IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, et al., *Plaintiffs*, v. KATHLEEN L. KRANINGER, in her official capacity as Director of the Consumer Financial Protection Bureau, et al., *Defendants*.	No. 1:20-cv-11141 (JCB)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Congress enacted the Federal Advisory Committee Act ("FACA") to control "the proliferation of costly [advisory] committees . . . dominated by . . . special interests seeking to advance their own agendas." *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999). The Consumer Financial Protection Bureau and its director, Kathleen Kraninger (collectively "Defendants"), have created an advisory committee that embodies those flaws: the Taskforce on Consumer Financial Law, a group hand-picked to represent the special interests of the financial services industry that profits from weak consumer protections. Defendants have directed the Taskforce to recommend ways to modify consumer financial protection laws and regulations that are at the heart of the Bureau's purpose of protecting consumers. Yet, in creating the Taskforce and selecting its members, Defendants failed to follow FACA requirements designed to ensure that the Taskforce is in the public interest, essential, unbiased, and open to public participation and scrutiny. Plaintiffs (and other advocates in favor of robust consumer protections) have thus been denied the chance to fully participate in the Taskforce or to stay apprised of its activities.

In their motion to dismiss, Defendants do not dispute that Plaintiffs have standing to assert their claims regarding the Taskforce's violations of FACA's transparency requirements, or that Plaintiffs have plausibly alleged that the Taskforce is subject to FACA. *See* ECF No. 20 [hereinafter MTD]. They argue only that Plaintiffs lack standing to challenge the Taskforce's unlawful creation and its biased composition. Neither argument has merit.

As to the Taskforce's creation, Plaintiffs have set forth detailed and specific allegations showing that the secretive establishment of the Taskforce deprived Plaintiffs of information to which they are entitled under FACA and forces them to divert resources to perform their core mission of studying and informing the public about developments in consumer finance laws. Indeed, if FACA's procedures had been followed, the Taskforce might well not exist at all

(because it is unnecessary) or it might look very different (as it would represent a balance of views). These violations thus directly caused Plaintiffs' injuries.

As to the Taskforce's biased composition, Plaintiff Kathleen Engel ("Professor Engel") was injured when Defendants denied her a fair opportunity to serve on the Taskforce through the use of a biased selection process. Beyond that, all of the Plaintiffs are injured by the lack of any representation of their interests on the Taskforce—making it harder for them to monitor the Taskforce's secretive work and increasing the likelihood that the Taskforce will issue biased recommendations that advance industry's special interests.

Finally, Defendants contend that several elements of Plaintiffs' prayer for relief should be dismissed. Even if Plaintiffs lacked standing to bring the unlawful creation and fairly-balanced claims, such a dismissal would be premature and unwarranted. The Court should therefore deny Defendants' motion in full.

BACKGROUND

I. The Federal Advisory Committee Act

FACA is a sunshine law designed to prevent special interest groups from using their membership on advisory committees "to promote their private concerns" outside the light of public scrutiny and participation. H.R. Rep. No. 92-1017, at 6 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3491, 3496; *see also Pub. Citizen v. DOJ*, 491 U.S. 440, 441 (1989) ("FACA was enacted to cure specific ills[,] particularly . . . biased proposals by special interest groups[.]"). To safeguard against this danger, FACA establishes a series of requirements for the creation and operation of advisory committees, defined as "any committee, . . . task force, or other similar group, . . . which is . . . established or utilized by one or more agencies[] in the interest of obtaining advice or recommendations[.]" 5 U.S.C. App. 2 § 3(2). These requirements are implemented by the General Services Administration ("GSA"), which is tasked with issuing

regulations governing these committees and overseeing their establishment and performance. *See id.* § 7(c).

To begin, FACA protects against wasteful and biased advisory committees by allowing agencies to create committees only *after* "consult[ing] with the [GSA]" and "determin[ing] as a matter of formal record" in the Federal Register that the committee is "in the public interest in connection with the performance of duties imposed on that agency by law." *Id.* § 9(a)(2). GSA's regulations further specify that, as part of the consultation process, agencies must submit to the GSA an "explanation stating why the advisory committee is essential to the conduct of the agency business," "an explanation stating why the advisory committee's functions cannot be performed by . . . other means," and "[a] description of the agency's plan to attain fairly balanced membership." 41 C.F.R. § 102-3.60. "Upon receiving notice from the [GSA] that its review is complete," agencies must then issue their public interest determination in the Federal Register. *Id.* § 102-3.65(a). Reflecting the GSA consultation process, this determination must include a finding that the committee is "essential to the conduct of agency business" and that "the information to be obtained is not already available through another advisory committee or source within the Federal Government." *Id.* § 102-3.30(a).[1]

FACA further guards against undue influence from special interest groups by requiring every advisory committee to "be fairly balanced in terms of points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2 § 5(b)(2), (c). The GSA

[1] Defendants assert that FACA does not require publication of findings that an advisory committee is essential and non-duplicative of other information sources. MTD at 11 n.5. Not so. Agencies are required to include these findings, accompanied by a reasoned explanation, in their formal public interest determination. *See, e.g.*, *NRDC v. Dep't of Interior*, 410 F. Supp. 3d 582, 596 (S.D.N.Y. 2019); *W. Org. of Resource Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1239-40 (D. Mont. 2019) [hereinafter *WORC II*]; *W. Org. of Resource Councils v. Bernhardt*, 362 F. Supp. 3d 900, 913 (D. Mont. 2019) [hereinafter *WORC I*].

has outlined the factors for "achieving a 'balanced'" committee, such as the need for "divergent points of view on the issues" before the committee. 41 C.F.R. pt. 102-3, subpt. B, app. A at III.

After they have been established, committees must operate in a transparent manner. Each committee must provide "timely notice" of its meetings, 5 U.S.C. App. 2 § 10(a)(2); allow interested persons to attend such meetings, *id.* § 10(a)(3); and publish any records "made available to or prepared for or by" the committee, *id.* § 10(b).

II. The Taskforce on Consumer Financial Law

Congress created the CFPB in the wake of the 2008 financial crisis—an economic disaster triggered in large part by pervasive failures in consumer protection—to ensure that all consumers have access to fair, transparent, and competitive markets for consumer financial products and services. 12 U.S.C. § 5511(a); *see also* ECF No. 1 ¶¶ 43-61 [hereinafter Compl.].

On October 11, 2019, Defendants announced the creation of the Taskforce for the ostensible purpose of obtaining recommendations to modify consumer financial laws and regulations—a broad mandate that positions the Taskforce to provide a blueprint for the CFPB to revise those laws. Compl. ¶¶ 80, 153. As a "task force . . . established [and] utilized by [the CFPB] in the interest of obtaining advice or recommendations," the Taskforce is subject to FACA's requirements, which are designed to ensure that such committees are in the public interest, necessary, fairly balanced, and transparent. 5 U.S.C. App. 2 § 3(2).[2]

From the outset, Defendants' creation of the Taskforce defied FACA's safeguards. Defendants disregarded FACA's mandate to consult with the GSA, including with respect to the

[2] The Taskforce does not fall within FACA's exemption for committees "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." Compl. ¶¶ 29-30 (discussing the exemption provided by 5 U.S.C. App. 2 § 3(2)); *id.* ¶¶ 85-86 (discussing the temporary, intermittent, and limited nature of the Taskforce members' appointments).

requisite public interest findings. Compl. ¶¶ 92-93. They thus never explained, among other things, why the Taskforce was necessary and why its functions could not be undertaken by an existing government office. They also avoided addressing any concerns the GSA likely would have raised. And they declined to issue a public interest determination in the Federal Register reflecting each of the findings that should have resulted from the GSA consultation. *Id.* ¶ 94.

Similarly, consistent with their failure to consult with the GSA on a fairly-balanced membership plan, *id.* ¶¶ 100-01, Defendants eschewed any attempt to ensure that the Taskforce represented competing points of view, *id.* ¶¶ 102-22. Rather, Defendants employed a biased process to select Taskforce members who exclusively represent deregulatory and industry views, while excluding the views of consumer advocates. *Id.* ¶¶ 102-14. For example, Defendants appointed as chairman of the Taskforce Todd Zywicki, a lobbyist for the consumer financial services industry and a longstanding opponent of consumer protections. *Id.* ¶¶ 103-05. Conversely, Defendants rejected numerous consumer finance law experts and advocates who endorse robust consumer protections, such as Professor Engel. *Id.* ¶¶ 115-18. Demonstrating the biased nature of the selection process, Defendants interviewed Professor Engel "'in an inquisitorial manner' for the purpose of 'determin[ing] [her] stance on deregulation,'" without asking "about her qualifications and experience." Compl. ¶ 121.

Defendants have likewise operated the Taskforce in violation of FACA's transparency requirements. Despite multiple attempts by Plaintiffs to access the Taskforce's meetings and records, *id.* ¶¶ 130-31, 138, Defendants have not provided public notice of their meetings, *id.* ¶¶ 123-33, held their meetings in public, *id.*, or published Taskforce records, *id.* ¶¶ 134-38.

III. Plaintiffs' Harms from the Unlawful Creation and Operation of the Taskforce

Given their longstanding work and missions to advance consumer protections, each Plaintiff has a "significant interest in the Taskforce's activities" and in monitoring and reporting

on those activities to the public. *Id.* ¶¶ 12, 16; *see id.* ¶¶ 20-22. By the same token, Plaintiffs have a significant interest in the Taskforce's compliance with FACA's safeguards, such as the GSA consultation process, which ensure that committees are "essential, in the public interest, fairly balanced between different points of view, and structured to avoid inappropriate influences." *Id.* ¶ 5; *id.* ¶ 7 (The Taskforce's "structural flaws[] directly implicate" Plaintiffs' interests).

Specifically, Plaintiff National Association of Consumer Advocates ("NACA") accomplishes its mission by advocating for policies that protect consumers against predatory financial institutions and by educating its members on topics related to consumer financial law. *Id.* ¶¶ 9-11. Likewise, Plaintiff United States Public Interest Research Group ("U.S. PIRG") is a non-profit consumer advocacy organization that works to reform consumer financial laws and regulations, including by educating the public on the Bureau's regulatory activities. *Id.* ¶¶ 13-15. And, as a nationally prominent scholar on consumer law and finance, Plaintiff Professor Engel writes extensively on issues impacted by the Bureau's work. *Id.* ¶¶ 17-18.

These interests have been injured by Defendants' unlawful creation and composition of the Taskforce. Defendants' failure to consult with the GSA—including with respect to Defendants' fairly-balanced membership plan and public interest findings—and to subsequently publish those findings has injured Plaintiffs by depriving them of information to which they are statutorily entitled. *Id.* ¶¶ 140, 143-45. Moreover, by failing to make the requisite public interest findings and thereby depriving Plaintiffs of access to them, Defendants have made it more difficult for NACA and U.S. PIRG (the "Organizational Plaintiffs") to keep the public informed, and for Professor Engel to study and write, about the Taskforce's purpose and impact on consumer financial law. *Id.* ¶¶ 139-55. As a result, Plaintiffs have been forced to divert staff time towards monitoring the Taskforce and attempting to secure information that should be public. *Id.*

¶¶ 139, 142. Moreover, if Defendants had complied with FACA, they may not have established a committee at all or they may have changed its composition—sparing Plaintiffs the burden of monitoring a biased and unnecessary committee. *Id.* ¶¶ 5, 7.

Plaintiffs are likewise injured by Defendants' use of a biased selection process to create an imbalanced Taskforce. Professor Engel was injured when she was denied a fair opportunity to apply for the Taskforce by a biased screening process that disfavored consumer advocates. *Id.* ¶ 150. Moreover, all three Plaintiffs were injured by the Taskforce's skewed composition, which denied Plaintiffs any representation by excluding the views of consumer advocates and experts who favor robust consumer protections. *Id.* ¶ 148. In so doing, Defendants have exacerbated Plaintiffs' inability to follow along with or participate in the Taskforce's work and increased the likelihood that the Taskforce will produce biased recommendations. *Id.* ¶¶ 148, 151-54. This has already caused, and will continue to cause, Plaintiffs to divert resources to monitor, participate in, and react to the Taskforce's work. *Id.* ¶¶ 139, 142, 155.

STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(1), courts must "take as true all well-pleaded facts in the plaintiffs' complaint[], scrutinize them in the light most hospitable to the plaintiffs' theory of liability, and draw all reasonable inferences therefrom in the plaintiffs' favor." *Van Wagner Boston, LLC v. Davey*, 770 F.3d 33, 36 (1st Cir. 2014). Courts "must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *see also Warth v. Seldin*, 422 U.S. 490, 502 (1975) (assuming for standing purposes that allegations "would be adjudged violative of the constitutional and statutory rights of the persons excluded").

While the party invoking jurisdiction bears the burden, this showing should be evaluated "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 1281-82 (quoting *Lujan*, 504 U.S. at 561); *accord Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 638 (1st Cir. 2013). Thus, at this stage of the litigation, "'the burden imposed' on plaintiffs . . . 'is not onerous.'" *Peacock v. Dist. of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012).

ARGUMENT

To establish standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Foisie v. Worcester Polytechnic Inst.*, 967 F.3d 27, 35 (1st Cir. 2020) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). Here, the Complaint contains detailed, concrete allegations that Plaintiffs—each of which has long pursued and educated the public on robust consumer financial protections—possess an adequate personal stake in Defendants' unlawful creation of a biased Taskforce designed to undermine those protections outside of the public eye.

