No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.
Respondents.

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

BRIEF FOR RESPONDENTS GERAWAN FARMING, INC., NILMEIER FARMS, AND GEORGE HUEBERT FARMS

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QUESTION PRESENTED

Whether the federal government's imposition of mandatory collective advertising on handlers of California-grown peaches, California-grown plums, and California-grown nectarines violates their rights under the First Amendment.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b) of the Rules of this Court, respondents Gerawan Farming, Inc., Nilmeier Farms, and George Huebert Farms, provide the following names of parties to this proceeding whose names do not appear in the caption:

Kash, Inc.
Gerawan Farming, Inc.
Asakawa Farms, Inc.
Chiamori Farms, Inc.
Phillips Farms, Inc.
Kobashi Farms, Inc.
Tange Bros., Inc.
Nagao Farms
Nilmeier Farms
Chosen Enterprises
Wilmer Huebert Farms
Kobashi Farms
Nakayama Farms, Inc.
Mihara Farms

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STATEMENT

This is a challenge to a federal program that requires handlers of particular agricultural products to make payments to an industry committee for the purpose of engaging in collective advertising for the industry as a whole. Respondents are family-run farms in the San Joaquin Valley of central California whose owners have commercial, economic, and sometimes ideological objections to the content of the advertising that they are required to support.

The Court of Appeals for the Ninth Circuit held that the forced advertising program, which is a form of compelled speech, violates respondents' commercial speech rights under the First Amendment. The court held that the program neither directly advances, nor is narrowly tailored to achieve, any substantial government interest, largely because there is no evidence that collective generic advertising is any more effective than the advertising efforts of individual growers and handlers in the marketplace. Pet. App. 19a-20a. We urge this Court to affirm.

We accept the government's summary of the lower court proceedings, and will not burden the Court with repetition. The government's account of the origins and nature of the programs and of the initial administrative phase of this litigation must, however, be supplemented. In particular, the government neglected to inform this Court of the extensive factual findings of Administrative Law Judge Dorothea A. Baker, which are an important part of the record — as the district court noted. Pet. App. 46a (citing *Saavedra* v. *Donovan*, 700 F.2d 496, 498 (9th Cir.), cert. denied, 464 U.S. 892 (1983); accord *Rowland* v. *USDA*, 43 F.3d 1112, 1114 (6th Cir.), cert. denied, 115 S. Ct. 2610 (1995)).[1] The challenged programs cannot be understood without additional information concerning their legislative origins and actual operation.

1. Collective advertising programs under federal marketing orders apply to fewer than thirty agricultural products out of the hundreds of fruits, vegetables, and meats produced in the United

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[1] The government included neither of the two ALJ opinions in the Appendix to the Petition for Certiorari. The second of these opinions, which contains the most pertinent findings, was included in the Appendix to the Brief in Opposition, and will be cited to that source.

States. This case involves the California peach, California nectarine, and California plum programs.[2] Other programs apply to cut flowers, beef, pork, dairy products, eggs, walnuts, almonds, tomatoes, avocados, celery, honey, and a handful of other products. No federal advertising program is imposed upon economically similar commodities such as cucumbers, oranges, blueberries, chicken, fish, sweet corn, lettuce, or apricots.[3]

California is the only state whose peach, plum, and nectarine handlers are required to pay for generic advertising under a federal marketing order, although there are 33 states that produce peaches for commercial distribution, 26 that produce plums, and 28 that produce nectarines. App. to Br. in Opp. 345a. The statute does not authorize the Secretary to establish a collective advertising program for non-California peaches, which comprise half the domestic commercial peach production in the country. See U.S. Br. 31 n.19. The Secretary is authorized to institute collective advertising for nectarines and plums grown throughout the United States, but has confined the programs to California fruit.

The collective advertising programs require three layers of authorization. First, each program is authorized by an act of Congress that is directed at one or more particular agricultural products. These generally take the form of amendments to the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA" or the "Act"), permitting the Secretary to add "paid advertising" to the list of authorized committee powers. Second, in order to promulgate a

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[2] The California plum order was discontinued in 1991 (56 Fed. Reg. 46368-01 (1991)), but litigation over past assessments is not moot because respondents seek the return of their past payments for compelled advertising.

[3] Marketing orders for certain specified fruits and vegetables allow for individual handlers to receive a credit (a reduction in their annual assessment) for their own authorized advertising expenditures. 7 U.S.C. § 608c(6)(I). See, *e.g.*, 7 C.F.R. § 981.41(c) (California almonds); *id.* § 932.45(a)(2) (California olives); *id.* § 989.53(b) (California raisins); *id.* § 982.58(b) (Oregon and Washington hazelnuts). The governing statute does not allow for such credits for the advertising efforts of individual handlers of California peaches, plums or nectarines.

marketing order, the Secretary must conduct a formal rulemaking proceeding (7 U.S.C. § 608c(3)), and then obtain approval of the order, generally by either two-thirds of the producers of the commodity or the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. § 608c(8)-(9). A marketing order must be discontinued if the Secretary determines that it does not effectuate the policies of the Act (7 U.S.C. § 608c(16)(A)(i)), or that a majority of producers does not support it. *Id.* § 608c(16)(B).

Third, the collective advertising program itself is designed and implemented by an industry committee, whose members are appointed by the Secretary. 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.20, 916.22, 917.16-917.25. These members are, by definition, in direct competition with the other farmers and handlers in the industry. The committees have wide-ranging authority over all aspects of the administration of the marketing orders, including quality, size, and maturity standards as well as advertising, "subject to the continuing right of the Secretary to disapprove [of the committee's rules] at any time." 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.62, 917.30. Annual budgets and assessments are promulgated by the Secretary in the Federal Register after a brief comment period. According to the findings of the ALJ, "with a few minor exceptions," the committees' recommendations "have been *pro forma* approved." App. to Br. in Opp. 332a.[4]

2. Although the fundamental structure of the marketing order system originated in the New Deal, the requirement of compelled collective advertising is a relatively recent development. Congress authorized the first such program under the AMAA — for cherries — in 1962. Pub. L. 87-703. The nectarine program at issue here was authorized by Congress in 1965 (Pub. L. No. 89-330, § 1(b)) and implemented in 1966; the plum program was authorized in 1965 (*ibid.*), implemented in 1971, and discontinued in 1991; and the peach

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[4] Indeed, the ALJ found that "[t]he Secretary * * * has abdicated his statutory duty, through *pro forma* bureaucratic action, of rubber stamping, for the most part, the * * * `generic' advertising and other expense recommendations, via the Committees." App. to Br. in Opp. 336a.

program was authorized in 1971 (Pub. L. No. 92-120, § 1) and implemented in 1976. See App. to Br. in Opp. 141a-145a.

The legislative histories of the AMAA amendments authorizing the programs at issue contain no explanation as to why the advertising is necessary with respect to these as opposed to any other particular products. The committee report for the plum and nectarine programs explains only that "individual requests [were] made by various producer groups." H.R. Rep. No. 846, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 4142, 4143. The report on the peach program was no more illuminating. See S. Rep. No. 295, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1406, 1407.

The formal rulemaking records through which the programs were instituted contain no evidence that the products or states to which they applied presented any economic condition that distinguished them from other products or states where similar programs were not implemented; no evidence that, in the absence of the programs, the covered producers or states would be impoverished or economically distressed; and no evidence that collective advertising of the covered products would be more effective than freely generated speech by the growers or handlers. App. to Br. in Opp. 146a-147a. The Secretary's explanation for the California plum program is typical:

> The record shows that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotional campaign.

36 Fed. Reg. 8735, 8736 (1971). The justifications for instituting the California peach and California nectarine programs were similar. See 41 Fed. Reg. 14375, 14376-77 (1976) (peaches); 31 Fed. Reg. 5635, 5636 (1966) (nectarines).

The collective advertising programs have been controversial among the growers and handlers, who are the supposed beneficiaries. In the 1991 producer referendum, almost a third of the California

peach and nectarine growers (see 56 Fed. Reg. 46739 (1991)) and nearly half of the California plum growers (56 Fed. Reg. 46368-01 (1991)) voted that the program did not advance their interests.

3. The record shows that there are significant differences in taste, color, and size among different varieties of peaches, plums, and nectarines — and indeed among the same variety of fruit grown on different parcels of land. App. to Br. in Opp. 364a.[5] Almost all tree fruit is distributed under a brand name, such as respondent Gerawan's brand "Prima®," respondent Wileman's brand "Mr. Sunshine®," or respondent Kash's brand "KASH®." There are no economic or technical obstacles to brand advertising, which is extremely common in the fruit industry (Sunkist oranges, Chiquita bananas, and Dole pineapples are familiar examples). Small farmers can, and do, combine into cooperatives for more efficient marketing (*National Broiler Mktg. Ass'n* v. *United States*, 436 U.S. 816, 820-22 (1978)),[6] or sell to distributors who package and market the fruit under a brand name. See *Cecelia Packing* v. *USDA*, 10 F.3d 616, 620 (9th Cir. 1993) (Sunkist oranges).

Most often, the advertisements designed by the marketing order committees make no distinction among the many varieties of peaches, plums and nectarines, but promote them all — generically — as "California Summer Fruits." See, *e.g.*, J.A. 428-433, 529-532. Some, however, stress particular characteristics, such as the connection between red color and sweetness (App. to Br. in Opp. 364a), or promote certain varieties. J.A. 531-32. The ALJ found:

> Promotion, through the California Tree Fruit Agreement's "generic" advertising program, advances the notion that all California fruit is the same and promotes the slogan that "red is better," which is not necessarily correct as revealed by the evidence herein. That is what is projected by the commercials advertising California fruit.

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[5] California alone produces at least 69 different varieties of peaches (J.A. 390), 61 varieties of plums (*id.* 392), and 80 varieties of nectarines (*id.* 394).

[6] See the *amicus curiae* brief filed by Sun Maid.

App. to Br. in Opp. 364a. See also *id.* at 387a (the "promotional program implies that all fruit, no matter who the grower, is equally nutritious, tasty and healthful"). Based on the finding that there are significant differences in taste and quality among different varieties and producers, ALJ Baker concluded that this advertising, which "lump[s] all California fruit into a single category," is "misleading." *Id.* at 364a.

The record is replete with uncontradicted evidence that the promotional activities of the committees benefit certain growers and segments of the industry (often the members of the committees) at the expense of others (including respondents), forcing the disfavored producers to engage in costly defensive counter-advertising or suffer the consequences. The ALJ expressly found[7] that the committees — who, she noted, are "[c]ommittees of competitors" (App. to Br. in Opp. 313a) — have violated the marketing orders by having "discussed, evaluated and voted on [issues of importance to the industry] in private clandestine meetings obscured from public scrutiny" (*id*. at 240a); have "illegally discriminated against" respondents in the administration of the marketing orders (*id.* at 205a); and have used assessment monies "in an effort to protect their own special interests and advance their own economic gain" (*id*. at 295a). The ALJ also concluded that respondents suffer harm as a result of the "forced `generic' advertising" program. *Id.* at 361a.[8]

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[7] The quoted findings pertain to various activities of the marketing order committee, in addition to its administration of the promotional program. They are relevant here because they demonstrate that the committee can (and does) use its authority to advance the interests of committee members, at the expense of others (including respondents).

