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

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, *Plaintiff*, v. SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE, et al. *Defendants*, MONTANA BEEF COUNCIL et al. *Defendant -Intervenors.*	Case No. 16-00041-BMM-JTJ **PLAINTIFF'S CONSOLIDATED OPPOSITION TO DEFENDANTS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGEMENT AND PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT**

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I. Introduction and Summary

The undisputed facts establish the Beef Checkoff's funding of the private state beef councils violates the First Amendment because the Government is compelling producers to pay for private speech. The Government and Intervenors admit the only way to hold the councils engage in "government speech"—the sole reason nongovernmental entities like the councils have been allowed to expend checkoff funds—is to reduce the requirements for "government speech" below any cited case. This runs counter to the Supreme Court's most recent statement on the doctrine—decided just days before this Court's preliminary injunction decision, and thus not previously briefed to this Court or the Ninth Circuit. There, the Supreme Court directs "great caution before extending our government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). The only rationale offered to abandon that caution here is "Congress [] provided a role for State programs." Gov. Br., Dkt. No. 99, at 3. However, compelling producers to fund private speech is "not permitted" by the First Amendment and neither Congress nor USDA can evade that command. *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 416 (2001) (concluding Mushroom Checkoff fails all levels of scrutiny).

The Government's and Intervenors' two other arguments to sustain the program—that allowing payers to "opt-out" of funding the councils *after* the councils take checkoff money for their speech establishes there is no "compelled"

funding, and that R-CALF (although not its members) does not have standing—lack law and logic. Thus, this Court should enjoin the councils' use of Beef Checkoff money unless the program is brought into line with the Constitution, or payers affirmatively consent to supporting the councils.

a. The Councils Are Not Engaged In "Government Speech"

The "government speech" doctrine is an unforgiving rule that places "government speech" outside the First Amendment's protections. *See, e.g.*, R-CALF Br., Dkt. 90, at 10; Gov. Br. 1; Int. Br., Dkt. No. 95, at 11-12. In the context of the Beef Checkoff program, the Supreme Court explained "government speech" requires "[t]he message set out in the beef promotions [be] from beginning to end the message established by the Federal Government." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). For there to be "government speech," the government's responsibility for the expressions must be so pervasive and substantive people can and will "use the political process to compel the government to change its speech," which is what makes the Constitution's protections unnecessary. *R-CALF v. Perdue*, 2017 WL 2671072, at *5 (D. Mont. June 21, 2017) (*R-CALF II*) (citing *Johanns*, 544 U.S. at 563).

Here, the Government and Intervenors admit the Government lacks numerous methods of accountability for and control over the state beef councils' speech it forces producers to fund.

1. "USDA does not appoint or remove" any of the state councils' "board members," despite this power being present in every "referenced case[]" cited by any party. Int. Br. 15-16; *see also* Gov. Br. 14.

2. Although *Johanns* holds the Government must ensure the speech "to [the] end" reflects the Government's desired "message," 544 U.S. at 560, the Government fails to review the councils' statements funded by the checkoff. Specifically: (i) it allows the councils to fund private third-parties' written and oral speech it does not review, Gov. Br. 18; Int. Br. 26; (ii) it does not review the councils' oral statements, Gov. Br. 15; Int. Br. 27; and (iii) its Guidelines for reviewing written communications provide the Government no substantive input, Gov. Br. 11; *see also* Dkt. No. 99-2 (Second Payne Decl.) ¶¶ 26-31.

3. The Government allows the councils to craft their speech so as to avoid public accountability. They are allowed to portray themselves and their expressions as private. *See, e.g.*, Gov. Br. 20-21; Int. Br. 23-24. In fact, the federal Beef Board, purportedly producing "government speech," declared the "producers on your state beef council board determine how [the checkoff] should be invested in local and state programs," not the Government. Gov. Response to R-CALF Statement of Undisputed Facts, Dkt. No. 101 ("Gov. RSUF") ¶ 57; Int. Response to R-CALF Statement of Undisputed Facts, Dkt. No. 97("Int. RSUF") ¶ 57.

Treating this constitutional case as a regulatory action, the Government and Intervenors ask this Court to defer to the Government as to when the "government speech doctrine" applies. Relying on a single sentence from *Paramount Land Co. LP v. California Pistachio Commission*, they claim requiring any particular form or quantum of government control or accountability for there to be "government speech" amounts to judicial "micro-managing legislative and regulatory schemes." 491 F.3d 1003, 1012 (9th Cir. 2007); *see also* Gov. Br. 13; Int. Br. 13. In other words, wholly ignoring the Supreme Court's more recent statement in *Matal*, they suggest the Government can, at its discretion, sink beneath the requirements of existing case law and chip away at the First Amendment.

That is not how the Constitution works. *Paramount Land* explains its sentence reflects the unremarkable principle that when a court cannot "draw a line between two approaches" it shouldn't. 491 F.3d at 1012. It does and could not provide the government free reign. The facts of this case make it plainly distinct from any "government-speech" precedent, and this Court should not expand that carve-out from the Constitution.

b. The Opt-Out Scheme Is Irrelevant

The Government contends that because producers may ask the private councils to release the producers' money *after* the councils take the funds for the councils' speech there is no "compelled" funding of the councils. Gov. Br. 21. That

internally inconsistent argument (i) contravenes Supreme Court precedent, *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 322 (2012) ("affirmative consent" required before people fund private speech), including as interpreted by this Court and the Ninth Circuit in this case, *R-CALF v. Perdue*, 2017 WL 2671072, at *4 (D. Mont. June 21, 2017) ("*R-CALF II*") (*Knox* requires payers affirmatively consent to funding private councils), *aff'd* 718 Fed. App'x 541, 543 (9th Cir. 2018) ("*R-CALF III*") (no error in this Court's reading of *Knox*); (ii) is rejected by Intervenors, Int. Br. 23 ("'opt-in' requirement is [] necessary to avoid a violation of the First Amendment"); and (iii) is inconsistent with the Government's own position before the Supreme Court, Amicus Brief of the United States in *Janus v. AFSCME*, No. 16-1466 (U.S. Dec. 6, 2017), 2017 WL 6205805, at *5, *20 (*Knox* applies to the checkoff programs and requires payers to choose to fund private speech).

c. R-CALF Has Standing To Challenge Funding of All These Councils

The Government and Intervenors also nominally challenge R-CALF's standing, but, except connected with the Maryland state council, that challenge is limited to whether R-CALF the organization is injured, not whether its member declarants from 12 of the 15 states at issue have standing. Gov. Br. 26; *see also* Int. Br. 9-11. Even on that narrow front, the Government and Intervenors falter, never disputing R-CALF's evidence that it has "'diver[ted] [] resources'" because the

councils' use of checkoff money "'frustrat[es] [] its mission,'" which their own authority states establishes standing. Gov. Br. 27 (quoting *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)).