I. Plaintiffs Have Standing to Challenge the Taskforce's Unlawful Creation.

As to Plaintiffs' claim regarding Defendants' unlawful creation of the Taskforce, Defendants contest only whether Plaintiffs have shown a cognizable injury. MTD at 10-12. In fact, Plaintiffs have adequately alleged two forms of injury: (1) the deprivation of information

guaranteed to Plaintiffs by law, and (2) the diversion of additional resources to deal with a secretive, unlawful advisory committee.

A. Plaintiffs have standing based on their informational injuries.

It is well established that a "plaintiff suffers an 'injury in fact' when [he or she] fails to obtain information which must be publicly disclosed pursuant to a statute." *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 332 (1st Cir. 2020) (quoting *FEC v. Akins*, 524 U.S. 11, 21 (1998)); *accord Kenn v. Eascare, LLC*, 2020 WL 5217117, at *6 (D. Mass. Sept. 1, 2020). The Supreme Court has explicitly recognized such injuries under FACA, explaining that, "[a]s when an agency denies requests for information under the Freedom of Information Act, refusal to permit [a plaintiff] to scrutinize [an advisory committee's] activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." *Pub. Citizen*, 491 U.S. at 449; *accord Jud. Watch, Inc. v. U.S. Dep't of Com.*, 583 F.3d 871, 873 (D.C. Cir. 2009).

Here, "the injury requirement is obviously met," *Jud. Watch*, 583 F.3d at 873, because Defendants failed to consult with the GSA regarding their public interest determinations and to publish those findings as required by FACA. Compl. ¶¶ 91-99; 139-40; 5 U.S.C. App. 2 § 9(a)(2); 41 C.F.R. § 102-3.60; *id.* § 102-3.30(a); *id.* § 102-3.65.[3] Defendants mischaracterize the Complaint, asserting that Plaintiffs alleged harms only as a result of Defendants' failure to consult with the GSA, without alleging harms from the four other challenged shortcomings (*i.e.*, the failure to publish the three public interest findings and to submit a fairly-balanced

[3] Defendants insinuate that they have satisfied the requirement to publish their public interest findings through the October 11, 2019 announcement of the Taskforce. MTD at 11 n.5. But that announcement is insufficient on numerous grounds: (1) it was not informed by a GSA consultation, (2) it was not published in the Federal Register, (3) it does not formally determine on the record that the Taskforce is in the public interest, essential to agency business, and non-duplicative of other information sources; and (4) it is not accompanied by a reasoned explanation. *See supra* page 3 & n.1.

membership plan). MTD at 10-11. In fact, the allegations cover each of these elements, describing injuries from Defendants' "failures to publish the requisite findings," as well as Defendants' failure "to consult with the GSA," Compl. ¶ 140—a process that requires GSA's review of the fairly-balanced membership plan and public interest findings, *supra* page 3. These findings constitute information that Defendants unlawfully withheld from Plaintiffs, and that would inform Plaintiffs' understanding of the purpose of the Taskforce.

Nor are these allegations too "barebones" to pass muster. MTD at 11. To the contrary, Plaintiffs' allegations are on all fours with those found to confer standing in other FACA cases. *See, e.g.*, *Byrd v. EPA*, 174 F.3d 239, 243 (D.C. Cir. 1999) (EPA caused injury in fact when it "den[ied] Byrd timely access to . . . comments and pre-meeting notes"); *Cummock*, 180 F.3d at 355 (plaintiff "readily satisfie[d] the standing requirements" when denied "information that [the agency] was required to produce"). In this regard, Defendants' reliance on *United States v. AVX Corp.* is misplaced. MTD at 11. There, an organization's allegations that its "members have been and will continue to be harmed by the releases" of toxic substances were too "nebulous" to establish standing under an environmental statute. 962 F.2d 108, 116-17 (1st Cir. 1992). In contrast, Plaintiffs have alleged specific informational harms repeatedly recognized by courts as a cognizable injury under FACA. Plaintiffs have therefore shown informational injury.

Defendants' remaining arguments are meritless. Defendants misstate the applicable legal standard, relying on case law addressing a different statute entirely to argue that Plaintiffs must demonstrate "the type of harm Congress sought to prevent by requiring disclosure." MTD at 11-12 (citing *Elec. Privacy Info. Ctr. v. Dep't of Com.*, 928 F.3d 95, 103 (D.C. Cir. 2019)). But in FACA cases, Plaintiffs "need not show more" than a denial of access to information that is required to be disclosed. *Wash. Toxics Coal. v. EPA*, 357 F. Supp. 2d 1266, 1270 (W.D. Wash.

