

For Opinion See [396 F.3d 1152](#)

United States Court of Appeals, District of Columbia Circuit.
CENTER FOR LAW AND EDUCATION; Designs for Change; Rachelle Lindsey, Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT OF EDUCATION, Defendant-Appellee.
Nos. 02-5227, 04-5150.
August 10, 2004.

On Appeal from the United States District Court for the District of Columbia
Oral Argument Scheduled for Nov. 23, 2004

Reply Brief for Appellants
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SUMMARY OF THE ARGUMENT

Plaintiffs have standing to challenge the Department of Education's ("Department") violation of the No Child Left Behind Act's ("NCLBA" or "Act") requirement that the Department form an "equitably balanced" negotiated rulemaking committee ("Committee") to develop regulations for standards and assessments under the Act. Despite the clear congressional directive to balance equitably representatives of parents and students and representatives of educators and education officials on the Committee, the Department formed a Committee consisting of nineteen representatives of educators and education officials and only two representatives of parents and students. The Department's decision to ignore the NCLBA's requirements violated Plaintiffs' procedural rights. In addition, the final rules that the Department promulgated under the unlawful rulemaking process harmed Plaintiffs' particular and concrete interests. Accordingly, each of the Plaintiffs has standing to challenge both the composition of the Committee and the Department's final rules.

Moreover, the district court had jurisdiction under the APA to review the Department's illegal actions. The government's appeals brief^[FN1] fails to rebut the well-established presumption favoring judicial review of agency actions. Under this Court's precedent, the selection of members for the Committee constituted a final agency action that is immediately reviewable under the APA. In addition, the NCLBA does not incorporate the Negotiated Rulemaking Act's judicial review bar. Even assuming *arguendo* that the judicial review bar was incorporated, it would not apply to the Department's establishment of the Committee under the NCLBA. Finally, even if incorporated, the NRA's judicial review provisions would prevent judicial review only prior to the Department's issuance of a final rule. Accordingly, there is no statutory bar to judicial review of Plaintiffs' claims.

FN1. Brief for Appellee, July 26, 2004 ("Response").

*3 ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE DEPARTMENT'S ILLEGAL ACTION IN CONSTITUTING AN INEQUITABLY BALANCED COMMITTEE

A. The Department's Violation of the NCLBA's Equitable Balance Requirement Injured

Plaintiffs' Procedural Rights

Plaintiffs have standing to challenge the violation of their procedural rights in this case. The Department's promulgation of rules through an inequitably balanced Committee deprived Ms. Lindsey and the organizational Plaintiffs of their right to representation and the chance to participate on the Committee. These particularized harms are sufficient to confer standing.

1. Rachele Lindsey Has Standing To Redress the Violation of Her Procedural Rights

Ms. Lindsey's standing arises out of a concrete injury to her procedural rights. The NCLBA requires the Department to constitute a Committee "in such numbers as will provide an equitable balance between representatives of parents and students and representatives of educators and education officials." 20 U.S.C. §6571(b)(3)(B). Although parents' interests often conflict with those of school officials, the Department nevertheless constituted a Committee in which educators and education officials purportedly represented the interests of parents. See J.A.89-93 (Wolfe Decl.). The Defendant's error is highlighted in Ms. Lindsey's case: as a parent of two children in a Title I public school, Ms. Lindsey has endured *4 harassment, intimidation, and retaliation from her children's school administrators because she chose to become involved in her children's education. See J. A.401; see also J.A.200. The Department violated her procedural rights when it denied her representation on the Committee in favor of educators and education officials.

The violation of Ms. Lindsey's procedural rights is fairly traceable to Defendant's actions. The injury occurred when the Department constituted a Committee and refused to select representatives of parents and students in "such numbers" as to equitably balance the viewpoints in the group. The district court has the power to redress this injury by invalidating the Department's actions and ordering the Department to form an equitably balanced Committee.

Disputing Ms. Lindsey's right to representation on the Committee, Defendant relies on cases in which the Court examined legislative history and found that Congress did not intend to create a private right of action under the Ethics in Government Act. Response at 18-19 (citing *Banzhaf v. Smith*, 737 F.2d 1167, 1170 & n.* (D.C.Cir. 1984) (en banc); *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986); *Nathan v. Smith*, 737 F.2d 1069, 1082 (D.C.Cir. 1984)). However, in contrast to those cases, the Defendant here has done nothing to rebut the presumption that Ms. Lindsay may litigate her right to equitably balanced representation through the APA. 5 U.S.C. §706 (empowering district court to set aside final agency action "without *5 observance of procedure required by law"); *Doe v. Casey*, 796 F.2d 1508, 1513-14 (D.C.Cir. 1986).

The defendant's analogy to *Gettman v. DEA*, 290 F.3d 430 (D.C.Cir. 2002) is also inapposite. Response at 17-18. In *Gettman*, the plaintiff sought review of the Drug

Enforcement Administration's ("DEA") denial of his petition to initiate rulemaking to reclassify marijuana under the Controlled Substances Act. *Id.* at 430. As opposed to the Plaintiffs in this suit, Gettman could not demonstrate a violation of his procedural rights because he was able to exercise his statutory right to file a petition. The *Gettman* court's inquiry did not stop there; it also found that the plaintiff suffered no actual injury because Gettman's alleged economic or competitive injuries from the agency decision were speculative and vague. *Id.* at 435. Moreover, Gettman was not part of any specific class of individuals identified as beneficiaries of the statute presented. By contrast, Ms. Lindsey--as a parent of children at a Title I school--is part of the class that the NCLBA expressly intended to benefit, and for which the NCLBA mandated equitable representation. *Cf. Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C.Cir. 1996) (requiring plaintiffs to show more than "general interest in the alleged procedural violation"). Accordingly, Ms. Lindsey does not claim a "mere interest in a problem" but instead has demonstrated that the Department injured her concrete right to representation on the Committee. *Gettman*, 290 F.3d at 434.

*6 The Defendant acknowledges that the equitable balance requirement in the NCLBA is intended to incorporate the views of both "program *beneficiaries* and program *providers*." Response at 20 (citing *H.R. Conf. Rep. 107-334*, 809, *reprinted in* 2002 U.S.C.C.A.N. 1230, 1351) (emphasis added). Moreover, the district court was required to accept Plaintiffs' allegations that the rulemaking committee was inequitably balanced and that the interests of parents and students were not adequately represented. See J.A.51. The district court failed to accept Plaintiff's allegations as true and therefore committed legal error when it held that "Section 1901 [of the NCLBA] does not ... expressly bestow upon any person an individual *right to enforce his or her construction* of an 'equitably balanced' negotiated rulemaking committee." J.A.62 (emphasis added).

2. The Organizational Plaintiffs Have Standing To Redress the Violation of Their Procedural Rights

The organizational plaintiffs also suffered a harm because of the Department's failure to place more representatives of parents and students on the Committee. Congress intended for The Department to seek advice and recommendations from civil rights and advocacy groups before formulating regulations under the NCLBA. See *H.R. Conf. Rep. 107-334*, at 809; *20 U.S.C. §6571*. Moreover, *§6571* expressly requires The Department to select Committee members from among those who give advice and recommendations, "in such numbers as will provide an equitable balance between *representatives* of parents and students and representatives of *7 educators and education officials." Because Congress intended to include advocacy groups among the members of the Committee, these groups are also intended beneficiaries of this provision of the statute.

Yet the Department categorically excluded civil rights and advocacy groups who are representatives of parents and students from serving on the Committee. Instead, it

required that nominees be "practitioners," and selected only two parent representatives. J.A.380. This exclusion of representatives of parents and students such as CLE and DFC injured the organizational plaintiffs by depriving them of the chance to sit on the Committee and thereby influence the proposed regulations. See J.A. 120-50 (Weckstein Decl.). As with Ms. Lindsey, this injury is concrete, directly traceable to The Department's actions, and redressable by the district court.

CLE and DFC are like the plaintiff organization in *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), where the Supreme Court held that denying a group the *opportunity* to compete is enough to provide a basis for Article III standing. *Id.* at 664-66. The Court explained that a plaintiff suffers a legally cognizable harm "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Id.* at 666. In addition, a 'member of the ... group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* Thus, contrary to the Department's assertion, a plaintiff need not show that he *8 *would have* been entitled to a place on the Committee in order to show an actual injury. Response at 19 n.9.

In several other cases, courts have held that plaintiffs have standing to seek redress for violations of their procedural rights in circumstances similar to those presented here. For example, in *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989), the Supreme Court ruled that plaintiff public interest groups had standing to pursue their claims against the Department of Justice ("DOJ") because of DOJ's refusal to comply with the requirements of the Federal Advisory Committee Act ("FACA") that certain meetings be open to the public. *Id.* at 449-50. The Court held that the agency's disregard of the statute led to the plaintiffs' injuries - a lack of notice and access to information. *Id.*

Likewise, in *Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C.Cir. 1989), a case interpreting the FACA's requirement that the members of an advisory committee be "fairly balanced," Judge Edwards wrote separately to explain why the plaintiffs had standing under the Act: The appellants in this case...are not claiming...a generalized grievance. The appellants claim that they have been denied their right to representation. This is not an abstract psychological or ideological injury of the kind that defeats standing...

*9 *Id.* at 435, n.4. [FN2] See also *Nat'l Anti-Hunger Coalition v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 557 F.Supp. 524, 527 (D.D.C. 1983) (plaintiffs have standing under FACA to challenge the membership of an advisory committee), *aff'd* by 711 F.2d 1071 (D.C.Cir. 1983).

FN2. Two of the three judges found either explicitly or implicitly that the plaintiffs had standing to sue under the statute. See *Public Citizen*, 886

F.2d at 421-26 (Friedman, J.) (concluding that although the case was a live controversy, the plaintiffs should lose on the merits); see also *id.* at 434-35 (Edwards, J.) (asserting that the plaintiffs have standing and should prevail on the merits).

B. The Department's Final Regulations, Issued Without Following NCLBA-Mandated Procedures, Also Injured Plaintiffs

The final regulations issued on the recommendation of the illegally constituted Committee also injured Plaintiffs. Because Plaintiffs' injuries flow from the failure to follow a procedural requirement, "the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury." *Fla. Audubon Soc'y*, 94 F.3d at 664 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). In other words, Plaintiffs must show a personal injury that is traceable to the Department. *Id.*

*10 1. Rachelle Lindsey Has Standing To Sue for Injuries the Final Regulations Caused Her

The Defendant's argument against Ms. Lindsey's standing misapprehends the true nature of each of Ms. Lindsey's injuries. The Department's failure to adhere to NCLBA-mandated procedures in issuing final regulations increased the risk that state actions implementing Title I programs will cause Ms. Lindsey and her children harm. To satisfy the standing requirement, Ms. Lindsey need not demonstrate that actual harm has already resulted; the increased risk of harm is sufficient injury to support standing. See *Lujan*, 504 U.S. at 572 n.7; *Fla. Audubon Soc'y* 94 F.3d at 664.

a. Rachelle Lindsey Has Suffered Personal and Particularized Injuries

Ms. Lindsey has suffered at least four different personal and particularized injuries resulting from the Department's final regulations.

First, Ms. Lindsey's children and her children's classmates are at an increased risk of being incorrectly assessed and thereby mistakenly denied benefits the NCLBA earmarks towards academically struggling students and schools. As demonstrated in Plaintiffs' initial brief, the NCLBA mandates that state Title I assessment programs must employ "multiple up-to-date measures" of student achievement to assess student performance. 20 U.S.C. § 6311(b)(3)(C)(vi). However, the Committee recommended (and the Department adopted) regulations that do not require multiple methods for demonstrating proficiency in each subject area, leaving states free to apply a *11 single measure of assessment in each area. Free of regulatory constraints, Illinois adopted a testing program using only one standardized exam. J.A. 185 (Moore Decl.). This one exam falls far short of true multiple measures assessment and does not accurately judge student achievement.

The Committee's recommended regulations - which the Department subsequently adop-

ted, almost unchanged, as final regulations - are highly significant because benefits are tied to school and individual student performance on the exam. See App. Br. at 31. For example, underperforming schools are to receive assistance in re-designing and improving their academic program, and students at a school that continues to underperform are entitled to transfer to another school or receive additional outside assistance, such as tutoring. 20 U.S.C. §6316(b)(5).

The Committee's actions, by failing to clarify the multiple measures requirement and allowing the states to implement single-test assessment plans, have significantly increased the risk that Ms. Lindsey's children and their classmates will be improperly assessed, increasing the risk that these students and their school will not receive benefits under the NCLBA. This is a personal and particularized injury. See *Lujan*, 504 U.S. at 572 n.7 (an increased risk of injury is sufficient to demonstrate standing to challenge a procedural violation); see also *Fla. Audubon Soc'y*, 94 F.3d at 667.

