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.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENT

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RULE 29.6 STATEMENT

Pictsweet, L.L.C. is the parent corporation of respondent United Foods, Inc. No other company owns 10% or more of respondent's stock.

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RELEVANT STATUTORY AND REGULATORY PROVISIONS

The appendix reproduces the relevant provisions of the Mushroom Promotion, Research, and Consumer Information Act, as well as the relevant provisions of the regulations promulgated pursuant to the Act.

STATEMENT OF THE CASE

In *Glickman* v. *Wileman Brothers & Elliott, Inc.* – which sustained the generic advertising component of comprehensive "marketing orders" for California tree fruit – the Solicitor General pointedly acknowledged that "the Government would lose in this case" but for the fact that the orders furthered an important interest in "regulating these commodities and establishing orderly marketing conditions." Oral Arg. Trans., No. 95-1184, at 13. The Court's subsequent opinion turned on precisely that point, holding that the advertising assessments presented no issue under the First Amendment but rather were integral to the orders' scheme of market regulation and therefore were properly scrutinized and sustained as "economic regulations." The Court took care to "*stress* the importance of the statutory context" in which the collective, generic advertising was funded: "detailed marketing orders that have displaced many aspects of independent business activity" establish "a broader collective enterprise in which [the tree fruit producers'] freedom to act independently is already constrained by the regulatory scheme." 521 U.S. 457, 469 (1997) (emphasis added).

In this case, the Sixth Circuit invalidated a very different assessment scheme that funds generic advertising of mushrooms. As the court of appeals explained, the mushroom market "is entirely different from the collectivized California tree fruit business" because it "has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or

otherwise subsidized through price supports or restrictions on supply." Pet. App. 5a, 8a. Indeed, the statute and order at issue in this case *forbid* the collective measures that were the key to *Wileman*'s holding. Both industry proponents and their congressional supporters furthermore took pains to explain that the compelled advertising program would not include the supply controls contained in marketing orders.

The Sixth Circuit's judgment invalidating the mushroom assessment should be affirmed. This case is properly distinguished from *Wileman*. Nor is the assessment properly sustained on the "government speech" theory raised for the first time in this entire case in the government's brief on the merits in this Court. Therefore, the assessment for mushroom advertising can be sustained only if it is, at the least, "germane" to a broader federal regulatory program. But no such program even exists. Nor does the government argue that the advertising scheme can be sustained under the scrutiny applicable to regulations of commercial speech. The First Amendment accordingly precludes the government from compelling respondent to fund this advertising program.

1. United Foods' Operations. Respondent United Foods produces a number of agricultural commodities, including mushrooms, which it sells in three regional markets.

a. United Foods operates mushroom farms in Ventura, California (serving Southern California and Arizona); Salem, Oregon (serving the Pacific Northwest); and Fillmore, Utah (serving the Central Rocky Mountain States). J.A. 141. Three characteristics of mushrooms confine United Foods' distribution to these regional markets: they (i) have a low density that makes shipping costly; (ii) spoil soon after harvesting; and (iii) are easily bruised in transit.[1]

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[1] See J.A. 86, 145, 148; U.S.D.A., Agric. Mktg. Serv., THE U.S. MUSHROOM INDUSTRY: THE IMPORT CHALLENGE 68-69 (1982) ("*U.S.D.A. Mushroom Report*") ("As a general rule, mushrooms arrive at the repacking plant on the same day they are picked. * * * * Shelf

Because United Foods competes with only a small number of mushroom suppliers in each self-contained local market, its marketing efforts are local, rather than national. In marketing, United Foods differentiates its "Pictsweet" brand mushrooms and its service to retailers as superior to the competition. United Foods' competitive advantage arises from its substantial investments in research, production, and distribution, as well as its experience as a grower and marketer of other vegetables. Among other things, Pictsweet mushrooms are fresher (because United Foods gets them to retailers faster) and of higher quality (because of the superior growing conditions and quality controls at United Foods' mushroom farms). See J.A. 113-14, 147, 149, 152, 158, 185, 201.[2]

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life of bulk mushrooms was estimated to range from 3 to 6 days, with an average of 5 days."); Hearings Before the Subcomm. on Domestic Mktg., Consumer Relations, and Nutrition, Comm. on Agric., 101st Cong., 1st Sess., *Research, Promotion, and Consumer Information Programs* 111 (1989) ("*Mushroom Act Hearings*") (Kirk Leighton, Pres., Camsco Produce Co.) ("[T]he base of the issue of regionality is the fact that mushrooms basically do not travel well. They have a very short shelf life and are highly perishable, among the most perishable of all produce items available. That perishability requires that they be marketed generally within several hundred miles of where they are grown."); W.C. Lane, *Mushroom Marketing in the 80's*, *in* PROCEEDINGS OF THE ELEVENTH INT'L SCIENTIFIC CONGRESS ON THE CULTIVATION OF EDIBLE FUNGI 631, 634 (1981) (mushroom producers must "maximize distribution in the areas closest to our production").

[2] In its local markets, United Foods expends considerable sums to promote its Pictsweet brand name, generally in coordination with local grocers, to encourage purchasing of United Foods mushrooms as opposed to other brands. For example, with certain grocers, United Foods assists in shelf-space planning, subsidizes newspaper advertising, provides point-of-sale promotions, and conducts in-store demonstrations and tastings. J.A. 153-54, 157, 159. United Foods believes, based on its considerable industry experience, that it is essential to target marketing in this fashion because mushrooms are perceived by the public as a discretionary, gourmet item and therefore are attractive only to certain consumers.

2. The Mushroom Market. The mushroom industry is characterized by vigorous competition, extraordinary stability, and elasticity of supply. *E.g.*, Jim Offner, *Mushrooms: Record Year Raises Hopes For Future*, THE PACKER, Sept. 11, 2000, at A2 (reporting view of the President of the Mushroom Council that the market is typified by "a stable price, with increasing supplies"); see also *U.S.D.A. Mushroom Report*, *supra*, at 97 (describing prices for fresh mushrooms as "highly stable").

The stability of the mushroom market reflects the unique nature of mushroom production. Mushroom farms are entirely insulated from the weather in warehouse-like buildings, in which factors such as temperature, humidity, and carbon dioxide levels are closely controlled within "growing rooms" to maintain optimal conditions during the sixty- to ninety-day growing cycle. See U.S.D.A., *An Economic Assessment of Mushrooms: Executive Summary* (undated), <<*www.act.fcic.usda.gov/pilots/feasible/txt/mushroom.txt*>> (visited Oct. 5, 2000) ("[V]irtually all commercial mushroom production occurs indoors, where it is largely isolated from naturally-occurring perils, such as unseasonable cold, moisture extremes, wind storms, and hail, which cause most yield losses among outdoor crops."). As explained by the President of the Mushroom Council, given the system of indoor production in carefully controlled conditions, "Mushroom farming is more like IBM than agriculture." Amy M. Starke, *Earthy Delights*, THE OREGONIAN, Jan. 18, 2000, at FD1.

"Mushrooms are available year round, largely because of controlled growing conditions in facilities in 38 states." H.R. Rep. 101-568, *Omnibus Agricultural Commodity Promotion and Research Act of 1990*, 101st Cong., 2d Sess. 45 (1990) ("*Mushroom Act Report*"). At any given time, growers will have mushrooms at every stage of production and (because of the exceedingly short growing cycle, the flexibility afforded by the numerous growing rooms, and the small capital investment required to shift production levels) can quickly and

inexpensively increase or decrease production in response to changing local market conditions.

3. Federal Regulation Of Agricultural Marketing. The federal government has adopted three approaches to the marketing and distribution of agricultural commodities.

a. Hundreds of commodities – a majority several times over – are not subject to any federal marketing controls at all. These include *all* of the other agricultural products that respondent sells, including, *e.g.*, corn, carrots, broccoli, green beans, spinach, lima beans, green peas, black-eyed peas of several kinds, southern greens (collards, turnips, kale, and mustard), cauliflower, peppers, brussels sprouts, and okra. J.A. 140, 184.

b. The marketing and distribution of approximately three dozen other commodities – including the California tree fruits at issue in *Wileman* – are subject to extensive federal regulation under "marketing orders" issued pursuant to the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. § 601 *et seq*. Congress enacted the AMAA in the aftermath of the great agricultural instability of the 1930s in an effort to stabilize volatile commodity markets. See *id.* § 602(1) (purpose to "establish and maintain * * * orderly marketing"), (2) (maintain fair prices), (3) ("effectuate * * * orderly marketing").

The principal features of marketing orders are measures designed to stabilize supplies and prices by regulating supply and facilitating collective action among producers. As this Court detailed in *Wileman*:

> Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices,"

> § 602(4), these orders may include mechanisms that provide a uniform prices to all producers in a particular market, that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6)(A), (7), that determine the grade and size of the commodity, § 608c(6)(A), and that make an orderly disposition of any surplus that might depress market prices, *ibid.* Pursuant to the policy of collective, rather than competitive marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6)(D), (H), (I).

521 U.S. at 461.

Activities under marketing orders are funded through assessments on producers. 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii). Beginning in the 1960s, Congress enacted a series of amendments to the AMAA (applicable to some but not all commodities) that permit use of assessed funds to pay for generic advertising. See *Wileman*, 521 U.S. at 462.

c. A far smaller group of commodities – including mushrooms, cultivated blueberries, honey, peanuts, popcorn, potatoes, and watermelons – are subject to a third scheme of commodity marketing: "research and promotion programs." See Pet. 13-14 & n.7 (listing programs).[3] These programs have been adopted not to stabilize volatile markets but instead to "expand, maintain, and develop" existing markets – *i.e.*, simply to sell more of the particular commodity. U.S.D.A., Agric. Mktg. Serv., *Research and Promotion Programs*, <<*www.ams.usda.gov/fv/rpb.html*>> (visited Feb. 18, 2001).[4]

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[3] Within the Department of Agriculture, these programs are administered by the "Research and Promotion Branch" while marketing orders are administered by a distinct entity, the "Marketing Order Administration Branch."

[4] In 1996, Congress authorized the Department of Agriculture to institute research and promotion programs for various commodities

Research and promotion programs do not authorize – indeed, they generally forbid – the market intervention that is the hallmark of marketing orders enacted pursuant to the AMAA. *E.g.*, 7 C.F.R. § 1207.335(b) (potato research and promotion program; "quality control, grade standards and supply management programs shall not be conducted under, or as a part of, this plan"); *id.* § 1210.331(b) (watermelon program; similar); see also *infra* at 9-10 (detailing provisions of mushroom order). Their core provision is instead an assessment, such as on every pound of mushrooms produced domestically or imported, that must be paid to a commodity board to finance generic advertising; failure to pay the assessment is a violation of federal law.

4. The "Mushroom Act" and "Mushroom Order." Given the consistent stability of the U.S. mushroom market, the federal government has elected not to regulate mushroom production or sales. The government does not have any programs to modulate supplies, whether directly through quotas or price controls, or indirectly through grade or packaging requirements. The only substantial federal regulation of the industry is the research and promotion program at issue in this case.

a. In the federal government's most comprehensive study of mushroom marketing, the Department of Agriculture recognized that the industry could seek federal authorization for an "involuntary" program of "industry promotion." *U.S.D.A. Mushroom Report*, *supra*, at 100. One of the two principal options was a marketing order that could include "regulatory aspects designed to promote orderly marketing." *Id.* "A Federal marketing order could provide for product inspection and the independent assignment of grades. A marketing order

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without seeking specific congressional authorization. See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, tit. V, subtit. A, 110 Stat. 888, 1029 (1996), *codified at* 7 U.S.C. § 7401.

also could provide for better application of industrywide grading standards." *Id.* at 104. See also *id.* at 102 ("the regulatory aspects of the Federal order program" would be "a means to ameliorate the market access and equity problem" suffered by smaller producers). The report recognized that the industry could pursue, as the "*alternative* to a Federal marketing order program," "specific 'free standing' legislation to authorize the establishment of a promotion and research program for mushrooms." *Id.* at 100-01 (emphasis added).

This federal study was not a call to governmental action; to the contrary, the U.S.D.A. flatly concluded that any "initiative for any course of action * * * rests entirely with the industry." *U.S.D.A. Mushroom Report*, *supra*, at 102. In 1989, a consortium of principally smaller mushroom producers did, in fact, pursue the "alternative" to a marketing order: a "research and promotion program" to compel all producers to finance generic advertising without employing the supply-side measures of marketing orders.

The mushroom producers who drafted and proposed the statute emphatically distinguished it from "price supports or a federal marketing order," taking care to "*clearly state* that we have *no desire* to pursue any supply management efforts. The goals of this legislation and the program are focused *solely* on the demand side of the equation." *Mushroom Act Hearings*, *supra*, at 136-37 (Dennis Zensen, then-Chairman of Mushroom Council) (emphases added). Congressional supporters, in turn, favored the legislation over "other proposals" and alternative "approach[es] to marketing order programs" precisely because it did *not* involve economic regulation, which they regarded as "the artificial bolstering of indigenous industries by exclusionary measures [that] is entirely antithetical to a free market." 136 Cong. Rec. S10,822 (daily ed. July 26, 1990) (Sen. Heinz).

b. Congress authorized the research and promotion program by enacting the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act"). Pub. L. No.

101-624, §§ 1921-1933 (Food, Agriculture, Conservation, and Trade Act of 1990, tit. XIX, subtit. B, 104 Stat. 3854-3865), *codified at* 7 U.S.C. § 6101-6112. The Department of Agriculture, in turn, implemented the program in 1993 in the "Mushroom Order." 7 C.F.R. pt. 1209; see 58 Fed. Reg. 3446 (1993).

