UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT F. KENNEDY CENTER FOR JUSTICE AND HUMAN RIGHTS, d/b/a ROBERT F. KENNEDY HUMAN RIGHTS, et al.,

Plaintiffs,

-v-

MICHAEL R. POMPEO, PETER BERKOWITZ, and UNITED STATES DEPARTMENT OF STATE,

Defendants.

20 Civ. 2002 (JGK)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendants Michael R. Pompeo, Peter Berkowitz, and the United States Department of State ("State") respectfully submit this memorandum in support of their motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

PRELIMINARY STATEMENT

Plaintiffs seek to enjoin the Commission on Unalienable Rights—a federal advisory committee established to advise State on issues related to the promotion of human rights, individual liberty, and democracy through U.S. foreign policy—from continuing to meet or make recommendations to the government. Plaintiffs assert violations of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 §§ 1-15, including statutory requirements about committee formation, membership composition, and public disclosures. Even though the Commission has held multiple public meetings and has made and will continue to make its materials publicly available, Plaintiffs assert that the Commission is attempting to operate in secret.

Plaintiffs' suit should be dismissed. First, Plaintiffs lack standing as they have failed to show any harm to their organizational activities resulting from Defendants' actions. Plaintiffs also have not demonstrated an imminent concrete injury that is fairly traceable to any alleged FACA violations. Rather, Plaintiffs' claimed injuries would result, if at all, from a speculative chain of uncertain events, including whether the alleged violations might affect possible future recommendations of the Commission, and whether those might in turn be implemented, and whether, if implemented, such changes may or may not have the effects Plaintiffs fear. Nor can this Court likely redress Plaintiffs' speculative alleged injuries. Article III thus bars Plaintiffs' action.

Second, Plaintiffs' claim regarding the balance of the Commission is non-justiciable, as there are no meaningful standards to apply in determining what balance would be "fair." Such discretionary decisions are more appropriately handled by the Executive branch.

Finally, Plaintiffs' challenges to the composition of the Commission, its establishment, and access to Commission meetings and records fail to establish any violation of the Administrative Procedure Act. Even setting aside non-justiciability, this Court should not override State's discretionary decision to appoint to the Commission a balanced group of highly qualified members with varied perspectives and backgrounds. Neither Plaintiffs nor this Court are entitled to dictate the composition of an executive advisory committee in this manner. Thus, Plaintiffs' claims fail as a matter of law, summary judgment should be granted for the Government, and Plaintiffs' motion for summary judgment should be denied.

BACKGROUND

I. THE FEDERAL ADVISORY COMMITTEE ACT

FACA governs the formation and operation of the numerous committees, commissions, and similar groups that are established to advise officers and agencies in the executive branch. 5 U.S.C. App. 2 § 2(a); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 446 (1989) (summarizing FACA's purpose). Under FACA, an "advisory committee" is one that is "established or utilized" by a federal agency "in the interest of obtaining advice or recommendations for . . . the Federal Government." 5 U.S.C. App. 2 § 3(2).

Among FACA's procedural requirements, an advisory committee cannot meet or take any action until a charter is filed with the head of the agency to which it reports. 5 U.S.C. App. 2 § 9(c). Before the charter is filed, the agency must consult with the General Services

Administration ("GSA") Secretariat, 41 C.F.R. § 102-3.60(a), and "publish a notice in the Federal Register announcing that the advisory committee is being established," *id*. § 102-3.65(a).

In general, every advisory committee must: give advance Federal Register notice of any meetings, 5 U.S.C. App. 2 § 10(a)(2); hold all meetings open to the public, unless a reason exists to close the meeting under 5 U.S.C. § 552b(c), *id*. §§ 10(a)(1) & (d); allow "[i]nterested persons" to "attend, appear before, or file statements," subject to reasonable rules or regulations, *id*. § 10(a)(3); keep minutes of each meeting and copies of all reports received, issued, or approved by the advisory committee, *id*. § 10(c); and make their records available to the public for inspection and copying, *id*. § 10(b). FACA also requires that each advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed," *id*. § 5(b)(2), and "not be inappropriately influenced by the appointing authority or by any special interest," *id*. § 5(b)(3).

GSA "prescrib[es] regulatory guidelines and management controls applicable to advisory committees," *Cummock v. Gore*, 180 F.3d 282, 285 (D.C. Cir. 1999), and has promulgated regulations that "establish[] the scope and applicability of the Act[] and outline[] specific exclusions from its coverage." 41 C.F.R. § 102-3.5; *see generally* 41 C.F.R. § 102-3. These regulations address, among other things, "[w]hat activities of an advisory committee are not subject to the notice and open meeting requirements of the Act," *see* 41 C.F.R. § 102-3.160, and the parameters of applicable open meeting requirements, *see id*. § 102.3-140. FACA's requirements "do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency." 41 C.F.R. § 102-3.35(a). GSA also exempts "preparatory" and "administrative" work from FACA's meeting and recordkeeping requirements. 41 C.F.R. § 102-3.160(a); *see also id.* § 102-3.160(b).

FACA does not provide for judicial review. *See, e.g., Judicial Watch v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 33 (D.D.C. 2002) ("FACA creates no private right of action."). Accordingly, a claim to enforce FACA's requirements may only be brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. *See, e.g., Judicial Watch*, 219 F. Supp. 2d at 33-34.

II. THE COMMMISSION ON UNALIENABLE RIGHTS

On April 1, 2019, State began the process of creating a new advisory commission on human rights. AR 0001-0021. A presentation to the Secretary of State set forth, among other things, a proposed mission statement, a program of work, and a vision statement, and included biographies on various proposed commission members. *Id*.; *see also* AR 0116-121.

