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)

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

/s/ Benjamin Seel

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INTRODUCTION

In their urgency to launch the Commission on Unalienable Rights, Defendants ran roughshod over the procedures for establishing advisory committees set forth in the Federal Advisory Committee Act ("FACA"). These violations, which irreparably stain the Commission's work, have been compounded by Defendants' failure to ensure that the Commission's membership represents a fair balance of viewpoints and that the Commission makes its meetings accessible and records available to the public in a timely manner. Defendants now seek to clear the way for the imminent dissemination on July 16 of their tainted Commission report. They do so by asking the Court to excuse their myriad FACA violations, arguing that the Court lacks jurisdiction; that their failure to provide the reasoning necessary to properly establish the Commission can be replaced by *post hoc* justification; that the Commission's undisputed failure to represent important viewpoints does not matter; and that their failure to timely disclose Commission records is either permissible or is harmless because they have recently—after the Commission's last public meeting and the commencement of this litigation—begun to provide access to *some* of the Commission's records.

None of Defendants' arguments are persuasive. As numerous prior cases establish, the Court has ample authority to resolve this case on the merits and ample reason to resolve it in Plaintiffs' favor. Indeed, to grant judgment for Defendants would nullify significant provisions of FACA—a statute enacted to bring transparency and accountability to agencies and restrain their reliance on outside advisors that do not represent a balance of viewpoints. Now, as a capstone to their record of FACA violations, Defendants add another: announcing that they will release their "proposed" Commission report at a public meeting scheduled without proper notice, in the middle of a pandemic, in a city requiring visitors from certain states (including California,

where staff for some Plaintiffs reside) to self-quarantine for several weeks after arrival. This final violation further demonstrates Defendants' flagrant disregard for FACA and its strictures.

Neither the arguments in Defendants' brief, their belated efforts to release documents, nor the addition of this final public spectacle disturbs Plaintiffs' entitlement to relief, including an order restraining Defendants from disseminating or using any Commission reports or recommendations. The Court should grant Plaintiffs' motion as soon as practicable.

ARGUMENT

I. Plaintiffs Have Standing

A. Organizational Standing

Defendants contend that Plaintiffs lack a qualifying "injury in fact because any actions they have taken have only been in response to alleged *future*, *hypothetical* harms." Mem. of Law in Opp. to Pls.' Mot. for Summ. J. ("Opp.") 9, ECF No. 55. That argument misunderstands both the applicable legal standard and the nature of Plaintiffs' organizational injuries.

To establish injury in fact, an organization must show that, as a result of the allegedly unlawful conduct, it has diverted its resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). "This is not a demanding standard" and requires "only a perceptible impairment of an organization's activities." *NRDC v. Dep't of Interior*, 410 F. Supp. 3d 582, 593 (S.D.N.Y. 2019) (quoting *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011)). As Judge Nathan explained in a similar FACA case, this standard is met where an advisory committee's "general lack of transparency has caused [the organization] to devote greater 'attention, time, and personnel' to monitoring" the committee in order to "keep abreast of the [committee] and its activities" so that it may fulfill its educational mission. *Id.* at 594. Such "increased monitoring efforts" may "include sending more members to meetings," or "spending extra time preparing staff for

meetings." *Id.* These harms arise "at the outset" of a committee's establishment and can be "compounded by Defendants' continuing lack of transparency." *Id.*[1]

Plaintiffs have made just such a showing, detailing how, in response to the Commission's unlawful formation and operation, they have been forced to spend time and resources (1) monitoring the Commission, (2) tracking its progress, (3) engaging at the public meetings and through the comment process, (4) strategizing on a response to its anticipated report with coalition partners, and (5) educating the public, as well as experts and policymakers, about their concerns with the Commission. Declaration of Wade McMullen ("McMullen Decl.") ¶¶ 6, 12-16, ECF No. 45; Declaration of Serra Sippel ("Sippel Decl.") ¶¶ 7, 14-18, ECF No. 46; Declaration of Mark Bromley ("Bromley Decl.") ¶¶ 7, 14-18, ECF No. 47; Declaration of Akila Radhakrishnan ("Radhakrishnan Decl.") ¶¶ 6, 12-16, ECF No. 48. These are not "choices Plaintiffs made in pursuit of their advocacy aims," Opp. 9, but rather examples of resource diversion necessitated by Defendants' failure to properly charter the Commission, staff it with a fair balance of viewpoints, and ensure adequate public access to Commission meetings and records.

[1] Defendants cursorily suggest that Plaintiffs' claims are unripe. Opp. 10 n.2. But Plaintiffs' injuries arise from the FACA violations Defendants have already committed, *see* Mem. of Law in Supp. of Pls.' Mot. for Summ. J. ("Br.") 15-17, and so their claims are ripe. *See NRDC*, 410 F. Supp. 3d at 594 (finding the diversion of resources injury occurred "at the outset" of the committee's establishment and was "compounded by Defendants' continuing lack of transparency").

