

**FILED**

JUL 22 2003

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_

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.<sup>1</sup>

8 I.

9 BACKGROUND<sup>2</sup>

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").<sup>3</sup> Cal. Rev. & Tax

14  
15 <sup>1</sup> 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 <sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup> 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).<sup>5</sup>

13 \_\_\_\_\_  
14           <sup>4</sup> 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).

<sup>5</sup> 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

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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.")<sup>6</sup>

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

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23       <sup>6</sup> 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.<sup>7</sup> 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

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24  
25 <sup>7</sup> 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,<sup>8</sup> 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

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23 <sup>8</sup> 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.<sup>9</sup> 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,

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23  
24 <sup>9</sup> 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").<sup>10</sup>

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

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24 <sup>10</sup> 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.").<sup>11</sup>

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

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23  
24 <sup>11</sup> 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.<sup>12</sup> 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,

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20  
21       <sup>12</sup> 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

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1 speaking on behalf of the government.<sup>13</sup> 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

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25 <sup>13</sup> 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.<sup>14</sup>

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."<sup>15</sup>

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12  
13 <sup>14</sup> 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.

<sup>15</sup> The Court explained:

The Government's failure to raise its argument in  
the Court of Appeals deprived respondent of the  
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

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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." ).<sup>16</sup>

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

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16  
17 <sup>16</sup> 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  
21 Almond IV") ("[I]n light of the Supreme Court's remand in Cal-  
22 Almond II and our subsequent remand for dismissal in Cal-Almond  
23 III, Cal-Almond I has been implicitly overruled."). The decision's  
24 holdings on other issues, however, retain precedential value. See,  
23 e.g., NRDC v. Evans, 316 F.3d 904, 906, 911-12 (9th Cir. 2003)  
(relying on Cal-Almond I for an administrative law issue; "The  
24 outcome here follows Cal-Almond.").

25 Nor does the Ninth Circuit's recent decision in Delano Farms  
26 help plaintiffs. Delano Farms simply offers a straightforward  
application of United Foods to a grape advertising program similar  
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  
26 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.<sup>17</sup> 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 &

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23 <sup>17</sup> 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).<sup>18</sup>

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.").<sup>19</sup>

16  
17 <sup>18</sup> 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 <sup>19</sup> 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

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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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1 things, content, timing and purpose." Downs, 228 F.3d at 1013.<sup>20</sup>

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.<sup>21</sup> While plaintiffs' reaction to

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22 <sup>20</sup> 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 <sup>21</sup> 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.").<sup>22</sup>

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

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21 philosophy rather than a specific constitutional power.  
22

23 <sup>22</sup> 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);<sup>23</sup> 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.").

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19  
20 <sup>23</sup> 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).<sup>24</sup> California's decision to combat

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13           <sup>24</sup> One pair of commentators have asserted that:

14           Speech is but one means that government must have at its  
15           disposal to conduct its affairs and to accomplish its  
16           ends. Restricting the use of tobacco, for example,  
17           might be accomplished by regulatory action that makes it  
18           sale or purchase or possession illegal. It might be  
19           accomplished by taxing the disfavored behavior or  
20           production. But the restriction might also be  
21           accomplished through the provision of information so  
22           that the consumer's choice will be knowing, or by direct  
23           persuasion in the form of government advertisements or  
24           by educational programs or even by subsidies for groups  
25           or organizations that speak out against tobacco use.  
26           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."

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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).<sup>25</sup>

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

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20 <sup>25</sup> 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.").<sup>26</sup>  
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.<sup>27</sup> See NEA v. Finley, 524 U.S.

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19  
20 <sup>26</sup> 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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18  
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).<sup>28</sup> 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.

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21  
22 <sup>28</sup> 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).<sup>29</sup> 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 <sup>29</sup> 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.<sup>30</sup> But even

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20  
21 <sup>30</sup> 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



1 3. As to plaintiffs' claim under Article I of the  
2 California Constitution, the Clerk is directed to  
3 enter judgment against the plaintiffs without  
4 prejudice.

5 4. As to plaintiffs' claims under the First  
6 Amendment, the Seventh Amendment and the Due  
7 Process Clause of the Fourteenth Amendment, the  
8 Clerk is directed to enter judgment against the  
9 defendants with prejudice.

10 5. The Clerk is directed to CLOSE the case.

11 IT IS SO ORDERED.

12 DATED: July 21, 2003.

13  
14 ~~LAWRENCE K. KARLTON~~  
15 SENIOR JUDGE  
16 UNITED STATES DISTRICT COURT  
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