On May 15, 2019, the Office of the Legal Adviser at State reached out to GSA to initiate the required FACA consultation process. AR 0022. State explained that the new advisory commission "is essential to the conduct of Department business and is in the public interest." *Id.* State further averred that "[t]he functions of the advisory committee cannot be performed by the Department alone, by another existing committee, or by any other means." *Id.* State noted that "the Department intends to have fairly balanced memberships," and attached a membership balance plan, draft charter, and draft Federal Register Notice. AR 0022-30.

GSA proposed edits to the draft Charter, *see generally* AR 0031-0050, including proposed substantive language changes regarding the Commission's duties, AR 0033, cost descriptions, AR 0034, and compensation of members, AR 0035. After several exchanges, State adopted GSA's proposed changes, and, on May 24, 2019, GSA concurred with the establishment of the committee. AR 0047-50.

On May 30, 2019, State published a Federal Register notice of its intent to establish the Commission on Unalienable Rights (the "Commission"). AR 0051. Subsequently, State decided to modify the Commission's charter and membership balance plan; accordingly, on June 26, 2019, State commenced a second GSA consultation concerning updated drafts of these documents. AR 0052. GSA responded that "[t]he establishment charter and membership balance plan appear to comply with FACA, GSA Final Rule and current Secretariat guidance," and GSA "concur[red] with the establishment of this committee." AR 0064.[1]

The Commission's charter was filed on July 8, 2019, stating that the Commission's objective was to "provide[ ] advice and recommendations on human rights to the Secretary of State, ground in our nation's founding principles and the 1948 Universal Declaration of Human Rights. The Commission's charge is not to discover new principles, but to furnish advice to the Secretary for the promotion of individual liberty, human equality, and democracy through U.S. foreign policy." AR 0066. The Charter states that the Commission would be comprised of "no more than fifteen members who have distinguished backgrounds in U.S. diplomacy, international law, and human rights," AR 0068. Pursuant to the Membership Balance Plan, "[t]he membership will be a bi-partisan, diverse group of men and women," from the following categories: legal scholars; other academics and leaders of non-profit, non-governmental research institutions; former government officials; and leaders of non-governmental philanthropic organizations. AR 0075-0076. The members would "be required to submit financial disclosure forms to flag any conflicts of interest." AR 0075. On July 8, 2019, the Secretary delivered

[1] Plaintiffs are incorrect that State published the Federal Register notice before concluding the GSA consultation. Pl. MSJ at 18 n.5. As evidenced in the record, GSA concurred with the Commission's establishment on May 24, 2019, AR 0047, and the notice was published on May 30, 2019, AR 0051. After State decided to modify the Charter, it again consulted with GSA, which again concurred. AR 0064.

remarks regarding the formation of the Commission, and announced the Commission's members. AR 0127-0141.

The Commission held monthly public meetings from October 2019 through February 2020, all announced in advance, in accordance with FACA and GSA rules, via *Federal Register* Notices. AR 0142-155. The open meeting scheduled for March 2020 was cancelled due to COVID-19-related public health concerns. AR 00156.

III. PROCEDURAL HISTORY

Plaintiffs' complaint ("Compl."), Dkt. No. 1, asserts that Defendants violated the APA by failing to follow procedural rules in creating the Commission, failing to provide Commission materials, and creating a Commission with unbalanced membership. Compl. ¶¶ 130-145. Plaintiffs seek summary judgment and an order that: sets aside the Commission's charter, enjoins it from conducting further business, requires all records be made publicly available, and bars Defendants from accepting advice or recommendations from the Commission. *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Pl. Mem.") (Dkt. No. 43).

ARGUMENT

I. LEGAL STANDARDS

A. Subject Matter Jurisdiction

"A case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id*. Courts must refrain from "drawing from the pleadings inferences favorable to the party asserting [jurisdiction]." *Shipping*

Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998). Indeed, courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted).

B. Summary Judgment

Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Agency decisions may not be disturbed under the APA unless they are arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of the agency's statutory authority, or without observance of procedure as required by law. 5 U.S.C. § 706(2)(A), (C), (D). APA review "is narrow, limited to examining the administrative record to determine whether the agency decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004) (quotation omitted). An agency's action must be upheld if it is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *see also Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (APA review "is highly deferential, presuming the agency action to be valid and affirming the agency action" if reasonable basis exists for agency's decision.).

II. PLAINTIFFS' CLAIMS MUST BE DISMISSED FOR LACK OF STANDING

Plaintiffs lack standing and thus fail to establish an Article III case or controversy, as is required for this Court to have subject-matter jurisdiction. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408-09 (2013). To establish jurisdiction, a plaintiff must plead facts establishing the "irreducible constitutional minimum of standing," *Lujan v. Defs. of Wildlife*, 504 U.S. 555,

560 (1992), namely, that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiffs bear the burden to demonstrate standing for each claim and for each form of relief that is sought. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). "At the summary judgment stage . . . mere allegations are insufficient to establish standing"; a plaintiff is "required to set forth by affidavit or other evidence specific facts" that establish the requisite standing elements. *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 293 (S.D.N.Y. 2015) (quotation omitted).

Because Plaintiffs have failed to meet these requirements, this case should be dismissed for lack of subject matter jurisdiction.

A. Plaintiffs Cannot Show an Injury in Fact to Establish Organizational Standing

To show an "injury in fact," a plaintiff must show "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). For an injury to be "actual or imminent," it "must be certainly impending . . . [a]llegations of possible future injury are not sufficient." *Clapper*, 568 U.S. at 409 (citation omitted).

