Union of Concerned Scientists v. Pruitt: Can EPA Purge Its Academic Science Advisors?

by Andrew Taylor

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In January 2018, the Union of Concerned Scientists and Dr. Elizabeth Anne Sheppard, a University of Washington science professor who specializes in air pollution, filed a strongly worded complaint against Administrator Scott Pruitt and the U.S. Environmental Protection Agency (EPA).[1] They filed in response to an Agency directive that Pruitt issued on October 31, 2017.[2] The directive consists of only one page, cites no specific law, and lays out four brief principles and procedures intended to enhance the "independence, diversity, and breadth of participation on EPA federal advisory committees."[3] One of these principles—that of "Strengthen[ing] Member Independence"—contains a novel conflict-of-interest policy.[4] This policy entails "a requirement that no member of an EPA federal advisory committee be currently in receipt of EPA grants, either as principal investigator or co-investigator, or in a position that otherwise would reap substantial direct benefit from an EPA grant."[5] The directive excludes EPA grant recipients affiliated with state, tribal, and local government agencies.[6]

A five-page memorandum, addressed to various EPA staff members, accompanied the directive.[7] The memo further develops a number of points mentioned in the cursory directive, including the importance of cooperative federalism in EPA administration, fair balancing of federal advisory committees, and increasing the participation of state, local, and tribal agencies, as well as geographic diversity and the promotion of "fresh perspectives."[8] The memo cites a bit of law, most notably provisions of the U.S. Code and *Code of Federal Regulations* pertaining to balanced membership of advisory committees.[9] The memo, however, does not cite any law in laying out its "Strengthen Member Independence" section, which sets out the conflict policy.[10] Overall, the memo does not develop any substantive legal basis for the policy, instead citing snippets of code and emphasizing words such as "geographic" and "diverse opinions."[11]

The petitioners in *Union of Concerned Scientists v. Pruitt* claim Pruitt's conflict-of-interest policy violates the Administrative Procedure Act (APA)[12] or Federal Advisory Committee Act (FACA)[13] in four ways: it allegedly is arbitrary and capricious, in violation of 5 U.S.C. §706(2)(A); exceeds statutory jurisdiction, authority, or limitations, in violation of 5 U.S.C. §706(2)(C); would create unbalanced advisory committees, in violation of 5 U.S.C. Appendix 2 §5(b)(2); and would be inappropriately influenced by Administrator Pruitt or special interests, in violation of 5 U.S.C. Appendix 2 §5(b)(3).[14] They seek declaratory relief with regard to the conflict-of-interest policy and injunctive relief with regard to the actual removal from advisory committees of recipients of EPA grants.[15]

This Comment analyzes *Union of Concerned Scientists* by providing relevant background and then examining the four specific claims put forth in the suit. Ultimately, based upon this analysis, it concludes that the petitioners' claims have merit. In fact, I argue that Pruitt's conflict-of-interest policy is arbitrary and capricious because it is utterly devoid of sufficient logic. Therefore, the conflict-of-

1. *See* Complaint for Declaratory and Injunctive Relief, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
2. Directive From E. Scott Pruitt, Administrator, U.S. EPA, Strengthening and Improving Membership on EPA Federal Advisory Councils (Oct. 31, 2017) [hereinafter Directive], https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf.
3. *Id.*
4. *See id.*
5. *Id.*
6. *Id.*
7. Memorandum From E. Scott Pruitt, Administrator, U.S. EPA, to Assistant Administrators, Regional Administrators, and Office of General Counsel, U.S. EPA (Oct. 31, 2017) (Strengthening and Improving Membership on EPA Federal Advisory Councils) [hereinafter Memo], https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_memo-10.30.2017.pdf.
8. *Id.*
9. *See id.*
10. *Id.* at 3.
11. *Id.* at 4.
12. 5 U.S.C. §§500-559.
13. 5 U.S.C. app. 2 §§1-16.
14. Complaint for Declaratory and Injunctive Relief at 27-32, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
15. *Id.* at 32-33.

interest policy contained in the directive should be vacated, declared arbitrary and capricious, remanded to the Agency for coherent explanation, and any Agency actions based upon it enjoined.

It bears mention that shortly before *Union of Concerned Scientists* was filed, a group of medical organizations and physicians filed a very similar suit against Pruitt in the District Court for the District of Columbia[16]; likewise, the Natural Resources Defense Council sued Pruitt in the Southern District of New York the day after the *Union of Concerned Scientists* complaint was filed.[17] In both *Physicians for Social Responsibility v. Pruitt* and *Natural Resources Defense Council, Inc. v. Pruitt*, the petitioners challenge the directive as arbitrary and capricious.[18] The claims in these sister cases, though articulated differently, are largely the same as those in *Union of Concerned Scientists*.[19] Like the *Union of Concerned Scientists* suit, *Physicians for Social Responsibility* and *Natural Resources Defense Council* are currently in the earlier stages of litigation—summonses, affidavits, motions to compel, and so forth have been filed. While this Comment focuses on *Union of Concerned Scientists*, it could just as easily deal with the sister cases—there is no overriding reason for selecting the one case, except perhaps that its complaint is more compelling.

I. Background

The APA provides for judicial review of "agency action,"[20] which is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[21] Only final agency actions are subject to review—"[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."[22] The U.S. Supreme Court has defined the hallmarks of final agency action: they are, in essence, *agency determination* of *rights or obligations* from which *legal consequences flow*.[23] The APA also requires that petitioners seeking review of a final agency action have no other adequate remedy in a court.[24]

The APA defines the scope of judicial review of agency actions and compels a court to find unlawful and set aside agency actions, findings, or conclusions found to be arbitrary and capricious.[25] The arbitrary-and-capricious standard is a narrow standard of review whereby an agency must merely "examine the relevant data and articulate a satisfactory explanation for its action."[26] Entailed in this articulation must be a "rational connection between the facts found and the choice made."[27] Because of this highly deferential standard of review, an agency need not necessarily conduct prior fact-finding with regard to issuing a new policy, and need not even proffer reasons why it would be better than the old policy.[28] However, an agency must articulate *some* good reasons for the policy change[29] and these reasons must be "supported by substantial evidence."[30]

For example, in *Judulang v. Holder*, an immigrant U.S. resident challenged a Board of Immigration Appeals (BIA) deportation policy as arbitrary and capricious.[31] The BIA's policy consisted of a "comparable-grounds" rule whereby an immigrant who had committed a crime could only apply for relief from deportation if his or her crime had a "substantial equivalent" in the statutory list of grounds for exclusion (from admittance to the country).[32] Thus, for example, an alien convicted of sexual abuse of a child could not seek relief from deportation—not because of the seriousness of the crime, however, but because it did not have a sufficient analogue (falling instead under the broad heading of moral turpitude) in the statutory grounds for exclusion.[33] While the BIA advanced reasons for the policy that the Court recognized may have been legitimate, the Court nonetheless held the policy to be arbitrary and capricious because it lacked any rational connection to a long-term resident immigrant's fitness *to remain* in the country.[34]

Likewise, in *Encino Motorcars, LLC v. Navarro*, the Court found a change in U.S. Department of Labor (DOL) policy to be arbitrary and capricious.[35] The policy regarded DOL's interpretation of the Fair Labor Standards Act, specifically with regard to the meaning of automobile "salesman."[36] In 2011, DOL announced its decision to abandon its decades-old policy of treating car service providers as exempt for the purposes of a statutory provision.[37] The Court found the new policy to be arbitrary and capricious because DOL "offered barely any explanation"

