CAUGHT IN THE CROSSFIRE OF *JOHANNS* AND *JANUS: THE FUTURE OF FEDERAL AND STATE CHECKOFF PROGRAMS*

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I. INTRODUCTION

Checkoff programs, also commonly referred to as commodity research and promotion programs, mandate that a per-unit assessment on specific agricultural commodities be collected from producers, typically by purchasers at the point of sale, so that those funds can be used to promote and provide research and information for that commodity. Commonly recognized examples of promotional activities supported from checkoffs are "Got Milk?", "Beef. It's What's For Dinner", and "Pork. The Other White Meat." The USDA Agricultural Marketing Service oversees the nearly two dozen federal checkoff programs, ranging from pork, dairy, beef, and soybeans to fresh cut flowers, honey, and watermelons.[1] Additionally, there are numerous state-level only checkoff programs, such as the rice checkoff programs in Arkansas, Louisiana, and California and some states' beef checkoff programs that operate separately and in addition to the national beef checkoff program.[2] Collectively, these programs have funded billions of dollars in promotion, public and private sector research, and other industry promotion activities around the country to promote various agricultural commodities.

Checkoff programs have been the target of many legal challenges over the years.[3] This was especially true during the 1990's and early 2000's, when multiple challenges were brought by plaintiffs asserting that the checkoff program at issue violated the First Amendment by compelling those plaintiffs to subsidize speech with which they disagree.[4] Prior to 2005, when the Supreme Court issued its landmark ruling in *Johanns v. Livestock Marketing Association*,[5] several courts sustained those challenges and held the particular program at issue violated the First Amendment. Thus, the constitutionality of checkoff programs was of increasing doubt up through 2005. In fact, *Johanns* itself reversed the United States Court of Appeals for the Eighth Circuit holding that the beef checkoff was unconstitutional, which was an affirmance of the decision reached by the United States District Court for the District of South Dakota.

[1] *See generally* Research & Promotion Programs, USDA Agric. Mktg. Serv., *available at* https://www.ams.usda.gov/rules-regulations/research-promotion (last visited Aug. 26, 2019).

[2] *See*, e.g., Ark. Code. Ann. 2-20-501 et seq.

[3] *See generally*, Checkoff Programs Case Law Index, Nat'l Agric. Law Ctr., *available at* https://nationalaglawcenter.org/aglaw-reporter/case-law-index/checkoff-programs/ (last visited Aug. 26, 2019).

[4] *See*, *e.g.*, Update on Checkoff Litigation, Susan Stokes, *available at* http://www.flaginc.org/wp-content/uploads/2013/03/Checkoff_Update20040126.pdf (last visited Aug. 26, 2019) (describing status of various checkoff challenges circa 2004).

[5] 544 U.S. 550 (2005) (hereinafter *Johanns*).

Johanns is the single-most important judicial opinion involving federal and state checkoff programs; without it, federal and state checkoff programs as we know them today would be non-existent. In *Johanns*, the Court held that the national beef checkoff was constitutional on the basis that the federal government exercised a level of control over the national beef checkoff sufficient to warrant activities carried out under the beef checkoff as government speech. In so doing, the Court charted a new course for checkoff programs that very effectively shielded them from First Amendment attacks in subsequent years; post-*Johanns*, it appeared that checkoff programs were effectively immune to First Amendment challenges. Additionally, *Johanns* so severely undercut the Court's 2001 decision in *United States v. United Foods*,[6] which held that the mushroom checkoff was unconstitutional and formed the basis of the legal challenge in *Johanns*, one could plausibly question whether *United Foods* could ever again emerge as a relevant threat.

Then, in June of 2018, along came *Janus v. AFSCME Council 31*[7] to raise new and serious questions. *Janus* is another landmark Supreme Court decision in its own right, because it expressly overturned *Abood v. Detroit Board of Education*[8] and, therefore, upended decades of labor law applicable to public sector union dues. *Janus* also could carry implications regarding the future of checkoff programs to the extent that its logic is applied in a non-labor union context. *Janus* involves a First Amendment challenge to the Illinois state statute that compels public sector employees to pay agency fees to a union, "even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities."[9] The Court held, *inter alia*, that "this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[10] It bears noting that *Janus* was the latest in a series of Supreme Court cases that had gradually weakened the efficacy of state laws to compel public employees to pay agency fees to a public union. It also bears noting that the majority in *Janus* favorably cites *United Foods* and that neither the majority nor the dissent cites to *Johanns*. Nor did the majority take the opportunity to otherwise differentiate its holding in *Janus* from the checkoff programs shielded by *Johanns*, potentially leaving the door open for future constitutional challenges to checkoff programs.

