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)

SUPPLEMENTAL BRIEF ON MOOTNESS

Pursuant to the Court's January 6, 2021 order, Plaintiffs respectfully submit this supplemental brief explaining why none of Plaintiffs' claims is moot following the release of the final report by the Taskforce on Federal Consumer Financial Law (the "Taskforce"). To the contrary, Plaintiffs' ongoing injuries—incurred as a direct result of each of Defendants' violations of the Federal Advisory Committee Act ("FACA")—remain redressable by this Court.

Since the inception of the Taskforce, Defendants have flouted FACA's transparency and public accountability requirements at every turn. By ignoring FACA's mandate, Defendants have created an unnecessary and unbalanced Taskforce that has operated behind closed doors to produce an irreparably compromised final report. Indeed, Plaintiffs' preliminary review of the report reveals that it relies on biased reasoning to offer many recommendations that would weaken critical consumer protections. The Taskforce therefore continues to harm Plaintiffs' interests as experts and advocates of robust consumer financial protections.

Having issued a 900-page report without following federal law, Defendants now seek to avoid scrutiny of that report and their actions leading to its release by suggesting that Plaintiffs' claims have become moot. *See* Defs.' Mot. to Continue the January 6, 2021, Scheduling Conference and Hearing, ECF No. 35 ("Defs.' Mot. for Continuance"). As a matter of law, Plaintiffs' claims are not moot. Plaintiffs are still injured by Defendants' violations, and this Court has ample authority to redress those injuries. Plaintiffs' injuries include—among other things—the ongoing diversion of resources Plaintiffs must incur to address the Taskforce's unlawful operation and its harmful report. Plaintiffs likewise continue to be deprived of information to which they are statutorily entitled and remain unable to educate the public regarding the same. Because these injuries are redressable by multiple forms of injunctive and declaratory relief—and will remain so "even after the [Taskforce] has been disbanded"—none of Plaintiffs' claims is moot. *Cummock v. Gore*, 180 F.3d 282, 292 (D.C. Cir. 1999); *Byrd v. U.S. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (holding that FACA claim was not moot after the committee completely disbanded because the plaintiff's injuries remained redressable); *NAACP Legal Def. & Educ. Fund, Inc. v. Barr ("NAACP I")*, No. 20-cv-1132, 2020 WL 5833866 at *9 (D.D.C. Oct. 1, 2020) ("FACA rights are enforceable even after an advisory committee has been disbanded."); *Ctr. for Arms Control & Non-Proliferation v. Lago*, No. 05-cv-682, 2006 WL 3328257 at *3 (D.D.C. Nov. 15, 2006) (same).

Defendants' view of mootness would lead to absurd results. If Defendants were correct, advisory committees could immunize themselves from FACA violations simply by virtue of completing their work. No matter what the continuing effects of a biased, secretly generated end-product of an advisory committee may be, according to Defendants there is nothing anyone can do about it. Such a view guts the very purpose of FACA.

ARGUMENT

The "burden of establishing mootness rests squarely on the party raising it, and the burden is a heavy one." *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 73 (1st Cir. 2006) (internal quotation omitted). Defendants must demonstrate that "it is 'impossible for [the] court to grant *any* effectual relief *whatever* to [Plaintiffs].'" *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 923 F.3d 209, 220 (1st Cir. 2019) (emphasis added) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)); *see also id.* ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (quotation omitted). "[E]ven the availability of a *partial* remedy is sufficient to prevent [a] case from being moot." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 36 (1st Cir. 2011) (emphasis added) (internal quotation omitted). Plaintiffs' ongoing injuries are redressable by both injunctive and declaratory relief, and so Defendants have failed to meet their heavy burden.

