IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 2003

MICHIGAN PORK PRODUCERS
ASSOCIATION, INC., et al.,

Petitioners,

v.

CAMPAIGN FOR FAMILY FARMS,
et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May Congress deliver a message to Americans to eat more pork by enacting a so-called "Pork Tax" on sales of hogs, when the advertising is created by others but specifically approved word-by-word in advance by the U.S. Department of Agriculture?

The United States Court of Appeals for the Sixth Circuit held that such a "Pork Tax" violated the First Amendment and invalidated an entire $50 million federal agricultural program that had been in effect since 1985. Petitioners respectfully urge this Court to grant the petition for writ of certiorari and reverse the Sixth Circuit, in order to insure that the federal government may continue to speak, in this and other areas, without being hamstrung by improvident extensions of First Amendment doctrine.

PARTIES TO THE PROCEEDING

These Petitioners are six State Pork Producer Associations and three hog farmers who had asked the district court and the court of appeals to uphold the constitutionality of the Pork Promotion, Research, and Consumer Information Act ("Pork Act"). The petitioning state associations – namely, Michigan Pork Producers Association, Inc., California Pork Producers Association, Kentucky Pork Producers Association, Indiana Pork Producers Association, New York Pork Producers Cooperative, Inc., and Ohio Pork Producers Council – are all nonprofit state pork producer associations that receive Pork Act assessments to carry out programs specifically approved by USDA. Each association is governed through an open, democratic process and has been "recognized by the chief officer of such State as representing such State's producers." 7 C.F.R. § 1230.25 (*see* Appendix at 70a). The other Petitioners – Pete Blauwiekel, Bob Bloomer, and High Lean Pork, Inc. – are Michigan hog farmers who support the Pork Act because of the benefits it provides.

The National Pork Producers Council, a nonprofit organization that receives certain Pork Act funds from the National Pork Board, also participated in the

proceedings below and urged the courts to uphold the constitutionality of the Pork Act.

The Respondents in this case are an unincorporated association (Campaign for Family Farms) and four individuals (James Dale Joens, Richard Smith, Rhonda Perry, and Larry Ginter) who either raise hogs or have raised hogs in the past. The Respondents asked the lower courts to declare the Pork Act unconstitutional.

Both the Secretary of Agriculture and the Administrator of the Agricultural Marketing Service (an agency of USDA) also appeared below and sought a declaration that the Pork Act was constitutional. They have requested an extension of the government's deadline to file a petition for writ of certiorari.

No parent or publicly held corporation owns 10 percent or more of the stock of any of the Petitioners.

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STATEMENT OF JURISDICTION

The judgment to be reviewed was entered on October 22, 2003. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the U.S. Constitution provides:

Congress shall make no law… abridging the freedom of speech….

Because of their length, the relevant provisions of the Pork Act are set forth in the Appendix at 56a-69a.

STATEMENT OF THE CASE

1. In 1985, Congress enacted the Pork Act to "authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to –

(A) strengthen the position of the pork industry in the marketplace; and

(B) maintain, develop, and expand markets for pork and pork products."

7 U.S.C. § 4801(b)(1) (57a).

One of Congress's main goals was to educate consumers about the benefits of eating pork. The official House Report states as follows:

> Because today's pork products are leaner than before, American consumers need to know that pork and pork products should play a significant role in their diets, and pork is an excellent food value from an economic and health standpoint. That is the role that pork promotion has to play – to inform the consuming public that pork not only tastes good, but is a positive nutritional component in a healthy, balanced diet. Promotion, research and consumer information will assist to enhance the acceptability of pork products while minimizing their cost and thus the pork sector of agriculture viable vis-à-vis its competitors.

H.Rep. No. 99-271, House Committee on Agriculture, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1294 (1985).

The official Senate Report likewise explained:

> The Committee believes that a national pork promotion program would help the pork industry compete with other industries and reverse the declining consumption trend that has persisted for many years.

S. Rep. No. 99-145, Senate Committee on Agriculture, Nutrition and Forestry, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1995 (1985).

The assessment established by the Pork Act (currently $.40 per $100) is based on the value of each porcine animal sold or slaughtered for sale. 7 U.S.C. § 4809; 7 C.F.R. § 1230.112 (61a-62a, 73a). It is not assessed on pork producers individually, but on the sale of hogs or the slaughtering of hogs for sale. *Id*. Each of the individual Respondents has characterized the assessment as a "Pork Tax," correctly recognizing that it functions like a sales tax. The more hogs you sell (or the more hogs you slaughter for sale if you are a vertically integrated producer), the more tax you pay. The Pork Tax is broad-based: it is paid by tens of thousands of businesses nationally on the sales of millions of hogs every year.

2. The funds collected by the "Pork Tax" (or "Pork Checkoff," as it is commonly called) go to the National Pork Board, a special entity created by the Pork Act. Every member of the 15-member Pork Board is appointed by the Secretary of Agriculture. Although potential nominees for the Pork Board are chosen by the National Pork Producers Delegate Body (whose members are themselves appointed by the Secretary), the Secretary makes the final decisions on appointments. The Secretary has declined to appoint individuals who had been recommended in the nomination process. Also, the Secretary has the authority to

remove any Pork Board member. 7 C.F.R. § 1230.55(b) (70a-71a). Although Pork Board members serve without compensation, their expenses are reimbursed.

The Internal Revenue Service of the U.S. Department of the Treasury has concluded, in an official opinion letter, that the Pork Board "is the federal government itself carrying on a governmental function through the [Agriculture] Department."

Pork Act assessments are used to fund Pork Board promotion, research, and consumer information projects in accordance with the Pork Act, to fund State Pork Producer Association promotion, research, and consumer information projects in accordance with the Pork Act, and to pay USDA's expenses of administering the Pork Act. Some dollars actually are used to pay the salaries of USDA employees in Washington. 7 U.S.C. § 4809(c) (63a-66a).

In addition to her authority to hire and fire the members of the Pork Board, the Secretary of Agriculture exercises the following controls:

- The Secretary must approve every plan or project funded by the Pork Act. No plan, project, or budget may become effective without the Secretary's approval. 7 U.S.C. § 4808(b)(2)-(3) (59a-60a).

- The Secretary may terminate or suspend the collection of assessments at any time if she determines that the Pork Checkoff is not tending to effectuate the declared policy of the Act. 7 U.S.C. § 4812(a) (67a-68a).
- A full-time employee of USDA attends all meetings of the Pork Board membership. One USDA staffer devotes full time to supervising the activities of the Pork Board and the State Pork Producer Associations under the Pork Act; other USDA employees devote portions of their time to this work.
- USDA approved the hiring of the full-time CEO of the Pork Board.
- USDA is involved in formulating the Pork Board's annual budget from the very beginning. USDA employees attend and participate in all the Pork Board Budget Committee meetings, which is where the initial proposed budget line items are developed. USDA staff identify areas of need for the Pork Board that they feel should be covered by the budget. USDA staff then review the proposed budget line items again when they are submitted to USDA. USDA may request modifications in programs or delete proposed programs.

Similarly, State Pork Producer Associations are required to submit their plans and budgets in advance to USDA for approval. Also, they are required to conduct elections in compliance with USDA requirements**.**

In 2000, after invoking the aforementioned authority under 7 U.S.C. § 4812(a), U.S. Secretary of Agriculture Dan Glickman conducted a discretionary one producer-one vote "fairness" referendum on whether the Pork Checkoff should continue. After a reported 53-47 percent majority voted against the checkoff, Secretary Glickman began terminating the program in January 2001, even though he publicly stated it was an "effective program." However, upon taking office later that month, Secretary Ann Veneman decided to increase certain controls over the program, rather than terminate it. Her decision not to terminate the Pork Checkoff program was upheld by the district court and not appealed by the Respondents. *See Michigan Pork Producers Assn., Inc. v. Campaign for Family Farms*, 174 F.Supp.2d 637 (W.D. Mich. 2001).[1]

[1] In any event, the record demonstrates that the "fairness" referendum was far from fair. For example, two of the individual Respondents have admitted that their *spouses* cast ballots in the referendum (presumably against the Pork Checkoff), even though not legally authorized to do so.

3. Approximately 20 percent of the funds generated by the Pork Act are spent on generic advertising of pork.[2] USDA exercises prior censorship over every word of every Pork Act advertisement. Whether the proposed ad is being run by the Pork Board or by a State Pork Producer Association, its complete text must be submitted in advance to USDA. USDA modifies or disapproves the ad where it disagrees with any aspect of the message. As explained by a USDA witness, "Our purpose is to make sure they [the ads] are consistent with the act and the order, that they are not disparaging other commodities, that they are factual and that they carry out the policies and are consistent with the objectives of the department." No ad may be run by the Pork Board or a State Pork Producer Association until it has been approved by USDA. USDA also receives confirmation copies of all ads after they have been run.

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[2] Seemingly disagreeing with this point, the Sixth Circuit observed that 51 percent of Pork Act expenditures relate to "demand enhancement." *See* 11a. However, as demonstrated by the table in the Sixth Circuit's opinion, demand enhancement includes much more than just advertising. For example, "merchandising" (*e.g.*, getting retail stores to carry more pork) and "foreign market development/world trade" fall within demand enhancement, even though they do not involve advertising. The Pork Board's budget is, of course, a public document and available for review by any interested party.

USDA rejects numerous ads. For example, one of the USDA officials responsible for administering the Pork Act[3] recently rejected two ads – one because it made a nutrition claim that he did not agree with, the other "because I quite frankly didn't like the way they were saying what they were saying. *It didn't seem like it was something that was appropriate for the government to be saying*" (emphasis added).

The record contains numerous examples of USDA's rewriting of Pork Checkoff-funded advertising. For example, during a particular two-week span, USDA (1) required deletion of the phrase "and a healthy alternative to those other meats" before approving an ad on April 27, 2001; (2) required the addition of the words "on average" before approving an ad on May 7, 2001; and (3) required the word "roasted" to be added before approving an ad on May 11, 2001. In another instance, the Oklahoma Pork Producers were required to change "enjoy the great taste and health benefits to eating Pork" to "enjoy the great taste of the many varieties of Pork."

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[3] The Pork Board runs about 145 separate ads per year, which means that USDA has to review about three proposed Pork Board ads every week. Many of the ads are repetitive of earlier ads; that is certainly true of the ads run by the State Pork Producer Associations.

Also, although nothing in the Pork Act prohibits the Pork Board or State Pork Producer Associations from touting the merits of pork vis-à-vis other meats, 7 U.S.C. § 4809(d) (prohibiting only the use of Pork Act funds to make "false or misleading" statements) (66a), USDA as a matter of policy rigorously roots out such comparisons and prevents them from being aired. For example, "Nothing satisfies a customer's desire for something different like the flavor of pork" had to be changed to "Pork's flavor satisfies a customer's desire for something different." USDA also recently prohibited the Pork Board's economist from commenting on the effect of Russia's decision to authorize the resumption of poultry imports from the U.S.

USDA employees do not pen the original texts of the ads. Rather, USDA engages in regular discussions with the Pork Board staff as ads are developed and then responds to drafts. This is, of course, a normal developmental process in advertising. As Petitioners pointed out below, the Army did not invent the slogans "Be All You Can Be" and "An Army of One"; each of these slogans was designed by a private ad agency.

All copyrights, trademarks, inventions, or publications developed through Pork Checkoff funds are "the property of the United States Government as

represented by the Board." 7 C.F.R. § 1230.88 (73a). The highly successful slogan "Pork: The Other White Meat" is not government property. It was developed with private funding prior to the enactment of the Pork Act, and is licensed to the Pork Board on an ongoing and exclusive basis at a bargain rate of $1 per year. Other than this unique asset (unique because it was created before enactment of the Pork Act), all funds and property will revert to the USDA if the Pork Checkoff is finally terminated. 7 C.F.R. § 1230.85 (71a-72a).

4. Since its enactment by Congress in 1985, the Pork Act has been enormously successful. According to a recent independent, peer-reviewed economic study that was mandated by Congress and took three person-years to complete, the Pork Act delivers at least $4.79 in returns to pork producers for each $1 in assessments. The demand enhancement activities (such as advertising) are particularly effective, and provide even higher positive returns of $15.26 to each $1 invested. Conservatively, the Pork Checkoff results in a net price increase of $1.17 per hog sold in the United States. These are across-the-board benefits to all pork producers, large and small. Petitioners doubt that many federal programs could pass such a rigorous cost-benefit test.

Because of Pork Checkoff-funded foreign market development initiatives in Asia and elsewhere, the United States has gone from being a net importer of pork (the second largest) to the second largest exporter of pork in the world. Pork is the fastest growing meat category in America's restaurants.

Also, this congressionally mandated study concluded that there is no effective substitute for a mandatory Pork Act assessment. A voluntary assessment would present a "free rider" problem; you could get the benefits without paying for them. Congress itself observed in 1985 that voluntary checkoffs had been inadequate. S. Rep. No. 99-145, Senate Committee on Agriculture, Nutrition and Forestry, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1995; H.R. Rep. No. 99-271, House Committee on Agriculture, *reprinted in* U.S. Code Cong. & Admin. News, 99th Cong., 1st Sess., p. 1295. Additionally, the congressionally mandated study found that generic advertising is much more effective at stimulating demand for pork than branded advertising. Thus, relying on branded advertising alone would not provide the same benefits.

Recognizing the importance of this study, Respondents tried below to rebut its conclusions. The attempted rebuttal turned into a reaffirmation. Respondents' expert testified that he was "inclined" to accept the study that produced the

$4.79/$1.00 and $15.26 benefit/cost ratios with only an adjustment for the discount rate. (He wanted to use an implausible and unprecedented 15 percent *per annum* discount rate, which still resulted in a highly positive benefit/cost ratio.) Ultimately, Respondents' expert characterized the study as "pretty good." Also, he expressly declined to accept arguments advanced by Respondents' counsel that pork packers and retailers are "free riders" because, allegedly, they do not pay the Pork Checkoff while receiving benefits from it.

In short, the economic benefits of this $50 million per year congressional program are beyond dispute. Generic advertising of pork has worked extraordinarily well. And while farmer-beneficiaries of this program have to pay for it, they receive far more in returns than they are assessed in checkoff.

Opponents of the Pork Act largely rely on the post hoc/propter hoc fallacy – *i.e.*, if people are leaving pork production, then the Pork Checkoff must be at fault. Hog farming, like other sectors of American agriculture, is undergoing consolidation. As the congressionally mandated study pointed out, the Pork Act has ameliorated this trend, but cannot reverse it. Some producers cannot remain profitable even with the additional $1.17 net per hog provided by the Pork Act.

But they blame the Pork Act because it is easier to criticize a federal program than to try to adapt to the inexorable forces of a global economy.

Not surprisingly, Respondents' criticisms of the Pork Act do not reflect a coherent or consistent position. Because the case was decided on cross-motions for summary judgment, no trial took place. However, the following deposition testimony was taken and filed with the district court:

- One of the Respondents could not give a single example of a Pork Act-funded statement or ad to which he objected. He admitted that eliminating the Pork Checkoff probably would not give him a better price for his hogs.
- Another Respondent said he objected to "Pork: The Other White Meat." because "[i]t's discriminating between white hog farmers and black hog farmers…. It pins (sic) white hog farmers against black hog farmers…. That's a racial objection." (This Respondent admitted that he did not know and never had spoken to an African-American hog farmer.)

- A third Respondent admitted that he was "retired" from hog farming, just did his "activism" now, and had paid only 43 cents in Pork Checkoff in 2002 and $8.77 in 2001.
- The fourth individual Respondent conceded that she currently owns only three hogs, and that all her sales of hogs in recent years have been to a § 501(c)(3) organization operated by herself and her husband that pays her a guaranteed price of 15 percent above the market for her hogs. This charitable organization is heavily subsidized by USDA grants in excess of $100,000 per year, and uses some of these federal taxpayer dollars to publish newsletters that criticize the Pork Act.

Notably, none of the Respondents is forced by the Pork Act to say anything to which she or he objects. All of them can and in fact do say whatever they want about hog farming.

5. In opposing Respondents' claim that Pork Act-funded advertising violated their First Amendment rights, Petitioners relied primarily upon the government speech doctrine. Petitioners contend that the government is speaking through the Pork Checkoff and, accordingly, no constitutional objection may be

raised to it. The district court, however, rejected Petitioners' government speech defense because the "funding scheme" for the speech consists of assessments on pork producers. *See* 45a. On appeal, the Sixth Circuit upheld the district court, but employed a somewhat different analysis.

The Sixth Circuit found that the Pork Act does not involve government speech for three reasons. First, the Pork Act benefits a specific industry – pork producers. Second, while USDA may adopt or approve the speech funded by the Pork Act, it does not create most of that speech. Third, as noted by the district court, the Pork Act is not funded by general tax revenues, but by an assessment of 0.4 percent on sales of hogs or the slaughter of hogs for sale. On these grounds, the court of appeals invalidated the Pork Act in its entirety. *See* 8a-9a.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Introduction.

There are several vital reasons why the Court should grant the writ. A highly effective and efficient $50 million government commodity program that has been in existence for almost twenty years will vanish if the Court withholds consideration of this case. The record conclusively establishes that the Pork Act is highly effective and greatly benefits all pork producers, including those who object

to it. Moreover, the Pork Act is but one of a number of similarly situated commodity programs that are in imminent danger of disappearing unless the Court considers the constitutional issue presented in this case.

The most compelling reasons for granting review, however, arise out of the following combination of circumstances: (1) the sheer importance of government speech; (2) the apparent confusion prevailing among lower courts on this issue; and (3) the jarring precedent established by the Sixth Circuit's opinion. Unless the application of the government speech doctrine to government sponsored programs and campaigns is promptly reviewed and clarified by this Court, we will likely see a cascade of challenges to government programs and campaigns involving the health, safety, and welfare of Americans.

Needless to say, the Sixth Circuit's decision conflicts with relevant decisions of this Court and at least one other circuit. This Court has never endorsed, let alone mentioned, the Sixth Circuit's three-part test. To the contrary, in its most recent government speech decision, this Court explained that "the salient point" separating private from government speech is whether the program in question "was designed to facilitate private speech, not to promote a government message." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Similarly, the Ninth

Circuit recently found that messages posted by teachers on a school bulletin board amounted to government speech because they were a "manifestation of the school board's policy…." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000). Yet instead of considering whose message is being promoted, the Sixth Circuit invented its own three-part test based largely on irrelevant factors.

