Nos. 03-1164 & 03-1165

IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *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

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REPLY BRIEF FOR PETITIONERS NEBRASKA CATTLEMEN, INC., GARY SHARP, AND RALPH JONES

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INTRODUCTION

Lost in respondents' First Amendment challenge to the Beef Act is a real world appreciation both for the importance of the federal program that they urge this Court to terminate and the attenuated nature of the alleged constitutional injury on which their entire case rests. Reading respondents' brief, one might surmise that the checkoff program represents a rash federal experiment thrust upon an industry up in arms. Little could be further from reality. The beef industry is the largest sector of the American agricultural economy—accounting for nearly $40 billion in annual revenues from the sale of cattle alone and an important source of U.S. exports. NCI Br. 5-6. Symbolically, moreover, the beef industry—and, in particular, the ranching way of life—has helped to forge our national identity. *Id.* at 5-8. The Beef Act was not enacted on a whim, but in response to a decades-long depression in the beef industry, and only after Congress's prior efforts to alleviate that industry crisis had failed. *Id.* at 8-13.

In addressing that crisis, Congress found that the welfare of the beef industry is "vital" to "the general economy." 7 U.S.C. § 2901(a)(4). It determined that it is in the "public interest" to "carry[] out a coordinated program of promotion and research" as to beef. *Id.* § 2901(b). It declared that the message of that program should be that all beef is "a valuable part of human diet" and "desirabl[e]." *Id.* §§ 2901(b), 2902(13). It charged the Secretary of Agriculture and special administrative bodies with administering all promotional activities implementing that message. *See* NCI Br. 10-11. And it made the common-sense decision to fund the government's generic pro-beef message through "assessments on all cattle sold in the United States." 7 U.S.C. § 2901(b).

It does not take a trained economist to appreciate that the ability to run TV, radio, and print ads promoting beef on a national scale—during the Super Bowl, no less—is a powerful way to stimulate demand. In an industry of thousands of

individual producers of a product, like the beef that comes from cattle, that is difficult to differentiate, collective action is necessary to wage that kind of campaign. With respect to some commodities, like cola, private market forces typically are sufficient to create the incentives necessary to conduct—and pay for—such promotional activities. Congress has determined that collective action—and funding—is required to achieve that result in the case of beef, and that neither the beef industry nor the general economy could afford to allow the U.S. beef market to continue to languish under the prior regime that left the thousands of individual cattle producers to their own devices and budgets in promoting beef.

The checkoff program has achieved great success during the nearly 20 years that it has been in effect, it has left no known (much less, in this case, evidentiary) record of curtailing speech of any kind, and it retains the widespread support of the Nation's beef producers. See NCI Br. 13-16. In a day when the discovery of a single BSE-infected cow can have a grave—and, through the marvels of modern technology, virtually instant—impact on the beef industry, the ability to promote beef and educate consumers about its safety on a national scale arguably has never been more important. This Court should reject the efforts of the small minority of producers who now seek to invalidate that program under the First Amendment on the ground that they object to the content of the government's message that "*all* beef is good."

In neither a literal nor a practical sense does the Beef Act abridge the freedom of speech. To the contrary, the Act *adds* the government's own speech to the marketplace—in the form of a message that was prescribed by an Act of Congress and is carefully implemented by special administrative bodies established by Congress and controlled by the Secretary of Agriculture. The Act does not prevent respondents from criticizing the government's message, adding to it, or saying anything else that they wish. Nor does the Act compel respondents to speak on any subject—or in any way.

The Act does impose a $1 assessment on the sale of cattle in the U.S. to fund the government's promotional activities and other efforts to stimulate beef sales. But that neither transforms the nature of the speech at issue from government speech to private speech nor abridges the speech of producers who pay that dollar. Indeed, respondents acknowledge (Br. 11) that the government could require the "public as a whole" to pay for the generic advertising of beef. It is no less constitutional for Congress to adopt a targeted scheme that is calibrated not only to the individuals who are most likely to *benefit* from the government's pro-beef message, but those who are most likely to *agree* with it, *i.e.*, those who choose to enter the profession of producing beef. The tailored nature of the assessments is a constitutional virtue, not vice.