16. Complaint for Declaratory, Injunctive Relief, and Vacatur, Physicians for Soc. Responsibility v. Pruitt, No. 1:17-CV-02742 (D.D.C. filed Dec. 21, 2017).
17. Complaint for Declaratory and Injunctive Relief, Natural Res. Def. Council, Inc. v. Pruitt, No. 18-CV-00613 (S.D.N.Y. filed Jan. 24, 2018).
18. *Id.* at 5; Complaint for Declaratory, Injunctive Relief, and Vacatur at 2, Physicians for Soc. Responsibility v. Pruitt, No. 1:17-CV-02742 (D.D.C. filed Dec. 21, 2017).
19. *See* Complaint for Declaratory and Injunctive Relief at 25-30, Natural Res. Def. Council, Inc. v. Pruitt, No. 18-CV-00613 (S.D.N.Y. filed Jan. 24, 2018); Complaint for Declaratory and Injunctive Relief at 27-32, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018); Complaint for Declaratory, Injunctive Relief, and Vacatur at 26-33, Physicians for Soc. Responsibility v. Pruitt, No. 1:17-CV-02742 (D.D.C. filed Dec. 21, 2017).
20. 5 U.S.C. §702.
21. *Id.* §551(13).
22. *Id.* §704.
23. *See* Sackett v. Environmental Prot. Agency, 566 U.S. 120, 126, 42 ELR 20064 (2012).
24. 5 U.S.C. §704.
25. *Id.* §706(2)(A).
26. Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983).
27. *Id.* (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).
28. Federal Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).
29. *Id.*
30. Safe Extensions, Inc. v. Federal Aviation Admin., 509 F.3d 593, 604 (D.C. Cir. 2007).
31. 565 U.S. 42 (2011).
32. *Id.* at 49-50.
33. *Id.* at 50.
34. *Id.* at 55.
35. 136 S. Ct. 2117, 2126 (2016).
36. *Id.* at 2122.
37. *Id.* at 2123.

for it.[38] While DOL maintained that its new approach was reasonable, statutorily permissible, and based on careful consideration of comments, analyses, and arguments, the Court found "the agency in fact gave almost no reasons at all" for its policy shift.[39]

In contrast, any number of agency actions, findings, or conclusions have survived the narrow and deferential arbitrary-and-capricious standard of review. For example, in *National Association of Home Builders v. Defenders of Wildlife*, public interest groups challenged EPA's transfer of national pollution discharge elimination system (NPDES) permitting power to the state of Arizona.[40] The U.S. Court of Appeals for the Ninth Circuit found that EPA acted arbitrarily and capriciously in transferring NPDES permitting to Arizona because it had relied on contradictory positions regarding its responsibilities under the Endangered Species Act (ESA).[41] The Supreme Court, however, held that EPA's action was not arbitrary and capricious because the Agency's contradictory positions took place before final agency action.[42]

Likewise, in *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, the Court held that EPA did not act arbitrarily and capriciously in determining that the Alaska Department of Environmental Conservation's (ADEC's) determination of a best available control technology (BACT) was not reasonable under the Clean Air Act (CAA).[43] In that case, EPA determined that the ADEC's determination of a BACT, which relied on economic considerations (i.e., the more stringent technology purportedly cost too much), was not reasonable because the ADEC had found the more stringent technology economically feasible and then, later, infeasible, with no factual support for the economic infeasibility.[44] Because EPA had statutory authority over state-level BACT decisions, and because EPA had good reason to find that the ADEC's economic infeasibility determination lacked evidentiary support, the Court held that EPA's stop-construction order was not arbitrary and capricious.[45]

Thus, with regard to the arbitrary-and-capricious standard overall, legal precedent supports the notion that agencies receive a high degree of deference—their actions need not be the ostensibly best ones, orders need not be perfectly clear, findings need not be supported by insurmountable evidence, and so forth. But when a final agency action is random or lacks reasonable justification, then it should be found arbitrary and capricious.[46] In addition, while a change in agency policy does not automatically command a heightened inquiry relative to the imposition of an entirely new policy,[47] a more detailed explanation is appropriate when an existing policy has created reliance interests or when factual findings supporting a new policy contradict those underlying an old policy.[48]

At the time *Union of Concerned Scientists* was filed, there was no sense of the administrative record on which the Administrator based his decision. On April 5, 2018, the petitioners moved to compel the administrative record.[49] On May 18, 2018, the judged denied the motion to compel without prejudice, determining that the complaint should first be reviewed for justiciability and, if it were to survive that review, then the issue of compelling the record could be taken up again with regard to APA compliance.[50] However, the record has been compelled in both of the sister cases.[51]

Thus, there is now an administrative record by which to begin weighing Pruitt's directive.[52] Generally, the record is unsurprising given Pruitt's pedigree: it overwhelmingly entails efforts by Republican politicians, particularly those from states with strong fossil-fuel lobbies, to regulate and influence the CASAC.[53] The record also includes various documents generally pertaining to EPA conflict policy, as well as efforts by industry-backed scientists to find their way onto the CASAC.[54] In aggregate, it does not engage on a *scientific* level (e.g., by presenting actual studies and numbers that purport to depict bias or bad science by the CASAC or other FACs).[55] Rather, it engages in a sort of tautology relative to the directive: the CASAC is conflicted largely because a number of politicians have determined that it is conflicted.[56]

The Supreme Court's *Chenery* doctrine holds that discretionary agency action will only be upheld on grounds articulated by the agency in the record.[57] The doctrine generally prevents courts from substituting their own judgment for that of the agency,[58] while also discouraging agency actions from occurring outside public scrutiny. There was no public notice-and-comment period with regard to the directive.[59] However, we now have a record (via the sister cases)

38. *Id.* at 2126.
39. *Id.* at 2127.
40. 551 U.S. 644, 37 ELR 20153 (2007).
41. *Id.* at 655; 16 U.S.C. §§1531-1544; ELR Stat. ESA §§2-18.
42. *Id.* at 659.
43. 540 U.S. 461, 502, 34 ELR 20012 (2004); 42 U.S.C. §§7401-7671q; ELR Stat. CAA §§101-618.
44. *Id.* at 498.
45. *Id.* at 502.
46. *See*, *e.g.*, Judulang v. Holder, 565 U.S. 42, 55 (2011).
47. Federal Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009).
48. *Id.* at 515.
49. Motion to Compel the Administrative Record and Memorandum of Law in Support, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Apr. 5, 2018) (ECF No. 19).
50. Order on Motion to Compel, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed May 18, 2018) (ECF No. 29).
51. Order on Motion to Compel, Physicians for Soc. Responsibility v. Pruitt, No. 1:17-CV-02742 (D.D.C. filed May 8, 2018); Scheduling Order, Natural Res. Def. Council, Inc. v. Pruitt, No. 18-CV-00613 (S.D.N.Y. filed Apr. 25, 2018) (ECF No. 25).
52. *See* Sean Reilly, *GOP Lawmakers, Industry Had EPA's Ear on Advisory Panels*, E&E News, May 24, 2018, https://www.eenews.net/stories/1060082657 (see "documents" link within to access the record as submitted to the court).
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.*
57. *See* Securities & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 93-95 (1943).
58. *See* Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 51, 13 ELR 20672 (1983).
59. It seems that the directive's lack of publication in the *Federal Register* was probably appropriate as an exemption under 5 U.S.C. §553(a)(2) ("a matter relating to agency management or personnel").

that facially aligns with the directive and the memo, which the courts can examine consistent with *Chenery*.

A. FACA

With regard to the type of committees that are the subject of the case at hand, the FACA establishes various guidelines and responsibilities for the formation of federal advisory committees (FACs).[60] The U.S. Congress passed the FACA in an effort to streamline and regulate the many FACs advising the federal government.[61] Further, Congress delegated "all matters relating to advisory committees" to the General Services Administration (GSA).[62] Generally, the FACA tasks GSA with rationalizing FACs by reviewing them to confirm that they are serving their purposes and inquiring into whether committees should be merged or abolished.[63]

Importantly for the instant matter, the FACA sets forth the requirement that FACs be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."[64] The FACA does not further define what it means to be "fairly balanced."[65] In its implementing regulations, GSA simply reiterated Congress' language regarding balancing relative to points of view and the functions to be performed by the committee.[66] GSA's Committee Management Secretariat, the specific body tasked with regulating FACs, also released a brief "best practices guidance document," titled *Federal Advisory Committee Membership Balance Plan*, that provides direction with regard to balancing guidance.[67] For example, the plan directs an agency to consider the "types of specific perspectives required [of an FAC], such as those of consumers, technical experts, the public at-large, academia, business, or other sectors" and the "need to obtain divergent points of view on the issues."[68]

