

MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
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Today the Supreme Court granted certiorari in two sets of cases of interest to the business community. Amicus briefs in support of petitioners will be due on Thursday, July 8, 2004, and amicus briefs in support of respondents will be due on Thursday, August 12, 2004.

1. *Dormant Commerce Clause – Regulation Of Interstate Shipping Of Wine.* In the compromise that led to the repeal of prohibition, the states were given the authority to regulate “[t]he transportation or importation into any state” of alcohol. U.S. CONST. am. XXI § 2. Pursuant to this authority, roughly half of the states preclude or sharply limit the ability of out-of-state wineries to ship wine directly to consumers within those states. A number of courts have upheld these laws as a valid exercise of the states’ authority under the 21st Amendment; others have invalidated these laws on the ground that they discriminate against out-of-state wineries in violation of the dormant Commerce Clause. The Supreme Court granted certiorari in and consolidated *Granholm v. Heald*, No. 03-1116, *Michigan Beer & Wine Wholesalers Association v. Heald*, No. 03-1120, and *Swedenburg v. Kelly*, No. 03-1274, to decide whether “a State’s regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate[s] the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment.”

This case is of obvious interest to any company involved in the sale or distribution of alcohol. Because the Court may use this case to address more broadly the scope of the dormant Commerce Clause, the case may also be important to any business that sells goods interstate or that is subject to the regulatory authority of multiple states.

Any questions about this case should be directed to David Gossett (202-263-3384) in our Washington, D.C. office.

2. *First Amendment – Mandatory Contributions for Generic Advertising.* In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Supreme Court held that a federal program imposing mandatory assessments on mushroom producers to fund generic mushroom advertising violated the First Amendment. The Supreme Court granted certiorari in and consolidated *Veneman v. Livestock Marketing Association*, No. 03-1164, and *Nebraska Cattlemen Inc. v. Livestock Marketing Association*, No. 03-1165, to consider whether the federal Beef Promotion and Research Act of 1985 (the “Beef Act”), which compels beef producers to pay a one dollar “checkoff” on every head of cattle sold to fund generic beef advertising, violates the First Amendment.

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Finding the beef-checkoff program to be identical in all material respects to the program invalidated in *United Foods*, the Eighth Circuit held that it violated the First Amendment. 335 F.3d 711 (2003). The court of appeals acknowledged that in *United Foods* the Supreme Court specifically left open the possibility that mandatory assessments for generic advertising programs might be sustained as government speech or under the balancing test traditionally applied to government restrictions on commercial speech. It held, however, that Beef Act advertising constitutes government *interference* with *private* speech (*id.* at 720), not government speech, and that the government’s interest in promoting the beef industry does not outweigh the rights of beef producers not to support advertising messages with which they disagree. See *id.* at 725-26.

This case is important to all businesses that either support or oppose government-sponsored generic advertising programs. Because there are many other contexts in which the government compels business entities to speak, this case may also be of broader interest to many other businesses.

Any questions about this case should be directed to Craig Canetti (202-263-3276) in our Washington, D.C. office.

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On May 3, 2004, the Supreme Court requested the views of the Solicitor General in the following case of interest to the business community:

IBP, Inc. v. Alvarez, No. 03-1238: The question presented is whether the time that employees spend walking from the lockers where they don protective gear to their work stations falls within Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), which excludes from “hours worked” under the Fair Labor Standards Act time spent “walking * * * to and from the actual place of performance of the principal activity or activities which such employee is employed to perform.”

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