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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 CONSOLIDATED RESPONSE TO THE GOVERNMENT'S AND INTERVENORS' OBJECTIONS TO THE FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE**

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I. INTRODUCTION

The Government's, Dkt. No. 140, and Intervenors', Dkt. No. 138, Objections to the Findings and Recommendations ("F&R"), Dkt. No. 135, highlight their dangerous conception of the law, and further undermine the F&R. They insist the Government can pick-and-choose which "factors" substantiating "government speech" it will implement, allowing it flexibility to place speech outside the First Amendment's reach. Gov. Obj. 11-12. This argument has been rejected by the Supreme Court, the Ninth Circuit, and this Court. In particular, those decisions dismiss the Government's and Intervenors' claim the loose controls in the "Beef Act" and its regulations ("Beef Order") ensure the private state beef councils use the checkoff for "government speech." Thus, the Act and Order are insufficient to render the councils' use of the funds constitutional.

As a result, the Objections also undercut the F&R. Although the F&R relies on the Memoranda of Understanding ("MOUs")—not the Act and Order—to hold the councils operate constitutionally, it acknowledges the MOUs can amount to nothing more than enforcing the Beef Act. F&R 14, 18. Thus, the Objections highlight, the F&R is in tension with controlling precedent and the law of the case.

At the very least, the Objections make clear the F&R errs in refusing to recommend an injunction to enforce the MOUs. The Government's "vigorous" (false) assertion that the statutes and regulations are sufficient without the MOUs,

establishes judicial intervention is required to enforce the MOUs' rules, should the Court believe they are what make the councils' activities constitutional. The Court cannot trust the Government will continue to abide by the revocable MOUs it claims are unnecessary. *See, e.g.*, *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985).

The Objections' arguments in the alternative: (i) that the Court need not address whether the councils are engaged in "government speech" because the Government's "Redirection Rule" moots the concern; and (ii) R-CALF lacks standing, are baseless. They misstate the text of the "Redirection Rule" and the bases of R-CALF's standing. And, they ignore black letter law that holds even were their characterizations correct, they would be irrelevant.

The Court should reject the Objections, and revise the F&R.

II. LEGAL FRAMEWORK

Despite the Objections' numerous asides, the relevant facts and legal principles are straight forward and undisputed.[1] The Government allows the fifteen

[1] As R-CALF noted in its motion to strike, before the Magistrate, the Government and Intervenors violated this Court's rules regarding how they presented their "Response to R-CALF's Statement of Undisputed Facts" ("RSUFs") to unnecessarily complicate the undisputed record. R-CALF Mot. to Strike, Dkts. Nos. 114-115, 120-122. The Government falsely presents this matter as resolved in its favor. Gov. Obj. 1. In fact, the F&R states it did not need to reach the Motion to Strike because it independently examined the record. F&R 19. This Court must engage in a *de novo* review. 28 U.S.C. § 636(b); *Thrifty Oil Co. v. Bank of Am.*

private state beef councils at issue to collect the federal Beef Checkoff tax and take half the money. That violates the First Amendment, unless the councils use the money for "government speech."

"Government speech" is meant to be a narrow carve-out to the First Amendment to enable government "officers and employees [to] speak about" government "venture[s]" without the requirements of "viewpoint neutrality." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). For example, if the government chooses to engage in combat, it should be able to "promote the war effort" without being constrained by the First Amendment. *Id.* at 1758. The doctrine has only ever been applied where the speech is "from beginning to end" government speech, *id*. at 1759, as shown through the government selecting the people crafting the speech, and pre-approving the speech itself. Recognizing a broader articulation of the doctrine would be subject to "dangerous misuse," the Supreme Court recently mandated "great caution before extending our government-speech precedents." *Id.* at 1758.

Thus, the central issue before the Court is whether the Government has shown the councils' use of the checkoff meets the test for "government speech"—

Nat. Trust & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003). Thus, it could do the same. However, should the Court have any questions regarding the state of the record, R-CALF points the Court to its Motion to untangle the Government's and Intervenors' efforts at misdirection.

which it acknowledges it has not, Gov. Obj. 11 (explaining it only seeks to satisfy some of the "factors" in the case law)—or justified expanding the doctrine—an argument it does not even advance.

A. The Beef Checkoff Program Can Only Stand If It Is Used Exclusively To Fund "Government Speech."

A "checkoff" is a targeted tax on producers of a good to fund "a coordinated program of promotion and research designed to strengthen the" industry. *E.g.*, 7 U.S.C. § 2901(b) (describing the Beef Checkoff). The Beef Act and its related regulations establish "general terms" for how this money should be spent, Gov. Obj. 12, explaining that the money must be put to producing ads: The funds must be used to "advance the image and desirability of beef and beef products," without "promot[ing] unfair or deceptive practices, or [] influenc[ing] government policy." *R-CALF v. Perdue*, 2017 WL 2671072, at *6 (D. Mont. June 21, 2017) (*R-CALF II*) (Morris, J.) (cleaned up) (citing 7 U.S.C. § 2901(b); 7 C.F.R. § 1260.169(a), § 1260.181(b)(7)).

Because "the principal object" of the checkoffs is to produce "speech itself," the Supreme Court has held the tax is equivalent to compelled speech and compelled association with the entity creating the speech, and thereby infringes on First Amendment freedoms. *United States v. United Foods, Inc.*, 533 U.S. 405, 415-16 (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"). In fact, the checkoffs fail all levels of First Amendment scrutiny. *United Foods*, 533 U.S. at 409-10, 416.

