[NOT YET SCHEDULED FOR ORAL ARGUMENT]
No. 19-5337

In the
UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

VOTEVETS ACTION FUND
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Defendants-Appellees.

On appeal from the
United States District Court for the District of Columbia
Case No. 18-cv-1925 (Kelly, J.)

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Appellant VoteVets Action Fund ("VoteVets") makes the following disclosures:

VoteVets is a non-governmental, nonprofit corporation. VoteVets has no parent or subsidiary. VoteVets has never issued shares or debt securities to the public, and has no affiliates.

CERTIFICATE AS TO PARTIES, RULINGS, & RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and *Amici*. Plaintiff-Appellant is the VoteVets Action Fund ("VoteVets"). Defendants-Appellees are the U.S. Department of Veterans Affairs ("VA" or the "Department"), and Robert Wilkie, in his official capacity as Secretary of the U.S. Department of Veterans Affairs. No entities participated as *amici* in the district court.

B. Rulings Under Review. The rulings under review are the September 30, 2019 order, *see* Order, D. Ct. Dkt. No. 18, Joint Appendix ("JA")__, and memorandum opinion, *see* Mem. Op., D. Ct. Dkt. No. 19, JA__, of the United States District Court for the District of Columbia (Kelly, J.) in case number 18-1925. The district court's memorandum opinion is published at *VoteVets Action Fund v. U.S. Dep't of Veterans Affairs*, 414 F. Supp. 3d 61 (D.D.C. 2019).

C. Related Cases. This case has not previously been before this Court, and counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Dated: May 11, 2020

/s/ Karianne M. Jones .
Karianne M. Jones

STATEMENT REGARDING ORAL ARGUMENT

This case involves questions of statutory interpretation relevant to determining when the Federal Advisory Committee Act, 5 U.S.C. App. 2, applies to a federal agency's solicitation, and use, of advice from private individuals. Given the importance of the issues raised and the extensive allegations of statutory violations, Plaintiff-Appellant VoteVets respectfully submits that oral argument may assist the Court's resolution of this matter.

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INTRODUCTION

At the start of his Administration, President Trump solicited the assistance of three individuals—Mr. Isaac ("Ike") Perlmutter, Dr. Bruce Moskowitz, and Mr. Marc Sherman—to "help" the Secretary of Veterans Affairs "straighten out" the Department of Veterans Affairs (the "Department" or "VA"). Thereafter, those three individuals worked as a "team" (the "Mar-a-Lago Council" or the "Council") to advise the Department on a range of issues. Records released via the Freedom of Information Act ("FOIA") reveal that the Council advised Department officials over the course of at least fifteen months on a variety of projects, including negotiating a $10 billion contract to digitize the Department's medical records and developing a mobile application to enable veterans to access medical records online. Yet, none of the Council's work was made public—as it should have been.

When the executive branch seeks to rely on groups of outside advisers, it must comply with the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2. FACA requires, among other things, that advisory committees be transparent and open to the public. As the Supreme Court has explained, "FACA's principal purpose was to enhance the public

accountability of advisory committees established by the Executive Branch." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 459 (1989).

Plaintiff-Appellant VoteVets, an advocate for America's veterans, filed suit in federal court seeking relief from these unlawful actions. In its Amended Complaint, VoteVets extensively detailed how the Department violated FACA by secretly convening a group consisting of three private citizens to advise the agency on projects and policies of tremendous importance to veterans. The district court dismissed VoteVets' Amended Complaint for failure to state a claim, reasoning that the Council was not an "advisory committee" within the meaning of FACA because the Department did not formally, and publicly, announce the creation of the Council, and because the Council exercised *too much* influence over the Department.

That decision was in error. Not only did the court fail to credit VoteVets' allegations and draw all reasonable inferences in its favor, but its ruling also effectively sanctioned precisely the kind of behavior Congress sought to prohibit: executive branch reliance on outside advisers, outside of public view, and without guardrails that would prevent such advisers from exercising too much influence on federal policymaking. *See*

Cummock v. Gore, 180 F.3d 282, 284-85 (D.C. Cir. 1999) ("One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns." (quoting H.R. Rep. No. 92-1017 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496)). At least as important, the district court's determination that, no matter the substance of a group's activities, plaintiffs cannot state a claim as long as the government does not formally announce the creation of an advisory committee would render FACA "easy to avoid"—a result this Court has admonished against. *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993).

Accordingly, VoteVets respectfully requests this Court reverse the decision of the district court to dismiss its claims, and remand for further proceedings.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C § 1331 because it arises under federal law, specifically FACA, 5 U.S.C. App. 2, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. VoteVets timely appealed from the district court's final judgment.

See Order, D. Ct. Dkt. No. 18, JA__. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court properly granted the Department's motion to dismiss where VoteVets had alleged that the Department violated FACA by establishing and utilizing a *de facto* advisory committee without adhering to the procedures set forth in the Act.

PERTINENT STATUTORY PROVISIONS

Pertinent statutes and regulations are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

A. Legal Background.

The Federal Advisory Committee Act ("FACA" or the "Act") is a sunshine law—"born of a desire to assess the need for the 'numerous committees, boards, commissions, councils, and similar groups' that have been established to advise officers and agencies in the executive branch of the Federal Government." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 445-46 (1989) (quoting 5 U.S.C. App. 2 § 2(a)); *see also* H.R. Rep. No. 92-1017, 3495 (1972) (Congress determined that there was a "need for tighter management" of advisory committees).

As the Supreme Court has explained, Congress' purpose in passing FACA

> was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature.

Public Citizen, 491 U.S. at 446 (citing 5 U.S.C. App. 2 § 2(b)). To that end, FACA imposes a number of specific requirements on advisory committees, including that the committee (1) be "fairly balanced in terms of the points of view," 5 U.S.C. App. 2 §§ 5(b)(2), (c), (2) file a charter, *id.* § 9(c), (3) keep detailed minutes of its meetings, *id.* § 10(c), (4) open those meetings to the public, *id.* § 10(a)(1), and (5) release to the public all committee minutes, records, and reports, *id.* § 10(b).

An advisory committee, as defined by FACA, is "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup … which is … established or utilized by one or more agencies … in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." *Id.* § 3(2).

Congress intended this definition to be interpreted in its "most liberal sense" to include any instance where "an officer brings together a group by formal or informal means … to obtain advice and information." S. Rep. No. 92-1098, at 8 (1972). As this Court has explained, FACA should be construed "in light of its purpose to regulate the growth and operation of advisory committees," and not in a way that makes it "easy to avoid." *AAPS*, 997 F.2d at 915; *see also id.* (rejecting argument that special government employees are not properly considered committee members under FACA because that would enable the executive branch to avoid FACA entirely).

B. Factual Background.

1. President Trump and the Department establish the Mar-a-Lago Council.

As alleged in the Amended Complaint, in January 2017, President-elect Donald Trump announced in a press conference his intention to create a "group" to "help" the Secretary of Veterans Affairs "straighten out the VA." Amended Complaint ("Am. Compl.") ¶ 28, D. Ct. Dkt. No. 10, JA__. Shortly thereafter, President Trump and the Department established the "Mar-a-Lago Council"; named Mr. Isaac ("Ike") Perlmutter to

lead the Council; and asked Dr. Bruce Moskowitz and Mr. Marc Sherman to serve on the Council. *Id.* ¶ 29, JA__.

The Department sought the advice and recommendations of this group of three men seemingly on account of their connection to President Trump through his golf and social club in Palm Beach. *Id.* ¶ 31, JA__. Mr. Perlmutter is the Chief Executive Officer for the entertainment and production company Marvel Entertainment. *Id.* ¶ 30, JA__. Dr. Moskowitz is a doctor practicing in West Palm Beach, Florida, and the founder of the Biomedical Research and Education Foundation. *Id.* And Mr. Sherman is a managing director with the consulting firm Alvarez & Marsal, which specializes in financial fraud and white-collar investigations. *Id.*

Though the formation of the Council did not have the accoutrements of an official Department announcement, its establishment and operation as a fixed committee of individuals from whom the Department would consistently seek and receive advice is nevertheless clear from its regular and extensive communication with senior Department officials, which are described in detail in the Amended Complaint. *Id.* ¶ 36, JA__. The Council met for the first time after President Trump took office in early February 2017, when Dr. David Shulkin, less than a month after

his nomination by the President to lead the Department and shortly before his confirmation by the Senate, flew to Mar-a-Lago to meet with all three men. *Id.* ¶ 36(c), JA__.[1] Following that meeting, under the subject line "Group meeting," Dr. Moskowitz emailed Dr. Shulkin to outline the pace at which the Council would update the Secretary and others at the Department on their recommendations and progress. Dr. Moskowitz stated that they would "not need to meet in person monthly, … meet face to face only when necessary," and hold "conference calls at a convenient time." *Id.* ¶ 36(d), JA__. Dr. Shulkin responded to "echo [Dr. Moskowitz's] comments and in particular thank" the trio.[2]

Documents made available by the Department under FOIA, and cited by VoteVets in its Amended Complaint, show that the Council held more than twenty-five meetings, at least ten of which included participation by all three outside advisors. *Id.* ¶ 36, JA__. If a Council member was unable to attend, another Council member would promise to fill him in

[1] Although Dr. Shulkin was confirmed a week after this meeting, as the documents cited in the Amended Complaint indicate, his schedule was nevertheless already being managed by Department officials at this point. *See* Am. Compl. ¶¶ 36(c)-(d) & nn. 17-19, JA__ (and materials cited therein).

[2] Am. Compl. ¶ 36(d) & n.18, JA__.

after, meaning that at least some number of the meetings attended by fewer than all three Council members nevertheless evidence the Council's collective advisory purpose. *E.g.*, *id.* ¶ 36(f), JA__.

These meetings frequently included high-level officials at the Department, including Secretary Shulkin, *e.g.*, *id.* ¶¶ 36(e)-(f), (h)-(k), (v)-(w), (dd), JA__; senior advisors to the Secretary, *e.g.*, *id.* ¶¶ 36(p)-(r), JA__; and other top agency officials, *e.g.*, *id.* ¶¶ 36(s)-(t), JA__ (Under Secretary for Health), ¶ 36(x), JA__ (White House and VA advisors), ¶ 36(dd), JA__ (Chief of Staff and later Acting Secretary Peter O'Rourke). Indeed, when Robert Wilkie, named Acting Secretary by the President in late March 2018, arrived for his first day of work at the VA, Mr. Sherman was waiting for him in his office. *Id.* ¶ 36(ff), JA__. Less than a month later, reprising Dr. Shulkin's earlier trip, Acting Secretary Wilkie met with the Council at Mar-a-Lago. *Id.* ¶ 36(hh), JA__.

2. The Mar-a-Lago Council advised the Department on veterans policy.

As alleged in the Amended Complaint, and confirmed with documentary proof in many cases, the Council provided advice and recommendations to the VA about issues that included some of the Department's most important priorities.

Development of mobile application. The Council recommended that the Department work with Apple to develop a mobile application that would permit veterans to find nearby medical services and access health records. *Id.* ¶ 46, JA__; *see id.* ¶¶ 47-60, JA__; *see also id.* ¶ 36(v), JA__. Darren Selnick, senior advisor to Secretary Shulkin and the Council's primary agency point of contact on the mobile app project, *id.* ¶¶ 36(q), 47, JA__, referred to the Council—along with Secretary Shulkin—as the project's "top principles [sic]," *id.* ¶ 51, JA__.

The mobile application was to be based, in part and at the Council's recommendation, on an existing application built by Dr. Moskowitz. *Id.* ¶ 50, JA__. Although "[t]he process by which Mr. Moskowitz's proprietary application was selected has been obscured from public view," *id.* ¶ 54, JA__, it is nevertheless clear that the application was selected because it met criteria the Council recommended and which the VA adopted, *id.* ¶ 50, JA__. When the Council expressed frustration that the Department was not acting on the mobile app more quickly, then-Chief of Staff Peter O'Rourke was quick to ask what he could "do to salvage [the] group's work and expertise." *See id.* ¶ 60, JA__.

Despite the Council's primary role in the development of the application, the Department nevertheless made clear to the group that it retained "responsibility to provide the overall … manage[ment] and [to] provide oversight for the VA/Apple/Ce[r]ner partnership." *Id.* ¶ 56, JA__. And a senior Department official reminded the Council that its advice and recommendations needed to flow through the Department's designated project leads. *See id.*; *see also id.* ¶ 60, JA__ (email from Chief of Staff O'Rourke to the Council addressing their frustration that aspects of their advice and recommendations had not been implemented by the Department).

Medical device registry. The Council also recommended that the Department organize—with their assistance—a summit of experts on medical device registries. *See id.* ¶ 61, JA__. In preparation for the summit, Council members joined VA officials on more than a dozen weekly calls. They also attended the summit itself, where Acting Secretary O'Rourke thanked Dr. Moskowitz for being one of the "driving forces" behind the initiative. *Id.*

Veteran suicide. The Council also assisted the Department with an initiative to raise awareness about veteran suicide, including an event

where Secretary Shulkin rang the closing bell at the New York Stock Exchange, flanked onstage by Captain America and Spider-Man, two characters from Mr. Perlmutter's Marvel Entertainment. *Id.* ¶ 45, JA__; *see also id.* ¶ 72, JA__ (describing the Council's recommendations to the Department concerning an initiative around mental health).