Multiple precedent-setting cases have dealt with issues surrounding this requirement of fair balancing. In *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, for example, a public interest group and individual recipients of federal food assistance sued an executive committee because it was composed almost wholly of corporate executives.[69] The petitioners in *National Anti-Hunger Coalition* claimed that the makeup of the executive committee violated the FACA's balancing requirement because of the disproportionate constitution of the committee.[70] The D.C. Circuit held that the committee did not violate FACA's balancing requirement because the committee's purpose was narrow and explicit: it was to apply "private sector expertise to attain cost-effective management in the federal government."[71] Thus, even though the committee's makeup was entirely imbalanced superficially, it complied with the FACA because its makeup had to be considered relative to its purpose.[72]

In *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, a public interest organization claimed that the U.S. Department of Agriculture had violated FACA's balancing requirement by forming an FAC concerned with food safety that was significantly light on consumer advocates.[73] Specifically, by the time the case reached the D.C. Circuit, only two of the committee's 24 members were considered consumer advocates.[74] In a split opinion, the D.C. Circuit affirmed the holding of the district court, which dismissed the case after a merits-based preliminary injunction hearing.[75]

Two out of the three circuit judges held that the petitioners had standing to sue, but only one concluded that the district court had correctly decided the case; therefore, a majority of the panel held that their claims were not meritorious.[76] The effects of the D.C. Circuit's split-panel decision in *Public Citizen* included the holding that committee-balancing claims under the FACA are justiciable[77] and an affirmation of the holding in *Anti-Hunger Coalition*, whereby an FAC that is facially unbalanced (overrepresentation of industry in both cases) need not necessarily violate FACA because its constitution must be weighed relative to the functions to be performed and the discretion of the Administrator.[78]

In *Cargill, Inc. v. United States*, a coalition of corporations and groups with mining interests claimed that a National Institute for Occupational Safety and Health (NIOSH) advisory committee was not fairly balanced with regard to the function of peer review.[79] Specifically, the NIOSH advisory committee peer-reviewed a protocol to study the health effects of diesel exhaust on underground miners, with the mining interests concerned that an unfairly balanced opinion would lead to unduly strict regulations.[80] The U.S. Court of Appeals for the Fifth Circuit, weighing the balance of the FAC against the purpose it was serving, held that the FAC was fairly balanced because it was staffed with scientists who were experts in germane fields (epidemiology, toxicology, etc.).[81] The industry group specifically attacked the FAC's lack of "point-of-view balance," claiming that such balance required representatives from the mining industry; the Fifth Circuit held, however, that

60. *See* FACA, 5 U.S.C. app. 2 §1-16.
61. *Id.* §2.
62. *Id.* §7(a).
63. *See id.* §7(b).
64. *Id.* §5(b)(2).
65. *See id.* §§3, 5(b)(2).
66. 41 C.F.R. §102-3.30(c) (2017).
67. GSA Committee Management Secretariat, Federal Advisory Committee Membership Balance Plan (2011), https://www.gsa.gov/cdnstatic/MembershipBalancePlanGuidance-November_2011.pdf.
68. *Id.* at 2.
69. 711 F.2d 1071, 1072 (D.C. Cir. 1983).
70. *Id.*
71. *Id.* at 1074.
72. *See id.*
73. 886 F.2d 419, 422 (D.C. Cir. 1989).
74. *See id.* at 420-22.
75. *Id.* at 421.
76. *See id.* at 419-20.
77. *See id.* at 419-20, 423.
78. *See id.* at 423-24.
79. 173 F.3d 323, 336 (5th Cir. 1999).
80. *Id.* at 328.
81. *Id.* at 337.

the task of providing scientific peer review was "politically neutral and technocratic" with "no need for representatives from the management of the subject mines."[82]

In 2016, the Energy and Environment Legal Institute (E&E Legal)—a nonprofit organization "dedicated to the advancement of rational, free-market solutions to America's land, energy, and environmental challenges"—filed suit against EPA, claiming that the composition of its Clean Air Scientific Advisory Committee Particulate Matter Review Panel (CASAC) violated the FACA by being non-independent[83]; interestingly, Dr. Elizabeth Sheppard, a petitioner in *Union of Concerned Scientists*, became a member of that panel.[84] The complaint asserted that the panel was not independent because a specific member—an epidemiologist who was critical of EPA's particulate matter regulations—was not nominated to it.[85]

The E&E Legal complaint made a point of noting the large amount of grant money received by panel members, including Dr. Sheppard, who led the entire panel with more than $50 million in EPA grants received.[86] The complaint quoted the Texas Commission on Environmental Quality: "[the membership of the FAC] indicates that most members are affiliated with academic institutions and receive EPA funding. This information raises significant concerns regarding conflict of interest within the CASAC. . . ."[87] Thus, the suit appeared as a precursor to the Pruitt policy and subsequent *Union of Concerned Scientists* suit because it raised the issue Pruitt's policy sought to address, with a particular FAC—the CASAC—apparently in mind because of its input on national air quality standards and high-dollar grant membership. EPA moved to dismiss the complaint, with the Barack Obama-era U.S. Department of Justice filing a memorandum in support of the motion to dismiss.[88] Subsequently, the plaintiff voluntarily dismissed the case.[89]

With regard to federal conflict-of-interest policies, statutory authority provides for uniform regulation of federal employees via the Office of Government Ethics (OGE).[90] Executive Order No. 12731, Principles of Ethical Conduct for Government Officers and Employees, buttresses OGE's authority in this regard.[91] In the U.S. Code, Congress specifically exempted FAC members—who are typically "special government employees"—from the general conflict-of-interest policy for federal employees, provided the appointing official certifies in writing that, following the member's financial disclosure, the need for their services outweighs any potential conflict arising from a financial interest.[92] OGE specifically addresses FAC members in its regulations:

> A special [g]overnment employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act . . . may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment . . . provided that the matter will not have a special or distinct effect on the employee other than as part of a class.[93]

Indeed, in the same regulations, OGE provides multiple hypothetical examples concerning academics, FACs, and grants (e.g., a FAC-member professor may help formulate a grant proposal for another researcher in the same state system); nowhere in these regulations does OGE state or suggest that an agency grant recipient cannot serve on an FAC at the agency awarding the grant.[94] All this is in keeping with OGE's general proscription of government employees from participating "personally and substantially" in "particular" matters where the particular matter will have a "direct and predictable" effect on the employee's financial interest.[95] A "particular" matter "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons."[96]

For example, the Internal Revenue Service changing its regulations to alter the calculation of depreciation is not a particular matter, while consideration of new safety standards for trucks on interstate highways is a particular matter.[97] Because both of these regulations are policy options that would presumably affect a large and diverse group of persons, the difference between them with regard to particularity would seem to be the directness and predictability of their effects. Unsurprisingly, OGE's hypothetical examples highlighting the meaning of particular matters with a direct effect on an employee's financial interest concern things like stock and property ownership, not agency grants.[98]

B. A Philosophical Battleground

While *Union of Concerned Scientists* will obviously hinge on questions of fact and law, it is difficult to give a satisfactory background of the lawsuit without placing it in the context of broader U.S. social phenomena. Generally, the United States has witnessed anti-science movements from both the political left and right.[99] While anti-science

