No. 03-1164 & 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 Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, violates the First Amendment by requiring beef producers and importers to fund generic advertising for beef, despite their objections to the advertisements.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Statutes and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting commercial speech rights, appearing before this Court in cases raising commercial speech issues. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). WLF successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd,* 202 F.3d 331 (D.C. Cir. 2000). WLF also has appeared before this Court to challenge government efforts to compel commercial entities to provide financial support for others' speech. *See, e.g., United States v. United Foods, Inc.,* 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457 (1997); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici strongly object to government efforts to compel individuals or corporations to speak against their will. *Amici* are concerned that the First Amendment standards proposed by Petitioners and their supporting *amici* are so lax as to permit compelled financial support of private speech based on a mere showing that the compelled support would rationally serve government policy. *Amici* believe it important for the Court to make clear that First Amendment protections against compelled speech are not so easily trammeled. *Amici* also agree with Respondents that the speech which they are being forced to support does not constitute "government speech" exempt from First Amendment scrutiny, albeit this brief does not focus on that issue.

Amici submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

Respondents -- five cattle producers, an association of livestock markets whose members collect and remit millions of dollars of "beef checkoff" assessments each year, and an association of groups dedicated to protecting family farms -- are challenging a program that requires them to contribute financially to generic beef advertising campaigns they find objectionable.

The Beef Promotion and Research Act of 1985 (the "Beef Act"), 7 U.S.C. § 2901 *et seq.,* establishes a federal program to promote beef sales. The program is financed by a $1-per-head assessment (often referred to as a "checkoff") on all cattle sold in, or imported into, the United States. 7 U.S.C. § 2904(8). A U.S. Department of Agriculture order issued pursuant to the Beef Act (the "Beef Order") establishes two governing bodies -- the Cattlemen's Beef Promotion and Research Board (the "Beef Board") and the Beef Promotion Operating Committee (the "Operating Committee") -- to oversee implementation of the Beef Act.

Although the Secretary contends that the program advances a "substantial government interest" because it prevents "further decay" in the beef industry that would "endanger" both the nation's beef supply and the "entire economy" (U.S. Br. 39-40), the Beef Act leaves the decision whether to continue the program entirely up to a vote of a majority of cattle producers and importers. The Act provided for a referendum among cattle producers and importers no later than 22 months after adoption of the Beef Order, and for termination of further collection of assessments unless a majority of those voting approved continuation. 7 U.S.C. § 2906(a).[2] It provides for additional referenda at the request of at least 10% of producers. 7 U.S.C. § 2906(b). Since 1999, Respondent Livestock Marketing Association ("LMA") has been petitioning the Secretary -- thus far without success -- to conduct a new referendum.

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[2] The initial referendum was conducted in 1988. More than 20% of producers voted to end the program. U.S. Br. 4. Pursuant to the terms of the Beef Act, those dissenters continue to be subject to the $1-per-head checkoff.

The beef checkoff program generated $82.7 million in revenue during 2003. U.S. Br. 7. A significant majority of those funds is used for generic beef advertising. Federal Petition Appendix ("Pet. App.") 11a. The "mandatory" $1-per-head assessment is "directly linked" to beef producers' "source of livelihood," and thus "they have no meaningful opportunity to avoid these assessments." *Id.*

Respondents' amended complaint alleges that the Beef Act and the Beef Order violate the First Amendment to the extent that they require cattle producers and importers to pay assessments for generic advertising. After a two-day trial, the district court ruled that the Beef Act and Beef Order violated the First Amendment by requiring Respondents to pay for private speech to which they object. Pet. App. 31a-61a. It issued an injunction barring further collection of beef checkoffs. *Id.* at 60a-61.

The appeals court affirmed. Pet. App. 1a-30a. The court rejected the Secretary's assertion that the "government speech" doctrine immunized the checkoff program from First Amendment scrutiny, finding that doctrine largely inapplicable to compelled speech cases. *Id.* at 17a-20a. Instead, the court applied the test established in *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557 (1980), for analyzing government restrictions on commercial speech. *Id.* at 22a. The court concluded that the beef checkoff program flunked that test, stating, "[W]e conclude that the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment rights." *Id.* at 28a.

SUMMARY OF ARGUMENT

The First Amendment protects not only freedom of speech, but also the freedom not to speak. Those restrictions on the government's power to compel speech extend fully to government efforts to compel financial support of speech to which one objects.[3]

The Secretary contends that regardless whether the beef checkoff program implicates Respondents' First Amendment rights, those rights are outweighed by the government's assertedly strong interest in compelling all beef producers and importers to finance a beef promotion campaign. Particularly troublesome is the Secretary's suggestion that a more relaxed standard of review should apply because the speech for which she seeks compelled support happens to be commercial speech (i.e., speech that "proposes a commercial transaction"). It makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity applying the compulsion that determines whether funds are to be used for commercial or noncommercial speech. Moreover, the rationale for permitting a somewhat relaxed standard of review in cases involving *regulation* of commercial speech is wholly inapplicable in the context of *compelled* speech.

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[3] The Secretary insists that the speech at issue here is the government's own and for that reason is exempt from First Amendment scrutiny under the "government speech" doctrine. *Amici* disagree with those contentions, but this brief does not address them -- except to observe that it strikes us as anomalous to deem beef advertisements to be government speech when the decision whether to speak *at all* is left wholly in the hands of private parties. *See* 7 U.S.C. § 2906 (beef producers at any time may vote by referendum to discontinue the beef checkoff program).

The advertising program at issue in this case, when subjected to an appropriately strict standard of First Amendment review, cannot withstand constitutional scrutiny. The Secretary has failed to articulate any vital policy interest served by the program, nor has she even attempted to demonstrate that the program is narrowly tailored to minimize interference with First Amendment rights.

ARGUMENT

I. COMPELLED SPEECH IS NOT SUBJECT TO MORE RELAXED REVIEW SIMPLY BECAUSE THE SPEECH TO BE COMPELLED IS COMMERCIAL IN NATURE

The Secretary seeks to lessen her evidentiary burden by noting that the speech she is attempting to compel in this case is commercial in nature. U.S. Br. 37-42. The Secretary argues:

> Because a requirement to provide money for commercial speech increases the total amount of information available to consumers and therefore interferes with First Amendment interests far less than a prohibition on commercial speech, the government should have greater flexibility to impose a funding requirement. * * * At the very least, a program that increases the amount of information that is made available to consumers should not be subjected to a more intense level of review than that afforded to restrictions on commercial speech.

Id. at 39.

The Secretary's reliance on case law concerning government attempts to *suppress* commercial speech is wholly

misplaced and would lead to a dangerous erosion in First Amendment protections against compelled speech. The Court's rationale for permitting a somewhat relaxed standard of review in cases involving regulation of commercial speech[4] is wholly inapplicable in the context of compelled speech.

In a decision striking down Rhode Island's ban on liquor price advertising, the Court reiterated the two justifications traditionally cited for affording the government more leeway in its regulation of commercial speech: (1) "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones"; and (2) "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 499 (1996). Neither of those two justifications has any relevance to government efforts to *compel* speech.

First, government compulsion of speech cannot logically further the government's interest in preventing the dissemination of false advertising. The only speech being propounded is the speech that the government is attempting to

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[4] The Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473 (1989). Fully protected speech is not transformed into commercial speech simply because it is uttered by a corporation, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), or that the speaker is motivated by a desire for a profit. As the Court explained in *Fox,* "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox,* 492 U.S. at 482. The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

compel. In the absence of that compulsion, there would be no speech and thus no cause to worry about false advertising.

Second, there is no basis for concluding that compelled commercial speech is any hardier than other forms of compelled speech. All forms of compelled speech are extremely "hardy" since they are backed by the force of law. Nor is there any reason to suppose that compelled noncommercial speech will have any more chilling effect on voluntary speech than would compelled commercial speech; a chilling effect on voluntary speech is simply not one of the dangers of compelled speech, whether commercial or noncommercial.

Moreover, it makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity that is applying the compulsion that determines whether funds are to be used for commercial speech or noncommercial speech. Why should government entities that compel payments into a fund used to finance private speech be afforded a lower level of First Amendment scrutiny simply because the funds ultimately are used to promote a product rather than, say, to encourage consumers to quit smoking?[5]

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[5] *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring in part and concurring in the judgment) ("Whatever the validity of [the Court's rationale for providing a lesser degree of First Amendment protection for commercial speech], it is limited to the peculiarly *commercial* harms that commercial speech can threaten -- *i.e.*, the risk of deceptive or misleading advertising."). In asserting that commercial speech is entitled to full First Amendment protection in all other contexts, Justice Thomas explained: "Even when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the

(continued...)

