No. 98-607

In the Supreme Court of the United States

OCTOBER TERM, 1998

JERRY GOETZ, DBA JERRY GOETZ AND SONS, ETC., PETITIONER

v.

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Beef Promotion and Research Act is a permissible exercise of Congress's authority under the Commerce Clause.
2. Whether the Beef Promotion and Research Act implicates the constitutional restrictions on Congress's exercise of the taxing power.
3. Whether the Beef Promotion and Research Act is consistent with the First Amendment.
4. Whether the Beef Promotion and Research Act is consistent with the equal protection component of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 149 F.3d 1131. The opinion of the district court (Pet. App. 24-46) is reported at 920 F. Supp. 1173.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1998. The petition for a writ of certiorari was filed on October 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, Title XVI, 99 Stat. 1597 (codified at 7 U.S.C. 2901-2911) (the Act), in order to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b). The Act reflects Congress's conclusion that "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation." 7 U.S.C. 2901(a)(4).

As directed by the Act, the Secretary of Agriculture promulgated, after notice and comment, a Beef Promotion and Research Order. The Order establishes two entities: the Cattlemen's Beef Promotion and Research Board (the Cattlemen's Board), composed of cattle producers and importers appointed by the Secretary, and the Beef Promotion Operating Committee (the Operating Committee), composed of ten members of the Cattlemen's Board and ten members elected by a federation that includes qualified state beef councils. 7 U.S.C. 2903(a) and (b), 2904(1) and (4)(A); 7 C.F.R. 1260.141, 1260.161.[1]

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[1] A "qualified State beef council" is defined in the Act as "a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State." 7 U.S.C. 2902(14).

The Operating Committee, on behalf of the Cattlemen's Board, develops and implements "promotion, research, consumer information and industry information plans or projects," subject to the approval of the Secretary of Agriculture. 7 U.S.C. 2904(4)(B); 7 C.F.R. 1260.168(d) and (e). That activity is funded by a $1 per head assessment on all cattle sold in the United States or imported into the United States. The assessment is collected by the person who pays a cattle producer for cattle. It is remitted directly to the Cattlemen's Board or to a qualified state beef council (which, in turn, remits money to the Cattlemen's Board). 7 U.S.C. 2904(8)(A)-(C); 7 C.F.R. 1260.172(a)(1), 1260.310, 1260.311(a), 1260.312(c). The assessment cannot be used for any political purpose "with the exception of recommending amendments to the [Beef Promotion and Research Order]." 7 U.S.C. 2904(10); see also 7 C.F.R. 1260.169(e) (implementing provision), 1260.181(b)(7) (state beef councils cannot use funds in a manner inconsistent with this provision).

On May 10, 1988, the Secretary of Agriculture, as required by the Act, submitted the Beef Promotion and Research Order to a nationwide referendum among cattle producers and importers. See 7 U.S.C. 2906(a).[2] The Order was approved by a majority vote. It remains in force today. Pet. App. 5. The Secretary may, however, conduct additional referenda upon the request of at least ten percent of cattle producers. 7 U.S.C. 2906(b).

The Secretary of Agriculture is authorized to investigate violations of the Act, 7 U.S.C. 2909; to issue

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[2] Before the referendum, a cattle producer who paid the assessment could demand a one-time refund of assessments paid up to that date. 7 U.S.C. 2907(c).

an order restraining or preventing a person from violating the Act or the Beef Promotion and Research Order and to assess a civil penalty of not more than $5,000 per violation, 7 U.S.C. 2908(a); and to request that the Attorney General initiate a civil enforcement action in federal district court, 7 U.S.C. 2908(b) and (c).

2. Petitioner Jerry Goetz is a Kansas cattle producer, buyer, and trader who is subject to the assessment and collection provisions of the Act. He brought the present suit challenging the constitutionality of the Act after the Secretary of Agriculture initiated administrative proceedings against him under 7 U.S.C. 2908(a) for failure to comply with the Act. He contended that the Act exceeds Congress's authority under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, imposes an unconstitutional direct tax, constitutes an unlawful delegation of taxing and spending powers, amounts to a taking of property without just compensation, and violates the First Amendment and the equal protection component of the Fifth Amendment. Pet. App. 5-7, 30.

The district court upheld the Act, relying largely on the reasoning of *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). Pet. App. 24-46. In *Frame*, the Third Circuit rejected challenges to the Act under the Commerce Clause, the Just Compensation Clause, the First Amendment, and the equal protection component of the Fifth Amendment.

