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## Constitutional Law - Forced Advertising: Free Speech or Not Even - Glickman v. Wileman Bros. & (and) Elliott, Inc.

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**CONSTITUTIONAL LAW—Forced Advertising: Free Speech or Not Even? *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).**

INTRODUCTION

The “California Dancing Raisins” sing “I Heard it Through the Grapevine.”<sup>1</sup> Celebrities with milk mustaches appear in ads captioned “Got Milk?”<sup>2</sup> Beef is touted as “Real food for Real People,” and “It’s [also] What’s for Dinner.”<sup>3</sup> These familiar advertisements are the product of some of the thirty-four marketing campaigns authorized by the United States Department of Agriculture.<sup>4</sup> The programs collect about 750 million dollars each year<sup>5</sup> to be used for promotional purposes, such as the generic advertising examples above.<sup>6</sup> Among the commodities for which the Department of Agriculture has authorized generic advertising are California nectarines, plums, and peaches.<sup>8</sup> In *Glickman v. Wileman Bros. and Elliott, Inc.*, the Supreme Court considered a First Amendment challenge to regulations that required handlers and processors of these fruits to fund this generic advertising.<sup>9</sup>

Wileman Bros. and Elliott, Inc. (Wileman) is a large handler of California fruits.<sup>10</sup> In 1988, Wileman filed a petition with the Secretary of Agriculture challenging the generic advertising regulations.<sup>11</sup> The generic advertising regulations are part of a series of regulations, known as marketing orders, that govern a number of agricultural markets.<sup>12</sup> Wileman’s challenge included a claim that these regulations compelled it to finance speech in violation of the First Amendment.<sup>13</sup> In conjunction with this claim, Wileman refused to pay the assessments required by the regulations.<sup>14</sup> The Adminis-

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1. David Savage & Nancy Rivera Brooks, *Supreme Court Says Farmers Must Keep Paying for Ads Agriculture: Generic promotions are characterized as type of ‘economic regulation’ that is routinely upheld*, L.A. TIMES, June 26, 1997, at D1.

2. Brian Williams, *Farmers Question Checkoff Program to Pay for Commodities Advertising*, COLUMBUS DISPATCH, Nov. 29, 1996, at F1.

3. Savage, *supra* note 1, at D1.

4. Steve Lash, *Justices Hear First Amendment Challenge to Government Required, Industrywide Agriculture Ads*, WEST’S LEGAL NEWS, Dec. 3, 1996, at 12898, available in 1996 WL 687547.

5. *Id.*

6. *Id.*

7. Generic advertising is defined as the promotion of a particular commodity, without reference to a particular brand or producer. 7 C.F.R. § 1485.11(g), (s) (1997). See *infra* note 33 and accompanying text.

8. See *infra* notes 38-39 and accompanying text.

9. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2135 (1997).

10. *Id.* Wileman also packs and markets its output, as well as that of other growers. *Id.*

11. *Id.*

12. *Id.* at 2134.

13. *Id.* at 2135.

14. *Id.*

trative Law Judge (ALJ) ruled for Wileman, without resolving the First Amendment question.<sup>15</sup> The Judicial Officer of the Department of Agriculture reversed the ALJ's decision.<sup>16</sup> Wileman, along with fifteen other handlers, appealed the decision to the district court.<sup>17</sup> The district court upheld the challenged regulations and entered judgment of 3.1 million dollars in past due assessments against the handlers.<sup>18</sup> The handlers appealed the district court's decision, claiming that the generic advertising provisions of the regulations violated both the Administrative Procedure Act (APA) and the First Amendment.<sup>19</sup> The Ninth Circuit Court of Appeals rejected the handler's APA challenge.<sup>20</sup> However, the court determined that such government-enforced contributions to pay for generic advertising violated the First Amendment rights of the handlers.<sup>21</sup> It based its ruling on prior Supreme Court cases addressing the First Amendment implications of compelled speech and commercial speech.<sup>22</sup>

The Ninth Circuit's disposition of the handler's First Amendment claim conflicted with the Third Circuit's rejection of a similar First Amendment challenge to comparable regulations in the beef industry.<sup>23</sup> The Supreme Court granted certiorari to resolve the conflict among the circuits.<sup>24</sup> In reversing the Ninth Circuit's decision, the Court held that the regulations authorizing generic advertising need only survive the rational basis test applied to economic regulations, rather than the heightened scrutiny used to review regulations implicating the First Amendment.<sup>25</sup> The Court stated that "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features

15. *Id.* The ALJ said she would have ruled in Wileman's favor on his First Amendment claims. *Id.* at 2135 n.6.

16. *Id.* at 2135.

17. *Id.* The appeal was pursuant to 7 U.S.C. § 608c(15)(B) (1994).

18. *Glickman*, 117 S. Ct. at 2135.

19. *Id.* at 2136.

20. *Id.* See *Wileman Bros. & Elliott v. Espy*, 58 F.3d 1367 (9th Cir. 1995) (concluding that substantial evidence justified both the original decision to engage in generic advertising and the decision to continue the program).