Under the Secretary's theory, a lower level of First Amendment review would be applied to a government program requiring Amish citizens to contribute to a fund for advertising General Motors cars than to a program requiring those same citizens to contribute to a nonprofit health-awareness program. The Amish citizens might object to being forced to promote a means of transportation which they shun, but (under the government's theory) the compelled speech on behalf of General Motors would be subjected to more lenient First Amendment review because an advertisement promoting the sale of General Motors cars clearly qualifies as commercial speech. It is no answer to respond that the Amish citizens' objections are entitled to greater weight because they are deeply felt or in some sense "ideological," because such a response would enmesh the Court in the impossible task of assigning comparative weights to objections to compelled commercial speech. For example, would a Ford Motor Co. executive (who believes that Ford cars are superior to General Motors cars) have less basis than Amish citizens for objecting to being compelled to fund General Motors advertisements?

Amici submit that the Court lacks any objective method of weighing the strength of objections of those compelled to fund commercial speech. Respondents object to being compelled to fund the generic beef advertising program because they sincerely believe that the program conveys an erroneous message (that all brands of beef are the same). There can be no principled basis for distinguishing that

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[5](…continued)
category." *Id*. *See also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (city may not discriminate in the siting of newsracks containing commercial flyers, where the problem allegedly caused by such newsracks (littering) is identical to the problem caused by newsracks containing general circulation newspapers).

objection from any other sincerely held "ideological" objection. Indeed, this Court has cautioned against *any* attempt by courts to discern the basis for objections to compelled speech:

> [T]he employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with 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.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977). Unless the Court is prepared to rule that *all* compelled commercial speech is entitled to a lesser degree of First Amendment protection no matter how strongly felt the objections may be, there can be no basis for the Secretary's claim that the commercial nature of the speech she is attempting to compel in this case lessens Respondents' First Amendment protections.

Nor may the Secretary rely on commercial speech case law that upholds disclaimer requirements designed to eliminate potential deception in existing advertisements. In *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985), the Court upheld an Ohio rule requiring lawyers whose advertisements are potentially misleading to include warnings or disclaimers in the advertisements in order to "dissipate the possibility of consumer confusion or deception." *Zauderer,* 471 U.S. at 651. But the Court has endorsed compelled disclaimer requirements *only* for the purpose of counteracting potentially misleading messages included in the advertisement; the Court has *never* imposed such requirements on individuals or businesses who

have not initiated the advertisements on their own. As the Court later explained:

> The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or expressly contrary to the corporation's views.

Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1, 15 n.12 (1986) (pluality). *See also Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781, 803 (1988) (Scalia, J., concurring in part and concurring in judgment) ("[T]he state can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made."); *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (in striking down compelled funding of mushroom advertisements, Court distinguishes *Zauderer,* stating, "There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.").

Nor is the Secretary's argument for a relaxed standard of First Amendment review advanced by her assertion that the checkoff program "increases the total amount of information available to consumers." U.S. Br. 39. Respondents object not to the increased dissemination of information to consumers, but to being forced to pay for the dissemination of information

with which they disagree. The Secretary's argument is based on a false premise: that the First Amendment protects commercial speech for the sole purpose of maximizing information made available to consumers (the listeners). To the contrary, the Court has made clear that the First Amendment *also* protects the interests of commercial entities in conveying whatever truthful and nonmisleading information they wish to convey -- no more and no less. *See, e.g., Pacific Gas & Electric,* 475 U.S. at 15 (plurality). Forcing beef producers to pay for advertisements to which they object deeply offends their First Amendment interests. Moreover, there is nothing in the record to support the Secretary's assertion that the checkoff program increases the volume of information available to consumers; there is no reason to believe that in the absence of the checkoff program, information promoting beef consumption would not be conveyed through a voluntary or government-funded program.

Finally, *amici* note that none of the Court's compelled speech decisions indicate that the level of First Amendment review depends on whether the compelled speech is commercial in character. In *Glickman*, a challenge to compelled funding of generic promotion of peaches, plums, and nectarines, the Court declined to evaluate the funding program under the First Amendment standards set forth in *Central Hudson*, and it held that the appeals court had erred in having done so. *Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457, 474 & n.18 (1997) ("The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech."). In *United Foods*, a challenge to compelled funding of advertisements for mushrooms, the Court declined to consider whether the commercial nature of compelled speech is of constitutional significance because "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.

In sum, nothing in the Court's past treatment of government efforts to *regulate* commercial speech lends support to the Secretary's argument that the government should be afforded greater latitude when compelling funding of commercial speech than when compelling funding of noncommercial speech.

