IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Robert F. Kennedy Center for Justice and Human Rights, et al.,

Plaintiffs,

v.

Antony Blinken, in his official capacity as U.S. Secretary of State, et al.,

Defendants.

Case No. 20-cv-2002 (JGK)

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2021 at 3:30 PM

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS FOR MOOTNESS

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INTRODUCTION

Since the inception of the Commission on Unalienable Rights (the "Commission"), Defendants[1] have flouted the Federal Advisory Committee Act's ("FACA") transparency and public accountability requirements at every turn. Defendants created an unnecessary and unbalanced Commission that operated behind closed doors to produce an irreparably compromised final report (the "Report"). Once published, Defendants quickly took their Report on a world tour, touting its findings and conclusions before the United Nations, foreign governments, and foreign civil society organizations. Now, having taken significant steps to permanently stamp the Report's view of human rights law with the imprimatur of the State Department, Defendants attempt to evade scrutiny of their conduct by arguing that their voluntary decision to terminate the Commission—on the day before their motion to dismiss was due—renders the Court incapable of granting relief that would redress Plaintiffs' harms. *See* Mem. of Law in Support of Defs.' Mot. to Dismiss Pursuant to Rule 12(h)(3) ("MTD"), ECF No. 73.

But Plaintiffs' harms—which arise from the flawed process that led to the creation of the Commission's Report and include, among other things, the ongoing diversion of resources Plaintiffs must incur in order to address the Commission's Report, and the deprivation of timely access to information to which they are statutorily entitled—are redressable by multiple forms of injunctive and declaratory relief. Such relief remains available even now that the Commission

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Secretary of State Antony Blinken is automatically substituted for former Secretary of State Michael Pompeo following his confirmation to that office. Plaintiffs have amended the case caption accordingly.

has been terminated. *See, e.g.*, *Byrd v. U.S. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999); *Cummock v. Gore*, 180 F.3d 282, 292-93 (D.C. Cir. 1999); *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). Accordingly, none of Plaintiffs' claims is moot.

Indeed, dismissal on mootness grounds would lead to the absurd result of permitting a federal agency to (1) violate FACA's safeguards for the purpose of engineering a report designed to advance parochial, partisan interests, and then (2) rely on that same report to validate their actions and buttress their policy pronouncements under the guise of having obtained advice from a body of neutral, credible experts. Failure to enforce FACA under these circumstances would render it "toothless, merely aspirational legislation," and would permit "the work product of spuriously formed advisory groups [to] obtain political legitimacy that it does not deserve." *Cargill, Inc. v. United States*, 173 F.3d 323, 341 (5th Cir. 1999).

To avoid this absurd result, and because the Court remains able to provide relief that will redress Plaintiffs' ongoing harms, the Court should deny Defendants' motion to dismiss.

BACKGROUND

As Plaintiffs alleged in their Complaint ("Compl."), ECF No. 1, and later established through summary judgment briefing, Defendants have violated numerous key provisions of FACA through their creation and operation of the Commission. These violations included the failure to meaningfully consult with the General Services Administration ("GSA") and adequately justify the Commission's establishment, 5 U.S.C. App. 2 § 9; the failure to ensure that the Commission was "fairly balanced in terms of points of view represented," 5 U.S.C. App. 2 § 5(b)(2); and the failure to make available to the public any records "made available to or prepared for or by" the Commission, *id.* § 10(b). *See generally* Compl. ¶¶ 127-145; Mem. of

Law in Support of Pls.' Mot. for Summ. J. ("Pls.' MSJ") 17-29, ECF No. 43; Pls.' Mem. in Opp. to Defs.' Cross-Mot. for Summ. J. and Reply in Support of Pls.' Mot. for Summ. J. ("Pls.' MSJ Reply") 7-23, ECF No. 56. To redress the injuries that stem from these violations, Plaintiffs have asked the Court for an order declaring the Commission to be unlawful, setting aside its Charter, enjoining the Commission from continuing to meet, ordering Defendants to release all records of the Commission (or a privilege log explaining any withholdings), and enjoining Defendants from using the Commission's work product. *See* Compl. at 49-50 (prayer for relief).

Defendants now ask the Court to dismiss this case as moot. ECF Nos. 72-74.

LEGAL STANDARD

A case should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) only where "'the district court lacks the statutory or constitutional power to adjudicate it.'" *Lyons v. Litton Loan Servicing LP*, 158 F. Supp. 3d 211, 218 (S.D.N.Y. 2016) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). "In resolving a Rule 12(b)(1) motion, the Court may consider evidence outside of the pleading to determine whether a plaintiff has established subject matter jurisdiction by a preponderance of the evidence." *Id.* (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008)).