21. *Glickman*, 117 S. Ct. at 2136. See *Wileman Bros. & Elliott v. Espy*, 58 F.3d at 1367.

22. *Glickman*, 117 S. Ct. at 2136. See *Wileman Bros. & Elliott v. Espy*, 58 F.3d at 1367 (relying on *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), and the three-part test established in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), to say that the forced contributions violated the First Amendment).

23. The conflict is with the Third Circuit's decision in *United States v. Frame*, 885 F.2d 111 (3d Cir. 1989). *Glickman*, 117 S. Ct. at 2137. The court in *Frame* "rejected a challenge to generic advertising for beef authorized by the Beef Promotion and Research Act of 1985." *Id.*

24. *Glickman*, 117 S. Ct. at 2137.

25. *Id.* at 2142. The Court framed the issue by saying, "[t]he legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." *Id.* at 2138.

of the marketing orders.”<sup>26</sup> The Court said the regulations on forced collective advertising are “a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress.”<sup>27</sup> Thus, the Court held that the regulations did not even implicate the First Amendment, let alone violate it.

This case note will discuss the history, merits, and implications of the Court’s decision. It first discusses the history and application of marketing orders and the line of cases that the majority examined in upholding the regulations. Second, it summarizes both the majority and dissenting opinions. Finally, the note discusses how the simplistic reasoning of the majority has set dangerous precedent for future cases.

### BACKGROUND

#### *The Agricultural Marketing Agreement Act of 1937*

In 1937, Congress enacted the Agricultural Marketing Agreement Act of 1937<sup>28</sup> (“AMAA” or “the Act”) in an effort to “establish and maintain orderly marketing conditions and fair prices for agricultural commodities.”<sup>29</sup> The AMAA gives the Secretary of Agriculture (“the Secretary”) the authority to promulgate regulations to implement the Act.<sup>30</sup> These regulations, known as marketing orders, provide for uniform prices, determine the quality and quantity of the commodity that may be marketed, and provide for the “orderly disposition of any surplus that might depress market prices.”<sup>31</sup> “Pursuant to the policy of collective, rather than competitive marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements.”<sup>32</sup> One activity that Congress has expressly authorized is the establishment of projects “designed to assist, improve, or promote the marketing, distribution, and consumption . . . [of the commodity, through]

26. *Id.*

27. *Id.* at 2142. The Court further stated,

[T]he mere fact that one or more producers ‘do not wish to foster’ generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial. *Id.*

28. Agricultural Marketing Agreement Act of 1937, Pub. L. No. 137, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601, 602, 608a-608e, 610, 612, 614, 671-74 (1994)).

29. *Glickman*, 117 S. Ct. at 2134 (citing 7 U.S.C. § 602(1) (1994)).

30. 7 U.S.C. § 608c(1). After giving notice and an opportunity for a hearing, the Secretary can issue marketing orders that “tend to effectuate the declared policy” of the Act. *Id.* §§ 608c(3)-(4). Marketing orders must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. *Id.* § 608c(9)(B).

31. *Glickman*, 117 S. Ct. at 2134.

32. *Id.*

any form of marketing promotion including paid advertising.”<sup>33</sup>

Committees, appointed by the Secretary, carry out the marketing orders.<sup>34</sup> The duties of the committees include recommending rules and regulations to the Secretary<sup>35</sup> as well as recommending the annual rate of assessments to be charged in order to cover the expenses of administering the marketing orders.<sup>36</sup> Each handler must pay a share of these expenses based on their pro rata share of the commodity they handle.<sup>37</sup> Marketing Order 916 and Marketing Order 917 are the specific regulations at issue in *Glickman*.<sup>38</sup> These orders expressly authorize, and thus require handlers to pay for, the generic advertising of nectarines, peaches, and plums grown in California.<sup>39</sup>

### *Regulations on Speech*

#### A. Commercial Speech and the First Amendment

In order to understand *Glickman*, it is important to understand several different strands of the Supreme Court’s First Amendment jurisprudence. The Court has defined commercial speech as “expression related solely to the economic interests of the speaker and its audience” and as “speech proposing a commercial transaction.”<sup>40</sup> The Court delineated the First Amendment protections for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*<sup>41</sup> In that case, the Supreme Court held that a ban by the New York Public Service Commission prohibiting advertising was unconstitutional because it violated the First and Fourteenth Amendments.<sup>42</sup> However, in striking down the regulation, the Court did not apply the heightened scrutiny standard it often applies to restrictions on expression.<sup>43</sup> Instead, the Court applied an “intermediate scrutiny” test, expressly holding that commercial speech merits lesser protection

33. 7 U.S.C. § 608c(6)(l) (1994).

34. *Glickman*, 117 S. Ct. at 2134 (citing 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30 (1997)). The committees are composed of producers and handlers of the commodity. 7 U.S.C. § 608c(7)(c) (1994). The Act defines handlers as “processors, associations of producers and others engaged in the handling of . . . [the] commodity or product.” *Id.* § 608c(1).

