Case: 17-35669, 04/09/2018, ID: 10828674, DktEntry: 35-1, Page 1 of 5

FILED

APR 09 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA, a Montana Corporation, Plaintiff-Appellee, v. SONNY PERDUE, in his Official Capacity as Secretary of Agriculture and UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants-Appellants.	No. 17-35669 D.C. No. 4:16-cv-00041-BMM MEMORANDUM*

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

Argued and Submitted March 5, 2018
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: N.R. SMITH and HURWITZ, Circuit Judges, and CURIEL,** District Judge.

Sonny Perdue, Secretary of Agriculture (Secretary), appeals the district court's grant of Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America's (R-CALF USA) motion for a preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292(a), and we affirm.

Under our "limited and deferential" review that "does not extend to the underlying merits of the case," we are unable to say the district court abused its discretion in granting the preliminary injunction. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) (citation omitted). Preliminary injunctions are reviewed for an abuse of discretion. *Paramount Land Co. v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1008 (9th Cir. 2007); *Thalheimer*, 645 F.3d at 1115. "Under this standard, as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Thalheimer*, 645 F.3d at 1115 (alteration and citation omitted). However, "[a] trial court abuses its discretion if it bases its decision on an erroneous legal standard or on clearly erroneous factual

** The Honorable Gonzalo P. Curiel, United States District Judge for the Southern District of California, sitting by designation.

findings." *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004) (quotation marks omitted).

1. The district court did not abuse its discretion by finding that the instant assessment likely violated R-CALF USA's First Amendment rights. The Secretary does not denote where the district court applied an "erroneous legal standard." Rather, the Secretary takes issue with the district court's conclusion. This is insufficient to support reversal of a preliminary injunction. The district court outlined the correct legal standards as found in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), *Paramount*, and *Delano Farms Co. v. California Table Grape Commission*, 586 F.3d 1219 (9th Cir. 2009), and applied those standards to the facts of this case. Reviewing the facts of these cases against the instant case, we cannot say the district court incorrectly concluded it was likely R-CALF USA would succeed on the merits. Unlike prior cases, the Secretary does not appoint any members of the Montana Beef Council (MBC), does not have pre-approval authority over the MBC's advertising, and may only decertify after an action has been taken. In addition, any oversight the Secretary might exert over the

MBC is one, additional step further removed from the governmental oversight analyzed in *Johanns*, *Paramount*, and *Delano Farms*.[1]

2. The district court did not abuse its discretion by finding that the "redirection" procedures were insufficient. The district court set out the correct

[1] The Secretary, through the Agricultural Marketing Service, entered into a Memorandum of Understanding (MOU) with the MBC ten days after the magistrate judge issued his findings and recommendations. On its face, the MOU granted the Secretary additional authority over the MBC. The Secretary attached the MOU in its objection to the magistrate judge's findings and recommendations. However, the district court's memorandum and order did not discuss the MOU. Nonetheless, the Secretary waived any argument that the district court's silence regarding the MOU was an abuse of discretion, because he failed to articulate this argument in his opening brief. *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) ("The general rule is that appellants cannot raise a new issue for the first time in their reply briefs." (quotation marks and alterations omitted)); *see also Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 978 (9th Cir. 2017) ("Issues raised in a brief which are not supported by argument are deemed abandoned." (citation omitted)). The Secretary asserted in the opening brief only that the MOU "makes the agency's oversight authority even more explicit" and that the district court "did not discuss the MOU in its order." The opening brief did not assert that the failure to address the MOU was an independent basis to conclude that the district court abused its discretion, nor did the Secretary refer to *United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000) (addressing the district court's duty regarding supplemental evidence provided in an objection to a magistrate's recommendation), or its progeny, for that proposition. Rather, in the reply brief, the Secretary argued—for the first time—that "the district court's failure to explain its reasons for not considering the MOU constitutes an abuse of discretion," and cited the relevant case law. Accordingly, we decline to consider the MOU's impact for the first time on appeal. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. . . . [A] bare assertion does not preserve a claim, particularly when, as here a host of other issues are presented for review." (citation omitted)).

legal standards as outlined in *Knox v. Service Employees International Union*, 567 U.S. 298 (2012), and applied those standards to the facts of this case. Like the labor union political contributions disapproved of in *Knox*, those who wish to opt out of assessments going to the MBC must do so every time cattle are sold. *Knox*, 567 U.S. at 322, 322 n.9; 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. 45,984-01 (proposed July 15, 2016) (to be codified at 7 C.F.R. parts 1220 to 1260) (amending regulations to require a request for a "redirection" by the "15th day of the month following the month the cattle were sold"). The Secretary disagrees with the district court's reading of *Knox*, but neither cites additional binding authority to contradict *Knox*'s reasoning, nor identifies a legal error by the district court. This is insufficient to warrant reversing a preliminary injunction.

AFFIRMED.

FILED

APR 9 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

R-CALF USA v. Perdue, 17-35669

HURWITZ, Circuit Judge, dissenting:

Even given our deferential standard of review, I believe that the district court erred in granting the preliminary injunction.

As the Supreme Court has made plain, the critical question in determining whether speech is public or private in the precise context of this case is whether the speech is "effectively controlled" by the government. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). The Memorandum of Understanding between the Secretary and the Montana Beef Council ("MBC") plainly grants the Secretary complete pre-approval authority over "any and all promotion, advertising, research, and consumer information plans and projects" of the MBC. The district court failed to even discuss the Memorandum in granting the preliminary injunction, let alone suggest why it was not a facially enforceable agreement.

To be sure, the Memorandum was not submitted to the district court until after the magistrate judge made his report and recommendation; "a district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). But, "the district court must actually exercise its discretion" rather than simply ignore the new evidence, as it did here. *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (citation omitted). Moreover, the Memorandum

was not entered into until after the issuance of the report and recommendation—and plainly was designed to remedy the purported deficiencies in "effective control" by the Secretary identified in the magistrate judge's submission. Under these circumstances, the district court's decision to preliminarily enjoin the operation of a federal program as unconstitutional without at least addressing the Memorandum was an abuse of discretion.

I find mystifying the majority's conclusion the Secretary has waived any argument based on the Memorandum. His opening brief repeatedly cites the Memorandum and expressly notes the failure of the district court to address it. The district court did not rely on *Howell* in failing to address the Memorandum, and I cannot conclude that the Secretary waived any argument based on the Memorandum simply because the majority has concluded, post-hoc, that his brief should also have sought to distinguish *Howell*. A party does not waive a clearly articulated argument by failing to anticipate the grounds on which a Court might reject it.

I respectfully dissent.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk