ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5238

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

DRONE ADVISORY COMMITTEE, et al.,
Defendants-Appellees.

On Appeal from Orders of the
U.S. District Court for the District of Columbia
Case No. 18-cv-833-RC

REPLY BRIEF FOR APPELLANT

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GLOSSARY

DAC	Drone Advisory Committee
DACSC	Drone Advisory Committee Subcommittee
DFO	Designated Federal Officer
EPIC	Electronic Privacy Information Center
FAA	Federal Aviation Administration
JA ___	Citation to the Joint Appendix
RTCA	Radio Technical Commission for Aeronautic

SUMMARY OF THE ARGUMENT

The Government's arguments should be rejected, and the decision of the lower court reversed, for three reasons. First, the Government erroneously contends—contrary to the plain text of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2—that the records of the Drone Advisory Committee's ("DAC") constituent subgroups are not the records of the DAC itself. This view is based on a misreading of the statute, the relevant FACA regulations, and this Court's decision in *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). Second, the Government focuses on an argument that EPIC did not raise: that advisory subcommittees automatically qualify as "advisory committees" under FACA § 3(2). EPIC has not made that argument; also, the Government misconstrues this Court's decisions in *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983), and *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). Finally, the Government invites the Court to adopt an interpretation of the FACA, without precedent, that would enable the Federal Aviation Administration ("FAA") and other agencies to circumvent the statute. The Court should decline that invitation, reverse the decision of the lower court, and remand for further proceedings.

ARGUMENT

I. THE GOVERNMENT'S ARGUMENTS AGAINST DISCLOSURE ARE BASED ON A MISUNDERSTANDING OF THE FACA AND THE STRUCTURE OF THE DRONE ADVISORY COMMITTEE.

Because the Drone Advisory Subcommittee ("DACSC") and the DAC Task Groups are constituent parts of the Drone Advisory Committee, records received or generated by these subgroups must be disclosed along with the DAC's other records. FACA § 10(b). Each of the Government's arguments to the contrary fail.

First, the Government falsely declares it "undisputed" that all documents "made available to or prepared for or by" the DAC are already "publicly available." Appellee Br. 31. But EPIC disputes this fact and the Government's interpretation of the FACA. *See* Appellant Br. 18–24; FACA § 10(b). Although the records "made available to or prepared for or by" the DAC's *parent committee* have been disclosed to EPIC, the records "made available to or prepared for or by" the DAC's constituent *subgroups* remain secret. FACA § 3(2); *see also* JA 41. By definition, both categories of records were "made available to or prepared for or by" the DAC, and must therefore be disclosed. That is the basis for this appeal.

Second, the Government selectively quotes EPIC's opening brief to imply that EPIC's reading of the FACA is atextual. *See* Appellee Br. 32. But EPIC's argument for the disclosure of subgroup records is rooted in the plain language of the statute. As EPIC previously explained: "any record that was 'made available to

or prepared for or by' a particular subpart of the DAC was necessarily 'made available to or prepared for or by' the greater DAC. FACA § 10(b). The Government may not withhold large volumes of DAC records simply because they were generated or acquired for or by a particular subcomponent of the DAC." Appellant Br. 18.

Although the Government objects to EPIC's use of the words "subgroup" and "subcomponent," Appellee Br. 32–33, the FAA has repeatedly described the DACSC, the Task Groups, and other subcommittees in these terms. *See* Appellee Br. 32 ("every subcommittee and subgroup"); Mem. in Supp. Defs.' Mot. Dismiss *passim*, Dkt. No. 16-1; JA 173 ("There is much going on outside this room that will affect the work being done by this group and subgroups."); JA 210 ("[S]ubgroups of the committee, will handle their records in accordance with General Records Schedule 26, Item 2[.]"). And the Government's apparent distaste for dictionary definitions, Appellant Br. 32, is not one shared by the Supreme Court. *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (relying on "dictionary definitions"); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019) (relying on "[c]ontemporary dictionaries").

