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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

<p>RANCHERS-CATTELMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, <i>Plaintiff,</i></p> <p>v.</p> <p>SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE, et al.</p> <p><i>Defendants,</i> MONTANA BEEF COUNCIL et al. <i>Intervenors.</i></p>	<p>Case No. 16-00041-BMM-JTJ</p> <p>PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT</p>
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I. Introduction

Plaintiff Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (“R-CALF”) asks that this Court enjoin Defendants (the “Government”) from authorizing private “state beef councils” use of the “Beef Checkoff” tax to fund private speech without the payers’ affirmative consent. The Court held this likely violates the First Amendment and granted a preliminary injunction against the Montana Beef Council using the money without consent. *R-CALF v. Vilsack*, 2016 WL 9804600 (D. Mont. Dec. 12, 2016) (*R-CALF I*), *findings and recommendations adopted sub. nom.*, *R-CALF v. Perdue* 2017 WL 2671072 (D. Mont. June 21, 2017) (*R-CALF II*), *aff’d*, 718 Fed. App’x 541 (9th Cir. 2018) (*R-CALF III*). R-CALF now seeks a declaratory judgment and permanent injunction that applies to the Montana council, and the other state beef councils the Government since stated are similarly situated: those in Hawaii, Indiana, Kansas, Maryland, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and Wisconsin. Statement of Undisputed Facts (“SUF”) ¶¶ 64, 69; *see also id.* ¶ 70.

The federal commodity “checkoff” programs impose a targeted tax on producers of goods, including cattle, to fund “a coordinated program of promotion and research designed to strengthen the[ir]” industry. *See* SUF ¶¶ 31, 33. The Supreme Court held “the compelled funding” mandated by these programs is “not

permitted under the First Amendment.” *United States v. United Foods, Inc.*, 533 U.S. 405, 411, 416 (2001) (addressing Mushroom Checkoff); *see also Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 558 (2005) (addressing Beef Checkoff, which is “very similar” to Mushroom Checkoff). “[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising” and because “compelled assessments” to fund advertising (speech) unnecessarily infringe on “associational rights” and free speech, the First Amendment “requires [courts] to invalidate” such programs. *United Foods*, 533 U.S. at 413-14.

The only reason the Beef Checkoff has survived is the Supreme Court held two of the entities that use the funds, the “Beef Board” and “Beef Committee,” are “effectively controlled by the Federal Government”; thus they generate “government speech,” and “government speech” is exempt from First Amendment scrutiny. *Johanns*, 544 U.S. at 560. In reaching this conclusion, the Court emphasized, *id.* at 560-61, the Beef Board and Beef Committee are creations of the statute establishing the checkoff (the “Beef Act”), 7 U.S.C. § 34, their membership is appointed and can be removed by the Department of Agriculture (“USDA”), 7 U.S.C. §§ 37-40, and USDA reviews and rewrites their speech to ensure it reflects the Government’s agenda, 7 U.S.C. §§ 40-43. These facts, collectively, ensure “political[] accountabil[ity]” for the Board and Committee’s speech and thereby make it government speech. *Johanns*, 544 U.S. at 563.

This case concerns an aspect of the Beef Checkoff the Supreme Court “did not address”: expenditures by private-state-based-beef councils. *R-CALF I*, 2016 WL 9804600, at *5. The councils collect the Beef Checkoff tax in their state, and in exchange are allowed to use up to half the money, passing the remainder to the Beef Board and Committee. *SUF* ¶¶ 44-47. Yet, they lack the government oversight required under *Johanns*. No member of the councils at issue here is appointed or subject to removal by the Government. *SUF* ¶¶ 71-73. While the Government has entered into Memoranda of Understanding (“MOUs”) with some of the councils, allowing it to review their speech, that review is not complete or substantive. *SUF* ¶¶ 79, 82, 85-91. The Government also allows the councils to act as pass throughs, transferring money to other private entities for those entities’ speech, which the Government does not supervise in any way. *SUF* ¶¶ 92-108. Accordingly, the councils regularly hold themselves out as independent from the Government. *SUF* ¶ 109. Indeed, the intervening state councils (“Intervenors”) stated to this Court that the Government “do[es] not (and cannot) adequately represent” their interests because they are “autonomous.” *SUF* ¶¶ 66-68.