* * *

The Government and Intervenors want this Court to hold that the admitted private-"autonomous"-nongovernmental state beef councils, Gov. & Int. RSUF ¶¶ 65-66, 69-70, that select their own officers free from government supervision, *id.* ¶¶ 71-74, to fund and create speech the government may never see nor approve, *id.* ¶¶ 90-91, 96, which is portrayed as private speech, *id.* ¶¶ 109-119, are actually producing "government speech." Their position is plainly untenable.

II. Argument

a. R-CALF Has Standing For Its Requested Relief

i. R-CALF Has Standing on Behalf of Itself To Challenge the Funding of Each Council

R-CALF has standing to challenge the compelled funding of each of the state councils because the undisputed facts establish that funding injures R-CALF. As the Government's authority explains, an organization has standing if "it suffered 'both a diversion of resources and a frustration of its mission.'" *La Asociacion*, 624 F.3d at 1088. "For example," if an organization dedicated to "counsel[ing] people on where they might live" is required to work against

unlawful "housing discrimination," so that its counseling is not made "more difficult," the organization has standing. *Id.* Organizational expenditures to counteract conduct that interferes with its mission, keeping the organization from other work, are injuries-in-fact brought about by the conduct and redressible by stopping the conduct causing the drain on resources. *See id.*

The agreed upon record demonstrates those facts here: (1) R-CALF's mission includes protecting domestic, independent cattle producers, Gov. & Int. RSUF ¶¶ 4-5, 11; (2) this includes working against the Beef Checkoff program sending money to private entities, including the state councils, because the resulting speech promotes corporate consolidation in the beef industry, *id.* ¶¶ 9-13 (citing examples of councils partnering with Wendy's and promoting NCBA positions); and (3) that work spans the nation and includes warning producers about this misuse of funds by the private state councils, consuming a substantial amount of R-CALF's resources and keeping it from other work, *id.* ¶¶ 15-19. To further its mission, R-CALF has taken-on the misconduct at issue here, consuming its resources, and it now sues to stop that unlawful activity so it can place its energies elsewhere. R-CALF has standing. *La Asociacion,* 624 F.3d at 1088.

The Government labels R-CALF's expenditures "discretionary budgetary choices," Gov. Br. 27, but the Ninth Circuit has explained "uncontradicted" "declarations" of a plaintiff organization that the challenged conduct "frustrates the

organization's goals" and led it to conduct additional "meet[ings]" when "time and resources … would have otherwise been expended toward" other activities establishes standing. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc). While the Government cutely quips that if R-CALF can proceed anyone who puts on "a presentation" would have standing, Gov. Br. 27, it does not actually contest R-CALF diverted 60% of its resources to this effort, hardly a de minimis harm, Gov. RSUF ¶ 16.

The unpublished case the Government cites concerns an organization expending resources on activities that "d[id] not implicate or frustrate [its] mission."' *United Poultry Concerns v. Chabad of Irvine*, 743 Fed. App'x 130, 131 (9th Cir. 2018). If an organization goes beyond its mission to counteract misconduct, that is a "manufactured" injury which does not confer standing. *Id.* (cleaned up). But, rightly, no party contests R-CALF's work against the state beef councils at issue here is part of R-CALF's mission. *See*, *e.g.*, Gov. & Int. RSUF ¶¶ 10-11, 13, 15; *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (organization's statements that it undertook work to further its mission and in response to "constituents' concerns" established organization diverted resources as part of mission).

Intervenors claim that if checkoff dollars are no longer used by the councils, but go to the Beef Board and Committee—which have been held produce

"government speech"—they cannot generate the speech R-CALF desires; therefore R-CALF's injury cannot be "redressed." Int. Br. 9-11. This is error on multiple levels.

First, it is legally incorrect. R-CALF's injury is from diverting resources to counteract unconstitutional activity, which is redressed by stopping the activity so that diversion no longer must occur. *Fair Hous. of Marin v. Combs*, 2000 WL 365029, at *4 (N.D. Cal. Mar. 29, 2000), *aff'd*, 285 F.3d 899 (9th Cir. 2002); *Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 343 n.12 (C.D. Cal. 1997). R-CALF need not show it will achieve other ends.

Second, it is factually incorrect. The injunction sought will achieve R-CALF's goals. R-CALF's checkoff-related work, in part, seeks to stop these state councils from siphoning off money to support their parochial agendas; for example, promoting the industrial-agribusiness-advocacy organization the National Cattlemen's Beef Association ("NCBA"). *See*, *e.g.*, R-CALF Ex. 56, Dkt. 91-3 (Bullard Decl.) ¶¶ 17-20 (citing example of evidence in the record demonstrating councils promoted NCBA); R-CALF Ex. 57, Dkt. No. 91-3 (First Cisco Decl.) ¶ 11 (providing another example). Thus, even if R-CALF needed to prove this case will advance its objectives (it doesn't), it has done so. *See also WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1156 n.5 (9th Cir. 2015) (standing when suit results in "[p]atrial relief").

