THE SOCIALIZATION OF AGRICULTURAL ADVERTISING: WHAT PERESTROIKA DIDN'T DO THE FIRST AMENDMENT WILL

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INTRODUCTION

President Roosevelt and Congress passionately embraced socialism when they instituted the Agricultural Marketing Agreement Act of 1937 (AMAA)[1] as a guaranteed, "short term fix" to pull farmers out of the Depression.[2] The AMAA and its later amendments had a provision permitting marketing orders to promote the products the legislation regulated.[3] In 1970, this provision was amended[4] to permit marketing

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[1] Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

[2] Ruth R. Harkin & Thomas R. Harkin, *"Roosevelt to Reagan," Commodity Programs and the Agriculture and Food Act of 1981*, 31 Drake L. Rev. 499 (1982). Congress passed the AMAA "to establish and maintain such orderly marketing conditions for agricultural commodities" as well as to establish "parity prices" for those commodities. 7 U.S.C. § 602(1) (1994). The AMAA authorized the Secretary of Agriculture to promulgate marketing orders for certain commodities if he finds that an order "will tend to effectuate the declared policy of the Act" after providing adequate notice and a hearing. 7 U.S.C. §§ 608c(3), (4) (1994). Marketing orders can only be implemented following approval by either two-thirds of the affected producers *who vote*, or by producers who market at least two-thirds of the volume of the commodity *voted*. 7 U.S.C. § 608c(9)(B) (1994). The United States Department of Agriculture (USDA) has promulgated more than 50 marketing orders governing approximately 100 fruits, vegetables, nuts and specialty crops. See 7 C.F.R. pts. 905-999 (1994). Marketing orders may contain provisions limiting the quantity of commodities produced; the grade, size or quality of commodities shipped; or the quantity of commodities shipped in interstate or foreign commerce. 7 U.S.C. § 608c(6)(A) (1994).

[3] 7 U.S.C. § 608c(6)(I) (1994).

[4] Pub. L. No. 91-522, 84 Stat. 1357 (1970) (current version at 7 U.S.C. § 608c(6)(I) (1994)).

orders applicable to almonds, and some other agricultural products, to credit "the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . ."[5]

A marketing order is administered by a board (sometimes referred to as a committee or a commission) composed of members of the commodity group to which the marketing order applies.[6] Producers (growers) and handlers (or handlers' representatives)[7] sit on the board; and the handlers who serve on the board compete with other handlers of the commodity group for growers' product production, buyers and market share. Producers who are members of cooperatives, and thus "own" the handler or handler entity, bloc vote consistent with their handler board member. The board makes recommendations to the Secretary of Agriculture, who promulgates rules regulating handlers.

In effect, 7 U.S.C. § 608c(6)(I) compels almond handlers[8] to pay money to a board of competitors to support an almond advertising and promotional program. The board recommends an assessment rate for advertising and promotion to the Secretary.[9] The board of competitors then designs an advertising and promotional program, and determines how much money should be allocated to various promotional and advertising activities. With respect to "crediting" the assessment obligations of the handler, the board determines which promotional and advertising activities are worthy of credit and which are not.[10]

In mandating the payment by handlers of advertising assessments, and then regulating which methods of advertising and promotion are creditable, neither Congress nor the USDA once gave any thought to

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[5] 7 U.S.C. § 608c(6)(I).

[6] *Id.* §§ 608c(7)(C), 610.

[7] A "handler" is a person or company which places an agricultural product in the stream of interstate or foreign commerce, i.e., the processor and marketer of the product.

[8] Congress recognized that it could not possibly regulate all of the growers of these commodities because it would take a sizeable army to do the job, so it was the handler who was regulated. Even though only the producers are entitled to vote in a referendum to establish a marketing order, a marketing order, once promulgated, is binding on all handlers, even those who do not wish to be parties to the order. *See* 7 U.S.C. § 608c(3), (4), (6), (9).

[9] *See, e.g.*, 7 C.F.R. §§ 981.41, 981.81 (1994) regarding assessment recommendations to the Secretary by the Almond Board of California [hereinafter referred to as the "Almond Board" or the "Board"].

