ARGUED MAY 12, 2020 | DECIDED APRIL 30, 2021

No. 19-5238

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

DRONE ADVISORY COMMITTEE, et al.,
Defendants-Appellees.

On Appeal from Orders of the
U.S. District Court for the District of Columbia
Case No. 18-cv-833-RC

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES[†]

Cases

Statutes

[†] Authorities principally relied upon are designated by an asterisk (*).

Other Authorities

GLOSSARY

DAC	Drone Advisory Committee
EPIC	Electronic Privacy Information Center
FAA	Federal Aviation Administration
JA ___	Citation to the Joint Appendix
NEPDG	National Energy Policy Development Group
SNEP	Sierra Nevada Ecosystem Project

RULE 35(b)(1) STATEMENT

Rehearing of this case is warranted for two reasons. ***First,*** the panel opinion conflicts with two prior decisions of this Court concerning the Federal Advisory Committee Act's definition of "advisory committee." 5 U.S.C. app. 2 § 3(2). As a result of the panel's ruling, the decisions of the Court now prescribe contradictory standards for determining whether an advisory group or subgroup is covered by FACA. En banc consideration is necessary to secure uniformity of the Court's precedents.

In *California Forestry Association v. United States Forest Service*, the Court held that FACA applies to agency-created committees that produce work "intended for [agency] use"—for example, a committee whose advice "will serve an essential element of" the agency's mission. 102 F.3d 609, 611–12 (D.C. Cir. 1996). The simple principle established in *California Forestry* is that "[i]f a group or subgroup is created by the government for the purpose of providing advice that is intended to benefit an agency, then its advice is obtained 'for' the agency." Dissent 9. The advisory bodies at issue in this case, subgroups of the Federal Aviation Administration's Drone Advisory Committee, plainly obtained advice "for" the agency under the *California Forestry* test and are thus subject to FACA. *Id.* at 2. Yet the majority disregarded the *California Forestry* test and grafted a novel requirement onto the text of § 3(2) that an entity must "*directly* advise[]" an

agency to qualify as an advisory committee. Op. 8 (emphasis added). Under this new-fashioned rule, the majority concluded that the DAC subgroups were not advisory committees.

The panel opinion also conflicts with *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*). In *AAPS*, the Court emphatically rejected the argument that FACA only applies to an advisory body "directly in contact" with the relevant government decisionmaker (there the President, here the FAA), observing that the "the statutory language does not remotely support" such a construction. *Id.* at 912. Nevertheless, the majority adopted this discredited view of the statute, reading a "direct reporting" requirement into FACA's definition of an advisory committee. Op. 15.

And the panel opinion contradicts *AAPS* in a second way. The majority concluded that its "direct reporting" test was compelled, in part, by *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983) (*Anti-Hunger Coalition*). Op. 8, 15. According to the majority, the Court in *Anti-Hunger Coalition* held "that task forces advising an advisory committee, but 'not providing advice directly to the President or any agency,' [are] not covered advisory committees." *Id.* (citing *Anti-Hunger Coalition*, 711 F.2d at 1075); *see also* Op. 9 n.1. But the Court explicitly rejected this reading of *Anti-Hunger Coalition* in *AAPS*, explaining that *Anti-*

Hunger Coalition did not reach a holding about the status of subgroups. *AAPS*, 997 F.2d at 912; *accord* Dissent 3, 12–13. The majority's decision is thus in open disagreement with *AAPS*.

***Second*,** this case concerns a question of exceptional importance: whether FACA will continue to ensure robust public scrutiny of the committees that develop policy advice for the federal government—or whether agencies may now "circumvent FACA" simply "by using subgroups." Dissent 18. As Judge Wilkins noted in his separate opinion dissenting in part, the panel majority "do[es] violence to the text," "elevates form over function," "undermines FACA's purpose," and "greenlights an easily abusable system[.]" *Id.* at 7, 9.