Third, Intervenors' assertion that the federal-level Beef Board and Committee cannot describe accurate "distin[ctions] between foreign and domestic beef," as R-CALF desires, is also wrong. *See* Int. Br. 10 (citing 7 U.S.C. § 2901(b); 7 C.F.R. § 1260.169). Their cited authority provides the checkoff *can* fund speech supporting "brand[s] or trade name[s] of any beef product" so long as it is approved by USDA. 7 C.F.R. § 1260.169(d); R-CALF Responses to Gov. & Int. Statement of Undisputed Facts ("R-CALF RUSF") ¶ AF4. Indeed, Intervenors point out USDA refused to sanction the Montana council for funding a Wendy's ad that promoted beef from the continent of "North American," *see*, *e.g.*, Int. RSUF ¶ 14, demonstrating the checkoff can promote beef from specific locations. Further, at least once, a Beef Board ad has promoted "American Beef" and "U.S. beef." R-CALF RUSF ¶ AF5; *see also* R-CALF RUSF ¶ AF6 (slide from Beef Board website describing differences in how cattle can be raised); Gov. Ex. 41, Dkt. No. 99-3, at 5 (Beef Board stating it can describe differences in "production practices").

Intervenors' fallback argument, that they predict the Beef Board and Committee will refuse to engage in R-CALF's desired speech, so R-CALF's injury is not redressible, is similarly incorrect. *See* Int. Br. 9. Again, that R-CALF will not have to divert resources to respond to unconstitutional conduct that undermines its mission is redress. Moreover, saying the quiet part out loud, Intervenors explain R-

CALF must be able to build "political support" to eventually achieve its broader goals. Int. Br. 11. In other words, they concede having had to divert resources from lobbying undermines R-CALF's potential for success, highlighting a way this suit will advance R-CALF's other work (although that is not required for standing).

Likewise, Intervenors' statement that some R-CALF members (as private citizens) served on certain councils and were unable to convince the councils to alter their speech does not address R-CALF's standing derived from diverting resources to counteract the councils' unlawful activities. Int. Br. 9. R-CALF's members' experience does underscore, however, the councils' unconstitutional nature that interferes with R-CALF's objectives. R-CALF member Al Cisco explains that during his tenure on the New York council it spent money to procure beef jerky for troops in Iraq. Mr. Cisco wanted this beef to come from New York producers. Those controlling the council were aligned with NCBA, and, at its behest, used New York producers' money to purchase beef from a corporate seller who would not commit to sourcing from New York or even the United States. R-CALF RUSF ¶ AF7. Of course, this is inconsistent with the Government's Buy America policies, demonstrating a truly politically accountable entity would achieve a different result closer to R-CALF's desires.

R-CALF has standing so it will no longer need to spend the same resources counteracting the councils' unlawful use of the money, to which it and its members

object. That R-CALF will also then be able to encourage politically accountable bodies to engage in other activities it desires is just an added benefit.

ii. R-CALF's Undisputed Standing On Behalf of Its Members Establishes Standing Related To All But Three Councils

R-CALF's separate ability to proceed on behalf of its member declarants also establishes its standing to challenge the compelled funding of all the state beef councils at issue except those in Hawaii, South Carolina, and Vermont.

An organization can represent its members when "(a) its members would otherwise have standing"; (b) the suit is "germane to the organization[]"; and "(c) neither the claim asserted nor the relief requested requires the participation of individual members," *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (quotation marks omitted); *see also* R-CALF Br. 13.

The third requirement is satisfied as a matter of law in suits such as this where the plaintiff only seeks prospective relief. *Hunt*, 432 U.S. at 343.

The Government and Intervenors concede the second element, failing to dispute R-CALF's evidence that it works to alter how the checkoff is spent. Gov. & Int. Response R-CALF SUF¶¶ 9-15, which makes this suit "germane" to its work, *see, e.g.*, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 286 (1986).

The first element, that R-CALF member declarants have standing, is also not truly disputed except regarding the Maryland council. "First Amendment rights are

infringed" when an "unconsenting" individual is forced to pay for private speech, even temporarily. *Knox*, 567 U.S. at 321; *see also United Foods*, 533 U.S. at 414-16. All parties agree that the non-Maryland declarants pay the checkoff and do not consent to any of their money going to fund the private state beef councils and their speech. Gov. & Int. RSUF ¶¶ 21-29.

The Government states that based on the "factual record" regarding its "opt-out" scheme R-CALF's members are not "compel[led]" to fund the councils and thus not injured. Gov. Br. 21; Gov. & Int. RSUF ¶¶ 25, 124. However, not only is that argument incorrect, *see* § II(e), *infra*, but merits issues are not part of the standing analysis, *see*, *e.g.*, *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 n.4 (9th Cir. 2011) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). Moreover, this Court has already rejected this exact "standing" argument. *R-CALF v. Vilsack*, 2016 WL 9804600, at *2 (D. Mont. Dec. 12, 2016) (*R-CALF I*) (opt-out scheme does not undermine standing).

Intervenors suggest R-CALF's Maryland declarant, Bill Schneider, lacks standing because he "does not currently sell cattle in Maryland," Int. RSUF ¶ 21, but Mr. Schneider explains he "maintain[s] ownership" of his farm that is run by his son, who continues to raise and sell cattle in Maryland, paying the checkoff. R-CALF Ex. 68, Dkt. No. 91-3 (Schneider Decl.) ¶ 1, 5. To say that Mr. Schneider has no interest in the checkoff payments disregards the reality of family farming.

Gekara v. Attorney Gen. of United States, 704 Fed. App'x 184, 188 (3d Cir. 2017) (unpublished) (indicating the "economics" of "family farm[s]" create cross-generational wealth and liabilities).

R-CALF has standing on behalf of its members to challenge the compelled funding of the private state beef councils in Indiana, Kansas, Maryland, Montana, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Dakota, Texas, and Wisconsin.

iii. Standing Does Not Determine the Scope of Available Relief

Finally, so long as R-CALF has standing to challenge the funding of some of the state councils, the Ninth Circuit recognizes it is appropriate for this court to enjoin that unlawful government conduct everywhere it is occurring, to uniformly protect people's rights. *Hawaii v. Trump*, 859 F.3d 741, 787 (9th Cir. 2017) (citing *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015)); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1237-38 (D. Haw. 2017), *vacated on other grounds*, 138 S. Ct. 377 (2017). This principle should be triply true here, as the rights at issue are constitutional, and the Government and Intervenors have offered no basis to distinguish between the conduct in the various states.

