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

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

Plaintiffs,

v.

Michael R. Pompeo, in his official capacity as U.S. Secretary of State, et al.,

Defendants.

Case No. 20-cv-2002 (JGK)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

/s/ Benjamin Seel .

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INTRODUCTION

Congress enacted the Federal Advisory Committee Act ("FACA") to check "the proliferation of costly [advisory] committees ... dominated by ... special interests seeking to advance their own agendas." *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999). FACA creates meaningful limitations on whether and how new committees are created by requiring agencies both to establish that the new body would serve the public interest and that it would bring a balance of perspectives to the issues under consideration. Once established, FACA requires committees to ensure the public can meaningfully access their proceedings and records in a timely manner. As the Administrative Record ("AR") makes clear, Defendants violated each of these core requirements in their establishment and operation of the Commission on Unalienable Rights (the "Commission").

The Commission was ostensibly formed to examine the scope and nature of human rights obligations based on "natural law" and to provide advice and recommendations to the Secretary of State on how such obligations should be reflected in U.S. foreign policy. Defendants' substantive and procedural violations of FACA, however, have rendered the Commission and its work unlawful. Defendants did not engage in reasoned decisionmaking as to the required predicate findings demonstrating the Commission's public interest value. And rather than staff the Commission after considering the range of viewpoints appropriate for a panel carrying out the Commission's sweeping and controversial mandate, as is required, Defendants chose Commission members from a short-list of pre-approved, like-minded academics. They failed, in this hasty effort, to include a balance of perspectives, and neglected to include, in particular, the perspective of practitioners and advocates like Plaintiffs. Instead, Defendants chose eleven academics with mostly religious liberty backgrounds, who are broadly skeptical of the manner in

which human rights obligations are created, and some of whom would deny LGBTQI rights and reproductive rights in favor of religious liberty-based "conscience" claims.

Importantly, the Court need not determine which understanding of international human rights law is correct in order to enforce FACA's requirement that the Commission include an appropriate balance of different experiences and perspectives.

Defendants' flouting of FACA also extends to their operation of the Commission. They repeatedly denied the public meaningful and timely access to committee proceedings and records. Across five public meetings, attendees seldom had advance access to either the name or presentation topic of invited witnesses, and never had access to prepared witness remarks or other documents provided to Commission members in advance of *or even at* the meeting. Only after the end of public meetings—and the commencement of this litigation—were most of the prepared witness remarks posted to the Commission's website. Similarly, Defendants provided links to video recordings of the public meetings only when they filed the AR in this Court last week (although most are still not available on the Commission's public website). This belated provision of Commission records does not cure Defendants' transparency lapses, which hampered the efforts of Plaintiffs to monitor and understand the work of the Commission—a body passing judgment on issues central to their missions but without representation of their views.

The parties have agreed to resolve this matter on cross-motions for summary judgment, ECF No. 32, and, for the reasons set forth below, the Court should grant Plaintiffs' motion.

LEGAL BACKGROUND

I. The Federal Advisory Committee Act

FACA "was enacted in 1976 with Congress's recognition that many committees, boards, commissions, and other groups were created without adequate justification," *People for the Ethical Treatment of Animals v. Barshefsky*, 925 F. Supp. 844, 847 (D.D.C. 1996), leading to the "wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Pub. Citizen v. DOJ*, 491 U.S. 440, 453 (1989); *Cummock*, 180 F.3d at 284 ("Congress ... feared the proliferation of costly committees ... dominated by ... special interests seeking to advance their own agendas."). FACA sought to curb this unregulated growth by (1) erecting meaningful barriers to the creation of nonessential new advisory committees; (2) requiring that the membership of advisory committees reflect a balance of viewpoints; and (3) ensuring the public has an opportunity to access committee proceedings and records in a timely manner.

A. Establishment of advisory committees (FACA Section 9)

FACA reflects Congress's explicit judgment that "new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary." 5 U.S.C. App. 2 § 2(b)(2). Section 9 therefore requires that federal agencies justify new committees to Congress, the public, and the General Services Administration ("GSA"), which issues FACA's implementing regulations and tracks advisory committees across the executive branch. *See Consumers Union of U.S. v. Dep't of Health, Educ. & Welfare*, 409 F. Supp. 473, 475 (D.D.C. 1976). An agency proposing a new committee "must consult" with GSA "[b]efore establishing" the committee, so that GSA can "suggest alternate methods of attaining its purpose ..., or inform the agency of a pre-existing advisory committee performing similar functions." 41 C.F.R. § 102-3.60(a); 5 U.S.C. App. 2 § 9 (a)(2)

(establishment of committee may only proceed "after" consultation). The record of this consultation must (1) explain "why the advisory committee is essential to the conduct of agency business and in the public interest"; (2) describe why its "functions cannot be performed by the agency, another existing committee, or other means such as a public hearing"; and (3) lay out "the agency's plan to attain fairly balanced membership," which must "ensure that ... the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee." 41 C.F.R. § 102-3.60(b). Upon completion of this consultative process, the agency must "determine[] as a matter of formal record ... with timely notice published in the Federal Register, [that the committee is] in the public interest in connection with the performance of duties imposed on that agency by law." 5 U.S.C. App. 2 § 9(a)(2).

B. Fairly balanced committee membership (FACA Section 5)

FACA obligates the establishing agency to ensure that "the membership of [an] advisory committee … be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2 § 5(b)(2), (c). GSA has specified factors relevant to membership balance:

> (i) The advisory committee's mission; (ii) The geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations; (iii) The types of specific perspectives required, for example, such as those of consumers, technical experts, the public at-large, academia, business, or other sectors; (iv) The need to obtain divergent points of view on the issues before the advisory committee; and (v) The relevance of State, local, or tribal governments to the development of the advisory committee's recommendations.

