Got Hemp? A Call For A Hemp Checkoff

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ABSTRACT

Hemp production in the United States has exploded since its legalization in the 2010s, but the market has struggled to keep up with this increased supply. As a result, growers have experienced freefalling prices and a shortage of buyers. Of course, volatile markets are not unknown to agriculturists, and their ingenuity has boosted their markets many times before. Remember "Got Milk?," "The Incredible Edible Egg," or "Beef: It's What's for Dinner"? These successful advertisements are the products of farmer-funded marketing initiatives known as "checkoff" programs.

A federal hemp checkoff is needed to drive demand and public awareness for this budding commodity. This tried-and-true solution will have the benefit of strong caselaw to support its constitutionality, as well as a clear framework to enact the program through either legislative or executive means. With a proven track-record in court and well-documented financial returns, hemp growers can take control of the market by creating a hemp checkoff, and perhaps create a household catchphrase in the process.

INTRODUCTION

In 1990, Gatewood Galbraith took the stage at Saint Jerome Church's "Fancy Farm Picnic" in the small community of Fancy Farm, Kentucky.[1] It was not the first time that Galbraith would bellow a stump speech before the boisterous crowd, which had assembled every year for over a century,[2] nor would it be his

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[1] *See generally* GATEWOOD GALBRAITH, THE LAST FREE MAN IN AMERICA: MEETS THE SYNTHETIC SUBVERSION (Outskirts Press 2004).

[2] *See generally* Joe Sonka, *What is Kentucky's Fancy Farm event? A look at history, political picnic's notable moments*, LOUISVILLE COURIER J. (Aug. 02, 2021, 6:18

last. He was running for Governor after an unsuccessful run for Kentucky Agriculture Commissioner eight years prior, and would go on to run for office a total of nine times, with zero victories.[3] As a perennial candidate, his words and ideas were often discarded without a second thought. On this hot summer day, though, he made a rather prophetical remark.

"If Kentucky is going to survive," Gatewood exclaimed, ". . . they're going to have to reach back and grab a plant that our granddaddies used to grow by the thousands of acres[.]"[4]

The plant he was referring to was hemp. Once a prominent cash crop, hemp had long been illegal by that August day in 1990, and its legalization was only a fringe idea at the time. Kentucky was a rather conservative state, and hemp's botanical cousin, marijuana, sullied any reputation that hemp could hope to have. However, over time the state and the nation evolved on the issue of hemp legalization.[5] Today, the crop is legally grown across the country by over 16 thousand growers.[6] It is certain that advocates, such as Galbraith, were successful—at least in part.

This new, yet ancient crop may now be legal, but for many growers, it is not yet profitable. The market for cannabidiol ("CBD") was rather strong immediately after legalization but has since tanked.[7] The crop that was once heralded by Popular Mechanics magazine as having 25 thousand uses now struggles to find any market at all.[8] The reasons behind the glut are plenty, but it can be predominantly attributed to the age-old law of supply and

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a.m.) https://www.courier-journal.com/story/news/politics/2021/08/02/kentucky-fancy-farm-what-to-know-about-picnics-history/5383925001/ [https://perma.cc/J5GD-KXGQ].

[3] *See* Galbraith, *supra* note 1.

[4] *Gatewood's Quotes…*, GATEWOOD GALBRAITH: THIS LEXINGTON KENTUCKY ATTORNEY WAS "THE LAST FREE MAN IN AMERICA" (Jan. 5, 2012, 6:02 AM), https://gatewoodgalbraithhistory.wordpress.com [https://perma.cc/7DNC-WKJ7].

[5] *See generally World Timeline of Hemp*, MINISTRY OF HEMP https://ministryofhemp.com/hemp/history/ (last viewed Dec. 28, 2020) [https://perma.cc/UMS3-SM3S].

[6] 2019 U.S. HEMP LICENSE REPORT, VOTE HEMP https://www.votehemp.com/wp-content/uploads/2019/09/Vote-Hemp-US-License-Report-2019.pdf (last viewed Dec. 28, 2020) [https://perma.cc/6UG9-HMHY].

[7] Grace Schneider, *More than 150 Kentucky farmers holding last year's hemp crop after disastrous last season*, LOUISVILLE COURIER J. (Jun. 1, 2020, 7:04 AM), https://www.courierjournal.com/story/news/local/2020/06/01/kentucky-hemp-farmers-steer-clear-after-2019-tumult/5282812002/ [https://perma.cc/GA4V-ZAAB].

[8] Popular Mechanics Mag., *New Billion Dollar Crop*, VOTE HEMP (Oct. 6, 2021) https://www.votehemp.com/blog/new-billion-dollar-crop-popular-mechanics/ [https://perma.cc/94WG-2P4D].

demand.[9] Processors cannot keep up with the volume of hemp produced by our farmers.[10] Further, the industry as a whole has done a poor job of telling customers what hemp and CBD are. Unscrupulous companies have misled the public, claiming that the compound can cure virtually every ailment from cancer to anxiety.[11] As it sits, the line between hemp oil and snake oil is blurry.

If hemp is to become a viable cash crop, swift changes must be made. While the industry could discuss the potential marketing solutions *ad nauseam*, I contend that we should "reach back" and "grab" a solution that has a proven record of success—checkoff programs. Checkoff programs are government-sanctioned research and marketing organizations that strive to improve the market of a particular commodity, without mention of specific brands or individual producers.[12] These programs have been rather effective. Researchers at Cornell University have found that, through the advertising and research conducted by the beef checkoff program, farmers and ranchers enjoy, on average, a return on investment of $11.91 for every dollar spent.[13] Soybean producers have received approximately $12.34 per dollar spent as a result of the soy checkoff.[14] Florida's orange growers have seen $14.40 for every dollar of checkoff investment.[15] Checkoff programs work.

Even successful ideas, however, can receive pushback. As laid out in the coming pages, checkoff programs have received intense legal scrutiny from discontent farmers and ranchers in the United States. Despite several Supreme Court rulings, the challenges against checkoff programs appear to have no end in

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[9] *Id.*

[10] *Id.*

[11] Peter Grinspoon, *Cannabidiol (CBD) — what we know and what we don't*, HARV. HEALTH BLOG (Aug. 24, 2018, 6:30 AM), https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476 [https://perma.cc/BXM2-MT8J].

[12] *Checkoff Programs – An Overview*, THE NAT'L AGRIC. L. CTR. https://nationalaglawcenter.org/overview/checkoff/ (last viewed Dec. 28, 2020) [https://perma.cc/C3KF-GGRN].

[13] Harry M. Kaiser, *An Economic Analysis of the Cattlemen's Beef Promotion and Research Board Demand-Enhancing Programs*, CATTLEMEN'S BEEF BD. https://www.beefboard.org/wp-content/uploads/2019/07/Full_ROI_Report2019.pdf (last viewed Dec. 28, 2020) [https://perma.cc/X2SC-8BUT].

[14] HARRY M. KAISER, AN ECONOMIC ANALYSIS OF THE UNITED SOYBEAN BOARD'S DEMAND- AND SUPPLY-ENHANCING PROGRAMS (2014-2018) (PRELIMINARY DRAFT), UNITED SOYBEAN BD. https://api.unitedsoybean.org/uploads/documents/usb-2019-roi-study-report-as-of-12-10-2019.pdf (last viewed Dec. 28, 2020) [https://perma.cc/PH9W-GPKF].

[15] Gary W. Williams & Oral Capps, Jr., *Measuring the Effectiveness of Checkoff Programs*, CHOICES, 2d Quarter 2006 21–2, https://www.choicesmagazine.org/2006-2/checkoff/2006-2-05.pdf (last viewed Dec. 28, 2020) [https://perma.cc/6TY5-B9N9].

sight. Nevertheless, the guidance provided by the courts and the power of *stare decisis* show a much better outlook on the future of checkoffs than before.

Although there has been a contemporaneous push by other authors for checkoff programs,[16] the legal and procedural logistics have yet to be evaluated. Hemp growers have fallen victim to false promises before, so they will undoubtedly view the checkoff with a healthy dose of skepticism, combined with fear that it may not stand up in court. However, this Article shows that a hemp checkoff program will pass legal muster and could perhaps solve the current hemp market crisis.

I. HEMP HISTORY

Hemp, botanically known as *Cannabis sativa L.* and often referred to as industrial hemp, has been cultivated by humans since the dawn of agriculture itself.[17] The plant traces its roots to China, with archeological evidence suggesting cultivation as early as 8 thousand BCE.[18] When it made its way to North America in 1616, the crop was used by the settlers of Jamestown, Virginia, as a textile.[19] This began the long and turbulent history of American hemp that continues to play out today. [20]

For quite some time, hemp occupied a special place in the heart of American agriculture, endearing both farmers and policymakers. In fact, it was so dear to the budding country that in 1633 the Virginia House of Burgesses required "that every planter as soone as he may, provide seede of flaxe and hempe and sowe the same."[21] Perhaps the most notable hemp advocate in early America was George Washington.[22] Washington grew the crop for his own personal and agricultural use, utilizing the fiber to make rope,

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[16] *Hemp Growers Exploring A Checkoff Program*, SUCCESSFUL FARMING (Jul. 7, 2020), https://www.agriculture.com/crops/hemp/hemp-growers-exploring-a-checkoff-program [https://perma.cc/AF43-XR69].

[17] *See* Ministry of Hemp, *supra* note 5.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Act of August, 1633, § VIII, Va. Laws (legislature terminated 1624), http://vagenweb.org/hening/vol01-09.htm [https://perma.cc/A4D5-VCDN].

[22] *Did George Washington Grow Hemp?*, GEORGE WASHINGTON'S MOUNT VERNON https://www.mountvernon.org/george-washington/farming/washingtons-crops/george-washington-grew-hemp/#- (last viewed Dec. 28, 2020) [https://perma.cc/AP7S-Y7FT].

canvas, clothing, and fishing netting.[23] Other notable statesmen who are known to have grown or used hemp include Thomas Jefferson, Benjamin Franklin, and Abraham Lincoln.[24]

In addition to the 1633 Virginia law mandating cultivation, hemp also received a governmental boost during World War II.[25] Hemp-based rope, canvas, and cloth were essential in warfare at the time, but the Navy's supply of hemp from the Philippines was cut off by Japan's Empire.[26] The U.S. Department of Agriculture ("USDA") responded by creating the "Hemp for Victory" campaign, which aimed to recruit hemp farmers by promoting hemp cultivation as a noble and patriotic endeavor.[27] Overall, the campaign was a success, with over 32 thousand acres of hemp seed planted in the first year, an increase of "several thousand percent" from previous years.[28]

But even before the war, the government began to grow uncomfortable with hemp. The first law to prohibit the cultivation of hemp was enacted in California in 1913, and by 1931, hemp cultivation was prohibited in twenty-eight other states.[29] Soon thereafter, the federal government took aim at the industry with the passage of the Marihuana Tax Act of 1937.[30] While it did not create an outright ban on hemp production, the law—by not distinguishing hemp from its psychotropic cousin—effectively limited the expansion of the crop through prohibitive taxes.[31] As mentioned previously, the crop had a renaissance during World War II, but this did not last very long after the ink dried on peace treaties.[32] The effects of the Marihuana Tax Act, combined with

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[23] *Id.*

[24] Nicole M. Miller, Note, *The Legalization of Industrial Hemp and What It Could Mean for Indiana's Biofuel Industry*, 23 IND. INT'L & COMPAR. L. REV. 555, 561 (2013).

[25] Robin Lash, Comment, *Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 321 (2002).

[26] *Id.*

[27] Courtney N. Moran, *Industrial Hemp: Canada Exports, United States Imports*, 26 FORDHAM ENV'T L. REV. 383, 405 (2015); Dennis Rens, *America's Hemp King*, NEW HEAD NEWS, http://newheadnews.com/hemp/Rens.hempstory.Wis/ (last viewed Dec. 28, 2020) [https://perma.cc/DF84-49YL] (The USDA Farmers Bulletin Number 1935 stating "[B]y growing hemp in 1943, farmers in Minnesota, Iowa, Wisconsin, Illinois, and Kentucky can serve their country and also have good prospects of profit for themselves. . .").

[28] Tara Christine Brady, Comment, *The Argument For the Legalization of Industrial Hemp*, 13 S.J. AGRIC. L. REV. 85, 90 (2003).

[29] Schaffer Library of Drug Policy, *When and why was marijuana criminalized?*, DRUG LIBRARY, http://druglibrary.org/schaffer/library/mj_outlawed.htm (last viewed Dec. 28, 2020) [https://perma.cc/4YKX-3AES].

[30] Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

[31] *See* Brady, *supra* note 28, at 88.