II. THIS CASE IS GOVERNED BY THE *BARNETTE* AND *ABOOD* LINE OF DECISIONS, WHICH REQUIRE VERY CLOSE SCRUTINY OF ANY GOVERNMENT EFFORT TO COMPEL SPEECH

Although the federal government now argues that compelled advertising programs should be judged under the *Central Hudson* test, it asserted in both *Glickman* and *United Foods* that the correct rule of decision derives from *Abood* and other cases in which the Court has considered government efforts to coerce support for expressive activities from unwilling speakers. *See Glickman*, Brief for the United States at 14-16; *United Foods*, Brief for the United States at 16-17. Indeed, in a brief opposing a prior effort to bring before the Court a First Amendment challenge to the beef checkoff program, the Secretary asserted, "*Central Hudson,* a case involving a *restriction* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech." *See Goetz v. Glickman*, No. 98-607, *cert. denied*, 525 U.S. 1102 (1999), Brief for the Federal Respondent in Opposition at 14-15 (Dec. 1998) (emphasis in original).

Amici agree with the Secretary's former position that the Court ought to look for guidance primarily from the *Abood* line of decisions. *Abood* and its progeny impose an exacting measure of First Amendment scrutiny on any government effort to compel speech by individuals or business entities. The beef checkoff program cannot survive that scrutiny.

Starting with its decision in *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 642 (1943), which struck down a law requiring school children to recite the Pledge of Allegiance regardless of their objections to doing so, the Court has made clear that the First Amendment protects not only freedom of speech, but also the freedom not to speak. *See also Wooley v. Maynard,* 430 U.S. 705, 713-715 (1977) (New Hampshire may not require objecting motorists to display the state motto, "Live Free or Die," on automobile license plates).

The Court has repeatedly held that constitutional restrictions on compelled speech extend to compelled financial support of private organizations' speech. Thus, First Amendment rights are implicated by compelled support of, *e.g.,* a state bar association, *Keller v. State Bar of California,* 496 U.S. 1 (1990), or a labor union by a public-sector employee. *Abood,* 431 U.S. at 222. The Court has never suggested that a different constitutional analysis is required depending on whether the compulsion takes the form of government efforts to force individuals to utter specific words (as in *Barnette*) or the form of monetary exactions earmarked to finance speech by non-government entities (as in *Keller* and *Abood*).

Under *Abood* and its progeny, government efforts to compel financial support of the speech of private organizations is subject to exacting First Amendment scrutiny. First, the government must demonstrate that the *compelled* financial

support serves some extremely important government interest. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991)(plurality).[6] Second, the funded activity must be "germane" to the government interest relied upon. *Id.* Third, the compulsory funding scheme must be narrowly tailored. *Chicago Teachers Union,* 475 U.S. at 303 & n.11; *Pacific Gas & Electric,* 475 U.S. at 19 (plurality). That is, it must not "significantly add to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality).

The Secretary's portrayal of *Abood* as a broad endorsement of compelled speech, U.S. Br. 38, is inaccurate. *Abood* involved an "agency shop" arrangement between a public school board and the union representing teachers, whereby teachers who declined to join the union were required to pay the union an "agency fee" -- a fee precisely equal to the dues paid by union members. The Court held that such compelled support of a union "ha[d] an impact upon [nonunion

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[6] The Court has used a variety of phrases to describe the showing required of the government in demonstrating the importance of its challenged policy interest. In *Lehnert*, the Court stated that the government must show that its policy interest is "vital." *Id.* Other cases have required that the government demonstrate that its interest is "compelling." *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.11 (1986). *Abood* itself was silent on the issue, instead relying without discussion on previous case law which established that "the important contribution of the union shop to the system of labor relations established by Congress" was sufficient to justify requiring employees to finance the collective bargaining activities of a union serving as the employees' exclusive bargaining representative. In any event, the precise verbal formulation of the government's burden is not of crucial significance; the important point is that the Court has imposed an extremely heavy burden on governments seeking to justify their efforts to compel speech.

members'] First Amendment interests," *Abood,* 431 U.S. at 222, and was impermissible except to the extent that the compelled support directly served some very important government interest. *Id.* at 234-236. The Court ruled that one such interest was the maintenance of labor peace -- which Congress had determined was directly advanced by creation of a system under which employee interests would be served by an exclusive bargaining agent. *Id.* at 220-224. Since under that system, a union designated as an exclusive bargaining agent was required to represent all employees within the bargaining unit (even nonmember employees), the Court determined that the exclusive bargaining agent system would be undermined by the "free rider" problem -- the financial incentive that employees have "to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees" -- unless nonmembers could be required to pay for such benefits. *Id.* at 221-222.

