[ORAL ARGUMENT NOT 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 the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Plaintiff-Appellant is the Electronic Privacy Information Center. Defendants-Appellees include the Federal Aviation Administration; the United States Department of Transportation; and David W. Freeman, in his official capacity as Committee Management Officer of the Department of Transportation. The Drone Advisory Committee, which was named as a defendant, ceased to exist on May 29, 2018. Steve Dickson, who is automatically substituted for Daniel K. Elwell under Federal Rule of Appellate Procedure 43(c)(2), is also named as a defendant, in his official capacity as Administrator of the Federal Aviation Administration and Designated Federal Officer of the former Drone Advisory Committee and RTCA Advisory Committee. (RTCA is not an acronym; the organization used to be known as the Radio Technical Commission for Aeronautics.) No amici curiae appeared before the district court or before this Court.

B. Rulings Under Review. Plaintiff-Appellant seeks review of the February 25, 2019 Order (Dkt. No. 24) and Opinion (Dkt. No. 25) of the district court in *Electronic Privacy Information Center v. Drone Advisory Committee*, 369 F. Supp. 3d 27 (D.D.C. 2019) (No. 1:18-cv-833) (Contreras, J.), which granted in part and denied in part Defendants'-Appellees' motion to dismiss, and the district court's July 26, 2019 Order (Dkt. No. 33), which entered final judgment in favor of Defendants-Appellees.

C. Related Cases. This case has not previously been before this Court. Defendants-Appellees are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Joseph F. Busa
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Rule:

Other Authorities:

GLOSSARY

FACA	Federal Advisory Committee Act
FAA	Federal Aviation Administration
FOIA	Freedom of Information Act

INTRODUCTION

The Federal Aviation Administration established the Drone Advisory Committee under the Federal Advisory Committee Act, 5 U.S.C. app. 2, to provide the agency consensus recommendations regarding how unmanned aircraft might be integrated into the national airspace. As required by the Act, the Committee's meetings were open to the public, and the Committee's records are publicly available.

Plaintiff urges that the Act's requirements also apply to the records of the Committee's subordinate staffing groups—a subcommittee and three task groups—that conducted research and gave preliminary recommendations to the parent Committee regarding what the Committee should recommend to the agency. Rejecting plaintiff's contentions, the district court correctly held that these staffing groups were not advisory committees within the meaning of the Act because they provided advice not to an agency but to the advisory committee itself. The court correctly applied the Act's definition of an advisory committee, 5 U.S.C. app. 2, § 3(2), and this Court's decision in *National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983). The decision also accords with administrative guidelines promulgated in reliance on this Court's precedent. *See* 41 C.F.R. § 102-3.35(a) ("In general, the requirements of the Act … do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency."); 66 Fed. Reg. 37,728, 37,729 (July 19, 2001) (citing *National Anti-Hunger Coalition*).

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under 28 U.S.C. § 1331, alleging violations of the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and the Federal Advisory Committee Act, 5 U.S.C. app. 2. *See* Joint Appendix (JA) 44 (Compl.). The district court issued an interlocutory order dismissing the claims at issue in this appeal on February 25, 2019. JA 6-39 (Op.); JA 40 (Order). Following resolution of plaintiff's remaining claims, the district court granted plaintiff's motion to enter final judgment as to all claims on July 26, 2019. JA 41-42 (Order). Plaintiff filed a timely notice of appeal on September 4, 2019. JA 5 (Dkt. Sheet); *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the Federal Advisory Committee Act applied to a subcommittee and task groups that advised the Drone Advisory Committee.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. The Federal Advisory Committee Act

1. Congress enacted the Federal Advisory Committee Act (FACA, or the Act) in 1972, finding that "there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government," and that these groups "are frequently a

useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." 5 U.S.C. app. 2, § 2(a). Among the purposes of the Act were to ensure that "standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees, *id.* § 2(b)(4), and that "the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees," *id.* § 2(b)(5); *see generally Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 445-47 (1989).

To those ends, the Act provides that an agency may establish an advisory committee if the head of the agency determines that an advisory committee would be "in the public interest." 5 U.S.C. app. 2, § 9(a)(2). The Act further provides that every advisory committee must have a charter prescribing, among other things, the committee's objectives, duration, and the "agency or official to whom the committee reports." *Id.* § 9(c)(B)-(D). The Act requires that "[e]ach advisory committee meeting shall be open to the public," *id.* § 10(a)(1), and that "[i]nterested persons shall be permitted to attend, appear before, or file statements," *id.* § 10(a)(3). "Detailed minutes of each meeting of each advisory committee shall be kept." *Id.* § 10(c). And each meeting of an advisory committee must be conducted in the presence of, and with an agenda approved by, a designated federal officer. *Id.* § 10(e)-(f).

The public-records requirement provides that, subject to exemptions in the Freedom of Information Act (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 and copying." 5 U.S.C. app. 2, § 10(b).

2. FACA's requirements apply only to "advisory committees." As relevant here, the Act provides that "[t]he term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof … , which is … established or utilized by one or more agencies … in the interest of obtaining advice or recommendations for … one or more agencies or officers of the Federal Government." 5 U.S.C. app. 2, § 3(2).

The Act authorizes the Administrator of the General Services Administration to "prescribe administrative guidelines and management controls applicable to advisory committees." 5 U.S.C. app. 2, § 7(c). These guidelines and management controls are codified in title 41 of the Code of Federal Regulations, part 102-3. Among those guidelines and controls is a provision specifying that, "[i]n general, the requirements of the Act … do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency." 41 C.F.R. § 102-3.35(a).

