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

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BARBARA MCDOWELL
Assistant to the Solicitor General

DOUGLAS N. LETTER
AUGUST E. FLENTJE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the assessments imposed by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101 *et seq.*, on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulation:

Statutes and regulation—Continued: Page

In the Supreme Court of the United States

No. 00-276

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

v.

UNITED FOODS, INC.

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America and the United States Department of Agriculture, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 197 F.3d 221. The opinion of the district court (App., *infra*, 10a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1999. A petition for rehearing was denied on March 23, 2000 (App., *infra*, 22a-23a). On June

9, 2000, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 21, 2000, and, on July 13, 2000, Justice Stevens further extended that time to and including August 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

2. The relevant provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, Subtitle B of Title XIX of the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, §§ 1921-1933, 104 Stat. 3854-3865 (7 U.S.C. 6101-6112) are reproduced at App., *infra*, 24a-28a.

STATEMENT

This case concerns the constitutionality of a generic advertising program for mushrooms that is similar to the generic advertising programs for California tree fruit upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). The court of appeals held that the mushroom advertising program violates the First Amendment, distinguishing *Wileman Brothers* on the ground that mushrooms are not subject to federal regulation that is as extensive as that applicable to California tree fruit.

1. Congress enacted the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101-6112 (Mushroom Act), after finding that "the maintenance and expansion of existing markets

and uses" for mushrooms are "vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation." 7 U.S.C. 6101(a)(5). Congress determined that the market for mushrooms could most effectively be maintained and expanded through "the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information." 7 U.S.C. 6101(a)(6).

To that end, the Mushroom Act authorizes the Secretary of Agriculture to issue an order establishing a Mushroom Council that would, *inter alia*, propose to the Secretary "projects of mushroom promotion, research, consumer information, and industry information." 7 U.S.C. 6104(c)(4).[1] The Mushroom Act provides that any such projects would be funded through assessments collected from mushroom producers and importers for the domestic fresh-mushroom market. 7 U.S.C. 6104(g)(1)(A) and (B).[2] The Mushroom Act expressly prohibits the use of the assessments "in any manner for the purpose of influencing legislation or governmental action or policy." 7 U.S.C. 6104(h).[3]

---

[1] The Mushroom Act provides that the Mushroom Council is to be composed of persons nominated by mushroom producers and importers and selected by the Secretary. 7 U.S.C. 6104(b)(1) and (2).

[2] The Mushroom Act provides that the assessment is to be based on the quantity of mushrooms produced or imported. 7 U.S.C. 6104(g)(2).

[3] The assessments may be used, however, to develop proposals to the Secretary for amendments to the Mushroom Order or for voluntary grade and quality standards for mushrooms. 7 U.S.C. 6104(h).

The Secretary of Agriculture issued an order, pursuant to the Mushroom Act, that took effect in 1993. See 7 C.F.R. Pt. 1209 (Mushroom Order). Before the Mushroom Order took effect, the Secretary submitted the Order to a referendum of mushroom producers and importers, as required by the Mushroom Act. 7 U.S.C. 6105(a). The Mushroom Act also required the Secretary to conduct a second such referendum after the Mushroom Order had been in effect for five years. 7 U.S.C. 6105(b)(1)(A). In that referendum, which was conducted in 1998, a substantial majority of mushroom producers and importers voted to retain the Mushroom Order. App., *infra*, 15a.[4] The Secretary is also authorized to conduct additional referenda on the Mushroom Order if 30% of the mushroom producers and importers request one. 7 U.S.C. 6105(b)(1)(B).

2. Respondent United Foods, Inc., a mushroom producer, has refused since 1996 to pay its assessments under the Mushroom Act and the Mushroom Order. C.A. App. 12; see App., *infra*, 15a. Instead, respondent filed a petition with the Secretary of Agriculture, pursuant to 7 U.S.C. 6106(a), claiming that the Mushroom Act, the Mushroom Order, and the assessments imposed thereunder violate the First Amendment. C.A. App. 93, 98. The United States then filed an action against respondent in district court, pursuant to 7 U.S.C. 6107(a), seeking to enforce the terms of the Mushroom Order and to require respondent to comply

[4] In 1998, 80% of those voting in the referendum, representing 70% of the volume of mushrooms produced by all those who voted, favored the continuation of the Mushroom Order. Agricultural Marketing Serv., United States Dep't of Agriculture, *Mushroom Industry Votes to Continue Promotion Program*, Release No. AMS-071-98 (Mar. 20, 1998).

with it. C.A. App. 9. The two actions were stayed in their respective fora pending this Court's resolution of *Wileman Brothers*. App., *infra*, 11a.

After the decision in *Wileman Brothers*, the administrative law judge assigned to respondent's case dismissed the petition, rejecting the argument that *Wileman Brothers* "is distinguishable because the peach and nectarine marketing orders at issue there regulated other aspects of the market, and did not have promotion as their sole purpose." C.A. App. 249.

