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

<p>RANCHERS-CATTELMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, <i>Plaintiff,</i></p> <p>v.</p> <p>SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE, et al., <i>Defendants,</i></p> <p>MONTANA BEEF COUNCIL et al., <i>Intervenors.</i></p>	<p>Case No. 16-00041-BMM-JTJ</p> <p>PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT</p>
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¶ #	Fact	Supporting Evidence
<i>Plaintiff's Standing</i>		
1	Plaintiff Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF") is a nonprofit, membership-based organization headquartered in Montana.	Exhibit 56 (Declaration of Bill Bullard, Chief Executive Officer of R-CALF) ¶ 4.
2	R-CALF's voting members are located in 42 states (counting Washington, D.C.)—including all but two of the states at issue here (Hawaii and Vermont).	Exhibit 56 (Bullard Decl.) ¶ 7
3	R-CALF's voting members are exclusively comprised of independent, domestic cattle producers who each have an equal vote in setting policy and electing directors.	Exhibit 56 (Bullard Decl.) ¶¶ 5-6 & Exhibit A (R-CALF's Bylaws).
4	R-CALF's mission focuses on ensuring the continued viability of independent, domestic cattle producers.	Exhibit 56 (Bullard Decl.) ¶ 8 & Exhibit A (R-CALF Bylaws).
5	R-CALF's advocacy focuses on advancing positions that will increase the profitability of independent, domestic ranchers, such as developing (a) rigorous standards for domestic beef that will increase its desirability, (b) country-of-origin labeling that will allow consumers to more easily select domestic beef, and (c) trade policies that advantage domestic producers.	Exhibit 56 (Bullard Decl.) ¶ 11.
6	In furtherance of these goals, R-CALF engages in regular, federal-level political advocacy, including testifying before Congress and the Executive Branch.	Exhibit 56 (Bullard Decl.) ¶¶ 9-10.
7	R-CALF has also felt compelled to work against programs that threaten independent, domestic ranchers, such as federal programs that promote the idea that all beef is equal or that fail to distinguish between where and how beef is produced—as is the case with the Beef Checkoff program.	Exhibit 56 (Bullard Decl.) ¶ 12.

8	Therefore, R-CALF has met with executive branch and congressional personnel, and provided written comments advocating that the Beef Board and Committee reorient their expenditures of Beef Checkoff funds.	Exhibit 56 (Bullard Decl.) ¶ 14 & Exhibit B (R-CALF Comments to the United States Department of Agriculture (“USDA”) on the Beef Checkoff program).
9	R-CALF also has identified that Beef Checkoff expenditures by private entities, such as the state beef councils at issue in this case, are frequently used to support activities that run contrary to R-CALF’s mission, including by generating advertising that treats all beef as equal.	Exhibit 56 (Bullard Decl.) ¶¶ 12, 17.
10	R-CALF has also seen that much of the money retained by the state beef councils is used to support the National Cattlemen’s Beef Association (“NCBA”), which R-CALF believes advocates for corporate consolidation in the beef industry, which harms independent, domestic ranchers.	Exhibit 56 (Bullard Decl.) ¶ 20 & Exhibits E (state beef council newsletter promoting NCBA policies and an event featuring a talk from an NCBA Senior Director), F (R-CALF’s 2009 list of policy disagreements it has with NCBA).
11	Starting in 2010, R-CALF listed as one of its priorities stopping the use of checkoff funds by private, unaccountable entities.	Exhibit 56 (Bullard Decl.) ¶ 21 & Exhibits G-J (R-CALF’s public lists of priorities describing this focus).
12	However, R-CALF has not been able to engage in its traditional federal-level advocacy to influence the private state beef councils to reform their use of the Beef Checkoff money.	Exhibit 56 (Bullard Decl.) ¶ 15, ¶ 16 (“The state beef councils at issue here are entirely private entities that are not subject to the traditional mechanisms of political accountability and advocacy.”).
13	Prior to filing this lawsuit, R-CALF attempted to leverage its membership and the press to try to alter advertisements by the Montana Beef Council that promoted the fast-food chain Wendy’s—which does not commit to sourcing its beef from the United States or Montana and failed to identify that	Exhibit 56 (Bullard Decl.) ¶¶ 18-19.

	domestic beef could be subject to different standards than the beef Wendy's uses.	
14	R-CALF's efforts failed, and the Montana Beef Council maintains its partnership with Wendy's.	Exhibit 56 (Bullard Decl.) ¶ 19 & Exhibits C (R-CALF letter to Secretary of Agriculture), D (Montana Beef Council's most recent annual marketing plan discussing its "partnership" with Wendy's).
15	R-CALF now gives presentations across the nation—at any forum to which it is invited and can attend, including 30 in the last year—regarding how Beef Checkoff funds can be taken and used by unaccountable state beef councils.	Exhibit 56 (Bullard Decl.) ¶ 22 (“In the last year I have given about 30 such presentations to warn producers about this misuse of funds. I make these presentations at any forum to which I am invited and can attend.”).
16	As R-CALF is a small non-profit with four staff members, this work against the use of Beef Checkoff funds by private state beef councils has had a significant effect on R-CALF's resources, with its presentations consuming 60% of its resources.	Exhibit 56 (Bullard Decl.) ¶¶ 24, 25 (“I would conservatively estimate that my presentations last year consumed 60% of our resources considering the expenses and staff time involved.”).
17	Demonstrating the significant drain this work has on R-CALF's resources, since the Court entered its preliminary injunction in this case, R-CALF has expanded its other advocacy work by more than 40%.	Exhibit 56 (Bullard Decl.) ¶ 26.
18	R-CALF believes its direct lobbying efforts would prove more effective in altering how the Beef Checkoff money is spent, but because of the volume of Beef Checkoff expenditures by the state beef councils, which it believes threaten its members and its own advocacy, it will continue to expend these resources if the state beef councils at issue	Exhibit 56 (Bullard Decl.) ¶¶ 27-28.

	here continue to retain and spend producers' money.	
19	If the injunction in this case were entered, however, R-CALF could further redirect its efforts towards advancing its positive policy agenda and towards lobbying the federal government for how the Beef Checkoff should be spent.	Exhibit 56 (Bullard Decl.) ¶ 27.
20	One of the reasons R-CALF's members joined R-CALF is to support its work, including its work against the federal Beef Checkoff program and the misuse of Beef Checkoff money by the private state beef councils.	Exhibit 56 (Bullard Decl.) ¶ 13 ("members have chosen to support ... R-CALF's work against the federal Beef Checkoff program ... and that work has been detailed in R-CALF's policy agendas sent to its members, and is a regular topic of conversation at R-CALF's annual conference"); Exhibit 57 (Declaration of Al Cisco) ¶¶ 14-15; Exhibit 58 (Declaration of David Wright) ¶¶ 12-13; Exhibit 59 (Declaration of Maxine Korman) ¶¶ 12-13; Exhibit 60 (Declaration of Ron Korman) ¶¶ 12-13; Exhibit 61 (Declaration of David Pfrang) ¶¶ 17-18; Exhibit 62 (Declaration of Alan Pruitt) ¶¶ 13-14; Exhibit 63 (Declaration of Vaughn Meyer) ¶¶ 12-13; Exhibit 64 (Declaration of Richard Wright) ¶¶ 12-13; Exhibit 65 (Declaration of Frederick Stewart) ¶¶ 12-13; Exhibit 66 (Declaration of Robert Weil) ¶¶ 13-14; Exhibit 67 (Declaration of Danny Rice) ¶¶ 12-13; Exhibit 68 (Declaration of William Schneider) ¶¶ 11-12; Exhibit 69 (Declaration of Stayton Weldon) ¶ 12.

