ORAL ARGUMENT NOT REQUESTED

No. 21-8042

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; U.S. 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 U.S. Department of Agriculture Animal and Plant Health Inspection Service,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Wyoming
District Court Case No. 19-cv-00205 (Judge Nancy D. Freudenthal)

BRIEF FOR APPELLEES

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STATEMENT OF RELATED APPEALS PURSUANT TO CIR. R. 28.2(C)(3)

Counsel for appellee is not aware of any prior or related appeals.

GLOSSARY

ADT	Animal Disease Traceability
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
Council	Producers Traceability Council
EID	Electronic Identification
FACA	Federal Advisory Committee Act
NIAA	National Institute of Animal Agriculture
USDA	United States Department of Agriculture
Working Group	Cattle Traceability Working Group

INTRODUCTION

The issue of Animal Disease Traceability (ADT) is one of importance both to the U.S. Department of Agriculture (USDA or Department) and to various stakeholders, including members of the cattle industry. An effective ADT program allows officials to efficiently identify at-risk animals when there is an outbreak of disease, which allows for any such outbreak to be quickly contained while minimizing the economic cost of containment measures. At the same time, implementing an effective ADT program presents a number of challenges and requires the agency to balance efficiency against cost.

In particular, under current agency regulations, promulgated in 2013, cattle producers may comply with traceability requirements by using visual (non-electronic) eartags on their cattle; those tags are relatively cheap, but it is challenging to effectively trace at-risk cattle using such tags. For that reason, and after compiling feedback from a number of public meetings, in 2017, a state-federal working group convened by USDA recommended that the agency move toward requiring an Electronic Identification system. Such a system presents a number of practical challenges, including higher upfront costs for producers and the need to ensure compatibility across different parties, but allows for a substantially more effective ADT program.

In light of the importance of these ADT issues to the industry, in 2017 and 2019, cattle industry representatives formed two groups—the Cattle Traceability Working Group (Working Group) and the Producers Traceability Council

(Council)—to allow industry stakeholders to work together to consider the various complex issues that implementing such an electronic system would present. Between 2017 and 2019, those groups regularly met to discuss those issues, and the Working Group ultimately provided at least one recommendation related to such technology to USDA.

Plaintiffs now claim that the Working Group and the Council were federal advisory committees within the meaning of the Federal Advisory Committee Act (FACA), *see* 5 U.S.C. app. 2, and that the groups therefore should have been subject to FACA's requirements. But plaintiffs' attempt to characterize either group as a federal advisory committee—which the statute defines (as relevant here) to include only groups that are "established or utilized by the President" or "by one or more agencies," *id.* § 3(2)—is without basis. USDA plainly did not establish either industry group because it did not determine either group's membership or structure. Nor did USDA utilize either group within the meaning of the statute, because neither group was subject to the agency's "strict management." *Byrd v. U.S. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999) (quotation omitted). To the contrary, industry representatives established and managed both groups, determining the groups' membership, structure, and goals; setting the groups' agendas; and facilitating the groups' meetings. Therefore, the district court's rejection of plaintiffs' claims should be affirmed.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331. The district court entered final judgment in defendants' favor on May 14, 2021. Plaintiffs filed a timely notice of appeal on July 7, 2021, and have invoked the jurisdiction of this Court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs claim that two groups created by members of the cattle industry between 2017 and 2019—the Cattle Traceability Working Group and the Producers Traceability Council—were federal advisory committees within the meaning of the Federal Advisory Committee Act. The issues presented are:

1. Whether either group was "established" or "utilized" by the agency, as those terms are used in FACA;

2. Whether the agency violated the Administrative Procedure Act by not producing any documents addressing its position on whether FACA applied to the two groups;

3. Whether the district court abused its discretion in denying plaintiffs' motion for discovery;

4. Whether, if plaintiffs are correct on the merits of their FACA claims, they would be entitled to an injunction prohibiting the agency from using the information received from the groups.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Federal Advisory Committee Act in 1972, in an effort "to control the growth and operation of the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government.'" *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 902-903 (D.C. Cir. 1993). FACA imposes numerous requirements on the work of advisory committees. They must file detailed charters before they can "meet or take any action." 5 U.S.C. app. 2 § 9(c). They generally must publish notices of their upcoming meetings in the Federal Register. *Id.* § 10(a)(2). Their meetings must be open to the public, *id.* § 10(a)(1), with minutes kept, *id.* § 10(c). And those minutes, together with all documents that were "made available to or prepared for or by" the committee, must be made available to the public under the terms of the Freedom of Information Act. *Id.* § 10(b).

FACA defines an "advisory committee" to include "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof," that is (as relevant here) "established or utilized by the President" or "by one or more agencies" for the purpose "of obtaining advice or recommendations for the President or one or more agencies or officers of

the Federal Government." 5 U.S.C. app. 2 § 3(2). Courts have interpreted that language narrowly to avoid "extend[ing] FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice." *Public Citizen v. U.S. DOJ*, 491 U.S. 440, 452 (1989). An "advisory panel is 'established' by an agency only if it is actually formed by the agency." *Byrd v. U.S. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999) (citing *Public Citizen*, 491 U.S. at 452, 456-457). A committee is "'utilized' by an agency only if it is 'amenable to . . . strict management by agency officials.'" *Id.* (alteration in original) (quoting *Public Citizen*, 491 U.S. at 457-58).

Although FACA contains a number of procedural requirements that an agency must follow when it establishes or utilizes a committee, the statute does not "contain[] a private right of action for those seeking to enforce the procedural requirements." *Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1234-35 (10th Cir. 2004). Accordingly, plaintiffs who wish to enforce FACA's requirements must rely on a cause of action that exists in a different statute, such as "the judicial review provisions of the Administrative Procedure Act" (APA). *Id.* at 1235. Under those judicial review provisions, courts are generally required to confine review to the administrative record. *See* 5 U.S.C. § 706; *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." (citation omitted)).