B. The Drone Advisory Committee

1. The Federal Aviation Administration (FAA) chartered the Drone Advisory Committee on August 31, 2016. JA 221. The charter specified that the Committee's objective would be to "identify and recommend a single, consensus-based set of

resolutions for … integrating [unmanned aircraft systems] into the [national airspace] and to develop recommendations to address those issues and challenges." *Id.* The Committee would consist of representatives from drone manufacturers, component manufacturers, software developers, operators, labor organizations, research and development groups, academia, local government, and air traffic management. *Id.*

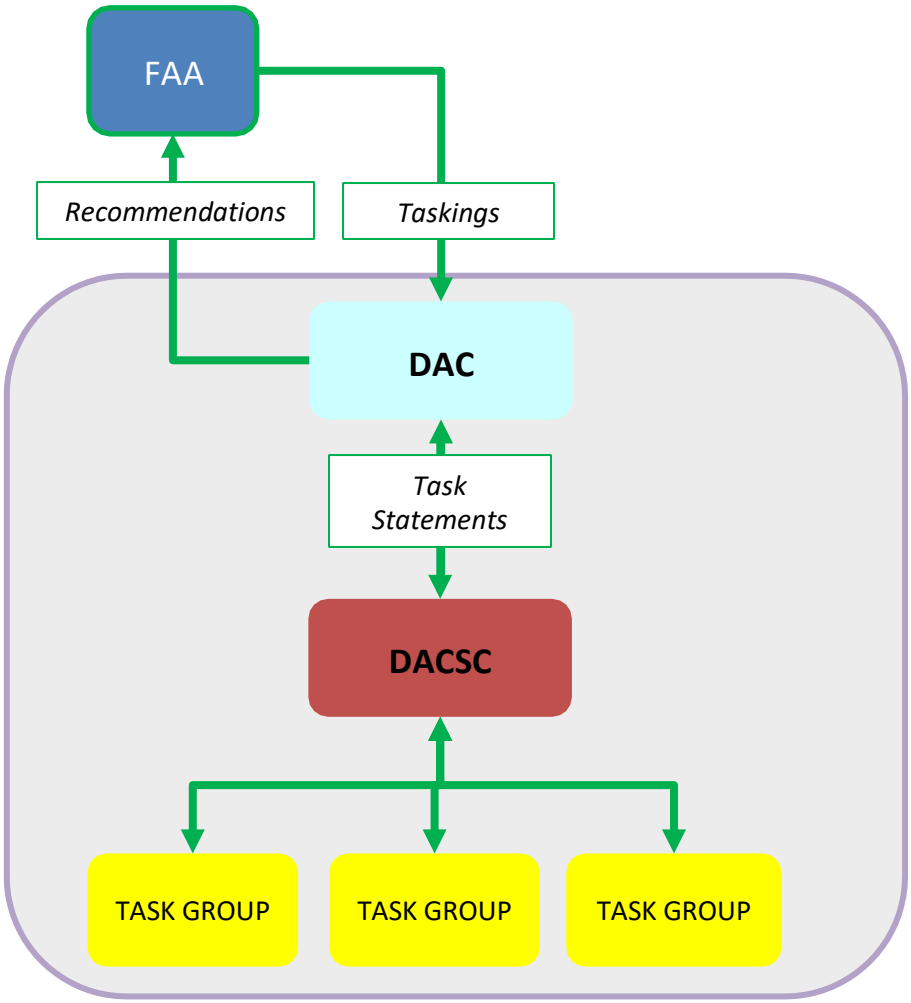
The Drone Advisory Committee was a component of an umbrella organization known as the RTCA Advisory Committee, which, in addition to providing advice to FAA itself, also provided administrative support for a number of advisory committees that made recommendations to the FAA. *See* JA 174 (RTCA charter); JA 212 (amendment adding "the drone advisory committee" as an RTCA component). The RTCA charter provided that RTCA components, such as the Drone Advisory Committee, "must report to the RTCA Advisory Committee and must not provide advice or work products directly to the agency"—"unless," as here, such components "operat[ed] under the authority and requirements contained in FACA." JA 177.

The Drone Advisory Committee charter provided that "details [concerning] the specific conduct of the [Committee]" would be "developed separately" in "[a] Terms of Reference" that "compl[ies] with … the FACA." JA 221. As issued, those terms of reference made clear that the Committee "will conduct its deliberations on recommendations to be provided to the FAA in meetings that are open to the public." JA 72. The terms of reference also made clear that the Committee, and not its subordinate staffing groups, would make recommendations to the agency: The

Committee "may establish [Task Groups] to accomplish specific tasks," including "to develop recommendations and other documents for the Committee." *Id.* And, "[a]djunct to the [Committee] is a Subcommittee," *id.*, serving as "[s]taff to [the Drone] Advisory Committee" that may "[g]uide and review selected work of [Task Groups]" and "[f]orward recommendations and other deliverables to [the Committee] for consideration," JA 73. "Depending upon the type of tasking, [Task Group] products will either be presented to the [Subcommittee] for review and deliberation, then forwarded to the [Committee] or they might be presented directly to the [Committee]." JA 72. In either case, the Committee itself would ultimately "[r]eview and approve recommendations to FAA." *Id.*

Separate "terms of reference" that further specified the Subcommittee's goals and structure also made clear that the Subcommittee would "provide the staff work for the" parent Committee, but would not itself advise the FAA. JA 102. The Task Groups would "[f]orward recommendations" to the Subcommittee, which would "[g]uide and review" the groups, "develop draft recommendations," and "[f]orward recommendations and other deliverables to [the Committee] for consideration." JA 104. Ultimately, the Committee would "[d]evelop, review, and approve recommendations to FAA." *Id.* The Subcommittee's terms of reference expressly provided that "[n]o recommendations will flow directly from the [Subcommittee] or [Task Groups] to the FAA"; "[a]ll must be vetted in a public [Committee] meeting and transmitted to the FAA upon approval by the [Committee]." *Id.*

An organizational chart in the terms of reference underscored that hierarchical relationship and emphasized that FAA would receive recommendations only from the Committee, not its subordinate staffing groups:



JA 103 ("DAC" is the Drone Advisory Committee; "DACSC" is the Subcommittee).

2. The Drone Advisory Committee conducted its work through six public meetings that were held between September 2016 and March 2018. *See* JA 56-63 (Compl.). It is undisputed that, consistent with FACA, the Committee's charter, and the terms of reference, the FAA published notice of each meeting in the Federal

Register, and members of the public were invited to attend and present oral or written statements for the Committee's consideration. *See* 81 Fed. Reg. 60,402 (Sept. 1, 2016); 82 Fed. Reg. 3071 (Jan. 10, 2017); 82 Fed. Reg. 18,682 (Apr. 20, 2017); 82 Fed. Reg. 28,929 (June 26, 2017); 82 Fed. Reg. 47,072 (Oct. 10, 2017); 83 Fed. Reg. 7284 (Feb. 20, 2018). It is also undisputed that the Committee records—such as membership lists, meeting minutes, and presentations, reports, and other documents prepared for or by the Committee or made available to the Committee—are available to the public. *E.g.*, JA 179-80 (membership); JA 81-101, 125-73 (minutes); JA 89, 126, 142, 153 (listing documents attached to minutes); *see also* RTCA, *Drone Advisory Committee*, https://www.rtca.org/content/drone-advisory-committee (accessed Feb. 10, 2020) (online repository for Committee documents).

In its first several meetings, the Committee created three Task Groups to research and draft proposals regarding (i) the roles and responsibilities of the federal, state, and local governments in regulating drones, (ii) procedures and rules for providing access to airspace for drone operations that are not currently permitted, and (iii) funding for federal activities and services regarding drone regulation and access to airspace. The first two groups were "creat[ed]" by the Subcommittee, JA 89 (minutes), "in response to direction from the" Committee, JA 114 (tasking), based on action items identified by the group discussion during the Committee's first meeting, JA 88-89 (minutes). Consistent with the Committee's organizational chart, the FAA issued "Recommended Tasking" statements for these first two groups, outlining

specific areas where the FAA was seeking input from the Committee. JA 107, 114. The Committee then debated those recommended tasking statements at its second meeting, modified the tasking instructions based on that discussion, and approved the modified instructions. JA 91-95 (minutes). The third group was "creat[ed]" by the Subcommittee, at the direction of the Committee, JA 98 (minutes), after the Committee's second meeting, at which the Committee members had discussed what issues the funding group should investigate, JA 95-98—a discussion that resulted in the Committee deciding to "[w]ork with the FAA to make modifications" to FAA's draft tasking statement, JA 98; *see also* JA 116 (tasking statement).

With all three Task Groups up and running, the groups began conducting research and developing draft recommendations. The group examining federal, state, and local government roles and responsibilities, for example, met with local law enforcement experts, conducted "field exercises" to learn about technical capacities of local governments, and held debates over potential proposals, with teams "advocat[ing] for the opposite view they held." JA 148, 160. The group examining how to integrate drones into the national airspace "developed into five focus subgroups" researching and developing issue papers on subjects including low-altitude operations, equipage requirements, how to leverage existing cellular networks for command and control, and operational and airworthiness certification requirements for commercial operations. JA 133. That group then "looked at use cases"—*i.e.*, specific examples of how drones might be used in the national airspace—"to narrow

the[ir] focus" and develop more-specific draft recommendations. *Id.* And the funding group identified various funding options by, among other things, engaging with subject-matter experts and the FAA, analyzing data and the results of studies, and assigning members to focus groups on particular topics. JA 139.

The Task Groups presented status updates and draft interim recommendations—which are publicly available, *see* JA 89, 126, 142—at the Committee's subsequent meetings. As reflected in the minutes from those meetings, these presentations led to substantive discussion among the Committee members and directives from the Committee to the staffing groups regarding new avenues to explore, changes to make in their methodologies or recommendations, and matters to prioritize or deemphasize. *See* JA 132-41 (third meeting); JA 144-50 (fourth meeting); JA 160-70 (fifth meeting); *see also infra* pp. 25-27. This "iterative process," JA 164—in which the groups made presentations to the Committee, received instructions from the Committee about how to proceed, implemented those instructions, and made new presentations at the next meeting—culminated in the Committee reviewing and approving, in its final two meetings, a set of recommendations and principles to be transmitted to the FAA. *See* JA 160-64 (accepting statement of principles regarding governmental roles and responsibilities), 168 (approving recommendations regarding access to airspace); *see also* RTCA, *Drone Advisory Committee March 9, 2018 Meeting Minutes* 5, https://www.rtca.org/sites/default/files/dac_meeting_summary_march_2018_final_draft_with_attachent.pdf (approving funding recommendations).

On May 29, 2018, shortly after the Committee's final meeting, and after this suit was filed, the RTCA Advisory Committee's charter expired. *See* JA 236. The RTCA Committee, and its component, the Drone Advisory Committee at issue in this suit, ceased to exist at that point. On June 15, 2018, the FAA chartered a new Drone Advisory Committee for a new two-year term. JA 239-41. Information about the new Committee's activities, including its public meetings and records, is available on the FAA's website. *See* FAA, U.S. Dep't of Transp., *Drone Advisory Committee* (accessed Feb. 10, 2020), https://go.usa.gov/xd97q. Plaintiff did not amend the complaint or make any allegations about the new Committee or its structure. *See* Drone Advisory Committee, *Meeting Minutes* 2 (July 17, 2018), https://go.usa.gov/xd97Y ("[T]he new charter resets the [Committee]," which, going forward, was not expected to include a "subcommittee or tasks groups"). Accordingly, this case involves only the question of access to records from the old Committee's staffing groups.

C. Prior Proceedings

Plaintiff—a nonprofit privacy organization—brought this case in April 2018, alleging violations of the open-meetings and public-records provisions of the Federal Advisory Committee Act. JA 44 (Compl.).

The district court dismissed the bulk of plaintiff's claims on a variety of grounds not relevant to this appeal. JA 6-25 (Op.); JA 40 (Order); Appellant's Brief (Br.) 14-15. The sole issue in this appeal is whether the district court correctly dismissed plaintiff's claims, brought under the Administrative Procedure Act against

the agency and official-capacity defendants, seeking access to the records of the Subcommittee and Task Groups. JA 26-36; Br. 15.