Nor can Defendants dismiss these harms as "conjecture" and "unwarranted inference[]." Opp. 9-10. In fact, Plaintiffs have made a robust evidentiary showing in support of their standing—including four detailed declarations—that Defendants do not rebut or call into question.

Plaintiffs' harms cannot be dismissed as activities each "would reasonably be expected to engage in … regardless of the alleged FACA violations." Opp. 10. That misunderstands the test for organizational standing. "[T]he Supreme Court has stated that so long as the economic effect on an organization is real,"—*i.e.*, so long as the organization has diverted resources—"the organization does not lose standing simply because the proximate cause of that economic injury is 'the organization's noneconomic interest in encouraging [a particular policy preference].'" *Nnebe*, 644 F.3d at 157 (alteration in original) (quoting *Havens Realty Corp.*, 455 U.S. at 379 n.20). Thus, while an organization focused specifically on advocacy around advisory committees may not establish injury-in-fact simply by trading engagement on one committee in favor of engagement on a different committee, *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 542 (S.D.N.Y. 2006), that is not the case here where none of the Plaintiffs was formed for the purpose of advocating or educating anyone about *the Commission*. *See, e.g.*, McMullen Decl. ¶ 4; Sippel Decl. ¶ 4. Had Defendants complied with FACA, Plaintiffs would not have needed to expend resources to closely monitor the Commission, as information would have been easier to come by and a member representing the mainstream human rights viewpoint would have ensured inclusion of their perspective in Commission discussions. *See, e.g.*, Bromley Decl. ¶ 10. Instead, Defendants' FACA violations caused Plaintiffs to "divert[] resources to monitoring the [Commission]," which "could otherwise have gone to their other activities." *NRDC*, 410 F. Supp. 3d at 595.

B. Informational Standing

Defendants likewise misconstrue Plaintiffs' claim to informational standing. Although Defendants correctly note that informational standing requires a plaintiff to show only "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," *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) (quotation omitted), they nevertheless mischaracterize Plaintiffs' informational injuries as solely procedural in nature and "belied by the record." Opp. 12-13.

Of course, Plaintiffs *have* suffered a procedural injury that is independently sufficient to confer standing. FACA's procedural requirements "were crafted to protect the public's concrete interest in the unbiased and productive establishment and operation of advisory committees," *W. Org. of Res. Councils v. Bernhardt*, 362 F. Supp. 3d 900, 909 (D. Mont. 2019) (citing *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989)), including with respect to "public access to records and committee materials" and the fair balance requirement. *Id.* Those interests are harmed by an agency "creating unnecessary committees that cut the public out of the process or" produce a "one-sided committee." *Id.*

But the lack of access to statutorily-required information constitutes an injury separate and apart from Plaintiffs' procedural injury. *Judicial Watch, Inc. v. Dep't of Commerce*, 583 F.3d 871, 873 (D.C. Cir. 2009) ("In the context of a FACA claim, an agency's refusal to disclose information that the act requires be revealed constitutes a sufficient injury."); *Pub. Citizen*, 491 U.S. at 449; *NRDC*, 410 F. Supp. 3d at 597. Ensuring the public can "present their views and be informed with respect to the subject matter taken up by such committees," was one of Congress's

chief concerns in passing FACA. S. Rep. No. 92-1098, at 14 (1972). Yet, here, Plaintiffs have been deprived of timely access to Commission records and an explanation of "why the Commission is in the public interest, necessary, and how it will be balanced." *See* 41 C.F.R. § 102-3.60.

That Plaintiffs have done their best to attend Commission meetings and submit comments to the Commission does not mean they were not injured. Opp. 12-13. Plaintiffs' ability to participate was undermined by their lack of *timely* access to the information Defendants were statutorily obligated to provide. *See Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (finding injury from defendants' "failure to furnish [plaintiffs] with the documents until long after they would have been of any use"); *Food Chem. News v. HHS*, 980 F.2d 1468, 1472 (D.C. Cir. 1992) (requiring committee records be released "before or at the meeting at which the materials are used and discussed").

Ultimately, Defendants' argument against informational injury turns on their belief that they have complied with FACA. Opp. 12-13. But that argument goes to "the heart of the merits dispute between the parties" and as "the Court must assume the validity of Plaintiff[s'] view of the law for purposes of the jurisdictional inquiry," Plaintiffs have established a qualifying injury. *See Lawyers' Comm. for Civ. Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, 265 F. Supp. 3d 54, 64 (D.D.C. 2017).

C. Defendants Caused Plaintiffs' Injuries And This Court Can Redress Them

Defendants argue that Plaintiffs cannot show causation and redressability because their harms stem from the "hypothetical *risk* of possible future recommendations" that the Commission might unlawfully make to Defendants. Opp. 11-12. To be sure, Plaintiffs will be concretely injured by the July 16 release of the Commission's report, which will contain

recommendations prepared by a committee that represents a single viewpoint—one that discounts rights-based protections for populations central to Plaintiffs' missions, to the exclusion of mainstream human rights advocates, and intended to inform U.S. policy on matters affecting the work and missions of Plaintiffs. *See* McMullen Decl. ¶ 16; Sippel Decl. ¶ 18; Bromley Decl. ¶ 18; Radhakrishnan Decl. ¶ 16.

But Plaintiffs are also harmed by Defendants' *past* failure to comply with FACA, which has denied Plaintiffs information they are entitled to receive, and caused Plaintiffs to divert resources to monitor the Commission and educate others about its work. Br. 15-17. Under each theory, Defendants' failure to comply with FACA caused Plaintiffs' harms. *NRDC*, 410 F. Supp. 3d. at 594 ("failure to provide the findings required by § 9(a)(2) at the outset, compounded by Defendants' continuing lack of transparency," caused diversion of resources). An order of this Court declaring that Defendants violated FACA, enjoining the Commission's further operation, restraining Defendants from disseminating, using, or relying on recommendations produced by the Commission's unlawful process, and/or compelling Defendants to produce the remaining Commission records will provide redress. *Pub. Citizen*, 491 U.S. at 451; *see Byrd*, 174 F.3d at 244 (FACA injury redressed by declaratory relief); *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1081 (11th Cir. 2002) (FACA injury redressed by injunctive relief).

II. The Commission Is Unlawful

A. The Commission Is Unlawfully Established

Before establishing the Commission, Defendants failed to provide (1) "[a]n *explanation stating why* the advisory committee is essential to the conduct of agency business and in the public interest" and "[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 (2) "[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).

1. Defendants did not *explain* why the Commission was essential, in the public interest, and involved functions that could not be performed elsewhere

In claiming that they complied with their duty to "explain" the necessity of the Commission, Defendants highlight their consultation with the General Services Administration ("GSA"), which purportedly "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." Opp. 17. In reality, this "discussion" included nothing more than Defendants' conclusory "averment" to GSA that the Commission

> 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.

AR0022, ECF No. 39-3.

The "brevity" of this exchange is certainly suspect, Opp. 17, but the violation is Defendants' *substantive* failure to "explain" or "describe" the conclusions as required by GSA regulation. Merely concluding the required findings have been made does not satisfy the APA's baseline requirement "that agencies offer genuine justifications for important decisions … that can be scrutinized by courts and the interested public." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019); *see also 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").

With no affirmative explanation available to point to in their communications with GSA regarding why the Commission was essential, in the public interest, and involved functions that could not be performed elsewhere, Defendants attempt three alternative arguments, all of which fail.

First, they suggest that they have met their obligations because "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." Opp. 17 (pointing to the Charter's "objective" and "Mission/Function"). Defendants seem to suggest that either the draft Charter's call for the Commission to "provide[] fresh thinking about human rights," AR0023 (Objective and Scope of Activities), or the draft Membership Balance Plan's "charge … to recover that which is enduring for the maintenance of free and open societies," AR0027 (Mission/Function), suffices to *explain why* the Commission is essential, in the public interest, and not duplicative, 41 C.F.R. § 102-3.60. But the *draft* Charter's reference to "fresh thinking," was not only deleted from the *filed* Charter but is also contradicted by the filed Charter's insistence that "[t]he Commission's charge is not to discover new principles." *Compare* AR0023, *with* AR0071. *See also ANR Storage Co. v. Fed. Energy Regulatory Comm'n*, 904 F.3d 1020, 1026 (D.C. Cir. 2018) (vacating agency action where agency's reasoning was internally inconsistent). Moreover, if an agency could justify the creation of a new advisory committee simply by asserting the need for "fresh thinking," Congress's desire to check "the proliferation of costly" and unnecessary advisory committees through passage of FACA would be meaningless. *See Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999).

Second, Defendants suggest that GSA's failure to object to Defendants' consultation is tantamount to Defendants' compliance with their procedural obligations. Opp. 18. But it was Defendants' duty, not GSA's, to *explain* why the Commission was "essential" and why its

function could not be served by existing entities. 41 C.F.R. § 102-3.60. Defendants provided no reasoned analysis on either point, and GSA's silence is no substitute for the required explanation. *See New York*, 139 S. Ct. at 2575-76 (emphasizing need for "reasoned explanation requirement" to facilitate public and judicial scrutiny).

Third, Defendants urge that deference should be granted to "State's reasonable determination that additional perspectives were needed" because "State is in the best position to know whether the Commission's work would overlap with work done within State." Opp. 18. Setting aside the tension between this argument and Defendants' suggestion that GSA's (implicit) opinions are dispositive for assessing compliance with FACA section 9, there is no basis for the Court to defer to Defendants' *unexplained* conclusion. *See New York*, 139 S. Ct. at 2575-76. Moreover, these justifications, appearing nowhere in the record, are nothing more than *post hoc* rationalizations, which cannot satisfy the APA's requirement for reasoned decisionmaking. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.* ("*Regents*"), --- S. Ct. ---, 2020 WL 3271746, at *10-11 (June 18, 2020).