ARGUMENT

"As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation omitted). Defendants thus bear "a heavy burden" to establish mootness. *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992). To meet this burden, they must establish that it is "impossible for a court to grant *any* effectual relief whatever to the [plaintiffs.]'" *Chevron Corp. v. Donziger*, 833 F.3d 74, 124 (2d Cir. 2016) (quoting *Chafin*, 568

U.S. at 172). If even a "partial remedy" is available, that "is sufficient to render a case not moot." *Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.*, 955 F.3d 314, 319 (2d Cir. 2020) (quotation omitted).

As discussed below, Plaintiffs continue to be injured by the ongoing dissemination of the unlawfully created Report. They are currently expending significant resources to track how that Report is being used by the U.S. government, foreign governments, and civil society groups in the United States and abroad, and they are engaging in significant efforts to oppose the Report in the public sphere. Injunctive and declaratory relief can redress these injuries. Specifically, were this Court to (1) enjoin Defendants from relying on or disseminating the Report, (2) require that the Report bear a label identifying it as a product of the unlawful Commission, and/or (3) declare the Commission's creation and/or operation unlawful, Plaintiffs would need to spend fewer resources tracking the use of the Report and combatting perceptions of its legitimacy because they would be armed with "ammunition for [their] attack on the [Commission's] findings." *Byrd*, 174 F.3d at 244 (quotation omitted).

Accordingly, the case is not moot.

I. Plaintiffs' Injuries Are Ongoing

Since the Commission's inception, Plaintiffs have been expending resources to understand the work of the Commission, track its progress, and counter the messages that the Commission was poised to deliver to the world about the United States' view of international human rights law. Compl. ¶¶ 28, 116-126; *see also* Pls.' MSJ 15-17; Pls.' Reply Br. 3-4. That work has continued since the Commission published its irreparably compromised Report: Plaintiffs have expended resources to track the Report's broad circulation and use by Defendants, a necessary step to enable them to counteract the spread of views that contradict the accepted

meaning of international human rights law and that undermine Plaintiffs' respective missions as international human rights organizations. Declaration of Mark Bromley ("Bromley Decl.") ¶¶ 3, 14, 21 (attached as Exhibit A). In particular, Plaintiffs have worked to counteract the Report's proclamation that religious liberty and property rights are the most "[p]rominent among the unalienable rights that the government is established to secure," its characterization of "abortion" and "same-sex marriage" as "divisive social and political controversies," and granting sovereign states "leeway" to base human rights obligations on "distinctive national traditions." *See* U.S. Dep't of State, *Report of the Commission on Unalienable Rights* 13, 24-25, 55 (Aug. 2020), https://www.state.gov/wp-content/uploads/2020/08/Report-of-the-Commission-on-Unalienable-Rights.pdf; *see also* Bromley Decl. ¶ 19.

Plaintiffs' efforts in this regard have included "develop[ing] written work product to educate the public about [their] concerns with the Commission and its Report," briefing members of the press to shape coverage of the Report and Defendants' use of it, and "conduct[ing] extensive outreach to human rights organizations, foreign policy institutions, and foreign embassies in Washington, DC to educate these key decisionmakers … and ensure they have the tools they need to effectively use their platforms to disavow the Report." *See, e.g.*, Bromley Decl. ¶¶ 5-7, 9-13; Declaration of Akila Radhakrishnan ("Radhakrishnan Decl.") ¶¶ 3, 7 (attached as Exhibit B) (describing engagement with members of the media, Congressional offices, and more than "17 UN-affiliated offices and country missions").

But the playing field is not level, and Plaintiffs face difficulties in multiple directions. In one direction, Plaintiffs have attempted to counter the messaging of Secretary Pompeo's State Department, which was able to bolster its message with the appearance of "outside, 'neutral' support," which in turn provides the "political legitimacy" needed to make their views "salable."

Cummock, 180 F.3d at 292 (describing how the government "uses advisory committees to legitimize agency viewpoints" and to "validate" a "tentative or even a firm conclusion") (quotation omitted). And, in the other direction, Plaintiffs must attempt to counter the use of the Report by autocrats and other human rights skeptics, who find themselves with "a powerful piece of authority" that carries the imprimatur of the State Department and "undermine[s] critical tools that Plaintiffs rely upon," Compl. ¶ 29. *See* Bromley Decl. ¶¶ 21, 23, 27; *cf. Cargill*, 173 F.3d at 341 (FACA guards against "the work product of spuriously formed advisory groups … obtain[ing] political legitimacy … it does not deserve"); *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) (crafting relief that would "remov[e] the appearance of legitimacy that attaches to advisory committee recommendations").