Relying on the text of FACA and the opinions of the district court and this Court in *National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control*, 557 F. Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983), the district court concluded that the Subcommittee and Task Groups were not themselves "advisory committees" subject to FACA. JA 30-35. In *National Anti-Hunger Coalition*, this Court held that task forces that acted as "staff" to an advisory committee by conducting research and "draft[ing] reports and recommendations" for the committee's "independent consideration" were not themselves "advisory committees" subject to FACA because the task forces were "not provid[ing] advice directly to the President or any agency." 711 F.2d at 1072, 1075 (second alteration in original). Like the task forces in *National Anti-Hunger Coalition*, the subordinate staffing groups here conducted research and developed preliminary recommendations for the Drone Advisory Committee to independently consider, revise, finalize, approve, and transmit to the agency. JA 33-35. Accordingly, unlike the Drone Advisory Committee, which was established "in the interest of obtaining advice or recommendations *for … one or more agencies* or officers of the Federal Government," the staffing groups here were established or utilized in the interest of obtaining staff work and preliminary recommendations *for the advisory committee*. JA 31 (quoting 5 U.S.C. app. 2, § 3(2)) (emphasis added).

The district court also rejected plaintiff's separate contention that, even if the staffing groups were not advisory committees in their own right, their records should be available as records of the parent Drone Advisory Committee. JA 27-30. As the district court noted, FACA requires that records that were "made available to or prepared for or by" an advisory committee shall be available to the public. JA 28 (quoting 5 U.S.C. app. 2, § 10(b)). The court concluded that the fact that the Subcommittee and Task Groups "ultimately answer to the [Drone Advisory Committee] does not mean that all of their documents are made available to or prepared for the [Committee]." *Id.*

The district court thus required that any documents actually made available to or prepared for the Drone Advisory Committee by the subordinate staffing groups be made publicly available. The court determined that there was a factual dispute as to whether all such Committee records had been made publicly available, and the court denied defendants' motion to dismiss as to any such remaining Committee records. JA 36-39. The government released additional records that were made available to or prepared for or by the Committee. JA 41. With that dispute resolved, plaintiff sought, and the district court granted, final judgment on all claims so that plaintiff could appeal the portion of the interlocutory order that had dismissed the claims seeking access to the records of the Subcommittee and Task Groups. JA 41-42.

SUMMARY OF ARGUMENT

Under the Federal Advisory Committee Act, an "advisory committee" advises federal agencies and officers, as the Drone Advisory Committee did. Subordinate staffing groups, such as those at issue here, help the parent committee. If they advise anyone, they advise the advisory committee, not the agency. They are thus not "advisory committees" subject to FACA in their own right.

National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control explained that "[t]he Act itself applies only to committees 'established or utilized *by*' the President or an agency 'in the interest of obtaining advice or recommendations *for* the President or one or more agencies,'" and "[t]he Act does not cover groups performing staff functions" for advisory committees, because subordinate staffing groups "do not provide advice directly to the President or any agency." 557 F. Supp. 524, 529 (D.D.C. 1983) (emphasis in original) (quoting 5 U.S.C. app. 2, § 3(2)), *aff'd* 711 F.2d 1071, at 1072 (D.C. Cir. 1983) ("approv[ing] the reasoning" of the district court). Congress designed FACA to require openness at "the point of contact between the public and the government," where an advisory committee advises an agency. *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993). Congress recognized, as this Court has recognized, that "[t]here is less reason to focus on subordinate advisers," as it is the "superior groups, after all, that will give the advice to the government, and which, in accordance with the statute, must" comply with the Act's openness provisions. *Id.*

Plaintiff references *National Anti-Hunger Coalition* only in passing and disregards the relevant discussion in *Association of American Physicians & Surgeons*. And plaintiff identifies no authority for the proposition that Congress created FACA to be a fractal regulatory regime, applying not only to advisory committees themselves, but also to their subsidiary groups, to those groups' subsidiaries, and so on.

The complaint does not suggest that the subsidiary groups here bypassed the Drone Advisory Committee and provided advice directly to the agency—much less that the agency would have condoned such evasion of the agency's own advisory committee. All of the allegations in the complaint, and the numerous documents attached to it, show only that the subsidiary groups followed protocol: They provided their findings and suggestions to the Drone Advisory Committee, which thoroughly reviewed their progress, deliberated over their presentations, independently considered their draft recommendations, revised them as necessary, and transmitted final recommendations to the FAA after reaching consensus.

Plaintiff's alternative theory—that the staffing groups' records should be attributed to the advisory committee and publicly disclosed on that basis—reflects the same errors as its contention that the staffing groups were themselves advisory committees. The Act requires public disclosure of only those documents that were "made available to or prepared for or by each advisory committee." 5 U.S.C. app. 2, § 10(b). Plaintiff identifies no authority to support its atextual proposition that documents made available to or prepared for or by the subsidiary groups at issue here,

but never made available to or prepared for or by the advisory committee, are nonetheless subject to public disclosure under FACA.

STANDARD OF REVIEW

"This Court reviews de novo the dismissal of a complaint for failure to state a claim." *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017).

ARGUMENT

I. The Drone Advisory Committee Was an Advisory Committee; Its Subordinate Staffing Groups Were Not.

A. The Federal Advisory Committee Act Applies to "Advisory Committees," which Advise Agencies, Not to Subordinate Groups that Advise Advisory Committees.

1. Under the Federal Advisory Committee Act, an "advisory committee" is a committee, subcommittee, or other subgroup that satisfies two criteria: an advisory committee must be (i) "established or utilized by one or more agencies," and (ii) it must have been so established or utilized "in the interest of obtaining advice or recommendations for … one or more agencies." 5 U.S.C. app. 2, § 3(2). Subcommittees or other subgroups of an advisory committee are thus advisory committees in their own right only if they independently meet each of these criteria. The district court "d[id] not address" the first criterion, which the parties had disputed, JA 30 n.4, because the court concluded that the Subcommittee and Task Groups at issue here did not satisfy the second. Those subordinate staffing groups were not "advisory committees" in their own right, the court concluded, because they

did not advise the FAA but rather conducted research and provided preliminary recommendations for the parent Committee to review, revise, and finalize in a forum to which FACA applied. That holding is clearly correct. The staffing groups were not established or utilized "in the interest of obtaining advice or recommendations *for … one or more agencies*," 5 U.S.C. app. 2, § 3(2) (emphasis added), but rather in the interest of obtaining advice or recommendations *for the advisory committee*.

That commonsense distinction is replicated in numerous provisions throughout the rest of the Act that describe an "advisory committee" as "report[ing]" "to" an agency, not to another advisory committee: An advisory committee's charter, for example, must be filed "with the head of the agency to whom any advisory committee reports," and the charter must specify the "agency or official to whom the committee reports." 5 U.S.C. app. 2, § 9(c)(D). An advisory committee's records must be made available for public inspection "in the offices of the advisory committee or the agency to which the advisory committee reports." *Id.* § 10(b). And "the head of the agency to which the advisory committee reports" may close the advisory committee's meetings to the public under certain circumstances. *Id.* § 10(d).

That distinction is also reflected in the administrative guidelines and management controls promulgated by the Administrator of the General Services Administration under authority conveyed by the Act. Those guidelines and management controls specify that, "[i]n general, the requirements of the Act … do not apply to subcommittees of advisory committees that report to a parent advisory

committee and not directly to a Federal officer or agency." 41 C.F.R. § 102-3.35(a); *accord id.* § 102-3.145 ("If a subcommittee makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee, then the subcommittee's meetings must be conducted in accordance with all openness requirements of this subpart.").

The General Services Administration's interpretations of the Act, "while not controlling upon the courts," are based on "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 463 n.12 (1989) (discussing FACA regulations); *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) (same). And, as the Administrator explained when promulgating the relevant provision here, in the government's experience "[m]ost subcommittees … report only to a parent advisory committee and it is the parent committee that is normally responsible for providing advice or recommendations to the Government." 66 Fed. Reg. 37,728, 37,729 (July 19, 2001). "In this conventional scenario, the subcommittee is not subject to the Act because it is not providing advice to the Government." *Id.* That rule, the Administrator explained, was both consistent with the Act's definition of an "advisory committee" and in "harmony" with the related propositions that staff work and preparatory or administrative activities are not subject to the Act. *Id.* (citing 41 C.F.R.

§ 102-3.160 regarding preparatory and administrative work). The Administrator further emphasized that the agency's conclusion was, in part, "a result of" this Court's precedents, on which the Administrator expressly relied. *Id.*

2. a. Among the key decisions the Administrator relied on was this Court's decision in *National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983), which held that groups that advise advisory committees are not advisory committees in their own right.

National Anti-Hunger Coalition involved a survey conducted by an executive committee, a subcommittee, and various task forces. 711 F.2d at 1072. The task forces conducted research on particular topics involving private sector cost control measures that might be applicable to the federal government, wrote "draft reports and recommendations," and submitted their research and draft recommendations, via a private foundation, to the subcommittee, which was responsible for reviewing those draft reports and making detailed recommendations to the President. *Id.* The executive committee would eventually convene and formulate a summary report for the President. *Id.* Because both the executive committee and the subcommittee provided recommendations and reports to the President, both were conceded to be advisory committees subject to FACA, and their meetings and records were (like those of the Drone Advisory Committee here) open to the public. *Id.*

The plaintiffs in *National Anti-Hunger Coalition*, like plaintiff here, also contended that the "task forces are themselves advisory committees" subject to

FACA, and sought records from the task forces. 711 F.2d at 1072. The district court rejected that argument because the task forces "do not directly advise the President or any federal agency, but rather provide information and recommendations for consideration to the [Executive] Committee" and subcommittee. 557 F. Supp. 524, 529 (D.D.C. 1983). The court explained that, as a textual matter, "[t]he Act itself applies only to committees 'established or utilized *by*' the President or an agency 'in the interest of obtaining advice or recommendations *for* the President or one or more agencies.'" *Id.* (emphasis in district court opinion) (quoting 5 U.S.C. app. 2, § 3(2)). "The Act does not cover groups performing staff functions such as those performed by the so-called task forces" because these subordinate staffing groups "do not provide advice directly to the President or any agency, but rather are utilized by and provide advice to only the Executive Committee" and its subcommittee, both of which are advisory committees, and both of which "then provide[] advice to the President or agency." *Id.* Applying FACA to the parent advisory committees but not the subordinate staffing groups was consistent with the purpose of the Act because "Congress did not contemplate that interested parties like the plaintiffs should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations." *Id.*

On appeal, this Court affirmed and expressly adopted the district court's reasoning: "We approve the reasoning under which the District Court rejected the appellants' contentions, and we affirm its decision on the basis of the record on appeal." 711 F.2d at 1072. This Court elaborated that it agreed with the district court's "characterization of the task forces as the Executive Committee's 'staff' and its conclusion that the task forces are 'not provid[ing] advice directly to the President or any agency'" because "the task force reports and recommendations would be exhaustively reviewed and revised by the Executive Committee" and the subcommittee—the advisory committees "nominally responsible for advising the President and federal agencies." *Id.* at 1075 (alteration in original). This Court concluded that, as long as the task forces did not themselves transmit reports and advice directly to "federal decision makers before they are made publicly available," and as long as "the subcommittee of the Executive Committee is [not] merely 'rubber stamping' the task forces' recommendations with little or no independent consideration," the task forces would not themselves be "advisory committees" subject to FACA. *Id.* at 1075-76.

