IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, *Plaintiff*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, and SONNY PERDUE, in his official capacity as Secretary of the United States Department of Agriculture, *Defendants*.	Case No. 1:20-cv-02552-RDM **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

REGULATIONS

OTHER AUTHORITY

*Pursuant to Local Rule 7(a) requesting counsel identify those cases on which counsel chiefly relies.

INTRODUCTION

Defendants ("USDA") admit their Memoranda of Understanding ("MOUs") substantively amended the federal Beef Checkoff program, adding new requirements for how the state beef councils[1] operate. Defs.' Brief in Supp. of Mtn. to Dismiss, Dkt. No. 11-1, at 5; *see also* Plf.'s Complaint, Dkt. No. 1, ¶¶ 11-16. Such substantive amendments to an existing regulatory structure must go through the notice-and-comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553; Dkt. No. 1, ¶¶ 71-81. Thus, the MOUs should be held "unlawful and set aside" as "arbitrary, capricious" and "without observance of procedure required by law." 5 U.S.C. § 706; Dkt. No. 1, ¶¶ 22, 26, 71-81, 83-89.

Rather than correct such plain violations, USDA raises purported procedural barriers to Plaintiff Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF")'s reaching the merits. USDA seems to believe the Beef Checkoff program can *only* produce First Amendment harms to R-CALF's members, so that if it is unlawfully administered it cannot produce any other injury-in-fact. However, USDA's own authority *Humane Society of the United States v. Perdue*, 935 F.3d 598 (D.C. Cir. 2019) ("*Humane Society*"), recognizes that the checkoffs can produce economic injuries to the producers who are required to fund them; in *Humane Society* the court merely determined that injury was not proven at summary judgment, which does nothing to undermine R-CALF's ability to plead such a harm.

Moreover, in addition to and separate from any injury to its members, R-CALF can establish standing by showing an injury to the organization itself, because it diverted resources as a result of USDA's unlawful MOUs. *People for the Ethical Treatment of Animals v. U.S. Dep't. of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Havens Realty Corp. v. Coleman*, 455

[1] Also referred to as "qualified state beef councils" or "QSBCs."

U.S. 363, 379 (1982)). USDA seeks to dispute this standing by once again relying on arguments only appropriate at summary judgment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (cleaned up). It insists "[t]he MOUs do not in any way impinge on R-CALF's ability" to operate, a fact question. Dkt. No. 11-1, at 12. Because R-CALF has plead exactly that, by alleging it diverted resources to counteract the harm to its organizational interests caused by the MOUs, R-CALF has alleged standing, and the case can proceed on this basis alone.

USDA also complains that R-CALF did not raise this Administrative Procedure Act challenge in a prior First Amendment challenge to the program, but this Circuit's precedent establishes that claim preclusion "does not preclude claims based on facts not yet in existence at the time of the original action." *Drake v. FAA*, 291 F.3d 59, 66-67 (D.C. Cir. 2002); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (surveying the court of appeals and explaining they consistently limit claim preclusion to events that predate "the filing of the initial complaint"). The facts giving rise to the system-wide regulatory change to the Beef Checkoff program R-CALF challenges here did not come into existence until years after R-CALF originally filed its First Amendment challenge in Montana. Indeed, while *some* of the MOUs that R-CALF challenges here arose during the course of the Montana litigation, others were not executed until after the final summary judgment briefing was filed, and yet others were not at issue at all in that case.

Thus, even had R-CALF been required to go back and amend its original complaint to add any later developed potentially related claim (and it was not), the Montana case would not

preclude this action because the two do not meaningfully overlap. There can be no claim preclusion where the cases concern "different rights, allege[] different injuries, and arise[] from different facts." *I.A.M Nat'l Pension Fund, Benefit Plan A v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 949 (D.C. Cir. 1983). There, R-CALF alleged First Amendment harms brought about by the expenditures of certain state councils. The terms of the MOUS were placed at issue by the government after the case was underway to try to moot that action. Here, R-CALF alleges APA violations due to USDA's systemic unlawful changes that caused distinct individual and organizational injuries, and concerns numerous MOUs with state beef councils not at issue in that litigation and the administrative record (or lack thereof) that was entirely irrelevant to the merits of the First Amendment claim. The government's decision to amend the checkoff program through promulgating MOUs throughout the nation (without notice and comment) as a response to R-CALF's narrower First Amendment challenge does not allow it to evade a separate APA challenge.

While USDA may be aggravated that the MOUs it entered into in response to a constitutional challenge violated the APA so that it must take additional steps before it can rely upon them, this frustration is no grounds for dismissal.

ARGUMENT

I. R-CALF Has Standing on Behalf of its Members and Itself

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528

U.S. 167, 180-81 (2000). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*. at 181. Separate from standing on behalf of its members, an association can independently assert standing on behalf of itself because "[t]he United States Supreme Court has made plain that a 'concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests' and thus suffices for standing." *People for the Ethical Treatment of Animals*, 797 F.3d at 1093 (alterations in original) (quoting *Havens Realty Corp.*, 455 U.S. at 379). "At the pleading stage," courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim" of standing. *Lujan*, 504 U.S. at 561.

A. R-CALF's Members Are Injured by the MOUs and USDA's Failure to Follow the Procedural Requirements of the APA, which Provides R-CALF Standing to Represent its Members' Interests.

i. R-CALF did not need to name members in its complaint.

