No. 21-8042
ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; TRACY and DONNA HUNT, d/b/a THE MW CATTLE CO., LLC; and KENNY and ROXY FOX,

Petitioners-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; TOM VILSACK, in his official capacity as Secretary of Agriculture; and KEVIN SHEA, in his official capacity as Administrator of the Animal and Plant Health Inspection Service,

Respondents-Appellees.

On Appeal from the U.S. District Court
for the District of Wyoming
No. 1:19-cv-00205-NDF; Judge Nancy D. Freudenthal

APPELLANTS' OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel states that Appellant Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF) is a non-profit corporation operating under § 501(c)(6) of the Internal Revenue Code. R-CALF has no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

/s/ Harriet Hageman
Harriet Hageman

TABLE OF CONTENTS

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

GLOSSARY vii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

INTRODUCTION 3

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 14

STANDARD OF REVIEW 19

ARGUMENT 20

I. THE CATTLE TRACEABILITY WORKING GROUP AND PRODUCERS TRACEABILITY COUNCIL ARE "ADVISORY COMMITTEES" SUBJECT TO FACA'S REQUIREMENTS BECAUSE APPELLEES "ESTABLISHED" THEM 20

A. "Established" Should Be Construed Broadly, Not "Narrow[ly]" as the District Court Did 23

B. The Record Demonstrates That the Committees Were "Established" by Appellees Under the Ordinary Meaning of the Word 27

C. CTWG and PTC Are Precisely the Types of Advisory Committees That Congress Intended to Regulate When It Adopted FACA 33

II. CTWG AND PTC ARE "ADVISORY COMMITTEES" SUBJECT TO FACA'S REQUIREMENTS BECAUSE APHIS "UTILIZED" THEM 36

III. APHIS VIOLATED FACA BY FAILING TO ADHERE TO FACA PROCEDURAL REQUIREMENTS AND FAILING TO ENSURE THAT PTC MEMBERSHIP WAS

"FAIRLY BALANCED" 40

IV. THE ADMINISTRATIVE RECORD FAILS TO PROVIDE A "SATISFACTORY EXPLANATION" FOR APHIS'S DECISION TO ACCEPT ADVICE FROM CTWG AND PTC WITHOUT COMPLYING WITH FACA PROCEDURAL REQUIREMENTS 43

V. THE DISTRICT COURT ERRED IN APPLYING LOCAL RULE 83.6 AND REFUSING TO ALLOW APPELLANTS TO CONDUCT DISCOVERY 45

A. This Matter Is Not Governed by Local Rule 83.6...............................48

B. R-CALF Should Have Been Allowed to Conduct Discovery 49

VI. THE COURT SHOULD DECLARE THE CTWG AND PTC ADVISORY COMMITTEES TO HAVE BEEN ESTABLISHED AND UTILIZED IN VIOLATION OF FACA, AND ISSUE AN INJUNCTION PROHIBITING THE FUTURE USE OF ANY WORK PRODUCT 54

CONCLUSION 57

REQUEST FOR ORAL ARGUMENT 57

ATTACHMENTS TO BRIEF

May 13, 2021 Order

May 14, 2021 Judgment in Civil Action

November 16, 2020 Order Denying Petitioners'/Plaintiffs' Request for Reconsideration of Denial of Motion to Compel Responsive Pleading or, Alternatively, Permit Discovery

October 13, 2020 Magistrate's Order Denying Petitioners'/Plaintiffs' Request for Reconsideration of Denial of Motion to Compel Responsive Pleading or, Alternatively, Permit Discovery as Untimely

TABLE OF AUTHORITIES

Cases

Alabama-Tombigbee Rivers Coalition v. Dep't of Interior,
26 F.3d 1103 (11th Cir. 1994)....................55
Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton,
997 F.2d 898 (D.C. Cir. 1993) 15, 26, 27, 28, 50
Banneker Ventures, LLC, v. Graham,
798 F.3d 1119 (D.C. Cir.)....................52
Baptist Mem'l Hosp. v. Sebelius,
566 F.3d 226 (D.C. Cir. 2009) 51
Cheney v. U.S. District Court for the District of Columbia,
542 U.S. 367 (2004) 46, 49
Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 19, 50
Colorado Environmental Coalition v. Wenker,
353 F.3d 1221 (10th Cir. 2004).................... 18, 41, 42, 46, 50
Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019) 18, 45
GWN Petroleum Corp. v. Ok-Tex Oil & Gas, Inc.,
998 F.2d 853 (10th Cir. 1993)....................20
Hill Dermaceuticals, Inc. v. FDA,
709 F.3d 44 (D.C. Cir. 2013) 51
Menkes v. U.S. Dep't of Homeland Sec.,
637 F.3d 319 (D.C. Cir. 2011) 51
Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance,
304 F.3d 1076 (11th Cir. 2002).................... 15, 25, 26
Motor Veh. Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 18, 45
NAACP Legal Defense & Educational Fund, Inc. v. Barr,
496 F.3d 116 (D.D.C. 2020) 56
Nat'l Ass'n of Consumer Advocates v. Uejio,
2021 WL 769413 (D. Mass., Feb. 25, 2021) 55
New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.,
248 F.3d 1277 (10th Cir. 2001).................... 20, 24
Public Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) 14, 15, 17, 24, 25, 26, 36, 37, 38
Sheridan v. United States,
487 U.S. 392 (1988) 27

Standiferd v. U.S. Trustee,
641 F.3d 1209 (10th Cir. 2011)....24
Theodore Roosevelt Conservation P'ship v. Salazar,
616 F.3d 497 (D.C. Cir. 2010)....51
U.S. Nat'l Bank Ass'n v. Village at Lakeridge, LLC,
138 S. Ct. 960 (2018)....20
Union of Concerned Scientists v. Wheeler,
954 F.3d 11 (1st Cir. 2020)....34
United States v. Stein,
985 F.3d 1254 (10th Cir. 2021)....20
VoteVets Action Fund v. U.S. Dept of Veterans Affairs,
992 F.3d 1097 (D.C. Cir. 2021)....52
W. Organization of Resource Councils v. Bernhardt,
412 F. Supp. 3d 1227 (D. Mont. 2019)....55
Wyandotte Nation v. Sebelius,
443 F.3d 1247 (10th Cir. 2006)....20
Zimomra v. Alamo Rent-a-Car, Inc.,
111 F.3d 1495 (10th Cir. 1997)....43

Statutes

28 U.S.C. § 1291....1
28 U.S.C. § 1331....1
28 U.S.C. §§ 2201-02....1
5 U.S.C. § 3(2)....35
5 U.S.C. § 704....18
5 U.S.C. § 706(2)....44, 45
5 U.S.C. § 706(2)(A)....9
5 U.S.C. §§ 701-706....1
5 U.S.C. app. 2 § 10....5
5 U.S.C. app. 2 § 2(b)....5
5 U.S.C. app. 2 § 3(2)....1, 2, 14, 21, 38
5 U.S.C. app. 2 § 5....5
5 U.S.C. app. 2 § 5(b)....41, 42, 43
5 U.S.C. app. 2 § 5(b)(2)....2, 5, 17, 34
5 U.S.C. app. 2 § 5(b)(3)....34
5 U.S.C. app. 2 § 9....5
5 U.S.C. app. 2 §§ 1-16....1

Rules and Regulations

9 C.F.R. § 86.8 7
9 C.F.R. pt. 86 .... 3, 4, 6, 7, 8
D. Wyo. L.R. 83.6 .... 9, 10, 11, 12, 19, 45, 46, 47, 48, 49
Fed. R. Civ. P. 12(a)(2) 45, 47

Other Authorities

APHIS Factsheet, Questions and Answers (Dec. 2012) 7
Brian Fletcher, Comment, Cheney v. United States Dist. Ct. for D.C., 28 HARVARD ENVTL. L. REV. 605 (2004) 40
Notice and Request for Comments, Use of Radio Frequency Identification Tags as Official Identification in Cattle and Bison, 85 Fed. Reg. 40,184 (July 6, 2020) 9
S. 3529, 92d Cong., 2d Sess. (1972) 27
S. Rep. No. 92-1098 (1972) 28, 38, 39
Stephen Stark & Sarah Wald, Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action, 36 ADMIN. L. REV. 333 (1984) 58
USDA News Release, USDA Announces Intent to Pursue Rulemaking on Radio Frequency Identification (RFID) Use in Animal Disease Traceability (Mar. 23, 2021) 9
USDA News Release, USDA Announces Intent to Pursue Rulemaking on Radio Frequency Identification (RFID) Use in Animal Disease Traceability (March 23, 2021) 62
Webster's New Collegiate Dictionary, G & C. Merriam Co. (1981) 25

Statement of Related Cases

There are not related cases or appeals.

GLOSSARY

APA	Administrative Procedure Act
App.	Appendix
APHIS	Animal and Plant Health Inspection Service
AR	Administrative Record
CTWG	Cattle Traceability Working Group
FACA	Federal Advisory Committee Act
Factsheet	APHIS, "Factsheet; Advancing Animal Disease Traceability: A Plan to Achieve Electronic Identification in Cattle and Bison" (April 2019)
PTC	Producers Traceability Council
R-CALF	Plaintiff Ranchers Cattlemen Action Legal Fund United Stockgrowers of America
RFID	Radio Frequency Identification
USDA	U.S. Department of Agriculture

JURISDICTIONAL STATEMENT

Appellants' Amended Complaint, filed on April 6, 2020 in the U.S. District Court for the District of Wyoming, asserts a claim under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1-16, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202. The district court had subject-matter jurisdiction over the claim under 28 U.S.C. § 1331 (federal question). The district court entered final judgment for Appellees disposing of all claims on May 14, 2021.

