SUPREME COURT OF THE UNITED STATES

No. 00–276

UNITED STATES AND DEPARTMENT OF AGRICULTURE, PETITIONERS *v.* UNITED FOODS, INC.

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

[June 25, 2001]

JUSTICE KENNEDY delivered the opinion of the Court.

Four Terms ago, in *Glickman* v. *Wileman Brothers & Elliott, Inc.,* 521 U. S. 457 (1997), the Court rejected a First Amendment challenge to the constitutionality of a series of agricultural marketing orders that, as part of a larger regulatory marketing scheme, required producers of certain California tree fruit to pay assessments for product advertising. In this case a federal statute mandates assessments on handlers of fresh mushrooms to fund advertising for the product. The Court of Appeals for the Sixth Circuit determined the mandated payments were not part of a more comprehensive statutory program for agricultural marketing, thus dictating a different result than in *Glickman*. It held the assessment requirement unconstitutional, and we granted certiorari. 530 U. S. 1009 (2000).

The statute in question, enacted by Congress in 1990, is the Mushroom Promotion, Research, and Consumer Information Act, 104 Stat. 3854, 7 U. S. C. §6101 *et seq*. The Act authorizes the Secretary of Agriculture to establish a Mushroom Council to pursue the statute's goals. Mushroom producers and importers, as defined by the statute,

submit nominations from among their group to the Secretary, who then designates the Council membership. 7 U. S. C. §§6104(b)(1)(B), 6102(6), 6102(11). To fund its programs, the Act allows the Council to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported. §6104(g)(2). The assessments can be used for "projects of mushroom promotion, research, consumer information, and industry information." §6104(c)(4). It is undisputed, though, that most monies raised by the assessments are spent for generic advertising to promote mushroom sales.

Respondent United Foods, Inc., is a large agricultural enterprise based in Tennessee. It grows and distributes many crops and products, including fresh mushrooms. In 1996 respondent refused to pay its mandatory assessments under the Act. The forced subsidy for generic advertising, it contended, is a violation of the First Amendment. Respondent challenged the assessments in a petition filed with the Secretary. The United States filed an action in the United States District Court for the Western District of Tennessee, seeking an order compelling respondent to pay. Both matters were stayed pending this Court's decision in *Glickman*.

After *Glickman* was decided, the Administrative Law Judge dismissed respondent's petition, and the Judicial Officer of the Department of Agriculture affirmed. Respondent sought review in District Court, and its suit was consolidated with the Government's enforcement action. The District Court, holding *Glickman* dispositive of the First Amendment challenge, granted the Government's motion for summary judgment. App. to Pet. for Cert. 18a.

The Court of Appeals for the Sixth Circuit held this case is not controlled by *Glickman* and reversed the District Court. 197 F. 3d 221 (1999). We agree with the Court of Appeals and now affirm.

A quarter of a century ago, the Court held that commercial speech, usually defined as speech that does no more than propose a commercial transaction, is protected by the First Amendment. *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 762 (1976). "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield* v. *Fane,* 507 U. S. 761, 767 (1993).

We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression. See, *e.g., Ibid.; Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557 (1980). That approach, in turn, has been subject to some criticism. See, *e.g., Glickman*, *supra,* at 504 (THOMAS, J., dissenting); *44 Liquormart, Inc.* v. *Rhode Island,* 517 U. S. 484, 518 (1996) (THOMAS, J., concurring in part and concurring in judgment); *Rubin* v. *Coors Brewing Co.,* 514 U. S. 476, 493 (1995) (STEVENS, J., concurring in judgment). We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case. It should be noted, moreover, that the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, Reply Brief for Petitioners 9, n. 7, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test. The question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.

Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may pre-

vent the government from compelling individuals to express certain views, see *Wooley* v. *Maynard,* 430 U. S. 705, 714 (1977); *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943), or from compelling certain individuals to pay subsidies for speech to which they object. See *Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.,* 496 U. S. 1 (1990); see also *Glickman,* 521 U. S, at 469, n. 13. Our precedents concerning compelled contributions to speech provide the beginning point for our analysis. 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.

