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

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GLOSSARY

APA	Administrative Procedure Act
App.	Appendix
APHIS	Animal and Plant Health Inspection Service
AR	Administrative Record
CTWG	Cattle Traceability Working Group
EID	Electronic Identification
FACA	Federal Advisory Committee Act
NIAA	National Institute of Animal Agriculture
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

INTRODUCTION

The principal contested issue in this case is whether two federal advisory committees, the Cattle Traceability Working Group ("CTWG") and the Producers Traceability Council ("PTC"), were "established" by Appellees within the meaning of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1-16. Appellees U.S. Department of Agriculture ("USDA") and Animal and Plant Health Inspection Service ("APHIS") deny they "established" the committees, but they do so by claiming that the term should be "narrowly" construed. USDA Br. at 5.

That claim is inconsistent both with the commonly understood meaning of "established" and with the Supreme Court's seminal FACA decision, *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989), which states that Congress intended "established" to be read broadly. As the term is commonly understood, Appellees indisputably "established" the committees: (1) they persistently lobbied for formation of the committees throughout 2017, as well as during the September 2017 "Strategy Forum on Livestock Traceability," held in Denver (the "Strategy Forum"); (2) they co-sponsored and co-funded the Strategy Forum, with a significant percentage of attendees being APHIS officials; (3) an agreement was reached at the Strategy Forum to form CTWG, an industry-led committee whose purpose was to advise APHIS on adoption of radio-frequency identification

("RFID") technology within the cattle industry; (4) APHIS specified the agendas for CTWG (and its successor, PTC), and the committees hewed closely to those agendas; and (5) APHIS officials regularly participated in the committees' telephonic meetings and were in constant contact with the heads of the committees and their subcommittees to ensure that the committees and APHIS were coordinating their activities.

Appellees do not seriously contest any of those facts, which are amply demonstrated by the Record. Indeed, the district court explicitly held, "[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.143.

Appellees' assert two facts to support their claim that they did not "establish" the committees: (1) no APHIS officials participated in the November 2017 telephone call that purportedly served as CTWG's organizational meeting; and (2) although APHIS recommended individuals to be appointed to CTWG, the actual appointments were made by officials at the National Institute of Animal Agriculture (NIAA), which had agreed to undertake such organizational activity *at*

APHIS's request. USDA Br. 22-24. Nothing in FACA, however, suggests that these facts negate a finding that Appellees "established" the committees. On the contrary, FACA is implicated, and compliance with its procedural requirements is mandated, whenever federal officials "create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." *Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton* ["*AAPS*"], 997 F.2d 898, 913-14 (D.C. Cir. 1993). CTWG and PTC easily satisfy each of those three criteria.

FACA applies to committees that are either "established *or* utilized" by the federal government. Citing *Public Citizen,* Appellees assert that Congress intended the word "utilized" to be read somewhat narrowly. USDA Br. 28. They fail to acknowledge, however, that *Public Citizen* also held that the phrase "established or utilized" is "more capacious" than the word "established" standing alone, and that Congress added the word "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. 491 U.S. at 462 (emphasis added). The Record confirms that NIAA's organizational activities were undertaken entirely "for" APHIS.

Appellees concede that they did not comply with FACA's various

procedural requirements and do not contest their failure to ensure that membership on the PTC was "fairly balanced in terms of the point of view represented." 5 U.S.C. app. 2 § 5(b). They instead rest their defense solely on their unfounded contention that CTWG and PTC were not subject to FACA's requirements.

Appellees also contend that even if Appellants Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al.* ("R-CALF") have established a FACA violation, any request for injunctive relief is premature until after the district court has had an opportunity to consider that issue in the first instance. USDA Br. 37-38. But the district court *did* have an opportunity to address the issue: R-CALF's district court brief sought injunctive relief. Although the district court chose to dismiss R-CALF's claims without ruling on the injunctive-relief issue, R-CALF is entitled to renew that issue on appeal. Moreover, Appellees do not contest R-CALF's asserted right to declaratory relief and have thereby forfeited any objection to entry of that form of relief for Appellees' statutory violations.