Janus foreshadows courts' reconsideration of precedents like *Johanns* and, ultimately, the next step in the life cycle of mandatory federal and state checkoff programs. This article briefly discusses the main aspects of both cases. Following that discussion, the article will briefly touch on the very significant and ongoing *Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America (R-CALF) v. United States Department of Agriculture* litigation. But, first, the article provides an overview of the national beef checkoff to provide context for understanding the issues surrounding *Johanns* and *Janus*.

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[6] 533 U.S. 405 (2001)

[7] No. 16-1466, 585 U.S. ___ (2018), 138 S.Ct. 2448 (2018) (hereinafter *Janus*).

[8] 431 U.S. 209 (1977).

[9] *Janus*, 138 S.Ct. at 2461 (internal citations omitted).

[10] *Id.* at 2460.

II. Discussion

A. National Beef Checkoff: Overview

The Beef Promotion and Research Act of 1985 (Beef Act) was enacted to establish "an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) . . . 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."[11] In so doing, Congress mandated the establishment of the Cattlemen's Beef Promotion and Research Board (Board) at the federal level and "qualified State beef councils" at the state level to carry out the many legislative directives set out in the Beef Act.[12] The Beef Act mandates that a dollar per-head assessment be collected from purchasers that would then be used to fund beef promotion and research activities.[13]

The Beef Act mandated USDA to issue a beef promotion and research order (Beef Order).[14] Additionally, the Beef Act prescribed the process and timeline for issuing the Beef Order and set out numerous provisions required to be included or otherwise resolved in the Beef Order.[15] On July 18, 1986, the USDA Agricultural Marketing Service issued the Beef Order, which along with the Beef Act governs the operation and administration of the national beef checkoff.

As noted, the Beef Act established the Board, but it also required the USDA Secretary to appoint members to the Board.[16] Additionally, the Beef Act required the Board to be comprised of geographically representative members that would be appointed by the Secretary and nominated by certain eligible organizations.[17] The Beef Act further required that the Board elect ten Board members to serve on the twenty-member Beef Promotion Operating Committee (Committee) who would serve with ten other members nominated "by a federation that includes as members the qualified State beef councils."[18]

The Beef Act provides that the Committee "shall develop plans or projects or promotion and advertising, research, consumer information, and industry information" that shall be paid from the mandatory one dollar per-head assessment imposed on producers and importers of cattle, beef, or beef products.[19] Additionally, the

[11] 7 U.S.C. § 2901(b).

[12] *Id.* at § 2904(1) and (8)(A).

[13] *Id.* at § 2904(8)(C).

[14] *Id.* at § 2904.

[15] *Id.*

[16] *Id.* at § 2904.

[17] *Id.*

[18] *Id.* at § 2904(4)(A). Today, the federation referenced in the Beef Act is known as the Federation of State Beef Councils.

[19] *Id.* at § 2904(4)(B) "or the equivalent thereof in the case of imported beef and beef products."

Committee is responsible for "developing and submitting to the Board, for its approval, budgets on a fiscal year basis of its anticipated expenses and disbursements, including probable costs of advertising and promotion, research, consumer information, and industry information projects."[20] The Board has authority to approve or disapprove the proposed budgets, but approved budgets must be submitted to and approved by the Secretary.[21]

In addition to the Board and Committee, the Beef Act establishes state-level qualified State beef councils to play an active role in the national beef checkoff. A "qualified State beef council" (QSBC) is defined as "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 Board pursuant to this subpart as the beef promotion entity in such State."[22] A state is not required to have a QSBC, but there can only be one QSBC in a state.

Typically, the dollar per-head assessment is divided equally between the QSBC and the Board. The Beef Act states that the Board "shall use qualified State beef councils to collect . . . [the] assessments" but that "[i]f an appropriate qualified State beef council does not exist to collect" the dollar per-head assessment, "such assessment shall be collected by the Board."[23] There are currently forty-four QSBCs.