Second, Ms. Lindsey is now at an increased risk of receiving inadequate information in her effort to be involved in her children's education. The Committee's and the Department's failure to adopt a *12 definition of "multiple measures" mandating multiple assessments in a single subject increased the risk that her children's academic performance will be incorrectly assessed. Thus, the risk that Ms. Lindsey will be provided with inadequate or inaccurate information concerning her children's and the school's performance has also increased. This increased risk to Ms. Lindsey interferes with NCLBA provisions calling for the informed participation of parents and interferes with her ability to participate in the education of her children. See 20 U.S.C. §§6314(b), 6315(c), 6318(c)(3).

Third, single-test programs encourage educators to "teach[] to the test" - a dysfunctional strategy in which educators focus instruction on test-taking skills and narrow instruction at the expense of the underlying knowledge and skills required by state standards. J.A. 185-86 (Moore Decl.); J.A. 136 (Weckstein Decl.). Thus Ms. Lindsey's children are at increased risk of receiving inadequate assessment and instruction in substantive subject areas. *Id.*

Fourth, although the NCLBA requires parental consultation in the development of state standards and assessments, the Committee recommended - and the Department issued - no regulations that defined "consultation." J.A.214; J.A. 137-38 (Weckstein Decl.); 20 U.S.C. §6311(a)(1). As a result, states such as Illinois were permitted to engage in superficial parental consultation that, in reality, amounted to no consultation at all. See J.A. 165-96 (Moore Decl.). In fact, Illinois permitted Ms. Lindsey *13 only a few days to comment on its proposed standards and testing program. *Id.* This denied Ms. Lindsey the ability to engage in the meaningful consultation the NCLBA requires, thus causing her injury and increasing the risk of further injury in the future.

b. Ms. Lindsey's Injuries Are Fairly Traceable to the Department of Education

The Defendant argues that Ms. Lindsey's injuries are not traceable to The Department's actions because the testing program adopted by Illinois is not fully described in the record, and therefore, its relationship to the regulations is unclear. Response at 15. Defendant would require Ms. Lindsey to offer affirmative proof at the motion to dismiss stage, but Plaintiffs' pleadings must be accepted as true for the purposes of a motion to dismiss. *Lujan*, 504 U.S. at 561. Ms. Lindsey has alleged that the Illinois assessments program is inferior to one in which true "multiple measures" assessment is required, and that Illinois failed adequately to consult the public when formulating its plans. The Department's failure to define "multiple measures testing" and "consultation" therefore placed her at an increased risk of harm. These are sufficient allegations of traceable injury to survive a motion to dismiss.

Defendant also argues that formation of testing programs is left to the discretion of the states and that the Department's failure to limit that discretion does not make the state's action that of the Department. Response Brief at 15. Yet Ms. Lindsey alleges that *the Department's* failure to follow ***14** the NCLBA-mandated procedures caused it to enact regulations that have increased the risk of harm to her and her children. She has pled a direct connection between the Department's action and her increased risk. While the actions of Illinois may not be those of the Department, the Department had the authority - indeed, the obligation - to regulate the states' actions. The Department failed to do so, thus allowing the state to take actions that caused Ms. Lindsey's injuries. See *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 438-443 (D.C. Cir. 1998).

Last, Defendant asserts that Ms. Lindsey's argument is best addressed to the legislature. Response at 15-16. But again, this misses the point. Ms. Lindsey is not arguing "that the NCLBA should command ... state adherence to a specific program of national standards and assessments." *Id.* (quoting J.A.65-66). She instead argues that the NCLBA commanded the Department to nominate an equitably balanced committee; that the inequitably balanced Committee recommended, and the Department issued, regulations without adequate input from representatives of parents and students; and that those regulations have caused her injury. It is the role of the courts, not the legislature, to remedy such procedural violations. See *Lujan*, 504 U.S. at 562-63 (implying that had plaintiffs possessed standing, the court possessed the power to remedy the procedural violation).

c. Ms. Lindsey's Injuries Are Redressable by the Court

***15** The Defendant argues that reconstituting the Committee with an equitable balance of representatives of parents and students would still leave Illinois with discretion in adopting testing procedures. This argument mischaracterizes Ms. Lindsey's injuries. See Response Brief at 16. Because she is claiming that the Department's final regulations - the product of an unbalanced committee - have increased the risk that she and her children will be denied NCLBA benefits, reconstituting the Committee with an equitable balance will redress her injuries by en-

suring that parents' and students' viewpoints are adequately considered. In essence, reconstituting the Committee will place Ms. Lindsey in the same situation she was in before the Department caused her injury. That is, she will be waiting for an equitably balanced negotiating committee to suggest, and the Department to issue, regulations implementing the NCLBA. With proper representation of the interests of parents and students, as opposed to a process dominated by those who work for the regulated agencies, the Department is likely to issue appropriate regulations restraining state discretion.