ARGUMENT

I. APPELLEES HAVE PROVIDED A DISTORTED PICTURE OF COURT DECISIONS CONSTRUING WHEN A FEDERAL AGENCY HAS 'ESTABLISHED OR UTILIZED' AN ADVISORY COMMITTEE WITHIN THE MEANING OF FACA

In dismissing R-CALF's claims, the district court held that FACA's use of "the term 'established' should not be read beyond a narrower formulation."

App.174. Appellees agree with that holding; they assert that the U.S. Supreme Court has held that FACA's definition of an advisory committee is to be read "narrowly." USDA Br. at 22.

That assertion is a gross misreading of the Supreme Court's *Public Citizen* decision. FACA applies to advisory committees "established or utilized" by the President or a federal agency. 5 U.S.C. app. 2 § 3(2). As explained in detail in R-CALF's opening brief (at 24-26), *Public Citizen*'s discussion of the word "established" (as used in FACA) indicates that the word should be accorded its normal, broad meaning. R-CALF urges the Court to closely examine *Public Citizen*, which contains the Supreme Court's most detailed analysis of FACA. The decision bears little resemblance to the Appellees' interpretation of what the Supreme Court said.[1]

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[1] *Public Citizen* also held that Congress intended the word "utilized" to be interpreted narrowly. 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 Federal Judiciary "would present formidable constitutional difficulties" because it might interfere with the President's Article II power to nominate federal judges. 491 U.S. at 466. The Court nonetheless stressed that Congress's use of the word "utilized" carries independent significance, and that FACA's use of the term "established or utilized" was "more capacious" than the word "established" standing alone. *Id.* at 462. The initial draft of the bill that became FACA referred only to committees "established" by a federal agency; it was amended during the legislative process to read "established or utilized." *Public Citizen* stated that the use of the more expansive term "established or utilized" indicates that Congress intended FACA to apply to "advisory committees established by the Federal Government *in a generous sense*

To support its contention that "established" should be construed narrowly, Appellees rely almost exclusively on *Byrd v. U.S. EPA*, 174 F.3d 239 (D.C. Cir. 1999), an outlier decision from a sharply divided D.C. Circuit panel. But the *Byrd* majority reached its narrow-construction conclusion *based solely* on its misreading of *Public Citizen*. *Id.* at 245 (stating inaccurately that *Public Citizen* "squarely rejected" an expansive interpretation of "established," and that it read the word "narrowly to prevent FACA from sweeping more broadly than Congress intended"). As explained above, *Public Citizen* states that "established" should be construed "in its most liberal sense," 491 U.S. at 461, not narrowly.[2] Post-*Public Citizen* decisions from other federal appeals courts have not adopted *Byrd*'s narrow construction of "established." *See, e.g., AAPS*, 997 F.2d at 913-15; *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076,

of that term." *Ibid.* (emphasis added.)

[2] In one instance, Appellees misleadingly quote from *Byrd* to make it appear that *Byrd* was quoting *Public Citizen*. USDA Br. at 22, sixth line from bottom. In fact, the quoted language is entirely from *Byrd*. It is followed by a "see" citation to *Public Citizen*, but the cited pages include a passage that strongly supports R-CALF's construction of "established." In support of *Public Citizen*'s conclusion that the ABA Standing Committee on the Federal Judiciary was not subject to FACA, the passage notes it was "an entity formed privately, rather than at the Federal Government's *prompting*." 491 U.S. at 457 (emphasis added). That passage, by suggesting that the federal government can "establish" an advisory committee by "prompting" others to join together, further indicates that the Supreme Court does not agree with Appellees that FACA is inapplicable unless a federal agency oversees every aspect of an advisory committee's formation.

1085-86 (11th Cir. 2002).

Appellees' efforts to distinguish *Miccosukee Tribe* are unavailing. USDA Br. 26-27. As set out in more detail in R-CALF's opening brief, the Eleventh Circuit in that decision explicitly adopted a broad understanding of the word "established" and carefully explained why *Public Citizen* should not be construed as having adopted a contrary understanding. R-CALF Br. at 25-26 (quoting *Miccosukee Tribe*, 304 F.3d at 1085-86). Employing *Public Citizen*'s terminology, the Eleventh Circuit held that the phrase "established or utilized" "encompass[es] groups formed indirectly 'for' public agencies as well as 'by' such agencies themselves." 304 F.3d at 1085.

