

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ROBERT F. KENNEDY CENTER FOR)
JUSTICE AND HUMAN RIGHTS,)
d.b.a. ROBERT F. KENNEDY HUMAN RIGHTS,)
1300 19th Street N.W.)
Washington, D.C. 20036,)

CENTER FOR HEALTH AND)
GENDER EQUITY d.b.a. CHANGE,)
1317 F Street N.W., Suite 400)
Washington, D.C. 20004,)

COMMUNITY INITIATIVES)
d.b.a. COUNCIL FOR GLOBAL EQUALITY,)
1220 L Street N.W.)
Washington, D.C. 20005,)

and)

GLOBAL JUSTICE CENTER,)
11 Hanover Square, 6th Floor)
New York, N.Y. 10005,)

Plaintiffs,)

v.)

Case No.:

MICHAEL R. POMPEO, in his official capacity as)
U.S. Secretary of State,)
2201 C Street N.W.)
Washington, D.C. 20520,)

PETER BERKOWITZ, in his official capacity as)
Director of the Policy Planning Staff,)
2201 C Street N.W.)
Washington, D.C. 20520,)

and)

U.S. DEPARTMENT OF STATE,)
2201 C Street N.W.)
Washington, D.C. 20520,)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Robert F. Kennedy Human Rights, CHANGE, Council for Global Equality, and Global Justice Center hereby sue Defendants Michael Pompeo, Secretary of State, Peter Berkowitz, Director of the Policy Planning Staff, and the United States Department of State (“State” or the “Department”), and allege as follows.

INTRODUCTION

1. This case challenges the Department of State’s “Commission on Unalienable Rights” (the “Commission”), a body ostensibly designed to prompt a serious examination of the scope of human rights and to provide advice and recommendations to the Secretary of State on how human rights should fit into U.S. foreign policy. This sweeping mandate implicates core interests of a wide array of human rights advocates, activists, and practitioners, like Plaintiffs, as well as scholars of numerous disciplines, and governmental actors.

2. The Department established the Commission in a manner ill-suited to allow it to robustly examine these important issues, or to represent the vast and varied interests implicated by its mandate. Its members are uniformly academics, some of whom are also close advisors to the Secretary. Most of these members, moreover, hold well-documented views that privilege religious liberty above all other fundamental human rights, and treat with skepticism, or outright derision, rights claims by lesbian, gay, bisexual, transgender, queer, and intersex (“LGBTQI”) individuals, proponents of gender parity, and women and girls seeking access to sexual and reproductive health and rights.

3. This outsourcing of foreign policy to a group of hand-picked academics with an essentially uniform perspective on the core issue the Commission was created to

examine violates the Federal Advisory Committee Act (“FACA”). Congress enacted that statute in 1972 as a “sunshine law” to curb the Executive Branch’s reliance on superfluous and secretive “advisory committees”: ad hoc, non-federal bodies that counsel governmental decisionmakers on national—or in this case, international—policy.

Accordingly, FACA establishes strict requirements for the creation and conduct of such committees. Every advisory committee must be in the public interest, fairly balanced among competing points of view, and structured to avoid inappropriate influence by special interests. Additionally, committees must make their meetings open to the public and disclose all documents produced to or by their membership.

4. The Commission’s unnecessary and inadequately explained creation, unbalanced membership, and opaque operation strike at the core of FACA, which the Commission has violated from its inception. For instance, the Commission’s charter fails to demonstrate the need for its existence and how it serves the public interest—perhaps because its mandate is well-covered by numerous other offices and advisory bodies within State. And in operation, it has failed to provide records to the public in a manner that would allow those deeply concerned about its work, like Plaintiffs, to meaningfully understand what the Commission is doing and fully participate in its public meetings.

5. These fundamental and meaningful procedural flaws exacerbate the Commission’s lack of membership balance, which fails to represent or reflect the concerns, real-world understanding, and thinking of human rights organizations like Plaintiffs. Indeed, there is reason to believe the Secretary carefully selected the Commission members to yield a pre-determined result: constraining the understanding of “unalienable” human rights to the narrow set of rights allegedly grounded in theories of

natural law. That result would exclude recognition of the rights of LGBTQI individuals seeking an end to unequal, discriminatory treatment, and of women and girls seeking equal treatment and access to sexual and reproductive healthcare services—likely in violation of the United States’ treaty obligations.

6. Now, while skirting the requirements of FACA, the Commission is moving quickly to provide the Secretary with a roadmap for achieving these goals. And Defendants’ failure to adhere to FACA is injuring Plaintiffs each time the Commission takes another step toward the formation of a theory of human rights that is antithetical to established international law and would exclude Plaintiffs’ core constituencies from the community of rights holders, all without the transparency and resulting opportunity for meaningful public participation that the statute requires.

7. The steady march toward this outcome is the predictable consequence of Defendants stacking the Commission with individuals representing only one side of the debate the Secretary purports to want, and neglecting entirely their duty under FACA to provide membership to those who would express a different view that would better represent the concerns and thinking of established human rights organizations, experts, activists and practitioners, and rights holders.

8. The Commission’s work is already well underway. It has met on five occasions, and—though several more public meetings are expected and its Charter is not soon expiring—it has, by its own account, already begun drafting its final report and recommendations.

9. To stop these violations of FACA before the illegally chartered Commission announces a new vision of human rights for Defendants to swiftly adopt,

Plaintiffs respectfully seek relief from this Court in the form of an order setting aside the Commission's charter, enjoining it from continuing its work, requiring it to make all Commission records available to the public, and barring Defendants from accepting advice or recommendations from the Commission.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under federal law, specifically FACA, 5 U.S.C. App. 2, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e) because Plaintiff Global Justice Center is headquartered in this District.

PARTIES

12. Defendant Michael R. Pompeo is the U.S. Secretary of State and has ultimate authority over the Commission's formation, composition, administration, and termination. He is sued in his official capacity.

13. Defendant Peter Berkowitz is the Director of the Policy Planning Staff at the State Department, and serves as the Commission's Executive Secretary. He is sued in his official capacity.

14. Defendant U.S. Department of State is a federal agency within the meaning of FACA, 5 U.S.C. App. 2 § 3(3), and of the APA, 5 U.S.C. § 551(1), that is headquartered in the District of Columbia. The State Department is the federal agency primarily tasked with setting and carrying out America's foreign policy, including its binding obligations under international human rights law.

15. Plaintiff Robert F. Kennedy Center for Justice and Human Rights is a not-for-profit corporation headquartered and incorporated in the District of Columbia, and doing business as Robert F. Kennedy Human Rights (“RFKHR”). Since 1968, it has worked to realize Robert F. Kennedy’s dream of a more just and peaceful world. In partnership with local activists, RFKHR advocates for key human rights issues, champions agents of change, and pursues strategic litigation in the United States and around the world. And to ensure change that lasts, RFKHR fosters a social-good approach to business and investment and educates millions of students on human rights and social justice.

16. Plaintiff Center for Health and Gender Equity (CHANGE) is a not-for-profit corporation headquartered in the District of Columbia, incorporated in the State of Maryland, and doing business as CHANGE. CHANGE was created in direct response to the 1994 International Conference on Population and Development, a landmark meeting of approximately 180 countries, including the United States, that produced a human rights framework for development assistance. That framework promoted, for the first time, the universal sexual and reproductive health and rights of women and girls. CHANGE’s mission since that time has been to ensure that the United States remains accountable for its commitment to that framework, and that sexual and reproductive health and rights are reflected in all U.S. foreign policy and programming. CHANGE carries out this mission by conducting policy research, analysis, and advocacy, and supporting students, reproductive justice advocates, faith-based organizations, HIV/AIDS groups, and women’s organizations with educational and advocacy tools. CHANGE elevates the voices of women and girls, and others who are discriminated against, from

the global south to ensure that those most affected by U.S. global sexual and reproductive health and rights policies have an opportunity to shape those policies.

17. Plaintiff Community Initiatives is a not-for-profit corporation headquartered and incorporated in Oakland, California and doing business as the Council for Global Equality (“CGE”). CGE is a fiscally sponsored project of Community Initiatives, headquartered in the District of Columbia, which brings together international human rights and intersex activists, foreign policy experts, philanthropists, and corporate officials to encourage a clearer and stronger American voice on human rights concerns impacting LGBT and intersex communities around the world. It does this by monitoring U.S. policy and appointments for consistency with U.S. values and human rights commitments; bearing witness to abuses carried out by foreign governments and advocating for principled responses from the U.S. government to those abuses; ensuring that U.S. embassies around the world are open to, and approachable by, LGBT and intersex civil society organizations; and urging corporate leaders around the globe to commit to fair and equal treatment of their employees in the workplace. Integral to the Council’s work is the coordinating role it plays among the diverse coalition of prominent U.S.-based human rights organizations that comprise its membership.

18. Plaintiff Global Justice Center (“GJC”) is a not-for-profit corporation headquartered and incorporated in New York, New York. GJC works to advance gender equality through the rule of law globally. GJC uses established international human rights, humanitarian, and criminal law to conduct legal and policy advocacy at the international and domestic levels. As part of this work, GJC provides expert and legal analysis to various international institutions, including the United Nations Security

Council, the Office of the U.N. High Commissioner for Human Rights (“OHCHR”), and OHCHR’s affiliated investigative, fact-finding, and treaty monitoring bodies. GJC further provides support and expertise to a wide variety of grassroots actors around the world, and has conducted trainings to help local groups understand how best to use U.N. human rights mechanisms and international law to support domestic accountability and advocacy efforts to achieve gender equality.

19. Key components of Plaintiffs’ organizational missions include:

(1) creating and facilitating programs that promote human rights, (2) ensuring that the United States remains accountable to the various international human rights agreements to which it is a party or is otherwise bound as a matter of customary international law, (3) educating the public—including members of the U.S. government, international institutions, and foreign governments—about human rights, and (4) advocating at the domestic and international levels for laws and policies that promote human rights.