In short, Plaintiffs' work has been made more difficult because, in their effort to advocate for the advancement of human rights, they must confront or explain away the flawed premises contained in the Commission's Report and the spurious appearance of legitimacy that bolsters them.

Plaintiffs are not relieved of their need to oppose the Report's assertions simply because the administration has changed, because "[r]epudiation by the political branches of government alone will only deepen the signal that Secretary Pompeo has used the Report and Commission to convey: that human rights are defined by political whims and so may shift in meaning depending the ideology of those who hold power, as opposed to a set of discernible legal principles that remain binding regardless of changing political winds." *See* Bromley Decl. ¶¶ 28-31. In any event, repudiation by the current administration provides no guarantee that some *future*

administration will not pick up where Secretary Pompeo left off and continue to make use of the Report.

Moreover, since the Report was first released on July 16, 2020, Defendants have, as they explain, engaged in a concerted effort—with the assistance of Commission members—to spread the Report's findings "to diplomatic and consular posts of the State Department," on the State Department's website, and "in hard copy to third parties, including foreign audiences and think tanks." *See* Decl. of Duncan Walker ("Walker Decl.") ¶¶ 5-7, ECF No. 74; MTD 3. Through this effort, Defendants have successfully embedded language and concepts from the Commission's work into, among other places, policy statements of other federal agencies and agreements formed with foreign countries. *See* Radhakrishnan Decl. ¶¶ 4-6, 8-11. The Commission's work has also seemingly been adopted into policy statements issued by the U.S. Agency for International Development and also into the so-called Geneva Consensus Declaration, an agreement forged with 34 other states, including Brazil, Egypt, Hungary, Indonesia, and Uganda that rejects LGBTQI and reproductive freedom rights claims. *See id.* ¶¶ 8-9.

Indeed, even after the change in administrations, Defendants continue to disseminate the Commission's work product, at least through the Commission website, where the Report is available in eight foreign languages. *See* U.S. Dep't of State, Report of the Commission on Unalienable Rights, https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights//index.html (landing page) (last visited Jan. 27, 2021).

Defendants note the extent of this distribution seemingly to suggest that they have spread their unlawfully created Report too far and too wide for the Court to do anything about it. *See* MTD 11. To the contrary, the extent of Defendants' publicity tour highlights the scope of the task in front of human rights advocates, like Plaintiffs, who must now counteract the Report's

faulty narrative on an equally global scale, where it has already been adopted by foreign countries and civil society organizations in a manner that undercuts LGBQTI and reproductive freedom rights claims. *See* Bromley Decl. ¶ 27; *see also* Radhakrishnan Decl. ¶¶ 7-15 (cataloguing events where Defendants have promoted the Report and describing its adoption in the "Geneva Consensus"). That makes it more, not less, important that Plaintiffs be able to counter the Report in those fora by pointing to the fact that its creation has been declared unlawful and its use restricted by an impartial federal court. *See, e.g.*, Bromley Decl. ¶ 32 (noting the utility to human rights organizations, like Plaintiffs, of "a non-partisan judgment of the Commission's illegality"); Radhakrishnan Decl. ¶¶ 15-17.

II. Injunctive and Declaratory Relief Are Available and Appropriate to Redress Plaintiffs' Record and Non-Records Claims

Because, for the reasons explained below, the Court has the power to grant both injunctive and declaratory relief, notwithstanding the publication of the Report and Defendants' termination of the Commission, and because those forms of relief will redress Plaintiffs' injuries, Plaintiffs' case is not moot.

A. Both Injunctive and Declaratory Relief Are Available to Redress Plaintiffs' Non-Records Claims

To deny Defendants' motion, the Court need only find that some form of relief is *available* at this phase of the case. *See Chevron Corp.*, 833 F.3d at 124. It is. As multiple courts have recognized, they may enforce FACA by issuing "use injunctions" limiting the ability of federal agencies to rely on or distribute the work product generated by unlawful advisory committees, *see, e.g.*, *Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 614 (D.C. Cir. 1996), requiring agencies to affix a label to the committee work product noting its non-compliance with FACA, *NAACP II*, 2020 WL 6392777, at *2, and/or declaring that the

committee violated FACA, *Byrd*, 174 F.3d at 244. Such relief may be granted *after* a committee has published its work product and/or been disbanded. *See, e.g.*, *id.*; *Cummock*, 180 F.3d at 292; *NAACP I*, 2020 WL 5833866, at *9. Accordingly, Plaintiffs' non-records claims are not moot.

