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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, v. TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE, AND THE UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants.</p>	<p>Case No. CV-16-41-GF-BMM-JTJ</p> <p>PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR AN OPPORTUNITY TO RESPOND TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER</p>
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The Government characterizes R-CALF's request for a Temporary Restraining Order to protect R-CALF's members' First Amendment rights as "extraordinary." Gov.'s Mem. ISO Delay TRO, Dkt. No. 29-1, at 1. What is extraordinary is the Government's refusal to abide by black letter Supreme Court law, which establishes the Government is violating the First Amendment, and the Government's repeated reliance on procedural tactics to delay resolution of this matter, which inflicts additional First Amendment harms. Therefore, R-CALF requests the Government's motion to delay adjudication of R-CALF's TRO be denied and that the Court enter R-CALF's requested relief.

A. The parties agree that the Government is violating the Constitution.

The Government states that the federal Beef Checkoff tax allows the Montana Beef Council to "retain up to 50 cents" of every \$1 collected "in the absence of an objection by a cattle producer." *Id.* It cannot be disputed that the Montana Beef Council is a private entity, which the Government has no authority to control. R-CALF's Statement of Undisputed Facts ("SUF") Ex. 7, Dkt. No. 23-7 (Certificate of Existence of the Montana Beef Council); 7 U.S.C. § 2904; 7 C.F.R. § 1260.181.

As a result, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), is dispositive. The Government's decision to allow the private Montana Beef Council to obtain producers' checkoff money is "contrary to the First

Amendment.” *Id.* at 413. The fact that, after the council obtains the money, a producer can object to funding the council, does nothing to salvage the scheme. *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2292-93 (2012) (where a First Amendment right is at stake “there is no way to justify the additional burden of imposing ... [an] opt-out requirement”); *In re Wash. State Apple Advert. Comm’n*, 257 F. Supp. 2d 1274, 1288 (E.D. Wash. 2003) (“The use of compelled assessments ... temporally, in violation of the First Amendment is an invasion on the dissenter’s constitutionally rights.”). Accordingly, every collection of the Beef Checkoff tax in Montana is an “irreparable injury.” *In re Wash. State Apple Advert. Comm’n*, 257 F. Supp. 2d at 1288.

B. R-CALF has prosecuted this action diligently.

Far from “sleeping on its rights,” Gov.’s Mem. ISO Delay TRO, Dkt. No. 29-1, at 5 (quotation marks omitted), R-CALF has prosecuted this action expeditiously. To detail its actions for the Court, R-CALF has enclosed a timeline of events at the end of this Opposition. In fact, just last week, the Government told the Court it was R-CALF’s efforts to act “early in this case” and “well before” the time expected that justified its extension request. Gov.’s Mem. ISO Second Extension Request, Dkt. No. 25, at 3.

At each step, R-CALF has attempted to provide the Government the fullest possible notice and opportunity to respond. The Government’s effort to turn this

into a waiver of R-CALF's members' constitutional rights should not be countenanced. Federal Rule of Civil Procedure 65 encourages the movant for a TRO to provide the adverse party notice. Fed. R. Civ. P. 65(b)(1)(B). It would be an unfortunate Catch-22 for a party's effort to comply with the letter and spirit of that rule to result in waiver.

Despite the Government's suggestion that R-CALF should have filed its TRO at the start of this litigation, Gov.'s Mem. ISO Delay TRO, Dkt. No. 29-1, at 4, it was only *after* the Complaint was filed that the Government *admitted* that for more than twenty years it has unlawfully administered the Beef Checkoff program. After R-CALF filed its Complaint, the Government came forward with a new policy and proposed rule that acknowledged, for the first time, that the Government has no basis to force producers to fund the Montana Beef Council. The policy and proposed rule explained that in 1995 the Government altered the Beef Checkoff regulations to allow state beef councils "to [automatically] retain a portion of the [federal] assessment" and this "unintended" action had "inadvertently" remained in the regulations for more than twenty years. Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments To Allow Redirection of State Assessments to the National Program; Technical Amendments, 81 Fed. Reg. 45984, 45986 (July 15, 2016); *see also* Polly

Ruhland, *Obligation to Redirect Assessments Upon Producer Request if Not Precluded by State Law* (July 29, 2016) (“Ruhland Memo”).¹

For the first time, the new policy and proposed rule also made clear that the Government believes an “opt-out” policy—allowing producers to request their checkoff money “held” by the private Montana Beef Council be transferred to the federal government—makes lawful the otherwise unacceptable compelled subsidies of the private Montana Beef Council. Ruhland Memo. R-CALF should not be faulted for failing to anticipate that the Government would *agree* the Beef Checkoff program has been unlawfully administered, but instead the Government would rely on a new opt-out policy to defend its program, despite this being in direct tension with Supreme Court precedent. *See Knox*, 132 S. Ct. at 2292-93.

