**Nos. 03-1180 and 03-1043**

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.

MICHIGAN PORK PRODUCERS ASSOCIATION, INC., 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

## RESPONDENTS' BRIEF IN OPPOSITION


Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Susan E. Stokes
*Counsel of Record*
David R. Moeller
Karen R. Krub
FARMERS' LEGAL ACTION GROUP, INC.
46 E. 4th Street, Suite 1301
St. Paul, MN 55101
(651) 223-5400


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## RULE 29.6 STATEMENT

The Campaign for Family Farms is an unincorporated association. No parent or publicly owned corporation owns 10 percent or more of the stock of the Campaign for Family Farms.

## PARTIES TO THE PROCEEDINGS BELOW

The United States petitioners in this case are Ann Veneman, Secretary, United States Department of Agriculture, and the United States Department of Agriculture. The private petitioners include the Michigan Pork Producers Association, Inc., California Pork Producers Association, Kentucky Pork Producers Association, Indiana Pork Producers Association, New York Pork Producers Cooperative, Inc., Ohio Pork Producers Council, High Lean Pork, Inc., Pete Blauwiekel, and Bob Bloomer.

The respondents in this case are the Campaign for Family Farms, James Dale Joens, Richard Smith, Rhonda Perry, and Larry Ginter.

The National Pork Producers Council was a party in the proceedings below.

The United States's petition erroneously listed the Cattlemen's Beef Promotion and Research Board as a party to the proceeding in this case.

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## STATEMENT OF THE CASE

In the three years since this Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the courts of appeals have all reached the same conclusion: mandatory agricultural assessment programs violate the First Amendment of the U.S. Constitution. The Sixth Circuit's decision in this case striking down the Pork Promotion, Research, and Consumer Act, 7 U.S.C. § 4801 *et seq.* (the "pork checkoff" or "Pork Act"), is entirely consistent with the recent decisions of the Third, Fifth, and Eighth Circuits regarding other checkoff programs. *Livestock Marketing Ass'n v. United States Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed* (Feb. 13, 2004) (Nos. 03-1164 and 03-1165) ("*LMA*") (beef checkoff); *see also Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004) (dairy checkoff); *Pelts & Skins, LLC v. Landreneau*, No. 03-30523, 2004 U.S. App. LEXIS 6364 (5th Cir. Apr. 2, 2004) (Louisiana alligator checkoff).

The United States and private petitioners[1] argue that this Court should revisit the constitutionality of checkoff programs, since *United Foods* did not consider the claim that these programs are somehow immune from First Amendment scrutiny because they involve "government speech." But that claim has been squarely rejected by all four courts of appeals that have considered checkoff programs. *See* Appendix to the U.S. Petition for Certiorari ("U.S. Pet. App.") 8a; *LMA*, 335 F.3d at 720; *Cochran*, 359 F.3d at 268; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *15. Thus, petitioners have

[1] Two petitions for certiorari have been filed in this case. For ease of reference, we refer to the petitioners in No. 03-1180 as "the United States" and to the petitioners in No. 03-1043 as "the private petitioners." Respondents address herein facts that bear on issues that would properly be before this Court if certiorari were granted, but do not address the array of inflammatory and sometimes false statements of facts asserted by the private petitioners.

presented no compelling reason for this Court to grant certiorari in either of the now-pending cases. If, however, the Court decides to hear either case, it should hear both in order to resolve the constitutionality of these programs once and for all.

1. Respondents are the Campaign for Family Farms (CFF) – a coalition of family farm organizations with hundreds of hog farmer members – and four individual hog farmers. CFF's mission is to ensure the continued existence of family farms in the face of increasing industrialization of agriculture.[2] U.S. Pet. App. 14a, 18a. Respondents oppose the mandatory pork checkoff because its objectionable ideological speech is aligned with policies that have had a devastating economic effect on family farms and the rural communities they support. *Id.* 18a.

2. The Norman Rockwell image of rural America is rapidly disappearing as the number of farms shrinks, the size of farms grows, and ownership and management of agricultural operations is consolidated in the hands of a shrinking number of individuals and corporations.[3] Those farmers who do raise hogs are increasingly raising them not as independent producers, but on behalf of others, usually a

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[2] CFF filed an *amicus* brief with this Court in *United Foods* urging affirmance of the Sixth Circuit's ruling.

[3] USDA statistics show the steady exit of independent hog farmers from the hog industry over the past twenty years. C.A. App. 822. In the mid-1980s, prior to the enactment of the pork checkoff, there were approximately 500,000 hog farms in the nation. As of year-end 2002, that number had shrunk to 75,350 hog operations. *Id.* 1194, C.A. Addendum 1. While the number of hog farms has declined, the total number of hogs produced has remained relatively stable, resulting in increasingly large hog operations. *See* William D. McBride & Nigel Key, *Economic and Structural Relationships in U.S. Hog Production—Agricultural Economic Report No. 818*, at 5 (Feb. 2003), *available at* http://www.ers.usda.gov/publications/aer818/aer818.pdf.

packer or packer affiliate.[4] Combined with this increasing vertical integration in hog production is continued corporate consolidation of processing capacity.[5] Independent hog farmers are being left without a competitive market in which to sell their hogs, driving them out of business or into unfavorable contracts with packers. *See, e.g.*, Neil E. Harl, *The Structural Transformation of Agriculture* 4-5 (Mar. 20, 2003), *available at* http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf.

The hog industry reached a watershed moment at the end of 1998 and beginning of 1999, when hog prices hit record lows and hog farmers could not break even.[6] Geoffrey S. Becker, *Hog Prices: Questions and Answers*, Congressional Research Service (updated Dec. 15, 1999), *at* http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-68.cfm. During this crisis, more than 15,000 hog farmers quit producing hogs. USDA National Agricultural Statistics Service, *Hogs and Pigs Report* 21 (Dec. 28, 1999), *at*

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[4] A 2002 National Pork Board (NPB) study showed that more than 83% of hogs at that time were committed to packers before slaughter through packer ownership or contractual arrangements, up from 38% in 1994. C.A. App. 1248.

