Free Speech & Election Law

Free Speech War on the Range: Legal Challenges to Nation's Commodity Checkoff Programs

*By Eric Schippers**

Got Milk?

The question may sound innocuous, but for many of America's independent farmers and ranchers, that marketing slogan and others like it represents compelled speech in violation of the First Amendment.

In addition to the ubiquitous milk moustache, the nation's agricultural commodity promotion programs — known as "checkoffs" — are responsible for such well-known ads as: "*Beef. It's What's for Dinner*" and "*Ahh, The Power of Cheese*." Authorized by Congress, run by agricultural producers, and overseen by the U.S. Department of Agriculture (USDA), more than a dozen checkoff programs for various agricultural commodities are funded through mandatory assessments on farmers and ranchers based on a portion of their sales. The beef checkoff, for example, raises more than $80 million annually from beef producers who are assessed $1 per head of cattle sold.

The twelve largest commodity promotion boards collect more than $700 million per year of farmers' hard-earned money for these so-called "generic" collective advertising programs. However, after the U.S. Supreme Court struck down the mushroom promotion program last year, many farmers and ranchers are now realizing that they *got milked.*

In *United States v. United Foods, Inc*., the Supreme Court held that the federal statute requiring mushroom growers to pay for generic mushroom advertisements violated the First Amendment by compelling support for speech with which at least some of the growers disagreed. The opinion, penned by Justice Kennedy, stated that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. . . . Just as the First Amendment may prevent the government from prohibiting speech, the First Amendment may prevent the government from. . . compelling certain individuals to pay subsidies for speech to which they object."[1]

In declaring the mushroom checkoff unconstitutional, the *United Foods* Court took significant strides to undo some of the damage caused by its much-criticized 1997 decision in *Glickman v. Wileman Brothers & Elliott, Inc*.[2] In *Glickman*, the Court rendered its decision in the assumed factual context that the producers of California tree fruits were part of a larger collective marketing program in which the objectors had given up their market autonomy. The issue was not whether the producers were compelled to speak, but whether the "mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy."[3]

In sharp contrast to *Glickman*, the mushroom producers in *United Foods* were subject to "no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions."[4]

In the wake of *United Foods*, lawsuits are now pending over other commodity promotions programs, including the beef and dairy checkoffs, which are materially indistinguishable from the mushroom program.[5,6]

In *Charter v. USDA*, independent Montana cattle ranchers Steve and Jeanne Charter have challenged the constitutionality of the Beef Act, which the government itself in *United Foods* had claimed was indistinguishable from the Mushroom Act. The government now claims, however, that the Beef Act is a part of a broader regulatory system to which the forced collective speech under the Act is "germane." But nothing in the Beef Act compels a cooperative marketing scheme or any other form of collective action that would prevent beef producers from making independent marketing decisions.

The government also asserts that the speech at issue is commercial in nature and that compelled support for such speech is subject to, and would survive, the *Central Hudson* test for restrictions on commercial speech.[7] Interestingly, the government did not rely upon *Central Hudson* in defense of the mushroom checkoff program. Regardless, the Supreme Court has clarified in *Glickman* that a lower court's application of the *Central Hudson* test should not be relied upon "for the purpose of testing the constitutionality of marketing order assessments for promotional advertising" because no explanation is given for how the *Central Hudson* test, which involves a restriction of commercial speech, should govern a case involving the compelled funding of speech.[8]

Perhaps recognizing the weakness of its arguments in light of *United Foods*, the government now places its strongest emphasis on the novel argument that checkoffs may be constitutional if construed as an extension of the government's own speech.[9]

The future of commodity checkoff programs may now hinge on whether the speech funded through the programs is, in fact, government speech and, if so, whether compelled support for government speech is nonetheless subject to the same First Amendment scrutiny as compelled support for third-party speech.

The government speech immunity defense for checkoff programs has never been accepted by any appel-

late court. Only two cases have dealt with the issue; the U.S. Court of Appeals for the Third Circuit held that the Beef Act, establishing the beef checkoff, is not government speech.[10] Likewise, the U.S. Court of Appeals for the Ninth Circuit held that the almond checkoff program is not government speech.[11]

In addition, none of the checkoff programs attribute the views they express to the government, but instead attribute them to agricultural producers. Common sense dictates that if the speech in question is not attributed to the government, is paid for by farmers, and is attributed to farmers, it is not government speech. In fact, in the case of beef, the USDA food pyramid — which is government speech — warns Americans not to eat too much beef.[12]

During recent Congressional negotiations over the 2002 Farm Bill, 15 agricultural trade associations sought to bolster the specious government speech argument by lobbying for language to be included in the bill that would declare all checkoff-related advertising as "government speech." Fearing that *United Foods* "ha[d] put all research and promotion programs under a cloud of doubt," the associations attempted to influence the outcome of pending litigation over checkoff programs.[13] Congress, in rejecting that attempt, reinforced the long-established position that checkoffs are producer-driven, producer-funded, "self-help" programs.[14]

If Congress wants to act to preserve the purported benefits of collective advertising, while at the same time respecting the First Amendment, it could do so by amending existing laws to limit such collective speech to those agricultural producers who have voluntarily entered into collective production, promotion or sales arrangements; for example, through agricultural cooperatives already authorized under current law.[15] That change would provide the economies of scale touted by proponents of the current system without forcing a collective regime upon those wishing to remain independent in the market in the true spirit of the family farmer and the independent rancher. It would also avoid any "free-rider" concerns by permitting voluntary co-ops to "brand" their collective advertising, while allowing independent producers to compete with such co-ops based on the unique attributes and quality of their products.