20. The ability of Plaintiffs to carry out their missions has been compromised by the State Department’s reliance on an opaque and procedurally flawed advisory committee. In turn, Plaintiffs’ ability to meaningfully participate and advocate for policies consistent with their interests has been, and will continue to be, compromised by Defendants’ noncompliance with FACA.

21. For instance, because they have been denied access to the information necessary to determine how the Commission’s work will shape understandings of human rights in the United States and abroad, Plaintiffs are unable to know how best to create educational and training programs that will advance their interests, or advise others on the same, given the potentially shifting landscape. Moreover, the lack of access to

information about the Commission's work hampers their ability to advocate to the Commission in an effort to prevent harmful recommendations from coming to fruition.

22. The same holds true for the other parts of Plaintiffs' core missions. The uncertainty created by the Commission conducting its work in secret impedes Plaintiffs' work to hold the U.S. government to its human rights commitments. Plaintiffs are, in turn, less able to anticipate and adjust to potential shifts in those commitments now, including by advocating for or against certain Commission recommendations, because they have been denied access to essential Commission records.

23. The secrecy of the Commission renders Plaintiffs unable to effectively educate the public about the activities of the Commission itself and how its work may impact the United States' understanding of its own human rights obligations. Likewise, Plaintiffs' legislative and law reform advocacy is impeded by the Commission's secretive processes.

24. These harms are exacerbated because the Commission does not include a member who represents the interests of human rights advocates, like Plaintiffs, particularly those that advocate for non-discrimination and gender equality, including on behalf of LGBTQI individuals, or sexual and reproductive health and rights.

25. Plaintiffs are thus left to their own devices to try to keep abreast of the Commission's activities and likely consequences of its work, and are required to expend time and organizational resources attending the Commission's public meetings, pursuing

Commission records that should already be public, *see* Ex. A, and making their views on Commission business known to agency officials at the State Department.¹

26. Plaintiffs have also had to spend additional staff time educating the public about the Commission and its potential impact on the international human rights framework.²

27. Plaintiffs have additionally devoted staff time to educating members of international institutions about the Commission and how the Commission's report will affect their work. For example, Plaintiffs have communicated with foreign diplomats,

¹ *See, e.g.*, Letter from Coalition of Organizations and Individuals to the Hon. Michael R. Pompeo, Secretary, U.S. Dep't of State at 2 (July 23, 2019), available at <http://humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf>; *see also* Letter from CGE, CHANGE, RFKHR et al. to the Hon. Mike Pompeo, Secretary, U.S. Dep't of State (June 20, 2019), available at <https://www.washingtonblade.com/content/files/2019/06/SecPompeoJune2019-1.pdf> (expressing concern over the announcement of the Commission).

² *See, e.g.*, Serra Sippel, *Trump's Attack on Iran Fits Right Into His Administration's Evangelical Priorities*, Newsweek (Jan. 14, 2020), <https://www.newsweek.com/trumps-attack-iran-fits-right-his-administrations-evangelical-priorities-opinion-1481957> (opinion piece by the President of Plaintiff CHANGE); Elena Sarver and Merrite Johnson, *The Commission to Undermine Human Rights, That's Illegal!* (Dec. 10, 2019), <https://soundcloud.com/globaljusticecenter/the-commission-to-undermine-human-rights> (podcast produced by GJC); Akila Radhakrishnan & Elena Sarver, *Canary in the Coal Mine: Abortion & the Commission on Unalienable Rights*, Colum. Hum. Rts. L. Rev. (2019), <http://hrlr.law.columbia.edu/hrlr-online/canary-in-the-coal-mine-abortion-the-commission-on-unalienable-rights/> (article written by the President and Legal Adviser at Plaintiff GJC); Press Release, GJC, "Statement on the Formation of the Commission on Unalienable Rights," July 9, 2019, <http://www.globaljusticecenter.net/press-center/press-releases/1145-statement-on-the-formation-of-the-commission-on-unalienable-rights>; Serra Sippel, *How the Trump Administration's Attack on Human Rights Is Spreading Globally*, Popsugar (June 30, 2019), <https://www.popsugar.com/news/What-Trump-Commission-Unalienable-Rights-46301806> (opinion piece by the President of Plaintiff CHANGE); CGE, *No Pride at State: 26 Human Rights and LGBTI Advocacy Groups Urge State Department to Clarify Policy Around Embassies and Dismantle 'Natural Rights' Commission*, June 24, 2019, <https://globalequality.wordpress.com/2019/06/24/no-pride-at-state-26-human-rights-and-lgbti-advocacy-groups-urge-state-department-to-clarify-policy-around-embassies-and-dismantle-natural-rights-commission/>.

senior U.N. leadership, and other international human rights experts on the likely effects of the Commission's report.

28. Upon issuance of the Commission's report and recommendations, which are intended to inform and guide U.S. policy determinations, Plaintiffs will need to divert further resources to understand its impact on U.S. foreign policy and funding decisions, to develop a strategy for countering or blunting erroneous recommendations or findings that counter existing understandings of international human rights law, and to educate their respective constituents and partners about these developments. Plaintiffs will also need to divert resources to analyze and understand the impact of the Commission's work abroad, including by analyzing how it will be used by U.S. embassies and foreign governments, and will need to develop recommendations and training materials for on-the-ground human rights partners on how best to advance their goals in a potentially newly complicated legal landscape.

29. Moreover, a Commission report that stands in opposition to established international law, including rights central to the constituents Plaintiffs serve, will impede Plaintiffs' respective missions. Such a report will add a powerful piece of authority to human rights skeptics and will undermine critical tools that Plaintiffs rely upon—*i.e.*, the ability to ground their arguments in a recognized legal right.

30. Each of these injuries is caused by Defendants, who collectively exercise control over the Commission's charter, membership, disclosures, and meetings and, therefore, the information about the Commission's work and the Commission's policy recommendations.

31. These injuries are redressable by an order from this Court setting aside the Commission’s founding documents, prohibiting the Commission from continuing its work, barring Defendants from relying on Commission recommendations, and requiring Defendants to comply with FACA’s requirements.

STATUTORY FRAMEWORK

I. The Federal Advisory Committee Act.

32. The Federal Advisory Committee Act is a “sunshine law,” requiring that when the Executive Branch establishes or uses non-federal bodies for the purpose of seeking advice and generating policy, it does so in a transparent way that allows for meaningful public participation.

33. A federal agency may form an advisory committee only after it has “determined as a matter of formal record . . . after consultation with the [General Services Administration (“GSA”)], with timely notice published in the Federal Register, [that the committee is] in the public interest in connection with the performance of duties imposed on that agency by law.” 5 U.S.C. App. 2 § 9(a)(2); *see also Foreign Affairs Manual and Handbook* (“FAM”), U.S. Dep’t of State at 11 FAM 812.1, <http://www.fam.state.gov>. The agency must further issue a “[d]etermination of need in the public interest,” including a finding that the committee is “essential to the conduct of agency business and . . . the information to be obtained is not already available through another advisory committee or source within the Federal Government.” 41 C.F.R. § 102-3.30(a).

34. In addition, the State Department requires that any sub-agency consult with the relevant Committee Management Officer (“CMO”) before establishing an advisory committee, 11 FAM 812.1(a), and send an action memo to the CMO fifteen

days before publishing notice of the advisory committee in the Federal Register “setting forth the purpose, organization (including subgroups, if known), and a statement of the need for the particular committee,” *id.* 812.1(b).

35. A State Department advisory committee cannot begin meeting until its charter has been approved by the Under Secretary of State for Management and filed with the CMO, the Senate Foreign Relations Committee, the House Committee on Foreign Affairs, and the Library of Congress. 5 U.S.C. App. 2 § 9(c); 11 FAM 814.1(a).

36. When it enacted FACA, Congress explained that “[o]ne of the great dangers in th[e] unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns,” citing in particular an Industrial Waste Committee where “only representatives of industry were present,” and “[n]o representatives of conservation, environment, clean water, consumer, or other public interest groups were present.” H.R. Rep. No. 92-1017, at 6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496. Accordingly, Congress required in FACA that “the membership of [an] advisory committee . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2 §§ 5(b)(2), (c). Consistent with these requirements, an establishing agency within the State Department must submit to GSA a “Membership Balance Plan.” 11 FAM 812.1; 41 C.F.R. § 102-3.60(3).

37. Likewise, the advisory committee’s charter must contain appropriate provisions to “assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special

interest, but will instead be the result of the advisory committee's independent judgment." 5 U.S.C. App. 2 §§ 5(b)(3), (c).

38. Once established, an advisory committee must include and facilitate public comment and participation. An advisory committee must provide "timely notice" of its meetings to the public, *id.* § 10(a)(2), and must allow interested persons to "attend, appear before, or file statements with [the] committee, subject to such reasonable rules or regulations as the Administrator [of GSA] may prescribe," *id.* § 10(a)(3). *See also* 11 FAM 811.2(c), 815.2.

39. The Administrator of GSA has implemented these statutory obligations by requiring advisory committees to publish notice of their meetings "at least 15 calendar days prior" to the meetings, unless documented "exceptional circumstances" require otherwise. 41 C.F.R. § 102-3.150. All meetings must be held "in a manner or place reasonably accessible to the public" and allow "[a]ny members of the public [to] speak to or otherwise address the advisory committee if the agency's guidelines so permit." *Id.* § 102-3.140(a), (d).

40. In addition to FACA's requirement for public notice and participation, an advisory committee must also make available "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, [and] other documents . . . made available to or prepared for" the committee. 5 U.S.C. App. 2 § 10(b); 11 FAM 817(a). "Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) . . . provides for the *contemporaneous* availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend

fully the work undertaken by the advisory committee.” 41 C.F.R. § 102-3.170; 11 FAM 817.2; *see also Food Chem. News v. Dep’t of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992) (records must be released before or at the relevant meeting, so that the public can “follow the substance of the [committee’s] discussions”). Notably, “agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records.” 41 C.F.R. § 102-3.170.