[8] An antitrust suit was brought against the members and staff of the California Tree Fruit Agreement (a term sometimes used to refer to the administration of the committees) alleging that they "issued and enforced a [maturity] standard, without authorization from the Secretary, to improve their own profitability and diminish the earnings of [their competitors]." *Wileman Bros. & Elliott, Inc.* v. *Giannini*, 909 F.2d 332, 333 (9th Cir. 1990). The Ninth Circuit rejected the committee members' claim of absolute immunity under 7 U.S.C. § 608b, and remanded the case for further proceedings.

Specific examples in the record show how the marketing order committees can wield their power over the advertising program of the entire industry to promote some growers over others. The committee's nectarine campaign, for example, stressed the connection between redness and sweetness — which may have been helpful to producers of red nectarines, but which worked to the disadvantage of producers of yellow nectarines. App. to Br. in Opp. 364a. The promotion of a proprietary variety of nectarines, "Red Jim," which happens to be owned by a member of the Nectarine Committee, obviously benefitted that grower over his competitors. *Id.* at 349a; J.A. 531. In a particularly controversial instance, the committee used assessment money to pay for "market tours" by buyer representatives to fruit packinghouses in California — but the only packinghouses on the tour were those owned by committee members. App. to Br. in Opp. 309a-311a; J.A. 495-497. The committees have changed the timing of their television advertisements to coincide with the availability of produce from a committee member. J.A. 633-34. On one occasion, a committee member threatened to use his power "as a standing member of the peach and nectarine board" against the program's marketing director, who had the temerity to issue a notice promoting several late-season varieties in competition with the member's own. J.A. 434-437; see *id.* at 439.

Even the decision to emphasize "generic" advertising over brand advertising has significant intra-industry allocative effects. Generic advertising, in addition to its effect on overall demand (if any), creates the perception that all of the products within the category are fungible. App. to Br. in Opp. 334a, 364a-365a. This works to the disadvantage of growers whose marketing strategy is to differentiate their products from lower-quality fruit produced by their competitors, or to emphasize other distinguishing characteristics (such as non-use of pesticides), and requires them to engage in counter-advertising to inform customers that — contrary to the message of the generic ads — not all California fruit really is the same. J.A. 588-589. A policy that is designed to favor generic advertising over the advertising of individual brands also has incidental anticompetitive effects that work to the disadvantage of consumers. The ALJ found that, since producers are inhibited in their ability to inform consumers about the superior quality of their fruit, they have less incentive to make the

investments necessary to improve its quality. App. to Br. in Opp. 365a.

4. In April 1987 and June 1988, respondents Wileman and Kash filed petitions with the USDA pursuant to 7 U.S.C. § 608c(15)(A), challenging various aspects of the marketing orders governing California peaches, plums, and nectarines, including the generic advertising regulations at issue here. Respondent Gerawan filed an administrative petition on August 5, 1988, raising essentially the same issues. The Gerawan petition was consolidated with the Wileman/Kash petitions. In May 1991, after a 19-day hearing in which several thousand pages of exhibits were introduced in evidence, ALJ Baker ruled in favor of respondents on the 1988 petitions. App. to Br. in Opp. 17a-401a.[9] The ALJ concluded that, in promulgating and administering the marketing orders, the Secretary had, in various respects, failed to comply with the Administrative Procedure Act and other statutory requirements.

Because the ALJ ruled in favor of the handlers on statutory grounds, it was not necessary to decide the First Amendment claims. App. to Br. in Opp. at 393a. The ALJ nonetheless made extensive findings with respect to the generic advertising program. Applying the analysis for regulations of lawful, nonmisleading commercial speech set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980), the ALJ concluded that (1) the government had not demonstrated a substantial interest in the program, particularly because the funding requirements are imposed only upon handlers in California and not on handlers in other states (App. to Br. in Opp. 365a); (2) there was no evidence in the voluminous record to support a finding that the program benefits the tree fruit industry (*id.* at 366a); and (3) for a variety of reasons, the burdens on speech imposed by the program are more extensive than necessary. *Id.* at 367a-376a.

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[9] The ALJ had earlier ruled in favor of the Wileman/Kash respondents on their 1987 petition. This ruling, which was reversed by the Judicial Officer (J.O.) of the USDA (Pet. App. 113a-274a), did not involve First Amendment issues and thus is not directly relevant to this case.

In September 1991, the J.O. ruled on consolidated petitions for review, as well as on similar claims by 51 other handlers. Without hearing testimony, receiving evidence, or entertaining argument, the J.O. reversed both of the ALJ's decisions and ruled in favor of the Secretary on all issues. Pet. App. 113a-274a.[10]

Respondents sought review of the J.O.'s decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. § 608c(15)(B). The district court affirmed, and the Ninth Circuit reversed solely on the ground that the collective advertising programs violate the First Amendment. By order of the district court, the respondents' assessments for all harvest seasons since 1987 have been placed in a trust fund pending disposition of this case. Pet. App. 7a. That fund presently contains about $6 million.[11]

INTRODUCTION AND SUMMARY OF ARGUMENT

In cases involving mere economic regulation, it is well established that the government has broad latitude to favor one industry (or segment of an industry) over another, to disregard consumer welfare, to legislate on the basis of flimsy (and even counterfactual) empirical assumptions and discredited economic theories, with only the minimum of judicial review or interference. That's democracy.

The marketplace of ideas, however, is a different kind of market. It is not subject to control by democratic majorities. The government does not choose the speaker, design the message, or target the

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[10] Several appellate courts have expressed concern that USDA's Judicial Officer appears to routinely reject administrative petitions without regard to their merits. See *Parchman* v. *USDA*, 852 F.2d 858, 866 (6th Cir. 1988); *Hutto Stockyard* v. *USDA*, 903 F.2d 299, 305 (4th Cir. 1990). In 1982, according to the Sixth Circuit, after the J.O. rendered a decision against the Secretary, USDA officials "unceremoniously removed him and presented a petition for reconsideration to their hand-picked replacement." *Utica Packing Co.* v. *Block*, 781 F.2d 71, 78 (6th Cir. 1986). The court condemned the USDA's maneuver as "a manipulation of a judicial, or quasi-judicial, system" in violation of due process. *Ibid.*

[11] Of the amount in trust, well over half is attributable to respondents Gerawan Farming, Inc., Nilmeier Farms, and George Huebert Farms.

audience. Absent the most compelling of reasons, the government may not appoint one citizen (or committee of citizens) to speak for others, or force unwilling persons to pay for or convey messages they do not freely choose to endorse. Congress has plenary power to regulate commerce, but its power over speech — even commercial speech — is constrained by the First Amendment.

The compelled advertising programs at issue here violate these fundamental premises of our constitutional order. As the Court explained in *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993):

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System* v. *FCC*, 114 S. Ct. 2445, 2458 (1994). "Government action that stifles speech on account of its message, *or that requires the utterance of a particular message favored by the Government*, contravenes this essential right." *Ibid.* (emphasis added).

In Section I, we will demonstrate that the collective advertising programs fail to satisfy all three parts of the constitutional test used by this Court to evaluate interference with commercial speech. In Section II, we will address, and refute, the government's argument that coerced speech in the commercial context should be evaluated under a far lower standard. Finally, in Section III, we will demonstrate that the collective advertising programs should be subjected to strict scrutiny, which they cannot possibly survive.

ARGUMENT

Central to the First Amendment is the premise that "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 791 (1988). That is the principle at stake in this case. Rather than allow the men

and women who produce and market California peaches, plums, and nectarines to direct their own appeals to the public in light of the information they believe would be most useful and persuasive to the listeners, the government has established a mandatory collective advertising program for them, substituting its own judgment for theirs about how best to sell their own products.

The only doctrinal novelty in this case is its commercial context. But this Court has repeatedly affirmed that the "free flow of commercial information" — like other kinds of speech — is protected from governmental interference. *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1589 (1995). Debates over the comparative quality of fruit (which varieties are tastiest, which regions of the country produce the best fruit, what is the significance of pesticide use, and the like) are important both to individual consumers and to "`the proper allocation of resources in a free enterprise system.'" *Ibid.* (quoting *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)). None of the reasons that justify less stringent constitutional protection for commercial speech applies to this program, and (as we shall demonstrate below) the justifications offered by the government are plainly inadequate to sustain it.

The principal effect of the collective advertising programs under review is to stifle advocacy and competition. By forcing competitors to combine their messages in a joint advertising program, the government fosters the impression that differences among products are inconsequential, to the benefit of those who do not wish to compete in marketing or in quality. It stifles the very debate over product characteristics that the Free Speech Clause is intended to foster. The collective advertising programs inhibit competition in marketing because the drumbeat of ads touting the "generic" qualities of fruit hampers respondents and other producers in their ability to tell the public about the distinctive and superior quality of their products (with the further effect of reducing the incentive of producers to improve that quality).

The government has not identified any characteristics unique to these products that might justify a departure from the usual First Amendment premise that speakers and listeners, rather than the government, should determine the content of speech. To be sure, the

government talks of the need to enhance producer incomes, the existence of economies of scale in advertising, and the problem of free riders; but these are characteristics shared by almost every industry in America. If the government can assume control over the advertising of these products on the basis of such ubiquitous considerations, it could replace the "free flow of commercial information" with government-imposed uniformity throughout the economy.

Fortunately, as we shall show, the First Amendment stands as a clear bar to that result.

I. THE COMPELLED ADVERTISING PROGRAMS CANNOT BE SUSTAINED UNDER THE TEST GENERALLY APPLIED TO COMMERCIAL SPEECH

In holding the compelled advertising programs for California peaches, nectarines, and plums unconstitutional, the Ninth Circuit applied the constitutional standard for commercial speech articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980):

> First, the asserted government interest behind the restrictions must be substantial. Second, the restrictions must directly advance that interest. Third, the program must not be more extensive than necessary to serve that interest.

Pet. App. 16a. In recent decisions, this Court has emphasized that the party defending restrictions on commercial speech bears a heavy burden of proof. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71 (citing numerous cases).[12] The government's arguments in support of the mandatory advertising program fall far short of satisfying that burden.

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[12] As explained in greater detail below (at 36-37), constitutional free speech protections are no less stringent for programs of compelled speech, like this one, than for programs that restrict speech.

A. The Government Has No Substantial Interest In Collectivizing The Advertising Of Randomly Selected Products

1. The government contends that the collective advertising programs "were intended to address the devastating effects of depressed consumption and unstable market forces that prevailed at the time of their enactment" (U.S. Br. 26), and argues that the legislative history of the 1954 amendments to the AMAA "amply demonstrates the importance of the program's objectives." *Ibid.*; see also *id.* at 35.