The dollar per-head assessment is almost always collected by purchasers and then first remitted to QSBCs and then the Board via a three-step process prescribed in the Beef Act and Beef Order. First, the purchaser is required to collect the assessment from the producer.[24] However, the failure of the purchaser to collect the assessment "shall not relieve the producer of his obligation to pay the assessment to the appropriate" QSBC or to the Board.[25] Second, the purchaser must remit the assessment to the QSBC operating in the state in which

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[20] *Id.* at § 2904(4)(C).

[21] *Id.*

[22] 7 C.F.R. § 1260.115.

[23] 7 U.S.C. § 2904(8)(A)-(B).

[24] *Id.* at § 2904(8)(A) ("The order shall provide that each person making payment to a producer for cattle purchased from the producers shall, in the manner prescribed in the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments."); 7 C.F.R. § 1260.172(a)(1) (". . . each person making payment to a producer for cattle purchased from such producer . . . shall collect an assessment from the producer, and each producer shall pay such assessment . . . ."); and 7 C.F.R. § 1260.311(a) (". . . .each person making payment to a producer for cattle purchased . . . shall collect from the producer an assessment at the rate of $1-dollar-per-head.").

[25] 7 C.F.R. § 1260.310(c).

the transaction occurred.[26] Third, the QSBC "shall remit to the Board assessments paid and remitted to the council, minus authorized credits issued to producers pursuant to § 1260.172(a)(3)"of the Order, which is equal to up to one-half of the dollar per-head assessment.[27]

Thus, when the producer, purchaser, and QSBC comply with the above-stated requirements, the result is that the QSBC retains physical possession of up to one-half of the original assessment. The remaining half is remitted by the QSBC to the Board. Through this federal-state structure, the Board and QSBCs help implement Congress's directive for the establishment of "an orderly procedure for financing . . . 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."[28]

The ongoing litigation in *R-CALF*, discussed below, presents a direct challenge to the above-described federal-state relationship Congress established when it enacted the Beef Act in 1985. It may also be a harbinger for how courts could view future challenges where checkoff programs are caught between *Johanns* and *Janus*. Currently, the federal district court has issued a preliminary injunction that requires cattle producers in Montana to affirmatively "opt in" – a concept reiterated by the Supreme Court in *Janus* – to having one-half of the dollar per-head assessment to be obtained by the Montana Beef Council, rather than continuing with the scenario where the Montana Beef Council automatically retains one-half of the dollar per-head assessment and remits the remaining half to the Board.[29] The net result is that for cattle sold in Montana, the full amount of a producer's assessment is remitted to the Board unless the producer affirmatively "opts in" to having the Montana Beef Council retain one-half of the assessment. As discussed below, the plaintiffs in R-CALF have requested that the injunction become permanent for Montana and thirteen additional states.

It also bears noting that on May 13, 2019, the USDA Agricultural Marketing Service issued a final rule that allows beef (and soybean) producers to "redirect" to the Board the portion of the original dollar per-head

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[26] 7 U.S.C. § 2904(8)(A); Id. at § 2904(8)(B) ("If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph(1), such assessment shall be collected by the Board."); 7 C.F.R. § 1260.172(a)(1) (". . . such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5)."); 7 C.F.R. § 1260.172(a)(5) ("Each person responsible for the remittance of the assessment pursuant to § 1260.172(a)(1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the Board."); 7 C.F.R. § 1260.311(a) (". . . each person making payment . . . shall collect . . . an assessment . . . and shall be responsible for remitting assessments to the QSBC or Board as provided in § 1260.312."); 7 C.F.R. § 1260.311 ("Each person responsible for the collection and remittance of assessments shall transmit assessments . . . to the qualified State beef council of the State in which such person resides or if there is not qualified State beef council in such State, then to the Cattlemen's Board as follows . . . .").

[27] 7 U.S.C. § 2904(8)(A); 7 C.F.R. § 1260.181(b)(4).

[28] 7 U.S.C. § 2901(b).

[29] Memorandum and Order, Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America v. Sonny Perdue et al., No. 4:16-cv-00041 (D. Mont. June 21, 2017).

assessment that would have otherwise been retained and expended by the QSBC in the applicable state. This rule is discussed briefly towards the end of this article to the extent it is germane to *R-CALF*.

