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ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; et al.	)	
Petitioners/Plaintiffs,	)	No. 19-CV-205-F
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE; et al.	)	
Respondents/Defendants.	)	

PLAINTIFFS' REPLY BRIEF RELATED TO FACA CLAIMS

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INTRODUCTION

This case comes down to whether the U.S. Department of Agriculture and its subagency, the Animal and Plant Health Inspection Service (collectively "USDA"), either "established" or "utilized" two advisory committees within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 §§ 1-16. Although Defendants contend they neither established nor utilized the Cattle Traceability Working Group (CTWG) nor the Producers Traceability Council (PTC), they have failed to respond to (and thereby concede) much of the evidence submitted by Plaintiffs (collectively "R-CALF") in support of the FACA claims. In particular, Defendants never contest R-CALF's showing that the Supreme Court *rejected* their assertion that "established," as used in FACA, should be construed narrowly. USDA's narrow-construction argument in fact ignores the Supreme Court's seminal FACA decision, *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), instead relying on a single appeals court decision that expresses a decidedly minority viewpoint and contradicts *Public Citizen*'s finding that Congress intended "established" to be read broadly.

USDA also fails to dispute that its Administrative Record shows that the two committees were formed only after APHIS officials repeatedly discussed the need and lobbied for their formation throughout 2017, as well as during the September 2017 "Strategy Forum on Livestock Traceability," held in Denver (the "Strategy Forum"). Nor do Defendants dispute that APHIS co-sponsored and co-funded the Strategy Forum, with a significant percentage of attendees being APHIS officials. USDA *does* dispute R-CALF's contention that CTWG was established at the Strategy Forum, asserting that the committee was formed during a November 2017 telephone conference in which no APHIS employees participated. USDA's Administrative Record, however, contradicts that version of history, with many documents tracing establishment of CTWG to the Strategy Forum. While APHIS officials

may have avoided the first CTWG telephone conference (an absence seemingly calculated to reduce potential FACA exposure), they thereafter regularly participated in the advisory committees' activities—setting the agendas, assisting in selection of committee members, participating as members and non-members in meetings, receiving committee policy recommendations, and remaining in constant touch with committee leaders. The committees simply would not have been formed nor continued to operate without APHIS's constant urging and support. USDA thus both "established" and "utilized" CTWG and PTC under any commonly understood definitions of those words.

USDA notes that the record does not reveal whether the advisory committees still exist and argues that if R-CALF wishes to avoid a finding that its claims are largely moot, it bears the burden of demonstrating that PTC continues to operate. Resp. Br. 23. That burden-of-proof argument is absurd; given that a senior APHIS official served as a PTC member in mid-2019 (the date of the most recent PTC-related documents in USDA's administrative record), PTC's current operating status is a fact uniquely within Defendants' knowledge. More importantly, the policy advice and recommendations submitted to USDA by CTWG and PTC remain in USDA's possession today, and USDA continues to move forward with efforts to force cattle producers to adopt radio-frequency identification (RFID) technology. Thus, R-CALF's claim in this lawsuit—that FACA prohibits use of recommendations from committees operated in violation of FACA procedural requirements—remains very much alive.

ARGUMENT

I. THE SUPREME COURT HAS REJECTED DEFENDANTS' CONTENTION THAT "ESTABLISHED," AS USED IN FACA, SHOULD BE READ NARROWLY

In the face of overwhelming evidence that they established both of the advisory committees at issue in this case—and thus that those committees were subject to FACA's numerous procedural requirements and safeguards—Defendants argue that Congress intended the word "established" to be

interpreted quite narrowly and not in accordance with its commonly accepted meaning. Resp. Br. 16-19. They base that narrow-construction argument on a single appeals court decision written more than 20 years ago. *Id.* at 16 (citing *Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239 (D.C. Cir. 1999)). Yet they utterly fail to respond to a point raised in R-CALF's opening brief: that the U.S. Supreme Court has *expansively* interpreted the word "established." Pet. Br. 12-14 (citing *Public Citizen*, 491 U.S. 440 (1989)). Quoting FACA's legislative history, the Court stated that:

> the phrase "established or organized" was to be understood in its "*most liberal sense*, so that when an officer brings together a group *by formal or informal means*, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill."

