No. 00-276

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

UNITED FOODS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

REPLY BRIEF FOR THE PETITIONERS

Respondent suggests only one basis for distinguishing the generic advertising program for mushrooms from the generic advertising programs for California tree fruits sustained in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). In respondent's view, unless tied to "supply-side controls" (Br. 32), such programs are unconstitutional. Respondent does not explain why the presence or absence of such additional non-speech regulation of the supply of a commodity is relevant to the application of the First Amendment to commercial advertising designed to stimulate demand for the commodity. And it is not. The Court held in *Wileman* that the generic advertising programs for California tree fruits are consistent with the First Amendment because they do not restrain a producer from communicating any message to any audience, require a producer to engage in actual or symbolic speech, or compel a producer to endorse or to finance any political or ideological views. See *Wileman*, 521 U.S. at 469-470. The generic advertising program in this case likewise has none of those adverse effects on producers' freedom of speech. It therefore does not "warrant special First Amendment scrutiny." *Id.* at 474.

The mushroom advertising program also does not implicate the First Amendment for an independent reason: The program involves government speech—on a topic selected by Congress and through means overseen by the Secretary of Agriculture—funded by those whom Congress expected would benefit most from the speech. Respondent suggests no valid reason why this government program should be viewed any differently, with respect to its impact on interests protected by the First Amendment, from other government programs that are targeted at a particular

industry and that are funded with taxes or user fees imposed on that industry.

I. THE MUSHROOM ADVERTISING PROGRAM IS VALID UNDER THE FIRST AMENDMENT

Respondent principally contends that *Wileman* turned on the comprehensive nature of the marketing orders establishing the generic advertising programs for California tree fruits, and thus is distinguishable from this case. Br. 21. As our opening brief explains, that proposition has scant support in *Wileman* (U.S. Br. 21-24), rests on an erroneous premise regarding the extent of regulation of the California tree fruit industries (*id.* at 27-28), and, most importantly, has no bearing on the extent to which a generic advertising program implicates interests protected by the First Amendment (*id.* at 24-26, 29-31).[1]

1. As this Court recognized in *Wileman*, generic advertising programs for agricultural commodities are different, in three critical respects, from laws that have been held to violate the freedom of speech protected by the First

[1] Respondent attempts (*e.g.*, Br. 22) to support that proposition with selective quotations from the United States' briefs and oral argument in *Wileman*. But those quotations, in context, confirm that the United States has consistently maintained that the constitutionality of a collective advertising program rests not on the presence of additional regulation, but on "the nonspeech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers"—a purpose that, depending upon the circumstances of a particular market, the government may seek to advance through a generic advertising program or "an array of [other] mechanisms." U.S. Reply Br. at 3 in *Wileman*, *supra*, No. 95-1184); see Oral Arg. Tr. 13 (relying on the legitimacy of the government's interest in "establishing orderly market conditions" for commodities). Indeed, given the number of stand-alone generic advertising programs established under federal law (see Pet. 13-14 & n.7), it would have been surprising for the government to have urged the Court to sustain the programs for California tree fruits under an analysis that would call into question the constitutionality of other generic advertising programs.

Amendment: They "impose no restraint on the freedom of any producer to communicate any message to any audience," they "do not compel any person to engage in any actual or symbolic speech," and they "do not compel the producers to endorse or to finance any political or ideological views." 521 U.S. at 469-470. None of those distinctions is any more, or less, true depending upon whether the advertised commodity is, or is not, regulated in other respects.

The Court made clear in *Wileman* that the First Amendment is not implicated by every law that requires the funding of expressive activity. See 521 U.S. at 471-473. The Court distinguished decisions, such as *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), which involved assessments to fund expressive and associational activities of an inherently "political" or "ideological" nature, such as collective bargaining. See 521 U.S. at 472. The Court explained that it "cannot be said to engender any crisis of conscience" to require producers to fund generic advertising for their own commodity. *Ibid.* For that reason, the Court concluded, an agricultural enterprise's objections to paying such assessments are not comparable to those of the teachers in *Abood*, "in which an objection rested on political or ideological disagreement with the content of the message." *Ibid.*[2] It is irrelevant to that distinction whether or

