IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, and THOMAS J. VILSACK, in his official capacity as Secretary of the United States Department of Agriculture, Defendants.	Case No. 20-cv-2552 (RDM)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGEMENT ON STANDING

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INTRODUCTION

Plaintiff Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF") has standing to challenge the Beef Checkoff Memoranda of Understanding that the U.S. Department of Agriculture ("USDA") entered with the Colorado Beef Council Authority, Florida Beef Council, Hawaii Beef Industry Council, Indiana Beef Council, Kansas Beef Council, Iowa Beef Cattle Producers Association d/b/a Iowa Beef Industry Council, Maryland Beef Council, Montana Beef Council, Nebraska Beef Council, New York Beef Industry Council, Nevada Beef Council, North Carolina Cattlemen's Beef Council, Oklahoma Beef Council, Pennsylvania Beef Council, South Carolina Beef Council, South Dakota Beef Industry Council, Tennessee Beef Industry Council, Texas Beef Council, Virginia Beef Industry Council, Vermont Beef Industry Council, and Wisconsin Beef Council.[1]

R-CALF shows it has associational standing to challenge the Beef Checkoff Memoranda of Understanding ("MOUs") that USDA entered with the Nebraska Beef Council, Oklahoma Beef Council, South Dakota Beef Industry Council, and Texas Beef Council ("QSBCs") because they authorize the QSBCs to use Checkoff funds for generic advertising for beef that increases competition against R-CALF's members—domestic cattle producers—thus causing them injury in fact. The D.C. Circuit has explicitly recognized such "competitor standing." Pursuant to this

[1] For purposes of establishing the factual bases for standing the parties agreed to focus on the activities of five QSBCs: Oklahoma, Nebraska, South Dakota, Texas, and Wisconsin. *See* Dkt. 28 at 2 (Joint Status Report). Below R-CALF demonstrates standing for members in four of those states—R-CALF's member in Wisconsin was unavailable for deposition and thus R-CALF agreed to withdraw him as a witness. While R-CALF establishes standing through its members in those four states, the Court's remedy should not be limited to vacating the MOUs with only those four QSBCs. R-CALF will brief remedy at the appropriate time and maintains that standing to challenge one of the MOUs is sufficient to challenge *all* MOUs. *See* Dkt. 13 at 11 (Pl.'s Opp'n to Defs.' Mot to Dismiss).

doctrine, courts *presume* a plaintiff suffers a financial injury sufficient to confer standing when they show that an agency action increases competition against them.

R-CALF's evidence establishes that the QSBCs' generic advertising for beef increases competition against its members' domestic and higher-quality beef and cattle. The QSBCs' generic advertising homogenizes the market for beef and prevents R-CALF's members from differentiating their domestic and higher-quality products to avoid competition. This, in turn, increases imports of cheaper beef and cattle that directly compete with R-CALF's members' products. R-CALF's evidence—including the results of six surveys R-CALF commissioned that show generic advertising for beef weakens consumer perceptions of segmentation in the beef market—is more than sufficient to resolve this motion that deals only with the threshold question of whether R-CALF has standing to proceed to challenge the MOUs.

In addition, the record establishes the MOUs permit the QSBCs to fund third-party entities whose political activities increase competition against R-CALF's members. This, too, suffices as an injury in fact sufficient to show standing.

R-CALF also meets the other requirements for standing. R-CALF asserts a procedural injury on the basis that USDA failed to comply with the Administrative Procedure Act's, ("APA"), 5 U.S.C. § 701 *et. seq.*, notice-and-comment rulemaking process in finalizing the MOUs. When a plaintiff alleges a procedural injury, "courts 'relax the redressability and imminence requirements' of standing.'" Dkt. 19 at 23 (Mem. Op. & Order) (quoting *Ctr. for Biological Diversity v. E.P.A.*, 861 F.3d 174, 182 (D.C. Cir. 2017)). The MOUs cause R-CALF's members' injuries by allowing the QSBCs to expend Checkoff funds on generic beef advertising and on third parties whose political activities harm R-CALF's members—whereas the QSBCs would be unable to expend any Checkoff funds without producer authorization in the MOUs'

absence. Furthermore, R-CALF's members' injuries are redressable by a favorable decision on the merits because notice-and-comment rulemaking may lead USDA to include additional terms in the MOUs that prevent the type of advertising and transfer of funds that harm R-CALF's members. Finally, R-CALF satisfies the "zone-of-interest" test because the Beef Checkoff program is designed to protect the economic interests of its members—domestic cattle producers.

BACKGROUND

I. R-CALF's Members and the U.S. Cattle and Beef Market.

R-CALF brings this lawsuit on behalf of its members—independent, domestic cattle producers—to challenge the MOUs that USDA entered with the QSBCs without following the rulemaking procedures required by the APA. R-CALF is a national non-profit membership organization that represents its members on domestic and international trade and marketing issues. Pl.'s Statement of Undisputed Material Facts ("SUF") ¶ 1. Its voting, dues-paying members include Vaughn Meyer, Gary Hendrix, David Wright, and Dennis Sweat. SUF ¶¶ 16, 20, 24, 31. Mr. Meyer, Mr. Wright, and Mr. Sweat all own and manage domestic cattle ranching operations. SUF ¶¶ 17, 21, 25. Mr. Hendrix owns and operates a meat processing business that utilizes patented technology to process beef in ways that produce a safer product with superior taste. SUF ¶¶ 32–35. Each of these members believes they could obtain higher prices for their product if consumers were more aware of the differences between their domestic and higher-quality cattle and beef and other cattle and beef products. SUF ¶¶ 28, 36.

USDA's own research has found that, when goods distinguish between domestic and foreign beef, U.S. consumers prefer beef produced in the United States. The "Product of USA" label is a voluntary label that may be applied to beef products that are processed in the United States but that may be made from animals born, raised, and/or slaughtered in other countries.

SUF ¶ 39. The agency recently conducted a survey on "Product of USA" labeling and found that consumers are willing to pay more for beef products with the label compared to those without. SUF ¶¶ 43, 44, Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims, 88 Fed. Reg. 15290, 15295, 15301 (Mar. 13, 2023). USDA found that consumers were willing to pay even higher prices for products from cattle identified as "born, raised, slaughtered, and processed in the United States" compared to those from cattle only processed in the United States. *Id*.

USDA's findings are consistent with other studies that have found that U.S. consumers prefer and are willing to pay more for domestic beef products. SUF ¶¶ 49–54. Research on this subject has settled that, "[w]ith a few exceptions" the "region of origin is an important factor influencing consumer attitudes about meat products," and that consumers "prefer steak or beef products that come from local producers or from the country or region in which the consumer resides." SUF ¶ 51.

These preferences are potentially important to the domestic beef market as the United States imports a substantial volume of cattle and beef from other countries. SUF ¶¶ 56–58. USDA estimates beef imports represent about 11% of U.S. beef, SUF ¶ 59, while another study estimates beef imports combined with beef from live, whole animal cattle imports represent about 18% of U.S. beef, SUF ¶ 60. Beef imports include lean trimmings that may be combined with U.S. beef to make hamburgers, but also includes cuts imported in the same form in which they are sold. SUF ¶¶ 62–63. USDA has noted that imports compete with the products of domestic producers and in two rulemakings has found that additional beef and cattle imports cause lower domestic cattle prices due to increased supply. SUF ¶¶ 64–70.

Imported beef is not required to be labeled with its country of origin. Country-Of-Origin-

Labeling, or "COOL," requires products to be labeled with the countries in which the animal from which the meat was derived was born, raised, and slaughtered. SUF ¶ 73. COOL allows consumers to distinguish imported beef more readily from domestic. The United States briefly required COOL for beef products before Congress subsequently revoked those rules, never replacing them with an alternative. SUF ¶¶ 74–76.

In separate litigation, large meatpacking companies (including Cargill, JBS, National Beef, and Tyson) admitted that COOL allowed domestic producers to receive higher prices:

> When the rule was in place, domestic feedlots could charge higher prices than foreign feedlots because of the premium paid for domestic beef. After the rule was repealed, foreign beef no longer had to be labelled as such. That spurred additional imports and caused domestic cattle prices to fall.

SUF ¶ 80.

The U.S. beef market is dominated by these four large meatpacking firms who slaughter and process 81-85% of cattle in the United States. SUF ¶¶ 9–10. They purchase cattle from producers and sell beef to retailers. *Id.* Their gross margins correspond to the spread between what they pay to purchase cattle from producers and the price at which they can sell processed beef to retailers. SUF ¶ 11. Thus, absent other differentiation by consumers in the market, they are incentivized to purchase cattle as cheaply as possible.