2. Defendants failed to *describe* their plan to attain fairly balanced membership

Defendants fare no better with respect to their Membership Balance Plan. Again, they cannot point to anything in their correspondence with GSA that provides a "description of the agency's plan to attain fairly balanced membership," 41 C.F.R. § 102-3.60(b)(3), and so ask the Court to *infer* a description of their plan for achieving balance from the face of a document which, while labeled a Membership Balance Plan, Opp. 18-19, describes no plan for achieving membership balance, *see* AR0075-76. Defendants point to provisions about "the diversity in members being sought" and "how State would make determinations about the members" as evidence that the Membership Balance Plan "ensure[s] a variety of represented viewpoints" and

therefore suffices to *describe* how balance will be achieved. Op. at 18-19 (citing AR0075-76).

Not so. The Membership Balance Plan states that the Commission will be comprised of members with "distinguished backgrounds in international law, human rights, and religious liberties"; will be "a bi-partisan, diverse group of men and women"; and will be drawn from among "(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." AR0075-76. But Defendants never explained *how* these broad categories of *occupations* relate to a balance of relevant *viewpoints* on the Commission. AR0076. As this committee proves, trivial differences across a membership's resumes can easily accommodate uniform thinking across the most important subjects under consideration by a committee. *See W. Org. of Res. Councils v. Bernhardt* ("*WORC*"), 412 F. Supp. 3d 1227, 1238-39 (D. Mont. 2019) (rejecting as "tautological" the argument "that the very nature of the members proves that they are balanced").

To be sure, the Membership Balance Plan does assert that members "will be selected to represent diverse points of view" and that diversity will be based on "recommendations from both senior career and political officials" within the U.S. Department of State. AR0076. But this conclusory statement merely restates Defendants' obligations under FACA, which does not amount to reasoned decisonmaking. *See Getty*, 805 F.2d at 1055. And stating *who* will make the diversity recommendations does nothing at all to *describe how* Defendants "plan to attain fairly balanced membership." 41 C.F.R. § 102-3.60(b)(3).

B. The Commission Lacks Fair Balance

1. "Fairly Balanced" Claims Are Justiciable

Having failed to adequately establish the Commission, Defendants now contend that this Court lacks jurisdiction to review the product of that faulty process by invoking the APA's narrow exception to judicial review for agency actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). *See* Opp. 13-15.

The exception does not apply here. As Defendants acknowledge, "a significant number of courts," both in this Circuit and others, have rejected the precise arguments Defendants make here and have held that "fairly balanced" FACA claims are justiciable, Opp. 15. *See NRDC*, 410 F. Supp. 3d at 603-606; *NRDC v. EPA*, --- F. Supp. 3d ---, 2020 WL 615072, at *6-7 (S.D.N.Y. Feb. 10, 2020); *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 18-20 (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* ("*Microbiological Criteria*"), 886 F.2d 419, 423-25, 433 (D.C. Cir. 1989) (opinions of Friedman, J., & Edwards, J., concurring); *see also Physicians for Social Resp. v. Wheeler*, 956 F.3d 634, 643 (D.C. Cir. 2020) ("GSA's regulations implementing FACA" provide "judicially manageable standards"); *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1232-33 (10th Cir. 2004) (BLM regulations provided meaningful standards to judge whether an advisory committee was "fairly balanced"); *Alabama-Tombigbee Rivers Coal. v. 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). Those decisions are correct and should be followed.

In cases involving a challenge to administrative action, "[t]here is a strong presumption favoring judicial review." *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016). As the Supreme Court has recognized in each of the last three terms, the APA's exception for agency action wholly "committed to agency discretion by law" is "quite narrow, restrict[ed to] those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *New York*, 139 S. Ct. at 2568 (internal quotation marks omitted); *Regents*, 2020 WL 3271746, at *7; *Sharkley v. Quarantillo*, 541 F.3d 75, 91 (2d Cir. 2008).

FACA's requirement that advisory committee membership be "fairly balanced" does not fall within the "rare" exception to judicial review. To the contrary, FACA section 5(b) mandates that agencies "shall … require" fair balance—which "is not the type of language Congress employs to create or preserve an area so traditionally left to agency discretion as to constitute an exception to the normal rule of justiciability." *Union of Concerned Scientists*, 954 F.3d at 18; *NRDC*, 410 F. Supp. 3d at 603. Instead, it "indicates an intent to impose discretionless obligations." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (quotations omitted). Nor is there anything in FACA to suggest "that Congress 'wanted an agency to police its own conduct.'" *NRDC*, 410 F. Supp. 3d at 604 (quoting *Match Mining v. EEOC*, 575 U.S. 480, 486 (2015)). Indeed, Congress's purpose in passing FACA was to "enhance the public accountability of advisory committees established by the Executive Branch," *Pub. Citizen*, 491 U.S. at 459, and "to rein in and introduce needed oversight over a sprawling, opaque, and generally poorly regulated process," *NRDC*, 410 F. Supp. 3d at 604.