The Judicial Officer of the Department of Agriculture affirmed. The Judicial Officer explained that the Mushroom Act and the Mushroom Order "have the very same three characteristics which the Court found dispositive of the First Amendment issue in [*Wileman Brothers*]." C.A. App. 274. Specifically, the Judicial Officer explained, the Mushroom Act and the Mushroom Order do not prohibit respondent from communicating any message to any audience, do not compel respondent to speak or be publicly associated with the Mushroom Council's promotion program, and do not compel respondent to finance any political or ideological views. *Id.* at 274-276.

Respondent then filed a complaint in district court. The court consolidated that action with the United States' enforcement action, and granted the United States' motions for summary judgment. App., *infra*, 10a-21a. The court held that *Wileman Brothers* "is clearly dispositive of [respondent's] First Amendment challenge to the [Mushroom Act] and the Order." *Id.* at 18a. The court rejected respondent's effort to distinguish *Wileman Brothers* on the ground that the mushroom industry is not as extensively regulated as the tree fruit industry. The court reasoned that *Wileman Brothers* "did not turn on the degree to which [the]

State or Federal Government has otherwise displaced free market competition"; rather, the court understood *Wileman Brothers* as holding that "compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court." *Ibid.* (quoting *Matsui Nursery, Inc.* v. *California Cut Flower Comm'n*, No. S-96-1012 EJG/GGH (E.D. Cal. Aug. 6, 1997), slip op., 12-13).

3. The United States Court of Appeals for the Sixth Circuit reversed. App., *infra*, 1a-9a. The court concluded that the Mushroom Act and the Mushroom Order violate the First Amendment to the extent that they require mushroom producers and importers to pay an assessment for a generic advertising program. *Id.* at 8a-9a.

The court of appeals read *Wileman Brothers* as holding that a generic advertising program funded by mandatory assessments must satisfy two conditions in order to withstand constitutional scrutiny: first, the advertising must be "germane[] to a valid, comprehensive, regulatory scheme," and, second, the advertising must be "nonideological." App., *infra*, 7a. The panel noted that *Wileman Brothers* had emphasized that the generic advertising program for California tree fruit possessed both characteristics—that is, the advertising program was "part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme," *id.* at 5a (quoting *Wileman Bros.*, 521 U.S. at 469), and was "not

used to fund ideological activities," *id.* at 6a (quoting *Wileman Bros.*, 521 U.S. at 473).[5]

The court of appeals then applied its two-part test to the generic advertising program established by the Mushroom Act and the Mushroom Order. App., *infra*, 8a-9a. The court did not suggest that the generic advertising program compels members of the mushroom industry to fund ideological activities. But the court nonetheless concluded that, because the generic advertising program is not part of a comprehensive scheme of regulation of the mushroom industry, the program violates the First Amendment to the extent that it imposes assessments on members of the industry. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional the assessment provisions of the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. 6101 *et seq.*, and the Mushroom Order promulgated by the Secretary of Agriculture thereunder, as a law "abridging the freedom of speech" within the meaning of the First Amendment. U.S. Const. Amend. I. That decision misconstrues this Court's precedents, including *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), and places unwarranted restrictions on

[5] The court of appeals reasoned that mandatory advertising assessments are justified in an extensively regulated industry, but not otherwise, in order to prevent members of the industry from "tak[ing] advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits [they] receive at the hands of the government." App., *infra*, 7a-8a. The court found support for such a "principle of reciprocity" in *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), which involved compelled contributions to a public-employee union in the context of an "agency-shop" arrangement. App., *infra*, 8a.

Congress's authority to engage in "a species of economic regulation," *id.* at 477, designed to stabilize and strengthen the market for an agricultural commodity. Certiorari is warranted to review the court of appeals' "exercise of the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), and to resolve disagreement among the lower courts concerning the constitutionality of generic advertising programs for various agricultural commodities.

1. In *Wileman Brothers*, this Court rejected a First Amendment challenge to the generic advertising programs for California peaches, plums, and nectarines authorized by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* Those generic advertising programs, like the generic advertising program for mushrooms in this case, were funded by mandatory assessments imposed on producers or handlers of the commodities. The Court concluded that the generic advertising programs in *Wileman Brothers* were subject to scrutiny not under the "heightened standard appropriate for the review of First Amendment issues," but instead under the more deferential standard "appropriate for the review of economic regulation." 521 U.S. at 469.

The Court identified three characteristics that distinguish such generic advertising programs from laws that abridge the freedom of speech protected by the First Amendment: *first*, the programs "impose no restraint on the freedom of any producer to communicate any message to any audience"; *second*, the programs "do not compel any person to engage in any actual or symbolic speech"; and, *third*, the programs "do not compel the producers to endorse or to finance any political or ideological views," much less views with which they

disagree. *Wileman Bros.*, 521 U.S. at 469-470; see also *id.* at 470-472. Accordingly, the Court concluded that "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard" from that applicable to other economic regulations. *Id.* at 470.

