

EXHIBIT A

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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,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE,</p>	<p>Case No. CV-16-41-GF-BMM-JTJ</p> <p style="text-align: center;">SUPPLEMENTAL PLEADING</p>
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AND THE UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants.	
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1. Pursuant to Federal Rule of Civil Procedure 15(d), in light of the Defendants’ representations and the Courts’ decisions in this matter, Plaintiff Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (“R-CALF”) makes this Supplemental Pleading to expand the scope of the requested relief.

2. In its original pleading, R-CALF asked this Court to declare unconstitutional and enjoin the “federal Beef Checkoff program [from] requiring cattle producers to fund the private speech of the Montana Beef Council” because this violates the First Amendment of the United States Constitution. Dkt. No. 1 ¶ 10.

3. Now, in addition, R-CALF asks this Court to declare unconstitutional and enjoin Defendants from allowing Beef Checkoff dollars to fund the private speech of the Hawaii Beef Industry Council, the Indiana Beef Council, the Kansas Beef Council, the Nebraska Beef Council, the Nevada Beef Council, the New York Beef Council, the North Carolina Cattlemen’s Beef Council, the Pennsylvania Beef Council, the South Carolina Beef Council, the South Dakota Beef Industry Council, the Texas Beef Council, the Vermont Beef Council, and the Wisconsin

Beef Council, without the councils first obtaining the payers' affirmative consent to use the money, as this violates the First Amendment.

4. The Beef Checkoff is a special federal tax on the sale of cattle, the funds of which can only be used for promotional activities to increase beef consumption (speech). 7 U.S.C. § 2901(b); 7 C.F.R. § 1260.172.

5. The Supreme Court has held that the core function of the checkoff programs (of which the Beef Checkoff is one example) is to generate speech. Thus, the checkoffs' exactions and expenditures are subject to the First Amendment. *See, e.g., R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 916–17 (9th Cir. 2005).

6. The Supreme Court has further held that if checkoff money is used to “to subsidize a private message” that is equivalent to the government compelling a person to utter another person's message and is unconstitutional. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005).

7. In the proceedings in this case, Defendants have admitted that none of the checkoff money is used by federal agencies.

8. Instead, Defendants have explained that, typically, half the money goes to the Cattlemen's Beef Promotion & Research Board (“Beef Board”) and the Beef Promotion Operating Committee (“Beef Committee”), entities established by the United States Department of Agriculture (“USDA”) pursuant to the statute creating the Beef Checkoff program (“the Beef Act”). Dkt. No. 40-1 ¶¶ 5, 11.

9. In most instances, the other half goes to state beef councils. *Id.* ¶ 11.

10. The state beef councils can be entirely private entities, determining their own membership and speech.

11. Nonetheless, in this suit, Defendants have admitted state beef councils are allowed to collect the full checkoff tax due in their state and take 50% to use in the councils' beef promotion activities (speech). The only restriction on the state beef councils' use of those funds, is that the funds have to be spent consistent with the Beef Act. *Id.* ¶ 11.

12. This Court upheld the Magistrate Judge's Findings and Recommendations, Dkt. No. 44, that R-CALF was likely to succeed on the merits that the private Montana Beef Council's retention of Beef Checkoff funds violates the payers' First Amendment rights, because the Montana Beef Council is engaged in private speech and uses those funds for that private speech. Dkt. No. 47, at 19.

13. This Court entered a preliminary injunction prohibiting Defendants from allowing the Montana Beef Council to retain any of the Beef Checkoff funds it collects, unless the payer first agrees that the council can use that money. *Id.* at 11, 19, 23. Under the injunction, the default is that all of the Beef Checkoff tax goes to Beef Board and Committee to be used by those entities. *See id.*

14. The Ninth Circuit affirmed this Court's decision. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Perdue*, 718 Fed. App'x 541 (9th Cir. 2018).

15. Defendants' evidence and arguments both before this Court and on appeal establish any decision declaring unconstitutional and enjoining Defendants from allowing the private Montana Beef Council to automatically take payers' checkoff dollars for its use should equally apply to the Hawaii Beef Industry Council, the Indiana Beef Council, the Kansas Beef Council, the Nebraska Beef Council, the Nevada Beef Council, the New York Beef Council, the North Carolina Cattlemen's Beef Council, the Pennsylvania Beef Council, the South Carolina Beef Council, the South Dakota Beef Industry Council, the Texas Beef Council, the Vermont Beef Council, and the Wisconsin Beef Council.