USDA's initial attack on R-CALF's member standing is not an attack on standing at all, but rather a formalistic assertion that R-CALF had to provide the legal name of the members it will rely on for standing in its complaint, Dkt. No. 11-1, at 9-10; this is something that is actually accomplished through disclosures and discovery and has no basis in the liberal pleading requirements. Indeed, this argument is a favorite of federal government defendants and has been explicitly rejected by other courts in this district. Surveying the case law, another judge in this court explained "[c]ases in this district suggest that a plaintiff—association must *identify* injured parties at the pleading stage, not necessarily that they be *named* in the complaint." *Am. Ass'n of*

Cosmetology Sch. v. Devos, 258 F. Supp. 3d 50, 68 (D.D.C. 2017) (emphasis in original). "To conclude that an individual member must be *named* to ensure that it is identified is unwarranted." *Id.* (emphasis in original); *see also id.* ("These cases do not require a plaintiff to specifically *name* an injured member in the complaint so long as it is identified.") (emphasis in original).

It is undisputed that R-CALF has "identified" its members who are injured. It has described their membership status and the nature of their injuries. Dkt. No. 1, ¶¶ 2, 6, 27, 36, 38-40. It merely has not met Defendants' absurd heightened pleading requirement that it provide personal identifying information for each harmed member in its Complaint. R-CALF proceeded precisely as the case law required.

Any other rule would be wholly inconsistent with the Supreme Court's statements that "general factual allegations of injury resulting from the defendant's conduct may suffice," as courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561; *see also Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19, 31 (D.D.C. 2012) (collecting cases and explaining the legal names of members is for "successive stages of the litigation"); *Fraternal Order of Police Library of Cong. Labor Comm. v. Library of Cong.*, 692 F.Supp.2d 9, 14 (D.D.C. 2010) (same).

USDA's authority is not to the contrary. *Public Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6 (D.D.C. 2018), concerned a case in which the plaintiffs moved for summary judgment and thus were required to produce evidence establishing standing. That decision explained that where the plaintiffs had an evidentiary burden to prove standing if they then failed to "identify a specific member who has suffered or who is likely to suffer, an injury" they have not carried their burden. *Public Citizen, Inc.*, 297 F. Supp. 3d at 18-19. There, neither the complaint nor multiple member declarations the plaintiffs submitted contained facts sufficient to identify that the

members had suffered or were likely to suffer an injury. *Id*. at 18. Nothing in this decision indicates that an association's members must be named in the complaint. *See id*. Instead, the issue was whether there were facts sufficient to *identify* a member that had a substantial likelihood of being harmed by the defendant's action. *Id*. at 18-19. R-CALF discusses how the complaint identifies its members' economic injuries below in Section I(A)(iii) of this brief.

Regardless, R-CALF, through counsel, represents here that its members David and Nicole Pfrang are independent ranchers in the state of Kansas who are injured as alleged in the complaint. When a complaint "call[s] for review of uniform, system-wide regulations that affect [regulated parties] the same," an "association need only identify a single member who has standing." *Friends of the Earth, Bluewater Network Div. v. U.S. Dep't of Interior*, 478 F.Supp.2d 11, 16 (D.D.C. 2007).[2]

Therefore, should the Court believe R-CALF had to name members to proceed, it should allow R-CALF to amend to add these names. *See Rudder v. Williams*, 666 F.3d 790, 796 (D.C. Cir. 2012) ("unless the claimant cannot possibly win relief … [j]ustice requires that a plaintiff be afforded the opportunity to refine his allegations without losing forever the right to litigate his claims on the merits") (citing Fed. R. Civ. Pro. 15(a)(2)). However, in order to thwart continued

[2] This principle renders USDA's attack on R-CALF's member standing on a state-by-state basis unavailing. Dkt. No. 11-1, at 11, n.3. As R-CALF alleged in its complaint, "the amendment to the statutory and regulatory scheme—while promulgated through separate documents—amended the administration of the federal Beef Checkoff program writ large." Dkt. No. 1, ¶ 64. Moreover, because USDA refused to file a copy of the index of the Administrative Record with their motion, as required by Local Civil Rule 7(n)(1), Dkt. No. 11-1, at 3, n.1, the number and identity of the state beef councils USDA has entered into MOUs with is information uniquely in the possession of USDA. R-CALF would need that information in order to produce the identity of a member in each state where USDA entered into an MOU, even if it was required to identify more than one member (and it is not). Thus, any dismissal of R-CALF's claims on a state-by-state basis would be premature, even if this Court were to reject the holding in *Friends of the Earth, Bluewater Network Div.*, 478 F. Supp. 2d at 16.

attempts by government defendants to baselessly raise the pleading standards, the Court should follow the other case law in this district and hold organizations need not *name* members in a complaint, which would preserve the federal rules' liberal pleading standard. Fed. R. Civ. Pro. 8.[3]

ii. The MOUs do not need to bind R-CALF's members to produce an injury.

USDA's next claim is that because the MOUs "do not bind R-CALF or affect the conduct of R-CALF and its members in any way," they *cannot* produce an injury to R-CALF's members. Dkt. No. 11-1, at 9. The idea that the MOUs need to bind or otherwise directly regulate R-CALF or its members' behavior to produce an injury ignores black letter law. In *Sierra Club v. EPA*, the D.C. Circuit found the plaintiff had standing on behalf of its members who could be exposed to hazardous air pollutants because they alleged the government's standards were arbitrarily and capriciously insufficient. 699 F.3d 530, 532-33 (D.C. Cir. 2012). "[S]uch a challenge presents a clearly redressable injury: some [of the plaintiff's] members unquestionably live within zones they claim are exposed to [hazardous air pollutants], and [] vacatur will require [the agency] … to entertain and respond to the [plaintiff's] claims about the necessary scope and stringency of the standards." *Id.* at 533. That neither the organization nor its members were bound by the standards was irrelevant.

USDA's authority simply does not speak to whether an agency action can harm individuals beyond those it directly regulates. In *Cherry v. FCC* the court held the plaintiff's injuries were not "attributable" to the specific agency action at issue. 641 F.3d 494, 498 (D.C. Cir. 2011). That factual determination does not support the broad, illogical argument USDA

[3] R-CALF reserves its rights to file declarations and other exhibits at the summary judgment stage from the members named here or any additional R-CALF members as necessary in order to "prove[]" its standing allegations. *Lujan*, 504 U.S. at 561-562.

makes here that an injury can *never* been attributed to agency action unless the agency declares that the person is subject to the agency action.

iii. R-CALF's members are harmed by the MOUs.

Turning to the heart of the matter, USDA claims that R-CALF is not injured by the MOUs because "R-CALF raises no First Amendment claim and therefore asserts no First Amendment injury based upon speech with which it disagrees." Dkt. No. 11-1, at 10.[4] But it does not follow that a plaintiff seeking to establish a violation of the APA's notice-and-comment procedures needs to separately raise a First Amendment claim, or that the APA violation can only be actionable if it produces a First Amendment harm.

Indeed, the Complaint makes clear the MOUs are causing R-CALF's independent rancher members injuries other than First Amendment harms. R-CALF explains its members are suffering economic injuries stemming from the state beef council's administration of the Beef Checkoff program under the procedurally deficient MOUs. *E.g.*, Dkt. No. 1, ¶ 6.[5] In fact, the complaint alleges R-CALF's members are suffering two different types of economic injuries, each of which independently provides R-CALF associational standing: (i) the unlawful administration of a checkoff program is a recognized economic injury in and of itself; and (ii) the particular administration created by the MOUs yet further economically harms R-CALF's members. Such harms are regularly understood to establish an injury-in-fact. *Carpenters Indus.*

[4] USDA, correctly, does not dispute R-CALF has plead the other elements of associational standing: (i) that the interests at stake in this action are germane to R-CALF's organizational purpose, *e.g.*, Dkt. No. 1, ¶¶ 3, 28-29, 31-32; and (ii) that R-CALF's members' individual participation in this litigation is not required, *e.g.*, *Hunt v. Washington State Apple Advert. Comm'*, 432 U.S. 333, 343 (1977).

[5] To the extent on reply USDA attempts to portray R-CALF's allegations as vague, once again, courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561.

Council v. Zinke, 854 F.3d 1, 5 (D.C. Cir. 2017) (Kavanaugh, J.) ("[a] dollar of economic harm is still an injury-in-fact for standing purposes" when brought about by agency action); *Alfa Int'l Seafood v. Ross*, No. 1:17-CV-00031 (APM), 2017 WL 1906586, at *1 (D.D.C. May 8, 2017) (if plaintiffs can show a "financial benefit[]" from "vacating the Rule" then they have standing) (cleaned up).

Focusing on the first type of economic injury, the Beef Checkoff program was expressly designed to "strengthen the beef industry's position in the marketplace" and thereby improve the "welfare of beef producers" like R-CALF's members. 7 U.S.C. § 2901. Beef producers are required to finance the program through an assessment of $1 per head of cattle sold, which the government splits between two entities, the federal-level Beef Board and the state beef council (assuming a council exists in the state). 7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(2). The money then must be spent on a "program of promotion and research designed to strength[en] the beef industry[]." 7 U.S.C. § 2901(b). In other words, through the Beef Checkoff the government imposes a targeted assessment on a particular set of producers in order to create "advertising" that is meant to benefit those producers financially. *United States v. United Foods, Inc.*, 533 U.S. 405, 413-15 (2001) (describing the Mushroom Checkoff program); *see also Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 558 (2005) (explaining the Beef Checkoff is "very similar" to the Mushroom Checkoff).

Given this structure, where the government compels a discrete set of individuals to fund a program purportedly for their benefit, a court within this district recently explained that payers into that program have a financial interest in its proper administration and thus suffer an economic injury-in-fact if it is not properly administered. *Resolute Forest Products, Inc. v. United States Department of Agriculture* concerned a challenge to the "Softwood Lumber

Checkoff Order" that like the Beef Checkoff imposed a "mandatory assessment[] [on] all manufactures and importers of [the] given commodity." 130 F. Supp. 3d 81, 85 (D.D.C. 2015). The plaintiff alleged that the "rulemaking process was rotten to the core," *id*., and the court determined that because the rulemaking related to a program designed to financially benefit the plaintiff (that like here was financed by the plaintiff) if the rulemaking was invalid the plaintiff was suffering a financial injury-in-fact, providing it standing. *Id*. at 90. "Resolute's injury-in-fact is straightforward: it has been paying assessments under the Order, which it claims is unlawful." *Id*.

This holding follows directly from the Supreme Court's discussion in *United Foods*, which concerned the Mushroom Checkoff program that operated essentially identically to the Beef Checkoff. There, the Court acknowledged that those who pay into a checkoff , whose "business and livelihood" depend on the operation of the program, have a unique, cognizable interest in the administration of the program. 533 U.S. at 410. Where there is a targeted tax meant to financially benefit a particular group, the payers of the tax have standing to challenge how that money is being used because they necessarily have a financial interest. R-CALF and its members have such an interest and are suffering such an injury because they pay into the checkoff and it is being unlawfully administered. Dkt. No. 1, ¶¶ 6, 17, 19, 36-38, 66-69.