To establish organizational standing, a plaintiff must show "an imminent injury in fact to itself as an organization (rather than to its members) that is distinct and palpable." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017) (quotation omitted). An organizational plaintiff has standing "where the defendant's conduct or policy interferes with or burdens [the] organization's ability to carry out its usual activities" or compels the organization "to act with a consequent drain on its resources." *Citizens for Responsibility and Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 190 (S.D.N.Y. 2017)

(quotation omitted). To show a burden on an organization's activities that would confer standing, plaintiffs' evidence must "constitute[] far more than simply a setback to the organization's abstract social interests"; rather, the defendant's actions must "have perceptibly impaired [the organization's] ability to" carry out concrete goals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Plaintiffs cannot show such an injury in fact because any actions they have taken have only been in response to alleged *future, hypothetical* harms. As Plaintiffs acknowledge, the Commission's work is ongoing and it has not yet issued any recommendations or report; thus, they can only speculate as to what specific harms might flow from a report issued at some future date. Nor is there evidence of whether or how the Commission's recommendations will impact State's policies, particularly given that the Secretary is under no obligation to accept or act on the recommendations of this or any other federal advisory committee. Thus, while Plaintiffs allege they have spent resources on education and advocacy, this was not in response to specific Commission activities; rather, Plaintiffs engaged in advocacy because of what they believe the Commission's recommendations and report *could* entail, and how they *might* affect State's policies and rulemaking. Compl. ¶¶ 21-23, 26-29, 118-126; MSJ at 16. Expenditures of resources in advance of an advisory committee report—which Plaintiffs attest is the harm caused by the Commissions work—are choices Plaintiffs made in pursuit of their advocacy aims, not a burden caused by Defendants' actions. *See Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017). Plaintiffs cannot defeat summary judgment based on such "conjecture" and "unwarranted inferences," *New York v. Mnuchin*, 408 F. Supp. 3d 399, 410 (S.D.N.Y. 2019), and they have not demonstrated with the

requisite evidence how any of the speculative injuries they identify are sufficiently "concrete and particularized and actual and imminent" to be justiciable, *Spokeo*, 136 S. Ct. at 1548.[2]

Although Plaintiffs claim they engaged in certain activities because of the Commission's formation and subsequent meetings, Plaintiffs are advocacy organizations that would reasonably be expected to engage in such activities regardless of the alleged FACA violations. To establish standing, Plaintiffs must show "harms beyond interference with their ability to advocate on an issue of interest." *Taylor v. Bernanke*, No. 13-CV-1013, 2013 WL 4811222, at *11 (E.D.N.Y. Sept. 9, 2013); *see also Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62 (D.C. Cir. 2005); *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 542 (S.D.N.Y. 2006). Here, Plaintiffs acted because of a concern of what they speculate the Commission may say or do, but do not plausibly allege interference with their ability to do so; this sort of advocacy choice does not confer standing.[3] Furthermore, with respect to Plaintiffs' claim of failure to provide records, Defendants have provided such records, and Plaintiffs have not been denied any opportunity to meaningfully participate in the Commission's activities. Nor is there evidence that an allegedly imbalanced membership establishes concrete, imminent harm for standing purposes. *See Pub. Citizen v. HHS*, 795 F. Supp. 1212, 1214 (D.D.C. 1992).

[2] Plaintiffs' claims also are unripe for adjudication, to the extent that ripeness overlaps with the injury-in-fact prong of the standing analysis. *National Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (quoting *Lujan*, 504 U.S. at 560).

[3] In *NRDC v. Dep't of Int.*, Judge Nathan held that the plaintiffs' allegations made clear that they "would not have to expend [ ] resources if not for the alleged FACA violations contained in the complaint." 410 F. Supp. 3d 582, 595 (S.D.N.Y. 2019). Defendants respectfully suggest that merely alleging a voluntary expenditure of resources to advise Plaintiffs' members and the public about the Commission's activities, particularly when there has been no report or recommendations issued, is insufficient to confer standing here.

B. Plaintiffs Cannot Make Out Causation and Redressability

Similarly, Plaintiffs are unable to make out the interrelated standing prongs of causation and redressability. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017). Plaintiffs cannot rely on an "attenuated chain of inferences" or "speculation about the unfettered choices made by independent actors not before the court." *Clapper*, 568 U.S. at 414 n.5 (quotation omitted). Plaintiffs alleging procedural injuries "must still demonstrate a causal connection between the [agency action] and the alleged injury to itself or one of its members." *Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235, 244 (D.C. Cir. 2015) (quotation omitted).

Again, Plaintiffs describe their harms in terms of the hypothetical *risk* of possible future recommendations, and thus do not plead facts showing causation of present or likely future harm. Plaintiffs may have spent resources discussing what they anticipate the Commission will ultimately do, but nothing that the Commission has allegedly done yet has *caused* any such harm. And, there is no evidence whether or how any future recommendations would impact State's policies since they are entirely discretionary and the Secretary could consider and take any such actions even in the absence of the Commission.[4] Thus, Plaintiffs have not met their burden to show causation. *See, e.g., Fertilizer Inst. v. U.S. EPA*, 938 F. Supp. 52, 55 (D.D.C. 1996).

Nor do Plaintiffs show that their alleged injuries are likely to be redressed by a favorable decision. The relief Plaintiffs seek, Compl. ¶ 31, has no effect on the Secretary of State's general statutory authority, and discretion, to craft the foreign policy of the United States under 22

[4] To the extent that any of the Commission's recommendations ultimately were adopted by the Secretary and required rulemaking, Plaintiffs could challenge any such proposed actions at that time. *See Fertilizer Inst.*, 938 F. Supp. at 55.