B. Factual Background

1. The United States Department of Agriculture includes as part of its mission the goals of facilitating marketing of domestic agricultural products and protecting the health of animals. Consistent with those goals, USDA "provides various programs that support the economic viability of animal agriculture." App. Vol. 1 at 193. One such program, managed by USDA's Animal and Plant Health Inspection Service (APHIS), is the Animal Disease Traceability program, which seeks to ensure that agency officials are able to determine an animal's present and past locations in order to effectively identify at-risk animals when there is a disease outbreak. *See id.* The ADT requirements currently in place were promulgated through a notice-and-comment rule issued in 2013. *See Traceability for Livestock Moving Interstate*, 78 Fed. Reg. 2040 (Jan. 9, 2013). Under that rule, livestock that move interstate generally must be officially identified, such as through an eartag, a brand, or a tattoo. *See id.* at 2073. Because the rule only regulates interstate movement of cattle, States and Tribal Nations "remain responsible for the traceability of livestock within their jurisdictions," an approach that "was designed to leverage the strengths and expertise of States, Tribes, and producers." App. Vol. 1 at 194.

Following the 2013 rule's promulgation, APHIS engaged in both internal reviews of the program and in extensive outreach to State, Tribal, and industry stakeholders "to obtain grassroots feedback" about the program. App. Vol. 1 at 195. As part of that outreach, APHIS conducted nine public meetings "to solicit industry

input regarding their experiences with ADT" and received 462 written comments from stakeholders related to the program. App. Vol. 1 at 197-98. In 2017, APHIS established a State-Federal ADT Working Group "to assist APHIS in reviewing the ADT regulation, examine feedback from the public meetings and written comments, and provide input based on their experiences with disease traceability issues." App. Vol. 1 at 198-99. That group eventually provided a list of 14 preliminary recommendations related to improving the effectiveness of the ADT program. *See* App. Vol. 1 at 205-15.

Of particular relevance here, one of the group's recommendations related to establishing an Electronic Identification (EID) system for cattle. The group explained that "[m]any animal health officials, as well as industry stakeholders, acknowledge that the level of traceability necessary in the United States is unachievable" with the non-electronic eartags permitted as identification under the 2013 rule. App. Vol. 1 at 206. The group found that there had been "an increase in support for EID" requirements among relevant stakeholders since 2013 and recommended that the United States "move toward an EID system for cattle with a target implementation date of January 1, 2023." App. Vol. 1 at 206-07. At the same time, the group recognized that successful implementation of any EID system posed a number of practical challenges and that any such implementation would require "defin[ing] a single technology standard" to "ensure system compatibility" across parties. App. Vol. 1 at 207. Therefore, the group determined that a "comprehensive plan is necessary to address

the multitude of very complex issues related to the implementation of a fully integrated electronic system" and recommended that a "specialized industry-le[d] task force with government participation should develop" that plan. *Id.*

2. In September 2017, around the time that the State-Federal ADT Working Group was finalizing its recommendations, the National Institute of Animal Agriculture (NIAA) and United States Animal Health Association—both private nonprofit organizations—hosted a Strategy Forum on Livestock Traceability. App. Vol. 2 at 496. That forum, which was co-funded by USDA and eight private groups, was attended by 164 "livestock industry professionals," including "producers, representatives of livestock markets, fairs, and shows, veterinarians, representatives of identification technology companies, and regulatory animal health officials." *Id.* One of the topics discussed at the forum was the set of preliminary recommendations from the State-Federal ADT Working Group. *See* App. Vol. 2 at 498.

The forum attendees agreed on the "need to put together a group of industry stakeholders to drive the [EID] movement forward" because "[t]hose directly affected usually come up with the best solutions." App. Vol. 2 at 518. Therefore, a representative from the Texas Cattle Feeders Association "challenge[d] the national producer associations to plan a meeting by the end of 2017" with the goal of "review[ing], prioritiz[ing], and determin[ing] next steps for the ADT working group's" preliminary recommendations, and representatives from a number of

additional industry groups "expressed their support and commitment for this challenge." *Id.*

Following that call for an industry working group on traceability issues, in November 2017, the NIAA Executive Committee held a meeting at which it decided to establish such a group, which it named the Cattle Traceability Working Group. App. Vol. 1 at 268-69. At that meeting, the Executive Committee created a list of organizations and individuals that would be invited to participate in the Working Group, determined that the cost of the Working Group would "be a shared responsibility among those who participate in the working group," and decided that the NIAA would "be named as the facilitator for the" Working Group. *Id.* In addition, the Executive Committee discussed the envisioned "level of government involvement" in the Working Group, and an NIAA member informed the Committee that USDA "only want[ed] to be kept up to speed" on the Working Group. App. Vol. 1 at 268.

After that meeting, the Chairman of the NIAA invited the identified organizations and individuals to participate in the Working Group. *See, e.g.*, App. Vol. 1 at 264-65. Those invitations reiterated that the Working Group was "to be facilitated by NIAA" and "led by key stakeholders in the beef industry," and they noted that state and federal government representatives would "not be[] members of the" Working Group but that NIAA "anticipated [that] governmental representatives will serve as resources for the work." App. Vol. 1 at 264. Finally, the invitations

specified that the "costs associated with facilitation of the [Working Group] will be shared among the group and through underwriting opportunities." *Id.*

Later that month, the Working Group held its inaugural meeting. App. Vol. 1 at 272. The minutes from that meeting reflect that 21 Working Group members and three NIAA staff members attended the meeting; no USDA employees were present. *See* App. Vol. 1 at 272-73. At that meeting, the Working Group members discussed the structure, purpose, and goals of the group, and they identified subgroups to focus on particular "challenge areas." App. Vol. 1 at 272-75. In addition, they confirmed that the costs of any in-person meetings of the group "would be a shared expense." App. Vol. 1 at 275.

Over the course of the following year, the Working Group and various permutations of its members met regularly. Although "USDA was not invited to their initial meetings as they discussed and developed their mission," the Working Group eventually informed APHIS that "they would like to work in parallel with USDA efforts." App. Vol. 1 at 179. After the Working Group reached out to APHIS, agency officials met with representatives of the group to discuss the State-Federal ADT Working Group's preliminary recommendations and to "get them on the same set of tracks" as the agency. App. Vol. 1 at 180.

USDA officials were occasionally invited to attend a particular Working Group meeting to answer questions or provide the agency's perspective. *See, e.g.*, Supp. App. 4 (email from NIAA official to APHIS official asking whether agency officials would

attend the Working Group's next meeting to answer questions about a particular subject); Supp. App. 16-17 (email from NIAA official to agency officials asking whether USDA would be able to participate in two upcoming Working Group meetings). In addition, the NIAA facilitators of the Working Group occasionally sent meeting minutes to apprise agency employees of the group's work. *See, e.g.*, App. Vol. 1 at 266, 276; Supp. App. 9-10.