491 U.S. at 461 (quoting S. Rep. No. 92-1098, p.8 (1972)) (emphasis added).

As noted by USDA, *Byrd* concluded that *Public Citizen* "squarely rejected an expansive interpretation of the words, reading 'established' and 'utilized' narrowly to prevent FACA from sweeping more broadly than Congress intended." Resp. Br. 16 (quoting *Byrd*, 174 F.3d at 245). But *Byrd* plainly misread *Public Citizen*, failing to acknowledge that while the Supreme Court narrowed the term "utilized,"[1] it stated explicitly that "established" should be interpreted in its "most liberal sense."

[1] The Court read "utilized" narrowly because it feared that ascribing an every-day meaning to "utilized" so as to apply FACA to federal government consultations with the ABA's Standing Committee on the Federal Judiciary "would present formidable constitutional difficulties" because it might interfere with the President's Article II power to nominate federal judges. 491 U.S. at 466. The Court also noted that the Standing Committee existed for decades before FACA's adoption, that it had long provided confidential advice to Presidents, and that Congress (when adopting FACA) said nothing suggesting that it intended to alter that practice by requiring public disclosure of all Committee deliberations. The federal government clearly had not "established" the longstanding Committee, and the Court read "utilized" narrowly because it concluded that Congress could not have intended such a major revision of policy toward long-established advisory committees. *Id.* Such considerations do not come into play, when (as here) no standing committee exists and a new committee is formed for the explicit purpose of providing group advice to the federal government.

Other federal appeals courts have rejected *Byrd*'s interpretation of *Public Citizen*. *See* Pet. Opening Br. at 12-13 (citing *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1085-86 (11th Cir. 2002), and *Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton* ["*AAPS*"], 997 F.2d 898, 913-15 (D.C. Cir. 1993)). The Eleventh Circuit has explained that *Public Citizen* held that "there is no need to run from the plain meaning of 'established' [as used in FACA] in order to escape a serious constitutional question, because there is no serious constitutional question raised by application of FACA's requirements to every advisory committee established by the federal government." *Miccosukee Tribe*, 304 F.3d at 1085-86.[2]

USDA does not challenge R-CALF's contention that the commonly accepted definition of the word "established" is quite broad. *See* Pet. Opening Br. 11 n.2 ("to establish" means "to bring into existence: found" or "to bring about: effect" (quoting *Webster's New Collegiate Dictionary*, G. & C. Merriam Co. (1981)). USDA's efforts to impose a limiting construction on "established" as used in FACA are inconsistent with that broad definition. For example, APHIS argues that an advisory committee can never be deemed to have been "established" by the federal government unless the government selects *all* of its members. Resp. Br. 16. That alleged limitation finds no support in the commonly understood meaning of "established"; the federal government can easily be understood to "bring about" a committee even if others have a hand in choosing members. As the Tenth Circuit has repeatedly warned, "Only the most extraordinary showing of a contrary legislative intent can

[2] USDA contends that Judge Johnson has "noted" the Supreme Court's "narrow interpretation of FACA." Resp. Br. 16 n.4 (citing *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 179 F. Supp. 2d 1279, 1304 (D. Wyo. 2001), *aff'd*, 383 F.3d 1241 (10th Cir. 2004)). APHIS has misconstrued Judge Johnson's opinion. The opinion never used the word "narrow." While Judge Johnson noted that *Public Citizen* construed the word "utilized" in a manner that somewhat limited its normally broad scope, he said nothing suggesting that the scope of "established" was similarly limited.

justify our departure from the plain meaning of the statutory language." *Standiferd v. U.S. Trustee*, 641 F.3d 1209, 1213-14 (10th Cir. 2011).

