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 Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE DKT LIBERTY PROJECT, THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, AND THE MEDIA INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. This case presents the possibility that the federal government will restrict these liberties. Because of the DKT Liberty Project's strong interest in protecting citizens from any government overreaching and in defending the constitutional rights of citizens from efforts to deny them, it is well-situated to provide this Court with additional insight into the issues presented in this case.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. The Center pursues that mission through research, educational programs, and intervention on behalf of the right of free expression. Since its founding in 1990, the Center has filed briefs as *amicus curiae* in this Court and numerous state and federal courts in cases that raised important free expression issues.

The Media Institute is an independent, nonprofit research foundation based in Arlington, Virginia. The Institute is one

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[1] The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

of the country's leading voices advocating a strong First Amendment, a competitive communications industry, and excellence in journalism. The Institute has filed *amicus curiae* briefs in the United States Supreme Court and federal courts of appeal in commercial speech and other First Amendment cases. The Institute has also filed comments with the Federal Communications Commission and other regulatory agencies. In addition to court and agency filings, the Institute advocates freedom of speech through publications, conferences, and other programs.

SUMMARY OF ARGUMENT

In striking down the beef checkoff program at issue in this case, the court of appeals engaged in a straightforward application of this Court's recent decision in *United States v. United Foods*, 533 U.S. 405 (2001). In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), this Court had upheld the use of mandatory assessments for generic advertising of California tree fruits. *Id.* at 477. But four years after *Wileman*, the Court invalidated compelled assessments imposed on mushroom growers, finding a clear violation of the First Amendment prohibition on compelled expression. *United Foods*, 533 U.S. at 417. As the court below recognized, the mandatory assessment program in this case is strikingly similar to the scheme invalidated in *United Foods* and therefore suffers from the same constitutional infirmity. Even if *Wileman* retained any validity after *United Foods*, it would not help sustain the beef checkoff program, which bears little resemblance to the highly regulated cooperative marketing scheme upheld in *Wileman*.

In any event, *Wileman* was, in all meaningful respects, superseded by *United Foods*. Although the Court in *United Foods* did not expressly overrule *Wileman*, the analytical foundations of *Wileman* have not survived. First, this Court in *United Foods* squarely rejected *Wileman*'s refusal to apply

the Court's compelled speech cases to mandatory assessment schemes. Consistent with well-settled compelled speech doctrine, *United Foods* confirmed that, in the context of checkoff programs, the First Amendment protects speakers from being forced to subsidize expression to which they object. Second, contrary to the decision in *Wileman*, the Court in *United Foods* made clear that constitutional proscriptions against compelled speech apply fully to commercial expression. In so doing, the *United Foods* Court rejected *Wileman*'s dismissive treatment of the Court's commercial speech cases and repudiated *Wileman*'s conclusion that an underlying commercial motive could insulate coerced speech from First Amendment challenge.

Because the Court's decision in *Wileman* no longer retains any analytical force, it provides no support for the beef checkoff program at issue here.

ARGUMENT

I. EVEN IF STILL VALID, THE *WILEMAN* RATIONALE CANNOT SUSTAIN THE COMPELLED ASSESSMENTS CHALLENGED HERE.

In defending the Beef Act, Petitioners and their *amici* seek support in this Court's decision in *Wileman*. But even assuming *Wileman* retains any vitality after *United Foods* – by no means a certainty, *see infra* Part II – it cannot sustain the checkoff program challenged here, which, as a factual matter, is remarkably similar to the scheme struck down in *United Foods*.

In *United Foods*, this Court distinguished between the regulatory program in *Wileman*, which comprehensively restricted the marketing autonomy of its participants, and a mushroom checkoff scheme that consisted primarily of a generic advertising program. *United Foods*, 533 U.S. at 411-

12. The *Wileman* program restrained the marketing of tree fruits so thoroughly, and "'displaced competition'" so completely, that it was "'expressly exempted from the antitrust laws.'" *Id.* at 412 (quoting *Wileman*, 521 U.S at 461). In that context, the cooperative advertising program in *Wileman* was merely one aspect of a "'broader collective enterprise in which [the growers'] freedom to act independently [was] already constrained by the regulatory scheme.'" *Id.* (quoting *Wileman*, 521 U.S. at 469). By contrast, in *United Foods* – as in this case – no comparable regime of "mandated cooperation" existed; instead, the compelled subsidies in *United Foods* were part of a program "where the principal object [was] speech itself." *Id.* at 414-15.

