



# The Constitutionality of Generic Advertising Checkoff Programs

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Until recently, the legal status of generic advertising programs seemed questionable. After an initial victory for generic advertising proponents in 1997 in *Glickman v. Wileman Brothers & Elliott, Inc.* (521 U.S. 457 (1997)), the U.S. Supreme Court ruled four years later in *United States v. United Foods, Inc.* (533 U.S. 405 (2001)) that the federally-mandated mushroom advertising program was not part of a larger regulatory scheme (as was present in the 1997 case), and was, therefore, unconstitutional as compelled private speech. To many, the marketing of mushrooms under the checkoff statute at the heart of the *United Foods* case seemed no different from the way in which other commodities promoted through checkoff programs, like beef and pork, were marketed. After the *United Foods* case, it seemed only a matter of time before all mandatory checkoff programs would be ruled unconstitutional as well.

The Supreme Court did not address in either the 1997 or 2001 cases, however, whether the checkoff-funded generic advertising programs at issue were government speech and, therefore, not subject to challenge as an unconstitutional proscription of private speech under the First Amendment. That question was answered in 2005 when the Court upheld the Constitutionality of the beef checkoff on government speech grounds. The checkoff industry was immediately re-invigorated.

What does this new ruling mean for other checkoff programs? This article reviews recent commodity promotion litigation, speculates on what opponents of compelled support for generic advertising may be planning next, and considers some potential fallout from the recent decision.

The Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*) and several “stand-alone” acts (such as the Beef Promotion and Research Act of 1985, 7 U.S.C. §

2901 *et seq.*) establish the federal statutes for checkoff programs. These mandated, grower-funded programs are used for a variety of industry enhancement programs including research, market development, and marketing strategies. The most controversial strategies surround the use of industry funds for generic advertising. Since the 1980s, the generic advertising portion of these checkoffs has been challenged constitutionally on the basis that the mandated programs violate the freedom of speech of producers. Courts have long held that advertising is a form of private speech protected under the First Amendment and that the right to freedom of speech also includes the right not to subsidize a private message with which an individual disagrees (see, for example, *Keller v. State Bar of California*, 496 U.S. 1 (1990)). The programs may be challenged on freedom of association grounds. Like the speech issue, opponents of generic advertising claim that the mandatory assessments compel industry participants to be associated with a particular message (the advertising) with which they do not agree. Over the last two decades, nearly every commodity promotion program in the country has been challenged.

After years of wrangling over the constitutionality of mandated producer-funded generic advertising programs, a case finally reached the U.S. Supreme Court. In 1997, the Supreme Court ruled in *Glickman* that a federally mandated checkoff program for California tree fruits was constitutional. The main issue in the case concerned the amount of regulation that already existed in the California tree-fruit industry. Writing for the Court, Justice Stevens repeatedly stressed the statutory context within which the generic promotion program had arisen and that generic campaigns had to be viewed in light of the regulatory scheme that Congress had put forward:

“California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme” (*Glickman*, at 457).

The Court then pointed out that there were four characteristics of the California nectarine and peach marketing orders’ regulatory schemes that distinguished the orders from other laws that had been found to violate the First Amendment. First, the checkoff programs did not prevent producers from communicating any message to any audience. Second, the programs did not compel handlers to engage in any actual or symbolic speech. Third, the programs did not compel the handlers to endorse or to finance any political or ideological views. Fourth, the programs had antitrust exemptions. The Court stressed that the regulatory nature of the marketing orders for the industries in question required that the generic advertising be judged in a different light from that of other commercial speech cases. Congress had made a regulatory decision that, right or wrong, certain commodities should be marketed jointly. Justice Stevens, writing for the majority, stated:

“In sum, what we are reviewing is a species of economic regulation that should enjoy

the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers ‘do not wish to foster’ generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of the market participants, bureaucrats, and legislators who have concluded that such programs are beneficial” (*Glickman*, at 477).

To many, the issue of mandated promotion seemed to have been decided with the *Glickman* case. However, in November of 1999, the Sixth Circuit Court of Appeals ruled that the Mushroom Promotion Act of 1990 (7 U.S.C. § 6101 et seq.) was unconstitutional because, unlike the marketing orders in *Glickman*, the Mushroom Act was not in the same spirit as the broader, collective regulation that the Supreme Court used to uphold the tree-fruit order (*United Foods, Inc. v. USDA*, 197 F.3d 221 (6th Cir. 1999)). *United Foods, Inc.*, a Tennessee food processor, had challenged the 1990 Mushroom Act on the grounds that the assessments were compelled commercial speech and that the marketing of mushrooms was distinct from the marketing that existed in the California tree-fruit industry in the *Glickman* case.