Personnel decisions. The Council also played a significant role in the hiring and firing of key Department personnel. *See id.* ¶¶ 43-44, 73, JA__. For example, the Mar-a-Lago Council recommended that President Trump nominate David Shulkin to serve as the Secretary of the VA. *Id.* ¶ 43, JA__. Almost a year later, however, the Council recommended that the President fire Secretary Shulkin—at least in part because of the friction between himself and the Council. *Id.* ¶ 73, JA__. The Council was then consulted on Shulkin's replacement. *Id.*

Digital records project and the Cerner contract. The Council provided substantial input on the Department's ten-year plan to transform its digital records system, *id.* ¶ 41, JA__. This effort initiated the largest health information technology overhaul yet undertaken, *id.* ¶ 64, JA__, and ultimately led the Department to award a $10 billion contract to the Cerner Corp, *id.* ¶ 64, JA__. Secretary Shulkin specifically sought

the Council's advice on the contract, including by flying to Mar-a-Lago for the purpose of meeting with the Council to "close the deal on" it. *Id.* ¶ 66, JA__. The Department's Chief Information Officer had Council members sign non-disclosure agreements in order to review the contract—agreements that the Council specifically modified to ensure that they would be able to consult with each other in providing recommendations to the agency. *Id.* ¶¶ 67, 74(j), JA__. Indeed, the Council played a significant role in the process of revising the $10 billion Cerner contract. *Id.* ¶ 67, JA__.

In describing the Council's involvement, one Department official said, "We just had to make the Mar-a-Lago guys comfortable with the deal…. They have someone's ear. Power and influence are power and influence." *Id.* ¶ 41, JA__. Another went further, saying "[e]verything needs to be run by [Mr. Perlmutter, Dr. Moskowitz, and Mr. Sherman]" because "[t]hey view themselves as making the decisions." *Id.*

Healthcare privatization. The Council also advised the Department about privatizing essential healthcare services. The Council spent months "talking to" Secretary Shulkin about the issue of privatization. *Id.* ¶ 68, JA__. As a result of those consultations, Secretary Shulkin

announced that the Department had "developed" a tool to measure the performance of VA hospitals against private hospitals. *Id.* ¶ 69, JA__.

Other examples of the Council's ability to make recommendations directly to decisionmakers at the Department abound. *See, e.g.*, *id.* ¶ 70, JA__ (evaluation of the Department's surgery programs); *id.* ¶ 71, JA__ (tracking human tissue devices); *id.* ¶ 72, JA__ (development of mental health initiative).

3. The Council's description of its work.

Once news of their significant involvement in Department affairs became public, Mr. Perlmutter, Dr. Moskowitz, and Mr. Sherman jointly issued a statement ("Joint Statement") describing the origins and scope of their work on behalf of the Department. Their collective service began, in their words, when they "saw an opportunity to assist the Department of Veterans Affairs' leadership in addressing some of the most intractable problems of the VA." *Id.* ¶ 74(o), JA__. Specifically, they sought to "share [their] expertise in organizational management and … personal relationships with healthcare experts around the country to assist the VA as it undertook an aggressive reform of its healthcare delivery and systems." *Id.* The three men "offered [their] counsel," as well as connections to "the

advice of these healthcare experts, to assist the President, Secretary and VA leadership in their making the essential decisions—sometimes life or death—that affect our nation's veterans." *Id.*

Through "Mr. Perlmutter's personal relationship with the President," the Council began in "late 2016" to "share [their] views and perspectives on a number of occasions with the Agency leadership" primarily by "facilitat[ing] introductions to subject matter healthcare and technology experts with whom [they] had relationships, or to discuss healthcare delivery and healthcare quality challenges facing the agency and therefore affecting our veterans." *Id.*

Importantly, while the Council enjoyed uncommon access to top officials at the VA—they "were on emails and conference calls with senior staff, and Secretary Shulkin referred on numerous occasions to his discussions with outside experts"—they stated that their role remained that of subservient advisors. *Id.* While they "were always willing to share [their] thoughts," they "did not make or implement any type of policy, possess any authority over agency decisions, or direct government officials to take any actions" and understood "[t]hat was not [their] role." *Id.* Rather, the Council "provided [their] advice and suggestions so that

members of the Administration could consider them as they wished to make their own decisions on actions to be taken." *Id.*

* * *

Notwithstanding the steady stream of advice and recommendations that the Council provided to the Department at its behest, its meetings were not noticed in the Federal Register; there is no evidence that any minutes of the meetings were kept; and none of the material that the Council generated or received was disclosed by the Department. *See id.* ¶¶ 37, 76, JA__.

C. Procedural Background.

VoteVets sued the Department alleging it had created and operated the Council in violation of FACA. The Department moved to dismiss, arguing that VoteVets lacked standing and that the Amended Complaint failed to state a claim. *See* Defendants' Motion to Dismiss Amended Complaint ("Defs.' Mot."), D. Ct. Dkt. No. 11, JA__.

The district court granted that motion, *see* Order, JA__, finding that VoteVets had standing but had "fail[ed] to state a claim for a violation of FACA," Mem. Op. 17, JA__. The court acknowledged that the Amended Complaint detailed "many instances in which Defendants *'ma[de] use of'*

advice provided by the three men," but nevertheless reasoned that "more is required to plead a cause of action under FACA." *Id.* (emphasis added). Specifically, the court held that VoteVets had not plausibly alleged the Council had "the structure required to be an advisory committee under FACA," *id.* 12, JA__, or that the Council "was actually formed by the government or was 'so closely tied to an agency as to be amenable to strict management by agency officials.'" *Id.* 17, JA__ (citations omitted) (quoting *Byrd v. U.S. E.P.A.*, 174 F.3d 239, 246 (D.C. Cir. 1999)).

The district court's doubt "that the 'group' referenced would have the structure required to be an advisory committee under FACA," *id.* 11-12, JA__ (citing *AAPS*, 997 F.2d at 914), was principally grounded in its evaluation of a press conference President Trump held during his transition into office at which he introduced Mr. Perlmutter as an advisor to the transition team on veterans issues. *Id.* 10-11, JA__. VoteVets had described the press conference, and contemporaneous reports that President-elect Trump intended for Mr. Perlmutter to "take on an informal, though 'significant,' advisory role" on veterans affairs issues, Am. Compl. ¶ 36(b), JA__, to demonstrate that, even before formally taking office,

President Trump had openly forecasted his intention for the VA to rely heavily on input from outside advisors, like Mr. Perlmutter.

