No. 00-276

In the Supreme Court of the United States

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

v.

UNITED FOODS, INC.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the assessments imposed pursuant to 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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 197 F.3d 221. The opinion of the district court (Pet. App. 10a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1999. A petition for rehearing was denied on March 23, 2000 (Pet. App. 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 petition for a writ of certiorari was filed on August

18, 2000, and was granted on November 27, 2000. This Court has jurisdiction 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 *et seq.*) are reproduced at Pet. App. 24a-28a.

STATEMENT

This case concerns the constitutionality of a generic advertising program for fresh mushrooms that is similar to the generic advertising programs for California tree fruits upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). The court of appeals held, however, 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 fruits. Pet. App. 1a-9a.

1. a. Congress enacted the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101 *et seq.* (Mushroom Act), after making a series of findings set forth in the Act itself. See 7 U.S.C. 6101(a)(1)-(7). Of particular relevance to this case, Congress found 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 further found that "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." 7 U.S.C. 6101(a)(6). The Mushroom Act therefore declares it to be "the policy of Congress that it is in the public interest" to establish an orderly program for developing, financing through adequate assessments on mushroom producers and importers, and carrying out an "effective, continuous, and coordinated program of promotion, research, and consumer and industry information" designed to "strengthen the mushroom industry's position in the marketplace," "maintain and expand existing markets and uses for mushrooms," and "develop new markets and uses for mushrooms." 7 U.S.C. 6101(b).

The Mushroom Act authorizes the Secretary of Agriculture to issue an order establishing a Mushroom Council and vesting it with authority to implement the statutory policy. See 7 U.S.C. 6104(b) and (c).[1] In particular, the Act provides that the powers and duties of the Mushroom Council shall include "propos[ing], receiv[ing], evaluat[ing], approv[ing] and submit[ting] to the Secretary for approval * * * budgets, plans, and projects of mushroom promotion, research, consumer information, and industry information." 7 U.S.C.

[1] The Mushroom Act provides that the Mushroom Council is to be composed of between four and nine members, all of whom are to be selected by the Secretary from among persons nominated by mushroom producers and importers. 7 U.S.C. 6104(b)(1) and (2).

6104(c)(4).[2] The Act specifies that the Council may not implement any such plan, project, or budget unless it is approved by the Secretary. 7 U.S.C. 6104(d)(3).

The Mushroom Act provides that the activities of the Mushroom Council are to be funded through assessments collected from producers and importers of mushrooms for the domestic fresh market. 7 U.S.C. 6104(g)(1)(A) and (B).[3] The rate of assessment is determined by the Mushroom Council subject to approval by the Secretary. 7 U.S.C. 6104(g)(2); 7 C.F.R. 1209.51(b). The assessments cannot exceed certain ceilings set by the Act; the currently applicable ceiling is one cent per pound of mushrooms. 7 U.S.C. 6104(g)(2)(D). The 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).[4]

b. The Mushroom Act was included in the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359, by means of a Senate floor amendment authorizing similar promotion programs for a number of agricultural commodities. See 136 Cong. Rec. 19,511 (1990) (statement of Sen. Fowler, sponsor of the amendment) ("The amendment authorizes new programs for soybeans, fresh mushrooms, limes, and pecans. It makes important modifications to

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[2] The Mushroom Act also provides that the Mushroom Order shall vest the Mushroom Council with the authority "to develop and propose to the Secretary voluntary quality and grade standards for mushrooms." 7 U.S.C. 6104(c)(5).

[3] The amount of the assessment is based on the quantity of mushrooms produced or imported. 7 U.S.C. 6104(g)(2).

[4] The Mushroom Act vests the federal district courts with "jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation made" under the Act. 7 U.S.C. 6107(a).

existing programs for cotton, potatoes, honey, and Vidalia onions."). See Pub. L. No. 101-624, Title XIX, §§ 1901-1998, 104 Stat. 3838-3914.

The congressional supporters of the amendment characterized such programs as "self-help" measures that are "funded and administered entirely by producers with oversight by the Secretary of Agriculture." 136 Cong. Rec. at 19,511 (statement of Sen. Fowler); accord *id.* at 19,513 (statement of Sen. Cochran). They recognized that such programs, by enabling producers "to unite on a national level to conduct effective marketing and research activities for their products," had "proven extremely successful in maintaining and expanding existing markets, and developing new markets and uses for our commodities." *Id.* at 19,511 (statement of Sen. Fowler); see also *id.* at 19,512 (statement of Sen. McCain) (noting that such programs "have been very successful in assisting our farmers and ranchers in promoting the benefits of their products"). Congressional supporters also noted that the effectiveness of such programs could be undermined if all but the smallest producers of a commodity were not required to pay their "fair share." *Id.* at 19,512 (statement of Sen. McCain); accord *id.* at 19,511-19,512 (statement of Sen. DeConcini).

Senator Heinz, in specifically addressing the mushroom program, emphasized that such programs reflect "an attempt to design a marketing order that respects our tradition of free trade," as opposed to marketing orders that, for example, engage in "the artificial bolstering of indigenous industries by exclusionary measures." 136 Cong. Rec. at 19,614. "Unlike other proposals," he explained, a generic promotion program "does not seek to restrict a given market to the unfair advantage of certain U.S. businesses, but rather to

enlarge that market, allowing everyone to benefit." *Ibid.*[5]

c. The Secretary of Agriculture issued an order, pursuant to the Mushroom Act, that became effective 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 Act. 7 U.S.C. 6105(a)(1).

The Mushroom Act 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 Order. Pet. App. 15a.[6] The Secretary is authorized to conduct additional referenda on the Order if 30% of mushroom producers and importers request one. 7 U.S.C. 6105(b)(1)(B). In addition, if the Secretary at any time "finds that the order * * * obstructs or does not tend to effectuate the declared policy" of the Act, the

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[5] Senator Specter, also addressing the provisions of the amendment authorizing a mushroom promotion program, noted that "this amendment is supported by the overwhelming majority of the fresh mushroom industry." 136 Cong. Rec. at 19,513. Senator Heinz identified respondent, which he described as "a food conglomerate based in Tennessee," as "[t]he chief opponent" of the amendment. *Id.* at 19,614.

[6] 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 Mktg. Serv., United States Dep't of Agric., *Mushroom Indus. Votes to Continue Promotion Program*, Release No. AMS-071-98 (Mar. 20, 1998) (J.A. 79-80).

Secretary is required to terminate or suspend the Order. 7 U.S.C. 6110.

d. Congress subsequently enacted the Federal Agricultural Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888. That Act, *inter alia*, elaborates on the findings made by Congress in enacting other statutes, specifically including the Mushroom Act, that authorize generic commodity promotion programs. See 7 U.S.C. 7401(a)(10).[7] In the FAIR Act, Congress confirmed that such programs are, as reflected in the provisions of the Mushroom Act, industry "'self-help' mechanisms" subject to the "supervision and oversight of the Secretary of Agriculture." 7 U.S.C. 7401(b)(8); see also 7 U.S.C. 7401(b)(1) (describing such programs as "Government-supervised"). Congress also declared in the FAIR Act that such programs are appropriately funded by producers and processors, "who most directly reap the benefits of the programs." 7 U.S.C. 7401(b)(2).