41 C.F.R. Pt. 102-3, Subpt. B, App. A.

C. Open meetings and records (FACA Section 10)

FACA aims to "open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups." *Wash. Legal Found. v. Am. Bar Ass'n Standing Comm. on the Fed. Judiciary*, 648 F. Supp. 1353, 1358 (D.D.C. 1986) (quotation omitted). Thus, committees must provide "timely notice" of their meetings to the public, 5 U.S.C. App. 2 § 10(a)(2), and must allow interested persons to "attend, appear before, or file statements with [the] committee," *id.* § 10(a)(3). All meetings must be held "in a manner or place reasonably accessible to the public" and permit "[a]ny member of the public [to] speak to or otherwise address the advisory committee if the agency's guidelines so permit[.]" 41 C.F.R. § 102-3.140(a), (d). Finally, every advisory committee must publicize "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, [and] other documents ... made available to or prepared for" the committee. 5 U.S.C. App. 2 § 10(b). Timeliness in this context requires that, "whenever practicable," the agency must provide the public with "access to the relevant materials *before or at the meeting at which the materials are used and discussed*." *Food Chem. News v. HHS*, 980 F.2d 1468, 1472 (D.C. Cir. 1992) (emphasis added).

FACTUAL AND PROCEDURAL BACKGROUND[1]

I. The Human Rights Legal Framework[2]

The modern human rights legal framework traces its roots to the post-World War II era and is grounded in the U.N. Charter, which commits the international community to the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." U.N. Charter, art. 55. This led to the creation of the U.N. Commission on Human Rights, which was followed by the adoption, and "near-universal acceptance," of the three major international human rights instruments: the Universal Declaration of Human Rights ("UDHR") in 1948, and the International Covenant on Civil and Political Rights ("ICCPR") and International Covenant on Economic, Social and Cultural Rights ("ICESCR") in 1966.

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[1] In APA cases such as this, the court reviews questions of law largely based on the administrative record, *Koopmann v. U.S. Dep' of Transp.*, 335 F. Supp. 3d 556, 560 (S.D.N.Y. 2018), so statements of undisputed and disputed material facts under Local Civil Rule 56.1 are "not necessary," *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 n.7 (S.D.N.Y. 2012). Accordingly, Plaintiffs have not submitted a 56.1 statement with their motion, but summarize herein the relevant agency proceedings with citations to the AR. If a Rule 56.1 statement would aid the Court's consideration of this motion, Plaintiffs are happy to provide one.

[2] The Court may judicially notice the facts set forth here. *See* Fed. R. Evid. 201; *Morgan Guar. Trust Co. v. Republic of Palau*, 924 F.2d 1237, 1244 (2d Cir. 1991) (judicially noticing actions taken by the United Nations).

The UDHR established the fundamental tenets of the modern human rights legal system: the "universality, indivisibility and interrelationship of all human rights." *See* OHCHR, *Human Rights: A Basic Handbook for UN Staff* 10-11 (2000), https://www.ohchr.org/Documents/Publications/HRhandbooken.pdf. In practice, this means that "civil, cultural, economic, political and social" rights "should be taken in their totality and not dissociated." *Id.* Those tenets, and many of the "inalienable" rights set forth in the UDHR, have been "effectively translated … into *treaty* law," *i.e.*, positive law, such as the ICCPR—which "address[es] the relationship between the individual and the State"—and the ICESCR—which addresses "economic, social and cultural rights." *Id.* at 9-12.

In total, the positive law of human rights is comprised of nine core treaties, which are binding on their state parties. OHCHR, *The United Nations Human Rights Treaty System* at 1 (2012), https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf ("Treaty System Fact Sheet"). Compliance with and implementation of each treaty is monitored by an expert body that provides authoritative interpretations of the rights enshrined in them. *Id.* at 36. These interpretive bodies operate through procedures that have been agreed upon by the treaty's signatories and so their decisions on questions of application or interpretation are determinative. *Id.* at 19-21, 36.

Through the development of this modern human rights system, historically marginalized individuals have been able to secure important protections as a matter of legal right grounded in positive law—including safe abortion access under the ICCPR and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, OHCHR, *Information Series on Sexual and Reproductive Health and Right: Abortion*, https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf, and equal treatment

for LGBTQI individuals pursuant to the ICCPR, *see Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 50th Sess. (Mar. 31, 1994).

This progress has been met with certain criticisms—namely, that "[c]laims of 'rights' have exploded" and elevate "debatable political priorities" and "personal preferences" to the level of "rights," which has caused confusion within the system. Index of AR ("Index") at 2, Oct. 23, 2019 Remarks by Secretary Pompeo, ECF No. 39-2. This is viewed as a "depart[ure] from our nation's founding principles of natural law and natural rights." 84 Fed. Reg. 25,109, 25,109 (May 30, 2019). To resolve the purported confusion and regain fidelity to founding principles, critics argue that it is necessary to evaluate human rights obligations against sources outside positive law, including "natural" law, religious traditions, and even domestic laws.

Human rights lawyers, advocates, and defenders respond that such criticisms are reflective of a desire to continue denying rights to marginalized groups, rather than a principled doctrinal objection. *See* Index at 3, Remarks of Ken Roth ("Roth Testimony") at 23:40. And that it trivializes their mission-driven advocacy to suggest it amounts to "making up new rights," when, in fact, the work involves the skilled application of "rights that are pretty broadly accepted" for the protection of all populations, including those most vulnerable. *Id.* at 27:45. Where tensions are perceived, moreover, positive law provides the final answer derived from treaty text or an authoritative committee interpretation. *Id.* at 48:40; *see also* Treaty System Fact Sheet at 19-21, 36.

It is in the context of these competing perspectives that the Commission—whose members represent but one side of the discussion—was established.