The federal government, of course, receives advice from hundreds of individuals and organizations on a daily basis, often provided in response to solicitation from government officials—and there is no serious argument that the receipt of such advice is subject to FACA constraints in the normal course. The D.C. Circuit has devised a good rule of thumb for differentiating between cases in which group advice is sought and received (to which FACA is applicable) and cases involving individualized advice (to which FACA is inapplicable):

> A group is a FACA advisory committee when it is asked to render advice or recommendations, *as a group*, and not as a collection of individuals. The group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally.

AAPS, 997 F.2d at 913 (emphasis in original). As detailed in R-CALF's opening brief, the Administrative Record demonstrates that CTWG and PTC fit *AAPS*'s definition to a "t." USDA engineered the formation of those committees, and the committees (at USDA's request) provided advice to USDA as a group on topics selected by USDA.[3]

II. CTWG WAS ESTABLISHED IN SEPTEMBER 2017 AS A RESULT OF APHIS'S MONTHS-LONG LOBBYING AND ITS DIRECT INTERVENTION

USDA would have the Court believe that even though the sole purpose of CTWG and PTC was to provide Defendants with technical advice regarding transition to mandatory RFID technology for cattle producers, USDA played no role in establishing those advisory committees. USDA instead contends that members of the cattle industry formed the committee on their own for the purpose of

[3] For the reasons explained in R-CALF's opening brief, USDA should also be deemed to have "utilized" the two committees. Indeed, USDA does not dispute that *Public Citizen* explicitly held that the phrase "established or utilized" sweeps more broadly than the word "established" standing alone. Pet. Opening Br. at 18 (citing *Public Citizen*, 109 S. Ct. at 462).

carrying out USDA's wish to force livestock producers to adopt an RFID mandate. The Administrative Record produced by USDA contradicts that absurd contention.

The record indicates that CTWG was established at the September 2017 Strategy Forum in Denver. The principal contemporaneous record of that meeting, the "White Paper—Strategy Forum on Livestock Traceability," says so explicitly:

> The cattle industry must be proactive if the U.S. is to accomplish the comprehensive vision of animal disease traceability [ADT]. Additionally, the ADT is unlikely to be accepted by the industry unless that industry contributes significantly to the rule. A group of industry stakeholders needs to be assembled to drive the movement forward. Representatives of several producer groups attending the forum expressed their commitment to this model and process, and a desire to be part of the solution.

White Paper, ECF 47-4, Executive Summary at 9.[4] Many other documents trace creation of the CTWG to the Strategy Forum. *See* AR 138 (APHIS memo says accompanying flow chart at AR 141 lists steps "APHIS implemented in 2017"); AR 141 (APHIS flow chart states that "industry leaders form a WG" at Strategy Forum); AR002 (February 2018 email from APHIS's Aaron Scott to an in-house USDA attorney stating, "this group [CTWG] was formed as an outcome of the NIAA/USAHA forum that we cohosted last September [*i.e.*, the Strategy Forum]"); AR 005.[5] Numerous documents indicate that CTWG had been "established" well in advance of both the

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[4] The White Paper shows APHIS's outsized role in its creation. For example, a November 27, 2017 email from NIAA's Katie Ambrose to Neil Hammerschmidt (a senior APHIS official) states, "Any updates yet on the White Paper? The deadline for edits, etc. is fast approaching on November 30th!" AR 383. This confirms that Hammerschmidt: (1) played a role in creating earlier drafts of the White Paper (thus the reference to "updates"); and (2) most likely provided additional input for the final version. In any event, the White Paper is part of the Administrative Record. USDA saw it when created, and USDA has not disputed its accuracy. As the dominant force at the Strategy Forum, APHIS could be expected to play a major role in accurately documenting what occurred there.