The requested relief does not rely on a speculative sequence of decisions, as the Defendant suggests. The relief is simple: reconstitute the Committee, and Ms. Lindsey will be placed in the position she was in before the Department issued final regulations through an improper procedure. The relief requires no further court action. Nor does this requested relief require the State of Illinois to be joined as a party. In fact, the relief has nothing to *16 do with Illinois. The relief affects only the Department, its regulations, the committee, and parents such as Ms. Lindsey.

Moreover, a "person who has been accorded a procedural right ... can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 573 n.7; see also *Fla. Audubon Soc'y*, 94 F.3d at 669 ("[In procedural fights cases], a court should not review redressability"). Thus, Ms. Lindsey need not prove that if the Department had followed the proper procedure the substantive result would have been altered, or that the agency's use of the proper procedure will ultimately lead to a different result. See *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 94-95 (D.C.Cir. 2002) (citing *Lujan*, 504 U.S. at 572 n.7); see also *City of Waukesha v. Env'l Prot. Agency*, 320 F.3d 228, 234-35 (2003). "All that is necessary is to show that the procedural step was connected to the substantive result." See *Sugar Cane*, 289 F.3d at 94-95.

2. Organizational Plaintiffs

The government's arguments with respect to the organizational plaintiffs' standing suffer from the same flaws as the arguments against Ms. Lindsey's standing: they apply the wrong analysis and mischaracterize the nature of the organizations' injuries.

a. The Organizational Plaintiffs' Injuries Are Personal and Particularized

The organizational plaintiffs have standing because the Department's final regulations frustrate DFC's and CLE's ability to meet their central *17 purpose to represent parents and students, particularly with respect to implementing Title I programs. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C.Cir. 1994).

First, as noted *supra*, the Department's final regulations punt much of the debate

concerning "multiple measures" to the state level, allowing states to rely on a single test rather than multiple ways of measuring proficiency. The regulations therefore force DFC to advocate, in spite of this presumption, for the use of true multiple measures in each subject area in Illinois. J.A. 185-92 (Moore Decl.). The regulations also force CLE to participate in multiple, state-level debates involving different state agencies. J.A. 135-36 (Weckstein Decl.) This significantly frustrates the organizations' goals not only by increasing the cost of operations, but also by opening many new fronts of debate.

Similarly, because the regulations allow states to use norm-referenced tests, CLE must now challenge these tests on a case-by-case basis, demonstrating that each norm-referenced test cannot meet the NCLBA's assessment requirements. J.A. 133-36 (Weckstein Decl.) Because CLE must challenge the tests on a case-by-case basis, CLE must expend greater effort and expense to prevent the use of such tests. CLE also faces an increased risk that it will not achieve its goals.

Moreover, because the Department did not issue regulations clarifying states' obligations to consult with parents in developing NCLBA ***18** implementation plans, J.A.214, [20 U.S.C. §6311 \(a\) \(1\)](#), states may ignore their obligation under the NCLBA and allow only superficial consultation, as has already happened in Illinois. See J.A. 195-96 (Moore Decl.). This materially frustrates CLE's and DFC's core interests to represent parents and students at the state level.

These injuries frustrate discrete programmatic concerns of the organizational plaintiffs. The very purpose of the organizations representing parents and students - and their specific programs to ensure the proper assessment of children are injured by the Department's failure adequately to regulate in these areas.

Defendant contends that this case is not analogous to *Havens*, because the plaintiff in *Havens* did not allege mere frustration of generalized purpose, but instead impairment of specific services. Response Brief at 23. The government fails to recognize that CLE and DFC, like the plaintiff in *Havens*, also allege impairment of *specific services*. Plaintiffs are not just claiming that the Department's regulations frustrate their general purpose to represent parents. They also contend, for example, that the regulations frustrate their more specific goal to see true "multiple measures" assessments of actual knowledge and skills in all Title I schools. This specific programmatic initiative was injured when the regulations shunted debate to the state level and failed to protect the right to participate at that level. Thus, the organizational claims in *Havens* are materially indistinguishable from those here.

