SUPREME COURT OF THE UNITED STATES

Nos. 03–1164 and 03–1165

MIKE JOHANNS, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS
03–1164 *v.*
LIVESTOCK MARKETING ASSOCIATION ET AL.

NEBRASKA CATTLEMEN, INC., ET AL., PETITIONERS
03–1165 *v.*
LIVESTOCK MARKETING ASSOCIATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 23, 2005]

JUSTICE THOMAS, concurring.

I join the Court's opinion. I continue to believe that "[a]ny regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny." *United States* v. *United Foods, Inc.,* 533 U. S. 405, 419 (2001) (THOMAS, J., concurring); see also *Glickman* v. *Wileman Brothers & Elliott, Inc.,* 521 U. S. 457, 504–506 (1997) (THOMAS, J., dissenting). At the same time, I recognize that this principle must be qualified where the regulation compels the funding of speech that is the government's own. It cannot be that all taxpayers have a First Amendment objection to taxpayer-funded government speech, even if the funded speech is not "germane" to some broader regulatory program. See *ante*, at 7–8. Like the Court, I see no analytical distinction between "pure" government speech funded from general tax revenues and from speech funded from targeted exactions, *ante*, at 10–12; the practice of using targeted taxes to fund government operations, such

as excise taxes, dates from the founding, see The Federalist No. 12, p. 75 (J. Cooke ed. 1961).

Still, if the advertisements associated their generic pro-beef message with either the individual or organization respondents, then respondents would have a valid as-applied First Amendment challenge. The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control. This principle follows not only from our cases establishing that the government may not compel individuals to convey messages with which they disagree, see, *e.g., West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 633–634 (1943); *Wooley* v. *Maynard,* 430 U. S. 705, 713–717 (1977), but also from our expressive-association cases, which prohibit the government from coercively associating individuals or groups with unwanted messages, see, *e.g.*, *Boy Scouts of America* v. *Dale,* 530 U. S. 640, 653 (2000) (government cannot "force [an] organization to send a message" with which it disagrees); *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U. S. 557, 576–577 (1995). If West Virginia had compelled Mr. Barnette to take out an advertisement reciting the Pledge of Allegiance and purporting to be "A Message from the Barnette Children," for example, that would have been compelled speech (if a less intrusive form of it), just like the mandatory flag salute invalidated in *Barnette*. The present record, however, does not show that the advertisements objectively associate their message with any individual respondent. *Ante*, at 13–15, and n. 11.* The targeted nature of the funding is also too attenuated a link.

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*I note that on remand respondents may be able to amend their complaint to assert an attribution claim. See Fed. Rule Civ. Proc. 15.

Moreover, these are not cases like *Barnette;* the government has not forced respondents to bear a government-imposed message. Cf. *ante*, at 13, n. 8; *post*, at 10, n. 9 (SOUTER, J., dissenting). The payment of taxes to the government for purposes of supporting government speech is not nearly as intrusive as being forced to "utter what is not in [one's] mind," *Barnette*, *supra*, at 634, or to carry an unwanted message on one's property.

With these observations, I join the Court's opinion.