Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.,

Respondents.

NEBRASKA CATTLEMEN, INC., ET AL.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PUBLIC CITIZEN, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a beef advertising program that all beef producers are compelled by the government to support can be saved from First Amendment invalidation under *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), on the theory that it is "government speech" or "commercial speech."

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues, and one of its principal concerns is consumer protection. Public Citizen has a particular interest in the commercial speech doctrine both because protecting truthful commercial speech helps consumers make informed choices in the marketplace and because preventing false and misleading commercial messages is critical to protecting consumers. Public Citizen attorneys have represented parties in a number of this Court's commercial speech cases, including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993). Public Citizen has also filed amicus briefs in other commercial speech cases before this Court, including, most recently, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

Another of Public Citizen's major interests is public health, including the safety of the food supply and the impact of dietary choices on health. The generic and undifferentiated promotion of beef to consumers through the checkoff program of the Beef Promotion and Research Act, 7 U.S.C. § 2901 *et seq.*, significantly affects this interest. Public Citizen is particularly troubled by the prospect that such advertising, which is in the private interest of an industry rather than of consumers or the public at large, may be characterized misleadingly as "government speech." Accordingly, Public Citizen submits this brief in support of the respondents.

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[1] Letters of consent to the filing of this brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

STATEMENT

The way beef is produced has a major impact on the health of the nation. For example, widespread practices in the mainstream beef industry (especially in the feedlot system and in the slaughtering and packing of beef by large-scale processors) help perpetuate pervasive food safety problems, including salmonella and e. coli contamination that has killed some American consumers and sickened thousands of others.[2] The beef industry has also promoted beef irradiation (which it misleadingly refers to as "cold pasteurization") as a short-cut solution to these contamination issues, despite the continuing scientific uncertainty over whether irradiation itself is safe.[3] In addition, the industry has, in our view, reacted inadequately to concerns about bovine spongiform encephalopathy ("Mad Cow Disease").[4]

Generic promotion of beef consumption encourages consumers to ignore these health issues and threatens to overwhelm the government's own message about diet and health, which is that Americans should eat more grains, fruits, and vegetables, and fewer and smaller servings of meat. Generic beef advertising also tends to obscure critical differences within the industry: On the one hand, there are mainstream producers whose cattle receive large quantities of hormones and antibiotics, are fattened in crowded and unsanitary feedlots, and are slaughtered and processed in industrial plants that contribute to the spread of contaminants; on the other, there are producers who grow organic, free-range or grass-fed beef and keep their products out of the big feedlots and

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[2] *See generally* Felicia Nestor & Patty Lovera, *Hamburger Hell: The Flip Side of USDA's Salmonella Testing Program* (2002), available at www.citizen.org/documents/salmonellareport.PDF.

[3] *See* Public Citizen, *The Top Ten Problems With Irradiated Food* (2004), www.citizen.org/documents/Top10.pdf.

[4] *See* Public Citizen, *Mad Cow Disease an Accident Waiting to Happen* (2004), www.citizen.org/pressroom/release.cfm?ID=1629.

slaughterhouses.[5] But to listen to the generic advertising program, "what's for dinner" is just plain "beef."

Public Citizen does not expect the Court to take sides in the controversies over beef production or the divisions within the beef industry itself. But we believe that in thinking about the issues posed by this case, it is critically important to distinguish between speech in which the dominant segment of an *industry* tries to sell consumers a *product* that it may or may not be in their interest to buy and speech that genuinely reflects the government's position on issues of public concern. Whether or not it limits the way the government chooses to fund the latter, the First Amendment must apply with full force when funding for an industry's advertising is coerced from a narrowly targeted group that includes opponents of the industry's marketing message.

SUMMARY OF ARGUMENT

In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), this Court addressed the question "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *Id.* at 410. The Court said the answer was no, at least when the speech in question amounted to no more than what Justice Stevens called the "naked imposition of … compulsion" to support speech that is "nothing more than commercial advertising." *Id.* at 418 (Stevens, J., concurring).