Third, the Government insists that it would "ma[k]e no sense" for Congress to "automatically attribute the records and meetings of every subcommittee and subgroup to its parent advisory committee," if the subcommittees can also qualify

as advisory committees on their own. Appellee Br. 31–32. But EPIC does not argue that the "meetings" of every subcommittee should be "attributed" to the parent committee—only that the *records* "made available to or prepared for or by" a subgroup are records of the advisory committee. If a subcommittee independently qualifies as an advisory committee, it will accrue additional obligations under the FACA, including the open meeting requirements of FACA § 10(a) and the meeting minutes requirement of FACA § 10(c). But even if a subcommittee does not qualify as an advisory committee, its records still belong to the parent committee.

The statute's differential treatment of records and meetings is reflected in the FACA regulations. Whereas the regulations expressly distinguish between the meetings of advisory committees (which must be "accessible to the public," 41 C.F.R. § 102-3.140(a)) and the meetings of subcommittees (which may be closed to the public more readily, *see* 41 C.F.R. §§ 102–3.35, 102–3.145), the regulations make no distinction between the *records* of a parent committee and the *records* of subgroups. *See* 41 C.F.R. § 102-3.170. In other words: the openness of a subcommittee's meetings depends on whether it is also an "advisory committee," FACA § 3(2); the public availability of a subcommittee's records does not. Thus, EPIC's reading of FACA § 10(b) does not lead to any redundancy in the statute.

Fourth, the Government resists EPIC's analogy of the FACA to the Freedom of Information Act ("FOIA") on the grounds that the FOIA applies to "agency records." Appellee Br. 32. This response misses the point of the analogy. If the FOIA—like the FACA—required the FAA to disclose records "made available to or prepared for or by *an agency*," the Government could not refuse to provide records "made available" to the Office of the FAA Administrator simply because that specific office was not an agency in its own right. So too here: the DAC (and now, the FAA) cannot refuse to publish certain records of the committee simply because they were made available to particular subcomponents of the committee.

Fifth, the Government attempts to recast the DACSC and Task Groups as "staffing groups" that merely "perform tasks to assist advisory committee." Appellee Br. 32–33. This is simply incorrect. The same FACA regulations that the Government relies on distinguish between a "Committee *member*" (defined as "an individual who serves by appointment or invitation on an advisory committee or subcommittee") and "Committee *staff*" (defined as an individual "who serves in a support capacity to an advisory committee or subcommittee"). 41 C.F.R. § 102-3.25 (emphasis added); *see also* 41 C.F.R. § 102-3.140(b) (distinguishing between "advisory committee members" and "advisory committee or agency staff"). The members of the DACSC and Task Groups are "Committee member[s]," not "Committee staff." 41 C.F.R. § 102-3.25. The Government's attempt to

characterize the work product of the DAC subgroups as mere "staff work" thus fails. Appellee Br. 18.

Sixth, the Government's attempt to distinguish *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999), undercuts its own argument. The Government concedes that the documents at issue in *Cummock* were "'made available to' the advisory committee," Appellee Br. 33, even though they were only provided to a subgroup of the committee. *Cummock*, 180 F.3d at 287 (noting that the records plaintiff sought included "an inch-thick briefing paper that she saw [two other Commissioners] reviewing"). By the same token, records provided to the DACSC and the Task Groups—both subgroups of the DAC—were "'made available to' the advisory committee," Appellee Br. 33. Thus, *Cummock* supports reversal.

Finally, the Government fails to rebut the remaining authorities cited by EPIC. First, the Government asserts that a General Services Administration training presentation—which states that an agency must "[a]llow public access to subcommittee records"—is somehow in conflict with FACA regulations concerning the duties of advisory subcommittees. Appellee Br. 33 (quoting JA 188). But as already explained, Appellant Br. 23–24, it is the obligation of the DAC (and by extension, the FAA) to disclose the records of constituent subgroups. The legal obligations that fall directly on *subcommittees* are not at issue in this case. Second, the Government argues that General Records Schedule 6.2 is

irrelevant—even though FACA regulations and the RTCA Advisory Committee Charter require that advisory committee records be handled in accordance with National Archives regulations. 41 C.F.R. § 102-3.175(e); JA 177. Although Schedule 6.2 does not itself govern the disclosure of advisory committee records, it is highly probative of how subcommittee records are treated: namely, as a subset of the parent committee's records. JA 181, 183.

Because the records of the DACSC and Task Groups are a subset of the DAC's records, they must be disclosed pursuant to FACA § 10(b). The Government's arguments to the contrary are not persuasive.

