No. 97-1935

In the Supreme Court of the United States

OCTOBER TERM, 1997

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether California almond handlers may, consistent with the First Amendment, be required to fund a generic advertising and promotion program for almonds and almond products under an agricultural marketing order similar to that upheld in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. A prior opinion of the court of appeals concerning remedial issues (Pet. App. 2a-14a) is reported at 67 F.3d 874. The order of the district court (Pet. App. 15a-32a) and the judgment of the district court (Pet. App. 33a-37a) concerning remedial issues are unreported.

The initial opinion of the court of appeals (Pet. App. 38a-71a), which addressed the First Amendment question presented in the petition, is reported at 14 F.3d 429. The four district court orders that were the subject of the court of appeals' initial opinion (Pet. App. 72a-148a) are not officially reported. Three of those orders are published, however, at 51 Agric. Dec. 44,

85, and 79. The opinions of the judicial officer of the Department of Agriculture (Pet. App. 149a-355a) are reported at 50 Agric. Dec. 23, 171, and 183.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1997. A petition for rehearing was denied on March 3, 1998. Pet. App. 356a. The petition for a writ of certiorari was filed on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Almond handlers (*i.e.*, processors and distributors) in the State of California are regulated by a marketing order issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The AMAA was enacted "in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2134 (1997) (citing 7 U.S.C. 602(1)).

The AMAA authorizes the Secretary of Agriculture to issue marketing orders for certain commodities, including almonds. 7 U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). It may also provide for "production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). Such projects may—with respect to certain commodities, including almonds—include "paid advertising." *Ibid.* The projects are funded by mandatory assessments on han-

dlers. *Ibid*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay assessments equal to their pro rata share of expenses of administering marketing orders). The AMAA authorizes the marketing orders for almonds and a few other commodities to allow a handler to receive credit against its assessment for amounts that it spends on certain advertising of its own. 7 U.S.C. 608c(6)(I).

Before issuing a marketing order for a commodity, the Secretary of Agriculture must conduct a formal rulemaking proceeding and, in most cases, obtain approval of the order either from two-thirds of the producers of the commodity covered by the order or from producers who market two-thirds of the volume of the commodity. 7 U.S.C. 608c(8). The marketing order is administered by a committee, which generally is composed of producers and handlers of the commodity, under the supervision of the Secretary. 7 U.S.C. 608c(7)(C), 610. The Secretary appoints the members of the committee and may remove them at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d) (relating to Almond Board of California). The committee recommends an annual budget for administering the marketing order, which may include expenditures for advertising and other promotional activities. The Secretary may accept or reject the recommended budget. 7 U.S.C. 608c(12); 7 C.F.R. 981.38; 7 C.F.R. 981.41. After adopting a budget, the Secretary promulgates a regulation prescribing assessments on handlers to fund the budgeted activities. See 7 U.S.C. 610(c); 7 C.F.R. 981.41(e), 981.80, 981.81(a).

A marketing order may be discontinued for either of two reasons. First, the Secretary of Agriculture must terminate or suspend a marketing order if he finds that it "obstructs or does not tend to effec-

tuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). Second, the Secretary must terminate a marketing order if he determines that a majority of the producers do not support it. 7 U.S.C. 608c(16)(B).

2. This case concerns the marketing order for California almonds, which is administered by the Almond Board of California, a committee of almond growers and handlers appointed by the Secretary of Agriculture. The marketing order was first promulgated in 1950. Since 1971, the marketing order has authorized the Almond Board to conduct a generic advertising and promotion program for California almonds. See 36 Fed. Reg. 20,887 (1971). The Board's activities, including its generic advertising and promotion program, are funded by mandatory assessments on handlers based on the volume of almonds that they handle. See 7 C.F.R. 981.41(a), 981.81(a). As authorized by the AMAA, the marketing order permits an almond handler to receive a credit against a portion of its assessment for conducting its own promotional activities, including paid advertising, provided that those activities meet certain regulatory guidelines. See 7 U.S.C. 608c(6)(I); 7 C.F.R. 981.41(c), 981.441. Those private activities are known as "creditable advertising."