II. The Beef Promotion and Research Act and Regulations.

The Beef Promotion and Research Act ("Beef Act"), 7 U.S.C. § 2901 *et. seq*., created the federal Beef Checkoff program, 7 U.S.C. § 2901(b), which is implemented through the "Beef Order," promulgated by the U.S. Secretary of Agriculture. 7 C.F.R. Pt. 1260. The Beef Act and Beef Order created the Cattlemen's Beef Promotion and Research Board ("Beef Board"), which in turn certifies "Qualified State Beef Councils." *Id.* § 1260.315. The Qualified State Beef

Councils operate on the state level and "conduct[] beef promotion, research, and consumer information programs." 7 U.S.C. § 2902(14); 7 C.F.R. § 1260.181(a).

The Beef Board engages in promotional and other activities that are funded in part by an assessment levied on domestic cattle producers of $1 per head of cattle sold. 7 C.F.R. § 1260.172(a). This fee is collected by the Qualified State Beef Councils. 7 U.S.C. § 2904(8); 7 C.F.R. § 1260.172. They may retain 50 cents of the assessment. 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3). Although, unless state law requires otherwise, a producer can also request that the entire $1 collected be directed to the Beef Board. 7 C.F.R. § 1260.172(a)(7).

Pursuant to the Beef Act and Beef Order, USDA has "limited" authority over how the Qualified State Beef Councils use the Checkoff funds they retain. *Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV-16-41-GF-BMM, 2020 WL 2477662, at *1 (D. Mont. Jan. 29, 2020). They may use the Checkoff funds to "conduct[] beef promotion, research, consumer information and/or industry information programs." 7 C.F.R. § 1260.181(a). Minimal statutory and regulatory limits on their activities prevent the Qualified State Beef Councils from using Checkoff funds for lobbying and deceptive acts:

> [Qualified State Beef Councils must] [n]ot use council funds . . . for the purpose of influencing governmental policy or action, or to fund plans or projects which make use of any unfair or deceptive acts or practices including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

7 C.F.R. § 1260.181(b)(7). In addition, Qualified State Beef Councils must submit "an annual report by a certified public accountant of all funds remitted to such council . . . and any other reports and information the Board or Secretary may request." 7 C.F.R. § 1260.181(b)(6).

III. R-CALF's Prior Beef Checkoff Litigation and the MOUs.

R-CALF previously brought an as-applied First Amendment challenge to the federal Beef Checkoff program. R-CALF alleged that allowing the Qualified State Beef Councils to retain and

spend Checkoff funds without obtaining affirmative consent from the producers paying into the program was an unconstitutional government-compelled subsidy of private (as opposed to government) speech. *See Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV 16-41-GF-BMM, 2017 WL 2671072 (D. Mont. June 21, 2017). The district court granted R-CALF's request for a preliminary injunction, finding that R-CALF "likely will succeed on its First Amendment claim due to the compelled private speech" because "[t]he Government's statutorily authorized control over the Montana Beef Council appears inadequate to transform the Montana Beef Council's advertising into government speech." *Id.* at *7. This determination was upheld by the Court of Appeals for the Ninth Circuit. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Perdue*, 718 F. App'x 541, 542 (9th Cir. 2018).

While R-CALF's lawsuit was pending, USDA entered memoranda of understanding with some of the Qualified State Beef Councils. SUF ¶ 96. USDA did so without providing any public notice or comment opportunity. SUF ¶ 97. Through the memoranda of understanding, USDA gained additional oversight authority over the Qualified State Beef Councils' activities. SUF ¶¶ 98–104. The Ninth Circuit has explained that with the memoranda in place:

> QSBCs must submit for pre-approval by the Secretary any and all promotion, advertising, research, and consumer information plans and projects 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. QSBCs must also submit an annual budget outlining and explaining . . . anticipated expenses and disbursements and a general description of the proposed promotion, research, consumer information, and industry information programs contemplated. Failure to comply can lead to de-certification of the QSBCs by the Secretary.

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Vilsack, 6 F.4th 983, 989 (9th Cir. 2021) (citation and internal quotations omitted). The Ninth Circuit determined that these procedures give USDA "final approval authority over every word used in every

promotional campaign" such that "[p]romotional campaigns by QSBCs and contracted third parties . . . are . . . plainly government speech." *Id.*

In addition to engaging in their own campaigns with Checkoff funds, under the memoranda of understanding, Qualified State Beef Councils "can also make noncontractual transfers of checkoff funds to third parties to produce promotional materials" of those third-parties' choosing, which "need not be pre-approved." *Id.* at 987. However, the Ninth Circuit found that even this speech was "government speech" because USDA had authority pursuant to the statute, regulations, and memoranda of understanding resulting in "unquestioned control of the flow of assessment funds to the QSBCs—and the threat of decertification under the MOUs and the regulations if [USDA] disapproves of the use of those funds." *Id.* at 990.

With the memoranda of understanding in place, the Montana District Court and Ninth Circuit found that USDA exercised sufficient authority over Qualified State Beef Councils' speech to transform their private speech into government speech, and the First Amendment does not protect against the compelled funding of government speech. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Vilsack*, 6 F.4th 983 (9th Cir. 2021); *Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of Am. v. Perdue*, 449 F. Supp. 3d 944 (D. Mont. 2020); *Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV-16-41-GF-BMM, 2020 WL 2477662 (D. Mont. Jan. 29, 2020).

IV. The QSBCs Expend Checkoff Funds in Ways that Promote Consumption of Beef Without Consideration of Non-Price Product Attributes.

Under the authority of the MOUs, the QSBCs have used Checkoff funds for generic advertising for beef. SUF ¶¶ 108–109, 114–116, 120–122, 126–128. That is, they expend funds to promote the consumption of beef without consideration of any non-price attributes. These promotions do not distinguish one beef product from another on any basis, including origin,

production method, or processing method. The QSBCs fund these advertisements on social media and digital channels with nationwide reach. SUF ¶¶ 110, 116, 122, 128. In addition, the QSBCs have transferred Checkoff funds to the National Cattlemen's Beef Association ("NCBA") and U.S. Meat Export Federation ("USMEF"). SUF ¶¶ 111–112, 117–118, 123–124, 129–130, 145–147, 160–161.

NCBA and USMEF are industry trade organizations that receive significant portions of their budget from Checkoff funding to implement programs to promote beef as a generic commodity. SUF ¶¶ 142, 144, 148–149, 159. The QSBCs pay them not only direct program costs but also an "implementation" fee for costs of administrative services and overhead incurred in carrying out the program. SUF ¶¶ 150–151, 162.

Both organizations lobby on policy issues that impact R-CALF's members. SUF ¶¶ 153–158, 163. NCBA has lobbied against COOL and sued USDA to stop the implementation of COOL regulations. SUF ¶¶ 155–156, 158. NCBA has also supported replacing the "Product of USA" label with a "Processed in USA" label that would still allow meat products from animals originating from other countries but that receive minimal processing in the United States to bear the same label as those made from animals born, raised, and slaughtered in the United States. SUF ¶¶ 157–158. USMEF has also opposed COOL. SUF ¶ 163.

A small number of QSBC ads have differentiated between beef products—though rarely to explain the differences between beef from different sources or produced according to different methods. SUF ¶¶ 113, 119, 125, 131. USDA guidelines explicitly permit QSBCs to fund comparative advertising "as long as the presentation of those facts is truthful, objective, not misleading, and supported by a reasonable basis." SUF ¶ 134. More specifically, the guidelines:

> permit comparative advertising that aids consumers in making purchase decisions. Such comparative advertising may compare the desirable qualities of a product

> compared to qualities of competing products. Comparative advertising (comparing facts about different commodities or products) is allowed as long as the information is factual.

SUF ¶ 135.

Non-generic advertising that the Checkoff has funded include branded partnerships promoting beef from Wendy's, McDonald's, and Arby's, SUF ¶ 140; promotions of state-specific beef businesses, SUF ¶ 140; and informational materials that explain the different environmental impacts of beef produced in different locations, the difference between grass-finished and grain-finished beef, what different labeling claims means, and the difference between various USDA beef quality grades, SUF ¶¶ 136–139.

V. R-CALF's Consumer Perception Surveys Show Generic Advertising Homogenizes the U.S. Beef Market.

Dr. Claudiu Dimofte, Professor of Marketing in the Fowler College of Business at San Diego State University, and an expert on marketing and consumer psychology, conducted consumer surveys on QSBC beef advertising for R-CALF. SUF ¶¶ 164–167. He tested two types of ads: (1) "current" ads promoting beef as a generic product typical of those funded by QSBCs (including five state ads featuring the target QSBCs and one national ad) and (2) an "adjusted" ad featuring a typical Checkoff ad image but with the added statement: "Beef that is produced domestically uses high quality feed, advanced standards of care, and a limited carbon footprint." SUF ¶ 168. He measured the effect of these ads on consumers in three areas: (1) the consumers' perceptions of differentiation in the beef marketplace, *i.e.*, the extent to which they see beef as a commodity, defined as "an economic good that the market treats as equivalent regardless of who

produced it;" (2) the consumers' willingness-to-pay for beef; and (3) the consumers' intent to purchase and consume beef. SUF ¶¶ 170–176.