In this Court, respondents' central complaint (Br. 10) is that requiring cattle producers to pay the assessments is unconstitutional on the ground that the government's speech is "likely to be attributed by the public to the beef producers rather than to the government." That attribution claim is unsubstantiated by respondents' own testimony. It flunks the test that this Court uses to evaluate attribution claims in a closely related First Amendment context, which assumes that the public is aware of the history and context of the government program at issue. And, as a doctrinal matter, it is "so unlimited in principle as to threaten a wide range of legitimate government activity," *R.J. Reynolds Tobacco Co.* v. *Shewry*, 384 F.3d 1126, 1129 (9th Cir. 2004), including exactions on commodities like cigarettes to pay for government speech in the form of public health ad campaigns.

Respondents are free to lobby their fellow beef producers to join in a referendum terminating or suspending the checkoff program; they can lobby Congress to change its generic pro-beef message to authorize ads touting *U.S.* beef (an action that could have serious trade repercussions for a key U.S. export, *i.e.*, beef); and they can run all the individualized ads about beef that they would like *in addition to* the gov-

ernment's generic pro-beef ads. But the First Amendment does not give them a "heckler's veto" over the government's generic pro-beef speech under the Beef Act or its embodiment in an ad like "Beef. It's What's for Dinner."[1]

ARGUMENT

I. THE BEEF ACT IS CONSTITUTIONAL UNDER THE GOVERNMENT SPEECH DOCTRINE.

A. The Speech Conveyed Pursuant To The Beef Act Is The Government's Own.

Generic advertising conducted pursuant to the Beef Act bears all the hallmarks of government speech. *See* NCI Br. 24-33. The message conveyed by that advertising—that *all* beef is good—is Congress's own. 7 U.S.C. §§ 2901(a)(1), (b), 2902(13). And it is disseminated by special administrative bodies—the Board and the Committee—that were created by Congress for the *sole* purpose of implementing the Beef Act and that remain subject to the daily supervision and control of the Secretary of Agriculture. The government's

[1] Respondents argue that the Beef Act violates their associational rights, but the *only* claim on which the District Court entered judgment is respondents' free speech claim. *See* J.A. 34; Pet. App. 60a. In their complaint, respondents alleged that the Beef Act impermissibly compels them to associate with the National Cattlemen's Beef Association ("NCBA"). *See* J.A. 38. That claim was not passed upon by the courts below, was not developed in respondents' brief in opposition, and thus is not before this Court. In any event, it lacks merit, as respondents even acknowledged at trial. Trial Tr. 141 (Smith). The Beef Act authorizes the Beef Board and Operating Committee to enter into contracts with "established national nonprofit industry-governed organizations," such as NCBA, in implementing the Act. 7 U.S.C. § 2904(6). But the Beef Act in no way compels respondents to associate with such independent contractors, including the NCBA. In addition, NCBA in any event maintains a firewall between its policy and checkoff-related divisions. *See* 8th Cir. J.A. 558-559. More fundamentally, there is no basis for holding that the Beef Act is constitutional under the Speech Clause of the First Amendment, but nonetheless runs afoul of some hypothesized association concern.

speech under the Beef Act is just as immune from First Amendment scrutiny as other government speech.

1. Respondents argue (Br. 30) that the speech conducted under the Beef Act is not government speech because the government's control over the speech is merely "pro forma." As we have explained, the record contains substantial and unrebutted evidence that the Secretary—acting through USDA—exercises extensive oversight and control over all aspects of the checkoff program. *See* NCI Br. 31-33. Respondents chide petitioners for "ask[ing] this Court to ignore its longstanding two-court rule," and argue for "deference" to the lower courts' factual findings. Resp. Br. 17 n. 10, 30. This Court, however, has long recognized that, in the First Amendment context, the Court must "make an *independent* examination of the whole record." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964) (emphasis added). *See also Hurley* v. *Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (In First Amendment cases, the Court has "a constitutional duty to conduct an independent examination of the record as whole, *without deference to the trial court*.") (emphasis added). Such an examination is particularly warranted where, as here, lower court "findings" are conclusory and unsubstantiated.[2]

Here, the only conclusion that can be drawn from the record is that, "[b]y no means is the government's control over the checkoff-funded program *pro forma*." *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1138 (D. Mont. 2002). Respondents' meager efforts (Br. 30) to demonstrate otherwise are unavailing. The Secretary does not "approve" Board members in "slate fashion." Board members are *appointed* by the Secretary, who receives at least two nominations, sometimes more, for each open seat on the Board. J.A. 116, 266-267; 7 C.F.R. § 1260.143(d). It is also hardly the case that "anything is

[2] Indeed, the Eighth Circuit's "factual findings" on this issue begin and end with a single sentence stating that the Secretary's oversight of the checkoff program is "limited." Pet. App. 24a.

permissible, as long as * * * it will advance the interests of the industry." Resp. Br. 30. USDA will reject any proposed ad that the agency believes does not further the government's interests—and it has rejected ads. *See* J.A. 118, 261, 275.[3] To be sure, USDA does not often disapprove ads, but that is because USDA works closely with the Board and the Committee in "initiat[ing], creat[ing], devis[ing], [and] compos[ing]" the ads every step of the way. Resp. Br. 30. *See* NCI Br. 31-32; U.S. Br. 35. The record establishing that USDA is involved in the activities of the Beef Board "every day," J.A. 268-269, and that the Secretary must approve *every* project or ad, *see* NCI Br. 31, refutes respondents' unfounded suggestion (Br. 30) that USDA only "loosely oversees compliance with the statute's conditions."[4]

2. Respondents argue (Br. 32) that, even if the government controls the message under the Beef Act, *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), demonstrates that the message is still not government speech. *Keller* is the antithesis of this case. In *Keller*, the Court concluded that the state bar was *not* like "a typical government * * * agency" pre-

[3] Respondent John L. Smith himself testified that USDA "controls the message" of the generic advertising conducted pursuant to the Beef Act. Trial Tr. 141-142. The trial record confirms that fact. *See id*. at 203-204, 215, 230, 270, 279-280.

[4] Contrary to respondents' assertions (Br. 31), the Beef Act does not require producers to fund the speech of qualified State beef councils. The Act merely permits producers who have contributed to programs established by qualified State beef councils to obtain a credit of up to 50 cents for contributions to such programs. *See* 7 U.S.C. § 2904(8)(C). Nor does the Act require producers to fund the NCBA. As explained, like many other organizations, the NCBA has contracted with the Board to develop promotional and research projects and plans. *See* J.A. 135. But that does not make the promotional materials developed by the NCBA the *NCBA*'s speech, or make it any less the *government*'s speech. When the government hires a private firm to develop and implement a promotional campaign, such as the Army's "be all that you can be" ad campaign, the campaign is still the government's own message. *See also* NCI Br. 28-29.

cisely because such control was *lacking*. *Id.* at 12. Here, under *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), the entities that Congress made responsible for conveying its message—the Beef Board and the Operating Committee—*are* government entities for First Amendment purposes. *See* NCI Br. 24-27. In *Keller*, there was *no* indication that the state bar officials served, like the Board and Committee, "under the direction and control of * * * governmental appointees." *Lebron*, 513 U.S. at 398. Indeed, unlike here, the speech in *Keller* was not prescribed in the first instance by the legislature, nor was it subject to the final approval of a politically accountable government official.

Respondents fail to offer a persuasive reason why *Lebron*, which involved the issue whether a particular entity "is part of the Government for purposes of the First Amendment," *id.* at 400, is not directly pertinent in considering whether the extent of governmental involvement in the speech at issue makes that speech "government speech." Under respondents' view, the same factors that might be considered in determining whether an entity is part of the government, and thus subject to the constraints of the First Amendment, have no relevance whatsoever in determining whether the entity is part of the government, and thus able to invoke the government speech doctrine when speaking itself. *Lebron*'s consideration of whether an entity "is part of the Government" should not be regarded as such "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

3. Invoking *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), respondents contend that, even if the speech at issue is government speech, it is still subject to First Amendment scrutiny. Resp. Br. 34. But this Court has already held that *Barnette* and *Wooley* and all the Court's "compelled speech case law" is "*clearly inapplicable*" to cases, like this, involving the compelled funding of a generic

advertising program. *Glickman* v. *Wileman Bros. & Elliot, Inc.*, 521 U.S. at 470-471 (emphasis added).[5] Indeed, *Wooley* and *Barnette* only underscore the *absence* of a First Amendment injury here. In *Wooley*, a State "required an individual to participate in the dissemination of an ideological message by displaying it on his private property." 430 U.S. at 713. And in *Barnette*, a State required an individual "to communicate by word and sign his acceptance" of government-dictated political viewpoints. 319 U.S. at 633. *See* NCI Br. 36-37. Here, the government's message that all beef is good is not political or ideological. Nor is anyone compelled to display an "Eat Beef or Die" motto on their personal property or to rise in public and say a "Pledge Of Allegiance To Beef"—indeed, no one is compelled to speak *at all*.

Nowhere is respondents' misplaced reliance on these compelled speech cases more evident than in the conclusions that they draw from them. In respondents' view, this line of cases demonstrates that the First Amendment "protects against the government's ability to compel private citizens to provide affirmative support for the *government's message*," even so far as that means simply "contributing money." Resp. Br. 35 (emphasis added). If respondents were correct, then *every* citizen—including smokers who object to the government's anti-smoking ads, pacifists who object to the government's promotion of the armed services, and atheists who object to the government's faith-based initiatives—would have the right to insist that his or her tax dollars not be used to support programs or policies with which he or she disagreed. That is an untenable proposition, and one which this Court has already rejected. *See Keller*, 496 U.S. at 12-13; NCI Br. 22.

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[5] The Court did not retreat from that holding in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), as amicus Coalition of Cotton Apparel Importers erroneously claims (Br. 5 & n.2). In *United Foods*, the Court stated that "[its] precedents concerning *compelled contributions to speech*," not its precedents concerning *compelled speech*, "provide the beginning point for our analysis." 533 U.S. at 410 (emphases added).

B. Congress Has Permissibly Chosen To Fund The Government's Speech Through Assessments.

Respondents claim (Br. 8) that they "do not challenge the government's ability to speak as it chooses," but rather its ability to compel funding for its speech. The compelled nature of funding itself provides no basis for invalidating a government speech program. *See Keller*, 496 U.S. at 12-13; NCI Br. 21-24. Indeed, respondents acknowledge (Br. 11) that the government could compel the "public as a whole" to pay for the government's pro-beef speech. *See id.* at 23. Moreover, they acknowledge that the government may fund promotional activities through "targeted mandatory assessments" on the sale of *certain* commodities. *Id*. at 37. There is no reason to adopt a different rule in the case of beef.

1. According to respondents (Br. 10-11), because Congress has chosen to fund the Beef Act through assessments on the sale of cattle rather than through "public as a whole," "generic beef promotions are likely to be attributed by the public to the beef producers rather than to the government." This "attribution" theory is now the lynchpin of respondents' constitutional challenge to the Beef Act. *See id.* at 10-11, 18-19. It fails for several different reasons, beginning with the fact that it is unsubstantiated by respondents' own evidence.

None of the affidavits that respondents submitted below—nor, for that matter, their amended complaint (*see* J.A. 34-38)—alleges that the public is likely to "attribute" the generic advertising conducted under the Beef Act to respondents or other beef producers, much less proves that such attribution exists. Instead, in explaining in their own words how they allegedly have been harmed by the generic beef ads, respondents focused on their objection to the "general content" of such promotions, and "the messages conveyed" by the government. J.A. 59 (Thullner); *accord* J.A. 62-63 (Smith), 65-66 (Goggins), 68-69 (Schumacher), 71-72 (Goebel); *see also* J.A. 74-75 (Goggins, on behalf of LMA), 78-79 (Smillie, on behalf of WORC). Similarly, no respondent who

testified at trial alleged any attribution harm. And the only time that the potential for such attribution was discussed, respondents' own witness testified that he did *not* believe that the public would attribute the government's checkoff ads to his organization of beef producers. Trial Tr. 46-47 (Smillie).

It is not surprising that respondents have shifted the theory of their First Amendment injury away from their disagreement with the *content* of the generic beef ads and the government's *message* that all beef is good. It is settled that the government may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). But having failed to allege—much less prove—any attribution injury below, respondents should not be permitted to attack the Beef Act on the basis of such an alleged injury here.

2. As a doctrinal matter, respondents' attribution theory also fails. As this Court has repeatedly recognized, the government has broad authority to decide how to fund its programs. *See Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."); *Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940) ("in taxation, even more than other fields, legislatures possess the greatest freedom in classification"); *see also Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 215 (1989) (noting "a number of recent congressional enactments designed to make various federal regulatory programs partially or entirely self-financing").

One of the most common—and oldest—forms of taxation is the assessment of excises on particular commodities or industries. *See* The Federalist No. 12 (A. Hamilton) ("[I]n America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises."). Last year alone, the federal government collected over $67 billion in excise taxes. *See* Office of

Management and Budget, *Budget for Fiscal Year 2005, Summary Tables.* This Court has repeatedly rejected challenges to such targeted exactions, including those levied on the *producers* of particular commodities, and not once suggested that they raise special First Amendment "attribution" concerns. *See* NCI Br. 38 n.7 (citing cases); *see also McCray* v. *United States*, 195 U.S. 27, 63 (1904) (excise on artificially colored oleomargarine); *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796) (excise on carriages).

As the Ninth Circuit recently observed, the basic attribution rationale advanced by respondents here is "so unlimited in principle as to threaten a wide range of legitimate government activity." *Shewry*, 384 F.3d at 1129. Under the logic of respondents' theory, individuals could refuse to pay any number of targeted assessments simply by invoking the First Amendment and objecting to the message or content of the activities funded by the assessments. Thus, for example, gasoline producers could refuse to pay excises on the sale of gasoline used to promote clean highways or fuel efficiency by objecting to the program's pro-conservation message. Smokers could refuse to pay excises on the sale of cigarettes on the ground that they disagree with the government's use of those funds to discourage smoking. Indeed, the government might even be prevented from collecting excises to fund *education*, because any number of people might object to particular school curricula. *See Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 & n.14 (1937).[6]

In particular, respondents' attribution theory casts serious doubt on the constitutionality of laws that impose exactions on the sale of cigarettes and alcohol to fund public service

[6] Self-proclaimed pacifists have long objected to the federal excise tax on telephone service because the exaction has funded war costs. *See Darling* v. *United States*, 352 F. Supp. 565 (E.D. Cal. 1972); *Telephone War Tax Resistance* (www.riseup.net/nacc/telephone.htm). Although such objections have failed to date, if accepted, respondents' attribution theory would breathe new life into such challenges, and no doubt many others.

ads designed to reduce the desirability of smoking and alcohol abuse, especially among the Nation's youth.[7] These laws are directly analogous to the program at issue here and the logic of respondents' position leads to the conclusion that they are unconstitutional too. Seeking to avoid that result, respondents offer the bizarre suggestion (Br. 11, 38) that it would be *more* constitutional for the government to collect funds from beef producers for purpose of *disparaging* beef as opposed to *promoting* it. Respondents have it backwards. The fact that the government speech in this case is designed—by Act of Congress—to promote the desirability of the commodity that is subject to the assessments only bolsters the constitutionality of the Beef Act.

Respondents proclaim that "the public would never attribute the government's warnings *to those who pay [cigarette] taxes*, whether producers or users." Resp. Br. 11 (emphasis added). We agree, but not because there is something special about *cigarette* taxes. Rather, the public would never reasonably assume that just because a producer or consumer is required by law to pay an assessment on the sale of a particular commodity, every producer or consumer must endorse the ends to which those funds are used by the government, including when it comes to government speech about the product. Taxes on the sale of commodities have been around since the earliest days of the Republic and the public is well aware that the payment of such assessments does not necessarily connote agreement with the government policy or speech advanced by the funds. It is no different for beef.

Respondents' attribution argument also creates a historical anomaly. Before the adoption of an income tax in the mid-1800s, most of the revenues collected by the fledgling federal government were from excises and imposts on commodities such as whiskey, tobacco, and sugar. Such revenues funded

[7] *See, e.g.*, Ariz. Rev. Stat. § 36-772; La. Rev. Stat. Ann. § 47:841.1; Me. Rev. Stat. Ann., tit. 22 § 272; Ore. Rev. Stat. § 323.030; *see also* Mont. Code Ann. § 16-1-404.

virtually all of the government's activities—including its speech—in that day. Yet nothing suggests that any of the founders—least of all Alexander Hamilton, the leading proponent of the Nation's first federal excises—believed that the First Amendment imposed any limit on the manner in which the funds collected from such commodity-specific exactions could be used. Indeed, it surely would have come as a shock to the whiskey producers who faced off against the federal troops at the Whiskey Rebellion in the fall of 1794 to learn that instead of raising arms against Washington's army, the producers need only have asserted a First Amendment objection to the payment of the federal assessments on the sale of whiskey on the theory that the public was likely to attribute their payment of such excises as support for the war debts paid off with the funds.[8]

3. None of this Court's government speech cases supports the notion that government speech can be funded only through exactions on the "public as a whole" (Resp. Br. 10). *See id.* at 23. In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the federally-funded nature of the speech at issue made the speech government speech, but the Court never inquired whether the funding came from general tax revenues or some other source. Moreover, there is no indication that the patients who received counseling from the private doctors in *Rust* had any idea that the counseling was funded by federal grants—or that the counseling was the government's message—yet the Court has squarely recognized "that the counseling activities of the doctors * * * amounted to governmental speech." *Legal Services Corp.* v. *Velazquez*, 531

[8] There is no reason to believe that Jefferson—one of the country's most ardent champions of state efforts to promote and sustain an agricultural economy—would have viewed this case any differently. His well-known observation on compelled funding was addressed solely to the colonies' practice on imposing taxes to support *the church*. *See Rosenberger*, 515 U.S. at 869-872 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). We have a specific clause of our Constitution—not remotely implicated here—that prescribes such assessments.