That sounds important. But is it credible? This Court has insisted that when the government seeks to justify a restriction on speech "as a means to redress past harms or prevent anticipated harms," it "must demonstrate that the recited harms are real, not merely conjectural." *Turner Broadcasting System* v. *FCC*, 114 S. Ct. 2445, 2470 (1994); see *Edenfield*, 507 U.S. at 770-71. If a restriction is justified by the needs of a particular industry, the government must "adequately show[] that the economic health of [that industry] is in genuine jeopardy." *Turner Broadcasting*, 114 S. Ct. at 2470.

The Solicitor General's argument comes nowhere near that standard of proof. The government presented no evidence during the course of this litigation in support of a claim that demand for these products is "depressed" or the market conditions faced by these growers "devastating." Congress made no such finding when it authorized "paid advertising" for these products, and the Secretary made no such finding when he promulgated the programs after formal rulemaking. Indeed, the only rationale for the programs provided in the Federal Register was that there was a "consensus" in the industry that advertising would be "beneficial." 36 Fed. Reg. 8735, 8736 (1971) (plums); see 41 Fed. Reg. 14375, 14376-77 (1976) (peaches); 31 Fed. Reg. 5635, 5636 (1966) (nectarines). If the industries were suffering from the "devastating" conditions described by the Solicitor General, the Secretary surely would have mentioned them when he instituted the programs.

Moreover, there is no evidence that producers of comparable products who operate without the "benefit" of collective advertising

(Georgia peach farmers, for example, or Virginia apple growers) "have fallen into bankruptcy, * * * curtailed their [farming] operations, or suffered a serious reduction in operating revenues as a result of their being [allowed to advertise their own products in their own way]." *Turner Broadcasting*, 114 S. Ct. at 2472.

The Solicitor General's only citation in support of his theory is to the district court opinion. U.S. Br. 26 (citing Pet. App. 89a). The district court, in turn, relied entirely on the legislative history of the 1954 Amendments to the AMAA, a statute whose principal provisions extended agricultural price supports for a few years after the Korean War in light of depressed post-war conditions.[13] The legislative reports make no reference to peach, plum, or nectarine growers, and were written roughly 20 years before the collective advertising programs at issue here were enacted. The "bleak description" this legislative history paints of "the American farmer" after the Korean War (Pet. App. 89a) bears no more relation to the circumstances of California fruit farmers in 1996 (or even in 1971 or 1965, when the collective advertising programs for these fruits were enacted) than THE GRAPES OF WRATH bears to wheat farmers in Oklahoma today.

In short, the *sole* support for the Solicitor General's theory is a legislative report written (1) at a different time, (2) predicated on different economic conditions, (3) about different products, and (4) in support of different policies. If this is sufficient to justify a restriction on speech, then the restraints of the First Amendment are just words, devoid of meaning or consequence.

2. Stripped of its dust-bowl rhetoric, the Solicitor General's argument reduces to the claim that the government has a substantial interest in "enhancing returns to peach and nectarine growers." U.S. Br. 35.[14]

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[13] See H. Rep. No. 1927, 83d Cong., 2d Sess., *reprinted in* 1954 U.S.C.C.A.N. 3399, 3401 (attributing farm problems to "the vast expansion of our agricultural output * * * during World War II" and the renewed "surge of production" during the "Korean conflict").

[14] The government also refers to "maintaining * * * orderly marketing conditions," promoting marketing and distribution, and "avoiding the

This Court has *never* upheld a restriction on the freedom of speech where the purpose of the restriction was no more lofty than enhancing the economic interests of a favored subclass of producers. The clearest parallel is *Turner Broadcasting*, where the Court reviewed the constitutionality of "must-carry" rules that required cable TV operators to carry the signals of certain local broadcasters. If enhancing the incomes of favored companies were a sufficiently important governmental interest in itself, then *Turner Broadcasting* would have been an easy case: no one disputed that the must-carry rules served the economic interest of the local broadcasters. But that was not enough. Rather, the Court called for evidence that the "dropped or repositioned broadcasters would be at serious risk of financial difficulty." 114 S. Ct. at 2472. This was because the underlying purpose of the must-carry rules was not to protect the broadcasters as such, but to preserve the *public* interest in "free, over-the-air local broadcast television," which is a "governmental purpose of the highest order" because of its connection to the free flow of ideas and an informed citizenry. *Id.* at 2469, 2470.

Here, petitioner makes no pretense that the *public* interest in inexpensive, healthful, and easily available food would be jeopardized by ending the collective advertising programs. Indeed, the principal purpose of the entire marketing order system is to raise the price of food and hence the incomes of producers, largely at the expense of consumers. *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Promoting favored segments of an industry is undoubtedly a sufficient ground to sustain mere economic regulation (see *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Semler* v. *Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935)), but this Court has never allowed *freedom of speech* to be infringed in the service of such a cause.

There has been no showing that the products promoted by mandatory collective advertising programs (which include beef, eggs, and cheese) are particularly healthful; that the producers of the covered products are especially impoverished, virtuous, or otherwise

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problem of free riders." U.S. Br. 35. These "wider" objectives are, however, just means to achieve the goal of enhancing returns to the growers.

worthy of extraordinary governmental solicitude; or that it is necessary to favor these economic actors (as opposed to any others) because their prosperity is linked to any other, wider, public interest. The government has not explained why California peach growers are more worthy of this kind of federal assistance (if it *is* assistance) than Georgia peach growers, why peaches and nectarines need this help more than apples or oranges, or why the government has any legitimate interest in persuading people to eat more almonds, olives, dates, and beef but not more fish, chicken, or cucumbers. These programs constitute "naked preferences" for selected, politically favored industries (and indeed, for the segments of these industries that favor generic marketing over product differentiation and quality or price competition). Whatever may be the legitimacy of naked preferences in other constitutional contexts (see Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984)), they do not supply a sufficient basis for abridging the freedom of speech.

The totally *ad hoc* manner in which the various compelled advertising programs are administered further undermines the proposition that they are needed to further an important government interest. For example, there is no way to explain (nor does the government attempt to explain) why the Act allows the Secretary to compel advertising for California peaches, papayas, grapes, dates, onions, and celery (7 U.S.C. § 608c(6)(I)), but not for Georgia peaches, kiwifruit, apricots, melons, or raspberries. Nor can the government explain why, given the statutory authority to do so, the Secretary has implemented compelled advertising through the marketing orders for peaches from California, winter pears (7 C.F.R. § 927.47), papayas (*id.* § 928.45), dates (*id.* § 987.33), and Vidalia onions from Georgia (*id.* § 955.50), but not in the marketing orders for Bartlett pears from Oregon or Washington (*id.* § 931.45), or onions from South Texas (*id.* Pt. 959) or from Idaho (*id.* Pt. 958). There is simply no rhyme or reason behind the implementation of compelled advertising for some of these products and not others; certainly nothing in the record offers any clue.

Moreover, the enormous degree of discretion that is delegated from Congress to the Secretary, and then from the Secretary to the committees, casts considerable doubt on the government's assertion

that there is an interest at stake that is of any serious concern to the government. The regulatory scheme leaves it almost entirely to the discretion of the Secretary whether to promulgate a marketing order provision for compelled advertising (7 U.S.C. § 608c(6)(I)), and all of the details of such programs are dictated by committees that are comprised of members of the industry. 7 C.F.R. §§ 917.35(b), 916.30(c). If the government interest in maintaining these programs is substantial, it is hard to understand why Congress left the decisions concerning whether, in what manner, and how much to advertise, in the hands of members of the industry.

3. To advance a coherent argument that "enhancing the returns to peach and nectarine growers" (U.S. Br. 35) is a substantial public interest, sufficient to justify infringements on respondents' freedom of speech, the government would have to explain why the *benefit* to these favored people (if the program *is* a benefit) outweighs the *detrimental effects* on other people. It is far from clear (as discussed *infra*, pages 21-31) that the collective advertising programs truly work to the advantage of the industries they purport to assist. But *if they do work*, then they necessarily have negative effects on others.

First, the programs work to the disadvantage of producers of competitive products, who are also part of the national agricultural economy and hence (we would assume) of no less interest to the federal government than the growers of California peaches, plums, and nectarines. See U.S. Br. 37-38 (the objectives of the program "relate to the economic well-being both of the industry and of the Nation as a whole"). If the compelled advertising is successful in persuading consumers that "California peaches are the sweetest" (see U.S. Br. 31 (explaining that "the advertising promotes California fruit as unique")), this must mean consumers are persuaded that peaches grown in Georgia, South Carolina, or other states are less sweet, and therefore presumably less desirable.[15] The Solicitor General does not

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[15] A more likely — but presumably unintended — consequence of the advertising is to benefit non-California growers at the expense of California growers, as the ALJ concluded. App. to Br. in Opp. 393a. Since most retailers do not identify the state of origin of the fruit they sell, ads that

seem to take this into account. What conceivable federal interest is served by a program that says that California peaches are better than Georgia peaches?[16]

More generally, the Secretary has found on the record that the California tree fruits "are marketed in a highly competitive situation * * * with a host of processed and fresh fruits," and that the compelled advertising program would help these products compete for shelf space with their competitors. 31 Fed. Reg. at 5636. Does it not follow that this will place the competitive fruits — products grown all over the United States — at a disadvantage in *their* (equally worthy) struggle for limited shelf space? By the same token, the advertising run by the beef committee (if it works) presumably induces customers to shift consumption to beef from competitive products, such as chicken. The government has not revealed the social welfare calculus it uses to reach the conclusion that net social welfare is increased when consumption is shifted from the products of one set of farmers to another.[17]

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promote "California" peaches or plums will most likely have the effect (if any) of promoting *all* peaches and plums. This is equally irrational from a federal point of view. Why force California producers to pay the cost of advertising that promotes fruit from all the producing states? Under this view of the effects of the program, the government has created, not alleviated, a free rider problem.

[16] We could imagine that a state program might be defended on this ground, but for the federal government to force its citizens to trumpet the virtues of one state's produce over another's is indefensible on any theory of national interests.

[17] An independent economic study of the collective advertising program concluded that, if the "negative cross-advertising effects" (meaning the effects of advertising on products in competition with the advertised product) are taken into account, those effects "make it almost impossible to justify *mandatory* assessments." Dermot Hayes & Helen Jensen, *Generic Advertising Without Supply Control: Implications of Mandatory Assessments*, in W. Armbruster & J. Lenz, COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY 90, 103 (1993). None of the studies or other record support relied on by the government takes these effects into account.

