No. 02-36140

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JEANNE CHARTER and **STEVE CHARTER,**

Petitioners-Appellants, and

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

Intervenors-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent-Appellee, and

CHARLES M. REIN, *et al.*

*Intervenors-Appellees***.**

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

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There is absolutely no doubt that under the test applied in *United Foods*, the Beef Act violates the First Amendment. The Act forces appellants to support collective speech with which they vehemently disagree and that is not germane to any compelled collective activities imposed on cattle ranchers. USDA's current pretense that such speech is fully immune "government speech" – even though the government neither pays nor accepts attribution for the speech – turns the First Amendment on its head. Such speech is generated and paid for exclusively by

cattle ranchers and is explicitly and exclusively attributed to cattle ranchers. It is ironic and appalling that USDA *oversight* authority intended to *protect* ranchers and their checkoff funds in this "self-help" program has so corrupted USDA that the ranchers now need protection from the Department's efforts to help itself to near *absolute* authority over the checkoff. Regardless how the resulting speech is categorized, compelled support for such speech violates the First Amendment.

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

The district court's government speech analysis in this case is indefensible, and USDA largely ignores the opinion below. USDA continues to defend the result, however, and this Court should thus recognize the government speech defense for what it is: A cynical gambit designed to circumvent years of precedent that finally resolved in favor of the First Amendment. Checkoff programs are not government speech. Rather, they involve collective private speech funded through the compelled support of discrete industries. In evaluating USDA's government-speech claims, this Court should "decline," as it did in *Brown* v. *California Department of Transportation*, "to extend the government-funding cases to a situation in which the government has not appropriated any funds toward achieving a policy goal for which it is accountable to the electorate." 321 F.3d 1217, 1225 (9th Cir. 2003). Here, as in *Brown*, to "do so would deal a crippling blow to the

First Amendment by removing an essential check on the government's ability to support one viewpoint to the exclusion of another." *Id*.

A. Beef Checkoff Speech Is Not Government Speech.

Any cogent test for defining "government speech" must distinguish between such speech on the one hand and censorship, viewpoint discrimination in non-public fora, and compelled support for third-party speech on the other. Attribution and funding are the two essential elements for drawing any possible line. Speech attributed to and paid for by the government is government speech. Speech attributed to and paid for by a discrete group of private parties is private speech, regardless of how much the government manipulates it, restricts it, compels it, or oversees it.

1. Frame *controls in this Circuit.*

This Court's decision in *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429 (9th Cir. 1993) (*Cal-Almond I*), adopted the government-speech analysis from *United States* v. *Frame,* 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), and applied it in a manner that disposes of this case. Joint Br. 19-20.[1] USDA erroneously claims, at 48, that *Cal-Almond I* lacks force because it was remanded

[1] Contrary to USDA's assertion, at 48, *Cal-Almond I*'s adoption of *Frame* was not *dicta*, but was a necessary first step in this Court's analysis. 14 F.3d at 435. *Glickman*, however, only conflicted with this Court's subsequent steps.

along with a subsequent *Cal-Almond* decision for reconsideration in light of *Glickman* v. *Wileman Brothers & Elliot, Inc.,* 521 U.S. 457 (1997). But while the remand implicitly overruled the commercial-speech analysis in *Cal-Almond I*, it did not question this Court's government-speech holding.[2]

This Court has continued to recognize and apply those portions of *Cal-Almond I* that were not called into question by *Glickman*. *See, e.g.*, *NRDC* v. *Evans*, 316 F.3d 904, 906, 911-12 (9th Cir. 2003) (relying on *Cal-Almond I* regarding an APA issue; "The outcome here follows from *Cal-Almond*."); *Yang* v. *California Dept. of Social Servs*., 183 F.3d 953, 958, 961 n. 5 (9th Cir. 1999) (citing and quoting *Cal-Almond I* regarding deference to agencies); *Gallo Cattle Co.* v. *USDA*, 159 F.3d 1194, 1199-1200 (9th Cir. 1998) (relying on *Cal-Almond I* regarding sufficiency of a checkoff refund as a post-deprivation remedy). That continuing reliance on *Cal-Almond I* demonstrates that the decision retains force in this Circuit on matters not implicitly overruled by *Glickman*. It thus disposes of the government-speech defense in this case.[3]

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[2] *See, e.g.*, *Glickman*, 521 U.S. at 482 n. 2 (Souter, J., dissenting) (noting that government does not assert government-speech defense)

[3] The suggestion by intervenors, at 26, that appellants failed to raise *Cal-Almond I* in the court below displays inattention at best. *See* Petitioners' Reply/Opposition on Summary Judgment, at ii, 8-9 & n. 1 (Table of Authorities and discussion).