The Court nonetheless made clear that the First Amendment prohibits a union from charging nonmembers for expressive activities *not* directly related to the union's collective bargaining functions. *Id.* at 232-237. The Court determined that nonmembers may not be required to share in the costs of the union's political contributions or of expressing the union's views on issues unrelated to its duty as exclusive bargaining representative, *id.* at 234, but it left for future cases the drawing of a precise line between union activities that constitute collective bargaining activities and those that do not. *Id.* at 236-237.[7]

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[7] That line-drawing process has been the subject of numerous subsequent federal court suits. *See, e.g., Lehnert; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 466 U.S. 435 (1984). Although the courts on occasion have had difficulty in drawing the line

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Keller applied *Abood*'s compelled speech analysis in the context of mandatory dues paid to a state bar association, finding that such dues impinge on lawyers' First Amendment rights. *Keller*, 496 U.S. at 13. The Court noted that it had previously held, in *Lathrop v. Donohue,* 367 U.S. 820 (1960), that states have a very strong interest in regulating the legal profession and improving the quality of legal services, and that in order to avoid the "free rider" problem, "[i]t is entirely appropriate" that lawyers share in the cost of such regulation -- which directly benefits lawyers by, among other things, excluding nonlawyers from the practice of law. *Id.* at 12. The Court made clear, however, that the First Amendment prohibits a state from requiring lawyers to fund expressive bar association activities not related to the bar association's function as a regulator of the legal profession. *Id.* at 15-16. As in *Abood,* the Court declined to draw a bright line between "related" activities and "unrelated" activities. *Id.* As examples of unrelated expressive activity that lawyers could not be compelled to fund, the Court listed "endorse[ment] or advance[ment] [of] a gun control or nuclear weapons freeze initiative," two of the activities in which the State Bar of California had engaged. *Id.* at 16.

It is important to note that the principles articulated in *Abood* and *Keller* extend to compelled funding of *any* speech or expressive activity, not simply to "political" speech. For example, *Abood* provided a lengthy list of traditional union expressive activities which could have "an impact upon the[]

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[7](…continued)
with precision, reported decisions have repeatedly emphasized that the *only* government interest that justifies impingement on the First Amendment rights of nonunion employees is the interest in maintaining a system of exclusive bargaining agents. *See, e.g., Lehnert,* 500 U.S. at 520-521.

First Amendment rights" of dissenting employees, only a few of which activities could be deemed "political" as that term is commonly used:

> [An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating a limit on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied.

Abood, 431 U.S. at 222. *See also id.* at 231 ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a nonexhaustive list of labels -- is not entitled to full First Amendment protections."); *Lehnert,* 500 U.S. at 521-522 (plurality) ("First Amendment protection is in no way limited to controversial topics or emotionally charged issues."). As the Court made clear in *Wooley*, the First Amendment protects "the right to refrain from speaking *at all*," not simply the right to refrain from speaking on political or controversial subjects. *Wooley,* 430 U.S. at 714 (emphasis added).[8] Thus, it is no

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[8] Of course, compelled funding of activities with no expressive content does not raise First Amendment concerns. Thus, the Court held in *Ellis* and again in *Lehnert* that "union social activities" were properly chargeable to dissenters (who were free to participate in the activities) because the "communicative content" of the activities was minimal, if

(continued...)

defense to Respondents' First Amendment objections to the beef advertising program that those objections are based on aesthetic disagreements regarding the quality of beef, rather than on hotly debated political differences.[9]

The Secretary suggests in passing that the *Abood* line of cases imposes a level of First Amendment scrutiny that is no higher than that imposed by *Central Hudson*. U.S. Br. 38. The American Cotton Shippers Association, *et al.* ("ACSA"), carry that argument even further, insisting that *Abood* actually imposes a significantly more relaxed standard of review than does *Central Hudson*. Brief *Amici Curiae* of ACSA at 5-16. Both briefs display a fundamental misunderstanding of *Barnette, Abood*, and their progeny. The ACSA contends that, under *Abood*, compelled financial support of the expressive activities of private parties should be upheld so long as such compelled support is "germane" to some "independent, non-

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[8](…continued)
any. *Ellis,* 466 U.S. at 456; *Lehnert,* 500 U.S. at 529 (plurality); *id.* at 559-560 (Scalia, J., concurring in the judgment in part and dissenting in part). Accordingly, putting severability issues to one side, compelled funding for those portions of the Beef Board's activities that lack expressive content (if any) may not be vulnerable to First Amendment challenge.