The beef promotion program at issue in this case was found by the court below to be essentially indistinguishable from the mushroom promotion program in *United Foods*, and so the court followed *United Foods* in holding that compelling dissenting beef producers to support it violated the First

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[5] *See* Jim Robbins, *Balancing Cattle, Land and Ledgers*, N.Y. Times, October 8, 2003; *see also* Eric Schlosser, *Fast Food Nation* 201-04, 255-57 (Perennial ed. 2002).

Amendment. The federal government, however, argues that the holding of *United Foods* does not apply here for two reasons supposedly not considered by the Court in that case: First, the government says the beef advertising funded by the program is "government speech," and, according to the government, compelled support for government speech is completely immune from First Amendment scrutiny. Second, the government contends that the beef ads are merely "commercial speech," and that the interest in not supporting such speech is subject to less constitutional protection.

To begin with the government's second argument, it is not correct to say that this Court did not address the commercial speech issue in *United Foods*. Rather, the Court made clear that "even viewing commercial speech as entitled to lesser protection, we find no basis … to sustain the compelled assessments sought in this case." 533 U.S. at 410. In any event, this Court's commercial speech precedents do not suggest that the government can compel support for commercial messages from those who disagree with them just to relieve an industry of so-called "free rider" problems.

Thus, the government's attempt to get around *United Foods* rests principally on its government speech argument. It is true that the Court did not address the government speech argument that it understood the Solicitor General to be making in *United Foods*. *See* 533 U.S. at 417. But the extremely broad arguments made by the government here are antithetical to the Court's holding in *United Foods* that the government may not "underwrite and sponsor" advertising with funds exacted from objecting members of a particular industry. *Id.* at 410. On the government's view, *any* speech the government "underwrites" or "sponsors" is government speech immune from First Amendment challenge. In short, the government's position completely negates *United Foods*.

Moreover, the government's simplistic assertion that speech is categorically immune from First Amendment scrutiny whenever its message is specified by the government, or

when an entity that is nominally governmental is involved in disseminating it, cannot be squared with this Court's opinions. Most notably, *Keller v. State Bar of California*, 496 U.S. 1 (1990), one of the Court's few opinions to address a government speech issue directly, holds that the formal categorization of a speaker as a government body is not dispositive of the First Amendment analysis.

The government's contrary argument posits that the handful of cases in which this Court has referred to government speech have erected a rigid doctrine based on a black-and-white dichotomy between governmental and non-governmental speech. That is not so, and should not become so. Instead, the Court should recognize that the matter is more complex and requires a more nuanced and realistic review of the nature of the speech and the speakers at issue.

Here, such an analysis must take into account that the speech is devised by industry members to promote their private interests in selling their products to consumers. The supposedly "governmental" body that oversees the program is entirely composed of members of the affected industry, and the advertising is actually created and disseminated by closely allied private organizations representing the dominant voices within the industry. The messages that the program conveys are not presented to the public as emanating from the government, but as advertising sponsored by "America's Beef Producers." And the content of the advertisements is not only exclusively designed to promote the industry's interests and persuade consumers to buy its products, it is also in tension with the government's own messages to consumers about healthy dietary choices.

All these features show that the beef promotional advertising is not the sort of government speech that might arguably be excused from condemnation under the principles of *United Foods*. Whatever may be the case with respect to other messages that genuinely constitute the government's

own speech, the industry advertising program here should not be exempted from First Amendment scrutiny.

ARGUMENT

I. THE COMMERCIAL SPEECH DOCTRINE DOES NOT SAVE THE BEEF PROGRAM.

Despite this Court's statement in *United Foods* that viewing generic promotional advertising as "commercial speech" would make no difference to the constitutionality of the mushroom program, 533 U.S. at 410, the government, without arguing that the beef program is distinguishable from the mushroom program, argues that the beef program can be sustained under a commercial speech analysis. Even if *United Foods*'s rejection of that very argument is set aside, this Court's commercial speech precedents offer scant support for the government's position.