II. THE ONLY PLAUSIBLE READING OF THE RECORD IS THAT FORMATION OF THE COMMITTEES WAS UNDERTAKEN, AT THE VERY LEAST, 'FOR' APPELLEES

The Record shows that Appellees "established" CTWG and PTC, under any reasonable understanding of that term. R-CALF's opening brief sets out a lengthy summary of the evidence demonstrating that Appellees not only were the driving force in the advisory committees' formation but also laid out in detail what goals the agencies expected the committees to accomplish. *See, e.g.*, R-CALF Br. 27-33. Appellees co-hosted, financed, and heavily attended (App.458-463) the September 2017 Strategy Forum at which: (1) a panel discussion featuring APHIS

personnel explained why formation of an industry-led task force was urgently needed to address RFID issues; (2) APHIS personnel called on cattle-industry representatives to join such a task force; and (3) forum attendees (including APHIS personnel) met and agreed that they would go forward with creation of Appellees' requested task force. *See, e.g.*, the "White Paper" summarizing activities at the Strategy Forum, ECF 47-4, App.494-520. The White Paper reported that: the Strategy Forum was funded in part by USDA (App.496, 520); four of the ten members of the Forum's "Planning Committee" were senior APHIS officials (App.497); Neil Hammerschmidt, APHIS's Program Manager for Animal Disease Traceability (ADT), chaired a program on ADT "Next Steps" that outlined the need to establish an industry-led task force (App.498);[3] a panel chaired by Dr. Sunny Geiser-Novotny of APHIS reported, "Industry must be involved in the

[3] The slide deck from Mr. Hammerschmidt's Power-Point presentation is ECF 62-1, App.530-550. Among the recommendations contained in the presentation: "The United States must move toward an EID system for cattle with a target implementation date of January 1, 2023. A comprehensive plan is necessary to address the multitude of very complex issues related to the implementation of a fully integrated electronic system. *The plan should be developed through a specialized, industry-*[*led*] *task force with government participation*." App.540 (emphasis added). *See also* App.550 (listing as "an immediate priority … the immediate establishment of an industry and State/Federal Task Force to prepare a plan for targeting implementation of an EID solution for cattle by January 1, 2023. The plan should include [a] recommendation on the technology most capable of working effectively at the speed of commerce and defining other key implementation target dates.").

decisions about the ADT program—not just choosing the format of the EID and storage of the data but in all aspects of the ADT rule. … As those most intimately affected by the ADT rule, producer groups are in the best position to determine all the answers to all the questions surrounding the ADT program" (App.505); and the White Paper's Executive Summary concluded that "[a] group of industry stakeholders needs to be assembled to drive the ADT movement forward. Representatives of several producer groups attending the forum expressed their commitment to this model and process, and a desire to be part of the solution." App.502.

The White Paper's final page leaves no doubt that participants at USDA's Strategy Forum agreed to help form APHIS's desired task force:

> We need to put together a group of industry stakeholders to drive the movement forward. Those directly affected usually come up with the best solutions, and producers trust their trade associations. Ross Wilson of the Texas Cattle Feeders Association challenges the national producer associations to plan a meeting by the end of 2017. Their goal should be to review, prioritize, and determine next steps for the ADT working groups' 14 'Preliminary Recommendations on Key Issues'. Representatives of [six named cattle-industry groups] all expressed their support and commitment for this challenge. They voiced issues— … but all want a seat at the table, so that they can be a part of the solution.

App.518.

Subsequent APHIS documents trace establishment of CTWG to the Strategy

Forum. *See, e.g.*, AR005, App.181 (stating that CTWG "was formed as an outcome of the NIAA/USAHA forum that we [APHIS] co-hosted last September"). When the NIAA's Executive Committee met on November 8, 2017 to begin the process of formally inviting groups and individuals to join CTWG, the meeting minutes reflected an understanding that invitations were required to go to all those "organizations, associations, and individuals" who had "participated" at the Strategy Forum six weeks earlier. *See* AR385, App.268. NIAA, in other words, knew that it was simply moving forward with a process that had already been initiated and agreed to at the Strategy Forum. NIAA, in other words, could be likened to a "straw buyer" in this scenario. FACA's requirements, however, should not be so readily circumvented.

Under any commonly accepted definition of the word "establish," these facts suffice to demonstrate that Appellees "established" CTWG and PTC.[4] Those committees came into existence solely because of Appellees' stated policy goals and efforts. Both committees had a formal structure, fixed membership, and a specific purpose (to provide advice to APHIS on RFID-related issues). *See AAPS*, 997 F.2d at 913-14. While NIAA undoubtedly performed some of the organizational tasks, the Record makes clear that any such activity was performed

[4] *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").

"for" at the behest and largely under the direction of Appellees, so NIAA was part and parcel of the agencies' effort to "establish" the committees. *Miccosukee Tribe*, 304 F.3d at 1085.

The Record also exposes the fact that APHIS initiated its efforts to create an industry-led advisory committee well before the September 2017 Strategy Forum. APHIS began by seeking the support of the State-Federal ADT Working Group for its proposal to create an industry-led task force. APHIS officials prepared the notes at ECF 52-1, 52-2, and 52-3 (App.521-529) in connection with the Working Group's June 27, 2017 meeting; the notes reflect that they were lobbying hard for the Working Group to support creation of an industry-led task force. The documents at ECF 62-4 (App.563-567), 62-3 (App.559-562), and ECF 62-5 (App.568-582) are, respectively, agendas for Working Group meetings on July 11, August 9, and August 29, 2017. Those documents indicate that, by mid-summer 2017, creation of "a specialized industry l[e]d task force with government participation" had become a "Point of Consensus" among Working Group members. App.565, 562, 572-573.

All three documents include a detailed list of topics that the industry-led task force would be expected to address. For example, ECF 62-5 states that "key issues" that the task force would address included: (1) "Standardization: Propose

minimum standards that will achieve a solution that works at the speed of commerce"; (2) "Transitional technology solutions"; (3) "Timelines: Propose a realistic timeline with key steps to support the transition to a fully integrated EID system"; and (4) "Funding: Consider funding options for addressing cost concerns." App.572-573.

APHIS's notes from the September 5, 2017 Working Group meeting (ECF 62-5, App.568-581) show that APHIS officials and other Working Group members took for granted that an industry-led task force with government participation would, indeed, be created at the upcoming Strategy Forum in Denver. The issue was not whether, but how soon, such an advisory group would begin meeting. The Working Group members stressed the need for meetings to begin "as soon as possible after the September Forum" because "we need to get a technology standard established as soon as possible." App.555. These June-to-September-2017 documents verify that APHIS had been planning for months in advance to establish CTWG at the Strategy Forum, it *expected* that CTWG would be established at the Forum, and it had strong views on what CTWG's agenda should be. CTWG's and PTC's agendas ended up being largely identical to the agenda APHIS envisioned in the summer of 2017—strong evidence that CTWG and PTC were, indeed, "established or utilized" by Appellees.

Appellees have focused on NIAA documents from November 2017 stating that CTWG members would not be paid for their time and expenses. USDA Br. 9-10.[5] They then argue that the absence of pay is evidence that they did not "establish" CTWG. *Id.* at 24-25. That argument is unpersuasive. Nothing in FACA suggests that advisory committees are not subject to the statute if their members are unpaid. Indeed, the Strategy Forum White Paper explained why many cattle-industry stakeholders agreed to serve on CTWG. It wasn't for the salary; rather, they recognized that committee members would have considerable say over future government policy, and they "want[ed] a seat at the table, so that they c[ould] be a part of the solution." App.518.

More importantly, there is nothing in the record to support a finding that Appellees did not underwrite the costs of advisory committee operations. On the contrary, R-CALF strongly suspects that Appellees *did* underwrite costs, based on the following statement in the minutes of CTWG's inaugural meeting: "Stuart [the meeting facilitator] mentioned the possibility for underwriters to support the NIAA effort given the staff time that will be involved for this initiative." App.275. By far the most logical candidates to "underwrite" NIAA's efforts were APHIS and USDA, given that they had been pushing so hard for creation of CTWG. R-CALF

[5] Out-of-pocket expenses for committee members were minimal because most CTWG and PTC meetings were conducted telephonically.

cannot prove that Appellees provided surreptitious funding for CTWG's operations because it was denied all opportunity to pursue that issue via discovery. But Appellees are similarly unable to prove *that there was no funding* (Appellees' self-selected administrative record is silent on that point), and thus they should not be heard to argue that a supposed lack of funding demonstrates that they did not "establish" the advisory committees.

Finally, Appellees argue they did not "establish" PTC; rather, they contend, members of CTWG established it. USDA Br. 25. But as R-CALF explained in its opening brief, PTC was not a *new* committee; it was simply a new name for an old committee (CTWG) from which several dissenting members (including our client, Kenny Fox) were booted out. R-CALF Br. 31-33. Tellingly, Appellees do not dispute R-CALF's account regarding the continuity of the two committees and the reasons for the purge of Plaintiff Kenny Fox. The fact that a senior APHIS official immediately joined PTC and attended all of its 2019 meetings is a strong indication that APHIS viewed the change of committee names as simply a continuation of business as usual (but without those who opposed the RFID mandate). AR927-29 (App.383-385), AR313-14 (App.244-245), AR330-32 (App.250-252).

III. 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's opening brief articulated a separate ground for awarding them judgment under the Administrative Procedure Act ("APA"). R-CALF Br. 43-45. 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. As the Supreme Court has repeatedly explained, review under 5 U.S.C. § 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 v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Veh. Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Because Appellees' Record includes no such explanation, R-CALF is entitled to judgment under § 706(2).

Appellees argue, in contrast, that USDA "had no reason to create a record to explain why it did not believe that either group was an advisory committee merely because plaintiffs subsequently claimed that the two groups fell within the scope of FACA." USDA Br. 33-34. That argument is unpersuasive. Appellees do not

dispute that its entire self-selected Record makes no mention of FACA and provides no explanation for the actions/inactions of which R-CALF complains. Appellees cannot have it both ways. Either this case should be decided *solely* on the basis of Appellees' Record, or else the "whole record" referenced in 5 U.S.C. § 706[6] contemplates allowing for reasonable discovery in FACA cases (as many other federal courts have held). If the former, then Appellees lose this case because their Record does not provide the "satisfactory explanation" (nor even *any* explanation) for their failure to comply with FACA's requirements, as required by *Dep't of Commerce*.[7] If the latter, then Appellees (and the district court) erred by insisting that discovery is impermissible in FACA cases.

Appellees argue alternatively that their conduct is not reviewable under the APA because it does not constitute "final agency action." USDA Br. 34. Appellees did not raise a no-final-agency-action claim in the district court and have therefore waived it. Appellees assert that the claim is non-waivable because it

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[6] Section 706 states that in deciding whether to "compel agency action unlawfully withheld or unreasonably denied," or "hold unlawful and set aside agency action," a reviewing court "shall review the whole record."

[7] Appellees assert that USDA "did not believe that either group was an advisory group" subject to FACA and that R-CALF's later contrary assertion should not give rise to an obligation to "create a record" explaining its belief. USDA Br. 33-34. Appellees are assuming facts not contained in their Record: nothing in the Record supports their claim that they "did not believe" that either CTWG or PTC was subject to FACA.

calls the Court's jurisdiction into question, but that assertion is incorrect. The only issue is whether R-CALF has stated a cause of action under 5 U.S.C. § 704, which creates a cause of action for review of "final agency action for which there is no other adequate remedy in a court." The Court's subject-matter jurisdiction is not in doubt; R-CALF has invoked federal question jurisdiction and has adequately alleged standing.

In any event, Appellees' no-final-agency-action argument is without merit. For agency action to be "final" under the APA, it "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations are determined, or from which legal consequences will flow." *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597 (2016). The actions/inactions challenged by R-CALF quite clearly *are* final; Appellees do not contend that they are still deliberating on whether to comply with FACA's procedural requirements with respect to the two advisory committees. And their prior decision not to comply with those procedural requirements has had legal consequences: the committees operated for years without complying.