Throughout 2018, the full Working Group and its various subgroups met regularly without agency employees' attendance. *See, e.g.*, Supp. App. 1 (minutes from March 23, 2018 meeting); Supp. App. 11-12 (minutes from January 31, 2018 meeting); App. Vol. 1 at 182 (minutes from March 22, 2018 meeting); App. Vol. 1 at 227 (minutes from June 29, 2018 meeting). The Working Group itself managed its own membership, adopting a rule providing that the full group vote on any prospective new members. App. Vol. 1 at 228. And the Working Group noted that USDA appreciated "the work being done by the" Working Group and was "very encouraged" that "the industry"—not the agency—was "taking the lead on this initiative." App. Vol. 1 at 182.

In February 2019, after the Working Group had been engaged in its work for more than a year, the group decided to "focus on each of" five specific issues related to Electronic Identification technology as to which the group wished to provide recommendations to USDA. App. Vol. 2 at 329-33. Over the ensuing weeks, the Working Group discussed and voted on some such specific recommendations, and

the group itself decided which particular recommendations to discuss and to approve. *See, e.g.*, App. Vol. 2 at 311, 329-34, 344-46. The record reflects that the group eventually provided at least one recommendation to USDA: that the agency should allow then-ongoing trials of various specific Radio Frequency Identification technologies to continue to completion and should then consider, based on the results of those trials and input from the industry, whether it would be appropriate to require one uniform Radio Frequency Identification technology, App. Vol. 2 at 344.

3. By March 2019, the Working Group had determined that it was "not yet ready to make some key decisions, like the selection of desired [EID] technology." App. Vol. 2 at 341. As a result, that month, three of the industry organizations represented on the Working Group sent letters to the NIAA stating that they were frustrated by the lack of progress and suggesting that the group should complete its work by June 1. App. Vol. 2 at 341-42.

Although NIAA officials forwarded those letters to agency officials to keep them informed, *see, e.g.*, App. Vol. 2 at 350-51, the record does not reflect that agency officials took any action in response to the letters. Instead, some of the Working Group leaders decided that a new, smaller group of producers should be formed. Those leaders explained that they had "determined that we will move the work that we have accomplished to date . . . to a new Working Group comprised exclusively of the people that we have been doing this work on behalf of since day 1 – the American Cattle Producers." App. Vol. 2 at 374. Accordingly, those leaders asked two

representatives from the groups who had sent the letters to put together the Producers Traceability Council, a "small, action oriented group with the singular goal of looking at the work [the Working Group has] done, and the work yet to be done, uniquely through the eyes of the producers." App. Vol. 2 at 374-75. After that announcement was made, an NIAA official forwarded the announcement to USDA officials to ensure that the agency was "aware of the changes that the [Working Group] will be introducing." App. Vol. 2 at 373.

Shortly thereafter, the two organizers of the Council sent an invitation to a number of producers, two state government representatives, and one USDA official to confirm their invitation to the first meeting of the Council. App. Vol. 2 at 377. That initial meeting took place in early May 2019, and one APHIS official, Dr. Sarah Tomlinson, attended. Following that meeting, the NIAA coordinating official circulated a draft press release that listed Dr. Tomlinson as a member of the Council; in response, Dr. Tomlinson requested to be removed from the release, explaining that she had "to be careful about [her] representing USDA on this decision." App. Vol. 2 at 393-94. Eventually, the NIAA official determined that it was appropriate to list Dr. Tomlinson as a non-voting government liaison, explaining that Dr. Tomlinson did not provide input into any Council "decision" but rather only provided the group with valuable "information" and "context around this issue." App. Vol. 2 at 393; *see* App. Vol. 1 at 252; Supp. App. 20 (Dr. Tomlinson explaining that she "simply presented facts and answered questions").

The following month, the Council held its second meeting. *See* App. Vol. 2 at 406-07. Its co-chairs asked APHIS if it would be willing to send "an expert from USDA" to discuss "data sharing and cost sharing," explaining that the group "will need as much information as they can get to arrive at a recommendation." App. Vol. 2 at 410-14. As a result, two agency officials—Dr. Tomlinson and an expert on the relevant subject—attended the second meeting, where they "provided an overview of [the Animal Health Event Repository] and how it works in need of an animal disease trace." App. Vol. 2 at 423-24. Following the meeting, the NIAA official circulated a draft press release reflecting the discussion, and the agency official attendees provided comments and edits to ensure the release was "accurate." App. Vol. 2 at 430-35. Similarly, when the Council held another meeting in August 2019, two agency officials attended to provide information and context, and those officials then worked with the NIAA official to ensure that the group's eventual press release was accurate. *See* Supp. App. 6-8.

After that August meeting, the record does not reflect further agency involvement in any continued Council operations, nor does the record reflect that the Council ever transmitted any recommendations to the agency.

C. Procedural History

In 2020, plaintiffs, who include individual ranchers, a ranching company, and an organization of ranchers, filed their operative complaint. *See* App. Vol. 1 at 23.[1] The complaint advanced a number of claims, all alleging that defendants had either "established" or "utilized" the Working Group and the Council within the meaning of FACA and that, as a result, defendants had violated FACA by not adhering to its various requirements. *See* App. Vol. 1 at 46-51. Plaintiffs requested as relief a declaratory judgment that the Working Group and the Council were subject to FACA (and that defendants therefore violated FACA by not adhering to its requirements for those groups) and an injunction requiring defendants to make available for public inspection and copying all of the Working Group's and the Council's records, requiring the Council to comply with FACA requirements moving forward, and forbidding defendants from "considering or making use of any of the materials generated by" the Working Group and the Council. App. Vol. 1 at 51-52.

After plaintiffs filed that operative complaint, defendants informed the district court on April 20, 2020, that because plaintiffs' claims challenged agency action and were brought under the APA, the case should proceed according to the District of

[1] Plaintiffs had previously filed an initial complaint, which primarily advanced claims challenging a "factsheet" issued by APHIS in 2019. *See* D. Ct. Dkt. No. 1. After APHIS withdrew the challenged factsheet, the district court dismissed the complaint as moot. *See* App. Vol. 1 at 27. Plaintiffs did not appeal that dismissal but instead filed an amended complaint, and so that operative complaint is the only one relevant to this appeal.

