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JUL 22 2003

CLERK, U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CLOSED
JUL 22 2003

R.J. REYNOLDS TOBACCO COMPANY;
R.J. REYNOLDS SMOKE SHOP, INC.;
and LORILLARD TOBACCO COMPANY,

NO. CIV. S-03-659 LKK/GGH

Plaintiffs,

v.

O R D E R

DIANA M. BONTA, Director of the
California Department of Health
Services; and DILEEP G. BAL,
Acting Chief of the Tobacco
Control Section of the California
Department of Health Services,

TO BE PUBLISHED

Defendants.

Two tobacco companies bring suit against officials of California's Department of Health Services. They challenge the state's anti-tobacco advertisements, which are funded through a special surtax on wholesale tobacco sales. The tobacco companies claim that the surtax forces them to fund ads with which they disagree, and that this violates their right to free speech under the First Amendment. They also complain that the

1 ads interfere with their right to trial by jury under the
2 Seventh Amendment and unfairly stigmatize them in violation of
3 the Due Process Clause of the Fourteenth Amendment.

4 The tobacco companies have moved for a preliminary
5 injunction and the state has moved to dismiss the complaint. I
6 decide the matter on the basis of the papers and pleadings filed
7 herein, and after oral argument.¹

8 I.

9 BACKGROUND²

10 A. PROPOSITION 99: THE TOBACCO TAX AND HEALTH PROTECTION ACT

11 In 1988, the voters of California approved Proposition 99,
12 a statewide ballot initiative also known as the "Tobacco Tax and
13 Health Protection Act of 1988" ("the Act").³ Cal. Rev. & Tax

14
15 ¹ In addition to unusually extensive and competent briefing
16 by the parties, the court has also had the benefit of briefing
17 by the amici American Cancer Society, American Heart Association
18 and American Lung Association.

19 ² Because this case is before the court on defendants' motion
20 to dismiss, the factual summary assumes the truth of all of the
21 allegations set forth in plaintiffs' First Amended Complaint. I
22 do not here consider the factual showing required for obtaining
23 injunctive relief, since "the irreducible minimum" for such relief
24 is "a fair chance of success on the merits." Benda v. Grand Lodge
25 of Int'l Machinists, 584 F.2d 308, 314 (9th Cir. 1978). Thus, if
26 the motion to dismiss prevails, the court will have no occasion
to consider the plaintiffs' motion. I have, however, on occasion
considered the contents of affidavits filed in support of
plaintiffs' motion, where they tender details concerning the facts
alleged in the complaint.

³ See generally Michael P. Traynor and Stanton A. Glantz,
California's Tobacco Tax Initiative: The Development and Passage
of Proposition 99, 21 J. Health Pol'y & L. 543 (1996); Edith D.
Balbach, et al., *The Implementation of California's Tobacco Tax*
Initiative: The Critical Role of Outsider Strategies in Protecting
Proposition 99, 25 J. Health Pol'y & L. 689 (2000). The history

1 Code §§ 30121-30130. The Act imposes a \$0.25 per-pack surtax on
2 all wholesale cigarette sales in California known as the
3 Cigarette and Tobacco Products Surtax ("the Surtax").

4 1. The Cigarette and Tobacco Products Surtax

5 The revenue collected by the Surtax is placed in the
6 "Cigarette and Tobacco Products Surtax Fund" and may be
7 appropriated only for the following purposes: (1) tobacco-
8 related school and community health education programs; (2)
9 tobacco-related disease research; (3) medical care for patients
10 who cannot afford to pay and who lack health insurance; and (4)
11 programs for fire prevention and environmental conservation.

12 Id., § 30122(a). In accordance with these purposes, taxes
13 deposited into the Surtax Fund are allocated, according to
14 specified percentages, among six separate accounts: Health
15 Education (20%), Hospital Services (35%), Physician Services
16 (10%), Research (5%), Public Resources (5%), and an Unallocated
17 Account (25%), which may be made available for any of the four
18 purposes specified above. Id., § 30124(b)(1). The tobacco
19 advertising program at issue in this case is funded through a
20 portion of the Health Education Account, which "shall only be
21 available for the prevention and reduction of tobacco use,
22 primarily among children, through school and community health
23 programs." Id., § 30122(b)(1).

24 _____
25 of Proposition 99 has been one of intense legislative and legal
26 conflict. See, e.g., American Lung Ass'n, 51 Cal.App.4th 743 (Cal.
Ct. App. 1996); Kennedy Wholesale, Inc. v. State Bd. of
Equalization, 53 Cal.3d 245 (Cal. 1991).

1 2. The Tobacco Control Program

2 In 1999, the Legislature adopted implementing legislation.
3 Cal. Health & Safety Code §§ 104350-104485. In conjunction
4 therewith, the Legislature made findings that smoking is
5 detrimental to the health of Californians, that it results in
6 huge costs to the state, and that prevention is the best means
7 of addressing these concerns.⁴ The Legislature also determined
8 that tobacco use prevention and cessation is "the highest
9 priority in disease prevention for the State of California" and
10 made a commitment to "play a leading role in promoting a smoke-
11 free society by the year 2000" Id., § 104350(a)(9),
12 (10).⁵

13 _____
14 ⁴ The legislature specifically found that:

15 Smoking is the single most important source of
16 preventable disease and premature death in California.

17 Tobacco-related disease places a tremendous financial
18 burden upon persons with the disease, their families,
19 the health care delivery system, and society as a
20 whole. California spends five billion six hundred
21 million dollars (\$5,600,000,000) a year in direct and
22 indirect costs on smoking-related illnesses.

23 The elimination of smoking is the number one weapon
24 against four of the five leading causes of death in
25 California.

26 Id. § 104350(a)(1), (7) & (8).

⁵ While California is certainly not "smoke-free," there is
substantial evidence, including published medical studies,
indicating that the Proposition 99 programs, and the media campaign
in particular, have been successful in achieving their goals. See
C. Fichtenberg and S. Glantz, *Association of the California Tobacco
Control Program with Declines in Cigarette Consumption and
Mortality from Heart Disease*, New England Journal of Medicine
343:24, 1772-1777 (2000); M. Siegel, *Mass Media Antismoking*

1 The Legislature directed the Department of Health Services
2 to establish "a program on tobacco use and health to reduce
3 tobacco use in California by conducting health education
4 interventions and behavior change programs at the state level,
5 in the community, and other nonschool settings." Id.,
6 § 104375(a). Pursuant to this program, known as the Tobacco
7 Control Program, the Department is required, inter alia, to
8 develop a media campaign directed to raising public awareness of
9 the deleterious effects of smoking and to effect a reduction in
10 tobacco use. Id., §§ 104375(b), (c), (e)(1) & (j); 104385(a);
11 104400.

12 Approximately two-thirds of the funds in the Health
13 Education Account are allocated to the Department of Health
14 Services for tobacco control activities. Plaintiffs allege that
15 the state spends approximately \$25 million annually on the
16 challenged advertisements. Complaint at ¶ 22.

17 **B. THE CHALLENGED ADVERTISEMENTS**

18 California's anti-tobacco media campaign consists of radio,
19 television, billboard and print advertising. Complaint at ¶ 14.
20 According to plaintiffs, the ads consistently portray smoking as
21 dangerous and undesirable and the tobacco industry and its
22 executives as deceptive. Id. at ¶¶ 17, 19. In several of the
23 television ads, actors playing tobacco executives are shown

24
25 Campaigns: A Powerful Tool for Health Promotion, *Annals of Internal*
26 *Medicine*, 129:2, 128-132 (1998); J.P. Pierce, et al, *Has the*
California Tobacco Control Program reduced smoking?, *Journal of the*
American Medical Ass'n, 280:10, 893-899.

1 discussing how to lure more people into smoking or are portrayed
2 as being elusive about smoking's health effects. See
3 Declaration of Todd Thompson ("Thompson Decl."), Exh. L. These
4 ads do not contain disclaimers explaining that the people shown
5 are actors rather than actual tobacco company employees.
6 Complaint at ¶ 18.

7 A recent round of television commercials features an actor
8 playing a public relations executive for the fictional cigarette
9 brand "Hampton," detailing for viewers his unseemly methods for
10 getting people to start smoking. Thompson Decl., Exh. L. The
11 ads end with the tagline, "Do You Smell Smoke?," id., implicitly
12 referencing both cigarette smoke and a smoke-and-mirrors
13 marketing strategy. Another ad portrays tobacco executives
14 discussing how to replace a customer base that is dying at the
15 rate of 1,100 users a day. Id. Some of the ads end with images
16 of mock warning labels such as: "WARNING: The tobacco industry
17 is not your friend.;" or "WARNING: Some people will say anything
18 to sell cigarettes." Id.

19 Several spots suggest that tobacco companies aggressively
20 market to children. Id. In one particularly striking
21 television ad entitled "Rain," children in a schoolyard are
22 shown looking up while cigarettes rain down on them from the
23 sky. Complaint at ¶ 19. A voice-over states "We have to sell
24 cigarettes to your kids. We need half a million new smokers a
25 year just to stay in business. So we advertise near schools, at
26 candy counters. We lower our prices. We have to. It's nothing

1 personal. You understand." Thompson Decl., Exhibit L. At the
2 conclusion, the narrator says, "The tobacco industry: how low
3 will they go to make a profit?" Id.

4 Each of the challenged advertisements is identified as
5 "Sponsored by the California Department of Health Services." Id.

6 **C. THE PARTIES**

7 Plaintiffs are R.J. Reynolds Tobacco Company, its
8 subsidiary, R.J. Reynolds Smoke Shop, Inc., and Lorillard
9 Tobacco Company. Both R.J. Reynolds and Lorillard manufacture
10 and sell cigarettes in California. All three corporations have
11 their principal place of business in North Carolina and are
12 incorporated in Delaware.

13 Lorillard and R.J. Reynolds allege that their business in
14 California requires them to pay the Cigarette and Tobacco
15 Products Surtax; R.J. Reynolds does not pay the Surtax directly
16 but pays it through the Smoke Shop subsidiary. Because the
17 Surtax is imposed on "distributors" of cigarettes, most Surtax
18 payments are not made by the cigarette manufacturers themselves,
19 but by cigarette wholesalers. Because plaintiffs also sell or
20 provide small quantities of cigarettes directly to smokers in
21 California, however, they claim that they have and will in the
22 future be required to pay the Surtax. See Declaration of Steven
23 F. Gentry ("Gentry Decl.") ¶¶ 2, 4. Plaintiffs state that their
24 combined payments of the Tobacco Products Surtax in 2002 were in
25 excess of \$14,000. Gentry Decl. ¶ 4. Thus, plaintiffs allege
26 that they collectively contributed approximately \$2,800 of the

1 \$25 million spent on the challenged ads.