2004); *see also, e.g.*, *Pub. Citizen*, 491 U.S. at 449. Regardless, even if Defendants have identified the correct standard, Plaintiffs easily meet it: by "enact[ing] in FACA a series of requirements governing the creation" of advisory committees, "Congress aimed . . . to open to public scrutiny the manner in which government agencies obtain advice from private individuals." *Cummock*, 180 F.3d at 285; *see also* 5 U.S.C. App. 2 § 2(b) (FACA ensures that "the public [is] kept informed"). Here, the lack of required information "prevent[ed] Plaintiffs from studying . . . and . . . informing the public about" the Taskforce. Compl. ¶¶ 140, 143-44.

Likewise, Defendants incorrectly fault Plaintiffs for failing to allege how the withheld information prevented Plaintiffs from studying and reporting on the Taskforce. But, again, Plaintiffs are only required to demonstrate the "agency's refusal to disclose information that [FACA] requires to be revealed." *Jud. Watch*, 583 F.3d at 873. In any event, contrary to Defendants' argument, Plaintiffs have made such a showing. Specifically, Plaintiffs would use public interest findings—which inform the Taskforce's purpose and agenda, *infra* pages 12-13—to "keep the public abreast of the Taskforce's efforts to reshape consumer financial laws and regulations," to "advise" NACA's members on consumer interests "given the shifting landscape," and to inform Professor Engel's academic work. Compl. ¶¶ 143-44.

Defendants also assert in passing that Plaintiffs' injury is insufficiently "particularized." MTD at 10. That argument is clearly wrong. As the Supreme Court has explained,

> the fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.

Pub. Citizen, 491 U.S. at 449-50. Defendants are also incorrect that Plaintiffs' allegations are deficient because they do not appear in the claims section of the Complaint. MTD at 10. The federal rules impose no such requirement, and Defendants cite no authority to support one.

B. Plaintiffs have standing based on their organizational and professional injuries.

Much like individuals can assert standing based on harm to themselves, it is "well accepted" that an "organization can assert standing to protect against injury to its own organizational interests." *Mass. Delivery Ass'n v. Coakley*, 671 F.3d 33, 44 n.7 (1st Cir. 2012). It need only show a "concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources." *Becker v. FEC*, 112 F. Supp. 2d 172, 180 (D. Mass. 2000) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Thus, even if the deprivation of information to which they are entitled were not enough on its own to create standing, Plaintiffs independently have standing because Defendants' actions have impaired Plaintiffs' activities, forcing them to expend resources to combat those harms.

1. Plaintiffs are injured by being deprived of information about the Taskforce.

To start, Plaintiffs have alleged, in detail, that the "opaque process through which the Taskforce was established" is "impeding NACA's and U.S. PIRG's mission-driven educational activities" and "preventing Professor Engel from carrying out her academic work." Compl. ¶ 139. By creating the Taskforce in a non-transparent manner, *id.* ¶ 140, Defendants have interfered with this work, including Organizational Plaintiffs' ability to "create educational and training programs that will advance consumer interests," "advise" their members, and "keep the public abreast of the Taskforce's efforts to reshape consumer financial laws and regulations," as well as Professor Engel's ability to "study and write" about the Taskforce. *Id.* ¶¶ 144-45. Had Defendants complied with FACA, they would have been required to explain why the Taskforce is "essential to the conduct of agency business" and why "information to be obtained [from the Taskforce] is not already available through another . . . source," such as the Bureau's Research, Markets, and Regulations Division. *Id.* ¶¶ 94, 97-98. Such information is "relevant to [the

Taskforce's] purpose and agenda," and so "Defendants' failure to provide . . . these findings at the outset impeded [the Organizational] Plaintiffs' mission of member and public education" and Professor Engel's professional activities. *NRDC*, 410 F. Supp. 3d at 595.

These harms, which are exacerbated by the "secrecy with which [the Taskforce] has operated," Compl. ¶ 139, have compelled Plaintiffs to expend time and resources monitoring the Taskforce and pursuing information that should already have been public, including by sending staff to meet with the Taskforce and by requesting the Bureau to release Taskforce records. *Id.* ¶ 142. Plaintiffs have thus "sufficiently alleged that Defendants' failure to provide the findings required by § 9(a)(2) at the outset, compounded by Defendants' continuing lack of transparency, has contributed to Plaintiffs' diversion of resources." *NRDC*, 410 F. Supp. 3d at 594.

2. Plaintiffs are injured by the creation of the Taskforce.

Plaintiffs also have standing because the unlawful creation of the Taskforce itself has forced them to divert resources. As another court concluded in finding that a plaintiff had standing to bring an analogous claim, because FACA was "created to protect the public's participation and concrete interest in unbiased, useful, and productive advisory committees," a plaintiff has standing to challenge the unlawful establishment of an advisory committee where the establishment "harm[s], or at least [] actually create[s] a material risk of harm to, this concrete interest[.]" *WORC I*, 362 F. Supp. 3d at 909. Thus, "when an advisory committee is unnecessarily established, . . . persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue." *Id.* (quotations omitted).

