No.

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

CAMPAIGN FOR FAMILY FARMS, ET AL.

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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QUESTIONS PRESENTED

1. Whether the Pork Promotion, Research, and Consumer Information Act of 1985 (Pork Act), 7 U.S.C. 4801 *et seq.*, and the implementing Pork Promotion, Research, and Consumer Information Order (Pork Order), 7 C.F.R. Part 1230, violate the First Amendment insofar as they require pork producers to pay assessments for generic advertising with which they disagree.

2. Whether the district court erred in issuing a nationwide injunction against the collection of all assessments under the Pork Act, including those from pork producers who support the generic advertising and those used to fund activities other than generic advertising.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Ann Veneman, Secretary, United States Department of Agriculture; the United States Department of Agriculture, and the Cattlemen's Beef Promotion and Research Board. The respondents are:

Campaign For Family Farms
James Dale Joens
Richard Smith
Rhoda Perry
Lawrence Ginter
National Pork Producers Council
Peter Blauwikel
Bob Bloomer
High Lean Pork, Inc.
California Pork Producers
Kentucky Pork Producers
Indiana Pork Producers
New York Pork Producers
Ohio Pork Producers

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The Solicitor General, on behalf of the Secretary of Agriculture, the United States Department of Agriculture (USDA), and the Administrator of the Agricultural Marketing Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 348 F.3d 157. The opinion of the district court (App., *infra*, 15a-55a) is reported at 229 F. Supp. 2d 772.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2003. On January 12, 2004, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 19, 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech.

2. The Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. 4801 *et seq.*, is reproduced at App., *infra.*, 56a-91a.

3. The Pork Promotion, Research, and Consumer Information Order, 7 C.F.R. Part 1230, is reproduced in pertinent part at App., *infra*, 92a-121a.

STATEMENT

This case presents a First Amendment challenge to the Pork Promotion, Research, and Consumer Information Act of 1985 (Pork Act), 7 U.S.C. 4801 *et seq.*, which requires pork producers and importers to pay assessments to fund generic advertising and other activities conducted under the supervision of the Secretary of Agriculture by a statutorily created board whose members are appointed by the Secretary. The Sixth Circuit held that the Act violates the First Amendment rights of producers who object to contributing to the generic advertising, rejecting two grounds of defense of such statutes that this Court did not consider in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). The Sixth Circuit then affirmed a nationwide injunction directing the Secretary to cease collecting *all* assessments under the Act. The Eighth Circuit recently resolved substantially similar issues against the government in *Livestock Marketing*

Association v. *United States Department of Agriculture*, 335 F.3d 711 (2003), in which the government has filed a petition for a writ of certiorari. *Veneman* v. *Livestock Marketing Association*, No. 03-1164 (filed Feb. 13, 2004).

1. a. In 1985, Congress enacted the Pork Act to establish a coordinated program of promotion, research, and consumer information concerning pork and pork products. The program is carried out by the National Pork Board (Pork Board), an entity created by the Act, under the supervision of the Secretary. 7 U.S.C. 4808. The program is funded by an assessment (commonly referred to as a "checkoff") on all hogs sold in the United States as well as on all hogs and pork products imported into this country. 7 U.S.C. 4809.

In the Pork Act, Congress found that "the production of pork and pork products plays a significant role in the economy of the United States," that "pork and pork products must be available readily and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and that "the maintenance and expansion of existing markets, and development of new markets, for pork and pork products" are vital to the pork industry and "the general economy of the United States." 7 U.S.C. 4801(a)(2)-(4). Accordingly, Congress declared as its purpose "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).

The Pork Act directs the Secretary to promulgate an order implementing the program, 7 U.S.C. 4803; defines the terms "promotion," "research," and "consumer information," 7 U.S.C. 4802(2), (12), and (13); and specifies provisions that are required or permitted to be contained in the order, 7 U.S.C. 4806-4810. The Act provides for the order to remain in effect only if approved by a majority of pork producers voting in a referendum. 7 U.S.C. 4811. The Act also authorizes the Secretary to terminate the program if she determines that it is not effectuating its purpose, 7 U.S.C. 4812(a), and to conduct subsequent referenda on continuing the program at the request of at least 15% of pork producers, 7 U.S.C. 4812(b).