B. *Johanns*

The rocky path to the Supreme Court's landmark *Johanns* decision began several years earlier when the Livestock Marketing Association, Nebraska Cattlemen, Inc., and other plaintiffs brought an action in the United States District Court for the District of South Dakota against USDA, the USDA Secretary in his official capacity, and the Board challenging various aspects of the beef checkoff.[30] When initially filed, though, the plaintiffs did not assert the First Amendment argument that would ultimately land before the Supreme Court. The federal district court granted plaintiffs a preliminary injunction that "forbade the continued use of checkoff funds to laud the beef program or to lobby for governmental action relating to the checkoff."[31] While that matter was pending in 2001, the United States Supreme Court ruled in *United Foods* that the national mushroom checkoff – a program that functioned very similarly to the beef checkoff – violated the First Amendment.[32]

The plaintiffs amended their complaint in light of *United Foods* to assert that the beef checkoff was unconstitutional because it forced them to subsidize speech of a private entity with which they disagreed.[33] The federal district court not only agreed with the plaintiffs, but, importantly, it expressly rejected the defendants' argument that the beef checkoff "survives First Amendment scrutiny because it funds only government speech."[34] The court then, *inter alia*, permanently enjoined any continued collection of the beef checkoff. On appeal in 2003, the United States Court of Appeals for the Eighth Circuit affirmed the federal district court, but did so on grounds that arguably placed the beef checkoff in even further jeopardy. Specifically, the Eighth Circuit held that "[c]ompelled funding of speech, . . ., may violate the First Amendment even if the speech in question is the government's."[35] Given the backdrop of other checkoff cases playing out around the country that reached similar conclusions, the Eighth Circuit's holding portended a potentially ominous future for the beef and other checkoff programs.

In 2004, the Supreme Court granted certiorari, representing the third such case heard by the court in less than a decade. The stage was now set for a high stakes Supreme Court decision in *Johanns* that would determine not only the future of the beef checkoff, but other federal and state checkoff programs as well.

In deciding *Johanns*, the Court noted that it had previously sustained First Amendment challenges in two types of cases, "'compelled speech' cases, in which an individual is obliged to personally express a message he

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[30] 207 F.Supp.2d 992, 995.

[31] Livestock Marketing Association et al. v. United States Dep't of Agric. et al., 132 F.Supp.2d 817, 832 (D. S.D. 2001).

[32] *See* Livestock Mktg. Ass'n et al v. United States Dep't of Agric. et al, 207 F.Supp.2d 992 (D. S.D. 2002).

[33] *Id.*

[34] *Id.*

[35] *Johanns*, 544 U.S. at 556 (citing *Livestock Mktg. Ass'n*, 335 F.3d at 720-721). (emphasis added). Livestock Mktg. Ass'n et al v. United States Dep't of Agric. et al, 335 F.3d 711 (8th Cir. 2003).

disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, *expressed by a private entity*."[36] It added that prior to *Johanns*, "[w]e have not heretofore considered the First Amendment consequences of government-compelled subsidy of *the government's own speech*."[37]

The Court noted that in holding the mushroom checkoff unconstitutional in *United Foods*, it relied on its decisions in *Keller v. State Bar of Cal.* and *Abood v. Detroit Bd. of Ed.*, stating that "although we have upheld state-imposed requirements that lawyers may be members of the state bar and pay its annual dues, and that public school teachers either join the labor union representing their 'shop' or pay 'service fees' equal to the union dues, we have invalidated the use of compulsory fees to fund speech on political matters."[38] Reflecting on *Keller* and *Abood*, the Court explained that "[b]ar or union speech with such content, we held, was not germane to the regulatory interests that justified compelled membership, and accordingly, making those who disagreed with it pay for it violated the First Amendment."[39] It further explained that in relying on *Keller* and *Abood*, it decided *United Foods* "on the assumption that the advertising was private speech, not government speech" and that "[i]n all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself."[40]

In *Johanns*, the plaintiffs' central assertion was that the Board and Committee are nongovernmental entities and, therefore, the promotional campaigns initially designed by the Committee are not government speech.[41] "We need not address this contention", the Court concluded, "because we reject its premise: The message of the promotional campaigns is effectively controlled by the Federal Government itself."[42]

The Court added, in part, the following:

> The message set out in the beef promotions is from beginning to end the message established by the Federal Government. Congress has directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products". . . . Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain . . ., and what they shall not . . . . Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).[43]

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[36] *Id.* at 557 (emphasis added).