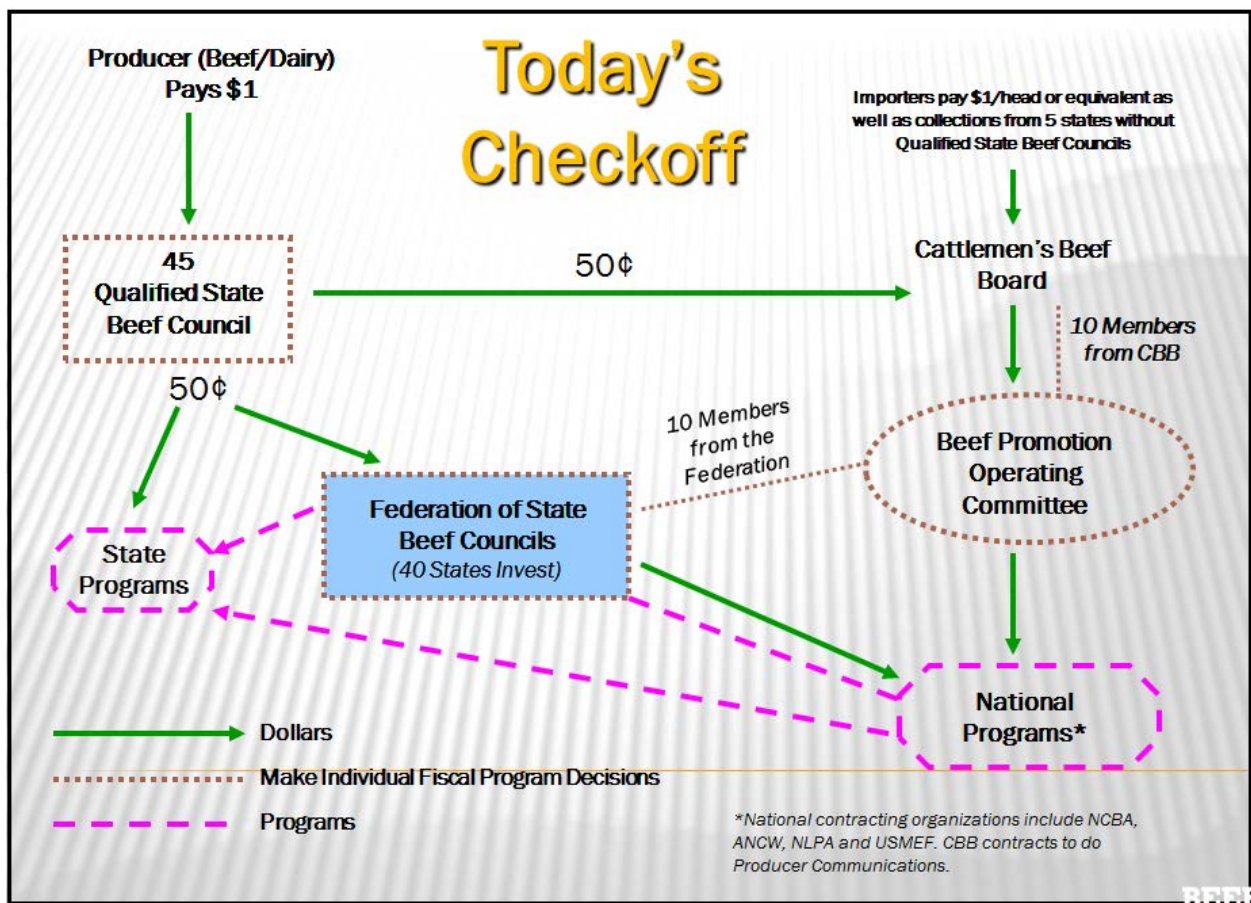
For these reasons, the councils’ use of Beef Checkoff funds supports private, not government speech. Under Supreme Court precedent, if the checkoff subsidizes private speech, it violates the First Amendment. Therefore, the Court should enjoin the councils from using the money unless they first obtain

affirmative consent, with the default being the money goes to the Beef Board and Committee to use for “government speech.”

II. Factual and Legal Background

a. The Beef Checkoff program.

The chart below depicts the movement and users of the Beef Checkoff tax, although, as discussed below, it is not complete. SUF ¶¶ 63.



In nearly every state—and every state at issue here—producers pay the tax to state councils, which can and, according to the Government, typically do keep half of the checkoff money, SUF ¶¶ 47-48. The councils transmit the other half to

the Beef Board. *Id.* The state councils spend their half independently. They use the money to fund their own speech and also make what they call “contributions” to other private entities, such as the Federation of State Beef Councils. SUF ¶¶ 47, 59-60, 92-93. While those entities can use the “contributions” to pay for “national programs,” similar to what is funded by the Beef Board and Committee, that does not need to be the case. The only restriction on these third-parties’ expenditures is that they need to be consistent with the Beef Act and its regulations (“the Beef Order”). *Id.*; SUF ¶ 99.

1. The State Beef Councils.

The state beef councils at issue here are not creations of the Beef Act, Order, or any statute, but privately incorporated entities or subsidiaries of privately incorporated entities. SUF ¶¶ 69-70. Accordingly, Intervenors admit they are “nongovernmental entit[ies].” SUF ¶ 65.

The Government has no role in appointing or removing the councils’ boards or staff. SUF ¶¶ 71-73. Each council controls who makes decisions for the organization. *Id.* Nothing in the Beef Act or Order provides for the Government to have input on these issues. *Id.*

Each council also uses its own private logo to brand its activities. SUF ¶¶ 110-13. Further, the councils *and* the Government state the councils’ speech is independent speech, not that of the Government. SUF ¶¶ 57, 59, 109.

The Government allows the state councils to collect and use Beef Checkoff funds after a single, ten-page form is approved by the Beef Board. SUF ¶¶ 49-50. The councils' only subsequent statutory or regulatory obligations are to turn over at least half the money to the Beef Board, provide an annual audit confirming they did so, and use the money consistent with the Beef Act and Order's broad mandates—that Beef Checkoff money be spent “to strengthen the beef industry” and not in a way that is “unfair,” “deceptive,” or “influencing governmental policy.” SUF ¶¶ 47, 51-52. Purportedly acting under the statutes and regulations, the Beef Board also requests councils submit “annual marketing plan[s]” to the Board—which “outline” the council's “planned activities” for the year—and, undergo a “compliance review” by the Board approximately twice a decade—to ensure the council is not violating the Act or Order. SUF ¶¶ 53-55. Under the statutes and regulations, the Government has no regular contact with the state councils and no one reviews the messages the councils generate with checkoff funds. SUF ¶ 56.