Not only does the Sixth Circuit's ruling detour from constitutional precedent, but it also comes at a time when lower courts are apparently befuddled by the government speech doctrine. Although the Ninth Circuit got it right in *Downs*, other appellate judges have complained about the lack of clarity in this Court's pronouncements on government speech. *See, e.g., Wells v. City and County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001); *Sons of Confederate Veterans, Inc. v. Commission of Virginia Dept. of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., dissenting from denial of rehearing en banc). This confusion extends to the numerous agricultural commodity promotion programs. As one might have predicted when this Court declined to reach government speech in *United States v. United Foods, Inc.*, 503 U.S. 405, 417 (2001), but said that it involved "difficult issues," lower courts have gone in different directions, even going so far as to reach different conclusions based on the very same record.

Compare *Livestock Marketing Assn. v. U.S. Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003) (overturning the Beef Act), with *Charter v. U.S. Department of Agriculture*, 230 F.Supp.2d 1121 (D. Mont. 2002) (upholding the Beef Act on an identical record).

This Court should grant the petition and reverse the Sixth Circuit's decision. Congress enacted the Pork Act; it has had dramatically and demonstrably beneficial effects for pork producers; and it should not be discarded based on an unprecedented and illogical view of constitutional law.

II. The Sixth Circuit's Opinion Conflicts with Prior Decisions of this Court and at Least One Other Circuit.

There is no constitutional right to keep the government from speaking. A pacifist may object to an ad for the U.S. Army; a libertarian to an anti-drug message; and a tobacco farmer to a speech by the Surgeon General. But none have the right to enjoin the government from speaking because their taxes or other exactions are being used for those forms of speech. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990).

The proposition that the government may say things with which some financial supporters of that speech disagree is so obvious that it needed little repetition until recently. It only became necessary to restate the obvious in the last few decades, as this Court confronted cases in which persons asserted First Amendment rights not to financially support speech with which they disagreed. In response to these cases, this Court has made it clear that the government speech rule operates as a limiting principle on First Amendment claims. *See Velazquez*, 531 U.S. at 541-42; *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995).

As noted above, what may be less clear is the *scope* of the government speech rule. Nonetheless, Petitioners believe that several decisions of this Court have marked a dividing line between private speech and government speech.

Thus, private speech consists of:

- Ideological activities of the Detroit Federation of Teachers that are unrelated to collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977).

- Statements made by the State Bar of California lobbying for or against state legislation on polygraph testing, possession of armor-piercing ammunition, rights to sue, etc. *Keller*, 496 U.S. at 15-16.
- Statements made by 343 different student organizations at the University of Virginia, which had contractually agreed they are neither part of nor controlled by the University. *Rosenberger*, 515 U.S. at 823-25.
- Statements made by student organizations at the University of Wisconsin such as Future Financial Gurus of America, the International Socialist Organization, the College Democrats, the College Republicans, and the American Civil Liberties Union Campus Chapter. *Southworth*, 529 U.S. at 223.
- Statements made by Legal Services attorneys representing welfare claimants. *Velazquez*, 531 U.S. at 538-39.

On the other hand, government speech includes:

- Invocations delivered by students (where the students chose the texts of the invocations) pursuant to school district policy before high school football games. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-09 (2000).

- Statements made by physicians on family planning topics carrying out a federal program to support preventive family planning. *Rust v. Sullivan*, 500 U.S. 173, 178-80 (1991).

The Pork Act is not like *Rosenberger* or *Southworth* – where the government decided to let a hundred flowers bloom, and then refused to water one of them. Nor does this case involve speech by an outside actor intending to influence the government, as in *Abood*, *Keller*, or *Velazquez*. (Indeed, it is strictly forbidden for Pork Checkoff funds to be used to influence legislation or governmental policy. 7 U.S.C. § 4809(e); 7 C.F.R. § 1230.74(a). *See* 66a, 71a.)

Rather, since 1985, the government through its elected representatives has chosen to convey the message to the public that pork, generically, is healthy and nutritious, just as it has chosen to fund countless advertisements that drugs and smoking are harmful to health. The generic ads run by the National Pork Board and State Pork Producer Associations, all of which have been pre-screened and pre-approved by USDA, are delivering a government message. It was Congress – not some unelected private entity – that decided in 1985 to promote pork generically.

Regardless of how one reads this Court's government speech precedents, the Sixth Circuit's decision to invalidate the Pork Act cannot be fit within them. "The simplest and clearest example of government speech advancing a point of view is provided when a 'law' specifically adopts a program of promoting a specific message." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 *Iowa L. Rev.* 1377, 1384 (2001). That is exactly what happened here in 1985.

Furthermore, it bears particular emphasis here that, unlike in *Rust*, a federal cabinet department has not merely decided on a general message and left it to others to deliver, but that department has actually reviewed and (where necessary) wordsmithed every advertisement. Even the district court acknowledged that "[r]eview of the organizational structure behind Pork Act advertising evidences a complex structure with extensive government oversight." *See* 40a.