This is no small matter: at any given moment, federal agencies are advised by an average of 1,000 committees comprising 60,000 members on subjects ranging from drone policy to nuclear waste to schools, highways, and housing. *The Federal Advisory Committee Act (FACA) Brochure*, U.S. Gen. Servs. Admin. (2019).[1] Whether these committees should have a legal roadmap to evade the public scrutiny that Congress intended FACA to provide is a question warranting review by the en banc Court.

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[1] https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/the-federal-advisory-committee-act-faca-brochure.

STATEMENT OF THE CASE

Congress enacted the Federal Advisory Committee Act in 1972 "to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals." *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Priv. Sector Surv. on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983) (quoting *Food Chem. News, Inc. v. Davis*, 378 F. Supp. 1048, 1051 (D.D.C. 1974)). Concerned by "the wasteful expenditure of public funds for worthless committee meetings and biased proposals," *Pub. Citizen v. DOJ*, 491 U.S. 440, 453 (1989), and fearing that "special interest groups may use their membership on such bodies to promote their private concerns," H.R. Rep. No. 92–1017 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496, Congress sought through FACA to ensure "transparency, accountability, and open public participation in executive branch decisions[.]" *VoteVets Action Fund v. U.S. Dep't of Veterans Affs.*, 992 F.3d 1097, 1101 (D.C. Cir. 2021).

FACA imposes a variety of obligations on agencies and advisory committees. As relevant here, FACA defines the term "advisory committee" to include

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . 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[.]

5 U.S.C. app. 2 § 3(2). Among other requirements, advisory committees must "open [meetings] to the public," § 10(a)(1), keep "detailed minutes of each meeting," § 10(c), and make "available for public inspection" 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] advisory committee[.]" § 10(b).

The FAA established the Drone Advisory Committee in 2016 to evaluate "the efficiency and safety of integrating [unmanned aircraft systems] into the [national airspace] and to develop recommendations to address those issues and challenges." JA 72. It is undisputed that the DAC itself was an advisory committee subject to FACA. However, the FAA also provided that the DAC would "conduct more detailed business through a subcommittee and various task groups that [would] help the FAA prioritize its activities, including the development of future regulations and policies." JA 80.

The DAC subcommittee and the DAC task groups were nominally required to operate at the direction of the DAC and to filter any recommendations to the FAA through the DAC. JA 104. In reality, FAA officials personally directed, participated in, and received the work and recommendations of the subcommittee

and task groups on a regular basis. The FAA "issued" the terms of reference for subcommittee, JA 128, and the tasking statements for the three task groups, JA 113, 115, 117, which variously included fact-finding assignments, research topics, and deadlines. JA 107–24. Senior FAA officials routinely attended meetings at which the subcommittee and the task groups delivered substantive reports and recommendations (prior to any approval by the DAC). *E.g.*, JA 90–91, 126, 128–29, 132–40, 142, 144–50, 154, 159–70. The Designated Federal Officer of the DAC, a FACA-mandated position held at all times by the Acting FAA Administrator or Deputy FAA Administrator, was obligated to "[c]all, attend, and adjourn" all meetings of the DAC subgroups; "[a]pprove all committee/ subcommittee agendas"; and "[c]hair meetings when directed to do so by the FAA Administrator." JA 175–76; *see also* 5 U.S.C. app. 2 § 10(e)–(f).

In 2018, Appellant Electronic Privacy Information Center—concerned that the industry-dominated DAC and DAC subgroups had ignored the privacy threat of drones in their deliberations—submitted a written request seeking all records "'made available to or prepared for or by' the DAC or any DAC subcomponent." JA 191 (quoting 5 U.S.C. app. 2 § 10(b)). After EPIC received no response to its request from the FAA or the DAC, JA 64, EPIC filed suit alleging (*inter alia*) that the DAC had violated FACA's records disclosure requirement. JA 66.

The Government filed a motion to dismiss EPIC's complaint, which the lower court (Hon. Rudolph Contreras) granted in part and denied in part. JA 40. The court denied the Government's motion to dismiss with respect to two of EPIC's records disclosure claims against the DAC. *Id.* However, the Court held that the records of the DAC subcommittee and task groups were not subject to disclosure under FACA. JA 25–36. After the DAC completed its production of records, EPIC moved for entry of final judgment. The lower court granted that motion, JA 41–42, and EPIC appealed.

On April 30, 2021, a divided panel of this Court affirmed the decision of the lower court. In the majority's view, the phrase "in the interest of obtaining advice or recommendations for . . . one or more agencies" in FACA's definition of "advisory committee" means that "FACA coverage turns on whether a subcommittee *directly* advises the agency." Op. 8 (emphasis added). Despite allegations in EPIC's complaint that top FAA officials had "personally participated in multiple DAC meetings at which the Subcommittee delivered reports on its work," JA 31, and had "personally . . . received the work and recommendations of the Task Groups," JA 53, the majority believed EPIC's complaint did not "support[] a plausible inference" that the subgroups "conveyed advice directly to the FAA[.]" Op. 11 n.2. On this basis, the majority ruled that that the DAC subgroups "do not qualify as advisory committees." Op. 11. Separately, the panel

ruled that "records created by the subgroups and never given to the DAC" parent committee did not qualify as "DAC records covered by section 10(b) of FACA." Op. 16.

Judge Wilkins concurred in part and dissented in part. Judge Wilkins agreed that "the 'records' of a subgroup are not necessarily disclosable as the records of the parent committee," but he believed EPIC had "plausibly allege[d] that these particular subgroups were FACA committees in their own right." Dissent 18–19. Relying on this Court's decision in *California Forestry Association v. United States Forest Service*, 102 F.3d 609 (D.C. Cir. 1996), Judge Wilkins explained that if "a group or subgroup is created by the government for the purpose of providing advice that is intended to benefit an agency, then its advice is obtained '*for*' the agency." Dissent 9 (emphasis added). As Judge Wilkins observed, "that standard is met here." *Id*. He also criticized the majority's use of a "direct reporting" test:

> Not content with the text in its current form, the majority grafts onto the word "for" in section 3(2) the idea that a group must report "directly to" the agency to be treated as a FACA committee. Besides doing violence to the text, this approach elevates form over function. Here, common sense tells us that the subgroups' advice is developed with the end goal of assisting the FAA in designing its airspace policy.

Dissent 7. Judge Wilkins warned that the majority's interpretation of the statute "undermines FACA's purpose and greenlights an easily abusable system, whereby agencies may direct government-established subgroups to deliberate in complete secrecy[.]" Dissent 9. "Because the FAA drafted the enabling documents to require

that the subgroups' advice be filtered through a nominal FACA committee, the majority prohibits EPIC from discovering the extent to which [the subgroups'] allegedly self-interested members influenced the deliberations," he wrote. Op. 18. "Surely, that's not what Congress intended when it passed FACA." *Id.*

ARGUMENT

I. The panel opinion conflicts with Circuit precedents establishing the meaning of 'advisory committee' under FACA.

The panel opinion is irreconcilable with at least two prior decisions of this Court concerning the scope of the term "advisory committee" under FACA: *California Forestry Association v. United States Forest Service*, 102 F.3d 609 (D.C. Cir. 1996), and *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). The majority in this case concluded that an entity is "established or utilized . . . in the interest of obtaining advice or recommendations for [an agency]" only if the entity "directly advises" the agency. Op. 8. But neither *California Forestry* nor *AAPS* support such a reading of 5 U.S.C. app. 2 § 3(2); indeed, both cases foreclose the test that the majority adopted. En banc rehearing is necessary to resolve this conflict between panel decisions.

In *California Forestry*, the Court faced the question of whether the Sierra Nevada Ecosystem Project was an advisory committee subject to FACA. The United States Forest Service had created SNEP in response to a Congressional

allocation of funds for a study of the Sierra Nevada ecosystem "by an independent panel of scientists[.]" *California Forestry*, 102 F.3d at 610 (quoting H.R. Conf. Rep. No. 102–901, at 48 (1992)). The parties agreed that SNEP had been "established" by the Service within the meaning of 5 U.S.C. app. 2 § 3(2) but disputed "whether SNEP was established '*in the interest of obtaining advice or recommendations for*'" the Service. *California Forestry*, 102 F.3d at 611 (emphasis added).

The Court held that it was. *Id.* But the Court's decision in *California Forestry* did not turn on whether SNEP "directly advise[d]" the Service, as the majority in this case would instruct. Op. 8. Rather, the Court focused on whether "the circumstances of SNEP's genesis support an inference that SNEP was in fact established 'in the interest' of advising an agency[.]" *California Forestry*, 102 F.3d at 611. Because "SNEP's work product [was to] serve an essential element of the Forest Service's long-term plan for ecosystem management," the Court concluded that SNEP was an advisory committee. *Id.* As Judge Wilkins explained: "The principle established in *California Forestry* is straightforward: If a group or subgroup is created by the government for the purpose of providing advice that is intended to benefit an agency, then its advice is obtained 'for' the agency," rendering it an advisory committee. Dissent 9; *see also Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 428 (D.C. Cir. 1997) (explaining that "the definition

given by the Court to an advisory committee utilized by the federal government focuses not so much on *how* it is used," but rather the circumstances of its creation (emphasis in original)); *Sofamor Danek Grp., Inc. v. Gaus*, 61 F.3d 929, 935 (D.C. Cir. 1995) (looking exclusively at the "*purpose* for the establishment" of several medical expert panels to determine whether they were covered by FACA (emphasis added)).

Accordingly, *California Forestry* precludes the majority's imposition of a "direct reporting" test on FACA's "advisory committee" definition. Op. 15. Judge Wilkins' analysis makes clear that, had the Court applied the correct test from *California Forestry*, it would have reached conclusion that the DAC subgroups were advisory committees subject to FACA. Dissent 12.

In *Association of American Physicians & Surgeons, Inc.*, the government argued that a working group of the President's Task Force on National Health Care Reform was not an "advisory committee" because the working group was "not directly in contact" with the President, *AAPS*, 997 F.2d at 912—the same view of 5 U.S.C. app. 2 § 3(2) that the panel adopted in this case. But the *AAPS* Court soundly rejected that argument:

> [T]he statutory language does not remotely support the government. Not only does FACA define an advisory committee as a task force or "any subcommittee or other subgroup thereof," 5 U.S.C. app. 2, § 3(2), but it also specifies that an advisory committee is a group that is either *established* or *utilized* by the President. *See id.* Certainly the President can establish an advisory group that he does not meet with face-to-face.

> In *Public Citizen* the Court did not suggest that FACA could be avoided merely because the ABA committee communicated with the Justice Department rather than with the President.

AAPS, 997 F.2d at 912 (emphases in original). In other words, Circuit precedent has long repudiated the core logic of the panel opinion in this case.

The majority attempts to distinguish *AAPS*, arguing that the above-quoted discussion was simply included in *AAPS* to reinforce that "the working group . . . qualified as an 'advisory committee' under FACA." Op. 11. But the panel misstates the holding of *AAPS*. Op. 10–11. The Court did not "h[o]ld that the working group was an advisory committee," Op. 10; it expressly reserved that issue. *AAPS*, 997 F.2d at 915–16 ("We simply have insufficient material in the record to determine the character of the working group and its members."). Whether or not the working group was an advisory committee—a question the *AAPS* Court left open—the Court was emphatic that "direct[] contact" between a committee and the government decisionmaker (be it the President or an agency) is not a requirement of 5 U.S.C. app. 2 § 3(2). *AAPS*, 997 F.2d at 912. The panel's "direct reporting" test cannot be squared with the holding of *AAPS*. Op. 15.

Finally, the panel opinion conflicts with *Association of American Physicians & Surgeons, Inc.*, in another respect. In *AAPS*, the Court noted the minimal precedential value of *Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir.

1983), explaining that *Anti-Hunger Coalition* "did not explicitly approve the judge's reasoning relating to the supposed staff groups; rather, [the Court] rejected an effort to challenge his decision based on new information not in the record." *AAPS*, 997 F.2d at 912; *accord* Dissent 3, 12–13. Yet the panel opinion treats *Anti-Hunger Coalition* as controlling authority on the question of whether subgroups are generally subject to FACA. Op. 9. The panel's interpretation of *Anti-Hunger Coalition* is at direct odds with the Court's prior decision in *AAPS*.

Because the panel opinion creates multiple intra-circuit conflicts, the en banc Court should rehear this case and restore order to the Circuit's FACA precedents.

II. The panel opinion 'greenlights an easily abusable system' for agencies to circumvent FACA.

This is a case of exceptional importance warranting en banc review. The panel decision threatens major negative consequences for the transparency of advisory committees across the federal government. As a result of the panel opinion, any subgroup—even a subgroup "established *by* an agency for the purpose of developing advice *for* the agency"—can now "shield from public view its meetings and records, so long as the advice first passes through a FACA committee." Dissent 1. In this way, the majority's holding "elevates form over function," "undermines FACA's purpose," and "greenlights an easily abusable system[.]" *Id.* at 7, 9.

The effects of the majority's holding are likely far-reaching. According to the FACA Database, 56 federal agencies are currently advised by approximately 1,000 FACA-covered committees. *All Agency Accounts*, FACADatabase.gov (2021).[2] Of those 56 agencies, at least 39 are already advised by a committee with a subgroup. *Id.* By sanctioning the FAA's system of closed-door subgroups, the panel has given these agencies a template to conceal "the manner in which [they] obtain advice from private individuals." *Anti-Hunger Coalition*, 711 F.2d at 1072 (quoting *Food Chem. News*, 378 F. Supp. at 1051). This result is directly contrary to the accountability that Congress intended FACA to impose and sufficiently grave to warrant the Court's en banc review. *See Animal Legal Def. Fund, Inc. v. Shalala*, 114 F.3d 1209, 1210 (D.C. Cir. 1997) (Wald, J., joined by Tatel, J., dissenting from the Court's denial of rehearing en banc) (arguing that a FACA case "affecting . . . the transparency of the deliberations and the procedures of hundreds of committees" was a "case of major consequence" warranting en banc review).

Notably, the en banc Court previously heard a case about the applicability of FACA to subgroups. *In re Cheney*, 406 F.3d 723, 730–31 (D.C. Cir. 2005) (en banc). *In re Cheney* presented the question of whether the "Task Force Sub-Groups" of the President's National Energy Policy Development Group were

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[2] https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation.

themselves advisory committees under FACA. *Id.* The Court emphasized that "FACA defines 'advisory committee' to include not only committees and other such groups, but also 'any subcommittee or other subgroup thereof.'" *Id.* at 730 (quoting 5 U.S.C. app. 2 § 3(2)). But the Court declined to address the general test for determining when subgroups are covered by FACA, holding instead that the NEPDG subgroups fit within FACA's exemption for bodies "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government[.]" *Id.* at 728, 731 (quoting § 3(2)).

The en banc Court should take this opportunity to revisit the issue of how and when FACA applies to advisory subgroups in order to bring much-needed clarity to the Court's precedents and resolve a case with major implications for federal policymaking.

CONCLUSION

The panel opinion is in direct conflict with multiple prior decisions of this Circuit and presents issues of exceptional importance. For the foregoing reasons, the Court should grant the petition for rehearing en banc.

Respectfully Submitted,

Dated: June 14, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition complies with the type- volume limits of Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), it contains 3,468 words. I also certify that the foregoing petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14- point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case will be served by email and the CM/ECF system:

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