FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA, a Montana Corporation, *Plaintiff-Appellant*, v. THOMAS VILSACK, in his Official Capacity as Secretary of Agriculture; 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*.	No. 20-35453 D.C. No. 4:16-cv-00041-BMM OPINION

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Argued and Submitted June 10, 2021
Portland, Oregon

Filed July 27, 2021

Before: Kim McLane Wardlaw, Richard C. Tallman, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz

SUMMARY*

Beef Promotion and Research Act/Government Speech

The panel affirmed the district court's summary judgment in favor of federal defendants and state intervenor defendants in an action brought by the Ranchers-Cattlemen Action Legal Fund challenging certain mandatory assessments on cattle sales imposed by federal law that are used to fund advertisements for beef products.

The Beef Promotion and Research Act of 1985 imposes a $1 assessment, or "checkoff," on each head of cattle sold in the United States to fund beef consumption promotional activities. Defendant, the Secretary of Agriculture, oversees the beef checkoff program. Intervenor defendants, the Montana Beef Council and other qualified state beef councils (QSBCs), receive a portion of the checkoff assessments to fund promotional activities and may direct a portion of these funds to third parties for the production of advertisements and other promotional materials. The Ranchers-Cattlemen Action Legal Fund's (R-CALF)

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

members include cattle producers who object to their QSBCs' advertising campaigns.

In 2016, during the pendency of prior litigation, the Secretary entered into memoranda of understanding (MOUs) with QSBCs which granted the Secretary pre-approval authority over, among other things, any and all promotion and which allowed the Secretary to decertify a noncompliant QSBCs, thereby terminating its access to checkoff funds. Under the MOUs, the Secretary must pre-approve all contracts to third parties and any resulting plans or project. But QSBCs can also make noncontractual transfers of checkoff funds to third parties for promotional materials which do not need to be pre-approved. Plaintiffs and intervenors contend that the distribution of funds under these arrangements is an unconstitutional compelled subsidy of private speech.

The panel first held that plaintiff, R-CALF had associational standing to sue the twelve QSBCs to which its members pay checkoffs. The panel further held that R-CALF also had direct standing to sue in states where its members did not pay checkoffs because the beef checkoff program affected its mission of protecting domestic, independent cattle producers.

The panel held that the speech generated by the third parties for promotional materials was government speech and therefore exempt from First Amendment scrutiny. Noting that this case was similar to *Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d 1003 (9th Cir. 2007), and *Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219 (9th Cir. 2009), the panel stated that under the MOUs, the QSBCs must submit for pre-approval by the Secretary any and all promotion, advertising, research, and

consumer information plans and projects and any and all potential contracts or agreements to be entered into by the QSBCs for the implementation and conduct of plans or projects funded by checkoff funds. The QSBCs must also submit an annual budget outlining and explaining anticipated expenses and disbursements and a general description of the proposed promotion, research, consumer information, and industry information programs contemplated. Promotional campaigns by the QSBCs and contracted third parties subject to the Secretary's pre-approval were therefore plainly government speech.

The panel additionally held that third-party speech not subject to pre-approval was also effectively controlled by the government. The panel noted that, as in *Paramount Land*, the message sent out in the promotions was firmly established by the federal government. Moreover, in addition to its oversight over promotional materials, the government also had the authority to control speech by the unquestioned control of the flow of assessment funds to the QSBCs—and the threat of decertification under the MOUs and federal regulations if the Secretary disapproved of the use of those funds.

The panel affirmed the district court's denial of a permanent injunction requiring the continuation of the MOUs. The panel held that under these circumstances, the MOUs were an entrenched change in the prior status quo, and the district court did not err, in the absence of any evidence that the Secretary intends to withdraw from the MOUs, in declining to enter a permanent injunction requiring him not to.

COUNSEL

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Tyler Lobdell and Tarah Heinzen, Food & Water Watch, Washington, D.C., for Amici Curiae Food & Water Watch, Dakota Rural Action, Family Farm Action Alliance, Farm and Ranch Freedom Alliance, Institute for Agriculture and Trade Policy, Iowa Citizens for Community Improvement, Rural Advancement Foundation International USA, and Western Organization of Resource Councils.

