MEMORANDUM

To: Mr. Pat Gurrentz
From: Steve Scheinert
Date: 19 July 2005
Re: Addendum to 21 February 2005 Memorandum.

In a memorandum dated 21 February 2005, I responded to your question regarding the likely outcome of the case of *Johanns* (now renamed from Veneman, with the change of Presidential administrations and Cabinet officials) *v. Livestock Marketing Association (LMA)*. While attempting to avoid an outright prediction, I tacitly suggested that I expected the decisions of the lower courts to be upheld. A copy of this original memo, with a few typos fixed, is appended to this document. Within a few days of the decision, I emailed to you a brief reaction to the decision, and you requested a longer discussion, as an addendum to previous memorandum.

SUMMARY

On 23 May 2005, the United States Supreme Court published its decision in *Johanns v. Livestock Marketing Association (LMA) (125 S.Ct. 2055, 2005 WL 1200576 (U.S.))*. In a 6-3 vote[1], the Court vacated the decision of the US 8th Circuit Court of Appeals, and called for new trials on the original issues involved in the case. This decision upheld the claim of the US Department of Agriculture that the generic advertisements qualify as government speech, and so are not subject to First Amendment scrutiny.

DISCUSSION

While the original memorandum implied an expectation that the decision of the Circuit Court would be upheld, it did contain on a caveat. Near the middle of page three,

[1] Voting in the majority were Justices O'Connor, Thomas, Ginsburg, Breyer, and Chief Justice Rehnquist. Justice Scalia delivered the opinion for the Court. Justices Kennedy, Souter, and Stevens dissented.

it read, "It is likely that the case as a whole will swing on how much the government stresses and how well it argues [the government speech doctrine] during oral arguments." The final decision in the case did indeed focus entirely on this doctrine, bringing about the difference in expected outcome, since the memorandum focused on the precedents surrounding the doctrine of protection of commercial speech.

The government speech doctrine holds that speech made by the government itself is not subject to First Amendment scrutiny. In the decision, Justice Scalia elaborates, "'Compelled support of government' – even those programs of government one does approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position" (*LMA*). After considering that by 'compelled support of government,' Justice Scalia is referring to the compelled payment of taxes, of monetary support for the government, not of the political or philosophical support of a government's policies, the argument really becomes quite clear; as Justice Scalia states, "We have generally assumed … that compelled funding of government speech does not alone raise First Amendment concerns" (*LMA*). In essence, the government enjoys the same First Amendment protections as any private entity, while private entities are still at all times required to pay their taxes.

In the opinion, Justice Scalia relied primarily on those measures of government control discussed in previous decisions. Namely, he focused on the degree of input and control held by different government agencies and actors, primarily the Department of Agriculture and the Secretary of Agriculture. Justice Scalia confirms in the decision, that the Beef Act itself states certain parameters for the advertisements, identifying Congressional control. From there, Justice Scalia notes that the advertisements are written by the Beef Board's Operating Committee, whose governmental status is never determined (*LMA, footnote 4*), but half of whose members are appointed by the Secretary of Agriculture and all of whom serve at the pleasure of the Secretary. Further, as Justice Scalia notes, the Secretary of Agriculture has final approval of all aspects of the advertisements. Justice Scalia notes further that the Department of Agriculture has taken an active role in generating the advertisements, not just reviewing and either rejecting or approving, but taking part in the meetings that formulate the advertisements. Finally, he

likens the act of using the Operating Committee to soliciting the assistance of an outside group to finalize the specifics of a message whose basic content and substance is already determined (*LMA*). Ultimately, the degree of government control is so vast that the commercials may be considered government speech, as the Justice notes in the decision (*LMA*).

Justice Scalia discusses an additional basis for protection under the government speech doctrine, but one which appears open to debate. One of the reasons that government speech is exempt from First Amendment scrutiny is that the speech is held to a measure of political accountability. Meaning that, while the public cannot sue in court to have the speech amended or terminated, the officials responsible for the speech must still stand for election, themselves, or are responsible to elected officials; that, if the disagreement is sufficiently strong and widespread, the public may fail to re-elect the officials making the speech. But, this argument is clearly incumbent on the public recognizing that the speech is government speech and which officials are responsible. Indeed, such understanding cannot be assumed.

In the specifics of *LMA*, the advertisements attribute themselves to "America's Beef Producers," and, at their close, display the logo of the Beef Check-off Program. The respondents claim that the former implies their endorsement of the commercials and the latter is a logo that lacks sufficient public familiarity for the casual viewer to recognize the government as the speaker. Indeed, even some familiar with this case are unaware that the Beef Board trademarked the phrase "America's Beef Producers" in 1999 (*LMA, footnote 10*). It stands to reason then, that while beef producers and importers may be familiar with this fact, the general public is not. Indeed, Justice Souter notes this exact point in his dissenting opinion, including how unlikely it is that the general public will recognize the logo of the Check-off Program for what it is (*LMA, Souter, J., dissenting, also Souter, J., dissenting, footnotes 5 and 6*).

However, this case is not yet completely resolved. The Court noted at several points, in both the majority and dissenting opinions, that the respondents could continue on their original claims, based on the specific application of the Beef Act. Also, it is likely that the question of clear attribution of government speech will be revisited by future cases, citing Justice Souter's dissenting opinion.