IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; GENERAL SERVICES ADMINISTRATION; EXECUTIVE OFFICE OF THE PRESIDENT; OFFICE OF THE VICE PRESIDENT; OFFICE OF ADMINISTRATION; MICHAEL R. PENCE, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; KRIS W. KOBACH, IN HIS OFFICIAL CAPACITY AS VICE CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; ANDREW KOSSACK, IN HIS OFFICIAL CAPACITY AS DESIGNATED FEDERAL OFFICER FOR THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; TIMOTHY R. HORNE, IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION; MARCIA L. KELLY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ADMINISTRATION,

Defendants.

Docket No. 1:17-cv-01354-CKK

Electronically Filed

REPLY IN SUPPORT OF PLAINTIFF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants' brief confirms that they have violated FACA and will continue to shroud this Commission in secrecy—evading the transparency mandated by federal law—unless and until this Court stops them. For the Commission's upcoming July 19 meeting, Defendants promise to release only the most narrow and cherry-picked set of records. There is no reason to guess whether those disclosures will be adequate: for the Commission's June 28 meeting, Defendants contend that they fully complied with FACA by attaching to their brief yesterday a half-page agenda and a single redacted email. Opp. 29. Defendants claim that those two documents are the entire universe of records related to the most controversial action any federal advisory committee has ever taken—a letter to all fifty states requesting personal information of every American voter. Nothing could be more implausible. Compounding these violations of FACA, Defendants intend to hold the July 19 meeting in a closed, nonpublic setting, supposedly because the Vice President cannot safely appear at events attended by members of the public.

Attempting to evade judicial review of their clear FACA violations, Defendants raise an avalanche of meritless procedural objections. They argue that some of the Lawyers' Committee's claims are too late and others are too soon. And they urge this Court to be the first ever to hold that the federal judiciary lacks power to review violations of FACA—not under the APA, not under FACA, not via mandamus, not at all. When Defendants do address the merits, it becomes clear why they rely so heavily on supposed procedurals bars. Defendants' anemic view of FACA's transparency requirements cannot be squared with the statute's plain language and purpose. And rather than explain what they intend to disclose, Defendants just say, "Trust us."

Defendants warn of perils of requiring the Commission to operate transparently, but the President chose to establish this Commission under FACA to obtain the veneer of bipartisanship and expertise. Defendants must comply with all the requirements that come with that choice.

If this Commission intends to federalize voter suppression, the American public demands to know. And FACA gives them that right. This Court should order full transparency, as FACA requires, even if it means some Commission members have to unpack their luggage.

ARGUMENT

I. The Lawyers' Committee's Claims Are Justiciable

Defendants' ripeness and mootness arguments both turn on the same unduly narrow view of what the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") seeks in this suit and the mistaken assumption that Defendants can insulate themselves against FACA challenges by self-selecting a few isolated documents for public disclosure. Indeed, if accepted, Defendants' arguments would all but end litigation about FACA's scope because every case would either come too soon or too late. Defendants' ripeness and mootness arguments both fail.[1]

A. The Lawyers' Committee Has a Concrete, Ripe Injury-in-Fact Related to the July 19 Meeting

Defendants argue that the Lawyers' Committee has not suffered a concrete, ripe injury with respect to the July 19 meeting because "the Commission has not refused to provide documents." Opp. 9. "[I]n fact," Defendants argue, the Commission "has announced its intent to release the relevant July 19 materials in advance of that meeting." *Id.* But the one case Defendants cite, *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449 (1989), establishes beyond any doubt that the Lawyers' Committee's claims related to the July 19 meeting are ripe, and that Defendants' accusation that the Lawyers' Committee "jumped the gun by filing suit" before receiving the Commission's response is a baseless attempt to foreclose adjudication of their unsustainably narrow interpretation of FACA.

[1] Defendants do not dispute that the Lawyers' Committee's claim that the July 19 meeting must be open to the public is ripe.

Public Citizen is directly on point. There, the Supreme Court held that a party that makes a request under FACA has standing and a justiciable claim when it seeks and has not received "specific . . . records." *Id.* That is the case here. The Lawyers' Committee requested the following emails and documents from the Commission:

> All emails since May 11, 2017 relating to the Commission's establishment, organization, operation, or work sent from or to the Commission's Chair, Vice Chair, other Commission members, or any federal employee (including special government employees) providing support to the Commission; and
>
> All other documentary materials created or received since May 11, 2017, including but not limited to records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, or agenda, relating to the Commission's establishment, organization, operation, or work that were made available to, or prepared by, the Commission's Chair, Vice Chair, other Commission members, or any federal employee (including special government employees) providing support to the Commission.