The attorneys for *United Foods* used a very interesting argument to distinguish the mushroom industry from the tree-fruit industry. Focusing on the language of Justice Stevens’ opinion concerning regulation and compelled association, they emphasized that the regulatory environment that justified the tree-fruit order was almost completely absent in the mushroom industry. The Court of

Appeals found this limited-regulation argument persuasive. Writing for the majority, Judge Merritt stated: “The Court’s holding in *Glickman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise” (*United Foods, Inc. v. USDA*, 197 F.3d 221 (6th Cir. 1999), at 224). In other words, without the extensive regulation present in the tree-fruit marketing orders, there was no justification for any further limits on compelled speech.

On appeal, the U.S. Supreme Court upheld the Sixth Circuit’s ruling in 2001. Writing for the majority, Justice Kennedy pointed out the differences between the 1997 tree-fruit case and the mushroom case: “The program sustained in [*Glickman*] differs from the one under review in a most fundamental respect. In [*Glickman*] the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme” (*US v. United Foods, Inc.* 533 U.S. 405 (2001), at 411-412). Thus, as long as the generic advertising is part of a broader regulatory scheme (like the marketing orders for fruit), the assessments pass constitutional muster. However, if generic advertising is the primary purpose for collecting the assessments, the assessments then violated the First Amendment. It did not take long for opponents of other mandatory checkoff programs, including the beef checkoff program, to adopt the strategy that was successful in the *United Foods* case. The Beef Promotion and Research Act (“Beef Act,” 7 U.S.C. § 2901 et seq.) was passed by Congress as part of the Food Security Act of 1985 (16

U.S.C. §§ 3801-3862). Under the Beef Act, the Secretary of Agriculture is directed to issue a Beef Promotion and Research Order and appoint a Cattlemen's Beef Promotion and Research Board which imposes a \$1 per head checkoff on all sales or importation of cattle. This assessment then is used to fund such things as beef promotional activities, which are designed by the Operating Committee of the Beef Board and approved by the Secretary of Agriculture.

Citing *United Foods*, the trial court ruled in 2001 that the beef checkoff program was unconstitutional (*Livestock Marketing Assoc. (LMA) v. USDA*, 132 F. Supp. 2d 817 (D. S.D. 2001)).<sup>1</sup> In this case, the government's argument that the beef checkoff was government speech was rejected by the trial court. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed (*LMA v. USDA*, 335 F.3d 711 (8th Cir. 2003)). The U.S. Supreme Court subsequently agreed to hear the case.

Meanwhile, another case against the Beef Act was winding its way through the federal courts. In November 2002, the Federal District Court for Montana held that the beef program "creates programs where the government utilizes private cattlemen

to disseminate a single message, a message prescribed by Congress and the USDA" (*Charter v. USDA*, 230 F. Supp. 2d 1121 (D.Mont. 2002)). In the *Charter* case, the District Court held that the government is making the speech *through* the cattlemen rather than *for* the cattlemen and, as such, the speech was government speech, not individual or private, commercial speech. Thus, the advertising did not implicate the plaintiffs' First Amendment rights. The *Charter* case was appealed to the U.S. Court of Appeals of the Ninth Circuit.

Before the Ninth Circuit ruled on the *Charter* appeal, the Supreme Court rendered its opinion in the *LMA* beef case. In a 6-3 ruling, with the majority opinion written by Justice Scalia, the Court upheld the beef checkoff on the grounds that the program was government speech (*Johanns, et al. v. LMA*, 544 U.S. 550 (2005)).

Why the change? In the majority's opinion, the beef checkoff case revolved around the question of whether the statutory language of the Beef Act created an advertising program that could be classified as government speech. Thus, as Justice Scalia explains, "We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech."

While the government speech doctrine is fairly new and not well developed, prior Supreme Court opinions (not involving agricultural commodity checkoffs) indicated that to constitute government speech, a government mandated program must pass three tests. First, the government must exercise sufficient control over the source of the message to be deemed ultimately responsible for the message. Second, the main purpose of the message and the program must

be identified as the government's. Finally, the source of the assessments must come from a large, nondiscrete group. It was believed by many that the beef checkoff would have a hard time overcoming this last test because the source of the funding, cattle producers, seemed to be a rather discrete, identifiable group. The rationale behind this third test is that courts have ruled that greater care needs to be taken when the government seeks to tax individuals or groups to pay for messages. The broader the source of the financing, the more diluted is the governmental infringement on individual rights.

Justice Scalia, writing for the majority, opined that the first two tests were satisfied because Congress has provided the rationale for a compelling state interest and instructed the Secretary of Agriculture to both impose the order, as well as oversee the actions of the Beef Board and the program's Operating Committee. While the opponents of the beef advertising program had argued that the Operating Committee was a non-governmental entity and, thus, the advertising cannot be considered government speech, the Court rejected this premise: "The message of the promotional campaigns is effectively controlled by the Federal Government itself. The message set out in the beef promotions is from beginning to end the message established by the Federal Government.... Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary.... Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign" (125 S.Ct. 2055 at 2063 (2005)).

