[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

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Plaintiff-Appellant Judicial Watch, Inc. ("Plaintiff"), by counsel, certifies as follows:

(A) **Parties and Amici.** The Parties appearing in the lower court and in this appeal are Plaintiff-Appellant Judicial Watch, Inc. ("Plaintiff"), and Defendant-Appellees United States Department of Commerce and Carlos Gutierrez ("Defendants"), in his official capacity as Secretary of the U.S. Department of Commerce. No intervenors or *amici* appeared before the district court, nor are any expected here.

(B) **Rulings Under Review.** The rulings under review in this appeal are the Memorandum Opinion and Order of September 19, 2008, by U.S. District Court Judge Ricardo M. Urbina, Joint Appendix (JA 80), granting defendants' motion to dismiss and published at *Judicial Watch, Inc. v. U.S. Department of Commerce*, 576 F. Supp. 2d 172 (D.D.C. 2008)).

(C) **Related Cases.** This case has not previously been before this Court. To counsel's knowledge, there are no related cases.

James F. Peterson

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STATEMENT OF JURISDICTION

Jurisdiction in the District Court was based upon the Federal Advisory Committee Act ("FACA"). 5 U.S.C. App. §§ 1-16 (*see* addendum). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This appeal is timely because the District Court entered its final judgment on September 19, 2008 (JA 90), and pursuant to Fed. R. App. 4(a)(1)(B), a timely notice of appeal was filed on November 18, 2008. JA 91.

STATEMENT OF ISSUES PRESENTED

Whether the District Court erred when it dismissed a complaint brought under FACA for lack of standing despite detailed factual allegations setting forth the injury caused by Defendants.

STATEMENT OF THE CASE

This appeal concerns an attempt by a federal agency to establish advisory committees comprised of business representatives from the United States, Canada, and Mexico, and yet evade the public disclosure requirements of FACA. Plaintiff has alleged that these committees, known as the North American Competitiveness Council ("NACC") and its component subgroups, fall within the definition of an "advisory committee," as that term is defined under FACA. 5 U.S.C. App. 2 § 3(2). Ultimately, resolution of this case is important, not only in regard to the

specific advisory committees at issue, but because the agency is seeking to create an exception under FACA which would substantially undermine the purposes of the statute. Before this issue could be fully litigated, however, the District Court dismissed this case on the basis that Plaintiff had failed to demonstrate standing to bring its claims.

Plaintiff's complaint alleged that Defendants violated FACA by establishing and utilizing the NACC and its U.S. component subgroups without complying with the open meeting and document disclosure provisions of that statute. JA 5-18 (Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus (filed August 10, 2007) (hereafter "Complaint"). As set forth in detailed and specific allegations, Defendants established the NACC for the specific purpose of receiving advice from certain business interests on various issues. In particular, the Complaint alleges that the NACC and its subgroups have regular closed meetings with U.S. government officials and provide various policy recommendations, including written reports, to these officials. After Defendant refused to bring these activities into compliance with FACA, Plaintiff filed this action.

The District Court subsequently dismissed this case on the basis that Plaintiff did not have standing to bring its claims. *Judicial Watch, Inc. v. U.S.*

Dep't of Commerce, 576 F. Supp. 2d 172 (D.D.C. 2008). Though conceding that Plaintiff had adequately alleged an "informational injury" under FACA, the District Court ruled that the injury was not fairly traceable to the Defendants or redressable by a court order. *Id.* at 178. Plaintiff timely appealed the District Court's ruling. JA 91.

STATEMENT OF FACTS

I. The Federal Advisory Committee Act

FACA sets out a "comprehensive scheme" designed "to control the creation and operation of advisory committees" within the executive branch. *Center for Auto Safety v. Cox*, 580 F.2d 689, 692 (D.C. Cir. 1978). The central purpose of FACA is to "control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups." *Cummock v. Gore*, 180 F.3d 282, 285 (D.C. Cir. 1999) (citations omitted); *see* 5 U.S.C. App. 2 § 2. This is because advisory committees are too often "dominated by representatives of industry and other special interests seeking to advance their own agendas." *Id* . at 284-85 (citing H.R. REP. NO. 92-1017 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496 ("One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns.").