Dr. Dimofte conducted six surveys—one national survey and five state surveys covering Nebraska, Oklahoma, South Dakota, Texas, and Wisconsin. SUF ¶¶ 168, 181. He then conducted a meta-analysis of the results of all six studies. SUF ¶ 190. Meta-analysis is a widely-used statistical technique that allows one to aggregate the results from multiple studies that are addressing the same variables—as is the case here—to achieve a more precise measurement of the effects. SUF ¶¶ 191–192.

Dr. Dimofte's meta-analysis showed three statistically significant findings: *First*, the adjusted advertisement led consumers to perceive the beef marketplace as more differentiated. SUF ¶ 195. The control group, who was not shown any beef advertising, largely did not see the beef marketplace as differentiated, and exposure to the current Checkoff advertisement did not affect this perception. *Id*. *Second*, the adjusted advertisement significantly improved willingness-to-pay for beef. SUF ¶ 193. The control group's willingness-to-pay was relatively low, and exposure to the current Checkoff advertisement did not affect this. *Id*. *Third*, the adjusted advertisement did not decrease consumers' intent to purchase beef compared to the current Checkoff ad. SUF ¶ 194. Both advertisements significantly improved the desire to purchase beef compared to the control, with similar effects. *Id*.

Dr. Dimofte also noted that while the control group was unexposed to beef advertising in the study, they likely had encountered Beef Checkoff advertising before the study. SUF ¶¶ 177–178. Thus, the control group's findings also supported inferences about the effects of generic QSBC advertising. The control group largely did not perceive the beef marketplace to be differentiated and their willingness-to-pay for beef was relatively low. SUF ¶¶ 179–180, 188–

189. This suggested that generic advertising for beef "has created consumer perceptions of low market differentiation that renders beef akin to a commodity product (i.e., one perceived as the same regardless of seller) in consumers' mind." SUF ¶ 197. Dr. Dimofte further concluded this has put "downward pressure on beef prices and induces a low consumer willingness-to-pay." SUF ¶ 210.

Dr. Dimofte drew from peer-reviewed literature to explain the consequences of his findings. Generic advertising by the QSBCs leads domestic and higher-quality beef producers to "fac[e] more competitive pressure than they would have had consumers been aware of their differentiating attribute(s)." SUF ¶ 212. In a market where there is less differentiation, "all products are seen as similar" and "there is no reason for consumers to consider any product attribute beyond price." SUF ¶ 211. This incentivizes consumers to purchase the lowest-priced beef. *Id.* By contrast, when a seller in market can differentiate their product—as domestic producers were able to do through the adjusted ad—producers of those differentiated goods can avoid competing on price and receive higher prices for their product compared to other non-differentiated sellers in the market. SUF ¶ 199.

Indeed, Dr. Dimofte's literature review found peer-reviewed studies examining generic advertising also establish that it harms differentiated sellers (such as domestic and high-quality beef and cattle producers). A review by Ferrier et al. (2007), "suggests that generic advertising may inhibit the ability of producers to differentiate." SUF ¶ 202. A study by Isariyawongse et al. (2007) shows that "generic advertising is likely to benefit the low quality firm more than the high quality firm when generic advertising lowers product differentiation" SUF ¶ 204. Crespi and Marette (2002) demonstrate that "a producer with a differentiated product may very well be harmed by an increase in generic advertising." SUF ¶ 208.

Dr. Dimofte also cited a study by Chakravarti and Janiszewski showing generic advertising impacts prices in a way that harms differentiated sellers. The study found that generic advertising that does not mention certain product attributes "decreases access to information about [those] non-advertised attributes (e.g., quality)" and "results in an increase[d] importance of price." SUF ¶ 213. Meanwhile—consistent with Dr. Dimofte's findings on the adjusted advertisement—that study also found that "generic advertisements that discuss a differentiating attribute produces an increase in the importance of that differentiating attribute." SUF ¶ 214.

In sum, generic advertising can make consumers more responsive to price by decreasing the importance of non-price differentiating qualities that are absent in the advertisement. However, advertising that is "generic" but still mentions a differentiating attribute can avoid this impact.

VI. USDA's Rebuttal Expert.

USDA employed a rebuttal expert, Dr. Harry Kaiser, to review Dr. Dimofte's report and findings. SUF ¶ 223. Dr. Kaiser critiqued Dr. Dimofte's methodology, study design, and use of the statistical method "analysis of variance" or "ANOVA," rather than regression analysis, to reach his results. SUF ¶¶ 226–232. Dr. Kaiser then purported to conduct a multiple linear regression using Dr. Dimofte's data and claimed to refute Dr. Dimofte's finding that willingness-to-pay increases with exposure to the adjusted advertisement. SUF ¶¶ 235–236. His analysis confirmed Dr. Dimofte's finding that exposure to both the current and adjusted advertisements increases consumer intent to purchase beef compared to the control group. SUF ¶¶ 237–238.

At deposition, Dr. Kaiser admitted that he did not have a background in marketing nor was he familiar with basic marketing research methodologies. SUF ¶¶ 241–242, 245, 248–49. Thus, while he criticized the failure to conduct a regression rather than an ANOVA, he could not state whether ANOVA was the standard tool in marketing studies or not. SUF ¶¶ 245–247.

Similarly, while he claimed Dr. Dimofte utilized leading questions invalidating his survey results, he could not point to any authority in the field that supported that opinion. SUF ¶ 250. Further still, while he insisted on conducting regression analysis, he conceded that he made multiple errors including miscoding data and wrongly employing variables. SUF ¶¶ 255, 259, 261–263. Many of the errors Dr. Kaiser admitted were due to his failure to adequately review Dr. Dimofte's report to understand his study design and process. SUF ¶ 260. Dr. Kaiser admitted that no "journal [would] accept an article" with the mistakes he made, SUF ¶ 258, and that such mistakes would render his analysis "not accepted in [his] field." SUF ¶¶ 257, 263. He also admitted that his failure to check his report to ensure its accuracy was another oversight making the entirety of his report not "the standard practice in [his] field." SUF ¶ 264.

Recognizing the unreliability of his opinions, Dr. Kaiser provided a supplemental report for the purpose of correcting the errors in his original regression analysis. In this second attempt, he again claimed to refute Dr. Dimofte's finding that consumer willingness-to-pay increased with exposure to the altered ad. SUF ¶ 276. However, in the new analysis he inexplicably took a different approach. Dr. Kaiser introduced new control variables, SUF ¶ 271–273, despite previously claiming he had already included every possible control variable in his original analysis, SUF ¶¶ 235, 254.

Dr. Dimofte reviewed both of Dr. Kaiser's analyses and produced his own supplemental expert report. Dr. Dimofte found multiple errors in both of Dr. Kaiser's regressions—including and beyond the ones Dr. Kaiser admitted to in his deposition. SUF ¶¶ 284–286, 288–290. These were of a similar nature to those Dr. Kaiser acknowledged would render the analysis unreliable and unacceptable in his field. *Id*. Dr. Dimofte conducted his own regression analysis where he corrected Dr. Kaiser's mistakes. This analysis confirmed the results from the ANOVA test Dr.

Dimofte originally performed. SUF ¶ 287. In other words, even employing Dr. Kaiser's preferred statistical approach, Dr. Dimofte's surveys demonstrate that the QSBCs' ads homogenize beef and that consumers will pay more for beef when exposed to advertising that mentions differentiating features of domestic beef products.

VII. Procedural History.

Defendants moved to dismiss R-CALF's lawsuit on the grounds that R-CALF lacked standing. Dkt. 11 at 1. The Court found that R-CALF had sufficiently alleged standing to defeat the motion to dismiss but ordered discovery into the factual basis for R-CALF's standing to develop the record to determine if R-CALF in fact has standing. Dkt. 19 at 2. After over a year of discovery, R-CALF moves the Court for summary judgment in favor of R-CALF on the issue of standing to proceed.

STANDARD OF REVIEW

The Court should grant summary judgment when "first, 'there is no genuine issue as to any material fact' and, second, 'the moving party is entitled to a judgment as a matter of law'" *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006) (quoting Fed. R. Civ. P. 56(c)). "A fact is 'material' if a dispute over it might affect the outcome of a suit under governing law." *Id*. An issue is genuine only "if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

R-CALF has standing to bring suit on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Here, it is not seriously disputed that the interests R-CALF seeks to protect are "germane" to its organizational purpose, because it was formed to ensure the continued profitability and viability of the U.S. cattle industry and to promote the industry's interest on trade and marketing issues. SUF ¶ 1. Moreover, it is clear that neither the APA claims R-CALF brings nor the relief requested—that USDA go through the APA's rulemaking procedures in entering the MOUs—require the participation of any particular individual member. *See Flyers Rts. Educ. Fund, Inc. v. U.S. Dep't of Transp.*, 957 F.3d 1359, 1362 (D.C. Cir. 2020) ("no question" that lawsuit seeking "rulemaking . . . does not require participation by individual members").

Thus, the only real dispute is whether R-CALF's members have standing to sue in their own right. An individual has standing to sue if: (1) they "have suffered an injury in fact," (2) there is "a causal connection between the injury and the conduct complained of," and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted). Since R-CALF challenges USDA's failure to follow required rulemaking procedures, a procedural violation, once it "establish[es] the agency action threatens [its] concrete interest . . . the normal standards for immediacy and redressability are relaxed." *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). Under the "relaxed" standard for a procedural injury, the plaintiff "need not demonstrate that but for the procedural violation the agency action would have been different . . . [nor] that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest." Instead, the plaintiff must only "demonstrate a causal relationship between the final agency action and the alleged injuries," and the court will

"assume[ ] the causal relationship between the procedural defect and the final agency action." *Id.* (internal quotations removed).

Finally, R-CALF satisfies the "zone-of-interest" test for standing if it can show that the interests it seeks to protect are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997).

ARGUMENT

I. R-CALF's Members Suffer a Competitive Injury In Fact Under the Doctrine of Competitor Standing.

R-CALF's members suffer an injury in fact from increased competition in the marketplace for cattle and beef due to the MOUs. The D.C. Circuit's doctrine of competitor standing recognizes "that economic actors 'suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition' against them." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010). An agency action can increase competition sufficient to confer standing when it "provides benefits to an existing competitor or expands the number of entrants in the petitioner's market," *New World Radio, Inc. v. F.C.C.*, 294 F.3d 164, 172 (D.C. Cir. 2002), or when it "permit[s] subsidization of some participants in a market," *U.S. Telecom Ass'n v. F.C.C.,* 295 F.3d 1326, 1331 (D.C. Cir. 2002). While courts have articulated "various formulations of the standard" for competitive injury, "the basic requirement . . . is that the complainant show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact." *Sherley*, 610 F.3d at 73.

Notably, a plaintiff relying on competitor standing need only demonstrate that the agency action increases competition against them, and the court will "acknowledge a chain of causation 'firmly rooted in the basic law of economics'" to infer resultant economic harm. *New World*

Radio, 294 F.3d at 172. Thus, a cognizable injury does not require the showing of "lost sales, per se" from the increase in competition but simply "exposure to competition" itself. *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996).

R-CALF's members face increased competition from the MOUs in two ways: (1) the MOUs allow the QSBCs to fund generic advertising for beef that frustrates R-CALF's members' ability to differentiate their product and avoid competition, and (2) the MOUs allow QSBCs to fund third party organizations who lobby for policies that increase competition against R-CALF's members. Either injury is sufficient to convey standing.

A. R-CALF's Members Suffer Competitive Injuries Due to the QSBCs' Advertisements.

Dr. Dimofte's studies establish that generic advertising for beef—funded by the QSBCs under the MOUs—increases competition against R-CALF's members for sale of their domestic cattle and beef. Across his studies, two findings hold true: (1) "[t]he current, generic Beef Checkoff program advertising tested [] has created consumer perceptions of low market differentiation that renders beef akin to a commodity product (i.e., one perceived as the same regardless of seller) in consumers' mind;" and (2) "the current, generic Beef Checkoff program advertising tested [] has also placed downward pressure on beef prices and induced a low consumer willingness-to-pay in general." SUF ¶¶ 197, 210. These findings establish not only that generic advertising increases competition—which courts "recognize will almost certainly cause an injury in fact" sufficient to confer standing—they also establish the resulting economic injury in the form of decreased willingness-to-pay, on its own sufficient to show standing. *Sherley*, 610 F.3d at 73.

i. Generic advertising causes injury in fact by homogenizing the market for beef and increasing competition against R-CALF's members.

The MOUs increase competition against R-CALF's members by undermining their ability to differentiate themselves as cattle and beef sellers, causing them injury in fact. Dr. Dimofte's studies found that, by default, consumers view the beef market as having little differentiation. SUF ¶ 189. This default state of seeing beef products as interchangeable was unaffected by exposure to generic beef advertisements. SUF ¶ 195. Dr. Dimofte explained, the default state was likely the product of consumers being exposed to generic Beef Checkoff advertising before the study. SUF ¶¶ 177–178. Thus, the studies find that QSBCs' generic ads cause consumers to view beef products as largely indistinguishable from one another.

R-CALF members Mr. Sweat, Mr. Meyer, and Mr. Wright aim to distinguish their cattle based on their cattle being produced in the United States and through specific practices they employ to produce a higher-quality product. SUF ¶¶ 18, 22, 26, 28–29. Mr. Hendrix aims to distinguish beef processed by his state-of-the-art technology from other beef. SUF ¶ 36. This type of differentiation is a strategy that firms can use to "enhance margins and avoid competing on price." SUF ¶ 199. However, when consumers do not perceive differences between beef products, "differentiated beef producers are in direct competition with undifferentiated ones for consumer favor." SUF ¶ 200. By homogenizing the market for beef, generic advertising authorized by the MOUs forces Mr. Sweat, Mr. Meyer, Mr. Wright, and Mr. Hendrix to compete directly against producers of imported and lower-quality cattle and beef. It thus "enlarges the pool of [their] competitors, which will 'almost certainly cause an injury in fact' to [them as] participants in the same market." *Arpaio v. Obama*, 797 F.3d 11, 23 (D.C. Cir. 2015) (quoting *Sherley*, 610 F.3d at 73)*; see also La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (increase in price competition establishes standing).

Other research studying the impacts of generic advertising programs has also found that generic advertising has these effects. These studies find "generic advertising may harm branded products in a market which is characterized by both branded and generic goods," that is, "the promotion of commodities may actually decrease demand for branded goods." SUF ¶ 203. Importantly, they note that even if generic advertising programs increase overall demand for a good, differentiated sellers may still be harmed if they lose market share to their lower-cost competitors. SUF ¶¶ 205–207, 215–218. Scholars have thus concluded, "as generic advertising increases the size of the pie, the [relative] sizes of the slices are also changing." SUF ¶ 217.

Even the Supreme Court has noted that generic advertising programs can increase competition against differentiated producers. The Court has held that a mushroom producer wanting "to convey the message that its brand of mushrooms is superior to those grown by other producers" was protected from being compelled to subsidize speech suggesting "that mushrooms are worth consuming whether or not they are branded" due to the original producer's competitive interest in that message. *United States v. United Foods*, 533 U.S. 405, 405, 411 (2001). Like the branded mushroom producer in *United Foods*, R-CALF's members also have a competitive interest in differentiating their domestic and higher-quality products. Generic beef advertising, however, homogenizes the beef market and "alter[s] [its] competitive conditions" injuring R-CALF's members "sufficient to satisfy the . . . injury-in-fact requirement." *Clinton v. City of New York*, 524 U.S. 417, 433 (1998).

The way the MOUs increase competition against R-CALF's members is similar to other cases where plaintiffs suffered injury in fact from an agency action that impeded their ability to differentiate themselves in a market. First, in *Organic Trade Association v. United States Department of Agriculture,* organic livestock operators had standing to challenge the withdrawal

of more stringent animal welfare standards for producers wanting to market their livestock as "organic." 370 F. Supp. 3d 98, 106–07 (D.D.C. 2019). The court found that the withdrawal of the standards allowed more producers to market their livestock as "organic" and thus "prevent[ed] a shrinkage of the pool of producers eligible to compete in the organic livestock market, to the detriment" of the plaintiffs, who exceeded existing standards. *Id.* at 107. Therefore, the plaintiffs were suffering an injury in fact. *Id.* at 109.

The court applied the same reasoning in *American Institute of Certified Public Accountants. v. I.R.S.*, where it found that certified public accountants ("CPAs") had standing to challenge an agency program granting uncredentialed tax return preparers listing in a special directory. 804 F.3d 1193 (D.C. Cir. 2015). The court found the program "intensified competition" and injured the plaintiffs by giving uncredentialed preparers a new credential that would "dilute[ ] the value of a CPA's credential in the market for tax-return-preparer services and permit unenrolled preparers to more effectively compete with and take business away from presumably higher-priced CPAs." *Id.* at 1197.

Like the organic livestock operators in *Organic Trade Association* and the CPAs in *American Institute of Certified Public Accountants,* R-CALF's members offer a differentiated product, which should compete against a smaller pool of other similar products. As the plaintiffs do in those cases, R-CALF's members challenge an agency action that broadened the pool of competitors, and thus increased competition against them. Plaintiff's evidence confirms that the sort of generic advertising funded by the QSBCs operating under the MOUs convinces consumers to see beef as an interchangeable product, thereby harming R-CALF's members' ability to distinguish themselves.