During the crop years at issue, the creditable advertising regulation provided that a handler could receive credit only for advertisements that had "[t]he clear and evident purpose" of "promot[ing] the sale, consumption, or use of California almonds." 7 C.F.R. 981.441(c)(2) (1992).[1] No credit was available for ad-

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[1] This case concerns the generic advertising programs for California almonds for the crop years 1980-1981 through 1991-1992. The creditable advertising regulations for California al-

vertising that promoted products containing less than 50 percent almonds, that referred to "more than two complementary branded products," that promoted "noncomplementary" products or "competing nuts," or that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. 981.441(c)(3)(iv) and (c)(5) (1992).

3. Petitioners, who are California almond handlers subject to the almond marketing order, petitioned the Secretary of Agriculture for relief from the order pursuant to 7 U.S.C. 608c(15)(A).[2] They contended, among other things, that the generic advertising program for California almonds, including certain provisions of the creditable advertising regulation, violated the First Amendment. The judicial officer of the Department of Agriculture rejected petitioners' First Amendment challenge. Pet. App. 179a-180a, 220a-225a, 315a-316a.

Petitioners sought review of the judicial officer's decisions in federal district court pursuant to 7 U.S.C. 608c(15)(B). The court affirmed the judicial officer's decisions, including the rejection of petitioners' First Amendment claim. Pet. App. 87a, 144a-145a.

The Ninth Circuit reversed in relevant part, holding that the generic advertising program for California almonds violated the First Amendment. Pet. App.

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monds have been revised substantially since that time. See 7 C.F.R. 981.441(e)(4).

[2] The AMAA provides a handler with the opportunity to petition the Secretary of Agriculture for relief from any provision of a marketing order on the ground that the provision is "not in accordance with law." 7 U.S.C. 608c(15)(A). A handler who is dissatisfied with the Secretary's disposition of the petition may seek judicial review in federal district court. 7 U.S.C. 608c(15)(B).

42a-53a. The court applied the three-pronged test of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), to evaluate the constitutionality of the generic advertising program as a regulation of commercial speech. Pet. App. 45a-53a. The court agreed that the first prong of the *Central Hudson* test was satisfied because the generic advertising program was designed to serve a "substantial" governmental interest—*i.e.*, to "stimulat[e] the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry." *Id.* at 47a.

The court of appeals held, however, that the generic advertising program did not satisfy the second prong of the *Central Hudson* test, which requires that the challenged regulation "directly advance" the government's asserted interest. Pet. App. 48a (quoting *Central Hudson*, 447 U.S. at 566). The court focused initially on the creditable advertising portion of the generic advertising program. *Id.* at 48a-52a. The court reasoned that the government had not established that the creditable advertising regulations directly advanced the sale of California almonds, because the government had not shown "that the advertising for which credit is *granted* is *better* at selling almonds than the [Almond] Board's own efforts and that the advertising for which credit is *denied* is *worse* at selling almonds than the Board's own efforts." *Id.* at 48a. The court went on to conclude that the generic advertising program, as a whole, failed to satisfy the second prong of *Central Hudson*, because the government had not shown that advertising conducted under the program sold almonds more effectively than would advertising by individual handlers. *Id.* at 52a.

The court of appeals also held that the generic advertising program failed the third prong of the *Central Hudson* test, which requires that regulation of commercial speech be narrowly tailored to further the government's asserted interest. Pet. App. 52a-53a. The court based that holding primarily on its determination that the government had "offer[ed] *no* justifications for the restrictions that *deny* credit for certain advertisements." *Id.* at 53a.

The court of appeals remanded the case to the district court to fashion an appropriate remedy. Pet. App. 70a-71a.[3]

4. On remand, the district court ordered the government to pay petitioners approximately $4.3 million, an amount that corresponded to approximately $1.8 million in assessments that petitioners had paid to the Almond Board or into a court escrow account and $2.5 million that petitioners had paid to third parties for creditable advertising. Pet. App. 34a-37a.