Once the Government’s position became clear, R-CALF *brought to the Government’s attention* the controlling Supreme Court authority that rendered the Government’s position untenable. R-CALF’s Mem. ISO TRO, Ex. C, Dkt. No. 28-3 (R-CALF email to Gov.). It was not until the Government filed its Motion to Dismiss that it became clear the Government had no basis to contest R-CALF’s authority, instead relying on cases that have been held inapplicable by the Supreme Court. R-CALF’s Mem. ISO MSJ, Dkt. No. 22, at 18-20. Until then, R-CALF

¹ <http://www.beefboard.org/library/files/redirection-memo-072916.pdf> (last visited Sept. 14, 2016).

could not have anticipated the Government would have no argument to justify its opt-out regime.

Once that became clear, R-CALF *immediately* moved for summary judgment or a preliminary injunction—filing its motion *before* its opposition to the Government’s Motion to Dismiss was due. There, R-CALF explained that “each and every time producers are forced to pay into the system they suffer an irreparable injury.” R-CALF’s Mem. ISO MSJ, Dkt. No. 22, at 27 (quotation marks omitted). R-CALF also provided four declarations from R-CALF members explaining that they have “definite and imminent” plans to sell cattle and pay the Beef Checkoff in Montana, which would result in additional violations of their First Amendment rights. R-CALF’s SUF, Exs. 2-5, Dkt. Nos. 23-2-5 (declarations of R-CALF members). However, recognizing that Rule 65 requires a party to attempt to provide notice before moving for a TRO, and that courts prefer both parties to have an opportunity to be heard, R-CALF did not immediately move for a TRO. Instead, it wished to provide the Government the time allowed to respond under the rules. R-CALF’s Mem. ISO TRO, Ex. C, Dkt. No. 28-3 (R-CALF email to Gov.). R-CALF should not be faulted for working within the rules and standard practice and attempting to allow the Government an opportunity to respond.

It was only when the Government sought to break with standard deadlines, resulting in additional constitutional violations, that R-CALF concluded an *ex*

parte TRO was necessary. Even then, R-CALF notified the Government of its intent to seek a TRO and the harms that would result from the Government's requested delay *before* the Government requested its extension. *Id.* Nonetheless, in its motion, the Government chose not to bring these issues to the Court's attention. The Court's Order granting the extension was entered before R-CALF had an opportunity to respond. Order, Dkt. No. 26. R-CALF filed its motion for a TRO within *days* of the Government's extension request. R-CALF should not be faulted for seeking to protect its members' and all Montana producers' First Amendment rights.

C. A TRO is appropriate.

Courts within this circuit regularly grant TROs when there is "a danger that [the plaintiff's] First Amendment rights would be curtailed." *Herson v. City of San Carlos*, 714 F. Supp. 2d 1018, 1021 (N.D. Cal. 2010); *see also Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 617 (9th Cir. 1999); *Doe v. Harris*, No. C12-5713 TEH, 2012 WL 6101870, at *1 (N.D. Cal. Nov. 7, 2012); *Doe v. Reed*, No. 09-5456BHS, 2009 WL 2392155 (W.D. Wash. July 29, 2009); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1022 (C.D. Cal. 2002); *Debont v. City of Poway*, No. 98CV0502-K(LAB), 1998 WL 415844, at *6 (S.D. Cal. Apr. 14, 1998); *3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1260 (C.D. Cal. 1995).

The Government is wrong that R-CALF has failed to justify its requested relief. According to the Government's own authority, a TRO is appropriate where it will "prevent[] irreparable harm." Gov.'s Mem. ISO Delay TRO, Dkt. No. 29-1, at 3 (quoting *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974)). R-CALF's motion details how the Government's extension will almost certainly cause irreparable harm to an R-CALF member. R-CALF member Maxine Korman has specific plans to sell cattle, for which she will be required to pay the checkoff, four times over the coming months. R-CALF's Mem. ISO TRO Ex. B, Dkt. No. 28-2 (Declaration of Maxine Korman). Thus, the Government's delay, indeed any delay, is almost certain to inflict additional, irreparable First Amendment violations upon Ms. Korman by compelling her to subsidize the private Montana Beef Council. Because the Government's delay occurs during the fall cattle run, when most cattle in Montana are sold, Ms. Korman is almost certainly not alone. *See* R-CALF's Mem. ISO TRO, Ex. A, Dkt. No. 28-1 (Declaration of Bill Bullard). The fact that some, albeit fewer, of these harms would have also occurred had the Government acted within the time allowed under the rules does not make the additional, irreparable injuries that will occur due to delay any less real or important.

