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Government Speech & the Constitutionality of State Checkoff Programs:

Factors Considered by the Ninth Circuit Court of Appeals

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I. INTRODUCTION

On May 2, 2016, a legal action titled *Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America (R-CALF) v. United States Department of Agriculture*¹ was filed in the United States District Court, District of Montana. The plaintiff alleges that the Montana Beef Council (“MBC”) is a private entity due to the lack of federal oversight of the MBC and, therefore, the promotion activities engaged in by the MBC are not “government speech” protected by the First Amendment of the United States Constitution.

Since 2005, several legal challenges have been brought that challenge the constitutionality of state or federal checkoff programs on the basis that the assessment at issue required certain producers to pay for speech with which they disagree. The most significant legal development in this area is the 2005 United States Supreme Court decision in *Johanns v. Livestock Mktg. Ass’n*.² In *Johanns*, the Supreme Court upheld the constitutionality of the beef research and promotion program, holding that the speech at issue was not an unconstitutional compelled subsidy because it constituted government speech, a determination that turned on the degree of control that the government had over the speech itself.³ Since *Johanns*, several legal challenges have been brought against various federal and state checkoff programs, all of which have applied *Johanns* to determine that the promotion activities at issue constituted government speech and were within the boundaries of the First Amendment.⁴

Two of those cases -- *Paramount Land Co. LP v. California Pistachio Com’n*⁵ and *Delano Farms Co. California Table Grape Com’n*⁶ – focus specifically on state checkoff programs and detail numerous factors that the United States Court of Appeals for the Ninth Circuit used to consider whether the activities at issue constituted government speech in light of the *Johanns* decision. This article briefly examines *Paramount Land* and *Delano Farms*, as those cases may provide insight into factors others could consider in assessing whether states’ “speech” via promotion and related activities funded by state checkoff assessments constitute permissible government speech. However, there is no bright line test with respect to the government speech doctrine and different courts may rely upon or apply *Johanns* and other courts’ decisions to varying degrees. Thus, the factors considered in *Paramount Land* and *Delano Farms* are discussed here for instructive purposes only, rather than as a predictor of how other courts may, or may not, analyze a government speech issue with respect to a state checkoff program.

II. DISCUSSION

A. Paramount Land

In *Paramount Land*, a large number of pistachio growers brought an action against the California Pistachio Commission.⁷ Similar to the plaintiff in *R-CALF*, the plaintiffs asserted that “the annual subsidies mandated by the California Pistachio Act of 1980 . . . and administered by the Pistachio Commission constitute compelled

¹ Complaint, *Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America v. United States Department of Agriculture*, No. 4:16-cv-00041-BMM-JTJ (D. Mont. May 2, 2016).

² *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

³ *Id.*

⁴ *See, e.g., Avocados Plus Inc. v. Johanns*, 421 F.Supp.2d 45 (D. D.C. 2006); *Cricket Hosiery, Inc. v. United States*, 429 F.Supp.2d 1338 (C.I.T. 2006); and *Gallo Cattle Co. v. Kawamura*, 72 Cal. Rptr. 3d 1 (Cal. App. 3 Dist. 2008).

⁵ *Paramount Land Co. LP v. California Pistachio Com’n*, 491 F.3d 1003 (9th Cir. 2007) (hereinafter *Paramount Land*).

⁶ *Delano Farms Co. California Table Grape Com’n*, 586 F.3d 1219 (9th Cir. 2009) (hereinafter *Delano Farms*).