* * *

In sum, while state-by-state standing is not necessary, under the undisputed law and facts, R-CALF has standing on behalf of itself to challenge the funding of

all of these councils, and standing on behalf of its members to challenge the funding of 12 of the 15 councils.

b. Government's Inability To Appoint or Remove Councils' Members Establishes They Aren't Engaged in "Government Speech"

It is also now undisputed that this case is different from every cited "prior case[]" upholding a private entity's use of checkoff funds because it was engaged in "government speech," *R-CALF III*, 718 Fed. App'x at 542, as the Government lacks the power to appoint *or* remove *any* member of any of the state councils, Gov. & Int. RSUF ¶¶ 71-72; *see also* Int. Br. 16 ("referenced cases involve a government's appointment and removal authority of individual board members"). Under *Matal*, this alone strongly counsels against holding the state beef councils are engaged in "government speech" and thus can constitutionally use checkoff funds. 137 S. Ct. at 1758.

The Government and Intervenors insist no case has held that the power to select the people producing "government speech" is dispositive, Gov. Br. 14; Int. Br. 12-13, but that is only because in no case any party cites has a government claimed the protections of the doctrine without such power, R-CALF Br. 18. Indeed, the Government concedes the councils must be "answerable" to the Government to be engaged in "government speech." Gov. Br. 10, 14. *Johanns* specifies an entity is "answerable" to the Government when "[a]ll members … are subject to *removal* by the Secretary" and "half" are "appointed by the Secretary."

544 U.S.at 560-61 (emphasis in original). The Government and Intervenors are baselessly asking this Court to expand the "government speech doctrine" to give "answerable" a new meaning.

Intervenors' claim that *Johanns* diminished the import of appointment and removal, suggesting other controls are "more than adequate," is misleading at best. Int. Br. 14. What *Johanns* actually states is that when the Government "authorize[s]" the program and then also "appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording" then there are "political safeguards more than adequate to set the[] [speech] apart from private speech." 544 U.S. at 563. Likewise, the Government's statement that not all members of the federal-level Beef Committee are appointed by USDA is a distraction. Gov. Br. 14. *Johanns* highlights that all Committee members are "subject to removal," in addition to half being appointed by USDA, making them "answerable" in ways not at all true for the state councils' members. *Johanns*, 544 U.S.at 560-61.

The Government and Intervenors also fail to dispute the California Supreme Court's and Ninth Circuit's conclusions that the power to appoint or remove is significant. The California Supreme Court explained that when the government appoints an entity's members it "is in a weakened position to disclaim responsibility" for its speech. *Delano Farms Co. v. California Table Grape Com.*,

417 P.3d 699, 722 (Cal.), *cert. denied*, 139 S. Ct. 567 (2018). Moreover, where a political official has the power to select who is crafting the speech, the official will ensure those people respond to the public's pressures. *Id.* The Ninth Circuit has repeatedly held the government's appointment power indicates an entity is engaged in government action. R-CALF Br. 18 (citing cases). Thus, as "democratic accountability" is the rationale for the "government speech doctrine," the power to appoint or remove is key.

Paramount Land, to which the Government cites, only confirms this conclusion. Gov. Br. 14. It explains the entity there was engaged in "government speech," in part, because the government appointed a member of the entity, and could remove the entity's president—who need not be the same person the government appointed—for any reason "in the public interest." 491 F.3d at 1010-11. Further, the Ninth Circuit emphasized, the government had the additional power to approve all "nomination and election procedures," providing it influence over who would become the other members. *Id*. It was only through this combination of authority, along with others, that *Paramount Land* concluded the scheme was sufficiently "similar" to other circumstances held to produce "government speech." *Id.*

No matter where the Court turns, "government speech" has always involved the government appointing or removing the people who will produce the speech.

Yet, that is not true with the state councils at issue here. Therefore, they should not be held to engage in "government speech."

i. Government's Power To Enforce the Beef Act and Order Is Not Equivalent To the Power To Appoint or Remove

The Government's and Intervenors' claim that other controls make the state councils "answerable" to the Government is particularly improper because the controls on which they rely, at most, amount to authority to enforce the Beef Act and Order. The Ninth Circuit has stated statutes and regulations must "***go much further in defining the [entity's] message than the Beef Act and Beef Order's general directive***" before they will contribute to government control over an entity's "message." *Delano Farms Co. v. California Table Grape Comm'n*, 586 F.3d 1219, 1228 (9th Cir. 2009) (emphasis added). Even then, in *Delano Farms*, the more detailed statutory and regulatory guidelines had to be combined with "greater" government power to select the individuals crafting the speech than was present in *Johanns* or *Paramount Land* for the court to hold the private entity was engaged in "government speech." *Delano Farms*, 586 F.3d at 1228-29.

Consistent with this, this Court recognized the Beef Act and Order "merely prohibit … using checkoff money to promote 'unfair or deceptive' practices, or to 'influenc[e] governmental policy' … and [the] regulations require only that … advertising advance the image and desirability of beef and beef products. *R-CALF II*, 2017 WL 2671072, at *6 (quoting 7 C.F.R. § 1260.181(b)(7)) (citing 7 U.S.C.

§ 2901(b); 7 C.F.R. § 1260.169(a)). Therefore, that speech must be consistent with the Beef Act and Order does not ensure it reflects the Government's message. The Act and Order provide the entity crafting the speech such leeway that if the Government is merely enforcing their terms it "does not control" the speech. *Id.*

Accordingly, the Government's and Intervenors' suggestion that the Government sufficiently controls the councils because the Act and Order allow the Government, acting "through" the Beef Board, to certify and decertify the councils fails. *See* Int. Br. 17; Gov. Br. 10. Certification seeks to ensure the councils will act consistent with the Act and Order, simply requiring the councils to commit to using checkoff funds for speech that "strengthen[s] the beef industry" without being "unfair," "deceptive," or "purpose[fully] influencing governmental policy." *See* 7 C.F.R. § 1260.181(b)(1), (7); R-CALF RSUF ¶ AF1-2. Correspondingly, a council can only be decertified under the Act and Order due to the content of its speech if it violates these rules. R-CALF RSUF ¶ AF3; Dkt. No. 40-1 ¶ 29 (First Payne Decl.); *see also* Gov. Br. 10. Therefore, certification and de-certification do not ensure the councils will generate "government speech."