The Act and Order eschew the market-intervention measures contained in marketing orders under the AMAA. They may not be construed to permit "the control of production or otherwise limit the right of individual producers to produce mushrooms" or to impose "mandatory requirements for quality control, grade standards, supply management programs, or other programs that would control production." 7 U.S.C. § 6101(c); 7 C.F.R. § 1209.40(a)(2). See also *infra* at 32-33 (describing how grade standards applicable to other commodities, such as tree fruit, function as supply controls). Nor do they immunize activities under the Act or Order from the federal antitrust laws or otherwise facilitate collective action rather than competition in the mushroom market.

The Mushroom Act and Order instead provide for mandatory assessments to fund generic advertising. The Act establishes a Mushroom Council, composed of nine producers, which collects a mandatory volume-based assessment[5] applicable to all producers and importers of at least 500,000 pounds of mushrooms annually for the "fresh" market. 7 U.S.C. § 6102(9), 7 C.F.R. §§ 1209.11, .51, .52; see also 7 C.F.R. § 3.91(b)(xxix) (penalty for noncompliance).[6] At least

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[5] The assessment varies annually, and generally ranges between approximately one-quarter cent and one-half cent per pound. See 7 U.S.C. § 6104(g)(2)(D) (maximum rate is one cent per pound). In response to the Sixth Circuit's decision in this case, the assessment was lowered to one-tenth cent per pound and then raised again to one-quarter cent on a temporary basis.

[6] Approximately 150 mushroom producers pay the assessment. See J.A. 87, 129; U.S.D.A., Agric. Mktg. Serv., *Mushroom Promotion and Consumer Information Order*, <<*www.ams.usda.gov/fv/mush*

98% of the $2.3 million in annual expenditures is used to finance speech (*i.e.*, paid advertising, industry information programs, or similar efforts) and the administrative support for that speech. See J.A. 229. Although a provision of the Act would permit expenditures for "research" as well, see 7 U.S.C. § 6104(c)(4), that provision is moribund.[7]

The Council has the exclusive discretion to design and implement generic promotional programs of its choosing. 7 C.F.R. § 1209.38(a). The Secretary of Agriculture's power is limited to vetoing the Council's proposals. See *id.* § 1209.39(b). The Secretary does not engage in any ongoing oversight of the promotional programs or the Council's activities generally other than to ensure compliance with the basic statutory framework. See *infra* at 48-50.

5. United Foods' Objections to the Compelled Advertising Scheme. United Foods' private ownership objects to the Council's use of respondent's support to attach to mushrooms certain social and ideological connotations. Inherent in the design of the Council is that the message conveyed by the generic advertising will be selected not only by United Foods' competitors, but by competitors that do not share its values. This is a particular concern because the Council uses all of the tools of modern advertising, including appeals to values and social mores. United Foods specifically objects that the Council has associated itself and mushrooms generally with the consumption of alcohol and has touted mushrooms as an aphrodisiac. *E.g.*, J.A. 173.

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room.html>> (visited Feb. 18, 2001). Prior to this litigation, respondent paid approximately $100,000 annually. J.A. 58.

[7] See J.A. 229 (no budgeted expenditures for research). A line item in the Council's Statement of Budgeted versus Actual expenditures lists a $36,251 expenditure (1.5% of all expenses) for "Research," but that may be in error because that line item is identified instead as "Program Evaluations" in the budget. Compare *id.* 231 with *id.* 229.

The Council's promotional programs also undermine United Foods' effort to distinguish its Pictsweet brand from the competition, as well as its effort to tailor marketing to local retail conditions, all without any corresponding regulatory benefit. The very purpose of generic advertising is to suggest that a commodity is homogenized – here, the Council's "if you've seen one mushroom, you've seen them all" approach to promotions conveys the message that all mushrooms are the same.[8]

In this respect, the Mushroom Order requires United Foods to finance advertising that (to the extent it is effective at all) will only benefit respondent's competitors, who generally do not sell on a branded basis. Indeed, to combat the effects of generic advertising, United Foods would have to engage in further branded advertising, effectively engaging in counter-speech against the very programs it is being forced to fund under the Mushroom Order. See Br. of U.S., *Wileman*, No. 95-1184, at 20 (objecting producers have option "to advertise their own products, to criticize their competitors' products, and even to criticize the generic advertisements created pursuant to the marketing orders"). And, as is discussed in greater detail *infra* at 16-17, the Order permits smaller producers and producers in regions in which United Foods does not operate to "free ride" on the advertising respondent funds.

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[8] See, *e.g.*, John E. Lenz & Olan D. Forker, *Generic Advertising as a Nonprice Marketing Strategy*, *in* COMPETITIVE STRATEGY ANALYSIS IN THE FOOD SYSTEM 137, 142 (Ronald W. Cotterill ed., 1993) (because "[g]eneric advertising is not brand specific [but instead] focus[es] on product or commodity characteristics common to all product items and brands," it is "possible that generic advertising could erode brand preference" resulting in "brands which are attempting counterfactual product differentiation seeing an erosion of their brand franchises"); Ronald W. Ward, *Domestic Commodity Check-Off Programs: Judging Their Impact*, *in* COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY 33, 36 (Walter J. Armbruster & John E. Lenz eds., 1993) (recognizing "arguments that generic programs can be biased against brands").

6. The Proceedings Below. Based on its objections to the generic advertising program, United Foods filed a petition with the Secretary of Agriculture, see 7 U.S.C. § 6106(a)(1), seeking a determination that the assessment violates the First Amendment. The United States in turn filed suit in federal district court in Tennessee, see *id.* § 6107(a), seeking to compel United Foods to pay the assessment. Without holding a hearing, the administrative law judge and a judicial officer of the Department of Agriculture subsequently rejected United Foods' claim, and respondent sought review in the same district court. See *id.* § 6106(b)(1).

The district court consolidated both actions and granted the government's motion for summary judgment, which rested entirely on this Court's decision in *Wileman*. Pet. App. 20a. According to the district court, "[t]he *Wileman* decision did not turn on the degree to which [the] State or Federal Government has otherwise displaced free market competition." *Id.* 18a (citation omitted).

On United Foods' appeal, the Sixth Circuit reversed. Devoting nearly the whole of its opinion to an analysis of *Wileman*, the Sixth Circuit "conclude[d] 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." *Id.* 7a. Compelled promotion programs are accordingly sustainable without any special First Amendment scrutiny, the Sixth Circuit reasoned, if they are part and parcel of a broader scheme of government regulation – in effect, a neutral set of rules of general applicability. "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." Pet. App. 7a-8a. In other words, "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." *Id.* 8a. The court of appeals therefore concluded that *Wileman* insulates from First Amendment challenge compelled promotion schemes that are "'germane to the purposes'" of market regulation, *id.* 6a (quoting *Wileman*, 521 U.S. at 473), or that present "some other compelling justification," *id.* 7a.

Applying this analysis, the Sixth Circuit found that the mushroom assessment was not entitled to deferential treatment as an "economic regulation" under *Wileman* because "the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated." Pet. App. 8a. "[T]he 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." *Id.* 5a. Indeed, "[t]he 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." *Id.* 2a n.1 (emphasis added). Accordingly, "the mushroom advertising program before us is not 'germane' to any collective program setting prices or supply." *Id.* 7a. Because the government did not maintain that the assessment could survive First Amendment scrutiny, the court of appeals held it invalid. *Id.* 8a.

SUMMARY OF ARGUMENT

The government's only argument is that the Sixth Circuit erred in subjecting the mushroom assessment to First Amendment scrutiny. If this Court disagrees, then the assessment is plainly invalid. Not only is the stand-alone advertising program not "germane" to any broader regulatory scheme (compare *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (assessment germane to unions' collective bargaining activities)) but there is no serious argument that it can be sustained under the scrutiny applicable to regulations of

commercial speech (see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Specifically, the mushroom assessment does not further any substantial government interest. It facilitates, rather than eliminates, "free riding" by exempting small mushroom producers and shifting advertising spending to regions in which the primary payors of the assessment do not compete. Moreover, the Mushroom Council's generic advertising does not increase mushroom sales and, even if it did, it would not substantially benefit the producers who principally pay the assessment. Finally, the scheme of federal regulation of commodity marketing is essentially irrational, exhibiting no rhyme or reason in respect of the agricultural products subject to no regulation at all, heavy regulation under marketing orders, or (as in this case) compelled generic advertising.

The government's argument that this Court's decision in *Wileman* immunizes the Mushroom Order from First Amendment scrutiny is erroneous. *Wileman* is limited to the context of marketing orders that regulate supplies. Because marketing orders have the effect of homogenizing the subject commodity, *Wileman* concluded that, as a related economic matter, the government may include provisions facilitating generic advertising that reflects the commodity's common features. Research and promotion programs such as the Mushroom Order, by contrast, forbid the direct and indirect supply controls of marketing orders. Indeed, the statute in this case reflects Congress' conscious determination *not* to engage in economic regulation of the mushroom market. The Solicitor General's further attempt to extend *Wileman* to apply to all non-ideological advertising schemes conflicts with several decisions holding that compelled assessments are constitutional only if "germane" to a regulatory program, as well as with this Court's commercial speech jurisprudence.

Nor is the Solicitor General correct that the mushroom assessment is immune from First Amendment scrutiny as "government speech." That argument is not properly presented

because it was not "pressed in or passed upon" below and is not fairly included in the question presented. Questions of "government speech" are furthermore irrelevant to respondent's allegation that the First Amendment applies to a targeted assessment compelling United Foods to finance the Mushroom Council's message. Rather than challenging the government's right to convey a particular message, United Foods asserts that First Amendment scrutiny applies to a requirement that it directly support and associate with that message. In any event, the Mushroom Council does not engage in "government speech" but rather is a fundamentally private entity promulgating a private message. The Department of Agriculture's oversight is minimal and, of particular importance, does not extend to shaping the Council's promotional message.

ARGUMENT

I. It Is Undisputed That If The Mushroom Assessment Is Subject To First Amendment Scrutiny, It Is Invalid.

It is appropriate to begin by briefly addressing the question left unanswered by the Solicitor General's brief: what if the Court concludes that this case is distinguishable from *Wileman* and that the mushroom assessment is accordingly subject to First Amendment scrutiny rather than highly deferential treatment as an "economic regulation"? The answer is that the assessment is invalid. The assessment scheme is not "germane" to any non-speech-compelling collective program instituted by Congress. Compare *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977).[9] Nor does the government main-

[9] It is no answer to say that the assessment is, in effect, "germane" to itself – *i.e.*, to the generic advertising of mushrooms. This Court has never read the *Abood* line of cases so broadly as to rubber stamp exactions to fund speech outside the context of a broader regulatory scheme. To the contrary, based on the First Amendment, the Court has consistently construed the federal labor laws to *forbid* the

tain that it could be sustained under the test applicable to regulations of commercial speech. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Instead, the government argues exclusively that the Sixth Circuit mischaracterized the mushroom assessment as a regulation of private speech. Compare Br. of U.S., *Wileman*, No. 95-1184, at 34-48 (extensive argument that assessment for tree fruit could be sustained under *Central Hudson* framework). Although the government has therefore waived the point, it is useful to explain why the assessment scheme cannot withstand First Amendment scrutiny in order to illustrate that the Mushroom Order simply requires respondent to finance advertising to benefit its competitors, and accordingly is subject to First Amendment scrutiny as a regulation of commercial speech.

The principal interest said to underlie the Mushroom Order is that it prevents "free riding." See U.S. Br. 26, 30. If that were actually so, however, respondent would be granted a credit towards the substantial advertising it undertakes on its own. Compare 7 U.S.C. § 608c(6)(I) (credit provided under AMAA for advertising of almonds, filberts, raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries).[10] Furthermore, contrary to its avowed purpose, the Order in reality permits small producers to "free ride" on respondent's contributions for paid advertising. A principal impetus for the Mushroom Act was the desire of some segments of the industry to protect small producers by diverting larger producers' advertising expenditures away from branded promotions to

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use of exactions to fund speech unrelated to collective bargaining activities. See *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 556-56 (1991) (Scalia, J., concurring) (collecting cases).

[10] The failure of the Act and Order substantially to further a governmental interest in preventing free-riding is itself an independent basis for invalidating the assessment under the *Abood* line of cases. See *Air Line Pilots Ass'n* v. *Miller*, 523 U.S. 866, 874 (1998) (discussing *Lehnert*, 500 U.S. at 519).

generic promotions that will benefit small producers.[11] Indeed, the statute's objective is completely transparent in that it exempts from the assessment the more than one-half of all mushroom growers who produce less than 500,000 pounds annually. See 7 U.S.C. § 1209.52; U.S.D.A., Agric. Mktg. Serv., *Mushroom Promotion, Research, and Consumer Information Order* (Sept. 18, 2000), <<*www.ams.usda.gov/fv/rpmushroom.html*>> (visited Feb. 18, 2001). The House Report on the Mushroom Act candidly acknowledges that producers of fewer than 500,000 pounds of mushrooms annually "would not be assessed, although they would experience many of the same benefits from the program as other producers." *Mushroom Act Report*, *supra*, at 44. See also *Mushroom Act Hearings*, *supra*, at 135-36 (Zensen) (exemption for growers of less than 500,000 pounds of mushroom annually was intended to protect "small producers," notwithstanding that "the benefits of the program would accrue to them as well"). United Foods is thus not seeking to "free ride" on the Council's advertising but rather, as the California Supreme Court recently concluded in a similar case, is "making an effort to prevent others from hijacking [its] own funds as they drive to their own destination." *Gerawan Farming* v. *Lyons*, 12 P.3d 720, 743 (2000).[12]

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[11] See *Mushroom Act Hearings*, *supra*, at 109 (Leighton) (under Act's assessment provisions, five major growers will be responsible for "50 percent of the funding, in comparison to the estimated 300 growers across the country"). Prior to the statute's adoption, smaller producers demonstrated "a surprising lack of effort directed at increasing the level of mushroom sales through product promotions," while larger firms generally "utilized a mushroom sales force of from 8 to 12 persons, and all firms had assigned sales responsibilities to personnel in senior executive positions." *U.S.D.A. Mushroom Report*, *supra*, at 60.