"[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield, supra,* at 767. There are some instances in which compelled subsidies for speech contradict that constitutional principle. Here the disagreement could be seen as minor: Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers. It objects to being charged for a message which seems to be favored by a majority of producers. The message is that mushrooms are worth consuming whether or not they are branded. First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distin-

guishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

In the Government's view the assessment in this case is permitted by *Glickman* because it is similar in important respects. It imposes no restraint on the freedom of an objecting party to communicate its own message; the program does not compel an objecting party (here a corporate entity) itself to express views it disfavors; and the mandated scheme does not compel the expression of political or ideological views. See *Glickman*, 521 U. S., at 469–470. These points were noted in *Glickman* in the context of a different type of regulatory scheme and are not controlling of the outcome. The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case we emphasized "the importance of the statutory context in which it arises." 521 U. S., at 469. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.,* at 469. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.,* at 461. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a

part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.,* at 469. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

The features of the marketing scheme found important in *Glickman* are not present in the case now before us. As respondent notes, and as the Government does not contest, cf. Brief for Petitioners 25, almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, there is no "heavy regulation through marketing orders" in the mushroom market. 197 F. 3d, at 225. Mushroom producers are not forced to associate as a group which makes cooperative decisions. "[T]he mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program," and "the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.,* at 222, 223.

It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups

which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. See, *e.g., Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.,* 496 U. S. 1 (1990).

The Government claims that, despite the lack of cooperative marketing, the *Abood* rule protecting against compelled assessments for some speech is inapplicable. We did say in *Glickman* that *Abood* "recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" 521 U. S., at 471 (quoting *Abood,* 431 U. S., at 235). We take further instruction, however, from *Abood*'s statement that speech need not be characterized as political before it receives First Amendment protection. *Id.,* at 232. A proper application of the rule in *Abood* requires us to invalidate the instant statutory scheme. Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place. In *Abood,* the infringement upon First Amendment associational rights worked by a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.,* at 222. To attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association.

A similar situation obtained in *Keller* v. *State Bar of Cal., supra.* A state-mandated, integrated bar sought to ensure that "all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts [were] called upon to pay a fair share of

the cost." *Id.,* at 12. Lawyers could be required to pay monies in support of activities that were germane to the reason justifying the compelled association in the first place, for example expenditures (including expenditures for speech) that related to "activities connected with disciplining members of the Bar or proposing ethical codes for the profession." *Id.,* at 16. Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of monies to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity. The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.

The situation was much the same in *Glickman.* As noted above, the market for tree fruit was cooperative. To proceed, the statutory scheme used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. The mandated cooperation was judged by Congress to be necessary to maintain a stable market. Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program. Though four Justices who join this opinion disagreed, the majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns. *Glickman*, 521 U. S., at 474; see *id.*, at 477 (SOUTER, J., dissenting).

The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action,

save to generate the very speech to which some handlers object. In contrast to the program upheld in *Glickman*, where the Government argued the compelled contributions for advertising were "part of a far broader regulatory system that does not principally concern speech," Reply Brief for Petitioner, O. T. 1996, No. 95–1184, p. 4, there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. Although greater regulation of the mushroom market might have been implemented under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. §601 *et seq.*, the compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

Our conclusions are not inconsistent with the Court's decision in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626 (1985), a case involving attempts by a State to prohibit certain voluntary advertising by licensed attorneys. The Court invalidated the restrictions in substantial part but did permit a rule requiring that attorneys who advertised by their own choice and who referred to contingent fees should disclose that

clients might be liable for costs. Noting that substantial numbers of potential clients might be misled by omission of the explanation, the Court sustained the requirement as consistent with the State's interest in "preventing deception of consumers." *Id.,* at 651. There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.

The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. As the Government admits in a forthright manner, however, this argument was "not raised or addressed" in the Court of Appeals. Brief for Petitioners 32, n. 19. The Government, citing *Lebron* v. *National Railroad Passenger Corporation,* 513 U. S. 374 (1995), suggests that the question is embraced within the question set forth in the petition for certiorari. In *Lebron*, the theory presented by the petitioner in the brief on the merits was addressed by the court whose judgment was being reviewed. *Id.,* at 379. Here, by contrast, it is undisputed that the Court of Appeals did not mention the government speech theory now put forward for our consideration.

The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government. For example, although the Government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval is *pro forma.* This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

We need not address the question, however. Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed

upon below, see, *e.g., United States* v. *Estate of Romani,* 523 U. S. 517, 526, n. 11 (1998), it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it. Just this Term we declined an invitation by an *amicus* to entertain new arguments to overturn a judgment, see *Lopez* v. *Davis,* 531 U. S. 230, 244, n. 6 (2001), and we consider it the better course to decline a party's suggestion for doing so in this case.

For the reasons we have discussed, the judgment of the Court of Appeals is

Affirmed.