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1. In October 2002, a U.S. district judge in Michigan, Richard Enslin, also citing *United Foods*, ruled that similar legislation for the pork checkoff program was not only unconstitutional but "rotten" as well (*Michigan Pork Producers Association v. Campaign for Family Farms*, 229 F. Supp. 2d 772 (W.D. Mich. 2002)) and struck down the entire pork checkoff, including the portions for research and education.

As to the final test regarding the source of the assessments, Justice Scalia argued that the compelled assessments, in fact, are unaffected by whether the funds are raised through general or targeted assessments. The dissent argued that this final test was key to the Act's being unconstitutional as the Act did not establish sufficient democratic checks. With this majority ruling, however, the Court eliminated this last test entirely. As Scalia opined, "Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object."

One First Amendment issue that was not addressed was the association issue. Most beef checkoff advertisements are credited to "America's Beef Producers," which may give the impression that the objecting cattle producers endorse the message. The majority examined only the language of the Act and concluded that because the statute does not require this attribution, the Act is not invalid on its face. However, the Court did note that they could not determine whether association rights were being violated because the record before them did not contain evidence that the ads were being associated with the plaintiffs. Such an argument was not part of the beef challenge, but is part of a pending challenge of the similar pork checkoff. In the pork case, the challenge is whether the government can compel producers to belong to a particular group. Previous rulings by the Supreme Court have held that Freedom of Association includes the right not to associate. As this question was not part of the beef checkoff case, the Court never

ruled on it. So, a checkoff program that is found to constitute government speech could still be found unconstitutional on freedom of association grounds.

An interesting question is whether the majority opinion was, in reality, a minority opinion as far as the government speech argument goes. Two of the six Justices who formed the majority, Justice Ginsburg and Justice Breyer, concurred with the majority opinion as an acceptable decision, though they disagreed with the rationale. Justice Ginsburg wrote separately that the Act was constitutional, but did not agree that the beef checkoff constituted government speech. Justice Breyer joined the majority, but wrote separately that the checkoff was an acceptable form of government regulation; hence the government speech issue was not pertinent for its constitutionality.

What are the implications of the Supreme Court decision on the beef checkoff program for commodity checkoff programs in general? In one sense, it could be argued that neither *Glickman* nor *United Foods* are relevant anymore in determining the constitutionality of a checkoff program. After the *United Foods* ruling, supporters of generic advertising tried to argue that their industries were more like that of the California tree-fruits, while their opponents argued that the industries were more like those of the mushroom industry. Because of this new ruling on the beef checkoff, deciding whether a program is pertinent based upon the degree of regulation in an industry no longer seems important *if* the advertising funded can be considered government speech. However, the fact that only four of the Justices actually saw the checkoff programs as government speech and that two of

these, Chief Justice Rehnquist and Justice O'Connor, are no longer on the Court, makes the relevance of the earlier decisions a bit murky.

Another implication of the beef case ruling is that, since checkoff messages may be considered government speech, much more regulatory oversight by the Secretary of Agriculture over all programs may be inevitable because failure to sufficiently monitor the programs may lead to lax oversight over promotional messages. Claims that a program is not being run as a government program would most likely blossom into further legal battles as to whether a program is in line with Congress' intent and whether or not the operating committee is sending an approved message. Generic advertising done by a program operating without sufficient oversight, therefore, may be seen as infringing on some participants' First Amendment rights.

Finally, for those thinking that the ruling will be limited to checkoff programs, a 2006 opinion of the United States Court of Appeals for the Sixth Circuit is worth watching. In 2003, the Tennessee legislature authorized sales of a specialty license plate with a "Choose Life" logotype with half of the profits going to a private organization, New Life Resources, Inc. At the same time, the legislature denied authorizing a pro-choice specialty license plate at the request of Planned Parenthood of Tennessee. Consequently, the American Civil Liberties Union of Tennessee sued, challenging the Act as unconstitutional. The Trial Court agreed but, based on the LMA beef case, the Appellate Court reversed (*ACLU of Tennessee, et al. v. Bredeesen*, 441 F.3d 370 (6th Cir. 2006)). Citing the Supreme Court's beef checkoff decision, the Appeals Court noted that the "Choose Life" license plate

was a government-crafted message where the legislature, like the Secretary of Agriculture in the checkoff program, had retained the right to approve the message even though the design and message itself was developed by a private organization. The Court also cited the beef case in holding that dissemination of a government-crafted message by a private organization did not require the views expressed to be neutral. The U.S. Supreme Court has declined to hear the case. Clearly, the government speech doctrine set in motion

by the Supreme Court's recent beef checkoff ruling may very well have repercussions far beyond the scope of agricultural enterprises.

### **For More Information**

Crespi, J.M. (2005). Generic advertising's long history and uncertain future. In Kaiser, Alston, Crespi, and Sexton (eds.). *Commodity Promotion Programs in California: Economic Evaluation and Legal Issues*. New York: Peter Lang Publishing.

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Supreme Court rules that beef checkoff is government speech; but checkoff litigation may not be over. *Agricultural Law Digest*, 16(11): 81-84.

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