[12] Proponents of the Act thus admitted that they were acting in substantial part as a result of the "strong consolidation occurring within [the] industry," with "[c]orporate entities" increasingly absorb-

The regional "free-riding" effect is just as substantial. Although United Foods cannot distribute its products beyond three specific markets, the volume-based assessments collected from United Foods – which are substantial given respondent's dominant position in those markets – are used to finance advertising principally in other regions of the country. J.A. 177-78, 201-02.[13] In other words, in contrast to California tree-fruit producers (who could distribute their products anywhere in the country and therefore stood to benefit from national growth in fruit consumption), United Foods does not stand to benefit from most of the Council's efforts. See Lane, *supra*, at 636 ("you would have to first distribute on a national basis for the individual grower to justify this type [of] promotion"). The benefits accrue instead to small mushroom producers located in markets in which United Foods does not participate – producers that could not otherwise afford advertising, and a majority of whom are entirely exempt from paying assessments under the Order.

Nor can United Foods be said to "free ride" on the benefits of generic advertising in the markets in which it operates. Even if the Council's efforts increased demand in those markets, respondent would not benefit because mushroom supplies are highly elastic, such that increased supplies from

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ing or displacing smaller producers. *Mushroom Act Hearings*, *supra*, at 101 (Zensen). See also *id.* at 95 (Ciarrocchi) (similar).

[13] The Mushroom Council's goal of increasing the per-capita consumption of mushrooms, J.A. 87, logically is targeted to regions where branded advertising has not already raised consumption levels. See *Mushroom Act Hearings*, *supra*, at 105 (Zensen) (relatively small segment of U.S. population consumes a substantial majority of all mushrooms); *U.S.D.A. Mushroom Report*, *supra*, at 93-94 (while per capita consumption in northeastern U.S. was 1.45 pounds in 1980, consumption in developed California market was 3.6 pounds); Lane, *supra*, at 641 (regions with existing, branded marketing have already increased per-capita consumption). See also, *e.g.*, J.A. 217-18 (discussing high-cost programs in regions in which United Foods does not operate).

competitors will preclude United Foods from increasing its sales or benefiting from higher prices. Not only can competing mushroom farms quickly increase production, but they can easily shift their production from the "processed" mushroom market (principally used for canned mushrooms) to the "fresh" market. J.A. 199.[14] Finally, there is substantial reason to believe that any profits resulting from generic advertising are captured by intermediaries in the marketplace rather than by producers.[15]

Nor does the mushroom assessment further a substantial governmental interest in increasing mushroom consumption (an interest that would, in any event, not be "tailored" to the assessment scheme for the reasons just described). The Council budget is too small to increase mushroom consumption (particularly given that the industry is highly competitive and already contains substantial private advertising). The Council's generic advertising also fails to account for local conditions and the specific consumers likely to purchase mushrooms. Not surprisingly, the evidence demonstrates, and

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[14] The Order thus engenders free-riding in yet another way: producers who sell principally in the "processed" market are exempt from the assessment (which applies only to those who sell at least 500,000 pounds annually in the "fresh" market) but can shift their sales to the "fresh" market in periods of high demand. Other market participants who benefit from higher sales, such as mushroom processors, are similarly exempt from paying the assessment. J.A. 181, 199, 204.

[15] See Dennis R. Henderson, *Commodity Promotion Policy in a Global Economy: Concluding Challenges*, *in* COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY, *supra*, at 157, 158-59 (criticizing assumption that benefits of generic advertising flow to producers as "heroic" because, *inter alia*, market intermediaries can capture revenue growth and "it is equally reasonable to expect that revenue enhancement at the industry level will result in entry, not in rent extraction, by existing firms"); *U.S.D.A. Mushroom Report*, *supra*, at 11-12 ("An examination of sales to the fresh market over time indicates that the processing sector has become only a residual claimant for mushrooms.").

the Solicitor General does not contest, that the Council's advertising has produced absolutely no demonstrated effect on the marketplace. See Decision on Respondent's Motion for Reconsideration, *In re Donald B. Mills, Inc.*, MPRCIA Dkt. No. 95-1, at 7-8 (June 12, 1996) ("Because the evidence has not shown that the Mushroom Council was better able to promote and increase consumption of mushrooms than [private] producer-handlers, or to increase consumption at all, the Mushroom Promotion Council's program has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry."), *rev'd on other grounds*, No. CV-F-97-5890 (E.D. Cal. Mar. 5, 1998). See generally J.A. 89, 93-94, 95, 120, 126, 132.[16]

The suggestion that commodity promotion programs are necessary to sustain agricultural markets is also belied by the fact that the mushroom industry was stable and growing before the Act was adopted,[17] as well as by the irrationality of the overall scheme of federal regulation of agricultural marketing. There is no rhyme or reason behind the decision to subject indistinguishable commodities to no federal marketing

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[16] Even authors of studies suggesting that generic advertising increases demand caution that "research has not been completed for many commodities and one *must not* extrapolate these positive examples to all other commodities." Olan D. Forker & Ronald W. Ward, *Commodity checkoff programs: A self-help marketing tool for the nation's farmers?*, CHOICES 21, 25 (4th Quar. 1993) (emphasis added). The Department of Agriculture itself concedes that "[m]any questions remain unanswered about the effects of these programs on sales and producer net returns, the distribution of returns between producers and marketers, and intercommodity competition." U.S.D.A., Econ. Rsch. Serv., *Generic Commodity Advertising & Promotion* 1 (June 1993).

[17] See *Mushroom Act Hearings*, *supra*, at 99 (Rep. Grant) (in the decade prior to adoption of the Mushroom Act, fresh mushroom sales doubled); *id.* at 108 (Leighton) (8% annual growth between 1980 and 1989); see also *U.S.D.A. Mushroom Report*, *supra*, at 11 (during 1970s, "in most dimensions the industry experienced an extremely favorable growth rate").

regulation, to the comprehensive market regulation of AMAA marketing orders, or to the advertising compulsion of research and promotion programs. As Justice Souter explained in his *Wileman* dissent without contradiction by the majority, adoption of these programs is "so random * * * as to unsettle any inference that the Government's asserted interest is either substantial or even real." 521 U.S. at 495.

Accordingly, if the mushroom assessment is subject to First Amendment scrutiny, it is invalid.

II. *Wileman* And Related Precedents Hold That Compelled Advertising Assessments Are Constitutional Only If, At The Least, They Are Germane To Comprehensive Market Regulations.

In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, this Court held that assessments to finance generic advertising included within comprehensive AMAA marketing orders were properly scrutinized and sustained as "economic regulations." That holding is inapposite to "research and promotion programs" such as the Mushroom Order, which are accordingly subject to First Amendment scrutiny.

A. *Wileman* Turned On The Comprehensive Nature Of Marketing Orders Under The Agricultural Marketing Agreement Act.

Wileman involved federal marketing orders for California tree fruit issued under the AMAA. In response to the plaintiffs' allegation that the orders' provisions compelling producers to finance generic advertising violated the First Amendment, the Solicitor General maintained that the advertising programs were properly regarded as nothing more than a speech-neutral form of economic regulation because they were integral to the orders' related controls on supplies. Marketing orders, the government argued, have "the non-speech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers," which is effectuated through "an array of mechanisms * * *,

including minimum quality and maturity standards, grading and inspection requirements, production research, marketing research, and development projects." Reply Br. of the U.S., *Wileman*, No. 95-1184, at 3. "The generic advertising activities that are at issue here," the Solicitor General advised this Court, are "but one element" of that scheme and but one "part of a far broader regulatory system that does not principally concern speech." *Id* at 3-4. Indeed, the Solicitor General went so far as to concede at oral argument that, were it not for its interests in "regulating these commodities and establishing orderly market conditions," neither of which is furthered by the Mushroom Order, "then the Government would lose in this case." Oral Arg. Trans., No. 95-1184, at 13.

The Court accordingly framed as "[t]he legal question that we address," "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 for Congress and the Executive to resolve." 521 U.S. at 468. Upon a detailed review of the marketing order provisions of the AMAA (quoted *supra* at 5-6), the Court agreed with the Solicitor General, holding that the case presented no First Amendment question because "[m]arketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets," such that "[c]ollective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets." *Id.* at 461. "The basic policy decision that underlies the *entire statute*," the Court reasoned, is the "assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market." *Id.* at 475 (emphasis added).

Of particular note, the Court carefully explained that its holding was limited to the context of federal regulations that

stabilize commodity markets by collectivizing agricultural supplies:

> In answering that question [whether the challenged programs constitute economic regulations or speech restrictions] we *stress* the importance of the statutory context in which it arises. 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. *It is in this context* that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

521 U.S. at 469 (emphases added).

Wileman plainly distinguishes between markets collectivized by regulation under marketing orders, on the one hand, and free markets like the mushroom market, on the other. Grade and packaging standards have the effect of homogenizing a commodity – *i.e.*, California nectarines sold under the orders at issue in *Wileman* have a consistent quality, shape, and size, and are similarly packaged for distribution. As *Wileman* explains, "inspection procedures that ensure uniform quality" and "standardized packaging requirements" reflect "the policy of collective, rather than competitive marketing" under the AMAA. 521 U.S. at 461. *Wileman* concludes that the government could, as a related economic measure in the same marketing orders, require the producers who benefit from such collectivization to contribute to a generic advertis-

ing program that reflects the characteristics of the homogenized product. By contrast, when a commodity is sold by individual producers in a competitive market that the government has not collectivized, any attempt by the government to alter the distribution of commercial advertising is properly regarded, and scrutinized, as a regulation of free speech.[18]

B. The Solicitor General's Contrary Reading Of *Wileman* Is Incorrect.

The government devotes only three paragraphs of its brief (see Br. 24) to the assertion that research and promotion programs such as the Mushroom Order are indistinguishable from the marketing orders in *Wileman*. Instead, the government argues almost exclusively, and implausibly, that *Wileman*'s extensive, repeated, and avowed reliance on the regulatory nature of AMAA marketing orders – every single word of it – was in fact wholly irrelevant *dictum*. According to the Solicitor General, "the Court's core First Amendment analysis" appears in Part IV of the *Wileman* opinion, but Part IV fails to cross-reference the opinion's discussion of marketing orders. *Id.* 22.

The government's characterization of *Wileman* is incorrect, and it was properly rejected by the Sixth Circuit. See Pet. App. 4a (*Wileman* "emphasized and reemphasized" that the heavily regulated, collectivized nature of the California tree-fruit market was critical to the Court's decision). As just noted, the *Wileman* majority both took great care to "stress the importance of the statutory context" in which the case arose and found no First Amendment question presented because the assessments were part and parcel of a statutorily

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[18] The four *Wileman* dissenters thus disagreed with the majority principally based on their view that the advertising program was distinct from the remainder of the marketing orders' controls on commodity supplies. See 521 U.S. at 498 (Souter, J., dissenting) (advertising provisions were "simply grafted onto the [AMAA] as a convenient vehicle for the funding schemes").

mandated collectivized marketing program. That holding could not have shocked the government at the time and cannot truthfully be confusing it now, for it rested on the very argument pressed by the United States in *Wileman*. See *supra* at 21-22.

Nor will Part IV of the *Wileman* opinion bear the weight that the government places upon it. Part IV does not "contain[] the Court's core First Amendment analysis." To the contrary, the Court's determination that marketing orders, including their assessment for paid advertising, constitute "economic regulations" rather than speech restrictions appears principally in Part III, which frames the legal question before the Court ("stress[ing]" the characteristics of marketing orders) and in Part V, which analyzes the requirements of marketing orders (announcing that the Court's holding turns on those characteristics). See 521 U.S. at 469, 474-77. Part IV, by contrast, simply addresses and distinguishes the three lines of cases on which the dissent relied in arguing that the advertising component of the marketing orders could not be fairly characterized as purely economic regulation. Manifestly, those lines of cases cannot be held to exhaust the First Amendment challenges that may be brought against assessment schemes, for (as is discussed *infra* at 34-35) that result would obliterate the holding of *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), that only assessments for "germane" activities are permissible.[19] Indeed, the very paragraph

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[19] The *Wileman* majority discussed the three lines of cases as follows. In contrast to "the limits on commercial speech at issue in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980)," and similar cases, "the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience." 521 U.S. at 469 & n.12. In contrast to "the compelled speech in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943), [and its progeny], and the compelled association in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)," marketing orders "do not compel any person to engage in any actual or symbolic speech." 521 U.S. at 469 & n.13. And, in con-

on which the Solicitor General relies makes clear that the Court's holding was limited to the context of broader schemes instituting collective, rather than competitive, marketing. See *id.* at 470 ("Thus, 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.").