2. *The Memoranda of Understanding Between the State Councils and the Government.*

Following the Magistrate's recommendation in this case, state beef councils—including all the councils in this case except the Maryland and Vermont councils—entered into MOUs with the Government. SUF ¶ 79. The MOUs do not alter how the councils' board or staff are appointed or removed. SUF ¶ 80. They

provide for the councils to submit their annual plans and audits, and specific “plan[s] or project[s]” to USDA for approval, and notify USDA about their meetings. SUF ¶¶ 81-83. But, even those requirements can be waived by “mutual agreement” of the parties. SUF ¶ 84. Further, under the MOUs, the Government’s review of “plan[s] or project[s]” focuses solely on ensuring they are “truthful, accurate, not misleading, and substantiated.” SUF ¶¶ 85-86.

3. Third-Party Recipients of Money from the Councils.

Moreover, the state beef councils can transfer Beef Checkoff money to other private entities, which can use the money as they see fit, so long as it is consistent with the Beef Act and Order’s requirements. SUF ¶¶ 59-60, 92-93. For example, in 2018, the Texas Beef Council gave \$1 million to the Federation of State Beef Councils in “Unrestricted” funds, and another nearly \$1 million in “Prioritized” funds—although it only identified a priority for \$491,400, stating that should support “International Marketing,” which pays for the work of yet another private entity, the U.S. Meat Export Federation (“USMEF”). SUF ¶ 95. The Texas council also paid \$8,600 for “membership” in USMEF. *Id.* Other councils “contribute” to these same entities, as well as others, such as the Wisconsin Livestock Identification Initiative. SUF ¶¶ 94, 97-98.

The Government does not supervise the speech generated with this money. Under the MOUs, the Government only reviews speech produced by third-parties

if it is pursuant to a contract for specific “deliverables” to the states councils; only one such contract exists. SUF ¶ 103-04. To make these “contributions,” the councils merely include a line item in their annual plan. SUF ¶¶ 100. Once the funds are transferred, the Federation of State Beef Councils, for example, states it can spend the money on any “programs established and executed by the Federation” consistent with the Beef Act, with the Federation simply providing an “annual[] account[ing]” of the money’s uses. SUF ¶ 96. As the Government put it, “The Federation [of State Beef Councils] is responsible for its own business decisions and financial accountability.” SUF ¶ 107. The same is true for the other entities that receive funds. *Id.* The Government also “does not select, appoint, or remove” the directors or staff of any of these third-parties. *Id.*

B. R-CALF’s and Its Members’ Injuries.

R-CALF is a national, nonprofit organization based in Montana and dedicated to ensuring the prosperity of independent, domestic cattle producers. SUF ¶¶ 1-4. It has advocated that speech paid for with Beef Checkoff dollars should acknowledge distinctions in the beef supply, which it believes would encourage consumption of domestically raised beef. SUF ¶¶ 7-8. After it determined Beef Checkoff money is spent by private, unaccountable entities, and saw such expenditures frequently subsidizing messages that benefit multinational corporations, rather than domestic producers, it expanded its checkoff-related work

to counteract that abuse. SUF ¶¶ 9-11. It now diverts a substantial portion of its organizational resources to warn producers across the nation about how their money is being spent, keeping R-CALF from engaging in other advocacy. SUF ¶¶ 12-17.

R-CALF members likewise object to the private state beef councils taking and using their Beef Checkoff payments for the councils' speech. SUF ¶ 25-27. Part of the reason they joined R-CALF is to support its advocacy. SUF ¶ 20. Yet, the councils are private entities that R-CALF cannot truly lobby or hold accountable. R-CALF's members would prefer their checkoff money go to the Beef Board and Committee so that it is spent by entities that are politically accountable. SUF ¶¶ 28-29.

C. The Prior Decisions In This Case Provide the Governing Law.

The three decisions in this case provide the framework for assessing the councils' use of checkoff funds. Those decisions explain the Beef Checkoff "require[s] [payers] to 'subsidize a [] message,'" therefore "First Amendment law concerning compelled speech governs" the Beef Checkoff tax. *R-CALF I*, 2016 WL 9804600, at *4 (quoting and citing *Johanns*, 544 U.S. at 557, 559). The "compelled assessments" must be used to "increase the demand" for beef, thus they are part and parcel of generating speech and implicate "the freedom of speech and the freedom of association." *R-CALF II*, 2017 WL 2671072, at *4, *7.

In fact, controlling case law makes clear it violates the First Amendment to compel a subsidy of the private speech “without first obtaining the citizen’s ‘affirmative consent.’” *Id.* at *4 (quoting *Knox v. Serv. Employees Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288, 2296 (2012)). Accordingly, the Ninth Circuit rejected the Government’s claim it could resolve this matter by allowing producers to “opt-out” of funding the state councils, explaining the Government pointed to no “authority” or any principle of law that justified such a burden. *R-CALF III*, 718 Fed. App’x at 543; *see also, e.g., Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (Unless payers of a compelled subsidy “clearly and affirmatively consent before any money is taken from them” the compelled subsidy “violates the First Amendment and cannot continue.”).

However, the First Amendment does not apply to the compelled subsidy of government speech because “[u]nlike private speech, government speech remains ‘subject to democratic accountability.’ People and groups who disfavor government speech may use the political process to compel the government to change its speech.” *R-CALF II*, 2017 WL 2671072, at *5 (quoting and citing *Johanns*, 544 U.S. at 563).

Determining if a compelled subsidy funds “government speech turns on whether government officials exercise ‘effective control’ over the speech. This rule consistently has been understood to mean that the government must at least hold

statutory control over [(a)] the entity that makes the challenged speech, and, also, [(b)] in most cases, the speech itself.” *Id.* (quoting *Paramount Land Co. LP v. California Pistachio Commission*, 491 F.3d 1003, 1011 (9th Cir. 2007)).

The Beef Act and Order’s guidelines for how the checkoff funds should be spent—which provide “broad discretion to determine the content of promotion activities,” requiring only that the expenditures “advance the image and desirability of beef” and not be used for “unfair or deceptive” practices or “to influence governmental policy”—do not establish government control over the councils’ speech. *Id.* at *2, *6 (quotation marks omitted).

The Ninth Circuit explained that in every Ninth Circuit and Supreme Court case to hold an entity was engaged in government speech, the government had the statutory authority to “appoint” the individuals who would control the money and create the speech, thereby controlling the entity. *R-CALF III*, 718 Fed. App’x at 542. Moreover, this Court noted that in holding the Beef Board and Committee were engaged in government speech, the Supreme Court emphasized the Government could “direct the [] advertising program.” *R-CALF II*, 2017 WL 2671072, at *6. At bottom, government speech only exists where it is clear the speech contains “the message established by the” government so it cannot avoid responsibility for the statements. *R-CALF I*, 2016 WL 9804600, at *5 (quoting *Johanns*, 544 U.S. at 560).

Therefore, in concluding the Government's control over the Montana Beef Council was likely insufficient, this Court emphasized "USDA lacks the authority to appoint or remove any ... members." *R-CALF II*, 2017 WL 2671072, at *6; *see also R-CALF III*, 718 Fed. App'x at 542 (affirming such authority is required by all controlling case law). It also explained it could separately hold the Government lacked "effective[] control" because the record indicated "USDA d[id] not control how the [private council] spends the checkoff assessments." *R-CALF II*, 2017 WL 2671072, at *6. With this background, this Court entered the current preliminary injunction against the Montana Beef Council taking producers' money for the council's use without first obtaining their affirmative consent. In Montana, producers may now choose to fund the state beef council, but, by default, their Beef Checkoff money goes to the Beef Board and Committee, whose expenditures have been held to be government speech.

III. Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

IV. Argument

A. R-CALF Had Standing On Behalf of Its Members and Itself.

R-CALF has standing to challenge the councils' use of checkoff money on two separate bases: (1) associational standing to represent the interests of its members; and (2) organizational standing, because it has been injured by the current administration of the Beef Checkoff program. For these reasons, the Government's prior attacks on R-CALF's standing failed, and Intervenors do not identify any doubts about R-CALF's standing, SUF ¶ 30.

An association has standing on behalf of its members when: "(a) its members would otherwise have standing to sue"; (b) the suit is "germane to the organization's purpose"; and "(c) neither the claim asserted nor the relief requested requires the participation of individual members," as is the case here, where "the association seeks a declaration [or] injunction." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)); *see also Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003) (same).

R-CALF's member declarants, who are paying the Beef Checkoff in Indiana, Kansas, Maryland, Montana, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Dakota, Texas, and Wisconsin, SUF ¶¶ 21-24, have standing to challenge the use of checkoff money by private state beef councils.

They are required to pay the checkoff, which, without this Court’s intervention, can be taken by private councils without their consent. *Id.* They object to funding these private entities for the exact reasons courts recognize compelled subsidies of speech interfere with First Amendment rights: (a) they do not want to associate with those entities; and (b) they object to the speech they are funding, particularly because they have no influence over it. SUF ¶¶ 25-28; *see also R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1091-94 (E.D. Cal. 2003). In fact, their compelled subsidies undermine their chosen advocacy, as the private state beef councils need not respond to R-CALF’s lobbying. SUF ¶¶ 12, 28. They are injured by funding private parties, and that injury can be remedied by their money, instead, going to the politically accountable Beef Board and Committee. *R-CALF II*, 2017 WL 2671072, at *3-4 (holding R-CALF’s members’ injuries are traceable to the payments to the councils and redressable through the requested relief).

This suit is also germane to R-CALF’s purpose. R-CALF has worked against the use of the Beef Checkoff to fund private speech for years. *See, e.g.*, SUF ¶¶ 9-13; *see also Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 286 (1986) (work organization announced it was going to do and did is “germane” to its purpose); *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001) (work to protect members “germane” to organization dedicated to “benefiting” members). Thus, R-

CALF can challenge the administration of the Beef Checkoff program to protect its members' rights.

“[A]n organization has ‘direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission’” in response to the alleged unlawful act. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (additions in original) (quoting *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012)).