Second, the programs work to the disadvantage of growers and producers who want to compete more vigorously by producing distinctive or higher-quality fruit, or fruit with other characteristics (such as non-use of pesticides) that set it apart from the competition. By skewing advertising in the direction of generic advertising, the collective advertising programs inhibit brand differentiation and force producers who wish to compete to expend resources in counter-advertising to combat the notion that all California fruit is the same. As the ALJ observed:

> Throughout the years, [respondents] have developed cultural practices which have enabled them to develop and harvest an extremely high quality fruit. * * * They have invested substantial time and vast sums of money in developing these cultural practices. By being forced to promote a "generic" advertising program their ability to promote their own labels is substantially curtailed. * * *
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> If, as a result of the "generic" advertising assessments being imposed, [respondents] are unable to promote their fruit through its specific brand name advertising, their competitive advantage is lost. In fact, there would be no incentive for them to continue advancing their cultural practices when their fruit would, from a consumer's standpoint, be no different from that in the mainstream.

App. to Br. in Opp. 364a-365a. The Solicitor General has not explained why the interests of these producers must be subordinated to the interests of their nondistinctive competitors.

Most conspicuously, the government totally disregards the interests of consumers, who presumably should be part of the public interest calculus. See *44 Liquormart* v. *Rhode Island*, 116 S. Ct. 1495, 1507 (1996) (the purpose of regulating commercial speech is to "protect consumers"). Consumer welfare is injured — not advanced — by these programs, in at least three distinct ways.

The most immediate effect on consumers is to reduce their access to information about the products that individual competitors would otherwise provide. A program that skews advertising in favor of more generic messages necessarily decreases the relative share of advertising that focuses on differences between products within the

advertised category. Often this is the most useful information from the consumer's point of view. For example, some respondents would publicize their decision not to use pesticides (App. to Br. in Opp. 387a), an issue that — for obvious reasons — is unlikely to feature in the collective advertising sponsored by the committees. Indeed, the differences among the varieties and producers of California fruits are so significant that the ALJ concluded that the message conveyed by the collective generic advertising — that all California fruits are fungible — is actually "misleading" to consumers. *Id.* at 364a.

Second, the suppression of competition in marketing will affect the quality of the produce. If it is more difficult for producers to make the public aware of the distinctive qualities of their fruit, they will have less incentive to invest resources in producing a superior product. As the ALJ found, on the basis of the record below:

> The grower and/or handler who minimizes his expenses by ignoring cultural practices, and cuts corners wherever he can, receives the same "benefit" (if any) from the [collective] advertising program. Growers who take pride in their product and expend large sums of money in the continual improvement of that product * * * are unable to improve their market position because they are unable to educate the consumer as to their superior product. The handler and/or grower with a mediocre product is thus subsidized by the industry, and the long term interests of the industry are being jeopardized by the United States Department of Agriculture's encouragement of mediocrity.

App. to Br. in Opp. at 370a.[18]

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[18] The economic point made by the ALJ — that brand advertising stimulates product improvements to the benefit of consumers — has been confirmed in numerous federal government reports. See John E. Calfee, *How Should Health Claims for Foods Be Regulated?* (FTC Bureau of Economics, Sept. 1989); Pauline Ippolito & Alan Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market* (FTC Bureau of Economics Staff Report, Aug. 1989); V.S. Freimuth, et al., *Health Advertising: Prevention for Profit*, 78 Amer. J. of Pub. Health 557, 557-61 (1988); David A. Kessler, *The Federal Regulation of Food Labeling: Promoting Goods to Prevent*

The final blow is to the consumers' pocketbooks. The government does not hide the fact that the advertising is intended to enable producers to raise prices. See U.S. Br. 36 (relying on study purporting to show that consumers aware of the generic advertising paid higher prices for the fruit). Consumers may wonder why their government has an interest in *that*. See App. to Br. in Opp. 147a-148a (discussing consumer group opposition to the program).

In short, the claim that these programs serve important public purposes is wholly unsupported.

B. The Government Has Failed To Demonstrate That The Compelled Advertising Programs Directly Advance The Asserted Interest In Promoting Consumption Of California-Grown Peaches, Plums, And Nectarines

To satisfy the second part of *Central Hudson*, the government must demonstrate "not merely that its regulation will advance its interest, but also that it will do so `to a material degree.'" *44 Liquormart*, 116 S. Ct. at 1509 (plurality) (quoting *Edenfield*, 507 U.S. at 771). Without detailed proof on this issue, the reviewing court would be required "to engage in the sort of speculation or conjecture that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the [government's] asserted interest." *Id.* at 1510. The Solicitor General's argument that the compelled advertising program significantly advances an important government interest (*whatever* that interest is) rests entirely on such speculation and conjecture.

The ALJ, describing the record in this case, stated:

> There have never been any research projects conducted which establish that forced "generic" advertising has benefitted the tree fruit industry particularly to the extent of the assessments collected therefrom. There is lacking evidence incorporated in the Secretary's rulemaking record which indicates that California tree fruit sales (or profits to the growers

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Disease, 321/11 New Eng. J. of Med. 717, 717-25 (1989).

> and handlers) have increased as a result of the forced "generic" advertising program.

App. to Br. in Opp. 366a. See also *id.* at 370a-371a (observing that the record "does not contain data reflecting the direct impact of different advertising strategies on profitability and increase[d] sales, if any, attributable thereto, as opposed to population growth and other factors"); *id.* at 375a ("There is no evidence that handler or grower profits increased significantly and in proportion to the `generic' advertising program"); *id.* at 333a (criticizing the government's "lack of data revealing the impact of advertising on profit").

The government attempts to overcome the glaring lack of support in the record by flatly asserting that it is "axiomatic * * * that promotional advertising leads to increased consumption of the advertised product or service." U.S. Br. 35 (citing cases). This misses the point. Even assuming advertising can stimulate demand, at least to some extent,[19] the question remains: Why would a government-mandated generic advertising campaign serve the interests of the industry or the public better than the advertising that would be conducted voluntarily by individual firms? As the Ninth Circuit held (Pet. App. 20a), there is nothing in the record here to support a finding "that the generic advertising program is better at increasing consumption than individualized advertising."

There is no logic to the government's suggestion (U.S. Br. 37-38) that the program can "substantially advance the government's interests" under *Central Hudson* even if the record does not support the proposition that the program achieves some effect that would be unavailable to handlers and producers left to their own devices. If private, voluntary advertising is as effective as collective advertising through government compulsion, the program cannot fairly be said to advance the government's interest "in a direct and material way." *Edenfield*, 507 U.S. at 767.

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[19] The efficacy of generic advertising, especially in the case of well-known, long-established products, is a disputed question among researchers. See, *e.g.*, the conflicting studies in H. Kinnucan, S. Thompson & H. Chang, eds., COMMODITY ADVERTISING AND PROMOTION (1992).

1. The Solicitor General maintains that there are certain "market defects" inherent in the California tree fruit industry that the government has an interest (and an ability) to repair through compelled advertising. The government asserts that, without mandatory collective advertising, the market would not produce sufficient "generic" advertising — advertising that "increases the size of the pie" as opposed to winning a larger share for certain producers. But there is nothing in the record to support the notion that the industry needs more — or for that matter, less — generic advertising than producers would use in a voluntary system. As the ALJ observed, "[t]he evidence is devoid of any comprehensive research program that would answer" such questions as "the extent to which `generic' advertising may or may not benefit the industry." App. to Br. in Opp. 334a.

The virtue of generic advertising, according to the government, is that it benefits "the entire industry" (U.S. Br. 39). But this depends entirely on how narrowly or broadly the term "industry" is defined. Ads for "California peaches" do not promote "the entire industry," but only that part located in California. Similarly, ads that (misleadingly) stress the superior quality of red nectarines (see App. to Br. in Opp. 364a) do not promote "the entire industry"; they are a detriment to producers of yellow nectarines (who nonetheless are compelled to pay for advertising that badmouths their product). Indeed, since various products are in competition with each other within the fruitgrowing industry or the meat industry (as the Secretary found), it is plain that campaigns for particular fruits or particular meats do not "increas[e] demand across the entire industry" (U.S. Br. 39), but (if at all) only for those segments organized into marketing order committees.

The government insists, however, that because of "economies of scale" and the "free-rider" problem, the "benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments." U.S. Br. 26, 27. It further speculates that, absent government coercion, collective promotional activities would "collapse for lack of participation." U.S. Br. 27. This doomsday scenario is refuted by the experience of private marketing efforts in the agricultural sector. When convinced it would be useful, members of various agricultural industries have not hesitated to form cooperatives in order to collectively market their products. Among these are some

of the most widely recognized and successful brand names in the world — Sun Maid Raisins, Ocean Spray Cranberries, Land-O-Lakes Butter, and Sunkist Oranges (a cooperative marketing organization with over 6,500 members and annual revenues of over $1 billion). Sunkist 1994 Annual Report. See "The Sunkist Adventure" (Farmer Cooperative Service, USDA (1975)). All of these are *voluntary*, independent cooperatives whose collective advertising efforts are undertaken with no government compulsion at all.[20]

More fundamentally, the government's professed need to force "free riders" to join in the advertising program is scarcely credible as a substantial *public* interest. On the shelves of every grocery store and pharmacy in America, you can find "generic" products from companies who do not engage in advertising and therefore are able to offer their products to the consumer at a lower price. Such producers are "free riders" on the promotional efforts of their branded competitors. But the presence of these generic goods is generally viewed as a boon to the consumer — not as an evil that must be stamped out. According to the government's logic in this case, generic product producers should be required to pay into a joint industry advertising fund, controlled by the dominant companies. While this might well be in the interest of the dominant producers, it is hard to see how the public interest would be advanced. To prevent "free

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[20] Congress has long recognized the effectiveness of agricultural cooperatives and has acted to encourage their formation. See, *e.g.*, 7 U.S.C. § 610(b)(1) (the Secretary shall "accord such recognition and encouragement to * * * cooperative associations * * * as will tend to promote efficient methods of marketing and distribution"); 12 U.S.C. § 1141a(3) (enacted in 1929) ("[i]t is declared to be the policy of Congress to promote the effective merchandising of agricultural commodities * * * by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting * * * cooperative associations and other agencies"); 7 U.S.C. § 291 (Capper-Volstead Act of 1922) (encouraging cooperatives by providing limited antitrust immunity for such organizations); see also *National Broiler Mktg. Ass'n* v. *United States*, 436 U.S. 816, 826 (1978) ("By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors").

riders" is to impede competition based on reduction of marketing costs, to the detriment of consumers.

Moreover, the government has offered no reason to suppose that industry advertising presents any more serious free rider problems than those posed whenever a degree of cooperation within an industry may be worthwhile. Almost every industry has one or more trade associations that provide a variety of services and conduct a variety of activities, which no individual firm could undertake and which benefit the industry as a whole. Under the government's reasoning, any trade association with clout in Congress should be able to obtain legislation to coerce unwilling members of the industry to pay for their activities. Non-members, after all, are "free riders," and the government has a "substantial interest" in the economic well-being of every industry. The government's argument proves too much.[21]

2. In its brief, the government relies on two studies that purport to show that consumers who are aware of the California tree fruit advertising campaigns either purchase more, or pay higher prices for, fruit. U.S. Br. 36. These studies could serve as elementary texts in fallacious reasoning.

Most obviously, while the studies purport to find a correlation between awareness of the advertising and propensity to buy fruit, they tell us nothing about causation. It is very common to find that users of a product pay more attention to ads for that product than non-users do. That does not mean that the ads are responsible for their decision to use the product. More likely, the causation runs in the opposite

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[21] It does not increase confidence in the government's argument that the brief is self-contradictory. At some points, the government argues that handlers must be required to participate in the program because they all benefit and should not be allowed to be free riders. U.S. Br. 26-27. At other points, confronted with evidence that handlers do not in fact benefit from the program, the government argues that the purpose of the program is to benefit growers (not handlers) and that "[t]he court of appeals' scrutiny of the programs' comparative impact on respondents and other *handlers* thus ignores an important aspect of the government's interest." *Id.* at 38 (emphasis in original). This suggests that the rationale for the program is not prevention of "free riding" but redistribution of income from handlers to growers.

direction: users pay more attention to the ads because as users, they are more interested in the product and are on the lookout for information about it. The popular expression for this phenomenon in the marketing profession is: "Volvo owners watch Volvo ads."[22]

Second, the studies do not consider the possibility that demographic differences account for the correlation. To give one example (among many), the "awareness" measure was determined by showing consumers a portion of a commercial and asking them to describe, from memory, material not included in the excerpt. J.A. 411. Obviously, this is a test of memory and not just of exposure to the advertising. Memory, in turn, tends to be correlated with intelligence and intelligence with income. The studies may have proved nothing more than that people with good memories, high intelligence, and high incomes buy more fruit at higher prices than people with poor memories, lower intelligence, and lower incomes.

Third, the studies are inconsistent in their inferences from data. When correlations run in the "right" direction, the NPD/Nielsen study attributes the effect to advertising. When they run in the wrong direction (for example, by showing that persons aware of the advertising purchase *less* fruit (J.A. 406)), it assumes there must be some other explanation. *Id.* at 406-07. Similarly, it appears to be the view of the Carmelita researchers that advertising is responsible for increases in purchases, but that advertising is irrelevant to declines in purchases. Compare J.A. 419 (giving advertising credit for increases in purchases of nectarines and pears) with *id.* at 425 (absolving advertising of responsibility for declining purchases of peaches and plums). Nothing of probative value can be gleaned from such studies.

Even if the studies were not so obviously flawed, they do not provide impressive support for the government's position. The NPD/Nielsen study concluded that there were "no major differences" between the two groups (those who were aware and those who were unaware of the advertising) with respect to early season buying habits

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[22] See Gerald Wilde, *Effects of Mass Media Communications on Health and Safety Habits: An Overview of Issues and Evidence*, 88 Addiction 983, 989 (1993).

(J.A. 406),[23] and that consumers aware of the advertising actually purchased *less fruit* per occasion than those who were not aware of the ads. *Ibid.* The Carmelita study found that, despite the advertising campaign, the average frequency of purchasing peaches and plums had declined from the previous year, and that advertising "cannot * * * do much to overcome" any of the principal reasons for failing to purchase fruit. J.A. 425.

More fundamentally, the studies do not even purport to compare the effectiveness of generic advertising to more focused individual marketing efforts, or the effectiveness of the advertising conducted by government-mandated committees to that conducted by handlers or cooperatives. Nor do they indicate anything about the relative return on investment in advertising, which would be relevant to whether to have more or less of it. It may be "axiomatic" that advertising will stimulate demand, as the Solicitor General says, but it requires *proof* that generic advertising is better than brand advertising, that a single advertising campaign devised by a government-appointed committee of competitors is better than a diversity of campaigns by profit-oriented businesses, and that more (or different) advertising is needed than the market would produce.

The Solicitor General complains that part of respondents' objection to the collective advertising program is simply "disagreement[] as to the best strategy for promoting the consumption of the[ir] goods." U.S. Br. 34. But the converse is also true. The government's support for the program is based simply on its espousal of the *opposite* marketing strategy. We seriously doubt that the government is a better judge of good marketing strategies than individual, profit-driven businesses, investing their own funds. But more fundamentally, it cannot possibly be thought a sufficient basis for abridging the freedom of speech that the government disagrees with the producers about their best marketing strategy. We submit that the government does not — *plainly, patently, and obviously does not* — have the right to take over the advertising efforts of an industry,

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[23] One of the Solicitor General's theories is that the collective advertising program is necessary to attract first time customers early in the season. U.S. Br. 40-41.

protected under the Free Speech Clause, simply because it thinks a different marketing strategy (more generic advertising) would be more effective at increasing net producer income.

Neither the rulemaking record, the studies, nor anything else lends credence to the government's claim that compelled "generic" advertising increases consumption of peaches, plums, or nectarines more than the alternative promotional strategies that individual members of these industries would use if left to their own devices.

3. The Solicitor General speculates that collective advertising achieves results for the California tree fruit industry that it could not attain without the government's help. These theories are nothing more than after-the-fact rationalizations of a fundamentally irrational government program. Unsurprisingly, none of the explanations withstands even the most deferential scrutiny.

For example, relying on the 1989 RMC Study (J.A. 511-528), the government states that a mandatory program is needed to enable the joint promotion of the several tree fruits in the same advertising campaign. Such treatment, it says, has a "synergistic effect on consumption" and is "precisely the type of generic advertising in which individual handlers of a particular fruit will not engage." U.S. Br. 39 (citing J.A. 523-524).

This is a slender reed. First, it cannot account for the beef, egg, walnut, cherry, almond, or cut flower programs, none of which involves multiple products. Second, far from justifying the tree fruit campaign, the RMC Study concluded that "[t]he grouping of peaches, plums, nectarines, and Bartlett pears is essentially an artificial one imposed by the pragmatic considerations of the California Tree Fruit Agreement." J.A. 519. In plain English: the committee structure has not been created because these four fruits should be advertised together; the fruits are advertised together because that is the way the marketing order committees are structured. Third, since the program for plums was terminated in 1991 (56 Fed. Reg. 46368-01 (1991)), and the program for California pears was suspended in 1994 (59 Fed. Reg. 10053 (1994)), the explanation is now obsolete. Finally, there is no factual basis for supposing that individual producers will not engage in joint product advertising, which is extremely common in American marketing. Indeed, as the record shows, respondents feature multiple

fruits in their own advertising. J.A. 537-544. The government's helping hand is not needed to enable complementary products to be advertised together.

The government also contends (citing the same study) that compelled advertising is needed to combat "pervasive ignorance" regarding proper ripening techniques for these fruits. U.S. Br. 40; see also J.A. at 524-525 ("[m]ost consumers are virtually ignorant of proper ripening techniques for tree fruits"). Since the government's advertising programs have been in effect for *decades*, surely the only conclusion to be drawn from this is that the programs have been an utter failure so far.

Relying again on the RMC Study, the government states that "over 90% of each fruit's total volume of sales is drawn from repeat purchasers, and * * * the highest percentage of repeat purchasers was found among customers who first purchased the fruit during its first four weeks of availability during the season." U.S. Br. 40. In a particularly precarious stretch of logic, the government asserts that it is therefore necessary to compel handlers of both early and late-season varieties to pay for advertising early in the season in order to increase the pool of potential repeat purchasers for everyone's benefit. However, the more obvious conclusions to be drawn from the RMC data are that (1) people who like peaches, plums, and nectarines are prone to buy them when they first become available each season, and (2) people who like these fruits have tried them before, and thus each time they purchase a peach they are repeat purchasers.[24]

Finally, government compulsion does not directly advance the government's asserted interest (assuming it *is* a legitimate interest) in preventing some handlers from free riding on the advertising efforts of others (U.S. Br. 26-27) "because of the overall irrationality of the Government's regulatory scheme." *Coors Brewing Co.*, 115 S. Ct. at 1592. As discussed above (at 2), 33 states handle peaches, yet California is the only one in which handlers are subject to compelled

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[24] Nor can the government base its argument on the seasonal or perishable nature of these fruits, since the government also compels handlers of such nonperishable items as walnuts, honey, and olives to pay for advertisements, and those products are on the shelves year-round.

payments for advertising. As the Ninth Circuit correctly noted, "[i]f the Secretary is concerned about free-riders, there are already plenty of them in other states." Pet. App. 21a.[25]

These examples represent the Solicitor General's best efforts to conjure up reasons why the compelled speech programs might achieve results that would otherwise be unattainable. None comes close to satisfying the government's burden to justify an infringement on respondents' First Amendment rights.

4. One set of interests that the compelled advertising programs certainly *do* advance are those of the politically connected members of the industry who sit on the committees. These members have broad authority over the administration of the marketing orders, including all decisions regarding the size and uses of the advertising and promotional budget. The record is clear that the committees have used mandatory assessment money in a variety of ways that confer competitive advantages upon the committee members vis-a-vis their competitors. See *infra*, pages 6-7.

Petitioner may argue that these abuses are aberrational, but they are not. They are the logical and inevitable outcome of a system in which politically influential members of an industry are granted control over important business decisions (here, advertising) of their competitors. Allowing the producers on the marketing order committee to direct the advertising campaigns for the entire industry

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[25] The government attempts to justify this patent irrationality in the regulatory scheme by claiming that the geographical limitation of the compelled advertising program is in keeping with the AMAA requirement that marketing orders be restricted "to the smallest regional production areas * * * practicable." U.S. Br. 47 (quoting 7 U.S.C. § 608c(11)(B)). This answer, however, does not reduce the irrationality of the system; it just shows that the irrationality is inherent in the statutory scheme. If the collective advertising programs are restricted to subnational production areas, then it is inevitable that they will produce geographical free-riders and other interstate anomalies. Imagine one group of citizens forced to proclaim "California peaches are the sweetest" and another group forced to proclaim "No, Georgia peaches are the sweetest." Will the government claim there is a substantial federal interest in compelling contradictory messages of this kind?

makes no more sense than to allow the owners of six professional football teams to direct the recruitment efforts of the entire NFL. We suppose a story about market defects and free riders could be concocted to support that idea. (If recruiting were left to individual teams, they would underinvest in enhancing the reputation of a football career vis-a-vis basketball or hockey, and some teams would "free ride" on the promotional efforts of the others. But would anyone be surprised if the best players went to the owners on the recruiting committee?

The record demonstrates that compelled advertising "directly advances" the interests of those who shape the message, decide when and where it will be delivered, and control the purse strings — but not the interests of growers, handlers, or the public.

C. The Compelled Advertising Program Is Not Narrowly Tailored To Achieve The Government's Asserted Purpose

The government's compelled advertising programs are the very model of a haphazardly applied regulatory program that burdens First Amendment rights. There is no apparent reason why the programs have been imposed on the products on which they have been imposed, why they have not been imposed on apparently comparable products, why there are credits for brand advertising for some products but not others, or why generic advertising (rather than more focused promotion) is thought necessary to achieve the government's stated purposes. It is manifest that, in designing the advertising programs, neither Congress nor the Secretary gave *any* consideration to achieving a constitutionally satisfactory fit between the government's means and ends.

The programs therefore cannot possibly satisfy the final part of the *Central Hudson* test, which requires a close fit between ends and means and places the burden on the government to demonstrate "that its restriction on speech [is] no more extensive than necessary." *44 Liquormart*, 116 S. Ct. at 1510 (plurality opinion). Under this test, as the government acknowledges (U.S. Br. 45 (citing *Coors Brewing Co.* and *44 Liquormart*)), a regulation of commercial speech is invalid

where the government could advance its asserted interest through non-speech-based regulation.

If the industry is in need of government assistance, that can be accomplished through financial subsidies, tax incentives, or any of the myriad other means by which the government routinely acts to favor or disfavor a given sector of the economy. See *Turner Broadcasting*, 114 S. Ct. at 2480 (O'Connor, Scalia, Ginsburg, Thomas, JJ., concurring in part) (rather than must-carry, Congress could "subsidize broadcasters that it thinks provide especially valuable programming"); *44 Liquormart*, 116 S. Ct. at 1519 (Thomas, J., concurring) ("directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be"). As American agricultural policy readily demonstrates, it is not just possible, but is a long-established policy, to promote the goal of "enhancing producer incomes" through price supports and subsidies.

Moreover, since the theory underlying the compelled advertising programs is that economies of scale and free rider problems make it difficult for individual firms, in the aggregate, to engage in sufficient levels of advertising for the industry, the most obvious less restrictive alternative has already been enacted: laws facilitating agricultural cooperatives. As already noted, co-ops are very effective in marketing agricultural products, achieving economies of scale, and excluding free riders.[26]

Alternatively, if the government believes that "increased public consumption" is the most effective way to promote the interests of the California fruit industry, there is no constitutional impediment to the government spreading the word itself through the use of taxpayer funds. Since the public would foot the bill, such a program would invite debate as to the desirability of subsidizing the California fruit industry in the first place. The government should not be permitted to avoid such public scrutiny by relying on compulsion of commercial speech. See *44 Liquormart*, 116 S. Ct. at 1507-1508 (plurality)

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[26] See *supra*, pages 23-24.

(commercial speech regulations "impede debate over central issues of public policy"); *Central Hudson*, 447 U.S. at 566 n.9 (regulation of commercial speech in order to pursue a non-speech related policy "could screen from public view the underlying governmental policy").

Finally — as the Ninth Circuit held — the burden that the program imposes on the handlers' First Amendment rights could be substantially lessened by the adoption of a credit program similar to that under the California Almond marketing order. See *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429 (9th Cir. 1993); 7 C.F.R. § 981.441(c). Under that system, each handler would be required to expend the same amount each year on advertising as under the current system, but handlers would be permitted to pay instead for their *own* advertising if the government's ads are deemed to be objectionable in any respect. Mandatory advertising with a credit option still constitutes compelled speech, but it obviously burdens the handlers' First Amendment interests to a lesser degree, while still accomplishing the government's asserted goal of assuring continued advertising "at a constant rate." U.S. Br. 43.[27]

II. THE GOVERNMENT'S ARGUMENTS FOR A LOWER LEVEL OF CONSTITUTIONAL SCRUTINY SHOULD BE REJECTED

Perhaps recognizing that the marketing orders in this case cannot withstand the *Central Hudson* test,[28] the Solicitor General devotes a

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[27] The government contends that a credit system would not work in the California peach, plum and nectarine industries because these markets are more fragmented than the almond industry. U.S. Br. 47. Because the almond industry is dominated by a single brand, the government says, it is equally benefitted by either brand or generic advertising. This argument fails to explain why the paid advertising programs for hazelnuts, walnuts, and olives — none of which is dominated by a single player — also have credit systems. It also reconfirms the fundamental irrationality of the system, since there is no free rider problem to overcome in an industry, like almonds, with a single dominant producer. The interesting question is not why the almond program allows brand credits, but why there is an almond program at all.

[28] The government argued in both the district court and the court of appeals that the constitutionality of the assessments for generic advertising

substantial portion of his brief (at 18-34) to arguing that *Central Hudson* applies only where commercial speech is "suppress[ed] or ban[ned]" and not where private parties are compelled by the government to "fund collective activities having an expressive component." *Id*. at 18.[29] In the latter context, the Solicitor General maintains, this Court dispenses with the *Central Hudson* test altogether and asks merely whether the "subsidized expressive activities" are somehow "germane" to the government's regulatory objectives. *Ibid.*; see also *id*. at 24, 28-29. The government would thus avoid not only the need to show that coerced speech in the commercial context "directly advances" or is "narrowly tailored" to the legislative purpose (replacing that exacting inquiry with what the government describes as a loose standard of "germaneness"), but also the need to show that the legislative purpose involved is "substantial." This would, in effect, legitimate any and all coercions of speech in the commercial context, no matter how manipulative, since it is hard to imagine any such requirements that would not be "germane" to some legitimate "regulatory objective." Under the government's logic, for example, Congress could pass a law directing that all television advertisements by American automakers contain a large, flashing subtitle stating "Buy American." That would presumably be "germane" to the various federal programs attempting to redress our trade imbalance.[30]

"must be analyzed under the three part test of [*Central Hudson*]." Br. in Opp. App. 5a; see *id.* 2a.

[29] To read the government's brief, with its repeated references to the target of respondents' complaint as "collective activities" that have "an expressive component" (U.S. Br. 14, 18), one could easily come away with the mistaken impression that this case is one involving *expressive conduct*. See *United States* v. *O'Brien*, 391 U.S. 367 (1968). Contrary to the government's repeated suggestion, however, the "conduct" that respondents object to being compelled to endorse and underwrite is speech itself.

[30] The government also repeatedly attempts to downplay the incursion on respondents' speech rights by stressing that respondents are being forced only to pay "assessments" that finance the objectionable speech, not to

The Solicitor General offers no principled justification for this astonishing enlargement of governmental power over the commercial marketplace of ideas. It has long been a bedrock of First Amendment jurisprudence that "freedom of thought and expression `includes both the right to speak freely and the right to refrain from speaking at all.'" *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 559 (quoting *Wooley*, 430 U.S. at 714). See also *Hurley* v. *Irish-American Gay Group of Boston*, 115 S. Ct. 2338, 2347 (1995) ("`Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide `what not to say'") (emphasis in original) (citation omitted); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). The Court has drawn inspiration from Thomas Jefferson's words: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31.

The government can manipulate or distort the marketplace of ideas just as effectively by commandeering private persons to advocate its message against their will as by preventing them from speaking their own minds. While the *commercial nature* of the speech in this case *may* dictate a lower standard of review (an issue we address below), the Solicitor General has suggested no convincing reason why the government should be given any wider latitude to *coerce* than to *forbid* commercial speech. Both are, prima facie, abridgements of the freedom of speech.

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communicate the messages themselves. But that distinction was rejected by this Court in the very cases on which the government elsewhere relies. See, *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (plurality) ("By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as `an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'") (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977)); *Keller* v. *State Bar*, 496 U.S. 1 (1990); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977). See also *Elrod* v, *Burns*, 427 U.S. 347, 356 (1976) (plurality).

In support of its position, the government invokes a line of cases involving challenges to the use by labor unions or integrated bars of mandatory member and nonmember contributions to support political and ideological activities with which the contributors disagree. U.S. Br. 18-34. This argument is flawed at every turn.

A. First, the Solicitor General simply ignores precedent inconsistent with his position. In analogous contexts, this Court has flatly rejected the idea that "the First Amendment interest in *compelled speech* is different than the interest in *compelled silence*." *Riley* v. *National Federation of Blind*, 487 U.S. 781, 796 (1988) (emphasis added); *ibid*. ("the difference is without constitutional significance"); see also *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633 (1943) (stating that "involuntary affirmation could be commanded only on *even more immediate and urgent grounds* than silence") (emphasis added).

"Our lodestars in deciding what level of scrutiny to apply to a compelled statement," the Court has explained, "must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley*, 487 U.S. at 796. In *Riley*, the State argued that a law compelling the disclosure of fees by professional charitable solicitors (plainly an example of coerced speech) should be analyzed as a regulation of commercial speech, while the plaintiffs argued that the speech was at least partly political. Although the case involved compelled speech rather than restrictions on speech, every member of the Court agreed that the level of scrutiny hinged on whether the speech was commercial or political. No member of the Court suggested that there is a third, even lower, level of scrutiny that applies to compelled commercial speech. Similarly, in *Turner Broadcasting*, the Court carefully considered whether to apply rational basis, intermediate, or strict scrutiny; and not one of the five separate opinions for the Court hinted that some lesser standard of review was appropriate because compelled speech rather than restrictions on speech was at issue.

The Court routinely reviews compelled speech claims in the commercial context under the standards applicable to commercial speech restrictions. See *44 Liquormart*, 116 S. Ct. at 1506 (because of the nature of commercial speech, "the State may require

commercial messages to `appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive'") (quoting *Virginia Pharmacy Bd.*, 425 U.S. at 772 n.24); *In re R.M.J.*, 455 U.S. 191, 201 (1982) ("a warning or disclaimer might be appropriately required * * * in order to dissipate the possibility of consumer confusion or deception"); *Coors Brewing Co.*, 115 S. Ct. at 1594 (Stevens, J,, concurring) (mandatory disclosure requirements are often justified in the commercial arena in order to insure that consumers are not misled by incomplete information).

The Solicitor General's argument thus flies in the face of substantial precedent.

B. The *Abood* line of cases is easily distinguishable. Those cases involved challenges to compulsory financial support of collective activities whose primary purpose was neither the suppression or promotion of particular ideas — namely, the conduct of collective bargaining and the regulation of the legal profession. The Court held that these purposes are sufficiently important to justify the incidental effects on First Amendment rights. At the same time, the Court held that unwilling persons cannot be forced to support speech that is *not* directly related to those collective activities. The *Abood* cases did not suggest that a program, like this one, whose very purpose is the promotion of government-favored ideas, could withstand constitutional scrutiny merely because it is "germane" to a "regulatory purpose."

Moreover, even the requirement of compulsory contributions for the purpose of collective bargaining was upheld only after the Court had concluded that these activities were "justified by the government's *vital policy interest*" in labor peace. *Lehnert*, 500 U.S. at 519 (emphasis added). See also *Keller* v. *State Bar*, 496 U.S. 1, 11 (1990) (explaining that an integrated bar "undoubtedly performs important and valuable services for the State by way of governance of the profession"); *Lathrop* v. *Donohue*, 367 U.S. 820, 864 (1961) (Harlan, J., jointed by Frankfurter, J., concurring in the judgment) (noting that integrated bar furthers "substantial state interest" and satisfies "highly significant state need"). In light of this Court's explicit recognition of the importance of the government's interest in the *Abood* cases, the government cannot use these cases as an excuse

for dispensing with the necessity of showing that its interest is substantial or important.