I. Plaintiffs' Ongoing Injuries Are Redressable by Injunctive Relief

Plaintiffs continue to suffer multiple ongoing injuries as a result of the FACA violations at issue in each of their four claims. Specifically, Plaintiffs remain forced to expend resources addressing the harmful consequences of the Taskforce's irreparably compromised report. Compl. ¶ 155. Likewise, Plaintiffs continue to be denied information to which they are statutorily entitled and are still unable to educate the public regarding the Taskforce's work. *Id.* ¶¶ 140-47. These injuries remain redressable by at least two types of injunctive relief: (1) an order prohibiting Defendants from relying on the Taskforce's report or requiring that they label the

report as one that is not compliant with FACA and (2) an order requiring Defendants to release all information that is required to be disclosed by FACA.[1]

A. Order Prohibiting Defendants From Relying On Taskforce Report Or Requiring Defendants To Add A Disclaimer

To begin, the Court can redress Plaintiffs' injuries from all four claims by issuing an order that prohibits Defendants from relying on the Taskforce's report. Alternatively, Plaintiffs' injuries could also be remedied—albeit to a lesser degree—by an order requiring Defendants to add a disclaimer indicating that the report was produced in violation of FACA. As alleged in the Complaint, each of Defendants' violations has contributed to the production of a fundamentally biased and flawed report, which will continue to force Plaintiffs to expend significant resources addressing the report's harmful effects.

With respect to Plaintiffs' first claim, the failure to consult with the General Services Administration and make the requisite public interest findings allowed Defendants to create an unnecessary and unbalanced Taskforce that went on to produce a report that is "single-minded in its focus on protecting the [financial services] industry." Pls' Opp. to Defs' Mot. to Dismiss ("Opp.") 13-14, ECF No. 23. Had Defendants complied with the consultation process and other pre-chartering requirements, they may not have created the Taskforce or produced a report at all. *Id.;* Compl. ¶¶ 91-99. Or they may have established a balanced and fair committee that would not have issued such a flawed report. Opp. at 13-14; Compl. ¶¶ 5-6, 101, 116-21.

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[1] The Court could also issue an order setting aside the Taskforce's Charter and prohibiting the Taskforce from meeting or otherwise conducting Taskforce business. Defendants suggest that such relief is now moot because "[t]he release of the final report marks the end of the Taskforce's work." Defs.' Mot. for Continuance, ECF No. 35 at 2. But the Taskforce's Charter does not expire until 90 days after the final report is delivered—an event that has not yet come to pass—and explicitly provides an option for renewal. CFPB, Charter of the Bureau's Taskforce on Federal Consumer Financial Law ¶ 10 (Jan. 8, 2020), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-charter.pdf.

Similarly, Defendants' failure to make the Taskforce's records and meetings public—at issue in the second and third claims—prevented Plaintiffs from participating in and following along with the Taskforce's work. Compl. ¶ 146. This "hamper[ed] Plaintiffs' ability to advocate before the Taskforce and [made] it more likely that recommendations favorable to industry [would] come to fruition." *Id.* Again, if they and others had been able to participate, the content and recommendations of the report may have been different.

Finally, the Taskforce's lack of balance—challenged by Plaintiff's fourth claim—contributed to the biased nature of the report by excluding Plaintiffs' views from the Taskforce and making it harder for Plaintiffs to "follow and influence the Taskforce's work." Opp. at 17-18; Compl. ¶¶ 147-48.

The report is simply the fruit of this poisonous tree—and Plaintiffs must now expend significant resources addressing its harmful effects. Plaintiffs must first "divert resources to [] understand how and why the Taskforce reached [the] final conclusions" in a 900-page, highly technical report—a task made "significantly more difficult" by the fact that the Taskforce's biased composition precluded Plaintiffs from "participat[ing] [in] and follow[ing] the work of the Taskforce." Compl. ¶ 155. Plaintiffs must then expend resources "adapt[ing] their educational and advocacy work to this new reality." *Id.* For example, Plaintiffs noted at the hearing that they will be required to spend significant staff time rigorously analyzing all 900 pages of the report, rebutting its conclusions, and educating the public about both its harmful effects and analytical flaws. Similarly, Plaintiff National Association of Consumer Advocates will likely have to develop a training program to help its members—comprised of consumer attorneys—to understand the threat the report poses to the laws and regulations on which they depend to protect consumers.