2. *Attribution and funding are the correct touchstones of any test defining government speech.*

When deciding who is the "speaker" in any given instance, the common-sense and correct questions to ask are who is *identified* as the speaker and who is *paying* for the speech – *i.e.*, attribution and funding. Attribution is significant because the government-speech doctrine turns on the supposed *accountability* of the government for such speech, which is necessarily a function of the electorate at least *knowing* that the government is doing the speaking.[4] Funding is significant as a practical identifier of who is actually speaking, as an accountability tool giving the public an incentive to "mind the shop," and as a fairness check to ensure that the costs of government speech supposedly benefiting the public as a whole are likewise borne by the public as a whole.

In this case, as in *Frame*, checkoff speech is expressly attributed to cattle producers, and the nexus to private parties, non-attribution to the government, funding, and speech generation corroborate such attribution to cattle producers

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[4] If the government-speech doctrine is to make any sense at all, it must depend on some uniquely *greater* accountability for government speech than for other speech-impacting government conduct. The government's ordinary democratic accountability for *all* of its behavior has never been thought to excuse it from otherwise applicable First Amendment limits.

rather than the government. Joint Br. 24-35.[5] Indeed, as *Frame* recognized, Congress itself expressly disclaimed any notion that the government was speaking through the Beef Act and instead held it out as a "'self-help'" program for private industry; government would neither pay for the industry's pursuit of "its own strategies" nor intrude upon that private activity. 885 F.2d at 1122 (citing Report of Committee on Agriculture, Beef Research and Information Act, H.R.Rep. No. 452, 94th Cong., 1st Sess. 3 (1975)). In proposing the Beef Act, cattlemen had asked "'only for *enabling* legislation,'" *Frame*, 885 F.2d at 1135 (quoting 121 Cong. Rec. 31,439 (statement of Rep. Santini)) (emphasis added), and that was all Congress enacted.

Even today, Congress continues to declare that the beef and other checkoffs are "industry-funded, Government-supervised" programs that "provide a unique

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[5] Despite USDA's criticisms, at 51, there is nothing especially uncertain about examining the nexus between speech and private parties as a part of the attribution analysis. And there is nothing anomalous about using a close private nexus to increase First Amendment scrutiny even where the speech may have originated with the government, as both *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), demonstrate in the context of state mottos on license plates and the Pledge of Allegiance in schools. Even in the case of admitted government speech, a close nexus to narrow groups of private speakers might be seen as involving compelled expressive association rather than direct speech. Viewed that way, it is irrelevant whether the primary expression of the beef checkoff is government speech or not: Forced expressive association with that speech, both group-specific through funding requirements and through group attribution would violate the First Amendment regardless of whether the government was entitled to speak independently.

opportunity *for producers and processors to inform consumers* about their products." 7 U.S.C. § 7401(b)(1) & (2) (emphasis added). Indeed, Congress expressly confirmed its original understanding and intent that such programs would "operate as 'self-help' mechanisms for producers and processors to fund generic promotions for covered commodities," subject only to "the required *supervision and oversight* of the Secretary of Agriculture." *Id*. § 7401(b)(8) (emphasis added). Congress intended nothing more than to enable collective private speech. It did not impose upon the industry a regime of government speech.

Congress' attribution of checkoff speech to private cattle ranchers and not the government is mirrored in statements by the Beef Board. Joint Br. 26, 28. Insofar as the government not only refuses to accept attribution for the checkoff speech but, in addition, actively attributes that speech to private speakers, there is no unique government accountability for the speech and it should not be categorized as government speech.

USDA, at 34-35, misguidedly relies on *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), to claim that the Beef Board itself is a government actor entitled to the supposed privilege of the government-speech doctrine. But *Lebron* expressly distinguished between "government" status "for purposes of the *constitutional obligations* of Government *rather than the*

'privileges of the government,'" *Id* at 399 (emphasis added), and held that Amtrak had *violated* the First Amendment. Amtrak was sufficiently governmental to involve state-action subject to the *constraints* of the Constitution, but not so part of the government as to claim its potential immunities. Similarly, the State Bar in *Keller* v. *State Bar of California* was definitively declared a "public corporation" and a "government agency," but that only triggered the First Amendment, it did not potentially immunize the Bar as a "government" speaker. 496 U.S. 1, 7, 10-13 (1990); *see also Board of Regents of the University of Wisconsin System* v. *Southworth*, 529 U.S. 217, 230 (2000) (student referendum sufficiently governmental to trigger First Amendment, but not government-speech privileges).

Regardless of the government's role in setting up the Beef Board, the Board still represents private interests, and is more akin to the Bar or to other instrumentalities created by Congress, such as the Red Cross, Daughters of the American Revolution, and the U.S. Olympic Committee, that constitute private organizations, not government mouthpieces. *See*, *e.g.*, *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm*., 483 U.S. 522, 543 n. 23 (1987).