The Beef Checkoff has survived because the Court held the money that makes its way to the federal level is used for "government speech," and "government speech" is exempt from First Amendment review. *Johanns*, 544 U.S. at 560. The Supreme Court declined to consider whether the private state councils' use of Beef Checkoff money funded "government speech," assuming for the purposes of its decision in *Johanns* that the councils only received "voluntary contributions." *Id.* at 544 n.1 (citing 7 U.S.C. § 2904(8)(C); 7 CFR § 1260.172(a)(3)).

Nonetheless, it is undisputed the Government allows each of the private state councils at issue here to collect the checkoff money in their state, and siphon off half of it. F&R 2; Gov. RSUF, Dkt No. 101 ¶¶ 46-48. While the Government notes the Beef Act speaks about producers receiving a "credit" for their donations to the state councils, it explains it has interpreted this provision to allow the state councils to automatically "retain[] 50 cents of every checkoff dollar collected" at their discretion. Gov. Obj. 4. Under the current system, producers do not choose whether to give money to the councils.

The Government's "Redirection Rule" does not alter this fact. By its plain terms, that rule—which was only drafted after this case began, and finalized approximately three years later, but one week before summary judgment briefing in this matter, Gov. RSUF ¶ 123—still allows the state councils to collect producers' money and place half of it under the councils' supervision. Under the rule, producers can only ask the councils to release their money and send it all to the federal-level entities engaged in "government speech" (the "Beef Board and Committee"), if they submit a request to their state council in each month they sell cattle. *Id.* ¶ 124. The state councils then have 60 days to "respond to such requests," during which time they can use the funds. *Id.* ¶ 125; *see also id.* ¶ 121.

In sum, even with the "Redirection Rule," the private state councils are allowed to use the checkoff to fund their "speech," which would violate the Constitution, unless the councils are engaged in "government speech."

B. Every Entity Held To Be Engaged In "Government Speech" Has Had Its Membership Selected By, and Its Speech Substantively Reviewed By the Government.

Despite the Government's and Intervenors' claim that there are no "'particular characteristic[s]'" of "government speech," Gov. Obj. 11 (quoting F&R 13), a comprehensive review of the case law proves otherwise. The doctrine is based on the view that the First Amendment need not apply when the government speaks, because the "democratic electoral process" checks the

statements. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015); *see also* Gov. Obj. 12 (relying on *Walker* to define contours of the doctrine); *Johanns*, 544 U.S. at 563 ("government speech" is "justified" because there is "democratic accountability" for the speech). Thus, courts have repeatedly stated "government speech" only exists when it is clear the speech is "from beginning to end" that of the government, ensuring the government will be held to account for the expressions. *Johanns*, 544 U.S. at 560.

Accordingly, every case that has held there is "government speech" has identified active government controls over the speech at each stage of its lifecycle. In particular, while often referring to other controls as well, each case explained the government played a role in selecting the people who craft the speech—ensuring the speech starts from the government's perspective—and approved the messages before they were issued—confirming the end result reflected the government's agenda. To the extent prior cases suggested flexibility in these requirements, that has not actually been true. Moreover, recent Supreme Court authority rejects that view. *Matal*, 137 S. Ct. at 1758, 1760 (existing case law "likely marks the outer bounds of the government-speech doctrine" and courts should be reluctant to extend).

To wit, *Johanns*, the first case to articulate the "government-speech" doctrine, held the Beef Checkoff was being used for "government speech" at the

federal level because—in addition to the statute and regulations establishing the "overarching" goals of the exactions—the Beef Board and Committee were "answerable" to the Government and the speech they generated was pre-approved by the Government. 544 U.S. at 561. The Secretary of Agriculture "appointed" members of both the Board and Committee, was empowered to "remov[e]" every member of both entities, helped "develop[]" their proposed speech, and "exercise[d] final approval authority over every word used in every promotional campaign," including examining the ads "for substance and wording." *Id*. at 560-61. It is "[t]his degree of governmental control over the message" that allowed the Court to call the Beef Board and Committee's speech "government speech." *Id.* at 561.

Each subsequent Ninth Circuit case upheld a program like the checkoffs because it could not distinguish the government controls over that speech from those over the Beef Board and Committee. In *Paramount Land Co. LP v. California Pistachio Commission*, the Ninth Circuit explained, the scheme was "nearly identical in design" to the one approved in *Johanns*. 491 F.3d 1003, 1010-11 (9th Cir. 2007). In particular, like in *Johanns*, the government participated in "develop[ing]" the speech, and it was required to "approve[]" the specific statements before they were issued. *Id.* While *Paramount Land* noted that approval occurred on an annual basis, it emphasized that, like in *Johanns* the government

was informed about each "promotional activity specifically," including the publications in which it would appear and its wording. *Id.* at 1011; *see also id.* (government controlled each specific "message"). Further, the Government could "appoint" one member of the Pistachio Commission, remove the Commission's president, and "must also concur in [the] nomination and election procedures" for everyone else, which made the Commission's members answerable to the government in a manner nearly identical to *Johanns*. *Id.* at 1010-11.

The Government, Intervenors, and F&R point to *Paramount Land*'s statements that courts should not "micro-manage" the controls establishing "government speech" and *Johanns* did not set a "floor" for what is "government speech," F&R 13, 17; Gov. Obj. 11; Int. Reply Br., Dkt. No. 123, at 3, but these statements were merely justifying minor variations in executing the same types of controls present in *Johanns*: That the government approved the speech annually, rather than promotion-by-promotion, and selected the commission's head and set its other eligibility requirements, rather than appointing a greater number of members. *Paramount Land*, 491 F.3d at 1011. *Paramount Land* still relied on the fact that the government approved the speakers and the speech. As it put it, the court could not "draw a line" between the facts of *Johanns* and its own, which is what demonstrated the speech was "from beginning to end the message established by the [] government." *Id.* at 1012.