To be sure, the Court has held that when a person has chosen to engage in commercial speech by advertising a product or service, his "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 650 (1985). Thus, governments may impose disclosure obligations on advertisers that are "reasonably related" to the "interest in preventing deception of consumers." *Id.* Similarly, the government may require persons who choose to advertise their products to include health and safety warnings that the government deems necessary to prevent or mitigate harm to consumers that may result if they heed the advertiser's commercial message. *See Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 54 (1st Cir. 2000), *aff'd in part and rev'd in part on other grounds sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

The Court made clear in *United Foods*, however, that promotional campaigns like the beef checkoff advertising program are by no means "necessary to make voluntary advertisements nonmisleading for consumers." 533 U.S. at 416.

And, as the Court recognized in *United Foods*, saying that a person who advertises has a minimal interest in not including warnings or disclaimers necessary to protect consumers is not the same as saying that he has a minimal interest in not joining in an advertising campaign at all. On the contrary, as Justice Stevens pointed out, a person may have a strong commercial interest in not "financ[ing] advertising for the benefit of his competitors." 533 U.S. at 418 (Stevens, J., concurring). In addition, there may be powerful ideological, moral, or religious reasons for not wanting to advertise a product or join in a particular promotional message about that product.

An example illustrates the point. Suppose that in *Wooley v. Maynard*, 430 U.S. 705 (1977), the state had been Michigan instead of New Hampshire, and it had placed on its license plates the slogan, "What's good for GM is good for the country." Would the First Amendment interest of an objecting citizen (or a GM competitor forced to bear the slogan on its own corporate fleet) have been deemed insubstantial because the message was commercial? It seems doubtful, to say the least. As the Court recognized in *United Foods*, objections to commercial messages, like objections to political ones, involve "freedom of belief." 533 U.S. at 413.

In this case, dissident beef producers may have principled objections to joining in advertising that tells consumers that they should consume beef without troubling themselves much (or at all) about differences in the way cattle are raised, fed, medicated, slaughtered, and processed. These objectors may, for example, dissent from the beef checkoff program's message that consumers should not worry about the overuse of antibiotics in cattle or about cattle feeds that contain animal byproducts, or they may disagree that conventional beef production is humane.[6] Producers who raise grass-fed, free-

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[6] The messages conveyed by the checkoff program on these subjects are found at www.beefitswhatsfordinner.com/askexpert/inthenews.asp, which tells consumers, among other things, that cattle producers use

(*Footnote continued*)

range, or organic beef or whose beef does not go through large industrial slaughterhouses and processing plants may also have powerful commercial interests in not sponsoring messages that suggest that conventional beef is just as good as, or even superior to, their products. A producer of grass-fed beef, for instance, might understandably object to having to support the checkoff program's message that grain-fed beef tastes better and is more tender than grass-fed beef.[7]

The government's commercial speech analysis not only devalues the strong interest of objectors in not supporting the beef promotional program, but also places unwarranted weight on what is virtually the sole interest advanced by the government to justify the program: avoiding "free riders." The free-rider argument would be available in virtually any generic advertising program, and, indeed, was offered in *United Foods* as well. *See* 533 U.S. at 429 (Breyer, J., dissenting). *United Foods*'s conclusion that such rationales do not suffice to sustain a program in which advertising is not a part of some broader regulatory program, *see* 533 U.S. at 412-16, cannot be wished away merely by invoking the commercial speech test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980).

The *Central Hudson* test requires the Court to consider purported justifications for speech regulations skeptically, demanding that the government "demonstrate that the harms

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"safe, FDA approved antibiotics only when needed for the health of the cattle," that producers "follow animal care and welfare guidelines developed by veterinarians and animal behaviorists to ensure animals are raised humanely," and that organic beef is not safer from Mad Cow Disease than conventionally fed beef.