3. The court of appeals affirmed. Pet. App. 1-23.

First, the court of appeals, applying the analytical framework articulated in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981), held that the Act is a valid exercise of Congress's authority under the Commerce Clause. The court determined that "Congress had a rational basis for

finding the beef industry substantially affects interstate commerce." Pet. App. 14; see *id.* at 12-13 (quoting findings set forth at 7 U.S.C. 2901(a)). The court held that Congress's objective in the Act—to strengthen the beef industry—involves a "proper regulatory activity." *Id.* at 14-15. And the court held that the means chosen by Congress in the Act—promotion, advertising, research, consumer information, and industry information—are "rationally related to the maintenance and expansion of the nation's beef markets." *Id.* at 16 (quoting *Frame*, 885 F.2d at 1127).

Second, the court of appeals held that the assessment imposed by the Act is not a tax, within the meaning of the Constitution, because the primary purpose of the assessment is regulation, not raising revenues. The court therefore concluded that the assessment is not subject to constitutional constraints on Congress's exercise of the taxing power. Pet. App. 17-18 (citing *Rodgers* v. *United States*, 138 F.2d 992, 994 (6th Cir. 1943)).

Third, the court of appeals rejected petitioner's First Amendment challenge to the assessments on the authority of *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). The court noted that *Wileman Bros.* held, contrary to petitioner's position in this case, that no First Amendment issue is presented by mandatory assessments to support generic advertising programs for agricultural products. Pet. App. 19-20.

Finally, the court of appeals held that the Act does not violate the equal protection component of the Fifth Amendment by imposing an assessment only on the initial sale of cattle and not on subsequent transactions. The court held that the Act is subject to equal protection scrutiny under the rational basis standard, because the Act does not infringe upon a fundamental

right or discriminate against a suspect class. The court further held that the Act "easily survives" rational basis review. Pet. App. 22-23. The court recited, with approval, the Third Circuit's reasoning in *Frame* as to why Congress may rationally have chosen to impose the assessment on the initial sale of cattle: "(1) an assessment on the initial sale of cattle is easier to administer; (2) ranchers would be most benefitted by the Act; and (3) ranchers could pass the cost on to others." *Id.* at 23 (citing *Frame*, 885 F.2d at 1137-1138).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other circuit. The decision is consistent with *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), with respect to the First Amendment claims and is consistent with *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), with respect to the Commerce Clause and equal protection claims. No reason exists for this Court to revisit the constitutionality of federal programs requiring the producers or distributors of an agricultural product to share the costs of its generic advertising. Indeed, the Court only recently denied a petition for a writ of certiorari in another case raising such issues. *Cal-Almond, Inc.* v. *Department of Agriculture*, 119 S. Ct. 57 (1998).

1. The Beef Promotion and Research Act is a valid exercise of Congress's authority under the Commerce Clause. This Court has held that an Act of Congress adopted pursuant to the Commerce Clause may be invalidated "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no

reasonable connection between the regulatory means selected and the asserted ends." *Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981). As recognized by the courts below and by the Third Circuit in *Frame*, the Act readily satisfies that standard. See Pet. App. 10-16, 31-39; *Frame*, 885 F.2d at 1125-1127.

Congress made extensive findings in the Beef Promotion and Research Act that the production and sale of beef affect interstate commerce: that "beef and beef products move in interstate and foreign commerce," that "the production of beef and beef products plays a significant role in the Nation's economy," and that "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers * * * as well as to the general economy of the Nation." 7 U.S.C. 2901(a). The court of appeals correctly held, in accordance with the analysis articulated in *Hodel*, that "Congress had a rational basis" for those findings. Pet. App. 14. The court of appeals also correctly held, in accordance with *Hodel*, that a "rational connection" exists between the Act's "asserted end" (the strengthening of the beef industry) and its "regulatory means" (the advertising and promotion of beef and beef products). *Id.* at 16; cf. *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (recognizing that Congress is entitled to legislate on the premise that "advertising of [a product] serves to increase the demand for the advertised product").

Petitioner does not dispute that *Hodel* sets forth the proper legal standard for determining whether the Beef Promotion and Research Act is a permissible exercise of Congress's authority under the Commerce Clause. Nor does petitioner challenge the reasonableness of the findings that the Congress made in passing the Act. Instead, petitioner's contention that the Act is not "a

valid regulation of interstate commerce under the Commerce Clause" rests principally on the Act's provisions for qualified state beef councils, such as the Kansas Beef Council, to retain 50 cents of each $1 assessment that they collect (while forwarding the remainder to the Cattlemen's Board). Pet. 12-13.

Congress was entitled to conclude, however, that some of the activities contemplated by the Beef Promotion and Research Act should be conducted at the state level though already established organizations. See 7 U.S.C. 2901(a)(5) (recognizing that "there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products"). The funds retained by the qualified state beef councils are not, as petitioner asserts (Pet. 12), "outside of the scope of [the Act]." Those funds must be used by the councils to advance the objectives of the Act. The councils are required to conduct research and promotion activities of the sort specified in the Act, are prohibited from using assessment funds for activities barred by the Act, and are required to report annually to the Cattlemen's Board and the Secretary on their use of assessment funds. 7 C.F.R. 1260.181; see also 7 U.S.C. 2902(14). And, in any event, a regulatory program such as that created by the Act "can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." *Hodel*, 452 U.S. at 329 n.17.[3]

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[3] Petitioner also suggests (Pet. 12-13) that the Beef Promotion and Research Act does not serve a "public good" because some of the assessment funds are turned over to "private trade association[s]." But Congress expressly concluded otherwise. See 7

2. The $1 assessment per head of cattle sold is not subject to any constitutional restriction on the taxing power, including the restriction relied upon by petitioner that direct taxes be apportioned among the States "according to their respective Numbers." See U.S. Const. Art. I, § 2, Cl. 3. The taxing power and the commerce power are distinct sources of constitutional power, and "the limitations of one cannot be read into the other." *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 76 (1946). Congress adopted the Beef Promotion and Research Act pursuant to the power conferred by the Commerce Clause. See 7 U.S.C. 2901(a)(6) ("beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products"). It is thus of no consequence whether the Act satisfies the requirements for statutes enacted under the power to levy and collect taxes. See U.S. Const. Art. I, § 8, Cl. 1.

Nor is the assessment a "tax" in the constitutional sense. In order to ascertain whether the assessment is a tax, the court of appeals inquired whether the "primary purpose" of the Beef Promotion and Research Act is "regulation" or "revenue." Pet. App. 17-18 (quoting *Rodgers* v. *United States*, 138 F.2d 992, 994 (6th Cir. 1943)). That analysis is consistent with the decisions of this Court and other courts of appeals. See, *e.g.*, *The Head Money Cases*, 112 U.S. 580, 595-596 (1884) (a 50-cent charge imposed on ship owners for each immigrant

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U.S.C. 2901(b) (stating that the "coordinated program of promotion and research" created by the Act "is in the public interest"). Petitioner has not offered any basis for disagreeing with that congressional judgment.

transported to a U.S. port was not "a tax or duty within the meaning of the Constitution," because the charge was "an expedient regulation of commerce by Congress" that did "not go to the general support of the government"); *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983) (applying the rule that, "[i]f regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax," to hold that a 50-cent deduction imposed by the Secretary of Agriculture on proceeds of commercially sold milk was not a "tax" for constitutional purposes), cert. denied, 465 U.S. 1080 (1984); *Rodgers*, 138 F.2d at 994 ("if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax").[4]

Petitioner does not challenge the legal standard on which the court of appeals relied in concluding that the assessment is not a tax. See Pet. 13-14 (quoting standard articulated in *Rodgers*). He merely challenges the application of that standard to the Beef Promotion and Research Act. But this Court ordinarily does not grant certiorari to review the application of settled legal standards to particular situations. See Sup. Ct. R. 10.

The "primary purpose" of the Beef Promotion and Research Act is not "to raise revenue," as petitioner contends (Pet. 16), but to establish and conduct a regulatory program for generic advertising, promotion, and research designed to strengthen the beef industry.

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[4] Cf. *Brock* v. *Washington Metropolitan Area Transit Authority*, 796 F.2d 481, 488-489 (D.C. Cir. 1986) (Ginsburg, J.) (assessment for workers' compensation fund was not a "tax," from which the transit authority was exempt under its compact, because "the 'primary purpose' of the [workers' compensation statute] is regulation, not the raising of revenue"), cert. denied, 481 U.S. 1013 (1987).