OPINION

HURWITZ, Circuit Judge:

This case involves a challenge by the Ranchers-Cattlemen Action Legal Fund ("R-CALF") to mandatory assessments on cattle sales imposed by federal law used to fund advertisements for beef products. The Montana Beef Council ("MBC") and other qualified state beef councils ("QSBCs") receive a portion of the assessments to fund promotional activities and some of these QSBCs direct a portion of these funds to third parties. The dispositive question is whether the speech generated by the third parties is government speech and therefore exempt from First Amendment scrutiny. The district court so held and entered summary judgment against R-CALF. We affirm.

I

A

The Beef Promotion and Research Act of 1985 ("Beef Act") imposes a $1 assessment, or "checkoff," on each head of cattle sold in the United States to fund consumption promotions to "maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. §§ 2901(b), 2904(8)(C). The Secretary of Agriculture oversees the beef checkoff program through the Cattlemen's Beef Promotion and Research Board (the "Beef Board"), whose members the Secretary appoints. *Id.* § 2904(1).[1] A QSBC typically collects the checkoff, retaining 50 cents to

[1] The Beef Board elects ten members to the Beef Promotion Operating Committee; a federation of QSBCs elects the other ten members. 7 U.S.C. § 2904(4)(A). The Operating Committee develops promotional campaigns for the Beef Board. *See* 7 U.S.C. § 2904(4)(B).

fund state marketing efforts, and forwarding the remainder to the federal program. *Id.* § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3). Producers may, however, opt out of funding their QSBC and direct the entire assessment to the federal program. *See* Beef Promotion and Research, 84 Fed. Reg. 20,765, 20,766–67 (May 13, 2019).

Since 2016, the Secretary, through the Agricultural Marketing Service ("AMS"), has entered into memoranda of understanding ("MOUs") with QSBCs. The MOUs grant the Secretary pre-approval authority over "any and all promotion, advertising, research, and consumer information plans and projects." The Secretary also reviews and approves the QSBCs' budgets and marketing plans, which detail their anticipated expenses and disbursements, and government officials can participate in QSBC board meetings at which promotional and funding decisions are made. The MOUs allow the Secretary to decertify a noncompliant QSBC, thereby terminating its access to checkoff funds.

Using checkoff funds, QSBCs can hire private third parties to produce advertisements and other promotional materials. Some engagements involve contracts. Under the MOUs, the Secretary must pre-approve all contracts and any plans or projects developed under them. The parties agree that third-party speech generated pursuant to these contracts is government speech.

But QSBCs can also make noncontractual transfers of checkoff funds to third parties to produce promotional materials. Materials produced by this funding method need not be pre-approved. Recipients of these transfers must identify their expenditures in an "annual accounting" and abide by the principles of the Beef Act—promoting beef without being unfair, deceptive, or political. The primary

issue on appeal is whether speech made by third parties under these arrangements is effectively government speech.

B

R-CALF's members include cattle producers who object to their QSBCs' advertising campaigns. R-CALF first challenged the checkoff program in 2016, alleging that the distribution of funds to the MBC under the federal program is an unconstitutional compelled subsidy of private speech. While that litigation was pending, the MBC entered into an MOU with the Secretary. Without considering the MOU, the district court entered a preliminary injunction preventing the use of checkoff funds for promotional campaigns absent the producers' consent. A divided panel affirmed the preliminary injunction; the majority expressly declined to consider the effect of the MOU. *R-CALF v. Perdue*, 718 F. App'x 541, 542 n.1 (9th Cir. 2018). The dissent opined that the MOU "plainly grants the Secretary complete pre-approval authority over 'any and all promotion, advertising, research, and consumer information plans and projects' of the MBC," and therefore would have vacated the preliminary injunction. *Id.* at 543 (Hurwitz, J., dissenting) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005)).