The Respondents conceded below that USDA makes "substantive" modifications to 4 percent of the ads that it reviews. *If these ads involved private speech, one might ask, why is USDA telling the Pork Board and State Pork Producer Associations what to say? Would that not be a flagrant First Amendment*

violation?[4] Indeed, prior restraints, such as USDA performs on Pork Act-funded advertisements and producer communications, raise the most serious First Amendment concerns and – as a practical matter – are almost never sustained against constitutional attack. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers case). Yet prior, content-based restraints are the norm with respect to Pork Act-funded speech, demonstrating that this is government, not private, speech.

Moreover, the Pork Checkoff is not just subject to "traditional political controls," *Southworth*, 529 U.S. at 229, but to some non-traditional controls as well. Of course, the Pork Checkoff could be terminated through the normal legislative process (and indeed Respondents have aggressively lobbied for its termination). However, the Secretary of Agriculture also has discretionary authority to terminate the Pork Checkoff under 7 U.S.C. § 4812(a) (67a-68a). Thus, Respondents (or anyone else) can bring about termination of the Pork Checkoff by any of the following three methods: (1) convincing Congress to change the law; (2) electing a President whose Secretary of Agriculture decides

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[4] Notably, prior to this litigation, Respondent Campaign for Family Farms had asked USDA on several occasions to restrict or prohibit certain categories of Pork Checkoff-funded communications.

that the Pork Checkoff is not effectuating the purposes of the Pork Act; or (3) obtaining 15 percent support for a binding referendum on the Pork Checkoff. 7 U.S.C. § 4812(b) (68a).

Additionally, the Sixth Circuit's decision is totally at odds with the Ninth Circuit's ruling in *Downs*, 228 F.3d 1003, that sundry materials posted by faculty and staff on a school bulletin board constituted government speech. In that case, the Los Angeles school district had issued a memorandum stating that it would provide posters and materials in support of Gay and Lesbian Awareness Month. Staff members at one school created a bulletin board where individual faculty and staff also could post their own separate materials "subject to the oversight of the school principal, who had ultimate authority within the school over the content of the boards." *Id*. at 1006. A number of faculty and staff posted messages urging tolerance and non-discrimination (including, of course, many materials they had not written themselves); one teacher, however, tried to post materials critical of homosexuality on a bulletin board and was prevented from doing so. In rejecting the teacher's freedom of expression claim, the court of appeals held that the bulletin boards were "the government itself speaking." Specifically, the court concluded, "Because the bulletin boards were a manifestation of the school board's

policy to promote tolerance, and because [the school administration] had final authority over the content of the bulletin boards, all speech that occurred on the bulletin boards was the school board's and LAUSD's speech." *Id*. at 1012. Consistent with this Court's precedents, the Ninth Circuit focused on whether a government message was being delivered, *i.e.*, whether the speech was a "manifestation" of government "policy."

To summarize: (1) all generic advertisements funded by the Pork Act deliver a congressional message; (2) all of them are scrutinized in advance by USDA and can be (and often are) modified or rejected; and (3) USDA literally owns the speech as any copyrights, trademarks, inventions, and publications created from Pork Checkoff dollars are the property of the federal government. In short, the government has more control over the message than it had in *Rust*, *Santa Fe* or *Downs*. Since those cases were found to involve government speech, this case clearly does.

III. The Sixth Circuit's Three-Part Test Creates a Dangerous Precedent with Far-Reaching Implications.

The Sixth Circuit's decision is likely to have sweeping, adverse consequences. While the Sixth Circuit's reliance on a three-part test (*see* 8a-9a)

may make its opinion *seem* moderate, its view of government speech is truly radical. The plain facts are:

1. Virtually all government programs are targeted to particular groups or industries.

2. Much of what the government says is not the original work product of its own employees.

3. Governments are creative at raising money and levy various taxes, assessments and user fees all the time. Indeed, in tight budgetary times, these kinds of exactions tend to proliferate, as elected representatives take the view that those who directly benefit from a government program ought to pay for it.

Thus, a government speech analysis based on these three tests will inevitably call all sorts of federal programs into question.

To begin with, most federal programs – not just the Pork Act – are designed to benefit a particular group. That is often Congress's intent, *i.e.*, to help one sector of our economy, in the belief that this makes America stronger and better as a whole. Congress demonstrated this intent when it enacted the Pork Act: "Congress finds that… the production of pork and pork products plays a significant role in the economy of the United States…. [T]he maintenance and expansion of

existing markets, and development of new markets, for pork and pork products are vital to… the general economy of the United States…." *See* 56a. Congressional intent to benefit a specific industry is not a reason for striking down a federal program.