The import market for cattle and beef illustrates how homogenization increases competition against R-CALF's members. By increasing consumer perception of beef as an interchangeable commodity, the QSBCs' advertising encourages large meatpacking companies to choose whether to source domestic or imported cattle based purely on which is cheaper. The vast majority of the U.S. market for beef is controlled by just four meatpacking companies. SUF ¶¶ 9–10. They purchase and process 81-85% of the cattle in this country and sell the resultant beef to retailers. *Id*. Thus, they profit from the spread between the price at which they can purchase cattle and the price for which they can sell beef. SUF ¶ 11. When imported beef and domestic beef are seen as undifferentiated, meatpackers will receive the same prices for the beef they sell regardless of whether it comes from domestic or imported cattle. It only follows that they will seek to increase their profits by purchasing the cheapest cattle without regard to its source. This increases their purchases of imported beef and cattle rather than domestic beef and cattle sold by R-CALF's members. This behavior of the meatpackers is a "hardly-speculative exercise in naked capitalism." *Nat. Res. Def. Council v. E.P.A.*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (for standing purposes court predicts that firms will take advantage of opportunity to source cheaper input products to increase their margins). Moreover, "[u]nder undisputed economic principles," when there is an influx of imported beef and cattle that are undifferentiated from domestic "such an increase in supply is likely to depress the prices that [those in the market] can secure." *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regul. Admin.*, 822 F.2d 1105, 1108 (D.C. Cir. 1987).

USDA itself has concluded that additional beef imports lower beef and cattle prices "[d]ue to the increase in supply," Importation of Beef From a Region in Brazil, 78 Fed. Reg. 77370, 77375 (Dec. 23, 2013), and that additional cattle imports similarly lower prices for cattle

producers, Bovine Spongiform Encephalopathy; Minimal-Risk Regions; Importation of Live Bovines and Products Derived From Bovines, 72 Fed. Reg. 53313, 53356 (Sept. 18, 2007). The Checkoff ads homogenize the market, inducing companies to import beef. Thus R-CALF members Mr. Sweat, Mr. Meyer, and Mr. Wright as producers of domestic cattle are harmed by the natural economic effects of homogeneity in the beef market, which increase imports and drive down prices, creating a specific financial harm to R-CALF's members. SUF ¶¶ 28–30.

ii. Consumers will pay less for beef that is undifferentiated in advertising, confirming that generic advertising causes R-CALF's members an injury in fact.

Consumers are willing to pay less for domestic beef when the domestic beef is undifferentiated by advertising. SUF ¶¶ 193, 195. Although not necessary, this conclusion confirms R-CALF's members' injury in fact.

Under the competitor standing doctrine, R-CALF's members need not demonstrate that the QSBCs' advertising has *actually* lowered prices for their cattle and beef—the fact that the ads homogenize beef and increase competition is enough. *Clinton*, 524 U.S. at 432–33 ("routinely recognize[] *probable* economic injury resulting from governmental actions that alter competitive conditions") (emphasis added); *see also Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1333–34 (Fed. Cir. 2008) ("in most 'competitor standing' cases, [] it is *presumed* (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors" and plaintiff can "fairly employ economic logic toward that end even though empirical analysis might conceivably have provided a higher level of certainty") (emphasis in original). Here, R-CALF's evidence goes further by establishing as an empirical matter that generic advertising costs R-CALF's members money by making price the

determinative factor in beef purchases, when with a differentiated marketplace consumers would pay more for domestic beef.

Plaintiffs' evidence shows consumers were willing to pay only relatively low prices for beef after they were exposed to the current QSBC advertising. SUF ¶¶ 179, 188. Moreover, consumers shown a current QSBC advertisement were not willing to pay more for steak than those not shown any beef advertisement. SUF ¶ 193. In contrast, survey respondents who viewed the adjusted advertisement featuring a message about domestic beef were willing to pay higher prices for steak than both those who viewed a generic beef advertisement that did not mention domestic beef and those who did not view any beef advertising. *Id*. Based on these observed findings, Dr. Dimofte concluded that generic advertising has lowered prices for domestic and differentiated producers. SUF ¶ 197, 210. As the literature explains, generic advertising decreases differentiation between products and leads consumers to select products based exclusively on price instead of other desirable attributes such as origin or production method. SUF ¶¶ 213–215. The QSBCs' generic advertising thus leads consumers to seek out the least expensive beef, driving prices for differentiated sellers like R-CALF's members down.

Plaintiffs' evidence is confirmed by USDA. The agency found that consumers will pay more for beef that has undergone more of its production steps in the United States, when that distinction is understood by the purchaser through labeling. SUF ¶¶ 43–44. USDA explained that when labels convey accurate information about products, "consumers [can] better comparison shop between products based on the value that consumers place on products fully raised and processed in the United States." SUF ¶ 48. On the other hand, generic advertising that uninforms consumers and obscures differences between domestic and imported beef hinders consumers from assessing beef based on this value and preference, erasing the premium price domestic beef

would otherwise command. This causes R-CALF's members injury in fact. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes.")

Contrary to Defendants' prior argument to this Court, R-CALF's evidence distinguishes this case from *Air Excursions LLC v. Yellen*, 66 F.4th 272 (D.C. Cir. 2023). Dkt. 44 at 2, 4–6 (Anticipated Bases for Defs' Opp'n to MSJ). There, an airline did not have competitor standing to challenge a competitor airline's receipt of a "windfall" payment. The plaintiff claimed that the windfall allowed the competitor airline to charge below-market rates and gain a stronger competitive position. *Air Excursions*, 66 F.4th at 278. But it fatally provided no evidence linking the government action (the windfall payment to the competitor) to the competitor's pricing strategy or other competitive behavior. *Id*. at 278–81. The court explained that while "the competitor standing doctrine supplies the link between increased competition and tangible injury" it "does not, by itself, supply the link between the challenged conduct and increased competition." *Id*. at 281.

Unlike the plaintiff in *Air Excursions LLC,* however, R-CALF has provided evidence supporting *both* links. Here, Plaintiff proffers expert testimony based on empirical research that the QSBCs' generic advertising homogenizes the market for beef and thus increases competition against R-CALF's members. SUF ¶¶ 195–197. Thus, R-CALF links the challenged conduct—the MOUs authorizing QSBCs to fund generic advertisements for beef—to the increased competition its members face. This establishes competitor standing because, as *Air Excursions LLC* explains, courts should infer that increased competition creates "tangible injury." *Air Excursions*, 66 F.4th at 281. Nonetheless, R-CALF goes one step further, demonstrating this

advertising has a concrete price effect by decreasing consumers' willingness-to-pay for domestic, differentiated beef products. SUF ¶¶ 179, 188, 193. Thus, R-CALF has clearly established an injury in fact under the competitor standing doctrine.

iii. USDA's rebuttal expert cannot create a dispute of fact as he is unqualified and provides flawed analysis.

USDA's rebuttal expert is unqualified to review R-CALF's evidence and create a dispute of fact over it, because his analysis relies upon flawed methodology inconsistent with the standards in his field and his findings are irrelevant to determining this motion.

Federal Rule of Evidence 702 provides that an expert witness may testify only if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

As explained below, Dr. Kaiser lacks the necessary expertise to rebut Dr. Dimofte's findings and both Dr. Kaiser's rebuttal and analysis contain numerous mistakes rendering them a far cry from meeting Federal Rule of Evidence 702. As such, he provides no basis to create any "genuine" issue over R-CALF's expert's findings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Dr. Kaiser's training and expertise in *economics*, SUF ¶¶ 224–225, does not equip him with the "specialized knowledge" needed to provide expert testimony to rebut Dr. Dimofte's *marketing* studies. Fed. R. Evid. 702(a). An expert's "impressive credentials," do not qualify them to provide expert testimony if such credentials are not in the fields relevant to the facts and evidence in the case. *See Arias v. DynCorp*, 928 F. Supp. 2d 10, 17 (D.D.C. 2013).

Dr. Kaiser admits that he is "not an expert in marketing and in consumer behavioral research," like Dr. Dimofte, but in "behavior economics," which he acknowledges is "different." SUF ¶ 241. He is not on the marketing faculty of his institution, has no training in marketing, has not worked in marketing, and has not taught courses on marketing. SUF ¶ 242. He is thus unqualified to analyze any of Dr. Dimofte's studies and findings, which apply marketing metrics to measure consumer responses to advertisements. *See Arias*, 928 F. Supp. 2d at 17 (expert unqualified where academic and professional experiences are in separate field not related to specific issues in case).

Dr. Kaiser's testimony is further unreliable because, instead of using "reliable principles and methods" in the field of marketing, he "chooses to utilize [his] own unique methodology" that is not scientifically accepted. *Groobert v. President & Directors of Georgetown Coll.*, 219 F. Supp. 2d 1, 6, 9 (D.D.C. 2002). For instance, he attacks Dr. Dimofte's use of hypothetical consumer surveys because they are not utilized in behavior economics, while simultaneously acknowledging that they are "regularly done" in "the marketing literature" that Dr. Dimofte is familiar with and relies upon. SUF ¶¶ 227, 243–244. Likewise, Dr. Kaiser is unable to say if ANOVA, the statistical tool employed by Dr. Dimofte, is "typical" in the marketing field because Dr. Kaiser readily admits that he is "not an expert on marketing studies research" and is "not aware of that literature." SUF ¶ 245.

From these crumbled foundations, Dr. Kaiser attempts to attack Dr. Dimofte's approach as flawed because it allegedly fails to control for demographic factors. SUF ¶ 232. Yet Dr. Kaiser admits he is "not aware of" analysis of covariance ("ANCOVA"). SUF ¶ 248. ANCOVA is one of the statistical analytical tools used in marketing research to provide statistical controls while still measuring the effect on the relevant variable. SUF ¶ 280. Thus,

even though Dr. Dimofte's ANCOVA analysis reached the same result as his ANOVA analysis, SUF ¶ 283, Dr. Kaiser would be unable to say whether this addresses the issue he raised. SUF ¶ 249.

Indeed, Dr. Kaiser's real complaint for the use of ANOVA and ANCOVA is that "[i]t isn't [typical] in economic research." SUF ¶ 246. Economic research, of course, is not the relevant scientific field in which to address the questions of how generic advertising impacts consumers. Dr. Kaiser's critique that Dr. Dimofte should have used a different statistical approach, "flies in the face of decades of social and cognitive psychology research," the relevant field. SUF ¶ 279.

Next, Dr. Kaiser attempts to criticize the phrasing of the altered advertisement used by Dr. Dimofte's study. SUF ¶ 230. The total basis of Dr. Kaiser's critique in this regard is not scientific literature, academic studies, or his claimed economic expertise. Instead, Dr. Kaiser's opinion is based on his "gut instinct," which is not the proper basis of testimony under Federal Rule of Evidence 702. SUF ¶ 250. Dr. Kaiser fails to apply *any* methodology, let alone a process that is "mainstream in this particular field," *i.e.* marketing. *Rothe Dev., Inc. v. Dep't of Def.*, 107 F. Supp. 3d 183, 204 (D.D.C. 2015) (expert testimony excluded when "preferred methodology . . . well outside of the mainstream in this particular field"). The use of expert testimony is improper when the opinion is based on a mere reaction to the phrasing of a question, where the trier of fact "is just as competent to consider and weigh the evidence as is an expert witness and just as well qualified to draw the necessary conclusions therefrom." *Evans v. Washington Metro. Area Transit Auth.,* 674 F. Supp. 2d 175, 179–80 (D.D.C. 2009).

Beyond testifying from the wrong scientific field and relying upon his "gut instinct," Dr. Kaiser's report should also be rejected because it is based upon "mistaken assumption[s]"

and "speculation," justifying the Court to set it aside as unreliable. *See Rothe Dev., Inc.*, 107 F. Supp. 3d at 204 (rejecting expert testimony consisting of speculation and mistaken assumptions). Dr. Kaiser admits to an elementary mistake by incorrectly treating a "dependent variable" (one expected to change based on the stimuli) as a "control variable" (one the study holds constant). SUF ¶¶ 255, 259. He fails to read Dr. Dimofte's report closely and overlooks Dr. Dimofte's explanation of the code names he used and what data they represent. SUF ¶ 260. Dr. Kaiser further admits to using multiple variables in his regression *despite not knowing what they are*, even though it is not typical in his field to do so and such analysis would not be accepted by any scientific journal. SUF ¶¶ 253–258. Finally, Dr. Kaiser miscodes data and treats a response that a respondent did not know or had no opinion as to their willingness-to-pay as indicating the respondent was willing to pay the highest possible amount. SUF ¶ 261. This "mistake," he acknowledges, would make his analysis "not accepted in [his] field." SUF ¶¶ 261–263. Expert testimony that is unreliable because the expert "missed" relevant information, *Arias*, 928 F. Supp. 2d at 18, or based their opinions on unfounded assumptions, *Rothe Dev., Inc*, 107 F. Supp. 3d at 204, is properly excluded.

Recognizing their expert was at risk of exclusion under *Daubert* based on the deposition testimony, Defendants asked Dr. Kaiser to prepare a supplemental report purporting to correct his mistakes. This new analysis suffers from the same (conceded) fatal flaws as Dr. Kaiser's original report. First, Dr. Kaiser continues to miscode the data. SUF ¶¶ 274–275. He *excludes* respondents who said they did not how much they were willing to pay for beef—removing all of their data. SUF ¶ 275. But he *includes* respondents who said they had an equivalent "no opinion" on the importance of various beef attributes, while treating their answer as if they had instead

selected a "neutral" score in the middle of the scale and thereby changing their answer to an opinion they purposefully did not choose. SUF ¶ 274.

Second, Dr. Kaiser continues to incorrectly manipulate the variables. For unexplained reasons he fails to exclude control variables he previously recognized as being incorrectly employed because of their relation to the independent variable being studied. SUF ¶¶ 273, 259. Moreover, although he testified that his original regression already included all possible control variables, his supplemental analysis incorrectly adds new control variables that are related to the independent variable being studied. SUF ¶¶ 254, 271–272. Dr. Dimofte explains that including control variables that are correlated to the variable being studied can lead to results that undercount the effect of the independent variable. SUF ¶ 285. Over-including control variables this way is "an example of what scholars have labeled 'reverse p-hacking' (Chuard et al., 2019), where the goal is not to find statistically significant results." SUF ¶ 288. Thus, this analysis too must be disregarded as unreliable because Dr. Kaiser fails to "employ[] . . . the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

Done correctly, regression confirms the findings of Dr. Dimofte's ANOVA test. Dr. Dimofte conducted his own regression on his data and found the same effects his meta-analysis uncovered: the current Checkoff advertisement had no impact on perceptions of beef as a commodity or willingness-to-pay, whereas the adjusted advertisement significantly lowered consumer perceptions of beef as a commodity, significantly improved willingness-to-pay, and did not decrease the impact on consumer demand. SUF ¶ 287.

While any one of the above fatal flaws in Dr. Kaiser's analysis and "supplemental" expert report are sufficient to exclude the testimony as unreliable, one final independent basis

exists for exclusion. Under Federal Rule of Evidence 702(a), expert testimony must "help the trier of fact to understand the evidence or to determine a fact in issue." Here, Dr. Kaiser's critique fails to address Dr. Dimofte's central finding: that generic advertising for beef harms R-CALF's members as differentiated producers in the beef marketplace. SUF ¶¶ 196–197. Dr. Kaiser misses that Dr. Dimofte was studying not just the impact of generic advertising on cattle and beef producers in general but on differentiated cattle and beef producers. Hence, Dr. Kaiser's initial analysis incorrectly treats data on the extent to which consumers viewed beef as a commodity as control data rather than "the main variable of interest." SUF ¶ 255. Then, Dr. Kaiser relies on studies that take a "10,000 feet, very aggregate, macro kind of view[] of the way generic advertising works" to examine the impact of generic advertising on overall beef demand rather than on sub-segments of the beef marketplace. SUF ¶ 265. Dr. Kaiser admits that none of the studies he considers address the question Dr. Dimofte was studying. SUF ¶ 266. The conclusion that generic advertising increases overall beef demand has no relevancy to Dr. Dimofte's findings. Unsurprisingly, Dr. Kaiser was unable to rebut that Dr. Dimofte's findings are consistent with research finding that consumers prefer and will pay more for domestic beef products when a distinction is made. SUF ¶¶ 49–54. Rather than attempt to understand those studies before critiquing Dr. Dimofte's conclusions, Dr. Kaiser instead chose not to read them at all. SUF ¶ 267. Thus, Dr. Kaiser's response is not only off point, but once again fails to abide by basic scientific (or academic) standards. His opinions should be excluded by the Court or, at the very least, given no evidentiary weight, certainly not enough to create a "genuine" dispute pursuant to the summary judgment standard. *See Bazarian Int'l Fin. Assocs., LLC v. Desarrollos*

Aerohotelco, C.A., 315 F. Supp. 3d 101, 119 (D.D.C. 2018) (excluding expert testimony that does not "relate to any issue in the case").[2]

B. The MOUs Authorize the Transfer of Checkoff Funds to Third-Party Organizations that Take Market Share from R-CALF's Members.

The MOUs independently injure R-CALF's members by authorizing QSBCs to fund NCBA and USMEF, organizations that lobby for policies that promote competition against R-CALF's members. The Federal Circuit has held the competitor standing doctrine confers standing to a plaintiff injured by a transfer of funds to an entity that is not itself a competitor but that engages in "promotional activities" that "have 'helped to take back market share from' [the plaintiff]." *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1334 (Fed. Cir. 2008) (emphasis omitted). Similarly, NCBA and USMEF—while not themselves competitors—engage in promotional activities that take market share away from R-CALF's members, giving them standing to sue.

The QSBCs fund NCBA and USMEF through both contractual and noncontractual transfers of Checkoff funds. SUF ¶¶ 111–112, 117–118, 123–124, 129–130, 146–147, 160–161. When contracted to implement promotional programs, NCBA and USMEF collect fees not just

[2] If the Court were to accept Dr. Kaiser's supplemental analysis despite these critical flaws, it will find weak evidence to rebut Dr. Dimofte's findings. Dr. Kaiser did not conduct a regression analysis on Dr. Dimofte's data on consumer perception of beef as commodity because that was one of the variables he confused and mistook as a control variable. SUF ¶ 255. His initial analysis *confirmed* Dr. Dimofte's findings on consumer desire to purchase beef. SUF ¶ 238. He claims to invalidate only Dr. Dimofte's findings on willingness-to-pay because he found that the adjusted advertisement had no significant effect on willingness-to-pay at a p-value of 0.06, which is less than the threshold of 0.05 that he used to determine significance. This indicates only that Dr. Dimofte's findings that the adjusted advertisement increases willingness-to-pay for beef "have a 6% chance of being an extreme anomaly, rather than the 5% chance that [Dr. Kaiser] would have found acceptable and the 1% chance that [Dr. Dimofte's] report uncovered." SUF ¶ 291. That 1% difference, on a finding that is not required to establish R-CALF's injury, is hardly enough to defeat standing.

for the "direct costs" of the programs, but also for "implementation costs." SUF ¶ 150, 162. These implementation costs include expenses the organizations incur in performing administrative services and can include staff salaries, benefits, and other overhead expenses. SUF ¶ 151. While NCBA and USMEF are prohibited from using Checkoff money directly in their policy and lobbying activities, 7 C.F.R. § 1260.181(b)(7), the funding they receive from the QSBCs indirectly supports their ability to undertake those activities in at least two ways. First, the QSBC funding they receive to carry out promotional, research, and other programs allows them to dedicate more of their non-Checkoff budget towards their policy division. Second, the "implementation fees" they receive cover overhead expenses that thereby subsidize their political and lobbying activities. This is especially true because NCBA and USMEF receive substantial portions of their overall budget from the Checkoff, with one report finding NCBA receives 82% of its budget from the Checkoff and USMEF stating it receives 24% of its budget from the Checkoff. SUF ¶¶ 148–149, 152, 159.

Canadian Lumber Trade Alliance v. United States is instructive. There, the court determined that government action resulting in payments to the North Dakota Wheat Commission, "an organization which *promotes the sale* of hard red spring wheat on behalf of farmers in North Dakota and sponsors research on hard red spring wheat," but which "does not itself sell wheat" conferred standing to the Canada Wheat Board, which "sells hard red spring wheat." *Canadian Lumber Trade All.*, 517 F.3d at 1333–34 (internal quotations omitted). The North Dakota Wheat Commission had not yet spent any of the money it received, nor had it earmarked the money for any purposes. *Id.* Moreover, some of the activities it might spend its distribution on included research that would benefit the Canadian producers. *Id*. at 1334. Thus, there was no guarantee that the funds would be spent on any activity that injured the Canadian

producers. Yet, because the evidence demonstrated that its "promotional activities have 'helped to take back market share from Canadian Wheat in specific export markets'" the court found that "it is quite rational to infer that Customs, by distributing money to an entity that aims to take away market share from Canadian wheat and has already been somewhat successful in that effort, is likely to inflict further economic injury on the Canadian Wheat Board." *Id. at* 1334.

The lower court recognized that even were the government distributions only *indirectly* funding the North Dakota Wheat Commission's promotional activities, this could still harm the Canadian Wheat Board. *Canadian Lumber Trade All. v. United States*, 30 C.I.T. 391, 416 (2006), *aff'd in part, vacated in part*, 517 F.3d 1319 (Fed. Cir. 2008). The court stated that the Canadian Wheat Board might be harmed even by expenditures on activities benefiting the Board, if those funds "freed up other money [the North Dakota Wheat Commission] would have spent on [the beneficial activity] but for the [government funds]." *Id.*

Similarly, here, the MOUs permit distribution of funds to NCBA and USMEF, whose prior political and lobbying activities have harmed R-CALF's members. Both entities have lobbied against COOL and NCBA has also promoted a "Processed in USA" label. SUF ¶¶ 153–158, 163. As the U.S. District Court for the Eastern District of Washington previously found, the absence of COOL harms R-CALF's members by making it more difficult for consumers to identify domestic beef at retail and lowering prices for domestic beef. *Ranchers-Cattlemen Action Legal Fund v. U.S.D.A.*, No. 2:17-CV-223-RMP, 2018 WL 2708747, at *4 (E.D. Wash. June 5, 2018); *see also* SUF ¶¶ 77–82. This is particularly so because the voluntary "Product of USA" label may misleadingly be applied to beef products made from cattle born, raised, and slaughtered outside of the country but that receive some minimal processing in the United States. SUF ¶¶ 39, 42. Were COOL in place, consumers could easily identify and select domestic

products, which command higher prices when identified, as multiple studies, including USDA's "Product of USA" survey, have found. SUF ¶¶ 43–44, 49–54. The "Processed in USA" label that NCBA supports would continue to allow imported beef products that receive minimal processing in the United States to bear the same label as domestic beef products. This limits consumers from selecting and paying more for domestic beef products, harming R-CALF members Mr. Sweat, Mr. Meyer, and Mr. Wright who produce domestic cattle. It follows that the QSBC funds that flow to NCBA and USMEF harm R-CALF's members like the distributions in *Canadian Lumber Trade All.* harmed Canadian Wheat producers, producing an injury in fact. 517 F.3d at 1334; *see also* SUF ¶ 38.

II. The MOUs Cause R-CALF's Members' Injuries.

The injuries described above are fairly traceable to USDA's failure to go through notice-and-comment rulemaking before entering the MOUs. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). When, as here, a plaintiff alleges a procedural injury, they must demonstrate two causal links: "one connecting the omitted procedural step to some substantive government decision that may have been wrongly decided because of the lack of that procedural requirement and one connecting that substantive decision to the plaintiff's particularized injury." *Ctr. for Biological Diversity v. E.P.A.*, 861 F.3d 174, 184 (D.C. Cir. 2017) (citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 668 (D.C. Cir. 1996)). "The first link does not require the plaintiff to show that but for the alleged procedural deficiency the agency would have reached a different substantive result. All that is necessary is to show that the procedural step was connected to the substantive result." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (internal citations and quotation marks omitted).

The first link is established because USDA's failure to engage in notice-and-comment rulemaking is "connected" to its decision to enter the MOUs under their current terms. The

APA's notice-and-comment procedures are "plainly designed to protect" the interests of stakeholders who are affected by an agency action—as R-CALF's members are by the MOUs. *See Sierra Club v. E.P.A.*, 699 F.3d 530, 533 (D.C. Cir. 2012). By failing to utilize these procedures, USDA denied R-CALF "the opportunity to participate in rulemaking and to ensure that the agency has before it all relevant information" including the impact of generic advertising and transfers of funds to NCBA and USMEF on its members. *Nat. Res. Def. Council v. E.P.A.*, 643 F.3d 311, 321 (D.C. Cir. 2011). This denial could have led USDA to enter the MOUs with terms that the agency otherwise would have reconsidered, had it known the injury they would inflict on domestic producers. *See Ctr. for Biological Diversity v. Zinke*, 369 F. Supp. 3d 164, 178 (D.D.C. 2019) ("the failure to conduct notice-and-comment rulemaking is plainly 'connected' to the withdrawal of the negative findings since the [agency] made the decision without engaging the public."); *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002) (party claiming "deprivation of a right to notice-and-comment rulemaking" does not need to "show that its comment would have altered the agency's rule").

The second link is established because the decision to enter the MOUs with their current terms cause R-CALF's members' competitive injuries by permitting the QSBCs to do what would otherwise be illegal—to use Checkoff funds at all without prior authorization from producers paying into the program. "Both the Supreme Court and [the D.C. Circuit] have repeatedly found causation where a challenged government action *permitted* the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal." *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998). Moreover, "[n]either court has ever stated that the challenged law must *compel* the third party to act in the allegedly injurious way." *Id.*

As R-CALF demonstrated in its prior litigation, in the absence of the MOUs, the QSBCs cannot lawfully collect Checkoff funds for generic advertising programs and promotional activities without affirmative payer consent. *Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV 16-41-GF-BMM, 2017 WL 2671072, at *7 (D. Mont. June 21, 2017), *aff'd sub nom. Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Perdue*, 718 F. App'x 541 (9th Cir. 2018); SUF ¶¶ 93–95. The Ninth Circuit determined that the expanded oversight authority created by the MOUs transformed the Montana Beef Council's speech into government speech and thereby rendered the speech constitutional. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Vilsack*, 6 F.4th 983, 988–91 (9th Cir. 2021), *cert. denied*, 213 L. Ed. 2d 1090, 142 S. Ct. 2867 (2022). For "purposes of standing" courts are "required to accept Plaintiffs' legal theories of the case as valid." *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 14–15 (D.D.C. 1999). Pursuant to R-CALF's theory of the case, it is the MOUs that legally allow the QSBCs to collect and use Checkoff funds to produce generic advertising that homogenizes the beef market and, separately, to fund third parties whose activities increase competition against R-CALF's members.

Moreover, it is only because USDA promulgated the MOUs without placing limits on how the funds could be expended—as would have been sought in R-CALF's comments—that the QBSCs can fund generic advertising that homogenizes beef or transfer money to NCBA and USMEF. This establishes causation under *Center for Biological Diversity*. 861 F.3d at 184. And as explained in *Animal Legal Defense Fund*, this is the case even though the MOUs themselves do not *compel* the QSBCs to engage in the injurious promotional activities. 154 F.3d at 442.

III. R-CALF's Members' Injuries Are Redressable.

R-CALF's members' injuries would be redressed by a decision ordering USDA to comply with the APA's rulemaking procedures in entering the MOUs. Under the "relaxed"

redressability standard for a plaintiff asserting a procedural injury, the plaintiff "need not show that 'court-ordered compliance with the procedure would alter the final [agency] decision,'" but only that if the agency were to comply with the required procedures it "*could* reach a different conclusion." *Ctr. for Biological Diversity*, 861 F.3d at 185. That is clearly the case here.

Were USDA required to go through notice-and-comment rulemaking, R-CALF would have taken the position that the QSBCs should not be permitted to fund generic advertising for beef nor transfer Checkoff funds to third parties that lobby for policies detrimental to R-CALF's members. R-CALF could submit information on how independent, domestic cattle ranchers are harmed by these activities of the QSBCs. R-CALF could provide data and information showing the depressive price effects such advertising has on domestic beef that would otherwise receive price premiums. With this information before it, USDA may place additional terms in the MOUs that would restrict QSBCs from expending Checkoff funds on homogenizing advertising and third-party entities such as NCBA and USMEF.

Indeed, USDA has significant latitude in measures it could impose that would ameliorate R-CALF's members' injuries while complying with the Beef Act and furthering the Beef Checkoff program's goals. USDA's Agricultural Marketing Service's guidelines explicitly permit comparative advertising that "compar[es] facts about different commodities or products" and "that aids consumers in making purchase decisions" if "the information is factual." SUF ¶¶ 134–135. The guidelines simply require that "the presentation of those facts is truthful, objective, not misleading, and supported by a reasonable basis." *Id*. Thus, the MOUs could require QSBCs to convey objective and neutral information to help consumers understand differences in beef production or how to identify beef that is produced domestically. As one example, the QSBCs could explain to consumers that the "Product of the USA" label does not

ensure that a beef product is from an animal born, raised, and slaughtered in the United States. This would decrease the extent to which consumers perceive imported and domestic beef products to be the same. Indeed, the QSBCs and Checkoff programs *have* funded advertising that distinguished between beef products, including informational and comparative advertising and even branded advertising. *See* SUF ¶¶ 113, 119, 125, 131, 137–141.The MOUs could dictate the QSBCs replace non-differentiating advertising with more informational promotions that reduce the harm to R-CALF's members.

Dr. Dimofte's survey also confirmed that small changes to QSBC advertising would prevent it from homogenizing the beef marketplace without negatively impacting beef demand. The survey tested an advertisement that promotes beef while preserving differentiating characteristics of beef products through the presentation of theoretical neutral, objective information. SUF ¶ 168. The study showed that this advertisement lowered consumer perceptions of beef as a commodity without undermining consumers' desire to purchase beef. SUF ¶¶ 194-195, 219.

USDA charges that "promotion" of domestic beef may lead importers to run their own ads promoting imported beef that could have an overall negative effect on domestic producers. Dkt. 44 at 6 (Anticipated Bases for Defs' Opp'n to MSJ). The claim that importers *might* increase promotions of imported beef that *might* be overall harmful to R-CALF's members "is too speculative to defeat standing on redressability grounds." *Nat. Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 107 n.4 (D.D.C. 2009). Such conjecture does not change the fact that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted).

Contrary to Defendants' prior suggestions, Dkt. 44 at 6, it also does not matter that R-CALF's members could better differentiate their products from their competitors if policies such as COOL were instated and consumers could better identify domestic beef at retail. The Supreme Court has explained that "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). In *Larson*, an organization seeking a "religious organization" exemption from certain reporting requirements challenged a rule that required organizations derive over 50 percent of their total donations from members to qualify. *Id.* at 231–32. The Court rejected the view that they first needed to show that they were a "religious organization" (which stood in some doubt) to show their injury was redressable. *Id*. at 242–43. Although they might never benefit from the modified donation rule, the Court held that because *if* they were a religious organization the rule as written would impose reporting requirements on them, their injury due to those reporting requirements was redressable by a decision striking them down. *Id*. at 243–44.

Similarly, here, it matters not that there may be additional hurdles (such as lack of COOL) to R-CALF's members obtaining market differentiation for their products. That R-CALF's members are harmed by a rule that enables homogenization means their injury is redressed through challenging that rule. That they may need to take additional steps to get the full benefits of a revised rule is irrelevant. The record shows they will get some benefits. SUF ¶¶ 219–220. This is particularly the case in a procedural injury case where "the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury." *Fla. Audubon Soc'y. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996).

R-CALF's other form of competitive injury is equally redressable. USDA could have included terms in the MOUs that prevented QSBCs from contracting with and transferring funds to entities such as NCBA and USMEF that promote competition against R-CALF's members. Restricting QSBCs from contracting with entities that lobby for policies detrimental to independent producers would redress the harm suffered by R-CALF's members by preventing those entities from benefiting from the funds.

IV. R-CALF's Members Meet the Zone-of-Interests Test.

R-CALF also has standing under the "zone-of-interests" test to bring this lawsuit. To assess whether a plaintiff meets this test, courts ask "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997). For suits brought under the APA, courts "look to whether they fall within the zone of interests sought to be protected by the substantive statute pursuant to which the [agency] acted." *Permapost Prod., Inc. v. McHugh*, 55 F. Supp. 3d 14, 25 n.5 (D.D.C. 2014). Further, a plaintiff who is "within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority." *Int'l Bhd. of Teamsters v. Peña,* 17 F.3d 1478, 1484 (D.C. Cir. 1994).

Here, the relevant statute is the Beef Act. To determine if a plaintiff falls within a statute's "zone of interest," courts "us[e] traditional tools of statutory interpretation" to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 127 (2014). For suits brought pursuant to the APA "the test is not 'especially demanding'" and "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes

implicit in the statute that it cannot reasonably be assumed that' Congress authorized that plaintiff to sue." *Id.* at 130.

The Beef Act was passed by Congress in order to "financ[e]…and carry[] out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. §§ 2901(b), 2904. The program is designed specifically to increase demand for beef and thus further the economic interests of sellers in the U.S. cattle and beef industry. *See* 7 U.S.C. § 2901(a)(4) (In enacting the Beef Act, Congress found that "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers."). R-CALF brings this lawsuit to protect and expand its members' business interests as domestic cattle producers who are precisely in the zone of interest of the substantive statute. SUF ¶¶ 1, 5. Because the APA's rulemaking procedures govern USDA's exercise of the authority conferred by the Beef Act, R-CALF has standing to bring this suit.

CONCLUSION

For the reasons above, the Court should grant R-CALF's motion for summary judgment on the issue of standing.

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Respectfully submitted,

s/ Surbhi Sarang
SURBHI SARANG
(NY 5484498)
(CO 56667)
475 14th Street, Suite 610
Oakland, CA 94612
Office: 510-622-8202
ssarang@publicjustice.net

DAVID S. MURASKIN (DC 1012451)
JESSICA L. CULPEPPER (DC 988976)
DAN SNYDER* (OR 105127, DC Pending)

1620 L Street, NW Suite 630
Washington, D.C. 20036
(202) 861-5245
dmuraskin@publicjustice.net
jculpepper@publicjustice.net
dsnyder@publicjustice.net
Counsel for Plaintiff

*Admitted *Pro Hac Vice*