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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, AND THE UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendants*, MONTANA BEEF COUNCIL et al., *Intervenors*.	Case No. CV-16-41-GF-BMM-JTJ **PLAINTIFF'S OBJECTIONS TO THE FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE**

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I. INTRODUCTION

The Findings and Recommendations ("F&R"), Dkt. No. 135, violate controlling authority. The Beef Checkoff tax at issue creates compelled speech and association inconsistent with the First Amendment, unless the Government exercises sufficient control so the funds are only spent on "government speech," which is exempt from First Amendment review. Building directly on Supreme Court and Ninth Circuit precedent, this Court previously held the Government's limited statutory and regulatory control over the Montana Beef Council—which is identically situated to the other fourteen state beef councils now joined in this case—indicated it engaged in private, not government speech, likely using the checkoff inconstant with the First Amendment. *Ranchers-Cattlemen Action Legal Fund ("R-CALF") v. Vilsack*, 2016 WL 9804600 (D. Mont. Dec. 12, 2016) (*R-CALF I*), *adopted sub nom. R-CALF v. Perdue*, 2017 WL 2671072 (D. Mont. June 21, 2017) (*R-CALF II*), *aff'd R-CALF v. Perdue*, 718 Fed. App'x. 541 (9th Cir. 2018) (*R-CALF III*).

Nonetheless, the F&R concludes the "government speech" carve out to the Constitution applies even when checkoff money passes through the state councils to another private entity to be used at the private-entity's discretion, which the F&R acknowledges allows the constitutional "damage" the case law prohibits. *See* F&R 12. The F&R also narrows what is required for government control beyond

what is present in *any* other case and required by the Supreme Court's most recent "government speech" decisions, and contradicts the Court's instruction to limit the "government speech" doctrine. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

This Court should reject the F&R, hold the current operation of the Beef Checkoff unconstitutional, and issue an injunction requiring the Government to bring the councils into conformity with the Constitution, or prevent the checkoff from funding their activities.

II. BACKGROUND

A. The Beef Checkoff Program.

The Beef Checkoff is a $1 per head federal tax on beef producers. In every state at issue here, the tax must be paid to private state beef councils, which are allowed to, and typically do, keep half the money. F&R 2. The councils transmit the other half to the Beef Board, an entity created by the "Beef Act," which works with the Beef Committee, another statutorily-created entity, to spend their half. *See id*. The state councils independently distribute the half of the Beef Checkoff funds they retain. *Id*.; *see also R-CALF II*, 2017 WL 2671072, at *1-2 (same).

Per the Beef Act, checkoff money can only be spent on "promotion and research designed to strengthen the beef industry[]," speech. 7 U.S.C. § 2901(b). Beyond that general directive, the only statutory or regulatory limits on the expenditures are that the speech cannot be "unfair," "deceptive," or meant to

"influenc[e] governmental policy." F&R 3; *R-CALF II*, 2017 WL 2671072, at *2 (same).

Given this structure, the Supreme Court explained, the checkoff compels producers to fund speech, which is a form of compelled speech implicating the First Amendment. *United States v. United Foods, Inc.*, 533 U.S. 405, 413-14 (2001) (concerning Mushroom Checkoff program); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (concerning Beef Checkoff program that is "in all material respects, identical to the mushroom checkoff"). The tax also results in compelled association with the entities spending the money. *United Foods*, 533 U.S. at 415. The checkoff fails all levels of First Amendment scrutiny. *Id.* at 416.

The only reason the Beef Checkoff has survived is the Court determined the expenditures by the Beef Board and Committee were sufficiently controlled by the government so that they amounted to "government speech." *Johanns*, 544 U.S. at 560. This case concerns the checkoff money that the private state beef councils are allowed to retain, which no court has previously addressed. *See id.* at 554 n.1 (stating the Court believed all money remaining with the councils were "voluntary contributions" (citing 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3)).

i. The state councils funnel millions of checkoff dollars to private parties.

The private state beef councils use the Beef Checkoff money they retain in three ways: (1) to fund their own activities; (2) to contract with third parties to do

work at the direction of the councils; and (3) to "contribute" to private third parties, who determine for themselves how they spend the money. Gov. Response to R-CALF's Statement of Undisputed Facts ("RSUF"), Dkt. No. 101 ¶¶ 47-48, 59-60, 92-94, 103.[1]

The only limitation placed on the last type of expenditures is that the "contributions" must be used "for purposes allowed under the Beef Act and Beef Order," *i.e.*, to fund beef promotion or research that is not unfair, deceptive, or meant to influence policy. *Id*. ¶ 99. The forms on which the councils detail these "contributions" explain the recipients only need to identify how they spent the money in "annual[] account[ings]" *after* the expenditures are made. *Id.* ¶¶ 93-99; *see also* Int. RSUF, Dkt. No. 97 ¶ 96.

