No. 22-270

IN THE
Supreme Court of the United States

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

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 capacity as Administrator of the Animal and Plant Health Inspection Service,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

Richard A. Samp
(Counsel of Record)
Kara Rollins
Mark S. Chenoweth
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
rich.samp@ncla.legal

February 14, 2023 Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Page(s)

Miscellaneous:

INTRODUCTION

Respondents concede that in the months preceding September 2017, they lobbied repeatedly for creation of an industry-led advisory committee to provide technical assistance needed for their planned conversion to use of RFID ("radio-frequency identification) eartags as the exclusive means of identifying livestock. Opp. Br. 4. The undisputed facts set out in the Administrative Record show what happened next at a September 2017 Denver agricultural Strategy Forum—sponsored, funded, and orchestrated by Respondent Animal and Plant Health Inspection Service (APHIS). APHIS officials dominated the proceedings, repeatedly lecturing attendees on the need to form an industry-led advisory committee, specifying the committee's agenda, and challenging cattle-industry attendees to play a role in that committee. Before the Strategy Forum ended, many attendees agreed to do so.

These uncontested facts show that APHIS "established" the Cattle Traceability Working Group (CTWG) at the September 2017 Strategy Forum, within the plain meaning of that word. The lower courts held that Respondents did not "establish[]" CTWG within the meaning of the Federal Advisory Committee Act (FACA)—after construing that statutory term quite narrowly. Review is warranted because that narrow construction is inconsistent with FACA's plain meaning and directly conflicts with an Eleventh Circuit decision.

Respondents attempt to portray this case as involving a "fact-bound decision" unworthy of the

Court's attention. *Id.* at 9. But the facts of this case are uncontested—it was decided on the basis of an Administrative Record unilaterally created by Respondents. The lower courts based their holding that FACA was inapplicable not on any facts unique to this case but on their conclusion that a federal agency does not "establish" a FACA advisory committee unless it directly attends the committee's purported organizational meeting.

Review is particularly warranted given APHIS's publication last month of a Proposed Rule that would mandate use of RFID eartags throughout the cattle industry. *See* APHIS, "Use of Electronic Identification Eartags as Official Identification in Cattle and Bison," 88 Fed. Reg. 3320 (Jan. 19, 2023) ("Proposed Rule"). As noted by the district court, the two advisory committees at issue here "sent APHIS a regular stream of RFID-related technical advice, approved by formal votes of those committees." App.56a. There is a distinct probability that APHIS will consider the committees' technical advice when it decides later this year whether to adopt its Proposed Rule. Any consideration of that technical advice would be highly improper if, as Petitioners contend, the committees were subject to FACA yet failed to comply with FACA's procedural requirements.

ARGUMENT

I. RESPONDENTS' EFFORTS TO DISTINGUISH THE ELEVENTH CIRCUIT'S *MICCOSUKEE* DECISION ARE UNAVAILING

At issue in this case is whether two committees that advised APHIS regarding adoption of RFID technology—the Cattle Traceability Working Group (CTWG) and the Producer Traceability Council (PTC)—were "established" by APHIS within the meaning of FACA. If so, then each committee comes within the statutory definition of an "advisory committee," 5 U.S.C. App. 2, § 3(2), and APHIS is subject to the many procedural requirements that FACA imposes on an agency that establishes such committees. *See, e.g.,* 5 U.S.C. App. 2, §§ 9 & 10. All parties agree that APHIS did not comply with those requirements.

In sharp contrast with the decisions below, the Eleventh Circuit ascribed to "established" (as used in FACA) its commonly understood, broad definition. *Miccosukee Tribe of Indians of Florida v. Southern Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002). A district court had adopted a narrowed construction of "established," based on its understanding of *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989). The Eleventh Circuit reversed, holding that the district court's narrow construction:

> runs counter to the teachings of *Public Citizen* that "established" was used "in an expanded sense of the word," and "'in a generous sense," and the word should be

> applied with a "broad understanding" in order to encompass all such committees *formed directly or indirectly* by the federal government or its agencies.

Id. at 1085 (emphasis added) (quoting *Public Citizen*, 491 U.S. at 462-63). Construing "established" in accord with its "plain meaning," the Court held that construction "compels our conclusion" that the federal government "established" a FACA advisory committee yet failed to comply with FACA's procedural requirements. *Id.* at 1087.