[10] *See, e.g.*, *id.* § 981.441 regarding the permissible and impermissible forms of advertising and promotion with respect to almonds.

whether the First Amendment of the United States Constitution[11] would become the "skunk at the company picnic." There were no discussions before Congress as to whether advertising regulations even implicated First Amendment rights. When the almond marketing order was initially attacked on First Amendment grounds,[12] the USDA claimed the argument was "at best, an indulgence in hyperbole"[13] and "an assertion so bereft of logic, that it is best left buried under petitioners' admissions."[14]

Various federal marketing orders provide for advertising assessments.[15] Other federal legislation has been separately introduced for specific commodities' compelled advertising programs.[16] For years, California boards and commissions which administer state marketing orders have jumped on the advertising bandwagon, as well.[17]

However, in *Cal-Almond, Inc. v. United States Department of Agriculture*,[18] the Ninth Circuit Court of Appeals struck down the almond marketing order advertising and promotional program as violative of the First Amendment. There have been very few challenges to the advertising provisions of marketing orders. But in light of the decision in *Cal-Almond,* it is reasonable to believe that additional challenges will

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[11] The First Amendment of the United States Constitution states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. COSNT. amend. I.

[12] The almond marketing order was the first marketing order challenged on First Amendment grounds.

[13] Proposed Findings of Fact, Conclusions of Law, Order, and Brief for Respondent [USDA] at 84, *In re* Saulsbury Orchards & Almond Processing, AMA Docket No. F&V 981-4 (Dep't of Agric. Jan. 31, 1990) (petitioners included Cal-Almond, Inc. and Carlson Farms).

[14] *Id.* at 89.

[15] *See* 7 C.F.R. pts. 905-999 (1994) and corresponding federal marketing orders containing provisions for compulsory advertising expenditures for certain fruits, vegetables and nuts, including nectarines, peaches, pears, Tokay grapes, olives, almonds, dates and raisins.

[16] *See, e.g.,* 7 U.S.C. §§ 2101-2119 (cotton), 2901-2918 (beef), 4601-4612 (honey), 4901-4916 (watermelons), 6101-6112 (fresh mushrooms) (1994). Compelled advertising programs pertaining to these and several other commodities are governed by legislation separate from the AMAA.

[17] California marketing orders have compelled advertising provisions for the following commodities: apples, apricots, artichokes, asparagus, avocados, dry beans, beef, cantaloupe, fresh carrots, cherries, eggs, figs, cut flowers, forest products, kiwi fruit, manufactured milk, fluid milk, cling peaches, pears, pistachios, plums, Lake County wine grapes, Lodi wine grapes, prunes, rice, wild rice, salmon, seafood, strawberries, table grapes, tomatoes, walnuts and wheat.

[18] 14 F.3d 429 (9th Cir. 1993).

be forthcoming.[19]

Because of the substantial attention directed toward the *Cal-Almond* decision in agriculturally-oriented publications, growers and handlers will no longer believe that there is nothing they can do about advertising programs and assessments. More of the programs are sure to come under attack. Which ones will depend upon the amount of the assessment, the perceived unfairness of the assessment, the potential cost of pursuing a legal challenge, the expected response to a challenge by the USDA or the affected state board or commission (some fear government retaliation and grower or buyer boycotts), and the individual challenger's degree of aversion to litigation.

With respect to a strictly "generic" advertising program,[20] challengers contend that the targeted application of advertising expenditures is determined by their competitors who sit on the board and who attempt to target markets board members believe will benefit their own individual companies. The challengers also contend that they do not need a group of their competitors and government bureaucrats telling them how to promote their products, or how much money should be spent on product advertising. After all, they are all competitors in the marketplace for their agricultural products. The challengers desire to target markets of their own choosing, or markets that they have an interest in developing.

The challengers contend that, with respect to certain commodities, some members of boards or commissions have monopolized the market

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[19] On June 27, 1995, the Ninth Circuit held that the generic advertising program authorized under the federal marketing order governing California nectarines and peaches, 7 C.F.R. parts 915 and 917, also failed to satisfy the *Cal-Almond* standard of First Amendment scrutiny. Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *6-*9 (9th Cir. June 27, 1995). Challenges are also being pursued with reference to the advertising programs mandated by the federal marketing order governing fresh mushrooms and the California marketing orders pertaining to kiwi fruit, walnuts, apples and plums. More challenges are likely with respect to milk, artichokes, cut flowers and nursery plants.

The USDA and the Almond Board "changed" their advertising program, in light of the *Cal-Almond* decision, but still compel handlers to pay money to the Almond Board for generic promotion and to advertise (or, in lieu thereof, to pay money to the Almond Board), and still regulate methods of advertising "speech." A challenge has been mounted against this "new" Almond Board program by Cal-Almond, Inc., and approximately 13 other almond handlers. On June 15, 1995, a USDA administrative law judge ruled that the modified almond advertising program is also in violation of the handlers' First Amendment rights.

[20] A "generic" advertising program promotes or advertises an agricultural commodity generally, as opposed to promoting or advertising a specific brand of the commodity.

for the commodity, and that the "generic" advertising program targeted toward the monopolized market results in greater benefits for the challengers' competitors than for the challengers. Yet the challengers are required to contribute equally toward underwriting the board's advertising message. This scheme, allege the challengers, unfairly benefits the challengers' competitors.

An additional argument by the challengers is that marketing order boards and commissions attempt to advertise and promote a particular product as though it were homogeneous and indistinguishable among producers and handlers. Instead, the challengers desire to convey the message that their own product is distinguishable in the marketplace. The product is either distinguishable to consumers, because it is sold directly to consumers, or distinguishable to a commercial buyer who uses the product as a food ingredient item. The challengers contend that they desire to spend money distinguishing their products from those of their competitors, providing service and quality, and developing personal relationships in the marketplace to advance their products. By comparison, the boards and commissions attempt to convey the message that *all* California apples, *all* California almonds, or *all* California nectarines are the same. This is certainly not the message individual challengers want to convey. Worse, after the message is conveyed, the challengers must spend more money to attack it and counteract its adverse effects on their businesses.

Other challenges include allegations that the boards' and commissions' programs are ineffective. Challengers contend that so much of the money derived from the compulsory assessments is used to fund overhead and outside consultants and organizations that very little ends up actually supporting promotional or advertising programs. Additionally, the handler or grower challenging the advertising program often contends that it is simply un-American to force a businessperson to contribute to an advertising program or to be compelled to advertise in certain ways.[21] This is born out of the notion that a grower—not the government and not the grower's competitors—knows best how to promote his products.

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[21] If, for example, Congress passed a law requiring that every registered Democrat and every registered Republican *must* contribute a dollar to a candidate representing the Democrat's or the Republican's respective political party, there would doubtless be thousands of challenges to such a program, even if the challengers would have otherwise voluntarily donated a dollar or more to their candidates. There are a number of handlers and growers who find it repugnant to the Constitution to *compel* speech, even if they would voluntarily engage in that speech absent the compulsion.

On the other side of the dispute, the boards and commissions under attack, and their supporters (including the USDA, the Department of Justice, the California Department of Food and Agriculture, and the California Attorney General), attempt to justify the programs. Several arguments are advanced in support of the compelled promotional programs. First, it is contended that a majority of producers and handlers desire the programs. Second, it is argued that no single producer or handler has the marketing clout to increase demand for a particular agricultural commodity. Third, since agriculture is a significant industry in California and throughout the nation, the industry must engage in self-help to keep producers in business and to educate consumers concerning the value of the agricultural product being advertised.

The government attempts to justify the compelled advertising programs as necessary to increase demand for the affected products and to raise grower returns. The government has also attempted to depreciate the challengers' arguments by resorting to rhetorical observations that challengers should not object to advertising a product they are in business to sell. Advertising expenditures, according to the government, are based upon "overwhelming" support for the marketing orders. In essence, the government's position is that the majority rules.[22]

Fortunately for the challengers, and unfortunately for the proponents of marketing orders, the First Amendment of the United States Constitution regulates the regulators, and places the burden on the regulators to legally justify each individual program under attack.

This article does not analyze the necessity for, or what is to many the absurdity of, marketing orders.[23] Nor does it address whether marketing orders have increased grower returns, with or without forcing consumers to pay higher prices for agricultural products made artificially scarce. It does not address various provisions of the AMAA, other than the provisions for the payment of assessments for, and the regulation of, advertising and promotion "authorized" by 7 U.S.C. § 608c(6)(I).

Rather, the focus of this article is on the Ninth Circuit Court of Appeals' decision in *Cal-Almond*. The article explores whether it is possible for government, at either the federal or state levels, to institute

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[22] Throughout the challenge of the almond marketing order, the government claimed the First Amendment challenge was "bereft of logic" and "an indulgence in hyperbole" and that the regulations, at most, merely provided an incentive to promote the product the handler was in business to sell. *See supra* notes 13, 14 and accompanying text.

[23] For an enlightening and entertaining history of the United States' agricultural policy generally, and marketing orders specifically, see JAMES BOVARD, THE FARM FIASCO 179-207 (1989).

any promotional or advertising program which would not be violative of the First Amendment.