Millions of checkoff dollars are spent this way. In both 2018 and 2019, for instance, the Texas Beef Council alone gave $1 million in "Unrestricted" funds to the Federation Division of the National Cattlemen's Beef Association ("NCBA") that it could spend on any "research, promotion, industry information, and consumer information," and another nearly $1 million in "Prioritized" funds—although it only identified a priority for $491,400, stating that should support

[1] To the extent the Government or Intervenors argue that any of the facts on which R-CALF relies are in dispute, R-CALF directs this Court to its Motion to Strike non-responsive denials and objections to R-CALF's Statement of Undisputed Facts, Dkt. Nos. 114-115, 120-122, which the F&R held was moot.

"International Marketing" by the U.S. Meat Export Federation ("USMEF"), without any other limitation. Gov. RSUF ¶¶ 94-95 (citing R-CALF Exs. 29 & 31).

Likewise, in 2019, the Nebraska Beef Council "contributed" more than $2 million to the Federation Division and USMEF, with $1,579,500 being contributed to "Unrestricted" activities, and $442,900 being "prioritized for international marketing" by USMEF, but containing no other restriction. *Id.* ¶¶ 94, 96-97. Again, the "contribution" form specified the funds only needed to be spent consistent with the Beef Act, and the recipients could report back *after* the expenditures were made regarding how the money was spent. *Id.*

While the F&R referred to these "contributions" as paying for "membership in the organizations," F&R 17, the undisputed record establishes that is incorrect. The "Unrestricted" investments help determine how many people the councils can appoint to the Federation's board, but the "contribution" form makes clear the purpose of the "contributions" is to "support the Federation's national programs," and, in fact, the money *must* be spent on beef related advertisements, speech. Gov. RSUF ¶¶ 95-96. The "contributions" to USMEF do not relate to membership. They are distinct from the $8,600 the Texas and Nebraska councils paid for "membership" in USMEF. *Id.* ¶¶ 94-97. Likewise, the Wisconsin Beef Council was authorized to "contribute" to yet other third parties—such as the Wisconsin

Livestock Identification Initiative—without that being connected to "membership." *Id.* ¶ 93.

The entities receiving the "contributions" are entirely private. The Federation is mentioned in the Beef Act as a source of appointees for the Beef Board and Committee, 7 U.S.C. § 2904(a)(4), but is an independent entity, run by the beef-packer lobbying group NCBA, Gov. RSUF ¶ 107. USMEF is not mentioned in the Beef Act or regulations, and is a private entity that promotes certain types of trade. *See id.* The Livestock Identification Initiative is a private advocacy group. *See id.* ¶ 98.

ii. The state councils themselves are wholly private.

In addition to funding the speech of private third parties, each of the councils at issue is a privately incorporated entity or the subsidiary of a privately incorporated entity. *Id.* ¶¶ 69-70. Indeed, the councils use their own private logo to brand their activities, *id.* ¶ 110, and the Government, *id.* ¶ 57, and councils, Int. RSUF ¶ 109, describe the councils' speech as private, nongovernmental expressions. Accordingly, Intervenors admit they are "nongovernmental entit[ies]." *Id.* ¶ 65.

The Government has no role in appointing or removing the councils' boards or staff, including their representatives to the Federation or USMEF. Gov. RSUF

¶¶ 71-73. Each council controls who makes decisions on behalf of the organization. *Id*.

The Government allows the state councils to collect and use Beef Checkoff funds after a single, ten-page form is approved by the Beef Board. *Id.* ¶¶ 49-50. The councils' only subsequent statutory or regulatory obligations are to turn over at least half the money to the Beef Board, provide an annual audit confirming they did so, and use the money consistent with the Act and regulations, *i.e.*, to fund advertisements that are not unfair, deceptive, or meant to influence policy. *Id.* ¶¶ 47, 51-52. The Beef Board also requests councils submit "annual marketing plan[s]" to the Board, which "outline" the council's "planned activities" for the year, and, undergo a "compliance review" by the Board approximately twice a decade, to ensure the council is not violating the Act or regulations. *Id.* ¶¶ 53-55.