The beef checkoff program bears little resemblance to the assessments in *Wileman*. The Beef Act neither creates, nor is subordinate to, a comprehensive regulatory scheme. Beef sellers and producers make their own marketing decisions. Indeed, the narrow assessment scheme does not even approach the degree of collective marketing activity that would necessitate an antitrust exemption. Finally, at least half of the funds collected by the Beef Board are used for generic advertising; only 10-12% of those funds are devoted to research. *See Livestock Mktg. Ass'n v. United States Dept' of Agric.*, 335 F.3d 711, 715-16 (8th Cir. 2003). This case thus mirrors *United Foods*. "[F]or all practical purposes," the advertising promoted by the beef checkoff program, "far from being ancillary, is the principal object of the regulatory scheme." *United Foods*, 533 U.S. at 411-12. Accordingly, as in *United Foods*, the compelled speech at issue here cannot withstand Respondents' constitutional challenge.

II. THIS COURT'S DECISION IN *UNITED FOODS* CAST SERIOUS DOUBT ON THE CONTINUED VITALITY OF *WILEMAN*.

Even if *Wileman* otherwise applied to the factual and structural scenario presented here, the doctrinal foundations of *Wileman* have been called into question by the Court's decision in *United Foods*. While the Court in *United Foods* declined to overrule *Wileman*, and expressly distinguished the factual underpinnings of the two cases, the underlying assumptions and conclusions of *Wileman* did not survive the Court's later analysis. For all relevant purposes, *Wileman* has been superseded, and therefore provides no support for Petitioners' defense of the Beef Act.[2]

Although Petitioners and their *amici* rely heavily on *Wileman*, the Court in *United Foods* cast serious doubt on the continued vitality of its earlier decision in two crucial respects. First, *United Foods* rejected *Wileman*'s treatment of the Court's compelled speech cases. In *United Foods*, the Court forcefully applied the compelled speech doctrine generally, and the mandatory dues assessments cases specifically, to federal checkoff programs. Contrary to the suggestions made in *Wileman*, the Court clarified that the government cannot, consistent with the First Amendment, "underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced."

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[2] Although not necessary to the disposition of this case, the Court should take this opportunity to recognize and make explicit the fact that *United Foods* overruled *Wileman*. *Cf. Hudgens v. NLRB*, 424 U.S. 507, 517-18 (1976) (noting that, although the Court in *Lloyd Corp., Inc. v. Tanner*, 407 U.S. 551 (1972), did not expressly overrule *Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) – and, in fact, pointedly distinguished the factual circumstances between the two cases – "the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*").

United Foods, 533 U.S. at 410. Second, *United Foods* declined to follow *Wileman*'s narrow reading of the Court's commercial speech cases. Instead, the Court emphasized that compelled assessments contravene basic constitutional values, even when the speech compelled has an underlying commercial motive.

A. *Wileman*'s Refusal to Apply the Court's Compelled Speech Cases Did Not Survive *United Foods*, and Therefore Cannot Help Justify the Mandatory Checkoff Program Challenged Here.

In defending the Beef Act's mandatory assessment program, Petitioners and their *amici* rely on *Wileman*'s refusal to apply the Court's compelled speech cases to checkoff programs. *See Wileman*, 521 U.S. at 470-71 (citing and distinguishing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986)); *see also Wileman*, 521 U.S. at 469 & n.13. *United Foods*, however, reached the opposite conclusion, noting the central importance of its compelled speech cases to mandatory assessment schemes. *See United Foods*, 533 U.S. at 410.