II. Creating the Commission

The origin of the Commission dates to April 1, 2019, when then-head of the U.S. Department of State's ("State" or the "Department") Office of Policy Planning, Kiron Skinner, presented Secretary Pompeo with a memorandum seeking approval for the Commission's establishment. AR001-03, ECF No. 39-3. The blueprint "suggested" sixteen names, AR0002, from which eight of the eleven Commission members were ultimately drawn, AR0122. This plan preceded by more than a month the Defendants' May 15 initiation of the required pre-establishment consultation with the GSA. AR022. That process began with an email from State with an "**URGENT**" request for GSA approval of the Commission, which State made clear was a committee "**[t]he Secretary is personally interested in**." *Id.* (emphasis in original). The email transmitting the proposed Charter and Membership Balance Plan to GSA also contained the following statement:

> [T]his advisory committee is essential to the conduct of the Department business and is in the public interest. The functions of the advisory committee cannot be performed by the Department alone, by another existing committee, or by any other means. The Department intends to have fairly balanced membership[.]

Id. This bare restatement of obligations imposed by FACA and GSA regulation is repeated in the Charter, AR0066-69, and Membership Balance Plan, AR0057.

The Charter, which tasked the Commission with providing the Secretary "advice and recommendations on human rights … grounded in our nation's founding principles and the [UDHR]," AR066, says that the Commission will be "comprised of no more than fifteen members who have distinguished backgrounds in U.S. diplomacy, international law, and human rights," AR0068. It did not explain why the Commission is "essential to the conduct of agency business," 41 C.F.R. § 102-3.30(a), nor how it would provide "information ... not already available through another advisory committee or source within the Federal government," *id.* And

it concludes: "the establishment of the Commission is in the public interest in connection with the performance of duties of the Department of State." AR0066.

The Commission's Membership Balance Plan says members are to be selected from recommendations made by senior career and political officials from "one of the following categories: (1) Legal scholars; (2) Other academics and leaders of non-profit, non-governmental research institutions; (3) Former U.S. Government officials (including former judges); and (4) Leaders of non-governmental, philanthropic organizations." AR0058. It does not say how balance will be achieved, and states only that "[t]he membership will be selected to represent diverse points of view," and that Defendants' "attorneys and senior leadership will be involved in determining balance on this Federal advisory committee." *Id.*

While the GSA consultation was ongoing, Defendants published a Federal Register notice on May 30, 2019 stating their "intent to establish" the Commission. AR0051. The notice, which neither invited public input nor called for the public to nominate candidates to sit on the Commission, stated that the Commission would "provide the Secretary of State advice and recommendations concerning international human rights matters," as well as "fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles of natural law and natural rights." 84 Fed. Reg. at 25,109. It also repeated the statement "that the advisory committee is necessary and in the public interest." *Id.*

Ultimately, Defendants made only a few changes to the Charter and Membership Balance Plan at GSA's request—in particular, to the operating cost estimate and to "streamline[] and clean[] up" language—but never discussed or revised the public interest, necessity, or balance statements. AR0064. GSA assented to Commission's establishment on June 26. *Id.*

Shortly thereafter, Secretary Pompeo gathered the press at a July 8 ceremony to announce the formation of the Commission. AR0127. He described the human rights legal system as one where the "proliferat[ion]" of rights has caused rights claims to "come into tension with one another, provoking questions -- and clashes -- about which rights are entitled to the greatest respect," and sowing confusion among "[n]ation-states and international institutions ... about their respective responsibilities concerning human rights." AR0134. His prescription for this purported problem was the formation of the Commission, which he asked to undertake a "review of the role of human rights in American foreign policy, … revisit the most basic of questions," and ultimately "point the way" forward. AR0135-141.

The Commission's Charter was filed the same day. AR0066.

III. The Commission

At the same July 8 press event, Secretary Pompeo announced the Commission's members. AR00135-36. The Commission is chaired by Mary Ann Glendon, former Ambassador to the Holy See and current law professor. Index at 2 (Oct. 23 Minutes). Dr. Peter Berkowitz, an academic and the director of the State Department's Office of Policy Planning, serves as its Executive Secretary. *Id.* Nine other academics round out the Commission: Dr. Russel Berman, an adviser on the Policy Planning Staff, Professor Paolo Carozza, Professor Hamza Yusuf Hanson, Dr. Jacqueline Rivers, Rabbi Dr. Meir Soloveichik, Dr. Katrina Lantos Swett, Dr. Christopher Tollefsen, Dr. David Tse-Chien Pan, and Professor Kenneth Anderson. AR0122. F. Cartwright Weiland, another Policy Planning staffer, is the Rapporteur. AR0137. The Commission's membership is, as the Chair characterized it, a "a group of eleven academics." Index at 3 (Feb. 21 Public Comment and Discussion at 16:48).

While the Commission includes three political appointees from the Policy Planning Staff (Dr. Berkowitz, Dr. Berman, and Mr. Weiland), it does not include any career diplomats or other personnel from State's Bureau of Democracy, Human Rights, and Labor ("DRL")—the office principally charged with carrying out the U.S.' binding human rights commitments—or representatives to treaty body committees or the U.S. Mission to the U.N. *See* AR0122; Answer ¶ 81, ECF No. 38. Further, as described below, the Commission members have mostly religious liberty backgrounds, are broadly skeptical of the manner in which human rights obligations are created, and some would deny LGBTQI rights and reproductive rights, in favor of religious liberty-based "conscience" claims. *Infra* 22-25. These views not only fail to represent the perspective of human rights practitioners and advocates, like Plaintiffs, but are indeed antithetical to the beliefs underpinning their work. Declaration of Mark Bromley ("Bromley Decl.") ¶ 7.

The Commission is also comprised of numerous members whose professional work has primarily focused on rights grounded in religious beliefs. *See* AR0117-19 (describing backgrounds of Professor Glendon, Professor Hanson, Dr. Rivers, Rabbi Dr. Soloveichik, Dr. Swett, and Dr. Tollefsen). Several, moreover, have made clear their belief that human rights law necessitates establishing "a hierarchy of rights." *See* Index at 2 (Nov. 21 Minutes: describing Professor Carozza's comments). Within this hierarchy, religious freedom would be given primacy because, in Professor Carozza's words, the "centrality of religious freedom" is "key to the coherence and viability of the entire human rights project," Declaration of Benjamin Seel ("Seel Decl."), Ex. 1-6 at 2.

