nation," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 2901(a)(3) and (4). In *Frame*, the Third Circuit recognized that the Beef Act was enacted to serve "importan[t]"—indeed, "compelling"—interests, such as "preventing further decay of an already deteriorating beef industry," which "would endanger not only the country's meat supply, but the entire economy." 885 F.2d at 1134. The court also recognized that the Beef Act serves "important non-economic interests," such as "ensur[ing] preservation of the American cattlemen's traditional way of life." *Id.* at 1135.

Moreover, the Beef Act—including its generic advertising funded by producer assessments—"directly advances" those interests. The Court has repeatedly recognized the "immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569; see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 557 (2001) ("[W]e have acknowledged the theory that product advertising stimulates demand for products."); *United States* v. *Edge Broadcasting Co.*, 509 U.S.

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rather than under the analysis applied in cases, such as *Central Hudson*, involving regulations of commercial speech. See U.S. Br. 18-34, *Wileman Brothers*, No. 95-1184. In the alternative, the United States urged that the program be upheld under the *Central Hudson* analysis. See *id.* at 34-48; cf. *United Foods*, 533 U.S. at 410 (noting that the government had not relied on *Central Hudson* in that case). In view of the Court's subsequent conclusion that the *Abood-Keller* analysis cannot provide a basis for sustaining programs of compelled funding exclusively or primarily for generic advertising and promotion, see *United Foods*, 533 U.S. at 415-416, the *Central Hudson* analysis, which typically has been applied to laws directed exclusively at speech or expressive activity, provides an alternative basis for sustaining such programs.

418, 434 (1993). The assessment provisions play an integral role in advancing the government's interests. Those provisions avoid saddling taxpayers with the costs of the program, which could undermine the very support for the beef industry that Congress sought to engender, and prevent "free-riders," who would "receiv[e] the benefits of the promotion and research program without sharing the cost." *Frame*, 885 F.2d at 1135; see *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (noting the government's "vital policy interest in * * * avoiding 'free riders'" in the collective bargaining context).

Nor is the Beef Act "more extensive than is necessary to serve" the government interests. It "impose[s] no restraint on the freedom of any producer to communicate any message to any audience," "do[es] not compel any person to engage in any actual or symbolic speech," and "do[es] not compel the producers to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470; see 7 U.S.C. 2904(10) (prohibition on use of assessment revenues for political activity). It requires only that cattle producers contribute financially to generic advertising (and other activities) designed to benefit the beef industry as a whole by promoting the sale of the product that the industry exists to market. Moreover, the Beef Act contains mechanisms whereby producers may seek to influence the direction of the program, such as through nominations to the Beef Board, see 7 U.S.C. 2904(1) and even to cause the termination of the program, see 7 U.S.C. 2906(b).

In sum, as the Third Circuit concluded in *Frame*, the Beef Act serves important or compelling government interests, is carefully tailored to serve those interests, and is ideologically neutral. 885 F.2d at 1137. The Eighth Circuit's con-

trary conclusion in this case is incorrect and irreconcilable with *Frame*.[8]

III. THE LOWER COURTS ERRED IN INVALIDATING THE BEEF ACT'S ASSESSMENT PROVISIONS IN THEIR ENTIRETY AND ENJOINING ANY FURTHER COLLECTION OF ASSESSMENTS NATIONWIDE

This Court's review is also warranted with respect to the scope of relief granted by the district court and affirmed by the court of appeals: the striking down of the assessment provisions of the Beef Act in their entirety and the issuance of a nationwide injunction against "any further collection of beef checkoffs." App., *infra*, 60a-61a; see *id.* at 28a-29a. Such relief improperly "invalidate[s] more of the statute than is necessary," *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987), and is "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) ("[A] federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (internal quotation marks omitted). It also inhibits the development of the law by effectively terminating a government program before courts in other circuits have had an opportunity to consider its validity. See *Yamasaki*, 442 U.S. at 702 (recognizing "the benefit of adjudication by different

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[8] The Sixth Circuit in *Michigan Pork Producers*, as well as the district court in *Charter*, held that the *Central Hudson* analysis is inapplicable to statutes of the sort at issue here that do not restrict private speech, but instead require payment for the speech of others. The *Charter* court went on to hold, however, that the assessment provisions of the Beef Act would satisfy the *Central Hudson* analysis, if applicable. *Charter*, 230 F. Supp. 2d at 1141.

courts in different factual contexts" of the same or similar claims).

The First Amendment violation alleged by the plaintiffs, found by the district court, and affirmed by the court of appeals was confined to the government's compelling the plaintiffs to share the costs of generic advertising to which they object. It was not alleged or held to be a First Amendment violation for the government to assess *other* cattle producers for generic advertising to which those other producers have *not* objected. Nor was it alleged or held to be a First Amendment violation for the government to assess even the plaintiffs themselves to fund activities aside from generic advertising.

Consequently, the First Amendment, even as understood by the lower courts in this case, does not justify the invalidation of the assessments provisions of the Beef Act in their entirety or the nationwide injunction against the collection of any further assessments under the Act. As this Court has recognized, when an individual's assessment for a private entity is used in part to fund political speech to which he objects, the appropriate remedy is to reduce that individual's assessment "in the proportion that [the private entity's] political expenditures bear to [its] total * * * expenditures." *Abood*, 431 U.S. at 240-241; see *Keller*, 496 U.S. at 17. The remedy is not to prohibit the collection of any portion of assessments from other individuals who have no objection to the speech, or to prohibit the collection even from objecting individuals of the portion of the assessments used to fund permissible activities.

The court of appeals viewed the Beef Act as precluding a result that would allow the collection of assessments to continue, except to the extent that individual producers object to paying the portion of the assessment used to fund generic advertising. The court principally relied on the fact that the Beef Act, as enacted in 1985, does not contain any severabil-

ity provision, although such a provision was contained in a predecessor statute that was never implemented. See App., *infra*, 29a. This Court has made clear, however, that "[i]n the absence of a severability clause, * * * Congress' silence is just that—silence—and does not raise a presumption against severability." *New York* v. *United States*, 505 U.S. 144, 186 (1992) (quoting *Alaska Airlines*, 480 U.S. at 686). The mere fact that a different Congress included a severability provision in a different, albeit similar, statute provides no reason to depart from that rule.

On the question of severability, then, the appropriate inquiry turns on legislative intent: Would the Congress that enacted the Beef Act have intended its assessment provisions to survive if they had to be understood, as a matter of constitutional law, to permit objecting producers to avoid the portion used for generic advertising? Nothing in the Beef Act's text, history, or purposes compels the conclusion that Congress would have intended to have the Act declared invalid on its face in these circumstances, and to preclude relief tailored to remedy that (perceived) constitutional defect.

Although the court of appeals suggested that a more narrowly tailored remedy would defeat "the 'principal object' of the Beef Act," App., *infra*, 29a, that view is incorrect. The Beef Act authorizes a variety of activities to assist the beef industry—research, consumer and industry information, and promotion other than generic advertising—that *all* producers still may constitutionally be compelled to fund under the decision below. The mere fact that generic advertising would have to be funded only by producers who do not object to it—presumably, a majority of producers—would not prevent Congress's objectives in the Beef Act from being substantially achieved. Even under the existing scheme, the Beef Board has used less than 60% of assessment revenues to fund generic advertising of the sort at

issue in this case; the remainder has been used for other sorts of promotion, such as contacts with retailers, as well as research, education, and information projects on such important matters as BSE, or "mad cow disease," and *E. coli* bacteria. See Dist. Ct. Tr. 198, 247-248, 299-301. Especially at a time of increasing public concern about food safety and nutrition issues, there is no justification for the evisceration of the Beef Act ordered by the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 02-2769, 02-2832

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
APPELLEES

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

July 8, 2003

Before: LOKEN,[1] Chief Judge and MCMILLIAN and FAGG, Circuit Judges.

McMILLIAN, Circuit Judge.

The United States Department of Agriculture ("USDA"), the Secretary of the USDA ("the Secretary"), the Cattlemen's Beef Promotion and Research Board ("the Beef Board"), the Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones (collectively "appellants") appeal from an order of the United States

[1] The Honorable James B. Loken became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 1, 2003.

District Court[2] for the District of South Dakota in favor of the Livestock Marketing Association ("LMA"), the Western Organization of Resource Councils, and several individual beef producers (collectively "appellees") enjoining as unconstitutional the collection of mandatory assessments from beef producers under the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* ("the Beef Act"), to pay for generic advertising of beef and beef products. *Livestock Marketing Ass'n v. United States Dep't of Agric.*, 207 F. Supp. 2d 992 (D.S.D. 2002) (*LMA II*) (holding that the Beef Act violates the free speech clause of the First Amendment and granting permanent prospective injunctive relief). For reversal, appellants argue that the district court erred in its analysis because the advertising conducted pursuant to the Beef Act is "government speech" and therefore immune from First Amendment scrutiny or because the Beef Act survives First Amendment scrutiny either as regulation of commercial speech or as part of a broader regulatory scheme. Appellants additionally argue that the district court abused its discretion in fashioning an overly broad injunction. For the reasons stated below, we now affirm the order of the district court.

Jurisdiction

Jurisdiction was proper in the district court based upon 28 U.S.C. §§ 1331, 1361. Jurisdiction is proper in this court based upon 28 U.S.C. §§ 1291, 1292(a)(1). The notices of appeal were timely filed pursuant to Fed. R. App. P. 4(a).

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[2] The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

Background

Following the enactment of the Beef Act, the Secretary promulgated a Beef Promotion and Research Order ("the Beef Order"), which established the Beef Board and a Beef Promotion Operating Committee ("the Beef Committee"). *See* 7 U.S.C. §§ 2903, 2904 (directing Secretary to promulgate order and setting forth required terms of order). The Beef Order requires beef producers and beef importers to pay transaction-based assessments, as mandated by the Beef Act. *See id.* § 2904(8). This mandatory assessment program is commonly referred to as the "beef checkoff" program. The funds from the beef checkoff program are designated for promotion and advertising of beef and beef products, research, consumer information, and industry information. *See id.* § 2904(4)(B).

Under the Beef Act, the Beef Order was subject to approval by qualified beef producers through a vote by referendum. *Id.* § 2906(a). In 1988, the Beef Order was put to an initial referendum vote and was approved by a majority of the participating beef producers. Thereafter, LMA began efforts to challenge the continuation of the beef checkoff program. *See id.* § 2906(b) ("After the initial referendum, the Secretary may conduct a referendum on the request of a representative group comprising 10 per centum or more of the number of cattle producers to determine whether cattle producers favor termination or suspension of the order."). On November 12, 1999, LMA submitted petitions to the USDA requesting a referendum on whether to terminate or suspend the Beef Order. The Secretary took no action on LMA's petitions.

On December 29, 2000, appellees filed the present lawsuit in the district court seeking: (1) declaratory

judgment that the Beef Act, or the Secretary's actions or inactions pursuant thereto, violate federal law; (2) an injunction prohibiting the Secretary from continuing the beef checkoff program; (3) a preliminary injunction ordering defendants to take immediate action toward a referendum on the continuation of the beef checkoff program; and (4) an order requiring the Beef Board to cease expenditures for "producer communications" (i.e., messages designed to discourage cattle producers from supporting a referendum) and to make restitution to producers of over $10 million, representing producer communications expenditures since 1998. The district court held a hearing on January 25, 2001, and issued a preliminary injunction on February 23, 2001, enjoining defendants from further use of beef checkoff assessments to create or distribute any communications for the purpose of influencing governmental action or policy concerning the beef checkoff program. *Livestock Marketing Ass'n v. United States Dep't of Agric.*, 132 F. Supp. 2d 817 (D.S.D. 2001) (*LMA I*).

On June 25, 2001, the Supreme Court held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.* ("the Mushroom Act"), violated the First Amendment. *United States v. United Foods, Inc.*, 533 U.S. 405, 413, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001) (United Foods) ("[T]he mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.")

(citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) (*Abood*); *Keller v. State Bar*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990) (*Keller*)). The Supreme Court distinguished the circumstances in *United Foods* from those in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997) (*Glickman*) (rejecting First Amendment challenge to mandatory agricultural assessments which paid for generic advertising of California tree fruits), decided four years earlier. The Court explained that, in *Glickman*, "[t]he 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,'" whereas, in *United Foods*, "the compelled contributions for advertising [were] not part of some broader regulatory scheme" and the advertising was itself the "principal object" of the regulatory scheme. *United Foods*, 533 U.S. at 412, 415, 121 S. Ct. 2334.

Thereafter, in the present case, the district court granted appellees leave to amend their complaint to include a First Amendment claim in light of the Supreme Court's *United Foods* decision. On August 3, 2001, appellees filed an amended complaint adding a claim that generic advertising conducted pursuant to the Beef Act violates their rights under the First Amendment to freedom of speech and freedom of association. The parties thereafter filed cross-motions for partial summary judgment on the First Amendment claim, and those motions were denied.

The case proceeded to a bench trial on January 14, 2002, solely to address appellees' First Amendment

claim. Upon considering the evidence presented, the district court issued LMA II, setting forth its findings of facts and conclusions of law. The district court held that appellees, or at least some of them, had standing to allege that they were being compelled to support speech to which they objected, in violation of their rights under the First Amendment. *See* 207 F. Supp. 2d at 996-97. In this context, the district court found that individual plaintiffs objected to the use of their checkoff dollars to "promot[e] all cattle rather than American cattle," "to promote imported beef," "for generic advertising of beef," "for generic advertising which implies that beef is all the same," and for "messages that are contrary to [the] belief that only American beef should be promoted." *Id.* at 996-97. The district court then reviewed several of the Supreme Court's pertinent First Amendment precedents, including *Abood* (1977), *Keller* (1990), *Glickman* (1997), and *United Foods* (2001). *See id.* at 997-1002. In this context, the district court discussed the Supreme Court's reasoning in *United Foods*, distinguishing the mandatory assessments for California tree fruit advertising at issue in *Glickman*, which "'were ancillary to a more comprehensive program restricting marketing autonomy,'" from the mandatory assessments for mushroom advertising at issue in *United Foods*, which funded speech that, "'far from being ancillary, [wa]s the principal object of the regulatory scheme.'" *Id.* at 1000 (quoting *United Foods*, 533 U.S. at 411-12, 121 S. Ct. 2334).

