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## Farm Product “Check-off” Programs: A Constitutional Analysis

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# Farm Product “Check-off” Programs: A Constitutional Analysis

## Summary

For decades, Congress has enacted laws authorizing generic promotion programs for a number of farm products to increase overall demand and consumption of the agricultural product. These generic promotion programs, commonly known as “check-off” programs, are funded through the payment of mandatory assessments imposed on the amount of product that a covered party sells, produces, or imports. Some producers have opposed the use of generic advertisements and have brought First Amendment challenges in court. Generally, these parties claim that they should not be required to pay for advertisements (i.e., speech ) with which they disagree.

The Supreme Court has ruled on the constitutionality of check-off programs three times in the last eight years, the most recent of which occurred in May 2005. The Court’s first two attempts at addressing First Amendment challenges to check-off programs resulted in contrasting outcomes and some confusion for lower courts. In *Johanns v. Livestock Marketing Association*, the Supreme Court’s third and most recent decision concerning a check-off program (beef), the Court ruled that the generic advertising under the program was the government’s own speech, and was therefore not susceptible to the First Amendment challenge before it. The Supreme Court’s decision was based on grounds that had not been previously addressed by the Court in the earlier check-off cases and may have far-reaching effects. For example, three circuit court rulings that invalidated other check-off programs have already been vacated by the Court for reconsideration in light of *Johanns*.

This report begins with a brief introduction to check-off programs and then describes many of the First Amendment principles that have been discussed in check-off cases. Next is an analysis of the first two challenges that reached the Supreme Court, as well as a brief discussion of subsequent lower court decisions. This report concludes with a discussion of *Johanns v. Livestock Marketing Association* and its possible implications for check-off programs. This report will be updated as warranted.

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# Farm Product “Check-off” Programs: A Constitutional Analysis

## Introduction

A number of farm products are promoted through the use of congressionally authorized generic promotion programs.<sup>1</sup> To fund these programs, the authorizing statutes (and orders) require that an assessment be collected based on the amount of product that a covered party sells, produces, or imports. Some producers have opposed the use of, or message in, generic advertisements and have brought First Amendment challenges in court, three of which the Supreme Court has decided.

The Supreme Court’s first two attempts at addressing First Amendment challenges to check-off programs — California fruits and mushrooms, respectively — resulted in contrasting opinions and some confusion for lower courts. Subsequent circuit court decisions for the beef, pork, and dairy check-off programs, for example, have all seemed to struggle with determining the applicable level of scrutiny to apply to the programs. Nonetheless, in each case the appellate courts rejected the government’s argument that the check-off programs were “government speech” immune from First Amendment scrutiny and found the programs to unconstitutionally compel speech (or compel the subsidy for the support of some type of speech).

In May 2005, the Supreme Court issued its third opinion in eight years regarding the constitutionality of a check-off program (beef). In *Johanns v. Livestock Marketing Association*,<sup>2</sup> the Supreme Court upheld the check-off program on “government speech” grounds — a legal theory not addressed by the Supreme Court in the earlier check-off cases. This ruling is likely to have far-reaching effects for check-off programs. For example, it has already been used to vacate the circuit court decisions mentioned above and will undoubtedly be used to defend other check-off programs from First Amendment challenges. The decision may also serve to inform and encourage future legislation creating or amending such programs.

This report begins with a brief introduction on check-off programs and then describes the applicable First Amendment principles argued in many of the check-off cases. Next is an analysis of the first two challenges that reached the Supreme Court, as well as a brief discussion of subsequent appellate court decisions. This report

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<sup>1</sup> For general information on check-off programs, see CRS Report 95-353 ENR, *Federal Farm Promotion (“Check-Off”) Programs*, by Geoffrey S. Becker.

<sup>2</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. \_\_\_\_ (2005); *together with* *Nebraska Cattlemen, Inc., v. Livestock Mktg. Ass’n* (No. 03-1165).

concludes with a discussion of *Johanns v. Livestock Marketing Association* and its possible implications for check-off programs.