35. Nectarines Grown in California, 7 C.F.R. § 916.51-.52, Fresh Pears and Peaches Grown in California. *Id.* §§ 917.40 to -.41 (1997).

36. 7 C.F.R. §§ 916.31(c), 917.35(f) (1997).

37. *Id.* §§ 916.41, 917.37.

38. *Id.* §§ 916, 917.

39. *Glickman*, 117 S. Ct. at 2134 & nn.4-5. Plums, while not currently under a marketing order, were still relevant to this case because Wileman was seeking a refund of assessments charged during the time period when a marketing order still covered plums. *Id.*

40. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 561-62 (1980).

41. 447 U.S. 557 (1980).

42. *Id.* at 570.

43. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

than does other constitutionally guaranteed expression.<sup>44</sup> The Court developed a three-part test for regulations concerning lawful, non-misleading commercial speech.<sup>45</sup> First, the government interest in regulating the speech must be substantial.<sup>46</sup> Second, the regulation must directly advance the asserted government interest.<sup>47</sup> Third, the regulation must not be more extensive than necessary to serve that interest.<sup>48</sup>

### B. Compelled Speech and the First Amendment

The government's ability to compel speech is limited in the same way and by the same concerns as its ability to limit speech.<sup>49</sup> For example, in *Wooley v. Maynard*,<sup>50</sup> the Court considered "whether the State may constitutionally require an individual to participate in an ideological message by displaying it on his private property."<sup>51</sup> Reviewing the law under heightened scrutiny, the Court held that the State may not prohibit an individual from covering up the motto "Live Free or Die" on his license plate.<sup>52</sup> The Court said the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."<sup>53</sup> The Court found that of the two State interests, the promotion of history and state pride was not compelling enough to outweigh the individual's right to avoid being the courier of the State's message, and that the regulation was not narrowly tailored in facilitating the identification of passenger vehicles.<sup>54</sup>

### C. Compelled Contributions to Fund the Speech of Others

In a series of cases similar to those involving compelled speech, the Court has found that compelling individuals to fund speech also raises First Amendment concerns. In the case of *Abood v. Detroit Board of Education*,<sup>55</sup> the issue was whether an "agency shop" agreement violates the constitutional rights of employees.<sup>56</sup>

44. *Central Hudson*, 447 U.S. at 563, 566.

45. *Id.* at 566.

46. *Id.*

47. *Id.*

48. *Id.* In *Central Hudson*, the Court found that the regulations directly advanced the Commission's substantial interest in energy conservation, but that the complete suppression of the advertising was more extensive than necessary. *Id.* at 568-71.

49. See *infra* notes 50-54 and accompanying text. See also *infra* note 66 for cases establishing the freedom from being compelled to speak.

50. 430 U.S. 705 (1977).

51. *Id.* at 713.

52. *Id.* at 715.

53. *Id.* at 714.

54. *Id.* at 716-17.

55. 431 U.S. 209 (1977).

56. *Id.* at 211. An agency shop agreement is an arrangement between a union and a local government where all employees, as a condition of employment, must pay to the union a service fee equal to the

In *Abood*, the Court held that there was no First Amendment violation where fees collected under an agency shop agreement were used to fund union activities such as collective bargaining, contract administration, and grievance adjustment.<sup>57</sup> However, the Court held that employees could not be compelled to fund ideological activities (as opposed to the activities listed above) that the employees opposed<sup>58</sup> because “[t]he fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.”<sup>59</sup>

Issues concerning commercial speech, compelled speech, and compelled funding of other’s speech all came together in the case of *Glickman v. Wileman Bros. and Elliott, Inc.* In *Glickman*, the Court was to decide whether the First Amendment afforded protection to members of a group where government regulations required that all members pay for generic advertisements.

#### PRINCIPAL CASE

##### *The Majority*

In *Glickman*, the Court held that the marketing orders for peaches, plums, and nectarines requiring handlers to fund generic advertising were not “law[s] ‘abridging the freedom of speech’ within the meaning of the First Amendment.”<sup>60</sup> The Court determined that the regulations at issue were similar to other requirements contained in the marketing orders and thus did not even implicate the First Amendment.<sup>61</sup> Upon holding that the First Amendment did not apply to the regulations, the Court applied a rational basis test, rather than heightened scrutiny, to determine whether the regulations were lawful.

The Court reached its conclusion by first recognizing the importance of the context in which this case arose:

California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. *The business entities that are compelled to fund the generic advertising at*

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amount of union dues, even if they are not a part of the union. *Id.*

57. *Id.* at 225-26.

58. *Id.* at 235.

59. *Id.* at 234.

60. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2134, 2138 (1997).

61. *Id.* at 2138. See *supra* notes 26-27 and accompanying text.

*issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising . . . .*<sup>62</sup>

The Court then held that three characteristics of the regulations distinguished them from laws that implicated the First Amendment.

