In the United States Court of Appeals for the Sixth Circuit

Nos. 02-2337, 02-2338

MICHIGAN PORK PRODUCERS ASSOCIATION, *et al.*,

Plaintiffs/Appellants,

and

ANN VENEMAN, Secretary of Agriculture, United States Department of Agriculture, *et al.*,

Defendants/Appellants,

vs.

CAMPAIGN FOR FAMILY FARMS, *et al.*,

Defendant-Intervenors/
Cross-Plaintiffs/Appellees.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF MICHIGAN

FINAL BRIEF FOR THE APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, the Campaign for Family Farms makes the following disclosures:

1. Are any of said parties a subsidiary or affiliate of a publicly owned corporation? NO.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO.

If the answer is YES, list the identity of such corporation and the nature of the financial interest.

s/ Susan E. Stokes
SUSAN E. STOKES
Counsel to Appellees

Dated: February 6, 2003

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STATEMENT REGARDING ORAL ARGUMENT

Both Federal Appellants and Michigan Pork Producers Association, *et al.* ("Private Appellants") requested oral argument in their opening briefs in this case, which were filed on December 20, 2002. A notice was sent on January 6, 2003, informing all parties that this case will be heard by a panel of this Court on March 14, 2003. The notice provides that oral argument will be limited to 15 minutes per side. On January 15, 2003, Appellants filed an unopposed motion requesting that each side be permitted 30 minutes, with Federal Appellants and Private Appellants splitting their allotted time.

Appellees agree that oral argument is appropriate in this case, given that the constitutional rights of thousands of hog farmers are at issue. However, Appellees request that, whether the oral argument is at 15 minutes per side or is increased to 30 minutes per side, they receive an amount of time allotted for argument that is equal to the amount collectively allotted to Federal Appellants and Private Appellants.

STATEMENT OF THE ISSUES

1. Whether the district court correctly ruled that the Pork Act unconstitutionally infringes on objecting hog farmers' First Amendment rights under the authority of *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

2. Whether the district court correctly ruled that activities generated by the pork checkoff program, which is operated by private individuals and funded pursuant to the Pork Act through compelled assessments against a targeted group of private individuals (hog farmers), do not constitute "government speech."

3. Whether the district court properly enjoined the operation of the unconstitutional pork checkoff program.

STATEMENT OF THE CASE

This dispute began with the Campaign for Family Farms ("CFF") submitting petitions to the United States Department of Agriculture ("USDA") so that the Secretary of Agriculture ("Secretary") would order a referendum on the termination of what is known as the "pork checkoff." *Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 174 F.Supp.2d 637, 639 (W.D. Mich. 2001)("*MPPA-I"*). The National Pork Producers Council ("NPPC") attempted to obtain the names and addresses of the hog farmers who signed those petitions through a Freedom of Information Act request, but was rebuked by the United States District Court for the District of Minnesota and the Eighth Circuit Court of Appeals. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000).

Secretary Glickman ordered a referendum that was held in August and September 2000. 65 Fed. Reg. 43,498 (July 13, 2000)(7 C.F.R. pt. 1230, subpt. E); *MPPA-I*, 174 F.Supp.2d at 639. In January 2001, Secretary Glickman announced that a majority of hog farmers voting in the referendum had voted to terminate the pork checkoff. The referendum results were: "15,951 producers disfavored the Program and 14,396 favored the Program." *Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 229 F.Supp.2d 772, 775 (W.D. Mich. 2002)("*MPPA-II*"). Given the results of the referendum, Secretary Glickman

ordered the termination of the checkoff, noting that it was no longer fulfilling its purpose. (R. 87 Ex. 4, Apx. pg. 150.) Michigan Pork Producers Association, *et al.* ("Private Appellants") sought to overturn Secretary Glickman's decision in the United States District Court for the Western District of Michigan. At that time Appellees sought and received permission to intervene in this case in defense of Secretary Glickman's decision. (R. 12 Order Apx. pgs. 39-40.)

The new Secretary of Agriculture, Ann Veneman, in February 2001, decided not to terminate the pork checkoff. *MPPA-I*, 174 F.Supp.2d at 639. Appellees then brought a cross-claim against USDA. *Id*. In December 2001, the district court ruled that Secretary Veneman was not mandated to terminate the pork checkoff based on the outcome of the 2000 referendum. *MPPA-I*, 174 F.Supp.2d at 647-48.

After the Supreme Court affirmed this Court's holding that the Mushroom Act violated the First Amendment in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001),[1] the district court granted Appellees' motion to supplement their cross-complaint to add two First Amendment claims: (1) that the Pork Act and Pork Order violate hog farmers' right to freedom of speech; and (2) that the Pork Act and Pork Order violate hog farmers' right to freedom of association. (R. 96

[1] CFF was an *amicus curiae* in support of affirming this Court's decision in *United Foods*.

Order, Apx. pgs. 41-42; R. 103 Cross-Claim pgs. 14-18, Apx. pgs. 55-59.)

All parties conducted extensive discovery between January and May 2002 on the First Amendment issues. The parties then filed competing motions for summary judgment, and Appellees moved to dismiss certain affirmative defenses. On October 25, 2002, the district court granted Appellees' motions and denied Appellants' motions. *MPPA-II*, 229 F.Supp.2d at 791-92. The district court held "the mandated system of Pork Act assessments is unconstitutional since it violates the [Appellees'] rights of free speech and association" (*id.* at 791) and rejected claims that the pork checkoff constitutes "government speech." *Id*. at 789. The district court enjoined the operation of the pork checkoff effective 30 days from the date of decision. *Id*. at 792. On November 15, 2002, this Court stayed the district court's order pending appeal. Federal Appellants and Private Appellants filed separate opening briefs. On January 17, 2003, this Court granted Appellees permission to file an oversized brief.

STATEMENT OF THE FACTS

A. The Hog Industry

The hog industry is in the midst of a dramatic transformation. USDA statistics show the steady exit of hog farmers from the hog industry. (R. 169, Declaration of Susan Stokes ("Stokes Decl.") Ex. 7 pg. 3, Apx. pg. 822.) Prior to the enactment of the pork checkoff program in the mid-1980s, there were approximately 500,000 hog farms in the nation; as of 2001, the number had diminished to 85,000. (*Id*. at Ex. 6 p. 36, Apx. pg. 1194.) By the end of 2001, according to USDA, there were 81,130 hog operations. (*Id.* at Ex. 7 pg. 2, Apx. pg. 1217.) USDA statistics indicate only 75,350 hog operations remained by year-end 2002. (Quarterly Hogs and Pigs, Dec. 30, 2002, Add. 1).[2]

This transformation is being precipitated by large corporate interests replacing independent family hog farms. According to USDA, operations with 2,000 or more hogs on hand accounted for 75% of the hog inventory in 2001. (*Id*. at 24-25, Apx. pgs. 1239-1240.) Those who do raise hogs are increasingly raising them not as independent farmers but on behalf of others: as of December 28, 2001, 33% of the hog inventory in the country was being raised under production contracts, with those hogs owned not by the farmers but by entities that have more than 5,000

[2] Appellees ask this Court to take judicial notice of this document pursuant to Fed.R.Evid. § 201(b)(2) and (f).

hogs. *(Ibid.)* A 2002 National Pork Board ("NPB") study shows that over 83% of hogs were committed to packers through ownership or contractual arrangements, up from 38% in 1994. (*Id.* at Ex. 8, pg. 2, Apx. pg. 1248.)

B. The Pork Act and Pork Order

The Pork Promotion, Research, and Consumer Information Act ("Pork Act") became law in 1985. 7 U.S.C. §§ 4801-4819. The stated purpose of the Pork Act is "to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to … strengthen the position of the pork industry in the marketplace," so long as it does so "at no cost to the Federal Government." 7 U.S.C. § 4801(b)(1), (2). The Pork Act is implemented through the Pork Order. 7 C.F.R. pt. 1230. The program authorized by the Pork Act and the Pork Order is commonly known as the "pork checkoff."

In enacting the Pork Act, Congress intended to enable pork producers to conduct their own "self-help" program through mandatory assessments. The Senate, in describing the effect of a mandatory assessment, stated: "This would enable the pork producers to significantly expand their public promotion, research, and consumer information activities." S. Rep. No. 99-145, 99th Cong., 1st Sess. 331 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 1997. In the debate preceding the passage of the Act, several senators described the legislation as a "self-help"

program for pork producers. 131 Cong. Rec. S. 16090 (1985)(Senator DeConcini: "This is an industry **self help** program in which all producers participate. The U.S. Government is simply helping an industry to help itself, at no additional cost to the taxpayers. The program is 100% funded by the producers and importers of ... hogs. Not only will they benefit, but packers, processors, retailers, and consumers will benefit as well."; Senator Trible: "Virginia pork producers and those around the Nation have supported a national **'self-help'** program. I am confident that this program should benefit farmers and the pork processing industry."; Senator Zorinsky: "Mr. President, the pork promotion legislation establishes a **self-help** program for pork producers to be operated at no cost to the Nation's taxpayer.")(emphasis added).

The pork checkoff program is administered by the National Pork Producers Delegate Body ("Delegate Body") and NPB. 7 U.S.C. § 4806. Neither Delegate Body members nor NPB members are government employees. (R. 169 Stokes Decl. Ex. 25, Carpenter Dep., pg. 34, Apx. pg. 1367); 7 C.F.R. § 1230.38. The Secretary appoints the Delegate Body members solely from pork producers who have been nominated by private state pork associations. 7 C.F.R. § 1230.31. The Delegate Body recommends the rate of the pork checkoff assessment, determines the percentage of assessments the state pork associations will receive, and selects a ranked slate of pork producers and importers for appointment by the Secretary to

the 15-member NPB. 7 C.F.R. § 1230.39. NPB develops budgets and awards contracts that are supposed to carry out the intent of the pork checkoff program. 7 U.S.C. § 4808(b). Congress authorized temporary disbursement of pork checkoff funds directly to NPPC in 1986. 7 U.S.C. § 4809(c)(2). Historically, the vast majority of pork checkoff funds have gone to NPPC, and, until the settlement agreement between NPPC and USDA that went into effect in about July 2001, NPPC was NPB's general contractor administering all of the pork checkoff. (R. 169 Stokes Decl. Ex. 2 pg. NPPC00023, Apx. pg. 1089.)

State pork associations receive a percentage of pork checkoff assessments. 7 U.S.C. § 4809(c)(1); 7 C.F.R. § 1230.72. There are currently 44 such state pork associations. (R. 169 Stokes Decl. Ex. 3, Apx pgs. 1181-1185.) These same 44 state pork associations make up the membership of NPPC. (*Id.* at Ex. 4, Apx. pgs. 1187-1189.) Six of these state pork associations are Private Appellants/ Intervenors in this case. Pr.App. Brief at 7. Unlike her role in appointing NPB members, the Secretary "has no authority to appoint or approve the leadership of the state associations." *MPPA-II*, 229 F.Supp.2d at 786 (*citing* 7 U.S.C. § 4802(16); 7 C.F.R. § 1230.25).

Since 2002, organic hog farmers have been exempted from paying the mandatory pork checkoff. *See* Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, § 10607, 116 Stat. 134 (May 13, 2002). All non-organic pork

producers are assessed 40 cents per $100 in market value for each hog sold. 67 Fed. Reg. 58,320, 58,322 (Sept. 16, 2002)(codified at 7 C.F.R. § 1230.112).[3] All non-organic pork producers who do not pay the mandatory assessment are subject to civil penalties of up to $1,000 per violation. 7 U.S.C. § 4815.