Wyoming's Local Civil Rule 83.6. *See* App. Vol. 1 at 125-26. Under that local rule, when a plaintiff challenges agency action, the agency is generally not required to file an answer to the complaint. *See* D. Wyo. L. Civ. R. 83.6(b). Instead, the agency is required to file the administrative record with the district court, and the parties are then generally required to proceed with briefing, in effect, a motion for judgment on the administrative record. *See* D. Wyo. L. Civ. R. 83.6(b)-(c). Pursuant to the provisions of that rule, defendants proceeded to file first the administrative record, *see* App. Vol. 1 at 128-29, and then a supplemental administrative record that included additional documents that the agency discovered when responding to Freedom of Information Act requests submitted by plaintiffs, *see* App. Vol. 1 at 133-34, 138-39.

On August 17, 2020—nearly four months after the government had informed the district court of its view that Local Rule 83.6 governed the case—plaintiffs filed a motion requesting that the court direct defendants to file a responsive pleading and permit plaintiffs to engage in discovery. *See* App. Vol. 1 at 6. That motion for discovery was referred to the magistrate judge, who denied it. The magistrate judge explained that plaintiffs had been on notice for nearly four months that the court intended to proceed on the basis of the administrative record rather than allowing for discovery but had "offer[ed] no reasoning or justification of any kind for failing to address this issue until now." App. Vol. 1 at 145. On that basis, the magistrate judge denied the motion as untimely. App. Vol. 1 at 146. Plaintiffs moved the district court for reconsideration of that decision, and the district court denied their motion. First,

the court upheld the magistrate judge's determination that plaintiffs' motion was untimely. *See* App. Vol. 1 at 150-51. Second, and separately, the court concluded that plaintiffs had not demonstrated an entitlement to discovery because their claims must proceed through the APA, which generally requires that courts review agency action on the basis of the administrative record. *See* App. Vol. 1 at 151-52. Following that decision, the district court did, however, permit plaintiffs to supplement the administrative record with a handful of additional documents. *See* App. Vol. 1 at 153-60, 175.

Based on the administrative record as supplemented by plaintiffs' additions, the district court eventually dismissed plaintiffs' FACA claims, concluding that neither the Working Group nor the Council was established or utilized by defendants. App. Vol. 1 at 161-75. First, the court explained, relying on Supreme Court precedent, that a committee is "established" by the government within the meaning of FACA when it is "directly formed by a government agency (or by a quasi-public organization such as the National Academy of Sciences for a government agency)." App. Vol. 1 at 172 (emphasis omitted). And applying that standard to the Working Group and the Council, the court determined that "there is no evidence to suggest that either group was directly formed by APHIS"; to the contrary, the evidence established that both groups were "formed by and composed of industry leaders." App. Vol. 1 at 173. Second, again relying on Supreme Court precedent, the district court explained that an agency "utilizes" a group within the meaning of FACA "only if the group is 'amenable

to . . . strict management by agency officials.'" App. Vol. 1 at 174 (alteration in original) (quoting *Public Citizen*, 491 U.S. at 457-58). And because "nothing in the Administrative Record supports the conclusion that APHIS exercised actual management or control over the operations of either" the Working Group or the Council, the court concluded that the agency did not "utilize" either group. *Id.* Therefore, the court dismissed plaintiffs' complaint with prejudice.

This appeal followed.

SUMMARY OF ARGUMENT

I.A. The record plainly demonstrates that USDA did not establish either the Working Group or the Council. It is axiomatic that "an advisory panel is 'established' by an agency only if it is actually formed by the agency." *Byrd v. U.S. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999). Among other things, that means that the agency must appoint the panel's members. *See id.* at 246. And the record here establishes that the NIAA "established" the Working Group by forming the group, selecting its members, and installing itself as the group's facilitator. *See* App. Vol. 1 at 264-69. And industry representatives "established" the Council, by deciding to form a smaller group focused on producers and by selecting the particular members of the group. *See* App. Vol. 2 at 374-77.

Plaintiffs do not seriously dispute any of that. Instead, they primarily contend that the district court erred by failing to construe "established" in accordance with its "ordinary" meaning. But the actual, plain meaning of the "established" coheres with

the construction consistently applied in FACA cases (and by the district court here): a group is "established" by the entity that actually forms the group, selecting its membership and structure. And in any event, the record here demonstrates that USDA did not "establish" either the Working Group or the Council under any reasonable understanding of that term.

B. The district court also correctly concluded that the agency did not "utilize" either the Working Group or the Council within the meaning of FACA. As used in FACA, the word "utilized" encompasses a group "so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Food Chem. News v. Young*, 900 F.2d 328, 332-333 (D.C. Cir. 1990). And the record here demonstrates that FACA's "stringent" standard—which requires "something along the lines of actual management or control" over the alleged advisory committee, *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994)—is not met.

To the contrary, the record demonstrates that, at every turn, the Working Group was controlled by the NIAA and by the industry stakeholders who constituted the group's members. Those individuals and organizations—and not the agency—structured the group and its subgroups, routinely conducted meetings without agency officials, retained control over the group's work, managed the group's membership, and decided which specific recommendations to discuss and to provide to the agency. Similarly, the record demonstrates that the industry representatives who formed and

composed the Council—and not the agency—managed that group, controlling its membership, its meeting schedule, and its agenda.

In arguing that the Working Group and the Council were nevertheless "utilized" by the agency, plaintiffs primarily focus on the facts that agency officials exchanged information with the groups and their leaders and that officials sometimes attended meetings of the group. But many outside groups provide advice, recommendations, and various types of input to Executive agencies, and it is well-established that those sorts of facts do not constitute utilization within the meaning of FACA. Instead, courts, including the Supreme Court in *Public Citizen*, have routinely rejected claims that an agency "utilized" an advisory group even where the agency sought and relied on the group's advice. *See, e.g.*, *Public Citizen v. U.S. DOJ*, 491 U.S. 440, 452 (1989); *Byrd*, 174 F.3d at 241-42; *Food Chem. News*, 900 F.2d at 329-30.