[37] *Id.* (emphasis added).

[38] *Id.* at 557-58.

[39] *Id.* at 558.

[40] *Id.*

[41] *Id.* at 560.

[42] *Id.*

[43] *Id.* at 560-61.

The Court further pointed out, among other factors, that the Secretary "exercises final approval authority over every word used in every promotional campaign" and that USDA officials "attend and participate in the open meetings at which proposals are developed."[44] The Court concluded that "[w]hen, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages."[45]
As noted, *Johanns* proved to be an effective shield against constitutional challenges to checkoff programs. First, it stopped several lower court challenges pending at that time dead in their tracks. Additionally, *Johanns* was applied to reject several challenges brought against various checkoff programs in the following years. Thus, it seemed that this area of law was fundamentally settled and that checkoff programs could reliably find safe harbor from First Amendment challenges (and specifically *United Foods*) under *Johanns*.

C. *Janus*

Mark Janus worked as a child support specialist in the Illinois Department of Healthcare and Family Services.[46] As such, he was one of 35,000 state employees represented by the American Federation of State, County, and Municipal Employees, Council 31 (Council 31).[47] Mr. Janus did not join Council 31 and expressed that "if he had the choice, he 'would not pay any fees or otherwise subsidize [the Union].'"[48]

Illinois law allows government employees to form unions. Following a majority vote within a bargaining unit to be represented by a union, the union becomes the sole representative for all employees regardless of whether employees choose to join the union. Further, employees are prohibited from being represented by any other agent other than the union. The union carries significant authority on behalf of all employees, including engaging in collective bargaining and negotiation of "'policy matters', such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies."[49] Members must pay full union dues, while non-member employees like Mr. Janus pay a percentage of the dues known as an "agency fee". The Court explained, "[u]nder *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are 'germane to [the union's] duties as collective-bargaining representative,' but nonmembers may not be required to fund the union's political and ideological projects."[50]

The agency fee is automatically deducted from the employees' paycheck. Non-union member employees are subsequently provided notice of the agency fee along with an explanation of how the fee was calculated. In the case of Mr. Janus, "nonmembers were told that they had to pay for '[l]obbying,' 'social and recreational

[44] *Id.* at 561.

[45] *Id.* at 562.

[46] *Janus*, 138 S.Ct. at 2461.

[47] *Id.*

[48] *Id.* (internal citations omitted).

[49] *Id.* at 2460-61.

[50] *Id.* (internal citations omitted).

activities,' 'advertising', '[m]embership meetings and conventions,' and 'litigation,' as well as other unspecified '[s]ervices that 'may ultimately inure to the benefit of the members of the local bargaining unit.'"[51]

Mr. Janus objected to this statutorily-required system, arguing that "'nonmember fee deductions are coerced political speech' and that 'the First Amendment forbids coercing any money from nonmembers.'" In light of *Abood*, the United States District Court for the Northern District of Illinois granted the defendants' motion to dismiss. The United States Court of Appeals for the Seventh Circuit affirmed on the same grounds. The Supreme Court granted certiorari and ultimately issued a holding that overturned *Abood*, cited favorably to *United Foods*, and opened a new door through which future First Amendment challenges may enter.

The Court wrote:

> As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein."*
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> Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. . . .
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> Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.
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> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.[52]

With that backdrop, the Court stated, while citing *United Foods*, that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns.[53] "As Jefferson famously put it," the Court added, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abor[s] is sinful and tyrannical.'"[54]

The Court then turned to a discussion of the appropriate standard of scrutiny applied to cases involving the subsidization of private speech. Noting its recent agency fee cases that led up to *Janus*, the Court explained

[51] *Id.* at 2460 (internal citations omitted).

[52] *Id.* at 2463 (internal citations omitted).

[53] *Id.* at 2464 (internal citations omitted) (emphasis in original).