Under the statutes and regulations, USDA has no regular contact with the state councils and no one, neither USDA nor the Beef Board or Committee, approves the messages the councils generate with the checkoff funds. *R-CALF II*, 2017 WL 2671072, at *2.

The Beef Board may only "de-certify" a qualified state beef council, removing its authority to collect and retain Beef Checkoff funds, for failing to comply with the requirements of the Beef Act or Beef Order, not the content of the councils' messages. 7 C.F.R. § 1260.181(b)(1), (7).

iii. The New Memoranda of Understanding Between the Government and Councils Allow the Councils To Continue To Fund Private Speech.

Prior to the current F&R—but after the first F&R found the funding of the Montana Beef Council was likely unconstitutional—all the councils in this case entered into Memoranda of Understanding ("MOUs") with the Government. The MOUs do not alter how the councils' board or staff are appointed or removed—that remains at the councils' discretion. Gov. & Int. RSUFs ¶ 80. The MOUs merely provide for the councils to submit the annual plans and audits they previously sent to the Beef Board to USDA, and to provide USDA information about their meetings and submit the specific "plan[s] or project[s]" the councils produce or supervise for approval before they are issued. *See, e.g.*, R-CALF Ex. 18, Dkt. No. 91-1 (MOUs). The councils must also produce an annual public statement about their activities. *Id.* All of these requirements can be waived by "mutual agreement" of the parties. *Id.*; Gov. & Int. RSUFs ¶ 84.

The Government explains that "[a]s much as possible" it details its review of the councils' "plans and projects" in its Marketing Communication Guidelines. R-CALF Ex. 19, Dkt. No. 91-1, at RCALF_000760. The Guidelines state that councils' speech will be considered "government speech" so long as it complies with federal standards regarding food health and safety, and is "appropriate for all audiences." *Id*. at RCALF_000775-76. The Guidelines further state USDA will not

ensure the councils' speech reflects the message of any government official, unless the speech names a specific official. *Id.*

Perhaps more importantly, under the MOUs, the Government has *no* authority to supervise the third-party speech generated with the state councils' "contributions." Gov. & Int. RSUFs ¶ 103. The MOUs *only* provide for the Government to approve the councils' speech, and the speech the councils contract for as "deliverables" to the councils, *not* the speech generated with the "contributions," R-CALF Ex. 18. The third parties only need to identify the speech the "contributions" funded in subsequent "annual account[ings]." Gov. RSUF ¶ 96.

The Government explains councils obtain "approval" to make the "contributions" by listing them in their annual "marketing plan and overview of expenditures." *Id.* ¶¶ 93, 100. Those budgets need not and do not detail the speech the councils will fund, but rather list the "costs" and provide a "general description" of the activity "contemplated." *Id.* ¶ 101. As an example, Texas was approved to "contribute" money to USMEF by stating that the money would help "[s]howcase beef." R-CALF Ex. 33, Dkt. No. 91-1, at RCALF_000474.

While some, albeit not all, of the third parties who receive "contributions" may also produce "deliverables" the Government reviews, the undisputed record establishes the "contributions" and "contracts for deliverables" are distinct, and the expenditures are differently supervised. Gov. RUSF ¶ 103; Gov. Ex. 84, Dkt. No.

99-4, at 29 (itemizing different funding streams and their uses). Indeed, neither the Government nor Intervenors could identify the specific expressions paid for by the "contributions" the third parties received, even after the money was spent. R-CALF Ex. 9, Dkt. No. 91-1 (Gov. responses RFAs Nos. 66-67, 69); Int. RSUF ¶¶ 105-106.

B. The Prior Decisions Provide the Governing Law.

The prior decisions in this case provide the framework for assessing the constitutionality of the councils' distribution of checkoff funds. They reiterate the checkoff is "unconstitutional under any level of scrutiny." *R-CALF II*, 2017 WL 2671072, at *7. Only when the compelled subsidy funds "government speech" can it survive because "[u]nlike private speech, government speech remains 'subject to democratic accountability'" and is exempt from First Amendment review. *Id.* at *5 (quoting *Johanns*, 544 U.S. at 563).

Determining if a compelled subsidy funds "government speech turns on whether government officials exercise 'effective control' over the speech." *Id.* "This rule consistently has been understood to mean that the government must at least hold statutory control over the entity that makes the challenged speech, and, also, in most cases, the speech itself." *Id.* (quoting *Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1011 (9th Cir. 2007)).

