No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

REPLY BRIEF FOR THE PETITIONERS

The construction of the Federal Advisory Committee Act (FACA) urged by respondents, and adopted by the courts below, would transform a statute designed to regulate the establishment of advisory committees of *non-government* experts into a general warrant to search Executive Branch advisory groups for contacts with outsiders who some might deem to be de facto "members." It would convert FACA—which expressly exempts advisory groups made up exclusively of government employees—into a mechanism for intrusive and unconstitutional interference with core Executive Branch functions. Such a construction of FACA should be rejected because it fundamentally misunderstands the statute and would violate the presumption of regularity and other principles of judicial review of Executive actions. Moreover, if any doubt existed on this score, it should be resolved, as in *Public Citizen* v. *United States*, 491 U.S. 440, 455-465 (1989), to avoid serious constitutional difficulties. Otherwise, application of FACA to the National Energy Policy Development Group (NEPDG), including the district court's discovery orders, is unconstitutional. See Pet. Br. 28-38.

The court of appeals had both mandamus and appellate jurisdiction. The important separation-of-powers questions raised in this case are neither premature nor stale. And the discovery ordered below was not some preliminary step on the way to a possible separation-of-powers violation, but a significant violation in itself.

I. THE DECISIONS BELOW IMPROPERLY EXPAND THE SCOPE OF FACA, CONFLICT WITH THIS COURT'S SEPARATION-OF-POWERS DECISIONS, AND WOULD RENDER FACA UNCONSTITUTIONAL

As petitioners have demonstrated (Pet. Br. 12-20), the court of appeals' so-called "de facto membership" doctrine, particularly as applied in this case to authorize broad discovery triggered by the mere allegation of participation by unauthorized members, effectively eliminates FACA's

express (and constitutionally necessary) exception for advisory groups comprised solely of government officials or employees. See 5 U.S.C. App. 3(2), at 2. It also undermines both FACA's requirement that the President (or an agency) "establish[] or utilize[]" an advisory committee, 5 U.S.C. App. 3(2), at 2, and its prohibition of any such committee not "specifically authorized by statute or by the President," 5 U.S.C. App. 9(a)(1), at 5. As a result, the decisions below conflict with FACA's text and this Court's cases governing the separation of powers and judicial review of Executive actions.

A. The Construction Of FACA Adopted Below Is Inconsistent With The Text, History, and Purposes Of The Statute

1. Respondents acknowledge (SC Br. 40-43; JW Br. 30, 45-46) that Congress created an exception from FACA's disclosure and other requirements for advisory groups composed entirely of government officials or employees precisely to avoid the separation-of-powers concerns raised by this case. For example, respondent Judicial Watch concedes that Congress adopted this exception to avoid "important constitutional concerns," JW Br. 30, and in particular to "respect[] the Opinion Clause" of the Constitution, *id.* at 46.

Nevertheless, under respondents' approach, no matter how clearly the President established or utilized an advisory group consisting *solely* of government officers, anytime a plaintiff makes an unsupported allegation of unauthorized, de facto members, "[the] plaintiff [would be] entitled to discovery to determine whether, as a factual matter, non-federal officials regularly participated in the work of an advisory committee * * * in such a manner as to become de facto members of the committee." SC Br. 2. Congress's constitutionally necessary exception for government-member groups would have little practical value if a mere allegation of an unofficial member could subject any such group—from the Cabinet on down—to intrusive discovery that raises the same or greater constitutional concerns as would a final

judicial determination that FACA applied. Congress plainly did not include the exception for all-government groups just to have it rendered nugatory by creative pleading and liberal discovery orders that disregard the presumption of regularity afforded Executive Branch actions.

2. Respondents' approach also disregards the provisions of FACA that ensure that the President (or an agency) has control over the manner in which an advisory group is established and utilized. FACA expressly forbids the creation of unauthorized, de facto advisory committees, 5 U.S.C. App. 9(a)(1), at 5, and recognizes that the President, by the manner in which he establishes the group and defines its membership, determines whether FACA applies, 5 U.S.C. App. 3(2), at 2. See 41 C.F.R. 101-6.1003 (2000).

