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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

<p>RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, Plaintiff,</p> <p>v.</p> <p>TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE, AND THE UNITED STATES DEPARTMENT OF AGRICULTURE,</p> <p>Defendants.</p>	<p>Case No. CV-16-41-GF-BMM-JTJ</p> <p>MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER</p>
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Plaintiff, the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (“R-CALF”), moves for immediate entry of a Temporary Restraining Order. *See* Fed. R. Civ. P. 65(b)(1) (allowing entry of a TRO without “notice to the adverse party or its attorney”); L.R. 7.1(a). Specifically, R-CALF asks the Court to impose the injunction requested in its Opposition to Defendants’ Motion to Dismiss, or in Alternative Stay the Case and Cross-Motion for Summary Judgment or, in the Alternative, a Preliminary Injunction (“R-CALF’s Motion”), Dkt. Nos. 21-23, until the Court can rule on that Motion; preventing any portion of the federal Beef Checkoff tax from being handed over to the private Montana Beef Council to fund its private speech without the payer’s affirmative consent, and thereby securing R-CALF’s members’ and, indeed, all Montana ranchers’ First Amendment rights.

“The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction.” *Guy v. Cty. of Hawaii*, No. CIV. 14-00400, 2014 WL 4702289, at *2 (D. Haw. Sept. 19, 2014). The plaintiff must show “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* (quotation marks omitted). Federal Rule of Civil Procedure 65 also requires that the movant

explain why a TRO should be granted without providing the adverse party an opportunity to respond. Fed. R. Civ. P. 65(b)(1)(B).

As established by the controlling statutes and regulations, as well as the Government's own filing, the administration of the Beef Checkoff in Montana violates the payers'—including R-CALF's members'—First Amendment freedoms of speech and association. The checkoff is a federal exaction that takes money from producers and turns a portion over to the private Montana Beef Council solely for the purpose of funding that council's private speech. Supreme Court precedent establishes this is a *per se* violation of the First Amendment. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). Money taken for the purpose of funding speech can only be turned over to a private entity if the payer first affirmatively consents to the transfer. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012).

Therefore, every exaction under the current checkoff scheme constitutes an “irreparable injury.” *In re Wash. State Apple Advert. Comm'n*, 257 F. Supp. 2d 1274, 1288 (E.D. Wash. 2003). In such circumstances, Ninth Circuit “case law clearly favors” equitable relief. *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009) (discussing preliminary injunctions). Moreover, each one of the other equitable considerations also favors R-CALF.

A TRO is particularly appropriate because September marks the beginning of the “fall cattle run,” the period in which the vast majority of cattle in Montana are sold. *See* Ex. A (Declaration of Bill Bullard) ¶ 5. Based on the United States Department of Agriculture’s and the Montana Beef Council’s statistics, between now and the end of the year more than 1 million heads of cattle will be sold in Montana, representing more than \$1 million in checkoff collections. *Id.* ¶ 7. Further, R-CALF’s members have specific plans to sell cattle at multiple times during this period, including over the coming weeks, Ex. B (Declaration of Maxine Korman) ¶¶ 4-5—meaning that, without a TRO, even the Government’s so-called “modest” extension of the time to respond to R-CALF’s Motion is likely to inflict additional harms upon them, *see* Gov. MET, Dkt. No. 25, at 3; Order, Dkt. No. 26 (granting extension request).

The Government has already had multiple opportunities to respond to R-CALF’s arguments and simply failed to do so. R-CALF filed and served its Complaint, Dkt. No. 1, more than four months ago and agreed to extend the period for the Government to respond by thirty days. The Complaint cites many of the cases and statutes on which R-CALF relies. Before the Government filed its Motion to Dismiss, R-CALF informed the Government of its additional Supreme Court authority. *See* Ex. C (R-CALF’s email to Gov.). Before the Government moved for its extension, R-CALF also warned the Government of the increased

constitutional violations that will occur from any delay during the fall cattle run.