16. Therefore, R-CALF seeks to expand its requested relief, asking this Court to declare unconstitutional and enjoin Defendants from allowing these other councils, as well as the Montana Beef Council, from retaining Beef Checkoff funds, unless the payer first affirmatively consents to the state council using that money.

I. JURISDICTION AND VENUE

17. This action arises under the United States Constitution and the laws of the United States. Therefore, this Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

18. This action also arises under the Court's inherent equitable jurisdiction.

19. This Court has authority to grant the declaratory and injunctive relief requested pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure, as well as the Court's inherent equitable powers.

20. Venue is proper in the United States District Court for the District of Montana pursuant to 28 U.S.C. § 1391(b)(1)-(2), (e)(1).

21. R-CALF is a Montana entity with its primary office in Montana.

22. Venue is also proper in this Court because this case concerns policies and practices the United States has implemented uniformly in each of the jurisdictions where R-CALF requests relief. Those policies violate the United States Constitution. Therefore, requiring R-CALF to file suit in multiple jurisdictions would be inequitable and unduly delaying vindicating individuals' constitutional rights. *See, e.g., Texas v. United States*, 809 F.3d 134, 188 & n.211 (5th Cir. 2015).

II. PARTIES

a. Plaintiff

23. R-CALF is a membership-based, nonprofit organization. It is the largest trade organization in the United States whose voting members are comprised exclusively of independent cattle producers. R-CALF's voting members include cow-calf operators, cattle backgrounders, and feedlot operators. They are located in 43 states, including Montana, Indiana, Kansas, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Dakota, Texas, and Wisconsin.¹

24. Its voting members pay dues and have equal voting rights in electing R-CALF directors and setting R-CALF policies.

25. R-CALF's mission focuses on ensuring the continued profitability and viability of independent, domestic cattle producers, particularly, but not exclusively, cow-calf producers who raise their cattle in the United States. This primarily involves advocating for independent United States cattle producers in trade and marketing—work that has taken on increasing import as the number of domestic cattle producers continues to decline year after year.

¹ R-CALF's voting, dues paying members in good standing who pay the Beef Checkoff tax include those identified previously in this case and: Dr. Robert Weil (Indiana); David Pfrang (Kansas); David Wright (Nebraska); Fredrick Stewart (Nevada); Al Cisco (New York); Alan Pruitt (North Carolina); Danny Rice (Pennsylvania); Vaughn Meyer (South Dakota); Stayton Weldon (Texas); and Richard Wright (Wisconsin), among others.

26. For years, R-CALF has spent time and resources to counteract the fact that Beef Checkoff money is used to undermine independent cattle producers. R-CALF has demonstrated to the press, public, and legislators that checkoff dollars are regularly used to promote the interests of multinational beef companies, which undermines the viability of domestic independent cattle producers. For instance, R-CALF has shown that checkoff dollars are regularly used to promote a false equivalency between domestic and imported beef because this allows multinational beef companies to import cheaper beef and pass it off to consumers at the same price as domestic beef, but with wider profit margins. This reduces the amount of beef purchased from domestic independent cattle producers and the prices they receive for their products.

27. Such inaccurate and undesirable statements are commonly made by state beef councils, whose activities are regularly directed by representatives of the multinational beef companies. Indeed, the state beef councils often share office space and personnel with the advocacy groups for multinational beef companies, the National Cattlemen's Beef Association, or its affiliates.

28. The misleading and harmful statements paid for by the Beef Checkoff are particularly pernicious when made by state beef councils because those councils can be wholly unaccountable to the cattle producers who fund them through the Beef Checkoff tax. The federal government fails to exercise control

over those councils and their speech. Often the councils are private entities. Their directors and employees can be selected in secret, excluding the participation of a large numbers of cattle producers, including R-CALF and its members.

29. R-CALF's members, including those in Montana, Indiana, Kansas, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Dakota, Texas, and Wisconsin, object both to the Beef Checkoff's messaging, and also the fact that the state beef councils are entirely unaccountable.