On remand, R-CALF amended its complaint to seek relief against fourteen additional QSBCs, all of which had MOUs with the Secretary. Four QSBCs and three producers intervened to defend the program. The district court granted summary judgment to the Secretary and intervenors, adopting a magistrate judge's proposed findings of fact and conclusions of law.

The district court found that R-CALF had standing to sue. But it concluded that the MOUs gave the Secretary

sufficient control over the promotional program to make the QSBCs' speech—and the speech of third parties they paid—effectively government speech. It also rejected R-CALF's request for an injunction to ensure the Secretary continues to enforce the terms of the MOUs. R-CALF timely appealed.

II

We agree with the district court that R-CALF has associational standing to sue the twelve QSBCs to which its members pay checkoffs. But R-CALF concedes that it lacks such standing to challenge the use of checkoff funds by QSBCs in states where none of its members pay checkoffs—Hawaii, South Carolina, and Vermont. Thus, R-CALF must establish direct standing to sue those three QSBCs.

"[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). "Of course, organizations cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all, but they can show they would have suffered some other injury had they not diverted resources to counteracting the problem." *Id.* (cleaned up); *see also Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154–55 (9th Cir. 2019) (collecting cases).

R-CALF's mission includes "protecting domestic, independent cattle producers." R-CALF uses some 60% of its resources to educate producers on the use of checkoff funds by QSBCs. The beef checkoff program affects that mission and R-CALF has devoted (and continues to devote) resources, independent of expenses for this litigation, to deal

with the program that might otherwise be used in support of that mission. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) (spending "time and resources" to "meet" with impacted individuals that kept from other "core organizing activities" established standing); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) ("divert[ing] resources to educational programs" established standing). Moreover, if R-CALF did not pursue this litigation, the QSBCs would have continued to use funds in a way that would frustrate R-CALF's organizational mission by allegedly "promot[ing] corporate consolidation in the beef industry." *See E. Bay Sanctuary*, 993 F.3d at 663. We therefore find that R-CALF has direct standing to pursue this litigation against the three QSBCs to which none of its members pay checkoffs.

III

A

The critical question in determining whether speech is public or private is whether the speech is "effectively controlled" by the government. *Johanns*, 544 U.S. at 560. In *Johanns*, the Supreme Court upheld the federal portion of the beef checkoff program against a compelled-speech attack because "the government sets the overall message to be communicated and approves every word that is disseminated." *Id.* at 562. *Johanns* "emphasized three overlapping aspects" of the federal program: (1) "Congress directed the establishment of the program itself, including its promotional activities," (2) "Congress and the Secretary specify the general content of the promotional campaigns," and (3) "the Secretary 'exercises final approval authority over every word used in every promotional campaign.'" *Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d

1003, 1009–10 (9th Cir. 2007) (quoting *Johanns*, 544 U.S. at 560–61, 563); *see also Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1226–27 (9th Cir. 2009) (identifying the same factors).

Applying the *Johanns* factors, this Court has twice issued opinions upholding mandatory assessment programs against First Amendment attacks.[2] *Paramount Land* refused to enjoin as unconstitutional a California statute providing subsidies from assessments on pistachio sales to the California Pistachio Commission because the State had specified the overall goal of the program—to promote pistachio sales—and exercised control over messaging. 491 F.3d at 1010–12. The Commission, comprised of nine members, only one of whom was named by the State, was required to submit to the State for concurrence "an annual statement of contemplated activities . . . including advertising, promotion, marketing research, and production research." *Id.* at 1010 (quoting Cal. Food & Agric. Code § 69051(q)). Noting that the State had "less control" over the Commission than the Secretary exercised over the Beef Board, the *Paramount* panel nonetheless concluded that "[t]o draw a line between these two approaches to oversight risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." *Id.* at 1011–12.

Delano Farms upheld similar compulsory assessments on California table grape growers, citing a state legislative directive that went "much further in defining the Commission's message than the Beef Act" along with the

[2] In an unpublished decision, this Court also upheld mandatory assessments on rental car transactions. *See In re Tourism Assessment Fee Litig.*, 391 F. App'x 643, 645–46 (9th Cir. 2010).