41. A subcommittee or working group of an advisory committee must also open its meetings and provide all records to the public if it “makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee.” 41 C.F.R. § 102-3.145; *see also* 11 FAM 811.2(d) (“A sub-group or subcommittee of a chartered advisory committee that independently possesses significant characteristics of an advisory committee, such as fixed membership, periodic meetings, reporting directly to Department officials, and other characteristics of advisory committees, will likely be subject to the requirements of FACA.”).

II. The Administrative Procedure Act.

42. The APA allows a person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” to seek judicial review of that action. 5 U.S.C. §§ 702-704. Under the APA, a reviewing court may “compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1), and “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2), or which are taken “without observance of procedure required by law,” *id.*

43. Because FACA does not provide its own standard or scope of review, or a cause of action, this case is properly brought under the standards set forth in the APA. *See* 5 U.S.C. § 701(a); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 30-31 (D.D.C. 2010).

FACTUAL ALLEGATIONS

I. The Modern International Human Rights Legal Framework.

44. In the years following the end of World War II—a conflict that, by even conservative estimates, claimed more than 70 million lives—a renewed effort took shape to establish an international human rights framework.³ The first significant articulation of this framework came in the U.N. Charter, where the international community signaled its support for a system that would “promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴

45. The U.N. Charter also led to the formation of the U.N. Commission on Human Rights.⁵ The creation of that commission, in turn, brought about “the elaboration and near-universal acceptance of the three major international human rights instruments: the Universal Declaration of Human Rights (UDHR), adopted in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the latter two adopted in 1966.”⁶

³ *See* OCHCR, *Human Rights: A Basic Handbook for UN Staff* 9 (2000), <https://www.ohchr.org/Documents/Publications/HRhandbooken.pdf>.

⁴ U.N. Charter art. 55.

⁵ Frans Viljoen, *International Human Rights Law: A Short History*, <https://www.un.org/en/chronicle/article/international-human-rights-law-short-history>.

⁶ *Id.*

46. The UDHR recognizes that “the inherent dignity and . . . equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁷ The document “consists of a Preamble and 30 articles, setting out the human rights and fundamental freedoms to which all men and women are entitled, without distinction of any kind.”⁸ Of central importance to this project is the “universality, indivisibility and interrelationship of all human rights,” meaning that “civil, cultural, economic, political and social” rights “should be taken in their totality and not dissociated.”⁹

47. The UDHR’s words have “change[d] the way governments operate,” but that result was not guaranteed at the outset.¹⁰ Rather, it is a consequence of the UDHR being “taken seriously . . . by those whose rights it protected,” and who, in turn, sparked the growth of a “global human rights movement.”¹¹

48. Through the power of this movement, which was coupled with a U.N. process that sought to codify specific rights, many of the “inalienable” rights set forth in the UDHR have been “effectively translated . . . into *treaty* law,” such as the ICCPR and

⁷ G.A. Res. 217 (III) A pmb., Universal Declaration of Human Rights (Dec. 10, 1948).

⁸ OHCHR, *Human Rights: A Basic Handbook for UN Staff*, *supra* note 3 at 10; *see generally* UDHR, *supra* note 7 arts. 1-30.

⁹ OHCHR, *Human Rights: A Basic Handbook for UN Staff*, *supra* note 3 at 10-11.

¹⁰ Larry Cox, Executive Director of Amnesty International USA, Remarks at the Brown University Janus Forum (Feb. 19, 2019), *in* Larry Cox and John Yoo, *Are Human Rights Universal?*, *Brown Journal of World Affairs* 16(1) 9, 11 (Fall/Winter 2009), available at <https://www.jstor.org/stable/24590736>.

¹¹ *Id.*

ICESCR,¹² the latter of which the United States has signed, but not ratified. Many of these rights are also recognized as customary international law. *See* Restatement (Third) of Foreign Relations Law § 702 (1987) (“The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts.”).

49. The ICCPR “address[es] the relationship between the individual and the State,” and focuses on, among other things:

the right to life, liberty and security; freedom of movement, including freedom to choose a place of residence and the right to leave the country; freedom of thought, conscience, religion, peaceful assembly and association; freedom from torture and other cruel and degrading treatment or punishment; freedom from slavery, forced labour, and arbitrary arrest or detention; the right to a fair and prompt trial; and the right to privacy.¹³

50. The ICESCR “embodies some of the most significant international legal provisions establishing economic, social and cultural rights,” including “rights relating to work in just and favourable conditions; to social protection; to an adequate standard of living including clothing, food and housing; to the highest attainable standards of physical and mental health; to education and to the enjoyment of the benefits of cultural freedom and scientific progress.”¹⁴

¹² OHCHR, *Human Rights: A Basic Handbook*, *supra* note 3 at 9-10; *see also* OHCHR, *Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights* 9 (June 1996), <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>, (“Nearly all the international human rights instruments adopted by United Nations bodies since 1948 elaborate principles set out in the Universal Declaration of Human Rights.”).

¹³ OHCHR, *Human Rights: A Basic Handbook*, *supra* note 3 at 12.

¹⁴ *Id.*

51. “There are 9 core international human rights instruments” animating the rights articulated in the UDHR.¹⁵ In addition to the ICCPR and ICESCR, these binding instruments include:¹⁶

- a. International Convention on the Elimination of All Forms of Racial Discrimination;
- b. Convention on the Elimination of All Forms of Discrimination against Women;
- c. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”);
- d. Convention on the Rights of the Child;
- e. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- f. International Convention for the Protection of All Persons from Enforced Disappearance; and
- g. Convention on the Rights of Persons with Disabilities.

52. Each of these treaties is served by an expert treaty body committee that monitors implementation of the treaty provisions by state parties and that provides authoritative guidance on the substance and contours of the rights enshrined in them.¹⁷

¹⁵ See OHCHR, *The Core International Human Rights Instruments and Their Monitoring Bodies*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

¹⁶ *Id.*

¹⁷ Universal Rights Group, *A Rough Guide to the Human Rights Treaty Bodies*, <https://www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-human-rights-treaty-bodies/>.

53. While social movements have always provided the energy necessary to make the promise of these instruments real, the UDHR and subsequent instruments provide the necessary architecture for historically marginalized groups to obtain the protection of existing, and sometimes longstanding, rights for themselves on equal terms.

54. For example, the ICCPR and CAT, among other instruments, provide explicit protections for the right to access an abortion, which has allowed advocates for women and girls around the world to advocate for domestic laws and policies ensuring this right, as well as reparations for its violations.¹⁸

55. Likewise, LGBTQI individuals are guaranteed the right to live free from discrimination pursuant to the ICCPR.¹⁹

56. Advocates for other historically marginalized social groups similarly rely on protections in these treaties and thus situate their rights claims within the existing human rights framework; they do not purport to establish some novel right.²⁰

57. The effort by marginalized groups to vindicate their rights has prompted backlash and accusations that this effort has produced a so-called “proliferation” of rights that threatens to create “a situation in which everyone has a right to everything” and so

¹⁸ OHCHR, *Information Series on Sexual and Reproductive Health and Right: Abortion*, https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf; see also Radhakrishnan and Sarver, *Canary in the Coal Mine*, *supra* note 2 at 5-6.

¹⁹ See, e.g., *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 50th Sess. (Mar. 31, 1994) (holding that ICCPR articles 2 and 26 prohibit discrimination on the basis of sexual orientation).

²⁰ See, e.g., Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 Yale Hum. Rts. & Dev. L.J. 1 (2005), available at <https://digitalcommons.law.yale.edu/yhrdlj/vol8/iss1/1> (situating rights of female migrant workers within “the panoply of standards set out in” the ICCPR and other longstanding instruments).

“there can be no justice.”²¹ The purported remedy to this supposedly problematic “proliferation” of rights is to cast aside the existing legal framework and international consensus, and instead commit to an understanding of human rights that is grounded in “the natural rights doctrine that informed the American Founding,” which ostensibly provides a “sound limiting principle.”²²

58. Neither the assumption that the human rights legal framework is in disarray, nor the notion that one ought to look chiefly to natural law—a concept with religious roots—to identify “unalienable” rights represents the consensus view of experts on these topics, however.²³ Instead, most human rights advocates and scholars look principally and primarily to the nine core human rights instruments discussed above, as well as their accompanying general comments/recommendations and jurisprudence—*i.e.*, positive law—as the definitive locus for human rights.

²¹ Peter C. Myers, *From Natural Rights to Human Rights—And Beyond*, Heritage Found., Special Report 197 at 2 (Dec. 20, 2017), available at https://www.heritage.org/sites/default/files/2017-12/SR-197_0.pdf.

²² *Id.* Even ardent proponents of this view struggle to define “natural rights” with specificity, and are instead left to define these “broad rights to pursue our safety and happiness” in terms of what they exclude: “[c]ivil and political rights,” which “are products of government” and therefore not naturally given. *See id.* at 4-5. Black’s Law Dictionary defines “Natural Law” as “A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action.” *Natural Law*, Black’s Law Dictionary (11th ed. 2019).

²³ *See* Alexis Papazoglou, *The Sneaky Politics of “Natural Law,”* The New Republic (June 13, 2019), <https://newrepublic.com/article/154192/sneaky-politics-natural-law>; Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 Harv. J. L. & Pub. Pol’y 711, 713 (1989) (noting that “[c]ontemporary thinking about rights draws a sharp line” between natural law traditions and utilitarian traditions); Jeremy Bentham, *Critique of the Doctrine of Inalienable, Natural Rights*, Anarchical Fallacies 2 (1843), available at http://fs2.american.edu/dfagel/www/Class%20Readings/Bentham/AnarchicalFallacies_excerpt.pdf (describing natural rights as “simple nonsense: natural and imprescriptible rights, rhetorical nonsense, -- nonsense upon stilts”).

