No. 01-252

IN THE
Supreme Court of the United States

JERRY GOETZ,
d/b/a Jerry Goetz and Sons

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; Anne Veneman, Secretary of the U.S. Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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I. PETITIONER'S CLAIMS WERE PROPERLY PRESERVED IN THE COURTS BELOW.

The government's only relevant argument opposing a GVR is the pretense that petitioner "did not raise such a [First Amendment] claim in the district court or the court of appeals" and thus the issue is not properly before this Court. BIO 9. Unfortunately, that argument is based on a falsehood and on a misconception of the nature of a request for a GVR.

Starting with the falsehood, petitioner most certainly *did* raise his First Amendment challenge in the district court. As noted in the petition and confirmed in the appendix, petitioner expressly reiterated in the district court the same constitutional claims that were being reviewed in *Goetz I*. *See* Pet. 6, 10; App. J1-J2. The government below acknowledged those claims and raised the affirmative defense of *res judicata.* App. K1. By the time the district court issued its decision in *Goetz II*, review had been completed in *Goetz I* and certiorari had been denied, which the district court recognized. App. F5-F6. The claim that petitioner failed to raise his arguments in the district court, therefore, is simply a fabrication.

Turning to the government's legal misconceptions, while it is true that petitioner did not continue to press his claims in the Tenth Circuit in this action, that does not undermine his request for a GVR. During the period between the denial of certiorari in *Goetz I* and this Court's decision in *United Foods*, petitioner's claims were indeed *res judicata* and it would have been frivolous – and likely sanctionable – for petitioner to continue to raise them. But after this Court's decision in *United Foods*, *Goetz I* ceased to be good law, and petitioner is no longer bound by either the *res judicata* or precedential effect of that earlier decision. *See, e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948) ("a change or development in the controlling legal principles may make that [prior] determination obsolete or erroneous"); *Spradling* v. *City of*

Tulsa, 198 F.3d 1219, 1223 (CA10 2000) ("[An intervening Supreme Court decision] constitutes an intervening change in the law sufficient to render collateral estoppel and *res judicata* inapplicable.").[1]

Petitioner's failure to reiterate his constitutional arguments in the Tenth Circuit in *Goetz II*, and his renewal of those arguments after *United Foods*, was precisely the correct course for a responsible party to take. Indeed, this Court has expressly held that a change in law between the proceedings below and the petition entitles a petitioner to raise an issue for the first time even on plenary review. *Standard Industries, Inc.* v. *Tigrett Industries, Inc.*, 397 U.S. 586, 587 (1970) (where party did not raise an issue below because it was precluded by controlling law that was subsequently changed, there is no waiver and "we have frequently allowed parties to

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[1] The government's claim, BIO 10-11, that petitioner would continue to be barred by *res judicata* simply ignores the case law from both the Tenth Circuit and this Court. *See also, e.g.*, *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 550 (CA6 2001) (no preclusion from predecessor litigation where there has been "a substantial change in the legal climate") (citation and quotation marks omitted). The cases the government cites are inapposite because they deal with attempts to re-open matters that were completely final, unlike here where the enforcement action against petitioner is here on direct review and hence still *non*-final and subject to reconsideration, as the government's own case recognizes. *Miller* v. *French*, 530 U.S. 327, 344 (2000) ("The decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired), and 'it is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws."'") (citation omitted). Finally, the notion that because this case relates to *past* transactions petitioner somehow may not take advantage of current law, BIO 11, is simply absurd. While the cattle transactions are in the past, the assessments, fines, and penalties in this case are still executory. The law to be applied to his defense is the law as it stands now, not the law as of the time of the transactions. The government's attempt to imply otherwise is inexplicable.

raise issues for the first time on appeal when there has been a significant change in the law since the trial"); *see also Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n. 7 (1984) ("We may consider petitioners' First Amendment argument, although not raised before the Board, because the intervening, substantial change in controlling law occasioned by *Bill Johnson's Restaurants* qualifies as an 'extraordinary circumstanc[e].'").