The mandatory assessments on hog farmers fund NPB's expenses. 7 C.F.R. § 1230.70. In 2001, NPB's pork checkoff program budget was $57.5 million with a $4.5 million deficit. (R. 169 Stokes Decl. Ex. 1 pg. NPPC00374, Apx. pg. 827.) From this budget, at least $29.4 million (57%) was spent on "Demand Enhancement." *(Ibid.)* Demand Enhancement expenditures include advertising, marketing, and merchandising. (*Id*. at pgs. NPPC00374-78, Apx. pgs. 827-828.) For 2001, state pork associations were allotted $10.4 million, or 18% of the budget, which they could spend on Demand Enhancement. (*Id*. at pg. NPPC00374, Apx. pg. 827.) According to NPB's 2002 budget, total expenses were budgeted at $55.6 million with a $6.5 million deficit. *(Ibid.)* From this budget, at least $28.9 million (52%) was allocated to Demand Enhancement. *(Ibid.)* For 2002, state pork associations were allocated approximately $9.8 million, or 17.6% of the budget,

[3] At the time of summary judgment briefing the assessment rate was 45 cents per $100 in market value. *See MPPA-II*, 229 F.Supp.2d at 774. This rate was reduced upon the Secretary accepting the Delegate Body's recommendation. 67 Fed. Reg. at 58,321.

which also could have been spent on Demand Enhancement. *(Ibid.)* The remaining 30.4% was allocated for research and consumer information programs and related communications. *(Ibid.)*

C. Appellees

The membership of the Campaign for Family Farms ("CFF") consists of four organizations: the Land Stewardship Project ("LSP"), the Illinois Stewardship Alliance ("ISA"), Iowa Citizens for Community Improvement ("Iowa CCI"), and the Missouri Rural Crisis Center ("MRCC")—as well as 540 individual members who are or recently were hog farmers. (R. 163 Declaration of Rhonda Perry ("Perry Decl.") Ex. 1 pgs. 5-7; Ex. 4 pgs. 233-34, Apx. pgs. 168-170, 228-229.) Each of the member organizations is comprised of individual members, including hog farmer members. (R. 166 Declaration of Mark Schultz ("Schultz Decl.") Ex. 6, Schultz Dep., pgs. 40, 42-44, Apx. pgs. 643, 644-646 (LSP—156 hog farmer members); R. 167 Declaration of Martin King ("King Decl.") Ex. 2, King Dep., pgs 68, 76, 79, Apx. pgs. 711, 712, 713 (ISA—61 hog farmer members); R. 169 Stokes Decl. Ex. 26, Espey Dep., pgs. 58-61, Apx. pgs. 1410-1413 (Iowa CCI—410 hog farmer members); *id*. at Ex. 27, Allison Dep., pgs. 159-64, Apx. pgs. 1431-1432 (MRCC—180 hog farmer members); R. 163 Perry Decl. Ex. 11, Perry Dep., pgs. 6-7, 22-23, Apx. pgs. 305-306, 321-322.) All four individual hog farmer Appellees (described below) are identified members of CFF's member

organizations who are or recently have been raising hogs for sale, making them subject to the mandatory pork checkoff assessments. In total, CFF and its member organizations have at least 1,347 members who are or recently were hog farmers.

CFF's mission is to work toward ensuring the continued existence of family farms, particularly hog farms. CFF is opposed to vertical integration, factory farms, and the consolidation of market control by a small number of agribusiness corporations in the hog industry. One of CFF's primary goals since 1998 has been to end the mandatory pork checkoff. (R. 163 Perry Decl. Ex. 11 pgs. 6-9, Apx. pgs. 305-308.) The CFF member organizations all have missions which include many of the same passionate principles to promote family farms and healthy rural communities, ethics in farmland stewardship, environmental integrity in production practices, and sustainable swine production. *MPPA-II*, 229 F.Supp.2d at 775. (R. 166 Schultz Decl. pg. 2, Apx. pg. 440, 631-642; R. 167 King Decl. pg. 2, Apx. pg. 666.)

James Joens is an independent hog farmer who has been raising and selling hogs for more than 25 years in rural Minnesota. (R. 164 Declaration of James Joens ("Joens Decl.") pg. 2, Apx. pg. 341.) He is a member of LSP. *(Ibid.)* As a hog farmer, Mr. Joens is required by the Pork Act to pay NPB a percentage of the proceeds from the hogs he sells. *(Ibid.)*

Richard Smith is an independent hog farmer who has been raising and selling hogs for more than 30 years in rural Minnesota. (R. 165 Declaration of Richard Smith ("Smith Decl.") pg. 2, Apx. pg. 406.) He is a member of LSP. *(Ibid.)* As a hog farmer, Mr. Smith is required by the Pork Act to pay NPB a percentage of the proceeds from the hogs he sells. *(Ibid.)*

Rhonda Perry is an independent hog farmer living in rural Missouri. (R. 163 Perry Decl. pg. 1, Apx. pg. 153.) As a hog farmer, Ms. Perry is required by the Pork Act to pay NPB a percentage of the proceeds from the hogs she sells. (*Id.* at pg. 2, Apx. pg. 154.) She is a member and the program director of MRCC. (*Id*. at pg. 1, Apx. pg. 153.)

Lawrence Ginter was an independent hog farmer for many years in rural Iowa and paid into the mandatory pork checkoff program a percentage of his proceeds for his hogs sold. (R. 8 Declaration of Lawrence Ginter pg. 1, Apx. pg. 141.) He sold his hog herd in the fall of 2000 but continued to help with the farrowing of hogs being raised on his land by another hog farmer who rented his land. (R. 196 Stokes Supp. Decl. Ex. 51, Ginter Dep. pgs. 44-48, Apx. pgs. 2456-2460.) At the time Mr. Ginter sold his hogs, he was "leaving his options open" to return to raising and selling hogs independently or in partnership. *(Ibid.)*

SUMMARY OF THE ARGUMENT

The district court below correctly held that the Pork Act and the Pork Order (collectively known as the "pork checkoff") violate the First Amendment to the Constitution.

The Pork Act compels a targeted group of private individuals—hog farmers—to pay a mandatory assessment on the sale of every hog. The funds are remitted to the National Pork Board, a private organization made up of fifteen individuals selected by private individuals and appointed by the Secretary of Agriculture. Appellees are an unincorporated association with hog farmer members and four individual hog farmers who are compelled to pay the pork checkoff assessment and who object on ideological, political, and economic grounds to all speech and activities that are generated by the pork checkoff.

Under the First Amendment, individuals have the right not to be targeted for compulsory funding of speech that is objectionable to them. The Supreme Court has held that some impingement of this right may be justified where the compelled speech or activities further some overriding public purpose, such as labor peace, or where a comprehensive statutory scheme has replaced competition with collective action. Even in such cases, however, the Court has only allowed compulsory funding of speech or activities that are germane to the larger regulatory purpose.

The Court has forbidden compulsory funding of ideological speech and activities that are not related to a purpose independent from the speech itself.

Because the pork checkoff program does not present any of the circumstances justifying compulsory funding of objectionable speech, the district court correctly held it unconstitutional. As the district court found, the Pork Act is not part of a greater regulatory scheme imposing collectivized marketing requirements on hog producers. And the Pork Act furthers no purpose but the promotion of pork. The compelled assessments imposed pursuant to the pork checkoff are therefore unconstitutional.

The district court correctly concluded that the speech funded by the pork checkoff cannot be immunized from First Amendment scrutiny as "government speech." Even assuming such a doctrine exists, where speech is funded by a targeted group of individuals–here, hog farmers–rather than the public fisc, the government cannot claim the speech as its own for purposes of immunity from First Amendment scrutiny.

The district court properly enjoined further operation of the unconstitutional pork checkoff. If the checkoff is unconstitutional for one hog farmer, it is unconstitutional for all. The Pork Act cannot be rewritten by a court to make the assessments voluntary for Appellees but mandatory for every other hog farmer. Nor can any portion of it be severed from the rest. The purpose of the Pork Act is

to promote pork, whether it is through advertising, research, or consumer information. Appellees object, on ideological, political, and economic grounds, to all activities and speech that are funded by the pork checkoff. Therefore, it is all unconstitutional, and the district court's injunction should be upheld.

ARGUMENT

I. THE PORK CHECKOFF VIOLATES HOG FARMERS' RIGHT TO FREEDOM OF SPEECH

A. Compelled Funding of Speech Triggers First Amendment Protection

The First Amendment to the United States Constitution provides: "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has established a distinct line of First Amendment jurisprudence governing compelled speech, which holds that:

> Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views ... or from compelling certain individuals to pay subsidies for speech to which they object.

United Foods, 533 U.S. at 410 (*citing Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)). This line of cases applies to the mandatory pork checkoff assessments hog farmers are forced to pay.

The standard for compelled and ideological speech cases was set in *Barnette*, in which the Supreme Court held that a state could not compel a public school student to recite the Pledge of Allegiance. In the words of Justice Jackson:

> 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. If there are any circumstances which permit an exception, they do not now occur to us.

319 U.S. at 642. Thus, the Supreme Court held that the State of West Virginia could not condition access to public education on compelled ideological speech that is objectionable to the speaker.

In *Wooley*, the Supreme Court held that the State of New Hampshire could not require individuals to display the state motto "Live Free or Die" upon their passenger vehicle license plates when the motto was repugnant to their moral, political, and religious beliefs. Following *Barnette*, the Court held that "the right of freedom of thought, protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714. The Court noted that the challenged law "forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id*. at 715.

In *Abood*, the Supreme Court addressed a Michigan statute authorizing compelled assessments against public employees to fund union activities. The Court first held that, while mandatory fees for "agency shop" collective bargaining activities impinged on individuals' First Amendment rights by compelling them to associate with unions and their activities, that impingement was constitutionally justified because collective bargaining furthered the national interest in labor peace and uniformity. 431 U.S. at 222-27. However, the Court held that the compelled assessments unconstitutionally infringed on the employees' First Amendment rights to the extent they funded activities that were not germane to collective bargaining. *Id*. at 234. The Supreme Court stated: "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id*. at 234-35. The Court did not bar unions from making expenditures that were not germane to collective bargaining; it simply held that "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id*. at 235-36.

Similarly, the Supreme Court in *Keller* found the state's interest in the improvement of the quality of legal services for the people of California, as well as

the fact that the legal profession is self-regulating, sufficient to permit compelled payment of dues by attorneys to the integrated bar association. 496 U.S. at 13-14. The Court held, however, that the State Bar of California could not use compulsory dues from attorneys to finance political and ideological activities that were not germane to the greater purpose that justified the compelled association. *Id*. at 14.

B. This Case Is Governed by *United Foods*

Two Supreme Court cases have addressed the issue of compelled assessments in two distinct agricultural statutory contexts. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Supreme Court rejected a First Amendment challenge to compelled assessments for advertising pursuant to California tree fruit marketing orders. The Court held that the extensive regulation of the tree fruit industry, which had effectively replaced competition with collective action, justified the compelled assessments. *Glickman*, 521 U.S. at 474. The Court held that, like the assessments used to further collective bargaining in *Abood* and the assessments used to further the integrated bar activities in *Keller*, the compelled contributions were germane to a separate, comprehensive statutory scheme, which was "judged by Congress to be necessary to maintain a stable market." *United Foods*, 533 U.S. at 414. The plaintiffs in *Glickman* did not argue

that the compelled assessments funded speech that violated their ideological beliefs. 521 U.S. at 467-68.

This Court distinguished *Glickman* when faced with a First Amendment challenge to the Mushroom Act, which not was enacted pursuant to a comprehensive marketing order, but rather was enacted as stand-alone legislation. Finding the mushroom industry "entirely different" from the tree fruit industry at issue in *Glickman*, this Court held:

> In the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.

United Foods, Inc. v. United States, 197 F.3d 221, 225 (6th Cir. 1999). This Court did not decide whether the Mushroom Act generated ideological speech, but noted: "Our interpretation of *Wileman* is that if either of the two elements is missing—either the collectivization of the industry or the purely commercial nature of the advertising—the First Amendment invalidates the compelled commercial speech.…" *Id*. at 224.

The Supreme Court agreed with this Court's distinction of *Glickman* when it affirmed the *United Foods* decision, finding that "there is no broader regulatory system in place here." *United Foods*, 533 U.S. at 415. The Supreme Court observed that: "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." *Id*.

In characterizing the lone producer's First Amendment challenge, the Supreme Court recognized the dual values of freedom and economic interests:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.

Id. at 410-11. Therefore, it concluded, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.…" *Id*. at 411.

Applying the holdings of *Abood* and *Keller*, the Supreme Court held that, since the primary purpose of the Mushroom Act was the speech itself, and the Mushroom Act was not part of a greater collectivized scheme, the compelled subsidies pursuant to the Act could not be "germane to a purpose related to an association independent from the speech itself...." 533 U.S. at 415. The Court thus held that the assessments were not permitted under the First Amendment. *Id.* at 416. The Court did not address this Court's interpretation of *Glickman* that

compelled speech is unconstitutional if it is ideological, even if the speech is germane to a greater statutory scheme.

C. The Pork Checkoff Cannot Withstand Scrutiny Under the *United Foods* Test

The Pork Act imposes the obligation of mandatory assessments on a discrete group of individuals to fund pork promotion, research, and consumer information in the absence of a collectivized industry. The entire Act therefore must be declared invalid because it is not germane to any greater statutory scheme. Moreover, Appellees object on ideological grounds not just to the promotion component of the pork checkoff program, but to the program in its entirety. Therefore, the district court correctly declared the entire program unconstitutional.

1. The Pork Act Is Not Part of a Larger Regulatory Scheme; Therefore, the Assessments Are Germane to Nothing

The Supreme Court in *United Foods* held that the threshold inquiry in determining whether compelled assessments could withstand First Amendment scrutiny was whether there is an "overriding associational purpose which allows any compelled subsidy for speech in the first place." 533 U.S. at 413. In *Abood*, the "overriding ... purpose" was the government's interest in maintaining "labor peace." 431 U.S. at 224. In *Keller*, the "overriding ... purpose" was the state's interest in an integrated, self-regulating bar association that would improve "the quality of the legal service available to the people of the State." 496 U.S. at 14. In

Glickman, it was a "comprehensive program restricting marketing autonomy" deemed necessary "to maintain a stable market." *United Foods*, 533 U.S. at 411, 414. In each of those cases, the Court held that only those activities that were germane to the larger purpose justifying the required association could be upheld as constitutional.

Appellants cannot plausibly argue that the Pork Act has an "overriding ... purpose" that is akin to maintaining "labor peace" in our country. Nor have they demonstrated that NPB serves a function similar to an integrated bar association. And, as with the Mushroom Act, the Pork Act is not part of a larger, comprehensive statutory scheme. The Pork Act, like the Mushroom Act, does not include any economic regulations except for the collection and enforcement of mandatory assessments. Indeed, the Pork Act, like the Mushroom Act, contains an explicit bar to economic regulations and collectivized action:

> Nothing in this subtitle [7 U.S.C. §§ 4801 *et seq.*] may be construed to (A) permit or require the imposition of quality standards for pork or pork products; (B) provide for control of the production of pork or pork products; or (C) otherwise limit the right of an individual pork producer to produce pork and pork products.

7 U.S.C. § 4801(b)(3); *compare* 7 U.S.C. § 6101(c) (Mushroom Act). The "statutory context" of the pork checkoff program thus is nearly identical to that in

United Foods, as USDA has admitted.[4] (R. 196 Stokes Supp. Dec. Ex. 45 pg. 13, Apx. pg. 2326)(USDA's Petition for Writ of Certiorari to the U.S. Supreme Court in *United States v. United Foods, Inc.)*("…Congress has authorized, and the Secretary of Agriculture has implemented, similar generic advertising programs for a number of other agricultural commodities. Those programs, like [the mushroom program], are not imposed as part of a statute or marketing order that comprehensively regulates the commodity. *See, e.g.,* … 7 U.S.C. 4801 *et seq*.")(citing to pork checkoff program).) Without any connection to a larger regulatory scheme, the pork checkoff lacks an overriding purpose that could justify compelled speech "in the first place," and therefore it cannot withstand First Amendment scrutiny.

Appellants thus are left arguing the tautology that was rejected in *United Foods*: that a commodity promotion act is germane to itself. That empty tautology applies to the entire checkoff program, whether the funds are used for promotion,

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[4] Even the two district court decisions that differ on the constitutionality of the Beef Act agree that the beef checkoff, similar to the pork checkoff, is not part of a broader regulatory scheme. *See Livestock Mktg. Ass'n v. USDA,* 207 F.Supp.2d 992, 1005 (D.S.D. 2002), *appeal pending,* Nos. 02-2769, 02-2832 (8th Cir.)("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."); *Charter v. USDA,* 230 F.Supp.2d 1121, 1129 (D. Mont. 2002), *appeal pending,* No. 02-36140 (9th Cir.)("[T]he beef checkoff program is not germane to a larger regulatory scheme, and it is subject to First Amendment constraints.").

research, or consumer information. Research and consumer information activities cannot be germane to themselves, any more than promotion can be germane to itself. The point for First Amendment analysis is that the checkoff program is not germane to a broader regulatory scheme, and it therefore is unconstitutional under *United Foods*.

2. The Pork Checkoff Funds Ideological Speech

The checkoff also violates the First Amendment because all of the speech funded by the pork checkoff is ideologically, politically, and economically objectionable to Appellees. *See United Foods*, 197 F.3d at 224; *Glickman*, 521 U.S. at 473. Because Appellees' objections to the promotion, research, and consumer information speech funded by the pork checkoff are ideological, the district court was correct in enjoining enforcement of the entire Pork Act.

The Supreme Court has held that public relations activities constitute "speech of a political nature." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 529 (1990)(holding unconstitutional compelled funding of "speech in support of the teaching profession generally"). Speech in support of the pork industry generally—which covers everything funded by the checkoff—is likewise political. The hog industry today is polarized between those who support a vertically integrated factory farm method of raising swine and those who believe in a family farm method that is sustainable and healthier for the animals, for the humans who

raise and eat them, and for rural communities. (R. 164 Joens Decl. pgs. 2-6, Apx. pgs. 341-345; R. 165 Smith Decl. pgs. 2-5, Apx. pgs. 406-409; R. 163 Perry Decl. pgs. 2-10, Apx. pgs. 154-162.) That NPB funds research to alleviate large manure lagoon odors, distributes consumer information relating to the factory farm system of raising hogs, and promotes pork raised in factory farm settings, is abhorrent to Appellees. Appellees' objections encompass everything funded by the pork checkoff.[5]

Appellees object to paying for generic advertising such as the "Pork. The Other White Meat" campaign on several grounds. First, the generic advertising promotes a product they do not sell. *MPPA-II*, 229 F.Supp.2d at 776. Appellees raise and sell hogs. The benefits of advertising pork inure to those who sell pork—the packers and the retailers. (R. 163 Perry Decl. pg. 4, Apx. pg. 156; R. 165 Smith Decl. pg. 5, Apx. pg. 409.) USDA research shows that between 1996 and

[5] Private Appellants misstate that Appellees' objections are limited to generic advertising. *See* Pr.App. Brief at 15. As stated above and in their cross-claim, Appellees object "to the content of the speech and expression included in the advertising, research, and consumer information programs paid for with producers' checkoff assessments." (R. 136 Cross-Claim ¶33, Apx. pg. 78). Private Appellants, throughout their brief, also mischaracterize Appellees' objections, taking portions of Appellees' deposition testimony out of context and disregarding their sworn declarations. The district court below rejected Appellants' attempts to so limit Appellees' objections, and Appellants did not appeal that ruling.

2001, hog farmers' share of the retail pork dollar declined from 42.5% to 30.1%. (R. 169 Stokes Decl Ex. 12 pg. 1, Apx. pg. 1282.) Second, the generic promotion of pork fails to distinguish the unique qualities and attributes of hogs raised and marketed by independent family farmers. *MPPA-II*, 229 F.Supp.2d at 776; (R. 163 Perry Decl. pgs 3-4, Ex. 4, pgs. 41-44, Apx. pgs. 155-156, 243-246; R. 164 Joens Decl. pg. 6, Apx. pg. 345; R. 165 Smith Decl. pg. 5, Apx. pg. 409). Appellees also believe that the generic advertising campaigns promote an industrialized production method they oppose. The "Pork. The Other White Meat" campaign is intended to create a demand for extremely lean pork. In order to obtain this type of pork, hogs must be raised in what Appellees believe are unhealthy or inhumane conditions for the animals. (R. 163 Perry Decl. pgs. 3-4, Apx. pgs. 155-156; R. 165 Smith Decl. pg. 5, Apx. pg. 409.) Finally, some hog farmers believe the "Pork. The Other White Meat" campaign "misrepresents pork as a white meat and discourages the sale of bacon and ham." *MPPA-II*, 229 F.Supp.2d at 776; (R. 166 Schultz Decl. Ex. 6, Schultz Dep. pgs. 60-61, Ex. 5, Apx. pgs. 656-657, 499-626.)

Some hog farmers find particularly galling the fact that they are compelled to pay for advertising that directly supports their competition. For many years the pork checkoff has paid for what is known as "branded advertising." (R. 169 Stokes Decl. Ex. 25, Carpenter Dep. pgs. 204-06, Apx. pgs. 1369-1371.) Branded ads

include promotions for specific companies, typically packers and retailers. (R. 168, Linse-Hemmelman Dec. pg. 4, Apx. pg. 725.) Because of concentration and lack of competition among packinghouses, and because of their philosophical beliefs that hogs raised using their farming practices produce better pork, some hog farmers, including Appellees Perry and Joens, have joined with other hog farmers to slaughter their own hogs and process their own pork. *MPPA-II*, 229 F.Supp.2d at 776; (R. 163 Perry Decl. pgs. 3-5, Ex. 10, pgs. 12-13, Apx. pgs. 155-157, 285-286; R. 164 Joens Decl. pg. 6, Apx. pg. 345.) The checkoff thus forces these farmers to subsidize advertising for such giants as Hormel or Smithfield, who are their direct competitors. (R. 163 Perry Decl. pgs. 4-5, Apx. pgs. 156-157.) Because increasingly more packers are vertically integrated and own their own hogs (R. 169 Stokes Decl. Ex. 13 pg. 15, Apx. pg. 1303), these packers are also directly competing with hog farmers who do not process their own pork. For example, in Colorado, where the pork checkoff paid for a radio ad that promoted Hormel pork, Hormel owns 25,000 sows. (R. 166 Schultz Decl. pg. 5, Ex. 4, Apx. pgs. 443, 495-497.) Not surprisingly, Appellees object to being forced to pay for their competitors' advertising. (*Id.* at pg. 5, Apx. pg. 443; R. 163 Perry Decl. pgs. 4-5, Apx. pgs. 156-157.)

Appellees also object to being compelled to pay for what is termed "consumer information" or "education." They believe these programs primarily

benefit factory farms, thus supporting a farming method they oppose. (R. 164 Joens Decl. pgs. 2-6, Apx. pgs. 341-345; R. 163 Perry Decl. pgs. 5-7, Apx. pgs. 157-159; R. 165 Smith Decl. pgs. 2-5, Apx. pgs. 406-409.) For example, NPB budgeted nearly $300,000 in 2002 to "inform" consumers about "animal welfare" because of the public's growing concerns about the treatment of swine. (R. 164 Joens Decl. Ex. 1 pg. NPPC00580-81, Apx. pgs. 391-392.) Appellee Joens believes the public's concern about the treatment of swine is well justified, and he objects to paying for this "information:"

> I raise my hogs using humane methods; they are not confined in pens their entire lives, as they are in many factory hog farms. I object to my checkoff dollars being used to publish information that helps cover up the abuses of those large corporate confinement facilities.

(*Id*. at pg. 3, Apx. pg. 342.) Appellee Smith similarly objects to the $300,000 "Pork Quality Assurance" program, which purports to "emphasize good management practices in the handling and use of animal health products" (R. 165 Smith Decl. Ex. 3 pgs. NPPC00565, Apx. pg. 436):

> These programs are for people that work in the corporate hog factories that have never seen a hog before they went to work for a huge conglomerate. I object because this is independent producer money going to a program that is focused on corporate hog factories and not the independent producers who believe in animal husbandry and who have been handling hogs humanely for years. I don't believe in giving shots unless we have to. If a hog is sick then I vaccinate it or give it a shot and so I think we have a cleaner hog. These programs are for the education of factory producers.

(*Id*. at pg. 4, Apx. pg. 408.) Appellees object to being compelled to pay for speech that supports a method of raising livestock they adamantly oppose. (R. 163 Perry Decl. pgs. 3-6, Apx. pgs. 155-158.)

Appellees further object to paying for checkoff-funded research—which they see as either for the benefit of factory farms or ultimately resulting in the dissemination of information designed to protect a factory farm system. (*Id.* at pgs. 2-3, 5, 7, Apx. pgs. 154-155, 157, 159.) One example of checkoff-funded research Appellees object to is the large expenditure for what NPB calls "Antimicrobial Resistance and Alternatives Research." That one program allotted $454,000 in 2002 to educate the public and policymakers about "producers' commitment to food safety" and give them "confidence that the pork industry is able to address the safe use of animal health products." (*Id*. at Ex. 3 pgs. NPPC00576-77, Apx. pgs. 205-206.) Appellee Perry objects to being compelled to support a practice that is diametrically opposed to her ideological and economic interests:

> I object to NPB using my checkoff dollars to convince the public and policymakers that the pork industry as a whole is looking out for the health of the general public. Sub-therapeutic antibiotic usage has become general industry practice in factory farm production. Many people are increasingly aware of the problems created by these practices. That is why we have standards for Patchwork Family Farms that limit the use of antibiotics. It appears to me as though checkoff dollars are being used to "convince" people that constant feeding of sub-therapeutic antibiotics is not a

> significant problem or at least to fund research to show that it isn't a problem. If that's the case, then Patchwork loses out in the marketplace because we have differentiated ourselves due to our growing standards.

(*Id.* at pg. 7, Apx. pg. 159.)

In *Abood*, the Supreme Court noted that plaintiffs were not required to specify to which causes they objected and held that it was sufficient to state generally in their pleadings that they objected; otherwise a plaintiff would face the dilemma of "relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." 431 U.S. at 241. Accordingly, Appellees have more than satisfied their burden of demonstrating that the entire pork checkoff program is objectionable, ideological activity that they cannot be compelled to finance.

D. The Pork Checkoff Is Not Entitled to Government Speech Immunity

Given the clear unconstitutionality of the pork checkoff program under the Supreme Court's *United Foods* analysis, Appellants hope to convince this Court to recognize and expand the existence of a "so-called 'government speech' doctrine" (*see Keller*, 496 U.S. at 10), a doctrine that has not been squarely adopted by the Supreme Court. In order to prevail on this defense, Appellants must convince this Court to make four great leaps beyond the bounds of current case law. First, they must convince this Court to accept that there is a "government speech doctrine"

that could immunize speech from any First Amendment challenge. Second, they must convince this Court to apply this "doctrine" where it has never been applied before—to a program that is funded by a targeted group of individuals rather than by taxpayers in general. Third, they must convince this Court that NPB, a private organization, is in fact a government entity. In the alternative, they must convince this Court that government oversight of a program can transform the speech of that program into the government's speech. Finally, Appellants must convince this Court to believe their current self-serving affidavits, which now state that the program is the government's. To do so, the Court must disregard everything Congress, Appellants, and NPB have said about the pork checkoff program being a "self-help" program created and funded by and for private pork producers.