59. Accordingly, robust disagreement exists on these issues. On one side are those who understand expanded access to human rights to be both a positive advancement and the result of progressive developments that explicitly protect a diverse set of marginalized groups under existing rights. On the other side are those who are skeptical of these developments and see the modern human rights framework as creating distinct entitlements adrift from those allegedly provided by natural law. A complete examination of this topic cannot neglect representation for the former in favor of the latter.

II. Defendants Have Illegally Established and Utilized the Commission.

60. On May 30, 2019, the Department of State announced the establishment of the Commission. 84 Fed. Reg. 25,109-01 (May 30, 2019).

61. On June 26, 2019, Secretary of State Michael R. Pompeo signed its charter,²⁴ which describes the Commission's purpose as providing

advice and recommendations on human rights to the Secretary of State, grounded in our nation's founding principles and the 1948 Universal Declaration of Human Rights. The Commission's charge is not to discover new principles, but to furnish advice to the Secretary for the promotion of individual liberty, human equality, and democracy through U.S. foreign policy."²⁵

62. The Commission was designed from the outset to limit human rights to those allegedly grounded in theories of natural law and thus to recommend that the U.S. government adopt a working definition of "unalienable" rights that departs from existing

²⁴ U.S. Dep't of State, Charter for the Commission on Unalienable Rights, <https://www.state.gov/charter-for-the-commission-on-unalienable-rights/> (the "Commission Charter").

²⁵ *Id.* ¶ 3.

human rights laws and protections, and precludes the acknowledgement of LGBTQI and sexual and reproductive rights as human rights.

63. Indeed, Secretary Pompeo expressly invoked the view that there has been an inappropriate “rights proliferation” when he announced the formation of the Commission. In particular, he suggested that this purported “proliferation” has caused claims to “come into tension with one another, provoking questions and clashes about which rights are entitled to gain respect,” and has sown confusion among “[n]ation-states and international institutions . . . about their respective responsibilities concerning human rights.”²⁶

64. Similarly, in speaking at the first Commission meeting, Secretary Pompeo observed that “in the last few decades, we’ve become confused about ‘rights.’ Claims of ‘rights’ have shaped our political debates but it isn’t always clear whether we’re talking about fundamental, universal rights; or debatable political priorities; or merely personal preferences. Claims of ‘rights’ have exploded.”²⁷ Secretary Pompeo thus went on to state that the Commission would need to answer some “key questions,” including (1) “[w]hat are our fundamental freedoms?” and (2) “[h]ow do we know if a claim of human rights is true?”²⁸

65. The presenters at the Commission’s first meeting likewise echoed Secretary Pompeo’s skepticism towards the accepted modern framework of human rights,

²⁶ U.S. Dep’t of State, Remarks to the Press, Sec’y of State Michael R. Pompeo (July 8, 2019), <https://translations.state.gov/2019/07/08/secretary-of-state-michael-r-pompeo-remarks-to-the-press-7/>.

²⁷ See U.S. Dep’t of State, Remarks, Sec’y of State Michael R. Pompeo (Oct. 23, 2019), <https://www.state.gov/commission-on-unalienable-rights-public-meeting>.

²⁸ *Id.*

and their comments further reveal the Commission’s ultimate purpose: to articulate a definition of human rights that admits of only a discrete few rights, grounded in certain religious traditions, and certainly not including rights for LGBTQI individuals or women and girls seeking sexual and reproductive health rights. Speaker Michael McConnell declared that he is skeptical of modern international human rights. And Speaker Wilfred McClay declared that the Commission’s project to define “unalienable rights” should produce a list that is “few in number and extremely well-defined.”²⁹ Expressing his view that “rights” claims have proliferated, he warned that allowing everyone to claim rights, renders that term meaningless.

a. Defendants Illegally Chartered the Commission.

66. Under FACA, creation of the Commission required meaningful consultation with GSA. 5 U.S.C. App. 2 § 9(a)(2).

67. Upon information and belief, Defendants did not engage in such meaningful consultation.

68. In addition, FACA required Defendants to make significant preliminary findings before chartering the Commission. Specifically, Defendants were required to “determine[] as a matter for formal record . . . after consultation with the [GSA]” that the committee is “in the public interest,” 5 U.S.C. App. 2 § 9(a)(2), and that it is “essential to the conduct of agency business” and the “information to be obtained is not already available through another advisory committee or source within the Federal government,” 41 C.F.R. § 102-3.30(a). They did not make these findings.

²⁹ U.S. Dep’t of State, Commission on Unalienable Rights Minutes (Oct. 23, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes/>.

69. Defendants' attempt to comply with these requirements reads, in its entirety: "The Department of State affirms that the advisory committee is necessary and in the public interest." 84 Fed. Reg. at 25,109-01. That single sentence falls far below State's burden under FACA to make the findings required under that statute or under the APA to engage in reasoned decisionmaking.

70. Defendants do not provide any evidence or reasoning to support its decision that the Commission is "in the public interest."

71. Nor do the Defendants explain why the Commission is "necessary," let alone "essential," as FACA requires. And, indeed, they would be hard-pressed to do so given that the Department has numerous other ways to get the kind of information and recommendations it seeks from the Commission.

72. For example, the Department could turn to its own Bureau of Democracy, Human Rights, and Labor ("DRL"), whose mission is to "address[] the fundamental freedoms set forth in the founding documents of the United States and the complementary articles of the Universal Declaration of Human Rights and other global and regional commitments."³⁰ Or the Department could engage its own Office of the Legal Adviser, which is staffed with public international law experts specifically tasked with advising on issues pertinent to the United States' international human rights commitments.³¹ Finally, the Department could turn to the Advisory Committee on

³⁰ U.S. Dep't of State, About Us – Bureau of Democracy, Human Rights, and Labor, <https://www.state.gov/about-us-bureau-of-democracy-human-rights-and-labor/>.

³¹ See U.S. Dep't of State, Functional Offices – Office of the Legal Adviser, <https://www.state.gov/functional-offices/> (describing the work of the Offices of Human Rights and Refugees, Treaty Affairs, and United Nations Affairs).

International Law, which is comprised of former Legal Advisers, international law practitioners, and academics.³²

73. Additionally, the Secretary has at his disposal the Office of Religious Freedom—recently elevated as a freestanding office of equal rank to the DRL—which has as its singular purpose the mission of “promoting religious freedom as a core objective of U.S. foreign policy.”³³

74. The Department thus has not made the public interest findings required by FACA, much less provided a reasoned explanation for any such conclusions.

b. Defendants Illegally Staffed the Commission.

75. FACA also requires “the membership of [an] advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2 §§ 5(b)(2), (c); *see also Nat’l Res. Def. Council, Inc. v. EPA*, 2020 WL 615072, at *6 (S.D.N.Y. Feb. 10, 2020) (holding that a “fairly balanced” claim under FACA is justiciable); *Nat’l Res. Def. Council v. Dep’t of Interior*, 410 F. Supp. 3d 582, 603-08 (S.D.N.Y. 2019) (same).

76. The Commission’s charter states that the Commission will be “comprised of no more than fifteen members who have distinguished backgrounds in U.S. diplomacy, international law, and human rights.” Charter ¶ 12. Its Membership Balance Plan elaborates that “members will be proposed for membership from one of the following

³² U.S. Dep’t of State, 2019 Current Fiscal Year Report: Advisory Committee on International Law, <https://www.facadatabase.gov/FACA/apex/FACACommitteeLevelReportAsPDF?id=a10t0000001gzkYAAQ> (last visited Feb. 14, 2020).

³³ U.S. Dep’t of State, Office of International Religious Freedom, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-of-international-religious-freedom/>.

categories: (1) Legal scholars; (2) Other academics and leaders of non-profit, non-governmental research institutions; (3) Former U.S. Government officials (including former judges); and (4) Leaders of non-governmental, philanthropic organizations.”³⁴

The Department’s only discussion of how it will achieve and maintain a balance of views is to state: “The membership will be selected to represent diverse points of view.”³⁵

77. The Membership Balance Plan provides that members of the Commission will be selected from recommendations made by senior career and political officials.³⁶ State did not provide the public with a mechanism for nominating members to the Commission.³⁷

78. The State Department selected former Ambassador (and current Professor) Mary Ann Glendon to chair the Commission and Dr. Peter Berkowitz to serve as the Executive Secretary. In addition, State has selected the following members to serve on the Commission: Dr. Russel Berman, Professor Paolo Carozza, Professor Hamza Yusuf Hanson, Dr. Jacqueline River, Rabbi Dr. Meir Soloveichik, Dr. Katrina Lantos Swett, Dr. Christopher Tollefsen, Dr. David Tse-Chien Pan, and Professor Kenneth Anderson. In addition, Mr. F. Cartwright Weiland serves as Rapporteur.

³⁴ U.S. Dep’t of State, Membership Balance Plan, Commission on Unalienable Rights ¶ 4(b) (May 10, 2019), <https://tinyurl.com/memshipbalanceplan> (the “Commission Membership Balance Plan”).

³⁵ *Id.*

³⁶ *Id.* ¶ 5.

³⁷ *See generally id.*

79. As Chair Mary Anne Glendon openly acknowledged at the February 21, 2020 Commission meeting, the Commission is “a group of academics,” and indeed draws its membership entirely from the ranks of academia.³⁸

80. Dr. Berman, Dr. Berkowitz, and Mr. Weiland are also members of the Office of Policy Planning within the Office of the Secretary of State, although Dr. Berkowitz and Dr. Berman are moonlighting from their positions at Stanford’s Hoover Institute while they serve as advisers to Secretary Pompeo.

81. The Committee does not include career officials at the Department, representatives to relevant treaty body committees, or anyone from DRL—the State Department office principally charged with carrying out the commitments expressed in the UDHR.

82. The Commission is also comprised of numerous members whose professional work has primarily focused on religious freedom and religious liberties, but does not include any members with a similarly focused background on any other civil, political, economic, or social right.³⁹

³⁸ See generally U.S. Dep’t of State, Commission on Unalienable Rights: Member Bios, <https://www.state.gov/commission-on-unalienable-rights-member-bio>.

³⁹ See, e.g., Mary Ann Glendon, *For Better or for Worse?*, Wall St. J. (Feb. 25, 2004), <https://www.wsj.com/articles/SB107767097367738444> (arguing that an expansion of abortion rights and allowing same sex marriage infringes on religious freedom); Press Release, Becket, *Rabbi Dr. Meir Soloveichik Awarded Religious Liberty’s Highest Honor* (May 25, 2018), <https://www.becketlaw.org/media/rabbi-dr-meir-soloveichik-awarded-religious-libertys-highest-honor/> (honoring Rabbi Soloveichik for “demonstrated courage and commitment to defending religious liberty for people of all faiths”); Masha Gessen, *Mike Pompeo’s Faith-Based Attempts to Narrowly Redefine Human Rights*, The New Yorker (July 10, 2019), <https://www.newyorker.com/news/our-columnists/mike-pompeos-faith-based-attempt-to-narrowly-redefine-human-rights> (describing the unifying feature of the commission members as being their focus on religious freedom).

83. Numerous Commission members also believe that religious freedom is a human right that must be prioritized above others, and see important social and political rights as in tension with religious liberty-based claims.

84. An exchange between Ken Roth, Executive Director of Human Rights Watch, and the Commission at the January 10, 2020 meeting made this point clear. In his remarks, Mr. Roth sought to explain why he finds the notion that rights are in tension to be misleading. He did so by employing case studies revealing that human rights abuses often involved multiple rights, and also by noting that other tensions have already been resolved by relevant treaty-monitoring bodies. In their questions, however, Commissioners Berkowitz, Carozza, Tollefsen, Tse-Chien Pan, and Lantos Swett sharply criticized Mr. Roth's assertion that the rights of women and girls to receive sexual and reproductive healthcare, including access to abortion, should not be absolutely subjugated to the rights of those who would deny such care on the basis of their religious beliefs.

85. In contrast, none of the Commissioners suggested that Mr. Roth's position had merit, though it is understood to be an accurate representation of international human rights law by human rights advocates and experts, including Plaintiffs.⁴⁰

86. Many of the Commission members also appear to believe that any conception of human rights must be grounded in natural law and natural rights, with the associated religious connotations of those terms.⁴¹

⁴⁰ See OHCHR, *Sexual and Reproductive Health and Rights*, <https://www.ohchr.org/en/issues/women/wrgs/pages/healthrights.aspx>.

⁴¹ See, e.g., *The Lawfare Podcast: Mary Ann Glendon on Unalienable Rights*, LawFare (Aug. 3, 2019), <https://www.lawfareblog.com/lawfare-podcast-mary-ann-glendon-unalienable-rights>, at 11:50 (Glendon stating that "The Declaration of Independence when it speaks of the laws of nature is hearkening back to a tradition of natural right

87. Conversely, none of the Commission members appears to believe that existing international treaties make clear what rights they protect, that interpretive disputes should be resolved within the four corners of those instruments, or that any question of interpretation can be resolved through the expert bodies that accompany each instrument. Nor do any of the Commissioners represent the approach codified in human rights law that balances protections for religious freedom with other fundamental rights.

88. Finally, members of the Commission have expressed skepticism about what they view to be a modern proliferation of rights. For example, as Chairwoman Mary Ann Glendon has explained: “[a]fter the human rights idea showed its power in the movements that ended apartheid in South Africa, brought down totalitarian regimes in Eastern Europe, . . . there began to be a surge of interest on the part of many groups to have their agenda items characterized as universal human rights.”⁴² She has further warned that “[i]f everything is a right, then nothing is.”⁴³

89. In contrast, none of the Commission members represents those who would disagree with the very premise—articulated by Secretary Pompeo in establishing the Commission—that rights have proliferated inappropriately, that this trend has made the

which holds that there are certain rights that are pre-political.”); U.S. Dep’t of State, Commission on Unalienable Rights: Member Bios, *supra* note 38 (describing Rabbi Dr. Soloveichik as “an expert on the influence of Jewish sources . . . on the natural rights understandings of America’s founding fathers,” and Dr. Tollefsen as “a leading scholar of natural law and natural rights”).

⁴² *The Lawfare Podcast: Mary Ann Glendon on Unalienable Rights*, *supra* note 41 at 17:15.

⁴³ Interview with Mary Ann Glendon, Chair of the U.S. Commission on Unalienable Rights in World Over (Sept. 19, 2019), <https://www.youtube.com/watch?v=QeR0y-Ed-IQ> (Glendon’s remarks at 3:35).

current system unwieldy, and that a re-examination based on first principles or natural law is therefore required.

90. Moreover, those who express a desire to curb the purported “proliferation” of rights very often do so as an overtly outcome-neutral way of expressing a desire to limit rights and protections for LGBTQI individuals and sexual and reproductive health and rights for women and girls.⁴⁴

91. Many members of the Commission have expressed clear opposition to reproductive freedoms as well as firm anti-LGBTQI views. For example,

- a. Professor Mary Ann Glendon has called marriage equality not a bid for civil rights, but rather “a bid for special preferences” that will leave the “rights of children . . . impaired” and put “religious freedom . . . at stake.”⁴⁵ She is also a vocal opponent of the expansion of abortion rights.⁴⁶

⁴⁴ See Papazoglou, *supra* note 23 (“[T]he concepts of natural law and rights, precisely because of their implied universality, do tend to obscure the political agendas of those invoking them.”); cf. Myers, *supra* note 21 at 1 (explaining in a Heritage Foundation report how “[t]he human rights view . . . leads to the endless proliferation of rights claims, which become self-negating”) with Thomas Jipping, *The Moral Rot of the Left’s Abortion Agenda* (Feb. 6, 2019), <https://www.heritage.org/life/commentary/the-moral-rot-the-lefts-abortion-agenda>, Ryan T. Anderson, Heritage Found., Issue Brief No. 4925, Sexual Orientation and Gender Identity (SOGI) Laws Are Not Fairness for All (Nov. 28, 2018), <https://www.heritage.org/sites/default/files/2018-11/IB4925.pdf>.

⁴⁵ Mary Ann Glendon, *For Better or for Worse?*, *supra* note 39.

⁴⁶ See, e.g., Kenneth Hallenius, *CEC Presents Notre Dame Evangelium Vitae Medal to Mary Ann Glendon*, DeNicola Center for Ethics and Culture (Apr. 30, 2018), <https://ethicscenter.nd.edu/news/cec-presents-notre-dame-evangelium-vitae-medal-to-mary-ann-glendon/>; Mary Ann Glendon, *The Bearable Lightness of Dignity*, First Things (May 2011), <https://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity> (“The turbulent decades of the sexual revolution were accompanied by campaigns to have sexual liberties and abortion recognized as universal rights.”).

- b. Professor Peter Berkowitz has criticized the Supreme Court’s 2003 ruling overturning sodomy laws as “dangerous.”⁴⁷
- c. Professor Paolo Carozza advocates for a “pro-life approach” to international development.⁴⁸ He has stated that “respect for ‘the unborn’ is one significant dimension of the Universal Declaration that remains unfulfilled.”⁴⁹
- d. Professor Hamza Yusuf Hanson is known for holding anti-abortion views and has lectured on his belief that Muslims should repress being gay and that homosexuality and same-sex marriage are prophesized as “one of the signs of the end of times.”⁵⁰
- e. Dr. Jacqueline Rivers has written that “marriage faces new threats as the divinely established order of marriage between one man and one woman is challenged.”⁵¹ She has insisted that LGBTQI activists have “abolish[ed] in law the principle of marriage as a conjugal union and reduc[ed] it to nothing other than sexual or romantic partnerships or domestic companionship,” and

⁴⁷ Peter Berkowitz, *Contribution to Symposium: Has the Supreme Court Gone Too Far?*, Commentary Magazine (Oct. 2003), <http://www.peterberkowitz.com/articles/commentarysymposium.html>.

⁴⁸ See Igor Derysh, *Mike Pompeo’s “Pro-Women” Human Rights Panel is Loaded with Abortion Foes*, Salon (July 12, 2019), <https://www.salon.com/2019/07/12/mike-pompeos-pro-women-human-rights-panel-is-loaded-with-abortion-foes/>.

⁴⁹ Lynn M. Morgan & Mary E. Woolley, *Claiming Rosa Parks: Strategic Secularism and Human Rights in Latin America*, at 8 (July 2011), available at <https://www.sxpolitics.org/wp-content/uploads/2009/02/morgan-claiming-rosa-parks-sussex-short-version.pdf>.

⁵⁰ Youtube Video of Hamza Yusuf (July 29, 2011), <https://www.youtube.com/watch?v=iXRnWTB2FRg&app=desktop>.