Appellants filed their timely notice of appeal on July 7, 2021. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Did Appellees "establish" or "utilize" the Cattle Traceability Working Group ("CTWG"), thereby qualifying CTWG as an "advisory committee" within the meaning of FACA, 5 U.S.C. app. 2 § 3(2)? Appellants raised the issue in the Amended Complaint (App.45-46) and in their opening district court brief (ECF 51 at 13-24). The district court ruled on the issue at App.169-174.[1]

[1] Citations to pages in the Appendix are referenced as "App.xx." Citations to Docket Numbers in the district court docket are referenced as "ECF xx." Citations to pages in the Administrative Record are referenced as "ARxx." Relevant portions of the Administrative Record, as well as relevant district court filings, are included in the Appendix.

(2) Did Appellees "establish" or "utilize" the Producers Traceability Council ("PTC"), thereby qualifying PTC as an "advisory committee" within the meaning of FACA, 5 U.S.C. app. 2 § 3(2)? Appellants raised the issue in the Amended Complaint (App.45-46) and in their opening district court brief (ECF 51 at 13-24). The district court ruled on the issue at App. 169-174.

(3) In their dealings with CTWG and PTC, did Appellees comply with the procedural requirements that FACA imposes on a federal "advisory committee"? Appellants raised the issue in the Amended Complaint (App.45-51) and in their opening district court brief (ECF 51 at 6-7, 11). The district court ruled on the issue at App.161-162.

(4) Was the membership of PTC "fairly balanced in terms of the points of view represented?" FACA, 5 U.S.C. app. 2 § 5(b)(2). Appellants raised the issue in the Amended Complaint (App.46, 49-50) and in their opening district court brief (ECF 51 at 24-26). The district court dismissed Appellants' FACA claims without reaching the "fairly balanced" issue.

(5) Have Appellees provided a "satisfactory explanation"—as required by the APA—for their decision to accept advice from CTWG and PTC without complying with FACA procedural requirements? Appellants raised the issue in their motion to compel defendants to answer the complaint and for discovery (ECF

35), their motion for reconsideration of the motion to compel (ECF 43), and in their opening district court brief (ECF 51 at 28-29). The district court dismissed Appellants' FACA claims without reaching the "satisfactory explanation" issue.

(6) Did the district court comply with the Federal Rules of Civil Procedure and the APA when it: (a) excused Appellees from filing an answer to the amended complaint; (b) relied solely on Appellees' self-selected "record" in ruling on Appellants' FACA claims; and (c) denied Appellants' requests to engage in discovery? Appellants raised the issue in their motion to compel defendants to answer the complaint and for discovery (ECF 35) and their motion for reconsideration of the motion to compel (ECF 43). The district court ruled on the issue at App.153-160.

INTRODUCTION

On January 9, 2013, Appellees U.S. Department of Agriculture, *et al.* (collectively, "USDA") published a final rule (the "2013 Rule") entitled "Traceability of Livestock Moving Interstate." 78 Fed. Reg. 2040 (2013), codified at 9 C.F.R. pt. 86. The 2013 Rule established requirements for the official identification and documentation necessary for the interstate movement of certain types of livestock, including cattle (the principal focus of Appellants). The 2013 Rule (which is still in effect) was designed to provide States, Tribes, and

producers with maximum flexibility in implementing livestock-identification systems in order to meet local needs, and to encourage the use of low-cost technology. In keeping with those goals, the 2013 Rule approved the use of official metal eartags, properly registered brands, group/lot identification numbers, backtags, tattoos, and other forms of identification as agreed to by shipping and receiving States.

In 2017, USDA began efforts to eliminate most of the traceability and identification techniques approved in the 2013 Rule. In particular, USDA, through its subagency Respondent/Appellee Animal and Plant Health Inspection Service ("APHIS"), concluded that the livestock industry should phase out the use of metal eartags, brands, backtags, and similar low-cost forms of identification, and convert to the exclusive use of RFID eartags, with such mandate to become effective on January 1, 2023.

Appellees recognized that a smooth transition to mandatory RFID technology would require input from all segments of the livestock industry to assist with a wide variety of practical and logistical issues—such as selecting a uniform technology for RFID devices. They therefore decided to arrange for the creation of an advisory committee (initially named the "Cattle Traceability Working Group") to assist them with that transition. They also realized that creating an

advisory committee might serve to minimize widespread opposition to mandatory RFID eartags among livestock producers.

FACA requires advisory committees "established" or "utilized" by a federal agency to comply with numerous procedural requirements—including filing a detailed charter, giving advance notice of meetings in the Federal Register, holding open meetings, having an officer or employee of the federal government preside over or attend every meeting, and making records available to the public. *See* 5 U.S.C. app. 2 §§ 5, 9, 10. Congress's stated purposes in adopting FACA included ensuring that "standards and uniform procedures ... govern the establishment, operation, administration, and duration of advisory committees" and that "the Congress and the public ... be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees." 5 U.S.C. app. 2 § 2(b).

Appellants Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al.* (collectively "R-CALF"), allege in their Amended Complaint that APHIS and USDA violated FACA both by failing to comply with FACA's procedural requirements and failing to ensure that advisory committee membership was "fairly balanced in terms of the point of view represented." 5 U.S.C. app. 2 § 5(b)(2). Appellees declined to answer or otherwise respond to the amended complaint and instead submitted a small number of documents they self-identified

as an "administrative record." Although the proffered documents make *no* mention of FACA, they conclusively demonstrate that USDA/APHIS both "established" and "utilized" CTWG and PTC within the meaning of FACA. Given USDA's concession that it did not follow the procedural steps prescribed by FACA, Appellants are entitled to judgment as a matter of law

The district court also erred in denying Appellants' requests for discovery to supplement Appellees' woefully inadequate record. R-CALF is challenging Appellees' failure to comply with any of FACA's procedural requirements; a record that fails to mention FACA entirely quite obviously does not provide an adequate explanation of Appellees' decision not to comply. Under those circumstances, courts routinely grant FACA plaintiffs an opportunity to engage in discovery. The trial court abused its discretion in denying R-CALF a similar opportunity.

STATEMENT OF THE CASE

The 2013 Rule governs livestock identification and traceability. The Rule supports use of "low cost technology" for cattle traceability by allowing use of metal eartags and other types of identification. *APHIS Factsheet, Questions and Answers* (Dec. 2012) at 1 and 3. ("to encourage its use, USDA plans to provide these eartags at no cost to producers to the extent funds are available."). ECF 1-1 at

Exh. 4. The 2013 Rule also specifically prohibited States and Tribes from requiring livestock producers to use RFID technology. 9 C.F.R. § 86.8.

In direct contravention of the 2013 Rule, Appellees in April 2019 issued a two-page guidance document described as a "Factsheet" stating that "[b]eginning January 2023, animals that move interstate and fall into specific categories will need official individual RFID eartags." App.55. According to the Factsheet, the "[a]nimals that will require individual RFID tags include" certain beef cattle, bison, and dairy cattle. App.56.

R-CALF filed its initial Complaint in the District Court for the District of Wyoming in October 2019, alleging that Appellees' new RFID policy pronouncement violated, *inter alia*, the APA and the 2013 Rule. ECF 1. Appellees responded by withdrawing the Factsheet and later filing a motion to dismiss, arguing that withdrawal of the Factsheet mooted the complaint. ECF 10, 11. The district court agreed and, on February 13, 2020, issued an order dismissing the complaint. App.11-18. The district court subsequently authorized Appellants to file an amended complaint to pursue the claim that Appellees violated FACA (which claim was included in the initial Complaint but not addressed in the district court's order). App.19-22.

Although they withdrew the Factsheet (after being sued), Appellees have not

abandoned their efforts to force livestock producers to use RFID technology. In July 2020, for example, APHIS published in the Federal Register a policy proposal that would effectively abrogate the 2013 Rule. APHIS proposed that, beginning in 2023, it would "only approve RFID tags as official eartags for use in interstate movement of cattle and bison." *See* Notice and Request for Comments, Use of Radio Frequency Identification Tags as Official Identification in Cattle and Bison, 85 Fed. Reg. 40,184, 40,185 (July 6, 2020). APHIS used a notice-and-comment procedure, which was an improvement over its clearly improper attempt to use a "Factsheet" guidance document never published in the Federal Register. APHIS's 2020 approach was fatally flawed, however, by proposing to amend how the 2013 regulations were applied without changing their regulatory text.

R-CALF and other cattle producers filed comments, strongly objecting to the proposal. After reviewing the 944 comments it received, APHIS announced in March 2021 that it would not proceed with its policy-statement approach (that effectively adopted a mandatory RFID requirement without amending the 2013 Rule). APHIS stated that it would instead pursue mandatory RFID through a new rulemaking proceeding. *See* USDA News Release, USDA Announces Intent to Pursue Rulemaking on Radio Frequency Identification (RFID) Use in Animal Disease Traceability (Mar. 23, 2021). The news release reiterated

USDA's/APHIS's commitment to eventual adoption of mandatory RFID: "APHIS continues to believe that RFID tags will provide the cattle industry with the best protection against the spread of animal diseases." Thus, while APHIS has now abandoned its second abortive attempt to amend the 2013 regulations without adhering to the governing APA processes, it has not given up its goal of eventually forcing mandatory RFID on the livestock industry.

Appellants filed their Amended Complaint on April 6, 2020, detailing their claims that CTWG and PTC are federal advisory committees within the meaning of FACA and that Appellees' failure to comply with the Act's requirements for such committees was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[3] Appellees declined to answer or otherwise respond to the Amended Complaint. They asserted in their initial "Status Report" that because R-CALF sought APA "review of an action taken or withheld by an administrative agency," the case was governed by the district court's Local Rule 83.6—which excuses the filing of an answer in cases involving review of administrative action and instead requires an agency to lodge an administrative record with the court consisting of:

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[3] R-CALF's initial Complaint alleged that Appellees violated FACA in connection with a third advisory committee, the State-Federal Animal Disease Traceability Working Group. R-CALF did not pursue that claim in the Amended Complaint. *See* App.164 n.2.

> (A) the final agency action sought to be reviewed or enforced; (B) the findings or report on which it is based (including all documents and materials directly or indirectly considered by agency decision-makers); and if existing, (C) the pleadings, evidence, and proceedings before the agency.

See App.126.

In July 2020, USDA lodged a small number of documents with the district court and claimed that they constituted an "Administrative Record" that contained "all of the available documents and materials directly or indirectly considered by [APHIS's Veterinary Services branch] in connection with [CTWG] and [PTC]." App.132. This "Record," however, was both incomplete and inadequate. None of the documents even mentions FACA in relation to CTWG or PTC, and thus they provide no explanation or support for Appellees' supposed decision *not* to undertake the procedural steps required of the government when interacting with a FACA committee. In particular, the Record contained neither "the final agency action sought to be reviewed" nor "the findings or report on which it is based," as required by Local Rule 83.6.[4]

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[4] Even Appellees recognized the inadequacy of their Record. After R-CALF discovered (through a Freedom of Information Act ("FOIA") request) that Appellees possessed additional documents that discussed CTWG and PTC, Appellees supplemented the "record" and lodged those documents with the court on August 28, 2020. App.138-142.

R-CALF uncovered additional documents throughout 2020-21 that were in Appellees' possession and highly relevant to R-CALF's FACA claims. It filed

On August 17, 2020, R-CALF filed a motion to require Appellees to answer the Amended Complaint or, alternatively, to permit R-CALF to engage in discovery for purposes of supplementing the Record. ECF 35. The Magistrate denied the motion, App.143-146, and the district court denied R-CALF's motion for reconsideration. App.147-152.[5] The district court held that discovery is impermissible in FACA cases, reasoning that: (1) FACA does not create an express private right of action, and thus judicial review of alleged FACA violations may proceed only under the APA; (2) judicial review of an APA action is limited to the administrative record; and (3) although R-CALF cited court decisions authorizing discovery in FACA cases, those decisions are erroneous and may have been based on a mistaken belief that FACA itself creates a private right of action. App.151-152. The court granted R-CALF 14 days "to submit any request under Local Rule 83.6(b)(3) for completion of the record or for consideration of

four separate motions to supplement the Record with the documents it uncovered. ECF 35, 47, 52, 62. Judge Freudenthal agreed (over Appellees' objections) to include many of the proffered documents in the Administrative Record, App.153-160 & 162, but Appellees themselves took no steps after August 28, 2020 to supplement the Record.

[5] The Magistrate stated that R-CALF's motion was "untimely," even though R-CALF filed its motion six weeks before the September 28, 2020 deadline (established in the court's scheduling orders (ECF 30 and 34)) for lodging objections to the Record. The district court's order denying reconsideration addressed the merits of R-CALF's arguments and said nothing suggesting that R-CALF (due to alleged untimeliness) waived its right to object that the Record

extra-record evidence." App.152.[6]

Applying Local Rule 83.6 to R-CALF's FACA claims, the district court directed R-CALF to file an appellate-style opening brief, with Appellees' opposition brief due 30 days later. These procedures were highly unfair to R-CALF, which filed its opening brief without Appellees ever having been required to explain their position in the case—that is, an explanation of why Appellees determined that they need not comply with FACA's procedural requirements in connection with the activities of CTWG and PTC.

On May 13, 2021, District Judge Freudenthal ruled as a matter of law in favor of Appellees on the basis of the Record and dismissed R-CALF's FACA claims with prejudice. App.161-175. She stated that FACA's applicability in this case boils down to a single issue: were the CTWG and PTC either "established" or "utilized" by USDA/APHIS within the meaning of FACA? App.162. She then held that USDA neither established nor utilized the two advisory committees. App.169-174.

The district court held that "the term 'established' should not be read beyond

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produced by Appellees failed to satisfy the requirements of Local Rule 83.6.

[6] As noted above, R-CALF filed several such motions in the ensuing months as USDA provided additional documents in response to R-CALF's FOIA request (that Appellees failed to produce with the "Record"), with the district court agreeing to supplement such "Record" with a number of those documents.

a narrow formulation" and should not be understood to apply to "a group which is not directly formed by a government agency." App.172 (emphasis in original). Based on the Record, the court stated, "[I]t seems clear that APHIS wanted, needed, envisioned and recommended the creation of an industry-led group (like CTWG and PTC) to work in furtherance of APHIS's objective to improve the effectiveness of the [Animal Disease Traceability] program and move toward an [RFID] system for cattle consistent with APHIS's targeted implementation date of January 1, 2023." App.173. But the court ruled as a matter of law that USDA/APHIS did not "establish" the advisory committees because, although "CTWG was formed 'as an outcome'" of a September 2017 meeting organized by USDA/APHIS and at which they heavily lobbied for creation of the advisory committee, it was not "directly formed" until a later organizational teleconference not attended by any USDA/APHIS officials (held in November 2017). *Ibid*.[7] The court based its decision on "a narrower rather than a literalistic interpretation" of the term "established." App.174.

Turning to "utilized," the court held that a federal agency should be deemed

[7] To further support its holding the court stated, "there is no dispute that neither group was funded by APHIS." *Ibid*. The court cited to no document in the Record in support of its no-funding claim, and there is none. R-CALF does not know whether Appellees provided funding; that would have been among R-CALF's first inquiries if it had been permitted to engage in discovery.

to have "utilized" an advisory committee only if the "the group is 'amenable to ... strict management by agency officials.'" App.174 (quoting *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 457-58 (1989)). The court held that CTWG and PTC were not "utilized" by USDA/APHIS within the meaning of FACA, because "nothing in the Administrative Record supports the conclusion that APHIS exercised actual management or control over the operations of either CTWG or PTC." *Id.*

SUMMARY OF ARGUMENT

Based on the facts set out in the Administrative Record (even in its present anemic state), it is readily apparent that USDA/APHIS "established" and "utilized" CTWG and PTC within the meaning of FACA. Accordingly, those committees fit within FACA's definition of "advisory committees." 5 U.S.C. app. 2 § 3(2). Appellees do not dispute that they did not undertake the procedural steps required of advisory committees. R-CALF is therefore entitled to judgment as a matter of law that Appellees violated FACA in their dealings with CTWG and PTC, and issuance of an injunction prohibiting Appellees from using any of the materials generated by those committees.

The district court's holding that Appellees were not required to comply with FACA was based on a crabbed understanding of the word "established." The

district court held that "established" as used in FACA should be accorded "a narrower rather than literalistic interpretation." App.174. That holding conflicts with Supreme Court FACA precedent, which directs that "established" is to be interpreted broadly, in accordance with its commonly understood definition. *Public Citizen*, 491 U.S. at 459-63. Later federal appeals court decisions have endorsed that broad interpretation of the word "established." *See, e.g., Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1074-86 (11th Cir. 2002); *Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton* ["*AAPS*"], 997 F.2d 898, 913-14 (D.C. Cir. 1993).

As the district court conceded, after reviewing the facts set forth in the Record, "[I]t seems clear that APHIS wanted, needed, envisioned and recommended the creation of an industry-led group (like CTWG and PTC) to work in furtherance of APHIS's objective to improve the effectiveness of the [Animal Disease Traceability] program and move toward an [RFID] system for cattle consistent with APHIS's targeted implementation date of January 1, 2023." App.173. That concession accurately encapsulates Appellees' motivations and concrete actions in 2017 to ensure creation of an advisory committee that would assist in development and implementation of mandatory RFID technology. Numerous Record documents demonstrate that Appellees decided in 2017 that: (1)

RFID technology should become mandatory for all cattle by January 1, 2023; (2) they needed to develop a comprehensive plan to address "the multitude of very complex issues related to the implementation of a fully integrated electronic system"; and (3) a "specialized industry-le[d] task force with government participation should develop the plan." AR 124; *see also* AR 133, 138-142, ECF 62-2.

The Record also confirms the following: (1) Appellees urged the formation of CTWG at a September 2017 meeting in Denver that was co-sponsored and financed by Appellees; (2) numerous APHIS employees actively planned and participated in the Denver meeting; (3) at the Denver meeting, participants met and agreed to create the advisory committee for which Appellees were lobbying; (4) CTWG thereafter had a fixed membership consisting largely of individuals not employed by the federal government; and (5) CTWG (and its various subgroups) met regularly and made a series of recommendations to APHIS regarding implementation of RFID technology. AR228-230, 297-300, 794-796, 798, 803-807, 820-825, 910–913. The Record also demonstrates that due to internal dissension within CTWG, APHIS and one faction of CTWG agreed to dissolve CTWG and continue its work under a new name (PTC)—with APHIS officials serving as members of PTC. AR1018-1021.

This Record evidence demonstrates that Appellees "established" CTWG and PTC under any commonly understood definition of that word—and, more importantly, did so within the meaning of FACA. Even though the district court summarized the Record consistent with this same evidence, it arrived at the opposite legal conclusion by construing FACA's use of the word "established" in an inappropriately narrow manner.

The Record also confirms that APHIS "utilized" CTWG and PTC within the meaning of FACA. Although *Public Citizen* cautioned against adopting an overly broad interpretation of the word "utilized," the Court nonetheless concluded that the phrase "established or utilized" "is more capacious than the word 'established'" standing alone. 491 U.S. at 461-62. The Record shows that APHIS "utilized" CTWG and PTC by repeatedly soliciting and receiving advice regarding implementation of RFID technology and mandates.

Appellees violated FACA by failing to comply with any of the procedural requirements imposed on federal agencies that establish and/or utilize such committees. APHIS also violated FACA by failing to ensure that PTC "was fairly balanced in terms of the point of view represented ... by the advisory committee." 5 U.S.C. app. 2 § 5(b)(2). Indeed, the Record demonstrates that APHIS's sole purpose in establishing the imbalanced PTC was *to exclude* the point of view

represented by the many cattle producers who opposed RFID mandates. This Court has strongly endorsed the right of aggrieved parties to obtain judicial relief for violations of FACA's "fair balance" requirement. *Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1232-34 (10th Cir. 2004).

Alternatively, Appellants are entitled to judgment in their favor regardless of whether the Court determines that the Record provides a sufficient basis for determining that APHIS "established" and "utilized" CTWG and PTC within the meaning of FACA. Appellees do not contest that the agency actions/inactions of which R-CALF complains are reviewable under the APA. 5 U.S.C. § 704. Under the APA, a federal agency acts arbitrarily and capriciously if the record indicates that the agency failed to "examine[ ] 'the relevant data' and articulate[ ] '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 U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The documents produced by APHIS include *no* discussion of FACA, let alone an articulation of why USDA and APHIS decided they did not need to comply with FACA's procedural requirements in the course of their dealings with CTWG and PTC. Because the Record fails to explain the basis for Appellees' decision, Appellants are entitled to judgment on

their APA claim.

Finally, the district court abused its discretion in applying Local Rule 83.6 and denying Appellants' repeated requests for discovery. Rule 83.6 excuses a defendant's obligation to file an answer, bars discovery, and requires a review of agency action to be decided solely on the administrative record; but it does so on the explicit understanding that the record will set out both "the final agency action sought to be reviewed" and "the finding or report on which it is based." D. Wyo. L.R. 83.6(b)(1). The Record produced by Appellees did neither. Under those circumstances, and in the event that this Court does not enter judgment in Appellants' favor as requested above, R-CALF is entitled at the very least to engage in discovery to determine the bases for Appellees' action and whether such action "was justifiable under the applicable standard." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

STANDARD OF REVIEW

The district court decided no factual issues. Rather, the court decided the case on the basis of facts set out in the Administrative Record.

The district court rendered legal conclusions regarding whether the uncontested facts demonstrated a violation of FACA. Those legal conclusions are subject to *de novo* review in this Court. *United States v. Stein*, 985 F.3d 1254,

1262 (10th Cir. 2021). To the extent that any of the district court's conclusions can be deemed rulings on mixed questions of law and fact, they too are subject to *de novo* review in this Court—because those questions required the district court "to expound on the law, particularly by amplifying or elaborating on a broad legal standard." *U.S. Nat'l Bank Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). This Court's "standard of review of the lower court's decision in an APA case is *de novo.* ... We owe no deference to the district court's decision." *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001).

Alternatively, Appellants are appealing the district court's denial of their motion to engage in limited discovery. Discovery rulings are reviewed for abuse of discretion. *GWN Petroleum Corp. v. Ok-Tex Oil & Gas, Inc.*, 998 F.2d 853, 858 (10th Cir. 1993). A district court necessarily abuses its discretion when it bases its ruling on an error of law. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006).

ARGUMENT

I. THE CATTLE TRACEABILITY WORKING GROUP AND PRODUCERS TRACEABILITY COUNCIL ARE "ADVISORY COMMITTEES" SUBJECT TO FACA'S REQUIREMENTS BECAUSE APPELLEES "ESTABLISHED" THEM

FACA defines an "advisory committee" as:

> [A]ny committee, board commission, council, conference, panel, task

> force, or other similar group, or any subcommittee or other subgroup thereof ... which is
>
> (A) established by statute or reorganization plan, or
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

5 U.S.C. app. 2 § 3(2). Appellees do not dispute that the CTWG and PTC are each properly defined as a "committee, board commission, council, conference, panel, task force, or other similar group." Nor do they assert that either of the exceptions listed in § 3(2)'s two romanettes applies here. Thus, whether the CTWG or the PTC qualifies as an "advisory committee" turns solely on whether each was either "established" or "utilized" by Appellees "in the interest of obtaining advice or recommendations for … one or more agencies or officers of the Federal Government."

The Record proves as a matter of law that Appellees "established" both CTWG and PTC for that purpose. The Record demonstrates that Appellees determined that they needed technical advice and buy-in from the livestock industry, to assist with APHIS's plan to implement a mandatory RFID technology

system by 2023. To obtain that advice and acquiescence, Appellees announced in 2017 that they sought the formation of an industry-led task force with government-employee participation. Numerous APHIS officials participated in the September 2017 meeting in Denver at which, in response to Appellees' request, meeting participants agreed to the formation of CTWG, with at least two senior APHIS officials agreeing to play active roles in CTWG's subsequent work. AR927-929.

CTWG thereafter operated precisely as Appellees requested: devoting its entire mission and every agenda to RFID-related issues. As the district judge noted, "CTWG and APHIS worked closely together, and CTWG made frequent recommendations on [Animal Disease Traceability] and [RFID] technology." App.165-166 (citing AR795, 830-35, 867, 872-73, 884-87). When, from Appellees' vantage point, internal dissension within CTWG began to reduce the committee's effectiveness APHIS officials joined with the committee's pro-RFID faction to form a successor committee (PTC), which carried on as before, with APHIS officials continuing to serve as members, but without opposing viewpoints. AR1018-1021.

Under any commonly accepted definition of the word "establish," these facts

suffice to demonstrate that Appellees "established" CTWG and PTC.[8] Those committees came into existence solely because of Appellees' stated policy goals and efforts. Both committees had a formal structure and fixed membership. CTWG and PTC pursued the precise agenda dictated to them by federal government officials to implement the mandatory use of RFID eartags for livestock traceability and identification. And the CTWG ceased to operate once it was no longer useful for Appellees' purpose.

A. "Established" Should Be Construed Broadly, Not "Narrow[ly]" as the District Court Did

The district court premised its conclusion that Appellees did not "establish" the two committees by first finding that Congress intended the word "established" as used in FACA to be construed more narrowly than the word's every-day meaning. App.172 ("this Court concludes that the term 'established' should not be read beyond a narrower formulation"), App.174 ("In summary, considering the term "established" and applying a narrower rather than literalistic interpretation, the Court concludes APHIS did not establish either CTWG or PTC for the purposes or application of FACA."). That holding, however, conflicts sharply with this Court's statutory-construction case law, which creates a presumption that "Congress's intent is expressed correctly in the ordinary meaning of the words it

[8] *See, e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY, G. & C. Merriam Co. (1981) (to "establish" means "to bring into existence: found" or "to bring about: effect"). []

employs." *New Mexico Cattle Growers*, 248 F.3d at 1281-82. "Only the most extraordinary showing of a contrary legislative intent can 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 district court relied on *Public Citizen*, the Supreme Court's most comprehensive FACA decision, to support its contention that "established" should be construed narrowly. App.172. That reliance is misplaced; the meaning of "established" was not at issue in *Public Citizen* because all parties agreed that the advisory committee in question had not been established by the federal government. 491 U.S. at 452. Indeed, *Public Citizen*'s discussion of the word "established" (as used in FACA), while not part of the Court's holding, indicates that the word should be accorded its normal, broad meaning. For example, the Court noted when discussing FACA's legislative history that the Senate version of what became FACA did not include the word "utilized" but instead focused on initial creation of the advisory committee at issue—using the phrase "established or organized." *Id.* at 461 (citing S. 3529, 92d Cong., 2d Sess. §§ 3(1), (2) (1972)). The Court cited the Senate Report's explanation that that phrase should be construed broadly:

> Like the House Report, the accompanying Senate Report 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."

Ibid. (citing S. Rep. No. 92-1098, p.8 (1972)) (emphasis added).

The Court then stated that the Conference Committee's final version of FACA, which covered committees "established or utilized" by federal agencies, is "more capacious" than the Senate's earlier version, *id.* at 462, and thus the final version cannot be construed as a retreat from the Senate's mandated "liberal" interpretation of "established." *Ibid.* (stating that the bill's "initial focus on advisory committees established by the Federal Government, in an *expanded sense* of the word 'established,' was retained") (emphasis added).

Appellate courts have subsequently endorsed *Public Citizen*'s expansive interpretation of "established." The Eleventh Circuit sharply contrasted *Public Citizen*'s treatment of the word "established" with its treatment of the word "utilized," noting:

> The [*Public Citizen*] majority avoided [the need to address a serious constitutional question] by construing the term "utilized" in a way contrary to its plain meaning. In contrast, there is no need to run from the plain meaning of "established" 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.

In discussing *Public Citizen*'s explanation of Congress's decision to add the word "utilized" to FACA, the Eleventh Circuit stated:

> [*Public Citizen*] explained that the phrase "or utilized" was added in conference "simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly ... 'for' public agencies as well as 'by' such agencies themselves." ... The phrase applies, the Court said, not to privately organized groups, but to "advisory groups 'established,' on a broad understanding of that word, by the Federal Government."

Id. at 1085 (quoting *Public Citizen*, 491 U.S. at 462-63).[9]

The D.C. Circuit's approach is similar. *See AAPS*, 997 F.2d at 913-15. In defining what constitutes a committee "established" by the federal government, *AAPS* carefully distinguished between government requests for advice from unorganized groups of individuals (not covered by FACA) and requests for advice

[9] The district court's holding cannot be reconciled with *Miccosukee Tribe*. Although the district court recognized that Appellees had been lobbying throughout 2017 for creation of an advisory committee and played a leading role at the September 2017 meeting in Denver, App.173 ("CTWG was formed 'as an outcome of'" the Denver meeting) (quoting AR5), the court held that Appellees did not "establish" CTWG because CTWG's organizational teleconference occurred in November 2017 without any APHIS officials being on the line. *Ibid.* In sharp contrast, *Miccosukee Tribe* held that FACA applies not only to advisory groups formed "by" public agencies but also to such groups "formed indirectly ... 'for' public agencies." 304 F.3d at 1085 (quoting *Public Citizen*, 491 U.S. at 462-63). The only plausible reading of the Record is that formation of CTWG was undertaken, at the very least, "for" Appellees. This fact further supports Appellants' arguments here. The fact that even indirectly formed advisory bodies are included shows that a broad causal analysis should be employed.

from groups with a formal structure (covered by FACA):

> [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. … In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose.

Id. at 913-14 (emphasis added).

That the word "established" should be applied more broadly here is also supported by the concept of "causation." "It is standard tort doctrine that a reasonably foreseeable injury can arise from multiple causes, each arising from a breach of a different duty and each imposing liability accordingly." *Sheridan v. United States*, 487 U.S. 392, 406 (1988) (Kennedy, J., concurring). The notion that the history of the CTWG and PTC leading up to Appellees' regulatory actions on RFID requirements is irrelevant because one telephone conference occurred without APHIS officials participating runs contrary to fundamental principles of causation law and defies the entire Record in this case. The establishment of the CTWG and PTC was clearly part of a long-term strategy and policy debate that merged to explain why APHIS undertook its regulatory steps in 2019 and 2020.

B. The Record Demonstrates That the Committees Were "Established" by Appellees Under the Ordinary Meaning of the Word

The Record demonstrates that CTWG and PTC comfortably meet the three requirements (organized structure, fixed membership, and specific purpose) set out in *AAPS.* The Record is replete with documents from 2017 in which APHIS called for creation of an industry-led task force to provide technical advice regarding implementation of RFID technology;[10] and the numerous minutes of CTWG/PTC meetings that are included in the Record attest to the organized structure, fixed membership, and specific purpose of the committees.

Appellees acknowledge (AR005) that CTWG was organized at the September 26-27, 2017 "Strategy Forum on Livestock Traceability," held in Denver, Colorado (hereinafter, the "Forum").[11] Appellees argued in the district court that, despite their repeated calls in advance of the Forum for formation of an industry-led task force to advise APHIS on RFID-related issues, and despite their major role in the Forum, CTWG was not "established" by Appellees but rather was independently formed by interested cattle-industry participants. That claim is not

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[10] *See, e.g.*, AR139 (APHIS "[e]ncourage[s] formation of an industry-led task force with input from animal health officials, as needed. The task force would represent a broad spectrum of industry organizations to thoroughly assess alternatives and gather input from industry sectors."); ECF 47-3 (9/25/17 slide show prepared by APHIS). *See also* ECF 47-4 at 9 ("A group of industry stakeholders needs to be assembled to drive the ADT movement forward."); ECF 47-4 at 25); AR173; ECF 52-1; ECF 62-1 through 62-5.

[11] *See also* AR141 (APHIS timeline states that a "working group" was formed at the Forum and became known as CTWG in November 2017).

only disingenuous but defies common sense and is contradicted by Appellees' own Record.

APHIS co-hosted and partially funded the Forum. AR005, 419, 736; ECF 47-4 at 3 and 27 ("The 2017 Strategy Forum on Livestock Traceability was funded in part by ... the USDA"). Four of the ten members of the Forum's "Planning Committee" were senior APHIS officials (Dr. Geiser-Novotny, Mr. Hammerschmidt, Dr. Munger, and Dr. Scott). ECF 47-2. Senior APHIS officials comprised a significant percentage of attendees. ECF 47-1. The working group whose creation was agreed to at the Forum (CTWG) was the precise sort of committee for which APHIS had been lobbying: a committee consisting primarily of cattle-industry representatives (with APHIS representation (*see* AR927-929 and ECF 47-4 at 25)) whose sole agenda was providing advice to APHIS on RFID-related issues. During an early meeting at which the name CTWG was chosen, Dr. Burke Healey, Associate Deputy of APHIS (AR546), was designated as CTWG's government "point person." AR385.

Because APHIS officials apparently did not save the notes they made regarding Forum activities (at least none have been produced), the Administrative Record does not include documents memorializing the precise terms of the agreement or decision to form CTWG. Appellees have objected to Appellants'

taking the depositions of agency officials who attended in order to ascertain their knowledge regarding that decision/agreement. In light of the factors cited above, however, the great weight of the evidence demonstrates that Appellees "established" CTWG, as that word is commonly understood and how applies in the FACA context. Appellees cannot seriously contend—and the Record does not support—that cattle-industry representatives acted wholly independently of APHIS's exhortations when they formed a committee whose purpose precisely matched what Appellees had identified as necessary, planned for, and asked to be created (*i.e.*, "established"). As the district court found, and the Record strongly supports, "[t]hroughout 2018-19, CTWG and PTC sent APHIS a regular stream of RFID-related technical advice, approved by formal votes of those committees." App.137 (citing AR864-867 (CTWG); AR335-336 (PTC)).

Moreover, APHIS deemed CTWG to be operating under its direct supervision. For example, APHIS actively and substantively revised messages that the CTWG leaders sent to members. AR267-269. APHIS actively and substantively edited news releases that the PTC distributed to the public. AR1061-1063. Open acknowledgment of that supervisory control is contained in an April 2018 speech to the National Institute of Animal Agriculture ("NIAA") by Dr. Jack Shere (APHIS's Associate Administrator, AR546). Dr. Shere spoke

confidently regarding the "purpose" and "goal" of the CTWG, something he could not have presumed to know if the CTWG did not take its marching orders from APHIS:

> The purpose of the CTWG is to work collaboratively across the various segments of the cattle industry to enhance the traceability of animals for purposes of protecting animal health and market access. The CTWG works to create consensus among stakeholders on key components of traceability so there is an equitable sharing of costs, benefits, and responsibilities across all industry segments. The overarching goal of the CTWG is to enhance cattle identification and traceability to a level that serves the needs of producers, marketers, exporters, and animal health officials.

AR510; *see also* AR502. By early 2018, Dr. Shere had already been working with CTWG "over the past couple of months." AR441.

As for PTC, it was essentially CTWG with a new name and much the same membership. PTC was also "established" by Appellees, with APHIS being intimately involved in the transition from CTWG to PTC in the spring of 2019. The transition came about because pro-RFID members of CTWG objected to what they viewed as obstructionism by members (including Appellant Kenny Fox) opposed to mandatory RFID technology for cattle.

In a March 28, 2019 letter, several pro-RFID members threatened to cease participating in CTWG unless the committee could "develop consensus" on going forward with mandatory RFID. AR892. CTWG members, including Dr. Tony

Forshey (co-facilitator for CTWG and who was in constant contact with senior APHIS officials), responded that same day by seeking a meeting with APHIS "to discuss next steps." AR852. CTWG members and senior APHIS officials met on April 1, 2019 to discuss appropriate "next steps." AR897-98, AR872, AR879, AR897, AR902. Not surprisingly, later internal APHIS correspondence shows that APHIS immediately began contemplating a plan to terminate CTWG and replace it with a new committee. For example, one APHIS official asked if there was a proposal to establish a new committee. AR903. Another APHIS official responded, "I don't know what the next group might look like or *how <u>we pull them together</u>* but something we should consider." AR901 (emphasis added). The first official then suggested that perhaps an APHIS official should serve at "the helm" of the new committee. *Id.*

In the following weeks, the CTWG members who had contacted APHIS about CTWG's internal dissension took steps to form a new committee (PTC), whose membership would be largely identical to CTWG except that those opposed to mandatory RFID technology (including Plaintiff Fox) would be excluded. AR914-16, AR927-28. The meeting at which PTC was officially launched was a CTWG meeting attended by two senior APHIS officials, Dr. Aaron Scott and Dr. Sarah Tomlinson, as "Members" of the CTWG. *Id.* Dr. Tomlinson became a

member of PTC and attended most if not all subsequent PTC meetings.

The only one plausible explanation for this chain of events is that APHIS was a party to the plan to replace CTWG with PTC. Indeed, APHIS, specifically referring to themselves as "we," admitted that they were the motivating force behind the new entity—"I don't know what the next group might look like or *how we pull them together* but something we should consider."