To rebut this basis for standing, USDA relies on *Humane Society*, but there, the standing analysis did not focus on the plaintiff's right to the proper administration of the checkoff program, but on whether the unlawful administration of the program caused harms "from lost sales and diminished production." 935 F.3d 598, 603 (D.C. Cir. 2019). In passing, the court noted that to the extent the plaintiff was alleging a harm from the administration of the program he only established a generalized grievance not any particular right. *Id.* at 604. Indeed, it noted to

the extent he alleged he was deprived of a "statutory entitlement to lawful promotions" to benefit his business he failed to show any lost benefit. *Id.* at 603.

Particularly at this pleadings stage, R-CALF does not suffer the same fate. Unlike in *Humane Society*, R-CALF lays out how its members have a particularized concrete interest in the administration of the Beef Checkoff. *E.g.* Dkt. No. 1, ¶¶ 43, 45. USDA cannot contend that R-CALF is precluded from raising this injury-in-fact because a different plaintiff failed to substantiate it in a different case concerning a different Checkoff program. Indeed, R-CALF details the economic benefits that it believes would result from the proper administration of the program. It explains that the unlawful MOUs allow for state beef councils to create advertisements that encourage consumers to purchase beef regardless of its origin, when consumers would otherwise prefer domestic products like those raised by R-CALF's members. Dkt. No. 1, ¶¶ 6, 37. Thus, R-CALF cannot be said to fall into the trap of *Humane Society*, particularly when it has not yet been provided the opportunity to substantiate its claims.

However, even if the Court were to disagree, *Humane Society* also makes clear R-CALF can establish another sort of financial injury to its members. There the D.C. Circuit held that a payer into a checkoff *can* allege an "economic injury" by showing the challenged activity "diminished [his] return on investment" or "reduced [his] bottom line." *Humane Society*, 935 F.3d at 602-03. *Humane Society* concluded that at summary judgment the plaintiff failed to show those injuries because he only produced a "one-page declaration" that "says little." *Id*. at 603. In contrast, taking the allegations in the complaint as true, as the Court must, R-CALF has plead that it is suffering the injuries which encompass those recognized in *Humane Society*. It explains that the money taken and used by the state councils due to the MOUs goes to promote "consolidation in the beef industry," which drives down prices and thereby financially "threatens

independent ranchers" who cannot benefit from the economies of scale and depend on higher market rates. Dkt. No. 1, ¶¶ 30, 37. That the specific plaintiff in *Humane Society* produced no evidence at the close of discovery does not prevent R-CALF from pleading those same harms. Indeed, that the court let that case reach summary judgment indicates R-CALF's allegations are entitled to the same outcome here.

USDA returns to its argument that R-CALF's members would have to pay the checkoff regardless of the MOUs, Dkt. No. 11-1, at 13-14, but the case law it cites to make this suggestion does not diminish R-CALF's alleged injury, but rather goes to whether that injury is caused by the MOUs and can be redressed through this action. Moreover, that authority is not on point and R-CALF's members' financial injuries are traceable to the MOUs and redressable through this case.

For example, *Scenic America, Inc. v. United States Department of Transportation*, concerned whether the plaintiff—at summary judgment—demonstrated vacatur would redress its injuries and the court determined it "cannot assume, without more," that vacating the action at issue "would eliminate or lessen" the conduct that injured plaintiffs. 836 F.3d 42, 52 (D.C. Cir. 2016). There, the issue was that the plaintiff could not demonstrate that the regulated party "would behave any differently" if the court were to vacate the action at issue. *Id*. The plaintiff "simply assume[d], without any proof, that [the regulated party] will revert to its pre-Guidance position as soon as the Guidance is invalidated." *Id.* Here, R-CALF has alleged the MOUs are causing a program in which it has a vested financial interest to be unlawfully administered and in particular that the MOUs are undermining the financial benefit to which R-CALF is entitled and producing a financial harm. Dkt. No. 1, ¶¶ 8, 16, 55-56, 59-63. Without the unlawful MOUs the challenged unlawful administration of the program would disappear. Further, at least some of the

state councils—and as discussed more below the court must assume potentially all the councils—would not be able to use the money in the ways that produce the financial injuries, at the very least lessening the harm to R-CALF's members. *See R-CALF v. Perdue*, 449 F. Supp. 3d 944, 951 (D. Mont. 2020) (MOUs are all that allow the challenged state councils to operate).

USDA's other authority, *Renal Physicians Ass'n v. Dep't of Health and Human Servs.*, 422 F. Supp. 2d 75, 85 (D.C. Cir. 2006), involves a circumstance where redressability was not possible because the agency had already "[rung] the bell" by informing the public of certain rate calculations it had determined yielded fair market value. That issue is not present here. USDA could stop unlawfully administering the program and providing money to entities that harm R-CALF's members.

Indeed, traceability and redressability are particularly strong here because—although USDA refuses to acknowledge these rules—where, as here, a party alleges a procedural violation, courts "'relax the redressability and imminence requirements' of standing." *Center for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017). In such cases, the standing inquiry is "whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury." *Id.* at 183. For causation, "[a]ll that is necessary is to show that the procedural step was connected to the substantive result." *Id*. at 184; *see also id.* ("the party seeking to establish standing need not show that but for the alleged procedural deficiency the agency would have reached a different substantive result."). For redressability, all a plaintiff need show is that if the agency had followed the proper procedures in making its decision, it "*could* reach a different conclusion." *Id*. at 185 (emphasis in original).

Here, R-CALF meets these standards because the MOUs are the but-for cause of its members' harm. That USDA entered into the MOUs without going through the notice-and-

comment process is clearly connected to the substantive result. After all, "the very purpose of" the "notice and comment process" is to ensure "interested parties the opportunity to participate in rulemaking" so that "the agency has before it all relevant information." *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (citing *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995). Had R-CALF and its members had the opportunity to comment and put before the agency all the relevant information, USDA *could* have reached a different decision, including one that did not result in economic injuries to R-CALF's members.

An "examination of the alternatives" the agency could have selected, which is appropriate for the traceability and redressability analysis for procedural violations, *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014), confirms as much. Among other things, rather than entering into the MOUs with the state beef councils USDA *could* have fixed the constitutionality of the Beef Checkoff by amending the program to eliminate the involvement of the councils in administering Checkoff funds altogether. Dkt. No. 1, ¶ 69; *see also id.* ¶¶ 18, 38, 68 (listing alternative and/or additional reforms to the program that would protect R-CALF's members' interests better than the MOUs); *see also Mendoza*, 754 F.3d at 1012 (comparing selected rule to numerous other options the agency could have selected to determine traceability and redressability). This is all that is needed to establish traceability and redressability for R-CALF's economic injuries.

Finally, the discussion of R-CALF's economic injuries above reveals that USDA's argument R-CALF is relying on a mere "procedural right in vacuo" is a red-herring. Dkt. No. 11-1, at 13. The authority on which USDA relies stands for the proposition that if a plaintiff points to the fact that it has "been denied the ability to file comments" and nothing more it lacks standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). As USDA's case law

explains, where a procedural requirement was "designed to protect some threatened concrete interest" then a plaintiff can challenge the failure to follow procedure; it merely must show that it has a more specific interest than the "general interest … common to all members of the public" that the government act lawfully. *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996). R-CALF has done so in multiple ways.

iv. R-CALF's standing allegations are not inconsistent with its prior positions.

Finally, contrary to USDA's contentions, Dkt. No. 11-1, at 14-16, R-CALF's standing here is not inconsistent with its prior positions. *See generally R-CALF v. Perdue*, No. CV-16-41-GF-BMM-JTJ (D. Mont. filed May 2, 2016). To start, that the court in Montana found the terms in the MOUs that gave USDA greater controls over the state beef councils and thereby rendered their speech "government speech" (exempting them from First Amendment scrutiny) does not mean that the MOUs were issued in compliance with the APA. Indeed, USDA admits they are not, and instead states that it intends to argue (wrongly) at "the summary judgment phase," that the MOUs "are not 'agency action' or 'rules' of the type required to conform to notice-and-comment procedures." Dkt. No. 11-1, at 3. Therefore, any statements R-CALF may have made regarding the MOUs' ability or inability to cure the violation at issue in the Montana case do not speak to the unlawful conduct at issue here.

Consistent with this, that R-CALF and its members explained they secured a victory for their First Amendment rights through the MOUs, leading them to file for attorney's fees, has no bearing on the issues presented here. R-CALF can have succeeded on its constitutional claim, entitling it to fees, and nonetheless be differently injured through a different set of violations, as R-CALF alleges here.

R-CALF's appeal requesting "an injunction enshrining the provisions of the MOUs,"

Dkt. No. 11-1, at 15 (citing R-CALF's Brief on Appeal, *R-CALF v. Perdue*, No. 20-35453 (9th Cir., filed Aug. 31, 2020, Dkt. No. 11), is no different. That request is merely a means to ensure R-CALF and its members' injuries stemming from violations of the First Amendment do not reoccur because, for example, the government and the state beef councils decide to terminate the MOUs.[6] It does nothing to suggest that the MOUs satisfy the APA or that R-CALF's members are not suffering a different injury than their prior First Amendment injury due to the MOUs' existence. Nor would the injunction requested in the other case cover all the state councils at issue in this suit, as the Montana case only addresses a subset of the state councils that have entered into the MOUs. That R-CALF maintains that USDA's actions in entering into the MOUs benefited its members in some respects and harmed them in other respects is not an example of inconsistent litigation positions.

* * *

In summary, R-CALF has standing on behalf of its members who have suffered economic injuries connected to USDA's violations of the APA, which could be redressed by vacatur. USDA's arguments to the contrary rely on ignoring the procedural posture of this case, misapplying the law, and distorting the facts.

B. R-CALF Itself Is Injured by the MOUs and USDA's Failure to Follow the Procedural Requirements of the APA

Even if this Court disagrees that R-CALF's members' economic injuries are sufficient to

[6] R-CALF seeks the controls USDA has over the state beef councils be made permanent because in the Montana litigation the district court found that the state beef councils do not conduct "government speech" in the absence of the MOUs. *R-CALF*, 449 F. Supp. 3d at 951; *see also* Dkt. No. 1, ¶¶ 59-63. That is, but-for the authority USDA has over the councils from terms contained in the MOUs, the councils' speech would violate R-CALF's members' First Amendment rights. *See id*. R-CALF's claim was that the MOUs did not moot the First Amendment harm and thus an injunction was still required to fully protect the First Amendment rights. *R-CALF*, 449 F. Supp. 3d at 956-57.

support standing, R-CALF has standing separately and independently because the organization is injured by the APA violations at issue here. *See People for the Ethical Treatment of Animals*, 797 F.3d at 1093 (an organization has standing on behalf of itself if it alleges a "concrete and demonstrable injury to [its] activities—with the consequent drain on [its] resources.") (quoting *Havens Realty Corp.*, 455 U.S. at 379). When an organization alleges standing on behalf of itself, courts ask "first, whether the agency's action or omission to act 'injured the organization's interest' and, second, whether the organization 'used its resources to counteract that harm.'" *Id*. at 1094 (alterations omitted) (quoting *Equal Rights Center v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011)).

