**Case No. 20-35453**

**In the United States Court of Appeals**
**for the Ninth Circuit**

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RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA,
*Plaintiff-Appellant,*

v.

SONNY PERDUE, in his official capacity as Secretary of Agriculture, and THE UNITED STATES DEPARTMENT OF AGRICULTURE,
*Defendants-Appellees,*

MONTANA BEEF COUNCIL; NEBRASKA BEEF COUNCIL; PENNSYLVANIA BEEF COUNCIL; TEXAS BEEF COUNCIL; LEE CORNWELL; GENE CURRY; WALTER J. TAYLOR, Jr.,
*Intervenor-Defendants-Appellees*.

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On Appeal from the United States District Court
for the District of Montana

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# BRIEF OF APPELLANT

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## CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant does not issue stock and has no parent corporations.

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## I. JURISDICTIONAL STATEMENT.

This action was brought in the District of Montana pursuant to the United States Constitution and 28 U.S.C. § 1331 and § 1343, challenging the Secretary of Agriculture's and the United States Department of Agriculture's ("Defendants'") administration of the federal Beef Checkoff program on First Amendment grounds. On March 27, 2020, the district court entered an order and judgment affirming the Findings and Recommendations of the Magistrate, and granting Defendants' and the Intervenor-Defendants' ("Intervenors'") motions for summary judgment. This is a final judgment resolving all merits issues. Excerpts of Record ("E.R.") 1-29. Plaintiff-Appellant, the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF"), filed a timely notice of appeal from that order and judgment on May 22, 2020. E.R.51-52. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## II. ISSUES PRESENTED.

1. Whether the government can compel cattle producers to fund private speech, which the Supreme Court, this Court, the district court, and Magistrate have held violates the First Amendment under all potentially applicable levels of scrutiny.

2. Whether R-CALF is entitled to an order enforcing the terms of Memoranda of Understanding ("MOUs"), entered into in response to this suit, which the lower

courts held are necessary to bring the Beef Checkoff program into line with the Constitution, but which, by their plain terms, are revocable and unenforceable.

Both of these issues were raised in R-CALF's summary judgment briefing submitted to the Magistrate and objections to the Magistrate's Findings and Recommendations submitted to the district court, and were passed on by the Magistrate and district court.

The pertinent constitutional provision is set forth in the addendum.

## III. INTRODUCTION.

There have been six opinions on the merits in this case and each—including the dissenting opinion in the prior appeal—held the same: The government violates the First Amendment when it compels people to pay for private speech. If taxpayer dollars are being directed to a private entity to produce that entity's speech that is unconstitutional because it is the equivalent of illegitimate, government compelled speech and association. Consistent with this, the Supreme Court has explained the Beef Checkoff program at issue here—which taxes cattle producers to pay for advertising to promote beef (speech)—is lawful only if the government controls all the speech the checkoff funds, "right down to the wording." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 563 (2005). Then the speech is "government speech," not private speech, and "government speech" is exempt from First Amendment scrutiny. *Id.*

However, the record establishes millions of Beef Checkoff tax dollars are turned over to private state beef councils, which then turn it over to other private entities for the express purpose of funding those private third-parties' speech. Those expenditures are free from any government supervision. That is unconstitutional.

In the words of the district court, the government has constructed a "shell game" in an attempt to insulate the continued funding of private speech from constitutional review. *R-CALF v. Perdue (R-CALF V)*, 2020 WL 1486051, at *8 (D. Mont. Mar. 27, 2020) (adopting Magistrate's Findings and Recommendations regarding summary judgment), E.R.25. The government forces cattle producers to pay the checkoff tax to private "state beef councils." The earlier decisions in this case, including this Court's prior opinion, establish the councils' own use of the checkoff must be controlled by the government or it is unconstitutional. As a result, the government created MOUs that establish control over the councils' speech, which the lower courts held convert it into "government speech." But the government still allows those same councils to pass checkoff money to other private entities for the express purpose of funding the third-party's speech. In other words, in "correcting" the prior unconstitutional conduct, the government constructed a program that allows for the same unconstitutional end, compelling beef producers to fund private speech.

Nonetheless, the Magistrate and district court refused to stop Defendants from allowing the checkoff to pay for private speech. The Magistrate and district court concluded these expenditures qualified for the "government speech" exception to the First Amendment not because they were actually "government speech," but because other uses of the Beef Checkoff funds by the private third parties might be constitutional. Therefore, the decisions below concluded, courts should not regulate the third-party expenditures whatsoever.

Not only is this illogical, it runs counter to the Supreme Court's most recent "government speech" decision, which directs "great caution before extending our government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). The decisions below, in contrast, create a new and expansive doctrine that if the government compels funding of "government speech" and "private speech" together—or simply makes it too complicated to determine what is "government speech"—the First Amendment will no longer apply. That holding should be reversed.

The decisions below also erred in holding that MOUs (as opposed to a court order permanently enforcing their terms) are sufficient to ensure the private state councils' use of the checkoff for their speech is constitutional. The MOUs were only created after the Magistrate held the private state beef councils' use of the checkoff to fund their speech was likely unconstitutional, and recommended that

be preliminarily enjoined. And the lower courts subsequently held the MOUs are necessary to turn the private state beef councils' speech into "government speech." *R-CALF V*, 2020 WL 1486051, at *4, E.R.12-13. Under this Court's precedent, even when the government voluntarily corrects ongoing misconduct, an enforceable injunction still must issue to ensure those the violations will not recur, unless the government shows its changes are "'complete[] and irrevocabl[e].'" *Id.* at *9 (quoting *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010)), E.R.26. However, the decisions below refused to enforce that rule. The MOUs seek to amend regulations governing the state beef councils without going through notice and comment, and state they can be revoked at any time. They are neither irrevocable nor sustainable. But, the lower courts held that should the MOUs be declared unlawful or abandoned, R-CALF will need to re-litigate this matter. To the contrary, precisely to avoid that risk, Defendants should be ordered to continue to enforce the terms of the MOUs as long as the councils use checkoff money to fund their speech—as well as be ordered to prohibit checkoff funds from going to private third-parties to fund their speech.

The Supreme Court explained that with the checkoff programs, "[t]he subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as

important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Therefore, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for" private speech. *Id.* at 411.

The record establishes the Beef Checkoff program is set up to violate First Amendment rights, and it continues to do so by compelling producers' money to fund private advocacy. That unconstitutional conduct must be stopped. Otherwise, First Amendment values are at serious risk.

## IV. STATEMENT OF THE CASE.

### *a. The Beef Checkoff program creates compelled speech and association, which violates the First Amendment rights of the payers if the money is used for private speech.*

The Beef Checkoff taxes producers to fund promotional activities for beef, which can violate the freedom of speech and association. Producers must pay $1 per head of cattle sold. E.R.75 (Defendants' Response to Plaintiff's Statement of Undisputed Facts ("Defs.' RSUF") ¶ 33).[1]As described by the authorizing statute,

[1] For simplicity in identifying the factual record, R-CALF has referred throughout to Defendants' response to Plaintiff's statement of undisputed facts, which establishes the facts as relevant here are undisputed by the government agency overseeing the Beef Checkoff program. For completeness, R-CALF has also

the "Beef Act," the money's sole purpose is to "finance[e] … [a] program of promotion and research designed to strengthen the beef industry's position in the marketplace." 7 U.S.C. § 2901(b). In other words, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *United Foods*, 533 U.S. at 413-15 (describing the Mushroom Checkoff program); *see also Johanns*, 544 U.S. at 558 (explaining the Beef Checkoff is "very similar" to the Mushroom Checkoff). For instance, the Beef Checkoff is most famous for funding the "Beef. It's What's For Dinner" campaign.

Thus, the Court explained, the very purpose of the checkoff's assessment is to "generate … speech." *United Foods*, 533 U.S. at 415. As a result, the program is "concededly different from" most government programs, where the objective does "not principally concern speech." *United Foods*, 533 U.S. at 415. The checkoff is a targeted tax that is not in furtherance of a "broader regulatory system," rather, its entire purpose is to compel funding of another entity's speech. *Id.*

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included in its Excerpts of Record Intervenors' response to that same statement of undisputed facts. E.R.166-245. It too establishes the relevant facts are undisputed, but also seeks to sow confusion through unnecessary, argumentative asides. As the district court put it, "Defendant-Intervenors have on numerous occasions stretched legal principles and factual findings at or near their limits." *R-CALF V*, 2020 WL 1486051, at *9, E.R.28. Nonetheless, because the Magistrate and district court declined to strike those statements—on the ground that "the[] Court knows when a party mischaracterizes a legal principle or fact[]," *id.*—R-CALF includes them for this Court's review.

For this reason, unlike with other programs, the checkoff raises significant constitutional concerns. It implicates "First Amendment association rights," by creating a "state imposed obligation" to associate through the mandated contributions for speech. *Id.* at 414. Moreover, because "an individual is required by the government to subsidize a message" of another, the checkoff also amounts to a form of "compelled expression," undermining the freedom of speech. *Johanns*, 544 U.S. at 557. The Supreme Court has not distinguished between "true compelled-speech cases" and "compelled subsidy cases, in which an individual is required by the government to subsidize a message he disagrees with." *Id.* (internal quotation marks omitted). As this Court summarized it, where "the government [] force[s] citizens to contribute to a private association when the funds are used primarily to support expression" that implicates "both freedom of expression and freedom of association." *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 916-17 (9th Cir. 2005).

In fact, if the checkoff is used to fund private speech, the Supreme Court has explained the First Amendment *requires* courts "to invalidate [such a] statutory scheme." *United Foods*, 533 U.S. at 413. The Supreme Court recognized that the checkoff compels funding of "commercial speech," which, in some instances, is "entitled to lesser protection" under the First Amendment, *i.e.*, intermediate rather than strict scrutiny. *Id.* at 410. Nonetheless, it explained it "need not" determine the

proper level of scrutiny to subject the checkoff to, because it fails any potentially applicable level of review. *Id*. The function of the checkoff is to produce speech. It can never be a legitimate government purpose to require people to fund private speech. If the government interest in funding private speech could justify the constitutional infringement of forcing people to fund private speech, the First Amendment "would be empty of meaning and significance." *Id.* at 415. Therefore, if the checkoff funds private speech, the "assessments are not permitted under the First Amendment." *Id.* at 416.

***b. The Beef Checkoff survives solely to the extent it funds "government speech," which is exempt from First Amendment review.***

The Beef Checkoff continues to operate because the Supreme Court analyzed a portion of the program and concluded that part produces "government speech." "Government speech" is totally exempt from any First Amendment review. *Johanns*, 544 U.S. at 560. "The government, as a general rule," can use "exactions" to fund its speech whether or not there are "protesting parties." *Id.* at 559.

Specifically, the Court examined the speech produced by two federal-level entities created by the Beef Act to handle the Beef Checkoff funds, the "Beef Board" and "Beef Committee." It concluded that because those entities were

"effectively controlled by the Federal Government" they generated "government speech." *Id.*

The Court explained the Beef Board's and Committee's expressions were "effectively controlled" by the government, and therefore "government speech" because the speech they funded with checkoff money was "from beginning to end the message established by the federal government." *Id.* at 560. The government demonstrated it controlled the entire lifecycle of the speech by showing that: (i) Congress established the Beef Checkoff program providing "in general terms, what the promotional campaign" it funds "shall contain," *id.* at 561; (ii) the speech is "designed" by the Beef Board and Committee, some members of which the government can appoint and remove, *id.* at 560; and (iii) "the Secretary [of Agriculture] exercises final approval authority over every word used in every promotional campaign," *id.* at 561. The Court particularly emphasized the last point, noting, "[a]ll proposed promotional messages are reviewed by Department officials both for substance and for wording." *Id.* "Nor is the Secretary's role limited to final approval or rejection: Officials of the Department attend and participate in the open meetings at which proposals are developed." *Id.*

Although the Supreme Court characterized the Beef Board and Committee as "nongovernmental source[s]" of speech, "[t]his degree of governmental control over the message[s]" they produced with the checkoff funds distinguished the Beef

Board and Committee's activities from the unconstitutional use of a compelled subsidy of speech by a private entity. *Id.* at 561, 562. Where "the government sets the overall message to be communicated and approves every word that is disseminated" then, even if the government "solicits assistance from nongovernmental sources in developing specific messages," the speech can be viewed as "government speech." *Id.* at 562.

As a result, the Beef Board's and Committee's "government speech" was not subject to the First Amendment. "Traditional political controls" will ensure "dissenting views" are heard, and thus the First Amendment's protections and court intervention are unnecessary. *Id.* at 562. Therefore, the Court held the Beef Board and Committee's use of the checkoff could continue.

***c. However, the Beef Checkoff also compels producers to subsidize other speech and speakers.***

This case focuses on an aspect of the Beef Checkoff program not addressed in *Johanns*, the provision of checkoff money to private "state beef councils" for their and yet others' use. Plaintiff R-CALF is the largest association of domestic, independent cattle producers. E.R.62, 66 (Defs.' RUSF ¶¶ 3, 16). It and its members, who are forced to pay the checkoff, objected to the state councils being able to take and use checkoff money to fund private speech. Unlike with "government speech," these private speakers were not democratically accountable

and thus need not and did not respond to R-CALF and its members' concerns. In fact, they often produced speech that was harmful to the domestic independent cattle producers who R-CALF represents. *See, e.g.*, E.R.64-65, 66, 67-68, 72-73 (Defs.' RSUF ¶¶ 9-11, 15, 20, 27). For instance, this case began because the Montana Beef Council used checkoff money to fund advertisements for the fast-food chain Wendy's, which both does not need producers' money to promote its goods, and does not commit to sourcing its beef from Montana or the United States. *See, e.g.*, E.R.65, 114 (Defs.' RSUF ¶¶ 13, 118).[2]

The state councils are able to obtain the Beef Checkoff money because in every state where the councils are allowed to operate, producers do not pay the checkoff tax to the federal government, but to the councils. *See* 7 C.F.R.

[2] Although R-CALF began this suit in response to the Montana Beef Council's speech, another fourteen wholly private state beef councils were added to the case once it became clear the government was relying on universally applicable statutes and regulations to defend the councils' ability to use the checkoff funds. E.R.399-421 (Amended Supplemental Pleading). Those additional state councils operate in Hawaii, Indiana, Kansas, Maryland, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and Wisconsin. *Id*. As the lower courts explained, R-CALF has members paying the checkoff in twelve of these fifteen states who object to doing so because the councils put the money towards private speech, and diverts its highly limited organizational resources to combat the state councils' use of checkoff money for private speech in all fifteen states. *R-CALF v. Perdue (R-CALF IV)*, 2020 WL 2477662, at *2-3 (D. Mont. Jan. 29, 2020) (Magistrate's Findings and Recommendations at summary judgment), E.R.33-36. Thus, it has standing to challenge the use of checkoff money by all of these entities. *Id.* There are yet other beef councils in other states whose status as private entities may be subject to dispute. They are not at issue here.

§ 1260.181. In *Johanns*, the Court acknowledged that the Beef Act "allow[s] domestic producers to deduct from their $1 assessment up to 50 cents" and provide it to the councils, but the Court explained it believed these payment were exclusively "voluntary contributions to the[] state beef councils." 544 U.S. at 554 n.1. In actuality, the government has conceded, it allows the state beef councils to take half of all the money collected as a matter of course. E.R.78-79 (Defs.' RSUF ¶¶ 47-48); *see also* 7 C.F.R. § 1260.181. Put another way, the "default" is 50 cents of every $1 collected goes to the Beef Board and Committee to use for their "government speech," but the government allows the other 50 cents to be siphoned off by the state councils for their use. *See, e.g.*, *R-CALF V*, 2020 WL 1486051, at *2, E.R.6. *Johanns* never considered nor endorsed this process.

Therefore, when this suit began, R-CALF sought to enjoin the automatic transfer of checkoff money to the state beef councils. It explained the state beef councils were not subject to "political controls," and the speech they produced with the checkoff was not "from beginning to end" determined by the federal government. Thus, the private councils could not create "government speech" and their continued collection and use of the Beef Checkoff for their speech was unconstitutional.