II. Plaintiffs' other arguments are without substance. First, they assert that the agency violated the APA by not explaining in the administrative record why it was not complying with FACA. But as is explained above, the Working Group and the Council were demonstrably not advisory committees within the meaning of that statute, and the agency did not consider that statute in the administrative record for the simple reason that neither group was subject to the statute's requirements.

Second, the district court did not abuse its discretion in denying plaintiffs' discovery motion. The primary basis for that denial was the unexcused lateness of plaintiffs' request, for which plaintiffs still have provided no justification. *See* App.

Vol. 1 at 145, 151. In any event, the district court correctly concluded that discovery was unwarranted here in light of the voluminous administrative record, and plaintiffs have not demonstrated any additional, specific information they could seek in discovery that would bear on their claims.

Finally, plaintiffs' argument that they are entitled to an injunction is both premature and incorrect. It is premature because the decision whether to grant a permanent injunction is within the equitable discretion of the district court, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006), and the district court has not yet had the opportunity to weigh the relevant equitable factors and exercise that discretion. Therefore, if this Court agrees with plaintiffs on the merits, it should remand to the district court to determine the appropriate remedy in the first instance. It is incorrect because plaintiffs have failed to establish any imminent injury that could be redressed by the requested injunction, and because the balance of equities and the public interest weigh heavily against granting any such injunction.

STANDARD OF REVIEW

The district court's determination that defendants were entitled to judgment on the basis of the administrative record is a determination of law that is reviewed de novo. *See Conover v. Aetna US Health Care, Inc.*, 320 F.3d 1076, 1077 (10th Cir. 2003). The district court's denial of plaintiffs' motion for discovery is reviewed for abuse of discretion. *See SEC v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1271 (10th Cir. 2010).

ARGUMENT

I. The District Court Properly Determined That USDA Did Not "Establish" or "Utilize" the Working Group or the Council Within the Meaning of the Federal Advisory Committee Act

A. USDA Did Not "Establish" Either the Working Group or the Council

The Supreme Court has long made clear that FACA's detailed protocols do not apply to "every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Public Citizen v. U.S. DOJ*, 491 U.S. 440, 452-53 (1989). Such broad construction of the statute "would present formidable constitutional difficulties," the Court recognized, by allowing Congress to micromanage the affairs of the Executive Branch. *Id.* at 466. The Court therefore "rejected an expansive interpretation of" FACA's definition of an advisory committee; rather, it read the definition "narrowly to prevent FACA from sweeping more broadly than the Congress intended." *Byrd v. U.S. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999).

Thus, "an advisory panel is 'established' by an agency only if it is actually formed by the agency." *Byrd*, 174 F.3d at 245 (quoting *Public Citizen*, 491 U.S. at 452, 456-57); *cf. Public Citizen*, 491 U.S. at 458 (suggesting that a committee is "established" by an agency when it is "Government-formed" (quotation omitted)); *id.* at 456-57 (explaining that FACA mostly "adopted wholesale the provisions of Executive Order No. 11007," which applied to certain committees "formed by a department or agency of the Government" (quotation omitted)). That means, among other things, that the

agency must appoint the panel's members. *See Byrd*, 174 F.3d at 246; *accord Food Chem. News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990) (rejecting argument that an advisory panel was "established" by an agency when a contractor, not the agency, "alone selected [the panel's] members").

Based on those established FACA principles, the district court properly concluded that an advisory group must be "directly formed by a government agency" to be "established" by that agency within the meaning of FACA and, therefore, that neither the Working Group nor the Council was "established" by USDA. App. Vol. 1 at 172-74 (emphasis omitted).

Plaintiffs do not urge that either group met those criteria. *See* R-CALF Br. 23-27. Instead, they contend primarily that the district court erred by construing the word "established" in accordance with established FACA analysis and that the court should instead have afforded a "liberal" or "broad" or "ordinary" meaning to the term. R-CALF Br. 23-27 (quotation omitted).

But the ordinary meaning of the word "establish" coheres with the construction consistently applied by the courts of appeals in interpreting FACA, as discussed above: to establish means "to bring into existence" or to "found," *Establish*, Merriam-Webster's Collegiate Dictionary (10th ed. 2002); *accord Establish*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/64530 (last visited Oct. 13, 2021) (defining "establish" as "[t]o set up on a secure or permanent basis; to found"). Thus, under the ordinary meaning of that word, the fact that the agency here

did not in fact bring into existence or found either the Working Group or the Council—that is, did not set it up or actually form it or select its members—means that the agency did not "establish" either group. And to the extent that the "liberal" construction of "established" envisioned by plaintiffs sweeps more broadly to cover groups that an agency did not directly form, that construction runs headlong into both the ordinary meaning of the term and decades of case law interpreting it in this context.

Even if plaintiffs' argument would not require this Court to disregard Supreme Court precedent and the decisions of other circuits implementing the Supreme Court's guidance, it is clear that USDA did not establish either group under any "ordinary" understanding of that word.

To the contrary, the record leaves no doubt that each group was "established" by industry. The NIAA decided to establish the Working Group in November 2017, developed a list of the organizations and individuals to invite as members of that group, and determined that the NIAA itself would act as the "facilitator." App. Vol. 1 at 268-69. The Chairman of the NIAA invited the identified organizations and individuals to become members of the Working Group. *See, e.g.*, App. Vol. 1 at 264-65. Moreover, the agency "was not invited to [the Working Group's] initial meetings as they discussed and developed their mission," App. Vol. 1 at 179; the members of the group decided (without the agency's input) on the structure, purpose, and goals of the group, App. Vol. 1 at 272-75; the participants, and not the agency, agreed to share

any costs, App. Vol. 1 at 275; and the members of the Working Group themselves retained control over the group's membership, App. Vol. 1 at 228.

The Council, in turn, was established by members of the Working Group in March 2019, after they concluded that the group's work could be accomplished more efficiently by a smaller group of producer representatives. *See* App. Vol. 2 at 374-75. Two of those industry representatives invited specific individuals and organizations to be members of the new Council. *See* App. Vol. 2 at 377. And although agency employees attended some of the Council's early meetings to serve as informational resources, they took no part in the committee's formation, the selection of members, or its agenda. *See, e.g.*, App. Vol. 1 at 252; App. Vol. 2 at 393; Supp. App. 20.

As the district court explained, and as plaintiffs do not seriously controvert, all of that is plain from the record. Indeed, plaintiffs' argument to the contrary is simply that the agency had previously suggested that it would find an industry group like the Working Group helpful as a source of technical advice regarding Radio Frequency Identification implementation, *see* R-CALF Br. 29-30, and that agency employees had some communications with Working Group members as those members took steps to establish the Council, from which plaintiffs infer that the agency must have "signal[led] its acceptance" of the Council's formation, *see* R-CALF Br. 31-33. But even under a capacious understanding of the word "established," the fact that the industry participants who formed the Working Group understood that the agency might find the group helpful does not mean that the agency "established" the group.

And similarly, no ordinary understanding of "established" could encompass simple acceptance of the fact that other entities had formed a new group.

That conclusion is further underscored by the case law that plaintiffs rely on. Plaintiffs cite the Eleventh and D.C. Circuits as courts that have endorsed their view that the word "established" in FACA should be given its plain meaning. R-CALF Br. 25-27 (citing *Miccosukee Tribe of Indians of Fla. v. South Everglades Restoration All.*, 304 F.3d 1076, 1085-86 (11th Cir. 2002); and *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913-15 (D.C. Cir. 1993)). But consistent with the understanding of "established" discussed above, both of those courts have focused their analysis under that provision on the question whether an alleged FACA committee was "formed or organized by federal agencies." *Miccosukee Tribe of Indians*, 304 F.3d at 1083; *see also Association of Am. Physicians*, 997 F.2d at 914 ("In order to implicate FACA, the President, or his subordinates, must create an advisory group . . . ."); *Byrd*, 174 F.3d at 245. Indeed, as noted above, the D.C. Circuit in particular has on several occasions addressed the meaning of "established," and its decisions, which faithfully implement the Supreme Court's guidance, are irreconcilable with plaintiffs' argument. For example, in *Byrd*, that court concluded that a panel was not "established" by the agency because a contractor, rather than the government, "selected the membership," even though the agency provided the contractor with a direction to convene an advisory panel and even "provided a list of suggested panel members" to the contractor. 174 F.3d at 246-47; *see also id.* at 247 (rejecting the argument that because

the agency "conceiv[ed] of the need for" the panel, it had "effectively" established it (quotation omitted)). Similarly, in *Food Chemical News*, the court explained that a panel was not "established" by the agency because a government contractor "alone selected its members," even though the relevant contract required the contractor "to assemble the panel as a means of obtaining the advice sought by the agency." 900 F.2d at 331, 333.

In contrast to that established precedent, plaintiffs fail to cite a single case in which any court has held that an advisory group was "established" by the Executive for FACA purposes when the agency did not itself select the members of the group. And in *Miccosukee Tribe,* it was not controverted that the committee at issue was "a group organized and funded at least in part by certain federal agencies to assist themselves and other agencies in developing strategies for implementing restoration projects in the Everglades." 304 F.3d at 1079. No similar circumstances exist here.

B. USDA Did Not "Utilize" the Working Group or the Council

As used in FACA, the word "'established' indicates 'a Government-formed advisory committee,' while 'utilized' encompasses a group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Food Chem. News*, 900 F.2d at 332-33 (citation omitted). As the Supreme Court has explained, "[t]he phrase 'or utilized'" was "added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term,

encompassing groups formed . . . by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves." *Public Citizen*, 491 U.S. at 462. As plaintiffs appear to recognize, *see* R-CALF Br. 36-37, this understanding comports with Congress's intention in enacting FACA and ensures that FACA's requirements do not unduly infringe on the Executive's constitutional prerogatives to enforce the laws, *cf. Public Citizen*, 491 U.S. at 465-67.

In implementing the Supreme Court's guidance, the courts of appeals have uniformly applied a "stringent" standard for determining whether a group is "utilized" by the government—a standard requiring "something along the lines of actual management or control of the advisory committee," *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994). Thus, "an advisory panel is . . . 'utilized' by an agency only if it is 'amenable to . . . strict management by agency officials.'" *Byrd*, 174 F.3d at 245 (second alteration in original) (quoting *Public Citizen*, 491 U.S. at 457-58). "[E]ven 'significant' influence" over an advisory panel "does not represent the level of control necessary to establish that a government agency 'utilized' [the] panel." *Id.* at 247; *see also Washington Legal Found.*, 17 F.3d at 1451 (explaining that "influence is not control.").

The district court correctly applied that standard in concluding that the record here makes clear that neither the Working Group nor the Council was in any sense amenable to strict management by agency officials. The Working Group was managed by the NIAA and by the industry members of the group. The NIAA created a list of

organizations and individuals that it initially invited to participated in the Working Group, App. Vol. 1 at 268-69, and it operated throughout the group's existence as the "facilitator" for the group, *id.*; App. Vol. 1 at 264. The members of the Working Group decided on the structure, purpose, and goals of the group; set up various subgroups to focus on particular issues; and determined that the costs of the group would be shared among the participants—all at a meeting where no agency officials were present. *See* App. Vol. 1 at 272-75; *cf.* App. Vol. 1 at 179 (explaining that "USDA was not invited to [the Working Group's] initial meetings as they discussed and developed their mission"). And then, through the group's existence, those members retained control over the group's work. The full group and various subgroups met regularly without agency officials' presence. *See, e.g.*, Supp. App. 1, 11-12; App. Vol. 1 at 182, 227. The Working Group's members managed the group's membership. App. Vol. 1 at 228. The group's members decided, in February 2019, that the group should "focus on each of" five specific categories, App. Vol. 2 at 329-33, and those same industry members decided which specific recommendations to discuss and approve, *see, e.g.*, App. Vol. 2 at 311, 329-34, 344-46. Therefore, throughout the life of the Working Group, it is clear that the group was "facilitated by NIAA" and "led by key stakeholders in the beef industry." App. Vol. 1 at 264. While agency employees kept in contact with the group's leaders and occasionally attended meetings to serve as an informational resource, nothing in the record remotely suggests that the agency exercised any control over the management and direction of the Working Group—

much less that the agency exerted the sort of strict control that would be required to meet the "utilize" standard.