U.S.C. § 2656. *See Physicians Educ. Network, Inc. v. Dep't of Health, Education & Welfare*, 653 F.2d 621, 623 (D.C. Cir. 1981); *Doe v. Shalala*, 862 F. Supp. 1421, 1429 (D. Md. 1994).

C. Plaintiffs Also Cannot Establish an Informational Injury

Plaintiffs' organizational standing theory is premised on the assertion they were denied access to information about the Commission's work. *See* Pl. Mem. at 16. "[A] denial of access to information can, in certain circumstances, work an 'injury in fact' for standing purposes." *Elec. Privacy*, 878 F.3d at 378 (quotation omitted). However, to establish standing, "the plaintiff must show that (1) it has been deprived of information that the government or a third party is statutorily required to disclose, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Id*. (quotation omitted).

First, Plaintiffs' alleged informational injury could only support standing for claims of a lack of access to information. *See* Compl. ¶¶ 135-142; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169, 185 (2000) (Plaintiffs "must demonstrate standing separately for each form of relief sought."). This theory fails here because the alleged procedural violations have not resulted in concrete harms. *Spokeo*, 136 S. Ct. at 1550. Alleged FACA violations alone do not establish injury for standing purposes because the "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009); *see Ctr. for Law & Educ.*, 396 F.3d at 1159-60. Here, the only possibly relevant alleged harm is that Plaintiffs assertedly have not been able to participate meaningfully in Commission meetings. Compl. ¶¶ 138, 141; Pl. MSJ at 16. This allegation is belied by the record. Plaintiffs have submitted numerous comments to the Commission and their views have been represented at

Commission meetings. *See* Pl. Mem. at 14, 23. And, as Plaintiffs acknowledge, Defendants have made and continue to make the requested materials available.

Accordingly, the complaint should be dismissed for lack of standing.

III. PLAINTIFF'S CLAIM REGARDING A "FAIRLY BALANCED" COMMISSION IS NOT JUSTICIABLE

Plaintiffs' claim that State violated the fair balance requirement of FACA, *see* Compl. ¶¶ 143-145, even if true (which it is not), is non-justiciable. FACA requires that advisory committee membership "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2 § 5(b)(2). However, Congress has not provided any meaningful standards (in FACA or elsewhere) for adjudicating claims of noncompliance with these requirements; nor has GSA. Adjudicating such claims would require the Court to arbitrarily substitute its own policy judgments for the agency's. These types of judgments are the province of the other branches of government, and do not present a justiciable question in the absence of manageable standards by which the Court could rule. *See Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 426 (D.C. Cir. 1989) ("*Microbiological*") (Silberman, J., concurring) (question of "fair balance" under FACA is non-justiciable for lack of manageable standards).

A. Matters Committed to Agency Discretion by Law Are Not Reviewable

The Commission's composition is legally committed to agency discretion, and therefore is not reviewable by this Court. As explained, because "FACA contains no provision for judicial review, the availability of such review must derive from the APA." *Fertilizer Inst.*, 938 F. Supp. at 54. And the APA's limited waiver of sovereign immunity does not apply where "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2), including where the agency decision "involves a complicated balancing of a number of factors which are peculiarly

within its expertise" such as what "best fits the agency's overall policies." *Lincoln v. Vigil*, 508 U.S. 182, 191, 193 (1993). As the Supreme Court stated:

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely.

Heckler v. Chaney, 470 U.S. 821, 830 (1985).

While "regulations promulgated by an administrative agency . . . can provide standards for judicial review," *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988), "general statements of policy," 5 U.S.C. § 553(b)(3)(A), do not grant rights or impose obligations and are not treated as binding norms for purposes of identifying "law to apply" in the section 701(a)(2) context, *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). That is the case here.

B. Plaintiffs' Claim Must Be Dismissed Because FACA's Fair Balance Provision Is Nonjusticiable

Because Section 5(b) of FACA does not provide manageable standards that permit meaningful judicial review, Plaintiffs' claim regarding the "fair balance" of the Commission is nonjusticiable. *Microbiological*, 886 F.2d at 431 (Silberman, J., concurring).[5]

First, the "fair balance" provision in section 5(b)(2) does not define "fairly balanced," nor does it specify how a "fairly balanced" membership on an advisory committee is to be achieved, in terms of either the types of representatives or their number. Indeed, "even before the points of view on an advisory committee can be balanced at all – 'fairly' or otherwise – it must first be determined *which* points of view should be balanced." *Id.* at 426. And, there is no "principled basis for a federal court to determine which among the myriad points of view deserve

[5] For further discussion of *Microbiological*, see Part IV.B.

representation on particular advisory committees." *Id.* The "relevant points of view on issues to be considered by an advisory committee are virtually infinite." *Id.*; *Doe*, 862 F. Supp. at 1430 ("For the Court to become entangled in determining which viewpoints must be represented is for the Court to arbitrarily substitute its judgment for that of the agency.").

There is similarly no "principled way" to determine whether those views are fairly balanced. *Microbiological*, 886 F.2d at 428. Such a determination would require the court to make "arbitrary judgments" about "which organizations or individuals qualified as bona fide" representatives of particular policy views. *Id.* at 428-29; *see also Fertilizer Inst.*, 938 F. Supp. at 54. Such a task is "hopelessly manipulable" and "best left to the executive and legislative branches of government." *Ctr. for Policy Analysis on Trade & Health ("CPATH") v. Office of the U.S. Trade Representative*, 540 F.3d 940, 945 (9th Cir. 2008).