Regarding the underlying circumstances in the present case, the district court found, among other things:

> Like the plaintiffs in *Abood* and *Keller*, the plaintiff cattle producers are compelled to associate. They are required by federal law, by virtue of their

> status as cattle producers who desire to sell cattle, to pay "dues," if you will, to an entity created by federal statute.
>
> . . . .
>
> The beef checkoff is, in all material respects, identical to the mushroom checkoff: producers and importers are required to pay an assessment, which assessments are used by a federally established board or council to fund speech. Each sale of a head of cattle requires a one dollar payment as a checkoff. Thus, the beef checkoff is more intrusive, if you will, than was the case with the mushroom checkoff. The evidence presented to the court in this case was that at least 50% of the assessments collected and paid to the Beef Board are used for advertising. Only 10-12% of assessments collected and paid to the Beef Board are used for research. Clearly, the principal object of the beef checkoff program is the commercial speech itself. Beef producers and sellers are not in any way regulated to the extent that the California tree fruit industry is regulated. Beef producers and sellers make all marketing decisions; beef is not marketed pursuant to some statutory scheme requiring an anti-trust exemption. The assessments are not germane to a larger regulatory purpose.

Id. at 997-98, 1002 (internal citations and quotation marks omitted). Thus, consistent with the Supreme Court's decision in *United Foods*, the district court concluded:

> The beef checkoff is unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the

> plaintiffs object. The Constitution requires that expenditures for advertising of beef be financed only from assessments paid by producers who do not object to advancing the generic sale of beef and who are not coerced into doing so against their wills.

Id. at 1002.

Addressing appellants' "government speech" argument, which was essentially asserted as an affirmative defense to appellees' First Amendment claim, the district court apparently assumed that, if the generic advertising conducted pursuant to the Beef Act qualifies as government speech, then the Beef Act is immune from First Amendment scrutiny. Upon considering whether the Beef Board is "more akin to a governmental agency, representative of the people," or more "akin to a labor union or state bar association whose members are representative of one segment of the population" *id.* at 1004, the district court ultimately determined the latter to be true and concluded that "[t]he generic advertising funded by the beef checkoff is not government speech and is therefore not excepted from First Amendment challenge." *Id.* at 1006. In reaching this conclusion, the district court relied upon *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989) (*Frame*), and disagreed with appellants' contention that *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995) (*Lebron*), conclusively supported the contrary view. The district court explained:

> *Lebron* could hardly be regarded as a "government speech" case. [The defendant] Amtrak was contending that it was not a governmental agency for the purposes of an artist's First Amendment

> challenge to the denial of his request to display an advertisement on an Amtrak billboard. The question in *Lebron* was not whether the speech was constitutional (because the government can use compelled contributions to pay for speech which is repugnant to some who contributed) but whether Amtrak could constitutionally prevent the artist's speech.

LMA II, 207 F. Supp. 2d at 1005.

The district court also rejected appellants' argument that the Beef Act survives First Amendment scrutiny as a regulation of commercial speech. In so doing, the district court declined to apply the test for commercial speech used in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (*Central Hudson*). The district court noted, among other things, that "[t]he Supreme Court in *Glickman* rejected the use of the *Central Hudson* test because [*Central Hudson*] involved a restriction on commercial speech rather than the compelled funding of speech involved in the California tree fruit marketing orders." *LMA II*, 207 F. Supp. 2d at 999 (citing *Glickman*, 521 U.S. at 474 n.18, 117 S. Ct. 2130).

On the issue of appropriate relief, appellants argued in the district court that the injunction should apply to only those who were plaintiffs in the case and only those expenditures that related to political or commercial speech. The district court disagreed as a practical matter, but recognized that retroactive enforcement of an injunction would result in undue hardships. Thus, the district court declared the Beef Act and the Beef Order unconstitutional and prospectively enjoined appellants "from any further collection of beef checkoffs

as of the start of business on July 15, 2002" (*i.e.*, approximately three weeks after the date of the district court's order). *Id.* at 1008.

The district court certified its order, which partially disposed of the issues in the case, as a final judgment pursuant to Fed. R. Civ. P. 54(b). Appellants thereafter timely filed the present appeals. We granted appellants' motion for a stay of the district court's order pending our decision.[3] For the reasons stated below, we now affirm the order of the district court.

Discussion

I.

We review *de novo* the question of whether the Beef Act violates the First Amendment. *See United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002) (challenge to constitutionality of federal statute reviewed *de novo*). We generally review the district court's findings of facts for clear error; however, in a case such as this involving a First Amendment claim, we will, where necessary, examine the record as a whole and "make a fresh examination of crucial facts." *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 567, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); *see also Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1411 (8th Cir. 1997) (en banc) ("[W]e review findings of noncritical facts for clear error . . . . We independently review the evidentiary basis of critical facts, giving due regard to the trial court's opportunity to observe the demeanor of witnesses.").

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[3] The stay order will remain in effect until our mandate issues.

In the present case, we have independently reviewed the record and agree with the district court's findings of crucial facts. For example, we agree with the district court's finding that appellees are compelled to pay the statutorily-mandated assessments in question. *See LMA II*, 207 F. Supp. 2d at 997-98. Unlike fees charged for the use of recreational facilities or special taxes imposed on non-essential consumer products, the mandatory assessments at issue in the present case are directly linked to appellees' source of livelihood, and they have no meaningful opportunity to avoid these assessments. We also agree with the district court that appellees, or at least some of them, disagree with the generic advertising conducted pursuant to the Beef Act. *See id.* at 996-97. Finally, upon careful consideration of the record and the pertinent statutory provisions, we agree with the district court that "[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff" at issue in United Foods, that "at least 50% of the assessments collected and paid to the Beef Board are used for advertising," and that "the principal object of the beef checkoff program is the commercial speech itself." *Id.* at 1002.

II.

Appellants first argue that appellees' First Amendment claim is barred because the advertising conducted pursuant to the Beef Act is government speech and therefore immune from First Amendment scrutiny. The Supreme Court has never specifically addressed this government speech argument in a case involving an agricultural checkoff program. In *United Foods*, it was undisputed that the government speech argument had not been asserted or addressed in the court below. Therefore, the Supreme Court declined to consider

whether or not the Mushroom Act was immune from First Amendment scrutiny on that basis. *See United Foods*, 533 U.S. at 416-17, 121 S. Ct. 2334 ("As the Government admits in a forthright manner, . . . this [government speech] argument 'was not raised or addressed' in the Court of Appeals.' . . . The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government.").

Since the Supreme Court's *United Foods* decision, many district courts have addressed the government speech issue in determining the constitutionality of various agricultural checkoff programs. *Compare*, *e.g.*, *Charter v. United States Dep't of Agriculture*, 230 F. Supp. 2d 1121 (D. Mont. 2002) (*Charter*) (upholding the beef checkoff program on ground that generic advertising under the Beef Act is government speech), *with Pelts & Skins, L.L.C. v. Jenkins*, No. CIV. A. 02-CV-384, 2003 WL 1984368, at (M.D. La. Apr. 24, 2003) (holding that mandatory assessments imposed to fund generic advertising of alligator products violate alligator farmer's First Amendment rights; reasoning in part: "[b]ecause the generic advertising here involved is not government speech, plaintiff is free to challenge such advertising on First Amendment grounds"); *In re Washington State Apple Advertising Comm'n*, 257 F. Supp. 2d 1290, 1305 (E. D. Wa. 2003) (holding that mandatory assessments imposed to fund generic advertising of Washington State apples violate apple producers' First Amendment rights; reasoning in part: "the Commission's activities are not protected by the government speech doctrine"); *Michigan Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 785-

89 (W.D. Mich. 2002) (holding that mandatory assessments imposed to fund generic advertising of pork and pork products violate pork producers' First Amendment rights; reasoning in part: "[t]hough the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into 'government speech'"). In the present case, appellants have specifically urged us to follow the reasoning and disposition in *Charter*.

Appellants describe the government speech doctrine as follows:

> The government is constitutionally entitled to engage in its own speech without implicating the First Amendment. As this Court has recognized, "'[t]he First Amendment does not prohibit the government itself from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression.'"

Brief for Appellants[4] at 26 (quoting *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir.)) (*Ku Klux Klan*) (where underwriting acknowledgments by nonprofit public broadcast ratio station constituted governmental speech, state university operating the station could exercise editorial discretion over content of such acknowledgments without being subject to First Amendment forum analysis), *cert. denied*, 531 U.S. 814, 121 S. Ct. 49, 148 L. Ed. 2d 18

[4] Citations to the "Brief for Appellants" refer to the brief filed by United States Department of Justice on behalf of the federal appellants.

(2000), (quoting *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc)).

As to the determination of whether generic advertising under the Beef Act is or is not government speech, appellants cite our decision in *Ku Klux Klan* for proposition that government speech may be identified based upon the central purpose of the program, the degree of editorial control exercised by the government over the content of the message, and whether the government bears the ultimate responsibility for the content of the message. In addition, appellants cite *Lebron*, 513 U.S. at 400, 115 S. Ct. 961, in which the Supreme Court stated that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." Applying these principles to the present case, appellants contend that the generic advertising under the Beef Act is government speech. They emphasize, among other things, that the Beef Board and the Beef Committee were created pursuant to the Beef Act, members of the Beef Board and the Beef Committee serve at the direction and under the control of the Secretary, the Beef Act itself prescribes the content of the Beef Board's and the Beef Committee's speech as generic promotion of beef and beef products, and the Beef Act defines the powers and duties of the Beef Board and the Beef Committee vis-a-vis those promotional activities. Moreover, they argue, the First Amendment exemption for government speech applies whether it is the government itself speaking or a private entity enlisted by the government to speak on

the government's behalf. *See*, *e.g.*, *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).

Appellants also dispute the district court's reasoning based upon the Third Circuit's 1989 decision in *Frame*. In *Frame*, the Third Circuit emphasized that funding for advertising under the Beef Act comes from an identifiable group rather than a general tax fund and reasoned that this type of funding creates a "coerced nexus" between the message and the group. However, appellants argue, such reasoning based upon a "coerced nexus" has been rejected by the Supreme Court in cases such as *Board of Regents v. Southworth*, 529 U.S. 217, 229, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000) (*Southworth*) (in evaluating a First Amendment compelled speech claim based upon the use of mandatory student activity fees to fund private organizations engaging in political or ideological speech, holding that "the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle").

III.

We begin our analysis by examining the so-called "government speech doctrine" at a fundamental level. The government speech doctrine has firm roots in our system of jurisprudence. As the Supreme Court has explained:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if

> those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he [or she] disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller, 496 U.S. at 12-13, 110 S. Ct. 2228 (citing *United States v. Lee*, 455 U.S. 252, 260, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (religious belief in conflict with payment of taxes affords no basis under the free exercise clause for avoiding uniform tax obligation)).

However, the government speech doctrine clearly does not provide immunity for all types of First Amendment claims. *Cf. Santa Fe Sch. Dist. v. Doe*, 530 U.S. 290, 302-10, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (student-led prayers delivered prior to home football games at a public high school constituted public speech attributable to the school district and thus violated the establishment clause of the First Amendment), *cited in Charter*, 230 F. Supp. 2d at 1134-36. Nor do the cases cited by appellants hold that, when the government speaks, it is entirely immune from all types of First Amendment free speech claims. Our decision in *Ku Klux Klan*, for example, upheld a discretionary decision by a state university-run radio station to decline an offer of an underwriting donation because the university did not wish to publicly acknowledge the source of the offered donation, as was required by law. That case stands for the proposition—embodied in the language from *Keller* quoted above—that, when the government speaks in its role as the government, it may be immune from First Amendment challenge

based upon its choice of content. *Cf. Rust v. Sullivan*, 500 U.S. 173, 192-95, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (the government may, without violating the First Amendment, selectively fund speech that is believed to be in the public interest, while at the same time restricting funding for speech that promotes an alternate viewpoint). Indeed, as appellants themselves argue: "Because the First Amendment limits government interference with private speech rather than the Government's own speech, 'when the State is the speaker, it may make content-based choices . . . [and] it is entitled to say what it wishes.'" Brief for Appellants at 26 (quoting *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)).

Appellants have inadvertently identified the precise flaw in their government speech argument. Unlike in *Ku Klux Klan*, where the plaintiffs challenged a decision concerning the content of government speech, appellees in the present case are challenging the government's authority to compel them to support speech with which they personally disagree; such compulsion is a form of "government interference with private speech." The two categories of First Amendment cases —government speech cases and compelled speech cases —are fundamentally different. *See, e.g.*, *Southworth*, 529 U.S. at 234-35, 120 S. Ct. 1346 (in addressing a First Amendment compelled speech claim based upon the use of mandatory student activity fees to fund private organizations engaging in political or ideological speech, the Supreme Court noted that "the analysis likely

would be altogether different" if the matter concerned speech by the University).[5]

In the present case, appellees have not invoked the First Amendment to influence the content of the generic beef advertising at issue. Rather, they assert their First Amendment free speech and free association rights to protect themselves from being compelled to pay for that speech, with which they disagree. Their First Amendment claim predominantly raises a free speech issue,[6] and our analysis is generally governed by

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[5] Similarly, appellants' reliance on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995) (*Lebron*), is misplaced. *Lebron* involved an artist's First Amendment claim against the entity commonly known as Amtrak, challenging Amtrak's refusal to allow him to lease billboard space for political advertising. The issue before the Supreme Court was whether Amtrak was a private corporation or part of the government for purposes of determining its exposure to a constitutional challenge. *Id.* at 379, 115 S. Ct. 961. Amtrak argued that it was *not* part of the government and therefore not subject to the constitutional challenge. By contrast, in a government speech case, the defendant typically argues that it *is* part of the government and therefore immune from content-related First Amendment scrutiny of its own speech under the government speech doctrine. Moreover, even if the Beef Board and the Beef Committee were deemed to be parts of the government under the *Lebron* standard and the speech in question was therefore deemed to be government speech, our First Amendment inquiry would not end there. *See* infra at 19-20 & n. 9.

[6] As indicated in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222-23, 233-36, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), if appellees' First Amendment claim challenged only the fact that they are being compelled to contribute to a collective fund, their claim would implicate only their free association right. However, because appellees are additionally challenging the use of those funds to pay for disfavored speech, their claim predominantly implicates their free speech right.

the Supreme Court's compelled speech line of cases, including *Keller* and *Abood*. *See United Foods*, 533 U.S. at 413, 121 S. Ct. 2334 ("It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.") (citing *Keller* and *Abood*). As suggested by Justice Stevens in his concurring opinion in *United Foods*, 533 U.S. at 417-18, 121 S. Ct. 2334, cases such as *Keller*, *Abood*, and the case at bar—involving compelled payment of money—may be viewed as the "compelled subsidy" subset of the compelled speech cases.

In compelled speech cases, the Supreme Court has traditionally applied a balancing-of-interests test to determine whether or not the challenged governmental action is justified. *See*, *e.g.*, *Keller*, 496 U.S. at 13, 110 S. Ct. 2228 ("[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services."); *Wooley v. Maynard*, 430 U.S. 705, 715-16, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (*Wooley*) ("Identifying the [appellees'] interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to [convey the message to which they object]."). In the present case, we must decide what constitutional standard applies when compelled subsidies are used to fund generic commercial advertising. On this question, appellants have con-

sistently argued that, even if the Beef Act is not immune from First Amendment scrutiny under the government speech doctrine, it nevertheless survives First Amendment scrutiny as regulation of commercial speech under the *Central Hudson* standard.

