FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA, a Montana Corporation, *Plaintiff-Appellant*, v. THOMAS VILSACK, in his Official Capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendants-Appellees*, MONTANA BEEF COUNCIL; NEBRASKA BEEF COUNCIL; PENNSYLVANIA BEEF COUNCIL; TEXAS BEEF COUNCIL; LEE CORNWELL; GENE CURRY; WALTER J. TAYLOR, JR., *Intervenor-Defendants-Appellees.*	No. 20-35453 D.C. No. 4:16-cv-00041-BMM OPINION

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Argued and Submitted June 10, 2021
Portland, Oregon

Filed July 27, 2021

Before: Kim McLane Wardlaw, Richard C. Tallman, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz

COUNSEL

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International USA, and Western Organization of Resource Councils.

OPINION

HURWITZ, Circuit Judge:

This case involves a challenge by the Ranchers-Cattlemen Action Legal Fund ("R-CALF") to mandatory assessments on cattle sales imposed by federal law used to fund advertisements for beef products. The Montana Beef Council ("MBC") and other qualified state beef councils ("QSBCs") receive a portion of the assessments to fund promotional activities and some of these QSBCs direct a portion of these funds to third parties. The dispositive question is whether the speech generated by the third parties is government speech and therefore exempt from First Amendment scrutiny. The district court so held and entered summary judgment against R-CALF. We affirm.

I

A

The Beef Promotion and Research Act of 1985 ("Beef Act") imposes a $1 assessment, or "checkoff," on each head of cattle sold in the United States to fund consumption promotions to "maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. §§ 2901(b), 2904(8)(C). The Secretary of Agriculture oversees the beef checkoff program through the Cattlemen's Beef Promotion and

Research Board (the "Beef Board"), whose members the Secretary appoints. *Id.* § 2904(1).[1] A QSBC typically collects the checkoff, retaining 50 cents to fund state marketing efforts, and forwarding the remainder to the federal program. *Id.* § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3). Producers may, however, opt out of funding their QSBC and direct the entire assessment to the federal program. *See* Beef Promotion and Research, 84 Fed. Reg. 20,765, 20,766–67 (May 13, 2019).

Since 2016, the Secretary, through the Agricultural Marketing Service ("AMS"), has entered into memoranda of understanding ("MOUs") with QSBCs. The MOUs grant the Secretary pre-approval authority over "any and all promotion, advertising, research, and consumer information plans and projects." The Secretary also reviews and approves the QSBCs' budgets and marketing plans, which detail their anticipated expenses and disbursements, and government officials can participate in QSBC board meetings at which promotional and funding decisions are made. The MOUs allow the Secretary to decertify a noncompliant QSBC, thereby terminating its access to checkoff funds.

Using checkoff funds, QSBCs can hire private third parties to produce advertisements and other

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[1] The Beef Board elects ten members to the Beef Promotion Operating Committee; a federation of QSBCs elects the other ten members. 7 U.S.C. § 2904(4)(A). The Operating Committee develops promotional campaigns for the Beef Board. *See* 7 U.S.C. § 2904(4)(B).

promotional materials. Some engagements involve contracts. Under the MOUs, the Secretary must pre-approve all contracts and any plans or projects developed under them. The parties agree that third-party speech generated pursuant to these contracts is government speech.

But QSBCs can also make noncontractual transfers of checkoff funds to third parties to produce promotional materials. Materials produced by this funding method need not be pre-approved. Recipients of these transfers must identify their expenditures in an "annual accounting" and abide by the principles of the Beef Act—promoting beef without being unfair, deceptive, or political. The primary issue on appeal is whether speech made by third parties under these arrangements is effectively government speech.

B

R-CALF's members include cattle producers who object to their QSBCs' advertising campaigns. R-CALF first challenged the checkoff program in 2016, alleging that the distribution of funds to the MBC under the federal program is an unconstitutional compelled subsidy of private speech. While that litigation was pending, the MBC entered into an MOU with the Secretary. Without considering the MOU, the district court entered a preliminary injunction preventing the use of checkoff funds for promotional campaigns absent the producers' consent. A divided panel affirmed

the preliminary injunction; the majority expressly declined to consider the effect of the MOU. *R-CALF v. Perdue*, 718 F. App'x 541, 542 n.1 (9th Cir. 2018). The dissent opined that the MOU "plainly grants the Secretary complete pre-approval authority over 'any and all promotion, advertising, research, and consumer information plans and projects' of the MBC," and therefore would have vacated the preliminary injunction. *Id.* at 543 (Hurwitz, J., dissenting) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005)).

On remand, R-CALF amended its complaint to seek relief against fourteen additional QSBCs, all of which had MOUs with the Secretary. Four QSBCs and three producers intervened to defend the program. The district court granted summary judgment to the Secretary and intervenors, adopting a magistrate judge's proposed findings of fact and conclusions of law.

The district court found that R-CALF had standing to sue. But it concluded that the MOUs gave the Secretary sufficient control over the promotional program to make the QSBCs' speech—and the speech of third parties they paid—effectively government speech. It also rejected R-CALF's request for an injunction to ensure the Secretary continues to enforce the terms of the MOUs. R-CALF timely appealed.

II

We agree with the district court that R-CALF has associational standing to sue the twelve QSBCs

to which its members pay checkoffs. But R-CALF concedes that it lacks such standing to challenge the use of checkoff funds by QSBCs in states where none of its members pay checkoffs—Hawaii, South Carolina, and Vermont. Thus, R-CALF must establish direct standing to sue those three QSBCs.

"[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). "Of course, organizations cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all, but they can show they would have suffered some other injury had they not diverted resources to counteracting the problem." *Id.* (cleaned up); *see also Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154–55 (9th Cir. 2019) (collecting cases).

R-CALF's mission includes "protecting domestic, independent cattle producers." R-CALF uses some 60% of its resources to educate producers on the use of checkoff funds by QSBCs. The beef checkoff program affects that mission and R-CALF has devoted (and continues to devote) resources, independent of expenses for this litigation, to deal with the program that might otherwise be used in support of that mission. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) (spending "time and resources" to "meet"

with impacted individuals that kept from other "core organizing activities" established standing); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) ("divert[ing] resources to educational programs" established standing). Moreover, if R-CALF did not pursue this litigation, the QSBCs would have continued to use funds in a way that would frustrate R-CALF's organizational mission by allegedly "promot[ing] corporate consolidation in the beef industry." *See E. Bay Sanctuary*, 993 F.3d at 663. We therefore find that R-CALF has direct standing to pursue this litigation against the three QSBCs to which none of its members pay checkoffs.

III

A

The critical question in determining whether speech is public or private is whether the speech is "effectively controlled" by the government. *Johanns*, 544 U.S. at 560. In *Johanns*, the Supreme Court upheld the federal portion of the beef checkoff program against a compelled-speech attack because "the government sets the overall message to be communicated and approves every word that is disseminated." *Id.* at 562. *Johanns* "emphasized three overlapping aspects" of the federal program: (1) "Congress directed the establishment of the program itself, including its promotional activities," (2) "Congress and the Secretary specify the general content of the promotional campaigns," and (3) "the Secretary 'exercises final

approval authority over every word used in every promotional campaign.'" *Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1009–10 (9th Cir. 2007) (quoting *Johanns*, 544 U.S. at 560–61, 563); *see also Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1226–27 (9th Cir. 2009) (identifying the same factors).

Applying the *Johanns* factors, this Court has twice issued opinions upholding mandatory assessment programs against First Amendment attacks.[2] *Paramount Land* refused to enjoin as unconstitutional a California statute providing subsidies from assessments on pistachio sales to the California Pistachio Commission because the State had specified the overall goal of the program—to promote pistachio sales—and exercised control over messaging. 491 F.3d at 1010–12. The Commission, comprised of nine members, only one of whom was named by the State, was required to submit to the State for concurrence "an annual statement of contemplated activities . . . including advertising, promotion, marketing research, and production research." *Id.* at 1010 (quoting Cal. Food & Agric. Code § 69051(q)). Noting that the State had "less control" over the Commission than the Secretary exercised over the Beef Board, the *Paramount* panel nonetheless concluded that "[t]o draw a line between these two approaches to oversight risks micro-managing

[2] In an unpublished decision, this Court also upheld mandatory assessments on rental car transactions. *See In re Tourism Assessment Fee Litig.*, 391 F. App'x 643, 645–46 (9th Cir. 2010).

legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." *Id.* at 1011–12.

Delano Farms upheld similar compulsory assessments on California table grape growers, citing a state legislative directive that went "much further in defining the Commission's message than the Beef Act" along with the State's power to appoint and remove all California Table Grape Commissioners. 586 F.3d at 1225, 1228, 1230. The Court reached this conclusion despite recognizing that the statute did "not *require* any type of review by the [State] over the actual messages promulgated by the Commission." *Id.* at 1229.

