

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

## OF THE

## UNITED STATES

CAPTION: DAN GLICKMAN, SECRETARY OF AGRICULTURE,  
Petitioner v. WILEMAN BROTHERS & ELLIOTT, INC.,  
ET AL.

CASE NO: 95-1184

PLACE: Washington, D.C.

DATE: Monday, December 2, 1996

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3       DAN GLICKMAN, SECRETARY OF       :  
4       AGRICULTURE,                   :  
5               Petitioner               :  
6               v.                       :   No. 95-1184  
7       WILEMAN BROTHERS & ELLIOTT,       :  
8       INC., ET AL.                   :

9       - - - - -X  
10                               Washington, D.C.  
11                               Monday, December 2, 1996

12               The above-entitled matter came on for oral  
13       argument before the Supreme Court of the United States at  
14       10:03 a.m.

15       APPEARANCES:

16       ALAN JENKINS, ESQ., Assistant to the Solicitor General,  
17               Department of Justice, Washington, D.C.; on behalf of  
18       the Petitioner.

19       THOMAS E. CAMPAGNE, ESQ., Fresno, California; on behalf of  
20       the Respondents.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-1184, Dan Glickman, Secretary of  
5 Agriculture v. Wileman Brothers and Elliott, Inc.

6 Mr. Jenkins.

7 ORAL ARGUMENT OF ALAN JENKINS

8 ON BEHALF OF THE PETITIONER

9 MR. JENKINS: Mr. Chief Justice, and may it  
10 please the Court:

11 In this case, respondents' challenge on First  
12 Amendment grounds, payments toward advertising designed to  
13 promote the products that they offer for sale, whether  
14 they're measured under the integrated bar and union line  
15 of cases that we believe is appropriate, or under the  
16 Central Hudson test for restrictions on commercial speech,  
17 the generic advertising programs pass constitutional  
18 muster. In our view, the regulatory framework at issue  
19 here is most analogous to the integrated bar and union  
20 context.

21 This Court has applied the Central Hudson test  
22 where Government has restricted or prohibited the  
23 dissemination of truthful commercial information, but the  
24 marketing order provisions at issue here do not ban,  
25 suppress, or restrict respondents' speech in any way.

1                   QUESTION: May I ask a question at an early  
2 stage, Mr. Jenkins? I think you take the position here  
3 that you didn't -- that the Government didn't argue that  
4 the Abood line or the union line cases wasn't argued in  
5 the Ninth Circuit because of the Cal-Almond decision in  
6 that court, but the administrative law judge suggests that  
7 the Government at least in that forum said that the Abood  
8 line didn't apply, and I'm just wondering if the  
9 Government has waived that, if we can't just assume that  
10 the Central Hudson test applies --

11                   MR. JENKINS: Well, I don't --

12                   QUESTION: -- in light of the posture taken  
13 below.

14                   MR. JENKINS: I don't think so, Justice  
15 O'Connor. In fact, the Government has argued throughout  
16 this litigation that these programs satisfy both Central  
17 Hudson and the Abood line of cases. We -- pardon me.

18                   QUESTION: But it does appear that the  
19 Government below chose not to urge the Abood line, took  
20 that tactic, and I don't know why we should address that  
21 here.

22                   MR. JENKINS: Well, Your Honor, I disagree with  
23 that characterization of our position below. I believe  
24 that in our briefs in the district court in particular we  
25 argued expressly that the Abood standard was satisfied and

1 that the Central Hudson test was satisfied.

2 It is true that we did not argue in the district  
3 court or in the court of appeals that that was the only  
4 appropriate test, but I do think that we've argued  
5 consistently that both tests are satisfied. In the court  
6 of appeals, as you've said, it's true that we were  
7 laboring under the adverse precedent in Cal-Almond, where  
8 the Central Hudson test was applied, but we did refer to  
9 the Frame case from the Third Circuit, which did rely in  
10 part on Abood, so I think that argument is preserved.

11 QUESTION: And both of those lines of cases, of  
12 course, deal with the First Amendment, don't they?

13 MR. JENKINS: Quite so, Mr. Chief Justice.  
14 That's certainly the case.

15 QUESTION: Mr. Jenkins, assuming that we apply  
16 one or the other test in a way that requires us to  
17 determine the value of the Government's interest, do you  
18 claim that the value of the Government's interest depends  
19 on a Government concern over and above that of the growers  
20 whose products they are advertising, or, on the other  
21 hand, do you claim that the Government's interest is  
22 essentially derivative, that it's important simply because  
23 the growers themselves want to do this, and that desire,  
24 that vote in fact on their part establishes its  
25 importance? Which is it?

1 MR. JENKINS: Well, I think it's the latter,  
2 Justice Souter, but I think it's even broader than that.  
3 The Agricultural Marketing Agreement Act expressly sets  
4 out the goals of that statute and of the marketing orders,  
5 which include establishing orderly market conditions for  
6 the covered commodities.

7 Congress, as in the integrated bar context and  
8 as in the union context, has chose to leave in the first  
9 instance to the regulated industry the determination  
10 whether, in a particular region, as for a particular  
11 commodity, that interest is threatened, but we think that  
12 both the overwhelming support by the industry and the  
13 record in this case indicate that that interest was  
14 certainly implicated here.

15 QUESTION: But the growers, as I understand it,  
16 do not vote in any narrow or specific sense as to whether  
17 the interest is threatened. They simply vote as to  
18 whether they want the advertising program or not, isn't  
19 that it?

20 MR. JENKINS: Well, I think that's correct,  
21 Justice Souter, but that just is at the core of the  
22 Government's interest. Where private industry and, I  
23 would add, the Secretary has to make a determination that  
24 private -- that generic advertising would further -- tend  
25 to further the interest of the act, that is because in a

1 particular region, under a particular marketing order, the  
2 need exists.

3 QUESTION: Is that how you would explain the --  
4 what struck me, at least, as the peculiarity in this case  
5 that apparently there are, I guess, peach-growers, for  
6 example, in some 30 States, but the only ones who seem to  
7 have expressed a need for this advertising scheme are  
8 California peach-growers. Is the explanation for that  
9 that there simply has not been a demonstrated instability  
10 in markets elsewhere?

11 MR. JENKINS: I think that's true, Justice  
12 Souter, but I'd also like --

13 QUESTION: Does the record support that?

14 MR. JENKINS: It does not, and let me make clear  
15 the way in which this act operates.

16 QUESTION: Mr. Jenkins, before you do that may I  
17 ask you, I think a question that is of a similar basic  
18 kind?

19 You latch onto the Abood and Keller cases. What  
20 is the Government interest here that compares to the labor  
21 peace or the regulation of the bar? That's what I don't  
22 understand. Why is it so important that we have these  
23 orders? What purpose that compares with collective  
24 bargaining underlies all of this?

25 MR. JENKINS: Justice Ginsburg, as I've said,

1 first the broader interest is in orderly market  
2 conditions.

3 I think the legislative history of the  
4 Agricultural Marketing Agreement Act, the 1954 legislative  
5 history of the adoption of promotional programs, and the  
6 record of the formal rulemaking that gave birth to the  
7 advertising provisions of the marketing orders indicate  
8 the economic hardship that results and the economic  
9 instability in the Nation as a whole that results when  
10 there's wide fluctuation of market prices, when  
11 particularly farmers but other elements of the industry --

12 QUESTION: Well, I could understand that if this  
13 was across the board, if you said there this compelling  
14 need, and so we do it for all agricultural commodities,  
15 but it seems to be rather haphazard.

16 MR. JENKINS: Well, I think that relates to my  
17 answer to Justice Souter's previous question, which is  
18 that taking, for example, that one of the proposed  
19 disparities is between California-grown peaches and  
20 Georgia-grown peaches -- and I think it's important to  
21 look at the regulatory framework here, which is commodity-  
22 specific, and region-specific.

23 Taking peaches as an example, first, California  
24 is responsible for the majority of peaches that wind up on  
25 people's shelves, but more importantly, between two

1 different regions there are vast disparities in labor  
2 costs, in quality.

3 The length of the season in California is much  
4 longer. California-grown peaches have a Nationwide  
5 market, whereas Georgia-grown peaches are basically  
6 locally grown and consumed along the Eastern seaboard.  
7 There are transportation costs that are different. There  
8 are investment costs that are different.