[5] In 2000, four firms controlled 56% of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001*, at 18, 38 (June 2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf. Smithfield, the nation's largest processor, recently acquired Farmland Industries, which only increased the consolidation of processing power. *See, e.g.*, Written Testimony of the Organization for Competitive Markets presented to the U.S. Senate Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights (July 23, 2003), *at* http://judiciary.senate.gov/testimony.cfm?id=869&wit_id=2452.

[6] While hog prices were at record lows, retail pork prices did not decline accordingly and processors like Smithfield posted near-record profits. *See* Joseph W. Luter, III, *To Our Shareholders*, Smithfield Foods, Inc., 2000 Annual Report 3 (July 7, 2000), *available at* http://www.smithfieldfoods.com/Investor/pdf/sfd_ar00.pdf.

http://usda.mannlib.cornell.edu/reports/nassr/livestock/phpbb/1999/hgpg1299.pdf.

Throughout this period of consolidation and record low prices, a private commodity group, the National Pork Producers Council (NPPC), acted as the general contractor for the $50 million annual pork checkoff. Many hog farmers, including respondents, sharply disagreed with being associated with the tactics and policies pursued by NPPC. For example, in response to the 1998 hog crisis, NPPC's CEO told producers to expand and seize the market share left by the hog farmers being driven out by the record low hog prices. Rod Smith, *'Clear Picture' Emerging for Pork Producers*; *Choices and Opportunities Ahead Are 'Staggering,'* Feedstuffs, Vol. 70, No. 44 at 23, Oct. 26, 1998. This comment, seen by many as reflecting NPPC's alignment with industrialized agriculture, drove thousands of hog farmers to sign petitions calling for a referendum to terminate the checkoff program.

3. The origins of this case stem from respondents' collection and submission to USDA of those petitions.[7] Based on the petitions, Agriculture Secretary Glickman ordered a referendum that was held in August and September 2000. *See Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (W.D. Mich. 2001) ("*MPPA*"). On January 11, 2001, Secretary Glickman announced that "15,951 producers disfavored the Program and 14,396 producers favored the Program," and issued an order terminating the checkoff. U.S. Pet. App. 17a. Private petitioners and NPPC filed suit, challenging both the counting of the votes and the legal basis for terminating the program.

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[7] NPPC attempted to obtain the names and addresses of the hog farmers who had signed the referendum petitions through a Freedom of Information Act request. CFF filed suit against USDA to block release of the information, and the Eighth Circuit ordered a permanent injunction to protect the hog farmers' privacy. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000).

Respondents intervened in support of the referendum and termination decisions. In February 2001, newly appointed Agriculture Secretary Veneman reversed Secretary Glickman's decision to terminate the pork checkoff. *MPPA*, 174 F. Supp. 2d at 639. Secretary Veneman settled the suit with the private petitioners through an agreement to continue the pork checkoff, albeit with a change in how it would be administered. U.S. Pet. App. 17a. Respondents then filed cross-claims against USDA.

In December 2001, the district court upheld Secretary Veneman's decision to continue the pork checkoff as within her discretion. *MPPA*, 174 F. Supp. 2d at 648. After *United Foods*, respondents added cross-claims alleging violations of their First Amendment rights of freedom of speech and association.

4. On October 25, 2002, the United States District Court for the Western District of Michigan granted respondents' motion for summary judgment on their constitutional claims, holding that the pork checkoff, like the mushroom checkoff, was "unconstitutional and rotten," and violated respondents' First Amendment rights of free speech and association. U.S. Pet. App. 55a. The district court then enjoined operation of the pork checkoff. *Id.* 53a. In response to the petitioners' argument that the program was immune from First Amendment scrutiny under the "government speech" doctrine, the district court held that the program was not in fact government speech; rather, it was "a self-help program for pork producers." *Id.* 47a. The district court acknowledged the Secretary's participation in the workings of the National Pork Board (NPB), but determined that "this involvement does not translate the advertising and marketing in question into 'government speech' as the federal courts have interpreted that term. You cannot make a silk purse from a sow's ear. This defense fails as a matter of law." *Id.*

The district court recognized that respondents and the hog farmers they represent have "sincere philosophical, political

and commercial" objections to the mandatory pork checkoff. *Id.* 50a. The court noted the "frustration" of independent farmers who object to all aspects of the pork checkoff because it supports a system of agriculture that is anathema to their core beliefs about what agriculture is and should be. *Id.* 51a. Put simply, respondents object to paying to support a system they believe is driving them out of existence. *See id.* 18a-19a.

Furthermore, the district court acknowledged that respondents have clearly and consistently articulated their economic and ideological objections to every aspect of the pork checkoff, including the generic promotion of pork. First, generic advertising fails to distinguish the unique qualities and attributes of hogs raised by independent family farmers. *Id.* 19a. Second, generic advertising promotes an industrialized method of production that respondents oppose. The "Pork. The Other White Meat" slogan is intended to create a demand for lean pork that comes from hogs raised in what respondents believe are unhealthy and inhumane conditions. *Id.* Third, generic advertising promotes a product respondents do not sell. Hog farmers sell hogs, not pork. Packers and retailers sell pork. *Id.* Fourth, because the checkoff promotes a product they do not sell, respondents do not benefit from it. *Id.*

Moreover, the district court validated respondents' objections to other aspects of checkoff promotion campaigns. In addition to generic advertising, the checkoff has also funded "branded advertising," which promotes the products of particular packers and retailers. *Id.* 20a. Because packers own their own hogs in growing numbers, through checkoff-funded branded advertising hog farmers are in fact forced to pay for the advertising of their direct competitors. *Id.*[8] The packers whose advertising budgets are being subsidized by hog farmers are also direct competitors of hog farmers such as

[8] One checkoff-funded "branded" radio ad promoting Hormel pork ran in Colorado, where Hormel owns 25,000 sows. C.A. App. 439, 494-97.

respondents Joens and Perry, who have joined with other hog farmers to slaughter their own hogs and market their pork. *Id.*

Respondents' objections to the other aspects of the pork checkoff – the "research" and "consumer information" portions – are equally ardent. They believe the "information" made available to consumers promotes and encourages consumers to participate in a system respondents abhor. For example, respondent Jim Joens objects to the pork checkoff's consumer information projects on "animal welfare":

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

*Id.* Respondent Richard Smith similarly objects to being compelled to pay for "education" of producers:

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

*Id.* 20a-21a.

