IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, and SONNY PERDUE, in his official capacity as Secretary of the United States Department of Agriculture,

Defendants.

Case No. 20-cv-2552 (RDM)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This lawsuit represents Plaintiff R-CALF's most recent sortie in its ongoing battle against the Beef Checkoff Program—a federal initiative providing generic beef promotion and marketing, funded by a "checkoff" assessment paid by beef producers. The Beef Checkoff Program is administered by the Department of Agriculture (USDA) and the national Cattlemen's Beef Promotion and Research Board, in partnership with local qualified state beef councils (QSBCs). Local QSBCs play an important role by working directly with beef producers. R-CALF previously brought a First Amendment challenge to the program in the District of Montana, arguing that the federal government exercised insufficient control over the speech of the state beef councils, which was funded in part by a portion of the checkoff assessment. As a consequence, R-CALF argued that the advertisements of the councils did not constitute government speech and therefore violated the First Amendment.

After extensive proceedings, including an appeal and discovery, the Montana district court granted defendants—including USDA—summary judgment. *See generally R-CALF v. Perdue* (*R-CALF I*), 449 F. Supp. 3d 944 (D. Mont. 2020). The district court analyzed USDA's control over checkoff-funded speech by QSBCs and concluded that USDA retained "enough authority over QSBC speech such that QSBC speech constitutes government speech." *Id*. at 955. This decision relied in large part upon the existence of Memoranda of Understanding (MOUs) that USDA entered into with individual beef councils at different times during the lawsuit. Those MOUs provided additional clarity concerning USDA oversight of the advertising and other speech by those councils, including pre-approval of promotions and contracts. *Id.* at 953.

There is no doubt that R-CALF's goal is to invalidate the beef checkoff program writ large. But there is significant doubt as to whether R-CALF actually opposes the MOUs that are the subject of the present lawsuit. Indeed, R-CALF (unsuccessfully) sought a prophylactic injunction from the Montana district court to make the MOUs permanent, in the event that the district court found the program constitutional, and on appeal R-CALF continues to seek such an injunction permanently enforcing the terms of the MOUs from the Ninth Circuit. Despite these representations, R-CALF now asks this Court to invalidate the MOUs in the hopes of then challenging the constitutionality of the broader Beef Checkoff Program.

A number of jurisdictional bars preclude the litigation tactic that R-CALF seeks to pursue in this lawsuit. First, R-CALF lacks standing because the MOUs do not injure R-CALF or its members. Quite the contrary—R-CALF has represented to other courts that it is benefited by the MOUs, and has therefore asked other courts to permanently enshrine the provisions of the MOUs through injunctions.

Second, even if this Court finds that R-CALF has established an Article III injury traceable to the MOUs, this lawsuit should be dismissed under the doctrine of claim preclusion. R-CALF already had a chance to bring its challenges to the MOUs as part of its challenge to the Beef Checkoff Program before the Montana district court, and even specifically amended its pleadings in that case after the first MOU was in place. R-CALF instead chose to wait and file in this Court only after its lawsuit in Montana was unsuccessful. R-CALF is precluded from splitting its claims in such a fashion, which has required the expenditure of additional court and party resources that would not have been necessary had it simply pursued these challenges in its original choice of forum.

In the event that this case reaches the summary judgment phase, R-CALF would still be unsuccessful because USDA acted entirely reasonably in entering into the MOUs, and because the MOUs—which are individual bilateral agreements between USDA and specific QSBCs—are not "agency action" or "rules" of the type required to conform to notice-and-comment procedures. But, for the following reasons, the Court should dismiss R-CALF's complaint at the motion to dismiss stage.[1]

BACKGROUND

I. Statutory and Regulatory Background

State and federal governments have repeatedly established statutory and regulatory schemes to fund the promotion of generic agricultural products. Such schemes generally levy assessments on producers of the specified agricultural product—for example, soy beans or dairy products—and use those assessments to fund generic marketing for the commodity. At issue here is one such federal scheme designed to promote beef.