Here, based on the same three distinctions identified by the Court in *Wileman Brothers*, the generic advertising program for mushrooms is unlike laws that have been held to violate the First Amendment. The Mushroom Act and the Mushroom Order do not restrain the freedom of respondent or other producers "to communicate any message to any audience," do not compel respondent or other producers "to engage in any actual or symbolic speech," and do not require respondent or other producers "to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470. They merely require respondent and other producers to share in the costs of commercial messages, without any ideological content, that are germane to the statutory purpose of "maintain[ing] and expand[ing] existing markets for mushrooms." 7 U.S.C. 6101(a)(6). See *Wileman Bros.*, 521 U.S. at 473 (explaining that the marketing orders in that case did not implicate the First Amendment's concern with compelled funding of certain speech because "(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities"). On that basis, the court of appeals should have concluded that the generic advertising program in this case, like the generic advertising programs in *Wileman Brothers*, 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." *Id.* at 477.

The court of appeals nonetheless departed from the holding in *Wileman Brothers* on the ground that the mushroom industry is "unregulated" whereas the California peach, plum, and nectarine industries are "collectivized." App., *infra*, 8a. This Court's analysis in *Wileman Brothers* did not, however, center on the extent to which those industries were regulated. To be sure, the Court did "stress the importance of the statutory context" in which *Wileman Brothers* arose, noting that the advertising programs were "a part of a broader collective enterprise in which [fruit growers'] freedom to act independently is already constrained by the regulatory scheme." 521 U.S. at 469. But that discussion was in Part III of the Court's opinion, which essentially identified what was and was not at issue in the case, see *id.* at 467-468, and described the context in which the case arose, see *id.* at 469. The Court's First Amendment analysis, on the other hand, was set forth in Part IV of the Court's opinion. See *id.* at 469-474. None of the three grounds on which the Court, in Part IV, distinguished the law in *Wileman Brothers* from laws that violate the First Amendment has anything to do with the "collectiviz[ation]" of the industry subject to the law. Presumably, if the Court had intended its decision in *Wileman Brothers* to turn on the extent of regulation of the industry at issue, the Court would not merely have stated as a fact that the California tree fruit industry was extensively regulated, but would also have explained the significance of such a fact to its First Amendment analysis.

Moreover, the Court granted certiorari in *Wileman Brothers* to resolve a conflict between the Ninth Circuit's decision in that case and the Third Circuit's deci-

sion in *United States* v. *Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990). See *Wileman Bros.*, 521 U.S. at 466-467. *Frame*, like the present case, involved a First Amendment challenge to a generic advertising program established pursuant to a statute —there, the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.* (Beef Act)—that does not extensively regulate the relevant sector of the agricultural industry. The Beef Act, like the Mushroom Act, is concerned solely with "promotion and advertising, research, consumer information, and industry information" funded through assessments on producers. 7 U.S.C. 2904(4)(B); see *Frame*, 885 F.2d at 1122 (The Beef Act "was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, while simultaneously avoiding the intrusiveness of government regulation and the cost of government 'handouts.'"). If the Court's decision in *Wileman Brothers* were limited to generic advertising programs imposed under marketing orders comprehensively regulating a commodity, then the circuit conflict that the Court identified in *Wileman Brothers* would not have been resolved.

2. Quite aside from the Third Circuit's pre-*Wileman Brothers* decision in *Frame*, the court of appeals' decision in this case conflicts with the Tenth Circuit's post-*Wileman Brothers* decision in *Goetz* v. *Glickman*, 149 F.3d 1131 (1998), cert. denied, 525 U.S. 1102 (1999), which rejected a First Amendment challenge to the generic advertising program established pursuant to the Beef Act. The plaintiff in *Goetz* argued that *Wileman Brothers* was inapplicable because the Beef Act "is not an overall regulatory scheme" and the beef industry remains "highly competitive." Appellant's

Supp. Br. at 6, *Goetz*, *supra*.[6] The Tenth Circuit summarily concluded, however, that "under the Supreme Court's decision in *Wileman Bros.*, [the plaintiff's] First Amendment claim is fruitless." *Goetz*, 149 F.3d at 1139.

The Ninth Circuit, somewhat similarly to the Sixth Circuit, has read *Wileman Brothers* to require an analysis of whether producers are being compelled to fund a generic advertising program "as a part of a broader collective enterprise in which their freedom to act independently is already constrained." *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 975 (1999) (quoting *Wileman Bros.*, 521 U.S. at 469). The Ninth Circuit further explained that such an analysis should be based on "the entire regulatory scheme" applicable to a given commodity, and not merely the particular statute or marketing order that establishes a generic advertising program. *Id.* at 975 & n.5. The court thus rejected the plaintiff's argument that *Wileman Brothers* was inapplicable to the state marketing order in that case, which did no more than establish a collective advertising and information program for milk and dairy products, because "California milk producers are regulated to the same extent as, if not more than, the tree fruit growers in *Wileman*," albeit not under the particular marketing order at issue. *Id.* at 974.

3. The court of appeals' decision significantly undermines the nationwide generic advertising program for mushrooms—a program that Congress determined to be "necessary to maintain and expand existing markets

---

[6] This Court decided *Wileman Brothers* while *Goetz* was pending on appeal. The Tenth Circuit directed the parties to file supplemental briefs "addressing the effect of [*Wileman Brothers*] on Goetz's first amendment claim." *Goetz*, 149 F.3d at 1135.

for mushrooms," and thus "vital to the welfare of producers * * * as well as to the agricultural economy of the Nation." 7 U.S.C. 6101(a)(5) and (6). It exempts mushroom producers and importers in the Sixth Circuit from contributing to the generic advertising program. It also encourages mushroom producers and importers outside the Sixth Circuit to withhold their payments until the constitutionality of such programs is definitively resolved. As this Court recognized with respect to another type of agricultural marketing program supported by assessments on handlers of a commodity, "[f]ailure by handlers to meet their obligations [to pay] promptly would threaten the whole scheme," and "[e]ven temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements." *United States* v. *Ruzicka*, 329 U.S. 287, 293 (1946).

In addition to the generic advertising program for mushrooms, Congress has authorized, and the Secretary of Agriculture has implemented, similar generic advertising programs for a number of other agricultural commodities. Those programs, like the program in this case, are not imposed as part of a statute or marketing order that comprehensively regulates the commodity. See, *e.g.*, 7 U.S.C. 2101 *et seq.* (cotton); 7 U.S.C. 2611 *et seq.* (potatoes); 7 U.S.C. 2701 *et seq.* (eggs); 7 U.S.C. 2901 *et seq.* (beef); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 4801 *et seq.* (pork); 7 U.S.C. 6401 *et seq.* (fluid milk).[7] Moreover, Congress recently enacted a statute,

---

[7] See also, *e.g.*, 7 U.S.C. 4601 *et seq.* (honey); 7 U.S.C. 4901 *et seq.* (watermelon); 7 U.S.C. 6301 *et seq.* (soybeans); 7 U.S.C. 7481 *et*

7 U.S.C. 7411 *et seq.* (Supp. IV 1998), that authorizes marketing programs for any agricultural commodity, under which generic advertising programs have recently gone into effect for peanuts, 7 C.F.R. Pt. 1216, and blueberries, 7 C.F.R. Pt. 1218. Several States have established their own commodity marketing programs, some of which could be categorized as involving only generic advertising funded through assessments on producers of the commodity. See, *e.g.*, Br. of Amici Curiae Attorneys General of Arizona *et al.* in Support of Petition for Writ of Certiorari at 1-3 & App. 1-4, *Wileman Bros.*, *supra* (describing commodity marketing programs in 11 States); see, *e.g.*, *Gallo Cattle Co.*, 185 F.3d at 974-978 (upholding generic advertising program established under state marketing order).

We do not mean to imply that all of those programs would necessarily be invalidated under the Sixth Circuit's analysis in this case.[8] At a minimum, however, the Sixth Circuit's decision creates considerable uncertainty about the constitutionality of other federal and state generic advertising programs, thereby complicat-

---

seq. (popcorn). Additional such programs, although authorized by Congress, are not currently in effect. See, *e.g.*, 7 U.S.C. 6001 *et seq.* (pecans); 7 U.S.C. 6201 *et seq.* (limes); 7 U.S.C. 6801 *et seq.* (cut flowers); 7 U.S.C. 7101 *et seq.* (sheep and sheep products); 7 U.S.C. 7441 *et seq.* (canola and rapeseed) (Supp. IV 1998); 7 U.S.C. 7461 *et seq.* (Supp. IV 1998) (kiwi fruit).

[8] For example, under the analysis employed by the Ninth Circuit in *Gallo Cattle*, 185 F.3d at 975 & n.5, courts may consider all federal and state regulation of a commodity, and not merely the statute and order establishing a generic advertising program, to determine whether the commodity is regulated to the same extent as the tree fruit in *Wileman Brothers*. Some generic advertising programs, such as that in *Gallo Cattle* itself, would be sustained under that approach.

ing the administration of such programs, "encourag[ing] wider non-compliance, and engender[ing] those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements," *Ruzicka*, 329 U.S. at 293. Certiorari is warranted here in order to eliminate that broader uncertainty, as well as to review the Sixth Circuit's holding of an Act of Congress unconstitutional and to resolve the circuit conflict that holding has created.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
DOUGLAS N. LETTER
AUGUST E. FLENTJE
Attorneys

AUGUST 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6436

UNITED FOODS, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF
AGRICULTURE, DEFENDANTS-APPELLEES

[Argued: Sept. 23, 1999
Decided and Filed: Nov. 23, 1999
Rehearing and Suggestion for Rehearing
En Banc Denied March 23, 2000]

OPINION

Before: MERRITT and CLAY, Circuit Judges;
ALDRICH,* District Judge.

MERRITT, Circuit Judge.

In this case of compelled, commercial speech challenged under the First Amendment, the Department of Agriculture requires the plaintiff, a mushroom pro-

---

* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

ducer, to contribute funds for advertising mushrooms, on a regional basis, as authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq*.[1] The District Court upheld

---

[1] Enacted by Congress in 1990, the Mushroom Act states:

> It is declared to be the policy of congress that it is in the public interest to authorize the establishment of an orderly procedure for financing through adequate assessments on mushrooms produced domestically or imported into the United States, program of promotion, research, and consumer and industry information designed to–
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and
>
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). These policy objectives are supported by findings set forth in the Act that mushrooms are not only an important food valuable to the human diet, but that they play a significant role in this country's economy and that their production benefits the environment. The Act does not permit the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry. It is basically a commercial advertising statute designed to assess mushroom growers for the cost of advertising. 7 C.F.R. Part 1209.40(a).