Congress found that such programs advance the interests of agricultural producers by "utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ." 7 U.S.C. 7401(b)(7). In addition, Congress found that such programs are of "particular benefit to small producers," who may "lack the resources or market power to advertise on their own" and may be "unable to benefit from the economies of scale available in promotion and advertising." 7 U.S.C. 7401(b)(10). Congress noted that the Mushroom Act and the other commodity promotion laws "were neither designed nor intended to prohibit or restrict, and the

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[7] All citations of provisions of the FAIR Act are of 7 U.S.C. (Supp. IV 1998).

promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors." 7 U.S.C. 7401(b)(4).

2. Respondent United Foods, Inc., a mushroom producer, has refused since 1996 to pay its assessments under the Mushroom Act and the Mushroom Order. See Pet. App. 15a. Instead, respondent filed a petition with the Secretary of Agriculture, pursuant to 7 U.S.C. 6106(a)(1)(A), claiming that the Mushroom Act, the Mushroom Order, and the assessments imposed thereunder violate the First Amendment. See J.A. 27. The United States then filed an action against respondent in the United States District Court for the Western District of Tennessee, pursuant to 7 U.S.C. 6107(a), seeking to enforce the terms of the Mushroom Order and to require respondent to comply with it. J.A. 55-60. The two matters were stayed pending this Court's resolution of *Wileman Brothers*. Pet. App. 11a.

After the decision in *Wileman Brothers*, the administrative law judge assigned to respondent's case dismissed the petition. J.A. 27-31. The administrative law judge concluded that *Wileman Brothers* "is dispositive of the issues herein," rejecting respondent's attempt to distinguish *Wileman Brothers* on the ground that "the peach and nectarine marketing orders at issue there regulated other aspects of the market, and did not have promotion as their sole purpose." J.A. 28.

The Judicial Officer of the Department of Agriculture affirmed. J.A. 32-54. 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*]." J.A. 43. 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 to be publicly associated with the Mushroom Council's promotion program, and do not compel respondent to finance any political or ideological views. J.A. 43-46.

Respondent then filed a complaint in district court, seeking review of the Judicial Officer's decision. The district court consolidated that action with the United States' enforcement action, and granted the United States' motions for summary judgment. Pet. App. 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 California tree fruit industries. 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-96-1092 EJG-GGH (E.D. Cal. Aug. 6, 1997)).

3. The United States Court of Appeals for the Sixth Circuit reversed. Pet. App. 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.

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." Pet. App. 6a. The panel noted that *Wileman Brothers* had emphasized that the generic advertising programs for California tree fruits possessed both characteristics—that is, the advertising programs were "part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme" and were "not used to fund ideological activities." Pet. App. 5a-6a (quoting *Wileman Bros.*, 521 U.S. at 469, 473).

The court of appeals was of the view 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." Pet. App. 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. Pet. App. 8a.

The court of appeals then applied its two-part test to the generic advertising program established by the Mushroom Act and the Mushroom Order. Pet. App. 8a. 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 to fund the advertising. *Ibid.*

SUMMARY OF ARGUMENT

I. The generic advertising program established under the Mushroom Act and the Mushroom Order is fully consistent with the First Amendment under this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). For the same three reasons that the Court identified with respect to the generic advertising programs for California tree fruits in *Wileman Brothers*, the generic advertising program for mushrooms is unlike laws that have been held to violate the freedom of speech protected by the First Amendment: It "impose[s] no restraint on the freedom of any producer to communicate any message to any audience"; it "do[es] not compel any person to engage in any actual or symbolic speech"; and it "do[es] not compel the producers to endorse or to finance any political or ideological views." *Id.* at 469-470. Instead, like the peach, plum, and nectarine handlers in *Wileman Brothers*, respondent and other mushroom producers are merely required to share the costs of promotional activities that are non-ideological and "unquestionably germane to the purposes," *id.* at 473, identified by Congress in the Mushroom Act, *i.e.*, to maintain and expand the existing markets for their product and to create new markets and uses for that product, 7 U.S.C. 6101(b).

The court of appeals erred in distinguishing this case from *Wileman Brothers* on the ground that mushrooms are not as extensively regulated as California peaches, plums, and nectarines. This Court's opinion in *Wileman Brothers*, while preliminarily noting the regulatory context in which that case arose, did not rest its First Amendment analysis on the extent to which the California tree fruit industries were subject to other government regulation. Indeed, the Court explicitly granted certiorari in *Wileman Brothers* to resolve a circuit conflict with a case involving a generic advertising program established under a statute that did not otherwise regulate the particular agricultural commodity involved. *Wileman Brothers* therefore is not appropriately read as turning on whether Congress sought to strengthen a sector of the agricultural economy solely through a generic advertising program or, alternatively, through a generic advertising program combined with other regulations of price, quantity, or quality (only the last of which had actually been imposed, contrary to the court of appeals' assumption, on the California tree fruit industries in *Wileman Brothers*).

Nor is there any First Amendment justification for such a distinction. The government's purpose for adopting a generic advertising program—to stimulate sales of a commodity—is equally valid regardless of the extent (if any) to which the commodity may be subject to other regulation. So, too, the government's choice to fund the program through mandatory assessments on members of the industry, in order to avoid the problem of "free riders" who would obtain the benefits of the program without sharing the costs, is equally valid whether or not those members also suffer the burdens, or enjoy the benefits, of other regulation. None of this Court's First Amendment decisions supports the court

of appeals' "principle of reciprocity" under which members of an industry may be required to finance a generic advertising program only as payment for "commercial benefits," distinct from those provided by the advertising program itself, that the members receive as a result of other government regulation. Pet. App. 7a-8a.

II. There is an additional reason, independent of the Court's decision in *Wileman Brothers*, to sustain the generic advertising program for mushrooms. The First Amendment does not constrain the government's ability to engage in speech of its own, whether the speech is funded from general tax revenues or from targeted exactions on those who benefit most from the speech. The Mushroom Council's promotional activities, carried out pursuant to the Mushroom Act and the Mushroom Order, are properly viewed as government speech. Under the standard articulated by the Court in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995), the Mushroom Council is part of the government for First Amendment purposes. The Mushroom Council was established by Congress and the Secretary under a special law, it is designed to serve objectives of the government, and its members are appointed (and may be removed) by the Secretary of Agriculture. Moreover, the Mushroom Act and the Mushroom Order not only specify the sorts of speech in which the Mushroom Council may (and may not) engage, but also require that all plans, projects, and budgets of the Mushroom Council receive the advance approval of the Secretary. Accordingly, because the Mushroom Council, as part of the government, is simply engaging in expression of its own about mushrooms, the First Amendment is not implicated here, under the principle that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions

binding on protesting parties" and, in so doing, may engage in "speech and other expression to advocate and defend its own policies." *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1354 (2000).