2 The defendants are Diana M. Bonta, Director of the
3 California Department of Health Services, and Dileep G. Bal,
4 Acting Chief of the Tobacco Control Section of DHS. The
5 Complaint alleges that "Bonta is the highest-ranking official of
6 DHS and, accordingly, is ultimately responsible for the
7 advertising challenged in this action." Complaint at 2, ¶ 4.
8 Defendant "Bal is directly responsible for the design, approval
9 and distribution of the advertising challenged in this action."
10 Id. at 2, ¶ 5.

11 **D. PLAINTIFFS' ALLEGATIONS**

12 Plaintiffs bring five causes of action. First, they allege
13 that the use of the Surtax for funding anti-industry ads
14 violates the right of free speech secured to them by the First
15 Amendment. Second, they allege an identical claim under the
16 free speech clause of Article I, section 2 of the California
17 Constitution. Third, plaintiffs allege that the "anti-industry"
18 ads stigmatize them, publicly disparage their reputation and
19 character, and prejudice potential jurors with respect to the
20 facts that underlie the sort of civil lawsuits that are
21 frequently brought against them in California. They allege that
22 the distribution of the advertisements thus constitutes a denial
23 of due process, in that the state has publicly stigmatized them
24 and denied them the right to a fair and impartial jury in
25 California, in violation of both the Fourteenth and Seventh
26 Amendments. Fourth, plaintiffs allege that the distribution of

1 the program's anti-industry ads constitutes a denial of their
2 right to a fair and impartial jury under the Seventh Amendment.
3 Fifth, plaintiffs bring a claim for declaratory relief, seeking
4 a judicial declaration that the distribution of the anti-
5 industry ads violates their constitutional rights because it (1)
6 constitutes compelled speech with which they disagree; (2)
7 constitutes disparaging speech which was published without
8 affording them prior notice and hearing; and (3) has the
9 potential to prejudice current and future California jurors with
10 respect to matters at issue in pending litigation. Plaintiffs
11 also seek an injunction barring defendants from using funds
12 raised by the Surtax to distribute any advertising that
13 "attacks, ridicules, vilifies, or otherwise criticizes or
14 comments negatively upon the conduct or speech of the 'tobacco
15 industry,' or of Plaintiffs." Complaint at 14 ¶ 1.

16 II.

17 STANDARDS UNDER FED. R. CIV. P. 12(b)(6)

18 On a motion to dismiss, the allegations of the complaint
19 must be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322
20 (1972). The court is bound to give the plaintiff the benefit of
21 every reasonable inference to be drawn from the "well-pleaded"
22 allegations of the complaint. See Retail Clerks Intern. Ass'n,
23 Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n. 6
24 (1963). Thus, the plaintiff need not necessarily plead a
25 particular fact if that fact is a reasonable inference from
26 facts properly alleged. See id.; see also Wheeldin v. Wheeler,

1 373 U.S. 647, 648 (1963) (inferring fact from allegations of
2 complaint).

3 In general, the complaint is construed favorably to the
4 pleader. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). So
5 construed, the court may not dismiss the complaint for failure
6 to state a claim unless it appears beyond doubt that the
7 plaintiff can prove no set of facts in support of the claim
8 which would entitle him or her to relief. See Hishon v. King &
9 Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355
10 U.S. 41, 45-46 (1957)). In spite of the deference the court is
11 bound to pay to the plaintiff's allegations, however, it is not
12 proper for the court to assume that "the [plaintiff] can prove
13 facts which [he or she] has not alleged, or that the defendants
14 have violated the . . . laws in ways that have not been
15 alleged." Associated General Contractors of California, Inc. v.
16 California State Council of Carpenters, 459 U.S. 519, 526
17 (1983).

18 III.

19 STANDING

20 The defendants' first defense is that the plaintiffs lack
21 standing. As I now explain, plaintiffs' constitutional claims
22 are such that this suit comes close to being "in the class of
23 those cases where standing and the merits are inextricably
24 intertwined." City of Revere v. Massachusetts General Hospital,
25 463 U.S. 239, 243 n.5 (1983).

26 ////

1 "[T]o satisfy Article III's standing requirements, a
2 plaintiff must show (1) it has suffered an 'injury in fact' that
3 is (a) concrete and particularized and (b) actual or imminent,
4 not conjectural or hypothetical; (2) the injury is fairly
5 traceable to the challenged action of the defendant; and (3) it
6 is likely, as opposed to merely speculative, that the injury
7 will be redressed by a favorable decision." Friends of Earth,
8 Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 180-181
9 (2000). These requirements together constitute the "irreducible
10 constitutional minimum" of standing. Lujan v. Defenders of
11 Wildlife, 504 U.S. 555, 560, (1992). The party invoking federal
12 jurisdiction bears the burden of establishing these elements.
13 See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). "At the
14 pleading stage, general factual allegations of injury resulting
15 from the defendant's conduct may suffice, for on a motion to
16 dismiss we presume that general allegations embrace those
17 specific facts that are necessary to support the claim." Lujan,
18 504 U.S. at 561 (internal citations and quotation marks
19 omitted).

20 **E. INJURY-IN-FACT**

21 Plaintiffs claim they are injured because they are
22 compelled to fund speech with which they disagree and because
23 the airing of the challenged advertisements injures their
24 reputation. Defendants contend that plaintiffs lack the
25 requisite injury because their stake as taxpayers is too
26 generalized and indirect to confer standing and because the

1 compelled-speech claim fails as a matter of law. Defendants
2 also argue that plaintiffs cannot premise standing on alleged
3 reputational injury because any such injury is not sufficiently
4 individualized.

5 Generally, suits premised solely on state or federal
6 taxpayer status are not cognizable in the federal courts because
7 a taxpayer's "interest in the moneys of the Treasury . . . is
8 shared with millions of others, is comparatively minute and
9 indeterminable; and the effect upon future taxation, of any
10 payments out of the funds, so remote, fluctuating and uncertain,
11 that no basis is afforded for [judicial intervention.]" ASARCO,
12 Inc. v. Kadish, 490 U.S. 605, 613 (1989) (quoting Frothingham v.
13 Mellon, 262 U.S. 447, 487 (1923)). The Supreme Court, however,
14 has indicated that standing may exist where the "peculiar
15 relation" of the taxpayer and the taxing entity or program makes
16 the taxpayer's interest in the application of revenues "direct
17 and immediate." Id.

18 In the matter-at-bar, it appears that plaintiffs have such
19 a "direct and immediate" interest. The Surtax in question is
20 levied only on tobacco wholesalers and manufacturers, for
21 purposes directly related to their business, so that the
22 interest at issue is not "shared with millions of others." Both
23 the Supreme Court and the Ninth Circuit have indicated that
24 standing is proper where, as here, a tax is challenged by
25 members of a small, discrete group on whom the tax is imposed.
26 See Bacchus Imports v. Dias, 468 U.S. 263, 267 (1984) (liquor

1 wholesalers had standing to challenge constitutionality of
2 liquor excise tax); United States v. Butler, 297 U.S. 1, 61
3 (1963) (farmers had standing to challenge agricultural
4 processing taxes); ACF Indus., Inc. v. California State Bd. of
5 Equalization, 42 F.3d 1286, 1291 (9th Cir. 1994) (holding that
6 where a state "directly assesses [plaintiffs] with the
7 challenged tax . . . the standing issue is not complex.").⁶

8 The plaintiffs, however, are not challenging the tax itself
9 but the government's use of tax dollars. The question is
10 whether the distinction makes a difference; I conclude that it
11 does not. Standing in the present context turns on whether the
12 plaintiffs are members of a small, discrete group on whom the
13 tax is imposed and whether the tax is put to uses directly
14 affecting the plaintiffs. Under this standard, there appears to
15 be no meaningful distinction between attacking the lawfulness of
16 collecting the tax, as contrasted with the lawfulness of the use
17 to which the tax is put. As I now explain, the issue here is
18 similar to taxpayer standing in another First Amendment context.

19 In Establishment Clause cases, rather than requiring a
20 "direct injury," courts require a plaintiff to demonstrate a
21 logical link between his taxpayer status and the challenged
22

23 ⁶ The Tax Injunction Act, 28 U.S.C. § 1343, which creates a
24 jurisdictional bar to cases in federal court that seek to enjoin
25 or restrain the collection of taxes under state law, is
26 inapplicable here because plaintiffs seek only to enjoin anti-
tobacco advertising funded by the tobacco Surtax, not the
collection of the Surtax itself. See Hoochuli v. Ariyoshi, 741 F.2d
1169, 1177 (9th Cir. 1984).

1 legislative enactment, and a nexus between his taxpayer status
2 and the precise nature of the alleged constitutional
3 infringement. Flast v. Cohen, 392 U.S. 83, 102-03 (1968); see
4 also Doe v. Madison Sch. Dist., 177 F.3d 789 (9th Cir. 1999) (to
5 challenge the constitutionality of a state statute on the basis
6 of the Establishment Clause, a party must show that "tax
7 revenues are expended on the disputed practice."). In Flast,
8 the decision rested in part on the fact that the Establishment
9 Clause is a specific limit on the power of Congress to tax and
10 spend. 392 U.S. at 104.⁷ If plaintiffs' theory on the merits of
11 their First Amendment claim is correct - i.e. that the Abood
12 line of compelled expressive association cases may be extended
13 to cover tax-funded government speech - then it would appear to
14 follow that the Free Speech Clause would also satisfy Flast,
15 since in that limited context the Free Speech Clause would also
16 operate as a limit on the state's power to tax and spend.

17 Similarly, plaintiff's alleged reputational injuries, on
18 which their Seventh Amendment and Due Process claims depend, are
19 not as generalized as defendants contend. In arguing to the
20 contrary, defendants rely on Allen v. Wright, 468 U.S. 737
21 (1984), a case in which the Supreme Court held that the alleged
22 harm of racial stigmatization was not sufficiently
23 individualized to confer standing on parents of black children

24
25 ⁷ The Court has never declared that the Establishment Clause
26 is the only constitutional provision that satisfies the Flast test
for taxpayer standing; it has, however, never found any other
constitutional provision that satisfies the test.

1 attending public schools who challenged IRS policies regarding
2 the tax-exempt status of racially-discriminatory private
3 schools. The Court explained that "[i]f the abstract stigmatic
4 injury were cognizable, standing would extend nationwide to all
5 members of the particular racial groups against which the
6 Government was alleged to be discriminating by its grant of a
7 tax exemption to a racially discriminatory school, regardless of
8 the location of that school." Id. at 755-56 (internal citations
9 and quotation marks omitted). Whatever the strength of Allen's
10 logic,⁸ the situation here is entirely different. The stigma
11 and reputational harm allegedly caused by the challenged
12 advertisements affects only tobacco wholesalers and a handful of
13 large tobacco manufacturers that sell their cigarettes to
14 Californians. Thus, plaintiffs have sufficiently alleged
15 injury.