In particular, this Court in *United Foods* rejected one of the central premises underlying *Wileman* – namely, that the compelled speech doctrine is "clearly inapplicable" to checkoff programs because, according to *Wileman*, "[t]he use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they 'would prefer to remain silent,' or require them to be publicly identified or associated with another's message." *Wileman*, 521 U.S. at 470-71 (quoting *PG&E*, 475 U.S. at 18) (internal citations

omitted). In *Wileman*, challengers to the mushroom checkoff program objected to the message, expressed through the use of coerced advertising funds, that all mushrooms were "the same." 521 U.S. at 468 n.11. While *Wileman* dismissed that objection as "trivial," *id.* at 471; *see also id.* at 472 ("Here, . . . requiring respondents to pay the assessments cannot be said to engender any crisis of conscience."), *United Foods* squarely held that the First Amendment protects producers against compelled speech subsidies "even where the disagreement could be seen as minor." *United Foods*, 533 U.S. at 411.

Notwithstanding *Wileman*, the objections asserted in *United Foods*, like those in *Wileman* and this case, are highly significant for constitutional purposes. As this Court explained:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.

United Foods, 533 U.S. at 411.[3]

In rejecting *Wileman*'s suggestion that these objections raise few constitutional concerns, *United Foods* fit well within the established compelled speech doctrine. With the exception of *Wileman*, the Court's compelled speech cases had never required express, ideological disagreement with

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[3] As Justice Souter explained, dissenting in *Wileman*, "While these points of disagreement may seem trivial to the Court, they in fact relate directly to a vendor's recognized First Amendment interest in touting his wares as he sees fit, so long as he does not mislead." *Wileman*, 521 U.S. at 488 (Souter, J., dissenting).

the coerced message. Instead, the vital First Amendment right "to refrain from speaking," *Wooley*, 430 U.S. at 714, protects against compelled expression irrespective of the putative speaker's reasons for wishing to remain silent. In this area, the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995); *see also, e.g., Riley v. National Federation of the Blind*, 487 U.S. 781, 797-98 (1988) (the Court's earlier compelled speech cases "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech"); *PG&E*, 475 U.S at 9 (compelled access impermissibly "forces speakers to alter their speech to conform with an agenda they do not set").

Similarly, after *United Foods*, little remains of *Wileman*'s treatment of the Court's mandatory dues assessment cases. In this subset of the compelled speech doctrine, the Court repeatedly has confirmed that the First Amendment limits the government's ability to "compel[] certain individuals to pay subsidies for speech to which they object." *United Foods*, 533 U.S. at 405; *see also, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 527-28 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977). Yet *Wileman* found the dues assessment cases inapplicable to the checkoff program at issue there, *see Wileman*, 521 U.S. at 469-73, primarily based on the conclusion that the challenged assessments were not "used to fund ideological activities," *Wileman*, 521 U.S. at 473; *see also, e.g., id.* at 472 (finding case not "comparable to those in which an objection rested on political or ideological disagreement with the content of the message").

But *United Foods* rejected such a narrow reading of the dues assessment cases. Contrary to *Wileman*, *United Foods* reiterated "*Abood*'s statement that speech need not be characterized as political before it receives First Amendment protection." *United Foods*, 533 U.S. at 413 (citing *Abood*, 431 U.S. at 232). Whether classically "ideological" or not, the coerced subsidy of speech to which one objects offends core constitutional principles. *Id.* at 410-11. *Wileman*'s conclusions to the contrary simply have not survived *United Foods*.

Finally, *United Foods* narrowed *Wileman*'s reliance on the "germaneness" test found in earlier compelled subsidy cases. *Wileman* had applied that test to uphold the challenged checkoff program, reasoning that "the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders." *Wileman*, 521 U.S. at 473 (citing *Abood* and *Keller*). In *United Foods*, however, the Court recognized the inherent limitations of the germaneness inquiry for advertising checkoff programs. By definition, advertising funds used to support compelled cooperative advertising will be germane to the program at issue. "Were it sufficient to say speech is germane to itself," this Court explained, "the limits observed in *Abood* and *Keller* would be empty of meaning and significance." *United Foods*, 533 U.S. at 415.

Thus, *United Foods* essentially rejected *Wileman*'s dismissal of the compelled speech cases, leaving *Wileman* with little analytical support.

B. As This Court Recognized in *United Foods*, the Commercial Nature of Expression Does Not Deprive the Speaker of a First Amendment Right to Resist Government Compulsion to Speak.