The record also shows that the CTWG members who took the lead in launching PTC were repeatedly in contact with APHIS officials. AR852, 914-16, 920, 940, 923-924, 917. Two APHIS officials attended the meeting at which PTC was officially launched, with one agreeing to serve as a PTC member. It simply is not plausible that members of CTWG would abandon CTWG and seek to form a new committee whose exclusive agenda (providing advice to APHIS on RFID-related issues) was identical to CTWG's *unless* APHIS signaled its acceptance of the move during one of their many conversations. Under those circumstances, APHIS "established" PTC as a matter of law.

C. CTWG and PTC Are Precisely the Types of Advisory Committees That Congress Intended to Regulate When It Adopted FACA

Subjecting CTWG and PTC to FACA's procedural requirements would directly serve the purposes that Congress had in mind when it adopted FACA. That fact provides additional support for R-CALF's proposed construction of

FACA's text.

Congress adopted FACA in response to concerns that representatives of major industries were disproportionately influencing government policy through their participation in unpublicized advisory committees:

> The Act followed on the heels of a disclosure that "the [Office of Management and Budget], without statutory authority, had established close liaison with an Advisory Council on Federal Reports (ACFR) composed entirely of business officials from each of the major industries" but not "consumer, labor, [ ] or small business representatives."

Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 16 (1st Cir. 2020) (quoting S. Rep. No. 92-1098, at 2 (1972)). Among the FACA provisions adopted to prevent such "agency capture" were requirements that the activities of advisory committees be publicized, that the membership of any committee be "fairly balanced in terms of the points of view represented," 5 U.S.C. app. 2 § 5(b)(2), and that measures be adopted "to assure that the [committee's] advice and recommendations ... will not be inappropriately influenced by ... any special interest." 5 U.S.C. app. 2 § 5(b)(3).

Many members of CTWG and PTC were employees of major corporations (large beef processors and companies involved in the development and manufacturing of RFID technology). Subjecting those committees to FACA requirements would decrease the possibility that the committees would make

biased recommendations for their benefit at the expense of independent ranchers such as Appellants Tracy and Donna Hunt, and Kenny and Roxy Fox.

One reason cited by the district court for finding that Appellees did not "establish" the committees is that only a small number of federal officials attended committee meetings, and their status as official "members" was not clear. App.173. But FACA's statutory language cuts in precisely the opposite direction. FACA exempts from its coverage any committee composed "wholly" of federal employees, 5 U.S.C. § 3(2). It is committees such as CTWG and PTC, almost all of whose members were drawn from private industry yet are given ready access to government officials who regulate their industries, that are bound by FACA's strictures.

The district court also asserted that the Record showed that "neither group was funded by APHIS." App.173. On the contrary, there is no evidence in the Record about the source of the committees' funding. R-CALF has no idea whether APHIS funded the committees (as it did so many other related activities, such as the September 2017 Forum in Denver), and was denied the opportunity to find out the answer through discovery. Moreover, whether the committees received APHIS funding is irrelevant to whether Appellees actually "established" the committees. As the Supreme Court explained, FACA applies whenever a

federal 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." *Public Citizen*, 491 U.S. at 461 (quoting S. Rep. No. 92-1098, at 8 (1972)) (emphasis added). Representatives of private industry hardly need promises of financial support to be induced to provide private advice to federal regulatory officials. The outcomes of a regulatory process can provide their own financial reward. This is precisely why FACA includes "transparency, balance, and anti-'undue influence' requirements"—to avoid agency capture by private interests. Brian Fletcher, Comment, Cheney v. United States Dist. Ct. for D.C., 28 HARVARD ENVTL. L. REV. 605, 611 (2004).

II. CTWG and PTC Are "Advisory Committees" Subject to FACA's Requirements Because APHIS "Utilized" Them

Appellees did not simply establish CTWG and PTC and then leave those committees to fend for themselves. They instead worked closely with both committees, dictating their agendas, participating in messaging to members, and asking for their advice on a variety of specific issues. Based on that very close relationship, Appellees "utilized" CTWG and PTC within the meaning of FACA.

The Supreme Court concluded in *Public Citizen* that Congress intended "utilized" to be read somewhat narrowly. It reached that conclusion after applying

the constitutional-avoidance doctrine. It feared that ascribing an every-day meaning to "utilized" so as to apply FACA's requirements 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. Also, while conceding that a "straightforward" and "literal reading" of the term "utilized" would compel the conclusion that FACA applied to the Standing Committee, the Court concluded that the term plausibly could (and thus should) be read more narrowly, given that: (1) a straightforward reading would compel "odd results," such as finding that "FACA's restrictions apply if a President consults with his own political party before picking his cabinet," *id.* at 455; and (2) Presidents had been consulting with the Standing Committee for many years before FACA's adoption, yet nothing in FACA's legislative history suggested that Congress intended such consultation to be subject to FACA. *Id.* at 455-65.

Public Citizen nonetheless stressed that Congress' use of the word "utilized" carries independent significance, and that FACA's use of the term "established and utilized" was "more capacious" than the word "established" standing alone. *Id.* at 462. Without assigning a precise definition to "utilized" as used in FACA, the Court suggested that Congress might have added "utilized" "to clarify that FACA

applies to advisory committees established by the Federal Government *in a generous sense of that term*" and encompasses committees established either "by *or for*" a federal agency. *Ibid.* (emphasis added).

Because the Standing Committee clearly was not "established" by the federal government, *Public Citizen* held that the federal government's consultation with that committee was not subject to FACA. *Id.* at 465. In sharp contrast, the evidence cited above demonstrates that CTWG and PTC are encompassed within FACA's definition of committees "established or utilized" by a federal agency—particularly when that term is construed "generous[ly]" to include committees *indirectly* brought into being by the federal government. While APHIS took numerous steps to disguise its direct involvement in the establishment and operation of CTWG and PTC, *Public Citizen* confirms that FACA applies to any advisory committee brought into being by a federal agency "in the interest of obtaining advice or recommendations," 5 U.S.C. app. 2 § 3(2), regardless of the means used by the agency to bring about that result.[12]

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[12] One particularly comical effort by APHIS to disguise its involvement in PTC's operations occurred following issuance of a May 15, 2019 PTC "News Release" regarding its May 2019 meeting in Denver. As initially prepared, the News Release listed Dr. Sarah Tomlinson of APHIS as having attended the meeting as a PTC "member." AR313-14. That listing led to a flurry of emails from APHIS officials (including attorneys in the General Counsel's office) objecting to Tomlinson's listing. *See, e.g.*, AR318-19. One APHIS attorney suggested eliminating Tomlinson's name altogether. AR322-23. PTC eventually issued a

APHIS's overarching and direct supervision of CTWG and PTC reinforces the conclusion that APHIS "utilized" those committees within the meaning of FACA. In addition to regularly attending committee meetings, APHIS conducted at-least-weekly phone conferences with the chairmen of the two committees and each of their subcommittees as well as maintaining regular correspondence with them. Those contacts are memorialized in scores of documents in the Administrative Record. *See, e.g.*, AR48-49, 52, 63-66, 322-23, 383, 408, 447, 457, 466, 492, 493, 514, 532, 533, 553, 554, 559-562, 715, 748, 750, 785, 794-95, 798, 799, 800, 827, 828, 833, 848-51, 866, 932. APHIS considered the committees' work sufficiently important that it circulated information it received from them to all APHIS officials working on RFID-related issues. AR457.

The Record demonstrates that both APHIS and the two committees considered that it was up to APHIS to set the committees' agendas. *See, e.g.*, AR383 (APHIS requests that CTWG send it minutes of its meetings, and CTWG

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revised News Release that listed Tomlinson as "Government Liaison" and "a non-voting member." AR335-36. Katie Ambrose, Executive Director of the NIAA and the head of PTC, wrote to Tomlinson on May 16 to abjectly apologize for "my listing you incorrectly" and stating that "I would never, ever want to put you in any position where there are concerns or questions about *your important role in this council* from anyone!" AR 333 (emphasis added). Ambrose did not specify what those "concerns" might be, but the most plausible inference is that APHIS officials feared that disclosure of Tomlinson's direct participation in PTC activities might increase APHIS's FACA exposure.

does so); AR446 (APHIS sends a list of APHIS goals to CTWG "to helpfully get them on the same set of tracks we are on"); AR447 (APHIS schedules a meeting with CTWG so that CTWG can "work in parallel" with APHIS); AR514 (CTWG requests meeting with APHIS to determine what APHIS "considers to be the *most important* to be sure [CTWG is] tracking on the same page" with APHIS); AR533 (head of CTWG schedules meeting with APHIS's Associate Administrator "to be sure we continue to be in alignment with the work of USDA"); AR715 (APHIS directs CTWG to make RFID performance standards a focal point of its analysis); AR 833 (CTWG leaders conduct pre-meetings with APHIS officials in advance of regularly scheduled CTWG meetings); AR1044-45, 1061-63 (PTC does not send out press releases until after receiving USDA approval of draft releases).

Throughout 2018-19, CTWG and PTC sent APHIS a regular stream of RFID-related technical advice, approved by formal votes of those committees. *See, e.g.*, AR864-867 (CTWG); AR335-36 (PTC). The Record documents cited above remove any doubt that APHIS "utilized" both committees within the meaning of FACA and directed their activities.

III. APHIS VIOLATED FACA BY FAILING TO ADHERE TO FACA PROCEDURAL REQUIREMENTS AND FAILING TO ENSURE THAT PTC MEMBERSHIP WAS "FAIRLY BALANCED"

Because CTWG and PTC were "advisory committees," Appellees violated

FACA by failing to comply with any of the procedural requirements imposed on federal agencies that establish and/or utilize such committees. Indeed, Appellees do not contend that they complied; they instead seem inclined to rest their defense entirely on their unfounded contention that the CTWG and PTC were not subject to FACA's requirements.

