

BREYER, J., concurring

SUPREME COURT OF THE UNITED STATES

Nos. 03–1164 and 03–1165

MIKE JOHANNIS, 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 BREYER, concurring.

The beef checkoff program in these cases is virtually identical to the mushroom checkoff program in *United States v. United Foods, Inc.*, 533 U. S. 405 (2001), which the Court struck down on First Amendment grounds. The “government speech” theory the Court adopts today was not before us in *United Foods*, and we declined to consider it when it was raised at the eleventh hour. See *id.*, at 416–417. I dissented in *United Foods*, based on my view that the challenged assessments involved a form of economic regulation, not speech. See *id.*, at 428. And I explained that, were I to classify the program as involving “commercial speech,” I would still vote to uphold it. See *id.*, at 429.

I remain of the view that the assessments in these cases are best described as a form of economic regulation. However, I recognize that a majority of the Court does not

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share that view. Now that we have had an opportunity to consider the “government speech” theory, I accept it as a solution to the problem presented by these cases. With the caveat that I continue to believe that my dissent in *United Foods* offers a preferable approach, I join the Court’s opinion.