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

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rules 28(a)(1) and 26.1 and Fed. R. App. P. 26.1, the Electronic Privacy Information Center ("EPIC") submits the following Certificate as to Parties, Rulings, and Related Cases and Corporate Disclosure Statement:

I. PARTIES AND *AMICI* APPEARING BELOW

Appellant (Plaintiff below) is EPIC. Appellees (Defendants below) are the Drone Advisory Committee; the Federal Aviation Administration; Steve Dickson, in his official capacity as Administrator of the Federal Aviation Administration and Designated Federal Officer of the Drone Advisory Committee; the United States Department of Transportation; and David W. Freeman, in his official capacity as Committee Management Officer of the Department of Transportation.[*]

II. RULINGS UNDER REVIEW

EPIC seeks review of the July 26, 2019, order of the district court (Hon. Rudolph Contreras) entering final judgment as to all claims and the district court's February 25, 2019 order and opinion granting in part and denying in part Defendant-Appellees' motion to dismiss.

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[*] At the time of EPIC's complaint in the case below, Daniel K. Elwell was the Acting Administrator of the Federal Aviation Administration and Designated Federal Officer of the Drone Advisory Committee.

III. RELATED CASES

EPIC is not aware of any pending related cases. This case has not been before this Court previously.

IV. CORPORATE DISCLOSURE STATEMENT

EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public, and no publicly held company has any ownership interest in EPIC.

Respectfully Submitted,

Dated: January 10, 2020

/s/ John L. Davisson
JOHN L. DAVISSON
EPIC Counsel

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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 Aeronautics

INTRODUCTION

This appeal concerns the Federal Aviation Administration's failure to disclose records from entities established by the FAA to advise the FAA on the integration of unmanned aerial vehicles—drones—into the national airspace. In 2018, the Electronic Privacy Information Center ("EPIC") requested the records of the FAA's Drone Advisory Committee ("DAC") pursuant the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2. EPIC sought to inform the public about the DAC's recommendations, or lack thereof, concerning the threat that drones pose to privacy rights in the United States. When the government failed to disclose the requested records, EPIC filed suit.

In the case below, EPIC obtained hundreds of previously undisclosed records from the DAC. The documents confirmed that the DAC understood the privacy risks of drones—and even considered forming a subcommittee on privacy—but ultimately failed to address privacy issues at all. Yet in ruling on the Government's motion to dismiss, the lower court held that the FACA did *not* apply to the records of a subcommittee and three task groups that were part of the DAC. Although FAA Administrators created, managed, and heard advice and recommendations directly from these DAC subgroups, the lower court determined that the records of the subgroups could be withheld from the public. As a result,

EPIC has been prevented from learning how or why privacy was dropped from the DAC's agenda, even as drone deployment over U.S. skies rapidly increases.

The ruling of the lower court is wrong for two reasons. First, the court erroneously concluded that the records of the subgroups fall into a separate category from the records of the DAC. In fact, the records of the subgroups *are* records of the DAC and must therefore be disclosed under the FACA. Second, the court erroneously concluded that, as a matter of law, the DAC subgroups could not have acted as "advisory committees" unto themselves. But EPIC's complaint plausibly alleges that the DAC subgroups were, in fact, acting as advisory committees. Thus, the subgroups are subject to the FACA's records disclosure requirement.

In enacting the FACA, "Congress aimed, in short, to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals." *National Anti–Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983) (internal quotation marks omitted). The lower court's ruling subverts that objective and misconstrues the FACA. If the decision is allowed to stand, other federal agencies could circumvent the law by creating subcommittees and task forces and developing policy in secretive meetings held by

entities that agencies attempt to place beyond the reach of the FACA. The Court should avoid that result and reverse the orders of the lower court.

JURISDICTIONAL STATEMENT

The lower court had jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. § 702, and 5 U.S.C. § 704. EPIC filed a timely notice of appeal on September 13, 2019. Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

PERTINENT STATUTORY PROVISIONS

The text of pertinent federal statutory provisions and regulations is reproduced in the addendum to this brief.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court erred in holding that records "made available to or prepared for or by" the subgroups of the Drone Advisory Committee are exempt from the public disclosure mandate of the Federal Advisory Committee Act, 5 U.S.C. app. 2 § 10(b)?
2. Whether the district court erred in holding that the subgroups of the Drone Advisory Committee did not act as "advisory committee[s]" under the Federal Advisory Committee Act, 5 U.S.C. app. 2 § 3(2)?

STATEMENT OF THE CASE

I. The Formation and Structure of the Drone Advisory Committee

On May 4, 2016, Michael Huerta—then the Administrator of the Federal Aviation Administration ("FAA")—announced the creation of the Drone Advisory Committee. JA 77. The FAA described the DAC as "a broad-based advisory committee . . . that [would] provide advice on key unmanned aircraft integration issues." *Id*. The FAA formally established the DAC under the RTCA Advisory Committee ("RTCA") on August 31, 2016. JA 79, 221. The FAA appointed chairman and original members of the DAC in the summer of 2016, JA 79, and the Committee held its first public meeting on September 16, 2016, in Washington, D.C. *See* JA 81.

The original DAC Terms of Reference, which were "issued" by the FAA, JA 128, charged the DAC with providing an "open venue" for Committee members to "identify and recommend a single, consensus-based set of resolutions for issues regarding the efficiency and safety of integrating [unmanned aircraft systems] into the [national airspace] and to develop recommendations to address those issues and challenges." JA 72. However, the Committee was to "conduct more detailed business through a subcommittee and various task groups that [would] help the FAA prioritize its activities, including the development of future regulations and policies." JA 80.

The DAC Subcommittee ("DACSC" or "Subcommittee") was established at some point between the first full DAC meeting (September 16, 2016) and the second full DAC meeting (January 31, 2017). *See* JA 87; JA 89. The DACSC Terms of Reference—which the FAA "issued"—stated that the Subcommittee's role was to "support" the DAC, to "present findings to DAC," and to "[f]orward recommendations and other deliverables to DAC for consideration." JA 102, 104. However, contrary to the DACSC Terms of Reference, the FAA repeatedly worked with and received recommendations directly from the Subcommittee, circumventing the DAC process.

For example, FAA officials "brief[ed]" and "educat[ed]" the DACSC, JA 132; provided "guidance and assistance to the DAC Subcommittee," JA 143; and personally participated in multiple DAC meetings at which the Subcommittee delivered reports and recommendations. *E.g.*, JA 90–91; JA 128–29, 132; JA 154, 159. Moreover, the DAC's Designated Federal Officer ("DFO")—a position held by Acting FAA Deputy Administrator Victoria B. Wassmer, Deputy FAA Administrator Daniel K. Elwell, and eventually Acting FAA *Administrator* Elwell—was required by both the RTCA Charter and the FACA to be intimately involved in the proceedings of the DACSC. The "DFO or alternate" was obligated to "[c]all, attend, and adjourn all the committee/ subcommittee meetings";

"[a]pprove all committee/subcommittee agendas"; and "[c]hair meetings when directed to do so by the FAA Administrator." JA 175–76.

The DAC also included three "FAA-approved Task Group[s]," each of which was required to "have a specific, limited charter" "approved by the FAA Administrator." JA 72. According to the FAA, the agency's "traditional way of providing tasking" to Task Groups is to "finalize and approve the tasking statement and forward it to the [Committee] to execute." JA 95. Task Group 1 was established and instructed by the FAA to develop recommendations "to inform future agency action related to the relative role of state and local governments in regulating aspects of low-altitude UAS operations." JA 110. Task Group 2 was established and instructed by the FAA to "provide recommendations on UAS operations/missions beyond those currently permitted" and to "define procedures for industry to gain access to the airspace." JA 114. Task Group 3 was established and instructed by the FAA to "develop recommendations as to the UAS community's preferred method(s) for funding Federal activities and services required to support UAS operations for the next two years, and beyond." JA 116.

The DACSC Terms of Reference nominally required the Task Groups to perform their work "at the direction of the DACSC," rather than at the direction of FAA officials. JA 104. Nevertheless, FAA officials personally directed, guided, participated in, and received the work and recommendations of the Task Groups.

For example, in early 2017, Acting Deputy Administrator Wassmer "issued" the detailed tasking statements for all three Task Groups. JA 128. The tasking statements included fact-finding assignments for each Task Group, topics that each Task Group should advise on, and deadlines by which each Task Group should deliver its recommendations and reports. JA 107–13; JA 114–15; JA 116–24. As Wassmer made clear to the DAC, "tasking statements from the FAA should guide the work of the DAC, DACSC, and TGs." JA 128.

Administrators Wassmer and Elwell also personally attended DAC meetings at which the Task Groups delivered substantive recommendations and reports. JA 126, 133–40; JA 142, 144–50; JA 154, 160–70. And because the Task Groups constituted subcommittees of the DAC, Wassmer and Elwell were required to be intimately involved in the proceedings of the Task Groups in their capacity as Designated Federal Officers. JA 175–76. Under the RTCA Charter, the "DFO or alternate" was obligated to "[c]all, attend, and adjourn all the committee/ subcommittee meetings"; "[a]pprove all committee/subcommittee agendas"; and "[c]hair meetings when directed to do so by the FAA Administrator." *Id*.

II. The Activities of the Drone Advisory Committee

On September 16, 2016, the DAC held its first full Committee meeting in Washington, D.C. JA 81–88. Acting Deputy Administrator Wassmer, then the Committee's DFO, attended the meeting and delivered remarks. JA 81. DAC

Secretary Al Secen presented the results of a survey conducted among DAC members. JA 56. Members of the DAC identified privacy as the second-highest public concern around drones, narrowly trailing safety and reliability. JA 57. Yet in the same survey, DAC members ranked privacy last among their regulatory and policy priorities. *Id*.

On or about October 26, 2016, the DACSC was established and assigned "[s]pecific [t]asks and [d]eliverables" under the Terms of Reference "issued" by the FAA. JA 102, 106, 128. Sometime between the DAC's September 2016 and January 2017 meetings, Task Group 1 and Task Group 2 were also established and assigned specific tasks to complete by the FAA. JA 90–95; JA 107–13; JA 114–15.

On January 31, 2017, the DAC held its second full Committee meeting in Reno, Nevada. JA 89–101. Acting Deputy Administrator Wassmer, then the Committee's DFO, attended the meeting and delivered remarks. JA 89–90. The DACSC, Task Group 1, and Task Group 2 each delivered a progress report at the January 2017 meeting. JA 90–95. Task Group 1 and Task Group 2 discussed their substantive recommendations to the FAA. JA 91–95.

On or about March 7, 2017, Task Group 3 was established and assigned specific tasks to complete by the FAA. JA 116–24.

On May 3, 2017, the DAC held its third full Committee meeting in Herndon, Virginia. JA 125–41. Acting Deputy Administrator Wassmer, then the

Committee's DFO, attended the meeting and delivered remarks. *Id.* The DACSC and each of the DAC Task Groups delivered a progress report at the May 2017 meeting. JA 126–29. Task Group 1 and Task Group 2 discussed their substantive recommendations to the FAA. *Id.*

On July 21, 2017, the DAC held its fourth full Committee meeting via digital conference. JA 142–52. Mr. Elwell, then the FAA Deputy Administrator, attended the meeting as the Committee's newly-appointed DFO. JA 142–44. Elwell also delivered remarks during the meeting. *Id.* Both Task Group 1 and Task Group 3 delivered a progress report and recommendations at the July 2017 meeting. JA 144–50. Task Group 3 also presented an interim report intended for the FAA concerning funding mechanisms for the introduction of drones into the national airspace. *Id.*

On October 23, 2017, the Washington Post published a report that Task Group 1—a group that included "industry insiders with a financial stake in the outcome" of the Committee process—"ha[d] been holding confidential meetings to shape U.S. policy on drones, deliberating privately about who should regulate a burgeoning industry that will affect everything from package delivery to personal privacy." JA 194. The Washington Post also reported that the Task Group 1 process had "been riven by suspicion and dysfunction" and that "[m]onths of tensions came to a head" when "an FAA contractor that manages the group told

members they had to sign a far-reaching confidentiality agreement to keep participating. After some raised concerns, several groups were blocked from receiving draft documents meant to represent their own 'common ground' positions, emails show." JA 195.