In 1986, the Secretary promulgated the Pork Promotion, Research, and Consumer Information Order (Pork Order), 7 C.F.R. Part 1230. In 1988, the Pork Order was approved by nearly 80% of pork producers voting in a referendum. App., *infra*, 4a.

b. The Pork Act and the Pork Order establish two entities to carry out the program. The National Pork Producers Delegate Body (Delegate Body) is composed of 167 members, including at least two from each pork-producing State and representatives of pork importers. The members, all of whom must themselves be pork producers or importers, are appointed by the Secretary based on nominations by state pork producer associations and recommendations by importers. 7 U.S.C. 4806(b); 7 C.F.R. 1230.30(a), 1230.33. The Delegate Body nominates pork producers and importers to serve on the Pork Board, recommends to the Secretary changes in the rate of assessments, and determines the percentage of assessments to be remitted to state associations for their own promotion, research, and con-

sumer information programs consistent with the Pork Act. 7 U.S.C. 4806(g) and (h); 7 C.F.R. 1230.39.[1]

The Pork Board consists of 15 pork producers and importers, all of whom are appointed by the Secretary. 7 U.S.C. 4808; 7 C.F.R. 1230.54. The principal responsibility of the Pork Board is to "develop * * * proposals for promotion, research, and consumer information plans and projects," which must be submitted to the Secretary for approval. 7 U.S.C. 4808(b)(1)(A) and (B); 7 C.F.R. 1230.17, 1230.58, 1230.60. All of those plans and projects must be "designed to strengthen the position of the pork industry in the marketplace and to maintain, develop, and expand domestic and foreign markets for pork and pork products." 7 C.F.R. 1230.60(a)(1). No plan or project may make any false or misleading statement concerning pork or a competing product, 7 U.S.C. 4809(d), 7 C.F.R. 1230.60(c), or refer to a private brand name without the Secretary's approval, 7 C.F.R. 1230.60(d). No assessments may be used to influence legislation. 7 U.S.C. 4809(e).

The Pork Board has used assessments to fund a variety of promotional activities, including generic advertising directed to consumers, such as the "Pork: The Other White Meat" campaign. C.A. App. 1888. Other promotional activities have included cooking contests involving chefs, the preparation of analyses to demonstrate pork's profit potential to retailers, the analysis of foreign markets, and the training of retailers, distributors, and food-service operators in pork marketing and presentation techniques. *Ibid.* Aside from promotional activities, the Pork Board has sponsored research on the safety, quality, and nutritional

[1] In 2001, for example, state associations were allocated 18% of assessment funds. App., *infra*, 41a-42a.

value of pork, including studies on eliminating or controlling the spread of swine-borne diseases and foodborne pathogens, and has developed consumer information materials on pork safety, preparation, and nutritional value. *Id.* at 1888-1889.

All of the Pork Board's activities are subject to the control of the Secretary, which is exercised through the Agricultural Marketing Service. The Secretary exercises approval authority over the Pork Board's annual budget as well as over all of its proposed plans and projects. 7 U.S.C. 4808(b)(1)(B) and (2); 7 C.F.R. 1230.58(b), (d) and (e)(1). The Secretary also exercises approval authority over the budgets, plans, and projects of state pork producer associations for the use of their share of Pork Act assessments. 7 U.S.C. 4808(b)(2)(B); 7 C.F.R. 1230.58(e)(2); see 7 U.S.C. 4808(b)(3) ("No plan, project or budget [of the Pork Board or a state association] may become effective unless approved by the Secretary."). In practice, moreover, "the Department [of Agriculture] reviews each Pork Act advertisement before airing," whether the advertisement originated with the Pork Board or a state association, and has required revision of some advertisements. App., *infra*, 42a.

2. a. This case began as a challenge to the Secretary's decision to terminate the Pork Order in accordance with the outcome of a voluntary referendum. Ultimately, the Secretary entered into a settlement with the plaintiffs, under which she agreed not to terminate the Pork Order, but required certain changes in the operation of the program. See App., *infra*, 40a.[2]

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[2] The original plaintiffs have filed their own certiorari petition seeking review of the court of appeals' decision in this case. *Michigan Pork Producers Ass'n* v. *Campaign For Family Farms*, No.