Were it otherwise, FACA would be rendered a nullity, as an agency could rush out a committee report, without complying with FACA, and thereby avoid judicial review. That is not what Congress intended. As the Fifth Circuit has explained, "while some of the strictures imposed by Congress … may seem trivial, Congress believed the rules were necessary to ensure balanced, rationally-based decisionmaking. If the courts do not enforce FACA by enjoining the work of improperly constituted committees, FACA will be toothless, merely aspirational legislation" and, as a result, "the work product of spuriously formed advisory groups may obtain political legitimacy that it does not deserve." *Cargill*, 173 F.3d at 341; *see also Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994) ("[A]llow[ing] the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of [FACA]."); *W. Org. of Res. Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1243 (D. Mont. 2019) (ordering a use injunction because it was "the only way to achieve FACA's purposes"); *cf Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton ("AAPS II")*, 997 F.2d 898, 915 (D.C. Cir. 1993) (FACA should not be read to make it "easy to avoid").

Defendants insist, however, that Plaintiffs' claims are moot "because the Commission has finished conducting its business … and was terminated on January 14, 2021,"[2] and urge the

[2] There is no indication on the Commission or State Department website that the Commission has been formally shuttered and is no longer advising the Department or Secretary, *see* U.S. Dep't of State, *Comm'n on Unalienable Rights: Commission Home* (last visited Jan. 27, 2021),

Court to adopt a rule "'that non-records claims … do not survive the termination of a FACA advisory committee.'" MTD 10 (quoting *NRDC v. Zinke*, No. 18-cv-6903, 2020 WL 5766323, at *4 (S.D.N.Y. Sept. 28, 2020)). But adopting such a rule would render FACA a nullity, which is precisely the result courts have routinely counseled against.

In support of that result, Defendants primarily rely on *National Nutritional Foods Association v. Califano* and *NRDC v. Zinke*. MTD 8-10. In each case, however, the court looked to the relevant facts to determine whether the plaintiffs' injuries were continuing and whether the courts could grant any relief that would ameliorate those injuries; neither case establishes that relief is unavailable in the circumstances presented here.

In *National Nutritional Foods Association*, a court in this District declined to grant injunctive relief after the defendants made assurances that the putative committee would not meet again. 457 F. Supp. 275, 280 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 327 (2d Cir. 1979). The committee in that case, however, was an "informal unstructured group[]," which met only once, produced no final report-like document, and to which the district court held FACA did not apply. *Id.* Thus, there would have been little risk of that entity's one-off meeting producing harms that could have outlived the operation of the committee, as Plaintiffs have shown here, *see, e.g.*, Bromley Decl. ¶¶ 26-29; Radhakrishnan Decl. ¶¶ 5, 11, 15. Indeed, the plaintiffs in that case

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https://2017-2021.state.gov/commission-on-unalienable-rights/index.html, and the Commission's Charter—which does not provide a mechanism for early termination—does not expire, by its own terms, until July 8, 2021. *See* AR0068, ECF No. 39-3. An order from the Court declaring the Commission unlawful, setting aside its Charter, and prohibiting the Commission from further meetings would, at a minimum, bind Defendants to this litigation representation.

even conceded that certain forms of injunctive relief were no longer required. *Nat'l Nutritional Foods Ass'n*, 457 F. Supp. at 280.

On appeal, the Second Circuit held that FACA did apply, but affirmed the district court's denial of injunctive and declaratory relief on the facts of that case. The court, however, plainly thought declaratory relief was *available*. *See Nat'l Nutritional Foods Ass'n*, 603 F.2d at 336 (finding that "[w]hether it was proper to deny declaratory relief [wa]s a close[] question."). Importantly, the mootness issue was not presented to the Second Circuit, which undercuts any value that opinion might have in predicting how the Circuit, squarely faced with the question before this Court, would decide the issue. *See Nat'l Nutritional Foods Ass'n*, 603 F.2d at 331 (noting that mootness was not a contested issue).

Thus, not only does *National Nutritional Foods Association not* set down the broad prohibition on post-disbandment relief for which Defendants cite it, but also the district court's narrow ruling—and the Second Circuit's partial affirmance—were based on very different facts, which provided an independent basis (separate from the government's assurances about the committee's termination) for concluding that any harms would be limited to the period of the committee's operation. By contrast, Defendants provide no similar reason to think that the harms it has imposed on human rights advocates, like Plaintiffs, will simply abate now that the Commission has been formally terminated. *See* Bromley Decl. ¶¶ 21, 23, 26-29; Radhakrishnan Decl. ¶ 15-17.