[2] The Court recognized that producers' objections to the content of particular advertisements, on grounds that they are not in good taste or that they suggest that all handlers' products are the same, did not call into question the constitutionality of the generic advertisement program. See *Wileman*, 521 U.S. at 467-468 nn. 10, 11. Similarly, respondent's objections to certain advertising of the Mushroom Council, such as the 1994 "Let Your Love Mushroom" promotion, do not undermine the constitutionality of the program. Respondent's claims that, for example, "[t]he Mushroom Council[] suggest[ed] that mushrooms are an aphrodisiac" (Br. 44) as part of that campaign are both legally irrelevant and factually exaggerated. The "suggestion" about which respondent apparently

not the commodity is also subject to other regulations that have nothing to do with any expressive activity.

The Court also distinguished *Abood* and similar cases on a second, independent ground. The Court explained that those cases allow objectors to be assessed even for political or ideological activities, as long as those activities are "'germane' to the purpose for which compelled association was justified," such as achieving labor peace. *Wileman*, 521 U.S. at 473 (quoting *Keller* v. *State Bar*, 496 U.S. 1, 13 (1990)). Thus, although compelled contributions for political or ideological speech *implicate* the First Amendment (whereas compelled contributions for commercial advertising do not), they do not *violate* the First Amendment if the speech is "germane" to a legitimate government purpose. The Court recognized that "the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders," *ibid.*, which the Court identified as advancing "the producers' and handlers' common interest in promoting the sale of a particular product" and thereby "disposing of their output on favorable terms," *id.* at 462. That is essentially the same purpose that Congress articulated in the Mushroom Act. See 7 U.S.C. 6101(b). A generic advertising program is equally "germane" to that purpose whether or not the government is also seeking to advance the purpose through other means. Here, therefore, the absence of quality, maturity, and packaging

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complains was contained in a brochure, distributed in connection with Valentine's Day, that principally consisted of mushroom recipes; mushroom purchasing, cooking, and storage tips; and advice on planning a "romantic" meal (*e.g.*, candlelight, flowers, music). The brochure also briefly noted, without endorsement, that "[t]he ancient philosopher Petronius and many others proclaimed mushrooms as a potent aphrodisiac and popular 'love' food," and that "[f]or centuries, legends have attributed mushrooms with special mystical powers that cure illness, prolong life and enhance sexuality." We have lodged copies of the brochure with the Court.

requirements for mushrooms, similar to those for the tree fruits in *Wileman*, has no bearing on the germaneness of the generic advertising program to the government's purpose of maintaining and expanding the mushroom market.

It is unnecessary for the Court to address in this case whether the First Amendment is satisfied if the expression for which funding is compelled is *either* non-ideological *or* germane to a valid government purpose, but not both. Here, as in *Wileman*, both requirements are met because "(1) the generic advertising of [mushrooms] is unquestionably germane to the purposes of the [Mushroom Act and Mushroom Order] and, (2) in any event, the assessments are not used to fund ideological activities." *Wileman*, 521 U.S. at 473.[3]

2. Respondent notes (Br. 24-26) several references in the *Wileman* opinion to the "other features of the marketing

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[3] As we have explained (U.S. Br. 16-17 n.9), the Court's use of the term "in any event" indicates that, at least in the context of generic advertisement programs like those in this case and *Wileman*, the First Amendment is satisfied if the generic advertising is either germane to the government's purpose or non-ideological. That conclusion is reinforced by the structure of Part IV of the Court's opinion. The Court first concluded that the producers did not "have a First Amendment complaint," because their objections to payment of the assessments did not, and could not, "rest[] on political or ideological disagreement with the content of the message." 521 U.S. at 472. Then, in a new paragraph introduced with the word "[m]oreover," the Court addressed the germaneness question. *Id.* at 472-473. The Court has also suggested in other contexts that the germaneness of the expressive activity for which assessments are used becomes relevant, for First Amendment purposes, only when that activity is to some extent political or ideological. See, *e.g.*, *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 529 (1991) (allowing the use of objecting teachers' contributions to fund portions of publications that, although not germane to collective bargaining, were "neither political nor public in nature"). The Court's decision in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), upon which respondent relies (Br. 36-37), is inapposite because the student activity fees in that case were used to fund expression that was in many instances ideological.