Moreover, the "fairly balanced" requirement provides a judicially manageable standard. "The concepts of fairness, balance, and influence are not foreign to courts." *Union of Concerned*

Scientists, 954 F.3d at 18; *Microbiological Criteria*, 886 F.2d at 423 (Friedman, J., concurring). "[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)). Beyond the text of the statute, GSA's implementing regulations provide "law to apply," *see id.*, by supplying further relevant factors for considering whether a committee is fairly balanced. *See* 41 C.F.R. § 102-3, Subpt. B, App. A.

Defendants rely primarily on Judge Silberman's concurrence in *Microbiological Criteria*, but the other two judges on the panel rejected that approach, *see Cargill*, 173 F.3d at 335 n.23 (parsing the three *Microbiological Criteria* opinions), and the D.C. Circuit has never adopted it. Quite the opposite. *See Physicians for Social Resp.*, 956 F.3d at 639 (indicating that legal challenges to a committee's membership are justiciable). Moreover, the clear weight of authority—including two recent opinions in this judicial district—suggests the better view is that "fairly balanced" claims are justiciable.

2. The Commission Lacks Fair Balance

In staffing the Commission, Defendants failed to ensure it was "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).

Citing *Microbiological Criteria*, Defendants contend that fair viewpoint balance "can be achieved even without committee members who support an interested organization's concerns or point of view." Opp. 20. But Plaintiffs' argument here is not merely that a specific organization's views are not included; it is that the mainstream (indeed, dominant) viewpoint of the human

rights community is being ignored. Nor do they seek, for example, appointment of a specific organization or individual to the Commission. Rather, Plaintiffs and FACA demand representation of the mainstream *viewpoint* of international human rights—*i.e.*, the viewpoint held by practitioners, advocates, and experts, like Plaintiffs and their *amici*. *See* Br. 22-24; *see also* Sippel Decl., Ex. 3-1, ECF No. 46-1 at 2-5 (CHANGE Comment); Radhakrishnan Decl., Ex. 5-1, ECF No. 48-1 at 1-4 (GJC Comment).

In any event, Defendants' rule applies only where the committee's function "involves highly technical and scientific studies and recommendations," *Microbiological Criteria*, 886 F.2d at 423 (Freidman, J, concurring), is "so 'narrow and explicit' that fair balance among competing viewpoints is irrelevant," *Nw. Ecosystem All. v. Off. of U.S. Trade Representative*, 1999 WL 33526001, at *5 (W.D. Wash. Nov. 9, 1999), or is "politically neutral and technocratic," *Cargill*, 173 F.3d at 336. Where the committee's function implicates "substantive legislative policy issues affecting the rights" of unrepresented individuals and entities, FACA requires that those with competing views be represented. *See Nat'l Anti-Hunger Coal. V. Exec. Comm. of President's Priv. Sector Surv. On Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (national anti-hunger policy); *Nw. Ecosystem All.*, 1999 WL 33526001, at *5 (forest products trade policy). The Commission's function inarguably implicates substantive policy issues and so consideration must be given for competing viewpoints.

Defendants next urge that fair balance has been achieved here because "[t]he Commission members have significant, diverse experience relevant to" the Commission's

mission. Opp. 21 (citing AR0071).[2] But what is most notable about Defendants' argument on this point is that *they do not even dispute* that no members of the Commission hold viewpoints consistent with those held by mainstream human rights advocates, like Plaintiffs, and other experts. *See* Suppl. Decl. of Benjamin Seel ("Suppl. Seel Decl."), Ex. 1-1 (Peter Berkowitz, *Pride, Humility, and America's Dedication to Human Rights*, Real Clear Politics (June 7, 2020), https://www.realclearpolitics.com/articles/2020/06/07/pride_humility_and_americas_dedication_to_human_rights_143392.html (Defendant Berkowitz, Commission Executive Secretary, identifying divergent views between the Commission and its "critics"—*i.e.*, human rights advocates)).[3] And Defendants similarly make no argument that the Commission even plausibly represents a fair balance of viewpoints on such core topics as the workability of the current international system, or the status of rights claimed by LGBTQI individuals, proponents of gender equality, and women and girls seeking access to sexual and reproductive health and

[2] The Commission's claim to experiential diversity is dubious, at best; it is comprised entirely of academics. *See* Index, ECF No. 39-2 at 3, Feb. 21 Public Comment and Discussion at 16:48 (Chair Glendon: describing Commission as "a group of eleven academics"). The membership's slight variations in career paths to academia hardly serve "to ensure that persons or groups directly affected by the work of a particular advisory committee," like Plaintiffs, "have some representation on the committee." *Nat'l Anti–Hunger Coal. v. Exec. Comm. of President's Priv. Sector Surv. On Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983).