The Administrative Record shows that APHIS violated FACA by failing to ensure that PTC's membership was "fairly balanced in terms of the point of view represented" as required by 5 U.S.C. app. 2 § 5(b). APHIS violated that requirement by denying representation on PTC for those cattle producers who opposed mandatory adoption of RFID technology (such as Appellant Kenny Fox).

This Court has endorsed the right of aggrieved parties to obtain judicial relief for violations of FACA's "fair balance" requirement. *Wenker*, 353 F.3d at 1232-34. The Court rejected the federal government's contention that FACA fair-balance claims are not justiciable. *Id.* at 1233 ("While the difficulty of determining what constitutes a 'fair balance' may incline courts to be deferential in reviewing the composition of advisory committees and may defeat a plaintiff's claims in a given case, this cannot be grounds for refusing to enforce the provision altogether."). The Court further held that individuals excluded from consideration for appointment to an advisory committee possessed Article III standing—based

on denial of their "interest in a fair opportunity to be appointed to" an advisory committee. *Ibid.*

Per *Wenker*, Appellant Kenny Fox possesses the requisite standing. He served as a member of CTWG. But when PTC replaced CTWG as APHIS's advisory committee on RFID issues, Fox was excluded from membership in the new committee due solely to his opposition to mandatory RFID requirements.[13] That exclusion suffices to provide Fox with standing to challenge APHIS's violation of § 5(b).

The Record demonstrates the accuracy of Fox's exclusion claim and the resulting imbalance in PTC membership. As outlined above, conflict between pro-RFID members of CTWG and members who opposed mandatory RFID came to a head in March 2019. Several prominent pro-RFID members threatened to cease participating in CTWG unless the committee as a whole ceased the debate on whether RFID should be mandatory and instead focus on how best to implement it. AR892. That letter led to a series of meetings between pro-RFID members and APHIS officials. AR897-98, 872, 879, 897, 901, 902. As a result of those meetings, CTWG ceased to operate and (with APHIS's support) was replaced by

[13] In connection with their November 30, 2020 Motion for Completion of Record, Appellants proffered to the district court Fox's November 30 Declaration, which detailed the facts surrounding his exclusion from PTC. ECF 47-8, App.588.

PTC.

Mandatory RFID technology is very controversial within the cattle industry. Many cattle producers oppose it for a variety of reasons (*e.g.,* high costs, infeasibility, privacy concerns, implementation, etc.). Other segments of the industry, including meat packers and RFID eartag manufacturing companies, support APHIS's push for mandatory RFID. The latter group being given disproportionate influence so that the RFID industry can earn economic "rents" from agency capture is one of the main ills that FACA is designed to avoid. *Cf. Zimomra v. Alamo Rent-a-Car, Inc.*, 111 F.3d 1495, 1504 (10th Cir. 1997) (Henry, J., concurring) (discussing "rent seeking by interest groups"). Under any plausible understanding of FACA's fair-balance requirement, APHIS's failure to ensure that PTC included members representing the views of independent cattle producers who oppose mandatory RFID technology violated APHIS's § 5(b) obligations.

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

R-CALF is entitled to judgment regardless of whether APHIS "established" and "utilized" CTWG and PTC within the meaning of FACA. The Record reveals that APHIS has failed to provide a satisfactory explanation for its actions/inactions in this case—its decision to work with and accept recommendations from CTWG

and PTC but not to comply with FACA's procedural requirements.

The theory underlying any federal-court case in which administrative action is to be reviewed on an administrative record is that the record provides an adequate basis for judging the propriety of the agency's action, thereby obviating any need for discovery. In this case, APHIS's self-selected collection of documents is woefully inadequate. Not one of the documents produced by Appellees even mentions FACA in relation to CTWG or PTC.

According to Appellee's worldview, this absence of documents relevant to its decision-making process means that the lawsuit should be dismissed based on an absence of proof. That convenient bootstrapping (since the agency largely controls the documents it opts to include in an administrative record), however, is not the rule of decision that governs lawsuits filed, as here, under the APA. Appellants allege that Appellees' actions with respect to CTWG and PTC were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Once Appellants came forward (as they clearly have) with colorable evidence that Appellees were seeking advice from CTWG and PTC, Appellees must provide, on the basis of *the Record* before the court (*i.e.*, not based on *post hoc* rationalizations by counsel for the government), a satisfactory explanation for their decision that they need not comply with FACA procedures.

As the Supreme Court has repeatedly explained, review under §706(2) requires a court to determine "whether [the government decision-maker] examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Commerce*, 139 S. Ct. at 2569 (quoting *Motor Veh. Mfrs. Assn.*, 463 U.S. at 43). Because Appellees' Record includes no such explanation,[14] R-CALF is entitled to judgment under § 706(2).

V. THE DISTRICT COURT ERRED IN APPLYING LOCAL RULE 83.6 AND REFUSING TO ALLOW APPELLANTS TO CONDUCT DISCOVERY

Appellants filed their Amended Complaint on April 6, 2020 (ECF 27) describing in detail how USDA violated FACA as well as the APA. Fed. R. Civ. P. 12(a)(2) required Appellees to file an answer or other responsive pleading within 60 days, but they never did so. They instead filed a "Status Report" on April 20, 2020 asserting that this case was governed by Rule 83.6 and that they would lodge an administrative record with the Court by July 6. Notably, they cited no case law supporting the argument that Appellants' FACA claims should be decided on the basis of an administrative record.

R-CALF is not seeking review of a discrete "action taken or withheld by an administrative agency" (such as a rulemaking or denial of a permit) as

[14] The only Record document that mentions FACA does so in a manner wholly unrelated to R-CALF's claims.

contemplated by Local Rule 83.6. R-CALF instead claims that Appellees engaged in an ongoing course of conduct throughout a two-year period (fall of 2017 through fall of 2019) that violated FACA, a law designed to ensure transparency and balance in the conduct of federal advisory committees. Courts have generally required the government agency to file formal responsive pleadings to such claims and, as appropriate, to engage in discovery. *See e.g., Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 391 (2004); *Wenker*, 353 F.3d at 1236.

Even if this matter would typically come within the purview of Local Rule 83.6, Appellees' "Administrative Record" as produced on July 6, 2020 was made up of only a small number of documents (99 in total, 368 pages, with substantial duplication) and was rife with errors, thereby calling into question whether it was compiled in good faith and confirming that discovery was warranted. As noted above, *none of the documents* included in the "Administrative Record" mentioned FACA in relation to the CTWG or PTC, and provided no explanation of Appellees' supposed "decision" that CTWG and PTC were not "advisory committees." Moreover, once USDA personnel started producing documents during the summer of 2020 in response to R-CALF's FOIA request, both R-CALF *and the Appellees* realized that the "Record" lodged on July 6 did not include many

of the documents related to the agency's involvement with the activities of the two advisory committees. In their August 13, 2020, filing with the district court, App.133-135, Appellees conceded the inadequacy of their previously lodged Record, asked to supplement it. The Magistrate granted that motion for an extension on August 17, 2020. App.136-37.

It was on that same day (August 17) that R-CALF filed an objection to Appellees' Administrative Record seeking two forms of relief: (1) an order requiring USDA to respond to the Amended Complaint by filing a responsive pleading, as required by Fed. R. Civ. P. 12(a)(2); and (2) an opportunity to engage in limited discovery to ascertain the basis for Appellees' claim that they were not subject to FACA requirements. *See* ECF 35 and 36.

On October 13, 2020, the Magistrate denied R-CALF's Motion. App.143-146. The district court denied R-CALF's request for reconsideration on November 16, 2020, finding that Local Rule 83.6 governs this action, and that discovery is not available in FACA cases. App.147-152. While the district court allowed R-CALF to "submit any request under Local Rule 83.6(b)(3)) for completion of the record, or for consideration of extra-record evidence," it also concluded that "the circumstances that warrant consideration of extra-record materials are 'extremely limited,'" and that R-CALF was required to "satisfy the

narrow conditions warranting an exception to the general rule that judicial review is generally limited to the administrative record…." App.147-48.

The district court's conclusions that R-CALF's FACA claim is governed by Local Rule 83.6, that this case must be decided on the basis of Appellees' self-identified and self-serving Administrative Record, and that discovery is unavailable in FACA claims were incorrect as a matter of law and an abuse of discretion. Reversal is appropriate.

A. This Matter Is Not Governed by Local Rule 83.6

The two primary issues in this case are whether Appellees' interactions with the CTWG and PTC over a two-year period violated FACA and, if so, whether R-CALF is entitled to its requested relief. *This case* thus does not seek "Review of Action of Administrative Agencies" within the purview, purpose and meaning of Local Rule 83.6. This case is instead a challenge to Appellees' efforts to circumvent and ignore their FACA obligations, and a request that they be prevented from relying upon or using any of the work product that was developed by these unlawful advisory committees. This issue is especially important now, considering USDA's March 2021 announcement that it intends to move forward with mandatory RFID.

Local Rule 83.6 governs "[r]eview of *an action* taken or withheld by an

administrative agency." Rule 83.6(a)(1) (emphasis added). R-CALF is not seeking review of any single "action taken or withheld." The Amended Complaint lists eight separate claims based on Appellees' misconduct that spanned a period of more than two years. Those claims should have been resolved by proceeding under the normal Rules of Civil Procedure and allow discovery. This procedure is how *every reported FACA decision* of which R-CALF is aware has proceeded. *See, e.g., Cheney*, 542 U.S. at 391.

