

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 08-5490

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

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF COMMERCE, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

In its opening brief, Plaintiff demonstrated that it has standing to bring this Federal Advisory Committee Act (“FACA”) case. 5 U.S.C. App. 2. The detailed factual allegations in the complaint allege a more than a “plausible scenario” under which Defendants caused Plaintiff’s injury and how that injury is redressable by a favorable court order.

In response, Defendants, like the District Court, focus on the involvement of third parties, superficially asserting that because Defendants have delegated away control of the NACC and its U.S. component subgroups, Plaintiff’s FACA injuries are not redressable by court order. Defendants’ arguments fail to account for the detailed allegations in Plaintiff’s Complaint (JA 5-18) describing Defendants’ direct and indispensable role in the creation of these groups, as well as Defendants’ continuing participation with these groups. Construed in their most favorable light, Plaintiff’s allegations are more than sufficient to confer standing to bring this FACA claim.

This case raises important questions regarding an agency’s ability to evade the plain meaning and intent behind FACA. Plaintiff has standing to litigate these questions and should have the opportunity to go forward. The decision of the

district court therefore should be reversed and this case remanded for further proceedings.

ARGUMENT

I. Plaintiff's Complaint Alleges Injuries "Fairly Traceable" to Defendants.

As set forth in its opening brief, Plaintiff's Complaint more than adequately alleges "informational injuries" necessary to maintain standing in FACA cases. In regard to causation, the second requirement of standing, Plaintiff's Complaint alleges, in considerable detail, how these injuries are fairly traceable to Defendants, specifically Defendants' failure to comply with the various provisions of FACA in their establishment of the NACC and its U.S. component subgroups.

Defendants do not dispute that Plaintiff has adequately alleged an injury for purposes of standing. Instead, Defendants focus on causation and the involvement of third parties, especially the two business groups to which Defendants delegated management of the NACC and its U.S. component subgroups. Defendants argue they do not "control" these entities and cannot "compel" them to comply with FACA. Defs.' Br. 12-16. Defendants cannot avoid, however, the detailed factual allegations demonstrating a "plausible," if not compelling, "scenario" (*Tooley v. Napolitano*, 556 F.3d 836, 839 (D.C. Cir. 2009)) under which Defendants have at

least “effective control” over the NACC and its U.S. component subgroups such that relief is available in this case.

At various times in their brief, Defendants try to downplay their role in the formation of the NACC and its U.S. component subgroups, alleging that Defendants merely “provided input” or were “consulted.” Defs.’ Br. at 16, 21, respectively. In contrast, the Complaint alleges that Defendants had a direct and indispensable role in both planning and “launching” the NACC and its U.S. component subgroups and continuing participation in the groups. As set forth in the Complaint, the NACC was, to use Defendants’ own description, “launched” by Defendant Gutierrez at a meeting in June 2006. Complaint at ¶ 14. The press release issued at the same time by Defendant Department of Commerce touted the NACC as “made up of high level business leaders from each country” who will meet annually with Defendants “to provide recommendations and priorities on promoting North American competitiveness globally.” *Id.* At the same meeting, Defendant Gutierrez “expressed a desire to ‘institutionalize’ . . . the NACC, so that work will continue through changes in administration.” *Id.* Subsequently, Defendants launched the U.S. section of the NACC at a meeting in May 2006. *Id.* at ¶ 16. Defendants then selected two business groups to serve as a “Secretariat” for the U.S. component of the NACC. *Id.* at ¶ 20. The Secretary of Commerce

meets twice a year with the U.S. component of the NACC and “additional meetings at the working group level” are scheduled “as needed.” *Id.* at ¶ 24. The sole function of both the NACC and its U.S. component subgroups is to provide policy recommendations to Defendants.

While Defendants may claim they were only “consulted,” these alleged facts demonstrate a far more direct involvement by Defendants in the creation of the NACC and its U.S. component subgroups. This is important because these allegations suggest at least “effective control” by Defendants over the NACC and the subgroups. Not only did Defendants plan and create the NACC and its U.S. component subgroups, but they agreed to receive regular policy recommendations of these groups. The sole reason the NACC and its U.S. component subgroups exist is to provide policy recommendations to Defendants.

When viewed in a light most favorable to Plaintiff, it is more than fair to infer from these allegations that Defendants have at least effective control over the

NACC and its U.S. component subgroups.¹ Significantly, Defendants in no way dispute that they have the power to impose conditions on their acceptance of recommendations from the NACC and its U.S. component subgroups. In other words, as suggested in Plaintiff’s opening brief, Defendants can require that the NACC and its U.S. component subgroups fully comply with the provisions of FACA in the development of their recommendations. If they do not, Defendants have the ultimate “control” in the sense that they can cease their regular meetings

¹ It is important to distinguish this case from prior FACA cases which have touched upon the issue of “control.” For example, in their discussion of whether Defendants have “utilized” the NACC and its U.S. component subgroups, Defendants rely on *Washington Legal Foundation v. U.S. Sentencing Commission*, 17 F.3d 1446 (D.C. Cir. 1994), for the proposition that “influence is not control.” Defs. Br. at 22. In that case, a “working group” established by the Sentencing Commission, an entity of the Judicial Branch, was deemed not subject to FACA even though two Department of Justice employees were members and arguably exercised some “influence” over the working group. The agency’s “influence” over the committee was far more removed than in this case, in which an agency is alleged to have directly created the committee and continues to participate in and accept its recommendations.

Similarly, the “peer review panel” created by a government contractor in *Byrd v. EPA*, 174 F.3d 239, 241 (D.C. Cir. 1999), was at least one step further removed than in this case, in which the agency is alleged to have directly participated in the planning and creation of the alleged advisory committee and continues to participate in it. *Cf. Id.* (“We have interpreted “utilized” to encompass “management . . . ‘by [any] semiprivate entity the Federal Government helped bring into being.’”)(citing *Food Chemical News v. Young*, 900 F.2d 328 (D.C. Cir 1990) (quoting *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440 (1989))).

and receipt of recommendations from the NACC and its U.S. component subgroups.

Accordingly, Defendants' concern over the "speculative" actions of third parties misses the point (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)). As alleged in the Complaint, it is Defendants' actions and omissions – the choices by Defendants in creating the groups and the failure to abide by the requirements of FACA – that are the cause of injuries at issue in this case. Taken together, and viewed in their most favorable light, Plaintiff's allegations constitute a more than "plausible scenario" under which Defendants have caused Plaintiff's injuries.

II. Plaintiff Also Has Demonstrated That Its Injuries Are Redressable by Declaratory and Other Relief.

Plaintiff's Complaint also satisfies the last prong of standing analysis, as a FACA violation is redressable by, at a minimum, declaratory relief by a court. It is not disputed that declaratory relief is a proper remedy for a FACA violation. In this case, Defendants' overall failure to comply with FACA can be redressed through declaratory or other relief.

Defendants attempt to distinguish the type of declaratory relief in *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999), from the relief sought by Plaintiff in this

case, asserting that Plaintiff does not seek specific information (“ammunition”) to challenge particular agency findings. Defs.’ Br. at 18-19. Defendants’ attempt is unavailing, as the relief approved of in *Byrd* is directly relevant here. As plainly alleged in the Complaint, Plaintiff seeks access to the records and meetings of the NACC and its U.S. component subgroups. This request is in furtherance of Plaintiff’s public interest mission, which includes dissemination of such information and records to the public. JA 13 (¶ 33). Conceptually, this purpose is indistinguishable from the purpose of the plaintiff “seeking ammunition” in *Byrd* to challenge particular agency findings. In either case, declaratory relief is an entirely appropriate remedy for a FACA violation.

In this case, Defendants’ FACA violation, as alleged in the Complaint, can be redressed by court order. Defendants created the NACC and its U.S. component subgroups for the explicit purpose of receiving advice on a regular basis from private interests. While Defendants tried to “walk away” from their creation, by delegating certain administrative tasks to private groups, they still desire to receive policy recommendations from these private interests and, in fact, continue to participate with the groups and receive recommendations. It is the equivalent of planting a tree, nurturing it, watering it, and enjoying the fruits grown from it, but at the same time claiming they have no “control” over the tree.

Defendants, in this case, make the same implausible argument as to the “tree” they planted and from which they continue to pick fruit. As properly alleged by Plaintiffs, this is a violation of FACA that, if ultimately upheld, would create an unwarranted exception to FACA.²

CONCLUSION

For the reasons set forth in its opening brief and above, Plaintiff respectfully requests that this Court reverse the district court’s decision below and remand for further proceedings.

Respectfully submitted,

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May 13, 2009

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² While not yet before this Court, Defendants seek to litigate the merits of this action, raising red herrings such as “significant constitutional concerns” regarding the “President’s authority to foster international cooperation” should Plaintiff prevail. Defs.’ Br. at 24. As will ultimately be demonstrated, such concerns are not relevant to this action as defendants are an agency and agency official, not the President. Moreover, only the NACC, and not the U.S. component subgroups, involve participation by foreign entities.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.App.P. 32(a)(7)(c) and D.C. Cir. Rule 32(a)(2), the attached principal brief is proportionally spaced, has a typeface of 14 points and contains 2,058 words, as counted by the word-processing system used to prepare the brief.

May 13, 2009

James F. Peterson

CERTIFICATE OF SERVICE

_____I hereby certify that on May 13, 2009, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were served, via first-class U.S. mail, postage prepaid, on the following:

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