IV. THE DISTRICT COURT ERRED IN REFUSING TO ALLOW APPELLANTS TO CONDUCT DISCOVERY

A. R-CALF's Motion for Discovery Was Timely Filed; the District Court's Denial of the Motion Was Not Based on Untimeliness

As soon as R-CALF had an opportunity to review the Record cobbled together by Appellees in July 2021 and discovered that the Record made no mention of FACA, it filed its motion for discovery. The district court issued an order denying the motion, App.147-152, and R-CALF appeals from that order. Appellees argue that the order should be affirmed because the district court properly determined that R-CALF's discovery motion was untimely. USDA Br. 34-35. That argument misconstrues the district court's order, which denied discovery on the merits, not on untimeliness grounds. Indeed, the district court could not have denied discovery as untimely because the timeliness of the request was self-evident on the face of the discovery motion.

An understanding of the timeliness argument requires a full explanation of the procedural history of this case. R-CALF filed its amended complaint on April 6, 2020. Appellees did not answer or otherwise respond to the amended complaint. Instead, they filed a "Status Report" on April 20, 2020, notifying the district court that they deemed the case governed by Local Rule 83.6 and would

lodge an administrative record with the court by July 6.

Rule 83.6 is unique and provides that when a party seeks review of an action taken or withheld by an administrative agency, the agency need not file a responsive pleading, as is normally required by Fed.R.Civ.P. 12(a)(2). Instead, the agency is required to lodge an administrative record with the district court within 90 days, consisting of: (A) the final agency action sought to be reviewed; (B) the findings or report on which it is based (including all documents and materials directly or indirectly considered by agency decision makers); and (C) the pleadings, evidence, and proceedings before the agency. Local Rule 83.6(b)(1)(A), (B), & (C).

Appellants had reservations both about whether a record of the sort required by Local Rule 83.6(b)(1) could ever be compiled in a FACA case, and whether Rule 83.6 could even apply in a case such as this. They nonetheless decided to wait to see whether Appellees could produce an adequate record.

When Appellees lodged their Record on July 6, 2020, and Appellants had an opportunity to review, it was quite apparent that the Record was woefully inadequate. In particular, *none* of the small number of documents produced 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 advisory committees. 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(b)(1) in cases involving on-the-record review of agency action.

The court's scheduling orders did not require Appellants to file objections to the Record's lodging until September 28, 2020. ECF 30 & 34. They nonetheless filed on August 17, a mere 42 days after Appellees initially lodged their Record, and more than a month before such motion was due. Their motion sought an order requiring Appellees to answer the amended complaint or, alternatively, to permit them to engage in discovery for purposes of supplementing the Record. ECF 35. Appellants argued that the Record lodged by Appellees did not satisfy the requirements of Rule 86.3(b)(1) and thus that Appellees should not be permitted to invoke the Rule.

On October 13, 2020, the magistrate judge denied the motion as untimely. ECF-42, App.143-146. He stated that when Appellees filed their status report on April 20, 2020, they "put [R-CALF] on notice" that they "considered this case to be governed by Local Rule 83.6," yet R-CALF waited four months to file its objection to application of Rule 83.6. App.144-145. He ruled that Appellants

should have filed their objection sooner and thus denied the motion as untimely. App.145-146.

Appellants sought district court review of that decision. ECF-45. They pointed out that they had not raised a wholesale objection to *any and all* application of Rule 83.6 in FACA cases (as the magistrate judge appeared to believe). They instead argued that Rule 83.6 should not apply in this case because the Record produced by Appellees was wholly inadequate and did not meet the minimum requirements of Rule 83.6(b)(1). Appellants noted that they did not see the lodged Record until July 2020 and thus waited at most 42 days (not four months) before raising objections to the Record. They also noted that the court's scheduling orders (which initially established an August 19 filing deadline and later extended the deadline to September 28) explicitly contemplated that Appellants' motion could encompass requests for additional discovery (under Local Rule 83.6(b)(3)).

On November 16, 2020, the district judge denied Appellants' motion for reconsideration of the Magistrate's decision. ECF 46, App.147-152. She affirmed as not "clearly erroneous" the magistrate's ruling that they had waived the right to object to Appellees' April 20, 2020 assertion that "the case must proceed under the APA and Local Rule 83.6." App.151.

Importantly for purposes of this appeal, the district court then went beyond the magistrate judge's denial-for-untimeliness ruling, addressed the merits of Appellants' request for discovery, and rejected that request, reasoning that "FACA violation claims must proceed under the judicial review provisions of the APA" and that the APA does not permit plaintiffs to engage in discovery. App.151. While acknowledging that the D.C. Circuit's *AAPS* decision did authorize discovery in a FACA case, 997 F.2d at 915-16, the district court disagreed with that decision. It concluded that the *AAPS* court likely had been operating under the assumption that FACA creates a private right of action, but that later case law—including this Court's decision in *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221 (10th Cir. 2004)—has made clear that FACA cases may proceed under the APA only. App.151-152.

It is this no-discovery ruling from which Appellants are appealing. By addressing their discovery request separately from the issue of Rule 83.6 applicability and reaching the merits of the request, the district court signaled that it was *not* denying the discovery request as untimely, nor could it coherently have done so. Appellants' argument that they are entitled to discovery is based on the inadequacy of the Record produced by Appellees, which they did not become aware of until they had an opportunity to review the initial Record lodged on July

6, 2020 (and later supplemented by Appellees). Accordingly, a motion for discovery filed on August 17, 2020, could not have been (and was not) deemed untimely by the district court.

In sum, the Court should reject Appellees' argument that the district court denied the motion for discovery on timeliness grounds. The motion was timely, and the Court should reach the merits of the appeal from denial of that motion.

B. The District Court Abused Its Discretion in Determining that Discovery Was Unwarranted in this Case

The district court denied R-CALF the opportunity to engage in *any* discovery, holding that discovery is impermissible in an APA case and that the case must be decided solely on the basis of the "record" lodged by Appellees.

The district court abused its discretion in so ruling—because 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). As R-CALF explained in its opening brief, *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. R-CALF Br. 49-54. *See, e.g.*, *VoteVets Action Fund v. U.S. Dep't of Veterans Affairs*, 992 F.3d 1097, 1106 (D.C. Cir. 2021) (stating that federal law does not relieve defendants in a FACA case "of

their obligation to respond to a complaint that states a plausible claim for relief, and to participate in discovery") (citation omitted). The need for at least some discovery is particularly acute in FACA cases when, as here, the "record" produced by the agency includes no references to FACA and thus fails to incorporate any "findings or report on which [the challenged action/inaction] is based." Local Rule 83.6(b)(1)(B). To find otherwise would ensure that the agency won every time by simply: (1) never mentioning FACA; (2) doing whatever it wants with an advisory committee; and (3) producing a record devoid of any mention of FACA whenever sued. That is not what Congress intended as it would make nullify the very purpose of FACA.

Appellees concede that discovery is at least sometimes appropriate in FACA cases. USDA Br. 36. Their only argument is that it is not necessarily "appropriate in every FACA case." *Ibid*. Appellants agree. But the district court did not deny discovery based on a finding that it was inappropriate in this case in particular; instead, it ruled that the judicial-review provisions of the APA categorically bar discovery and limit review to the record compiled by the agency—subject to the possibility of supplementing the record with documents submitted by the defendant. App.151-152.

The district court cited no FACA case law in support of its categorical

ruling. And that ruling cannot explain the many published decisions that have routinely authorized discovery in FACA cases. The scope of review in APA cases encompasses review of "the whole record." 5 U.S.C. § 706. Nothing in that capacious phrase precludes considering material that was not included in an agency's self-selected record and instead was uncovered during the discovery process. That is particularly true when, as will often be true in FACA cases, the agency has not prepared any contemporaneous documents that explain its conclusion that a potentially applicable statute does not apply to its contemplated actions.

Appellees assert that FACA cases are often "decided on a motion to dismiss"—and a plaintiff will never get discovery if its complaint is dismissed on the pleadings. USDA Br. 36. While that assertion may be accurate, it is not relevant here because Appellees opted not to file a motion to dismiss. Indeed, Appellees have never filed a pleading suggesting that the amended complaint fails to state a claim upon which relief can be granted.