Although Defendants did not create a formal opportunity for the public to comment on either the creation or makeup of the Commission, many human rights practitioners and advocates

promptly objected to "to the Commission's stated purpose" as "harmful to the global effort to protect the rights of all people," Declaration of Serra Sippel ("Sippel Decl."), Ex. 3-3 at 1 (coalition letter to Secretary Pompeo), and committed themselves to monitoring the Commission's work and attempting to follow along with its public process. These efforts at engagement were stymied, in large measure, by Defendants' refusal to comply with FACA's records disclosure and transparency obligations. Sippel Decl. ¶ 8; Bromley Decl. ¶ 8.

The Commission met on five occasions between October 2019 and February 2020. AR0142-43, AR0151-55. A sixth public meeting, scheduled for March 2020, was cancelled in response to Covid-19, AR0156, and no further public meetings have been scheduled.

Public meetings were announced through the Federal Register. For some, a witness name and broad meeting topic was made available in advance, but for others the public arrived without knowing who would be speaking or on what topic they would be speaking, *see* Index at 3 (Dec. 11 Minutes: describing audience concerns with speakers diverging from previously announced topic), and without the benefit of having witness remarks—or other materials provided to the Commission members—made available in advance of or even at the meeting. Bromley Decl. ¶ 8. Witness remarks were made available only in the form of a citation on the Commission's website, but without access to their actual content. *See* Seel Decl., Ex. 1-17 (archived version of Commission website from March 9, 2020).[3]

[3] Defendants posted some witness remarks to the Commission's website after this lawsuit was filed, but their utility is greatly diminished now that the Commission's public meetings have concluded.

Plaintiffs identified these violations in a February 21, 2020 letter requesting Defendants provide all Commission records. *Id.* Ex. 1-15. In response, Defendants pointed Plaintiffs to the Commission's website. *See id.*, Ex. 1-16.

With the cancellation of its March 2020 public meeting, AR0156, and decision not to hold further public meetings, the sole remaining means by which the public may engage with the Commission is through the submission of a comment. Each Plaintiff has done so, *see* Declaration of Wade McMullen ("McMullen Decl."), Ex. 2-1 ("RFKHR Comment"); Sippel Decl., Ex. 3-1 ("CHANGE Comment"); Bromley Decl., Ex. 4-1 ("CGE Comment"); Declaration of Akila Radhakrishnan ("Radhakrishnan Decl."), Ex. 5-1 ("GJC Comment"), as have many other organizations, *see* Index at 3, Feb. 21 Public Comment at 5:10 (Chair acknowledging that comment had been "received and will be part of the materials that the Commission will study"). None of the comments thus far submitted to the Commission have been made publicly available.[4]

STANDARD OF REVIEW

Claims alleging violations of FACA may be brought under the Administrative Procedure Act ("APA"). *Nat. Resources Def. Council v. U.S. Dep't of Interior*, 410 F. Supp. 3d 582 (S.D.N.Y. 2019). Under the APA, a reviewing court may "compel agency action unlawfully

[4] Although the Commission's Charter does not expire until July 2021, Secretary Pompeo has said that he expects to "receiv[e] the commission's work sometime around the Fourth of July of this year." U.S. Dep't of State, Remarks to the Press, Sec'y of State Michael R. Pompeo (Mar. 11, 2020), https://www.state.gov/secretary-michael-r-pompeo-on-the-release-of-the-2019-country-reports-on-human-rights-practices/ ("Mar. 11 Remarks").

withheld or reasonably delayed," 5 U.S.C. § 706(1), and "hold unlawful and set aside agency action, findings, and conclusions" that are "adopted without observance of procedure required by law," *id.* § 706(2)(D), or that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A). An agency action is arbitrary and capricious if the record demonstrates that the "agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. Plaintiffs Have Standing

Plaintiffs have suffered both organizational and informational injuries; those injuries are caused by Defendants' failure to adhere to FACA's strictures; and they would be redressed by a favorable ruling of this Court. Accordingly, Plaintiffs have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

First, Plaintiffs have suffered organizational injury because Defendants' violations of FACA have "perceptibl[y] impair[ed]" their organizational activities and caused them to divert resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011). As a court in this district recently held, an organization suffers injury-in-fact in the FACA context if the government's failures to abide by its statutory obligations to make advisory committees transparent and balanced causes the organization to expend "greater attention, time, and personnel to monitoring" that committee. *NRDC*, 410 F. Supp. 3d at 594, 602 (quotation omitted).

Plaintiffs must follow the Commission's deliberations in order to fulfill their educational and advocacy missions, including by preparing to react to changes in Department policy ushered in by Commission recommendations. *See* McMullen Decl. ¶ 6, 12-16; Sippel Decl. ¶ 7, 14-18; Bromley Decl. ¶ 7, 14-18; Radhakrishnan Decl. ¶ 6, 13-16. Defendants' failure to abide by FACA's transparency and balance requirements caused Plaintiffs to spend time and resources (1) monitoring the Commission to understand its purpose and the effect of its work, (2) tracking its progress, (3) engaging at the public meetings and through the comment process, (4) strategizing on a response with their coalition partner organizations, and (5) educating the public, as well as experts and policymakers, about their concerns with the Commission. *See* McMullen Decl. ¶ 9-15; Sippel Decl. ¶ 10-17; Bromley Decl. ¶ 10-17; Radhakrishnan Decl. ¶ 9-15. Plaintiffs have thus suffered organizational injuries sufficient to confer standing. *See NRDC*, 410 F. Supp. 3d at 594, 602.

Second, Plaintiffs have suffered informational injuries. *See Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) (a plaintiff suffers informational injury if "(1) it has been deprived of information that, on its interpretation, a statute requires the government … to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure").

