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NCLA Petitions Supreme Court to Review Tenth Circuit’s Misinterpretation of “Established” in FACA

R-CALF USA, et al. v. U.S. Department of Agriculture, Animal and Plant Health Inspection Service, et al.

Washington, DC (September 19, 2022) – Ranchers and livestock owners are taking the U.S. Department of Agriculture (USDA), its subagency, the Animal and Plant Health Inspection Service (APHIS), and the heads of those agencies to the Supreme Court over the government’s effort to phase out the use of metal ear tags, brands, backtags, and similar low-cost means of identifying livestock. Today, the New Civil Liberties Alliance filed a [petition](#) for a *writ of certiorari* with the U.S. Supreme Court in *R-CALF USA v. USDA*, asserting that APHIS failed to comply with statutory requirements in the Federal Advisory Committee Act (FACA) when it established two advisory committees and that the Tenth Circuit let APHIS off the hook based on an unduly confined interpretation of “established” that would gut FACA. U.S. courts of appeals have issued sharply conflicting decisions on the issues presented in this case—warranting Supreme Court review to resolve the split in authority.

NCLA argues that APHIS formed the “Cattle Traceability Working Group” (CTWG) and “Producer Traceability Council” (PTC) as federal advisory committees in 2017 and 2019, respectively, to assist in the development of the unlawful mandate requiring radio frequency identification (RFID) ear tags to trace livestock. APHIS devoted significant resources to convince livestock industry representatives of the need for an advisory committee and to spell out the proposed committee’s agenda. APHIS “established” CTWG (and its successor PTC) under any common understanding of that word, and within the meaning of FACA. The district court and the Tenth Circuit held otherwise, based not on any disagreement about the factual record but on their unusually narrow constructions of the word “established.” That interpretation directly conflicts with an Eleventh Circuit decision and is in considerable tension with the Supreme Court’s decision in *Public Citizen v. U.S. Department of Justice*.

NCLA’s petition raises an issue of exceptional importance. A key contested issue in a large percentage of FACA cases is whether a group is a FACA “advisory committee” that was “established” by the President or a federal agency—and thus subject to FACA constraints. The Tenth and Eleventh Circuit Courts of Appeals disagree regarding when the President or an agency should be deemed to have “established” a FACA advisory committee. And the Supreme Court’s decision in *Public Citizen* strongly suggests that “established,” as used in FACA, should be interpreted as taking its ordinary meaning—or if anything a broader sense, not a narrower one.

The factual evidence is overwhelming that APHIS played *the* major role in creating the advisory committees. The decisions below, however, provide APHIS and all other federal agencies with a roadmap for evading FACA in the future. The Act imposes important procedural and transparency requirements on federal advisory

committees to ensure they operate in an open, fair, and transparent manner. But according to the Tenth Circuit decision, agencies like APHIS that find the FACA requirements burdensome now have an easy means of evading them by just setting up the committee and then skipping its initial meeting. Supreme Court review is warranted to determine whether Congress intended that FACA be construed so narrowly as to render it toothless.

NCLA released the following statements:

“FACA was adopted to ensure transparency and accountability whenever government agencies seek to empower outside groups to develop public policies and mandates. APHIS clearly established the CTWG and PTC to further its goal of forcing our livestock producers to use RFID eartags, while pretending that such requirements were industry driven. The Supreme Court needs to ensure that FACA is enforced as written and as intended.”

— **Harriet Hageman, Senior Litigation Counsel, NCLA**

“FACA imposes important procedural requirements on federal advisory committees to ensure they operate in an open and fair manner. When, as here, federal courts overlook noncompliance with those requirements, they increase the danger that administrative agencies will succumb to secret lobbying by powerful special interests.”

— **Rich Samp, Senior Litigation Counsel, NCLA**

For more information visit the case page [here](#). Watch the case video [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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