Checkoffs and Government Speech-The Merry-Go-Round Revolves Again

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August 2021
Agricultural Law and Taxation Blog, by Roger McEowen: https://lawprofessors.typepad.com/agriculturallaw/

Overview

The research and promotion of numerous ag products is funded by the producers that raise the commodities via "checkoff" programs. Sometimes producers object to the content and manner of various promotions and claim that being compelled to fund the offensive advertising is private speech that they cannot be compelled to fund. But, is a mandatory checkoff private speech or is it constitutionally protected government speech? Recently the U.S. Court of Appeals addressed the question again in the context of the beef checkoff.

Checkoff programs and the Constitution – it's the topic of today post.

Background

Legislation has established mandatory assessments for promotion of particular agricultural products. An assessment (or "checkoff") is typically levied on handlers or producers of commodities with the collected funds to be used to support research promotion and information concerning the product. Such checkoff programs have been challenged on First Amendment free-speech grounds. For example, in *United States v. United Foods, Inc., 533 U.S. 405 (2001),* the U.S. Supreme Court held that mandatory assessments for mushroom promotion under the Mushroom Promotion, Research, and Consumer Identification Act violated the First Amendment. The assessments were directed into generic advertising, and some handlers objected to the ideas being advertised. In an earlier decision, the Court had upheld a marketing order that was part of a greater regulatory scheme with respect to California tree fruits. *Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, rev'g, 58 F. 3d 1367 (9th Cir. 1995).* In that case, producers were compelled to contribute funds for cooperative advertising and were required to market their products according to cooperative rules. In addition, the marketing orders had received an antitrust exemption. None of those facts was present in the *United Foods* case, where the producers were entirely free to make their own marketing decisions and the assessments were not tied to a marketing order. The Supreme Court did not address, however, whether the checkoffs at issue were government speech and, therefore, not subject to challenge as an unconstitutional proscription of private speech.

The Government Speech Issue

In *Livestock Marketing Association v. United States Department of* Agriculture, *335 F.3d 711 (8th Cir. 2003),* the Eighth Circuit held unconstitutional the beef checkoff authorized under the Beef Promotion and Research Act of 1985. The court ruled that the mandatory assessment of one dollar per-head violated the free-speech rights of those who objected to the generic advertising of beef funded by the check-off because cattle producers and sellers were not regulated nearly to the extent the California tree fruit industry was regulated in *Wileman Brothers.* As such, the beef industry was similar to the mushroom industry, and *United Foods* controlled. The court also ruled that the beef checkoff did not constitute government speech.

The Supreme Court agreed to hear the *Livestock Marketing Association* case on the narrow grounds of whether the beef checkoff was government speech. The Court reversed the Eighth Circuit and upheld the check-off as government speech. *Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005).* The

case involved (in the majority's view) a narrow facial attack on whether the statutory language of the Act created an advertising program that could be classified as government speech. That was the only issue before the Court.

Elements of constitutionality. While the government speech doctrine is relatively new and is not well-developed, prior Supreme Court opinions not involving agricultural commodity checkoffs indicated that to constitute government speech, a checkoff must clear three hurdles: (1) the government must exercise sufficient control over the content of the check-off to be deemed ultimately responsible for the message; (2) the source of the checkoff assessments must come from a large, non-discrete group; and (3) the central purpose of the checkoff must be identified as the government's. Based on that analysis, it was believed that the beef checkoff would clear only the first and (perhaps) the third hurdle, but that the program would fail to clear the second hurdle. Indeed, the source of funding for the beef check-off comes from a discrete identifiable source (cattle producers) rather than a large, non-discrete group. The point is that if the government can compel a targeted group of individuals to fund speech with which they do not agree, greater care is required to ensure political accountability as a democratic check against the compelled speech. That is less of a concern if the funding source is the taxpaying public which has access to the ballot box as a means of neutralizing the government program at issue and/or the politicians in support of the program. While the dissent focused on this point, arguing that the Act does not establish sufficient democratic checks, Justice Scalia, writing for the majority, opined that the compelled-subsidy analysis is unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. That effectively eliminates the second prong of the government speech test. The Court held that the other two requirements were satisfied because the Act vests substantial control over the administration of the checkoff and the content of the ads in the USDA Secretary.

The Supreme Court, in *Johanns*, did not address (indeed, the issue was not before the Court) whether the advertisements, most of which are credited to "America's Beef Producers," give the impression that the objecting cattlemen (or their organizations) endorse the message. Because the case only involved a facial challenge to the statutory language of the Act, the majority examined only the Act's language and concluded that neither the statute nor the accompanying Order *required* attribution of the ads to "America's Beef Producers" or to anyone else. Thus, neither the statute nor the Order could be facially invalid on this theory. However, the Court noted that the record did not contain evidence from which the Court could determine whether the actual application of the checkoff program resulted in the message of the ads being associated with the plaintiffs. Indeed, Justice Thomas, in his concurring opinion, noted that the government may not associate individuals or organizations involuntarily with speech by attributing an unwanted message to them whether or not those individuals fund the speech *and whether or not the message is under the government's control.* Justice Thomas specifically noted that, on remand, the plaintiffs could possibly amend their complaint to assert an attribution claim which ultimately could result in the beef checkoff being held unconstitutional. If that occurred, and the ads were found to be attributable to the complaining ranchers or their associated groups, the beef checkoff could still be held to be unconstitutional.