Intervenors list out other rules under the Act and Order, but those add nothing to the Government's control over the councils' speech. Specifically, Intervenors claim the Government has "plenary authority," a term that does not appear in the Act or Order. Int. Br. 14-15 (citing 7 U.S.C. §§ 2908-09). But, they

later acknowledge, this is just the power to investigate and stop violations of the Act and Order. Int. Br. 14-15 (admitting authority only allows the Government to enforce the Act and Order); *see also Goetz v. United States*, 99 F. Supp.2d 1308, 1312 (D. Kan. 2000) (explaining Secretary can only seek to "restrain or prevent a person from violating" the Beef Act, Order, or related regulations (citing 7 U.S.C. §2908-09)). Likewise, Intervenors highlight the councils can be audited by the Government and independent auditors, Int. Br. 22, but such post-hoc reviews are just mechanisms to ensure compliance with the Act and Order's general directives. *See, e.g.*, Gov. & Int. RSUF ¶ 52 (example of audit, which merely attests to compliance with Act and Order).

In this manner, the "investigatory" authority provided for in the Beef Act and Order is wholly unlike the authority Intervenors analogize it to in *Paramount Land*. *See* Int. Br. 21. There, the government could stop any speech it determined was contrary to the "public interest," which— when combined with other government powers not present here, including the power to appoint and remove certain members—made the speech "government speech." *Paramount Land*, 491 F.3d at 1010-11. Here, the Government can only enforce statutes and regulations to ensure the councils are promoting beef without being unfair, deceptive, or purposefully engaging in lobbying, which is insufficient to turn the councils' speech into "government speech."

In fact, the Government explains that under the statutes and regulations, the Beef Board, *not* the Government is the one exercising this (highly limited) authority. The Government's role is only to ensure these tasks were performed. *See* Dkt. No. 99-2 (Second Payne Decl.) ¶¶ 11-14. As this Court previously explained, the Beef Board is set-up as "an independent body" separate from the Government and therefore any control it exercises over the councils cannot create "democratic accountability" for the councils' speech. *R-CALF II*, 2017 WL 2671072, at *6.

Finally, Intervenors incorrectly claim that because Government can order a referendum to reconsider the Beef Checkoff it essentially possesses the power to determine the councils' membership. Int. Br. 16. First, the Government does not possess that power. A referendum to end the Beef Checkoff can only be called at the request of "10 percentum or more of the number of cattle producers." 7 U.S.C. § 2906(b); R-CALF RSUF ¶ AF8. Second, where the Ninth Circuit has suggested the power to call a referendum could contribute to government control over speech, that power was in addition, not instead of to the power to appoint and remove "[a]ll of the commissioners," and the referendum could be requested by those appointees. *Delano*, 586 F.3d at 1221.[1]

[1] Without citing any authority, Intervenors make the peculiar argument that the referendum amounts to an alternative remedy R-CALF should have sought before filing suit. Int. Br. 29. Yet, the referendum seeks to end the checkoff, whereas this suit only asks that the program be constitutionally administered. As R-CALF has explained, it only questions the checkoff in its entirety because it has been unable

* * *

In sum, neither the Government nor Intervenors offer any basis to hold the state councils produce "government speech" when the Government does not have the power to select *or* remove *any* of the councils' members. All the authority indicates otherwise. Moreover, the stand-ins the Government and Intervenors rely on are not nearly equivalent. This should resolve the matter. *See Matal*, 137 S. Ct. at 1758.

c. Government's Failure to Review Councils' Messages Establishes They Aren't Engaged in "Government Speech"

A separate basis on which the Court can hold the state councils use the checkoff for private speech is that the Government does not approve the councils' ultimate speech. In *Johanns*, the Supreme Court emphasized that—in addition to the fact that USDA appointed and/or removed their membership—the Beef Board and Committee were engaged in "government speech" because of the "degree of governmental control over" the specific speech, including that "[a]ll proposed promotional messages are reviewed by Department officials both for substance and

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to ensure the money is lawfully expended. R-CALF RSUF ¶ AF9. Moreover, "'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, (1976)). R-CALF's members do not need to canvas the nation before they can secure their constitutional rights.

for wording." *Johanns*, 544 U.S. at 561. "Government speech," of course, is meant to further the Government's agenda.

Despite protesting this logical rule, Gov. Br. 15-16, the case law cited by the Government does nothing to diminish this requirement. The facts of *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45, 48 (D.D.C. 2006), are essentially identical to those presented in *Johanns*. *Paramount Land* states the government sufficiently controlled the message because, in addition to the other power discussed above, it signed-off on plans that "detail the themes to be emphasized, the actors to be used, the demographics to be targeted, and the media to be employed," including "specific magazines in which the advertisements will run, [] the approximate timing of their publication (in February, to coincide with the Super Bowl, for example), and often [] specific words and imagery to be used." 491 F.3d at 1011.

The Government's review of the state beef councils' speech, including those operating under Memoranda of Understanding ("MOUs"), is deficient under this case law in at least the three ways. Indeed, while Intervenors assert the MOUs salvage the state beef councils' operations, Int. Br. 1, the record now establishes the MOUs are no more than window dressing, never correcting a variety of ways the councils use the checkoff to fund private messages, and providing for only the most superficial controls over *some* of the councils' messaging.

i. Government Allows Councils To Fund Private Third-Party Speech It Never Reviews

Even under the MOUs, the Government allows the state beef councils to fund the independent speech of private third-parties. The Government admits the councils can pass along Beef Checkoff money to support other private entities' speech, so long as the councils put "the[] amounts" in their annual "budgets and marketing plans." Gov. RSUF ¶¶ 93. As an example, the Government approved the North Carolina council's budget and plan that stated the council will "support [] the development and implementation of national domestic and foreign promotion" through funding "the NCBA and the Meat Export Federation to enhance any effective means of reaching the largest possible audience with a positive beef message." Gov. Ex. 50, Dkt. No. 99-4, at 3.