Congress enacted the Beef Act in 1985 to promote the beef industry and expand domestic and foreign markets for beef. Pub L. No. 99-198, § 1601(b), 99 Stat. 1354, 1597-98 (1985). USDA implemented the Beef Act by promulgating the Beef Order. 51 Fed. Reg. 26,132 (July 18, 1986).

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[1] Defendants respectfully note that they do not intend to file a certified copy of the index of the Administrative Record with this motion. Local Civil Rule 7(n)(1), which refers to such a filing, presupposes that the "dispositive motion" at issue implicates the contents of the administrative record. *See* LCvR 7(n) cmt.1 ("This rule is intended to assist the Court in cases involving a voluminous record . . . by providing the Court with copies of relevant portions of the record relied upon in any dispositive motion."). Defendants' instant motion does not rely on the contents of any administrative document. Accordingly, consistent with the Rule's intent, Defendants will be prepared to file such an index at the summary judgment phase of this litigation, should such an index prove necessary.

By law, the Beef Order was then approved after a referendum of cattle producers. 7 U.S.C § 2906(a). The Beef Order establishes a program for the development of "plans or projects of promotion and advertising, research, consumer information, and industry information." 7 U.S.C. § 2904(4)(B).

The program is financed through an "assessment[] on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States," *id.* § 2901(b)—more specifically, through a one-dollar-per-head-of-cattle "checkoff." *Id.* § 2904(8)(A); 7 C.F.R. § 1260.172(a). The Beef Act and the Beef Order establish two national entities to administer the program under USDA oversight: the Cattlemen's Beef Promotion and Research Board (Beef Board) and the Beef Promotion Operating Committee (Operating Committee). 7 U.S.C. §§ 2904(1)-(5); *see also* 7 C.F.R. §§ 1260.141, 1260.161. The Supreme Court addressed the Beef Act and Beef Order at length in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). In *Johanns*, plaintiff-beef-producers argued that the scheme violated the First Amendment by compelling them to fund speech with which they disagreed. The Supreme Court upheld the program because it concluded that the Beef Board's generic advertising constituted government speech. *Id.* at 557-67.

In addition to the Beef Board and Operating Committee, Congress also provided a role for state entities, known as QSBCs, in the Beef Checkoff Program. 7 U.S.C. § 2905. A QSBC is "a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the [Beef Board] . . . as the beef promotion entity in such State." 7 C.F.R. § 1260.115. QSBCs serve a number of functions in the Beef Checkoff Program, including liaising between the Beef Board

and local producers and collecting the checkoff assessments on behalf of the Beef Board. 7 U.S.C. § 2904(8); 7 C.F.R. § 1260.172(a). To encourage producers to participate in state programs, the Beef Act provides that producers paying the federal assessment can receive "credit" of up to 50 cents per head of cattle for funds contributed to a QSBC. 7 U.S.C. § 2904(8)(C); *see also* 7 C.F.R. § 1260.172(a)(3). In other words, producers must pay the full one-dollar assessment regardless, but up to 50 cents of that dollar may stay with the QSBC to support state programs. In practice, USDA permits QSBCs to implement this policy by retaining 50 cents of every checkoff dollar collected and forwarding the remainder to the Beef Board, although producers may opt to direct their full checkoff dollar to the Beef Board absent a contrary state law.

In recent years, USDA has entered into memoranda of understanding (MOUs) with a number of QSBCs to provide additional clarity concerning USDA's oversight of the QSBCs. Under the MOUs, USDA engages in direct oversight of the QSBCs through review and approval of budgets and marketing plans, preapproval of plans and projects, preapproval of contracts and agreements, bookkeeping and records requirements, and a decertification provision. *See, e.g.*, Mem. of Understanding Between USDA and Montana Beef Council, *R-CALF I*, No. 4:16-cv-41 (D. Mont., filed June 28, 2019), Ex. 25 to Halainen Decl., ECF No. 99-3 (starting at page 277 of .pdf file) (among other requirements, providing that the Montana Beef Council will submit "any and all promotion, advertising, research, and consumer information plans and projects" to USDA for pre-approval, requiring the Montana Beef Council to prepare an annual budget for approval by USDA, requiring the Montana Beef Council to provide USDA with an annual audit, and agreeing to submit to USDA "such additional information as may be requested").