C. Even if the *Abood* framework, properly understood, is applied to this case, the collective advertising programs cannot be sustained. Contrary to the Solicitor General's argument, the *Abood* cases did not establish a constitutional test approving all compelled speech that is "germane" to the government's "regulatory objective." U.S. Br. 32. Instead, the Court articulated a three-part test *at least if not more* stringent than the *Central Hudson* test the Solicitor General seeks to avoid. Mandatory exactions may be used in the labor context only to fund those activities that (1) are "germane" to the union's collective-bargaining activities; (2) are justified by the government's vital policy interest in labor peace and avoiding "free riders"; *and* (3) do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. *Lehnert*, 500 U.S. at 519.

A comparison of these factors with their counterparts under *Central Hudson* demonstrates the relative stringency of the *Abood* framework. To begin with, the requirement that the challenged regulation serve a *vital* policy interest is, on its face, more demanding than *Central Hudson*'s "substantial" interest test (447 U.S. at 566). In addition, the "germaneness" test urged by the Solicitor General has, in practice, been applied with equal rigor to *Central Hudson*'s "direct advancement" prong. See *Ellis* v. *Railway Clerks*, 466 U.S. 435, 451-54 (1984). Finally, the question whether a particular use of mandatory union dues "significantly add[s] to the burdening of free speech" (*Lehnert*, 500 U.S. at 519) implicates precisely the same concerns as does the *Central Hudson* "narrow tailoring" requirement. The compelled advertising involved in this case does not satisfy the *Lehnert* test.

The government conspicuously fails to identify any "vital policy interest" that compares in any way to the public interest in "labor peace" underlying the Court's reasoning in the *Abood* line of cases. In *Abood*, the Court held that the First Amendment could tolerate certain incidental infringements on the associational rights of dissenting non-union members only because "exclusive union representation" is a "central element in the congressional structuring

of industrial relations." *Abood*, 431 U.S. at 220 (citing National Labor Relations Act, Railway Labor Act, and numerous cases). As the Court explained, its emphasis on the role of exclusive union representation "reflects familiar doctrines in federal labor laws":

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-21 (citations omitted).

To point out the obvious, there is no "familiar doctrine" in federal law that producers in any given industry require a regime of forced, collective speech in order to accomplish peace or prosperity for themselves or the public. Those who are forced to join in the collective speech in this case are *competitors*, not co-workers. There is no need for them to speak with a single voice. Rather than even attempt to identify a "familiar doctrine" supporting this program, the Solicitor General instead concocts, *after the fact*, various lawyerly rationalizations as to why the public interest rides on compelled collective advertising. As discussed in the previous section, those justifications are wildly speculative and unsupported either in the record of this case or in the legislative or administrative records at the time the programs were established.

The collective advertising program is therefore not germane to any vital public function analogous to the collective bargaining activities in *Abood*. Arguably, the marketing order committees' *regulatory* functions (setting size, quality, and appearance standards for fruit) are analogous to the regulatory functions of the integrated bar in *Keller*, but any connection between those regulatory functions and the collective advertising programs is plainly too "attenuated" (*Lehnert*, 500 U.S. at 520) to satisfy First Amendment scrutiny. The regulatory and advertising functions of the market order committees

are logically and operationally independent. The committees performed their regulatory functions for thirty years before the "paid advertising" provisions were enacted, and many marketing orders still function without any advertising program. While the *Abood* line of cases might support the constitutionality of using mandatory assessments to pay the costs of the marketing order committees' *regulatory* functions, it does not support a separate program of *advertising*.

Nor is the problem of "free riders" here comparable to the "free rider" problem in *Abood*. Contrary to the government's suggestion (U.S. Br. 21-24, 26-28), the mere possibility that a collective activity (including speech) might confer a benefit on a person does not make the beneficiary a "free rider." "Free riders" of that description abound in our interconnected world. The distinctive feature of the labor laws is that the union is forced by law to assume the legal responsibility of fair representation for each and every worker. See *Ellis*, 466 U.S. at 452 ("The free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members").

In any event, as discussed above (at 25 and n.21), compelling respondents to pay the challenged contributions would not eliminate the "free rider" problem even as the government conceives it. Under the government's view of the statute, "the marketing orders are designed in large measure for the benefit of the producers (farmers)." U.S. Br. 25 n.16. The handlers, however, are the ones required to pay for the advertising. Thus, according to the government, part of the purpose of the statutory scheme is to *foster* "free riding" (by farmers at the expense of handlers). Moreover, the geographic focus of the marketing orders ensures that, for example, the handlers of Georgia peaches (whose marketing order does not include provision for generic advertising) will "free ride" at least in part on the compelled messages funded by the handlers of California peaches (whose marketing order does). As the Ninth Circuit commented: "If the Secretary is concerned about free-riders, there are already plenty of them in other states." Pet. App. 21a.

Finally, the compelled contributions in this case, like those struck down in the labor union and integrated bar contexts, add significantly

to the burdening of free speech that is already inherent in the marketing orders. In fact, apart from the compulsory funding of the advertising, there is *no* impairment of First Amendment rights caused by the regulatory scheme. Because of the substantial *incremental* incursion on First Amendment rights involved here, the mandatory contributions fail the third test under *Lehnert*.[31]

III. GOVERNMENTAL COMPULSION OF NONFACTUAL ADVOCACY FOR THE PURPOSE OF MANIPULATING CONSUMER OPINION IS SUBJECT TO STRICT SCRUTINY

Because the government has not demonstrated any substantial interest in support of the programs at issue here, the programs constitute an impermissible regulation of commercial speech. However, the programs suffer from an even more fundamental

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[31] An *amicus curiae* brief urges this Court to reverse the Ninth Circuit on the ground that the compelled advertising here is "government speech" and thus not subject to First Amendment challenge. Br. *Amici Curiae* for the National Association of State Departments of Agriculture *et al.*, at 4. That argument was not made in the court below, and was expressly waived in the Petition for Certiorari. Pet. 21-22 n.14. It should therefore not be considered. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 532 n.13 (1979).

Nor does the argument have merit. The advertising in question promotes products produced and sold by private persons; it is paid for entirely by those private persons with no contribution from the Treasury; it is designed by a committee made up of representatives of the industry; and it is identified to the consumer as produced by the "California Tree Fruit Agreement," whose name indicates an "agreement" among tree fruits producers and gives no hint that the speaker is the U.S. government. The government here is "requir[ing] a publicly identified group" of narrow scope — the handlers — to "contribute to a fund earmarked for the dissemination of a particular message associated with that group," a scheme that plainly creates a "coerced nexus" between the handlers and the subsidized messages. *United States* v. *Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). *Amici*'s argument (at 5, 10-14) that government action sufficient to be "state action" should be treated as "government speech" must be rejected, since it would render virtually any compulsion of speech by a state actor immune from scrutiny under the First Amendment.

defect. Their sole and central purpose — to manipulate consumer perceptions — is a constitutionally invalid purpose for regulating commercial speech. See generally *44 Liquormart*, *supra*. The government's reliance on this interest takes this case outside of traditional commercial speech doctrine and requires the application of strict scrutiny.

A. In its commercial speech cases, this Court has repeatedly stressed the valuable contribution that such speech makes to the proper functioning of a market economy and to the dissemination of information that is of vital importance to consumers. In *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995), the Court observed that "the free flow of commercial information is `indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Id.* at 1589 (quoting *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)). "[A] `particular consumer's interest in the free flow of commercial information,'" the Court noted, "`may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" 115 S. Ct. at 1589 (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 763). When the government forces producers to pool their advertising efforts in a single campaign, run by a politically appointed committee, the result is the very antithesis of the "free flow of commercial information."

This Court has relaxed the degree of constitutional scrutiny in commercial speech cases from strict to intermediate scrutiny where the government has compelled disclosures of uncontroversial, purely factual information, for the protection of the public. As the Court explained in *Hurley*, "the State may at times `prescribe what shall be orthodox in commercial advertising' by requiring the *dissemination* of `*purely factual and uncontroversial information*.'" 115 S. Ct. at 2347 (citations omitted) (emphasis added). This power to require a commercial speaker to disclose "purely factual and uncontroversial information" derives from the government's interest in "preventing deception of consumers" and from the notion that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). See also *44 Liquormart*,

116 S. Ct. at 1508 ("It is the State's interest in protecting consumers from `commercial harms' that provides `the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech'") (quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).[32]

The government's regulation of advertising in this case, however, is not limited to "purely factual and uncontroversial information"; nor is it justified by the need to prevent deception.[33] The compelled advertising here accordingly finds no support in the rationale underlying relaxed scrutiny for disclosure requirements of a commercial nature.

B. Aside from their commercial context, the collective advertising programs have all the hallmarks of impermissible speech regulation that ordinarily would entail strict scrutiny.

First, the very purpose is to alter the *content* of the speech that would be produced in the absence of government intervention. It is well established that "the State retains less regulatory authority when its commercial speech restrictions strike at `the substance of the information communicated' rather than the `commercial aspect of

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[32] The government also may restrict commercial speech concerning illegal conduct. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973).

[33] Indeed, according to the ALJ's findings, it is the *government* in this case that is engaged in disseminating to consumers commercial speech that is "misleading." App. to Br. in Opp. 364a. The ALJ found:

> Promotion, through the California Tree Fruit Agreement's "generic" advertising program, advances the notion that all California fruit is the same * * * . That is what is projected by the commercials advertising California fruit. * * * [T]o lump all California fruit into a single category *is misleading* and [respondents] have stressed their philosophical objections of their advertising assessments being directed to such a message. (Tr. 2960). The [government] has not adduced any evidence to show why the United States Department of Agriculture would have a legitimate purpose in having the consumer believe that all California fruit are the same, *when they are not*.

Ibid. (emphasis added).

[it].'" *44 Liquormart*, 116 S. Ct. at 1506 (quoting *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 96 (1977)); accord *Turner Broadcasting*, 114 S. Ct. at 2459 ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as are content-based restrictions).

The compelled advertising programs alter the content of speech both directly and indirectly. As previously explained, the programs compel respondents to pay for and be associated with commercial messages whose content they object to. It is undisputed that, but for the coercion, respondents would not engage in this speech. As this Court has made clear, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795.