On November 8, 2017, then-San Francisco Mayor Ed Lee sent a letter to DAC Chairman Brian Krzanich warning that "Task Group 1's process has been marred by a lack of transparency and poor management," including "lack of agendas, last minute rescheduling of meetings, failure to have minutes of any proceedings, conflicting advice and guidance by RTCA and Requirements to sign documents that public employees cannot sign." JA 192.

On the same day—November 8, 2017—the DAC held its fifth full Committee meeting at the Amazon Meeting Center in Seattle, Washington. JA 153–73. Mr. Elwell, then the FAA Deputy Administrator, attended the meeting and delivered remarks. JA 155–58. The DACSC and each of the Task Groups delivered a progress report at the meeting. JA 159–70. Each Task Group discussed its substantive recommendations to the FAA. *Id.* Task Group 2 also presented a final report intended for the FAA concerning drone access to airspace. JA 165–66.

On January 7, 2018, Mr. Elwell became the Acting FAA Administrator. On March 9, 2018, the DAC held its sixth full Committee meeting in McLean, Virginia. JA 63.

On May 29, 2018, the charters of the RTCA Advisory Committee and the DAC (as it was then constituted under RTCA) expired. JA 234–38. Throughout the life of the DAC—and to this day—the Government has failed to make any DACSC or DAC Task Group records available for public inspection, apart from the limited information presented to the DAC at its public meetings. JA 58–63.

III. The Transparency Obligations of the Drone Advisory Committee

Under the Drone Advisory Committee's Terms of Reference, the DAC was required to conduct its work in the "open, transparent venue of a federal advisory committee (FAC). As with all FACs, the Drone Advisory Committee (DAC) will be designed to: ensure transparency, include broad and balanced representation across the industry, encourage innovation and remain consistent with US anti-trust laws." JA 71.

Under the FACA, "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." FACA § 10(b). The RTCA Charter in effect during the operation of the DAC confirms that "[s]ubject to the Freedom of Information Act, 5 U.S.C. § 552, records, reports, transcripts, minutes, or meeting

summaries, and other materials presented to or prepared for the RTCA Advisory Committee are available for public inspection." JA 177.

The RTCA Charter also states that the "records of the committee, formally and informally established subcommittees, or other work or task subgroup of the subcommittee" were to "be handled in accordance with the General Records Schedule 6.2, or other approved agency records disposition schedule." *Id.* General Records Schedule 6.2 "covers Federal records created or received by Federal advisory committees and their subgroups[.]" JA 181. General Records Schedule 6.2 requires the "[p]ermanent" preservation of "Substantive Committee Records," including "documentation of advisory committee subcommittees" and "records that document the activities of subcommittees that support their reports and recommendations to the chartered or parent committee." JA 183.

The General Services Administration, which issues "administrative guidelines and management controls applicable to advisory committees," FACA § 7(c), instructs that: "Whether subcommittees are open to the public or not, the agency must . . . [c]omply with recordkeeping requirements (i.e., minutes)" and "[a]llow public access to subcommittee records." JA 188. The GSA's FACA regulations also state that a committee or agency "may not require members of the public or other interested parties to file requests for non-exempt advisory

committee records under the request and review process established by section 552(a)(3) of FOIA." 41 C.F.R. § 102-3.170.

IV. EPIC's Request for Drone Advisory Committee Records

On March 20, 2018, EPIC sent a records request via email to then-Acting FAA Administrator Elwell, DOT Committee Management Officer David W. Freeman, DAC Secretary Al Secen, and the RTCA's general information email address. JA 191. In the request, EPIC stated that it wished to access "all 'records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by' the DAC or any DAC subcomponent. 5 U.S.C. App. 2 § 10(b)." *Id.* EPIC asked the agency and Committee recipients to "direct EPIC to the URL or location where the full collection of DAC and DAC subcomponent records is available for public inspection and copying." *Id.* EPIC also advised the FAA, DAC, and RTCA of their records disclosure obligations under the FACA. *Id.* EPIC received no response to its request. JA 64.

V. Procedural History

On April 11, 2018, EPIC filed suit against the Drone Advisory Committee; the Federal Aviation Administration; Daniel K. Elwell, in his official capacity as Acting Administrator of the Federal Aviation Administration and Designated Federal Officer of the Drone Advisory Committee and RTCA Advisory

Committee; the RTCA Advisory Committee; the United States Department of Transportation; and David W. Freeman, in his official capacity as Committee Management Officer of the Department of Transportation. JA 43–70.

EPIC alleged seven claims in all: failure to open advisory committee meetings to the public in violation of FACA § 10(a)(1) of the FACA (Count I); failure to open advisory committee meetings to the public in violation of FACA § 10(a)(1) and 5 U.S.C. § 706(1) (Count II); unlawful holding of nonpublic committee meetings in violation of FACA § 10(a)(1) and 5 U.S.C. § 706(2) (Count III); failure to make committee records available for public inspection in violation of FACA § 10(b) of the FACA (Count IV); unlawful withholding of committee records in violation of FACA § 10(b) and 5 U.S.C. § 706(1) (Count V); unlawful carrying on of committee business without disclosing committee records in violation of FACA § 10(b) and 5 U.S.C. § 706(2) (Count VI); and a claim under the Declaratory Relief Act, 28 U.S.C. § 2201(a) (Count VII). JA 64–68.

On June 25, 2018, EPIC stipulated to the dismissal of all claims against the RTCA Advisory Committee. Dkt. No. 13. On July 3, 2018, the Government filed a motion to dismiss EPIC's complaint in its entirety.