This is likely all the council could say, as the Government concedes the councils are allowed to commit money to third-parties to be used in an "unrestricted" manner, so long as the third-parties agree to spend it "for purposes permitted by the Act and Order." Gov. & Int. RSUF ¶¶ 94, 96. The third-parties are only required to identify the speech the councils funded at the end of the year, after the money is spent, and they barely do that. *Id.* ¶¶ 94, 96, 105-106. If the Act and Order's guidelines do not "defin[e] the [councils'] message" enough to make speech "government speech," turning money over to private third-parties to fund

speech consistent with the Act and Order cannot be "government speech." *Delano Farms*, 586 F.3d at 1228; *R-CALF II*, 2017 WL 2671072, at *6.

The Government and Intervenors insist this sort of shell game is constitutional because the Government can work with vendors to "coordinate" the creation of "government speech." Gov. Br. 18 (quotation marks omitted); Int. Br. 26. However, that nongovernmental entities and their agents can be part of creating "government speech" if that process establishes there is government control over the speech is immaterial. Such a process isn't present with these third-parties. They are private, independent entities allowed to use checkoff money to craft their own speech without Government oversight, so long as it is consistent with the Beef Act and Order. Indeed, the Government seems to admit the money it is mandating producers pay is being used to fund the private "beef-related speech by the Federation and USMEF," two independent bodies that promote consolidation in the animal agriculture industry. Gov. Br. 18. That is patently unconstitutional.

Intervenors claim that because *some* of the third parties who receive the money *at times* act as contractors for the Beef Board and Committee, the state councils sending *all* third-parties money *for any purpose* should be allowed. Int. Br. 26. However, as explained above, the money the state councils turn over to third-parties is provided without any commitment it will be spent on activities controlled by the Beef Board, Committee, or Government, just that the activities

will be consistent with the Beef Act and Order. *See, e.g.*, Gov. & Int. RSUF ¶ 96. Moreover, in the circumstance where the state councils fund third-parties that also act as contractors, and those third-party use some of their money to pay for a program also funded through a contract from the Beef Board and Committee, the record reveals the two funding sources are kept separate. Money the third-parties contribute to that program and money they receive for the program from the Board and Committee is tracked separately, down to identifying the distinct speech the two sources of money pay for. Gov. Ex. 84, Dkt. No. 99-4, at 2, 29. Therefore, that a third-party obtains money pursuant to a contract to pay for a program it also funds does not suggest the Board, Committee, or the Government will control all the speech produced as part of that program—especially the speech the third-parties independently fund. And, it certainly does not suggest the state councils' contributions to third-parties are always subject to Government control.

In a last ditch argument, the Government states this Court cannot remedy the compelled funding of private speech until R-CALF "identif[ies] expenditures" by the third parties. Gov. Br. 19-20. Nonsense. If the Government is allowing the private state beef councils to fund the unsupervised speech of other private parties (as it is) that violates the First Amendment each time it occurs, and can and should

be enjoined. *R-CALF II*, 2017 WL 2671072, at *4; *In re Wash. State Apple Advert. Comm'n*, 257 F. Supp. 2d 1274, 1288 (E.D. Wash. 2003).[2]

ii. Government Does Not Review Councils' Oral Speech

Likewise, even under MOUs, the Government concedes it does not review or approve the state beef councils' own oral communications. Gov. RSUF ¶¶ 90-91. This is hardly unimportant speech. It includes messages delivered during visits to and from foreign markets, and in numerous public forums. *Id.*

The Government and Intervenors insist this speech can go forward because the Government sees "detail[ed] … annual budgets and marketing plans" that lay out this speech Gov. Br. 16; Int. Br. 18. Not so. The Government and Intervenors admit the annual budgets and plans are nothing like those in *Paramount Land*. In their words, these documents contain "probable costs" of the speech and "a general description of the … program[] contemplated." Gov. & Int. RSUF ¶ 101. The North Carolina plan described above states it will allocate funds to "emphasize desirability of beef with the express intent of stimulating sales" through, among other activities, "seek[ing] out promotional opportunities to provide … positive beef news." Gov. Ex. 50, Dkt. No. 99-4, at 3-4. At most, the council is saying it

[2] The Government wrongly insists R-CALF is bringing a "facial challenge." Gov. Br. 19, 21. As R-CALF's motion make plain, it is challenging the current administration of the Beef Checkoff program that requires producers to fund private speech. Dkt. No. 89, at 2; *see also* Complaint, Dkt. No. 1 ¶ 1 ("This is an as-applied First Amendment suit" because the state councils are "not effectively controlled by the government").

will engage in oral communications consistent with the Beef Act and Order, which is insufficient. *See, e.g.*, *R-CALF II*, 2017 WL 2671072, at *6.

This process should be particularly concerning because the Government does not select the councils' members. This Court is being asked to hold expressions are "government speech," exempt from the First Amendment, if the Government approves an entity providing "positive beef news" and then privately selected people can choose that news and where and how to deliver it. That cannot be. Contrary to the Government's and Intervenors' insistence, it is not at all like what happens with the Beef Board. Gov. Br.15. Assuming the Government does not review the Beef Board's oral speech (and the record does not address that), the Government appoints and can remove all members of the Beef Board, creating government accountability for their statements in a way that is not present here.

The Government raises the specter of burden, stating it should not have to review every "utterance" by the state councils, but it is seeking an exemption from the Constitution for those utterances, which only exists if it is responsible for them. *See* Gov. Br. 15. Under all of the case law, it must ensure the councils' speech promotes the Government's agenda. It does not attempt to do that with the councils' oral communications, not even requiring the councils submit talking points. Therefore, the councils use funds to generate their own private speech.

iii. Government Does Not Substantively Review Councils' Written Communications

To the extent the MOUs differentiate the record from what was before the Court when R-CALF first filed this case that is because they nominally provide for the Government to review some of the councils' written speech. *See* Gov. RSUF ¶¶ 90-91 (making clear Government does not review all oral communications). Yet, discovery proves this review is not the sort that ensures the councils are expressing the Government's views. Thus, on this subpart, of a subpart of the test for "government speech" that the MOUs purportedly address, they are insufficient.