Respondents concede (SC Br. 2; JW Br. 30-34), as they must, that the President established the NEPDG to consist entirely of government officers, and that the NEPDG in its report formally identified its members as only those government officers identified by the President. Respondent Judicial Watch, moreover, concedes (JW Br. 30) that one of the ways that Congress tried to "resolve" the "important constitutional concerns" associated with regulating "the process by which the President and other Executive Branch officials obtain information in performing functions assigned to them by the Constitution" was to "leav[e] it to the President or his subordinates to choose whether to establish *or* utilize an advisory committee that includes outside members and, thereby, is subject to FACA's balance and disclosure requirements." But, as with FACA's exception for all-government advisory groups, respondents' approach would render these important limitations largely meaningless by authorizing broad discovery based solely on an unsupported allegation that the group, as "utilized," had unauthorized, de facto members.

Respondent Judicial Watch, for example, argues (JW Br. 31) that petitioners' construction of FACA "ignores FACA's

applicability to advisory committees 'utilized' [as opposed to 'established'] by the President." Both respondents, moreover, argue that focusing on the formal membership of the advisory group as established by the President "is an open invitation to massive evasion of FACA" (SC Br. 10) and would "render violations of" FACA "effectively unreviewable" (JW Br. 35). Respondents are not only mistaken, but their arguments demonstrate a fundamental misunderstanding of FACA's text and purposes.

First, as this Court held in *Public Citizen*, Congress's inclusion of the term "utilized" in addition to "established" was only intended to broaden slightly the disclosure and balance requirements previously imposed by Executive Order No. 11,007, so as to include "advisory committees established by the Federal Government in a 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." 491 U.S. at 462. Section 2(a) of Executive Order No. 11,007 defined the term "advisory committee" to mean any advisory group "that is *formed* by a department or agency of the Government * * * and that is not composed wholly of officers or employees of the Government," as well as any such group "that is *not formed* by a department or agency, but only during any period when it is being *utilized* by a department or agency in the same manner as a Government-formed" group. 3 C.F.R. 182 (1962) (emphasis added). It is precisely this meaning of "*utilized*" that this Court in *Public Citizen* said Congress was intending to include in FACA. See 491 U.S. at 458-465. Here, it is undisputed that the President "established" the NEPDG to consist solely of government officers. Respondents' attempt to avoid the natural consequence of that concession by emphasizing the term "utilized" is entirely misplaced, since as Executive Order No. 11,007 makes clear, that term refers only to groups "not formed" or established by the President or an agency.

Second, contrary to respondents' suggestions (SC Br. 1-2, 29; JW Br. 48), Congress manifestly did not enact FACA to regulate all aspects of the process by which the President seeks advice to formulate policies or legislative proposals, nor was FACA intended to remove the influence of all outside interests from Executive Branch decisionmaking. Congress did not enact FACA to police or prohibit "ex parte contacts" with Executive Branch Officials, which are, outside of the narrow contexts like Executive Branch adjudications, a sign of a functioning representative democracy. Rather, as this Court indicated in *Public Citizen*, Congress enacted FACA to address "specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." 491 U.S. at 453. That is why Congress required the President or an agency to establish an advisory committee and prohibited the creation of unauthorized, de facto FACA committees. See S. Rep. No. 1098, 92d Cong., 2d Sess. 1 (1972) (purpose of legislation to "strengthen the authority of Congress and the executive branch to limit the use of Federal advisory committees to those that are necessary and serve an essential purpose" and to "provide uniform standards for the creation, operation, and management of such committees"). Yet, under respondents' view, FACA committees can routinely spring to life by virtue of a post-hoc judicial determination that unauthorized members participated in the group's deliberations, regardless of the formal procedures used to establish the group.