#### A. Claim One—Restriction on Speech

First, the Court distinguished the line of cases represented by *Central Hudson* by noting that the marketing orders did not restrict producers from communicating any message, commercial or otherwise, to any audience.<sup>63</sup> The Court rejected Wileman's claim that the regulations violated the First Amendment because the payments reduce the amount of money that the handlers can spend on their own advertising, thus preventing speech as in *Central Hudson*. The Court reasoned that other assessments warranted under the marketing orders<sup>64</sup> also reduce the amount available for advertising, but that the "First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget."<sup>65</sup>

#### B. Claim Two—Compelled Speech

Second, the Court distinguished *Glickman* from the line of cases where the State compelled people to engage in actual or symbolic speech.<sup>66</sup> It pointed out that the assessments used to pay for the advertising did not require respondents to "repeat an objectionable message out of their own mouths,"<sup>67</sup> "use their own property to convey an antagonistic ideological message,"<sup>68</sup> "respond to a hostile message when they 'would prefer to remain silent',"<sup>69</sup> or "be publicly identified or associated with another's mes-

62. *Glickman*, 117 S. Ct. at 2138 (emphasis added).

63. *Id.* The Court also cited *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). *Glickman*, 117 S. Ct. at 2138 n.12.

64. The Court listed activities such as employee benefits and inspection fees. *Glickman*, 117 S. Ct. at 2138.

65. *Id.* at 2139.

66. *Id.* at 2138 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maryland*, 430 U.S. 705 (1977); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988); and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1985)). See *Glickman*, 117 S. Ct. at 2138 n.13.

67. *Glickman*, 117 S. Ct. at 2139.

68. *Id.* See *supra* notes 50-54 and accompanying text.

69. *Glickman*, 117 S. Ct. at 2139. The Court cited *Pacific Gas and Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 18 (1986) (plurality opinion).



sage.<sup>70</sup> The Court said that the marketing orders merely required respondents to fund generic advertising, not speak themselves, and moreover, the advertising did not convey any message with which the respondents disagreed.<sup>71</sup>

### C. Claim Three—Government Compelled Contributions to Fund Speech

Finally, the Court held that the regulations did not oblige the producers to endorse or finance any political or ideological views.<sup>72</sup> While the Court acknowledged that the First Amendment forbids, at least without sufficient justification, government-compelled contributions to fund the speech of others,<sup>73</sup> it concluded that *Abood* did not say that the First Amendment always protects an individual from being forced to pay into an organization that engages in expressive activities.<sup>74</sup> The Court limited the holding in *Abood* as “merely recogniz[ing] a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one’s ‘freedom of belief.’”<sup>75</sup> The Court said the compelled contributions for political purposes unrelated to collective bargaining in *Abood* violated the First Amendment because “they interfere[d] with the values lying at the ‘heart of the First Amendment the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.’”<sup>76</sup> In *Glickman*, on the other hand, the Court distinguished making the handlers pay for advertising that promoted California tree fruit from cases where messages conveyed a political or ideological belief. The Court said the generic advertising programs did not implicate the First Amendment simply because some handlers may have thought that too much or too little was being spent on advertising, or that independent advertising would have worked better.<sup>77</sup>

After concluding that nothing in the regulations even implicated the First Amendment, the Court went on to say its “cases provide affirmative support for the proposition that assessments to fund a lawful collective pro-

70. *Glickman*, 117 S. Ct. at 2139. The Court cited *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980) as supportive of this conclusion.

71. *Glickman*, 117 S. Ct. at 2139.

72. *Id.* at 2138 (citing *International Ass’n of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *Glickman*, 117 S. Ct. at 2138 n.14.

73. *Glickman*, 117 S. Ct. at 2139.

74. *Id.*

75. *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1976)).

76. *Glickman*, 117 S. Ct. at 2139 (second alteration in original) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1976)).

77. *Glickman*, 117 S. Ct. at 2140.

gram may sometimes be used to pay for speech over the objection of some members of the group."<sup>78</sup> The Court relied on the rule from *Keller v. State Bar of California*.<sup>79</sup> According to the Court, an organization may "constitutionally fund activities germane to [its] goals out of the mandatory dues of all members, [but] [i]t may not, however, in such a manner fund activities of an ideological nature which fall outside of those areas of activity."<sup>80</sup> The Court then held that the test was "clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological speech."<sup>81</sup>

The Court concluded by saying that since the generic advertising provisions of the marketing orders do not fit into any of the speech categories discussed above, they are just a "species of economic regulation,"<sup>82</sup> rather than a regulation of speech. The Court said it was therefore error for the court of appeals to rely on the intermediate scrutiny test in *Central Hudson* when analyzing the issue.<sup>83</sup> Because the Court characterized the regulations as economic in nature, the Court applied only a rational basis test to determine their validity.<sup>84</sup> In finding the marketing orders constitutional, the Court briefly noted that the purpose of generic advertising was both legitimate and consistent with the AMAA.<sup>85</sup>

### *Justice Souter's Dissent*

A significant portion of Justice Souter's dissent<sup>86</sup> focused on the majority's reading of the *Abood* line of cases.<sup>87</sup> Souter disagreed with the majority's conclusion that *Glickman* was not even a First Amendment case.<sup>88</sup> He felt

78. *Id.*

79. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). The court also relied on *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). *Glickman*, 117 S. Ct. at 2140. *But see infra* notes 93, 135-37 and accompanying text

80. *Glickman*, 117 S. Ct. at 2140 (quoting *Keller*, 496 U.S. at 14).