In this case, petitioner merely seeks the opportunity to pursue his previously barred, but now revived, arguments before the Tenth Circuit. He is not seeking plenary review, only a GVR. Petitioner raised his constitutional claims at every opportunity reasonably available to him – including before the ALJ, the Judicial Officer, and the District Court in this case – and it is simply unreasonable to say that he is not entitled to review under newly available law simply because he failed to reiterate the then-barred argument before the Tenth Circuit. Having litigated the constitutional issues when seeking to enjoin these very proceedings in *Goetz I*, petitioner is allowed to raise the same issues on petition from the ensuing proceedings regardless of whether he re-litigates those issues before the same court that rejected his arguments in the first place. *Cf. Gant* v. *Oklahoma City*, 289 U.S. 98, 100 (1933) (finding jurisdiction for appeal from state-court decision that did not itself address federal question where federal question was fully litigated, appealed, and rejected on initial injunction motion and case was remanded thereafter for consideration of state questions).

The cases on waiver cited by the government, BIO 9, simply do not apply to the situation in this case. While it is correct that this Court will not ordinarily reach the *merits* of an issue not raised below, this Court is not being asked to reach the merits. The general rule – designed to preserve this Court's resources and to ensure that issues receive adequate consideration before this Court addresses them – simply makes no sense in the context of a GVR. The Court's resources are not at stake here given that it will only be

remanding the case to the Tenth Circuit. And the interest in having issues receive proper consideration is actually furthered by a GVR, which would give the Tenth Circuit the opportunity to correct its own errors in light of precedent not available to it before. Furthermore, in the particulars of this case, the constitutional issues *did* receive full and thorough consideration by multiple courts: The district court and the Tenth Circuit in *Goetz I*, which addressed the very proceeding under review here; the Judicial Officer in this case, which gave lengthy consideration to the constitutional issues; and the district court in *Goetz II*, which seems to have disposed of the issues on the government's now-moribund *res judicata* defense. Having fully considered the factual and legal issues raised by petitioner's constitutional claims, there is no conceivable reason that the Tenth Circuit should not be required to reconsider its views now that they have been so thoroughly repudiated in *United Foods*.

Finally, even assuming *arguendo* the basic applicability of the presentation-on-appeal requirement to a petition seeking only a GVR, this case plainly fits within the exceptions to that general rule. *Wood* v. *Georgia*, 450 U.S. 261, 265 n. 5 (1981) (even where issue not raised in the court of appeals, case was remanded for consideration of that issue "in the interests of justice," *citing* 28 U.S.C. § 2106); *Connor* v. *Finch*, 431 U.S. 407, 421 n. 19 (1977) ("Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'") (citation omitted).

II. THIS CASE SHOULD BE REEVALUATED BY THE TENTH CIRCUIT IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED FOODS*.

The government makes no attempt to deny that the result below and in *Goetz I* hinges entirely on arguments now repudiated in *United Foods*. Instead the government claims that

petitioner is not entitled to any reconsideration in light of *United Foods* because he was merely a collecting person as to the assessments of others, and did not sell cattle or fail to pay assessments of his own. BIO 8-9. Once again the government's argument consists of nothing but fabrication regarding the facts and misconception regarding the law.

Starting with the fabrication, it is simply not true that petitioner sold no cattle. Had the government merely read the opinions below, it would have seen that petitioner is being assessed and fined for cattle he *sold as a producer* in addition to the assessments and fines on him as a collecting person.[2]

Turning to the government's legal misperceptions, even as to the assessments and fees against petitioner in his capacity as a collecting person, he plainly has standing to raise his constitutional claims. First, both the buyer and seller in a cattle transaction (the collecting person and the producer) are jointly liable for beef checkoff assessments and thus have equivalent grounds for objecting to such assessments. *See, e.g.*, App. A13 ("both the buyer and seller in private treaty sales are responsible for the unpaid checkoffs"). The very fact that petitioner is the one who will have to pay the government if he loses this case plainly establishes his financial injury and his standing to sue over unconstitutional exaction of those funds from him. The fact that the law nominally places the expense on the producer is no support for the government given that in bilateral transactions such as cattle sales, the ultimate economic burden of the checkoff will vary

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[2] *See, e.g.*, App. A3-A4 (third issue raised is whether the district court erred "in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on cattle which Goetz sold at sales barns"); *id*. A8-A9 (rejecting exemption from "producer status" for cattle sold at sales barns); *id*. C4 ("Plaintiff is a 'producer' * * * subject to the one dollar per head assessment upon the sale of cattle."); *id*. at D2 (describing government complaint that Goetz failed "to remit the assessments due for the purchase *and sale* of cattle") (emphasis added); *id*. D57 (discussing sales made by Goetz); *id*. F8, F13-14 (same).

