Nos. 03-1164 & 03-1165

IN THE

Supreme Court of the United States

VENEMAN, *ET AL.*, *Petitioners*,
v.
LIVESTOCK MARKETING ASSOCIATION, *ET AL.*, *Respondents*.

NEBRASKA CATTLEMEN, INC., *ET AL.*, *Petitioners*,
v.
LIVESTOCK MARKETING ASSOCIATION, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* JEANNE and STEVE CHARTER, GERAWAN FARMING, INC., DELANO FARMS CO., GRAVES BROTHERS CO. and SEVEN OTHER FLORIDA CITRUS GROWERS, and CRICKET HOSIERY, INC. and FIVE OTHER COTTON IMPORTERS, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Steve and Jeanne Charter are independent Montana ranchers subject to assessments under the Beef Act. Because they have strongly held views regarding ranching, nutrition, food safety, and marketing that are considerably different – and often diametrically opposed – to the views expressed by checkoff-funded speech, they challenged the constitutional validity of the Beef Act and the resulting beef checkoff. That challenge is now pending before the Ninth Circuit, *Charter* v.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. None of the corporate *Amici* have any parent companies and no publicly traded company owns 10% or more of any of their stock.

USDA, No. 02-36140 (CA9) (argued March 31, 2004), and is being held for the outcome in this case.

Gerawan Farming, Inc., is a family-owned grower-shipper of peaches, nectarines, plums, and table grapes. Gerawan has filed an administrative challenge at USDA to the mandatory assessments imposed under federal marketing orders for peaches and nectarines. It also has challenges to the mandatory fee imposed under state marketing orders for plums and grapes pending in the California courts. *See Gerawan Farming, Inc.* v. *Kawamura*, 33 Cal.4th 1 (2004). Gerawan, whose annual assessments for the four commodities are approximately $750,000, is opposed all mandatory speech assessments. For example, it opposed the nectarine and peach fees for ideological (government should not interfere with its right to choose speaker and message), ethical (the group-determined messages are largely false with respect to its fruit), and practical reasons (investment of significant resources in know-how, technology, and the Prima brand name to distinguish Gerawan fruit from the "rest" of the industry).

Delano Farms Company, a Washington corporation, is subject to speech assessments to support the California Table Grape Commission. Delano objects to the generic messages of the Commission, with which it does not wish to be affiliated, because they falsely group Delano's superior grapes with the mediocre product of the rest of the industry. Delano has challenged the program as a violation of both the state and federal Constitutions. The Ninth Circuit recently held in *Delano Farms* v. *California Table Grape Commission*, 318 F.3d 895 (CA9 2003), that the fees violated the First Amendment.

Graves Brothers Co., Evans Properties, Inc., Southern Gardens Groves Corp., The Latt Maxcy Corporation, Fellsmere Joint Venture, Oak Hammock Grove, Ltd., Silver Strand III and Barron Collier Partnership are Florida citrus growers subjected to assessments on every box of citrus they produce. The assessments finance the Florida Advertising Trust Fund

established by Section 601.15, Florida Statutes, to generically promote citrus. They have challenged the validity of the Florida statute, which has been held unconstitutional in *Graves Bros. Co.* v. *Florida Dept. of Citrus*, Case Nos. GC-G-02-4686, GC-G–03-0281 (Fla. 10th Jud. Cir., Polk County 2003), *appeal pending*. They object to the generic promotion of citrus for a variety of reasons. All object because the advertising is acknowledged to promote their competitors, including cheap imported Brazilian frozen orange juice and citrus grown in Texas and California. Further, they object to generic promotion which benefits frozen orange juice, because pasteurized juice not-from-concentrate is their profitable market. Individually, Graves Brothers Co. has established its "Orchid" brand for fresh grapefruit and would like to expand that brand to grapefruit juice, but the box tax is as much or more than its profit margin on grapefruit used for juicing. Fellsmere Joint Venture objects on moral grounds to the promotion of grapefruit juice as a mixer for alcoholic drinks, and it considers it reprehensible to promote such television programming as "Sex And The City." Further, it believes that generic advertising is harmful to the promotion of the "Ocean Spray" brand of its voluntary cooperative. They believe that by encouraging cheap imports, generic promotion contributes to low pay for agricultural workers and other adverse social and environmental consequences in their local rural communities.

Cricket Hosiery, Inc., The William Carter Co. (publicly traded), and Artex International, Inc., are named plaintiffs in a class action filed in the Court of International Trade seeking a refund of the cotton fee. *See Cricket Hosiery, Inc.* v. *United States*, 2004 WL 1376402 (CIT, Jun 18, 2004). Revman Industries, Michael Simon Designs, Inc., and Tru 8, Inc., d/b/a Arriviste, have filed follow-on complaints in that Court. Those companies import products made of cotton and cotton blends, and as such were forced to begin paying the cotton fee in 1992. They in turn sell their products to the retail and insti-

tutional trade, and thus have no interest in supporting the retail advertising of the Cotton Board, with which they disagree and which is actually adverse to their products.