I. The *Frame* Decision

While the federal almond marketing order advertising program was languishing in the administrative tribunal before the USDA,[24] the Third Circuit Court of Appeals in *United States v. Frame*,[25] a two-to-one decision, was impressed with the argument that a forced federal promotional program for the beef industry did not violate the First Amendment. However, that case was decided on freedom of association grounds. The court chose that test because it requires "strict scrutiny." By comparison, a "commercial speech" test commands a lower level of scrutiny. The court in *Frame* stated it would sustain the constitutionality of the Beef Promotion and Research Act of 1985[26] "only if the government can demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms."[27]

In *Frame*, the court found that the beef promotional program was ideologically neutral and could not be achieved through means significantly less restrictive of free speech or associational freedoms. There was a compelling state interest in the program, because there were congressional findings that

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[24] Under the AMAA, a handler must exhaust administrative remedies before the USDA prior to bringing a challenge in the district court. 7 U.S.C. § 608c(15)(A) (1994); United States v. Ruzicka, 329 U.S. 287 (1946); Saulsbury Orchards and Almond Processing, Inc. v. Yeutter, 917 F.2d 1190 (9th Cir. 1990); Cal-Almond, Inc. v. Yeutter, 756 F. Supp. 1351 (E.D. Cal. 1991). The State of California likewise contends that, with respect to every California marketing order, internal grievance procedures are established requiring exhaustion of administrative remedies. However, Article III, § 3.5, of the California Constitution states that an administrative agency does not have the power to declare a state statute unconstitutional. Furthermore, a California statute cannot limit federal court subject matter jurisdiction. *See* Ferrari v. Woodside Receiving Hosp., 624 F. Supp. 899, 902 (N.D. Ohio 1985), *aff'd* 827 F.2d 769 (3d Cir. 1987), *cert. denied*, 487 U.S. 1204 (1988). Thus, it appears that the exhaustion of administrative remedies prerequisite to bringing suit in federal court attacking a federal marketing order program under the First Amendment of the United States Constitution will not prevent a direct challenge in federal court under the First Amendment regarding a state marketing order program.

[25] 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

[26] Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, § 1601(a), 1985 U.S.C.C.A.N. (99 Stat.) 1597 (1986) (codified at 7 U.S.C. §§ 2901-2911 (1994).

[27] *Frame*, 885 F.2d at 1134.

> [w]idespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether. A continuation of this trend would endanger not only the country's meat supply, but the entire economy. The Act also furthers important non-economic interests. Maintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life.[28]

Indeed, the "free association" test requires a higher degree of scrutiny than the "free speech" test.[29] However, the Ninth Circuit Court of Appeals in *Cal-Almond* did not analyze the almond advertising program under the more stringent free association test, as was done in *Frame*, because the court found that not even the lesser standard of review for commercial speech was satisfied by the government with respect to the almond program.[30]

Under the more stringent free association test discussed in *Frame*, the government must show a "compelling state interest" that is ideologically neutral and cannot be achieved through means " 'significantly less restrictive of free speech or associational freedoms.' "[31] By comparison, the Ninth Circuit in *Cal-Almond* applied the commercial speech test originally outlined by the United States Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.[32] The Ninth Circuit described this three-prong test as requiring the government to prove (1) that the interest behind the restrictions is " 'substantial[,]' " (2) that the restrictions " 'directly advance [] the governmental interest asserted[,]" and (3) that the restrictions are " 'not more extensive than is necessary to serve that interest.' "[33]

Under the *Frame* analysis, nowhere in the free association test is the government required to prove that the speech compelled "directly advances the governmental interest asserted." If the Third Circuit Court of Appeals had analyzed the argument under the *Central Hudson* test, its decision would not have been the same, even though it upheld the regulations under the more stringent test. Obviously, a federal, state or local law can raise free association arguments without raising free speech issues at all. Likewise, regulations can raise free speech issues without raising free association issues. Marketing orders, by their na-

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[28] *Id.* at 1134-35 (citations omitted).

[29] *Id.* at 1133-34; Cal-Almond, Inc., v. United States Dep't of Agric., 14 F.3d 429, 436 (9th Cir. 1993).

[30] *Cal-Almond*, 14 F.3d at 436.

[31] *Frame*, 885 F.2d at 1134 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

[32] 447 U.S. 557 (1980).

[33] *Cal-Almond*, 14 F.3d at 436 (citing *Central Hudson* at 566).

ture, raise both issues.

Although the Supreme Court has never defined the difference between a "compelling" governmental interest and a governmental interest that is merely "substantial," there certainly could be governmental agricultural programs which require association and speech and which have attached to them a governmental interest that is substantial but not compelling. There could also be governmental agricultural programs in which the government's asserted interest is *neither* compelling *nor* substantial.