Moreover, the examples of advisory groups identified in the legislative history of FACA, and discussed by this Court in *Public Citizen*, involved the *acknowledged* participation of non-government members. See, *e.g.*, S. Rep. No. 1098, *supra*, at 8; 491 U.S. at 460-461. As those examples demonstrate, Congress was concerned about waste and manipulation by government or private interests of advisory groups of *non-government* experts. See See H.R. Rep. No. 1731, 91st Cong., 2d Sess. 4 (1970). Those concerns have no application where, as here, the group is formally established to

consist solely of *government* officers and there is only an allegation of secret, de facto members. That, in fact, is the inverse of the problem identified by Congress, and there is no reason to believe FACA was intended to address that situation.

To the contrary, the Senate Report specifically noted that prior versions of the bill would have imposed disclosure and balance requirements on advisory groups consisting entirely of government officers or employees, and that those proposals were rejected because Congress determined that (1) "the main problems of proliferation, confusion and operational abuse lay with those advisory committees whose membership in whole or in part comes from the public [*i.e.*, non-government] sector," S. Rep. No. 1098, *supra*, at 8, and (2) "the matter of controlling the number *and activities of inside-government committees* was better left to the President, the OMB and the agencies, which had sufficient legislative and administrative authority to deal with the problem," *ibid.* (emphasis added).

Accordingly, respondent Sierra Club misses the point of FACA entirely when it complains (SC Br. 30) that "if agencies know that no court can go behind the formal designation of a committee's membership to determine even whether FACA applies, that will provide a huge opportunity to render FACA almost meaningless." FACA, as its name suggests, regulates advisory committees *as established by the President or agency*, not all interactions between private citizens and the Executive Branch. Where, as here, the President formally designates an advisory group as consisting solely of government officers, any concern about "the * * * activities of [that] inside-government committee[]"—including the amount and nature of its contacts with private interests—"[is] better left to the President," who "ha[s] sufficient * * * authority to deal with the problem." S. Rep. No. 1098, *supra*, at 8.

3. Respondents do not deny that their construction of FACA, together with their disregard for the presumption of regularity afforded Executive actions, would have the effect

of eliminating most, if not all, of the protections afforded by FACA's provisions excluding all-government advisory groups and limiting FACA committees to those formally designated by the President or his subordinates. Indeed, respondents wholeheartedly embrace the notion that a court must disregard the Executive's own description of its advisory group and permit discovery to determine whether the number, frequency, or nature of contacts between the official government members of the group and private persons are sufficient for the judiciary to deem those private persons de facto members. Such a formless, post-hoc judicial inquiry would be required, moreover, in every case in which the plaintiff makes an unsupported allegation of de facto membership. Even if the discovery—which, as this case demonstrates, would often be broader than the disclosure requirements imposed by FACA itself—confirms the Executive's account of the committee he created (as it would here), the intrusion on the Executive Branch would be complete. Accordingly, under respondents' view, and that adopted by the courts below, constitutionally problematic discovery will be necessary in virtually every FACA case.

Such an approach stands in stark contrast to this Court's decision in *Public Citizen*, where the Court went to great lengths to impose limits on FACA to avoid unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. See 491 U.S. at 466-467; see also *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992), and *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). This case involves the same statute and raises the same separation-of-powers concerns involved in *Public Citizen*, and it does so in a context in which the interference with the Executive's functions is far more direct and the construction of the statute that avoids those difficulties is far more obvious. See Pet. Br. 20-22, 35-38. Accordingly, the Court should reject the de facto member doctrine to avoid a construction of FACA that would, at a minimum, raise serious constitutional concerns.

B. The Decisions Below Violate The Presumption Of Regularity And Other Settled Principles Governing Judicial Review Of Executive Branch Actions

1. The courts below could have avoided the separation-of-powers concerns inherent in the district court's discovery orders by properly applying longstanding principles of judicial review of Executive actions. See Pet. Br. 22-28. Most notably, the courts below should have adhered to the rule that, "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996) (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). The lower courts' complete disregard for the presumption of regularity, standing alone, provides a sufficient basis for reversal in this case.