[32] *See* Ministry of Hemp, *supra* note 5.

the drastically reduced post-war textile market and the general sentiment against cannabis, became too much for the industry to handle.[33] The final hemp harvest of the era occurred in 1957 in Wisconsin, signaling what appeared to be the end of American Hemp.[34]

After decades of effective prohibition, significant interest in hemp's resurgence began to sprout at the turn of the 21st Century.[35] North Dakota led the charge by legalizing hemp at the state level in 1999, and many other states followed suit.[36] However, these laws had no practical effect due to the federally-enacted Controlled Substance Act ("CSA").[37] The Act, which was enacted in 1970, prohibited the cultivation of marijuana by requiring growers to obtain a permit from the Drug Enforcement Agency ("DEA").[38] The CSA made no distinction between low- and high-THC cannabis and, although the DEA had the authority to issue permits, the permitting system served as a *de facto* prohibition.[39] Virtually no permits were granted for hemp production through this regulatory scheme.[40] Thus, hemp was, for all intents and purposes, illegal throughout the United States.

This *de facto* federal prohibition began to crumble on August 29, 2013 with the "Cole Memo."[41] The memorandum, drafted by Deputy Attorney General, James M. Cole, informed all United States Assistant Attorney Generals that the Department of Justice would no longer enforce marijuana laws where marijuana had been legalized at the state-level, with minor exceptions.[42] The release did not mention hemp by name, but some states interpreted the memorandum to signal the end of federal hemp law enforcement.[43] Soon thereafter, a Colorado farmer reaped the first commercial hemp harvest that the United States had seen in fifty-

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[33] *See* Moran, *supra* note 27.

[34] *See* Brady, *supra* note 28, at 90.

[35] *See* MINISTRY OF HEMP, *supra* note 5.

[36] Michael D. Moberly, *Old Macdonald Hid a Farm: Examining Arizona's Prospects for Legalizing Industrial Hemp*, 20 DRAKE J. AGRIC. L. 361, 369–370 (2015).

[37] *See generally* Controlled Substances Act, 21 U.S.C. § 802–889 (2018).

[38] *Id.*

[39] Moran, *supra* note 27, at 406.

[40] *See id.* at 407–08, 411, 432.

[41] *See* Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf [https://perma.cc/4VGJ-J5T4].

[42] *Id.*

[43] Moran, *supra* note 27 at 416, 427.

six years.[44] Other states were more cautious and opted to create state-law frameworks for the ever-more probable blessing from Congress to begin planting.[45]

The Congressional blessing finally arrived with the passage of the Agricultural Act of 2014.[46] The Agricultural Act, which served as the nation's quadrennial "Farm Bill", permitted states to implement pilot programs to research the "growth cultivation, or marketing" of hemp.[47] This bill was far from a sweeping legalization of hemp; rather, it was more of a way to "test the waters" in determining whether further reform was warranted. The plant remained a controlled substance under the CSA, but the pilot programs, which operated under the premise of research, allowed carefully regulated growers to sell their harvests.[48] Though it may have been a small step toward legalization, the 2014 Farm Bill was a critical step nonetheless.

The most sweeping reform to date occurred with the passage of the 2018 Farm Bill.[49] The 2018 Farm Bill removed hemp from the oversight of the Controlled Substance Act and instead transitioned hemp regulation to a system of "cooperative federalism," where state governments are the primary enforcers of hemp regulation, so long as the state's regulatory framework is approved by the Secretary of Agriculture.[50] Under the current framework, forty-eight states and a number of tribal governments have submitted plans to the USDA, and many have already received approval.[51]

This is where the legal landscape of hemp lies at the present time. One could argue that the hemp industry is no longer in its infancy. The number of hemp acres in the U.S. has exploded from virtually zero acres prior to 2013, to 465,787 licensed acres in

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[44] *Id.* at 428.

[45] *Id.* at 421.

[46] *See generally* Agricultural Act of 2014, 128 Stat. 649 (2014) (codified as amended at 7 U.S.C. § 5940(a)(1), (b)(B)(ii) (2014)).

[47] *Id.*

[48] Shannon Smith, *Hemp on the Horizon: The 2018 Farm Bill and the Future of CBD*, 98 N.C. L. REV. 1503, 1510 (2019).

[49] *See generally* Agricultural Improvement Act of 2018, 132 Stat. 4490 (2018).

[50] Ryan Quarles, *Hemp, Kentucky, and the Law*, 12 KY. J. OF EQUINE AGRIC. & NAT. RES. L. 311, 323 (2020).

[51] *See* Sean Ellis, *Idaho hemp bill defeated*, IDAHO FARM BUREAU FED'N (Mar. 13, 2020), https://www.idahofb.org/News-Media/2020/03/idaho-hemp-bill-defeated [https://perma.cc/GB3N-Y6UN].

2020.[52] However, the industry is still a long way from maturity. Those wishing to enter the industry must still overcome burdensome regulations and a still-developing body of husbandry research.[53] While it has come far in recent years, the U.S. hemp industry is, at its best, in a period of adolescence.

II. MARKETING ISSUES & POSSIBLE SOLUTIONS

Adolescence always comes with issues. For hemp growers, no bigger issue exists than the current market.[54] The market for hemp has been nothing short of tumultuous over the past several years, causing farmers to lose faith in the crop's potential.[55] When a producer is paid for a hemp crop, they are typically paid on a per pound, per CBD concentration basis.[56] While these farmers could once sell their harvest for around $40 per pound depending upon its quality, that same crop may now be worth only a fraction of that amount.[57] For example, in early 2020 farmers could expect to gross only $7.50 per pound.[58] Such weak prices are devastating for growers, assuming they can sell the crop at all. In addition, hemp that exceeds the federal THC limit of 0.3 percent must be destroyed, resulting in thousands of dollars going up in smoke.[59] That which remains may be turned away by purchasers if they are overstocked.[60] Furthermore, many farmers have delivered their

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[52] Laura Drotleff, *2020 Outlook: Licensed US hemp acreage falls 9% from 2019, but grower numbers increase 27%*, HEMP INDUS. DAILY (Jun. 19, 2020), https://hempindustrydaily.com/2020-outlook-licensed-u-s-hemp-acreage-falls-9-from-2019-but-grower-numbers-increase-27/ [https://perma.cc/XG8B-LZUE].

[53] *See generally Hemp Program Overview*, KY. DEP'T AGRIC. https://www.kyagr.com/marketing/hemp-overview.html (last viewed Oct. 6, 2021) [https://perma.cc/3UTM-T6CD].