[7] *See* www.beefitswhatsfordinner.com/askexpert/inthenews.asp (citing studies concluding that "grass-finished cattle produce beef that is less tender" and that "consumers preferred the overall flavor of grain-finished beef").

it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Here, the notion that, without generic advertising, the free-rider problem will prevent the beef industry from adequately promoting its products is fanciful. The National Cattlemen's Beef Association (NCBA), the dominant national organization of beef producers, boasts that it and its affiliates represent "more than 230,000 cattle breeders, producers and feeders" who voluntarily join to "advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests" through lobbying, political endorsements, and promotional activities *not* funded by the checkoff.[8] An industry that is able to mobilize so many members to promote its interests hardly seems likely to fall apart if it cannot compel dissenters to support its advertising.

Moreover, unlike the beef production industry, which involves thousands of individual farmers and ranchers (as well as larger corporate operations), the beef *packing* industry is highly — and increasingly — concentrated and is dominated by a very small number of very large firms. "Today the top four meatpacking firms … slaughter about 84 percent of the nation's cattle." Eric Schlosser, *Fast Food Nation* 137-38 (Perennial ed. 2002). Those firms would have ample incentives and resources to promote beef consumption even if the producers' generic advertising were to suffer somewhat from the denial of compelled support.

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[8] www.beef.org/dsp/dsp_locationContent.cfm?locationId=881. The NCBA also conducts much of the checkoff advertising as a "contractor" of the Beef Board. www.beefitswhatsfordinner.com/footer/aboutus.asp.

II. THE BEEF PROGRAM CANNOT BE SUSTAINED AS GOVERNMENT SPEECH.

A. The Government's Arguments Distort the Government Speech Doctrine.

The phrase "government speech" has appeared in this Court's opinions only 12 times, and seven of those opinions have discussed whether speech was attributable to the government solely for Establishment Clause purposes. The government speech doctrine at issue here has been mentioned only five times, and each time the Court has either held that the doctrine did not apply or declined to reach the issue.[9]

As a result, although the government's brief is written as if the government speech doctrine embodied a firmly established and well-developed set of principles, the truth is that, as Judge Luttig has put it, "the 'government speech' doctrine is still in its formative stages, and, as yet, it is neither extensively nor finely developed." *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (opinion respecting denial of rehearing en banc). As Judge Luttig went on to observe, whether particular speech is "government" or "private" is not necessarily a black-or-white question, and some speech may have characteristics of both. *Id.* Determining how to treat compelled support of such speech for First Amendment purposes is not as simple as affixing a convenient label to it.

Unfortunately, the government's analysis in this case overlooks doctrinal uncertainties and factual complexities and labels the beef checkoff advertising government speech

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[9] *See United Foods*, 533 U.S. at 417; *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 235 (2000); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 483 n.2 (1997); *Keller*, 496 U.S. at 10-11.

based on what it tries to suggest are bright-line tests. Under scrutiny, the government's bright lines fade into obscurity.

The government's principal argument is that the beef advertising is government speech because the boards that oversee the program exercise governmental authority and are therefore government bodies (though they are made up entirely of industry representatives). The government's analysis requires it to ignore the holding of the one decision of this Court that considers the government speech issue most fully and is most nearly on point: *Keller v. State Bar of California*.

In *Keller*, members of the California Bar raised a First Amendment challenge to the requirement that they pay dues to the Bar to support speech with which they disagreed. The Bar's principal argument was that because it was an agency of the government of California, its speech was government speech and, accordingly, the exaction of funds to support its speech was immune from First Amendment scrutiny. This Court, while acknowledging that the Bar did exercise governmental authority in some sense and was a "government agency" under California law, rejected the claim that its speech therefore constituted government speech. The Court explained its holding in words strikingly applicable here:

> The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

496 U.S. at 13. Tellingly, the government cites *Keller* for relatively peripheral points without ever acknowledging, let alone distinguishing, its core holding.

The government further contends that because actions of the Beef Board that infringed the free speech rights of others would be deemed "governmental" for First Amendment purposes under *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), it necessarily follows that its speech must be government speech. Again, however, *Keller* demonstrates that the matter is not nearly so simple. There is no doubt that if the State Bar of California were to discriminate against a lawyer because of his political beliefs, *see Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232 (1957), or even to prevent a lawyer from advertising, *see Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), its actions would be subject to First Amendment scrutiny. Thus, *Keller* proves that entities whose actions are restrained by the First Amendment are not necessarily government *speakers*.