Respondents Campaign For Family Farms and four individuals, who had intervened to support the termination of the Pork Order, then asserted various claims against the Secretary and the Administrator of the Agricultural Marketing Service. Among other things, they contend that the Pork Act and the Pork Order violate the First Amendment by assessing them for generic advertising and other activities with which they disagree. For example, respondents object to the Pork Board's generic advertising as promoting "lean pork," which they claim is produced under unsafe and inhumane conditions, and as not promoting what they perceive as the unique qualities of pork produced on family farms. See App., *infra*, 19a-21a.

b. The district court held on summary judgment that "the mandated system of Pork Act assessments is unconstitutional since it violates [respondents'] rights of free speech and association." App., *infra*, 51a. The court rejected the contention that generic advertising conducted under the Pork Act is government speech, which the government may require objecting persons to fund without violating their First Amendment rights. The court reasoned that, "[t]hough the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into 'government speech.'" *Id.* at 47a.

The district court then held that the assessment provisions of the Pork Act cannot be sustained under

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03-1043 (filed Jan. 20, 2004). Although those parties are also respondents with respect to the government's petition in this case, this petition uses the term respondents to refer to Campaign For Family Farms and the other defendants/cross-plaintiffs who challenged the constitutionality of the Pork Act below.

the analysis applied in this Court's two previous cases involving generic advertising programs for agricultural products. The court reasoned that the Pork Act program more closely resembles the Mushroom Act program, which was held not to satisfy that analysis in *United Foods*, 533 U.S. at 412-416, than it does the tree fruit program that was upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). App., *infra*, 50a. The court did not analyze the Pork Act assessments under the intermediate scrutiny standard articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). See App., *infra*, 48a.

As a remedy, the district court declared the Pork Act unconstitutional and entered a nationwide injunction directing the Secretary and the Administrator "to cease the collection of assessments under the Pork Act and to cease the operation of the Pork Check-off Program." App., *infra*, 53a, 55a. The court refused to limit the injunction to assessments against the objecting parties in this case. *Id.* at 52a. And, although the court found that only $29.4 million of the Pork Board's $57.5 million budget for 2001 was designated for "demand enhancement" activities such as advertising (*id.* at 41a), the court refused to limit the injunction to the portion of assessments used to fund advertising and similar expressive activities. *Id.* at 52a-53a.

3. The Sixth Circuit affirmed. App., *infra*, 1a-14a.

The court of appeals, like the district court, held that generic advertising conducted by the Pork Board is not government speech. The court acknowledged that "the government may dictate the content and even the viewpoint of speech when the government itself is the speaker." App., *infra*, 7a. The court held, however, that the Pork Act involves not government speech, but

"wholly private" speech that the government merely "facilitate[s]." *Id.* at 9a. The court accorded significance to the facts that "the primary purpose of the Pork Act is to strengthen the market position of the pork industry and increase the domestic markets for pork and pork products"; that the Act's programs are funded by assessments against pork producers and importers rather than by general tax revenues; and that, although the Secretary retains ultimate control over the generic advertising conducted under the Act, the advertising is created by the Pork Board, which consists of pork producers, and entities under contract to the Board. *Id.* at 8a-9a.

The court of appeals also refused to hold that the Pork Act provides for permissible regulation of commercial speech under the intermediate scrutiny analysis applied in cases such as *Central Hudson.* The court viewed the *Central Hudson* analysis as inapplicable because, in contrast to many laws to which that analysis has been applied, "[t]he Pork Act does not directly limit the ability of pork producers to express a message." App., *infra*, 12a. The court instead characterized the Pork Act as "compel[ling] [pork producers] to express a message with which they do not agree." *Ibid.*

Finally, having found that the Pork Act violates the First Amendment by assessing respondents for generic advertising and similar promotional activities, the court of appeals sustained the district court's nationwide injunction against the collection of all assessments under the Act. App., *infra*, 12a-14a. The court rejected the government's arguments that any relief should be confined to respondents themselves, as well as to the portion of the assessments used to fund generic advertising and similar activities. The court reasoned that, at least in the absence of a textual severability

provision, "[i]t would contort congressional intent" to preserve the Act except to the extent that it requires respondents or other persons to contribute to the costs of speech to which they object. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

