No. 22-____

IN THE

Supreme Court of the United States

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; TRACY and DONNA HUNT, d/b/a THE MW CATTLE CO., LLC; KENNY and ROXY FOX,

Petitioners,

v.

U.S. DEPARTMENT OF AGRICULTURE; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; TOM VILSACK, in his official capacity as Secretary of Agriculture; and KEVIN SHEA, in his capacity as Administrator of the Animal and Plant Health Inspection Service,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1 - 16, imposes detailed reporting requirements on federal advisory committees. The Act defines "advisory committee" as including any committee "established" or "utilized" by a federal agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. App. 2, § 3(2). In *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989), this Court held that the word "utilized" should not be construed in accordance with its "straightforward" and "literal" meaning but rather should be read narrowly—in part because assigning "utilized" its commonly understood meaning would raise considerable doubt regarding FACA's constitutionality. 491 U.S. at 465-67. Relying on *Public Citizen*, the courts below held—in direct conflict with a decision of the Eleventh Circuit—that "established" should also be construed more narrowly than its ordinary meaning would suggest.

The Question Presented is:

Should the word "established," as used in FACA, be construed in accord with its "plain" meaning (as the Eleventh Circuit held) or should be it construed more narrowly (as the Tenth Circuit held)?

PARTIES TO THE PROCEEDING

Petitioners Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF), Tracy and Donna Hunt, d/b/a The MW Cattle Co., LLC, and Kenny and Roxy Fox were plaintiffs in the district court and the plaintiffs-appellants in the court of appeals. R-CALF is a non-profit corporation operating under § 501(c)(6) of the Internal Revenue Code. R-CALF has no parent corporation, and no publicly held company has a 10% or greater ownership interest.

Respondents U.S. Department of Agriculture, the Animal and Plant Health Inspection Service, and Kevin Shea in his official capacity as Administrator of the Animal and Plant Health Inspection Service were defendants in the district court and defendants-appellees in the court of appeals. Secretary of Agriculture Sonny Perdue was initially a defendant in the district court but left office in 2021. His successor as Secretary of Agriculture, Respondent Tom Vilsack, replaced Perdue as a named defendant in 2021 and was later a defendant-appellee in the court of appeals. He is being sued in his official capacity only.

STATEMENT OF RELATED PROCEEDINGS

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture, No. 19-205 (D.Wyo.). Judgment entered May 13, 2021.

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture, No. 21-8042 (10th Cir.). Judgment entered May 20, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 35 F.4th 1225 and is reproduced at App.1a. The district court's orders dismissing the amended complaint and granting judgment for the defendants are unreported and are reproduced at App.49a and App.67a. The order of the district court holding, *inter alia*, that discovery is unavailable in suits alleging claims under the Federal Advisory Committee Act is unreported and is reproduced at App.69a.

JUDGMENT

The court of appeals issued its judgment on May 20, 2022. On August 4, 2022, Justice Neil Gorsuch extended the time for filing a petition for a writ of certiorari to September 19, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. App. 2, § 3(2) states in relevant part:

> The term "advisory committee" means any committee ... 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.

The full text of § 3(2) and other relevant statutes are set out in the Appendix.

INTRODUCTION

By early 2017, the U.S. Department of Agriculture and the Animal and Plant Health Inspection Service (collectively, "APHIS") had concluded that the livestock industry should phase out the use of metal eartags, brands, backtags, and similar lost-cost means of identifying livestock. The agency concluded that the industry should convert to exclusive use of RFID ("radio frequency identification") eartags.

APHIS also concluded that successful conversion to a mandatory RFID system required creation of an advisory committee composed largely of industry representatives. APHIS envisioned that the committee would serve two essential functions. First, the committee could assist with a wide variety of practical and logistical issues that conversion to mandatory RFID would create—such as selecting a uniform technology for RFID devices, a uniformity that could not be achieved without industry assistance. Second, APHIS viewed the committee as a vehicle for enlisting industry support for a mandatory RFID system, which was generating considerable opposition among livestock producers.

Throughout 2017, APHIS devoted significant resources to convincing others of the need for an industry-led advisory committee and to spelling out the

proposed committee's agenda. It was at a September 2017 industry-wide meeting in Denver that APHIS both co-sponsored and co-funded and that many APHIS officials attended, that APHIS's lobbying efforts finally bore fruit: industry representatives attending the meeting agreed to play a role in APHIS's longed-for advisory committee. The first committee began regular meetings in November 2017. APHIS officials regularly attended meetings and worked closely with committee leaders to ensure that the committee hewed closely to APHIS's agenda. Throughout the next two years, the committees—the Cattle Traceability Working Group (CTWG) and it successor, the Producer Traceability Council (PTC)—provided APHIS with a steady stream of advice on RFID technology issues.

The uncontested facts outlined above suffice to demonstrate that APHIS "established" CTWG and PTC under any common understanding of that word, and within the meaning of the Federal Advisory Committee Act (FACA). The district court and the Tenth Circuit held otherwise, based not on any disagreement about the record but on their unusually narrow constructions of the word "established." That narrow construction directly conflicts with an Eleventh Circuit decision and is in considerable tension with this Court's decision in *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989).