The transfer of Beef Checkoff funds to private state beef councils for their speech provides R-CALF such standing. R-CALF determined that the private use of checkoff dollars frequently undermines it and its members' advocacy to promote the interests of domestic, independent ranchers. SUF ¶¶ 9-14. Indeed, it filed this suit after the Montana Beef Council used checkoff money to fund a “partnership” with the fast-food-chain Wendy's, which does not commit to sourcing its beef from the United States, let alone Montana, and R-CALF's advocacy against that speech proved ineffective. *Id.* R-CALF has since put on presentations across the nation to warn producers about how the checkoff's use by private entities undermines their interests. SUF ¶ 15. As a small nonprofit with limited resources this diversion of resources has kept and will keep R-CALF from pursuing other work. SUF ¶¶ 5-6, 16-19. Demonstrating just how much its efforts to combat the private use of Beef

Checkoff dollars has drained R-CALF, it estimates the presentations consume 60% of its resources, and since the Court entered its preliminary injunction in this case, R-CALF has expanded its other work by more than 40%. *Id.* Therefore, R-CALF has standing to challenge private state beef councils' use of the checkoff so it can turn more of its energies towards advancing policies to benefit domestic ranchers, including advocating to the Beef Board and Committee. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014).

B. The State Beef Councils' Use of the Beef Checkoff Supports Private Speech, Not Government Speech.

The Government and Intervenors seek to salvage the private councils' ability to use Beef Checkoff funds through the government speech doctrine, which "eliminates all First Amendment protection." *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017). Unsurprisingly given this extreme consequence, the Supreme Court recently warned "we must exercise great caution before extending our government-speech precedents." *Id.* at 1758. The government speech doctrine should only apply where "the democratic process" will ensure the expressions "espouse the views of a majority," *Delano Farms Co. v. California Table Grape Commission*, 586 F.3d 1219, 1224 (9th Cir. 2009) (quotation marks omitted), and, if not, the Government will be held to account and alter the speech. *Johanns*, 544 U.S. at 563; *see also Delano Farms Co. v. California Table Grape Com.*, 417 P.3d 699, 710

(Cal). (citing additional Supreme Court authority), *cert. denied* 139 S. Ct. 567 (2018).

Here, however, the record establishes that neither the councils nor their activities funded by the Beef Checkoff are responsive to the public for at least four separate reasons: (1) the people creating the councils' speech are not appointed or removable by the Government, often being selected through biased procedures; (2) even for those councils subject to the MOUs, the Government does not ensure the councils' speech reflects the Government's agenda; (3) the state councils fund the speech of other private organizations the Government does not supervise; and (4) both the Government and councils present the councils' speech as private speech. To conclude the state beef councils are engaged in government speech despite any one of these facts would mark an expansion of the government speech doctrine. Thus, each is a basis to hold that the councils generate private speech, and are subject to the First Amendment. *See Matal*, 137 S. Ct. at 1758.

i. The State Beef Councils' Board and Staff Are Privately Selected.

The councils should be held to engage in private speech because the Government and Intervenors admit no government is involved in selecting or replacing the directors or staff of the state beef councils, SUF ¶¶ 72-73, and nothing in the Beef Act or Order provides that authority, SUF ¶ 71. Therefore, the councils lack a characteristic of *every* entity the Ninth Circuit and Supreme Court

has held can use compelled subsidies to generate “government speech.” *R-CALF III*, 718 F. App’x at 542; *see also Johanns*, 544 U.S. at 561 (Beef Board and Committee’s “members are answerable to the Secretary” and members of both committees are “appointed by him as well”).

Indeed, in *every* case the Government has cited holding an entity was engaged in government speech, the government appointed members of the body overseeing the speech. *In re Tourism Assessment Fee Litigation*, 391 Fed. App’x 643, 646 (9th Cir. 2010); *Delano Farms*, 586 F.3d at 1228-29; *Paramount Land*, 491 F.3d at 1010; *Am. Honey Producers Ass’n, Inc. v. U.S. Dep’t of Agric.*, 2007 WL 1345467, at *9 (E.D. Cal. May 8, 2007); *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45, 52 (D.D.C. 2006); *Cricket Hosiery, Inc. v. United States*, 30 C.I.T. 576, 584 (2006).

It makes sense the absence of such authority would be significant. Determining who crafts the speech prevents the government from being able “to disclaim responsibility for promotional messaging.” *Delano Farms Co.*, 417 P.3d at 722. Indeed, the Ninth Circuit has repeatedly held a key indicia of government action is that the actors are government appointees. *Delano Farms*, 586 F.3d at 1225; *see also Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1407 (9th Cir. 1996) (same). If the Government does not take charge of choosing who generates the speech, it can dodge responsibility for their

expressions, making “the democratic process” an ineffective control. *R-CALF II*, 2017 WL 2671072, at *4 (citing *Johanns*, 544 U.S. at 563).

Moreover, the state beef councils reveal that when private entities select who generates their speech, they insulate themselves against public influence. For example, the bylaws of the Kansas, Montana, Texas, and Wisconsin councils ensure the election of certain directors. SUF ¶¶ 74-78. In other words, the councils have *undemocratic* procedures, meaning there is no reason to expect they will be influenced by the majority’s views. *See R-CALF II*, 2017 WL 2671072, at *4.

The Government has suggested that because the councils’ “certification” to collect and use Beef Checkoff funds can be revoked, the Government is essentially responsible for choosing their directors. *See, e.g.*, Dkt. No. 39 at 2. Hardly. A council can only be de-certified based on the content of its speech if the speech was unfair, deceptive, or sought to influence government policy. SUF ¶ 61. That narrow power to disband a council—which is actually possessed by the Beef Board, not the Government, *id.*—does not ensure the councils have directors who will reflect the Government’s views or respond to public pressure. Indeed, the *single* time a council was de-certified, the exact same council was later re-certified. SUF ¶ 62.