As highlighted by the district court, the research funded by the pork checkoff is just as ideologically abhorrent to independent hog farmers. A primary focus of checkoff-funded research is in the area of what the checkoff terms "Antimicrobial Resistance and Alternatives Research," meaning the continuous feeding of subtherapeutic levels of

antibiotics to hogs to promote growth and prevent disease. *See id.* 21a; National Pork Board, *Pork Checkoff Report*, Vol. 22 No. 1, 10-13 (Winter 2003), *available at* http://www.porkboard.org/docs/porkcheckoffQtr12003.pdf. Respondent Rhonda Perry, like many independent hog farmers, opposes this practice and strongly objects to funding and being associated with this research and the industrialized method of agriculture it promotes through checkoff communications:

> I object to NPB using my checkoff dollars to convince the public and policymakers that the pork industry as a whole is looking out for the health of the general public. Subtherapeutic antibiotic usage has become general industry practice in factory farm production. Many people are increasingly aware of the problems being created by these practices. That is why we have standards for Patchwork Family Farms [the entity through which she processes and markets her hogs] that limit the use of antibiotics. It appears to me as though checkoff dollars are being used to "convince" people that constant feeding of subtherapeutic antibiotics is not a significant problem or at least to fund research to show that it isn't a problem.

*See* U.S. Pet. App. 21a; C.A. App. 159.

Finally, the district court rejected petitioners' arguments that the remedy should be applied only to respondents, ruling that so limiting the injunction would "essentially re-write the Act in a manner inconsistent with judicial interpretation," since the Pork Act does not allow voluntary participation. *Id.* 52a-53a. The district court declared the Pork Act unconstitutional and enjoined the collection of assessments and the operation of the pork checkoff. *Id*. 53a.

5. Petitioners appealed. The Sixth Circuit initially stayed the injunction, and then affirmed the district court. *Id.* 12a. The court of appeals determined that the Pork Act "is nearly identical in purpose, structure, and implementation to the

Mushroom Act." *Id.* 10a. Like the other courts of appeals that have considered checkoff programs, the Sixth Circuit followed this Court's clear precedent in *United Foods* and ruled the Pork Act unconstitutional.

Addressing the principal issue left open by this Court in *United Foods*, the Sixth Circuit affirmed the district court's ruling that the pork checkoff cannot be saved by the government speech doctrine, given the "pork industry's extensive control" over the program. *Id.* 8a. The court of appeals based its ruling on several factors. First, it found that the primary purpose of the Pork Act is to market pork and strengthen the pork industry. *Id.* Second, the court of appeals found that the program is funded not by general tax revenues, but rather from mandatory assessments paid by pork producers. The court of appeals noted that not only does the Pork Act prohibit the use of government funds for the checkoff, but the Secretary and her staff are actually reimbursed from the assessments for any time or expenses related to the program. *Id*. Third, the Sixth Circuit found that the government's oversight of the checkoff is limited, concluding:

> In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.

*Id.* 9a.

The Sixth Circuit rejected petitioners' attempt to distinguish this case from *United Foods* by claiming that most of the funds collected under the Mushroom Act were used for generic advertising, while only a small percentage of the pork checkoff funds were so used. The record showed that at least fifty-one percent of the 2001 budget was listed under the category of "Demand Enhancement," which includes many forms of promotion. *Id.* 11a. Moreover, the Sixth Circuit

affirmed the district court's finding that the pork checkoff-funded programs for "education" and "research" "were designed to further the Act's promotional goals." *Id.* 12a. Accordingly, the court of appeals concluded that "the Pork Act serves but one purpose: promotion." *Id.* Thus, compelled assessments are unconstitutional under *United Foods*.

Finally, the Sixth Circuit also rejected the argument (preserved by the United States in a single footnote in its appellate brief) that the case should be analyzed under the test for restrictions on commercial speech set forth in this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). U.S. Pet. App. 12a. The court of appeals distinguished this case from cases governed by *Central Hudson* because "[t]he Pork Act does not directly limit the ability of pork producers to express a message; it *compels* them to express a message with which they do not agree." *Id.* (emphasis added). *Central Hudson* has never been applied to a case involving compelled speech. *Id.* (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474 n.18 (1997)). The court noted: "It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.*

6. The Solicitor General has filed petitions for certiorari in this case and in a parallel case in which the Eighth Circuit declared the beef checkoff unconstitutional. *Veneman v. Livestock Marketing Ass'n*, No. 03-1164 (filed Feb. 13, 2004). This Court should deny certiorari in both cases, but if it grants certiorari in either case, it should grant the government's petition in both cases and set them for oral argument together.

## ARGUMENT

The petition for a writ of certiorari should be denied. Petitioners ask this Court to grant certiorari on an issue on which there is no conflict among the federal courts of appeals. Following this Court's decision in *United Foods*, four courts of appeals have found an array of checkoff programs

unconstitutional. *See* U.S. Pet. App. 14a (6th Cir. 2003) (pork checkoff); *LMA*, 335 F.3d 711 (8th Cir. 2003) (beef checkoff); *Cochran*, 359 F.3d 263 (3d Cir. 2004) (dairy checkoff); *Pelts & Skins*, 2004 U.S. App. LEXIS 6364 (5th Cir. 2004) (Louisiana alligator checkoff). Each of those courts considered and unequivocally rejected the government speech argument raised by petitioners here. No court of appeals has come to a contrary conclusion. There being no conflict among the circuits, there is no compelling reason for this Court to grant the petitions. *See* S. Ct. R. 10(a).