21	R-CALF member declarants are cattle producers who have raised and currently raise cattle in their respective states—which include every state at issue here except Hawaii, South Carolina and Vermont—and paid the checkoff there.	Exhibit 57 (Cisco Decl.) ¶¶ 3-4; Exhibit 58 (Wright Decl.) ¶¶ 3-4; Exhibit 59 (M. Korman Decl.) ¶¶ 3-4; Exhibit 60 (R. Korman Decl.) ¶¶ 3-4; Exhibit 61 (Pfrang Decl.) ¶¶ 3-4; Exhibit 62 (Pruitt Decl.) ¶¶ 3-4; Exhibit 63 (Meyer Decl.) ¶¶ 3-4; Exhibit 64 (R. Wright Decl.) ¶¶ 3-4; Exhibit 65 (Stewart Decl.) ¶¶ 3-4; Exhibit 66 (Weil Decl.) ¶¶ 3-4; Exhibit 67 (Rice Decl.) ¶¶ 3-4; Exhibit 68 (Schneider Decl.) ¶¶ 3, 5; Exhibit 69 (Weldon Decl.) ¶¶ 3-4.
22	Each member declarant is an active, dues paying, voting member of R-CALF in good standing.	Exhibit 57 (Cisco Decl.) ¶¶ 1-2; Exhibit 58 (Wright Decl.) ¶¶ 1-2; Exhibit 59 (M. Korman Decl.) ¶¶ 1-2; Exhibit 60 (R. Korman Decl.) ¶¶ 1-2; Exhibit 61 (Pfrang Decl.) ¶¶ 1-2; Exhibit 62 (Pruitt Decl.) ¶¶ 1-2; Exhibit 63 (Meyer Decl.) ¶¶ 1-2; Exhibit 64 (R. Wright Decl.) ¶¶ 1-2; Exhibit 65 (Stewart Decl.) ¶¶ 1-2; Exhibit 66 (Weil Decl.) ¶¶ 1-2; Exhibit 67 (Rice Decl.) ¶¶ 1-2; Exhibit 68 (Schneider Decl.) ¶¶ 1-2; Exhibit 69 (Weldon Decl.) ¶¶ 1-2.
23	R-CALF's member declarants have definite and imminent plans to sell cattle in their respective states again.	Exhibit 57 (Cisco Decl.) ¶ 6; Exhibit 58 (Wright Decl.) ¶ 6; Exhibit 59 (M. Korman Decl.) ¶ 6; Exhibit 60 (R. Korman Decl.) ¶ 6; Exhibit 61 (Pfrang Decl.) ¶ 6; Exhibit 62 (Pruitt Decl.) ¶ 6; Exhibit 63 (Meyer Decl.) ¶ 6; Exhibit 64 (R. Wright Decl.) ¶ 6;

		Exhibit 65 (Stewart Decl.) ¶ 6; Exhibit 66 (Weil Decl.) ¶ 6; Exhibit 67 (Rice Decl.) ¶ 6; Exhibit 68 (Schneider Decl.) ¶ 5; Exhibit 69 (Weldon Decl.) ¶ 6.
24	Each member declarant and/or the farm they own will be required to pay the \$1 federal Beef Checkoff tax to their state's qualified state beef council each time they sell cattle in their respective state.	Exhibit 57 (Cisco Decl.) ¶¶ 5, 7; Exhibit 58 (Wright Decl.) ¶¶ 5, 7; Exhibit 59 (M. Korman Decl.) ¶¶ 5, 7; Exhibit 60 (R. Korman Decl.) ¶¶ 5, 7; Exhibit 61 (Pfrang Decl.) ¶¶ 5, 7; Exhibit 62 (Pruitt Decl.) ¶¶ 5, 7; Exhibit 63 (Meyer Decl.) ¶¶ 5, 7; Exhibit 64 (R. Wright Decl.) ¶¶ 5, 7; Exhibit 65 (Stewart Decl.) ¶¶ 5, 7; Exhibit 66 (Weil Decl.) ¶¶ 5, 7; Exhibit 67 (Rice Decl.) ¶¶ 5, 7; Exhibit 68 (Schneider Decl.) ¶¶ 4, 6; Exhibit 69 (Weldon Decl.) ¶¶ 5, 7.
25	R-CALF's member declarants object to being associated with their respective state beef councils through their money being used to support that private entity without their consent.	Exhibit 57 (Cisco Decl.) ¶¶ 8-13; Exhibit 58 (Wright Decl.) ¶¶ 8-11; Exhibit 59 (M. Korman Decl.) ¶¶ 8-11; Exhibit 60 (R. Korman Decl.) ¶¶ 8-11; Exhibit 61 (Pfrang Decl.) ¶¶ 8-16; Exhibit 62 (Pruitt Decl.) ¶¶ 8-12; Exhibit 63 (Meyer Decl.) ¶¶ 8-11; Exhibit 64 (R. Wright Decl.) ¶¶ 8-11; Exhibit 65 (Stewart Decl.) ¶¶ 8-11; Exhibit 66 (Weil Decl.) ¶¶ 8-12; Exhibit 67 (Rice Decl.) ¶¶ 8-11; Exhibit 68 (Schneider Decl.) ¶¶ 8-10; Exhibit 69 (Weldon Decl.) ¶¶ 8-11.
26	R-CALF's member declarants also object to being associated with their respective state beef councils because	Exhibit 57 (Cisco Decl.) ¶ 16; Exhibit 58 (Wright Decl.) ¶ 14; Exhibit 59 (M.

