FILED
United States Court of Appeals
Tenth Circuit

May 20, 2022

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; TRACY HUNT, d/b/a The MW Cattle Company LLC; DONNA HUNT, d/b/a The MW Cattle Company LLC; KENNY FOX; ROXY FOX,

Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES DEPARTMENT OF AGRICULTURE ANIMAL AND PLANT HEALTH INSPECTION SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE SECRETARY, in his official capacity, a/k/a Sonny Perdue; UNITED STATES DEPARTMENT OF AGRICULTURE AND PLANT HEALTH INSPECTION SERVICE ADMINISTRATOR, in his official capacity, a/k/a Kevin M. Shea,

Defendants - Appellees.

No. 21-8042

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 1:19-CV-00205-NDF)

Harriet Hageman (Richard A. Samp and Kara Rollins, with her on the briefs), New Civil Liberties Alliance, Washington, DC, appearing for appellants.

Sean R. Janda, Attorney (Brian M. Boynton, Acting Assistant Attorney General, L. Robert Murray, Acting United States Attorney, and Mark B. Stern, Attorney, with him on the brief), United States Department of Justice, Civil Division, Washington, DC, appearing for appellees.

Before **HOLMES**, **BRISCOE**, and **MORITZ**, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiffs 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 filed this action under the Administrative Procedure Act (APA) alleging that defendants United States Department of Agriculture (USDA), the USDA's Animal and Plant Health Inspection Service (APHIS), the Secretary of the USDA, and the Administrator of APHIS violated certain procedural requirements imposed by the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 §§ 1–16. Specifically, plaintiffs focus on the interactions of USDA and APHIS with two private groups—the Cattle Traceability Working Group (CTWG) and the Producers Traceability Council (PTC)—both of which plaintiffs claim are "advisory committees" for purposes of FACA. More specifically, plaintiffs alleged that defendants "established" and "utilized" both of these groups and were thus obligated to comply with FACA's procedural requirements with respect to both groups.

Defendants filed a status report invoking the District of Wyoming's Local Civil Rule 83.6, which governs the review of final agency action and Social Security

cases. Thereafter, defendants prepared and submitted to the district court an administrative record and a supplemental administrative record. The parties then filed briefs on the merits of plaintiffs' claims. After reviewing the record, the district court concluded that neither CTWG nor PTC were "established" or "utilized" by defendants within the meaning of FACA. It therefore dismissed plaintiffs' claims with prejudice and entered judgment in favor of defendants.

Plaintiffs now appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the decision of the district court.

I

a) FACA

FACA was enacted by Congress in 1972. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. 2 §§ 1–16). "FACA was born of a desire to assess the need for 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.'" *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 445–46 (1989) (quoting 5 U.S.C. App. § 2(a)). FACA's

> purpose was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature.

Id. Thus, "FACA's terms promote transparency, accountability, and open public participation in executive branch decisions and prevent informal advisory committees

from exerting improper or one-sided influence." *VoteVets Action Fund v. United States Dep't of Veterans Affairs*, 992 F.3d 1097, 1101 (D.C. Cir. 2021).

"At the same time, 'although its reach is extensive,' FACA does not 'cover every formal and informal consultation between the President or an Executive agency and a group rendering advice.'" *Id*. (quoting *Pub. Citizen*, 491 U.S. at 453). "Executive officials' solicitation of views from independently formed and operated entities—such as nonprofit organizations, associations, or political parties—with relevant insight and experience does not, without more, implicate the Act." *Id*.

As the D.C. Circuit noted in *VoteVets Action Fund*:

> Where it applies, FACA requires, among other things, that each covered advisory committee publicly file its charter, 5 U.S.C. app. 2 § 9(c), that "[e]ach advisory committee meeting . . . be open to the public" following public notice, that "[d]etailed minutes" of all such meetings be maintained, *id*. § 10(a)(1)–(2), (c), and 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" the committee be made available to the public, *id*. § 10(b).

Id.

b) The USDA's ADT program

The USDA "provides various programs that support the economic viability of animal agriculture."[1] Aplt. App., Vol. I at 193. "Animal disease traceability" (ADT), which the USDA refers to as "knowing the whereabouts of diseased and at-risk animals" and "where they have been . . . and when," is considered by the USDA as "important to

[1] Our description of the underlying facts of this case is based upon the evidence contained in the record that was compiled by the defendants and filed with the district court.

ensuring a rapid response when animal disease events take place." *Id*. The USDA's view is that "an efficient and accurate traceability system reduces the number of animals and response time involved in a disease investigation; which, in turn, reduces the economic impact on owners and affected communities." *Id*.

"In early 2010, USDA announced a new approach for responding to and controlling animal diseases, referred to as the ADT framework." *Id*. at 185, 193. That resulted in the USDA publishing a final rule on January 9, 2013 (the 2013 Rule), entitled "Traceability for Livestock Moving Interstate." *Id*. at 193; *see* 78 Fed. Reg. 2040 (2013), codified at 9 C.F.R. pt. 86.

The 2013 Rule established requirements for the official identification and documentation necessary for the interstate movement of certain types of livestock, including cattle. More specifically, the 2013 Rule approved the use of official metal eartags, properly registered brands, group/lot identification numbers, backtags, tattoos, and other forms of identification as agreed to by shipping and receiving states. "Under th[is] final rule, unless specifically exempted, livestock moved interstate" were required to "be officially identified and accompanied by an interstate certificate of veterinary inspection (ICVI) or other documentation." Aplt. App., Vol. I at 185. "Covered livestock include[d] cattle and bison, horses and other equine species, poultry, sheep and goats, swine, and captive cervids." *Id*. But "the ADT program's primary focus" was on "enhancing traceability in cattle as bovine disease eradication programs [we]re phased out." *Id*. at 194. The 2013 Rule did not apply to livestock that was moved "[e]ntirely within Tribal land . . . that straddle[d] a [s]tate line and for which the Tribe ha[d] a

separate traceability system from the [s]tates in which its lands [we]re located," or "[t]o a custom slaughter facility in accordance with [f]ederal and [s]tate regulations for preparation of meat." *Id*. at 193.

Between 2015 and 2017, APHIS attempted to collect internal and external data regarding the effectiveness of the ADT program. *Id*. at 195. This process began in 2015 when the APHIS Administrator selected the ADT program for an internal review. *Id*. In 2016, APHIS initiated a program and stakeholder review "to determine the effectiveness of the framework, as well as implementation successes and shortfalls" that occurred between 2013 and 2016. *Id*. In 2017, APHIS "conducted extensive outreach activities . . . with [s]tate, [t]ribal, and [f]ederal animal health officials and industry to obtain grassroot feedback from producers and other sectors of the livestock industry." *Id*. This included conducting nine public meetings between April and July of 2017 and receiving written comments regarding the current ADT framework. *Id*. at 198.

"In 2017, APHIS established a State-Federal ADT Working Group in accordance with [FACA] to assist APHIS in reviewing the ADT [program], examine feedback from the public meetings and written comments, and provide input based on their experiences with disease traceability issues." *Id*. at 198–99. The Working Group was comprised of APHIS officials and officials from various state agencies and associations. *Id*. at 199 (listing members of group). The Working Group met regularly and eventually provided a list of fourteen preliminary recommendations "pertaining to the traceability of the cattle sector." *Id*. at 205. The fourth of those recommendations concerned the possibility of an electronic identification system (EID) for cattle. *Id*. at 206. The Working Group noted

that "[p]ossibly the most significant change in stakeholder opinion since the establishment of the . . . ADT framework in 2013 . . . [wa]s an increase in support for EID for cattle." *Id*. The Working Group further noted 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 visual only tags." *Id*. The Working Group concluded that "[t]he ultimate success of an EID system hinge[d] on identifying a high majority of the cattle population with a compatible EID tag to gain the greatest efficiencies possible from the technology." *Id*. at 207. The Working Group also concluded that "it w[ould] be imperative to define a single technology standard" and "that any new standards support[ed] the movement of animals at the speed of commerce." *Id*.