Finally, R-CALF has been severely prejudiced by the denial of discovery. For example, while R-CALF believes that the existing Record suffices to show that Appellees "established or utilized" the advisory committees, its case would be further strengthened if it could establish through discovery that Appellees paid

NIAA handsomely for administering the work of the committees. There is reason to suspect that Appellees paid NIAA. *See* App.275 (CTWG meeting minutes note "the possibility for underwriters to support the NIAA effort given the staff time that will be involved for this initiative."). A showing that NIAA was Appellees' paid agent would conclusively rebut their claim that the committees were not acting under APHIS's direct control.

V. HAVING DEMONSTRATED A FACA VIOLATION, R-CALF IS ENTITLED TO BOTH INJUNCTIVE AND DECLARATORY RELIEF

As explained in R-CALF's opening brief, if the Court finds a FACA violation, R-CALF is entitled to an award of both injunctive and declaratory relief.

Appellees argue that any request for injunctive relief is premature until after the district court has had an opportunity to consider that issue in the first instance. USDA Br. 37-38. But the district court *did* have an opportunity to address the issue: R-CALF's district court brief sought injunctive relief. Although the district court chose to dismiss R-CALF's claims without ruling on the injunctive-relief issue, R-CALF is entitled to renew that issue on appeal and obtain that relief here.

A remand on the injunctive-relief issue would be appropriate only if the Court determines that there are unresolved factual issues that would more appropriately be addressed by the district court in the first instance. But R-CALF is unaware of any such issues. In particular, it is uncontested that the questions

addressed by CTWG and PTC (*e.g.*, what standard technology should be employed for RFID eartags?) are still very much on the front burner. *See* USDA News Release, "USDA Announces Intent to Pursue Rulemaking on Radio Frequency Identification (RFID) Use in Animal Disease Traceability" (Mar. 23, 2021) (announcing plans to initiate a new rulemaking proceeding for the purpose of mandating use of RFID eartags for cattle and bison moving interstate). Accordingly, in the absence of an injunction, Appellees can be expected to rely on the advisory committees' recommendations when considering technical issues related to adoption of an RFID mandate.

Appellees also argue that the Appellants have failed to establish standing to seek injunctive relief. USDA Br. 38. But the amended complaint includes detailed allegations regarding the injuries Appellants would incur (*e.g.*, lost privacy, financial losses) if prevented from continuing to use metal eartags for their cattle, and Appellees have never challenged the accuracy of those allegations. *See, e.g.*, Amended Complaint ¶¶ 59-61, App.33-34. Given that Appellees possess detailed recommendations supplied to them by CTWG and PTC, it is not mere speculation to conclude that Appellees will consider those recommendations in connection with its planned rulemaking proceeding.

Appellees argue that Appellants cannot demonstrate that the balance of

equities and the public interest support entry of equitable relief. USDA Br. 39. But Appellees have not responded to the case law cited by Appellants, which demonstrates that injunctive relief is appropriate under these circumstances. As the Eleventh Circuit explained, in affirming an injunction against use of a report from a noncompliant advisory committee, injunctive relief is often "the only vehicle that carries sufficient remedial effect to ensure compliance with FACA's clear requirements. Anything less would be tantamount to nothing." *Alabama-Tombigbee Rivers Coalition v. Dep't of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994).

Appellees contend that an injunction would injure them, asserting, "Any injunction that interferes with the ability of the agency to consider relevant and useful information as it moves forward with rulemaking proceedings on the important subject of disease traceability will cause a significant harm both to defendants and to the public." USDA Br. 39. But Appellees fail to explain why they could not gather the same information from other sources, meaning that the information gathered by the CTWG and/or PTC is not exclusive in relation to disease traceability.

Finally, Appellees do not contest R-CALF's asserted right to declaratory relief and thereby have forfeited any objection to entry of that form of relief for

Appellees' statutory violations.

CONCLUSION

The district court's holding that Appellees are not subject to FACA should be reversed, and this Court must grant appropriate declaratory and injunctive relief.

Respectfully submitted,

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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, the word count of the brief is 6,401, not including the table of contents, table of authorities, glossary, signature block, certificate of service, and this certificate of compliance.

/s/ Harriet Hageman
Harriet Hageman

November 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2021, I electronically filed the Reply 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