	they are not democratically accountable to beef producers.	Korman Decl.) ¶ 14; Exhibit 60 (R. Korman Decl.) ¶ 14; Exhibit 61 (Pfrang Decl.) ¶ 19; Exhibit 62 (Pruitt Decl.) ¶ 15; Exhibit 63 (Meyer Decl.) ¶ 14; Exhibit 64 (R. Wright Decl.) ¶ 14; Exhibit 65 (Stewart Decl.) ¶ 14; Exhibit 66 (Weil Decl.) ¶ 15; Exhibit 67 (Rice Decl.) ¶ 14; Exhibit 68 (Schneider Decl.) ¶ 13; Exhibit 69 (Weldon Decl.) ¶ 13.
27	R-CALF's members object to specific speech funded by the state beef councils with Beef Checkoff money.	Exhibit 57 (Cisco Decl.) ¶¶ 8-13; Exhibit 58 (Wright Decl.) ¶¶ 8-11; Exhibit 59 (M. Korman Decl.) ¶¶ 8-11; Exhibit 60 (R. Korman Decl.) ¶¶ 8-11; Exhibit 61 (Pfrang Decl.) ¶¶ 8-16; Exhibit 62 (Pruitt Decl.) ¶¶ 8-12; Exhibit 63 (Meyer Decl.) ¶¶ 8-11; Exhibit 64 (R. Wright Decl.) ¶¶ 8-11; Exhibit 65 (Stewart Decl.) ¶¶ 8-11; Exhibit 66 (Weil Decl.) ¶¶ 8-12; Exhibit 67 (Rice Decl.) ¶¶ 8-11; Exhibit 68 (Schneider Decl.) ¶¶ 8-10; Exhibit 69 (Weldon Decl.) ¶¶ 8-11.
28	R-CALF's members believe that R-CALF is less effective in representing their interests before the private state beef council in their respective states than before the federal government.	Exhibit 57 (Cisco Decl.) ¶ 16; Exhibit 58 (Wright Decl.) ¶ 14; Exhibit 59 (M. Korman Decl.) ¶ 14; Exhibit 60 (R. Korman Decl.) ¶ 14; Exhibit 61 (Pfrang Decl.) ¶ 19; Exhibit 62 (Pruitt Decl.) ¶ 15; Exhibit 63 (Meyer Decl.) ¶ 14; Exhibit 64 (R. Wright Decl.) ¶ 14; Exhibit 65 (Stewart Decl.) ¶ 14; Exhibit 66 (Weil Decl.) ¶ 15; Exhibit 67

		(Rice Decl.) ¶ 14; Exhibit 68 (Schneider Decl.) ¶ 13; Exhibit 69 (Weldon Decl.) ¶ 13.
29	Therefore, R-CALF's members would prefer all of their Beef Checkoff dollars to go to the federal Beef Board so that: (a) they are not associated with a private entity they do not support and with which they disagree; (b) there is direct, political accountability for how the money is spent; and (c) R-CALF can directly employ traditional, political advocacy to lobby for changes in the Beef Checkoff program's expenditures.	Exhibit 57 (Cisco Decl.) ¶ 15; Exhibit 58 (Wright Decl.) ¶ 15; Exhibit 59 (M. Korman Decl.) ¶ 15; Exhibit 60 (R. Korman Decl.) ¶ 15; Exhibit 61 (Pfrang Decl.) ¶ 14; Exhibit 62 (Pruitt Decl.) ¶ 16; Exhibit 63 (Meyer Decl.) ¶ 15; Exhibit 64 (R. Wright Decl.) ¶ 15; Exhibit 65 (Stewart Decl.) ¶ 15; Exhibit 66 (Weil Decl.) ¶ 16; Exhibit 67 (Rice Decl.) ¶ 15; Exhibit 68 (Schneider Decl.) ¶ 14; Exhibit 69 (Weldon Decl.) ¶ 14.
30	Intervenors do not identify any doubts as to R-CALF's standing.	Exhibit 1 (Intervenors' Response to ROG No. 15) (identifying no "evidence on which [they] will rely to support" Plaintiffs lack of standing).
<i>The Beef Checkoff Program</i>		
31	Congress passed the Beef Promotion and Research Act ("Beef Act") in order to "financ[e] ... and carry[] out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products."	7 U.S.C. §§ 2901(b), 2904; Dkt. No. 40-1 (Declaration of Kenneth Payne, Director of the Research and Program Division, in the Livestock, Poultry, and Seed Program, of the Agricultural Marketing Service, USDA) ¶ 3.
32	Pursuant to the Act, in what is known as the "Beef Order," the Secretary of Agriculture ("the Secretary") promulgated regulations for the Beef Checkoff program.	7 U.S.C. §§ 2901(b), 2903; 7 C.F.R. Pt. 1260; Dkt. No. 40-1 (Payne Decl.) ¶ 4.

33	Under the Beef Checkoff program, domestic cattle producers must pay \$1 per head of cattle sold to finance “a coordinated program of promotion and research designed to strengthen the beef industry’s position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.”	7 U.S.C. §§ 2901(b), 2904(8)(C); Dkt. No. 40-1 (Payne Decl.) ¶¶ 3, 11.
34	The Beef Checkoff Act and Order created two “administrative” entities to manage the Beef Checkoff at the federal-level: the Cattlemen’s Beef Promotion and Research Board (“Beef Board”), and the Beef Promotion Operating Committee (“Beef Committee”).	7 U.S.C. § 2904(1)-(5); 7 C.F.R. §§ 1260.141-1260.151, 1260.161-1260.169; Dkt. No. 40-1 (Payne Decl.) ¶ 5.
35	The Beef Board reviews and approves the Beef Committee’s budget, and is responsible for certifying state beef councils as “qualified state beef councils” empowered to collect and use Beef Checkoff funds.	7 U.S.C. § 2904(4)(C); 7 C.F.R. § 1260.181; Dkt. No. 40-1 (Payne Decl.) ¶ 10.
36	The Beef Committee develops the “plans or projects of promotion and advertising, research, consumer information, and industry information, which shall be paid for with assessments collected by the [Beef] Board.”	7 U.S.C. § 2904(4)(B); Dkt. No. 40-1 (Payne Decl.) ¶ 9.
37	Members of the Beef Board are appointed by the Secretary. The Beef Board then elects ten of its members to serve on the Beef Committee.	7 U.S.C. §§ 2904(1)-(2), (4)(A); 7 C.F.R. §§ 1260.141, 1260.161, 1260.213; Dkt. No. 40-1 (Payne Decl.) ¶¶ 6-7.
38	The other ten members of the Beef Committee are “elected by a federation that includes as members the qualified State beef councils.” Before they can serve, however, they must “file with the Secretary a written agreement to serve on the Committee and to disclose any relationship with any beef promotion entity or with any organization that has or is	7 U.S.C. §§ 2904(4)(A); 7 C.F.R. § 1260.161; Dkt. No. 40-1 (Payne Decl.) ¶ 7.