Id. The Government has failed to respond. It has not discussed R-CALF's central Supreme Court authority. Instead, the Government first conceded state beef councils should only receive "voluntary" contributions, but then cited case law suggesting producers can be forced to "contribute" to the councils, even though that case law has been expressly rejected by R-CALF's Supreme Court authority. *See* R-CALF's Motion, Dkt. No. 22, at 9-10, 18-20. The Government did not even acknowledge R-CALF's concerns regarding the fall cattle run in its request for an extension. For these reasons, R-CALF requests a TRO preventing the transfer of Beef Checkoff money to the private Montana Beef Council without the payer's affirmative consent until its Motion can be resolved.

A. The Beef Checkoff in Montana violates the First Amendment.

The Beef Checkoff is a federal tax that exacts \$1 per head of cattle each time cattle is sold in order to fund advertisements that promote beef consumption. 7 U.S.C. §§ 2901(b), 2904(8)(C). In Montana, that tax is collected by the Montana Beef Council, a private corporation. R-CALF's SUF Ex. 7, Dkt. No. 23-7 (Certificate of Existence). As the Government concedes, the Montana Beef Council is allowed to keep 50 cents of every \$1 collected pursuant to the federal Beef Checkoff, sending the other 50 cents onto the federal government. Gov. MTD, Dkt. No. 19-1, at 1. No state law requires Montana producers to contribute

to the Montana Beef Council. *Id.* at 8-9. And, the Government does not supervise how the private Montana Beef Council uses the money it obtains from the federal Beef Checkoff. *See* 7 U.S.C. § 2904; 7 C.F.R. § 1260.181. The Montana Beef Council's expenditures are determined by the "deliberations" of its Board of Directors. *Montana Beef Checkoff Directors Set Work Plan for Upcoming Fiscal Year* (Sept. 29, 2015).¹

R-CALF represents independent, domestic cattle producers, including 375 in Montana. Its members object to the advertisements the Montana Beef Council funds with their checkoff dollars. R-CALF's SUF Exs. 1-5, Dkt. Nos. 23-1-5 (declarations of R-CALF CEO and members). For instance, using the checkoff's exactions, the Montana Beef Council funded advertisements for the fast-food chain Wendy's, despite the fact that Wendy's does not necessarily use beef raised in Montana or even the United States. *MT Beef Council & Wendy's of Montana, Fun MT Beef Council & Wendy's Partnership* (Feb. 21, 2014)²; Wyatt Bechtel,

¹ <https://mtbeef.org/montana-beef-checkoff-directors-set-work-plan-for-upcoming-fiscal-year/> (last visited Sept. 10, 2016).

²

<http://www.backup.northernag.net/AGNews/tabid/171/articleType/ArticleView/articleId/8961/Fun-MT-Beef-Council-Wendys-Partnership.aspx> (last visited Sept. 10, 2016).

Wendy's Maintains Focus on Quality Beef from North America, AgWeb (Feb. 19, 2016).³

The Supreme Court has unequivocally held that forcing a producer to turn over his or her checkoff dollars to a private entity violates the First Amendment. *United Foods, Inc.*, 533 U.S. 405, reviewed the Mushroom Checkoff, an equivalent program to the Beef Checkoff. *See also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (discussing the Beef Checkoff). There, as here, the record established the checkoff money was being turned over to a private entity. *Johanns*, 544 U.S. at 559 (explaining *United Foods* was decided based on the assumption the checkoff money was used to fund a private entity). As a result, the Supreme Court stated simply, “the assessments are not permitted under the First Amendment.” *United Foods*, 533 U.S. at 416.