The district court dismissed the form and forum in which this preview arose as "off-the-cuff comments at a press conference" that "hardly reflect the kind of formal, affirmative steps required to establish an advisory committee." Mem. Op. 11, JA__. For the district court, "formal steps" akin to an "announce[ment] via an 'initiation letter'" are necessary to "plausibly allege the establishment of an advisory committee." *Id.* 12, JA__ (quoting *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 218, 228 (D.D.C. 2017)).

In addition to its view that the Mar-a-Lago Council lacked the requisite form to constitute an advisory committee, the court also found that the Department had not "established" the Council. *Id.* The court reasoned that the Amended Complaint did not include allegations suggesting "that anyone at the Department took any affirmative step to establish the Council," and found insufficient VoteVets' allegations "that the Department's 'establishment of the Council was *confirmed* countless times.'" *Id.* 12, JA__ (quoting Plaintiff's Opposition to Defendants' Motion to Dismiss ("Pl.'s Opp'n") 14, D. Ct. Dkt. No. 13, JA__). The court found allegations

tending to show that the Mar-a-Lago Council had taken some initiative to interact with each other and Department officials as dispositively "undercut[ting] any reasonable inference that Defendants established the three men as an advisory committee." *Id.* 13, JA__.

Finally, the court concluded that VoteVets had not sufficiently alleged that the Department "utilized" the Council. *Id.* 15, JA__. The court reasoned that "[t]he allegations in the amended complaint suggest that the alleged *advisory committee* exercised influence … over the *agency*," whereas FACA governs only instances where "the *agency* exercises [influence] over the *advisory committee*." *Id.* The court found unavailing allegations showing that the Department had, at various points, asserted its control over the Council, and that the Council itself understood its role as subject to the ultimate control of the Department. *See id.* 16-17, JA__.

VoteVets filed its notice of appeal on November 26, 2019. Notice of Appeal, D. Ct. Dkt. No. 20, JA__.

STANDARD OF REVIEW

This Court "review[s] a district court's dismissal of a complaint for failure to state a claim de novo." *Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 68 (D.C. Cir. 2015). To survive a motion to dismiss, "detailed

factual allegations" are not required. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Plausibility requires 'more than a sheer possibility that a defendant has acted unlawfully,' but it is not a 'probability requirement.'" *Banneker Ventures*, 798 F.3d at 1129 (quoting *Twombly*, 550 U.S. at 556). And this Court must "accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in [VoteVets'] favor." *Philipp v. Fed. Rep. of Germany*, 894 F.3d 406, 409 (D.C. Cir. 2018).

SUMMARY OF ARGUMENT

VoteVets plausibly alleged that the Mar-a-Lago Council operated as a *de facto* advisory committee. Specifically, VoteVets alleged in detail facts showing that the Council was an "advisory committee," Am. Compl.

¶¶ 29, 36(b-c), 39-40, JA__, that had been "established," *id.* ¶¶ 28-29, 36(a-c), JA__, or "utilized," *id.* ¶¶ 32, 40, 46-61, 66-68, 74(o), JA__, by the Department, and thus should have been operated in accordance with FACA's requirements. *See* 5 U.S.C. App. 2 § 3(2).

In holding to the contrary, the district court failed to take VoteVets' allegations as true and draw all reasonable inferences in its favor—as it should have done, *Philipp*, 894 F.3d at 409—and erred as a matter of law.

First, the court incorrectly concluded that the Council was not subject to FACA because it did not have the requisite formal structure necessary to render it an "advisory committee" within the meaning of FACA. Mem. Op. 11-12 (citing *AAPS*, 997 F.2d at 914), JA__. In so doing, the court discounted detailed allegations set forth in the Amended Complaint, with extensive references to emails, the members' own statements, and other materials, showing that the Council had an "organized structure, a fixed membership, and a specific purpose"—elements that, this Court has explained, define an "advisory committee" under FACA. *AAPS*, 997 F.2d at 914.

Second, the court determined that the Council had not been "established" by the federal government because VoteVets had not alleged

that the government engaged in any sort of formal announcement of the Council—such as announcing the Council via an "initiation letter." Mem. Op. 11-12, JA__. But this Court has never suggested that the government can "establish" an advisory committee only if it does so with such formality. To the contrary, this Court has instructed that an advisory committee is "established" by the federal government if the government proposed the committee, selected its members, and set its agenda. *Food Chem. News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990); *Byrd*, 174 F.3d at 249. VoteVets' allegations, which should have been taken as true, show just that. *See infra* 34-35.

Third, although "establishment" of the Council is enough for FACA to apply, the district court also erred in determining that the Department had not "utilized" the Council. The court explained that "[t]he allegations in the amended complaint suggest that the alleged *advisory committee* exercised influence … over the *agency*," whereas under FACA "it is the amount of influence that the *agency* exercises over the *advisory committee* that matters." Mem. Op. 15, JA__. That conclusion flouts one of FACA's central purposes—to prevent advisers from amassing too much influence. *See* S. Rep. No. 92-1098, at 13-14 (1972) (Congress was aware

in passing FACA that "an invitation to advise can by subtle steps confer the power to regulate and legislate"). It also ignores the wealth of factual allegations in the Amended Complaint showing that the Council was "closely tied" to the Department and that it was, at the very least, "amenable" to the Department's management or control. *See Public Citizen*, 491 U.S. at 457-58, 461; *Food Chem. News*, 900 F.2d at 333. And it likewise disregards the Joint Statement of the Council members themselves, incorporated into the Amended Complaint, Am. Compl. 40-41, JA__, that they "provided [their] advice and suggestions so that members of the Administration could consider them as they wished to make their own decisions on actions to be taken." *Id.* ¶ 74(o), JA__.

For these reasons, this Court should reverse and remand.

ARGUMENT

FACA extends to any "advisory committee" that is either "established" or "utilized" by the federal government. 5 U.S.C. App. 2 § 3(2). A group of advisers comes within the definition of an "advisory committee" under FACA if it has "an organized structure, a fixed membership, and a specific purpose." *AAPS*, 997 F.2d at 914. And such an "advisory committee" is "established" by the federal government if it is "government-

formed," and "utilized" if it is "so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Food Chem. News*, 900 F.2d at 332-33 (quoting *Public Citizen*, 491 U.S. at 457-58).