30. R-CALF members, including those in Montana, Indiana, Kansas, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Dakota, Texas, and Wisconsin, pay the Beef Checkoff tax and object to being required to turn over their hard earned money to fund private speech with which they disagree and cannot influence.

31. R-CALF's members, including those in Montana, Indiana, Kansas, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Dakota, Texas, and Wisconsin, wish to have greater influence over how their checkoff dollars are spent, particularly by the state beef councils.

32. The harm caused to R-CALF's members by Defendants allowing the Beef Checkoff exactions to be spent by private, unaccountable entities is particularly severe because that unlawful activity has caused R-CALF to divert resources to work against unaccountable state beef councils. R-CALF has had to

divert time and resources away from its other activities to educate its membership, the press, and legislators on the process by which state beef councils obtain producers' funds. For instance, R-CALF's CEO regularly delivers presentations to cattle producers across the country discussing the structure of the Beef Checkoff program and how that structure allows unaccountable entities to undermine independent producers' financial and economic interests.

33. If Beef Checkoff money did not automatically go to private state beef councils to fund their activities, R-CALF would be able to put some or all of those resources to other pressing issues, such as advocating against the federal government's policy that allows imported beef to be labeled a "Product of the USA," or advocating for how the checkoff funds should be spent by government-controlled entities.

b. Defendants

34. Defendant Secretary of Agriculture Sonny Perdue, sued in his official capacity, is charged with overseeing the federal Beef Checkoff. 7 U.S.C. §§ 2904, 2908-09.

35. Defendant USDA is the agency charged with administering the federal Beef Checkoff.

III. FACTS

a. **The law of the case.**

36. “[T]he principal object” of the Beef Checkoff program is “speech itself” and thus the exactions obtained to fund this program are subject to the First Amendment. Dkt. No. 47, at 20 (quotation marks omitted).

37. The First Amendment prohibits the government from requiring cattle producers to pay the Beef Checkoff tax if it is used to fund private speech. Dkt. No. 47, at 9-10.

38. “The government cannot compel citizens to subsidize a private advertising program for the sole purpose of increasing demand for a product.” *Id.* at 18.

39. The Beef Checkoff program has survived only because the Supreme Court concluded that if the checkoff’s tax goes to the Beef Board and Committee to pay for their speech, then it is funding “government speech,” not “private speech,” and “government speech” is exempt from the First Amendment. *See id.* at 11-12, 13.

40. The Supreme Court explained that whether an entity is engaged in government speech rather than private speech turns on whether there is “‘democratic[] accountab[ility]’” for the speech. *Id.* at 11–12 (quoting *Johanns*, 544 U.S. at 563); *see also id.* at 13.

41. It has also stated that the Beef Checkoff program will only be held to pay for government speech if the speech is ““from beginning to end the message established by the Federal Government.”” Dkt. No. 44, at 10 (quoting *Johanns*, 544 U.S. at 560).

42. In all the Supreme Court and Ninth Circuit cases where an entity has been held to be engaged in government speech, the government “appoint[ed] ... members of the” entity, had “pre-approval authority” over that entity’s speech, and could disband the entity or remove its members at the government’s discretion. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am.*, 718 Fed. App’x at 542.

43. The federal Beef Act and its regulations do not provide the government authority “to appoint or remove any of the Montana Beef Council’s members.” Dkt. No. 47, at 15.

44. The federal Beef Act and its regulations also do not provide the government “control [over] how the Montana Beef Council spends the checkoff assessments.” *Id.* The federal Beef Act and its regulations “merely prohibit the Montana Beef Council from using checkoff money” in a way that is inconsistent with the Beef Act. In other words, “these statutes and regulations require only that the Montana Beef Council’s advertising advance the image and desirability of beef and beef products.” *Id.* (citing 7 U.S.C. § 2901(b); 7 C.F.R. § 1260.169(a)). The

only limitation on those expenditures is the council cannot “promote ‘unfair or deceptive’ practices, or to ‘influenc[e] governmental policy.’” *Id.* (quoting 7 C.F.R. § 1260.181(b)(7)) (alteration in original).

45. The fact that a payer can request money taken by the Montana Beef Council to be used for the council’s speech be released, and sent onto the Beef Board and Committee is insufficient to alleviate the constitutional violation that comes from having to fund the council’s private speech. *Id.* at 9-10, 17.