The decisions below strike at the heart of FACA by providing federal agencies with a roadmap for evading its strictures. FACA imposes important procedural and transparency requirements on federal advisory committees to ensure they operate in an open and fair manner. But thanks to the Tenth Circuit's

misreading of the statute, agencies like APHIS that find the FACA requirements cumbersome or burdensome now have at their disposal an easy means of evading them. All an agency need do, after laying the groundwork for a desired advisory committee, is to avoid attending the committee's first organizational meeting. Under the Tenth Circuit's narrow construction of "established," an agency not present at the initial organizational meeting has not "established" the committee and thus need not comply with FACA. Review is warranted to determine whether Congress really intended that FACA be so narrowly construed and thereby rendered toothless.

STATEMENT OF THE CASE

The Federal Advisory Committee Act. Congress adopted FACA, 5 U.S.C. app. 2 §§ 1-16, in 1972 to address whether and to what extent advisory committees should be maintained to advise Executive Branch officers and agencies. 5 U.S.C. app. 2 § 2(a). Congress's enactment of FACA was driven by its concern over excessive reliance on secretive committees through which non-governmental actors could wield governmental power behind closed doors and outside the public's view. In passing this "sunshine" statute, Congress explicitly recognized the risk that "interest groups may use their membership on such bodies to promote their private concerns," pointing to past advisory committees that excluded representatives from many stakeholders. H.R. Rep. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 2491, 3496.

To guard against the danger that committees would be captured by one small group of stakeholders,

Congress prescribed rules for advisory committees "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 Office of the President's Private Sector Survey on Cost Control*, 711 F.2d 1072, 1072 (D.C. Cir. 1983). Congress concluded that the "requirement of openness is a strong safeguard of the public interest." H.R. Rep. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3500.

FACA does not permit an advisory committee to "meet or take any action" until it files a charter with "the head of the agency to whom any advisory committee reports." 5 U.S.C. app. 2 § 9(c). The charter must contain, *inter alia*, "the committee's objectives and the scope of its activity," "the period of time necessary for the committee to carry out its purposes," "the agency or official to whom the committee reports," "the estimated number and frequency of committee meetings," and "a description of the duties for which the committee is responsible." *Id.*

An "officer or employee of the Federal Government" must be designated to "chair or attend each meeting of each advisory committee." 5 U.S.C. app. 2 § 10(e). No meeting shall be held in the absence of the Designated Federal Officer (DFO). *Id.* The DFO of an advisory committee is required to, *inter alia*, "[a]pprove or call the meeting of the advisory committee," "[a]ttend the meetings," "[a]djourn any meeting when he or she determines it to be in the public interest," and "[c]hair the meeting when so directed." 41 C.F.R. § 102-3.120.

Each advisory committee meeting "shall be open to the public," 5 U.S.C. app. 2 § 10(a)(1), and held "at a reasonable time and in a manner or place reasonably accessible to the public." 41 C.F.R. § 102-3.140(a). To close any part of an advisory committee meeting from the public, the DFO must justify the closure, obtain advance approval pursuant to specific procedures, and make the determination of closure available to the public. 41 C.F.R. § 102.3-155.

FACA mandates that "[d]etailed minutes of each meeting of each advisory committee shall be kept," including a "record of the persons present, and a complete and accurate description of matters discussed and conclusions reached." 5 U.S.C. app. 2 § 10(c). It further requires that "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." *Id.* § 10(b). Section 10(b)'s disclosure requirement "serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group." H.R. Rep. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3500.

To ensure that advisory committees provide advice representing a broad cross-section of interested parties, FACA requires that membership of advisory committees "be fairly balanced in terms of the points of view represented." 5 U.S.C. app. 2 § 5(b)(2). Courts routinely enforce the fair-balance requirement, and individuals with standing to raise fair-balance issues include those excluded from advisory committee membership in violation of the requirement. *See, e.g.,*

Colorado Environmental Coalition v. Wenker, 353 F.3d 1221 (10th Cir. 2004).

FACA provides a relatively clear definition of what constitutes an "advisory committee" subject to the procedural requirements set out above: any committee "established or utilized" by the President or 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." 5 U.S.C. app. 2 § 3(2).[1]

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[1] The definition in its entirety reads as follows:

> 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.

Ibid.

Animal Disease Traceability. Under the Animal Health Protection Act, 7 U.S.C. § 8301 *et seq.*, APHIS is charged with, *inter alia*, establishing programs to prevent the spread of disease among livestock. APHIS has determined that an effective means of preventing the spread of disease is an Animal Disease Traceability (ADT) program that permits rapid identification of where diseased livestock are located and where they have been. App.5a-6a. A final rule issued by APHIS in 2013 establishes requirements for the official identification and documentation necessary for the interstate movement of certain types of livestock, including cattle (Petitioners' principal focus). *See* "Traceability of Livestock Moving Interstate," 78 Fed. Reg. 2040 (2013) (the "2013 Rule"), codified at 9 C.F.R. pt. 86.

The 2013 Rule, which is still in effect, requires that certain livestock moved interstate be marked to identify their origin. The Rule provides States, Tribes, and livestock producers with considerable flexibility in satisfying the livestock-identification requirement and encourages use of traditional, low-cost technology. It explicitly approves the use of official metal eartags, properly registered brands, group/lot identification numbers, backtags, and other forms of identification as agreed to by shipping and receiving States.

This lawsuit arose from APHIS's efforts, beginning in 2017, to eliminate most of the traceability and identification techniques approved by the 2013 Rule. APHIS officials concluded in 2017 that ADT efforts could be improved if all cattle producers were required to identify their livestock using RFID technology.