82. *Id.*
83. Verified Complaint for Declaratory and Injunctive Relief at ¶¶ 2-3, 7, Energy & Envtl. Legal Inst., No. 1:16-CV-00915 (D.D.C. filed May 13, 2016).
84. *Id.* ¶ 17.
85. *Id.* ¶¶ 9, 16.
86. *Id.* ¶¶ 18-23.
87. *Id.* ¶ 25 (quoting Texas Commission on Environmental Quality in Press Release, House Committee on Science, Space, and Technology, ICYMI: TCEQ Criticism of EPA Air Pollution Science (Sept. 7, 2012), https://science.house.gov/news/press-releases/icymi-tceq-criticism-epa-air-pollution-science).
88. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, Energy & Envtl. Legal Inst., No. 1:16-CV-00915 (D.D.C. filed July 15, 2016).
89. Notice of Voluntary Dismissal Without Prejudice, Energy & Envtl. Legal Inst., No. 1:16-CV-00915 (D.D.C. filed July 29, 2016).
90. 18 U.S.C. §208(d)(2).
91. Exec. Order No. 12731, §201(a), (c), 55 Fed. Reg. 42547 (Oct. 17, 1990).
92. 18 U.S.C. §208(b)(3).
93. 5 C.F.R. §2640.203(g) (2017).
94. *See id.* §2640.203(b)-(c).
95. *Id.* §2635.402(a).
96. *Id.* §2635.402(b)(3).
97. *Id.*
98. *See*, *e.g.*, *id.* §2635.402(b)(1).
99. *See*, *e.g.*, Shawn Lawrence Otto, *Antiscience Beliefs Jeopardize U.S. Democracy*, Sci. Am., Nov. 1, 2012 ("Today's denial of inconvenient science comes

momentum has come from both political sides, it is fairly evident that the right has exhibited far more anti-science fervor (e.g., phenomena like climate change denialism, hostility to the teaching of evolution, and religious homeschooling are far more endemic to the right).[100] Combined with this general anti-science stance within the political right is often a rigid belief in "free markets," as well as climate change skepticism.[101] Administrator Pruitt, a native Oklahoman with strong ties to the fossil fuel industry,[102] possessor of an obvious disdain for climate science,[103] and evangelical Christian,[104] is at or near the apex of this particularly American mélange of religion, right-wing politics, climate denialism, and fossil fuel lobbying.

Further examining these assertions and the complex marriage of these phenomena is beyond the scope of this Comment, but suffice it to say that the *Union of Concerned Scientists* lawsuit is undoubtedly part of a broader philosophical-cultural war. For example, the complaint avers in its first paragraph that "[s]cience conducted by independent, unbiased scientists plays a critical role in a functioning democracy . . . [a]nti-democratic governments, which thrive on obfuscating truth, seek to delegitimize and suppress scientists and other authoritative voices. . . ."[105] It states that the directive is "an attack on science itself."[106] The complaint also highlights Pruitt's unusual biblical justification for the new policy:

> Joshua says to the people of Israel: choose this day whom you are going to serve. This is sort of like the Joshua principle—that as it relates to grants from this agency, you are going to have to choose either service on the committee to provide counsel to us in an independent fashion or chose [sic] the grant.[107]

Again, "Joshua principle" aside, Pruitt offers no reason why local, state, and tribal grant recipients would be immune from such a conflict, let alone how scientists funded by industry would be able to provide impartial advice to EPA.

II. Analysis

Before discussing the merits of the *Union of Concerned Scientists* complaint, it is necessary to show that the directive is justiciable. As the petitioners aver, the conflict-of-interest policy contained in the directive is a final agency action.[108] The Pruitt policy possesses all the essential hallmarks of a final agency action: it is an agency determination of rights or obligations from which legal consequences flow.[109] Here, this means that an Agency head has set forth a new policy that obligates FAC members who have won EPA grants to divest themselves of either committee membership or the grants, in a reversal of a long-standing policy upon which they have come to rely. With specific regard to the petitioner Dr. Sheppard, she was forced by the new policy to relinquish her role as co-investigator on a $3 million EPA grant[110]; she also turned down funding from a new EPA grant because she wanted to remain a member of the FAC.[111] Further, there is no apparent remedy available for the petitioners outside of APA litigation.[112]

Next, the petitioners appear to possess Article III standing, which requires that a plaintiff have suffered "injury-in-fact" that is actual or imminent, the harm be fairly traceable to the conduct complained of, and redressability of the injury would likely receive a favorable ruling.[113] Here, the complaint avers that Dr. Sheppard had to turn down further grant funding and choose between existing

from partisans on both ends of the political spectrum."), https://www.scientificamerican.com/article/antiscience-beliefs-jeopardize-us-democracy/.

100. *See*, *e.g.*, *id.*; Chris Mooney, The Republican Brain: The Science of Why They Deny Science—And Reality *passim* (2012); Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. Times, June 3, 2017 ("The Republican Party's fast journey from debating how to combat human-caused climate change to arguing that it does not exist is a story . . . favoring extreme positions and uncompromising rhetoric."), https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html; Dana Nuccitelli, *Can the Republican Party Solve Its Science Denial Problem?*, Guardian, Apr. 28, 2016 ("Evolution and climate science denial are predominant on the political right; there is no equivalent on the left."), https://www.theguardian.com/environment/climate-consensus-97-per-cent/2016/apr/28/can-the-republican-party-solve-its-science-denial-problem.

101. *See*, *e.g.*, Jean-Daniel Collomb, *The Ideology of Climate Change Denial in the United States*, 9 Eur. J. Am. Stud. 1, 32 (2014):

> The central contribution of human activities to the warming of our planet does not destroy the case for a market economy *per se*; it does, however, put a dent in the validity of the American Right's faith in the free market as the ultimate solution to all social, economic, and environmental problems.

available at http://journals.openedition.org/ejas/10305; Stephan Lewandowsky et al., *The Role of Conspiracist Ideation and Worldviews in Predicting Rejection of Science*, 8 PLOS ONE 1 (2013):

> Since the 1970s, Conservatives—unlike Liberals or Moderates—have become increasingly skeptical and distrustful of science. Polarization is particularly pronounced with respect to climate change: People who embrace a laissez-faire vision of the free market are less likely to accept that anthropogenic greenhouse gas emissions are warming the planet than people with an egalitarian-communitarian outlook.

available at http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0075637&type=printable.

102. *See*, *e.g.*, Ben Jervey, *Mapping EPA Nominee Scott Pruitt's Many Fossil Fuel Ties*, DeSmogBlog, Jan. 13, 2017, https://www.desmogblog.com/2017/01/13/mapping-epa-nominee-scott-pruitt-many-fossil-fuel-ties.

103. *See*, *e.g.*, John Nichols, *For Scott Pruitt's EPA, Climate-Change Denial Is Mission Critical*, Nation, Aug. 13, 2017, https://www.thenation.com/article/for-scott-pruitts-epa-climate-change-denial-is-mission-critical/.

104. *See*, *e.g.*, Niina Heikkinen, *Scott Pruitt, Christ Follower*, E&E News, July 14, 2017, https://www.eenews.net/stories/1060057367.

105. Complaint for Declaratory and Injunctive Relief at 1, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).

106. *Id.* at 4.

107. *Id.* at 14 (quoting Pruitt as quoted in Dino Grandoni, *The Energy 202: Pruitt Cites Bible in Ending Way EPA Committees Staffed*, Wash. Post, Nov. 1, 2017, https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/11/01/the-energy-202-pruitt-cites-bible-in-ending-way-epa-committees-staffed/59f8f39c30fb0468e7653f76/?utm_term=.89dbf2a3a580).

108. Complaint for Declaratory and Injunctive Relief at 27, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).

109. *See* Sackett v. Environmental Prot. Agency, 566 U.S. 120, 126, 42 ELR 20064 (2012).

110. Complaint for Declaratory and Injunctive Relief at 7, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).

111. *Id.* at 23.

112. *See* 5 U.S.C. §704.

113. *See*, *e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 22 ELR 20913 (1992).

grant funding and remaining on an FAC[114]—an arrangement upon which she had come to rely (both injuries-in-fact); this injury is fairly traceable to Pruitt's directive; and a favorable ruling—declaring the directive unlawful—would redress the injury.

With regard to the Union of Concerned Scientists, its mission is conducting scientific analysis and research in the public interest, and it has, or had, approximately 90 members who were current EPA grant recipients and 80 members serving on EPA FACs.[115] Associational Article III standing doctrine requires that at least one of the association's members would have standing in his or her own right to sue; the interest the member seeks to protect is relevant to the association's general purpose; and neither the claim asserted nor the relief requested requires the association's member to participate in the suit.[116] Here, the Union of Concerned Scientists seems to meet these standing requirements.

It also bears mention that, while the petitioners are suing with regard to the directive generally,[117] they are concerned with the conflict-of-interest policy contained therein.[118] Much of the directive comprises sound bites (e.g., "promote fresh perspectives," "[i]n the spirit of cooperative federalism," "enhance geographic diversity," etc.) that mean little without further guidance. It is not the directive generally, but the new conflict-of-interest policy at which all the claims here are directed.