***19** b. The Injuries Suffered by the Organizational Plaintiffs Are Fairly Traceable to the Department and Are Capable of Redress

In just one sentence of its brief, the Defendant seems to argue that CLE's and DFC's injuries are not traceable to the Department and not capable of redress. Re-

sponse Brief at 21. Defendant is mistaken.

"To prove causation, a plaintiff ... must demonstrate that the particularized injury that the plaintiff is suffering or is likely to suffer is fairly traceable to the agency action ..." *Fla. Audubon Soc'y*, 94 F.3d at 669. Thus, there must be a "substantial probability that the substantive agency action that disregarded a procedural requirement created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of the plaintiff..." *Id.* Because this case is before the Court on a motion to dismiss, the plaintiffs need only allege - not prove - causation. *Lujan*, 504 U.S. at 561.

The Department's final regulations, by failing to define "multiple measures" and 'consultation,' and failing to prohibit norm-referenced testing, caused CLE's and DFC's injuries. For example, the final regulations, in failing to define 'multiple measures,' force CLE to fight at the state level for a proper definition of that phrase.^[FN3] Further, by failing to *20 define 'consultation' the Department allowed the states to engage in only perfunctory consultation with representatives of parents and students. This increases the risk that the viewpoints of CLE and DFC - and the viewpoints of those whom they represent - will not be fully considered, a risk that came to fruition in Illinois and elsewhere.

FN3. Indeed, the Department's failure to clarify this requirement when implementing the 1994 reenactment of the ESEA led to many of the problems CLE and DFC face today. J.A. 135-36.

The organizational plaintiffs' injuries are also capable of redress. Again, the organizational plaintiffs need not prove that the Department's use of the proper procedure will ultimately lead to a different result. See *Sugar Cane*, 289 F.3d at 94-95. The simple act of reconstituting the Committee will cure the injuries, irrespective of what happens afterward.

II. THE DISTRICT COURT HAD JURISDICTION

A. Composing an Inequitably Balanced Committee Was a Final Agency Action Under the APA

The Department's composition of the Committee marked the 'consummation' of the agency's decision-making process - a process that included the initial steps of soliciting and evaluating recommendations from across the country - as to which combination of nominees would satisfy the statutory requirement of an 'equitably balanced' committee. See *Harris v. Fed. Aviation Admin.*, 353 F.3d 1006, 1010 (D.C.Cir. 2004). Yet the Defendant attempts to rewrite the law by claiming that final rules only, and not final actions, are subject to judicial review. See 5 U.S.C. §704 ('...final agency action ... [is] subject to judicial review') (emphasis added).

*21 The Department's composition of the Committee is a final agency action not-

withstanding that the Department subsequently continued to work on the development of regulations pursuant to the NCLBA. See 353 F.3d at 1010. In *Harris*, the Federal Aviation Administration ('FAA') issued a notice reinstating air traffic controllers after a strike. *Id.* at 1008. The notice provided that reinstated controllers would initially be hired at the GS-9 grade and could advance beyond that grade by completing certain requirements. *Id.* at 1010. This Court held that the issuance of the notice by the FAA was a final action, even though at the time of the notice the FAA hadn't actually reinstated any controllers at the GS-9 level. *Id.*; see also 5 U.S.C. §704 ('agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for ... any form of reconsideration'); see also *Harris*, 353 F.3d at 1011.

Furthermore, the Department's composition of the Committee is subject to judicial review because it is an action 'by which rights and obligations have been determined' or from which 'legal consequences will flow.' *Harris*, 353 F.3d at 1010. The Department's decision to compose an inequitably balanced committee 'determined' parents' and students' rights because it permanently deprived these groups of their opportunity to be fairly represented on the Committee. As a result, the role that the Plaintiffs could play in the promulgation of final rules was drastically minimized. Instead of drafting the regulations, Plaintiffs were relegated to the sidelines *22 where they prepared written commentary for the Department after the meaningful negotiations were complete.