[54] *Id.*

that in *Knox*, "the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech."[55] It further explained, [e]ven though commercial speech has been thought to enjoy a lesser degree of protection . . ., prior precedent in the area, specifically *United Foods* . . ., had applied what we characterized as 'exacting' scrunity, . . . a less demanding test than the 'strict' scrutiny that might be thought to apply outside the commercial sphere."[56] The Court further explained that in *Knox* it stated that under the standard of "exacting scrutiny" "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[57] The Court noted that in its second agency fee case preceding *Janus*, *Harris v. Quinn*,[58] it determined that the agency fee requirement failed the standard of "exacting scrutiny".[59] In so doing, it expressly raised the question at that time of "whether that test provides sufficient protection for free speech rights, since 'it is apparent that the speech compelled' in agency-fee cases 'is not commercial speech.'"[60]

With that precedential background, Mr. Janus argued that the appropriate standard to apply to the Illinois statute was "strict scrutiny". On this threshold issue, the Court responded that ". . . we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Harris* and *Knox*."[61] The Court went on to comprehensively deconstruct *Abood* and then concluded the following:

> For these reasons, States and public-sector unions may not extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmembers' wages. . . . No form of employee consent is required.
>
> This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, *unless the employee affirmatively consents to pay*. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. . . . Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. . . . Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.[62]

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[55] *Id.* at 2465.

[56] *Id.* (internal citations omitted).

[57] *Id.* (internal citations omitted).

[58] 573 U.S. 616 (2014).

[59] *Janus*, 138 S.Ct. at 2465 (internal citations omitted).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 2464-86, 2486.

D. *R-CALF v. USDA*

R-CALF has emerged as the most significant First Amendment constitutional challenge to a national checkoff program since *Johanns*. First, it is important to the future operation of the beef checkoff vis-à-vis the role of QSBCs in the federal-state relationship envisioned under the Beef Act as well as a transformational shift in how assessment funds may flow after being collected from producers at the point of sale. Second, the outcome may implicate the national soybean checkoff due to the fundamentally similar federal-state structure of the beef and soybean programs. Third, *R-CALF* embodies the manner by which checkoff programs are continuing to be tested in the courts. The brief discussion below focuses only on the latter point.

R-CALF was filed on May 2, 2016. The plaintiffs argue that the portion of the dollar per-head assessment retained by the Montana Beef Council, which is the QSBC for Montana, constitutes a "government-compelled subsidy of the speech of a private entity" that is unconstitutional under the First Amendment of the United States Constitution.[63] According to R-CALF, "[t]he government-compelled subsidy of the speech of a private entity, which is not effectively controlled by the government, is unconstitutional under the First Amendment of the United States Constitution and should be enjoined."[64]

In addition, R-CALF also asserted in paragraph 74 of its complaint, the following:

> None of the Montana Beef Council's activities are undertaken with the direct oversight of the Secretary of Agriculture or any other federal official. Moreover, on information and belief, neither USDA nor the Montana Beef Council has established a procedure by which a cattle producer who disagrees with the Montana Beef Council's message can request that the complete amount of his assessments be directed to the Beef Board, a body controlled by the federal government.[65]

Thus, R-CALF does not assert, as did the plaintiffs in *Johanns*, that the beef checkoff is entirely unconstitutional. Rather, its argument is predicated on the premise that the Montana Beef Council is a private entity and, therefore, only the payments to the state council are unconstitutional. Additionally, R-CALF is not arguing that producers are not bound to pay the full dollar per-head assessment. Quite the contrary; R-CALF asserts that Montana producers must pay the assessment, but that they should be able to forward – or redirect – the full assessment to the Board, "a body controlled by the federal government."[66]

On June 21, 2017, the Montana federal district court issued a preliminary injunction that required producers to provide affirmative consent – i.e., "opt in" – to having the Montana Beef Council receive any portion of the beef checkoff assessment. As part of its analysis the court cited *Knox* for the proposition that a citizen's First

[63] Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America v. United States Department of Agriculture, No. 4:16-cv-00041-BMM-JTJ (D. Mont. May 2, 2016) (hereinafter R-CALF Complaint).

[64] R-CALF Complaint at 2.

[65] *Id.* at 27-28.