Furthermore, most of us cannot write like Ralph Ellison, Edith Wharton, or F. Scott Fitzgerald. Federal employees are no exception. Like the rest of us, therefore, they frequently borrow from, ratify, approve, or adopt the speech of others. However, it does not make speech any less the government's because the government asked people with greater ability and expertise to craft the government's message.

Just as the government routinely contracts for outside services in other areas, in this case USDA has partnered with experts, subject to various controls over the final product. If carried to its logical conclusion, the Sixth Circuit's position could bar the government from obtaining private assistance in any communications-related area. To put it another way, no one would suggest that under the First Amendment, a pamphleteer is entitled to less protection because he or she did not "create" the pamphlet. By the same token, however, the government must be

permitted to speak through speech "created" by others as well. Indeed, that is one teaching of *Rust*.

Lastly, much of what our government does is not funded by general revenues. The government levies all kinds of narrowly focused taxes, user fees, and assessments – on vehicles, gasoline, airline tickets, etc. This has nothing to do, logically or legally, with whether the speech funded by that exaction is that of the government. It would be absurd to say that an airline passenger has a First Amendment right to enjoin an airport authority from displaying an anti-terrorism message in an airport terminal, just because that message was funded by security fees imposed on that passenger rather than general tax revenues.

Moreover, the suggestion that government speech has to be financed from general tax revenues flies directly in the face of both *Rosenberger* and *Southworth*. In *Rosenberger*, the funding mechanism was "a mandatory fee of $14 per semester assessed to each full-time student." 515 U.S. at 824. Yet, when this Court indicated that the University of Virginia could "disburse[] public funds to private entities to convey a governmental message," *id*. at 833, it was taking for granted that this $14 per student per semester assessment amounted to "public funds." The constitutional problem did not arise from the fee, but from what the university was

doing with it. Specifically, the university was utilizing the fee "to encourage a diversity of views from private speakers" while also imposing a content-based restriction. *Id*. at 834.

Similarly, just four years ago, in *Southworth*, 529 U.S. at 229, this Court said, "The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties" (emphasis added). This Court added, "If the challenged speech here were *financed by tuition dollars* and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id*. (emphasis added). Thus, according to *Southworth*, government speech may be financed by "other exactions," not just by general revenues.

By any reasonable standard, the "Pork Tax" – which is analogous to a sales tax and is paid by corporations, partnerships and individuals alike as a flat percentage of the sale price or value – is less targeted than the fees that were involved in *Rosenberger* and *Southworth*.

The Sixth Circuit's tripartite test not only is a startling deviation from precedent, it also presents a threat to commonplace government programs. The threat is particularly serious here, because the Sixth Circuit also decided to

invalidate this $50 million nationwide program in its entirety, even though only four named individuals had objected to it and even though most of the program does not involve speech. The court of appeals failed to mention that both the Pork Act and the accompanying regulations contain provisions allowing for specific relief that would have cured all of Respondents' objections – even assuming those objections to be valid. 7 U.S.C. § 4814(a) (authorizing Secretary to grant exemption from order); 7 C.F.R. § 1230.90 (severability clause). By striking down the entire Pork Act (not just the advertising portions), as to all persons (including pork producers who strongly support it), the Sixth Circuit has now extended an open national invitation to objectors. Anyone who is subject to an assessment or exaction for a federal program that includes some speech may come to Kentucky, Michigan, Ohio, or Tennessee and file a lawsuit to shut down the entire program. There is no reason for anyone to challenge an agricultural commodity programs anywhere else.[5]

Consider the following examples.

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[5] What the Sixth Circuit did here would be analogous to a decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), that New Hampshire had to recall every license plate in the state.

Under the Food, Drug & Cosmetic Act, drug manufacturers seeking approval of a new drug must file an application and pay a user fee. 21 U.S.C. §§ 355, 379h. That fee covers the costs of FDA's review process. FDA then assigns an advisory panel (comprised exclusively of private individuals) to review and report back on the drug. *Id*. § 355(n). Under the Sixth Circuit's opinion, that system violates the First Amendment. It is an "abridgment" of drug manufacturers' First Amendment rights because they have to pay for speech by advisory panel members with which they may disagree.

California has a $.25 per pack surtax on cigarette sales to fund various programs, including anti-tobacco advertising. In other words, California uses taxes paid by a specific industry to fund advertising that condemns that industry. Is this government speech? Under the Sixth Circuit's decision, clearly not. If it is unconstitutional to impose an assessment on an industry to fund speech benefiting it, as the Sixth Circuit concluded, then certainly the same must be true of an assessment to pay for speech attacking that industry. The federal district court in California upheld the surtax, *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1104 (E.D. Cal. 2003), but had the case arisen in a different part of the country we can only assume the outcome would have been different.

