

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANN M. VENEMAN, SECRETARY OF :

4 AGRICULTURE, ET AL., :

5 Petitioners, :

6 v. : No. 03-1164

7 LIVESTOCK MARKETING ASSOCIATION, :

8 ET AL., :

9 Respondents; :

10 :

11 AND :

12 :

13 NEBRASKA CATTLEMEN, INC., ET AL., :

14 Petitioners, :

15 v. : No. 03-1165

16 LIVESTOCK MARKETING ASSOCIATION :

17 ET AL., :

18 Respondents. :

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20 Washington, D.C.

21 Wednesday, December 8, 2004

22 The above-entitled matter came on for oral  
23 argument before the Supreme Court of the United States at  
24 10:06 a.m.

25

1 APPEARANCES:

2 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
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4 on behalf of the Petitioners, Ann M. Veneman, et al.,  
5 in 03-1164.

6 GREGORY G. GARRE, ESQ., Bethesda, Maryland; on behalf  
7 of the Petitioners, Livestock Marketing, et al.,  
8 in 03-1165.

9 LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on  
10 behalf of the Respondents, Livestock Marketing  
11 Association, et al.

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1 P R O C E E D I N G S

2 [10:06 a.m.]

3 JUSTICE STEVENS: We will now hear argument in  
4 Veneman against the Livestock Marketing Association.

5 Mr. Kneedler.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER

7 ON BEHALF OF PETITIONERS IN 03-1164

8 MR. KNEEDLER: Justice Stevens, and may it  
9 please the Court:

10 Congress enacted the Beef Promotion and Research  
11 Act in 1985 in the midst of a serious depression in the  
12 beef industry. The beef industry found itself unable to  
13 respond to that situation through the promotion of its  
14 products. Congress responded to that situation by  
15 establishing a government program of promotion, research,  
16 and consumer information. In the Beef Act, Congress  
17 prescribed the central message for advertising under the  
18 Act, Congress established a government body, the Beef  
19 Board, to administer and implement the program, and it  
20 placed the program under the control of a Cabinet officer,  
21 the Secretary of Agriculture.

22 JUSTICE O'CONNOR: Mr. Kneedler, will you tell  
23 us how this case differs, if it does, from what was before  
24 the Court in United Foods? What meaningful distinctions  
25 do you find?

1           MR. KNEEDLER: Well, the important distinction  
2 is that the two grounds that -- on which we are defending  
3 the statute here were not addressed in United Foods. In  
4 particular, the government speech argument, that what I've  
5 just said goes to, that the Court specifically did not  
6 address because it had not --

7           JUSTICE O'CONNOR: We've never addressed that in  
8 --

9           MR. KNEEDLER: In none of these cases, and --

10          JUSTICE O'CONNOR: -- in these cases --

11          MR. KNEEDLER: Right.

12          JUSTICE O'CONNOR: -- have we?

13          MR. KNEEDLER: The Court has not. And we think  
14 that that is -- the critical point about this -- about  
15 this case and these programs, these are government --  
16 these are programs of government speech. As I said,  
17 Congress, itself, prescribed the central message.  
18 Congress established the government board, all of whose  
19 members are appointed by the Secretary, to administer it.

20          JUSTICE SCALIA: Does it remain government  
21 speech even if you don't say, "This is your government  
22 speaking"?

23          MR. KNEEDLER: It --

24          JUSTICE SCALIA: If you say, you know,  
25 "America's cattlemen are speaking," is it government

1 speech?

2 MR. KNEEDLER: It does -- for purposes of this  
3 Court's government speech doctrine, it does. And I think  
4 --

5 JUSTICE SCALIA: Why is that? I mean --

6 MR. KNEEDLER: And the Court -- the Court's  
7 decision in *Rust*, I think, is the best illustration of  
8 that.

9 JUSTICE SOUTER: Yes, but *Rust* did not -- *Rust*  
10 was not a case in which the doctor was saying, "This is my  
11 personal opinion, not the government's." And here, as  
12 Justice Scalia pointed out, there is an affirmative effort  
13 to say, "This is -- this is paid for by" whatever it's  
14 called, the cattlemen's group or the beef group, which  
15 affirmatively indicates that it's not government speech.

16 MR. KNEEDLER: Well, it -- all those statements  
17 say -- and there are advertisements in the record that say  
18 that the advertising is funded by America's beef  
19 producers, which is, of course, accurate, because they --

20 JUSTICE SOUTER: Well, it's accurate --

21 MR. KNEEDLER: -- they pay for it.

22 JUSTICE SOUTER: -- but it also contains the  
23 implication that who -- he who pays is the person whose  
24 speech is being broadcasted.

25 MR. KNEEDLER: Well, but, again, in *Rust*, the

1 doctor who spoke -- I think the patient who went to see  
2 the doctor for counseling would have -- would have assumed  
3 or believed that the doctor was -- in the immediate  
4 encounter, that the doctor was speaking, and yet the  
5 Court, in its subsequent cases, has regarded Rust as a  
6 situation of government speech.

7 But the important point about what you've just  
8 asked is that any concerns about the tag line in the  
9 advertising does not go to the constitutionality of the  
10 statute or the beef order. Neither the Act nor the order  
11 requires that in the advertising. And if the Court was to  
12 perceive that as a problem, the right remedy would not be  
13 to invalidate the Act, but to, instead, provide that there  
14 should be some different identification --

15 JUSTICE SCALIA: Yes, but some people --

16 MR. KNEEDLER: -- on the advertising, itself.

17 JUSTICE SCALIA: -- may be more resistant to an  
18 -- to an ad that says, "Your government wants to eat --  
19 wants you to eat more meat," than they are to an ad which  
20 say, "The meat producers would like you to eat more meat."

21 MR. KNEEDLER: Well, I -- and I think in Rust,  
22 some people would have been resistant to the idea that  
23 your government wants you to engage in family planning,  
24 but what the -- what the Court said about Rust was that  
25 the government had established a program with a central

1 message about counseling. That was then carried out by  
2 private individuals. Here, this case is much stronger  
3 than Rust.

4 JUSTICE KENNEDY: Well, but if you -- if you say  
5 the Act can be -- say, because this is just an as-applied  
6 challenge, you're asking us to assume that we can put on a  
7 label that's not true, "This message is brought to you by  
8 your friendly Department of Agriculture." That isn't  
9 accurate.

10 MR. KNEEDLER: Well, it would be accurate --

11 JUSTICE KENNEDY: And you're having us save the  
12 statute by just putting a label on it that isn't accurate.

13 MR. KNEEDLER: Well, they're -- I'm sure that a  
14 label could be devised that would -- that would be  
15 accurate. The -- first of all, they are approved --  
16 specifically approved by the Department of Agriculture.  
17 The -- certainly, the Act and regulations provide that the  
18 Secretary must approve every contract, every project for  
19 advertising. And, beyond that, the USDA approves all  
20 advertising, all copy --

21 JUSTICE GINSBURG: But, Mr. Kneedler --

22 MR. KNEEDLER: -- that is actually to be used,  
23 so there is specific approval by the Secretary.

24 JUSTICE GINSBURG: But there is -- there's  
25 another tape put out by the government, on meat, and that

1 -- what is the government speech? Usually, the government  
2 has a position, and is presenting it. Here, we have  
3 America beef producers has a label on -- "Eat meat." But  
4 if you went to the Surgeon General, probably that message  
5 would be "Eat meat moderately." So what is the government  
6 speech? I don't know another case involving a claim of  
7 government speech where the message that you are saying is  
8 the government's is not the message that the government is  
9 putting out when it's dealing with its concern for public  
10 health.

11 MR. KNEEDLER: Well, the government, in the  
12 concern -- in situations where it may be concerned about  
13 public health, doesn't say, "Don't eat meat." It -- there  
14 may be nutritional standards. And USDA does have  
15 nutritional standards that it advises people to adhere to.  
16 But what the government is doing here is facilitating a  
17 situation, facilitating promotion of a commodity.

18 There is a structural defect in a market like --  
19 a market for a fungible commodity, and I think it's  
20 important to understand what Congress was responding to  
21 here. When you have a fungible commodity, when you have a  
22 lot of small producers, no one of those producers has an  
23 incentive to advertise --

24 JUSTICE STEVENS: Mr. Kneedler, is meat  
25 fungible? Or -- I think there are some steak houses that

1 might disagree with that.

2 MR. KNEEDLER: Well, there are -- there are --  
3 there are, to be sure, different cuts of meat, but the --  
4 but the basic --

5 JUSTICE STEVENS: I mean, even quality of meat  
6 within the -- some is tougher than others.

7 MR. KNEEDLER: Well --

8 JUSTICE STEVENS: It's not like milk or wheat.

9 MR. KNEEDLER: But Congress could reasonably  
10 determine, under this statute, that there are -- that  
11 there are -- that beef has many things in common, that it  
12 is a generic problem -- or generic food or generic  
13 commodity, and the industry --

14 JUSTICE O'CONNOR: At some level, it certainly  
15 is, I suppose. But, just as in wheat or corn, there are  
16 different brands and different qualities. But I suppose  
17 it's still fungible, in a broad sense.