Pursuant to the Mushroom Act, the Secretary of Agriculture promulgated an Order establishing a Mushroom Council made up of mushroom producers nominated by producers and importers for appointment by the Secretary. 7 U.S.C. § 6104(b); 7 C.F.R. Part 1209. The Order generally directs the Council to "carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry." 7 C.F.R. § 1209.39(l). The Council's activities are funded through mandatory assessments on larger producers

the Act and the government's action compelling payments for mushroom advertising. The plaintiff claims that other mushroom producers shape the content of the advertising to its disadvantage and that the administrative process allows a majority of producers to create advertising to its detriment. The issue before us is whether the answer to the First Amendment question presented here should be the same as in the recent case of *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997), in which the Supreme Court in a controversial 5-4 decision[2] upheld a similar agricultural advertising program in the heavily regulated California tree fruits business (peaches, plums and nectarines). But unlike the tree fruit business in *Wileman*, the mushroom growing business in the case before us is unregulated, except for the enforcement of a regional mushroom advertising program.

The government argues that the degree of regulation or "collectivization" of an industry should make no First Amendment difference on the compelled advertising issue so long as the compelled advertising is nonpolitical and so long as the plaintiff is not restricted in its own advertising. The plaintiff contends to the contrary that

---

and importers of fresh mushroom products for domestic use, based upon poundage of mushrooms marketed in the United States and not to exceed a penny per pound 7 U.S.C. § 6104(g), 7 C.F.R. § 1209.51. The Council has used these funds solely to finance generic advertising efforts on behalf of the mushroom industry.

[2] *See, e.g.*, Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929 (1998); Leading Case, *Commercial Speech—Compelled Advertising*, 111 HARV. L. REV. 319 (1997).

the constitutionality of the compelled speech under the 1990 Mushroom Act—in light of *Wileman*—must turn on the degree of regulation of the industry. The question for us is whether the degree of government regulation of an industry controls the outcome or whether the government is right that this is irrelevant under *Wileman*.

In prior restraint and compelled speech cases involving nonbroadcast political speech, the First Amendment prohibition is nearly absolute, *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931), holding that newspapers have a right to publish without prior restraint, *West Virginia v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943), holding that schoolchildren may not be compelled to join in a flag salute ceremony, and *Miami Herald v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974), holding that newspapers may not be compelled to publish a reply by political candidates. But commercial speech compelled by government is governed by a different, and as yet unsettled, set of principles which require a court to balance a number of factors according to its judgment concerning the welfare of buyers and sellers in the market place.

In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman*, 521 U.S. at 461, 117 S. Ct. 2130. In

his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed] the importance" of the fact that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469, 117 S. Ct. 2130. In contrast, the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply. Except for the compelled advertising program assessing growers based on their volume of mushroom production, there appears to be a relatively free market in mushrooms, both processed and fresh.[3]

---

[3] Justice Souter's twenty-five page dissenting opinion in *Wileman* provides an extensive history of compelled advertising in the market for agricultural commodities. His reading of the history of the agricultural regulations is that it shows that the advertising is simply the result of interest group lobbying, not a response to economic conditions. See *Wileman*, 521 U.S. at 491-99, 117 S .Ct. 2130 (Souter, J., dissenting). Justice Souter's dissent recounts that in 1952 Congress began providing for compelled advertising for an ever-expanding list of agricultural commodities. Sometimes the legislation, and the marketing orders authorized by the legislation, cover a commodity from just one section of the country—for example, California peaches but not Georgia peaches. In recent years Congress has added many farm products to the list in which compelled advertising is the main or the only form of regulation. Justice Souter explains that this comes about because of "the view of the Department of Agriculture that 'any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so.'" *Id.* at 495-96, 117 S. Ct. 2130 (citing S. REP. NO. 92-295, at 2 (1971)). Justice Souter concludes that these programs of compelled advertising appear to rest only on "the preference of a local interest group." *Id.* at 497, 117 S. Ct. 2130. "Without more, the most reasonable inference is not of a

On the other side of the ledger, the government correctly argues that Justice Stevens also emphasized repeatedly in his opinion that the compelled agricultural advertising in *Wileman* is not a restriction on commercial advertising as in cases that have invalidated such regulation, *see, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980), because separate, individual, producer advertising of tree fruits is not prohibited or restricted. *See Wileman*, 521 U.S. at 469-70, 117 S. Ct. 2130. The opinion emphasizes that the test for compelled advertising is not the same as the four-part test for restrictions on advertising set out in Central Hudson. *See id.* The government also correctly argues that Justice Stevens repeatedly emphasizes that no "symbolic," "ideological" or "political" speech is involved in the tree fruit advertising. *See id.* Justice Stevens' opinion sets out these various factors concisely when he says that the compelled advertising of tree fruits passes muster "because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders [which collectivize the industry] and, (2) *in any event*, the assessments are not used to fund ideological activities." *Wileman*, 521 U.S. at 473, 117 S. Ct. 2130 (emphasis added).