II. R-CALF's Lawsuits Against the Beef Checkoff Program

Plaintiff R-CALF, a trade association representing domestic cattle producers, has long disagreed with the Beef Checkoff Program. In 2016, it sued in the District of Montana, arguing that USDA violated the First Amendment by permitting one QSBC—the Montana Beef Council—to retain a portion of producers' checkoff dollars to fund speech with which R-CALF's members disagreed. *See generally R-CALF v. Perdue* (*R-CALF I*), 449 F. Supp. 3d 944 (D. Mont. 2020). After the magistrate judge presiding over the lawsuit entered a report and recommendation in support of a preliminary injunction, finding that USDA exercised insufficient control over the speech of the beef councils, *id.* at 947, USDA entered into an MOU with the Montana QSBC.

The district court subsequently entered a preliminary injunction without any discussion of the MOU. Mem. & Order, *R-CALF I*, No. 4:16-cv-41, ECF No. 47 (D. Mont., June 21, 2017). On appeal, the Ninth Circuit affirmed the injunction over a dissent, also without consideration of the MOU. *See R-CALF v. Perdue*, 718 F. App'x 541, 543-44 (9th Cir. 2018) (Hurwitz, J., dissenting) (criticizing the district court for "ignor[ing] the new evidence" presented by the MOU and describing the majority's decision not to consider the MOU as "mystifying").

Following the Ninth Circuit's decision, R-CALF expanded its challenge to the Beef Checkoff Program to include fourteen additional QSBCs in addition to the Montana QSBC. Am. Supp. Pleading, *R-CALF I*, No. 4:16-cv-41 (D. Mont., filed Sept. 6, 2018), ECF No. 58-3. At the same time, USDA eventually entered into an MOU with all fifteen QSBCs at issue in the lawsuit,

as well as other QSBCs over the course of the litigation. *R-CALF I*, 449 F. Supp. 3d at 948-49.[2] After discovery and extensive briefing, and this time considering the MOUs, the Montana district court ultimately granted USDA and intervenor-defendants summary judgment, concluding that the QSBCs' speech constituted government speech because the government exercised sufficient control. *Id.* at 958. This decision addressed the MOUs extensively. *Id.* at 952-55. R-CALF appealed that decision to the Ninth Circuit, and its appeal remains pending. *See R-CALF I*, No. 20-35453 (9th Cir., appeal filed May 21, 2020).

Unsatisfied with that result, R-CALF has now filed the instant lawsuit raising APA challenges to the MOUs. R-CALF raises two claims—first, that USDA should have proceeded through notice-and-comment rulemaking as it entered into each of these individual MOUs, Compl. ¶¶ 70-81, ECF No. 1, and second, that USDA acted arbitrarily and capriciously, Compl. ¶¶ 82-89. R-CALF requests declaratory and injunctive relief vacating the MOUs. Compl. at 22.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), a plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court has jurisdiction to hear his or her claims. *See U.S. Ecology, Inc. v. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). In reviewing a motion to dismiss for lack of subject-matter jurisdiction, the Court may, where necessary, consider the complaint supplemented by undisputed facts evidenced in the record, or

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[2] *See also* MOUs, *R-CALF I*, No. 4:16-cv-41 (D. Mont., filed June 28, 2019), Exs. 9-29 to Halainen Decl., ECF No. 99-3 (comprising pages 215 to 297 of .pdf file) (21 MOUs entered into between December 22, 2016 and June 26, 2019); Notice of Development, *R-CALF I*, No. 4:16-cv-41, ECF No. 133 (attaching an MOU, effective November 11, 2019, between USDA and the Vermont QSBC); Notice of Development, *R-CALF I*, No. 4:16-cv-41, ECF No. 134 (attaching an MOU, effective January 16, 2020, between USDA and the Maryland QSBC).

the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

When a complaint fails "to state a claim upon which relief can be granted," then dismissal is appropriate pursuant to Federal Rule of Civil Procedure 12(b)(6). Claim preclusion can be asserted "in a pre-answer Rule 12(b)(6) motion when all relevant facts are shown by the court's own records, of which the court takes notice." *Hemphill v. Kimberly-Clark Corp.*, 605 F. Supp. 2d 183, 186 (D.D.C. 2009) (internal quotation marks and citations omitted); *see also Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 76-77 (D.C. Cir. 1997) (collecting cases allowing parties to assert res judicata on 12(b)(6) motion). In addition, "[a] court may take judicial notice of public records from other proceedings." *Hemphill*, 605 F. Supp. 2d at 186 (citing *Covad Comms. Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005)).