That there remain issues not addressed by this Court relating to these commodity promotion programs is due entirely to the government's choice of litigation tactics. In the two commodity promotion cases this Court has already decided, the government either waived the government speech argument, *Wileman Bros.*, 521 U.S. at 482 n.2, or failed to raise it in the court of appeals, *United Foods*, 533 U.S. at 416-17. As to the government's newfound argument that these compelled speech cases should be governed by *Central Hudson* (*see* U.S. Pet. 19 n.3), the government has twice declared to this Court that *Central Hudson* should *not* apply to such programs. *See* C.A. App. 1341-42 (arguing in *United Foods* that "the *Central Hudson* test, which involves a restriction on commercial speech, should [not] govern a case involving the compelled funding of speech") (brackets in original); U.S. Br. 14-15, *Goetz v. Glickman*, 525 U.S. 1102 (1999) (No. 98-607) (asserting: "As the Court made clear in *Wileman Bros.*, *Central Hudson*, a case involving a *restriction* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech.") (emphasis in original). In the instant case, the United States did not even argue to the Sixth Circuit that *Central Hudson* should be applied; it simply preserved the argument in a footnote in its brief. U.S. C.A. Br. n.3. The government should not be permitted to burden this Court by creating a moving target, raising and waiving issues without end.

Petitioners' arguments for review are also inappropriate because they largely seek review of factual, rather than legal conclusions. *See* S. Ct. R. 10. In arguing that the lower courts were wrong in not applying the government speech doctrine, petitioners primarily take issue with the district court and court of appeals' characterizations of how the program operates in fact. *See, e.g.*, U.S. Pet. 13-15. Such asserted errors do not warrant this Court's review.

If, however, this Court grants certiorari in either this case or *LMA*, it should grant it in both cases. The federal and state governments have enacted a number of commodity checkoff programs of this type; thus far, review of these programs has been conducted on a case-by-case basis with the United States often taking fundamentally inconsistent positions in different cases. This Court's consideration of how such programs operate across different factual contexts will assure a widely applicable final resolution of the First Amendment questions they present.

## I. This Court Should Not Grant Certiorari Because the Ruling Below Was Correct.

The Sixth Circuit's holding is compelled by this Court's decision in *United Foods*. None of the arguments raised by petitioners – that the program is immune from First Amendment scrutiny because it is government speech, that the claims should be governed by the more relaxed standard set forth by this Court in *Central Hudson*, or that the injunction is overly broad – warrants Supreme Court review. Because the mandatory assessments under these checkoff programs are just as unconstitutional now as they were in June 2001 when this Court decided *United Foods*, the petitions for certiorari should be denied.

### A. The Pork Checkoff Is Not Government Speech.

The Sixth Circuit's holding that the pork checkoff cannot be sustained under the government speech doctrine is both correct and consistent with the holdings of its sister circuits

and this Court's rulings. Because there is no conflict among the circuits or with any decision of this Court, petitioners demonstrate no compelling reason for this Court to grant certiorari on this issue.

### 1. The Pork Checkoff Is a Private Self-Help Program.

The pork checkoff was enacted in 1995 as a stand-alone industry "self-help" program, along with several other such programs. U.S. Pet. App. 47a; S. Rep. No. 99-145, 99th Cong., 1st Sess. 331 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 1997; H.R. Rep. No. 99-271, 99th Cong., 1st Sess. 190 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1294; 131 Cong. Rec. S16,090 (1985); C.A. App. 2203, 2237; 7 U.S.C. §§ 4801-4819. Congress itself has stated that commodity promotion programs, such as the pork checkoff and the beef checkoff, are intended to be "'self-help' mechanisms for producers and processors to fund generic promotions for covered commodities." 7 U.S.C. § 7401(b)(8). Throughout the pork checkoff's existence, all checkoff-funded communications have told producers and the world that the checkoff is run by and for producers. *See, e.g.*, C.A. App. 2200, 2237. Checkoff ads proclaim that they are brought to you by "America's Pork Producers." *Id.* 724.

The pork checkoff is run entirely by private pork producers, not the government. The Pork Act itself endows NPB, not the government, with the powers and duties of developing checkoff-funded projects. 7 U.S.C. § 4808(b)(1). NPB members are not considered government employees, C.A. App. 1367, and they are reimbursed for their expenses from the collected assessments. 7 U.S.C. § 4808(a)(1)(6). NPB's Executive Vice President admitted that NPB "is not to be considered as a governmental entity/agency or a government contractor." U.S. Pet. App. 3a-4a.[9]

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[9] Private state pork associations receive approximately 20% of all checkoff assessments. 7 U.S.C. § 4809(c)(1); *id.* § 4806(g). The Secretary

The Pork Act specifically prohibits government regulation of the pork industry. It prohibits the imposition of quality standards and control of production of pork or pork products. 7 U.S.C. § 4801(b)(3).

Nothing in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), suggests that NPB is a government agency. In *Lebron*, this Court found that Amtrak (which is subsidized with government funds) is an agency of the government for purposes of analyzing whether it had restrained an individual's speech in violation of the First Amendment. *Id.* at 394. That decision explicitly did not extend to the issue of whether an entity is a government agency for purposes of creating a "privilege" of the government. *Id*. at 399.

The fact that checkoff programs were enacted to help the private industries they promote has been a significant factor in each of the decisions of the courts of appeal declaring the various checkoff programs unconstitutional. *See* U.S. Pet. App. 8a-9a (pork); *Cochran*, 359 F.3d at 270-71 (dairy); *LMA*, 335 F.3d at 725-26 (beef); *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *22 (Louisiana alligator checkoff). In light of these clear rulings, there is no good reason for this Court to grant certiorari on this issue.

### 2. The Pork Checkoff Is Privately Funded.

The Sixth Circuit also held that pork checkoff-funded speech cannot be government speech because the pork checkoff must be conducted "at no cost to the Federal Government." U.S. Pet. App. 4a (quoting 7 U.S.C. § 4801(b)(2)). That holding follows the guidance this Court has provided on government speech which shows that, to be considered government speech, the speech in question must, at a minimum, be funded by the government. In *Keller v.*

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has no role in appointing or approving the leadership of the state associations. 7 U.S.C. § 4802(16); 7 C.F.R. § 1230.25.

*State Bar of California*, 496 U.S. 1 (1990), this Court rejected application of the "so-called government speech doctrine," in part because the bar association was funded by dues paid by members of the bar and not appropriations from the legislature. *Id*. at 10-11.

Statements in this Court's other cases likewise support the Sixth Circuit's holding that the underpinning of the government speech doctrine is government funding. In *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000), the Court indicated that for government speech analysis to apply, one prerequisite would be that the speech be "financed by tuition dollars" rather than through the compelled student activity fee. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), the Court's dicta regarding government speech plainly referred only to instances "[w]hen the government disburses public funds."

In cases where this Court *has* found that an activity involves government speech, the speech in question was unquestionably funded with government expenditures. In *Rust v. Sullivan*, 500 U.S. 173 (1991), for example, this Court upheld regulations that restricted what doctors who worked for Title X-funded programs could say about abortions while performing work for those government-funded programs. *Id.* at 193; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (upholding regulations concerning criteria for federal grant recipients).

The consistent teaching of these cases is that the government is free to speak its own message when it funds that message itself. The Sixth Circuit thus was correct in rejecting petitioners' argument that the pork checkoff is immune from First Amendment scrutiny as government speech, since the program's funding does not and cannot come from general tax revenues. U.S. Pet. App. 8a; 7 U.S.C. § 4801(b)(2). Indeed, the government must be reimbursed

from checkoff funds for any oversight it provides. U.S. Pet. App. 8a; 7 C.F.R. § 1230.73(c)(4).

The United States makes the incorrect and misleading assertion that the pork checkoff is merely a type of modest "user fee," U.S. Pet. 11, imposed on those who have "chosen" to be hog farmers, *id.* 10. That argument is without merit for two reasons. First, payers of "user fees" are volunteers: they choose, for example, to visit a national park or to use a particular service for which they are charged a fee. But, like the public employees in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and the lawyers in *Keller*, the mandatory assessments of the pork checkoff are imposed on hog farmers as a condition of earning their livelihood. Second, payers of "user fees" get something in return for the fee, such as a service, and the fee generally is germane to a legitimate non-speech activity. The only thing hog farmers receive in return for the mandatory pork checkoff is objectionable speech. In all of the cases cited by the United States for the novel argument that the pork checkoff assessments are a form of "user fees," the "fees" were actually a reimbursement to the government to cover its administrative expenses. *See United States v. Sperry Corp.*, 493 U.S. 52 (1989) (involving a "user fee" reimbursing the government for administrative expenses incurred in connection with the Iran-United States Claims Tribunal); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) (considering whether school boards could require students who use bus service to pay for that bus service); *Cox v. New Hampshire*, 312 U.S. 569, 570-71 (1941) (upholding local government's imposition of a reasonable fee to compensate for administrative and law-enforcement expenses, noting the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed"). The pork checkoff, by contrast, is not imposed to cover administrative expenses pertaining to a government function;

rather, the money goes into the coffers of private organizations and pays for their highly objectionable speech.

### 3. The Government Exercises Only *Pro Forma* Oversight.

One of the reasons this Court did not address the issue of whether checkoff-funded speech is government speech in *United Foods* was that, by failing to raise the argument sooner, the government had "deprived respondent of the ability to address significant matters that might have been difficult points for the government," such as whether the Secretary's approval of the advertising was "*pro forma*." 533 U.S. at 416-17. Addressing that exact issue, the Third, Fifth, and Sixth Circuits all found that the respective checkoff programs at issue lacked sufficient USDA oversight to be considered government speech. *See* U.S. Pet. App. 8a; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *20; *Cochran*, 359 F.3d at 274.

To the extent that petitioners challenge the Sixth Circuit's decision that the government exercises only "limited oversight" over the pork checkoff programs, U.S. Pet. App. 9a, they seek factual, rather than legal review. The court of appeals based its conclusion on the following facts: 1) USDA has only one staff member to perform all pork checkoff-related duties; 2) the government does not draft or propose any of the advertisements funded by the pork checkoff; 3) the trademark for "Pork. The Other White Meat" is owned by a private organization, not the government; and 4) NPB is comprised of private pork producers, who are nominated by state pork associations, which are entirely private and not appointed by the Secretary. *Id.* The Sixth Circuit concluded that "the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government." *Id.* 8a; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *20.

### 4. There Is No Conflict Among the Circuits Regarding the Application of the Government Speech Doctrine to Commodity Checkoffs.

The United States's argument that this Court should grant certiorari because the courts of appeal "did not rely on any consistent rationale" misses the point that those courts all reached the same result: the checkoffs cannot be sustained under the government speech doctrine. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his court reviews judgments, not opinions."). Moreover, the United States's reliance on the Third Circuit's statement from 1989 that "the issue [is] a close one" and there are "sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute 'government speech,'" U.S. Pet. 16 (citing *United States v. Frame*, 885 F.2d 1119, 1131-32 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990)), is no longer warranted. On February 24, 2004, the Third Circuit affirmed the conclusion in *Frame* that checkoff-funded speech is subject to First Amendment scrutiny. *Cochran*, 359 F.3d at 274.

## B. The Pork Checkoff Is Unconstitutional Under Any Standard.

The refusal of the court of appeals to apply *Central Hudson* to this compelled speech case is not a basis for granting certiorari. First, the ruling is correct; as the government itself has recognized, *Central Hudson* is not the applicable test in a compelled speech case. *See supra* at 12. Second, even if *Central Hudson* were applicable, the pork checkoff would be unconstitutional. This Court said as much in *United Foods* when, in discussing whether or not the *Central Hudson* test was applicable, it stated: "We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* [*v. Wileman Bros.*] or our other precedents to sustain the compelled assessments sought in this case." 533

U.S. at 410. This Court need not grant certiorari to address a legal issue of negligible effect.

### 1. *Central Hudson* Is Inapplicable.

The Sixth Circuit correctly ruled that *Central Hudson* does not apply to a case involving compelled speech. As this Court stated in *Wileman Bros.*, courts should *not* "rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising." 521 U.S. at 474. The Court further noted: "The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech." *Id.* at 474 n.18.

Moreover, the more lenient standard of analysis set forth in *Central Hudson* applies only to commercial speech, which is defined as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. The speech at issue here does not fall into this narrow category. The district court characterized the hog farmers' objections as "sincere *philosophical, political* and commercial disagreements," likening them to the objecting bar members in *Keller*. U.S. Pet. App. 50a (emphasis added). Thus, even if *Central Hudson* were applicable to compelled speech concerning "solely . . . economic interests," it would nevertheless be inapposite here.

### 2. Even If Central Hudson Applied, There Would Be No Basis to Sustain the Checkoff.

Even if the *Central Hudson* test does apply, the pork checkoff cannot pass muster. *Central Hudson* holds that the government may regulate commercial speech only if: (1) "the asserted governmental interest is substantial," (2) "the regulation directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. The three circuit courts that examined the government's purported

interest in the stand-alone checkoff programs have agreed that it is not sufficiently substantial to justify the infringement on producers' First Amendment rights. *See LMA*, 335 F.3d at 725-26; *Cochran*, 359 F.3d at 279; *Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *30 n.21.[10] The pork checkoff likewise is unconstitutional under *Central Hudson*.

**a. The Governmental Interest Is Not Substantial.**

Petitioners are wrong that "the welfare of pork producers" is a sufficiently important government interest to justify the compelled assessments. First, as the Third Circuit noted in *Cochran*, "promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's." 359 F.3d at 279. The same is true of the parallel Pork Act.

Second, in addition to the pork checkoff, the government also has enacted similar generic promotion programs to promote products that compete with pork, such as beef.[11] That

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[10] The Third Circuit's decision in *Cochran*, which was issued after petitioners filed their petitions for certiorari, refutes petitioners' argument that the Sixth Circuit's decision in this case is somehow inconsistent with the Third Circuit's decision in *Frame*. Prior to this Court's decisions in *Wileman Bros.* and *United Foods*, the Third Circuit had held in *Frame* that the beef checkoff was constitutional under *Central Hudson*. 885 F.2d at 1134. But in *Cochran*, the Third Circuit reconsidered its prior decision in light of this Court's intervening pronouncements. It discussed the different rationales courts have used to analyze commodity promotion programs, including the approach it used in *Frame*. The Third Circuit concluded that the different approaches made little difference since, in the end, *United Foods* governs. 359 F.3d at 279-80. The court in *Cochran* noted: "We reach this conclusion whether accepting the standard explicitly expressed in *Frame* or deciding that in view of the Court's discussion in *United Foods*, that standard is not [*sic*] longer controlling." *Id.* at 279 n.13.

[11] For instance, NPB, in its pork checkoff communications, identifies beef as being in competition with pork. C.A. App. 2254-86. At the same time, the Cattlemen's Beef Board, in its beef checkoff communications, maintains that beef has more of a potentially beneficial food compound

the beef and pork checkoffs are working at cross-purposes undermines any claim that the government has a "substantial interest" in promoting pork specifically. *See Livestock Marketing Ass'n v. United States Department of Agriculture*, 207 F. Supp. 2d 992, 1006 (N.D.S.D. 2002) ("After all, is the 'government message' therefore that consumers should eat no other product [other than beef] or at least reduce the consumption of other products such as pork, chicken, fish or soy meal?"); *see also Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999) (striking under *Central Hudson* a federal restriction on advertising related to casino gambling in part because Congress allowed other forms of gambling to flourish). By authorizing multiple, competing checkoffs, Congress is not promoting the welfare of pork producers; rather, it is promoting the interest of competing industry groups like private petitioners that receive funding from commodity checkoffs.

**b. The Pork Checkoff Does Not Directly Advance Any Asserted Governmental Interest.**

Even if the two other interests the United States identified as served by the Pork Act – namely, "stabilizing the general economy of the United States," or "ensuring that the people of the United States receive adequate nourishment" – can be considered substantial in some circumstances, the government does not meet its "burden of showing that the challenged regulation advances the Government's interest in a direct and material way. That burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

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than pork and that beef tops pork in per capita consumption. *See id.* 2287-2300.

*Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995) (internal quotation marks omitted).

The record in this case contains no evidence suggesting that a pork nutrition problem exists in this country or that the Pork Act will help alleviate it. Nor does the record show that the Pork Act has a beneficial effect upon the American economy as a whole. Indeed, petitioners cannot even show that the Pork Act benefits the entire pork industry. Although the pork checkoff arguably has helped packers and retailers, petitioners cannot plausibly argue that promotion of specific multinational retailers and processors through checkoff-funded "branded advertising" directly advances the interests of pork producers. USDA statistics show that hog farmers' share of the retail pork dollar declined from 42.5% to 30.1% between 1996 and 2001. U.S. Pet. App. 19a. Thus, the true "free riders" of the pork checkoff are retailers and processors. What is more, since the Pork Act's inception, at least 415,000 hog farmers have quit raising hogs. C.A. App. 1194, 1217. The producers themselves are in the best position to judge whether the pork checkoff has directly advanced their interests. They answered that question with a resounding "no" when 53% of them voted to terminate the entire program. U.S. Pet. App. 17a.

**c. The Pork Checkoff Is Far More Extensive Than Necessary to Serve Any Asserted Governmental Interest.**

The pork checkoff also burdens First Amendment speech more than necessary to advance the purported governmental interest. If the government's interest in the welfare of the pork industry were truly substantial, the government could use funds from general revenues to fund the same projects. *See Pelts & Skins*, 2004 U.S. App. LEXIS 6364, at *30 n.21. Indeed, it has done so in the past. For example, the Small Hog Operation Payment program provided government payments to small- and medium-sized producers based on past production in response to historically low hog prices in 1998

and 1999. *See* 7 C.F.R. § 759.1 (2003). That government-funded program actually did enhance the welfare of pork producers. Here, however, the government has chosen to address these alleged problems by compelling respondents to fund speech with which they disagree. Accordingly, the Pork Act fails even the more lenient *Central Hudson* test.