Finally, the appointment of advisory committee members is committed to agency discretion for purposes of the APA, and thus is unreviewable. 5 U.S.C. § 701(a)(2). GSA's implementing regulations explicitly state that "[u]nless otherwise provided by statute, Presidential directive, or other establishment authority, advisory committee members serve at the pleasure of the appointing or inviting authority" and membership terms "are at the sole discretion of" the agency. *See* 41 C.F.R. § 102-3.130(a).

Notwithstanding these considerations, a significant number of courts, including in two judges in this District, have found such claims to be justiciable. *See NRDC*, 410 F. Supp. 3d at 603-08; *NRDC v. EPA*, No. 19-CV-5174 (DLC), 2020 WL 615072, at *5-6 (S.D.N.Y. Feb. 10, 2020); *see also Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 20 (1st Cir. 2020) (noting weight of authority favors review). Defendants respectfully submit that these cases should not be followed because they do not overcome the logic of Judge Silberman's

concurrence in *Microbiological*, and the cases that have followed that analysis. Courts simply are not equipped to weigh the many and potentially nuanced factors that the executive is charged with weighing in composing a "fair and balanced" advisory committee.

For all these reasons, FACA "fair balance" claims are non-justiciable. *See CPATH*, 540 F.3d at 945; *Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, No. 2:11-CV-578-FTM-29SPC, 2012 WL 3589804, at *8-9 (M.D. Fla. Apr. 12, 2012); *Sanchez v. Pena*, 17 F. Supp. 2d 1235, 1238 (D.N.M. 1998); *Fertilizer Inst. v. EPA*, 938 F. Supp. 52, 54 (D.D.C.1996); *Doe v. Shalala*, 862 F. Supp. 1421, 1431 (D. Md. 1994); *Pub. Citizen v. Dep't of Health & Human Servs*., 795 F. Supp. 1212, 1220-21 (D.D.C. 1992).

IV. DEFENDANTS' ACTIONS DO NOT VIOLATE THE APA

Even if Plaintiffs had standing and their claims were justiciable, they cannot succeed on the merits of their claims because Defendants have not acted in a manner that is arbitrary, capricious, not in accordance with law, in excess of their authority, or without observance of procedure required by law. 5 U.S.C. § 706(A), (C), (D). Thus, Plaintiffs' motion should be denied in full and the Government's cross-motion should be granted.

A. State Did Not Improperly Found the Commission

State has complied with all relevant, applicable FACA requirements. To establish an advisory committee, an agency must "determine[ ]" that the committee is "in the public interest in connection with the performance of duties imposed on that agency by law" and must file a committee charter. 5 U.S.C. App. 2 § 9(a)(2), (c). Before a charter is filed, the agency must consult with the GSA Secretariat. 41 C.F.R. § 102-3.60(a). Such consultations must include: (1) an explanation stating why the advisory committee is essential to the conduct of agency business and in the public interest; (2) an explanation stating why the committee's functions

cannot be performed by the agency, another existing committee, or other means; and (3) a description of the agency's plan to attain fairly balanced membership. *Id.* § 102-3.60(b). The regulations "encourage[] . . . constructive dialogue" between GSA and the agency, and GSA may "share its knowledge and experience with the agency on how best to make use of the proposed advisory committee, suggest alternate methods of attaining its purpose . . . , or inform the agency of a pre-existing advisory committee performing similar functions." *Id.* § 102-3.60(a). A reason "for deciding that an advisory committee is needed may include . . . [that] [t]he advisory committee's recommendations will provide an important additional perspective or viewpoint affecting agency operations." *Id.* § 102-3.30(a)(3).

As required, State and GSA engaged in email communications regarding the Commission, its charter, and the membership balance plan. AR 0022-65. This process included discussions about the substance of the charter and the plan, and why the Commission was essential, in the public interest, and involved functions that could not be performed elsewhere. *Id.* GSA expressed no concerns about State's explanations, State accepted all of GSA's comments, and GSA concurred in the establishment of the Commission. AR 0047-50. State subsequently proposed changing the charter and plan, and again consulted with GSA. AR 0052. Ultimately, GSA responded that "[t]he establishment charter and membership balance plan appear to comply with FACA" and relevant law, and again concurred with the Commission's establishment. AR 0064.

Plaintiffs take issue with the asserted brevity of State's initial email to GSA. AR 022. But Plaintiffs ignore that the Commission's draft charter and membership plan were attached to the email and detail State's views as to why the committee is essential. *See, e.g.*, AR 23-30

(setting forth the Commission's "objective" and "Mission/Function").[6] These statements satisfy FACA and the GSA regulations, which state that an agency may determine an advisory committee is needed if it provides "an important additional perspective or viewpoint." 41. C.F.R. § 102-3.30(a)(3). Such determinations are within the Agency's discretion. *Cf. Claybrook v. Slater*, 111 F.3d 904, 909 (D.C. Cir. 1997).

As to whether the Commission's functions could be performed by other bodies, State's draft charter and membership plan indicated that the Commission's purpose was to develop "fresh thinking" about matters important to State's mission. *See, e.g.*, AR 0023. During the consultation process, GSA did not question State's findings that the Commission was essential or that other bodies could not perform its functions, despite GSA's express regulatory authority to inform requesting agencies if there is any "pre-existing advisory committee performing similar functions." 41 C.F.R. § 102-3.60(a). Plaintiffs hypothesize that other committees or offices within State could do what this Commission was chartered to do. Pl. Mem. at 18-19. But State is in the best position to know whether the Commission's work would overlap with work done within State, or whether "additional perspectives or viewpoints" are needed. 41. C.F.R. § 102-3.30(a)(3). State's reasonable determination that additional perspectives were needed should be afforded deference. *Pac. Dawn*, 831 F.3d at 1173.