Defendants have not complied with their statutory duties to release advisory committee records and to explain, through the Commission's Charter and Membership Balance Plan, why the Commission is in the public interest, necessary, and how it will be balanced. As a result, Plaintiffs were less able to participate fully in the Commission's meetings, follow its work, craft complete comments for the Commission reflecting a full understanding of its work, or otherwise

fulfill their respective educational and advocacy missions. *See* McMullen Decl. ¶ 7; Sippel Decl. ¶ 8; Bromley Decl. ¶ 8; Radhakrishnan Decl. ¶ 7. That constitutes injury. *See Pub. Citizen*, 491 U.S. at 449 ("[The] refusal to permit appellants to scrutinize the [advisory committee's] activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue."); *NRDC*, 410 F. Supp. 3d at 597. Standing is especially apparent here "insofar as the Commission denied [their] request for information that it was required to produce." *Cummock*, 180 F.3d at 290 (citing *Pub. Citizen*, 491 U.S. at 449).

These injuries were caused by Defendants' failure to abide by FACA's obligations and can be redressed by an order of this Court declaring that Defendants violated FACA and enjoining the Commission's operation. *See Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (declaratory relief will redress injuries caused by FACA violations); *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1081 (11th Cir. 2002) (injunctive relief will redress injuries caused by FACA violations). Accordingly, Plaintiffs have standing.

II. The Commission Is Unlawful

A. The Commission Is Unlawfully Established

In their urgency to launch the Commission, Defendants violated FACA by failing to meaningfully consult with GSA and adequately justify the Commission's establishment.

Defendants were required to provide (1) "[a]n *explanation stating why* the advisory committee is essential to the conduct of agency business;" (2) "[a]n *explanation stating why* the advisory committee's functions cannot be performed by the agency, another existing committee, or other means such as a public hearing;" and (3) "[a] *description* of the agency's plan to attain fairly balanced membership" that will "consider a cross-section of those directly affected, interested, and qualified." 41 C.F.R. § 102-3.60 (emphasis added).

They did not.[5] Instead, Defendants sent GSA an email stating: "The Department avers that this advisory committee is essential to the conduct of the Department business and is in the public interest. The functions of the advisory committee cannot be performed by the Department alone, by another existing committee, or by any other means. The Department intends to have fairly balanced membership." AR022. Such conclusory statements do not constitute an "explanation." *See Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 430 (E.D.N.Y. 2018) (a conclusory statement "falls well short of the APA's 'requirement that an agency provide reasoned explanation for its action.'" (quoting *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 516 (2009))).

Defendants did not explain in any way why the Commission was "essential to the conduct of agency business" and why its "functions [could not] be performed" by other government bodies. 41 C.F.R. § 102-3.60(b)(1)-(2). Indeed, the Department already has experts convened to work on matters of international law and international human rights. That includes DRL, which works on issues related to "the fundamental freedoms set forth in the founding documents of the United States and the complementary articles of the Universal Declaration of

[5] Further undercutting any notion that Defendants' consultation with GSA was meaningful is the fact that Defendants published their boilerplate public interest statement in the Federal Register on May 30, 2019, AR0051, even though its consultation with GSA did not conclude until June 26, AR0064. *See also* 5 U.S.C. App. 2 § 9(a)(2) (requiring a formal public interest finding to be made "*after* consultation with [GSA]" (emphasis added)).

Human Rights and other global and regional commitments,"[6] and a separate advisory committee whose mandate is to advise the Secretary on "significant issues of international law."[7]

Likewise, Defendants have not adequately explained how they would "attain fairly balanced membership," 41 C.F.R. § 102-3.60(b)(3). "Though the agency's final decision as to membership falls within the realm of agency discretion, it must provide a rational basis for its decision." *W. Org. of Res. Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1238-39 (D. Mont. 2019) ("*WORC*"). But the Membership Balance Plan states only that Defendants "intend[ed] to have fairly balanced membership," AR022, and that such "membership [would] be selected to represent diverse points of view," AR0058. That "explanation" merely restates the required outcome—which is never enough for reasoned decisionmaking. *See Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) (asserting that a required factor will be considered "is not a substitute for considering it").

Nor does the record include any evidence suggesting that Defendants even considered, let alone explained, who would be "directly affected" by or "interested" in the Commission's work, who would be "qualified" for membership, and "why certain groups were omitted or excluded." *WORC*, 412 F. Supp. 3d 1238-39 (finding the agency's Membership Balance Plan arbitrary and

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[6] About Us, Bureau of Democracy, Human Rights, and Labor, https://www.state.gov/about-us-bureau-of-democracy-human-rights-and-labor/ (last visited May 29, 2020).

[7] U.S. Dep't of State, Charter of the Advisory Committee on International Law, https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005mSQ/bbeGGTaYT61SUdkTgel1LNy6hUQMAH6o1.QEgsur6Yg.

capricious for failing to "explain why certain groups were omitted or included"); 41 C.F.R. § 102-3.60(b)(3).

Instead, the Defendants listed, without explanation, the categories of professionals from which it would choose members. AR0058. This list tracks the members that had been identified in April, AR0002, and approved by the Secretary before Defendants even initiated consultation with GSA, AR0125. But the "nature of the members" does not prove that the Commission is balanced, nor that Defendants satisfied their duty to provide a reasoned explanation as to how they would achieve balance. *See WORC*, 412 F. Supp. 3d at 1238-39 (rejecting the "tautological argument (that the very nature of the members proves that they are balanced)" amounts to "reasoned decisionmaking"); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (holding agency action arbitrary and capricious where it was based on consideration of factors Congress didn't intend).

Accordingly, the Court should find that Defendants failed to meaningfully consult with GSA prior to establishing the Commission and that their public interest determination does not reflect reasoned decisionmaking. The Commission's establishment was therefore arbitrary and capricious agency action undertaken without observance of required procedures. 5 U.S.C. § 706(2)(A), (D).

B. The Commission Lacks Fair Balance

The Commission is not "fairly balanced in terms of points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2 § 5(b)(2).[8]

[8] Courts in this Circuit and others have repeatedly found such claims to be justiciable. *See NRDC*, 410 F. Supp. 3d at 603-606; *NRDC v. EPA*, --- F. Supp. 3d---, 2020 WL 615072, at *6 (S.D.N.Y. Feb. 10, 2020); *accord. Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 18-19

Although the "fairly balanced" requirement may not be amenable to "mathematical precision," *Microbiological Criteria*, 886 F.2d at 423 (Edwards, J., concurring), it is grounded in concepts that courts are well-equipped to judge. *See Union of Concerned Scientists*, 954 F.3d at 18 ("The concepts of fairness, balance, and influence are not foreign to courts."). "[F]airness ... is defined as '[c]haracterized by honesty, impartiality ... equitable' and '[f]ree of bias or prejudice,'" and "balance" means "'[t]o equalize in number, force, or effect, to bring into proportion,' and '[t]o measure competing interests and offset them appropriately.'" *NRDC*, 410 F. Supp. 3d at 603 (quoting Black's Law Dictionary (11th ed. 2019)).

In ensuring an advisory committee's balance, GSA requires agencies to consider

> (i) The advisory committee's mission; (ii) The geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations; (iii) The types of specific perspectives required, for example, such as those of consumers, technical experts, the public at-large, academia, business, or other sectors; (iv) The need to obtain divergent points of view on the issues before the advisory committee; and (v) The relevant of State local, or tribal governments to the development of the advisory committee's recommendations.

(1st Cir. 2020); *Cargill, Inc. v. United States*, 173 F.3d 323, 335 (5th Cir. 1999); *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 423-25, 433 (D.C. Cir. 1989) (per curiam) (opinions of Friedman, J. and Edwards, J., concurring); *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 643 (D.C. Cir. 2020) ("GSA's regulations implementing FACA" provide "judicially manageable standards"); *Colo. Envt'l Coal. v. Wenker*, 353 F.3d 1221, 1232-33 (10th Cir. 2004); *Alabama-Tombigbee Rivers Coal. v. U.S. Dep't of Interior*, 26 F.3d 1103, 1106-07 (11th Cir. 1994) (upholding a district court's injunction imposed for violations of FACA's fairly balanced requirements); *see also Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016) (in administrative review cases "[t]here is a strong presumption favoring judicial review." (internal quotation marks omitted)).

41 C.F.R. Pt. 102-3, Subpt. B, App. A.

Here, the Commission's mission and recommendations could not have broader reach. Its mandate is to "furnish advice to the Secretary for the promotion of individual liberty, human equality, and democracy through U.S. foreign policy." AR0066. Yet the perspectives of the Commission's members are strikingly narrow and uniform: they share the same philosophical premises, which differ from those of Plaintiffs and the broader human rights community; the majority view with derision reproductive and LGBTQI rights, yet not one member has a history of speaking up for those rights; and Commission members share a singular professional experience, namely, that of the academic. Each is discussed below, *see infra* 23-25.

Most troublingly, the Commission lacks "divergent points of view on the issues before" it. *See* 41 C.F.R. Pt. 102-3, Subpt. B, App. A; *see also Microbiological Criteria*, 886 F.2d at 437 (Edwards, J., concurring) ("[A] [member's] viewpoints c[an] be inferred from his or her background and employment status."). Commission members' statements indicate that they uniformly adhere to a controversial set of premises that run counter to fundamental principles of international law and would have major ramifications for the matters before the Commission.

They begin from the premise, echoing Secretary Pompeo, that the human rights legal system is imperiled because rights have "proliferated" and need to be curbed. *See* Seel Decl., Ex. 1-2 at 6 (Professor Glendon characterizing abortion as a "new right[]"); *id.*, Ex. 1-5 at 3:35 (Prof. Glendon: "[i]f everything is a right, then nothing is"). Countering this proliferation requires, in their view, a philosophical adjustment to treat as binding only rights grounded in some notion of the "laws of nature," which create "rights that are pre-political." Seel Decl., Ex. 1-4 at 11:40 (Professor Glendon discussing the Commission and "natural rights"); *see also* AR0119 (describing "natural rights" scholarship of Dr. Soloveichik and Dr. Tollefsen).

Commission members also believe that this proliferation has caused rights to "bump up against each other." *See* Seel Decl., Ex. 1-5 at 5:00 (Professor Glendon). To resolve these perceived tensions, they would look to sources other than the positive law—*i.e.*, treaties and binding committee interpretations—and seek answers from (1) various religious traditions, Roth Testimony at 1:01:30 – 1:04:45 (comments of Dr. Tollefsen), (2) a state's domestic laws, *see id.* at 1:05:07 (response of Dr. Pan), or (3) "natural law," *see* Seel Decl., Ex. 1-4 at 11:40 (Professor Glendon commenting that certain rights are "pre-political").

The uniform perspectives of the Commission members stand starkly apart from, and fail to represent, those of human rights advocates and practitioners like Plaintiffs. Such organizations understand rights to be universal and non-hierarchical and reject the premise that rights have proliferated and thrown the human rights system into disarray. CHANGE Comment at 2-5. They would resolve any perceived tension between rights *only* by looking to the text of the instrument creating the right and authoritative committee interpretations; additional sources—including notions of "natural law"—would not inform their understanding of rights obligations. *Id.* at 5-6; GJC Comment at 1-3.