[9] There is language in *Glickman* suggesting that the majority questioned whether the promotional activities funded by agricultural marketing orders are sufficiently expressive to warrant First Amendment protection. *Glickman*, 521 U.S. at 471, 473 & n.16. That language, which was largely extraneous to the Court's holding, is in significant tension with the passages from *Abood* and *Lehnert* quoted above, and is contradicted by *United Foods*, which held that similar promotional activities for mushrooms directly implicated First Amendment rights. *Amici* respectfully request that the Court expressly disavow the *dicta* in *Glickman* that suggest that compelled support of agricultural advertising may not implicate First Amendment rights.

speech related purpose." ACSA Br. 8. Thus formulated, the ACSA's test amounts to little more than rational basis review of compelled speech. The Court's compelled speech decisions make clear that government interference with the First Amendment right not to speak is not to be treated so cavalierly.

The ACSA's portrayal of the *Barnette/Abood* line of cases is faulty not simply because of its attempts to minimize a government's burden in demonstrating that the compelled speech serves some extremely important interest. The ACSA also eliminates all consideration of the "narrow tailoring" requirement[10] and wholly misconstrues the "germaneness" test. The word "germane" arose in both *Abood* and *Keller* only after the Supreme Court had determined that the defendants in those cases were justified, in limited circumstances, in compelling financial support for some of their expressive activities.[11] Once the Court had determined that there were at least *some* expressive activities for which a defendant could compel financial contribution without violating First Amendment rights, the Court was required to determine which expressive

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[10] As noted *supra* at 15, *Chicago Teachers Union, Pacific Gas & Electric,* and *Lehnert* all made crystal clear that compelled financial support of the speech of private organizations violates the First Amendment unless it is "narrowly tailored," meaning that the infringement of First Amendment rights is the minimum amount necessary to achieve the government's purpose.

[11] As noted above, the principal justification in *Abood* for permitting unions to impose a collective bargaining fee on nonmembers was that doing so was the only way of avoiding the "free rider" problem whereby employees could take advantage of (but not pay for) the collecting bargaining services that unions are required to provide to all employees in a bargaining unit. *Abood,* 431 U.S. at 220-222.

activities fell into that protected category. That is where the term "germane" arose. As the Court explained in *Keller*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not *germane* to the purpose for which compelled association was justified: collective bargaining.

Keller, 496 U.S. at 13. Thus, "germaneness" is not a test that permits defendants to compel support for expressive activities that further some important governmental, non-speech related interest. Rather, the burden of proof is on a defendant in a compelled-financial-support case to demonstrate why *compelled* support is necessary (*i.e.*, why the government's vital policy interest could not be achieved without requiring dissenters to support speech with which they disagree). Only after that burden has been met may a defendant then seek to demonstrate that particular expressive activities are permissible because they are "germane" to the purpose for which compelled support is justified.

Under the ACSA's view of compelled speech doctrine, the government would be free to compel school children to recite the Pledge of Allegiance in classrooms. Inculcating a spirit of national unity would appear to qualify as an "independent, non-speech related" objective, and compelled recitation of the Pledge of Allegiance is undoubtedly "germane" to that objective. Yet even in the middle of World War II, the Court in *Barnette* rejected a school board's argument that the spirit of national unity fostered by recitation of the Pledge of Allegiance should override First Amendment concerns. *Barnette,* 319 U.S. at 640-641. Indeed, the Court has made clear that in the context of protected speech, any difference between compelled speech and compelled silence "is without constitutional significance, for the First

Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley,* 487 U.S. at 796-797. Just as the Court has been extremely reluctant to permit government regulation of protected speech, so too should it be extremely reluctant to permit the government to compel speech except in the rarest of circumstances. Moreover, *Pacific Gas & Electric* makes clear that corporations enjoy the same First Amendment protections against compelled speech as do individuals. *Pacific Gas & Electric,* 475 U.S. at 16.