U.S. 533, 541 (2001); *see id.* at 554 (Scalia, J., joined by Rehnquist, C.J., O'Connor, and Thomas, JJ., dissenting).[9]

Similarly, in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), the Court did not "refuse" (Resp. Br. 26) to apply the government speech doctrine because the speech at issue was funded by a targeted assessment in the form of a student activity fee rather than more general exactions imposed on the public as a whole. Rather, the Court did not apply the doctrine because "[t]he University [had] *disclaimed* [the] speech [as] its own," and, therefore, the case simply did not "raise the issue of the government's right * * * to use its own funds to advance a particular message." 529 U.S. at 229 (emphasis added). Moreover, far from establishing that government speech may be funded only through general tax revenues, the Court in *Southworth* specifically acknowledged that, "[t]he government, as a general rule, *may* support valid programs and policies by taxes *or other exactions* binding on protesting parties." *Id.* (emphasis added).

Respondents' reliance on *Keller*—the case respondents describe as "the closest precedent by far," Br. 13—also does not withstand scrutiny. There, the Court focused exclusively on the non-government nature of the entity speaking—the state bar—and not on the purported nexus between the bar's members and the political and ideological speech to which some of them objected. The fact that the bar's funding came "not from appropriations made to it by *the legislature*, but from dues levied on its members by [the bar's] *board of governors*," 496 U.S. at 11 (emphases added), was one factor that led the Court to conclude that the bar was not like a "typical government * * * agency," *id*. at 12, but it was not the *sine qua non*. Significantly, the Court never suggested

[9] In *Velazquez*, the Court distinguished *Rust* on the ground that the "LSC program was designed to facilitate private speech, not to promote a governmental message." 531 U.S. at 542. The program here is expressly designed to promote Congress's own message.

that, if the bar *were* a government entity, its speech could not be funded through assessments imposed by the State.

4. Respondents' attribution argument also fails on its own terms. In evaluating claims that the "link" between money and an activity gives rise to an unconstitutional perception of attribution or endorsement in a nearby First Amendment context, this Court has applied a "reasonable observer" test. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002). A "reasonable observer" is presumed to be aware of the "history and context" of a challenged government program. *Id.* Respondents' attribution claim would flunk any reasonable-observer test. No one presumed to be familiar with the "history and context" of the checkoff program—including not only the Beef Act, but the industry crisis that led to it—would attribute the message prescribed by Congress and disseminated by the Beef Board to beef producers whose only "link" to the program is the payment of a $1 assessment per head of cattle sold in the United States.

Some (though not all, *see*, *e.g.*, J.A. 53) of the Beef Board's ads state that they are "funded by America's beef producers." But that does not alter the First Amendment analysis in this case either.[10] The ads do not state that they are the *message* of America's beef producers, just that they are *funded* by them. And they are. At the same time, anyone who notices the statement that the ads are "funded by America's beef producers" also would presumably see the well-known checkoff program logo that appears on most ads—the red ✓ mark with "Beef" appearing at the top (*see* www.ams.usda.gov/lsg/mpb/beef/beefchk.htm#History; www.beefboard.org/dsp/dsp_locationContent.cfm?locationId=1055; J.A.

[10] Nor, in any event, does the notation provide a basis for invalidating the Beef Act itself. Nothing in the Beef Act (or the Beef Order) requires generic ads disseminated under the Act to state that they are "funded by America's beef producers." At most, therefore, such a designation could be challenged in an APA action challenging the Secretary of Agriculture's approval of the ad.

51). The distinctive checkoff logo is a direct sign that the ads are disseminated pursuant to the federal checkoff program—and therefore represent the *government*'s pro-beef message and speech. Conversely, producers who disseminate their own ads to promote their beef products may not use the checkoff logo, and instead use their own marks, such as "certified angus beef" (*see* www.cabprogram.com).