The Government explains its review under the MOUs is limited to ensuring "nutrient claims" meet its "policy requirements" and information is properly "source[d]," "accurate[],""factual," and "appropriate"—*i.e.*, not an expletive or "disparaging." Dkt. No. 99-2 (Second Payne Decl.) ¶¶ 26-31; *see also* Gov. Br. 11 (Under MOUs, the Government ensures "information is accurate … substantiated" and "only factual.").

This is confirmed by the Government's "Marketing Communication Guidelines," which states it lays out "[a]s much as possible" the "points" that the Government will "consider" in its review. R-CALF Ex. 19, Dkt. No. 91-1, at 1; *see also* Gov. & Int. RSUF ¶ 85. The Guidelines' focus is on ensuring food-related jargon and handling practices are properly conveyed. R-CALF Ex. 19. For instance, "low in fat" must be used in the same way it is used by federal agencies.

Id. at 8. The Guidelines have a section titled "Government Speech" which states the councils' speech must be consistent with agency "polic[ies]" such as "guidance related to foodborne illness outbreaks should agree with the guidance issued by USDA." *Id.* at 16-17; *see also* Dkt. No. 99-2 (Second Payne Decl.) ¶¶ 28-30 (confirming same). That section continues, the Government will *only* seek to a confirm council's speech contains the Government's approved message if the council states its speech is on behalf of a specific Government official. *Id.*

Matal addressed similar circumstances and concluded that to call such speech "government speech" would be "far-fetched." 137 S. Ct. at 1758. Under the trademark statute at issue in *Matal* the Government ensured the mark met certain technical requirements and was not offensive. The Court held exempting the resulting speech (the trademark) from the First Amendment would be a "dangerous misuse" of the "government speech" doctrine. *Id.*

Rather than discuss *Matal*, the Government and Intervenors emphasize the number of communications between state councils and the Government. Gov. Br. 17; Int. Br. 19. But, that the Government and councils must send lots of emails does not mean the Government substantively analyzes what is in those communications. For these same reasons, Intervenors' note that under the MOUs the Government can attend the councils' formal board meetings and must approve the councils' contractors is immaterial. Int. Br. 20. The Government has explained

its review of the councils' activities has a narrow, technical focus. The number of points of contact for that review does not make the speech generated "government speech."

The Government and Intervenors also ask the Court to assume the Government *could* engage in more substantive review. Gov. Br. 17; *see also* Int. Br. 19-20. But, the Guidelines provide otherwise. "An agency is bound by the commitment it makes." *Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1123 (D. Mont. 2016). Thus, the Government could not force greater control on the councils, and the Court should not assume such control might exist.[3]

Finally, the Government argues the MOUs should be sufficient because the Beef Act and Order provide the councils additional guidance on what sort of speech they should engage in. Gov. Br. 17. This argument does not improve with repetition; statutory and regulatory guidelines must "go much further … than the Beef Act and Beef Order's general directive" before they will be said to contribute to government control over the "message." *Delano Farms*, 586 F.3d at 1228.

[3] The Government would be unable to insist upon new guidelines because it explained in its Beef Checkoff rulemaking it would not seek to regulate the councils' messaging, making even the MOUs and their Guidelines unenforceable absent the councils' consent. R-CALF Br. 29; *see also* Int. Br. 17 (erroneously claiming R-CALF does not contest "MOUs' validity").

* * *

In every case cited by either party, a nongovernmental entity was only held to engage in "government speech" if the Government could appoint and/or remove its members and controlled the specific expressions they generated. The MOUs were the Government's solution to the second half of this problem—never bothering to address the first. Now, the record reveals the MOUs are just a cover to allow the councils to continue to generate and fund messages of their own choosing. Therefore, by definition, the councils are using the checkoff to produce private speech.

d. Councils' Speech Establishes It Is Not "Government Speech"

Finally, the record also establishes the principle justifying the "government-speech doctrine," that the speech is democratically accountable, is not true for these councils' speech. As this Court explained, "government speech" is exempt from the First Amendment because people "may use the political process to compel the government to change its speech." *R-CALF II*, 2017 WL 2671072, at *5 (quoting and citing *Johanns*, 544 U.S. at 563). Yet, the record shows the state beef councils portray themselves as independent entities run by their private boards, label their speech with their own distinct logos, and use the Beef Checkoff money to produce ads that state they are the speech of private-independent councils. Gov. & Int. RSUF ¶¶ 109-119. Thus, there is no way R-CALF or its

members can fully use the political process to challenge this speech. Politics involves "organiz[ing] public pressure." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532, (1989) (Scalia, J., concurring in plurality opinion). The Government, however, structures the Beef Checkoff to prevent that pressure from developing by permitting the councils to dupe the public about who should be responsible for the speech.

Accordingly, the Government's claim that it only matters whether "producers who pay the checkoff" are confused about who directs the speech is incorrect. *See* Gov. Br. 20. That the Government allows the state councils to portray their speech as private speech reduces objecting payers' ability to generate a public outcry, the only rationale for exempting the speech from the Constitution.

Indeed, the Federal Circuit explained that when speech "is clearly private speech," such as because it is "associated with" private actors and goods, that "is antithetical to the notion that [speech] is tied to the government," the essence of "government speech." *In re Tam*, 808 F.3d 1321, 1345 (Fed. Cir. 2015) (en banc) *aff'd*. *Matal*, 137 S. Ct. 1744. The Government and Intervenors concede this same principle has been articulated by the Supreme Court's more recent "government-speech" cases. Gov. Br. 20 n.3; Int. Br. 24; *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015) (explaining speech is

"government speech," in part, because it is "closely identified in the public mind with the State." (cleaned up))

While *Johanns* states in a footnote that "government speech" does not need to "identify government as the speaker," 544 U.S. at 564 n.7, as the Court's subsequent cases make clear, this does not mean "government speech" exists if it affirmatively portrays itself as private speech. Likewise, the Government's and Intervenors' focus on *Johanns*' statement that a cause of action exists if the government associates particular individuals with its speech, does nothing to suggest the government can place speech outside the First Amendment if it allows speech to be presented as private speech. *Id.* at 565 & n.8; Int. Br. 23; *see also* Gov. Br. 21.