## Check-off Programs

Congress has provided for the generic promotion of farm products since the 1930s.<sup>3</sup> These programs — commonly known as “check-off” programs — are requested, administered, and funded by the industries themselves, and, in part, operate under promotion and research orders or agreements issued by the Secretary of Agriculture. General oversight of these programs is provided by the U.S. Department of Agriculture’s (USDA) Agricultural Marketing Service; however, there is still some debate as to actually how much control and responsibility the USDA has over the check-off programs. Farm product check-off programs are designed to strengthen the position of each respective commodity in the marketplace by increasing domestic demand and consumption and by expanding foreign markets.

Typically, the statutory language authorizing a check-off program calls on the Secretary of Agriculture to appoint a board (e.g., National Dairy Promotion and Research Board), council (e.g., Mushroom Council) or other type of representative body, based on nominations made by the producers, to pursue the statute’s goals. To fund the programs, the authorizing statutes and orders call on the board or council to collect an assessment based on the amount of product that a covered party sells, produces, or imports. The collected funds may finance a variety of programs, including advertising, consumer education, nutrition, production, marketing research, and new product and foreign market development. In some cases, large percentages of the collected funds are used to implement generic promotions and advertisements.<sup>4</sup> The Secretary of Agriculture must approve each promotional project or plan before it can be implemented.<sup>5</sup>

## The First Amendment

The First Amendment to the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>6</sup> In general, the First Amendment prohibits the government from regulating private speech based on its content and may prevent the government from compelling individuals to express

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<sup>3</sup> See Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601 *et seq.*).

<sup>4</sup> See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 408 (2001) (noting that most monies raised under the mushroom check-off program were spent for generic advertising to promote mushroom sales); see also *Livestock Marketing Ass’n v. Dep’t of Agriculture*, 335 F.3d 711, 723 (8<sup>th</sup> Cir. 2003) *vacated sub nom. Johanns v. Livestock Mktg. Ass’n*, 544 U.S. \_\_\_ (2005) (noting that at least 50% of the assessments collected under the beef check-off program are used for generic beef advertisements).

<sup>5</sup> See, e.g., 7 C.F.R. §1209.40 (mushrooms); §1230.60 (pork); §1260.169 (beef).

<sup>6</sup> For more information on the First Amendment, see CRS Report 95-815 A, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

certain views<sup>7</sup> or to pay subsidies for speech to which they object.<sup>8</sup> However, the right to speak or refrain from speaking is not absolute. Courts, for example, look at the context and purpose of the speech and allow greater government regulation for some types of speech than others. In considering challenges to check-off programs, courts have generally looked to the “commercial speech,” “compelled speech,” and “government speech” doctrines that have been developed under First Amendment jurisprudence.

**Commercial Speech.** Commercial speech is speech that “proposes a commercial transaction”<sup>9</sup> or relates “solely to the economic interests of the speaker and its audience.”<sup>10</sup> The government may regulate commercial speech, even truthful expressions, more than it may regulate fully protected speech, and it also may ban false or misleading commercial speech, or advertisements that promote an illegal product.

Courts typically use a four-prong test that was articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* to determine whether a governmental regulation of commercial speech is constitutional.<sup>11</sup> The *Central Hudson* test asks (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. “If both inquiries yield positive answers,” then to be constitutional the restriction must (3) “directly advance the governmental interest asserted,” and (4) be “not more extensive than is necessary to serve that interest.”<sup>12</sup> Determining whether the speech in question is “commercial speech” is important because it allows a court to apply the more flexible intermediate scrutiny test of *Central Hudson*. As discussed below, courts have often struggled with placing check-off programs solely within the parameters of “commercial speech.”

**Compelled Speech.** The First Amendment has been interpreted to prevent the government from compelling individuals to express certain views or to pay subsidies for certain speech to which they object. Agricultural check-off cases have traditionally been analyzed within this category or some modification of it.

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<sup>7</sup> See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

<sup>8</sup> See *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

<sup>9</sup> *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 482 (1989).

<sup>10</sup> *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 561 (1980).

<sup>11</sup> 447 U.S. 557 (1980).

<sup>12</sup> In *Central Hudson*, the Supreme Court was asked to determine the constitutionality of a state regulation that banned all promotional advertising as a way to, in part, conserve energy. In holding that the restriction was not constitutional, the Court articulated the test described in the text, and concluded that the regulation was more extensive than necessary to serve the state interest (a violation of prong four).