18 MR. KNEEDLER: It is fungible in --

19 JUSTICE O'CONNOR: May I ask you whether, in  
20 deciding the government's speech doctrine, is it the  
21 Secretary's formal right to control, as set out in the  
22 statute, that we look to, or do we look to the Secretary's  
23 actual record of oversight and participation?

24 MR. KNEEDLER: We think the -- we think the  
25 formal legal control is sufficient. And it -- the

1 Secretary has the responsibility to approve -- under the  
2 statute -- to approve budgets, to approve contracts, and  
3 to approve projects. And USDA does, in fact, go beyond  
4 that and determine whether particular advertisements will  
5 be -- will be issued. But we think it's only necessary to  
6 look what the statute requires. But the testimony in this  
7 case shows that, in any event, USDA is extensively  
8 involved in the development of the advertising under this  
9 statute, by extensive consultations with the Operating  
10 Committee and the Beef Board in the development of the  
11 project. So there -- this is an integrated effort within  
12 the Department of Agriculture.

13 JUSTICE BREYER: Is it at all possible to do  
14 here what has been done in the union cases, where -- I  
15 mean, it's pretty hard for me to believe that there aren't  
16 -- that meat -- that cattle growers don't, by and large,  
17 like beef. I mean, maybe they have a ideological  
18 objection to people eating beef, but I doubt it. They  
19 probably object to some content. So can you segregate  
20 that? I mean, in the union cases, the bar cases, they try  
21 to segregate where there really is an ideological  
22 objection from the cases where really all that the  
23 objector wants is not to pay the money. And so they work  
24 out a system. You know, you pay so much for your dues  
25 anyway, you just don't pay that pro rata amount, where you

1 really have an ideological objection.

2 MR. KNEEDLER: Well, I think that --

3 JUSTICE BREYER: Is it possible to work that  
4 out?

5 MR. KNEEDLER: What has -- what has been  
6 proposed by the -- by the Respondents in this case, of  
7 course, is to make it voluntary, so that people --

8 JUSTICE BREYER: Yes, but, I mean, if you make  
9 it --

10 MR. KNEEDLER: -- can opt out.

11 JUSTICE BREYER: -- totally voluntary, what  
12 you're going to discover is, all of a sudden, the beef  
13 people, rather than write a check, will say, "Oh, you  
14 know, I make -- I raise cattle, but I don't think people  
15 should eat beef."

16 MR. KNEEDLER: Well --

17 JUSTICE BREYER: That saves them the money.

18 MR. KNEEDLER: Well, and I --

19 JUSTICE BREYER: And I tend to doubt that that's  
20 their view.

21 MR. KNEEDLER: Well, and --

22 JUSTICE BREYER: Some may view -- object to  
23 certain content. So I'm asking if it's feasible to work  
24 out --

25 MR. KNEEDLER: I think it -- I think it would

1 not be feasible. It would -- it would enmesh the  
2 Department in difficult judgments and time-consuming --

3 JUSTICE KENNEDY: It would be -- in the union  
4 cases, it's hard enough. It's a -- the good-of-the-order  
5 exception is the way it works in the union. And in the  
6 bar thing, I think it would be hard to --

7 MR. KNEEDLER: Absolutely. And the Court made a  
8 similar point in Southworth, where it specifically  
9 declined to impose, on the university, a requirement to  
10 make judgments that would enable people to opt out in  
11 particular cases. And we think that the problem here  
12 would be even greater. But they would be particularly  
13 great under Respondents' proposal that individuals who  
14 don't want to pay, without even having to express an  
15 objection, because the whole system would collapse. This  
16 is a classic collective-action, free-rider problem.

17 JUSTICE SCALIA: Mr. Kneedler --

18 MR. KNEEDLER: What the numbers --

19 JUSTICE SCALIA: -- can I come back to Rust  
20 versus Sullivan? You say that that was a government  
21 speech case? I had not recollected it as a government  
22 speech case.

23 MR. KNEEDLER: This Court --

24 JUSTICE SCALIA: This is government subsidizing  
25 speech by private organizations, and it chose to subsidize

1 one type of speech, but not another.

2 MR. KNEEDLER: Yes --

3 JUSTICE SCALIA: Did we say, in the opinion,  
4 that this was --

5 MR. KNEEDLER: Not in Rust, but in the Court's  
6 subsequent cases, Rosenberger, Southworth -- in  
7 particular, in Velazquez -- this Court said that Rust has  
8 come to be understood by the Court as a government speech  
9 case, because the government prescribed the message, and  
10 it's government speech whether or not the government  
11 speaks for itself or enlists others to transmit the  
12 message.

13 JUSTICE SCALIA: Well, for the precise purpose  
14 at issue here, I think it makes a lot of difference. You  
15 can fund private people for some things, and not fund them  
16 for others, and it doesn't make whatever they say  
17 government speech. I think that's a --

18 MR. KNEEDLER: But --

19 JUSTICE SCALIA: -- I think that's a really --

20 MR. KNEEDLER: -- but there's really no --

21 JUSTICE SCALIA: -- strong proposition, that  
22 whenever you're subsidizing any private enterprise, the  
23 speech of that private enterprise becomes public speech.

24 MR. KNEEDLER: There's really no need to get to  
25 that point here, because the Beef Board, which is the

1 entity that does the speaking, is, I think, unquestionably  
2 a government body. It's established by special statute  
3 under the Lebron test. All of its members are appointed  
4 by the --

5 JUSTICE SCALIA: That's fine. But what you were  
6 using Rust for was to establish the proposition that in  
7 order to be government speech, it -- you don't have to --  
8 you don't have to say, "This is the government speaking."

9 MR. KNEEDLER: Well, I think --

10 JUSTICE SCALIA: And Rust doesn't stand for  
11 that.

12 MR. KNEEDLER: -- Right -- I think, as this Court  
13 has come to explain Rust, as being a species of government  
14 speech -- but, as I say, there is no need -- there is no  
15 need for the Court to get to that situation. And the fact  
16 that the government is the one in control of the speech  
17 here critically distinguished -- distinguishes this case  
18 from cases like Keller and Abood.

19 JUSTICE KENNEDY: This is a question perhaps  
20 more for the Respondent than for you, but I would like  
21 your comment on it. Suppose the statute were changed and  
22 there was a dollar-a-head assessment on beef, and it just  
23 went into the general funds of the United States Treasury,  
24 and then they used part of that money -- they had more  
25 money for beef advertising, and the government did the

1 advertising. What would the Respondents say about that?

2 MR. KNEEDLER: I think -- I think they would say  
3 that that -- that there's something different about  
4 general taxes and excise taxes or focus taxes. But I  
5 don't think there's any basis in this --

6 JUSTICE KENNEDY: But why can't --

7 MR. KNEEDLER: -- in history or --

8 JUSTICE KENNEDY: -- why can't you just do that?  
9 Or is your answer to me, "Well, then, it's just formalism,  
10 and you might as well rule for me now?"

11 MR. KNEEDLER: I'm sorry, do -- maybe I  
12 misunderstood your question.

13 JUSTICE KENNEDY: Why can't the government --

14 MR. KNEEDLER: Were you asking why focus --

15 JUSTICE KENNEDY: -- why can't the government  
16 adopt my solution?

17 MR. KNEEDLER: Well, I -- and maybe I  
18 misunderstood. Was it -- was it paying for it out of  
19 general taxes or taking this money and putting into the  
20 focus --

21 JUSTICE KENNEDY: It's put into the general fund  
22 of the -- of the Treasury.

23 MR. KNEEDLER: I -- they may say that that's the  
24 same thing, but I -- they were drawing a distinction  
25 between paying for it out of general funds -- income tax

1 or something -- that we all would pay for. They say  
2 that's the solution, rather than having the industry, that  
3 benefits from the advertising, pay for it. Not only does  
4 the industry benefit --

5 JUSTICE KENNEDY: But then you'd come within the  
6 protections of Frothingham versus Mellon, and  
7 Massachusetts versus Mellon, if you did it that way.

8 MR. KNEEDLER: Yes, there would be standing  
9 objection -- objections at that point, but we think, in  
10 terms of the merits of the argument, the notion that a  
11 person would have a First Amendment objection to paying an  
12 excise tax because of the uses to which the excise taxes  
13 are being put is really extraordinary and finds no basis  
14 in cases like Abood and Keller, which have to do with  
15 private association -- an association with private speech  
16 --

17 JUSTICE KENNEDY: But then you could --

18 MR. KNEEDLER: -- no government speech.

19 JUSTICE KENNEDY: -- simply restructure this  
20 Act to get to the result you want.

21 MR. KNEEDLER: Yes. If that -- but the funds  
22 that are raised are public monies. They don't go in --  
23 they're not deposited in the Treasury. But in the Joint  
24 Appendix, there is a reproduced -- an AMS, Agricultural  
25 Marketing Service, circular that explains how these public

1 monies -- and calls them "public monies" -- are to be  
2 disposed of. And it describes the Beef Board, this  
3 governmental body that receives the money, as being the  
4 custodian for the Agricultural Marketing Service and  
5 handling these monies. And Congress and the Secretary  
6 have imposed strict limitations on how those funds can be  
7 deposited. So whether they go into the general Treasury  
8 or whether they're handled in this way is really a matter  
9 of fiscal and revenue and internal governmental policy  
10 that I don't think that --

11 JUSTICE GINSBURG: Mr. Kneedler, this theory is  
12 one that wasn't brought up at all in Wileman, if I  
13 remember correctly. And in United Foods, it was brought  
14 up too late, so the government -- so the Court didn't  
15 entertain it. The argument that you're making today, I  
16 take it, would necessarily displace United Foods as  
17 having any kind of a continuing --

18 MR. KNEEDLER: Yes, because the government did  
19 not reach the government speech -- or the Court did not  
20 reach the government speech argument in United Foods.  
21 And, in fact, United Foods is back, on remand. That was a  
22 reversal of summary judgment for the government. It's  
23 back, on remand, and is being stayed, pending the outcome  
24 of this case on government speech. So there would not be  
25 an inconsistent result in --

1 JUSTICE SCALIA: You wouldn't want to treat beef  
2 and mushrooms inconsistently.

3 [Laughter.]