A. "Arbitrary and Capricious"

The logic of Pruitt's conflict-of-interest policy is arbitrary and capricious for a simple reason: it lacks an articulation of how the grant-conflict policy serves the stated purpose of committee independence. There is no inherent conflict between receiving EPA grants and providing advice to the Agency on an FAC.[119] If anything, this situation presents the opposite of a conflict of interest—a symmetry or congruence of interest. The assertion that receiving merit-based EPA grant money (which is not awarded or influenced by FACs) to do research relevant to EPA and advising the Agency based upon that research necessarily conflict is, put simply, nonsensical. Further, it is compounded by the exemption of state, local, and tribal government agency recipients from the policy—why would academic scientists and not-for-profits be singularly prone to this purported conflict? Neither the directive nor the memo attempts to answer this question.

EPA's core mission, reiterated in the directive, is protecting human health and the environment.[120] EPA awards competitive grants—more than $4 billion annually[121]—with the winners of these grants being overwhelmingly universities (with academic scientists as investigators), state and local agencies, conservation organizations, and Native American tribes.[122] Given the nature of EPA's mission and administration, many of these grants will be for highly technical, specialized research or programs.[123] As the former chair of the FAC upon which Dr. Sheppard sat stated, "[The scientists] most qualified to provide objective and transparent scientific advice to EPA are of course the scientists who will likely be most successful at obtaining highly competitive grants."[124]

The principle purportedly served by Pruitt's conflict-of-interest policy is the strengthening of FAC member independence.[125] The directive does not define "independence," it simply posits the conflict-of-interest policy as a way to foster the independence of advisory committees.[126] The accompanying memo provides a bit more explanation with regard to "independence":

> EPA FAC members should avoid financial entanglements with EPA to the greatest extent possible. Non-governmental and non-tribal members in direct receipt of EPA grants while serving on an EPA FAC can create the appearance or reality of potential interference with their ability to independently and objectively serve as a FAC member. FAC members should be motivated by service and committed to providing informed and independent expertise and judgment . . . . Accordingly, in addition to EPA's existing policies and legal requirements preventing conflicts of interest among the membership of the Agency's FACs, it shall be the policy of the Agency that no member of an EPA federal advisory committee currently receives EPA grants, either as principal investigator or co-investigator, or in a position that otherwise would reap substantial direct benefit from an EPA grant. *This principle should not apply to state, tribal or local government agency recipients of EPA grants*.[127]

114. Complaint for Declaratory and Injunctive Relief at 7, 23, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
115. *Id.* at 5-6.
116. American Trucking Ass'ns, Inc. v. Federal Motor Carrier Safety Admin., 724 F.3d 243, 247 (D.C. Cir. 2013).
117. *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 3, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018) ("The Directive is impeding the EPA's FACs from providing valuable scientific and policy advice.").
118. *See, e.g.*, *id.* at 2 ("The Directive . . . prohibits scientists and experts who are recipients of EPA grants from serving on FACS. . . .").
119. This view is supported by precedent case law: "Working for or receiving a grant from [an agency], or co-authoring a paper with a person affiliated with the department, does not impair a scientist's ability to provide technical, scientific peer review of a study sponsored by . . . one of its agencies." Cargill, Inc. v. United States, 173 F.3d 323, 339 (5th Cir. 1999).
120. Directive, *supra* note 2.
121. U.S. EPA, *EPA Grants*, https://www.epa.gov/grants (last updated Apr. 10, 2018).
122. *See, e.g.*, U.S. EPA, Fiscal Year 2017 Competitive Grant Awards (2018), https://www.epa.gov/sites/production/files/2018-04/documents/fiscal_year_2017_competitive_grant_awards_updated_april_24_2018_0.pdf.
123. *See, e.g.*, *id.* (noting grant awards for projects including "Technical Assistance to Tribal Communities Addressing Brownfields," "Freshwater Harmful Algal Blooms," and "Using a Total Environment Framework (Built, Natural, Social Environments) to Assess Life-Long Health Effects of Chemical Exposures").
124. Complaint for Declaratory and Injunctive Relief at 24, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018) (quoting Dr. Ana Diez Roux).
125. Directive, *supra* note 2.
126. *Id.*
127. Memo, *supra* note 7, at 3 (emphasis added).

Thus, the memo mentions financial considerations—"entanglements"—as an impediment to FAC independence; EPA grants, constituting an award of money for a defined program or research, are posited as purveyors of "substantial direct benefit[s]" to investigators and possibly others.[128] As noted, the memo does not clarify why state, tribal, and local government grant recipients are immune to such entanglements—it merely creates a de facto bright-line rule for academic and not-for-profit grant recipients.[129] This lack of reasoning is in addition to the initial unanswered question: why would serving as an investigator, co-investigator, or even research assistant on an EPA grant necessarily impede *anyone's* ability to serve independently and objectively on an FAC? This conflict-of-interest policy is literally devoid of logic—Pruitt offers no reason for it. Thus, the directive is facially arbitrary and capricious because it offers no articulation with regard to how or why EPA grant recipients would be conflicted so as to hinder independence and why this conflict would be endemic only to nongovernmental and academic scientists.[130]

If the court were to demand some "substantial evidence"[131] supporting EPA's new policy, it seems, based upon the directive and memo, unlikely to exist.[132] Indeed, it seems such evidence would be tantamount to proving, or strongly suggesting, that the actual scientific research underlying members' advisory opinions is systematically biased, or perhaps that academic scientists are systematically prone (consciously or not) to apocryphal opinions. This is why the *Union of Concerned Scientists* called the directive "an attack on science itself."[133] Under this view, the language of financial "entanglements" is a red herring, for there is no reason to believe, and indeed no reason given, why, for example, an EPA grant-winning researcher from the Louisiana Department of Environmental Quality would remain an "independent" FAC member while an EPA grant-winning researcher from Tulane University would not.

To provide "substantial evidence" of such bias or non-independence vis-à-vis academic and not-for-profit advisors *as a class*, Pruitt would seem to require some evidence that he does not have and almost certainly could never obtain. Further, because Pruitt's definition of conflict of interest represents a break from well-established policy that has certainly created reliance interests, it seems likely that the court *would* demand a more detailed explanation of the change in policy.[134] Again, such an explanation has definitely not been proffered, and if the court were to remand to EPA for a detailed articulation and robustly supported rationale for the policy, there is no reason to believe Pruitt could offer this in a form that could withstand even arbitrary-and-capricious scrutiny.

The arbitrary-and-capricious standard acts as a catch-all for administrative misconduct not otherwise delineated in the APA.[135] Given Pruitt's documented friendliness to industry (especially fossil fuels) and hostility to climate science,[136] it seems much more likely that a court would be skeptical of his motivation for the new policy. Even with the benefit of the doubt, the directive, as stated, appears facially arbitrary and capricious. Without the benefit of the doubt, the directive seems no more than a naked attempt to discriminate against academic science in favor of local, presumably pro-industry influences. Indeed, a scientist who is being paid by, for example, Chevron to conduct a particulate matter study would not be able to receive an EPA grant for that study. However, that scientist could be nominated to and perhaps actually serve on an FAC under the directive.

Further, while the complaint at hand focuses almost entirely on discrimination against formally academic scientists (who are usually professors at universities or like institutions), the directive also discriminates against potential FAC members affiliated with not-for-profits (e.g., Natural Resources Defense Council, Earth Conservancy, Delta Institute), which would seem to heighten the belief that Pruitt has (unlawfully) targeted those who are perceived as environmentally friendly in general. In light of all this, Pruitt's policy, put simply, appears baldly arbitrary and capricious and an example of the sort of administrative misconduct intended to be captured by that standard of review.