VoteVets alleged that the White House, in consultation with the Department, created the Council, staffed it with Mr. Perlmutter, Dr. Moskowitz, and Mr. Sherman, tasked it with advising the Department on veterans policy, and that, in fact, the Council did provide such advice. These allegations, which should have been taken as true, make it at least plausible that the Mar-a-Lago Council (1) was an "advisory committee" within the meaning of FACA, and (2) was either "established" or "utilized" by the federal government. Nothing more was required to survive a motion to dismiss, and this Court should reverse.

I. VoteVets plausibly alleged that the Mar-a-Lago Council was an advisory committee under FACA.

VoteVets sufficiently alleged that the Mar-a-Lago Council was an "advisory committee," within the meaning of FACA—*i.e.*, that it had "an organized structure, a fixed membership, and a specific purpose." *AAPS*, 997 F.2d at 914.

A. FACA incorporated a broad definition of an "advisory committee."

The definition of an "advisory committee" under FACA is "rather sweeping." *Id.* at 903. An "advisory committee" includes a "committee, board, commission, council, conference, panel, task force, or other similar group." 5 U.S.C. App 2 § 3(2). And although the executive branch has "a good deal of control over whether a group constitutes a FACA advisory committee," *AAPS*, 997 F.2d at 914, that control is not limitless, and an agency's failure to label a group an "advisory committee" is not dispositive of whether that group meets the statutory test. *See id.* at 915 (noting that an outside group providing joint advice "would seem covered by the statute regardless of other fortuities such as whether the members are called 'consultants'"); *see also Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1012 (D.D.C. 1994) ("[C]alling [an advisory committee] a 'team' does not alter its nature.").[3]

Accordingly, courts are often called upon to determine whether a group of private citizens organized or consulted by the executive branch

[3] In fact, Congress passed FACA because it did not view the executive branch's efforts at self-regulating its use of advisory committees to be adequate. *See* H.R. Rep. No. 92-1017 (1972), at 3496-97 (describing the executive branch's attempts to regulate advisory committees).

for the purpose of rendering advice comes within the purview of FACA. *See, e.g.*, *Public Citizen*, 491 U.S. 440; *Food Chem. News*, 900 F.2d 328; *AAPS*, 997 F.2d 898; *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28 (D.D.C. 2011); *Nw. Forest Res. Council*, 846 F. Supp. 1009. In such cases, courts must determine whether the group functions as an advisory committee that should, "in light of [FACA's] purpose to regulate the growth and operation of advisory committees," be subject to FACA's strictures. *See AAPS*, 997 F.2d at 915.

In making that determination, courts "must bear in mind that a range of variations exist in terms of the purpose, structure, and personnel of the group." *AAPS*, 997 F.3d at 915. As this Court has explained, that "range of variations" is "best characterized as a continuum":

> At one end one can visualize a formal group of a limited number of private citizens who are brought together to give publicized advice as a group. That model would seem covered by the statute regardless of other fortuities such as whether the members are called 'consultants.' At the other end of the continuum is an unstructured arrangement in which the government seeks advice from what is only a collection of individuals who do not significantly interact with each other. That model, we think, does not trigger FACA.

Id. And while "form is a factor," it is the "formality and structure of the group"—*i.e.*, the manner in which the group members interact with each

other and the purpose those interactions serve—that is relevant, *see AAPS*, 997 F.2d at 914, not the formality of the group's creation by the federal government, *see Byrd*, 174 F.3d at 245.

This Court has thus defined "an advisory committee" as a group that "has, in large measure, an organized structure, a fixed membership, and a specific purpose," and "is asked to render advice or recommendations, *as a group*, and not as a collection of individuals." *AAPS*, 997 F.2d at 913. The issue in *AAPS* was whether a "working group," consisting of 340 "virtually anonymous" members, was an "advisory committee" under FACA. *Id.* at 914-15. This Court acknowledged that the group did not appear to "bear the characteristics of the paradigm FACA advisory committee" and seemed "more like a horde than a committee." *Id.* at 914. Still, this Court found the allegations sufficient at the pleading stage, and remanded the case for further proceedings, including "expedited discovery." *Id.* at 916.

Applying this Court's decision in *AAPS*, another district court in this Circuit likewise concluded that a plaintiff had plausibly alleged a *de facto* FACA claim. *Freedom Watch*, 807 F. Supp. 2d at 35. Specifically, the court found sufficient allegations that "[s]ince taking the oath of office

in January 2009, President Obama has established and directed [a committee], with the goal of gathering information and negotiating agreements that will lead to the passage of President Obama's proposed Health Reform legislation" and that "'non-federal employees … regularly attended and fully participated' in committee meetings." Complaint ¶¶ 7-8, *Freedom Watch, Inc. v. Obama*, Case No. 09-cv-2398 (D.D.C. Dec. 21, 2009); *Freedom Watch*, 807 F. Supp. 2d at 35 (focusing on the allegations contained in ¶¶ 7-8 of the complaint and finding that "Freedom Watch has plausibly alleged the existence of an advisory committee that maybe subject to the requirements of FACA").

B. VoteVets plausibly alleged that the Mar-a-Lago Council was an "advisory committee."

As set forth below, the facts alleged in the Amended Complaint are far more detailed than those presented in either *AAPS* or *Freedom Watch*, and they demonstrate the applicability of FACA to the Council.

As VoteVets alleged, the Council had "an organized structure" and "fixed membership." *See* Am. Compl. ¶ 75, JA__. The Council was chaired by Mr. Perlmutter, *id.*; its members included Dr. Moskowitz and Mr. Sherman, *id.* ¶¶ 29, 75, JA__; and it met periodically by conference call, email, and in-person meetings to update the Secretary, or his immediate

advisors, on the Council's progress on various projects and recommendations, *id.* ¶ 36, JA__ (detailing the many meetings of the Council).

Additionally, as VoteVets alleged, the Council had a "specific purpose": namely, to advise the Department on personnel and policy issues related to veterans' health, *id.* ¶¶ 39, 75, JA__, or, as then-President-elect Trump more bluntly expressed it, "to help" the Secretary "straighten out the VA," *id.* ¶ 28, JA__. Indeed, VoteVets alleged facts showing that the Council in fact advised the Department on a number of matters, including personnel decisions, the issue of veteran suicide, the development of a mobile application for accessing medical records, the creation of a medical device registry, the negotiation of a multi-billion dollar contract related to the digitization of the Department's health records, the privatization of the Department's healthcare services, the evaluation of the Department's surgery program, the tracking of human tissue devices, and veterans' mental health. *See supra* 9-11.