The district court here correctly recognized *National Anti-Hunger Coalition*'s controlling force. JA 31, 34. But, in its brief to this Court, plaintiff makes no attempt to grapple with this Court's most relevant precedent, citing *National Anti-Hunger Coalition* only once for a proposition with no pertinence to the issue on appeal. Br. 2.

b. This Court echoed the reasoning of *National Anti-Hunger Coalition* in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), which highlights the distinction between a group that provides recommendations to an advisory committee and a group that provides advice to the government itself. In that case, a Task Force, chaired by Hillary Clinton and otherwise composed of cabinet-level officials and presidential advisors, was charged with developing healthcare legislative proposals to be presented to the President. *Id.* at 900-01. A working group, aiding the Task Force, gathered information and "developed alternative health care policies for use by the Task Force." *Id.* at 901. "But only the Task Force, it was contemplated, would directly advise and present recommendations to the President." *Id.* The district court had determined that the Task Force was an advisory committee because Mrs. Clinton, the President's spouse, was not a federal officer or employee. *Id.* at 901-02. Having concluded that the Task Force was an advisory committee, the district court concluded that the working group was *not* an advisory committee under *National Anti-Hunger Coalition* because it provided advice to the advisory committee and not to the government. *Id.* at 902.

On appeal, this Court concluded that the Task Force was not, in fact, an advisory committee, and was simply part of the government itself. 997 F.2d at 903-11. That ruling removed the basis for the district court's conclusion that the subordinate working group was not an advisory committee: Any advice provided by the working group was now tendered directly to the government and not to an

advisory committee. Accordingly, this Court remanded for the district court to determine whether the working group met the Act's other criteria for an advisory committee. *Id.* at 913-16. In doing so, this Court, in dicta, misread *National Anti-Hunger Coalition* as not having expressly affirmed the reasoning of the district court in that case. *Id.* at 912. But this Court, in any event, correctly explained that the situation in *National Anti-Hunger Coalition* was "entirely different" because the subordinate staffing groups there had reported to an advisory committee that was itself subject to FACA. *Id.* at 913.

As particularly relevant here, this Court explained why the result in *National Anti-Hunger Coalition* was consistent with the text and purpose of the Act: "[T]here is less reason to focus on subordinate advisers or consultants who are presumably under the control of the superior groups" when it is the "superior groups, after all, that will give the advice to the government, and which, in accordance with the statute, must be 'reasonably' balanced" and subject to the Act's other requirements. 997 F.2d at 913. By contrast, because the Task Force chaired by Mrs. Clinton was *not* an advisory committee subject to FACA, "it is the working group now that is the point of contact between the public and the government," and therefore the working group that would potentially be subject to FACA. *Id.*

Thus, far from purporting to overrule *National Anti-Hunger Coalition*, this Court in *Association of American Physicians & Surgeons* emphasized the same core reasoning set out in that case. Disregarding this reasoning, plaintiff instead focuses (Br. 35-36) on

an inapposite portion of that case in which this Court analyzed a separate question: whether the working group was "established" or "utilized" by the President given that the working group reported to the Task Force. In that passage, this Court noted that the President may establish or utilize an advisory committee "that he does not meet with face-to-face." *Association of Am. Physicians & Surgeons*, 997 F.2d at 912. But whether the President may establish or utilize a group that gives advice to some other part of the government (there, the Task Force) is separate from the question this Court addressed just a page later: whether the group, so established, "is the point of contact between the public and the government," and thus potentially subject to FACA as an "advisory committee." *Id.* at 913. Regardless of whether the subordinate staffing groups at issue here were "established" or "utilized" by FAA or by the Committee, *see* Br. 26-34—a disputed issue that the district court did not resolve, *see* JA 30 n.4—those groups are not, as a matter of law, "advisory committees" subject to FACA if, as here, they only gave draft recommendations to the parent advisory committee and did not directly advise the agency.

B. The District Court Correctly Applied the Terms of the Act and This Court's Decisions.

The district court correctly applied the Act's text and this Court's precedent in dismissing plaintiff's claim. Like the task forces in *National Anti-Hunger Coalition*, the Subcommittee and Task Groups at issue here were not "advisory committees" because they provided advice to an advisory committee and did not advise the agency.

1. The allegations in plaintiff's complaint and attached documents uniformly show that the Subcommittee and Task Groups provided staffing support for the Drone Advisory Committee. They conducted research, developed draft recommendations, and presented their preliminary work to the Committee. Over the course of several public meetings, the Committee reviewed that preliminary work, issued instructions for how the groups should proceed, and ultimately reached consensus on final recommendations to approve and transmit to the agency.

At the Committee's third meeting, for example, the minutes attached to the complaint reveal that three Task Groups made presentations regarding the status of their research and preliminary activities and recommendations. JA 132-40. Following those presentations and substantive discussion among the Committee members, the Committee issued several directives to guide the Task Groups' future work: The Committee required that the access-to-airspace group "adjust" a particular preliminary recommendation "to be more standards based and less about technology." JA 141. The Committee instructed the group exploring governmental roles and responsibilities to "re-look" at the issue of local government engagement and to give that issue "more attention" before reporting back. JA 141. And the Committee instructed the group examining funding issues to "divide its activities into near-term (24-month horizon) and long-term (5-year horizon)" considerations. JA 146.

Similarly, at the Committee's fourth meeting, the minutes show that the chairperson of the Committee explained that the Committee "would hear updates

from [the government-roles-and-responsibilities group] to make sure they are going in the 'right direction.'" JA 143. The representative from that group explained to the Committee that "the team has incorporated guidance received from the [Committee]," at the last meeting, "namely, to set aside work on [law] enforcement for now." JA 148. At the same meeting, in a discussion between the Committee and a representative from the funding group, members of the Committee asked whether the group was "thinking about establishing a [drone] Trust Fund similar to the Airport and Airways Trust Fund," and the group representative replied that the group had and would continue to examine that issue as requested. JA 146. And another member of the Committee emphasized to the funding group that the group should take the access-to-airspace group's work as a starting point, so that the funding mechanisms being developed would be consistent with the federal government activities being considered by the other group. JA 147.