9 But I think the particularized nature,  
10 commodity-specific nature and region-specific nature of  
11 these marketing orders reflects narrow tailoring rather  
12 than arbitrariness, but Justice --

13 QUESTION: How can it be narrow tailoring when  
14 the -- when in effect the tailoring is done by a  
15 nongovernmental entity? I mean, the tailoring to which  
16 you are referring, market-specific, region-specific, is  
17 simply done by a vote of the people who are growing the  
18 peaches.

19 MR. JENKINS: Well, that's not entirely true,  
20 Justice Souter, insofar as the marketing -- the  
21 Agricultural Marketing Agreement Act treats different  
22 commodities in different regions differently, but you're  
23 certainly correct that it's the industry in the first  
24 instance, a supermajority, two-thirds majority producers,  
25 that caused the marketing order to come into being.

1           That's because Congress I think reasonably has  
2           determined that people in the industry, operating day-to-  
3           day, are the best measure of need.

4           QUESTION: Mr. Jenkins --

5           MR. JENKINS: Pardon me.

6           QUESTION: -- do we have to believe -- this  
7           argument sounds like something time-warped out of the  
8           1920's.

9           QUESTION: The thirties.

10          QUESTION: Or the thirties.

11          (Laughter.)

12          QUESTION: And this is a remnant of the National  
13          Industrial Recovery Act when this kind of an argument was  
14          made for every industry in the country, and indeed, they  
15          tried to have marketing, the equivalent of marketing  
16          orders for every industry in the country. It was found  
17          not to be true and not to be effective.

18          Now, do we have to believe it, that somehow it  
19          is effective for agricultural marketing orders, but having  
20          the Government in cooperation with the industry, the  
21          corporate State, it is called, in Italy, as an efficient  
22          mechanism for producing economic prosperity?

23          MR. JENKINS: I think so, Justice Scalia, for  
24          two reasons. First, as we've indicated in our brief at  
25          footnote 3, Congress since the court of appeals decision

1 in this case has reaffirmed the importance of these  
2 programs and, in fact, expanded them and made significant  
3 factual findings regarding their importance, but -- pardon  
4 me.

5 QUESTION: Just for agriculture. I mean,  
6 Congress hasn't done it for everything else.

7 MR. JENKINS: Has not done it for every  
8 commodity, that's true.

9 QUESTION: I mean, it seems to express the  
10 belief that elsewhere that isn't true.

11 MR. JENKINS: Well, I don't think so. Again, if  
12 I can --

13 QUESTION: That market disorder is okay.  
14 Indeed, it's what drives the market.

15 MR. JENKINS: Well, no, Justice Scalia. I think  
16 the determination first is that there may not be  
17 significant market disorder and fluctuation in those  
18 industries where -- private industry where producers have  
19 not felt a need to invoke the Government's aid, but if I  
20 can analogize --

21 QUESTION: They will invoke the Government's aid  
22 anywhere. Where have they not felt the need to invoke the  
23 Government's aid?

24 MR. JENKINS: Well --

25 QUESTION: They'll take the Government's aid

1       wherever they can get it.

2               MR. JENKINS: Well, I don't think so. For  
3       example, there are a number of commodities for which  
4       marketing orders are authorized, but where the industry  
5       has not chosen to use them, to ask for them.

6               In plums, for example, in 1991 the California --  
7       the aspects of the marketing order that relate to plums  
8       were terminated because there was an industry-wide  
9       referendum and plum producers found that it was no longer  
10      important.

11              But if I could again analogize to the union  
12      context, not every workplace is unionized. It's only  
13      where a majority of workers feel that a union will  
14      effectuate their interest and therefore Congress' interest  
15      in labor peace.

16              QUESTION: Well, isn't it at least, or couldn't  
17      Congress find as a fact that in agriculture, at least  
18      since after the First World War, there's always been a  
19      problem. If there's a good crop the prices are low, and  
20      if the prices are good, there's virtually no crop. It's a  
21      totally different situation from most other kinds of  
22      marketed goods.

23              MR. JENKINS: We think so, Mr. Chief Justice,  
24      and I think particularly as to these commodities that is  
25      true.

1           QUESTION: But that -- that could justify the  
2 marketing orders, but it certainly doesn't support with  
3 any necessity the advertising. You could have marketing  
4 orders and try to organize the market without any  
5 Government advertising.

6           MR. JENKINS: That's certainly true as a  
7 technical matter, Your Honor, but it's also true that in  
8 adopting both -- in adopting promotional programs Congress  
9 found, and in adopting these particular marketing order  
10 provisions the Secretary found that these -- the ability  
11 to invoke generic advertising activities has a beneficial  
12 effect, and in fact directly advances --

13          QUESTION: What is the test that you say we must  
14 apply to determine the validity of this provision  
15 requiring advertising? Do we have to find that there is a  
16 real, substantial harm, and that this is a provision  
17 that's narrowly tailored to eliminate it, or is the  
18 standard that's applied something far more deferential?

19          MR. JENKINS: Well, Justice Kennedy, I think it  
20 is more deferential, but if I could set back for a moment,  
21 I think that if certainly this Court were to conclude that  
22 regulating these commodities and establishing orderly  
23 market conditions in terms of its effect on the national  
24 economy was a trivial interest, then the Government would  
25 lose in this case. I think there's no --

1 QUESTION: Because speech is involved?

2 MR. JENKINS: I'm sorry, I --

3 QUESTION: Because speech is involved?

4 MR. JENKINS: Well, insofar as the First

5 Amendment rights of handlers are affected, then there must

6 be, I suppose, more than an irrational governmental

7 interest, but I think there's no question that the

8 interest here is substantial. If -- insofar as your

9 question about what test should apply, we do think it's

10 more deferential.

11 QUESTION: Mr. Jenkins --

12 QUESTION: Well, in a commercial speech context

13 it seems to me that you don't have to establish a very

14 clear governmental interest in order to prevail. If it's

15 simply commercial speech necessary to move a line of

16 goods, isn't that the end of it?

17 MR. JENKINS: Well, yes. The Court has --

18 QUESTION: What is the case, the closest case

19 that you have to suggest the proper standard that we

20 should use here? Which case, Turner Broadcasting, or --

21 MR. JENKINS: No, Your Honor,

22 QUESTION: Or the Zauderer case? What --

23 MR. JENKINS: Zauderer, insofar as the Central

24 Hudson test commercial speech analysis is applicable,

25 Zauderer would probably be the closest case insofar as it

1 involved the aspect of compelled disclosure of  
2 information, as distinguished from restrictions on speech,  
3 but we think that the speech interests in this case are  
4 attenuated in several respects, first because it's  
5 commercial speech, second because there's no restriction  
6 on respondent's ability to advertise in any respect, third  
7 because --

8 QUESTION: Well, let me ask you about that. One  
9 of respondents' complaints is that the 1989 advertising  
10 guide promoted a proprietary variety of nectarine, the Red  
11 Jim, which is grown exclusively by one of the growers, and  
12 a grower who does not want to lease or sell a royalty to  
13 that, so Red Jim is grown only by one grower.

14 Now, do you defend that practice under the --  
15 under any test?

16 MR. JENKINS: Your Honor, we do, but let me  
17 first say that I think --

18 QUESTION: That's amazing, that the Government  
19 could take money from everybody in the industry, every  
20 grower of peaches and nectarines, and advertise one  
21 grower's exclusive use to a patented fruit.

22 MR. JENKINS: Well, Justice O'Connor, if that  
23 were the dominant or even perhaps a plurality of --

24 QUESTION: Well --

25 MR. JENKINS: Pardon me.

1 QUESTION: -- do you defend the right of the  
2 Government to do that?

3 MR. JENKINS: Justice O'Connor, we would --

4 QUESTION: Just answer that isolated question --  
5 under any test.

6 MR. JENKINS: I suppose my answer is no.

7 QUESTION: No.

8 MR. JENKINS: We do not defend an overarching  
9 governmental goal of advertising a particular  
10 competitor's --

11 QUESTION: But you say, if it happens once in a  
12 while it's okay. We can overlook that.

13 MR. JENKINS: Well, Justice O'Connor, I think  
14 it's important to look -- in our, in the Joint Appendix in  
15 Volume 2, at page 531, this is the varieties chart to  
16 which respondents were referring, and among the list of  
17 many, many varieties, there is included the Red Jim which,  
18 as you pointed out, is a proprietary variety --

19 QUESTION: Right.

20 MR. JENKINS: -- shipped by only one handler.

21 QUESTION: Right.

22 MR. JENKINS: Now, we think that this is an  
23 infinitesimal aspect of this program.

24 QUESTION: So you say if there are violations,  
25 they're de minimis, and so we can ignore them. Is that in

1 a nutshell what you say there?

2 MR. JENKINS: That's part of our argument.

3 QUESTION: Would you clarify one more thing for  
4 me? Assessments under this program run against the  
5 handlers, is that right?

6 MR. JENKINS: That's correct.

7 QUESTION: Not the growers.

8 MR. JENKINS: That's correct.

9 QUESTION: Do the handlers pass it on to the  
10 growers?

11 MR. JENKINS: That's the expectation of the way  
12 in which this program operates, and I --

13 QUESTION: And who has to vote to terminate the  
14 program, the growers or the handlers?

15 MR. JENKINS: The growers vote in the first  
16 instance to terminate. I would note, however, that in  
17 adopting the advertising provisions of this marketing  
18 order handlers also --

19 QUESTION: As well as the growers.

20 MR. JENKINS: That's correct.

21 QUESTION: To set it in place in the first  
22 place, handlers and growers vote.

23 MR. JENKINS: That's correct.

24 QUESTION: But to terminate it only growers  
25 vote.

1 MR. JENKINS: That's correct, and let me --

2 QUESTION: Have any of the growers asked for a  
3 vote on peaches and nectarines in California?

4 MR. JENKINS: Well, in fact, Your Honor, there  
5 are periodic referenda, I believe every 4 years, and in  
6 the last referenda there was overwhelming support for this  
7 program, I believe between 75 and 83 percent.

8 QUESTION: Mr. Jenkins, this relates to Justice  
9 O'Connor's question about the Big Jim, and --

10 QUESTION: Red Jim.

11 QUESTION: Red Jim, I'm sorry.

12 (Laughter.)

13 QUESTION: I don't know how I could have made  
14 that mistake.

15 (Laughter.)

16 QUESTION: And ties it in to the Government's  
17 assertion that Abood governs here.

18 Let me read you what I wrote in an opinion  
19 joined by Justices O'Connor, Souter, and Kennedy in a case  
20 called Lehnert v. Ferris Faculty Association:

21 What is distinctive, the opinion said, about the  
22 free riders who are nonunion members of the union's own  
23 bargaining unit, is that in some respects they are free  
24 riders whom the law requires the union to go out of its  
25 way to benefit even at the expense of its other interests.

1 In the labor union context, the union has a fiduciary  
2 obligation to every one of the employees, whether they're  
3 union members or not, and sometimes has to sacrifice its  
4 own interest to those obligations.

5 That is not the case as I understand this  
6 program. It can be the case that advertising will benefit  
7 a mere majority of the handlers and severely impair the  
8 interests of a minority of members. You don't assert that  
9 there is a fiduciary obligation here on the part of the  
10 organization, as there is with unions, do you?

11 MR. JENKINS: We don't, Justice Scalia, assert  
12 that there's something comparable to the duty of fair  
13 representation in this context, although that is similarly  
14 true in the integrated bar context, that there is no  
15 concomitant duty of fair representation.

16 QUESTION: Well, I think the bar is a special  
17 situation, and have always felt that, but as far as unions  
18 go, you have the distinctive fiduciary obligation. I just  
19 don't see how you can take Abood and apply it to this  
20 situation, where a majority can harm a minority's  
21 interests.

22 MR. JENKINS: Well, Justice Scalia, I also think  
23 that the majority cannot, as an overwhelming, either as a  
24 goal or as the effect harm the minority's interest. There  
25 are significant safeguards in place, both regulatory and

1 statutory, to ensure that there is not overwhelming harm  
2 or even significant harm to handlers as individuals.

3 I'd also point out in the integrated --

4 QUESTION: Some of them here say they're being  
5 harmed.

6 MR. JENKINS: I'm sorry, I didn't hear you.

7 QUESTION: Some of them here say they're being  
8 harmed, that the mere advertising of, generically, peaches  
9 harms them because they are trying to convince the public  
10 that all peaches are not fungible, that some kind of  
11 peaches are really good peaches, and their interests are  
12 harmed by any generic peach advertising.

13 MR. JENKINS: But Justice Scalia, I don't see  
14 how that removes this from the Aboud line of cases. It's  
15 similarly true that if I'm an employee and I'm opposed to  
16 maternity leave, and the union nonetheless negotiates a  
17 maternity leave clause in our contract, I have no First  
18 Amendment right to prevent that.

19 Although I feel that I'm being harmed and my,  
20 both my First Amendment interests, I feel, and my  
21 practical interests are being harmed, there's no violation  
22 of the duty of fair representation, nor is there a  
23 violation of the First Amendment.

24 QUESTION: Mr. Jenkins, supposing there's such a  
25 thing as the Beer Institute, which is a private

1 organization devoted to generic advertising for beer, and  
2 supposing some of its members feel that some of the micro  
3 breweries who aren't members are kind of free-riding on  
4 the generic, could the Beer Institute go to Congress and  
5 say, look, we want to have a kind of a marketing agreement  
6 and some generic advertising. We want to bring these  
7 freeloaders on board, so let's assess everybody who  
8 produces any beer.

9 MR. JENKINS: Well, Mr. Chief Justice, I think  
10 if it were, in fact, an important governmental interest --

11 QUESTION: Well, I'm sure the beer people would  
12 think it was.

13 (Laughter.)

14 MR. JENKINS: Well, I --

15 QUESTION: You think beer is less important than  
16 peaches?

17 (Laughter.)

18 MR. JENKINS: No comment on that, but I do think  
19 that -- of course, it's up to this Court to determine as a  
20 matter of law whether the interest that Congress in this  
21 case seeks to achieve is an important or a substantial  
22 one.

23 QUESTION: Mr. Jenkins, on that point, I  
24 understand the portion of these marketing orders that  
25 deals with inspection quality controls, and nobody is

1     contesting that everybody can be required to pay for the  
2     cost of inspecting and assuring health and safety  
3     standards.

4             But the -- whatever importance that interest  
5     has, does that spill over to, that advertising is an  
6     important interest? Aren't these quite discrete, so one  
7     could say yes, the Government's got a very important  
8     interest to making sure that health requirements are met,  
9     but the advertising, the promotional interest doesn't have  
10    the same strength, does it?

11            MR. JENKINS: Well, Justice Ginsburg, I just  
12    have a two-part answer to that. First, I think that the  
13    other things that these marketing orders allow have to do  
14    with increasing consumption. They're not safety and  
15    health regulations. Those are regulated through a  
16    different set of programs.

17            So the question is, if there's an adequate  
18    justification for those aspects, does the availability of  
19    generic marketing, generic advertising, also help to  
20    achieve that goal? The question -- pardon me.

21            QUESTION: It may also help, but does it have  
22    the same importance as maturity standards and the  
23    inspection controls?

24            MR. JENKINS: Well, I think, Justice Ginsburg,  
25    under this Court's cases the question has not been, is the

1 means toward the end as important, is one means as  
2 important as another, but first is the end important and  
3 then, secondly, does the means chosen advance the end, and  
4 so I think the record in this case does demonstrate that  
5 the end of orderly market conditions and sustained demand  
6 for these products is significantly advanced by the means  
7 that's chosen, including generic advertising.

8 QUESTION: But your argument is on that, as I  
9 understand it, that we have generally accepted the  
10 proposition that advertising induces people to buy what is  
11 advertised.

12 I mean, do you -- there's kind of an assumption  
13 as a matter of law that advertising works to some degree,  
14 and I will grant you that, but is that enough in a case  
15 like this, because it seems to me, number one, that  
16 advertise -- the assumption that advertising works doesn't  
17 tell us very much about whether the advertising is  
18 creating or advancing an orderly market as opposed to a  
19 less orderly one, and it doesn't tell us very much about  
20 what the difference is between the effect of advertising  
21 either on consumption or orderly markets in California and  
22 the failure of advertising with respect to markets  
23 everywhere else.

24 I guess to put the -- my question in a nutshell,  
25 are the peach growers in the other, whatever it is, 29

1 States making less of a profit in a chaotic market as  
2 opposed to the California growers who, as a result of this  
3 advertising program, are making measurably more money in  
4 an orderly market? Do -- does the record indicate that?

5 MR. JENKINS: Justice Souter, let me answer the  
6 second part of your question first. You asked earlier  
7 about the record. I think it's important to note that  
8 here the Government was defending a particular program,  
9 and so the record doesn't reflect, for example, why  
10 Georgia peaches are not regulated.

11 As I've indicated, there are reasons why  
12 different markets are treated differently, but the record  
13 doesn't reflect it because in our view our burden is to  
14 demonstrate that this program satisfies constitutional  
15 requirements, and we think that the evidence amply  
16 demonstrates first that advertising, generic advertising  
17 programs advance the interest of consumer demand for these  
18 products, and in fact --

19 QUESTION: It makes consumers buy them, is what  
20 you mean.

21 MR. JENKINS: That's correct.

22 QUESTION: Yes.

23 MR. JENKINS: And both of the courts below found  
24 that, and that secondly, viewed in the context of this  
25 act, it provides the Secretary and the commodity

1 committees with a tool for influencing consumer  
2 preferences, and I think it's the inevitable -- the  
3 conclusion is inevitable that that aids in regulating  
4 market conditions. If the Secretary -- insofar as the  
5 Secretary --

6 QUESTION: Well, I -- it regulates only in the  
7 sense that it -- we will assume that it creates some  
8 demand that would not have been there otherwise.

9 But when we're faced with a situation in which  
10 there are in fact contrasting markets, and we want to  
11 know, even under a comparatively relaxed standard, what  
12 the causal connection is between the advertising and  
13 orderly markets, it seems to me sensible to look at the  
14 markets where the advertising isn't going on to see if  
15 they are depressed or disorderly, and I take it we cannot  
16 do that in this case, because the record just doesn't tell  
17 us anything about it.

18 MR. JENKINS: I think that's generally correct,  
19 but I would also note --

20 QUESTION: Isn't it fair to say -- and I'm  
21 sorry, I didn't mean to cut you off. Go ahead.

22 MR. JENKINS: Well, I was just going to say it's  
23 also the case that these markets are very different, so  
24 that if there is sufficient demand --

25 QUESTION: But how do we know that?

1 MR. JENKINS: We don't, Justice Souter, but as  
2 I've said, I don't think we need to know that in order to  
3 answer the question that's at issue here.

4 QUESTION: Mr. Jenkins --

5 QUESTION: So you're saying -- I'm sorry.

6 QUESTION: To take a specific case, in this  
7 record there's nothing like there was in the case before  
8 the Third Circuit, the meat case, where the Court said,  
9 well, we can understand -- the Government has made a case  
10 that this industry is in disastrous shape, but there's  
11 nothing of that kind here, that the peach and nectarine  
12 industry is about to fall apart, is there?

13 MR. JENKINS: Well, Justice Ginsburg, I think  
14 the record in the Frame case was quite similar, but the  
15 program was somewhat different.

16 The beef program focuses almost exclusively on  
17 promotional programs and advertising, and so insofar as  
18 Congress perceived a problem and the only thing it did  
19 about it was to create promotional advertising programs,  
20 the Third Circuit concluded correctly, we think, that  
21 there was a problem existing that Congress sought to  
22 address.

23 Here, Congress has used a larger number of  
24 tools, but --

25 QUESTION: Am I wrong in having the impression

1 that Congress made a determination with respect to the  
2 state of the meat market and said we have to respond to  
3 that terrible situation, and there were no such findings  
4 by the legislature here?

5 MR. JENKINS: I think with respect, Justice  
6 Ginsburg, that's incorrect. I think the district court in  
7 particular made findings as to the type of problem that  
8 Congress was trying to get at, and in fact cites the  
9 Congressional Record indicating that there were in fact  
10 gluts of supply, that there was suppressed demand --

11 QUESTION: But the question is whether Congress  
12 made the findings, not whether the district court did.  
13 Did Congress make the findings?

14 MR. JENKINS: Congress was citing -- pardon me.  
15 The district court was citing Congress' findings, but let  
16 me be clear --

17 QUESTION: Citing the findings, or --

18 MR. JENKINS: Was citing the Congressional  
19 Record reports, and --

20 QUESTION: Statements by -- not the whole  
21 Congress, but by some individual Members of Congress?

22 MR. JENKINS: Some were from reports --

23 QUESTION: Committee reports?

24 MR. JENKINS: That's correct.

25 QUESTION: But there was no congressional

1 finding?

2 MR. JENKINS: Well, Your Honor, I think in the  
3 act itself there's a congressional finding that programs  
4 are necessary, that --

5 QUESTION: Programs, but is there anything --  
6 are you telling me that the record from Congress is  
7 comparable, that there was no more that Congress said  
8 about the meat industry than it said about the fruit  
9 industry?

10 MR. JENKINS: I think it is comparable, but I  
11 want to be specific, because I don't want to mislead the  
12 Court.

13 Congress made findings both in 1937, when it  
14 adopted the act, and then in 1954, when it added  
15 promotional programs, not advertising specifically. It --  
16 Congress subsequently added advertising as among the  
17 promotional programs, and we think Congress was not  
18 required to make additional findings, as when it had  
19 already indicated what it found promotional programs to  
20 accomplish.

21 It's also true that in the formal rulemaking by  
22 the Secretary the record, when the advertising  
23 specifically was adopted, their extensive findings -- in  
24 fact, even the court of appeals found that there were  
25 extensive findings in rejecting respondent's APA

1 challenge, that this type of advertising did effectuate  
2 the goals of the act. That's a statutory requirement.

3 If I could, I'd like to reserve the remainder of  
4 my time.

5 QUESTION: Very well, Mr. Jenkins.

6 Mr. Campagne, we'll hear from you.

7 ORAL ARGUMENT OF THOMAS E. CAMPAGNE

8 ON BEHALF OF THE RESPONDENTS

9 MR. CAMPAGNE: Mr. Chief Justice, and may it  
10 please the Court:

11 I think there's one thing everybody's missing,  
12 and that is, what is the problem? What is the problem  
13 with peaches, plums, and nectarines in California that's  
14 any different than the other 32 States that grow these  
15 commodities?

16 QUESTION: Disorderly markets are the problem.

17 MR. CAMPAGNE: Well, Justice Scalia, the  
18 Solicitor, in answering your question in that regard, I  
19 believe misspoke. He indicated that there was a finding  
20 that there was disorderly markets --

21 QUESTION: So --

22 MR. CAMPAGNE: -- and he cites the 1954 act,  
23 which doesn't deal with that subject whatsoever.

24 The way the promulgation records show here --  
25 because we have an unusual situation that Justice O'Connor

1 spoke about in the Community Nutrition case, where we file  
2 a 15(a) petition. We sue before an ALJ employed by the  
3 Secretary of Agriculture.

4 She gave the Government every opportunity  
5 possible -- as a matter of fact, they stipulated that  
6 Exhibit 297, and they made that stipulation at Stipulation  
7 Number 57 -- I'm sorry, 59, that that was the exclusive  
8 rulemaking record. When the district court relied on --

9 QUESTION: Just a minute, Mr. Campagne.

10 MR. CAMPAGNE: Yes.

11 QUESTION: That isn't terribly helpful to simply  
12 hold up a brief and say that Stipulation Number 59 -- we  
13 don't know what -- if you want to make a point, make it so  
14 that we can all understand it.

15 MR. CAMPAGNE: Very well, Your Honor.

16 In that stipulation the administrative law judge  
17 said, I've got a problem. I don't understand what some of  
18 you are expressing in your questions. I want to give you  
19 every opportunity to show me that there's disorderly  
20 marketing going on in California but not in the other 32  
21 States, and the stipulation that was entered into is that  
22 the USDA relies on Exhibit 297.