81. *Id.* The Court went on to say that the program here is even less likely to violate the First Amendment than the program that was upheld in *Lehnert*. *Lehnert* dealt with union agency-shop agreements which have been held to always impose some burden on free speech. On the other hand, collective programs authorized by marketing orders have generally been held not to encroach upon First Amendment rights. *Id.* at 2140 n.16.

82. *Id.* at 2142.

83. *Id.* at 2141.

84. *Id.* at 2141-42.

85. *Id.* at 2141.

86. Justice Souter filed a lengthy dissenting opinion that was joined by Chief Justice Rehnquist, Justice Scalia and (except for part two) Justice Thomas. Justice Thomas (joined by Scalia, J.) also filed a dissenting opinion. While agreeing with Souter's dissent that the marketing order did involve free speech, Justice Thomas disagreed with the use of the *Central Hudson* balancing test. Thomas felt that regulations of commercial speech should be scrutinized under the same heightened standard as other speech. *Glickman*, 117 S. Ct. at 2155 (Thomas J., dissenting).

87. *Glickman*, 117 S. Ct. at 2142-48 (Souter, J., dissenting).

88. *Id.* at 2145-46.

that *Abood* did not say that the First Amendment is not implicated so long as the speech is germane to lawful economic regulations.<sup>89</sup> Souter conceded that *Abood* allowed compulsory funding of certain union activities.<sup>90</sup> He said, however, that *Abood* first recognized that all compulsory funding impacted employees' First Amendment interests, and funding for certain activities was upheld only after the Court concluded that any First Amendment interference was justified.<sup>91</sup> Souter noted that decisions after *Abood*<sup>92</sup> say that "a mandatory fee must not only be germane to some otherwise legitimate regulatory scheme; it must also be justified by vital policy interests of the government and not add significantly to the burdening of free speech inherent in achieving those interests."<sup>93</sup>

In a separate but related point, Souter argued that the Court also erred in interpreting the First Amendment test established in *Abood*.<sup>94</sup> He contended that *Abood* does not stand for the proposition that, as long as the speech is not political or ideological, the government does not violate the First Amendment when it forces a member of an organization to fund speech with which he disagrees.<sup>95</sup> Souter argued that nothing in *Abood* or the cases following it said that the government had the power to compel funding for protected speech, whether political or nonpolitical.<sup>96</sup> Souter understood *Abood* as holding that compelling individuals to make expenditures for speech is the same as prohibiting expenditures, therefore both are protected by the First Amendment.<sup>97</sup> The dissent stated that the same principle that applies to ideological speech should apply to commercial speech as well.<sup>98</sup> Thus, unlike the majority, Souter felt that the generic advertising regulations clearly implicated the First Amendment, and in analyzing the regulations, the Court should have applied the same scrutiny as if it were looking at regulations prohibiting generic advertising.

After concluding that generic advertising programs were not merely economic regulation, but rather the regulation of commercial speech,<sup>99</sup> the dissent applied the *Central Hudson* test. The dissent found that the market-

89. *Id.*

90. *Id.* at 2145.

91. *Id.*

92. The dissent cited *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). *Glickman*, 117 S. Ct. at 2146 (Souter, J., dissenting).

93. *Glickman*, 117 S. Ct. at 2146. This is a rephrasing of the test prescribed in *Lehnert*.

94. See *infra* notes 95-101.

95. *Glickman*, 117 S. Ct. at 2147.

96. *Id.*

97. *Id.*

98. *Id.* In Souter's view, the only reason that the Court had not yet established this principle was because this was a case of first impression since no case had yet involved the compelled funding of commercial speech. *Id.*

99. *Id.* at 2149.

ing orders concerning generic advertising failed all three prongs of the test.<sup>100</sup> Thus, the dissent would have affirmed the court of appeals and invalidated the marketing orders as they related to generic advertising.<sup>101</sup>

#### ANALYSIS

*Glickman v. Wileman Bros. & Elliott, Inc.* required the Court to analyze several strands of its First Amendment jurisprudence: compelled speech, commercial speech, and compelled funding of other's speech. *Glickman* itself, however, did not fit neatly into any single category. That the case was difficult and novel does not excuse the Court's shortsighted analysis. The majority in *Glickman* erred by examining the case as an economic regulatory scheme and determining that the generic advertisements contained no speech element at all.<sup>102</sup> Souter's dissent, while correctly recognizing the First Amendment implications of the dispute, erred by simply concluding that, because advertisements were at issue, the *Central Hudson* test for commercial speech should apply.<sup>103</sup> Rather, after recognizing that the First Amendment was the appropriate standard, the Court should have analogized *Glickman* to the compelled funding of speech cases exemplified by *Abood*. Had they done so, the Court could have properly balanced the interests of the growers (both the dissenters and the majority) and the government. As a result, the Court in *Glickman* has set dangerous precedent for resolving future compelled funding of speech cases.

