Case No. 20-35453

In the United States Court of Appeals
for the Ninth Circuit

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.

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

REPLY BRIEF OF APPELLANT

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiff-Appellant

William A. Rossbach
ROSSBACH LAW, P.C.
401 North Washington St.
Missoula, MT 59807-8988
(406) 543-5156
bill@rossbachlaw.com
Counsel for Plaintiff-Appellant

(additional counsel listed on inside cover)

J. Dudley Butler
BUTLER FARM & RANCH LAW GROUP, PLLC
499-A Breakwater Dr.
Benton, MS 39039
(662) 673-0091
jdb@farmandranchlaw.com
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. STATUTORY CITATIONS.

The statutes relevant to refuting the government-Defendants' ("Defendants'") and Intervenors' arguments are set out in the addendum to this brief.

II. INTRODUCTION AND SUMMARY.

Defendants and Intervenors seek to prevail through misdirection. They focus on the government's controls over the federal-level Beef Board and Committee, the state beef councils, and their contractors, which render their activities "government speech." However, those expenditures are not at issue on appeal. Rather, Plaintiff, the Ranchers-Cattlemen Action Legal Fund ("R-CALF"), contests the district court's decision to allow a "shell game," in which the state councils can transfer millions of producers' Beef Checkoff dollars to private third parties, for the third parties' independent speech. *R-CALF v. Perdue* (*R-CALF V*), 449 F. Supp. 3d 944, 956 (D. Mont. 2020), Excerpts of Record ("E.R") 24-25. In this manner, the checkoff is used in the same way every prior decision in this case, including the prior dissent in this Court, indicated was unconstitutional. The exactions are funding private speech. The Supreme Court has held courts must "invalidate" the checkoffs to the extent they fund private speech. *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001). Thus, the district court erred in allowing these uses of the checkoff to continue.

Defendants and Intervenors argue that if other expenditures are constitutional, all of the program's expenditures should be allowed to stand, *e.g.* Defs.' Br. 2, 19; but there is no constitutionality by association, *see, e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 203 (2010) (Alito, J., concurring) (as-applied challenges "play[] a critical role in safeguarding First Amendment rights"). The Supreme Court recently explained that even if the government could justify some compelled payments for speech, each fee must be examined individually, otherwise "First Amendment values would be at serious risk." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 322 (2012) (cleaned up).

Likewise, Defendants' and Intervenors' claim that this Court has exempted independent-third-party checkoff expenditures from constitutional scrutiny is false. *E.g.*, Defs.' Br. 11; Ints.' Br. 42. This Court has only allowed third parties to spend checkoff funds when those expenditures are consistent with the Constitution. *Paramount Land Co. LP v. California Pistachio Comm'n*, 491 F.3d 1003, 1011-12 (9th Cir. 2007).

The two "controls" Defendants and Intervenors point to that exist over the independent-third-party expenditures have been deemed insufficient to make them "government speech." Defendants and Intervenors state that because the third parties must "adhere to the Beef Act and implementing regulations" they are by definition engaged in "government speech." Defs.' Br. 11. This Court has held that

the Beef Act and regulations do not turn private speech into "government speech." *Delano Farms Co. v. California Table Grape Comm'n,* 586 F.3d 1219, 1228 (9th Cir. 2009). Defendants and Intervenors also claim that because the government "must approve the [state councils'] annual budgets that propose to make such contributions to third-party organizations," that ensures the third parties put the checkoff towards "government speech." Ints. Br. 34-35; *see also* Defs.' Br. 22. But, this process is not at all similar to the approval process held to contribute to "government speech." *Paramount Land*, 491 F.3d at 1011; R-CALF Br. 23.

Defendants and Intervenors cite other government controls, but they do not apply to the third-party expenditures at issue here. Instead, Defendants and Intervenors repeatedly engage in a slight-of-hand by referencing, for example, "obligations [that] extend to any third parties contracting with a state council," when these transfers are not made pursuant to any contract. Defs.' Br. 22; *see also* Ints.' Br. 25.

To the extent Intervenors suggest there is a dispute of fact over whether the third-party expenditures are constitutional because Intervenors now contend they don't fund speech, that too is incorrect. Ints'. Br. 45-46. This argument is contrary to the Supreme Court's holding that the function of the checkoff is to produce speech, contrary to the record, and fails to consider that the checkoff implicates both the freedom of speech and association. *See United Foods*, 533 U.S. at 411-14.