1. The Supreme Court Has Not Adopted a Blanket "Government Speech" Immunity From First Amendment Challenges

Only four recent Supreme Court decisions can provide any authority for a "government speech doctrine." Three of them have done so only in *dicta*, and in each of those cases the Court rejected the contention that the speech at issue was "government speech." *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001)("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."); *Board of Regents of Univ. of Wis. Sys.*

v. Southworth, 529 U.S. 217, 235 (2000)("In the instant case, the speech is not that of the University or its agents."); *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)("The University has taken pains to disassociate itself from the private speech involved in this case."). The decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), which the Court later said was decided on "government speech" grounds, *see Velazquez*, 531 U.S. at 541, was actually based on Congress's "spending power," not on any privilege or immunity with regard to speech. *Rust*, 500 U.S. at 197-99.

Thus, all of Appellants' efforts to defeat the mandatory pork checkoff hinge on the hope that this Court will expand Supreme Court *dicta* and apply a "government speech" immunity that has not been adopted by this Court or the Supreme Court. As set forth below, Appellants' arguments are contrary to precedent and reason and should be rejected.

2. "Government Speech" Immunity Cannot Apply to Programs That Are Not Funded by the Government

In attempting to claim private speech as the government's, Appellants stretch case law beyond any reasonable interpretation. Appellants would have this Court believe that simply by endorsing and reviewing a message or a program, the government can claim the speech of that message or program. *See* Fed.App. Brief at 38-43; Pr.App. Brief at 37-43. The crucial element lacking from Appellants'

analysis is that the cases they rely on all involve *government funding*, not compelled private funding. If any common thread about government speech can be gleaned from the Supreme Court's *dicta* and its actual holdings, it is that the Court has struggled with the reality that the government must be able to conduct the day-to-day business of implementing government-funded programs and be democratically accountable to the citizens of the United States. Assuming there is a "government speech" doctrine, it would not apply to compelled speech that is privately funded by mandatory assessments against a targeted group of private individuals.

The starting point for this analysis is *Rust*, in which the Supreme Court upheld regulations that restricted what doctors who worked for federally funded projects could say about abortions. The Court specifically relied upon the fact that the projects were *federally funded*, noting that the Title X grantees could continue to do whatever they like with regard to abortions through programs that "are separate and independent from the project that receives Title X funds." 500 U.S. at 196. Citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983), the Court relied on Congress's "spending power" to uphold the regulations that proscribed what the doctors could say. *Rust*, 500 U.S. at 197-99. Nowhere is there a mention of the government's "right" to speak, or sanction of any broad

doctrine granting the government "immunity" from First Amendment scrutiny. The Court in fact took pains to note that it was *not* ruling on speech grounds:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Id. at 198.

The Supreme Court in *Velazquez* struck down restrictions that prohibited recipients of LSC funds from undertaking legal representation that involved an attempt to challenge existing welfare law. 531 U.S. at 548-49. The Court's *dicta* in that case does not recognize the blanket "government speech" privilege upon which Appellants rely. Rather, it explains the Court's holding in *Rust* and confirms that the underlying prerequisite to what Appellants argue is "government speech" is government funding:

> The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based **funding decisions** can be sustained in instances in which the government is itself the speaker, [*citing Southworth*, 529 U.S. at 229, 235], or instances, like *Rust*, in which the government "used private speakers to transmit information **pertaining to its own program**."

Id. at 541 (*citing Rosenberger*, 515 U.S. at 833)(emphasis added). Thus, at most, the Court was acknowledging that when the government makes public funding decisions, those decisions necessarily reflect a viewpoint of the government with which some may disagree.

The Supreme Court's decisions in *Rosenberger, Keller,* and *Southworth* are in accord with the principle that any deference given to a governmental message must stem from the government's acts in implementing government-funded programs. In *Rosenberger*, a student organization sued the University for denying it funds from the Student Activities Fund to pay for its Christian publication. 515 U.S. at 827. The Supreme Court held the denial was a violation of the group's free speech rights because it constituted viewpoint discrimination. *Id.* at 845-46. In response to arguments by the University that it was entitled to make content-based choices because it (as the state) was "speaking," the Court distinguished the case from *Rust* as follows:

> There [in *Rust*], the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that **when the government appropriates public funds** to promote a particular policy of its own it is entitled to say what it wishes. [*citing Rust*, 500 U.S. at 194] When the government **disburses public funds** to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. *See* [*Rust*] at 196-200.

Id. at 833 (emphasis added). In contrast, the Court held that the disbursement of the Student Activities Fund was not intended to convey a government message, but rather the University (state) had created a public forum to "encourage a diversity of views from private speakers," *Id*. at 834, and, having established a public forum, it could not discriminate on the basis of viewpoint.

In *Keller*, the Supreme Court explicitly recognized the principle that government funding is the necessary prerequisite to any finding of "government speech." In rejecting the state's argument that the State Bar of California was engaging in government speech that should therefore be immune from First Amendment scrutiny, the Court highlighted the fact that the bar association was funded by dues and fees paid by members of the bar and not by appropriations from the legislature. 496 U.S. at 10-11.

Similarly, a review of the entire passage of the *Southworth dicta* regarding the "government speech" doctrine, rather than just the snippet provided by Appellants, demonstrates that the ability of the government to speak in favor of programs it establishes is linked to the government funding of those programs:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that **funds raised by the government** will be spent for speech and

> other expression to advocate and defend its own policies. [*citing Rust*, 500 U.S. 173; *Regan*, 461 U.S. at 548-9]. The case we decide here, however, does not raise the issue of the government's right, or to be more specific, the state-controlled University's right, **to use its own funds** to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.... 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. That is not the case before us.

529 U.S. at 229 (emphasis added). And that is not the case before this Court. This is not a case where the government is using public funds to pay for advertising or education relating to the pork industry.

As was true of the speech in *Abood* and *Keller*, the speech at issue in this case is funded by an assessment against a targeted group of private individuals. Indeed, it *cannot* be funded by the government. The Pork Act specifically requires that the checkoff program "shall be conducted, at no cost to the Federal Government." 7 U.S.C. § 4801(b)(2). Thus, even if there were such a sweeping doctrine as "government speech," its unequivocal prerequisite of government funding is wholly absent in this case. This renders Appellants' reliance on the

Supreme Court's acknowledgement that the government may speak in furtherance of its own programs or policies ill placed, at best.[6]

The importance of the funding source is at the heart of the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), a case directly on point and relied on by the district court below. *MPPA-II*, 229 F.Supp.2d at 787. In *Frame*, the Third Circuit rejected the same argument Appellants raise here—that the compelled speech funded by the comparable Beef Act constituted government speech. Relying on Justice Powell's concurring opinion in *Abood*, the Third Circuit found the fact that the speech was funded by a group of private individuals, rather than the government, to be a controlling factor:

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. 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.

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[6] Appellants' arguments, relying on *Rust*, that the government may "speak" through private speakers, similarly miss the necessary condition precedent contained in the cases they rely on: they all involve government expenditures or speech on government-owned property. *See infra*, 41-42.

885 F.2d at 1132 (internal citation omitted). The Third Circuit held that the beef checkoff:

> more closely resembles the *Abood* situation, where the unions, as exclusive bargaining agents, served as the locators for a distinguishable segment of the population, *i.e.*, the employees, or the *Wooley* case, where the state "required an individual to participate in the dissemination of an ideological message...."

Id. at 1132-33.[7] The United States District Court for the District of South Dakota also recently followed *Frame's* analysis, holding in *Livestock Mktg. Ass'n v. USDA*, that beef checkoff-funded speech was not government speech. 207 F.Supp.2d 992, 1006-7 (D.S.D. 2002), *appeal pending*, Nos. 02-2769, 02-2832 (8th Cir.)("*LMA*").[8]

Appellants' blithe dismissal of *Frame* on the simplistic ground that it predates *Rust, Rosenberger, Southworth,* and *Velazquez* thus ignores that those cases actually reinforce the Third Circuit's holding in *Frame*. Using Appellants'

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[7] For this reason, Federal Appellants' reliance upon *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), is misplaced. The Eleventh Circuit in *Hunt* merely held that *Abood* has not been applied to the government. As the district courts in this case and *LMA* held, and as set forth in more detail below, NPB is like the union in *Abood* or the bar association in *Keller*; it is not the government. Therefore, *United Foods, Abood*, and *Keller* apply to these compelled assessments.

[8] The district court in *Charter,* 230 F.Supp.2d at 1135-37, came to the opposite conclusion, relying primarily on the Supreme Court's decision in *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000). That Establishment Clause decision, however, is inapplicable to a compelled funding case. *See infra,* n.9.

interpretation, any time a government adopts or endorses a message, regardless of who pays for it, that message would become government speech and therefore be immune from any constitutional challenge. Such an interpretation would plunge First Amendment jurisprudence into an entirely new arena with no discernable boundaries. Appellants' argument is not supported by Supreme Court precedent, since every Supreme Court decision relied upon by Appellants involved programs funded by the government, or ultimately the general public.[9]

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[9] Appellants' newfound reliance on *Santa Fe* is no more helpful to them. That case involved an Establishment Clause challenge to a public school policy that permitted student-led prayer at football games. The Supreme Court did not hold that the speech at issue was "government speech" so to immunize the speech from First Amendment challenges; rather, the Court held that there was sufficient state action to constitute a violation of the Establishment Clause. *Id.* at 302-05.

Federal Appellants' citation to *Columbia Broadcast System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973), is puzzling, since the holding of that case squarely supports the district court's decision in this case. The Supreme Court in that case held that private broadcasters, although heavily regulated by the government, were private and not government actors for purposes of determining whether their program content decisions constituted a restraint on private individuals' First Amendment speech rights. *Id.* at 119-121. Justice Stewart's concurrence eloquently articulated the justification for the holding:

> The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government. To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights.

Id. at 139 (emphasis in original). The rather esoteric footnote cited by Federal Appellants for the proposition that the government need not control its own expression overlooks the fact that NPB is in the same position as the private broadcasters in the *CBS* case.

In addition, every appellate court decision cited by Appellants in support of their "government speech" argument exists involved some form of public funding. *See Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011-12 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001)(finding government speech where a public high school provided a bulletin board on school property that it controlled and claimed responsibility for); *Wells v. City and County of Denver*, 257 F.3d 1132, 1142 (10th Cir.), *cert. denied*, 534 U.S. 997 (2001)(finding government speech where city built, paid for, owned, and maintained a public sign); *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)(finding no government speech in a state program allowing private groups or individuals to purchase special license plates); *Griffin v. Secretary of Veteran Affairs*, 288 F.3d 1309, 1324-25 (Fed. Cir.), *cert. denied*, 123 S.Ct. 410 (2002)(finding government speech in decisions on which flags to fly at national cemeteries); *Edwards v. California Univ. of Pennsylvania*, 156 F.3d 488, 491-92 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999)(state-funded university may make decisions as to the content of its curriculum); *Knights of the Ku Klux Klan v. Curators of the Univ. of Missouri*, 203 F.3d 1085, 1094 (8th Cir.), *cert. denied*, 531 U.S. 814 (2000)(finding government speech where a state university-owned public radio station's advertisements were

required by law to identify the ad sponsor and where the radio staff members themselves composed the ad scripts).[10]

The only Sixth Circuit First Amendment case cited by Appellants is actually a public figure libel case, which held that members of a state election commission are entitled to qualified immunity. *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991). That case had nothing to do with compelled speech and is inapposite here.

Because the pork checkoff is funded by a targeted group of private individuals, rather than the public fisc, the "government speech" doctrine is inapplicable.

3. Political Controls Are Absent

Cases considering the power of government to control its own speech and speech that it funds have noted that where the safeguard of accountability through the democratic process is absent, the rationale for permitting government immunity likewise is absent. In *Velazquez*, the Supreme Court provided the

[10] A recent Eighth Circuit decision distinguished *KKK*, noting it "rested largely on the unique context of public broadcasting." *Cuffley v. Knights of the Ku Klux Klan*, 208 F.3d 702, 706 n.3 (8th Cir. 2000)(rejecting government speech argument and finding First Amendment violation). The fact that the television station in question in *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), was a publicly funded television station likewise distinguishes it from the case at hand.

rationale for its decision in *Rust*, in which it had held that the government could constitutionally restrict the speech of persons funded through federal programs:

> [T]he government ... 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.

Velazquez, 531 U.S. at 541 (*quoting Southworth*, 529 U.S. at 235).

This reasoning further demonstrates the inapplicability of a "government speech" doctrine to Appellees' First Amendment challenges to the pork checkoff. Appellants' claim that Appellees should seek redress for their objections to the pork checkoff program in the political process is wrong on the law and on the facts of this case. A political remedy for Appellees' First Amendment objections to the pork checkoff is both unnecessary and infeasible. A political remedy is not necessary because the Supreme Court has placed constitutional rights outside this realm:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. **One's right to life, liberty and property, to free speech**, to free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; **they depend on the outcome of no elections**.