Compl. ¶ 44 & Ex. L. Although Defendants claim the Commission has "not refused to provide documents," Opp. 9, their response and the Declaration of the Commission's Executive Director and Designated Federal Officer (the "Kossack Declaration") nowhere state that Defendants will provide all documents responsive to the Lawyers' Committee's request. Rather, the Kossack Declaration states only that the Commission will post to its website "the agenda, public comments received through the Commission's staff email account within a reasonable time in advance of the meeting, the attachments to this declaration, and other documents that are prepared for or by the Commission." Kossack Decl. ¶ 10. The Kossack Declaration does not state that it will produce emails, working papers, drafts, notes, memoranda, and other documents that are responsive to the Lawyers' Committee's request and must be disclosed under FACA.

Far from establishing that the Lawyers' Committee's claims related to the July 19 meeting are not ripe, the Kossack Declaration effectively confirms the Commission's refusal to produce all of the emails and documents that the Lawyers' Committee requested. And while

Defendants suggest that they have produced all of the records they are required to produce under FACA, that is a merits question and has nothing to do with ripeness or injury in fact. The Lawyers' Committee has suffered an injury in fact, and its requests for records in advance of the July 19 meeting is ripe.[2]

B. The Lawyers' Committee's Claims from the June 28 Meeting Are Not Moot

Defendants' argument that the Lawyers' Committee's claims related to the June 28 meeting are moot fails largely for the same reason. According to Defendants, the Lawyers' Committee's claims "are moot because the Commission has now provided the relevant materials related to that teleconference." Opp. 9. But, again, Defendants produced a grand total of two documents—a partially redacted email and a half-page agenda—and nowhere suggest that they provided all of the documents the Lawyers' Committee seeks in this lawsuit.

Defendants again conflate the merits with justiciability. The test for mootness is whether it is "impossible for the court to grant any effectual relief whatever to the prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Here, even a cursory examination of the Lawyers' Committee's Complaint shows that it is not "impossible" for the court to grant it "effectual relief" for claims related to the June 28 meeting. The Lawyers' Committee seeks an

[2] Defendants also argue that the Lawyers' Committee's records claim is not ripe because "the sole evidence before the Court is the Commission's commitment to provide documents pursuant to FACA," as purportedly evidenced by the records the Commission has posted to its website. Opp. 10. But the records posted to the website are actually incomplete and self-serving, and only go to show the necessity of this Court's intervention. The website contains a link for "Responses from Public Officials" to the Commission's data request. *Presidential Advisory Commission on Election Integrity Resources*, https://www.whitehouse.gov/presidential-advisory-commission-election-integrity-resources. But as of 12:45 p.m. on July 14, 2017, only responses from seven states were posted, and the selection omits vociferously negative responses from a host of states, including Pennsylvania, Arizona, Maryland, and Oregon, and official statements expressing the same sentiment from states such as Mississippi, California, Delaware, Kentucky, New Mexico, and Vermont. It appears that the Commission is trying to provide a veneer of transparency while actually obscuring the truth from the public. This evidence only adds to the conclusion that Defendants have no intention of complying with their disclosure obligations.

order requiring Defendants to "produce records responsive to the Lawyers' Committee's request," which include a wide range of records that Defendants have thus far not produced. Compl. ¶ 59, 64, 69; *id*., Prayer for Relief (f).

Defendants have a "heavy" burden of establishing mootness. *Citizens for Responsibility & Ethics in Washington v. SEC*, 858 F. Supp. 2d 51, 61 (D.D.C. 2012) (citing *Honeywell Int'l. Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010)). By failing to state or present any evidence to suggest that they have produced all documents related to the June 28 meeting that the Lawyers' Committee seeks to obtain in this case, Defendants have failed to carry their burden.

II. Defendants' Violations of FACA Are Subject to Judicial Review

Defendants are wrong that the Lawyers' Committee "lack[s] a right of relief." Opp. 1. As demonstrated below, many courts have held, under an array of rationales, that plaintiffs may challenge violations of FACA in federal court. While courts have differed on the appropriate mechanisms to challenge FACA violations, courts have ***unanimously*** concluded that some mechanism *must* exist for members of the public to vindicate their rights under FACA. And for good reason: the purpose of FACA is to give the public the right to access an advisory committee's deliberations and other records. As then-Senator Edmund Muskie explained in opening the Congressional hearings on FACA, Congress passed FACA to protect the "fundamental[] . . . rights of people to find out what is going on and, if they want, to do something about it." S. Rep. No. 92-1098, at 4 (1972). Absent judicial review of an overly secret advisory committee such as this one, the Lawyers' Committee and every other member of the public will have no means "to find out what is going on" and "to do something about it."