	being considered for a contractual relationship with the Board or the Committee” and they must be “certified by the Secretary as producers that are directors of a qualified State Beef council” and “duly elected” by the federation.	
39	The Secretary may remove any member of either the Beef Board or Beef Committee.	7 C.F.R. § 1260.213; Dkt. No. 40-1 (Payne Decl.) ¶ 8.
40	The Secretary approves the budget set by the Beef Board.	7 U.S.C. §§ 2904(4)(C), (9); Dkt. No. 40-1 (Payne Decl.) ¶ 10.
41	A representative of the Secretary attends all Beef Board meetings.	Dkt. No. 1-1 (Complaint Exhibit A) at 11 (Beef Board PowerPoint).
42	The Secretary also approves all plans and projects developed by the Beef Committee.	7 C.F.R. § 1260.169; Dkt. No. 40-1 (Payne Decl.) ¶ 25.
43	All of the Beef Committee’s proposed promotional messages are reviewed by USDA officials both for substance and for wording, and some proposals are rejected or rewritten by the Department.	<i>Johanns v. Livestock Mktg. Ass’n</i> , 544 U.S. 550, 561 (2005).
44	A “state beef council” is an entity that “conducts beef promotion, research, and consumer information and/or industry information programs.”	7 C.F.R. § 1260.181(a); <i>see also</i> 7 U.S.C. § 2902(14); 7 C.F.R. § 1260.115; <i>accord</i> Dkt. No. 40-1 (Payne Decl.) ¶ 7.
45	To become a “qualified” state beef council a state beef council must be “certified by the [Beef] Board.”	7 C.F.R. § 1260.181(b); Dkt. No. 40-1 (Payne Decl.) ¶ 7.
46	Qualified state beef councils are authorized to collect the Beef Checkoff assessment in their state, on behalf of the Beef Board.	7 C.F.R. § 1260.181(a); Dkt. No. 40-1 (Payne Decl.) ¶ 11.
47	Qualified state beef councils are allowed to keep up to half of all money collected and can use that money consistent with the Beef Act and Beef Order. That is, councils are	7 C.F.R. § 1260.181(b)(1), (4), (7); Dkt. No. 40-1 (Payne Decl.) ¶¶ 11, 18.

	allowed to use the Beef Checkoff money “to strengthen the beef industry’s position in the marketplace” so long as they do not use the “checkoff funds for the purpose of influencing governmental policy or action, or to fund plans or projects which make use of any unfair or deceptive acts or practices including unfair or deceptive acts or practices with respect to the quality, value or use of any product that is a competitor to beef.”	
48	The Government indicates qualified state beef councils typically take full advantage of this privilege, with the USDA Office of Inspector General’s (“OIG”) characterizing the qualified state beef councils as “responsible for forwarding half of the funds each month,” and OIG’s figures actually indicating that the Beef Board receives less than half the total amount of Beef Checkoff funds.	Dkt. No. 1-3 (Compl. Exhibit C) at 2 (USDA OIG Report); Dkt. No. 65 (Answer to Supplemental Pleading) ¶ 11 (“Defendants admit that, typically, qualified state beef councils collect the Beef Checkoff and, absent a producer’s objection, may retain up to 50 cents of each assessment for activities that are authorized by the Beef Promotion and Research Act of 1985.”)
49	To become “qualified,” a state beef council must submit a 10-page form to the Beef Board.	Exhibit 2 (Government’s Response to RFA No. 14 & Exhibit A).
50	To become “qualified” the Beef Board “does not require an entity seeking to be certified as a qualified state beef council to complete and submit any forms other than” the 10-page form described above.	Exhibit 2 (Government’s Response to RFA No. 15).
51	The Beef Act and Beef Order require that once qualified, a state beef council “furnish the Board with an annual report by a certified public accountant of all funds remitted to such council pursuant to this subpart and any other reports and	7 C.F.R. § 1260.181(b)(6); Dkt. No. 40-1 (Payne Decl.) ¶ 18.

	information the Board or Secretary may request.”	
52	Exhibit 3 is an example of these audits—although the Government has redacted the figures. The auditor makes three representations: (1) the finances are “present[ed]” fairly; (2) “nothing came to our attention” that the council was violating the Beef Act or Order; and (3) “nothing came to our attention” that “the Council failed to accurately allocate expenses it shared with any other entity.” The council also represents it “believes” that it is in compliance with the Beef Order and that “nothing came to this Council’s attention that caused it to believe that funds invested in [other] organizations” were being used in violation of the Beef Order.	Exhibit 3 (Montana Beef Council’s Financial Statements and Independent Auditor’s Report) at RCALF_001215, 1229.
53	Purportedly acting pursuant to the Beef Act and Order, the Beef Board also requires qualified state beef councils to (a) provide the Beef Board “an annual marketing plan” that “outline[s] [their] planned activities”; and (b) approximately twice a decade, submit to a “compliance review” by the Board to “assess” compliance with the Beef Act, Beef Order, and certain Beef Board guidelines.	Dkt. No. 40-1 (Payne Decl.) ¶ 19; <i>see also</i> 7 C.F.R. § 1260.181.
54	Exhibit 4 is an example of the annual marketing plans submitted to the Beef Board.	Exhibit 4 (North Carolina Cattlemen’s Beef Council’s 2017 Marketing Plan).
55	Exhibit 5 is an example of the compliance reviews the Beef Board performs approximately twice a decade.	Exhibit 5 (2017 Summary of the Review of the Maryland Beef Industry Council).
56	Under the statutes and regulations, the Government has no regular contact with the state beef councils, and no one reviews the councils’ specific speech.	Dkt. No. 40-1 (Payne Decl.) ¶¶ 15-29.
57	A Beef Board presentation states that for the 50 cents	Dkt. No. 1-2 (Beef Board Presentation) at

	retained by the state beef councils, “your state beef council board determine[s] how it should be invested in local and state programs.”	13.
58	The Beef Act and Order grant producers a “credit” of up to 50 cents per head of cattle sold for the money kept by their state beef council. That is, under the federal Beef Checkoff program, producers never need to pay more than \$1 per head even if the state beef councils retain 50 cents of every \$1 paid.	7 U.S.C. § 2904(8)(C); 7 C.F.R. § 1260.172(a)(3).
59	Beyond the limitations described above—that the Beef Checkoff money must promote beef without being unfair or deceptive or influencing government policy—USDA and the Beef Board previously represented the qualified state beef councils “make individual fiscal program decisions” regarding how to spend the checkoff money, including being allowed to send the money to other entities that may “make individual fiscal program decisions” regarding how to spend the checkoff money, so long as those third-party expenses are consistent with the Beef Act and Order.	Exhibit 6 (Joint USDA and Beef Board Presentation) at PlaintiffRCALF0014.
60	The intervening state beef councils state that they regularly make “investment[s]” in third-parties and that part of the reason they intervened in this suit is that their inability to retain producers’ funds without the producers’ consent “jeopardize[s]” those payments, which may cost the intervening state beef councils “seat[s]” on those third-parties’ Boards of Directors.	Dkt. No. 63-1 (Declaration of Montana Beef Council) ¶¶ 14, 18, 31; Dkt. No. 63-2 (Declaration of Texas Beef Council) ¶¶ 15, 19; Dkt. No. 63-3 (Declaration of Pennsylvania Beef Council) ¶¶ 14, 18; No. 63-4 (Declaration of Nebraska Beef Council) ¶ 14.
61	The Beef Board, with the Government’s consent, can “de-certify” a qualified state beef council, removing its authority	Dkt. No. 40-1 (Payne Declaration) ¶ 29 (citing 7 C.F.R. § 1260.181).