In September 2017, two private, non-profit organizations—the National Institute of Animal Agriculture (NIAA) and the United States Animal Health Association—hosted a two-day "Strategy Forum on Livestock Traceability." *Id*., Vol. II at 458. The forum was jointly funded by USDA and eight private groups. Multiple USDA employees attended and participated in the forum. The program materials for the Strategy Forum listed four USDA employees as members of the "Planning Committee." *Id*. at 466. One of the topics discussed at the Strategy Forum was the State-Federal ADT Working Group's set of preliminary recommendations. The Strategy Forum attendees concluded that it was necessary "to put together a group of industry stakeholders . . . to review, prioritize, and determine next steps for the ADT [W]orking [G]roup's 14 'Preliminary Recommendations on Key Issues,'" including the implementation of EID. *Id*. at 518.

In November 2017, APHIS issued a written "Summary of Program Review and Preliminary 'Next Step' Recommendations." *Id*., Vol. I at 190. APHIS concluded therein "that implementation of the basic ADT framework was successful," but that "some of its parameters limit[ed] the progress of the program" and that "significant gaps still exist[ed] within current tracing capabilities." *Id*. at 197. As an example, APHIS noted in its written summary that the "[u]se of visual-only low cost ID eartags present[ed] obstacles for collecting animal ID efficiently and accurately."[2] *Id*. APHIS in turn noted in its written summary that "[p]ossibly the most significant change in stakeholder opinion since the establishment of the current ADT framework in 2013 . . . [wa]s an increase in support for EID for cattle."[3] *Id*. at 206. APHIS further noted 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 visual only tags." *Id*. APHIS concluded that "[t]he United States must move toward an EID system for cattle with a target implementation date of January 1, 2023." *Id*. at 207. APHIS also concluded that "[a] comprehensive plan [wa]s necessary to address the multitude of very complex issues related to the implementation of a fully integrated electronic system," and it stated that "[a] specialized industry-lead task force with government participation should develop the plan." *Id*.

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[2] Other examples cited by APHIS included "some animals being untraceable, a lack of traceability to the birth herd, and visual ID tags for cattle that [we]re incompatible with the speed of commerce." Aplt. App., Vol. I at 186.

[3] APHIS also noted, however, that "there continue[d] to be some stakeholders that [we]re not supportive of EID for livestock in general." Aplt. App., Vol. I at 206.

c) The Cattle Traceability Work Group

In November 2017, in response to what occurred at the September 2017 Strategy Forum on Livestock Traceability, the NIAA's Executive Committee established the CTWG. The CTWG was intended to "represent[] a broad swath of industry interests." *Id*., Vol. II at 309; *see id*. at 341 (letter noting that CTWG was created because "[i]ndustry felt the need to create a group to discuss next steps [regarding ADT] from an industry perspective"). To that end, CTWG was "composed of about 30 prominent industry leaders from across the industry sectors with a goal to advance ADT." *Id*., Vol. I at 179. CTWG's stated "purpose . . . [wa]s to work collaboratively across the various segments of the cattle industry to enhance the traceability of animals for purposes of protecting animal health and market access." *Id*. at 185. CTWG "work[ed] to create consensus among stakeholders on key components of traceability so there [wa]s an equitable sharing of costs, benefits, and responsibilities across all industry segments." *Id*.

Some members of CTWG became interested in "mov[ing] forward with an [EID] system that include[d] both the ID methods and reader infrastructure to capture ID's electronically at the speed of commerce." *Id*. at 186. In addition, some members of CTWG were also of the view that "EID [wa]s necessary for effective traceability and should allow for the handling of cattle without unduly slowing business operations." *Id*. That said, other members of the CTWG, especially some cattle ranchers, "opposed USDA's proposal to require [radio frequency identification (RFID)] eartags for cattle and bison moved in interstate commerce." *Id*., Vol. II at 590.

The "USDA was not invited to [CTWG's] initial meetings as they discussed and developed their mission." *Id*. at 179. But in late February 2018, CTWG indicated to the USDA that it was interested in "work[ing] in parallel with USDA efforts." *Id*.

At least one USDA employee, Dr. Sarah Tomlinson, who was employed as APHIS's Executive Director for Strategy and Policy, regularly attended CTWG's virtual meetings and sometimes provided information to the group. *Id*., Vol. II at 350. There are allegations that other USDA employees also "participated actively in the work of [CTWG's] subgroups." *Id*. at 590.

By early 2019, members of the CTWG had reached an impasse regarding whether the USDA should move forward with, and mandate, an EID system. In March 2019, the president of the Livestock Marketing Association (LMA) wrote a letter to Katie Ambrose, CTWG's Group Facilitator, expressing the view that "the CTWG group has reached a point of diminishing returns" and recommending that CTWG "conclude its body of work." *Id*. at 341. Similarly, in March 2019, the National Cattlemen's Beef Association (NCBA) and American Farm Bureau Federation (AFBF) wrote a letter to Ambrose expressing "growing concerns regarding the ability of CTWG to develop consensus around clear recommendations to the [USDA] to improve [the] animal disease traceability system for cattle in the United States." *Id*. at 342. The letter noted that "[w]hile the CTWG ha[d] provided a forum for numerous segments of the cattle industry to collaborate on this issue, the dialogue to advance traceability in this forum ha[d] not yielded any substantive solutions." *Id*. The letter concluded by stating that "[i]f the CTWG cannot develop consensus on a final comprehensive plan to enhance the cattle

identification and traceability by June 1st, 2019, then NCBA and AFBF will no longer be willing to participate in this group." *Id*.

Ambrose forwarded copies of the letters to USDA officials and asked to set up a conference call "to discuss next steps in advance of the NIAA Annual Conference." *Id*. at 349. After receiving the information from Ambrose, Dr. Tomlinson emailed another APHIS employee and noted that the CTWG "[wa]s far apart on several key things, including some don't want to retire metal tags until a technology is chosen." *Id*. at 350. Burke Healey, an APHIS employee, responded to Dr. Tomlinson and noted:

> I appreciate your perspectives particularly to the value of the CTWG ability to bring a group of diverse industry folks together. I feel the signatories of the two letters are trying to say; this group, and NIAA specifically, have run the course and we need to move on. I don't know what the next group might look like or how we pull them together but something we should consider. It just wont [sic] be able to have NIAA/Katie Ambrose appearing as the helm.

Id. at 362.

d) The Producer Traceability Council

On April 9, 2019, Ambrose sent an email to several APHIS employees noting that NIAA's annual conference was starting the next day and that, in response to the letters sent by LMA, NCBA, and AFBF, CTWG "w[ould] be introducing at the meeting" "a spinoff" group called "the 'Producers Council.'" *Id*. at 370. The "emphasis" of this new group, Ambrose stated, would be "on producers being driven by producers only." *Id*. Along with her email, Ambrose forwarded APHIS employees a copy of an email that was sent by Glenn Fischer, the head of CTWG, to CTWG members. In that email, Fischer noted that the "new Working Group," i.e., the Producer Traceability Council, would

effectively continue the work of the CTWG and would be "comprised exclusively of . . . the American Cattle Producers." *Id*. at 371. Fischer further noted that he had "tasked" two NCBA members "with the charge of putting together a 'Producers Council' — a small, action oriented group with the singular goal of looking at the work we have done, and the work yet to be done, uniquely through the eyes of the producers we all serve." *Id*.