The court of appeals has exercised "the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), striking down a central provision of a statute designed to protect the livelihood of pork producers and others in the pork industry, to provide information to consumers, and to strengthen the national economy. That holding is incorrect. The Pork Act is not a law "abridging the freedom of speech" under the First Amendment. The Pork Act promotes speech—by the government—using modest assessments from persons who have chosen to make their living in the pork industry. Respondents produce the very product that the government has chosen to promote in the Pork Act, and respondents are not constrained by the Pork Act from communicating their own messages.

In holding that the generic advertising conducted under the Pork Act is not government speech—a question expressly reserved in *United States* v. *United Foods*, 533 U.S. 405, 417 (2001)—the Sixth Circuit has called into question the government's ability to convey messages to the public. In also declining to sustain the Pork Act under the intermediate scrutiny generally applied to commercial speech regulations, the Sixth Circuit has rendered a decision that cannot be reconciled with the Third Circuit's decision in *United States* v. *Frame*, 885 F.3d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), which sustained the similar Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*,

under stricter scrutiny. And, in upholding a nationwide injunction against the collection of all assessments under the Pork Act, the Sixth Circuit has acted contrary to the principle that injunctions should be no broader than necessary to provide relief to the complaining parties.

The government has recently sought this Court's review of the Eighth Circuit's decision in *Livestock Marketing Association* v. *United States Department of Agriculture*, 335 F.3d 711 (2003), which presents questions virtually identical to those presented here in the context of the Beef Act. See *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164 (filed Feb. 13, 2004); see also *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Ass'n*, No. 03-1165 (filed Feb. 13, 2004). This petition should be held pending the disposition of the petitions in *Livestock Marketing Association.*

I. GENERIC ADVERTISING CONDUCTED UNDER THE PORK ACT IS GOVERNMENT SPEECH, WHICH IS NOT SUBJECT TO THE CONSTRAINTS OF THE FIRST AMENDMENT

For reasons more extensively explained in the government's certiorari petition in *Livestock Marketing Association* (at 12-24), statutes such as the Beef Act in that case and the Pork Act here involve programs of government speech. The generic advertising conducted under those Acts serves public purposes identified by Congress, is confined to a message specified by Congress, and is disseminated by a governmental entity that was created by Congress and is subject to the control of the Secretary of Agriculture. The First Amendment does not limit the government's ability to engage in speech, whether funded by general tax revenues or by "user fees" assessed against those, such as pork

producers here, who benefit most from the speech and who are members of an industry that Congress has chosen to protect. See, *e.g.*, *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000) (explaining that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties," even when the government will spend the funds so raised "for speech and other expression to advocate and defend its own policies").

A. Although this Court has not defined the precise contours of the government speech doctrine, the Court's cases suggest that the program is insulated from First Amendment challenge under that doctrine when (i) the government establishes a program to convey a specified message, (ii) in order to advance a public purpose, and (iii) retains ultimate editorial control over the message. See, *e.g.*, *Southworth*, 529 U.S. at 229 (suggesting that, if a state university established a program "to advance a particular message" of its own and remained "responsible for its content," the program would involve government speech). Under those criteria, the Pork Act, like the Beef Act in *Livestock Marketing Association*, is properly viewed as establishing a program of government speech.

First, Congress directed the creation of the program at issue here. Congress identified several public purposes that were to be served by the Pork Act: advancing "the welfare of pork producers" and others in the pork industry, stabilizing "the general economy of the United States," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 4801(a)(3) and (4). Congress specified the activities that could be conducted under the program—namely, "promotion, research, and consumer informa-

tion," 7 U.S.C. 4801(b)(1)—as well as the content of the message to be conveyed through those activities. In particular, through its definition of the term "promotion," Congress made clear that advertising and other promotional activities conducted under the Pork Act are to be directed solely to "present[ing] a favorable image for porcine animals, pork, or pork products to the public with the intent of improving the competitive position and stimulating sales of porcine animals, pork, or pork products." 7 U.S.C. 4802(12). Congress prohibited the use of any funds collected under the Pork Act to make "a false or misleading claim on behalf of pork or a pork product" or "a false or misleading statement with respect to an attribute or use of a competing product," or "for the purpose of influencing legislation." 7 U.S.C. 4809(d) and (e).