Respondents' attempts to distinguish this Court's presumption of regularity cases are unavailing—and inconsistent. The Sierra Club provides no argument at all for why the presumption should not apply here, and instead merely asserts (SC Br. 37) that none of the Court's cases applying the presumption has "arise[n] in contexts remotely similar to this case." While it is true that none of those cases involved application of FACA, the Sierra Club's own description underscores the broad range of cases and contexts in which this Court has consistently adhered to the presumption. See *id.* at 3. The diversity of those cases, moreover, rebuts Judicial Watch's mistaken characterization (JW Br. 27) of the presumption as being solely "a principle of APA law" that does not apply in other areas, such as mandamus actions.

In fact, the presumption of regularity is fully applicable here. As this Court explained in *Armstrong*, the presumption "rests in part on an assessment of the relative competence" of Executive Branch officials and courts, as well as on "a concern not to unnecessarily impair the performance of a core executive constitutional function." 517 U.S. at 465. Those concerns warrant strict adherence to the presumption

of regularity in this case, and that presumption would preclude any discovery based on respondents' unsupported —and, indeed, contradicted—allegations of unauthorized, de facto members. See Pet. Br. 22-23.

This Court's recent decision in *National Archives & Records Administration* v. *Favish*, 124 S. Ct. 1570, 1581-1582 (2004), further confirms that view. There, the Court rejected a view of the Freedom of Information Act that would transform a statutory exception "into nothing more than a rule of pleading," and held that "where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to gain disclosure." *Id.* at 1581. Analogizing to the presumption of regularity identified in *Armstrong* and other cases, the Court observed that a "presumption of legitimacy" would apply to the government's actions, thereby requiring the requestor to "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Ibid.* The Court observed that "[t]he presumption perhaps is less a rule of evidence than a general working principle," but reaffirmed that, "[h]owever the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it." *Ibid.* (citing *United States* v. *Armstrong*, *supra*, and *United States* v. *Chemical Found., Inc.*, *supra*). Respondents have provided no reason to conclude that the presumption of regularity should not apply to government actions under FACA.

2. Petitioners showed in their opening brief (at 24-26 & n.3) that the district court's assumption that respondents could proceed against the Vice President on a mandamus claim, see Pet. App. 96a-97a, is plainly mistaken. Respondents have done nothing to rebut that showing, nor have they demonstrated why mandamus should be available against the Vice President here. See SC Br. 38-39; JW Br. 27-28.

Petitioners also demonstrated (Pet. Br. 26-28) that the discovery ordered below would not even be appropriate in an action brought under the APA, which would not apply to the President or the Vice President, in part because of separation-of-powers considerations. See *Franklin*, 505 U.S. at 800-801. Respondent Sierra Club complains (SC Br. 32) that "there is nothing in FACA at all that suggests that it limits the circumstances under which a plaintiff can obtain discovery." That is true, but unilluminating. FACA itself provides no cause of action, much less rights to discovery, and so quite naturally does not impose limits on discovery for a non-existent cause of action. A FACA claim can be enforced, if at all, only under the APA, which generally limits proceedings to an administrative record and does not include a right to discovery.

Respondents assert (SC Br. 34-35; JW Br. 29) that discovery is available consistent with the APA under *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419-420 (1971), because there is a "gap" in the administrative record concerning the membership of the NEPDG. But both the President's memorandum establishing the NEPDG and the NEPDG's report confirm that only federal officials were members of the NEPDG. The only conceivable "gap" to which respondents point stems solely from their unsupported allegation that the President was disobeyed and private individuals were somehow permitted to serve NEPDG members. Such baseless allegations, however, could be made to suggest a "gap" in *any* administrative record and are plainly insufficient under *Overton Park* to require a further explanation by appropriate officials, much less intrusive discovery. See Pet. App. 38a-39a (Randolph, J., dissenting).