II. EPIC HAS PLAUSIBLY ALLEGED THAT THE FAA ESTABLISHED, UTILIZED, AND WAS DIRECTLY ADVISED BY THE SUBGROUPS, WHICH IS SUFFICIENT FOR REVERSAL

Because EPIC has plausibly alleged that the FAA established, utilized, and received advice directly from the DAC subgroups, the subgroups qualify as "advisory committee[s]" in their own right and must disclose their records on these additional grounds. FACA § 3(2). Failing to rebut EPIC's well-pleaded allegations, the Government instead relies on a misreading of this Court's precedents, a misstatement of EPIC's arguments, and a misinterpretation of the FACA that cannot be squared with the text or purpose of the statute.

A. The Government misconstrues this Court's decisions on advisory subcommittees and dwells on an argument that EPIC did not make.

Much of the Government's brief responds to an argument that EPIC has never made. For six pages, the Government explains why, in its view, subcommittees which exclusively "advise *advisory committees* are not advisory committees in their own right." Appellee Br. 19 (emphasis added); *see also id.* at 19–24. But EPIC does not contend that *every* advisory subcommittee qualifies as an "advisory committee" under FACA § 3(2). Rather, EPIC argues that the *particular* subgroups in this case qualify as advisory committees because they were "established" and "utilized" "in the interest of obtaining advice or recommendations" for the FAA, FACA § 3(2). Accordingly, the DACSC and Task Groups must comply with the FACA's records disclosure requirement. *Cf.* 41 C.F.R. § 102-3.145 ("If a subcommittee makes recommendations directly to a Federal officer or agency . . . then the subcommittee's meetings must be conducted in accordance with all openness requirements of this subpart."). The Government's extended argument about subcommittees which have no direct nexus to a federal agency—such as the task forces in *National Anti-Hunger Coalition. v. Executive Committee of the President's Private Sector Survey on Cost Control (NAHC)*, 711 F.2d 1071 (D.C. Cir. 1983)—is thus irrelevant to this case.

The Government also misconstrues this Court's holdings in *NAHC* and *Association of American Physicians & Surgeons, Inc. v. Clinton (AAPS)*, 997 F.2d 898 (D.C. Cir. 1993). According to the Government, these two cases stand for the proposition that subgroups "are not, as a matter of law, 'advisory committees' subject to FACA" if "they only [give] draft recommendations to the parent advisory committee and [do] not directly advise the agency." Appellee Br. 24. But that is not the test that Congress established, nor is it the test the Court adopted in those cases. Under the plain text of the statute, an entity qualifies as an advisory committee if it is "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies." FACA § 3(2). Thus, if an agency "established" a subgroup "in the interest of obtaining advice" for the agency, that is enough for the subgroup to qualify as an "advisory committee." *Id.* The subgroup need not *also* advise the agency directly—even though the DACSC and Task Groups did so in this case.

Nothing in *NAHC* or *AAPS* is to the contrary. As this Court later clarified, *NAHC* did not "explicitly approve the [lower court]'s reasoning relating to the supposed staff groups[.]" *AAPS*, 997 F.2d at 912 (citing *NAHC*, 711 F.2d at 1075). Rather, the *NAHC* court "rejected an effort to challenge [the lower court's] decision based on new information not in the record." *Id.* (citing *NAHC*, 711 F.2d at 1075). Because *NAHC* did not reach a holding on the status of subcommittees

under the FACA, that decision has no bearing on the issues in this appeal. But even if the *NAHC* Court had adopted the lower court's logic, this case differs in a crucial respect. In *NAHC*, it was uncontested that an advisory committee—rather than the President—had "established" the task forces at issue. *See Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 526 (D.D.C.) ("The Foundation's Management Office has organized thirty-six 'task forces[.]'"), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983). Had the President himself actually established the task forces at issue—as the FAA did in this case—those task forces would have satisfied the statutory definition of "advisory committee[s]." FACA § 3(2). Thus, *NAHC* is inapposite.