VoteVets also plausibly alleged that advice on these matters was not sought from Council members as a collection of individuals. Rather, as VoteVets alleged, both the White House and the Department viewed Mr. Perlmutter, Dr. Moskowitz, and Mr. Sherman as a "team." *See id.*

¶ 73, JA__ (email from Secretary Shulkin stating his agreement "with Ike and the team"); *id.* ¶ 74(d), JA__ (email from a White House senior advisor on veterans' affairs to the Department instructing the Department to "[u]tilize outside team (Ike)").

That is, as VoteVets alleged, also in keeping with how the Council viewed itself. *See id.* ¶ 74(b), JA__ (Dr. Moskowitz referring to the Council as a "group"); *id.* ¶ 70, JA__ (Mr. Sherman referring to the Council as "my gang"); *id.* ¶ 74(k), JA__ (email from Dr. Moskowitz to Secretary Wilkie: "I am sure that I speak for the group"); *id.* ¶ 74(m), JA__ (email from Mr. Perlmutter to Secretary Wilkie saying he wrote "for all of" the Council). Tellingly, and as VoteVets thoroughly documented, Council members consistently described their activities using collective pronouns—*e.g.*, "we," "our"—and issued a single, *joint* statement describing their common role. *See id.* ¶ 74(o), JA__ ("[w]e offered our counsel … to assist the President, Secretary and VA leadership"; "we offered our help and advice on a voluntary basis"; "we have shared our views and perspectives on a number of occasions with VA leadership"; "[w]e provided our advice and suggestions so that members of the Administration could

consider them as they wished"); *id.* ¶ 74(c), JA__ ("we are making very good progress"; "we are still very far away from achieving our goals").

The group dynamic was reflected not only in the language Council members used to describe their work, but also in how they, in fact, worked together. For example, on occasions when only one member of the Council was present for a meeting with a VA official, that member took pains to ensure their fellow members were aware of developments in their work with the VA. *See, e.g.*, *id.* ¶ 74(a), JA__ (promise by Dr. Moskowitz to "update [Mr. Sherman] after the call"); *id.* ¶ 74(g), JA__ (promise by Dr. Moskowitz to "discuss with everyone"). Moreover, the group edited the Cerner non-disclosure agreement to ensure that they could discuss the issue amongst themselves. *Id.* ¶¶ 67, 74(j), JA__.

In light of these allegations, which must be taken as true, VoteVets met its burden at the motion to dismiss stage to make out a plausible case that the Mar-a-Lago Council was an "advisory committee" within the meaning of FACA. *AAPS*, 997 F.2d at 914-15.

In deciding to the contrary, the district court reasoned that "President-elect Trump's off-the-cuff comments … do not suggest that the 'group' referenced would have the structure required to be an advisory

committee under FACA." Mem. Op. 11-12 (citing *AAPS*, 997 F.2d at 914), JA__. But VoteVets did not rely solely on those comments to establish that the Council's structure satisfied FACA's requirements.

Rather, as described immediately above, VoteVets alleged in detail that the group had "an organized structure"—that it was headed up by Mr. Perlmutter and met periodically to update the Secretary and his advisers on the group's progress. Am. Compl. ¶¶ 28, 36, JA__. Those allegations, coupled with the similarly detailed allegations, likewise discussed above, showing that the group had a "fixed membership," "specific purpose," and provided "group advice," make it at least plausible that it was an "advisory committee" under FACA.

In any event, a plaintiff need not "plead in the complaint all facts that are needed to prove its claims." *Freedom Watch*, 807 F. Supp. 2d at 35 (rejecting government's argument that the case should be dismissed because the plaintiff had not pleaded any facts "describe[ing] the committee's structure"); *see also Nw. Forest Res. Council*, 846 F. Supp. at 1011-12 (finding that a "team," or "a consultative assembly of knowledgeable persons for a specific purpose," was an "advisory committee" under FACA). Indeed, "a well-pleaded complaint may proceed even if it strikes

a savvy judge that actual proof of … facts [supporting relief] is improbable." *Twombly*, 550 U.S. at 556.

II. VoteVets plausibly alleged that the Department "established" or "utilized" the Mar-a-Lago Council.

VoteVets also sufficiently alleged that the Department "established," or, in the alternative, "utilized," the Council. The district court erred by applying an overly narrow interpretation of the statutory terms "established" and "utilized," and by failing to draw reasonable inferences in Plaintiff's favor.

A. VoteVets plausibly alleged that the President and the Department established the Council.

The Supreme Court has made clear that the term "established," as used in FACA, is interpreted broadly. *Public Citizen*, 491 U.S. at 462 (Congress focused on groups "established by the Federal Government, in an expanded sense of the word 'established'"); *id.* at 463 (FACA applies to "advisory groups 'established,' on a broad understanding of that word, by the Federal Government"). As this Court has explained, an advisory committee is "established" by the federal government if it is "[g]overnment-formed." *Food Chem. News*, 900 F.2d at 332 (quoting *Public Citizen*, 491 U.S. at 457); *see also* 13 West's Encyclopedia of American Law,

Dictionary and Indexes 82 (2d ed. 2005) (defining the word "establish" as "[t]o make or form" or "[t]o create, to ratify, or confirm").

VoteVets alleged facts showing as much. President-elect Trump met with Mr. Perlmutter, Dr. Moskowitz, and Mr. Sherman to discuss veterans policy. Am. Compl. ¶ 36(a), JA__. He thereafter announced that his Administration planned to "set up a group," which would include Mr. Perlmutter, to "help" the Secretary of Veterans Affairs "straighten out the VA." *Id.* ¶¶ 28-29, 36(b), JA__. Shortly thereafter, Mr. Perlmutter, Dr. Moskowitz, and Mr. Sherman began meeting with, and advising, the Secretary and Department leadership on a variety of veterans-related issues, subject to input by the Department about its agenda, schedule, and work. *See, e.g., id.* ¶ 49, JA__ (VA official describing to Dr. Moskowitz and Mr. Sherman the issues the VA wanted the mobile app project to address); *id.* ¶ 67, JA__ (Council members asked to sign non-disclosure agreements so that they could, at the request of VA officials, review the Cerner contract); *id.* ¶ 71, JA__ (Secretary Shulkin requesting the Council weigh in on a proposal for the VA to develop "systems for tracking and tracing all devices, including human tissue devices"); *id.* ¶¶ 47-48, JA__ (VA project lead for mobile app project suggesting meetings to discuss the

project and to bring Mar-a-Lago Council up to speed on prior VA work with Apple); *id.* ¶ 53, JA__ (VA official providing feedback to Council on mobile app recommendations); *id.* ¶ 56, JA__ (communicating to the Council that the designated VA project lead had "the overall responsibility to manage and *provide oversight*" for the mobile app project (emphasis added)).