On February 25, 2019, the district court (Hon. Rudolph Contreras) issued an interlocutory order granting in part and denying in part the Government's motion to dismiss. JA 40. The court dismissed Counts I, II, III, IV, and VII of EPIC's

Complaint on grounds not relevant to this appeal and dismissed all claims against the Drone Advisory Committee for lack of subject matter jurisdiction. *Id.* The court denied the Government's motion as to Counts V and VI against the remaining federal Defendants. *Id.* However, in the accompanying Memorandum Opinion, the Court held that the records of the DACSC and DAC Task Groups were not subject to disclosure under the FACA. JA 25–36.

On March 13, 2019, the lower court ordered the Government to "complete a reasonable search for any responsive DAC records that have not already been disclosed, and produce to Plaintiff any non-exempt portions of such records that do not need to be referred to third-parties pursuant to the FAA's submitter review process[.]" Order (Mar. 13, 2019). The Government completed its production of records from the DAC parent committee on May 30, 2019. JA 41.

On July 26, 2019, EPIC filed a consent motion to enter final judgment as to all claims. Dkt. No. 32. In the motion, EPIC stated its belief that—as a result of the Government's production of records—there was "no substantive dispute remaining between the parties concerning the records of the DAC parent committee." *Id.* ¶ 10. But EPIC stated that it "respectfully disagree[d] with [the lower court's] conclusion that the records of the DAC Subcommittee and DAC task groups [were] beyond the scope of the disclosure requirement of FACA § 10(b)." *Id.* ¶ 11. Because the lower court's "prior adjudication of this issue constitute[d] 'law-of-

the-case,'" EPIC stated its intent to seek review of the lower court's ruling by filing an appeal to this Court. *Id.* ¶ 12 (quoting *Duberry v. District of Columbia*, 316 F. Supp. 3d 43, 51 (D.D.C. 2018), *aff'd*, 924 F.3d 570 (D.C. Cir. 2019)). Accordingly, EPIC "move[d] the [lower court] to enter judgment as to all remaining claims in this case . . . in the form of a final, appealable order" and to "incorporate by reference the February 25, 2019 Memorandum Opinion, so as to permit review of the [lower court's] legal conclusions concerning the applicability of FACA § 10(b) to the records of the DAC Subcommittee and DAC task groups." *Id.* ¶ 12.

The lower court granted EPIC's Motion the same day and dismissed all remaining claims. JA 41–42. EPIC filed a notice of appeal on September 4, 2019. Dkt. No. 35.

SUMMARY OF THE ARGUMENT

The orders of the lower court should be reversed—and the case remanded for further proceedings—for two reasons. First, the records of the DACSC and DAC Task Groups are a subset of the records of the Drone Advisory Committee. As such, they must be disclosed to EPIC pursuant to section 10(b) of the FACA. The lower court's contrary holding is inconsistent with the FACA, with the regulations and guidelines governing advisory committee records, and with the precedents of this Court. Second, the DACSC and DAC Task Groups qualify as

advisory committees in their own right. The DAC subgroups were "established" and "utilized" by the FAA or, in the alternative, established by the quasi-public Drone Advisory Committee. FACA § 3(2). Because the DAC subgroups were themselves advisory committees subject to section 10(b) of the FACA, their records must be disclosed to EPIC. In concluding otherwise, the lower court misconstrued the FACA's definition of an "advisory committee" and adopted an interpretation that is inconsistent with a prior ruling of this Court. The lower court also erred by ignoring the role that the FAA Administrators played as Designated Federal Officers managing the DACSC and DAC Task Groups.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss de novo. *EPIC v. IRS*, 910 F.3d 1232, 1236 (D.C. Cir. 2018). For the purposes of that review, the Court "assume[s] the truth of all of plaintiffs' plausibly pleaded allegations, and draw[s] all reasonable inferences in their favor." *Agnew v. D.C.*, 920 F.3d 49, 53 (D.C. Cir. 2019) (citing *Weyrich v. The New Republic, Inc.*, 235 F.3d 617, 623 (D.C. Cir. 2001)). The Court also reviews questions of law de novo on appeal from an order of final judgment. *Owens v. Republic of Sudan*, 864 F.3d 751, 768 (D.C. Cir. 2017).

ARGUMENT

I. THE FACA REQUIRES PUBLIC DISCLOSURE OF THE SUBGROUP RECORDS BECAUSE THEY ARE A SUBSET OF DRONE ADVISORY COMMITTEE RECORDS.

The records of the DAC subgroups must be publicly disclosed because they are a subset of the Drone Advisory Committee's records—a category of documents that is indisputably subject to disclosure under section 10(b) of the FACA.

The FACA requires advisory committees such as the DAC to "make available for public inspection and copying" all records "which were made available to or prepared for or by each advisory committee[.]" FACA § 10(b); *see also Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 944 F.3d 945, 950 (D.C. Cir. 2019). As the Government conceded below, the DAC was a "parent committee" of the DACSC and DAC Task Groups, which in turn were the "subgroups" of the DAC. Dkt. No. 16-1 at 20. This relationship between the DAC and the DAC subgroups is dispositive: any record belonging to a subgroup also belongs, by definition, to the group. *See Subgroup*, Collins English Dictionary (2018) (defining "subgroup" as "a subdivision of a group"). In other words: 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.

Accordingly, the General Services Administration has explained that "[w]hether subcommittees are open to the public or not, the agency must . . . [c]omply with recordkeeping requirements (i.e., minutes)" and "*[a]llow public access to subcommittee records*." JA 188 (emphasis added). This requirement is also reflected in the GSA's regulations implementing the FACA. Whereas FACA regulations 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, 41 C.F.R. §§ 102-3.35, 102-3.145), the regulations make no distinction between the *records* of a parent committee and its subgroups. *See* 41 C.F.R. § 102-3.170. The Government must publish all DAC records—including the records of the DAC subgroups—subject only to the exemptions of 5 U.S.C. § 552(b). *See* FACA § 10(b).

This requirement follows, too, from General Records Schedule 6.2, which governs the handling of all "Federal records created or received by Federal advisory committees and their subgroups . . . ." JA 181; *see also* JA 177. ("[R]ecords of the committee, formally and informally established subcommittees, or other work or task subgroup of the subcommittee, shall be handled in accordance with the General Records Schedule 6.2 . . . ."). Among the types of

"*Substantive Committee Records*" identified in Schedule 6.2 are "documentation of advisory committee subcommittees (i.e., working groups, or other subgroups)" and "records that document the activities of subcommittees that support their reports and recommendations to the chartered or parent committee." JA 183 (emphasis added). Subgroup records are thus a subset of advisory committee records—not a distinct category of documents beyond the reach of the FACA.

In reaching the opposite conclusion, the lower court made two key errors. First, the lower court incorrectly assumed that section 10(b) only requires the disclosure of records prepared for an advisory "*as a whole*." JA 28 (emphasis added). Because records prepared for "specific subgroups" of the DAC were not prepared for "the DAC as a whole," the lower court reasoned that the former category of records fell outside of section 10(b). JA 27–30. But nothing in the text of section 10(b) limits disclosure to records prepared for the "whole" committee. The provision simply requires the publication of records "which were made available to or prepared for or by each advisory committee[.]" FACA § 10(b). That language easily encompasses records generated by or provided to the DAC subgroups, which are constituent parts of the DAC. *Cf. Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 64 (D.D.C. 2012) ("The mere fact that the subgroup drafts were not ultimately passed on to the final decisionmaker does not lead to the conclusion that they were not before the agency.").

Indeed, the lower court's reading of section 10(b) cannot be squared with this Court's decision in *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). In *Cummock*, a member of the White House Commission on Aviation Safety and Security argued that the Commission had violated section 10(b) by failing to provide her with certain records prepared by or made available to the Commission. *Cummock*, 180 F.3d at 287. These records included "an inch-thick briefing paper that she saw [two other Commissioners] reviewing," "documents submitted to or received from the Air Transport Association," a "classified annex," and "information on the availability of protective breathing equipment for passengers" submitted to the Commission by "at least one company." *Id.* at 287–88. On the lower court's reasoning, *Cummock* should have been an easy case: none of the records sought by the plaintiff would have been subject to section 10(b) because they were not prepared by or made available to the committee "as a whole." JA 28. As long as the Commission kept the plaintiff out of the loop, the records at issue would have escaped the coverage of 10(b). But that is not what this Court ruled. Instead, the Court held that the plaintiff had "an enforceable right under FACA" and remanded the case to the lower court to determine, as a factual matter, which records were "made available to the Commission during the course of its deliberative process"—and must therefore be disclosed to the plaintiff under section 10(b). *Cummock*, 180 F.3d at 292.

The flaw in the lower court's holding is also clear by analogy to the Freedom of Information Act. Under the lower court's reading of the statute, the FAA could refuse to release records arising out of an agency subcomponent—for example, the Office of the FAA Administrator—merely because that subcomponent is not an agency in its own right. *See* 5 U.S.C. § 552(a) (imposing disclosure obligations only on "agenc[ies]"). That is plainly not what the FOIA allows, or what the FACA permits—and yet the lower court's reasoning compels that result. By the logic of the lower court, an advisory committee can evade the FACA's document disclosure obligation simply by (1) forming a subcommittee; (2) conducting all of its substantive work and deliberations in secret at the subcommittee level; and (3) upon completion of the subcommittee's closed-door proceedings, releasing the bare minimum information necessary for the parent committee to vote on the subcommittee's recommendations. Congress did not mean the FACA to be such a paper tiger, particularly when the statute explicitly refers to "task force[s]," "subcommittees," and "subgroup[s]" as being subject to its transparency requirements. FACA § 3(2); *see also* FACA § 10(b).

Second, the lower court misunderstood the significance of the FACA regulations concerning subcommittees. The lower court cited repeatedly to 41 C.F.R. § 102-3.35 for the proposition that "subcommittees are not generally subject to FACA." JA 29. As an initial matter, that regulation is not a supportable

interpretation of the FACA, which "specifically provides that subgroups of advisory committees are subject to the provisions of the Act." *Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176, 178 n.13 (D.C. Cir. 1977). Nor are the GSA's regulations implementing the FACA entitled to the Court's deference. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) ("As we have so often noted, we do not defer to an agency's construction of a statute interpreted by more than one agency . . . let alone one applicable to all agencies[.]"); *see also* JA 29 (citing *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 33 n.4 (D.D.C. 2010)) ("The Court initially notes that it need not defer to interpretative regulations of a statute that were not promulgated pursuant to express statutory authority.").

More importantly, section 102-3.35 does not govern this case. EPIC's right to access the records of the DAC subgroups does not depend on any legal obligations specific to *subcommittees*.[2] Rather, EPIC is seeking to enforce the obligation of the Drone Advisory *Committee*—and the FAA, as the DAC's parent agency—to disclose all of the DAC's records. And as noted, the records "made

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[2] However, when a subcommittee directly advises an agency or otherwise qualifies as an "advisory committee" in its own right, it must adhere to the procedural requirements of the FACA like any other advisory committee. *See* 41 C.F.R. § 102-3.145; FACA § 3(2). Because the DAC subgroups constituted advisory committees in their own right, EPIC is entitled to the disclosure of DAC Subgroup records on these separate grounds as well. *See* Section II, *infra*.

available to or prepared for or by" the DAC necessarily include the records "made available to or prepared for or by" the DAC's constituent subgroups. FACA § 10(b).

In sum, the lower court misconstrued and impermissibly narrowed a statute that was enacted to "allow the public to monitor [the] existence, activities, and cost" of advisory committees. *Animal Legal Def. Fund, Inc. (ALDF) v. Shalala*, 104 F.3d 424, 426 (D.C. Cir. 1997). Section 10(b) of the FACA requires the disclosure DAC Subgroup records because they are part of the DAC's records.