Respondents concede that the district court in this case defined "established" quite narrowly. Opp. Br. 11.[1] But they assert that although the Tenth Circuit affirmed the district court's rejection of Petitioners' claims, it did not adhere to the district court's narrow construction of "established." *Ibid.* Respondent's assertion does not accurately reflect the Tenth Circuit's holding. The Tenth Circuit's rationale for finding that APHIS did not "establish" CTWG and PTC precisely matched the district court's rationale.

The generally understood meaning of "establish" is to take steps to bring something into existence. *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"). Consistent with its "narrower" understanding of the

---

[1] That concession is warranted. The district court held that "a narrower rather than a literalistic interpretation should be applied to FACA's use of the word 'established.'" App.64a.

word "established," the district court held that a federal agency has not "established" a FACA advisory committee unless it "directly" forms the committee. App.63a. The court reasoned that although "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," APHIS should not be deemed to have "established" those committees because they were not "directly" formed at the September 2017 Strategy Forum hosted by APHIS. *Ibid.*

The Administrative Record shows that APHIS officials who conducted the Strategy Forum stressed to participants the urgent need to form an advisory committee to address RFID issues and that cattle-industry attendees, before the forum concluded, agreed to APHIS's request that they form such a committee.[2] The court nonetheless held APHIS did not "establish" the committee because when those attendees held their first committee meeting in November 2017, APHIS officials absented themselves. App.63a-64a. If one adopts the dictionary definition of that word, APHIS unquestionably "established" CTWG at the Strategy Forum—that is, APHIS's actions elicited agreements to join APHIS's envisioned advisory committee, and thus APHIS's "br[ought] about" CTWG's creation. But the district court ruled FACA inapplicable on the theory that the advisory committee was not "directly"

[2] The Record's account of events at the Strategy Forum is more fully described in the Petition at 12-14. The district court confirmed that account, citing the Record for the proposition that "CTWG was formed 'as an outcome of" that Strategy Forum." App.64a (quoting AR 5).

formed until those who attended the Strategy Forum held their first committee meeting in November 2017. App.63a-64a.

The Tenth Circuit adopted precisely the same understanding of "established." It stated that APHIS should not be deemed to have "established" the advisory committees because its absence from CTWG's first meeting meant that it had not "directly" formed the advisory committee. APHIS asserts that the Tenth Circuit used the word "directly" only once—and only then in the course of describing the district court's opinion. Opp. Br. 11. That assertion is inaccurate. In addition to quoting the district court's conclusion that "a group which is not directly formed by a government agency ... is not a committee 'established' by the government within FACA's terms," App.21a, the appeals court also adopted that construction as its own. App.41a (stating that "as the district court noted in its decision, 'there is no evidence' in the administrative record 'to suggest that either group was *directly* formed by APHIS.'") (emphasis added) (quoting App.63a). *See also ibid*. (FACA inapplicable in absence of evidence that APHIS "actually 'established'" the advisory committees); App.39a ("an advisory panel is 'established' by an agency under FACA only if it is *actually* formed by the agency") (emphasis added) (citation omitted).

The appeals court's narrow construction of "established" cannot be reconciled with *Miccosukee*, which held that Congress intended a "broad understanding" of the word "established" so as to "encompass all [advisory] committees formed *directly or indirectly* by the federal government or its agencies."

304 F.3d at 1085. Review is warranted to resolve that circuit conflict.

FACA defines "advisory committees" as including committees either "established" or "utilized" by a federal agency. 5 U.S.C. App. 2, § 3(2). The Eleventh Circuit explained that although *Public Citizen* construed "utilized" more narrowly than its plain meaning, this Court's rationale for doing so is inapplicable to "established":

> The [*Public Citizen*] majority avoided [the need to address a serious constitutional question] by construing the term "utilized" in a way contrary to its plain meaning. In contrast, there is no need to run from the plain meaning of "established" in order to escape a serious constitutional question, because there is no serious constitutional question raised by application of FACA's requirements to every advisory committee established by the federal government.

Miccosukee, 304 F.3d at 1085-86.