16 **F. CAUSATION**

17 In arguing that plaintiffs have failed to demonstrate the
18 requisite causation, defendants again raise arguments that are
19 more properly directed to the merits. Defendants' causation
20 argument is particularly directed to the merits of plaintiffs'
21 Seventh Amendment claim; they claim that any impact on jury
22

23 ⁸ I note in passing that the observation is less than
24 perfectly persuasive. African-Americans are a distinct group, and
25 if indeed the government is discriminating against the members of
26 the group in its use of taxes, it is not clear why any member of
the group should not have standing. See generally Gene R. Nichol,
Abusing Standing: A Comment on Allen v. Wright, 133 U. Pa. L. Rev.
635, 641-49 (1985).

1 trials caused by the challenged program is entirely speculative.
2 For purposes of the standing inquiry, at least on a motion to
3 dismiss, plaintiffs would appear to have satisfactorily alleged
4 that California's advertising campaign, which has the purpose of
5 changing people's attitudes about tobacco use and maligning the
6 character of the tobacco industry, actually has that effect.
7 These allegations are sufficient to show that the reputational
8 harm alleged flows from the advertisements.

9 **G. REDRESSABILITY**

10 Finally, defendants argue that plaintiffs' claims, even if
11 sustained, would not be redressable. As defendants correctly
12 point out, the ordinary remedy in compelled funding for speech
13 cases is a refund of the money used to fund the objected-to
14 speech. Here, however, plaintiffs do not seek a refund or an
15 order enjoining the state from collecting the Surtax and, in any
16 event, such a remedy would be barred by the Tax Injunction Act,
17 28 U.S.C. § 1343. The remedy that plaintiffs do seek, however,
18 an injunction prohibiting the defendants from airing the
19 objectionable advertisements, is not barred by statute and has
20 in fact been adopted by at least one court in a compelled speech
21 case. See Pelts & Skins LLC v. Jenkins, No. 02-384, 2003 WL
22 1984368 (M.D. La. Apr. 24, 2003) (enjoining use of funds in the
23 Louisiana Fur and Alligator Public Education Marketing Fund for
24 the purpose of generic alligator marketing). Whether or not the
25 relevant law dictates such a remedy is a separate matter.

26 ////

1 Because there appears to be no bar to the remedy plaintiffs
2 seek, they have alleged redressability for purposes of standing.

3 Given all the above, the court concludes that plaintiffs'
4 allegations satisfy Article III's "case or controversy"
5 requirement. I now turn to the merits.

6 IV.

7 THE FIRST AMENDMENT

8 The tobacco companies argue that California's use of the
9 Proposition 99 Surtax to fund the challenged advertising
10 effectively compels them to fund speech with which they
11 disagree. They assert that such compulsion violates their
12 rights under the First Amendment.⁹ They do not question the
13 states's right to convey information to its citizens about the
14 health risks of smoking. Rather, they object to advertising
15 that assails the character, motives and practices of the tobacco
16 industry and seek to enjoin the state from airing ads fitting
17 that description.

18 Defendants and *amici* contend that the advertising is speech
19 by the government on a matter of urgent importance to the public
20 health of its citizens, and as with any other speech by the
21 government, the advertising is necessarily funded by tax
22 revenues. Under the "government speech" doctrine, they argue,

23
24 ⁹ While there is no doubt that corporations enjoy the
25 protection of the First Amendment, Hague v. CIO, 307 U.S. 496
26 (1939), the Court has not "decid[ed] whether the First Amendment's
protection of corporate speech is coextensive with the protection
it affords to individuals." McIntyre v. Ohio Elections Commission,
514 U.S. 334, 353 (1995).

1 taxpayers do not have a right to object to such activity under
2 the First Amendment. Before turning to the government speech
3 doctrine, I begin by addressing the compelled speech cases on
4 which plaintiffs rely.

5 **A. WHETHER THE DHS ADVERTISEMENTS ARE IMPERMISSIBLE COMPELLED**
6 **SPEECH**

7 Cases involving "compelled speech" fall into two distinct
8 categories. The first line of authority, involving situations
9 where the government directly compels citizens to engage in
10 speech activity, is plainly inapplicable here. The challenged
11 program does not, for instance, require the tobacco companies to
12 repeat an objectionable message out of their own mouths, see
13 West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943)
14 (government may not compel children, contrary to their
15 conscience, to salute the American flag), or force them to use
16 their own property to convey an antagonistic ideological
17 message, see Wooley v. Maynard, 430 U.S. 705 (1977) (government
18 may not compel motorists, contrary to their conscience, to
19 display license plates bearing the motto "Live Free or Die").¹⁰

20 Instead, plaintiffs rely on a second line of cases in which
21 the Supreme Court has scrutinized programs that compel people to
22 join and contribute to groups or associations whose speech they
23

24 ¹⁰ While the plaintiffs object to the use of "their" tax
25 money to fund the advertisements, they do not contend (nor could
26 they, given the undisputed propriety of imposing the tax), that
funds so raised are not the State's at the time the funds are
expended.

1 find objectionable. See Abood v. Detroit Bd. of Educ., 431 U.S.
2 209 (1977); Keller v. State Bar of California, 496 U.S. 1
3 (1990); Glickman v. Wileman Brothers, 521 U.S. 457 (1997);
4 United States v. United Foods, 533 U.S. 405, 413 (2001) ("[T]he
5 mandated support is contrary to the First Amendment principles
6 set forth in cases involving expression by groups which include
7 persons who object to the speech, but who, nevertheless, must
8 remain members of the group by law or necessity.").¹¹

9 As I explain below, plaintiffs' reliance on these cases is
10 unwarranted. Neither the holdings nor the reasoning in these
11 cases suggest that government's decision to levy a targeted tax
12 used to fund its own speech runs afoul of the First Amendment;
13 moreover, so far as this court can determine, no lower court,
14 state or federal, has found otherwise. This is not surprising.
15 Cf. National Ass'n for Advancement of Colored People v. Hunt,
16 891 F.2d 1555, 156 (11th Cir. 1990) ("Abood has never been
17 applied to the government, however; if it were, taxation would
18 become impossible."). Put directly, the courts have
19 consistently drawn a line between the compelled payment of funds
20 to support private expressive association, which may be
21 unconstitutional "compelled speech," and the compelled payment
22 of taxes and other exactions to fund speech by the government

23
24 ¹¹ I have previously described this line of cases as
25 articulating a "doctrine of unwilling allegiance." Prescott v.
26 County of El Dorado, 915 F.Supp. 1080, 1085 (E.D. Cal. 1996).
I have also noted my sense that this line of cases does not fit
easily within the conventional pattern of First Amendment issues.
Id. at 1085 n. 5.

1 itself. Questions arising under the latter scenario must be
2 considered under the government speech doctrine. The Supreme
3 Court cases on which plaintiffs principally rely serve to
4 illustrate this distinction.

5 1. Abood and Keller

6 Chronologically, the first such case is Abood.¹² There,
7 public school teachers in Detroit challenged the "agency shop"
8 provisions of their collective bargaining agreement, which
9 required every teacher represented by the teachers' union,
10 regardless of whether the teacher was a member, to pay a service
11 fee equal to union dues. 431 U.S. at 210. The Court held that
12 although being required to help finance the union "might well be
13 thought . . . to interfere in some way with an employee's
14 freedom to associate for the advancement of ideas, or to refrain
15 from doing so," any such interference was constitutionally
16 justified by the important contribution of agency shops to the
17 system of labor relations established by Congress. Id. at 222-
18 232. When it came to the union's use of service fees for
19 political activities unrelated to collective bargaining,

20
21 ¹² In their opening brief, plaintiffs propose that "[t]he
22 compelled speech doctrine was first applied in International Ass'n
23 of Machinists v. Street, 367 U.S. 740, 768-69 (1961), in which the
24 Court held that when employees are required by law to pay dues to
25 a labor union, the union cannot use those dues to support political
26 activities the employees oppose." Pl's MPA in Supp. of Prelim.
Inj. at 13. While this statement of the holding in Street is
accurate, that holding was dictated by the Court's interpretation
of the Railway Labor Act, not by a conclusion that the challenged
policy violated the First Amendment. 367 U.S. at 768. In any
event, Abood made clear that the First Amendment dictates the same
result.

1 however, the Court reached a different conclusion; using the
2 fees for such purposes, the Court held, constituted
3 impermissible compelled speech.

4 This holding was dictated by two well-established
5 principles: first, that "the freedom of an individual to
6 associate for the purposes of advancing beliefs and ideas is
7 protected" by the First . . . Amendment, id. at 233, and second,
8 that "a government may not require an individual to relinquish
9 rights guaranteed to him by the First Amendment as a condition
10 of public employment." Id. at 234. It followed, the Court
11 held, that the First Amendment prohibited the union and the
12 school board from requiring any teacher, as a condition of
13 employment, to contribute to the advancement of ideological
14 causes with which the teacher disagreed and which were not
15 "germane" to the union's duties as a collective-bargaining
16 representative. Id. at 235-35. The Court carefully limited the
17 prohibition to activity unrelated to the union's core
18 associational purposes, distinguishing between collective
19 bargaining activities, for which otherwise impermissible
20 compelled association was justified, and other purposes, for
21 which no such justification existed.

22 In a concurring opinion, Justice Powell emphasized that the
23 obligation of citizens to contribute taxes to the government,
24 whether or not they agree with how the money is spent, is not an
25 obligation that may be excused by the freedom of speech or
26 association. In doing so, he highlighted the critical

1 distinction between expressive association and government
2 speech:

3 Compelled support of a private association is
4 fundamentally different from compelled support of
5 government. Clearly, a local school board does not
6 need to demonstrate a compelling state interest every
7 time it spends a taxpayer's money in ways the taxpayer
8 finds abhorrent. But the reason for permitting the
9 government to compel the payment of taxes and to spend
money on controversial projects is that the government
is representative of the people. The same cannot be
said of a union, which is representative only of one
segment of the population, with certain common
interests. The withholding of financial support is
fully protected as speech in this context.

10 Id. at 259 n.13 (Powell, J., concurring).

11 In Keller, the Court expanded on Abood's compelled speech
12 analysis and, more importantly for our purposes, on the
13 distinction in Justice Powell's footnote. The Keller Court held
14 that compelling objecting attorneys to pay dues to the
15 California State Bar, to the extent that such dues were used to
16 finance political or ideological activities not germane to the
17 state bar's function, was invalid. The California Supreme
18 Court decision under review, relying on the government speech
19 doctrine, had rejected the attorneys' First Amendment challenge
20 because it determined that the Bar was a government agency. In
21 ruling against the Bar, the U.S. Supreme Court did not reject
22 the state court's rationale. On the contrary, the Court
23 embraced the distinction between government speech and compelled
24 speech and merely rejected the premise that the State Bar was

25 ////

26 ////

1 speaking on behalf of the government.¹³ Indeed, the Court
2 quoted the California court's broad articulation of the
3 doctrine, along with Justice Powell's Abood concurrence,
4 apparently with approval:

5 *If the bar is considered a government agency,*
6 *then the distinction between revenue derived*
7 *from mandatory dues and revenue from other*
8 *sources is immaterial. A government agency may*
9 *use unrestricted revenue, whether derived from*
10 *taxes, dues, fees, tolls, tuition, donation, or*
11 *other sources, for any purposes within its*
12 *authority.*

13 Keller, 496 U.S. at 10 (quoting Keller v. State Bar, 47 Cal.3d
14 1152, 1167 (1989)) (emphasis added).

15 The High Court, however, concluded that the Bar's primary
16 purpose was the representation of its members, and thus it was
17 functionally equivalent to the union in Abood and "a good deal
18 different from most other entities that would be regarded in
19 common parlance as 'government agencies.'" 496 U.S. at 11. The
20 Court clearly articulated the difference between the compelled
21 speech at issue there and government speech, holding that "[t]he
22 very specialized characteristics" of the Bar distinguished its
23 role from that of government officials, who "are expected as
24 part of the democratic process to represent and espouse the

25 ¹³ The Court acknowledged that "the Supreme Court of
26 California is the final authority on the 'governmental status' of
the State Bar of California for purposes of state law" but held
that the state court's "determination that the respondent is a
'government agency' . . . is not binding on us when such a
determination is essential to the decision of a federal question."
496 U.S. at 10. But see McMillian v. Monroe County, Alabama, 520
U.S. 781, 786 (1997).

1 views of a majority of their constituents." Id.

2 As in Abood, the Court found that compelled association
3 with the Bar was permissible to the extent that it furthered the
4 Bar's core purposes. Just as the "agency shop" arrangement was
5 designed to prevent free-riders (people who benefit from
6 collective bargaining but don't pay dues), it was appropriate
7 that "the lawyers who derive benefit" from the Bar's activities,
8 "should be called upon to pay a fair share of the cost of
9 professional involvement in this effort." Id. at 11. Again, as
10 in Abood, to the extent that the political and ideological
11 activities funded were not germane to that purpose, compelled
12 association could not be justified.

13 **2. Glickman and United Foods**

14 Plaintiffs place greater emphasis on a pair of more recent
15 Supreme Court decisions, Glickman and United Foods, both of
16 which discussed the application of Abood and Keller to programs
17 that compel agricultural producers to contribute to trade groups
18 for the purposes of generic industry advertising. Neither of
19 these cases, however, upset the Court's distinction between
20 government speech and impermissible compelled speech.

21 In Glickman, the Court rejected a challenge by growers and
22 processors of California tree fruits, who were required by
23 marketing orders promulgated by the Secretary of Agriculture
24 (pursuant to the Agricultural Marketing Agreement Act) to pay
25 assessments to a Nectarine Administrative Committee and Peach
26 Commodity Committee. Those committees, in turn, used the money

1 to pay for generic industry advertising.

2 The Court began its inquiry by stating that "Abood, and the
3 cases that follow it, did not announce a broad First Amendment
4 right not to be compelled to provide financial support for any
5 organization that conducts expressive activities. Rather, Abood
6 merely recognized a First Amendment interest in not being
7 compelled to contribute to an organization whose expressive
8 activities conflict with one's freedom of belief." 521 U.S. at
9 471. The Glickman Court held that the assessments at issue did
10 not violate the First Amendment because "(1) the generic
11 advertising of California peaches and nectarines is
12 unquestionably germane to the purposes of the marketing orders
13 and, (2) in any event, the assessments are not used to fund
14 ideological activities." Id. at 473. Thus, as in Abood and
15 Keller, the Court adhered to its germaneness test, holding that
16 speech that is germane to broader, legitimate purposes of
17 association will be upheld. As Justice Souter noted, the Court
18 was not required to discuss the government speech doctrine
19 because the Secretary of Agriculture expressly waived the
20 argument that the advertisements at issue constituted government
21 speech. Id. at 483 n.2 (Souter, J., dissenting).

22 Only four years later, in United Foods, the Court
23 invalidated a similar federal assessment program imposed on
24 mushroom growers. The Court distinguished the fruit-tree
25 program upheld in Glickman by explaining that "[i]n Glickman,
26 the mandated assessments for speech were ancillary to a more

1 comprehensive program restricting marketing autonomy. Here, for
2 all practical purposes, the advertising itself, far from being
3 ancillary, is the principal object of the regulatory scheme."

4 United Foods, 533 U.S. at 415.¹⁴

5 Notably, the Court again did not reach the question of
6 government speech. Because the issue had not been addressed in
7 the courts below, the Court declined to consider the argument.
8 The Court suggested, however, that the government would have to
9 establish that it exercised more than pro forma control over the
10 speech for it "to be labeled, and sustained, as government
11 speech."¹⁵

12
13 ¹⁴ Based on this distinction, defendants contend that, even
14 if the speech at issue here were not government speech, the use of
15 Tobacco Products Surtax funds for advertising would nevertheless
16 survive constitutional scrutiny because the ads are just one part
17 of a comprehensive regulatory scheme aimed at reducing the harmful
18 effects of tobacco use. Because the vast majority of the funds
19 raised by the Surtax are used to fund activities other than speech,
20 such as health care, research and other programs, they maintain
21 that this case would be closer to Glickman than United Foods.
22 Assuming government speech were not involved, defendants' argument
23 has considerable weight, since speech appears not to be "the
24 principal object of the regulatory scheme." United Foods, 533 U.S.
25 at 415; see Delano Farms Co. v. California Table Grape Comm'n, 318
26 F.3d 895, 898 (2003) (applying Glickman-United Foods distinction
to grape advertising program; explaining that the distinction turns
on the comprehensiveness of the regulatory scheme). Since the
speech involved here is government speech, neither Glickman nor
United Foods control and there is therefore no need to further
address the issue.

23 ¹⁵ The Court explained:

24 The Government's failure to raise its argument in
25 the Court of Appeals deprived respondent of the
26 ability to address significant matters that might
have been difficult points for the government. For
example, although the Government asserts that the
advertising is subject to approval by the Secretary

1 Unlike the mushroom assessment program invalidated in
2 United Foods, there is no question that the DHS officials named
3 as the defendants here exercise much more than pro forma
4 authority over the challenged advertising, and plaintiffs do not
5 suggest otherwise. The parties do not dispute that the
6 defendants are actually responsible for the speech conveyed.
7 Thus, there are no "difficult issues [that] would have to be
8 addressed [before] the program [is] labeled, and sustained, as
9 government speech." 533 U.S. at 417.

10 In Board of Regents of the Univ. of Wisconsin v.
11 Southworth, 529 U.S. 217 (2000), as in United Foods, the Court
12 made clear that when the question of whether government speech
13 is involved is properly raised, that question presents a
14 threshold issue in a compelled speech challenge under the Abood
15 line of cases. Only after first concluding that "[t]he case we
16 decide here . . . does not raise the issue of the government's
17 right, or to be more specific, the state-controlled University's
18 right, to use its own funds to advance a particular message,"
19 529 U.S. at 1354, did the Court move on to the compelled speech
20 inquiry, id. ("[t]he Abood and Keller cases, then, provide the

21 ////

22 ////

23 of Agriculture, respondent claims that the approval
24 is pro forma. This and other difficult issues would
25 have to be addressed were the program to be labeled,
and sustained, as government speech.

26 533 U.S. at 417.

1 beginning point of our analysis.").¹⁶

2 In the wake of United Foods, federal courts addressing
3 challenges of mandatory assessments for generic agricultural
4 advertising programs have uniformly addressed government speech
5 as a threshold issue before turning to the compelled speech
6 inquiry. See, e.g., Pelts & Skins, LLC v. Jenkins, No. Civ.A.02-
7 CV 384, - F.Supp.2d -, 2003 WL 1984368, at *6 (M.D. La. Apr. 24,
8 20903) (challenge of mandatory assessments used to fund generic
9 advertising of alligator products; reasoning that "because the
10 generic advertising here involved is not government speech,
11 plaintiff is free to challenge such advertising on First
12 Amendment grounds"); In re Washington State Apple Comm'n, 257
13 F.Supp.2d 1290, 1305 (challenge of mandatory assessments used to
14 fund generic advertising of apples; reaching compelled speech
15 issue only after holding that "the Commission's activities are

16
17 ¹⁶ The Ninth Circuit authority on which plaintiffs rely does
18 not suggest another mode of analysis. Plaintiffs rely on Cal-
19 Almond, Inc. v. USDA, 14 F.3d 429 (9th Cir. 1993) ("Cal-Almond I"),
20 and go so far as to suggest that the case "controls" the outcome
21 here. See, e.g., Pl's Reply Br. at 8-10. But as Cal-Almond's
22 procedural history makes clear, and as the Ninth Circuit has
23 explained, that decision's compelled speech analysis is no longer
24 good law. See Cal-Almond v. USDA, 192 F.3d 1272, 1277 (1999) ("Cal-
25 Almond IV") ("[I]n light of the Supreme Court's remand in Cal-
26 Almond II and our subsequent remand for dismissal in Cal-Almond
III, Cal-Almond I has been implicitly overruled."). The decision's
27 holdings on other issues, however, retain precedential value. See,
28 e.g., NRDC v. Evans, 316 F.3d 904, 906, 911-12 (9th Cir. 2003)
29 (relying on Cal-Almond I for an administrative law issue; "The
30 outcome here follows Cal-Almond.").

31 Nor does the Ninth Circuit's recent decision in Delano Farms
32 help plaintiffs. Delano Farms simply offers a straightforward
33 application of United Foods to a grape advertising program similar
34 to the mushroom program considered by the Supreme Court.

1 not protected by the government speech doctrine"); Michigan Pork
2 Producers v. Campaign for Family Farms, 229 F.Supp.2d 772, 785-
3 89 (W.D. Mich. 2002) (challenge of mandatory assessments for
4 generic advertising of pork products; reasoning that "though the
5 Secretary is integrally involved with the workings of the Pork
6 Board, this involvement does not translate the advertising and
7 marketing in question into 'government speech'"); Livestock
8 Mktg. Ass'n v. United States Dep't of Agric., 207 F.Supp.2d 992
9 (D.S.D. 2002) ("The generic advertising program funded by the
10 beef checkoff is not government speech and is therefore not
11 excepted from First Amendment challenge"); Charter v. United
12 States Dep't of Agric., 230 F.Supp.2d 1121 (D. Mont. 2002)
13 (rejecting challenge to a program of mandatory assessments for
14 beef industry advertising on the grounds that the advertising at
15 issue was government speech and that United Foods, therefore,
16 did not control).

