

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

NAACP LEGAL DEFENSE &  
EDUCATIONAL FUND, INC.,

Plaintiff,

v.

WILLIAM P. BARR, in his official capacity  
as Attorney General of the United States,

UNITED STATES DEPARTMENT OF  
JUSTICE, an agency of the United States,

PRESIDENTIAL COMMISSION ON LAW  
ENFORCEMENT AND THE  
ADMINISTRATION OF JUSTICE, an  
advisory committee established and utilized  
by Attorney General William Barr,

PHIL KEITH, in his official capacity as  
Chair of the Presidential Commission on Law  
Enforcement and the Administration of  
Justice, and

KATHARINE SULLIVAN, in her official  
capacity as Vice Chair of the Presidential  
Commission on Law Enforcement and the  
Administration of Justice,

Defendants.

Civil Action No. 20-1132 (JDB)

**PLAINTIFF'S SUR-REPLY TO SECTION III OF DEFENDANTS' REPLY IN  
SUPPORT OF DEFENDANTS' RENEWED PARTIAL MOTION TO DISMISS**

## INTRODUCTION

In Section III of their Reply in Support of Defendants’ Renewed Partial Motion To Dismiss, ECF No. 62, at 15–16 (“Reply”), Defendants raise a new argument in their attempt to avoid discovery concerning Plaintiff NAACP Legal Defense and Educational Fund, Inc.’s (“LDF’s”) claim under Section 5(b)(3) of FACA. This argument is without merit. Defendants argue that LDF’s inappropriate-influence claim is available only against the Attorney General and the Department of Justice (“DOJ”), limiting this Court’s review of the claim to the Administrative Procedure Act (“APA”). But Defendants are incorrect. LDF’s claim is not raised only against agency actors covered by the APA. Instead, it is also properly raised under the Mandamus Act against Chair Phil Keith, Vice Chair Katharine Sullivan, and the Presidential Commission on Law Enforcement and the Administration of Justice (“Commission”) itself. Moreover, even with respect to LDF’s APA claim, Defendants mistake the law in arguing that the Court’s review should be confined to the “Commission’s establishing documents,” which Defendants inaccurately describe as constituting an “administrative record.” Reply at 16. The establishing documents are merely the result of an agency decision-making process for which no administrative record has been produced. The relevant administrative record here is the record of the decision-making process that culminated in Defendants’ violation of Section 5(b)(3), which Defendants have not made available to the Court or to LDF. Thus, Defendants’ argument that the Court stay discovery and confine its review to the Commission’s establishing documents should be rejected.

## ARGUMENT

**I. LDF’s Section 5(b)(3) Claim Is Properly Raised Not Only Against the Attorney General and DOJ Under the APA, But Also Against Chair Keith, Vice Chair Sullivan, and the Commission Itself Under the Mandamus Act.**

As this Court has recognized, “the APA is an appropriate vehicle for LDF’s claims against [the] Attorney General [] and the DOJ,” including LDF’s Section 5(b)(3) claim for inappropriate

influence. Memorandum Opinion, ECF No. 45, at 42 (“Oct. 1 Op.”). However, LDF’s Section 5(b)(3) claim is not raised only against these two agency defendants. It is also properly raised against the Commission itself, Commission Chair Phil Keith, and Commission Vice Chair Katharine Sullivan. For LDF’s Section 5(b)(3) claim against these three Defendants, mandamus, not APA review, is the appropriate vehicle. *See id.* With respect to LDF’s APA claim, Defendants’ argument that discovery should be limited to the administrative record is legally incorrect, as discussed below. With respect to LDF’s mandamus claim, Defendants’ argument is irrelevant.

Defendants are wrong to suggest that the Commission and its chairs have no duty under FACA to prevent inappropriate influence from contaminating the Commission’s deliberations. The statute bars not only inappropriate influence exerted by the Commission’s “appointing authority,” but also inappropriate influence exerted by “any special interest,” to ensure that an advisory committee’s advice and recommendations are the result of its independent judgment. 5 U.S.C. app. § 5(b)(3). Further, FACA imposes the duty to prevent inappropriate influence not only on the President and agency heads, but also on “other Federal officials . . .” *Id.* § 5(c). Here, those “other Federal officials” include Chair Keith and Vice Chair Sullivan, who ran the Commission’s day-to-day operations, including the solicitation of input by special interests. Moreover, the Commission itself, as Defendants acknowledge, “did not comply with the requirements of Section 5(b)(3) to assure that [its] membership was without undue influence.” Reply at 3. Accordingly, LDF can pursue its claim against these Defendants under the Mandamus Act and pursue relevant discovery into the special interests that inappropriately influenced the Commission.

## **II. Under the APA, Discovery Is Appropriate for LDF’s Section 5(b)(3) Claim Against the Attorney General and the Department of Justice.**

Furthermore, contrary to Defendants’ argument, the APA does not limit discovery into LDF’s Section 5(b)(3) claim against the Attorney General and the DOJ to only the Commission’s

establishing documents—which are not a complete or adequate administrative record. Discovery beyond the administrative record is appropriate in those APA cases, as here, “when the [administrative] record is so bare that it prevents effective judicial review” of the challenged agency action. *Menkes v. U.S. Dep’t of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011) (quoting *Baptist Mem’l Hosp.-Golden Triangle v. Sebelius*, 556 F.3d 226, 230 (D.C. Cir. 2009)).

Under the APA, reviewing courts are empowered to invalidate agency actions that are “arbitrary, capricious, . . . or otherwise not in accordance with law;” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;” or, inter alia, “without observance of procedure required by law[.]” 5 U.S.C. § 706. Importantly, when the APA serves as a vehicle for judicial review of claims arising from FACA violations, the agency action to be reviewed is the agency’s failure to comply with FACA’s relevant requirements, including the underlying decision-making process that culminated in that failure. *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 736 F. Supp. 2d 24, 30 (D.D.C. 2010).

A court’s review under the APA can be limited to the administrative record showing the basis for the agency’s decision-making process in some cases. *See, e.g., Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). However, some APA claims require discovery beyond the administrative record. One scenario that necessitates discovery arises “when the [administrative] record is so bare that it prevents effective judicial review” of the challenged agency action. *Menkes*, 637 F.3d at 339. This case presents precisely that scenario. Here, LDF’s APA claim requires review of the record of the decision-making process that culminated in Defendants’ failure to comply with FACA’s inappropriate-influence prohibition, including Defendants’ decision not to implement appropriate procedural safeguards. Defendants point solely to the “Commission’s establishing documents” as the administrative record, Reply at

16, but those documents shed no light—they are merely the final agency action taken as a result of a decision-making process, not the record of that decision-making process.

Despite arguing that the Court can rely on the administrative record, to date, Defendants have failed to file any administrative record from the agency process underlying the agency actors' decision concerning Section 5(b)(3). Nor have they filed a list detailing what such an administrative record would contain in this case, as required by Local Rule 7(n)(1). Thus, in the absence of an administrative record elucidating the decision-making process that led to the agency Defendants' violation of FACA Section 5(b)(3), LDF is entitled to discovery not only under its mandamus claim, but also under its APA claim against the Attorney General and the DOJ.

### **CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Renewed Partial Motion to Dismiss.

Dated: January 22, 2021

Respectfully submitted,

/s/ Steven Lance

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