The government also makes much of the fact that the message expressed here (that is, the general theme of promoting beef consumption) was chosen by the government. That the message was chosen by the government, however, does not make a communicative act government speech. For example, in both *Wooley v. Maynard*, *supra*, and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the messages ("Live Free or Die" and "I pledge allegiance to the flag") were certainly chosen by the government. But the speech itself was not government speech, and, quite evidently, it was not held to be immune from First Amendment scrutiny. *See, e.g., Sons of Confederate Veterans*, 305 F.3d at 243 ("The complainant's First Amendment interests were implicated in *Wooley* because the message in question, displayed on his license plate, would be attributed to him.") (Williams, J., concurring in denial of rehearing).

Of course, in *Barnette* and *Wooley,* the government expressed its chosen message either by compelling individuals to repeat it (in *Barnette*) or by emblazoning it on private property (in *Wooley*). But here, too, the actual speaking is not done by the government, but by private entities, such as the National Cattlemen's Beef Association, who contract to develop and carry out the advertising campaigns funded by the checkoff program, and other private persons are compelled to support the messages conveyed by the private speakers.

To be sure, the beef advertising, though carried out through private speakers, is funded with checkoff dollars collected by the government. The government thus makes much of *Rust v. Sullivan*, 500 U.S. 173 (1991), which it discusses as if that case held that speech subsidized by the government is, necessarily, government speech. But *Rust* itself never mentions the term "government speech." And however one may view the Court's later characterization of *Rust* as a government speech case (*see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001); *but see id.* at 554 (Scalia, J., dissenting)), its holding remains relatively narrow: When a private person *accepts a government subsidy to disseminate a particular message*, his First Amendment rights are not violated by the government's insistence that he stick to that message and not contradict it. *See Velazquez*, 531 U.S. at 541-42.

But that does not mean that all government-subsidized speech is government speech. Indeed, *Velazquez* is directly to the contrary: It holds that sometimes a subsidy means that the government has decided to provide financial support for "private, *nongovernmental speech*," *id*. at 544 (emphasis added), and such subsidies remain subject to First Amendment scrutiny. Moreover, nothing in *Rust* suggests that private individuals may not complain when *they* are singled out to subsidize other private speakers who are conveying a government-favored message that they disagree with.

Finally, the government relies on the fact that the Secretary of Agriculture must formally approve all advertising

conducted under the beef checkoff program. But this Court's refusal to entertain the government speech argument in *United Foods* was predicated on the view that the Secretary's formal approval authority was not enough to answer the government speech question. Thus, the Court observed that one reason it would not reach the issue was that the analysis could require some inquiry into whether the Secretary's approval was more than merely pro forma (which the government for the most part avoids addressing here), as well as "other difficult issues." 513 U.S. at 417. But on the theory advanced by the government here, the Court was just wrong in *United Foods* to think that the government speech question involved any "difficult issues." Under the government's theory, the Court's very framing of the issue in *United Foods* would be enough to answer the government speech question: Because the speech was "sponsor[ed]" and "underwrit[ten]" by the government (513 U.S. at 410), it was necessarily government speech. Thus, according to the government, the First Amendment inquiry undertaken by the Court in *United Foods* was fundamentally flawed from the outset, and the resulting decision was constitutionally meaningless.

In sum, the government speech question is not as simple as the government would have it. Answering it requires a searching examination of the nature of the entities and of the speech itself. And here, such an examination of the speakers and the speech demonstrates that the beef checkoff advertising should not be exempt from First Amendment scrutiny.

B. The Beef Ads Are Not Government Speech.

Like the bar organization in *Keller*, the Beef Board itself does not "participate in the general government" of the United States. *Keller*, 496 U.S. at 13. Indeed, the Board plays even less of a governmental role than did the California State Bar, for while the Bar at least had responsibilities with respect to "governing the legal profession," *id.*, the Beef Board does not regulate beef production at all. It exists simply to administer the checkoff program itself.