The question for us then is whether these two elements—(1) germaneness to a valid, comprehensive, regulatory scheme and (2) nonideological content—are

---

substantial Government interest, but effective politics on the part of producers who see the chance to spread their advertising costs." *Id.* at 498, 117 S. Ct. 2130.

independent of each other and each provide a sufficient basis for upholding compelled commercial speech. In other words, even though the mushroom advertising program before us is not "germane" to any collective program setting prices or supply, does the fact that the advertising is "nonideological" or "nonpolitical" in nature mean that it should be permitted under the First Amendment?

We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and"—germaneness "and" nonpolitical—is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing—either the collectivization of the industry or the purely commercial nature of the advertising—the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive

at the hands of the government. Whether wise or unwise, or true or untrue, the legislative theory behind such extensive regulation is that the interests of producers and consumers are furthered by the monopoly powers inherent in government control of price and supply. In exchange for such power in the market place, members of the industry may have to provide certain benefits to their industry in the form of payments for nonideological advertising of industry products. If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest. This principle of reciprocity designed to control free-ridership is essentially the same basis upon which the Supreme Court upheld some, and struck down other, compelled speech in the union, closed-shop context in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S. Ct. 1950, 114 L.Ed.2d 572 (1991).

Applying this interpretation to the case at hand, we find that the context of the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated. Hence the compelled commercial speech is not a price the members must pay under the reciprocity principle in order to further their self-interest which is regarded as arising from heavy regulation through marketing orders controlling price, supply and quality. Thus in the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.

Accordingly, the judgment of the District Court is reversed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

No. 96-1252

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED FOODS, INC., DEFENDANT

No. 98-1082

UNITED FOODS, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: JULY 31, 1998]

ORDER GRANTING UNITED STATES' MOTIONS FOR SUMMARY JUDGMENT

The United States, on behalf of the Department of Agriculture (USDA), filed civil action No. 96-1252 on October 16, 1996, pursuant to the Mushroom Promotion, Research, and Consumer Information Act (MPRCIA), 7 U.S.C. § 6101 *et seq*. The complaint seeks to enforce against United Foods, Inc., a producer and first handler of fresh mushrooms, the terms of an Order issued under the MPRCIA by the Secretary of Agriculture. Already pending when the action was filed was an administrative petition before the USDA on behalf of

United Foods, challenging the constitutionality of the Order. On November 16, 1996, the United States filed a motion for summary judgment or, in the alternative, for a preliminary injunction. United Foods responded with a motion to stay the proceedings in order to await the decision of the United States Supreme Court in a case involving the same issues that United Foods had raised.

On February 11, 1997, the court granted United Foods' motion to stay No. 96-1252. An administrative law judge (ALJ) had also stayed proceedings on the pending administrative petition. The Supreme Court issued its decision in *Glickman v. Wileman Bros. & Elliott*, 117 S. Ct. 2130, on June 25, 1997. The ALJ ruled on December 9, 1997, that *Wileman Bros.* was dispositive of the issues raised by United Foods, and dismissed the administrative petition. United Foods appealed, and a USDA Judicial Officer affirmed. On March 23, 1998, United Foods filed civil action No. 98-1082, seeking judicial review of the USDA administrative decision, pursuant to 7 U.S.C. § 6106(b). The stay in No. 96-1252 was lifted, and upon motion of United Foods, the court consolidated the two cases, as the issues raised are identical. The United States has moved for summary judgment in both cases, and United Foods has responded to the motion.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of

proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex Corp.*, 477 U.S. at 323.

In enacting the MPRCIA in 1990, Congress made the following findings:

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy. . . .;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States;

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer infor-

mation are necessary to maintain and expand existing markets for mushrooms; and

(7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

7 U.S.C. § 6101(a). Based on these findings, Congress stated:

> It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and
>
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). The statute directs the Secretary to issue an Order to effectuate this goal of establishing an industry-wide program of mushroom promotion, research, and consumer and industry information. 7 U.S.C. § 6103(a).

The Order issued by the Secretary under the MPRCIA provides for the establishment of a Mushroom Council made up of mushroom producers nominated by producers and importers and appointed by the Secretary. The primary function of the Mushroom Council is to administer and carry out the terms of the Order. 7 U.S.C. § 6104(b), (c)(1); 7 C.F.R. §§ 1209.30-1209.40. The activities of the Council, including generic advertising efforts, are funded through mandatory assessments on mushrooms produced in or imported into the United States for the domestic, fresh market. The assessments are to be collected by all first handlers of mushrooms and remitted to the Council, and are not to exceed a penny per pound. 7 U.S.C. § 6104(g); 7 C.F.R. § 1209.51. The Order also requires first handlers to submit monthly reports to the Council containing specified information, including the quantity of mushrooms subject to assessment, and the amount of assessments remitted. 7 U.S.C. § 6104(i); 7 C.F.R. §§ 1209.60-1209.62, 1209.260.