4 MR. KNEEDLER: Well --

5 JUSTICE GINSBURG: But there is --

6 MR. KNEEDLER: -- I think --

7 JUSTICE GINSBURG: -- the public perception of  
8 these ads -- it says, "Eat meat" -- it's quite different  
9 from saying, "Your government wants you to buy meat." And  
10 the United States isn't saying that. So --

11 MR. KNEEDLER: But what the -- what the United  
12 States is doing is responding to this classic collective-  
13 action problem by establishing a government program to  
14 meet the situation where the industry, itself, will -- is  
15 unable to conduct the advertising because of -- because  
16 of, what I said, the fungibility of the product --

17 JUSTICE GINSBURG: But then --

18 MR. KNEEDLER: -- and all.

19 JUSTICE GINSBURG: -- isn't it more realistic to  
20 describe this as the government facilitating the private  
21 speech of the many people in this industry who don't have  
22 a big budget to advertise on --

23 MR. KNEEDLER: I think --

24 JUSTICE GINSBURG: -- on their own?

25 MR. KNEEDLER: -- doctrinally, it is government

1 speech. It has the -- it has the benefit of enabling the  
2 promotion that would have happened in the industry, but  
3 for the collective-action problem to occur. But it is  
4 government speech under this Court's decision.

5 If I may --

6 JUSTICE STEVENS: Do you want to save your time?

7 MR. KNEEDLER: Please.

8 JUSTICE STEVENS: Mr. Garre.

9 ORAL ARGUMENT OF GREGORY G. GARRE

10 ON BEHALF OF PETITIONERS IN 03-1165

11 MR. GARRE: Thank you, Justice Stevens, and may  
12 it please the Court:

13 The First Amendment does not prevent the  
14 government from speaking out in order to revive and expand  
15 the market for the nation's most important agricultural  
16 product.

17 JUSTICE KENNEDY: If we can just continue on  
18 government speech, because that's where --

19 MR. GARRE: Yes.

20 JUSTICE KENNEDY: -- where we left off. It  
21 seems to me there is something offensive about making a  
22 particular portion of the public pay for something that  
23 the government says.

24 MR. GARRE: Justice Kennedy --

25 JUSTICE KENNEDY: It ought to be out of the

1 general fund.

2 MR. GARRE: Justice Kennedy, the assessments in  
3 this case are imposed on a class of people who sell  
4 particular commodity -- cattle. In that respect, they're  
5 no different than the types of assessments the Federal  
6 Government has been imposing for centuries on the same of  
7 commodities, from the first tax the Federal Government  
8 imposed on whiskey to the excise taxes on gasoline  
9 producers today. And Respondents concede you could do  
10 this out of general tax revenues. They concede that you  
11 could have a government speech program funded by excises  
12 on certain commodities, like cigarettes or alcohol. There  
13 is no basis under the First Amendment to carve out a  
14 different rule in the case of beef.

15 JUSTICE KENNEDY: What I'm saying, it seems to  
16 me that the government speech doesn't seem to me to  
17 advance your argument very much, because it has problems  
18 of its own.

19 MR. GARRE: Well, we agree with the government  
20 speech doctrine, although we also think that the Court can  
21 uphold the statute under the intermediate-scrutiny  
22 analysis. It makes perfect sense for the government to be  
23 speaking out in order to correct the market problem that  
24 Congress identified in the midst of a two-decades-long  
25 depression in the beef industry.

1           Take the BSE incident last year. BSE imposes a  
2 potentially catastrophic and overnight impact on the beef  
3 industry. In response to that threat, because of the beef  
4 checkoff program, the government was able to respond  
5 immediately with the funds necessary to respond on a  
6 national scale, not only through promotion -- and this is  
7 an important part in which this case is different from  
8 United Food -- only about half of every checkoff dollar  
9 goes to promoting beef through commercial advertising,  
10 like the "Beef, it's what's for dinner" campaign. The  
11 rest of that dollar goes to things like producing  
12 information to consumers about the safety of U.S. meat,  
13 the -- addressing the health concerns imposed by BSE and  
14 other potential diseases, like E. coli; going to open up  
15 foreign markets so that we can export beef -- beef exports  
16 have risen dramatically under this program -- and going  
17 for things like research in order to identify an early-  
18 detection system for BSE. In United Foods, this Court  
19 emphasized, at least three times throughout its opinion,  
20 that the only aspect of the program that was -- the dollar  
21 was being collected for was commercial advertising. And,  
22 Justice Stevens, I think you emphasized that in your  
23 concurrence, as well. And this program is much more  
24 holistic --

25           JUSTICE SCALIA: Yes, but, I mean, that -- the

1 part that's good can't save the whole thing, any more than  
2 in the -- in the union case, the fact that some -- the  
3 union dues could be used for some permissible purposes,  
4 saved the dues that were being used for impermissible  
5 purposes. You --

6 MR. GARRE: Well, the union --

7 JUSTICE SCALIA: You don't want to just save  
8 half of this program, do you?

9 MR. GARRE: Well, certainly saving half is  
10 better than scuttling the whole --

11 JUSTICE SCALIA: Oh, all right.

12 MR. GARRE: -- thing, Justice Scalia. But the  
13 union case is -- the speech that was -- that this Court  
14 held could not be funded -- and, after all, in those  
15 cases, the message was controlled by a non-government  
16 entity, the union or the state bar. But there, you're  
17 talking about political and ideological speech. Here,  
18 we're talking about beef production -- producing --

19 JUSTICE BREYER: Well, what's the objection to,  
20 whenever you have an ad, you put a little thing in the  
21 corner, and it says, "This advertisement is paid for by  
22 the beef industry under a regulation, X-23, of the  
23 Department of Agriculture"?

24 MR. GARRE: Justice Breyer, the program would do  
25 that if this Court held it was necessary --

1 JUSTICE BREYER: And it wouldn't --

2 MR. GARRE: -- under the First Amendment.

3 JUSTICE BREYER: -- tough, would it?

4 MR. GARRE: But --

5 JUSTICE BREYER: All you'd have to do is have a  
6 little thing -- and it would just say, "USDA requires  
7 this, under the program," and then the whole problem goes  
8 away.

9 MR. GARRE: That's correct. But let me make a  
10 few additional --

11 JUSTICE BREYER: All right.

12 MR. GARRE: -- points. First, as Mr. Kneedler  
13 emphasized, nothing in the statute, the regulation,  
14 requires the ad to say that they're funded by America's  
15 beef --

16 JUSTICE SOUTER: Well, I -- we realize that. I  
17 mean, we're getting into it because there's at least a  
18 potential constitutional problem here.

19 MR. GARRE: And let me make another --

20 JUSTICE SOUTER: As you respond to Justice  
21 Breyer's question, would you go the step further and say,  
22 Why isn't one possible solution to this difficulty we're  
23 having about government speech a requirement that if you  
24 want to justify it as government speech, you put in the  
25 advertisement, "This is the government's position, paid

1 for by the beef producers"?

2 MR. GARRE: The government isn't hiding from --

3 JUSTICE SOUTER: No --

4 MR. GARRE: -- the messages in its pro-beef ads.

5 It -- Justice Souter, the government could do that, but  
6 it's not hiding from this message. We think that if the  
7 Court --

8 JUSTICE SOUTER: It seems to be. In fact, there  
9 was an indication in the brief that the government had taken  
10 the position that if the government came out front and said,  
11 "Hey, we're urging you to eat more meat," that, in fact,  
12 it would be very unsuccessful in doing it. It seems to  
13 want to hide the ball here.

14 MR. GARRE: Well, the government does do that,  
15 Justice Souter. Last year, during the height of BSE  
16 crisis, the President, from his ranch in Texas, urged  
17 Americans to eat more beef and told Americans that beef  
18 was safe. That's the same message that went out,  
19 supervised by the United States Department of Agriculture,  
20 through the Beef Board, to communicate --

21 JUSTICE SOUTER: Did he --

22 MR. GARRE: -- message.

23 JUSTICE SOUTER: And who paid for that? Did  
24 these people pay for that?

25 MR. GARRE: The President's message was paid

1 through general tax dollars. The message under this  
2 program is paid through the assessment. It's the same  
3 message. The message under the Beef Board is carefully  
4 controlled and supervised by the United States Department  
5 of Agriculture.