[5] Although not part of the Administrative Record, numerous NIAA documents also attribute establishment of CTWG to the Strategy Forum. *See, e.g.,* NIAA 2017-18 Annual Report at 6 (stating that "[o]ne outcome of the Strategy Forum was the formation of the Cattle Traceability Working Group"). There is no indication in the record that APHIS attempted to disavow these statements.

NIAA's November 8, 2017 conference call and before the group's first teleconference on November 20, 2017. For example, the November 8, 2017 minutes of the NIAA's executive committee meeting (the first of the two meeting at which USDA claims the CTWG was established) states APHIS's Dr. Burke Healy had *already* provided NIAA with "suggestions for working group [CTWG] co-chairs" (AR 385-87); a November 9, 2017 letter from NIAA (the organization previously designated to serve as CTWG's "facilitator") spoke of CTWG as a *fait accompli* whose agenda and goals *had already been determined* at the Strategy Forum's final meeting:

> There was much discussion at the end of the Forum regarding the next steps necessary to further progress of a more robust traceability system for cattle and that industry representatives should be the ones to develop and lead a cattle traceability working group. ... Therefore, this letter is written to invite participation from all sectors of the cattle industry and technology providers in a Cattle Traceability Work Group (CTWG) to be facilitated by NIAA, and led by key stakeholders in the beef industry. It is anticipated this group will focus on the areas of tag and readership technologies, application responsibilities, reporting responsibilities, and cost-sharing responsibilities.

AR 379-380. While it is unclear as to whether APHIS exercised veto power over selecting working group members, numerous documents show that APHIS played an active role in October/November 2017 in recommending and vetting potential members. *See, e.g.*, AR 371-72, 378, 385-87.

R-CALF's opening brief describes the dominant role APHIS officials played at the Strategy Forum, which it co-hosted and partially funded. Pet. Opening Br. 13-14. Four of the ten members of the Planning Committee and a plurality of attendees were APHIS officials. *Id.* Given all of Plaintiffs' evidence, the only plausible conclusion is that the establishment of CTWG at the Strategy Forum was APHIS's doing. Any doubt on that score is eliminated by events in the months preceding the Strategy Forum. Documents from that period demonstrate that: (1) USDA determined that its goal of transitioning to a mandatory RFID regime would be advanced by creating an industry-led task force to provide technical advice regarding the transition; (2) USDA lobbied the State-Federal Working Group

to support creation of an industry-led task force; (3) the State-Federal Working Group agreed to make task force creation one of its 14 recommendations; and (4) members of the State-Federal Working Group (including APHIS officials) presented their recommendations at the September 2017 Strategy Forum, including a plea for creation of an industry-led task force. *Id.* While USDA argues that the such evidence does not demonstrate that APHIS "established" the two advisory committees, it has not challenged its accuracy. If USDA seeks to deny that it was the moving force behind establishment of an industry-led task force during the May-to-September-2017 period, the Court may wish to examine the documents proffered by R-CALF in connection with its two pending motions to complete the Administrative Record—documents which USDA recently released under the FOIA and which confirm its efforts to establish a task force and to convince industry representatives to join it.

The evidence that USDA "established" the PTC (Pet. Opening Br. 15-17) is equally compelling. USDA's fanciful interpretation of the record is that it was informed after the fact that an advisory committee whose agenda it controlled had abolished itself, formed a new committee with an identical agenda and largely identical membership (shorn of dissidents), and named an APHIS official as a member of the new group. That account overlooks one very inconvenient fact: two APHIS officials who had become members of CTWG attended the April 8, 2019 meeting in Des Moines, Iowa where the transition from CTWG to PTC was completed. *See* AR 927-29, 917-19, 925.