B

This case is similar to *Paramount Land* and *Delano Farms*. Under the MOUs, QSBCs must submit "for pre-approval" by the Secretary "any and all promotion, advertising, research, and consumer information plans and projects"[3] and "any and all potential contracts or agreements to be entered into by [QSBCs] for the implementation and conduct of plans or projects funded by checkoff funds."[4] QSBCs must also submit "an annual budget outlining and explaining . . . anticipated expenses and disbursements" and a

[3] QSBCs have submitted thousands of approval requests to the AMS. For example, the Texas QSBC has made more than 650 submissions, and it may take days or weeks before a final product is approved.

[4] In 2018 and 2019, the AMS reviewed about 155 QSBC contracts.

"general description of the proposed promotion, research, consumer information, and industry information programs contemplated." *See Paramount Land*, 491 F.3d at 1010 (noting that the Pistachio Commission must submit "an annual statement of contemplated activities . . . including advertising, promotion, marketing research, and production research" (quoting Cal. Food & Agric. Code § 69051(q))). Failure to comply can lead to de-certification of the QSBCs by the Secretary. This establishes, as in the federal program, "final approval authority over every word used in every promotional campaign." *Johanns*, 544 U.S. at 561. Promotional campaigns by QSBCs and contracted third parties subject to the Secretary's pre-approval are therefore plainly government speech.

Third-party speech not subject to pre-approval is also "effectively controlled" by the government. Congress expressly contemplated the participation of third parties in the beef checkoff program, designating several "established national nonprofit industry-governed organizations" with whom the Operating Committee could contract to "implement programs of promotion." 7 U.S.C. § 2904(6).[5] The Supreme Court upheld that

[5] Most of the third-party funding goes to two advocacy organizations—the Federation Division of the National Cattleman's Beef Association ("Federation") and the United States Meat Export Federation ("USMEF")—with established relationships with the Beef Board. Congress gave the Federation an express role in the beef checkoff program, authorizing it to elect members of the Operating Committee, 7 U.S.C. § 2904(4)(A), and directing the Operating Committee to "enter into contracts or agreements

program despite recognizing the presence of "assistance from nongovernmental sources in developing" advertising. *Johanns*, 544 U.S. at 562.

Paramount Land vacated a preliminary injunction in a similar program despite the Pistachio Commission's use of funds from assessments to pay "a political consultant who hires lawyers to represent the industry before the International Trade Commission and the Commerce Department, and to lobby government entities on behalf of the pistachio industry." 491 F.3d at 1007. We treated the third-party speech as that of the Commission because the "message set out in the pistachio promotions is from beginning to end the message established by the state government." *Id.* at 1012 (cleaned up).

Here, too, the message is firmly established by the federal government. The Beef Act's implementing regulations require that all third-party speech "strengthen the beef industry's position in the marketplace," and not mention "brand or trade" names, engage in "unfair or deceptive acts or practices," or seek to influence "governmental policy or action." 7 C.F.R. § 1260.169(a), (d), (e). QSBCs must submit annual budget and marketing proposals for the Secretary's approval that contain "anticipated expenses and disbursements" and "a general description of the

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. . . with established national nonprofit industry-governed organizations, including the federation . . . to implement programs of promotion, research, consumer information, and industry information," 7 U.S.C. § 2904(6).

proposed promotion . . . programs contemplated." In addition, the QSBCs must give the Secretary advance notice of all board meetings, allowing participation by the Secretary or his designees in any discussions about payments to third parties.[6]

R-CALF argues that such safeguards are insufficient because the government does not exercise final pre-approval authority over some third-party speech. But in *Paramount Land*, we found dispositive the government's *ability* to control speech, even when it declined to do so. *See* 491 F.3d at 1011–12. Here, the Secretary clearly has that authority. In addition to the oversight previously mentioned, the Secretary has unquestioned control of the flow of assessment funds to the QSBCs—and the threat of decertification under the MOUs and the regulations if he disapproves of the use of those funds. *See* 7 C.F.R. § 1260.181(a) (providing for certification, and, impliedly, decertification of QSBCs by the Beef Board); *see also id.* § 1260.213 (providing for the removal of Beef Board members by the Secretary). "Just as 'the Secretary of Agriculture does not write the copy of the beef advertisements himself' for the Beef Board, neither should such oversight be required for the [] scheme to pass constitutional muster." *Paramount Land*, 491 F.3d at 1012 (quoting *Johanns*, 544 U. S. at 560) (cleaned up). A contrary holding here "risks micro-managing

[6] Defendants also argue that the opt-out scheme cures any First Amendment concern. Because we hold that the government effectively controls the speech at issue, we do not reach this issue.

legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." *Id.* at 1012.[7]

We therefore affirm the summary judgment of the district court.

IV

Even if the underlying summary judgment is affirmed, R-CALF nonetheless argues that the district court should have entered a permanent injunction requiring the continuation of the MOUs to prevent the risk that the current policy will be undone. The district court determined that no injunction was needed because the MOUs mooted R-CALF's entitlement to relief and no exception to mootness applied.

"It is well-established . . . that 'voluntary cessation of allegedly illegal conduct does not deprive the

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[7] R-CALF also argues that the QSBCs must have at least some members appointed and removable by the Secretary for the speech to constitute government speech. But the Secretary's ability to decertify a QSBC—which has been previously exercised—provides even greater oversight than the limited removal authority this Court has cited in other cases. *See Delano Farms*, 586 F.3d at 1229 (noting the State's power to remove individual members of the Table Grape Commission and to recommend that producers suspend the Commission's operation); *Paramount Land*, 491 F.3d at 1011 (noting that while the Secretary cannot remove members of the Pistachio Commission, she may "suspend or discharge the Commission's president if he has engaged in any conduct that the Secretary determines is not in the public interest," or "correct or cease any existing activity or function that is determined by the [S]ecretary not to be in the public interest or in violation of the Pistachio Act") (cleaned up).

tribunal of power to hear and determine the case' unless 'it can be said with assurance that there is no reasonable expectation that the alleged violation will recur' and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (cleaned up) (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). The government receives greater deference than private parties when courts analyze voluntary cessation. *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (collecting cases). But the government "must still demonstrate that the change in its behavior is entrenched or permanent." *Fikre*, 904 F.3d at 1037 (cleaned up). It must be "absolutely clear to the court, considering the procedural safeguards insulating the new state of affairs from arbitrary reversal and the government's rationale for its changed practices, that the activity complained of will not reoccur." *Id*. at 1039 (cleaned up).

The government has met that burden here. To be sure, the MOUs are revocable. And, the Secretary entered into the first MOU only after the magistrate judge recommended a preliminarily injunction in this case. But, over five years have now passed since the Secretary first entered into the MOUs to document the Department's control of the use of checkoff funds—including with QSBCs not named in this litigation. *See Am. Diabetes Ass'n*, 938 F.3d at 1153 (finding two years of policy weighs in favor of mootness). And the MOUs remain binding unless both parties agree to rescind

them, providing safeguard from arbitrary reversal. *See Fikre*, 904 F.3d at 1039. Under these circumstances, the MOUs are an "entrenched" change in the prior status quo, and the district court did not err, in the absence of any evidence that the Secretary intends to withdraw from the MOUs, in declining to enter a permanent injunction requiring him not to.[8]

AFFIRMED.

[8] We also reject R-CALF's cursory argument that the MOUs are unlikely to remain in place because they did not go through notice and comment. Even assuming that R-CALF preserved this argument by raising it below, an MOU is not a legislative rule for which notice and comment is required. *See*, *e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015); *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003).

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

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA,

Plaintiff,

vs.

SONNY PERDUE, in his official capacity as Secretary of Agriculture, and the UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendants,

vs.

MONTANA BEEF COUNCIL, et al.

Defendant-Intervenors.

CV-16-41-GF-BMM

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS

(Filed Mar. 27, 2020)

Introduction

This Court answered the exact question now before it nearly three years ago when it adopted Magistrate Judge John Johnston's findings and recommendations to grant a preliminary injunction in favor of Plaintiffs on the basis that the federal Beef Checkoff Program violated the First Amendment. This Court adopted Magistrate Judge Johnston's findings in

full. The Ninth Circuit affirmed. As this litigation wound its way from the Magistrate Judge to the Ninth Circuit, the United States Department of Agriculture ("USDA") began entering into memorandums of understanding with a number of qualified state beef councils that remain parties to this litigation. These memorandums gave USDA broad new authority over any potential speech that the beef councils might produce. The parties all filed motions and cross motions for summary judgment.

Magistrate Judge Johnston reversed course and now recommended granting summary judgment in favor of Defendants and Defendant-Intervenors. He outlined why the memorandums of understanding—which no beef council had entered until after Magistrate Judge Johnston had issued his first findings and recommendations—provided sufficient control of qualified state beef councils' speech for that speech to qualify as government speech and thus not run afoul of the First Amendment. All parties objected in full, or in part, to Magistrate Judge Johnston's Findings and Recommendations. And so, three years after having answered this question once before, this Court faces the questions of whether the federal Beef Checkoff Program violates the First Amendment.