Likewise, while *Paramount Land* states "passivity is not an indication that the government cannot exercise authority," that is in reference to the fact that the government approved all of the speech it reviewed in *Paramount Land*. *Id*. at 1011. *Paramount Land*'s language does not establish, as the Government and F&R would have it, the government need not actually review the speech it claims is "government speech." *See* Gov. Obj. 11; F&R 10.

Indeed, the next Ninth Circuit case held an entity was engaged in "government speech" because the government had "greater" power to select the people crafting the speech, which ensured it controlled the speakers and the speech. *Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1228-29 (9th Cir. 2009). The government's authority over the commission's members in *Delano Farms* was so extensive the court concluded the entity was a "government entity," so its statements did not need to be reviewed by additional officials, because they were, by definition, the messages of the government. *Id.* at 1226; *see also Delano Farms Co. v. Cal. Table Grape Comm'n.*, 417 P.3d 699, 721 (Cal. 2018) (emphasizing Table Grape Commission was engaged in government speech because commission was a "public corporation," of which all members are appointed and subject to removal by the government). Once again, the Ninth Circuit emphasized its holding relied on the "similar[ity]" between the controls over the entity before it and those over the Beef Board and Committee, explaining

this is what ensured the "message is from beginning to end that of the State." *Delano Farms*, 586 F.3d at 1228-29.

The most recent Ninth Circuit case follows the same pattern. It reiterated an entity was engaged in "government speech" when the government "appoint[ed]" half the people at the entity creating the speech, could "remove" all of them, and engaged in a "final review" of the speech. *In re Tourism Assessment Fee Litig.*, 391 Fed. App'x. 643, 646 (9th Cir. 2010) (unpublished). Again, the Ninth Circuit stated its outcome was determined by the fact that "[t]here are no principled distinctions to be drawn between" the controls presented and those the Court held were sufficient in *Johanns*. *Id.*

In fact, no party has cited, and R-CALF could not locate a single case holding the compelled subsidy of speech funded "government speech" where the government did not select the speakers and substantively review the speech before it was issued. *Adams v. Maine Mun. Ass'n*, 2013 WL 9246553, at *22 (D. Me. Feb. 14, 2013); *Am. Honey Producers Ass'n, Inc. v. U.S. Dep't of Agric.*, 2007 WL 1345467, at *2, *9-10 (E.D. Cal. May 8, 2007); *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45, 52 (D.D.C. 2006); *Dixon v. Johanns*, 2006 WL 3390311, at *1 (D. Ariz. Nov. 21, 2006); *Cricket Hosiery, Inc. v. United States*, 30 C.I.T. 576, 584, 589 (2006); *Gallo Cattle Co. v. Kawamura*, 159 Cal. App. 4th 948, 953 (2008).

The most recent Supreme Court "government-speech" cases only underscore these rules. Both *Walker* and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), held speech in government created forums was "government speech"—allowing the government to discriminate against other speech—because "several factors" coalesced. *Walker*, 135 S. Ct. at 2245 (citing *Summum*, 555 U.S. at 470). The government "maintain[ed] direct control" over the speech, including "approv[ing] every" statement, to the point where it could prove it "actively exercised this authority." *Id.* at 2249 (citing *Johanns*, 544 U.S. 560-61). Moreover, paralleling the requirement that the government must select the people crafting the speech—indicating they are likely to express the government's view—the Court explained history and practice suggested the government "arrange[d]" the forums to "convey [its] thought[s]," helping establish they presented "government speech." *Id.* at 2247 (citing *Summum*, 555 U.S. at 470-71). It was "[i]n light of these and a few other relevant considerations" the Court invoked the "government-speech" exception to the First Amendment. *Id.*

In fact, returning to the notion that "government speech" is only exempt from the First Amendment because it is democratically accountable, the Court continued, it is not enough for the government to possess such powers, it must publically communicate its role in generating the speech. In *Walker* and *Summum* the speech qualified as "government speech" not just because the government

controlled its content, but because its "active" use of that authority led observers to "routinely … interpret [the speech] as conveying" the government's message. *Id.* at 2248-49.

Finally, in *Matal* the Court rejected the Government's claim that trademarks amount to "government speech." Pointing to *Johanns*' statement that "government speech" must be from "beginning to end the message established by the" government, the Court explained that because the Government "does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy" it cannot be "government speech." *Matal*, 137 S. Ct. at 1758-59. Indeed, the Court warned it would be a "dangerous misuse" of the doctrine "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval." *Id.* Building on *Walker*, the Court also stated that because no one would "identif[y]" the trademarks as government speech, they could not be "government speech." *Id.* at 1759-60.

In sum, the courts have held speech was "government speech" because the government could control the entire process of developing the speech, and particularly the people crafting the speech and speech itself. The language the Government and Intervenors rely on to suggest the doctrine can be whittled down does not support that outcome. Regardless, *Matal* now requires "great caution"

before expanding the doctrine and even emphasizes additional pre-conditions. *Id.* at 1758.

III. ARGUMENT

A. As this Court Previously Held, the Beef Act and Regulations Do Not Convert the Private State Councils' Speech Into "Government Speech."

The Government's and Intervenors' contention the Beef Act and its regulations establish the councils use the checkoff for "government speech" is not only inconsistent with the case law above, but also the law of this case. Each of the statutes and regulations on which they rely were before this Court when it issued a preliminary injunction on the basis that the Montana Beef Council likely used checkoff funds for private, not "government speech." *R-CALF II*, 2017 WL 2671072, at *6 (Beef Act and Order insufficient to create "government speech" because they do not establish "authority to appoint or remove any of the [council's] members" nor for the government to direct "the [council's] spend[ing]"). A court's "conclusions on pure issue of law," including those entered at the preliminary injunction stage, "are binding" absent changed circumstances not present here. *R-CALF v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007); *see also Defs. of Wildlife v. U.S. Army Corps of Engineers*, 2017 WL 1405732, at *2 (D. Mont. Apr. 19, 2017) (Morris, J.) (party seeking to dissolve preliminary injunction must show a change in law or facts). Indeed, as discussed below, this Court rejected

each of the statutory and regulatory arguments the Government and Intervenors now repeat and should not revisit its conclusions.

In fact, the Government's claim that because checkoff money must be spent consistent with the "general terms" of the Beef Act and Order, all speech generated as part of the program is "government speech," Gov. Obj. 12, has been rejected by both this Court and the Ninth Circuit. The Ninth Circuit stated statutory and regulatory guidelines must go "much further … than the Beef Act and Beef Order's general directive" before they can be *part* of establishing speech is "government speech." *Delano Farms*, 586 F.3d at 1228-29. As this Court explained, because the "general terms" of the Act and Order only require the checkoff be used to "advance the image and desirability of beef," and "merely prohibit," unfair, deceptive or political speech, they "do[] not control how" the private councils will craft their messages, and thus do not establish the councils' use of the checkoff funds "government speech." *R-CALF II*, 2017 WL 2671072, at *6. The Act and Order do not ensure the councils' beef promotion is the sort the government would select, and thus cannot make the councils' speech "government speech." *Johanns*, 544 U.S. at 560-61.

These holdings also resolve the Government's and Intervenors' other statutory and regulatory arguments because the additional rules they point to simply reiterate the power to enforce the Act and Order's "general terms." For

instance, the Government and Intervenors suggest the councils are engaged in "government speech" because they must be "certifie[d]" to receive checkoff funds. Gov. Obj. 12; Int. Obj. 9. As the Magistrate explained in the first F&R, "certification" only involves the private councils committing to following the "general terms" of the Act and Order—and that they will document they turned over half the checkoff money they collect to the Beef Board. *R-CALF v. Vilsack*, 2016 WL 9804600, at *1 (D. Mont. Dec. 12, 2016) (*R-CALF I*) (citing 7 C.F.R. § 1260.181(b)). Thus, since the Act's general guidelines are insufficient to render the councils' speech "government speech," so is the certification process.

Essentially conceding as much, the Government argues in the alternative that the councils are engaged in "government speech" not because of what certification requires, but because the Government could add new requirements. Gov. Obj. 11. False. The regulation on which the Government relies to claim this authority speaks about the councils providing "an annual report … and any other reports and information" the Government might request to prove the councils "remitted" the necessary funds to the Beef Board, nothing more. 7 C.F.R. § 1260.181(b)(6). The Government concedes this authority has not been used to regulate the councils' speakers or speech. First Payne Decl., Dkt. No. 40-1 ¶ 24. The Government does not have the authority it claims.

Further, the Government's claimed unexercised power is irrelevant, because the government must "actively" control the speech for it to be "government speech." *Walker*, 135 S. Ct. at 2249; *see also Matal*, 137 S. Ct. 1758. Even *Paramount Land*—on which the Government relies to state its "potential control" is sufficient, Gov. Obj. 11—requires the government be expressly empowered to "reject[]" and "edit[]" the speech, simply stating the government need not do so if it agrees with the speech. 491 F.3d at 1011. If the Government were right, all that would be required for "government speech" would be for a government agency to administer a law, which would establish its authority to promulgate rules. Thankfully, it is not that easy to evade First Amendment review.

The Government's and Intervenors' reference to the Government's authority to de-certify the councils and "enjoin" their misconduct is no different. Gov. Obj. 12; Int. Obj. 9. The Government explains under the Act and Order it can only de-certify a council if the councils' speech is inconsistent with the "general terms" of the statute and regulations, *i.e.*, unfair, deceptive, or seeking to influence government policy. Gov. RSUF ¶ 61. Likewise, Intervenors acknowledge the Government can only seek to enjoin councils' speech if it violates those rules. Int. Br., Dkt. No. 95, at 14-15. Even were this not the case, this Court previously explained "post-hoc" controls do not ensure the councils are engaged in "government speech," as for "government speech" to exist the Government must

affirmatively "direct the … advertising program." *R-CALF II*, 2017 WL 2671072, at *6. The notion that the Government must "pre-approv[e]" the speech for it to be "government speech" is so well entrenched even the dissent in this case echoed this rule. *R-CALF v. Perdue*, 718 Fed. App'x. 541, 543 (9th Cir. 2018) (Horwitz, J. dissenting) ("*R-CALF III*").

The Government and Intervenors' final claim, that the state councils are engaged in "government speech" because the Act and Order empower the Beef Board (not USDA) to supervise some of the councils' activities, amounts to the same contention. Under the Act and Order, the Board only works to ensure the councils' speech promotes beef and is not unfair, deceptive, or political. Gov. Obj. 12-13. The Board may review councils' annual plans and audit their activities, *id.*, but, at most, this amounts to it reviewing "outlines" of the councils' intended activities to ensure the plans are consistent with the Act and Order, and conducting "post-hoc" reviews to confirm the councils' compliance with those rules. *R-CALF II*, 2017 WL 2671072, at *6 (citing First Payne Decl. ¶ 19).

Further, in the prior briefing before this Court, the Government admitted, "The statutes and regulations structure the Beef Board to operate as an independent body," not an extension of the Government. *Id*. While the Government references USDA's "participation" in the Beef Board's work, Gov. Obj. 3, 12, that is limited to ensuring the Board carried out its review of the councils. USDA does not have

any regular contact with the councils under the Act and Order. First Payne Decl. ¶¶ 22, 25-29; *see also* Gov. RSUF ¶ 56. Thus, the independent Beef Board's review of the councils could never be sufficient to create "government speech." *See, e.g.*, *Johanns*, 544 U.S. at 554 ("the Secretary['s]" role in appointing the speakers and "approv[ing]" the speech establishes it is "government speech").[2]

In *Delano Farms*, the Ninth Circuit criticized a "laissez-faire" approach to "government speech" and the First Amendment, critiquing the plaintiffs there for trying to gin-up the appearance of private action. 586 F.3d at 1230. The Government and Intervenors now commit that error in reverse. They claim if they can point to enough iterations of the same minor rules that façade of control is sufficient. To the contrary, the prior decisions in this case and all of the "government-speech" cases establish this does not make the speech "from beginning to end" government speech.

[2] Intervenors' representation that the Government can "oversee a referendum" to stop the checkoff, providing it control over the councils' speech, is a word-game. While the Government can oversee the administration of a referendum, a referendum can only be called at the request of "10 per centum or more of the number of cattle producers." 7 U.S.C. § 2906(b); *see also* R-CALF RSUF, Dkt. No. 113-0 ¶ AF8. The power to conduct a referendum has only been held to be relevant to the "government-speech" analysis when the government could determine if it would happen, and then the authority was in addition to, not instead of the other controls discussed in § II(B) above. *Delano Farms*, 586 F.3d at 1229.

B. The MOUs Do Not Add To the Government's Controls.

Although the F&R correctly concludes the Act and Order do not establish the councils are engaged in "government speech," its reliance on the MOUs replicates the Government's and Intervenors' faulty analysis. F&R 14-15.[3]

Most directly, the F&R's conclusion that the councils can constitutionally "contribute" money to private third parties to fund those third-parties' speech, F&R 18, effectively states "government speech" exists if the government enforces the "general terms" of the Act and Order. It is undisputed the MOUs allow for the councils to "contribute" millions of dollars a year to entities like the Federation Division of the National Cattlemen's Beef Association ("NCBA") and the United States Meat Export Federation ("USMEF"). Gov. RSUF ¶¶ 94-97. The only limit on those third-parties' use of this money is it must be spent consistent with the Beef Act and Order. *Id.* ¶ 99. They only need to report back after the money is spent to describe the speech the "contributions" funded. *Id.* ¶ 100.

The F&R states the fact that "contributions" are listed in the councils' annual plans, which under the MOUs are reviewed by the Government, renders them constitutional. F&R 18. But, these plans only need to state the third parties

[3] Intervenors' statement that "The Magistrate Judge based [his] conclusion on USDA's effective control … through the Beef Act (the "Act") and the Beef Order (the "Order")," is blatantly false. Int. Obj. 1. The F&R states its "first ruling was correct," the Act and Order are insufficient to create "government speech." F&R 14.

will use the money consistent with the Act and Order. *See, e.g.*, Gov. Ex. 50, Dkt. No. 99-4, at 3 (approved plan for providing money to NCBA and USMEF because they will generate "a positive beef message"); Gov. Ex. 52, Dkt. No. 99-4, at RCALF_000383 (approved plan providing money to NCBA to "impact consumer attitudes towards beef and build demand"); R-CALF Ex. 33, Dkt. No. 91-1, at RCALF_000474 (approve plan providing money to USMEF in part because it would be used to "showcase beef"). Thus, the F&R's analysis is inconsistent with the holdings that statutes and regulations must go "much further" than enforcing the Beef Act and Order's "general directives" before they can be part of establishing "government speech." *See, e.g.*, *Delano Farms*, 586 F.3d at 1228-29; *R-CALF II*, 2017 WL 2671072, at *6.

Moreover, because, under the MOUs, the third parties can report how they spent the money after they use the funds, the F&R also improperly waives the requirement that the Government must "pre-approve" the speech. *See, e.g.*, *R-CALF III*, 718 Fed. App'x. at 543 (Horwitz, J., dissenting). Indeed, Intervenors stated the third-parties' glossy annual summaries of their activities provide sufficient detail of how the "contributions" were spent—suggesting the councils do not even know after the fact precisely what speech they funded. Int. RSUF, Dkt. No. 97 ¶ 96.

For these reasons, the F&R's suggestion that requiring more control would be improper judicial "micro-managing" should be rejected. F&R 17-18. As noted above, the courts—including *Paramount Land*, where the "micro-managing" concern comes from—stated they were only withholding judicial intervention because they could not "draw a line" between their facts and precedent. 491 F.3d at 1012. Where the Government merely requires the "contributions" comply with the Act and Order, only potentially learning after the fact how the money was spent, there are multiple stark demarcations between this case and existing authority. This Court can and should require that be remedied.

The F&R's separate conclusion that the MOUs establish sufficient control over the state councils' own use of the checkoff funds, even though the Government cannot appoint or remove any members of the councils, F&R 11, is similar to the Government's and Intervenors' "laissez-faire" approach. Without requiring this authority, the F&R diminishes the requirements for "government speech" below any existing case. *See* § II(B), *supra*; R-CALF Obj., Dkt. No. 139, at 20-23.

In light of the record, this conclusion also effectively abandons the requirement that the government substantively approve the "government speech." The Government only claims that it "engages in direct oversight" of the councils' speech through the "preapproval of [their] plans and projects" provided for under

the MOUs. Gov. Obj. 5. Thus, while the F&R notes the Government can attend councils' meetings, F&R 9, that power does not ensure review of the councils' speech. The Government's review of the "plans and projects" is conducted pursuant to its Marketing Communication Guidelines. The Guidelines state the Government will *not* consider whether the councils reflect officials' desired messages, unless they name a specific official. R-CALF Ex. 19, Dkt. No. 91-1, at RCALF_000775-76. Instead, the Government's review is like that the Court held was insufficient in *Matal*, the Government merely confirms the speech meets certain technical requirements, without ensuring it reflects the Government's desired viewpoint. 137 S. Ct. at 1758.

Finally, the F&R's statement that it is immaterial the Government and councils present the councils' speech as private speech further improperly expands the "government-speech" doctrine. F&R 16-17. It fails to apply the Supreme Court's recent direction that viewers must be able to "'appreciate the identity of the speaker'" as the government. *Walker*, 135 S. Ct. at 2247 (quoting *Summum*, 555 U.S. at 471); *see also Matal*, 137 S. Ct. at 1758-59.

The F&R's failure to require more than that the checkoff be spent consistent with the Act and Order's "general terms," and its decision not to mandate the government pre-approve the message and the speech be recognizable as "government speech," should not be accepted. The first statement revisits the law

of the case, which was directed by controlling authority. All of the conclusions too easily place speech outside the First Amendment, in contravention of the Supreme Court's direction.

C. At Minimum, an Injunction Is Required To Ensure the Councils Are Engaged in Government Speech.

Even were this Court to agree with the F&R that the MOUs establish the councils use Beef Checkoff money for "government speech," the Objections confirm the F&R erred in holding an injunction is not required to enforce the MOUs. *See* F&R 18-19. The Objections repeatedly claim the MOUs are "not [] necessary" to comply with the Constitution. Gov. Obj. 11; *see also* Int. Obj. 8. They even ask this Court to vacate the F&R's analysis that the statute and regulations are insufficient to create "government speech," enabling the Government to revoke the MOUs at a later date and claim to be in compliance with the law. Gov. Obj. 7. In this manner, the Objections disprove the F&R's conclusion that we can assume the MOUs—which state they can be revoked at any time, R-CALF Ex. 18, Dkt. No. 91-1—will remain in force and prevent the councils from "resum[ing] [their] … unconstitutional activities." F&R 19.

The Government tries to dodge this concern by stating if the MOUs establish the councils are engaged in "government speech," R-CALF cannot demonstrate a "constitutional injur[y]" justifying court intervention, Gov. Obj. 1; yet again, that is not the law. The MOUs were entered into after this case began and can be revoked

at the parties' discretion. Gov. & Int. RSUFs ¶ 84. Thus, assuming the Court agrees with the F&R's "government-speech" analysis, the MOUs represent a voluntary cessation of the prior unconstitutional conduct. Where there is voluntary cessation, a live controversy requiring a judicially enforceable remedy remains, unless the Government proves the cessation moots the case. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (absent mootness, plaintiff's "legally cognizable interest" in judicial intervention remains).

"[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* This is true even when the government is the defendant. While courts assume "good faith" on the part of the government, the government still must establish "that the change in its behavior is entrenched or permanent." *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1037-38 (9th Cir. 2018). For instance, statutory changes can moot a claim, but decisions the government could "alter or abandon" with "ease" cannot. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015).

Thus, that the Government wrote the MOUs so they could be revoked, should be sufficient to reject the F&R's conclusion an injunction is unnecessary. *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (courts look to whether government's new policy is "unequivocal in tone"). It is notable that with the

"Redirection Rule" the Government promulgated a new regulation, subject to the Administrative Procedure Act, but it has made no such efforts to codify the statements in the MOUs. The Government and Intervenors imply the MOUs reflect the Government's authority to informally add new certification requirements, *see* Gov. Obj. 11, Int. Obj. 9, but: (i) as discussed above, the text of the cited regulation and the Government's practice in applying it suggest no such authority exists; and (ii) the Government claimed its "Redirection Rule" "codified" an informal rule it was empowered to impose, Gov. Obj. 4, and nonetheless it engaged in formal notice and comment to create a new regulation. The MOUs are the Government "equivocating."

Further, where, as here, a party continues to contend the conduct they claim to have stopped was lawful, that weighs in favor of providing judicially enforceable redress. *Olagues*, 770 F.2d at 795; *see also McCormack*, 788 F.3d at 1025. Certainly the Government's and Intervenors' efforts to defend the councils' use of the checkoff under the Act and Order, without the MOUs, meets this test.

Indeed, the Government not only defends its past scheme, but suggests it wishes the councils could be independent "beef promotion entit[ies]" that would operate as if they received "voluntary assessments or contributions" free from Government control. Gov. Obj. 3-4. This is consistent with its past rulemakings that chose to limit its control over the state beef councils. Beef Order, 51 Fed. Reg.

26132, 26137 (July 18, 1986); *see also Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 763 (4th Cir. 1993) (Government cannot contract around prior regulatory commitments). Where the Government indicates it does not "believe[]" its changed conduct is desirable, that too supports judicial intervention. *McCormack*, 788 F.3d at 1025.

In other words, with the Objections, it is now clear the Court cannot count on the Government maintaining its waiveable MOUs. Even if it concludes the MOUs are sufficient to create "government speech," it should issue an injunction enforcing all conditions that make the councils' use of the checkoff funds constitutional. *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).

D. The Government's Litigation-Generated "Redirection Rule" Has No Bearing.

The Government's contention that because its now allows producers to "submit[] a redirection request"—asking the councils to send all of their checkoff money to the Beef Board and Committee—producers are not compelled to subsidized the councils' speech, Gov. Obj. 5, 8, is factually and legally incorrect.

Factually, the "Redirection Rule" still requires producers to fund the state councils. Under the rule, producers are only allowed to "redirect" their funds after

they pay the checkoff to the state councils, and the state councils then have 60 days to "respond to" those requests. Gov. RSUF ¶¶ 121, 124-25. In other words, even if producers select not to fund the councils, the private councils can still, temporarily, take and use producers' checkoff money for their private speech, violating the First Amendment. *United Foods*, 533 U.S. at 413-14. "[T]he 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). Thus, a temporary compelled subsidy violates the First Amendment. *R-CALF II*, 2017 WL 2671072, at *4; *see also In re Wash. State Apple Advert. Comm'n*, 257 F. Supp. 2d 1274, 1288 (E.D. Wash. 2003).

Legally, the Supreme Court has held that when a compelled subsidy funds private speech, the payer must "affirmative[ly] consent" to the payment before the money is taken. *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 322 (2012); *R-CALF II*, 2017 WL 2671072, at *4. Because there is "no constitutional right" to obtain money for private speech, but there is one to decline to fund such speech, the First Amendment requires the "side whose constitutional rights are not at stake" to bear the burden of ensuring consent ahead of time. *Knox*, 567 U.S. at 321. The Court explained it "permit[ted] unions to use opt-out rather than opt-in schemes when annual dues are billed" because it believed unions served special functions, justifying the "substantial[] impinge[ment] upon the First

Amendment" the "opt-out" created. *Id*. However, "[t]he general rule," of "opt-in," "should prevail" in most instances. *Id*. The "general rule" should certainly be applied to the checkoffs, which the Court held fail all levels of First Amendment scrutiny in part because they do not advance "some broader" societal goal. *United Foods*, 533 U.S. at 416.

Indeed, pointing to the checkoffs, the Court in *Knox* explained, "First Amendment values would be at serious risk" if the Government could exact funds for private speech prior to obtaining "affirmative consent." *Knox*, 567 U.S. at 322 (alterations omitted) (citing *United Foods*, 533 U.S. at 411). In later briefing before the Supreme Court, the Government picked up on this reference to explain *Knox*'s "opt-in" rule derives from the principles governing "compulsory subsidies for private speech—even … relatively mundane commercial speech like mushroom advertising" paid for by the Mushroom Checkoff. Amicus Brief of the United States in *Janus v. AFSCME*, No. 16-1466 (U.S. Dec. 6, 2017), 2017 WL 6205805, at *5 (quoting *Knox*, 567 U.S. at 309-10). The Government used this to argue *Knox* stands for the proposition that even where free speech interests may be less, people must affirmatively "choose" to pay a subsidy of private speech before a private party can ever obtain the money. *Id*. at *20.

In *Janus* the Court then expanded *Knox* to apply to unions' annual dues—making the Government's effort to distinguish *Knox* as only applying to unions'

"special assessment[s]," Gov. Obj. 9, all the more disingenuous. *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). In so doing, the Court emphasized "a waiver [of First Amendment rights] cannot be presumed." *Id.* at 2486. Thus, the Court confirmed, beyond that "opt-in" should be the default, the "Redirection Rule" violates the First Amendment because it temporarily allows the councils to use checkoff money, erroneously presuming a temporary waiver of producers' First Amendment rights.

The cases on which the Government relies only undermine its position. *Friedrichs v. California Teachers Association*, 2013 WL 9825479, at *2 (C.D. Cal. Dec. 5, 2013), was overruled by *Janus*, 138 S. Ct. at 2485-86. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 883-84 (9th Cir. 2018), holds that if "employees consent" to funding private speech before doing so, through agreeing to make payments in their collective bargaining agreement, that is constitutional. It goes on to explain unions can only engage in private political speech if they use money that does not "lack[] affirmative" consent. *Id.* at 894 n.12. *Mentele v. Inslee*, 916 F.3d 783, 787-88 (9th Cir. 2019), does not address the opt-out, opt-in issue. And *Schmid v. Sonoma Clean Power*, 673 Fed. App'x 785 (9th Cir. 2017) (unpublished), concerned the plaintiff's pre-enrollment in an electricity plan he could switch prior to using any electricity, not the compelled subsidy of speech. It

explains *Knox* was not implicated because the plaintiff "ha[d] not been compelled to give any money" whatsoever. *Id.* at 786.

The Government must secure "affirmative consent" before taking checkoff money to fund private speech. It certainly cannot require producers who object to funding the private state beef councils to allow their money to be used for 60 days after they "opt-out." Therefore, the "Redirection Rule" does nothing to salvage the state councils' unconstitutional use of checkoff money.

E. R-CALF Has Standing.

Finally, Intervenors' attack on R-CALF's standing repeatedly verges on a lack of candor with the Court. Indeed, while the Government pursued this argument in all prior proceedings, it does not co-sign Intervenors' claim here, declining to object to any part of the F&R's standing analysis.

In particular, Intervenors fail to acknowledge R-CALF established two separate bases for standing: (i) on behalf of itself, and (ii) on behalf of its members. R-CALF's standing on behalf of its members provide it the right to object to checkoff money going to twelve of the fifteen councils at issue. R-CALF's members pay the checkoff to those twelve councils and "object to being associated with [their] speech." F&R 4-6; *see also Knox*, 567 U.S. at 321 (establishing this is a constitutional injury); *United Foods*, 533 U.S. at 414-16 (same). Thus, because Intervenors solely attack whether R-CALF's organizational injury can be

"redressed"—never mentioning, let alone disputing R-CALF's members' standing—Intervenors cannot even theoretically establish this "lawsuit should be dismissed for lack of standing." Int. Obj. 2; *see also* L.R. 72.3(a) (objections must identify specific findings or recommendations to which they object).

Moreover, Intervenors' lead argument fundamentally misstates what it means to have standing. They claim that because the F&R concludes the MOUs establish the councils are now "engaged in government speech," R-CALF lacks standing. Int. Obj. 3. Yet, "the threshold question of whether [a] plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (collecting cases); *see also In re Google, Inc. Privacy Policy Litig.*, 2015 WL 4317479, at *1 (N.D. Cal. July 15, 2015) (this rule applies "[a]t all times" in federal proceedings). For standing purposes the question is whether, if the plaintiff's claim is "factually true," has the plaintiff established an injury caused by the challenged conduct that can be redressed. *Maya*, 658 F.3d at 1068. Thus, it should be beyond dispute the F&R stating the MOUs cured a previously ongoing constitutional violation, after R-CALF filed suit, does not alter R-CALF's standing.

Intervenors' other argument, that R-CALF lacks standing because it may not agree with the "government speech" the checkoff would fund if it was constitutionally expended, misrepresents the nature of R-CALF's standing. "An

organization has 'direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission'" in response to the alleged unlawful act. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (alterations in original). The undisputed record shows: (a) R-CALF's mission includes protecting domestic, independent cattle producers, Int. RSUF ¶¶ 4-5, 11; (b) which involves working against the Beef Checkoff program sending money to private entities, particularly NCBA, as R-CALF believes this promotes consolidation in the beef industry, *id.* ¶¶ 9-13; (c) its work in this regard spans the nation, *id.* ¶¶ 13-19; (d) and includes, both prior to and during this case, publicly warning about the use of checkoff funds to support private speech, such as putting on presentations to inform producers how their money is being spent. *Id.* Those presentations consumed as much as 60% of its resources, and continue to consume 40% of R-CALF's resources. *Id.* In other words, prior to bringing this case and after, to further its mission, R-CALF has taken-on the misconduct at issue here, consuming its resources. It now sues to stop that misconduct so it can place its energies elsewhere. R-CALF has suffered an injury through a mission driven drain on its resources this suit could stop. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). R-CALF has standing.

Therefore, whether R-CALF will like the constitutional "government speech" is irrelevant. If the checkoff is no longer used to fund private speech, R-

CALF will be able to put the resources it diverted to educate the public and producers about the unlawful use of checkoff money to other purposes. *See* Int. RUSF ¶ 5 (identifying R-CALF engages in trade and labeling-related advocacy, as well as work on the checkoff). Where an organization is injured from diverting resources, that injury is redressed by stopping the activity that caused the diversion, so the resources can be put elsewhere. *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). Contrary to Intervenors' wishes, Int. Obj. 5, R-CALF need not prove the unknowable counterfactual of what will happen once the unlawful conduct stops and it can redirects its energies.

Intervenors' related suggestion that the Beef Act prohibits the speech R-CALF desires, Int. Obj. 4, is not only inconsequential, but knowingly false. Intervenors fail to apprise the Court that discovery shows the Beef Board has funded an advertisement that promotes "American Beef" and "U.S. Beef," as R-CALF desires. R-CALF RUSF, Dkt. No. 112-0 ¶ AF5; *see also id.* ¶ AF6 (Beef Board speech differentiating between types of beef, as R-CALF desires); *id.* ¶ AF6 (Beef Board can describe differences in "production … practices," as R-CALF desires).

Moreover, part of what R-CALF hopes to achieve is to reduce the funding of private corporate advocacy, like that of NCBA. Int. RSUF ¶¶ 9-13. That goal would be furthered by this case, such as by stopping the third-party "contributions," regardless of how else the checkoff is spent. *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]artial relief").

Similarly, given the record here, Intervenors' statement that R-CALF's expenditures solely stem from the "cost[s] of litigation" that are not actionable, Int. Obj. 6, blinks reality. As part of its mission, R-CALF's diverted resources to educate the public and producers about the unconstitutional conduct at issue here. These expenditures are an actionable injury-in-fact that have nothing to do with the cost of litigation. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) ("uncontradicted" "declarations" establishing organization conducted additional "meet[ings]" as part of its mission when "time and resources … would have otherwise been expended toward" other activities prove standing).

Lastly, Intervenors' reference to *Humane Society of the United States v. Perdue*, 935 F.3d 598 (D.C. Cir. 2019), is specious. In that case, there were individual and organizational plaintiffs. The D.C. Circuit explained none of the "organization[s] filed any standing declarations or affidavits" to support their

claims, thus they "forfeited any claim" of standing. *Id.* at 604. Further, the individual plaintiff failed to produce any evidence of "economic injury." *Id.* at 603. *Humane Society* cannot speak to R-CALF's standing.

The attack on R-CALF's standing is simply not credible. R-CALF has standing on behalf of itself to proceed with this case, as well as to represent its members in twelve of the fifteen states at issue.

IV. CONCLUSION

For the foregoing reasons, the Court should reject the Government's and Intervenors' Objections, conclude the F&R erred, and hold the state beef councils' use of checkoff funds violates the First Amendment, enjoining that unconstitutional conduct.

RESPECTFULLY SUBMITTED this 6th day of March 2020.

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

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