Transparency is most important when government officials seek to avoid it, and absent judicial review, the Defendants could avoid it with impunity.

Defendants fail to identify even a single case in FACA's 45-year history foreclosing judicial review of a FACA violation. While cherry-picking isolated phrases from the case law to imply that judicial review of FACA violations is unavailable, Defendants fail to inform the Court that ***every*** one of these decisions found a basis to conduct judicial review. This Court would be the first ever to conclude that it lacked power to adjudicate a FACA dispute. This Court should decline Defendants' invitation to take this unprecedented step.

There are multiple avenues by which this Court may grant relief for Defendants' FACA violations. Defendants' actions are reviewable under the APA and FACA itself, and in all events this Court can and should grant mandamus relief or exercise non-statutory review.

A. Defendants' Violations Are Subject to Review Under the APA

Defendants concede that plaintiffs may assert APA claims against federal agencies for violating the requirements of FACA. Opp. 10; *see, e.g.*, *Ctr. for Biological Diversity v. Tidwell*, Civ. No. 15-2176, 2017 WL 943902, at *4 (D.D.C. Mar. 9, 2017); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 30-31 (D.D.C. 2010) (collecting cases). In these cases, the federal agency that organizes the advisory committee's activities is the relevant "agency" whose actions are subject to review under the APA. *See, e.g.*, *Idaho Wool Growers Ass'n v. Schafer*, 637 F. Supp. 2d 868, 873 (D. Idaho 2009) (holding that the plaintiff could assert an APA claim against the Forest Service challenging its "decision" to convene meetings of an advisory committee "without public access to [the] meetings," in violation of FACA).

Here, Defendants ignore that, in addition to suing the Commission itself, the Lawyers' Committee has sued GSA and its Acting Administrator and expressly brought APA claims against them. Compl. ¶ 61; *see* Opp. 10-13. GSA indisputably is a federal agency subject to the

APA. *See Am. Airlines, Inc. v. Austin*, 778 F. Supp. 72, 75 (D.D.C. 1991). As explained more fully below, GSA's actions to convene the Commission's July 19 meeting without public access, and without the Commission having first disclosed all of its records as required by FACA, constitute "final agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 704, 706.

GSA convened the Commission's July 19 meeting—a fact that Defendants conspicuously fail to acknowledge. Specifically, Jeffrey A. Koses, Director of GSA's Office of Acquisition Policy, Office of Government-wide Policy, issued the Federal Register notice scheduling the July 19 meeting, and that notice expressly identifies GSA as the "Agency" scheduling the meeting. 82 Fed. Reg. 31063 (July 5, 2017). GSA organized the meeting pursuant to the functions specifically delegated to GSA by the May Executive Order and the Commission's Charter. Both direct GSA to "provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary." Compl. Ex. G § 7(a); *id.* Ex. H § 6. At the hearing in the *Electronic Privacy Information Center* case, even the Government conceded that GSA's responsibilities with respect to the Commission include arranging "meeting locations." July 7, 1017 Hr'g Tr. 28:1-5, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-01320-CKK (D.D.C.).

GSA thus violated FACA in its organizing of the July 19 meeting. That violation is apparent on the face of GSA's Federal Register notice. 82 Fed. Reg. 31063 (July 5, 2017). Rather than schedule the meeting to "be open to the public," GSA selected as the meeting location the Eisenhower Executive Office Building—*a space closed to the public*. And GSA convened this meeting despite the fact that the Commission will have failed to comply with FACA's disclosure requirements by the time of the meeting.

APA review would be available even if, in arranging the July 19 meeting, GSA merely carried out orders from the Commission or another entity that Defendants argue does not qualify as an "agency" under the APA. The D.C. Circuit has held that where an entity not subject to the APA (such as the President) orders an agency to take action, courts have "power to review the legality of" the agency's action under the APA, because "courts have power to compel subordinate executive officials to disobey illegal . . . commands." *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971). In other words, the fact that an agency's actions "are based on" the directive of an APA-exempt entity does not "insulate them from judicial review under the APA," even if APA review of the agency's actions will "draw[] into question" "the validity of" the directive from the APA-exempt entity. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). The APA thus authorizes this Court to review any action by GSA to implement a directive that is inconsistent with FACA, whether the directive came from the Commission, the Vice President, or anyone else allegedly exempt from the APA.

Beyond GSA, Defendants Office of Administration (OA), Office of the Vice President (OVP), and the Executive Office of the President (EOP) also are "agencies" for purposes of the APA. The APA defines "agency" broadly to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," subject to specified exclusions not relevant here. 5 U.S.C. § 551(1). Defendants OA, OVP, and EOP are each an "authority of the Government of the United States." Defendants point to cases holding that these entities are not "agencies" for purposes of FOIA, but FOIA employs a different definition of "agency," *compare* 5 U.S.C. § 551(1) *with id.* § 552(f)(1), and applying FOIA to these entities raises unique concerns that are not present in the context of the APA. Defendants fail to cite a single case holding that OA, OVP, and EOP are not agencies for purposes of the

APA. These Defendants fall within the APA's broad definition of agency, and APA review is available for their actions relating to the Commission, including the failure to produce the Commission's records and to ensure that the Commission's meetings are open to the public.[3]

B. Defendants' Violations Are Subject to Review Under FACA

The Lawyers' Committee recognizes that this Court recently held that FACA does not confer a private right of action. *See Ctr. for Biological Diversity*, 2017 WL 943902, at *4. Other judges in this District, however, have reached the opposite conclusion. *See, e.g., Ctr. for Arms Control & Non-Proliferation v. Lago*, No. CIV A 05-682, 2006 WL 3328257, at *4 (D.D.C. Nov. 15, 2006); *see also Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989) (assuming without deciding that FACA may provide a private right of action). The Lawyers' Committee agrees with these latter decisions and therefore asserts that this Court may review Defendants' FACA violations under a private right of action to preserve the issue for appeal.

C. Alternatively, this Court Should Grant Mandamus Relief

To the extent the Court determines that neither the APA nor FACA provides for full judicial review of Defendants' FACA violations, the Court should grant mandamus relief compelling Defendants to perform their non-discretionary duties under FACA. "[A] district court may grant mandamus relief if (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005). Courts in this District have held that plaintiffs challenging FACA violations satisfy these requirements, and thus mandamus is available to compel compliance with FACA's non-discretionary requirements. *See Freedom*

[3] If the Court were to find that only some, but not all, of the relief that the Lawyers' Committee requests is available under the APA, the Court should order the remaining relief pursuant to mandamus or non-statutory review. *See infra* Parts II.C, II.D.

Watch, Inc. v. Obama, 807 F. Supp. 2d 28, 33 (D.D.C. 2011); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 31 (D.D.C. 2010); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 43 (D.D.C. 2002), *abrogated on other grounds by In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005). This Court should hold the same.

First, the Lawyers' Committee has clearly enforceable rights under the plain language of FACA and controlling precedent. The D.C. Circuit has recognized that members of the public such as the Lawyers' Committee have "an enforceable right" to an advisory committee's records under Section 10(b). *Cummock v. Gore*, 180 F.3d 282, 292 (D.C. Cir. 1999). The Lawyers' Committee likewise maintains a right under Section 10(a) to have an advisory committee's meetings be open to the public, so that the Lawyers' Committee can attend. *See, e.g.*, *Food Chem. News v. Young*, 900 F.2d 328, 330 (D.C. Cir. 1990) ("The public is entitled . . . to attend [FACA meetings]."); *Wash. Toxics Coal. v. EPA*, 357 F. Supp. 2d 1266, 1271 (W.D. Wash. 2004) ("FACA requires advisory committees to comply with several procedural requirements, including . . . permitting the public to attend meetings, and disclosing records and meeting minutes to interested persons.").

Second, FACA imposes on Defendants a clear duty to act. "[N]early every provision of the FACA that explains the statutory duties of advisory committees, like those at issue here, includes the word 'shall.'" *Judicial Watch*, 736 F. Supp. 2d at 31. Section 10(b) provides that the Commission's records "*shall* be available for public inspection and copying" 5 U.S.C. app. II § 10(b) (emphasis added). Section 10(a) likewise provides that "[e]ach advisory committee meeting *shall* be open to the public," and that "[i]nterested persons *shall* be permitted to attend, appear before, or file statements with any advisory committee." *Id.* § 10(a) (emphases added). It is well-settled that a statute "imposes a mandatory duty" when it uses the word "shall."

Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016). Accordingly, FACA imposes "discrete, non-discretionary duties" on Defendants, which "qualify [for] relief in the nature of mandamus." *Judicial Watch*, 736 F. Supp. 2d at 31; *accord Judicial Watch*, 219 F. Supp. 2d at 43 ("The language of [Section 10 of FACA] leaves no room for discretion.").