orders" for California tree fruits. 521 U.S. at 476; see also *id.* at 470, 476. As we have explained (U.S. Br. 21-24), those observations are not essential elements of the Court's First Amendment analysis.[4] As discussed above (at 2-4), the First Amendment concerns that the Court identified as relevant to that analysis—whether producers are restrained from communicating any message to any audience, required to engage in actual or symbolic speech, or compelled to endorse or fund political or ideological views, see 521 U.S. at 469-470—are unaffected by the existence, or absence, of such additional regulatory provisions. The Court's references to those provisions are most naturally read as reflecting the conclusion that a producer's obligation to fund a generic advertising program for its commodity is no different, for any reason relevant to First Amendment interests, from a producer's

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[4] Respondent errs in asserting (Br. 25) that the Court's core First Amendment analysis in *Wileman* is contained not in Part IV of the opinion, but "principally in Part III * * * and in Part V." As we have noted (U.S. Br. 21-22), Part III is an introductory section, which describes the scope of the controversy. Significantly, the final paragraph of Part III, which discusses "the statutory context" in which the case arose, concludes by stating that "[i]t is in this context that we *consider* whether" the generic advertising programs should be reviewed "under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues." 521 U.S. at 469 (emphasis added). It is in Part IV of the opinion that the Court proceeds to its consideration of the question posed. Part V, the other section of the opinion on which respondent relies, mentions only one First Amendment case, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980), which the Court had already determined in Part IV to be inapposite. See 521 U.S. at 469 & n.12, 474 & n.18. Part IV, in contrast, considers the relevance of 16 First Amendment cases, and concludes with the holding that generic advertising programs do not "warrant special First Amendment scrutiny." *Id.* at 474. The dissenting opinion in *Wileman* had no difficulty in discerning the portion of the majority's opinion that contains its core First Amendment analysis. See *id.* at 477 (Souter, J., dissenting) (summarizing majority's analysis).

obligation to comply with other regulatory requirements that Congress might impose for the purpose of promoting demand (or controlling supply) of the commodity. It is therefore appropriate to review all such measures under the same deferential standard. See *id.* at 477 (describing the generic advertising programs for California tree fruits as "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress").

3. Respondent does not embrace the court of appeals' rationale for distinguishing *Wileman*: that the marketing orders there conferred on producers "the monopoly powers inherent in government control of price and supply," and that the producers could be required "[i]n exchange for such power" to fund a generic advertising program. Pet. App. 8a. As our opening brief explains (U.S. Br. 27-28), that rationale rests on an erroneous premise: The marketing orders in *Wileman* did not, in fact, impose "government control of price and supply" (or otherwise vest producers with "monopoly powers"), but rather imposed only quality, maturity, and packaging requirements.[5]

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[5] As we have noted (U.S. Br. 28-29), the same regulations imposed on the California tree fruit industries—or more extensive regulations concerning price and supply—could be imposed on the mushroom industry in marketing orders issued pursuant to the Agricultural Marketing Agreements Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The AMAA is applicable, with exceptions not relevant here, to "any agricultural commodity," 7 U.S.C. 608c(2), including mushrooms. Respondent's assertion (Br. 28) that "[f]ederal law relating to mushroom marketing * * * not only does not mandate * * * collective controls on supply, *it forbids them*," is misleading. The Mushroom Act states merely that "[n]othing in this chapter [*i.e.*, the Mushroom Act itself] may be construed to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms." 7 U.S.C. 6101(c). Neither the Mushroom Act nor any other statute "forbids" the imposition of "collective controls on supply" of mushrooms in marketing orders under the AMAA.