Further, the Government states that R-CALF's requested relief should be delayed because it will "[u]pend[] th[e] longstanding 'status quo.'" Gov.'s Mem.

ISO Delay TRO, Dkt. No. 29-1, at 6. However, this is not the case. R-CALF's requested relief would still require producers to pay the *exact same amount* of money into the Beef Checkoff. That money could still even go to the Montana Beef Council. The *only* difference would be that rather than the private council automatically being allowed to keep half of the producers' payments, producers would have to first affirmatively agree to the council retaining their money.

Otherwise, the full exaction would be immediately sent on to federally-controlled, democratically accountable bodies, as is required by the First Amendment. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561, 563 (2005).

Relying on a case that addresses whether a TRO should issue in a trademark dispute, the Government also states a TRO should only issue if "a known party cannot be located in time for a hearing." Gov.'s Mem. ISO Delay TRO, Dkt. No. 29-1, at 3 (citing *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006)). Even under this standard that has no bearing to the constitutional issue presented here, R-CALF prevails. While R-CALF and the Court may know where the Government is physically located, the Government's refusal to respond in the time allowed under the rules is tantamount to the Government being unavailable. *Reno Air Racing Association* explains its limitation on a TRO only applies when a party could have, but chose not to provide notice. 452 F.3d at 1131. Here the Government had notice of R-CALF's arguments and evidence when R-CALF filed

its motion for summary judgment or a preliminary injunction, and the Government had notice of R-CALF's intention to seek a TRO before the Government moved for its extension: the Government has simply chosen to prioritize its other cases and its continuing legal education course. *See* Gov.'s Mem. ISO Second Extension Request, Dkt. No. 25. It still has not informed the Court why its other commitments could not and should not be rescheduled in light of the pressing issues in this case. The Government's decision to avoid acting in this case should not work to the detriment of R-CALF's members.

D. Conclusion.

The facts as stated by the Government establish the administration of the Beef Checkoff in Montana results in ongoing constitutional violations. Rather than address the merits, the Government has sought to delay, enabling additional First Amendment injuries. R-CALF has repeatedly provided the Government notice of the ongoing constitutional violations, and only moved for immediate relief when it became apparent the Government would not proceed in a timely manner, inflicting yet more irreparable, constitutional harms. Given the Government's course of conduct, the Court should act to protect producers' constitutional rights. It should enter R-CALF's requested TRO until it can act on the pending request for summary judgment or a preliminary injunction.

Timeline of Events

May 2, 2016	Complaint filed
June 30, 2016	Government files unopposed request to extend time to respond to Complaint
July 14, 2016	Government informs R-CALF of new policy and proposed rule
July 14, 2016	R-CALF informs Government of Supreme Court authority rendering new opt-out policy unconstitutional
Aug.4, 2016	Government files Motion to Dismiss or, in the Alternative Stay the Case that fails to address R-CALF's authority and relies on authority that has been held inapplicable
Aug. 24, 2016	R-CALF files Opposition to Government's Motion to Dismiss or, in the Alternative Stay the Case, & Motion for Summary Judgment or, in the Alternative, a Preliminary Injunction
Sept. 6, 2016	Government informs R-CALF it will seek an extension for its time to respond
Sept. 7, 2016	R-CALF informs Government that any extension beyond the time allowed under the rules will inflict additional, irreparable harms, thus R-CALF opposes the Government's request and may seek a TRO if the Government moves for an extension
Sept. 7, 2016	Government moves for an extension
Sept. 9, 2016	R-CALF informs Government R-CALF will move for a TRO
Sept. 12, 2016	R-CALF moves for a TRO

RESPECTFULLY SUBMITTED this 14th day of September, 2016.

PUBLIC JUSTICE, P.C.

By: /s/ David S. Muraskin
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)

I HEREBY CERTIFY that this Brief consists of 2,305 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/ David S. Muraskin