Barnette, 319 U.S. at 638 (emphasis added).

Even assuming that the notion of a political remedy applies to Appellees' First Amendment challenge, the "remedy" is not a question for the general electorate, but a group of targeted individuals, *i.e.*, hog farmers. As the Third Circuit held in *Frame*:

> According to Justice Powell, 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. [citing *Abood*] The Cattlemen's Board seems to be an entity "representative of one segment of the population, with certain common interests."

Frame, 885 F.2d at 1133. Noting that the Cattlemen's Board was made up of individuals nominated by private beef industry organizations and not government officials, the *Frame* court found that the lack of political accountability supported the conclusion that beef checkoff-funded activities could not be "government speech." *Ibid.* In *Keller*, the Court similarly found that the compelled speech was not "government speech," noting that the bar association was not a "typical government official or agency" and that the officials of the state bar were not accountable to the citizens through the "democratic process." 496 U.S. at 12-14.

Given a universe of only hog farmers, the potential political remedies here are limited. NPB is comprised of private individuals, not government officials, and NPB's duties under the Pork Act are limited to allocating pork checkoff

assessments. 7 U.S.C. § 4808(b)(1)(A); 7 C.F.R. § 1230.58. The duties do not include the power to "espouse some different or contrary position" (*Southworth*, 529 U.S. at 235) with regard to the existence of the checkoff, so electing new NPB members is not an adequate remedy. Like the Cattlemen's Board in *Frame* and the state bar in *Keller*, NPB is not accountable to the citizens through the democratic process.

In addition, according to Federal Appellants' majority rule arguments, the 2000 pork checkoff referendum ordered by Secretary Glickman should have been honored by Secretary Veneman, since 15,951 pork producers, or 53% of those who voted, voted for termination of the pork checkoff program. This clearly did not happen since the program continued under a settlement agreement between USDA and Private Appellants despite the majority vote. *See MPPA-I,* 174 F.Supp.2d at 639. Federal Appellants' arguments thus ring hollow in light of the government's own actions to subvert what limited political process was available. Accordingly, the pork checkoff program lacks the necessary safeguards necessary for finding the speech at issue to be "government speech."

4. Pork Checkoff-Funded Speech Is Not the Government's Speech

The undisputed facts of this case demonstrate that the hog farmers' checkoff-funded speech is not the government's. Even the appellate court cases cited by Appellants do not support their argument that checkoff-funded activities

are immune from First Amendment challenges because they are "government speech." The cases that have recognized a "government speech" doctrine have applied four factors: (1) what is the central purpose of the program in which the speech occurs; (2) what is the degree of control over the content of the speech exercised by the government or private entities; (3) who is the literal speaker;[11] and (4) who maintains ultimate responsibility for the content of the speech. *See Sons of Confederate Veterans*, 288 F.3d at 618; *KKK*, 203 F.3d at 1094; *Downs*, 228 F.3d at 1011-12; *Wells*, 257 F.3d at 1142. In addition, the Eighth Circuit in *KKK* noted that who the listener perceives to be the speaker is also relevant. 203 F.3d at 1094 n.9.

Appellants presume this test is applicable, although neither the Supreme Court nor this Court has adopted the analysis set forth by these courts. Even applying this questionable test, however, using the factors as they are, rather than as Appellants wish them to be, pork checkoff-funded activities cannot be considered "government speech."

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[11] Federal Appellants, with no authority, make the argument in a footnote that the "literal speaker" factor should not be applied where the government "controls" the speech, thus rendering it redundant. While it is understandable that the government does not wish this factor to apply, since the literal speaker in checkoff-funded communications is "America's Pork Producers" (R. 168 Linse-Hemmelman Decl. pgs. 3-4, Apx. pgs. 724-725), the government's wishful thinking cannot provide a basis for eliminating this factor altogether.

a. Central Purpose of the Pork Act

A review of the purpose of the Pork Act weighs against pork checkoff-funded communications being considered "government speech." First, the purpose of the Pork Act is essentially the same as the Beef Act (7 U.S.C. §§ 2901-11), yet those two products compete with each other. Their messages are inconsistent. Pork checkoff-funded messages promote pork as an alternative to beef. (R. 196 Stokes Supp. Decl. Exs. 38-39, Apx. pgs. 2255-2286.) Beef checkoff-funded messages promote beef as a competitor of pork. (*Id.* at Ex. 41, Apx pgs. 2289, 2296.) As the district court correctly held below, the government cannot claim both as its message:

> Common sense tells us that the government is not "speaking" in encouraging customers 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.

MPPA-II, 229 F.Supp.2d at 789 (*quoting LMA*, 207 F.Supp.2d at 1006). While it is true, as Appellants have argued, that Congress *may* enact programs that promote competing products, it cannot claim the speech generated by those competing programs as its own. The Supreme Court recognized as much when it rejected the government's contention that the speech of the legal services attorneys in *Velazquez* was the government's: "Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients ... The [LSC] lawyer is not

the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message...." 531 U.S at 542. The Court held that the government could not claim both opposing positions as its own. *Ibid*.

Second, the pork checkoff program was created as a "self-help" measure for the pork industry to help itself by promoting and increasing demand for pork. 7 U.S.C. § 4801; *see supra* 6-7; *see also* (R. 196, Stokes Supp. Decl. Ex. 29 pg. NPB001549, Apx. pg. 2200; Ex. 35 pg. 4, Apx. pg. 2237). The central purpose of the Pork Act thus was to establish a program for pork producers to help themselves, not to create a government program that helped pork producers. Accordingly, the purpose of the Act supports the conclusion that the speech at issue is not the government's.

b. Control of the Speech

Appellants place great weight on the oversight function of the government. The undisputed facts, however, demonstrate that not only does the government not have final control over the content of pork checkoff-funded communications, any "control" it does exercise is merely *pro forma*.

(1) Pork Checkoff Actors Are Private Pork Producers

The Pork Act itself endows NPB, not the government, with the powers and duties of developing plans for checkoff-funded projects to submit to the Secretary for approval. 7 U.S.C. § 4808(b)(1). While the Pork Order says that the Secretary

may attend or have a representative attend NPB meetings at which NPB prepares its plans and budgets, there is no requirement that the Secretary be present at such meetings, and neither the Secretary nor her representative has a vote at those meetings. 7 C.F.R. § 1230.56. The Secretary's attendance and input at those meetings does not convert the speech produced by the private NPB into the Secretary's "speech." In addition, USDA is reimbursed by NPB for any time USDA staff spend on pork checkoff activities. 7 C.F.R. § 1230.73(c)(4).

Although the Secretary has the power to appoint NPB members, the nominations of these pork producers and importers come directly from the Delegate Body that is elected by the private state pork associations. The Delegate Body presents the Secretary with the nominees ranked by the number of votes they received. In the past five years, the Secretary has not deviated from the slate as presented. (R. 196 Stokes Supp. Decl. pg. 5; Ex. 48, Apx. pgs. 2168, 2394-2408.) The court in *LMA* found the Secretary's similar approval of appointments to the Beef Board to be *pro forma*. 207 F.Supp.2d at 1005.

(2) NPB Is Not a Government Entity

Appellants' simplistic argument that NPB is a government agency "for First Amendment purposes," under *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), misapprehends the holding of that decision. The issue before the Supreme Court in *Lebron* was very different from that before the Court today. In

Lebron, the plaintiff was challenging Amtrak's restraint on his speech; he was not asserting, as Appellees do here, that he was unconstitutionally being compelled to support speech he found objectionable. The Supreme Court in *Lebron* acknowledged that it uses a different standard to determine whether the actions of a government-created corporation are state action when looking at restraint of speech under the First Amendment than when looking at a claim of government privilege or immunity. *Id.* at 399. In distinguishing its holding in *Lebron* from its holdings in prior cases in which it allowed state government-created entities to be sued, despite sovereign immunity provided by the Eleventh Amendment, the Supreme Court noted that:

> [I]t does not contradict those statements to hold that a corporation is an agency of the Government, for purposes of the constitutional obligations of Government rather than the 'privileges of the government,' when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.

Id. at 399. Accordingly, the Supreme Court held that, for purposes of whether or not there was a First Amendment restraint on Mr. Lebron's speech, Amtrak would be considered part of the government.[12] *Id.* at 400. The Court did not address

[12] It should also be noted that Amtrak was, when *Lebron* was decided, and still is today, subsidized with public funds. *See* Pub. L. 103-272, 108 Stat. 745, § 24104

whether Amtrak would be considered the government if Amtrak had tried to claim Mr. Lebron's speech as its own, or had compelled Mr. Lebron to pay for a message he despised. Thus, *Lebron* does not support Appellants' argument that NPB is the government.

It is noteworthy that, prior to the outgrowth of significant litigation challenging checkoff programs, USDA itself did not consider NPB a government actor. In 1999, NPB sent a letter to USDA confirming a conversation between the NPB Executive Vice President and the USDA official then responsible for overseeing the pork checkoff program, stating that: "In the conversation we determined that NPB is not to be considered as a governmental entity/agency or a government contractor. Therefore, NPPC should not be considered a government contractor or subcontractor." (R. 196 Stokes Supp. Decl. Ex. 33 pg. NPB001504, Apx. pg. 2212.) In addition, NPB members and staff are not government employees. (R. 169 Stokes Decl. Ex. 25, Carpenter Dep. pg. 34, Apx. pg. 1367.)

(3) The Most Recognizable Pork Checkoff Ad Campaign Is Not Owned by the Government

The most recognized checkoff-funded speech is the ubiquitous "Pork. The Other White Meat" campaign about which NPB frequently brags. (R. 196 Stokes

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(July 5, 1994) and Amtrak Reform and Accountability Act of 1997, Pub. L. 105-134, 111 Stat. 2570, § 301 (Dec. 2, 1997).

Supp. Decl. Ex. 38; Ex. 39 pgs. USDA051134-35; Ex. 50 pg. 138, Apx. pgs. 2255-56, 2273-74, 2449.) However, the trademark for "Pork. The Other White Meat" is actually owned by NPPC, a private group. (*Id.* at Ex. 50 pgs. 138-39, Apx. pgs. 2449-50; R. 169 Stokes Decl. Ex. 3 pgs. NPPC49-53, Apx. pgs. 1115-1119.)

(4) The Government Exercises Little or No Oversight Over the State Pork Associations

State pork associations—which for the year 2002 received and spent more than 17% of the $55 million pork checkoff budget—are run by private persons who are not appointed by and have no responsibility to the Secretary. (R. 196 Stokes Supp. Decl. Ex. 50, Dorminy Dep. pg. 61, Apx. pg. 2444.) In addition, the Federal Deposit Insurance Corporation does not consider pork checkoff funds that go to the state pork associations to be public monies. (*Id.* at Ex. 32, pgs. NPB001450-1454, Apx. pgs. 2206-2210.) If their money is not considered public, they cannot be the government.

Furthermore, when USDA began reviewing checkoff-funded communications to producers in 1999, it agreed that it would not review the producer communications issued by the state organizations. (*Id.* at Ex. 29 pgs. NPB001633, 001496-97, 001481, Apx. pgs. 2201, 2188-2189, 2178.)

(5) The Government's Review Is Limited and Pro Forma

While Appellants' briefs and Barry Carpenter's Declaration purport to describe the extensive government review of all pork checkoff-funded

advertisements (*see* Fed.App. Brief at 38-43; R. 184 Carpenter Decl. ¶¶ 4-80, Apx. pgs. 1774-1792), USDA's oversight authority of the pork checkoff in fact is limited to ensuring compliance with the Pork Act and Pork Order. 7 U.S.C. § 4801(b)(2).[13] Mr. Carpenter's deposition testimony confirms that is the purpose of USDA's review. (R. 184 Ex. 3 Carpenter Dep. pg. 173, Apx. pg. 2055; R. 196 Stokes Supp. Decl. Ex. 49 Carpenter Dep. pgs. 17-19, 24-29, 85-86, 130-31, Apx. pgs. 2413-2414, 2416-2421, 2422-2423, 2424-2425.) This type of mere oversight responsibility was the reason the court in *LMA* rejected the government's contention that beef checkoff-funded speech was government speech. 207 F.Supp.2d at 1005-6.

With regard to the speech itself, Mr. Carpenter testified that the government does not itself propose or draft any ads. (R. 184 Ex. 3, Carpenter Dep. pgs. 172-73, Apx. pgs. 2054-2055.) This fact alone distinguishes this case from *KKK*, 203 F.3d at 1094, in which the court found government speech where the staff of a state

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[13] The Pork Act states that pork checkoff-funded promotions shall not "make a false or misleading claim on behalf of pork or a pork product" or make "a false or misleading statement with respect to an attribute or use of a competing product." 7 U.S.C. § 4809(d). Guidelines for checkoff oversight by USDA's Agricultural Marketing Service (AMS) affirm the limited purpose of USDA review. (R. 196 Stokes Supp. Decl. Ex. 34 pgs. USDA004952-53, Apx. pgs. 2222-2223 ("AMS will disapprove any advertising which it considers to be disparaging to another commodity or in violation of the prohibition against false and misleading advertising contained in the legislation.").)

university-owned radio station composed, edited, and reviewed scripts and would not broadcast "pre-produced" announcements.