over time and circumstance, resting upon the buyer, the seller, or both, depending upon market circumstances and momentary bargaining position. *Cf*. App. C15 (noting Goetz's argument that the Beef Act "burdens producers, importers and persons who must collect the tax (buyers of beef)"). But under all circumstances, the checkoff is an added transaction cost to the cattle sale and both parties to the transaction have standing to claim injury from that added cost, even if the constitutional right asserted is nominally derivative from a third party. *See, e.g.*, *Barrows* v. *Jackson*, 346 U.S. 249, 257-59 (1953) (white sellers had standing to raise Fourteenth Amendment rights of prospective black buyers in restrictive covenant case); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446 (1972) (contraceptives distributor had standing to raise constitutional rights of prospective unmarried buyers).

Second, even as to the collecting-person elements of the decisions below, the government's new argument was neither raised nor relied upon in any of the courts or agency venues. Because it was not the basis of the government's victory below, it would be particularly inappropriate for this Court to decide the issue in the first instance. Rather, if the government believes that the portion of assessments and fines levied against petitioner as a collecting person are not subject to constitutional defense, it can present that new claim to the Tenth Circuit on remand and that court can then decide whether the argument is permissible or meritorious. This Court, however, is not being asked to reach the merits of this case. The only question is whether the new decision in *United Foods* might have changed the result below. There is no question that *United Foods* guts the Tenth Circuit's basis for rejecting Goetz's constitutional claims. Whether other defenses might lead to the same result remains to be decided.

Third, aside from the direct monetary exaction the government seeks from petitioner, he also has constitutional injury and standing even as a collecting person due to the non-monetary compelled support for speech arising from the

Beef Act. The Act's designation of petitioner as a collecting person for some of his transactions imposes on petitioner the significant administrative and labor burden of collection, remittance, and record keeping, as a number of the enforcement counts in this case amply demonstrate. For First Amendment purposes, compelled support for speech is unconstitutional regardless of whether that support comes in the form of forced financial contributions or forced labor. *Cf*. *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977) (First Amendment violated where individuals forced to carry State motto on automobile license plate, even though presence of motto was costless). Indeed, it may well be *more* offensive to the First Amendment to compel a person to labor in support of speech with which he disagrees, and hence the result in *United Foods* would *ipso facto* drive the result in the compelled labor circumstance. But in any event, compelled labor and payments are at least equivalent for present purposes given that they are economically fungible.[3]

Overall, the attempt to cast doubt on Goetz's standing to raise constitutional claims that have already been litigated on the merits is frivolous. The government readily litigated the issue against Goetz and then relied on the results of that litigation to claim a split with the Sixth Circuit in *United Foods*. With the government's position on the merits now gutted, it should not be heard to say that Goetz cannot revisit the issue because he supposedly suffers no constitutional burden.

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[3] Surely the government could not evade *United Foods* by requiring that producers donate several hours a week of their time to the checkoff program (perhaps sweeping the floors or doing the filing) in order to make up for the money the program would have received in unconstitutional assessments. Yet that is precisely what the government suggests when it claims that the compelled labor of a collecting person – substituting for tasks that would otherwise have to be performed by the checkoff program itself – does not give rise to a claim under *United Foods.*

III. THE BEEF ACT IS MATERIALLY INDISTINGUISHABLE FROM THE MUSHROOM ACT AND CANNOT SURVIVE A FIRST AMENDMENT CHALLENGE UNDER THE STANDARDS ARTICULATED IN *UNITED FOODS*.

The government's final tactic is to argue the substance of its constitutional position and the supposed limits of *United Foods*. Aside from such arguments being better left to the court of appeals they are also meritless and misleading.