⁵¹ Jacqueline C. Rivers, *Marriage and the Black Family*, Public Discourse (Nov. 25, 2014), <https://www.thepublicdiscourse.com/2014/11/14108/>.

that LGBTQI activists have further “unjustly appropriate[d]” civil rights language.⁵²

- f. Rabbi Dr. Meir Soloveichik has called marriage equality “nonsensical” and suggested that tolerance for same-sex marriage would lead to calls in favor of bestiality.⁵³
- g. Dr. Christopher Tollefsen has written extensively on his anti-abortion views.⁵⁴ He has argued that “contraception is morally impermissible,”⁵⁵ and that abortion is “the unjust and intentional taking of innocent human life.”⁵⁶
- h. F. Cartwright Weiland formerly worked at the Texas Conservative Coalition Research Institute, a conservative think tank that opposes reproductive freedom, where he helped draft an amicus brief supporting the State of Texas⁵⁷ in *Whole Women’s Health v. Hellerstedt*, a case in which the United

⁵² *Id.*

⁵³ Bill Browning, *Every Member of Trump’s New Human Rights Commission Is an Anti-LGBTQ Activist*, LGBTQ Nation (July 11, 2019), <https://www.lgbtqnation.com/2019/07/every-member-trumps-new-human-rights-commission-anti-lgbtq-activist/>.

⁵⁴ *See, e.g.*, Robert P. George and Christopher Tollefsen, *Embryo: A Defense of Human Life* (1st ed., Doubleday Publishing 2008).

⁵⁵ Christopher Tollefsen, *Pope Francis, the Zika Virus, and Contraception*, Public Discourse (Feb. 23, 2016), <https://www.thepublicdiscourse.com/2016/02/16517/>.

⁵⁶ Christopher Tollefsen, *Assault Weapons, Defense, and the Resistance to Tyranny*, Public Discourse (Mar. 6, 2018), <https://www.thepublicdiscourse.com/2018/03/21140/>.

⁵⁷ John D. Colyandro and F. Cartwright Weiland, *Undercover Footage Undermines Abortion Advocates’ Case in Texas Abortion Case*, Dallas Morning News (Mar. 2, 2016), <https://www.dallasnews.com/opinion/commentary/2016/03/02/weiland-and-colyandro-undercover-footage-undermines-abortion-advocates-case-in-texas-abortion-case/>; *see also* Brief of American Center for Law & Justice, et al. as Amici Curiae Supporting Respondent, *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 403754.

States Supreme Court struck down a Texas law that imposed onerous and medically unnecessary conditions on abortion providers in an effort to force their closure and restrict abortion access in the state, 136 S. Ct. 2292 (2016).

92. In sum, the Commission, which is comprised entirely of academics, is bereft of members who are recognized as human rights experts, lacks any member who represents the views of an established human rights organization, or brings the perspective of activists and experts working on the ground to promote and defend human rights against abuses and infringements.

93. It also lacks any member with a background focused on supporting any specific defined right other than religious liberty rights. Though numerous members hold established views that are hostile to both sexual and reproductive health and rights and LGBTQI rights, the Commission lacks any member with an established commitment to upholding those rights, or those of other marginalized groups.

94. It further lacks any member who rejects the premise that human rights have proliferated in a way that throws the international human rights legal system itself into disarray, or who would advocate for understanding human rights from the standpoint of the binding post-UDHR legal instruments that establish those rights, rather than casting aside the modern human rights framework to look only to natural law.

95. Defendants have thus set up the Commission in a manner that excludes representation for human rights advocacy organizations, among other key interest groups, and is generally ill-suited to allow for the robust debate Defendants purportedly want. Rather, the members were carefully selected to yield a pre-determined result: recommendations that would limit human rights to those allegedly grounded in theories

of natural law and that would have the U.S. government adopt a working definition of “unalienable” rights that precludes acknowledging LGBTQI and sexual and reproductive health and rights as “human rights.”

c. Defendants Have Unlawfully Withheld Commission Records.

96. FACA requires Defendants to make available, in advance of the public meetings where their content will be relevant, “the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, [and] other documents ... made available to or prepared for or by” the committee. 5 U.S.C. App. 2 § 10(b); 11 FAM 817(a); *see Food Chem. News*, 980 F.2d at 1472 (records must be released before or at the relevant meeting, so that the public can “follow the substance of the [committee’s] discussions”).

97. The first Commission meeting was held on October 23, 2019.⁵⁸ Following Secretary Pompeo’s remarks, the Commission heard testimony from Professors Michael McConnell (Stanford Law School) and Wilfred McClay (University of Oklahoma).⁵⁹ Defendants did not announce in advance that Professors McConnell or McClay would be speaking, nor have copies of their remarks been made publicly available, though they are listed among the “citations” the Commission is considering.⁶⁰

98. The Commission members also received in preparation for this meeting copies of a “Bureau of Democracy, Human Rights, and Labor (DRL) PowerPoint

⁵⁸ Commission Oct. 23 Minutes, *supra* note 29.

⁵⁹ *Id.*

⁶⁰ *See* U.S. Dep’t of State, Commission on Unalienable Rights: Citations, <https://www.state.gov/commission-on-unalienable-rights-citations> (last visited Feb. 12, 2020).

presentation overview,” as well as a “[b]inder of previously-assigned readings.”⁶¹ These materials have not been made available to the public.

99. The Commission’s second meeting took place on November 1, 2019.⁶² Professors Cass Sunstein (Harvard Law School) and Orlando Patterson (Harvard University) presented testimony to the Commissioners.⁶³ Defendants did not announce in advance that Professors Sunstein or Patterson would be speaking. Copies of their remarks have not been made available to the public, though Professor Sunstein’s remarks and a paper authored by Professor Patterson are listed among the “citations” the Commission is considering.⁶⁴

100. The Commission’s third public meeting was held on December 11, 2019.⁶⁵ Michael Abramowitz, President of Freedom House, and Miles Yu, a history professor at the U.S. Naval Academy, presented testimony to the Commission.⁶⁶ Copies of their remarks have not been made available to the public, though they are listed among the “citations” the Commission is considering.⁶⁷

⁶¹ Commission Oct. 23 Minutes, *supra* note 29.

⁶² U.S. Dep’t of State, Commission on Unalienable Rights Minutes (Nov. 1, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-2/>.

⁶³ *Id.*

⁶⁴ *See* Commission Citations, *supra* note 60.

⁶⁵ U.S. Dep’t of State, Commission on Unalienable Rights Minutes (Dec. 11, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-3/>.

⁶⁶ *Id.*

⁶⁷ *See* Commission Citations, *supra* note 60.

101. The Commission’s fourth public meeting was held on January 10, 2020.⁶⁸ Commission members Soloveichik and Rivers were unable to attend the meeting. The Commission received testimony from Kenneth Roth, President of Human Rights Watch, and Diane Orentlicher, professor at the Washington College of Law at American University. The Commission members asked questions of both speakers, specifically referencing an article that Ms. Orentlicher provided to the Commission: Diane F. Orentlicher, *The Power of an Idea: The Impact of United States Human Rights Policy*, 1 *Transnat’l L. & Contemporary Problems* at 48-60 (1991).

102. Neither Professor Orentlicher’s article, her remarks to the Commission, nor Mr. Roth’s remarks to the Commission have been made publicly available. Instead, the Commission has merely included Ms. Orentlicher’s article and the oral remarks delivered by Ms. Orentlicher and Mr. Roth at the public meeting among the “citations” the Commission is considering.⁶⁹

103. Also at the fourth meeting, the Commission described itself as engaged in a period of self-education to inform itself about the founding principles of the U.S. human rights tradition, including by reading briefing materials provided by DRL and the Office of the Legal Adviser, which Chairperson Mary Ann Glendon described as “tremendously important” briefings. None of these materials, including any briefing materials provided by offices within State, has been made publicly available.

⁶⁸ U.S. Dep’t of State, Commission on Unalienable Rights, <https://www.state.gov/commission-on-unalienable-rights> (last visited Mar. 2, 2020).

⁶⁹ See Commission Citations, *supra* note 60.

104. The Commission’s fifth public meeting was held on February 21, 2020.⁷⁰ The Commission received testimony from Martha Minow, Professor at Harvard Law School, and Thor Halvorssen, the Chief Executive Officer of the Human Rights Foundation.⁷¹ Both speakers provided copies of their remarks to the Commission, but these have not been made available to the public, though they are listed among the “citations” the Commission is considering.⁷² On information and belief, Ms. Minow was also invited by the Chair to provide a supplemental submission.

105. The Department has also announced that it will hold a sixth public meeting on March 26, 2020, which will continue the “discussion of the role of human rights in American foreign policy.”⁷³ The Commission will receive testimony from Joseph Weiler, a professor at the New York University School of Law.

106. Upon information and belief, the Commission has met on other occasions in closed sessions to discuss matters related to the Commission’s final report and recommendations. Minutes are prepared for these closed-door meetings, which are distinct from the subcommittee meetings. The public has not been permitted to attend these meetings, and minutes and notes taken at these meetings have not been made publicly available.

107. In addition to the meetings of the entire Commission, and the closed-door meetings, the Commission has also established at least four subcommittees, which have met periodically since the Commission was established in July 2019. The subcommittees,

⁷⁰ Commission Homepage, *supra* note 68.

⁷¹ *Id.*

⁷² *See* Commission Citations, *supra* note 60.

⁷³ *Id.*; 85 Fed. Reg. at 6011.

which are comprised of 2 to 4 Commission members each, are tasked with answering the following questions:

- a. What does it mean for advice on human rights in U.S. foreign policy to be grounded in America's founding principles? (Berkowitz, Soloveichik).
- b. What does it mean for advice on human rights in U.S. foreign policy to be grounded in the international principles to which the United States ascribed after World War II? (Carozza, Glendon, Pan).
- c. What role should human rights play in U.S. foreign policy? (Berman, Carozza, Lantos Swett, Rivers).
- d. Clarification of terms and concepts. (Tollefsen, Hanson).

108. These subcommittee meetings have not been opened to the public, nor have Defendants provided the subcommittee records to the public.

109. To date, the only records that Defendants have released are Secretary Pompeo's prepared remarks for the October 23 Commission meeting; minutes from the October and November public meetings; agendas from the October, November, December, and January public meetings; and a list of citations to some of the papers and documents purportedly being used by the Commission in the course of its work, but not the actual papers or documents. Meeting minutes for the January 2020 and February 2020 meetings have not been released.