Second, Congress created a governmental entity—the Pork Board—to carry out the Pork Act's program. Congress specified the composition of the Pork Board, and provided for appointment of its members by the Secretary. See 7 U.S.C. 4808(a); see also 7 U.S.C. 4806(a) and (b) (Delegate Body). Congress defined the powers and duties of the Pork Board. See 7 U.S.C. 4808(b); see also 7 U.S.C. 4806(g) and (h) (Delegate Body). And Congress specified the circumstances (aside from repeal of the Pork Act itself) in which the Pork Board would be required to cease operations. 7 U.S.C. 4812(a) and (b). Cf. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes

of the First Amendment" when it restricts the speech of others).

Third, Congress provided that a politically accountable official, the Secretary, would exercise control over the advertising and other activities conducted by the Pork Board. The Secretary has approval authority over the annual budget proposed by the Pork Board for the use of assessment revenues, 7 U.S.C. 4808(b)(2); 7 C.F.R. 1230.58(e)(1), as well as over all of its plans and projects, 7 U.S.C. 4808(b)(1)(A) and (B); 7 C.F.R. 1230.58(d); 7 C.F.R. 1230.60(a). As noted above, the Secretary appoints all members of the Pork Board, see 7 U.S.C. 4808(a), and may remove any member for cause, see 7 C.F.R. 1230.55(b). See also *Bowsher* v. *Synar*, 478 U.S. 714, 726-727, 734 (1986) (noting significant control exercised through appointment and removal power). In fact, the Secretary, through USDA's Agricultural Marketing Service (AMS), exercises substantial control over the message conveyed by the Pork Board, as well as the state associations that receive assessment funds. See, *e.g.*, C.A. App. 1773-1884 (Declaration of Barry Carpenter, Deputy Administrator, Livestock and Seed Program, AMS, with exhibits).

Accordingly, because Congress enacted the Pork Act to serve public purposes, directed the message to be disseminated, created a governmental entity to disseminate it, and required the Secretary's continuing control over that entity, the Pork Act is properly understood as creating a program of government speech. A person does not have any First Amendment right to avoid taxes or other exactions to fund government speech. See *Southworth*, 529 U.S. at 229.

B. In concluding that the generic advertising conducted under the Pork Act is not government speech, the Sixth Circuit accorded significance to the facts that

the Act is designed to strengthen a particular industry; that the generic advertising and other expressive activities conducted under the Act are funded by assessments against persons in that industry; and that the speech is carried out by an entity whose members, while appointed by the Secretary, are drawn from that industry. See App., *infra*, 8a-9a. None of those facts renders the government speech doctrine inapplicable.

The welfare of a particular industry is, contrary to the court of appeals' suggestion, an appropriate subject of governmental concern. As Congress found in enacting the Pork Act, "the production of pork and pork products plays a significant role in the economy of the United States," thereby making the maintenance and expansion of markets for pork "vital to * * * the general economy," as well as to the many persons who participate in the pork industry. 7 U.S.C. 4801(a)(2) and (4).

The government is entitled to fund its speech through whatever means it considers most appropriate, and thus is not limited, as the court of appeals supposed, solely to general tax revenues. Congress consequently may impose the costs of government speech on participants in the industry that Congress has chosen to promote, on the understanding that those persons would "most directly reap the benefits of" the speech. 7 U.S.C. 7401(b)(2) (making findings with respect to generic advertising programs, including the pork program). The assessments at issue here thus are a species of "user fees," which this Court has viewed as a permissible means of funding many government activities. See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-62 (1989); *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 461-462 (1988); *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941).

Furthermore, the government is entitled to speak through whatever public or private entity it considers most suited to the task. See, *e.g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (recognizing that the government speech doctrine applies when the government "disburses public funds to private entities to convey a governmental message"); *Rust* v. *Sullian*, 500 U.S. 173, 192-193 (1991). The government thus may choose to speak through a congressionally created body, which is composed entirely of members who are appointed and removable by the Secretary, and which acts under the Secretary's ongoing supervision and control. It is immaterial that the members of that body are themselves pork producers and importers.

C. Although three courts of appeals have refused to sustain the Pork Act or the Beef Act under the government speech doctrine, those courts did not rely on any consistent rationale. (A fourth case, in which the district court sustained the Beef Act under that doctrine, is currently before the Ninth Circuit. *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1129-1140 (D. Mont. 2002), appeal pending, No. 02-36140.). Moreover, in the first of those cases, the Third Circuit acknowledged that "the issue [is] a close one," and that there are "sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute 'government speech.'" *Frame*, 885 F.3d at 1131-1132. Because the various grounds on which the courts of appeals relied in these cases are erroneous for the reasons stated above and in the government's petition in *Livestock Marketing Association* (at 18-22), this Court's review is warranted.

The question whether the government speech doctrine defeats First Amendment challenges to assess-

ments for generic advertising programs under statutes such as the Pork Act is an important one for American agriculture and American consumers. Indeed, in *United Foods*, the Court expressly left unresolved the question whether the generic advertising program at issue there could be sustained as one involving government speech. See 533 U.S. at 416-417.

In addition to the generic advertising programs for beef and pork, Congress has authorized, and the Secretary has implemented, similar programs for a number of other agricultural commodities. See, *e.g.*, 7 U.S.C. 2101 *et seq.* (cotton); 7 U.S.C. 2611 *et seq.* (potatoes); 7 U.S.C. 2701 *et seq.* (eggs); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 6401 *et seq.* (fluid milk); Pet. 23 n.6, *Veneman* v. *Livestock Marketing Ass'n*, No. 03-1164. Moreover, Congress has enacted a statute, 7 U.S.C. 7411 *et seq.*, that authorizes marketing programs for any agricultural commodity, under which generic advertising programs have been established for such products as peanuts, 7 C.F.R. Part 1216; blueberries, 7 C.F.R. Part 1218, and lamb, 7 C.F.R. Part 1280. Several States have also established their own commodity marketing programs, some of which may resemble the pork program at issue here and the beef program in *Livestock Marketing Association.*

II. THE ASSESSMENT PROVISIONS OF THE PORK ACT ARE CONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY APPLICABLE TO REGULATIONS OF COMMERCIAL SPEECH

Aside from the government speech question, the Sixth Circuit also erred, as did the Eighth Circuit in *Livestock Marketing Association*, in refusing to sustain the assessment provisions at issue under the intermediate scrutiny standard articulated in *Central Hud-*

son Gas & Electric Corp. v. *Public Service Comm'n*, 447 U.S. 557 (1980), for regulations of commercial speech. These decisions, which themselves diverge in their reasoning, are inconsistent with the Third Circuit's holding in *Frame* sustaining the Beef Act under stricter scrutiny. See *Frame*, 885 F.2d at 1134-1137.

Under *Central Hudson*, a regulation of commercial speech will be upheld against a First Amendment challenge if the regulation (1) promotes a "substantial" governmental interest, (2) "directly advances the governmental interest asserted," and (3) is "not more extensive than is necessary to serve that interest." 447 U.S. at 566; see *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989) (explaining that the *Central Hudson* standard requires a legislature not to employ "the least restrictive means" of regulation, but merely to achieve a "reasonable" fit by adopting regulations "in proportion to the interest served") (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

The Sixth Circuit refused even to apply the *Central Hudson* analysis in this case, reasoning that *Central Hudson*'s "more lenient standard of review" is inapposite because the Pork Act does not "directly limit the ability of pork producers to express a message," but instead "compels them to express a message with which they do not agree." App., *infra*, 12a. As a threshold matter, the Sixth Circuit erred in characterizing the Pork Act as "forc[ing] [persons] to become a mouthpiece" for any message. *Ibid.* This Court has made clear that "[t]he use of assessments to pay for advertising does not require [persons subject to the assessments] to repeat an objectionable message out of their own mouths"; nor does such use of assessments "force [those persons] to respond to a hostile message when they would prefer to remain silent, or require them to