We note in passing that the lower courts have uniformly rejected the ACSA's assertion that the *Barnette/Abood* line of cases establishes a more relaxed standard of review than that provided under *Central Hudson* in commercial speech regulation cases. The Third Circuit in *Frame* stated that the *Abood* line of compelled speech decisions provided the rule of decision in a First Amendment challenge to the Beef Act. *United States v. Frame,* 885 F.2d 1119, 1134 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1994). The court said that *Abood* and its progeny employ "a higher standard of scrutiny than employed in cases involving only regulation of commercial speech," such as *Central Hudson*. *Id. See also Cal-Almond, Inc. v. U.S. Dep't of Agriculture,* 14 F.3d 429, 436 (9th Cir. 1993) ("[B]ecause we hold the almond marketing program unconstitutional even under the *less stringent Central Hudson* standard, we do not decide which of these two should apply.") (emphasis added).

In sum, *Abood* imposes an exacting standard of review on government efforts to compel financial support of private speech, a standard which (as demonstrated in Part III, *infra*) the Secretary has not come close to meeting.

III. THE COMPELLED ADVERTISING PROGRAM CANNOT BE SUSTAINED UNDER THE TEST ESTABLISHED BY *ABOOD* FOR COMPELLED FINANCIAL SUPPORT

A. The Government Has No Vital Policy Interest in Financing the Beef Checkoff Program Through Compelled Contributions

The Secretary's arguments in support of the mandatory beef checkoff program fall far short of satisfying the burden imposed by *Abood* and its progeny on governments seeking to compel financial support of private speech.

In particular, the Secretary has failed to articulate anything approaching a "vital" policy interest in maintaining the disputed advertising program. We note that thousands of commodities are successfully marketed in this country without the benefit of federal government-imposed advertising programs (e.g., bananas and Georgia peaches). It is difficult to understand how the beef checkoff campaign can be deemed "vital" when the evidence plainly indicates that such campaigns are not necessary to permit American agriculture to survive. Even accepting for the sake of argument the Secretary's claims that the compelled beef checkoff campaign leads to increased product sales, effectuating marginal increases in sales within a relatively healthy industry is hardly on a par with the policy interests cited in *Abood* (preservation of labor peace by strengthening the collective bargaining process) as the bases for assessment of agency fees on dissenting employees.

The Court noted in *Abood* that prohibiting the collection of agency fees from dissenting employees -- thereby allowing them to become "free riders" -- could completely undermine

the exclusive representation system upon which American labor law is based. *Abood,* 431 U.S. at 223-224. The Court held that Michigan was justified in fearing that if the exclusive representation system were undermined, "confusion and conflict . . . could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. No similar calamity is plausible if the beef checkoff program were ended.

Moreover, *Abood* has been explained in later decisions as based primarily on the recognition of the inequity of permitting "free riders" to refuse to bear their fair share of collective bargaining. As the Court stated in *Ellis,* "Congress' essential justification for authorizing the union shop was the desire to eliminate free riders -- employees in the bargaining unit on whose behalf the union was obliged to perform its statutory function, but who refused to contribute to the cost thereof." *Ellis,* 466 U.S. at 447. Despite the Secretary's claims to the contrary, no similar "free rider" problem exists in this case.

Respondents are "free riders" only in the sense that they have arguably benefitted from the federal advertising program to which they object. But any such benefit is only incidental to the programs' professed desire to benefit the industry as a whole; the advertising committees are under no obligation to create advertising that will be of special benefit to Respondents.[12] In contrast, a union is *required* to provide particularized benefits for *each* employee within its bargaining unit,

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[12] Indeed, Respondents allege that members of the Beef Board and the Operating Committee have promoted the interests of some beef producers at the expense of others'.

regardless whether the employee is one who objects to paying money to the union. For example, the union is required to provide fair representation to dissenting employees in any grievance proceeding they may initiate with the employer. Thus, Respondents are simply not the type of "free riders" that *Abood* had in mind. As Justice Scalia explained in *Lehnert:*

> [W]here the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that alone does not empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry -- indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others.

Lehnert, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). *See also Abood,* 431 U.S. at 222 ("benefits of union representation * * * necessarily accrue to all employees").

Respondents are no more "free riders" than are rival long-distance telephone companies when AT&T encourages consumers to "reach out and touch someone" by placing a

long-distance phone call. Those companies undoubtedly benefit from such advertisements, but that benefit is hardly sufficient justification for overriding their First Amendment objections to being compelled to contribute to the costs of the advertisements.