6 If I could make a point --

7 JUSTICE BREYER: Well, let's be honest about it.  
8 Let's be totally accurate. It's not going to say, "The  
9 government believes this." The government may not believe  
10 it. What it says is, "This message is brought to you by  
11 the Beef Association under the -- under a program  
12 requiring contributions to advertising of the Department  
13 of Agriculture."

14 MR. GARRE: And --

15 JUSTICE BREYER: Nobody will even know what that  
16 means, but it has the --

17 [Laughter.]

18 JUSTICE BREYER: -- it has --

19 MR. GARRE: Well, that's good.

20 JUSTICE BREYER: -- it has the virtue of being  
21 totally accurate.

22 MR. GARRE: That's right. Every single ad that  
23 we're aware of, has the beef check, which is the sign that  
24 the beef -- or the reasonable observer would know that  
25 this is a statute passed by Congress containing a message

1 that Americans should eat more beef, that beef is  
2 nutritious, that's disseminated under a program that's  
3 carefully supervised and controlled by the Secretary of  
4 Agriculture.

5 JUSTICE BREYER: The important thing is, you  
6 have no objection to doing that.

7 MR. GARRE: We would not, but we also think --  
8 and if the Court made that clear in this case, it wouldn't  
9 be a basis for invalidating the statute; it might be a  
10 basis for sending it back or an as-applied challenge.  
11 Importantly, we --

12 JUSTICE SOUTER: But what it -- what it would --  
13 what it would be a basis for, at least within the confines  
14 of this argument, would be a basis for your government  
15 speech claim in the sense that you wouldn't be basing a  
16 government speech claim on what is really a  
17 misrepresentation.

18 MR. GARRE: It -- we don't think it's a  
19 misrepresentation. The speech is funded by America's beef  
20 producers. The Respondents in this case, the centerpiece  
21 of their First Amendment argument --

22 JUSTICE SOUTER: No, including those who don't  
23 want to fund it and who don't agree with the message. I  
24 mean, the problem here is that by making that  
25 representation, you indicate that this is the message of

1 the people who are paying for it. And some of the people  
2 who are paying for it do not wish to convey that message.

3 MR. GARRE: We --

4 JUSTICE SOUTER: That's the misrepresentation.

5 MR. GARRE: With respect, we would disagree.

6 There's no reason to believe that a reasonable observer  
7 would think that just because an ad says it's funded by  
8 the nation's beef producers, every single one of the  
9 850,000 individual cattle producers in this country agrees  
10 with every single statement --

11 JUSTICE SOUTER: But what they would --

12 MR. GARRE: -- of the message.

13 JUSTICE SOUTER: -- what they would, I think,  
14 assume is that, in the name, the beef producers do, in  
15 fact, agree with this, and this is their message. What  
16 they would not assume from it is that it is what you and  
17 Mr. Kneedler are claiming, the speech of the Government of  
18 the United States. They certainly wouldn't infer that.

19 MR. GARRE: We think it's fair to assume, as the  
20 Court would under the establishment clause, that they're  
21 familiar with the act of Congress that makes it its message  
22 as well as a program.

23 A critical point on this attribution argument is  
24 that it's not supported by any single piece of evidence  
25 that Respondents, themselves, have put into the record in

1 this case. Their First Amendment objection is to the  
2 content of the ads. There's not a single piece of evidence  
3 in the record purporting to make this attribution argument  
4 that the public would attribute to the ads to them. It's  
5 not in the complaint in this case, it's not in their own  
6 affidavits, it's not in the --

7 JUSTICE SOUTER: Well, maybe --

8 MR. GARRE: -- in the --

9 JUSTICE SOUTER: -- maybe it's not because they  
10 didn't know you were going to be defending on the basis of  
11 government speech. That's what's getting us into this.

12 MR. GARRE: Well, I highly doubt that, Justice  
13 Souter, because the First Amendment claim was added in  
14 response to the United Foods case, and this case was  
15 developed, from the outset, on a government speech theory.

16 JUSTICE SOUTER: Which wasn't a government  
17 speech case.

18 MR. GARRE: But it -- the case was tried under  
19 the First Amendment, under a government speech argument.  
20 But -- so the fact that Respondents didn't put --

21 JUSTICE GINSBURG: This case, not United Foods.  
22 Because United Foods, the Court said it -- it was not  
23 legitimately before us.

24 MR. GARRE: That's correct. But my point is  
25 that the First Amendment case proceeded after United

1 Foods. The government's central argument in the trial was  
2 government speech. The one time attribution came up --  
3 and this is at pages 46 and 47 of the trial record --  
4 Respondents' own witness testified that the public was not  
5 likely to attribute the message of the pro-beef ad to its  
6 organization of beef producers. So if the Court finds  
7 that attribution is a constitutional concern, it's no  
8 basis to bring down the act of Congress on the record in  
9 this case.

10 The -- I want to emphasize, if I could, that the  
11 program in this case has been effective. The record  
12 establishes that the beef checkoff has had a statistically  
13 significant impact on increasing consumer demand for beef  
14 and an increase in prices. That's contained in the expert  
15 testimony of Professor Ward, at pages 100 and 173. The  
16 record also shows that for every checkoff dollar spent on  
17 the program, there's more than a 5.67 rate of return back  
18 to the beef producers in the form of increased prices for  
19 cattle. The Beef Board's 2003 report suggests -- finds  
20 that the price of a fed steer increased by more than \$200  
21 in the past few years. This program has worked.

22 Thank you very much.

23 JUSTICE STEVENS: Thank you.

24 Mr. Tribe.

25 ORAL ARGUMENT OF LAURENCE H. TRIBE

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ON BEHALF OF RESPONDENTS

MR. TRIBE: Justice Stevens, and may it please the Court:

As I was listening to some of the questions about whether it would solve the problem to be more candid and say, "This is your government speaking," I thought I would begin with that question, rather than with an overview of government speech.

You'll recall *Wooley v. Maynard*, of course, in which the State of New Hampshire, without sensing the irony of its position, said, "We'll put you in jail if you do not say, 'Live Free or Die' on" --

JUSTICE KENNEDY: But that was --

MR. TRIBE: -- "your license plates."

JUSTICE KENNEDY: -- that was an individual attribution. You, yourself, had --

MR. TRIBE: Yes.

JUSTICE KENNEDY: -- had to carry this message. Now, here you want us to think of some cowboy --

MR. TRIBE: Well --

JUSTICE KENNEDY: -- going into the bar, and he gets jeered by all his friends because he likes beef.

MR. TRIBE: Well, Justice Kennedy, my --

[Laughter.]

MR. TRIBE: -- my point -- my point was going to

1 be that a footnote on the license plate saying, "This is  
2 New Hampshire speaking," would not have helped. But one  
3 of the central holdings, as I understood it, of United  
4 Foods, independent of government speech, was that although  
5 there is a difference between having to say something  
6 yourself, having to put it on your car, and having to pay  
7 for it, that difference does not go to the existence of a  
8 First Amendment speech objection -- not an association  
9 objection, but a speech objection.

10 JUSTICE SCALIA: Let's first address the  
11 question you said -- you said you were going to address,  
12 whether in order to be government speech, within the  
13 meaning of our cases, it has to be identified as such. Is  
14 that really true? I mean, you know, in World War II, Bob  
15 Hope would appear in movie theaters and say, you know,  
16 "Buy war bonds?"

17 MR. TRIBE: Yes, I don't --

18 JUSTICE SCALIA: "This is Bob Hope. You people  
19 ought to go out now" --

20 MR. TRIBE: Justice Scalia, I think, although  
21 it's an interesting digression about whether the  
22 government is being candid, the objection here has nothing  
23 to do with that.

24 JUSTICE SCALIA: Okay, so it is --

25 MR. TRIBE: But being the government --

1 JUSTICE SCALIA: -- it is not essential --

2 MR. TRIBE: It may be.

3 JUSTICE SCALIA: -- that government might -- in  
4 order to be government speech, the government does not  
5 have to identify itself as the speaker.

6 MR. TRIBE: I --

7 JUSTICE SCALIA: Yes or no? Yes or no?

8 MR. TRIBE: I think the answer is yes, it must  
9 identify itself, but it doesn't help, because --

10 JUSTICE SOUTER: Well, it doesn't --

11 MR. TRIBE: -- the government --

12 JUSTICE SOUTER: -- we understand that you have  
13 a First Amendment claim, which you're going to have even  
14 if we say, "This is not government speech." I think the  
15 whole point here is to decide whether this is even --

16 MR. TRIBE: No, no, Justice --

17 JUSTICE SOUTER: -- an issue that should be  
18 disposed of on any grounds other than candor.

19 MR. TRIBE: Justice Souter, I think that we're  
20 getting off track by assuming that it helps for it to be  
21 government speech. My point is that a central theme of  
22 this --

23 JUSTICE SCALIA: Well, just indulge us. I mean,  
24 some of us think it makes --

25 MR. TRIBE: Let me --

1 JUSTICE SCALIA: -- a difference --

2 MR. TRIBE: Well, but --

3 JUSTICE SCALIA: -- and I would --

4 MR. TRIBE: -- but let me ask you whether --

5 JUSTICE SCALIA: -- I would like to know whether  
6 it is essential to its character as government speech that  
7 the government's say, "This your government speaking."