The court in *Frame*, deferring to legislative findings, concluded that the governmental interest in implementing the Beef Promotion and Research Act of 1985 was compelling.[34] In *Cal-Almond*, while the Ninth Circuit felt it " 'must identify with care the interests the State itself asserts,' "[35] it also concluded that the purpose of the Act was to assist, improve or promote the marketing, distribution and consumption of almonds, and that the regulations at issue[36] would provide the "opportunity to stimulate the demand for almonds."[37] Therefore, the court held "that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial governmental interest."[38] However, the Supreme Court has not had occasion to decide the issue whether requiring producers or handlers to advertise an agricultural product is either a compelling or a substantial state interest. If forcing the advertising of an agricultural commodity is either a compelling or a substantial governmental interest, it certainly would seem to dilute and depreciate what are truly compelling and substantial governmental interests such as maintenance of the public's health and welfare, food safety, enhancement of the environment, and police protection. Indeed, the United States Supreme Court has stated that it will not simply defer to legislative and executive judgment on this question, but must itself determine whether a program directly advances the government's asserted interest.[39]

It can be argued whether forcing a businessperson to contribute to an advertising program, including compelling that businessperson to ad-

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[34] *Frame*, 885 F.2d at 1134-35.

[35] *Cal-Almond*, 14 F.3d at 437 (citing Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993)).

[36] 7 U.S.C. § 608c(6)(I) (1994); 7 C.F.R. §§ 981.41, 981.441 (1994).

[37] *Cal-Almond*, 14 F.3d at 437.

[38] *Id.* (citing *Frame*, 885 F.2d at 1134).

[39] City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984); *Cal-Almond*, 14 F.3d at 437. *See also* Ibanez v. Florida Dep't of Business & Prof. Regulation, Bd. of Accountancy, 114 S. Ct. 2084, 2089-90 (1994).

vertise or pay a "tax" in lieu thereof, is ideologically neutral or is merely commercial speech, which requires a lesser standard of scrutiny than political speech.[40] Cases may arise in which the government may be unable to establish that the type of agricultural product compelled to be promoted is one in which the government has a substantial or a compelling interest.

II. The *Cal-Almond* Decision

In *Cal-Almond*, the court addressed the First Amendment issue brought by handlers of California almonds. The handlers receive almonds from growers, process them and sell the processed commodity primarily for use as an ingredient in candy, ice cream and cereal. The Almond Board was established in 1950, pursuant to the AMAA and the almond marketing order. The Board consists of ten members, all of whom are nominated by representatives of the industry and appointed by the Secretary.[41] Besides advertising, the Almond Board engages in research, development, quality control and volume regulation.[42] The Board also engages in "marketing research" through which it funds a generic pro-almond public relations program paid for by handler assessments. Pursuant to the AMAA and the almond marketing order, the Board requires handlers to spend a defined amount of money (based upon the amount of almonds handled) each year on advertising, or to pay an equal amount of money to the Board in lieu of spending it

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[40] Just a supposition, but believed to be well-reasoned, is the notion that most businesspersons would find, even more abhorrent, regulations that compel advertising and allow competitors to dictate where that advertising is to be directed (particularly when the advertising regulations compel the expenditure of tens, if not hundreds, of thousands of dollars) than regulations restricting or compelling "political speech," which require the government to overcome exacting scrutiny. *See, e.g.*, Stuart Banner, *Who's Afraid of Commercial Speech?* 76 Va. L. Rev. 627, 652 (1990). Neither the *Frame* court nor the *Cal-Almond* court addressed this issue. The court in *Frame* stated that the advertising program for almonds constitutes "commercial speech;" i.e., speech that merely "proposes a commercial transaction" (citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S 328, 340 (1986)). It must be assumed that the Supreme Court will reach this issue in some future case, given the fact that the commercial speech cases previously decided by the Court dealt with regulating commercial speech that was *voluntarily* engaged in by the businessperson who desired to sell a particular product or service. None of the Supreme Court's cases to date have dealt with a situation wherein the government compels a businessperson to engage in and fund "commercial speech" and then dictates where and how much money is to be spent on the speech.

[41] *Cal-Almond*, 14 F.3d at 433; 7 C.F.R. §§ 981.30-.34 (1994).

[42] *Cal-Almond*, 14 F.3d 429.

on qualified product advertising.