See Pet. App. 18; 7 U.S.C. 2901(b). The funding of that specialized program, by assessments on those who benefit most from it, is merely incidental to its establishment. This Court has recognized that "a bill creating a discrete governmental program and providing sources for its financial support is not a revenue bill simply because it creates revenue." *United States* v. *Munoz-Flores*, 495 U.S. 385, 400 (1990).[5]

Petitioner offers no principled basis to distinguish the assessment at issue here from the assessment in *The Head Money Cases*. Those cases involved a challenge to a statute that imposed a charge on ship owners in order to create a fund "to defray the expense of regulating immigration" and "for the care of immigrants arriving in the United States." 112 U.S. at 590. Under petitioner's reasoning, the "primary purpose" of that statute, like the Act at issue here, would be the "imposition of the assessment." Pet. 15. But this Court recognized otherwise in concluding that the statute was not a tax but a regulatory measure. 112 U.S. at 595-596. No justification exists for reaching a contrary conclusion in this case.[6]

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[5] Petitioner notes (Pet. 14) the use of the term "tax" by a few Members of Congress to refer to the assessment. But there is no reason to conclude that any of those Members, much less the Congress as a whole, was expressing any view on whether the assessment would constitute a tax as that term is used in the Constitution. Cf. *The Head Money Cases*, 112 U.S. at 596 (recognizing that an "act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax").

[6] Because the assessment is not a tax at all, this Court, like the court of appeals, need not consider petitioner's arguments (Pet. 17-20) that the asserted tax is a direct one that violates the apportionment requirement.

3. This Court's recent decision in *Wileman Bros.* is dispositive of petitioner's First Amendment challenge to the Beef Promotion and Research Act. In *Wileman Bros.*, the Court held that regulations imposing a generic advertising program for California peaches, nectarines, and plums, paid for by mandatory assessments on handlers of the fruit, did not implicate the First Amendment. The Court identified three factors that distinguish such generic advertising programs from laws that abridge freedom of speech in violation of the First Amendment. First, generic advertising programs "impose no restraint on the freedom of any producer to communicate any message to any audience." 117 S. Ct. at 2138. Second, generic advertising programs "do not compel any person to engage in any actual or symbolic speech," because persons "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 2138-2139. And third, generic advertising programs "do not compel the producers to endorse or to finance any political or ideological views." *Id.* at 2138. The Court explained that requiring the members of an industry to pay assessments for generic advertising, which does not promote "any particular message other than encouraging consumers to buy [their product]," does not "engender any crisis of conscience" or otherwise interfere with any "freedom of belief." *Id.* at 2139-2140 (quoting *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)).

The First Amendment issues here are virtually identical to those resolved in *Wileman Bros.* Although, as petitioner notes (Pet. 21), the generic advertising program in *Wileman Bros.* was established pursuant to a marketing order while the generic advertising program in this case was established pursuant to a statute, the two programs are indistinguishable for First

Amendment purposes. Both generic advertising programs are part of larger regulatory schemes for research and promotion of their respective commodities. Compare 7 U.S.C. 608c(6)(I) with 7 U.S.C. 2904(4)(B). Both generic advertising programs are implemented by committees of individuals in their respective industries and funded by assessments paid by members of those industries. Compare 7 U.S.C. 608c(6)(I), 610(b)(2)(ii) with 7 U.S.C. 2904(8)(A)-(C). And, like the marketing order in *Wileman Bros.*, 117 S. Ct. at 2134-2135 & n.3, the Beef Promotion and Research Act contains a mechanism by which cattle producers can express their disapproval of the generic advertising program. See 7 U.S.C. 2906(b) (Secretary of Agriculture may conduct referenda upon request of ten percent of cattle producers).[7]

Petitioner attempts to distinguish *Wileman Bros.* on the ground that generic beef advertising, in contrast to generic fruit advertising, involves the expression of "ideological views," specifically, that "the consumption of beef is healthy and desirable in the face of contrary medical evidence." Pet. 21-22.[8] The Third Circuit rejected similar arguments in *Frame*, concluding that

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[7] Indeed, this Court appears to have recognized the similarity, for purposes of First Amendment analysis, between the generic advertising programs in *Wileman Bros.* and in this case. In *Wileman Bros.*, the Court noted that the Ninth Circuit's decision in that case was "in conflict" with the Third Circuit's decision in *Frame*, which, like this case, involved a First Amendment challenge to the generic advertising program established by the Beef Promotion and Research Act. 117 S. Ct. 2137.

[8] Similar arguments about the "ideological" aspects of generic advertising of agricultural products, including beef, were asserted in *Wileman Bros.* See, *e.g.*, Br. of Resp. Gerawan Framing, Inc., et al. at 46-49.