	to collect and retain Beef Checkoff funds, for “failure to comply with the requirements of the Beef Act or Beef Order.”	
62	The Government has identified only a single instance in which a state beef council has been “de-certified,” but, subsequently “the Beef Board recertified” the same entity, with the only identified change being “the Beef Board maintains more contact with the [state council] and its Executive Director to assist them with any procedural question they may have.”	Exhibit 7 (Government’s Response to ROG No. 11).
63	USDA and the Beef Board have created a presentation about the Beef Checkoff program, which includes a chart depicting the typical flow of money from producers’ payments to end users, although all parties agree that while the chart is accurate, it is not fully complete.	Exhibit 6 (Joint USDA and Beef Board Presentation) at PlaintiffRCALF0014; Exhibit 8 (Intervenors’ Response to RFA No. 23) (admitting the chart is correct but does not fully depict review of funds); Exhibit 9 (Government’s Response to RFA No. 19) (same).
<i>The State Beef Councils At Issue</i>		
64	Each of the state beef councils named in this action is the qualified state beef council for its state.	7 C.F.R. § 1260.315 (list of qualified state beef councils); <i>see also</i> Dkt. No. 57 (Government’s Opposition to Supplemental Pleading) at 11 (admitting supplemental pleading concerns qualified state beef councils).
65	The intervening state beef councils admit they are “nongovernmental entit[ies].”	Exhibit 10 (Intervenors’ Response to RFA No. 1)
66	The intervening state beef councils have described themselves as “separate[] autonomous entities.”	Dkt. No. 63 (Intervenors’ Brief in Support of Intervention) at 27.

67	The intervening state councils have also stated, the Government-Defendants “do not (and cannot) adequately represent the Proposed Intervenors.”	<i>Id.</i> at 4.
68	The intervening state councils have also stated “USDA cannot adequately represent [their] interests because, as explained herein and in the supporting declarations, they are distinct, varied, and unique.”	<i>Id.</i> at 27.
69	No statute establishes any of the state beef councils at issue and no state law entitles them to take any portion of the federal Beef Checkoff tax.	Dkt. No. 56-3 (Government letter to R-CALF identifying councils that are wholly private entities like the Montana council); Dkt. No. 58-2 (same); Exhibit 11 (Government’s Response to ROG No. 2) (failing to identify any form of state control over the state beef councils at issue here); <i>accord</i> Dkt. No. 58 (Plaintiff’s Reply Brief in Support of Supplementation) at 8, 15 (explaining it selected the named state councils because all parties agreed no state statute established these councils).
70	Each of the state beef councils is a privately incorporated entity under its state law or a subsidiary of another private corporation organized under the laws of its state.	Dkt. No. 23-7 (Montana Beef Council Certificate of Existence); Exhibit 12 (certificates of existence for the other entities at state beef councils’ business address); Exhibit 10 (Intervenors’ Response to RFA No. 2) (admitting the intervening state beef councils are “organized as private entit[ies] under the laws of [their] state[s]”); Exhibit 13 (Government’s Response to

		RFA No. 5) (admitting same).
71	No provision of the Beef Act or Order empowers the Secretary or any other federal officer to appoint or remove members of the named state beef councils.	<i>See</i> 7 U.S.C. § 2904; 7 C.F.R. § 1260.181.
72	The Government does not appoint, remove, or determine the selection procedures for the staff or directors of the state beef councils at issue here.	Exhibit 2 (Government’s Responses to RFAs Nos. 1-3); Exhibit 10 (Intervenors’ Responses to RFAs Nos. 1-3).
73	The intervening state beef councils admit they appoint and remove their directors and staff.	Exhibit 10 (Intervenors’ Responses to RFAs Nos. 3-4).
74	The state beef councils’ bylaws can limit who can be a director.	Exhibit 14 (Kansas Beef Council bylaws); Exhibit 15 (Montana Beef Council bylaws); Exhibit 16 (Texas Beef Council bylaws); Exhibit 17 (Wisconsin Beef Council operational guidelines).
75	For instance, the bylaw the Kansas Beef Council presented to the Beef Board when it applied to become “qualified” provide that its executive committee will be comprised of: (1) “Eight Council members appointed by the [Kansas Livestock Association (“KLA”)] President and approved by the KLA Board of Directors”; (2) the “KLA President, KLA President-Elect, Kansas CowBelle President, and the Kansas CowBelle President-Elect”; and (3) “[a]ny Kansan who is a member of the Beef Industry Council Board of Directors of the National Live Stock and Meat Board and any Kansan who is a director of the Cattlemen’s Beef Promotion and Research Board.”	Exhibit 14 (Kansas Beef Council bylaws) at PlaintiffRCALF00237-38.
76	The bylaws of the Montana Beef Council gives five of the 13 seats on its Board of Directors to five pre-set	Exhibit 15 (Montana Beef Council bylaws) at QSBC_000016-17.

	organizations, and limits the other seats to cattle and farm groups “certified” or “qualif[ied]” by the existing Board.	
77	The Texas Beef Council’s bylaws require that any “[p]roposed directors ... be approved and elected by current directors” and that Board establishes the “criteria” for what “organizations may qualify to nominate a director.”	Exhibit 16 (Texas Beef Council bylaws) at QSBC_000494-95.
78	The Wisconsin Beef Council’s operational guidelines, presented to the Beef Board when it applied to become a qualified state beef council, provide that its Board of Directors must be selected from certain organizations.	Exhibit 17 (Wisconsin Beef Council operational guidelines) at PlaintiffRCALF00361-62.
<i>The MOUs</i>		
79	Following the Magistrate’s recommendation in this case, the Government-Defendants (“Government”) entered into memoranda of understanding (“MOUs”) with all of the state beef councils at issue in this case except the councils in Maryland and Vermont; those councils have not entered into the MOUs.	Exhibit 18 (MOUs between Government and state beef councils).
80	Nothing in the MOUs provide the Government the authority to appoint or remove the directors or staff of the state beef councils.	<i>Id.</i>
81	The MOUs provide that the state beef councils will now submit an “annual budget” containing “a general description of the proposed promotion, research, consumer information and industry information programs contemplated therein”—akin to the annual marketing plan they previously submitted to the Beef Board—to USDA for approval. Likewise, under the MOUs the annual audits the councils previously submitted to the Beef Board are submitted to USDA.	<i>Id.</i>

82	The MOUs also provide that the state councils will submit “[a]ny plan or project” to USDA for approval, notify USDA of their meeting times, provide USDA minutes of those meetings, and release an annual public report of their activities and expenses.	<i>Id.</i>
83	Failure to comply with the terms of the MOUs can result in “de-certification” of the state council.	<i>Id.</i>
84	However, the MOUs can be terminated at any time, “upon mutual agreement” of the parties, so long as there is thirty days’ notice.	<i>Id.</i>
85	The Government has explained that under the MOUs, its review of state beef councils’ plans and projects is guided by USDA’s Marketing Communication Guidelines, which focus on ensuring “food claims,” namely “nutritional” and “health” claims, are “truthful, accurate, not misleading, and substantiated.”	Exhibit 7 (Government’s Response to ROG No. 10).
86	“For example, [under the Marketing Communication Guidelines], use of the term ‘healthy’ must be used in accordance with the Food and Drug Administration (FDA) requirements.”	<i>Id.</i>
87	The Guidelines state USDA will consider speech “government speech” if “[f]or example, [] guidance related to foodborne illness outbreaks [] agree[s] with the guidance issued by USDA and other Federal agencies and [does] not contradict any guidance provided by USDA and other government agencies.” USDA will only seek to “verify the materials are consistent with [an] individual’s position” if the materials “refer to a specific office holder or individual.”	Exhibit 19 (USDA Marketing Communication Guidelines) at RCALF_000775-76.