ARGUMENT

I. THE GENERIC ADVERTISING PROGRAM FOR MUSHROOMS DOES NOT VIOLATE THE FIRST AMENDMENT UNDER THIS COURT'S DECISION IN *WILEMAN BROTHERS*

A. For Each Of The Three Reasons Identified By The Court In *Wileman Brothers*, The Generic Advertising Program Here Is Unlike Laws That Have Been Held To Abridge The Freedom Of Speech

1. In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), 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 (AMAA), 7 U.S.C. 601 *et seq.* Those generic advertising programs, like the generic advertising program for fresh 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's analysis in *Wileman Brothers* turned on three vital distinctions between generic advertising programs for commercial products and laws that have been found to abridge the freedom of speech protected by the First Amendment: *first*, generic advertising

programs "impose no restraint on the freedom of any producer to communicate any message to any audience"; *second*, generic advertising programs "do not compel any person to engage in any actual or symbolic speech"; and, *third*, generic advertising programs "do not compel the producers to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470; see also *id.* at 470-472. "Indeed," the Court continued, "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." *Id.* at 470. 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. *Ibid.*[8]

The Court, in elaborating upon that holding, rejected the contention that the generic advertising programs involved the sort of compelled funding of expressive and associational activity that was held to implicate the First Amendment in cases such as *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). *Wileman Bros.*, 521 U.S. at 472-473. The Court explained that

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[8] The Court noted, in particular, that its "compelled speech" case law was "clearly inapplicable." *Wileman Bros.*, 521 U.S. at 470. The Court explained that the use of assessments to pay for advertising "does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message." *Id.* at 470-471 (internal citations and quotation marks omitted).

"*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities," but instead "merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Id.* at 471 (quoting *Abood*, 431 U.S. at 235). The Court added that an individual may be required to contribute even to such activities—although they may be to some extent ideological—provided that the activities are "germane" to a sufficiently important legislative purpose justifying the compelled association. *Id.* at 472-473 (discussing *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and *Keller* v. *State Bar*, 496 U.S. 1 (1990)).

The Court concluded that the generic advertising programs in *Wileman Brothers* "clearly satisfied" the standard articulated in *Abood* and its progeny on two counts: "(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." *Wileman Bros.*, 521 U.S. at 473.[9] Indeed,

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[9] The Court thus recognized that the compelled funding of expressive activities does not violate the First Amendment so long as at least one of the quoted requirements is satisfied—*i.e.*, that the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose (or, as here and in *Wileman Brothers*, both). That conclusion is reinforced by the Court's use of the phrase "in any event," which is ordinarily used to introduce an independently sufficient ground of decision. Cf. *Flamer* v. *Delaware*, 68 F.3d 736, 757 (3d Cir. 1995) (en banc) ("[A]s the Supreme Court's use of the phrase 'in any event' [in *Victor* v. *Nebraska*, 511 U.S. 1, 20 (1994)] suggests, we do not interpret the Court's opinion

the Court recognized that compelled contributions to generic advertising programs for agricultural commodities are "even less likely to pose a First Amendment burden" than the compelled contributions for collective bargaining activities in *Lehnert* and *Abood*, because "a union agency-shop agreement * * * arguably always poses some burden on First Amendment rights," whereas collective marketing programs for commercial products "do not, as a general matter, impinge on speech or association rights." *Id.* at 473-474 n.16.

2. 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 mushroom 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.

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to mean that this alternative definition was essential to its holding."), cert. denied, 516 U.S. 1088 (1996). Justice Souter, in his dissenting opinion in *Wileman Brothers*, understood the Court's opinion as stating alternative bases on which a generic advertising program funded by assessments on members of the industry could satisfy the First Amendment. See 521 U.S. at 483 n.3 (Souter, J., dissenting) (describing the Court's opinion as holding "that a compelled subsidy of speech does not implicate the First Amendment if the speech either is germane to an otherwise permissible regulatory scheme or is nonideological, so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy").

Instead, the Mushroom Act and the Mushroom Order merely require respondent and other producers to share in the costs of commercial messages, without any political or ideological content, that are germane to the statutory purposes of "strengthen[ing] the mushroom industry's position in the marketplace," "maintain[ing] and expand[ing] existing markets and uses for mushrooms," and "develop[ing] new markets and uses for mushrooms." 7 U.S.C. 6101(b). The Act explicitly "prohibit[s]" the use of producers' and importers' assessments "in any manner for the purpose of influencing legislation or government action or policy." 7 U.S.C. 6104(h).[10] The Act also explicitly confines the use of those assessments to the "payment of the expenses in implementing and administering this chapter," 7 U.S.C. 6104(g)(3)—expenses relating to developing and carrying out programs of "mushroom promotion, research, consumer information, and industry information," which must be proposed by the Mushroom Council and approved by the Secretary before they are put into effect, 7 U.S.C. 6104(c)(4). See also 7 C.F.R. 1209.40 (describing the "programs, plans, and projects" that may be conducted under the Mushroom Act and the Mushroom Order).

Thus, the generic advertising program for mushrooms, like those for California tree fruits in *Wileman*

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[10] The Mushroom Act excepts from that prohibition the use of funds received by the Mushroom Council for the development and recommendation to the Secretary of amendments to the Mushroom Order and for submission to the Secretary of recommended voluntary grade and quality standards for mushrooms. 7 U.S.C. 6104(h); see also 7 U.S.C. 6104(c)(5) (providing that the Mushroom Order may authorize the Mushroom Council to develop such standards). We have been informed by the Department of Agriculture that no voluntary grade or quality standards have been developed to date.

Brothers, is "a species of economic regulation that should enjoy the same strong presumption of validity that [the Court] accord[s] to other policy judgments made by Congress." 521 U.S. at 477. The Court has recognized that such programs serve a "legitimate" governmental purpose—that is, "stimulat[ing] consumer demand for an agricultural product." *Id.* at 476.[11] Congress, the Secretary, and the industry itself have all determined that the program established under the Mushroom Act and the Mushroom Order is "effective," *ibid.*, to serve that purpose. In such circumstances, as in *Wileman Brothers*, "[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 477.