On April 17, 2019, Ambrose sent an email to CTWG members noting that at NIAA's Annual Meeting "the formation of a Producer [Traceability] Council of the CTWG" was announced. *Id*. at 381. Ambrose stated that "[t]he producer council [wa]s being formed to continue and focus the work of enhancing animal traceability that [wa]s currently being undertaken by the [CTWG]." *Id*. The new Producer Traceability Council, Ambrose stated, "w[ould] work towards providing opinions on EID tag and reader technology, data storage, system cost identification and sharing, and the implementation timeline for such a system." *Id*. She also noted that the "make-up of the council w[ould] include producers, livestock marketers, state and federal health officials, and a brand inspector," and that "[p]roducer representatives w[ould] come from the cow-calf, stocker, backgrounder, feedlot and dairy management sectors." *Id*.

Thus, the PTC was formed. The PTC is allegedly independent of the CTWG, and its "focus is specifically on ways to increase the number of cattle identified with electronic identification devices, increase the number of sightings of identified cattle, identify methods of data storage, and suggest cost sharing scenarios, while taking into consideration and minimizing negative effects on producers." *Id*. As of May 2019, the

members of the PTC included: Chuck Adami of Equity Cooperative Livestock Sales Association; Mike Bumgarner of United Producers; Jarold Callahan of Express Ranches; Ken Griner of Usher Land & Timber, Inc.; Kevin Hueser of Tyson Foods; Dr. Justin Smith, the Kansas Animal Health Commissioner; Dr. Tomlinson from the USDA; and Keith York, a dairy farmer. Notably, LMA and NCBA were not represented on the PTC. Further, former members of the CTWG who opposed an EID system were not invited to become part of PTC.

The first meeting of PTC occurred in early May 2019. Dr. Tomlinson participated in that meeting. *Id*. at 395. Following the meeting, Ambrose and Dr. Tomlinson exchanged emails discussing how Ambrose should describe Dr. Tomlinson's participation in the meeting. Dr. Tomlinson noted in one of those emails that the USDA's "preference would be to remove" her name as a meeting participant in any announcement or, alternatively, to list her as "government liaison." *Id*. at 394. In a separate email, Dr. Tomlinson told Ambrose: "I have to be careful about me representing USDA on this [PTC] decision – since we are not picking a technology. I don't think it *should* lend credibility as everyone thinks." *Id*. at 393.

The USDA subsequently clarified that Dr. Tomlinson was "support[ing] the [PTC] . . . in an advisory capacity only and [wa]s a non-voting member." *Id*. at 250.

Dr. Tomlinson attended subsequent PTC meetings and provided input on press releases that PTC issued following its meetings.

There is no evidence in the record of any PTC meetings after August 2019. Nor is there any evidence in the record of the PTC transmitting any recommendations to the USDA.

e) The USDA's April 2019 Factsheet

In April 2019, APHIS issued a document entitled "Factsheet," with a subtitle of "Advancing Animal Disease Traceability: A Plan to Achieve Electronic Identification in Cattle and Bison" (2019 Factsheet). *Id*., Vol. I at 55. The 2019 Factsheet stated at the outset that "[w]hile there [we]re several steps USDA need[ed] to take in order to strengthen its traceability system, the most essential one [wa]s to move from metal identification tags to electronic identification tags in beef and dairy cattle, as well as in bison," and it noted that "[t]he electronic tags [would] use . . . RFID" to "speed[] information capture and sharing." *Id*. The 2019 Factsheet stated, in pertinent part, that "[b]eginning January 1, 2023, animals that move interstate and fall into specific categories," except for "feeder cattle," would "need official, individual RFID ear tags." *Id*.

On October 25, 2019, approximately three weeks after the plaintiffs filed this civil action, APHIS posted a statement on its website announcing that "[i]n light of" feedback from the livestock industry, it "believe[d] that [it] should revisit [its] guidelines" and consequently "ha[d] removed the [2019] Factsheet from its Web site, as it [was] no longer representative of current agency policy." *Id*. at 58. APHIS further stated that it would "take the time to reconsider the path forward and then make a new proposal, with ample opportunity for all stakeholders to comment." *Id*. APHIS also stated that it would

"encourage the use of [RFID] devices through financial incentives that [we]re . . . consistent with suggestions [it] ha[d] received from cow/calf producers and others," and that it "continue[d] to believe that RFID devices w[ould] provide the cattle industry with the best protection against the rapid spread of animal diseases, as well as meet the growing expectations of foreign and domestic buyers." *Id*.

II

a) The plaintiffs

R-CALF was formally organized in 1999 as a public benefit corporation under Montana law. R-CALF is the country's largest producer-only membership organization representing cattle producers on domestic and international trade and marketing issues. R-CALF represents the interests of over 280 cattle producers located within the State of Wyoming, and over 5,300 livestock producers around the United States.

The Hunts are cow-calf operators that live in northeastern Wyoming. They do business as The MW Cattle Company LLC, which is organized under the laws of Wyoming. The Hunts are members of R-CALF and the Wyoming Stock Growers Association.

The Foxes own and operate a cow-calf ranching enterprise near Belvidere, South Dakota. Mr. Fox is also chairman of R-CALF's Animal Identification Committee and past president of the South Dakota Stockgrowers Association. Mr. Fox was a member of CTWG and was a vocal critic of proposals to require RFID eartags for cattle. He is not a member of PTC.

b) The original complaint and its dismissal

Plaintiffs initiated this action on October 4, 2019, by filing a petition for review of agency action and complaint for declaratory judgment and injunctive relief against the USDA, APHIS, the USDA's Secretary, and APHIS's Administrator. The primary focus of the petition was the legality of the 2019 Factsheet. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim, noting that the 2019 Factsheet, which plaintiffs were challenging, was withdrawn on October 25, 2019.

On February 13, 2020, the district court dismissed the petition for lack of jurisdiction, noting that plaintiffs' claim was moot because the 2019 Factsheet had been withdrawn.

c) Plaintiffs' Rule 60(a) motion

Plaintiffs filed an original and a supplemental Rule 60 motion for correction of and relief from the district court's order dismissing the case. In their original motion, plaintiffs argued that the district court should correct its order of dismissal to specifically address their claim that defendants violated FACA by establishing the State-Federal ADT Working Group. Alternatively, plaintiffs asked for leave to amend their petition to the extent that their FACA claim was somehow inadequate. In their supplemental Rule 60 motion, plaintiffs argued that they had come into possession of additional information indicating that defendants were continuing their efforts to require livestock producers to use RFID eartags for cattle.

On March 6, 2020, the district court issued an order granting plaintiffs leave to amend their complaint with respect to the FACA claim. But the district court denied plaintiffs' supplemental Rule 60 motion, concluding that there was no evidence that defendants had taken official agency action with regard to the use of RFID eartags for cattle.

d) Plaintiffs' amended complaint

On April 6, 2020, plaintiffs filed an amended complaint alleging that the 2019 Factsheet "resulted from the work and collaboration between the Defendants" and either CTWG or PTC (or one of their subcommittees), and that the 2019 Factsheet "was intended as a 'substantive' or 'legislative' rule that was designed to impose legally binding obligations on livestock producers." *Id*. at 24–25. Plaintiffs further alleged that "[t]he CTWG, its subcommittees, and the PTC . . . are FACA 'advisory committees' within the meaning of 5 U.S.C. app. § 3(2) and are thus subject to and must comply with all of the FACA requirements." *Id*. at 28. Plaintiffs in turn alleged that defendants "violated FACA by convening meetings of the Committees without first filing a charter and by failing to abide by FACA's public access and disclosure requirements." *Id*. at 29. Plaintiffs conceded that "[t]he CTWG was fairly balanced in terms of the points of view represented," but they alleged that the PTC failed to "satisfy FACA's fair-balance requirement" because it "exclude[d] cattle producers who are opposed to new animal-traceability measures being considered by USDA, most specifically the idea of mandating RFID-only eartag requirements." *Id*. Indeed, plaintiffs alleged that "[t]he

primary reason for abolishing the CTWG and replacing it with the PTC was to eliminate the fair balance that had existed on the CTWG." *Id*. at 46.