The method engaged by the almond marketing order to compel the advertising by handlers involves a rate of assessment imposed by the Secretary of Agriculture after he receives a recommendation from the Almond Board. A portion of the assessment is creditable to a handler for market promotion, including paid advertising, if engaged in by the handler consistent with the regulations and authorized by the marketing order and the Secretary.[43] Handlers Cal-Almond, Inc., Saulsbury Orchards & Almond Processing, Inc., and Carlson Farms filed administrative petitions before the Secretary of Agriculture[44] alleging that the advertising assessments, whether for the generic promotional program or for creditable advertising, violated the handlers' rights guaranteed under the First Amendment of the United States Constitution.[45]

Following the handlers' exhaustion of administrative remedies, the case came before the District Court for the Eastern District of California in Fresno. The district court "held that the almond marketing program did not even implicate, let alone violate, the [handlers'] First Amendment rights 'because plaintiffs are not "compelled" to advertise.' "[46] On appeal, the Ninth Circuit found that, even though the marketing order did not compel the handlers to advertise, the order compelled them to expend a certain sum of money each year on either assessments or creditable advertising. Either of the alternatives burdened and thus implicated the handlers' First Amendment rights.[47]

The Ninth Circuit held that even if there were no "creditable advertising regulations," and the handlers merely paid the money to the Board for the Board to conduct generic advertising and promotional programs, the handlers' First Amendment rights to be free from compelled speech and association would be infringed.[48] The Ninth Circuit also concluded that the almond promotion program was not "government speech," because the program singled out a certain group, almond handlers, to contribute money to fund the "dissemination of a particular message associated with that group."[49] The court found, therefore, that a contribution of money for an advertising program implicated the

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[43] *Id.*

[44] *See* requirements for exhaustion of administrative remedies in 7 U.S.C. § 608c(15)(A) (1994). *See also supra* note 36.

[45] *Cal-Almond*, 14 F.3d at 433-34.

[46] *Id.* at 434. "Almond marketing program" is the court's euphemism for the Board's generic program and the creditable advertising program.

[47] *Id.* (citing dicta from the district court's decision).

[48] *Id.*

[49] *Id.* at 435.

handlers' rights to freedom of association and speech.[50]

The court of appeals stated that even if the almond marketing order did not require the payment of assessments or alternative contributions, but only required that handlers spend "the equivalent sum every year on advertising that met the requirements of [the almond marketing order regulations]," the order would nonetheless "clearly implicate" the handlers' First Amendment rights, "both because it would compel them to speak and because it would impose content-based restrictions on that speech."[51]

The Ninth Circuit held: "Thus, both an assessment-only program and an advertising-only program would implicate Appellants' First Amendment rights. Because the order is a combination of both, it implicates those rights as well."[52]

The Ninth Circuit also analyzed the type of speech restricted. The court found the speech to be commercial speech, and thus subject to a lesser standard of scrutiny than if it were political speech.[53] The court concluded that the advertising regulations would implicate freedom of association rights. However, the court did not need to apply the more "exacting scrutiny" discussed in *Frame*, because the almond marketing order program did not even pass the less stringent *Central Hudson* standard.[54] The court held that the USDA, under the *Central Hudson* commercial speech test, had the burden of justifying the program and establishing each *Central Hudson* element by presenting evidence "sufficient to satisfy these requirements."[55]

First, the Ninth Circuit held that there was a "substantial government interest"[56] in enhancing returns to almond producers and stabilizing the health of the almond industry through an advertising program.[57] However, in turning to whether or not the government's evidence showed that the program directly advanced that governmental interest under *Central Hudson*, the court stated that it would not simply defer to "legislative and executive judgment on this question; we must determine ourselves whether the program directly advances the USDA's asserted interest."[58] In an interesting twist, the Ninth Circuit

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 436.
[54] *Id.*
[55] *Id.* at 437.
[56] *Id.*
[57] *Id.* ***But see supra*** note 27 and accompanying text.
[58] *Cal-Almond*, 14 F.3d at 437 (citing City Council v. Taxpayers for Vincent, 466

held that

> because the Order forces each handler to fund Board promotional efforts with every assessment dollar not spent on creditable advertising, [the] USDA must show both that the advertising for which credit is ***granted*** is ***better*** at selling almonds than the Board's own efforts ***and*** that the advertising for which credit is ***denied*** is ***worse*** at selling almonds than the Board's own efforts.[59]

The Ninth Circuit found it important that the Almond Board had conducted no studies which would show whether or not the creditable advertising rules and assessments caused more sales of almonds.[60] The court concluded that