Another similarity to *Keller* is that the members of the Beef Board "are such not because they are citizens or voters, but because they are" beef producers (*id.*), and that the Board derives its revenues from assessments on members of the industry. *Id.* at 11. And once again, there is another factor that suggests that checkoff-funded speech is even less attributable to the government than the Bar's speech was in *Keller*: The Beef Board, unlike the Bar, does not generally speak for itself, but carries out its promotional activities through private contractors, like the NCBA, who develop and implement the advertising campaigns themselves. These factors strongly suggest that, as in *Keller*, the speech in question should not be considered that of a government agency.

Examination of the speech funded by the checkoff program confirms that it is not, in any meaningful sense, government speech.[10] To begin with, checkoff-funded advertisements and other communications typically do not tell consumers that they represent the views of the government, but instead say that they are "Funded by America's Beef Producers." Indeed, far from purporting to speak on the government's behalf, checkoff-funded promotional materials refer to the government in the third person. For example, a part of the checkoff program website that offers nutritional advice to consumers responds to the question "Shouldn't I be avoiding saturated fat?" with this advice: "The government tells us to limit saturated fat …."[11] By contrast to "the government," the website clearly identifies the checkoff ads with "the beef industry," as in this example: "**Why has the beef industry**

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[10] Examples of checkoff-funded communications are available on the internet at www.beefitswhatsfordinner.com, a website established by the NCBA to reproduce checkoff-funded print, television, and radio advertisements, and to provide additional checkoff-supported information on cooking, nutrition, and other beef-related subjects.

[11] www.beefitswhatsfordinner.com/askexpert/nutrition.asp.

launched nutrition advertising? We're proud of our product."[12]

The messages conveyed by the checkoff advertising also reveal that this is not really our federal government speaking to us. The checkoff-funded ads, for example, encourage consumption of beef over chicken by downplaying concerns about fat. Touting very small servings of less-popular, very lean cuts of beef, one ad asserts that "LEAN BEEF'S ACTUALLY LOWER IN FAT THAN YOU THINK," and asks rhetorically, "MAKES YOU WONDER ABOUT EATING ALL THAT SKINLESS CHICKEN, DOESN'T IT?"[13] Another ad pictures slices of rare beef and announces: "ONLY ONE MORE GRAM OF SATURATED FAT THAN A CHICKEN BREAST. BUT STEAK KNIVES ARE HEAVY, **SO IT EVENS OUT.**"[14] One wonders if the Surgeon General would concur. Is it really federal government policy that consumers should choose beef over chicken?

In fact, we know that when the government itself speaks to us about nutrition and health, it encourages us to limit both the number of servings and the serving size of foods in the meat group (which also includes poultry, fish, eggs, legumes and nuts), to about two three-ounce servings per day for most adult men, and less for most women and children; in addition, the government urges us to choose lean cuts of meat.[15] Although some beef checkoff advertising does show three-ounce servings of lean cuts, other checkoff ads depict consumers enjoying very large servings of high-fat cuts. For example, the television commercial "Grilling" depicts a father

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[12] www.beefitswhatsfordinner.com/askexpert/advertising.asp.

[13] www.beefitswhatsfordinner.com/ads/default.asp#.

[14] *Id.*

[15] *See* U.S. Departments of Agriculture and Health & Human Services, *Nutrition and Your Health: Dietary Guidelines for Americans* (2000), available at www.health.gov/dietaryguidelines/#current.

grilling two thick t-bone steaks (cuts that, while tasty, are extremely high in fat) and three plump hamburgers to serve a family of four.[16] Conservatively assuming five ounces apiece for the burgers and 14 for the steaks, this family is about to consume in one meal about twice as many servings of meat as the government recommends for an entire day. Another checkoff program print ad consists of a photograph of two massive grilled t-bones with the slogan, "**WHY SPACE ALIENS STEAL OUR COWS."**[17]