Exclusive funding by cattle producers also serves to identify those producers, rather than the government, as the "speakers" under the beef checkoff. Joint Br. 27-28. Not only was such funding a central factor in *Frame*, it was likewise a central factor in *Keller*. Given that *Keller* represents the only Supreme

Court *holding* addressing identification of government speech, it should substantially control categorization of speech in this case: The Beef Board, like the Bar, represents a limited group in society with a narrow set of interests, it is funded exclusively by that group, and consequently is not a "government" speaker regardless of whether it might be considered a government instrumentality for other purposes.[6]

3. Santa Fe *and* Downs *are consistent with* Frame.

While USDA wisely makes no effort to defend the district court's reliance on *Santa Fe Independent School District* v. *Doe,* 530 U.S. 290 (2000), it also neglects to rebut *Santa Fe*'s discussion of *Southworth* and its analysis demonstrating why the current case does not involve government speech. Joint Br.

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[6] Contrary to USDA's suggestion, at 48-49, *Frame*'s consideration of funding is fully compatible with the *dicta* in *Southworth*, 529 U.S. at 230, which distinguished *tuition* dollars, which are fully the property of the University (and thus akin to general federal revenues), from student activity fees, which are targeted exactions from students and which do not create government speech. *See also* Joint Br. 25 n. 3 (discussing *Southworth*). Checkoff assessments are not public funds like general revenues or tuition. They are merely entrusted to the Board as a fiduciary for cattle producers and would have been returned to those producers if the program had failed the initial vote. 7 U.S.C. § 2907. Indeed, the Beef Act expressly forbids the use of appropriated *government* funds for the expenses or expenditures of the Beef Board. 7 U.S.C. § 2911. The regulations suggesting that the Secretary could *keep* residual funds or intellectual property if the program is later terminated, 7 C.F.R. §§ 1260.211(d), 1260.215, lack statutory basis and have never been tested in court.

35-39.[7] And, for the numerous reasons already given, Joint Br. 39-41, *Downs* v. *Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001), is not inconsistent with *Frame* and in fact supports a focus on attribution. That the teachers there were school employees, speaking on and with school property, and doing so in the course of their employment, left little doubt regarding the attribution of the speech.

4. USDA's Purpose-Control-Final Authority test lacks defining qualities.

USDA's proposed alternative focus, at 28-29, on purpose, control, and final authority for speech fails to distinguish government speech from government restrictions or compulsions of speech, does not align with the purported justification for a lenient government-speech doctrine, and overclaims the cases from other circuits.

Failure to Distinguish Compulsions or Restrictions. Far from being indicia of government speech, USDA's three factors are present in any sufficiently heavy-handed abridgment of free speech. For example, a viewpoint-discriminatory restriction on speech in a government-created or non-public forum would have the purpose of promoting a favored government message and would plainly involve

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[7] Intervenors, at 7, curiously quote a sentence from *Santa Fe* that does not exist, with no apparent excuse for such inventiveness. *See* Joint Br. 36 n. 9.

government control and final authority over the permitted messages by virtue of its discriminatory control over the forum. Under USDA's approach, such a well-established First Amendment violation would be wholly immune from scrutiny. USDA's question-begging claim that public fora are created with the intent to allow free-ranging private expression fails to account for special-purpose or non-public fora, which are subject to considerably more control and, when coupled with viewpoint discrimination, would be indistinguishable from government speech under USDA's test. Just as USDA relies on its viewpoint discrimination to claim it *controls* checkoff speech, so too could viewpoint discrimination in a forum be turned on its head and used to claim government control of the messages in that forum, thus converting a First Amendment violation into government speech.

Any significant censorship scheme or viewpoint-discriminatory compulsion for speech also would boast a putative governmental purpose to advance a favored message and would necessarily involve government control and final authority over speech. In fact, both the license-plate motto in *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977), and the Pledge of Allegiance in *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624 (1943), would easily satisfy USDA's proposed test, with results exactly opposite the Supreme Court holdings in those cases.

USDA seems to recognize, at 40, that control of speech is not a basis for distinguishing government speech from government manipulation of private

speech. It instead claims that the purpose and ultimate-responsibility factors, when combined with control, make the difference.

If the purpose element requires nothing more than the desire to advance the public interest in one fashion or another, then such factor also fails to distinguish any government law. All government impositions on speech are done for some putative public purpose, otherwise they would never be enacted at all. Such an empty inquiry can hardly make up for the deficiencies of the control element. And even the narrower purpose of *promoting* a favored message fails to distinguish viewpoint discrimination. The only governmental purpose that matters is the government's purpose to speak for itself, a purpose best evidenced by the government accepting attribution of the speech and by the government paying for the speech with its own resources.