[3] As Plaintiffs previously emphasized, the Court need not find that one view or another on these issues is correct to determine that federal law requires that leading viewpoints be reflected on the Commission for there to be any semblance of "balance."

rights. *See* Br. 24-25. Defendants have thus failed to even plausibly staff the Commission with the "fair balance of viewpoints" that FACA requires. *See Nw. Ecosystem Alliance*, 1999 WL 33526001, at *5 (finding lack of balance where plaintiffs' views were "directly contrary" to committee members').

Finally, Defendants rely on isolated snippets from Judge Edwards' opinion in *Microbiological Criteria* to assert that courts may not look into "specific opinions" of committee members to determine whether a committee has fair viewpoint balance, and are constricted to considering "background and experience." Opp. 20-21. That turns the opinion on its head. Although the plaintiffs there proffered no evidence of "specific opinions," Judge Edwards nevertheless found the plaintiffs sufficiently showed imbalance because "background and employment status" were reasonable proxies for "infer[ring]" viewpoint. *See Microbiological Criteria*, 886 F.2d at 437 (Edwards, J., concurring).[4] But that does not suggest that *more direct* evidence, like the public statements from Commission members, may not be considered. Such a rule would be a perverse interpretation of Congress's focus on "viewpoint."

But, even setting aside the public statements, the Commission's overwhelming representation of religious liberty scholars is nevertheless clear. *See* AR0117-19; Br. 22-25. So, too, is the absence of any career State Department officials, current or former representatives at

[4] Accepting Defendants' strained reading of Judge Edwards' concurrence *arguendo*, the Court may still consider the public statements of Commission members. These statements were made in the members' capacity as public academics and commentators and so are relevant evidence of their "background and employment status," Br. 24–25, which even Defendants concede is a permissible way to measure viewpoint, *see* Opp. 21.

the U.N., relevant treaty bodies or U.N. special procedures, or, critically for Plaintiffs, representatives from mainstream human rights advocacy organizations, activists, in-the-field practitioners, or members with a background advocating for LGBTQI or reproductive rights. *Id.* Again, Defendants do not claim that views of the mainstream human rights community are represented. Thus, "the Committee is unbalanced within the meaning of FACA." *Microbiological Criteria*, 886 F.2d at 437 (Edwards, J., concurring) (examining which backgrounds are *missing* to determine balance).

C. Defendants Unlawfully Shielded The Commission From Public Oversight

1. Defendants violated FACA's record disclosure requirements.

Defendants have also violated FACA's disclosure requirements. Defendants insist they have not, or, if they have, any failure was harmless error. Opp. 23-26. Both arguments fail.

a. Defendants' disclosure violations are not harmless

Defendants neither dispute that they failed to disclose documents that qualify as Commission "records" under FACA contemporaneously with the work of the Commission and at, or before, the meetings at which such records were relevant, Opp. 23-26, nor explain why timely release of the Commission records was not "practicable," *see Food Chem. News*, 980 F.2d at 1472. *See also NRDC*, 410 F. Supp. 3d at 599. These failures are not harmless. "Timely access to advisory committee records is an important element of the public access requirements of the Act," 41 C.F.R. § 102-3.170, which "Congress considered … to be: 'one of the key sections in the legislation'" because it underpins the ability of "interested parties to *present their views and be informed with respect to the subject matter taken up by such committees*." *Food Chem. News*, 980 F.2d at 1472. Section 10(b) thus "provides for the *contemporaneous availability* of advisory committee records that, when taken *in conjunction with* the ability to attend committee meetings,

provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee." 41 C.F.R. § 102-3.170 (emphasis added).

As Plaintiffs' uncontested declarations describe, Defendants' failure to provide complete information about who would be speaking and on what topic left attendees scrambling to "'google' the speakers" from their seats "to try to understand [the speakers'] perspective or areas of scholarship," Bromley Decl. ¶ 8, and generally hampered Plaintiffs' ability to monitor and engage with the Commission, leaving each to craft their public comments without a complete understanding of the Commission's work. *See* McMullen Decl. ¶ 7; Sippel Decl. ¶ 8; Bromley Decl. ¶ 8; Radhakrishnan Decl. ¶ 7. Accordingly, Defendants' "simple 'excuse us' cannot be sufficient" here. *Alabama-Tombigbee,* 26 F.3d at 1106 (quoting *Alabama-Tombigbee Rivers Coal. v. Fish & Wildlife Serv. of Dep't of Interior*, 1993 WL 646410, at *2 (Dec. 22, 1993)). To hold otherwise would allow Defendants' delayed release of Commission records to render FACA's openness requirements "meaningless." *Food Chem. News*, 980 F.2d at 1472.