The Ninth Circuit affirmed in part and reversed in part. Pet. App. 2a-14a. The court held that sovereign immunity barred the government from being required to reimburse petitioners for their expenditures on creditable advertising. *Id.* at 8a. The court affirmed the district court's refusal to reduce the amount of the refund to take into account the benefits that

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[3] The court of appeals rejected petitioners' other challenges to the administration of the marketing order for California almonds, which concerned the procedures by which assessments were imposed under the order (Pet. App. 53a-59a), the reserve requirements used to stabilize the volume of almonds marketed (*id.* at 59a-69a), and the administrative procedure for challenging the order (*id.* at 69a-70a).

petitioners received from the generic advertising purchased with their assessments. *Id.* at 8a-12a.[4]

5. In a later case, *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367, 1386 (1995), the Ninth Circuit, relying on its initial decision in this case, held that the AMAA's generic advertising programs for California peaches, nectarines, and plums violated the First Amendment under the *Central Hudson* test. This Court granted the Secretary of Agriculture's petition for a writ of certiorari in *Wileman Bros.* and ultimately reversed the court of appeals' decision on the merits, holding that the generic advertising programs at issue in that case did not violate the First Amendment. *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

After the Ninth Circuit's disposition of the remedial issues and entry of final judgment in this case, and while the certiorari petition in *Wileman Bros.* was pending before the Court, the Secretary of Agriculture also petitioned for a writ of certiorari on the First Amendment issue in this case. The Secretary suggested that, because *Wileman Bros.* provided "a more appropriate vehicle for resolution of the First Amendment issue," the Court should hold the petition in this case pending the disposition of the petition in *Wileman Bros.* See Pet. 16-17, *USDA* v. *Cal-Almond, Inc.*, No. 95-1879.

On June 27, 1997, two days after the Court issued its decision in *Wileman Bros.*, the Court granted the Secretary's petition in this case, vacated the Ninth Circuit's judgment, and remanded the case to the

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[4] This Court denied a petition for a writ of certiorari seeking review of the court of appeals' decision on sovereign immunity. *Cal-Almond, Inc.* v. *USDA*, 117 S. Ct. 72 (1996).

Ninth Circuit "for further consideration in light of [*Wileman Bros.*]." *Department of Agriculture* v. *Cal-Almond, Inc.*, 117 S. Ct. 2501.

On September 4, 1997, the court of appeals, citing *Wileman Bros.*, remanded the case to the district court with instructions to dismiss petitioners' First Amendment claim. Pet. App. 1a.[5]

ARGUMENT

The court of appeals' unpublished order remanding this case for dismissal in light of *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is correct, does not conflict with the decision of any other circuit, and does not present any issue of continuing significance, especially since the marketing order at issue in this case has been amended. No reason therefore exists for this Court to revisit so soon after *Wileman Bros.* the constitutionality of agricultural marketing orders that require the distributors of a commodity to share the costs of its generic advertising. Nor need the Ninth Circuit be directed, yet again, to give this case further consideration.

1. This Court held in *Wileman Bros.* that handlers may, as part of a regulatory program for the marketing of an agricultural product, be required to fund generic advertising for that product. The Court identified three factors that distinguish such marketing orders from laws that abridge the freedom of speech protected by the First Amendment. First, "the marketing orders impose no restraint on the

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[5] The court of appeals subsequently denied a petition for rehearing and suggestion of rehearing en banc, after calling for a response from the government. Pet. App. 356a.

freedom of any producer to communicate any message to any audience." 117 S. Ct. at 2138. Second, the marketing orders "do not compel any person to engage in actual or symbolic speech," because the handlers "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 2138-2139. And third, the marketing orders "do not compel the producers to endorse or finance any political or ideological views," *ibid*., much less any political or ideological views with which they disagree.

The almond marketing order in this case is distinguishable, for the same three reasons, from laws that have been held to violate the First Amendment. Indeed, the almond marketing order is even further removed from such unconstitutional laws than were the marketing orders in *Wileman Bros.*, because almond handlers have the choice either to contribute to the Almond Board's generic advertising program or to engage in their own creditable advertising under rules promulgated by the Secretary of Agriculture. In *Wileman Bros.*, three of the dissenting Justices observed that such a credit system, "[o]n its face, at least," is "a far less restrictive and more precise way to achieve the government's stated interests [in promoting an agricultural commodity], eliminating as it would much of the burden on [handlers'] speech without diminishing the total amount of advertising for a particular commodity." 117 S. Ct. at 2154 (Souter, J., dissenting) (contrasting the marketing orders in *Wileman Bros.* with, *inter alia*, the "marketing order[] for almonds").[6]