The Court has conducted a balancing test where federal exactions are used to fund speech *and other activities*, but it has explained that test is inapplicable to the checkoffs, because their only function is to fund advertisements, *i.e.*, speech. A different standard applies to “comprehensive program[s]” where the generation of speech is “ancillary” to carrying out “broader regulation.” *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 916 (9th Cir. 2005) (quoting *United Foods*, 533 U.S. at 411). Yet, “advertising itself, far from being ancillary, is the principal

³ <http://www.agweb.com/article/wendys-maintains-focus-on-quality-beef-from-north-america-naa-wyatt-bechtel/> (last visited Sept. 10, 2016).

object of the [checkoff] regulatory scheme.” *United Foods*, 533 U.S. at 408, 411-12 (quotation marks omitted); *see also Johanns*, 544 U.S. at 558-59 (indicating “the only regulatory purpose” of the Beef Checkoff is “the funding of the advertising” not any “broader regulatory scheme” (quoting *United Foods*, 533 U.S. at 415)). Therefore, when the checkoffs exact money, “mandated support” of a private entity is *per se* “contrary to the First Amendment.” *United Foods*, 533 U.S. at 413.

To date, the Government has not addressed why *United Foods* does not control this litigation. Instead, the Government has relied on *Johanns*. But, as the Government concedes, *Johanns* only concerned the portion of the Beef Checkoff money that is sent to the federal Government. In fact, *Johanns* stated that it assumed the only contributions to the state beef councils were “voluntary.” Gov. MTD, Dkt. No. 19-1, at 9-10 (emphasis added) (quotation marks omitted). In analyzing the Beef Checkoff program, *Johanns* explained “compelled support of a private association is fundamentally different from compelled support of government.” 544 U.S. at 559 (quotation marks omitted). It held that the Beef Checkoff could fund the federal government’s advertisements because a federal official “exercises final approval authority over every word used,” making the advertisements “subject to democratic accountability.” *Id.* at 561, 563. Yet, by statute, and the Montana Beef Council’s own statements, this is not the case with

the council's campaigns. Therefore, per *United Foods*, it is unconstitutional for the Beef Checkoff's exactions to go to the Montana Beef Council.

The Government also relies on a new policy and proposed rule, which allow producers to request that the portion of the checkoff money collected and "held" by the Montana Beef Council be transferred to the federal government. Polly Ruhland, *Obligation to Redirect Assessments Upon Producer Request if Not Precluded by State Law* (July 29, 2016)⁴; Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments To Allow Redirection of State Assessments to the National Program; Technical Amendments ("Amendments"), 81 Fed. Reg. 45984, 45986 (July 15, 2016). The Montana Beef Council still collects the \$1 per head assessment and still keeps 50% of the money, but, if the council determines the payer has successfully requested the council release the money it has held, the council has to transfer that amount to the federal Government. This process can take up to 105 days. Amendments, 81 Fed. Reg. at 45986.

The Supreme Court recently explained that when the First Amendment does not permit an "extract[ion] ... from [an] unwilling" participant "there is no way to justify the additional burden of imposing ... [an] opt-out requirement." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2292-93 (2012). Instead,

⁴ <http://www.beefboard.org/library/files/redirection-memo-072916.pdf> (last visited Sept. 10, 2016).

there must be “affirmative consent” *before* the money is turned over to a private entity. *Id.* at 2296. The First Amendment does not allow a private entity to even temporarily obtain “a loan from an unwilling” funder. *Id.* at 2292-93. Put another way, the Government’s policy and proposed rule do nothing to cure the constitutional violation. Producers are still required to, at least temporarily, give money meant to fund speech to the private Montana Beef Council, exactly what is prohibited by the First Amendment. *See also In re Wash. State Apple Advert. Comm’n*, 257 F. Supp. 2d 1274, 1288 (E.D. Wash. 2003) (“The use of compelled assessments ... temporarily, in violation of the First Amendment is an invasion on the dissenter’s constitutionally rights.”). Therefore, any further delay in adjudicating R-CALF’s Motion without a TRO will result in additional First Amendment violations.

B. Any delay will cause substantial harm.

Because each transfer of money to the private Montana Beef Council without affirmative consent violates the First Amendment, every payment of the Beef Checkoff in Montana results in an “irreparable injury.” *Id.* This alone is a sufficient basis to grant the TRO. *See, e.g., Guy v. Cty. of Hawaii*, No. CIV. 14-00400 SOM, 2014 WL 4702289, at *5-6 (D. Haw. Sept. 19, 2014) (granting TRO because plaintiff showed likelihood of success on the merits of First Amendment claim).