ARGUMENT

I. R-CALF Lacks Standing Because It Has Failed to Allege an Injury in Fact that Is Traceable to the MOUs Between USDA and the QSBCs.

Neither R-CALF nor any of its members are injured by the MOUs, and R-CALF therefore lacks standing. An organization can establish standing either "by showing either an injury to itself ('organizational standing')," or by "a cognizable injury to one or more of its members" (associational standing). *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 39 (D.C. Cir. 2016) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) and *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977)). Here, neither R-CALF nor its members are injured by the MOUs, or regulated by them at all. *Cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) ("[W]hen the plaintiff is not himself the object of the government action or inaction he

challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." (citation omitted)).

The MOUs are cooperative agreements between USDA and specific QSBCs—they do not bind R-CALF or affect the conduct of R-CALF and its members in any way. With or without the MOUs, R-CALF's members must pay the same one-dollar-per-head-of-beef checkoff. While R-CALF's continued contentious litigation surrounding the Beef Checkoff Program certainly indicates that R-CALF has a policy disagreement with USDA over the program, such an abstract interest is insufficient to satisfy the requirements of Article III.

A. R-CALF Has Failed to Allege Associational Standing Because the Requirement that R-CALF's Members Pay the Beef Checkoff Is Neither Traceable to the MOUs Nor Redressable by R-CALF's Requested Relief.

In its complaint, R-CALF spends numerous paragraphs detailing the purported injury to its members from the payment of the beef checkoff and the operation of the program generally. For instance, R-CALF complains that "Beef Checkoff expenditures by state beef councils are frequently used to promote the type of speech to which R-CALF objects," Compl. ¶ 30, and that "R-CALF's members include cattle producers who . . . pay the Checkoff [in their respective states]," Compl. ¶ 36; *see also* Compl. ¶ 37 ("R-CALF's members' livelihoods as independent, domestic producers are threatened by speech that promotes consolidation, treats all beef as equal and/or that fails to distinguish between where and how beef is produced.").

As an initial matter, R-CALF cannot demonstrate associational standing because it has not identified any individual member who in fact is harmed in such a manner. Although R-CALF refers generally to its members, the complaint does not identify specific members who are allegedly injured by the MOUs, as it is required to do to establish associational standing. *See Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 18 (D.D.C. 2018) ("'[I]t is not enough' for the association

'to aver that unidentified members have been injured.'" (quoting *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011))). Thus, even if the general operation of the Beef Checkoff Program were relevant to the associational harm alleged in this lawsuit, R-CALF's attempt to allege such injury fails at the outset.

Even if R-CALF could identify a member who has allegedly been harmed by the checkoff program writ large, it has not identified *how* that harm is caused by the MOUs. The MOUs do not obligate R-CALF's alleged members to pay the beef checkoff. As R-CALF's lawsuit in Montana repeatedly emphasized, that obligation is imposed by the Beef Act and Beef Order, not by the MOUs, and that obligation pre-dated the MOUs' existence. The MOUs affect only the relationship between USDA and the QSBCs, and do not bind or affect beef producers in any way. Indeed, if this Court were to invalidate the MOUs, there would remain an independent statutory obligation for R-CALF's members to pay the required amount. Therefore, the requirement that beef producers pay the beef checkoff is neither traceable to the MOUs, nor redressable by the relief R-CALF seeks here of vacating and setting aside the MOUs. *See, e.g.*, *Cherry v. FCC*, 641 F.3d 494, 498 (D.C. Cir. 2011) (concluding what "[w]here the alleged injuries . . . 'occurred before, existed at the time of, and continued unchanged after the challenged [agency action] action,' they 'cannot be fairly traced to the [agency action'" (quoting *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998))).