46. The only way a state beef council engaged in private speech can lawfully retain checkoff funds for any period of time is if a payer first agrees to fund that council’s private speech. *Id.* 9-11.

b. Defendants’ admissions in this litigation.

47. In this case, Defendants stated they interpret and have implemented the federal Beef Act and its regulations to provide the government no role in directly supervising any aspect of any of the state beef councils.

48. According to Defendants’ admissions in this litigation, to become a state beef council an entity merely must submit an application for certification to the Beef Board, not the government. Dkt. No. 40-1, ¶ 16. The Beef Board’s role is then to determine (1) whether or not there is already another state beef council in the state and (2) whether the applicant meets the “requirements specified in 7

C.F.R. § 1260.181(b).” *Id.* If there is no other state beef council in the state and the applicant meets the requirements, it is certified. *Id.*

49. It is then up to the “Beef Board [to] monitor[,]” the state beef council. *Id.* ¶ 19.

50. This “monitoring” involves the Beef Board receiving an annual “outline[]” of the council’s planned activities and annual “audit” showing the amount of money collected by the council. *Id.* ¶ 19(a)-(b).

51. “[E]very four to five years” the Beef Board will conduct a “compliance review[]” of each state beef council. *Id.* ¶ 19(c). These reviews are solely meant to ensure the state beef councils are not violating the Beef Act. *Id.* That is, the reviews do not examine the substance of the state beef councils’ use of the checkoff funds (speech); they simply ensure the Beef Checkoff dollars used by the state beef councils are spent on promoting beef, without violating the Beef Act’s two restrictions.

52. The government has no role in any of these activities. Its sole function is to “oversee[] the Beef Board’s monitoring” of state beef council, which only means ensuring that the Beef Board carries out the steps described above. *Id.* ¶ 22.

53. The government only “participates in discussions regarding” each state beef council’s activities twice a decade when, as part of its work supervising

the Beef Board, the government “receives reports of the results of the Beef Board’s compliance reviews.” *Id.*

54. There are three minor ways in which, pursuant to the Beef Act, the government nominally has greater contact with the state beef councils, although Defendants admit that, in actuality, none involve the government questioning or reviewing the state beef councils’ activities.

55. Technically, the government must approve a state beef council “entering into a State Branded Promotion Partnership,” but, Defendants explain, the Beef Board is the first to review the request, and only if the “Beef Board staff review and approve the partnership” is it “sent to [the government] for review and approval.” *Id.* ¶ 25.

56. Defendants did not identify a single instance the government has ever disagreed with the Beef Board staff.

57. Similarly, the government must “concur” in state beef councils waiving “late fees associated with past-due assessments,” but the initial determination is made by the Beef Board. *Id.* ¶ 26.

58. Defendants did not identify a single instance where the government has ever disagreed with the Beef Board.

59. Likewise, under the Beef Act and its regulations, a state beef council can be punished if, but only if, it violates the few prohibitions in the statutes and

regulations. Those punishments are “handled, at least initially, by Beef Board staff ... with oversight from the Beef Board’s Executive Committee” and the government. *Id.* ¶ 27.

60. Defendants did not identify a single instance where the government has ever disagreed with the Beef Board and only identified a single instance where a state beef council had ever been de-certified. *Id.* ¶ 29.

c. Other state beef councils are identical to the Montana Beef Council for First Amendment purposes.

61. The facts that caused this Court to grant a preliminary injunction, preventing Defendants from allowing the Montana Beef Council to retain and use checkoff funds, exist for the Hawaii Beef Industry Council, the Indiana Beef Council, the Kansas Beef Council, the Nebraska Beef Council, the Nevada Beef Council, the New York Beef Council, the North Carolina Cattlemen’s Beef Council, the Pennsylvania Beef Council, the South Carolina Beef Council, the South Dakota Beef Industry Council, the Texas Beef Council, the Vermont Beef Council, and the Wisconsin Beef Council.

62. Each of these councils is a private entity.

63. No federal or state law determines the membership of these councils or empowers a federal or state government official to appoint members to these councils.

64. No federal or state law determines how these councils' members are selected or empowers a federal or state government official to participate in those determinations.

65. No federal or state law empowers a government official to remove any member of these councils.

66. No federal or state law empowers a government official to review, approve, or participate in the development of these councils' beef promotion activities (speech) on which they spend checkoff funds.