The sharp divergence between the perspectives of Commission members and those of human rights advocates and practitioners was brought clearly into focus at the January meeting. There, Ken Roth, Executive Director of Human Rights Watch, testified that access to safe abortion is a fundamental right established by treaty law and cannot, therefore, be subjugated to the religion-based "conscience" rights of providers. *See* Roth Testimony at 54:24 *et seq.* Moreover, he noted, any tension between rights must be resolved through the relevant treaty's interpretative body. *Id.* This perspective is shared by Plaintiffs. *See, e.g.*, CHANGE Comment at 6 ("the right to freedom of thought, conscience, and religion cannot be used to … deny[] …

access to reproductive healthcare."). In response, Dr. Berkowitz, Dr. Tollefsen, Dr. Pan, and Dr. Swett all made their skepticism quite clear, *id.* at 1:25:20 (Dr. Swett: "I feel you have … been a little bit naïve about this issue of rights in tension and conflicting rights and particularly in the area of freedom of religion, conscience, and belief"). Tellingly, not a single one of the Commission members voiced support for Mr. Roth's position—despite it being "the established position of the human rights field." GJC Comment at 4.

In addition to broad philosophical differences in approach, Commission members also differ in their view of specific rights. Indeed at least seven of the Commission members and Mr. Weiland have expressed views that are skeptical or derisive of rights claims by LGBTQI individuals, proponents of gender equality, and women and girls seeking access to sexual and reproductive health and rights—*i.e.*, the very protections at the heart of Plaintiffs' work, *see* McMullen Decl. ¶¶ 2, 6; Sippel Decl. ¶ 4-5; Bromley Decl. ¶ 5; Radhakrishnan Decl. ¶ 4:

- Professor Glendon has called marriage equality "a bid for special preferences" that will leave the "rights of children … impaired" and put "religious freedom … at stake." Seel Decl., Ex. 1-1. She has been honored for her work on anti-abortion causes, *id.*, Ex. 1-3, and has characterized abortion rights as "new rights" that "clash[] with established rights relating to religion and the family." *Id.*, Ex. 1-2 at 6.
- Professor Berkowitz has expressed the view that a fetus is more properly called an "unborn child" with a "right to life." Roth Testimony at 55:10.
- Professor Carozza has asserted that the liberty notions underpinning the Supreme Court's abortion jurisprudence "becomes the justification for the killing of innocent human life on a massive scale." Seel Decl., Ex. 1-7 at 2.

- Professor Hanson has articulated a view of Islam that calls for gay Muslims to repress their homosexuality, which he describes as comparable to criminal conduct. *Id.*, Ex. 1-8.
- Dr. Rivers has asserted that marriage equality threatens "the divinely established order of marriage between one man and one woman," and that LGBTQI activists have "unjustly appropriate[d]" the language of civil rights. *Id.*, Ex. 1-9.
- Rabbi Dr. Soloveichik has called the question of "whether homosexuals should be allowed to marry each other … nonsensical; marriage *by definition* refers to something wholly different than a relationship involving two men." *Id.*, Ex. 1-10 at 71.
- Dr. Tollefsen has written extensively on his anti-abortion views, *see, e.g.*, *id.*, Exs. 1-12, 1-13, and has called abortion "the unjust and intentional taking of innocent human life," *id.*
- Mr. Weiland's background includes work at the Texas Conservative Coalition Research Institution helping to draft amicus briefs opposing challenges to anti-abortion legislation. *Id.*, Ex. 1-14.

By contrast, not a single Commission member has a background focused on upholding reproductive or LGBTQI rights.

Finally, the Commission fails to include members that would bring diverse backgrounds and experience to the table. *See* AR0122. It does not include, for example, career State officials—including from DRL, or current or former representatives at the U.N., relevant treaty bodies or U.N. special procedures. And, critically for Plaintiffs, it does not include either representatives from mainstream human rights advocacy organizations or any member who can provide the perspective of activists or in-the-field practitioners. Instead, it is, as the Chair

described it, "a group of eleven academics." Index at 3, Feb. 21 Public Comment and Discussion at 16:48.

This case thus closely mirrors others where courts have found that an advisory committee was not fairly balanced. In *Northwest Ecosystem Alliance*, for example, a commission advising on forest products trade policy—a "[d]iverse and far-reaching issue[] that affect[s] others"—was unfairly balanced where it included the views of timber and paper industry officials, but excluded the views of environmental advocates. *Nw. Ecosystem All. v. Off. of the U.S. Trade Representative*, 1999 WL 33526001, at *5 (W.D. Wash. Nov. 9, 1999). Likewise in *National Anti-Hunger Coalition*, the court held that an advisory committee that advised on, among other things, anti-hunger policies of "general national import" was not fairly balanced because it included only members from the business community and excluded the views of poverty advocates. *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983).

Similarly here. Despite the breadth of its mandate, the Commission's membership—eleven academics—all espouse a common view of the international human rights legal framework, one that is incompatible with the view of human rights advocacy organizations and practitioners like Plaintiffs. The Court need not decide which view is correct to determine that the lack of balance in perspectives and experience renders the Commission unlawful.

C. Defendants Unlawfully Shielded The Commission From Public Oversight

Section 10 of FACA requires Defendants to make available to the public "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, [and] other documents … made available to or prepared for or by" the committee. 5 U.S.C. App. 2 § 10(b); *Foreign Affairs Manual and Handbook* ("FAM"), U.S. Dep't of State at 11 FAM 817(a),

http://fam.state.gov. The timing of those disclosures matters. As the D.C. Circuit has explained, "[i]n order for 'interested parties to present their views,' and for the public to 'be informed with respect to the subject matter,' it is essential that, whenever practicable, parties have access to the relevant materials *before or at the meeting at which the materials are used and discussed*." *Food Chem. News*, 980 F.2d at 1472 (emphasis added).

Defendants ran afoul of section 10's requirements in at least six respects. ***First***, the information provided to the public was insufficient to allow them to arrive at the meeting informed and prepared to participate. For instance, the Federal Register meeting notices included neither witness names nor the specific topic on which they would speak, AR0142-43, 0151-56, leaving attendees to scramble to "'google' the speakers" from their seats "to try to understand their perspectives or areas of scholarship," Bromley Decl. ¶ 8. Starting at the November meeting, the Commission began announcing the names of witnesses for the following meeting, *see, e.g.*, Index at 2 (Nov. 1 Minutes), but that benefitted only those able to attend each meeting in-person; miss just one meeting and you would be left in the dark until the Commission published its certified minutes several months later.