Third, if the Court determines that judicial review is not available under the APA or FACA itself, the Lawyers' Committee will be left with no other remedy—let alone an adequate remedy—to enforce its rights under FACA. And enforcing such rights is particularly critical because the very purpose of FACA is to ensure the public has access to an advisory committee's proceedings and deliberations. Mandamus relief is warranted in such circumstances.

Defendants' "constitutional concerns" about applying FACA to a Presidential commission are overblown and offer no basis to deny mandamus relief. Opp. 16. FACA's requirements explicitly apply to advisory committees "established or utilized by the President." 5 U.S.C. app. II § 3(2). And the D.C. Circuit has squarely held that when, as here, the President designates a Presidential advisory committee as subject to FACA, the committee is subject to all of FACA's requirements. *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983). The court explained that "where the President formally convenes an advisory committee pursuant to FACA, he cannot claim that enforcement of the Act's requirements would unconstitutionally impede his ability to perform his functions." *Id.* Further, the D.C. Circuit has specifically applied Section 10(b)'s disclosure requirements to a Presidential advisory committee constituted just like this one. In *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999), the court of appeals held that, under Section 10(b), the public "possesse[d] an enforceable right" to the records of a Presidential advisory committee chaired by the Vice President. *Id.* at 292. Strikingly, in four pages discussing their

"concerns," Defendants fail even to mention *National Anti-Hunger Coalition* or *Cummock*. Opp. 16-19; *compare* Pl.'s Mot. 10-11 (discussing both cases).

Rather than acknowledge or try to distinguish these controlling precedents, Defendants rely on cases in which the question presented was whether a particular group qualified as a "federal advisory committee" subject to FACA in the first place. *See* Opp. 17. For instance, in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), the D.C. Circuit addressed "the question whether the President's Task Force on National Health Care Reform ('Task Force') and its working group are advisory committees for purposes of the Federal Advisory Committee Act ('FACA')." *Id.* at 900. The court of appeals held that "the Task Force is not an advisory group subject to FACA." *Id.* While this case and others identified constitutional concerns in concluding that a group of Presidential advisors did not qualify as a "federal advisory committee" at all, *see* Pl.'s Mot. 10, Defendants cite no case—and we are aware of none—refusing to apply FACA's requirements to a group that the President expressly designated as subject to the Act.

Indeed, it bears emphasis that the President specifically made the choice to study the issues under the Commission's purview through a federal advisory committee to be chaired by the Vice President. The President could have asked his own White House Staff to study these issues (e.g., staff in the Domestic Policy Council), or the President could have asked the Department of Justice or other agencies to conduct any necessary review. But the President chose to create a Commission to carry the weight and imprimatur of a "bipartisan" committee comprised of purported experts in the field. That was the President's choice to make, but it comes with the consequence that the Commission's activities are subject to the full panoply of FACA's requirements. *Nat'l Anti-Hunger*, 711 F.2d at 1073 n.1.

In sum, if this Court concludes that no other remedy is available to the Lawyers' Committee to obtain the relief that it seeks, the Court should issue mandamus relief to require Defendants to carry out their mandatory duties under FACA.

D. As a Further Alternative, this Court May Exercise Non-Statutory Review

Finally, if the Court finds that none of the above forms of review are available, the Court may consider the Lawyers' Committee's claims as a "non-statutory review action." *Chamber of Commerce*, 74 F.3d at 1327. As this Court has written, "[t]he doctrine of non-statutory review of *ultra vires* actions allows a plaintiff in certain limited circumstances to challenge government action in court even if the 'plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision.'" *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63, 76 (D.D.C. 2016) (quoting *Chamber of Commerce*, 74 F.3d at 1327). "The D.C. Circuit has explained that nonstatutory review may be had" when the Executive Branch "has disregarded a specific and unambiguous statutory directive, or when [it] has violated some specific command of a statute." *Jasperson v. Fed. Bureau of Prisons*, 460 F. Supp. 2d 76, 85 (D.D.C. 2006); *see also Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 29-30 (D.D.C. 1999).

Although the non-statutory review doctrine "is narrow," *Cause of Action Inst.*, 224 F. Supp. 3d at 76, this case fits comfortably within it. As explained, Defendants have "disregarded a specific and unambiguous statutory directive" in failing to comply with FACA's mandatory requirements to disclose the Commission's deliberations and records, and to make the Commission's meetings open to the public. *Jasperson*, 460 F. Supp. 2d at 85. This Court may "grant relief" under non-statutory review where, as here, the Executive Branch refuses "to obey [Congress's] statutory commands." *Chamber of Commerce*, 74 F.3d at 1328.