Many governments use special taxes or assessments (such as on hotel rooms or rental cars) to promote tourism. For example, Hawaii has a Tourism Authority (a public agency, although its members are not state employees). The Tourism Authority receives most of its funding from a transient accommodations tax, then transfers much of that funding to a private entity known as the Hawaii Convention and Visitors Bureau. The HCVB recently has come under criticism for its spending and management practices. *See* Honolulu Advertiser, January 10, 2004. Under the Sixth Circuit's reasoning, it would seem relatively easy for someone to shut down the HCVB by bringing a First Amendment claim, arguing that he or she had to pay the accommodations tax, thinks Hawaii's beaches are getting too crowded, and objects to paying for advertising that touts Hawaii's sunshine and temperate climate. Or, objection could be raised to some other aspect of HCVB's advertising, such as a controversial recent joint promotion with Disney.

These are not improbable hypotheticals; indeed, one of them is already an actual lawsuit. And, they demonstrate why clarification of government speech doctrine should be an urgent priority of this Court.

IV. The Government Speech Doctrine Has Created Both Confusion and Conflict in Lower Courts and There is a Pressing Need to Address It Now.

Although the Sixth Circuit has adopted a particularly odd approach to government speech, it is not the only lower court apparently confused by this Court's pronouncements.

The Sixth Circuit's decision has come at a time when agricultural commodity promotion programs are already in a state of legal chaos. In *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997), this Court decided that mandatory assessments to fund generic advertising of California tree fruits were constitutional. However, four years later, this Court upheld the constitutional challenge to the Mushroom Act in *United Foods*, 533 U.S. 405. At the same time, this Court expressly declined to rule on the government speech argument because it had not been timely raised. *Id*. at 417.

Since then, there have been a host of lawsuits over these programs centering on the government speech issue – with conflicting results. In *Livestock Marketing Assn.*, 335 F.3d at 723-26, the Eighth Circuit seemingly conflated government speech with the germaneness analysis in *United Foods*, and concluded that because the Beef Act failed the *United Foods* germaneness test, the Beef Checkoff program could not be considered government speech – even though *United Foods* had expressly reserved the government speech issue. In *Charter*, 230 F.Supp.2d at

1139, the court reviewed the very same record as in *Livestock Marketing Assn.* and found that the Beef Checkoff did involve government speech because the government "disseminates its chosen message by way of private speakers." In *Pelts & Skins, L.L.C. v. Jenkins,* 259 F.Supp.2d 482 (M.D. La. 2003), the court found that a state program to benefit the alligator industry did not involve government speech because it was funded by licensing fees rather than "general tax dollars." Thus, the only certain statement one can make about these agricultural commodity programs is that courts have divergent views as to whether and when the government speech doctrine applies.

Since this Court observed in *United Foods* that government speech presented "difficult issues" (533 U.S. at 417), it is not surprising that the Court's decision has spawned considerable litigation already, and that lower courts have reached different conclusions.

Having the benefit of a full record, which was not available in *United Foods*, this Court should complete the task of ruling on the constitutionality of these agricultural commodity promotional programs. Individuals and entities like the Petitioners here should not be penalized simply because the government failed to

raise an argument on time in *United Foods*. The unfinished business from *United Foods* needs to be completed.

Furthermore, Petitioners believe this Court's pronouncements in *Rosenberger* and *Southworth* are clear, but since some lower courts seem to be getting a different message, *see Pelts & Skins, L.L.C.*, 259 F.Supp.2d at 490; *Summit Medical Center of Alabama, Inc. v. Riley*, 284 F.Supp.2d 1350, 1360-61 (M.D. Ala. 2003), it appears the lower courts need far more guidance on whether the government can pay for a speech-related program out of something other than general tax revenues.

Moreover, acts of Congress are at stake. The Pork Act alone is a $50 million a year federal program. As found by an exhaustive economic study, it contributes many times that figure in across-the-board benefits to all hog farmers, large and small. The Pork Act does not just provide generic advertising (although this is important enough), but also research into swine health, programs like Pork Quality Assurance ("PQA") to assure that pork is safe to eat, and initiatives to open up overseas markets. Congress has enacted numerous other commodity promotion programs, covering industries such as cotton, potatoes, eggs, honey, and soybeans.

Lastly, the government speech question reverberates far beyond just these commodity promotion programs. Information is becoming ever more important in our society, and governments are increasingly strapped for cash. These two trends can be expected to result in a tide of government speech litigation in the future unless this Court brings greater clarity to the underlying constitutional principles. Cases have already been brought concerning special license plates, childbirth counseling, and tobacco advertising where government speech was the pivotal issue. None of these programs, however, has the proven economic track record of the Pork Act. Before this Act is permanently invalidated, we respectfully ask the Court to consider and resolve the fundamental question of whether the government is speaking.

CONCLUSION

This Court should grant a writ of certiorari and reverse the judgment and decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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