But there is an even more fundamental issue with R-CALF's apparent attempt to invoke the Beef Checkoff Program payments as an injury. Unlike in its Montana lawsuit, R-CALF raises no First Amendment claim and therefore asserts no First Amendment injury based upon speech with which it disagrees (which, of course, would be unavailing in light of the decision of the Montana district court). As such, R-CALF simply objects to its members' payments, and the

manner in which those payments are being used. But the statutorily required payments would still be one dollar even if the whole amount were directed to the federal beef board, rather than state QSBCs receiving a portion. As such, R-CALF's members suffer no economic injury.

And, as the D.C. Circuit recently emphasized in another case involving a USDA checkoff program, the potential disagreement of R-CALF's members with the manner in which the checkoff funds are used is not itself an Article III injury. *Humane Soc'y of the United States v. Perdue*, 935 F.3d 598 (D.C. Cir. 2019). In *Humane Society*, a pork producer sought to challenge the pork marketing scheme. At the motion to dismiss stage, the D.C. Circuit held that the producer had alleged an injury to his "bottom line" from the alleged misuse of checkoff funds. *Id.* at 602. At summary judgment, however, the producer could not substantiate any economic harms and the court made clear that the producer's non-economic injuries would be insufficient to establish injury. As the court explained, the producer's "general opposition to the Council's lobbying and the government's funding of it" establishes "'only a generally available grievance about government,' which 'does not state an Article III case or controversy.'"[3] *Id.* at 604.

B. R-CALF Cannot Establish Organizational Standing Based on Its Voluntary Spending on Education.

R-CALF next appears to attempt to assert organizational standing based on its choice to divert its resources to "educate its membership and the public about the MOUs." Compl. ¶ 21, *see also* Compl. ¶ 35. But courts have routinely held such an "injury" to be insufficient to establish standing—when the government changes the law, it does not inflict an Article III injury on every

[3] If the Court *were* to identify standing based on the beef checkoff, R-CALF would lack standing to challenge the MOUs with the QSBCs in Hawaii and Vermont, as R-CALF does not have any members in Hawaii or Vermont. Compl. ¶ 36.

organization providing education on a related topic. *See, e.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919-21 (D.C. Cir. 2015) ("[A]n organization does not suffer an injury in fact where it expend[s] resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." (citations and quotation marks omitted)).

Here, R-CALF has long used resources to educate its members and others about the Beef Checkoff Program. Compl. ¶ 32. That it has now updated its work to include education about the MOUs is nothing more than a "self-serving observation that it has expended resources to educate its members and others" and "does not present an injury in fact" because the MOUs do not "subject[] [R-CALF] to operational costs beyond those normally expended to review, challenge, and educate the public" about R-CALF's standard topic. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The MOUs do not in any way impinge on R-CALF's ability to provide such education. And while R-CALF's complaint and past history makes it clear that it has long been an adversary of the Beef Checkoff Program, "organizations 'who seek to do no more than vindicate their own value preferences through the judicial process' generally cannot establish standing." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (citation omitted). R-CALF attempts to plead its way around this black-letter law by suggesting that it did not need to educate its members when the payments to Montana's QSBC were temporarily enjoined. *E.g.*, Compl. ¶ 34. Even crediting this allegation (despite the fact that the Beef Checkoff Program still existed and R-CALF therefore presumably continued to educate its members about its activities with respect to the national program), it would not establish injury in fact traceable to the MOUs. R-CALF believes that it needs to educate its members about the effects of the checkoff payments to QSBCs, not about the MOUs. After all,

the MOUs do not impose any requirements whatsoever on R-CALF's members, and there is therefore no need to educate its members about its requirements. What R-CALF alleges it has done is instead inform its members about the legal effect of its loss on summary judgment in Montana, and the implications for speech by QSBCs. *E.g.*, Compl. ¶ 35. Thus, even if general member education expenses could establish injury in this Circuit, which they do not, R-CALF's allegations would fail to establish organizational injury.