Standard of Review

The Court reviews de novo findings and recommendations to which the parties make objections. 28 U.S.C. § 636(b)(1). No review is required of proposed

findings and recommendations to which no objection has been made. *Thomas v. Arn*, 474 U.S. 140, 149-152 (1986). "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).

Background

Congress passed The Beef Promotion and Research Act of 1985 ("Beef Act") "to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets." 7 U.S.C. § 2901(b). To accomplish this goal, Congress imposed a $1 assessment, or "checkoff," on cattle producers for each head of cattle sold in the United States. *See id.* The checkoff would fund beef-related promotional campaigns. Congress also created the Beef Board and Beef Promotion Operating Committee to run the checkoff program and assist in crafting the research and promotion plans undertaken with checkoff funds. 7 U.S.C. § 2904(1)-(5); *see also* 7 C.F.R. §§ 1260.141, 1260.161.

While Congress created this federal program to strengthen the beef industry, it also recognized that "State and national organizations [already] conduct[ed] beef promotion, research, and consumer education programs that [were] invaluable to the efforts" of maintaining beef markets. 7 U.S.C. § 2901(a)(5). So Congress gave these state entities a role to play in this new beef-market-strengthening regime by allowing

qualified state beef councils ("QSBCs") to collect the checkoff assessments on behalf of the Beef Board. *See* 7 C.F.R. § 1260.172(a)(2). QSBCs must receive certification from the Beef Board before they may collect assessments. *See id.* § 1260.181(a). In certain limited circumstances, the Beef Board may decertify QSBCs. (*See* Doc. 40-1 (Payne Declaration) ¶ 29 (citing 7 C.F.R. § 1260.181).)

QSBCs that collect the checkoff funds may retain $0.50 to fund its own promotional activities. It must send the remaining $0.50 to the Beef Board. 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3). This process operates as the default payment for checkoff funds. Producers, if they so choose, can opt-out under the "Redirection Rule" of paying QSBCs any of their assessment. This rule allows producers to "request a redirection of assessments from a Qualified State Beef Council to the Board" by "submitting a redirection request." 7 C.F.R. § 1260.172(a)(7). QSBCs agree that any such requests "will be honored" as a condition of certification. *Id.* § 1260.181(b)(8).

QSBCs may only uses checkoff funds in a limited manner. QSBCs may only engage in promotional activities that "strengthen the beef industry's position in the marketplace." 7 C.F.R. § 1260.181(b)(1); *see* 7 C.F.R. § 1260.169 (defining activities that QSBCs may conduct under § 1260.181(b)(1) to include "projects for promotion" of the beef industry). At the same time, QSBCs must certify that they will not use any of the money that they receive under the Beef Checkoff Program to promote "unfair or deceptive" practices,

or to "influenc[e] governmental policy." 7 C.F.R. § 1260.181(b)(7).

On top of these limits, QSBCs have begun entering into Memoranda of Understaning ("MOU") that give USDA significant discretion to approve or reject any and all QSBC promotional activities. Under the MOUs, QSBCs agree to submit to USDA "for pre-approval any and all promotion, advertising, research, and consumer information plans and projects." (Ex. 18, Doc. 91-1 at RCALF_000045.) QSBCs also must provide USDA with advance notice of any QSBC board meetings and allow a USDA official to attend. (*Id.*) USDA may "direct the Beef Board to de-certify" the QSBC if the QSBC fails to comply with the MOU. (*Id.* at RCALF_000046.) Decertified QSBCs cannot receive checkoff funds. (*Id.*)

I. R-CALF Possesses Article III Standing

Magistrate Judge Johnston determined that R-CALF had Article III standing to bring this lawsuit. (Doc. 135 at 4-7.) Article III limits courts to deciding "cases" or "controversies." *See* U.S. Const. art. III. Courts have distilled the case or controversy requirement into a familiar three-part test—injury-in-fact, causation, and redressability. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 102-03 (1998). As the party invoking the court's jurisdiction, R-CALF bears the burden of proof for each element. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Organizations can invoke a court's jurisdiction by demonstrating a few additional elements on top of the

typical three. These additional requirements differ depending on whether the organization brings the lawsuit on behalf of itself or its members. To bring a lawsuit on behalf of its members, the organization must demonstrate that "(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)). An organization may bring a lawsuit on its own behalf "[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)).

Magistrate Judge Johnston found that R-CALF had demonstrated associational standing to bring this lawsuit on behalf of itself against all of the QSBCs and on behalf of its members against 12 of the 15 QSBCs. (Doc. 135 at 6-7.) No party objected to this part of Magistrate Judge Johnston's analysis.

Although they do not object to Magistrate Judge Johnston's findings about organizational standing, Defendant-Intervenors object to whether R-CALF has satisfied the redressability prong of Article III

standing. (Doc. 138 at 2-8.) Magistrate Judge Johnston rejected Defendant-Intervenors' argument about redressability because this Court had "rejected a nearly identical argument in its opinion in 2016" and nothing since then would have changed Magistrate Judge Johnston's analysis. (Doc. 135 at 7.)

Defendant-Intervenors object to Magistrate Judge Johnston's findings in five ways. They seem to argue that Magistrate Judge Johnston contradicted himself because he ruled that QSBCs "were engaged in *government speech*" and thus this Court could not offer any redress. This argument impermissibly collapses the Court's standing analysis with its merits analysis. Plaintiffs only fail to satisfy the redressability prong if they cannot receive a remedy redressing their injury *even if they win*. Of course this Court cannot offer Plaintiffs a remedy that would redress their injuries when Plaintiffs lose on the merits (i.e. whether QSBCs make government speech). This conclusion does not preclude Plaintiffs from receiving a remedy that would redress their injuries had Plaintiffs prevailed on the merits. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (collecting cases that distinguish between standing and the merits).

Defendant-Intervenors also argue that the Court cannot redress R-CALF's injury because R-CALF wants "the Beef Checkoff program to differentiate between foreign and domestic beef." (Doc. 138 at 2.) This objection fails because it largely ignores—and does not preclude—Magistrate Judge Johnston's finding regarding standing. Magistrate Judge Johnston

found that R-CALF had standing because one of R-CALF's purported purposes was "protecting domestic, independent cattle producers." (Doc. 135 at 6 (quoting Doc. 111 at 7).) R-CALF has been injured by diverting resources from protecting domestic, independent cattle producers to fighting this alleged First Amendment violation. (*See id.*) The Court could redress R-CALF's injury by an injunction preventing the alleged First Amendment violation.

Whether R-CALF wants the Beef Checkoff program to differentiate between foreign and domestic beef proves irrelevant to Magistrate Judge Johnston's analysis. Defendant-Intervenors' objection would only preclude R-CALF from showing that it had standing if Magistrate Judge Johnston had found that R-CALF's injury arose from the Beef Checkoff program's failure to differentiate between foreign and domestic beef. His analysis did no such thing.

Defendant-Intervenors other three objections relate to whether R-CALF has suffered injury by diverting resources. First, they claim that R-CALF cannot have standing because R-CALF has not shown that "its lack of success [lobbying] Congress and the Executive Branch was due to a lack of resources." (Doc. 138 at 5.) This argument would place a requirement on organizations not mandated by Ninth Circuit case law. R-CALF does not need to show that it will lobby Congress and the Executive Branch successfully; it only needs to show that it will be able to undertake *more* lobbying of Congress and the Executive Branch

in the absence of the alleged First Amendment violation. R-CALF has done so.

Defendant-Intervenors make two separate, but related arguments, that both suffer from the same flaw: they simply ignore without explanation Magistrate Judge Johnston's findings that R-CALF has diverted resources to fight this alleged First Amendment violation. Defendant-Intervenors maintain that R-CALF "cannot manufacture . . . injury [to itself] by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." (*Id.* at 6 (quoting *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)).) Defendant-Intervenors then argue based on a recent decision, *Humane Soc'y v. Perdue*, 935 F.3d 598, 601-04 (D.C. Cir. 2019)), that R-CALF must have more than a "mere interest in a problem or an ideological injury." (*Id.* at 6 (quoting *Humane Soc'y*, 935 F.3d at 604 (quoting *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015))).) The thrust of both arguments strikes at a fundamental principle underlying standing doctrine: Plaintiffs must have a "personal stake in the outcome" of a lawsuit. *Baker v. Carr*, 369 U.S. 186, 205 (1962); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Both of Defendant-Intervenors' arguments maintain in different ways that R-CALF lacks a personal stake in this litigation.