Indeed, each of the councils at issue here is privately formed and incorporated, or operating as a subsidiary of another privately formed and

incorporated entity. E.R.87-88 (Defs.' RSUF ¶¶ 69-70). Each controls who makes decisions for the organization. E.R.88-89 (Defs.' RSUF ¶¶ 71-73). The government has no role in selecting the councils' board members or staff, and the statutes and regulations provide the government no authority to direct their decision making. E.R.89 (Defs.' RSUF ¶¶ 73-74).

Moreover, under the statutes and regulations, to be certified to collect the Beef Checkoff funds and use half the money, the councils only needed to submit a single ten-page form for approval to the Beef Board that established they met basic qualifications. E.R.80-81 (Defs.' RSUF ¶¶ 49-50). Their sole commitment concerning the speech they would fund with the checkoff in exchange for being able to use the money, was that the speech would be consistent with the Beef Act. That is, they only represented that any speech they would fund with the checkoff would be designed "to strengthen the beef industry" and not in a way that was "unfair," "deceptive," or "influencing governmental policy." E.R.78-79 (Defs.' RSUF ¶ 47); *see also R-CALF v. Perdue (R-CALF II)*, 2017 WL 2671072, at *2 (D. Mont. June 21, 2017) (adopting the Magistrate's Findings and Recommendations for a preliminary injunction).

The statutes and regulations also do not provide for any regular contact between the government and state councils. Instead, the government designated the "nongovernmental" Beef Board to review the councils' activities. The Beef Board

does not review any of the councils' specific statements prior to them issuing. Rather, it requests an annual "outline" of the councils' activities and an annual audit establishing they provided the Board half the funds they collected; it also performs "compliance review" of the councils approximately twice a decade. E.R.81-83 (Defs.' RSUF ¶¶ 51-56); *see also R-CALF II*, 2017 WL 2671072, at *2.

Put simply, under the statutes and regulations, the state councils are allowed to operate as independent private entities that can design and produce their own speech with beef producers' checkoff assessments.

***d. The compelled funding of the private state beef councils resulted in the preliminary injunction in this case, because the courts concluded that funded private speech and was unconstitutional.***

Given the statutory and regulatory scheme, the Magistrate recommended and the district court entered a preliminary injunction against the transfer of money to the Montana Beef Council—the only private state beef council at issue at the time. A judgment this Court affirmed. Those decisions explained that under the statute and regulations, the government could not "claim that it effectively can control the" speech the private state councils used the checkoff to produce. *R-CALF II*, 2017 WL 2671072, at *6. Therefore, the compelled subsidy of those activities was likely unconstitutional and should be enjoined.

They elaborated, "The *Johanns* court noted that the Secretary of Agriculture had the authority to approve every word of the Beef Board and Beef Committee's

campaigns. … Nothing in the record indicates that federal officials participate in the creation of [the Montana state council's] advertising campaigns. *R-CALF v. Vilsack (R-CALF I)*, 2016 WL 9804600, at *5 (D. Mont. Dec. 12, 2016) (Findings and Recommendations on preliminary injunction). Further, "[t]he USDA lacks the authority to appoint or remove any of the Montana Beef Council's members." *R-CALF II*, 2017 WL 2671072, at *6. "[And] [t]he USDA does not control how the Montana Beef Council spends the checkoff assessments. The applicable statutes and regulations merely prohibit the Montana Beef Council from using checkoff money to promote 'unfair or deceptive' practices, or to 'influence governmental policy.'" *Id.* (brackets removed) (quoting 7 C.F.R. § 1260.181(b)(7)). "Absent [such] control[s], the Court finds that it is unlikely [the Montana Beef Council's] speech is government speech," but rather it is private speech. *R-CALF I,* 2016 WL 9804600, at *5.

A divided panel of this Court affirmed the preliminary injunction on the same basis. "[W]e cannot say the district court incorrectly concluded it was likely R-CALF [] would succeed on the merits. Unlike prior cases, the Secretary does not appoint any members of the [the state council], does not have pre-approval authority over the [Montana Beef Council's] advertising, and may only decertify [the council] after an action has been taken." *R-CALF v. Perdue (R-CALF III)*, 718

Fed. App'x 541, 542 (9th Cir. 2018). These distinctions made this case "[u]nlike prior cases" where courts had held "government speech" existed. *Id.*[3]

***e. The government's controls over the state beef councils evolved through the MOUs.***

As the district court was considering R-CALF's motion for a preliminary injunction, Defendants began entering into MOUs with the state beef councils. E.R.91 (Defs.' RSUF ¶ 79). While the councils entered into those agreements with Defendants, R-CALF expanded the suit to include the other wholly private state beef councils on the ground that they were governed by the same statute and regulations the courts held are insufficient to create "government speech." E.R.399-421 (Amended Supplemental Pleading). Each of the councils now at issue

[3] In addition to defending the scheme on the merits, Defendants also attempted to moot the case through issuing a new policy that allowed producers to opt out of funding their state beef councils "by submitting a redirection request" to send all their checkoff money to the Beef Board and Committee. *R-CALF I*, 2017 WL 2671072, at *2-3. Under that rule, the councils have 60 days to act upon the request, during which time they can "hold the cattle producer's checkoff assessments" and use them at the councils' discretion. *Id.* Every court has deemed this procedure irrelevant. The Supreme Court has been clear, "The Government first must secure the citizen's 'affirmative consent' through an *opt-in* provision when it wishes to have a citizen fund private speech through a compelled subsidy." *R-CALF II*, 2017 WL 2671072, at *4 (emphasis added) (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 322 (2012)); *see also R-CALF V*, 2020 WL 1486051, at *9 (affirming same conclusion at summary judgment, which has not been appealed), E.R.27. Indeed, in both *Knox*, 567 U.S. at 322, and more recently in *Janus v. AFSCME Council 31*, the Court explained compelled subsidies of private speech "cannot continue" unless there is "affirmative[] consent before any money is taken." *Janus*, 138 S. Ct. 2448, 2486 (2018).

has entered into an essentially identical version of the MOU. *E.g.*, *R-CALF IV*, 2020 WL 2477662, at *1; E.R.32. According to the lower courts, without being subject to notice and comment, the MOUs amend "USDA's limited statutory and regulatory authority" over the state councils, providing new authority "stemming from [the MOUs]." *Id.* Nonetheless, each MOU also provides it can be voided at any time upon thirty days' notice and "mutual agreement of the parties." E.R.93 (Defs.' RSUF ¶ 84).

The MOUs still do not allow the government to appoint or remove the councils' boards or staff. E.R.91 (Defs.' RSUF ¶ 80). Yet, they provide the councils must notify Defendants about their meetings, and Defendants must pre-approve the "plan[s] and project[s]" the councils generate or contract for others to generate for the councils. E.R.53-60, 246-286 (MOUs). In the words of the MOUs, the councils must "submit to [Defendants] for pre-approval any and all promotion, advertising research, and consumer information plans and projects." *E.g.* E.R.55 Similarly, when the councils "enter[] into" contracts to "implement[] and conduct [] plans or projects funded by checkoff funds" the speech those contracts generate can only issue "upon [Defendants'] approval." *Id.*

It was on this basis that Judge Hurwitz dissented from this Court's preliminary injunction decision. He explained that if the government truly pre-approved each of the state beef councils' statements that would render their use of

the Beef Checkoff money constitutional. He stated he would have vacated the preliminary injunction because with the MOUs it appeared the government would have "complete pre-approval authority over any and all promotion, advertising, research, and consumer information plans and projects of the" councils. *R-CALF III*, 718 Fed. App'x at 543 (Hurwitz, J., dissenting) (internal quotation marks omitted). In Judge Hurwitz's view, that pre-approval authority would establish sufficient government control for the councils' speech to be "government speech." *Id.*

***f. The MOUs still allow the checkoff to fund other private speech.***

Core to this appeal, however, is that Judge Hurwitz was unaware of a loophole in the MOUs' controls that became apparent through discovery. In addition to, and separate from, any speech the councils generate on their own, or contract with others to generate on their behalf, the councils transfer money to private third parties to fund the speech of those third parties' choosing. In such circumstances, the councils do not know the "plan or project" the checkoff is paying for and thus cannot seek the government's pre-approval for that speech.

In making these transfers, the state councils explain the entire purpose of the payments is that they will be used by the third parties for their "programs which promote the marketing and consumption of beef and beef products." E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30). In other

words, the transfers are made for the express purpose of putting Beef Checkoff tax dollars towards producing speech. But, the speech is that of a private entity, and is not subject to the MOUs' controls.

In fact, the majority of these transfers are labeled as "[u]nrestricted," which the councils explain means the money can be used by the third parties in "all budget areas of research, promotion, industry information and consumer information," *i.e.*, beef-related speech of the third party's choosing. *See id*. The third parties are only required to identify the speech the councils funded *after* they spend the money. *Id.*; *see also* E.R.100, 101, 107 (Defs.' RSUF ¶¶ 94, 96, 105-106).

In these circumstances, the sole restriction placed on the third parties' use of the money is that it must be put to "purposes permitted by the [Beef] Act and [its regulations]." *See, e.g.*, E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30). Put another way, so long as they put the money towards a "program of promotion and research designed to strengthen the beef industry[]" that does not run afoul of the prohibitions on using checkoff money for unfair, deceptive or political speech, the third parties can use the money however they like. *See* 7 U.S.C. § 2901; 7 C.F.R. § 1260.181.

Millions of Beef Checkoff dollars are spent this way. *See, e.g.*, E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30). For example,

in 2018 the Texas Beef Council gave $2 million from the Beef Checkoff funds it collected to be split between two private advocacy organizations—the Federation Division of the National Cattleman's Beef Association ("Federation") and the United States Meat Export Federation ("USMEF"). E.R.100-01 (Defs.' RSUF ¶ 95). [4] The council identified that approximately $500,000 should support "International Marketing" by USMEF, without any further explanation of what marketing that money should produce, and provided no direction for how the remaining approximately $1,500,000 should be spent—$1,000,000 was provided in "unrestricted" funds and another approximately $500,000 was provided for "prioritized" projects, which the Texas Beef Council failed to identify or describe in any manner. *Id.* The form the council filled out committing these payments made clear the only other conditions were that the speech abide by the general rules of the Beef Checkoff program—promoting beef without being unfair, deceptive, or political—and that the recipients of the money identify their expenditures in an "annual accounting." E.R.101 (Defs.' RSUF ¶ 96).

[4] The Federation is referenced in the Beef Act and its regulations, but not with regards towards producing speech for the program. Rather, the Federation is a source of nominees for people to staff the federal-level Beef Committee. 7 U.S.C. § 2904(4)(A). The act also allows the federal-level Beef Board and Committee to enter into contracts with third-parties like the Federation and USMEF to produce speech funded by the Beef Checkoff, so long as the Beef Committee is involved in designing that speech and the government pre-approves that speech before it is issued. *Id.* § 2904(6). The statutes, regulations, and MOUs provide no rules governing the Federation's or USMEF's independent activities.

Similarly, in 2019, the Nebraska Beef Council funded those same private third parties using that same form. The Nebraska council provided $1,579,500 to the Federation to be used in an "[u]nrestricted" manner to produce advertisements consistent with the Beef Act, and $442,900 to USMEF to be "prioritized for international marketing." E.R.312 (Plf's. Ex. 27). No additional descriptions of the speech the checkoff was to fund were provided, and the recipients only needed to report back how they used the money through an "annual accounting" to the state council.[5]

The Federation and USMEF are wholly private entities. The government admits it has no "direct oversight" over the Federation, which makes "its own business decisions." E.R.107-08 (Defs.' RSUF ¶ 107). Likewise it admits its only oversight of USMEF is when USMEF acts as a contractor for the Beef Board and Committee, producing speech at those entities' direction and subject to the government's approval. *Id.* It does not have any role in supervising USMEF's use of funds that are provided to USMEF for its own use. *Id.* In those instances USMEF is a fully independent actor. *Id.*

[5]The record establishes each of the intervening state beef councils made transfers to private third parties to pay for their speech for years, including indicating to Defendants they intended to fund third parties other than the Federation and USMEF. *See* E.R.100-101, 102 (Defs.' RSUF ¶¶ 94-95, 98).

The government's only knowledge of how the money transferred to third parties in this manner will be spent comes from annual plans provided by the state councils. Those "plans" merely "outline" the councils' anticipated "expenses and disbursements." E.R.141 (Defs.' Decl. ¶ 23). As a result, they do not identify the specific speech of the third parties the councils will fund. They barely state how the money they are providing will be spent at all.

For instance, Defendants approved the Nebraska council transferring millions of dollars to the Federation and USMEF where the council merely described that the money would be used to "fund [] national and international efforts [to] stimulat[e] markets and the use of beef and beef products." E.R.291 (Plf's. Ex. 21). Defendants also approved the North Carolina council's annul plan to send money to those same entities when the council simply stated the money will "support [] the development and implementation of national domestic and foreign promotion" so as "to enhance any effective means of reaching the largest possible audience with a positive beef message." E.R.123 (Defs.' Ex. 50). In other words, the government approved these transfers believing the checkoff money would be spent on speech consistent with the Beef Act, but with no other details.

In fact there is so little direction and review of how the third parties spend the checkoff money that when the intervening state councils were asked to identify how the money was spent after the fact, they merely pointed to the recipient

organizations' annual reports, which made no effort to identify the activities the checkoff funded. E.R.107 (Defs.' RSUF ¶¶ 105-06). The government failed to identify a single way the money was spent. E.R.108-09 (Defs.' RSUF ¶ 108).

In sum, under the MOUs, Beef Checkoff money can be spent in the exact same way as it was prior to the MOUs. The money can be taken by a private entity and used in the manner of that entity's choosing, without first seeking the government's approval, so long as it is consistent with the Beef Act's general directives. The only difference is that the private entity using the checkoff money for private speech is no longer the state beef councils, but other private groups to which the state beef councils act as pass throughs.

***g. The decisions on appeal.***

At summary judgment, both the Magistrate and district court affirmed their earlier analysis: without the MOUs the private state beef councils' use of the checkoff to fund their speech is unconstitutional because the statutes and regulations do not provide the government sufficient control over the councils' speech to render it "government speech." However, they went on, the MOUs sufficiently altered the relationship between the councils and government so that the councils now produce "government speech" entirely exempt from First Amendment review. Regarding the councils' transfer of money to third parties for those third-parties' speech, the decisions below determined that because some of

the councils' expenditures were now funding government speech, the courts did not need to concern themselves with ensuing all the expenditures were constitutional. They also held that, although the MOUs were prerequisites to the state beef councils constitutionally using the checkoff, and they can be revoked at any time, the courts did not need to issue an order ensuring the MOUs' terms would remain in force. The courts stated they should assume the MOUs will remain in effect, despite their text allowing for them to be dissolved.

Specifically, the Magistrate and district court reiterated that "[t]he First Amendment protects private parties from subsidizing speech that the private party disagrees with." *R-CALF IV*, 2020 WL 2477662, at *3, E.R.37. "No such prohibition applies to government speech, though" as it is entirely exempt from First Amendment review. *R-CALF V*, 2020 WL 1486051, at *4, E.R.13.

For speech to be "government speech," the message must be "'from beginning to end the message established by the Federal Government.'" *R-CALF IV*, 2020 WL 2477662, at *3 (quoting *Johanns*, 544 U.S. at 560), E.R.38. "[C]rucially for this case" that has meant "the [government-Defendants] retained ultimate veto power over the nongovernment entities' advertisements, 'right down to the wording.'" *Id.* (quoting *Johanns*, 544 U.S. at 563); *see also R-CALF V*, 2020 WL 1486051, at *5 (similar), E.R.14.