⁷ *Paramount Land* at 1003, 1004.

speech in violation of the First Amendment.”⁸ The United States District Court for the Central District of California issued a preliminary injunction in favor of the plaintiff.⁹ However, on appeal the United States Court of Appeals for the Ninth Circuit applied *Johanns* to determine that the California Pistachio Act was likely government speech.¹⁰ The Ninth Circuit thus reversed and remanded the decision of the federal district court.¹¹

The Ninth Circuit concluded that “[t]he framework of statutes and regulations governing the Pistachio Commission and its activities essentially mirrors the scheme addressed in *Johanns*.”¹² The court added that “[a]lthough the state of California may, in practice, exercise less oversight over the Pistachio Commission than the Secretary of Agriculture exercises over the Beef Board, on the record developed thus far, that distinction is not enough to differentiate the activities of the Pistachio Commission from those of the Beef Board.”¹³

The Ninth Circuit considered the following factors in determining that the state assessments at issue likely constituted government speech:

- California Secretary of Agriculture appointed one of nine members of the Pistachio Commission;
- The California Secretary “must . . . concur in any nomination and election procedures adopted by the Pistachio Commission;”
- “The Pistachio Commission is directed to ‘promote the sale of pistachios by advertising and other promotional means,’”;
- The California Secretary of Agriculture “is authorized to attend and participate in the meetings where promotional activities are planned”;
- The Pistachio Commission must submit to California Secretary of Agriculture “for his concurrence, ‘an annual statement of contemplated activities authorized [by the Pistachio Act], including advertising, promotion, marketing research, and production research.’”;
- The California Secretary of Agriculture has authority to “‘correct or cease any existing activity or function that is determined by the secretary not to be in the public interest or in violation of [the Pistachio Act]’”, even though the Pistachio Act did contain a provision allowing the California Secretary to remove members from the Pistachio Commission;
- The California Secretary of Agriculture “may suspend or discharge the Commission’s president if he has engaged in any conduct that the Secretary determines is not in the public interest.”
- Pistachio growers who were “dissatisfied with any Commission activity may file a grievance, which can be directly appealed” to the California Secretary of Agriculture; and
- The California Secretary of Agriculture “must approve the Commission’s annual budget before the Commission may disburse funds, . . . and he may conduct a separate fiscal compliance audit whenever he deems such an audit is necessary”¹⁴

B. *Delano Farms*

⁸ Id. at 1005, 1006.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id. at 1010.

¹³ Id.

¹⁴ Id. at 1010-12.

In *Delano Farms*, certain grape producers sought a declaratory judgment that the state law requiring assessments to the California Table Grape Commission for generic advertising of grapes violated the First Amendment because the advertising did not constitute government speech.¹⁵ Relying on *Johanns* and *California Pistachio Commission*, the United States Court of Appeals for the Ninth Circuit held that “the Commission’s promotional activities constitute government speech that is immune to challenge under the First Amendment.”¹⁶ In so holding, the Ninth Circuit pointed to the following factors:

- “Like the beef program and the Pistachio Commission, the Commission was established by an act of the Legislature”;
- “The California Legislature intended for the Commission . . . to ‘implement public policy through expressive conduct.’”
- “The Commission is tasked with ‘enhance[ing] the image of California agricultural and seafood products to increase the overall demand for these commodities.’”
- The California legislature “provided an overriding directive for the sorts of messages the state commissions should promote. . . .”;
- “The State possesses additional oversight powers over the Commission, as the Commission is required to ‘keep accurate books, records, and accounts of all of its dealings’ and must make those records open to review by the State.”
- Grape Commission “may recommend to Secretary that its operation be suspended, or producers may file a petition with the Secretary recommending the same.”;
- And finally, a factor that the Ninth Circuit found particularly important; the California Secretary of Agriculture “possesses the power of nomination over all of the table grape commissioners” and “has the power to remove a table grape commissioner”.¹⁷

III. CONCLUSION

R-CALF demonstrates that the government speech test as applied to state checkoff programs vis-à-vis *Johanns* may not yet be entirely resolved. However, courts are very likely to apply *Paramount Land* and *Delano Farms* along with *Johanns* to determine whether a state checkoff program has a sufficient nexus to qualify as government speech.

¹⁵ *Delano Farms* at 1220.

¹⁶ *Id.*

¹⁷ *Id.* at 1227-30.