These injuries can be redressed by a use injunction. As multiple circuits have recognized, courts may enforce FACA by enjoining federal agencies from relying on the policy recommendations or work product generated by unlawful advisory committees. For example, the Eleventh Circuit has explained that use injunctions are proper where "allow[ing] the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of [FACA]." *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994). Similarly, the Fifth and D.C. Circuits have held that use injunctions are appropriate where "the unavailability of an injunctive remedy would effectively render FACA a nullity." *Cargill, Inc. v. United States*, 173 F.3d 323, 342 (5th Cir. 1999) (quoting *Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 614 (D.C. Cir. 1996)). *See also W. Org. of Res. Councils v. Bernhardt*, 412F. Supp.3d 1227, 1243 (D. Mont. 2019) (ordering a use injunction because it was "the only way to achieve FACA's purposes").

Alternatively, the Court could also redress these injuries to a lesser degree by issuing a limited use injunction, which would require Defendants to attach a disclaimer to the report stating that it was produced in violation of FACA. *NAACP Legal Def. & Educ. Fund, Inc. v. Barr ("NAACP II")*, No. 20-cv-1132, 2020 WL 6392777 at *2 (D.D.C. Nov. 2, 2020). Such relief would redress Plaintiffs' injuries—which "stem from [their] inability to influence the [Taskforce's] work by scrutinizing the [Taskforce's] activities and having access to a representative voice on the [Taskforce]"— "because the disclaimer would give [Plaintiffs] ammunition in the arena of public opinion." *Id.* (internal quotation omitted). Indeed, similar to the declaratory relief discussed below in Part II, the disclaimer would "remov[e] the appearance of legitimacy that attaches to advisory committee recommendations . . . by ensuring that everyone who views the report is aware that it was produced in violation of FACA[.]" *Id.*

Both a use injunction and a limited use injunction remain available even after the Taskforce has issued its report. *See, e.g.*, *Cal. Forestry Ass'n*, 102 F.3d at 614 (noting that a use "injunction might be appropriate" where the committee had already issued its final report); *NAACP II*, 2020 WL 6392777 at *4 (ordering a limited use injunction in the event the advisory committee published its final report); *cf. Cummock*, 180 F. 3d at 292 ("[W]e have [] made it clear that FACA rights are enforceable even after an advisory committee has been disbanded.").

B. Order Requiring Defendants to Release Required Information

Plaintiffs' informational injuries, which flow from their first and third claims, also remain redressable by an order requiring Defendants to immediately release all information required to be disclosed by FACA. As made clear in their Complaint and Opposition, Plaintiffs continue to be deprived of information to which they are statutorily entitled as a result of the Taskforce's unlawful creation and Defendants' failure to release all Taskforce records. Opp. at 9-12; Compl. ¶¶ 140-47. Courts have repeatedly recognized that claims based on informational injuries do not become moot after an advisory committee finishes its work because the public's "rights to obtain information under FACA" are "enforceable even after an advisory committee has been disbanded." *Cummock*, 180 F.3d at 292; *see also Ctr. for Arms Control & Non-Proliferation*, 2006 WL 3328257 at *3 ("[T]he ability of a court to award access to the documents as relief for previous violations of the duty is limited only by the existence of the documents.") (quotation omitted). Plaintiffs first and third claims are therefore not moot.

II. The Court Can Issue Declaratory Relief Independent of Injunctive Relief

The Court can also provide a remedy for Plaintiffs' injuries by declaring that Defendants have violated FACA. The First Circuit has long recognized that a case may remain live—even where injunctive relief is no longer available—so long as the plaintiff "retains sufficient interests and injury as to justify the award of declaratory relief[.]" *Unión de Empleados de Muelles de*

Puerto Rico, Inc. v. Int'l Longshoremen's Ass'n, AFL-CIO, 884 F.3d 48, 58 (1st Cir. 2018) (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974)). This is because a declaratory judgment "can be used by a party to obtain further relief," including in "subsequent proceedings." *Id.* Thus, "[t]o determine whether [a plaintiff's] claim for declaratory relief is moot," the court must "examine whether there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* (quotation omitted).