"[t]he purpose underlying the Beef Promotion Act is ideologically neutral." 885 F.2d at 1135. Petitioner offers no authority to support his broad definition of ideological speech, under which any conceivable statement, regardless of its political content, is "ideological" as long as someone disagrees with it. Cf. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion) (noting "the difference between commercial price and product advertising and ideological communication") (citing *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 69 n.32 (1976)). And, even if one assumes *arguendo* that generic advertising promoting beef and beef products expresses a particular ideology, there is no reason to suppose that any member of the beef industry who is subject to the assessment does not generally share that ideology. See *Wileman Bros.*, 117 S. Ct. at 2138 ("since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program"). Nor does anything in the Act prevent petitioner, or any other member of the beef industry, from expressing the view that the consumption of beef is *not* healthy and desirable.

In sum, *Wileman Bros.* makes plain that generic advertising programs such as the one at issue here do not implicate any First Amendment issue. There is accordingly no basis, as petitioner argues, for subjecting the Beef Promotion and Research Act to further scrutiny under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 (1980). As the Court made clear in *Wileman Bros.*, *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.").[9]

4. Finally, the Beef Promotion and Research Act comports with the equal protection component of the Fifth Amendment. Contrary to petitioner's assertions (Pet. 23), there is no basis for subjecting the Act to strict scrutiny, because the Act does not involve any legislative classification that operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976). As explained above, the Act does not infringe upon any free speech rights. Nor does the Act categorize individuals on the basis of a suspect characteristic such as race. The Act merely makes an economic distinction and, accordingly, need only be rationally related to a legitimate governmental interest in order to satisfy equal protection. *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989) (rationality standard applies to a classification for assessing fees that "neither burdens fundamental constitutional rights nor creates suspect classifications").

As recognized by the Tenth Circuit in this case and the Third Circuit in *Frame*, the Beef Promotion and Research Act easily satisfies the rational basis test. Pet. App. 23; *Frame*, 885 F.2d at 1138. Congress's

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[9] Nor does this case involve infringements on the right to associate for expressive purposes. There is thus no reason to accept petitioner's invitation (Pet. 23) to apply the standard of review articulated in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984).

interest in strengthening the beef industry is undoubtedly "legitimate," given Congress's recognition that "the production of beef and beef products plays a significant role in the Nation's economy." 7 U.S.C. 2901(a)(2). The assessment is rationally related to that interest because it is used to fund promotion and advertising, which affect demand by increasing beef consumption and expanding the markets for beef and beef products. See H.R. Rep. No. 271, 99th Cong., 1st Sess., Pt. 1, at 190 (1985) (recognizing "the value of promotion and advertising in improving the incomes of United States farmers by enhancing the markets for their products"); see also *Wileman Bros.*, 117 S. Ct. at 2141 (recognizing that "[g]eneric advertising [that] is intended to stimulate consumer demand for an agricultural product" serves purposes that are "legitimate" and "consistent with the regulatory goals of the overall statutory scheme" of strengthening an agricultural industry); *Edge Broadcasting*, 509 U.S. at 434 (noting nexus between advertising and demand).

Petitioner's criticisms (Pet. 24-26) of the regulatory scheme created by the Beef Promotion and Research Act do not undermine that equal protection analysis. The fact that others in the beef industry, such as packers and promoters, do not pay or collect the assessment is irrelevant. Congress could reasonably have concluded that those members of the beef industry who have the most to gain from the generic advertising program should also bear its costs. Petitioner's assertion (Pet. 24-25) that 52 percent of beef consumers' choice meat dollars go to beef producers simply confirms that producers are the primary beneficiaries of the increases in consumption that Congress sought to achieve through the Act. Similarly, the fact that the beef industry includes several large corporate pro-

ducers (Pet. 25) does not negate the benefits of the regulatory scheme that inure to small producers and that help to preserve the "American cattlemen's traditional way of life." *Frame*, 885 F.2d at 1135. Finally, the referendum and refund provisions do not, as petitioner suggests (Pet. 26), indicate that Congress's interest in promoting the consumption of beef was insubstantial. Those provisions simply reflect Congress's understanding that, "[i]f the beef promotional program is to succeed, the program will need input and support from the beef industry, before and after implementation of the program." S. Rep. No. 145, 99th Cong., 1st Sess. 334 (1985).

In short, like the marketing orders at issue in *Wileman Bros.*, the Beef Promotion and Research Act

> is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., 117 S. Ct. at 2142. The Tenth Circuit correctly held that the Act is constitutional. Petitioner has offered no persuasive reason for this Court to review that determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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