### C. The Injunction Ordered by the District Court and Affirmed by the Sixth Circuit Is the Only Feasible Remedy.

There is no reason for this Court to grant certiorari on the issue of the scope of the injunction ordered by the courts below. The injunction is well supported by the courts' decisions and is the only practicable remedy in this case. The district court's exercise of its traditional authority to grant equitable relief, and the Sixth Circuit's finding that the district court did not abuse its discretion, present no significant issues warranting this Court's review.

The Sixth Circuit held: "Because the Pork Act is nearly identical in purpose, structure, and implementation to the Mushroom Act, the Pork Act is unconstitutional under the analysis set forth in *United Foods*." U.S. Pet. App. 10a. The Sixth Circuit thus held that the entire Pork Act was unconstitutional. Its decision was not "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," as the United States asserts. U.S. Pet. 22. The Sixth Circuit correctly upheld the injunction's nationwide application, and explicitly and correctly ruled that its decision could not be limited solely to checkoff advertising activities. U.S. Pet. App. 12a-14a.

#### 1. The Injunction Cannot Be Limited to Respondents.

While the general rule is that an injunction should be "no more burdensome than necessary to the defendant to provide complete relief to the plaintiffs," there are no legal limits on

the scope of a federal court's injunction. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This Court in *Yamasaki* upheld a nationwide injunction. *Id.* at 705.

In this case, the injunction could not be limited to respondents. If the Pork Act is unconstitutional for one, it is unconstitutional for all. This Court in *United Foods* ruled the Mushroom Act unconstitutional based solely on the objections of a single producer. 533 U.S. at 408-09. When a regulation or law is found to be invalid, courts must enjoin any further application of that regulation or law. *See, e.g.*, *Dimension Financial Corp. v. Board of Governors of the Fed. Res. Sys.*, 744 F.2d 1402, 1411 (10th Cir. 1984) (enjoining the Board from enforcing or implementing invalid regulations); *Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (rejecting the Department of Labor's argument that nationwide injunction was overly broad and should be limited only to parties where the program was declared unconstitutional); *American Mining Cong. v. U.S. Army Corps of Engineers*, 962 F. Supp. 2, 4-5 (D.D.C. 1997) (rejecting the government's contention that an injunction should be limited to members of plaintiff associations; enjoining application of invalid rule).

As the district court held, it could not limit its injunction only to the parties without rewriting the statute, which it cannot do. *See* U.S. Pet. App. 52a; *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."). The Pork Act does not provide for voluntary assessments or exclusions. Therefore, if the Pork Act violates respondents' First Amendment rights, the only appropriate relief is to strike down the entire Act.

Moreover, a more limited injunction would have been infeasible. Checkoff payments are remitted primarily through third parties who buy hogs from farmers. 7 C.F.R. § 1230.71.

It would not be possible to limit the injunction to only those packers who have dealings with respondents, or to their dealings with respondents only. *Cf. Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (injunction ordering the Secretary of Labor to enforce the Migrant and Seasonal Agricultural Worker Protection Act could not be enforced only against contractors who had dealings with the named plaintiffs, or only as to their dealings with the named plaintiffs).[12]

### 2. The Injunction Cannot Be Limited to Promotional or Advertising Activities.

When legislation does not contain a severability clause, as the Pork Act does not, a reviewing court "must invalidate the entire statute if the 'balance of the legislation is incapable of functioning independently.'" U.S. Pet. App. 12a-13a (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). In this case, the Sixth Circuit correctly concluded: "The very basis for holding that the Act violates the First Amendment – that its assessment of fees to promote pork is the chief goal of the Act, which does not create a broader regulatory program – prevents us from preserving other parts of the statute." U.S. Pet. App. 13a.

Petitioners have presented no persuasive reason for this Court to disturb or question that conclusion. The stated purpose of the Pork Act is to promote pork. 7 U.S.C. § 4801(b)(1). Even the definitions of "research" and "consumer information" in the Pork Act demonstrate that

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[12] Limiting an injunction to the hog farmer members of respondent CFF and its member organizations would require them to identify themselves, their associational affiliations, and their political beliefs to USDA, private petitioners, and packers. An injunction so structured would have an obvious chilling effect on the exercise of the very First Amendment rights those individuals are trying to vindicate through this lawsuit. *Cf. CFF v. Glickman*, 200 F.3d at 1188-89 (holding farmers' positions on the "controversial issue" of a mandatory checkoff were entitled to privacy protection).

those aspects of the program are also intended to further the promotion of pork. 7 U.S.C. §§ 4802(2), (13).

In any event, the vast majority of checkoff funds continue to be expended on outright promotion. Of the eighty-one percent of the funds that were expended on national programs in 2002 (nineteen percent went to the states for them to spend as they wish for promotion, consumer information, or research), seventy-one percent were spent on promotion activities. National Pork Board, *Pork Checkoff Report*, Vol. 22 No. 1, at 28 (Winter 2003), *available at* http://www.porkboard.org/docs/porkcheckoffQtr12003.pdf. The 2003 Pork Checkoff Report shows that only eight cents of every checkoff dollar was actually spent on "Science & Technology," and makes clear that the purpose of the "research" and "consumer information" components is to further promote pork. *Id.*

Virtually everything funded by the checkoff is speech. That promotion and consumer information constitute speech cannot be questioned. And the research component of the budget, eight percent in 2002, also constitutes speech, since the purpose of doing the research is to publish the results on NPB's website, at www.porkboard.org. *See id.* at 9. As set forth above, respondents have ideological objections to that speech. *See supra* at 6-8, 20.