But it goes even beyond that. In order to communicate the message they wish to convey concerning their products — including the idea that their products are of superior quality — respondents must engage in counterspeech to neutralize the government's conflicting message. See U.S. Br. 20 (suggesting that if they do not like the committees' advertisements, respondents' remedy is "to advertise their own products, to criticize their competitors' products, and even to criticize the generic advertisements created pursuant to the marketing orders"). Cf. *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 9 (1986) (holding unconstitutional a law that "forces speakers to alter their speech to conform with an agenda they do not set"). Thus, the compelled advertising programs not only force respondents to say what they wish to avoid saying, but indirectly require respondents to redouble their efforts to convey the messages they wish to be heard.

As if all of that were not enough, the government's defense of the compelled speech hinges exclusively on speech content. See U.S. Br. 16 (referring to "government's interest in a broad-based commercial message"). We are told that respondents should be compelled to join in the collective advertising precisely because of its supposed *communicative effect* — its persuasive impact on consumers of California peaches, pears, and nectarines.

Second, the collective advertising programs have the purpose and effect of compelling *advocacy* or *persuasion* (and not merely disclosure of "purely factual and uncontroversial information"). This goes beyond the range of purposes for which the government is given greater latitude to regulate commercial speech. See *44 Liquormart*, 116 S. Ct. at 1507 (plurality); *id.* at 1516-18 (Thomas, J., concurring). One of the "`commonsense differences' that exists between commercial messages and other types of protected expression," the Court has explained, is "the greater `objectivity' of commercial speech." *Id.* at 1506 (quoting *Virginia Board of Pharmacy*, 425 U.S. at 771 n.24); see also *Friedman* v. *Rogers*, 440 U.S. 1, 10 (1979) (justifying commercial speech regulation on the ground that "commercial speech is more objective, hence more verifiable, than other varieties of speech"). Requirements to disclose objective facts and information thus fall within the justification for differential treatment of commercial speech. When the government requires advocacy of an opinionated sort ("California fruit is the sweetest"), however, this rationale for relaxed constitutional scrutiny simply does not apply.

Third, in its most recent decisions, this Court has condemned attempts by government to influence the choices of consumers by deciding what information they should hear. See, *e.g.*, *44 Liquormart*, 116 S. Ct. at 1505 (plurality); *Coors Brewing Co.*, 115 S. Ct. 1588. Several members of the Court have expressed doubt as to whether commercial speech regulations designed only to manipulate consumer choices can ever survive First Amendment scrutiny. See *44 Liquormart*, 116 S. Ct. at 1507 (plurality opinion of Stevens, Kennedy, Ginsburg) (where commercial speech regulations are not directed toward the "preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands"); *id.* at 1515-16 (Thomas, J., concurring) (where a speech restriction is enacted "to keep legal users of a product or service ignorant in order to manipulate [consumer] choices in the marketplace, * * * such an `interest' is *per se* illegitimate and can no more justify regulation of `commercial' speech than it can justify regulation of `noncommercial' speech"); *Coors Brewing Co.*, 115 S. Ct. at 1596-97 (Stevens, J., concurring) (because statute was not directed toward preservation of a fair

bargaining process it "should be subjected to the same stringent review as any other content-based abridgment of protected speech").

The compelled advertising in this case, of course, *is* designed only to manipulate consumer choices. That is its alpha and its omega. And while it is not designed to keep consumers ignorant, it has the effect of communicating the inaccurate — or, as the ALJ termed it, "misleading" (see *supra*, n.33) — impression that all California fruits are alike. By skewing the information marketplace in favor of one type of advertising — generic advertising — the programs obscure the differences between products, making it more difficult for producers to call attention to, and consumers to learn about, distinctions that are relevant to consumer choice. As discussed above, it is the differences between products — such as differences in sweetness, maturity, healthfulness, price, or the use or non-use of pesticides — that often are of greatest interest to consumers. Enforced advocacy of this sort, neither factual in nature nor designed to protect consumers, warrants the same degree of scrutiny — even though it involves commercial speech — as that accorded to talk about politics, sports, weather, gossip, sex, or the funny papers.

Indeed, this case is the mirror image of *44 Liquormart*. In *44 Liquormart*, the government *restricted* commercial speech about alcohol prices in order to *discourage* public consumption (a policy with dubious empirical basis, inconsistent application, and numerous less restrictive alternatives). Here, the government is *compelling* commercial speech in order to *encourage* public consumption (likewise, a policy with dubious empirical basis, inconsistent application, and numerous less restrictive alternatives). In *44 Liquormart*, the Court unanimously held the state law unconstitutional. This law deserves the same fate, for the same reasons.

Finally, in contrast to government regulation that requires disclosure of objective and verifiable facts and information, compelled advocacy on issues of opinion, which involves appeals to the public's emotions, memories, biases, tastes, and opinions, necessarily becomes intertwined in issues of wider cultural or ideological significance. See Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 635, 644-48 (1990). The power to restrict commercial advertising inevitably has ideological ramifications, whether the

purpose is to reduce demand for contraceptives (see *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983)) or to increase demand for beef. Governmental collectivization of advertising inevitably puts the government into the position of making choices about ideologically charged messages — choices that, in our constitutional system, should be left to private actors. See *United States* v. *Frame*, 885 F.2d 1119, 1147 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990) (Sloviter, J., dissenting) ("Although beef promotion may be less ideological than the motto `Live Free or Die,' I am less persuaded than the majority is that beef promotion does not implicate ideological concerns").

Television and radio advertisements do not appear in a cultural or ideological vacuum, but appeal to, express, and reinforce ideas and images with significance beyond the particular products. For example, a major strategy of the tree fruit committees is to create a mood of nostalgia (and in some cases patriotism) by conjuring up homespun images of listeners' and viewers' first encounters with the fruits. See J.A. 429 (radio advertisement) ("When you bite into a big, juicy peach, what memories come to mind?" * * * "The first time you danced with a girl, one Fourth of July?"). See generally J.A. 444 (committee presentation stating that "nostalgia can be an effective consumer `hot button' for selling the fruits"). Yet the promotion of nostalgia has broad political and cultural significance — as a comparison of the convention acceptance speeches of Bob Dole and Bill Clinton illustrates.

More pointed examples of the ideological component of advertising of the kind challenged here are not difficult to locate. The beef promotion program devotes a substantial portion of its budget to combatting what a representative of the National Cattlemen's Association calls the "transparent vegetarian agenda" — an effort that its supporters admit must be kept "less visible" than the usual marketing efforts in order to be "effective." Charles Lambert, *An Analytical Framework for Policy Issues: Response*, in W. Armbruster & J. Lenz, COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY 105, 107 (1993). Is it an appropriate role for the government to compel citizens to pay for a clandestine campaign to discredit vegetarianism?

Similarly, the Florida Citrus Board was forced to decide on several different occasions whether to continue to use controversial figures as public spokespersons. In 1980, the Board fired singer Anita Bryant after her extremely controversial opposition to a Miami gay rights ordinance. In 1993, the Board fired Burt Reynolds in the wake of his highly-publicized divorce; in 1994 the choice of Rush Limbaugh as the Board's spokesman drew protests from numerous civil rights groups; and in 1995, the Board attempted to run promotional ads for "O.J." during telecasts of the O.J. Simpson murder trial. (The ads, which consisted of a flashing message — "Get O.J" — were rejected by Court Television as "inappropriate.") Gannett News Service, Jan. 24, 1995.[34] These are all ideologically significant choices.

To give another example, the use of sexual imagery is a pervasive and controversial issue in modern advertising, with profound consequences for the culture's conception of the role of women. Each time a marketing order board decides on an advertising strategy that may involve sexual imagery, it is making an ideological statement. Rodney Chang, president of respondent Kash, was not being trivial when he complained about an ad for peaches (for which he was required to pay, and which would be associated in the public's mind with his product) that featured a young girl in a wet bathing suit with the announcer intoning "remember the taste * * * so cool, juicy * * * taste them and see." App. to Br. in Opp. 356a; J.A. 530.

Our point is not that these programs are unconstitutional as applied, in that they force unwilling citizens to pay for ads denigrating vegetarians, associating their products with controversial public figures whom they may find ideologically obnoxious, or using morally questionable sexual imagery. The opposite decisions (to refuse to hire Rush Limbaugh, for example, or to hew to a "politically correct" portrayal of women) might be equally controversial. The point is that the government should not be involved in these ideologically-charged

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[34] A well-known advertisement of the 1920s presented signatures by labor leader Samuel Gompers, British author and socialist H.G. Wells, and the presidents of U.S. Steel and the B.& O. Railroad as testimony to the quality of the Parker Pen. Rudolph J.R. Peritz, COMPETITION POLICY IN AMERICA, 1888-1992, at 106 (1996).

decisions. The government's attempt to trivialize the free speech interests in this case by denying the ideological subtexts of commercial messages should be rejected. Because the speech at issue *does* have an ideological component, the government's action in compelling respondents to support it should be subjected to strict scrutiny.

In short, this governmental attempt to exercise control over speech should be subjected to strict scrutiny, which it cannot possibly survive. The compelled advertising programs are based squarely on the government's desire to promote a particular message, based on its communicative impact; the compelled speech consists of persuasion regarding matters of opinion; the purpose is to manipulate consumer behavior rather than to protect consumers; and administration of the programs needlessly implicates the government in controversial choices of serious ideological and cultural import. To apply a less stringent standard of review to such a program is to strain the "commercial speech" doctrine far beyond its logic.

C. Moreover, it cannot be said that "the long accepted practices of the American people" permit the government to launch and conduct compelled advertising campaigns of the kind at issue here. *44 Liquormart*, 116 S. Ct. at 1515 (Scalia, J., concurring). As the *amicus curiae* brief of the American Advertising Federation in this case demonstrates, neither the opinions of the framers of the First Amendment nor the historical practices of the state and local governments justifies a sharp distinction between commercial and noncommercial speech in First Amendment doctrine. Outside of efforts to protect consumers against misleading speech and regulation of speech that facilitates illegal transactions, the commercial marketplace of ideas in this country has been unfettered. Indeed, under the common law framework for speech regulation, which lasted until constitutionalization of the field after the 1920s, commercial speech may even have enjoyed a greater degree of protection than political speech. Speaking of the period before 1920, one historian has written:

> Whether motivated by concern about the destruction of property or some other threat associated with state police power, the Court granted political majorities broad powers to regulate political speech. When the speech involved commercial

> enterprise, however, the Court was less likely to look for some "bad tendency" or "clear and present danger." In short, commercial speech was seen as less dangerous and thus more worthy of protection.

Rudolph J.R. Peritz, COMPETITION POLICY IN AMERICA, 1888-1992, at 106 (1996).

The particular form of interference with freedom of speech at issue here has even less historical pedigree than other restrictions on commercial speech. Our research has not uncovered any instance in the nation's history, other than agricultural marketing orders, in which the government has assumed control over the advertising of private products for the ostensible benefit of an industry. The first such program at the state or federal level was initiated in 1954.

An interference with freedom of speech so recently devised, so haphazardly applied, so devoid of empirical or logical support, and so injurious to the "free flow of commercial information" on which consumers and producers both depend, cannot be sustained.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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