EDITOR'S NOTE: On June 21, 2002, U.S. District Judge Charles Kornmann, in *Livestock Marketing Association v. USDA* (Civ. 00-1032, U.S. District Court, Northern Division, South Dakota), ruled the Federal Beef Promotion and Research Act, responsible for the beef checkoff, "unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object." After July 15, 2002, the U.S. Department of Agriculture (USDA) and the Cattlemen's Beef Board (CBB) are barred from any further collection of checkoff funds in order to "wind down" the program; money remaining on hand can continue to be used for promotional purposes. The cases against the beef checkoff (which seeks a more thorough repudiation of the Beef Act) and dairy checkoff referenced in Mr. Schippers's article are still pending.

*Eric Schippers is the Executive Director of the Center for Individual Freedom. Founded in 1998, the Center for Individual Freedom is a non-partisan, non-profit organization with the mission to protect and defend individual freedoms and rights guaranteed by the U.S. Constitution. The Center is assisting in lawsuits filed by independent beef ranchers against the beef checkoff, and by a Pennsylvania family of dairy farmers against the dairy checkoff. The Center filed an amicus curiae in the *United Foods* case, as well as in a case involving "generic" collective advertising for California plum growers (*Gerawan Farming, Inc. v. Veneman, No. S080610. Calif. Supreme Court*). Copies of the legal briefs may be read online at www.cfif.org.

Footnotes

[1] *United States. v. United Foods, Inc*., 533 U.S. 405, 410-11 (2001).
[2] *Glickman v. Wileman Brothers & Elliott, Inc*., 521 U.S. 457 (1997).
[3] *United Foods*, 533 U.S. at 411 (describing *Glickman*).
[4] *Id*. at 412.
[5] *Charter v. USDA*, CV 00-198-BLG-RFC (U.S. District Court, Billings, Montana). In writing this article, the author references legal briefs prepared by Mr. Erik S. Jaffe, Mr. Kelly J. Varnes and Ms. Renee L. Giachino. Mr. Jaffe, a sole practitioner in Washington, D.C., concentrating in appellate litigation, is Chairman of the Advertising Law and Regulation Subcommittee of the Federalist Society; Mr. Kelly J. Varnes is an associate in the law firm of Hendrickson, Everson, Noennig & Woodward, P.C. in Billings, Montana; Ms. Renee Giachino is General Counsel of the Center for Individual Freedom.
[6] *Cochran v. Veneman*, No. CV-02-0529 (U.S. District Court, Middle District of Pennsylvania). A family of dairy farmers, in conjunction with the Center for Individual Freedom, filed on April 2, 2002 a lawsuit challenging the constitutionality of the mandatory dairy promotion program. The suit, filed in U.S. District Court in Scranton, Pennsylvania, on behalf of Joe and Brenda Cochran, seeks to enjoin the USDA and the Dairy Promotion Board from collecting dairy checkoff assessments, or using existing checkoff funds without prior consent of those assessed, pending a declaratory judgment in the case.
[7] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The precise boundary between commercial and noncommercial speech has not been clearly defined. The Supreme Court has previously characterized commercial speech as speech that does "no more than propose a commercial transaction."
[8] *Glickman, 521 U.S. at 474.*
[9] The government also has forced United Foods, Inc. back into district court to once again argue the constitutionality of the Mushroom Act based on its new "government speech" theory.
[10] *United States v. Frame*, 885 F.2d 1119,1132 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The Third Circuit held that "the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as 'government speech.'"
[11] *Cal-Almond, Inc. v. Department of Agriculture*, 67 F.3d 874 (9th Cir. 1995).
[12] USDA, The Food Guide Pyramid, www.nal.usda.gov:8001/py/pmap.htm
[13] March 5, 2002 letter to Senate Agriculture, Nutrition and Forestry Committee Chairman Tom Harkin signed by Alabama Farmers' Federation, Alabama Peanut Producers Association, American Beekeeping Federation, American Farm Bureau Federation, American Mushroom Institute, Georgia Agricultural Commodity Commission for Peanuts, National Cattlemen's Beef Association, National Cotton Council of America, National Milk Producers Federation, National Pork Producers Council, National Potato Council, The Popcorn Institute, United Egg Association, United Egg Producers and Western Peanut Growers Association.
[14] *Frame*, 885 F.2d at 1135.
[15] The Capper-Volstead Act allows for voluntary cooperatives which can market, promote and sell agricultural commodities.