The entire motivation for the checkoff was the promotion of pork. Enjoining the most fundamental portion of the Pork Act – the promotion portion – while leaving in place the peripheral aspects would fashion a very different program than the one Congress created.[13] The district court had ample

[13] Petitioners' assertion that *Abood* and *Keller* stand for the proposition that the appropriate remedy for an individual who objects to funding political speech to which he objects is to reduce that individual's assessment misses the crucial underlying point that in *Abood* and *Keller*, *some* of the assessments were found to be germane to a greater statutory scheme or purpose. This Court in *United Foods* ruled that assessments for the promotion of a commodity were germane only to themselves, and thus

basis for exercising its equitable powers in crafting the remedy, as did the Sixth Circuit for affirming the district court. Their decisions raise no questions of exceptional importance warranting this Court's review.

## II. This Court Should Deny Certiorari in Both the Present Case and in *Veneman v. LMA*, But If It Grants Certiorari in Either Case, It Should Grant It in Both.

The issues in this litigation have already been fully decided by *United Foods* and by the four recent court of appeals decisions that address and reject petitioners' arguments. But if there is to be further review by this Court, it should be done in a comprehensive way so that USDA can no longer force family farmers to bear the additional costs and burdens of organizing costly legal challenges on a commodity-by-commodity basis. If this Court determines that it is appropriate to grant certiorari in *LMA* or in this case, it should grant certiorari in both cases and set them for oral argument together.

In its briefing of *United Foods*, the United States identified a number of agricultural checkoff programs which it described as virtually identical to the mushroom checkoff, and therefore indicative of the great precedential significance of that case. Since this Court decided *United Foods*, USDA has not applied that precedent to other agricultural checkoff programs, but has instead launched a scorched earth, government speech defense for all of them, even those that it identified as virtually identical to the mushroom checkoff.[14]

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they were unconstitutional. 533 U.S. at 415-16. Without the critical finding of some substantial government interest justifying the compelled association for expressive purposes in the first place, there is nothing for the assessments to be germane to, and therefore nothing to justify any compelled contributions in the first place.

[14] Indeed, since initially lowering the rate of assessment on mushroom growers after this Court's *United Foods* decision, the mushroom board

Hearing these two cases, with their factual variations, would provide the Court with ample evidence on which to make a decision on government speech that would apply to the range of mandatory checkoff programs. There are potentially several permutations of the government speech defense. For example, since mid-2001, the pork checkoff has been administered by NPB, the entity Congress designated to run it, while the National Beef Board has hired the National Cattlemen's Beef Association, a private commodity group not mentioned in the Beef Act, to act as the general contractor for the beef checkoff. *LMA*, 207 F. Supp. 2d at 995. In addition, the record in this case on the issue of whether the government's approval of the speech is "*pro forma*" is extensive and includes, among other things, copies of ads themselves and the corresponding approval documentation. Based on that record, the district court recognized that review by the Agriculture Marketing Services results in edits to only four percent of all ads funded by the pork checkoff. U.S. Pet. App. 42a.

Similarly, with regard to petitioners' challenge to the lower courts' remedy, hearing both cases would provide the Court with a basis for rendering a decision that would apply across the spectrum of mandatory checkoff programs. For example, the Beef Act has a unique legislative history, on which the Eighth Circuit based its conclusion that the non-promotional aspects of the Beef Act are not severable from the promotional aspects and thus the entire program should be enjoined. This case, on the other hand, has a complete record

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increased the assessment to a rate higher than it was before this Court's decision. Agricultural Marketing Services (AMS) News Release, *USDA Approves Mushroom Program Assessment Reduction*, No. 176-01 (Aug. 3, 2001), *at* http://www.ams.usda.gov/news/176-01.htm; *USDA Approves Mushroom Program Assessment Increase*, No. 291-01 (Dec. 4, 2001), *at* http://www.ams.usda.gov/news/291-01.htm; *USDA Approves Mushroom Program Assessment Increase*, No. 281-02 (Nov. 6, 2002), *at* http://www.ams.usda.gov/news/281-02.htm.

of the details of the programs funded by the pork checkoff, demonstrating why the different portions of the Pork Act are not severable and why everything funded by the pork checkoff is objectionable speech. Hearing both cases would allow the Court to render a ruling that would have broad applicability to all mandatory checkoff programs.

Hearing two cases from two different agricultural industries would also provide the Court with the broader backdrop necessary to finally resolve the legal issues raised by petitioners' argument that the case should be governed by the standard set forth in *Central Hudson*. For example, the government advances competing interests to justify the infringement on producers' First Amendment rights in the beef checkoff and the pork checkoff under *Central Hudson*. If the Court were to address the level of constitutional inquiry to be applied to checkoff programs, it should have before it the different interests the government claims are advanced.

This case contains a complete record of the programs funded by the pork checkoff and the objections to each of those programs, showing that the speech is not commercial, but ideological and political. Respondents' objections to the pork checkoff and the programs it funds go to the very core of their values, engendering the "crisis of conscience" discussed by this Court in *Wileman Bros.* 521 U.S. at 472. The record in this case shows that the speech in this case is not just about advertising a product, or promoting a particular brand as opposed to the generic product. The programs and resulting speech generated by the pork checkoff support a system of agriculture that is anathema to those compelled to pay for them. Farming has never been just about commerce; it is a way of life. The polarization of views about the future of agriculture in this country is dramatically illustrated in the hog industry. Respondents believe that farming involves stewardship of the land and fostering healthy and vibrant rural communities.

The United States's request to hold this case – with its clear record on the ideological and political nature of the speech and objections – is another example of the government's litigation tactics of raising and then dropping arguments in order to delay the day when the last checkoff dollar is collected.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Susan E. Stokes
*Counsel of Record*
David R. Moeller
Karen R. Krub
FARMERS' LEGAL ACTION GROUP, INC.
46 E. 4th Street, Suite 1301
St. Paul, MN 55101
(651) 223-5400

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[15] Counsel for respondents were principally assisted by Farmers' Legal Action Group Staff Attorney Jess Anna Speier, and the following students in the Stanford Law School Supreme Court Litigation Clinic, supervised by Thomas C. Goldstein and Pamela S. Karlan: Michael P. Abate, Eric J. Feigin, and Daniel S. Goldman. Clinic members William B. Adams, David M. Cooper, Nicola J. Mrazek, and Jennifer J. Thomas also contributed.