The record is equally clear that the agency did not utilize the Council. Industry representatives created the Council and determined its membership when they became dissatisfied with the Working Group's rate of progress. App. Vol. 2 at 341-42, 374-75. And it was the industry representatives on the Council who controlled the direction of the group. For example, those representatives determined when and where the group would meet, *see, e.g.*, App. Vol. 2 at 377, 413, and they set the agenda for those meetings, *see, e.g.*, App. Vol. 2 at 388 (email before the first meeting from industry co-chairs stating that an "agenda . . . will be sent prior to the meeting"). Those representatives asked USDA to provide a representative who could answer questions about particular topics, and one or two agency employees attended a handful of Council meetings in response to those invitations. *See* App. Vol. 2 at 410-12. Nowhere in the record is there any suggestion that the agency exercised any control over the Council's management, much less that the agency exercised the extreme control that would be required to conclude that the agency "utilized" the group.

Plaintiffs do not appear to dispute the relevant legal principles with respect to the meaning of "utilize," *see* R-CALF Br. 36-38, but they disregard those principles in their analysis, urging that the agency "utilized" the groups within the meaning of FACA because it considered the groups' advice.

Plaintiffs' argument focuses on the facts that agency officials maintained regular communication with the Working Group's and the Council's leaders, sometimes attended meetings of those groups, and received (and internally circulated) information about EID-related issues from those groups. *See* R-CALF Br. 39-40. But an agency does not "utilize" a nongovernmental committee within the meaning of FACA simply because it maintains communication with or receives advice from the group. In *Public Citizen*, the Supreme Court had "no doubt that the Executive ma[de] use of " the American Bar Association committee that reviewed potential judicial nominees. 491 U.S. at 452; *see id.* at 443-45; *see also id.* at 478 (Kennedy, J., concurring in the judgment) (committee's "views [were] sought on a regular and frequent basis, [were] given careful consideration, and [were] usually followed"). The same was true, for example, of the expert panel in *Food Chemical News*, which had been created by the Federation of American Societies for Experimental Biology to render advice for the Food and Drug Administration, 900 F.2d at 329-30; and the panel in *Byrd*, which had been created by the Eastern Research Group to advise the Environmental Protection Agency, 174 F.3d at 241-42. Yet all three groups were held not to have been "utilized" within the meaning of FACA. *Public Citizen*, 491 U.S. at 467; *Byrd*, 174 F.3d at 247-48; *Food Chem. News*, 900 F.2d at 333.

Plaintiffs also mistakenly urge that various disparate actions by USDA reflect its strict management and control of either the Working Group or the Council. But none of those arguments is persuasive. For example, plaintiffs lay considerable stress

on a speech given by an agency official in which he discussed the "purpose" and "goal" of the Working Group, something that plaintiffs argue the official could not have known if the Working Group was not under the agency's control. *See* R-CALF Br. 30-31. It is entirely unclear why that would be the case. And plaintiffs omit to mention that the agency official simply repeated the purpose statement that the Working Group had developed during its inaugural meeting (without any agency official's involvement). *Compare* App. Vol. 1 at 283, *with* App. Vol. 1 at 287. And although plaintiffs focus on the fact that agency officials suggested revisions to various internal Working Group communications and Council press releases, *see* R-CALF Br. 30, nowhere do plaintiffs explain how agency officials' provision of suggestions to ensure that those documents reflected the officials' memory of previous discussions or understanding of the agency's intended actions constituted any sort of control of the groups' operations.

Plaintiffs also suggest that the agency tried to "disguise its involvement in [the Council's] operations" by requesting that the agency official who had attended the inaugural meeting not be listed as a member of the Council in a press release. R-CALF Br. 38 n.12. On the contrary, the agency official was properly concerned that her role be made clear—that of a non-voting participant who provided "information" and "context" but did not take substantive positions on the issues before the Council, *see* App. Vol. 1 at 252; App. Vol. 2 at 393; Supp. App. 20. And plaintiffs make no

attempt to explain how any of that suggests that the agency was engaging in strict control of the Council.

II. Plaintiffs' Additional Arguments Are Without Merit and Provide No Basis for Relief

Plaintiffs also advance a variety of additional insubstantial arguments. They urge that the agency violated the APA by not explaining in the administrative record why it chose to accept advice from the Working Group and the Council without adhering to FACA's requirements. They argue that the district court abused its discretion in denying their motion for discovery. And they claim that they are entitled to an injunction prohibiting the agency from using any of the advice received from the Working Group and the Council.

1. Plaintiffs contend that, separate and apart from whether the Working Group and the Council were in fact advisory committees subject to FACA's requirements, the agency violated the APA by failing to provide a "satisfactory explanation" for their decision to accept advice from those groups without complying with FACA's (inapplicable) requirements. R-CALF Br. 43-45. But USDA did not fail to comply with FACA's requirements because, as is explained above, neither group was a federal advisory committee. And if the agency had actually established or utilized either group, it would have had no basis for explaining why it nevertheless chose the path of noncompliance. It 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.

Plaintiffs' argument fails as well because a decision to accept advice from a person or group is not "final agency action," 5 U.S.C. § 704, reviewable under the APA. An action is "final" only if it represents "the consummation of the agency's decisionmaking process" and determines legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted). Those prerequisites are clearly absent here.[2]

2. Plaintiffs further contend that the district court abused its discretion by resolving this case on the basis of the administrative record and denying plaintiffs' motion to conduct discovery. R-CALF Br. 45-54. But that contention fails for two reasons: plaintiffs fail to challenge the primary basis for the district court's denial of their motion (that it was untimely) and, in any event, the district court properly

[2] Plaintiffs briefly suggest—in their summary of argument although not in their argument itself—that defendants "do not contest that the agency actions/inactions of which R-CALF complains are reviewable under the APA," with a citation to 5 U.S.C. § 704. *See* R-CALF Br. 18. To the extent plaintiffs intend that brief reference as an argument that defendants have forfeited any finality objection to their arbitrary-and-capricious claim, that argument is incorrect. Defendants argued below that the arbitrary-and-capricious "argument misconceives the final agency action which [plaintiffs] challenged in their" complaint, D. Ct. Dkt. No. 60, at 21-22, and this Court treats the issue of final agency action as jurisdictional (and so unwaivable) in any event, *see Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014).

exercised its discretion to conclude that additional discovery was unnecessary in this APA case.