Finally, Plaintiffs misapprehend what is required regarding a membership plan. State met the requirements of 41 C.F.R. § 102-3.60(b) by providing GSA with its membership balance plan during the consultation process. This plan includes provisions about the diversity in members

[6] The initial versions of these documents were ultimately revised to streamline certain language. AR 52. However, all versions of the charter and membership plan include language about the objectives and scope of the Commission, which serve to demonstrate why the Commission was essential. *See* AR 0066; AR 0075.

being sought (to ensure a variety of represented viewpoints), and how State would make determinations about the members. *See* AR 0075-76. State's plan thus adequately explained how it intended to attain fairly balanced membership in accordance with FACA. Such a plan was reasonable given the stated mission of the Commission was to seek fresh advice about human rights related to theories of liberty, equality, and democracy. AR 0075. Accordingly, State sought members from varied professions with relevant experience. The APA does not require more. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 20140 (APA requires only "a rational connection between the facts found and the conclusions made"). Thus, the Court should reject Plaintiffs' claims related to the establishment of the Commission. [7]

B. State's Staffing of the Commission Was Not Arbitrary or Capricious

Plaintiffs further claim that the Commission violates FACA's provision requiring fair balance "in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2 § 5(b)(2); *see also* 41 C.F.R. § 102-3, Subpt. B, App. A (providing additional factors regarding fair balance). But, even if there were sufficiently meaningful standards for the Court to apply in reviewing "fair balance" claims, "a statute may be justiciable and still provide the agency with wide latitude." *NRDC*, 410 F. Supp. 3d at 606 (quotation omitted). "The determination of how the 'fairly balanced' membership of an advisory committee . . . is to be achieved, necessarily lies largely within the discretion of the official who appoints the committee." *Microbiological*, 886 F.2d at 424 (Friedman, J., concurring).

[7] Plaintiffs conflate the requirement that State *provide a description* of its plan to attain a fair balance, and the requirement that the Commission *have* a fairly balanced membership. Defendants satisfied both requirements, but the latter is addressed in Section IV.B.

In *Microbiological*, a per curiam decision, the D.C. Circuit considered a challenge to the composition of an advisory committee under FACA. The three opinions, while reaching different results, all shed light on the considerations courts should apply when reviewing whether a committee is "fairly balanced." First, FACA's fair balance requirement does not mean that Congress intended "to entitle every interested party or group affected to representation on the Commission." *Id.* at 423. Rather, the appropriate inquiry is whether the Commission's members "represent a fair balance of viewpoints given the functions to be performed." *Id*. (quotation omitted). FACA requires "only that the membership of an advisory committee be 'fairly balanced'; it does not specify how the 'fairly balanced' membership is to be achieved in terms of either the type of representatives or their number." *Id.* (comparing FACA to other statutes specifying groups to be represented). Thus, a "fair balance" of viewpoints can be achieved even without committee members who support an interested organization's concerns or point of view. *Id*. When members of a committee are "highly trained and skilled" in the functions the Committee was established to perform, the agency has complied with FACA and has not abused its discretion by failing to include members that directly represent an organizations' interests. *Id.* at 424.

The concerns of the other two *Microbiological* judges (who disagreed about justiciability) also counsel in favor of deferring to agency discretion regarding the composition of advisory committees. First, determinations about a "fair balance" may require the court to make "arbitrary judgments" about "which organizations or individuals qualified as bona fide" representatives of particular policy views. *Id*. at 428-29. Second, "the difficulty of determining what precisely constitutes a 'fair balance' may incline courts to be deferential" as to committee composition. *Id.* at 434. Finally, a point that directly undermines Plaintiffs' claims: "Congress

clearly did not intend courts to inquire into the specific opinions of every committee member in order to determine if a committee is unbalanced. . . . Nothing in the Act or its legislative history even slightly indicates that Congress intended the presence or absence of balance to turn on an inquiry into the opinions of individual members." *Id.* at 437.

Plaintiffs ask the Court not to defer to the agency's reasoned decision-making in consultation with GSA, and to instead override these determinations in light of Plaintiffs' assertions about the opinions of every committee member. The Court should decline this invitation. Assuming the question is justiciable, the proper judicial inquiry, at most, is whether the Commission members' background and experience provide for "a fair balance of viewpoints given the functions to be performed"; the proper judicial inquiry does *not* include an inquiry into the members' "specific opinions." *Id.* at 423, 437.

Here, the "functions to be performed by the advisory committee," 5 U.S.C. App. 2 § 5(b)(2), are: "to provide advice and recommendations on human rights, grounded in our nation's founding principles and the 1948 Universal Declaration of Human Rights [and] to furnish advice to the Secretary for the promotion of individual liberty, human equality, and democracy through U.S. foreign policy." AR 0071. The Commission members have significant, diverse experience relevant to these tasks, and State reasonably determined they are "fairly balanced." *See* Commission on Unalienable Rights: Member Bios, Department of State, https://www.state.gov/commission-on-unalienable-rights-member-bio. The Commission includes distinguished academics, government employees, present and former members of various commissions including the European Commission for Democracy and the President's Council on Bioethics, the Director of the Seymour Institute for Black Church and Policy Studies, a president of a human rights foundation, and the vice-president of the UAE-based Forum for

Promoting Peace in Muslim Societies. *Id.* The members have extensive experience in various areas related to human rights. *Id.* Their varied backgrounds and areas of expertise, and diversity in gender, race, age, national origin, and religion, will allow for different perspectives and approaches to be taken regarding the specified functions of the Commission. *See* 41 C.F.R. § 102-3, Subpt. B, App. A. Accordingly, this Court should grant Defendants summary judgment on Plaintiffs' "fair balance" claim.