By its plain terms, FACA imposes a number of requirements on committees established or utilized by the President or federal agencies to obtain advice or recommendations ("advisory committees"). 5 U.S.C. App. 2 § 2 *et seq*. FACA defines "advisory committee," in relevant part, to include any "committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . 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). The definition of an advisory committee does not include any committee that is "composed wholly" of federal employees. *Id.*

Advisory committees that meet this definition are subject to FACA's requirements unless specifically exempted by statute. *Id.* at § 4. These requirements include, but are not limited to, the following: (i) that all meetings be open to the public; (ii) that notice of each meeting be published in the Federal Register; (iii) that interested persons be allowed to attend, appear before, or file statements with the advisory committee; and (iv) that records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agendas, and other documents made available to or prepared for or by the advisory committees be

made available through the provisions of FOIA. *See, e.g.*, 5 U.S.C. App. 2 §§ 10(a)(1-3) and (b).

II. The Establishment and Membership of the NACC.

The Complaint alleged numerous detailed facts regarding Defendants' establishment and use of the NACC and its subcomponents. On March 23, 2005, then-President George W. Bush, Mexican President Vincente Fox, and Canadian Prime Minister Paul Martin met in Waco, Texas for a summit of North American leaders. JA 8 (Compl. ¶ 9). The principal outcome of this meeting was the creation of the Security and Prosperity Partnership of North America ("SPP"), which has been described as a cooperative effort of the governments of the United States, Mexico, and Canada to address numerous areas of mutual concern, including the movement of goods, traveler security, energy, environment, and health. *Id.*

Subsequently, on March 15, 2006, Defendant Gutierrez, Canadian Deputy Minister of Industry Suzanne Hurtubise, and Dr. Alberto Ortega, a representative of Mexican President Vicente Fox, met with certain business leaders in Washington, D.C. to solicit their views on priorities for the SPP, as well as recommendations from these business leaders on how the SPP could help their companies become more competitive, reduce the cost of doing business, cut red

tape, and eliminate unnecessary barriers to trade in North America. JA 8 (Compl. ¶ 10). Also discussed was the possible creation and institutionalization of a "North American Competitiveness Council." *Id.*

Following this March 15, 2006 meeting, a framework for the NACC was reached trilaterally. JA 8-9 (Compl. ¶ 11). It was agreed that the NACC would provide recommendations on issues concerning North American competitiveness that could be addressed through the SPP. *Id.*

On March 30-31, 2006, President Bush, President Fox, and Prime Minister Harper held a series of meetings in Cancun, Mexico to discuss various North American priorities, including the SPP and "North American Competitiveness." JA 9 (Compl. ¶ 12). One meeting between President Bush, President Fox, Prime Minister Harper, and certain business representatives from each country addressed the proposed structure of the NACC. *Id.* Subsequent to these meetings, Defendant U.S. Department of Commerce reportedly worked with the Council of the Americas, the U.S. Chamber of Commerce, and certain other interested parties to formalize the NACC by facilitating interaction between representatives from the three governments and certain private sector interests. *Id.* at ¶ 13.

On June 15, 2006, Defendant Gutierrez, Mexican Economy Minister Sergio Garciade Alba, Canadian Minister of Interior Maxime Bernier, and certain North

American business leaders met in Washington, D.C. to officially launch the NACC. JA 9 (Compl. ¶ 14). According to a press release issued by Defendant U.S. Department of Commerce, on that same date, the NACC "is made up of high level business leaders from each country" who will meet annually with representatives of the United States, Mexican, and Canadian governments "to provide recommendations and priorities on promoting North American competitiveness globally." *Id.* According to the U.S. Chamber of Commerce, Secretary Gutierrez expressed a desire to "institutionalize" the SPP and the NACC, so that its work would continue through changes in administrations. *Id.*

As officially launched by Defendant Gutierrez and his counterparts in Mexico and Canada on June 15, 2006, the NACC is comprised of thirty-five (35) members of the business community. JA 10 (Compl. ¶ 15). Each country determines its own members and the membership selection process. *Id.* The U.S. component of the NACC is comprised of fifteen (15) members, all of which are large corporations.[1] *Id.* The Mexican and Canadian components of the NACC are comprised of ten (10) members each, all of whom appear to be heads of major

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[1] Prior to the June 15, 2006 launch of the NACC, an organizational meeting of the U.S. section of the NACC had been held on May 26, 2006, attended by Defendant Gutierrez and more than 100 business leaders and government officials and employees. JA 10 (Compl. ¶ 16).