II. THE FACA REQUIRES PUBLIC DISCLOSURE OF THE SUBGROUP RECORDS BECAUSE THE SUBGROUPS WERE ACTING AS ADVISORY COMMITTEES.

Even if subcommittee records would otherwise be exempt from section 10(b) of the FACA, EPIC would still be entitled to the disclosure of DAC subgroup records at issue. The DACSC and DAC Task Groups were acting as "advisory committee[s]" in their own right because they were established by the FAA and managed by FAA Administrators. FACA § 3(2).

Under the FACA, an entity qualifies an "advisory committee" if it is "established or utilized" by an agency "in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government." FACA § 3(2). When a subcommittee satisfies this definition, or when it otherwise directly advises an agency, it must adhere to the requirements of

the FACA regardless of whether it is organizationally subordinate to another committee. *See Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 913; 41 C.F.R. § 102-3.145.

This Court has identified three different ways to meet the "established or utilized" test. As summarized by a district court in this Circuit:

> First, the government "establishes" an advisory committee when the government directly forms it. *Food Chem. News v. Young*, 900 F.2d 328, 332 (D.C. Cir. 1990) (citing [*Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 460–62 (1989)]). Second, the government "utilizes" a privately-formed advisory committee when agency officials exercise actual management or control over that committee. *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1451 (D.C. Cir. 1994). Third, even if a non-government entity forms an advisory committee, that committee will still fall under the FACA if the organization forming it is "quasipublic." *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 431 (D.C. Cir. 1997).

Judicial Watch, Inc. v. U.S. Dep't of Commerce, 736 F. Supp. 2d 24, 32 (D.D.C. 2010). The DAC subgroups easily satisfy the first two elements—"established" and "utilized"—because subgroups were formed and managed by FAA officials (including FAA Administrators). The subgroups alternatively satisfy the third ("quasi-public") test. The lower court's conclusion that the subgroups cannot, as a matter of law, constitute "advisory committee[s]" is based on a misreading of section 3(2) that is foreclosed by prior decisions of this Court.

A. The FAA established the DAC subgroups.

First, the FAA "established" the DAC subgroups as advisory committees because "the agency form[ed]" them. *Byrd v. EPA*, 174 F.3d 239, 246 (D.C. Cir. 1999). The FAA announced the formation of the DACSC on August 31, 2016, before the DAC had even held its first meeting. *See* JA 80 ("The committee will conduct more detailed business through a subcommittee . . . that will help the FAA prioritize its activities, including the development of future regulations and policies."). According to Acting Deputy Administrator Wassmer, the FAA "issued" the DACSC Terms of Reference, which constitute the foundational document of the Subcommittee. JA 128. The Terms of Reference exhaustively laid out the purpose, structure, operating guidelines, membership breakdown, meeting procedures, and deliverables for the DACSC. JA 102–06. The Terms of Reference also clarified that the "FAA seeks to establish 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 . . . ." JA 102. From these facts, it is clear—and certainly plausible—that the FAA established the DACSC within the meaning of section 3(2) of the FACA.

The same holds for the DAC Task Groups. The FAA announced the formation of the Task Groups before the DAC first met. *See* JA 80 ("The committee will conduct more detailed business through . . . various task groups

that will help the FAA prioritize its activities, including the development of future regulations and policies."). Each of the Task Groups "ha[d] a specific, limited charter," or Tasking Statement, that was "issued" and "approved by the FAA Administrator." JA 72; JA 128. According to the FAA, the agency's "traditional way of providing tasking" to task groups is to "finalize and approve the tasking statement and forward it to the [Committee] to execute," as occurred here. JA 95. The Tasking Statements provided by the FAA included factfinding assignments for each Task Group, topics that each Task Group should advise on, and deadlines by which each Task Group should deliver its recommendations and reports. JA 107–13; JA 114–15; JA 116–24. The DACSC Terms of Reference—which, again, were issued by the FAA—also state that "Task Groups will be established as outlined" in the same document. JA 105. This, too, plausibly constitutes "establish[ment]" under section 3(2) of the FACA.

Moreover, unlike the agency in *Byrd v. EPA*, the FAA "exercised its authority" in the "selection process" of DAC subgroup members. *Byrd*, 174 F.3d at 247. As noted, the FAA "issued" the DACSC Terms of Reference, JA 128, which established detailed criteria for membership selection and committee composition. JA 105; *see also* JA 84 ("Ms. Jenny also reiterated the FAA and DAC Chairman's belief that they should quickly establish [sic] DAC subcommittee with a representative from each DAC member along with additional member

organizations from pool of DAC applicants and others as appropriate to address high priority issues."). Through the same Terms of Reference, the FAA specifically dictated that agency personnel would "take part in the DACSC's deliberations" as "Non-voting Members." JA 105. Similarly, the FAA exercised authority over the composition of the Task Groups and the selection of its members. *See* JA 72 ("Unlike the DAC and DACSC, members of TG[s] . . . are selected for their expertise in the subject matter rather than their affiliation."); *accord* JA 105. Finally, member selections for both the DACSC and Task Groups were subject to the approval of the DAC DFO, JA 105, who at all times was an Administrator or Deputy Administrator of the FAA. Accordingly, the FAA "established" both the DACSC and the DAC Task Groups within the meaning of the FACA.

B. The FAA utilized the DAC subgroups.

Second, the FAA "utilized" the DAC subgroups. FACA § 3(2). "Utilized" means "something along the lines of actual management or control of the advisory committee." *Wash. Legal Found*, 17 F.3d at 1450. A committee meets the "management or control" standard if it ultimately "answers to" an agency. *Id.* at 1451.