17 A recent decision by the Eighth Circuit offers a concise
18 explanation of the difference between compelled speech and
19 government speech:

20 Unlike [a case] where plaintiffs challenge[] a
21 decision concerning the content of government
22 speech, appellees in the present case are
23 challenging the government's authority to
24 compel them to support speech with which they
25 personally disagree; such compulsion is a form
of government interference with private speech.
The two categories of First Amendment cases -
government speech cases and compelled speech
cases - are fundamentally different.

26 Livestock Mktg. Ass'n v. United States Dep't of Agric., Nos.

1 02-2769/283, - F.3d -, 2003 WL 21523837 (July 8, 2003) at *8.
2 (emphasis added). Put simply, while the cases on which
3 plaintiffs rely fall in the compelled speech line, this case
4 involves government speech. Plaintiffs are not seeking to
5 prevent coerced participation in private expressive association;
6 rather, they are attempting to exercise a taxpayer's veto over
7 speech by the government itself. As I explain below, that
8 attempt founders on the shoals of the "government speech"
9 doctrine.

10 **B. WHETHER THE DHS ADVERTISEMENTS ARE GOVERNMENT SPEECH**

11 The determination as to whether speech is properly
12 characterized as government speech or private speech turns
13 entirely on "who is responsible for the speech." Downs v. Los
14 Angeles Unified Sch. Dist., 228 F.3d 1003, 1011-12 (9th Cir.
15 2000), cert. denied, 532 U.S. 994 (2001). In other words, the
16 inquiry rests on the level of control and authority that the
17 government exercises over the message conveyed. See id. at
18 1009-1012 (content of public school bulletin boards was
19 government speech because boards were used to express school
20 policy, access was limited to faculty and staff, and postings
21 were subject to the oversight of school principals); see also
22 Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203
23 F.3d 1085, (8th Cir.), cert. denied, 531 U.S. 814 (2000)
24 (underwriting acknowledgments by state university-run radio
25 station constituted government speech because, inter alia, radio
26 station's staff members composed, edited and reviewed

1 acknowledgment scripts prior to broadcast and because the
2 university was ultimately responsible for all broadcast
3 material).

4 While in some cases the distinction between government
5 speech and compelled allegiance may present "difficult issues,"
6 United Foods, 533 U.S. at 417, the analysis here is
7 straightforward. The advertisements at issue here are
8 controlled by government officials, who are ultimately
9 responsible for their content.¹⁷ See Complaint at 2, ¶ 4
10 (alleging that defendant Bonta "is ultimately responsible for
11 the advertising challenged in this action"); id. at 2, ¶ 5
12 (alleging that defendant Bal "is directly responsible for the
13 design, approval and distribution of the advertising challenged
14 in this action."). Indeed, the Department of Health Services is
15 specifically directed by statute to produce and implement a
16 "media campaign . . . stress[ing] the importance of both
17 preventing the initiation of tobacco use and quitting smoking
18 . . . based on professional market-research and surveys
19 necessary to determine the most effective method of diminishing
20 tobacco use among specific target populations." Cal. Health &

21 ////

22
23 ¹⁷ In contrast, the "speakers" in the compelled allegiance
24 cases cited by the plaintiffs were the Mushroom Council (United
25 Foods), the Nectarine Administrative Committee and Peach Commodity
26 Committee (Glickman), the State Bar of California (Keller), the
Detroit Federation of Teachers (Abood), the California Table Grape
Commission (Delano Farms), California Almond Board (Cal-Almond I),
and the Cattleman's Beef Promotion and Research Board (United
States v. Frame, 885 F.3d. 1119 (3rd Cir. 1989)).

1 Saf. Code § 104375(e)(1).¹⁸

2 If the determination turned on the attribution of the
3 speech rather than control of the message, the result here would
4 be the same. Unlike the Glickman-United Foods line of cases
5 where a discrete group is compelled to fund the "dissemination
6 of a particular message *identified with that group*," Cal-Almond
7 I, 14 F.3d at 435 (emphasis added), the tobacco advertisements
8 are clearly identified as coming from the California Department
9 of Health Services, i.e. the state government. Compare Thompson
10 Decl., Exhibit L (challenged advertisements are all clearly
11 identified as "Sponsored by the California Department of Health
12 Services") with Frame, 885 F.2d at 1133 n.11 (beef checkoff
13 advertising contains "no mention of the Secretary or the
14 Department of Agriculture, thus failing to convey that the
15 advertisements are funded through a government program.").¹⁹

16
17 ¹⁸ The same statute also provides that "[n]o media campaign
18 funded pursuant to this article shall feature in any manner the
19 image or voice of any elected public official or candidate for
20 elected office, or directly represent the views of any elected
21 public official or candidate for elected office." Cal. Health &
22 Safety Code § 104375(e)(2). This provision in no way undermines
the fact the government is directly responsible for the ads; on the
contrary, it ensures that the position being advanced is that of
the government itself, not of political candidates. The provision
is clearly designed to ensure that tax money is not used to fund
partisan political speech or electioneering.

23 ¹⁹ With near unanimity, courts that have squarely addressed
24 the issue have found that generic agricultural assessment programs,
25 which fund speech by non-governmental or quasi-governmental
26 industry groups for the collective benefit of contributing
producers, are not governmental speech. The "Beef Checkoff"
program appears to be the only such program on which courts have
been somewhat divided. Compare Livestock Marketing, 2003 WL
21523837 (holding that beef program is not government speech;

1 Even if the ads were not so clearly identified, no one could
2 possibly confuse them for the tobacco companies' own speech.
3 This fact of attribution, together with the actual
4 responsibility of government officials for the ads, demonstrates
5 that the speech at issue here is government speech.

6 **C. THE GOVERNMENT SPEECH DOCTRINE**

7 In discussing the latitude afforded to the government under
8 the "government speech" doctrine, courts have generally spoken
9 in terms that are remarkably open-ended. Given the purposes of
10 the doctrine, a broad opportunity for government speech is not
11 entirely inappropriate. I cannot acknowledge the doctrine,
12 however, without also expressing my serious reservations about
13 its undefined and open-ended nature. I begin by explaining why
14 the government speech doctrine compels the conclusion that the
15 challenged program must be upheld. I then turn to the potential
16 limits on the doctrine in order to underscore that government
17 speech, like government action, is not without constitutional
18 limits. Nonetheless, I conclude that none of the present
19 limitations on government speech support plaintiffs' claims.

20 I begin this portion of the analysis by noting that the
21 government does not enjoy protection for its speech under the

22 _____
23 striking down program as "in all material respects, identical to
24 the mushroom checkoff program at issue in United Foods"); Goetz v.
25 Glickman, 149 F.3d 1131, 1138-39 (10th Cir. 1998), cert. denied,
26 525 U.S. 1102 (1999) (upholding beef program under Glickman);
United States v. Frame, 885 F.3d 1119 (3d Cir. 1989) (holding beef
program is not government speech and passes muster under Central
Hudson) with Charter (beef checkoff is government speech and thus
United Foods does not control).

1 First Amendment. See Columbia Broad. Sys., Inc. v. Democratic
2 Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring)
3 ("The First Amendment protects the press from government
4 interference; it confers no analogous protection on the
5 government"); id. at 139, n.7 ("The purpose of the First
6 Amendment is to protect private expression and nothing in the
7 guarantee precludes the government from controlling its own
8 expression or that of its agents.'" (quoting T. Emerson, The
9 System of Freedom of Expression 700 (1970)).

10 Nonetheless, "[t]he government speech doctrine has firm
11 roots in our system of jurisprudence." Livestock Marketing,
12 2003 WL 21523837, at *8. The Supreme Court has said, in dicta,
13 that "when the government appropriates public funds to promote a
14 particular policy of its own it is entitled to say what it
15 wishes." Rosenberger v. Rector and Visitors of the Univ. of
16 Virginia, 515 U.S. at 813 (1995); see Columbia Broad. Sys., 412
17 U.S. at 139 & n.7 (Stewart, J., concurring) ("Government is not
18 restrained by the First Amendment from controlling its own
19 expression."). In equally broad language, the Ninth Circuit has
20 said that when the government is the speaker, "its control of
21 its own speech is not subject to the constraints of
22 constitutional safeguards and forum analysis, but instead is
23 measured by practical considerations applicable to any
24 individuals' choice of how to convey oneself: among other

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26 ////

1 things, content, timing and purpose." Downs, 228 F.3d at 1013.²⁰

2 It has been said that the government speech doctrine is a
3 necessary implication of our system of government:

4 Government officials are expected as a
5 part of the democratic process to
6 represent and to espouse the views of a
7 majority of their constituents. With
8 countless advocates outside of the
9 government seeking to influence its
10 policy, it would be ironic if those
11 charged with making governmental decisions
12 were not free to speak for themselves in
13 the process. If every citizen were to
14 have a right to insist that no one paid by
15 public funds express a view with which he
16 disagreed, debate over issues of great
17 concern to the public would be limited to
18 those in the private sector, and the
19 process of government as we know it
20 radically transformed.

21 Keller, 496 U.S. at 12-13.²¹ While plaintiffs' reaction to

22 ²⁰ Implicit in the government speech cases is a suggestion
23 that government is just one more participant in the marketplace of
24 ideas. Such a notion appears to this court to be naïve. It
25 ignores the force of government, as compared to private speech,
26 and, even more importantly, the access that government speech has
to free media, much less the paid media at issue here.

27 ²¹ Such broad statements appear to this court to miss the
28 nuances that should inform the question. It is one thing to
29 recognize that the government in a democracy must make policy
30 choices about those issues that are properly before it, and must
31 be able to inform the public about why those choices were made.
32 This case appears to present quite a different question. Here, the
33 legislature has not made a decision about banning or even
34 regulating the sale of tobacco products to adults, but rather seeks
35 to persuade adults not to use tobacco products. In a sense, the
36 path taken by Proposition 99 turns the democratic process on its
37 head. Rather than citizens trying to persuade the government as
38 to a proper course of its conduct, the government tries to dissuade
39 the public from engaging in conduct it apparently does not have the
40 political will to either regulate or ban. While these observations
41 may well address questions of political philosophy rather than
42 purely legal issues, they nonetheless appear appropriate, given
43 that the entire government speech doctrine derives from political

1 California's advertisements is quite understandable, the
2 government speech doctrine teaches that the remedy for their
3 assertion of harm is "political rather than judicial." Griffin
4 v. Secretary of Veteran Affairs, 288 F.3d 1309, 1324-25 (Fed.
5 Cir. 2002). "[W]hen government speaks, for instance to promote
6 its own policies or to advance a particular idea, it is, in the
7 end, accountable to the electorate and the political process for
8 its advocacy. If the citizenry objects, newly elected officials
9 later could espouse some different or contrary position."
10 Southworth, 529 U.S. at 235; see Downs, 228 F.3d at 1011-14 ("In
11 order for the speaker to have the opportunity to speak as the
12 government, the speaker must gain favor with the populace and
13 survive the electoral process.").²²

14 Here, some may think that the issue is not as problematic
15 as government's efforts to persuade the public might be in
16 another context. They would take comfort from the fact that the
17 advertisements in question derive not just from some government
18 official's choice, but are instead the result of an initiative.
19 In a sense, then, the program represents the direct decision of
20 the majority of those voting to attempt to convince smokers to
21 _____
22 philosophy rather than a specific constitutional power.

