

ORAL ARGUMENT SCHEDULED FOR MAY 13, 2004

No. 03-5086

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AVOCADOS PLUS INCORPORATED,  
LGS SPECIALTY SALES LTD.,  
AVO-KING INTERNATIONAL, INC.,  
SUNNY AVOCADO, LTD.,

Plaintiffs-Appellants

v.

ANN M. VENEMAN, A.J. YATES,

Defendants-Appellees,

CHARLIE WOLK; THE JEROME J.  
STEHLY AND CHRSTINA M. STEHLY  
LIVING TRUST OF NOVEMBER 30, 1999,

Intervenor Defendants-Appellees.

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On appeal from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT  
IN SUPPORT OF REVERSAL

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January 22, 2004

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### (A) Parties and Amici

Before the district court, the parties included Avocados Plus Incorporated; LGS Specialty Sales Ltd.; Avo-King International, Inc.; Sunny Avocado, Ltd.; Ann M. Veneman; A.J. Yates; and the U.S. Department of Agriculture. Intervenors included Charlie Wolk and The Jerome J. Stehly and Christina M. Stehly Living Trust of November 30, 1999.

Before this court, the parties and intervenors are the same. In addition, The DKT Liberty Project has filed with this brief an Unopposed Motion for Leave to File a Brief *Amicus Curiae*.

### (B) Rulings Under Review

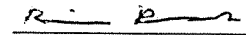
Judge Gladys Kessler of the U.S. District Court for the District of Columbia issued rulings in this case on February 14, 2003, a copy of which appears at page 80 of the joint appendix, and on April 14, 2003, a copy of which appears at page 103 of the joint appendix. *Amicus* is not aware of any official citation to these decisions.

### (C) Related Cases

*Amicus* is not aware of any related cases.

## CERTIFICATE REGARDING SEPARATE BRIEFS

Pursuant to Circuit Rule 29(d), I, Brian Hauck, respectfully certify the following. On the day before this brief was due, counsel for the DKT Liberty Project was made aware of another expected *amicus* brief in support of reversal, filed on behalf of the Mexican Government. That brief is expected to address such issues as the relationship between the Hass avocado assessment program on certain tariffs agreed to pursuant to the North American Free Trade Agreement and the effect of the assessment on Mexican producers. As these issues are wholly unrelated to the First Amendment concerns that are of interest to the DKT Liberty Project, counsel respectfully submits that a single brief between the Mexican Government and the DKT Liberty Project would have been impracticable.

  
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Brian Hauck

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## INTEREST OF AMICUS

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, which threaten the reservation of power to the citizenry that underlies our constitutional system.

This case implicates one of the most profound individual liberties, the right to free speech, and its concomitant right, the right not to speak. Laws compelling contributions to generic advertising campaigns are of particular concern to the DKT Liberty Project because they undermine these crucial rights. Because of the DKT Liberty Project’s strong interest in protection of citizens from government overreaching, it is well-situated to provide this Court with additional insight into the issues presented in this case.

## SUMMARY OF ARGUMENT

“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Compelling persons to fund speech violates this basic principle.

Thus the Supreme Court has consistently subjected compelled speech, including compelled contributions to fund particular speech, to rigorous scrutiny under the First Amendment. In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Supreme Court examined the question of “whether the government may 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.” *Id.* at 410. In the specified context of a compelled contribution to subsidize advertisements from a mushroom industry council, the Supreme Court ruled quite clearly that the government could not.

Traditional First Amendment scrutiny of the compelled contribution in this case, which involves an assessment nearly identical to that struck down in *United Foods*, requires invalidation of the Hass Avocado Board’s compelled contribution program. The statutory requirement that avocado producers contribute funds to support the generic advertising of avocados violates the precise principle laid down in *United Foods*: Absent a narrowly tailored program to further a substantial state interest, the government may not compel individuals to subsidize speech. Moreover, because the assessment constitutes a privately-funded, privately-controlled program to promote a private industry, it cannot be saved under the guise of “government” speech. And even if it were government speech, the plaintiffs’ strong interest the speech far outweighs the limited government interest, and the First Amendment thus requires invalidating the compelled assessment program.

## ARGUMENT

This appeal is from the District Court’s decision of April 14, 2003, in which the District Court ruled that the plaintiffs could not bring suit until they had exhausted their administrative remedies. Docket Entry #38. That decision granted the government’s motion to alter or amend an earlier decision on February 14, in which the Court had found (1) that exhaustion was not necessary, and (2) that plaintiffs were not entitled to a preliminary injunction because, although the Hass Avocado Board is composed entirely of private industry producers and importers of avocados, and although the Hass Avocado Board speaks for the sole purpose of promoting a single private interest, the speech of the Hass Avocado Board constitutes government speech.

Docket Entry #28 at 3, 10, 13. The District Court's later decision on the exhaustion issue did not expressly or implicitly vacate the second part of the earlier decision. Thus, if this Court reverses the later decision and holds, as plaintiffs urge, that exhaustion of administrative remedies is not required, then the District Court's earlier decision on the merits is still effective. The merits issues were fully briefed and argued below; indeed, as the District Court noted in its first opinion, the parties agreed that a ruling on the motion for a preliminary injunction would be combined with a ruling on the merits of the entire case. Order of Feb. 14, 2003, Docket Entry #28, at 2 n.3. There is little reason to remand the case to the District Court for a decision on the merits, because there is already such a decision. Because such a remand would waste judicial and party resources, it would be prudent for this Court to resolve the merits of the claims. Accordingly, *amicus* respectfully urges the Court to apply the standard of *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), to reject the defendants' suggestion that the Hass Avocado Board is a government speaker, and to uphold the plaintiffs' right to speak, or not speak, as they choose.

**I. THE SPEECH IN THIS CASE FAILS THE HEIGHTENED SCRUTINY THAT APPLIES TO COMPELLED SPEECH.**

The compelled assessment program invalidated in *United Foods* was in all relevant respects identical to the program at issue here. There, as here, certain producers of a particular agricultural product – there, mushrooms; here, avocados – lobbied for and received the power to raise and spend money on generic advertising that promotes the product. In both programs, producers and importers of the product submit nominations from among their groups to serve on a board that levies mandatory assessments on every pound of the product produced or imported. The nominees who are selected by the Secretary of Agriculture then use the funds collected to promote the product in a manner that they see fit, subject only to the Secretary's veto.

**A. The Statute Compels Speech.**

The Supreme Court struck down the mushroom program in *United Foods*, finding the program impermissibly compelled speech in violation of the First Amendment. *United Foods*, 533 U.S. at 409. The Court concluded that “the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.” *Id.* at 413. That is precisely the case here, where certain avocado producers and importers, including the plaintiffs, object to the messages that the Hass Avocado Board conveys, but that the plaintiffs, by law, are compelled to support.

It is well-settled that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Further, the Supreme Court has emphasized that the “difference between compelled speech and compelled silence . . . is without constitutional significance.” *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *see also West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *Turner*, 512 U.S. at 642. A law that compels speech, whether the speech is ideological or not (and whether or not such a distinction is possible), is subject to the same rigorous First Amendment scrutiny as one that prohibits speech.

Heightened scrutiny of laws compelling speech is necessary because such laws implicate two fundamental First Amendment interests. First, compelled contributions may force individuals to support speech with which they do not wish to be associated. This is so regardless of whether the individuals agree with the message being advanced. For example, the First Amendment would likely preclude supporters of a particular political candidate from being compelled to contribute to that candidate even though they agreed with that candidate’s message. The same is true when the speech is less obviously ideological: individuals (and companies)

have an interest in choosing the messages with which they wish to be associated, whether or not the messages are ideological. *See, e.g., Riley*, 487 U.S. at 797-78 (holding that compelled statements of facts, like compelled statements of opinion, violate First Amendment).

Second, compelled contributions may force individuals to support speech with which they disagree. Such a requirement “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to . . . reserve from all official control.” *Barnette*, 319 U.S. at 642. This is the fundamental principle upheld in *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977): an employee who objected to lobbying and electoral activities of the union he was compelled to support could not be “compelled to contribute to the support of an ideological cause he may oppose.” *See also Keller v. State Bar of Calif.*, 496 U.S. 1, 13 (1990) (invalidating portion of mandatory bar dues used for lobbying activities not necessary to regulate the legal profession or improve the quality of legal services).