The government's position also cannot be reconciled with the fact that Part IV of the *Wileman* opinion *rejected* the argument that non-ideological compelled advertising programs are broadly constitutional: "our cases provide affirmative support for the proposition that assessments to fund a lawful collective program *may sometimes* be used to pay for speech over the objection of some members of the group." 521 U.S. at 472-73 (emphasis added). Part IV furthermore repeatedly states that the Court's analysis is limited to the nature of "this regulatory scheme," *id.* at 471, contrasts marketing orders with "an unregulated market," *id.* at 474, and explains that the assessment provisions could not be distinguished from "other features of the regulatory orders that impose restraints on competition," *id.* Those statements refer to the Court's earlier, meticulous discussion of the heavily regulated and collectivized nature of commodity markets subject to marketing orders. See *id.* at 461 ("Collective action, rather than the aggregate consequences of independent competitive choices, characterizes *these regulated markets*." (emphasis added)).[20]

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trast to "cases like *Machinists* v. *Street*, 367 U.S. 740 (1960)," marketing orders "do not compel the producers to endorse or to finance any political or ideological views." 521 U.S. at 469 & n.14.

[20] The government's further, highly attenuated argument that *Wileman*'s holding cannot be limited to the context of AMAA marketing orders because the Court in that case granted certiorari to resolve a circuit conflict arising in part from a decision involving the assessment for beef (U.S. Br. 23-24) is wrong for the numerous reasons detailed in the brief in opposition (BIO 15-21) but never addressed by the Solici-

III. The Assessment For Mushroom Advertising Is Properly Distinguished From Marketing Orders Issued Under The AMAA.

The Mushroom Order lacks the regulatory characteristics that led this Court in *Wileman* to hold that AMAA marketing orders, including their provisions for paid advertising, are not speech restrictions but rather are "a species of economic regulation that has displaced competition." 521 U.S. at 461.[21] The Solicitor General's passing attempt to extend *Wileman* to this context is precluded by the *Abood* line of cases as well as this Court's commercial speech jurisprudence.

A. "Research and Promotion Programs" Such As The Mushroom Order Have Very Different Characteristics And Purposes Than AMAA Marketing Orders.

As *Wileman* details, AMAA marketing orders directly regulate supplies and facilitate "[c]ollective action": they may set "a uniform price"; "limit the quality and the quantity of the commodity that may be marketed"; "determine the grade and size of the commodity"; and/or "make an orderly disposition of any surplus that might depress market prices." 521 U.S. at 461. Activities under the orders are immune from the antitrust laws. *Id.*

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tor General. Of note, the government now admits (Br. 31) that the beef market is the subject of substantial governmental regulation.

[21] There is no need in this case to decide the constitutionality of assessments applicable to agricultural products such as beef and milk that are not subject to AMAA marketing orders but, unlike mushrooms, are subject to other substantial marketing regulations. It is apparent, however, that the lower courts have looked to the full array of regulation. *E.g.*, *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 975 (CA9 1999); *Nature's Dairy* v. *Glickman*, No. 98-1073, 1999 U.S. App. LEXIS 3547, at *11 (CA6 Mar. 2, 1999), *cert. denied*, 528 U.S. 1074 (2000). The government offers no support for its assertion (Br. 30) that such an inquiry is unadministrable.

Federal law relating to mushroom marketing, by contrast, not only does not mandate such collective controls on supply, *it forbids them*. As noted (see *supra* at 9-10), the Mushroom Act and Order state categorically that they shall not be construed to permit either direct supply restrictions or indirect measures such as grade standards. 7 U.S.C. § 6101(c); 7 C.F.R. § 1209.40(a)(2). Nor does the Mushroom Order authorize "inspection procedures that ensure uniform quality" or "standardized packaging requirements," or provide that activities of mushroom producers under the order are exempted from the antitrust laws.

Congress' determination to employ a research and promotion program rather than a marketing order for mushrooms was a conscious one; it therefore would be particularly inappropriate to defer in this case to Congress' broader latitude over "economic" matters. After a comprehensive report by the U.S.D.A. recognized that either a marketing order or the "alternative" of a research and promotion program could be enacted for mushrooms, proponents of the Act chose the latter course. As noted (see *supra* at 8), the producers who drafted the Act were emphatic that it would not include any of the supply controls that typify marketing orders. The government similarly undermines its case in emphasizing (Br. 5, 26 n.14) that congressional supporters favored adoption of a "research and promotion program" precisely because, in contrast to the regulatory components of a marketing order, it would not involve intervention in free markets. Congress clearly determined *not* to engage in economic regulation of the mushroom market.[22]

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[22] The government's related argument (Br. 26 n.14) that Congress sometimes avoids employing marketing orders in order to avoid "antagoniz[ing] consumers" does not help its case. It is deeply troubling as a First Amendment matter that the government would avoid influencing purchasing decisions through overt efforts, such as restrictions on supplies, in favor of covert support of advertising undertaken in the name of producers.

That the federal government has made a conscious determination not to intervene in the mushroom market is also illustrated perfectly by the Solicitor General's argument (Br. 29) that, although the federal government could conceivably issue a marketing order under the AMAA for any commodity, it has not done so for mushrooms.[23] All that the U.S.D.A. has done – and all that Congress has directed it to do in the Mushroom Act – is impose mandatory assessments to be used in advertising.[24]

B. The Government's Arguments To The Contrary Are Unavailing.

The government fares no better in arguing (Br. 24-26) that the Mushroom Order is not properly subject to First Amendment scrutiny because compelled assessments for paid advertising have the same purpose and effect on the marketplace even when (as here) not included in comprehensive marketing measures. We have explained above that *Wileman* held pre-

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[23] It bears noting that, in fact, the Mushroom Order could not be issued under the AMAA, which would have to be amended by Congress to permit (i) paid advertising for mushrooms, (ii) the imposition of assessments upon importers, and (iii) the adoption of a national rather than a regional program. See *U.S.D.A. Mushroom Report*, *supra*, at 100-01. Furthermore, because producers sought only a research and promotion program, and affirmatively opposed supply controls of marketing orders, see *supra* at 8, such a marketing order likely would not have secured the super-majority support required for enactment under the AMAA. See 7 U.S.C. § 608c(9)(B).

[24] The government understandably does not argue that the research component of the Mushroom Order brings this case within the ambit of *Wileman*. "Research" is far afield from the supply-side controls and forced collectivization that characterize marketing orders. Thus, if a research program reveals a new, profitable type of mushroom or mushroom packaging, those discoveries must be employed and marketed by mushroom producers on an individual basis in an unregulated marketplace. In any event, the record reveals that the Mushroom Council expends virtually none of its approximately $2.3 million annual budget on research. See *supra* at 10 & n.7.

cisely the opposite – *i.e.*, that such assessments have the character of economic regulations rather than speech restrictions only when employed as an integral component of other controls on commodity supplies – and detail below (see *infra* at 33-39) why the government's characterization of the "purpose" and "effect" of the Mushroom Act, even if it were correct, would be irrelevant as a constitutional matter.[25]

For present purposes, however, the salient point is that the purposes and effects of AMAA marketing orders are quite different from those of the Mushroom Act and Order. The former constitute direct government intervention to stabilize certain volatile commodity markets, *Wileman*, 521 U.S. at 461 (citing 7 U.S.C. § 602(1)), while the latter are nothing more than advertising programs intended to "expand" a commodity market that does not otherwise require government intervention, *e.g.*, 7 U.S.C. § 6101(b) (Mushroom Act).

In contrast to the inherently unstable market for California tree fruit, the mushroom market is uniquely stable as a result of indoor, near-industrial growing conditions, as well as short growing cycles that permit easy adjustment to shifts in demand. See *supra* at 4. Accord *Mushroom Act Hearings*, *supra*, at 108 (Leighton) (stability of the mushroom industry is accordingly "far different than the situations that have been developed with pork and beef and other such orders where distress and decline was more the watch word than the growth [mushroom producers] have seen").[26] Mushrooms are ac-

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[25] This certainly is not the only context in which governmental activity that otherwise would be constitutionally impermissible is sustained in the context of a regulated industry. Although for different reasons, that is the rule under the Fourth Amendment as well. *E.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987) (owners of regulated junkyards have reduced expectation of privacy).

[26] The principal factors destabilizing the tree fruit market are the long lead time from planting until maturity and the large capital commitment incurred at the time of planting. Growers respond to higher prices by enlarging their orchards. By the time new plantings are at

cordingly subject only to a research and promotion program. That program's effort at market expansion is nothing more than an effort to use advertising – *i.e.*, constitutionally protected commercial speech – to sell more mushrooms, not an "economic regulation" immune from any and all First Amendment scrutiny.

The Solicitor General's repeated assertion that both marketing orders and research and promotion programs seek to avoid "free riders" (*e.g.*, Br. 26, 30) is not correct either. As the Sixth Circuit explained, in the context of the AMAA, the government has a non-speech-related interest in ensuring that individual producers do not "free ride" on the benefits provided by marketing orders' collectivized controls on commodity supplies. Here, by contrast, the government can only suggest that the Mushroom Order prevents objecting producers such as respondent from "free riding" on the advertising of competitors. Not only is that factual assertion incorrect given the unique characteristics of the mushroom marketplace, see *supra* at 16-19, but as a legal matter it is merely a restatement of the fact that the mushroom assessment is singularly designed to enhance the speech of certain producers while shifting the ensuing costs to others. Such a program triggers the protections of the First Amendment.

The government nonetheless maintains (Br. 27) that whatever supply controls may be authorized by the AMAA, many of those controls were not included in the specific tree-fruit marketing orders at issue in *Wileman*. But in answering the question of how to characterize marketing orders, *Wileman* adopted the government's view (which it now disavows without so much as a side-long glance) that the relevant point of

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full production (typically seven years), considerably more trees may have been planted than the market can support. In times of substantial oversupply, which are sustained because growers continue producing because most of their costs already have been sunk, prices may fall for considerable periods. See J.A. 190, 198.

inquiry is the statutory scheme under which the orders are authorized. See *supra* at 21-22. Congress determined beginning in the 1930s that various commodity markets require stabilization, and provided the Secretary with discretion to determine which specific economic controls to adopt for each commodity. For some but not all commodities, the tools at the Secretary's disposal have since been expanded to include paid advertising. *Wileman* concluded that, in this context, all of the activities authorized by the AMAA were properly regarded as "economic regulations." The Solicitor General's quarrel with that conclusion is simply a challenge to the line drawn at the government's urging by *Wileman* itself; it is not a basis for sustaining an exaction for advertising in the very different context of the Mushroom Order.

Just as important, the marketing orders addressed in *Wileman* did, in fact, include important supply-side controls on California tree fruit that are not present under the Mushroom Order. According to the U.S.D.A., Marketing Order 916 (governing California nectarines) "authorizes grade, size, quality, and maturity regulations. It also sets container size, capacity, weight, dimension, and marking requirements. Minimum size requirements are specified for most varieties * * *. Container and pack requirements are also in effect." U.S.D.A., Agric. Mktg. Serv., *Summaries of Fruit and Vegetable Marketing Order and Agreement Programs*, <<*www.ams.usda.gov/fv/mosummary.htm*>> (visited Feb. 18, 2001). See also *id.* (Marketing Order 917 (governing California peaches) "authorizes grade, size, container, and pack requirements"). The Mushroom Order, by contrast, authorizes the Council to propose only "*voluntary* quality and grade standards for mushrooms" (which it has not done, in any event) and no restrictions at all on marketing containers. 7 C.F.R. § 1209.38.

Contrary to the assertion of the Solicitor General (Br. 27-28), regulations of grades and containers manifestly do restrict "supply" – their very purpose is to prohibit the market-

ing of noncompliant crops and to ensure uniform marketing. As explained in the Department of Agriculture's publication entitled *Federal Marketing Orders* (*available at* <<*www.ams.usda.gov*>>), "Regulating the quality of commodities to be shipped helps to keep inferior products from depressing the market for the whole crop, contributes to consumer satisfaction, and builds demand." In addition, as noted above, restrictions on commodity size, grade, and containers also have the effect of homogenizing the subject varieties of fruit. In other words, the orders' market-stabilization measures preclude, or at least substantially interfere with, individual producers' attempts to distinguish their products on a branded basis.

C. The Government's Attempt To Extend *Wileman* To Encompass All Exactions For "Non-Ideological" Promotional Programs Conflicts With The First Amendment Under This Court's Precedents.

1. Implicitly recognizing the substantial differences between AMAA marketing orders and research and promotion programs, the Solicitor General places considerable weight on the assertion that all compelled assessments for all "non-ideological" activities, including promotional advertising, are *per se* constitutional. See U.S. Br. 16 n.9, 30. From the outset, that contention is self-evidently implausible. If true, the federal and state governments would have carte blanche to compel individuals to finance, for example, performance art or cubist paintings that they find highly objectionable simply because the art in question is generally deemed "non-ideological." In the commercial area alone, objecting businesses could be forced to fund advertising supporting unionization drives; unions could be forced to advertise in support of decertification; and businesses could be required to finance their competitors' promotions – all without raising *any question* under the First Amendment. Not surprisingly, such an absurd suggestion has been soundly rejected by this Court's precedents.

A line of decisions beginning with *Abood* (431 U.S. 209 (1977)) holds that the First Amendment permits the government to compel dissenting employees to pay an "agency fee" equivalent to the costs of union representation. See also, *e.g.*, *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991). In so holding, the Court recognized that compelled contributions for collective bargaining activities implicate employees' associational and speech interests under the First Amendment. Dissenting employees, the Court first held in *Abood*, have a First Amendment right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234. The Court found the assessments justified, however, by "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress" because failure to require contributions would engender "free riding" that would put at risk the collective effort. *Abood*, 431 U.S. at 222-24. The Court has balanced the competing First Amendment and governmental interests by requiring that the compelled contributions be either (i) used for activities "germane" to the collective effort (see *Lehnert*, 500 U.S. at 527-28), or (ii) (in the context of universities' efforts to foster a diversity of viewpoints) allocated to recipients on a "viewpoint neutral" basis (see *Board of Regents* v. *Southworth*, 529 U.S. 217, 232 (2000)).