Government speech only exists where it is clear the speech is "'from beginning to end the message established by the'" government, so it will be responsible for the statements. *R-CALF I*, 2016 WL 9804600, at *5 (quoting *Johanns*, 544 U.S. at 560). Where the Court held the Beef Board and Committee were engaged in "government speech," it emphasized that in addition to the Act and regulations creating authority over the Beef Board, Committee, and their members, "the Secretary of Agriculture had the authority to approve every word of the … campaigns" they developed, and "federal officials participated in the development of the campaigns." *Johanns*, 544 U.S. at 560-61.

Accordingly, the Beef Act and its regulations' broad guidelines for how the checkoff should be spent—that the expenditures must "advance the image and desirability of beef" without being used for "unfair or deceptive" practices or "to influence governmental policy"—are insufficient to ensure the checkoff is used to fund government speech. *R-CALF II*, 2017 WL 2671072, at *2, *6.

On this basis, this Court entered a preliminary injunction in this case because the Government's control over the Montana Beef Council was likely insufficient. It emphasized that "USDA lack[ed] the authority to appoint or remove any … members" of the state council. *Id.* at *6. It also explained it could separately hold the Government lacked "effective[] control" over the council's speech funded by

the checkoff because the record indicated "USDA d[id] not control how the [council] spends the checkoff assessments." *Id.* at *6.

C. The Current F&R.

The current F&R relies entirely on the MOUs to conclude the Government now exercises sufficient control over the state councils to render their speech "government speech." *See* F&R 3. The F&R confirms the Act and regulations only provide insufficient "general terms" for how the Beef Checkoff money can be spent. *Id.* at 10. Further, while each state council must be certified to obtain checkoff money and can be de-certified for "failure to follow" the Act and regulations, given the limited authority this provides the Government, it is also inadequate. *Id.* at 12. As the Magistrate explained, if these are the only controls, councils "could receive certification, then develop their ads, [and] disseminate them," even if they were inconsistent with the Government's desired message, and only then could the Government even consider whether it could de-certify the councils. *Id.* Speech the Government only evaluates after the fact is not "government speech," and the expenditures would violate the First Amendment. *Id.*

Yet, the F&R continues, with the MOUs "USDA now retains complete final approval over all [council] ads. … That proves enough to make QSBCs 'answerable' to USDA." *Id.* at 13.

In reaching this conclusion, the F&R fails to account for the money "contributed" to third parties. The F&R labels this money as "membership" dues, and asserts courts should not attempt to analyze such expenditures, despite them creating a substantial part of the checkoff-funded speech. *Id.* at 17.

The F&R appears to acknowledge the "contributions" allow an "end run around the [Government] pre-approval process," failing to ensure the money is used to express the Government's message, but it claims that because the Government approves the "budgets" that list the "contributions," that is sufficient. *Id.* at 18. The F&R fails to reconcile this statement with its own, this Court's, and the Supreme Court's holdings that the Government must be able to approve "every word used," *id.* at 14-15, and the budgets only need to list the amount of the contribution, and a "general description" of the "contemplated" activity—which need only amount to saying the activity will be consistent with the Act and regulations. The budgets do not need to list the specific speech the money will fund.

Turning to the portion of the checkoff money retained by the councils for the speech they design or supervise, in contradiction to this Court's prior holding, the F&R concludes "the Government's inability to appoint or remove anyone from the [councils]" does not establish the Government exercises insufficient control over councils' expressions. *Id.* at 11. It states that while "appointment and removal

powers … [are] quite a powerful way to ensure that [] entities remain answerable to the government" here the "*absence* of these powers … proves insignificant." *Id.* at 11-12 (emphasis in original). Instead, the F&R states the certification process, "USDA's … authority to participate in open meetings," and its approval of the individual advertisements render the councils' speech "government speech." *Id.* at 13.

The F&R also rejected the argument that the Government's Guidelines for reviewing the councils' speech render that control insufficient. The F&R stated, "the test is whether the government retains authority to control the speech, not whether the government actually exercises that authority. So if USDA simply acts as a rubberstamp … that fact proves irrelevant." *Id.* at 15-16. The Court did not address the fact that the Government has limited its authority under the MOUs to the terms of the Guidelines, and the Guidelines disclaim the right to ensure the councils' speech aligns with the Government's message. R-CALF Ex. 19, at RCALF_000775-76.

The F&R appears to agree with R-CALF's characterization that the state councils "present [their speech] as private speech," but concludes that too is inconsequential for whether the councils' speech is "government speech." F&R 16-17 (citing *Johanns*, 544 U.S. at 564-65).