C. The Alleged Denial of Notice and Comment Alone Is Not a Cognizable Article III Injury.

Nor does R-CALF's notice-and-comment claim provide the injury that R-CALF is otherwise lacking. *See* Compl. ¶ 18 (asserting that R-CALF and its members were injured because USDA did not engage in notice-and-comment rulemaking prior to entering into the MOUs). The Supreme Court has repeatedly made clear that a party asserting an injury because they were "denied the ability to file comments on some [agency] actions" is asserting only "a procedural right in vacuo" which is "insufficient to create Article III standing" absent some other concrete interest. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

In other words, "[t]he mere violation of a procedural requirement thus does not permit any and all persons to sue to enforce the requirement." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996); *see also id.* at 664-65 ("To demonstrate standing, then, a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.").

Here, as discussed above, the MOUs do not otherwise injure R-CALF—R-CALF's members would have to pay the same checkoff assessments with or without the MOUs, and R-CALF's decision to reorient its own educational resources was entirely self-inflicted. R-CALF

cannot correct its standing deficiency simply by proclaiming a desire to see the government follow its own rules. *See, e.g.*, *Scenic Am., Inc. v. Dep't of Transp.*, 836 F.3d 42, 48-53 (D.C. Cir. 2016) (holding that a plaintiff lacked standing to raise a notice-and-comment challenge to guidance issued by the Federal Highway Administration); *Renal Physicians Ass'n v. HHS*, 422 F. Supp. 2d 75, 85 (D.D.C. 2006), *aff'd* 489 F.3d 1267 (D.C. Cir. 2007) (rejecting the argument that a party has standing on the grounds that they were denied notice and comment on an agency rule which interested them).

R-CALF alleges that, if it commented, it would have recommended additions to the MOUs. *E.g.*, Compl. ¶ 38. But that is the case with every individual who alleges an absence of notice and comment. To assert standing on the basis of potential positive changes as a result of comments, if permitted, is simply to assert standing based on the absence of notice and comment. As the Supreme Court has held, such allegations are insufficient absent independent allegations of substantive harm from the policy at issue. *See Summers*, 555 U.S. at 496.

D. R-CALF's Lack of Injury Is Further Demonstrated by Its Prior Litigation.

If there were any doubt as to whether the MOUs injure R-CALF, R-CALF's prior conduct in its lawsuit in the District of Montana and before the Ninth Circuit would dispel that doubt.

Before the District of Montana, R-CALF argued that the MOUs were an improvement over the status quo because they provided additional government control over the QSBCs' speech. In fact, R-CALF even requested, in the alternative, that the court enter an injunction to make the MOUs permanent so that R-CALF could continue to benefit from them, should the district court uphold the constitutionality of the program. *See* Pl.'s Br. Supp. Mot. Summ. J. 29 (Pl.'s MSJ in *R-CALF I*), *R-CALF I*, No. 4:16-cv-0041 (D. Mont., filed May 20, 2019), ECF No. 90 (arguing for "an injunction to enforce the MOUs[,] should the Court conclude they render the program

constitutional" on the grounds that "plaintiffs are 'entitled to the protection of an enforceable order' to ensure the violation will not recur" (citation omitted)). In its pending appeal before the Ninth Circuit, where R-CALF no longer disputes the constitutionality of the QSBCs' own speech, R-CALF has renewed its request for an injunction enshrining the provisions of the MOUs. *See, e.g.*, Br. Appellant 50, *R-CALF I*, No. 20-35453 (9th Cir., filed Aug. 31, 2020), ECF No. 11 ("R-CALF is entitled to an injunction to ensure the MOUs' terms remain in place.").