23 ²² The assumption that a particular piece of government
24 speech would suffice in the mind of the voting public to justify
25 obtaining "newly elected officials" seems not just unrealistic, but
26 also ignores the difficulty and vast costs of election campaigns
in a state such as California. See, e.g., California ProLife
Council v. Scully, 989 F.Supp. 1282 (E.D. Cal. 1998). To say that
the answer to abuse by government speech is political, frequently
will simply mean that there is no answer.

1 forego that vice. In this court's view, however, those facts
2 provide cold consolation. The issue is not whether the majority
3 of voters approve of the program, but whether in a system of
4 limited government, such approval should be translated into a
5 government sponsored propaganda effort. Indeed, as I have
6 previously noted, the fact that a statute was adopted by the
7 initiative process "provides no special insulation from review
8 for asserted constitutional infirmity." Service Employees Int'l
9 Union v. Fair Political Practices Comm., 747 F.Supp. 580, 583
10 (E.D. Cal. 1990) (citing Citizens Against Rent Control v.
11 Berkeley, 454 U.S. 290, 295 (1981)). Again, notwithstanding
12 this court's scruples, the present state of the government
13 speech doctrine appears to provide no basis for limiting the
14 advertisements in issue.

15 Certainly, the fact that the advertisements at issue are
16 tax-supported provides no support for plaintiffs' claims. The
17 government's speech is necessarily paid for by citizens, some of
18 whom - like plaintiffs here - will disagree with its message.
19 See Southworth, 529 U.S. at 229 ("It is inevitable that
20 government will adopt and pursue programs and policies within
21 its constitutional powers but which nevertheless are contrary to
22 the profound beliefs and sincere convictions of some of its
23 citizens."). The High Court has consistently taught that such
24 disagreement is simply the cost of living in a democracy and
25 provides no basis under the First Amendment to silence the
26 government or to excuse objecting citizens from having to share

1 the costs of its speech. See Lathrop v. Donahue, 367 U.S. 820,
2 857 (1961) (Harlan, J., concurring) ("A federal taxpayer obtains
3 no refund if he is offended by what is put out by the United
4 States Information Agency."); United States v. Lee, 455 U.S.
5 252, 260 (1982) ("The tax system could not function if
6 denominations were allowed to challenge the tax system because
7 tax payments were spent in a manner that violates their
8 religious belief.").

9 The tobacco companies argue that a crucial difference
10 between this case and others in which the courts have applied
11 the government speech doctrine is that, here, the state is using
12 taxes paid by a specific industry to finance advertising that
13 condemns that very industry. Again, one may understand the
14 plaintiffs' discomfort, but the Supreme Court has never
15 suggested that the government speech doctrine applies only to
16 speech funded with general tax revenues. On the contrary, it
17 seems clear that speech by the government is government speech,
18 however funded. That is, given that the tax is lawfully
19 imposed, the money collected becomes the government's to expend
20 as it sees fit, so long as those expenditures fall within legal
21 limits. If this were not so, the Supreme Court's discussion of
22 and reference to the government speech doctrine in Abood, 431
23 U.S. at 259 n. 13, Keller, 496 U.S. at 12-13, Glickman, 521 U.S.
24 at 415, and United Foods, 533 U.S. at 417, would have been
25 irrelevant surplusage. Indeed, the Court has recently declared
26 that "[t]he government, as a general rule, may support valid

1 programs and policies by taxes or other exactions binding on
2 protesting parties. Within this broader principle it seems
3 inevitable that funds raised by the government will be spent for
4 speech and other expression to advocate and defend its own
5 policies." Southworth, 529 U.S. at 229 (emphasis added);²³ see
6 also United Foods, 533 U.S. at 425-26 (Breyer, J., dissenting)
7 (arguing that if contested assessments on industry constituted
8 "a targeted tax," government could fund advertising with such a
9 tax, which, under Southworth, would be "binding on protesting
10 parties."); cf. Regan v. Taxation With Representation of Wash.,
11 461 U.S. 540, 547 (1983) ("Legislatures have especially broad
12 latitude in creating classifications and distinctions in tax
13 statutes"); Laurence H. Tribe, American Constitutional Law, §
14 12-4 at 807 n. 14 (2d ed. 1988) (observing that while a taxpayer
15 might have standing to challenge "an earmarked tax" used to fund
16 government speech on a political or ideological issue, "it has
17 been assumed that the taxpayer would lose any such challenge on
18 the merits.").

19
20 ²³ In Southworth, which concerned the constitutionality of a
21 student activity fee that was used in part to fund student
22 organizations engaging in political or ideological speech, the
23 Court noted that because "[t]he University ha[d] disclaimed that
24 the speech was its own," the case did not present the question
25 whether the challenge could be sustained "under the principle that
26 the government can speak for itself." Id. at 234-35. The Court
went on to observe that, "[i]f the challenged speech here were
financed by tuition dollars and the University and its officials
were responsible for the content, the case might be evaluated on
the premise that the government itself is the speaker." Id. Thus,
the Court recognized the applicability of the government speech
doctrine to speech funded not from general tax revenues, but from
tuition dollars.

1 Nor does the content or subject matter of the speech at
2 issue alter the applicability of the government speech doctrine,
3 as it might if the speech were religious, politically partisan,
4 defamatory or in some other way subject to legal constraints.
5 While the precise scope of the government speech doctrine has
6 hardly been considered, there is no doubt that modern government
7 is called upon to deal with "innumerable subjects" on which
8 government may be required to take a position and then explain
9 its reasons for doing so. National Endowment for the Arts v.
10 Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring).

11 As the Supreme Court has recently observed, "tobacco use,
12 particularly among children and adolescents, poses perhaps the
13 single most significant threat to public health in the United
14 States." Lorillard Tobacco v. Reilly, 533 U.S. 525, 570 (2001)
15 (quoting FDA v. Brown & Williamson, 529 U.S. 120, 161 (2000));
16 cf. id. at 528 ("The governmental interest in preventing
17 underage tobacco use is substantial, and even compelling.");
18 Brown & Williamson, 529 U.S. at 162 (Breyer, J., dissenting)
19 ("Unregulated tobacco use causes more than 400,000 people to die
20 each year from tobacco-related illnesses, such as cancer,
21 respiratory illnesses, and heart disease. Indeed, tobacco
22 products kill more people in this country every year than . . .
23 AIDS, car accidents, alcohol, homicides, illegal drugs,
24 suicides, and fires, combined." (citations and internal
25 quotation marks omitted)). It seems clear that the dangers of
26 tobacco use, with its concomitant effects on public health, are

1 matters properly to be considered by the government and, upon
2 adopting laws or regulations concerning such use, are proper
3 subjects for government speech.

4 I have noted above my discomfort as to the propriety of the
5 government's speech where the state has not sought to directly
6 regulate the conduct that its speech condemns. Candor requires
7 me to recognize that many others find no such discomfort.

8 Indeed, government advertising to combat the public health
9 problems caused by smoking is often cited as a paradigmatic
10 instance of permissible government speech. See, e.g., Finley,
11 524 U.S. at 610-11 (Souter, J., dissenting) (stating that in its
12 role as speaker, "the government is of course entitled to engage
13 in viewpoint discrimination: if the Food and Drug Administration
14 launches an advertising campaign on the subject of smoking, it
15 may condemn the habit without also having to show a cowboy
16 taking a puff on the opposite page."); Randall Bezanson and
17 William Buss, *The Many Faces of Government Speech*, 86 Iowa L.
18 Rev. 1377, 1384 (2001) ("The simplest and clearest example of
19 government advancing a point of view is provided when a 'law'
20 specifically adopts a program of promoting a specific message.
21 For example, a law might create a program to assist smokers to
22 stop smoking.").

23 Put directly, while I believe that government speech
24 doctrine raises profound questions concerning the appropriate
25 role of government in a liberal society, the fact that the
26 activity being condemned - the sale, purchase and use of tobacco

1 by adults - is a legal activity does not, under present
2 doctrine, appear to preclude government from actively
3 discouraging that activity. On the contrary, the Ninth Circuit,
4 by which I am bound, has recently indicated that the government
5 speech would be unrestricted even if the sale of cigarettes were
6 not only legal, but constitutionally-protected:

7 We agree with the host of other circuits
8 that recognize that public officials may
9 criticize practices that they would have no
10 constitutional ability to regulate, so long
11 as there is no actual or threatened
12 imposition of government power or sanction.

11 American Family Ass'n, Inc. v. San Francisco, 277 F.3d
12 1114, 1125 (9th Cir. 2002).²⁴ California's decision to combat

13 _____
14 ²⁴ One pair of commentators have asserted that:

15 Speech is but one means that government must have at its
16 disposal to conduct its affairs and to accomplish its
17 ends. Restricting the use of tobacco, for example,
18 might be accomplished by regulatory action that makes it
19 sale or purchase or possession illegal. It might be
20 accomplished by taxing the disfavored behavior or
21 production. But the restriction might also be
22 accomplished through the provision of information so
23 that the consumer's choice will be knowing, or by direct
24 persuasion in the form of government advertisements or
25 by educational programs or even by subsidies for groups
26 or organizations that speak out against tobacco use.
 These expressive forms of action are no less necessary
 or proper means, nor less practical, efficient, or
 effective

23 Randall Bezanson and William Buss, *The Many Faces of Government
24 Speech*, 86 Iowa L. Rev. 1377, 1380 (2001).

24 Another commentator has explained that "[t]here are several
25 ways of understanding government's contribution as speaker . . .
26 Government speech can serve as an avenue for the representation of
 citizens' higher-minded desires even when as consumers they act
 with perhaps lower-minded motives (the smoker who supports Surgeon
 General's warnings against smoking, the careless litterer who

1 the problem through a strategy of education and counter-
2 advertising, as opposed to outright prohibition, is, under
3 present doctrine, a political and practical judgment that the
4 state is free to make. See Lorillard Tobacco, 533 U.S. at 587
5 ("The State's assessment of the urgency of the problem posed by
6 tobacco is a policy judgment, and it is not this Court's place
7 to second-guess it."); id. at 571 ("To the extent that federal
8 law and the First Amendment do not prohibit state action, States
9 and localities remain free to combat the problem of underage
10 tobacco use by appropriate means."). In sum, the challenged
11 program passes constitutional muster.

12 D. POTENTIAL LIMITATIONS ON GOVERNMENT SPEECH

13 Courts, including the Supreme Court and the Ninth Circuit,
14 have framed the government speech doctrine in especially broad
15 terms and have generally done so without discussing ways in
16 which the Constitution, including constitutional provisions
17 other than the First Amendment, may place substantive limits on
18 the government's power to speak. Nonetheless, "[t]he
19 'government speech' doctrine is still in its formative stages,
20 and, as yet, it is neither extensively nor finely developed."

21 supports environmental warning campaigns, etc.) . . . Government
22 can use its speech powers to alter social norms that might be
23 difficult for people to change through private action." Abner S.
24 Greene, *Government Speech on Unsettled Issues*, 69 Fordham L.
25 Rev. 1667, 1683-84 (2001).

26 While my own views suggest that a more restricted role for
government speech is both appropriate and more consistent with the
role of government in a democracy, these comments demonstrate that
others are more sanguine about the exercise of the government's
enormous power to persuade.

1 Sons of Confederate Veterans, Inc. v. Commissioner of Virginia
2 Dept. of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002)
3 (Luttig, J., respecting denial of rehearing en banc). As the
4 contours of the doctrine develop more fully, it is to be hoped
5 that the courts will recognize that limitations, both
6 constitutional and otherwise derived, constrain the government's
7 power to speak on controversial issues. See Livestock
8 Marketing, 2003 WL 21523837, at *8 ("The government speech
9 doctrine clearly does not provide immunity for all types of
10 First Amendment claims.") (citing Santa Fe Sch. Dist v. Doe, 530
11 U.S. 290 (2000) (prayers at public school football games)).
12 Although these issues have not been raised by the parties and
13 indeed, do not alter resolution of the case at bar, I pause
14 briefly to address some of the important limitations on
15 government speech in order to emphasize that my conclusion
16 regarding plaintiffs' free speech claim does not imply that the
17 "government speech" doctrine offers a blank check for abuse.
18 First, and most obviously, the Establishment Clause
19 prohibits government from using its speech to endorse religion.
20 See Board of Ed. of Westside Community Schools (Dist.66) v.
21 Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring)
22 ("[T]here is a crucial difference between government speech
23 endorsing religion, which the Establishment Clause forbids, and
24 private speech endorsing religion, which the Free Speech and
25 Free Exercise Clauses protect."). As the Court explained in Lee
26 v. Weisman, 505 U.S. 577, 591 (1992), "[t]he First Amendment

1 protects speech and religion by quite different mechanisms.
2 Speech is protected by ensuring its full expression even when
3 the government participates, for the very object of some of our
4 most important speech is to persuade the government to adopt an
5 idea as its own. The method for protecting freedom of worship
6 and freedom of conscience in religious matters is quite the
7 reverse. In religious debate or expression the government is
8 not a prime participant, for the Framers deemed religious
9 establishment antithetical to the freedom of all." (citations
10 omitted).²⁵

11 Second, the First Amendment may place other substantive
12 limits on the government's use of speech. For instance,
13 government speech that "drowns out" private speech may violate
14 the First Amendment. See National Ass'n for Advancement of
15 Colored People v. Hunt, 891 F.2d 1555, 156 (11th Cir. 1990)
16 ("[T]he government may not monopolize the 'marketplace of
17 ideas,' thus drowning out private sources of speech . . . For
18 example, the government may not confer radio frequency
19

20 ²⁵ Plaintiffs open their brief by invoking Thomas Jefferson's
21 pronouncement that "to compel a man to furnish contributions of
22 money for the propagation of opinions which he disbelieves, is
23 sinful and tyrannical." P. Kurland & R. Lerner, eds, The Founders'
24 Constitution, vol. 5 (1987) at 77. The quoted statement is taken
25 from Jefferson's Virginia Bill for Establishing Religious Freedom,
26 a landmark anti-establishment measure declaring that "no man shall
be compelled to frequent or support any religious worship, place,
or ministry whatsoever." Id. It is perhaps significant that the
statement arose in this context, since "the Establishment Clause
is a specific prohibition on forms of state intervention in
religious affairs with no precise counterpart in the speech
provisions." Lee v. Weisman, 505 U.S. 577, 591 (1992).

1 monopolies on broadcasters it prefers."); Warner Cable
2 Communications v. City of Niceville, 911 F.2d 634, 638 (11th
3 Cir. 1990) ("[T]he government may not speak so loudly as to make
4 it impossible for other speakers to be heard by their audience.
5 The government would then be preventing the speakers' access to
6 that audience, and first amendment concerns would arise.").²⁶
7 For this reason, it is particularly important for courts to
8 carefully distinguish between situations in which the government
9 speaks for itself and situations in which the government creates
10 a public forum for private speech. As Judge Luttig recently
11 observed, it may even be that these categories will not always
12 be mutually exclusive. See Sons of Confederate Veterans, 305
13 F.3d at 245 (Luttig, J., respecting denial of rehearing en
14 banc).

15 Third, the Constitution would appear to contain a core
16 structural principle, perhaps embodied in the Republican Form of
17 Government Clause, that would limit the use of tax dollars to
18 fund overtly partisan activity.²⁷ See NEA v. Finley, 524 U.S.

19
20 ²⁶ Here, of course, the "drown out" concern appears
21 inapplicable. The tobacco industry spends much more than
22 California does on advertising within the state itself, even
23 excluding national advertising expenditures that have an impact in
24 California. In 1999/2000, the tobacco industry spent an estimated
25 \$823 Million advertising and promoting tobacco use in California,
26 an amount that translates into \$34.01 for every man, woman and
child in the state. In contrast, the state's tobacco control
budget for 1999/2000 was \$3.42 per capita. See DHS, California
Tobacco Control Update (Nov. 2002).

27 Article IV, § 4 of the Constitution, which provides that
"[t]he United States shall guarantee to every State in this Union
a Republican Form of Government," is generally treated as

1 569, 598 (1998) (Scalia, J., concurring) ("[I]t would be
2 unconstitutional for the government to give money to an
3 organization devoted to the promotion of candidates nominated by
4 the Republican Party - but it would be just as unconstitutional
5 for the government itself to promote candidates nominated by the
6 Republican Party, and I do not think that that
7 unconstitutionality has anything to do with the First
8 Amendment."); Lathrop v. Donahue, 367 U.S. 820, 853 (1961)
9 (Harlan, J., concurring in the judgment) (stating that a
10 legislature could not constitutionally "'create a fund to be
11 used in helping certain political parties or groups favored' by
12 it 'to elect their candidates or promote their controversial
13 causes'" (quoting International Ass'n of Machinists v. Street,
14 367 U.S. 740, 788 (1961) (Black, J., dissenting)). One recent
15 commentator has argued for an even broader "political anti-
16 establishment" principle, which would prohibit a range of speech
17 activity by the government in the sphere of election activities

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19 judicially unenforceable, based on a series of decisions thought
20 to have established a per se rule of nonjusticiability. See
21 Colegrove v. Green, 328 U.S. 549, 556 (1946) ("Violation of the
22 great guaranty of a republican form of government in States cannot
23 be challenged in the courts."). In recent years, however, a
24 growing chorus of academic critics has urged the Court to abandon
25 the per se nonjusticiability rule in Guarantee Clause cases. See
26 Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be
Justiciable*, 65 U. Colo. L. Rev. 849, 850 n.4 (1994). Recently,
the Court has shown some signs of receptiveness to these arguments,
and "has suggested that perhaps not all claims under the Guarantee
Clause present nonjusticiable political questions." New York v.
United States, 505 U.S. 144, 185 (1992) (O'Connor, J.) (declining
to decide the issue); see Reynolds v. Sims, 377 U.S. 533, 582
(1964) ("[s]ome questions raised under the Guarantee Clause are
nonjusticiable").

1 in a manner analogous to the Establishment Clause. See
2 generally Brian P. Marron, *Doubting America's Sacred Duopoly:*
3 *Disestablishment Theory and the Two-Party System*, 6 Tex. F. on
4 C.L. & C.R. 303 (2002).²⁸ Such a principle might be thought to
5 flow from Justice Jackson's eloquent statement, which remains
6 perhaps the best encapsulation of the First Amendment's core
7 values: "If there is any fixed star in our constitutional
8 constellation, it is that no official, high or petty, can
9 prescribe what shall be orthodox in politics, nationalism,
10 religion, or other matters of opinion or force citizens to
11 confess by word or act their faith therein." West Virginia Bd.
12 of Educ. v. Barnette, 319 U.S. 624, 642 (1943). But see
13 American Family Ass'n v. City and County of San Francisco, 277
14 F.3d 1114, 1124 (9th Cir. 2002) (holding that for the orthodoxy-
15 of-belief prohibition to apply, there must be more than mere
16 speech by the government; rather, there must be "actual or
17 threatened imposition of government power or sanction.").
18 Whatever its source, it seems clear that the Constitution places
19 some structural limits, as yet undefined, on the ability of
20 government officials to divert public funds for partisan speech.

21
22 ²⁸ This article is a recent revival of an argument advanced
23 in the earlier work of two scholars, both of whom argued for broad
24 limitations on government speech. See Mark G. Yudof, *When*
25 *Government Speaks* (1983); Robert D. Kamenshine, *The First*
26 *Amendment's Implied Political Establishment Clause*, 67 Cal. L. Rev.
1104 (1979). These broad arguments have gained few adherents among
commentators, however, and even its chief proponents appear to have
recognized that the theory is out of step with current
jurisprudence. See Robert D. Kamenshine, *Reflections on Coerced*
Expression, 34 Land & Water L. Rev. 101 (1999).