That state beef councils board and staff are privately selected makes their speech private speech.

ii. The Government Does Not Ensure Councils' Speech Reflects the Government's Views.

Johanns and this Court also held that for an expression to be government speech the Government must ensure that “from beginning to end” it is the “message established by the Federal Government,” which it does not do here. *Johanns*, 544 U.S. at 563; *see also R-CALF II*, 2017 WL 2671072, at *7. For the Vermont and Maryland councils, the Government does not have *any* authority to influence the messages they generate. The only supervision of their activities is the annual marketing plans and audits they submit to the Beef Board, and the Board’s twice a decade “compliance review.” SUF ¶¶ 51-56. Even for those councils that have entered the MOUs, the Government has abdicated control over their messages in multiple ways.

First, part of the speech the Beef Checkoff funds is in in-person marketing, including “foreign marketing visits,” SUF ¶ 90. The Government, however, has explained it has not conducted any “review ... of state beef councils’ requests to travel to foreign countries” or the “speech they will engage in” during the visits. *Id.* Likewise, it signs off on councils’ public presentations without asking what will be said. SUF ¶ 91. The MOUs only require the state beef councils submit “plan[s] or project[s]” to the Government, SUF ¶¶ 81-82, and that appears to have been interpreted to mean the Government will only review physical copies of the councils’ speech. Beyond being dispositive on its own, that the Government fails

to review the councils' statements confirms that its failure to control the councils' board and staff is meaningful, the Government allows private actors to select how they will convey a statement, which must be private speech.

Second, what review the Government performs under the MOUs is substanceless. The Government relies on "Guidelines" for its review of the state beef councils' written speech, which provide the Government will accept speech as "government speech" so long as "[f]or example ... guidance related to foodborne illness outbreaks [] agree[s] with the guidance issued by USDA and other Federal agencies." SUF ¶ 87. The Government's focus is on ensuring the councils' speech aligns with the Government's requirements for "nutritional" and "health" claims. SUF ¶ 85. It only ensures a statement reflects political officials' views when the speech directly references the official. SUF ¶ 87. It claims that if a council offers an opinion that "cannot be substantiated" it will ask the opinion be removed. SUF ¶ 88. But, it does not identify any changes it has requested to a council's message. *Id.* The Government also does not purport to recommend positions to the councils. SUF ¶ 89. By contrast, the Supreme Court emphasized the Government helped "develop[]" the content and then undertook final "rewrite[es]" of the Beef Board and Committee's speech. *Johanns*, 544 U.S. at 561.

The Supreme Court has warned it would be a "dangerous misuse" of the government speech doctrine "[i]f private speech could be passed off as government

speech by simply affixing a government seal of approval.” *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). Where the Government signs off on slogans so long as they are not problematic that is not government speech because the speech is not required to reflect the Government’s agenda, and thus the Government will not be held accountable. *See id.* at 1759. To the extent the MOUs provide for any review of the state beef councils’ speech, they only provide for a cite-check and rubberstamp, which is another reason to hold the councils’ speech is private speech.

iii. *Councils Are Allowed To Fund Other Unaccountable Speech.*

Moreover, councils can use Beef Checkoff money to sponsor third-parties’ speech, over which the government has no authority, thus their use of the Beef Checkoff cannot fund government speech. The state beef councils can send money to other private entities such as the Federation of State Beef Councils, U.S. Meat Export Federation, and Wisconsin Livestock Identification Initiative to use in any manner those entities choose, so long as it is consistent with the Beef Act and Order. SUF ¶¶ 92-93, 99. No member of these entities is appointed or removable by the Government. SUF ¶ 107. Even under the MOUs, the Government signs off on these “contributions” as part of the councils’ annual plans, which provide the Government, at most, an “outline” of how the money will be spent—such as that

the money will be used to “develop and implement demand generation initiatives,”
SUF ¶¶ 100-02.

Intervenors admit that even after the money is spent they do not know what expressions they funded. Despite paying thousands of dollars to the Export Federation in “membership” dues, and “contributing” much more, Intervenors rely on the Export Federation’s annual reports, which “celebrate[]” the Export Federation’s work with self-selected “activity highlights,” to demonstrate how the money was spent. SUF ¶¶ 105-06; *see also* SUF ¶ 108 (Government admitting it cannot confirm how third-parties spend “contributions” they receive).

As noted above, that this speech must comply with the Beef Act and Order does not make it “government speech.” *R-CALF II*, 2017 WL 2671072, at *6. The Ninth Circuit has explained the Government must go “much further ... than the Beef Act and Order” in directing the nature of the speech, and *also* have authority to “nominate” and “remove” the people crafting the messages, before a compelled subsidy will be held to fund government speech. *Delano Farms*, 586 F.3d at 1228-29. Government “involve[ment] ... in the oversight” of the specific statements is elemental to government speech and, because the state councils can use the checkoff to fund activities of other unaccountable private entities, that is not present here. *See id.* 1229; *see also R-CALF I*, 2016 WL 9804600, at *5 (“[A]bsent [Government] control” over “every word,” R-CALF should prevail.).

iv. Councils Present Their Speech As Private Speech.