The Government's reliance on *AAPS* fares no better. In *AAPS*, the Government alleged that a working group of the President's Task Force on National Health Care Reform did not qualify as an "advisory committee" simply because "the working group [was] not in contact with the President and [was] not, therefore, 'utilized' by him." *AAPS*, 997 F.2d at 912. That, of course, sets *AAPS* apart from the instant case, in which EPIC has established that the DACSC and Task Groups were in regular contact with the FAA. Appellant Br. 24–32. FAA officials' direct management of and communication with the DAC subgroups—often in closed-door meetings—created precisely the "point of contact between the public and the government" that the FACA is concerned with. *AAPS*, 997 F.2d at

913. Moreover, the Court in *AAPS* did not even find the Government's "face-to-face" distinction persuasive. *Id.* 912. "[T]he statutory language does not remotely support the government. . . . In [*Public Citizen v. Department of Justice*, 491 U.S. 440 (1989),] the Court did not suggest that FACA could be avoided merely because the ABA committee communicated with the Justice Department rather than with the President." *AAPS*, 997 F.2d at 912. The Court thus rejected the Government's arguments and "remand[ed] for further proceedings, including expedited discovery, regarding the working group" and its status under the FACA. *Id.* at 916. The Court should similarly remand for discovery in this case to evaluate the activities of the subgroups.

B. The Government fails to rebut EPIC's plausible allegations that the FAA established, utilized, and was directly advised by the subgroups.

In opposing EPIC's argument for reversal, the Government urges the Court to adopt an unsupportable interpretation of EPIC's well-pleaded complaint and an incoherent construction of the FACA. The Court should not adopt either.

First, the Government appears to forget that EPIC's burden on a motion to dismiss—and an appeal therefrom—is modest. To survive a motion under Fed. R. Civ. P. 12(b), a complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009)). Plausibility is not a "probability requirement." *Id.* (quoting *Iqbal*, 556 U.S. at 678). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

EPIC, in its complaint and opening brief, explained in detail how the FAA established and utilized the DACSC and Task Groups and how the subgroups advised the agency. Appellant Br. 26–32. These allegations are more than sufficient to meet the plausibility standard of Fed. R. Civ. P. 12(b). It is irrelevant that—in the Government's view—the facts alleged are susceptible to a different interpretation. Appellee Br. 25–28. "[A] well-pleaded complaint should be allowed to proceed 'even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and that a recovery is very remote and unlikely.'" *Banneker Ventures*, 798 F.3d at 1129 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Second, EPIC has never argued, nor must it demonstrate, that *all* of the advice provided by the DACSC and Task Groups passed directly from the subgroups to the FAA. To come under the FACA, it is enough that the subgroups were "established or utilized by" the FAA "in the interest of obtaining advice or recommendations for" the agency, FACA § 3(2), or that the subgroups otherwise "directly" advised the FAA at some point. 41 C.F.R. § 102-3.145. It is of no

moment that the DAC *sometimes* "reviewed and revised" the work of the subgroups before delivering it to the FAA or instructed the subgroups to investigate certain matters. Appellee Br. 27 (quoting *NAHC*, 711 F.2d at 1075); *see also* Appellee Br. 25–28. EPIC has plausibly alleged that the FAA created, managed, and was at *other* times directly advised by the subgroups, thereby bringing them within the definition of an "advisory committee." FACA § 3(2).

Third, the Government attempts to minimize the significance of the Designated Federal Officer's ("DFO") presence at DAC and subgroup meetings—all the while ignoring that the DFO in this case was the *Administrator or Deputy Administrator of the FAA*. Appellee Br. 28–31. In essence, the Government asks the Court to endorse an end run around the FACA: to evade the statute's transparency requirements, the head of an agency need only appoint herself DFO of an advisory committee and establish a subordinate subcommittee. Wearing this dual hat, the agency head can thus supervise closed-door subcommittee meetings in which outside experts will develop, debate, and agree upon recommendations. 41 C.F.R. § 102-3.120. The agency head can then attend meetings of the parent committee, where the subcommittee will convey the same recommendations—again, before that advice has been "reviewed and revised" by any publicly accountable body. *NAHC*, 711 F.2d at 1075. Finally, having intimately supervised every step of the advisory committee process, the agency head will at last receive

"official" recommendations from the parent committee. By the Government's telling, it is only this final step at which the FAA is "advised" or "utilize[s]" an advisory committee.