EPIC alleges throughout its Complaint that FAA officials managed and controlled the DACSC. First and foremost, the DAC's DFO—who at all times was

an Administrator or Deputy Administrator of the FAA—was required to be intimately involved in managing and controlling the DACSC. The "DFO or alternate" must "[c]all, attend, and adjourn all the committee/ subcommittee meetings"; "[a]pprove all committee/subcommittee agendas"; and "[c]hair meetings when directed to do so by the FAA Administrator." JA 175–76; *see also* FACA § 10(e)–(f). Moreover, the FAA "issued" the DACSC Terms of Reference, which provided the DACSC with its marching orders. JA 128. As noted, the Terms of Reference laid out the purpose, structure, operating guidelines, membership breakdown, meeting procedures, and deliverables for the DACSC. JA 102–06; *see also* JA 73 (assigning "responsibilities" to DACSC). The DAC Terms of Reference also charged the "Director of the FAA UAS Integration Office" with "oversee[ing] the DAC Subcommittee." JA 75. Over the lifetime of the DACSC, officials "brief[ed]" and "educat[ed]" the Subcommittee, JA 132; provided "guidance and assistance to the DAC Subcommittee," JA 143; and personally participated in DAC meetings at which the Subcommittee delivered reports and recommendations (prior to any DAC approval). *E.g.*, JA 90–91; JA 128–29, 132; JA 154, 159

EPIC's complaint also demonstrates FAA management and control of the Task Groups. For example, Acting Deputy Administrator Wassmer "issued" the detailed tasking statements for all three Task Groups. JA 128. The tasking statements included factfinding assignments for each Task Group, topics that each

Task Group should advise on, and deadlines by which each Task Group should deliver its recommendations and reports. *See* JA 107–13; JA 114–15; JA 116–24. As Wassmer made clear to the DAC, "tasking statements from the FAA should guide the work of the . . . TGs." JA 128. Administrators Wassmer and Elwell also personally attended DAC meetings at which the Task Groups delivered substantive recommendations and reports (prior to any DAC approval). *See, e.g.*, JA 126, 133–40; JA 142, 144–50; JA 154, 160–70. And again, the DAC's DFO—at all times a top-ranking FAA official—was required to be intimately involved in the management and control of the DAC Task Groups by "[c]all[ing], attend[ing], and adjourn[ing] all the committee/ subcommittee meetings"; "[a]pprov[ing] all committee/subcommittee agendas"; and "[c]hair[ing] meetings when directed to do so by the FAA Administrator." JA 175–76; *see also* FACA § 10(e)–(f).

If these facts do not constitute "management or control" of a committee, it is difficult to imagine what would. To summarize: the FAA variously determined for the DAC subgroups (1) who the subgroup would report to; (2) how the subgroup would be structured; (3) what categories of people could serve as subgroup members; (4) what operating procedures the subgroup had to follow; (5) what topics the subgroup would research; (6) what types of recommendations the subgroup would make; (7) when the subgroup could meet; (8) what would appear on the subgroup's meeting agendas; and (9) who would chair the subgroup's

meetings. The record also shows that the FAA was in constant contact with the DAC subgroups, providing input directly to them and receiving recommendations directly from them—often through the Administrator or Deputy Administrator.

In analyzing the relationship between the DAC subgroups and the FAA, the lower court erroneously discounted "[t]he authority of the FAA DFO over DACSC and DAC task groups meetings[.]" JA 33. The lower court entirely ignored the fact that DFO was at all times an FAA Administrator who, as DFO, exercised extensive control over the DAC subgroups. Rather, the lower court improperly assumed that that the FAA's use of a DFO to manage the Subcommittee and Tasks Groups did not "bypass[] the DAC" because "GSA regulations *require* that agencies designate a DFO." *Id.* (emphasis added). But even if the lower court's reasoning had merit in other contexts, it certainly does not apply when the DFO is *the head of the agency*. When the Administrator or Deputy Administrator of the FAA directly and personally supervises the operations of an advisory subgroup—as occurred in this case—it is clearly plausible that the subgroup is subject to the FAA's "management or control[.]" *Wash. Legal Found*, 17 F.3d at 1450.

The lower court's reasoning would permit an absurd result: an agency can put its Administrator directly in charge of a subcommittee and have that official attend and participate in subcommittee meetings without subjecting the subcommittee records to disclosure under FACA. There is no such carveout in the

FACA's definition of an "advisory committee." FACA § 3(2). Indeed, the FACA states that "[t]here shall be designated an officer or employee of the Federal Government to chair or attend each meeting *of each advisory committee*," FACA § 10(e) (emphasis added), which suggests that the agency's assignment of a DFO to a subgroup is an admission that the subgroup constitutes an advisory committee. The DAC subgroups thus constituted advisory committees under the "utilize[]" prong of section 3(2).

C. Alternatively, the DAC subgroups were formed by a quasi-public organization.

Third, even if this Court found that the FAA did not establish or utilize the DAC subgroups, the subgroups would alternatively qualify as advisory committees under the "quasi-public" rule of *ALDF v. Shalala*, 104 F.3d 424. In *ALDF*, the D.C. Circuit concluded that FACA's definition of "advisory committee" also extends to "the offspring of 'quasi-public' organizations 'permeated by the Federal government.'" *ALDF*, 104 F.3d at 429 (quoting *Pub. Citizen*, 491 U.S. at 463). An advisory body thus constitutes a FACA committee if the organization that created it (1) was quasi-public rather than "purely private"; (2) was "formed and funded" by the Government; and (3) was "formed 'for the explicit purpose of furnishing advice to the Government.'" *ALDF*, 104 F.3d at 429 (quoting *Pub. Citizen*, 491 U.S. at 460 n.11).