Defendants also cite *NRDC v. Zinke*, in which a court in this District dismissed non-records FACA claims as moot after the committee was "terminated" because there was "no further relief for the Court to order that would ameliorate" the plaintiffs' allegations that the defendants had violated FACA's non-records provisions. 2020 WL 5766323, at *4-5. But, unlike

here, there was no suggestion in *NRDC* that the committee at issue delivered to the agency a final document intended to outlive its existence, or that the agency had disseminated any such document. And the absence of such an enduring document likewise meant there was little chance any committee work product would cause ongoing harm to the plaintiffs. *See id.* That is plainly not the case here, *see supra* 7. *NRDC* is thus inapposite.

Defendants cite other out-of-circuit district court cases as support for the same broad prohibition on post-disbandment relief, but none supports the sweeping rule Defendants propose. For example, Defendants cite dicta in the district court's decision in *Association of American Physicians & Surgeons, Inc. v. Clinton* to support their assertion that, once a committee is disbanded and its records are released, there would be no continuing case or controversy. *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton ("AAPS I")*, 879 F. Supp. 103, 103 (D.D.C. 1994). But *AAPS I* cannot bear that weight because the *only claims* that the plaintiff there raised were records claims. Here, of course, Plaintiffs allege harm arising not only from Defendants' failure to provide Commission records, but also from a host of non-records violations, which culminated in the unlawfully generated Report, the dissemination of which continues to cause Plaintiffs' injury. *Supra* 2-3.

Likewise, *Seattle Audubon Society v. Lyons* does not suggest Plaintiffs' claims are moot. Defendants cite that case for the proposition that "'once a committee has served its purpose, courts *generally* have not invalidated the agency action even if there were earlier FACA violations.'" MTD 10-11 (quoting 871 F. Supp. 1291, 1309 (W.D. Wash. 1994) (emphasis added), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996)). The *Seattle Audubon Society* court recognized that whether an injunction remains appropriate once the advisory committee has disbanded is a fact-specific inquiry, and that other courts had granted

such relief after a committee had been terminated. 871 F. Supp. at 1309; *accord Alabama-Tombigbee Rivers Coal.*, 26 F.3d at 1106.

That decision thus supports the conclusion that this Court has the *authority* to grant injunctive relief here, which, as noted, is all that is necessary to deny the motion to dismiss. *Chevron Corp.*, 833 F.3d at 124. Moreover, the court there decided such relief was not appropriate because the agency had "concluded, in agreement with [another federal] court, that" the report and recommendations the plaintiffs sought to enjoin "would have been the same had there been full compliance with FACA." *Seattle Audubon Soc'y*, 871 F. Supp. at 1310. No such finding has been made here, and Plaintiffs have demonstrated the ways in which the Report reflects the Commission's lack of a fair balance of viewpoints. *See* Pls.' Surreply in Support of Pls.' Mot. for Summ. J. 2, ECF No. 61-1.

Elsewhere, Defendants—like the court in *NRDC*, *see* 2020 WL 5766323, at *4—cite *Center for Biological Diversity v. Tidwell* and *Freedom Watch, Inc. v. Obama* for this same sweeping proposition. MTD 7-8. Neither case precludes the Court from granting relief.

In *Tidwell*, dismissal of the plaintiff's non-records claims as moot hinged on the agency changing the committee's composition in order to bring it into compliance with FACA, 239 F. Supp. 3d 213, 224 (D.D.C. 2017). That case did not set forth a broader prohibition on post-disbandment relief and so is inapposite as Defendants did no such thing here. *Freedom Watch* is also of no help to Defendants' argument that the Court cannot grant any relief, as the plaintiff there sought as relief "advance notice of, and the ability to participate in, any future meetings" of an alleged *de facto* committee and the "appointment of 'at least one person with a different point of view' to the committee." 859 F. Supp. 2d 169, 174 (D.D.C. 2012) (citation omitted). *Freedom Watch* thus applies only to cases where all of the requested relief would *require* the existence of

a committee. Where, as here, relief does not turn on a committee continuing to operate, *Freedom Watch*'s reasoning does not apply.

At bottom, Defendants stretch to find support for their view that FACA violations are immune once an unlawfully constituted and operated committee has ceased work. This Court, like many others, should reject such a sweeping and harmful rule and find that relief in this case is, at the very least, available. *See Byrd*, 174 F.3d at 243–44; *cf. 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). Nothing more is required to deny Defendants' motion.