During the 60-day period prior to the effective date of the Order, the Secretary is required to "conduct a referendum among mushroom producers and importers to ascertain whether the Order shall go into effect." 7 U.S.C. § 6105(a)(1). The Order will become effective if "the order has been approved by a majority of the producers and importers voting . . . which majority, on average, annually produces and imports into the United States more than 50 percent of the mushrooms annually produced and imported by all those voting in the referendum." 7 U.S.C. § 6105(a)(2). After the Order becomes effective, the Secretary must conduct additional referendums, at certain specified intervals, to determine if the mushroom producers and importers favor

continuation, termination, or suspension of the Order. 7 U.S.C. § 6105(b)(1)(A); 7 C.F.R. §§ 1209.300-1209.307. A representative group of at least 30% of the mushroom producers and importers may request such a referendum at any time. 7 U.S.C. § 6105(b)(1)(B). The most recent referendum under the Order was conducted from February 24-March 13, 1998, with continuation favored by 80% of those who voted, representing 70% of the volume of mushrooms produced by those who voted.

These cases arise out of United Foods' refusal to pay the assessments or submit the monthly reports required by the MPRCIA and the Order. United Foods challenges the constitutionality of the statute and the Order under the First Amendment, arguing that the mandatory assessments are used to support speech with which it does not agree. United Foods also argues that the statute and Order violate the Equal Protection Clause of the Fifth Amendment because certain classes of mushroom producers are exempt from the assessment and reporting requirements.

In *Wileman Bros.*, the Supreme Court considered a First Amendment challenge to marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 601 *et seq.* A group of growers, handlers, and processors of California nectarines, plums, and peaches asserted that the imposition of mandatory assessments used to fund generic advertising of those fruits violated the First Amendment by compelling them to finance others' speech. The Supreme Court, however, held that being compelled to fund such generic advertising does not implicate the First Amendment. Rather, the program was "a species

of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." 117 S. Ct. at 2142.

The Court in *Wileman Bros.* emphasized that:

> Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

117 S. Ct. at 2138. The Court noted that these three characteristics served to differentiate the program from the various laws and schemes at issue in, for example, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (commercial speech), *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compelling actual speech by a particular person), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)(compelling financial contributions for political purposes with which one does not agree). 117 S. Ct. at 2138 nn.12-14. The Court then stated, "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders." *Id.* at 2138.

The Court recognized that the generic advertising involved in *Wileman Bros.* was intended to stimulate consumer demand for California peaches, plums, and nectarines, and that this "purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme." *Id.* at 2141. The mere fact that such generic advertising may not be the most effective method of promotion, or that those objecting "believe their money is not being well spent" does not implicate the First Amendment. *Id.* at 2140. The Court concluded by stating, "[t]he 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." *Id.* at 2142.

United Foods states that *Wileman Bros.* involved the AMAA, a "detailed regulatory scheme that restricts competition," while the MPRCIA is "free-standing" legislation that exists *only* to collect assessments to be used for promotion, advertising, and research. Therefore, it is argued, this case is distinguishable, and *Wileman Bros.* is not controlling. However, like other courts which have addressed whether *Wileman Bros.* is applicable to "free-standing" legislation, this court finds United Foods' arguments unpersuasive. *See Goetz v. Glickman*, __ F.3d __, 1998 WL 384618 (10th Cir. July 10, 1998); *Donald B. Mills, Inc. v. United States Dept. of Agric.*, No. CV-F-97-5890 OWW SMS (E.D. Cal. Mar 5, 1998) (rejecting the identical arguments regarding the MPRCIA raised in this case); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, No. S-96-102 EJG/GGH (E.D. Cal. Aug. 6, 1997).

There is nothing in *Wileman Bros.* that supports United Foods' assertion that the decision applies only to those statutory and regulatory programs that contain detailed restrictions on competition in a particular agricultural market. As succinctly stated by Judge Garcia in his ruling in *Matsui Nursery*:

> The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court. . . .

No. S-96-102 EJG/GGH, slip op., tr. at 12-13.

Wileman Bros. is clearly dispositive of United Foods' First Amendment challenge to the MPRCIA and the Order, and the United States is entitled to summary judgment on that claim.

The court finds that United Foods' challenge to the MPRCIA and the Order on equal protection grounds is also without merit. United Foods objects because the MPRCIA exempts from the payment of assessments three categories of mushrooms or producers: (1) producers who produce or import, on average, less than 500,000 pounds of mushrooms annually for the fresh mushroom market; (2) mushrooms that are exported; and (3) mushrooms that are sold to be processed rather than for the fresh market. 7 U.S.C. §§ 6102(6), (9), & (11); 6104(g)(1)(A)-(B) & (g)(4).

The Supreme Court's equal protection analysis is well established. United Foods, as a mushroom producer, is not a member of a "suspect" or "quasi-suspect" class, and the exercise of "fundamental rights" is not inordinately burdened. Therefore, it is unnecessary to apply either the "strict scrutiny" or "intermediate scrutiny" standard. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). *See also 37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 621 (6th Cir. 1997).