Furthermore, R-CALF filed a motion for attorney's fees as a prevailing party in the District of Montana, on the theory that R-CALF *prevailed* in that litigation because USDA chose to enter into the MOUs. *See* Pl.'s Mem. Supp. Pl.'s Mot. Atty.'s Fees & Costs 1, ECF No. 153, *R-CALF I*, No. 4:16-cv-41 (D. Mont., filed Sept. 10, 2020) ("While the Court subsequently granted USDA's Motion for Summary Judgment, it did so only because the Government had entered into Memoranda of Understanding ('MOUs') with the private state beef councils . . . . This qualifies R-CALF as a prevailing party[.]").[4]

R-CALF should not be permitted to simultaneously argue in one district court that the MOUs represent R-CALF's success—so much so that the government owes it attorney's fees—and simultaneously take precisely the opposite position here by claiming to be injured by the MOUs. R-CALF's litigation conduct constitutes at least a judicial admission that it is not injured

[4] R-CALF's theory for how it can seek attorney's fees while appealing the overall result is that the MOUs are helpful to its interests but do not go far enough. Pl.'s Mem. Supp. Pl.'s Mot. Atty.'s Fees & Costs 11, ECF No. 153, *R-CALF I*, No. 4:16-cv-41 (D. Mont., filed Sept. 10, 2020) ("While in its appeal R-CALF continues to argue . . . that a court should order the terms of the MOUs remain in place permanently, R-CALF has prevailed on the gravamen of its claim: It . . . succeeded in compelling the government to amend those controls. . . . R-CALF has merely appealed to argue that yet further steps are needed towards that end."). If anything, this argument makes clear that R-CALF is *benefited* rather than injured by the MOUs.

by the MOUs, and indeed prefers a world with the MOUs to a world without them. *See In re United Mine Workers of Am. Employee Ben. Plans Litig.*, 782 F. Supp. 658, 674 (D.D.C. 1992) (treating a party's inconsistent position in a prior case as a judicial admission), *opinion amended on denial of reh'g sub nom. United Mine Workers of Am. 1974 Pension Tr. v. Pittston Co.*, 793 F. Supp. 339 (D.D.C. 1992), *and aff'd and remanded sub nom. United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993).

II. R-CALF's Failure to Raise the Present Claims in Its Prior Challenge to the Beef Checkoff Program Precludes this Lawsuit.

Finally, this lawsuit is also barred by claim preclusion, because R-CALF's APA challenges to the MOUs could have been raised in *R-CALF I*, but were not. Here, R-CALF challenges the MOUs under 5 U.S.C. § 706. But it already challenged USDA's administration of the Beef Checkoff Program, including through the MOUs, in the District of Montana—and lost. *Compare* Compl. ¶¶ 70-81 (arguing under 5 U.S.C. § 706 that USDA acted unlawfully in entering into the MOUs without undergoing notice-and-comment rulemaking), *and* Compl. ¶¶ 82-89 (arguing under 5 U.S.C. § 706 that USDA acted arbitrarily and capriciously in entering into the MOUs), *with* Compl. ¶¶ 98-101, *R-CALF I*, No. 4:16-cv-41 (D. Mont., filed May 2, 2016), ECF No. 1 (arguing that the Beef Checkoff Program violates the First Amendment). The necessary consequence of R-CALF's decision to split its claims concerning the Beef Checkoff Program is that this lawsuit should be dismissed.

"A subsequent lawsuit is barred by claim preclusion 'if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction.'" *Nat. Res. Def. Council v. EPA*, 513 F.3d 257, 260 (D.C. Cir. 2008). Here, there can be no dispute

over the latter three requirements[5]—the District of Montana lawsuit was brought by R-CALF against USDA and its Secretary, and the district court judge entered a final judgment on the merits, which R-CALF is currently appealing. *R-CALF I*, 449 F. Supp. 3d 944 (D. Mont. 2020).

The first element is also satisfied here because this case involves the same claims or cause of action as R-CALF's previous lawsuit. Although it is true that R-CALF now challenges the MOUs directly, it does so as part of its broader challenge to the Beef Checkoff Program. Indeed, as discussed above, R-CALF suffers no injury from the MOUs that is independent of the program.[6] Accordingly, the MOUs (and their purported insufficiency to establish the constitutionality of the Beef Checkoff Program) were a major component of R-CALF's arguments to the district court in Montana. *See, e.g.*, Pl.'s MSJ in *R-CALF I* at 21 (criticizing USDA review of speech under the MOUs as insufficient).