III. Defendants Have Violated FACA's Disclosure and Open-Meeting Requirements

A. Defendants Refuse To Comply With Their Disclosure Obligation

Defendants' promises that they have complied with, and will continue to comply with, their disclosure obligations are belied by their conduct to date. Defendants state they have "made the documents pertaining to the June 28 conference call publicly available," Opp. 29, but in fact they have released a grand total of two documents relating to the meeting: a redacted email invitation and a half-page agenda. Kossack Decl. Exs. A, B. The Commission surely generated more records in relation to a meeting that discussed the enormously significant matter of sending a request to all fifty states for voter data. But Defendants' inadequate disclosures related to the June 28 meeting are illustrative of the broader problem, which is that Defendants take an erroneous and unduly narrow view of their disclosure obligations under FACA.

Notably, Defendants do not discuss anywhere in their brief the scope of materials that FACA requires be disclosed to the public under Section 10(b). And nowhere do they discuss, let alone say whether they will comply with, the Lawyers' Committee's request for "all emails relating to the Commission" from its members and staff and all "other documentary materials" created or received by the Commission's members and staff in the course of their work.

But Defendants' silence does not change the fact that the Lawyers' Committee's request is consistent with the scope of records that Section 10(b) requires the Commission to disclose. Section 10(b) provides that "[s]ubject to [FOIA], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection." 5 U.S.C. app. II §10(b); *see also* 41 C.F.R. § 102-3.170 (Section 10(b) mandates that advisory committees disclose this wide range of records so the public can have "a meaningful opportunity to comprehend fully the work undertaken by the advisory committee.").

GSA and the National Archives and Records Administration (NARA) have made clear that "Federal Advisory Committee Records" include all of the records requested by the Lawyers' Committee. GSA and NARA define "substantive committee records" to include:

- "correspondence documenting discussions, decisions, or actions related to the work of the committee . . . , *including electronic mail, exchanged between one or more committee members and/or agency committee staff*";
- "memos or similar documentation of how and/or why individual members were selected";
- "membership balance plans"; and
- "other records documenting decisions, discussions, or actions related to the work of a committee."

General Records Schedule 6.2 ("GRS 6.2"), https://goo.gl/e3oTRA (emphasis added). All records that meet these criteria "must be available for public review . . . per . . . section 10(b)." *GRS 6.2 Federal Advisory Committee Records*, httsp://goo.gl/qSxfF8.

This settled understanding of the scope of committee records available under Section 10(b) is consistent with that provision's cross-reference to FOIA. Indeed, "the scope of FOIA's document disclosure requirements" is "*narrower* than FACA's analogous requirements." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 583 F.3d 871, 874 (D.C. Cir. 2009) (emphasis added). While agencies can withhold certain deliberative materials under FOIA, that exemption is not available to withhold deliberative advisory committee records. *Id.*; *accord Wolfe v. Weinberger*, 403 F. Supp. 238, 241-43 (D.D.C. 1975). In other words, a federal advisory committee must make available under FACA all records that a federal agency ordinarily must make available under FOIA, plus more.

While Defendants remain silent on the scope of Section 10(b), their actions to date confirm that their view of Section 10(b) is erroneous. Defendants imply that they will make available only those records that directly relate to the June 28 meeting, the July 19 meeting, and perhaps future meetings. *See, e.g.*, Opp. 26. But nothing in Section 10(b)'s text limits the

records that are subject to disclosure to records that relate to meetings Rather, the Commission must disclose all records "prepared for or by" the Commission, regardless of their connection to a particular meeting. The General Records Schedule confirms as much, defining "substantive committee records" to include a broad range of documents extending well beyond just documents relating to meetings. GRS 6.2, *supra*. Meeting dates may trigger the deadline by which committees must disclose their records, but meeting topics do not limit the substantive content of the records that must be disclosed.