23 QUESTION: Where is that?

24 QUESTION: Can we find it in something that we  
25 have before us?

1 MR. CAMPAGNE: Yes. It's page 134a of our  
2 appendix to our opposition to the petition, Your Honor.  
3 In there, they actually stipulate that the Government  
4 relies solely and exclusively on Exhibit 297, and I'm  
5 paraphrasing, as being the entire rulemaking record  
6 regarding the implementation of the advertising program.

7 QUESTION: It doesn't say exclusively in what  
8 I'm reading.

9 MR. CAMPAGNE: It says, as being the entire  
10 rulemaking record --

11 QUESTION: Oh, okay.

12 MR. CAMPAGNE: -- on the third line, Your Honor,  
13 regarding the implementation of the advertising record  
14 with respect to peaches, plums, and nectarines which  
15 occurred approximately 6 years after the act was amended.

16 The next --

17 QUESTION: Mr. Campagne, can I ask you a  
18 question?

19 MR. CAMPAGNE: Yes.

20 QUESTION: We basically have a constitutional  
21 question here, and there are an awful lot of details  
22 floating around. Would it make any difference, as a  
23 matter of constitutional law, if Congress had made a  
24 finding that this particular market had particular  
25 problems that justified this kind of group advertising

1 program? Would you still have the same constitutional  
2 argument?

3 MR. CAMPAGNE: It would make a huge difference,  
4 Your Honor.

5 QUESTION: You do.

6 MR. CAMPAGNE: They would have an easier time  
7 with Central Hudson.

8 QUESTION: So you're not saying this sort of  
9 program is always unconstitutional.

10 MR. CAMPAGNE: No, Your Honor. Despite what the  
11 Wall Street Journal said last week, we're not saying that  
12 the beef program has to be thrown out or the milk program  
13 has to be --

14 QUESTION: Why can't Congress leave those  
15 findings to be made by the Secretary? Congress does that  
16 all the time.

17 MR. CAMPAGNE: But in this case --

18 QUESTION: Establishes a basic framework for a  
19 program and says if an executive officer finds a certain  
20 situation to exist, he can take certain actions. They do  
21 that all the time.

22 MR. CAMPAGNE: In this case, Your Honor, I don't  
23 need to address that issue, although --

24 QUESTION: Sure you do. I just asked you about  
25 it.

1 MR. CAMPAGNE: Oh, I'm sorry. Of course  
2 Congress can delegate its legislative authority, despite  
3 Carter v. Cole, because of the subsequent cases, to the  
4 Secretary of Agriculture, but he didn't do that in this  
5 case, Your Honor. The 1954 act that the Solicitor was  
6 referring to was the post Korea act. It didn't have  
7 anything to do with advertising. The advertising act,  
8 that's 608(c)(6)(I), was a -- came into existence in 1965.

9 QUESTION: Well, in connection with that, Mr.  
10 Campagne, you don't have to attack here the various health  
11 inspection provisions, the pro rata provisions, that sort  
12 of thing, and I take it you're not challenging the basic  
13 congressional authority to enact something like that.  
14 You're simply trying to separate out the advertising  
15 provision.

16 MR. CAMPAGNE: Yes, Your Honor. We're assessed  
17 on average 19 cents a carton. Nine cents goes for quality  
18 control and inspection. We have no problem with that.  
19 Fifty-three percent -- that is, 10 percent -- goes to  
20 generic advertising.

21 QUESTION: Well, what is the difference  
22 between -- you say what is the problem. There's a  
23 regulatory problem. If you think this program is  
24 unjustified I guess you can go to the courts and say, it's  
25 arbitrary, capricious, abuse of discretion, and get it

1       thrown out, right? All right.

2               We're talking about the First Amendment.

3               MR. CAMPAGNE: Yes, Your Honor.

4               QUESTION: So what is the First Amendment  
5       problem that your client has that wouldn't be shared by  
6       anybody who used to fly on the airlines and had to pay  
7       money in part for messages that they might have disagreed  
8       with that would have been spent by the Air Transport  
9       Association required by the Civil Aeronautics Board, or  
10      exactly the same thing in the utilities industry, or the  
11      trucking industry, or any taxpayer who pays taxes which  
12      then is spent by the Government on messages they disagree  
13      with?

14              In other words, what's the First Amendment  
15      interest here that isn't shared in thousands of regulatory  
16      situations by millions of members of the public whose  
17      money the Government often takes to spend, or have other  
18      private people spend, on messages that they might not want  
19      to pay for?

20              MR. CAMPAGNE: Your Honor, we would have no  
21      objection whatsoever if the Secretary of Agriculture was  
22      taking money out of the General Treasury and --

23              QUESTION: No, no, they didn't -- I'm saying the  
24      Civil Aeronautics Board, the Interstate Commerce  
25      Commission -- I mean, I thought the Constitution would

1 permit the public, mistaken or not, to have regulatory  
2 systems to regulate every industry, perhaps, if they  
3 wanted to, to have a nonfree enterprise system perhaps if  
4 they didn't want to. I don't know. I thought those were  
5 basically democratic questions.

6 But if we have a system where the industry is  
7 regulated, I'm asking what is the First Amendment interest  
8 that is different from the same First Amendment interest  
9 of every flier, every customer of a trucker, every  
10 customer of a utility -- I'm just repeating myself, but it  
11 seems to me that there are vast numbers of consumers who  
12 used to have to spend lots of money they didn't want to  
13 spend for messages that regulators would either permit or  
14 require.

15 MR. CAMPAGNE: The First Amendment issue, Your  
16 Honor, is two-pronged. First of all, they're forcing us  
17 to associate with our competitors, and it's not like the  
18 milk board, where milk is white and wet, and so the milk  
19 board doesn't have much opportunity to prefer one product  
20 over another.

21 When you buy milk, you don't know if it's a  
22 Jersey or a Guernsey milk you're drinking, whereas in our  
23 commodity, we have over 100 varieties of plums. My  
24 clients happen to grow some green plums. If I tell you  
25 today --

1 QUESTION: Well then, you would point out, I  
2 suppose, that you're not objecting to expenditure of money  
3 for advertising or for any other purpose by the  
4 Government. The United States doesn't contend in this  
5 case that these are Government expenditures, does it?

6 MR. CAMPAGNE: No. In their footnote, Your  
7 Honor, they admit this is not Government speech, although  
8 one of their --

9 QUESTION: So it's not Government speech, which  
10 would pose a different issue, so we can get rid of a whole  
11 lot of those regulatory programs that Justice Breyer was  
12 referring to, and only limit ourselves to those in which a  
13 privately run organization spends money that is assessed  
14 against competitors.

15 QUESTION: Namely, all of the programs.

16 MR. CAMPAGNE: But the point I was trying to  
17 make, Your Honor, here we have absolutely no studies  
18 whatsoever.

19 When the act was amended in 1965 it was done by  
20 one letter, one letter from the Secretary to Congress that  
21 said, I would like to implement advertising because --

22 QUESTION: It seems to me your argument is they  
23 did a lousy job here, but if they'd done a good job, it  
24 would be constitutional.

25 MR. CAMPAGNE: If they could meet the Central

1 Hudson test, which was the test they stipulated to before  
2 the Ninth Circuit in Cal-Almond --

3 QUESTION: Yes, but we're not bound by that.

4 QUESTION: Why a Central Hudson test, where in  
5 fact in Central Hudson and the other speech cases that  
6 seem relevant there was a problem with a person having  
7 attributed to him a view that he really didn't hold, and  
8 moreover an important view, and a political view, and a  
9 view of conscience.

10 Is there anything like a political view, a view  
11 of conscience, an important, critical view that the public  
12 would think that your client held because of these  
13 messages?

14 MR. CAMPAGNE: Yes, Your Honor.

15 QUESTION: What?

16 MR. CAMPAGNE: Some of our clients testified  
17 they don't sponsor lying. They believe --

18 QUESTION: They don't sponsor what?

19 MR. CAMPAGNE: Lying. Misleading the public.  
20 The generic advertising program is that a California peach  
21 is better than a Georgia peach or a South Carolina peach,  
22 which together add up to the same amount of volume we  
23 have. We say that's not true. There's over 100  
24 varieties, and if you grow that variety in South Carolina  
25 it's going to taste the same as that variety tastes in

1 California. It's a lie.

2 Another one of our clients testified that he  
3 really resents the sexual subliminal messages of the  
4 advertising board. He happens to be on a hospital board  
5 that deals with abuse of children. They --

6 QUESTION: Is that the picture of this little  
7 girl running in a sprinkler eating a nectarine?

8 MR. CAMPAGNE: And the radio that says so juicy,  
9 so sweet, a radio advertisement right afterwards that says  
10 eating a peach reminds you of your first kiss in the back  
11 seat of your car. He has an ideological problem with  
12 that, but more importantly, they're sending a subliminal  
13 message that red is better.