Second, while each of the ten witnesses delivered some form of prepared remarks to the Commission, those remarks were not made available to the public either prior to or at the Commission meeting. *See* Seel Decl., Ex. 1-17 (archived Commission webpage from March 9, 2020); *see also NRDC*, 410 F. Supp. 3d at 599-600 (failure to provide materials presented at committee meetings). Only recently, and after this lawsuit was filed, did Defendants make witness remarks available online. *See* Index at 2-4. But this tardy publication cannot make up for the meetings Plaintiffs CHANGE and CGE attended without benefit of these Commission records, Bromley Decl. ¶ 8; Sippel Decl. ¶ 8, nor for the months in which the Commission

operated with Plaintiffs RFKHR and GJC left in the dark, having been unable to attend the meetings in-person, *see* McMullen Decl. ¶ 7; Radhakrishnan Decl. ¶ 6.

Third, speakers and Commission members repeatedly referred to materials provided to them that have not been made publicly available. *See Cummock*, 180 F.3d at 287-293 (undisclosed briefing materials constituted FACA violation). For instance, Commission members received copies of a DRL PowerPoint presentation, AR0144-0150, and other assigned readings prior to the Commission's first meeting, AR0116 (Defendants stating intent to "[p]romulgate readings in advance of first meeting" to Commission members). Professor Glendon mentioned these materials at the October 23 meeting, *see* Index at 2 (Oct. 23 Minutes), but they have not been made available to the public. And, except for a book written by Professor Glendon, these preparatory background materials, which were provided to and used by the Commission members, are not listed on the Commission's website. *See* U.S. Dep't of State, Commission on Unalienable Rights: Citations, https://www.state.gov/commission-on-unalienable-rights-citations (last visited June 2, 2020).

Fourth, State Department staff documented each Commission meeting with audio and video recordings which they now provide links to in the AR, *see* Index at 2-4 (Vimeo links), but that weren't previously disclosed to the public, as Defendants admit, *see* Answer ¶ 111.

Fifth, the Commission has received numerous public comment submissions, *see*, *e.g.*, Ex. 2-1, 3-1, 4-1, 5-1 (comments submitted by Plaintiffs), which have not been made publicly available by the Commission. *See Cummock*, 180 F.3d at 290-93 (undisclosed letters provided to committee constituted FACA violation).

Sixth, and finally, Defendants have not released any draft work product, despite the Secretary having said publicly that he expects to "receiv[e] the commission's work sometime

around the Fourth of July of this year." Mar. 11 Remarks, *supra* n.4. *See Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 228 (D.D.C. 2017) (undisclosed draft chapters of advisory committee report violated FACA); *Heartwood, Inc. v. U.S. Forest Service*, 431 F. Supp. 2d 28, 38 (D.D.C. 2006) (same).

Defendants' failure to adhere to the record dissemination and open meeting requirements of FACA constitutes final agency action that is not in accordance with law and has been unlawfully withheld. 5 U.S.C. § 706(1), (2).

III. The Court Should Order Defendants To Release All Commission Records And Enjoin The Department From Relying On The Commission's Work Product

The Court should declare that Defendants have violated FACA Sections 5, 9, and 10, and FACA's implementing regulations. The Court should also grant several forms of injunctive relief. It should order Defendants to open Commission records for inspection. Should the Court grant this relief, Plaintiffs are further entitled to "discovery and fact finding" necessary to ascertain the full scope of the Commission's activities, including any meetings they held out of the public eye. *Cummock*, 180 F.3d at 293; *see also W. Org. of Res. Councils v. Bernhardt*, 18-cv-139, 2020 WL 248940, at *3 (D. Mont. Jan. 16, 2020) (granting post-judgment discovery).

Moreover, the Court should enjoin the continued operation and work of the Commission until such time as Defendants can bring it into compliance with FACA. And it should likewise enjoin Defendants from relying on any Commission recommendations or work product. As the Fifth Circuit has explained, "[i]f the courts do not enforce FACA by enjoining the work product of improperly constituted committees, FACA will be toothless, merely aspirational legislation." *Cargill*, 173 F.3d at 341. And "[i]f FACA has no teeth, the work product of spuriously formed advisory groups may obtain political legitimacy that it does not deserve." *Id.* (citing *Assoc. of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993)).

In this regard, courts have consistently held that use injunctions are appropriate, or even mandatory, where an agency operates an advisory committee in violation of FACA's strictures. *See Alabama-Tombigbee Rivers Coal v. U.S. Dep't of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994) ("[T]o allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of [FACA]."). As the Fifth and D.C. Circuits have explained, injunctive relief is necessary in those cases where "the unavailability of an injunctive remedy would effectively render FACA a nullity." *Cargill*, 173 F.3d at 342; *Cal. Forestry Ass'n v. United States Forest Serv.*, 102 F.3d 609, 614 (D.C. 1996).

Consistent with prior decisions, and because Defendants, at every step of the way, have failed to operate the Commission in accordance with FACA, this Court should grant injunctive relief enjoining the continued operation and work of the Commission and Defendants' reliance on any of its recommendations or work product. *See also WORC*, 412 F. Supp. 3d at 1242-43 (granting a use injunction where the FACA violations went "to the very creation and existence of the advisory committee").

CONCLUSION

The Court should grant Plaintiffs' motion and enter appropriate relief.

Dated: June 2, 2020

Respectfully submitted,

/s/ Benjamin Seel .

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CERTIFICATE OF COMPLIANCE

Pursuant to section 2(D) of the Court's Individual Practices, the undersigned counsel for Plaintiffs certifies that this brief: (1) complies with the type-volume limitations set forth therein because it contains 8,418 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 2, 2020

/s/ Benjamin Seel .
Benjamin Seel