Respondents assert that it is Petitioners (collectively, "R-CALF") that seek to define "established" in a manner inconsistent with its commonly understood meaning. Not so. Throughout these proceedings, R-CALF has consistently argued that Congress intended "established," as used in FACA, to be construed in accordance with its dictionary definition. As the Tenth Circuit's opinion states explicitly, R-CALF argued in the appeals court

that "*Public Citizen*'s discussion of the word 'established' (as used in FACA), while not part of the Court's holding, indicates that the word should be accorded its *normal, broad meaning*." App.40a (quoting R-CALF 10th Cir. Br. at 24) (emphasis added). In contrast, APHIS consistently urged the lower courts to reject dictionary definitions of "established" and instead to construe it "narrowly." *See, e.g.*, APHIS 10th Cir. Br. at 22 (urging court to interpret "advisory committee" and "established" "'narrowly to prevent FACA from sweeping more broadly than the Congress intended'") (quoting *Byrd v. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999)).

The frequent citation of *Byrd* in the decision below is further indication that the Tenth Circuit accepted APHIS's invitation to adopt a "narrow" construction of "established." The D.C. Circuit's *Byrd* decision explicitly ruled, based on its reading of *Public Citizen*, that the word "established" should be read "narrowly." It rejected an argument that FACA should apply when an agency is a prime mover in creating the advisory committee but does not act "directly" to form it. 174 F.3d at 246-47. The D.C. Circuit's later FACA decisions have frequently cited *Byrd*, suggesting that the D.C. Circuit can be counted on the Tenth Circuit's side of the circuit split. Neither *Byrd* nor the decision below can be reconciled with the Eleventh Circuit's holding that FACA applies to committees "formed directly or indirectly by the federal government or its agencies." *Miccosukee*, 304 F.3d at 1085. Review is warranted to resolve this longstanding conflict regarding the meaning of an important federal statute.

II. THE DECISION BELOW IS IN CONSIDERABLE TENSION WITH THIS COURT'S *PUBLIC CITIZEN* DECISION

At issue in *Public Citizen*, the Court's most comprehensive FACA decision, was whether the federal government "utilized" an advisory committee within the meaning of FACA. 491 U.S. 440. Whether the federal government "established" the Committee was not at issue—all parties agreed that the federal government had not done so.

The courts below nonetheless sought to rely on *dicta* in *Public Citizen* to support their narrow construction of "established." As explained more fully in the Petition, at 26-30, that reliance was misplaced. Nothing said in *Public Citizen* provides support for a narrow construction. On the contrary, the decision states repeatedly that "established" should be read broadly and thus is in considerable tension with the decisions below.

In response, APHIS argues that "*Public Citizen* ... does not indicate that the word 'established' in FACA should be given an artificially broad construction." Opp. Br. 18. But R-CALF has never urged an "artificially broad construction." Rather, R-CALF cites *Public Citizen* to refute the lower courts' claim that Congress intended "established" to be construed more narrowly than its plain, broad meaning.

Public Citizen cited Executive Order 11007, a document issued by President Kennedy in 1962 that *Public Citizen* viewed as a forerunner to FACA, in

support of its holding that Congress intended "utilized" to be construed narrowly. 491 U.S. at 456-57. Both the district court (App.63a) and the Tenth Circuit (App.37a, App.39a) cite *Public Citizen*'s discussion of Executive Order 11007 in support of their narrow construction of "established." The Petition points out that the lower courts totally misconstrued *Public Citizen*'s discussion of Executive Order 11007, which has no relevance to FACA's use of the word "established." Pet. 26-27. APHIS's brief has no response.

APHIS also has no response to R-CALF's claim (Pet. 27-28) that *Public Citizen*'s citation to FACA's legislative history "is in considerable tension with the Tenth Circuit's decision." This Court noted that the Senate bill that eventually became FACA "defined 'advisory committee' as one 'established or organized'" by a federal agency, and that the accompanying Senate report:

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

Id. at 461 (quoting S. Rep. No. 92-1098 (1972) at 8).

Public Citizen cited the Senate report in support of its explanation of why "utilized" should be narrowly construed. But the language quoted above directly undercuts the Tenth Circuit's contention that "established" does not encompass committees that: (1) a federal agency creates by informal or indirect means; or (2) are not federally funded.

III. THE MEANING OF "ESTABLISHED" IS A FREQUENTLY RECURRING QUESTION WORTHY OF THE COURT'S ATTENTION

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. *Compare, Public Employees for Environmental Responsibility v. Nat'l Park Service*, 2022 WL 1657013 at *17 (D.D.C. May 14, 2022) ("E-bike group" was "established" by National Park Service), *with American Oversight v. Biden*, 2021 WL 4355576 at *7-*9 (D.D.C. Sept. 24, 2021) ("Clemency Task Force" was not "established" by the President). That question is squarely raised by this case; review is warranted in light of the frequency with which the issue arises.

APHIS asserts that "this case would be a poor vehicle in which to address the question presented" because the evidence "quite clearly indicates" that CTWG and PTC were not established by a federal agency. Opp. Br. 18. APHIS alleges that "industry representatives ... made the decision to form both groups; selected the membership for both groups; and

determined both groups' organization, structure, and goals." *Ibid*.

Each of those allegations mischaracterizes the Record.[3] But because the case was decided solely on the basis of the Record, there are no factual disputes in need of resolution. The parties are bound by the facts set forth in the Record unilaterally prepared by APHIS. Those facts demonstrate that the Question Presented is outcome-determinative: if the Court determines that "established" should be accorded its plain meaning, the Record demonstrates that APHIS "established" both CTWG and PTC.

IV. THE QUESTION PRESENTED HAS TAKEN ON ADDED SIGNIFICANCE IN LIGHT OF APHIS'S PROPOSED RULE

Last month, APHIS released the Proposed Rule, which would mandate use of RFID eartags throughout

---

[3] For example, the Record demonstrates conclusively that at the September 2017 Strategy Forum, APHIS officials: (1) explained why they considered it crucial that an industry-led advisory committee be formed immediately to address RFID issues; (2) spelled out the precise agenda they expected the committee to follow; (3) "challenged" industry representatives attending the Forum to participate in the advisory committee; and (4) before the Forum concluded, received commitments from many attendees to help form and participate in the committee. *See* Pet. 11-14. The Record further shows that APHIS played a role in selecting committee members, CTWG and PTC closely adhered to APHIS's prescribed agenda, and APHIS officials regularly attended committee meetings and conducted at-least-weekly phone conferences (and regular correspondence) with the chairmen of the two committees and each of their subcommittees. *See* Pet. 14-17.

the cattle industry. APHIS has maintained for at least seven years that it planned to issue such a rule. Each of the Petitioners, as well as many other cattle producers, strongly oppose the rule. Indeed, Petitioners initially filed this lawsuit to challenge a 2019 APHIS "Factsheet" that sought to adopt mandatory RFID without engaging in notice-and-comment rulemaking.[4]

The issue of whether APHIS violated FACA becomes significantly more important in light of the Proposed Rule. CTWG and PTC "sent APHIS a regular stream of RFID-related technical advice, approved by formal votes of those committees." App.56a. There is a distinct probability that APHIS will consider the committees' technical advice when it decides whether to adopt its Proposed Rule. As a remedy for the FACA violation, Petitioners seek injunctive relief to prevent APHIS from relying on that advice.

APHIS asserts that Petitioners would suffer no injury if APHIS relies on the committees' technical advice. It argues that if they believe that CTWG or PTC "has provided inaccurate or incomplete advice to the agency, ... they will have the "opportunity to present their own views on those issues." Opp. Br. 19. That argument misperceives the nature of a FACA injury and the statute's purpose. As the Eleventh Circuit explained in upholding an injunction against agency use of material produced by an advisory committee operating in violation of FACA, "A simple

[4] The district court dismissed that aspect of the lawsuit as moot after APHIS withdrew the Factsheet.

'excuse us' [from a federal agency that violates FACA] cannot be sufficient. It would make FACA meaningless, something Congress certainly did not intend." *Alabama-Tombigbee Rivers Coalition v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard A, Samp
(Counsel of Record)
Kara Rollins
Mark S. Chenoweth
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
rich.samp@ncla.legal

February 14, 2023 Counsel for Petitioners