Mexican and Canadian business interests. *Id.* at ¶ 17. None of the NACC's members are full-time officers or employees of the U.S. government. *Id.* at ¶ 19. A complete list of members of the NACC was attached as Exhibit A to the Complaint.

Defendants, as well as representatives of the governments of Mexico and Canada, each designated organizations in their respective countries to serve as "Secretariats" and to help collect input from certain members of the business community. JA 10 (Compl. ¶ 20). Defendants selected two business groups, the Council of the Americas and the U.S. Chamber of Commerce, to serve jointly as the "Secretariat" for the United States. *Id.*

According to the U.S. Chamber of Commerce, Defendants, as well as the governments of Mexico and Canada, have committed to participate in "ministerial-level" meetings with the NACC annually. JA 10-11 (Compl. ¶ 21). The NACC also meets with "senior government officials" "two to three times per year" to "engage on an on-going basis to deliver concrete results." *Id.*

The U.S. component of the NACC is composed of an Executive Committee and an Advisory Committee. JA 11 (Compl. ¶ 22). The Executive Committee is comprised of the fifteen (15) U.S. members of the NACC. *Id.* Each member is charged with representing the sector in which its business operates. *Id.* The

Advisory Committee is comprised of more than 200 U.S. corporations, business associations, and local chambers of commerce. *Id.* The Advisory Committee provides advice and recommendations to the Executive Committee. *Id.* at ¶ 23. The U.S. component of the NACC, which refers to the Executive Committee, meets twice a year with the Secretary of Commerce and "additional meetings at the working group level" are scheduled "as needed." *Id.* at ¶ 24.

The NACC met on August 15, 2006 in Washington, D.C. JA 11(Compl. ¶ 25). This apparently was the first formal meeting of the NACC. *Id.* Subsequently, Defendant Gutierrez and his counterparts from Mexico and Canada, met with the NACC on February 23, 2007 in Ottawa, Canada. *Id.* at ¶ 26. At this meeting, the NACC issued a report to Defendant Gutierrez and his counterparts containing over fifty (50) recommendations regarding border-crossing facilitation, standards and regulatory cooperation, and energy integration. *Id.* That same day, Defendant Gutierrez and his counterparts in Mexico and Canada issued a press release acknowledging their receipt of the NACC's report and recommendations. *Id.* The press release states that "[o]ur respective governments will review the report and consider carefully its recommendations in preparation for the next leaders' meeting." *Id.* The press release further states that "[w]e will continue to

work with the NACC and other stakeholders as we strive to make North America the safest and best place to live, invest and prosper." *Id.*

Finally, the Complaint alleged that a "leaders" meeting was to be scheduled for August 20-21, 2007 in Montebello, Canada. JA 12 (Compl. ¶ 27). The Complaint further alleged that a meeting of the NACC also was occur on or about these same dates in Montebello, Canada, in conjunction with the "leaders" meeting. *Id.*

III. Plaintiff's Investigation of the NACC.

In furtherance of its public interest mission, Plaintiff began investigating the activities of the SPP and the NACC in approximately July 2006. JA 12 (Compl. ¶ 28). In August 2006, Plaintiff sent Freedom of Information Act ("FOIA") requests to various federal agencies, including Defendant U.S. Department of Commerce, seeking access to records regarding the creation, membership, operating guidelines, and meetings of the NACC, among other topics. *Id.* Plaintiff subsequently made further FOIA requests to various federal agencies, including again Defendant U.S. Department of Commerce, seeking access to additional records regarding the NACC. *Id.*

On March 23, 2007, Plaintiff submitted a request to the U.S. Chamber of Commerce, one of the organizations designated by Defendants to serve as

Secretariat for the U.S. component of the NACC, asking that it be allowed to "participate in all future meetings of the NACC, to include Ministerial, Executive Committee and Advisory Committee meetings." JA 12 (Compl. ¶ 29). By letter dated April 19, 2007, the U.S. Chamber of Commerce informed Plaintiff that only invited officials and members of the Executive Committee of the NACC could participate in "Ministerial" meetings. *Id.* at ¶ 30. The U.S. Chamber of Commerce also informed Plaintiff that membership in the Executive Committee was "by definition only open to companies" and that the Advisory Committee is "only open to companies, sectoral associations, and local chambers of commerce." *Id.*

Subsequently, on July 26, 2007, Plaintiff submitted a request to Defendants asking that they acknowledge that the NACC and its U.S. component subcommittees are advisory committees under FACA. JA (Compl. ¶ 31). Plaintiff's letter also requested Defendants bring the NACC and its U.S. component subcommittees into compliance with all appropriate laws and regulations, including FACA's requirements that meetings be open to members of the public and that all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agendas, or other documents made available to or prepared

by the NACC and its U.S. component subcommittees be made available to Plaintiff pursuant to the provisions of FOIA. *Id.*

When Defendants failed to respond, Plaintiff filed this action on August 10, 2007. Plaintiff sought preliminary and/or injunctive relief to require Defendants to make the upcoming meetings in Montebello open to the public. The District Court denied the motion. *Judicial Watch, Inc. v. Department of Commerce*, 501 F. Supp. 2d 83 (D.D.C. 2007).

As a not-for-profit, tax exempt, educational organization that seeks to promote integrity, transparency, and accountability in government, Plaintiff has been and continues to be injured by Defendants' refusal to allow it access to the meetings and records of the NACC and its U.S. component subcommittees. JA 13 (Compl. ¶ 33). Not only has Defendants' refusal thus far denied Plaintiff the ability to obtain information and records about the SPP and the NACC, but it also is restricting Plaintiff's ability to disseminate such information and records to the public and is limiting Plaintiff's ability to carry out its public interest mission in general. *Id.*

Moreover, public confidence in the integrity of the U.S. government as a whole has been and will be harmed by the appearance that Defendants were meeting with and obtaining recommendations and advice from representatives of a

few, select major corporations, both foreign and domestic, each with their own self interests, in order to formulate U.S. government policy. JA (Compl. ¶ 34). Defendants' actions also create the appearance that members of the NACC and its U.S. component subcommittees may gain favor or influence with Defendants and/or the U.S. government by participating in the NACC process, to the detriment of others who are not allowed to participate, thus further undermining public confidence in government. *Id.*

SUMMARY OF ARGUMENT

Plaintiff has standing to bring this action under FACA. The numerous detailed and specific factual allegations in the Complaint demonstrate that Plaintiff's injuries are fairly traceable to Defendants and redressable by a favorable court order. Moreover, Plaintiff has more than sufficiently alleged a "plausible scenario" under which relief may be granted in this FACA case.

STANDARD OF REVIEW

To establish constitutional standing, a plaintiff must show an injury in fact that is fairly traceable to the challenged conduct and that will likely be redressed by a favorable decision on the merits. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In reviewing the standing question, a court "must be careful not to decide the questions on the merits for or against the plaintiff, and

must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *see Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

Furthermore and importantly, at the motion to dismiss stage, standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500. A plaintiff does not need to "prove that the agency action it attacks is unlawful;" otherwise "every unsuccessful plaintiff will have lacked standing in the first place." *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 368 (D.C. Cir. 1998) (internal quotations omitted).

As this Court recently affirmed, "[t]his liberal pleading standard requires a court to deny a motion to dismiss 'even if it strikes a savvy judge that . . . recovery is very remote and unlikely." *Tooley v. Napolitano*, No. 07-5080, 2009 U.S. App. LEXIS 3252, *6 (D.C. Cir. Feb. 20, 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007)). "So long as the pleadings suggest a 'plausible scenario' to "sho[w] that the pleader is entitled to relief," a

court may not dismiss." *Tooley*, 2009 U.S. App. LEXIS at *6 (quoting *Twombly* at 1966).

In the context of a FACA claim, a plaintiff can demonstrate standing by showing simply that it sought and was denied specific agency records. *NRDC v. Johnson*, 488 F.3d 1002, 1003 (D.C. Cir. 2007). A party does not need to assert any other cause of action other than to bring a FACA claim directly. *Id.*

ARGUMENT

I. The District Court Erred in Concluding Plaintiff Lacked Standing To Bring This Action.

A. Plaintiff Has Suffered an Injury in Fact.

Both the U.S. Supreme Court and this Court have defined a FACA-related injury-in-fact as the "refusal to permit [the requestor] to scrutinize the [advisory committee's] activities to the extent FACA allows." *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); *see also Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 243 (D.C. Cir. 1999). This refusal "constitutes a sufficiently distinct injury to provide standing to sue." *Id.*

In this case, the District Court conceded that Plaintiff suffered an "informational injury" by being denied access to the meetings and records of the NACC and its U.S. component subgroups. 576 F. Supp. 2d at 177; *see Food*

Chem. News v. Department of Health & Human Servs., 980 F.2d 1468, 1469 (D.C. Cir. 1992) ("Whenever practicable, all [Federal Advisory Committee] materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply."). The Complaint sets forth detailed factual allegations regarding Plaintiff's attempts to open the meetings and records of the NACC to the public, and Defendants refusal to do so. *Sierra Club v. Envtl. Prot. Agency*, 292 F.3d 895, 898-99 (D.C. Cir. 2002)(at the pleading stage, only general factual allegations of injury are required).

Therefore, Plaintiff sufficiently alleged an "injury in fact" in order to maintain standing in this case.

B. Plaintiff's Injuries Are Fairly Traceable to the Conduct of Defendants.

Though it found Plaintiff suffered an "informational injury," the District Court ruled that the injury was not fairly traceable to Defendants or redressable by a court order. 576 F. Supp. 2d at 177-78. This conclusion, however, overlooks the numerous specific facts alleged by Plaintiff describing Defendants' role in establishing and utilizing the NACC and its U.S. component subgroups.[2] Taken

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[2] As an initial matter, it appears that the District Court did apply the correct standard in its review of the motion to dismiss. Specifically, the District Court stated that "plaintiff offers no evidence, or argument, that defendants have control over the NACC" such that Plaintiff's injuries could be redressed. *Id.* at

together, these factual allegations easily provide the "plausible scenario," as this Court recently stated, under which a plaintiff may be granted relief. *Tooley*, 2009 U.S. App. LEXIS *6 ("So long as the pleadings suggest a 'plausible scenario' to "sho[w] that the pleader is entitled to relief," a court may not dismiss.")(quoting *Twombly* at 1966).

The highly detailed allegations in the Complaint more than adequately allege how Plaintiff's injury is fairly traceable to Defendants. First, the NACC was planned and created by Defendants, and functions solely to provide "advice or recommendations" to Defendants. 5 U.S.C. App. 2 § 3(2). The Complaint describes how Defendant Gutierrez met with certain "senior business leaders" to solicit their views regarding how government could "help their companies become more competitive, reduce the cost of doing business, cut red tape, and eliminate unnecessary barriers to trade in North America." JA 8 (Compl. ¶ 10). A part of the same discussion was the eventual creation and institutionalization of a "North

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178. This assertion is incorrect for two reasons. First, at this initial stage of pleading, Plaintiff is not required to provide any "evidence" in support of its allegations. Second, as set forth in Plaintiff's Memorandum in Opposition to the Motion to Defendants' Motion to Dismiss (Dist. Ct. Dkt. No. 14 (pp. 12-15), Plaintiff did argue at length how the NACC and the U.S. component subgroups are entities created by and exist only to serve Defendants. As discussed herein, these allegations are more than sufficient to show the "causation" between Plaintiff's injury and Defendants' establishment and use of the NACC and its U.S. component subgroups.