Nor may the Secretary obviate the need for demonstrating a vital policy interest in this case by pointing out that Respondents have voluntarily chosen to become beef producers. The Court has routinely rejected arguments that the government may condition citizens' right to participate in routine commercial activities on their willingness to relinquish First Amendment rights. For example, *Wooley* held that New Hampshire could not condition motorists' access to its highways on their relinquishment of First Amendment objections to displaying the state motto, "Live Free or Die," on their cars. *Wooley,* 430 U.S. at 713-715. Nor does the First Amendment permit a state to condition employment in a government job on public support of a political party; the First Amendment is violated in such cases even though the prospective employee may easily avoid the "compelled" speech by simply refusing to accept the proffered job. *Elrod v. Burns,* 427 U.S. 347 (1976). The trial court expressly found that payment of the beef checkoff is "directly linked" to Respondent's "source of livelihood," and that "they have no meaningful opportunity to avoid these assessments"; and the appeals court stated that it agreed with those factual findings. Pet. App. 11a. Under those circumstances, the burden on Respondents' First Amendment rights is not lessened by their ability to avoid checkoff payments by ceasing beef production.

In sum, the Secretary has failed to demonstrate a policy interest sufficiently "vital" to justify its infringement of Respondents' First Amendment rights. The interests asserted by the Secretary in support of the beef checkoff program do

not begin to approach the level required by *Abood, et al.* to permit infringement of First Amendment protections against compelled speech.

B. The Beef Checkoff Program Is Not Narrowly Tailored to Achieve Any Government Policy Interest

The beef checkoff program is constitutionally defective for the additional reason that it is not narrowly tailored to achieve any of the Secretary's identified policy interests. Indeed, the Petitioners' briefs fail even to acknowledge the existence of a "narrow tailoring" requirement in compelled speech cases.

While *Abood* is silent on the issue of narrow tailoring,[13] more recent cases have made clear that compelled speech cannot pass constitutional muster unless it is narrowly tailored to serve the government's vital policy interests. *Lehnert,* 500 U.S. at 519 (plurality); *Chicago Teachers Union,* 475 U.S. at 303 & n.11; *Pacific Gas & Electric,* 475 U.S. at 19 (plurality). Even assuming that the Secretary has a "vital" interest in compelling all beef producers to support the beef checkoff, she could easily do so while infringing on Respondents' First Amendment rights to a far lesser extent.

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[13] That silence can hardly be viewed as an indication that the *Abood* Court believed that there were no limits on how far a government could go in infringing First Amendment rights so long as all measures enacted were germane to its vital policy interests. Rather, the Court had no occasion to address that issue; it simply determined that some core union functions were properly chargeable to dissenting employees and that other functions not germane to those core functions were not chargeable, and it left more precise line drawing for later cases.

The Secretary's interest in sales promotion could be satisfied by simply requiring each producer to spend not less than a fixed amount on promotional campaigns; the producer would then be free to decide whether to contribute his promotional funds to the current advertising campaign or to develop his own campaign. By granting each producer a greater say in how his promotional funds would be used, such a system would impose far less of a burden on First Amendment rights while at the same time ensuring that adequate amounts are expended each year on promotional campaigns. Indeed, numerous federal agricultural promotional campaigns -- including the almond promotion program at issue in *Cal-Almond* -- provide handlers with credits for funds they spend on their own promotional activities; there is no evidence in the record that such programs have proven any less effective in promoting sales than programs without a credit option.

Alternatively, the Secretary's policy interests could be achieved in a more narrowly tailored manner if the advertising programs were funded through general tax revenues. As the Supreme Court explained in *Keller*, 496 U.S. at 10-13, use of general tax revenues to disseminate a particular viewpoint does not raise First Amendment concerns. Thus by definition, an advertising program funded through general tax revenues would be far less restrictive of First Amendment rights than is the current program -- and therefore the current program cannot be said to be narrowly tailored to achieving the Secretary's policy interests.[14]

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[14] Moreover, given the absence of a "free rider" problem of the type present in *Abood*, there is no basis for contending that taxpayer funding fails to address the Secretary's interests in correcting the inequities arising from the presence of "free riders."

A third method of achieving the Secretary's policy interests in a more narrowly tailored manner would be to encourage beef producers and importers to enter into voluntary cooperative promotional ventures. Voluntary cooperatives have been successfully established for numerous agricultural products. Indeed, since the beef checkoff program is premised on the theory that such programs are in the overall best interest of producers and importers (albeit they do not always recognize their best interests), it stands to reason that increased encouragement of voluntary cooperatives would eventually succeed in increasing the number of such cooperatives.

In sum, the beef checkoff program is not narrowly tailored to achieve the Secretary's policy interests. Numerous alternatives to those programs would achieve the Secretary's policy interests while infringing far less on First Amendment rights.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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