B. Both Injunctive and Declaratory Relief Are Appropriate to Redress Plaintiffs' Non-Records Claims

Although the Court need not decide, for purposes of this motion, what relief would best redress Plaintiffs' injuries, Plaintiffs have previously explained why both declaratory and injunctive relief would be appropriate here in light of the breadth and depth of Defendants' FACA violations, *see* Pls.' MSJ at 17-29; Pls.' MSJ Reply at 7-18. *See W. Org. of Res. Councils v. Bernhardt*, 412 F. Supp. 3d at 242-44; *Cal. Forestry Ass'n*, 102 F.3d at 613; *Byrd*, 174 F.3d at 243–44.

Plaintiffs advocate for human rights on the international stage and thus have been injured by Defendants' broad—indeed, global—dissemination of the Report within the U.S. government, and to foreign governments and foreign civil society groups, which have already begun using, and citing to, it. *Supra* 7-8. Plaintiffs have, accordingly, been compelled to expend resources opposing this adoption of the Report. *Supra* 3-5.

An injunction or declaration establishing that the Report was created in violation of federal law would make it significantly less likely that those entities would rely on the Report, and would thereby obviate Plaintiffs' ongoing need to monitor and oppose efforts to adopt policies and practices justified by the Commission's framing of human rights. *See* Compl.¶ 28; Bromley Decl. ¶¶ 21, 27. Likewise, an order of this Court requiring that a disclaimer be affixed to the Report would redress Plaintiffs' injuries "because the disclaimer would give [Plaintiffs] ammunition in the arena of public opinion," and 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." *NAACP II*, 2020 WL 6392777, at *2 (internal quotation omitted).

Defendants nevertheless urge that "[p]ractical considerations … counsel against entry of a use injunction" because, in their view, a use "injunction here would not serve FACA's 'principal purposes of public accountability, and avoidance of wasteful expenditures.'" MTD 12 (quoting *Cargill*, 173 F.3d at 342). That is not the case. Accountability under FACA is best-served by denying Defendants' bid to evade judicial scrutiny and granting the relief Plaintiffs seek because "allow[ing] the government to use the product of a tainted procedure would circumvent the very policy" of FACA. *Alabama-Tombigbee Rivers Coal.*, 26 F.3d at 1107; *see also AAPS*, 997 F.2d at 915 (FACA should not be construed to be "easy to avoid").

Likewise, Defendants' argument that a use injunction, if it is available as a legal matter, would "serve no purpose" here practically because the Commission made "no recommendations and the Report itself was requested by and intended to advise a Secretary of State who will be departing office in less than a week" is without merit. MTD 12. The Commission's charge was to "provide[] advice and recommendations on human rights to *the Secretary of State*," not

specifically to *Secretary Pompeo*. *See* AR0066 (emphasis added). And while the Commission did not propose enactment of specific agency actions, Defendants have acknowledged relying on the Report in carrying out their official, diplomatic functions. *See* MTD 3 (describing dissemination within the State Department, to foreign governments, and civil society groups); *see also* U.S. Embassy & Consulates in Indonesia, *Remarks by Secretary Pompeo on Unalienable Rights and Traditions of Tolerance* (Oct. 29, 2020), https://id.usembassy.gov/remarks-by-secretary-pompeo-on-unalienable-rights-and-traditions-of-tolerance/ (transcribing event at which Secretary Pompeo and Chairperson Glendon spoke to the Indonesian Secretary General, among other foreign officials, about the Commission and the Report). Even aside from that, because Defendants took great pains to disseminate the Report to foreign audiences, which are now putting it to use to the detriment of Plaintiffs, the mere fact of a changing administration neither eliminates Plaintiffs' need to counter the Report abroad nor does it undercut their need for judicial relief. *Supra* 6-7.