Both of these arguments fail because they ignore Magistrate Judge Johnston's findings regarding the personal stake that R-CALF has in this litigation,

namely the diversion of its resources. As Magistrate Judge Johnston correctly pointed out, R-CALF has diverted resources to educate producers on the use of checkoff funds by QSBCS—the alleged problem central to this case that would undercut R-CALF's purpose of protecting domestic, independent cattle producers if let unaddressed. (*See* Doc. 135 at 6.) Thus, R-CALF is not attempting to solve a problem that would otherwise not affect it, but instead attempting to address a problem that would directly undercut its entire purpose. The diversion of resources also proves that R-CALF has not alleged some "mere interest in a problem," but rather has alleged a problem and the specific way that problem impacts R-CALF. Neither of Defendant-Intervenors arguments proves availing absent some sort of explanation about why R-CALF has not diverted 40 percent of its resources.

II. QSBCs Do Not Conduct Government Speech in the Absence of the MOUs

Magistrate Judge Johnston noted that "the Government tangentially claims that it had effective control over the QSBCs' advertising campaigns without the MOUs." (Doc. 135 at 14.) Magistrate Judge Johnston endorsed this Court's first ruling, which address the same factual scenario now before the Court with the exception of the MOUs. (*Id.*) The Government objects to this finding. This Court has no reason to doubt its analysis from its first decision in this case, as the Ninth Circuit affirmed. *See R-CALF*

v. Perdue, 718 F. App'x 541 (9th Cir. 2018). The Court rejects the Government's objection on this issue.

III. QSBCs Conduct Government Speech Under the MOUs

The First Amendment protects private parties from subsidizing speech with which the private party disagrees. *See Knox*, 567 U.S. at 309. No such prohibition applies to government speech, though. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559-560 (2005). Government's remain accountable to its constituents for any speech with which those constituents disagree; the same is not true of private speech. *See id.* at 563.

That said, private organizations may still make speech that falls within the definition of government speech. *See id.* at 560 n.4. Private organizations make government speech only when the federal government "effectively control[s]" the message of the nongovernment entity. *Id.* at 560; *see also Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1226 (9th Cir. 2009).

The Supreme Court has given a general description of what government speech looks like in the context of checkoff funded organizations. The federal government must control the speech "from beginning to end." *Johanns*, 544 U.S. at 560. The Supreme Court has considered a number of factors when determining if speech by a checkoff funded entity qualifies as government speech. The Court considered whether

statutes and regulations "specified, in general terms, what the promotional campaign shall contain, and what they shall not." *Id.* at 561. The Government may then delegate "development of the remaining details to an entity whose members are answerable" to the government. *Id.* Whether government officials may "attend and participate in open meetings at which" that development occurs also proves relevant to the analysis. *Id.* Finally, the government must retain ultimate veto power over the private organization's advertisements, "right down to the wording." *Id.* at 563.

The Ninth Circuit has recognized two critical considerations when applying *Johanns*. First, the focus in a *Johanns* analysis must be on potential control, rather than actual control exercised. *See Paramount Land Company LP v. California Pistachio Commission*, 491 F.3d 1003, 1011 (9th Cir. 2007); *see also Johanns*, 544 U.S. at 560. Second, "*Johanns* did not set a floor or define minimum requirements." *Paramount Land*, 491 F. 3d at 1011.

Magistrate Judge Johnston made two findings related to the factors outlined in *Johanns* to which no party has objected. The Court has reviewed Magistrate Judge Johnston's findings regarding the general terms of promotional campaigns and participation in QSBC board meetings. The Court agrees with Magistrate Judge Johnston's findings and will adopt them.

A. Answerability to USDA

Magistrate Judge Johnston found that QSBC members remain answerable to USDA through the certification and decertification process. 7 C.F.R. § 1260.181. Through that process the Beef Board, in concurrence with USDA, approves all QSBCs. QSBCs may not obtain checkoff funds without certification. *Id.* The Beef Board similarly can revoke that certification and ability to receive checkoff funding.

Magistrate Judge Johnston rejected R-CALF's argument that the QSBCs only remain answerable to the Government if the Government appoints some or all of their members. R-CALF noted that every board previously approved by a court as making government speech had one or members who were appointed by the Government. Magistrate Judge Johnston noted that the "*presence* of appointment and removal powers proves significant, but the absence of those powers proves quite little." (Doc. 135 at 11.) He continued by stating that appointment and removal stand as strong ways to ensure answerability, but hardly the only way. (*Id.*) Magistrate Judge Johnston emphasized that "under the MOUs . . . , USDA now retains complete final approval over all QSBC ads. This final approval gives USDA the option to exercise its authority to decertify a QSBC *before* the QSBC ever gets the chance to disseminate advertisements." (Doc. 135 at 13.)

R-CALF now objects to Magistrate Judge Johnston's findings related to the appointment and removal of QSBC board members. R-CALF does not cite a single

case that explicitly states that boards like QSBCs that receive checkoff funds must have at least some members appointed and potentially removed by the Federal Government. R-CALF instead claims that because "any party had some or all of its members appointed and likely subject to remove by the government" in other government speech cases, QSBCs cannot undertake government speech unless at least one of their members is appointed and likely subject to removal by the Government. (Doc. 139 at 20-23.) R-CALF then claims that the absence of appointment and removal of QSBC members makes QSBC speech "inconsistent with the premise of 'government speech': that the First Amendment need not apply because there is 'democratic accountability' for the speech." (*Id.* at 22 (quoting *R-CALF II*, 2017 WL 2671072, at *5).)

This argument borders on frivolous as *Paramount Land* explains. There the government appointed one member of the nine-member board. The government also could suspend or discharge the board's president and must "concur in any nomination and election procedures." *Paramount Land*, 491 F.3d at 1010. The Court fails to see what practical difference as related to democratic accountability could possibly exist between the board in *Paramount Land* and QSBCs here due to the appointment of one member of a nine-member board. And as R-CALF acknowledges in a different part of its brief, "if a court is sure the speech 'is from beginning to end the message established' by the government[,] it should not 'draw a line between' minor differences in satisfying that requirement."

(Doc. 139 at 17 (quoting *Paramount Land*, 491 F.3d at 1011-12).) Certainly, the difference between a board with one out of nine members and a board with zero members appointed by the Government proves minor here.

What is more, courts have upheld checkoff funded entities' speech as government speech even when the Government possessed limited appointment power. The United States Supreme Court approved the Beef Board even though the Government could only appoint people from a list of candidates nominated by the trade associations. The Government was further limited by the requirement that the members must be a geographically representative group of beef producers and importers. *See Johanns*, 544 U.S. at 553. As the Ninth Circuit pointed out in *Paramount Land*, both the Beef Board and the board at issue in *Paramount Land* were "dominated by industry appointees, not independent third party board members." 491 F.3d at 1010 n.4.

Given the Ninth Circuit's directive that "*Johanns* did not set a floor or define minimum requirements," this Court agrees with Magistrate Judge Johnston that the lack of appointment and removal power proves quite insignificant here. *Id.* at 1011. Rather, the focus must remain on answerability to the government, and Magistrate Judge Johnston's findings and recommendations correctly outline why QSBCs remain answerable to USDA even in the absence of appointment and removal power. The Court rejects R-CALF's objections on this issue.

B. Final Approval

Magistrate Judge Johnston ultimately found that USDA now exercises final approval over all QSBC advertisements. Magistrate Judge Johnston relied on the MOUs between QSBCs and USDA. (Doc. 135 at 14-15.) Under the MOUs, QSBCs agree to submit to USDA "for pre-approval any and all promotion, advertising, research, and consumer information plans and projects, which [USDA] shall review and approve or reject." (Doc. 133-1 at 3.) The QSBCs also agree "to submit for pre-approval . . . any and all potential contracts or agreements to be entered into by [a QSBC] for the implementation and conduct of plans or projects funded by checkoff funds." (*Id.*) Magistrate Judge Johnston concluded that the "MOUs gives broad pre-approval authority, without much, if any, limitation. At bottom, QSBCs face the choice of getting USDA approval or not speaking at all." (*Id.* at 15.)

R-CALF objects to Magistrate Judge Johnston's findings and recommendations on the basis that Magistrate Judge Johnston allegedly made both legal and factual error. R-CALF claims that Magistrate Judge Johnston legally erred because under *Matal* private speech cannot "be passed off as government speech by simply affixing a government seal of approval." (*Id.* (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017)).) R-CALF claims that this quote, and *Matal* as a whole, show that Magistrate Judge Johnston incorrectly focused on potential, rather than actual, level of control.

Matal hardly undercuts Magistrate Judge Johnston's analysis. There the potential control the Government could exercise amounted to little more than a rubber stamp. The Government could not inquire into whether "any viewpoint conveyed by a mark is consistent with Government policy" and was required to register trademarks if, in essence, a list of requirements had been met. The Government had almost no discretion. *See Matal*, 137 S. Ct. at 1758.

