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March 12, 2001

COURT ASKED TO STRIKE DOWN COMPELLED SUBSIDY OF GENERIC ADVERTISING

(United States v. United Foods, Inc.)

Last week the Washington Legal Foundation (WLF) filed a brief with the U.S. Supreme Court, asking the Court to prevent the government from becoming a bully in the marketplace of ideas by striking down a federal program forcing farmers to contribute to generic advertising with which they disagree.

This case stems from a constitutional challenge brought to overturn certain provisions of a federal law that requires mushroom growers to fund generic advertising. Under the law, a company may be assessed a civil fine for failure to make the mandatory contribution. United Foods, Inc. (United Foods), an agricultural producer headquartered in Tennessee, brought a suit in federal district court to overturn the law.

The company charged that the mandatory subsidy program infringed its freedom of speech under the First Amendment. In particular, United Foods asserted that the government could not constitutionally force it to pay for advertising with which it disagreed. The government's defense relied on the U.S. Supreme Court's decision in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), which upheld a compelled subsidy program involving California peaches, plums, and nectarines. United Foods distinguished its case, pointing out that *Wileman* turned on the degree of regulation present in a particular industry and that government regulation of mushrooms was substantially less pervasive than the regulation of California tree fruits.

Although the district court sided with the government, the U.S. Court of Appeals for the Sixth Circuit held that the degree of regulation in a particular industry *is* decisive for the constitutional analysis. Accordingly, the court overturned the federal law requiring United Foods to contribute to generic marketing with which it disagrees. The government subsequently sought and obtained review in the U.S. Supreme Court.

In its brief filed with the Supreme Court, WLF argued that the Sixth Circuit's decision should be affirmed. First, WLF pointed out that the government's reading of *Wileman* would make that decision directly conflict with many precedents holding that the First Amendment

prohibits the government from mandating financial support for objectionable speech, with only a few narrow exceptions. For that reason, WLF urged the Court to adopt United Foods' narrow reading of *Wileman*. Second, WLF argued that, if the Court wished to reconsider *Wileman*, it would be well advised to adopt the most searching standard of judicial review—strict scrutiny—in cases where a governmentally mandated subsidy program is challenged on free speech grounds. Doing so would result in the following rule: a governmentally mandated subsidy should be struck down unless it serves a compelling government interest and is narrowly tailored to avoid unnecessary infringements on free speech. Third, WLF concluded that the mandatory subsidy in this case cannot survive this test. However important Congress may believe the promotion of mushrooms, that interest cannot qualify as compelling. Besides, even if the government's interest were deemed compelling, forcing companies to fund objectionable advertising is not narrowly tailored to that end. Tax revenues might be spent for the same purpose, instead. Or the government might simply leave companies free to band together in voluntary cooperatives, which could fund generic advertising as they see fit.

"Forcing companies to pay for advertising with which they disagree infringes on their freedom of speech," said Shawn Gunnarson, WLF's Senior Counsel for Litigation Affairs. "We are confident that the Supreme Court will subject the marketing order in this case to the most searching judicial scrutiny and conclude that the order must be struck down."

The Washington Legal Foundation is a public interest law and policy center with supporters in all fifty states. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights.

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