The challenged provisions is this case are appropriately analyzed using the least demanding standard, the "rational relationship" test. Under this test, the legislation bears a strong presumption of validity and will be sustained if the legislative classification is rationally related to any conceivable legitimate governmental interest. *Heller v. Doe by Doe*, 509 U.S. 312, 319-21 (1993); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993); *City of Cleburne*, 473 U.S. at 439-40; *Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997); *37712, Inc.*, 113 F.3d at 621-22. Furthermore, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315.

As set out earlier in this order, Congress specifically found that mushroom production plays a significant role in the national economy and benefits the environment. Congress also found that the "cooperative development, financing and implementation" of a program of mushroom promotion, research, and consumer information was necessary to maintain and expand existing markets, and to develop new markets, for fresh mushrooms.

7 U.S.C. § 6102(a). These findings clearly constitute a legitimate governmental interest.

The exemptions set out in the MPRCIA plainly bear a rational relationship to the specified governmental interest. It is reasonable that, given the small percentage of mushrooms produced for export compared to the percentage produced for the domestic market, Congress would choose to concentrate promotional programs solely on the domestic market. In addition, most mushrooms produced in the United States are sold in the fresh market. Fresh mushrooms, unlike processed mushrooms, have a short shelf life and bring a substantially higher price per pound. Thus, the markets for fresh and processed mushrooms are somewhat distinct, and it is not unreasonable to treat them differently. Finally, it was not unreasonable for Congress to conclude that, compared to those producing over 500,000 pounds of mushrooms annually, assessments from small volume producers would likely be offset by the administrative costs incurred in collecting such small amounts.

It is clear that the challenged distinctions set out in the MPRCIA and the Order easily satisfy the rational relationship test, and do not violate the equal protection clause. Thus, the United States is also entitled to summary judgment on United Foods' Fifth Amendment claim.

For the foregoing reasons, the United States' motions for summary judgment in these consolidated cases are hereby GRANTED. Judgment will be entered accordingly.

IT IS SO ORDERED.

/s/ JAMES D. TODD
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

Date: July 27, 1998

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6436

UNITED FOODS, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF
AGRICULTURE, DEFENDANTS-APPELLEES

[Filed: Mar. 23, 2000]

ORDER

Before: MERRITT and CLAY, Circuit Judges; and ALDRICH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

---

* Hon. Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN
Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. Section 6101 of Title 7 of the United States Code provides:

Findings and declaration of policy

(a) Findings

Congress finds that—

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy in that mushrooms are produced by hundreds of mushroom producers, distributed through thousands of wholesale and retail outlets, and consumed by millions of people throughout the United States and foreign countries;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States;

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with

marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markets for mushrooms; and

(7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

(b) Policy

It is declared to be the policy of Congress that it is in the public interest to authorize the establishment * * * of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to–

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

(c) Construction

Nothing in this chapter may be construed to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms.

2. Section 6103 of Title 7 of the United States Code provides, in pertinent part:

Issuance of orders

(a) In general

To effectuate the declared policy of section 6101(b) of this title, the Secretary * * * shall issue orders under this chapter applicable to producers, importers, and first handlers of mushrooms. Any such order shall be national in scope. Not more than one order shall be in effect under this chapter at any one time.

* * * * *

3. Section 6104 of Title 7 of the United States Code provides, in pertinent part:

Required terms in orders

(a) In general

Each order issued under this chapter shall contain the terms and conditions prescribed in this section.

(b) Mushroom Council

(1) Establishment and membership of Council

(A) Establishment

The order shall provide for the establishment of, and selection of members to, a Mushroom

Council that shall consist of at least 4 members and not more than 9 members.

* * * * *

(c) Powers and duties of Council

The order shall define the powers and duties of the Council, which shall include the following powers and duties—

* * * * *

(4) to propose, receive, evaluate, approve and submit to the Secretary for approval * * * budgets, plans, and projects of mushroom promotion, research, consumer information, and industry information, as well as to contract and enter into agreements with appropriate persons to implement such plans or projects;

(5) to develop and propose to the Secretary voluntary quality and grade standards for mushrooms;

* * * * *

(g) Assessments

(1) Collection and payment

(A) In general

The order shall provide that each first handler of mushrooms for the domestic fresh market produced in the United States shall collect, in the manner prescribed in the order, assessments from producers and remit the assessments to the Council.

(B) Importers

The order also shall provide that each importer of mushrooms for the domestic fresh market shall pay assessments to the Council in the manner precribed by the order.

* * * * *

(3) Use of assessments

The order shall provide that the assessments shall be used for payment of the expenses in implementing and administering this chapter, with provision for a reasonable reserve * * *.

* * * * *

(h) Prohibition

The order shall prohibit any funds received by the Council under the order from being used in any manner for the purpose of influencing legislation or governmental action or policy, except that such funds may be used by the Council for the development and recommendation to the Secretary of amendments to the order as prescribed in this chapter and for the submission to the Secretary of recommended voluntary grade and quality standards for mushrooms under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.).