88	<p>The Government can only identify a few examples of where it has objected to language used by the state beef councils: (1) where they have made nutritional claims in way that is not “in accordance with [] FDA requirements” or those of USDA and the FTC; (2) where materials failed to “reflect the correct minimal cooking temperature for a whole muscle beef cut” or called uncooked meat safe; (3) where an opinion was not based on “factual information” and “cannot be substantiated”; (4) where an advertisement lacked a logo to identify the speaker; and (5) where a council wished to use the term “cracker” to refer to ranchers and also failed to properly state “nutritional claims.” In none of those instances, beyond recommending a logo be added, did the Government direct what language should replace the problematic terms, except that it comply with FDA, FTC and USDA requirements for health claims and cooking times.</p>	<p>Exhibit 7 (Government’s Response to ROG No. 10); Exhibit 11 (Government’s Response to ROG No. 14).</p>
89	<p>The Government does not claim to recommend substantive positions to the state beef councils.</p>	<p>Exhibit 11 (Government’s Responses to ROG No. 14).</p>
90	<p>The Government also has indicated it does not review councils’ oral communications. For instance, the state councils engage in foreign marketing “visits” and bring foreign purchasers to the United States, but the Government has no documents demonstrating any review of state beef councils’ speech “during those visits.”</p>	<p>Exhibit 20 (Government’s Responses to RFPs Nos. 24-25) (also stating Government did not conduct any “review ... of state beef councils’ requests to travel to foreign countries” or the “speech they will engage in while there”); Exhibit 21 (Nebraska Beef Council’s 2018-2019 Marketing plan) at RCALF_000234 (stating “Beef checkoff dollars will supplement foreign marketing</p>

		visits” to, among other activities “build the beef industry image”); Exhibit 22 (Wisconsin Beef Council’s 2019 Budget) at RCALF_000560 (describing its plan “to bring 5 or 6 importers from Central America to Wisconsin to ... increase the demand for US beef”).
91	Likewise, the state beef councils engage in in-person presentations, but, when the Government approves those presentations, it only seeks to approve the slides to be shown, not the speech to be given.	Exhibit 23 (USDA Email) at QSBC_002539 (“review[ing] and approv[ing] [a] presentation”); Exhibit 24 (PowerPoint Presentation) at RCALF_002937 (producing attachment sent to USDA for approval, a PowerPoint presentation without notes); <i>see also</i> Exhibit 53 (USDA email) at QSBC_000686 (approving similar PowerPoint); Exhibit 54 (USDA email) at QSBC_000815 (approving similar PowerPoint).
<i>The State Beef Councils At Issue Fund Third-Party Speech</i>		
92	The intervening state beef councils state that in addition to using the Beef Checkoff to support their own activities, “[e]ach year” they “make[] [] voluntary contribution[s] to the Federation of State Beef Councils” and they may also make “voluntary contribution[s] intended to be specifically designated to USMEF [the United States Meat Export Federation].”	Exhibit 25 (Intervenors’ Responses to ROGs Nos. 7, 9, 10).
93	The Government confirms the state beef councils can “contribute” Beef Checkoff money to other private third-	Exhibit 11 (Government’s Response to ROG No. 17); Exhibit 7 (Government’s

	<p>parties, such as the Federation of State Beef Councils, USMEF, and the Wisconsin Livestock Identification Initiative, in amounts at the state beef councils’ discretion.</p>	<p>Response to ROG No. 19) (Government “does not have a role in determining in advance how much funding” the state councils send to the Federation of State Beef Councils or USMEF, but if the councils do make such contributions “such funding will generally be part of a [] marketing plan and budget”); Exhibit 26 (Government’s Response to ROG No. 23) (The Government “does not have a role in determining how much funding QSBCs can send to such ‘outside entities.’ However, if a [state council] does provide funding, [the Government] would review and approve this funding generally as part of [reviewing] marketing plan[s] and budget[s]”).</p>
94	<p>The intervening state beef councils submit to the Federation of State Beef Councils, a subdivision of the National Cattlemen’s Beef Association (“NCBA”), an annual “investment projection” form that details their “Projected investment to NCBA Unrestricted”; their “Projected investment to NCBA Prioritized” for particular uses— which, if the money is prioritized for “International Marketing,” will go to USMEF; their money provided for other NCBA and Federation of State Beef Council projects; and their money earmarked for USMEF membership.</p>	<p>Exhibit 27 (Nebraska 2019 Investment Form); Exhibit 28 (Montana 2017 Investment Form); Exhibit 29 (Texas 2018 Investment Form); Exhibit 30 (Pennsylvania 2019 Investment Form).</p>
95	<p>For example, for the 2018 financial year, the Texas Beef Council represented to the Federation of State Beef Councils</p>	<p>Exhibit 31 (Texas 2019 Investment Form).</p>

	<p>it would make an “Unrestricted” investment in the National Cattlemen’s Beef Association of \$1 million; a \$500,000 “Prioritized” investment to the National Cattlemen’s Beef Association, although no priority was specified; a \$491,400 “Prioritized” investment for “International Marketing” which is forwarded to USMEF; and a \$8,600 “Earmarked” contribution “for USMEF membership”; bringing its total “investment[s]” to \$2 million.</p>	
96	<p>The investment form states that “The Federation Division of NCBA may use the funds only for purposes permitted by the Act and the Order and in accordance with budgets and programs established and executed by the Federation. The Federation Division of NCBA will annually account to SBCs for its use of these funds.”</p>	<p>Exhibit 27 (Nebraska 2019 Investment Form); Exhibit 28 (Montana 2017 Investment Form); Exhibit 29 (Texas 2018 Investment Form); Exhibit 30 (Pennsylvania 2019 Investment Form).</p>
97	<p>The intervening state beef councils explain that they can make “contributions” to USMEF “through the Federation [of State Beef Councils] Commitment Form and also through direct contributions to USMEF.”</p>	<p>Exhibit 25 (Intervenors’ Responses to ROGs Nos. 9-10).</p>
98	<p>The Wisconsin Beef Council has also contributed Beef Checkoff funds to the Wisconsin Livestock Identification Initiative, among other third-parties.</p>	<p>Exhibit 32 (Wisconsin Beef Council 2017 Beef Marketing Plan) at RCALF_000540.</p>
99	<p>Beyond any “priorities” state councils list for the expenditure, the only “limit” on the use of their contributions is that the “contributions” must be spent “for purposes allowed under the Beef Act and Beef Order.”</p>	<p>Exhibit 25 (Intervenors’ Responses to ROGs Nos. 7, 9, 10); Exhibit 11 (Government’s Response to ROG No. 17) (only “limit” on money sent to the Federation of State Beef Councils is it “must be spent on programs that comply with the Beef Act and Beef Order”); Exhibit</p>