Even when those compelled to contribute may expect to benefit economically from the success of a particular advertising campaign, it cannot be presumed that they will agree with the message articulated. For this reason, the Supreme Court has held that teachers cannot be compelled to support an advertising campaign designed to enhance the reputation of teachers and thus create public support for an increase in teacher salaries. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 528-29 (1991) (plurality). And the Supreme Court rejected the presumption that individuals agree with messages that benefit them economically in *United Foods*, recognizing that even if the disagreement was “minor,” some mushroom producers disagreed with the generic advertising message. Those producers, the Court recognized, did not believe that all mushrooms were created equal, and objected to supporting a message with which it disagreed.

The message is that mushrooms are worth consuming whether or not they are branded. 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. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

*United Foods*, 533 U.S. at 411. Similarly, an avocado producer who appears to benefit economically from a generic advertising campaign might disagree that an increase in avocado consumption generally, as opposed to consumption of its unique avocados in particular, is beneficial for American consumers or might have strong objections to the very notion of a collective advertising campaign. This is not just a disagreement in strategy. This is a disagreement with ideas – and it triggers First Amendment scrutiny.

Of course, even if all of those entities compelled to fund particular speech happened to agree with that speech, the speech cannot be exempt from First Amendment scrutiny. Case-by-case inquiry into the views of those objecting to compelled contributions would itself compel speech in violation of the First Amendment. Because of this concern, the Supreme Court has determined that a plaintiff can make out a compelled contribution claim merely by asserting a general objection to the compelled contribution:

To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

*Abood*, 431 U.S. at 241 (footnote omitted); *see also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 n.16 (1986) (“The nonmember’s burden is simply the obligation to make his objection known.”) (quotation marks omitted). Finally, if the constitutionality of compelled contributions were to depend on the potentially changing views of those compelled to contribute,

a statute that was constitutional one moment could become unconstitutional the next. Neither legislatures nor judges could ever settle the question of constitutionality.

There is no doubt that the program here compels speech, or that the plaintiffs in this case have properly objected to it. The issue, then, is whether the compulsion can withstand heightened scrutiny.

**B. The Program Compelling Speech From Avocado Producers Cannot Survive Heightened Scrutiny, Because It Exists Solely To Compel Speech.**

In *United Foods*, the Supreme Court used a heightened scrutiny analysis to strike down a compelled speech program, because the government's asserted interest – advertising mushrooms – was insufficient. *United Foods*, 533 U.S. at 415. Compelled contributions to fund speech must serve a substantial (or even compelling) governmental interest and be narrowly tailored to serve that interest. The contributions here, like those in *United Foods*, cannot pass that rigorous standard.

Heightened scrutiny for compelled speech has deep roots in Supreme Court case law. In *Abood v. Detroit Board of Education*, which involved compulsory payment of union dues, the Court determined that compulsory payments spent on collective bargaining activities served “important government interests,” including industrial peace, stable labor relations, and the advancement of collective goals of unionized employees. 431 U.S. at 224-25. The importance of these goals was underscored by the entire framework of the system of labor relations, which revealed that in the labor arena, government believed it necessary to subordinate the interests of individual employees to the collective interests of the employees as a whole. *Id.* at 221 n.15. The “interference” with First Amendment rights in that context was “constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor

relations established by Congress.” *Id.* at 222; *see also Lehnert*, 500 U.S. at 520-21 (plurality); *Ellis v. Brotherhood of Railway, Airline and S.S. Clerks*, 466 U.S. 435, 455-56 (1984).

But an important governmental interest was not enough to justify the compulsion. The *Abood* Court also evaluated whether the law compelling contributions was narrowly tailored to serve the government’s interests. Thus, only the union dues that were necessarily related (or “germane”) to collective bargaining activities could be compelled. *Abood*, 431 U.S. at 235-36.

The Court in *Chicago Teachers Union v. Hudson* explained this rationale:

[A]lthough the government interest in labor peace is strong enough to support an ‘agency shop’ notwithstanding its limited infringement on nonunion employees’ constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.

475 U.S. at 302-03 (footnote omitted); *see also id.* at 303 n.11 (citing First Amendment cases regarding the need for narrow tailoring, including cases that applied strict scrutiny). And in *Lehnert*, the Court explicitly held that compelled contributions had to serve a “vital policy interest” and be narrowly tailored to serve that interest. The Court explained that “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of speech that is inherent in the allowance of an agency or union shop.” 500 U.S. at 518-19.

The Supreme Court consistently requires narrow tailoring to important government interests before it will condone a compelled contribution requirement. In *Keller*, 496 U.S. 1 (1990), the Court applied heightened scrutiny to mandatory dues collected by a state bar association. The Court distinguished between activities that served “the State’s interest in regulating the legal profession and improving the quality of legal services,” such as ethical codes

or disciplinary functions, and other activities not germane to that interest. *Keller*, 496 U.S. at 13, 16. The Court upheld the compulsory dues payments only to the extent that the requirement was carefully crafted to fund activities furthering the interest in regulating the profession and improving legal services. *Id.* at 13-14; *see also Board of Regents v. Southworth*, 529 U.S. 217, 229-33 (2000) (looking to whether university's method of allocating student activity fees was tailored to further university's important interests). And in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), the Court upheld an assessment on growers of California tree fruit in the context of a comprehensive statute that essentially collectivized the tree fruit industry, because the assessment was tailored to further an important government interest: "The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market." *Id.* at 475. In light of the substantial governmental purpose in stabilizing volatile markets, not only for benefit of the benefit of the fruit producers but also *for the public at large*, the Court concluded that the collective advertising program was constitutional because it was germane to that purpose and because the alternative of individual advertising would not effectively serve the same purpose. *Id.* at 473, 475; *see also Abood*, 431 U.S. at 223-24 (recognizing public interest in collective bargaining).

There is no similar public interest at issue here, as the decision in *United Foods* makes clear. Unlike the compelled speech in *Wileman*, where it was necessary to stabilize an industry, or in *Abood*, where it was necessary to promote industrial peace, or in *Keller*, where it was necessary to improve the quality of legal services, the compelled speech in *United Foods* and here serve only one purpose: advertisements. But as the Court in *United Foods* recognized, "We

have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.” *United Foods*, 533 U.S. at 415; *see also id.* (“The only program the Government contends the compelled contributions serve is the very advertising scheme in question.”).

Thus the government’s simple interest in promoting an individual product cannot justify compelling industry participants to support generic advertising. *See Michigan Pork Producers Ass’n v. Veneman*, 348 F.3d 157, 163 (6th Cir. 2003) (striking down Pork Act assessment because “the Pork Act serves but one purpose: promotion”); *Livestock Marketing Ass’n v. United States Department of Agriculture*, 335 F.3d 711, 725-26 (8th Cir. 2003) (“[T]he government’s interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees’ First Amendment free speech right.”). As the program at issue here is indistinguishable from that in *United Foods*, it impermissibly compels speech and cannot be upheld.

## **II. The Speech Of The Hass Avocado Board, Which Is Composed Of Private Industry Representatives With The Narrow Purpose Of Promoting Their Private Industry, Is Not Government Speech.**

Essentially accepting that *United Foods* would otherwise resolve this case, the government relies wholly on an argument not properly raised in *United Foods*. It argues that speech by the Hass Avocado Board is government speech, and therefore, not subject to the First Amendment. Thus, the question before this Court is whether the government can compel specific private entities to pay for specific advertising speech on the grounds that it is “government speech.” The answer is that it cannot. The speech of such an identifiable group, for private purposes and funded with private dollars, cannot possibly be justified as government

speech. And even if it were government speech, the private First Amendment interests sacrificed are so strong that compelling speech could not be upheld.