In direct contravention of the 2013 Rule, APHIS in April 2019 posted a two-page "Factsheet" to its website, stating that "[b]eginning January 2023, animals that move interstate and fall into specific categories will need official individual RFID eartags." ECF27-1. According to the Factsheet, the "[a]nimals that will require individual RFID tags include" certain beef cattle, bison, and dairy cattle. *Ibid.*

R-CALF filed its initial Complaint in U.S. District Court for the District of Wyoming in October 2019, alleging that the new APHIS policy announced in the Factsheet violated, *inter alia*, the Administrative Procedure Act (APA) and the 2013 Rule. ECF1. APHIS eventually responded by withdrawing the Factsheet. APHIS's retreat led the district court to conclude that a live controversy no longer existed, and it dismissed the complaint as moot in February 2020. ECF21. The court later authorized R-CALF to file an amended complaint to allege claims (also included in the initial Complaint but not addressed in the dismissal order) that Appellees violated FACA. ECF26.

Although APHIS withdrew the Factsheet, it has not abandoned its efforts to force livestock producers to use RFID technology. In July 2020, for example, APHIS published in the Federal Register a proposal that would effectively abrogate the 2013 Rule. APHIS proposed that, beginning in 2023, it would "only approve RFID tags as official eartags for use in interstate movement of cattle and bison." *See* "Use of Radio Frequency Identification Tags as Official

Identification in Cattle and Bison," 85 Fed. Reg. 40,184, 40,185 (July 6, 2020).[2]

The Advisory Committees. The district court and the Tenth Circuit decided there were no contested factual issues regarding the two advisory committees. Rather, the courts denied discovery and decided the case solely on the basis of facts set out in the Administrative Record. Contrary to the lower courts' legal conclusions, even APHIS's limited and constrained record demonstrates APHIS's major role in bringing the advisory committees into existence.[3]

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[2] R-CALF and other cattle producers filed formal comments, strongly objecting to the proposal. After reviewing the 944 comments it received, APHIS announced in March 2021 that it would not proceed with informal adoption of a mandatory RFID requirement; it stated that, instead, it would pursue mandatory RFID through a *formal* rulemaking proceeding. USDA News Release, "USDA Announces Intent to Pursue Rulemaking on Radio Frequency Identification (RFID) Use in Animal Disease Traceability" (March 23, 2021). The news release reiterated USDA's commitment to adoption of mandatory RFID: "APHIS continues to believe that RFID tags will provide the cattle industry with the best protection against the spread of animal diseases." Release of a proposed rulemaking is likely imminent. In its Semi-annual Regulatory Agenda published last month, USDA disclosed that its targeted issuance date for a Notice of Proposed Rulemaking was July 2022 (*i.e.*, the previous month). *See* 87 Fed. Reg. 48,242, 48,246 (Aug. 8, 2022).

[3] As they also did in the lower courts, Petitioners herein include citations to documents in APHIS's Administrative Record ("AR") that provide an account of APHIS's efforts to establish the advisory committees. APHIS has never challenged the accuracy of that account. At Petitioners' request, the district court supplemented the Administrative Record with several documents drafted by APHIS. Although the district court deemed these

APHIS determined in early 2017 that it would seek the formation of an industry-led advisory committee to assist with its hoped-for transition to mandatory RFID. APHIS had previously established the State-Federal ADT Working Group (the "Working Group"), a committee consisting of federal and state-government officials that was looking into Animal Disease Traceability issues. APHIS sought the Working Group's formal support for its proposal to create an industry-led task force. ECF 52-1, 52-2, and 52-3 are notes prepared by APHIS officials in connection with the Working Group's June 27, 2017 meeting; the notes reflect that they were lobbying hard for the Working Group's support.

ECF 62-4, 62-3, and ECF 62-5 are, respectively, agendas for Working Group meetings on July 11, August 9, and August 29, 2017. Those documents indicate that, by mid-summer 2017, creation of "a specialized industry le[d] task force with government participation" had become a "Point of Consensus" among Working Group members. All three documents include a detailed list of topics that the industry-led task force would be expected to address. For example, ECF 62-5 states that "key issues" that the task force would be expected to address included: (1) "Standardization: Propose minimum standards that will achieve a solution that works at the speed of commerce"; (2) "Transitional technology solutions"; (3)

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documents relevant to Petitioners' FACA claims, APHIS failed to include them in the record it lodged with the district court. Counsel for Petitioners obtained the additional documents via an FOIA request. They are cited herein by their district court ECF designations.

"Timelines: Propose a realistic timeline with key steps to support the transition to a fully integrated EID [Electronic Identification, a synonym for RFID]" system; and (4) "Funding: Consider funding options for addressing cost concerns."

The decision to form an industry-led task force with government participation was made at an industry-wide Strategy Forum held in Denver in September 2017. An APHIS "White Paper," ECF 47-4, summarizes events at the Strategy Forum:

- The Strategy Forum was funded in part by APHIS, which also served as co-host;
- Four of the ten members of the Forum's "Planning Committee" were senior APHIS officials;
- Neil Hammerschmidt, APHIS's Program Manager for Animal Disease Traceability, chaired a program on ADT "Next Steps" that outlined the need to establish an industry-led task force;[4]

[4] The slide deck from Hammerschmidt's Power-Point presentation is ECF 62-1. Among the recommendations contained in the presentation: "The United States must move toward an EID system for cattle with a target implementation date of January 1, 2023. A comprehensive plan is necessary to address the multitude of very complex issues related to the implementation of a fully integrated electronic system. *The plan should be developed through a specialized* industry-*le*[*d*] *task force with government participation*." (Emphasis added.) Hammerschmidt listed, as "an immediate priority," "the immediate establishment of an industry and State/Federal Task Force to prepare a plan for targeting

- A panel chaired by Dr. Sunny Geiser-Novotny of APHIS reported, "Industry must be involved in the decisions about the ADT program—not just choosing the format of the EID and storage of the data but in all aspects of the ADT rule. ... As those most intimately affected by the ADT rule, producer groups are in the best position to determine all the answers to all the questions surrounding the ADT program."