B. "Fairly Balanced"

Much of the directive and supporting memo, as well as the lawsuit contesting the EPA conflict-of-interest policy contained therein, concerns the notion that FACs must somehow be fairly balanced. As previously stated, the requirement of fair balancing is found in the FACA and GSA's implementing regulations.[137] The statute and regulations state that FACs must be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee,[138] with GSA providing a bit more general guidance (e.g., consideration of the geographic, ethnic, social, economic, or scientific impact of the FAC's recommendations) for the balancing of committees.[139] Further, with regard to discretionary committees, agencies must provide a plan to establish membership balance during the charter consultation process with GSA.[140]

128. *Id.*
129. *See id.*
130. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126-27 (2016).
131. *See* Safe Extensions, Inc. v. Federal Aviation Admin., 509 F.3d 593, 604 (D.C. Cir. 2007).
132. The administrative record would need to provide such evidence. Neither the directive nor the memo allude to any sort of particular finding supporting the assertion that academic and not-for-profit FAC members are uniquely biased or prone to conflicts of interest stemming from grants.
133. Complaint for Declaratory and Injunctive Relief at 4, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
134. *See* Federal Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).
135. Association of Data Processing Serv. Orgs., Inc. v. Board of Governors of Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984).
136. *See*, *e.g.*, Nichols, *supra* note 103.
137. 5 U.S.C. app. 2 §5(b)(2); 41 C.F.R. §102-3.30(c) (2017).
138. 5 U.S.C. app. 2 §5(b)(2); 41 C.F.R. §102-3.30(c) (2017).
139. GSA Committee Management Secretariat, *supra* note 67, at 2.
140. *Id.* at 1 (citing 41 C.F.R. §102-3.30(c) (2017)).

The petitioners in *Union of Concerned Scientists* aver that their claim of unfair balancing is justiciable[141]; this is likely the case given the holdings in *Public Citizen*[142] and *Cargill*.[143] As noted, the petitioners lost their fair balancing claim in each of the key precedent cases: in *National Anti-Hunger Coalition*, the petitioners lost their claim because, although the FAC was completely imbalanced in terms of corporate versus public interest, the stated purpose of the FAC was to apply private-sector expertise to a government program[144]; in *Public Citizen*, the petitioners lost their claim because, while the food-safety FAC was light on overt consumer advocates, the FAC members were well-qualified relative to the FAC's purpose and there was no requirement for consumer advocacy on the FAC[145]; and in *Cargill*, the petitioners lost their fair balancing claim because the FAC members were well-qualified to provide "politically neutral and technocratic" scientific peer review, with no need for mining industry input.[146]

Thus, in a very facile sense, one may expect the claim here to be relatively weak simply because the key precedent cases seem to establish a strong degree of deference to the Agency's selection of FAC members. Given the facts in those cases, it is evident that a great deal of presumed bias (i.e., private versus public, corporate versus consumer, industry versus academic) on an FAC is allowable *as long as the FAC's composition is appropriate relative to its charter-based purpose*.[147] In this light, the fair-balancing claim in the case at hand, at least relative to these major precedent cases, appears novel. This is because it concerns, given the directive, the exclusion of *all* those "reap[ing] substantial direct benefit from an EPA grant" from *all* EPA advisory committees.[148] There appears to be no ready precedent for such an agency action. Further, with particular regard to the CASAC, a high percentage of academic-specialist members would seem appropriate given that FAC's purpose.

EPA currently employs 22 FACs.[149] Included among these are FACs as facially disparate as the Farm, Ranch, and Rural Communities Advisory Committee, the Great Lakes Advisory Board, and the National Environmental Justice Advisory Council.[150] Each FAC will have a charter stating a purpose that must have been approved by GSA.[151] One can presume, without delving into the particular charters and membership of different FACs, that it would be absurd and likely unlawful, for example, for the Great Lakes Advisory Board to not have members from local government agencies in Michigan, Ohio, or Wisconsin, or for the National Environmental Justice Advisory Council to not have members from the African-American or Native American communities. Some of the FACs (e.g., the Farm, Ranch, and Rural Communities Advisory Committee) may already be to Pruitt's liking if they are relatively more local, more Republican, and less "academic." The FACA and GSA regulations do not, of course, provide anything like quotas for FAC membership; rather, they provide what could be called commonsense guidance for balancing FACs relative to any given FAC's stated purpose.[152]

All this is to say that the *Union of Concerned Scientists* claim of unfair balancing appears far more meritorious than it would in an "ordinary" case. The key precedents all concerned a *particular* FAC; here, we see a proscription of all active-grant researchers affiliated with academic institutions and not-for-profits from serving on all FACs.[153] When it comes to particular FACs, such as the CASAC (the one at issue in this suit), this necessarily means that some of the foremost specialists in areas of greatest interest to EPA, such as air pollution toxicology, must choose between informing EPA policy as a FAC member and receiving merit-based EPA funding to do the research necessary to properly inform such policy—this seems to be an absurd result that would necessarily lower the expertise on some FACs. The obvious inference is, as the *Union of Concerned Scientists* complaint avers, that those scientists who have less need for grant funding—particularly industry-backed scientists—would disproportionately populate various EPA FACs.[154]

Pruitt could have attempted to influence the makeup of EPA FACs via a less arbitrary and capricious, more-nuanced directive, or privately. Indeed, the sweeping, discriminatory nature of the directive seems to be its greatest weakness. While precedent holds that FACs that are facially imbalanced in terms of industry versus academic[155] or private versus public interest[156] are allowable under the FACA, this is always weighed relative to a given FAC's charter-based purpose.[157] Because the directive creates a policy that facially discriminates against all academic and not-for-profit researchers in favor of those with local, state, tribal, and industry affiliation, it seems, by definition, to imbalance the membership of all EPA FACs without regard to the purposes or needs of any given FAC.[158]

141. Complaint for Declaratory and Injunctive Relief at 30-31, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
142. *See* Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 419-20 (D.C. Cir. 1989).
143. *See* Cargill, Inc. v. United States, 173 F.3d 323, 334 (5th Cir. 1999).
144. National Anti-Hunger Coal. v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 (D.C. Cir. 1983).
145. *Public Citizen*, 886 F.2d at 423-24.
146. *Cargill, Inc.*, 173 F.3d at 337.
147. *See*, *e.g.*, *National Anti-Hunger Coal.*, 711 F.2d at 1074.
148. *See* Directive, *supra* note 2.
149. *See* U.S. EPA, *All Federal Advisory Committees at EPA*, https://www.epa.gov/faca/all-federal-advisory-committees-epa (last updated May 4, 2018).
150. *See id.*
151. *See* 41 C.F.R. §105-54.203 (2017).
152. *See* GSA Committee Management Secretariat, *supra* note 67.
153. *See* Directive, *supra* note 2.
154. Complaint for Declaratory and Injunctive Relief at 3, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
155. *See* Cargill, Inc. v. United States, 173 F.3d 323, 337 (5th Cir. 1999).
156. *See* National Anti-Hunger Coal. v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 (D.C. Cir. 1983).
157. *See*, *e.g.*, *id.*
158. *See* Complaint for Declaratory and Injunctive Relief at 3, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).

C. *"In Excess of Statutory Authority"*

Neither the directive nor the memo was published in the *Federal Register* or cosigned by the OGE.[159] These facts alone seem to suggest—given that OGE has well-established, statutory authority over *uniform* federal conflict-of-interest policy[160] and that GSA has well-established, statutory authority over FAC guidelines[161]—that something may be amiss with the directive; not only does it overturn long-standing policy, it has done so abruptly and furtively.

The *Union of Concerned Scientists* complaint avers that Pruitt has exceeded his statutory authority in violation of 5 U.S.C. §706(2)(C).[162] The FACA specifically directs agency heads to make their FAC guidelines and controls consistent with those of GSA[163]—this serves the rational purpose, given GSA's purview over FACs generally, of making sure that any given agency does not deviate beyond its statutory authority and ensuring general consistency of FAC policies across agencies. As the complaint notes, GSA, given its authority to issue guidelines and controls for FACs, has directed agency heads to "[a]ssure that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes, regulations issued by the U.S. Office of Government Ethics (OGE), including any supplemental agency requirements, and other Federal ethics rules."[164]

As noted in the previous section, OGE has set forth uniform conflict-of-interest regulations for government employees, including FAC members.[165] Further, OGE issues specific supplementary regulations for EPA employees[166]—nowhere in the general guidelines or in the EPA-specific guidelines is there even a suggestion that an EPA active-grant researcher would be conflicted by serving as an FAC member.[167] Indeed, the opposite seems to be the case: as discussed earlier, OGE specifically considers grant and FAC scenarios in its regulatory hypotheticals[168]—nowhere does it declare or suggest that holding a grant and serving on an FAC is a conflict of interest.[169]

Thus, that Pruitt's directive exceeds statutory authority seems evident here. The FACA gives GSA authority to regulate FACs.[170] With regard to FAC conflicts of interest, GSA orders agency heads to comply with guidelines as set forth by OGE, which has purview over government employee ethics generally.[171] Pruitt's conflict-of-interest policy violates GSA's order because it is inconsistent with the conflict-of-interest regulations set forth by OGE.[172] Indeed, the directive's conflict policy is unprecedented and sets forth an EPA-specific policy that has no basis in any regulations set forth by either GSA or OGE.