8 MR. TRIBE: It depends on the purpose for which  
9 you are acting whether it's government speech. In *Rust v.*  
10 *Sullivan*, even though I think you're certainly right,  
11 Justice Scalia, that in that opinion it wasn't called  
12 government speech, in order to rationalize it, in  
13 *Rosenberger* and *Velazquez*, it was so described. But the  
14 question there wasn't, "Can people be made to support it?"  
15 The question, rather, was, "Can the government insist on  
16 staying within the terms of its grants and saying you  
17 can't talk about abortion?" When the question is, "Can  
18 the government force you to support it," the "it," if it's  
19 government speech, doesn't help. The First Amendment  
20 makes it a harder case for them, not easier.

21 JUSTICE SCALIA: It does it all the time in  
22 general taxes. Every --

23 MR. TRIBE: Well --

24 JUSTICE SCALIA: -- time we pay general taxes,  
25 we're supporting government speech --

1 MR. TRIBE: Of course.

2 JUSTICE SCALIA: -- we may not agree with.

3 MR. TRIBE: But the Court has said there is a  
4 fundamental difference between being singled out, as in  
5 Wooley, to have a license plate, as in Pruneyard, to have  
6 someone on your premises. In Pruneyard, the Court said  
7 that one of the reasons it's okay to require someone to  
8 allow a private speaker onto the premises is that he was  
9 not required to support a government slogan. When it is  
10 --

11 JUSTICE O'CONNOR: Yes, but there it --

12 MR. TRIBE: -- government speech --

13 JUSTICE O'CONNOR: -- there it is your car, your  
14 property. That's not this. This is a generic ad on  
15 behalf of beef.

16 MR. TRIBE: That was true of --

17 JUSTICE O'CONNOR: I think there is --

18 MR. TRIBE: -- that was true of United Foods.

19 JUSTICE O'CONNOR: -- there's a world of  
20 difference between this and having something put on your  
21 license plate or in your --

22 MR. TRIBE: Justice O'Connor, I would be much  
23 more offended by having to put it in my license plate.  
24 But if I were raising cattle, and I were told, as they  
25 were told in this case, "cattle equals beef; that's all

1 it's worth, and that's why we won't let you, in these ads  
2 -- we won't let the ads, that you have to pay for,  
3 increase the demands for cattle; only beef" --

4 JUSTICE O'CONNOR: Well, I don't even understand  
5 your argument. Would you still be if the --

6 MR. TRIBE: I haven't made it.

7 JUSTICE O'CONNOR: Well, you're trying.

8 [Laughter.]

9 JUSTICE O'CONNOR: Would you still be here if  
10 there were distinctions made on behalf of free-range beef  
11 or, you know, "Our cattle" --

12 MR. TRIBE: Oh, yes.

13 JUSTICE O'CONNOR: -- "never had a" --

14 MR. TRIBE: The most important distinction --

15 JUSTICE O'CONNOR: -- "medicine" or something  
16 like that? Would you still be here if those distinctions  
17 --

18 MR. TRIBE: Well, if it --

19 JUSTICE O'CONNOR: -- had been made?

20 MR. TRIBE: -- wasn't generic -- there's no way  
21 for them to have an ad for every imaginable different kind  
22 of cattle in one set of advertisements. I just think --

23 JUSTICE O'CONNOR: Well, I'm just --

24 MR. TRIBE: -- it's a --

25 JUSTICE O'CONNOR: -- asking you if,

1 theoretically, some attention had been paid to the  
2 different kinds of producers --

3 MR. TRIBE: Right.

4 JUSTICE O'CONNOR: -- would you still be  
5 objecting?

6 MR. TRIBE: We would object, fundamentally, if  
7 they did not emphasize American beef. That was our first  
8 objection. They said that they don't want to emphasize  
9 American beef, because, in cross-examination, the officer  
10 of the Beef Board said, "Consumers might actually have a  
11 preference for American beef. That would be irrational.  
12 We don't want that." And so all of those cattle ranchers  
13 can say that, "We're proud of it being American." They  
14 can't get that in there.

15 And the other principal thing is that they don't  
16 think of themselves as selling sides of beef. Some of  
17 them are selling dairy cattle, some of them are selling --  
18 even if it's going to, in the end, be in the  
19 slaughterhouse -- we all die someday -- their fundamental  
20 belief is that these are animals, and they're to be cared  
21 for. And the reason that that makes a difference -- the  
22 reason that it makes a difference that they can't even  
23 advertise -- try to make live cattle more attractive to  
24 buy -- is that the collective-action problem, if that were  
25 relevant here -- I think that was really resolved by

1 United Foods -- but the collective-action problem is  
2 really created, not solved, by what they're doing.  
3 Because the structure of the market is that there are a  
4 few concentrated meat-packers. Something like four  
5 slaughter 80 percent of the -- of the cattle in the United  
6 States. They have the bargaining power. And in the  
7 record, their support for the findings of the District  
8 Court, that when the demand for beef goes up through these  
9 generic ads saying, "Eat beef" -- although they certainly  
10 don't say, "Your government says you should eat beef,  
11 beef, beef" -- but when the demand for beef goes up, the  
12 profit is pocketed by the meat processor, the meat packer,  
13 the restaurant, the supermarket. And these guys still end  
14 up taking their cattle to market, and often having to pay  
15 a dollar checkoff, even though they can't even get the  
16 price of the -- of the cattle back. So --

17 JUSTICE BREYER: But would it --

18 MR. TRIBE: -- the free rides are now taken by  
19 the people who don't pay --

20 JUSTICE BREYER: -- seems to --

21 MR. TRIBE: -- the processors don't pay anything.

22 JUSTICE BREYER: I understand that a person  
23 could have an ideological objection to the content of the  
24 ad. But the ad, itself, is an effort by government, in  
25 this area, to regulate a commercial matter, not a license

1 plate that says, "Free Speech, or Die," or "Freedom" --

2 MR. TRIBE: But it regulates speech, Justice  
3 Breyer.

4 JUSTICE BREYER: Yes, I know. Right now I'm  
5 asking --

6 MR. TRIBE: They don't --

7 JUSTICE BREYER: Well, my question is, does it  
8 make a difference for the point of distinguishing, or not  
9 distinguishing, "Live Free, or Die," and similar  
10 ideological matters -- does it make a difference that the  
11 fundamental aim of the program, and 99 percent of the way  
12 it's carried out, has to do with simple advertising,  
13 commercial advertising, the regulation of a commercial  
14 matter, commerce --

15 MR. TRIBE: Right.

16 JUSTICE BREYER: -- does that make a difference?

17 MR. TRIBE: I think it makes an emotional  
18 difference.

19 JUSTICE BREYER: But no legal difference.

20 MR. TRIBE: Not in the context of forcing people  
21 to pay.

22 JUSTICE BREYER: So, in other words --

23 MR. TRIBE: It makes a difference --

24 JUSTICE BREYER: -- in other words, a program  
25 that is a regulatory program regulating commerce, we

1 should no longer think of that, though we tend to think of  
2 it as quite different in the way we approach the First  
3 Amendment -- we no longer, in your view, should?

4 MR. TRIBE: No, no. I think, certainly if we  
5 are regulating economic transactions and only dealing with  
6 speech in a purely ancillary way -- that is, we're  
7 regulating sale, transactions --

8 JUSTICE BREYER: We regulate advertising. We  
9 regulate commercial advertising.

10 MR. TRIBE: Right, but the --

11 JUSTICE BREYER: The Federal Trade Commission --

12 MR. TRIBE: -- network --

13 JUSTICE BREYER: Yes.

14 MR. TRIBE: -- didn't you say that just the fact  
15 that you call it commercial speech only means that when  
16 you are regulating problems of a transactional kind --  
17 deception, overbearing -- then the fact that it's  
18 commercial speech makes a big difference. But you can't  
19 just generically say that because something doesn't fit  
20 your idea of what's ideological -- I mean, to these  
21 ranchers, the ideology --

22 JUSTICE BREYER: I didn't say --

23 MR. TRIBE: -- is different --

24 JUSTICE BREYER: -- I didn't say they had a --

25 MR. TRIBE: But whose --

1 JUSTICE BREYER: -- commercial objection.

2 MR. TRIBE: -- whose line -- whose line between  
3 ideology and commerce will --

4 JUSTICE BREYER: I am asking. In analyzing the  
5 program, there are some things for it, and there are some  
6 things against it. And in trying to make that weighing, I  
7 do think it's different, because the basis of the program  
8 is commercial regulation. And so I want to be certain, in  
9 your view, that's either correct or incorrect.

10 MR. TRIBE: I think it's --

11 JUSTICE BREYER: If it's incorrect, I want to  
12 know why.

13 MR. TRIBE: Well, I think it's -- if one were  
14 just weighing and didn't have a structured set of  
15 principles on the balance in favor of it, I think, you're  
16 right, we can't -- they're not trying to induce  
17 ideological conformity. This is not a case where they're  
18 trying to enforce what Justice Jackson calls "the  
19 unanimity of the graveyard." It is a case where the  
20 spirit of the government is in the right place. The  
21 government is trying to facilitate collective speech when  
22 --

23 JUSTICE BREYER: Well, if it makes a difference,  
24 then the lens that I look at this through is called our --  
25 whatever the second-tier commercial speech lends.