In practice, USDA's review of checkoff-funded ads has been consistent with its limited oversight role. Of the 625 checkoff-funded ads that ran between 1998 and 2002, USDA suggested changes that could be considered even arguably substantive to only 25 of those ads (4% of all pork checkoff-funded ads). (R. 194 Supplemental Declaration of Kelly A. Linse-Hemmelman pgs. 2-3, Ex. 1, Apx. pgs. 2155-2156, 2158-2163.)[14] The changes made to those ads were consistent with USDA's limited oversight responsibility.

USDA's review of other checkoff-funded communications, by its own admission, has been limited. For example, in 1999, USDA began a "new policy" of "taking a more active role in reviewing producer communications materials"

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[14] Moreover, USDA's review of pork checkoff-funded ads has notably increased since it began arguing that its review of commodity checkoff-sponsored promotion constitutes "government speech." Prior to 2001, USDA proposed changes to pork checkoff-funded ads on average 11 times per year. In 2001 (when USDA began making the "government speech" argument at the *certiorari* stage in the *United Foods* litigation), it suggested changes 16 times, and it suggested 11 changes to ads in the first four months of 2002 alone. (R. 194 Linse-Hemmelman Supp. Decl. pgs. 2-3, Ex. 1, Apx. pgs. 2155-2156, 2158-2163.) Indeed, the three examples Federal Appellants highlight in this case (Carpenter Dec. Exs. E-G; Fed.App. Brief at 17-18) to allegedly demonstrate how much control USDA exerts over the ads all took place within the 16 months prior to the summary judgment briefing in this case.

developed by NPB, when the "petition for referendum [was] initiated...." (R. 196 Stokes Supp. Decl. Ex. 29 pgs. NPB001500, NPB001633, Apx. pgs. 2192, 2201). When NPB and NPPC strongly objected to this policy change (*id.* at pgs. NPB001549, 001538-40, Apx. pgs. 2200, 2197-2199), USDA hastened to assure them that USDA's review would be quick, noting that it scanned two boxes, pulled out the producer communications, including two newsletters, five letters, and "various" releases, and reviewed of three months' worth of materials in only 30 minutes. (*Id.* at Ex. 29 pg. NPB001481, Apx. pg. 2178.) USDA "guaranteed" a 24-hour turnaround time for approving producer communications. (*Id*. at Ex. 29 pgs. NPB01471, 1479, Apx. pgs. 2171, 2176.) Further, in response to a letter from the Speaker of the House of Representatives questioning the "intrusive action" of USDA's new policy, the then-Undersecretary for Marketing and Regulatory Programs Michael Dunn stated:

> [I]t is not the Department of Agriculture's (USDA) intent to micromanage the Board or the State associations. Nor is it USDA's intent to censure [sic] the Board's and State associations' speech or limit their ability to communicate to producers. After all, it is an industry-funded and administered program.

(*Id*. at. Ex. 31 pgs. USDA050988-89, Apx. pgs. 2203-2204.)

Mr. Carpenter testified that USDA reviews all checkoff-funded communications, including ads, producer communications, press releases, NPB's website, and the state pork associations' websites. (*Id*. at. Ex. 49, Carpenter Dep.

pgs. 85-86, 221-24, 227, Apx. pgs. 2422-2423, 2430-2433, 2435.) Mr. Carpenter also testified that he has one staff person who, without particular education or training (other than on-the-job training), is responsible for overseeing all of the duties relating to the pork checkoff program, including attending all NPB meetings and reviewing all of its ads and communications. (*Id*. at pgs. 24-29, Apx. pgs. 2416-2421.) He further testified that this person works no more than 40 hours per week. (*Id*. at pg. 151, Apx. pg. 2426.) During discovery in this case, USDA produced 625 NPB ads from a four-year-plus timeframe (which do not include ads run by the state pork associations), which averages out to approximately 145 ads per year. NPB's general pork checkoff website currently contains 198 press releases that date back to 1998 and hundreds of pages of information, with links to extensive documents containing research and consumer information. It also contains links to other NPB websites, for example, the NPB Environmental Web Site. All told, there are hundreds, if not thousands, of pages of text on NPB's checkoff website. *See* http://www.porkboard.org. It also contains links to other publications, including 39 different hog reports. NPPC's website currently contains 284 press releases from 1998 to 2001. There are 44 state pork associations, 18 of which have websites. Just one of those state association websites, for example, contains 89 press releases, 312 pages of text, 82 links to other sites, and 16 audio links. (R. 194 Linse-Hemmelman Supp. Decl. pg. 3, Apx.

pg. 2156.) It is not possible for one person to be thoroughly reviewing all of these documents, let alone controlling them, as Appellants contend.

USDA's *post hoc* arguments to the contrary, the undisputed contemporaneous facts show that USDA's review of the speech that is drafted by private producers can only be *pro forma*. The district court below correctly concluded that:

> Though 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" as that term has been interpreted by the federal courts. You cannot make a silk purse from a sow's ear. This defense fails as a matter of law.

MPPA-II, 229 F.Supp.2d at 789. *See also infra*, 60-61.

c. Literal Speaker

The literal speaker factor of the "government speech" test, which Federal Appellants would prefer be ignored, was in fact applied in the cases relied upon by Appellants. Application of this factor compels the conclusion that checkoff-funded expressive activity is private speech, not government speech.

In no instance is the government the literal speaker of any checkoff-funded communication. In the majority of checkoff-funded ads, the speaker is "America's Pork Producers" (R. 168 Linse-Hemmelman Decl. pgs. 3-4, Apx. pgs. 723-724), reinforcing that the speech belongs to the private producers who fund it. Moreover, more than one-third of the ads show a *private corporation* as the literal

speaker. (*Id.* at pg. 4, Apx. pg. 724.)[15] Nowhere do checkoff-funded communications identify the government as having anything at all to do with the communication, let alone identify it as the author. Indeed, USDA itself has taken active steps to ensure that the literal speaker *is* "America's Pork Producers." In six of the changes USDA made to pork checkoff ads, the change was to insert "America's Pork Producers" as the author of the ad. (R. 194 Linse-Hemmelman Supp. Decl. pgs. 2-3, Ex. 1, Apx. pgs. 2155-2156, 2158-2163.) In no instance has USDA made any effort to communicate that pork checkoff-funded speech is its speech. It could not do so, of course, since it has always maintained that: "After all, [the pork checkoff] is an industry-funded and administered program." (R. 196 Stokes Supp. Decl. Ex. 31 pg. USDA050988, Apx. pg. 2203.) USDA has also explicitly "limited [its] oversight" because it "view[s] these [commodity promotion] programs as industry, self-help measures." (*Id*. at. Ex. 35 pg. 4, Apx. pg. 2237.)

[15] In addition to the undeniable fact that the literal speaker is not the government, it is also true that, given what the ads say, any listener would believe that private pork producers and private corporations are the speakers. The Eighth Circuit listed this as relevant to the inquiry of what constitutes government speech. *KKK*, 203 F.3d at 1094 n.9.

d. Ultimate Responsibility

The ultimate responsibility for pork checkoff-funded communications lies with NPB, which is comprised of pork producers. 7 U.S.C. § 4806. (R. 196 Stokes Supp. Decl. Ex. 49, Carpenter Dep. pgs. 130-31, Apx. pgs. 2424-2425.) In all public communications, NPB goes to great lengths to assure pork producers that this program is their program. For example, USDA recently approved a brochure to be distributed to pork producers at state trade shows that is captioned: "When I invest in the pork checkoff, I ..." "work with other pork producers," "expand markets for pork," "promote pork and raise demand," and "provide on-farm information." (*Id*. at Ex. 37 pg. USDA050921, Apx. pg. 2244.) Most pork checkoff communications describe what is being done with checkoff dollars by including a lead-in sentence attributing all of the checkoff actions to pork producers. (*Id*. at. Ex. 37, Apx. pgs. 2244-2253.) Checkoff-funded communications thus tell the world that pork producers are ultimately responsible for checkoff speech and activities.

Moreover, by statute, ultimate responsibility for the program lies with the private producers. The Secretary must stop collecting assessments if a majority of producers and importers vote to terminate the program in a referendum. 7 U.S.C. § 4812(b)(1). This factor, like the other three, also weighs in favor of a finding that checkoff-funded speech is not the government's speech.

5. Government Oversight Is Not Government Speech

Government oversight or regulation of private speech does not transform that speech into government speech. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987)(*citing Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)). The Supreme Court in *Jackson* explained that even "extensive and detailed [regulation], as in the case of most public utilities," does not turn private action into state action. 419 U.S. at 350. Likewise, this Court has recognized that a public school's regulation of what T-shirts students wear does not transform that expression into the school's speech. *See Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 541 (6th Cir. 2001)("there is no way [the students'] speech could be considered to be 'school-sponsored,' nor did the students use any school resources to express their views"); *see also Bryant v. Secretary of the Army*, 862 F.Supp. 574, 580-81 (D.D.C. 1994)(finding that letters to the editor published in a military base newspaper "clearly did not reflect government speech in any ordinary sense of the term" and therefore the Army's editorial regulation, which "touches upon instances in which the Government is seeking to regulate speech," was not immunized from plaintiff's First Amendment challenges).

Consistent with these decisions, the Third Circuit concluded in *Frame* that, although the Secretary of Agriculture extensively supervised the expressive

activities funded by the beef checkoff, that oversight "does not transform this self-help program for the beef industry into 'government speech.'" 885 F.2d at 1133.

If government regulation and oversight could transform private speech into government speech, all speech heard over the airwaves—including speech by radio personalities from Jim Hightower to Howard Stern to Rush Limbaugh—would be considered government speech, since the Federal Communications Commission regulates, licenses, and reviews it. *See* 47 U.S.C. § 303; *see also Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dep't of Motor Vehicles*, 305 F.3d 241, 246 (4th Cir. 2002)(J. Luttig, respecting the denial of rehearing *en banc*)("No one, upon careful consideration, would contend that, simply because the government owns and controls the forum, all speech that takes place in that forum is necessarily and exclusively government speech. Such would mean that even speech by private individuals in traditional public fora is government speech, which is obviously not the case."). Because regulation alone cannot transform private action into government action, USDA's limited oversight of private producers' speech under the Pork Act cannot shield the Act's provisions from First Amendment scrutiny. Furthermore, if checkoff-funded speech truly were the government's speech, there would be nothing for USDA to regulate or oversee.

E. The Pork Checkoff Is Not Protected Commercial Speech

Appellants' argument that the Pork Act survives First Amendment scrutiny as protected commercial speech under the disputed standard set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), should be rejected for three reasons. First, as USDA has acknowledged, "the *Central Hudson* test, which involves a restriction on commercial speech, should [not] govern a case involving the compelled funding of speech." (R. 169 Stokes Decl. Ex. 15 pgs. 9-10 n.7, Apx. pgs. 1341-1342)(alteration in original).)

Second, the speech to which Appellees object in this case is not simply commercial, it is political and ideological (*see supra*, 24-30), rendering *Central Hudson* inapplicable. *See United Foods*, 197 F.3d at 224 ("if either of the two elements are missing—either the collectivization of the industry or the purely commercial nature of the advertising—the First Amendment invalidates the compelled speech…").

Finally, even if *Central Hudson* were applicable, the pork checkoff still does not pass constitutional muster. As the Supreme Court held when considering the question of *Central Hudson's* applicability to the nearly identical Mushroom Act, "[w]e 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." *United Foods*, 533 U.S. at 410.

II. THE PORK ACT VIOLATES HOG FARMERS' RIGHT TO FREEDOM OF ASSOCIATION

The Supreme Court has declared that "the right of an individual to engage in activities protected by the First Amendment—speech, assembly, petition for redress of grievances and the exercise of religion—encompasses the corresponding right to 'associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Frame*, 885 F.2d at 1130 (*quoting Roberts v. United States Jaycees*, 468 U.S. 608, 622 (1984)); *see also LMA*, 207 F.Supp.2d at 997-98. The right to associate for "expressive" purposes presupposes a freedom to refrain from associating. *Roberts*, 468 U.S. at 623 (*citing Abood*, 431 U.S. at 234-35).

The mandatory assessments that fund the pork checkoff program are used to compel Appellees to finance and be associated with groups and ideological speech they oppose. The entities that collect and/or expend pork checkoff assessments—NPB, NPPC,[16] and the state pork associations—claim to speak on behalf of all pork producers, including Appellees, in a variety of public forums. For example,

[16] Although NPPC is no longer the general contractor for the pork checkoff, NPPC still receives checkoff dollars. (R. 169 Stokes Decl. Ex. 5 pg. 6.)

when testifying before Congress, NPPC claimed to be "representing America's pork producers." (R. 169 Stokes Decl. Ex. 14, Apx. pgs. 1324-1327.) *See also* (R. 163 Perry Ex. 6., Apx. pg. 265 (NPPC's website stating "it has 85,000 producer members," equivalent to the total number of the nation's hog farmers)).