Therefore, without the MOUs, the lower courts reiterated, the private state beef councils' use of Beef Checkoff money for their speech was unconstitutional. The private councils "could receive certification," which allows them to collect and use Beef Checkoff money to produce speech, "then develop their ads, disseminate them, and only" potentially be subject to scrutiny for the specific speech they funded with the checkoff after the fact. *R-CALF IV*, 2020 WL 2477662, at *5, E.R.41. "[B]y that time, the damage will have been done." *Id.* People like R-CALF's members will have been forced to pay for private speech without their consent, which violates their First Amendment rights. *Id.*; *see also R-CALF V*, 2020 WL 1486051, at *4 ("This Court has no reason to doubt its analysis from its first decision in this case, as the Ninth Circuit affirmed," that without the MOUs the councils' use of Beef Checkoff funds is unconstitutional.), E.R.13.

Nonetheless, like Judge Hurwitz, the lower courts concluded the MOUs rendered the private state beef councils' use of checkoff funds constitutional, because the MOUs ensured Defendants would review and approve the councils' speech ahead of time. With the MOUs, they stated, "USDA retains enough authority over [the state councils'] speech such that [the councils'] speech constitutes government speech" because Defendants now have authority to pre-approve each of the councils' statements. *R-CALF V*, 2020 WL 1486051, at *7, E.R.21. "In the absence of discretion to approve or reject speech, the hallmark of

government speech—political accountability—disappears. If USDA had no discretion under the MOUs to approve or reject [the councils'] speech, R-CALF would have no political recourse when it saw advertisements with which it disagreed. That would fundamentally make [the state councils'] speech private speech." *Id.* at *6, E.R.19. However, with the MOUs, "USDA enjoys significant discretion to approve or reject [the councils'] speech." *Id*. at *6, E.R.20. As the Magistrate put it, "USDA now retains complete final approval over all [state beef council] ads. … That proves enough to make [the state councils] 'answerable' to USDA" for their statements and ensures they will generate "government speech," rather than their own private speech. *R-CALF IV*, 2020 WL 2477662, at *5, E.R.42.

Yet, despite articulating these standards, when it came to considering the state councils' transfers of checkoff money to private third parties for those third-parties' speech, both the Magistrate and district court abandoned these rules. They ignored the facts in the record that the state councils pass millions of dollars to other private parties to employ at those private parties' discretion, with the only limit being that the third parties must comply with the Beef Act and its regulations. *See, e.g.*, E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30).

Indeed, the Magistrate entirely failed to address these transfers, focusing his analysis on different expenditures by the state councils, which he concluded the Constitution should not regulate. He stated the state councils should be able to "pay for membership in organizations," under the First Amendment, even if the money ultimately pays for speech. *R-CALF IV*, 2020 WL 2477662, at *6, E.R.46. He seemed to reason that once those membership dues are turned over, if the membership is a legitimate expense, how the third party uses those dues should not matter. If the councils could legitimately pay for membership, the government should not have to control any speech supported by those dues, as the councils are getting what they paid for. How the recipient of the funds used that money should be irrelevant. With that purchase, the money became private money, rather than a government compelled tax. *See id.*

The Magistrate then relied on this scenario to conclude courts should never "parse budget line items" regarding how state beef councils distribute checkoff dollars to third parties because doing so would be "'micro-managing legislative and regulatory schemes.'" *Id.* at *6 (quoting *Paramount Land Co. LP v. California Pistachio Comm'n*, 491 F.3d 1003, 1012 (9th Cir. 2007)), E.R.46-47. Put another way, he stated if the councils could legitimately pay for some third-party items, there was no need to review all of their expenditures and confirm they were constitutional.

He did not address the fact that the record shows the councils pay for membership in USMEF separate from their transfers to fund USMEF's speech. E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30); E.R.100-01 (Defs.' RSUF ¶ 95). Nor did he explain why it would be "micro-managing" to regulate payments the state councils represent in their annual plans are made exclusively for the purpose of funding private-third-party speech—not paying for some service—which the Supreme Court has held is unconstitutional. *See, e.g.*, E.R.100-02 (Defs.' RSUF ¶¶ 94-97); E.R.291 (Nebraska council's annual plan, Plf's. Ex. 21); E.R.123 (North Carolina council's annual plan, Defs.' Ex. 50).

Nonetheless, the district court doubled down on the notion that because it is possible the state councils could provide money to private third parties constitutionally, the courts should not concern themselves with whether any of those expenditures violate the First Amendment. The district court acknowledged the Magistrate's holding allows for a "shell game" where "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" that had led to the preliminary injunction in this case. *R-CALF V*, 2020 WL 1486051, at *8, E.R.25. However, the district court stated this issue should be remedied by Defendants not the courts, despite the record establishing Defendants were allowing the money to be transferred to fund private-third-parties' speech. *Id.*

The district court's only additional rationale for refusing to address the transfers to third parties to fund their speech was that crafting a clear injunction could prove challenging. *Id.* However, the district court itself articulated a bright-line distinction between lawful and unlawful third-party payments: The state councils can pay third parties for legitimate "goods and services" and then the subsequent uses of that money is not subject to the Constitution, but they cannot purposefully fund private speech, unless it is subject to the government's effective control. *Id.* For example, the councils could buy Bic pens to craft their own speech and Bic's subsequent use of the money would not raise First Amendment concerns. But, they could not give money to Bic for nothing except to craft its desired speech.

Further still, the district court's focus on how to craft an injunction ignored that R-CALF also requested the unconstitutional transfers in the record simply be declared unconstitutional. E.R.320 (Plf's. Motion for Summary Judgment). Such an order would have provided R-CALF part of the relief it sought without inviting the district court's concerns.

Finally, R-CALF also pointed out that the courts were relying on the terms of revocable MOUs to uphold the constitutionality of the private state beef councils' use of the checkoff money to fund their speech, leaving R-CALF without an enforceable order should the councils and Defendants revert to their prior

unconstitutional conduct (or the MOUs be declared unlawful). The MOUs provide for such a turn of events, stating they could be revoked at any time. E.R.93 (Defs.' RSUF ¶ 84). However, the Magistrate stated the courts should "assume the Government" will maintain the MOUs, especially as they were not entered "as merely a way to avoid an adverse result," even though Defendants *only* entered into the MOUs after the Magistrate first recommended a preliminary injunction. *R-CALF IV*, 2020 WL 2477662, at *7, E.R.48.

The district court seemed to recognize a court order was more appropriate to enforce the Constitution's requirements, but it stated that in light of its preliminary injunction decision the councils would need to accept the MOUs or lose their checkoff money. *R-CALF V*, 2020 WL 1486051, at *9, E.R.27. It did not explain how such a statement could be enforced, given the court was granting summary judgment for Defendants, vacating the earlier injunction. *Id.*

## V. STANDARD OF REVIEW.

This court "review[s] a grant of summary judgment de novo. Viewing the evidence in the light most favorable to the nonmoving party, [it] must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc) (citations omitted).

## VI. SUMMARY OF ARGUMENT.

The record establishes millions of checkoff dollars beef producers, including R-CALF's members, pay go to private entities such as the Federation and USMEF to fund those entities' "programs which promote the marketing and consumption of beef and beef products." *See, e.g.*, E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30). Beyond the third-parties' agreement that their speech will not be unfair, deceptive, or support a specific policy, they may use the money at their discretion for any beef-promoting speech, only providing an "annual accounting" of how the money was used. *Id.*; *see also* E.R.101 (Defs.' RSUF ¶ 96). The government allows the checkoff money to be spent this way based entirely on vague representations such as that the money will "fund [] national and international efforts [to] stimulat[e] markets and the use of beef and beef products." E.R.291 (Nebraska council's annual plan, Plf's. Ex. 21).

Such uses of the checkoff money do not produce "government speech." Indeed, this Court has held that much more robust controls are needed to create "government speech." *Delano Farms Co. v. California Table Grape Comm'n*, 586 F.3d 1219, 1219 (9th Cir. 2009). Likewise, the controls here amount to less than what every judge that has reviewed this case indicated is necessary to create "government speech."

Therefore, the record establishes the checkoff is being used for the private-third-parties' private-speech. That compelled subsidy is subject to the First Amendment and unconstitutional. *United Foods*, 533 U.S. at 413. The lower courts' concern that other expenditures by the third parties may be allowed is irrelevant. They erred in failing to stop this established unlawful conduct.