14 Now, if I ask each one of you to buy some --

15 QUESTION: Well, there's nothing in words to  
16 that effect in the ads, is there?

17 MR. CAMPAGNE: No, Your Honor. It's the  
18 depiction, the subliminal message that red is better, and  
19 some of these varieties, not only the Red Jim that you  
20 mentioned --

21 QUESTION: Well, would you be here at all if the  
22 advertising were in fact generic advertising for  
23 California fruit?

24 MR. CAMPAGNE: Well, first of all they'd have to  
25 define to me, Your Honor, in some --

1 QUESTION: Or is there some problem here?

2 MR. CAMPAGNE: -- what the problem -- that's the  
3 point, exactly.

4 QUESTION: Well, what?

5 MR. CAMPAGNE: I don't know --

6 QUESTION: I'm trying to understand what it is  
7 you say causes or results in a First Amendment violation  
8 here. It is not clear to me.

9 MR. CAMPAGNE: They take almost a million  
10 dollars a year, give it to my competitors to advertise 15  
11 varieties of fruit we don't grow, and force us to  
12 associate with our competitors in a manner --

13 QUESTION: Don't you represent handlers?

14 MR. CAMPAGNE: I represent handlers/shippers,  
15 but there's a big distinction, Your Honor. My handlers  
16 are growers who handle their own fruit. The handlers that  
17 run the committee are growers who -- are handlers who  
18 primarily ship fruit grown by other people.

19 QUESTION: Well, of course, you're forced to  
20 associate, using your term, by the terms of the marketing  
21 order anyway. If there were no promotional advertising  
22 you'd be "forced to associate."

23 So what we have here is a program that I think,  
24 insofar as its regulatory mechanisms other than promotion,  
25 is clearly lawful and valid and constitutional, and it

1 seems to me that you're building on that base. Once you  
2 have in place a marketing order, a marketing system, it  
3 seems to me logical that that marketing entity engage in  
4 generic advertising. I don't see why the advertising  
5 suddenly causes a forced association problem.

6 MR. CAMPAGNE: Because what --

7 QUESTION: You're already associated, whether  
8 you like it or not.

9 MR. CAMPAGNE: In 1959, when they promulgated  
10 marketing orders for quality control there was no problem.  
11 We had no objection to that.

12 But when they moved in 1971 for a legislative  
13 amendment and in 1975 and 1976 actually adopted it, with  
14 no rulemaking record of Congress at all, and then made it  
15 discretionary so that annually the Secretary of  
16 Agriculture annually is supposed to be deciding whether to  
17 advertise, how much money to advertise, is there a problem  
18 in California that's different in other States -- he  
19 didn't do any of that. Actually, no notice and comment  
20 through 1986 harvest, a few months before my trial  
21 started.

22 QUESTION: I didn't know you were here on some  
23 APA claim. I thought what we had before us was a First  
24 Amendment claim, and I haven't heard a response yet as to  
25 what specific problem you have that triggers the First

1 Amendment. Are you relying on the fact that there are  
2 assessments made, and you have less money to advertise on  
3 your own? Is that part of your argument?

4 MR. CAMPAGNE: That's absolutely what I was  
5 trying to express, Your Honor.

6 QUESTION: Well, that's odd, because I thought  
7 that there isn't much difference between an assessment or  
8 any other fee or tax that Government might take, which  
9 necessarily, of course, limits your funds for advertising.  
10 You have less money.

11 MR. CAMPAGNE: Yes, but, Your Honor --

12 QUESTION: Do you cite a case from this Court to  
13 support you on that?

14 MR. CAMPAGNE: Yes, PG&E, and that is that  
15 you're taking our money --

16 QUESTION: PG&E.

17 MR. CAMPAGNE: Yes.

18 QUESTION: Do you have a citation for that?

19 MR. CAMPAGNE: Yes, Your Honor. PG&E v. PUC of  
20 California, cited in our merits brief.

21 That's the case, Your Honor, where you struck a  
22 rule that required PG&E to promulgate the messages in  
23 their own envelopes to others, and the reason this Court  
24 struck it is that it stated it would require PG&E to  
25 respond when they might not otherwise want to speak, and

1 that's exactly what goes on here.

2 We give almost a million dollars a year, of  
3 which 53 percent is devoted to generic collective  
4 advertising, to our competitors who grow fruit we don't  
5 grow, primarily, and then when we do have a little bit of  
6 money left over and try to advertise our own brands, we  
7 have to spend a lot of it trying to change the minds of  
8 the consumer --

9 QUESTION: Do you say that your growers do  
10 not -- that your clients do not grow peaches or  
11 nectarines?

12 MR. CAMPAGNE: Our clients grow peaches, plums,  
13 and nectarines, but there's over 100 varieties of each  
14 peach, plum, and nectarine, unlike beef and unlike milk,  
15 where --

16 QUESTION: You don't believe that all  
17 California peaches are the same.

18 MR. CAMPAGNE: Absolutely not.

19 QUESTION: And that is the message that this  
20 advertising conveys to the public.

21 MR. CAMPAGNE: Absolutely, Your Honor.

22 QUESTION: So they're conveying precisely the  
23 message that you want to counter.

24 MR. CAMPAGNE: They're conveying -- exactly,  
25 Your Honor.

1 QUESTION: And your associational objection, as  
2 I take it, is not an objection to simply being regulated  
3 with everybody else, associated on that basis, but rather  
4 the objection of being presented to the public as in  
5 league with everybody else: All us California peach-  
6 growers are the same. California peaches are California  
7 peaches, and California peach-growers are California  
8 peach-growers.

9 MR. CAMPAGNE: Exactly, Your Honor.

10 QUESTION: You don't like some of these other  
11 peach-growers, do you?

12 (Laughter.)

13 MR. CAMPAGNE: We want you to buy our yellow  
14 nectarines and not their red nectarines. They taste  
15 better.

16 QUESTION: Mr. Campagne --

17 QUESTION: May I ask you, if this were a  
18 homogenous product, you then would not have a problem?

19 MR. CAMPAGNE: It would be -- that's correct,  
20 Your Honor. It would be much --

21 QUESTION: And if the advertising was limited to  
22 those features of the California peaches that were, in  
23 fact, common to all California peaches, you would not have  
24 a problem.

25 MR. CAMPAGNE: If they could establish that

1 California had a problem which the Government had an  
2 interest in solving, but there is no record whatsoever --

3 QUESTION: Well, assume they could do that.  
4 Assume they could establish that the Secretary of  
5 Agriculture is convinced that we ought to sell more  
6 California peaches, and that therefore they ought to have  
7 a program that advertises the features of California  
8 peaches that all California peaches share. Would that be  
9 permissible?

10 MR. CAMPAGNE: I believe, Your Honor, that the  
11 answer would be yes if there was only one variety of  
12 peaches and it was grown in 33 States, and for some reason  
13 California's economic environment was in imminent danger  
14 of collapse, and no other States --

15 QUESTION: Well, it doesn't have to be in  
16 collapse, does it? I mean --

17 MR. CAMPAGNE: Well, in Frame they stipulated --

18 QUESTION: I mean, they've got all sorts of  
19 marketing orders where the --

20 MR. CAMPAGNE: -- that the meat industry was in  
21 imminent danger of collapse and they assessed --

22 QUESTION: Are you saying that that's the bottom  
23 line that they must show? It's a question I asked  
24 Mr. Jenkins about and he said no, that Frame is just like  
25 this case, but I couldn't grasp from your brief whether

1 you were saying this -- none of this forced advertising  
2 can be justified unless there's some compelling need shown  
3 in the particular industry. That was one argument that  
4 you made.

5 And then you sort of had another argument that  
6 said, well, they don't give us credit for our own  
7 advertising, and they're advertising some varieties that  
8 belong to particular members of the committee.

9 So which is it? Are you saying none of this is  
10 any good, or some of it may be good but some isn't?

11 MR. CAMPAGNE: We're saying both, Your Honor.  
12 We're saying first, if you want to force me to associate  
13 with my competitors when we're head-on competing, that I  
14 want you to buy my yellow nectarines and not your red  
15 nectarines, and you're giving my money to the person who  
16 grows those red nectarines, you've got to show a problem  
17 that requires a governmental compelling interest to solve  
18 under association rights.

19 QUESTION: But may I interrupt again, Mr.  
20 Campagne? Supposing that you agree that if the  
21 advertising were restricted to common features of  
22 California peaches, and there was an adequate  
23 justification -- the industry is having all sorts of  
24 troubles. People are buying bananas instead of peaches --  
25 and the advertising was restricted, I think you'd say that

1 would be okay, but you're complaining because they  
2 advertise features of the peaches that are unique to some  
3 varieties and not shared by all the others.

4 Now, supposing 97 percent of the advertising  
5 concentrates on common features, and 3 percent is bad  
6 under your analysis. Is the whole program bad, or just  
7 the 3 percent?

8 MR. CAMPAGNE: Under that hypothetical of  
9 course, Your Honor, if there was a compelling governmental  
10 interest to solve some serious problem --

11 QUESTION: Right.

12 MR. CAMPAGNE: -- and we only grew one variety  
13 in all the States, the answer would be that 3 percent  
14 would be bad. However, that's not the facts of this case,  
15 Your Honor. A peach is not a peach. A plum is not a  
16 plum.

17 QUESTION: Yes, but what if the Secretary of  
18 Agriculture made a lot of findings saying a peach is a  
19 peach, to add --

20 MR. CAMPAGNE: They haven't made any such  
21 findings, Your Honor. As a matter of fact, the record of  
22 this trial where ALJ Baker said bring in all the  
23 rulemaking record and produce all your witnesses, prove  
24 that there's over 100 varieties of peach, and they're  
25 completely different, and I can prove it to you --

1 QUESTION: With reference to the marketing --

2 QUESTION: But the question, the basic question  
3 I have is whether you're really attacking a program as a  
4 program, or maladministration of the program.

5 MR. CAMPAGNE: I'm sorry, I couldn't hear the  
6 end of --

7 QUESTION: I'm trying to figure out whether the  
8 program is just sort of per se bad, or has it just been  
9 poorly administered. You make a very persuasive case that  
10 they've made some bad decisions along the way, but does  
11 that taint the entire program? That's the basic question  
12 I see.

13 MR. CAMPAGNE: This particular program on this  
14 particular 19 days of trial record, it was tainted from  
15 the very beginning. They went to Congress on one letter,  
16 and all they said is, the majority of the growers want it.  
17 That's all.

18 QUESTION: But this is not an APA problem. I  
19 thought your point was that the First Amendment requires  
20 that you be careful and do it right.

21 MR. CAMPAGNE: Just like Turner.

22 QUESTION: As is not required in some other  
23 areas.

24 MR. CAMPAGNE: Exactly.

25 QUESTION: You must demonstrate the compelling

1 interest.

2 MR. CAMPAGNE: For over 20 years they didn't  
3 produce any studies or any reports showing that  
4 California --

5 QUESTION: We keep drifting away from the First  
6 Amendment, and it does get to sound like an Administrative  
7 Procedure Act problem, but that is not your point. Your  
8 point is that these I's have to be dotted and the T's have  
9 to be crossed because the First Amendment is at stake.

10 MR. CAMPAGNE: That's right, Your Honor.

11 QUESTION: Of course, to the extent that the  
12 marketing order without the promotional aspects of it  
13 helps everybody to market their peaches, I suppose you're  
14 helping to market Red Jim through the marketing order.

15 MR. CAMPAGNE: Yes.

16 QUESTION: And given the fact that you are  
17 therefore in a common marketing entity anyway, it seems to  
18 me to much diminish your First Amendment claim.

19 MR. CAMPAGNE: I don't believe so.

20 QUESTION: Whether you like it or not, big  
21 growers may be helping smaller growers to market their  
22 products, and maybe that's not cost-effective for you and  
23 you'd rather have something else, but you begin with the  
24 premise that this is a valid program.

25 MR. CAMPAGNE: But you're forgetting a very key

1 important point, Your Honor. At least we're playing on a  
2 level playing field when the agency says you can't sell a  
3 nectarine, whether it's a Red Jim nectarine or a Tom Gran  
4 yellow nectarine, if it has a worm in it. We're not going  
5 to advertise to people and change our message that we want  
6 you to eat worms.

7 But when 50 percent of this advertising dollar  
8 goes to spending, as their own testimony indicates,  
9 towards varieties that are controlled by 40 to 60 percent  
10 of -- single varieties controlled by 40 to 60 percent of  
11 the handlers that aren't us, we're not playing on a level  
12 playing field.

13 QUESTION: Well, don't you also distinguish  
14 between regulations which don't have any speech import to  
15 them, like quality and so on, plus some sort of regulation  
16 that forces you to spend money for speech?

17 MR. CAMPAGNE: Exactly, Your Honor.

18 QUESTION: I agree with you that a peach is not  
19 a peach. I really do.

20 (Laughter.)

21 QUESTION: I mean, absolutely. I love those  
22 juicy peaches which you can hardly ever get. I understand  
23 that. But I'm also concerned about turning First  
24 Amendment district courts into regulatory agencies, and  
25 therefore I'm worried about this problem of the Air -- I

1 promise you I disagreed a lot with what the Air Transport  
2 Association might have advertised. In the rate base the  
3 customer pays, and I pay Florida Flyer. That's what I'm  
4 worried about.

5 Now, you brought up PG&E as a precedent, but  
6 then I look at PG&E and I look at it and think, my  
7 goodness, that was a case where there was a more clear  
8 First Amendment problem, because it was the company's  
9 property. The company had to put the message in the  
10 envelope. It was absolutely clear that the company was  
11 underwriting this message with which it disagreed, rather  
12 than analogize it to like a public forum.

13 So I'd like you to talk a little bit more about  
14 that case, because as I looked at that plurality opinion  
15 quickly, it seemed to me that yours was a more attenuated  
16 interest by a long shot than the interest there, but I  
17 raise that so you can discuss it.

18 MR. CAMPAGNE: Yes, Your Honor. I can give you  
19 a good example. When Mr. Gerawan testified that in 1987  
20 they took \$675,000 from him and gave it to his competitors  
21 of a committee of nectarine growers that was run by his  
22 competitor, Mr. Jimmy Ito, whose proprietary variety is  
23 the Red Jim nectarine that Mr. Gerawan can neither grow  
24 nor buy, nor handle, because all the fruit has to be  
25 handled by Mr. Ito, that he -- he respects Mr. Ito, but he

1 just doesn't want his money to go to him, because they  
2 have a marketing window and they're producing the same --  
3 he produces -- and competes with --

4 QUESTION: Well, that may well have been an  
5 error, as the Government conceded in its argument, but you  
6 don't overturn the whole program, I suppose. You would  
7 overturn that.

8 MR. CAMPAGNE: But it's inherent to the entire  
9 system, Your Honor.

10 QUESTION: Well, are there other examples where  
11 in these advertisements a single proprietary item that no  
12 one else could acquire was advertised by name, and if so,  
13 what, and where?

14 MR. CAMPAGNE: The May Belle nectarine, Your  
15 Honor.

16 QUESTION: Excuse me?

17 MR. CAMPAGNE: The May Belle nectarine.

18 QUESTION: And it was specifically referred to  
19 in the ad?

20 MR. CAMPAGNE: Yes.

21 QUESTION: Where?

22 MR. CAMPAGNE: I believe in the very same  
23 exhibit.

24 QUESTION: Weren't these peaches --

25 MR. CAMPAGNE: It's in that same section. I

1 can't remember the exact --

2 QUESTION: Weren't the peaches selected because  
3 of the volume? Doesn't the chart which lists all the  
4 peaches reflect the volume of peaches that were sold  
5 through the marketing entity? Wasn't that the criteria  
6 for inclusion?