In the absence of discretion to approve or reject speech, the hallmark of government speech—political accountability—disappears. If USDA had no discretion under the MOUs to approve or reject QSBC speech, R-CALF would have no political recourse when it saw advertisements with which it disagreed. That would fundamentally make QSBC speech private speech. USDA has significantly more discretion, however, to approve or reject speech than the government agency in *Matal*.

Here, as Magistrate Judge Johnston pointed out, USDA enjoys significant discretion to approve or reject QSBC speech. Under the MOUs, USDA will review, and approve or reject, all promotions, advertising, research, and consumer information plans and projects. (*See* Doc. 133-1 at 2.) Nothing in the MOUs limits USDA's ability to approve QSBC speech as it sees fit. Thus, anytime R-CALF sees a QSBC ad that it dislikes, it may lobby USDA, who has the discretion to approve or reject similar ads in the future.

This analysis raises the question of R-CALF's alleged factual error. Although unclear in its brief, R-CALF appears to claim that Magistrate Judge Johnston made a factual error by crediting USDA with more authority to review QSBC speech than USDA has under the MOUs. (*See id.* at 24-26.) R-CALF relies on guidelines provided to QSBCs outlining considerations that USDA will make when evaluating QSBC speech. (Exhibit 19, Doc. 91-1 at RCALF_000760.) R-CALF paints these guidelines as putting drastic limits on USDA's review of QSBC speech. A closer review of the guidelines proves otherwise.

The guidelines retain much of the discretion that USDA retains under the plain terms of the MOUs. The guidelines reiterate that QSBCs may not place advertisements "prior to [USDA] approval." (*Id.*) The guidelines further note that USDA involvement will require "much analysis" and the guidelines only encompass USDA's considerations "[a]s much as possible." (*Id.*) USDA will consider how and where marketing proposals will be used, how they will be distributed, and who is the target audience. (*Id.* at RCALF_000763.) Critically, and notably absent from R-CALF's argument, USDA will consider "the overall takeaway or net impression" of any marketing proposal. (*Id.*) USDA identifies the overall takeaway or net impression as a "Key Point[ ]" of its consideration. On top of that, USDA will ensure that "[a]ll statements and depictions [are] appropriate for all audiences and [are] appropriate for the Secretary of Agriculture

and all other USDA employees to make." (*Id.* at RCALF_000775.)

All of these considerations indicate that USDA retains significant discretion to approve or reject QSBC speech, even under the guidelines on which R-CALF relies. R-CALF takes significant liberties with how it characterized these guidelines in its objections. Its objection that Magistrate Judge Johnston made factual error cannot withstand much scrutiny based upon the text of the Guidelines. The Court will adopt Magistrate Judge Johnston's findings regarding whether USDA retains enough authority over QSBC speech such that QSBC speech constitutes government speech.

IV. Attribution of the Speech to Private Parties Does Not Per Se Transform Government Speech to Private Speech

Relying on *Johanns*, Magistrate Judge Johnston rejected R-CALF's argument that QSBCs' speech is private speech because QSBCs present it as private speech. (Doc. 135 at 16-17.) Magistrate Judge Johnston noted that *Johanns* addressed and rejected R-CALF's argument on this front (*Id.*)

R-CALF now claims that more recent government speech decisions state that "part of the government speech analysis is whether viewers" believe it is the government doing the speaking. (Doc. 139 at 26.) R-CALF relies on various cases that dealt with government speech issues, although none of those cases dealt

with checkoff funds. (*Id.* (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) and *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (en banc), *aff'd Matal*, 137 S. Ct. 1744 (2017)).)

A number of concerns give this Court pause to adopt R-CALF's proposed reasoning. To start, even R-CALF acknowledges that if this Court adopted the reasoning that R-CALF suggests, then how the speech was attributed would represent only a "part" of the analysis. (Doc. 139 at 26.) Every factor under *Johanns* weighs in favor of finding that QSBCs conduct government speech. Second, the Court in *Johanns* expressed concern regarding attribution only if the alleged speech were associated with the parties who are now in R-CALF's position. *See Johanns*, 544 U.S. at 564 n.7 ("[R]espondents enjoy no right not to fund government speech . . . whether or not the reasonable viewer would identify the speech as the government's. If a viewer would identify the speech as *respondents'*, however, the analysis would be different.") R-CALF does not allege that QSBCs attribute the speech to R-CALF.

Finally, R-CALF has cherrypicked convenient portions of analyses from cases that did not involve checkoff programs. The Ninth Circuit and United States Supreme Court have spoken when it comes to determining whether a checkoff program constitutes government speech. All of the cases that R-CALF cites, in turn, cite *Johanns* at various points. None of the cases explicitly discuss, however, amending, overruling, or superseding *Johanns*. Indeed, *Matal* discusses

Johanns, *Summum*, and *Walker* and the different reasonings of each, implicitly acknowledging that the government speech analysis may look different when considering different types of speech. Absent the United States Supreme Court and Ninth Circuit saying otherwise, this Court will continue to determine whether checkoff programs constitute government speech by applying the factors as outlined in *Johanns*.

V. Third-party Organizations

Magistrate Judge Johnston also rejected R-CALF's arguments that QSBCs violate the First Amendment by providing funds to third-party entities, who may then use those funds to make advertisements. Magistrate Judge Johnston rejected R-CALF's argument because doing otherwise would run the "risk[ ] [of] micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." (Doc. 135 at 17-18 (quoting *Paramount Land*, 491 F.3d at 1012).) Magistrate Judge Johnston also noted that USDA would be better suited than a federal district court to "parse budget line items" and remedy any potential abuse of third-party funds by QSBCs. (*Id.* at 18.)

R-CALF objects to Magistrate Judge Johnston's findings regarding third-party use of QSBC funds. R-CALF claims that the Government must have complete control over speech from third-parties who receive money from QSBCs just as the Government has complete control of QSBC speech. (Doc. 139 at 16.)

According to R-CALF, however, the only limit on third-party speech by entities that receive QSBC funds is that they must comply with the Beef Act and Order. (*Id.*) And compliance with the Beef Act and Order" cannot satisfy *Johanns*' requirements for government speech. (*Id.* at 16-17.) R-CALF then claims that under "the F&R's logic, a private state council can create another private entity, transfer checkoff money to it to fund its speech, and thereby evade the First Amendment's prohibitions. . . . The Constitution cannot be satisfied through such a shell game of corporate forms." (*Id.* at 20.)

R-CALF suggests that this Court can remedy the situation simply by ordering "checkoff money only be spent if the Government can pre-approve the speech." (*Id.* at 18.) Things do no prove so simple. A slight twist on R-CALF's own hypothetical proves why. Say, for instance, that a QSBC used checkoff funds to pay for a membership in an organization. And that organization used its membership dues to pay for advertisements that complied with the Beef Order and Act. What then? How would R-CALF's proposed remedy solve the problem if the QSBC had no ability to control how this third-party used the QSBC's membership dues? What if this third-party transferred all membership dues to another third-party? How does the QSBC track what happens to its membership due once it pays the third-party? How does R-CALF's proposed remedy resolve any of these issues?

Magistrate Judge Johnston's analysis did not create this shell game but simply acknowledged that

USDA stood best suited to remedy any shell game that does exist. USDA possesses experience and expertise in dealing with QSBCs and their budgets that this and all federal district courts lack. Further, as the Government notes, R-CALF continues to offer no authority for the proposition that the government must control all speech by any third-party entity that receives payments for goods and services from a commodity-marketing board." (Doc. 143 at 17.) In the absence of controlling case law saying otherwise, this Court will not impose that requirement on QSBCs.

VI. R-CALF Cannot Receive an Injunction

R-CALF unsuccessfully claimed before Magistrate Judge Johnston that it should receive an injunction even if QSBCs conducted government speech. In recommending against R-CALF, Magistrate Judge Johnston noted that a party may receive an injunction in a moot case "where there is 'no reasonable . . . expectation that the alleged violation will recur,' and where 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Am. Cargo Transp., Inc. v. United States*, 625 F. 3d 1176, 1179 (9th Cir. 2010) (quoting *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)); *see Barnes*, 980 F.2d at 580 (citing the same standard as outlined in *Davis*). Governments receive greater deference than private parties when it comes to whether events have completely and irrevocably eradicated the effect of the alleged violation. *See Am. Cargo Transp., Inc.*, 625 F.3d at 1180 (collecting cases). Magistrate

Judge Johnston saw no reason to doubt that the Government had completely and irrevocably cured the alleged violation, and neither does this Court.