State's power to appoint and remove all California Table Grape Commissioners. 586 F.3d at 1225, 1228, 1230. The Court reached this conclusion despite recognizing that the statute did "not *require* any type of review by the [State] over the actual messages promulgated by the Commission." *Id.* at 1229.

B

This case is similar to *Paramount Land* and *Delano Farms*. Under the MOUs, QSBCs must submit "for pre-approval" by the Secretary "any and all promotion, advertising, research, and consumer information plans and projects"[3] and "any and all potential contracts or agreements to be entered into by [QSBCs] for the implementation and conduct of plans or projects funded by checkoff funds."[4] QSBCs must also submit "an annual budget outlining and explaining . . . anticipated expenses and disbursements" and a "general description of the proposed promotion, research, consumer information, and industry information programs contemplated." *See Paramount Land*, 491 F.3d at 1010 (noting that the Pistachio Commission must submit "an annual statement of contemplated activities . . . including advertising, promotion, marketing research, and production research" (quoting Cal. Food & Agric. Code § 69051(q))). Failure to comply can lead to de-certification of the QSBCs by the Secretary. This establishes, as in the federal program, "final approval authority over every word used in every promotional campaign." *Johanns*, 544 U.S. at 561.

[3] QSBCs have submitted thousands of approval requests to the AMS. For example, the Texas QSBC has made more than 650 submissions, and it may take days or weeks before a final product is approved.

[4] In 2018 and 2019, the AMS reviewed about 155 QSBC contracts.

Promotional campaigns by QSBCs and contracted third parties subject to the Secretary's pre-approval are therefore plainly government speech.

Third-party speech not subject to pre-approval is also "effectively controlled" by the government. Congress expressly contemplated the participation of third parties in the beef checkoff program, designating several "established national nonprofit industry-governed organizations" with whom the Operating Committee could contract to "implement programs of promotion." 7 U.S.C. § 2904(6).[5] The Supreme Court upheld that program despite recognizing the presence of "assistance from nongovernmental sources in developing" advertising. *Johanns*, 544 U.S. at 562.

Paramount Land vacated a preliminary injunction in a similar program despite the Pistachio Commission's use of funds from assessments to pay "a political consultant who hires lawyers to represent the industry before the International Trade Commission and the Commerce Department, and to lobby government entities on behalf of the pistachio industry." 491 F.3d at 1007. We treated the third-party speech as that of the Commission because the "message set out in the pistachio promotions is from

[5] Most of the third-party funding goes to two advocacy organizations—the Federation Division of the National Cattleman's Beef Association ("Federation") and the United States Meat Export Federation ("USMEF")—with established relationships with the Beef Board. Congress gave the Federation an express role in the beef checkoff program, authorizing it to elect members of the Operating Committee, 7 U.S.C. § 2904(4)(A), and directing the Operating Committee to "enter into contracts or agreements . . . with established national nonprofit industry-governed organizations, including the federation . . . to implement programs of promotion, research, consumer information, and industry information," 7 U.S.C. § 2904(6).

beginning to end the message established by the state government." *Id.* at 1012 (cleaned up).

Here, too, the message is firmly established by the federal government. The Beef Act's implementing regulations require that all third-party speech "strengthen the beef industry's position in the marketplace," and not mention "brand or trade" names, engage in "unfair or deceptive acts or practices," or seek to influence "governmental policy or action." 7 C.F.R. § 1260.169(a), (d), (e). QSBCs must submit annual budget and marketing proposals for the Secretary's approval that contain "anticipated expenses and disbursements" and "a general description of the proposed promotion . . . programs contemplated." In addition, the QSBCs must give the Secretary advance notice of all board meetings, allowing participation by the Secretary or his designees in any discussions about payments to third parties.[6]

R-CALF argues that such safeguards are insufficient because the government does not exercise final pre-approval authority over some third-party speech. But in *Paramount Land*, we found dispositive the government's *ability* to control speech, even when it declined to do so. *See* 491 F.3d at 1011–12. Here, the Secretary clearly has that authority. In addition to the oversight previously mentioned, the Secretary has unquestioned control of the flow of assessment funds to the QSBCs—and the threat of decertification under the MOUs and the regulations if he disapproves of the use of those funds. *See* 7 C.F.R. § 1260.181(a) (providing for certification, and, impliedly, decertification of QSBCs by

[6] Defendants also argue that the opt-out scheme cures any First Amendment concern. Because we hold that the government effectively controls the speech at issue, we do not reach this issue.

the Beef Board); *see also id.* § 1260.213 (providing for the removal of Beef Board members by the Secretary). "Just as 'the Secretary of Agriculture does not write the copy of the beef advertisements himself' for the Beef Board, neither should such oversight be required for the [] scheme to pass constitutional muster." *Paramount Land*, 491 F.3d at 1012 (quoting *Johanns*, 544 U.S. at 560) (cleaned up). A contrary holding here "risks micro-managing legislative and regulatory schemes, a task federal courts are ill-equipped to undertake." *Id.* at 1012.[7]

We therefore affirm the summary judgment of the district court.

IV

Even if the underlying summary judgment is affirmed, R-CALF nonetheless argues that the district court should have entered a permanent injunction requiring the continuation of the MOUs to prevent the risk that the current policy will be undone. The district court determined that no

[7] R-CALF also argues that the QSBCs must have at least some members appointed and removable by the Secretary for the speech to constitute government speech. But the Secretary's ability to decertify a QSBC—which has been previously exercised—provides even greater oversight than the limited removal authority this Court has cited in other cases. *See Delano Farms*, 586 F.3d at 1229 (noting the State's power to remove individual members of the Table Grape Commission and to recommend that producers suspend the Commission's operation); *Paramount Land*, 491 F.3d at 1011 (noting that while the Secretary cannot remove members of the Pistachio Commission, she may "suspend or discharge the Commission's president if he has engaged in any conduct that the Secretary determines is not in the public interest," or "correct or cease any existing activity or function that is determined by the [S]ecretary not to be in the public interest or in violation of the Pistachio Act") (cleaned up).

injunction was needed because the MOUs mooted R-CALF's entitlement to relief and no exception to mootness applied.

"It is well-established . . . that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case' unless 'it can be said with assurance that there is no reasonable expectation that the alleged violation will recur' and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (cleaned up) (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). The government receives greater deference than private parties when courts analyze voluntary cessation. *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (collecting cases). But the government "must still demonstrate that the change in its behavior is entrenched or permanent." *Fikre*, 904 F.3d at 1037 (cleaned up). It must be "absolutely clear to the court, considering the procedural safeguards insulating the new state of affairs from arbitrary reversal and the government's rationale for its changed practices, that the activity complained of will not reoccur." *Id*. at 1039 (cleaned up).

The government has met that burden here. To be sure, the MOUs are revocable. And, the Secretary entered into the first MOU only after the magistrate judge recommended a preliminarily injunction in this case. But, over five years have now passed since the Secretary first entered into the MOUs to document the Department's control of the use of checkoff funds—including with QSBCs not named in this litigation. *See Am. Diabetes Ass'n*, 938 F.3d at 1153 (finding two years of policy weighs in favor of mootness). And the MOUs remain binding unless both parties agree to rescind

them, providing safeguard from arbitrary reversal. *See Fikre*, 904 F.3d at 1039. Under these circumstances, the MOUs are an "entrenched" change in the prior status quo, and the district court did not err, in the absence of any evidence that the Secretary intends to withdraw from the MOUs, in declining to enter a permanent injunction requiring him not to.[8]

AFFIRMED.

[8] We also reject R-CALF's cursory argument that the MOUs are unlikely to remain in place because they did not go through notice and comment. Even assuming that R-CALF preserved this argument by raising it below, an MOU is not a legislative rule for which notice and comment is required. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015); *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003).