Moreover, while Defendants claim that they have "made the documents pertaining to the June 28 conference call publicly available," Opp. 29, their scant productions of just two documents strains credulity. Were there earlier drafts of the letter to states, or memoranda or work papers related to the request? Did Mr. Kossack or any other staff members take notes of the call, or prepare minutes or a transcript? Are there records that indicate which members attended the meeting, and whether any (other than the Vice President) left before the meeting ended? Were there written communications between and among staff and Commission members before or after the meeting? Section 10(b) expressly covers such categories of documents.[4]

In short, Defendants have violated Section 10(b) and will continue to violate Section 10(b) absent this Court's intervention. Defendants either misapprehend their disclosure obligations or are simply unwilling to comply. Either way, it is clear that the public's rights to

[4] Remarkably, Defendants' disclosures are lacking even for the meager two documents they do disclose. Without any explanation, Defendants have redacted the names of all persons invited to the June 28 teleconference. Kossack Decl. Ex. A. There are no conceivable grounds under FACA for redacting the names of meeting attendants. But it is does make one wonder what Defendants are trying to hide.

the Commission's records will be vindicated only if this Court directs the Commission to comply with their obligations and precludes the Commission from meeting until it does.

B. Defendants Must Permit Public Attendance at the July 19 Meeting

Defendants have also violated Section 10(a) of FACA in failing to allow for in-person public attendance at the July 19 meeting. In their opposition, Defendants make clear that they intentionally scheduled a meeting so that "members of the general public will not be able to attend." Opp. 6. But Section 10(a) requires that "[e]ach advisory committee meeting shall be open to the public," and "[i]nterested persons shall be permitted" to "attend" and "appear before" the Commission at its meetings. 5 U.S.C. app II §10(b). The statutory text is clear that the public has a right to physically attend the Commission's meetings. *See Pub. Citizen v. Nat'l Econ. Comm'n*, 703 F. Supp. 113, 129 (D.D.C. 1989).

Defendants nowhere discuss the actual statutory language of FACA. Opp. 23-25. Rather, as their only explanation, Defendants cite a single GSA regulation that, under certain limited circumstances, permits for telephonic or virtual public access, but they badly misinterpret that regulation. *Id.* at 24 (citing 41 C.F.R. § 102-3.140(e)). The regulatory history of the provision makes clear that it is limited to circumstances where *the committee members themselves* gather telephonically or virtually. GSA explained in issuing the regulation that it "provide[s] for adequate public access to advisory committee meetings that are conducted in whole or part through electronic means." 66 Fed. Reg. 37728, 37730 (July 19, 2001). The provision, GSA explained, "*complements existing policy covering advisory committee meetings that are held within a physical setting*, such as a conference room, by ensuring that agencies adequately plan for public participation by adding additional capability (such as a designated number of public call-in lines *for a teleconference*) to ensure access to committee deliberations." *Id.* at 37730-31 (emphases added).

In other words, when advisory committee members meet via teleconference or the Internet, the committee may open public access through the same means. But when advisory committee members meet in person, the public must be granted live access to the meeting. Indeed, in every advisory committee meeting from prior administrations that Defendants cite as examples where public access was remote, the committee members themselves met telephonically and simply created a dial-in number for the public to join by phone as well. Opp. 24 & n.5. It is telling that Defendants scoured the history of advisory committee meetings and could not find a single example of what they propose to do here—hold an advisory committee meeting in person but not allow for in-person public attendance. We are aware of none either. Defendants' effort to close the doors to its meeting finds no support in FACA's text or the implementing regulations, and would be unprecedented.[5]

C. Defendants Violated FACA in Conducting the June 28 Meeting

Defendants plainly violated FACA in conducting the Commission's June 28 meeting, during which the Commission deliberated upon the request to states for voter information. Even from the limited information Defendants have disclosed, it is clear that the meeting was a "gathering of advisory committee members (whether in person or through electronic means) held with the approval of an agency for the purpose of deliberating on the substantive matters upon

[5] Defendants' justifications for this unprecedented step—that the meeting must be closed "[d]ue to security protocols with the Vice President's attendance," Opp. 6—are pretextual. The Vice President regularly attends events in large public settings. *See, e.g.*, Tom Latek, *Vice President speaks to friendly crowd in Lexington, vowing repeal of 'Obamacare;' protestors object*, July 13, 2017, Ky. Today, https://goo.gl/sPtr1c (Vice President spoke at a rally of about 300 people in Kentucky); Austin Harrington, *Pence meets with conservative crowd at third-annual Roast and Ride*, June 3, 2017, Ames Tribune, https://goo.gl/WJJdBm (Vice President appeared before "a pack of more than 500 bikers" at an event in Iowa).

which the advisory committee provides advice or recommendations." 41 C.F.R. § 102-3.25 (defining "committee meeting").