The reasonable inference to be drawn from these facts is that the Administration had, as President Trump promised, "formed" the Council and appointed Mr. Perlmutter, Dr. Moskowitz, and Mr. Sherman to serve.[4]

The district court's conclusion to the contrary was in error, and its reasoning flawed.

First, the court concluded that VoteVets had not plausibly alleged that the White House and the Department "established" the group because (1) the President's remarks stated an intention to create a group

[4] The Department below argued that if President Trump was alleged to have established the Council, then VoteVets had not sued the proper party. Defs.' Mot. 17, JA__. Not so. FACA easily allows the President to establish a committee for use by an agency. Thus, even if the President, not the Department, established the Council, it was the Department's duty in working with the Council to ensure it complied with FACA.

"in the future, as opposed to at that time," and (2) because President Trump announced that group would include "an undetermined number of hospitals and doctors, including Dr. Toby Cosgrove"—whom VoteVets did not allege served as members of the Council. Mem. Op. 11, JA__.

But the President's statement, combined with the facts alleged in the Amended Complaint showing that this group subsequently began meeting with the Department numerous times and advising on multiple issues, make it plausible to conclude that, shortly after the President announced his intention to set up a group, such a group was established. That is particularly true, given that the President had previously met with all three of the members of the Council to discuss veterans policy, Am. Compl. ¶ 36(a), JA__, and had announced that the group would include, at least, Mr. Perlmutter, *id.* ¶¶ 29, 36(b), JA__. *Cf. Nw. Forest Res. Council*, 846 F. Supp. at 1010, 1012 (finding that an agency had "established" an advisory committee shortly after the President publicly announced his plan to create a committee).

The fact that VoteVets did not allege that the Council included all the individuals originally identified by President Trump as likely to advise his administration on veterans issues, Mem. Op. 11, JA__, does not

defeat the plausibility of its allegations such that dismissal would be justified. *See Banneker Ventures*, 798 F.3d at 1129 ("plausibility" is not a "probability requirement"). The key facts, which are alleged in detail and largely supported with documentation in the Amended Complaint, remain: President Trump announced that his Administration would create a "group," in which Mr. Perlmutter would participate, to advise the Secretary of Veterans Affairs on veterans policy and thereafter, Mr. Perlmutter teamed up with Dr. Moskowitz and Mr. Sherman, to offer collective advice to the Secretary of Veterans Affairs on veterans policy. It is, at a bare minimum, plausible that this was the "group" President Trump had in mind, and that he and the Department took affirmative steps to create it. The district court erred in determining otherwise. *See id.* ("A complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible." (citation omitted)).

Second, the district court incorrectly asserted that VoteVets alleged only that "the establishment of the Council was *confirmed* countless times," Mem. Op. 12, JA__, but not that it was "established" by the Department. Of course, it is common sense that an advisory committee that

was "confirmed countless times" must also, at some prior point, have been "established." Thus, contrary to the district court's apparent understanding, the confirmations are highly relevant because they are strong *evidence* that the government has previously established such a group.

In any event, VoteVets pleaded, in addition, that the Council "was created" to advise the Department, that the Department had, in fact, "established" the Council, and that the Department's establishment of the Council was marked by a meeting between the Council members and Secretary Shulkin. *See* Am. Compl. ¶¶ 28, 36(c), 81, JA__.

Third, the district court improperly concluded that the federal government had not "established" the Council because "the three men—not President Trump or the Department—were the ones who took the initiatives to organize themselves." Mem. Op. 13, JA__. But even if the Council members, as the district court put it, "offered to assist the Department," that does not undercut VoteVets' allegations that it was ultimately the President, in consultation with Department officials, that *selected* the Council members and granted them the access necessary to render their advice. *See* Am. Compl. ¶ 41, JA__ (describing the prevailing understanding within the Department that the Mar-a-Lago Council "ha[s] someone's

ear. Power and influence are power and influence"). Even if those facts could also be read to provide an "alternative explanation[]," that is not a basis to reject VoteVets' Complaint at the motion to dismiss stage. *See Banneker Ventures*, 798 F.3d at 1129.

Fourth, the district court erred by adopting an overly narrow understanding of the statutory term "established." As the court explained, "President-elect Trump's off-the-cuff comments at a press conference hardly reflect the kind of formal, affirmative steps required to establish an advisory committee." Mem. Op. 11-12, JA__.

But that conclusion conflicts with Congress's direction in passing FACA that "the word[] 'established'" be interpreted "*in [its] most liberal sense*, so that when an officer brings together a group *by formal or informal means*, … to obtain advice and information, such group is covered by the provisions of this bill." S. Rep. No. 92-1098, at 8 (1972) (emphasis added). Indeed, if the district court's opinion were to stand, FACA would become "easy to avoid." *AAPS*, 997 F.2d at 915. The executive branch could, in secret and without announcement or formal process, convene a group of private citizens to render advice—all without having to subject the group to FACA's strictures and thus in contradiction of the Act's

manifest purpose. *See* S. Rep. No. 92-1098, at 6 (1972) (FACA was passed to ameliorate the "danger that subjective influences not in the public interest could be exerted on the Federal decisionmakers" when advisory committees "operate in a closed environment").

Accordingly, this Court has never focused on the formalities of a group's creation in deciding whether it was "established" by the federal government. Instead, the question has always been whether the government *in fact* formed the committee.

For example, in *Food Chemical News v. Young*, this Court determined that the government had not "established" the "panel" because a private entity had "proposed the panel," "alone selected its members," and "set the panel's agenda, scheduled its meetings, and would have reviewed the panel's work." 900 F.2d at 333. Similarly, in *Byrd v. EPA*, this Court determined that, even though the agency had contracted for the creation of a peer review panel, it had not "established" the panel within the meaning of FACA because it did not select its members. 174 F.3d at 239. This Court explained that, although the contract had granted EPA "significant *potential* authority in the panel selection process, EPA never

fully exercised it." *Id.* at 247 ("The result in this case might have been different if EPA had exercised its authority.").[5]

In dismissing VoteVets' claim, the district court relied on *Center for Biological Diversity v. Tidwell*, where another district found that an agency that had announced the creation of a committee via an "initiation letter" had "established" a *de facto* advisory committee. Mem. Op. 12, JA__ (citing 239 F. Supp. 3d at 218, 228). But the court in that case did not even mention the letter in its analysis, let alone suggest that such a letter—or its equivalent—was *necessary* to its conclusion that plaintiff had plausibly alleged a *de facto* FACA claim. *See generally Ctr. for Biological Diversity*, 239 F. Supp. 3d at 228 (finding that the agency had "convened" the group).