This case differs greatly from those where plaintiffs have successfully brought FACA challenges to commissions, such as one where a commission on forest products trade policy included only timber and paper industry officials and no environmental advocates, or one where an anti-hunger policy commission included only business representatives, and no poverty advocates. *See* Pl. Mem. at 26. This Commission includes individuals with varied employment and experiential backgrounds, and diverse points of view; it would far exceed the judiciary's proper role to nevertheless reject the Commission's composition based on its members' assumed viewpoints. This is especially so because Plaintiffs are not entitled to have every interest represented, or to have commission membership include individuals with the exact backgrounds or previously expressed viewpoints they prefer. *Microbiological*, 886 F.2d at 423-24.

C. State Complied with Applicable Rules Regarding Meetings and Records

Notwithstanding Plaintiffs' criticisms, the record establishes that Defendants have complied with all applicable open meeting and records obligations, thereby allowing for meaningful public participation. Summary judgment therefore should be entered on Plaintiffs' claims regarding advisory committee meetings and materials.

1. State Has Complied With Its Obligations Regarding Notice of Commission Meetings

Plaintiffs fail to identify a FACA violation in their objection that "the Federal Register meeting notices included neither witness names nor the specific topic on which they would speak." Pl. MSJ at 27. Nothing in FACA or its implementing regulations requires that State provide such information. Rather, an agency is only required to give a "summary of the agenda" "and/or" the "topics to be discussed." 41 C.F.R. § 102-3.150. State's Federal Register meeting notices did so by describing the discussion topics for the upcoming meetings. AR 142-143; AR 151; AR 152; AR 154. Accordingly, this claim fails to identify any FACA violation. *See Claybrook*, 111 F.3d at 909 n.7 (failure to publish agenda is not FACA violation).

2. State Has Complied With FACA Obligations Regarding Records

State also has complied with FACA section 10(b), which requires that records, reports, and other documents that "were made available to or prepared for or by each advisory committee . . . be available for public inspection and copying." 5 U.S.C. App. 2 § 10(b). All of the specific documents that exist and that referred to in Plaintiffs' complaint (¶¶ 97-110) are publicly available, unless they are copyrighted or not subject to FACA.[8] Thus, Plaintiffs' only remaining complaint is that certain materials were not made publicly available with enough time to engage with such materials. Pl. MSJ at 27-28. But, as discussed, given that the Commission has complied with FACA's actual requirements, and Plaintiffs *have* meaningfully participated with

[8] The Complaint asserts that materials related to subcommittee and closed-door meetings should be made available, Compl. ¶¶ 106-108, but Plaintiffs do not raise this argument on summary judgment. With good reason: materials from these types of meetings are generally not subject to FACA, with certain exceptions not established here. *See* 41 C.F.R. § 102-3.35 (FACA's requirements do not apply to subcommittees); *id.* § 102-3.160 (FACA does not apply to preparatory or administrative meetings). Thus, any such contentions have been abandoned. *See Singleton v. City of Newburgh*, 1 F. Supp. 2d 306, 312 (S.D.N.Y. 1998).

the Commission, *see* Pl. Mem. at 14, 23, Plaintiffs have suffered no prejudice by the timing of the release of various materials. *See* 5 U.S.C. § 706 (requiring courts to take "due account . . . of the rule of prejudicial error"); *see also California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1092 (9th Cir. 2011) (confirming that "the burden of showing an agency's deviation from the APA was not harmless rests with the petitioner").

Plaintiffs fail to make out a FACA recordkeeping violation by arguing that written remarks prepared by witnesses speaking at meetings and audio and video recordings of the meetings were not timely made public. Pl. Mem. at 27. Such materials are not covered by FACA section 10(b), which applies only to documents that are "made available to or prepared for or by [an] advisory committee," 5 U.S.C. App. 2 § 10(b), and are required to be disclosed so the public can follow meeting discussions, *Food Chem. News v. Department of Health & Human Servs*., 980 F.2d 1468, 1472 (D.C. Cir. 1992). Moreover, State had no obligation to release such materials before meetings.[9] *Food Chem.*, 980 F.2d at 1472 (FACA only requires that 10(b) materials be provided "before **or at** the meeting at which the materials are used and discussed." (emphasis added)). Here, witness remarks were available *during* the Commission meetings as they were oral remarks given by witnesses *at* meetings. Similarly, the audio and video recordings merely document what transpired at the open public meetings. Finally, Plaintiffs acknowledge that State has made copies of these remarks and the recordings available. Pl. Mem. at 27, 28. Plaintiffs may have preferred that these materials be released earlier, but FACA does not impose a release deadline (particularly for materials documenting what happened *at open meetings*), and Plaintiffs have suffered no concrete from harm from the release's timing. The

[9] State has represented that, for the vast majority of witness remarks, State did not have copies of the written remarks prior to the meetings. And, of course, a recording of a meeting could not be disclosed before that meeting.

fact that certain Plaintiffs chose not to attend meetings does create an obligation under FACA to release documents by a date certain.[10]