The government provided the district court and plaintiffs with notice in April 2020 that it believed that plaintiffs' APA claims were properly resolved on the basis of the administrative record under the district court's local rule governing challenges to agency actions. *See* App. Vol. 1 at 125-26. Plaintiffs failed to challenge the applicability of that local rule or to request discovery until August 2020. *See* App. Vol. 1 at 6. And both the magistrate judge and the district court denied plaintiffs' motion primarily on the basis of that delay, for which plaintiffs have never provided a reasonable explanation. *See* App. Vol. 1 at 145 ("Plaintiff/Petitioner's request that this matter proceed under the Federal Rules of Civil Procedure is denied as untimely."); App. Vol. 1 at 151 ("If R-CALF had a legal basis to assert [that it was entitled to discovery], it should have brought that to the attention of the Court rather than waiting nearly four months to file its motion. In short, R-CALF fails to show how the Magistrate Judge's reasoning is clearly erroneous or contrary to law."). Plaintiffs, however, develop no argument in their opening brief that the magistrate judge and district court abused their discretion in denying plaintiffs' motion as untimely, and they have now forfeited any such argument. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). That alone is sufficient reason to affirm the district court's discovery decision.

In any event, the district court also did not abuse its discretion in deciding that discovery was unwarranted in this case. *See* App. Vol. 1 at 151-52. As plaintiffs do not contest, because FACA contains no private cause of action, each of their FACA claims must proceed through "the judicial review provisions of the Administrative Procedure Act." *Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1235 (10th Cir. 2004). And under those provisions, courts are generally required to confine review to the administrative record. *See* 5 U.S.C. § 706; *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." (citation omitted)).

Although plaintiffs contend that discovery is sometimes permitted in FACA cases, *see* R-CALF Br. 49-50, that contention does not establish that discovery is appropriate in every FACA case (or that it would have been appropriate in this case specifically). Indeed, cases alleging violations of FACA are routinely decided on a motion to dismiss, often without considering even the administrative record (much less allowing for additional extrarecord discovery). *See, e.g.*, *Public Citizen*, 491 U.S. at 448; *Center for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836 (D.C. Cir. 2008); *Food & Water Watch v. Trump*, 357 F. Supp. 3d 1 (D.D.C. 2018); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24 (D.D.C. 2010). The voluminous administrative record filed in this case—including the supplemental documents submitted by plaintiffs that the district court considered as part of the administrative

record—makes clear that neither the Working Group nor the Council was established or utilized by the agency. And although plaintiffs generically argue that additional discovery might have shed more light on the interactions between the agency and the advisory groups, *see* R-CALF Br. 52-53, they have failed to identify any specific material gap in the administrative record or material disputed fact that discovery might help resolve.[3]

3. Finally, plaintiffs argue that if this Court agrees with the merits of their claims, it should provide plaintiffs with declaratory relief and with an injunction prohibiting the agency from using any of the advisory groups' work product and requiring the agency to include a disclaimer regarding the alleged FACA violation in any future *Federal Register* notice. R-CALF Br. 54-56. That argument is not ripe for resolution by this Court, and, in any event, any request for injunctive relief is unsupported.

If plaintiffs were to prevail on their FACA claim, the question of relief would properly be addressed by the district court in the first instance. *See, e.g.*, *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1027 (D.C. Cir. 1998) (remanding to district court

[3] Plaintiffs also briefly complain that the district court local rule governing review of administrative actions does not apply by its terms to this case. *See* R-CALF Br. 48-49. That argument was, like plaintiffs' request for discovery, rejected as untimely below and can be rejected by this Court on that threshold ground. But in any event, even on the merits, plaintiffs fail to develop any argument explaining how they were prejudiced by the district court's application of that rule (as separate from the court's rejection of their request for discovery).

to determine whether injunctive relief was appropriate in FACA case); *California Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 614 (D.C. Cir. 1996) (same). That course is required because consideration of the relevant factors and the ultimate "decision to grant or deny permanent injunctive relief" are acts "of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Because the district court in this case granted judgment in favor of defendants, it had never had the opportunity to consider or balance those factors in its equitable discretion.

But if this Court were to consider plaintiffs' request for injunctive relief in the first instance, plaintiffs have not even seriously attempted to establish an entitlement to such relief. At the outset, plaintiffs fail to establish standing to seek any injunctive relief. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (explaining that a litigant must "demonstrate standing separately for each form of relief sought"). To establish standing, plaintiffs must demonstrate an "injury in fact" that is "concrete and particularized" and "actual or imminent," a "causal connection between the injury and the conduct complained of," and that it is "likely" that "the injury will be redressed" by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation omitted). But plaintiffs barely even attempt to make out such a concrete injury caused by the alleged FACA violations and redressable by any injunctive relief. At most, plaintiffs suggest that the agency intends to promulgate a rule in the future related to Electronic Identification technology and

that the use of any advice from the two groups at issue might contribute to a rule of which plaintiffs disapprove. *See* R-CALF Br. 55-56. But that "asserted injury is speculative because it depends on the outcome of a future rulemaking." *Kansas Nat. Res. Coal. v. U.S. Dep't of Interior*, 971 F.3d 1222, 1234 (10th Cir. 2020); *cf. id.* (explaining that a plaintiff "cannot show a certainly impending injury when the outcome" of a future agency decision "is unknown"). And plaintiffs cannot establish causation or redressability because, even assuming that the agency promulgates an Radio Frequency Identification rule in the future that injures plaintiffs, any such rule will be the result of the agency's consideration of a wide variety of factors and information such that it would be impossible to "show[] the FACA violation is responsible for [that] concrete injury." *Natural Res. Def. Council*, 147 F.3d at 1026 n.8.

Plaintiffs have also failed to demonstrate that the balance of the equities and the public interest support such relief (and, in particular, that those considerations support a use injunction, which "should be the remedy of last resort," *Natural Res. Def. Council*, 147 F.3d at 1025). 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. And of course, any future rule promulgated by USDA will be reviewable under the APA, and, insofar as plaintiffs are aggrieved by such a rule in the future, they will be free to challenge that rule and its supporting record.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellee does not believe that oral argument is necessary in this case. Nevertheless, if the Court believes that oral argument would be of assistance, appellee stands ready to present argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,051 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Sean R. Janda
Sean R. Janda

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Service will be accomplished on all parties by the appellate CM/ECF system.

s/ Sean R. Janda
Sean R. Janda

ADDENDUM

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5 U.S.C. app. 2 § 3

§ 3. Definitions

For purposes of this Act—

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), 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 of the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in section 551(a) of title 5, United States Code.

…