Obviously, detecting and regulating conflicts of interest on the part of government employees is a core part of OGE's mission and that agency has certainly long been aware that EPA grant recipients were serving on FACs, yet, as evinced by the regulations it has promulgated, determined that no conflict existed.[173] This is in keeping with the general thrust of the conflict regulations, which is to enable highly qualified experts to advise on general policy matters without directly and predictably influencing their personal financial interests.[174] Statutory authority enables GSA and OGE to create a generally uniform regulatory regime for FAC conflicts of interest and the directive seems clearly to improperly impede upon those agencies' statutory authority by creating an unprecedented carve-out at EPA.[175]

D. *"Inappropriate Influence"*

Finally, the *Union of Concerned Scientists* complaint claims that the directive violates the section of the FACA prohibiting FACs from being "inappropriately influenced by the appointing authority or by any special interest, but [ ] instead be[ing] the result of the advisory committee's independent judgment."[176] Further, all creators of FACs—including the president and agency heads—must follow this dictate of impartiality.[177]

This claim is fundamentally similar to the one just discussed—that of Pruitt exceeding statutory authority—in that it concerns a violation of the FACA itself and does not seem to have an on-point analogue in precedent. Multiple cases have dealt with questions that tangentially touched upon a violation of FACA via inappropriate influence, but these cases overwhelmingly dealt with questions of whether a given group advising the president or other officials actually *was* an FAC under the meaning of the FACA.[178] Like

159. *Id.* at 21.
160. *See* 18 U.S.C. §208(d)(2).
161. *See* 5 U.S.C. app. 2 §7(c).
162. Complaint for Declaratory and Injunctive Relief at 28, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
163. 5 U.S.C. app. 2 §8(a).
164. Complaint for Declaratory and Injunctive Relief at 29, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018) (quoting 41 C.F.R. §102-3.105(h) (2017)).
165. *See* 5 C.F.R. §2640.203(g) (2017).
166. *Id.* §6401. For example, employees in the Office of Pesticide Programs are restricted from having any financial interest in any company that manufactures or wholesales pesticides registered by EPA. *See id.* §6401.102(2).
167. *See id.* §6401.
168. *See id.* §2640.203(b)-(c).
169. *See id.*
170. 5 U.S.C. app. 2 §7(a).
171. *See* 41 C.F.R. §102-3.105(h) (2017).
172. *See id.*
173. *See*, *e.g.*, 5 C.F.R. §2640.203(g) (2017).
174. *See* S. Rep. No. 87-2213, at 6-7 (1962); *see also* 5 C.F.R. §2635.402(a) (2017).
175. *See* Directive, *supra* note 2.
176. Complaint for Declaratory and Injunctive Relief at 31, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018) (quoting 5 U.S.C. app. 2 §5(b)(3)).
177. 5 U.S.C. app. 2 §5(c).
178. *See*, *e.g.*, Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 467 (1989) (holding that an American Bar Association standing committee "utilized" by the Department of Justice to seek advice on potential federal judges was not subject to the FACA); Byrd v. Environmental Prot. Agency, 174 F.3d 239, 247, 29 ELR 21150 (D.C. Cir. 1999) (holding that an EPA benzene peer-review panel was not an "advisory committee" under the FACA); Northwest Forest Resource Council v. Espy, 846 F. Supp. 1009, 1013 (D.C. Cir. 1994) (holding that a forest ecosystem committee advising the president was an "advisory committee" under the FACA); Food Chem. News v. Young, 900 F.2d 328, 349 (D.C. Cir. 1990) (holding that an expert food-safety panel was not an "advisory committee" under the FACA).

the claim of exceeding statutory authority, it does not seem that there is precedent concerning a government official inappropriately influencing an FAC by discriminating against an entire class of experts—this is appropriate given that Pruitt's policy is unprecedented.

Because of the nature of the claims, it seems that the charge of inappropriate influence *should* track the claim of unfair balancing—while they are not precisely the same, they are very similar. It is difficult to imagine a court concluding that Pruitt committed one violation and not the other. This is because, as the *Union of Concerned Scientists* complaint avers, Pruitt's policy constitutes an unlawful purge of academic scientists as a *class* from EPA advisory committees.[179] It is not logical to conclude that the FACs as a group are fairly balanced and yet Pruitt has inappropriately influenced them, or vice versa; either the directive inappropriately influences and imbalances all the FACs, or it does neither—there is simply not sufficient demarcation between the two claims to decorrelate them given the facts here.

The directive creates classifications; it segregates academic and not-for-profit EPA grant-holders from other EPA grant-holders.[180] Pruitt does not simply seek to inappropriately influence a given FAC; he has created a bright-line rule for all the FACs. Thus, because the directive seems to violate the FACA's fair-balancing requirement for the reasons discussed previously, it seems that it also violates the FACA's requirement proscribing inappropriate influence because it purges academic and not-for-profit members at Pruitt's command.[181] Further, because of Pruitt's well-documented closeness with the fossil fuel lobby and climate denialists,[182] it would not be a stretch for the court to see this as a violation of FACA requirements by an appointing authority *and* special interest(s).[183]

E. Motion to Dismiss

On March 27, 2018, the defendants in *Union of Concerned Scientists* moved to dismiss the complaint for lack of standing, ripeness, finality, and justiciability.[184] The supporting memo is a 53-page document emphasizing Pruitt's and EPA's FAC discretion and framing the directive as an "appointment philosophy," rather than a conflict policy, that "imposes no standard of conduct on government employees."[185] Of course, it *does* impose a standard of conduct on certain government employees—it states that they now possess an actual or facial conflict of interest if they are working on an EPA grant and serving on an EPA FAC. A thorough analysis of the defendants' arguments supporting the motion to dismiss is beyond the scope of this Comment, though it is essential to address some of them broadly.

First, the supporting memo claims both petitioners lack standing.[186] The supporting memo argues that the complaint is deficient because it fails to name specific Union of Concerned Scientists members who have been harmed by the directive.[187] However, the precedent cited by the defense does not support the assertion that a petitioner need specify particular members who have been harmed in the *complaint*.[188] The Union of Concerned Scientists, because it pleaded that it has numerous members who are EPA grant recipients and members of FACs, and because the organization's general purpose is clearly concerned with the harms alleged here,[189] seems to have standing at this procedural phase because these assertions are taken as true, but will likely need to prove individual-member harm via affidavit in response to the standing challenge.[190]

The supporting memo also argues that Dr. Sheppard, who seems to possess standing for the aforementioned reasons, does not possess standing because the alleged harm was mediated by a third party, the University of Washington.[191] But because the University of Washington presumably already approved her as co-investigator on the grant she stepped away from,[192] because she has apparently worked under numerous EPA grants and could reasonably expect to do so again,[193] and because grant applications are typically initiated by individual academics with their universities acting as a mere institutional support mechanism and there is no logical reason to believe that the university would not support her pursuit of EPA grants, it is difficult to imagine a court determining Dr. Sheppard lacks standing because the University of Washington stands in the way of redressability. Further, because Pruitt's conflict policy effectively renders those working on EPA grants ineligible from serving on FACs and vice versa, it is not apparent that the University of Washington's involvement