> [b]ecause [the] USDA has presented little or no evidence regarding the effectiveness of the Board's promotional efforts, it cannot show that the creditable advertising regulations "directly advance" the government's interest in increased almond sales by enhancing the effectiveness of those efforts.[61]

The court cited *Edenfield v. Fane,* wherein the Supreme Court held that the Florida Board of Accountancy had failed to justify a ban on personal solicitation of prospective business clients by accountants when it had provided no studies or anecdotal evidence suggesting that such solicitation creates the asserted dangers of fraud, overreaching or compromised independence.[62] Moreover, in *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy,*[63] decided by the United States Supreme Court after the *Cal-Almond* decision, the Court refused to countenance "hypothetical" or insubstantial assertions: "Given the state of this record—the failure of the Board to point to any harm that is potentially real, not purely hypothetical—we are satisfied that the Board's action is unjustified."[64] As the Court pointed out in *Edenfield*, the government must show that the "harms" are real and that the program will alleviate them to a "substantial degree."[65] The Court in *Edenfield* also stated that the government's burden applies as well to prophylactic regulations, wherein the government must "demonstrate that it is regulating speech in order to address what

U.S. 789, 803 n.22 (1984)).

[59] *Id.*

[60] *Id.* at 437-38.

[61] *Id.* at 438 (footnote omitted).

[62] *Id.* (citing Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

[63] Ibanez v. Florida Dep't of Business & Prof. Regulation, Bd. of Accountancy, 114 S. Ct. 2084 (1994).

[64] *Id.* at 2090.

[65] *Edenfield*, 113 S. Ct. at 1800.

is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem."[66]

The Ninth Circuit found that most of the evidence in the record showed that the regulations actually hindered the handlers' efforts to increase sales and returns to growers. Because of the way that the handlers market their almonds, those marketing efforts were not creditable under the Board's advertising regulations.[67] The Ninth Circuit also found that there was no evidence that the regulations actually stimulated additional or more effective advertising from other handlers, since Blue Diamond Growers, Inc., the dominant handler in the industry, would continue to advertise in the same manner absent the regulations. Therefore, there was no reason to *compel* handlers to advertise to begin with.[68] The Ninth Circuit concluded that the USDA failed to present evidence that the regulations stimulated additional or more effective advertising, and that the regulations were, therefore, unconstitutional restrictions on the handlers' First Amendment rights.[69]

Next, the Ninth Circuit addressed the Board's "generic" promotional program. The court first assumed, as a matter of law, that advertising increases consumption of the product or service being advertised.[70] But the court found that

> because [the Board's] efforts are funded with money that handlers would presumably have spent on their own advertising, we cannot compare the Board's program with a no-advertising situation; we must compare it to a situation where handlers spent their assessments on their own marketing.[71]

The court's conclusion with respect to the second prong of the *Central Hudson* test established an incredibly difficult hurdle for the government, not only with respect to the almond promotional and advertising program, but also any advertising or promotional program which compels handlers or producers to contribute to such a program. The court observed:

> [the] USDA has presented no evidence tending to show that the generic Board promotion financed by that money sells almonds more effectively than the specific, targeted marketing efforts of individual handlers. *We agree with Appellants' argument that each handler knows best how to*

[66] *Id.* at 1803.

[67] Cal-Almond, Inc., v. United States Dep't of Agric., 14 F.3d 429, 438 (9th Cir. 1993).

[68] *Id.* at 438-39.

[69] *Id.*

[70] *Id.* at 439.

[71] *Id.*

> ***sell his own almonds***; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson. The USDA has failed to meet its burden of showing that the overall almond marketing program "directly advances" its stated goals of selling more almonds and increasing returns to producers.[72]

Since the Ninth Circuit assumes that advertising increases consumption of the product or service being advertised, a simple showing that advertising increases consumption of the product through handler (or with respect to state cases, producer) assessments will not be enough to overcome the formidable hurdle erected by the Supreme Court in *Central Hudson* and by the Ninth Circuit in *Cal-Almond*. Therefore, the question to be answered in future litigation is not whether the advertising program increases consumption, and thus increases grower returns, but rather whether the program is "better" than what individual handlers could achieve if left with their own money to target their own individual markets. This is because the Ninth Circuit presumes, absent "hard evidence" to the contrary, that a handler "knows best how to sell his own almonds . . . ."[73]

The Ninth Circuit, addressing the third prong of the *Central Hudson* test,[74] held that the regulations were more extensive than necessary to serve the interest of increasing almond sales.[75] Utilizing the test announced in *Board of Trustees of State University v. Fox*,[76] the government would have to show that the restrictions in the almond marketing order relating to advertising and promotional credits were "narrowly tailored to achieve the desired objective."[77] The court held that the government failed this test in that it offered no evidence to show that the type of advertising and promotion which could be engaged in by handlers not receiving credit under the Board's program was reasonably denied:

> [the] USDA offers ***no*** justifications for the restrictions that ***deny*** credit for certain advertisements . . . . It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who [sic] overwhelmingly dominates the retail almond

[72] *Id.*(emphasis added) (footnotes omitted).