be publicly identified or associated with another's message." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997) (internal quotation marks and citations omitted). Moreover, the Sixth Circuit got it backwards in reasoning that a law, such as the one in *Central Hudson*, that prohibits a person from engaging in his own commercial speech, should be reviewed more leniently than a law, such as the Pork Act, that merely requires a person to fund a separate entity's (here, a government entity's) commercial speech. The Sixth Circuit's reasoning in that regard is inconsistent not only with the Third Circuit's reasoning in *Frame*, but also with the Eighth Circuit's reasoning in *Livestock Marketing Association*, which explicitly "disagree[d]" with the proposition that *Central Hudson* is inapplicable to statutes such as the Beef Act and the Pork Act. See 335 F.3d at 722.[3]

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[3] In *Wileman Brothers*, the United States urged the Court to evaluate the generic advertising program at issue under the analysis applied in cases, such as *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller* v. *State Bar*, 496 U.S. 1 (1990), involving compelled funding of speech, rather than under the analysis applied in cases, such as *Central Hudson*, involving regulations of commercial speech. See U.S. Br. at 18-34, *Wileman Brothers*, No. 95-1184. In the alternative, the United States urged that the program be upheld under the *Central Hudson* analysis. See *id.* at 34-48; cf. *United Foods*, 533 U.S. at 410 (noting that the government had not relied on *Central Hudson* in that case). In view of the Court's subsequent conclusion that the *Abood-Keller* analysis cannot provide a basis for sustaining programs of compelled funding exclusively or primarily for generic advertising and similar promotional activities, see *United Foods*, 533 U.S. at 415-416, the *Central Hudson* analysis, which typically has been applied to laws directed exclusively at speech, provides an alternative basis for sustaining such programs.

Like the Beef Act at issue in *Frame* and *Livestock Marketing Association*, the Pork Act is constitutional under the *Central Hudson* analysis. The Pork Act advances "substantial" governmental interests specifically identified by Congress: enhancing "the welfare of pork producers" and other members of the pork industry, stabilizing "the general economy of the United States," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 4801(a)(3) and (4).

Moreover, the Pork Act—including its generic advertising funded by producer assessments—"directly advances" those interests. This Court has repeatedly recognized the "immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569; see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 557 (2001); *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993). The assessment provisions play an integral role in advancing the government's interests. Those provisions avoid saddling taxpayers with the costs of the program, which could undermine the very support for the pork industry that Congress sought to engender, and prevent "free-riders," who would "receiv[e] the benefits of the promotion and research program without sharing the cost." *Frame*, 885 F.2d at 1135; see *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (noting the government's "vital policy interest in * * * avoiding 'free riders'" in the collective bargaining context).

Nor is the Pork Act "more extensive than is necessary to serve" the governmental interests. *Central Hudson*, 447 U.S. at 566. It "impose[s] no restraint on the freedom of any producer to communicate any message to any audience," "do[es] not compel any person to engage in any actual or symbolic speech," and "do[es]

not compel the producers to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470; see 7 U.S.C. 4809(e) (prohibition on use of assessment revenues for political activity). It requires only that pork producers contribute financially to generic advertising and other activities designed to benefit the industry in which they have chosen to participate.

In sum, the Pork Act serves substantial governmental interests, is carefully tailored to serve those interests, and is ideologically neutral. Cf. *Frame*, 885 F.2d at 1137. The Sixth Circuit's refusal to sustain the Pork Act under intermediate First Amendment scrutiny is incorrect and inconsistent with both the holding of *Frame* and the reasoning of *Livestock Marketing Association*.

III. THE LOWER COURTS ERRED IN INVALIDING THE PORK ACT'S ASSESSMENT PROVISIONS IN THEIR ENTIRETY AND ENJOINING ANY FURTHER COLLECTION OF ASSESSMENTS NATIONWIDE

In this case, as in *Livestock Marketing Association*, the court of appeals further erred in affirming the sweeping relief ordered by the district court—here, the invalidation of the assessment provisions of the Pork Act in their entirety and the issuance of a nationwide injunction "to cease the collection of assessments under the Pork Act and to cease the operation of the Pork Check-off Program." App., *infra*, 55a; see *id.* at 12a-14a. Such relief improperly "invalidate[s] more of the statute than is necessary," *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987), and is "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*,

442 U.S. 682, 702 (1979); see *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) ("[A] federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (internal quotation marks omitted).