R-CALF has more than adequately alleged "that the USDA's []action injured its interests." *Id*. R-CALF's mission is to ensure the continued viability of independent, domestic cattle producers. Dkt. No. 1, ¶ 28. It accomplishes its mission through advocacy and education efforts, including by educating ranchers and consumers about positions that will increase the profitability of independent, domestic ranchers. *Id*. (listing examples such as educating and advancing (a) rigorous import standards to protect the domestic cattle herd from foreign animal diseases, (b) country-of-origin labeling that will allow consumers to more easily select domestic beef, and (c) trade and marketing policies that advantage domestic producers). Unfortunately, R-CALF also must work against programs that threaten independent, domestic ranchers, including the Beef Checkoff program. *Id*. ¶ 29. In particular, since 2010, R-CALF has determined as a priority that it must work to stop the use of checkoff funds by state beef councils which frequently use speech to promote corporate consolidation within the beef industry, which harms R-CALF's members' financial interests. *Id*. ¶¶ 29-30. The MOUs implicate that interest. *Id*. ¶¶ 30, 35. Again, but-for the MOUs, at least certain state beef councils would not be allowed to

continue to use Checkoff funds to produce speech harmful to R-CALF's interests, and had the MOUs been properly noticed-and-commented they might have eliminated the state councils altogether. *Id*. ¶¶ 8, 16, 55-56, 59-63; *R-CALF*, 449 F. Supp. 3d at 951.

Just as clear, is that R-CALF "has expended resources to counteract [its] injuries" caused by the MOUs. *People for the Ethical Treatment of Animals*, 797 F.3d at 1094. In the past, R-CALF has seen its resources drained by as much as 60% due to its efforts to counteract injuries to these same interests. Dkt. No. 1, ¶ 33. Due to USDA entering into the MOUs at issue, R-CALF has seen a consequent drain on the organization's resources. *Id*. ¶ 35. For instance, R-CALF has added to its presentation materials to consumers and ranchers information regarding how the MOUs allow for state beef councils to funnel money obtained through producer assessments to third party organizations that promote consolidation (such as the National Cattlemen's Beef Association and the United States Meat Export Federation). *Id*. Likewise, R-CALF has diverted resources to educate ranchers and the public on the MOUs' failure to ensure the state beef councils remain accountable to ranchers. *Id*. In addition, R-CALF has produced social media videos, advocated on radio programs, and allotted time during its annual convention to counteract the speech of the state beef councils and educate ranchers and consumers about how the MOUs were unlawfully promulgated and fail to prevent the state beef councils from generating pro-corporate speech that is inherently harmful to independent producers. *Id*.

In sum, R-CALF alleges the MOUs harmed its interests and created a consequent drain on its resources, which is a financial injury-in-fact stemming from the agency action that impacts its interest, providing R-CALF organizational standing. The MOUs have subjected R-CALF to operational costs far beyond those it would otherwise expend educating its members and the public about (and advocating for reform of) the Beef Checkoff program. There is no doubt these

resources would not have been spent on this work, and instead would have been directed towards its efforts to promote independent ranchers through other means, but-for the MOUs. *E.g. id*. ¶ 28. Again, but-for the MOUs state beef councils could not retain independent ranchers' assessments nor use those assessments for speech at all. *R-CALF*, 449 F. Supp. 3d at 951; *see also* Dkt. No. 1, ¶¶ 59-63. Therefore, absent the MOUs R-CALF would have no need to speak on the state councils' activities. R-CALF certainly would not have had to discuss the unlawful promulgation of the MOUs had USDA gone through notice-and-comment. *Id*. ¶ 35.

In this manner, R-CALF's standing allegations look no different than what has long been accepted in this Circuit. As then-Judge Ruth Bader Ginsburg explained, "advertising" harmful to an organization's interests that "impel[s] the organization[] to devote resources to check or neutraliz[e] the ads' adverse impact," thereby "require[ing] them to devote more time, effort, and money to endeavors designed to educate" consumers about the harmful representations, is sufficient for organizational standing. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27-29 (D.C. Cir. 1990). Here, R-CALF has not only had to put money toward "education" efforts that counteract the advertising the MOUs allowed to occur, but also that addressed the lawfulness of the MOUs themselves.

Many of USDA's arguments to the contrary simply retread their assertions about R-CALF's members' standing by arguing "the MOUs do not impose any requirements whatsoever on R-CALF's members, and there is therefore no need to educate its members about its requirements." Dkt. No. 11-1, at 13. Again, this misses the point: the MOUs harm R-CALF's organizational interests, and R-CALF used its resources to counteract that harm. Whether the MOUs impose requirements on R-CALF itself or its members is not part of the analysis.

Neither is it relevant that USDA characterizes R-CALF's diversion of resources as a

"choice" or "voluntary." *Id*. at 11. As this Circuit has previously made clear, the organizational standing analysis does not depend "on the voluntariness or involuntariness of the plaintiffs' expenditures." *Equal Rights Center*, 633 F.3d at 1140. Instead, courts in this circuit look to whether the plaintiff "undertook the expenditures in response to, and to counteract," the impact of the defendant's alleged unlawful conduct. *Id*. "While the diversion of resources to litigation or investigation in anticipation of litigation does not constitute an injury in fact sufficient to support standing, [a plaintff's] alleged diversion of resources to programs designed to counteract the injury to its interest" is "such an injury," and nothing more is required. *Id.*

Here, USDA's unlawful conduct—failing to notice-and-comment the MOUs and otherwise exercise reasoned decision making in their issuance—resulted in R-CALF taking educational and advocacy efforts to address the unlawfulness of the MOUs and counteract the harms to its interests created by them (e.g., the speech of the state beef councils that runs directly adverse to its interests of ensuring the vitality of independent ranchers). After all, taken to its logical conclusion, an agency could always say it is not their fault that an organization *chose* to take steps to counteract its unlawful behavior. If that were the case, there would be no organizational *Havens* standing.

Nearly every case USDA cites involves a plaintiff who failed to allege that their educational or advocacy efforts subjected the organization "to operational costs beyond those normally expended." Dkt. No. 11-1, at 12 (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919-21 (D.C. Cir. 2015); *id*. (citing *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (stating the same)). But R-CALF has alleged the exact opposite, that it took steps in response to the unlawful MOUs it would not have otherwise taken. *E.g.*, Dkt. No. 1 ¶ 35. USDA does not claim that R-CALF would otherwise educate consumers

and the public about the MOUs or the pro-corporate speech of the state beef councils. Instead, it states the Beef Checkoff program would still exist and "R-CALF therefore presumably [would] continue[] to educate its members about its activities with respect to the national program." Dkt. No. 11-1, at 12. This line of reasoning does not follow R-CALF's standing allegations. R-CALF's allegations of organizational standing all relate to a drain on resources to counteract the unlawful MOUs and speech of the state beef councils not the national program administered by other entities not subject to the MOUs, the Beef Board and Beef Commission.

The only other authority USDA relies on involves a plaintiff who failed to allege its injury was "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by a favorable court decision." *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011). Specifically, there the problem was the plaintiff following a trial "failed to *demonstrate* that [the defendant's] treatment of elephants 'contribut[es] to the public misimpression, particularly in young children, that bullhooks and chains are lawful and humane practices,'" which was the organization's only purported interest. *Id*. at 28. In other words, where the plaintiff bore an evidentiary burden it failed to show that the defendant's conduct "foster[ed] a public impression" it was required to counteract and expend resources. *Id*. at 27.

It is not even clear how USDA presumes this case has any bearing on the present matter. Once again, this case is at the pleadings stage. As explained above, the allegations tie the expenditures to the challenged conduct. Moreover, it bears repeating that for a procedural violation such as this, but which was not at issue in *American Society for the Prevention of Cruelty to Animals*, traceability and redressability requirements are "relax[ed]." *Center for Biological Diversity*, 861 F.3d at 183-85. The plaintiff must merely show that the injury could be

redressed by the suit if it were provided an opportunity to comment. *Id.* R-CALF has alleged different results that USDA could have reached that would not result in the organizational injury alleged (e.g., had USDA instead eliminated the involvement of the state beef councils altogether, Dkt. No. 1, ¶ 69).

Finally, USDA's suggestion that educational expenses cannot establish injury in this Circuit, Dkt. No. 11-1, at 13, is wrong. *See Spann*, 899 F.2d at 27-29. All that is needed is that those educational expenses subject the organization to operational costs beyond those normally expended. *Id*.; *see also Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir.2012) (finding standing at summary judgment based on plaintiff's statements that it "investigated Roommate's alleged violations and, in response, started new education and outreach campaigns targeted at discriminatory roommate advertising."). Such a drain on an organization's resources is a financial injury, which constitutes far more than simply a setback to R-CALF's social interests and is an actionable injury-in-fact. *Havens Realty Corp*., 455 U.S. at 379. Thus, R-CALF has more than met the standards required to establish standing on behalf of itself.

II. R-CALF'S CLAIMS ARE NOT BARRED BY CLAIM PRECLUSION

USDA also argues that R-CALF's APA challenge is barred by claim preclusion because of R-CALF's prior First Amendment Litigation in Montana. Dkt. No. 11-1, at 16-19. This is false, as the two cases concern entirely different claims based on an entirely different set of facts. The standard for whether a subsequent lawsuit is barred by claim preclusion is "if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Nat. Res. Def. Council*, 513 F.3d at 260; Dkt. No. 11-1, at 16 (citing

same). "Whether two cases implicate the same cause of action turns on whether they share the same 'nucleus of facts.'" *Apotex, Inc. v. Food & Drug Admin*., 393 F.3d 210, 217 (D.C. Cir. 2004) (quoting *Drake*, 291 F.3d at 66). The answer to these questions turns on "'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Id*. (quoting *I.A.M Nat'l Pension Fund*, 723 F.2d at 949, n.5). Of particular relevance, and in fact outcome determinative here, claims cannot be based on the same nucleus of facts if the later brought claim depends on facts that were "not yet in existence at the time of the original action." *Drake*, 291 F.3d at 66-67; *see also Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984) (plaintiff "obviously could not have asserted claims based on facts that were not yet in existence").

USDA does not even claim that the MOUs existed prior to R-CALF filing its First Amendment lawsuit in Montana. This is because USDA entered into MOUs over the course of many years and only *after* an initial summary judgment motion in which the Magistrate determined the speech of the state beef councils was unconstitutional without them. *E.g. R-CALF v. Perdue*, No. CV-16-41-GF-BMM-JTJ (D. Mont. filed May 2, 2016), Dkt. No. 45-1 (first MOU entered into with the Montana Beef Council 11 days after the Magistrate issued its initial Findings and Recommendations). And all but one of the MOUs were entered after the district court affirmed the Magistrate's ruling *and* the Ninth Circuit affirmed that ruling. *Id.*, Dkt. No. 91-1, Ex. 18 (additional MOUs entered into after the Ninth Circuit's affirmance of the preliminary injunction). Yet more MOUs were entered into after a second round of summary judgment briefing and argument. *Id*., Dkt. Nos. 133-1 & 134-1 (more MOUs entered into with state beef councils in Vermont and Maryland after the Magistrate's final hearing on summary

judgment and more than a year after the lawsuit was expanded to encompass those councils). Because there is no administrative record and this case concerns a broader number of states than the Montana case it may be that yet more relevant MOUs were entered into subsequently. R-CALF is alleging USDA created a nationwide rule for which it failed to notice-and-comment. At the very least, that was not clear until years into the Montana litigation and long after it had entered into its first MOU with the Montana Beef Council. Thus, USDA's contention that "R-CALF could easily have raised these APA challenges to the MOUs" in its prior litigation, Dkt. No. 11-1, at 18, is wrong and certainly R-CALF was not required to do so. *Drake*, 291 F.3d at 66-67.

In an attempt to argue around this, USDA suggests that R-CALF could have raised their APA challenges with their supplemental pleading in the prior litigation, Dkt. No. 11-1, at 18. However, unlike amendments, such pleadings, do not seek to raise new claims, but merely to "set[s] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented," but does *not* seek to amend the cause of action. Fed. R. Civ. P. 15(d).[7] Moreover, ironically, at the time USDA complained that the supplemental pleading represented a "drastic expansion of this case that … would unfairly prejudice defendants … [by] transform[ing] a case about the operation of the beef checkoff program in a single state … into a broad, fourteen-state challenge." *R-CALF v. Perdue*, No. CV-16-41-GF-BMM-JTJ (D. Mont. filed May 2, 2016), Dkt. No. 57, at 11. Even if this had been an amended pleading (which it was not), and even if R-CALF could be required to add to its initially filed cause of action because of USDA's later

[7] USDA refers to this as a "supplemental amended complaint," Dkt. No. 11-1, at 18, but that is misleading. It was always styled as a supplemental pleading, not an amended pleading. The supplemental pleading was merely amended after USDA objected to its filing because yet more new information came to light.

conduct (which it was not) USDA cannot show that all of the MOUs establishing this systemic change to the Beef Checkoff program, Dkt. No. 1, ¶ 64, were in effect at the time of the supplementation. In other words, the facts did not even exist at the time of supplementation to bring the claim brought here.

Moreover, even if this were not enough to show claim preclusion does not apply here, the "two causes of action differ in that each asserts different rights, alleges different injuries, and arises from different facts," which prevents claim preclusion. *I.A.M Nat'l Pension Fund*, 723 F.2d at 949. The claims in the Montana lawsuit did not encompass any examination of USDA's compliance with the APA in entering into the MOUs and the government produced no administrative record in that case.[8] That is, the prior litigation solely concerned whether the speech of the state beef councils—both prior to and after USDA entered into a subset of the MOUs at issue here—constituted "government speech" exempt from the First Amendment.

USDA's arguments that claim preclusion still applies rests on a false dichotomy: "R-CALF tries to have it both ways, either it alleges standing based on a purported First Amendment injury because this case is simply a retread of its challenge to the Beef Checkoff Program in the District of Montana, or this case is a completely separate challenge to the MOUs alone and R-CALF lacks standing because the MOUs do not injure it." Dkt. No. 11-1, at 17. But R-CALF's allegations reveal that this case *is* a completely separate challenge to the MOUs alone, *and*, as

[8] USDA's claim that the administrative record in this case "would presumably contain documents that R-CALF already received in discovery in Montana," Dkt. No. 11-1, at 19, must refer to a handful of the MOUs USDA produced in discovery in addition to those it filed in the court docket well after summary judgment had been fully briefed and argued before the magistrate. At minimum, to litigate R-CALF's claims, USDA will be required to produce every MOU it has entered into with the state beef councils, including with councils in states that were not part of the Montana litigation. This is in addition to any other documents USDA will produce in its administrative record, documents R-CALF ostensibly did not receive in the previous case.

demonstrated above, R-CALF has standing because both it and its members *are* injured by the MOUs in distinct manners from the injuries at issue in the Montana litigation.

And none of USDA's authority supports a finding of claim preclusion. In *Natural Resources Defense Council*, the court looked at what constitutes a prior litigation "involving the same claims or cause of action." 513 F.3d at 260. In that case, the plaintiff challenged "the same two EPA decisions that it challenged in the previous case." *Id*. at 261. The plaintiff argued claim preclusion did not apply because in its previous lawsuit it had "limited its claim to a *Chevron* 'step one' argument …, while it now claims that EPA violated its duty to give reasonable construction of governing statutes under *Chevron* 'step two.'" *Id*. The court acknowledged that the two arguments were "subtly different," but determined "claim preclusion precludes the relitigation of *claims*, not just *arguments*." *Id*. (emphasis in original). This case establishes R-CALF would not be permitted to refile its First Amendment lawsuit with the only difference being the addition of new arguments for why the program violates the First Amendment. However, this case provides no support for USDA's argument that R-CALF's First Amendment claims are the same as its APA claims. Likewise, the case does not address a set of facts where a defendant takes actions after a lawsuit is filed that give rise to a separate cause of action.

Again, while R-CALF understands that it might be frustrating to USDA that in solving one of their problems they have created another, this frustration is no basis to deny jurisdiction in this case and is certainly no excuse for USDA's repeated attempts in their brief to cast aspersions on R-CALF and its counsel. *See, e.g.*, Dkt. No. 11-1, at 1 (referring to R-CALF's efforts to vindicate it and its members' rights as "R-CALF's most recent sortie"); *Id*. at 9 (referring to R-CALF's efforts to vindicate it and its members' rights as "continued contentious litigation").

CONCLUSION

For the foregoing reasons, this Court should deny USDA's motion to dismiss R-CALF's complaint.

Dated this 18th day of December 2020.

Respectfully submitted,

PUBLIC JUSTICE, P.C.

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