7 MR. CAMPAGNE: Yes. Mr. Field, the chief  
8 employee of the committee, testified that they tried to  
9 advertise the top 15 producing varieties and to leave the  
10 other 100 minor varieties behind, but Your Honor --

11 QUESTION: So it was based on volume.

12 MR. CAMPAGNE: They're spending all of their TV  
13 and radio advertising money on eat California peaches  
14 because they're all the same before July 4, 80 percent of  
15 the money. They're reserving 20 percent of it to --

16 QUESTION: Was there a finding to that effect,  
17 that that's the necessary purport of those ads, or can we  
18 just tell it from the -- from reading the ads?

19 MR. CAMPAGNE: There's a finding to that effect  
20 in Judge Baker's decision, Your Honor.

21 QUESTION: Mr. --

22 QUESTION: To what effect? To the effect that  
23 the advertising goes primarily or overwhelmingly to  
24 support the proposition that all California peaches are  
25 desirable?

1 MR. CAMPAGNE: Are the same.  
2 QUESTION: Are the same?  
3 MR. CAMPAGNE: Yes.  
4 QUESTION: And --  
5 QUESTION: Mr. -- I'm sorry.  
6 MR. CAMPAGNE: And she further --  
7 QUESTION: And you object to that. You'd be  
8 here even if they weren't pushing the Red Jim or whatever  
9 this nectarine is.  
10 MR. CAMPAGNE: Absolutely, because that's not  
11 truthful. I want to tell --  
12 QUESTION: Well, that -- but isn't there another  
13 reason --  
14 MR. CAMPAGNE: -- that you ought to buy green  
15 plums and give them to your wife, and you're thinking to  
16 yourself right now you don't want to give your wife  
17 diarrhea, but green plums --  
18 QUESTION: Green plums? I would never give my  
19 wife a green plum.  
20 (Laughter.)  
21 QUESTION: Mr. Campagne --  
22 QUESTION: I've never even seen a green plum.  
23 QUESTION: I thought plums --  
24 (Laughter.)  
25 QUESTION: Plums aren't regulated any more, so

1       why are we talking about those?

2               MR. CAMPAGNE:   Because, Your Honor, we have  
3       almost \$6 million in trust --

4               QUESTION:   Greengage.

5               MR. CAMPAGNE:   -- and the Ninth Circuit ordered  
6       that there would be a determination as to whether or not  
7       those moneys that we related to plums from 1987 through  
8       1991, so plums are still relevant.

9               QUESTION:   Mr. --

10              MR. CAMPAGNE:   And we grow green plums.   We  
11       just --

12              QUESTION:   Well, the only ads --

13              QUESTION:   Greengage.

14              QUESTION:   Excuse me.   I thought the only ad  
15       programs once plums were out of it were for peaches and  
16       nectarines.

17              MR. CAMPAGNE:   That's true, Your Honor, but it's  
18       not moot because the regulation never changed that  
19       required the Secretary to annually decide whether or not  
20       to advertise, if so, where, how much money, and Mr. Chief  
21       Justice raised a very interesting question to the  
22       Solicitor, and that is, doesn't this all kind of follow  
23       the law of supply and demand, but one thing we notice here  
24       is that as the crop goes down, the assessments change,  
25       versus go up.

1 In other words, the promulgation record we have  
2 in existence here is not tied to solving any problem.

3 QUESTION: Well, Mr. Campagne, that raises  
4 something I wanted to get back to you on. As I understand  
5 it, even if the advertising were truthful, and even if the  
6 advertising were truly generic, you would still claim that  
7 there was a First Amendment violation, wouldn't you?

8 MR. CAMPAGNE: Absolutely.

9 QUESTION: Because there is no justification in  
10 the first place. There is no necessity.

11 MR. CAMPAGNE: There's no problem --

12 QUESTION: All right.

13 MR. CAMPAGNE: -- and because there's no  
14 problem --

15 QUESTION: All right. Let me ask you --

16 MR. CAMPAGNE: -- there's no governmental  
17 interest in solving a problem that doesn't exist.

18 QUESTION: Let me ask you a final question. If  
19 that is so, why do you concede that you have no First  
20 Amendment objection to the -- in effect, to the forced  
21 association with the growers for nonspeech purposes?

22 MR. CAMPAGNE: Because in that sense, when they  
23 pass a quality control rule that says that all growers of  
24 all 100 different varieties, green and red, can't sell  
25 anything that's got a worm in it, that doesn't impinge on

1 my First Amendment rights.

2 QUESTION: You're saying that really is not an  
3 association within the meaning of the First Amendment,  
4 aren't you?

5 MR. CAMPAGNE: No. That's just pure regulation.

6 QUESTION: So there really isn't an association  
7 component here to the regulatory -- to the regulatory  
8 scheme, which is exclusive of the speech problem that you  
9 raise.

10 MR. CAMPAGNE: Exactly.

11 QUESTION: Is that your position?

12 MR. CAMPAGNE: We're not here, Your Honor,  
13 trying to vitiate the entire marketing order. We don't --  
14 we accept the 9 cents that goes to the quality control.  
15 We're only speaking to the 10 cents per carton that goes  
16 to the forced association with our competitors who grow  
17 different varieties and, basically, in some varieties take  
18 over \$200 an acre, which is more than our profit margin in  
19 some varieties, and force us in the limited amount of time  
20 we have --

21 QUESTION: Thank you --

22 MR. CAMPAGNE: -- to --

23 QUESTION: -- Mr. Campagne.

24 QUESTION: Mr. Jenkins, you have 2 minutes  
25 remaining.

1 REBUTTAL ARGUMENT OF ALAN JENKINS

2 ON BEHALF OF THE PETITIONER

3 MR. JENKINS: Thank you, Mr. Chief Justice. I'd  
4 like to begin just very briefly by stating that as to the  
5 administration of this program most of the factual  
6 findings that respondent's cite come from the ALJ's  
7 findings on the APA claim against these programs. Those  
8 were overturned by the judicial officer, who found those  
9 findings as to bias, as to red is better, and what-have-  
10 you, to be clearly erroneous.

11 Both of the courts below affirmed that holding,  
12 the APA holding, and so I think those findings are simply  
13 out of the case. The Court need not necessarily ignore  
14 them completely, but no final adjudication has been made  
15 upholding these findings of bias.

16 If I could turn to the question of the  
17 Government interest here, I think we have demonstrated  
18 that there's a free rider problem that's important and  
19 comparable to the union and integrated bar context, that  
20 in agriculture, and particularly as to these commodities,  
21 there are many small producers who could not engage in the  
22 kind of economies of scale that's available under this  
23 program.

24 That's not necessarily true in some other  
25 industries. The record does speak, for instance, to the

1 California almond industry, and this Court has repeatedly  
2 held that where Congress finds a problem and deals with it  
3 in a way that is constitutionally justifiable, the fact,  
4 at least outside of the strict scrutiny context, that it  
5 has not chosen to employ those remedies elsewhere does not  
6 render unconstitutional its action where it has done so.

7 QUESTION: Does anything in the law prevent  
8 bias? Does anything in the law -- let's assume that  
9 51 percent of the California growers grow red peaches, or  
10 red nectarines, or whatever color red things we were  
11 talking about. Anything in the law would prevent this  
12 money from being spent with advertisements showing only  
13 the red fruit?

14 MR. JENKINS: I think so, Justice Scalia, as a  
15 practical matter.

16 QUESTION: What provision is that?

17 MR. JENKINS: May I complete my answer?

18 QUESTION: Yes.

19 MR. JENKINS: The AMAA provides that the  
20 Secretary must find that particular activities are -- tend  
21 to effectuate the goals of the act. The Agricultural  
22 Marketing Service has guidelines which, for instance,  
23 prevent the criticism of other commodities or products, so  
24 I think both as a practical matter and as a legal matter  
25 there are checks on misuse of this system.

1 Thank you.

2 CHIEF JUSTICE REHNQUIST: Thank you,  
3 Mr. Jenkins.

4 The case is submitted.

5 (Whereupon, at 11:04 a.m., the case in the  
6 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

DAN GLICKMAN, SECRETARY OF AGRICULTURE, Petitioner v. WILEMAN BROTHERS & ELLIOTT, INC., ET AL.  
CASE NO. 95-1184

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Don Mari Federico

(REPORTER)