1 MR. TRIBE: I don't think --

2 JUSTICE BREYER: Have you looked at --

3 MR. TRIBE: That doesn't follow. I don't think  
4 that follows. It follows that if you were -- if you were  
5 writing on a clean slate and were trying to create a  
6 wholly new doctrine, one of the things you would look at,  
7 I suppose, is that this is not a program designed to  
8 create ideological conformity in America. At least the  
9 spirit of the program is not that. But the road to hell  
10 is often paved with good intentions, and the means, in  
11 this case, that was chosen, was not to have the government  
12 spend some more money telling people, "Beef isn't all as  
13 bad for you as you think." The remedy that they are  
14 choosing is to pick a group of ranchers and say to them,  
15 "You are the ones who are going to pay, and you are going  
16 to pay for" --

17 JUSTICE STEVENS: Mr. Tribe, would --

18 MR. TRIBE: -- "ads that are in your name."

19 JUSTICE STEVENS: -- would you comment on the  
20 argument that -- what will this do to compelling cigarette  
21 manufacturers to finance the advertisements against  
22 smoking?

23 MR. TRIBE: Well, by "advertisements against  
24 smoking," Justice Stevens, if you mean, "Here are the  
25 things that will kill you in cigarettes," the kind of

1 thing that's on the package now, it seems to me that it is  
2 constitutional, under even cases like Zauderer, to say  
3 that whoever sells a product or a service --

4 JUSTICE STEVENS: They have to give warning.  
5 But why is the -- why is the cigarette analogy different  
6 from this case? What is your answer to that?

7 MR. TRIBE: Well, it seems to me that no one  
8 suggests that the cigarette companies are supporting the  
9 ads in California. California is doing exactly what the  
10 Surgeon General does.

11 JUSTICE KENNEDY: Well, it's odd that you can be  
12 compelled to --

13 MR. TRIBE: Say negative things --

14 JUSTICE KENNEDY: -- engage in speech that you  
15 don't agree with. Now you're saying that the more --

16 MR. TRIBE: Right.

17 JUSTICE KENNEDY: -- disagreeable it is to you  
18 --

19 MR. TRIBE: Well --

20 JUSTICE KENNEDY: -- the more legitimate it is.  
21 That's --

22 MR. TRIBE: I think if you're --

23 JUSTICE KENNEDY: -- a very strange argument.

24 MR. TRIBE: Well, it may be strange, but I think  
25 that there have been stranger things. The reason that

1 it's true is that if you go around doing things that might  
2 endanger people, it's entirely justifiable for the state,  
3 as part of its non-speech effort to protect people --

4 JUSTICE O'CONNOR: Well, do you --

5 MR. TRIBE: -- from harm, to make you give  
6 warnings --

7 JUSTICE O'CONNOR: -- do you accept the fact  
8 that the government can charge taxes on the sale of  
9 cigarettes and compel -- and use that money to tell people  
10 that they're dangerous?

11 MR. TRIBE: Well, I think that's a much harder  
12 case than this, to be honest with you. I think --

13 JUSTICE O'CONNOR: We do, however.

14 MR. TRIBE: Well, California does that.

15 JUSTICE O'CONNOR: Is that part of what's going  
16 on?

17 MR. TRIBE: In California, it does.

18 JUSTICE O'CONNOR: So what you're arguing here  
19 --

20 MR. TRIBE: Yes.

21 JUSTICE O'CONNOR: -- is going to have rather a  
22 drastic effect on --

23 MR. TRIBE: Well, I think the --

24 JUSTICE O'CONNOR: -- what's going on.

25 MR. TRIBE: -- drastic effect would be the other

1 way, wouldn't it? If this Court were to hold, despite  
2 United Foods, that it is permissible to force people to  
3 support speech they don't agree with, as long as that  
4 speech doesn't fit our sense of what's ideological, that  
5 cuts to roll back Keller and Lehnert and Abood. It's not  
6 a small part of the constitutional landscape that would be  
7 unearthed. Whereas, think about what is the marginal  
8 effect of saying --

9 JUSTICE SCALIA: Wait, I don't -- I had not  
10 understood you to be arguing, Professor Tribe, that this  
11 would be unlawful, even if the money were raised in the  
12 fashion that it is, just from the -- just from the  
13 cattlemen. And the government's own program used that  
14 money to say, "Your government thinks it's -- wants you to  
15 know that beef is thoroughly safe. We've done studies.  
16 Beef is good for you. You should eat more beef." I  
17 thought you --

18 MR. TRIBE: No, I do think that would be  
19 permissible.

20 JUSTICE SCALIA: That would be permissible?

21 MR. TRIBE: Because, I mean, technically, it  
22 would solve only the association problem. They're not  
23 associated with the message. They're still forced to  
24 support it, but not in any sense different from general  
25 taxpayers. And because that's the case, and because it

1 would be an odd formalism to say that it makes a  
2 difference whether we segregate that money or not,  
3 seems to me it would follow that if the government is  
4 willing to pay the political cost of having the speech be  
5 perhaps less persuasive because of -- people's discount for  
6 what the government says and of having to get an appropriation  
7 from the taxpayers -- I mean, taxpayers are smart enough  
8 to know --

9 JUSTICE O'CONNOR: No, not that. The same  
10 program, but you just have a little tag on the ad.

11 MR. TRIBE: Like the lockbox? I mean, every --  
12 I think the taxpayers know that money is fungible. Well,  
13 in this case, you mean if you had the program, not from  
14 general revenue, but you simply said, on the ad, "This is  
15 actually part of a government program"? I don't think  
16 that solves any problem, other than deception.

17 JUSTICE SOUTER: What's the --

18 MR. TRIBE: Deception is the -- my  
19 constitutional argument.

20 JUSTICE SOUTER: -- what's the difference  
21 between the checkoff and the excise tax?

22 MR. TRIBE: Well, the checkoff in this case is  
23 money that goes to a group, which, though it is  
24 organized by the government, purports to represent --

25 JUSTICE SOUTER: So the answer is --

1 MR. TRIBE: -- the way it structured --

2 JUSTICE SOUTER: -- where --

3 MR. TRIBE: -- these people.

4 JUSTICE SOUTER: -- where the money goes and who  
5 pays out the money for the ad, that's the difference.

6 MR. TRIBE: Well, the difference is the whole  
7 structure. Keep in mind --

8 JUSTICE SOUTER: Well, isn't that the -- isn't  
9 that the essential difference between the structure in  
10 this case and the structure in the case in which the  
11 government comes out, saying, "This is your government,  
12 saying, 'Don't smoke.'"

13 MR. TRIBE: Yes, one -- the difference is that  
14 in one case, we've got Congress, we've got the executive,  
15 we have one --

16 JUSTICE SOUTER: Right.

17 MR. TRIBE: -- person, one vote. Here, we have  
18 a million --

19 JUSTICE BREYER: I know, but take all that out  
20 of it -- take all that out of it, and what is your answer  
21 to Justice Stevens and Justice Souter? That is, look,  
22 like this, you have an organization, the Federal Trade  
23 Commission, say, or that the FDA says, on the one hand,  
24 (a) broccoli industry, "Fruits and vegetables are good for  
25 you; crib death device, "Buy anti-crib-death devices; "Buy

1 car seats for your children"; or, "Don't smoke"; or --

2 MR. TRIBE: Well, I mean --

3 JUSTICE BREYER: -- "Don't buy a crib without a  
4 crib-death device" --

5 MR. TRIBE: -- I mean, I think it's --

6 JUSTICE BREYER: -- "or a car without a car  
7 seat."

8 MR. TRIBE: Right.

9 JUSTICE BREYER: See? One's negative and one's  
10 positive. And everything else is the same. Then how do  
11 you --

12 MR. TRIBE: Whether it's --

13 JUSTICE BREYER: -- what's the difference?

14 MR. TRIBE: -- negative --

15 JUSTICE BREYER: Yes.

16 MR. TRIBE: -- or positive, it's the government  
17 --

18 JUSTICE BREYER: Okay, maybe it doesn't matter.

19 MR. TRIBE: Well, no, it matters, in this sense.  
20 When the government puts out a message and puts its  
21 credibility behind the message, likely to have to balance  
22 -- it's going to say, "A little broccoli, but a little  
23 steak." "Don't risk crib death" --

24 JUSTICE BREYER: But I'm not interested -- I got  
25 that point.

1 MR. TRIBE: Right.

2 JUSTICE BREYER: I'm not dismissing it. I  
3 understand it.

4 MR. TRIBE: All right.

5 JUSTICE BREYER: But I'm not sure --

6 MR. TRIBE: So I'm not understanding what your  
7 question is.

8 JUSTICE BREYER: Well, my question is, is it  
9 implied in what you're argued that it would be equally  
10 unconstitutional, in the same way, to tell the cigarette  
11 industry to advertise, "Don't smoke," or to tell the  
12 automobile industry to advertise, "Buy car seats for your  
13 children," or to tell the crib industry to advertise, "Be  
14 sure you have an anti-crib-death device"?