[54] *See generally* Grace Schneider, *Kentucky hemp's painful correction: Some big player's sink, smaller ones hang on,* LOUISVILLE COURIER J. (Feb. 12, 2020, 7:38 AM), https://www.courier-journal.com/story/news/2020/02/12/kentucky-hemp-day-reckoning-has-arrived-and-its-not-pretty/4694036002/ [https://perma.cc/4WZB-L6PB].

[55] *Id.*

[56] *Id.*

[57] Schneider, *supra* note 54.

[58] *Id.*

[59] *Id.*; Tanner Hesterberg, *State officials burn nearly $20,000 in hemp that failed standard*, WKYT (Apr. 12, 2017, 10:54 PM), https://www.wkyt.com/content/news/State-officials-to-burn-nearly-20000-in-hemp-that-barely-failed-standard-419334524.html [https://perma.cc/YGN5-2DFA].

[60] Schneider, *supra* note 54.

crops to insolvent processors who cannot make payments.[61] All these factors, and more, have caused numerous growers to exit the industry, as they are either unwilling or financially unable to continue in such a harsh environment.

Agriculture is no stranger to complex markets, though, and America's farmers and ranchers have often found stability from the federal government. From the Homestead Act of 1864, which incentivized farming throughout the western territories,[62] to the 2018 Farm Bill, American agriculture has built much of its success on the nation's progressive farm policies. Nevertheless, for the obstacles faced by today's hemp farmers, one such policy warrants consideration—the commodity checkoff program.

III. CHECKOFF PROGRAMS

While the average American may not know what a checkoff program is, they have almost certainly been subject to their outcomes and perhaps influenced by it. Research and promotion programs, more commonly known as checkoff programs or simply checkoffs, are organizations formed to advance a given agricultural commodity, most notably through marketing campaigns.[63] Checkoff marketing campaigns have become household names through catchy titles and taglines such as "Got Milk?," "BEEF. It's what's for dinner!," and "The Incredible Edible Egg."[64] The organizations are led by producers, importers, and industry stakeholders and are funded through mandatory assessments collected when the particular commodity is sold.[65] For example, when a pork producer sells a $200 market hog, 0.4 percent of the sale price ($0.80) is sent to the pork checkoff program.[66] These checkoff programs, which go by formal names such as the National

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[61] *2 Kentucky hemp companies face bankruptcy proceedings*, COURIER J. (Jan. 30, 2020), https://www.courier-journal.com/story/news/local/2020/01/30/2-kentucky-hemp-companies-gencanna-sunstrand-face-bankruptcy-proceedings/2854716001/ [https://perma.cc/FG2C-YW44].

[62] Homestead Act of 1862, 12 Stat. 392 (1862).

[63] THE NAT'L AGRIC. L. CTR, *supra* note 12.

[64] *Got Milk?*, CAL. MILK PROCESSOR BD., http://www.gotmilk.com (last viewed Oct. 6, 2021) [https://perma.cc/4U56-A4L4]; *Beef It's What's For Dinner*, CATTLEMEN'S BEEF BD., https://www.beefitswhatsfordinner.com (last viewed Oct. 6, 2021) [https://perma.cc/L7ZC-CZP7]; *The Incredible Egg*, AM. EGG BD., https://www.incredibleegg.org (last viewed Oct. 6, 2021) [https://perma.cc/ZD8B-P34F].

[65] THE NAT'L AGRIC. L. CTR, *supra* note 12.

[66] *Pay Pork Checkoff Remittance*, PORK CHECKOFF, https://www.porkcheckoff.org/about/ (last viewed Oct. 5, 2021) [https://perma.cc/3GAH-JXFZ].

Pork Board, the American Egg Board, and the like, then use the funds to build demand for their respective commodities through advertising and research.[67] Although they are largely perceived as "independent" organizations, the programs are ultimately a product of Congress which are established and enforced by the federal government.[68]

A. Checkoff Formation Procedures

There are presently two methods under which a checkoff program may be created under federal law: (1) legislation or (2) regulation.[69] Producers of more common commodities, likely due to their congressional influence, have opted to form checkoff programs through independent legislation.[70] An alternative method is through the processes prescribed in the Commodity Promotion, Research, and Information Act of 1996, more commonly known as the Generic Commodity Act.[71] The Generic Commodity Act delegates the authority to create new checkoff programs to the USDA, implementing a structured process for approval.[72] This avenue is mainly taken by small, niche commodities such as honey, blueberries, and lamb. [73] The process includes the submission of a proposal with the following components: (1) a detailed industry analysis; (2) a detailed argument for the need to create the proposed program; (3) a list of objectives to be met through the proposed program; (4) an analysis on how small business will handle the new burdens imposed through the program; (5) evidence of industry support for the program; and (6) a draft of the

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[67] THE NAT'L AGRIC. L. CTR, *supra* note 12.

[68] *Id.*

[69] *See* Pork Promotion, Research and Consumer Information Act, 7. U.S.C. 4801–4819 (2000); Cotton Research and Promotion Act, 7 U.S.C. 2101–2118 (2000); Beef Research and Information Act, 7 U.S.C. 2901–2911 (2000); Commodity Promotion, Research, and Information Act of 1996, 7 U.S.C. 7411–7425.

[70] *See* Pork Promotion, Research and Consumer Information Act, 7. U.S.C. 4801–4819 (2000); Cotton Research and Promotion Act, 7 U.S.C. 2101–2118 (2000); Beef Research and Information Act, 7 U.S.C. 2901–2911 (2000).

[71] Commodity Promotion, Research, and Information Act of 1996, 7 U.S.C. 7411–7425.

[72] Kaiser, *supra* note 13*; Research & Promotion Programs,* AGRIC. MKTG. SERV. (U.S.D.A.), https://www.ams.usda.gov/rules-regulations/research-promotion (last viewed Oct. 5, 2021) [https://perma.cc/SW8W-ZL6F].

[73] THE NAT'L AGRIC. L. CTR, *supra* note 12.

proposed order creating the program.[74]

As mentioned in Section II, hemp supporters have been rather successful in advancing legislation on behalf of the crop and may well be capable of passing a hemp checkoff act. However, the industry, due to small size relative to staple commodities and its controversial nature, may be better suited for a checkoff program formed under the Generic Commodity Act. Regardless, the requirements to create a checkoff consist of two major factors: (1) A need for hemp marketing reform and (2) a desire for reform by hemp stakeholders. While the answer to the first question is quite clear, the second has yet to be evaluated.

