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 *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground."[1] Mindful of this trend, The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties, which threaten the reservation of power to the citizenry that underlies our constitutional system.

This case implicates one of the most profound individual liberties, the right to free speech, and the corollary right not to speak. Laws compelling contributions to generic advertising campaigns are of particular concern to the Liberty Project because they undermine this crucial right. Because of the Liberty Project's strong interest in protection of citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641

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[1]Petitioners and respondents both have consented to the filing of this *amicus* brief. Counsel for respondent has informed *amicus* that a letter of consent has previously been filed with the Court. Petitioner's letter of consent is being lodged with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* attests that no counsel for a party had any role in authoring this Brief, and no outside party has made a monetary contribution for its preparation or submission.

(1994). Compelling persons to fund speech violates this basic principle.

The Court therefore has consistently subjected compelled speech, including compelled contributions, to rigorous scrutiny under the First Amendment. The government's suggestion that *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), categorically exempts all compelled contributions used to fund non-ideological speech from the First Amendment is belied by both the factual context of *Wileman* and the Court's caselaw involving compelled contributions.

First Amendment scrutiny of the compelled contributions here requires invalidating them, and this reading is consistent with *Wileman*. The Department of Agriculture's requirement that mushroom producers contribute funds to support the generic advertising of mushrooms does not serve a substantial governmental interest and is not narrowly tailored to serve even the government's alleged interest.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES RIGOROUS SCRUTINY OF ALL COMPELLED CONTRIBUTIONS.

This Court should apply rigorous First Amendment scrutiny to compelled contributions used to support both non-ideological and ideological speech. Although *Wileman* noted that the advertising at issue in that case was non-ideological, that characterization was not fundamental to the decision. In no other area of First Amendment law has the Court ever created a line between ideological and non-ideological speech, much less concluded that non-ideological speech is exempt

from First Amendment scrutiny altogether. That is for good reason.

A. Distinguishing Between Ideological and Non-ideological Speech Is Not Supported By First Amendment Principles or Precedents.

In light of the absolute language of the First Amendment, this Court has only very rarely exempted categories of speech from its scope. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Thus, the Court has determined that fighting words, obscenity and libel fall outside the purview of the First Amendment. But it has never suggested that an extremely broad, vitally important category of speech such as non-ideological speech, is similarly exempted from First Amendment protection. To the contrary, it has recognized that "[a]ll ideas having even the slightest redeeming social importance. . . have the full protection of the guaranties [of the First Amendment]." *Roth v. United States*, 354 U.S. 476, 484 (1957). *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected."); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("What is one man's amusement, teaches another doctrine."). Clearly, much "non-ideological" speech is of fundamental social importance – including art, science, history and everyday conversation. Concluding that such speech is outside the purview of First Amendment protection would radically alter the scope of that protection.

Moreover, the distinction between ideological and non-ideological speech may be impossible to define and, in *Wileman*, the Court makes no attempt to do so. Perhaps the Court viewed non-ideological speech as synonymous with commercial speech. But commercial speech often has

significant ideological implications. Some commercial speech implies that conspicuous consumption is an important component of a good life, for example. Some commercial speech implies that the appropriate role for women is to stay at home to raise children, while other commercial speech suggests that women should seek fulfilling careers and the clothes that go with them. Thus, any line drawn to exempt commercial speech would necessarily exempt some speech that is actually ideological. And, in any case, the drawing of such a line is precluded by the Court's repeated conclusion that commercial speech is protected by the First Amendment. *See, e.g, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The *Wileman* Court certainly did not purport to alter this fundamental conclusion.

Nor would it be consistent with this Court's precedents to carve out a more limited First Amendment exemption for compelled contributions used to fund non-ideological speech. It is well-settled that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Court has emphasized that the "difference between compelled speech and compelled silence . . . is without constitutional significance." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). *See also West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *Turner*, 512 U.S. at 642. Under this principle, a law that compels speech is subject to the same analysis as one that prohibits speech. Thus, for example, if the First Amendment applies to a law prohibiting citizens from contributing money to scientists to discuss electromagnetic

power, it must also apply to laws compelling contributions to those scientists.

Moreover, this Court's compelled contribution caselaw itself demonstrates that compelled contributions used to support non-ideological speech *are* subject to rigorous First Amendment scrutiny, because they implicate two fundamental First Amendment interests. First, compelled contributions may force individuals to support speech with which they do not wish to be associated. This is so regardless of whether the individuals agree with the message being advanced. For example, the First Amendment would likely preclude supporters of a particular political candidate from being compelled to contribute to that candidate even though they agreed with the candidate's message. The same is true with non-ideological speech. Individuals (or companies) have an interest in choosing the messages with which they wish to be associated whether or not the messages are ideological. *See, e.g.*, *Riley*, 487 U.S. at 797-8 (holding that compelled statements of fact violated First Amendment).

Second, compelled contributions may force individuals to support speech with which they disagree and thus "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to . . . reserve from all official control." *Barnette*, 319 U.S. at 642. Once again this is true of non-ideological as well as ideological speech. For example, Georgia peach growers are likely to disagree vehemently with an advertising program that promotes the superiority of California peaches. A public health organization is likely to disagree with a non-ideological advertising program designed to promote candy consumption. And some parents are likely to disagree with a non-ideological program explaining the science of evolution. Indeed, even when those compelled to contribute

may expect to benefit economically from success of a particular advertising campaign, it cannot be presumed that they will agree with the message articulated. A socially conscious tobacco company might economically benefit from a tobacco advertising program aimed at children, for example, but might strongly disagree with such a campaign. A mushroom grower who appears to benefit economically from a generic mushroom advertising campaign might disagree that an increase in mushroom consumption generally – as opposed to consumption of its mushrooms in particular – is beneficial for American consumers or might have strong objections to the very notion of a collective advertising campaign. Indeed, the Court need look no further than this case. United Foods objects to the Mushroom Council's collective mushroom advertising campaign because the campaign associates mushrooms with consumption of alcohol, touts mushrooms as an aphrodisiac, and suggests that all mushrooms are equivalent. Op. Cert. at 4.[2] This is not disagreement with a strategy – this is disagreement with ideas.

Of course, it may happen that those compelled to fund particular speech might all agree with that speech.[3] And it may

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[2] Moreover, as will be shown *infra*, this Court has already rejected the notion that compelled contributions are exempt from First Amendment scrutiny whenever they are used to fund speech that appears consistent with the economic interests of those forced to contribute. For example, teachers cannot be compelled to support an advertising campaign designed to enhance the reputation of teachers and thus create public support for an increase in teacher salaries. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528-29 (1991) (plurality); *see also id.* at 559 (Scalia, J., concurring in part).

[3] *Wileman* pointed to the fact that the fruit growers forced to contribute to the advertising campaign at issue in that case did not disagree with the message of the campaign. 521 U.S. at 467-68. But to the extent this was

even be true that those compelled to fund may more often agree with non-ideological speech than with ideological speech. But this kind of rule of thumb cannot support categorically exempting non-ideological speech from First Amendment scrutiny.

Nor should this Court adopt a rule that exempts compelled contributions from First Amendment scrutiny when those compelled to contribute do not disagree with the message. Case-by-case inquiry into the views of those objecting to compelled contributions would itself compel speech in violation of the First Amendment. Because of just this concern, the Court has determined that a plaintiff can make out a compelled contribution claim merely by asserting a general objection to the compelled contribution:

> To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Abood v. Detroit Board of Educ., 431 U.S. 209, 241 (1976). *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 n.16 (1986) ("The nonmember's burden is simply the obligation to make his objection known.") (quotation omitted). Finally, if the constitutionality of compelled contributions

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true, it was a function of the particular contributors, not a function of the type of speech.

depended on the potentially changing views of those compelled to contribute, a statute that was constitutional one moment could become unconstitutional the next. Neither legislatures nor judges could ever settle the question of constitutionality.

Thus, both First Amendment principles and precedents support the conclusion that all compelled contributions, not just those used to fund ideological speech, are subject to First Amendment scrutiny. That conclusion is also supported by the Court's specific caselaw on compelled contributions both before and after *Wileman*.