That is precisely the case here. Simply put, if Defendants had followed the legally required procedures for the formation of the Taskforce, including consultation with the GSA, they may well have determined that the Taskforce was not "actually useful and beneficial to the public," Compl. ¶ 6, or that its work could be handled by existing government offices, as the

Complaint alleges, *id.* ¶¶ 91-99. Alternatively, that consultation could have led to a more balanced Taskforce composition. *Id.* ¶ 5-6, 101, 116-21. But because Defendants elected to rush through an unnecessary and unjustified Taskforce on a subject that bears directly on Plaintiffs' missions, Plaintiffs must now "expend time and organizational resources" monitoring, reporting on, and addressing the "likely consequences," *id.* ¶ 142, of a Taskforce that is "single-minded [in its] focus on protecting the [financial services] industry," *id.* ¶ 6. *See also id.* ¶ 154-55 (Plaintiffs will be forced to "monitor, and if necessary, advocate against" the recommendations of the biased Taskforce). These "serious structural flaws" therefore "directly implicate the interests of . . . Plaintiffs, who have long fought for robust consumer protections[.]" *Id.* ¶ 7; *see also id.* ¶¶ 12, 16, 22 (explaining that Plaintiffs have a significant interest in the Taskforce's activities).

Thus, by violating "procedures [that] seek to minimize the risk of future harm," the Taskforce's existence itself has injured Plaintiffs by creating a "demonstrable risk to their interests," *Nkihtaqmikon v. Impson*, 503 F.3d 18, 28 (1st Cir. 2007), and "interfer[ing] with [Plaintiffs'] ability to provide services to [their] members[.]" *WORC I*, 362 F. Supp. 3d at 909.[4]

II. Plaintiffs Have Standing to Challenge the Taskforce's Lack of Balance.

Plaintiffs also have standing to bring their fourth claim for relief: that the Taskforce fails to comply with FACA's mandate that "the membership of [an] advisory committee . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2 § 5(b)(2), (c). Professor Engel suffered injury from her

[4] While Defendants did not challenge this aspect of Plaintiffs' standing, it bears noting that this injury is distinct from the kinds of "undifferentiated injury common to all members of the public" that Defendants say do not confer standing. MTD at 9. Plaintiffs have shown that they are directly affected by the Taskforce's work and thus have a particularized interest, *WORC I*, 362 F. Supp. 3d at 909, that is "concrete, even if it is widely shared," *Cargill, Inc. v. United States*, 173 F.3d 323, 330 & n.6 (5th Cir. 1999). To hold otherwise "would convert FACA from a statute binding on the agency to one that is merely hortatory." *Id.*

unlawful exclusion from the Taskforce, and all of the Plaintiffs suffer additional harms to their organizational and professional interests from the Taskforce's lack of balance.

A. Professor Engel has standing based on her unlawful exclusion from the Taskforce.

Professor Engel suffered a cognizable injury-in-fact from the denial of her application for Taskforce membership through a biased selection process. Although the First Circuit has not decided whether an individual unlawfully excluded from an unbalanced advisory committee has standing, "the weight of the caselaw in other circuits indicates that if a party with a direct interest in the committee's work applies for membership and is denied access, that party has standing to challenge the denial." *NRDC*, 410 F. Supp. 3d at 601-02 (collecting cases); *accord Ctr. for Pol'y Analysis on Trade & Health v. Off. of U.S. Trade Rep.*, 2006 WL 8446407, at *3 (N.D. Cal. June 29, 2006) (collecting cases).

As the Complaint alleges, "Professor Engel applied" and was "interviewed to serve on the Taskforce," Compl. ¶¶ 20, 21; "[h]owever, her application was ultimately rejected," *id.* ¶ 21. The Complaint also explains how the Taskforce's "imbalanced composition was the result of a biased selection process," which included "intentionally screen[ing] applicants based on whether they supported deregulation." *Id.* ¶¶ 120-21, 150. In addition to depriving her of a fair opportunity to obtain a valuable position, Professor Engel's exclusion makes it more difficult for her to "monitor[] the Taskforce's work" and to "make her views known to the Taskforce." *Id.* ¶ 22. Those allegations—which must be taken as true on a motion to dismiss—establish that Professor Engel was unlawfully denied access to the Taskforce as a result of the Taskforce's intended lack of balance.