We are again faced with an issue that was not directly addressed by the Supreme Court in *United Foods*. In *United Foods*, 533 U.S. at 409-10, 121 S. Ct. 2334 (internal citations omitted), the Supreme Court stated:

> We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression. That approach, in turn, has been subject to some criticism. We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case. It should be noted, moreover, that the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test.

In the present case, as stated above, the district court declined to apply the *Central Hudson* test to appellees' First Amendment claim, noting that the Supreme Court had declined to apply that test in *Glickman*. *See LMA II*, 207 F. Supp. 2d at 999 ("The Supreme Court in *Glickman* rejected the use of the *Central Hudson* test because [*Central Hudson*] involved a restriction on commercial speech rather than the com-

pelled funding of speech involved in the California tree fruit marketing orders.") (citing *Glickman*, 521 U.S. at 474 n. 18, 117 S. Ct. 2130). However, we disagree with the district court's reasoning because it fails to account for the more recent pronouncements in *United Foods*. In *United Foods*, the Supreme Court went out of its way to distinguish the broad cooperative scheme that comprehensively regulated the California tree fruit industry at issue in *Glickman* from the comparatively unregulated, and more commercially competitive, mushroom industry. The Court also emphasized that collective advertising was the "principal object" of the Mushroom Act, *United Foods*, 533 U.S. at 415, 121 S. Ct. 2334, whereas the collective advertising in *Glickman* was just one among many of the "anticompetitive features of the [California tree fruit] marketing orders," *Glickman*, 521 U.S. at 470, 117 S. Ct. 2130. Accordingly, we conclude that *Glickman* does not provide a complete answer to this commercial speech issue. We infer that, had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case, but would nevertheless have held that the Mushroom Act unconstitutionally regulated commercial speech. Such an inference, we believe, is consistent with the language from *United Foods* quoted above. We reach this conclusion recognizing that *Central Hudson* involved a restriction on speech[7] while the

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[7] In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570-71, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), the Supreme Court held that a regulation promulgated by the New York Public Service Commission, which completely banned promotional advertising by a utility company, violated the company's First Amendment free speech right because it was

present case involves compelled speech. In our view, it is more significant that *Central Hudson* and the case at bar both involve government interference with private speech in a commercial context. Accordingly, because the beef checkoff program at issue in the present case is identical in all material respects to the mushroom checkoff program at issue in *United Foods*, we now adapt the *Central Hudson* test to appellees' First Amendment claim.

In *Central Hudson*, 447 U.S. at 566, 100 S. Ct. 2343, the Supreme Court explained:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In adapting the *Central Hudson* test to the particular circumstances of this case, we ask not whether the expression at issue is protected but rather whether appellees have a protected interest in avoiding being compelled to pay for the expression at issue (the generic beef advertising). We have already answered that question; under the compelled speech line of cases, appellees have a protected First Amendment interest at stake. The remaining questions are whether the

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more extensive than necessary to further the State's governmental interest in energy conservation.

governmental interest in the beef checkoff program is substantial and, if so, whether the beef checkoff program directly advances that governmental interest and is not more extensive than necessary to serve that interest. Stated more succinctly, the issue is whether the governmental interest in the commercial advertising under the Beef Act[8] is sufficiently substantial to justify the infringement upon appellees' First Amendment right not to be compelled to subsidize that commercial speech.

At this juncture, we may now revisit appellants' government speech arguments, to put them into proper perspective. Appellants' government speech arguments are relevant to our assessment of the substantiality of the government's interest.[9] As a general proposition, the greater the government's responsibility for, and control over, the speech in question, the greater the government's interest therein. In this sense, we do take into account the quasi-governmental nature of the

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[8] Appellants describe the governmental interest as "protecting the welfare of the beef industry." Brief for Appellants at 51.

[9] As we have already explained, a determination that the expression at issue is government speech does not preclude First Amendment scrutiny in the compelled speech context. For example, in *Wooley v. Maynard*, 430 U.S. 705, 715-16, 97 S. Ct. 1428, 51 L. Ed .2d 752 (1977), the issue was whether New Hampshire motorists could be compelled to convey a message with which some of them disagreed, by having it displayed on their state-issued license plates. The message was clearly "government speech" in the sense that it came directly from the state, yet it was ultimately held to violate the First Amendment. *See id.* at 717, 97 S. Ct. 1428 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh the individual's First Amendment right to avoid becoming the courier for such message.").

Beef Board and the Beef Committee and the oversight, albeit limited, exercised by the Secretary over the generic advertising conducted pursuant to the Beef Act. However, consistent with the district court's conclusion that the advertising in question is not government speech, we consider the substantiality of the government's interest to be highly doubtful. In any event, even assuming that the government's interest is substantial, our First Amendment inquiry does not end there. We must determine whether the government's interest is sufficiently substantial to justify the infringement upon appellees' First Amendment rights. At this point, the analysis turns largely upon the nature of the speech in question. *See, e.g.*, *Central Hudson*, 447 U.S. at 563, 100 S. Ct. 2343 (constitutional protection available turns on both the nature of the governmental interest served by the regulation and the nature of the expression).

In *Keller* and *Abood*, the Supreme Court considered the nature of the speech at issue in terms of whether or not it was *germane* to the institutional purposes which justified the mandatory dues in the first place. In *Keller*, 496 U.S. at 13-14, 110 S. Ct. 2228, the Court explained:

> *Abood* held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not,

> however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

More recently, in *Southworth*, 529 U.S. at 232-35, 120 S. Ct. 1346, the Supreme Court determined that the germaneness standard was "unmanageable" in the context of a state university, "particularly where the State undertakes to stimulate the whole universe of speech and ideas." Thus, the Court held in that particular case that "[t]he proper measure, and the principal standard of protection for objecting students . . . is the requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233, 120 S. Ct. 1346. The Court explained:

> Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Id. at 233-34, 120 S. Ct. 1346. As observed above, the Court also alluded to the government speech doctrine in *Southworth* by stating:

> Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether

> different. *The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play*.

Id. at 234-35, 120 S. Ct. 1346 (emphasis added) (internal citations omitted).

The Supreme Court has repeatedly warned that, when assessing the nature of the speech in the compelled speech context—whether based upon germaneness, viewpoint neutrality, or some other benchmark—the analysis often comes down to a difficult line-drawing exercise. *See Keller*, 496 U.S. at 15, 110 S. Ct. 2228 ("Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern."); *Abood*, 431 U.S. at 236, 97 S. Ct. 1782 ("There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."). In the case at bar, however, we need not, ourselves, engage in such a line-drawing exercise. The Supreme Court has already drawn the relevant line for us. In *United Foods*, the Supreme Court explained:

> The statutory mechanism as it relates to handlers of mushroom 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. In contrast

> to the program upheld in *Glickman*, where the Government argued the compelled contributions for advertising were "part of a far broader regulatory system that does not principally concern speech," there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. Although greater regulation of the mushroom market might have been implemented, . . . the compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. 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.

533 U.S. at 415-16, 121 S. Ct. 2334 (internal citation omitted); *see also id.* at 418, 121 S. Ct. 2334 (Stevens, J., concurring) ("As we held in *Glickman*, *Keller*, and a number of other cases, such a compelled subsidy is permissible when it is ancillary, or 'germane,' to a valid cooperative endeavor. The incremental impact on the liberty of a person who has already surrendered far greater liberty to the collective entity (either voluntarily or as a result of permissible compulsion) does not,

in my judgment, raise a significant constitutional issue if it is ancillary to the main purpose of the collective program. This case, however, raises the open question whether such compulsion is constitutional when nothing more than commercial advertising is at stake. The naked imposition of such compulsion, like a naked restraint on speech itself, seems quite different to me. We need not decide whether other interests . . . might justify a compelled subsidy like this, but surely the interest in making one entrepreneur finance advertising for the benefit of his [or her] competitors, including some who are not required to contribute, is insufficient.") (internal footnote omitted).

This court is duty-bound to reconcile and apply the precedents of the Supreme Court to the best of our ability. The beef checkoff program is, in all material respects, identical to the mushroom checkoff program at issue in *United Foods*. *See* 207 F. Supp. 2d at 1002. Therefore, notwithstanding the reasoned counterpoints advanced by the dissent in *United Foods*, *see* 533 U.S. at 419-31, 121 S. Ct. 2334 (Breyer, J., dissenting), we conclude that the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right. Accordingly, the district court did not err in holding that the Beef Act and the Beef Order are unconstitutional and unenforceable.

IV.

Having carefully reviewed the arguments asserted by the parties concerning the scope of the injunction imposed by the district court, we further hold that the

district court did not abuse its discretion in fashioning its relief. Our holding that the Beef Act is unconstitutional is not limited solely to the plaintiffs in the present case. *See*, e.g., *United Foods*, 533 U.S. at 416, 121 S. Ct. 2334 (holding that "the assessments are not permitted under the First Amendment"). We also reject the suggestion that a portion of the assessments may continue to be collected because some of the funds are spent on activities other than commercial or political speech. When the Beef Act was amended in 1985, Congress specifically deleted a pre-existing severability provision. The legislative history of that deletion is described as follows:

> **Separability of Provisions**
>
> Section 19 of Pub.L. 94-294, which provided that if any provision of this Act [enacting this chapter and provisions set out as notes under this section] or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby, *was omitted* in the general revision of sections 2 through 20 of Pub. L. 94-294 by Pub. L. 99-198, Title XVI, § 1601(b), Dec. 28, 1985, 99 Stat. 1597.

7 U.S.C.A. § 2901 (West 1985) (Historical and Statutory Notes) (emphasis added). In view of this clear expression of non-severability and the fact that the "principal object" of the Beef Act is the very part that makes it unconstitutional (i.e., compelled funding of generic advertising), no remaining aspects of the Act can survive.

Conclusion

For the reasons set forth above, the order of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

No. Civ. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

June 21, 2002

MEMORANDUM OPINION AND ORDER

KORNMANN, district judge.

INTRODUCTION

Plaintiffs instituted this action to challenge certain activities in connection with the Beef Promotion and Research Act (Title XVI, Subtitle A, of the Food Security Act of 1985), Pub.L. 99-198, Title XVI, § 1601, codified at 7 U.S.C. §§ 2901-11 ("the Act") and certain actions and inaction on the part of the United States Secretary of Agriculture ("Secretary") and the Cattle-

men's Beef Board ("Board"). The Act authorizes the Secretary to promulgate a Beef Promotion and Research Order ("Order"), 7 U.S.C. § 2903, to establish a Cattlemen's Beef Promotion and Research Board ("Board"), 7 U.S.C. § 2904, and an Operating Committee, 7 U.S.C. § 2904(4)(A), to carry on a "program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. § 2901(b). The program is funded by mandatory producer and importer contributions of one dollar per head on each transaction. 7 U.S.C. § 2904(8)(C). These mandatory contributions are referred to collectively as the "beef checkoff."

In fiscal year 2001, beef checkoff revenues totaled $86,099,403.00. Of that, $47,469,581.00 went to the Board. In states with a Qualified State Beef Council ("QSBC"), such as South Dakota, all checkoff funds collected by livestock markets go to the QSBC. There are 45 QSBC organizations. Each QSBC sends 50 cents to the Board, 25 cents to the National Cattleman's Beef Association ("NCBA"), a private trade group, for use in its non-Beef Board activities. The amount going to the Board included $60,907.00 collected from producers in states without a QSBC, $8,778,852.00 from importers, and $38,629,822.00 from QSBCs. The remaining funds were used by the QSBCs. The NCBA is the federation of QSBC's. The NCBA is a private contractor with the Board and 90% of all Board contracts are awarded to the NCBA. The Board consists of 110 members. The QSBC's nominate ten members to serve on the Beef Operating Committee which approves the budgets of the Board. The Board elects the Operating Committee.

In 1998, the Livestock Marketing Association ("LMA") initiated a petition drive to obtain a referendum on the question of the continuation of the beef checkoff program. LMA submitted the petitions to USDA on November 12, 1999. The Secretary did not act to validate the petitions and schedule a referendum vote. Plaintiffs instituted this litigation seeking 1) a declaratory judgment that the 1985 Act and the Secretary's action or inaction pursuant thereto is unconstitutional in violation of plaintiffs' rights to due process and equal protection, 2) an injunction prohibiting the Secretary from collecting assessments pursuant to the 1985 Act, 3) a preliminary injunction ordering defendants to immediately schedule a referendum election as to whether the checkoff should be retained or, alternatively, ordering defendants to immediately decide whether to schedule such a referendum, and 4) an order requiring the Board to immediately cease its expenditures for so-called "producer communications" and to make restitution to producers for in excess of $10 million claimed to have been illegally expended on such communications since 1998.

Plaintiffs' claims that the Board's producer communications activities violate both the Act and the First Amendment by using checkoff funds to disseminate public relations messages, including anti-referendum messages, and their claims that in implementing the petition validation program, the Secretary has failed to comply with the requirements of the Paperwork Reduction Act of 1995, were heard on January 25, 2001. The court issued a preliminary injunction on February 23, 2001. This prevented defendants from any further use of beef checkoff assessments to create or distribute any material for the purpose of influencing governmental

action or policy with regard to the beef checkoff or the Board or both. It also prevented defendants from using assessments to block or discourage a referendum, from using assessments to attempt to influence beef producers to keep the Board or the checkoff program or both in existence, and from using assessments to laud the checkoff program by using descriptive words or phrases such as "fair", "accountable", "effective", "it's working", and the like. *Livestock Marketing Association v. United States Department of Agriculture*, 132 F. Supp. 2d 817 (D. S. D. 2001).

The United States Supreme Court issued a decision on June 25, 2001, in *United States Department of Agriculture v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001), holding that the mandatory checkoff for mushroom promotions was in violation of the First Amendment and striking down as unconstitutional all portions of the Mushroom Act of 1990 which "authorize such coerced payments for advertising." *United Foods v. U.S.*, 197 F.3d 221, 225 (6th Cir. 1999), aff'd 533 U.S. 405, 121 S. Ct. at 2341, 150 L. Ed. 2d 438. Following the issuance of the United Foods decision, the plaintiffs were allowed to amend their complaint to add a claim that the beef checkoff program violated plaintiffs' First Amendment rights to freedom of speech and freedom of association. The parties filed cross motions for summary judgment on the new First Amendment claims and those motions were denied. The First Amendment claims were bifurcated and a trial to the court on those issues was held on January 14, 2002.

DECISION

I. Standing.

Defendants and intervenors contend that plaintiffs LMA and the Western Organization of Resource Councils ("WORC") lack standing to raise the First Amendment claims at issue here. Standing is comprised of three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (internal quotations and citations omitted). It is sufficient to confer standing that at least one of the plaintiffs qualifies and, if so, the court does not need to consider the standing issue as to the other plaintiffs in that action. *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 3185, 92 L. Ed. 2d 583 (1986), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 n.9, 97 S. Ct. 555, 562 n.9, 50 L. Ed. 2d 450 (1977).

Plaintiff Pat Goggins ("Goggins") is a grower, breeder and livestock marketer from Billings, Montana.

Goggins objects to the use of his checkoff dollars to produce messages promoting all cattle rather than American cattle. Goggins is of the opinion that American produced cattle are superior to foreign produced cattle. Goggins objects to being compelled to pay for and promote foreign products. Goggins' auction business collects from producers and pays approximately $30,000 each year to the Board under the checkoff.

Plaintiff Johnnie Smith ("Smith") from Pierre, South Dakota, raises cattle and owns a partnership interest in a livestock market. Smith believes that the generic promotion of beef serves to promote imported beef. In fact, from September 11, 2001, to October 2001, foreign beef imports from Canada increased 26% while imports from Mexico increased 8%. Smith believes that foreign cattle are generally older with meat that is stringy and tough and that the foreign animals are more likely to have been subjected to pesticides. Smith opposes the use of his checkoff dollars to promote imported beef.

Herman Schumacher ("Schumacher") is a cattle producer from Herried, South Dakota. He also owns a livestock auction. He believes that generic advertising increases foreign imports which hurts his business. Foreign grown beef is in direct competition with his business. He objects to the use of his checkoff dollars for generic advertising of beef.

Plaintiff Jerry Goebel ("Goebel") is a cattle producer from Lebanon, South Dakota. Goebel objects to the use of checkoff funds for generic advertising which implies that beef is all the same.

Plaintiff Robert Thullner ("Thullner") is a cattle producer from Herried, South Dakota. Thullner objects to the generic messages paid for by checkoff dollars,

which messages are contrary to his belief that only American beef should be promoted.

The parties spent considerable trial time trying to establish or attack the organizational standing of LMA and WORC. It was all much ado about nothing since it is clear that at least the foregoing five individual plaintiffs have standing to raise a *United Foods* First Amendment challenge to the beef checkoff. One plaintiff with standing is sufficient to confer jurisdiction over the claim and afford complete relief. Any claim of lack of standing should be rejected.

II. Compelled Speech.

The United States Supreme Court has made it clear that "the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Abood v. Detroit Board of Education*, 431 U.S. 209, 233, 97 S. Ct. 1782, 1798, 52 L. Ed. 2d 261 (1977). *Abood* made it clear that the First Amendment protects not only the right to associate but also the right to refuse to associate.

The First Amendment does not necessarily prohibit Congress from compelling beef producers to associate for a common purpose. Indeed, the Supreme Court in *Abood* recognized that requiring public employees to help finance a union as a collective-bargaining agent "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood*, 431 U.S. at 222, 97 S. Ct. at 1793. The Supreme Court has also held that compelled association by virtue of an integrated state bar is "justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Keller v. State Bar of*

California, 496 U.S. 1, 13, 110 S. Ct. 2228, 2236, 110 L. Ed. 2d 1 (1990).

Like the plaintiffs in *Abood* and *Keller*, the plaintiff cattle producers are compelled to associate. They are required by federal law, by virtue of their status as cattle producers who desire to sell cattle, to pay "dues," if you will, to an entity created by federal statute. Their status is not much different from that of attorneys who are required by statute to pay dues to a state bar association, which bar association is created by statute. The Act authorized the Secretary of Agriculture to promulgate the Beef Promotion and Research Order. The rules and regulations for collecting the checkoff assessments, for establishing the Board which Board decides how to spend the assessments collected, and the powers and duties of that Board are all statutorily mandated.

However, the use of compelled "dues" for advancing ideological causes objectionable to any member of the group violates the First Amendment. Compelling plaintiffs to make contributions for speech to which they object works an infringement of their constitutional rights. *Abood*, 431 U.S. at 234, 97 S. Ct. at 1799.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Abood, 431 U.S. at 235, 97 S. Ct. at 1799 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943)). The First Amendment protects not only the right to engage in or

not engage in political speech but also any "expression about philosophical, social, artistic, economic, literary, or ethical matters." *Abood*, 431 U.S. at 231, 97 S. Ct. at 1797. *See* also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958) ("it is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters").

Three terms after the *Abood* decision the Supreme Court declared, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U.S. 557, 562, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341 (1980). The Supreme Court announced a four-part analysis in commercial speech cases which has become known as the *Central Hudson* test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S. Ct. at 2351.

Applying the *Central Hudson* analysis, the United States Court of Appeals for the Third Circuit held:

> Although we find that the Beef Promotion Act implicates the first amendment rights of those obli-

> gated to participate, we hold that the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way that infringes on the contributors' rights no more than is necessary to achieve the stated goal.

United States v. Frame, 885 F.2d 1119, 1137 (3rd Cir. 1989). The Ninth Circuit reviewed the constitutionality of a similar generic advertising program for California tree fruits in *Wileman Brothers & Elliott, Inc. v. Espy*, and, applying *Central Hudson*, reached a contrary conclusion:

> In sum, although we agree that the Secretary has a substantial interest in promoting peaches and arines, we hold that forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers. The generic advertising programs neither "directly advance" the government's interest nor are they narrowly tailored. They therefore fail the second and third prongs of the *Central Hudson* test and violate the First Amendment.

Wileman Brothers & Elliott, Inc. v. Espy, 58 F.3d 1367, 1380 (9th Cir. 1995). The United States Supreme Court granted certiorari in *Wileman* to resolve the conflict between *Frame* and *Wileman*. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 466-67, 117 S. Ct. 2130, 2137, 138 L. Ed. 2d 585 (1997).

The Supreme Court in *Glickman* rejected the use of the *Central Hudson* test because that case involved a restriction on commercial speech rather than the compelled funding of speech involved in the California tree fruit marketing orders. *Glickman*, 521 U.S. at 474 n.

18, 117 S. Ct. at 2141 n.18. A recent case, while admittedly dealing with the *Central Hudson* test, contains a statement indicating, if nothing else, the philosophical bent of the United States Supreme Court: "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet it seems to have been the first strategy the Government thought to try." *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S. Ct. 1497, 1507, 152 L. Ed. 2d 563 (2002). This court makes the same observation in the context of the present case, namely that if the First Amendment means anything, it means that compelling speech must be the last and not the first strategy considered by the government. *Glickman*, rather than using the *Central Hudson* test, applied *Abood's* "germaneness" test, which the Supreme Court summarized as whether 1) the generic advertising in question "is unquestionably germane to the purposes" of the Act and 2) the assessments are not used to fund ideological activities. *Glickman*, 521 U.S. at 473, 117 S. Ct. at 2140. The Court held that the compelled contributions at issue were germane:

> Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme . . . In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of

> market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Glickman, 521 U.S. at 476-77, 117 S. Ct. at 2141-42. The Court further concluded that the assessments were not used to fund ideological activities. *Glickman*, 521 U.S. at 473, 117 S. Ct. at 2140.

The Supreme Court in *Glickman* instructed that:

> . . . *Abood* . . . did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." . . . Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message . . . our cases provide affirmative support for the proposition that assessments to fund a lawful program may sometimes be used to pay for speech over the objection of some members of the group.

Glickman, 521 U.S. at 471-73, 117 S. Ct. at 2139-40. In *Glickman*, the Court emphasized that, in determining

whether the compelled assessments raised a First Amendment issue, it was important to consider the statutory context in which the compelled assessments arise:

> 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. 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. It is in this context that we consider 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, 117 S. Ct. at 2138. It was the broad regulatory scheme, as we shall see, which was dispositive of the outcome in *Glickman*. Thus, the extent of the regulatory scheme in connection with the beef checkoff must be largely dispositive in this case.

Four terms after *Glickman*, the very same First Amendment claim was raised in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001). The statute in question in *United Foods* was the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101, *et seq*. The Mushroom Act mandated assessments upon handlers of

fresh mushrooms to fund advertising for mushrooms. The assessment was similar to the beef checkoff in that the assessment is paid by producers and importers in an amount not to exceed one cent per pound of mushrooms. 7 U.S.C. § 6104(g). The Supreme Court distinguished *Glickman* because the compelled assessments for California tree fruits arose out of "a different regulatory scheme" which was fundamentally different in that the "mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy" while the advertising involved in the mushroom checkoff, "far from being ancillary, is the principal object of the regulatory scheme." *United Foods*, 533 U.S. at 411-12, 121 S. Ct. at 2338-39.

> The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." [*Glickman*, 521 U.S.] at 469, 117 S. Ct. 2130, 138 L. Ed. 2d 585. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.*, at 461, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585. 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, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585. 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 program with a particular message was the logical concomitant of a valid scheme of economic regulation.
>
> The features of the marketing scheme found important in *Glickman* are not present in the case now before us . . . almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. 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 growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program," and "the 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.

United Foods, 533 U.S. at 412-13, 121 S. Ct. at 2339.

United Foods applied the rules of *Abood* and *Keller*: "objecting members [are] not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required associa-

tion." *United Foods*, 533 U.S. at 414, 121 S. Ct. at 2340. "We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *United Foods*, 533 U.S. at 415, 121 S. Ct. at 2340. *United Foods* held that the compelled contributions for advertising mushrooms are not part of some broader regulatory scheme. *United Foods*, 533 U.S. at 415, 121 S. Ct. at 2340.

The Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101, et seq., was identical in many respects to the Beef Promotion and Research Act, 7 U.S.C. § 2901, et seq. The Mushroom Act authorized the establishment of a

> coordinated program of promotion, research, and consumer and industry information designed to—(1) strengthen the mushroom industry's position in the marketplace; (2) maintain and expand existing markets and uses for mushrooms; and (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). The Beef Act authorizes the establishment of a

> coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

7 U.S.C. § 2901(b). The Mushroom Act authorized the Secretary to issue a Mushroom Order which mandated the establishment of a Mushroom Council and provided that each first handler of mushrooms, importer of mushrooms or any person marketing that person's own mushrooms must pay an assessment to the Mushroom Council. 7 U.S.C. §§ 6104(b) and 6104(g). The Beef Act

authorizes the Secretary to issue a Beef Promotion and Research Order which mandates the establishment of a Cattlemen's Beef Promotion and Research Board and which order shall provide that producers of cattle and importers of cattle, beef, or beef products shall pay an assessment to the Board. 7 U.S.C. §§ 2904(1) and 2904(8). The Mushroom Act authorized the Mushroom Council to use the assessments for "the implementation and carrying out of plans or projects of mushroom promotion, research, consumer information, or industry information". 7 U.S.C. § 6104(e). The Beef Act authorizes the Beef Board to use the assessments to "implement programs of promotion, research, consumer information, and industry information." 7 U.S.C. § 2904(6).

The beef checkoff is, in all material respects, identical to the mushroom checkoff: producers and importers are required to pay an assessment, which assessments are used by a federally established board or council to fund speech. Each sale of a head of cattle requires a one dollar payment as a checkoff. Thus, the beef checkoff is more intrusive, if you will, than was the case with the mushroom checkoff. The evidence presented to the court in this case was that at least 50% of the assessments collected and paid to the Beef Board are used for advertising. Only 10-12% of assessments collected and paid to the Beef Board are used for research. Clearly, the principal object of the beef checkoff program is the commercial speech itself. Beef producers and sellers are not in any way regulated to the extent that the California tree fruit industry is regulated. Beef producers and sellers make all marketing decisions; beef is not marketed pursuant to some statutory scheme requiring an anti-trust exemption. The assessments are not germane to a larger regula-

tory purpose. This case is therefore controlled by *United Foods* and not by *Glickman*.

The producer plaintiffs object to the payment of $1 per head of cattle for use in generically advertising beef. As set forth above in the discussion on standing, the plaintiffs believe that the generic advertising campaign increases the demand for cheaper foreign beef, to the detriment of plaintiffs. Plaintiffs also object to having to pay for the advertisement of steak, which is not the product that they sell. The plaintiff producers sell live cattle and the assessment is paid per head of live cattle. Restaurants, meat-packers, wholesale food outlets, and retail groceries sell beef and beef products. The plaintiffs object that they are required to pay for advertising for a product for which they do not receive the profit. These other entities receive the profits when there is an increase in demand for beef products. The objections of plaintiffs could be analogized to a wheat farmer being required to fund advertising for General Mills breakfast cereal.

The beef checkoff is unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object. The Constitution requires that expenditures for advertising of beef be financed only from assessments paid by producers who do not object to advancing the generic sale of beef and who are not coerced into doing so against their wills. *Abood*, 431 U.S. at 236-237, 97 S. Ct. at 1800.

II. Government Speech.

The defendants and intervenors argue that promotional materials paid for by the beef checkoff constitute government speech and are therefore not subject

to a First Amendment challenge. The so called "government speech" doctrine is not so much a doctrine as it is an evolving concept that the government may compel the use of coerced financial contributions for public purposes. The Supreme Court explained the doctrine in *Abood* without actually naming it:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

Abood, 431 U.S. at 259 n.13, 97 S. Ct. at 1811 n.13 (Powell, J., concurring).

The State of California sought to rely on the government speech doctrine in *Keller v. State Bar of California*, 496 U.S. 1, 10, 110 S. Ct. 2228, 2234, 110 L. Ed. 2d 1 (1990). *Keller* held, however, that the State Bar of California was not a typical government agency because it

> was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are

> citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

Keller, 496 U.S. at 13, 110 S. Ct. at 2235.

Keller and other cases imply, in passing, that there is a "government speech" doctrine. It cannot be said, however, that the Supreme Court has given us an extensive discussion or explanation of the doctrine. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-42, 121 S. Ct. 1043, 1048-49, 149 L. Ed. 2d 63 (2001), the Supreme Court stated:

> We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000), or instances, like *Rust*, in which the government "used private speakers to transmit specific information pertaining to its own program." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). . . . The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its

> advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of Univ. of Wis. System v. Southworth*, supra, at 235, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193.

One of the latest Supreme Court cases dealing with the First Amendment is *Ashcroft v. The Free Speech Coalition, et al.*, 535 U.S. 234, 122 S. Ct. 1389, 1399, 152 L. Ed. 2d 403 (2002): "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." The "laundry list", for what significance it may have, does not speak of "government speech."

The question here is essentially whether the government is the speaker or whether the government has instead permitted a private entity to promote its own program and agenda. Congress cannot legislatively extend the power to a private group to abridge First Amendment rights. *Abood*, 431 U.S. at 226 n.23, 97 S. Ct. at 1795 n.23 (citing *Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961)).

Is the Board, which receives the compelled checkoff assessments, akin to a labor union or state bar association whose members are representative of one segment of the population, thus preventing the Board from using checkoff assessments to fund speech of an ideological nature, or instead, is the Board more akin to a governmental agency, representative of the people, thus allowing the Board to use checkoff funds for speech that is relevant and appropriate to the Board's governmental interests? Defendants and intervenors contend

that this issue is squarely answered by the Supreme Court's decision in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995). In *Lebron*, the Supreme Court held that, where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Lebron*, 513 U.S. at 400, 115 S. Ct. at 974-75. *Lebron* held that Amtrak was one such corporation.

The Third Circuit rejected the government's contention that the compelled expressive activities mandated by the Act constitute "government speech" in *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989).

> When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

Frame, 885 F.2d at 1132 (internal citations omitted).

> The Cattlemen's Board seems to be an entity "representative of one segment of the population with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the

> Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or overriding purpose is to promote the economic welfare of cattle producers." 7 U.S.C. § 2905(b)(3) & (4). Therefore, we believe that although the Secretary's extensive supervision passes muster under the nondelegation doctrine, it does not transform this self-help program for the beef industry into "government speech."

Frame 885 F.2d at 1133. The evidence presented to this court as to the makeup of the Board and the Operating Committee as well as the supervision by the Secretary is consistent with that set forth in *Frame*.

Defendant and intervenors contend that *Frame* is no longer valid in light of *Lebron*. *Lebron* could hardly be regarded as a "government speech" case. Amtrak was contending that it was not a governmental agency for the purposes of an artist's First Amendment challenge to the denial of his request to display an advertisement on an Amtrak billboard. The question in *Lebron* was not whether the speech was constitutional (because the government can use compelled contributions to pay for speech which is repugnant to some who contributed) but whether Amtrak could constitutionally prevent the artist's speech.

Of course, in evaluating whether the Beef Act's generic advertising scheme constitutes "government speech", one must take into account whether the speech comes from general tax revenues or instead from some forced assessments paid for by members of one group.

"Since neither Congress nor the state legislatures can abridge (First Amendment) rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly." *Abood*, 431 U.S. at 227 n.23, 97 S. Ct. at 1795 n.23 (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 777, 81 S. Ct. 1784, 1804, 6 L. Ed. 2d 1141 (1961) (concurring opinion)). The speech at issue here is not funded by any governmental general tax revenue. The assessments are collected from only one very narrow segment of society—cattle producers, importers, and others, all of whom sell cattle. That segment of society is not representative of the population in general. The speech funded by that group can be traced directly to that group.

I reject the contentions of defendants that the beef checkoff is part of a regulatory scheme, akin to what exists with regard to California tree fruit. The regulatory scheme as to beef deals with meat safety, livestock auctions, and, at least allegedly, conduct by packers and stockyards. Cattle producers are not regulated on the farm or ranch or in marketing cattle. Cattle producers take what is offered to them by buyers and do not sell collectively.

As already discussed, the evidence received by the court in the trial of the First Amendment issue would support the findings by the district court and the Third Circuit in *Frame*, 885 F.2d at 1131-33. It is true that the Board, the entity which decides how to spend the mandated checkoff assessments, is created by statute to further the policy of the United States Congress to promote beef for the purpose of strengthening the beef industry's position in the marketplace. The Board is,

however, comprised of private individuals who are not government employees. It is true that the Secretary must approve the appointment of those nominated to the Board. However, based upon the evidence, I conclude that such approval is merely pro forma. In fact, the Act itself only provides that the Secretary "certify" that those elected are in fact qualified. 7 U.S.C. § 2904(4)(A). It is true that all projects are submitted to the Secretary for final approval to spend checkoff funds for the project. It is true that USDA employees attend every meeting of the Board, the Operating Committee, and the Executive Committee. However, Barry Carpenter, Deputy Administrator for the Livestock and Seed Division of the USDA Agricultural Marketing Service, admitted that USDA oversight is more akin to ministerial review of the Board's compliance with the Order.

Many millions of dollars have been spent these past several years on "producer communications". All of these so-called "producer communications," which were prepared with checkoff funds, stress to the producers that the Beef Board is a "producer-controlled, independent Board." They stress to the producers that the beef checkoff is an "industry run program," that "cattlemen run the program," that the Board is "accountable" to the producers, that the people who make the decisions are producers, that the program is producer run, producer led, producer controlled, and independent. Nowhere in any of the "producer communications" (which communications were apparently approved or at least not vetoed by the Secretary) does it even hint that the Board is accountable to the USDA or that the speech being paid for by the producers is that of the federal government.

All audits of the Board are done by a private auditing concern, not by the Office of Inspector General.

The Board's beef advertisements bear the copyright of the NCBA and the Board. They do not bear the distinctive notice from the Government Printing Office.

The Act provides that the Board, with the approval of the Secretary, may invest assessment funds "only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in Obligations fully guaranteed as to principal and interest by the United States." 7 U.S.C. § 2904(9). These funds are not treated in the same manner as general tax funds. For the one year period ending September 30, 2001, (FY 2001) the Board earned interest income of $1,820,563.00. As of December 31, 2001, the Board's total investments amounted to $30,046,237.00.

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

Common sense tells us that the government is not "speaking" in encouraging consumers to eat beef. After all, is the "government message" therefore that consumers should eat no other product or at least reduce the consumption of other products such as pork, chicken, fish, or soy meal? The answer is obvious.

The Secretary approves Board contracts much like the Indian Gaming Commission does as to Indian casino contracts. Do the advertisements promoting gambling and entertainment then generated by Indian casinos or their management companies (operating under a contract approved by the Commission) then constitute "government speech"? Again, the answer is obvious.

The beef checkoff was used to pay $176,502.00 in FY 2000 and $169,988.00 in FY 2001 for "USDA Oversight." This is a further indication that what the Board has been doing is not government speech, the reason being that general tax revenues are not even being used to oversee the checkoff program. Administration expenses of the Board in FY 2001 were $1,745,110.00. Total program expenses for FY 2001 were $51,409,950.00.

III. Relief.

As in *Abood*, it would be impossible to separate what portion of any individual's checkoff assessment is related to the objectionable generic beef promotion activities and what portion is used for the unobjectionable research and educational activities. There is no authority for this court to allow any objecting producer to simply not pay the assessment. Such relief would, in essence, rewrite the Act so as to make it a voluntary assessment. This court may not and will not rewrite the Act. The only other relief available and authorized is to strike down those portions of the Act which authorize compelled assessments for generic promotional activities.

The court rejects the contentions of defendants that the court should, if relief is granted, limit the terms of this ruling to the contributions paid and to be paid by

plaintiffs. To so limit the holding would only encourage numerous other producers, importers, and other sellers of beef on the hoof to file additional lawsuits in this and other federal jurisdictions.

With a ruling that the entire Act and the Order violate the First Amendment, the defendants would be prohibited from using previously paid checkoff funds to continue operations, pay staff members, rent and other expenses, and otherwise operate under the terms of the Act and the Order to promote the purchase and consumption of beef and to fund or conduct research, i.e. until the money "runs out." Contracts for advertising have already been signed. It would be a virtual impossibility to attempt to refund illegally collected checkoff dollars to the beef producers and sellers. Costs to conduct the refund would be astronomical. Plaintiffs have not sought the refund of checkoffs paid in violation of the First Amendment. They have sought only the refund of checkoffs used in violation of the Act, i.e. to promote the checkoff itself and to oppose the referendum sought by plaintiffs. The court has already enjoined the use of beef checkoffs for such illegal purposes and does so again today by way of a permanent injunction. For all these reasons, the court determines that this ruling should be prospective only and should take effect only as of the start of business on July 15, 2002.

The court has earlier today discussed with counsel of record what the court intends to do. Defendants and the intervenors have orally and informally stated to the court and the other parties their desire to seek a stay of this injunction and declaratory ruling, this pursuant to Fed. R. App. P. § 8(a)(1). The court has informally advised the parties that the court would not be inclined to grant any such application for a stay. Therefore, it

appears that moving for such a stay in the district court would be impracticable. The reasons are: (a) the ruling is prospective only; (b) the defendants will be allowed to continue to expend checkoff derived funds on hand and to be collected between now and July 15, 2002, to the extent that the uncommitted funds total more than $10,048,677.00; (c) the Board has at all times had a large surplus and such surplus can be used to continue advertising and research as the Board "winds down"; (d) if the defendants were to be allowed to continue to collect checkoffs under an unconstitutional law, cattle producers, many of whom are now under severe stress from drought conditions, unfavorable market conditions, and economic pressures forcing almost unprecedented sales of live cattle, including in many cases entire herds, would be irreparably harmed since it would be extremely impractical, if not impossible, to refund, if the ruling of this court is not overturned by the United States Court of Appeals for the Eighth Circuit or the United States Supreme Court, any such future collections; (e) justice would not be served by a stay; and (f) the entire matter would only be further delayed if defendants were to be required to seek a stay in the district court with likely no chance of success before proceeding to the Court of Appeals.

The foregoing constitutes the court's findings of fact and conclusions of law.

The requested alternative relief as to the referendum and the Fifth Amendment claims should be denied on the basis that they are moot.

Remaining issues in this case include (a) the award of attorney fees, sales tax, and costs, and (b) the refund request as to $10,048,677.00 alleged to have been illegally expended on so-called "producer communica-

tions." A certification pursuant to Fed. R. Civ. P. § 54(b) is appropriate.

Portions of the preliminary injunction previously issued by the court should be made permanent.

ORDER

Based upon the foregoing,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) The plaintiffs' request in the seventh cause of action of their third amended complaint for declaratory and injunctive relief is granted.

(2) The Beef Promotion and Research Act, 7 U.S.C. § 2901, et seq., and the Beef Order promulgated thereunder, which mandate the payment of an assessment by cattle producers, importers, and others who sell beef subject to the terms of the Act (the beef checkoff), are unconstitutional and unenforceable because they violate the plaintiffs' rights under the First Amendment to the United States Constitution.

(3) The defendants and each of them as well as those described in Fed. R. Civ. P. § 65(d) are hereby enjoined and restrained from any further collection of beef checkoffs as of the start of business on July 15, 2002. This does not prohibit anyone from remitting on or after July 15, 2002, checkoffs collected before July 15, 2002.

(4) This ruling is prospective only as of July 15, 2002.

(5) There is no just reason for delay and, pursuant to Fed. R. Civ. P. § 54(b), judgment should be entered as provided herein although the judgment is as to fewer

than all the claims or the rights and liabilities of the parties.

(6) Attorney fees, sales tax thereon, and the costs of this action shall be awarded to the plaintiffs.

(7) A stay, even if formally requested, would be denied for the reasons expressed in the opinion.

(8) The defendants and those described in Fed. R. Civ. P. § 65(d) are permanently enjoined and restrained from any further use of checkoff funds, directly or indirectly, for the purpose of lauding the merits of the checkoff program and from creating or distributing any material, whether written, oral, or audio-visual, for the purpose of influencing governmental action or policy with regard to the beef checkoff or the Board or both.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 02-2769, 02-2832

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
APPELLEES

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., APPELLANTS

Oct. 16, 2003

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy and Judge Melloy would grant the petition for rehearing en banc.

Judge Wollman did not participate in the consideration or decision of this matter.

(5128-010199)

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GENS
MICHAEL E. GENS

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

The Beef Promotion and Research Act of 1985, Act, 7 U.S.C. 2901 *et seq.*, provides:

§ 2901. Congressional findings and declaration of policy

(a) Congress finds that—

(1) beef and beef products are basic foods that are a valuable part of human diet;

(2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;

(3) beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;

(5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and

(6) beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this chapter shall be construed to limit the right of individual producers to raise cattle.

§ 2902. Definitions

For purposes of this chapter—

(1) the term "beef" means flesh of cattle;

(2) the term "beef products" means edible products produced in whole or in part from beef, exclusive of milk and products made therefrom;

(3) the term "Board" means the Cattlemen's Beef Promotion and Research Board established under section 2904(1) of this title;

(4) the term "cattle" means live domesticated bovine animals regardless of age;

(5) the term "Committee" means the Beef Promotion Operating Committee established under section 2904(5) of this title;

(6) the term "consumer information" means nutritional data and other information that will assist consumers and other persons in making evaluations and decisions regarding the purchasing, preparing, and use of beef and beef products;

(7) the term "Department" means the Department of Agriculture.[1]

(8) the term "importer" means any person who imports cattle, beef, or beef products from outside the United States;

(9) the term "industry information" means information and programs that will lead to the development of new markets, marketing strategies, increased efficiency, and activities to enhance the image of the cattle industry;

(10) The[2] term "order" means a beef promotion and research order issued under section 2903 of this title.[1]

(11) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(12) the term "producer" means any person who owns or acquires ownership of cattle, except that a person shall not be considered to be a producer if

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[1] So in original. The period probably should be a semicolon.

[2] So in original. Probably should not be capitalized.

the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee;

(13) the term "promotion" means any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace;

(14) the term "qualified State beef council" means a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State;

(15) the term "research" means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of beef and beef products, other related food science research, and new product development;

(16) the term "Secretary" means the Secretary of Agriculture;

(17) The[3] term "State" means each of the 50 States; and

(18) the term "United States" means the several States and the District of Columbia.

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[3] So in original. Probably should not be capitalized.

§ 2903. Issuance of orders

(a) During the period beginning on January 1, 1986, and ending thirty days after receipt of a proposal for a beef promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment on such proposed order. Such proposal may be submitted by any organization meeting the requirements for certification under section 2905 of this title or any interested person, including the Secretary.

(b) After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a beef promotion and research order. The order shall become effective not later than one hundred and twenty days following publication of the proposed order.

§ 2904. Required terms in orders

An order issued under section 2903(b) of this title shall contain the following terms and conditions:

(1) The order shall provide for the establishment and selection of a Cattlemen's Beef Promotion and Research Board. Members of the Board shall be cattle producers and importers appointed by the Secretary from (A) nominations submitted by eligible State organizations certified under section 2905 of this title (or, if the Secretary determines that there is no eligible State organization in a State, the Secretary may provide for nominations from such State to be made in a different manner), and (B) nominations submitted by importers under such procedures as the Secretary determines appro-

priate. In determining geographic representation for cattle producers on the Board, whole States shall be considered as a unit. Each State that has a total cattle inventory greater than five hundred thousand head shall be entitled to at least one representative on the Board. A State that has a total inventory of fewer than 500,000 cattle shall be grouped, as far as practicable, with other States each of which has a combined total inventory of not less than 500,000 cattle, into geographically contiguous units in a manner prescribed in the order. A unit may be represented on the Board by more than one member. For each additional million head of cattle within a unit, such unit shall be entitled to an additional member on the Board. The Board may recommend a change in the level of inventory per unit necessary for representation on the Board and, on such recommendation, the Secretary may change the level necessary for representation on the Board. The number of members on the Board that represent importers shall be determined by the Secretary on a proportional basis, by converting the volume of imported beef and beef products into live animal equivalencies.

(2) The order shall define the powers and duties of the Board, which shall be exercised at an annual meeting, and shall include only the following powers:

(A) To administer the order in accordance with its terms and provisions.

(B) To make rules and regulations to effectuate the terms and provisions of the order.

(C) To elect members of the Board to serve on the Committee.

(D) To approve or disapprove budgets submitted by the Committee.

(E) To receive, investigate, and report to the Secretary complaints of violations of the order.

(F) To recommend to the Secretary amendments to the order.

In addition, the order shall determine the circumstances under which special meetings of the Board may be held.

(3) The order shall provide that the term of appointment to the Board shall be three years with no member serving more than two consecutive terms, except that initial appointments shall be proportionately for one-year, two-year, and three-year terms; and that Board members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Board.

(4)(A) The order shall provide that the Board shall elect from its membership ten members to serve on the Beef Promotion Operating Committee, which shall be composed of ten members of the Board and ten producers elected by a federation that includes as members the qualified State beef councils. The producers elected by the federation shall be certified by the Secretary as producers that are directors of a qualified State beef council. The Secretary also shall certify that such directors are duly elected by the federation as representatives to the Committee.

(B) The Committee shall develop plans or projects of promotion and advertising, research, consumer information, and industry information, which shall be paid for with assessments collected by the Board. In developing plans or projects, the Committee shall—

(i) to the extent practicable, take into account similarities and differences between certain beef, beef products, and veal; and

(ii) ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment under this chapter.

(C) The Committee shall be responsible for developing and submitting to the Board, for its approval, budgets on a fiscal year basis of its anticipated expenses and disbursements, including probable costs of advertising and promotion, research, consumer information, and industry information projects. The Board shall approve or disapprove such budgets and, if approved, shall submit such budget to the Secretary for the Secretary's approval.

(D) The total costs of collection of assessments and administrative staff incurred by the Board during any fiscal year shall not exceed 5 per centum of the projected total assessments to be collected by the Board for such fiscal year. The Board shall use, to the extent possible, the resources, staffs, and facilities of existing organizations.

(5) The order shall provide that terms of appointment to the Committee shall be one year, and that no person may serve on the Committee for more than six consecutive terms. Committee members shall serve without compensation, but shall be reimbursed for their

reasonable expenses incurred in performing their duties as members of the Committee. The Committee may utilize the resources, staffs, and facilities of the Board and industry organizations. An employee of an industry organization may not receive compensation for work performed for the Committee, but shall be reimbursed from assessments collected by the Board for reasonable expenses incurred in performing such work.

(6) The order shall provide that, to ensure coordination and efficient use of funds, the Committee shall enter into contracts or agreements for implementing and carrying out the activities authorized by this chapter with established national nonprofit industry-governed organizations, including the federation referred to in paragraph (4), to implement programs of promotion, research, consumer information, and industry information. Any such contract or agreement shall provide that—

(A) the person entering the contract or agreement shall develop and submit to the Committee a plan or project together with a budget or budgets that shows estimated costs to be incurred for the plan or project;

(B) the plan or project shall become effective on the approval of the Secretary; and

(C) the person entering the contract or agreement shall keep accurate records of all of its transactions, account for funds received and expended, and make periodic reports to the Committee of activities conducted, and such other reports as the Secretary, the Board, or the Committee may require.

(7) The order shall require the Board and the Committee to—

(A) maintain such books and records, which shall be available to the Secretary for inspection and audit, as the Secretary may prescribe;

(B) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe; and

(C) account for the receipt and disbursement of all funds entrusted to them.

(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

(B) If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph (1), such assessment shall be collected by the Board.

(C) The order also shall provide that each importer of cattle, beef, or beef products shall pay an assessment, in the manner prescribed by the order, to the Board. The assessments shall be used for payment of the costs of plans and projects, as provided for in paragraph (4), and expenses in administering the order, including more administrative costs incurred by the Secretary after the order has been promulgated under this chapter, and to establish a reasonable reserve. The rate of assessment prescribed by the order shall be one dollar per head of cattle, or the equivalent thereof in

the case of imported beef and beef products. A producer who can establish that the producer is participating in a program of an established qualified State beef council shall receive credit, in determining the assessment due from such producer, for contributions to such program of up to 50 cents per head of cattle or the equivalent thereof. There shall be only one qualified State beef council in each State. Any person marketing from[4] beef from cattle of the person's own production shall remit the assessment to the Board in the manner prescribed by the order.

(9) The order shall provide that the Board, with the approval of the Secretary, may invest, pending disbursement, funds collected through assessments only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(10) The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order.

(11) The order shall require that each person making payment to a producer, any person marketing beef from cattle of the person's own production directly to consumers, and any importer of cattle, beef, or beef products maintain and make available for inspection such books and records as may be required by the order

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[4] So in original. The word "from" probably should not appear.

and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the Secretary as is appropriate to the administration or enforcement of this chapter, the order, or any regulation issued under this chapter. In addition, the Secretary shall authorize the use of information regarding persons paying producers that is accumulated under a law or regulation other than this chapter or regulations under this chapter.

All information so obtained shall be kept confidential by all officers and employees of the Department, and only such information so obtained as the Secretary deems relevant may be disclosed by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order. Nothing in this paragraph may be deemed to prohibit—

(A) the issuance of general statements, based on the reports, of the number of persons subject to the order or statistical data collected therefrom, which statements do not identify the information furnished by any person; or

(B) the publication, by direction of the Secretary, of the name of any person violating the order, together with a statement of the particular provisions of the order violated by the person.

No information obtained under the authority of this chapter may be made available to any agency or officer of the United States for any purpose other than the implementation of this chapter and any investigatory or enforcement act necessary for the implementation of this chapter. Any person violating the provisions of this

paragraph shall be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or both, and if an officer or employee of the Board or the Department, shall be removed from office.

(12) The order shall contain terms and conditions, not inconsistent with the provisions of this chapter, as necessary to effectuate the provisions of the order.

§ 2905. Certification of organizations to nominate

(a) Eligibility of State organization certified by Secretary; eligibility criteria

The eligibility of any State organization to represent producers and to participate in the making of nominations under section 2904(1) of this title shall be certified by the Secretary. The Secretary shall certify any State organization that the Secretary determines meets the eligibility criteria established under subsection (b) of this section and such determination as to eligibility shall be final.

(b) State cattle association or State general farm organization

A State cattle association or State general farm organization may be certified as described in subsection (a) of this section if such association or organization meets all of the following eligibility criteria:

(1) The association or organization's total paid membership is comprised of at least a majority of cattle producers or the association or organization's total paid membership represents at least a majority of the cattle producers in the State.

(2) The association or organization represents a substantial number of producers that produce a substantial number of cattle in the State.

(3) The association or organization has a history of stability and permanency.

(4) A primary or overriding purpose of the association or organization is to promote the economic welfare of cattle producers.

(c) Factual report basis for certification of State cattle association and State general farm association

Certification of State cattle associations and State general farm organizations shall be based on a factual report submitted by the association or organization involved.

(d) Certification of more than one State organization; caucus

If more than one State organization is certified in a State (or in a unit referred to in section 2904(1) of this title), such organizations may caucus to determine any of such State's (or such unit's) nominations under section 2904(1) of this title.

§ 2906. Requirement of referendum

(a) Continuation or termination of order

For the purpose of determining whether the initial order shall be continued, not later than 22 months after the issuance of the order (or any earlier date recommended by the Board), the Secretary shall conduct a referendum among persons who have been producers or importers during a representative period, as determined by the Secretary. The order shall be continued only if the Secretary determines that it has been approved by not less than a majority of the producers voting in the referendum who, during a representative period as determined by the Secretary, have been engaged in the production of cattle. If continuation of the order is not approved by a majority of those voting in the referendum, the Secretary shall terminate collection of assessments under the order within six months after the Secretary determines that continuation of the order is not favored by a majority voting in the referendum and shall terminate the order in an orderly manner as soon as practicable after such determination.

(b) Additional referendum to determine suspension or termination of order

After the initial referendum, the Secretary may conduct a referendum on the request of a representative group comprising 10 per centum or more of the number of cattle producers to determine whether cattle producers favor the termination or suspension of the order. The Secretary shall suspend or terminate collection of assessments under the order within six months after the Secretary determines that suspension or termination of the order is favored by a majority of the producers voting in the referendum who, during a

representative period as determined by the Secretary, have been engaged in the production of cattle and shall terminate or suspend the order in an orderly manner as soon as practicable after such determination.

(c) Reimbursement for cost of referendum; time and place of referendum; certification by producers; absentee mail ballot

The Department shall be reimbursed from assessments collected by the Board for any expenses incurred by the Department in connection with conducting any referendum under this section, except for the salaries of Government employees. Any referendum conducted under this section shall be conducted on a date established by the Secretary, whereby producers shall certify that they were engaged in the production of cattle during the representative period and, on the same day, shall be provided an opportunity to vote in the referendum. Each referendum shall be conducted at county extension offices, and there shall be provision for an absentee mail ballot on request.

§ 2907. Refunds

(a) Establishment of escrow account

During the period prior to the approval of the continuation of an order pursuant to the referendum required under section 2906(a) of this title, subject to subsection (f) of this section, the Board shall—

(1) establish an escrow account to be used for assessment refunds;

(2) place funds in such account in accordance with subsection (b) of this section; and

(3) refund assessments to persons in accordance with this section.

(b) Funding escrow account

Subject to subsection (f) of this section, the Board shall place in such account, from assessments collected under section 2906 of this title during the period referred to in subsection (a) of this section, an amount equal to the product obtained by multiplying—

(1) the total amount of assessments collected under section 2906 of this title during such period; by

(2) the greater of—

(A) the average rate of assessment refunds provided to producers under State beef promotion, research, and consumer information programs financed through producer assessments, as determined by the Board; or

(B) 15 percent.

(c) Demand and receipt of one-time refund

Subject to subsections (d), (e), and (f) of this section and notwithstanding any other provision of this chapter, any person shall have the right to demand and receive from the Board a one-time refund of all assessments collected under section 2906 of this title from such person during the period referred to in subsection (a) of this section if such person—

(1) is responsible for paying such assessment; and

(2) does not support the program established under this chapter.

(d) Form and time period for demand for one-time refund

Such demand shall be made in accordance with regulations, on a form, and within a time period prescribed by the Board.

(e) Submission of proof for one-time refund

Such refund shall be made on submission of proof satisfactory to the Board that the producer, person, or importer—

(1) paid the assessment for which refund is sought; and

(2) did not collect such assessment from another producer, person, or importer.

(f) Insufficiency of funds in escrow account; proration of funds among eligible persons

(1) If the amount in the escrow account required to be established by subsection (a) of this section is not sufficient to refund the total amount of assessments demanded by all eligible persons under this section and the continuation of an order is approved pursuant to the referendum required under section 2906(a) of this title, the Board shall—

(A) continue to place in such account, from assessments collected under section 2904 of this title, the amount required under subsection (b) of this section, until such time as the Board is able to comply with subparagraph (B); and

(B) provide to all eligible persons the total amount of assessments demanded by all eligible producers.

(2) If the amount in the escrow account required to be established by subsection (a) of this section is not sufficient to refund the total amount of assessments demanded by all eligible persons under this section and the continuation of an order is not approved pursuant to the referendum required under section 2906(a) of this title, the Board shall prorate the amount of such refunds among all eligible persons who demand such refund.

§ 2908. Enforcement

(a) Restraining order; civil penalty

If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may—

(1) issue an order to restrain or prevent a person from violating an order; and

(2) assess a civil penalty of not more than $5,000 for violation of such order.

(b) Jurisdiction of district court

The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain a person from violating, an order or regulation made or issued under this chapter.

(c) Civil action to be referred to Attorney General

A civil action authorized to be brought under this section shall be referred to the Attorney General for appropriate action.

§ 2909. Investigations by Secretary; oaths and affirmations; subpoenas; judicial enforcement; contempt proceedings; service of process

The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this chapter or to determine whether any person subject to this chapter has engaged or is about to engage in any act that constitutes or will constitute a violation of this chapter, the order, or any rule or regulation issued under this chapter. For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. The attendance of witnesses and the production of records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of the person and the production of records. The court may issue an order requiring such person to appear before the Secretary to produce records or to give testimony regarding the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

Process in any such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.

§ 2910. Preemption of other Federal and State programs; applicability of provisions to amendments to orders

(a) Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State.

(b) The provisions of this chapter applicable to the order shall be applicable to amendments to the order.

§ 2911. Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out this chapter. Sums appropriated to carry out this chapter shall not be available for payment of the expenses or expenditures of the Board or the Committee in administering any provisions of the order issued under section 2903(b) of this title.

APPENDIX E

The Beef Promotion and Research Order, 7 C.F.R. 1260.101 *et seq*., provides:

DEFINITIONS

§ 1260.101 Department.

Department means the United States Department of Agriculture.

§ 1260.102 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in the Secretary's stead.

§ 1260.103 Board.

Board means the Cattlemen's Beef Promotion and Research Board established pursuant to the Act and this subpart.

§ 1260.104 Committee.

Committee means the Beef Promotion Operating Committee established pursuant to the Act and this subpart.

§ 1260.105 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

§ 1260.106 Collecting person.

Collecting person means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment

pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

§ 1260.107 State.

State means each of the 50 States.

§ 1260.108 United States.

United States means the 50 States and the District of Columbia.

§ 1260.109 Unit.

Unit means each State, group of States or class designation which is represented on the Board.

§ 1260.110 [Reserved]

§ 1260.111 Fiscal year.

Fiscal year means the calendar year or such other annual period as the Board may determine.

§ 1260.112 Federation.

Federation means the Beef Industry Council of the National Live Stock and Meat Board, or any successor organization to the Beef Industry Council, which includes as its State affiliates the qualified State beef councils.

§ 1260.113 Established national nonprofit industry-governed organizations.

Established national nonprofit industry-governed organizations means organizations which:

(a) Are nonprofit organizations pursuant to sections 501(c) (3), (5) or (6) of the Internal Revenue Code (26 U.S.C. 501(c) (3), (5) and (6));

(b) Are governed by a board of directors representing the cattle or beef industry on a national basis; and

(c) Were active and ongoing before the enactment of the Act.

§ 1260.114 Eligible organization.

Eligible organization means any organization which has been certified by the Secretary pursuant to the Act and this Part as being eligible to submit nominations for membership on the Board.

§ 1260.115 Qualified State beef council.

Qualified State beef council means a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the Board pursuant to this subpart as the beef promotion entity in such State.

§ 1260.116 Producer.

Producer means any person who owns or acquires ownership of cattle; provided, however, that a person shall not be considered a producer within the meaning of this subpart if (a) the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee; or (b) the person (1) acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party, (2) resold such cattle no later than ten (10) days from the date on which the person acquired ownership, and (3) certified, as required by regulations prescribed

by the Board and approved by the Secretary, that the requirements of this provision have been satisfied.

§ 1260.117 Importer.

Importer means any person who imports cattle, beef, or beef products from outside the United States.

§ 1260.118 Cattle.

Cattle means live domesticated bovine animals regardless of age.

§ 1260.119 Beef.

Beef means flesh of cattle.

§ 1260.120 Beef products.

Beef products means edible products produced in whole or in part from beef, exclusive of milk and products made therefrom.

§ 1260.121 Imported beef or beef products.

Imported beef or beef products means products which are imported into the United States which the Secretary determines contain a substantial amount of beef including those products which have been assigned one or more of the following numbers in the Tariff Schedule of the United States: 106.1020, 106.1040, 106.1060, 106.1080, 107.2000, 107.2520, 107.4000, 107.4500, 107.4820, 107.4840, 107.5220, 107.5240, 107.5500, 107.6100, 107.6200, 107.6300.

§ 1260.122 Promotion.

Promotion means any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace.

§ 1260.123 Research.

Research means studies relative to the effectiveness of market development and promotion efforts, studies relating to the nutritional value of beef and beef products, other related food science research, and new product development.

§ 1260.124 Consumer information.

Consumer information means nutritional data and other information that will assist consumers and other persons in making evaluations and decisions regarding the purchasing, preparing, and use of beef and beef products.

§ 1260.125 Industry information.

Industry information means information and programs that will lead to the development of new markets, marketing strategies, increased efficiency, and activities to enhance the image of the cattle industry.

§ 1260.126 Plans and projects.

Plans and projects means promotion, research, consumer information and industry information plans, studies or projects conducted pursuant to this subpart.

§ 1260.127 Marketing.

Marketing means the sale or other disposition in commerce of cattle, beef or beef products.

§ 1260.128 Act.

Act means the Beef Promotion and Research Act of 1985, Title XVI, Subtitle A of the Food Security Act of 1985, Pub.L. 99-198 and any amendments thereto.

§ 1260.129 Customs Service.

Customs Service means the United States Customs Service of the United States Department of the Treasury.

§ 1260.130 Part and subpart.

Part means the Beef Promotion and Research Order and all rules and regulations issued pursuant to the Act and the order, and the order itself shall be a "subpart" of such Part.

CATTLEMEN'S BEEF PROMOTION AND RESEARCH BOARD

§ 1260.141 Membership of Board.

(a) Beginning with the 2002 Board nominations and the associated appointments effective early in the year 2003, the United States shall be divided into 39 geographical units and 1 unit representing importers, and the number of Board members from each unit shall be as follows:

Cattle and Calves[1]

State/unit	(1,000 head)	Directors
1. Alabama	1,440	1
2. Arizona	833	1
3. Arkansas	1,823	2
4. California	5,117	5
5. Colorado	3,167	3
6. Florida	1,820	2

[1] 1999, 2000 and 2001 average of January 1 cattle inventory data.

State/unit	(1,000 head)	Directors
7. Idaho ……..……..……..	1,940	2
8. Illinois ……	1,497	1
9. Indiana ……..	953	1
10. Iowa ……	3,683	4
11. Kansas ……	6,617	7
12. Kentucky ……..	2,303	2
13. Louisiana ……..	887	1
14. Michigan ……	1,013	1
15. Minnesota …….	2,533	3
16. Mississippi ……	1,100	1
17. Missouri …….	4,333	4
18. Montana …….	2,583	3
19. Nebraska ……..	6,650	7
20. Nevada ……..	517	1
21. New Mexico ……..	1,617	2
22. New York …….	1,433	1
23. North Carolina …….	957	1
24. North Dakota ……	1,927	2
25. Ohio ……	1,237	1
26. Oklahoma ……..	5,183	5
27. Oregon ……	1,447	1
28. Pennsylvania …….	1,653	2
29. South Dakota ……	3,950	4
30. Tennessee …….	2,167	2
31. Texas …….	13,900	14
32. Utah ……..……..	903	1
33. Virginia …….	1,650	2
34. Wisconsin ……..	3,383	3
35. Wyoming ……..	1,563	2

State/unit	(1,000 head)	Directors
36. Northwest ……	……	1
Alaska ……..	11	……..
State/unit	(1,000 head)	Directors
Hawaii ……	162	……..
Washington ……...	1,187	……..
Total …….	1,408	
37. Northeast …….	……	1
Connecticut ……..	65	……..
Delaware ……..	28	……..
Maine ……	99	……..
Massachusetts …….	55	……..
New Hampshire ……..	45	……..
New Jersey ……..	50	……..
Rhode Island ……	6	……..
Vermont	300	……..
….Total …….	647	
38. Mid-Atlantic …….	……	1
District of Columbia….	0	……
Maryland	243	……
West Virginia	420	……
….Total …….	663	
39. Southeast …….	……	2
Georgia …….	1,293	……
South Carolina ……	463	……
….Total …….	1,756	
40. Importer[2] …….	7,654	8

[2] 1998, 1999, and 2000 average of annual import data.

(b) The Board shall be composed of cattle producers and importers appointed by the Secretary from nominations submitted pursuant to the Act and regulations of this Part. A producer may only be nominated to represent the unit in which that producer is a resident.

(c) At least every three (3) years, and not more than every two (2) years, the Board shall review the geographic distribution of cattle inventories throughout the United States and the volume of imported cattle, beef, and beef products and, if warranted, shall reapportion units and/or modify the number of Board members from units in order to best reflect the geographic distribution of cattle production volume in the United States and the volume of imported cattle, beef, or beef products into the United States.

(d) The Board may recommend to the Secretary a modification in the number of cattle per unit necessary for representation on the Board.

(e) The following formula will be used to determine the number of Board members who shall serve on the Board for each unit:

(1) Each geographic unit or State that includes a total cattle inventory equal to or greater than five hundred thousand (500,000) head of cattle shall be entitled to one representative on the Board;

(2) States which do not have total cattle inventories equal to or greater than five hundred thousand (500,000) head of cattle shall be grouped, to the extent practicable, into geographically contiguous units each of which have a combined total inventory of not less than 500,000 head of cattle and such unit(s) shall be entitled to at least one representative on the Board;

(3) Importers shall be represented by a single unit, with the number of Board members representing such unit based upon a conversion of the total volume of imported cattle, beef or beef products into live animal equivalencies;

(4) Each unit shall be entitled to representation by an additional Board member for each one million (1,000,000) head of cattle within the unit which exceeds the initial five hundred thousand (500,000) head of cattle within the unit qualifying such unit for representation.

(f) In determining the volume of cattle within the units, the Board and the Secretary shall utilize the information received by the Board pursuant to §§ 1260.201 and 1260.202 industry data and data published by the Department.

§ 1260.142 Term of office.

(a) The members of the Board shall serve for terms of three (3) years, except that the members appointed to the initial Board shall serve, proportionately, for terms of 1, 2, and 3 years. To the extent practicable, the terms of Board members from the same unit shall be staggered for the initial Board.

(b) Each member shall continue to serve until a successor is appointed by the Secretary.

(c) No member shall serve more than two consecutive 3-year terms in such capacity.

§ 1260.143 Nominations.

All nominations authorized under this section shall be made in the following manner:

(a) Nominations shall be obtained by the Secretary from eligible organizations. An eligible organization shall only submit nominations for positions on the Board representing units in which such eligible organization can establish that it is certified as an eligible organization to submit nominations for that unit. If the Secretary determines that a unit is not represented by an eligible organization, then the Secretary may solicit nominations from organizations, and producers residing in that unit.

(b) Nominations for representation of the importer unit may be submitted by—

(1) Organizations which represent importers of cattle, beef or beef products, as determined by the Secretary, or

(2) Individual importers of cattle, beef or beef products. Individual importers submitting nominations for representation of the importer unit must establish to the satisfaction of the Secretary that the persons submitting the nominations are importers of cattle, beef or beef products.

(c) After the establishment of the initial Board, the Department shall announce when a vacancy does or will exist. Nominations for subsequent Board members shall be submitted to the Secretary not less than sixty (60) days prior to the expiration of the terms of the members whose terms are expiring, in the manner as described in this section. In the case of vacancies due to reasons other than the expiration of a term of office, successor Board members shall be appointed pursuant to § 1260.146.

(d) Where there is more than one eligible organization representing producers in a unit, they may caucus

and jointly nominate two qualified persons for each position representing that unit on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary two nominees for each appointment to be made to represent that unit.

§ 1260.144 Nominee's agreement to serve.

Any producer or importer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed; and

(b) Disclose any relationship with any beef promotion entity or with any organization that has or is being considered for a contractual relationship with the Board.

§ 1260.145 Appointment.

(a) From the nominations made pursuant to § 1260.143, the Secretary shall appoint the members of the Board on the basis of representation provided for in § 1260.141.

(b) Producers or importers serving on the Federation Board of Directors shall not be eligible for appointment to serve on the Board for a concurrent term.

§ 1260.146 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall request that nominations for a successor for the vacancy be submitted by the eligible organization(s) representing producers or importers of the unit represented by the vacancy. If no eligible

organization(s) represents producers or importers in such unit, then the Secretary shall determine the manner in which nominations for the vacancy are submitted.

§ 1260.147 Procedure.

(a) At a properly convened meeting of the Board, a majority of the members shall constitute a quorum, and any action of the Board at such a meeting shall require the concurring votes of at least a majority of those present at such meeting. The Board shall establish rules concerning timely notice of meetings.

(b) When in the opinion of the chairperson of the Board emergency action is considered necessary, and in lieu of a properly convened meeting, the Board may take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph, but any such action by telephone shall be confirmed promptly in writing. In the event that such action is taken, all members must be notified and provided the opportunity to vote. Any action so taken shall have the same force as though such action had been taken at a regular or special meeting of the Board.

§ 1260.148 Compensation and reimbursement.

The members of the Board shall serve without compensation, but shall be reimbursed for necessary and reasonable expenses incurred by them in the performance of their duties under this subpart.

§ 1260.149 Powers of the Board.

The Board shall have the following powers:

(a) administer the provisions of this subpart in accordance with its terms and provisions;

(b) To make rules and regulations to effectuate the terms and provisions of this subpart;

(c) To receive or initiate, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(d) To adopt such rules for the conduct of its business as it may deem advisable;

(e) To recommend to the Secretary amendments to this subpart; and

(f) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1260.172, in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

§ 1260.150 Duties of the Board.

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairperson, a vice-chairperson and a treasurer and such other officers as may be necessary;

(b) To elect from its members an Executive Committee of no more than 11 and no less than 9 members, whose membership shall, to the extent practicable, reflect the geographic distribution of cattle numbers or their equivalent. The vice-chairperson of the Board shall serve as chairperson of the Executive Committee

and the chairperson and the treasurer of the Board shall serve as members of the Executive Committee;

(c) To delegate to the Executive Committee the authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

(d) To elect from its members 10 representatives to the Beef Promotion Operating Committee which shall be composed of 10 members from the Board and 10 members elected by the Federation;

(e) To utilize the resources, personnel, and facilities of established national nonprofit industry-governed organizations;

(f) To review and, if approved, submit to the Secretary for approval, budgets prepared by the Beef Promotion Operating Committee on a fiscal period basis of the Committee's anticipated expenses and disbursements in the administration of the Committee's responsibilities, including probable costs of promotion, research, and consumer information and industry information plans or projects, and also including a general description of the proposed promotion, research, consumer information and industry information programs contemplated therein;

(g) To prepare and submit to the Secretary for approval budgets on a fiscal period basis of the Board's overall anticipated expenses and disbursements, including the Committee's anticipated expenses and disbursements, in the administration of this subpart;

(h) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe,

and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(i), (j) [Reserved]

(k) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(l) To cause its books to be audited by a certified public accountant at least once each fiscal period and at such other times as the Secretary may request, and submit a copy of each such audit to the Secretary;

(m) To give the Secretary the same notice of meetings of the Board as is given to members in order that the Secretary, or his representative may attend such meetings;

(n) To review applications submitted by State beef promotion organizations pursuant to § 1260.181 and to make determinations with regard to such applications;

(o) To submit to the Secretary such information pursuant to this subpart as may be requested; and

(p) To encourage the coordination of programs of promotion, research, consumer information and industry information designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

§ 1260.151 Expenses.

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve), as the Secretary finds are reasonable and likely to be incurred by the board for its maintenance and functioning and to enable it to exercise its powers and perform its duties

in accordance with this subpart. Administrative expenses incurred by the board shall not exceed 5 percent of the projected revenue of that fiscal period. Expenses authorized in this paragraph shall be paid from assessments collected pursuant to § 1260.172.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1260.172, for administrative costs incurred by the Department to carry out its responsibilities pursuant to this subpart after the effective date of this subpart.

(c) [Reserved]

(d) Expenditures for the maintenance and expansion of foreign markets for beef and beef products shall be limited to an amount equal to or less than the total amount of assessments paid pursuant to § 1260.172(a).

BEEF PROMOTION OPERATING COMMITTEE

§ 1260.161 Establishment and membership.

(a) There is hereby established a Beef Promotion Operating Committee of 20 members. The Committee shall be composed of 10 Board members elected by the Board and 10 producers elected by the Federation.

(b) Board representation on the Committee shall consist of the chairperson, vice-chairperson and treasurer of the Board, and seven representatives of the Board who will be duly elected by the Board to serve on the Committee. The seven representatives to the Committee elected by the Board shall, to the extent practical, reflect the geographic and unit distribution of cattle numbers, or the equivalent thereof.

(c) Federation representation on the Committee shall consist of the Federation chairperson, vice-chair-

person, and eight duly elected producer representatives of the Federation Board of Directors who are members or ex officio members of the Board of Directors of a qualified State beef council. The eight representatives of the Federation elected to serve on the Committee shall, to the extent practical, reflect the geographic distribution of cattle numbers. The Federation shall submit to the Secretary the names of the representatives elected by the Federation to serve on the Committee and the manner in which such election was held and that such representatives are producers and are members or ex officio members of the Board of Directors of a qualified State beef council on the Federation Board of Directors. The prospective Federation representatives shall file with the Secretary a written agreement to serve on the Committee and to disclose any relationship with any beef promotion entity or with any organization that has or is being considered for a contractual relationship with the Board or the Committee. When the Secretary is satisfied that the above conditions are met, the Secretary shall certify such representatives as eligible to serve on the Committee.

§ 1260.162 Term of office.

(a) The members of the Committee shall serve for a term of 1 year.

(b) No member shall serve more than six consecutive terms.

§ 1260.163 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Committee, the Board or the Federation, depending upon which organization is represented by the vacancy, shall submit the name of a successor for the position in

the manner utilized to elect representatives pursuant to § 1260.161 (b) and (c) of this section.

§ 1260.164 Procedure.