15 MR. TRIBE: I think --

16 JUSTICE BREYER: And all that, assuming the  
17 financing is the same as here, everything else the same,  
18 is it implicit in your argument that they're all equally  
19 unlawful?

20 MR. TRIBE: No. My argument is that you can  
21 require the seller of any commodity to include warnings.  
22 It does not necessarily follow that you can say to an  
23 industry, "You're bad guys. We want you to put on an  
24 advertising campaign, and the campaign has to have these  
25 characteristics." Forcing them to advocate that people

1 not buy their products, I think, is not the same thing --

2 JUSTICE GINSBURG: Mr. Tribe --

3 MR. TRIBE: -- as forcing them to say --

4 JUSTICE GINSBURG: -- I thought --

5 MR. TRIBE: -- that it will be addictive or that  
6 it will cause cancer.

7 JUSTICE STEVENS: But you're saying --

8 JUSTICE GINSBURG: -- I thought --

9 JUSTICE STEVENS: I want to be sure I -- that I  
10 understood your answer. You can compel them to make  
11 warnings. Can you compel them to pay for warnings that  
12 are just industry-specific, in saying, "This is dangerous"  
13 --

14 MR. TRIBE: I think so, because I can't see any  
15 difference between saying that -- you put on the package,  
16 "The Surgeon General has determined that smoking will  
17 cause cancer," and saying, "We're going to put on  
18 television" --

19 JUSTICE STEVENS: But it seems --

20 MR. TRIBE: -- "the Surgeon General" --

21 JUSTICE STEVENS: -- almost ironic, to me, to  
22 say that you have a greater power to tell the whole  
23 industry to publish something they don't want to publish  
24 than you do to let them --

25 MR. TRIBE: But that -- Justice Stevens, what --

1 JUSTICE STEVENS: -- pay for what --

2 MR. TRIBE: -- what is --

3 JUSTICE STEVENS: -- 90 percent of them want to  
4 say.

5 MR. TRIBE: -- what is the difference between  
6 telling them that -- I mean, there may be a critical  
7 difference between the point of sale and a generic ad --  
8 that is, the power to regulate the transaction to make  
9 sure it's safe, includes the power to include on the  
10 package certain warnings. The moment you step back from  
11 that and say that, "Because you're in a dangerous  
12 business, you have to publish general warnings to the  
13 public," maybe that's where the line has to be drawn,  
14 because I agree that it would be rather bizarre --

15 JUSTICE STEVENS: Are you limiting your point to  
16 putting information on the package, or are you saying they  
17 could -- could California compel a cigarette -- companies  
18 to contribute to a large fund which is just used to by  
19 newspaper advertising describing the dangers of smoking?  
20 Could they do that?

21 MR. TRIBE: Well, I think that the rationale for  
22 that would be far stronger than this. The state's power  
23 to protect people, in terms of life and health, includes  
24 the power to compel --

25 JUSTICE STEVENS: Yes, but supposing there are

1 disagreements. We were -- you were talking about  
2 cigarettes. But supposing there's a legitimate  
3 disagreement between the industry position and the  
4 government position --

5 MR. TRIBE: Okay.

6 JUSTICE STEVENS: -- could the government,  
7 nevertheless, insist on the industry financing advertising  
8 advocating the government's position?

9 MR. TRIBE: Well, not advocating; reporting what  
10 the government position is. I mean, the -- when the  
11 cigarette company says on the package, "The Surgeon  
12 General has found this stuff is deadly," they're not quite  
13 saying, "We agree with the Surgeon General." They've --  
14 making them fund or support statements that do not reflect  
15 their own beliefs, as though it were --

16 JUSTICE KENNEDY: So, in this case --

17 MR. TRIBE: -- is impermissible.

18 JUSTICE KENNEDY: -- I take it, it would be okay  
19 if the beef producers had to use a dollar a head to put,  
20 "Eating too much beef is dangerous to your health."

21 MR. TRIBE: Well, if they had -- well, they're  
22 not beef producers. I mean, I am troubled by -- they're  
23 -- these are cattle.

24 JUSTICE KENNEDY: All right, cattle, then --

25 MR. TRIBE: All right? And then -- and then

1 they're trying, ultimately, to brand us as though we are  
2 slicing these things up and selling them.

3 JUSTICE KENNEDY: But what's the answer to my  
4 question?

5 MR. TRIBE: If the question is, can retail  
6 grocers be required to put on the beef packages they sell,  
7 "The government has determined that the cholesterol  
8 content is dangerous if you have more than X," I see no  
9 reason why that would be harder --

10 JUSTICE BREYER: In other words --

11 MR. TRIBE: -- to defend than the cigarette  
12 package.

13 JUSTICE BREYER: I think the question, or at  
14 least the version I have of it --

15 MR. TRIBE: Yes.

16 JUSTICE BREYER: -- is, we have this case,  
17 exactly, and the only difference is, instead of getting  
18 these people to eat -- say, "Eat beef," what they say do  
19 is, they get people together and say, "Don't eat too much  
20 beef." I put --

21 MR. TRIBE: Well --

22 JUSTICE BREYER: -- "too much," because that --

23 MR. TRIBE: Yes.

24 JUSTICE BREYER: -- makes it more realistic.

25 All right, now, does it suddenly become constitutional?

1           MR. TRIBE: The program is facially  
2 unconstitutional. It is the structure that says to all  
3 these people, "You've got to put money into this elaborate  
4 structure, which purports to represent you" -- that is,  
5 the -- they have all this stuff saying that the Beef Board  
6 is related to the industry as board of directors, the  
7 shareholders -- "These people, who purport to represent  
8 you, will, under the aegis of the government, put out  
9 statements at various times." That's facially  
10 unconstitutional.

11           JUSTICE SOUTER: All right. Consider this  
12 theory. The Congress passes an excise tax. It happens to  
13 be a dollar head, on the cattle, just like this so-called  
14 "checkoff." And the government uses the excise tax  
15 revenue to finance advertising, saying -- maybe saying,  
16 "Eat more beef," maybe advertising, saying, "Don't eat  
17 quite so much."

18           MR. TRIBE: Or maybe --

19           JUSTICE SOUTER: First Amendment problem --

20           MR. TRIBE: -- talking about the war in Iraq.  
21 No, I think that once your taxes enter the general fund,  
22 a pretense that it's --

23           JUSTICE SOUTER: Including excise?

24           MR. TRIBE: Well, I don't think excise taxes are  
25 segregated in any way that makes -- that makes it harder

1 --

2 JUSTICE SOUTER: No, I just want to know what --

3 MR. TRIBE: -- than Social Security.

4 JUSTICE SOUTER: -- your position is. I just  
5 want to know what your position is.

6 MR. TRIBE: My position is that once the revenue  
7 is part of the government's general fund, the government's  
8 subject to doctrines that I don't think are First  
9 Amendment doctrines about government propaganda -- there  
10 may be limits on the government's ability --

11 JUSTICE SOUTER: Okay, then --

12 MR. TRIBE: -- to defend it.

13 JUSTICE GINSBURG: He's just going back to --

14 MR. TRIBE: Subject to that --

15 JUSTICE SOUTER: Okay, then it does not have --

16 MR. TRIBE: -- it's not a First Amendment  
17 problem.

18 JUSTICE SOUTER: -- it's not a First Amendment  
19 problem. It does not have the objection that you're  
20 raising.

21 MR. TRIBE: That's correct.

22 JUSTICE SOUTER: Okay.

23 JUSTICE GINSBURG: Is that -- is that an answer  
24 to the question that Justice Kennedy urged in the opening  
25 argument? That is, it's the same dollar a head, except

1 you call it an excise tax instead of a -- whatever this is  
2 called. The same thing, but to say it's a tax. And  
3 you're not -- this is not general revenues that you  
4 collect from everybody and spend --

5 MR. TRIBE: If the structure is they take the  
6 money from you and put it in this elaborate machinery  
7 which comes out with statements you're forced to support,  
8 the statements that don't have behind them the  
9 accountability checks of the Federal Government, which has  
10 to answer to taxpayers and answer to the public for the  
11 stuff it puts out -- that is -- if that's what it is, it  
12 doesn't matter what you call it, it remains  
13 unconstitutional. It remains unconstitutional because  
14 these individuals are forced in a way that taxpayers are  
15 not -- forced to be part of a system in which, even if you  
16 have footnotes saying, "This is pursuant to the  
17 government," a system in which they will be generally  
18 understood in just the way Justice Breyer said, "Well, you  
19 know, we assume" --

20 JUSTICE GINSBURG: But suppose --

21 MR. TRIBE: -- that these people --

22 JUSTICE GINSBURG: -- we don't have that? I  
23 mean, could then -- could the government fix this problem  
24 this way, saying, "We're going to get the same bucks, but  
25 we are going -- and we're going to have the same kinds of

1 ads, but they're going to be labeled, 'U.S. Department of  
2 Agriculture."

3 MR. TRIBE: And we're going to eliminate the  
4 cattlemen's Beef Board and all of these things --

5 JUSTICE GINSBURG: Yes.

6 MR. TRIBE: -- that are supposed to represent  
7 you --

8 JUSTICE GINSBURG: But we are -- but where this  
9 money is coming from to pay this is --

10 MR. TRIBE: I would be happy to represent the  
11 cattlemen in that circumstance, saying, "You still have  
12 not an associational right, but a right not to be singled  
13 out to support government speech." But it would be a  
14 different and more difficult claim. One.

15 Two, this Court doesn't have before it the  
16 possibility of rewriting all of this.

17 Three, there was a severability provision in an  
18 earlier version of the law suggesting that maybe if you  
19 could lop something off, it would be okay. But that was  
20 eliminated in the current law.

21 And, finally, any attempts to analogize this to  
22 the cases like Lehnert and Keller, in terms of remedy,  
23 that maybe we can create some scheme where only the  
24 objectionable part is returned, is fundamentally  
25 incoherent, because what is objectionable here is

1 homogenizing all of these people into some one message,  
2 and putting it out through this elaborate structure that  
3 purports to represent them.

4 JUSTICE SOUTER: May I go back to one of your  
5 reasons, which was that they are being singled out to pay  
6 for this? They're being singled out to pay for it in the  
7 excise tax situation. Do you come to different answers,  
8 depending whether it's excise tax or singled out without  
9 excise tax, based, essentially, on the ground that there  
10 is a point beyond which we simply cannot look behind the  
11 expenditure of tax revenue? Is that it?

12 MR. TRIBE: I think that there's a point beyond  
13 which, for institutional reasons, it would be very  
14 problematic for a courts to say that you could trace the  
15 dollars into the treasury and those institutional reasons  
16 would be, I think, an instance of under-enforcement of a  
17 constitutional norm, because the underlying constitutional  
18 principle that you ought not to be able, by some gimmick,  
19 to get some people to support speech they don't believe  
20 in, that would be there. But the difficulty of having  
21 this Court enforce that principle, I think, would be very  
22 real. But no such difficulty, I think, is presented in a  
23 case like this one, because if this case came out their  
24 way because of government speech, of course, United Foods  
25 would be obliterated, but a good deal more would be

1 obliterated, because the theory would have to be that  
2 because it's not on your license plate, because you don't  
3 have to carry it, you're only supporting it, then that's  
4 all the difference in the world. Because, otherwise, its  
5 being government speech would make it worse. But if it's  
6 all the difference in the world whether you have to carry  
7 or utter it, or merely support it, then all of the  
8 decisions of this Court carefully protecting the rights of  
9 dissenters in every imaginable kind of organization, from  
10 the powerful overriding theory that collective-action  
11 problems mean that we've really got to get more speech  
12 over here than you are willing, yourselves, to engage in  
13 --

14 JUSTICE STEVENS: Yes, but on the other hand --

15 MR. TRIBE: -- you'd be --

16 JUSTICE STEVENS: -- you're running into the  
17 problem that the taxpayer can be compelled to pay taxes to  
18 support activities that he doesn't support at all. That's  
19 the other --

20 MR. TRIBE: Well, we do that all the time.

21 JUSTICE STEVENS: -- the other extreme. I know  
22 we --

23 MR. TRIBE: We do that all --

24 JUSTICE STEVENS: -- do it all the time.

25 MR. TRIBE: -- the time.

1 JUSTICE STEVENS: And when are we crossing --

2 MR. TRIBE: That's the --

3 JUSTICE STEVENS: -- the line?

4 MR. TRIBE: -- that's why we have elections, in  
5 part.

6 JUSTICE STEVENS: Pardon me?

7 MR. TRIBE: Right? We have elections, in part,  
8 because the only way -- there's no way to protect every  
9 individual's right to have the government's collective  
10 policy suit his or her fancy. I mean, that way --

11 JUSTICE STEVENS: But it is --

12 MR. TRIBE: -- would allow complete chaos.

13 JUSTICE STEVENS: -- inconsistent with the basic  
14 principle on which you rely, that the individual should  
15 not be compelled to support speech --

16 MR. TRIBE: Well --

17 JUSTICE STEVENS: -- with which he disagrees.

18 MR. TRIBE: -- to support -- supporting speech  
19 is somewhat different from supporting activities that you  
20 don't agree with. I mean, the First Amendment makes a  
21 fundamental difference in that respect.

22 JUSTICE SOUTER: But isn't --

23 MR. TRIBE: If there were --

24 JUSTICE SOUTER: -- isn't that --

25 MR. TRIBE: I'm sorry.

1 JUSTICE SOUTER: Don't you go back to the answer  
2 you gave me? Sure, when taxes are involved, there may be  
3 an under-inclusive enforcement of certain individual  
4 rights, but they have to be under-enforced, because,  
5 otherwise, you simply cannot administer a tax structure.

6 MR. TRIBE: Or any structure. I mean, Bowen v.  
7 Roy -- I mean, there's a sympathetic case of the man who  
8 did not want Little Bird of the Snow to be given a Social  
9 Security number. But we could, when we, interactive with  
10 the government, say to him, "You -- we can't make you give  
11 the number to get the food for your little daughter," but  
12 if one person says, "I don't want numbers in your  
13 computers," and the other says, "I don't want letters, I  
14 want only numbers," the fact that every individual who has  
15 a potential claim on a collective choice could pull in a  
16 different direction means we can't run a system that way.  
17 But no such problem is presented in cases like this.

18 JUSTICE STEVENS: Thank you, Mr. Tribe.

19 MR. TRIBE: Thank you.

20 JUSTICE STEVENS: I think we understand your  
21 position. Thank you.

22 Mr. Kneedler, you have about three -- three or  
23 four minutes.

24 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

25 ON BEHALF OF PETITIONERS IN 03-1164

1 MR. KNEEDLER: Thank you, Justice Stevens.

2 Mr. Tribe has conceded that if this program were  
3 financed by a system of excise taxes that went into the  
4 general Treasury, and Congress then paid -- provided the  
5 exact same amount of money to produce the exact same ads,  
6 that there would be no constitutional problem. And, in  
7 our view, the First Amendment simply does not regulate the  
8 details of government fundraising, the details of  
9 government accounting, and the details of government  
10 bookkeeping in that manner. The First Amendment is --

11 JUSTICE KENNEDY: But that goes back to  
12 Frothingham and Mellon, and Massachusetts versus Mellon,  
13 and United States versus Butler, where we could trace the  
14 amount.

15 MR. KNEEDLER: Right, and --

16 JUSTICE KENNEDY: It's old stuff.

17 MR. KNEEDLER: Right, and the Court -- the Court  
18 superceded those decisions in cases like Carmichael Coal  
19 and Storaasli Company and cases like that, where the Court  
20 said excise taxes can be imposed. As long as there is a  
21 public welfare justification, they can be spent. And it  
22 would be an odd result to have the First Amendment drive  
23 the way the government arranges a system like this. After  
24 all -- and Professor Tribe said it would be different if  
25 the cattlemen's Beef Board were gotten rid of. It

1 actually -- the principal point here is the Secretary  
2 controls the speech. Whatever the cattlemen's Beef Board  
3 does -- and that is a government entity -- the Secretary  
4 controls the speech. So that -- this is not some jury-  
5 rigged system; this is a system of governmental control.  
6 Congress has prescribed the message, and the Secretary  
7 carries it out.

8           It's important to recall that many federal  
9 excise taxes go into dedicated trust funds -- for  
10 highways, for other functions like that. And out of that  
11 dedicated trust fund, there may be money expended on  
12 highway safety. So the fact that it's dedicated really  
13 should not matter.

14           And this case is completely different from cases  
15 like Keller. In Keller, the state bar was not appointed  
16 by the -- by the government, there was no governmental  
17 supervision of what it did, and the government certainly  
18 did not approve the messages in favor of nuclear freezes,  
19 et cetera. This is different in all the critical ways  
20 that make this a program of government speech.

21           And, as Justice O'Connor pointed out, to strike  
22 down this program would have drastic consequences. There  
23 are many, many agricultural promotion programs like this.  
24 There are 13 at the national level. This program has been  
25 in existence since 1988. One billion dollars has been

1 collected, and promotions have been conducted under it.  
2 These promotional programs go back to the '50s, and even  
3 -- and even earlier. And there are many programs on the  
4 state levels, as the amicus brief filed by the states in  
5 this case shows. This Court would be striking down a lot  
6 to hold that this commonsense way of approaching things is  
7 unconstitutional.

8           It's also important to recognize that the  
9 ultimate beneficiary of the advertising is the consumer.  
10 Yes, it affects the industry, but it's the consumer. And  
11 the very first finding that Congress made in the Beef Act  
12 is, beef and beef products are basic foods that are a  
13 valuable part of the human diet. When the -- when the --  
14 because of the collective-action problem in this industry,  
15 that it cannot organize to advertise, that basic message  
16 is not getting to consumers. So this -- the  
17 justifications for this, to the extent one thinks of it in  
18 terms of the commercial speech, it is squarely within the  
19 ultimate purposes of the commerce speech doctrine, which  
20 is to correct market failure with respect to advertising  
21 in order to get information to consumers.

22           JUSTICE STEVENS: Thank you, Mr. Kneedler. The  
23 case is submitted.

24           (Whereupon, at 11:06 a.m., the case in the  
25 above-entitled matter was submitted.)

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