This view of the FACA is entirely inconsistent with a statute designed "to hold the committees to uniform standards and procedures; and to keep Congress and the public informed of their activities." *AAPS*, 997 F.2d at 903 (citing FACA § 2(b)(1)–(6)). Indeed, as the Government acknowledges, the FACA is most concerned with the "point of contact between the public and the government." Appellee Br. 24 (quoting *AAPS*, 997 F.2d at 913). Such a "point of contact" assuredly exists where the FAA Administrator or Deputy Administrator directly manages and attends subcommittee meetings comprised of members of the public. Were it otherwise, "FACA would be rather easy to avoid[.]" *AAPS*, 997 F.2d at 915. For example, President Clinton could have evaded public scrutiny of the working group in *AAPS* simply by appointing himself DFO and receiving the working group's recommendations in closed-door meetings. But as this Court's ruling in *AAPS* reflects, the FACA cannot be so easily bypassed.

Perhaps this would be a different case if the FAA had followed the standard practice of federal agencies and appointed a career civil servant to serve as DFO of the Drone Advisory Committee. *See, e.g.*, *All Federal Advisory Committees at EPA*, EPA (Feb. 26, 2020) (listing the various DFOs of the Environmental

Protection Agency's twenty advisory committees).[2] But the FAA chose to appoint its Deputy Administrator—and later, its Administrator—as the person directly in charge of the DAC, the DACSC, and the Task Groups. Having done so, the FAA cannot escape the conclusion that the agency utilized and received advice from the DAC's subgroups through FAA Administrators.

Fourth, the Government simply ignores the ample allegations in EPIC's Complaint that the FAA established, utilized, and was advised by the DAC subgroups, instead asserting that "[a]ll of the factual allegations are to the contrary[.]" Appellee Br. 30. *Contra* Appellant Br. 26–32 (detailing how the FAA established and utilized the subgroups and how the subgroups advised the agency). In support of this, the Government points to written policies, an organizational chart, and various meeting minutes. Appellee Br. 30. But as explained above, the fact that the DAC subgroups filtered *some* recommendations through the parent committee does not change the fact that the subgroups were established and utilized by the FAA to obtain advice in *other* circumstances. Whether these alternate channels of advice constituted "collu[sion]" or "sleight of hand," as the Government puts it, is beside the point. Appellee Br. 30–31. The applicability of FACA does not turn on what officials "understood" to be the case, *id.* at 30; it

[2] https://www.epa.gov/faca/all-federal-advisory-committees-epa.

turns instead on how a committee was actually formed and operated. *See* FACA § 3(2). EPIC more than plausibly alleged that the subgroups were established and utilized by the FAA, making this the "rare case" in which the Court must reject the Government's refusal to apply the FACA. *AAPS*, 997 F.2d at 914.

Fifth, the Government asserts—without explanation—that the subgroups were established "in the interest of obtaining advice or recommendations for the" DAC rather than the FAA. This is directly contradicted by FAA statements in the record. *See* JA 80 ("The committee will conduct more detailed business through a subcommittee and various task groups that will help the FAA prioritize its activities, including the development of future regulations and policies."); JA 102 ("FAA seeks to establish [through the DACSC] a venue and process to enable stakeholders to advise the FAA on the needs of these new and expanding users of the National Airspace System . . . ."). Moreover, the phrase "in the interest of" is commonly understood to mean "in order to achieve (a particular goal or result)." *In The Interest Of*, Merriam Webster (2020).[3] It is beyond serious dispute that the subgroups were established "in order to achieve . . . [the] goal" of obtaining advice for the FAA—even if the subgroups were nominally required to pass recommendations through the DAC first. *Id.*

[3] https://www.merriam-webster.com/dictionary/in%20the%20interest%20of.

Finally, the Government does not meaningfully dispute that the FAA "established" and "utilized" the subgroups, Appellant Br. 26–34; instead, the Government generically asserts that these issues are "disputed." Appellee Br. 24. And the Government does not respond at all to EPIC's alternative argument that the subgroups were established by the quasi-public DAC. Appellant Br. 32–34. Accordingly, the Government has waived any arguments to the contrary. *Whitaker v. United States Dep't of State*, No. 14-5275, 2016 WL 9582720, at *1 (D.C. Cir. Jan. 21, 2016) ("Because the brief never expands on either issue, they are waived.").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court and remand the case for further proceedings.

Respectfully Submitted,

Dated: March 2, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) and D.C. Cir. R. 32(e), because it contains 3,868 words, excluding parts of the brief exempted under Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case will be served by email and the CM/ECF system:

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