Finally, the state beef councils’ speech should be held to be private speech because they and the Government depict it as private speech, ensuring no citizen would know to hold the government accountable for the statements. *In re Tam*, 808 F.3d 1321, 1345 (Fed. Cir. 2015) (en banc) (where speech is “clearly private speech” it cannot be “government speech” because it is “associated with” the private actor, not the Government), *aff’d Matal*, 137 S. Ct. 1744.

Below are examples of beef council speech the Government has approved.

Save \$1.00
when you purchase any cut of beef and any flavor jar of Bolner's Fiesta Brand Seasoning (5 oz. or larger)

Grilled Southwestern Steak and Colorful Vegetables

INGREDIENTS

- 1 beef top round steak, cut 1-inch thick (about 1 1/2 pounds)
- 1/4 cup fresh lime juice
- 1/4 cup prepared mild salsa
- 1 Tbsp. chopped garlic
- 1 Tbsp. olive oil
- 1 tsp. ground cumin
- 1/2 tsp. coarse grind black pepper
- 2 Tbsp. olive oil
- 1 medium green or red bell pepper, cut into 1/4-inch strips
- 8 oz. button mushrooms, sliced 1/4-inch thick
- 2 cups sliced mushrooms, 1/4-inch thick
- 1/2 tsp. ground cumin
- 1/2 tsp. salt
- 1/2 tsp. coarse grind black pepper
- 1 cup finely chopped tomatoes
- 1/2 cup chopped green onions

PREPARATION

- Combine marinade ingredients in small bowl. Place beef steak and marinade in food-safe plastic bag; turn steak to coat. Close bag securely and marinate in refrigerator 1 1/2 hours or as long as overnight, turning occasionally.
- Remove steak from marinade; discard marinade. Place steak on grill over medium, ash-covered coals. Grill, covered, 12-14 minutes (over medium heat on preheated gas grill, 10-9 minutes) for medium rare (145°F) doneness, turning once. Do not overcook.
- Meanwhile prepare Colorful Vegetables. Heat 2 tablespoons olive oil in large nonstick skillet over medium-high heat. Add bell pepper strips; cook and stir 1-2 minutes or until crisp-tender. Add mushrooms, onion, cumin, salt and black pepper; cook and stir 3-4 minutes or until crisp-tender. Add tomato and green onions, cook and stir 1 minute.
- Carve steak into thin slices season with salt, as desired. Serve with Colorful Vegetables.

<http://bit.ly/19h0eak>

Nutrition Information
Nutrition information per serving: 377 calories; 15g fat (12g saturated fat); 7g monounsaturated fat; 27mg cholesterol; 332mg sodium; 4g calcium; 16g fiber; 21g protein; 53mg iron; 10mg vitamin B12; 2.3mg vitamin B6; 2.7mg zinc; 15.7mg potassium; 4.3mg zinc; 150mg sodium.

0071758-018004

CONSUMER: Take this coupon to the checkout stand and save \$1.00 NOW on Beef when you purchase any flavor jar Bolner's Fiesta Brand Seasoning. Coupon expires 10/1/16. Limit one coupon per consumer per store visit and coupon must be presented at time of purchase. NO DOLLAR FOR TRIPLE COUPONING. No duplication, reproduction or facsimile will be accepted. Subject to retailer product availability. Please visit Bolner's Fiesta Brand Spices at www.fiestaspices.com.

RETAILER: Send coupon after redemption to Bolner's Fiesta Products, Inc., CMS #71758, 11 Fawcett Drive, Del Rio, TX 78840, for reimbursement of face value plus eight cents handling. Void if duplicated. Proof of purchase may be required upon submission to validate authenticity. Any other duplication of this coupon may be fraudulent. Consumers must pay sales tax. Offer/Coupon expires 10/1/16.

SUF ¶ 114

Yes, please.

BEEF LOVING TEXANS

CREATE YOUR PLATE
Healthy Meal Planning

FAMILY MEAL-TIME TIPS

- Use your plate to create a healthy meal for your family.
- Try to include an variety of colors of fruits and vegetables. Different colors give you different nutrients and vitamins.
- Keep healthy mealtime. Talk about what you're eating and how it makes you feel.
- Have yourself a plate after the meal to see what you've eaten!

Fruit & Non-Starchy Vegetables

Protein

Grains & Starchy Vegetables

Low-Fat Dairy

For more ideas, visit www.BeefLovingTexans.com

SUF ¶ 115



SUF ¶¶ 118-19.

The Government has also allowed the Pennsylvania council to place its unique logo, reading “Pennsylvania Beef Council Funded By Beef Farmers and Ranchers,” at the top of a flyer funded by the Beef Checkoff, alongside a description of the council as the “voice for our beef and veal partners”—no other information identifying the speaker appeared on the ad. SUF ¶ 116. The Government likewise approved a letter sent by the Texas Beef Council that stated it was on behalf of “Texas’ beef ranchers.” SUF ¶ 117.

Further, the state beef councils publically claim they are “non-profit organization[s] charged with the promotion and marketing of beef and beef products” whose officers are “responsible for” and “direct[.]” their activities. SUF ¶ 109. The Government-controlled Beef Board likewise has said the members of “your state beef council board determine how [the checkoff] should be invested in local and state programs.” SUF ¶ 57.

Particularly because the speech appears to be private speech—even using private logos, *see* SUF ¶¶ 110-13—the public will believe such statements that the councils are engaged in private speech, and the Court should conclude the same.

Intervenors imply that the nature of the councils’ speech is only relevant if particular plaintiffs are “associated with [the] speech.” *Johanns*, 544 U.S. at 565. Not so. *Johanns* stated that even if a compelled subsidy generally funds “government speech,” private individuals can bring a claim against particular expressions, if the speech is associated with the plaintiffs, as that would interfere with their free expression. *Johanns*, 544 U.S. at 565 & n.8. Nothing about this separate cause of action suggests “government speech” exists if the speech is affirmatively represented to be private speech. Core to whether a compelled subsidy funds government speech is whether the speech is ““subject to political safeguards [that] set [it] apart from private messages,”” something that cannot be true if everyone affirmatively disclaims the speech as government speech. *Paramount Land*, 491 F.3d at 1011 (quoting *Johanns*, 544 U.S. at 563).

Further, contrary to *Johanns*’ dicta, in recent government speech cases challenging infringement on individual expression, the Court examined whether viewers would ““appreciate the identity of the speaker”” as the government, not just whether the speech could be mistaken for speech of the plaintiff. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247 (2015)

(quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 471 (2009)). Thus, the state councils' speech is another reason for the Court to conclude the councils use checkoff money for private speech.

* * *

In sum, the Government's failure to appoint the state councils' officers, ensure the council's speech conveys the Government's message, review the private-third-party speech the councils sponsor, or prohibit the speech from being presented as private speech each provide separate bases to conclude the councils use Beef Checkoff money for private speech, which is subject to the First Amendment.

C. Therefore, the Continued Transfer of Money To the State Beef Councils Without Affirmative Consent Is Unconstitutional and Must Be Enjoined.

In light of the above, the state beef councils taking and using Beef Checkoff funds violates the First Amendment and must be enjoined. In reviewing the nearly identical Mushroom Checkoff program, the Supreme Court explained that even assuming the program was subject to the "lesser" First Amendment scrutiny applied to commercial speech, there was "no basis ... to sustain the compelled assessments" for private speech. *United Foods*, 533 U.S. at 410. The Court stated such compelled funding of private speech can serve no legitimate purpose or be properly tailored. *Id.* at 415. This is particularly the case here, where the

constitutional violation stems from private councils siphoning off money without consent, and can be remedied by requiring producers to either consent to the councils' expenditure, or having their money go to the Beef Board and Committee to fund related speech, but which has been held to be democratically accountable and constitutional. *See also R-CALF II*, 2017 WL 2671072, at *7 (Supreme Court since “made clear” ““exact[ing]” scrutiny applies, which is ““rare[ly]” met) (quoting *Knox*, 132 S. Ct. at 2289)).

Where a plaintiff shows an ongoing violation of the First Amendment, it is entitled to a declaratory judgment and an injunction to stop the violation. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009); *Brown v. California Dep't of Transp.*, 260 F. Supp. 2d 959, 967-68 (N.D. Cal. 2003); *ApolloMedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1088-89 (N.D. Cal. 1998) (three judge panel).

The Government has suggested that because, following this suit, it informed producers they can “opt-out” of funding state beef councils, the program should be allowed to continue. *See* SUF ¶¶ 120-30 (describing “opt-out” system). However, the Supreme Court has explained an “opt-out” system “substantially impinge[s] upon the First Amendment” because it places a burden on those seeking to protect their rights when there is no right to take the money. *Knox*, 567 U.S. at 321; *see also id.* at 312 (cannot “presume acquiescence in the loss of fundamental rights” (quotation marks omitted)). Therefore, in *Knox*, 567 U.S. at 322, and more recently

in *Janus*, 138 S. Ct. at 2486, the Court explained compelled subsidies for speech “cannot continue” unless there is “affirmative consent before any more is taken.”

D. Were the Court To Disagree An Injunction Is Still Required.

Even if the Court concludes the councils are engaged in government speech, it would still need to issue an injunction covering these councils. The MOUs are all that provide the Government any involvement with the councils’ speech, and they can be revoked at any time. SUF ¶ 84. Indeed, this appears likely to occur. The MOUs were created solely in response to this suit and are inconsistent with the Government’s statements that the state beef councils should be independent, *see* SUF ¶¶ 79, including statements in Beef Order, 51 Fed. Reg. 26132, 26137 (July 18, 1986). Therefore, the councils could (seemingly rightly) argue the Government cannot enforce MOUs that “circumvent” such commitments. *Exec. Bus. Media, Inc. v. U.S. Dep’t of Def.*, 3 F.3d 759, 763 (4th Cir. 1993). This provides another reason for the Court to not rely on the MOUs, but also mandates an injunction to enforce the MOUs should the Court conclude they render the program constitutional. The Ninth Circuit has explained that where an agency “might find it convenient at any time to dispense” with the commitments that make its conduct lawful, the plaintiffs are “entitled to the protection of an enforceable order” to ensure the violation will not recur. *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992).

V. Conclusion.

The Court should hold these state beef councils taking Beef Checkoff money for their uses unconstitutional, unless the payer first affirmatively consents. Otherwise, the money should go to the Beef Board and Committee, which the Supreme Court has held can constitutionally expend the funds.

RESPECTFULLY SUBMITTED this 20th day of May, 2019.

PUBLIC JUSTICE, P.C.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)

I hereby certify that this reply brief contains 6,500 words, excluding the caption, certificates of service and compliance, and tables of contents and authorities. That word count was calculated using the Microsoft Word program used to write this brief.

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