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HIGH COURT PERMITS COMPELLED SUPPORT OF GOVERNMENT COMMERCIAL SPEECH

(Johanns v. Livestock Marketing Ass'n, No. 04-1164)

The U.S. Supreme Court ruled yesterday that the federal government may force beef producers to provide financial support for advertising with which they disagree, because the government at least nominally supervises the advertising. The 6-3 decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *Johanns v. Livestock Marketing Association*, urging the Court to strike down the advertising program. WLF argued that the First Amendment protects not only the right to speak but also the right not to speak, and that forcing someone to provide financial support for private speech with which he disagrees violates his First Amendment rights.

The Court held that so long as the speech in question originates with the government, the First Amendment does not prohibit the government from forcing small groups of people to fund the speech against their will. The Court left open the possibility that the plaintiffs could still establish, in later proceedings, that the government was not exercising any control over the speech -- in which case, they could prevail on their First Amendment claims.

"A silver lining in the Court's decision was that it did not rely on the commercial nature of the compelled speech as a reason for upholding the government's actions," said WLF Chief Counsel Richard Samp after reviewing the Court's decision. "Restrictions on compelled speech should not be relaxed simply because, as here, the speech being compelled is commercial in nature. An individual's interest in not being forced to provide financial support for speech with which he disagrees does not vary depending on the subject matter of the speech," Samp said.

Johanns (formerly known as *Veneman v. LMA*) was a challenge to a Department of Agriculture program (the "Beef Order") that requires all beef producers and importers to fund a generic advertising campaign ("Beef. It's What's for Dinner") administered by a committee of producers. Many producers object to the advertising campaign, particularly to advertisements indicating that beef is fungible. These producers contend that their beef is superior to other beef on the market, and the government-mandated generic advertisements thus undermine their efforts to market their beef based on its superior quality. A federal appeals court in St. Louis struck down the Beef Order as a violation of the First Amendment rights of dissenting producers. The Supreme Court's ruling yesterday overturned that decision.

This case marked the third occasion in recent years on which the Supreme Court has reviewed First Amendment challenges to agriculture marketing orders. In *Glickman v. Wileman Brothers* (1997), the Court upheld a program that required producers of California peaches, plums, and nectarines to fund generic advertising. Four years later, the Court in *United States v. United Foods* struck down a largely indistinguishable program that required mushroom producers to fund generic advertising. In the wake of *United Foods*, lower federal courts struck down a wide variety of agricultural advertising programs, including advertising for milk ("Got Milk"), pork ("It's the Other White Meat"), and Washington apples. But in neither *Glickman* nor *United Foods* did the Supreme Court address the question presented in *Johanns*: if the speech for which plaintiffs are required to make financial support is attributable to the government, does the "government speech" doctrine exempt the speech from First Amendment challenge. By answering that question affirmatively and broadly defining government speech, *Johanns* essentially renders *United Foods* a dead letter and likely will bring to an end all First Amendment challenges to agricultural marketing programs.

In its brief urging the Court to strike down the Beef Order, WLF argued that the First Amendment fully protects the right to refuse to speak, and that forcing someone to fund another's speech is constitutionally equivalent to forcing him to utter that speech. WLF cited Supreme Court precedents prohibiting schools from requiring school children to recite the Pledge of Allegiance, and prohibiting labor unions from requiring dissenting employees to pay any portion of the costs of the union's political activities.

WLF also (unsuccessfully) urged the Court to reject the government's claim that the Beef Order is exempt from First Amendment review because the speech at issue is really the government's own speech. In support of that claim, the government noted that it exercises some supervision over the committee of beef producers that carries out the beef advertising program. WLF argued that "government speech" doctrine only exempts the government from First Amendment review when the speech at issue is funded by general tax revenues or is subject to close government supervision. WLF argued that because the ultimate decision whether to have a beef advertising campaign at all is left to private individuals, the speech at issue here cannot qualify as government speech.

WLF filed its brief on behalf of itself and the Allied Educational Foundation. WLF is a public-interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to free speech rights, both of individuals and of the business community.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.