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SUPREME COURT NULLIFIES THE COMPELLED SUBSIDY OF ADVERTISING

(United States v. United Foods, Inc.)

The U.S. Supreme Court has handed a landmark victory to the Washington Legal Foundation (WLF) by striking down a federal program forcing farmers to contribute to generic advertising with which they disagree.

In a 6-3 decision the Court held that a federal program requiring mushroom farmers to subsidize generic advertising violates the dissenting farmers' free speech rights under the First Amendment. In perhaps the most significant passage of the majority opinion, Justice Kennedy dismissed the argument that compelled *commercial* speech is somehow less deserving of constitutional protection than other forms of compelled speech:

The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited. The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. *First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.*

"We are gratified by the Court's decision," said Shawn Gunnarson, WLF's Senior Counsel for Litigation Affairs. "That decision makes it plain that forcing companies to pay for advertising with which they disagree infringes on their freedom of speech."

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.

In its brief filed with the Supreme Court, WLF had 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.

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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