**A. The Doctrine of Government Speech Does Not Allow the Government To Compel a Select Group of Private Parties To Fund Particular Speech Relating Only to Those Private Parties.**

The First Amendment does not prohibit government and government officials from participating in public discourse. *Keller*, 496 U.S. at 12-13. And when the government “disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate” steps to make sure that its message is not “garbled.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). This is an essential aspect of government; in order for government to work, it must have the ability to communicate with its citizens, *see Keller*, 496 U.S. at 12-13 – and if the citizens disagree with its message, they have the power to change the government. *See Southworth*, 529 U.S. at 235.

Necessarily, this power requires that the government be able to tap the public fisc to promote its speech. And while some citizens may disagree with the government’s message, the harm that the individual suffers by being required to support that speech with his or her tax dollars is too attenuated to give rise to a First Amendment claim. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982) (denying standing to plaintiffs who sued solely as taxpayers interested in having the government follow the law). The courts have held that neither the message nor the funds used to support it can be attributed or traced to particular individuals. Thus when a government program is designed not “to encourage private speech, but instead” to “use[] private speakers to transmit specific information pertaining to its own program, the Supreme Court has found “government speech.” *Rosenberger*, 515 U.S. at 833 (characterizing the government speech upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991)).

But these principles do not lead to the conclusion that the government urges: that in the name of government speech, it may compel a select group of individuals to fund particular speech that directly addresses the interests of that group. As the Eighth Circuit recognized in *Livestock Marketing Ass'n*, “[t]he two categories of First Amendment cases – government speech cases and compelled speech cases – are fundamentally different.” *Livestock Marketing Ass'n*, 335 F.3d at 720. That speech is organized or even drafted by the government cannot justify compelling specific individuals to engage in specific speech. For this reason, the Supreme Court held that the state could not require individuals to carry the state motto on their automobiles, despite the fact that the message emblazoned on the license plates was the government’s message, not the individuals’. The Court determined that the state’s requirement infringed on the car owners’ “right to avoid becoming the courier for such message,” and it struck down the law at issue. *Wooley*, 430 U.S. at 717.

Further, the fact that speech is facilitated by the government cannot justify compelling a select group of private entities to fund it. *All* compelled speech is in some way facilitated by the government; if the fact that it was compelled made it government speech, then the doctrine of compelled speech would be eviscerated. Compelling speech would always be permissible, because the speech would always be traceable to the government. But in *Wooley* and other cases, the Court has made clear that there is a difference between *government* speech, which is not traceable to individual taxpayers, and *compelled* speech, in which the message required by the government directly infringes on the rights of private parties. *See, e.g., Wooley*, 430 U.S. at 717 n.15.

The avocado assessment program at issue here relates *only* to private entities. The private parties alone are assessed monies, and those monies are used solely to support speech

relating only to their private interests. The government is not making the content-based choices it is entitled to make when it decides to speak. Instead, it is directly interfering with specific individuals' right to speak or not speak as they choose. As nearly every court to consider the issue has found, advertisements funded by the mandatory checkoffs are not government speech. *See Michigan Pork Producers*, 348 F.3d at 161-62; *Livestock Marketing Ass'n*, 335 F.3d at 723 n.9; *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989); *In re Washington State Apple Advertising Comm'n*, 257 F. Supp. 2d 1290, 1305 (E.D. Wash. 2003); *Pelts & Skins, L.L.C. v. Jenkins*, 259 F. Supp. 2d 482, 490 (M.D. La. 2003).<sup>1</sup>

**B. The Hass Avocado Board Advertisements Are Not Government Speech.**

Even if the government speech doctrine could somehow justify compelling speech, the mandatory assessment program is still invalid because the Hass Avocado Board advertisements do not constitute government speech. Far from being a government body of any kind, the Hass Avocado Board is composed of private representatives who are required to have a financial stake in the industry and who have the sole purpose of promoting their product. Neither the compelled contributions that provide their funding nor the limited government oversight the producers and importers on the Board receive can convert them into government speakers.

**1. Because It Has a Private Purpose and Is Made Up Only of Private Industry Participants, the Hass Avocado Board Is Not a Government Speaker.**

The critical feature of the Hass Avocado Board is that it represents a narrow, private concern. Like the union of public employees in *Abood* and the state-sanctioned bar association in *Keller*, the Board in this case cannot purport to represent the public interest generally, or even

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<sup>1</sup> *Amicus* has found only one case (besides this one) in which any court has held that advertisements funded by a mandatory checkoff constitute government speech. *Charter v. United States Department of Agriculture*, 230 F. Supp. 2d 1121 (D. Mont. 2002). That case is currently on appeal in the Ninth Circuit (No. 02-36140).

a significant array of private interests. Its purposes are to “strengthen the position of the Hass avocado industry in the domestic marketplace” and to “maintain, develop, and expand markets and uses for Hass avocados in the domestic marketplace.” 7 U.S.C. § 7801(b).

This private purpose distinguishes the Board from the more generalized interests that define government speakers. See *Michigan Pork Producers*, 348 F.3d at 161 (rejecting government speech argument in part because “the primary purpose of the Pork Act is to strengthen the market position of the pork industry and increase the domestic markets for pork and pork products”). In *Keller*, the Supreme Court rejected a state bar association’s argument that its political activities could be considered “government speech”:

The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers.

*Keller*, 496 U.S. at 13. The same is true of the public employees’ union in *Abood*, which rather than serving as a “representative of the people,” serves as a “representative only of one segment of the population, with certain common interests.” *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). As the interests represented by a speaker become narrower and more private, the likelihood that the speaker speaks on behalf of the government decreases. When the represented interest becomes a single profession, as in *Keller*, or a single economic interest, as in *Abood*, or a single product, as in this case, the notion that the representative’s speech is on behalf of the government becomes too remote to recognize.

Such private speech is not considered government speech even when the state has sanctioned and supported the speaker’s mission. The Supreme Court has made clear that the question is not whether the state in some way supports the speech, but whether the speech

further some narrow, private interest. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), for example, the Court recognized that when the government speaks, it need not remain content-neutral, and it may place restrictions on certain speech that it funds. *Id.* at 541-42. But the Court also ruled that not all speech funded by the government is government speech, and it identified the speech of attorneys working for the Legal Services Corporation as an example of government-funded, non-government speech: “[T]he LSC program was designed to facilitate private speech, not to promote a governmental message. Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients.” *Id.* at 542.

Here, too, agricultural checkoff boards were created not to promote a government message, but to facilitate the speech of a private industry. The question is not whether the Avocado Board’s message has the support of the government. The question is whether the Avocado Board’s message *is* the message of the government. *See Keller*, 496 U.S. at 5 (ruling that certain bar activities, though consistent with bar’s statutory purpose of “promot[ing] the improvement of the administration of justice,” were not government speech) (internal quotation marks omitted); *Abood*, 431 U.S. at 215 (concluding, despite state law permitting “union expenditures for legislative lobbying and in support of political candidates,” that public employees could not be compelled to contribute to union’s political activities).

The Board exists solely to promote avocados. 7 U.S.C. § 7801(b). This private purpose is carried out not by government officials, but by the private business interests that make up the Board – the twelve avocado producers and importers who are nominated by other private interests to sit on the board and who, by statute, must be participants in the assessment program. 7 U.S.C. § 7804(b)(2)(A) (requiring that board members be “subject to assessments”); *see also Livestock Marketing Ass’n*, 335 F.3d at 723 (recognizing that Secretary’s act of appointing

individuals nominated by private industry does not create a significant government interest for purposes of identifying government speech).

Because the purpose of the Board and its advertisements is to promote avocados, the government's influence and involvement is understandably minimal. The Secretary's influence over the board's composition is limited to selecting from among the private industry nominees; neither the Secretary nor any other government employee serves *ex officio*. "The government itself does not propose or draft any of the advertisements," *Michigan Pork Producers*, 348 F.3d at 162; *see also United Foods*, 533 U.S. at 417 (suggesting that if government involvement in program were "pro forma," speech is less likely to be government speech), but merely approves or rejects the ideas of the board members, *see Declaration of Martha B. Ransom*. And even when Department of Agriculture employees do participate in Avocado Board activities, the Board must use the assessments it has collected to *reimburse* the Secretary for the government's expenses, using the assessments. 7 U.S.C. § 7804(i) (requiring Board to reimburse Secretary for certain costs of, among other things, administering the orders that govern the assessment program). The avocado industry thus *pays* the government to run the program – and in return it gets the power to compel the speech of unwilling speakers.

The Board's speech is also not government speech because the Board does not, and cannot, govern. Although it has the power to promote avocados, the Board is specifically prohibited from any regulatory activity. 7 U.S.C. § 7801(c) ("Nothing in this chapter may be construed to provide for the control of production or otherwise limit the right of any person to produce, handle, or import Hass avocados."). Just like the bar association in *Keller*, which had advisory powers but which could not admit, disbar, or suspend attorneys, or establish codes of conduct without the state supreme court's approval, *Keller*, 496 U.S. at 11, the Board's lack of

governing power “serve[s] to distinguish it from the role of the typical government official or agency,” *id.* at 12.

**2. The Public Will Not Attribute Hass Avocado Board Advertisements to the Government.**

Courts determining whether particular speech is government speech also look to how the speech will be perceived: as that of the government or of a private speaker. Thus in *Wooley*, the Supreme Court suggested that an objectionable government message on an automobile’s license plate is more troubling than a similarly objectionable message on currency, because unlike currency, which is associated with government, “an automobile . . . is readily associated with its operator.” *Wooley*, 430 U.S. at 717 n.15. For similar reasons, in *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1101 (E.D. Cal. 2003), the court concluded that because antitobacco ads funded by taxes on cigarettes clearly stated that they were paid for by the California Department of Health Services, and because no one could possibly confuse the negative ads as the tobacco companies’ own speech, “[t]his fact of attribution, together with the actual responsibility of government officials for the ads, demonstrates that the speech at issue here is government speech.”

In contrast, when the Hass Avocado Board advertises avocados, few objective listeners would attribute the speech to the government. Rather, they will attribute it to the entity identified in the ads – the Hass Avocado Board – and to other entities who sell avocados. Any listener familiar with the Board will know, of course, that the Board is composed not of any government officials, but twelve representatives of private avocado producers and importers. Listeners who are not familiar with the program will see the speech identified only with the “Hass Avocado Board,” a title that gives no indication of government involvement. And unlike other cases in which private individuals’ messages are considered government speech, the avocado

advertisements do not come at a government-sponsored event or with other traditional indicia of government actions. See *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 307-08 (2000) (emphasizing that student prayer at school football game is government speech in part because it is delivered “as part of a regularly scheduled, school-sponsored function conducted on school property”). To the contrary, the speech of the Hass Avocado Board is disseminated through traditional media outlets, with no indication of any government origins.

Any attempt to trace the Board’s speech back to the government is further obscured by the sources of the Board’s funding. The Hass Avocado Board’s advertisements – and its administrative costs, and the funds it must use to reimburse the government for expenses incurred – come not from general tax revenues, but from private payments from those with business interests in avocados. 7 U.S.C. § 7804(h). Like funding for the bar association in *Keller*, which came “not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors,” *Keller*, 496 U.S. at 11, funding for the Board demonstrates that the Board’s speech is private.

For these reasons, the compelled advertisements of the Hass Avocado Board do not constitute government speech. It is a privately-funded board of representatives of private industry, charged with promoting their own product. It reimburses the government for costs the government incurs. Just as the Supreme Court rejected the government speech argument in *Keller*, based on the sources of the bar’s funding, the composition of its membership, and the simple fact that the bar association does not govern, *Keller*, 496 U.S. at 11, and just as the Court of Appeals rejected the government speech argument in *Michigan Pork Producers Ass’n*, based on the assessment program’s purely private purpose, the source of its funding, and the government’s limited involvement, *Michigan Pork Producers Ass’n*, 348 F.3d at 161-62, the

and vilify the doctors who provide them.” *Bonta*, 272 F. Supp. 2d at 1110 (offering hypothetical); *see also id.* at 1106-10 (identifying other limits on government speech).

Thus, the question is whether the government’s interest in speaking outweighs the competing First Amendment rights of the private individuals affected. *Summit Med. Ctr.*, 284 F. Supp. 2d at 1350. In ordinary cases, private individuals’ First Amendment may be only minimally affected, because the government’s speech is typically funded out of general tax revenues that are not directly traceable to individual taxpayers. “When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated.” *Frame*, 885 F.2d at 1132. But when there is “a coerced nexus” between the speech and those supporting it, however, the connection of those supporting it is much clearer, and the First Amendment harm is much greater. *Id.*; *see also id.* (“[W]here the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.”); *Wooley*, 430 U.S. at 717 n.15.

**B. Here, the Government’s Minimal Interest in Promoting Avocados Does Not Outweigh the First Amendment Rights of Private Parties Not To Speak.**

In the mandatory checkoff cases, the government’s interest in promoting the specific product does not outweigh the private entities’ right not to be forced to speak. The private entities’ interest is strong, as the “coerced nexus” is obvious: as discussed above, the funds used to support the speech at issue come not from general tax revenues, but from a specific assessment levied only on avocado producers. Thus, in the checkoff cases, the speech is directly funded by and easily attributed to the market participant. *Southworth*, 529 U.S. at 240 (Souter, J., concurring) (looking to nature of the connection between the speech and the entity compelled

to support it). Moreover, that focused coercion is directed not just at any group, but at “those whose business and livelihood depend in some way upon the product involved,” thus making the intrusion on their right not to speak in a particular way about that product all the more important. *United Foods*, 533 U.S. at 410. The individual’s interest in the government’s speech here is as high as it could be: it is closely linked to speech that it finds uniquely important.

Unless the government’s interest in promoting avocados is similarly high, the speech impermissibly infringes on the plaintiffs’ free speech rights. But the government’s interest here in promoting avocados is minimal, at best. There is no government interest here in stabilizing a market or collectivizing an industry, as has justified other similar intrusions. The government’s only interest in the Hass Avocado Board is in promoting a particular product. And that interest carries little weight against the plaintiffs’ First Amendment rights. *See Michigan Pork Producers Ass’n*, 348 F.3d at 163; *Livestock Marketing Ass’n*, 335 F.3d at 725-26. Even if the avocado advertising constitutes government speech – which it does not – it infringes so directly on the plaintiffs’ right to speak, and is supported by so little government interest, that it cannot be upheld.

## CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed.

Respectfully submitted,

THE DKT LIBERTY PROJECT

A handwritten signature in dark ink, appearing to read "Julie M. Carpenter", is written over the printed name.

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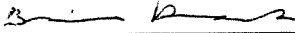
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January 22, 2004

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)**

I, Brian Hauck, respectfully certify that the accompanying brief contains 6571 words, thereby complying with the requirements of Federal Rules of Civil Procedure 32(a)(7)(B) and 29(d).

  
\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I, Brian Hauck, respectfully certify that on January 22, 2004, I served by U.P.S. overnight mail two copies of the enclosed brief to the following counsel.

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## **ADDENDUM**

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## 7 U.S.C.A. § 7801

### (a) Findings

Congress finds the following:

- (1) Hass avocados are an integral food source in the United States that are a valuable and healthy part of the human diet and are enjoyed by millions of persons every year for a multitude of everyday and special occasions.
- (2) Hass avocados are a significant tree fruit crop grown by many individual producers, but virtually all domestically produced Hass avocados for the commercial market are grown in the State of California.
- (3) Hass avocados move in interstate and foreign commerce, and Hass avocados that do not move in interstate or foreign channels of commerce but only in intrastate commerce directly affect interstate commerce in Hass avocados.
- (4) In recent years, large quantities of Hass avocados have been imported into the United States from other countries.
- (5) The maintenance and expansion of markets in existence on October 28, 2000, and the development of new or improved markets or uses for Hass avocados are needed to preserve and strengthen the economic viability of the domestic Hass avocado industry for the benefit of producers and other persons associated with the producing, marketing, processing, and consuming of Hass avocados.
- (6) An effective and coordinated program of promotion, research, industry information, and consumer information regarding Hass avocados is necessary for the maintenance, expansion, and development of domestic markets for Hass avocados.