		<p>7 (Government’s Response to ROG No. 19) (only “limit” on money sent to United States Meat Export Federation as “funding” for that entity is it “must be spent on programs that comply with the Beef Act and Order”); Exhibit 26 (Government’s Response to ROG No. 23) (only “limit” on money sent to the Wisconsin Livestock Identification Initiative or other such third-parties is it “must be spent on programs that comply with the Beef Act and Beef Order”).</p>
<p>100</p>	<p>State beef councils obtain Government “approval” for these contributions by placing them in their annual “marketing plan and [] overview of expenditures.”</p>	<p>Exhibit 25 (Intervenors’ Responses to ROGs Nos. 7, 10); Exhibit 11 (Government’s Response to ROG No. 17); Exhibit 7 (Government’s Response to ROG No. 19) (Government “does not have a role in determining in advance how much funding” the state councils send to the Federation of State Beef Councils and United States Meat Export Federation, but if they do make such contributions “such funding will generally be part of a [] marketing plan and budget”); Exhibit 26 (Government’s Response to ROG No. 23) (Government “does not have a role in determining how much funding QSBCs can send to such ‘outside entities’ However, if a [state council] does provide funding, [the</p>

		Government] would review and approve this funding generally as part of [reviewing] marketing plan[s] and budget[s]”).
101	The Government confirms those annual marketing plans merely include an “outline” or “general description” of the council’s plans.	Exhibit 11 (Government’s Response to ROG No. 14).
102	The Government admits an example of the types of “outlines” and “general descriptions” in these marketing plans is: “develop and implement demand generation initiatives.”	Exhibit 9 (Government’s Response to RFA No. 39) (referencing Exhibit 33, Texas Beef Council 2018 Marketing Plan at RCALF_000459).
103	The Government explains it does not review the speech generated through these “contributions”; it only reviews the speech generated by third-parties funded by the state beef councils subject to the MOUs if that speech is a “deliverable[.]” provided to the state council under a contract for services, as the Government would do “with any other contractor.”	Exhibit 7 (Government’s Response to ROG No. 19).
104	Only one state beef council subject to an MOU has such a contract for deliverables with any of the third-parties described above.	<i>Id.</i> ; <i>see also</i> Exhibit 11 (Government’s Response to ROG No. 17) (not identifying any contracts between state beef councils and Federation of State Beef Councils); Exhibit 26 (Government’s Response to ROG No. 23) (not identifying any contracts between state beef councils and the Wisconsin Identification Initiative); Exhibit 34 (Kansas Beef Council 2016/2017 Financial Statements and Report) at RCALF_001127 (indicating Kansas Beef

		Council does not consider “contributions” to the Federation of State Beef Councils to be part of the money the council spends on council activities); Exhibit 35 (Nebraska Beef Council 2017 Financial Statement) at RCALF_001332 (same for Nebraska Beef Council).
105	Plaintiffs requested the intervening state beef councils produce documents “sufficient to demonstrate” how their Beef Checkoff money provided to USMEF “was spent,” and, for every state council except the single council with a contract for deliverables, Intervenor only identified the Federation of State Beef Councils’ and USMEF’s annual reports, a single USMEF Auditor’s Report, and the councils’ Federation investment sheets.	Exhibit 36 (Intervenors’ Response to RFP No. 9).
106	The annual reports explain their function is to “celebrate[]” the work of USMEF through providing “Beef activity highlights.”	Exhibit 37 (2015 Annual Report identified by Intervenor as demonstrating how their “contributions” to USMEF were spent) at QSBC_002618, 2628; Exhibit 38 (2016 Annual Report also identified by Intervenor) at QSBC_002635, 2636.
107	The Government does not control or supervise any of the third parties receiving Beef Checkoff funds as “contributions” from the state beef councils. The Government states, the “Federation [of State Beef Councils] is responsible for its own business decisions and financial accountability.” The Government “does not have	Exhibit 11 (Government’s Response to ROG No. 16); Exhibit 7 (Government’s Responses to ROGs Nos. 18-19) (stating its description of its supervision of the Export Federation as a “contractor” is “the extent of the ways in which [it] ‘supervise[s] the United States Meat Export Federation.’”);

	<p>direct oversight authority over the Federation as an entity.”</p> <p>The Government’s only oversight of USMEF is when it serves as a contractor for the Beef Board or state beef councils. It “does not select, appoint, or remove” directors of the Meat Export Federation. The same is true for other third-parties who receive “contributions” of Beef Checkoff money from the state beef councils.</p>	Exhibit 26 (Government’s Response to ROG No. 23).
108	The Government was unable to say how any of the third-parties spend Beef Checkoff money.	Exhibit 9 (Government’s Responses to RFAs Nos. 66-67, 69).
<i>The State Beef Councils At Issue Hold Themselves Out As Private Entities</i>		
109	The state beef councils at issue in this case, hold themselves out as independent, non-governmental entities, who direct their own activities	Exhibit 39 (Hawaii beef council webpage) at PlaintiffRCALF0048 (stating it is a “nonprofit organization working for the cattle producers of Hawaii”); Exhibit 40 (Kansas Beef Council webpage) at PlaintiffRCALF00469 (stating it is “directed by a board of volunteer cattle producers from across the state”); Exhibit 41 (Montana Beef Council webpage) at PlaintiffRCALF0064 (stating “A 12 member board of directors guides the Montana Beef Council.”); Exhibit 42 (Nebraska’s Beef Council’s webpage) at PlaintiffRCALF0086 (stating its Executive director is “[r]esponsible for management of staff and oversight of all check-off programs”); Exhibit 43 (North Carolina