Declaratory relief is clearly appropriate here given the real and immediate controversy posed by Defendants' sweeping FACA violations, as well as the utility of a declaratory judgment in providing Plaintiffs with relief in subsequent proceedings. As the D.C. Circuit explained in *Byrd v. EPA*, FACA violations may be redressed by declaratory relief even where injunctive relief is no longer available. 174 F.3d at 244. In that case, defendant EPA argued that plaintiff Byrd's informational injuries under FACA were no longer redressable because the withheld information had been made available over the course of the litigation and the advisory committee at issue had completed its work and disbanded. *Id.* The court rejected this view, explaining that Byrd's injuries resulted not simply from EPA's failure to release the requested information, but instead from "EPA's failure to furnish him with the documents until long after they would have been of any use to him." *Id.* Accordingly, the "court's declaration that the agency failed to comply with FACA" would redress Byrd's injury because it would "give Byrd ammunition for [his] attack on the Committee's findings in subsequent agency proceedings that make use of the [advisory committee's work product]." *Id.* (internal quotation omitted); *cf. Unión de Empleados*, 884 F.3d at 58-59 (holding that a challenge to an international union's decision to place a local union in trusteeship was not moot—even though the trusteeship had since dissolved—because

declaratory relief would be useful to plaintiffs in "challeng[ing] the validity of actions taken by the trustee during the course of the trusteeship").

The same is true here. Plaintiffs' injuries flow not just from Defendants' failure to comply with FACA's information disclosure and public participation requirements (claims one, two, and three), but also from Defendants' failure to provide Plaintiffs with access to information and meetings when such access "would have been of any use[.]" *Byrd*, 174 F.3d at 244. As alleged in the Complaint, the "Taskforce's secrecy [] prevent[ed] Plaintiffs from participating in its work . . . and [made] it more likely that recommendations favorable to industry will come to fruition." Compl. ¶ 146. Likewise, the biased composition of the Taskforce (claim four) deprived Plaintiffs of any representation on the Taskforce, further hampering their ability to participate in the Taskforce's work and making it more likely that the "Taskforce's report would fail to represent the views . . . that consumer protections are beneficial[.]" *Id.* ¶ 151; *id.* ¶¶ 148-49.

Thus, Plaintiffs are now faced with the substantial probability that Defendants, as well as the financial services industry, will rely on the biased and flawed Taskforce report to "legitimize" industry-friendly policies under the pretense that the Taskforce provided "outside, neutral" advice. *See Cummock*, 180 F.3d at 292 (explaining that advisory committees provide the government with "political legitimacy with respect to its policy decisions"); Compl. ¶¶ 151-54. Plaintiffs must now expend resources addressing and responding to these harmful consequences. *Id.* ¶ 155. Because declaratory judgment would provide Plaintiffs with "ammunition" in these efforts, *Byrd*, 174 F.3d at 244, it "can [] be used as a predicate to further relief" in subsequent proceedings, *Unión de Empleados*, 884 F.3d at 59. The controversy over Defendants' FACA violations is therefore "sufficiently real and immediate to permit [Plaintiffs' case] to go forward." *Id.*

The Taskforce's report heightens, rather than eliminates, the need for the Court to remedy Plaintiffs' harms from the Taskforce's unlawful creation and operation. Defendants should not be permitted to run out the clock by ramming a biased report through an illegitimate process. The Court should therefore deny the government's motion to dismiss and order the parties to confer on a schedule for briefing summary judgment.

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Respectfully submitted,

/s/ Kristen Miller

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