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[6] The dissenting Justices surely understood that any marketing order that gave handlers credit for their own advertising could permissibly be content-based. Otherwise, a business

Petitioners nonetheless contend (Pet. 13) that the almond marketing order, because of its creditable advertising regulation, imposes a greater restraint on "the freedom of the producer to communicate the message of his choice to the public" than did the marketing orders in *Wileman Bros.* Petitioners are mistaken. An almond handler remains free to convey any message that it chooses in its advertising. See 7 U.S.C. 608c(10) (no marketing order may "prohibit[], regulat[e], or restrict[] the advertising of any commodity or product"). The creditable advertising regulation simply limits the types of advertising for which an almond handler may receive credit against its assessment for the Almond Board's generic advertising and promotion program. The handler has the option of paying its entire assessment without engaging in any creditable advertising of its own—which was the only course available to the fruit handlers under the marketing orders in *Wileman Bros.* The almond marketing order thus involves less compulsion to engage in commercial speech than did the marketing orders declared to be constitutional in *Wileman Bros.*

Relying on Justice Souter's dissent in *Wileman Bros.*, petitioners argue (Pet. 16 & n.10) that the almond marketing order is unconstitutional under the three-part test announced in *Central Hudson Gas &*

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that handled almonds and multiple other products could receive a credit against its Almond Board assessment for its advertising of all of those products, whether or not the advertising had anything to do with almonds. Such a content-neutral credit, which petitioners suggest (Pet. 14) is the only even arguably permissible credit, would not serve the governmental interest underlying the marketing order of promoting a particular commodity.

Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980), for reviewing restrictions on commercial speech. As the *Wileman Bros.* majority made clear, however, *Central Hudson*, a case involving a *restriction* on commercial speech, is inapplicable in cases, such as this one, involving *compelled funding* of commercial speech. See 117 S. Ct. at 2141 ("It was therefore error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising."). The mere fact that petitioners could satisfy their "compelled funding" obligation either by paying the assessment, as in *Wileman Bros.*, or by engaging in creditable advertising does not bring this case within the reach of *Central Hudson*.

Nor do petitioners' complaints (Pet. 6, 17) about the efficacy of the almond promotion program advance their First Amendment claim. As this Court has held, arguments that "generic advertising may not be the most effective method of promoting the sale of these commodities" are irrelevant to resolving the legal issue of "whether being compelled to fund this advertising raises a First Amendment issue for [the Court] to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." *Wileman Bros.*, 117 S. Ct. at 2138.[7]

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[7] There is likewise no merit to petitioners' contentions (Pet. 14, 16) that the creditable advertising provisions are unconstitutional because the decision whether an advertisement receives credit is made by the Almond Board, a committee that includes petitioners' competitors. During the period at issue, the Almond Board was merely authorized to apply, in the first instance, the detailed criteria contained in the regulation to the advertisements submitted by handlers for credit. See 7 C.F.R.

2. Petitioners erroneously assert that the government previously took the position that "the creditable advertising provisions raise constitutional issues different from those raised by the mandatory advertising assessments in *Wileman Bros.*" Pet. 11; see also *id.* at 14-15. To the contrary, we indicated when this case was previously before this Court on the Secretary of Agriculture's petition for a writ of certiorari that both this case and *Wileman Bros.* presented the same First Amendment issue. See, *e.g.*, Pet. 14-15, *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879 ("the Ninth Circuit's decision on the First Amendment issue in this case warrants invoking this Court's jurisdiction, for the same reason as does the Ninth Circuit's decision on that issue in *Wileman Bros.*"); *id.* at 16 ("the First Amendment issue presented here and in *Wileman Bros.* warrants review by this Court"). We further argued, however, that "*Wileman Bros.* provide[d] a more appropriate vehicle for resolution of the First Amendment issue than [did] this case," both because most marketing orders, like that in *Wileman Bros.*, contain no provision for creditable advertising and because the creditable advertising provision at issue in this case had been revised significantly since the Ninth Circuit's decision. *Id.* at 15-16. We therefore urged the Court to hold the petition in this case for disposition "as appropriate in light of the disposition of the petition for a writ of certiorari in [*Wileman*

981.441 (1992). A handler was entitled to appeal the Almond Board's initial determination to the Secretary of Agriculture, who had final authority as to whether an advertisement would receive credit. See 7 C.F.R. 981.40(c).