Finally, despite its reliance on the waivable MOUs, the F&R concludes an injunction is not required to ensure the Government and councils continue to abide by their terms. *Id*. at 18. While acknowledging an injunction can be required to prevent an injury from recurring, it states "Courts have routinely given government agencies greater leniency when considering whether the party may resume its illegal or unconstitutional activities." *Id.* at18-19.[2]

III. STANDARD OF REVIEW

This Court exercises *de novo* review of the F&R, 28 U.S.C. § 636(b), and this case presents a question of the "legal significance of undisputed facts," which "collapses into a question of law," *Thrifty Oil Co. v. Bank of Am. Nat. Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003).

IV. ARGUMENT

A. The Councils' "Contributions" To Third Parties Render the Councils' Activities Unconstitutional.

It is undisputed that the state beef councils can and do "contribute" millions of producers' checkoff dollars to private entities to use for their *private third-party speech*, so long as it is consistent with the Beef Act and regulations. Gov. RSUF

[2] Separate from its conclusion regarding why the councils' expenditures fund "government speech," the F&R also concluded R-CALF has standing on behalf of itself and its members, *id.* at 4-7, and rejected the argument that if the Government provides producers the ability to "opt-out" of funding the state councils—after the councils take producers' money to fund their and third-party activities—that remedies any First Amendment harm, *id.* at 7-8. R-CALF does not object to these portions of the F&R, but reserves the right to respond to any objections raised.

¶ 99. The checkoff money the Government is mandating producers pay is being used to fund private "beef-related speech by the Federation and USMEF" among other entities, whose speech the Government is, at most, informed about after the fact. Gov. Br., Dkt. No. 99-0 at 18. The F&R failed to address these facts. This transfer of money is unconstitutional and must be enjoined.

For there to be "government speech" "the message must be 'from beginning to end the message established by the Federal Government.'" F&R 9 (quoting *Johanns*, 544 U.S. at 560). Consistent with *Johanns*, every judge reviewing this matter has said "government speech" requires the Government to possess "absolute veto power over the content of" the speech the checkoff funds, "right down to the wording." *R-CALF II*, 2017 WL 2671072, at *5; *R-CALF III*, 718 Fed. App'x. at 542 (fact that Government did "not have pre-approval authority over" the speech warranted preliminary injunction); *id.* at 543 (Horwitz, J., dissenting) (injunction required unless "the Secretary [has] complete pre-approval authority over" all speech produced by the checkoff). The Government does not possess that authority over the speech generated by the third parties who receive "contributions" from the state councils, rendering it unconstitutional.

Lest there be any doubt, the only limit placed on the third-party expenditures is that they must be consistent with the Beef Act and regulations, which every court has rejected as sufficient to make speech "government speech." F&R 10; *R-*

CALF II, 2017 WL 2671072, at *6. Indeed, the Ninth Circuit has explained statutes and regulations must go "much further … than the Beef Act and Order" before a court can rely on those controls to conclude an entity is engaged in "government speech"—and even then a court should only do so if those more detailed guidelines are combined with the power to appoint and remove all of the people crafting the speech. *Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1228-29 (9th Cir. 2009).

The F&R presents two justifications for shrugging off this First Amendment violation: (1) to hold otherwise would risk "micro-managing legislative and regulatory schemes," F&R 17 (citing *Paramount Land*, 491 F.3d at 1012); and (2) the constitutional "concerns are minimized by USDA's approval of the [councils'] budgets," *id.* at 18.

The first of these statements dramatically over reads *Paramount Land*. *Paramount Land* explains that if a court is sure the speech "is from beginning to end the message established" by the government it should not "draw a line between" minor differences in satisfying that requirement. 491 F.3d at 1011-12 (affirming, there, the government reviews "each … promotional activity specifically" and "retains authority to control … the message" funded). This does not excuse the F&R from requiring the message be "from beginning to end" the

Government's, which requires the Government have the power to review the statements funded by the checkoff before they are issued. *See, e.g.*, F&R 9.

Indeed, to hold that requiring the Government to pre-approve the checkoff-funded speech is improper "micro-managing" nullifies the Constitution. As the F&R explains, if the Government must wait until after speech funded by the checkoff is issued to determine if that speech is consistent with the Government's desired message, "the damage will have been done," producers will have been forced to fund private speech. F&R 12. The F&R worries courts will have to "parse budget line items" to determine where the checkoff money is going and whether it is being properly controlled. *Id.* at 18. But that is not correct. The Court can order checkoff money only be spent if the Government can pre-approve the speech. The Court would only need to review those expenditures if the Government then disobeyed its order.