Nor would that case give the district court reason to disregard the analysis adopted by this Court in *Byrd* and *Food Chemical News*. Applying that analysis here, the allegations in VoteVets' Amended Complaint—that the President and Department conceived of the need for the

[5] Both *Byrd* and *Food Chemical* were decided on motions for summary judgment, not, as here, on motions to dismiss under Rule 12(b)(6).

Council, selected its members, and set its agenda, *see supra* 6-9, 34-35—make it at least plausible that the Department established the Council.[6]

B. VoteVets plausibly alleged that the Department "utilized" the Mar-a-Lago Council.

VoteVets also plausibly alleged that the Department "utilized" the Council, *see* Am. Compl. ¶ 81, JA__. For this independent reason, VoteVets has sufficiently stated a *de facto* FACA claim. *See* 5 U.S.C. App. 2 § 3(2) (FACA applies where a committee is "established *or* utilized" (emphasis added)).

The Supreme Court has held that Congress did not intend the statutory term "utilize" in FACA to be given a "straightforward meaning," such that any advisory committee that the executive branch "makes use of" would be covered by the Act. *Public Citizen*, 491 U.S. at 452. Instead, the Court held that "utilize" is a gloss on the term "established," and means that FACA applies to advisory committees formed "'for' public agencies as well as 'by' such agencies themselves." *Id.* at 462. Although

[6] None of this means that it is necessarily the case that the White House and the Department did not use formal measures when forming the Council. Such steps may well have been taken, but they would, of course, be unknown to VoteVets precisely because the Council was operated in violation of FACA's openness requirements.

the Court's "ultimate interpretation" was "never clearly stated," *id.* at 482 (Kennedy, J., concurring in the judgment), this Court has read *Public Citizen* to mean that a committee is "utilized" by the executive branch if it is "organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Food Chem. News*, 900 F.2d at 333 (quoting *Public Citizen*, 491 U.S. at 457-58).[7]

There can be little question that the Mar-a-Lago Council was "closely tied" to the Department. As VoteVets alleged, the Council "[s]poke with VA officials daily." Am. Compl. ¶ 40, JA__; *see also id.* ¶ 36, JA__ (summarizing the known meetings between the Council and the Department); *id.* ¶¶ 46-60, JA__ (detailing emails and meetings between the Council and the Department concerning the development of a mobile app); *id.* ¶ 61, JA__ (Council members joined Department officials on more than a dozen weekly conference calls to discuss organizing a summit around a medical device registry); *id.* ¶ 68, JA__ (email stating that

[7] VoteVets disagrees that *Public Citizen* should be read so narrowly, but recognizes that this Court is bound by decisions of prior panels. *See Byrd*, 174 F.3d at 245.

the Council had "been talking to [Secretary] Shulkin for many months about" privatizing certain VA services).

VoteVets also alleged facts plausibly showing that the Council was "amenable to strict management by" the Department. As the Amended Complaint alleged, the Department's position was that "the Mar-a-Lago Council served at [its] direction." *Id.* ¶ 56, JA__; a fact the Council likewise understood. *See id.* ¶ 32, JA__ (describing their role to "assist" the Department); *id.* ¶ 74(o), JA__ (the Council did not "direct government officials to take any actions," nor did it "possess any authority over agency decisions …. That was not our role, *and we were at all times very well aware of that*." *Id.* (emphasis added)). In addition, Council members had to direct their recommendations "through the [Department's] designated project leads," *id.* ¶ 56, JA__, and comply with restrictions the Department imposed on their ability to discuss their work for the Department, *id.* ¶¶ 66-67, JA__.

In holding that VoteVets had not sufficiently alleged that the Department "utilized" the Council, the district court not only improperly discounted these allegations, but it also agreed with the Department's remarkable position that the Council held *too much influence* over the

Department to be properly characterized as "utilized" by it. *Compare* Mem. Op. 15, JA__ (holding that "VoteVets has not plausibly asserted that the three men were 'utilized' by the Department" because "[t]he allegations in the amended complaint suggest that the alleged *advisory* committee exercised influence … over the agency") *with* Defs.' Mot. 24-25, JA__ (arguing that VoteVets failed to allege "that the Department managed or controlled the Three Individuals" because "the Three Individuals asserted influence *over the Department*").

That conclusion—offered without any legal support—turns FACA on its head. Congress passed the Act *precisely because of* its concern that "an invitation to advise can by subtle steps confer the power to regulate and legislate." S. Rep. No. 92-1098, at 13-14 (1972); *see also AAPS*, 997 F.2d at 913 (reasoning that the less an agency controls an advisory committee, the more a court should scrutinize it). Under the district court's view, however, advisory committees that threaten to cross that line might not be covered by FACA. Such a contorted reading of the statute should not be allowed to stand.

It was wholly improper at the motion to dismiss stage for the district court to discount VoteVets' allegations that the Council, *in its own*

words, merely "assist[ed]" the Department. Am. Compl. ¶ 74(o), JA__; *see Banneker Ventures*, 798 F.3d at 1129. But even if the Council *did*, in fact, exert significant influence within the Department, that does not change the fact that its operations were "so closely tied" with the Department as to make it "*amenable*" to management by Department officials, *see Amenable*, Meriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/amenable (defining "amenable" to mean "liable to be brought to account" or "capable of submission")—whether or not Department officials succeeded in actually exercising such management.

In sum, the allegations that VoteVets set forth make it at least plausible that the Council operated under "something along the lines of actual management or control" by the Department, *Wash. Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994), and thus was "utilized" by the Department. At the motion to dismiss stage, nothing more was required.

CONCLUSION

For the reasons discussed above, this Court should reverse the district court's dismissal of VoteVets' Amended Complaint for failure to state a claim.

Dated: May 11, 2020

Respectfully submitted,

/s/ Karianne M. Jones

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g), the undersigned counsel for Plaintiff-Appellant certifies that this brief:

(i) complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 9,262 words, including footnotes and excluding the parts of the brief exempted by FRAP 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: May 11, 2020

/s/ Karianne M. Jones .
Karianne M. Jones

ADDENDUM

ADDENDUM TABLE OF CONTENTS

PERTINENT STATUTORY PROVISIONS

The Federal Advisory Committee Act, 5 U.S.C. App. 2

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that--

> (1) the need for many existing advisory committees has not been adequately reviewed;
>
> (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;
>
> (3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;
>
> (4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;
>
> (5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and
>
> (6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§ 3. Definitions

For the purpose of this Act—

* * *

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§ 5. Responsibilities of Congressional committees; review; guidelines

*** * ***

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such

determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

* * *

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

* * *

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy.

* * *

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance.

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(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee

or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

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