#### *First Amendment Interests in Glickman*

As discussed earlier, the Court in *Glickman* held that regulations requiring generic advertisements involved in the case did not implicate the First Amendment.<sup>104</sup> The Court based this conclusion on three facts: the marketing orders do not restrict the freedom of the producers to communicate their own messages; the orders do not compel the producers to engage in actual or symbolic speech; and the orders do not compel the producers to finance any political or ideological view.<sup>105</sup>

The Court's conclusion that the First Amendment was inapplicable is erroneous for several reasons. First, the Court's holding is a non sequitur. The Court reasoned that the First Amendment did not apply to this case because the facts and circumstances could be distinguished from earlier

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100. *Id.* at 2149-54.

101. *Id.* at 2155.

102. *Id.* at 2138.

103. *Id.* at 2149.

104. See *supra* notes 60-85 and accompanying text.

105. *Glickman*, 117 S. Ct. at 2149.

cases that violated the First Amendment.<sup>106</sup> In other words, just because the Court was able to distinguish *Glickman* from other cases where the Court found *violations* of the First Amendment, it does not necessarily follow that First Amendment *scrutiny* was improper in *Glickman*.<sup>107</sup>

More specifically, Justice Souter's dissent correctly pointed out the majority's "misemployment of *Abood* and its successors."<sup>108</sup> Stating that "*Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief,'"<sup>109</sup> the Court held that when the government neither forbids speech nor attributes it to an objector, only compelled speech that is political or ideological will be scrutinized under the First Amendment.<sup>110</sup> While *Abood* undoubtedly dealt with political speech, a close reading of the case illustrates that the *Glickman* Court read its holding much too narrowly.<sup>111</sup> The *Abood* Court said that "[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests."<sup>112</sup> Later, holding that public and private employees have the same First Amendment rights despite the fact that the activities of the former could be called "political," the Court said "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."<sup>113</sup> The same must surely be true when the government compels growers to financially support the expressive activities of the committees.<sup>114</sup> Thus, Souter was correct in concluding that "*Abood* continues to stand for the proposition that being compelled to make expenditures for protected speech 'works no less an infringement of . . . constitutional rights' than being prohibited from making such expendi-

106. Clearly there is a difference between saying that the First Amendment does not apply and saying that the First Amendment applies, but is not violated. As Justice Thomas pointed out in his dissent, "[i]t is one thing to differ about whether a particular regulation involves an 'abridgment' of the freedom of speech, but it is entirely another matter—and a complete repudiation of our precedent—for the majority to deny that 'speech' is even at issue in this case." *Id.* at 2155-56 (Thomas, J., dissenting).

107. Indeed, not even the government argued that the regulations should be analyzed under any standard other than the First Amendment. Brief for Petitioner at iii, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997) (No. 95-1184) [hereinafter Petitioner's Brief] (on file with the *Land and Water Law Review*).

108. *Glickman*, 117 S. Ct. at 2147 (Souter, J., dissenting).

109. *Id.* at 2139.

110. *See id.* at 2142.

111. "While it is perfectly true that cases like *Abood* and *Keller* did involve political or ideological speech, and the Court made reference to that character in explaining the gravity of the First Amendment interests at stake, nothing in those cases suggests that government has free reign to compel funding of nonpolitical speech . . ." *Id.* at 2147.

112. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1976).

113. *Id.* at 232. *See generally* Leading Cases, *Commercial Speech-Compelled Advertising*, 111 HARV. L. REV. 197, 325-29 (1997) (arguing that *Glickman* was a First Amendment case).

114. *See supra* notes 95-97 and accompanying text.

tures."<sup>115</sup>

Moreover, the majority's holding that the First Amendment does not even apply to the generic advertising in *Glickman* seems to conflict with some other basic principles of First Amendment law. First, as Souter pointed out, the Court has traditionally held that all speech is subject to some level of First Amendment protection unless it falls within an unprotected category of speech such as obscenity.<sup>116</sup>

Second, while the Court noted the importance of the "statutory context" and "regulatory scheme" in which *Glickman* arose,<sup>117</sup> that fact seems more relevant to the type of First Amendment scrutiny to apply, rather than whether to apply First Amendment scrutiny at all.<sup>118</sup>

Finally, the Court's reasoning creates an asymmetrical situation. It seems hard to imagine that if Congress were to *prohibit* the generic advertising of California fruit that the Court would not view it as a First Amendment issue. The Court created another asymmetry as well: *Buckley v. Valeo*<sup>119</sup> held that paying for political advertising was protected speech, while *Glickman* held that paying for commercial advertising is not speech at all.<sup>120</sup> Also, as to the audience, generic advertising would appear to be speech whether or not it is compelled or in a "statutory context."<sup>121</sup>

#### *Constitutional Scrutiny of the Generic Advertising Program in Glickman*

Finding that the generic advertising involved in *Glickman* implicates the First Amendment does not, however, end the inquiry. Souter, although correct in finding a First Amendment interest in *Glickman*, was incorrect in simply applying *Central Hudson's* test for commercial speech.<sup>122</sup> He based his decision to use *Central Hudson* on the First Amendment principle "that compelling . . . speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny."<sup>123</sup> Although it is undoubtedly true that in many instances the scrutiny applied to compelled speech should

115. *Glickman*, 117 S. Ct. at 2147 (Souter, J., dissenting) (quoting *Abood*, 431 U.S. at 234).