The Drone Advisory Committee—which the Government has argued "established" the DAC subgroups, Dkt. No. 16-1 at 23—readily meets the *ALDF* criteria. First, the DAC was established as an advisory committee by the FAA, yet it was placed under the management of RTCA, Inc., "a private, non-for-profit association." JA 174. The DAC was also populated with a mixture of government and non-government members. JA 179–80. The DAC was thus a quasi-public organization. *See ALDF*, 104 F.3d at 429. Second, the DAC was formed, supported, and funded by the government. *See* JA 75 ("DAC Subcommittee (DACSC) Oversight"); *see also* FACA § 12 ("Fiscal and administrative provisions; record-keeping; audit; agency support services"). And third, the DAC was "formed 'for the explicit purpose of furnishing advice to the Government.'" *ALDF*, 104 F.3d at 429 (quoting *Pub. Citizen*, 491 U.S. at 460 n.11); *see* JA 72 ("The purpose of the DAC is to . . . identify a single, consensus-based set of resolutions for issues regarding the efficiency and safety of integrating [unmanned aircraft systems] into the [national airspace system] and to develop recommendations to address those issues and challenges.").

The DAC is thus on all fours with the National Academy of Sciences in *ALDF*, which (1) was created by the government "to answer the government's requests for investigations, examinations, experiments, and reports," and (2) is financially "take[n] care of" by the government when it performs those duties.

ALDF, 104 F.3d at 429. Because the DAC constituted a "quasi-public" entity within the meaning of *ALDF*, any subgroups it (allegedly) established necessarily constituted "advisory committees" under section 3(2) of the FACA. The records of the DACSC and DAC Task Groups are therefore subject to disclosure under section 10(b), even if it is the DAC—and not the FAA—that established the subgroups.

D. The lower court misinterpreted the FACA's definition of an 'advisory committee.'

The lower court, in concluding that the DAC subgroups did not fit the definition of an "advisory committee," simply misread section 3(2) of the FACA. According to the lower court, EPIC was required—and failed—to allege that the DAC subgroups were "established or utilized ***directly*** for the purpose of obtaining advice or recommendations for the FAA." JA XX (Mem. Op. 29). But the word "directly" does not appear in section 3(2). To qualify as an advisory committee, an entity need only be "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[.]" FACA § 3(2) (emphasis added). Even if the DAC subgroups had not provided advice directly to the FAA—which they did through FAA Administrators—it is beyond serious dispute that the DAC subgroups were established "*in the interest* of obtaining advice or recommendations" for the FAA. *Id.* (emphasis added). That is precisely how the

FAA characterized the subgroups in public statements and the DACSC Terms of Reference. *See* JA 80 (emphasis added) ("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 (emphasis added) ("FAA seeks to establish 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 . . . .").

This Court previously rejected a similar misreading of section 3(2). In *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, the government argued that presidentially created committees "not directly in contact" with the President could not, therefore, constitute "advisory committee[s]" under section 3(2). *Ass'n of Am. Physicians & Surgeons, Inc.*, 997 F.2d at 912. The Court disagreed:

> [T]he government's argument effectively would render almost all presidential advisory committees free from FACA. Committees in direct contact with the President implicate the President's executive power and hence cannot be covered by FACA, while committees not directly in contact are not "utilized." In any event, the statutory language does not remotely support the government. Not only does FACA define an advisory committee as a task force or "any subcommittee or other subgroup thereof," 5 U.S.C. App. 2, § 3(2), but it also specifies that an advisory committee is a group that is either *established* or *utilized* by the President. *See id.* Certainly the President can establish an advisory group that he does not meet with face-to-face. In *Public Citizen* 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.

Ass'n of Am. Physicians & Surgeons, Inc., 997 F.2d at 912. So too here: even if DAC subgroups had not directly advised the FAA, the subgroups would still qualify as advisory committees because they were established to help the FAA obtain advice and recommendations about drone policy.

Moreover, EPIC *did* allege facts in its Complaint and associated exhibits to demonstrate that the DAC subgroups directly advised the FAA. As noted above, top FAA officials personally participated in DAC meetings at which the DACSC delivered recommendations and reports, *e.g.*, JA 90–91; JA 128–29, 132; JA 154, 159; and at which the DAC Task Groups delivered recommendations and reports, *e.g.*, JA 126, 133–40; JA 142, 144–50; JA 154, 160–70. At the time these recommendations and reports were delivered—with an FAA Administrator in attendance at the meeting—the DAC had yet to review, approve, or filter them. Although the lower court identified ways in which *some* of the advice from DAC subgroups passed through the DAC before it was delivered to the FAA, JA 34–35, that does not change the fact that *other* advice was provided directly to FAA Administrators at DAC subgroup meetings. Thus, EPIC alleged facts sufficient to plausibly demonstrate that the DAC subgroups constitute advisory committees subject to the FACA's records disclosure requirement.

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: January 10, 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)(iii) and D.C. Cir. R. 32(e), because it contains 8,415 words, excluding parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 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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ADDENDUM

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STATUTES

U.S.C. Title 5 – Government Organization and Employees

Administrative Procedure Act

5 U.S.C. § 702

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

  (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

  (B) contrary to constitutional right, power, privilege, or immunity;

  (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

  (D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Federal Advisory Committee Act

5 U.S.C. app. 2 § 3

Definitions

For the purpose of this Act--

***

(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.

***

5 U.S.C. app. 2 § 7

Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

***

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

***

5 U.S.C. app. 2 § 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.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(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.

5 U.S.C. app. 2 § 12

Fiscal and administrative provisions; record-keeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

U.S.C. Title 28 – Judiciary and Judicial Procedure

28 U.S.C. § 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 2201

Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States,

upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

REGULATIONS

41 C.F.R. § 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.

41 C.F.R. § 102-3.140

What policies apply to advisory committee meetings?

The agency head, or the chairperson of an independent Presidential advisory committee, must ensure that:

(a) Each advisory committee meeting is held at a reasonable time and in a manner or place reasonably accessible to the public, to include facilities

that are readily accessible to and usable by persons with disabilities, consistent with the goals of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794;

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41 C.F.R. § 102–3.145

What policies apply to subcommittee meetings?

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.

41 C.F.R. § 102-3.170

How does an interested party obtain access to advisory committee records?

Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) of the Act provides for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Although advisory committee records may be withheld under the provisions of the Freedom of Information Act (FOIA), as amended, if there is a reasonable expectation that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA.