No. 22-270

# In the Supreme Court of the United States

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA, ET AL., PETITIONERS

*v.*

DEPARTMENT OF AGRICULTURE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Petitioners claim that two groups created by members of the cattle industry between 2017 and 2019—the Cattle Traceability Working Group and the Producers Traceability Council—were federal advisory committees within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, *et seq.* The question presented is:

Whether the court of appeals correctly determined that neither group was "established" by a federal agency, as that term is used in FACA.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 35 F.4th 1225. The opinion of the district court (Pet. App. 49a-66a) is reported at 539 F. Supp. 3d 1220.

## JURISDICTION

The judgment of the court of appeals was entered on May 20, 2022. On August 4, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including September 19, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1972, Congress enacted the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 *et seq.*, "to

control the growth and operation of the '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.'" *Association of Am. Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 902-903 (D.C. Cir. 1993) (citation omitted).

To that end, FACA imposes numerous requirements on the work of "advisory committee[s]," which it defines to include "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof," that is (as relevant here) "established" by the President or "by one or more agencies" for the purpose "of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. App. 3(2). For example, an advisory committee must file a detailed charter before it can "meet or take any action," 5 U.S.C. App. 9(c), and generally must publish notices of its upcoming meetings in the Federal Register. 5 U.S.C. App. 10(a)(2). Its meetings must be open to the public, 5 U.S.C. App. 10(a)(1), with minutes kept, 5 U.S.C. App. 10(c). And those minutes, together with all documents that were "made available to or prepared for or by" the committee, must be made available to the public under the terms of the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.* 5 U.S.C. App. 10(b).

2. a. The United States Department of Agriculture (USDA) "provides various programs that support the economic viability of animal agriculture." Pet. App. 5a (citation omitted). One such program, managed by USDA's Animal and Plant Health Inspection Service (APHIS), is the Animal Disease Traceability program,

which seeks to ensure that agency officials are able to determine an animal's present and past locations in order to effectively identify at-risk animals when a disease outbreak occurs. See *Traceability for Livestock Moving Interstate*, 78 Fed. Reg. 2040, 2040 (Jan. 9, 2013). APHIS promulgated the current Animal Disease Traceability requirements through notice-and-comment rulemaking in 2013. *Ibid.* Under the operative regulations, livestock that move interstate generally must be officially identified through means such as an eartag, brand, or tattoo. *Id.* at 2073-2074; see 9 C.F.R. 86.2-86.3. Because the rule only regulates interstate movement of cattle, States and Indian tribes "remain responsible for the traceability of livestock within their jurisdictions," an approach that "was designed to leverage the strengths and expertise of States, Tribes, and producers." C.A. App. 194.

Following promulgation of the current requirements in 2013, APHIS engaged in both internal review of the program and in extensive outreach to state, tribal, and industry stakeholders "to obtain grassroot feedback" about the Animal Disease Traceability program. Pet. App. 7a. In 2017, a State-Federal Animal Disease Traceability Working Group convened "to assist APHIS in reviewing the [Animal Disease Traceability program], examine feedback from the public meetings and written comments [that APHIS had solicited on the topic], and provide input based on their experiences with disease traceability issues." *Ibid.* That group—which is not directly at issue here—eventually provided a list of 14 preliminary recommendations related to improving the effectiveness of the Animal Disease Traceability program. *Ibid.*

One of those recommendations related to establishing an Electronic Identification (EID) system for cattle. The group explained that "[m]any animal health officials, as well as industry stakeholders, acknowledge[d] that the level of traceability necessary in the United States [wa]s unachievable" with the non-electronic eartags permitted as identification under the 2013 rule. Pet. App. 7a-8a (citation omitted; brackets in original). The group found that there had been "an increase in support for EID" requirements among relevant stakeholders since 2013 and recommended that the United States "move toward an EID system for cattle with a target implementation date of January 1, 2023." C.A. App. 206-207. At the same time, the group recognized that successful implementation of any EID system posed a number of practical challenges and that any such implementation would require "defin[ing] a single technology standard" to ensure system compatibility across parties. Pet. App. 8a (citation omitted). Therefore, the group concluded that a "comprehensive plan is necessary to address the multitude of very complex issues related to the implementation of a fully integrated electronic system" and recommended that a "specialized industry-le[d] task force with government participation should develop" that plan. C.A. App. 207.

b. In September 2017, around the time that the State-Federal Animal Disease Traceability Working Group was finalizing its recommendations, the National Institute of Animal Agriculture (NIAA) and the United States Animal Health Association—both private nonprofit organizations—hosted a Strategy Forum on Livestock Traceability. Pet App. 8a. That forum, which was co-funded by USDA and eight private groups, was attended by 164 "livestock industry professionals,"

including "producers, representatives of livestock markets, fairs, and shows, veterinarians, representatives of identification technology companies, and regulatory animal health officials." C.A. App. 496; see Pet. App. 8a. One of the topics discussed at the forum was the set of preliminary recommendations from the State-Federal Animal Disease Traceability Working Group. Pet. App. 8a.

The forum attendees agreed on the "need to put together a group of industry stakeholders to drive the [EID] movement forward" because "[t]hose directly affected usually come up with the best solutions." C.A. App. 518; see Pet. App. 8a. Therefore, a representative from the Texas Cattle Feeders Association "challenge[d] the national producer associations to plan a meeting by the end of 2017" with the goal of "review[ing], prioritiz[ing], and determin[ing] next steps for the [Animal Disease Traceability] working group's" preliminary recommendations; representatives from a number of additional industry groups "expressed their support and commitment for this challenge." *Ibid.*

Following that call for an industry working group on traceability issues, the NIAA Executive Committee held a meeting in November 2017 at which it decided to establish such a group, which it named the Cattle Traceability Working Group (CTWG). Pet. App. 10a. The NIAA Executive Committee created a list of organizations and individuals that would be invited to participate in the CTWG, determined that the cost of the CTWG would "be a shared responsibility among those who participate in the working group," and decided that the NIAA would "be named as the facilitator for the" CTWG. C.A. App. 269; see *id.* at 268-269. In addition, the Executive Committee discussed the envisioned

"level of government involvement" in the CTWG, and an NIAA member informed the Committee that USDA "only want[ed] to be kept up to speed" on the CTWG. *Id.* at 268.

After the November 2017 NIAA Executive Committee meeting, the Chairman of the NIAA invited the identified organizations and individuals to participate in the Working Group. See, *e.g.*, C.A. App. 264-265. Invitations reiterated that the CTWG was "to be facilitated by NIAA" and "led by key stakeholders in the beef industry," and noted that state and federal government representatives would "not be[] members of the" CTWG but that NIAA "anticipated [that] governmental representatives will serve as resources for the work." *Id.* at 264 (emphasis omitted). Finally, the invitations specified that the "costs associated with facilitation of the [CTWG] will be shared among the group and through underwriting opportunities." *Ibid.*

Later that month, the CTWG held its inaugural meeting. C.A. App. 272. The minutes from that meeting reflect that 21 members of the CTWG and three NIAA staff members attended the meeting, but that no USDA employees were present. See *id.* at 272-273. Attendees discussed the structure, purpose, and goals of the group, and identified subgroups to focus on particular "challenge areas." *Id.* at 272-275.

c. For more than a year after its establishment, the CTWG and various permutations of its members met regularly. But by March 2019, the CTWG had determined that it was "not yet ready to make some key decisions, like the selection of desired [EID] technology." C.A. App. 341. As a result, three of the industry organizations represented on the CTWG sent letters to the NIAA stating that they were frustrated by the lack of

progress and suggesting that the group should complete its work by June 1, 2019. Pet. App. 11a-12a.

Although NIAA officials forwarded those letters to agency officials to keep them informed, see Pet. App. 12a, the record does not reflect that agency officials took any action in response to the letters. Instead, some of the CTWG leaders decided that a new, smaller group of producers should be formed. Those leaders explained that they had "determined that we will move the work that we have accomplished to date * * * to a new Working Group comprised exclusively of the people that we have been doing this work on behalf of since day 1—the American Cattle Producers." C.A. App. 374; see Pet. App. 13a. Accordingly, those leaders asked two representatives from the groups that had sent the letters to put together the Producers Traceability Council, a "small, action oriented group with the singular goal of looking at the work [the CTWG has] done, and the work yet to be done, uniquely through the eyes of the producers." Pet. App. 13a (citation omitted). After that announcement was made, an NIAA official forwarded the announcement to USDA officials to ensure that the agency was "aware of the changes that the [CTWG] will be introducing." C.A. App. 373; see Pet. App. 12a-13a.

Shortly thereafter, the two organizers of the new Producers Traceability Council sent an invitation to a number of producers, two state government representatives, and one federal official to confirm their invitation to the first meeting of the Producers Traceability Council. C.A. App. 377. That initial meeting took place in early May 2019, and one APHIS official, Dr. Sarah Tomlinson, attended. Pet. App. 14a. After that initial meeting, the Council met a few additional times during the summer of 2019; the record does not reflect any

further agency involvement in continued Producers Traceability Council operations after that summer, nor does it reflect that the Producers Traceability Council ever transmitted any recommendations to the agency. See *id.* at 14a-15a.

3. Petitioners—individual ranchers, a ranching company, and an organization of ranchers—brought suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, alleging (as relevant here) that respondents—USDA and named USDA officials—had "established" the CTWG and the Producers Traceability Council within the meaning of FACA and that, as a result, respondents had violated FACA by not adhering to its various requirements. Pet. App. 16a, 18a-19a.

The district court dismissed petitioners' complaint, concluding that neither the CTWG nor the Producers Traceability Council was covered by FACA. Pet. App. 49a-66a. The court stated that a committee is "established" by the government within the meaning of FACA when it is "directly formed by a government agency (or by a quasi-public organization such as the National Academy of Sciences for a government agency)." *Id.* at 63a (emphasis omitted). Applying that standard to the CTWG and the Producers Traceability Council, the court determined that "there is no evidence to suggest that either group was directly formed by APHIS"; to the contrary, the evidence established that both groups were "formed by and composed of industry leaders." *Id.* at 63a-64a.

4. The court of appeals affirmed. Pet. App. 1a-48a.

The court of appeals explained that the "'ordinary'" meaning of the word "established" is "'[t]o set up on a secure or permanent basis; to found (a government, an institution; in modern use often, a house of business),'

or '[t]o set up or bring about permanently (a state of things).'" Pet. App. 36a (quoting Established, *Oxford English Dictionary Online*, https://www.oed.com/view/Entry/64530) (brackets in original). The court further explained that this Court's discussion of FACA in *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440 (1989), confirms that the term "established" is properly construed in accordance with that ordinary meaning: "'[I]n the [Supreme] Court's delineation, . . . "established" indicates "a Government-formed advisory committee."'" Pet. App. 38a (quoting *Food Chem. News* v. *Young*, 900 F.2d 328, 332 (D.C. Cir.), cert. denied, 498 U.S. 846 (1990)). Expressly agreeing with the approach of the D.C. Circuit, the court of appeals thus held "'that an advisory panel is "established" by an agency' under FACA 'only if it is actually formed by the agency.'" *Id.* at 39a (quoting *Byrd* v. *United States EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999), cert. denied, 529 U.S. 1018 (2000)).

Applying that standard to the facts here, the court of appeals affirmed the district court's findings that the CTWG and Producers Traceability Council were not formed by respondents. Pet. App. 40a-42a. Instead, "the evidence in the record quite clearly indicates that both [the CTWG and the Producers Traceability Council] were 'formed by and composed of industry leaders.'" *Id.* at 41a (citation omitted).

## ARGUMENT

Petitioners contend that the CTWG and the Producers Traceability Council were "established" by a federal agency within the meaning of FACA. The court of appeals correctly rejected that contention, and its fact-bound decision does not conflict with any decision of this

Court or another court of appeals. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals construed the statutory term "established" in accordance with its ordinary meaning and consistent with the precedent of this Court and other courts of appeals, and correctly applied that legal standard to the facts of this case in concluding that neither the CTWG nor the Producers Traceability Council was "established" by respondents.

a. It is well-settled that FACA's detailed protocols do not apply to "every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 453 (1989). Instead, "an advisory panel is 'established' by an agency"—and thereby covered by FACA—"only if it is actually formed by the agency." *Byrd* v. *United States EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999) (citing *Public Citizen*, 491 U.S. at 452, 456-457), cert. denied, 529 U.S. 1018 (2000); see *Public Citizen*, 491 U.S. at 458 (indicating that a committee is "established" by an agency when it is "Government-formed" (citation omitted)); *id.* at 457 (explaining that FACA mostly "adopted wholesale the provisions of Executive Order No. 11007," which applied to certain committees "'formed by a department or agency of the Government'") (citation omitted). That means, among other things, that a committee generally is not "established" by an agency unless the agency appoints its members. See *Byrd*, 174 F.3d at 246; accord *Food Chem. News* v. *Young*, 900 F.2d 328, 333 (D.C. Cir.) (rejecting argument that an advisory panel was "established" by an agency when a contractor, not the agency, "alone selected [the panel's] members"), cert. denied, 498 U.S. 846 (1990). Where a private entity or

group of private entities forms a committee and selects that committee's members, therefore, the committee is not "established" by the President or a federal agency for purposes of FACA. 5 U.S.C. App. 3(2).

That settled understanding of FACA's reach reflects the ordinary meaning of its text. To "establish," in the context of a committee or other such entity, means "[t]o originate and secure the permanent existence of; to found; to institute; to create and regulate." *Webster's New International Dictionary of the English Language* 874 (2d ed. 1958); see Pet. App. 36a (quoting *Oxford English Dictionary Online*). A federal agency accordingly "establishe[s]" an advisory committee when it originates, founds, or creates that committee. 5 U.S.C. App. 3(2). Reading FACA more broadly, such that it would cover every group with whom the President or an executive agency consults informally, "would present formidable constitutional difficulties" because it would enable Congress to micromanage the affairs of the Executive Branch. *Public Citizen*, 491 U.S. at 466.

b. Petitioners contend (Pet. 22) that the court of appeals' decision conflicts with "ordinary usage" of the word "establish." Their contention, however, rests on the *district court's* treatment of the word "established" as meaning "'directly' formed," which they contend is inconsistent with the term's plain meaning. *Ibid.*; see Pet. 23, 24, 25 (same). But aside from quoting the district court's factual determination that "'there is no evidence' in the administrative record 'to suggest that either group was directly formed by APHIS,'" Pet. App. 41a (citation omitted); see *id.* at 21a-22a (similar), the court of appeals did not employ that formulation. Instead, expressly drawing on dictionary definitions, *id.* at 36a, the court of appeals repeatedly stated that

"established" simply means "formed," "actually formed," or (in this context) "Government-formed." *Id.* at 38a, 39a, 40a, 41a, 42a (citation omitted). Those understandings properly reflect the ordinary meaning of "established," particularly in light of the constitutional doubts that might arise from a broader understanding. See p. 11, *supra*.

Indeed, the court of appeals expressly rejected petitioners' argument that "established" should be accorded a "'broad meaning'" on the ground that interpreting "established" in FACA as meaning "formed by a department or agency of the Government" better reflected "the ordinary meaning" of that term. Pet. App. 40a (citation omitted). Petitioners do not acknowledge, let alone respond to, that central aspect of the court's decision.

c. The court of appeals also correctly determined that respondents did not "establish" either the CTWG or the Producers Traceability Council. Pet. App. 41a-42a.

It is clear that respondents did not "establish" either group under any "ordinary" understanding of that word. See Pet. App. 41a-42a. To the contrary, "the evidence in the record quite clearly indicates that both [the CTWG and the Producers Traceability Council] were 'formed by and composed of industry leaders.'" *Id.* at 41a (citation omitted). The NIAA decided to establish the CTWG in November 2017; developed a list of the organizations and individuals to invite to be members of that group; and determined that the NIAA itself would act as the "facilitator." C.A. App. 268-269. The Chairman of the NIAA invited the identified organizations and individuals to become members of the CTWG. See, *e.g.*, *id.* at 264-265. Moreover, APHIS "was not

invited to [the CTWG's] initial meetings as they discussed and developed their mission," *id.* at 179; the members of the group decided (without the agency's input) on the structure, purpose, and goals of the group, *id.* at 272-275; the participants, and not the agency, agreed to share any costs, *id.* at 275; and the members of the CTWG themselves retained control over the group's membership, *id.* at 228.

The Producers Traceability Council, in turn, was established by members of the CTWG in March 2019, after they concluded that the group's work could be accomplished more efficiently by a smaller group of producer representatives. See C.A. App. 374-375. Two of those industry representatives invited specific individuals and organizations to be members of the new Producers Traceability Council. See *id.* at 377. And although federal employees attended some of the Producers Traceability Council's early meetings to serve as informational resources, they took no part in the group's formation, the selection of members, or its agenda. See, *e.g.*, *id.* at 252, 393; C.A. Supp. App. 30.

Petitioners' argument to the contrary (Pet. 30-33) is simply that APHIS had previously suggested that it would find an industry group like the CTWG helpful as a source of technical advice, that the agency co-hosted and co-funded a conference at which formation of the CTWG was discussed, and that agency employees subsequently had some communications with industry leaders as those leaders were taking steps to establish the CTWG. (Petitioners develop no argument at all regarding the Producers Traceability Council. See *ibid.*) But even under a capacious understanding of the word "established," the fact that the industry participants who formed the CTWG understood that APHIS would find

the group helpful does not mean that APHIS "established" the group. 5 U.S.C. App. 3(2).

2. The decision below does not conflict with the decision of any other court of appeals or of this Court, nor does it otherwise warrant further review.

a. Petitioners contend (Pet. 24-25) that the decision below is in "direct conflict" with the Eleventh Circuit's decision in *Miccosukee Tribe of Indians* v. *Southern Everglades Restoration Alliance*, 304 F.3d 1076 (2002). That is so, according to petitioners, because the Eleventh Circuit's decision, unlike the decision below, properly construed "established" "in accord with its 'plain meaning.'" Pet. 24-25 (quoting *Miccosukee Tribe*, 304 F.3d at 1087).

As an initial matter, the decision below accords with petitioners' description of the Eleventh Circuit's approach. As explained, the Tenth Circuit here relied on sources including dictionaries to construe the statutory term "established," interpreted that term in accordance with its plain meaning, and expressly rejected petitioners' argument that this interpretation differed from "the ordinary meaning of the term." Pet. App. 36a, 40a.

In any event, to the extent petitioners suggest that the Eleventh Circuit's decision held that the "established" prong of FACA reaches more broadly than the decision below contemplated, Pet. 25, they are incorrect. The complaint in *Miccosukee Tribe* "allege[d] that [the committee at issue] was formed or organized by federal agencies," "funded by federal agencies[,] and did not select its own agenda" but instead worked according to an agenda given to it by federal agencies. 304 F.3d at 1083. Those allegations would have been sufficient to establish that the committee was "established" by a federal agency under the plain-meaning

interpretation employed in the decision below, see Pet. App. 35a-41a, and the point was not meaningfully disputed in *Miccosukee Tribe*. Instead, the contested question there was whether FACA contains an implicit carveout for committees that, while established by a federal agency, consisted only of state and federal employees. See *Miccosukee Tribe*, 304 F.3d at 1085 (rejecting the argument that "committees established by federal agencies are not covered by FACA unless they have private individual or group members the inclusion of which threatens to infect the proceedings of government with the influence of external special interests"). The Eleventh Circuit's rejection of that atextual exception has no bearing here, where the committee in question was not "established" by a federal agency in the first place.

Petitioners quote (Pet. 24) the Eleventh Circuit's passing statement that FACA's definition of "advisory committee" encompasses committees "formed directly or indirectly" by a federal agency, *Miccosukee Tribe*, 304 F.3d at 1085. But that passage was dictum, because the allegations in the complaint were that the committee was "formed or organized by federal agencies," *id.* at 1083, and the Eleventh Circuit concluded that the committee was "established" by the government "in every sense of the word," *id.* at 1085. Moreover, the passing phrase in the court of appeals' opinion was part of a discussion of a passage in this Court's decision in *Public Citizen* that, as explained at pp. 17-18, *infra*, was addressed to the addition of "or utilized" to the definition of "advisory committee." See 491 U.S. at 457. And it is unclear, in any event, what the Eleventh Circuit might have meant in its use of the word "indirectly." *Miccosukee Tribe*, 304 F.3d at 1085.

b. Petitioners are also wrong to contend (Pet. 25-26) that the D.C. Circuit has adopted an entirely different approach to construing "established" that "focuses on three factors:" Whether the group "'has, in large measure, an organized structure, a fixed membership, and a specific purpose.'" Pet. 25 (quoting *Association of Am. Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993)).

As the decision on which petitioners rely makes clear, the D.C. Circuit has looked to those factors to determine whether a group is a "committee" at all, not to determine whether it is a committee that was "established" by an agency. See *Association of Am. Physicians & Surgeons*, 997 F.2d at 914. The D.C. Circuit decisions that actually address the meaning of "established," meanwhile, are fully consonant with the Tenth Circuit's approach here. Indeed, the decision below explicitly embraced the D.C. Circuit's interpretation of that term. See Pet. App. 38a-39a. For example, the court of appeals cited (*id.* at 39a) the D.C. Circuit's decision in *Byrd*, which held that a panel was not "established" by the agency because a contractor, rather than the government, "selected the membership," even though the agency provided the contractor with a direction to convene an advisory panel and even "provided a list of suggested panel members" to the contractor. *Byrd*, 174 F. 3d at 246; see *ibid.* (rejecting the argument that because the agency "conceiv[ed] of the need for" the panel, it had "effectively" established it) (citation omitted). Similarly, in *Food Chemical News*, the D.C. Circuit explained that a panel was not "established" by the agency because a government contractor "alone selected its members," even though the relevant contract required the contractor "to assemble the panel as a

means of obtaining the advice sought by the agency." 900 F.2d at 331, 333; see Pet. App. 38a (quoting *Food Chem. News*, 900 F.2d at 328, 332).

c. Petitioners separately contend that the decision below "narrowly construed" the word "established," in tension with various "statements regarding the 'broad' scope of 'established'" in *Public Citizen*. Pet. 28-29 (citation omitted). That contention is incorrect.

As already explained, pp. 10-12, *supra*, the decision below did not adopt an artificially narrow construction of the word "established." Instead, it construed the word according to its ordinary, plain meaning, see Pet. App. 36a, paying careful attention to this Court's analysis in *Public Citizen*, see *id.* at 36a-38a, 40a-41a.

In any event, petitioners' reliance (Pet. 26-30) on various statements in *Public Citizen* to argue for a "broad" reading of the "established" prong of FACA reflects a misunderstanding of *Public Citizen*. The American Bar Association's Standing Committee on Federal Judiciary at issue in that case was not established by the federal government, and no one had suggested otherwise. See *Public Citizen*, 491 U.S. at 452. This Court's statements that Congress intended for FACA as a whole to encompass committees "established" by the government in a "broad" sense, *id.* at 463, instead came in a discussion of how to construe the separate prong of FACA covering committees "utilized" by the federal government. The Court explained that the phrase "or utilized" was apparently "added [to FACA] simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the

National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves." *Id.* at 462.

*Public Citizen* thus does not indicate that the word "established" in FACA should be given an artificially broad construction. It instead makes clear that to the extent that Congress intended FACA to sweep more broadly than the ordinary meaning of "established" alone would suggest, it added the "utilized" prong to ensure that slightly broader scope. Cf. Pet. App. 41a (suggesting that petitioners' arguments on this score "appear at most to potentially fall within the scope of the word 'utilized,' as defined by the Supreme Court in *Public Citizen*"). And although petitioners argued below that the agency also "utilized" the CTWG and the Producers Traceability Council, the court of appeals rejected that argument, *id.* at 43a-47a, and petitioners have not sought further review of the issue.

d. Even if petitioners could demonstrate some difference in approaches among the courts of appeals, this case would be a poor vehicle in which to address the question presented because petitioners have failed to demonstrate that the CTWG or the Producers Traceability Council would be treated as "established" by a federal agency under any formulation employed by any court. The "evidence in the record quite clearly indicates" that both the CTWG and the Producers Traceability Council were established by industry, not by a federal agency. Pet. App. 41a. As explained, that evidence reflects that industry representatives, and not a federal agency, made the decision to form both groups; selected the membership of both groups; and determined both groups' organization, structure, and goals. See pp. 18-20, *supra*. Petitioners point to no case from any

court concluding that the federal government "established" a group in similar circumstances.

The particular controversy at issue here, moreover, does not raise issues of broad importance warranting this Court's review. The record suggests that both the CTWG and the Producers Traceability Council disbanded years ago. See C.A. App. 374; Pet. App. 15a. Petitioners have successfully filed FOIA requests for agency documents related to both groups, see Pet. App. 19a-20a, and they do not contend that there remain any additional documents in the government's possession that would become available to them if either group were found to implicate FACA.

Moreover, USDA has already issued a notice indicating its intent to initiate notice-and-comment rulemaking proceedings to address whether to amend the Animal Disease Traceability regulations to incorporate EID requirement. See 87 Fed. Reg. 48,242, 48,246 (Aug. 8, 2022). To the extent petitioners believe that the CTWG or the Producers Traceability Council provided inaccurate or incomplete advice to the agency, or that their own perspectives were not properly represented in those groups, petitioners will have the opportunity to present their own views on those issues through the comment period, and the agency will be required to consider and respond to those views. Petitioners identify no basis to conclude that those ordinary administrative mechanisms are insufficient to address any prejudice that petitioners might claim to have suffered from the groups' asserted noncompliance with FACA. See Pet. 33-34.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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