For example, the government notes that *United Foods* addressed only the Mushroom Act, and not the checkoffs for other commodities. BIO 7. While true, that is why petitioner is simply asking for a GVR, rather than a summary reversal. What the government does not – and cannot – deny is that the *United Foods* decision is relevant to the consideration of other checkoff programs, and that it completely rejected the underlying *reasoning* of the decision in *Goetz I*. The final application of *United Foods* as a precedent in the context of the Beef Act is precisely the point of a GVR to the Tenth Circuit. *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (GVR indicates that an intervening case is "sufficiently analogous and, perhaps, decisive to compel re-examination" of pending case). The government will be hard-pressed before the Tenth Circuit to repudiate its repeated representation before this Court that the Mushroom Act and the Beef Act are materially indistinguishable for First Amendment purposes.[4]

Next the government argues that *United Foods* did not decide whether the Mushroom Act (and, by extension, the Beef Act) would survive under a commercial speech analysis. BIO 7. While literally true, that argument is misleading given that this Court did not address commercial speech standards

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[4] The government's passing commentary that other commodities "may be regulated differently in other respects" simply ignores the fact that the only pertinent regulation of beef, the Packers and Stockyards Act, is designed to *enhance* competition and thus makes this an even *stronger* case for striking down the assessments than was *United Foods*.

because it had previously held, and the government in *United Foods* had recognized, that such standards did not apply to checkoff challenges. *See* Reply Br. for the Petitioners, *United Foods*, No. 00-276 (Apr. 9, 2001) at 9-10 n. 7 (Supreme Court has "made clear in *Wileman* that 'the *Central Hudson* test, which involved a restriction on commercial speech, should [not] govern a case involving the compelled funding of speech'"; concluding that the inapplicability of *Central Hudson* has now "been resolved") (*quoting Glickman* v. *Wileman Brothers & Elliot, Inc.*, 521 U.S. 457, 474 n. 18 (1997)) (brackets in brief). Furthermore, this Court in *United Foods* assumed that the speech in question was commercial speech and found that irrelevant, holding that "even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *United States* v. *United Foods, Inc.*, -- U.S. --, --, 121 S. Ct. 2334, 2337 (2001). The notion that a defense of the Beef Act under commercial-speech standards remains viable is thus frivolous.

The government also suggests that it could defend the program as government speech, which was explicitly left unresolved in *United Foods*. BIO 7. Aside from that argument best being left to the Tenth Circuit in the first instance, the government neglects to mention that the only court of appeals to reach the government speech argument has expressly rejected it as applied to the Beef Act. *See United States* v. *Frame*, 885 F.2d 1119, 1132 (CA3 1989), *cert. denied*, 493 U.S. 1094 (1990). Indeed, in *United Foods*, the government seemingly endorsed the view in *Frame* that the Beef Act "'was structured as a "self-help" measure that would enable the beef industry to employ its own resources and devise its own strategies'" Brief for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Jan. 24, 2001), at 24 (*quoting Frame*, 885 F.2d at 1122). That view of the Beef Act as a "self-help" measure is flatly inconsistent with the government's revisionist position on government speech.

Finally, the government suggests that it could defend the Beef Act under strict scrutiny. BIO 7-8. Wishful thinking aside, that argument somewhat begs the question of the nature of scrutiny applied in *United Foods*. If it was strict scrutiny, then the government's answer is simply wrong. If it was less than strict scrutiny – which petitioner believes it was – then having failed the more lenient standard in *United Foods* the government would *ipso facto* fail any stricter standard.

Overall, however much the government tries to raise doubts on the merits, it singularly fails to rebut the central issue for a GVR – whether the intervening case from this Court might change the outcome of the case pending on petition. In this case, there is simply no doubt as to the relevance of *United Foods* to petitioner's claims.

IV. VACATUR AND REMAND SERVE THE EQUITIES OF THE CASE AND FURTHER THE ORDERLY AND EFFICIENT ADMINISTRATION OF JUSTICE.

It would be a great injustice if petitioner were forced to pay the government an unconstitutional assessment after his position finally has been vindicated by this Court. It would be especially disturbing given that it was petitioner's very own case seeking to halt this collection action that the government relied upon as the split that brought *United Foods* to this Court in the first place. This case, while in the eleventh hour, is not yet final, is fully amenable to a GVR, and petitioner should be allowed to argue based upon *United Foods* the newly vindicated position that he has maintained all along. The alternative is to allow the government to go forward and collect unconstitutional assessments based on a decision the reasoning of which this Court has rejected in almost every conceivable detail. The interests of justice, the credibility of the judicial system, the avoidance of new litigation to seek a refund, and the equities surrounding petitioner's late-vindicated struggle strongly favor a GVR.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and vacate and remand to the Tenth Circuit for reconsideration in light of *United Foods*.

Respectfully submitted,

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