67. No federal or state law empowers a government official to even attend these councils' meetings.

68. No federal or state law empowers a government official to review these councils' annual budgets.

69. Pursuant to Defendants' admissions in this case, their management of the state councils does not vary by state.

70. In other words, based on Defendants' interpretation of the Beef Act and its regulations, they have no role in directly supervising these councils' membership or activities.

71. Consistent with this, each of the Hawaii, Indiana, Kansas, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and Wisconsin state beef councils emblazon the council's

promotional activities with the council's unique logo that indicates the speech is distinct from that of USDA, the Beef Board, or the Beef Committee.

72. These logos can also indicate that the councils are speaking for the state's producers. For instance, the Hawaii council promotes its activities under the name the Hawaii Beef Industry Council and uses an image of a cow on the Hawaiian landscape. The Nebraska Beef Council proudly declares that its activities (speech) are being funded by "Nebraska's beef producers."² And the Texas council uses the tag line that it is acting on behalf of "Beef Loving Texans."³

73. In this manner and the others provided above, the private state councils' speech disproportionately burdens R-CALF's members and other cattle producers from engaging in their desired speech by drowning out independent producers' desired messages.

74. Nonetheless, Defendants allow these state councils to siphon off half of all Beef Checkoff payments in their state for their own private speech.

IV. SUPPLEMENTAL CAUSE OF ACTION

75. R-CALF re-alleges and incorporates by reference all of the allegations set forth above.

76. The fact that Defendants allow the Hawaii Beef Industry Council, the Indiana Beef Council, the Kansas Beef Council, the Nebraska Beef Council, the

² <https://www.nebeef.org/about-us/contact-us>.

³ <http://www.texasbeef.org/>.

Nevada Beef Council, the New York Beef Council, the North Carolina Cattlemen's Beef Council, the Pennsylvania Beef Council, the South Carolina Beef Council, the South Dakota Industry Beef Council, the Texas Beef Council, the Vermont Beef Council, and the Wisconsin Beef Council to retain and utilize assessments mandated by the federal Beef Checkoff violates the First Amendment of the United State Constitution. The assessments are a compelled subsidy of speech. The government does not control these councils' speech. Thus, the federal Beef Checkoff is mandating that independent cattle producers, including R-CALF's members fund and associate with these councils' private speech, which violates the First Amendment.

77. There are no administrative remedies that would correct this constitutional violation.

78. R-CALF has no adequate remedy at law and is entitled to injunctive and declaratory relief for this claim.

V. SUPPLEMENTAL PRAYER FOR RELIEF

79. R-CALF requests that the court enter a judgment:

i. Declaring the current operation of the federal Beef Checkoff, which allows the Hawaii Beef Industry Council, the Indiana Beef Council, the Kansas Beef Council, the Nebraska Beef Council, the Nevada Beef Council, the New York Beef Council, the North Carolina Cattlemen's Beef Council, and the

South Dakota Beef Industry Council to retain and use the federal Beef Checkoff funds for their private speech, without first obtaining the payers' affirmative consent, unconstitutional under the First Amendment;

ii. Enjoining the Secretary of Agriculture, as well as his officers, agents, employees, attorneys, and all other persons in active concert or participation with him or his officers, from continuing to allow the Hawaii Beef Industry Council, the Indiana Beef Council, the Kansas Beef Council, the Nebraska Beef Council, the Nevada Beef Council, the New York Beef Council, the North Carolina Cattlemen's Beef Council, the Pennsylvania Beef Council, the South Carolina Beef Council, the South Dakota Beef Industry Council, the Texas Beef Council, the Vermont Beef Council, and the Wisconsin Beef Council to retain and use the federal Beef Checkoff funds for their private speech, without first obtaining the payers' affirmative consent;

iii. To ensure that the public has accurate notice of the requirements of the law, requiring Defendants to provide public notice that the challenged aspects of the federal Beef Checkoff are unconstitutional and will not remain in effect;

iv. Awarding R-CALF its reasonable attorneys' fees and costs; and

v. Awarding such other relief as may be just and proper.

RESPECTFULLY SUBMITTED this 9th day of August, 2018.

PUBLIC JUSTICE, P.C.

By: /s/ David S. Muraskin
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