### (b) Purpose

It is the purpose of this chapter to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for the development and financing (through an adequate assessment on Hass avocados sold by producers and importers in the United States) of an effective and coordinated program of promotion, research, industry information, and consumer information, including funds for marketing and market research activities, that is designed to--

- (1) strengthen the position of the Hass avocado industry in the domestic marketplace; and
- (2) maintain, develop, and expand markets and uses for Hass avocados in the domestic marketplace.

### (c) Limitation

Nothing in this chapter may be construed to provide for the control of production or otherwise limit the right of any person to produce, handle, or import Hass avocados.

## **7 U.S.C.A. § 7802**

As used in this chapter:

### **(1) Board**

The terms “Avocado Board” and “Board” mean the Hass Avocado Board established under section 7804 of this title.

### **(2) Conflict of interest**

The term “conflict of interest” means a situation in which a member or employee of the Board has a direct or indirect financial interest in a person that performs a service for, or enters into a contract with, the Board for anything of economic value.

### **(3) Consumer information**

The term “consumer information” means any action or program that provides information to consumers and other persons on the use, nutritional attributes, and other information that will assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of Hass avocados.

### **(4) Customs**

The term “Customs” means the United States Customs Service.

### **(5) Department**

The term “Department” means the United States Department of Agriculture.

### **(6) Hass avocado**

#### **(A) In general**

The term “Hass avocado”--

(i) the fruit of any Hass variety avocado tree; and

(ii) any other type of avocado fruit that the Board, with the approval of the Secretary, determines is so similar to the Hass variety avocado as to be indistinguishable to consumers in fresh form.

#### **(B) Form of fruit**

Except as provided in subparagraph (C), the term includes avocado fruit described in subparagraph (A) whether in fresh, frozen, or any other processed form.

(C) Exceptions

In any case in which a handler further processes avocados described in subparagraph (A), or products of such avocados, for sale to a retailer, the Board, with the approval of the Secretary, may determine that such further processed products do not constitute a substantial value of the product and that, based on its determination, the product shall not be treated as a product of Hass avocados subject to assessment under the order. In addition, the Board, with the approval of the Secretary, may exempt certain frozen avocado products from assessment under the order.

(7) Handler

(A) First handler

The term “first handler” means a person operating in the Hass avocados marketing system that sells domestic or imported Hass avocados for United States domestic consumption, and who is responsible for remitting assessments to the Board. The term includes an importer or producer who sells directly to consumers Hass avocados that the importer or producer has imported into the United States or produced, respectively.

(B) Exempt handler

The term “exempt handler” means a person who would otherwise be considered a first handler, except that all avocados purchased by the person have already been subject to the assessment under section 7804(h) of this title.

(8) Importer

The term “importer” means any person who imports Hass avocados into the United States.

(9) Industry information

The term “industry information” means information and programs that are designed to increase efficiency in processing, enhance the development of new markets and marketing strategies, increase marketing efficiency, and activities to enhance the image of Hass avocados and the Hass avocado industry domestically.

(10) Order

The term “order” means the Hass avocado promotion, research, and information order issued under this chapter.

(11) Person

The term “person” means any individual, group of individuals, firm, partnership, corporation, joint stock company, association, cooperative, or other legal entity.

(12) Producer

The term “producer” means any person who--

(A) is engaged in the domestic production of Hass avocados for commercial use; and

(B) owns, or shares the ownership and risk of loss, of such Hass avocados.

(13) Promotion

The term “promotion” means any action to advance the image, desirability, or marketability of Hass avocados, including paid advertising, sales promotion, and publicity, in order to improve the competitive position and stimulate sales of Hass avocados in the domestic marketplace.

(14) Research

The term “research” means any type of test, study, or analysis relating to market research, market development, and marketing efforts, or relating to the use, quality, or nutritional value of Hass avocados, other related food science research, or research designed to advance the image, desirability, and marketability of Hass avocados.

(15) Secretary

The term “Secretary” means the Secretary of Agriculture.

(16) State

The term “State” means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, the Republic of the Marshall Islands, and the Federated States of Micronesia.

(17) United States

The term “United States” means the United States collectively.

7 U.S.C.A. § 7803

(a) In general

(1) Issuance

To effectuate the policy of this chapter specified in section 7801(b) of this title, the Secretary, subject to the procedures provided in subsection (b) of this section, shall issue orders under this chapter applicable to producers, importers, and first handlers of Hass avocados.

(2) Scope

Any order shall be national in scope.

(3) One order

Not more than one order shall be in effect at any one time.

(b) Procedures

(1) Proposal for an order

An existing organization of avocado producers established pursuant to a State statute, or any other person who will be affected by this chapter, may request the issuance of, and submit a proposal for an order.

(2) Publication of proposal

The Secretary shall publish a proposed order and give notice and opportunity for public comment on the proposed order not later than 60 days after receipt by the Secretary of a proposal for an order from an existing organization of avocado producers established pursuant to a State statute, as provided in paragraph (1).

(3) Issuance of order

(A) In general

After notice and opportunity for public comment are provided in accordance with paragraph (2), the Secretary shall issue the order, taking into consideration the comments received and including in the order such provisions as are necessary to ensure that the order is in conformity with this chapter.

(B) Effective date

The order shall be issued and become effective only after an affirmative vote in a referendum as provided in section 7805 of this title, but not later than 180 days after publication of the proposed order.

(C) Amendments

The Secretary, from time to time, may amend an order. The provisions of this chapter applicable to an order shall be applicable to any amendment to an order.

## 7 U.S.C.A. § 7804

### (a) In general

An order shall contain the terms and provisions specified in this section.

### (b) Hass Avocado Board

#### (1) Establishment and membership

##### (A) Establishment

The order shall provide for the establishment of a Hass Avocado Board, consisting of 12 members, to administer the order.

##### (B) Membership

###### (i) Appointment

The order shall provide that members of the Board shall be appointed by the Secretary from nominations submitted as provided in this subsection.

###### (ii) Composition

The Board shall consist of participating domestic producers and importers.

##### (C) Special definition of importer

In this subsection, the term "importer" means a person who is involved in, as a substantial activity, the importation, sale, and marketing of Hass avocados in the United States (either directly or as an agent, broker, or consignee of any person or nation that produces or handles Hass avocados outside the United States for sale in the United States), and who is subject to assessments under the order.

#### (2) Distribution of appointments

##### (A) In general

The order shall provide that the membership of the Board shall consist of the following:

(i) Seven members who are domestic producers of Hass avocados and are subject to assessments under the order.

(ii) Two members who represent importers of Hass avocados and are subject to assessments under the order.

(iii) Three members who are domestic producers of Hass avocados and are subject to assessments under the order, or are importers of Hass avocados and are subject to assessments under the order, to reflect the proportion of domestic production and imports supplying the United States market, which shall be based on the Secretary's determination of the average volume of domestic production of Hass avocados proportionate to the average volume of imports of Hass avocados in the United States over the previous 3 years.

(B) Adjustment in Board representation

Three years after the assessment of Hass avocados commences pursuant to an order, and at the end of each 3-year period thereafter, the Avocado Board shall adjust the proportion of producer representatives to importer representatives on the Board under subparagraph (A)(iii) on the basis of the amount of assessments collected from producers and importers over the immediately preceding 3-year period. Any adjustment under this subparagraph shall be subject to the review and approval of the Secretary.

(3) Nomination process

The order shall provide that--

(A) two nominees shall be submitted for each appointment to the Board;

(B) Nominations for each appointment of a producer or an importer shall be made by domestic producers or importers, respectively

(i) in the case of producers, through an election process which utilizes existing organizations of avocado producers established pursuant to a State statute, with approval by the Secretary; and

(ii) in the case of importers, nominations are submitted by importers under such procedures as the Secretary determines appropriate; and

(C) in any case in which producers or importers fail to nominate individuals for an appointment to the Board, the Secretary may appoint an individual to fill the vacancy on a basis provided in the order or other regulations of the Secretary.

(4) Alternates

The order shall provide for the selection of alternate members of the Board by the Secretary in accordance with procedures specified in the order.

(5) Terms

The order shall provide that--

(A) each term of appointment to the Board shall be for 3 years, except that, of the initial

appointments, four of the appointments shall be for 2-year terms, four of the appointments shall be for 3-year terms, and four of the appointments shall be for 4-year terms; and

**(B)** no member of the Board may serve more than 2 consecutive terms of 3 years, except that any member serving an initial term of 4 years may serve an additional term of 3 years.

**(6) Replacement**

**(A) Disqualification from Board service**

The order shall provide that if a member or alternate of the Board who was appointed as a domestic producer or importer ceases to belong to the group for which such member was appointed, such member or alternate shall be disqualified from serving on the Board.

**(B) Manner of filling vacancy**

A vacancy arising as a result of disqualification or any other reason before the expiration of the term of office of an incumbent member or alternate of the Board shall be filled in a manner provided in the order.

**(7) Compensation**

The order shall provide that members and alternates of the Board shall serve without compensation, but shall be reimbursed for the reasonable expenses incurred in performing duties as members or alternates of the Board.

**(c) General responsibilities of the Avocado Board**

The order shall define the general responsibilities of the Avocado Board, which shall include the responsibility to--

- (1)** administer the order in accordance with the terms and provisions of the order;
- (2)** meet, organize, and select from among the members of the Board a chairperson, other officers, and committees and subcommittees, as the Board determines to be appropriate;
- (3)** recommend to the Secretary rules and regulations to effectuate the terms and provisions of the order;
- (4)** employ such persons as the Board determines are necessary, and set the compensation and define the duties of the persons;
- (5)(A)** develop budgets for the implementation of the order and submit the budgets to the Secretary for approval under subsection (d) of this section; and
- (B)** propose and develop (or receive and evaluate), approve, and submit to the Secretary for

approval under subsection (d) of this section plans or projects for Hass avocado promotion, industry information, consumer information, or related research;

**(6)(A)** implement plans and projects for Hass avocado promotion, industry information, consumer information, or related research, as provided in subsection (d) of this section; or

**(B)** contract or enter into agreements with appropriate persons to implement the plans and projects, as provided in subsection (e) of this section, and pay the costs of the implementation, or contracts and agreement, with funds received under the order;

**(7)** evaluate on-going and completed plans and projects for Hass avocado promotion, industry information, consumer information, or related research and comply with the independent evaluation provisions of the Commodity Promotion, Research, and Information Act of 1996 (subtitle B of title V of Public Law 104-127 [7 U.S.C.A. § 7411 et seq.]);

**(8)** receive, investigate, and report to the Secretary complaints of violations of the order;

**(9)** recommend to the Secretary amendments to the order;

**(10)** Invest, pending disbursement under a plan or project, funds collected through assessments authorized under this chapter only in

**(A)** obligations of the United States or any agency of the United States;

**(B)** general obligations of any State or any political subdivision of a State;

**(C)** any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System; or

**(D)** obligations fully guaranteed as to principal and interest by the United States, except that income from any such invested funds may be used only for a purpose for which the invested funds may be used;

**(11)** borrow funds necessary for the startup expenses of the order; and

**(12)** provide the Secretary such information as the Secretary may require.

**(d)** Budgets; plans and projects

**(1)** Submission of budgets

The order shall require the Board to submit to the Secretary for approval budgets, on a fiscal year basis, of the anticipated expenses and disbursements of the Board in the implementation of the order, including the projected costs of Hass avocado promotion, industry information, consumer information, and related research plans and projects.

The order shall provide that each first handler shall remit to the Board, in the manner provided in the order, an assessment collected from the producer, except to the extent that the sale is excluded from assessments under paragraph (6). In the case of imports, the assessment shall be levied upon imports and remitted to the Board by Customs.

(B) Published lists

To facilitate the payment of assessments under this paragraph, the Board shall publish lists of first handlers required to remit assessments under the order and exempt handlers.

(C) Making determinations

(i) First handler status

The order shall contain provisions regarding the determination of the status of a person as a first handler or exempt handler.

(ii) Producer-handlers

For purposes of paragraph (3), a producer-handler shall be considered the first handler of those Hass avocados that are produced by that producer-handler and packed by that producer-handler for sale at wholesale or retail.

(iii) Importers

The assessment on imported Hass avocados shall be paid by the importer to Customs at the time of entry into the United States and shall be remitted by Customs to the Board. Importation occurs when Hass avocados originating outside the United States are released from custody of Customs and introduced into the stream of commerce within the United States. Importers include persons who hold title to foreign-produced Hass avocados immediately upon release by Customs, as well as any persons who act on behalf of others, as agents, brokers, or consignees, to secure the release of Hass avocados from Customs and the introduction of the released Hass avocados into the current of commerce.

(2) Assessment rates

With respect to assessment rates, the order shall contain the following terms:

(A) Initial rate

The rate of assessment on Hass avocados shall be \$.025 per pound on fresh avocados or the equivalent rate for processed avocados on which an assessment has not been paid.

(B) Changes in the rate

(i) In general

Once the order is in effect, the uniform assessment rate may be increased or decreased not more than once annually, but in no event shall the rate of assessment be in excess of \$.05 per pound.

(ii) Requirements

Any change in the rate of assessment under this subparagraph--

(I) may be made only if adopted by the Board by an affirmative vote of at least seven members of the Board and approved by the Secretary as necessary to achieve the objectives of this chapter (after public notice and opportunity for comment in accordance with section 553 of Title 5 and without regard to sections 556 and 557 of such title);

(II) shall be announced by the Board not less than 30 days prior to going into effect; and

(III) shall not be subject to a vote in a referendum conducted under section 7805 of this title.

(3) Collection by first handlers

Except as provided in paragraph (1)(C)(iii), the first handler of Hass avocados shall be responsible for the collection of assessments from the producer under this subsection. As part of the collection of assessments, the first handler shall maintain a separate record of the Hass avocados of each producer whose Hass avocados are so handled, including the Hass avocados produced by the first handler.

(4) Timing of submitting assessments

The order shall provide that each person required to remit assessments under this subsection shall remit to the Board the assessment due from each sale of Hass avocados that is subject to an assessment within such time period after the sale (not to exceed 60 days after the end of the month in which the sale took place) as is specified in the order.

(5) Claiming an exemption from collecting assessments

To claim an exemption under section 7802(6) of this title as an exempt handler for a particular fiscal year, a person shall submit an application to the Board--

(A) stating the basis for such exemption; and

(B) certifying such person will not purchase Hass avocados in the United States on which an assessment has not been paid for the current fiscal year.

(6) Exclusion

An order shall exclude from assessments under the order any sale of Hass avocados for export

from the United States.

(7) Use of assessment funds

The order shall provide that assessment funds shall be used for payment of costs incurred in implementing and administering the order, with provision for a reasonable reserve, and to cover the administrative costs incurred by the Secretary in implementing and administering this chapter, including any expenses incurred by the Secretary in conducting referenda under this chapter, subject to subsection (i) of this section.

(8) Assessment funds for State association

The order shall provide that a State organization of avocado producers established pursuant to State law shall receive an amount equal to the product obtained by multiplying the aggregate amount of assessments attributable to the pounds of Hass avocados produced in such State by 85 percent. The State organization shall use such funds and any proceeds from the investment of such funds for financing domestic promotion, research, consumer information, and industry information plans and projects, except that no such funds shall be used for the administrative expenses of such State organization.

(9) Assessment funds for importers associations

(A) In general

The order shall provide that any importers association shall receive a credit described in subparagraph (B) if such association is--

(i) established pursuant to State law that requires detailed State regulation comparable to that applicable to the State organization of United States avocado producers, as determined by the Secretary; or

(ii) certified by the Secretary as meeting the requirements applicable to the Board as to budgets, plans, projects, audits, conflicts of interest, and reimbursements for administrative costs incurred by the Secretary.

(B) Credit

An importers association described in subparagraph (A) shall receive 85 percent of the assessments paid on Hass avocados imported by the members of such association.

(C) Use of funds

(i) In general

Importers associations described in subparagraph (A) shall use the funds described in subparagraph (B) and proceeds from the investment of such funds for financing promotion,

research, consumer information, and industry information plans and projects in the United States.

(ii) Administrative expenses

No funds described in subparagraph (C) shall be used for the administrative expenses of such importers association.

(i) Reimbursement of Secretary expenses

The order shall provide for reimbursing the Secretary--

(1) for expenses not to exceed \$25,000 incurred by the Secretary in connection with any referendum conducted under section 7805 of this title;

(2) for administrative costs incurred by the Secretary for supervisory work of up to two employee years annually after an order or amendment to any order has been issued and made effective; and

(3) for costs incurred by the Secretary in implementation of the order issued under section 7803 of this title, for enforcement of the chapter and the order, for subsequent referenda conducted under section 7805 of this title, and in defending the Board in litigation arising out of action taken by the Board.

(j) Prohibition on brand advertising and certain claims

(1) Prohibitions

Except as provided in paragraph (2), a program or project conducted under this chapter shall not--

(A) make any reference to private brand names;

(B) make false, misleading, or disparaging claims on behalf of Hass avocados; or

(C) make false, misleading, or disparaging statements with respect to the attributes or use of any competing products.

(2) Exceptions

Paragraph (1) does not preclude the Board from offering its programs and projects for use by commercial parties, under such terms and conditions as the Board may prescribe as approved by the Secretary. For the purposes of this subsection, a reference to State of origin does not constitute a reference to a private brand name with regard to any funds credited to, or disbursed by the Board to, a State organization of avocado producers established pursuant to State law. Furthermore, for the purposes of this section, a reference to either State of origin or country of origin does not constitute a reference to a private brand name with regard to any funds credited to, or disbursed by the Board to, any importers association established or certified in accordance with subsection

(h)(9)(A) of this section.

(k) Prohibition on use of funds to influence Governmental action

(1) In general

Except as otherwise provided in paragraph (2), the order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing legislation or government action or policy.

(2) Exception

Paragraph (1) shall not apply to the development or recommendation of amendments to the order.

(l) Prohibition of conflict of interest

The Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in, any action that would be a conflict of interest.

(m) Books and records; reports

(1) In general

The order shall provide that each first handler, producer, and importer subject to the order shall maintain, and make available for inspection, such books and records as are required by the order and file reports at the time, in the manner, and having the content required by the order, to the end that such information is made available to the Secretary and the Board as is appropriate for the administration or enforcement of this chapter, the order, or any regulation issued under this chapter.

(2) Confidentiality requirement

(A) In general

Information obtained from books, records, or reports under paragraph (1) shall be kept confidential by all officers and employees of the Department of Agriculture and by the staff and agents of the Board.

(B) Suits and hearings

Information described in subparagraph (A) may be disclosed to the public only--

(i) in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, involving the order; and

(ii) to the extent the Secretary considers the information relevant to the suit or hearing.

(C) General statements and publications

Nothing in this paragraph may be construed to prohibit--

(i) the issuance of general statements, based on the reports, of the number of persons subject to the order or statistical data collected from the reports, if the statements do not identify the information furnished by any person; or

(ii) the publication, by direction of the Secretary, of the name of any person who violates the order, together with a statement of the particular provisions of the order violated by the person.

(3) Lists of importers

(A) Review

The order shall provide that the staff of the Board shall periodically review lists of importers of Hass avocados to determine whether persons on the lists are subject to the order.

(B) Customs Service

On the request of the Secretary or the Board, the Commissioner of the United States Customs Service shall provide to the Secretary or the Board lists of importers of Hass avocados.

(n) Consultations with industry experts

(1) In general

The order shall provide that the Board may seek advice from and consult with experts from the production, import, wholesale, and retail segments of the Hass avocado industry to assist in the development of promotion, industry information, consumer information, and related research plans and projects.

(2) Special committees

(A) In general

For the purposes described in paragraph (1), the order shall authorize the appointment of special committees composed of persons other than Board members.

(B) Consultation

A committee appointed under subparagraph (A) shall consult directly with the Board.

(o) Other terms of the order

The order shall contain such other terms and provisions, consistent with this chapter, as are necessary to carry out this chapter (including provision for the assessment of interest and a charge for each late payment of assessments under subsection (h) of this section).

## **7 U.S.C.A. § 7805**

### **(a) Requirements for initial referendum**

#### **(1) Referendum required**

During the 60-day period immediately preceding the proposed effective date of an order issued under section 7803(b)(3) of this title, the Secretary shall conduct a referendum among producers and importers required to pay assessments under the order, as provided in section 7804(h)(1) of this title.

#### **(2) Approval of order needed**

The order shall become effective only if the Secretary determines that the order has been approved by a simple majority of all votes cast in the referendum.

### **(b) Votes permitted**

#### **(1) In general**

Each producer and importer eligible to vote in a referendum conducted under this section shall be entitled to cast one vote if they satisfy the eligibility requirements as defined in paragraph (2).

#### **(2) Eligibility**

For purposes of paragraph (1), producers and importers, as these terms are defined in section 7802 of this title, shall be considered to be eligible to vote if they have been producers or importers with sales of Hass avocados during a period of at least 1 year prior to the referendum.

### **(c) Manner of conducting referenda**

#### **(1) In general**

Referenda conducted pursuant to this chapter shall be conducted in a manner determined by the Secretary.

#### **(2) Advance registration**

A producer or importer of Hass avocados who chooses to vote in any referendum conducted under this chapter shall register with the Secretary prior to the voting period, after receiving notice from the Secretary concerning the referendum under paragraph (4).

### (3) Voting

A producer or importer of Hass avocados who chooses to vote in any referendum conducted under this chapter shall vote in accordance with procedures established by the Secretary. The ballots and other information or reports that reveal or tend to reveal the identity or vote of voters shall be strictly confidential.

### (4) Notice

The Secretary shall notify all producers and importers at least 30 days prior to the referendum conducted under this chapter. The notice shall explain the procedure established under this subsection.

### (d) Subsequent referenda

If an order is approved in a referendum conducted under subsection (a) of this section, effective beginning on the date that is 3 years after the date of the approval, the Secretary--

(1) at the discretion of the Secretary, may conduct at any time a referendum of producers and importers required to pay assessments under the order, as provided in section 7804(h)(1) of this title, subject to the voting requirements of subsections (b) and (c) of this section, to ascertain whether eligible producers and importers favor suspension, termination, or continuance of the order; or

(2) shall conduct a referendum of eligible producers and importers if requested by the Board or by a representative group comprising 30 percent or more of all producers and importers required to pay assessments under the order, as provided in section 7804(h)(1) of this title, subject to the voting requirements of subsections (b) and (c) of this section, to ascertain whether producers and importers favor suspension, termination, or continuance of the order.

### (e) Suspension or termination

If, as a result of a referendum conducted under subsection (d) of this section, the Secretary determines that suspension or termination of the order is favored by a simple majority of all votes cast in the referendum, the Secretary shall--

(1) not later than 180 days after the referendum, suspend or terminate, as appropriate, collection of assessments under the order; and

(2) suspend or terminate, as appropriate, activities under the order as soon as practicable and in an orderly manner.

## 7 U.S.C.A. § 7806

### (a) Petition and hearing

(1) Petition

A person subject to an order may file with the Secretary a petition--

(A) stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law; and

(B) requesting a modification of the order or an exemption from the order.

(2) Hearing

The petitioner shall be given the opportunity for a hearing on a petition filed under paragraph (1), in accordance with regulations issued by the Secretary. Any such hearing shall be conducted in accordance with section 7808(b)(2) of this title and be held within the United States judicial district in which the residence or principal place of business of the person is located.

(3) Ruling

After a hearing under paragraph (2), the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(4) Limitation

Any petition filed under this subsection challenging an order, any provision of the order, or any obligation imposed in connection with the order, shall be filed within 2 years after the effective date of the order, provision, or obligation subject to challenge in the petition.

(b) Review

(1) Commencement of action

The district courts of the United States in any district in which a person who is a petitioner under subsection (a) of this section resides or conducts business shall have jurisdiction to review the ruling of the Secretary on the petition of the person, if a complaint requesting the review is filed no later than 20 days after the date of the entry of the ruling by the Secretary.

(2) Process

Service of process in proceedings under this subsection shall be conducted in accordance with the Federal Rules of Civil Procedure.

(3) Remand

If the court in a proceeding under this subsection determines that the ruling of the Secretary on the petition of the person is not in accordance with law, the court shall remand the matter to the

Secretary with directions--

(A) to make such ruling as the court shall determine to be in accordance with law; or

(B) to take such further action as, in the opinion the court, the law requires.

(c) Enforcement

The pendency of proceedings instituted under this section shall not impede, hinder, or delay the Attorney General or the Secretary from obtaining relief under section 7807 of this title.

**7 U.S.C.A. § 7807**

(a) Jurisdiction

A district court of the United States shall have jurisdiction to enforce, and to prevent and restrain any person from violating, this chapter or an order or regulation issued by the Secretary under this chapter.

(b) Referral to Attorney General

A civil action brought under subsection (a) of this section shall be referred to the Attorney General for appropriate action, except that the Secretary is not required to refer to the Attorney General a violation of this chapter, or an order or regulation issued under this chapter, if the Secretary believes that the administration and enforcement of this chapter would be adequately served by administrative action under subsection (c) of this section or suitable written notice or warning to the person who committed or is committing the violation.

(c) Civil penalties and orders

(1) Civil penalties

(A) In general

A person who violates a provision of this chapter, or an order or regulation issued by the Secretary under this chapter, or who fails or refuses to pay, collect, or remit any assessment or fee required of the person under an order or regulation issued under this chapter, may be assessed by the Secretary--

(i) a civil penalty of not less than \$1,000 nor more than \$10,000 for each violation; and

(ii) in the case of a willful failure to remit an assessment as required by an order or regulation, an additional penalty equal to the amount of the assessment.

(B) Separate offenses

Each violation shall be a separate offense.

(2) Cease and desist orders

In addition to or in lieu of a civil penalty under paragraph (1), the Secretary may issue an order requiring a person to cease and desist from continuing a violation of this chapter, or an order or regulation issued under this chapter.

(3) Notice and hearing

No penalty shall be assessed, or cease and desist order issued, by the Secretary under this subsection unless the Secretary gives the person against whom the penalty is assessed or the order is issued notice and opportunity for a hearing before the Secretary with respect to the violation. Any such hearing shall be conducted in accordance with section 7808(b)(2) of this title and shall be held within the United States judicial district in which the residence or principal place of business of the person is located.

(4) Finality

The penalty assessed or cease and desist order issued under this subsection shall be final and conclusive unless the person against whom the penalty is assessed or the order is issued files an appeal with the appropriate district court of the United States in accordance with subsection (d) of this section.

(d) Review by district court

(1) Commencement of action

(A) In general

Any person against whom a violation is found and a civil penalty is assessed or a cease and desist order is issued under subsection (c) of this section may obtain review of the penalty or order by, within the 30-day period beginning on the date the penalty is assessed or the order is issued--

(i) filing a notice of appeal in the district court of the United States for the district in which the person resides or conducts business, or in the United States District Court for the District of Columbia; and

(ii) sending a copy of the notice by certified mail to the Secretary.

(B) Copy of record

The Secretary shall promptly file in the court a certified copy of the record on which the Secretary found that the person had committed a violation.

(2) Standard of review

A finding of the Secretary shall be set aside under this subsection only if the finding is found to be unsupported by substantial evidence.

(e) Failure to obey an order

(1) In general

A person who fails to obey a cease and desist order issued under subsection (c) of this section after the order has become final and unappealable, or after the appropriate United States district court had entered a final judgment in favor of the Secretary of not more than \$10,000 for each offense, after opportunity for a hearing and for judicial review under the procedures specified in subsections (c) and (d) of this section.

(2) Separate violations

Each day during which the person fails to obey an order described in paragraph (1) shall be considered as a separate violation of the order.

(f) Failure to pay a penalty

(1) In general

If a person fails to pay a civil penalty assessed under subsection (c) or (e) of this section after the penalty has become final and unappealable, or after the appropriate United States district court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General for recovery of the amount assessed in any United States district court in which the person resides or conducts business.

(2) Scope of review

In an action by the Attorney General under paragraph (1), the validity and appropriateness of a civil penalty shall not be subject to review.

(g) Additional remedies

The remedies provided in this chapter shall be in addition to, and not exclusive of, other remedies that may be available.

**7 U.S.C.A. § 7808**

(a) Investigations

The Secretary may conduct such investigations as the Secretary considers necessary for the effective administration of this chapter, or to determine whether any person has engaged or is engaging in any act that constitutes a violation of this chapter or any order or regulation issued under this chapter.

(b) Subpoenas, oaths, and affirmations

(1) Investigations

For the purpose of conducting an investigation under subsection (a) of this section, the Secretary may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, and require the production of any records that are relevant to the inquiry. The production of the records may be required from any place in the United States.

(2) Administrative hearings

For the purpose of an administrative hearing held under section 7806(a)(2) or 7807(c)(3) of this title, the presiding officer may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, and require the production of any records that are relevant to the inquiry. The attendance of witnesses and the production of the records may be required from any place in the United States.

(c) Aid of courts

(1) In general

In the case of contumacy by, or refusal to obey a subpoena issued under subsection (b) of this section to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which the investigation or proceeding is conducted, or where the person resides or conducts business, in order to enforce a subpoena issued under subsection (b) of this section.

(2) Order

The court may issue an order requiring the person referred to in paragraph (1) to comply with a subpoena referred to in paragraph (1).

(3) Failure to obey

Any failure to obey the order of the court may be punished by the court as a contempt of court.

(4) Process

Process in any proceeding under this subsection may be served in the United States judicial district in which the person being proceeded against resides or conducts business, or wherever the person may be found.

**7 U.S.C.A. § 7809**

(a) Prohibition

No information regarding names of voters or how a person voted in a referendum conducted under

this chapter shall be made public.

(b) Penalty

Any person who knowingly violates subsection (a) of this section or the confidentiality terms of an order, as described in section 7804(m)(2) of this title, shall be subject to a fine of not less than \$1,000 nor more than \$10,000 or to imprisonment for not more than 1 year, or both. If the person is an officer or employee of the Department of Agriculture or the Board, the person shall be removed from office.

(c) Additional prohibition

No information obtained under this chapter may be made available to any agency or officer of the Federal Government for any purpose other than the implementation of this chapter or an investigatory or enforcement action necessary for the implementation of this chapter.

(d) Withholding information from Congress prohibited

Nothing in this chapter shall be construed to authorize the withholding of information from Congress.

**7 U.S.C.A. § 7810**

(a) Grounds for suspension or termination

If the Secretary finds that an order, or any provision of the order, obstructs or does not tend to effectuate the policy of this chapter specified in section 7801(b) of this title, the Secretary shall terminate or suspend the operation of the order or provision under such terms as the Secretary determines are appropriate.

(b) Effect of lack of approval of order

If, as a result of a referendum, the Secretary determines that the order is not approved, the Secretary shall, within 180 days after making the determination, suspend, or terminate, as appropriate, collection of assessments under the order, and suspend or terminate, as appropriate, activities under the order in an orderly manner as soon as possible.

**7 U.S.C.A. § 7811**

(a) Termination or suspension not an order

The termination or suspension of an order, or a provision of an order, shall not be considered an order under the meaning of this chapter.

(b) Rights

This chapter--

(1) may not be construed to provide for control of production or otherwise limit the right of individual Hass avocado growers, handlers and importers to produce, handle, or import Hass avocados; and

(2) shall be construed to treat all persons producing, handling, and importing Hass avocados fairly and to implement any order in an equitable manner.

(c) Other programs

Nothing in this chapter may be construed to preempt or supersede any other program relating to Hass avocado promotion, research, industry information, and consumer information organized and operated under the laws of the United States or of a State.

**7 U.S.C.A. § 7812**

The Secretary may issue such regulations as are necessary to carry out this chapter and the powers vested in the Secretary by this chapter, including regulations relating to the assessment of late payment charges and interest.

**7 U.S.C.A. § 7813**

(a) In general

There are authorized to be appropriated for each fiscal year such sums as are necessary to carry out this chapter.

(b) Administrative expenses

Funds appropriated under subsection (a) of this section may not be used for the payment of the expenses or expenditures of the Board in administering a provision of an order.