At the Committee's fifth meeting, the minutes attached to the complaint show that the Committee heard a final presentation from the group examining the roles and responsibilities of federal, state, and local governments. The group presented a set of five consensus-based principles along with four principles that did not achieve consensus and were presented as options. JA 153, 160-64. The non-consensus principles received extensive attention from and discussion by the Committee, before the Committee ultimately accepted the group's presentation as submitted. JA 161-63. At the same meeting, the Committee reviewed final recommendations from the

access-to-airspace group. The group noted that its recommendations had "gone through an iterative process over the past few months," with the group making presentations and receiving Committee feedback. JA 164. Most recently, the group noted, the Committee had "given instructions" to the group at the last meeting regarding ways in which the group's recommendations should be "update[d]," and the group explained that it had followed those instructions and was now presenting final recommendations "to the [Committee] for approval" and, if approved, for "transmission to the FAA." JA 164. After yet another round of public deliberations by the Committee regarding those recommendations, JA 165-67, the Committee voted to approve the recommendations with a final "clarifying amendment" emerging from that discussion, JA 168; *see also* JA 171 (describing the amendment).

In sum, the allegations in the complaint, and documents attached to the complaint, show that the Subcommittee and Task Groups here, like the task forces in *National Anti-Hunger Coalition*, functioned as staff for the parent advisory committee. The Drone Advisory Committee was not "merely 'rubber stamping' the task forces' recommendations with little or no independent consideration." *National Anti-Hunger Coal.*, 711 F.2d at 1075-76. To the contrary, the Committee provided extensive guidance and instruction to its subordinate staffing groups in an iterative process over the course of the Committee's many meetings. The Committee "exhaustively reviewed and revised" the groups' work, *id.* at 1075, ordered changes as it saw fit, and ultimately adopted recommendations when the Committee had reached consensus.

As this Court has explained, in these circumstances, "[t]here is less reason to focus on subordinate advisers" who are "under the control of" a superior advisory committee subject to FACA. *Association of Am. Physicians & Surgeons*, 997 F.2d at 913.

2. Plaintiff argues that it "allege[d] facts in its Complaint and associated exhibits to demonstrate that the" Subcommittee and Task Groups "directly advised the FAA." Br. 36. The allegations on which plaintiff relies concern the presence of an FAA official at various meetings and have no bearing on the analysis here.

FACA requires the attendance of a designated federal officer at every meeting of an advisory committee. 5 U.S.C. app. 2, § 10(e). Accordingly, as plaintiff notes, an FAA official "personally participated in [Committee] meetings" in which the Subcommittee and Task Groups "delivered recommendations and reports" to the Committee. Br. 36. On this basis, plaintiff argues that the staffing groups presented their "recommendations and reports" directly to FAA rather than to the Drone Advisory Committee. *Id.* And, for this reason, plaintiff contends that the staffing groups necessarily became advisory committees within the meaning of the statute. *Id.*

On plaintiff's reasoning, any subcommittee or staffing group that provides recommendations to any advisory committee is thereby transformed, as a matter of law, into an advisory committee, since there will always be a designated federal officer present. Nothing in the statute, common sense, or past understanding provides any support for this novel contention. A subcommittee is an "advisory committee" only when it meets the criteria specified in the statute. 5 U.S.C. app. 2, § 3(2).

In a variant of this argument, plaintiff alleges that an FAA official also attended Subcommittee and Task Group meetings. Br. 5-6, 7. Plaintiff argues (Br. 32) that the attendance of agency officials at such meetings "is an admission that the subgroup[s] constitute[d] … advisory committees." Br. 32. No basis exists for this inference. The General Services Administration requires that a federal officer "must … [a]ttend the meetings" of "each advisory committee and its subcommittees." 41 C.F.R. § 102-3.120(c). That regulatory requirement applies even when a subcommittee is not itself an advisory committee and when attendance would not be mandated by the statute. This policy determination does not reflect an implicit conclusion that all subcommittees are themselves advisory committees. Indeed, the regulations make clear that subcommittees that do not directly advise agencies are not advisory committees and are thus not subject to FACA. *Id.* § 102-3.35(a). And the FAA quite plainly did not believe it was transforming the subsidiary staffing groups into advisory committees by having an agency official present at their meetings.

Plaintiff also contends (Br. 36) that because a government official was present at Subcommittee and Task Group meetings, those groups provided advice and recommendations directly to the government rather than to the Drone Advisory Committee. This contention fails for the same reason as plaintiff's argument with respect to an official's presence at the meetings of the advisory committee itself. And the FAA certainly did not believe that these subordinate groups—in contrast to the Drone Advisory Committee itself—were advisory committees submitting consensus

advice to the agency. *See Association of Am. Physicians & Surgeons*, 997 F.2d at 914 ("[T]he government has a good deal of control over whether a group constitutes a FACA advisory committee," and "it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch."). On the contrary, as the documents attached to plaintiff's complaint make clear, FAA officials expressly understood that "the work that is done by the [Task Groups] gets vetted, … through the [Subcommittee] and the [Committee], before any final recommendations are sent to the FAA." JA 128.

Plaintiff does not contend—nor could it plausibly do so—that the staffing groups here nonetheless colluded to meet with, and directly advise, the FAA in secret, outside the Committee process. All of the factual allegations are to the contrary: The Committee's terms of reference stated that the groups would draft recommendations and submit them for the Committee to "review and approve." JA 73. The Subcommittee's terms of reference similarly provided that the Committee would "[d]evelop, review, and approve recommendations to FAA." JA 104. "No recommendations will flow directly from the [Subcommittee] or [Task Groups] to the FAA." *Id.*; *see also* JA 103 (organizational chart). And the minutes of the various Committee meetings show that the Subcommittee and Task Groups followed protocol: As discussed above, those groups made extensive presentations of draft recommendations for Committee discussion and approval. There is no indication or allegation that those presentations up the chain of command to the Committee, and

the Committee's deliberation and approval of final recommendations, were sleight of hand, meant to distract from direct advice already provided to the agency. Nor is there any allegation that the FAA would have accepted any such advice proffered in circumvention of the forum that the FAA created in order to receive advice.