The fact is that these promotional activities do not represent a government effort to convey information to citizens, but an industry hard-sell. As the NCBA put it in a recent press release touting the checkoff program's achievements, the ads successfully convey the message that "beef is expensive, but worth it," and they make people "feel better about eating beef."[18] The checkoff advertising campaign's successful effort to "reinforce[e] the passion consumers have for beef" won it the "the advertising industry's most prestigious award, the gold Effie," whose other winners "included IBM, Kellogg and Pepsi" (whom no one, presumably, would confuse with government speakers).[19]

Another telling example helps illustrate the real nature of the checkoff program. Just weeks before the submission of this brief, the NCBA announced another initiative of the checkoff program: a "partnership" with Quiznos Sub, a national fast-food restaurant chain, to promote its new "Steak-

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[16] "Grilling" can be viewed at www.beefitswhatsfordinner.com/ads/tv.asp.

[17] www.beefitswhatsfordinner.com/ads/print2.asp#.

[18] NCBA, *Checkoff News: Beef Messages Delivered to Millions of Consumers this Year; Award-Winning Advertising Providing Foundation For Other Checkoff-Funded Beef Promotion Efforts* (Aug. 11, 2004), www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2720.

[19] *Id.*

house Beef Dip Sub."[20] The NCBA press release announcing the promotion begins with the stirring proclamation: "What this world needs is more beef sandwiches."[21] Could this possibly be the government of the United States speaking? Does Uncle Sam really want you — *to eat more Quiznos subs?*

The way the checkoff advertising is carried out also blunts the government's supposed "political accountability" for the speech. *Cf.* Fed. Pet. Br. 19. Because the ads are funded exclusively by the industry, created by industry members, and presented as coming from "America's Beef Producers," it is extremely unlikely that members of the public will hold elected officials accountable for them. Indeed, most consumers would no more think of holding the government responsible for the beef industry's "Beef, It's What's for Dinner" campaign than for the jingles of McDonald's or the Coca-Cola Company.

In sum, there is no question but that the checkoff program, like the mushroom program in *United Foods*, is "government-sponsored," but only in the sense that the government has chosen to facilitate speech that promotes private, not public interests. That, in itself, should not suffice to transform an industry's promotional campaign into government speech or to immunize it from First Amendment scrutiny. The messages at issue here are not of the same character as those we receive when the government genuinely speaks to us in its own name in fulfillment of its own programs and policies.

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[20] NCBA, *Checkoff News: Beef Checkoff Partners with Quiznos Sub to Promote New Steak Sandwich* (Sept. 9, 2004), http://www.beef.org/dsp/dsp_content.cfm?locationId=45&contentTypeId=2&contentId=2783.

[21] *Id.*

C. Invalidating the Beef Checkoff Program Will Not Threaten True Government Speech.

The government asserts that affirming the Eighth Circuit in this case would imply that any taxpayer could withhold whatever portions of her taxes went to support any government speech with which she disagreed. The government's fears are entirely unwarranted.

To begin with, this case, like *United Foods* and *Keller*, challenges only targeted assessments that require members of particular groups to associate with and support messages with which they disagree. The distinguishing feature of such exactions is that they raise funds earmarked to support speech from groups that include "persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *United Foods*, 533 U.S. at 413. Thus, this case in no way concerns the use of general tax revenues or other funds that are not exacted in the challenged manner.

Nor does this case involve communications that decisionmakers in an agency that genuinely exercises government authority have determined to make in the exercise of that authority, in the interest of the government and/or the public at large, and in the government's own name. Such speech, whether funded with general tax revenues or even a tax on a particular industry, is quite distinct from speech that is no more than an industry's promotion of its own product.[22]

For example, in *R.J. Reynolds Tobacco Co. v. Shewry*, __ F.3d __, 2004 WL 2158901 (9th Cir. Sept. 28, 2004), California had enacted legislation requiring the state's Depart-

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[22] Even the most ardent academic supporters of a broad government speech doctrine agree that "government should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government's message." Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1510 (2001).

ment of Health Services to develop a media campaign to discourage smoking, and it had imposed a surtax on tobacco sales to fund the program. The ads, which directly attacked the tobacco industry, made clear that they were "Sponsored by the California Department of Health Services." *Id.* at *2.

