No. 03-475

In the Supreme Court of the United States

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, §§ 1 *et seq.*, can be construed, consistent with the Constitution, principles of separation of powers, and this Court's decisions governing judicial review of Executive Branch actions, to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Richard B. Cheney, Vice President of the United States, the former National Energy Policy Development Group (NEPDG), and former members and staff of the NEPDG, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 334 F.3d 1096. The orders of the district court (App., *infra*, 46a-52a) are unreported, although its earlier opinion in this case (*id.* at 53a-123a) is reported at 219 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on

September 10, 2002 (App., *infra*, 124a-125a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 1, are reproduced in Appendix F, *infra*, 126a-134a.

STATEMENT

1. President Bush established the NEPDG as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. See C.A. App. 117. The President named the Vice President to preside over meetings and direct the work of the NEPDG and ordered that the membership of the NEPDG shall "consist[] of * * * the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs." *Id.* at 117-118. The President also authorized the Vice President to invite the Chairman of the Federal Regulatory Commission, the Secretary of State, and "as appropriate, other officers of the Federal Government" to participate in the work of the NEPDG. *Id.* at 118. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Ibid.* It was directed to "gather information,

deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.*

On May 16, 2001, the NEPDG issued a public report containing a set of recommendations to enhance energy supplies and encourage conservation. See NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* (*NEPDG Report*) at iii (*available at* <www.whitehouse.gov/energy/National-Energy-Policy.pdf>). The report included a list of the members of the NEPDG. *Id.* at v. In accordance with the President's January 2001 memorandum, C.A. App. 117-118, all of the members identified in the NEPDG Report were "officers of the Federal Government." Indeed, the NEPDG members identified in the Report were precisely the same cabinet-level officials and assistants to the President named in the President's memorandum. The NEPDG was terminated on September 30, 2001. *Id.* at 119, 257-258.

2. Plaintiffs Judicial Watch, Inc. and Sierra Club filed these consolidated actions against the Vice President, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG included private citizens as unofficial de facto members and so the NEPDG was an advisory committee subject to FACA and all its disclosure requirements. Plaintiffs requested access to NEPDG documents and a declaration that the defendants violated FACA. C.A. App. 35-36, 48, 113-115. The government filed motions to dismiss, which the district court granted in part and denied in part. App., *infra*, 121a.

The court recognized that FACA itself provides no private right of action, but it held that the statute is enforceable through either the Administrative Procedure Act (APA) or mandamus. App., *infra*, 73a-97a.

The court recognized that the Vice President is not an "agency" within the meaning of the APA, *id.* at 78a-79a, but, without deciding the question, left open the prospect that the Vice President could be sued through mandamus and therefore kept the Vice President in this litigation, *id.* at 96a-97a. It also deferred ruling on the government's contention that applying FACA to the NEPDG would violate the separation of powers and interfere with core Article II prerogatives. *Id.* at 97a-119a. Although the court acknowledged "the seriousness of the constitutional challenge raised by defendants," *id.* at 98a, and recognized that discovery could raise related constitutional questions, *id.* at 118a, it nonetheless allowed discovery to proceed in the hope that it might obviate the need to resolve the constitutional questions, *id.* at 97a-119a.

The court directed plaintiffs to submit a proposed discovery plan, which it approved on August 2, 2002, directing the government to "fully comply with" plaintiffs' discovery requests or "file detailed and precise objections to particular requests." App., *infra*, 50a-51a. Among other things, the district court approved the plaintiffs' request for the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and outside individuals. See, *e.g.*, C.A. App. 246, 251, 253.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established procedure that would be applicable in a suit under the APA. In addition, the government submitted an affida-

vit of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." C.A. App. 257, 260-262. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees. See *id.* at 261-262. The district court denied the government's motion for a protective order, App., *infra*, 47a, and forbade the government to file a motion for summary judgment pending further order of the court, C.A. App. 264.

3. The Vice President and the other defendants filed a petition for writ of mandamus, asking the court of appeals to vacate the district court's discovery orders, direct the district court to decide the case on the basis of the administrative record and any supplemental affidavits that the court might require, and dismiss the Vice President as a defendant. The Vice President also filed a notice of appeal, invoking the court's appellate jurisdiction under 28 U.S.C. 1291, see *United States* v. *Nixon*, 418 U.S. 683 (1974).

A divided panel of the court of appeals denied relief. The panel majority held that it lacked jurisdiction to issue a writ of mandamus because the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President "can be fully addressed, untethered by anything we have said here, on appeal following final judgment." App., *infra*, 19a. The court dismissed the Vice President's appeal for lack of jurisdiction, holding that the absence of any claim of executive privilege in this case rendered *Nixon*, *supra*, inapposite. *Id.* at 23a.

Judge Randolph dissented. He criticized the majority's reliance on the holding in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898,

915 (D.C. Cir. 1993) (*AAPS*), that an outside consultant may "be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members." App., *infra*, 31a, 34a. That holding, Judge Randolph argued, makes "extensive discovery into the Executive Office of the President * * * inevitable." *Id.* at 35a. Judge Randolph concluded that "[f]or the judiciary to permit this sort of discovery, authorized in the name of enforcing FACA—a statute providing no right of action * * *—strikes me as a violation of the separation of powers." *Id.* at 37a. In order to avoid the constitutional difficulties that *AAPS* creates, Judge Randolph urged reliance on a General Services Administration regulation that, during the time period relevant to this case, defined "committee member" to mean "an individual who serves by appointment on a committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." See *id.* at 42a-44a (quoting 41 C.F.R. 101-6.1003 (2000)).

4. On September 10, 2003, the court of appeals denied rehearing en banc, with Judges Randolph, Sentelle, and Roberts dissenting and Judge Henderson noting her recusal. App., *infra*, 124a-125a.

REASONS FOR GRANTING THE PETITION

These cases present fundamental separation-of-powers questions arising from the district court's orders compelling the Vice President and other close presidential advisors to comply with broad discovery requests by private parties seeking information about the process by which the President received advice on important national policy matters from his closest advisors. Those orders subject the Vice President and

other senior presidential advisors to discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself, in order to determine whether FACA even applies. They do so, moreover, based solely on an unsupported allegation in a complaint that the NEPDG included unauthorized de facto members—an allegation that is contradicted by the President's order creating the NEPDG, by the NEPDG's published report, and by a declaration by a top NEPDG staff person, all of which confirm that there were no non-governmental NEPDG members, de facto or otherwise.

Any construction of the FACA that would permit discovery of the Vice President and other presidential advisors in such circumstances would violate fundamental principles of the separation of powers. The court of appeals exacerbated those separation-of-powers problems by holding that it lacked mandamus and appellate jurisdiction because the orders are discovery orders that generally cannot support immediate appellate review. But those orders are far from ordinary discovery orders. They would subject the President to intrusive and distracting discovery every time he seeks advice from his closest advisors. They would open the way for judicial supervision of internal Executive Branch deliberations. Moreover, in the context of a statute that this Court has recognized raises serious constitutional concerns in large measure because of its disclosure requirements, it is no answer to say that discovery orders that are more extensive than the disclosure triggered by a statutory violation do not raise serious and ripe constitutional issues. As Judge Randolph explained in his dissenting opinion: "As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge

of constitutionality. The decision in this case pushes it over." App., *infra*, 31a (citing Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994)).

While this Court has recognized the constitutional difficulties presented by FACA and has interpreted it to avoid constitutional problems, see *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989), the decisions by the panel and the district court will routinely generate the kind of intrusions into the Executive Branch that this Court has sought to avoid. The decision below also conflicts with this Court's decisions governing judicial review of Executive Branch actions. Plenary review by this Court is warranted to resolve those conflicts and to ensure that FACA does not intrude on the President's vital interests in receiving unregulated and uninhibited advice from his closest advisors or on the unique relationship between the President and the Vice President.

A. The Decisions Below Work A Wholesale Expansion Of FACA And Conflict With This Court's Decisions Governing The Separation Of Powers And Judicial Review Of Executive Branch Actions

Throughout this litigation, the Vice President has respectfully but resolutely maintained that, in the circumstances of this case, the legislative power and judicial power cannot extend to compelling a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President, heads of departments and agencies, and assistants to the President in the President's exercise of powers committed exclusively to the President by the Constitution, specifically by the Recommendations and Opinions Clauses. See

U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. The district court recognized the seriousness of those concerns, but then ordered sweeping discovery raising equally serious separation-of-powers problems, and the court of appeals' decision immunizes those separation-of-powers violations from effective review. By working an unprecedented and unwarranted expansion of FACA and disregarding established principles of judicial review of Executive Branch actions, as well as interbranch comity, the decisions of the court of appeals and district court threaten substantial interference with vital Executive Branch functions.