Nor is discovery warranted based on the Sierra Club's contention (SC Br. 2-3, 15-16) that there is a gap in the administrative record concerning the membership of NEPDG "subgroups." First, the allegation of unauthorized "subgroups" amounts to nothing more than the unsupported allegations of de facto members. The Sierra Club's complaint identified the so-called "Sub-Groups" as being pre-

cisely those "groups of energy industry executives and other non-federal employees" that it alleges were de facto members. J.A. 146.

In any event, respondent is mistaken about the status of the administrative record. The Presidential memorandum establishing the NEPDG authorized the Vice President to establish "subordinate working groups to assist the [NEPDG] in its work," subject to the same requirement that members be "officers of the Federal Government." The Knutson Declaration noted that authorization, but explained that "[t]he Vice President did not establish any such working groups." J.A. 240. The Knutson Declaration further explained that while there was one staff-level support group, it was comprised solely of government officials or employees. J.A. 240-241.

In sum, because neither FACA, nor the APA, nor mandamus, nor any combination thereof entitles respondents to the far-reaching and constitutionally problematic discovery ordered by the courts below, the decisions below should be reversed.

C. The Decisions Below Violate The Separation Of Powers Guaranteed By The Constitution

Respondent Sierra Club makes no meaningful attempt to address the merits of petitioners' separation-of-powers arguments, instead relying on assertions that those constitutional arguments are either premature or stale and that the court of appeals lacked jurisdiction to address them. SC Br. 16-26, 39-44. Although Judicial Watch raises additional objections to petitioners' constitutional arguments (JW Br. 39-49), they are equally unavailing.

1. Both respondents attempt to minimize the core Executive Branch functions implicated in this case by pointing out that groups other than the Executive, including Congress itself, can recommend legislation dealing with energy policy. SC Br. 43-44 n.22; JW Br. 46. While true, that fact is entirely beside the point. It is equally true that Congress and others can "nominate" individuals to certain positions in

government. That, however, does not make the power to nominate federal judges, at issue in *Public Citizen*, any less an exclusively Executive power. Similarly, Congress, through the Senate, has as much a role in confirming the President's nominations as it does in acting on the President's legislative proposals. But Congress still cannot make *presidential* nominations any more than it can propose *presidential* legislative recommendations. Those powers belong exclusively to the President.

The Recommendations Clause, for example, expressly contemplates that the President will, "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. The President's duties to inform Congress and to recommend measures for its consideration presuppose that the President "must possess more extensive sources of information * * * than can belong to [C]ongress," Joseph Story, *Commentaries on the Constitution of the United States* § 807, at 575 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833), and that he must be able to cultivate his sources of information and develop for himself the "measures" that he will recommend. Moreover, the Recommendations Clause expressly vests the exercise of those powers in the President's own discretion. Because the President's duty requires him to recommend only what "*he* shall judge necessary and expedient" (U.S. Const. Art II, § 3 (emphasis added)), the Constitution indicates clearly that this exclusively Executive power must remain free from interference. Cf. *Webster* v. *Doe*, 486 U.S. 596, 600 (1988). While others may be able to recommend legislation to Congress, the measures the President recommends remain *his* recommendations, not the recommendations forced upon him according to some system of congressional or judicial regulation.

Similarly, the President's power under the Opinion Clause is exclusively an Executive function under Article II of the Constitution. Judicial Watch's contention (JW Br. 45) that

Congress's investigative powers somehow render the President's Opinion Clause powers non-exclusive is plainly mistaken. Congress's investigative power is derivative of, and constrained by, its legislative power. As this Court explained in *Barenblatt* v. *United States*, 360 U.S. 109, 111-112 (1959), "[s]ince Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." If Congress cannot "inquire into matters which are within the exclusive province" of the Executive, then, *a fortiori*, it cannot empower the public to force disclosure of such matters. This is true, moreover, without regard to the assertion of a claim of Executive privilege. The Constitution vests no power in Congress to regulate such exclusively Executive functions. See *INS* v. *Chadha*, 462 U.S. 919 (1983); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1872); *Public Citizen*, 491 U.S. at 482 (Kennedy, J., concurring).