Defendants argue that Professor Engel "has no entitlement to Taskforce membership," MTD at 13, but that is beside the point. As one court has explained in rejecting this precise

argument, "the harm arises not because a given individual is entitled to a seat on an advisory committee, but rather because she is entitled to a fair adjudication of her application for membership." *NRDC*, 410 F. Supp. 3d at 602. That is because "a plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity." *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 724 (D.C. Cir. 2015). Moreover, the cases cited by Defendants rely on the conclusion that FACA's fairly-balanced requirement is nonjusticiable, a conclusion recently rejected by the First Circuit in *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 17-20 (1st Cir. 2020).[5]

Defendants also assert that Professor Engel's injuries are not redressable because the Complaint did not specifically request that she be appointed to the Taskforce. MTD at 13-14. But the full scope of Professor Engel's injuries—which pertain to the ongoing operation of a secretive, unlawful committee from which she was purposefully excluded—would be redressed more fully by the dissolution of the Taskforce than by her forced inclusion upon it. To that end, the Complaint requests an order "set[ting] aside the Taskforce's charter and all orders and decisions attendant to the Taskforce's creation, *including the appointments of individual Taskforce members*." Compl. at 49 (emphasis added). Moreover, that relief would require CFPB to conduct a fair and balanced hiring process in the event it decides to reconvene the Taskforce.

[5] Defendants have "waived" any assertion that Professor Engel's claim is nonjusticiable by raising it "only in a footnote [and] in a perfunctory manner." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999); *see* MTD 13 n.7. Nevertheless, fairly-balanced claims like that raised by Professor Engel are justiciable precisely because they do not challenge "individual hiring decisions"—*i.e.*, decisions based on credentials or qualifications—but instead a biased hiring process. *Union of Concerned Scientists*, 954 F.3d at 18 n.5; *see Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1234-35 (10th Cir. 2004) (finding standing and justiciability for "plaintiffs' claim of an interest in a fair opportunity to be appointed to [a committee] which opportunity was denied them when the [agency] short-circuited the 'fair balance' requirement").

In any event, a request for appointment is encompassed within Plaintiffs' request for "any other relief this Court deems appropriate." *Id.*; *cf. Yniguez v. Arizona*, 975 F.2d 646, 647 n.1 (9th Cir. 1992); *Liberty Nat. Ins. Holding Co. v. Charter Co.*, 734 F.2d 545, 560 n.31 (11th Cir. 1984).

B. All Plaintiffs have standing based on their organizational and professional injuries.

As directly on-point cases establish, both Professor Engel and the Organizational Plaintiffs also have standing because the Taskforce's lack of balance inflicts additional costs on them. Plaintiffs have standing to challenge a committee's lack of balance where "their lack of representation on the [committee] has further contributed to their monitoring costs" because "representation on the [committee] would improve their ability to keep abreast of [its] activities and increase access to information and documents relating to [its] work." *NRDC*, 410 F. Supp. 3d at 602. "If the concrete interest at stake is participation in and oversight for advisory committees, . . . having an allegedly one-sided committee [is a] direct threat[] to that interest." *WORC I*, 362 F. Supp. 3d at 909; *see Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Priv. Sector Surv. on Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) ("When the requirement is ignored, therefore, persons having a direct interest in the committee's purpose suffer injury-in-fact."); *Wash. Legal Found. v. ABA Standing Comm. on Fed. Judiciary*, 648 F. Supp. 1353, 1358 (D.D.C. 1986) ("To the extent that WLF has charged that it has been 'directly affected' by the lack of balance . . . , it is entitled to assert a section 5(b) violation.").

That is precisely what Plaintiffs allege here. As explained above, Plaintiffs all have significant interests in monitoring, reporting on, influencing, and responding to the Taskforce's work. *See supra* pages 6-7. But the Taskforce's "lack of a balanced composition of members," coupled with its lack of transparency, forces the Organizational Plaintiffs "to divert resources in response" and "prevent[s] Professor Engel from carrying out her academic work." Compl. ¶ 139.

The Taskforce's secrecy and insularity is "exacerbated because the Taskforce does not include a member who represents the interests of consumer advocates or academics," meaning that "Plaintiffs' views are necessarily not represented on the taskforce." *Id.* ¶¶ 147-48. Put simply, it will be harder for Plaintiffs to follow and influence the Taskforce's work when they lack a pair of eyes and an open ear. That is enough to establish their standing.

Defendants focus instead on Plaintiffs' allegations that the Taskforce is likely to recommend policies that the Plaintiffs oppose and that they will have to divert additional resources to address, which Defendants characterize as "hypothetical" and "speculative." MTD at 14-16. Defendants' argument is wrong on the law and the facts. As to the law, the First Circuit has explained that a plaintiff alleging procedural injury need not show a "certainty" that they will be harmed; they need only show that the challenged action inflicts "a demonstrable risk to their interests." *Impson*, 503 F.3d at 28; *accord Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002) ("A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.").

As to the facts, the Complaint contains detailed allegations—which must be taken as true at this stage—that easily state a plausible claim that the Taskforce will recommend policies adverse to Plaintiffs' interests. Specifically, the Complaint explains that each of the Taskforce's current members is a staunch opponent of consumer protections, *see* Compl. ¶¶ 102-15; that CFPB intentionally excluded candidates who support such protections, *id.* ¶¶ 116-22; that the Taskforce is therefore "likely to issue a report" that conforms to its members' views "that protecting consumers from abusive financial products is paternalistic and harmful," *id.* ¶¶ 151-52; and that that report is likely to influence CFPB's policies, given CFPB's statements

regarding the Taskforce and its resource commitments, *id.* ¶ 153, or provide fodder for opponents of consumer protections, *id.* ¶ 154. To require any more would effectively mean that Plaintiffs must wait until the Taskforce actually issues harmful recommendations, at which point it may be too late to unwind the Taskforce's work.

Defendants also claim that Plaintiffs' injuries amount to mere "lobbying" costs. MTD at 15. That is incorrect. As explained above, Plaintiffs face increased costs to perform their core public-facing activities—researching and writing for Professor Engel, and monitoring, reporting on, and addressing policies that harm consumers for the Organizational Plaintiffs. These are the sort of resource expenditures undertaken "in response to, and to counteract, the effects of the defendants' alleged [unlawful conduct]" that "fit comfortably within . . . organizational-standing jurisprudence." *PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1097 (D.C. Cir. 2015); *see also Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) ("[T]he Supreme Court has stated that so long as the economic effect on an organization is real, the organization does not lose standing simply because the proximate cause of that economic injury is 'the organization's noneconomic interest in encouraging [a particular policy preference].'") (quoting *Havens*, 455 U.S. at 379). Thus, Plaintiffs have standing to bring their fairly-balanced claim.

III. The Court Should Not Dismiss Any Part of Plaintiffs' Prayer for Relief.

Because Plaintiffs have standing to assert all of their claims, there is no basis to dismiss any part of Plaintiffs' Prayer for Relief. MTD at 16-17. In any event, it would be premature to assess on a motion to dismiss whether Plaintiffs are entitled to their requested remedies, which may require additional factual development and briefing. *See Owens v. Hous. Auth. of Stamford*, 394 F. Supp. 1267, 1274 (D. Conn. 1975) ("The propriety of the redress requested must, of course, await more advanced steps in this litigation."); *cf. New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 353 (E.D.N.Y. 2007) ("[A] motion for failure to state a claim properly addresses

the cause of action alleged, not the remedy sought."). Regardless, each of the challenged requests for relief should survive dismissal even if the Court dismisses the first or fourth claim.

First Prayer for Relief. If the Taskforce is being operated in secret in violation of FACA, as alleged in the (unchallenged) second and third claims, there are plainly grounds for the Court to "[d]eclare that Defendants' . . . administration of the Taskforce violates the APA, FACA, and FACA's implementing regulations." Compl. at 49.

Second and Third Prayers for Relief. Just as Plaintiffs' second and third claims warrant the release of Taskforce materials and access to Taskforce meetings, they also provide a basis for setting aside decisions made without complying with those requirements or for preventing the Taskforce from continuing to operate behind closed doors. *Cf. Pub. Citizen v. Nat'l Econ. Comm'n*, 703 F. Supp. 113, 129 (D.D.C. 1989) ("Should the December 12 meeting proceed behind closed doors, plaintiffs will be denied, perhaps for all time, but at a minimum during the on-going course, that which Congress expressly protected through FACA.").

Fifth Prayer for Relief. As courts have explained, violations of FACA's transparency requirements can provide a basis for enjoining the use of a committee's recommendations (a so-called "use injunction"). "[T]o allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act." *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994); *see also California Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 614 (D.C. Cir. 1996) ("[A]n injunction might be appropriate in some cases . . . if the unavailability of an injunctive remedy would effectively render FACA a nullity."). It would be premature to assess whether a use injunction is permissible now, when the extent and the effects of the Taskforce's secrecy are not yet fully known.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for dismissal.

September 14, 2020

Respectfully submitted,

/s/ Kristen Miller

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Plaintiffs' Opposition to Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) were served on September 14, 2020 on all counsel or parties of record through the CM/ECF system, and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Kristen Miller
Kristen Miller