In addition, they also were mistaken in not issuing an injunction that permanently enforces the terms of the MOUs against the state councils' use of the beef checkoff for their own speech. The lower courts held the state beef councils could not lawfully use the checkoff for their speech absent the MOUs, which were entered into after the Magistrate's preliminary injunction ruling. *R-CALF V*, 2020 WL 1486051, at *5-6, E.R.13. Under this Court's case law, the voluntary cessation of ongoing unlawful conduct following suit still requires a judicially enforceable remedy, unless the change is "entrenched or permanent." *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (internal quotation marks omitted); *see also Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992). The MOUs fail that test. By their plain terms they can be revoked at any time, and, in fact, they are unlawful and unenforceable rulemakings. They seek to rework existing regulations without notice and comment. Accordingly, the decisions below also erred in failing to order that, if the state councils continue to use the checkoff for their speech, they must abide by the terms of the MOUs, whether or not the MOUs are in place.

Those two holdings should be reversed.

## VII. ARGUMENT.

### *a. The transfer of Beef Checkoff money to private parties to fund speech of their choosing is unconstitutional and should be stopped.*

Each of the opinions in this case articulates the same test, whether speech is "government speech," and thereby exempt from First Amendment scrutiny, depends largely on whether the government reviews and approves the statements before they are issued. These decisions draw on a variety of controlling authority that (logically) emphasizes the import of the government pre-approving statements before the "government speech" doctrine can apply. Nonetheless, with the Beef Checkoff, no party disputes money continues to be handed over to private parties for the purposes of funding their speech, and the government does not and cannot pre-approve their statements. While case law suggests other governmental controls over private speech can be relevant to the "government speech" analysis, that authority also establishes the highly limited controls the government has over the third-party speech at issue here are insufficient. Therefore, the transfers of Beef Checkoff money to these private entities to fund their speech are subject to the First Amendment and unconstitutional. The concern below that there might be other ways to spend the money that is constitutional is a distraction. Nothing allows courts to disregard the ongoing, indisputable constitutional violations

because some case not before them might warrant a different outcome. Nor is stopping an established constitutional violation improper judicial "micro-managing."

*i. The government's failure to review the private-third-party speech directly funded by the Beef Checkoff means that speech violates the First Amendment.*

In determining whether speech is "government speech," this Court has repeatedly emphasized the importance of the government reviewing and approving the speech before it is issued. This Court "adopt[ed]" the "non-exhaustive" four-factor test employed by "the Fourth, Eighth and Tenth Circuits" to "differentiate between" private and government speech. *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964-65 (9th Cir. 2008). Those factors are: "(1) the central purpose of the program in which the speech in question occurs; (2) the *degree of editorial control* exercised by the government or private entities *over the content* of the speech; (3) the identity of the literal speaker; and (4) *whether the government or the private entity bears the ultimate responsibility for the content of the speech*." *Id.* (emphasis added) (internal quotation marks omitted).

In a subsequent case that did not follow that four-factor test, this Court nonetheless identified "three key factors" that establish private speakers funded through government commodity promotion programs generate "the government's own speech because the message is effectively controlled by the federal

government." *Delano Farms Co.*, 586 F.3d at 1226. Those factors were: (i) that the legislature "directed the creation of the promotional program"; (ii) in that program the legislature "specified, in general terms, what the promotional campaigns shall contain and what they shall not" and (iii) that the government "exercises final approval authority over every word used in every promotional campaign." *Id.* (cleaned up).

In *Paramount Land*, 491 F.3d 1003, another case concerning a commodity promotion program, the government's pre-approval of the speech took on a different form than in *Johanns*—where the government reviewed and edited the speech statement-by-statement—but this Court again emphasized that the government being able to consider and reject speech before it is issued is a core concern of the "government speech" analysis. This Court elaborated that in *Paramount Land*, at the start of each year, the Pistachio Commission submitted to the government plans for its speech that "detail the themes to be emphasized, the actors to be used, the demographics to be targeted, and the media to be employed." *Id.* at 1011. For example, for one proposed advertisement, the plan described the suggested "campaign," and also "the specific magazines in which the advertisements will run [and] note[d] the approximate timing of their publication." *Id.* In other words, the government was required to sign-off on "detail[ed]" meaningful descriptions of the statements that would be issued. *Id.* The court also

noted that with the Pistachio Commission the government "is authorized to attend and participate in the meetings where promotional activities are planned" and "[a]s a practical matter" actually exercised that authority. *Id.* at 1010.

These facts combined, along with others, allowed the court to hold the "statutes and regulations governing the Pistachio Commission and its activities essentially mirrors the scheme addressed in *Johanns*." *Id*. In sum, even though the government did not review the expressions one at a time, as in *Johanns*, the Pistachio Commission's speech was "government speech" largely because the government was given the opportunity and information to weigh in on the specific expressions ahead of time.

Other courts have emphasized the same focus in the "government speech" analysis, whether the government pre-approves the statements. *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 175 (2d Cir. 2020) (speech not "government speech" where private speaker has independent "discretion" in what to say because the government was not "extensive[ly] involve[d]" in developing statements); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 862 (7th Cir. 2008) ("The Court's conclusion in *Johanns* had been driven by the federal government's pervasive and complete control—'from beginning to end'—over the beef-promotion message.").

However, here, money the state councils transfer to private third parties is funding speech the government does not pre-approve, and thus it is not

"government speech," regardless of which test one uses. Indeed, the speech the transfers fund lack three of the four features identified in *Arizona Life Coalition*: the government does not exercise "editorial control" or "bear[] the ultimate responsibility" for determining the speech, rather the "literal speakers," who are the private third parties, are in control. 515 F.3d at 964-65. Beef Checkoff money is given over to entities that, so long as they follow the general terms set forth in the Beef Act, are solely responsible for choosing the speech. E.R.101, 102-03 (Defs.' RSUF ¶¶ 96, 99). The only further direction the third parties may get is that, in some instances, the money must be used for certain "prioritized" categories of beef-related speech, such as "international marketing," *see, e.g.*, E.R.100-01 (Defs.' RSUF ¶ 95), but no additional specifics are suggested.

The only advanced knowledge the government has of what statements these Beef Checkoff dollars will fund comes from the annual "outline[s]" the government gets from the state beef councils—not the third party speakers. E.R. 101, 102-03 (Defs.' RSUF ¶¶ 96, 99); E.R.141 (Gov. Decl. ¶ 23). Unlike in *Paramount Land*, those outlines need not, cannot, and do not identify the actual expressions the councils plan to fund because the third-party speakers only need to inform the councils how they spent the money after the fact. *See, e.g.*, E.R.100-01 (Defs.' RSUF ¶ 95). Therefore, the government has approved the transfers of the Beef Checkoff money to fund private-third-party speech based on such non-

descript representations as that the money will "support … promotion." E.R.123 (North Carolina council's annual plan, Defs.' Ex. 50).

Thus, nothing ensures the speech is from "beginning to end" that of the government. When Beef Checkoff money funds third-party speech, it is not funding "government speech," but private speech. As a result, this use of the checkoff tax amounts to unconstitutional compelled speech and association. *Johanns*, 544 U.S. at 561; *United Foods*, 533 U.S. at 413.

True, in *Delano Farms* this Court ultimately allowed a marketing program like the checkoff to go forward where the law did "not *require* any type of review … over the actual messages promulgated," but there the government possessed a variety of other controls over the speech that were "greater" than the other controls identified in *Johanns* and *Paramount Land*. *Delano Farms*, 586 F.3d at 1229 (emphasis in original). No such authority exists over the private-third-party speech at issue here whatsoever.

The *Delano Farms* court explained that the authorizing statute of that program went "much further in defining" the necessary "message than the Beef Act" and regulations. *Id.* at 1228. Moreover, the government "possess[ed] the power of nomination" over all the people crafting the speech on the Table Grape Commission. *Id.* It also "ha[d] the power to remove" each of those individuals. *Id.* at 1229. And the Commission was required to maintain "books, records, and

accounts of all of its dealings" so they could be reviewed by the government. *Id.* This Court did "not discount the significance of the power over specific messaging," but explained that given these other facts, the distinctions between the government controls in *Delano Farms* and other instances in which there was "government speech" were "legally insufficient to justify invalidating" the expenditures. *Id.* at 1230.

The record establishes the state beef councils' transfers to private third parties to fund their speech lack any similar safeguards—let alone the particularly robust controls necessary to offset the fact that the government does not pre-approve the third-parties' statements. The general statutory framework the third parties are operating under is the one laid out in the Beef Act and its regulations, E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30); E.R.102-03 (Defs.' RSUF ¶ 99), precisely what *Delano Farms* stated was insufficiently specific, 586 F.3d at 1229. The entities receiving the money, such as the Federation and USMEF, are wholly private creations; for instance, unlike in *Delano Farms*, the government cannot "select, appoint, or remove" any directors of USMEF, E.R.107-08 (Defs.' RSUF ¶ 107). And unlike in *Delano Farms*, where the commission had to track "all its dealings" to describe them to the government, the only records the third parties need to provide are an "annual accounting" of their expenditures, which they turn over to the state beef councils, not the

government, E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30); E.R.101 (Defs.' RSUF ¶ 96).

At bottom, for speech to be "government speech," the courts must be able to conclude the speech was "developed under official government supervision." *Johanns*, 544 U.S. at 562. Here, however, the state councils fund privately-created-and-run third parties for the express purpose of paying for those private-third-parties' speech. Those third parties are allowed to design and produce that speech on their own. The government need not even be informed what statements the third parties are considering funding prior to the speech issuing. Any consequences for the expressions are after the fact, at which point payers like R-CALF's members will already have been compelled to fund private speech, violating their First Amendment rights. *See R-CALF IV*, 2020 WL 2477662, at *3. E.R.41. This is nothing like the other "government speech" cases; rather, R-CALF's members are being forced "to support speech by others" and "that [] mandated support is contrary to the First Amendment." *United Foods*, 533 U.S. at 413.

*ii. That some third-party payments may not violate the First Amendment does not render these payments constitutional.*

The Magistrate and district court concluded the constitutional violations should be allowed to continue because not all payments to private third parties would be improper, regardless of whether the payments for the purpose of funding

third-party speech were lawful. No principle states that some potential constitutional conduct negates other constitutional violations. Indeed, the notion that district courts must "address all hypotheticals" in order to enjoin unlawful conduct has been rejected. *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 586 (5th Cir. 2013). The single citation the Magistrate and district court offer for their result does not justify their outcome, and, may no longer be good law, particularly if it were interpreted and applied in way the decisions below suggest.

The lower courts relied on a statement from *Paramount Land* that when determining whether speech is "government speech" courts should not "micro-manag[e] legislative and regulatory schemes, a task federal courts are ill-equipped to undertake," 491 F.3d at 1012; but *Paramount Land* makes clear this rule is meant to allow for some flexibility in the nature of the government controls necessary to establish "government speech," not—as the decisions below read it—to allow uncontrolled private speech to continue because other activities could be lawful. *Paramount Land* made its statement about "micro-managing" in connection with its holding that although "there [were] differences in actual oversight between the beef scheme [at issue in *Johanns*] and the pistachio scheme" before the court, such differences did not prevent the court from finding "government speech." *Id.* In this way, *Paramount Land* made clear the notion

courts should not micro-manage is an expression that the definition of "government speech" allows for a few variations in the sorts of oversight that will establish the speech is that of the government. *Paramount Land* did not allow the courts to avoid determining whether the speech is controlled by the government, or accept some compelled subsidies of private speech.

Consistent with this, the micro-managing language reappeared in *Delano Farms* in an almost identical context. The Court "acknowledge[ed] that there are differences in statutorily-prescribed oversight afforded to the government in the case of the Commission [then before the Court], the beef program, and the Pistachio Commission [in *Paramount Land*]," but stated "these differences are legally insufficient to justify invalidating the" program before it or the courts would be involved in "micro-managing." *Delano Farm*, 586 F.3d at 1230. The micro-managing language is meant to allow the courts to accept different regulatory circumstances where it is impossible to "draw a line between the[] two approaches" of creating "government speech." *Paramount Land*, 491 F.3d at 1012. It is not a reconsideration of the rule that compelled subsidies of private speech violate the freedom of speech and association.

Therefore, the statement courts should not micro-manage does nothing to salvage the transfers to private third parties identified here. Those transfers fail *every* test for "government speech" and have *none* of the controls this Court has

pointed to that justify minor variations in the regulatory scheme. Any suggestion that it is impossible to draw a line between money given to totally private entities for the express purpose of producing speech of their choosing (so long as it complies with the Beef Act and regulations), and the other "government speech" described above is self-evidently false.

Neither the Magistrate nor district court disagreed, but pointed to concerns about how to regulate "membership dues." *R-CALF V*, 2020 WL 1486051, at *8, E.R.24-25; *R-CALF IV*, 2020 WL 2477662, at *6, E.R.46-47. However, while the record shows councils pay membership dues to certain organizations, it also makes clear these are separate and distinct payments from the payments to third parties for purpose of funding the third-parties' speech. E.R.311-318 (state beef council "Investment Projection Forms," Plf's. Exs. 27-30); E.R.100-01 (Defs.' RSUF ¶ 95). The payments at issue here—by far the largest payments the councils make to third parties—are *solely* to fund speech. E.R.291 (Nebraska council's annual plan, Plf's. Ex. 21); E.R.123 (North Carolina council's annual plan, Defs.' Ex. 50); E.R.100, 101 (Defs.' RSUF ¶¶ 94, 96).

Thus, the district court's concern about how it would craft an injunction to address membership dues is baseless. *R-CALF V*, 2020 WL 1486051, at *8, E.R.24-25. The court could simply enjoin Defendants from approving transfers to private third parties for the express purposes of funding speech that is not subject

to governmental pre-approval and remedy the identified constitutional violations. It should go without saying that an injunction is only meant to address the unlawful conduct before the court, not anticipate potential future allegations. *See Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983).

Further, the district court's willingness to throw up its hands is in tension with a plethora of Ninth Circuit law that indicates an injunction is *required* where plaintiffs establish an ongoing First Amendment violation. "Both this court and the Supreme Court have repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (cleaned up). This Court has also "consistently recognized the significant public interest in upholding free speech principles." *Id.* And, it has explained that even if some might prefer the unconstitutional program to continue, they "can derive no legally cognizable benefit from being permitted to further enforce an unconstitutional" program, so there are no countervailing interests to enjoining a violation of the First Amendment. *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012). Where courts find a First Amendment violation they should seek to enjoin it from continuing, not avoid using their powers.

Further still, even if the district court's concerns about an injunction were proper, it still could have declared the transfers unlawful. This would have

provided R-CALF and its members partial relief. 28 U.S.C. § 2201 (establishing a declaratory judgment as a proper remedy); *see also* E.R.320 (Plf.'s Motion for Summary Judgment requesting declaratory relief).

While the above is more than sufficient to reverse the decisions below, it is also worth noting the "micro-managing" rule from *Paramount Land* on which they relied is of questionable validity. The Supreme Court's most recent "government speech" decision warned that the doctrine "is susceptible to dangerous misuse," as it places speech entirely outside the reach of the First Amendment, freeing it from having to survive any scrutiny. *Matal*, 137 S. Ct. at 1758. Therefore, the Court directed "great caution before extending our government-speech precedents." *Id.* As a result, it is unclear whether a principle that the courts can continually chip away at the margins of what is required for "government speech" to avoid "micro-managing" remains good law.

Moreover, even without *Matal*, to interpret and apply *Paramount Land* and *Delano Farms* in the way the decisions below did is in tension with *United Foods*. The *United Foods* Court explained that there is a "recognized [] First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's freedom of belief." 533 U.S. at 413. Those rights require courts "to invalidate … statutory schemes" that force producers to pay private parties for collective marketing. *Id.* Here, the decisions below indicated the

payments to third parties to fund their speech do *not* fall within the "government speech" exception, but ignored the Supreme Court's direction that such payments must be invalidated.

* * *

The record shows cattle producers are being compelled to fund private speech that the government does not control and therefore it cannot be "government speech." That violates the First Amendment. Contrary to the decisions below, precedent does not allow that constitutional violation to continue unrecognized. Therefore, the decisions below erred in failing to act against the unlawful transfers of checkoff tax dollars to private third parties for the express purpose of funding their private speech. They should have declared those transfers unlawful and enjoined them from occurring. This Court should reverse and remand with a direction that the district court do so.

***b. The decisions below should have issued an injunction to ensure the state beef councils' continued use of the checkoff for their speech is consistent with the Constitution.***

The decisions below further erred in failing to grant R-CALF a remedy to ensure the private state beef councils continued use of the checkoff for their own speech is constitutional. As the lower courts explained, at summary judgment, Defendants only "tangentially claim[ed]" that the use of checkoff funds by private state beef councils or their contractors was constitutional without the MOUs. *R-*

*CALF IV*, 2020 WL 2477662, at *5, E.R.43. Consistent with this, the lower courts determined the terms of the MOUs are necessary for the private state councils to constitutionally take and use checkoff funds to pay for their own or their contractors' speech, and that ruling has not been appealed. *See R-CALF V*, 2020 WL 1486051, at *4, E.R.13. Because Defendants and the courts are relying on revocable MOUs entered into after this suit began to uphold the use of the money by private state beef councils, contrary to the decisions below, an injunction should issue to ensure their terms continue to govern the state councils' speech were the MOUs to ever be dissolved.

"It is well-established … that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case,'" including declaring the prior conduct unlawful and issuing an injunction to ensure it does not recur, "unless 'it can be said with assurance that there is no reasonable expectation that the alleged violation will recur' and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Fikre*, 904 F.3d at 1037 (cleaned up) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Indeed, this Court has held that where "complete and irrevocable eradication" of the prior unlawful conduct is not accomplished, the plaintiff "is entitled to the protection of an enforceable order" to ensure the defendants do not revert to their prior misconduct. *Barnes*, 980 F.2d at 580.

"Where that party is the government [the courts do] presume that it acts in good faith," but "the government must still demonstrate that the change in its behavior is 'entrenched' or 'permanent'" or it should be enjoined. *Fikre*, 904 F.3d at 1037 (internal citation omitted) (quoting *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015)). In making this determination, "the form the governmental action takes is critical." *Id.* "A statutory change is usually enough," but "executive action that is not governed by any clear or codified procedures" is not. *Id.* (cleaned up). "For cases that lie between these extremes, we ask whether the government's new position 'could be easily abandoned or altered in the future.'" *Id.* (quoting *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014)). If so a judicial remedy is standard.

In addition to the nature of the policy change, a court may also look to the "avowed rationale" for the change. *Id.* at 1038. In some instances, the government's "unambiguous renunciation of its past actions [as unlawful] can compensate for the ease with which it may relapse into them." *Id.* at 1039. But, absent a broad declaration that the government agrees new "polic[ies] or procedure[s]" are required, an enforceable order against the prior misconduct should still issue. *Id.* at 1040.

Here, the government entered into MOUs only after the Magistrate initially recommended the Montana State Beef Council's use of the checkoff for its speech

be preliminary enjoined. E.R.93 (Defs.' RSUF ¶ 84). Thus, the MOUs are an attempt to "voluntarily cease" the unconstitutional conduct initially identified in this case: That the private state councils' use of the checkoff for their own speech was unconstitutional.

Yet, the face of the MOUs establish they are not "entrenched" or "permanent." They provide they can be revoked by mutual agreement of the parties—Defendants and the state councils—at any time, so long as there is thirty days' notice. *Id*. They are structured so they can be undone. Therefore, under this Court's precedent, R-CALF is entitled to an injunction to ensure the MOUs' terms remain in place. *Barnes*, 980 F.2d at 580.

The district court suggested Defendants and the state councils would want to maintain the MOUs because its preliminary injunction decision, and decision at summary judgment, state that without the MOUs the state beef councils' use of the money would be unconstitutional, *R-CALF V*, 2020 WL 1486051, at *9, E.R.27. But, it is the government's burden to make "absolutely clear" its conduct will not recur or an order should issue. *McCormack*, 788 F.3d at 1025. The court's hypothesis of how the government and councils will read its holdings does no such thing.

In fact, because the decisions below vacated the preliminary injunction, if the expenditures fall out of compliance with the First Amendment R-CALF and its

members will be required to re-litigate this matter. It is for this reason the voluntary cessation doctrine requires that an order issue when the government has not made its commitments clear, so "past violations … will not be repeated" even temporarily. *Barnes*, 980 F.2d at 580. The district court's suggestion of how it believes the government should act provides no such protection.

Moreover, the district court's reliance on its belief that the MOUs will remain in place is particularly problematic because they are unlawful, so they should be, and likely will be, dissolved. The government has issued regulations defining for the councils and the public its relationship to councils' speech. The lower courts held, and now Defendants concede, those rules were insufficient. Yet, the government cannot "circumvent" its previous, binding statements, made through notice and comment rulemaking, with a contract. *See Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 763 (4th Cir. 1993). Instead, it was required to issue new regulations to place the public on notice of the new rules it was considering, allowing people (including R-CALF) to comment, and requiring the government to respond. *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087-88, 1091 (9th Cir. 2003) (when a policy change bringing a program into line with the law "creates new rights and imposes new obligations" that requires notice and comment rulemaking). Therefore, even were Defendants and the state beef councils to want to permanently operate under the MOUs, they are unlikely to be

able to do so without taking numerous additional steps, the outcome of which are uncertain. As a result, it was incorrect for the lower court to assume R-CALF will be protected by the MOUs.

Were this Court to consider the rationale for the MOUs, that would further support granting R-CALF relief. The district court noted the government has entered into MOUs with a few state councils "not involved in this litigation," which it took to suggest the government recognized the MOUs were permanently necessary. *R-CALF V*, 2020 WL 1486051, at *9, E.R.27. But, this overlooks that the MOUs were only entered into following the initial preliminary injunction decision. E.R.91 (Defs.' RSUF ¶ 79). Courts have repeatedly pointed to "suspicious timing" of the changed conduct to determine whether it was meant to moot litigation. *McCormack*, 788 F.3d at 1025. Where, as here, the changes are "late in the game," after the writing was on the wall, that indicates the changes are strategic, not accepted policy positions. *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013). This is particularly true where the government continues to defend its earlier policy, as it did below by even "tangentially" arguing the MOUs were not required. That confirms the government does not believe the MOUs need to be maintained. *McCormack*, 788 F.3d at 1025.

The state beef councils' use of checkoff money for their own speech is unconstitutional absent the MOUs. For more than four years, R-CALF has been

litigating this matter to stop the unconstitutional use of checkoff funds by private entities. Although the councils' unconstitutional use of the checkoff money for their own speech has now stopped, R-CALF is entitled to an order to ensure the prior violations will not recur. *Barnes*, 980 F.2d at 580. Therefore, the decisions below erred. The case should be reversed with instructions to enter an order requiring that, if the private councils at issue are going to fund their own speech with Beef Checkoff money, they must continue to abide by the terms of the MOUs that render the speech "government speech" not private speech.

## VIII. CONCLUSION.

For the foregoing reasons, this case should be reversed and remanded with instructions that the decisions below should have: (i) declared the transfer of Beef Checkoff money to fund private-third-party speech unconstitutional and enjoined that from occurring, and (ii) ordered Defendants to permanently enforce the terms of the MOUs against the state councils, as that is all that makes their use of the checkoff money for their speech constitutional.

## IX. REQUEST FOR ORAL ARGUMENT.

R-CALF respectfully requests this case be calendared for oral argument. The decisions below commit multiple errors that allow Defendants to infringe on beef producers' First Amendment rights. Moreover, because Defendants have worked throughout the litigation to evade such a ruling by altering the program, the record

is complex. To understand the dispute also requires a detailed discussion of documents. Therefore, R-CALF believes the Court would benefit from oral argument.

## X. RELATED CASES.

R-CALF is not aware of any related cases at this time.

August 31, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 12,495 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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# ADDENDUM

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**U.S. Const. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.