Rejecting a claim by cigarette companies that compelling them to provide financial support for the program violated the First Amendment, the Ninth Circuit upheld the use of a targeted tax to fund the ads because the speech at issue was truly governmental. The court explained:

> When a union, a state bar association or even a mushroom growers' association speaks, it represents only the interests of that particular entity. When California uses funds from the tobacco surtax to produce advertisements, it does so in the name of all of California's citizens. … That California has chosen to fund a valid public health message through a targeted excise tax does not mean that it is no longer speaking as the State of California.

Id. at *7.[23]

The court was careful to recognize, moreover, that the government may not "avoid the limits of the First Amendment simply by labeling a compelled contribution a contribution to the government's own speech." *Id.* at *8. The beef checkoff program is precisely what the Ninth Circuit had in mind when it referred to situations where government speech is merely a convenient label, not a reality. *See id.* Thus, holding the beef checkoff program to be subject to First Amendment analysis would not affect the result in *Reynolds* or similar cases — one way or the other.

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[23] As the court's opinion suggests, the matter might be different if the ads said they were sponsored by the tobacco industry, thus indicating a direct association between members of the industry and the anti-industry sentiments with which they disagreed.

Nor would a ruling against the checkoff program give public university students the right to withhold tuition because they disagreed with statements made by professors in particular courses or with other speech attributable to the university itself. To begin with, tuition is not an exaction imposed upon persons because they fall within some group of which they "must remain members … by law or necessity." *United Foods*, 533 U.S. at 413. It is a payment for educational services that students have chosen, and paying it does not in any way identify them with course offerings with which they disagree. (In this way, tuition is different from added fees imposed on students and used directly to support private speech. *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000).)

Just as importantly, the speech of professors and other university personnel is integral to a public university's performance of a traditional government function — the provision of public higher education. As such, it is governmental in a way that speech promoting an industry's private interests is not.[24] As this Court suggested in *Southworth*, a university could hardly carry out its function if every student who paid tuition could claim a First Amendment violation whenever a professor said something she disagreed with. *See id.* at 234-35.

This is not to suggest that there are no circumstances in which the funding of even true government speech could pose genuine First Amendment issues. Suppose, for instance, that a state government, or the federal government, were to

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[24] Even this example illustrates that the government/private speech dichotomy is not entirely clear-cut, because the speech of professors is not purely governmental: It is also their own academic expression, and the First Amendment offers some protection to academic freedom of speech. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197-98 & n.6 (1991) (recognizing dual role of government in public universities as both "speaker" and "regulator" of academic speech).

determine that it was desirable to erect billboards, asserting that abortion is a constitutionally protected right and expressing the government's disapproval of those who would interfere with that right, on public rights-of-way adjacent to the offices of right-to-life groups. Suppose further that the government paid for the billboards with a special levy imposed only on the occupants of the adjacent buildings. Would no First Amendment issue be posed?[25]

Perhaps even the hypothetical program in this example could be upheld on a government speech rationale. This case, however, provides no occasion for probing the precise extent to which the funding of *genuine* government speech is or is not exempt from First Amendment scrutiny. It is enough to resolve this case to hold that the speech at issue here, which amounts to no more than an industry's promotion of its products, cannot be saved from invalidation under *United Foods* by calling it "government speech."

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[25] A somewhat similar scenario was presented in *Summit Medical Center of Alabama v. Riley*, 284 F. Supp. 2d 1350 (M.D. Ala. 2003), where the court struck down Alabama's Women's Right-to-Know Act, which required abortion providers to distribute government-prepared anti-abortion pamphlets to women seeking abortions and imposed a targeted fee on the providers to pay for them. While the case is arguably distinguishable from the California tobacco case because of the compelling public health purpose served by the anti-tobacco advertisements and the burden Alabama law's placed on pro-abortion speech, both cases help illustrate that the issue of government speech is more complex than the government recognizes. *See* Fed Pet. Br. 11 ("the government may say what it wishes without implicating the First Amendment.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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