The "Administrative Record" does not capture the Appellees' day-to-day interactions with the two advisory committees—interactions that are highly relevant to whether Appellees can be deemed to have "established" or "utilized" the CTWG or PTC. The Administrative Record includes no information regarding FACA's applicability to these committees and provides neither explanation of nor support for Appellees' decision not to apply FACA's mandated procedures. R-CALF was therefore entitled to pursue this case under the regular Rules of Civil Procedure and to conduct the discovery necessary to determine the nature of the relationship between Appellees and the advisory committees. It was an abuse of discretion for the district court to find otherwise.

B. R-CALF Should Have Been Allowed to Conduct Discovery

Every reported FACA decision of which R-CALF is aware has held that

FACA lawsuits are not decided on the government's self-selected administrative record but rather are subject to the discovery rules normally applicable in federal court proceedings. *See, e.g., Wenker*, 353 F.3d 1221. Courts routinely recognize that discovery is permissible in FACA cases, particularly when there are factual disputes regarding the federal government's claims that a committee is not an "advisory committee" subject to the Act. *See, e.g., AAPS*, 997 F2d at 915-16 ("further proceedings, including expedited discovery, are necessary before the district court can confidently decide whether the working group is a FACA committee").

It is obvious that Appellees' "Administrative Record" does not accurately reflect or contain all evidence regarding how they interacted with the CTWG and the PTC. The Record is also silent on the issue of *how, why, or when*, Appellees concluded that they were not required to comply with FACA's procedural requirements.

The APA, 5 U.S.C. § 706, requires that cases such as this be determined on the basis of the "whole record". The Supreme Court addressed the issue of what is the "whole record" in *Citizens to Preserve Overton Park*, 401 U.S. at 420, in which it overturned lower court decisions that upheld a Department of Transportation decision to build a highway through a Memphis park. It remanded

the case to the district court, stating as follows with regard to allowing discovery:

> That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.
>
> The court may require the administrative officials who participated in the decision to give testimony explaining their actions.

401 U.S. at 420.

Other courts have also recognized that "extra-record" discovery is appropriate when, as here, the record supplied by the agency fails to explain its decision. "In agency cases, limited extra-record discovery is only appropriate '… when the record is so bare that it prevents effective judicial review.'" *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011) (cleaned up). *See also Baptist Mem'l Hosp. v. Sebelius,* 566 F.3d 226, 230 (D.C. Cir. 2009); *Hill Dermaceuticals, Inc. v. FDA,* 709 F.3d 44, 49 (D.C. Cir. 2013); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010).

The D.C. Circuit just this past March endorsed use of discovery on remand from the decision reinstating the plaintiffs' FACA claims: "Our holding that VoteVets has pleaded sufficient facts to survive a motion to dismiss allows the issues—whether the group was structured as an advisory committee within the

meaning of FACA, and whether it was 'established or utilized' by the government—to play themselves out in the district court *through discovery* and summary judgment or trial." *VoteVets Action Fund v. U.S. Dept of Veterans Affairs,* 992 F.3d 1097, 1107 (D.C. Cir. 2021) (emphasis added). With regard to a disputed fact regarding who appointed the committee members, the Court said, "The existence of a plausible alternative—even one that may 'prove to be ... true'—'does not relieve defendants of their obligation to respond to a complaint that states a plausible claim for relief, and to participate in discovery.'" *Id.* at 1106 (quoting *Banneker Ventures, LLC, v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir.)).

Courts have granted numerous exceptions to the no-discovery-beyond-the-administrative-record rule. *See* Stephen Stark & Sarah Wald, Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action, 36 ADMIN. L. REV. 333, 344 (1984). It cites eight such exceptions, two of which are particularly relevant here: "Briefly, the exceptions which have developed to allow extra-record evidence are the following: (1) when agency action is not adequately explained in the record before the court; ... (6) in cases where agencies are sued for failure to take action." *Id.*

The documents produced by Appellees show constant communication

between USDA officials and leaders of the CTWG, as the latter developed the "comprehensive plan" sought by USDA for imposing RFID requirements. Because so much of that communication occurred by telephone, however, R-CALF should have been allowed to conduct discovery to determine the full extent to which Appellees established or utilized the CTWG in developing the RFID traceability and identification mandates.

R-CALF also should have been allowed to conduct discovery to determine the extent of Appellees' role in establishing and utilizing the PTC. The Record includes documents showing the Appellees' role in establishing the PTC: (1) documents demonstrating communication between USDA and leaders of the CTWG in March 2019 at the time that those leaders were considering forming a new committee; (2) the PTC's self-description: "The newly formed Producers Traceability Council has evolved and was established independently of the [CTWG]" (AR313); and (3) USDA's Dr. Sarah Tomlinson's service as a member of the PTC at its inception, her later role as a "Government Liaison," and her later service in an "advisory capacity only," while remaining at all times at least a "non-voting member" of the PTC. AR314, AR330. Discovery would have allowed R-CALF to learn the full extent of Appellees' involvement in the decision to establish the PTC as a replacement for the CTWG.

The general premise that FACA cases are decided on the basis of a government-created administrative record simply does not apply here. Even if one accepts Appellees' premise (as did the district court) that these types of cases are *typically* decided on the basis of an administrative record, this is not a *typical* situation. Discovery was warranted here for the simple reason that the Record itself—as produced by Appellees—omits substantial evidence highly relevant to Appellees' "establishment" or "utilization" of the two committees within the meaning of FACA. Permitting R-CALF to engage in discovery would have provided numerous answers regarding their role in the establishment and utilization of the CTWG and PTC. The District Court abused its discretion in denying Appellants that opportunity.

VI. THE COURT SHOULD DECLARE THE CTWG AND PTC ADVISORY COMMITTEES TO HAVE BEEN ESTABLISHED AND UTILIZED IN VIOLATION OF FACA, AND ISSUE AN INJUNCTION PROHIBITING THE FUTURE USE OF ANY WORK PRODUCT

Based upon the Record before it, and considering the arguments set forth above, this Court has sufficient information to issue a declaratory judgment that Appellees violated FACA when they established and utilized both the CTWG and PTC. When a federal agency violates FACA in connection with its efforts to obtain advice from an advisory committee, courts have recognized that an injunction against use of advice received from the committee is an appropriate

form of relief. Indeed, as the Eleventh Circuit has recognized, injunctive relief is often "the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements." *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994). *See W. Organization of Resource Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1243 (D. Mont. 2019) ("A use injunction is the only way to achieve FACA's purposes of enhancing public accountability and avoiding wasteful expenditures going forward. The agency ... cannot now rely on recommendations from an advisory committee whose very existence flies in the face of FACA."); *Nat'l Ass'n of Consumer Advocates v. Uejio*, 2021 WL 769413 at *12 (D. Mass., Feb. 25, 2021). In affirming an injunction against the U.S. Fish and Wildlife Service's use of a report prepared by an advisory committee operating in violation of FACA, the Eleventh Circuit explained:

> A simple "excuse us" [from a federal agency that violates FACA] cannot be sufficient. It would make FACA meaningless, something Congress certainly did not intend. ... The court sees no reason to retreat from its conclusion that FACA was designed by Congress to prevent the use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly constituted and produces its report in compliance with the procedural requirements of FACA, particularly where, as in this case, the procedural shortcomings are significant.

Alabama-Tombigbee, 26 F.3d at 1107 (quoting district court decision with

approval).

Appellees announced in March 2021 that they intend to pursue mandatory RFID through a new rulemaking proceeding. That proposal remains highly controversial and is opposed by many cattle producers. In light of the importance of those efforts to the entire cattle industry, it is crucial that they make any final decision in an open, fair, and procedurally correct manner. Allowing them to proceed on the basis of tainted recommendations received from defective advisory committees would badly pollute that process.

Another appropriate remedy here is declaratory relief. A declaratory judgment can redress a FACA plaintiff's injuries even after an advisory committee has disbanded. A court's "declaration that the agency failed to comply with FACA ... will give [the injured plaintiff] ammunition for his attack on the Committee's findings in subsequent agency proceedings that make use of the [Committee's] report." *NAACP Legal Defense & Educ. Fund, Inc. v. Barr*, 496 F. Supp. 3d 116, 131 (D.D.C. 2020). Considering the nature of their transgressions here, and in light of the remedy provided for in the foregoing case, it would also be appropriate for this Court to require Appellees to include a disclaimer in any future *Federal Register* notice related to the use of mandatory RFID technology that such proposal emerges from advisory committees that violated FACA.

CONCLUSION

The district court's holding that Appellees are not subject to FACA should be reversed, and this court should grant appropriate declaratory and injunctive relief, first finding that Appellees violated FACA in relation to the CTWG and PTC, and enjoining any future use of the work product from those committees. This Court should also reverse the district court's erroneous conclusion that this case was subject to Local Rule 83.6 and that Appellants were not entitled to discovery.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested to offer the Court the opportunity to more fully develop and clarify the issues and facts.

Respectfully submitted,

/s/ Harriet Hageman

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CERTIFICATE OF COMPLIANCE

I am an attorney for Appellants. Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amici* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 12,728, not including the cover page, Rule 26.1 disclosure statement, table of contents, table of authorities, glossary, statement regarding oral argument, signature block, certificate of service, and this certificate of compliance.

/s/ *Harriet Hageman*
Harriet Hageman

August 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2021, I electronically filed the brief of Appellants with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Harriet Hageman*
Harriet Hageman