C. This Court Can Also Redress Plaintiffs' Injuries by Ordering Injunctive or Declaratory Relief on the Records Claims

There is no dispute that FACA Section 10(b) requires Defendants to make public all materials produced for or by the Commission. 5 U.S.C. App. 2 § 10(b). Nor is there a dispute that Defendants failed to make Commission materials available to the public until after the Commencement of this litigation. *See, e.g.*, MTD 4 ¶ b (acknowledging that certain records were made available only through the administrative record); Pls.' MSJ 28-29. The only question, therefore, is whether there may yet be public materials that Defendants have not released. *Chevron Corp.*, 833 F.3d at 124. Defendants contend that "the Commission has disclosed all records required to be disclosed under FACA," Walker Decl. ¶ 12, but also admit that they have

withheld other records provided to the Commission as "not subject to the record disclosure requirements of FACA." MTD 9.[3]

Defendants' declaration, however, falls well short of the information other courts have required before determining that an agency had fulfilled its record disclosure obligation. In *Lawyers Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity*, for example, the court ordered defendants to produce (1) a declaration detailing their definition of records subject to release under FACA, (2) a declaration detailing their steps to identify such documents, and (3) a privilege log for withheld documents. *See, e.g.*, Order, 17-cv-1354, at *1 (D.D.C. Aug. 30, 2017), ECF No. 28 (attached as Exhibit C); *see also AAPS I*, 879 F. Supp. at 105 (determining that "an adequate index and provision of an explanation as to the reasons why each document continues to be withheld from the public" was necessary for "the court to make an informed decision about which documents must be released to satisfy the court that this case is now moot"). An order requiring Defendants to make a similar showing—as requested in the Complaint, *see* Compl. 49—would be appropriate here, especially since Defendants assert that certain records are exempt from disclosure, despite having been

[3] Defendants make much of the examples of missing records identified by Plaintiffs in the Complaint, but those allegations represented Plaintiffs' best effort to identify Commission records that were undisclosed at the time of filing. It did not purport to catalogue all undisclosed records of the Commission. *See* Compl. ¶¶ 96-115. Defendants attempt to shift the burden of identifying missing Commission records onto Plaintiffs, but Defendants are, of course, best positioned to know what records were created for or by the Commission, *see* 5 U.S.C. App. 2 § 10(b), and which of those records have not yet been made available.

indisputably "made available to or prepared for or by" the Commission, 5 U.S.C. App. 2 § 10(b). *See* MTD 9 (noting that withheld "materials were discussed with the Commission"); *see also* Walker Decl. ¶ 11.[4]

Moreover, there is good reason to think that additional Commission documents remain outstanding. For instance, as Commission Chair Mary Ann Glendon accompanied Secretary Pompeo on "several outreach events" to publicize the Commission's Report before foreign audiences in the months after the Commission's last public meeting, MTD 3, it is reasonable to think that records would have been created for those events, which would be subject to disclosure under FACA. Likewise, Professor Glendon and Peter Berkowitz, the Commission's Executive Secretary, recently announced that the University of Notre Dame will serve as "a second home" for the Commission's work product and will also provide a platform to "carry forward the [C]ommission's work." Bromley Decl. ¶ 28 (citing Peter Berkowitz & Mary Ann Glendon, *Commission on Unalienable Rights: Lessons Learned*, RealClear World (Jan. 7, 2021), https://www.realclearworld.com/articles/2021/01/07/commission_on_unalienable_rights_lessons_learned_655765.html). Yet no records detailing this project of the Commission exist on the Commission's website. And, finally, Defendants must have documented their decision to terminate the Commission in some fashion and relayed that news to the Commission members.

[4] Defendants' reliance on 41 C.F.R. § 102-3.160 is also misplaced. MTD 4. As Plaintiffs have previously explained, that regulation "does not exempt materials presented during administrative meetings from disclosure under section 10(b). Rather, it provides only that agencies need not notice or open administrative meetings to the public." Pls.' MSJ Reply 20-21 (citing *Elec. Privacy Info. Ctr. v. Drone Advisory Comm.*, 369 F. Supp. 3d 27, 48 (D.D.C. 2019)).

But Defendants have neither released any such records on their website nor provided assurances that no records of this sort exist. Thus, the Court remains capable of issuing relief to address at least these violations. *See AAPS*, 879 F. Supp. at 104 (declining to dismiss a records claim as moot until the agency produced "documents … created by members" of an advisory committee after it disbanded "that related to the group's original efforts").

The only thing that Defendants have provided to describe their approach and explain any withholdings is the Walker Declaration. But that document cannot suffice to meet Defendants' "heavy burden," *Harrison*, 981 F.2d at 59, as it contains largely conclusory assurances and fails to explain what documents were considered to be covered by section 10(b) and what methods Defendants took to ensure all covered records were made public aside from simply asking the Commission members. *See generally* Walker Decl. ¶¶ 8-12. Additionally, it fails to include a privilege log justifying Defendants' decisions to withhold certain documents. *Id.* Deference to such conclusory assertions is hardly warranted given Defendants' history of releasing records pursuant to their FACA obligations *only after* commencement of this litigation and after the Commission stopped holding public, deliberative meetings. *See* Compl. ¶ 109 (identifying "the only records Defendants ha[d] released" as of the date on which Plaintiffs filed the Complaint); Pls.' MSJ Reply at 18-19.