However, the relief is particularly necessary here because delay will extend resolution of this litigation during the fall cattle run, resulting in a particularly large number of irreparable harms. Based on 2015 weekly sales data, 61% of cattle sales in Montana occur between now and the end of the year. Ex. A (Declaration of Bill Bullard) ¶ 5. Twenty-seven percent of cattle sales will occur over the course of approximately the next two months. *Id.* These figures are consistent with R-CALF's members' sales. *Id.* ¶ 4.

Based on the Montana Beef Council's projections of cattle sales in 2016, this means that more than \$1 million in Beef Checkoff funds will be collected from now through December, with more than half a million dollars automatically going to the private Montana Beef Council. *Id.* ¶ 7. Nearly half a million dollars in Beef Checkoff exactions will be collected over the next several weeks, with nearly a quarter millions dollars going to the Montana Beef Council. *Id.* ¶ 9.

While the Government claimed the delay it obtained in responding to R-CALF's Motion was insignificant, it is certain to inflict additional harms on beef producers, including R-CALF's members. To provide just one concrete example, Maxine Korman is an R-CALF member who is a declarant in connection with R-CALF's Motion. Ex. B (Declaration of Maxine Korman) ¶¶ 1-2. She has specific plans to sell cattle in Montana on at least four separate occasions between now and the end of November: in mid-September, in mid-October, before the end of

October, and in November. *Id.* ¶ 5. Thus, the Government’s delay of its response from the middle of September to the end of September, which pushes the completion of briefing to the middle of October and the Court’s order even later, is almost certain to result in additional violations of Maxine Korman’s First Amendment rights. Without the Government’s delay, a preliminary injunction could have been entered by mid-October, preventing her payment of the Beef Checkoff at that time from being turned over to the Montana Beef Council without her consent. Therefore, the Court should enter a TRO to prevent the multitude of irreparable harms, including to Maxine Korman, which will occur before R-CALF’s Motion is resolved.

C. All other considerations also favor equitable relief.

As noted above, the Ninth Circuit favors equitable relief whenever a plaintiff has shown ongoing conduct likely violates the First Amendment. The risk of constitutional injury is typically sufficient to tilt the analysis in favor of relief. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009); *see also Barrett v. Premo*, 101 F. Supp. 3d 980, 997-1000 (D. Or. 2015) (explaining other equitable considerations typically “merge[]” with the merits where constitutional injuries are concerned). However, should the Court wish to proceed further, the other equitable considerations—the public interest and balance of the equities—also favor relief here.

Not only is there a significant public interest in guaranteeing the protections provided by the First Amendment, but equitable relief here will protect both R-CALF's members and other producers who pay into the Beef Checkoff. *See Barrett*, 101 F. Supp. 3d at 998. Every one of these individuals has an equal right to ensure their money is not turned over to fund private speech without their consent and thus would benefit from a TRO.

For these same reasons, the balance of the equities favors the relief. It will protect a sizeable number of people from a substantial injury. The only inequity that could result would be to deny the Montana Beef Council money. A court in this circuit has already held such a risk insufficient to deny equitable relief. *In re Wash. State Apple Advert. Comm'n*, 257 F. Supp. 2d at 1288-89. Moreover, with R-CALF's requested relief, the Montana Beef Council could still receive money from any producer who affirmatively consents to it, and the Beef Checkoff program would still receive the *exact same amount*. Producers would still pay the full amount to the Beef Checkoff; that money would just go to federally-controlled, democratically accountable bodies, rather than to the private Montana Beef Council. The money could always be transferred back to the Montana Beef Council should the TRO be dissolved.