Bros.]." *Id.* at 17. And that is what the Court chose to do.

3. Contrary to petitioners' assertion (Pet. 16), the constitutionality of the almond marketing order in this case does not, after *Wileman Bros.*, present any issue "of considerable importance" warranting the Court's review. Petitioners do not contend that the Ninth Circuit's unpublished order remanding the case for dismissal in light of *Wileman Bros.* conflicts with any decision of any other circuit. Nor is any such conflict likely to arise in the future because, as petitioners acknowledge (Pet. 17), the only marketing orders with creditable advertising provisions "operate within the confines of the Ninth Circuit." Petitioners also acknowledge (*id.* at 16-17) that the Secretary of Agriculture has promulgated only three such marketing orders in addition to the one at issue here, all of which involve creditable advertising regulations that vary both from one another and from the regulation challenged in this case. See 7 C.F.R. 932.45(a)(2) (California olives); 7 C.F.R. 982.58 (filberts grown in Oregon and Washington); 7 C.F.R. 989.53(b) (California raisins).

Moreover, as noted in our certiorari petition two years ago in this case, since the Ninth Circuit decided petitioners' challenge to the creditable advertising regulation more than four years ago, the Secretary of Agriculture has significantly revised that regulation. See 59 Fed. Reg. 35,222 (1994) (adopting final rule revising creditable advertising regulation). The revised regulation eliminates many of the previous restrictions on the types of advertising for which an almond handler may receive credit against its assessment. See *id.* at 35,226-35,227. The constitutionality of the former regulation is thus of no con-

tinuing importance. And the constitutionality of the revised regulation is not at issue in this case.[8]

4. Petitioners request (Pet. 19), in the alternative, that the Court remand the case once more to the Ninth Circuit "for serious consideration in light of *Wileman Bros.*," because the Ninth Circuit may have "erroneously understood this Court's [earlier] remand order as a judgment on the merits against petitioners." Petitioners apparently base that supposition on the panel's "summar[y] dispos[ition]" (*id.* at 20) of their First Amendment claim on remand and on the panel's failure to request additional briefing from the parties before doing so.[9]

Petitioners are grasping at straws. This Court's remand order directed the Ninth Circuit, in clear and unambiguous terms, to give this case "further con-

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[8] Petitioners contend (Pet. 18 n.11) that the revised regulation presents the same "serious constitutional defects" as did the former regulation. But this Court is not the appropriate forum in which to raise arguments, not addressed by the courts below, concerning the content or the constitutionality of the revised regulation. We note that petitioners are already challenging the revised regulation in separate proceedings in federal district court. See *Cal-Almond, Inc.* v. *USDA*, No. CV-F-98-5049 REC (E.D. Cal. filed Jan. 13, 1998); *Cal-Almond, Inc.* v. *USDA*, No. CV-F-98-5298 REC (E.D. Cal. filed Mar. 26, 1998).

[9] We note that more than two months elapsed between this Court's order remanding this case to the Ninth Circuit and the Ninth Circuit's order remanding the case to the district court for dismissal. At no point during that period did petitioners file a motion with the court of appeals requesting the opportunity to file additional briefs on the applicability of *Wileman Bros.* to this case. The court could reasonably assume in such circumstances that petitioners had nothing further to say on the subject.

sideration in light of *Glickman* v. *Wileman Bros.*" *Department of Agriculture* v. *Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). There is no reason to conclude that the Ninth Circuit failed to comprehend that straightforward directive. It is more reasonable to conclude that the panel, after reviewing its earlier decision in light of the proper analysis provided by *Wileman Bros.*, determined that petitioners' First Amendment claim was without merit and did not warrant any further expenditure of the parties' and the courts' resources. The full Ninth Circuit, after considering petitioners' request for rehearing en banc and the government's response, left the panel's disposition of the case undisturbed. Pet. App. 356a. This Court should do so as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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