b. The documents at issue are records under FACA

Defendants also offer several unpersuasive reasons why the material at issue does not fall under section 10(b). But section 10(b) is broad, encompassing all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee." 5 U.S.C. App. 2 § 10(b). Accordingly, an agency's disclosure obligations under it are "liberally construed," *Food Chem. News*, 980 F.2d at 1472. The records Plaintiffs identify easily fall within this expansive disclosure requirement:

Prepared remarks. Defendants insist that prepared remarks are not records required to be disclosed under FACA. Opp. 24. But a witness's prepared remarks are certainly "prepared

for" the Commission. Indeed, Commission members noted that such remarks had been "made available to" them in advance of the meetings. *See, e.g.*, Index at 2, Remarks of Cass Sunstein at 1:14:24 (Dr. Tollefsen: "Thank you, I really enjoyed the paper very much"). Accordingly, the remarks should have been provided to the public contemporaneously with the meetings at which they were presented. It is no answer that, as Defendants contend, "witness remarks were available *during* the Commission meetings as they were oral remarks given by witnesses *at* meetings." Opp. 24. Section 10(b) required Defendants not only to provide the public with access to these remarks, but also to allow for the public to "inspect[] and copy[]" such remarks. 5 U.S.C. App. 2 § 10(b). Moreover, obtaining copies of the witnesses' prepared remarks would further FACA's purpose of enabling public participation by allowing the public, including Plaintiffs, to draft comments with specific reference to such remarks.

Audio and video recordings. Defendants' arguments regarding video recordings are similarly unpersuasive. Plaintiffs do not contend that an agency must always generate audio and video recordings of advisory committee meetings. But if an agency does make such recordings, they must be provided to the public as "transcripts" "prepared for" or "made available to" an advisory committee. 5 U.S.C. App. 2 § 10(b). Had Defendants promptly released these recordings to the public they would have enabled Plaintiffs to review the recordings in preparing their comments to the Commission.

DRL PowerPoint. Defendants likewise contend that the "DRL PowerPoint" is not a record under section 10(b) because it "was presented during an administrative briefing." Opp. 25. However, the regulation Defendants cite, 41 C.F.R. § 102-3.160, does not exempt materials presented during administrative meetings from disclosure under section 10(b). Rather, it provides only that agencies need not notice or open administrative meetings to the public. *See Elec.*

Privacy Info. Ctr. v. Drone Advisory Comm., 369 F. Supp. 3d 27, 48 (D.D.C. 2019) (rejecting the argument that records characterized as "preparatory or of an administrative nature" did not need to be disclosed under FACA).

Nor does it matter, as Defendants insist, Opp. 25, that the PowerPoint was included in the administrative record produced in this case. That record was produced months after the bulk of the Commission's work and engagement with the public, and *after* Plaintiffs sued over Defendants' failure to comply with FACA's disclosure requirements. Moreover, section 10(b) requires that advisory committee records be made available "at a single location." 5 U.S.C. App. 2 § 10(b). That, at the least, means that Defendants should have provided a link to the PowerPoint on the Commission's webpage where its other records are housed and where it would be more easily found by the public.

Assigned readings. Defendants argue that the assigned readings for Commission members are not records under section 10(b). Opp. 25. Not so. "Documents 'prepared for or by the Commission' invariably must include documents that will be 'used and discussed'" at a Commission meeting, a category which includes assigned readings. *Lawyers' Comm.*, 265 F. Supp. 3d at 69. *See also Cummock*, 180 F.3d at 287-93 (undisclosed briefing materials violated FACA).

2. Defendants violated FACA's open meeting requirement

Defendants have also violated FACA's open meeting requirement, which requires public meetings to be noticed in the Federal Register at least 15 days prior, 41 C.F.R. § 102-3.150(a); "held at a reasonable time and in a manner or place reasonably accessible to the public," *id.*

§ 102-3.140(a); and conducted so as to allow "[a]ny member of the public [to] speak to or otherwise address the advisory committee," *id.* § 102-3.140(d).