- The White Paper's Executive Summary stated that "[a] group of industry stakeholders needs to be assembled to drive the ADT movement forward. Representatives of several producer groups attending the forum *expressed their commitment to this model and process*, and a desire to be part of the solution." (Emphasis added.)

The White Paper's final page leaves no doubt that industry participants at APHIS's Strategy Forum agreed to APHIS's request for formation of its desired task force:

> We need to put together a group of industry stakeholders to drive the movement forward. Those directly affected usually come up with the best solutions, and producers trust their trade associations. Ross Wilson of the Texas

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implementation of an EID solution for cattle by January 1, 2023. The plan should include recommendation on the technology most capable of working effectively at the speed of commerce and defining other key implementation target dates."

> Cattle Feeders Association challenges the national producer associations to plan a meeting by the end of 2017. Their goal should be to review, prioritize, and determine next steps for the ADT working group's 14 'Preliminary Recommendations on Key Issues'. Representatives of [six named cattle-industry groups] all expressed their support and commitment for this challenge. They voiced issues— ... but all want a seat at the table, so that they can be a part of the solution.

ECF 47-4.

Later APHIS documents trace establishment of the Cattle Traceability Working Group to the Strategy Forum. *See, e.g.*, AR005 (stating that CTWG "was formed as an outcome of the [Strategy Forum] that we [APHIS] co-hosted last September").

Indeed, the lower courts accepted that APHIS played a major role in CTWG's formation. The district court concluded, based on the Administrative Record, that "it seems clear that APHIS wanted, needed, envisioned and recommended the creation of an industry-led group (like CTWG and PTC) to work in furtherance of APHIS's objective to improve effectiveness of the ADT program and move toward an EID system for cattle consistent with APHIS's targeted implementation date of January 1, 2023." App.63a.

Following the Strategy Forum, the National Institute of Animal Agriculture (NIAA) took the lead in organizing the initial meeting of the industry advisory

committee, which adopted the CTWG name at that initial November 2017 meeting. AR392-95. All individuals (and their organizations) who had attended the Strategy Forum were invited to become members of the advisory committee. AR385-87.

APHIS officials made a point of not attending that *initial* meeting. But one or more APHIS officials "regularly attended" CTWG's meetings, App.11a, as well as meetings of PTC (the successor to CTWG). App.42a.[5] In addition, APHIS conducted at-least-weekly phone conferences with the chairmen of the two committees and each of their subcommittees as well as maintaining regular correspondence with them. Those

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[5] Although noting that a senior APHIS official, Dr. Sarah Tomlinson attended every PTC meeting, the Tenth Circuit asserted that "Tomlinson did not have a voting role in the PTC." *Ibid*. The appeals court neglected to mention the humorous lengths to which USDA went to disguise the extent of Tomlinson's involvement. A News Release prepared by PTC after its May 15, 2019 meeting listed Tomlinson as having attended as a PTC "member." AR313-14. That listing led to a flurry of emails from APHIS officials (including attorneys in the General Counsel's office) objecting to Tomlinson's listing. *See, e.g.*, AR318-19. One APHIS attorney suggested eliminating Tomlinson's name altogether. AR322-23. PTC eventually issued a revised News Release that listed Tomlinson as "Government Liaison" and a "non-voting member." AR335-36. Katie Ambros, Executive Director of the NIAA and the head of PTC, wrote to Tomlinson on May 16 to abjectly apologize for "my listing you incorrectly" and stating that "I would never, ever, want to put you in any position where there are concerns or questions about *your important role in this council* from anyone!" AR333 (emphasis added). Ambrose did not specify what those "concerns" might be, but the most plausible inference is that APHIS officials feared that disclosure of Tomlinson's direct participation in PTC activities might increase APHIS's FACA exposure.

contacts are memorialized in scores of documents in the Administrative Record. *See, e.g.*, AR48-49, 52, 63-66, 322-23, 383, 408, 447, 457, 466, 492, 293, 514, 532, 533, 554, 559-62, 715, 748, 750, 785, 794-95, 798, 799, 800, 827, 828, 833, 848-51, 866, 932.

Individual members of CTWG and PTC were not compensated for the time they spent participating in the committees' virtual meetings. App.42a. Although Petitioners strongly suspect that APHIS paid NIAA's substantial expenses in coordinating the two advisory committees,[6] the Administrative Record is silent on that issue—and Petitioners were denied the opportunity for discovery to explore the issue further.