110. The minutes that have been released do not contain a full and thorough accounting of the Commission's meetings. Rather, they contain only cursory summations

of witness remarks and the Commission members' questions and comments, and do not fully document questions asked by audience members or answers provided by Commission members.

111. State Department staff have also documented each of the Commission's public meetings with audio and video recordings. These files would contain a nearly complete replication of the Commission's public meetings that would provide additional information of interest. On information and belief, the State Department maintains these audio-visual files in its records. Such files have not been made publicly available.

112. Moreover, the Commission has not yet held a public meeting where the audience had access to witness remarks, a description of the specific topic the witnesses would be covering, or an agenda for the meeting *in advance of the meeting*. Though the Commission has outlined very broad topics for each public session, witnesses are not required to adhere closely to these topics, and indeed speakers discussing the same broad topic have taken substantially different approaches in their remarks.

113. The lack of access to Commission records in advance of or even at the meetings, especially with respect to witness remarks, has made it more difficult for the interested public, including Plaintiffs, to prepare to attend the public meetings, to follow along with the meetings as they happen, and to participate in each of the public meetings. The lack of information has also made it more difficult to follow along with the Commission's work.

114. In requests made on February 21 to Duncan Walker, the Commission's Designated Federal Officer, Plaintiffs requested "that the State Department and Commission make available all documents thus far prepared for or by the Commission

and ensure that Commission records are made publicly available in a timely manner moving forward.” Ex. A.

115. Through Mr. Walker, the Department provided a short electronic mail response that same day, and directed Plaintiffs to the Commission’s website as the apparent sole repository of records the Commission intends to make public. Ex. B. The Department further noted that the Commission intends to provide, through the website, only the “agendas, minutes, and information on each document received, issued, or approved by the advisory committee *at the public meetings*[.]” *Id.* (emphasis added). Thus, the Department apparently does not intend to make publicly available either the content of documents provided to the Commission at the public meetings, including prepared remarks provided by the invited witnesses, or material provided to it outside of the public meetings, such as public comments submitted to the Commission.

III. The Commission Has Harmed Plaintiffs and Advocates for Human Rights.

116. Because of the opaque process with which the Commission was established, the secrecy with which it has since operated, and its failure to provide a balanced composition, the Commission is already causing Plaintiffs to suffer harm by impeding their missions and forcing them to divert resources in response. *See supra* ¶¶ 20-31. And once completed, its work will further inflict concrete, imminent harms on Plaintiffs.

117. The Secretary of State has asked this body to articulate principles that “will inform policy-making in the future.”⁷⁴ The “U.S. articulations of human rights can

⁷⁴ *See* Sec. Pompeo Oct. 23 Remarks, *supra* note 27.

influence interpretations of human rights law, contribute to other governments' positions on (and implementation of) human rights, and impact the work of multilateral bodies."⁷⁵

118. Given the statements and public positions of its members, the Commission may well issue a report or set of recommendations that adopts the Secretary's premise that human rights have proliferated, resulting in a chaotic and unworkable scheme, and that there is, accordingly, a need to reconsider the current understanding of human rights. Because the Commission does not contain members who would represent the contrary view, the Commission's report or recommendations would fail to represent the views of many mainstream human rights organizations—*i.e.*, that rights have not proliferated and that the current system is not in disarray—and would stand in contrast to current international law and consensus.

119. Starting from this premise, the Commission's report and recommendations are likely to arrive at an understanding of "unalienable" rights that undermines the rights and protections of, among others, LGBTQI individuals seeking equal treatment, and women and girls and others seeking access to sexual and reproductive health and rights.

120. The Commission is likely to articulate recommendations in its final report that threaten the rights now guaranteed to Plaintiffs' core constituencies as human rights. Such a result is the predictable consequence of the Department staffing the Commission with individuals holding well-established narrow views, and neglecting entirely its obligation to ensure a balance of viewpoints by including important perspectives, such as

⁷⁵ JoAnn Kamuf Ward and Catherine Coleman Flowers, *How the Trump Administration's Efforts to Redefine Human Rights Threaten Economic, Social, and Racial Justice*, 4 Colum. Hum. Rts. L. Rev. 27 (2019), <http://hrlr.law.columbia.edu/hrlr-online/how-the-trump-administrations-efforts-to-redefine-human-rights-threaten-economic-social-and-racial-justice/>.

those held by mainstream human rights organizations, like Plaintiffs, as well as activists and practitioners, and rights holders.

121. The Commission’s report and recommendations will likely be used to influence U.S. policy. The Secretary has said that he “hope[s the Commission’s work] will inform policy-making in the future.”⁷⁶ Given his high-level involvement in establishing the Commission, including by staffing it with several of his personal advisors from the Office of Policy Planning, there is little reason to believe that the Secretary’s “hope” will not come to pass. Indeed, in a speech to Concerned Women for America, Secretary Pompeo noted that the report “will deliver to our organization this foundational document that I hope will become a document that the State Department will turn to for decades to come, so that as our officers—young officers who enter the State Department—are moving around the world, they have something to look back to. So as they talk about religious freedom or they talk about these central ideas of personal autonomy—that they’ll have something they can turn back to.”⁷⁷

122. Moreover, a report and set of recommendations bearing the imprimatur of the State Department that suggests that the very meaning of human rights is open to interpretation will provide foreign states inclined towards restricting human rights with a powerful new tool with which to justify their conduct.

123. Indeed, the concern that the Commission’s report will be swiftly utilized by foreign governments is supported by evidence from the Commission’s own meetings.

⁷⁶ See Sec. Pompeo Oct. 23 Remarks, *supra* note 27.

⁷⁷ U.S. Dep’t of State, Remarks at the Concerned Women for America 40th Anniversary Luncheon, Sec’y of State Michael R. Pompeo (Sep. 13, 2019) <https://www.state.gov/secretary-michael-r-pompeo-at-the-concerned-women-for-america-40th-anniversary-luncheon>.

During the question and answer portion of the Commission’s third public meeting on December 11, 2019, a member of the Brazilian government who was in attendance expressed the view that new rights had been created that deviated from foundational understandings of “unalienable” rights. The Brazilian representative asked the Commission to use their mandate to define key terms to ensure that “unalienable” rights were understood in a manner consistent with that original understanding.⁷⁸

124. A report or recommendation by the Commission that eliminates important rights from the category of human rights will surely embolden governments across the globe to act in a manner that, among other things, limits LGBTQI rights as well as sexual and reproductive health and rights.

125. Even if the Commission’s report and recommendations are not immediately translated into policy, the Commission’s work will nevertheless cause Plaintiffs to suffer immediate and concrete harm. If the report does nothing more than carry out the mandate set for it by the Secretary—to “provide the intellectual grist for . . . one of the most profound reexaminations of the unalienable rights in the world since the 1948 Universal Declaration,”⁷⁹—it will still create significant uncertainty about the status of traditionally recognized human rights. In the midst of this potentially new landscape, Plaintiffs will be required to divert resources to first understand how and why the

⁷⁸ Brazil has received demerits on a variety of human rights indicators from human rights organizations. In particular, under President Jair Bolsonaro, Brazil has “sought to restrict the rights of lesbian, gay, bisexual, and transgender (LGBT) people.” Human Rights Watch, World Report 2020: Brazil – Events of 2019, <https://www.hrw.org/world-report/2020/country-chapters/brazil#e81181>. Brazil has also outlawed abortion, except in cases of rape, and imposes a three year prison sentence for “[w]omen and girls who have clandestine abortions.” *Id.*

⁷⁹ Sec. Pompeo Remarks to the Press, *supra* note 26.

Commission reached its final conclusions, what the impact of those will be, and second, to adapt its educational and advocacy work to this new reality. This work will be made significantly more difficult by the Commission's current lack of transparency, which has impaired the ability of Plaintiffs to participate and follow the work of the Commission.

126. Moreover, it will signal to many that the U.S. has called into doubt the post-UDHR framework that protects a diverse set of marginalized groups, which will, in turn, undermine the very language and framework through which Plaintiffs carry out their mission, and will thereby harm their ability to ground their advocacy in a universally agreed upon rights framework, and to educate and train their partners to powerfully converse in that same language, and protect the constituencies they serve.

Claims for Relief

Count One

Unlawful Creation of a Federal Advisory Committee 5 U.S.C. § 706, 5 U.S.C. App. 2 § 9, 41 C.F.R. § 102-3.30(a)

127. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

128. FACA and its implementing regulations require certain findings and procedures before an agency may create an advisory committee. Defendants failed, in multiple respects, to comply with such requirements. In particular,

- a. Defendants have not made the requisite findings concerning whether: (1) the Commission is “in the public interest in connection with the performance of duties imposed on that agency by law,” 5 U.S.C. App. 2 § 9(a)(2); (2) the Commission is “essential to the conduct of agency business,” 41 C.F.R. § 102-3.30(a); and (3) “the information to be obtained [through the committee] is not

already available through another advisory committee or source within the Federal Government,” *id.* See Commission Charter ¶ 2.

- b. Defendants did not meaningfully consult with GSA before creation of the Commission. 5 U.S.C. App. 2 § 9(a)(2); *see also* 11 FAM 812.1.
- c. Defendants did not submit an adequate Membership Balance Plan. *See* Commission Membership Balance Plan, *supra* note 34.

129. Accordingly, Defendants’ creation of the Commission was done without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

Count Two
Unlawful Creation of a Federal Advisory Committee
5 U.S.C. § 706, 5 U.S.C. App. 2 § 9, 41 C.F.R. § 102-3.30(a)

130. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

131. Defendants assert that “[t]he Under Secretary for Management’s approval of this charter constitutes a determination by the Secretary of State that the establishment of the Commission is in the public interest in connection with the performance of duties of the Department of State.” Commission Charter ¶ 2.