[73] *Id.*

[74] If the government is not sustained under any one of the three prongs of the *Central Hudson* test, the program regulations violate the First Amendment. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993); *Cal-Almond*, 14 F.3d at 437.

[75] *Cal-Almond*, 14 F.3d at 439.

[76] 492 U.S. 469, 480 (1989).

[77] *Cal-Almond*, 14 F.3d at 439-40.

> market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers.[78]

The court concluded by stating that the regulations disregarded the *Fox* "narrowly tailored" standard, and the almond marketing program therefore violated the handlers' First Amendment rights.[79] Finally, the Ninth Circuit held that while there is a substantial governmental interest in advertising agricultural products in order to increase consumption and grower income, the government has the substantial burden of proving, by "hard evidence," that there is a real problem and that the regulations and assessments will alleviate the problem to a "material degree."[80] The court concluded that, in the absence of hard evidence to the contrary, it will be presumed that businesspersons know best how to promote their own products in their own targeted markets.[81]

Thus, it is not enough for the government or commodity groups to be anxious to regulate.[82] It is not enough to simply prove that a majority of the industry desires the regulations.[83] Nor is it enough to merely put on evidence showing that product sales have increased. The Ninth Circuit presumes that sales will increase as a result of an advertising program. Instead, the marketing order boards and commissions—that is, the government—must prove that the mandated program is more effective at producing sales than would be the case if handlers or producers were left with their own money to target their own particular markets. That is, the government's paternalistic view that it rather than handlers and producers can do a better job of marketing agricultural products must be proven by it, with hard evidence. And the government must show that its program, taking into consideration that it is wresting money away from handlers and producers who would otherwise spend money on advertising and promotion, will increase sales more than would be the case if handlers and producers were left to pursue the task with their own money.

The Ninth Circuit's *Cal-Almond* decision, coupled with the Supreme Court's opinions in *Ibanez, Edenfield,* and *Taxpayers for Vincent*, points out that the government must show that the industry has a "problem" with sales, consumer demand and grower prices, and that

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[78] *Id.* at 440.

[79] *Id.*

[80] *Id.* at 439.

[81] *Id.*

[82] *See, e.g.,* Simon & Schuster v. New York State Crime Victims Bd., 502 U.S. 105 (1991).

[83] Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455 (9th Cir. 1994).

the government-sponsored program will alleviate the problem to a material degree.[84]

Conclusion

Only time will tell whether handlers or producers who are compelled to fund a board's or commission's advertising program for commodities other than almonds will take the time and incur the expense necessary to litigate the issue, or whether they will have the thick skin necessary to deflect the criticism of government and industry members when the advertising program is challenged. But the Ninth Circuit has made it extremely clear that if a case comes before it regarding a compelled advertising program dealing with an agricultural commodity, the government, whether state or federal, must be prepared to defend the challenge with hard evidence, not merely the often repeated rhetoric that the majority of people in the industry support the program, therefore it must be "good." After all, the First Amendment was established to protect not only the voice of the majority, but the voice of the minority, even the voice of one. If forced advertising has been so good for agricultural products, why aren't there "marketing orders" applicable to every industry in the United States? Citizens could collectively pool their money and allow a few competitors and the government to decide where and how it should be spent.

The First Amendment requires (1) that the advertising program be needed, (2) that there is harm that will result unless the program is mandated, (3) that the program be fair, (4) that the program will be or is effective, and (5) that a group of competitors can do a better job of spending promotional money than can an individual businessperson left with his or her own money to target his or her own markets. Placing such a burden on the government is a necessary requirement to insure that the First Amendment protects not only door-to-door solicitors, political speakers, flag burners, nude dancers and X-rated movie producers, but also businesspersons growing or selling agricultural products.

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[84] Ibanez v. Florida Dep't of Business & Prof. Regulation, Bd. of Accountancy, 114 S. Ct. 2084 (1994); Edenfield v. Fane, 113 S. Ct. 1792 (1993); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).