Respondent does, however, attempt a variation on the court of appeals' theme, which proceeds from the (also erroneous) premise that the quality standards in *Wileman* resulted in "homogenization" of the fruits to the benefit of producers.[6] Respondent asserts (Br. 23-24) that "*Wileman* concludes that the government could, as a related economic measure in the same marketing orders, require the producers who benefit from such collectivization to contribute to a generic advertising program that reflects the characteristics of the homogenized product." Tellingly, respondent cites no page in *Wileman* on which this "conclu[sion]" supposedly appears. Nor could respondent do so. Nothing in *Wileman* suggests, much less holds, that producers may be required to fund a generic advertising program only when they obtain some separate "benefit" from government regulation aside from the benefit that they obtain from the generic advertising program itself. Indeed, the homogenization "benefit" that respondent postulates was vigorously disputed by the fruit handlers in *Wileman*, who denied that all California tree fruits were "of equal quality," 521 U.S. at 467 n.10; thus, if the Court's analysis were predicated on a contrary factual determination, the Court surely would have said so.

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[6] A marketing order that sets minimum quality standards does not "homogenize" a commodity, because growers retain the ability to differentiate their own product, including by competing with respect to quality above the minimum standard. The marketing orders in *Wileman*, moreover, left growers free to produce any of the numerous varieties of those fruits. See, *e.g.*, 7 C.F.R. 916.356 (1999) (listing 111 varieties of California nectarines); 7 C.F.R. 917.459 (1999) (listing 98 varieties of California peaches). Indeed, the respondents in *Wileman* objected to the marketing orders on the ground, among others, that generic advertising erroneously implied that "all California fruit is the same," whereas, in fact, "the commodities are highly varied" in type and quality. 521 U.S. at 468 n.10; see *id.* at 467 n.11.

Respondent's theory is without support not only in *Wileman* itself but also in First Amendment jurisprudence generally. This Court's cases involving compelled payments for expressive or associational activity assume that payors will receive some benefit from that very activity. See *Abood*, 431 U.S. at 222 (explaining that union-shop arrangements are "thought to distribute fairly the cost of [negotiating and administering collective bargaining agreements] among those who benefit"). But those cases do not hold that payors must also receive some regulatory benefit *in addition to* the benefit they receive from the expressive or associational activity. Nor is there any reason to conclude that the existence, or absence, of some separate regulatory benefit bears on whether, or to what extent, the payor's First Amendment interests have been infringed.

4. Respondent also suggests (Br. 15-21) that there is not a sufficient public or governmental interest to justify the Mushroom Act, that the generic advertising program does not adequately serve the interest that Congress identified, and that Congress did not suitably tailor the Act's assessment provisions to avoid "free-rider" concerns. The short answer is that, in matters of economic regulation, Congress's choices are entitled to a "strong presumption of validity." *Wileman*, 521 U.S. at 477; accord, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-315 (1993); *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 234 (1956). Respondent has not rebutted that presumption here. In any event, generic advertising program for mushrooms is valid, even under a less deferential standard of review.[7]

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[7] Respondent errs in asserting (Br. 16) that the United States has somehow "waived" an argument that the generic advertising program for mushrooms satisfies the test articulated in *Central Hudson*, 447 U.S. at 566, or some other First Amendment test that respondent might urge the Court to adopt. The Court made clear in *Wileman* that "the *Central Hudson* test, which involved a restriction on commercial speech, should

First, as our opening brief notes (U.S. Br. 2-3), Congress reasonably concluded that the Mushroom Act, and the generic advertising program that it authorized, would serve an important interest: "the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms"—an interest that Congress deemed "vital to the welfare of producers," other members of the industry, and "the agricultural economy of the Nation." 7 U.S.C. 6101(a)(5); see *Wileman*, 521 U.S. at 476 (noting "legitima[cy]" of Congress's purpose of "stimulat[ing] consumer demand for an agricultural product"). The record developed by Congress with respect to the Mushroom Act demonstrated the need to "increase the stability of the mushroom market." H.R. Rep. No. 568, 101st Cong., 2d Sess. 45 (1990). For example, Members of Congress believed it crucial to the domestic mushroom industry to expand the market for fresh mushrooms, because the market for mushrooms to be used in canning had been "practically * * * destroyed" as a result of dramatic increases in imports of canned mushrooms. *Research, Promotion, and Consumer Information Programs*: *Hearings Before the Subcomm. on Domestic Mktg., Consumer Relations, and Nutrition of the House Comm. on Agric.*, 101st Cong., 1st Sess. 81 (1989) (*Mushroom Act Hearings*) (Rep. Schulze); accord *id.* at 82 (Rep. Panetta). Congress was also made aware that per capita mushroom consumption in the United States was less than half that in Canada, Great Britain, and the Netherlands, see H.R. Rep. 568, *supra*, at 45, which suggested the desirability of "unit[ing] the industry to

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[not] govern a case involving the compelled funding of speech." 521 U.S. at 474 n.18; accord *id.* at 469 & n.12. There was thus no reason in this case (as there was in *Wileman*, where that question had not yet been resolved, and where the court of appeals relied on *Central Hudson*) to make a separate argument that the generic advertising program satisfies the *Central Hudson* test.

provide the critical mass needed to initiate beneficial research and consumer information efforts." *Mushroom Act Hearings* 87 (Rep. Panetta); see also *id.* at 78 (Rep. Schulze) (noting that "[a]s separate entities, the smaller growers * * * have no vehicle for getting this information out to the public").[8]

Second, Congress also reasonably concluded that a generic advertising program would advance the governmental interest in strengthening the mushroom industry. Congress enacted the Mushroom Act against the backdrop of similar generic advertising programs already in existence for other agricultural commodities. If such programs had not been effective to maintain and expand markets, then Congress, together with members of the mushroom industry, would not have urged adoption of the Mushroom Act. In practice, moreover, the generic advertising program has proven effective in maintaining and expanding the mushroom market. As our opening brief notes (U.S. Br. 6 & n.6), growers and importers subject to assessments under the

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[8] The validity of Congress's interest in strengthening the mushroom market is not, as respondent suggests (Br. 30), undermined by the distinctive characteristics of mushrooms or their cultivation. For example, the mere fact that mushrooms grow indoors in a controlled environment does not insulate mushroom producers from many of the same "production perils" that affect producers of other agricultural commodities, including disease, insect damage, and extremes of weather (which can "damag[e] the mushroom house," "make[] controlling the inside climate difficult," and "interfere with compost production"). Economic Research Serv., U.S. Dep't of Agric., *Mushrooms: An Economic Assessment of the Feasibility of Providing Multiple-Peril Crop Insurance* 24-28 (Apr. 28, 1995) (*available at* <*http://www.rma.usda.gov/pilots/feasible/txt/mushrooms.txt*>); see also *Mushroom Act Hearings* 105 (chairman of mushroom producers' organization explaining that "[o]ur crops are subject to problems as most of agriculture is from disease or pests or strains that lose their integrity, problems with labor," etc.).

Mushroom Act voted overwhelmingly in a 1998 referendum to continue the generic advertising program, thereby expressing the industry's consensus that the program is serving its purpose. See *Wileman*, 521 U.S. at 476 ("At least a majority of the producers in each of the markets in which such advertising is authorized must be persuaded that it is effective, or presumably the programs would be discontinued.").[9] Moreover, an econometric study conducted by an independent research organization has since concluded that the activities of the Mushroom Council have "clearly had a consistent and significant positive impact on the overall demand for fresh mushrooms in the US." Food Marketing and Economics Group, *Mushroom Council Program Effectiveness Review 1999*, at 7 (Feb. 2000) (copies lodged with the Court).[10]

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[9] Respondent claims (Br. 18-19) that it "would not benefit" from the greater demand for mushrooms generated by the Mushroom Council's activities, because "increased supplies from competitors will preclude [respondent] from increasing its sales or benefiting from higher prices." It is not apparent, however, why respondent could not increase its supplies along with its competitors. In any event, respondent acknowledges that other mushroom producers, even if not respondent itself, increase their production of mushrooms in response to increases in demand—conduct that would be economically rational only if such increased production was profitable for those producers (*i.e.*, if the marginal benefits exceeded the marginal costs). That is precisely sort of benefit to the mushroom industry that Congress sought to achieve in the Mushroom Act.

[10] Respondent quotes (Br. 20) from a 1996 administrative law judge's opinion (which was subsequently overturned in light of *Wileman*) that the generic advertising program "has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry." But respondent omits the ALJ's reason for arriving at that conclusion: that the program "cannot be measured econometrically because the program is relatively new, and several years' data are necessary to conduct a complete analysis." J.A. 95. As noted in the text, such an econometric study now has been conducted.