The ultimate-authority element also adds nothing if, as USDA would have it, it means nothing more than control over the speech. If, by contrast, it encompasses not just *exercising* authority, but *accepting* responsibility for the speech as well, then it is effectively the same as attribution, is perfectly consistent with *Frame*, but is of no use to USDA in this case. Checkoff speech is not attributed to the government. Rather, it is routinely passed off as the product of the industry.

In the end, USDA concedes that government control alone is not a distinguishing factor for government speech. The other two factors cannot make

up for that deficiency if they themselves distinguish nothing or are merely repetitive of the control element. The inability to actually *define* the relevant category is a fatal flaw in USDA's proposed test for defining government speech. Any useful interpretation of that test merely steers it in the direction of attribution and funding and toward the conclusion that the beef checkoff is not government speech.

Unrelated to Accountability. Another fatal flaw in USDA's proposed test is that purpose, control, and final authority, in the absence of attribution and funding, have absolutely nothing to do with the essential accountability justification for a lenient government-speech doctrine. If government accountability for its speech provides the check that makes the First Amendment unnecessary, then such accountability must exist to a significantly greater extent for government speech than it does for government actions that compel or restrict private speech. But neither government control nor the government's "public purpose" has any bearing on the degree of accountability the government will face. Similarly, ultimate authority adds no unique accountability for any given speech program. It is only with clear government attribution and funding through the appropriations process that the government can be held accountable for the ensuing speech. Without such elements, USDA's test is completely detached from the government-speech doctrine.

Misconstrues Cases. The various cases USDA cites, at 28-31, in support of its proposed test do not involve compelling a discrete group to support speech and do not reject attribution and funding as the touchstones for government speech. Instead, those cases illustrate fairly obvious examples of government speech and are perfectly in line with the *Frame* analysis. Rather than involving the government compelling third parties to support speech, each of USDA's cases finding government speech involved attempts to *force the government* to include private speech along with its own. *See, e.g.*, *Wells* v. *City and County of Denver*, 257 F.3d 1132, 1141-42 (10th Cir.) (rejecting attempt to compel government to include private sign in government holiday display), *cert denied*, 534 U.S. 997 (2001); *Knights of the Ku Klux Klan* v. *Curators of the Univ. of Missouri*, 203 F.3d 1085, 1093 (8th Cir.) (rejecting attempt to force school radio station to accept Klan contributions and then acknowledge them along with other station acknowledgments thanking donors), *cert. denied*, 531 U.S. 814 (2000); *Downs*, 228 F.3d at 1007-08 (rejecting attempt to force school to allow teacher's private views to be expressed on school bulletin board reserved for school's views).[8]

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[8] Cases involving *direct* government speech through its own employees or property offer no help to USDA on its definitional quest. *Of course* such communication is government speech given that it is expressly attributed to the government and supported by ordinary government resources, not private exactions. *See, e.g.*, *Griffin* v. *Secretary of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir.) (undisputed that government selecting and flying its own flags at national cemetery

Those cases are entirely consistent with a focus on attribution and funding given that the pre-existing government speech was readily acknowledged by the government as its own, recognized as such by anyone interested, propounded by government employees on government property, and thus was easily attributed to the government itself rather than to third parties. As for purpose, control, and final authority over the speech in those cases, those factors were not considered to the exclusion of attribution and funding, but rather in conjunction with such identifying traits. And none of the cases suggest that a generic government purpose coupled with control and authority would be sufficient to demonstrate government speech in the absence of attribution or funding. Indeed, in *Sons of Confederate Veterans, Inc.* v. *Commissioner of Virginia Dept. Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002), the court expressly noted the limited utility of the government's factors, and included as a further factor the identity of the "literal speaker." Not surprisingly, determining the identity of the literal speaker goes a long way toward determining the attribution of the speech.[9]

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was government speech), *cert. denied*, 123 S. Ct. 410 (2002); *NAACP* v. *Hunt*, 891 F.2d 1555, 1556 (11th Cir. 1990) (government flying of own flag on its own the Capitol building).

[9] USDA, at 29 n. 1, offers no reason why the literal speaker element from its own cases is inappropriate or why the remaining factors are sufficient without proper *identification* of government as the speaker. That the government may speak through third parties is only true where such parties are the acknowledged agents

5. USDA fails even its own test.

Even assuming that USDA's alternative test was appropriate, the beef checkoff still would not qualify as government speech.