III. THE ADMINISTRATIVE RECORD FAILS TO PROVIDE A SATISFACTORY EXPLANATION FOR USDA'S DECISION TO ACCEPT ADVICE FROM CTWG AND PTC WITHOUT COMPLYING WITH FACA PROCEDURAL REQUIREMENTS

All parties agree that R-CALF possesses a right of action for injuries incurred due to USDA's FACA violations. *See* 5 U.S.C. § 706. USDA has insisted, however, that the propriety of its actions/inactions must be judged based solely on USDA's self-selected "record"—a carefully culled collection of documents that appear to bear no relationship to any decisions USDA may or may not

have made with respect to FACA compliance. R-CALF will not repeat here its continuing objection to USDA's position, a position that sets this case apart from every other FACA case of which R-CALF is aware. Rather, as R-CALF explained in its opening brief (at 24-25), USDA's approach requires it to demonstrate that it "examined the relevant data and articulated a 'satisfactory explanation' for its decision, 'including a rational connection between the facts found and the choice made.' " *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Veh. Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.* ["*State Farm*"], 463 U.S. 29, 43 (1983)).

USDA's response concedes that it never undertook those steps; it simply responds that it was not required to do so under the APA. Resp. Br. 21-22. But it fails to explain why it is exempt from the requirements imposed by *State Farm*, which apply any time an APA plaintiff alleges (as here) that agency action has been "unlawfully withheld or unreasonably denied." 5 U.S.C. § 706(1). In determining whether an agency has provided the requisite "satisfactory explanation," a reviewing court is entitled to examine "the whole record." 5 U.S.C. § 706. But when, as here, the agency has insisted that the "record" be limited to documents that are silent about the decision-making process and has prevented all discovery, the agency cannot possibly satisfy the *State Farm* requirements. USDA asserts that the agency action challenged by R-CALF is "the alleged failure to adhere to the procedural requirements which apply to alleged advisory committees, not a decision regarding FACA's applicability." Resp. Br. 22. That assertion is correct but irrelevant. The fact remains that the record fails to provide a satisfactory explanation for USDA's admitted "failure to adhere to the procedural requirements" that would apply if, as alleged, CTWG and PTC are covered by FACA.

IV. USDA REMAINS COMMITTED TO ADOPTING A MANDATORY RFID REGIME

USDA argues that "events occurring since this action was filed have rendered this case moot and/or eliminated any justification for a use injunction." Resp. Br. 22. USDA concedes, however,

that it is moving ahead with plans to mandate RFID for cattle by 2023. Indeed, one day before USDA filed its merits brief, it announced plans to initiate a rulemaking proceeding designed to implement mandatory RFID. USDA News Release, "USDA Announces Intent to Pursue Rulemaking on Radio Frequency Identification (RFID) Use in Animal Disease Traceability," March 23, 2021. The Release stated that USDA "believe[s] that RFID tags will provide the cattle industry with the best protection against the rapid spread of animal diseases." So long as USDA continues to pursue mandatory RFID, a live controversy exists because the threat remains that USDA may use the CTWG/PTC RFID-related work product and recommendations developed in violation of FACA.

USDA argues that any FACA violation was somehow "cured" by its solicitation (in July 2020) of public comments on the advisability of mandating RFID tags. Resp. Br. 25. That argument makes little sense. Congress designed FACA to prevent the use of any advisory committee for making important federal agency decisions unless certain procedural safeguards are followed, including that the committee is properly constituted. *Alabama-Tombigbee Rivers Coalition v. Dep't of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994). Curing such a violation requires excluding those committees' reports from the decision-making process, not adding other voices.

CONCLUSION

Plaintiffs respectfully request that the Court enter judgment in their favor on their claims that CTWG and the PTC are federal advisory committees covered by FACA and that Defendants failed to comply with procedures required by FACA for those committees. Plaintiffs further request that the Court enjoin Defendants from making use of the work product and recommendations solicited from those committees with respect to implementation of RFID technology for livestock moving interstate.

Dated this 21st day of April 2021.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on April 21, 2021, a copy of Plaintiffs' Reply Brief Related to FACA Claims was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ *Harriet M. Hageman*
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