R-CALF objects to Magistrate Judge Johnston's recommendation that R-CALF not receive an injunction. R-CALF claims that even though the Government receives greater deference than a private party, the Government still must show that any changes are "entrenched" or "permanent." (Doc. 139 at 28 (quoting *Fikre v. FBI*, 904 F.3d 1033, 1037-38 (9th Cir. 2018)).) R-CALF further claims that the Government fails here because the MOUs here are revocable. (*Id.*)

This Court remains unpersuaded by R-CALF's objections for two reasons. First, the Government has entered into MOUs with QSBCs uninvolved in this litigation. (Statement of Undisputed Facts, Doc. 100 ¶ 57.) The involvement of QSBCs not involved in this litigation indicates that the Government has enacted a broader policy change, not a change with the sole aim of ending this litigation. Further, the Government may only revoke the MOUs with the consent of the QSBCs. (*See*, *e.g.*, Doc. 133-1 at 3.) Given this Court's initial order and the Ninth Circuit's affirmance, the QSBCs face the choice of operating under the MOU or consenting to withdrawal of the MOU and losing their checkoff funding. These considerations prove sufficient to show that the MOUs stand "entrenched" in the way that USDA and QSBCs make use of checkoff funds. *See Fikre*, 904 F.3d at 1037-38. The Court denies R-CALF's request for an injunction.

VII. Redirection Rule

Magistrate Judge Johnston found that the Government's finalization of the Redirection Rule failed to remedy the compelled subsidy problem of which R-CALF complains. (Doc. 135 at 7-8.) Magistrate Judge Johnston relied almost exclusively on this Court's previous analysis rejecting the Redirection Rule when the rule represented only a policy. The Government objects to Magistrate Judge Johnston's findings. Having reviewed *de novo*, this Court agrees with Magistrate Judge Johnston that nothing has happened since this Court last addressed the Redirection Rule that would change its analysis. The Court rejects the Government's objections.

VIII. R-CALF's First Motion to Strike (Doc. 114)

No party objected to Magistrate Judge Johnston's recommendation regarding R-CALF's motion to strike (Doc. 114). Reviewing for clear error and finding none, this Court will adopt Magistrate Judge Johnston's recommendation and deny R-CALF's motion to strike as moot.

IX. R-CALF's Second Motion to Strike (Doc. 144)

R-CALF filed a motion to strike Defendant-Intervenor's Response to R-CALF's objections. The Court generally tends to agree with the idea behind R-CALF's brief that Defendant-Intervenors have on numerous occasions stretched legal principles and

factual findings at or near their limits. That said, the Court need not strike their responses; this Court knows when a party mischaracterizes a legal principle or factual finding. R-CALF's motion is denied.

ORDER

Accordingly, **IT IS ORDERED** that Magistrate Judge John Johnston's Findings and Recommendations (Doc. 135) are **ADOPTED IN FULL**:

1. Plaintiff's motion for summary judgment (Doc. 89) is **DENIED**;
2. Plaintiff's motion to strike (Doc. 114) is **DENIED**, as moot;
3. Defendant Sonny Perdue, in his official capacity as Secretary of Agriculture, and the United States Department of Agriculture's cross motion for summary judgment (Doc. 98) is **GRANTED**;
4. Defendant-Intervenors Montana Beef Council, et al.'s cross motion for summary judgment (Doc. 94) is **GRANTED**.

Further, Plaintiff's smotion to strike (Doc. 144) is **DENIED**, as moot.

DATED this 27th day of March, 2020.

/s/ Brian Morris
Brian Morris,
Chief District Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, Plaintiff, vs. SONNY PERDUE, in his official capacity as Secretary of Agriculture, and the UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants. vs. MONTANA BEEF COUNCIL, et al., Defendant-Intervenors.	Case No. CV-16-41 -GF-BMM JUDGMENT IN A CIVIL CASE (Filed Mar. 27, 2020)

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court for bench trial, hearing, or determination on the record. A decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Magistrate Judge John Johnston's Findings and Recommendations (Doc. 135) are ADOPTED IN FULL:

1. Plaintiff's motion for summary judgment (Doc. 89) is **DENIED**;

2. Plaintiff's motion to strike (Doc. 114) is **DENIED**, as moot;

3. Defendant Sonny Perdue, in his official capacity as Secretary of Agriculture, and the United States Department of Agriculture's cross motion for summary judgment (Doc. 98) is **GRANTED**;

4. Defendant-Intervenors Montana Beef Council, et al.'s cross motion for summary judgment (Doc. 94) is **GRANTED**.

Further, Plaintiff's motion to strike (Doc. 144) is **DENIED**, as moot.

Dated this 27th day of March, 2020.

TYLER P. GILMAN, CLERK

By: /s/ S. Redding
S. Redding, Deputy Clerk

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

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA,

Plaintiff,

vs.

SONNY PERDUE, in his official capacity as Secretary of Agriculture, and the UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendants,

vs.

MONTANA BEEF COUNCIL, et al.

Defendant-Intervenors.

CV-16-41-GF-BMM

FINDINGS AND RECOMMENDATIONS

(Filed Jan. 29, 2020)

Background

The Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. § 2901 *et seq.*, imposes a $1 assessment on cattle producers for each head of cattle sold in the United States. It imposes the same assessment on each head of cattle imported into the United States. 7 U.S.C. §§ 2901(b), 2904(8)(C); 7 C.F.R. § 1260.172(a)(1). The assessment, also known as a

checkoff, funds beef related promotional campaigns designed to "strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets . . . for beef and beef products." 7 U.S.C. § 2901(b). The Cattlemen's Beef Promotion and Research Board ("Beef Board") runs the federal checkoff program. *See* 7 U.S.C. § 2904(1)-(2).

Qualified state beef councils ("QSBCs"), which may be either private entities organized and operating within a state or entities authorized by state statute, may collect the checkoff assessments on behalf of the Beef Board. *See* 7 C.F.R. § 1260.172(a)(2). Before QSBCs may collect assessments, they must receive certification from the Beef Board. *See id.* § 1260.181(a). In certain limited circumstances, the Beef Board may decertify QSBCs. (*See* Doc. 40-1 (Payne Declaration) ¶ 29 (citing 7 C.F.R. § 1260.181).)

When QSBCs collect the one dollar per-head checkoff from a cattle producer, it sends 50 cents from each dollar to the Beef Board. QSBCs retain the remaining 50 cents to fund its own promotional activities. 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3).

The flow of the producers' one-dollar assessments—from producer to QSBCs to the Beef Board with QSBCs keeping their 50 cents—operates as the default process. Producers have the option, however, to opt-out of paying QSBCs any of their assessment. The "Redirection Rule" allows producers to "request a redirection of assessments from a Qualified State Beef Council to the Board" by "submitting a redirection

request" and requires that QSBCs agree that any such requests "will be honored" as a condition of certification. 7 C.F.R. §§ 1260.172(a)(7), 1260.181(b)(8).

USDA possesses limited statutory and regulatory authority over QSBCs use of checkoff funds. USDA allows QSBCs to engage in promotional activities that "strengthen the beef industry's position in the marketplace." 7 C.F.R. § 1260.181(b)(1); *see* 7 C.F.R. § 1260.169 (defining activities that QSBCs may conduct under § 1260.181(b)(1) to include "projects for promotion" of the beef industry). QSBCs must certify, however, that they will not use any of the money that they receive under the Beef Checkoff Program to promote "unfair or deceptive" practices, or to "influenc[e] governmental policy." 7 C.F.R. § 1260.181(b)(7).

In addition to USDA's limited statutory and regulatory authority, USDA now possesses significant authority stemming from Memoranda of Understanding ("MOU") that USDA has entered into with all 15 QSBCs in this lawsuit. Under the MOUs, QSBCs agree to submit to USDA "for pre-approval any and all promotion, advertising, research, and consumer information plans and projects." (Ex. 18, Doc. 91-1 at RCALF_000045.) QSBCs must also provide USDA with advance notice of any QSBC board meetings and allow a USDA official to attend. (*Id.*) If any QSBC fails to comply with the MOUs, USDA may "direct the Beef Board to de-certify [the QSBC], and, in the event of such de-certification, [the QSBC] shall stop receiving" checkoff funds. (*Id.* at RCALF_000046.)

Analysis

The primary issue relevant here is whether speech by QSBCs constitutes government speech. Defendants Sonny Perdue, in his official capacity as Secretary of Agriculture, and the U.S. Department of Agriculture (collectively the "Government") and Defendant-Intervenors raise a few other threshold questions related to Article III standing and the Redirection Rule, 84 Fed. Reg. 20,765, 20,766 (May 13, 2019). The Court will address those in short order, ruling in favor of Plaintiff Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF"), before moving on to the question of government speech.

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).

Standing

Article III of the Constitution limits the judicial power of federal courts to the resolution of cases and controversies. *See* U.S. Const. art. III. A case or controversy exists under Article III only if the Plaintiff possesses standing. *Gettman v. DEA*, 290 F.3d 430, 433 (D.C. Cir. 2002). An individual has Article III standing if he or she satisfies three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 102-03 (1998).

Organizations may bring lawsuits but face different standing requirements than the typical three elements of standing. If an organization seeks to bring a lawsuit on behalf of its members, the organization must demonstrate that "(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)). Alternatively, an organization may bring a lawsuit on its own behalf "[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 Court finds that R-CALF have demonstrated associational standing to bring a lawsuit on behalf of its members against 12 of the 15 QSBCs. Those members pay the Beef Checkoff and object to being associated with speech over which they have no control. (*See* Doc. 90 at 14.) Also, this lawsuit is germane to at least one of R-CALF's purported purposes—"protecting domestic, independent cattle producers." (Doc. 111 at 7.) Finally, the Court finds

that neither the claim asserted nor the relief requested requires the participation of individual members.

The Court also finds that R-CALF has satisfied Article III's standing requirements to bring this lawsuit on behalf of itself. As R-CALF points out, neither the Government nor Defendant-Intervenors contest that R-CALF has diverted 60 percent of its resources to attempting to educate producers on the use of checkoff funds by QSBCs. (*See* Doc. 111 at 8; Ex. 56, Doc. 91-3 at 7.) These resources represent funds that could otherwise be spent "protecting domestic, independent cattle producers." That constitutes a diversion of resources sufficient to give R-CALF organizational standing. Further, R-CALF reasonably fears that QSBCs will use funds in a way that fails to protect domestic, independent cattle producers, which would frustrate R-CALF's organizational mission.

The Government takes issue with whether R-CALF has diverted resources and frustrated their mission by bringing this lawsuit. The Government claims that R-CALF's "mission *is* to challenge USDA policies." (Doc. 125 at 14.) And the resources that R-CALF has diverted to things like this lawsuit only further that mission. According to the Government, an organization cannot "divert" resources from its mission when the organization then uses those resources in a way that serves their mission. (*Id.*) This argument fails because nothing about protecting domestic, independent cattle producers requires R-CALF to fight against QSBCs use of checkoff funds.

Rather than take issue with R-CALF's organizational or associational standing, Defendant-Intervenors challenge whether this lawsuit would redress R-CALF's injuries. This Court rejected a nearly identical argument in its opinion in 2016. *See R-CALF et al. v. Vilsack et al.*, 2016 WL9804600, at *2 (D. Mont. Dec. 12, 2016), *adopted in full*, 2017 WL 2671072, at *4 (D. Mont. June 6, 2017). The case law has not changed since then, and neither does this Court's analysis.

Redirection

Since this Court's last ruling, the Government has finalized its "Redirection Rule." *See* 84 Fed. Reg. 20,765, 20,766 (May 13, 2019). This rule formalized USDA's policy of permitting producers to forward their full assessment to the Beef Board. The Government argues in essence that this rule removes any compulsion and thus any First Amendment claim brought by R-CALF must fail.

The Government made similar arguments before this Court when the Redirection Rule was still just USDA policy. USDA has finalized the Redirection Rule since that time. This Court rejected the Governments arguments related to the Redirection Rule when it was just policy and it has no reason to reconsider that rejection now that it is a final rule. This Court relied on *Knox v. Service Employees International Union*, 567 U.S. 298 (2012). Under *Knox*, opt-out provisions like the one that this Court ruled on previously that has now been finalized as the Redirection Rule violate the

First Amendment. Instead, *Knox* requires the Government to obtain affirmative consent before taking funds from individuals for private speech. *See id.* at 322. The Ninth Circuit upheld that ruling, *see R-CALF v. Perdue*, 718 Fed. App'x 541, 543 (9th Cir. 2018), and nothing has happened in the interim that requires this Court to change its analysis.

Private speech versus government speech

The First Amendment protects private parties from subsidizing speech that the private party disagrees with. *See Knox*, 567 U.S. at 309. That protection does not extend to subsidizing government speech. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559-560 (2005). Government speech includes speech from nongovernmental entities in certain circumstances. *See id.* at 560 n.4. Nongovernmental entities make government speech only when the federal government "effectively control[s]" the message of the nongovernment entity. *Id.* at 560; *see also Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1226 (9th Cir. 2009).

To effectively control the speech, the message must be "from beginning to end the message established by the Federal Government." *Johanns*, 544 U.S. at 560. In *Johanns*, the Supreme Court provided a general outline of what establishing a message "from beginning to end" looks like. The Court noted that statutes and regulations "specified, in general terms, what the promotional campaign shall contain, and

what they shall not." 544 U.S. at 561. The Government may then delegate "development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well)." *Id.* And government officials "attend and participate in open meetings at which" that development occurs. *Id.* Further and crucially for this case, the Secretary there retained ultimate veto power over the nongovernment entities advertisements, "right down to the wording." *Id.* at 563. Additionally, the Court noted that Congress "retain[ed] oversight authority" and "the ability to reform the program at any time." *Id.* at 563-64. "No more is required" to demonstrate control of a message "from beginning to end." *Id.* at 564.

The Ninth Circuit has not viewed *Johanns* as defining minimum requirements for showing control from beginning to end. For example, in *Paramount Land Company LP v. California Pistachio Commission*, 491 F. 3d 1003, 1011-12 (9th Cir. 2007), the Ninth Circuit held that a nongovernment entity created government speech even though the Secretary of Agriculture had less appointment and removal powers over that entities members as compared to the Secretary's appointment and removal powers in *Johanns*.

When determining whether government speech exists, the Ninth Circuit emphasized *effective*, that is, potential control. *See Paramount Land*, 491 F.3d at 1011; *Johanns*, 544 U.S. at 560. A failure to "reject[] or edit[] proposals" or to take a particularly active role in meetings" is "not an indication that the government cannot exercise authority," and does not preclude a

Court from ruling that the government effectively controls that speech. *Paramount Land*, 491 F.3d at 1011; *see also Delano Farms*, 586 F.3d at 1230 (noting that the proper test for determining effective control focuses on potential control, "not the actual level of control evidenced in the record"). Instead, the question is whether the government "retains authority to control both the activities and the message." *Paramount*, 491 F.3d at 1011.

General Terms of Promotional Campaigns

Here, statutes and regulations "specif[y], in general terms, what the promotional campaign shall contain, and what they shall not." *Johanns*, 544 U.S. at 561. QSBCs' promotions must "advance the image and desirability of beef and beef products" and may not make "reference to a brand or trade name of any beef product." 7 U.S.C. § 2902(13); 7 C.F.R. § 1260.169(d); *see also Johanns*, 544 U.S. at 561 (quoting these provisions).

Answerability to USDA

QSBC members remain answerable to USDA through the certification and decertification process. 7 C.F.R. § 1260.181. Through that process the Beef Board, in concurrence with USDA, approves all QSBCs. QSBCs may not obtain checkoff funds without certification. *Id.* The Beef Board can similarly revoke that certification and ability to receive checkoff funding.

R-CALF claims that QSBCs are not answerable to USDA, placing particular importance on the Government's inability to appoint or remove anyone from the QSBCs. R-CALF notes that "*every* entity the Ninth Circuit and Supreme Court [have] held can use compelled subsidies to generate 'government speech'" has had some of its members appointed or removable by the Government. (Doc. 90 at 17-18.) According to R-CALF, "[i]t makes sense the absence of such authority would be significant" here.

The *presence* of appointment and removal powers proves significant, but the absence of those powers proves quite little. The presence of appointment and removal powers proves significant because appointment and removal of entity members stands as a quite powerful way to ensure that those entities remain answerable to the government. The *absence* of these powers, however, proves insignificant, at least in this case. No Ninth Circuit or Supreme Court opinion has held that appoint and removal stand as the sole way that entities remain answerable to government agencies.

Here, for example, QSBCs remain answerable to USDA through the certification and decertification power, in combination with USDA's pre-approval over all QSBC advertisements. Each board must meet certain certification requirements to receive funding. 7 C.F.R. § 1260.181. With USDA's concurrence, the Beef Board may use its authority to revoke certification for failure to follow USDA requirements. USDA and the Beef Board "retain[] [this] authority" and under

Johanns that proves sufficient to demonstrate answerability. That USDA has used the decertification authority on at least one occasion only underscores the usefulness of this power.

The certification process only proves useful for making QSBC members answerable to USDA when considered as one part of the whole scheme that USDA uses to control QSBCs' message "from beginning to end." Viewed in isolation, by contrast, the certification power would prove relatively useless for keeping the QSBCs answerable to USDA. In theory, QSBCs could receive certification, then develop their ads, disseminate them, and only then get decertified. But by that time, the damage will have been done to R-CALF and those whose speech was compelled. Without more, the certification and decertification power do quite little to make QSBCs answerable to USDA without allowing QSBCs to harm R-CALF.

When considered as one part of the whole, however, this problem with the certification process disappears. As discussed above, under the MOUs that USDA entered into with QSBCs, USDA now retains complete final approval over all QSBC ads. This final approval gives USDA the option to exercise its authority to decertify a QSBC *before* the QSBC ever gets the chance to disseminate advertisements. The MOUs all but make this explicit. (*See*, *e.g.*, Doc. 133-1 at 4 ("If at any time [Vermont's QSBC] fails to comply with the terms of this MOU, . . . [USDA] may direct the Beef Board to de-certify [Vermont's QSBC.") That proves enough to make QSBCs "answerable" to USDA.

This Court acknowledges that the certification process makes QSBC members less answerable to USDA than the Beef Board officials in *Johanns*. As noted earlier, however, the Ninth Circuit has not treated any one particular characteristic present with the Beef Board in *Johanns* as a floor that other entities must satisfy. *See Paramount Land*, 491 F.3d 1003 (upholding organization where Secretary of Agriculture had less appointment authority over board members than in *Johanns*).

Participation in Open Meetings

Under the MOUs, USDA retains the authority to participate in open meetings. (*See*, *e.g.*, Doc. 133-1 (noting that Vermont Beef Industry Council must provide USDA with notice of their meetings as well as meeting minutes and additional information related to those meetings as USDA requests).

Final Approval

This Court previously held that USDA did not have effective control because there was no evidence that federal officials either participated in the creation of QSBCs' advertising campaigns or that USDA approved every word of those campaigns. *See R-CALF v. Vilsack*, 2016 WL 9804600, at *5 (D. Mont. Dec. 12, 2016). Simply put, *Johanns* requires control "from beginning to end" and USDA had no control at the end of QSBCs' advertisement process.

Since then, USDA and all QSBCs named in this lawsuit have entered into MOUs that fix this problem. The Court continues to believe its first ruling was correct, even though the Government tangentially claims that it had effective control over the QSBCs' advertising campaigns without the MOUs. (*See* Doc. 99 at 7-8.) The Government's bare assertion carries no weight because it relies exclusively on the MOUs to argue that USDA now retains "final approval authority over every word used in every promotional campaign." (Doc. 99 at 11 (quoting *Johanns*, 544 U.S. at 561).) In other words, USDA relies exclusively on the MOUs to argue that the problem identified by this Court in its first ruling has now been rectified. All fifteen states named in this lawsuit have entered into MOUs with USDA. (*See* Doc. 99 at 9 (Hawaii, Indiana, Kansas, Montana, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, and Wisconsin), Doc. 133 at 2 (Vermont), and Doc. 134 at 2 (Maryland).) The Court will only reference the MOU with Vermont's QSBC, but the MOUs with the remaining QSBCs prove identical. (*See* Doc. 133 at 2.)

Under the MOUs, Vermont's QSBC agrees to submit to USDA "for pre-approval any and all promotion, advertising, research, and consumer information plans and projects, which [USDA] shall review and approve or reject." (Doc. 133-1 at 3.) Also, Vermont's QSBC agrees "to submit for pre-approval . . . any and all potential contracts or agreements to be entered into by [Vermont's QSBC] for the implementation and conduct

of plans or projects funded by checkoff funds." (*Id.*) The MOU gives broad pre-approval authority, without much, if any, limitation. At bottom, QSBCs face the choice of getting USDA approval or not speaking at all. That constitutes final approval of authority "over every word used in every promotional campaign." *Johanns*, 544 U.S. at 561.

R-CALF maintains that the Government does not ensure that QSBCs' speech reflects the Government's views. (Doc. 90 at 20-22.) R-CALF's argument boils down to this: the Government does not take *enough* involvement in the QSBCs' speech.

This argument misconstrues the government speech standard outlined in *Johanns*. *See Johanns*, 544 U.S. at 563. As discussed above, the test is whether the government "retains authority" to control the speech, not whether the government actually exercises that authority. So if USDA simply acts as a rubber-stamp for QSBC advertisements, that fact proves irrelevant as long as USDA retains the broad authority in the MOUs.

The distinction drawn in *Delano Farms* between actual authority exercised and retained authority makes sense when considering the hallmark of government speech: political accountability. The Courts have held that government speech does not implicate the First Amendments compelled speech protections because "[w]hen the government speaks, . . . it is, in the end, accountable to the electorate and the political process for its advocacy." *Bd. of Regents of*

Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000). Similarly, a failure to exercise authority to control speech from the QSBC is a failure of USDA, an agency headed by the "Secretary of Agriculture, a politically accountable official." *Johanns*, 544 U.S. at 563. As long as R-CALF complains about a failure to exercise authority, it can rectify that complaint by holding USDA politically accountable. Only if USDA has no authority to exercise in the first place does R-CALF lose the ability to rectify its problems in the political arena.

Finally, R-CALF contends that speech from the QSBCs is private speech because QSBCs present it as private speech. (Doc. 24-27.) The Court addressed and rejected this argument in *Johanns*: "We need not determine the validity of this argument—which relates to compelled speech rather than compelled subsidy—with regard to respondents' facial challenge. Since neither the Beef Act nor the Beef Order requires attribution, neither can be the cause of any possible First Amendment harm." 544 U.S. at 564-65.

Third-party Organizations

R-CALF maintains that QSBCs engage in private speech because it funds organizations with checkoff money and neither USDA nor the QSBCs have authority to review what speech is made by those organizations. (Doc. 99 at 22-23.) The Government claims that it need only "exercise effective control over QSBCs when they distribute checkoff dollars, ensuring

that those expenditures are authorized by the Beef Act and the Beef Order." They further claim that "there is no separate requirement that USDA exercise effective control of every entity downstream from that disbursement." (Doc. 99 at 19.) The Government counters that no case law requires USDA to exercise control over downstream entities that receive money from QSBCs. (*Id.*)

The Government has the stronger argument. R-CALF offers no rationale to explain why QSBCs may not pay for membership in organizations like the Federation of State Beef Councils or the U.S. Meat Export Federation. To hold otherwise, raises the "risk[] [of] micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." *Paramount Land*, 491 F.3d at 1012. This Court is ill-equipped to parse budget line items from QSBCs to determine whether that particular contribution constitutes a compelled subsidy. To the extent that R-CALF argues that these contributions represent a potential end run around the pre-approval process in the MOUs, those concerns are minimized by USDA's approval of QSBCs budgets.

Injunction Even Under MOUs

R-CALF argues that it should receive an injunction even if QSBCs engage in government speech. It argues that under the Ninth Circuit's mootness doctrine that it is "entitled to the protection of an enforceable order to ensure that past [constitutional]

violations will not be repeated." (Doc. 111 at 37-38 (quoting *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992)).) The Government maintains first that mootness doctrine doesn't apply because R-CALF would not have standing if this Court finds that QSBCs make government speech. The Government also argues that even under Ninth Circuit's mootness case law that the Government is entitled to greater deference than a private party regarding whether a party can moot a case by changing its actions that caused the alleged constitutional violation. (Doc. 125 at 16-17.)

Assuming R-CALF has standing, R-CALF still has not demonstrated that an injunction would prove necessary at this point. A party may receive an injunction in a moot case "where there is 'no reasonable . . . expectation that the alleged violation will recur,' and where 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010) (quoting *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)); *see Barnes*, 980 F.2d at 580 (citing the same standard as outlined in *Davis*). But mootness does not treat private parties and the government equally. Courts have routinely given government agencies greater leniency when considering whether the party may resume its illegal or unconstitutional activities. *See Am. Cargo Transp., Inc.*, 625 F.3d at 1180 (collecting cases). The Court sees no reason here to assume the Government entered these MOUs as merely a way to avoid an adverse result in this Court.

Motion to Strike

R-CALF also moved to strike both Defendant-Intervenors' and the Government's individual Responses to Plaintiff's Statement of Undisputed Facts ("RSUFs"). (Doc. 114 (seeking to strike portions of Doc. 97 and Doc. 101).) The Court has recommended resolving this case at the summary judgment stage. In doing so, the Court decided which facts were material and whether those material facts were in dispute. R-CALF's motion proves moot.

RECOMMENDATIONS

Accordingly, this Court **RECOMMENDS** that the district court:

1. Plaintiff's motion for summary judgment (Doc. 89) should be **DENIED**;

2. Plaintiff's motion to strike (Doc. 114) should be **DENIED**, as moot;

3. Defendant Sonny Perdue, in his official capacity as Secretary of Agriculture, and the United States Department of Agriculture's cross motion for summary judgment (Doc. 98) should be **GRANTED**;

4. Defendant-Intervenors Montana Beef Council, et al.'s cross motion for summary judgment (Doc. 94) should be **GRANTED**.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

The parties may file objections to these Findings and Recommendations within fourteen (14) days after service (mailing) hereof. 28 U.S.C. § 636. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

This order is not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a), should not be filed until entry of the District Court's final judgment.

DATED this 29th day of January, 2020.

/s/ John Johnston
John Johnston
United States
Magistrate Judge