116. *Id.* at 2143. Indeed, the Court has gone even further recently and suggested that no category of speech is "entirely invisible to the Constitution." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

117. *Glickman*, 117 S. Ct. at 2138.

118. See *infra* notes 131-32 and accompanying text.

119. 424 U.S. 1 (1976) (per curiam).

120. See Leading Cases, *Commercial Speech—Compelled Advertising*, 111 HARV. L. REV. 197, 324 (1997).

121. Cf. Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RTS. J. 1, 17 (1995) (discussing concern for audience and societal interests in the compelled speech context).

122. *Glickman*, 117 S. Ct. at 2149 (Souter, J., dissenting).

123. *Id.* at 2144.

be the same test that is applied to prohibitions on speech,<sup>124</sup> *Glickman* is not one of those instances.<sup>125</sup>

Despite any appeal of the *Central Hudson* test, the more appropriate test is found in the line of First Amendment cases exemplified by *Abood*. These cases mostly concern employees who were forced to contribute to union activities that they found to be objectionable. The Court has extended its analysis to other areas though, such as the integrated bar in *Keller v. State Bar of California*.<sup>126</sup> The same analogy used to link *Abood* and *Keller* can be made between those covered by the marketing orders on one hand, and unions and integrated bars on the other. In each case, individuals are compelled to participate in organizations that conduct activities for the benefit of all members.<sup>127</sup>

The application of an *Abood*-type analysis to the facts of *Glickman* makes sense because of the similarity of the competing interests involved. In both cases, the government initially impacts the First Amendment rights of individuals by requiring them to financially support a collective undertaking that they might not otherwise join or even support.<sup>128</sup> Additionally, both cases represent instances where dissenting contributors object to the use for which their money has been used by the majority. Thus, both are instances where individuals are bringing specific First Amendment claims in situations where the government has already impacted (without necessar-

124. See, e.g., *supra* notes 49-54, 66 and accompanying text.

125. Other instances that would not fit the general rule are not hard to imagine. Suppose, for example, that the handlers of California nectarines, peaches, and plums were forced to pay for advertising that contained obscene images of nude men and women enjoying California tree fruit. Under Souter's reasoning it would appear that the handlers would have no recourse because the First Amendment does not protect obscene speech. The scrutiny to be applied in compelled speech cases surely must not always depend merely on the type of speech being compelled.

126. 496 U.S. 1 (1990). *Keller* involved members of the California Bar who objected to the Bar's funding of certain ideological and political activities. In *Keller*, the Court found a "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id.* at 12. The Court based its analogy on the idea that compelled memberships in these organizations prevented the "free-rider" problem—that it is unfair for people to receive benefits for which they have not paid. *Id.*

127. The Petitioner's Brief also cited *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 345 (1977), as "noting, in context of 'associational standing' under Article III, parallels between state created commodity advertising commission, labor unions, and integrated bar associations." Petitioner's Brief at 24, *Glickman*, 117 S. Ct. 2130 (No. 95-1184). The Ninth Circuit's objection that there was already a free-rider problem here because growers that are not covered by these specific marketing orders (e.g., peach growers in Georgia) benefit from the generic advertisements seems to miss the mark. See *Wileman Bros. & Elliot, Inc. v. Espy*, 58 F.3d 1367, 1380 (1995) ("If the Secretary is concerned about free-riders, there are already plenty of them in other states."). Georgia peach growers can not be said to free-riding on generic advertisements for California peaches because the ads promote California fruit as unique. *Glickman*, 117 S. Ct. at 2152 (Souter, J., dissenting). To argue otherwise is the equivalent of saying that *Pepsi rides on the back of advertisements for Coke*.

128. *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 222 ("[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests.").

ily infringing)<sup>129</sup> their rights by requiring them to fund the collective activities in the first place. Thus, analysis under the *Abood* line of cases balances the dissenters' individual First Amendment rights with the government's interest in enabling the group to achieve its goals.<sup>130</sup>

The additional twist of the government requiring membership in the first place removes *Glickman* and the *Abood* cases from the "typical" rule on which Souter relies.<sup>131</sup> When scrutinizing the generic advertising program in *Glickman*, the important fact to remember is that the government did not merely coerce separate individuals to pay for speech; rather the government had already lawfully required the handlers to act as a group, and then some of the handlers objected to some of the group's speech. The Court itself has noted the importance of the group setting in these types of cases:

The furtherance of the common cause [in this case, stable markets and increased consumer demand] leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.<sup>132</sup>

### *Discerning the Proper Test from the Abood Line*

Even if the Court had correctly analyzed *Glickman* under the *Abood* line, it would still have faced a difficult task. While *Glickman* can be analogized to the *Abood* line, trouble arises when the Court has tried to determine just what these cases seem to mean. One author has stated that "[t]he Supreme Court has been unable to delineate, with any precision, the permissible boundaries within which unions may legally apply the dues collected from objecting nonmembers without those expenditures being challenged

129. See, for example, *Lehnert*, where the court allowed the union to finance certain parts of the union newsletter from the dues of dissenters. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 527 (1991).

