

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RANCHERS CATTLEMEN ACTION
LEGAL FUND UNITED
STOCKGROWERS OF AMERICA, a
Montana Corporation,
Plaintiff-Appellant,

v.

THOMAS VILSACK, in his Official
Capacity as Secretary of Agriculture;
UNITED STATES DEPARTMENT OF
AGRICULTURE,
Defendants-Appellees,

MONTANA BEEF COUNCIL;
NEBRASKA BEEF COUNCIL;
PENNSYLVANIA BEEF COUNCIL;
TEXAS BEEF COUNCIL; LEE
CORNWELL; GENE CURRY; WALTER
J. TAYLOR, JR.,
Intervenor-Defendants-Appellees.

No. 20-35453

D.C. No.
4:16-cv-00041-
BMM

OPINION

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

Argued and Submitted June 10, 2021
Portland, Oregon

Filed July 27, 2021

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

Opinion by Judge Hurwitz

SUMMARY*

Beef Promotion and Research Act/Government Speech

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

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

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

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

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

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

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

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

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

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

COUNSEL

David S. Muraskin (argued), Public Justice P.C., Washington, D.C.; William A. Rossbach, Rossbach Law P.C., Missoula, Montana; J. Dudley Butler, Butler Farm & Ranch Law Group PLLC, Benton, Mississippi; for Plaintiff-Appellant.

Lindsey Powell (argued) and Michael S. Raab, Appellate Staff; Civil Division, United States Department of Justice, Washington, D.C.; Ryan M. Majerus, Senior Counsel; Stephen A. Vaden, General Counsel; United States Department of Agriculture, Washington, D.C.; for Defendants-Appellees.

Jean-Claude André (argued), Bryan Cave Leighton Paisner LLP, Santa Monica, California; Bryan J. Harrison, Bryan Cave Leighton Paisner LLP, Washington, D.C.; Robert M. Thompson and Mollie E. Harmon, Bryan Cave Leighton Paisner LLP, Kansas City, Missouri; Randy J. Cox, Boone Karlberg P.C., Missoula, Montana; for Intervenor-Defendants-Appellees.

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

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