American Competitiveness Council." *Id.* Subsequent to this meeting, Defendants created the "framework" for the NACC. *Id.* at ¶ 11. Defendant Department of Commerce then "worked with private sector interest groups, the Council of the Americas and the U.S. Chamber of Commerce, and other interested parties to formalize the NACC . . . ." *Id.* at ¶ 13. The express purpose of the NACC, the reason it exists, is to "provide recommendations [to Defendants] on issues concerning North American competitiveness . . . ." *Id.*

As further set forth in Complaint, the NACC was, to use Defendants' own description, "launched" by Defendant Gutierrez at a meeting in June 2006. *Id.* at ¶ 14. The press release issued that day 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.* This is the essence of a FACA advisory committee.

Plaintiff pled even more specific allegations regarding Defendants' establishment and utilization of the U.S. component of the NACC. Specifically, Defendants launched the U.S. section of the NACC at meeting in May 2006, a

meeting attended by more than 100 business leaders and government officials and employees. *Id.* at ¶ 16. The U.S. component of the NACC is comprised of 15 members, all of which are large U.S. corporations. *Id.* As also alleged by Plaintiff, Defendants selected two business groups, the Council of the Americas and the U.S. Chamber of Commerce, to serve as a "Secretariat" for the U.S. component of the NACC. *Id.* at ¶ 20. Even more specifically, according to the U.S. Chamber of Commerce, the U.S. component of the NACC is composed of an Executive Committee and an Advisory Committee. *Id.* at ¶ 22. The Executive Committee is comprised of the fifteen (15) U.S. members of the NACC. *Id.* Each member is charged with representing the sector in which its business operates. *Id.* The Advisory Committee is comprised of more than 200 U.S. corporations, business associations, and local chambers of commerce. *Id.* The Advisory Committee provides advice and recommendations to the Executive Committee. *Id.* at ¶ 23. Also according to the U.S. Chamber of Commerce, the U.S. component of the NACC, which refers to the Executive Committee, meets twice a year with the Secretary of Commerce and "additional meetings at the working group level" are scheduled "as needed." *Id.* at ¶ 24.

These highly detailed, specific factual allegations describe Defendants' direct role in the establishment and use of the NACC and its U.S. component

subgroups. Plaintiff's allegations also demonstrate how these advisory committees exist only to provide policy recommendations to Defendants. Most importantly, these allegations identify the cause of Plaintiff's "informational injury" – specifically Defendants' failure to abide by FACA in creating these committees and their refusal to take any steps to bring them into compliance with FACA.

C. Plaintiff's Injuries Are Redressable by a Court Order.

FACA violations in and of themselves warrant declaratory relief which can be redressed by the Court. *See Byrd*, 174 F.3d at 244 ("declaratory relief will redress [plaintiff's] injury because it will provide him with this Court's declaration that the agency failed to comply with FACA."). In this case, Defendants' overall failure to comply with FACA – in particular, establishing advisory committees and accepting the committee's policy recommendations without complying with FACA – can be redressed through declaratory or other relief by the Court.

The facts alleged by Plaintiff more than "plausibly" show that Defendants' have "effective control" over the NACC and its U.S. component subgroups. Defendants not only created the NACC and its U.S. component subgroups, but also agreed to participate in and receive the recommendations of these groups. Defendants certainly can require that any further meetings with and/or

recommendations received from the committees be prepared in compliance with the provisions of FACA. Defendants, however, have refused to take such a step.

The purpose of FACA is to regulate interactions between an agency's advisory committees and private interests. Hence, it is well within the authority of a court to declare Defendants in violation of FACA. It would also be entirely proper for a court to order that Defendants cease their involvement with advisory committees that Defendants established, as the committees do not operate in compliance with FACA. In any event, Plaintiff's injury is redressable by a favorable court order.