There is, if anything, even more reason here than in *Wileman Brothers* for the Court to "assume," without any need to engage in further inquiry, that the generic advertising program "accomplish[es] [its] goals" and "therefore further[s] the interests of those who pay for [it]." *Wileman Bros.*, 521 U.S. at 462-463 n.3. In contrast to the generic advertising programs for California tree fruits, which were adopted by the Secretary under

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[11] In *Wileman Brothers*, the Court identified the government's interest as stimulating demand for agricultural products "in a regulated market." 521 U.S. at 476. As we explain below (at 24-26), regardless of the extent to which the market for a commodity is regulated, the government's interest in maintaining and expanding that market is equally legitimate. Moreover, the Court recognized that a generic advertising program funded with mandatory contributions from members of the industry is itself "regulatory." See *id.* at 476 (referring to "promotional advertising" and "other regulatory programs").

the general authority of the AMAA, the generic advertising program for mushrooms was specifically authorized by Congress in 1990. At that time, Congress expressly found the mushroom program to be "in the public interest," 7 U.S.C. 6101(b), as "necessary to maintain and expand existing markets for mushrooms," 7 U.S.C. 6101(a)(6).[12] In 1996, Congress reaffirmed in the FAIR Act that the generic advertising program for mushrooms, along with a number of other specifically identified programs, "is in the national public interest and vital to the welfare of the agricultural economy of the United States." 7 U.S.C. 7401(b)(1); see 7 U.S.C. 7401(a)(10) (identifying the mushroom program as one of the programs addressed by the FAIR Act). And, as recently as 1998, in a statutorily required referendum of producers and importers subject to assessments under the Mushroom Act, 80% of those voting agreed that the generic advertising program should be continued. See note 6, *supra*; cf. *Wileman Bros.*, 521 U.S. at 463 (noting that marketing order amendments providing for generic advertising programs were adopted between 1966 and 1976). There is no warrant under *Wileman Brothers* for courts to revisit such recent, specific, and decisive "policy judgments" by Congress, the Secretary, and the affected industry. 521 U.S. at 476.

[12] The legislative record reflects that Members of Congress were aware both of the widespread support within the mushroom industry for a generic advertising program and of respondent's opposition to such a program. See note 5, *supra*.

B. The Court Of Appeals Erred In Distinguishing This Case From *Wileman Brothers* On The Ground That Mushrooms Are Not As Extensively Regulated As California Tree Fruits

The court of appeals departed from the holding in *Wileman Brothers* on the ground that, in its view, the mushroom industry is "unregulated," whereas the California peach, plum, and nectarine industries are "fully collectivized" and "no longer a part of a free market." Pet. App. 7a-8a. The court of appeals' analysis is not supported by *Wileman Brothers*, by this Court's other decisions involving compelled funding of expression, or otherwise by fact, law, or logic. And it is premised on a misunderstanding of the scope of the marketing orders in *Wileman Brothers*, which did not, as the court below supposed (*id.* at 7a-8a), extend to "price" and "supply" regulations that conferred the benefits of "monopoly power" on the California tree fruit industries.

1. The court of appeals distinguished the generic advertising program for mushrooms from the generic advertising programs for California tree fruits on the basis of language that was not a part of this Court's First Amendment analysis in Part IV of the *Wileman Brothers* opinion. Instead, the discussion of industry regulation relied upon by the court of appeals was set forth in Part III of the *Wileman Brothers* opinion, the section in which the Court sought to define the scope of the controversy before it. There, the Court explained that, in answering the question "whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy," "we stress the importance

of the statutory context in which it arises." *Wileman Bros.*, 521 U.S. at 468-469. The Court went on to state:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469.

That discussion is not repeated, referenced, or relied upon in Part IV of the *Wileman Brothers* opinion, the section that contains the Court's core First Amendment analysis. Compare 521 U.S. at 467-469 (Pt. III) with *id.* at 469-474 (Pt. IV). And significantly, none of the three grounds on which the Court distinguished the laws in *Wileman Brothers* from laws held to violate the First Amendment has anything to do with the extent to which the industry subject to the law is otherwise regulated. See *id.* at 469-470; see pp. 14-15, *supra*. 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 peach, plum, and nectarine industries were regulated in other respects, but would also have explained the significance of that fact to its First Amendment holding.

As one court has suggested, "the point" of the Court's discussion of the regulatory context in *Wileman Brothers* appears to be that "the advertising tool

merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions," which indisputably are entitled to a strong presumption of validity. *Gerawan Farming, Inc.* v. *Veneman*, 85 Cal. Rptr. 2d 598, 605 (Ct. App. 1999), aff'd in part and vacated in part *sub nom. Gerawan Farming, Inc.* v. *Lyons*, 12 P.3d 720 (Cal. 2000) (remanding for consideration of objecting growers' challenge under free speech provision of California Constitution). It thus seems particularly appropriate to accord the same degree of judicial scrutiny to all of the regulatory tools that are directed at those goals, notwithstanding that "the advertising tool involves an activity that, in other contexts, is 'commercial speech' protected by the First Amendment." 85 Cal. Rptr. at 605. That analysis is consistent with the Court's observation in *Wileman Brothers* that "decisions that are made by the majority, if acceptable for other regulatory programs, should be equally so for promotional advertising." 521 U.S. at 476.

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 decision 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 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 and importers. 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.'"). The Court was made aware of the differences in regulatory scope between the orders in *Wileman Brothers* and *Frame*. See Oral Argument Tr. at 26, *Wileman Bros.* (No. 95-1184) (government counsel explains that "[t]he beef program focuses almost exclusively on promotional programs and advertising"); *Frame*, 885 F.2d at 1122-1124; see also *Wileman Bros.*, 521 U.S. at 466-467 (discussing *Frame*). The Court did not suggest that a distinction of constitutional significance should be drawn between the advertising program in *Frame* and the advertising programs in *Wileman Brothers*. If the Court's decision in *Wileman Brothers* were limited to generic advertising programs imposed under marketing orders comprehensively regulating a commodity, then the Court's decision would not support the decision in *Frame*, and the Court presumably would have said so, having granted certiorari to resolve the conflict between *Wileman Brothers* and *Frame*.

2. In any event, whether or not *Wileman Brothers* squarely controls a case involving "stand alone" generic advertising programs such as the ones here and in *Frame*, the Court's First Amendment rationale in *Wileman Brothers* plainly does apply, as we have explained above. Accordingly, the Court now should hold that such programs are consistent with the First Amendment. There is no reason to evaluate generic advertising programs differently under the First Amendment depending upon whether, or to what extent, the pro-

gram involves a commodity that is subject to other sorts of government regulation in addition to assessments for generic advertising.