The Court cannot overlook the transfers nor can it sustain them. Indeed, not only should the Court declare the transfers unlawful, but under its precedent an injunction is required to prohibit them from going forward. *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012); *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

Further, Defendants and Intervenors confirm an injunction also is required to ensure the state councils' *own* use of checkoff money will continue to be subject to the restrictions in the memoranda of understanding ("MOUs"). The district court held that when this case began the councils were unconstitutionally using the checkoff, and only the subsequently created MOUs ensure the councils put the checkoff towards "government speech"—a determination no one appealed. All parties agree the issue is not moot and judicial intervention is required if Defendants fail to show the MOUs are "entrenched." Ints.' Br. 51. This Court has explained the government's refusal to acknowledge its prior conduct was "improper" indicates its new policy is not "entrenched." *Fikre v. FBI*, 904 F.3d 1033, 1037-38 (9th Cir. 2018). Here, Defendants expressly state they do not believe they need to "maintain[]" the MOUs. Defs.' Br. 28 & n.4. Similarly, in a recent filing before the district court, Defendants call the MOUs a "voluntary change" they are not "compelled" to follow. Further Excerpts of Record ("F.E.R.") 2. Therefore, a judicial remedy is required to ensure the councils' use of the

checkoff continues to be constitutional, and, per the case law above, an injunction is necessary to prevent the risk of First Amendment harm.

In an attempt to salvage the decision below, Defendants raise two new arguments, both fail. First, they claim that the state councils do not need the MOUs and can transfer money to third parties because beef producers can "opt[] out" of funding the councils, obviating any First Amendment concerns. Defs.' Br. 25. This argument is waived. Every court in this case has rejected this argument. *E.g.*, *R-CALF V*, 449 F. Supp. 3d at 957, E.R.27. Defendants and Intervenors chose not to appeal the issue a second time. Therefore, they should not be allowed to raise it now. *Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001).

Regardless, the Supreme Court, relying on a decision concerning the checkoffs, held the First Amendment requires a payer to provide "affirmative consent" before its money is put towards private speech. *Knox*, 567 U.S. at 322 (citing *United Foods*, 533 U.S. at 411). The ability to opt out later is not enough. *Id.* at 312-13.

Defendants also contest R-CALF's standing to challenge checkoff expenditures in three of the fifteen states at issue. In particular, they suggest R-CALF lacks standing because its injury is it expends resources on lobbying, and lobbying costs cannot be a basis for standing. Defs.' Br. 10, 14. But, in a finding Defendants did not object to before the district court, the Magistrate determined R-

CALF's injury is it expends resources on "educat[ional]" efforts to inform beef producers how the checkoff is being abused. *R-CALF v. Perdue (R-CALF IV)*, 2020 WL 2477662, at *2-3 (D. Mont. Jan. 29, 2020), E.R.35-36. Such expenditures regularly establish organizational injury. *E.g.*, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc). Defendants further claim R-CALF cannot be injured because it already engaged in similar activities. Yet, Defendants' authority demonstrates an organization diverting resources towards activities that are part of its mission is required for organizational standing. *United Poultry Concerns v. Chabad of Irvine*, 743 Fed. App'x 130, 131 (9th Cir. 2018) (unpublished). An organization has standing even if it merely increases work that it is already undertaking. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014). The Magistrate found that R-CALF's work against the unlawful expenditure of the checkoff detracts from its other work, a clear injury-in-fact, and Defendants did not object to that finding. *R-CALF IV*, 2020 WL 2477662, at *2-3. R-CALF has standing.

R-CALF narrowed the issues on appeal to focus on the most concerning errors below. While Defendants and Intervenors plainly believe they can color the Court's review by rehashing responses to R-CALF's other contentions, that is nothing but a distraction. The checkoff cannot be used to fund private speech. That violates the First Amendment. Therefore, the independent-private-third-party

expenditures that the checkoff funds should be declared unlawful and enjoined. Moreover, no party challenged that the MOUs are required to make the state beef councils' speech "government speech." Yet, the government continues to claim the state councils do not require the MOUs. Thus, R-CALF is entitled to an injunction to ensure the state councils' uses of the checkoff remains constitutional. Accordingly, the district court should be reversed and this case remanded for entry of such orders.

III. ARGUMENT.

a. The Beef Checkoff is being used to fund third parties' private speech and that unconstitutional conduct should be declared unlawful and enjoined.

The record establishes that in FY2018 alone the intervening state beef councils transferred more than $4 million to private entities to use for beef-related speech of those entities' choosing. R-CALF Br. 19-24 (citing E.R.311-18). Defendants and Intervenors seek to maintain this system by asking for new exceptions to the First Amendment's rules, and pointing to government controls over other uses of the checkoff. The former is unfounded and runs counter to the Supreme Court's recent statement courts should exercise "great caution before extending our government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). The latter is irrelevant. The transfers must be declared unlawful and enjoined because the Supreme Court has held the checkoff violates the First

Amendment unless it funds "government speech." The activities funded through the councils' transfers of checkoff dollars to third parties for the third parties' independent activities lack any of the characteristics of "government speech."

i. The independent-third-party expenditures fail the test for "government speech" and thus are unconstitutional.