Purpose. The indisputable purpose of the Beef Act was to create a "self-help" program and to avoid the unpleasant prospect of direct government involvement. *See supra* at 6-7; *infra* at 26-27. That purpose was confirmed by Congress in the FAIR Act, 7 U.S.C. § 7401(b). The purpose Congress intended for USDA was not to engage in speech but rather to oversee the speech of others. *Id.* USDA's suggestion, at 32, that Congress *itself* intended to convey the message "eat beef" is belied by Congress' own understanding of its action as adopting "enabling" legislation rather than taking affirmative steps to promote beef. Furthermore, the contingent nature of the beef checkoff, subject to the vote of producers, demonstrates that Congress itself merely had a permissive, rather than a pro-active, purpose. Granting permission and awaiting private choices are not the hallmarks of government speech. *Confederate Veterans*, 288 F.3d at 620-21. That Congress *limited* the permission it gave to the beef industry to speak collectively does not convert that permission into an intent to speak. Rather, it merely reflects

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of the government, are funded by the government, and thus are literally speaking *for* the government. That is a far cry from speech by third parties who purport to be speaking *for themselves* but are nonetheless being compelled, restrained, or manipulated by the government.

the beef industry's request for a limited grant of power to promote beef, and Congress' concern that the Board not overstep the supposedly common interests of the industry.[10]

Congress' purpose in adopting the Beef Act was to enable a self-help program. The Beef Board consistently represents the checkoff to be the voice of the beef industry. And cattle producers had the purpose to speak for themselves, not merely fund USDA's speech, when they voted to authorize the checkoff in the first place. For USDA now to repudiate that history and purpose is not merely disingenuous, it is incredible.

Control. Having conceded that control alone does not distinguish government speech, USDA's alleged control, even if true, would not suffice to turn the checkoff into government speech. Indeed, such control would only exacerbate the First Amendment violation without a separate means of establishing that the speech is the government's own.[11]

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[10] The further purpose and expectation that the checkoff would have the public *benefits* of helping the economy by helping the beef industry, USDA Br. 31-32, has nothing whatsoever to do with its categorization. All laws are presumably intended and required to have public, rather than purely private, benefits.

[11] Indeed, the government in both *Southworth* and *Velazquez* exerted substantial control over the speech at issue, but that speech remained non-governmental because the programs were designed to facilitate private speech of a favored type. Joint Br. 38 n. 10. USDA's citation, at 47, to *Frame*'s discussion of the Secretary's supposedly "'pervasive surveillance and authority,'" 885 F.2d at 1129,

Furthermore, even the control claimed by USDA is vastly overstated. USDA claims control over the membership of the Beef Board and Operating Committee, control over budgets and spending, and control over the content of the ensuing speech. But the evidence cited by USDA for such control proves far less than USDA implies. At best what it shows is oversight authority and the occasional abuse of that authority to coerce decisions that USDA lacks the power to compel directly.

Regarding Board and Committee membership, USDA claims, at 33-34, to exercise control over checkoff speech through its appointment, removal, and certification authority. Such authority, however, is limited to verifying the qualifications of the beef organizations and nominees and then selecting among such nominees based on statutory criteria designed to ensure representation of the views of *beef producers*, not the views of the government.[12] USDA has no authority to control appointments in order to further its own governmental interests or any other non-producer interests. *Cf. Frame*, 885 F.2d at 1133 (Beef Board

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comes from *Frame*'s discussion of delegation, not government speech, and merely highlights that such control was *still* insufficient to create government speech.

[12] *See* 7 U.S.C. § 2905 (nominating organizations must represent cattle producers and have primary or overriding purpose "to promote the economic welfare of cattle producers"); *id*. § 2904(1) (board members must be producers or importers nominated by qualified organizations and their number and origin must relate to

represents views of cattle producers, not the public in general). Absent the authority to remove and appoint Board members at its discretion, USDA exercises only the control of an ombudsman, not the control of a principal. The true principals behind the beef checkoff are the cattle producers who pay for the checkoff, as the Beef Board has repeatedly acknowledged.

USDA's budget-approval role is entirely secondary to the role of the Board itself, and does not even get triggered unless and until the Board itself approves a budget. 7 U.S.C. § 2904(4)(C). At that point the Secretary's role is narrow oversight, not open-ended discretion. *Id*. § 2904(4), (6)-(12). USDA cannot, for example, require the Board to fund or eliminate projects based upon USDA's own views and interests. It recognizes as much in its carefully worded claim, at 38, that it "has at times expressed dissatisfaction with the refusal" to fund certain projects, rather than commanded its preferred funding.