The *purpose* of a generic advertising program is the same, whether the program stands alone (as here) or is part of a more comprehensive regulatory scheme (as in *Wileman Brothers*). In either case, the purpose is to maintain and expand the market for an agricultural commodity, to the benefit of the producers and processors of the commodity and, ultimately, of the Nation's agricultural economy as a whole. See *Wileman Bros.*, 521 U.S. at 476 (noting that the government's purpose of "stimulat[ing] consumer demand for an agricultural product in a regulated market" is a "legitimate" one); 7 U.S.C. 7401(a), (b)(1) and (2) (congressional findings in the FAIR Act with respect to generic advertising programs).[13] That purpose is equally legitimate whether the government has sought to achieve it through a generic advertising program alone or, alternatively, though a generic advertising program coupled with regulations of, for example, quality, quantity, or price. It would make little sense to require Congress, in order to assure the constitutionality of a generic advertising program designed to stimulate the market for a given commodity, to tack on

[13] Congress made that point clearly in the FAIR Act, which articulated the same "national public interest" served by all extant generic advertising programs for agricultural commodities, including programs authorized under the AMAA (like those in *Wileman Brothers*) as well as programs authorized under specific statutes such as the Mushroom Act. 7 U.S.C. 7401(b)(1); see 7 U.S.C. 7401(a)(1)(referring generally to AMAA programs) and (10) (referring specifically to Mushroom Act).

other regulations that Congress did not consider necessary to achieve that purpose.[14]

So, too, the *effect* of the generic advertising program is the same, whether the program stands alone or is part of a more comprehensive regulatory scheme. In either case, the program is financed by assessments on all producers or handlers of the commodity, so as to avoid the problem of "free riders" who could obtain the benefits of the program without sharing the costs. Those means are equally legitimate whether the assessments are used only to fund a generic advertising program or also to fund other regulatory efforts, such as an inspection program. Cf. *Abood*, 431 U.S. at 224 (declining to apply a more rigorous First Amendment analysis when an agency-shop requirement is imposed on government employees as opposed to private sector employees, because "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller").[15]

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[14] In some settings, Congress might find such additional regulation not only unnecessary, but also unwise. For example, as noted by congressional supporters of the generic advertising programs enacted in 1990 for mushrooms and other agricultural commodities, some regulatory measures designed to strengthen the position of domestic producers and processors of a commodity could antagonize our foreign trading partners. See 136 Cong. Rec. at 19,614 (statement of Sen. Heinz). And regulations that operate directly to restrict the supply or maintain the price of a commodity may antagonize consumers.

[15] This Court's decisions involving compelled funding of expressive or associational activities (*e.g.*, *Abood*, *Lehnert*, and *Keller*) do not suggest a First Amendment distinction based on whether, or to what extent, the government otherwise regulates the party on whom the funding obligation is imposed. To the contrary, the Court has applied the same standard to public employees, whose workplaces perforce are comprehensively regulated by the govern-

3. The court of appeals, in seeking to distinguish this case from *Wileman Brothers*, assumed that members of "fully collectivized" industries—a category in which the court included the California peach, plum, and nectarine industries—enjoy the benefits of "the monopoly powers inherent in government control of price and supply." Pet. App. 7a-8a. The court reasoned that only "[i]n exchange for" such benefits may industry members be required to contribute to a generic advertising program. *Id.* at 8a. The court held that such contributions may not be exacted, however, in industries without such extensive regulation. *Ibid.* The court of appeals erred in several basic respects.

As an initial matter, the court of appeals' analysis rests on two erroneous factual premises. The California tree fruit handlers in *Wileman Brothers* did not operate under a regulatory regime whereby, as the court of appeals assumed (Pet. App. 7a), they possessed "monopoly power resulting from regulation of price and supply." Instead, the marketing orders in that case authorized collective advertising and "govern[ed] marketing matters such as fruit size and maturity levels." *Wileman Bros.*, 521 U.S. at 462; see also *Gerawan Farming*, 12 P.3d at 746 (noting that the marketing orders in *Wileman Brothers* "provided for the undertaking * * * of research and development projects, including advertising, and set out specific regulations regarding both fruit containers and packs and also fruit grades and sizes"). Those marketing orders did not

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ment, and to private sector employees, whose workplaces ordinarily are less extensively regulated. See *Abood*, 431 U.S. at 229-230 (rejecting argument that more rigorous First Amendment standard should apply to public employees); see also *Keller*, 496 U.S. at 10 (observing that *Abood* principles apply "equally to employees in the private sector").

impose limits on the supply or price of the covered commodities. See 7 C.F.R. Pts. 916, 917 (1997).[16] The additional regulations that the marketing orders *did* impose, such as fruit size and maturity standards, were doubtless perceived as beneficial by the affected industries. (For example, if California peaches are marketed at their optimal size and ripeness, consumers might be expected to buy more of them.) But those sorts of regulations ordinarily would not, standing alone, enable an industry to enjoy the benefits associated with "monopoly power." Nor did the court of appeals in this case, which mistakenly perceived the marketing orders in *Wileman Brothers* as regulating much more extensively, suggest that mere size, maturity, or packaging regulations would have that effect.

Also contrary to the court of appeals' premise (Pet. App. 8a), the mushroom industry is not wholly "unregulated." As the Court indicated in *Wileman Brothers*, a generic advertising program funded with mandatory contributions from members of the industry is itself "regulatory." See 521 U.S. at 476 (referring to "promotional advertising" and "other regulatory programs"). Moreover, as with respect to the California tree fruit

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[16] This Court appears to have recognized as much. See *Wileman Bros.*, 521 U.S. at 461-462 (distinguishing the regulations actually imposed by the marketing orders at issue from the broader set of "collective activities that Congress authorized" in the AMAA); *id.* at 461 (noting that marketing orders under the AMAA "*may* include mechanisms that provide a uniform price to all producers") (emphasis added). The mere fact that price or supply regulations *could* have been imposed on the California tree fruit industries in *Wileman Brothers* provides no basis to distinguish that case from this one, because such regulations could also be adopted for the mushroom industry under the AMAA. See pp. 28-29, *infra*.

industries in *Wileman Brothers*, the statutory framework exists under the AMAA, as well as under the Mushroom Act, for additional regulation of the mushroom industry. The AMAA authorizes the same degree of regulation by industry consensus in the mushroom industry as in the California tree fruit industries. See 7 U.S.C. 608c(2) (with exceptions not relevant here, "any agricultural commodity" may be covered by an "[o]rder[] issued pursuant to" the AMAA). And the Mushroom Act authorizes the Mushroom Council to develop voluntary grade and quality standards, which would serve essentially the same purposes as the binding fruit size and maturity standards under the marketing orders in *Wileman Brothers*. See 7 U.S.C. 6104(c)(5).