Formed in the spring of 2019, PTC was "a spinoff" of CTWG with much the same membership. AR914-15. The transition to PTC occurred because pro-RFID members of CTWG objected to what they viewed as obstructionism by members (including Petitioner Kenny Fox) opposed to mandatory RFID technology for cattle. AR892, 897-98; App.54a-55a. Fox and other CTWG members who opposed

[6] Petitioners' suspicion is fueled by the minutes of CTWG's November 20, 2017 meeting, prepared by NIAA. The minutes reflect that NIAA alerted committee members to "the possibility for underwriters to support the NIAA effort given the staff time that will be involved for this initiative." AR395. While the minutes do not state the name of the potential underwriter(s), the most plausible candidate is APHIS. A showing that NIAA was the paid agent of APHIS would conclusively refute APHIS's claim that the committees were not operating under its direct control.

mandatory RFID were excluded from PTC. AR914-16; AR927-28.[7]

Throughout their existence, both committees hewed closely to the agendas set out for them by APHIS in 2017. *See supra* at 11-12. As found by the district court, "Throughout 2018-19, CTWG and PTC sent APHIS a regular stream of RFID-related technical advice, approved by formal votes of those committees." App.56a.

Proceedings Below. Petitioners Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al*. (collectively, "R-CALF") filed their Amended Complaint in April 2020, detailing their claims that CTWG and PTC are federal advisory committees within the meaning of FACA and that APHIS's failure to comply with FACA requirements for such committees was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). APHIS declined to answer or otherwise respond to the Amended Complaint. Instead, in July 2020 it lodged a small number of documents with the district court and claimed that they constituted an "Administrative Record" that contained all documents considered by APHIS in connection with CTWG and PTC. ECF-29. None of the lodged documents mention FACA or discuss why

[7] By excluding all cattle producers who opposed mandatory RFID, PTC failed to comply with a one of FACA's most significant mandates: that the membership of a federal advisory committee "be fairly balanced in terms of the points of view represented." 5 U.S.C. app. 2 § 5(b)(2).

APHIS may have decided *not* to follow FACA procedural requirements.

R-CALF objected to the adequacy of the Administrative Record and sought to compel APHIS to answer the Amended Complaint and to engage in limited discovery. The district court denied the motion. App.67a-75a. It held that FACA creates no private right of action and that FACA claims may proceed only under the judicial-review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 704 & 706—which, the court held, limit review to the agency's administrative record and bar discovery in FACA cases. App.73a-74a.[8]

Based on the Administrative Record (as supplemented by several documents obtained by R-CALF via a contemporaneous FOIA request), the district judge dismissed R-CALF's FACA claims. App.49a-66a. She held that APHIS did not need to comply with FACA's procedural requirements because it had not "established" CTWG and PTC within the meaning of that statute. App.63a-64a. In reaching that conclusion, she held that "a narrower rather than a literalistic interpretation" should be applied to FACA's use of the word "established." App.64a. While conceding that APHIS "wanted, needed, envisioned and recommended" that CTWG and PTC be formed, App.63a, she held that APHIS had not "established"

[8] The court held alternatively that R-CALF waived any right to seek discovery by not asserting discovery rights until several months after filing the Amended Complaint. App.74a-75a. Both discovery-related holdings are erroneous, but R-CALF's Petition does not contest either holding.

the advisory committees because it had not "directly formed" them. App.64a.

The Tenth Circuit affirmed. App.1a-48a. It "agree[d] with the district court that, for purposes of FACA, defendants did not 'establish' either CTWG or PTC." App.43a.

Citing this Court's *Public Citizen* decision, R-CALF urged the appeals court to construe the word "established" according to its "normal" and "ordinary meaning." App.40a (citing R-CALF Br. 24). The appeals court rejected that approach, asserting that "Plaintiffs' arguments are flawed for several reasons." *Ibid.* It held that "FACA was largely intended to codify Executive Order 11007," *ibid.*, and that the Executive Order did not encompass "private[ly] organized committees that received no federal funds." App.37a (quoting *Public Citizen*, 491 U.S. at 459). The Court also cited *Public Citizen*'s reliance on FACA's legislative history for the proposition that FACA is inapplicable to "*advisory committees not directly established by or for* [federal] *agencies*." App.38a (quoting *Public Citizen*, 491 at 462) (emphasis added by appeals court).

Applying that somewhat constricted definition of "established," the appeals court held that there was "no evidence" in the Administrative Record that either CTWG or PTC was "directly formed" (and thus "established") by APHIS. App.41a (quoting district court decision at App.63a). Rather, the court held, CTWG was not "established" (as defined by FACA) until November 2017, when "the executive committee of the non-profit organization NIAA"—"in response to

what occurred at the September 2017 Strategy Forum"—organized the first meeting of CTWG. App.10a, 41a. In support of that holding, the court also noted evidence in the Administrative Record that CTWG members would not be compensated for the time they spent participating in the committees' virtual meetings. App.42a.[9]

Having found that CTWG and PTC were not "advisory committee[s]" as defined by FACA because they were not "established" by APHIS, the appeals court concluded that APHIS was not required to comply with FACA's procedural requirements when dealing with those committees. App.47a. The court also held that APHIS did not violate the APA by failing to provide "some type of explanation in the administrative record" regarding why it "did not comply with FACA's procedural requirements." App.47a-48a.

REASONS FOR GRANTING THE PETITION

The petition raises an issue of exceptional importance. A key contested issue in a large percentage of FACA cases is whether a group is a FACA "advisory committee" that was "established" by the President or a federal agency—and thus subject to

[9] The Administrative Record is silent regarding who bore the advisory committees' most significant expense: the thousands of man hours that NIAA employees devoted to administering the two committees over the course of two years. As noted above, R-CALF has good reason to suspect that APHIS underwrote those costs, *see supra* at p. 16 n.6, a suspicion it brought to the appeals court's attention.

FACA constraints. *Compare, Public Employees for Environmental Responsibility v. Nat'l Park Service*, 2022 WL 1657013 at *17 (D.D.C. May 14, 2022) ("E-bike group" was "established" by National Park Service), *with American Oversight v. Biden*, 2021 WL 4355576 at *7-*9 (D.D.C. Sept. 24, 2021) ("Clemency Task Force" was not "established" by the President). The federal appeals courts have issued sharply conflicting decisions regarding when the President or an agency should be deemed to have "established" a FACA advisory committee. Review is warranted to resolve that conflict.

Review is also warranted because the decisions below cannot be reconciled with the Court's *Public Citizen* decision. Although *Public Citizen* focuses on FACA's use of the word "utilized," the Court's opinion strongly suggests that "established," as used in FACA, should be interpreted as taking its ordinary meaning. Both the district court and the Tenth Circuit misread *Public Citizen* as mandating a "narrow" construction of that word.

Review is particularly appropriate because the Question Presented is outcome determinative. As described above, the evidence is overwhelming that APHIS played *the* major role in creating CTWG and PTC. Only by adopting a "narrow" interpretation of "established"—whereby a federal agency does not "establish[]" an advisory committee unless it "directly" forms the committee, including directly participating in the committee's initial organizational meeting—could the lower courts conclude that APHIS did not "establish" CTWG and PTC.

I. REVIEW IS WARRANTED TO RESOLVE A SHARP CONFLICT AMONG THE FEDERAL APPEALS COURTS

In ordinary usage, "to establish" is broadly defined to include "to bring into existence: found" or "to bring about: effect," WEBSTER'S NEW COLLEGIATE DICTIONARY, G. & C. Merriam Co. (1981), a definition R-CALF urged the Tenth Circuit to adopt. *See* App.40a. The successful lobbying campaign undertaken by APHIS throughout 2017 would, in normal usage, be deemed one aimed "to bring about" (and thus "to establish") the advisory committees at issue in this case.

The courts below, in construing the word "established" as used in FACA, declined to employ that ordinary meaning of the word. Based on its inaccurate reading of FACA's legislative history and this Court's *Public Citizen* decision, the district court concluded that "the term 'established' should not be read beyond a narrower formulation consistent with Executive Order 10007." App.63a. The court attached a direct-causation requirement to the word's meaning: "a group which is not directly formed by a government agency (or by a quasi-public organization such as the National Academy of Sciences for a government agency) is not a committee 'established' by the government within FACA's terms." *Ibid.* (emphasis in original). Applying this narrowed definition of "established," the court held that CTWG and PTC were not "established" by APHIS—notwithstanding its recognition that APHIS cajoled industry leaders to join a committee that would address the ADT agenda created by APHIS—because CTWG was not "directly" formed by APHIS. *Ibid.*

Rather, the court found, it was "directly" formed at a meeting in November 2017 organized by NIAA. App.64a.

The Tenth Circuit agreed with the district court's construction of "established." App.40a-43a. It held that R-CALF's arguments—that *Public Citizen* supported its position that "established" should be afforded its "normal" and "ordinary meaning"—were "flawed for several reasons." App.40a. The appeals court explained:

> To begin with, plaintiffs ignore the Supreme Court's statement in *Public Citizen* indicating that FACA was largely intended to codify Executive Order No. 11007. Plaintiffs in turn misinterpret the Supreme Court's reference in *Public Citizen* to "most liberal" and "most capacious." Contrary to plaintiffs' suggestion, the Supreme Court was not using those phrases to indicate that the term "established" was to be interpreted in a broad fashion. Rather, the Court used those phrases in reference to the statutory phrase "established or utilized," ultimately holding that the term "utilized" was intended by Congress as simply an expansion of the term "established."

Ibid.

Employing the district court's narrow, "directly formed" construction, the Tenth Circuit held that

APHIS had not "established" the advisory committees: "as the district court noted in its decision, 'there is no evidence' in the administrative record 'to suggest that either group was *directly* formed by APHIS.'" App.41a (quoting App.63a) (emphasis added).

In direct conflict with the Tenth Circuit's construction of FACA, the Eleventh Circuit has expressly held that "the word 'established' in the statutory phrase 'established or utilized' should be given its plain meaning." *Miccosukee Tribe of Indians of Florida v. Southern Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002). The district court had adopted a narrowed construction of "established" (based on its understanding of *Public Citizen*) and dismissed a FACA claim based on that narrowed construction. The Eleventh Circuit overturned the district court decision, holding that adopting a narrow construction of "established":

> runs counter to the teachings of *Public Citizen* that "established" was used "in an expanded sense of the word," and "'in a generous sense," and the word should be applied with a "broad understanding" in order to encompass all such committees *formed directly or indirectly* by the federal government or its agencies.

Id. at 1085 (emphasis added). Construing "established" in accord with its "plain meaning," the Court held that that construction "compels our conclusion" that the federal government had "established" a FACA advisory committee yet had

failed to comply with FACA's procedural requirements. *Id.* at 1087.

The Tenth and Eleventh Circuit's decisions cannot be reconciled. The Tenth Circuit held that the word "established" should be read narrowly, such that an advisory committee has not been "established" by a federal agency unless the agency has "directly formed" the committee—without regard to how many indirect steps the agency may have taken to bring about creation of the committee. In sharp contrast, the Eleventh Circuit has held explicitly that the word "established" "encompass[es] all [advisory] committees formed directly or indirectly by the federal government or its agencies." *Id.* at 1085. Review is warranted to resolve that conflict.

The D.C. Circuit has adopted yet another approach to determining whether a federal agency has "established" a FACA advisory committee. Rather than focusing on the precise manner in which a committee is formed, the D.C. Circuit focuses on three factors: FACA is implicated, and compliance with its procedural requirements is mandated, whenever federal officials "create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." *Assoc. of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993). Both CTWG and PTC met all three of those requirements: they had organized structures (*e.g.*, they appointed chairs both of the committee as a whole and of various subcommittees, and they maintained meeting minutes), they had fixed memberships, and they had specific purposes (to provide advice on a wide variety of

practical and logistical issues that conversion to mandatory RFID would create). Thus, CTWG and PTC would also be deemed FACA advisory committees under the D.C. Circuit standard.

Given the widely varying standards applied by the appeals courts, whether a committee will be deemed to have been "established" by a federal agency depends largely on where a FACA claim is being adjudicated. Review is warranted to bring uniformity to an issue that arises frequently in FACA litigation.

II. THE DECISIONS BELOW ARE IN CONSIDERABLE TENSION WITH *PUBLIC CITIZEN* AND MISREAD FACA'S LEGISLATIVE HISTORY

At issue in *Public Citizen*, the Court's most comprehensive FACA decision, was whether the federal government "utilized" the American Bar Association's Standing Committee on Federal Judiciary within the meaning of FACA. 491 U.S. 440. Whether the federal government "established" the Committee was not at issue—all parties agreed that the federal government had not done so.

The courts below nonetheless sought to rely on *dicta* in *Public Citizen* to support their narrow construction of "established." That reliance was misplaced. Nothing said in *Public Citizen* provides support for a narrow construction. On the contrary, the decision states repeatedly that "established" should be read broadly.

The courts below sought to draw support for their narrow construction of "established" from *Public*

Citizen's discussion of Executive Order 11007, a document issued by President Kennedy in 1962 that *Public Citizen* viewed as a forerunner to FACA, which was enacted in 1972. *See* 491 U.S. at 456-57. The district court stated, "From *Public Citizen*, this Court concludes that the term 'established' should not be read beyond a narrower formulation consistent with Executive Order 11007." App.63a. The Tenth Circuit viewed Executive Order 11007 similarly. After quoting at length from *Public Citizen*'s discussion of Executive Order 11007, App.37a, the appeals court stated that its construction of "established" was "consistent with the Supreme Court's discussion in *Public Citizen* and in turn with Executive Order 11007." App.39a.

Both courts have misconstrued *Public Citizen*'s discussion of Executive Order 11007. The sole point of that discussion was to demonstrate that: (1) Executive Order 11007 imposed reporting requirements on advisory committees "utilized" by a federal agency, even when they had not been "established" by the agency; (2) during the ten years between issuance of the Executive Order in 1962 and enactment of FACA in 1972, the government concluded that the ABA Committee was not subject to the Executive Order because it was not being "utilized" by the Justice Department, even though Justice regularly sought advice from the Committee; and thus (3) it was unlikely that Congress, when it enacted identical "utilized" language, intended thereby to make the Committee subject to FACA. *Public Citizen*, 491 U.S. at 456-59. None of that discussion has any relevance to FACA's use of the word "established."

On the contrary, much of what *Public Citizen* had to say about "established" supports R-CALF's position and is in considerable tension with the Tenth Circuit's decision. For example, the Court discussed a Senate bill "that grew into FACA." *Id.* at 461. The Court noted that the bill "defined 'advisory committee' as one 'established or organized'" by a federal agency, and that the accompanying Senate report:

> stated that the phrase "established or organized" was to be understood in its "*most liberal sense*, so that when an officer brings together a group *by formal or informal means*, by contract or other arrangement, and *whether or not Federal money is expended*, to obtain advice and information, such group is covered by the provisions of this bill."

Id. at 461 (quoting S. Rep. No. 92-1098 (1972) at 8).

This Court cited the Senate report in support of its explanation of why "utilized" should be narrowly construed. But the language quoted above directly undercuts the Tenth Circuit's contention that "established" does not encompass committees that: (1) a federal agency creates by informal or indirect means; or (2) are not federally funded.

The word "utilized" did not appear in early versions of FACA and was not added until just before final passage by Congress. *Public Citizen* explained at length why that addition should not be viewed as a major expansion of FACA's scope. 491 U.S. at 461-62. That explanation is replete with statements regarding

the "broad" scope of "established." *See, e.g., id.* at 461-62 ("the phrase 'established or utilized' ... is more capacious than the word 'established' or the phrase 'established or organized'"); *id.* at 462 ("it appears that the House bill's initial restricted focus on advisory committees established by the Federal Government, *in an expanded sense of the word "established,"* was retained rather than enlarged by the Conference Committee") (emphasis added); *ibid.* ("The phrase 'or utilized' therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government *in a generous sense of that term*") (emphasis added); *ibid.* (stating that the House and Senate bills extended FACA to cover "advisory groups 'established,' on *a broad understanding of that word*, by the Federal Government") (emphasis added).

The Eleventh Circuit has expressly recognized that *Public Citizen* provides support for assigning "established"—as used in FACA—its normal, broad meaning. It sharply contrasted *Public Citizen*'s treatment of the word "established" with its treatment of the word "utilized," noting:

> The [*Public Citizen*] majority avoided [the need to address a serious constitutional question] by construing the term "utilized" in a way contrary to its plain meaning. In contrast, there is no need to run from the plain meaning of "established" in order to escape a serious constitutional question, because there is no serious constitutional question raised

> by application of FACA's requirements to every advisory committee established by the federal government.