Most recently, Defendants announced on July 2, 2020 that they will hold a public Commission meeting on July 16, 2020—14 days later—in Philadelphia, Pennsylvania where Secretary Pompeo will present the Commission's "proposed" report. 85 Fed. Reg. 39,967, 39,967 (July 2, 2020).[5] This violation of FACA's 15-day notice requirement is hardly trivial; it forces the public, including Plaintiffs, to make quick and difficult decisions about whether and how to travel amid the COVID-19 pandemic to a city experiencing a "[h]igh risk of community transmission," City of Philadelphia, *Current Situation And Risk In Philadelphia* (last visited July 7, 2020), https://www.phila.gov/programs/coronavirus-disease-2019-covid-19/, to attend an indoor event where it is unclear whether mitigation efforts will be taken to reduce transmission risk to participants, *see* 85 Fed. Reg. at 39,967.[6] And some—including California residents, like CGE's Senior Adviser, Ambassador Michael Guest—are precluded from attending by Defendants' late notice because they will be subject to travel restrictions imposed by the City of Philadelphia, which require those coming from certain states, including California, to self-

[5] The notice describes the report as "proposed," but Secretary Pompeo has indicated otherwise, stating that his planned remarks will "unveil the work of the Commission." Secretary Pompeo (@SecPompeo), Twitter (July 5, 2020, 12:13 PM), https://twitter.com/SecPompeo/status/1279810694075109380?s=20.

[6] The Court may take judicial notice of local conditions, *Griffin, Inc. v. Tully*, 404 F. Supp. 738, 748 (D. Vt. 1975), and COVID-19's health risks, *Basank v. Decker*, Civ No. 20-cv-2518, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020).

quarantine for 14 days upon arrival. Suppl. Seel Decl., Ex. 1-2; Declaration of Michael Guest ("Guest Decl."), attached as Ex. 2, ¶ 6. Subject individuals would have needed to arrive in Philadelphia *the day before* notice was given in order to comply with public health rules and attend the July 16 meeting, *id.* ¶¶ 7-8. Thus, the July 16 meeting is not "reasonably accessible to the public." *Id.* § 102-3.140(a).

Defendants claim the "exceptional circumstance" of "the Secretary's schedule" excuses their deficient notice, 85 Fed. Reg. at 39,967, but cabinet secretaries are always busy people and it strains credulity to suggest that a secretary's busy schedule is "exceptional." Allowing improper notice to be excused on such thin reasoning effectively permits the exception's invocation whenever an agency "say[s] that it was necessary to do so." *Buschmann v. Schweiker*, 676 F. 2d 352, 357-58 (9th Cir. 1982); *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) ("[A] mere recital of good cause does not create good cause."). Nor is it sufficient that Defendants may provide a video feed through which the public can view the Secretary's remarks. *See* Guest Decl. ¶ 9. FACA grants the public the right to "speak to or otherwise address" the Commission, 41 C.F.R. § 102-3.140(d), which applies with equal force to "meeting[s] conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium," *id.* § 102-3.140(e). For all these reasons, the July 16 meeting violates FACA's openness requirements.

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

Defendants do not dispute that a use injunction is appropriate "if the unavailability of an injunctive remedy would effectively render FACA a nullity." *Cargill*, 173 F.3d at 342. That is certainly the case here, where the "FACA violation[s] … go[] to the very creation and existence of the advisory committee." *WORC*, 412 F. Supp. 3d at 1242-43.

Moreover, a use injunction "is the only way to achieve FACA's purposes of enhancing public accountability and avoiding wasteful expenditures going forward." *Id.* at 1423. Absent that remedy, Defendants would be allowed to "rely on recommendations from an advisory committee whose very existence flies in the face of FACA." *Id.*; *Nat'l Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979) ("If an agency wishes to rely publicly on the backing of an advisory committee, it must do what the statute commands.").

Defendants' belated release of some records does not change the analysis. *See* Opp. 26-27. Their failure to release records is only one of several violations at issue, and an after-the-fact release cannot cure Plaintiffs' injuries, which stem from Defendants' failure to disclose records in time to allow the public, including Plaintiffs, to follow along with the Commission's work, adequately prepare for meetings, and develop comments responsive to the materials under consideration by the Commission.

Finally, Defendants erroneously suggest that a use injunction is improper because the Commission's "procedurally tainted recommendations" may, at some later date, be subject to "rulemaking procedures" that "afford ample opportunity to correct infirmities resulting from improper advisory committee action." Opp. 27 (quoting *Califano*, 603 F.2d at 336). Relying on speculative future opportunities would not serve "FACA's purposes of enhancing public accountability and avoiding wasteful expenditures going forward." *WORC*, 412 F. Supp. 3d at 1243. In any event, unless Defendants stipulate that they will not invoke the "foreign affairs" exception to notice-and-comment procedures, 5 U.S.C. § 553(A)(1), for any rulemakings related to the Commission's recommendations, their speculation about Plaintiffs' future opportunities for correction provides Plaintiffs no relief. Thus, a use injunction may be Plaintiffs' "last resort." *NRDC v. Pena*, 147 F.3d 1012, 1025 (D.C. Cir. 1998).

CONCLUSION

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

Dated: July 7, 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 6,941 words, including footnotes and excluding the parts of the brief exempted by the Court's Individual Practices; and (2) complies with the typeface requirements of the Court's Individual Practices because it contains double spaced, Times New Roman font, and uses one inch by one inch margins.

Dated: July 7, 2020

/s/ Benjamin Seel
Benjamin Seel