Nor does the notation that the ads are "*funded by* America's beef producers" make them any less the government's speech to begin with. A highway sign urging motorists to car-pool is no less government speech if it states that it is funded by tolls paid by the users of that highway. Nor is an anti-smoking ad any less government speech if it states that it is funded by cigarette taxes on tobacco companies or consumers. So too here, ads that are funded by mandatory assessments on beef producers and which themselves remain "the property of the U.S. government *as represented by the Board*," *see* 7 C.F.R. § 1260.215(a), are no less government speech simply because they identify the source of funding.

C. The Government Speech Program At Issue Is Subject To Multiple Political Controls.

Respondents do not dispute that adequate political controls exist to ensure responsible government action where general tax revenues are used to fund government speech—in fact, they contend that this is true. *See* Resp. Br. 10, 27, 50. Those same controls, however, ensure responsible action where targeted taxes are used to fund government speech. Beef producers who disagree with Congress's message that "*all* beef is good" can lobby Congress to change its message or vote for members of Congress who support a different message, just like any other taxpayer can when he or she disagrees with government speech. So too, they can lobby the Secretary of Agriculture (or the President, under whom she serves). And, as in the case of any other commodity-specific excise, beef producers can lobby Congress to end the assessments on the sale of cattle.

Indeed, beef producers enjoy *greater* political control over the checkoff program than most citizens do over either general taxes or commodity-specific exactions. The checkoff program itself was initially established by a referendum requiring the approval of a majority of producers voting in the referendum. 7 U.S.C. §§ 2906(a). Moreover, the program is subject to termination or suspension by referendum *at any time* if a majority of producers voting in a referendum so favor. *Id.* § 2906(b). Such a referendum may be held whenever requested by a representative group comprising at least 10% of beef producers. *Id.* The Act's referendum provision ensures that the very individuals who pay assessments have a direct political check over the program.[11]

II. THE BEEF ACT IS CONSTITUTIONAL UNDER THE *CENTRAL HUDSON* ANALYSIS.

The Beef Act is constitutional under the *Central Hudson* analysis as well. *See* NCI Br. 39-46. Respondents argue (Br. 12, 43-44) that the *Central Hudson* test has no applicability in a case, like this, involving the compelled funding of speech. At least six Justices—a majority of this Court—have disagreed. *See Wileman*, 521 U.S. at 491-504 (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.) (applying *Central Hudson*); *United Foods*, 533 U.S. at 429-431 (Breyer, J., dissenting, joined by O'Connor and Ginsburg, JJ.) (same). Respondents also assert that the Court "squarely" held in *United Foods* that the mushroom program "could not withstand even *Central Hudson* scrutiny." Resp. Br. 12, 43. To the contrary, in *United Foods* this Court

[11] Respondents incorrectly assert (Br. 27 n.16) that their petition drive for a referendum was "successful." As an independent accounting firm determined, respondents failed to collect enough valid signatures for a referendum. *See* U.S. Dep't of Agric., *USDA Announces Results of Validation of Beef Petitions* (Jan. 17, 2001). In any event, respondents may seek to renew their referendum challenge (J.A. 32-33; Pet. App. 59a), but their failure to trigger a referendum through democratic means is no reason for a court to void the checkoff program under the First Amendment.

specifically *declined* to apply *Central Hudson* because the government did not rely on it in that case. 533 U.S. at 410.

Respondents' arguments on the merits of *Central Hudson* fare no better. Respondents make no meaningful attempt to demonstrate that the Act does not promote a substantial government interest. That is not surprising, because it cannot be seriously disputed that the principal objective of the Act—ensuring the welfare of the largest segment of the American agricultural economy—is a substantial, if not compelling, government interest. *See* NCI Br. 40-41. Nor do respondents make a meaningful attempt to show that the Beef Act does not directly advance that government interest. Respondents argue (Br. 46) that petitioners must show that the *funding*, not the *advertising*, under the Beef Act advances the government's interest, but that does not follow. The funding enables the government's promotional activities under the Beef Act and thus directly advances the government's interests. Respondents simply ignore the abundant evidence demonstrating that generic advertising under the Beef Act has been highly effective in stimulating consumer demand for beef. *See* NCI Br. 14, 41-42.[12]

Respondents also do not dispute that most producers lack the resources to conduct their own meaningful promotional programs. *See id.* at 44-45. Nor do they dispute that the Beef Act has been critical in ensuring the welfare of the beef industry in the wake of the discovery of a BSE-infected cow