B. Legal Considerations

If a hemp checkoff is to make any improvement to the marketing woes faced by its growers, it must survive challenges in the courts. As one can imagine, not all growers are pleased with the idea of forcibly giving up a portion of their sales for the checkoff, despite indirect benefits. Furthermore, some farmers may disagree with the messaging put out by the board, believing that their mandatory fees are being wasted on marketing efforts they do not feel are in their best interest. Fortunately for those who wish to create a hemp checkoff, or any new checkoff for that matter, there is plenty of case law to evaluate the odds of success.[75]

Opponents of commodity checkoffs have largely based their arguments on the First Amendment. The First Amendment states that, "Congress shall make no law. . . abridging the freedom of speech. . .,"[76] and it has been interpreted to protect "the right to refrain from speaking at all."[77] However, not all speech is protected.[78] In fact, much ink has been spilled in the quest to find the boundaries of that freedom. The doctrine has aptly been referred to as an "analytical and theoretical morass"[79] that cannot

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[74] AGRIC. MKTG. SERV. U.S.D.A., *How to Propose a New R&P Program*, https://www.ams.usda.gov/rules-regulations/research-promotion/how-to-propose (last viewed Dec. 29, 2020) [https://perma.cc/PJ5L-ZHC7].

[75] *See* Wooley v. Maynard, 430 U.S. 705 (1977); Children First Found., Inc. v. Martinez, 631 F. Supp. 2d 159, 172 (N.D.N.Y. 2007); Bd. of Regents v. Southworth, 529 U.S. 217, 229–235 (2000); United States v. Frame, 885 F.2d 1119, 1122 (3rd Cir. 1989).

[76] U.S. CONST. amend. I.

[77] *Wooley v. Maynard*, 430 U.S. at 714.

[78] *See generally* VICTORIA L. KILLION, THE FIRST AMENDMENT: CATEGORIES OF SPEECH, CONG. RSCH. SERV. (2019), https://sgp.fas.org/crs/misc/IF11072.pdf [https://perma.cc/F8KQ-SB6M].

[79] Toni M. Massaro, *Tread On Me!*, 17 UNIV. PA. J. CONST. L. 365 (2014).

be easily summarized. For example, the doctrine typically does not apply to "fighting words,"[80] but with the ever-growing English lexicon and the importance of tonality in language, how could one possibly declare a comprehensive list of "fighting words?" Further, expressions that amount to harassment in the workplace are generally unprotected by the freedom of speech.[81] But how can one draw the bounds of harassing language? Would harassing language of today be viewed as harassing language in years gone by? These exceptions have led to much confusion and an abundance of litigation.

The First Amendment exception that has garnered the most attention in checkoff litigation is government speech. Generally speaking, the government has the right to speak for itself without much constraint by the First Amendment.[82] It may promote policies and advocate for ideas through its speech, even when such speech is paid for through the tax dollars of those who object.[83] However, defining whether it is the government speaking becomes tricky when the government acts through more quasi-governmental entities, like checkoff programs. Because checkoff programs occupy a unique position as governmental, yet largely independent organizations,[84] the federal courts have paved a long, yet unfinished, road of cases to determine their constitutionality.

The first suit challenging a commodity checkoff came in the 1989 case, *United States v. Frame*.[85] This specific challenge involved the Beef Promotion and Research Act, first passed in 1976 and significantly amended in 1985.[86] In the Act, Congress declared that "it is in the public interest to authorize the establishment. . . (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products."[87] This assessment

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[80] Ronald K.L. Collins, *Foreword, Exceptional Freedom – The Roberts Court, The First Amendment, and the New Absolutism*, 76.1 ALB. L. REV. 409, 417 (2013).

[81] *Id.* at 418.

[82] Children First Found., Inc. v. Martinez, 631 F. Supp. 2d 159, 172 (N.D.N.Y. 2007).

[83] Bd. of Regents v. Southworth, 529 U.S. 217, 229–235 (2000).

[84] *See* THE NAT'L AGRIC. L. CTR, *supra* note 12 and accompanying text.

[85] United States v. Frame, 885 F.2d 1119, 1122 (3rd Cir. 1989).

[86] 99 Stat. 1597 (codified as amended at 7 U.S.C. §§ 2901–11).

[87] 7 U.S.C. §§ 2901–11.

came in the form of a one dollar assessment on each head of cattle sold or imported into the United States.[88] This assessment was to be collected by the purchaser who, for the purpose of the checkoff, was referred to as the "collecting person."[89] These assessments were then to be remitted to the respective state beef council, or, if no state beef council existed, to the Cattlemen's Beef Promotion and Research Board, a federation of state beef councils supervised by the Secretary of Agriculture.[90] Although these fees were required to be collected for all sales, individual cattlemen who did not wish to participate could receive a refund of their assessments during the first few years of the program.[91] However, as required by the Act, Secretary Richard Lyng conducted a referendum on May 10, 1988 to make the assessments mandatory for all producers and importers.[92] The referendum passed with 70 percent of the voting cattlemen approving the measure.[93] Now that the Act had teeth, the Secretary had broad powers to investigate non-compliance.[94] Those found to be in violation of the act were subject to either an administrative hearing or a civil suit, with the possibility of a $5,000 penalty.[95]

The Defendant, Robert Frame, operated a cattle auction business in Pennsylvania and thus was considered a "collecting person" responsible for collecting the checkoff assessment.[96] By his own admission, Frame had not collected any assessments from the sales at his auction barn, despite multiple warnings. Frame was warned by the state & federal beef councils, as well as the USDA.[97] In November 1986, the U.S. took action and filed suit in district court against Frame for his willful failure to collect the assessments.[98] Frame defended himself by claiming that the checkoff was unconstitutional, demanding that the program cease and that the unspent funds were to be refunded to the assessed

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[88] 7 U.S.C § 2904(8)(C)(1986); *See* CATTLEMEN'S BEEF BD., *Frequently Asked Questions*, https://www.beefboard.org/checkoff/frequently-asked-questions/ (last viewed Dec. 28, 2020) [https://perma.cc/YT9J-ECT6].

[89] *Frame*, 885 F.2d at 1124; *See also* CATTLEMEN'S BEEF BD., *supra* note 88.

[90] 885 F.2d at 1123–24.