If R-CALF indeed believes that the MOUs were issued improperly, then R-CALF could have brought this theory before the District of Montana court in support of its First Amendment claim. Claim preclusion is "intended 'to prevent 'litigation of matters that should have been raised in an earlier suit,'" and therefore "bars relitigation not only of matters determined in a previous

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[5] That an appeal of the decision in the District of Montana case is pending does not reduce its finality for claim preclusion purposes, especially where the flaw is R-CALF's decision to split its claims. *See Nat'l Post Office Mail Handlers v. Am. Postal Workers Union, AFL-CIO*, 907 F.2d 190, 192 (D.C. Cir. 1990) ("[The federal rule is to grant preclusive effect to final judgment even when appeal is pending[.]" (citing 18 Wright, Miller & Cooper, Federal Practice & Procedure § 4433, at 305-12 & n. 8 (1981))); *cf. Katz v. Gerardi*, 655 F.3d 1212, 1218 (10th Cir. 2011) ("[I]n the claim-splitting context, the appropriate inquiry is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion.").

[6] Although R-CALF tries to have it both ways, either it alleges standing based on a purported First Amendment injury because this case is simply a retread of its challenge to the Beef Checkoff Program in the District of Montana, or this case is a completely separate challenge to the MOUs alone and R-CALF lacks standing because the MOUs do not injure it.

litigation but also ones that a party *could have raised*." *Nat. Res. Def. Council*, 513 F.3d at 261 (citations omitted) (emphasis added); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

R-CALF could easily have raised these APA challenges to the MOUs in *R-CALF I*. Indeed, in 2018—two years after USDA entered into the first MOU with the Montana QSBC in 2016—R-CALF filed a supplemental amended complaint before the Montana tribunal. Am. Supp. Pleading, *R-CALF I*, No. 4:16-cv-41 (D. Mont., filed Sept. 6, 2018), ECF No. 58-3. That supplemental amended complaint expanded the number of QSBCs at issue, but did not plead any APA challenges to the MOUs. R-CALF did not complain that it deserved an opportunity to comment on that MOU, or that the MOU was arbitrary or capricious. That was R-CALF's strategic choice about how to pursue its claims, and it forecloses this new lawsuit.

The overlapping facts between the two lawsuits also demonstrate the existence of similar claims. "Whether these two suits are based on the same claim 'turns on whether they share the same nucleus of facts.'" *Nat. Res. Def. Council v. EPA*, 513 F.3d at 261 (quoting *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004)). *R-CALF I* involved extensive analysis of the MOUs, including their features and effects, as part of the court's determination that the Beef Checkoff Program was constitutional. *See R-CALF I*, 449 F. Supp. 3d at 951-55 (analysis under the heading "QSBCs Conduct Government Speech Under the MOUs"). Indeed, R-CALF engaged in extensive discovery, including discovery about the MOUs, and R-CALF then extensively addressed the effects of the MOUs throughout its summary judgment briefing in R-*CALF I*. Pl.'s MSJ in

R-CALF I at 6-7.[7] This lawsuit, if it proceeds, will require exploration of similar issues concerning the effects and scope of the MOUs, on the basis of an administrative record that would presumably contain documents that R-CALF already received in discovery in Montana. That R-CALF now seeks to change tack from arguing that the MOUs are "substanceless," Pl.'s MSJ in *R-CALF I* at 21, to arguing that they improperly amend the Beef Act and Beef Order is not a reason to permit R-CALF a second bite at the apple. Because R-CALF could have raised these APA challenges to the MOUs in *R-CALF I,* this action should be dismissed.

CONCLUSION

For the above-stated reasons, R-CALF's claims should be dismissed.

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Respectfully submitted,

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[7] *See, e.g.*, Pl.'s MSJ in *R-CALF I* at 17 ("[E]ven for those [QSBCs] subject to the MOUs, the Government does not ensure the councils' speech reflects the Government's agenda[.]"); Pl.'s MSJ in *R-CALF I* at 21 ("[W]hat review the Government performs under the MOUs is substanceless."); Pl.'s MSJ in *R-CALF I* at 22 ("To the extent the MOUs provide for any review of the state beef councils' speech, they only provide for a cite-check and rubberstamp[.]").

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