While the Vice President's contemporaneous "readout" of the meeting failed to disclose such information, *see* Kossack Decl. Ex. C, we now know that the Commission intended to—and did—deliberate upon the request to states for voter data. The meeting's agenda listed "Information Requests" as one of the topics to be discussed. Kossack Decl. Ex. B. Mr. Kossack's declaration admits that "[t]he members discussed the proposed request for several minutes," and Defendants' brief adds that the discussion focused on "the content of [the] letter." Opp. 21; Kossack Decl. ¶ 5. Defendants also do not disclose that there was debate among the Committee members about the content of the letter, something that emerged in subsequent press coverage. Maine Secretary of State Matthew Dunlap "recommended against asking states for private information." Josh Delk, *Trump voter fraud commission was warned before requesting states' voter data*, July 5, 2017, The Hill, https://goo.gl/rjd2RU.

Such debate plainly constitutes the kind of deliberations upon the Commission's substantive work that FACA requires be open to the public. Indeed, what was discussed at the June 28 meeting was hardly a mundane administrative matter. It was an unprecedented decision to request personal and confidential information concerning every voter in the nation. It was a request of such ground-breaking nature that it unleashed a bipartisan condemnation around the nation and became a major news event.

Defendants nonetheless suggest that the June 28 telephonic conference was not subject to FACA's open meeting requirements because the Commission did not deliberate upon the final "recommendations" they will make to the President. Opp. 21-22. But FACA does not define committee meetings in such a manner. A committee meeting includes any gathering that

discusses "substantive matters upon which the advisory committee provides advice or recommendations"—meaning substantive matters that are germane to the topics and issues upon which that committee will eventually provide recommendations. The entire point of FACA's open-meetings requirements is for the public to see the process by which an advisory committee arrives at its ultimate conclusions. Defendants' interpretation would vitiate this central purpose of the statute, as advisory committees could refrain from meeting in public until they begin actually formulating their recommendations. Defendants cite no case that has interpreted Section 10(a) in such a manner, nor could they.

Defendants thus clearly violated all of the transparency requirements of FACA in conducting the June 28 meeting: they did not provide notice, they did not allow public access, and they have not produced the full complement of Commission records. As explained above, Defendants must produce all of the Commission's records, but at a bare minimum, they must produce all emails, drafts, notes, and other documents that relate in any way to the issues discussed at the June 28 meeting, including the request to states for voters' personal information.

IV. The Lawyers' Committee Satisfies All of the Other Preliminary Injunction Factors

Absent immediate relief, the Lawyers' Committee will continue to suffer irreparable injury from Defendants' flagrant disregard of FACA's requirements. As explained above, the Lawyers' Committee is entitled by law to attend the Commission's meetings, *see Food Chem. News*, 900 F.2d at 330; as the June 28 meeting shows, the Lawyers' Committee cannot turn back the clock to attend the July 19 meeting after it occurs. And the Lawyer's Committee has an immediately enforceable right to obtain the Commission's records. The need for those records is particularly urgent to understand and evaluate the Committee's activities before its first public meeting, especially given the chaos that has resulted from the Commission's request for voter

data. The harm that the Lawyers' Committee and the public will suffer if they does not receive the records before the July 19 meeting is far from speculative. *See* Opp. 27-28.

Given Defendants' past and continuing disregard for FACA, the Lawyers' Committee is entitled to injunctive relief to compel compliance in advance of the July 19 meeting. *See Pub. Citizen v. Nat'l Econ. Comm'n*, 703 F. Supp. 113, 129 (D.D.C. 1989) ("In the absence of injunctive relief, plaintiffs will be irreparably harmed" if future FACA meeting is conducted "behind closed doors" because they would be "denied, perhaps for all time, but at a minimum during the on-going course, that which Congress expressly protected through FACA.").

In contrast to the real and irreparable harm that the Lawyers' Committee and the public will suffer absent immediate relief, Defendants' sole claim of harm is that an injunction will "disrupt the schedules and travel plans for the Commission's members." Opp. 30. Suffice to say, the inconvenience of rebooking an Amtrak or airline ticket for the roughly half dozen members of the Commission who do not live in the Washington, D.C. area pales in comparison to the public interest in enforcing FACA's transparency requirements for a Commission that threatens the voting rights of every single American. While the Commission members have been making travel arrangements, voters around the country have been canceling their registrations due to the Commission's unprecedented request for voter data and the lack of transparency regarding what the Commission intends to do with that data. The balance of equities and public interest overwhelmingly favor entry of a TRO.

CONCLUSION

For the foregoing reasons, the Court should grant the requested temporary restraining order and preliminary injunction.

Dated: July 14, 2017

Respectfully Submitted,

/s/ John A. Freedman

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