As the excerpt quoted above reflects, *Abood* itself involved objections to non-germane expenditures that were "political." *Wileman*, in turn, noted the context of *Abood*, see 521 U.S. at 473, but (contrary to the Solicitor General's argument in this case) did not hold all exactions for non-ideological activities *per se* constitutional. To the contrary, *Wileman* reiterated the holding of *Lehnert*, in which eight members of the Court (all but Justice Marshall) agreed with the plaintiffs that a union could not, consistent with the First Amendment, exact fees to finance a non-ideological publication not germane to Congress' design in mandating associa-

tion to preserve labor peace. See 500 U.S. at 527-28 (plurality opinion); *id.* at 558-60 (Scalia, J., concurring). As the plurality explained, the Court has "consistently" required that even "*nonideological* expenses [be] germane to collective bargaining." *Id.* at 522 (citation omitted).[27] *Wileman*, in turn, recounted that *Lehnert* had applied *Abood* to hold "that the cost of certain publications that were not germane to collective-bargaining activities could *not* be assessed against dissenting union members." 521 U.S. at 473 (emphasis added).

Despite the fact that *Wileman* thus could not have broadly immunized all non-ideological assessments from First Amendment scrutiny, the Solicitor General argues the contrary based on a single sentence in the paragraph that follows *Wileman*'s discussion of *Lehnert*. See U.S. Br. 16 (emphasizing *Wileman*'s statement that "*in any event*, the assessments are not used to fund ideological activities" (emphasis added)). Not only would any such statement in *Wileman* be dictum (because the question was not remotely presented in that case), but the sentence in question simply distinguishes the specific holdings of *Abood* and *Keller*, as is plain when it is read in context.[28]

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[27] The government admitted as much in *Wileman*. See Br. of U.S., No. 95-1184, at 22-23 ("Otherwise stated, unions may utilize the dues of dissenting employees for expressive activities, so long as those activities are germane to the unions' statutory role under the labor laws.").

[28] The Court explained:

> As we pointed out in *Keller*, "*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund

2. If there were any doubt that the *Abood* principle extends to non-ideological activities, it was put to rest in two post-*Wileman* decisions. *Air Line Pilots Ass'n* v. *Miller*, 523 U.S. 866 (1998), held that non-union members who have not agreed to arbitration procedures may raise agency-fee objections directly in court. The Court relied substantially on employees' First Amendment interest in not being compelled to finance objectionable union activities, a category in no way restricted to "ideological" activities:

> agency fees assessed by public-employee unions "must (1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

523 U.S. at 874 (quoting *Lehnert*, 500 U.S. at 519).

Subsequently, *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), held that students at public universities have a First Amendment interest in not paying fees to finance speech by organizations to which they object, including organizations

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> activities of an ideological nature which fall outside of those areas of activities." 496 U.S. 1 at 13-14. *This test* is clearly satisfied in this case 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.

521 U.S. at 473 (emphasis added). The government's argument (Br. 16 n.9, 30) that this passage from *Wileman* establishes a disjunctive test – immunizing from First Amendment scrutiny assessments for activities that are *either* germane *or* non-ideological – is implausible as well. On that view, the First Amendment would not be implicated at all if the government required a group to finance ideological "Buy American" advertising programs germane to an effort to support American industries, or forced another group to finance ideological advertisements urging support for Democrats or Republicans germane to an effort to promote stability of the two-party system.

that do not engage in political or ideological activities.[29] Particularly relevant here, the Court explained:

> The proposition that students who attend the University cannot be required to pay subsidies for the speech of other students without some First Amendment protection follows from the *Abood* and *Keller* cases. * * * It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him.

Id. at 232. See also *id.* at 223 (funding included "Future Financial Gurus of America").[30]

3. The Solicitor General's argument that all non-ideological assessments are immune from First Amendment scrutiny conflicts not only with *Abood* and its progeny, but also with this Court's commercial speech jurisprudence. The government presumably concedes, as it must, that a compelled assessment to fund ideological advertising would trigger First Amendment scrutiny. But see *supra* at 35-36 n.28 (discussing the government's apparent position that *all* germane activities are *per se* constitutional, even if used to fund solely ideological speech). This case, of course, involves not a

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[29] Of note, three members of the *Wileman* majority – Justices O'Connor, Kennedy, and Ginsburg – joined the Court's opinions in both *Southworth* (per Kennedy, J.) and *Miller* (per Ginsburg, J.).

[30] Rather than importing the "germaneness" test of *Abood*, the Court in *Southworth* ultimately held that the student fees must be apportioned on a viewpoint-neutral basis in light of the unique context of "the public university setting" in which "the State undertakes to stimulate the whole universe of speech and ideas." 529 U.S. at 232. No parallel concerns regarding application of the "germaneness" test are present in this case, where there is no governmental program to which the assessment could even arguably be germane, and where there is no possible argument that *all* speech would be "germane."

political or ideological message but a commercial one, which could conceivably trigger a lesser degree of First Amendment scrutiny under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980). See also, *e.g.*, *44 Liquormart* v. *Rhode Island*, 517 U.S. 484 (1996). But see *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410 (1993). But the basic principle is the same: United Foods has a First Amendment interest *of some degree* in not associating with, or fostering, a message with which it disagrees, no matter whether the message is ideological or instead purely commercial. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (decisively rejecting the conclusion that commercial speech "is wholly outside the protection of the First Amendment"). The government's position that assessments for non-ideological purposes are *per se* valid as "economic regulations" without further inquiry is therefore insupportable.[31]

Indeed, this case directly implicates the concerns that led this Court to reverse course in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), and assign First Amendment value to commercial speech. Because "[i]t is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed," "the free flow of commercial information is indispensable." 425 U.S. at 765. The singular design of the

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[31] Nor is United Foods' First Amendment interest diluted significantly by the fact that respondent has been compelled to finance advertising rather than required to speak directly. See *Buckley* v. *Valeo*, 424 U.S. 1, 16 (1976) ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."). Indeed, *Virginia State Board*, *Central Hudson*, and *44 Liquormart*, to name just a few examples, all involved paid advertising. Cf. *Buckley* v. *American Constitutional Law Found.*, 525 U.S. 182 (1999) (invalidating restriction on paid petition circulators).

Mushroom Order, by contrast, is to tip the scales in favor of a commercial message – generic advertising favoring small producers – that would not otherwise prevail. That the specific message financed by United Foods' contributions is selected by respondent's *competitors* makes the assessment all the more inimical to First Amendments values. Cf. *44 Liquormart*, 517 U.S. at 501 (plurality opinion of Stevens, Kennedy, and Ginsburg, JJ.) (when regulation of commercial speech is not based on "preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands").[32]

IV. The Mushroom Assessment Is Not Immune From Scrutiny As "Government Speech."

The "government speech" defense raised by the Solicitor General is not properly presented because it was not "pressed in" or "passed on by" either of the lower courts, nor is it fairly included within the question presented. Furthermore, even if the Mushroom Council engages in "government speech," that fact does not defeat United Foods' First Amendment claim, which is directed at the compulsion of being required to support and associate with the Council's message. In any event, the Council's operations and promotional activities are overwhelmingly private, not governmental, and therefore cannot fairly be said to constitute "government speech."

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[32] As the foregoing makes clear, respondent's view is that the Sixth Circuit's judgment can and should be affirmed on the basis of *Wileman*. That said, a number of the government's arguments – particularly its contention that, contrary to the Court's understanding in *Wileman*, advertising assessments are not integrally related to non-speech-related aspects of marketing orders – suggest that it would be appropriate to reconsider *Wileman*. To the extent the Court elects to do so, respondent would of course prevail on that basis as well.

A. No Question Of "Government" Speech Is Properly Presented In This Case.

The Solicitor General's concession that "[t]he argument that the generic advertising program for mushrooms is permissible government speech [was] not raised or addressed below" (Br. 32 n.19) should be the end of the matter. Whether the issue is fairly included within the question presented or not is beside the point: this Court "may address a question properly presented in a petition for certiorari *if* it was 'pressed [in] or passed on' by the Court of Appeals." *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (quoting *United States* v. *Williams*, 504 U.S. 36, 42 (1992)) (emphasis added). See also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993) (describing the "prudential rule [that] precludes our review of an issue that 'was not pressed or passed upon below'").[33]

Furthermore, the government speech argument is not "fairly included" within the Court's grant of certiorari. Although the issue may "literally" fall within the question presented, which asserts that the mushroom assessment does not "violate the First Amendment" (Pet. i), the same would be true if the question had broadly asserted that "the Sixth Circuit erred." The relevant point is that neither the certiorari

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[33] The government's reliance (Br. 32 n.19) on *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), in which the question whether Amtrak was a state actor "was addressed by the court below" (*id.* at 379), is therefore misplaced. Moreover, as the *Lebron* majority emphasized, the state action theory was "closely related" to, and indeed had to be resolved "prior to," the argument raised in the petition for certiorari. *Id.* at 381-82. Here, by contrast, the government seeks to raise an issue that, as the Solicitor General admits (Br. 13, 32), is entirely "independent of" the arguments raised and addressed below. Indeed, the government's argument that the mushroom assessment finances government "speech" is in considerable tension with the *Wileman*-based argument that the assessment merely constitutes "economic regulation."

petition nor the decision of the court of appeals adverts to this issue directly or even obliquely.[34] To the contrary, the petition principally relies on *Wileman* (in which the government *disavowed* the government speech theory (see 521 U.S. at 482 n.2 (Souter, J., dissenting))) and asserts that the decision below conflicts with *United States* v. *Frame*, 885 F.2d 1119 (CA3 1989), *cert. denied*, 493 U.S. 1094 (1990) (which *rejected* the government speech theory in the context of the assessment for beef). See Pet. 8-11; cf. *Lebron*, 513 U.S. at 380-81 (petition's discussion of circuit conflict relevant to scope of question presented). The court of appeals decision is similarly limited to an analysis of *Wileman*.

Adherence to this Court's firm practice of reaching only those questions that are properly presented is particularly appropriate in this case. As the Court has recently reiterated, the determination whether the Mushroom Council is a governmental entity would be a "'necessarily fact-bound inquiry.'" *Brentwood Acad.* v. *Tennessee Sec. Sch. Athl. Ass'n*, No. 99-901, slip op. at 9 (Feb. 20, 2001) (quoting *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 935 (1982)). Factors such as the degree of federal oversight of the Council's operations, the independence of the Mushroom Council's private members in shaping advertising programs, and whether and to what extent the advertising is issued in the name of a private, rather than governmental, entity would all be relevant. But because petitioners never raised a government speech defense in the lower courts, no record was developed on any of those points.[35] At bottom, the government seeks advantage in its

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[34] The petition did not even reproduce as "relevant" several of the statutory provisions on which the "government speech" argument assertedly rests. Compare U.S. Br. pt. II (citing 7 U.S.C. § 7401(a)(10), (b)(8), (b)(11)) with Pet. 24a-28a (not reproducing those provisions).

[35] Indeed, based on the government's objection, the administrative law judge rejected United Foods' request to have a developed record from a parallel administrative challenge to the mushroom assessment adopted in this case. See Order Granting Motion To Stay Pro-

own default by attempting to circumvent respondent's right to discovery on a fundamentally fact-bound defense.[36] The Court accordingly should not reach the merits of the government speech argument in this case.

If the Court does reach the issue, it should hold (for the reasons addressed in the next sections) that the mushroom assessment is not immune from First Amendment scrutiny as "government speech."

B. The Government's Argument Misapprehends The Nature Of Respondent's Claim.

When the government *itself* speaks (whether through its officials or through the expenditure of public funds) it has the broad power to determine what message and viewpoint it will convey. See *Legal Servs. Corp.* v. *Velazquez*, No. 99-603, slip op. at 6-7 (Feb. 28, 2001). That conclusion follows from the broader principle that the government generally may expend funds through "speech and other expression to advocate

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ceedings, No. 96-1252, *United States* v. *United Foods*, at 4 (W.D. Tenn. Feb. 11, 1997).

[36] An example illustrates the danger of this Court attempting to address this defense based on unsupported assertions or anecdotal evidence regarding the Mushroom Order's functioning. The government advised this Court in its opening brief (Br. 41-42 & n.27) that the Order includes "political controls" that "provide meaningful relief" because producers may terminate the mushroom program through a referendum vote. In support of that statement, the Solicitor General explained that "the generic advertising program for pork was to be discontinued by the Secretary of Agriculture after a referendum in which a majority of park producers voted against the program," citing not the record in this case but instead an article in the *Washington Post*. *Id.* 42 n.27 (quoting William Claiborne, *Hog Producers Defeat "Pork Checkoff*," WASH. POST., Jan. 16, 2001, at A2). That turned out to be inaccurate. The U.S.D.A. subsequently "reversed a decision by the Clinton administration to honor the [referendum]," having negotiated changes in the program with a subset of producers. William Claiborne, *Hog Farmers Vow To Sue USDA – Reversal On Vote Against Promotion Fee Stirs Anger*, WASH. POST, Mar. 2, 2001, at A7, 2001.

and defend its own policies." *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

That rationale is simply inapplicable to the First Amendment claim in this case. It is common ground that the government speech doctrine could be advanced to oppose a claim brought by a member of the Mushroom Council that the Mushroom Order constitutes viewpoint discrimination – for example, by limiting negative statements about other commodities, see 7 C.F.R. § 1209.40(d). It is also common ground that, under the government speech doctrine, the federal government could, without raising a First Amendment concern, create, staff, and finance through general tax revenues a public body to engage in generic mushroom promotion. Indeed, the government likely could fund this very program if funded through *voluntary* contributions. See 7 C.F.R. § 1209.50(d) (Council may accept voluntary contributions).