1. The Decisions Below Effectively Eliminate Constitutionally-Necessary Limits On FACA's Reach

The orders of the court of appeals and the district court find no basis in FACA's text or purposes. Rather, they are clearly premised on the view that FACA and its disclosure requirements apply to an advisory group established by the President to consist only of full-time government employees, if the "de facto" membership deviates from that established by the President. Those decisions effectively undermine Congress's judgment that FACA is not to be applied to a group established by the President and composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 2, § 3(2). That provision reflects Congress's own effort to limit the separation-of-powers difficulties inherent in FACA. Nevertheless, the decisions below engender those difficulties by eliminating this key textual protection as a practical matter by ordering discovery obligations at least as onerous as the disclosure obligations imposed by FACA—all upon the mere allegation that, contrary to the President's express

directive and the group's own report, there was a non-governmental member of the committee. Under the court of appeals' approach, the President and Vice President would be subject to discovery any time they sought advice from their advisors, even where, as here, the President seeks the benefits of confidential advice only from his closest advisors and expressly structures the process so that FACA does not apply. Nothing in FACA supports such a result.

Both the court of appeals and the district court based their holdings effectively repealing FACA's textual exemption for advisory groups made up exclusively of governmental officials—an exception that is necessary to avoid unconstitutional interference with the Executive—on the notion adopted by the District of Columbia Circuit in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (1993) (*AAPS*), that an advisory committee could include "de facto" members. In *AAPS*, the court of appeals held that courts could look beyond formal membership to determine whether persons formally designated as "consultants" to working groups associated with First Lady Hillary Clinton's health care task force "may still be properly described as * * * member[s] of an advisory committee," because their "involvement and role are functionally indistinguishable from those of the other members." *Id.* at 915. The decisions below extend *AAPS* beyond the advisory process at issue there, which was expressly designed to include non-governmental advisors, to a committee formally established by the President as composed exclusively of government officials.

The notion of de facto membership applied below has no support in FACA's text. See App., *infra.*, 31a-38a (Randolph, J., dissenting). FACA plainly envisions only advisory committees "established or utilized by the

President" or an agency, 5 U.S.C. App. 2, § 3(2), and it expressly forbids the establishment of an advisory committee "unless such establishment is," *inter alia*, "specifically authorized by statute or by the President," 5 U.S.C. App. 5, § 9(a). Thus, by its terms, FACA recognizes that the question whether an advisory group established by the President is subject to the statute's disclosure and reporting requirements is principally determined by the group's formal structure as established by the President. Here, the record is clear that the NEPDG, as "established" by the President, was comprised wholly of government officials and employees.

In contrast to the clear implication of FACA's text, the de facto member doctrine applied below makes the President's memorandum establishing the NEPDG largely irrelevant to the question of FACA's applicability. By so doing, that doctrine also conflicts with the relevant General Services Administration regulation, 41 C.F.R. 101-6.1003 (2000), which makes clear that whether a presidential advisory group is subject to FACA turns on the formal structure given it by the President, not on some loose notion of de facto membership.[1] Moreover, as Judge Randolph explained in his dissent below—and as this case amply demonstrates—

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[1] At the time the President formed the NEPDG, the GSA regulation defined "*Committee member*" to mean "an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." 41 C.F.R. 101-6.1003 (2000). Effective August 20, 2001, the GSA revised the "*Committee member*" definition to read "an individual who serves by appointment or invitation on an advisory committee or subcommittee." 66 Fed. Reg. 37,728, 37,734 (2001) (codified at 41 C.F.R. 102-3.25).

the de facto member doctrine as applied below *inevitably* leads to constitutionally problematic discovery into the process by which the President receives advice from his closest advisors any time a plaintiff alleges that the committee's membership deviated materially from that established by the President. App., *infra*, 31a-38a, 43a-45a.