II. FACA Does Not Apply to Documents That Were Never "Made Available To or Prepared for or by" an Advisory Committee.

A. The district court also correctly rejected plaintiff's argument that, even if the Subcommittee and Task Groups were not themselves "advisory groups" subject to FACA, "the records of the [Subcommittee and Task Groups] *are* records of the [Drone Advisory Committee]," which is concededly an "advisory committee," and such records "must therefore be disclosed under the FACA." Br. 2 (emphasis in original). As the district court recognized, *see* JA 27-28, that contention is flatly at odds with the statutory text. The Act mandates the public disclosure only of "documents which were *made available to or prepared for or by* each advisory committee." 5 U.S.C. app. 2, § 10(b) (emphasis added). As the case comes to this Court, it is undisputed that any documents that actually met that standard, and were "made available to or prepared for or by" the Drone Advisory Committee, are publicly available. *See* JA 41. That is all that the Act requires.

Indeed, it would have made no sense for Congress to provide, as it did, that a "subcommittee or other subgroup" of an advisory committee may independently qualify as an advisory committee in its own right if it satisfies the necessary criteria in

the Act, *see* 5 U.S.C. app. 2, § 3(2), if, as plaintiff insists, the Act were to automatically attribute the records and meetings of every subcommittee and subgroup to its parent advisory committee in any event.

B. Plaintiff chiefly contends that FACA requires the public disclosure of all documents "belonging" to an advisory committee. Br. 18. And plaintiff further contends that documents belonging to the staffing groups at issue here also "belong[]" to the Drone Advisory Committee because a dictionary, cited by plaintiff, defines "subgroup" as a "subdivision of a group." Br. 18. This reasoning has nothing to do with the statute. The Act applies to those documents that were prepared by the Drone Advisory Committee itself or "made available to" the Committee. The district court ensured that all such documents that were made available to the Committee were made public. It quite properly rejected the contention that the Act would apply as well to documents never made available to the Drone Advisory Committee, and declined plaintiff's invitation to rewrite the statute.

Plaintiff offers the seriously mistaken suggestion that under the district court's reasoning, an agency "could refuse" under FOIA "to release records arising out of an agency subcomponent … merely because that subcomponent is not an agency in its own right." Br. 22. FOIA applies to all "agency records," 5 U.S.C. § 552(a)(3)(D), *id.* § 552(a)(4)(B)—not, as in FACA, only to documents "made available to or prepared for or by" an advisory committee, *id.* app. 2, § 10(b). And FACA working groups do

not constitute a "subcomponent" of an advisory committee for these purposes: they perform tasks to assist the advisory committee, which provides advice to the agency.

Cummock v. Gore, 180 F.3d 282 (D.C. Cir. 1999) is similarly inapposite. There, this Court held that documents "made available to" an advisory committee "during the course of its deliberative process" must be made available to a member of the committee who had not received those documents. *Id.* at 292. Plaintiff attempts to extract from *Cummock* the general proposition that a document need not be made available to the "whole" advisory committee in order to be subject to FACA disclosure, *see* Br. 21—with the apparent implication being that a document does not need to be made available to the advisory committee at all in order to be subject to FACA disclosure. But *Cummock* stands for the opposite proposition: The excluded committee member had a right to access the documents to prepare her dissent from the committee's report precisely because the documents had actually been "made available to" the advisory committee, and were relied on by the committee in its formal deliberations and development of recommendations as a group. To the extent *Cummock* has any bearing on the issue presented here, it supports affirmance.

Plaintiff's reliance on sub-statutory authorities is similarly unavailing. Plaintiff points (Br. 19) to what purports to be a slide from a General Services Administration FACA training presentation, which states that "[w]hether subcommittees are open to the public or not, the agency must … [a]llow public access to subcommittee records." JA 188. Whatever the origin or meaning of that slide, the FACA guidelines and

management controls that were promulgated in the Federal Register by the Administrator of the General Services Administration make clear that "the requirements of the Act," including both the public-records and open-meetings requirements, "do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency." 41 C.F.R. § 102-3.35(a); *see also* 66 Fed. Reg. at 37,729 ("Under FACA, a group is either an advisory committee subject to all of the statutory requirements, or it is not an advisory committee, and therefore not subject to any of its requirements.").

Similarly misplaced is plaintiff's reliance (Br. 19-20) on a General Records Schedule that specifies agencies' records-preservation requirements, including for certain documents from advisory committees' subcommittees and other working groups. *See* JA 181-83. That the Archivist of the United States has exercised authority under the Federal Records Act to determine that certain documents "have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government," 44 U.S.C. § 3303a(d), says nothing about whether FACA requires automatic public disclosure of such records. As this Court has explained in the FOIA context, "the treatment of documents for disposal and retention purposes under the various federal records management statutes" does not "determine[] their status under FOIA." *Consumer Fed'n of Am. v. Department of Agric.*, 455 F.3d 283, 289 (D.C. Cir. 2006). So, too, under FACA.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,339 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

TABLE OF CONTENTS

5 U.S.C. app. 2: Federal Advisory Committee Act

§ 3. Definitions

For the purpose of this Act—

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

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)

(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, 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 and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

…

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

41 C.F.R. part 102-3: Federal Advisory Committee Act regulations

§ 102-3.35. What policies govern the use of subcommittees?

(a) In general, the requirements of the Act and the policies of this Federal Advisory Committee Management part do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency. However, this section does not preclude an agency from applying any provision of the Act and this part to any subcommittee of an advisory committee in any particular instance.

(b) The creation and operation of subcommittees must be approved by the agency establishing the parent advisory committee.