130. These competing interests are summarized by the Court's language in *Abood*:

To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson and Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

*Abood*, 431 U.S. at 222.

131. This conclusion is also different from the majority's reliance on the "regulatory scheme" in which *Glickman* arises. See *supra* note 62 and accompanying text. The Court suggests that the context goes to whether the generic advertising component of the marketing orders even implicates the First Amendment, whereas analysis under the *Abood* line suggests that it goes to the weight of First Amendment interests involved.

132. *Abood*, 431 U.S. at 222-23 (quoting *Machinists v. Street*, 367 U.S. 740, 778 (1961) (Douglas, J., concurring)).



on First Amendment grounds.”<sup>133</sup> The widely divergent explanations of *Abood* itself in the majority and dissenting opinions of *Glickman* clearly illustrate the confusion concerning *Abood*'s meaning.<sup>134</sup>

At least one solution to the meaning of these cases is found in *Lehnert v. Ferris Faculty Ass'n*.<sup>135</sup> Decided in 1991, *Lehnert* is noteworthy because, after a lengthy review of the precedent in the area, it “sets forth several guidelines to be followed” when analyzing what kinds of activities dissenting union members can be forced to contribute financially.<sup>136</sup> The Court held that “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”<sup>137</sup>

Transferring the test to *Glickman*, the question would be whether the generic advertisements (1) are germane to the marketing orders; (2) are justified by the governments vital policy interest in stable agricultural markets and avoiding “free riders”; and (3) do not significantly add to the burdening of free speech that is inherent in the allowance of the marketing order. This test is appropriate because, as stated earlier, it balances the interests of both the government and the dissenters in the context of “the cause which justified bringing the group together.”<sup>138</sup>

While a full scale application of this test to the facts of *Glickman* is beyond the scope of this note, it would seem that the generic advertising portion of the marketing orders in question would have a good chance of surviving scrutiny. The generic advertising of the California peaches, plums and nectarines seems germane to the purpose of maintaining fair prices by

133. Joseph A. Ciucci, Note, *Defining the Permissible Uses of Objecting Members' Agency Dues: Is the Solution Any Clearer After Lehnert v. Ferris Faculty Ass'n?*, 70 U. DET. MERCY L. REV. 89, 108 (1992) (noting that “the Court has perpetuated uncertainty and confusion, and will in the future certainly be required to reassess these problems and issue an opinion that provides a practical, analytical standard”).

134. See *supra* notes 74-81, 87-98 and accompanying text.

135. 500 U.S. 507 (1991).

136. *Id.* at 519.

137. *Id.* Although the *Glickman* majority did not mention the *Lehnert* test, Justice Souter discussed it in his dissent. Souter said that a mandatory fee must be “justified by vital policy interests of the government.” *Glickman*, 117 S. Ct. at 2146 (Souter, J., dissenting) (emphasis added). This change would seem to make a great difference in the amount of scrutiny a chargeable activity would receive. Under Souter’s test, the activity itself would have to constitute a vital policy interest. A plain reading of the wording in *Lehnert* suggests that the vital policy interest is what warranted the government to form the group in the first place, and the chargeable activity must merely be justified in light of those interests. Indeed, it would be hard to describe as a “vital policy interest” the conventions upheld in *Lehnert*. *Lehnert*, 500 U.S. at 530.

138. See *supra* notes 130-32 and accompanying text.

keeping demand up among consumers. Reducing the free rider problem justifies the requirement that all handlers pay for generic advertising. Finally, given that the marketing orders create a highly regulated arena to begin with, forced payments for generic advertising add little to the First Amendment burden that handlers already bear.<sup>139</sup>

#### CONCLUSION

After the decision in *Glickman*, one commentator remarked that the decision was not “a vital development in First Amendment jurisprudence.”<sup>140</sup> If this is in fact the case, it is only because the Court decided the case on its most simplistic level. Not answering the more difficult questions was relatively easy in this case because it appeared the dissenting growers and handlers were trying to use the First Amendment to advance their own pecuniary interests. The luxury of a non-deserving challenger will not always be the case, though. Can any rule, by the fact that it is related to an economic regulation, be exempt from First Amendment scrutiny? Surely not, but *Glickman* seems to set the stage for just this argument. Justice Jackson warned of the perils of shirking the tough questions. “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim . . . .”<sup>141</sup> *Glickman* is a loaded weapon.

DAVE SMITH

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139. Of course, Souter would probably strike down the regulations given his reading of the *Lehnert* test and his analysis under *Central Hudson*. See *supra* notes 93, 100 and accompanying text.

140. Felix H. Kent, *Compelled Contributions to Commercial Speech*, N.Y. L.J., Aug. 15, 1997, at 3.

141. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).