In the particular context of FACA, such discovery, far from being a preliminary step in determining the existence of a violation or the propriety of a remedy, is essentially indistinguishable—both in practical effect and in separation-of-powers difficulties—from the final relief that would follow from an adjudicated violation. That is especially true of an alleged FACA committee that has terminated, because prospective compliance with FACA's other requirements is impossible and the only potential remedy is disclosure of past proceedings. In short, while application of FACA to close presidential advisors has long raised significant separation-of-powers concerns—as this Court unanimously recognized in *Public Citizen*, see 491 U.S. at 466-467, 486-489—the court of appeals' construction of an extra-statutory de facto member doctrine and its green light for discovery upon the mere allegation of such de facto members plainly "push[] [FACA] over" the constitutional edge. App., *infra*, 31a (Randolph, J., dissenting).[2]

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[2] To be sure, no other court of appeals has expressly disagreed with the District of Columbia Circuit's approach in *AAPS*, *supra*, or the decision below. However, there is no impediment to bringing such actions in the District for the District of Columbia, and as the decisions below ensure that the mere allegation of de facto membership entitles the plaintiff to the same effective remedies as those that would apply in a final judgment, there is no reason for litigants to file suit anywhere else. In any event, the conflicts be-

2. The Expansion Of FACA Adopted Below Conflicts With This Court's Cases Interpreting The Constitution's Separation of Powers

Contrary to the approach taken by the court of appeals and the district court in this case, this Court in *Public Citizen*, *supra*, went to great lengths to impose limits on FACA to avoid an unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. This case implicates analogous—and, indeed, even more serious—separation-of-powers difficulties with the same statute. It therefore presents substantial questions warranting review.

Indeed, the court of appeals' approach is flatly at odds with the approach taken by this Court in *Public Citizen*. At issue in *Public Citizen* was the President's practice of having the Department of Justice seek advice from the Standing Committee on Federal Judiciary of the American Bar Association (ABA) to assist the President in fulfilling his constitutional duty to nominate and appoint federal judges. The plaintiffs in that case alleged that the ABA consultations were subject to the disclosure and other requirements of FACA because the Executive "utilized" the ABA committee as a non-governmental advisory group.

This Court disagreed. Although the Court acknowledged that the Executive may have "utilized" the ABA committee "in one common sense of the term," it recognized that adopting a broad understanding of the statute would raise significant separation-of-powers concerns, since "it would extend FACA's requirements to any group of two or more persons, or at least any

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tween the decisions below and this Court's precedents, discussed *infra*, are more than sufficient to warrant plenary review.

formal organization, from which the President or an Executive agency seeks advice." *Public Citizen*, 491 U.S. at 452; see *id.* at 466-467. As the Court explained, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Id.* at 453.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, concurred separately.[3] The concurring Justices agreed that "it is quite desirable not to apply FACA to the ABA Committee," but they concluded that "as a matter of fair statutory construction" there was no way to avoid that result. *Public Citizen*, 491 U.S. at 481. Instead, they would have held that application of FACA in the context of that case violated constitutional separation-of-powers principles. See *id.* at 482 ("The essential feature of the separation-of-powers issue in this suit, and the one that dictates the result, is that this application of the statute encroaches upon a power that the text of the Constitution commits in explicit terms to the President."). The concurring Justices explained that "[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution," as had the President's nomination and appointment power, "the balance already has been struck by the Constitution itself," and the other Branches have no authority to regulate the exercise of that power. *Id.* at 486. Thus, "[t]he mere fact that FACA would regulate so as to interfere with

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[3] Justice Scalia took no part in the decision. *Public Citizen*, 491 U.S. at 467.

the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act." *Id.* at 488-489.

This case involves the same statute and raises the same separation-of-powers concerns involved in *Public Citizen* and does so in a context in which the interference with the President is far more direct and the construction of the statute that avoids such difficulties is far more obvious. Both opinions in *Public Citizen* make clear that the construction of FACA adopted below is unconstitutional. Unlike the Executive's use of the ABA committee in *Public Citizen*, which did fit within the ordinary terms of the statute, the de facto member doctrine, especially as applied in this case, is inconsistent with FACA's text. Moreover, while the ABA committee in *Public Citizen* concededly involved individuals outside the government, here there is no basis in the record to suspect that a committee established by the President to consist exclusively of the Vice President, heads of departments, and assistants to the President in fact involved any "unofficial," non-governmental members. If the mere allegation of an unofficial, non-governmental member is enough to trigger discovery obligations roughly co-extensive with the available remedies for a FACA violation, then the textual exemption of advisory groups including only government officials, which is essential to the statute's constitutionality, has little or no practical effect. Thus, the decisions below will routinely generate the kind of intrusions that this Court sought to avoid in *Public Citizen* and other cases. Cf. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992) (holding that absent "an express statement by Congress," Court would not construe the APA's definition of "agency" as an

"authority of the Government of the United States" to include the President); *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that telephone notes made by Henry Kissinger while he was serving as Assistant to the President were not "agency records" under the Freedom of Information Act's broad definition of agency to include "any * * * establishment in the executive branch of the Government (including the Executive Office of the President)").

It is equally clear that FACA, as interpreted below, is unconstitutional under the three-Justice concurring opinion in *Public Citizen*. See 491 U.S. at 467-489. The President organized the NEPDG to assist him in the exercise of his exclusive authority under the Constitution to "require" opinions from his advisers and to prepare "Measures" that he might recommend to Congress. U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. Just like the appointment power at issue in *Public Citizen*, the authority to require opinions from his advisors and to recommend measures to Congress are "power[s] that the text of the Constitution commits in explicit terms to the President." 491 U.S. at 482. Accordingly, "[t]he mere fact" that FACA, as construed below, "would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his dut[ies] assigned under the Constitution * * * is enough to invalidate the Act." *Id.* at 488-489.

3. The Approach Adopted Below Conflicts With This Court's Cases Governing Judicial Review Of Executive Branch Actions

The decisions below also conflict with decisions of this Court affording a presumption of regularity to executive action and limiting discovery in APA and mandamus actions. Those conflicts likewise warrant this Court's review.

1. By ordering unprecedented and constitutionally troubling discovery against the Vice President based only on an unsupported—and, in fact, contradicted—allegation that the group he chaired to assist the President was not constituted as the President expressly directed and the group itself reported, the district court turned the traditional presumption of regularity applicable to Executive Branch actions on its head. Indeed, the district court did so expressly, basing its sweeping discovery orders on its suspicion that "the government doesn't always comply with the law." C.A. App. 217 (Tr. of Aug. 2, 2002 Hearing).

That approach directly conflicts with this Court's holding 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, 464 (1996) (quoting *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926)) (emphasis added); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). As this Court explained in *Armstrong*, the presumption of regularity "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. Here, both of those concerns warrant strict

adherence to the presumption of regularity. The President and the Vice President, for example, are in the best position to know whether the NEPDG's advisory activities were structured to fall within FACA's disclosure requirements and whether disclosure would chill necessary candor by the President's advisors. And, for the reasons explained above, disclosure in this context would interfere with the President's exercise of "core executive constitutional function[s]," *ibid.*, specifically his powers to "require" opinions from his advisers and to prepare "Measures" that he might recommend to Congress. U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3.[4]

2. Similarly, the court of appeals and the district court failed to appreciate the significance of the district court's determination that FACA does not provide a cause of action and so that an action to enforce FACA can proceed, if at all, only as an APA or mandamus action. Accordingly, their decisions are inconsistent with this Court's holding that judicial review under the APA is generally based on an administrative record, not on discovery. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971). The record in this case makes clear that the NEPDG was established as a group of high-ranking government

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[4] In addition, the plaintiffs have not demonstrated any heightened showing of need, as is usually necessary—although often not sufficient—to obtain discovery into Executive Branch decision-making. See *Dellums* v. *Powell*, 561 F.2d 242, 245-249 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977); *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). As the record amply reflects, the President assigned the Vice President and the other members of the NEPDG the responsibility to fulfill core Executive Branch functions under Article II of the Constitution. In this context, especially, such principles of interbranch comity should preclude discovery against the President or Vice President.

officials and that it consisted only of those officials. The President's memorandum establishing the NEPDG appointed only federal officials as members and made clear that only "officers of the Federal Government" could be invited to participate. C.A. App. 117-118. Consistent with that directive, the NEPDG's final report lists only federal officials as members. See *NEPDG Report* at v; see also C.A. App. 93 (letter from David Addington, Counsel to the Vice President, to plaintiffs' counsel explaining that all of NEPDG's members were federal employees); *id.* at 261-262 (Knutson Declaration describing group membership).[5]

In addition, any review under mandamus could be no more intrusive than that under the APA. Indeed, the lower courts' treatment of the mandamus issue underscores their failure to appreciate the separation-of-powers difficulties inherent in ordering discovery

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[5] *Overton Park* indicates that in certain circumstances in an APA action a further explanation by the agency may be appropriate to fill in a "gap" in the administrative record. See 401 U.S. at 419-421. But such a gap exists only where the record taken as a whole would not permit review of the agency action under 5 U.S.C. 706. Here, review is not available under Section 706, and in any event, there is no "gap." Both the President's memorandum establishing the NEPDG and the NEPDG's report speak clearly to the issue of the group's membership, and both confirm that its only members were federal officials. Indeed, any conceivable "gap" stems only from plaintiffs' unsupported allegation that somewhere there is a document that shows that the President was disobeyed and private individuals were somehow permitted to serve as NEPDG members. Such baseless allegations, however, could always be made to suggest a "gap" in any administrative record. Contrary to the court of appeals' suggestion (App., *infra*, 11a), nothing in *Overton Park* suggests that, even in an APA action, a further explanation by appropriate officials—much less discovery —would be appropriate based on such allegations. See *id.* at 38a-39a (Randolph, J., dissenting).

against the Vice President in the context of a statute that is constitutionally problematic precisely because it envisions the disclosure of the process by which the President's closest advisors furnish advice to the President. The district court recognized that FACA does not provide a cause of action and that the APA does not reach the Vice President. App., *infra*, 73a-79a. Despite this Court's cases limiting remedies not provided by Congress, see, *e.g.*, *Gonzaga Univ.* v. *Doe,* 536 U.S. 273, 283-284 (2002), the district court entertained the possibility of a mandamus remedy against the Vice President. Rather than definitely deciding whether the Vice President should remain in the case, however, it ordered extensive discovery in the hope that it could avoid deciding the difficult issues. But in the FACA context, such discovery creates rather than avoids difficult separation-of-powers concerns.

The approach adopted below stands in stark contrast not only to this Court's decision in *Public Citizen*, discussed above, but also to the approach adopted by this Court in *Franklin* v. *Massachusetts*, *supra*, and *Kissinger* v. *Reporters Committee for Freedom of the Press*, *supra*. In each of those cases, this Court took pains to construe broad statutory language regulating and requiring disclosure of Executive Branch communications to avoid direct interference with the President and his closest advisors. By requiring the Vice President to comply with broad-ranging discovery requests based on the mere assumption (and a mistaken one at that) that mandamus lies against the Vice President in this context, the courts below have invited the very separation-of-powers concerns this Court has so consistently sought to avoid.

B. The Court Of Appeals' Jurisdictional Rulings Conflict With This Court's Cases And Improperly Immunize Serious Separation-Of-Powers Violations From Meaningful Judicial Review

1. The court of appeals also erred in holding that it lacked jurisdiction to issue a writ of mandamus because the dispute was, in its view, premature. This case self-evidently involves more than an ordinary discovery dispute. Not only does this case involve intrusive and distracting discovery against the Vice President himself, but it arises in the context of FACA, in which this Court has recognized the separation-of-powers concerns presented by FACA's obligations, which are not meaningfully different from the discovery orders themselves. The distraction caused by the discovery orders that will become an inevitable feature of the scheme created by the lower courts will provide ample incentives for some to file these lawsuits. The outcome of the lawsuits will largely be beside the point, as the remedy for a proven FACA violation is not materially different from a discovery order—either in real-world effect or in the separation-of-powers concerns raised.

The procedural posture of this case in no way renders petitioners' separation-of-powers concerns premature. In *Public Citizen, supra*, this Court unanimously viewed the obligations imposed by FACA as giving rise to serious separation-of-powers concerns even if they were imposed as a result of a final judgment with all the attendant protections. Here, by contrast, the upshot of the decisions below is that effectively the same remedies imposed upon a final adjudication of a violation—with the same separation-of-powers difficulties—will be triggered by the mere allegation that a committee's membership deviated in practice from that established by the President. The imposition of such problematic

disclosure requirements upon mere allegations, far from rendering separation-of-powers problems premature, only exacerbates them.

Contrary to the court of appeals' decision (App., *infra*, 13a, 15a), the fact that petitioners have not yet asserted privilege over the documents subject to discovery does not render the separation-of-powers problems associated with those orders either "premature" or "hypothetical." Rather, the intrusive discovery ordered below violates the separation of powers without regard to whether privilege could or would be asserted. That is made clear in this Court's decision in *Public Citizen*. There, this Court unanimously recognized the serious separation-of-powers concerns raised by FACA, even though no privilege claim had been asserted. See 491 U.S. at 466-467, 486-489; cf. *Nader* v. *Baroody*, 396 F. Supp. 1231, 1234 & n.5 (D.D.C. 1975) (holding that fact that President had not asserted privilege "misses the point" of separation-of-powers concern).[6]

Nor can the Vice President's separation-of-powers objections be adequately addressed by the district court on remand or by appeal after final judgment, because the very essence of those objections is that *any* discovery—let alone discovery tantamount to relief for a violation—in the context of the record in this case

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[6] In this regard as well, the disclosure provided by the discovery orders mirrors the relief provided for a violation of the statute. FACA itself preserves the ability of the President or the head of a committee to close meetings to the public, see 5 U.S.C. App. 6, § 10(d), and privilege claims could preserve material from disclosure in a suit filed against a terminated committee. Accordingly, the relief ordered below is not materially different from the relief that could be ordered in a final judgment and so there is no reason to postpone plenary review until a final judgment issues.

would violate the separation of powers. Thus, the concerns here are separate from and antecedent to any claims of privilege. The court of appeals' refusal even to assert jurisdiction over these claims before an assertion of privilege is itself an erroneous decision, which merits this Court's review. The decision below would limit the Executive's ability to obtain appellate review of separation-of-powers claims that are distinct from privilege claims, unless and until privilege is invoked. That illogical requirement erects an enormous obstacle to vindicating the proper functioning of the separation of powers.[7]

2. For similar reasons, the court of appeals' denial of jurisdiction over the Vice President's appeal and its attempt to distinguish *United States* v. *Nixon*, 418 U.S. 683 (1974), are also mistaken. The majority's reading of *Nixon* as requiring the assertion of a privilege claim before an appeal may be permitted (App., *infra*, 24a-25a) is illogical. Where, as here, the separation-of-powers arguments do not take the form of—and are logically antecedent to—a privilege claim, it serves no purpose to require the President or Vice President to

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[7] Indeed, the panel majority itself recognized that petitioners' separation-of-powers arguments are both broader than and antecedent to any specific future claims of privilege, see App., *infra*, 15a (characterizing petitioners' separation-of-powers argument as more like an "immunity" than a privilege), but then failed to recognize the jurisdictional consequence of that observation. As the court of appeals had previously held, an "immunity claim has special characteristics beyond those of ordinary privilege. 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." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

assert privilege claims before permitting an interlocutory appeal.

In any event, *Nixon* did not turn on the assertion of privilege, but on separation-of-powers concerns raised by forcing the President to submit to contempt proceedings merely to facilitate timely review. This Court held that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate" in a case involving the President. 418 U.S. at 691. "To 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 would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." *Id.* at 691-692. Moreover, the Court held, "a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review." *Id.* at 692. Those same considerations support permitting an appeal here by the Vice President (or, at a minimum, providing appellate review on the merits to constitutional objections raised by the Vice President). Cf. *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (citing *Nixon* and stating that "[m]andamus has been recognized as an appropriate shortcut when holding a litigant in contempt would be problematic").

The court of appeals did not question that the unique role of the Vice President under the Constitution places him within the *Nixon* exception to the contempt requirement. Nevertheless, under its approach, the only way that the Vice President can obtain appellate review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery on remand, suffer the indignity of a contempt citation, and appeal the order holding him in contempt. Such an

approach is clearly inconsistent with *Nixon*, not to mention the separation of powers established by the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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