1 Fourth, it is possible that the Due Process Clause and the
2 Equal Protection Clause may provide substantive limitations on
3 government speech programs where the legislative classifications
4 do not bear a rational relationship to a legitimate state
5 interest. See Richardson v. City & County of Honolulu, 124 F.3d
6 1150, 1162 (9th Cir. 2000).²⁹ Imagine a situation in which a
7 state legislature, under the influence of a powerful dairy
8 industry, decides to tax the margarine industry and use the
9 money for baseless ads attacking the industry. Such a scheme,
10 it seems, would not hold up to constitutional scrutiny.
11 "[P]rotecting a discrete interest group from economic
12 competition is not a legitimate governmental purpose." See
13 Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2003) (rejecting
14 proffered health and safety justifications and holding that a
15 state's prohibition on the sale of caskets by anyone not
16 licensed as a funeral director violated due process and equal

17 _____
18 ²⁹ Some have also suggested that government speech with
19 discriminatory content would be barred by equal protection or anti-
20 endorsement principles. See, e.g., James Forman, Note, *Driving*
21 *Dixie Down: Removing the Confederate Flag from the Southern State*
22 *Capitols*, 101 Yale L.J. 505 (1991) (arguing that the Southern
23 states' flying of the Confederate Flag "constitutes government
24 endorsement of discrimination by private parties" and is therefore
25 unconstitutional); cf. American Family Ass'n, 277 F.3d at 1127
26 (Noonan, J., dissenting) ("Suppose a city council today, in the
year 2002, adopted a resolution condemning Islam because its
teachings embraced the concept of a holy war and so, the resolution
said, were 'directly correlated' with the bombing of the World
Trade Center. Plausibly the purpose might be to discourage terror
bombings. Would any reasonable, informed observer doubt that the
primary effect of such an action by a city could be the expression
of official hostility to the religion practiced by a billion
people?").

1 protection clauses); see City of Philadelphia v. New Jersey, 437
2 U.S. 617, 624 (1978) (holding, in dormant commerce clause
3 context, that "where simple economic protectionism is effected
4 by state legislation, a virtually per se rule of invalidity has
5 been erected.").

6 Finally, the Constitution places substantial limits on the
7 government's ability to use its speech to interfere with or
8 punish constitutionally-protected activity. As a general rule,
9 of course, the Supreme Court's "unconstitutional conditions"
10 jurisprudence has said that the state may exercise its power to
11 spend in order to discourage protected activity. See, e.g.,
12 Maher v. Roe, 432 U.S. 464 (1977) (holding that the government
13 "may make a value judgment favoring childbirth over abortion,
14 and . . . implement that judgment by the allocation of public
15 funds."). Perhaps the most extreme (and extremely
16 controversial) application of this principle was Rust v.
17 Sullivan, 500 U.S. 173, 192-93 (1991), which sustained a
18 prohibition on abortion-related advice by recipients of federal
19 funds designated for family-planning counseling.³⁰ But even

20
21 ³⁰ While "Rust did not place explicit reliance on the
22 [government speech rationale], when interpreting the holding in
23 later cases [the Court has] explained Rust on this understanding."
24 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540 (2001). This
25 explanation of Rust's holding, however, may be dicta. See Brown
26 v. California Dep't of Transp., 321 U.S. 1217, 1225 (9th Cir. 2003)
("Rust addresses only the government's ability to exclude from a
government-funded program speech is incompatible with the program's
objectives."); Velazquez, 531 U.S. at 554 (Scalia, J., dissenting)
(stating that if the speech "at issue in Rust constituted
'government speech,' it is hard to imagine what subsidized speech
would not be government speech").

1 there, the Court was careful to emphasize the difference between
2 discouragement and coercion:

3 A refusal to fund protected activity,
4 without more, cannot be equated with the
5 imposition of a 'penalty' on that activity.
6 There is a basic difference between *direct*
7 *state interference* with a protected activity
8 and state encouragement of alternative
9 activity consonant with legislative policy.

10 500 U.S. at 193 (quoting Harris v. McRae, 448 U.S. 297, 317 n.19
11 (1980)); Maher, 432 U.S. at 475) (internal quotation marks and
12 citations omitted); see also American Family Ass'n, 277 F.3d at
13 1125 (holding that government may criticize protected activity
14 "so long as there is no actual or threatened imposition of
15 government power or sanction").

16 It is easy to imagine, however, a government speech program
17 that goes beyond mere discouragement and crosses into
18 constitutionally-forbidden territory. Suppose, for instance,
19 that a state decided to levy a severely punitive per-procedure
20 tax on doctors who perform abortions and directed that the
21 revenue thereby derived be used to fund an aggressive public
22 advertising campaign designed to intimidate women seeking
23 abortions and vilify the doctors who provide them. The
24 government speech doctrine notwithstanding, such a program would
25 undoubtedly constitute an impermissible "penalty" on, or an
26 instance of "direct state interference" with, protected
27 activity. As even the Rust Court implicitly acknowledged, such
28 a program would fail constitutional scrutiny.

1 Plaintiffs make no claim that the advertisements at issue
2 fall within any of the above limitations or the government
3 speech doctrine, and it does not require extended discussion to
4 recognize that their reticence is entirely proper. While it is
5 likely that as the government speech doctrine develops, other
6 limitations will be recognized, plaintiffs do not suggest any
7 such development. Nonetheless, it is appropriate to reiterate
8 that government is no more free to disregard constitutional and
9 other legal norms when it speaks than when it acts.

10 V.

11 ARTICLE I OF THE CALIFORNIA CONSTITUTION

12 In addition to their First Amendment claim, plaintiffs'
13 bring an identical claim under the California Constitution's
14 free speech clause. See Cal. Const., Art. I, § 2. In Pennhurst
15 State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117 (1984),
16 however, the Supreme Court held that "a federal suit against
17 state officials on the basis of state law contravenes the
18 Eleventh Amendment when . . . the relief sought and ordered has
19 an impact directly on the State itself." As plaintiffs now
20 concede, this is such a suit. Because the Eleventh Amendment
21 operates as a restriction on the jurisdiction of the federal
22 courts, see California v. Deep Sea Research, Inc., 523 U.S. 491
23 (1998), plaintiffs' claim under the California Constitution must
24 be dismissed without prejudice to it being re-filed in a court
25 of competent jurisdiction. See Freeman v. Oakland Unified Sch.
26 Dist., 179 F.3d 846, 847 (1999) (reversing district court's

1 dismissal with prejudice of state law claim barred by
2 Pennhurst); Frigard v. United States, 862 F.2d 201, 204 (9th
3 Cir.1988) (holding dismissals for lack of jurisdiction "should
4 be . . . without prejudice so that a plaintiff may reassert his
5 claims in a competent court").

6 VI.

7 SEVENTH AMENDMENT

8 The Seventh Amendment provides in relevant part: "In suits
9 at common law, where the value in controversy shall exceed
10 twenty dollars, the right of a trial by jury shall be
11 preserved." U.S. Const., amend. VII. Plaintiffs' attempt to
12 invoke this provision must fail. It is established that the
13 right to a jury trial in civil cases under the Seventh Amendment
14 is not among those provisions of the Bill of Rights that have
15 been made applicable to the states through the Fourteenth
16 Amendment. See Gasperini v. Center for Humanities, Inc., 518
17 U.S. 415, 418 (1996) ("Seventh Amendment . . . governs
18 proceedings in federal court, but not in state court"); Curtis
19 v. Loether, 415 U.S. 189, 192 n.6 (1974) (the Supreme Court "has
20 not held that the right to jury trial in civil cases is an
21 element of due process applicable to state courts through the
22 Fourteenth Amendment"); Walker v. Sauvinet, 92 U.S. 90, 92
23 (1875) ("The States, so far as [the Fourteenth] amendment is
24 concerned, are left to regulate trials in their own courts in
25 their own way. A trial by jury . . . is not, therefore, a
26 privilege or immunity of national citizenship, which the States

1 are forbidden by the Fourteenth Amendment to abridge.").
2 Because defendants are state officials, and because the Seventh
3 Amendment does not restrain the conduct of state officials,
4 plaintiffs cannot maintain a Seventh Amendment claim against
5 them.

6 VII.

7 THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

8 Finally, plaintiffs argue that the State's broadcast of its
9 ads denies them due process of law. To establish a procedural
10 due process claim, plaintiffs must first show the deprivation of
11 a liberty or property interest protected by the Due Process
12 Clause. See Bd. of Regents of State Colleges v. Roth, 408 U.S.
13 564 (1972). "Plaintiffs all are corporations. Corporations do
14 not have fundamental rights; they do not have liberty interests,
15 period." Nat'l Paint & Coatings Ass'n v. City of Chicago, 45
16 F.3d 1124, 1129 (7th Cir. 1995). Corporations do have property
17 interests, however, that may be protected by procedural due
18 process.

19 Here, plaintiffs allege that the challenged ads stigmatize
20 them and publicly disparage their reputation and character. See
21 Complaint at 11, ¶ 40. Allegations of injury to reputation
22 alone, however, cannot support a claim for violation of due
23 process, and therefore must be accompanied by a constitutionally
24 recognized injury. See Paul v. Davis, 424 U.S. 693, 712 (1976).
25 This rule, labeled the "stigma-plus" standard, requires a
26 plaintiff to show that the government official's conduct

1 deprived the plaintiff of a previously recognized property or
2 liberty interest in addition to damaging the plaintiff's
3 reputation. Id. at 712. The rule is designed to prevent the
4 Due Process Clause from becoming an all-purpose
5 constitutionalization of state tort law. Id. at 701. The
6 Supreme Court has explained that an "interest in reputation is
7 simply one of a number which the State may protect against
8 injury by virtue of its tort law, providing a forum for
9 vindication of those interests by means of damages actions. And
10 any harm or injury to that interest, even where as here
11 inflicted by an officer of the State, does not result in a
12 deprivation of any 'liberty' or 'property' recognized by state
13 or federal law[.]". Id. at 712; cf. Siegert v. Gilley, 500 U.S.
14 226, 234 (1991) ("Most defamation plaintiffs attempt to show
15 some sort of special damage and out-of-pocket loss which flows
16 from the injury to their reputation. But so long as such damage
17 flows from injury caused by the defendant to a plaintiff's
18 reputation, it may be recoverable under state tort law but it is
19 not recoverable in a Bivens action."). The Ninth Circuit has
20 made clear that this rule is no less applicable to businesses,
21 holding that the dissemination of a defamatory government report
22 did not deprive a California business of "property" in its
23 customer goodwill. See WMX Technologies, Inc. v. Miller, 197
24 F.3d 367, 376 (9th Cir. 1999) (en banc).

25 Plaintiffs' attempts to satisfy the "plus" element of the
26 "stigma-plus" requirement essentially by re-alleging that they

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- 3. As to plaintiffs' claim under Article I of the California Constitution, the Clerk is directed to enter judgment against the plaintiffs without prejudice.
- 4. As to plaintiffs' claims under the First Amendment, the Seventh Amendment and the Due Process Clause of the Fourteenth Amendment, the Clerk is directed to enter judgment against the defendants with prejudice.
- 5. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.
DATED: July 21, 2003.

~~LAWRENCE K. KARLTON~~
SENIOR JUDGE
UNITED STATES DISTRICT COURT