B. The Court's Compelled Contribution Caselaw Before *Wileman* Requires Rigorous Scrutiny of Non-ideological Speech.

In compelled contribution cases prior to *Wileman*, the Court referred to some speech as ideological and suggested that other speech was less ideological, or even non-ideological. But it never held that compelled contributions could be used to support non-ideological speech without First Amendment scrutiny. To the contrary, the Court always demanded that the compelled contributions serve a substantial (or even compelling) governmental interest and be narrowly tailored to serve that interest.

For example, in *Abood*, which concerned compulsory payment of union dues, the Court drew a line between "collective-bargaining activities" and "ideological activities unrelated to collective bargaining." 431 U.S. at 236. The Court viewed collective bargaining largely as a form of conduct with an expressive component, rather than pure speech. And it understood that collective bargaining generally aimed to promote the economic interests of union members -- making it

less likely to conflict significantly with the ideological views of those members.[4] Despite viewing collective bargaining activities as largely non-ideological, the Court nevertheless recognized that important First Amendment interests were at stake in compelling individuals to contribute to such activities. *Abood*, 431 U.S. at 222. *See also Hudson*, 475 U.S. at 301. Thus, even with respect to compelled contributions used to support collective bargaining activities, as opposed to "ideological activities unrelated to collective bargaining," the Court recognized First Amendment limitations.

The Court first evaluated the governmental interests at stake to determine whether they were sufficiently weighty to justify infringing on First Amendment rights. It noted that there were "important government interests" served by compulsory contributions supporting collective bargaining, including industrial peace, stable labor relations and the advancement of collective goals of unionized employees. *Abood*, 431 U.S. at 224. The importance of these goals was underscored by the entire framework of the system of labor relations that showed that in the labor arena government

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[4] The Court knew that individual employees might object to particular collective bargaining activities or to unionism itself, *Abood*, 431 U.S. at 222, but believed that "discussion by negotiators regarding the terms and conditions of employment," was far less "likely to concern topics about which individuals hold strong personal views" than lobbying or electoral speech. *Lehnert*, 500 U.S. at 521. The Court thus clearly viewed collective bargaining activities as non-ideological, or at least much less ideological than lobbying or electoral speech. *See Abood* 431 U.S. at 237 (contrasting subsidization of collective bargaining with subsidization of ideological activities); *id.* at 235 (individual potentially can be compelled to support collective bargaining activities but cannot be compelled "to contribute to the support of an ideological cause he may oppose."); *Lehnert*, 500 U.S. at 516 (collective-bargaining functions "do not include political or ideological activities.").

believed it necessary to subordinate the interests of individual employees to the collective interests of the employees as a whole. *Id.* at 221 n.15. Based on this evidence, the Court concluded as it had in earlier cases "that such interference [with First Amendment rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222. *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 516, 520-21 (1991) (plurality); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 455-56 (1984) ("[By] allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. . . . It has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace.").

But an important governmental interest was not enough. The *Abood* Court also evaluated whether the law compelling contributions was narrowly tailored to serve the government's interests. Thus, only the union dues that were necessarily related (or "germane") to collective bargaining activities could be compelled. 431 U.S. at 235-36. Similarly, in *Hudson*, the Court explained that

> although the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.

475 U.S. at 302-03 (footnote omitted). *See also id.* at 303 n.11 (citing First Amendment cases regarding the need for narrow tailoring, including cases that applied strict scrutiny). And in

Lehnert, the Court explicitly held that compelled contributions had to serve a "vital policy interest" and be narrowly tailored to serve that interest. The Court explained that "chargeable activities 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 speech that is inherent in the allowance of an agency or union shop."[5] 500 U.S. at 518-19.[6]

This First Amendment analysis of compelled contributions applies to non-ideological speech outside the labor context as well. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court applied this analysis to mandatory dues collected by a state bar association. The Court distinguished between activities that served "the State's interest in regulating the legal profession and improving the quality of legal services," such as

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[5] The second prong of the test merely re-emphasized the conclusion implicit in the first prong: compulsion must facilitate collective bargaining and thus serve the government's interest in labor peace and avoiding free riders. The third prong underscored the importance of narrow tailoring. If the activities funded by the compulsory payment differed significantly from core collective bargaining activities, and thus imposed a burden on speech not inherent in allowance of a union shop, the compulsory payment was impermissible.

[6] The rigorous nature of this test is underscored by the fact that the Court has applied it to speech it viewed as political. In *Abood*, the Court recognized that the collective bargaining activities at issue might have more ideological and political content than ordinary collective bargaining because the union was a public sector union. Yet the Court explained that this did not mean that any greater First Amendment interest was at stake. *Abood*, 431 U.S. at 231. Because the collective bargaining activities were germane to the state's important interests, compelled contributions could be used to fund these activities. The substantiality of the government's interest, not the ideological nature of the speech, was central to the analysis.

ethical codes or disciplinary functions, and ideological activities not germane to that interest. *Keller*, 496 U.S. at 13, 16. But the Court did not hold that because the former activities were non-ideological, they were exempt from First Amendment scrutiny. Instead, it determined that they served state interests of equivalent importance to those that justified compelled contributions in *Abood*. *Id.* at 13. The Court also ensured that compelled contributions were narrowly tailored to serve those interests by requiring that they fund only activities germane to those interests. *Id.* at 13-14.

Thus, prior to *Wileman*, the Court consistently applied rigorous First Amendment scrutiny to all compelled contributions. As the Court explained, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters – to take a nonexhaustive list of labels – is not entitled to full First Amendment protection." *Abood*, 431 U.S. at 231 & n.28. *See also Lehnert*, 500 U.S. at 521-22 (plurality) ("First Amendment protection is in no way limited to controversial topics or emotionally charged issues."); *id.* at 522 ("we consistently have looked to whether *nonideological* expenses are 'germane to collective bargaining.'") (emphasis added).[7]

Moreover, by rigorously scrutinizing compelled contributions used to support collective bargaining, the Court

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[7] In *Lehnert*, the plurality did say that "the extent of one's disagreement with the subject of compulsory speech is relevant to the *degree* of impingement upon free expression that compulsion will effect," 500 U.S. at 522 (emphasis added), but it acknowledged that all compulsory speech is subject to First Amendment scrutiny. Moreover, as discussed *supra* n.6, in *Abood*, the Court applied the same scrutiny to compelled contributions that funded "political" collective bargaining activities as to other collective bargaining activities.

has rejected the idea that compelled contributions are exempt from First Amendment scrutiny simply because the funded message appears to advance the economic interest of those compelled to contribute. In fact, in *Lehnert*, the Court invalidated a teachers' union's use of compulsory union dues to fund lobbying activities designed to secure funds for public education and to support a public relations campaign designed to enhance the reputation of the teaching profession.[8] *Id.* at 527-29. The Court found that lobbying and public relations efforts were "political" and "[m]ore important, . . . not sufficiently related" to collective bargaining functions to be upheld despite the fact that such activities would likely benefit the economic interests of all teachers. *Id.* at 527-29 (plurality). *See also id.* at 559 (Scalia, J., concurring in part).

C. The Court's Compelled Contribution Caselaw Since *Wileman* Does Not Exempt Non-ideological Speech From the First Amendment.

The Court has applied the same principles in the compelled contribution cases since *Wileman* that it did in the cases prior to *Wileman*. In *Air Line Pilots Ass'n. v. Miller*, 523 U.S. 866, 874 (1998), the Court made clear that the test articulated in *Lehnert* remains the law. Thus, all compelled contributions to unions are subject to rigorous scrutiny. And in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court applied rigorous First Amendment scrutiny to non-ideological speech.

In *Southworth*, the Court considered a challenge to the University of Wisconsin's requirement compelling students to

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[8] The Court suggested that speech that involves public advocacy is ideological. *Id.* at 528-29. Under that criterion, the speech at issue in the instant case (and that at issue in *Wileman*) is also ideological speech.

pay student activity fees that were distributed to a variety of student organizations. Although the Court noted that some of the activity fees were likely used to fund speech particular students found objectionable, *id.* at 230, this finding did not make the University's program an ideological one. "The student contributor . . . has to fund only a distributing agency having itself no social, political or ideological character and itself engaging . . . in no expression of any distinct message. Indeed, the disbursements, varying from year to year are as likely as not to fund an organization that disputes the very message an individual finds exceptionable." *Id.* at 240 (Souter, J., concurring) (footnote and citations omitted).[9]

Despite the non-ideological nature of the University's program, however, the Court concluded that the program raised First Amendment concerns. *Southworth*, 529 U.S. at 231. Consequently, it examined the government purpose, which was to facilitate a wide range of speech, and concluded that it was important. *Id.* The Court then evaluated whether the University's program was narrowly tailored to serve that interest. The Court did not make this assessment by applying the germaneness test of *Abood* and *Keller* but rather by direct evaluation of whether particular aspects of the program were necessary to serve the University's purpose.[10] For example, the Court concluded that use of referenda to make funding decisions did not serve that purpose and thus impinged on First

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[9]Just as a funding program is viewpoint neutral if the criteria used to distribute the funds are viewpoint neutral, regardless of whether the speech that is ultimately funded represents all viewpoints, a funding program is non-ideological if the criteria used to distribute the funds are non-ideological.

[10]The Court explained that it is difficult to apply the germaneness test in a university setting where all speech is likely germane to the goals of the university. *Id.* at 232.

Amendment rights more than was necessary. Majoritarian decisionmaking was not viewpoint neutral and "[v]iewpoint neutrality is the justification for requiring the student to pay the fee in the first instance." *Id.* at 233. *See also id.* at 229 ("The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. We conclude the objecting students may insist upon certain safeguards.").

The narrow tailoring analysis did not end there. The Court also explored whether the University's program could be altered in other ways to minimize imposition on First Amendment rights. But the Court concluded that the possible alternatives – establishment of an opt out program for dissenting students or using student activity funds only for on-campus activities – would not have enabled the government to serve its significant purposes. *Id.* at 232, 234.

Thus, in *Southworth*, as in *Abood* and its progeny, the Court applied First Amendment scrutiny to compelled contributions to support non-ideological speech and activities.

D. Intermediate Scrutiny Should Be Applied to Compelled Contributions Used to Fund Commercial Speech.

The conclusion that compelled contributions to support non-ideological speech are not exempt from First Amendment protections does not resolve the issue of what level of scrutiny should apply. In *Abood* and its progeny, as well as in *Keller*, the Court required that the supported speech be germane to government interests that were variously described as "vital," "important" or perhaps even "compelling." In *Southworth*, the Court recognized the government's "important and substantial"

interests and required that the program be tailored to serve those interests.

These cases suggest that at a minimum, intermediate scrutiny is required. This is so if the Court simply applies the tests developed in prior compelled contribution cases. It is also so under the Court's general principle that compelled speech is subject to the same scrutiny as prohibited speech. Because the speech at issue here is commercial speech which is subject to at least a form of intermediate scrutiny, *see Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), compelled contributions that fund commercial speech should similarly be subject to such scrutiny. Under the *Central Hudson* test, restrictions on speech are only justified if they directly advance substantial governmental interests and are no more extensive than necessary to serve that interest. This formulation parallels the compelled contribution caselaw which requires (at least) substantial governmental interests and that the compelled contribution support only those interests.

Nor does *Wileman* require a different result. In *Wileman*, the Court evaluated whether "the assessments used to fund collective advertising, *together with other collective activities,*" were in essence economic regulations. 521 U.S. at 469. Because the compelled assessment was but a single part of a complex regulatory system that essentially collectivized the tree fruit industry, and because those compelled to contribute did so "as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme," *id.*, the Court concluded that the assessment was more like an economic regulation. Nevertheless, the Court considered its caselaw relating to compelled contributions to support speech and concluded that

the regulations in *Wileman*, like those in *Abood*, did not violate the First Amendment. In light of the substantial governmental purpose in stabilizing volatile markets, the Court concluded that the collective advertising program was constitutional because it was germane to that purpose and because the alternative of individual advertising would not effectively serve the same purpose. *Id.* at 473, 475.

The conclusion that the collective advertising program at issue in *Wileman* survived First Amendment scrutiny may have made sense in the context of that case. There was little dispute that the market for agricultural products such as tree fruit is extremely variable. Such agricultural products are subject to a multitude of risks including drought, flooding, frost and overproduction. As a result, the government largely collectivized the fruit growing market in order to limit these risks. It exempted the marketing orders from the antitrust laws, and implemented specific regulations governing marketing and sale of the fruit. Thus, as the Court emphasized, "[t]he basic policy decision that underlies the entire statute rests on an 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.

The existence of this cooperative regulatory scheme evidences the seriousness of the government's purpose as to the compelled advertising assessment. It demonstrates government's belief that collectivization is needed not merely to facilitate the economic interests of a particular group but to serve broader public purposes. *See Abood*, 431 U.S. at 223-24 (relying on scheme of collectivized bargaining as support for conclusion that compelled contributions to support such bargaining were constitutional). It also demonstrates that

government did not attempt to serve that purpose by *first* adopting a method that impinged on the First Amendment. *See Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 192 (holding unconstitutional limitations on advertisements related to gambling in part because Congress could have attempted to regulate gambling in other ways *before* doing so by restricting speech). Finally, the fact that the industry is collectivized in so many ways reduces the intrusion on the First Amendment of a collective generic advertising scheme.

In the context of an existing scheme of collectivization in the tree fruit market, it is at least arguable that carefully controlled collective advertising programs may have helped to smooth out demand and may have offset some of the risks inherent in that market. This could have benefitted consumers as well as producers by helping to ensure a steady supply of tree fruit at relatively constant prices. Individual advertising might not have served that same purpose. Because individual advertising is not coordinated, individual advertising might have sent demand too high during times of shortages and too low during times of overproduction. Thus, it may have been reasonable for the Court to conclude that compelled contributions to support collective advertising (in addition to the other collectivist regulations) were narrowly tailored to support a substantial government interest in stabilizing the tree fruit market. Indeed, the Court implicitly reached just this conclusion in explaining that the compelled contributions at issue met the germaneness test articulated in *Abood*.

II. REQUIRING COMPELLED CONTRIBUTIONS FROM MUSHROOM GROWERS VIOLATES THE FIRST AMENDMENT.

The compelled contribution program at issue here cannot survive intermediate First Amendment scrutiny, however. There is no substantial governmental interest justifying compelled contributions from mushroom growers, nor is the government's program narrowly tailored to serve the governmental interests alleged to exist. These conclusions are entirely consistent with the result in *Wileman*.

Unlike the market for tree fruit, the mushroom market is highly stable. Mushrooms are grown inside in controlled environments, and mushroom supply is highly elastic because of the short growing cycle for mushrooms and the low marginal cost of producing additional mushrooms. *See* Op. Cert. at 2 (citing sources). There is no need to collective this market, and the government has not attempted to do so.

Despite the existence of a stable mushroom market and the absence of a collectivized market, the United States asserts that it has legitimate purposes in compelling contributions to support generic mushroom advertising – strengthening the mushroom market, expanding uses for mushrooms, and avoiding free riders. U.S. Br. at 18-20, 25-26. But these purposes – outside the public interest purpose of stabilizing collectivized markets – are not sufficiently substantial to justify infringing First Amendment rights. Nor does the United States assert they are sufficiently substantial, instead relying on its view that the compelled contributions are exempt from First Amendment scrutiny.

With respect to the government's ostensible interest in strengthening the mushroom markets, the United States does not point to anything unique about mushrooms that would show the importance of this interest. If the argument is that the government always has a substantial interest in promoting any commodity – or indeed in promoting any other message it chooses to promote – that would effectively exempt all collective advertising programs on any issue from the First Amendment. Based on this argument, the government could compel all photographers to contribute to an advertising campaign for swimsuit magazines. Or, the government could compel all metal manufacturers to contribute to an advertising campaign promoting gun ownership. The Court has never upheld a compelled contribution scheme based merely on the government's alleged interest in supporting the economic interests of particular companies or individuals.

Moreover, there is no evidence that the collective advertising scheme implemented here even serves the economic interests of mushroom growers. Collective advertising programs may have little effect other than to drive up the price for a particular product by increasing the cost of production without increasing demand for the product (or at least without increasing demand sufficiently to offset the cost of the advertising). And even if they succeed in increasing demand, this may simply decrease demand for competing products which are equally important to the economy and equally good for consumers.

The government's interest in serving the private interests of mushroom growers, unsupported by any evidence, should not even survive the scrutiny accorded to purely economic regulations. It surely cannot justify infringing the First Amendment. Indeed, the government's interest in expanding

the mushroom market is surely no greater than its interest in expanding funds for public education and enhancing the reputation of teachers. Yet the Court struck down compelled contributions to collective advertising programs that supported just those purposes. *See Lehnert*, 500 U.S. at 527-29 (plurality). *See also id.* at 559 (Scalia, J., concurring in part).

As for the government's alleged interest in avoiding free-riders, such an interest has never alone been deemed sufficient to justify compelled contributions. First, if there were no generic advertising program, there would be no free-rider problem. The government cannot create a program without a substantial interest, and then compel speech to solve a problem that would not exist but for the program.[11] Second, whatever free-rider problem exists with compelled advertising programs also existed in the case of the programs designed to fund lobbying activities supporting public education and a public relations campaign on behalf of teachers. Yet this was not found to be sufficient to justify compulsion. As Justice Scalia explained, "private speech often furthers the interest of nonspeakers, and that does not alone empower the state to compel speech to be paid for." *Id.* at 556 (Scalia, J., concurring in part). In contrast, when the Court has found compelled contributions to be permissible under the First Amendment, it has been because it concluded that there was an important reason to avoid free riders, such as protecting industrial peace.

In addition, the compelled contribution program for mushroom growers is not narrowly tailored to advance any

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[11]The compelled contributions do not even fully resolve the free rider problem that is created. Small mushroom growers are exempt from the requirement to contribute and thus are allowed to free ride on larger growers.

interest the government does have in promoting mushrooms. In contrast to the advertising at issue in *Wileman*, there is no reason why the government's alleged interest is better served through a collective advertising program than through individual advertising. And to the extent there is any advantage served by collective advertising, the government fails to explain why that interest is better served through government compulsion than through voluntary advertising programs put together by trade associations, such as the American Mushroom Institute and Western Mushroom Marketing Association, both of which filed *amicus* briefs supporting petitioners. Trade associations often put together generic advertising programs and these mushroom associations could put together such a program as well.[12] The government has not demonstrated any need for compelled contributions supporting collective advertising other than its bare assertion. This is insufficient under the First Amendment.

Finally, in assessing whether the compelled contributions here can satisfy the exacting requirements of the First Amendment, it is perhaps useful to note that the requirement may violate the far less exacting criteria of the Fifth Amendment by taking private property for public use without just compensation. Government generally cannot appropriate money from a select group of individuals unless there is a nexus to services voluntarily used by those individuals, to "commitment[s] that [they] made, or to any injury they have caused." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537

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[12]Any potential free rider problem could be avoided if the trade associations provided significant benefits to participating mushroom growers, such as listing those mushroom growers in their ads – or pointing consumers to a web site that contained such a list. The trade associations also could develop programs in which they certified the quality of dues paying mushroom growers that met the requisite standards.

(1998) (plurality). *See also Webb's Fabulous Pharamacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (holding that government could not compel selective contribution to general government revenues). Here, the required nexus is absent. Mushroom growers have not made voluntary use of a government program that would justify exaction of a usage fee. Mushroom growers who do not wish to support generic advertising have no connection with those who do. And mushroom growers have not imposed any cost on society that would justify imposing a special cost on them. To the contrary, the government's view is that mushroom growers are benefitting society by producing mushrooms. Thus, if the purpose of the generic advertising is to encourage the public good of consuming mushrooms, that is a cost which should be borne by all. Alternatively, if the purpose is to help mushroom growers make better choices for themselves – or simply to transfer funds from some mushroom growers to others – there is no public purpose to support the taking.

CONCLUSION

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

Respectfully submitted,

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