Plaintiffs alleged eight claims for relief in their amended complaint. Claims I through VII were all based on specific alleged violations of FACA. For example, Claim I alleged that "[n]o charter has been filed for the PTC, for the CTWG, or for their subcommittees" as required by FACA and its implementing regulations. *Id*. Claim VIII alleged that defendants violated the APA by failing to satisfy each of the FACA requirements alleged in Counts I through VII. *Id*. at 50. In their prayer for relief, plaintiffs asked for declaratory relief, injunctive relief, and attorneys' fees and costs.

e) The administrative record

On April 20, 2020, defendants filed a "Status Report" asserting that the case was governed by Local Civil Rule 83.6, which applies to the review of final agency action and Social Security cases. *Id*. at 125–26. Thereafter, acting pursuant to Local Civil Rule 83.6, defendants filed what they deemed to be the administrative record with the district court on July 6, 2020. That record "includes 99 documents that cover 368 pages." *Id*. at 132. Defendants alleged that this record "contain[ed] all of the available documents and materials directly or indirectly considered by [APHIS] in connection with the [CTWG] and [PTC]." *Id*. at 129.

During the pendency of this action, plaintiffs submitted a Freedom of Information Act (FOIA) request to the USDA and APHIS. "In processing that request, APHIS . . . discovered additional emails which, if they had been discovered earlier, would have been included in the Administrative Record." *Id*. at 134. "The parties . . . conferred and

Plaintiffs d[id] not oppose the Defendants supplementing the Administrative Record with those [supplemental] documents." *Id*. On August 28, 2020, defendants filed a supplemental administrative record.

f) Plaintiffs' motion to compel an answer and to permit discovery

On August 17, 2020, plaintiffs filed a motion seeking permission to proceed with their FACA claims pursuant to the regular rules of civil procedure rather than the requirements of the district court's Local Rule 83.6, and to require defendants to file an answer or other responsive pleading to the amended complaint. Alternatively, plaintiffs asked for permission to engage in discovery for the purpose of supplementing the record.

On October 13, 2020, the magistrate judge denied the motion as untimely. In doing so, the magistrate judge noted the court had provided plaintiffs with timely notice that it "was treating this action as an administrative review case governed by Local Rule 83.6." *Id*. at 145. The magistrate judge further noted that plaintiffs "offer[ed] no reasoning or justification of any kind for failing to address this issue" earlier. *Id*.

Plaintiffs moved for reconsideration. The district court agreed with the magistrate judge "that R-CALF was on notice that the case would proceed under a record review pursuant to local Rule 83.6 rather than as a civil case where discovery is permitted" and nevertheless "made no objection or response of any kind until nearly four months" later. *Id*. at 150–51 (quotation marks omitted). The district court therefore denied the motion, but granted plaintiffs additional time to submit a request under Local Rule 83.6(b)(3) for completion of the record, or for consideration of extra-record evidence.

Plaintiffs then moved for completion of the record or for consideration of extra-record evidence. The district court granted the motion in part and allowed consideration of five additional documents submitted by plaintiffs.

g) Briefing and order on the merits of the FACA claims

In early 2021, the parties filed briefs on the merits of plaintiffs' FACA claims. On May 13, 2021, the district court issued an order dismissing plaintiffs' FACA claims with prejudice. At the outset of its order, the district court considered and granted plaintiffs' motion to complete the agency record with certain documents that they received in response to a FOIA request. The district court then turned to plaintiffs' claim that APHIS "established" CTWG and PTC. After examining the Supreme Court's decision in *Public Citizen* at length, the district court concluded that "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." *Id*. at 172 (emphasis in original). The district court in turn concluded that the administrative record did not indicate that defendants "established" CTWG or PTC:

> Applying these conclusions to the facts derived from the Administrative Record, 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 the effectiveness of the ADT program and move toward an EID system for cattle consistent with APHIS's targeted implementation date of January 1, 2023. APHIS also worked with both entities, and corrected work product produced by the entities. However, notwithstanding R-CALF's arguments to the contrary, there is no evidence to suggest that either group was directly formed by APHIS. More specifically, it is not persuasive to find that APHIS directly

> formed CTWG at the September 2017 Strategy Forum on Livestock Traceability. APHIS presented slides at the 2017 Traceability Forum, and CTWG was formed "as an outcome of" that Forum. AR 5. But it was not directly formed by APHIS at or after that Forum. Rather, it was formed by and composed of industry leaders, as was PTC. Id.; AR 331-32, 921.
>
> Further, while R-CALF argues that APHIS officials were members of CTWG and PTC, that fact is not established. Considering the totality of the Administrative Record, the Court finds that APHIS was not a member of either group, but rather it functioned to provide input and to help focus the groups, as well as a resource for the groups. Notwithstanding whether either group was purely private, there is no dispute that neither group was funded by APHIS. There is also no dispute that both groups were led by industry representatives and both were comprised (if not in total, then by a vast majority) of industry representatives.
>
> In summary, considering the term "established" and applying a narrower rather than literalistic interpretation, the Court concludes APHIS did not establish either CTWG or PTC for the purposes or application of FACA.

Id. at 173–74.

As to the question of whether APHIS "utilized" CTWG or PTC, the district court again relied on *Public Citizen* and concluded that "an agency 'utilizes' a group, as that term is used in FACA, only if the group is 'amenable to . . . strict management by agency officials.'" *Id*. at 174 (quoting 491 U.S. at 457–58). The district court in turn concluded that the administrative record did not establish that APHIS "utilized" CTWG or PTC:

> As noted above, the Administrative Record demonstrates only that CTWG and PTC were advancing the same objective as APHIS in support of an effective ADT program, and they were operating for the most part on parallel tracks with APHIS. APHIS participated in certain meetings to provide input and help focus the groups, and edited the work product of the groups. However, nothing in the Administrative

> Record supports the conclusion that APHIS exercised actual management or control over the operations of either CTWG or PTC. Given this, the Court concludes APHIS did not utilize either CTWG or PTC for the purposes or application of FACA.

Id.

Having determined that APHIS did not establish or utilize CTWG or PTC, the district court concluded that CTWG and PTC "[we]re not subject to FACA." *Id*. at 175. And, "[b]ased on this conclusion," the district court further concluded "there [wa]s no violation of the Administrative Procedure Act and no injunction [wa]s appropriate." *Id*.

Final judgment was entered in the case on May 14, 2021. Plaintiffs thereafter filed a timely notice of appeal.

III

Plaintiffs assert a number of issues in their appeal. We begin by addressing and ultimately rejecting plaintiffs' argument that the district court erred in applying Local Civil Rule 83.6 and denying their request to conduct discovery. We then address the merits of plaintiffs' FACA claims. As discussed in greater detail below, we agree with the district court that there is no basis to conclude that defendants either "established" or "utilized" CTWG or PTC within the meaning of FACA. We also reject plaintiffs' argument that defendants were required to issue some type of decision concluding that their interactions with CTWG and PTC were not governed by FACA. Consequently, we reject plaintiffs' requests to direct the entry of judgment in their favor. Instead, we affirm the district court's decision in its entirety.