For these same reasons, a TRO should be entered without requiring R-CALF to post any security. *See Fed. R. Civ. P. 65(c)* (explaining security is only required

to offset “costs and damages”). No actual damages could result from the order and R-CALF’s motion for a preliminary injunction is already pending. *Amica Mut. Ins. Co. v. Momii*, No. CV 16-24-BLG-SPW, 2016 WL 4059228, at *4 (D. Mont. July 29, 2016) (“Rule 65(c) invests the district court with discretion as to the amount of security” and when the court finds no risk of harm, no security should be required); *Taylor-Failor v. Cty. of Hawaii*, 90 F. Supp. 3d 1095, 1102-03 (D. Haw. 2015) (stating substantially same). Indeed, a court in this district has already explained that to require R-CALF to post anything more than a “minimal bond” “would not be in the public interest” because it would inhibit R-CALF’s efforts to hold the Government accountable. *R-CALF v. U.S. Dep’t of Agric.*, No. 04-CV-51, 2004 WL 1047837, at *9 (D. Mont. Apr. 26, 2004).

D. The Government has had an opportunity to respond.

Federal Rule of Civil Procedure 65 provides a TRO can only issue if the movant demonstrates why the adverse party should not be given an opportunity to respond. Fed. R. Civ. P. 65(b)(1)(B). Here, however, the Government has had ample opportunity to respond.

Much of the above case law is cited in R-CALF’s Complaint, Dkt. No. 1, and R-CALF informed the Government of the other Supreme Court authority on which it relies during the meet and confer before the Government filed its Motion to Dismiss. Ex. C (R-CALF’s email to Gov.). In that Motion, the Government

chose not to discuss *United Foods*, 533 U.S. 405—providing that the checkoff’s exaction cannot be turned over to private entities—nor even cite *Knox*, 132 S. Ct. 2277—requiring affirmative consent before individuals’ money is used to fund private speech. *See* Dkt. No. 19-1.

Further, each of the above arguments on the merits and in favor of immediate equitable relief were made in R-CALF’s Motion, *see* Dkt. No. 22, to which the Government has chosen to delay responding. The Government’s three justifications for that delay do not justify the extension without a TRO. The Government states that it “has summary judgment briefing due in another matter on September 20,” Gov. MET, Dkt. No. 25, at 3, but that was nearly a week after the Government’s Opposition was due here. The Government has also failed to state the issue in this other case, why it believes that is more important than the issue presented here, and why an extension could not be obtained in that other case. The Government further states it has “training from September 21 to 23.” *Id.* However, it is hard to believe any continuing legal education course a week after the Government’s brief was due should delay action to prevent an ongoing constitutional injury. And, again, the Government failed to say why this claimed conflict could not be rescheduled. Finally, the Government states that it needs additional time to respond to R-CALF’s Motion. *Id.* However, all of the facts on which R-CALF relies are alleged in its Complaint and/or found in the

Government's filing. R-CALF consented to the Government having an additional *month* to review the Complaint.

What is more, the Government was apprised of all of R-CALF's concerns regarding the merits and the extensive harm that will be caused by delay before the Government filed its motion for an extension. Ex. C (R-CALF's email to Gov.). The Government did not address any of these issues in that Motion.

The Government has certainly been given notice of the arguments and issues before the Court. No further opportunities should be provided for it to respond. The Court should act to protect R-CALF's members' rights and those of all producers who pay the Beef Checkoff in Montana.

E. Conclusion.

R-CALF has made substantial showings that each payment of the Beef Checkoff in Montana violates the First Amendment. Accordingly, based on the agreed upon and publically available facts, R-CALF moved for summary judgment or, in the alternative, a preliminary injunction. R-CALF has further established that during the additional time the Government has obtained to respond to R-CALF's Motion, R-CALF's members will be directly injured, and that nearly a quarter million dollars will be unconstitutionally transferred to the Montana Beef Council in the coming weeks. No harm will result from the TRO. Therefore, this

Court's immediate intervention is required to protect producers' First Amendment rights.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

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

I HEREBY CERTIFY that this Brief consists of 3,487 words, excluding the caption and certificates. It is further represented that the word count referred to has been calculated in reliance upon the Microsoft Word system utilized to prepare this Brief.

/s/ William A. Rossbach