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

REPLY BRIEF FOR THE PETITIONERS

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Respondents do not dispute that the district court's orders here—which compel the Vice President and other close presidential advisors to comply with respondents' broad discovery requests and which seek information about the process by which the President received advice on important national policy matters from his closest advisors—raise fundamental separation-of-powers questions. Rather, they contend that petitioners' objections are premature (or, alternatively, stale) and that the court of appeals lacked jurisdiction to decide them. See Sierra Club Br. in Opp. 8- 9; Judicial Watch Br. in Opp. 5-6.

Respondents are mistaken. The important separation-of-powers questions raised in the petition for certiorari are properly presented in this case, are neither premature nor stale, and warrant review by this Court. In addition, the court of appeals had both mandamus and appellate jurisdiction to decide those issues, and its jurisdictional holdings to the contrary themselves conflict with this Court's decisions and improperly shield separation-of-powers violations from

meaningful judicial review. Accordingly, the petition for certiorari should be granted.

A. Review Is Warranted Because The Decisions Below Improperly Expand The Scope Of FACA, Render FACA Unconstitutional, And Conflict With This Court's Decisions Governing The Separation Of Powers

As petitioners have demonstrated (Pet. 8-20), the court of appeals' so-called "de facto membership" doctrine adopted in *Association of American Physicians & Surgeons, Inc.* v. *Clinton* (*AAPS*), 997 F.2d 898, 915 (D.C. Cir. 1993), particularly as applied in this case, 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. 2, § 3(2). As a result, the decisions below conflict with the text of FACA and with this Court's cases governing the separation of powers and judicial review of Executive Branch actions. Respondent Judicial Watch does not even attempt to address the merits of petitioners' arguments, instead relying solely on assertions that those separation-of-powers arguments are premature and that the court of appeals lacked jurisdiction to address them. Judicial Watch Br. in Opp. 6-7. Respondent Sierra Club briefly responds to the merits of petitioners' arguments (Br. in Opp. 19-24) and raises four objections to them, each of which is mistaken.

The Sierra Club's first "merits" argument—that "this case has not proceeded beyond the motion to dismiss stage" and is therefore premature (Br. in Opp. 19)—does not address the merits of petitioners' arguments at all, but merely repackages its mistaken jurisdictional arguments. See Part B, *infra*.

The Sierra Club's second and third merits arguments—that petitioners' separation-of-powers arguments fail under *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440 (1989), because (a) they relate to the powers of the Vice President and other close presidential advisors, rather than the President's powers, and (b) the President *himself*

"established" the alleged advisory committee in this case, whereas in *Public Citizen*, the committee was established by the American Bar Association—are mistaken and internally inconsistent. As the petition makes clear (*e.g.*, Pet. 8-9), the unconstitutional interference with the President's authority under the Recommendations and Opinions Clauses, see U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3, at issue here, like the intrusion into the President's nomination power at issue in *Public Citizen*, implicates powers that are expressly vested in the *President* by the Constitution. That the Vice President and other close presidential advisors assert the interference with *presidential* power here has no more relevance than the fact that the Department of Justice, among others, asserted the violation in *Public Citizen.* If anything, the greater relative proximity of the petitioners here to the President only underscores the separation- of-powers difficulties raised by the decisions below.

Thus, while the Sierra Club may be correct that the President's role in establishing the advisory group in this case makes "the separation of powers balance * * * quite different" from that in *Public Citizen* (Br. in Opp. 21), *all* of the relevant differences only underscore the gravity of the separation-of-powers implications of the decision below and confirm that the construction of FACA adopted below is flawed. Here, the President sought advice from his closest advisors *inside* the Executive Branch, rather than from an outside group as in *Public Citizen*; the President created an advisory group of government officials for the express purpose of advising him (and in a manner that rendered FACA inapplicable), rather than rely on a pre-existing group formed for different purposes; and the construction of the statute that avoids the separation-of-powers violation—rejecting the textually unsupported "de facto membership" doctrine—is far more obvious than was the construction of the statutory term "utilized" at issue in *Public Citizen.* Congress, after all, expressly exempted groups comprised of Executive Branch officials, thereby avoiding the very

separation-of-powers problems that will now become routine under the decisions below.

Finally, the Sierra Club complains (Br. in Opp. 21-22) that petitioners' arguments against any discovery in this context lack precedent and would insulate claims of non-compliance with FACA from discovery. But the real novelty lies in the lower courts' adoption of the extra-statutory de facto membership doctrine and their disregard for this Court's decisions affording a presumption of regularity to executive action and limiting discovery in APA and mandamus actions. See Pet. 13-20. In *Public Citizen*, as well as in *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992), and *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), this Court took pains to construe broad statutory language regulating or requiring disclosure of Executive Branch communications to avoid direct interference with the President and his closest advisors. By ordering unprecedented and constitutionally troubling discovery against the Vice President based solely on an unsupported allegation that a presidential advisory group had unauthorized de facto members, the courts below have turned those decisions on their heads and have invited the very separation-of-powers concerns this Court has so consistently sought to avoid. FACA expressly allows the President to establish committees to receive advice from government employees without triggering FACA's disclosure requirements. The decisions below allow any plaintiff to insist on that statutorily precluded disclosure through discovery. Those decisions plainly frustrate the statute and intrude on the President's Article II powers. This Court's review is necessary.

B. The Questions Presented Are Neither Premature Nor Stale, And There Are No Jurisdictional Obstacles That Preclude This Court's Review

As petitioners have explained (Pet. 21-25), 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 (and, in the case of Judicial Watch, all) of their briefs to that mistaken notion.

The fundamental error in respondents' arguments and in the court of appeals' reasoning is 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 of FACA that would apply if a court ever determined that the National Energy Policy Development Group violated the statute. Congress enacted a statutory exception for advisory groups consisting only of government officials and employees, which ameliorates the separation-of-powers difficulties posed by FACA. 5 U.S.C. App. 2, § 3(2). Nevertheless, under the decisions below, effectively the same remedies imposed upon a final adjudication of a FACA 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. Far from rendering separation-of-powers problems premature, the imposition of such problematic disclosure obligations based on mere allegations only exacerbates them.

Paradoxically, the Sierra Club argues, for the first time, that the court of appeals lacked jurisdiction because petitioners' separation-of-powers claims were not only premature, but stale. According to the Sierra Club, because petitioners' separation-of-powers arguments throughout this litigation have been essentially the same—namely, that in the circumstances of this case, the legislative and judicial powers 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 and other senior presidential advisors—petitioners were required to seek appellate review of the district court's denial of their motion to dismiss, rather than waiting

to challenge subsequent discovery orders on related constitutional grounds.

That contention is meritless. Petitioners' argument 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 discovery orders requiring even more disclosure than the statute itself based on a mere allegation, as opposed to an adjudication, of unauthorized de facto members violates the separation of powers, *a fortiori*. The district court's unprecedented discovery orders violate the Constitution's separation of powers, without regard to whether it should have granted petitioners' motion to dismiss. And it was those discovery orders—not the denial of the motion to dismiss—that made immediate mandamus and appellate review by the court of appeals imperative. Indeed, petitioners contended below, after denial of the motion to dismiss, that the district court could resolve this case on the merits based on the available administrative record, without any discovery. See Pet. 18-20.

But while meritless, the Sierra Club's misplaced staleness argument does serve to demonstrate the folly of respondents' prematurity arguments. For example, it 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.*, Sierra Club Br. in Opp. 11 (acknowledging that petitioners have consistently argued that they "have a constitutional right not to submit to any discovery in cases of this kind, presumably on some kind of immunity theory"). The court of appeals made a similar acknowledgment, but failed to recognize its jurisdictional implications. See Pet. 23 n.7.

In this case, federal agencies have produced tens of thousands of pages of materials in response to respondents' discovery requests. Petitioners, however, 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 Opinions 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.

For these reasons, the court of appeals' illogical jurisdictional holdings erect a significant obstacle to vindicating the proper functioning of the separation of powers in all cases where—as here, as well as in *Public Citizen*, see 491 U.S. at 466-467, 486-489—the Executive's claims are broader than and antecedent to assertions of privilege over individual documents. 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."). Accordingly, rather than providing a reason to deny the petition for certiorari in this case, the court of appeals' jurisdictional holdings, which threaten to shield separation-of-powers violations from meaningful review, provide an additional ground for certiorari.

The Sierra Club's staleness argument also makes clear that the questions presented in the petition for certiorari were fully raised below. See Sierra Club Br. in Opp. 11 (petitioners' discovery objections in district court "were identical to the ones that they had previously raised—no discovery was proper and the burden of even having to respond with

specific claims of privilege would violate principles of separation of powers"); *ibid.* ("the basis of the Government's claims never changed—no discovery is permitted in this case"). As Judge Randolph observed in his dissenting opinion, "the federal officers have repeatedly argued before the district court and this court that the discovery, as permitted by *AAPS*, violates the separation of powers. * * * The problem here is not that the petitioners failed to make the arguments. The problem is that the majority failed to answer them." Pet. App. 42a n.5.

In addition, the Sierra Club argues that the court of appeals lacked jurisdiction under *United States* v. *Nixon*, 418 U.S. 683 (1974), because contempt was not necessarily imminent and the district court may have imposed sanctions other than contempt if the Vice President had disobeyed its discovery orders. The rationale in *Nixon*, however, did not turn on the particular sanction of contempt, but on 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 that doing so "would present an unnecessary occasion for constitutional confrontation between two branches of the Government." 418 U.S. at 691-692. That rationale is equally applicable regardless of the sanction the district court might choose to impose. Moreover, absent mandamus or an immediate 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*.

Finally, 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 is not immune to civil litigation stemming from actions or events that occurred before the President began his term in office. Sierra Club Br. in Opp. 13; Judicial Watch Br. in Opp. 8. But arguing that a case like this follows, *a fortiori*, from *Jones* turns *Jones* on its head. *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 here, 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.

Not only is respondents' effort to rely on *Jones* to defeat certiorari unavailing, but *Jones* squarely supports exercising jurisdiction over this petition. In *Jones*, despite the Court's lopsided rejection of the immunity theory advanced and the interlocutory posture of the case, the Court underscored the

importance of its review of the question. While the Court recognized "the importance of avoiding the premature adjudication of constitutional questions," it reaffirmed its appraisal of the importance of the issue by noting: "The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration." 520 U.S. at 689-690.

Two critical principles prevent every cabinet meeting, indeed every government meeting, from becoming the basis for a potential FACA suit with concomitant distracting discovery: (1) FACA's express exemption of groups consisting only of government officials, and (2) the presumption of administrative regularity. The decisions below effectively eliminate both of those safeguards and in the process push FACA over the constitutional edge. See Pet. App. 31a (Randolph, J., dissenting). The distraction caused by the discovery orders that will become an inevitable feature of the scheme created by the decisions below will provide ample incentives for some to file FACA lawsuits, regardless of their merits. Because the remedy for a proven FACA violation is not materially different from a discovery order in this context, the outcome of such suits will become largely irrelevant, and the discovery ordered will be effectively immune from appellate review. It is difficult to overstate the potential to distract the President and his senior advisors or otherwise to interfere with Executive Branch decisionmaking that could result from such a wholesale reworking of FACA.

* * * * *

For the foregoing reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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