The district court's application of Local Civil Rule 83.6

Plaintiffs argue that the district court erred in applying its own Local Civil Rule 83.6 and refusing to allow them to conduct discovery. Aplt. Br. at 45. For the reasons that follow, we disagree and conclude that the district court did not abuse its discretion in refusing plaintiffs' discovery request. *See Diaz v. Paul J. Kennedy L. Firm*, 289 F.3d 671, 674 (10th Cir. 2002) ("A district court's discovery rulings are reviewed for an abuse of discretion.").

a) Local Civil Rule 83.6

Local Civil Rule 83.6 for the United States District Court for the District of Wyoming is entitled "REVIEW OF ACTION OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS, AND OFFICERS (INCLUDING SOCIAL SECURITY CASES)." Subsection (a) of Rule 83.6, entitled "Commencement of Action," makes clear that Rule 83.6 applies to two different types of cases: (1) "Review of final agency action," which includes "[r]eview of an order, decision, rulemaking, or other final action taken or withheld by an administrative agency under an agency's establishing statute or the Administrative Procedure Act"; and (2) "Social Security Cases," which are described as "[r]eview of a decision of the Commissioner of Social Security." U.S.D.C.L.R. 83.6(a)(1), (2). Subsection (a)(5) of Rule 83.6 states: "If the parties disagree over the applicability of this rule to their case, or if a case involves unusually complicated or out-of-the-ordinary claims warranting modifications to the requirements of this rule, a party shall request *as promptly as possible after service of process, and no later than 30 days before the deadline for*

filing the record under subsection (b) of this rule, an initial scheduling conference with the Court for resolution of such issues." U.S.D.C.L.R. 83.6(a)(5) (emphasis added). Subsection (b) of Rule 83.6, entitled "Administrative Record," provides as follows:

> (1) Composition of the record. Unless the applicable statute provides otherwise, the record in proceedings to review agency action is comprised of:
> (A) the final agency action being challenged;
> (B) all documents and materials directly or indirectly considered by the agency and/or agency decision-makers; and
> (C) if existing, the pleadings, evidence, and proceedings before the agency.
>
> (2) Filing of the record. Unless a different time is provided by statute or otherwise ordered by the Court, the agency shall file the record with the Clerk of Court within ninety (90) days of proper service of the complaint or petition for review (sixty (60) days for Social Security case). * * *
>
> (3) Supplementation of the record. Supplementation of the record will be allowed only upon leave of Court. Any request for completion of the record, or for consideration of extra-record evidence, must be filed within fourteen (14) days after the record was filed. Local Rule 7.1(b), pertaining to briefing of non-dispositive motions, shall apply. Extra-record evidence will be considered only in extremely limited circumstances.

U.S.D.C.L.R. 83.6(b). Finally, Local Civil Rule 83.6(c) outlines a "Briefing Schedule" that applies to every case that falls within the scope of Local Rule 83.6.

b) The procedural history relevant to this issue

Turning to the procedural history of this case, plaintiffs filed their amended complaint on April 6, 2020, alleging that defendants violated FACA with respect to their dealings with CTWG and PTC. Defendants in turn filed a "Status Report" on

April 20, 2020. Aplt. App., Vol. I at 125. In that status report, defendants asserted that "[c]laims for violations of FACA are only actionable under the judicial review provisions of the Administrative Procedure Act," and they in turn asserted that "the case [wa]s [therefore] governed by Local [Civil] Rule 83.6." *Id*. at 126. Defendants further asserted in their status report that, in accordance with Local Rule 83.6, they were "preparing the administrative record . . . to be lodged with the Court within 90 days of service of Plaintiffs'" amended complaint, which they "calculate[d] . . . to be July 6, 2020." *Id*.

Plaintiffs did not respond to the defendants' status report or otherwise object to defendants' assertion that Local Civil Rule 83.6 applied to the case. Indeed, there was no further docket activity until July 6, 2020, when defendants filed what they described as the administrative record. The next day, July 7, 2020, the district court entered a scheduling order setting forth briefing and motions deadlines in accordance with Local Civil Rule 83.6.

On July 16, 2020, plaintiffs filed a motion for extension of time to review the administrative record and to file any motions under Local Civil Rule 83.6. On July 17, 2020, the magistrate judge granted plaintiffs' motion and "extend[ed] the deadline to file such motions until August 19, 2020." ECF No. 32 at 1.

On August 13, 2020, defendants filed a status report and motion to reset deadlines. In that motion, defendants alleged that, in responding to FOIA requests filed by plaintiffs, they had discovered additional emails that should have been included in the administrative record. Defendants sought an additional thirty days in

which to file a supplemental administrative record, and asked that the deadline for filing any Local Civil Rule 83.6 motions be moved to September 28, 2020. The magistrate judge granted defendants' motion in its entirety.

On August 17, 2020, plaintiffs filed a motion to compel defendants to answer the amended complaint and for discovery. In that motion, defendants asked the district court to issue "an Order allowing them to proceed with their [FACA] claims *pursuant to the regular rules of civil procedure rather than under the requirements of Local [Civil] Rule 83.6*, and to require [defendants] to file an answer or other responsive pleading to the Amended Complaint." ECF No. 35 at 2 (emphasis added). "Alternatively," plaintiffs asked the district court, if it "determine[d] that the case should proceed pursuant to Local Rule 83.6 and on the basis of an administrative record," to allow plaintiffs "to engage in discovery for the purpose of supplementing the record." *Id*. In a supporting memorandum, plaintiffs argued that their amended complaint did "not seek review of a discrete 'action taken or withheld by an administrative agency' . . . as contemplated by Local [Civil] Rule 83.6." ECF No. 36 at 1–2. Instead, plaintiffs argued, they were "claim[ing] that USDA engaged in an ongoing course of conduct throughout a two-year period . . . that violated the requirements of FACA." *Id*. at 2. Plaintiffs in turn argued that "[c]ourts throughout the nation require the Government to file formal responsive pleadings to such claims and, as appropriate, to respond to discovery." *Id*. Plaintiffs also argued that "[e]ven a cursory review of the 'Administrative Record' produced by USDA confirm[ed] that Local [Civil] Rule 83.6 d[id] not apply here." *Id*. Plaintiffs "suspect[ed] that USDA

w[ould] claim that it neither 'established' nor 'utilized' the two advisory committees at issue," and they in turn argued that discovery was necessary on the "establishment" and "utilization" issues. *Id*. at 3–4. In particular, plaintiffs argued that "[b]ecause so much of the communication between CTWG and USDA officials occurred by telephone," discovery was necessary "to determine the full extent to which USDA 'utilized' the CTWG in developing its EID policy within the meaning of FACA." *Id*. at 5.

Defendants filed a supplemental administrative record on August 28, 2020, and on September 14, 2020, they filed a response in opposition to plaintiffs' motion to compel an answer and for discovery. Defendants argued that to the extent plaintiffs were seeking a ruling that the case was not governed by Local Civil Rule 83.6, that request should be denied as untimely. In support, defendants noted that "[p]etitioners did not raise any concerns with the Court's directive to proceed under Local [Civil] Rule 83.6 until August 17, 2020, almost four months after Defendants filed their April 20, 2020 status report and almost six weeks after the Court entered its Local [Civil] Rule 83.6 scheduling order." ECF No. 40 at 4. Defendants further argued that Local Civil Rule 83.6 applied to the case because "FACA provides no private right of action," "[c]laims for violations of FACA are only actionable under the judicial review provisions of the [APA]," and "[p]etitioners expressly assert[ed] in their amended pleading that Defendants' alleged actions constitute final agency action." *Id*. (quotation marks omitted). Finally, defendants argued that plaintiffs had

failed to establish that they were entitled to discovery on the "established" or "utilized" issues.

On October 13, 2020, the magistrate judge issued an order denying as untimely plaintiffs' motion to compel a responsive pleading or for discovery. The magistrate judge noted that plaintiffs were first "put on notice" by defendants' status report that defendants "considered th[e] case to be governed by Local [Civil] Rule 83.6," and plaintiffs "made no objection or response." Aplt. App., Vol. I at 144. The magistrate judge further noted that plaintiffs did not immediately object after the district court issued its scheduling order "setting out a timeline for the case to proceed under Local [Civil] Rule 83.6." *Id*. at 144–45. Indeed, the magistrate judge noted, plaintiffs waited "nearly four months" before objecting to the case being handled under Local [Civil] Rule 83.6, and they "offer[ed] no reasoning or justification of any kind for failing to address this issue" in a timelier fashion. *Id*. at 145.

Plaintiffs filed a motion for reconsideration. Plaintiffs argued that defendants "unilaterally and summarily declared that seven of [the] claims [in the amended complaint] [we]re invalid and that the eighth (APA) claim [wa]s subject to Local [Civil] Rule 83.6 and thus it need not file an answer." ECF No. 43 at 2. Plaintiffs complained that defendants never "filed a motion seeking permission not to answer" the amended complaint and "cited no case law supporting [their] argument that FACA claims should be decided on the basis of an administrative record." *Id*. Plaintiffs also argued that even if the case fell within the scope of Local Civil Rule 83.6, defendants' "efforts to produce an administrative record ha[d] been slow and

rife with errors," and plaintiffs filed their motion for discovery "42 days in advance of the court-established deadline." *Id*. at 2, 6. Moreover, plaintiffs argued, they "availed [themselves] of the one discovery tool available to [them]: [they] filed a timely motion under Rule 83.6(b)(3), seeking discovery of evidence not included within the record compiled by USDA—the precise sort of motion that the Court's orders authorized [plaintiffs] to file any time before September 28." *Id*. at 8.

On November 16, 2020, the district court denied plaintiffs' motion for reconsideration. The district court stated that "[u]pon consideration of [plaintiffs'] objections," it "conclude[d] the Magistrate Judge's October Order [wa]s neither clearly erroneous nor contrary to law." Aplt. App., Vol. I at 147. More specifically, the district court concluded that the magistrate judge was "correct that [plaintiffs] w[ere] on notice that the case would proceed under a record review pursuant to Local Rule 83.6 rather than as a civil case where discovery is permitted," and it found "unpersuasive" plaintiffs' argument that they "could not have filed [their] motion earlier." *Id*. at 151. Nevertheless, the district court afforded plaintiffs "fourteen (14) days from the date of entry of this Order to submit any request under Local Rule 83.6(b)(3) for completion of the record, or for consideration of extra-record evidence." *Id*. at 147–48. The district court stated, however, that "[a]ny such filing under Local [Civil] Rule 83.6(b)(3) shall not include discovery requests but must comply with *American Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985) which recognizes that the circumstances that warrant consideration of extra-record materials are 'extremely limited.'" *Id*.

On November 30, 2020, plaintiffs filed a motion pursuant to Local Civil Rule 83.6(b)(3) for completion of record or for consideration of extra-record evidence. Plaintiffs asserted in their motion that "[t]he 'Administrative Record' submitted by USDA . . . d[id] not accurately reflect all of the evidence regarding how and why USDA interacted with the two committees . . . and d[id] not disclose the basis for USDA's conclusion that it was not required to comply with FACA's procedural requirements in establishing and utilizing the committees." ECF No. 47 at 2–3. Plaintiffs further asserted that they "ha[d] identified nine additional documents that clearly [we]re (or should be) part of the 'whole record.'" *Id*. at 4. Plaintiffs asked that those documents be considered part of the record in the case.

On December 23, 2020, the district court granted in part and denied in part plaintiffs' motion. Specifically, the district court agreed to consider five of the additional documents submitted by plaintiffs, but "denie[d] the motion in all other respects." Aplt. App., Vol. I at 153.

c) Analysis

As noted, plaintiffs argue in their appeal that the district court erred in applying Local Civil Rule 83.6. Aplt. Br. at 45. "Local [Civil] Rule 83.6," plaintiffs note, "governs '[r]eview of an action taken or withheld by an administrative agency.'" *Id*. at 48–49 (quoting Local Civil Rule 83.6(a)(1)). Plaintiffs assert that they are "not seeking review of any single 'action taken or withheld'" and instead are alleging claims "based on Appellees' misconduct that spanned a period of more than two years." *Id*. at 49. "Those

claims," plaintiffs argue, "should have been resolved by proceeding under the normal Rules of Civil Procedure." *Id*.

We conclude that plaintiffs effectively waived this issue by failing to raise it in a timely fashion in the district court. As noted, Local Civil Rule 83.6(a)(5) requires a party who disagrees with the applicability of Local Civil Rule 83.6 to "request as promptly as possible after service of process, and no later than 30 days before the deadline for filing the record under subsection (b) of th[e] rule, an initial scheduling conference . . . for resolution of" the issue. U.S.D.C.L.R. 83.6(a)(5). In this case, plaintiffs clearly failed to comply with that rule. Further, both the magistrate judge and the district court concluded that plaintiffs failed to object in a timely fashion to defendants' assertion in their April 2020 status report that the case was governed by Local Civil Rule 83.6, or to the district court's July 2020 scheduling order that was issued pursuant to Local Civil Rule 83.6. Although plaintiffs' counsel claimed at oral argument that it was necessary for plaintiffs to first review the administrative record before objecting to the application of Local Civil Rule 83.6, we disagree. The question of whether Local Civil Rule 83.6 properly applied in this case hinged solely on the type of claims being asserted by plaintiffs, and not on the state of the administrative record that was compiled and submitted by defendants. Consequently, we conclude that the district court did not abuse its discretion in denying plaintiffs' request for the case to proceed under the Federal Rules of Civil Procedure, including discovery.[4]

[4] Federal Rule of Civil Procedure 83 authorizes district courts to adopt local rules, but requires any such local rules to "be consistent with" and "not duplicate" all

Did defendants "establish" or "utilize" CTWG or PTC?

We now turn to the merits of plaintiffs' FACA claims. The district court concluded, and plaintiffs do not dispute on appeal, that FACA provides for no private right of action and that, as a result, their claims alleging violations of FACA are reviewable only under the APA. *See Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 17 (1st Cir. 2020) ("FACA contains no private right of action. The APA, however, generally provides a vehicle for reviewing agency decisions that are alleged to violate federal law."); *Colo. Env't Coal v. Wenker*, 353 F.3d 1221, 1234–35 (10th Cir. 2004) (concluding that, although FACA provides no private right of action, plaintiffs could proceed under the judicial review provisions of the APA); *see also Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (holding that, because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," federal courts "appl[y] a 'strong presumption' favoring judicial review of administrative action").

"[W]e review de novo a district court's decision in an APA case, and consider the administrative record directly." *N.M. Health Connections v. U.S. Dep't of Health & Human Serv.*, 946 F.3d 1138, 1161 (10th Cir. 2019) (quotation marks and citations omitted). "In reviewing the agency's action, we must render an independent decision

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"federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075." Fed. R. Civ. P. 83(a)(1); *see Energy and Env't. Legal Inst. v. Epel*, 793 F.3d 1169, 1176 (10th Cir. 2015) (emphasizing that district courts' "considerable leeway for personal practice and local rules remains subject to Rule 83"). Plaintiffs do not argue that Local Civil Rule 83.6 is inconsistent with the Federal Rules of Civil Procedure.

using the same standard of review applicable to the district court's review." *Id*. (quotation marks and brackets omitted).

"The APA requires courts to consider agency action in conformity with the agency's statutory grant of power, and agency action is unlawful if it is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Sinclair Wyoming Refining Co. v. United States Environmental Protection Agency*, 887 F.3d 986, 990 (10th Cir. 2017) (quoting 5 U.S.C. § 706(2)(C)). We also "review questions of statutory interpretation de novo." *Id*.

a) Did defendants "establish" CTWG or PTC?

Plaintiffs argue that, contrary to the conclusion reached by the district court, "[t]he Record proves as a matter of law that Appellees 'established' both CTWG and PTC" in order to obtain advice or recommendations for one or more agencies or officers of the federal government. Aplt. Br. at 21. For the reasons that follow, we disagree.

FACA defines "[t]he term 'advisory committee'" to mean:

> 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, § 3(2).

FACA does not, however, define the term "established." "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The word "establish" is commonly defined to mean "[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)." *Established*, Oxford English Dictionary Online (Sept. 2021).

Before settling on this common definition, it is necessary for us to consider the Supreme Court's decision in *Public Citizen*. In *Public Citizen*, the Supreme Court was tasked with interpreting the meaning of the word "utilized," as employed in FACA. Considering first the term's common meaning, the Court noted that "'[u]tilize' is a woolly verb, its contours left undefined by the statute itself." 491 U.S. at 452. The Court in turn concluded "that Congress did not intend" the term to be "[r]ead unqualifiedly." *Id*. The Court therefore "consider[ed] indicators of congressional intent in addition to the statutory language." *Id*. at 455. The Court noted that "[c]lose attention to FACA's history is helpful" when construing the meaning of its terms because "FACA did not flare on the legislative scene with the suddenness of a meteor," but rather was preceded by twenty years of "[s]imilar attempts to regulate the Federal Government's use of advisory

committees." *Id*. In 1962, "President Kennedy issued Executive Order No. 11007 . . . which governed the functioning of advisory committees until FACA's passage." *Id*. at 456. That Executive "Order applied to advisory committees 'formed by a department or agency of the Government in the interest of obtaining advice or recommendations,' or 'not formed by a department or agency, but only during the period when it is being utilized by a department or agency in the same manner as a Government-formed advisory committee.'" *Id*. at 456–57 (quoting § 2(a) of Executive Order) (emphasis omitted). The Supreme Court noted that "[t]o a large extent, FACA adopted wholesale the provisions of" that Executive Order. *Id*. at 457. "FACA's principal purpose," the Court noted, "was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them," and "[t]hat purpose could be accomplished . . . without expanding the coverage of Executive Order No. 11007 to include private organized committees that received no federal funds." *Id*. at 459.

The Court also noted that, "[i]n the section dealing with FACA's range of application, the Conference Report" of the final version of FACA approved by both Houses "stated: 'The Act does not apply to persons or organizations which have contractual relationships with Federal agencies *nor to advisory committees not directly established by or for such agencies*.'" *Id*. at 462 (quoting H.R. Conf. Rep. No. 92-1403, p.10 (1972), U.S. Code Cong. & Admin. News 1972) (emphasis in *Public Citizen*). The Court concluded from this that "[t]he 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," and thus "encompass[es] 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*.

To be sure, the Supreme Court in *Public Citizen* was not directly tasked with interpreting the word "established."[5] But as the D.C. and Ninth Circuits have both since recognized, "the elements" the Supreme Court "used [in *Public Citizen*] to determine the utilization issue smacks of facets of the establishment issue." *Aluminum Co. of Am. v. Nat'l Marine Fisheries Serv*., 92 F.3d 902, 905 (9th Cir. 1996). In other words, "the Court defined" the term "utilized" "in relation to the preceding term 'established' in the statutory formulation: a group 'established or utilized by' an agency." *Food Chem. News v. Young*, 900 F.2d 328, 332 (D.C. Cir. 1990). And, as the D.C. Circuit has repeatedly noted, "[i]n the Court's delineation, . . . 'established' indicates 'a Government-formed advisory committee.'" *Id*. (quoting *Public Citizen*, 491 U.S. at 457, 462).

Consistent with the Supreme Court's discussion in *Public Citizen* and in turn with Executive Order No. 11007, the D.C. Circuit, which has decided more FACA cases than any other circuit, has held "that an advisory panel is 'established' by an agency" under FACA "only if it is actually formed by the agency." *Byrd v. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999). The D.C. Circuit has also held "that in order to qualify as a group established to provide 'advice or recommendations,' within the meaning of FACA," the group at issue "must have been created to provide advice or recommendations with

[5] This is because the parties in *Public Citizen* agreed that the American Bar Association's Standing Committee on Federal Judiciary—the entity under consideration in *Public Citizen*—was not established by the President or a federal agency.

regard to specific government policy and not merely to facilitate an exchange of ideas and information or simply to be an 'operational' committee." *Miccosukee Tribe of Indians of Fl. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1083 (11th Cir. 2002) (citing *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 934 & n. 28 (D.C. Cir. 1995); *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232, 1233 (D.C. Cir. 1996); and *Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993)). "Advisory committees," the D.C. Circuit has noted, "not only provide ideas to the government, they also bestow political legitimacy on that advice" and thus "[t]hese committees . . . possess a kind of political legitimacy as representative bodies." *Ass'n of Am. Physicians*, 997 F.2d at 914.

Although the district court recognized and essentially followed this case law, plaintiffs argue on appeal that the district court's holding "conflicts sharply with this Court's statutory-construction case law, which creates a presumption that 'Congress's intent is expressed correctly in the ordinary meaning of the words it employs.'" Aplt. Br. at 23–24 (quoting *N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1281–82 (10th Cir. 2001)). Plaintiffs further argue that "*Public Citizen*'s discussion of the word 'established' (as used in FACA), while not part of the Court's holding, indicates that the word should be accorded its normal, broad meaning." *Id*. at 24.

Plaintiffs' arguments are flawed for several reasons. To begin with, plaintiffs ignore the Supreme Court's statements in *Public Citizen* indicating that FACA was largely intended to codify Executive Order No. 11007. Plaintiffs in turn misinterpret the

Supreme Court's references in *Public Citizen* to "most liberal" and "more 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." Further, plaintiffs do not identify precisely how *Public Citizen*'s discussion of the word "established"—i.e., formed by a department or agency of the Government—differs from the ordinary meaning of the term "established." In a footnote in their opening brief, plaintiffs point to a common dictionary definition of the term "establish" that "means 'to bring into existence: found' or 'to bring about: effect.'" Aplt. Br. at 23 n.8 (quoting Webster's New Collegiate Dictionary (1981)). Although it is not entirely clear, perhaps plaintiffs are suggesting that the term "established" should be interpreted to include any situation where a federal agency promotes, but is not actually involved in, the formation of an advisory committee. If that is what plaintiffs are arguing, then it is clearly contrary to the definition of "establish" that the Supreme Court suggested in *Public Citizen*. That situation would, instead, appear at most to potentially fall within the scope of the word "utilized," as defined by the Supreme Court in *Public Citizen*.

Plaintiffs also point to various items of evidence in the administrative record that, they assert, support their position that defendants "established" both CTWG and PTC. Having examined this evidence, however, we disagree. For example, the first item of evidence cited by plaintiffs—APHIS employees supposedly calling for the creation of an

industry-led task force—does not prove that defendants actually "established," i.e., formed, either CTWG or PTC. In fact, 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." Aplt. App., Vol. I at 173. "Rather," the evidence in the record quite clearly indicates that both CTWG and PTC were "formed by and composed of industry leaders." *Id*.

According to the administrative record, CTWG was established by the executive committee of the non-profit organization NIAA in November 2017. The NIAA's executive committee took this action in response to discussions that occurred at the September 2017 Strategy Forum on Livestock Traceability regarding the preliminary recommendations that were issued by the State-Federal ADT Working Group, including its recommendation to implement EID. More specifically, attendees at that Strategy Forum concluded that it was necessary "to put together a group of industry stakeholders . . . to review, prioritize, and determine next steps for the ADT [W]orking [G]roup's 14 'Preliminary Recommendations on Key Issues,'" including the implementation of EID. *Id*. at 518. To be sure, the Strategy Forum was jointly funded by the USDA and eight private groups, and attendees included numerous APHIS employees. Nevertheless, there is simply no evidence in the record that could reasonably support a finding that APHIS itself formed CTWG. Further, the evidence in the record indicates that CTWG was to be financed by CTWG members, and not by the USDA. *Id*., Vol. I at 268–69.

The same is true for PTC. According to the administrative record, the NIAA formed PTC in the spring of 2019 after members of the CTWG reached an impasse in

early 2019 regarding the implementation of EID for cattle. *E.g.*, *id*., Vol. II at 398 (email between APHIS officials noting that "[t]here was apparently an internal rift in the CTWG" and that "[t]he others in CTWG . . . decided to go for it on their own without LMA and NCBA."). In April 2019, Glenn Fischer, who had been the head of the CTWG, sent an email to CTWG members noting that the PTC would effectively continue the work of the CTWG and would be comprised exclusively of cattle producers. Shortly thereafter, at NIAA's annual meeting, NIAA announced the official formation of PTC. The NIAA noted that the PTC would focus on providing opinions on EID tag and reader technology, data storage, system cost identification and sharing, and the implementation timeline for an EID system.

When the first PTC meeting occurred in May 2019, an APHIS employee, Dr. Tomlinson, attended to provide information and to respond to questions from PTC members. Dr. Tomlinson also attended at least two more PTC meetings that year. But Dr. Tomlinson did not have a voting role in the PTC.

Thus, in sum, we agree with the district court that, for purposes of FACA, defendants did not "establish" either CTWG or PTC.

b) Did defendants "utilize" CTWG or PTC?

Plaintiffs also argue that, contrary to the district court's conclusion, defendants "'utilized' CTWG and PTC within the meaning of FACA" because they "worked closely with both committees, dictating their agendas, participating in messaging to members, and asking for their advice on a variety of specific issues." Aplt. Br. at 36. Plaintiffs argue that "[i]n addition to regularly attending committee meetings, 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." *Id*. at 39. Plaintiffs argue that "APHIS considered the committees' work sufficiently important that it circulated information it received from them to all APHIS officials working on RFID-related issues." *Id*.

FACA defines the term "advisory committee" to include, in pertinent part, "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" that is "*utilized* by one or more agencies . . . in the interest of obtaining advice or recommendations for . . . one or more agencies of the Federal government." 5 U.S.C. app. 2, § 3(2) (emphasis added). FACA does not, however, include a definition of the term "utilized."

Public Citizen, as we have noted, considered FACA's history and, after doing so, rejected "a literalistic reading of § 3(2)" because it "would catch far more groups and consulting arrangements than Congress could conceivably have intended." 491 U.S. at 463. Instead, the Court concluded that "the phrase 'or utilized' . . . appears to have been added" by Congress "simply to clarify that FACA applies to advisory committees established by the Federal Government in a more 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.

Following the Supreme Court's decision in Public Citizen, the General Services Administration implemented a regulation defining certain terms for purposes of FACA. Of relevance here, that regulation states, in pertinent part:

> Utilized for the purposes of [FACA], does not have its ordinary meaning. A committee that is not established by the Federal Government is utilized within the meaning of [FACA] when the President or a Federal office or agency exercises actual management or control over its operation.

41 C.F.R. § 102–3.25.

The D.C. Circuit has since held, consistent with both *Public Citizen* and the implementing regulation, that "[t]he word 'utilized' in FACA . . . is a stringent standard, denoting something along the lines of actual management or control of the advisory committee." *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994). In other words, the D.C. Circuit has held that the term "utilized" "encompasses a group . . . so closely tied to an agency as to be amenable to strict management by agency officials." *Id*. (quotation marks omitted); *see Town of Marshfield v. FAA*, 552 F.3d 1, 6 (1st Cir. 2008) (same).

Neither the CTWG nor the PTC, according to the evidence in the administrative record, fit this description. Turning first to the CTWG, the administrative record indicates that the "USDA was not invited to [CTWG's] initial meetings as they discussed and developed their mission." Aplt. App., Vol. I at 179. But CTWG did keep APHIS officials updated on what occurred during those initial meetings (by forwarding copies of the meeting minutes), and in late February 2018, CTWG informed APHIS officials that it was interested in "work[ing] in parallel with

USDA efforts." *Id*.; *see id*. at 266, 276, 280. In particular, CTWG informed APHIS that CTWG members were "interest[ed] in the 14 recommendations that were compiled from USDA stakeholder outreach in 2017 . . . and presented at the September forum." *Id*. at 280. During a March 2018 meeting of CTWG's "Collection Technology Task Group,"[6] Glenn Fischer, who served as the head of CTWG and co-chair of the task group, noted that he had met with several USDA officials in Washington, D.C., and that those officials were "very encouraged and very supportive of the industry taking the lead on this initiative and the work being done by the CTWG." *Id*. at 182. That said, no federal employees were members of the CTWG or the task group at that time, and the meeting minutes indicate that the participants had questions regarding, and were thus unclear about, the USDA's position on certain issues. *Id*. at 183 ("Would USDA accept ID being put into database at any point along the line (other than herd of origin)?").

The administrative record also, to be sure, indicates that there were various types of contacts between CTWG and defendants. For example, Katie Ambrose, NIAA's Chief Operating Officer, regularly emailed APHIS officials to obtain input on animal traceability and EID issues. *Id*. at 184. Likewise, Fischer emailed APHIS officials for input on various topics. *Id*. at 230. In addition, at some point during CTWG's existence, at least one APHIS employee, Dr. Tomlinson, attended CTWG's

[6] CTWG created five "task groups" or "sub groups" that focused on different aspects of EID cattle traceability, including "Communications & Transparency," "Collection Technology," "Responsibilities & Opportunities," "Information Liability," and "Data Storage & Access." Aplt. App., Vol. I at 282.

virtual meetings, provided information to the group, and responded to questions from CTWG members. *Id*., Vol. II at 302, 350. Lastly, petitioner Kenny Fox, who is a former member of the CTWG, alleges without specificity that other USDA employees also "participated actively in the work of [CTWG's] subgroups." *Id*. at 590.

But none of this evidence reasonably suggests that CTWG was amenable to strict management or control by APHIS or USDA officials. To the contrary, the record indicates that CTWG operated independently of APHIS and USDA and that, in carrying out its mission, CTWG officials typically initiated the interactions that occurred between CTWG and APHIS officials. *E.g.*, *id*. at 291, 292, 293, 294, 297. At most, the evidence suggests that APHIS officials collaborated, or worked in parallel, with CTWG in order to plan for and implement an EID system for tracing cattle.

As for PTC, the evidence in the record indicates that CTWG and NIAA officials kept APHIS officials apprised of their decision to create PTC and disband CTWG. *E.g.*, *id.*, Vol. II at 370, 373. The evidence further indicates that, following the creation of PTC, NIAA officials drove the interactions that occurred between the PTC and APHIS officials. *Id*. at 377, 381, 393, 406, 410, 411, 412, 418, 421, 427. The evidence also establishes that one or more APHIS officials participated in PTC meetings in order to answer questions from, or provide technical information to, PTC members. *Id*. at 411, 412. Lastly, the evidence establishes that NIAA officials solicited input from APHIS officials regarding (a) how APHIS officials should be

listed in a PTC press release, and (b) the content of at least one PTC press release describing what occurred at a PTC meeting. *Id*. at 394, 428, 439. Considered together, this evidence establishes that APHIS officials again collaborated with NIAA and PTC officials as PTC carried out its meetings and objectives, but that at no point did APHIS manage or control PTC.

Thus, in sum, we reject plaintiffs' assertion that APHIS "utilized" CTWG or PTC for purposes of FACA.

FACA's procedural requirements

Because the administrative record contains no support for plaintiffs' claims that defendants "established" or "utilized" CTWG or PTC, those entities cannot be considered "advisory committees" within the purview of FACA. Consequently, we conclude that defendants were not, as asserted by plaintiffs, required to comply with FACA's procedural requirements in connection with their interactions with CTWG or PTC. We likewise reject plaintiffs' argument that defendants were required to provide some type of explanation in the administrative record as to why they did not comply with FACA's procedural requirements.

Declaratory and injunctive relief

Finally, for the reasons outlined above, we decline plaintiffs' request "to issue a declaratory judgment that [defendants] violated FACA," Aplt. Br. at 54, or to enjoin defendants from using any "of the work product from" CTWG or PTC, *id*. at 57.

IV

The judgment of the district court is AFFIRMED.