The government wrongly contends that it would be illogical to allow judicial review of an agency's action establishing a committee because the results of the negotiations are not binding on the agency. Response Brief at 26, n.7. Although the Committee's consensus is not strictly binding on the Department, the NCLBA presumes that the Department will adopt the committee's recommendations, 20 U.S.C. §6572(a), and the Secretary did adopt the Committee's recommendations wholesale.

Indeed, in situations closely analogous to the facts presented here, courts - including this Court - have recognized that the selection of a committee under FACA is a final agency action subject to judicial review. See, e.g., *Cummock v. Gore*, 180 F.3d 282 (D.C.Cir. 1999); *Alabama-Tombigbee River Coalition v. Dep't of Interior*, 26 F.3d 1103 (11th Cir. 1994) (issuing injunction prior to final rule for violation of FACA); *Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999) (reaching merits of challenge that committee was not 'fairly balanced' although final agency report and plan had not been issued); *Nat'l Advisory Comm.*, 886 F.2d at 426 (in split decision, judges Edwards and Friedman reached merits of the case, implicitly finding agency action was final). These cases recognize that the selection of a committee, in itself, marks the consummation of an agency's decision-making process from which rights and obligations flow. These *23 cases are persuasive authority that the composition of the Committee constitutes final agency action.^[FN4]

FN4. Both FACA and NCLBA seek to constrain federal bureaucratic policy-mak-

ing by involving the public in the process. Both acts regulate the way the government obtains advice from private individuals and groups. FACA cases are instructive even though FACA does not anticipate a uniform endpoint to a committee's work. Although FACA does not itself include an end-point, the charters of committees established pursuant to FACA often designate an endpoint at which time the committee will make its recommendations and disband. See *Cummock*, 180 F.3d at 286 (charter provided that commission would terminate after six months unless extended by the President).

B. The NCLBA Provides a Meaningful Standard That the Court Can Enforce

Contrary to Defendant's assertions, the NCLBA's equitable balance requirement provides 'a meaningful standard against which to judge the agency's exercise of discretion.' *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Indeed, NCLBA §6571 (b) (3) (B) provides courts with substantial guidance with which to judge the Department's exercise of discretion. Congress directed the Department to 'select individuals to participate in such process from among individuals or groups that provided advice or recommendations' to the Department. §6571 (b) (3) (B). Congress explained that such individuals should include 'representatives of Federal, State, and local administrators, parents, teachers, paraprofessionals, and members of local school boards and other organizations involved with the *24 implementation and operation' of Title I programs. §§6571 (b) (1), 6571 (b) (3) (B). Finally, Congress required that The Department ensure 'representation from all geographic regions' of the country, as well as 'an equitable balance between representatives of parents and students and representatives of educators and education officials.'" §6571 (b) (3) (B). Interpreting these statutory provisions falls squarely within the competence of the courts.

Indeed, this Court has found FACA's "fairly balanced" requirement, which is more vague than the NCLBA's "equitably balanced" language, justiciable. See *Cummock*, 180 F.3d 282 (commission could not deny a member access to information, in part because such a denial would contravene FACA's fair balance requirement); *Nat'l Advisory Comm.* 886 F.2d at 423-26 (Friedman, J. concurring), and 432-34 (Edwards, J. concurring) (split decision).^[FN5]

FN5. Similarly, the Department's interpretation of NCLBA's "equitable balance" requirement as allowing program providers to represent program beneficiaries on the Committee renders that requirement meaningless.

C. The Judicial Review Restrictions in the NRA Do Not Apply to the Establishment of a Committee Under the NCLBA

The government incorrectly argues that Congress incorporated the NRA's judicial review bar into the NCLBA. The Defendant has not overcome the well-established presumption in favor of judicial review of *25 agency action. See *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

1. Judicial Review is not a "Process" of Negotiated Rulemaking

The NCLBA provides only that the negotiated rulemaking "process ... shall otherwise follow the provisions of the Negotiated Rulemaking Act." 20 U.S.C. §6571(b)(4)(B). NCLBA does not state that the NRA in its entirety is incorporated into the NCLBA, nor does it reference section 570 of the NRA - the judicial review bar - directly. Instead, the NCLBA provides that "the Secretary shall ... establish a negotiated rulemaking process," and that "such process ... shall not be subject to the Federal Advisory Committee Act, but shall otherwise follow the provisions of the Negotiated Rulemaking Act." 20 U.S.C. §6571(b)(4)(B) (emphasis added). The NCLBA merely instructs the Secretary to conduct the negotiated rulemaking process in accordance with steps outlined in the NRA. Judicial review, or the preclusion thereof, is not a "process" of negotiated rulemaking, and it is not something the Secretary "shall ... establish." The NRA's preclusion of judicial review is a limit on the courts' power, and is completely unrelated to any process of the Department or the Committee.

