

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:

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5 in 03-1164.

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8 in 03-1165.

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10 behalf of the Respondents, Livestock Marketing

11 Association, et al.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	EDWIN S. KNEEDLER, ESQ.	
4	On behalf of the Petitioners	
5	In 03-1164	4
6	ORAL ARGUMENT OF	
7	GREGORY G. GARRE, ESQ.	
8	On behalf of the Petitioners	
9	In 03-1165	20
10	ORAL ARGUMENT OF	
11	LAURENCE H. TRIBE, ESQ.	
12	On behalf of the Respondents	30
13	REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.	
14	On behalf of the Petitioners	
15	In 03-1164	61
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
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P R O C E E D I N G S

[10:06 a.m.]

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

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
ON BEHALF OF PETITIONERS IN 03-1164

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

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

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

1 ON BEHALF OF RESPONDENTS

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

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

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

13 JUSTICE KENNEDY: But that was --

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

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

17 MR. TRIBE: Yes.

18 JUSTICE KENNEDY: -- had to carry this message.

19 Now, here you want us to think of some cowboy --

20 MR. TRIBE: Well --

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

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

24 [Laughter.]

25 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 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 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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