This Court's decision in *United Foods* resolved any doubt raised in *Wileman* about whether a commercial speaker

who is compelled to speak can claim any First Amendment protection. *Wileman* could be read as exempting commercial speech from the long-recognized constraints upon government's power to compel expression. *See e.g., Wooley*, 430 U.S. 705 (1977*); Barnette,* 319 U.S. 624 (1943). But *United Foods* restored what surely had been the previous assumption: that a commercial motive on the speaker's part in no way deprives the speaker of a constitutional objection to compulsion imposed by legislative or administrative edict.

This case thus properly invokes *United Foods*' recognition of the abiding principle that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . or from compelling certain individuals to pay subsidies for speech to which they object." 533 U.S. at 410 (internal citations omitted). The explanation for including commercial speech within those safeguards is telling, and is clearly apposite here:

> The fact that the speech is in aid of a commercial purpose does not deprive [the speaker] of all First Amendment protection . . . . The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

Id. This explanation is especially pertinent to the compelled speech issue in this case. As in *United Foods*, "First Amendment concerns [should] apply here because of the

requirement that producers subsidize speech with which they disagree." *Id.* at 410-11.

Such a clear recognition that commercial speech may no more readily be coerced than political speech sets to rest any lingering doubt created by *Wileman.* There, the Court appeared to dismiss commercial speech precedents because they had involved only restrictions or outright bans on expression. Specifically, the *Wileman* Court observed that the absence of "restraint on the freedom of any producer to communicate any message to any audience" served to "distinguish . . . the limits on commercial speech" which had been invalidated in a host of earlier judgments. 521 U.S. at 469 & n.12. The *Wileman* Court also seemed to suggest that commercial speech protection was unavailing where expression was compelled or coerced; a later footnote chided the court of appeals for having "fail[ed] to explain why the *Central Hudson* test . . . should govern a case involving the compelled funding of speech." 521 U.S. at 474 n.18.

So severe a narrowing of First Amendment protection for commercial speech received little analytic support in *Wileman.* The proposition that commercial speech differs in several important respects from political speech required no demonstration; that much has been clear at least since *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). What was not at all clear, however, and found no support beyond *Wileman*'s brief *ipse dixit*, was the suggestion that such differences relate in any constitutionally significant way to the issue of compulsion.

In fact, contrary to *Wileman*'s suggestions, this Court had recognized as early as *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), that a commercial speaker is entitled to raise First Amendment objections to compelled expression. In *Zauderer*, an Ohio

professional ethics rule required that attorneys who made reference to contingent fees in their advertising must disclose that clients still might be liable for certain costs. Recognizing that compelled statements might indeed "offend the First Amendment by chilling protected commercial speech," *id.* at 651, the Court applied a First Amendment analysis, and sustained that legally imposed obligation. *See United Foods*, 533 U.S. at 416 (summarizing *Zauderer*).

In *Zauderer*, the Court found that the narrow category of permissible government-mandated messages served directly and effectively the very rationale for protecting commercial speech – to ensure that consumers receive truthful information that may aid judgments about the purchase of lawful products or services. The advertising obligations imposed on Ohio attorneys were "reasonably related to the State's interest in preventing deception of consumers" and were upheld on that basis. *Zauderer*, 471 U.S. at 651.

Zauderer's analysis of mandated commercial speech, which *United Foods* noted, contains clear and direct implications for the present case. Its unambiguous recognition that chilling commercial speech might offend the First Amendment provides the clearest possible refutation of *Wileman*'s categorical dismissal of the producers' free speech claims. Moreover, *Zauderer* strongly implied a limitation on government's ability to compel commercial messages – the need for proof that the required disclosures be "reasonably related to the State's interest in preventing deception of consumers" to whom the commercial speech is directed. *Id.*

Where such an interest is absent, not only will a coerced speaker have a legitimate First Amendment objection, but the governmental interest in compelling speech is attenuated, at best. If, for example, Ohio had required attorneys to include in their advertising a statement such as "Ohio Lawyers:

They're the Best," or any other message unrelated to consumer protection, this Court's acceptance of such a mandate seems highly unlikely. Validating any government mandate for a message that is not corrective or truth-ensuring would, at the very least, fall outside *Zauderer*'s limited acceptance of a state interest that directly serves the central premise of conferring partial protection on commercial speech.

This analysis closely fits the current case, and helps to bring it squarely within *United Foods*' recognition of a producer's First Amendment objection to compelled commercial speech. The primary basis for mandating an industry-wide agricultural marketing subsidy is to benefit producers, not consumers. To the extent that consumers might benefit from greater market stability, as the *Wileman* Court suggested, 521 U.S. at 475, such an interest is far removed from the sorts of interests that underlie the commercial speech doctrine. There has been no suggestion at any stage of the current litigation that consumers need to be told that "Beef [is] what's for dinner" in order to make informed choices about the retail purchase of meats. Nor is there even a hint in the Government's defense of this program that such a mandated subsidy for a particular advertising mantra serves in any way the needs or interests of the nation's food purchasers. Thus, *Zauderer*'s limited validation of compelled attorney disclosure is of no help to the present program.

In fact, the link between the currently challenged mandate and *Zauderer*'s rationale may even be inverse. While generic messages such as those to which Respondents object may not be clearly misleading or deceptive, they surely cannot be deemed consumer-protective. Further, to the extent that a single slogan appears to consumers to reflect the unanimous view of an entire industry – when, in fact,

some producers vehemently object to that slogan because it does not accurately describe their product – the mandate may actually *deprive* consumers of potentially valuable information.

The closely analogous pork marketing program recently invalidated in *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3539 (No. 03-1180), better illustrates the problem. The mandate that dissenting producers challenged in that case compelled industry-wide support for advertising that features the slogan, "Pork. The Other White Meat." *Id.* at 162. Contrary to that message, some high-end pork producers apparently pride themselves on the pinkness of meat that comes from grain-fed animals, and find potentially misleading (as well as harmful to their interests) the suggestion that all "pork [is] . . . white meat." To be sure, such dissenters could (at substantial extra expense) buy advertisements emphasizing the special value of grain-fed pink pork products. Apart from the onerous burden of having to pay twice to spread that message to consumers, the simple fact is that a massive ad campaign implying that pork comes in only one shade is potentially misleading. Perhaps most pork, even most good quality pork, is indeed white. But as long as not all pork can be so described – and if indeed the highest quality pork is not white – the generic advertising program challenged in *Michigan Pork Producers* sends to food buyers a picture of available meat products that is less than complete, and, in that respect, potentially misleading. That result is a far cry from the basis on which the *Zauderer* Court ruled that Ohio attorneys may be required to warn potential clients of hidden costs in contingent fee arrangements. Not only is the consumer-protective rationale for compelled speech totally absent in such cases; such a government mandate may even misinform consumers.

Finally, *Wileman*'s dismissive approach to compelled, as opposed to restricted commercial speech also has been undermined. *Wileman* suggested that the checkoff did not hurt producers' First Amendment interests because they could otherwise advertise their products as they wished. But *United Foods* refused to rely on that distinction. As the court of appeals recognized in this case, "both [compelling and restricting speech] involve government interference with private speech in a commercial context." *Livestock Marketing Ass'n v. U.S. Dept. of Agriculture*, 335 F.3d 711, 722 (8th Cir. 2003). Especially for small and mid-level producers such as the Respondents, advertising budgets are not infinite. When substantial funds already have been preempted by a generic marketing program, any suggestion that dissenting producers may remain competitive while supporting their own separate advertising campaigns misapprehends market conditions in a volatile industry with relatively narrow profit margins. Whether or not such a costly burden might be justified under the unique circumstances of the fruit marketing structure in *Wileman*, no such reasoning could extend to the far less comprehensive programs involved in *United Foods* and the present case. To tell dissenting beef producers, "You may always pay separately to get your own message out" imposes an economically unrealistic dilemma. It also cannot constitutionally justify the compelled subsidy.

In *Wileman*, the ultimate ground for avoiding the clear import of commercial speech precedents seems to have been – not the absence of any prohibition or restriction – but rather "the very nature and purpose of the collective action program at issue [in *Wileman*]." 521 U.S. at 474. But in *United Foods*, the Court applied those precedents to a federal checkoff program consistently with all its earlier, pre-*Wileman* cases. Because coerced commercial speech is subject to First Amendment challenge, and because the

program now under review closely resembles that in *United Foods*, *Wileman* provides no basis for rejecting commercial speech safeguards.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals holding the federal beef checkoff program unconstitutional should be affirmed.

Respectfully submitted,

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