Regarding USDA's alleged content control, it is useful to distinguish between the power to generate speech – *i.e.*, to speak – and the power to manipulate speech. USDA exercises the latter, not the former. Contrary to the USDA's claim, it cannot force the Beef Board to speak by enforcing its "duties" under the Act and Order. The Board is not obligated by the Order to *approve* a

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cattle production); *id*. § 2904(4)(A) (certification of State beef councils only to ensure they legitimately represent beef interests).

budget at all, only to *review* any proposed budget. 7 C.F.R. § 1260.150(f) (duty of the Board "[t]o review and, *if approved*, submit to the Secretary for approval, budgets prepared by" the Operating Committee) (emphasis added). Absent Board approval of a budget, there can be no checkoff speech.[13]

As for USDA's claimed participation in the development process, at 10-12, 36-37 its claim is conspicuously limited to providing "input and advice," rather than affirmative control. USDA concedes that the ideas and specifics for checkoff speech come from cattle producers, industry contractors, and the Beef Board itself, are approved or rejected by the Operating Committee, and only then become subject to any *actual* USDA control by way of veto.

USDA's claim, at 13, that its review encompasses both the "substance and the language of" checkoff advertisements is notable only for the complete absence of cited legal authority for such review, much less for the changes that it claims, at 14, to have required. Indeed, USDA's rejection of the "Tastes Like Chicken" ad, which plainly promotes beef against its major market competitor, is inexplicable

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[13] Interestingly, if USDA truly does exercise oversight of every dollar spent and every word said through the checkoff, then the numerous examples of checkoff speech being attributed to private parties – i.*e.*, "Brought to you by the Nebraska Beef Producers and their Beef Checkoff" [ER 35-38] – pose something of a dilemma for USDA: Either the attribution is true, and thus constitutes an admission by USDA that the speech is not government speech, or the attribution is false and USDA is affirmatively lying to the public and the beef industry in order to avoid accountability for the content of the speech.

under the Beef Act. If such arbitrary censorship by a government agency is all that is required to generate "government speech" and supposedly slip the reins of the First Amendment, then that Amendment is meaningless.

USDA also claims, at 14, that it uses the checkoff program to further USDA's own initiatives. In another carefully worded paragraph, however, USDA not once claims to have any authority to *require* checkoff speech supporting its preferred views. Instead it claims, at 14, to have "encouraged the board" to fund favored projects, "convey[ed]" its "expect[ations]" to the Board, and "expressed dissatisfaction" with Board decisions. Such coercion does not represent the exercise of lawful authority to engage in speech, but rather is emblematic of a willingness to abuse a minor authority in order to extort the misappropriation of checkoff funds. Such behavior is simply unlawful blackmail by a government censor, not the valid conduct of a government speaker.[14]

[14] That the Board obsequiously tries to please USDA and thus responds to such pressure says nothing about the character of the speech that ensues, only the character of the USDA and the Board.

B. Compelled Support for Government Speech Should Be Subject to the Germaneness Test.

1. *Neither the Supreme Court nor this Court has immunized government speech*.

It remains undisputed that the Supreme Court has never held that government speech is immune from First Amendment scrutiny. Joint Br. 42-44. The *dicta* repeated by USDA, at 25-28, 54-55, has already been addressed by appellants and is neither controlling nor persuasive.[15] More significant than such *dicta* are the core First Amendment principles and holdings that would be trampled by unfettered immunity for so-called government speech. Joint Br. 46-53.

USDA's continued reliance, at 24, on *Downs*, is misplaced. *Downs*, like other circuit cases cited by USDA, involved the government *resisting* efforts to force *it* to support or adopt third-party messages rather than forcing third parties to

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[15] USDA, at 26, claims support for a government speech immunity in *Rust* v. *Sullivan* and the mischaracterization of that case in *dicta* from *Velazquez*. The correct characterization of *Rust* was addressed in appellants' opening brief, at 52. This Court has recently construed *Rust* in a similar fashion. *Brown*, 321 F.3d at 1224 ("*Rust* addresses only the government's ability to exclude from a government-funded program speech that is incompatible with the program's objectives"). USDA makes no attempt to defend the merits of the *Velazquez dicta* or to rebut Justice Scalia's dismantling of that *dicta*. *Legal Services Corporation* v. *Velazquez*, 531 U.S. 533, 554 (2001) (Scalia, J., dissenting) (if the speech "at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech") (emphasis in original).

support a message favored by the government.[16] The germaneness analysis proposed here is entirely compatible with the result in *Downs*, was not considered by this Court in *Downs*, and thus is not foreclosed by *Downs*. *See* Joint Br. 44-46.[17]

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

On the merits of how compelled support for government speech should be scrutinized under the First Amendment, USDA, at 26-28, again repeats *dicta* from *Velazquez* and *Southworth*. The flawed reasoning behind such *dicta* has been discussed at length, Joint Br. 46-53, and USDA offers no additional defense of a more lenient government-speech doctrine.

In considering the proper First Amendment treatment for government speech, this Court should focus on three fundamental points. First, *speech is*

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[16] Furthermore, schools are different, as other courts have recognized, and thus doctrine developed in the school context would not necessarily translate or control problems arising in other contexts. *See* C*onfederate Veterans*, 288 F.3d at 619 n. 7 (noting that *Downs* involved speech restrictions in school, "a context where First Amendment inquiries may be colored by recognition of the special necessities of the educational environment.").

[17] USDA's citation, at 25-31, to cases from other circuits addressing the government speech doctrine is unavailing. Most of those cases arose in the context of trying to force the government to accept private speech rather than resisting compelled support for government speech, there is no suggestion that they have even considered, much less addressed, the arguments raised in this case regarding the germaneness test, and they obviously do not bind this Court.

different, and justifications that work for compelled support for conduct cannot sustain compelled support for speech. While ordinary democratic accountability may provide a sufficient check for non-speech legislation subject only to rational basis analysis under the due process clause, the government is similarly accountable for *all* speech restrictions and compulsions it adopts yet such accountability has *never* conferred immunity on speech-impacting legislation. The Constitution commands that speech is different, and any viable theory for this case must recognize and account for that difference.

Second, uniform application of the germaneness analysis to *all* compelled support for speech still would permit most ordinary government speech just as it permits compelled support for third-party speech where needed to accomplish other permissible non-speech activities. The government would continue to be able to speak about existing government programs, and elected officials would be entirely free to debate issues of public concern. Government speech integral to government commands or conduct – "Join the Army"; "Pay Your Taxes"; "Don't Drive Drunk" – typically would satisfy the germaneness test, as would speech by an elected official in the performance of his or her official duties. The supposed breakdown of public debate and taxation in general would not arise from the proposed germaneness analysis.

Third, when correctly defined, "government speech" is a fairly limited category, and hence the marginal burden imposed by the germaneness analysis will be similarly limited in scope. For example, the mere receipt of government funds would not convert all recipients into government speakers, and hence their speech would be protected, not constrained, by the First Amendment. *Cf. Pickering v. Board of Education,* 391 U.S. 563, 568 (1968) (distinguishing "the interests of the [employee], as a citizen" in speaking on public issues and the "interest of the State, as an employer" in performing services through its employees); *League of Women Voters* v. *Countywide Crim. Justice Coordination Comm.*, 250 Cal. Rptr 161, 178-79 (Cal. App. 2 Dist.) (distinguishing between sheriff's right to join advocacy group as an individual and expenditure of public funds for such advocacy), *review denied* (1988).

What would be constrained, however, is the government's appropriation of funds, or selective taxation, to generate speech saying "Vote Democrat" or "Vote Republican." Such viewpoint-discriminatory speech, unlike the neutral exhortation simply to "Vote," would not be germane to the government's legitimate activities and would violate the First Amendment, as USDA mutely concedes. *See* Joint Br. 50-52. For First Amendment purposes, however, if some level of heightened scrutiny applies to *that* form of government speech, it applies to all government speech.

C. Even Lower Scrutiny Cannot Sustain Compelled Support for any "Government Speech" in this Case.

USDA offers no cogent explanation of how it satisfies even the lower standard suggested by *Southworth*'s *dicta* of "whether traditional political controls" are "sufficient to overcome First Amendment objections" to the beef checkoff even if it is categorized as government speech. *Southworth*, 529 U.S. at 229. In this case, if the beef checkoff is indeed government speech, then it makes a mockery of traditional political controls through deceitful attribution, false propaganda from the Beef Board, and circumvention of the appropriations process.

USDA concedes that the beef checkoff avoids the appropriations process and thereby minimizes the likelihood of scrutiny by the citizenry as a whole. And USDA repeatedly highlights the fact that its control over the speech at issue is hidden from view, denies the truth of Beef Board statements regarding who the actual speaker is, and thus functionally concedes that it is lying to both the public and the beef producers through such Beef Board statements. Indeed, had USDA articulated its current government-speech position earlier, the Beef Act likely never would have passed and, if it had, the referendum would have failed. The "self-help" and "'enabling'" character of the Act was not merely a coincidence, but rather was necessary to "ensure the support, and respect the integrity, of the independent American cattlemen," and to avoid what would have been extensive opposition from numerous cattlemen who, like "'Montana ranchers,'" have been

"'historically unwilling to accept government handouts or interference.'" *Frame*, 885 F.2d at 1135 (quoting Rep. Santini and Sen. Baucus). USDA's current position on government speech, if correct, would represent the culmination of the type of bait-and-switch maneuver that is inimical to democratic accountability.[18]

If this is government speech, then it is a First Amendment nightmare: A government agency engaging in domestic propaganda and disinformation while hiding behind the façade of cattle ranchers and forcing those ranchers to pay for the "privilege" of being USDA's "beard."[19] Nothing in Supreme Court or Ninth Circuit precedent even remotely suggests that such a staggeringly dishonest campaign to coerce minority cattle ranchers and manipulate consumers is valid, and everything in the history and purpose of the First Amendment suggests that it is unconstitutional.

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

USDA's suggestion, at 59-62, that the beef checkoff survives the *United Foods* test is frivolous. *United Foods* expressly required that compelled *collective*

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[18] Intervenors, at 46, claim to find political checks in USDA's oversight and the beef industry's referendum. But if this is *government* speech, USDA can hardly be the check on itself, and beef industry control is merely indicative of private speech, not a *public* check.

[19] It is such fairness concerns that underlie *Wooley,* which plainly involved government speech yet still found a First Amendment violation. The equivalent notion underlies the Takings Clause.

speech be germane to compelled *collective* conduct, 533 U.S. at 411-15, not merely some general economic program. As USDA concedes, at 60, the beef checkoff "does not have the collective marketing features present in *Wileman*." *See also* Joint Br. 8-9 (describing competitive nature of beef production).

This Court in *Delano Farms Co.* v. *California Table Grape Comm'n*, 318 F.3d 895, 899 (9th Cir. 2003), held that "[c]ollectivization of the industry" is the constitutional dividing line between *Glickman* and *United Foods*, expressly finding that "consumer protection and information regulations apply to much of the economy, and are far from rising to the level of the collectivization that controlled the result in *Glickman*." Laws and regulations involving voluntary grading, price reporting, unfair trade practices, and health inspection, USDA Br. 61-62, thus have nothing to do with the germaneness inquiry into industry collectivization.[20] If anything, the Packers and Stockyards Act and the price reporting requirements are vigorously pro-competitive – the very antithesis of the collectivization the government would need to show under *United Foods*. *See, e.g.*, Packers and Stockyards Act, 7 U.S.C. § 192(c) & (d) (prohibiting conduct "apportioning the supply" of goods with the "tendency or effect of restraining commerce or of

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[20] Indeed, many of the regulations cited by USDA do not even apply to the cattlemen who must pay the checkoff – they apply to downstream purchasers and processors of cattle.

creating a monopoly"); *id*. §§ 192(e) & (f) (similar). Similarly, checkoff funding for safety, nutrition, and health *information* programs, and research to generate content for such programs, still involves *speech*, not any collectivization of non-speech activities to which the compelled speech might be germane.[21]

As the United States expressly and correctly represented to the Supreme Court in the *United Foods* case, the beef checkoff is identical to the mushroom checkoff. Joint Br. 55-56 (quoting *United Foods* Petition and Reply); Prelim. Inj. Mem. 6-7 (quoting government briefs in *United Foods* and *Glickman* for the proposition that beef program is identical to mushroom program and different from tree-fruit program). It therefore must suffer the identical fate under the *United Foods* analysis.

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

Without even acknowledging clear adverse authority, USDA suggests, at 56-58, that this Court apply the *Central Hudson* test. That suggestion ignores the

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[21] The USDA's attempt, at 61 n. 4, to dispute the district court's factual finding that such expenditures are minimal conflates "informational" expenditures with research expenditures and fails to account for over $46 million of the $87.9 million in FY 2001 revenue [ER 61]. In any event, it has never been disputed in this case that the various elements of the Beef Act are non-severable, *see* 7 U.S.C. § 2901 (Historical and Statutory Notes) (describing the removal of previous severability clause as part of the revisions enacted by Pub.L. 99-198, Title XVI, § 1601(b), Dec. 28, 1985, 99 Stat. 1597).

Supreme Court's contrary ruling in *Glickman*, 521 U.S. at 474 n. 18; it ignores the government's contrary representations to the Supreme Court, Joint Br. 57-58 (quoting government briefs); it ignores the ruling in *United Foods* that commercial speech analysis was irrelevant, 533 U.S. at 410; and it ignores the history of the *Cal-Almond* cases, wherein this Court's application of the *Central Hudson* test was the very ground for remand by the Supreme Court and was the one portion of that decision that was effectively reversed.[22] The commercial-speech doctrine has no application in the checkoff context. If the beef checkoff is not government speech then it fails the *United Foods* test and is unconstitutional. Period.

CONCLUSION

For the above reasons, this Court should reverse the judgment below and remand to the district court with instructions to enter a declaratory judgment that the Beef Act violates the First Amendment.

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[22] Indeed, it is the height of hypocrisy for USDA to reject *Cal-Almond*'s government-speech ruling that was unrelated to the remand in light of *Glickman* while advocating the very position that was the *basis* for that remand.

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I hereby certify that, on this 19th day of June, 2003, I caused one copy of the foregoing Joint Reply Brief for Appellants to be served by First Class Mail, postage pre-paid, on each of:

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I hereby certify that the foregoing Joint Reply Brief for Appellants complies with the 7,000 word type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that it contains 6993 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word XP. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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