Plaintiffs claim that other materials—a "DRL PowerPoint" presentation and various assigned readings—were not made publicly available. The PowerPoint presentation has been included as part of the Administrative Record, thus curing any possible erroneous nondisclosure. AR 0144-150. Moreover, State informs this Office that this PowerPoint was presented during an administrative briefing held with the Bureau of Democracy, Human Rights, and Labor pursuant to 41 C.F.R. § 102-3.160, which provides that materials from administrative meetings are not subject to FACA's procedural requirements. *See* Compl. ¶ 103. Accordingly, State had no obligation to make this PowerPoint publicly available (though, as noted, State has now done so). With respect to the "assigned readings" that Plaintiffs cite, Pl. Mem. at 28, there is no evidence in the record that such readings were assigned to anyone or that they were "made available to or prepared for or by" the Commission, 5 U.S.C. App. 2 § 10(b). A list of readings is included in an April 23, 2019 PowerPoint presentation to the Secretary, which took place prior to the Secretary's approval of the advisory committee, and set forth the possible mission of the Commission, what its work could entail, and who the members might be. *See* AR 115-121. The Commission did not yet exist, and would not until July 8, 2019; thus, FACA's record disclosure requirements does not apply to that list. Other materials are included in the "Citations" list on the Commission's public website. That list includes the reading materials used by the Commission.

[10] Contrary to Plaintiffs' suggestion, the record does not demonstrate that State has decided not to hold further meetings. Pl. Mem. at 14. The last public meeting was cancelled because of Government-wide COVID-19 mitigation measures and State indicated that if "another meeting is scheduled," State would issue a *Federal Register* notice. AR 156.

Plaintiffs also assert that the Commission has failed to make available various public comment submissions. Pl. Mem. at 28. These are now available on the Commission's website. https://www.state.gov/public-submissions-to-the-commission. Lastly, Plaintiffs have alleged that State has not provided a draft of the Commission's report. But Plaintiffs have not met their burden to show that the work of the Commission is not still ongoing. The Commission will soon make its report available to the public and will invite public comment on the report before the Commission completes its work.

Thus, the Court should award summary judgment to the government concerning State's compliance with FACA's open meeting or records requirements.

V. PLAINTIFFS' REQUESTED RELIEF SHOULD BE DENIED

The Court need not reach the question of remedy, as Defendants are entitled to summary judgment. But were the Court to reach the question, Plaintiffs' requested forms of relief are moot, unnecessary, and/or disfavored.

Plaintiffs' records claim is moot because Defendants have produced all materials subject to FACA's requirements. *See Cicero v. Lew*, 190 F. Supp. 3d 16, 23 (D.D.C. 2016). Although Plaintiffs hypothesize that a purported delay in receiving information harmed their ability to meaningfully participate in Commission meetings, this theory is belied by the fact that they submitted comments and their views were represented at the meetings, as they admit. Pl. Mem. at 14, 23. Any other potential harm is merely speculative. Thus, and because all documents covered by Section 10(b) have been disclosed, there is no remaining relief that could be awarded on the records claims. *See Nat'l Nutritional Foods Assoc. v. Califano*, 457 F. Supp. 275, 281 (S.D.N.Y. 1978), *aff'd* 603 F.2d 327 (2d Cir. 1979). Also, even if there were a FACA violation,

Plaintiffs have not met their burden of demonstrating that any such error caused lasting harm. *See* 5 U.S.C. § 706; *California Wilderness*, 631 F.3d at 1092.

Despite the extensive materials made public by the Commission to date, and State's commitment to continue to disclose materials as work progresses, Plaintiffs also request the Court to "open Commission records for inspection," without limitation. Pl. Mem. at 29. But judicial review under the APA is generally limited to the administrative record. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (discovery inappropriate under the APA absent "strong showing of bad faith or improper behavior"). Plaintiffs have shown no basis to depart from this usual rule. And, if the Court perceives any inadequacy in the record, the proper response would be to call for a declaration providing any necessary facts. *See Citizens for Responsibility & Ethics in Wash. v. Leavitt*, 577 F. Supp. 2d 427, 434 (D.D.C. 2008).

It also would be improper to enjoin the Commission from working and Defendants from relying on *any* of the Commission's recommendations or work product (commonly known as a "use injunction"). *See* Pl. Mem at 29-30. "[A] use injunction should be the remedy of last resort" in a FACA case. *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1025 (D.C. Cir. 1998). While Plaintiffs cite Fifth and D.C. Circuit cases, the Fifth Circuit actually has "reject[ed] the approach of the Eleventh Circuit" and "join[ed] the District of Columbia Circuit in concluding that a use injunction should be the remedy of last resort." *Cargill, Inc. v. United States*, 173 F.3d 323, 342 (5th Cir. 1999) (quotation omitted)). To the extent Plaintiffs are concerned that procedurally tainted recommendations may become State regulations, "[a]pplicable rulemaking procedures afford ample opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal." *Califano*, 603 F.2d at 336. And, if the Commission were to

propose actions that the Secretary would be empowered to take even in the Commission's absence, any injunctive relief precluding reliance on such recommendations would be an unwarranted infringement on the Secretary's ability to execute the President's foreign affairs authority. Plaintiffs thus fail to justify the extreme remedy of a use injunction.

CONCLUSION

The Court should grant Defendants' motion to dismiss and cross-motion for summary judgment and deny Plaintiffs' motion for summary judgment.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to section 2(D) of the Court's Individual Practices, the undersigned counsel for Defendants certify that this brief: (1) complies with the type-volume limitations set forth therein because it contains 8,380 words, including footnotes and excluding the parts of the brief exempted by the Court's Individual Practices, see ECF No. 41; 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: June 16, 2020
New York, New York

By: */s/ Emily E. Bretz*
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