JDSUPRA®

Compelled Speech

Mark Arnold

November 6, 2018

The state and federal governments tax a wide variety of growers of agricultural products to fund generic advertising – e.g., beef producers to fund “Beef: It’s What’s For Dinner” or pork producers to fund “Pork: The Other White Meat.” Many growers would prefer not to fund these programs, but the Supreme Court has generally upheld them as long as the content was dictated or approved by a government agency.

These kinds of marketing efforts date to the 1930’s at the state level and the mid-1960’s at the federal level. They can cost large growers several hundred thousand dollars a year. The rationale is that all growers benefit from the increased demand supposedly generated by generic advertising, so the program must be compulsory to avoid free riders from benefiting from the advertising without sharing its costs. Not all growers agree with this proposition. Some of them argue that generic advertising is harmful to their interests, because they market their product on the basis that they are different from, and better quality than, generic products.

In 1976, the Supreme Court decided Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748 (1976). Virginia Citizens held that the First Amendment protects commercial speech such as advertising, at least so long as the advertising is truthful and not deceptive. And the Court has long held that the First Amendment also largely protects people from compelled speech – being forced to support speech with which they disagree.

In 1988, a California fruit grower challenged the marketing tax on First Amendment grounds. In Glickman v. Wileman Bros. & Elliott, 531 U.S. 457 (1997), by a 5-4 vote, the Supreme Court upheld the program. The majority held that the program did not compel Wileman to engage in speech, merely to contribute money to fund it. Because the end product contained no ideological or political message, it did not run afoul of the First Amendment.

The majority opinion both relied on and distinguished Abood v. Detroit Board of Education, 431 U.S. 209 (1977). Abood held that the Detroit teachers’ union could collect agency fees from non-members to cover the cost of collective bargaining and related activities that benefit all teachers. It could not, however, collect fees to cover the cost of its political activities. In subsequent years, the Court grew increasingly hostile to Abood and Janus v. AFSCME, 138 S.Ct. 2448 (2018), overruled it.

The Supreme Court next visited the issue in United States v. United Foods, Inc., 533 U.S. 405 (2001). United Foods challenged a tax imposed to support generic advertising for mushrooms. This time, by a 6-3 margin, the Court held that the tax did violate the First Amendment's ban on compelled speech. The majority distinguished Glickman on the basis that the advertising there at issue was part of a much broader marketing effort designed to replace competition with cooperation. By contrast, the mushroom advertising program was a standalone program. The majority further made clear its disagreement with Glickman's holding that speech had to contain ideological or political content to fall within the ban on compelled speech.

The last time the Court reviewed compulsory advertising was in Johanns v. Livestock Marketing Ass'n, 540 U.S. 550 (2005). Johanns challenged the beef tax used to support beef advertising. By a 6-3 margin, the Court upheld the tax. It did so on very different grounds than Glickman: the advertising in question was government speech and the government always has the right to impose taxes to fund its own speech.

The majority held that Congress and the Secretary of Agriculture had set broad parameters for what the advertising could and could not say. The details were filled in a by a board, half of whose members were appointed by the Secretary and all of whom he could remove. Finally, the Secretary had to approve every word used in every promotional campaign.

That set the stage for Delano Farms Co. v. California Table Grape Com'n, No. 18-300, a petition for certiorari filed in the United States Supreme Court. The Commission assesses growers of table grapes to support generic advertising. It is overseen by a 22-person board, 21 of whom are elected by other growers, and its mission is to further the interests of the grape industry. The Secretary of the California Department of Food and Agriculture selects the 22nd member from a list submitted by the Commission. The Secretary does have discretion to remove board members but has rarely done so. The Secretary has no input into the generic advertising the Commission approves, although an aggrieved person can seek review from the Secretary. Such review is limited to whether the Commission abused its discretion or acted illegally, and has never been used to challenge an advertising decision. The Commission's website ends with .com, not .gov, and the ads themselves do not reference the state of California.

Despite this very limited state control over the Commission, the Supreme Court of California held that the speech in question was government speech. Delano Farms Co. v. California Table Grape Com'n, 4 Cal. 5th 1204 (2018). The Court reasoned that the legislature developed and endorsed the central message promulgated, namely that generic advertising of grapes served the public interest. It also held that the Commission was subject to meaningful oversight by the public to assure that the messages remain within the statutory parameters.

The central argument in the petition is that, unlike Johanns, the state of California exercises minimal control over the advertising. According to the petition, advertising can be governmental speech only if some public person or entity – accountable to the people – has the final decision on content. The petition also argues that one essential element of government speech is that the public attributes the content to the government rather than some private party.

The Cato Institute filed an amicus brief in support of the petition. The amicus argued that compulsory funding of generic advertising based on the free rider theory was strikingly similar to the agency fees that public labor unions were allowed to collect before Janus. Janus specifically held that avoiding free riders is not a compelling state interest. The amicus brief argued that the

check off fees used to support generic advertising should face similar First Amendment scrutiny. That position, of course, assumes that the speech in question is not governmental speech.

The Commission's primary argument against the petition is that the California Supreme Court decided only an issue of California state law, which the Supreme Court of the United States has no jurisdiction to review. The lower court's discussion of federal precedent was merely illustrative of the meaning of the California Constitution, not controlling. At the very least, the brief argues, the jurisdictional issue counsels against granting the petition.

On the merits, the response asserts that there is no disagreement among lower courts about how to apply Johanns. In particular, the response argues that the cases have uniformly held that the ability to control the content of the advertising, rather than the exercise of that control, is the key to the existence of government speech. The ability to exercise such control means that, in the end, the public can hold the official politically accountable for the ultimate content of the advertising.

The response also disagrees with the argument that the advertising must be explicitly attributed to the government, as opposed to some private entity. The response argues that Johanns rejected a categorical imperative to attribute speech to the government, so long as it was not attributable to private entities.

The response's best argument is the procedural one that the California Supreme Court opinion rested on the California Constitution rather than the First Amendment. With six new justices on the Court since Johanns, the merits could well be up for grabs.