Miccosukee Tribe, 304 F.3d at 1085-86.

The Eleventh Circuit also recognized that *Public Citizen* construed "utilized" narrowly because construing it more broadly would have led to "absurd results." *Id.* at 1086. The appeals court explained that this avoiding-absurd-results rationale was inapplicable to the word "established" because "there is nothing absurd, or even questionable, about applying FACA's requirements to all advisory groups established by federal agencies. It makes sense to do so in light of the statute's stated purposes." *Ibid.*

Indeed, construing "established" narrowly would undercut those stated purposes. It would allow federal agencies to take all steps necessary to ensure establishment of an advisory committee and then disavow responsibility for the committee by turning over the final organizational steps to a third party.

III. THE QUESTION PRESENTED IS OUTCOME-DETERMINATIVE

Review is particularly warranted because the Question Presented is outcome-determinative. Under the Tenth Circuit's narrow construction of "established," CTWG and PTC are not advisory committees subject to FACA's procedural requirements. But the Administrative Record conclusively demonstrates that if the word "established" is construed in the broader sense

contemplated by *Public Citizen* and *Miccosukee Tribe*, those committees were, indeed, "established" by APHIS.

There are no contested facts in this case; the parties are bound by the facts set forth in the Administrative Record unilaterally prepared by APHIS after R-CALF filed its Amended Complaint.

The pertinent facts are summarized at pp. 10-17, *supra*. Those facts demonstrate that APHIS went to great lengths to ensure the establishment of an industry-led advisory committee to prepare a plan for adoption of mandatory RFID by January 1, 2023. It lobbied throughout 2017 for the committee's establishment. It convinced the State-Federal ADT Working Group to formally endorse establishment of a committee in June 2017. At meetings held throughout the summer of 2017, the Working Group reached agreements regarding what the new committee's agenda would be. APHIS then convened a Strategy Forum in Denver in September 2017 at which the final details of the committee could be worked out. APHIS co-hosted and co-financed the conference, and APHIS officials dominated both the Planning Committee and the presentations—which stressed the importance of creating an industry-led task force with government participation. The presentation by Neil Hammerschmidt, APHIS's Program Manager for Animal Disease Traceability, spelled out the precise agenda this advisory committee should adopt.

As APHIS's White Paper for the Strategy Forum confirms, in response to APHIS's entreaties, a group of cattle-industry leaders attending the Strategy Forum

agreed to go forward with creating the advisory committee. The White Paper states:

> A group of industry stakeholders needs to be assembled to drive the ADT movement forward. Representatives of several producer groups attending the forum expressed their commitment to this model and process, and a desire to be part of the solution. ... We need to put together a group of industry stakeholders to drive the movement forward. ... Ross Wilson of the Texas Cattle Feeders Association challenges the national producer associations to plan a meeting by the end of 2017. Their goal should be to review, prioritize, and determine next steps for the ADT working groups's 14 'Preliminary Recommendations on Key Issues'. Representatives of [six named cattle-industry groups] all expressed their support and commitment for this challenge.

ECF47-4.

A later APHIS document erases any doubt that the CTWG was "established" at the September 2017 Strategy Forum, as that word is commonly understood. The document stated that CTWG "was formed as an outcome of the [Strategy Forum] that we [APHIS] co-hosted last September." AR005. Accordingly, if FACA's use of the word "established" is construed according to its ordinary usage, R-CALF will prevail in this litigation. The average person, if told that the

government asked a number of individuals to form a group that would provide advice to the government and they agreed to do so, would say that the government had "established" the group—even if the individuals had not yet held their initial meeting and finalized their membership roll. The average person would be particularly likely to say so when, as here, the group, following its formation, regularly consults with government officials, adheres to the agenda suggested by those officials, and sends the government "a regular stream of RFID-related technical advice, approved by formal" committee votes. App.56a. Under those circumstances, the government "bring[s the committee] into existence: found[s]" or "bring[s it] about: effect[s]." WEBSTER'S NEW COLLEGIATE DICTIONARY, G. & C. Merriam Co. (1981).

Only by adopting a narrowed understanding of the word "established" can APHIS's position prevail. If, as the Tenth Circuit held, the government does not "establish[]" a committee unless it "directly" forms the committee (meaning, as applied to these facts, it convenes the committee's initial meeting and selects all members), then APHIS did not "establish" CTWG and PTC and did not need to comply with FACA's procedural requirements. Accordingly, review is warranted because whether R-CALF can prevail on its FACA claim depends entirely on whether the Tenth Circuit erred in adopting an unduly narrow construction of the word "established."

Review is particularly warranted because of the timeliness of R-CALF's claim. USDA and APHIS recently announced that they plan in the very near future to release their long-awaited proposed rule that

would mandate use of RFID eartags on cattle moving in interstate commerce. *See* 87 Fed. Reg. 48,242, 48,246 (Aug. 8, 2022). Whether APHIS, when considering whether to adopt a final rule, is permitted to rely on the "regular stream of RFID-related technical advice" supplied to the agency by CTWG and PTC hinges on the outcome of this lawsuit. If APHIS is ultimately determined to have violated FACA, then APHIS is likely to be enjoined from making use of that technical advice in connection with its rulemaking. Granting review now will save substantial resources by permitting resolution of the issue *before* APHIS completes the entire administrative process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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