SUMMARY OF ARGUMENT

1. Treating *dicta* as holdings and holdings as meaningless, the government seeks an unprecedented – and constitutionally offensive – immunity from First Amendment review of compelled support for domestic propaganda. It claims such immunity *because* it has discriminated in favor of particular content and viewpoints, *because* it has conscripted private parties, including dissenters, to pay for and disseminate such propaganda, and *because* it exercises censorial control over the content of such propaganda in order to promote the "image" of beef. That approach turns the First Amendment on its head. It seeks a license for government to *compel* support for speech whenever the free marketplace of ideas fails to yield adequate support for a favored government viewpoint. But the failure of all members of an industry to support particular viewpoints espoused by others is not a market failure and is not free riding, it is *dissent*. To respond to such dissent by forcing the dissenters to support competing speech anyway is nothing short of a First Amendment abomination, regardless whether the eventual speech is characterized as private collective speech or government speech. Compelled support for government speech is no less an offense to the First Amendment than compelled support for third-party speech. The government's authority to *act* in a manner contrary to the views of a minority does not immunize compelled support for government speech from the First Amendment because *speech is different* and subject to greater constitutional protection than non-speech conduct.

2. The proper approach to analyzing viewpoint-discriminatory compelled support for speech is set out in the *Abood*/*Keller*/*United Foods* line of cases and should be the same regardless how the ultimate speaker is characterized.

While government speech tied to non-speech government programs generally will survive such analysis, domestic propaganda aimed at manipulating public opinion and unnecessary to the functioning of any non-speech government activity generally will fail. That is the proper approach, yields reasonable outcomes, and is faithful to this Court's *holdings* and to bedrock First Amendment principles.

ARGUMENT

I. COMPELLED SUPPORT FOR GOVERNMENT SPEECH SHOULD BE SUBJECT TO THE SAME FIRST AMENDMENT SCRUTINY AS COMPELLED SUPPORT FOR OTHER SPEECH.

Where individuals are compelled to subsidize the expression of viewpoints with which they disagree, the First Amendment test should be the same regardless whether the speaker being subsidized is a third party chosen or appointed by the government or the government itself. Government speech would be permissible if it were necessary and incidental – *i.e.*, germane – to a non-speech government program and met the other requirements of the test set out by cases from *Abood* v. *Detroit Bd. of Educ.,* 431 U.S. 209, 259 n. 13 (1977), to *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). Such an approach will not hamstring the legitimate functioning of the government given that much government speech easily would survive First Amendment scrutiny. But government speech conducted for its own sake or not integral to the operation of a government program would be unconstitutional. In this case, the *United Foods* analysis should be the same regardless of how the speech is characterized, and the Beef Act readily fails such analysis.

Amici, of course, recognize that there is considerable language from this Court's opinions suggesting more lenient treatment for government speech than for compelled support

for non-government speech. Such occasional language, however, is entirely *dicta*, and has never been adopted in a holding of this Court.

A. The Parameters of Government Speech.

Government speech comes in many forms and arises in many contexts. It may involve primarily factual speech concerning the government's own activities, such as laws it enacts or the annual budget. It may involve factual speech about other persons, things, or events, such as economic data, scientific research, or weather reports. Or it may involve advocacy on topics ranging from government programs, public conduct, or, as in this case, agricultural commodities. It is primarily the latter category of advocacy – or, more accurately, domestic propaganda – seeking to manipulate the public's views that is at issue here.

In addition to the various types of government speech, there are various modes by which the government speaks. It may speak through its officers and agents, through administrative officials, through official publications, or through the purchase or donation of third-party communications services such as advertising. The means by which the government purports to speak may have significant ramifications for First Amendment analysis and may sometimes mix government speech with private speech, adding further complications.[2]

Finally, the government may be acting in different capacities in different cases, with material consequences for First Amendment analysis. For example, the government may act as employer, it may act as market participant in the sale of

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[2] Speech by individuals within government, for example the President, Senators, or Representatives, may not be "government" speech at all, but rather individual speech. When an elected official communicates with constituents or campaigns for re-election, such speech is not on behalf of the government itself, but rather on behalf of the individual office-holder. The communication that occurs by the component members of government regarding their jobs is not the type of speech at issue in this case.

goods and services, it may act as sovereign speaking to its own citizens, it may act as sovereign speaking to the international community, or it may act in some mixture of those roles. Just as with restrictions or prohibitions on speech, the governmental role will alter the First Amendment analysis of government speech. *See Connick* v. *Myers*, 461 U.S. 138 (1983) (speech restrictions by government as employer). But recognizing the necessity and acceptability of speech in one context does not, *a fortiori*, establish the propriety of government speech in all contexts any more than permissible speech restrictions in the workplace justify like restrictions on the public at large.

The point of this extended taxonomy is simply to show that government speech is a complex and heterogeneous issue that should not be determined on the basis of broad generalities about government speech made in past *dicta*. This Court should focus carefully upon the particular type of government speech allegedly at issue here – viewpoint-discriminatory compelled support for speech directed at manipulating public opinion. It is not necessary to rule on other forms of government speech or to give undue deference to the speech here out of concern for speech in some other circumstance that may well raise different issues. The government's reliance on undifferentiated statements of support for government speech is overly simplistic and has a tendency to wash over potentially material distinctions within the menagerie of government speech.

In this case, even assuming *arguendo* that beef promotion involves government speech at all, this Court is addressing viewpoint-discriminatory advocacy through the use of a targeted exaction to coerce resources from a limited segment of the public, targeted at the general citizenry in order to manipulate their views in a manner preferred by portions of the beef industry and favored by the government. This case thus does *not* involve speech or advocacy by individual officials within the government or by the government as market par-

ticipant, but rather an off-budget diversion of private resources obtained through the coercive power of government in its role as sovereign.[3] Furthermore, the issue in this case at best involves government advocacy and persuasion, and not the very different issue of government publication of information.[4] As presented in this case, therefore, the question is simply whether the government *qua* government may use its power to divert resources into viewpoint-specific advocacy that seeks to alter public opinion in a direction preferred by the government.

B. This Court Has Never Immunized All Government Speech from the First Amendment.

Contrary to the government's repeated assertions and distortions, this Court has never held that government speech is immune from First Amendment scrutiny. Indeed, the various cases the government cites for the proposition that the First Amendment "does not place any limit on the government's own speech" in fact say no such thing. Pet. Br. 15-16. In each of those cases the issue of government speech was irrelevant to the holding and hence the incidental commentary regarding government speech was entirely *dicta*. In *Board of Regents of the University of Wisconsin System* v. *Southworth*,

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[3] As a simple example, if Congress were to appropriate a million dollars to buy a television advertisement saying "Please support the expansion of prescription drug benefits" or "Please support the war against Iraq," that would be government advocacy. By contrast, if individual Senators or Congressmen were to hold a press conference and announce their support for Medicare expansion or the Iraqi war, that would not be government speech notwithstanding that the speakers are government officials.

[4] In many instances the government is required to provide information to the public, for example, the publication of any new laws it has passed. Similarly, publication of economic data raises different questions from attempts to persuade the public to a particular viewpoint. While the line between information and advocacy may sometimes blur, this case presents a clear issue of government advocacy – literally "promotion" – intended to change public views of and desire for beef.

for example, the University expressly disavowed any government-speech defense, leading this Court to state that the "University having disclaimed that the speech is its own, we do not reach the *question* whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself." 529 U.S. 217, 229 (2000) (emphasis added). Any commentary on the government's purported right to advocate its policies was admittedly unnecessary to the decision and thus classic *dicta*.

In *Rosenberger* v. *Rector & Visitors of the University of Virginia*, this Court squarely rejected the notion that the University itself was speaking or subsidizing its own preferred message and instead held that the University was "expend[ing] funds to encourage a diversity of views from private speakers." 515 U.S. 819, 834 (1995). Once again, commentary concerning what rules might apply to government speech was unnecessary to the decision and advisory.[5]

In *Keller* v. *State Bar of California*, this Court referred to the respondent's argument as the "so-called 'government speech' doctrine" and then squarely held that the speech at issue was not government speech and thus "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." 496 U.S. 1, 12-13 (1990). Any discussion in *Keller* about possible immunities for government speech was, again, simply *dicta*.

Finally, in *Legal Services Corporation* v. *Velazquez*, 531 U.S. 533, 540-43 (2001), the opinion repeats much of the

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[5] The government's citation, at 19, to a concurring opinion in *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring in the judgment), is self-evidently non-authoritative, as are its citations, at 16, 26, to the concurring commentary in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring in the judgment), and *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment).

dicta from *Southworth* and *Rosenberger*, but notes that the legal services program at issue "was designed to facilitate private speech, not to promote a governmental message," *id*. at 542, thus making such discussion *dicta* as well.

The essential point here is that this Court has *never held* that government speech is immune from First Amendment scrutiny. Such *dicta* as has appeared in various opinions from this Court was written without benefit of a genuine adversarial clash on the issue and thus should not be relied upon as authoritative now that there is full briefing on the issue.

C. Compelled Support for Speech Should Receive the Same First Amendment Scrutiny Regardless of Speaker.

It is useful to review some bedrock First Amendment principles when considering whether compelled support for government speech – as opposed to government conduct – is subject to lesser or no First Amendment scrutiny.

It is a central First Amendment principle that the "freedom of speech" includes the complementary freedoms from both the restriction and compulsion of expression. As this Court recognized in *Riley* v. *National Federation of the Blind*, while "[t]here is certainly some difference between compelled speech and compelled silence, * * * in the context of protected speech, *the difference is without constitutional significance*, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." 487 U.S. 781, 796-97 (1988) (emphasis added). In *Abood*, the Court likewise recognized such First Amendment equivalence as to monetary contributions in support of expression, holding that the "fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works *no less an infringement* of their constitutional rights." 431 U.S. at 234 (emphasis added).

The fundamental objection to government regulation of speech – whether by prohibition or by compulsion – is that it coercively manipulates public opinion:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government … pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information *or manipulate the public debate through coercion rather than persuasion*.

Turner Broadcasting Sys., Inc. v. *FCC*, 512 U.S. 622, 641 (1994) (emphasis added). At issue in this case is precisely such an attempt to manipulate public opinion through coerced support for domestic propaganda designed to give beef a government-favored "image." Pet. Br. at 3. While the government certainly has the authority to take numerous *actions* based upon prevailing points of view, such authority does not extend to manipulating public opinion. Rather, "[a]uthority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 641 (1943).

The concern that public opinion – the "public mind" – remain free from manipulation by the government retains force regardless whether such manipulation is attempted by restriction or compulsion of speech:

> The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. * * * "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners;

> free and robust debate cannot thrive if directed by the government.

Riley, 487 U.S. at 790-91. Tilting the playing field of ideas, whether through compelled subtraction or compelled addition of particular viewpoints, necessarily clashes with the First Amendment. Even absent complete suppression of particular views, the First Amendment is offended by efforts to skew public debate. *See, e.g.*, *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-86 (1978) (where speech restriction "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended") (footnote omitted).[6]

With those basic First Amendment principles in mind, we can examine the *dicta* cited in support of the government speech doctrine. One such passage comes from *Southworth*:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. *See, e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 548-549 (1983).

529 U.S. at 229. But noting that it "seems" inevitable for the government to speak in support of its substantive programs

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[6] The First Amendment offense of attempting to skew public debate through coerced allocation of greater resources to speech in support of a favored viewpoint is a complete answer to the government's observation that it does not prohibit ranchers from speaking out contrary to the generic messages promoted in this case. Pet. Br. at 10.

does not mean that every instance of government speech is inevitable or acceptable. Furthermore, even *Southworth*'s restrained suggestion of a *potential* government-speech doctrine turns on a mistaken parallel between government conduct and government advocacy. The error in that *dicta* is that it overlooks the constitutional fact that *speech is different* from conduct, and the government may not act in the speech arena as freely as it may with regard to conduct.

That is the essential lesson of the First Amendment. Indeed, the very existence of that difference is both the substantive assumption and the legal consequence of the First Amendment. While the government may certainly adopt controversial policies opposed by a current minority, it may not properly use its coercive power to tilt the marketplace of ideas to ensure continued public support for its programs or to counter a current minority's efforts to change public opinion. Government's role is to obey the changing popular will, not to play rearguard to give permanence to a temporal majority viewpoint.[7]

In the end, the relevant constitutional equivalence is not between government conduct and government speech, but rather between government speech and government-coerced support for third-party speech. The latter two raise the same concerns of government manipulation of the marketplace of ideas, viewpoint discrimination, and compelled support for objectionable advocacy. As Justice Scalia has observed regarding viewpoint discrimination in government *support* for third-party speech, to instead have speech "directly involving

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[7] The notion that it is "the very business of government to favor and disfavor points of view," *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment), is correct insofar as favored views are implemented through regulation of *conduct* rather than speech. But it is surely *not* the business of government to use its coercive powers to compel support for *speech* in order to shape the public's views (or worse yet, entrench a currently fashionable view) rather than respond to such views as they evolve without governmental manipulation.

the government itself in viewpoint discrimination (if it is unconstitutional) would make the situation even worse." *Finley*, 524 U.S. at 598 (concurring in the judgment). That the government, at 16, 19, repeatedly relies upon Justice Scalia's concurrence in *Finley* is particularly misleading given its failure to cite that fundamental predicate of Justice Scalia's opinion and given that this Court *has* imposed significant First Amendment limits on such discrimination in the subsidies and compelled-support contexts. Because direct government speech "would make the situation even worse," such limits likewise must apply to government speech.

One of the most telling arguments in favor of First Amendment limits on government speech comes indirectly from Justice Scalia, who allows that "it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party" and that "it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party," though he denies that such "unconstitutionality has anything to do with the First Amendment." *Finley*, 524 U.S. at 598 n. 3 (concurring in the judgment). But no other source of unconstitutionality is readily apparent. And other Justices who have recognized constitutional difficulties with such openly partisan government speech have expressly identified the First Amendment as the source of those difficulties. *See International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting) (quoting the First Amendment and then stating: "Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very

reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands."); *Lathrop* v. *Donohue*, 367 U.S. 820, 853 (1961) (Harlan, J., concurring in the judgment) (agreeing that neither a state nor the federal government could "'create a fund to be used in helping certain political parties or groups favored' by it 'to elect their candidates or promote their controversial causes'" (quoting *Street* dissent)).

As with much of the *dicta* regarding government speech, the government here cites to *Rust* v. *Sullivan* for the supposed proposition that the government can freely choose what speech it will fund. *See* Pet. Br. 15-16; *see also Southworth*, 529 U.S. at 229; *Finley*, 524 U.S. at 597 (Scalia, J., concurring in the judgment). In *Rust*, however, the issue of government speech was not necessary to the decision. Indeed, this Court has recently recognized that *Rust* did not rely upon a claim that the government-financed medical activities at issue constituted government speech. *Velazquez*, 531 U.S. at 541; *see also id*. at 554 (Scalia, J., dissenting) (noting that the speaker in *Rust* was not the government). *Rust*'s observation about the government's ability to choose "to fund one activity to the exclusion of" another, 500 U.S. at 193, seems to view the activity in question as conduct, and does not address the different issues raised by the viewpoint-discriminatory funding of speech. But *speech is different*.[8]

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[8] Even if the medical services funding addressed in *Rust* were viewed as support for mixed speech and conduct, it would fit neatly into the analytic paradigm suggested here. The program in *Rust* thus might well survive the germaneness analysis insofar as the only speech authorized was that necessary to provide the medical *services* being funded. Indeed, because Title X funds could not be used to *provide* abortion services, speech promoting such services arguably would not have been germane to the *conduct* properly funded by the government, and hence the government's own limitation on what speech it would support was entirely consistent with the First Amendment principles in this area.

Another common argument in favor of a government speech doctrine is to cite the National Endowment for Democracy as evidence of the government's authority to engage in viewpoint discriminatory speech. This Court in *Rust,* for example, assumed that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." 500 U.S. at 194; *see also Finley*, 524 U.S. 597 (Scalia, J., concurring in the judgment) (citing *Rust*); *cf*. *Lathrop*, 367 U.S. at 857 (Harlan, J., concurring in the judgment) (speculating on propriety of using tax funds for United States Information Agency propaganda that might offend some taxpayers).

But pro-democracy propaganda funded by general revenues and directed at other countries is readily distinguishable from propaganda aimed at a domestic audience and financed through compelled contributions from a discrete group. Outward-directed propaganda serves far more legitimate national interests and raises far fewer concerns than does inward-directed propaganda. Furthermore, speech promoting basic constitutional structures even in the United States would very likely pass First Amendment scrutiny as integral to the operation of those very same structural components of our democracy. Were such domestic advocacy to take on a partisan slant, however, there would be grave doubt regarding its constitutionality, regardless whether the United States may use advocacy to promote a partisan agenda abroad.

In a similar vein, course selection at public universities may pose a unique situation requiring somewhat different analysis than government advocacy to the public at large. Both *Southworth* and *Rosenberger* appear to have been moved to comment on government speech in order to dispel any implication that public universities might somehow be constrained in selecting their offerings or that academics

might somehow be forced to offer viewpoint-neutral courses. That concern is legitimate, but does not support a government speech doctrine untethered to the unique concerns of the university environment, the voluntary nature of attendance at such universities, and the fee-for-service nature of tuition payments. But a public university's potential claims to being a market participant in the educational context, its traditions of academic freedom and independence, and the ready choice among a variety of schools within the public system offer no support for the type of government advocacy at issue in this case, which shares none of those distinguishing features.

Finally, this case does not raise the same practical issues as when government acts in a proprietary manner as a consumer of, for example, art to put up in its own buildings, where it might sensibly be given greater leeway than if it were purchasing art to inculcate a particular viewpoint among the public. Government as a consumer of labor in support of valid government activities also poses no concerns comparable to those in this case. "Join the Army" is perfectly valid government speech that is integral to the valid government *activity* of raising an army, and thus readily survives First Amendment scrutiny. Likewise, when the government is selling some product – surplus typewriters or confiscated vehicles perhaps – the First Amendment would pose no obstacle to its advertising just as any other seller would. Such speech would be incidental to the accomplishment of permissible government conduct and is fairly necessary to such conduct.[9]

Regardless whether there are sufficient political checks on other forms of conduct by the government, First Amendment protection of the freedom of speech is not subservient to such political processes:

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[9] Indeed, if the government actually did collectivize the beef industry and itself purchased all cattle for resale then promotional advertising incidental to the government's sale of such goods would be acceptable, assuming the underlying collectivization was valid.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638. If political checks are inadequate to replace the First Amendment where the government chooses to compel a dissenting minority to support third-party speech, there is no reason why such checks suffice when the government avoids the middleman and coerces minority support for the same speech out of the government's mouth. In both instances the First Amendment should provide the same protection and the same heightened scrutiny.

D. Even a Lower Level of Scrutiny for Government Speech Generally Cannot Sustain the Compelled Support for Speech in this Case.

Even assuming, *arguendo*, that government speech receives more lenient treatment under the First Amendment, this Court's *dicta* on the subject does *not* suggest that such speech receives a free pass. Rather, it merely poses the "question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections" to a program claimed to be government speech. *Southworth*, 529 U.S. at 229. But the Beef Act would fail even such lenient scrutiny examining the adequacy of political checks.

In numerous ways, the Beef Act and its implementation undermine traditional political checks on government behavior. The Beef Act insulates itself from any true political check by the citizenry as a whole by compelling private off-budget funding, rather than providing structurally checked

government funding. Such circumvention of ordinary fiscal checks and balances reduces any direct incentive for taxpayers to scrutinize the program and eliminates the role of House appropriations in the ongoing existence of the checkoff. Indeed, the government essentially concedes its circumvention of ordinary political checks by claiming – as if it were a point in *favor* of the Beef Act – that were the program funded by general revenues it would lose political support. Pet. Br. 29, 41.

Finally, by regulating speech alone, rather than as an incident to implementing some direct control over conduct, the government eliminates the political check of public resistance to government "intrusiveness." *Cf. United States* v. *Frame,* 885 F.2d 1119, 1122 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (congressional statements claiming to be avoiding intrusive government regulation and leaving matters up to the beef industry). While regulation of conduct may be more "intrusive" in the colloquial sense, it is the very burden of such regulation that ensures an adequate political check on its adoption. Given such an inherent check, conduct regulation is only subject to rational basis scrutiny and hence is considered minimally intrusive on *constitutional* concerns. Regulations or compulsions of speech may well be less intrusive in a colloquial sense than conduct controls, but it is precisely such *seeming* innocuousness that undermines ordinary political checks as would limit conduct regulation. The lesser effectiveness of political checks on speech regulation, however, requires heightened judicial scrutiny under the First Amendment, in recognition of the fact that such regulations are in fact *more* intrusive on constitutional values. It is the insidious nature of controls on speech that requires a constitutional, rather than a political, check on such controls.

II. CONGRESS MAY NOT COMPEL SUPPORT FOR SPEECH THAT IS NOT INTEGRAL TO OTHERWISE PERMISSIBLE COMPELLED CONDUCT.

Whether viewed as compelled support for government speech or collective private speech, the First Amendment requires substantial scrutiny of the Beef Act. As this Court recognized in *United Foods*, the proper test in a compelled-support case comes from the *Abood*/*Keller* line and requires, as a threshold matter, that a speech compulsion must be "germane" not to itself, but rather to the accomplishment of *some other action* that Congress has properly required. In this case, the stand-alone speech compulsion serves only itself, is not necessary and incidental to implementing other conduct that Congress has required, and thus violates the First Amendment.

A. Compelled Speech Is "Germane" Only When It Is Necessary and Incidental to Engaging in Conduct Otherwise Properly Compelled.

The "germaneness" test was developed in the context of compelled contributions to labor unions and integrated bar associations. *See Abood*, 431 U.S. at 236 (contributions may be compelled for "collective-bargaining activities," but "such compulsion is prohibited" for "ideological activities unrelated to collective bargaining"); *Keller*, 496 U.S. at 16 ("Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession."). In *Lehnert* v. *Ferris Faculty Association*, the applicable standards for the use of compelled contributions in the union context were summarized as follows:

> chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the govern-

> ment's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. 507, 519 (1991). That description identifies the germaneness inquiry as relating to specific conduct and as separate from the government's "policy interest" or motive in adopting the legislative scheme in the first instance. It also establishes two additional components that even "germane" compelled support for speech must satisfy in order to be valid.

In *Board of Regents of the University of Wisconsin System* v. *Southworth*, however, this Court recognized that even in the more familiar context of labor unions, it has "encountered difficulties in deciding what is germane and what is not." 529 U.S. 217, 232 (2000); *see also Keller*, 496 U.S. at 15 ("Precisely where the line falls * * * will not always be easy to discern. But the extreme ends of the spectrum are clear."). *Amici* suggest that it would be appropriate to clarify that test and confirm that the germaneness of compelled support for speech must be measured against some underlying compelled conduct that cannot be accomplished without a certain amount of speech incidental to that conduct. That clarification of the germaneness test is consistent with the *Abood* line and with First Amendment jurisprudence relating to restrictions on mixed speech and conduct.

Over the long line of labor cases, this Court has identified specific economic conduct – negotiation and implementation of collective bargaining agreements – as both the permissible purpose of compelled support and the relevant *object* of the germaneness analysis. Thus, in *Railway Employees' Department* v. *Hanson*, this Court held that compelled "financial support of the collective-bargaining agency" does not violate the First Amendment but noted that "a different problem would be presented if the assessments were "imposed for purposes not germane to collective bargaining." 351 U.S.

225, 236, 238 (1956). In *Abood*, this Court followed *Hanson* "insofar as the service charge is used to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-26. But this Court agreed with appellants there that a union could not, over objection, spend compelled service fees on speech "unrelated to its duties as exclusive bargaining representative." *Id*. at 234. And where the relation between particular speech and the "process of establishing a written collective-bargaining agreement" was uncertain, the Court suggested that the relevant inquiry would be whether the context of the speech "*might be seen as an integral part of the bargaining process*." *Id*. at 236 (emphasis added); *cf. Ellis* v. *Railway Clerks*, 446 U.S. 435, 448 (1984) ("the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues").[10]

By contrast, speech regarded as non-germane was not integral to the primary conduct being compelled. While such speech may have been relevant to the overall *goal* of the program – and hence germane in the colloquial sense – it was not essential to the required conduct itself and thus was analyzed distinctly from such conduct. For example, in *Lehnert* this Court held that generic promotional advertising by the union was not "germane" to collective bargaining because it was not a necessary element of such bargaining.

> [P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collec-

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[10] While the collective bargaining process nominally involves speech, it is actually more a series of speech-acts – such as offers and acceptances – constituting the commercial transaction of contracting with the employer. Similarly with communications from the union to the employer and to the employees, those constitute the necessary elements of representation without which the union could not bargain, resolve grievances, or exchange information with those to whom it owes a duty of representation.

> tive-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

500 U.S. at 528-29 (Blackmun, J., for four Justices). That such promotion might have advanced the general interests of the teaching profession collectively was insufficient to render such promotional activities "germane." Rather, any permissibly chargeable speech had to be far more closely tied to the actual conduct – collective contract negotiation and administration – being compelled in the first place.

This construction of the germaneness test is consistent with, and in effect the compulsion flip-side of, this Court's cases involving restrictions on mixed speech and conduct. For example, in *United States* v. *O'Brien* the law forbade harmful conduct – the destruction of an official document – that at times was intertwined with expression. 391 U.S. 367, 376 (1968). The law in *O'Brien* was upheld where the impact on speech was "incidental" to the underlying regulation of conduct, was "no greater than is essential" to accomplishing the interests of regulating the conduct, and met additional conditions designed to safeguard First Amendment values. *Id.* at 377. In like manner, the germaneness test allows some burden on speech arising from compelled support of conduct where the speech burden is incidental and no greater than essential to achieve the otherwise properly compelled conduct. And finally, as in *O'Brien*, the purposes and effect of government-compelled contributions must be imposed for the "noncommunicative impact of [the supported] conduct, *and for nothing else.*" *Id*. at 382; *see also id*. at 381-82 ("both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct").

As clarified and read in light of cases such as *O'Brien*, the germaneness test is an appropriate means of addressing the problem of compelled support for mixed speech and conduct. It is also a test that the government fails in this case.

B. Compelled Beef Advertising Is Not Integrally Tied to Compelled Conduct.

While the government here does not even attempt to satisfy the *Abood*/*Keller* test, various of its *amici*, and the government itself in its various litigation with the *Amici* on this brief, use as their primary dodge on the germaneness test the misidentification of the *object* of the test: that to which the speech compulsion must be "germane." Instead of the speech having to be germane to particular compelled conduct, the government claims the compulsion need only be germane to a government "purpose," defined at the highest possible level of generality as its "goal" or the "benefits" it hopes to achieve. But that formulation of the test is meaningless, and would fully eviscerate the germaneness requirement. Indeed, the compelled support for teacher promotional advertising rejected in *Lehnert* would satisfy the empty test proposed by the government, but eight members of the Court rejected such involuntary use of mandatory fees. The better test is that the speech must be tied to and in the service of some *conduct* that is the primary object of compelled support or collective activity. In this case there is no joint conduct such as collective bargaining to which the beef ads are integrally related and hence "germane."[11]

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[11] It would be a different – though not necessarily constitutional – situation if the marketing order also compelled the collective sale of all cattle through the Beef Board. Under such circumstances, advertising by the Board, and compelled support of such advertising, might be considered integrally related to the sale of cattle *by the Beef Board itself*, and would be germane in the *Abood* sense to the compelled *conduct* of collective sales of cattle. It would also be a different case if the marketing order gave credit for the separate promotional activity of the ranchers, thus allowing for choice in content and viewpoint while still providing a mecha-