Initially, courts looked to the Supreme Court cases of *Abood v. Detroit Board of Education*<sup>13</sup> and *Keller v. State Bar of California*<sup>14</sup> when analyzing check-off programs under the principles of compelled speech or subsidies. In *Abood*, non-union employees objected to paying a “service fee” equal to union dues because the fees subsidized economic, political, professional, scientific, and religious activities not related to the union’s collective bargaining agreement. The Supreme Court held that the union could constitutionally finance ideological activities that were not *germane* to the union’s collective bargaining but only with funds provided by non-objecting employees.<sup>15</sup> Since collective bargaining was the authorized purpose of the union, and the union’s political activities were not germane to that purpose according to the Court, employees who disagreed with the political activities could not be compelled to support them. Similarly, in *Keller*, the Supreme Court held that the State Bar of California could constitutionally fund activities germane to its goals of regulating the legal profession out of the mandatory dues of all members, but could not use compulsory dues for activities of an ideological nature that fell outside of activities germane to the Bar’s goals.<sup>16</sup>

From these two cases, courts have fashioned a “germaneness” test for “compelled speech” or more particularly, “compelled subsidy” cases.<sup>17</sup> Under this test, courts are called on to “draw a line” between those activities that are germane to a broader and legitimate government purpose and those that are not — a test both the *Abood* and *Keller* courts acknowledged would be difficult to apply.

**Government Speech.** Generally, courts have “permitted the government to regulate the content of what is or is not expressed when the government is the speaker or when the government enlists private entities to convey its own message.”<sup>18</sup> So long as the government bases its actions on legitimate goals, the government may speak despite citizen disagreement with the content of the message. Indeed, the government, with some exceptions pertaining to religion, may deliver a content-oriented message. “When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate

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<sup>13</sup> 431 U.S. 209 (1977).

<sup>14</sup> 496 U.S. 1 (1990).

<sup>15</sup> *Abood*, 431 U.S. at 235-236.

<sup>16</sup> *Keller*, 496 U.S. at 13-14. Thus, the members had no valid constitutional objection to their dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession because such activities were germane to the bar’s goals. However, compulsory dues could not be expended to endorse or advance a gun control or a nuclear weapons freeze because they were activities not germane to the goals set out by the California Bar.

<sup>17</sup> Justice Stevens suggested in his concurring opinion in *United States v. United Foods*, 533 U.S. 405, 417-418 (2001), that cases such as *Keller* and *Abood* — involving compelled payment of money — may be viewed as the “compelled subsidy” subset of the “compelled speech” cases.

<sup>18</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”<sup>19</sup>

In analyzing whether the “government speech” doctrine applies, courts typically consider the government’s responsibility for, and control over, the speech in question. The more control the government exerts, the more likely it will be determined to be the speaker. While there seems to be some debate as to the scope of the “government speech” doctrine,<sup>20</sup> its effect is still broad, in that it can provide immunity to First Amendment scrutiny.

## Check-off Case Law

Over the years, a number of parties assessed under check-off programs have claimed that the mandatory assessments are unconstitutional restraints on their right to free speech. Generally, opponents argue that they should not be required to pay for advertisements with which they disagree. For example, in a challenge against the dairy check-off program, the claimants were traditional dairy farmers that did not use the genetically engineered and controversial “recombinant Bovine Growth Hormone.” Consequently, they objected to subsidizing generic advertisements that they felt conveyed a message that milk is a fungible product that bears no distinction based on where and how it is produced.<sup>21</sup> These types of challenges were most often successful under a “compelled speech” analysis, even though the cases varied in their analysis of “germaneness” and their attention to whether a “government speech” approach might be more appropriate. The Supreme Court’s recent expansive view of what can constitute “government speech,” however, has put the entire line of earlier case law in question.

## Early Supreme Court Cases

**California Tree Fruits Check-off Program.** In *Glickman v. Wileman Brothers and Elliot, Inc.*, several producers of California tree fruits (peaches, nectarines, and plums) challenged the constitutionality of a USDA marketing order that required assessments be imposed on producers to fund costs associated with the orders, including generic advertising.<sup>22</sup> The marketing order at issue was derived from the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §§ 601 *et seq.*) and provides regulatory guidelines and restraints on its participants, including quality and quantity controls, uniform price measures, and grade and size standards. Ultimately, the Supreme Court determined that the marketing orders were a species of economic regulation and upheld the constitutionality of the assessments imposed on the fruit growers to cover the costs of generic advertising.

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<sup>19</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

<sup>20</sup> *See Johanns v. Livestock Mktg. Ass’n*, 544 U.S. \_\_\_\_ (2005) (Souter, J., dissenting) slip op. at 2 (noting that the government speech doctrine is relatively new and correspondingly imprecise).

<sup>21</sup> *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), *vacated sub nom Johanns v. Cochran*, 2005 U.S. LEXIS 4353 (May 31, 2005) (No. 04-446).

<sup>22</sup> 521 U.S. 457 (1997).

The Supreme Court began its analysis by describing the regulatory guidelines and restraints that the marketing order posed on the industry as a whole and concluded that they fostered a “policy of collective, rather than competitive marketing.”<sup>23</sup> The Court then distinguished the regulatory scheme at issue from laws that had previously been found suspect under the First Amendment by determining that the orders (1) posed no restraint on the freedom of any producer to communicate any message to any audience, (2) did not compel any person to engage in any actual or symbolic speech, and (3) did not compel the producers to endorse or to finance any political or ideological views.<sup>24</sup> Next, the Court determined that the standards established in “compelled speech” case law favored a finding of constitutionality because (1) the generic advertising was unquestionably germane to the purposes of the marketing orders, and (2) the assessments were not used to fund political or ideological activities.<sup>25</sup> The *Glickman* Court further dismissed the argument that the compelled assessments required the level of scrutiny usually applied in “commercial speech” cases because this level was inconsistent with the very nature and purpose of the collective action of marketing orders at issue.<sup>26</sup>

Based on these findings and the general cooperative nature of the regulatory scheme, the Court found that the assessments imposed did not raise First Amendment concerns. The Court determined that the respondent’s criticisms of generic advertising “provid[ed] no basis for concluding that factually accurate advertising constitutes an abridgment of anybody’s right to speak freely.”<sup>27</sup> The Supreme Court concluded by stating that the marketing orders in question were a “species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgements made by Congress.”<sup>28</sup>

**Mushroom Check-off Program.** In 2001, the Supreme Court revisited the issue of compelled marketing assessments for generic advertisements in *United States v. United Foods, Inc.*<sup>29</sup> In *United Foods*, the Court was faced with determining whether the mandatory assessments for the mushroom check-off program established pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990 (7 U.S.C. §§ 6101 *et seq.*) violated the First Amendment. The Supreme Court concluded that the program authorized by the Mushroom Promotion Act differed

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<sup>23</sup> *Glickman*, 521 U.S. at 461.

<sup>24</sup> *Id.* at 469-470.

<sup>25</sup> *Id.* at 471-472 (“Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message.”).

<sup>26</sup> *Id.* at 474-475 (finding it erroneous for the lower court to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising).

<sup>27</sup> *Id.* at 474.

<sup>28</sup> *Id.* at 477.

<sup>29</sup> 533 U.S. 405 (2001).

fundamentally from the marketing orders at issue under *Glickman* and found the program unconstitutional.

The Court started its analysis by declaring that it was not going to view the case in light of “commercial speech” jurisprudence because the government never raised the issue; however, the Court determined that First Amendment issues arose “because of the requirement that producers subsidize speech with which they disagree.”<sup>30</sup> Accordingly, the Court began its examination by viewing the entire regulatory program at issue and comparing it with the scheme under scrutiny in *Glickman*. The Court determined that the features of the marketing scheme found important in *Glickman* were not present in the case before it. For example, the Court concluded that “[i]n *Glickman*, the mandated assessments for speech were ancillary to a more comprehensive program restricting market autonomy” and that under the mushroom check-off “the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.”<sup>31</sup> By underscoring these differences, the Court moved away from the precedent established by *Glickman*.

The Court next turned to the “compelled speech” arguments before it and found that the “mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.”<sup>32</sup> In so holding, the *United Foods* Court found that the compelled speech in the mushroom check-off program was not germane to a purpose related to an association independent from the speech itself. The only purpose the compelled contributions served, according to the Court, was the advertising scheme for the mushroom check-off program, which was not like the broader cooperative marketing structure relied upon by a majority of the Court in *Glickman*.<sup>33</sup> Accordingly, the Court struck down the mandatory assessments used to fund generic advertisements imposed by the mushroom check-off program. The government also attempted to assert “government speech” arguments; however, the Court refused to hear such substantive claims because they had not been raised at the lower levels.<sup>34</sup>

Since this decision, the Mushroom Council, which administers the check-off program under USDA supervision, voted to reduce the mandatory assessments and divert their revenue to non-promotional activities such as research into mushrooms’ health and nutritional attributes.

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<sup>30</sup> *Id.* at 411.

<sup>31</sup> *Id.* at 411-412. The Court further noted that “[b]eyond the collection and disbursement of advertising funds there are 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.”

<sup>32</sup> *Id.* at 413.

<sup>33</sup> *Id.* at 415.

<sup>34</sup> *Id.* at 416.

## Federal Circuit Cases after *United Foods*

Since *United Foods*, there have been challenges to the constitutionality of the beef, dairy, and pork check-off programs. These challenges were all successful at the appellate level.<sup>35</sup> In each case, the appellate courts rejected the government's argument that the check-off programs were "government speech" immune from First Amendment scrutiny.<sup>36</sup> Generally, the courts found that the government exerted insufficient control and responsibility over the check-off programs to support the applicability of the "government speech" doctrine. After declaring that the check-off cases presented private speech, the courts typically compared the check-off program at issue with those presented in *Glickman* and *United Foods*. All three circuit courts found the check-off programs in question more akin to the teachings and holdings of *United Foods* and thus unconstitutional. In so holding, each court appeared to struggle with placing the check-off programs within the "commercial speech — compelled speech" rubric.

All three appellate decisions were appealed to the Supreme Court. The Court, however, heard arguments only in *Livestock Marketing Ass'n v. Dep't of Agriculture*, where the Eighth Circuit had ruled that the beef check-off program, authorized under the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901 *et seq.*) and its implementing regulations was unconstitutional.<sup>37</sup> The Court decided to hold the petitions for writ of certiorari for the pork and dairy check-off cases until the beef case was decided. The Court heard oral arguments in December 2004, and released its opinion on May 23, 2005, upholding the constitutionality of the beef check-off program. The Supreme Court vacated all three appellate court decisions and remanded each case for further consideration in light of the ruling.<sup>38</sup>

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<sup>35</sup> *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711 (8<sup>th</sup> Cir. 2003), *vacated sub nom. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. \_\_\_\_ (2005) (beef); *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), *vacated sub nom. Johanns v. Cochran*, 2005 U.S. LEXIS 4353 (May 31, 2005) (No. 04-446) (dairy); *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6<sup>th</sup> Cir. 2003), *vacated sub nom. Mich. Pork Producers Ass'n, Inc. v. Campaign for Family Farms*, 2005 U.S. LEXIS 4349 (May 31, 2005) (No. 03-1043) (pork).

<sup>36</sup> *But see Charter v. United States Dep't of Agric.*, 230 F. Supp. 2d 1121 (D. Mont. 2002) (finding the beef check-off constitutional, in part, because the program constituted "government speech").

<sup>37</sup> 335 F.3d 711 (8<sup>th</sup> Cir. 2003), *vacated sub nom. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. \_\_\_\_ (2005). Under the beef check-off program, producers are charged a \$1-per-head assessment on all sales or importation of cattle, which is used to fund beef-related projects, including promotional campaigns, designed by a beef industry Operation Committee and approved by the Secretary.

<sup>38</sup> The Court has also vacated a Fifth Circuit decision that invalidated a similar *state* generic advertising program for alligator products. *See Pelts & Skins v. Landreneau*, 365 F.3d 423 (5<sup>th</sup> Cir. 2004), *vacated by Landreneau v. Pelts & Skins*, 2005 U.S. LEXIS 4351 (May 31, 2005) (No. 04-23).

## Recent Supreme Court Decision: *Johanns v. Livestock Marketing Association*

In *Johanns v. Livestock Marketing Association*, the Supreme Court, in a 6-3 opinion, ruled that the beef check-off funds the government’s own speech, and it is therefore not susceptible to a First Amendment compelled-subsidy challenge.<sup>39</sup> The Court vacated the judgment by the Eighth Circuit and remanded the case to the appellate court for further proceedings consistent with its decision.<sup>40</sup>

The Court began its analysis by declaring that it has upheld First Amendment challenges in cases involving “compelled speech” and “compelled subsidy,” but had never considered the First Amendment consequences of “government-compelled subsidy of the government’s own speech.”<sup>41</sup> In all the cases invalidating requirements to subsidize speech, the Court stated, “the speech was, or was presumed to be, that of an entity other than the government itself.”<sup>42</sup> The Court added (quoting an earlier Supreme Court case), that “[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.”<sup>43</sup> After recognizing these principles, the Court observed that it has generally assumed, but not squarely held, that “compelled funding of government speech does not alone raise First Amendment concerns.”<sup>44</sup>

The Court next rejected respondent’s argument that the beef check-off program was not “government speech,” and instead, found the promotional campaigns to be “effectively controlled by the Federal Government itself” and “from beginning to end the message established by the Federal Government.”<sup>45</sup> The Court seemed to come to these conclusions primarily because: (1) Congress and the Secretary set out the overarching message of the beef check-off program; (2) all proposed promotional messages are reviewed for substance (and possibly rejected or rewritten) by USDA officials; and (3) officials of the USDA attend and participate in the open meetings at which proposals are developed.<sup>46</sup> Noting the overall degree of governmental control over the check-off messages, the Court stated that “the government is not

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<sup>39</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. \_\_\_\_ (2005); *together with* *Nebraska Cattlemen, Inc. v. Livestock Mktg. Ass’n* (No. 03-1165). USDA Secretary Mike Johanns replaced Ann Veneman as the appellant in this case when he became Secretary of the USDA.

<sup>40</sup> The Court noted that the claimants would now have the opportunity to proceed on their other claims (though they were not named).

<sup>41</sup> *Johanns*, 544 U.S. slip op. at 5.

<sup>42</sup> *Id.* at 7 (citing among others, *Keller*, 496 U.S. at 15; *Abood*, 431 U.S. at 212; and *United Foods*, 533 U.S. at 416).

<sup>43</sup> *Johanns*, 544 U.S. slip op. at 8 (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 9. (“The Operating Committee’s only relevant involvement is ancillary — it designs the promotional campaigns, which the Secretary supervises and approves. . . .”) *Id.* at 9 n.4.

<sup>46</sup> *Id.* at 9.

precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.”<sup>47</sup>

The Court also dismissed the respondent’s argument that the beef check-off program needed to be funded by general revenues, rather than targeted assessments, to qualify as “government speech.” In so concluding, the Court pointed out that the respondents have no right under the First Amendment not to fund government speech, irrespective of where the money comes from (i.e., broad-based taxes or targeted assessments).<sup>48</sup> In addition, the Court concluded that the beef check-off program provides political safeguards that are “more than adequate” to ensure that the message is kept apart from private interests.<sup>49</sup> Finally, the Court rejected respondent’s argument that they were unconstitutionally forced to endorse a message with which they disagreed because the promotions used the tag-line “America’s Beef Producers.” The Court stated that such an argument involved *compelled* speech, rather than compelled *subsidy*.<sup>50</sup> The Court suggested in dictum, nonetheless, that a *compelled* speech cause of action might lie if a party could show that an objectionable beef advertisement was attributable to it. That is, even if a statute is constitutional on its face, a party may show that the government has applied it in an unconstitutional manner.

Justices Souter, Stevens, and Kennedy dissented from the majority opinion. The dissent argues that the generic beef advertisements should not qualify for treatment as speech by the government mainly because the statute does not require the government to indicate that it is the sponsor of the message.<sup>51</sup> If the government wishes to rely on the “government speech” doctrine to compel specific groups to fund speech with targeted taxes, the dissent states, “it must make itself politically accountable by indicating that the content actually is a government message. . . .”<sup>52</sup> Because the “government speech” doctrine is not applicable, the dissent noted, the case should have been decided in line with *United Foods*.

## **Possible Implications of *Johanns v. Livestock Marketing Association***

The Supreme Court’s decision to uphold the beef check-off program on the “government speech” doctrine is likely to have far-reaching implications for check-off programs. *Johanns*, in general, appears to have fortified the constitutionality of

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 11 and 12 n.7.

<sup>49</sup> *Id.* at 12. In so concluding, the Court noted that the Secretary of Agriculture is a politically accountable official who retains absolute veto power over the advertisements and that Congress retains oversight authority and the ability to reform the program at any time. *Id.*

<sup>50</sup> *Id.* at 13 and n.8 (noting that under a compelled-subsidy analysis, personal autonomy is violated when a person is forced to fund someone else’s private speech that is unconnected to any legitimate government purpose).

<sup>51</sup> *Johanns*, 544 U.S. slip op. at 2 (Souter, J., dissenting).

<sup>52</sup> *Id.*

check-off programs and has likely enhanced the ability of Congress to provide similar promotional support for more agricultural products. Accordingly, this ruling will undoubtedly be used to defend other check-off programs from First Amendment challenges, to reevaluate those already decided, and to inform future legislation creating or amending check-off programs.

This opinion will probably clear up much of the confusion that the *Glickman* — *United Foods* dichotomy established. By classifying the beef check-off program as a type of “government speech,” the Court has now made it possible for lower courts to avoid (1) placing a check-off program within or (2) applying a test from, the “commercial speech — compelled speech” line of cases — a task many lower courts struggled with. On the other hand, attorneys for the respondent claim that with five different opinions from the Court (i.e., majority, three concurrences, dissent), “there are as many questions left open as there were answers.”<sup>53</sup> Moreover, the extent to which *United Foods* is, as the dissent points out, a “dead letter” is unclear, since the ruling did not expressly overrule it.<sup>54</sup> These observations notwithstanding, the decision establishes a precedent by which check-off programs may be immune from First Amendment scrutiny.

The *Johanns* ruling put into question many of the earlier check-off appellate court decisions.<sup>55</sup> Indeed, the Supreme Court has already vacated the appellate court decisions that invalidated the federal dairy and pork check-off programs and has remanded each case, including the beef check-off case, for reconsideration in light of the decision. If it can be shown that these cases are analogous to the beef check-off program, it appears that a court would now likely find these check-off programs constitutional “government speech.” This finding seems probable, since the programs are authorized and administered much in the same fashion and were all declared almost identical to the mushroom check-off program in *United Foods*.

Opponents, accordingly, may attempt to reformulate their arguments outside the beef check-off holding, perhaps using what was suggested by the Court in dictum (i.e., an as-applied challenge), or pursue recourse under completely different legal theories. Opponents of the pork check-off program, for instance, are reportedly pursuing a “freedom of association” claim that was not addressed by the Supreme

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<sup>53</sup> Rod Smith, Feedstuffs, *What they said about the ruling*, Vol. 77, No. 22, at 5 (May 30, 2005) (citing Prof. Lawrence Tribe who argued the case before the Supreme Court for respondents). Professor Tribe pointed out that Justice Breyer and to a certain extent Justice Ginsburg, according to their concurring opinions, were more inclined to view the assessments as a form of “economic regulation” rather than “government speech.”

<sup>54</sup> *Johanns*, 544 U.S. slip op. at 2 (Souter, J., dissenting). Both the majority and the dissent recognized that the beef check-off program was virtually identical to the mushroom check-off program. The majority, however, seemed to sidestep the holding from *United Foods* by deciding the case on “government speech” grounds.

<sup>55</sup> The exact procedure that may be used to reevaluate past decisions will depend in large part on the relief granted or order issued by the court and the overall status of the case. Parties, for example, might ask a court to relieve them from a final judgement under Rule 60 of the Federal Rules of Civil Procedure, which allows such a motion to be made for “any reason justifying relief from the operation of the judgment.”

Court in the beef check-off decision.<sup>56</sup> The USDA has stated that it is studying the beef check-off opinion to determine its impact on other First Amendment challenges to check-off programs.<sup>57</sup>

Some have claimed that the decision might spur Congress into reconsidering the underlying authority and purposes of the check-off programs to accommodate some of the concerns raised by the parties or noted by the courts.<sup>58</sup> Congress, for instance, might consider exempting certain categories of producers who disagree with generic advertising from paying mandatory assessments under a commodity promotion law similar to the exemption that Congress established in the 2002 Farm Bill for persons that produce and market solely 100% organic products.<sup>59</sup> Congress might also seek to further define or expand current provisions in commodity promotion laws that already require councils and projects to “take into account similarities and differences” between certain products and producers.<sup>60</sup>

Congress may also wish to reexamine its position on requiring the advertisements to show that they are, in fact, speech by the Government, since this was a major criticism in the dissent and all circuit courts found insufficient governmental control. A clear indication of who is the speaker may be important, as mentioned by Justice Ginsburg in her concurring opinion and some experts, to reconcile the message in check-off programs with other speech that is overtly sponsored by the government, particularly the nutritional and dietary guidelines (*e.g.*, “Food Pyramid”).<sup>61</sup> The most recent federal Dietary Guidelines, for example, encourage greater consumption of fruits, vegetables, whole grains, and low-fat dairy, within a balanced, lower-calorie intake diet, while check-off programs generally encourage more consumption of both low-fat and high-fat beef, pork, and dairy

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<sup>56</sup> See Agriculture Online, *Supreme Court sends challenge to Pork Check-Off back to lower court* (June 2, 2005) available at [[http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/agNews\\_050602crPORKCHECKOFF.xml&catref=ag1001](http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/agNews_050602crPORKCHECKOFF.xml&catref=ag1001)] last viewed on June 2, 2005.

<sup>57</sup> Press Release, U.S. Department of Agriculture, *U.S. Supreme Court Rules that Beef Checkoff Program is Constitutional*, No. 0179.05 (May 23, 2005).

<sup>58</sup> Roger Bernard, *Supreme Court: Beef Checkoff. It's Constitutional*, AgWeb.com, (May 23, 2005) available at [[http://www.agweb.com/get\\_article.asp?pageid=117980&newscat=GN](http://www.agweb.com/get_article.asp?pageid=117980&newscat=GN)] last viewed on June 13, 2005.

<sup>59</sup> See Farm Security and Rural Investment Act of 2002, P.L. 107-171, §10607 (codified at 7 U.S.C. §7401).

<sup>60</sup> See, *e.g.*, 7 U.S.C. §2904(4)(B) (beef). The provision further requires that the Beef Board “ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment under this chapter.”

<sup>61</sup> *Johanns*, 544 U.S. slip op. at 1 (Ginsburg, J., concurring). See also Parke Wilde, *Federal Communication about Obesity in the Dietary Guidelines and Checkoff Programs*, prepared for the workshop: “The cost of obesity: Lessons for business and public policy.” Univ. of Baltimore (May 3, 2005) [hereinafter Wilde, *Federal Communication about Obesity in the Dietary Guidelines and Checkoff Programs*].

products.<sup>62</sup> These apparent inconsistencies, it has been argued, might undermine one or both federal government messages and could lead to consumer confusion.<sup>63</sup>

Some also speculate, given the Court's acceptance of the "government speech" argument, that the ruling will prompt the USDA to exert greater effort in supervising check-offs and addressing the concerns of some of the opposing parties.<sup>64</sup> With respect to programs that are still operating, many may continue operating as usual. Others that have modified their practices, such as the mushroom check-off program, may look to return to the *status quo*, pre-*United Foods*, and impose mandatory assessments for generic promotion campaigns. Overall, the ruling is expected to call more attention to the operation of check-off programs

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<sup>62</sup> Wilde, *Federal Communication about Obesity in the Dietary Guidelines and Checkoff Programs*, at 34.

<sup>63</sup> *Id.* at 27-35.

<sup>64</sup> Bernard, *supra* note 58.