[91] *Id.* at 1124.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] United States v. Frame, 885 F.2d 1119, 1124 (3rd Cir. 1989).

[96] *Id.*

[97] *Id.* at 1124–25.

[98] *Id.* at 1125.

sellers.[99] The district court was unconvinced by Frame's argument, granting summary judgement in favor of the government with an award of $66,625.11.[100] Frame appealed that judgment.[101]

On appeal, Frame advanced multiple arguments against the constitutionality of the Act. Frame's first argument was that the checkoff violated his right to freedom of association.[102] The court responded that "'freedom of association,' while protecting the rights of citizens to engage in 'expressive' or 'intimate' association, does not protect every form of association."[103] The opinion stated that the beef checkoff was not expressive because there is no "compulsion … to declare a belief," and it also did not involve any sort of intimate human relationship.[104] The court held that the Act "required [Frame] to 'associate' with the Beef Promotion Program no more than any taxpayer is required to associate with armed forces advertisements, Social Security, or the Voice of America."[105]

Frame then argued that the checkoff is a form of government speech that implicates his right to silence. The court addressed this challenge by first explaining that government speech is not necessarily prohibited by the First Amendment.[106] They stated that the government speaks on behalf of unapproving citizens frequently through activities such as airing anti-tobacco advertisements or encouraging enlistment in the military.[107] But even if government speech was unconstitutional, the Beef Promotion Act cannot be considered as such.[108] They explained that the Cattlemen's Board is largely self-regulated, with board members consisting of private individuals, not government officials, and that it is more of a "self-help program for the beef industry" with only attenuated ties to the government.[109]

Next, the Act was challenged as unconstitutionally compelled commercial speech. To test this assertion, the court applied the *Central Hudson* test, which holds that commercial speech backed by the government is constitutional when (1) the

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[99] *Id.*
[100] *Id.*
[101] United States v. Frame, 885 F.2d 1119, 1125 (3rd Cir. 1989).
[102] *Id.* at 1131.
[103] *Id.* at 1131.
[104] *Id.* at 1130–31. *See also* Dallas v. Stanglin, 490 U.S. 19 (1989).
[105] United States v. Frame, 885 F.2d 1119, 1130 (3rd Cir. 1989).
[106] *Id.* at 1132.
[107] *Id.* at 1146.
[108] *Id.* at 1131.
[109] *Id.*

state has a "substantial government interest"; (2) "the regulatory technique [is] in proportion to that interest"; and (3) the government's invasion of that speech is "designed carefully to achieve the State's goal."[110] The court had no issue finding that the government's interest in "preventing further decay of an already deteriorating beef industry" was sufficiently substantial and that the mandatory assessments were well proportioned to that interest, given the importance of a stable meat supply.[111] Finally, the court found the Act to survive the third prong of the test because of the government's minimal involvement and because the checkoff costs the taxpayer virtually nothing.[112] In sum, Frame was unable to convince the court that the beef checkoff invaded his First Ammendment rights, despite his numerous arguments.[113]

The *Frame* decision, though, was only an appellate decision and it was nowhere close to the final word on checkoff program constitutionality. The next big step in the checkoff constitutionality analysis occurred in 1997, when a case conflicting with *Frame* made its way to the U.S. Supreme Court. *Glickman v. Wileman Bros. & Elliott* arose out of a USDA-formed marketing order for California-grown nectarines, plums, peaches and pears.[114] The respondent, Wileman Brothers & Elliott, Inc., was both a producer and distributor of these "California Summer Fruits" and objected that the compulsory assessments, which funded generic advertising, were unconstitutional through arguments similar to that in *Frame*.[115] The Ninth Circuit ruled that the assessments were, in fact, unconstitutional.[116] In applying the same *Central Hudson* test used in *Frame*, the Court claimed that the second and third prongs of the test were not met, largely because the government did not prove that generic advertising would be more effective in satisfying the government's interest better than "individualized advertising."[117] Because this ruling was in direct conflict with the Third Circuit's ruling in *Frame*, the Supreme Court wished to resolve the conflict.[118]

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[110] *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

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

[112] *Id.* at 1135.

[113] *Id.* at 1136.

[114] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 463 (1997).

[115] *Id.*

[116] *Id.* at 465–66.

[117] *Id.* at 466.

[118] *Id.* at 466–67.

Justice Stevens, writing for the majority, framed the question as "whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve."[119] In answering this question, he outlined a three-factor test to determine if the checkoff could be considered compelled speech. [120] These three factors were: "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views."[121] The growers asserted that even if the checkoff were not "compelled speech," it was certainly compelled financial support for speech that they did not agree with.[122] The Court cited to *Abood v. Detroit Board of Education*, in which the Court found that compelled contributions by union members for the union's political endeavors violated the First Amendment because, ". . . in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[123] The Court distinguished the cases, however, on the basis that the checkoff could not possibly cause a conflict with the grower's conscience simply because they feel that they could do a better job of marketing independently than collectively.[124] Simply put, the Court said that "[t]he mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'"[125] Thus, the "California Summer Fruits" checkoff lived on.[126]

Only four terms after *Glickman* was decided, the Supreme Court found itself evaluating yet another checkoff program for First Amendment issues. This time the issue was the Mushroom Promotion, Research, and Consumer Information Act, which instituted mandatory assessments on fresh mushrooms for its advertising campaign.[127] In *United States v. United Foods, Inc.*,

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[119] *Id.* at 468.
[120] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 469–70 (1997).
[121] *Id.* at 469–70.
[122] *Id.* at 471.
[123] Abood v. Detroit Bd. Of Educ., 431 U.S. 209, 234–35 (1977).
[124] *Glickman*, 521 U.S. at 472.
[125] *Id.* (quoting Ellis v. Ry. Clerks, 466 U.S. 435, 456 (1984)).
[126] *Id.* at 473.
[127] Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq*.

respondent, United Foods, Inc. was a large mushroom enterprise who refused to pay the assessments.[128] United Foods argued that the mushroom checkoff should dictate a different outcome than the previous checkoff cases because, although the act stated that the assessments would fund "projects for mushroom promotion, research, consumer information, and industry information," the funds impermissibly went almost entirely to generic advertising.[129] The Court made much of this distinction, stating that the advertising campaign was "for all practical purposes. . . the principal object of the regulatory scheme" created by the Act, whereas previously evaluated advertising campaigns were only ancillary to a larger marketing program.[130] Because the ads were not "part of a far broader regulatory system that does not principally concern speech," the assessments were ruled unconstitutional under the First Amendment.[131]