[12] Citing nothing but their own testimony, respondents contend (Br. 5 n.8) that since the Beef Act was enacted cattle prices have fallen and consumption of beef has dropped. Not so. *See* J.A. 170-173 (Ward). In fact, recent statistics show that both cattle prices—which constantly fluctuate and are influenced by a number of factors, including climate—and consumer demand, are up. *See, e.g.*, U.S. Dep't of Agric., *Meat Animals Production, Disposition, and Income, 2003 Summary* 1 (Apr. 2004); Charles Abbott, *U.S. Taste for Beef Raises Cost of Food*, L.A. Times, Mar. 29, 2004. Indeed, prior to the discovery of a BSE-infected cow, U.S. beef prices had reached "record levels." Pia Sarkar, *Demand Pushes Price of Beef to New Peaks*, S.F. Chron., Nov. 4, 2003.

in the United States last year, including in relation to foreign markets. *See id*. at 45 n.13, 46. Indeed, the only thing respondents seriously take issue with under the *Central Hudson* analysis is the conclusion, reached by the Third Circuit in *United States* v. *Frame*, 885 F.3d 1191, 1135 (3d Cir. 1989), that mandatory assessments are necessary to avoid "free-riders," who would "receiv[e] the benefits of the promotion and research program without sharing the cost."

Although respondents assert that "there is *no* evidence that a beef promotion program relying on voluntary contributions * * * would not have been successful," Br. 47 (emphasis added), the record itself contains evidence that, because of "the equity concerns" with free riders, a voluntary program would likely fail. J.A. 169. Respondents cite *no* evidence to the contrary. Instead, they argue (Br. 46-47) that Congress was required, at the time it enacted the Beef Act, to make specific findings that mandatory assessments were necessary to prevent free riders. That is incorrect. But, in any event, Congress *has* recognized that the beef checkoff program is designed in part to eliminate the free-rider problem. *See* 7 U.S.C. §§ 7401(a)(5), (b)(10). That free-rider problem is real and substantiated, especially in the beef industry. *See* NCI Br. 44-46; Br. for Amici Cal. Agric. Issues Forum 18-23.

In the end, respondents fall back on their principal argument—that Congress should have funded the Beef Act through general tax revenues. Resp. Br. 49. This Court has made clear, however, that a regulation of commercial speech need not employ the "*least* restrictive means" to accomplish its objectives. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2001) (emphasis added). All that is required is "a *reasonable* fit between the legislature's ends and the means chosen to accomplish those ends." *Id*. (emphasis added; quotation omitted). Such a fit has been amply demonstrated here. *See* NCI Br. 42-46; U.S. Br. 41-42. Indeed, the targeted nature of the assessments helps *ensure* a "reasonable fit." While some taxpayers—*e.g.*, vegetarians or animal-

rights activists—might object to the government's promotion of beef, Congress could reasonably assume that those most likely to agree with its promotion of beef would be those who choose to produce beef. *See Wileman*, 521 U.S. at 470.

III. THE BEEF ACT IS CONSTITUTIONAL UNDER *WILEMAN*.

Respondents concede (Br. 1 n.1) that the beef industry is subject to "some" regulation. That is an understatement, but it alone distinguishes the beef industry from the wholly "unregulated" mushroom industry in *United Foods*. *United Foods*, 533 U.S. at 413. Moreover, unlike in *United Foods*, where "almost all of the funds collected under the mandatory assessments [were] for one purpose: generic advertising," *id*. at 412, here, a significant portion of each checkoff dollar is used for something *other* than promotion, such as vitally important research and education activities. *See* NCI Br. 14, 49 n.16.[13] Thus, in sharp contrast to the mushroom handlers in *United Foods*, beef producers are required to associate under the Beef Act and other federal programs for purposes *other* than promotion. *See id.* at 47-49. Accordingly, under *Wileman*, the federal government's regulation of beef should go far enough to tip the constitutional balance in favor of sustaining an Act of Congress and a longstanding government program designed to protect the Nation's most important agricultural product—beef.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed.

[13] Respondents assert (Br. 3) that 85 to 90% of checkoff funds are spent on generic advertising, but as the very page of the record they cite makes clear (J.A. 265), only about 50% of the Board's budget is spent on generic advertising. *See also* J.A. 47 ($34 million of $67 million annual budget spent on advertising).

Respectfully submitted,

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