(a) Attendance of at least 15 members of the Committee shall constitute a quorum at a properly convened meeting of the Committee. Any action of the Committee shall require the concurring votes of at least two-thirds of the members present. The Committee shall establish rules concerning timely notice of meetings.

(b) When in the opinion of the chairperson of the Committee emergency action must be taken before a meeting can be called, the Committee may take action upon the concurring votes of no less than two-thirds of its members by mail, telephone, or telegraph. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Committee.

§ 1260.165 Compensation and reimbursement.

The members of the Committee shall serve without compensation but shall be reimbursed for necessary and reasonable expenses incurred by them in the performance of their duties under this subpart.

§ 1260.166 Officers of the Committee.

The following persons shall serve as officers of the Committee:

(a) The chairperson of the Board shall be chairperson of the Committee.

(b) The chairperson of the Federation shall be vice-chairperson of the Committee.

(c) The treasurer of the Board shall be treasurer of the Committee.

(d) The Committee shall elect or appoint such other officers as it may deem necessary.

§ 1260.167 Powers of the Committee.

The Committee shall have the following powers:

(a) To receive and evaluate, or on its own initiative, develop and budget for plans or projects to promote the use of beef and beef products as well as projects for research, consumer information and industry information and to make recommendations to the Secretary regarding such proposals;

(b) To select committees and subcommittees of Committee members, and to adopt such rules for the conduct of its business as it may deem advisable;

(c) To establish committees of persons other than Committee members to advise the Committee and pay the necessary and reasonable expenses and fees of the members of such committees.

§ 1260.168 Duties of the Committee.

The Committee shall have the following duties:

(a) To meet and to organize;

(b) To contract with established national nonprofit industry-governed organizations to implement programs of promotion, research, consumer information and industry information;

(c) To disseminate information to Board members;

(d) To prepare and submit to the Board for approval budgets on a fiscal-period basis of its anticipated expenses and disbursements in the administration of its responsibilities, including probable costs of promotion, research, consumer information and industry information plans or projects, and also including a general description of the proposed promotion, research, consumer information and industry information programs contemplated therein;

(e) To develop and submit to the Secretary for approval promotion, research, consumer information and industry information plans or projects;

(f) With the approval of the Secretary to enter into contracts or agreements with established national nonprofit industry-governed organizations for the implementation and conduct of activities authorized under §§ 1260.167 and 1260.169 and for the payment of the cost of such activities with funds collected through assessments pursuant to § 1260.172. Any such contract or agreement shall provide that:

(1) The contractors shall develop and submit to the Committee a budget or budgets which shall show the estimated cost to be incurred for such activity or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Committee or Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary, the Committee or the Board may require. The Secretary or agents of the Committee or the Board

may audit periodically the records of the contracting party;

(g) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(h) To give the Secretary the same notice of meetings of the Committee and its subcommittees and advisory committees in order that the Secretary, or his representative, may attend such meetings;

(i) To submit to the Board and to the Secretary such information pursuant to this subpart as may be requested; and

(j) To encourage the coordination of programs of promotion, research, consumer information and industry information designed to strengthen the cattle industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

§ 1260.169 Promotion, research, consumer information and industry information.

The Committee shall receive and evaluate, or on its own initiative, develop and submit to the Secretary for approval any plans and projects for promotion, research, consumer information and industry information authorized by this subpart. Such plans and projects shall provide for:

(a) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research, consumer information and industry information, with respect to beef and beef products designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic

and foreign markets and uses for beef and beef products;

(b) The establishment and conduct of research and studies with respect to the sale, distribution, marketing, and utilization of beef and beef products and the creation of new products thereof, to the end that marketing and utilization of beef and beef products may be encouraged, expanded, improved or made more acceptable in the United States and foreign markets;

(c) Each plan or project authorized under paragraph (a) and (b) of this section shall be periodically reviewed or evaluated by the Committee to ensure that each such plan or project contributes to an effective program of promotion, research, consumer information and industry information. If it is found by the Committee that any such plan or project does not further the purposes of the Act, then the Committee shall terminate such plan or project;

(d) In carrying out any plan or project of promotion or advertising implemented by the Committee, no reference to a brand or trade name of any beef product shall be made without the approval of the Board and the Secretary. No such plans or projects shall make use of any unfair or deceptive acts or practices, including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product; and

(e) No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this Part.

ASSESSMENTS

§ 1260.172 Assessments.

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

(2) Any producer marketing cattle of that producer's own production in the form of beef or beef products to consumers, either directly or through retail or wholesale outlets, or for export purposes, shall remit to a qualified State beef council or to the Board an assessment on such cattle at the rate of one dollar ($1) per head of cattle or the equivalent thereof.

(3) In determining the assessment due from each producer pursuant to § 1260.172(a) , a producer who is contributing to a qualified State beef council(s) shall receive a credit from the Board for contributions to such Council, but not to exceed 50 cents per head of cattle assessed.

(4) In order for a producer described in § 1260.172(a) to receive the credit authorized in § 1260.172(a)(3), the qualified State beef council or the collecting person must establish to the satisfaction of the Board that the producer has contributed to a qualified State beef council.

(5) Each person responsible for the remittance of the assessment pursuant to § 1260.172(a)(1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the Board. However, the Board, with the approval of the Secretary, may authorize qualified State beef councils to propose modifications to the foregoing "State of origin" rule to ensure effective coordination of assessment collections between qualified State beef councils. Qualified State beef councils and the Board shall coordinate assessment collection procedures to ensure that producers selling or marketing cattle in interstate commerce are required to pay only one assessment per individual sale of cattle. For the purpose of this subpart, "State of origin" rule means the State where the cattle were located at time of sale, or the State in which the cattle were located prior to sale if such cattle were transported interstate for the sole purpose of sale. Assessments shall be remitted not later than the 15th day of the month following the month in which the cattle were purchased or marketed.

(6) If a State law or regulation promulgated pursuant to State law requires the payment and collection of a mandatory, nonrefundable assessment of more fifty (50) cents per head on the sale and purchase of cattle, or the equivalent thereof for beef and beef products as described in § 1260.172(a)(1) and (2) for use by a qualified State beef council to fund activities similar to those described in § 1260.169, and such State law or regulation authorizes the issuance of a credit of that amount of the assessment which exceeds fifty (50) cents to producers who waive any right to the refund of the

assessment credited by the State due pursuant to this subpart, then any producer subject to such State law or regulation who pays only the amount due pursuant to such State law or regulation and this subpart, including any credits issued, shall thereby waive that producer's right to receipt from the Board of a refund of such assessment for that portion of such refund for which the producer received credit pursuant to such State law or regulation.

(b) *Importer assessments.* (1) Importers of cattle, beef, and beef products into the United States shall pay an assessment to the Board through the U.S. Customs Service, or in such other manner as may be established by regulations approved by the Secretary.

(2) The assessment rates for imported cattle, beef, and beef products are as follows:

Live Cattle	Assessment
0102.10.00103	$1.00/hd
0102.10.00201	$1.00/hd
0102.10.00309	$1.00/hd
0102.10.00504	$1.00/hd
0102.90.20004	$1.00/hd
0102.90.40206	$1.00/hd
0102.90.40402	$1.00/hd
0102.90.40607	$1.00/hd

Beef and Beef Products	Assessment	
	cents/lb	cents/kg
0201.10.00103	.77	1.697542
0201.10.00906	.20	0.440920
0201.20.20009	.28	0.617288
0201.20.40005	.27	0.595242
0201.20.60000	.20	0.440920
0201.30.20007	.28	0.617288
0201.30.40003	.27	0.595242
0201.30.60008	.27	0.595242
0202.10.00102	.77	1.697542
0202.10.00905	.20	0.440920
0202.20.20008	.28	0.617288
0202.20.40004	.27	0.595242
0202.20.60009	.20	0.440920
0202.30.20006	.28	0.617288
0202.30.40002	.27	0.595242
0202.30.60007	.27	0.595242
0206.10.00000	.20	0.440920
0206.21.00007	.20	0.440920
0206.22.00006	.20	0.440920
0206.29.00009	.20	0.440920
0210.20.00002	.35	0.771610
1601.00.40003	.25	0.551150
1601.00.60204	.25	0.551150
1602.50.05004	.35	0.771610

Beef and Beef Products	Assessment	
	cents/lb	cents/kg
1602.50.09000	.35	0.771610
1602.50.10203	.35	0.771610
1602.50.10409	.35	0.771610
1602.50.20201	.37	0.815702
1602.50.20407	.37	0.815702
1602.50.60006	.38	0.837748

(3) The Board may prescribe by regulation, with the approval of the Secretary, an increase or decrease in the level of assessments for imported beef and beef products based upon revised determinations of live animal equivalencies.

(4) The assessments due upon imported cattle, beef and beef products shall be remitted to the Customs Service upon importation of the cattle, beef or beef products into the United States, or in such other manner as may be provided by regulations prescribed by the Board and approved by the Secretary.

(c) The collection of assessments pursuant to § 1260.172 (a) and (b) shall begin with respect to cattle purchased or cattle, beef, and beef products imported on and after the effective date of this section and shall continue until terminated by the Secretary.

(d) Money remitted pursuant to this subpart shall be in the form of a negotiable instrument made payable as

appropriate to the qualified State beef council or the "Cattlemen's Beef Promotion and Research Board." Such remittances and the reports specified in § 1260.201 shall be mailed to the location designated by the Board.

§§ 1260.173, 1260.174 [Reserved]

§§ 1260.173, 1260.174 [Reserved]

§ 1260.175 Late-payment charge.

Any unpaid assessments due to the Board pursuant to § 1260.172 shall be increased 2.0 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the qualified State beef council or Board, whichever is earlier.

§ 1260.176 Adjustment of accounts.

Whenever the Board or the Department determines that money is due the Board or that money is due any person from the Board, such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1260.172. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts

due in succeeding months except that the Board shall make prompt payment when an overpayment cannot be adjusted by a credit.

§ 1260.181 Qualified State beef councils.

(a) Any beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives assessments or contributions from producers and conducts beef promotion, research, consumer information and/or industry information programs may apply for certification of qualification so that producers may receive credit pursuant to § 1260.172(a)(3) for contributions to such organization. The Board shall review such applications for certification and shall make a determination as to certification of such applicant.

(b) In order for the State beef council to be certified by the Board as a qualified State beef council, the council must:

(1) Conduct activities as defined in Section 1260.169 that are intended to strengthen the beef industry's position in the marketplace;

(2) Submit to the Board a report describing the manner in which assessments are collected and the procedure utilized to ensure that assessments due are paid;

(3) Certify to the Board that such council will collect assessments paid on cattle originating from the State or unit within which the council operates and shall establish procedures for ensuring compliance with this subpart with regard to the payment of such assessments;

(4) Certify to the Board that such organization shall remit to the Board assessments paid and remitted to

the council, minus authorized credits issued to producers pursuant to § 1260.172(a)(3), by the last day of the month in which the assessment was remitted to the qualified State beef council unless the Board determines a different date for remittance of assessments.

(5) [Reserved]

(6) Certify to the Board that the council will furnish the Board with an annual report by a certified public accountant of all funds remitted to such council pursuant to this subpart and any other reports and information the Board or Secretary may request; and

(7) Not use council funds collected pursuant to this subpart for the purpose of influencing governmental policy or action, or to fund plans or projects which make use of any unfair or deceptive acts or practices including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

REPORTS, BOOKS AND RECORDS

§ 1260.201 Reports.

Each importer, person marketing cattle, beef or beef products of that person's own production directly to consumers, and each collecting person making payment to producers and responsible for the collection of the assessment under § 1260.172 shall report to the Board periodically information required by regulations prescribed by the Board and approved by the Secretary. Such information may include but is not limited to the following:

(a) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the

collection of assessment, and the dates of such transaction;

(b) The number of cattle imported; or the equivalent thereof of beef or beef products;

(c) The amount of assessment remitted;

(d) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and,

(e) The date any assessment was paid.

§ 1260.202 Books and records.

Each person subject to this subpart shall maintain and make available for inspection by the Secretary the records required by regulations prescribed by the Board and approved by the Secretary that are necessary to carry out the provisions of this subpart, including records necessary to verify any required reports. Such records shall be maintained for the period of time prescribed by the regulations issued hereunder.

§ 1260.203 Confidential treatment.

All information obtained from such books, records or reports required under the Act and this subpart shall be kept confidential by all persons, including employees and agents and former employees and agents of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and employees and all former officers and employees of contracting organizations having access to such information, and shall not be available to Board members or any other producers or importers. Only those persons having a specific need for such information in order to effectively administer the provisions of this subpart

shall have access to this information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of the subpart violated by such person.

MISCELLANEOUS

§ 1260.211 Proceedings after termination.

(a) Upon the termination of this subpart the Board shall recommend not more than 11 of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all the funds and property owned, in the possession of or under the control of the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to §§ 1260.150 and 1260.168.

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research, consumer information or industry information plans or projects authorized pursuant to this subpart.

§ 1260.212 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued pursuant thereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may hereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or,

(c) Affect or impair any rights or remedies of the United States, or of the Secretary, or of any person, with respect to any such violation.

§ 1260.213 Removal.

If any person appointed under this Part fails or refuses to perform his or her duties properly or engages in acts of dishonesty or willful misconduct, the Board or Committee may recommend to the Secretary that that person be removed from office. If the Secretary finds that the recommendation demonstrates adequate cause, the Secretary shall remove the person from office. A person appointed or certified under this Part or any employee of the Board or Committee may be removed by the Secretary if the Secretary determines that the person's continued service would be detrimental to the purposes of the Act.

§ 1260.214 Personal liability.

No member, employee or agent of the Board or the Committee, including employees or agents of a qualified State beef council acting on behalf of the Board, shall be held personally responsible, either individually or jointly, in any way whatsoever, to any person for errors in judgment, mistakes or other acts of either commission or omission, or such member or employee, except for acts of dishonesty or willful misconduct.

§ 1260.215 Patents, copyrights, inventions and publications.

(a) Any patents, copyrights, inventions or publications developed through the use of funds collected by the Board under the provisions of this subpart shall be

the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, ensure to the benefit of the Board. Upon termination of this subpart, § 1260.211 shall apply to determine disposition of all such property.

(b) Should patents, copyrights, inventions or publications be developed through the use of funds collected by the Board under this subpart and funds contributed by another organization or person, ownership and related rights to such patents, copyrights, inventions or publications shall be determined by agreement between the Board and the party contributing funds towards the development of such patent, copyright, invention or publication in a manner consistent with paragraph (a) of this section.

§ 1260.216 Amendments.

Amendments to this subpart may be proposed, from time to time, by the Board, or by any organization or association certified pursuant to the Act and this Part, or by any interested person affected by the provisions of the Act, including the Secretary.

§ 1260.217 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof of other persons or circumstances shall not be affected thereby.