Accordingly, contrary to the Government's unsupported wishes, Gov. Br. 21, the Court certainly can enjoin the state beef councils from engaging in speech that is not democratically accountable "government speech." If the present portrayals render the councils' speech private speech (as they do), the Court can enjoin producers from having to fund that speech until it is actually "government speech," and the Court should do so. *Klein*, 584 F.3d at 1208.

e. Opt-Out Procedure Is Not A Solution

Intervenors acknowledge that if the Beef Checkoff funds private speech the current program must be enjoined as payers must "opt-in," *i.e.*, affirmatively

consent, before their money is taken for the councils' speech. Int. Br. 23. The Government, however, insists that if payers can "opt-out" after the state councils take their money, through submitting forms asking the councils to release the funds and send them on to the Beef Board—which has been held to generate "government speech"—there is no "compelled subsidy" and the payments are constitutional. Gov. Br. 21. The Government errs as matter of fact and law.

On the facts, the Government explains the councils "collect the assessments" and by "default retain" and use them. *Id.* at 22. It is only at that point producers can opt-out. *Id.* The councils can still keep and use the money for 60-days once the opt-out paperwork is submitted. Gov. & Int. RSUF ¶¶ 121, 124-125. Put another way, the facts establish producers are compelled to, at least temporarily, pay for the councils' speech, which violates the First Amendment. *See R-CALF I*, 2016 WL 9804600, at *2; *see also In re Wash. State Apple Advert. Comm'n*, 257 F. Supp. 2d at 1288 ("The use of compelled assessments … even temporally, in violation of the First Amendment is an invasion on the dissenter's constitutional[] rights.").

On the law, the Supreme Court recently made clear the "general rule" is that "permitting" "use [of] opt-out rather than opt-in" schemes is improper. *Knox*, 567 U.S. at 321. *Knox* states a private entity cannot "exact any funds" for its speech "without the[payer's] affirmative consent." *Id.* at 322 (citing *United Foods*, 533 U.S. 411, the Mushroom Checkoff case). *Knox* earlier explained its rules derived

from the Court's authority on "compelled funding of speech of other private speakers," particularly the "mundane commercial" speech funded by the checkoffs. *Id.* at 309-10 (citing *United Foods*, 533 U.S. 405).

The Government argues *Knox* does not apply because the Government "has little reason to suspect" payers object to the checkoff. Gov. Br. 23. That is, it claims it can risk violating the First Amendment by compelling subsidies of private speech that might be unwanted until it decides there is enough evidence of harm. *Knox*'s statement that the default should be "opt-in" disposes of this argument. 567 U.S. at 321. It further explains placing the burden on an objector to opt-out "creates a risk" that people will fail to do so even when they "do not agree" to fund the speech, and, as a private entity has no right to the money absent consent, courts may not "presume acquiescence in the loss of fundamental rights." 567 U.S. at 312 (quotations marks omitted). Rather, they must require affirmative consent.

This Court previously agreed. *R-CALF II*, 2017 WL 2671072, at *4. And, when not taking litigation positions in this case, so does the Government. U.S. Amicus Br., *Janus*, 2017 WL 6205805, at *5, *20.

This result is a particularly sensible here because the Government has not produced any evidence substantiating its *ipse dixit* that few payers object to the checkoff. To make this assertion, it relies on the fact that only some producers have submitted the monthly paperwork required to opt-out, which demands they

reproduce all receipts. Gov. & Int. RUSF ¶¶ 126, 128-129. That producers have not taken on this burden does not suggest they support the councils. To the contrary, particularly in light of R-CALF's member declarations, the record proves *Knox* correct—the opt-out scheme is causing producers to fund private speech that they do not wish to support, thereby facilitating a constitutional violation.

The Government points out that in *Johanns* the Supreme Court acknowledged state councils typically get half the Beef Checkoff money, implying the Court expected the councils to be funded. Gov. Br. 22. To the contrary. The Court explained it assumed payments to the councils were "***voluntary contributions***" and, as a result, was not addressing them. 544 U.S. at 554 n.1 (emphasis added). The Government concedes that "[i]n practice" it simply allows the councils to "retain[] 50 cents of every checkoff dollar" it forces producers to provide. Gov. Br. 4. This is not volunteerism.

If the councils are not engaged in "government speech," the councils must obtain affirmative consent before accessing checkoff money.

f. An Injunction Is Required Regardless

Finally, were the Court to conclude the MOUs render the state councils' speech constitutional, an injunction is still required to enforce the MOUs. *See* R-CALF Br. 29. The Ninth Circuit provides for this precise result, explaining that where the Government seeks to "voluntarily" correct its ongoing misconduct the

plaintiff is "entitled to the protection of an enforceable order to ensure that past [constitutional] violations will not be repeated." *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992). If the Court relies on the MOUs, *Barnes* applies. The Government entered into the revocable contracts with the state beef councils following the Findings & Recommendations in this case, Dkt. No. 44, so as to undermine R-CALF's constitutional claims, Gov. & Int. RSUF ¶¶ 79, 84.

The Government labels this established remedy "extraordinary" relief for which R-CALF does not have standing. Gov. Br. 28. Yet, as the Ninth Circuit's controlling authority recognizes, R-CALF, having pleaded an accurate claim for which it had standing, should not be required to litigate again. *Barnes*, 980 F.2d at 580. It should be able to enforce the Government's litigation maneuvers, should the Court rely on those to uphold the program. This is particularly so as the MOUs are revocable as soon as this case ceases to exist. Gov. & Int. RSUF ¶ 84.

III. Conclusion

For the foregoing reasons, R-CALF's motion for summary judgment should be granted and the Government's and Intervenors' cross-motions denied.

RESPECTFULLY SUBMITTED this 30th day of July, 2019.

PUBLIC JUSTICE, P.C.
By: /s/ David S. Muraskin
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I hereby certify that this reply brief contains 8,997 words, excluding the caption, certificates of service and compliance, and tables of contents and authorities. That word count was calculated using the Microsoft Word program used to write this brief.

By: /s/ David S. Muraskin