D. The Involvement of Other Entities Does Not Undermine the Court's Ability to Afford Relief With Respect to Defendants.

According to the District Court, in order to demonstrate causation, Plaintiffs needed to specifically allege something more – that Defendants had "control over the NACC" such that Defendants could "force" disclosure of records or require public access to meetings of the NACC. 576 F. Supp. 2d at 178. The District Court seemed to conclude that the "involvement of two other governments and multiple non-governmental organizations" limited its ability to provide redress as to the two Defendants before the District Court. *Id.* The participation of other entities in the NACC in no way diminishes the connection between Defendants'

actions and Plaintiff's injury, or limits the District Court's ability to redress Plaintiff's injury.

As set forth above, Plaintiffs have alleged in detail Defendants' central role in creating the NACC and the U.S. component subgroups. Plaintiff's allegations show that the "cause" of Plaintiff's injury is Defendants' establishment and use of these "advisory committees" without requiring compliance with FACA.

The involvement of third parties in the creation of these "advisory committees" is of no relevance as FACA does not contain any exemption from its requirements for advisory committees created in conjunction with other entities. If FACA were interpreted to include such an exemption, the statute would quickly become a nullity.

This is because an agency seeking to shirk it responsibilities under FACA could simply "opt out" by, for example, inviting some other entity – a corporation, a special interest group, or a foreign government – to "jointly" participate in the formation of the advisory committee. Similarly, an agency might try to evade FACA by delegating certain administrative tasks to interested parties, such as special interest groups, and then claim it no longer has control over the committee, allowing special interests groups it selected to run the committee behind closed doors. Under both these scenarios, the agency would receive the input from the

advisory committee that it was purposefully seeking, but having avoided public scrutiny and the strictures of FACA. Such a gaping loophole, if it were recognized, would be completely inconsistent with the purpose of FACA and open government laws in general.

The above "hypothetical scenarios" are, of course, precisely what Plaintiff has alleged in this case. After playing a direct and indispensable role in "launching" the NACC and its U.S. component subgroups and promising their continued participation, Defendants have refused to accept the applicability of FACA to their creations. Defendants' own statements, however, undercut their position, such as the press release issued by Defendant U.S. Department of Commerce which describes the NACC as "made up of high level business leaders from each country" who will meet annually with representatives of the United States, Mexican, and Canadian governments "to provide recommendations and priorities on promoting North American competitiveness globally." JA 9 (Compl. ¶ 14). This statement describes precisely the operation of a FACA advisory committee.

Significantly, the U.S. General Service Administration ("GSA"), the federal agency charged with administering FACA (5 U.S.C. app. 2 § 7), has issued guidelines to assist agencies in determining when FACA applies. These

guidelines, entitled "When FACA Is and Is Not Applicable to Interactions with The Private Sector," are available on the agency's website (www.gsa.gov) and a copy was attached as Exhibit A to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss (Dist. Ct. Dkt. No. 14, filed Nov. 6, 2007).

To help agencies comply with FACA, GSA describes various hypothetical scenarios under which an agency may establish a FACA advisory committee. In strikingly similar fact pattern to the facts alleged in this case, the GSA considers a committee that is created by an agency head and is composed of "senior corporate officials which will meet, interact, deliberate, and advise him on a variety of issues . . . ." Exh. A. at 2. The committee structure also includes "a core membership with subgroups."

According to the GSA, such a committee constitutes a FACA advisory committee. This is because "[t]he committee is established by an agency head (the Administrator) to obtain advice or recommendation for himself of other federal officials in the executive branch; and the committee is not composed wholly of full-time, or permanent part-time federal employees." For these reasons, the agency must abide by all the requirements of FACA.

GSA's hypothetical example is this case. As alleged in the Complaint, Defendants wish to receive recommendations from various "corporate officials."

Defendants established and are utilizing the NACC and its U.S. component subgroups to develop and provide such recommendations. Based upon these alleged facts, the NACC and its U.S. component subgroups are governed by FACA. Hence, even the federal agency with unique expertise in interpreting FACA rejects Defendants' approach.

Accordingly, construed in their most favorable light, Plaintiff's allegations demonstrate causation and redressability sufficient to maintain standing in this case.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the district court's decision below and remand for further proceedings.

Respectfully submitted,

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March 30, 2009

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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 5,981 words, as counted by the word-processing system used to prepare the brief.

March 30, 2009

James F. Peterson