Additionally, because Plaintiffs were unable to access many Commission records until after the conclusion of its public meetings and the commencement of this litigation, a delay that precluded Plaintiffs from meaningfully participating in the Commission's work, Compl. ¶¶ 135-139; Pls.' MSJ 16-17, declaratory relief is available and warranted. *See Byrd*, 174 F.3d at 243–44 (holding that a "declaration that the agency failed to comply with FACA" provides plaintiffs with "ammunition" with which they can attack the advisory committee's work product); *cf.*

Citizens for Responsibility & Ethics in Wash. v. Duncan, 643 F. Supp. 2d 43, 50 (D.D.C. 2009) (drawing "a clear distinction between an injury resulting only from a failure to produce and one resulting from a failure to produce in a *timely* fashion") (emphasis in original).

In sum, because Defendants have yet to fulfill their records obligations under FACA, and because it is not "*impossible* for a court to grant … effectual relief," whether in the form of an injunctive order compelling the provision of a more thorough search description and privilege log or in the form of declaratory relief, Plaintiffs' records claim is not moot. *See Chevron Corp.*, 833 F.3d at 124 (emphasis added).

III. The Voluntary Cessation Doctrine Applies and Preserves The Court's Jurisdiction

Even if the Court finds that Defendants have demonstrated that the Plaintiffs' claims are moot, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982)). Thus, defendants who assert mootness on the basis of their own "voluntary conduct" face a "stringent" test in which they must meet the "heavy burden" of showing that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quotation omitted). As Defendants acknowledge, they can meet this burden only by showing that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Chocho v. Shanahan*, 308 F. Supp. 3d 772, 774 (S.D.N.Y. 2018) (quoting *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819

F.3d 581, 603 (2d Cir. 2016)). Defendants are unable to meet that burden here, and so their voluntary conduct does not moot this case.

This is so, in particular, because Defendants' voluntary action to disband the Commission on the eve of filing their motion, and to announce that decision through an exhibit to their brief, makes this precisely "a case where 'suspicious timing and circumstances' suggest that the Commission completed its work to evade judicial review." MTD 15 (quoting *MHANY Mgmt.*, 819 F.3d at 604). Indeed, Defendants' belated release of records and its termination decision have "track[ed] the development of this litigation." *MHANY Mgmt.*, 819 F.3d at 604. Moreover, key to *NRDC v. Zinke*'s holding, on which Defendants rely, that voluntary cessation did not apply, was the fact that the advisory committee's charter had naturally expired prior to the termination of the litigation. *See* MTD 14 (citing *Zinke*, 2020 WL 5766329, at *9). That is a wholly different case than here, where the Commission would, per the terms of its Charter, continue to operate until July 8, 2021, *see* AR0068, but without "Defendants … [having] *cause[d]* the [Commission's] charter to lapse after … litigation was brought so to avoid its consequences." *NRDC*, 2020 WL 5766323, at *9 (emphasis in original).

At least as important, "interim relief or events" have not "completely and irrevocably eradicated the effects of the alleged violation." *Chocho*, 308 F. Supp. 3d at 774. To the contrary, Defendants' efforts to spread the Commission's Report far and wide have exacerbated Plaintiffs' harms. *See supra* 4-8. And even if the Commission will not meet again, that does nothing to ensure that the State Department—now or in the future—will not consult, rely upon, or publicize the Commission's unlawful Report, which continues to be disseminated by the State Department through its website without any indication that its contents were created by a committee that was

unlawfully established, unlawfully operated, and lacked a fair balance of viewpoints, as is required by FACA.

CONCLUSION

For the reasons given above and in Plaintiffs' prior briefing in this case, the Court should deny Defendants' motions, ECF Nos. 54 & 73, grant Plaintiffs' motion for summary judgment, ECF No. 42, and enter any other appropriate relief.

Dated: January 29, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to section 2(D) of the Court's Individual Practices, the undersigned counsel for Plaintiffs certifies that this brief: (1) complies with the type-volume limitations set forth therein because it contains 6,422 words, including footnotes and excluding the parts of the brief exempted by the Court's Individual Practices; and (2) complies with the typeface requirements of the Court's Individual Practices because it contains double spaced, Times New Roman font, and uses one inch by one inch margins.

Dated: January 29, 2020

/s/ Benjamin Seel
Benjamin Seel