The F&R's second notion, that First Amendment concerns are minimized because the Government reviews the councils' annual budgets, is also inconsistent with governing law. The Supreme Court and Ninth Circuit have explained that for there to be "government speech," in addition to enforcing statutory requirements, "review[ing] … annual outlines" of activities, and being able to conduct "post-hoc" enforcement, the government must "direct" the "advertising program" itself. *R-CALF II*, 2017 WL 2671072, at *6 (citing *Paramount Land Co.*, 491 F.3d at

1010-11, in turn citing *Johanns*). The F&R agreed. F&R 13 (Government must have power of "approval over all [] ads"). That the councils provide the Government annual plans "outlining" "contemplated" activities is not enough. *R-CALF II*, 2017 WL 2671072, at *6 (Government reviewing outline is insufficient).

The budgets confirm that reviewing them cannot be a stand-in for reviewing the actual speech the checkoff funds. Gov. Ex. 50, Dkt. No. 99-4, at 3 (approved budget providing money to NCBA and USMEF because they will generate "a positive beef message"). In fact, the Government and Intervenors admit that while the Government has reviewed the budgets, it does not know what specific expressions the third-parties funded. R-CALF Ex. 9 (Gov. responses RFAs Nos. 66-67, 69); Int. RSUF ¶¶ 105-106.

Before the Magistrate, the Government and Intervenors suggested that because third parties *may* use the "contributions" to pay for "national programs" related to what the Beef Board funds, and *may* act as contractors for the Beef Board, their expenditures are essentially supervised by the Government. Nonsense. The only restriction placed on the third-parties' expenditures of the "contributions" is that they must be consistent with the Beef Act and regulations. Int. & Gov. RSUFs ¶ 99. That the third parties may independently decide to fund something similar to what the Government would support does not establish government control.

Before the Magistrate, the Government also noted the Ninth Circuit did not object to a governmentally-controlled entity hiring a consultant, but this proves the councils' funding of third parties exceeds what is constitutional. There, the court held the consultant was merely "coordinat[ing]" the "Commission's government relations activities," which the government sufficiently controlled. *Paramount Land*, 491 F.3d at 1007. Here, the third parties are not acting exclusively as contractors for the councils, but allowed to use the "contributions" for their own ends.

Under the F&R's logic, a private state council can create another private entity, transfer checkoff money to it to fund its speech, and thereby evade the First Amendment's prohibitions on the compelled subsidy of private speech. The Constitution cannot be satisfied through such a shell game of corporate forms.

B. That the Government Does Not Appoint Or Remove the Councils' Members Is Constitutionally Significant.

The F&R also erred in holding the state councils can constitutionally expend checkoff money on their own, even though the Government lacks the ability to appoint or remove any member of the councils. Every entity that has been held to be engaged in "government speech" in any case cited by any party had some or all of its members appointed and likely subject to removal by the government. *Johanns*, 544 U.S. at 561 (Beef Board and Committee's "members are answerable to the Secretary" and members of both are "appointed by him as well"); *R-CALF*

III, 718 Fed. App'x. at 542 (all prior cases had "appoint[ment]" power); *In re Tourism Assessment Fee Litig.*, 391 Fed. App'x. 643, 646 (9th Cir. 2010) (unpublished) (government appointed one-third of members and could remove all of them); *Delano Farms*, 586 F.3d at 1228-29 (government could appoint and remove all members); *Paramount Land*, 491 F.3d at 1010-11 (government appointed one member, could remove president, and approved all selection procedures); *Am. Honey Producers Ass'n, Inc. v. U.S. Dep't of Agric.*, 2007 WL 1345467, at *9 (E.D. Cal. May 8, 2007) (Government appoints and removes all members); *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45, 52 (D.D.C. 2006) (Government appoints all members); *Cricket Hosiery, Inc. v. United States*, 30 C.I.T. 576, 589 (2006) (Government appoints members).

The Supreme Court has directed "great caution before extending our government-speech precedents." *Matal*, 137 S. Ct. at 1758; *see also Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239-240 (2d Cir. 2019) (rejecting efforts to expand "government speech" per *Matal*); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34-35 (2d Cir. 2018) (same); *Kotler v. Webb*, 2019 WL 4635168, at *6 (C.D. Cal. Aug. 29, 2019) (same). Yet, the F&R does exactly that, allowing the councils to expend checkoff funds even though no government is involved in selecting or replacing their directors or staff, and nothing in the Beef

Act, Order, or MOUs provides the Government that authority. Gov. & Int. RSUFs ¶¶ 71-73, 80.