Respondent's claim is very different. United Foods complains that the federal government is compelling *it* to support – effectively to finance and associate with – the Mushroom Council's speech activities. Unlike an allegation that the government is engaging in viewpoint discrimination in expending its own resources, respondent's claim is one both of compelled speech and of compelled association.[37] On the So-

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[37] Respondent's claim is not undermined by the fact that it is compelled to associate only for the purpose of speech rather than a broader array of collective activities. To the contrary, the fact that the Mushroom Order involves virtually no non-speech-related activities establishes that it must be scrutinized as a regulation of speech. *E.g.*, *Lehnert*, 500 U.S. at 522 (plurality) ("The burden on freedom of expression is particularly great where, as here, the compelled speech is in a public context."); *id.* at 560 (Scalia, J., concurring) (if a "newsletter [funded by compelled assessments] is inherently communicative," the fact that it "communicates * * * 'for the benefit of all' does not lessen the First Amendment injury to those who do not agree" (citation omitted)); *Ellis* v. *Brotherhood of Ry., Airline & Steamship Clerks*, 466

licitor General's view that the "government speech" doctrine automatically defeats all such claims, it is difficult to understand why the government would not have carte blanche to compel, without any First Amendment inquiry at all, the nation's 300 leading competitive runners to pay a special assessment to finance a costly scheme by the Surgeon General to advertise jogging's benefits to health and sexual vitality – akin to the Mushroom Council's suggestion that mushrooms are an aphrodisiac – on billboards, on television, in skywriting, and perhaps even on every pair of running shorts.

Furthermore, unlike instances in which a complaining party voluntarily associates itself with a governmental program or is subject to broad economic regulation that always compels association to some degree, the federal government compels United Foods to associate with other producers for the singular purpose of financing speech to which it objects.[38] Such a program requires First Amendment scrutiny, which it concededly cannot survive. As the Third Circuit reasoned in rejecting the invocation of the government speech doctrine with regard to the beef assessment:

U.S. 435, 456 (1984) ("The First Amendment concerns with regard to publications and conventions are more serious; both have direct communicative content and involve the expression of ideas."). In point of fact, the First Amendment interest in this case is substantially greater than in *Abood* and its progeny because the generic promotions funded by the mushroom assessment directly undermine United Foods' constitutionally protected commercial promotions of its Pictsweet brand.

[38] Compare, *e.g.*, *Legal Servs. Corp.* v. *Velazquez*, No. 99-603 (Feb. 28, 2001) (clients voluntarily associate themselves with legal services program); *Wileman*, 521 U.S. 457 (heavy regulation of industry marketing); *Southworth*, 529 U.S. 217 (students voluntarily attend university); *Rust* v. *Sullivan*, 500 U.S. 173 (1991) (doctors voluntarily associate themselves with Title X program); *Abood*, 431 U.S. 209 (employees voluntarily associate themselves with agency-shop employer).

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. See *Wooley* v. *Maynard*, 430 U.S. at 721 (Rehnquist, J., dissenting). In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

Frame, 885 F.2d at 1132.[39]

C. The Mushroom Assessment Is Not Properly Immunized From First Amendment Scrutiny As Government Speech.

In any event, on a proper understanding, the Mushroom Council's activities are private rather than governmental speech; the fact that contributions are exacted under the authority of the U.S.D.A. (see U.S. Br. 38-39) only means that there is sufficient state action to trigger the First Amendment. As in *Southworth*, the speech in this case "springs from the

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[39] It is no answer, of course, that observers – *e.g.*, those who read the Mushroom Council's promotions – may be unaware of the compelled association or, if aware, may not regard United Foods as endorsing the Council's activities because the assessment is avowedly involuntary. The right of association, encompassing as it does a freedom of belief and a right *not* to associate, has never turned on how "obvious" the compelled association was. Cf. *Wooley* v. *Maynard*, 430 U.S. 705 (1977) (unconstitutional to compel display of state motto on license plate, notwithstanding that motto was obviously statement of the state rather than the driver); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (unconstitutional to compel flag salute, notwithstanding that act might be obviously involuntary).

initiative" of private parties who "give it purpose and content." 529 U.S. at 229.

1. The Council's Promotional Activities Are Private, Not Governmental. The Mushroom Council cannot fairly be described as a governmental entity. Unlike a case such as *Brentwood*, slip op. at 12 n.4, "public officials" do *not* "control operation" of the Council. An industry referendum not only created the program but could terminate it as well, even over the Secretary of Agriculture's objection. 7 C.F.R. §§ 1209.71(3), .300 *et seq*. Mushroom producers and importers both nominate and constitute the membership of the Mushroom Council. *Id.* §§ 1209.31, .32. No government officials sit on the Council, and the Secretary's power to control its membership is limited to the formal act of appointment or the power of removal in exceptional circumstances. *Id.* §§ 1209.33, .35(c). Funding for the Council's activities comes entirely from assessments on mushroom producers and importers, not tax revenues or even "user fees" used to finance a variety of activities. *Id.* §§ 1209.50, .51.[40] The Council also uses assessed funds to reimburse the federal government for any costs it incurs with respect to the program. See U.S.D.A., Agric. Mktg. Serv., *Mushroom Promotion, Research, and Consumer Information Order*, *supra*.

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[40] The cases cited by the government (Br. 42-43 n.28) involving "user fees" did not address any First Amendment question and accordingly are inapposite. The Solicitor General's further reliance (*id.* 43) on *Southworth*'s statement that funds from "tuition dollars" could support government speech misunderstands that decision, which in reality seriously undermines petitioners' position. The *Southworth* majority described student fees, which are targeted to funding of private speech by student organizations, as incompatible with a "government speech" analysis, in contrast to general tuition dollars, which finance all of the university's educational endeavors. 529 U.S. at 229. The assessment in this case, which is targeted to financing mushroom advertising, is far more analogous to the former.

The Council's promotional activities also further a private, not governmental, interest. As in *Legal Services Corp.* (slip op. at 7), this program "was designed to facilitate private speech, not to promote a governmental message." The Council's private membership is solely responsible for creating a budget, as well as (particularly relevant here) designing and implementing all of the promotional programs; the Secretary of Agriculture has no such power. 7 C.F.R. §§ 1209.40, .50.

The Council furthermore may engage only in activities related to the research and promotion of mushrooms – any other activities of a governmental or quasi-governmental nature either are outside the bounds of its authority or are expressly forbidden. In particular, in direct contrast to what would be regarded as the paradigmatic governmental activity of seeking policy changes, the Council's funds may not "in any manner be used for the purpose of influencing legislation or governmental policy or action" other than suggesting amendments to the Mushroom Order and proposing possible "voluntary grade and quality standards for mushrooms." 7 C.F.R. § 1209.53.

The Council furthermore represents itself, and particularly its promotional activities, as private rather than governmental. Thus, press accounts of promotional activities by the Council over the past year variously describe it as "a trade association representing mushroom growers," "a promotional organization," "an organization that promotes the use of cultivated mushrooms," and "a mushroom growers trade group." Linda Giuca, *Flourishing Fungi*, HARTFORD COURANT, Jan. 31, 2001, at G1; Melissa Clark, *Food Chain*, N.Y. TIMES, Nov. 1, 2000, at F12; Teresa J. Farney, *Specialty Mushrooms Take Center Stage*, CINCI. ENQUIRER, June 4, 2000, at H3; Noi Mahoney, *AACC Creating Frugal Kitchens*, CAPITAL (ANNAP.), Apr. 18, 2000, at B1.[41] Nor does the Council's princi-

[41] The Council's advertisements themselves are not compiled in the record.

pal promotional venture, <<*www.mushroomcouncil.com*>>, suggest that it promulgates a governmental message.

The Solicitor General argues to the contrary (Br. 37-40) based principally on the "findings" of the Mushroom Act and the FAIR Act that Congress seeks through commodity promotion programs to further the interests of producers. But that is no more than the assertion that *every* congressional enactment, each one of which seeks to further some interest, is "governmental" rather than "private." The more salient point – which is entirely consistent with the congressional findings – is that the Act seeks to achieve this result through promotional advertising funded, designed, and administered by the industry participants for their own benefit. There is no serious argument that such activities have traditionally been undertaken by the government. Moreover, it is apparent that the "findings" were drafted specifically in order to circumvent judicial scrutiny of commodity promotion programs. See 142 Cong. Rec. S3070 (daily ed. Mar. 28, 1996) (Sen. Feingold) (FAIR Act findings "are not indicative of the views of more than a handful of farm bill conferees," but rather were added by the staff of the conference committee to preempt "the first amendment challenges to these programs"; describing manipulation of legislative process as "shameful" and "irresponsible"); cf. *Brentwood*, slip op. at 11 ("the time is long past when" the degree of governmental involvement that would lead to First Amendment liability was "attested frankly").

2. The Secretary of Agriculture's Oversight Role Is Minimal. The Solicitor General's principal argument in support of the "government speech" theory is that the Secretary of Agriculture has oversight authority over the Council's decisions. There is no record support for that claim. See *supra* at 41-42. Furthermore, all of the publicly available materials establish the contrary. As the General Accounting Office has explained, U.S.D.A. views its role as simply "ensuring compliance with the authorizing legislation and the agency's related orders." G.A.O., *Agricultural Marketing: Comparative*

Analysis of U.S. and Foreign Promotion and Research Programs 3 (1995). U.S.D.A.'s "Guidelines for AMS [Agricultural Marketing Service] Oversight of Commodity Research and Promotion Programs" state that AMS will only review submitted materials to ensure that they "are in compliance with the applicable legislative authority." 64 Fed. Reg. 70682, 70686 (1999). The only substantive check imposed by the U.S.D.A. is that promotional programs may not be "disparaging to another commodity or false and misleading," or "derogatory to individuals with respect to ethnicity, gender, race, physical abilities, or religion." *Id.*

Moreover, U.S.D.A. "is *not* responsible for evaluating program effectiveness; that responsibility is left to the individual [commodity] boards." G.A.O., *Agricultural Marketing: Federally Authorized Commodity Research and Promotion Programs* 2 (1993) (emphasis added). To the extent that the U.S.D.A.'s Inspector General uncovers problems with the programs, "AMS reports the OIG's findings to the boards and relies on the boards to correct any problems identified." *Id.* at 7. Indeed, U.S.D.A. "think[s] it is *important* that the industry themselves make the determination of how these programs operate" and therefore limits itself to determining that "the industry stays within the enabling legislation." Testimony of Lon Hatamiya, Admin'r of A.M.S., *Review of the National Soybean Checkoff Program*, Hrg. Before the Subcomm. on General Farm Commodities of the House Comm. on Agric., 104th Cong., 2d Sess. 10 (July 31, 1996) (emphasis added). As a result, "[b]eyond establishing the legal framework for operations and setting certain informational standards, federal input into program operations has been minimal." Ronald W. Ward, *supra*, at 35. See also Charles D. Lambert, *An Analytical Framework for Policy Issues: Response*, *in* COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY, *supra*, at 105, 112 ("Government's role is simply to see that the programs are collected uniformly and administered according to the legislation that established the checkoff programs.").

Limited federal involvement reflects the design of Congress, which regards research and promotion programs including the Mushroom Act as "designed and implemented by the producers themselves." *Mushroom Act Hearings*, *supra*, at 81 (Rep. Emerson). As the Congressional Report on the various research and promotion programs enacted by Congress in 1990 explains in the very first sentence on the Mushroom Act, the statute was intended to "enable producers of fresh mushrooms to develop, finance, and carry out" the program. *Mushroom Act Report*, *supra*, at 44. The Mushroom Act is thus nothing more than, as is stated in its text, a "self-help" measure enforced through the threat of federal sanction. 7 U.S.C. § 7401(b).[42]

The fact that there is no ongoing federal oversight of these programs also serves to illustrate that the Mushroom Order lacks the "political controls" that ameliorate First Amendment concerns, *Legal Servs. Corp.*, slip op. at 7, found in "government speech" cases. To the contrary, the determination whether the assessment shall be continued rests squarely in the hands of a majority of United Foods' competitors. The Bill of Rights was intended in large part, of course, precisely to serve as a check against the untrammeled will of the majority.

The "government speech" doctrine, even if properly presented in this case, accordingly does not immunize the Mushroom Council's activities from First Amendment scrutiny.

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[42] Supporters of the omnibus statute that included the Mushroom Act similarly explained that it would "not add to the Federal bureaucracy. All we are doing is allowing these commodity groups to establish and administer their own research and marketing programs, to develop uses and find customers for their products." 135 Cong. Rec. S15068 (daily ed. Nov. 6, 1989) (Sen. Fowler). They specifically recognized that, "[w]hile the Department of Agriculture would provide oversight and ensure compliance, the checkoff program would be run by producers at the State and national level." 136 Cong. Rec. S10708 (daily ed. July 26, 1990) (Sen. Cochran).

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

Provisions of the Mushroom Act, 7 U.S.C. § 6101 *et seq.*:

§ 6104. Required terms in orders

(a) In general. Each order issued under this subtitle 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.

(B) Membership. Except as provided for in paragraph (2), 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, except that no more than one member may be appointed to the Council from nominations submitted by any one producers or importer.

(2) Appointments.

(A) In general. In making appointments, the Secretary shall take into account, to the extent practicable, the geographical distribution of mushroom production throughout the United States, and the comparative volume of mushrooms imported into the United States.

(B) Units. In establishing such geographical distribution of mushroom production, a whole State shall be considered as a unit and such units shall be organized into 4 regions that shall fairly represent the geographic distribution of mushroom production within the United States.

(C) Importers. Importers shall be represented as one region, which shall be separate from the regions established for mushrooms produced in the United States.

(D) Members per region. The Secretary shall appoint one member from each region if such region produces or imports, on average, at least 35,000,000 pounds of mushrooms annually.

(E) Additional members. Subject to the nine-member limit on the number of members on the Council provided in paragraph (1), the Secretary shall appoint an additional member to the Council from a region for each additional 50,000,000 pounds of production or imports per year, on average, within the region.

(F) For purposes of this paragraph, in determining average annual mushroom production in each of the 4 regions of the United States established under this paragraph, the Secretary shall only consider mushrooms produced by producers covered by this subtitle, as defined in section 1923(11) [*7 USCS § 6102*(11)].

(G) Failure to nominate. If producers and importers fail to nominate individuals for appointment, the Secretary may appoint members on a basis provided for in the order.

(3) Terms; compensation.

(A) Terms. The term of appointment to the Council shall be for 3 years, except that the initial appointments shall to the extent practicable be proportionately for 1-year, 2-year, and 3-year terms.

(B) Compensation. Council members shall serve without compensation but shall be reimbursed for their expenses incurred in performing their duties as members of the Council.

(c) Powers and duties of the Council. The order shall define the powers and duties of the Council, which shall include the following powers and duties--

(1) to administer the order in accordance with its terms and provisions;

(2) to make rules and regulations to effectuate the terms and provisions of the order;

(3) to appoint members of the Council to serve on an executive committee;

(4) to propose, receive, evaluate, approve and submit to the Secretary for approval under subsection (d) 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;

(6) to receive, investigate, and report to the Secretary complaints of violations of the order;

(7) to recommend to the Secretary amendments to the order; and

(8) to invest, pending disbursement under a plan or project, funds collected through assessments authorized under this subtitle only in--

(A) obligations of the United States or any agency thereof;

(B) general obligations of any State or any political subdivision thereof;

(C) any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System; or

(D) obligations fully guaranteed as to principal and interest by the United States,

except that income from any such invested funds may only be used for any purpose for which the invested funds may be used.

(d) Plans and budgets.

(1) Submission to Secretary. The order shall provide that the Council shall submit to the Secretary for approval any plan or project of promotion, research, consumer information, or industry information.

(2) Budgets. The order shall require the Council to submit to the Secretary for approval budgets on a fiscal year basis of its anticipated expenses and disbursements in the implementation of the order, including projected costs of promotion, re-

search, consumer information, and industry information plans and projects.

(3) Approval by Secretary. No plan or project of promotion, research, consumer information, or industry information, or budget, shall be implemented prior to its approval by the Secretary.

(e) Contracts and agreements.

(1) In general. To ensure efficient use of funds, the order shall provide that the Council may enter into contracts or agreements for the implementation and carrying out of plans or projects of mushroom promotion, research, consumer information, or industry information, including contracts with producer organizations, and for the payment of the cost thereof with funds received by the Council under the order.

(2) Requirements. Any such contract or agreement shall provide that--

(A) the contracting party shall develop and submit to the Council a plan or project together with a budget or budgets that shall show estimated costs to be incurred for such plan or project;

(B) the plan or project shall become effective on the approval of the Secretary; and

(C) the contracting party shall keep accurate records of all of its transactions, account for funds received and expended, make periodic reports to the Council of activities conducted, and make such other reports as the Council or the Secretary may require.

(3) Producer organizations. The order shall provide that the Council may contract with producer organizations for any other services. Any such contract shall include provisions comparable to those provided in subparagraphs (A), (B), and (C) of paragraph (2).

(f) Books and records of Council.

(1) In general. The order shall require the Council to--

(A) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the Secretary may prescribe;

(B) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe; and

(C) account for the receipt and disbursement of all funds entrusted to the Council.

(2) Audits. The Council shall cause its books and records to be audited by an independent auditor at the end of each fiscal year, and a report of such audit to be submitted to the Secretary.

(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 by 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 prescribed by the order.

(C) Direct marketing. Any person marketing mushrooms of that person's own production directly to consumers shall remit the assessments on such mushrooms directly to the Council in the manner prescribed in the order.

(2) Rate of assessment. The rate of assessment shall be determined and announced by the Council and may be changed by the Council at any time. The order shall provide that the rate of assessment--

(A) for the first year of the order, may not exceed one-quarter cent per pound of mushroom;

(B) for the second year of the order, may not exceed one-third cent per pound of mushroom;

(C) for the third year of the order, may not exceed one-half cent per pound of mushroom; and

(D) for the following years of the order, may not exceed one cent per pound of mushrooms.

(3) Use of assessments. The order shall provide that the assessments shall be used for payment of the expenses in implementing and administering this subtitle, with provision for a reasonable reserve, and to cover those administrative costs incurred by the Secretary in implementing and administering this subtitle, except for the salaries of Government employees incurred in conducting referenda.

(4) Limitation on collection. No assessment may be collected on mushrooms that a first handler certifies will be exported as mushrooms.

(h) Prohibition. The order shall prohit 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 subtitle 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.).

(i) Books and records.

(1) In general. The order shall require that each first handler and importer of mushrooms maintain, and make available for inspection, such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order.

(2) Availability to Secretary. Such information shall be made available to the Secretary as is appropriate for the administration or enforcement of this subtitle, the order, or any regulation issued under this subtitle.

(3) Confidentiality.

(A) In general. Except as otherwise provided in this subtitle, all information obtained under paragraph (1) shall be kept

confidential by all officers and employees of the Department and the Council, and agents of the Council, and only such information so obtained as the Secretary considers relevant may be disclosed to the public by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order.

(B) Limitations. Nothing in this paragraph may be construed to prohibit--

(i) the issuance of general statements, based on the reports, of the number of persons subject to the order or statistical data collected therefrom, which statements do not identify the information furnished by any person; or

(ii) the publication, by direction of the Secretary, of the name of any person violating the order, together with a statement of the particular provisions of the order violated by such person.

(4) Availability of information.

(A) In general. Except as otherwise provided in this subtitle, information obtained under this subtitle may be made available to another agency of the Federal Government for a civil or criminal law enforcement activity if the activity is authorized by law and if the head of the agency has made a written request to the Secretary specifying the particular information desired and the law enforcement activity for which the information is sought.

(B) Penalty. Any person knowingly violating this subsection, on conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for not more than 1 year, or both, and if an officer or employee of the Council or the Department, shall be removed from office.

(5) Withholding information. Nothing in this subtitle shall be construed to authorize the withholding of information from Congress.

(j) Other terms and conditions. The order also shall contain such terms and conditions, not inconsistent with this subtitle,

as are necessary to effectuate this subtitle, including provisions for the assessment of a penalty for each late payment of assessments under subsection (g).

* * * *

§ 6105. Referenda

(a) Initial referendum.

(1) In general. Within the 60-day period immediately preceding the effective date of an order issued under section 1924(b) [*7 USCS § 6103*(b)], the Secretary shall conduct a referendum among mushroom producers and importers to ascertain whether the order shall go into effect.

(2) Approval of order. The order shall become effective, as provided in section 1924(b) [*7 USCS § 6103*(b)], if the Secretary determines that the order has been approved by a majority of the producers and importers voting in the referendum, which majority, on average, annually produces and imports into the United States more then 50 percent of the mushrooms annually produced and imported by all those voting in the referendum.

(b) Succeeding referenda.

(1) Determination concerning order.

(A) In general. Effective 5 years after the date on which an order becomes effective under section 1924(b) [*7 USCS § 6103*(b)], the Secretary shall conduct a referendum among mushroom producers and importers to ascertain whether they favor continuation, termination or suspension of the order.

(B) Request for referendum. Effective beginning 3 years after the date on which an order becomes effective under section 1924(b) [*7 USCS § 1924*(b)], the Secretary, on request of a representative group comprising 30 percent or more of the number of mushroom producers and importers, may conduct a referendum to ascertain whether producers and importers favor termination or suspension of the order.

(2) Suspension or termination. If, as a result of any referendum conducted under paragraph (1), the Secretary determines that suspension or termination of an order is favored by a majority of the producers and importers voting in the referendum, 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, the Secretary shall--

(A) within 6 months after making such determination, suspend or terminate, as appropriate, collection of assessments under the order; and

(B) suspend or terminate, as appropriate, activities under the order in an orderly manner as soon as practicable.

(c) Manner. Referenda conducted pursuant to this section shall be conducted in such a manner as is determined by the Secretary.

Provisions of the Mushroom Order, 7 C.F.R. Pt. 201:

§ 1209.11 Mushrooms.

Mushrooms means all varieties of cultivated mushrooms grown within the United States and marketed for the fresh market, or imported into the United States and marketed for the fresh market, except such term shall not include mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed in such manner as the Council, with the approval of the Secretary, may determine.

* * * *

§ 1209.15 Producer.

Producer means any person engaged in the production of mushrooms who owns or shares the ownership and risk of loss of such mushrooms and who produces, on average, over 500,000 pounds of mushrooms per year.

* * * *

§ 1209.30 Establishment and membership.

(a) There is hereby established a Mushroom Council of not less than four or more than nine members. The Council shall be composed of producers appointed by the Secretary under § 1209.33, except that, as provided in paragraph (c), importers shall be appointed by the Secretary to the Council under § 1209.33 once imports, on average, reach at least 35,000,000 pounds of mushrooms annually.
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§ 1209.31 Nominations.

All nominations for appointments to the Council under § 1209.33 shall be made as follows:

(a) As soon as practicable after this subpart becomes effective, nominations for appointment to the initial Council shall be obtained from producers by the Secretary. In any subsequent year in which an appointment to the Council is to be made, nominations for positions whose terms will expire at the end of that year shall be obtained from producers, and as appropriate, importers, and certified by the Council and submitted to the Secretary by August 1 of such year, or such other date as approved by the Secretary.

(b) Nominations shall be made at regional caucuses of producers or importers, or by mail ballot as provided in paragraph (e), in accordance with procedures prescribed in this section.

(c) Except for initial Council members, whose nomination process will be initiated by the Secretary, the Council shall issue a call for nominations by February 1 of each year in which nominations for an appointment to the Council is to be made. The call shall include, at a minimum, the following information:

(1) A list by region of the vacancies for which nominees may be submitted and qualifications as to producers and importers.

(2) The date by which the names of nominees shall be submitted to the Secretary for consideration to be in compliance with paragraph (a) of this section.

(3) A list of those States, by region, entitled to participate in the nomination process.

(4) The date, time, and location of any next scheduled meeting of the Council, and national and State producer or

importer associations, if known, and of the regional caucuses, if any.

(d)(1) Except as provided in paragraph (e), nominations for each position shall be made by regional caucus in the region entitled to nominate for such position. Notice of such caucus shall be publicized to all producers or importers within the region, and to the Secretary, at least 30 days prior to the caucus. The notice shall have attached to it the call for nominations from the Council and the Department's equal opportunity policy. Except with respect to nominations for the initial appointments to the Council, the responsibility for convening and publicizing the regional caucus shall be that of the Council.

(2) All producers or importers within the region may participate in the caucus. However, if a producer is engaged in the production of mushrooms in more than one region or is also an importer, such person's participation within a region shall be limited to one vote and shall only reflect the volume of such person's production or imports within the applicable region.

(3) The regional caucus shall conduct the selection process for the nominees in accordance with procedures to be adopted at the caucus subject to the following requirements:

(i) There shall be two individuals nominated for each open position.

(ii) Each nominee shall meet the qualifications set forth in the call.

(iii) If a producer nominee is engaged in the production of mushrooms in more than one region or is also an importer, such individual shall participate within the region that such individual so elects in writing to the Council and such election shall remain controlling until revoked in writing to the Council.

(e) After the regional caucuses for the initial Council, the Council may conduct the selection of nominees by mail ballot in lieu of a regional caucus.

(f) When producers or importers are voting for nominees to the Council, whether through a regional caucus or a mail ballot, the following conditions shall apply:

(1) Voting for any open position shall be on the basis of:

(i) one vote per eligible voter; and

(ii) volume of on-average production or imports of the eligible voter within that region.

(2) Whenever the producers or importers in a region are choosing nominees for one open position on the Council, the proposed nominee with the highest number of votes cast and the proposed nominee with the highest volume of production or importers voted shall be the nominees submitted to the Secretary. If a proposed nominee receives both the highest number of votes cast and the highest volume of production or imports voted, then the proposed nominee with the second highest number of votes cast shall be a nominee submitted to the Secretary along with such proposed nominee receiving both the highest number of votes cast and the highest volume of production or imports voted.

(3) Whenever the producers or importers in a region are choosing nominees for more than one open position on the Council at the same time, the number of the nominations submitted to the Secretary shall equal twice the number of such open positions, and for each open position shall consist of the proposed nominee with the highest number of votes cast and the proposed nominee with the highest volume of production or imports voted with respect to that position, subject to the rule set out in paragraph (f)(2). An individual shall only be nominated for one such open position.

(4) Voters shall certify on their ballots as to their on-average production or import volume within the region involved. Such certification may be subject to verification.

(g)(1) The Secretary may reject any nominee submitted. If there are insufficient nominees from which to appoint members to the Council as a result of the Secretary's rejecting such nominees, additional nominees shall be submitted to the Secretary under the procedures set out in this section.