In any event, this Court's compelled funding cases, including *Wileman Brothers*, offer no support for the so-called "reciprocity principle" announced by the court of appeals—*i.e.*, that a person may be compelled to fund expressive activity only "[i]n exchange for" some benefit (*e.g.*, "monopoly power") that is distinct from, and in addition to, the benefit that the person receives from the expressive activity itself (*e.g.*, increased consumer awareness of mushrooms). Pet. App. 8a. This Court has not suggested that, as the court of appeals held (*id.* at 7a-8a), assessments to fund "nonideological * * * commercial speech" are justified only "in the context of the extensive regulation of an industry but not otherwise," on the premise that only in the former context will such assessments serve "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."[17]

Rather, this Court's cases proceed on the understanding that, when the legislature determines that a sufficiently important public purpose will be served by collective speech or association among members of a group (*e.g.*, fruit growers, public school teachers, lawyers), the legislature may require all members of the group to share the costs of that collective speech or association so as to avoid "free rider" problems. See, *e.g.*, *Keller*, 496 U.S. at 12; *Abood*, 431 U.S. at 221-222. In considering whether the assessments imposed on objecting members of the group comport with the First Amendment, the Court has looked to whether the assessments are used to fund activities that are either non-ideological or germane to the public purpose that justified the collective speech or association. See, *e.g.*, *Keller*, 496 U.S. at 13-14; *Abood*, 431 U.S. at 222-223, 236. But the Court has not also looked to whether the members obtain some additional economic (or other) benefit, under regulatory provisions separate from

[17] Indeed, this Court has recognized that businesses with "monopoly power" enjoy First Amendment protection, just as do businesses without such power. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 568 (1980) (concluding that a utility's "monopoly position does not alter the First Amendment's protection for its commercial speech"); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980) ("We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection."). Although those cases arose in the context of government regulations that (unlike those here and in *Wileman Brothers*) suppressed the companies' own speech, they reinforce the conclusion that the distinction drawn by the court of appeals is also without constitutional significance with respect to mandatory assessments to fund generic advertising programs.

those establishing a program of collective speech or association, "in exchange for" which the members may be required to contribute to that program.

Finally, the court of appeals' approach, if allowed to stand, would produce difficulties in application and anomalies in result. It would require a court to engage in an intricate analysis of all of the regulatory provisions applicable to a given commodity, so as to ascertain whether those provisions confer some other commercial benefit on producers of the commodity, in return for which they may be required to participate in a generic advertising program. Presumably, a court could not look solely at the statute or marketing order establishing the generic advertising program, because a commodity may be regulated (or subject to regulation) in other respects under other statutes or marketing orders. For example, the generic advertising programs for milk, dairy products, and beef are each established pursuant to statutes that, like the Mushroom Act, do not otherwise regulate the commodity at issue. See 7 U.S.C. 2901 *et seq.* (beef); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 6401 *et seq.* (fluid milk). But those commodities are regulated extensively (in some respects more extensively than the California tree fruits in *Wileman Brothers*) under other federal and state statues.[18] Thus, of two generic advertising programs authorized by Congress and established by the Secretary pursuant to statutes virtually identical to the

[18] The Sixth Circuit, in an unpublished opinion that was issued shortly before its decision in this case, sustained the generic advertising program for dairy products against a First Amendment challenge. *Nature's Dairy* v. *Glickman*, No. 98-1073, 1999 WL 137631 (Mar. 2, 1999) (173 F.3d 429 (Table)), cert. denied, 528 U.S. 1074 (2000).

Mushroom Act, one program might be constitutional and the other unconstitutional under the court of appeals' approach, depending on whether another Congress, another Secretary, or another federal or state authority had imposed additional regulations on the commodity to be advertised.

II. THE GENERIC ADVERTISING PROGRAM FOR MUSHROOMS DOES NOT VIOLATE THE FIRST AMENDMENT FOR THE INDEPENDENT REASON THAT IT INVOLVES ONLY GOVERNMENT SPEECH

There is a second reason, independent of this Court's decision in *Wileman Brothers*, why the generic advertising program for mushrooms is consistent with the First Amendment. The First Amendment does not constrain the government's ability to engage in speech of its own, whether funded by general tax revenues or by "user fees" imposed on those who benefit most from the speech. The Mushroom Act and the Mushroom Order may appropriately be viewed as establishing a program of government speech.[19]

1. This Court has recognized that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on

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[19] The argument that the generic advertising program for mushrooms is permissible government speech, although not raised or addressed below, "is fairly embraced within the question set forth in the petition for certiorari," *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995), which asks whether the generic advertising program for mushrooms violates the First Amendment. See Pet. I. The government did not rely upon an argument based on the "government speech" doctrine in *Wileman Brothers*. See 521 U.S. at 482 n.2 (Souter, J., dissenting); U.S. Br. at 25 n.16, *Wileman Bros.*, No. 95-1184.

protesting parties." *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1354 (2000). It follows from that "broader principle" that the government may spend the funds that it raises to engage in "speech and other expression to advocate and defend its own policies." *Ibid.*; see also, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

The government's speech necessarily is paid for by citizens, some of whom (although, presumably, a minority) may disagree with its message. But such disagreement provides no basis under the First Amendment to silence the government or to excuse objecting citizens from having to share the costs of its speech. The First Amendment limits government interference with private speech; it does not limit the government's own speech. See *Keller*, 496 U.S. at 12-13 ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."); *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring) ("A federal taxpayer obtains no refund if he is offended by what is put out by the United States Information Agency."). As Justice Scalia has put it:

> It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects * * *. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their (and, in a democracy, our)

> favored point of view by achieving it directly * * *; or by advocating it officially * * *; or by giving money to others who achieve or advocate it * * *. None of this has anything to do with abridging anyone's speech.

National Endowment for the Arts v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring); see also *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) (Scalia, J.) (rejecting the view that the marketplace of ideas is "one in which the government's wares cannot be advertised"), cert. denied, 478 U.S. 1021 (1986).[20]

2. The speech engaged in by the Mushroom Council, subject to the continuing oversight of the Secretary of Agriculture, is government speech for purposes of the First Amendment.

In *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1985), the Court held that Amtrak is an arm of the government, such that Amtrak is subject to the constraints of the First Amendment when it restricts private speech. The Court ruled that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400.

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[20] Similarly, Justice Powell, in his concurring opinion in *Abood*, recognized that "[c]ompelled support of a private association is fundamentally different from compelled support of government." 431 U.S. at 259 n.13 (Powell, J., concurring). As Justice Powell explained, "the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." *Ibid.*

Under that standard, the Mushroom Council, even more clearly than Amtrak, is part of the government for First Amendment purposes. First, the Mushroom Council, like Amtrak, was "create[d] * * * by special law." *Lebron*, 513 U.S. at 400. As explained above (at 3 & note 1), the Mushroom Act specifically provides for the establishment of the Mushroom Council, by an order issued by the Secretary of Agriculture, subject to approval of that order by a majority of mushroom producers and importers. 7 U.S.C. 6103, 6104(b), 6105(a); see *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 577-578 (1939); *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939).

Second, the Mushroom Council, like Amtrak, was established "for the furtherance of governmental objectives." *Lebron*, 513 U.S. at 400. As explained above (at 3-4), the Mushroom Council was designed to propose to the Secretary and to implement programs of "mushroom promotion, research, consumer information, and industry information." 7 U.S.C. 6104(c)(4). The Mushroom Act declares it to be the "policy of Congress" that it is in "the public interest" to authorize a mechanism for developing, financing (through assessments), and carrying out an effective program of promotion, research, and consumer and industry information designed to "strengthen the mushroom industry's position in the marketplace," "maintain and expand existing markets and uses for mushrooms," and "develop new markets and uses for mushrooms." 7 U.S.C. 6101(b); see also 7 U.S.C. 7401(b)(1) (discussing the "national public interest" served by generic advertising pro-

grams, including the mushroom program, see 7 U.S.C. 7401(a)(10)).[21]

Third, the Secretary appoints not merely "a majority," *Lebron*, 513 U.S. at 400, of the members of the Mushroom Council, but *all* of its members. 7 U.S.C. 6104(b)(1)(B) ("the members of the Council shall be mushroom producers and importers *appointed by the Secretary* from nominations submitted by producers and importers in the manner authorized by the Secretary") (emphasis added); see also 7 U.S.C. 6104(b)(2)(G) (Secretary may appoint members of the Council in the absence of nominations from producers and importers). The Mushroom Act establishes three-year terms of appointment, 7 U.S.C. 6104(b)(3)(A), thereby assuring the Secretary's continuing role in the composition of the

[21] In the FAIR Act, Congress referred to generic promotional programs as "'self-help' mechanisms." 7 U.S.C. 7401(b)(8). As the rest of that provision of the FAIR Act makes clear, the reference to such programs as "'self-help' mechanisms" simply reflects the fact that such programs provide "for producers and processors to fund generic promotions for covered commodities," *ibid.*—and, presumably, that members of the industry involved typically participate in a referendum before the order establishing a promotional program becomes effective and nominate persons for the Secretary to appoint to a council or board established by the order. That description does not detract from the status of the advertising generated by such programs as government speech for First Amendment purposes. To the contrary, 7 U.S.C. 7401(b)(8) goes on to state that the generic promotion programs are conducted "under the required supervision and oversight of the Secretary of Agriculture," "further specific national governmental goals, as established by Congress," and "produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities."

Council.[22] The Secretary also has authority to remove members of the Council for "adequate cause." 7 C.F.R. 1209.35(c).

The statutory and regulatory scheme governing the Mushroom Council, in addition to satisfying the three factors articulated in *Lebron*, provides further reason to conclude the Council's speech may properly be viewed as government speech. Most significantly, of course, the central thrust of the expression to be undertaken by the Council—the promotion of mushrooms—is prescribed by the Mushroom Act, see 7 U.S.C. 6101(a)(5) and (b); 7 U.S.C. 6104(c)(4), and the Mushroom Order, see 7 C.F.R. 1209.40(a)(1). Cf. *Wileman Bros.*, 521 U.S. at 470 (referring to the "central message" of the speech generated by the generic advertising program). The Act and the Order also carefully delineate in other respects the activities, including the expressive activities, in which the Council may, and may not, engage. See 7 U.S.C. 6104(c) (defining the "powers and duties" of the Council); 7 C.F.R. 1209.38-1209.39 (same); see also 7 U.S.C. 6104(h) (prohibiting the Council from using its funds "in any manner for the purpose of influencing legislation or governmental action or policy"); 7 C.F.R. 1209.40(d) (prohibiting the Council from, *inter alia*, making any reference in its programs "to a brand name, trade name, or State or regional identification of any mushrooms or mushroom product"). The Act and the Order also provide for the Secretary's continuing oversight of the Council's activities. For example, the Act directs that "[n]o plan or project of promotion, research, consumer information, or industry information, or budget, shall be implemented prior to its

[22] A member is limited to serving two three-year terms. 7 C.F.R. 1209.34(e)(1).

approval by the Secretary." 7 U.S.C. 6104(d)(3); see also 7 C.F.R. 1209.70 ("All fiscal matters, programs, plans, or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Council shall be submitted to the Secretary for approval.").[23] The Secretary also has the authority to suspend or terminate the mushroom program at any time upon determining that the program "obstructs or does not tend to effectuate the declared policy of this chapter." 7 U.S.C. 6110.[24]

In addition, any legal proceedings concerning the enforcement or validity of any order issued under the Mushroom Act are brought by or against the United States. Thus, the Mushroom Act provides that any

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[23] The Secretary's currently applicable Guidelines for the oversight of generic advertising programs, such as the mushroom program, provide for review, *inter alia*, of "all commodity promotional campaigns—advertising, consumer education programs, and other promotional materials" as well as "the advertisements or printed materials generated in the campaign." Agricultural Mktg. Serv., United States Dep't of Agric., *Guidelines for AMS Oversight of Commodity Research and Promotion Programs* 7 (1994). The Guidelines explicitly require the disapproval of advertising that the Agricultural Marketing Service considers to be "false and misleading" or "disparaging to another commodity." *Id.* at 8; see also Agricultural Mktg. Serv., United States Dep't of Agric., *Guidelines for AMS Oversight of Commodity Research and Promotion Programs*, 64 Fed. Reg. 70,682 (1999) (proposing revised Guidelines).

[24] The status of the Mushroom Council as a government entity is further demonstrated by the provision of the Mushroom Order governing the ownership of property created through projects administered by the Council: "Any patents, copyrights, inventions, publications, or product formulations developed through the use of funds received by the Council under this subpart shall be the property of *the United States Government as represented by the Council*." 7 C.F.R. 1209.75 (emphasis added).

person who is subject to an order issued under the Act may file a petition with the Secretary, contending that the order, a provision of the order, or any obligation imposed in connection with the order is contrary to law, or requesting a modification of or exemption from the order. See 7 U.S.C. 6106(a). The Secretary's final decision on the petition, after a hearing, is subject to judicial review in district court. See 7 U.S.C. 6106(a)(2) and (b). Respondent invoked that procedure in this case. See Pet. App. 11a. Similarly, an enforcement action may be brought against any person who violates any order or regulation issued by the Secretary under the Mushroom Act, either in a civil action brought in district court by the Attorney General on behalf of the United States (see 7 U.S.C. 6107(a) and (b)), as in this case (see Pet. App. 10a-11a), or in administrative proceedings instituted by the Secretary to assess a civil penalty or to issue a cease-and-desist order (see 7 U.S.C. 6107(c)), subject to judicial review and enforcement in district court (see 7 U.S.C. 6107(d)-(f)).

Finally, the FAIR Act, enacted six years after the Mushroom Act, confirms that various generic advertising programs for agricultural commodities, specifically including the mushroom program, see 7 U.S.C. 7401(a)(10), are conducted "under the required supervision and oversight of the Secretary of Agriculture." 7 U.S.C. 7401(b)(8); see also 7 U.S.C. 7401(b)(1) (describing such programs as "Government-supervised"); 7 U.S.C. 7401(b)(2) (describing such programs as "supervised by the Secretary of Agriculture"). The FAIR Act also recognizes the ongoing role of both the Secretary and Congress in assessing whether "the objectives of the programs are being met." 7 U.S.C. 7401(b)(11).