The First Amendment violation identified by the Sixth Circuit was confined to the government's requiring respondents (or their members) to share the costs of the generic advertising and similar promotional activities under the Pork Act.[4] The Sixth Circuit did not hold that the First Amendment was violated by the government's assessing *other* pork producers for generic advertising to which those other producers have *not* objected. Nor did the Sixth Circuit hold that the First Amendment was violated by the government's assessing even respondents themselves for activities, such as food safety and nutrition research, that do not involve advertising or similar expressive activity.

Consequently, the First Amendment, even as understood by the Sixth Circuit in this case, does not require the invalidation of the assessment provisions of the Pork Act in their entirety or the nationwide injunction against the collection of any further assessments under

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[4] Respondents have asserted that assessing them for *any* Pork Act activities—including research and other non-speech activities—violates their First Amendment freedoms of speech and association. Although the district court held that the Pork Act's assessment provisions violate respondents' "rights of free speech and association," App., *infra*, 51a, the district court confined its analysis to the use of assessments for generic advertising and similar promotional activities. The Sixth Circuit did not address any separate challenge, based on the First Amendment freedom of association, to requiring respondents to pay assessments for other activities.

the Act. As this Court has recognized, when an individual's assessment for a private entity is used in part to fund political speech to which he objects, the appropriate remedy is to reduce that individual's assessment "in the proportion that [the private entity's] political expenditures bear to [its] total * * * expenditures." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 240-241 (1977); see *Keller* v. *State Bar*, 496 U.S. 1, 17 (1990).

The court of appeals viewed the Pork Act as precluding a result that would allow the collection of assessments to continue (except from producers who object to paying the portion of the assessment used to fund generic advertising and similar promotional activities). The court reasoned that the Pork Act "has no 'severability clause'" and "is incapable of functioning independently" of any (assertedly) unconstitutional provisions. App., *infra*, 12a-13a. This Court has made clear, however, that "[i]n the absence of a severability clause, * * * Congress' silence is just that—silence—and does not raise a presumption against severability." *New York* v. *United States*, 505 U.S. 144, 186 (1992) (quoting *Alaska Airlines*, 480 U.S. at 686). The severability inquiry therefore turns on legislative intent: Would the Congress that enacted the Pork Act have intended its assessment provisions to survive if objecting producers were found to have a constitutional right to avoid the portion used for generic advertising and similar activities? Nothing in the Pork Act's text, history, or purposes compels the conclusion that Congress would have intended to preclude relief tailored to remedy that (perceived) constitutional defect, and would instead have preferred that the Pork Act be rendered wholly inoperative.

Although the court of appeals viewed such a construction as defeating the purpose of the Pork Act,

see App., *infra*, 13a-14a, that view is incorrect. The Pork Act authorizes a variety of activities to assist the pork industry—including, for example, research and education activities—that *all* producers still may constitutionally be compelled to fund under the decision below. The mere fact that generic advertising and similar promotional activities would have to be funded only by producers who do not object to them would not prevent Congress's objectives in the Pork Act from being substantially achieved. Even under the existing scheme, the Pork Board devoted approximately 18% of its 2001 budget to research and education projects, including research on swine-borne diseases, the nutritional value of pork, production practices, and new product development. C.A. App. 1889, 1939-1942 (Declaration of Hugh Dorminy, President, Pork Board, with exhibits); see *id.* at 1888 (observing that a substantial portion of promotional expenditures are for activities distinct from advertising, such as studying export market opportunities and training retailers, distributors, and food-service operators in marketing and presentation techniques). Especially at a time of increasing public concern about food safety and nutrition issues, there is no justification for the evisceration of the Pork Act ordered by the courts below.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Veneman* v. *Livestock Marketing Association*, No. 03-1164, and *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Association*, No. 03-1165, and then disposed of accordingly.

Respectfully submitted.

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