132. But Defendants have not explained why they believe the Commission is “in the public interest,” 5 U.S.C. App. 2 § 9(a)(2), and “essential to the conduct of agency business,” 41 C.F.R. § 102-3.30(a), or provided assurances that (3) “the information to be obtained [through the committee] is not already available through another advisory committee or source within the Federal Government,” *id.* See Commission Charter ¶ 2.

133. Defendants failure to explain why the Commission is “necessary,” let alone “essential,” and why it will generate information not otherwise available to the

State Department does not reflect the reasoned decisionmaking required of agencies under the APA.

134. Creation of the Commission is therefore arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of their statutory authority. 5 U.S.C. §§ 706(2)(A), (C).

Count Three
Failure to Disclose Advisory Committee Materials In a Manner That Provides for
Meaningful Public Participation
5 U.S.C. § 706, 5 U.S.C. App. 2 § 10

135. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

136. FACA and its implementing regulations require that Defendants be transparent when conducting advisory committee business. Yet, the Commission has unlawfully operated outside of the public eye.

137. Specifically, Defendants have failed to make available to the public the “[r]ecords, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, [and] other documents . . . made available to or prepared for or by” the Commission and its subcommittees and working groups. 5 U.S.C. App. 2 § 10(b).

138. Moreover, Defendants have failed to make these Commission materials available sufficiently far in advance of the public meetings, such that members of the public, including Plaintiffs, could meaningfully prepare themselves to follow the Commission’s work at those meetings, and to ask questions and deliver statements relevant to the topic being discussed. 5 U.S.C. App. 2 § 10(b).

139. Defendants' failures, described above, are arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory authority, and/or constitute agency action unlawfully withheld. 5 U.S.C. §§ 706(1), (2).

Count Four
Failure to Disclose Advisory Committee Materials and to Provide for Meaningful
Public Participation
5 U.S.C. § 706, 5 U.S.C. App. II § 10

140. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

141. Defendants have also failed to provide adequate notice of Committee, subcommittee, and working group meetings, 5 U.S.C. App. 2 §§ 10(a)(2), 10(d); 41 C.F.R. § 102-3.145, or to allow meaningful public participation at Committee, subcommittee, and working group meetings, 5 U.S.C. App. 2 §§ 10(a)(1), (a)(2), 10(d); 41 C.F.R. § 102-3.145.

142. Defendants' failures, described above, are arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory authority, and/or constitute agency action unlawfully withheld. 5 U.S.C. §§ 706(1), (2).

Count Five
Unfairly Balanced Advisory Committee,
5 U.S.C. § 706, 5 U.S.C. App. 2 § 5

143. Plaintiff repeats and incorporates by reference each of the foregoing allegations as if fully set forth herein.

144. FACA requires that an advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. II § 5(b)(2). The Commission's stated function is to provide advice and recommendations "on human rights to the Secretary of State, grounded in our

nation’s founding principles and the 1948 Universal Declaration of Human Rights.” Commission Charter ¶ 3. The Commission does not include representation from human rights practitioner organizations with experience navigating the historical and cultural impacts on human rights practice, nor does it include representation from the LGBTQI and sexual and reproductive health and rights advocacy communities—despite the fact that this Commission is tasked with advising on a topic that directly implicates the very existence of those rights as human rights in the eyes of the U.S. government. Nor does the Commission include any representative who would suggest, as many in the broader human rights community would, that understanding binding legal instruments by looking to natural law sources is a misguided approach; such members would speak to the importance of understanding binding instruments within the four corners of those documents, or through other interpretive techniques, including affiliated treaty bodies established for this very purpose. Failure to include these perspectives leaves the Commission ill equipped to consider this much debated and disputed topic in full or with integrity to the issues.

145. Defendants’ actions in appointing the Commission membership are arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory authority. 5 U.S.C. § 706(2).

Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that Defendants’ creation and administration of the Commission violates the APA, FACA, FACA’s implementing regulations, and Department guidance, and that the establishment of the Commission is therefore unlawful;

2. set aside the Commission's charter and all Secretarial orders and decisions attendant to the Commission's creation, including the appointments of individual committee members and alternate members;
3. through the named Defendants, enjoin the Commission and any of its subdivisions from meeting, advising the Secretary, and otherwise conducting committee or subcommittee business;
4. order Defendants to immediately release all materials prepared for the Commission or its subcommittees, and to provide a *Vaughn* index for such material and those withheld from production for any reason;
5. enjoin Defendants from relying on any recommendations or advice from the Commission;
6. award Plaintiffs their costs, attorneys' fees, and other disbursements for this action; and
7. grant any other relief this Court deems appropriate.

Dated: March 6, 2020

Respectfully submitted,

/s/ Jeffrey Dubner

Karianne M. Jones (*pro hac* to be filed)
Benjamin Seel (*pro hac* to be filed)
Jeffrey Dubner (N.Y. Bar No. 4974341)
Sean Lev (*pro hac* to be filed)
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Counsel for Plaintiffs

EXHIBIT A



February 21, 2020

VIA ELECTRONIC MAIL

Duncan Walker, Designated Federal Officer
Policy Planning Staff
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520
walkerdh3@state.gov
commission@state.gov

Dear Mr. Walker:

As you are aware, on May 30, 2019, the State Department announced its “intent to establish the Department of State Commission on Unalienable Rights ... in accordance with the Federal Advisory Committee Act,” 5 U.S.C. app. 2 (“FACA”).¹ The Commission has thus far held public meetings on October 23, 2019, November 1, 2019, December 11, 2019, and January 10, 2020. It is scheduled to hold another one today, February 21, 2020. It has also reportedly held intermittent subcommittee or working group meetings.

Advisory committees, like the Commission, must meet certain obligations imposed by the FACA. Among these, is the requirement that all “records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda [and] other documents ... made available to or prepared for or by” the advisory committee be made publicly available.² To date, however, the Commission has made publicly available only the following items: Secretary Pompeo’s prepared remarks for the October 23 Commission meeting; minutes from the October and November public meetings; agendas from the October, November, December, and January public meetings; and a list of citations to some of the papers and documents purportedly being used by the Commission in the course of its work, but not the actual papers or documents.³ Furthermore,

¹ See *Department of State Commission on Unalienable Rights*, 84 Fed. Reg. 25109, 25109 (May 30, 2019).

² 5 U.S.C. § 10(b).

³ *Commission Home: Commission on Unalienable Rights*, U.S. Dep’t of State (accessed Jan. 30, 2020), <https://www.state.gov/commission-on-unalienable-rights>; *Citations: Commission on Unalienable Rights*, U.S. Dep’t of State (accessed Jan. 30, 2020), <https://www.state.gov/commission-on-unalienable-rights-citations>; see also *Federal Advisory Committee Act Database, Department of State Commission on Unalienable Rights Committee Members, Meetings, and Advisory Reports* (accessed on Jan. 27, 2020), <https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000003eF4JAAU> (showing that there is “[n]o data available” in tab labeled “Committee Meetings”).

though it is clear that the Commission has been provided with detailed papers produced by invited speakers, these have not been released to the public.⁴

Thus, among other issues with its formation and operation, it does not appear that the Commission is in compliance with its obligation to make all material “made available to or prepared for or by” the Commission “available for public inspection and copying,”⁵ including any materials prepared for or by the Commission’s subcommittees or working groups.

* * *

For the reasons set forth above, CHANGE, Council for Global Equality, Global Justice Center, and Robert F. Kennedy Human Rights respectfully request that the State Department and Commission make available all documents thus far prepared for or by the Commission and ensure that Commission records are made publicly available in a timely manner moving forward.

Sincerely,

Karianne Jones
Benjamin Seel
Democracy Forward Foundation

On behalf of

*CHANGE
The Council for Global Equality
The Global Justice Center
Robert F. Kennedy Human Rights*

Cc:

Mark String, Acting Legal Adviser
U.S. Department of State
2201 C Street, N.W.
HST, Room 6421
Washington, D.C. 20520
legal-fo-support-dl@state.gov

⁴ In some cases, prepared remarks are listed among the “citations” on the Commission’s website, but access to the content is not provided. For remarks that are not otherwise publicly available, a citation alone is plainly insufficient.

⁵ 5 U.S.C. § 10(b).

EXHIBIT B



Benjamin Seel <bseel@democracyforward.org>

Request for Records of Unalienable Rights Commission

Walker, Duncan H <WalkerDH3@state.gov>

Fri, Feb 21, 2020 at 7:00 PM

To: Benjamin Seel <bseel@democracyforward.org>, Commission on Unalienable Rights <Commission@state.gov>

Cc: Legal-FO-Support-DL <Legal-FO-Support-DL@state.gov>, Karianne Jones <kjones@democracyforward.org>

Dear Mr. Seel,

Please see the Commission's website: <https://www.state.gov/commission-on-unalienable-rights>. The State Department created the website to provide agendas, minutes, and information on each document received, issued, or approved by the advisory committee at the public meetings. To the best of our knowledge, the web page contains all such documents for the meetings held so far.

Please let me know if this response meets your request on behalf of CHANGE and Robert F. Kennedy Human Rights.

With best regards,

Duncan

Duncan H. Walker

Member

Policy Planning Staff (S/P)

U.S. Department of State

202-647-2236

walkerdh3@state.gov

From: Benjamin Seel <bseel@democracyforward.org>

Sent: Friday, February 21, 2020 10:50 AM

To: Walker, Duncan H <WalkerDH3@state.gov>; Commission on Unalienable Rights <Commission@state.gov>

Cc: Legal-FO-Support-DL <Legal-FO-Support-DL@state.gov>; Karianne Jones <kjones@democracyforward.org>

Subject: Request for Records of Unalienable Rights Commission

Mr. Walker,

[Quoted text hidden]