The default rule is the checkoff's exactions are unlawful and must be stopped. The Supreme Court explained in *United Foods*—which Defendants and Intervenors fail to even cite—that because "the principle object of the" checkoffs is to generate speech, if the government "compel[s] certain individuals to pay subsidies" into the program and they object, the program infringes on the First Amendment freedoms of speech and association. 533 U.S. at 410-13. The checkoff's exactions amount to compelled speech and association. *Id.* Moreover, they further no legitimate governmental end and thus fail every level of First Amendment scrutiny. *See id.* at 415; *see also R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 916-17 (9th Cir. 2005) (same).

The only reason checkoff programs persist is the Court determined in certain instances they qualify for a narrow immunity from First Amendment review, because they fund "government speech." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). *Johanns* left open the question of whether the money taken by the state beef councils was constitutionally expended, assuming incorrectly the money was "voluntar[ily]" given to the councils and not a compelled contribution.

Id. at 554 n.1. In fact, the government allows the state councils to automatically "retain up to fifty cents of each dollar assessed" by the Beef Checkoff program. Defs.' Br. 1.

For the "government speech" exception to apply, the government must be intimately involved in crafting the expressions funded by the checkoff. In another holding Defendants and Intervenors fail to discuss, *Johanns* explained "government speech" exists where "[t]he message set out … is from beginning to end the message established by the Federal Government." 544 U.S. at 560. Building on that, and also unaddressed in the response briefs, this Court stated the "government speech" analysis focuses on "the degree of 'editorial control' exercised by the government or private entities over the content of the speech" and "whether the government or the private entity bears the 'ultimate responsibility' for the content of the speech," among other considerations. *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964-65 (9th Cir. 2008).

These rules apply to *all* speech funded by the checkoff. Contrary to Defendants' and Intervenors' wishes, there is no principle that if the checkoff funds some "government speech," the remainder of expenditures need not also satisfy the requirements for "government speech." Ints.' Br. 44. The "government speech" doctrine does not constitutionalize half-baked measures. Indeed, *Johanns* invites beef producers to contest the constitutionality of "individual beef

advertisements." 544 U.S. at 565. Defendants and Intervenors point to this Court's statements that it should not "micro-manag[e]," but that principle was only applied *after* the court concluded the government possessed the necessary "authority to control both the activities and messages" generated, *i.e.*, each statement was "government speech." *Paramount Land*, 491 F.3d at 1011-12; *see also* R-CALF Br. 42-44.

Thus, while Defendants and Intervenors are correct *Paramount Land* raised no concern over an expenditure by a third party, that was not because third-party expenditures of checkoff funds do not need to be "government speech." Def. Br. 11, 18; Ints.' Br. 42. *Paramount Land* held the Pistachio Commission was engaged in "government speech" because the commission's expressions were "from beginning to end the message established by the state government." 491 F.3d at 1012. It then explained it was acceptable for the commission to hire a "political consultant" to "coordinat[e]" its activities because the consultant was carrying out "the Pistachio Commission's government relations activities." *Id.* at 1007. In other words, just as R-CALF argues must be true of the third-party expenditures funded by the state beef councils, *Paramount Land* held a third party could only use

checkoff funds if it puts that money towards activities that are shown to be "government speech."[1]

Defendants' and Intervenors' fallback arguments, that the few government interactions with the independent-third-party expenditures are sufficient to turn them into "government speech," have also been rejected. They argue the third-party expenditures should qualify as "government speech" because they comply with the Beef Act and its regulations. However, *Johanns* explained that the Beef Board and Committee were engaged in "government speech" because "Congress … set out the overarching message and some of its elements," *and* the Board and Committee members were "answerable to the Secretary" and "the Secretary exercise[d] final approval authority over every word." 544 U.S. at 561. The statutes and regulations were not sufficient.

This Court, considering another checkoff scheme, held the statutes and regulations there were only helpful in establishing "government speech" because they went "much further in defining" the necessary "message than the Beef Act" and it regulations. *Delano Farms*, 586 F.3d at 1228. Moreover, in *Delano Farms*

[1] It is also worth noting that the central question in *Paramount Land*, like every other case any party has identified concerning checkoff programs, was whether the "statutory scheme" was constitutional. 491 F.3d at 1005. That is, it presented a facial challenge. The instant case is the first one to examine an as-applied challenge, with other cases merely commenting on specifics as examples for their facial analysis. Therefore, Defendants' statement that additional courts have not "separately evaluated" individual payments is unavailing. Defs.' Br. 2.

the more comprehensive statute and regulations were only significant because they were combined with additional "greater" government controls than in the Beef Checkoff program. *Id.* at 1229. The program gave the government greater authority to select the people crafting the speech than the government possessed over the entities involved in the Beef Checkoff, and the government had greater access to those entities' records. *Id.*; *see also In re Tourism Assessment Fee Litig.*, 391 Fed. App'x 643, 646 (9th Cir. 2010) (unpublished) (Intervenors' authority explaining there was government control only because a legislative directive was combined with appointment and removal authority over speakers and the government's ability to review the speech).

Defendants and Intervenors further suggest that because *Paramount Land* held the Pistachio Commission was engaged in "government speech" because, among other controls, the government approved "an annual statement of contemplated activities," the state councils' transfers must fund "government speech" because they are listed in annual statements to the government. Defs.' Br. 24; *see also* Ints.' Br. 24. To the contrary, *Paramount Land* explained the annual statements there contributed to government control over the speech only because they gave the government enough information it effectively reviewed and approved each individual statement funded. The annual statements included "the themes to be emphasized, the actors to be used, the demographics to be targeted, []

the media to be employed" and even "the specific magazines in which the advertisements will run [and] note[d] the approximate timing of their publication." *Paramount Land*, 491 F.3d at 1011. The government's approval of something called a plan does not establish that payments outlined there are "government speech." The plan must be detailed enough that the government can review and approve the messages ahead of time.[2]

Here, the record unequivocally establishes the state councils' transfers to third parties, for the third parties' independent use, funds private, not government speech; thus the transfers are unconstitutional. Defendants concede the government's review of how the third parties will use the checkoff money is limited to its "review [of state councils'] budgets and marketing plans." E.R.98-99 (Defs.' RSUF ¶¶ 92-93); *see also* E.R.149 (Payne Decl. ¶ 38). Defendants state those plans only contain a "general description" of what will be funded. E.R.141 (Payne Decl. ¶ 23). Their example of such a description shows the government approving the North Carolina council's transfer of money to the private National Cattlemen's Beef Association Federation of State Beef Councils based on the

[2] Intervenors misleadingly suggest that the ability of beef producers to "request" a referendum to revoke the checkoff is a relevant form of government control." Ints.' Br. 32. However, in *Delano Farms*, on which Intervenors rely, the Secretary could effectively determine that a referendum would be conducted, unlike with the Beef Checkoff program. Even then, that government control was just one of numerous government controls that *Delano Farms* held needed to be combined for speech to be "government speech." 586 F.3d at 1228-29.

representation that the money would support "national domestic and foreign promotion, education, and research to reach the target audience." E.R.123 (Defs.' Ex. 50). As another example, the government also approved the Nebraska council's budget and plan to send $2,106,000 to that Federation for "efforts in stimulating markets and the use of beef." E.R.291 (Plf's. Ex. 21). Wholly unlike the annual statements in *Paramount Land*, these annual statements merely inform the government the money will be used for beef-related speech, nothing more.

In fact, the councils cannot say more about what expressions the transfers will fund. The third parties are informed by the state councils they can put the money towards any "purposes permitted by the [Beef] Act and [its regulations]" according to the third parties' own "budgets and programs." E.R.314 (state beef council "Investment Projection Forms," Plf. Ex. 28); *see also* E.R.107-08 (Defs.' RSUF ¶ 107, admitting same). The third parties do not need to report back how they will spend the money before using it. E.R.101 (Defs.' RSUF ¶ 96).

Accordingly, while Defendants complain that they should not be required to "review and approve each message," Defs.' Br. 24—despite this being a constant component of the "government speech" analysis—that rule need not be applied to hold these expenditures unconstitutional. Nothing about the speech produced through this process suggests it could be considered "from beginning to end" that of the government. The transfers lack any of the controls this Court has looked to

in the past. R-CALF Br. 35-41. Indeed, this case is exactly like what *Delano Farm* held was insufficient, with private entities being told they can spend the money in any manner consistent with the Beef Act and its regulations. 586 F.3d at 1228.

Seeming to recognize as much, Intervenors argue the third-party activities are not actually speech and therefore the First Amendment's restrictions do not apply. Ints.' Br. 45-46. At most this creates a dispute of fact, it is also false. The Supreme Court explained the checkoffs' statutory command that the money be spent on "promotion, research, consumer information, and industry information" means the objective of the checkoff is to develop "generic advertising," speech, and thus the program implicates the freedom of speech. *United Foods*, 533 U.S. at 408, 411-12; *see also* 7 U.S.C. § 2901(b) (providing this directive for the Beef Checkoff). Consistent with this, the description Defendants relied on to approve the transfers—that they will produce "promotion, education, and research to reach a target audience"—clearly shows the money is being put towards speech. *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The hallmark" of what is protected by the First Amendment is the "trade in ideas."). Moreover, the Court has explained producers' "compelled contributions" do not just amount to compelled speech, but compelled association with the entity receiving the money, which independently implicates the First Amendment. *United Foods*, 533 U.S. at 414-15.

In a moment of candor, Intervenors acknowledge that for the checkoff's exactions to be constitutional, USDA must have "control of all such expressive activities funded by the Beef Checkoff Program," even when the money is used by "private industry groups." Ints.' Br. 43 (cleaned up). Those controls do not exist over the activities funded through the councils' transfers to third parties. Therefore, the state councils turning over checkoff money to fund that speech is unconstitutional. *United Foods*, 533 U.S. at 410-13.

ii. Most of the "controls" Defendants and Intervenors point to do not exist over these expenditures.

Defendants and Intervenors spend a great deal of time detailing other government controls, but they do not apply to the money transferred to third parties for their independent activities. Specifically, Defendants and Intervenors describe:

- Some of the third parties who receive transfers may act as contractors for the Beef Board and the speech they produce pursuant to those contracts is subject to government control, Defs.' Br. 20-21; Ints.' Br. 45, including the government pre-approving the speech before it is issued, Ints.' Br. 11. But the transfers are not a contract for services with the councils or Beef Board. The third parties only need to provide "annual accounting" of how they spent the money, not obtain pre-approval for the speech they create. R-CALF Br. 20-22.
- The MOUs allow the government to "review and approve … the state councils[']" "plans, [] projects," contracts, and the materials produced through

those contracts for services. Defs.' Br. 21; Ints.' Br. 25. But, again, the transfers are for none of those things. The councils make clear the money can be spent pursuant to the third parties' "budgets and programs," not the councils' or government's direction, or contact terms. E.R.100-01, 106 (Defs.' RSUF ¶¶ 95-96, 104); *see also* E.R.149 (Payne Decl. ¶ 39, under MOUs government only reviews and approves third-party "deliverables" to state councils).

- The MOUs contain reporting and record keeping requirements that may allow the government to audit the state councils and their contractors. Defs.' Br. 22; Ints.' Br. 36-37. But, these requirements only cover the councils' "books and records" and the "transactions under the[ir] contract[s]" for services. E.R.247-251 (Plf's. Ex. 18, MOU). They do not apply to the transfers because the money is neither being spent by the council nor pursuant to a contract for services.
- Defendants can attend state council meetings to help supervise the councils' speech. Defs.' Br. 23; Ints. Br. 36. But those meetings need not discuss the transfers, which the government explains only need to be listed in the "budget and marketing plan[s]" described above. *See* E.R.149 (Payne Decl. ¶ 38).[3]

[3] As part of discussing the council meetings, Defendants state council members may join the organization to which they transfer money. Defs.' Br. 23. But they fail to explain how this provides any form of government control over the speech. Indeed, the government does not choose any of the councils' directors, staff, or representatives. E.R.88-89 (Defs.' RSUF ¶¶ 71-73).

- Defendants are authorized to investigate misuses of the checkoff and terminate a state council for violations of the statutes and regulations. Defs.' Br. 23; Ints.' Br. 31. But this authority only applies to "noncompliant" expenditures and these third-party transfers are authorized by the government and thereby compliant, Defs.' Br. 23; *see also* 7 U.S.C. § 2909 (providing investigatory authority).

Put simply, these lengthy discussions in Defendants' and Intervenors' papers are irrelevant to the question at hand: whether the councils' transfers to private third parties for speech of the third party's choosing are constitutional. The transfers are not constitutional because they do not fund "government speech," in no small part because they lack any and all of the controls described above.

iii. The unconstitutional transfers should be stopped.

Although the record establishes an ongoing First Amendment violation, Defendants argue the Court should decline to provide a remedy because sometimes the state councils provide third parties money that does not come from the checkoff. Defs.' Br. 27. It is unclear how this prevents relief. The third-party transfers of checkoff money could be declared unlawful, as R-CALF requested. R-CALF Br. 45-46. Moreover, an injunction prohibiting the government from approving the transfer of checkoff money to private third parties for their speech would remedy the violation without infringing on other transfers, which would not require government approval.

Further, under this Court's precedent an injunction should issue. It has held "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and undermines "the significant public interest in upholding free speech principles." *Klein*, 584 F.3d at 1208. In contrast, there is "no legally cognizable benefit from being permitted to further" carry out an unconstitutional activity. *Sanders Cty. Republican Cent. Comm.*, 698 F.3d at 749. Defendants acknowledge that if their position was adopted, producers would have to wait until after the money was unconstitutionally used and their rights are violated to challenge the payments. Defs.' Br. 27. Therefore, the independent-third-party expenditure of checkoff funds should be both declared unlawful and enjoined.[4]

[4] To the extent Defendants imply R-CALF is not entitled to this relief because it differs from what R-CALF requested in its Complaints, this is wrong. R-CALF set out to stop the state councils from funding private speech and requested all other relief that is properly connected to that end. E.R.417-19, 456-577 (Complaints). This request allows courts to enjoin any "applications" of the scheme ultimately uncovered and shown to be unlawful. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006); *see also Oregon Nat. Desert Ass'n v. United States Forest Serv.*, 957 F.3d 1024, 1032 n.7 (9th Cir. 2020). The very point of discovery is to determine how the alleged unlawful activity is occurring, and a party does not need to go back and amend its complaint to litigate the facts developed. *E.g.*, *Ellis v. Pennsylvania Higher Educ. Assistance Agency*, 2008 WL 5458997, at *9 (C.D. Cal. Oct. 3, 2008) ("[A] party need not amend his complaint to encompass all facts discovered during the course of a case.").

b. R-CALF is also entitled to an injunction to enforce the MOUs, which render the state councils' speech "government speech."

Defendants and Intervenors also contest R-CALF's entitlement to an injunction to ensure that when state councils use the checkoff to fund their own speech, they operate consistent with the MOUs. Here, their misdirection begins with the standard of review, claiming this Court must determine the district court abused its discretion in denying the injunction. Defs.' Br. 29; Ints.' Br. 48-49. But the district court did not weigh whether an injunction was warranted. *R-CALF V*, 449 F. Supp. 3d at 956-57, E.R.26-27. It determined no injunction was needed because the MOUs mooted R-CALF's entitlement to relief. While it recognized plaintiffs are entitled to an injunction if they identified a constitutional violation that could recur, it concluded the MOUs entered into this case after it began "irrevocably eradicated" the risk the councils would use the checkoff for their own private speech, so no relief could issue. *R-CALF V*, 449 F. Supp. 3d at 956-57, E.R.26. Mootness is reviewed *de novo*. *Fikre*, 904 F.3d at 1037.

On the merits, R-CALF has identified a continuing risk of First Amendment harm, which warrants an injunction. As Defendants recognize, the district court held "the state councils' use of checkoff funds" at the beginning of the case was unconstitutional; the state councils can only use the checkoff for their own activities because they are now subject to the MOUs. Defs.' Br. 28 & n.4. Defendants, however, have failed to carry their burden to show they will maintain

this policy change. Therefore, under this Court's case law, R-CALF is entitled to an injunction to prevent the risk the policy will be undone and the constitutional violation will be renewed.

McCormack v. Herzog, which neither Defendants nor Intervenors address, explains it is the government's obligation to establish its policy change moots an ongoing action, thereby avoiding a judicial remedy. 788 F.3d 1017, 1024 (9th Cir. 2015). The government must make "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

Defendants and Intervenors, however, do not attempt to meet that burden. They rely on "deference" to the government, Ints.' Br. 53, particularly the "presumption of regularity," Defs.' Br. 29. Yet, *McCormack* holds that "cannot overcome a court's wariness of applying mootness" doctrine. 788 F.3d at 1025. Moreover, it states the presumption of regularity is particularly weak where, as here, the policy change "seems timed" for the litigation rather than reflecting true reconsideration. *Id.* They also refuse to explain how the MOUs can be considered part of regular government process when they were issued without notice and comment and are inconsistent with preexisting regulations. R-CALF Br. 51-52.[5]

[5] Defendants assert R-CALF waived this issue, Defs.' Br. 29 n.5, but R-CALF has consistently pointed out that the MOUs are unlawful because they did not go through rulemaking. *E.g.*, R-CALF's Response to First Appeal, No. 17-35669,

While Defendants' and Intervenors' failure to carry their burden should be sufficient, the government's statements also affirmatively undermine the claim of mootness. In assessing whether relief is required, this Court has looked to whether the government has "repudiated" its past conduct. *McCormack*, 788 F.3d at 1025. Courts should examine whether there has been "unambiguous renunciation of [] past actions." *Fikre*, 904 F.3d at 1039. For instance, a government memorandum was only deemed sufficient to moot a case because, in addition to implementing a new policy, it "confessed" the changes were necessary under the law in a manner that was "unequivocal in tone." *Id.* (citing *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000)). Defendants' claim courts should not consider the "contingency" of backsliding, Defs.' Br. 29, comes from a case that states its rule does *not* apply where "a *defendant* attempts" to avoid relief, but only where the plaintiff voluntarily dismisses its claims with prejudice so that it is judicially barred from refiling, *Deakins v. Monaghan*, 484 U.S. 193, 200 n.4 (1988) (emphasis in original).

Here, rather than demonstrating they are committed to the MOUs, Defendants insist the state councils' use of the checkoffs is "government speech[] even in the absence of the [MOUs]" and thus the MOUs can be revoked at any time. Defs.' Br. 16 n.2; *see also* F.E.R.2 (Defendants' brief characterizing the

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2017 WL 4619162, at *39-40 (9th Cir. Oct. 13, 2017); F.E.R.4 (R-CALF's objections to district court); F.E.R.6 (R-CALF's summary judgment brief).

MOUs as a "voluntary," not "compelled" requirement). Intervenors argue the MOUs will be difficult to undo, not that they are permanent, by noting the state councils must agree with Defendants to revoke them. Ints.' Br. 52. However, Intervenors emphasize elsewhere that the government has "ultimate authority" because it can disband the councils, indicating the councils' agreement is *pro forma*. Ints.' Br. 32. Therefore, under this Court's case law it should act as if the MOUs are at risk of being revoked, which would renew the First Amendment violation.

This Court has held an injunction is required to prevent that risk of harm. *Klein*, 584 F.3d at 1208. Defendants assert that where there is a question of mootness an injunction cannot issue. Defs.' Br. 28. However, their authority says no such thing. It merely denied relief because it held the case moot. *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). For live claims, this Court has ordered an injunction to ensure a new policy remains in place. *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992); *see also United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct."). The same result should follow here, so Defendants cannot carry through on their suggestion they can return to the state councils expending the checkoff unconstitutionally.

c. Defendants have waived their ability to argue the "opt-out" procedure renders the checkoff constitutional, and, regardless, it does not.

Defendants point to the "opt out" procedure created following this litigation as salvaging the transfers to third parties. Defs.' Br. 26; *see also* Ints.' Br. 8. Under the Beef Checkoff program, "the default" is the state councils "may retain $0.50" of every $1 collected to distribute as they see fit. *R-CALF V*, 449 F. Supp. 3d at 948, E.R.6. However, in regulations promulgated in response to this case, Defendants authorized payers to "opt out" of funding the state councils and send all of their money to the federal-level Beef Board by submitting a request in each month they pay the checkoff. *Id.* (citing 7 C.F.R. §1260.172(a)(7)). At summary judgment, the district court, consistent with every prior decision in this matter, held that the ability to opt out does nothing to "remedy the compelled subsidy problem" because the default remains producers' money goes to the state councils. *Id.* at 957, E.R.27. As a result, it rejected Defendants' and Intervenors' objections to the Findings and Recommendations and held the First Amendment continues to govern. *Id.*

Neither Defendants nor Intervenors appealed the district court's ruling. Therefore, Defendants have waived their ability to rely on the new "opt-out" rule on appeal. Regardless, controlling authority establishes the "opt-out" scheme does not change the First Amendment violation.

This Court should not pass on Defendants' suggestion that the "opt-out" scheme renders the payments constitutional because it would "'lessen[]" the rights the appellate obtained below, which this Court has held can only occur through a cross-appeal. *Lee*, 245 F.3d at 1107. To hold the opt-out scheme cured any First Amendment concern would "lessen" the relief R-CALF obtained because the district court rejected Defendants' and Intervenors' objections to the Findings and Recommendations and held the First Amendment continues to apply, which in turn requires the councils to be subject to the MOUs. *See R-CALF V*, 499 F. Supp. 3d at 957, E.R.27. As a result, because they declined to cross appeal, the Court need not address the "opt-out" argument.

Moreover, the Supreme Court has expressly rejected Defendants' position on the merits. The Court held there is "no constitutional right" to obtain money for private speech, but there is one to decline to fund private speech, and therefore if money is going to be taken for private speech the "side whose constitutional rights are not at stake" must obtain consent *prior* to taking the money; it cannot place the burden on the payer to opt out. *Knox*, 567 U.S. at 321; *see also Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) ("a waiver [of First Amendment rights] cannot be presumed," therefore payers must "affirmatively consent" to funding private speech "before any money is taken from them"). *Knox* explained the Court had sometimes "permit[ted] unions to use opt-out rather than opt-in schemes" because

it believed unions served important social functions justifying the "substantial[] impinge[ment] upon the First Amendment" the "opt-out" process created. 567 U.S. at 321. However, it continued, "[t]he general rule," of "opt in," "should prevail" in most instances. *Id.* This "general rule" is clearly applicable to the checkoffs, which the Supreme Court held serve no legitimate governmental function and thus fail every level of First Amendment scrutiny. *See United Foods*, 533 U.S. at 415.

Lest there be any doubt that payers must "opt in" before the checkoff is used for private speech, *Knox* cited *United Foods* as support for the rule that if government compelled exactions could be used for private speech the payers must first provide "affirmative consent." *Knox*, 567 U.S. at 322 (alterations omitted) (citing *United Foods*, 533 U.S. at 411). Elsewhere Defendants recognized this holding establishes that where there are "compulsory subsidies for private speech—even [] relatively mundane commercial speech like mushroom advertising" paid for by the Mushroom Checkoff, those payments are subject to *Knox*'s "opt-in" rule. Amicus Brief of the United States in *Janus v. AFSCME*, No. 16-1466, 2017 WL 6205805, at *5 (U.S. Dec. 6, 2017) (citing *Knox*, 567 U.S. at 309-10).

The authority Defendants cites to support "opt-out" schemes in fact does the opposite. *Fleck v. Wetch* addresses bar association dues. 937 F.3d 1112 (8th Cir. 2019). The Supreme Court has explained those dues, unlike the checkoffs, serve

"legitimate" governmental interests entitling them to greater First Amendment leeway. *See United Foods*, 533 U.S. at 415. Nonetheless, the Eighth Circuit only upheld the payments in *Fleck* because it determined the payers "affirmatively consented" to them. 937 F.3d at 1118.

In sum, the opt-out scheme does not render any of the checkoff payments constitutional, and, regardless, Defendants and Intervenors have waived this argument.

d. R-CALF has standing in all the states at issue.

Finally, Defendants seek to renew an argument they made to the Magistrate, but failed to raise before the district court, that R-CALF lacks standing to challenge the state councils' uses of checkoff money in three of the fifteen states at issue. *R-CALF V*, 449 F. Supp. 3d at 949 (explaining only Intervenors objected to Magistrate's standing determination), E.R.9. Yet, R-CALF plainly has standing given the Magistrate's findings, which must be taken as true at this point. *Robbins v. Carey*, 481 F.3d 1143, 1146 (9th Cir. 2007) (failure to object to factual findings waives fact dispute).

As Defendants note, R-CALF asserts organizational standing to challenge these three state councils' distribution of checkoff funds. "An organization has direct standing to sue when it shows a drain on its resources from both a diversion

of its resources and frustration of its mission" due to the alleged unlawful act. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (cleaned up).

Defendants claim that R-CALF lacks standing because "lobbying activities" can never amount to such a diversion of resources. Defs.' Br. 10. Assuming that is a correct statement of law, the Magistrate explained, "R-CALF has diverted 60 percent of its resources to attempting to educate producers" on the misuses of checkoff funds, which detracts from all of its other mission-driven work. *R-CALF IV*, 2020 WL 2477662, at *2, E.R.35. Education, not lobbying, that undermined its other activities constitutes R-CALF's diversion of resources establishing its injury-in-fact. The en banc Ninth Circuit has explained an organization spending "time and resources" on "meet[ings]" with impacted individuals that keeps it from other "core organizing activities" is a diversion of resources that establish standing. *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 943; *see also Valle del Sol Inc.*, 732 F.3d at 1018 (9th Cir. 2013) ("divert[ing] resources to educational programs" established standing).[6]

Defendants also claim that because R-CALF "work[s] against the Beef Checkoff" in other contexts, any efforts related to the checkoff cannot establish standing. Defs.' Br. 14. Wrong. As Defendants' case explains, because R-CALF

[6] For these reasons too, Defendants' assertions that R-CALF's expenditures are "litigation costs" or that this suit merely seeks to vindicate R-CALF's "value[s]" rather than protect it from having to divert resources is baseless. Defs.' Br. 14-15.

"altered [its] resource allocation" in response to the unlawful conduct that is an injury-in-fact, particularly because R-CALF established this detracts from its other work. *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019). Whether R-CALF was already engaged on the issue is of no moment; the increased diversion of resources to a matter is an injury. For example, organizations dedicated to "safeguarding voter rights" "diverted resources" establishing their standing when they "expended resources to locate and assist [] members to ensure [] they were able to vote." *Arcia*, 772 F.3d at 1341-42.

Indeed, Defendants' cases demonstrate organizational standing requires an organization to show it diverted resources on an issue that *falls within* its mission. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010). Defendants' case law denied standing because the plaintiff did not establish it expended resources on matters that "implicate[d] or frustrate[d] [its] mission,"' and thus the court held the expenditures were a "manufactured" injury. *United Poultry Concerns*, 743 Fed. App'x at 131.

The Magistrate explained R-CALF's mission is not specifically to challenge checkoffs, but to "protect[] domestic, independent cattle producers." *R-CALF IV*, 2020 WL 2477662, at *3, E.R.35. Taking on the unconstitutional use of the checkoff furthers this end, but would not have been necessary absent the misconduct. *Id.* at *2-3. Therefore, the lower court found the unconstitutional

conduct drove R-CALF to undertake activities it would not have otherwise, detracting from its other work. *Id.* at *2, E.R.35. That is an actionable injury-in-fact.

IV. CONCLUSION.

For the foregoing reasons, this Court should reverse and remand for entry of the necessary declarations and injunctions: (i) preventing the state councils from transferring checkoff money to private third parties for their independent use; and (ii) prohibiting the state councils from using the checkoff on their own unless they are complying with the terms of the MOUs.

November 20, 2020

Respectfully submitted,

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net

William A. Rossbach
ROSSBACH LAW, P.C.
401 North Washington St.
Missoula, MT 59807-8988
(406) 543-5156
bill@rossbachlaw.com

J. Dudley Butler
BUTLER FARM & RANCH LAW GROUP, PLLC
499-A Breakwater Dr.
Benton, MS 39039
(662) 673-0091
jdb@farmandranchlaw.com
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,985 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).

Date: November 20, 2020

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Plaintiff-Appellant

ADDENDUM

TABLE OF CONTENTS

7 U.S.C. § 2901(b)

It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this chapter shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2909

The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this chapter or to determine whether any person subject to this chapter has engaged or is about to engage in any act that constitutes or will constitute a violation of this chapter, the order, or any rule or regulation issued under this chapter. For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. The attendance of witnesses and the production of records may be required

from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of the person and the production of records. The court may issue an order requiring such person to appear before the Secretary to produce records or to give testimony regarding the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Process in any such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.