(2) Whenever producers or importers in a region cannot agree on nominees for an open position on the Council under the preceding provisions of this section, or whenever they fail to nominate individuals for appointment to the Council, the Secretary may appoint members in such manner as the Secretary, by regulation, determines appropriate.

* * * *

§ 1209.33 Appointment.

From the nominations made pursuant to § 1209.31, the Secretary shall appoint the members of the Council on the basis of representation provided for in § 1209.30, except that no more than one member may be appointed to the Council from nominations submitted by any one producer or importer.

* * * *

§ 1209.38 Powers.

The Council shall have the following powers:

(a) To receive and evaluate or, on its own initiative, develop and budget for proposed programs, plans, or projects to promote the use of mushrooms, as well as proposed programs, plans, or projects for research, consumer information, or industry information, and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To appoint or employ such individuals as it may deem necessary, define the duties, and determine the compensation of such individuals;

(d) To make rules and regulations to effectuate the terms and provisions of this subpart;

(e) To receive, investigate, and report to the Secretary for action complaints of violations of the provisions of this subpart;

(f) To disseminate information to producers, importers, first handlers, or industry organizations through programs or by direct contact using the public postal system or other systems;

(g) To select committees and subcommittees of Council members, including an executive committee whose powers and membership shall be determined by the Council, subject to the approval of the Secretary, and to adopt such bylaws and other rules for the conduct of its business as it may deem advisable;

(h) To establish committees which may include individuals other than Council members, and pay the necessary and reasonable expenses and fees for the members of such committees;

(i) To recommend to the Secretary amendments to this subpart;

(j) With the approval of the Secretary, to enter into contracts or agreements with national, regional, or State mushroom producer organizations, or other organizations or entities, for the development and conduct of programs, plans, or projects authorized under § 1209.40 and with such producer

organizations for other services necessary for the implementation of this subpart, and for the payment of the cost thereof with funds collected and received pursuant to this subpart. The Council shall not contract with any producer or importer for the purpose of mushroom promotion or research. The Council may lease physical facilities from a producer or importer for such promotion or research, if such an arrangement is determined to be cost effective by the Council and approved by the Secretary. Any contract or agreement shall provide that:

(1) the contractor or agreeing party shall develop and submit to the Council a program, plan, or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

(2) any such program, plan, or project shall become effective upon approval of the Secretary;

(3) the contracting or agreeing party shall keep accurate records of all of its transactions and make periodic reports to the Council of activities conducted, submit accountings for funds received and expended, and make such other reports as the Secretary or the Council may require; and the Secretary may audit the records of the contracting or agreeing party periodically; and

(4) any subcontractor who enters into a contract with a Council contractor and who receives or otherwise uses funds allocated by the Council shall be subject to the same provisions as the contractor;

(k) With the approval of the Secretary, to invest, pending disbursement pursuant to a program, plan, or project, funds collected through assessments provided for in § 1209.51, and any other funds received by the Council in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in

obligations fully guaranteed as to principal and interest by the United States;

(l) Such other powers as may be approved by the Secretary; and

(m) To develop and propose to the Secretary voluntary quality and grade standards for mushrooms, if the Council determines that such quality and grade standards would benefit the promotion of mushrooms.

* * * *

§ 1209.39 Duties.

The Council shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairperson and such other officers as may be necessary;

(b) To evaluate or develop, and submit to the Secretary for approval, promotion, research, consumer information, and industry information programs, plans, or projects;

(c) To prepare for each fiscal year, and submit to the Secretary for approval at least 60 days prior to the beginning of each fiscal year, a budget of its anticipated expenses and disbursements in the administration of this subpart, as provided in § 2109.50.

(d) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(e) To prepare and make public, at least annually, a report of its activities carried out, and an accounting for funds received and expended;

(f) To cause its financial statements to be prepared in conformity with generally accepted accounting principles and to be audited by an independent certified public accountant in accordance with generally accepted auditing standards at least once each fiscal year and at such other times as the Secretary may request, and submit a copy of each such audit to the Secretary;

(g) To give the Secretary the same notice of meetings of the Council as is given to members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(h) To submit to the Secretary such information as may be requested pursuant to this subpart;

(i) To keep minutes, books, and records that clearly reflect all the acts and transactions of the Council. Minutes of each Council meeting shall be promptly reported to the Secretary;

(j) To act as intermediary between the Secretary and any producer or importer;

(k) To follow the Department's equal opportunity/civil rights policies; and

(l) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, and industry information designed to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, develop new markets and uses for mushrooms, and to carry out

programs, plans, and projects designed to provide maximum benefits to the mushroom industry.

* * * *

§ 1209.40 Programs, plans, and projects.

(a) The Council shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, consumer information, and industry information with respect to mushrooms; and

(2) The establishment and conduct of research with respect to the sale, distribution, marketing, and use of mushrooms and mushroom products, and the creation of new products thereof, to the end that marketing and use of mushrooms may be encouraged, expanded, improved or made more acceptable. However, as prescribed by the Act, nothing in this subpart may be construed to authorize mandatory requirements for quality control, grade standards, supply management programs, or other programs that would control production or otherwise limit the right of individual producers to produce mushrooms.

(b) No program, plan, or project shall be implemented prior to its approval by the Secretary. Once a program, plan, or project is so approved, the Council shall take appropriate steps to implement it.

(c) Each programs, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Council to ensure that it contributes to an effective program of promotion, research, consumer information, or industry information. If it is found by the Council that any such pro-

gram, plan, or project does not contribute to an effective program of promotion, research, consumer information, or industry information, then the Council shall terminate such program, plan, or project.

(d) In carrying out any program, plan, or project, no reference to a brand name, trade name, or State or regional identification of any mushrooms or mushroom product shall be made. In addition, no program, plan, or project shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

* * * *

§ 1209.50 Budget and Expenses.

(a)(1) At least 60 days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Council shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

(i) a statement of objectives and strategy for each program, plan, or project;

(ii) a summary of anticipated revenue, with comparative data for at least one preceding year;

(iii) a summary of proposed expenditures for each program, plan, or project; and

(iv) staff and administrative expense breakdowns, with comparative data for at least one preceding year.

Each budget shall include a rate of assessment for such fiscal year calculated, subject to § 1209.51(b), to provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in paragraph (f). The Council may change such rate at any time, as provided in § 1209.51(b)(5).

(2)(i) Subject to paragraph (a)(2)(ii), any amendment or addition to an approved budget must be approved by the Sec-

retary, including shifting of funds from one program, plan, or project to another.

(ii) Shifts of funds which do not cause an increase in the Council's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

(b) The Council is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Council for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Council.

(c) The Council shall not use funds collected or received under this subpart to reimburse, defray, or make payment of expenditures incurred in developing, drafting, studying, lobbying on or promoting the legislation authorizing this subpart. Such prohibition includes reimbursement, defrayment, or payment to mushroom industry associations or organizations, producers or importers, lawyers, law firms, or consultants.

(d) The Council may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Council shall retain complete control of their use. The donor may recommend that the whole or a portion of the contribution be applied to an ongoing program, plan, or project.

(e) The Council shall reimburse the Secretary, from funds received by the Council, for administrative costs incurred by the Secretary in implementing and administering this subpart, except for the salaries of Department employees incurred in conducting referenda.

(f) The Council may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established, except that the funds in the reserve shall not exceed approximately one fiscal year's expenses. Such reserve funds may be used to defray any expenses authorized under this subpart.

(g) With the approval of the Secretary, the Council may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Council.

* * * *

§ 1209.51 Assessments.

(a) Any first handler initially purchasing, or otherwise placing into the current of commerce, mushrooms produced in the United States shall, in the manner as prescribed by the Council and approved by the Secretary, collect an assessment based upon the number of pounds of mushrooms marketed in the United States for the account of the producer, and remit the assessment to the Council.

(b) The rate of assessment effective during any fiscal year shall be the rate specified in the budget for such fiscal year approved by the Secretary, except that:

(1) The rate of assessment during the first year this subpart is in effect shall be one-quarter of one cent per pound of mushrooms marketed, or the equivalent thereof.

(2) The rate of assessment during the second year this subpart is in effect shall not exceed one-third of one cent per pound of mushrooms marketed, or the equivalent thereof.

(3) The rate of assessment during the third year this subpart is in effect shall not exceed one-half of one cent per pound of mushrooms marketed, or the equivalent thereof.

(4) The rate of assessment during each of the fourth and following years this subpart is in effect shall not exceed one cent per pound of mushrooms marketed, or the equivalent thereof.

(5) The Council may change the rate of assessment for a fiscal year at any time with the approval of the Secretary as necessary to reflect changed circumstances, except that any such changed rate may not exceed the level of assessment specified in paragraphs (b)(1), (2), (3), or (4), whichever is applicable.

(c) Any person marketing mushrooms of that person's own production to consumers in the United States, either directly or through retail or wholesale outlets, shall be considered a first handler and shall remit to the Council an assessment on such mushrooms at the rate per-pound then in effect, and in such form and manner prescribed by the Council.

(d) Only one assessment shall be paid on each unit of mushrooms marketed.

(e)(1) Each importer of mushrooms shall pay an assessment to the Council on mushrooms imported for marketing in the United States, through the U.S. Customs Service or in such other manner as may be established by rules and regulations approved by the Secretary.

(2) The per-pound assessment rate for imported mushrooms shall be the same as the rate provided for mushrooms produced in the United States.

(3) The import assessment shall be uniformly applied to imported mushrooms that are identified by the number, 0709.51.0000, in the Harmonized Tariff Schedule of the United States or any other number used to identify fresh mushrooms.

(4) The assessments due on imported mushrooms shall be paid when the mushrooms are entered or withdrawn for consumption in the United States, or at such other time as may be

established by rules and regulations prescribed by the Council and approved by the Secretary and under such procedures as are provided in such rules and regulations.

(5) Only one assessment shall be paid on each unit of mushrooms imported.

(f) The collection of assessments under this section shall commence on all mushrooms marketed in or imported into the United States on or after the date established by the Secretary, and shall continue until terminated by the Secretary. If the Council is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments on behalf of the Council and may hold such assessments until the Council is constituted, then remit such assessments to the Council.

(g)(1) Each person responsible for remitting assessments under paragraphs (a), (c), or (e) shall remit the amounts due from assessments to the Council on a monthly basis no later than the fifteenth day of the month following the month in which the mushrooms were marketed, in such manner as prescribed by the Council.

(2)(i) A late payment charge shall be imposed on any person that fails to remit to the Council the total amount for which the person is liable on or before the payment due date established under this section. The amount of the late payment charge shall be prescribed in rules and regulations as approved by the Secretary.

(ii) An additional charge shall be imposed on any person subject to a late payment charge, in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed in rules and regulations as approved by the Secretary.

(3) Any assessment that is determined to be owing at a date later than the payment due established under this section, due to a person's failure to submit a report to the Council by the payment due date, shall be considered to have been payable

on the payment due date. Under such a situation, paragraphs (g)(2)(i) and (g)(2)(ii) of this section shall be applicable.

(h) The Council, with the approval of the Secretary, may enter into agreements authorizing other organizations to collect assessments in its behalf. Any such organization shall be required to maintain the confidentiality of such information as is required by the Council for collection purposes. Any reimbursement by the Council for such services shall be based on reasonable charges for services rendered.

(i) The Council is hereby authorized to accept advance payment of assessments for the fiscal year by any person, that shall be credited toward any amount for which such person may become liable. The Council shall not be obligated to pay interest on any advance payment.

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§ 1209.52 Exemption from assessment.

(a) Persons that produce or import, on average, 500,000 pounds or less of mushrooms annually shall be exempted from assessment.

(b) To claim such exemption, such persons shall apply to the Council, in the form and manner prescribed in the rules and regulations.

(c) Mushrooms produced in the United States that are exported are exempt from assessment and are subject to such safeguards as prescribed in rules and regulations to prevent improper use of this exemption.

(d) Domestic and imported mushrooms used for processing are exempt from assessment and are subject to such safe-

guards as prescribed in rules and regulations to prevent improper use of this exemption.

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§ 1209.53 Influencing governmental action.

No funds received by the Council under this subpart shall in any manner be used for the purpose of influencing legislation or governmental policy or action, except to develop and recommend to the Secretary amendments to this subpart, and to submit to the Secretary proposed voluntary grade and quality standards for mushrooms.

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§ 1209.71 Suspension or termination.

(a) Whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall terminate or suspend the operation of this subpart or such provision thereof.

(b)(1) Five years after the date on which this subpart becomes effective, the Secretary shall conduct a referendum among producers and importers to determine whether they favor continuation, termination, or suspension of this subpart.

(2) Effective beginning three years after the date on which this subpart becomes effective, the Secretary, on request of a representative group comprising 30 percent or more of the number of mushroom producers and importers, may conduct a referendum to determine whether producers and importers favor termination or suspension of this subpart.

(3) Whenever the Secretary determines that suspension or termination of this subpart is favored by a majority of the mushroom producers and importers voting in a referendum

under paragraphs (b) (1) or (2) who, during a representative period determined by the Secretary, have been engaged in producing and importing mushrooms and who, on average, annually produced and imported more than 50 percent of the volume of mushrooms produced and imported by all those producers and importers voting in the referendum, the Secretary shall:

(i) suspend or terminate, as appropriate, collection of assessments within six months after making such determination; and

(ii) suspend or terminate, as appropriate, all activities under this subpart in an orderly manner as soon as practicable.

(4) Referenda conducted under this subsection shall be conducted in such manner as the Secretary may prescribe.