Thus, given that Congress created the Mushroom Council "by special law, for the furtherance of governmental objectives," *Lebron*, 513 U.S. at 400, that the Secretary appoints (and may remove) all members of the Council, that the Mushroom Act and the Mushroom Order specify the central message of any generic advertising and provide substantial direction for the activities of the Council, that the Secretary retains supervisory authority over the Council, and that the authority to enforce the Order is vested in the government, the Council is part of the government, and its speech is government speech, for purposes of the First Amendment.[25] As such, the Council may engage in speech promoting mushrooms, using funds exacted from members of the public, without implicating the First Amendment. Cf. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ("Compelled support of a private association is fundamentally different from compelled support of government.").

3. In *Southworth*, the Court suggested that, in cases where the speech at issue is the government's own, the only question that may remain is "whether traditional political controls [exist] to ensure responsible government action." *Southworth*, 120 S. Ct. at 1354. Such "traditional political controls" clearly exist with respect

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[25] By contrast, in *Keller*, in which the Court held that ideological speech by the California State Bar was not government speech, the State Bar had an existence and functions that were in many ways independent of the State; a majority of its Board of Governors was selected by the membership, not appointed by the State; and the central message of the challenged speech was not prescribed by the government. See 496 U.S. at 4-5 & n.2; *Keller* v. *State Bar*, 767 P.2d 1019, 1023-1025 (Cal. 1989), rev'd, 496 U.S. 1 (1990).

to the advertising and other activities conducted under the Mushroom Act.

Congress, in the Mushroom Act, explicitly approved a program of expressive activity to promote mushrooms; at the same time, Congress imposed its own restrictions on that expressive activity (*e.g.*, prohibiting activity "for the purpose of influencing legislation or governmental action or policy," 7 U.S.C. 6104(h)). Congress also made all "plan[s]" and "project[s]" of mushroom "promotion, research, consumer information, or industry information," as well as all budgets for the Mushroom Council, subject to the approval of the Secretary of Agriculture, a Cabinet officer appointed by the President and confirmed by the Senate. 7 U.S.C. 6104(d)(3); see 7 U.S.C. 2202.[26]

Moreover, Congress built additional political controls into the Mushroom Act in order to assure that the mushroom promotion program serves the interests of those who are required to fund it. Congress thus provided that the program would become effective only if approved by a majority vote in a referendum of those producers and importers who are subject to assessments. 7 U.S.C. 6105(a). Congress provided for a

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[26] The legislative record of the Food, Agriculture, Conservation, and Trade Act of 1990, of which the Mushroom Act was a part, reflects that a number of Members of Congress gave voice to the conclusion that generic advertising programs for agricultural commodities are in the public interest. See, *e.g.*, 136 Cong. Rec. at 19,511-19,513 (statements of Sens. Fowler, Graham, DeConcini, McCain, Bond, Cochran, and Specter); *id.* at 19,614 (statements of Sens. Heinz and Thurmond); *id.* at 19,258 (statement of Rep. Panetta). The statements of Senator Specter (*id.* at 19,513) and Senator Heinz (*id.* at 19,614) reflect that the Mushroom Act was enacted only after receiving the views of members of the mushroom industry, including respondent.

second such referendum after the program had been in effect for five years. 7 U.S.C. 6105(b)(1)(A). And the Act authorizes additional referenda if requested by 30% of affected producers and importers. 7 U.S.C. 6105(b)(1)(B).[27] Accordingly, whatever "traditional political controls" may be required "to ensure responsible government action," *Southworth*, 120 S. Ct. at 1354, they are plainly present in the mushroom program.

4. No more rigorous First Amendment scrutiny of government speech is required here simply because Congress chose to fund the generic advertising not from general tax revenues, but from assessments on those whom Congress determined would "most directly reap the benefits of" the advertising. 7 U.S.C. 7401(b)(2) (making findings with respect to generic advertising programs, including the mushroom program, see 7 U.S.C. 7401(a)(10)). The assessments are a species of "user fees," which this Court has viewed as a permissible means of funding many government activities, including activities relating to expression.[28]

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[27] Such provisions provide meaningful relief where (as is not suggested to be the case here) a generic advertising program loses the support of a majority of producers. See, *e.g.*, *Wileman Bros.*, 521 U.S. at 463 n.5 (noting that the plum portion of one of the marketing orders at issue in that case "was terminated in 1991 after a majority of plum producers failed to vote for its continuation"); see also William Claiborne, *Hog Producers Defeat "Pork Checkoff,"* Wash. Post, Jan. 16, 2001, at A2 (noting that the generic advertising program for pork was to be discontinued by the Secretary of Agriculture after a referendum in which a majority of pork producers voted against the program).

[28] See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-62 (1989) (upholding, as a permissible "user fee," a requirement that successful claimants before the Iran-United States Claims Tribunal pay a portion of any award to the U.S. Treasury as "reimbursement to the United States Government for expenses incurred in

The Court has not suggested that the "government speech" doctrine applies only to speech funded with general tax revenues. To the contrary, in *Southworth*, which concerned the constitutionality of a student activity fee that was used in part to fund student organizations engaging in political or ideological speech, the Court noted that, because "[t]he University ha[d] disclaimed that the speech is its own," the case did not present the question whether the challenged program could be sustained "under the principle that the government can speak for itself." 120 S. Ct. at 1354. The Court went on to observe that, "[i]f the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Ibid.* Thus, the Court recognized the potential applicability of the government speech doctrine to speech funded not from general tax revenues, but from "tuition dollars," another species of user fees. See *ibid.* (observing that "[t]he government, as a general rule, may support valid programs and policies by taxes *or other exactions*

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connection" with the Tribunal); *Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 461-462 (1988) (observing that "[i]t is manifestly rational" for a State "to allow local school boards the option of charging patrons a user fee for bus service" rather than funding such service out of general revenues); *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941) (State may require payment of a "reasonable" parade license fee to compensate local government for its administrative and law-enforcement expenses); cf. *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 141 (1981) (White, J., concurring) ("No one questions * * * that the Government, the operator of the [postal] system, may impose a fee on those who would use the system, even though the user fee measurably reduces the ability of various persons or organizations to communicate with others.").

binding on protesting parties") (emphasis added); *Rosenberger*, 515 U.S. at 833 (recognizing that "[w]hen the University determines the content of the education it provides, it is the University speaking," without suggesting that the particular source of the University's funds is of any consequence).[29]

The Court need not decide in this case whether the government speech doctrine should ever apply differently depending on whether the speech is funded from user fees or general tax revenues. At a minimum, where a user fee is reasonably commensurate to the benefit received (as established here by the overwhelming support for the mushroom program in referenda of those subject to the assessments), government speech funded by the user fee should be viewed no differently from government speech funded by general tax revenues.

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[29] Cf. Laurence H. Tribe, *American Constitutional Law* § 12-4, at 807 n.14 (2d ed. 1988) (observing that, although a taxpayer might have standing to challenge "an earmarked tax" to fund government speech on a political or ideological issue, "it has been assumed that the taxpayer would lose any such challenge on the merits").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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