Judicial Watch's reliance on Justice Jackson's description of the Opinion Clause as "trifling," see JW Br. 45 (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 n.9 (1952) (Jackson, J., concurring), is entirely misplaced. Justice Jackson used that term not to show that the Opinion Clause power was unimportant, but to the contrary, that the power is so central to the functioning of the Executive Branch that its express enumeration in the Constitution was less necessary. 343 U.S. at 641 n.9.

Respondents spend most of their discussion of the constitutional issues arguing for application of the balancing approach to separation of powers issues that this Court has generally applied to Congress's attempts to regulate matters not exclusively delegated to the Executive by the Constitution. See SC Br. 39-44; JW Br. 40-49. For the reasons set forth above and in petitioners' opening brief (at 28-38), petitioners submit that the Constitution, by its textual resting of the Executive Power in the President and by the Opinion and Recommendations Clauses, has already struck any balance that there is to be struck here—the Constitution

preserves the zone of autonomy for the President in obtaining advice he seeks to perform his duties.

Even if, however, this Court were to apply a balancing approach, it is clear that any such balance would weigh heavily against allowing the discovery at issue here. Cf. *Morrison* v. *Olson*, 487 U.S. 654, 695 (1988); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Congress's legitimate interests are non-existent when it comes to investigating the discharge of functions within the exclusive province of another Branch—such as the process by which the President gathers advice and information to formulate *his* policies and recommendations. See *Barenblatt*, 360 U.S. at 111-112. This is especially true in the context of the President's *legislative* recommendations, the destiny of which is controlled by Congress. While Congress will have the opportunity to judge the merits of the President's legislative proposals as part of its discharge of its Article I authority, it has no legitimate role in interfering with the President's determination of how to formulate those proposals.

Similarly, respondents have no meaningful need for the information that they seek. As the record amply shows, any further discovery would only confirm that the NEPDG was organized as the President directed and the group itself reported, that FACA does not apply, and that respondents, therefore, are not entitled to any of the information that they seek. In any event, a mere interest in disclosure for its own sake could not remotely counterbalance the extreme interference with core Article II responsibilities authorized by the decisions below, see *Favish*, 124 S. Ct. at 1581-1582, any more than a mere interest in disclosure for its own sake would justify a law that required the deliberations of this Court to be open to public scrutiny. This is not remotely a case, for example, like *United States* v. *Nixon*, 418 U.S. 683 (1974), in which a carefully circumscribed intrusion into the Executive's sphere of confidentiality was permitted only because of countervailing interests of *constitutional* dimension in the context of criminal wrongdoing. Accordingly, as explained in petitioners' opening brief (at 35-38), the deci-

sions below are fundamentally inconsistent with both the majority and concurring opinions in *Public Citizen*. See 491 U.S. at 452-467; *id.* at 481-489 (Kennedy, J., concurring).

II. PETITIONERS' OBJECTIONS ARE NEITHER PREMATURE NOR STALE, AND RESPONDENTS' JURISDICTIONAL ARGUMENTS, LIKE THE DECISIONS BELOW, ARE MISTAKEN

1. As petitioners have explained (Pet. Br. 38-47), the court of appeals also erred in holding that it lacked mandamus or appellate jurisdiction because the separation-of-powers dispute here was akin to an ordinary discovery dispute and just as premature. Respondents devote most of their briefs to defending that mistaken notion.

Both respondents and the court of appeals, however, ignore the reality that there is no meaningful difference —either in real-world effects or in the separation-of-powers concerns raised—between the sweeping discovery ordered in this case and the disclosure obligations imposed by FACA if it were ultimately held to apply. Indeed, far from rendering separation-of-powers problems premature, the imposition of such problematic disclosure obligations based on mere allegations only exacerbates them. It is that immediate separation-of-powers violation—not potential violations that might occur in the event of a mistaken final judgment—that petitioners seek to remedy.

Respondents quibble with petitioners' characterization of the scope of the district court's discovery orders. According to respondents, the district court approved only "very tightly-reigned" discovery directed "[i]n the main" at gathering information on the threshold issue of the extent to which private parties participated in the work of the NEPDG. SC Br. 4, 7 (citation omitted); see *id.* at 11-14; JW Br. 12-21. In reality, the discovery ordered by the district court was both sweeping and unprecedented. It would have provided respondents with greater information about the process by which the President obtained information and advice from the Vice President and other senior presidential advisors

than respondents would have been entitled to receive if they had proven a violation of FACA—all purportedly to determine whether the statute even applied in the first instance. Indeed, even the court of appeals below indicated that the district court's discovery orders went far beyond the information respondents would receive if they prevailed on the merits of their FACA claim. See Pet. App. 16a-19a.

But even as narrowed by the court of appeals to the information that respondents "need to prove their case" (Pet. App. 18a), the discovery authorized below would violate core principles of the separation of powers. The process of reviewing the communications of the NEPDG and its official members to determine whether the communications to others were sufficient to qualify someone else as a de facto member (i.e., the process envisioned by respondents as necessary to "prove their case") necessarily exceeds the disclosure contemplated by FACA and its open-meeting requirements for committees that include non-government members.

Moreover, as respondent Sierra Club acknowledges (SC Br. 12), petitioners' separation-of-powers objections are not based solely on the expansive scope of the discovery below. To the contrary, the decisions below violate established principles designed to minimize friction between the branches by disregarding the presumption of regularity and ordering discovery in this sensitive area based solely on an unsupported allegation in a complaint that the Vice President and other government officials disregarded the President's directive in permitting unauthorized, de facto members to participate in the workings of the NEPDG. See Pet. Br. 28-38.

2. Respondents also argue (SC Br. 16, 18-22; JW Br. 25-26) that the court of appeals lacked jurisdiction under *United States* v. *Nixon*, *supra*, because contempt was not necessarily imminent and the district court may have imposed sanctions short of contempt if the Vice President had disobeyed its discovery orders. The rationale in *Nixon*, however, did not turn on the certainty of contempt if the President had refused to comply with the order, but rather on the recognition that, unless the Court allowed an appeal, inviting

a contempt sanction would be the only certain way for the President to obtain review. That reasoning is equally applicable here, as is the Court's determination that it would be "inappropriate" and "unseemly" "[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling," and doing so "would present an unnecessary occasion for constitutional confrontation between two branches of the Government." 418 U.S. at 691-692. Absent immediate appellate review under either mandamus or an appeal under *Nixon*, the only way that the Vice President could obtain review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery, suffer the indignity of a court-imposed sanction, and then either appeal the sanction or, if the initial sanction were deemed unappealable, invite a more serious (and therefore more "inappropriate" and "unseemly" under *Nixon*) and appealable sanction. Requiring such a procedure is plainly inconsistent with *Nixon*.

3. Paradoxically, the Sierra Club renews (and expands) its argument, raised for the first time in its brief in opposition to certiorari, that petitioners' separation-of-powers objections are not only premature, but stale, and should have been raised in an appeal of the district court order denying petitioners' motion to dismiss. The Sierra Club goes so far as to argue (SC Br. 23-24) that petitioners' separation-of-powers arguments should be barred by the equitable doctrine of laches.

As petitioners' explained in their opening brief (at 44-47), the Sierra Club's staleness argument is meritless and only serves to demonstrate the folly of respondents' prematurity arguments. The fact that petitioners argued in their motion to dismiss that application of FACA's disclosure requirements would violate fundamental separation-of-powers principles does not preclude them from arguing—either in the district court or in the court of appeals on mandamus or appellate review—that the district court's discovery orders and disregard of the presumption of regularity also violate

the separation of powers. Even after denying the motion to dismiss, the district court could have minimized or avoided separation-of-powers concerns by properly applying the presumption of regularity and other established principles of judicial review of Executive action. Its discovery orders issued in disregard of those principles created distinct, more serious, and more immediate separation-of-powers problems, and gave rise to the need for immediate mandamus and appellate review—regardless of whether it should have granted the motion to dismiss.

The Sierra Club's staleness argument, moreover, makes clear that petitioners' separation-of-powers arguments are broader than claims of privilege to individual documents, and instead are more in the nature of a claim of immunity from discovery, at least where the plaintiff fails to overcome the well-established presumption of regularity afforded to Executive Branch actions. See, *e.g.*, SC Br. 23 (noting that petitioners "did not seek mandamus on the ground that the lower court ordered them to provide specific information that is subject to Executive privilege or otherwise exempt from discovery," but "[r]ather, they sought a much 'broader and antecedent' form of discovery immunity") (citation omitted).

In this case, federal agencies have produced tens of thousands of pages of materials and provided detailed interrogatory answers in response to respondents' discovery requests. Respondent Sierra Club complains (SC Br. 37-38 n.18) that "none of those records describes anything material about the operation of the Task Force or its sub-groups." But the fact that the wealth of documentation provided no material support for respondents' unsupported—and contradicted—allegation of unauthorized, de facto members only underscores the inappropriateness of allowing further discovery in derogation of the presumption of regularity.

Noting the many materials the government provided respondents about the nature and composition of the NEPDG, petitioners have resisted discovery against the Vice President and the President's immediate subordinates into the

President's exercise of powers committed exclusively to the President by Article II of the Constitution, including the Opinion and Recommendations Clauses. Because the very essence of petitioners' separation-of-powers objections is that *any* discovery against the Vice President and immediate assistants to the President—let alone discovery tantamount to relief for a proven FACA violation—in the context of the record in this case would violate the separation of powers, it makes no sense to require assertions of privilege over individual documents before allowing mandamus and appellate jurisdiction. Cf. *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough.").

4. Lastly, respondents argue that appellate or mandamus jurisdiction in this case would somehow be inconsistent with this Court's holding in *Clinton* v. *Jones*, 520 U.S. 681 (1997), that the President has no immunity from civil litigation stemming from actions or events that occurred before the President began his term in office. SC Br. 14, 16; JW Br. 19-20. But *Jones* makes clear that its holding is limited to suits based on the President's *unofficial* conduct. Indeed, it reaffirms this Court's numerous decisions holding that Executive Branch officials are immune to lawsuits for money damages based on their *official* conduct, precisely because such suits threaten to interfere with vital Executive Branch functions. See 520 U.S. at 692-694 (discussing cases); cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982); *id.* at 763 (Burger, C.J., concurring). Moreover, because *Jones* involved a claim of temporary immunity from suit, the opinion does not discuss, or undermine, the ample authorities limiting unnecessary discovery of high-ranking government officials in the absence of immunity. See Pet. 18-19 & n.4 (discussing such cases).

Of particular relevance to this case, the Court explained that official immunity exists for Executive Branch officials in

part because "[t]he conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy." *Jones*, 520 U.S. at 693 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)). No statute makes that difference more apparent than FACA, which provides every individual with a right to disclosure and a potential lawsuit. In contrast, the Court observed, "because the President has contact with far fewer people in his private life than in his official capacity, the class of potential plaintiffs is considerably smaller and the risk of litigation less intense." *Jones*, 520 U.S. at 702 n.36. Here, the Vice President's functions related to the NEPDG were Executive functions, which as Congress has recognized, the President may ask the Vice President to perform. See 3 U.S.C. 106.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2004