The Government and Intervenors insisted this is acceptable because no case held the power to select the people producing the speech is dispositive. Similarly, the F&R states that although the appointment power was present in every case that does not require "other entities [to] satisfy" that demand. F&R 13. Yet, not only is this at odds with *Matal*, but to hold the appointment power is unnecessary is inconsistent with the premise of "government speech": that the First Amendment need not apply because there is "democratic accountability" for the speech. *R-CALF II*, 2017 WL 2671072, at *5. The California Supreme Court has explained the appointment and removal power ensures the government cannot "disclaim responsibility for promotional messaging." *Delano Farms Co. v. Cal. Table Grape Comm'n*, 417 P.3d 699, 722 (Cal. 2018). Likewise, the Ninth Circuit has held a key indicia of government action is that the actors are government appointees. *Delano Farms*, 586 F.3d at 1225; *see also Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp*., 75 F.3d 1401, 1407 (9th Cir. 1996) (same).

The Government suggested that because the councils' "certification" to collect and use Beef Checkoff funds can be revoked, the Government is essentially responsible for choosing the councils' directors. False. Where "the development of the [] details" of the speech is by an "an entity whose members are answerable to

the Secretary," that helps establish the entity is engaged in "government speech," because the Government can remove people whose views differ from its own. *Johanns*, 544 U.S. at 561. Under the Act and regulations, a council can only be de-certified if the speech was unfair, deceptive, or sought to influence government policy. Gov. RSUF ¶ 61. Under the MOUs, a council can only be de-certified if it fails to follow the MOU's procedures. Gov. & Int. RSUFs ¶ 83. The de-certification power does not allow the government to choose its mouth piece.

Indeed, it is undisputed the privately selected members of the councils are allowed to engage in marketing trips so long as they list those trips in their annual budgets. Gov. RSUF ¶ 90. Unless that speech is "unfair," "false" or can be shown to be meant to influence policy, even with the MOUs, the Government has no ability to take any action against the councils' members for anything they say there. Thus, under the current structure, private members of the private councils are allowed to put checkoff money towards funding their private expressions.

In sum, without the appointment and removal power that is present in every other case, the councils and their speech is less democratically accountable. Proclaiming such speech "government speech" is inconsistent with *Matal*.

C. The Government's Review of the Council's Expressions Is Constitutionally Insufficient.

The F&R acknowledges that under the MOUs the Government's approval of the councils' speech may be nothing more than a "rubberstamp," but states that is

"irrelevant so long as USDA retains broad authority" to review the councils' speech if it so chooses. F&R 16. This conclusion is: (1) legal error because the unexercised power to review the councils' speech is insufficient to create "government speech"; and (2) factual error because the Government does not even possess the potential to substantively review the councils' speech.

The F&R relies on the Ninth Circuit's statement that courts should not be concerned with the "actual level of control," just what powers the government could wield, *Delano Farms*, 586 F.3d at 1230; but this is inconsistent with *Matal*. There, the Court instructed private speech cannot "be passed off as government speech by simply affixing a government seal of approval." *Matal*, 137 S. Ct. at 1758.

Even under *Delano Farms*, on which the F&R relies, the Ninth Circuit explained the Government must possess sufficient "statutorily-authorized" powers over the private expressions. 586 F.3d at 1230. Thus, the F&R erred in relying on the potential authority created by the waivable MOUs. That the Government claims, for the time being, it is empowered to review the councils' speech, is not the sort of Government authority and accountability the Ninth Circuit deemed sufficient.

Moreover, USDA has explained in its Guidelines what it will consider "government speech." R-CALF Ex. 19, at RCALF_000775-776. There it describes

that absent councils naming an official, USDA will not work to ensure their speech is "consistent with" political officials' messages. *Id*. Instead, the Guidelines explain, so long as "[f]or example … guidance related to foodborne illness outbreaks [] agree[s] with the guidance issued by USDA and other Federal agencies," the speech will be accepted as "government speech." *Id*. Particularly given that the Guidelines elucidate vague contracts drafted by the Government, these statements of its authority are binding. *Hollerbach v. United States*, 233 U.S. 165, 172 (1914) (Government statements regarding the terms of a contract are binding upon the Government).

Consistent with this understanding of the Government's power under the MOUs, the Government explained its primary focus is on ensuring "nutritional" and "health" claims are consistent with Government guidelines. Gov. RSUF ¶ 88. The only other types of changes it sought to councils' speech is when a council attempted to use a racial pejorative, when it failed to cite support for its claims, or where it omitted a logo that provided clarity to the council's desired statement. *Id*. The Government highlighted this work is time consuming, but that does not make it substantive.

Indeed, the Government's power under the Guidelines is no different than what the Court held was unacceptable in *Matal*. There, the Government argued that because it ensured a trademark met certain technical requirements and was not

offensive, it was government speech. *Matal*, 137 S. Ct. at 1758. The Court stated this would be a "dangerous extension" of the doctrine. *Id.*

In sum, while the F&R is incorrect that the Government must merely have the potential, under a waivable contract, to alter the councils' messages, here its potential authority and the actual authority it employs are both insufficient.

D. That the Councils' Speech Is Presented As Private Speech Renders It Unconstitutional.

The F&R is also incorrect that the councils' and Government's depiction of the councils' speech as private speech does not impact the "government speech" analysis. F&R 16-17. While *Johanns* states, in dicta, that government speech need not "identify [the] government as the speaker," 544 U.S. at 564 n.7, this does not support the conclusion that the Government and speaker can affirmatively represent the speech as private speech and claim the benefits of the "government speech" doctrine. In extending *Johanns* in this manner, the F&R contradicts more recent Supreme Court precedent holding that part of the government speech analysis is whether viewers would "'appreciate the identity of the speaker'" as the government. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247 (2015) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)). Accordingly, the en banc Federal Circuit stated that where speech is "clearly private speech" it cannot be "government speech" because it is "associated with" the private actor, not the Government, undermining government

accountability for the speech. *In re Tam*, 808 F.3d 1321, 1345 (Fed. Cir. 2015) (en banc), *aff'd Matal*, 137 S. Ct. 1744.

The record shows the Government allows the state councils to portray themselves as independent entities run by their private boards, Int. RSUF ¶ 109, and to use the Beef Checkoff money to produce ads that state they are the speech of private-independent councils, Gov. RSUF ¶¶ 114-119. Core to whether a compelled subsidy funds government speech is whether the speech is "'subject to political safeguards [that] set [it] apart from private messages,'" *Paramount Land*, 491 F.3d at 1011 (quoting *Johanns*, 544 U.S. at 563), something that cannot be true if the Government and speakers are allowed to disavow the speech as "government speech."

E. At Minimum, an Injunction Enforcing the MOUs Is Required.

Even if the Court agrees with the F&R and concludes the MOUs are sufficient to render the councils' speech "government speech," contrary to the F&R's analysis, it would still need to issue an injunction. The MOUs are all that provide the Government any involvement with the councils' speech, and they can be revoked at any time. Gov. & Int. RSUFs ¶ 84. Thus, they do not remedy R-CALF's and its members' injury, as it can recur. *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1037-38 (9th Cir. 2018).

For a court to assume the MOUs will continue to be followed and thus the First Amendment violation will not recur, the Government must show the changes the MOUs implement are "entrenched or permanent." *Id*. There must be "procedural safeguards" in place that prevent "arbitrary reversal." *Id.* at 1039.

Where, as here, the Government relies on a revocable MOU, that standard has not been met. R-CALF is entitled to an injunction to enforce the provisions necessary to remedy the constitutional harm. Otherwise, it and its members face a constant threat, which is unlawful. *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992) (if agency "might find it convenient at any time to dispense" with the commitments plaintiffs are "entitled to the protection of an enforceable order" to ensure the violation will not recur).

This should be particularly true here, as the MOUs are inconsistent with the Government's statements in the Beef Checkoff regulations that it would not assert direct control over the councils' expressions. Beef Order, 51 Fed. Reg. 26132, 26137 (July 18, 1986). They are likewise inconsistent with Intervenor's statement that the councils are designed to operate with "distinct … interests [from] the Government." Dkt. No. 63, at 27. Therefore, the MOUs are unenforceable because they seek to "circumvent" the Government's prior binding commitments. *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 763 (4th Cir. 1993).

V. CONCLUSION

For the foregoing reasons, the Court should reject the F&R's conclusions that the state councils and the third parties they fund are engaged in government speech, and enjoin the unconstitutional activities.

RESPECTFULLY SUBMITTED this 14th day of February 2020.

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

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