Even if the same government "purpose" were thought to persist regardless of other regulation, it is only the *relationship* between such other regulation and the speech being compelled that serves to insulate incidental speech compulsions from the rigorous scrutiny applied to pure regulation of speech. That the government may have a "valid" purpose tells us nothing when that purpose is described at a sufficiently high level of generality, and it is beside the point in any event. Virtually any censor could describe their purpose with sufficient abstraction to render it "legitimate" in the sense that it would support government action in the non-speech arena under the rational basis test. But the First Amendment demands more. It is not the purpose, but the "means" of accomplishing that purpose that is most often the subject of dispute in a First Amendment case, and this case is no different. *Cf. Riley*, 487 U.S. at 791 (even "purest of mo-

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nism for cooperation among those with similar perspectives. Such a viewpoint-neutral approach avoids free-riders by effectively requiring that everybody do their fair share to build the cattle market, and would relate directly to the rancher's *own* sales of cattle, unlike generic ads by an entity not itself selling the commodity.

While petitioner Nebraska Cattlemen, Inc., rejects such funding of diverse views through advertising credits, its reason – that it would be less effective at conveying the generic message – highlights the constitutional offense. It will always be more effective to convey a particular viewpoint by forcing people to goose-step to the same message and by forcing competing speakers to support the favored viewpoint. But the First Amendment assumes and requires that viewpoints win their effectiveness through acceptance in a free marketplace of ideas, not through a market in which support for homogenized speech is compelled by the government. Those who would remain silent or would speak contrary to the government's preferences are not free riders or nuisances, they are *dissenters*. As such they are the very object of First Amendment concerns, and if a favored viewpoint is weakened by lack of support or by dissent, that is not a market *failure*, it is a *free* market where the choice of whether or how to speak is left to private individuals, not the government.

tives" do not allow government to "substitute its judgment as to how best to speak for that of speakers").[12]

The occasional claim that compelled support for speech merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions, mistakes the relative offensiveness of different types of government conduct. The First Amendment establishes that speech regulation is, by definition, more invasive in a constitutional sense than are other forms of regulation entitled to presumptions of validity under rational basis review. As this Court noted in *Barnette*:

> The right of a State to regulate, for example, a public utility may well include * * * all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds*.

319 U.S. at 639 (emphasis added). That mere rationality is sufficient to regulate conduct but not speech simply highlights the point that *speech is different*.

The position taken by the government in justifying government speech as equivalent to government conduct, and by various *amici* in justifying compelled support for speech as a lesser-included component of the power to compel conduct, is reminiscent of the now-repudiated argument in *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico* that the power to ban conduct, even when unexercised, includes the supposedly "lesser" power to regulate speech concerning such conduct. 478 U.S. 328, 345-46 (1986). This Court has emphatically rejected that contention, holding that it is "well settled that the First Amendment mandates closer

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[12] Indeed, the First Amendment forbids government action that is presumed to be valid under the government's enumerated powers, for if it were beyond the government's powers to begin with, there would be no need to reach the First Amendment question at all.

scrutiny of government restrictions on speech than of its regulation of commerce alone." *Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, 527 U.S. 173, 193 (1999); *see also 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 510 (1996) (principal opinion) (rejecting contention "premised entirely on the 'greater-includes-the-lesser' reasoning endorsed toward the end of the majority's opinion in *Posadas*."). "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society." *Id.* at 512.

By manipulating public opinion, speech regulation is a much more insidious, intrusive, and effective means of controlling behavior than is the direct application of government fiat to individual conduct. *See 44 Liquormart,* 517 U.S. at 509-10 (principal opinion) (discussing *Posadas*: Puerto Rico's "advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw").[13] While Congress may well desire to avoid the political consequences of its programs and to hide their true costs, the First Amendment stands as a sound and sensible barrier to such political deception.

Finally, the notion that the benefits of the speech alone are sufficient to trigger the free-rider justification of the *Abood* line of cases, Pet. Br. 12, 30, independent of any group benefits from other substantive regulation, is mistaken and repugnant to the First Amendment. If the supposed benefits of the forced speech alone are sufficient to justify compelled collec-

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[13] Where people are free to think and speak, government regulation of conduct will be recognized for what it is, and accepted or opposed according to the strength of the arguments for and against the regulation. But where government tries to achieve the same regulatory result by altering the information flow and hence altering the way people think about an issue to begin with, there is less chance that the government's coercion will be seen for what it is.

tive speech, then there is nothing that would fail to satisfy that test. In any instance where the government elects to force speech at all, it plainly believes there is some benefit to that speech, and under the rational basis test proposed by the government, courts would rarely be in a position to say otherwise. But while "private speech often furthers the interests of non-speakers," the existence of such third-party benefits – *i.e.*, positive externalities – "does not alone empower the state to compel the speech to be paid for." *Lehnert*, 501 U.S. at 556 (Scalia, J., concurring in the judgment and dissenting in part).

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Eighth Circuit should be affirmed.

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