[66] *Id.*

Amendment rights are violated when the government "compels a citizen to subsidize the private speech of a private entity without first obtaining the citizen's 'affirmative consent.'"[67]

The court also opined that the level of control exercised by the Board does not satisfy *Johanns*. Here, the court stated that it "cannot state, as a matter of law, that USDA's limited control over the Montana Beef Council, constitutes 'effective control' over the Montana Beef Council's advertising program. The Court cannot conclude, therefore, as a matter of law, that the Montana Beef Council's advertisements qualify as government speech."[68] Finally, it is noteworthy that the court cited *Knox* to reject the "redirection" concept as a viable defense to the plaintiff's First Amendment claim, stating that "[t]he Supreme Court has rejected the argument that mere presence of an opt-out provision alleviates First Amendment concerns."[69]

Defendants appealed the preliminary injunction to the United States Court of Appeals for the Ninth Circuit. On April 9, 2018, a three-judge panel of the Ninth Circuit voted 2 to 1 to affirm the district court determination to issue the preliminary injunction.[70] The matter then returned to the federal district court, where plaintiffs have requested a permanent injunction to be instituted not only with respect to payments to the Montana Beef Council but for thirteen additional states: South Dakota, Indiana, Nebraska, Texas, Kansas, New York, North Carolina, South Carolina, Wisconsin, Nevada, Vermont, Pennsylvania, and Vermont.[71] The timeline for discovery and cross-motions for summary judgment expired August 28, 2019.[72] Eventually, the matter will be considered by a magistrate, who is expected to present findings and recommendations to the federal district court for a final decision.

E. Redirection

On July 15, 2016 – approximately two months after *R-CALF* was filed and less than a month before its initial response – USDA AMS issued a proposed rule titled *Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program.*[73] The final rule was issued May 13, 2019 and became effective June 12, 2019. Thus, the final rule was not yet in place when the Montana federal district court issued the preliminary injunction.

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[67] Memorandum and Order, Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America v. United States Department of Agriculture, No. 4:16-cv-00041-BMM-JTJ (D. Mont. June 21, 2017), at 9-10 (citing *Knox*, 132 S.Ct. at 2296).

[68] *Id.* at 16.

[69] *Id.*

[70] No. 17-35669, 718 Fed.Appx. 541 (Mem) (Apr. 9, 2018).

[71] *See, e.g.,* R-CALF Extends Checkoff Lawsuit to 13 Additional States, BEEF Magazine (Aug. 16, 2018), *available at* https://www.beefmagazine.com/seedstock/beef-business-pioneer-martin-f-jorgensen-jr-passes (last visited Aug. 26, 2019).

[72] Joint Proposed Schedule for Further Proceedings, Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America v. United States Department of Agriculture, No. 4:16-cv-00041-BMM-JTJ (D. Mont. Feb. 4, 2019).

[73] 84 Fed. Reg. 20765 (to be codified at 7 C.F.R. Part 1220 and 1260).

The redirection final rule allows beef producers in certain states to redirect to the Board the portion of the beef checkoff assessment that would have otherwise been retained by the QSBC in that state. Specifically, cattle producers in states that meet one of the following criteria may request redirection of the assessment:

- States where there is no state law that requires assessments be directed to a QSBC; or
- States where there is a state law that requires assessments to be directed to the QSBC and the state law allows for refunds.[74]

In *R-CALF*, the defendants argue that redirection defeats the plaintiff's First Amendment claims because Montana does not have a state law that requires assessments be directed to the Montana Beef Council. Thus, according to the defendants, the plaintiffs are not compelled by government to subsidize speech with which they disagree since they can simply redirect – or "forward" as plaintiffs complained on May 2, 2016 they could *not* do – the full assessment to the Board.

It remains to be seen whether the magistrate and federal district court will view the plaintiff's First Amendment claims differently now that the matter is considered in the context of a final redirection rule rather than a proposed rule. There is certainly a strong basis for a decision that holds that the matter is now moot, since both the litigating parties are in full agreement that there should be, and now is "established a procedure by which a cattle producer who disagrees with the Montana Beef Council's message can request that the complete amount of his assessments be directed to the Beef Board, a body controlled by the federal government."[75]

But, even if such a ruling is reached, other federal and state checkoff programs, just like the Montana Beef Council, could find themselves caught in crossfire between *Janus* and *Johanns*.

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[74] Press Release, USDA Clarifies Redirection of Assessments under Beef and Soybean Acts, USDA Agric. Mktg. Serv. (May 13, 2019), *available at i*https://www.ams.usda.gov/content/usda-clarifies-redirection-assessments-under-beef-and-soybean-acts (last visited Aug. 26, 2019).

[75] R-CALF Complaint at 27-28.