Third, Congress reasonably structured the assessment provisions of the Mushroom Act to address concerns about "free riders." Congress was made aware that voluntary generic advertising programs in the mushroom industry had proved unworkable because some producers declined to contribute. See *Mushroom Act Hearings* 95-96 (testimony of president of American Mushroom Institute).[11] Congress's decision to exempt the smallest producers and importers does not, as respondent suggests (Br. 16-17), undermine the validity of Congress's "free-rider" concerns. See 7 U.S.C. 6102(6) and (11) (defining "importer" and "producer" as those who import or produce more than 500,000 pounds of mushrooms a year). Congress could reasonably conclude that the small sums that would be collected from small producers and importers would not warrant the added administrative and enforcement effort that would be entailed. See 136 Cong. Rec. 19,614 (1990) (colloquy between Sen. Fowler and Sen. Thurmond articulating that reason for a similar exemption). For example, at the current assessment rate of one-quarter cent per pound, a grower that produced 500,000 pounds of mushrooms would pay only $1250 annually.

Moreover, the referenda provision of the Mushroom Act takes into account the greater contribution of larger mushroom producers to the generic advertising program. See 7

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[11] Respondent suggests (Br. 16) that "free rider" concerns require that producers be granted a credit against the assessment for their own advertising. But the marketing orders in *Wileman* did not provide such credits. Respondent's argument also disregards the fact that generic advertising, which is designed to maintain or expand the market for a commodity, serves a different purpose from individual advertising, which is designed primarily to increase one producer's share of the market. See *Wileman*, 521 U.S. at 475 ("Independent advertising would be primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity.").

U.S.C. 6105. Producers and importers that are exempt from assessments are not entitled to participate in referenda to approve the establishment or continuation of the program. Moreover, a majority for purposes of such referenda is based not only on the number of producers and importers voting, but also on the volume of mushrooms produced or imported by those voting, 7 U.S.C. 6105(a)(2) and (b)(2), thereby assuring that producers and importers who pay relatively small assessments do not dominate a referendum.[12]

II. THE MUSHROOM ADVERTISING PROGRAM IS INDISTINGUISHABLE FROM TAXPAYER-FUNDED GOVERNMENT SPEECH PROGRAMS THAT RESPONDENT CONCEDES WOULD BE CONSTITUTIONAL

1. As respondent acknowledges (Br. 40-42), this Court has discretion to consider whether the Mushroom Act and Mushroom Order establish a program of government speech, and thus are not subject to First Amendment constraints on that additional ground. That argument, although not raised or addressed below, "is fairly embraced within the question set forth in the petition for certiorari." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995).[13]

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[12] Respondent also complains (Br. 18) about a supposed "regional 'free-riding' effect," *i.e.*, that some of its assessments are used to finance promotional activities outside the markets in which it does business. But that is a consequence of a national generic advertising program, which Congress, at the suggestion of the Department of Agriculture (see *Mushroom Act Hearings* 127), decided was preferable to regional programs. There is no record support for respondent's assertion (Br. 18 n.13) that the Mushroom Council's programs are "targeted to regions where branded advertising has not already raised consumption levels."

[13] That question is "[w]hether the assessments imposed by the [Mushroom Act] * * * on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment." Pet. I.

Of course, if the Court sustains the generic advertising program for mushrooms under *Wileman*, the Court need not consider the government speech issue. Otherwise, however, the Court could avoid considerable disruption of that program and other such programs by resolving the government speech issue in this case. The question here, as in *Lebron*, is an essentially legal one that does not require factual development.[14] The issue has been fully briefed by the parties, and may appropriately be decided by the Court.

2. Respondent concedes (Br. 43) that Congress could constitutionally establish the same sort of generic advertising program for mushrooms if the program were financed though "general tax revenues." Respondent identifies no reason relevant to First Amendment interests why Congress cannot instead fund the program through a tax, or user fee, that is assessed against the very persons who benefit most from the program.[15] As we have noted (U.S. Br. 42-43

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[14] Contrary to respondent's suggestion (Br. 42 n.36), our footnote citation to a newspaper article about the generic advertising program for pork was not offered as "evidence" on the government speech issue. Nor do we agree with respondent's suggestion (*ibid.*) that the litigation over the pork referendum—which arose out of disputes over such issues as whether a sufficient number of valid signatures had been obtained on petitions seeking the referendum and whether the Secretary could conduct a referendum in the absence of such signatures—demonstrates that democratic controls over generic advertising programs are ineffective. It demonstrates only that the election process in a democracy does not always function smoothly.

[15] For that reason, the mushroom advertising program is unlike the government program hypothesized by respondent (Br. 44) that would require "the nation's 300 leading competitive runners to pay a special assessment to finance a costly scheme by the Surgeon General to advertise jogging's benefits." In that instance, the advertising program would benefit not the "competitive runners" who were required to pay for it, but the more sedentary persons who might be induced to begin jogging.

& n.28), user fees are an accepted means by which the government may recover the costs of its programs or services, including those relating to the exercise of First Amendment rights. See, *e.g.*, *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 215 (1989) (noting statutory trend "to make various federal regulatory programs partially or entirely self-financing"); *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941) (a State may require a "reasonable" fee for a parade license to compensate local government for administrative and law-enforcement expenses); cf. *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000) (noting potential applicability of the government speech doctrine to programs of a state university "financed by tuition dollars," a form of use fee imposed on university students).

As respondent observes (Br. 44-45), the Third Circuit in *United States* v. *Frame*, 885 F.2d 1119, 1132-1133 (1989), cert. denied, 493 U.S. 1094 (1990), concluded that, although the question was "a close one," the similar generic advertising program for beef did not involve government speech.[16] The court deemed the government speech doctrine inapplicable because of the "close nexus between the individual [upon whom the assessment was imposed] and the message funded," suggesting that the situation "resemble[d]" those in *Abood*, *supra*, and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). *Frame*, 885 F.2d at 1132-1133. But there is no basis in those cases, or in any of this Court's other First Amendment cases, to conclude that whether or not a government program involves "government speech" turns upon the particular

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In any event, such a program, whether sensible or not, would not present any obvious First Amendment problems under this Court's cases.

[16] The Third Circuit's discussion of the government speech question was unnecessary to its holding in *Frame*, which concluded, applying strict scrutiny, that the generic advertising program did not violate the First Amendment. See 885 F.2d at 1133-1137.

mechanism chosen by the government to fund that speech. *Abood* did not present any question of government speech; the case instead involved assessments for expressive and associational activity by a union. See *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ("[c]ompelled support of a private association is fundamentally different from compelled support of government"). *Wooley* was concerned not with whether an individual could be required to fund the State's "Live Free or Die" message, but with whether an individual could be required to "display[] it on his private property." 430 U.S. at 713; cf. *id.* at 721 (Rehnquist, J., dissenting) (assuming that the State could "erect a multitude of billboards, each proclaiming 'Live Free or Die,' and tax all citizens for the cost of erection and maintenance"). And both *Abood* and *Wooley*, in contrast to this case, involved the rights of individuals, as opposed to commercial entities, with respect to activity of an ideological, as opposed to commercial, nature.

3. Respondent does not seriously dispute that the Mushroom Council satisfies the three criteria upon which this Court relied in *Lebron* to conclude that Amtrak is "part of the Government for purposes of the First Amendment," and thus is subject to the constraints of the First Amendment when it restricts private speech. See *Lebron*, 513 U.S. at 400 (when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment"). Nor does respondent offer any persuasive reason why the *Lebron* criteria are not equally applicable in determining whether the Mushroom Council is "part of the Government for purposes of the First Amendment" such that its speech constitutes government speech.

Respondent does argue (Br. 46), however, that the Mushroom Council's speech is not government speech because "'public officials' do *not* 'control operation' of the [Mushroom] Council." Respondent is wrong. As we have explained (U.S. Br. 34-40), Congress and the Secretary *do* exercise significant control over the Mushroom Council's speech and over its operations generally.

Congress has determined the essential message to be expressed by the Mushroom Council: speech to "enhance the image or desirability of mushrooms, including paid advertising," 7 U.S.C. 6102(12), and to "assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of mushrooms," 7 U.S.C. 6102(2). Congress also determined how such speech is to be funded. See 7 U.S.C. 6104(g). Congress vested the Secretary with the responsibility of appointing all members of the Council, see 7 U.S.C. 6104(b), a responsibility that is not the mere "formal[ity]" that respondent claims (Br. 46). See 7 C.F.R. 1209.31(f) (requiring that two nominations be submitted to the Secretary for each open seat); 7 C.F.R. 1209.31(g)(1) ("The Secretary may reject any nominee submitted."). The Secretary has the authority to remove members from the Council—not, as respondent asserts (Br. 46), only in "exceptional circumstances," but whenever the Secretary determines that "such member's continued service would be detrimental to the achievement of the purposes of the Act." 7 C.F.R. 1209.35(c). And Congress prohibited the Council from implementing *any* "plan or project of promotion, research, consumer information, or industry information, or budget" before its approval by the Secretary. 7 U.S.C. 6104(d)(3).[17]

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[17] The Mushroom Council is described in its Independent Auditors' Report as "an instrumentality of the United States Department of Agriculture." J.A. 225; see J.A. 234 ("The Council is considered an instru-

Indeed, authorities cited by respondent recognize, with respect to similar generic advertising programs, that "the amount of government oversight of the program[s] is considerable." *Frame*, 885 F.2d at 1128; see *id.* at 1132 (noting that "the Secretary makes the final decisions on all projects funded under the [Beef] Act"). The Administrator of the Agricultural Marketing Service, in congressional testimony respondent cites (Br. 49), confirmed the extensive government oversight of such programs:

> USDA plays an active role in the oversight of the soybean program to ensure that it is administered by the Board in accordance with the authorizing legislation and Order. * * * * We approve budgets and projects, attend all meetings of the Board and its principal committees, approve board bylaws and amendments or additions to the budget, including any major shifting of program funds from one major area to another. We require information as to the objectives and strategy in each major program area, such as research and promotion, and ensure that all Board expenditures are in accordance with the Act and the Order and with USDA approved contracts and agreements.

Review of the National Soybean Checkoff Program: Hearing Before the Subcomm. on Gen. Farm Commodities of the House Comm. on Agric., 104th Cong., 2d Sess. 65 (1996).[18]

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mentality of the U.S. Department of Agriculture which conducts the administrative oversight of its activities."). That characterization, which is consistent with the statutory and regulatory scheme, refutes any contrary implication that might arguably be drawn from the isolated "press accounts" cited by respondent (Br. 47).

[18] Such extensive oversight by public officials of a speaker's operations may not be necessary in order for its speech to constitute government speech. See, *e.g.*, *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of

Finally, respondent incorrectly asserts (Br. 49) that "U.S.D.A. 'is *not* responsible for evaluating program effectiveness'" quoting a report that predates the enactment of the FAIR Act in 1996. See U.S. Br. 7-8. The FAIR Act requires each commodity board to authorize and fund, at least every five years, "an independent evaluation of the effectiveness of [its] generic commodity promotion program" for submission to the Secretary. 7 U.S.C. 7401(c) (Supp. V 1999). The FAIR Act specifies that those evaluations "will assist Congress and the Secretary of Agriculture in ensuring that the objectives of the programs are met," 7 U.S.C. 7401(b)(11) (Supp. V 1999), thus making clear that the Secretary, together with Congress, is "responsible for evaluating program effectiveness." See 7 U.S.C. 6110 ("The Secretary shall, whenever the Secretary finds that the [Mushroom] order or any provision of the order obstructs or does not tend to effectuate the declared policy of this chapter [*i.e.*, the Mushroom Act], terminate or suspend the operation of such order or provision.").

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

APRIL 2001

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what is or is not expressed when it is the speaker *or when it enlists private entities to convey its own message.*") (emphasis added); see also *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring) ("[I]t makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their (and, in a democracy, our) favored point of view by achieving it directly * * *; or by advocating it officially * * *; *or by giving money to others who achieve or advocate it.*") (emphasis added).