179. Complaint for Declaratory and Injunctive Relief at 2, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
180. *See* Directive, *supra* note 2.
181. *See id.*; 5 U.S.C. app. 2 §5(b)(3).
182. *See*, *e.g.*, Nichols, *supra* note 103.
183. *See* 5 U.S.C. app. 2 §5(b)(3).
184. Motion to Dismiss, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Mar. 27, 2018) (ECF No. 16).
185. Defendants' Memorandum of Law in Support of Motion to Dismiss at 1, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Mar. 27, 2018) (ECF No. 17).
186. *Id.* at 16-20.
187. *Id.* at 18.
188. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss at 18, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Mar. 27, 2018) (ECF No. 17) (citing Draper v. Healey, 827 F.3d 1, 3 (1st Cir. 2016) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 499, 39 ELR 20047 (2009)).
189. *See* Complaint for Declaratory and Injunctive Relief at 4-6, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
190. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 65-66, 18 ELR 20142 (1987) ("our standing cases uniformly recognize that allegations of injury are sufficient to invoke the jurisdiction of a court . . . the Constitution does not require that the plaintiff offer this proof as a threshold matter . . .).
191. Defendants' Memorandum of Law in Support of Motion to Dismiss at 20, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Mar. 27, 2018) (ECF No. 17).
192. *See* Complaint for Declaratory and Injunctive Relief at 7, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
193. *See id.*; *see also* Verified Complaint for Declaratory and Injunctive Relief at ¶ 18, Energy & Envtl. Legal Inst., No. 1:16-CV-00915 (D.D.C. filed May 13, 2016).

matters at all because it is Dr. Sheppard as an individual who becomes ineligible.

Further still, only one plaintiff needs to establish standing for the court to have jurisdiction[194]; even if the judge should determine that one party does not have standing, it is challenging to envision an analysis whereby the judge determines both lack standing. Therefore, because both petitioners seem to have standing, and because only one plaintiff needs to have standing for the court to have jurisdiction, the case will likely not be dismissed for lack of standing.

Second, the supporting memo avers that "the power to appoint committee members is the agency's alone and is non-reviewable by the courts under the circumstances presented here."[195] This does not appear to be valid because of the precedential cases discussed earlier, each of which involved the adjudication of FAC fair-balancing claims. The supporting memo stresses that the claims are nonjusticiable under FACA; it achieves this in large part by emphasizing Judge Laurence Silberman's minority opinion in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*.[196] As discussed previously, courts have consistently reviewed FACA fair balancing issues—Judge Silberman's minority opinion is an outlier in this canon.[197] While FACA gives broad discretion to agencies, it is nonetheless apparent that there is law to apply with regard to fair balancing of FACs.[198]

Third, the supporting memo frames the directive as a holistic appointment philosophy aimed at enhancing cooperative federalism, geographic diversity, and "fresh perspectives."[199] However, like the directive, it fails to rationally explain how the conflict-of-interest-policy achieves the stated goal of committee independence within this framework. For example, imagine an EPA-grant-winning scientist who happens to be a member of a Native American tribe and a professor at the University of Wyoming. Even though a member of a key minority stakeholder group and a resident of the least populous state, the professor would be proscribed from serving on an FAC as long as he or she received "substantial benefit" from the EPA grant. Thus, working on an EPA grant is dispositive under Pruitt's scheme as long as the individual is affiliated with academia or a not-for-profit.

To borrow the language of constitutional law, assuming that FAC "independence" is a legitimate agency purpose, the bright-line rule appears to bear no rational relationship to the stated goal. The actual effect, as stated, is to create a classification system that is arbitrary and capricious relative to the stated goal of independence in the context of enhancing cooperative federalism, geographic diversity, and fresh perspectives because one's institutional affiliation is the essential criterion in determining one's "independence," which takes precedence over the other stated purposes of the directive. This claim of arbitrary and capricious discrimination against academics is justiciable under the APA.

Fourth, the supporting memo claims that the petitioners' claims are unripe under the APA because the directive does not constitute a final agency action.[200] This does not seem to be the case because the directive bears the essential qualities of a final agency action. As the *Union of Concerned Scientists* complaint avers, Dr. Sheppard was contacted by Aaron Yeow, the designated federal officer of the CASAC,[201] who informed her that FAC appointments would reflect "potential policy changes" with regard to EPA grants and FAC membership.[202] The complaint then states that Mr. Yeow sent Dr. Sheppard further communication stating that FAC membership "will reflect this policy change if the member has a current active EPA grant."[203] The complaint avers that, as a result of the policy change, Dr. Sheppard declined to receive funding from an EPA grant.[204] The complaint also charges that other members of FACs have been asked to leave or surrender their grant funding.[205]

Thus, the memo supporting Pruitt's motion to dismiss appears to be incorrect when it states that "[t]he Directive at issue here merely explains the policies that will guide EPA in the exercise of its discretion in appointing committee members . . . the Directive itself does not constitute final agency action subject to immediate judicial review."[206] As stated previously, the directive sets forth a policy that has all the hallmarks of final agency action—EPA has determined a new obligation (to either serve on an FAC or relinquish grant funding) from which legal consequences (the necessity of divesting oneself from either an FAC or a grant) have flowed.[207] Thus, the memo supporting dismissal seems to completely ignore that the directive has already had direct results sufficient to render it a final agency action.

Overall, the supporting memo paints a picture of a directive that attempts to pursue laudable-sounding goals through permissible means. In doing so, it acts as if its unprecedented conflict policy were but an "appointment philosophy"—but this euphemism should not fool a court.

194. Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 518, 37 ELR 20075 (2007).
195. Defendants' Memorandum of Law in Support of Motion to Dismiss at 2, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Mar. 27, 2018) (ECF No. 17).
196. *See id*. at 25-32 (J. Silberman's opinion is cited incessantly, as if the majority opinion with regard to justiciability did not exist).
197. *See* Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 419-20, 426 (D.C. Cir. 1989); *see also* Cargill, Inc. v. United States, 173 F.3d 323, 335 (5th Cir. 1999).
198. *See*, *e.g.*, *Cargill, Inc.*, 173 F.3d at 335.
199. Defendants' Memorandum of Law in Support of Motion to Dismiss at 2, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Mar. 27, 2018) (ECF No. 17).
200. *Id*. at 20-21.
201. *See* U.S. EPA, *supra* note 149.
202. Complaint for Declaratory and Injunctive Relief at 23, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Jan. 23, 2018).
203. *Id*.
204. *Id*.
205. *Id*.
206. Defendants' Memorandum of Law in Support of Motion to Dismiss at 21, Union of Concerned Scientists v. Pruitt, No. 1:18-CV-10129 (D. Mass. filed Mar. 27, 2018) (ECF No. 17).
207. *See* Sackett v. Environmental Prot. Agency, 566 U.S. 120, 126, 42 ELR 20064 (2012).

Pruitt could have sought, for example, to pursue increased rotation of FAC members and greater geographic diversity in a tailored manner. Instead the directive, as the complaint elucidates, entails an unlawful purge of academic scientists from FACs based upon a specious justification.

III. Conclusion

In aggregate, the petitioners' claims in the *Union of Concerned Scientists* case appear sound. The conflict policy in Pruitt's directive appears brazenly arbitrary and capricious, as well as disingenuous—not only does it fail to provide a reasoned explanation for the Agency's change in longstanding policy, it explicitly discriminates against academic scientists and not-for-profits by creating a new classification. In essence, it comes across as a transparent Trojan horse, wherein the actual purpose of a directed purge is poorly concealed by a facade of acceptable-purpose language. It appears that no other agency has attempted to put forth such a policy. To find the directive lawful, existing administrative law might need to be turned upon its head.

In light of all this, one must wonder why Pruitt did not pursue a different path. Given that he is an attorney and former attorney general of Oklahoma with experience litigating against EPA, he must have been cognizant that the directive would be immediately challenged as arbitrary and capricious, and that such a challenge would have merit. Pruitt could have attempted to influence EPA's FACs through more subtle means. He could pursue the goals of cooperative federalism and more local influence on FACs without putting forth such a facially discriminatory policy. Thus, one wonders whether Pruitt is simply interested in taking a shot at disrupting the administrative regime, causing some expert scientists to lose a bit of EPA funding over the short term, forcing more industry-friendly FAC appointments in the interim, or motivated by something not evident in the directive. His conflict policy appears hypocritical given mounting evidence of his own venality. Regardless, for the reasons discussed here, the Union of Concerned Scientists and Dr. Sheppard *should* prevail.