		<p>Beef Council webpage) (stating it “is a non-profit organization charged with the promotion and marketing of beef and beef products in North Carolina” and “[a] 13-member board of cattlemen, representing the state’s 19,000 cattle producers, directs the organization”); Exhibit 44 (Pennsylvania State Beef Council webpage) at PlaintiffRCALF00131 (stating it is a “non-profit organization working on behalf of 25,000 beef, dairy and veal producers in the Commonwealth” that “administers the Beef Checkoff program in Pennsylvania”); Exhibit 45 (South Dakota Beef Council webpage) at PlaintiffRCALF00140 (stating Executive Director is “responsible” for “oversight of all checkoff programs”); Exhibit 46 (Vermont Beef Industry Council webpage) at PlaintiffRCALF154 (stating it “is governed by Vermont dairy, beef and veal producers and folks representing allied industries”); Exhibit 47 (Wisconsin Beef Council webpage) (stating it “is a producer-funded, producer-directed organization”).</p>
110	<p>Moreover, each state beef council named in this action has a “unique logo specific to that beef council,” although it may incorporate parts of the Beef Board’s logo.</p>	<p>Exhibit 10 (Intervenors’ Response to RFA No. 10); Exhibit 2 (Government’s Response to RFA No. 10).</p>
111	<p>The Government was not involved in designing the state</p>	<p>Exhibit 10 (Intervenors’ Response to RFA</p>

	beef councils' unique logos.	No. 11); Exhibit 2 (Government's Response to RFA No. 11).
112	The Government did not approve the state beef councils' unique logos.	Exhibit 10 (Intervenors' Response to RFA No. 12); Exhibit 2 (Government's Response to RFA No. 12).
113	The state beef councils' unique logos can "appear on promotional or other materials distributed by the state beef councils named in this action."	Exhibit 2 (Government's Response to RFA No. 13); <i>see also</i> Exhibit 10 (Intervenors' Response to RFA No. 13).
114	Under the MOUs, the Government approved a Texas Beef Council advertisement that (a) contains the logo for the Texas Beef Council—which does not contain any part of the Beef Board's logo—but states "Beef Loving Texans"; (b) promotes the Texas Beef Council website, "BeefLovingTexans.com"; and (c) reproduces the Boiner's Fiesta Brand seasoning jars, the company name, and a coupon for the seasoning. No other identifying information is present.	Exhibit 8 (Intervenors' Response to RFA No. 62) (admitting Exhibit 48 at QSBC_001421-22 was submitted to and "reviewed and approved by USDA"); Exhibit 9 (Government's Response to RFA No. 52) (admitting same); Exhibit 48.
115	Under the MOUs, the Government reviewed and approved a Texas Beef Council advertisement that (a) contains the logo for the Texas Beef Council—which does not contain any part of the Beef Board's logo—but states "Beef Loving Texans"; and (b) promotes the Texas Beef Council website, "BeefLovingTexans.com." No other identifying information is present.	Exhibit 8 (Intervenors' Response to RFA No. 57) (admitting Exhibit 49 at QSBC_001174-75 was submitted to and "reviewed and approved by USDA"); Exhibit 9 (Government's Response to RFA No. 48) (admitting same); Exhibit 49.
116	Under the MOUs, the Government reviewed and approved a Pennsylvania Beef Council advertisement that reproduced the logo for the Pennsylvania Beef Council with the tagline "Pennsylvania Beef Council Funded By Beef Farmers and	Exhibit 8 (Intervenors' Response to RFA No. 55) (admitting Exhibit 50 at QSBC_000866 was submitted to and "reviewed and approved by USDA");

	Ranchers” at the top, alongside a description of the council as the “voice for our beef and veal partners.” The remainder of the advertisement depicts a cow and claims about the economic “bottom line” of the “checkoff programs,” without other identifying information of who is speaking.	Exhibit 9 (Government’s Response to RFA No. 44) (admitted same); Exhibit 50.
117	Under the MOUs, the Government reviewed and approved a Texas Beef Council letter that stated it was sent “On behalf of Texas’ beef ranchers” with the “Beef Loving Texans” logo and no other logos present.	Exhibit 8 (Intervenors’ Response to RFA No. 66) (admitting Exhibit 51 at QSBC_0002253 was submitted to and “reviewed and approved by USDA”); Exhibit 9 (Government’s Response to RFA No. 56) (admitting same); Exhibit 51.
118	The Beef Board approved the Montana Beef Council entering into a “branded partnership agreement” with the fast-food chain Wendy’s that funded an advertisement largely filled with the Wendy’s burger, logo, and catchphrase, with a tagline that says “In Partnership With Montana Beef Producers” alongside the Montana Beef Council’s unique logo that includes the state’s name.	Exhibit 8 (Intervenors’ Response to RFA No. 48) (regarding Exhibit 52 at QSBC_00262); Exhibit 52.
119	The Government reviewed a similar advertisement produced through the partnership between the Montana Beef Council and Wendy’s after it ran and concluded it would take no action to prevent the advertisements or partnership from continuing.	Dkt. No. 40-1 (Payne Decl.), Exhibits D-E.
<i>The Government’s Post-Complaint “Opt-Out” Procedure</i>		
120	Following the Complaint in this case, the Beef Board issued a memo stating that producers can “request that their assessment be redirected from” the state councils to the Beef Board.	Dkt. No. 23-6 (Beef Board Memorandum).

121	That memo explains that under this opt-out procedure, the state councils may “h[old]” the portion of the Beef Checkoff payments they previously retained for their own use while they determine if the opt-out request “meets documentation requirements.”	<i>Id.</i>
122	Around the same time, the Government issued a notice of proposed rulemaking to formalize the opt-out procedure.	Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments To Allow Redirection of State Assessments to the National Program; Technical Amendments (“Proposed Beef Order Amendment”), 81 Fed. Reg. 45984, 45986 (June 15, 2016).
123	That rule was not finalized until May 13, 2019, nearly three years later, but seven days before R-CALF was to move for summary judgment.	Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program (“Final Beef Order Amendment”), 84 Fed. Reg. 20765 (May 13, 2019).
124	The final rule, which parallels the requirements in the memo issued in 2016, requires producers who wish to opt-out of funding their state beef council to “submit a QSBC-1 form that is postmarked by the 15th day of the month following the month the cattle were sold” <i>every</i> time cattle is sold and the checkoff paid to the state council.	<i>Id.</i> at 20767.
125	A state council has 60-days to “respond to such requests.”	<i>Id.</i>
126	The final rule does not include a QSBC-1 form, but the Government’s existing approved opt-out request form	Exhibit 55 (Government’s approved opt-out request form); <i>see also</i> Exhibit 11

	requires a producer to “attach a copy of the livestock-market invoice or other document supporting payment of the beef checkoff assessment” for “each transaction” that the producer wishes to redirect to the Beef Board.	(Government’s Response to ROG No. 3) (relying on the form to demonstrate how a payer can “submit a redirection request.”).
127	The Government’s final rule notes that the “majority of commenters believe that assessments should go to the national program, unless a producer provides affirmative consent that their federal assessment paid to a State council to remain with the State program.”	Final Beef Order Amendment, 84 Fed. Reg. 20765 at 20770.
128	The Government’s final rule rejects this approach because it believes only a limited number of producers have undertaken the burden to opt-out.	<i>Id.</i>
129	On this basis, the final rule asserts, “the majority of producers prefer that the [state beef councils] retain their assessments.”	<i>Id.</i>
130	The final rule also asserts without any support that requiring affirmative consent “would create an unnecessary burden.”	<i>Id.</i>

RESPECTFULLY SUBMITTED this 20th day of May, 2019.

PUBLIC JUSTICE, P.C.

By: /s/ David S. Muraskin
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