Hog farmers are also compelled to associate with NPB through checkoff-funded programs. (R. 165 Smith Decl. pgs. 3-4, Apx. pgs. 407-408; R. 164 Joens Decl. pgs. 5-6, Apx. pgs. 344-345.) For instance, NPPC has encouraged packers to require hog farmers to obtain what is known as "Pork Quality Assurance" certification in order to be able to sell their hogs to packers. (R. 213 Declaration of David Moeller Ex. 67, Dierks Dep. pgs. 143-46, Ex. 57 pg. 4 Apx. pgs. 2524-2527, 2519.) The card hog farmers must present in order to prove PQA certification and be able to sell their hogs to packers on its face associates the farmers with NPB and can only be obtained through NPB. (R. 165 Smith Decl. pg. 3, Ex. 2 pg. 005255, Apx. pgs. 407, 415; R. 164 Joens Decl. Ex. 2 pg. 005254, Apx. pg. 403.) Until 2002, the card associated pork producers with NPPC, which had listed its name on the card. (R. 165 Smith Decl. Ex. 2 pg. 005256, Apx. pg. 416.) Checkoff-funded communications, such as advertising, press releases,

reports, and producer communications, do the same thing: proclaim that they are being brought to the consumer or the reader by "America's Pork Producers." (R. 168 Linse-Hemmelman Dec. pg. 4, Apx. pg. 725.)

Appellees object to being lumped in with all other pork producers through checkoff-funded speech. Checkoff-funded generic advertising implies that all pork is the same, contrary to the message that Appellees wish to convey. As noted above, that advertising promotes pork, not hogs, and this benefits packers and retailers. *See supra*, 25-27.

Appellees further object to being associated with NPB, NPPC, and the private state pork associations because they disagree with these groups' fundamental ideologies. For instance, Appellees advocated for the defeat of the pork checkoff program in the 2000 referendum, while NPB used its charge of representing all pork producers to challenge Secretary Glickman's decisions to order the referendum and terminate the pork checkoff program—actions Appellees contend are political and ideological speech. (R. 169 Stokes Decl. Exs. 20-21, Apx. pgs. 1354-1356, 1358-1362.) In January 2001, NPB told Secretary Veneman that one of "important benefits of the checkoff has been the effectiveness of the organization to 'speak with one voice' for producers and the pork industry on key industry issues." (*Id*. at Ex. 21 NPB pg. 000174, Apx. pg. 1361.)

Appellees also object to being associated with the 44 state pork associations that are also members of NPPC, including six that are parties to this case. Appellee Perry, for example, objects to being associated with the Missouri Pork Association (MPA) because she believes that its mission and the policies it promotes are contrary to the interests of family hog farmers. (R. 163 Perry Decl. pgs. 7-10, Apx. pgs. 159-162.)

The Third Circuit in *Frame* held that "[T]he government's burden [in justifying interference with associational rights] is a heavy one...." 855 F.2d at 1134. The Supreme Court has held that an employee's compelled financing of a union-shop does have an impact on that individual's First Amendment freedom to associate, or refrain from associating, but that impact was justified by the government's important interest in "labor peace" (*Abood*, 431 U.S. at 224-26). The Court has also held that a state's interest in improving the quality of legal services justified compelling mandatory bar association dues. *Keller*, 496 U.S. at 8-9. Appellants have shown no governmental interest sufficient to justify compelling Appellees to associate with NPB, NPPC, and the state pork associations and their speech.[17] Private Appellants' reading of *Abood* and *Keller* overlooks this

[17] *Morrow v. State Bar of California*, 188 F.3d 1174 (9th Cir. 1999), is inapplicable to Appellees' associational objections because, unlike in *Morrow*, where an integrated bar has regulatory functions over attorneys that include

requirement and assumes such an interest already has been demonstrated. Thus, the district court correctly held the pork checkoff violates Appellees' freedom of association rights.

III. ALL APPELLEES HAVE STANDING TO BRING THIS ACTION

Private Appellants challenge the standing of CFF and individual hog farmers Rhonda Perry and Larry Ginter. Pr.App. Brief at 58. Private Appellants' appeal of this issue is without basis, given the settled law in this area.[18]

As the district court properly recognized, this Court need not even address Private Appellants' standing arguments, since the law is clear that, in order to bring this First Amendment claim, it is only necessary to find that one of the Appellees has standing. *MPPA-II*, 229 F.Supp.2d at 783 n.11. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998); *LMA*, 207 F.Supp.2d at 996. Because Private Appellants concede that individual hog farmers Richard Smith and James Joens have standing to challenge

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"admission, continuing education, and attorney discipline" (*Id*. at 1175), NPB cannot exercise regulatory functions over hog farmers except for civil penalties when hog farmers fail to pay the mandatory pork checkoff. 7 U.S.C. § 4815.

[18] Federal Appellants did not appeal the district court findings that all Appellees have standing.

the checkoff, it is unnecessary for a court to even address the issue regarding the others.[19]

If the other Appellees' standing is considered, it is apparent that they all have standing to bring a First Amendment challenge to the checkoff. CFF has standing to bring suit on behalf of its membership. In *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333 (1977), the Supreme Court set out the three-part test to determine if an association has standing:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343. CFF satisfies all three of these requirements.

As noted in the Statement of Facts, CFF's membership consists of four organizations: the Land Stewardship Project, the Illinois Stewardship Alliance, Iowa Citizens for Community Improvement, and the Missouri Rural Crisis Center. *See supra,* 10-11. In addition, as the district court noted, "there is sworn unrebutted testimony that CFF includes 540 members, who oppose mandatory

[19] Private Appellants' incorrect assertion that the remedy should be limited to those who are named parties in this lawsuit is addressed *infra,* 71-78.

assessments on ongoing hog sales." *MPPA-II*, 229 F.Supp.2d at 781; (R. 163, Perry Decl. Ex. 4 pgs. 233-34, Apx. pgs. 228-229.) Unrebutted sworn testimony shows that each of CFF's member organizations is comprised of individual members, and each organization has hog farmer members who object to the pork checkoff program. *See supra* 10-12. Those organizations' hog farmer members would have standing to sue in their own right, since they are subject to and suffer a direct injury as a result of the mandatory pork checkoff. Because CFF's member associations would have standing to bring this claim on behalf of their own members, CFF also has standing to bring the instant claim. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9-10 (1988). CFF also has standing to bring this action directly on behalf of its 540 members who are or recently were hog farmers. CFF thus satisfies the first prong of the *Hunt* test.[20]

CFF meets the other prongs of the *Hunt* test as well. CFF's primary objective since 1998 has been to challenge the pork checkoff. *See supra,* 11. A

[20] Private Appellants' complaints about CFF's assertion of its members' constitutional right not to have their associations revealed (*see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)) overlooks the fact that the four individuals who came forward in this lawsuit and subjected themselves to "grueling discovery" are members of CFF's member organizations. *See MPPA-II*, 229 F.Supp.2d at 782. Moreover, as the district court noted, these arguments were not presented below in a motion to compel. In any case, the district court properly balanced the First Amendment interests of CFF and found CFF met the first prong of the *Hunt* test. *Id*. at 782-83.

First Amendment challenge to the pork checkoff is certainly germane to that interest; CFF thus satisfies the second prong of the *Hunt* test. The relief CFF and its four individual hog farmer members seek is a declaration of unconstitutionality and an injunction against future operation of the Program. (R. 136 Cross-Claim ¶¶A-C, Apx. pg. 80.) Because Appellees are seeking only declaratory and prospective injunctive relief, individual members of CFF need not participate and CFF satisfies the third prong of the *Hunt* test. Therefore, CFF has established that it has associational standing to challenge the pork checkoff.

Rhonda Perry had standing at the time this challenge was initiated, a fact distorted by Private Appellants. Ms. Perry is a hog farmer. (R. 163 Perry Decl. pg. 1, Apx. pg. 153.) Ms. Perry has been compelled to make mandatory pork assessments for many years and will continue to unless the pork checkoff is terminated. Ms. Perry paid the mandatory pork assessment in her own name prior to the commencement of this action. (*Id*. at pg. 2, Apx. pg. 154; R. 196 Stokes Supp. Decl. Ex. 53 pgs. 42-48, Apx. pgs. 2469-2470 (showing that Ms. Perry made a checkoff payment in her own name dated April 21, 2001).) What she does with the proceeds of the hogs she sells is irrelevant to a standing inquiry. Ms. Perry has standing to bring a First Amendment challenge.

While Larry Ginter retired from selling hogs in 2000, "he has 'left the door open' as to whether he will sell hogs in the future." *MPPA-II*, 229 F.Supp.2d at

783. The district court properly held that Mr. Ginter's "claims are not moot since they 'are capable of repetition, but evading review.'" *Id*. (*quoting Corigan v. City of Newaygo*, 55 F.3d 1211, 1213 (6th Cir. 1995)). Mr. Ginter has standing to bring a First Amendment challenge.

IV. THE DISTRICT COURT PROPERLY ENJOINED THE OPERATION OF THE PORK CHECKOFF

A. Standard of Review

This Court reviews "a district court's decision to grant or deny a motion for permanent injunction for abuse of discretion, accepting the court's findings of fact unless they are clearly erroneous." *Waste Mgmt., Inc. of Tennessee v. Metropolitan Gov't of Nashville and Davidson County*, 130 F.3d 731, 735 (6th Cir. 1997). "An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Ibid.* Appellants have not shown that the district court's grant of Appellees' motion for an injunction constituted an abuse of discretion.

B. The Injunction Should Not Be Limited to Appellees

To the extent that Federal Appellants argue that district courts cannot order nationwide injunctions (*see* Fed.App. Brief at 47-48), their argument goes against 200 years of jurisprudence. Ruling on the constitutionality of acts passed by Congress is within the exclusive jurisdiction of Article III courts. *Marbury v. Madison*, 5 U.S. 137 (1803). District courts also have authority to implement those

decisions by enjoining the operation or enforcement of invalid statutes. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-11 (1942); *see also Hill v. Wallace*, 259 U.S. 44, 72 (1922)(upon finding the challenged act unconstitutional, Supreme Court did not issue the preliminary injunction, but rather, remanded for the district court to enjoin enforcement of the act).[21]

Appellants' complaints about the remedy go to the scope of the injunction. District courts can and sometimes must issue nationwide injunctions. The Supreme Court in *Yamasaki* held that, while the general rule is that the relief granted should be no "more burdensome than necessary to redress the complaining parties," there are no legal limits on the scope of a federal district court injunction. 442 U.S. at 702-03. The Supreme Court in *Yamasaki* in fact upheld a nationwide injunction. *Id.* at 705.

Federal Appellants also assert that relief should be "carefully tailored to remedy the alleged specific harm alleged by plaintiffs," and that the relief should

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[21] Federal Appellants' argument that district courts should limit their remedies until issues percolate up to the Supreme Court likewise misses the mark, since a district court need not wait for the resolution of appeals before ruling on a motion for an injunction. *United States v. Szoka*, 260 F.3d 516, 530 (6th Cir. 2001). *United States v. Mendoza*, 464 U.S. 154 (1984), is inapposite, as it addresses the very different issue of applying non-mutual collateral estoppel against the government.

not extend to nonparties unless necessary to give the individual plaintiffs a complete remedy. (*See* Fed.App. Brief at 47-48.) While citing the correct general principle, Federal Appellants failed to address the body of law holding that when a federal court is addressing the validity of a statute or regulation, the remedy necessarily extends to nonparties.[22]

In *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987), the Ninth Circuit upheld the district court's nationwide injunction ordering the Secretary of Labor to enforce the Migrant and Seasonal Agricultural Worker Protection Act ("Act") to protect forestry workers. In response to the government's argument that the relief should be limited to the parties in that case, the Ninth Circuit held:

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[22] The cases cited by Federal Appellants are easily distinguishable. The Eighth Circuit, in *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992), simply held that a prisoner was not entitled to an injunction when he made no showing of future harm. Appellees have demonstrated actual continuing harm: the unconstitutional assessments will continue by operation of statute unless enjoined. In *Lever Brothers Co. v. United States*, 981 F.2d 1330, 1338 (D.C. Cir. 1993), the district court ordered a nationwide injunction prohibiting application of an invalid regulation. The D.C. Circuit reversed because the complaint in that case only sought to enjoin application as to the parties in that case. Appellees' Amended First Supplemental Cross-Claim seeks "An injunction prohibiting the continuation of the Pork Checkoff Program and prohibiting collection of the producer assessments on all porcine animals sold that fund this program." (R. 136 Cross-Claim, Prayer for Relief, ¶C, Apx. pg. 80). *Aluminum Workers Int'l Union v. Consol. Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982), has no application to this case. In that case, the district court ordered parties to arbitrate. This Court held that the order was not necessary because the party had not refused to arbitrate.

> Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown. On the other hand, an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*

Id. (emphasis in original)(internal citations omitted). The Ninth Circuit affirmed the district court's order requiring nationwide enforcement of the Act, since the Secretary had not shown how it could be enforced only against contractors who had dealings with the named plaintiffs, or only as to their dealings with the named plaintiffs.

This Court has followed this principle. In *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), plaintiffs were inmates of a Kentucky prison who challenged a new telephone system that was being placed in all federal prisons. In rejecting the government's argument on appeal that the nationwide injunction granted by the district court was overly broad, this Court held that "it cannot be successfully argued that a nationwide injunction was improper.... [I]n this case, the appropriate relief to be granted to the plaintiffs on their [funding] claim necessarily implicates nationwide relief," even though it would also extend to all federal inmates. *Id.* at 1103-04. This Court noted that limiting the injunction to just the plaintiffs would provide only "illusory" relief because it would allow the Bureau of Prisons to violate its fiduciary obligations to inmates at other institutions. *Ibid.*

Other appellate courts have similarly upheld nationwide injunctions where the injunction was necessary to provide the prevailing parties the relief to which they were entitled. *See, e.g., Dimension Financial Corp. v. Board of Governors of the Fed. Reserve Sys.*, 744 F.2d 1402, 1411 (10th Cir. 1984)(enjoining the Board from enforcing or implementing invalid regulations); *Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 665 (D.C. Cir. 1983)(affirming injunction prohibiting enforcement of invalid regulations); *Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980)(rejecting Department of Labor's argument that nationwide injunction was overly broad and should only apply to parties where program was declared unconstitutional). Indeed, courts frequently enjoin agencies from enforcing regulations that have been found to be invalid or unconstitutional, and do not limit their injunctions solely to the parties. *See American Mining Congress v. U.S. Army Corps of Engineers*, 962 F.Supp. 2, 4-5 (D.D.C. 1997)(rejecting government's contention that injunction should be limited to members of plaintiff associations; enjoining application of invalid rule); *Service Employees Int'l Union v. General Servs. Admin.*, 830 F.Supp. 5, 11 (D.D.C. 1993)(invalidating GSA regulation; enjoining GSA from further enforcement of the rule).

Here, Appellants have not shown that the district court abused its discretion in enjoining the operation of the pork checkoff. An injunction limited to Appellees would not provide Appellees with the relief to which they are entitled for at least

four reasons. First, Appellants have not suggested how an injunction could be limited to just Appellees.[23] Checkoff payments are remitted primarily through third parties who buy hogs from farmers. 7 C.F.R. § 1230.71. As in *Bresgal*, it would not be feasible to limit the injunction to only those packers who have dealings with the named parties, or to their dealings with the named parties only. Second, limiting relief for a First Amendment violation only to those who are willing to waive their *NAACP v. Alabama* free association rights and identify themselves, their affiliations, and their political beliefs to USDA and to packers, would have a chilling effect on the exercise of those rights. *See MPPA-II*, 229 F.Supp.2d at 782.

Third, to limit the injunction to just the parties in this lawsuit would only encourage a multiplication of suits; it cannot be the case that, in order to obtain relief from an unconstitutional statute, every hog farmer in the country must bring

[23] Both Appellants argue that the remedy should have been limited to the parties in the case, without specifying exactly whom they mean. Federal Appellants seem to argue the remedy should be limited to CFF's 540 hog farmer members (Fed.App. Brief at 49); Private Appellants seem to argue it should be limited to just Appellees Smith and Joens. Pr.App. Brief at 61. Federal Appellants' argument makes no sense because not only does CFF have 540 hog farmer members, its member organizations have hog farmer members, for a total of about 1,347 hog farmer members in all organizations. Private Appellants' argument makes no sense because, as set forth above, CFF has associational standing. *See* MPPA-II, 229 F.Supp.2d at 783; *see supra* 68-70.

his or her own individual lawsuit.[24] *See LMA*, 207 F.Supp.2d at 1007 ("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.").

Finally, the court could not limit its injunction only to the parties in this case without violating the separation of powers doctrine. "The general federal rule is that courts do not rewrite statutes to create constitutionality." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991)(*citing Blount v. Rizz*, 400 U.S. 410, 419 (1971)("it is for Congress, not this Court, to rewrite the statute.")); *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988)("we will not rewrite a state law to conform it to constitutional requirements"). The reason is that courts cannot create programs that are different from those intended by the

[24] This is what Private Appellants suggest (Pr.App. Brief at 61) in arguing that 7 U.S.C. § 4814(a) permits hog farmers to seek an "exemption" from the checkoff. Assuming the Secretary denied such a request (a reasonable assumption, given that the Secretary is opposing checkoff challenges in at least three courts of appeal), the remedy is to sue in federal court. According to NPB's own checkoff-funded survey, 31% of hog farmers surveyed believed the checkoff primarily benefits packers. (R. 196 Stokes Supp. Decl. Ex. 44 pgs. USDA016728-40, Apx. pgs. 2302-2314.) Assuming only some of them would come forward to request an

legislature when adopting the legislation. *See Sloan v. Lemon*, 413 U.S. 825, 834 (1973). Ruling that the checkoff applies to all but these parties or only applies to those who do not publicly object is, in effect, rewriting the Pork Act. The statute itself does not provide for voluntary assessments or exclusions, and the court cannot rewrite the legislation to make the checkoff optional for some and mandatory for others. *See LMA*, 207 F.Supp.2d at 1007 ("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."). Therefore, if the Pork Act's mandatory assessments violate the First Amendment for Appellees, the only available and authorized relief is to strike down the entire Act.

C. The District Court Correctly Invalidated the Entire Pork Act

Both Federal and Private Appellants argue that any injunction should be limited to only the portion of the checkoff program that relates to the promotion of pork. This argument fails for many reasons. First, it flies in the face of Supreme Court precedent. Second, the promotion portion of the program cannot be severed from whatever else might be left of the Act. Third, allowing any portion of the Act

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exemption, that would result in tens of thousands of legal proceedings throughout the country.

to remain in effect still violates Appellees' freedom of association rights. And finally, everything funded by the compelled assessments is objectionable speech.

1. The Supreme Court in *United Foods* Held All Assessments Unconstitutional

The Supreme Court in *United Foods* held that the Mushroom Act's "assessments are not permitted under the First Amendment." 533 U.S. at 416. The Supreme Court did not limit its holding to assessments that fund advertising under the Mushroom Act. That USDA continues to collect assessments from mushroom growers (*see* Pr.App. Brief at 62) only underscores the importance of upholding the district court's injunction.

2. The Promotion Assessments Are Not Severable

Appellants argue that even if the assessments that are used for promotion or advertising are found to be unconstitutional, those assessments can be severed from the assessments for "research" and "consumer information" activities, thereby allowing hog farmers to continue to be compelled to pay for research and consumer information. As set forth above, the Supreme Court has held that individuals cannot be compelled to pay assessments to fund objectionable activities that are not germane to a greater regulatory purpose. Appellees have established that none of the activities funded by the pork checkoff—whether they fall under the heading of promotion, research, or consumer information—can be found to be "germane" to anything but themselves, since there is no greater

statutory scheme, as was found in *Glickman*. *See supra*, 18-24. Appellees have also established that all of the activities funded by the pork checkoff are ideological; therefore, they must all be declared unconstitutional. *See supra*, 24-30. Because the entire Pork Act is unconstitutional, the entire Act must be enjoined.

Moreover, even if only the promotion portion of the Act were found unconstitutional, it could not be severed from the rest of the Act. The inclusion of a severability clause in legislation creates a presumption that Congress did not intend the validity of statute to depend on the validity of the provision in question. *INS v. Chadha*, 462 U.S. 919, 932 (1983). Where, as here, there is no severability clause, courts look to legislative intent and ask whether the statute will function in a manner consistent with the intent of Congress if the offending provision is stricken. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). However, if the "balance of the legislation is incapable of functioning independently," the offending provision cannot be severed and the entire act must be invalidated. *Id*. at 684. In other words, if the valid and invalid provisions are so intertwined that the court would have to rewrite the law to allow it to stand, the entire act is invalid. *Hill*, 259 U.S. at 70-72 (tax on all contracts for sale of future grain delivery was unconstitutional and not severable from the rest of the Futures Trading Act, notwithstanding a severability clause in the legislation).

Here, whether it is through advertising, research, or consumer information, the primary purpose of the pork checkoff is to promote pork. Congress enacted the

Pork Act to: "(A) strengthen the position of the pork industry in the marketplace; and (B) maintain, develop, and expand markets for pork and pork products." 7 U.S.C. § 4801(b)(1). Thus, the entire motivation for the program was the promotion of pork. *See* S. Rep. No. 99-145 at 329 ("a national pork promotion program would help the pork industry..."). It is hardly conceivable—and Appellants have cited to no legislative history so showing—that Congress would have passed an act that promoted pork without any expenditures for promotion. Indeed, enjoining the most fundamental portion of the Pork Act—the promotion portion—would leave in place a very different program than the "self-help" program Congress envisioned, a result which goes beyond the role of a federal court. *Cf. Sloan*, 413 U.S. at 834.

The definitions of "research" and "consumer information" in the Pork Act also show that the promotion, research, and consumer information are intertwined. The Act defines "research" as "(A) research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animal, pork, or pork products; or (B) dissemination to a person of the results of such research." 7 U.S.C. § 4802(13). It would be almost impossible to distinguish most of these research activities from "promotion." "Consumer information" is defined in the Act as "an activity intended to broaden the understanding of sound nutritional attributes of pork or

pork products, including the role of pork or pork products in a balanced, healthy diet." 7 U.S.C. § 4802(2). As with the research activities, it is clear from the statutory definition that the only point of this "consumer information" is to increase pork consumption through the dissemination of information regarding pork. Because the provisions calling for assessments for promotion, research, and consumer information are completely intertwined with one another, the district court did not abuse its discretion in enjoining the entire program.

3. Appellees' Freedom of Association Claim Necessitates Invalidating Entire Pork Act

Even if the statutory provision authorizing assessments for research and consumer information were somehow severable from the provision authorizing promotion assessments, the compelled assessments for "research and consumer information" would still compel Appellees to associate with NPB and NPPC, which Appellees find objectionable. The dissemination of checkoff-funded research and consumer information holds out to the world that they are paid for and "brought to you by America's Pork Producers." (R. 168 Linse-Hemmelman Decl. pgs. 3-4, Apx. pgs. 724-725.) As set forth above, Appellees strongly disagree with the core values and ideologies of NPB and NPPC and do not wish to be compelled to associate with them. *See LMA*, 207 F.Supp.2d at 997-8, *citing Abood*, 433 U.S. at 222, *Keller*, 496 U.S. at 13).

4. Everything Funded by the Compelled Assessments Is Objectionable and Unconstitutional

The activities funded under the "research" and "consumer information" portion of the Pork Act are unconstitutional, whether they are considered "activities," "speech," or "expressive activity." Appellees object, in ideological grounds, to the research and information portion of the Act as strongly as they do to the promotion aspects. Accordingly, the district court did not abuse its discretion in enjoining them as well.

The Supreme Court in *Abood*, *Lehnert*, and *Keller* did not limit its holdings to "speech" or "expressive activities." The Court found unconstitutional the organizations' objectionable political and ideological "activities." *Keller*, 496 U.S. at 14 (the State Bar "may not, however, in such manner fund activities of an ideological nature...."); *Lehnert*, 500 U.S. at 524 (a union may not charge objecting employees for "activities wholly unrelated to the employees in their unit."); *Abood*, 431 U.S. at 236 (compelling an employee to finance a union's "ideological activities unrelated to collective bargaining" violates the First Amendment). Federal Appellants' argument that only "expressive activities" were covered by the Supreme Court's holding in *Abood* and *Keller* is wrong.

Moreover, that the activities funded under the captions "research" and "consumer information" are speech cannot seriously be disputed. The definition of

"research" includes "dissemination to a person of the results of ... research" (7 U.S.C. § 4802(13)), and NPB does extensively disseminate the research funded by the pork checkoff through press releases, radio programs, and on checkoff-funded websites. (R. 169 Stokes Decl. pg. 3, Exs. 9-11, Apx. pgs. 822, 1252-1280.) Consumer information, by definition, is communication. *(Ibid.)*

Regardless of the label, checkoff-funded "research" and "consumer information" are unconstitutional because they are not severable from the remainder of the Pork Act; they are not germane to any greater statutory scheme; and Appellees object to funding "research" and "consumer information" on ideological grounds.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed in its entirety and the injunction immediately instated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief for the Appellees complies with the type-volume requirements of Fed. R. App. P. 32(a)(7) in following manner: the Brief was prepared using Microsoft Word 2000. It is proportionally spaced in 14-point type and contains 19,955 words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2003, I served the foregoing Proof Brief of the Appellees upon counsel of record by electronic mail and by causing two copies to be mailed to:

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ADDENDUM