United Foods was the first major blow to checkoff programs, but not a total knockout. The Mushroom Council continued its mandatory assessments for non-promotional efforts and began collecting voluntary assessments for advertising.[132] However, the *United Foods* ruling left a sense of unease throughout other checkoffs that would lead to the most recently decided case on checkoff constitutionality, *Johanns v. Livestock Mktg. Ass'n.*[133]

The respondents in *Johanns*, like those in *Frame*, took aim at the massive beef checkoff program on First Amendment grounds, stating that the program was too similar to the mushroom program in *United Foods*.[134] Furthermore, the respondents contended that the checkoff thwarted efforts by individual producers to differentiate their beef from that of others.[135] Cattlemen producing certified Hereford or Angus beef, the respondents argued, should not have to fund a campaign promoting generic beef sales, thereby undermining their own profitability.[136] The government defended the advertising as government speech which, they argued, is immune to First

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[128] United States v. United Foods, Inc., 533 U.S. 405, 408–09 (2001).

[129] *Id.*

[130] *Id.* at 411–12.

[131] *Id.* at 415–16.

[132] Emily Buckles, Comment, *Food Fights in the Courts: The Odd Combination of Agriculture and First Amendment Rights*, 43 HOUS. L. REV. 415, 423 (2006).

[133] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 550 (2005).

[134] *Id.* at 555–56.

[135] *Id.* at 556.

[136] *Id.*

Amendment restrictions.[137] Therefore, the Court was presented with the challenge of whether the First Amendment prohibits compelled subsidization of the government's own speech.[138]

The respondents rebutted the idea that the ad campaign was government speech on two grounds.[139] First, they claimed that the ads were not government speech because they were largely controlled by the Beef Board, a non-governmental organization.[140] Second, they argued that it differed from government speech because the funding is provided by beef producers and not by general tax revenue.[141] On review of the first argument, the Court found that the government influence on the board was too great to ignore.[142] After all, the checkoff itself was a directive from Congress through the Beef Act.[143] Furthermore, the Secretary of Agriculture has indirect control of the Board's work through his authority to dismiss board members.[144] Finally, the Court noted that every word of advertising released by the board was subject to the Secretary's approval.[145] Essentially, the Court found that the activities of the Beef Board were sufficiently governmental to overcome the respondent's first challenge.

Respondents' second argument, regarding how the checkoff is funded, was based on two factors: the program was not supervised by directly accountable officials, such as legislators, and the collective advertising was billed as a production by "America's Beef Producers."[146] The Court made short work of the idea that there were no political safeguards in the program. The fact that the Secretary of Agriculture, an official with rather direct political accountability, held such control over the checkoff, combined with Congress's ability to reform the program at will, was sufficient protection from the "narrow interest group" influence the Respondents worried about.[147]

The Respondents next argued that the ads could not possibly be government speech because the ad is credited to

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[137] *Id.*
[138] *Id.* at 557.
[139] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005).
[140] *Id.* at 560.
[141] *Id.* at 562.
[142] *Id.* at 560–62.
[143] *Id.* at 554.
[144] *Id.* at 560.
[145] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 561 (2005).
[146] *Id.* at 562.
[147] *Id.* at 563–64.

"America's Beef Producers," not the USDA, the Secretary of Agriculture, or the like.[148] How could the government be "speaking" through the ad, they argued, if the speech is attributed to beef producers?[149] To answer this question, the Court looked to the text of the Beef Act itself. The Court found that because the Act did not include any sort of attribution requirements, such attributions could not be considered in a facial challenge of the bill.[150]

A significant question went unanswered by the Court when Respondents argued that, by attributing the speech to "America's Beef Producers," the government implied its endorsement of the ad's content.[151] While the Court had to pass upon analyzing the compelled endorsement on a facial challenge due to the lack of attributional requirements in the bill, it seemed to invite future litigation through as-applied challenges.[152] The Respondents did not advance an as-applied challenge, so the Court was without authority to make any ruling on such a challenge.[153] The Court stated that if a party could prove that an individual advertisement were attributed to them, they could have a valid claim.[154]

The Court gave even more guidance to future parties by noting that certain beef producer organizations may have success in litigation.[155] The dissent drew an analogy to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* a case in which Massachusetts ordered a veterans organization to allow a gay rights group to participate in their public parade.[156] The *Hurley* Court unanimously found Massachusetts's order to violate the veteran groups' First Amendment rights.[157] In relevant part, the Court stated that the order "violate[d] the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say."[158] The Court inferred that an individual beef producer or an independent, non-governmental group, such as the National

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[148] *Id.* at 564.
[149] *Id.*
[150] *Id.* at 564–65.
[151] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564 (2005).
[152] *See id.* at 565.
[153] *Id.* at 565–67.
[154] *See id.* at 565.
[155] *See id.* at 573 (Souter, J., dissenting).
[156] *See id.* at 575 (Souter, J., dissenting).
[157] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 559 (1995).
[158] *Id.* at 558.

Farmers Association or the National Farmers Union,[159] could plausibly obtain a First Amendment violation ruling if they had sufficient facts to support the contention that the advertisement was speaking for them. Interestingly, that inference was affirmed in *Charter v. U.S. Dep't of Agriculture* that very same year.[160] In *Charter*, the appellants claimed that because they were not members of the National Cattlemen's Board Association (the contractor publishing the beef checkoff ads), the ad's attribution to "America's Cattle Producers" improperly implied their approval of the message personally.[161] The trial court granted judgement to the USDA, believing that the speech was government speech, as outlined in *Johanns*.[162] However, the appellate court made note of the as-applied question and found that "[u]nlike in *Johanns*, the record in this case is not 'altogether silent' on whether the individual appellants who are beef producers would be associated with the speech to which they object."[163] The court found the record to contain sufficient facts for the appellant to plausibly be successful in litigation, so the district court's decision was vacated and remanded.[164]

C. Hemp Checkoff Analysis

The constitutionality of checkoff programs has remained relatively undisturbed since the aforementioned cases, and because the law is somewhat settled at the present time, a hemp checkoff program can now be built upon a firm legal foundation.[165] The creation of a hemp checkoff would not be an exercise in futility,

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[159] *See generally Who We Are*, NAT'L FARMERS ORG. (2021), https://www.nationalfarmers.com/about/; *About NFU*, NAT'L FARMERS UNION (2021), https://nfu.org/about/ [https://perma.cc/Y36R-MJ5S] (showing that both organizations are independent organizations of ranchers and farmers, including beef producers).

[160] *See* Charter v. U.S. Dep't of Agric., 412 F.3d 1017, 1019–20 (9th Cir. 2005).

[161] *Id.* ("For example, Jeanne Charter, one of the appellants, declared in an affidavit: 'The checkoff [program] results in our being associated against our will with positions both political and economic, from the National Cattlemen's Beef Association (NCBA), the primary checkoff contractor. The NCBA routinely, before Congress, and in other public ways and in press announcements, states that it is the trade organization and marketing organization of America's one million cattle producers. We are not members of the NCBA, yet as cattle producers, we are associated with their messages.'").

[162] *Id.* at 1019.

[163] *Id.*

[164] *Id.* at 1020

[165] *See e.g., Hemp Checkoff*, NAT'L INDUS. HEMP COUNCIL (2021), https://hempindustrial.com/hemp-checkoff/ [https://perma.cc/CC4L-LC9F].

either legally or commercially.[166] Checkoffs have proven to be an effective way to stimulate the market for commodities for decades.[167] As an investment, checkoffs have proven to pay for themselves many times over through the resulting demand.[168] For purposes of publicity, one could argue there is no better method to generate a household name for a product.

However, there will always be resistance when the government asks someone to part with their money. While every lawyer and policymaker in the country could support a hemp checkoff program, without growers' consent, it cannot happen. Research into hemp checkoff programs did not reveal any studies conducted to show whether hemp growers are supportive of a theoretical checkoff and as such, this Article makes no inferences regarding that point. Nonetheless, the past success of checkoff programs warrants such an inquiry.

Finally, this analysis would not be complete without addressing the application of *Janus v. AFSCME, Council 31*, a recent Supreme Court case that upended much of the country's law on government-related speech restrictions.[169] The case was brought by Mark Janus, a state government employee in Illinois.[170] Under the Illinois Public Labor Relations Act ("IPLRA"), employers who work in a union-affiliated workplace must either join the union or, if they decline to join, must pay an "agency fee."[171] This fee was designed to cover the cost of union activities, which benefited all workers since the union was the sole representative for employees of unionized workplaces, regardless of their membership status.[172] These activities included collective bargaining efforts, lobbying, advertising, litigation, membership activities, and the like.[173] The agency fee relevant to this case was 78.06 percent of the dues assessed to union members.[174]

The state workers in Illinois elected to unionize, therefore requiring Janus, an employee of the Illinois Department of Healthcare and Family Services, to either join the American

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[166] *Id.*

[167] *See* Kaiser, *supra* note 13.

[168] *Id.*

[169] Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[170] *Id.* at 2461.

[171] *Id.* at 2460.

[172] *Id.* at 2460–61.

[173] *Id.* at 2461.

[174] *Id.*

Federation of State, County, and Municipal Employees, Council 31 or pay an agency fee of $535 per annum.[175] Janus did not wish to join the Union but also did not wish to pay an agency fee because he disagreed with many of the Union's stances.[176] Particularly, he believed that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens."[177] In his complaint, Janus claimed that all "nonmember fee deductions are coerced political speech" and such fees violate the First Amendment.[178]

The Court agreed with Janus, holding that neither state governments nor public-sector unions can require employees to pay agency fees if they do not consent.[179] Forcing non-members to sponsor the work of the Union, the Court reasoned, is a serious impingement on First Amendment rights that cannot be justified under any level of scrutiny.[180] The ruling contradicted precedent, primarily *Abood*, which found agency-fee agreements to be permissible because of the State's interest in "labor peace" and preventing "free riders."[181] The Court dismissed *Abood's* focus as unpersuasive, given that multiple public employers had since done away with agency fees without any breach of labor peace.[182] Additionally, the Court seemed to agree with Janus's argument that "he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[183] The impingement on unwilling employees' First Amendment rights, the Court found, was too great to justify the minimal state interest in preventing free riders.[184] Due to this faulty reasoning, the Court overruled *Abood*, and found agency fees to be a violation of public employees' First Amendment rights.[185]

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[175] *Janus*, 138 S. Ct. at 2461.
[176] *Id.*
[177] *Id.*
[178] *Id.* at 2462.
[179] *Id.* at 2486.
[180] *Id.* at 2464.
[181] *Janus*, 138 S. Ct. at 2465–69; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).
[182] *Janus*, 138 S. Ct. at 2466.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 2486.

While *Janus* has certainly thrown a wrench into the mechanisms of our First Amendment jurisprudence, it is unlikely to affect the ability of checkoff programs to collect assessments from unwilling farmers and ranchers. A key difference between the facts of *Janus* and those surrounding checkoff programs is the party speaking on behalf of the unwilling party. *Janus* was a case involving public employees being forced to subsidize a private union, whereas checkoffs require producers to subsidize government speech. Despite this difference not being specifically addressed in *Janus*, the limiting language used in the case indicates that it should be interpreted rather narrowly. To extend *Janus's* reasoning to checkoff programs would have massive implications on the government's ability to function. Checkoffs are a form of government speech similar to anti-tobacco advertisements, military recruitment efforts and a number of other governmental efforts.[186] Under an interpretation of *Janus* that prohibits the government to speak on behalf of agricultural producers via checkoffs, the Court would likewise have to strike down a multitude of other instances of government speech, such as those mentioned in *Frame*. The government must be free to speak in order to achieve its purposes and that necessarily results in taxpayer disagreement. *Janus* may be interpreted to prevent a government from requiring assessments for agricultural advocacy groups, but it cannot be interpreted to prohibit mandatory assessments for governmental checkoff programs without fundamentally changing our entire government.

CONCLUSION

Checkoff programs have stood up to legal challenges at the highest level several times over. Although the past is not a perfect predictor of the future, the power of *stare decisis* builds a strong legal foundation for a hemp checkoff program. Inaction is not an option if hemp growers want the industry to succeed. A hemp checkoff cannot solve every market issue. As any beef or grain producer will tell you, the only constant thing in agricultural markets is change. However, a checkoff program will give growers the publicity they need to build customer demand, and it will do so in a way that no private efforts could. Just as we "reached back" and brought hemp into the twenty-first century, let us also take a

[186] United States v. Frame, 885 F.2d 1119, 1131 (3rd Cir. 1989).

lesson from the history of checkoff programs and implement this tried and true invention.