In the first check-off opinion rendered by a federal court after the U.S. Supreme Court's opinion in the beef check-off case, the Federal District Court for the Central District of California issued a preliminary injunction against enforcement of the California Pistachio check-off on the basis that the plaintiffs were likely to succeed on the merits of their claim that the program was unconstitutional. *Paramount Land Co., et al. v. California Pistachio Comm'n, No. 2:05-cv-05-07156-mmm-pjw (C.D. Cal. Dec. 12, 2005).* The court reasoned, based on *Johanns*, that the check-off was not government speech and that the industry regulation of the marketing aspects of pistachios was more like the regulatory aspects of the Mushroom industry at issue in *United Foods* than the regulatory aspects of the California tree fruit industry at issue in *Glickman*. However, on appeal, the district court's opinion was reversed. *Paramount Land Company, LP v. California Pistachio Commission, 491 F.3d 1003 (9th Cir. 2007).* The appellate court determined that the First Amendment was not implicated because, consistent with *Johanns*, the Secretary of the California

Department of Food and Agriculture retained sufficient authority to control both the activities and the message under the Pistachio Act. The court reasoned that the fact that the Secretary had not actually played an active role in controlling pistachio advertising could not be equated with the Secretary abdicating his regulatory role. In another California case, a court held that milk producer assessments used for generic advertising to stimulate milk sales were constitutional under the *Johanns* rationale. *Gallo Cattle Co. v. A.G. Kawamura, 159 Cal. App. 4th 948, 72 Cal. Rptr. 3d 1 (2008).*

Recent Case

The government speech issue came up again in the context of the beef checkoff in *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. Vilsack, No. 20-35453, 2021 U.S. App. LEXIS 22189 (9th Cir. Jul. 27, 2021).* The plaintiff represents cattlemen that are subject to the $1 per head of cattle sold in the United States federal beef checkoff created under the Beef Promotion and Research Act of 1985. The checkoff funds promotions to "maintain and expand domestic and foreign markets and uses for beef and beef products." The USDA Secretary, the defendant in the case, oversees the checkoff through the Cattlemen's Beef Promotion and Research Board that consists of members the Secretary appoints. A qualified state beef council typically collects the checkoff, retains half of the amount collected to fund state marketing efforts and forwards the balance to the federal program. A cattle producer may opt out of funding their state beef council and direct the entire assessment to the federal program.

The plaintiff's members object to their states' advertising campaigns, and claim in particular that the distribution of funds to the Montana Beef Council under the federal program is an unconstitutional compelled subsidy of private speech. Later, the plaintiff amended its complaint to include numerous other states where it had members. The trial court entered a preliminary injunction preventing the use of checkoff funds for promotional campaigns absent the producers' consent. On the merits, the trial court determined that by virtue of a memorandum of understanding that the Montana Beef Council and the other state beef councils had entered into with the defendant, the defendant had sufficient control over the promotional program to make the speech of the various state beef councils effectively government speech.

On appeal, the appellate court affirmed. The appellate court noted that the critical question in determining whether speech is public or private is whether the speech is "effectively controlled" by the government. The appellate court determined that the challenged speech was. Under the memorandums of understanding, the state beef councils had to submit for the defendant's pre-approval "any and all promotion advertising, research, and consumer information plans and projects" and "any and all potential contracts or agreements to be entered into by state beef councils for the implementation and conduct of plans or projects funded by checkoff funds." The state beef councils also had to submit "an annual budget outlining and explaining . . . anticipated expenses and disbursements" and a "general description of the proposed promotion, research, consumer information, and industry information programs contemplated." Failure to comply could lead to the defendant's de-certification of a state beef council. The appellate court noted that this established "final approval authority over every word used in every promotional campaign," and constituted government speech. In addition, all private contracted third parties that were not subject to pre-approval were "effectively controlled" by the government. The appellate court noted that the Congress expressly contemplated the participation of third parties in the beef checkoff program, designating several "established national nonprofit industry-governed organizations" with whom the Operating Committee could contract to "implement programs of promotion."

In addition, the appellate also pointed out that the state beef councils had to give the defendant notice of all board meetings and allow the defendant or his designees to participate in any discussions about payment to third parties. It was this ability to control speech that was the key rather than whether the defendant exercised final pre-approval authority over some third-party speech. On that point, the appellate court noted it had previously ruled similarly in 2007 in the *Paramount Land Company, LP* case.

Conclusion

If by use of a memorandum of understanding the USDA is able to create sufficient theoretical control over a checkoff to transform the program into government speech, there isn't much of a viable path forward for claiming that a checkoff isn't government speech. Any future challenge, as Justice Thomas pointed out in *Johanns*, would have to clearly and convincingly posit that an unwanted message is being attributed to particular producers.