***26** 2. In the Alternative, Only the Process the Committee Followed - not the Establishment of the Committee - is Subject to the NRA

The Defendant reads the word "process" in §6571 to mean "establishment and process." A closer look at the NCLBA and NRA reveals that "establishment" and "process" of the negotiated rulemaking committee have two different meanings. The NRA's provisions regarding "establishment" pertain to an agency's *voluntary* decision to convene a negotiated rulemaking committee. See 5 U.S.C. §565(a)(1) ("... the agency may establish a negotiated rulemaking committee"). Under the NCLBA, which mandates that the Department establish a committee, "establishment" refers to the solicitation of nominees and selection of members for the committee. 20 U.S.C. §6571(b)(3)(B). By contrast, the "process" of the negotiated rulemaking committee, under *both* the NCLBA and NRA, refers to the functions of a committee, such as the development of a consensus and duties of the committee, once it is established.

Defendant claims that all actions related to the promulgation of rules pursuant to the NCLBA, including the establishment of the Committee, constitute the negotiated rulemaking "process" because the standards governing these actions are contained within a subsection titled, "[n]egotiated rulemaking process." See §6571 (b). Defendant reads too much into this subheading. Subsection 6571(c) contains numerous provisions that cannot be said to be part of a "negotiated rulemaking process" subject to the NRA. For example, subsection 6571(b) contains ***27** provisions concerning procedures for soliciting advice and recommendations prior to establishing the negotiated rulemaking process. See §§6571(b)(1), 6571(b)(3)(A). Although positioned under the subheading "Negotiated rulemaking process," these actions clearly occur before the negotiated rulemaking process. Moreover, the advice and recommendation requirement of subsection 6571(b)(1) cannot possibly be subject to the NRA because the NRA has no parallel process or standards that could be applied. Similarly, subsection 6571(b) contains a provision that, in certain emergency situations, allows the Department to promulgate regulations without following the

process outlined in the NCLBA. See §6571(b)(5). Like the advice and recommendation provision, the emergency situation clause has no parallel in the NRA and cannot be said to be part of the "negotiated rulemaking process."

Thus, not every provision listed in subsection 6571 (b) is a "process," as that term is used in subsection 6571(b)(4)(B). Rather, subsection 6571(b), which contains all of the NCLBA's substantive guidance on rulemaking, contains not only provisions that constitute the negotiated rulemaking "process," but also provisions that relate to the "process."

The plain statutory language also demonstrates that the establishment of a committee is distinct from the negotiated rulemaking process although both actions are contained within the same subheading. Subsection 6571 (b) (3) (B) instructs the Secretary to "select individuals to participate in such process." This language demonstrates that the selection of individuals *28 is an action that occurs prior to, and independent of, the negotiated rulemaking "process." Thus the Act's incorporation of the NRA's bar on judicial review does not preclude judicial review over the establishment of

3. In the Alternative, The NRA's Judicial Review Bar Applies Only to Committees Established Under the NRA

By its own terms, NRA §570 bars judicial review only of an "agency action relating to establishing ... a negotiated rulemaking committee *under this subchapter*." The Committee was established under the NCLBA, not the NRA. The NRA's provisions governing "establishment" allow agencies discretion in deciding whether to establish a committee at all as well as freedom in determining committee membership. See 5 U.S.C. §565(a). Here, the Department had no such discretion: the NCLBA mandated that the "[s]ecretary ... shall establish a negotiated rulemaking process," 20 U.S.C. §6571(b)(3), and set forth specific criteria for committee membership. See §6571(b)(3)(B). Because the Committee was not established voluntarily under the NRA, section 570's judicial review bar does not apply.

4. The Requirement That the Rulemaking Committee Be Equitably Balanced Constitutes a Substantive Constraint on the Department

Congress, in enacting the NCLBA and requiring negotiated rulemaking, recognized the competing goals of parents and students as *beneficiaries* of education services, and educators and education officials as *29 *providers* of education services. See H.R. Conf. Rep. 107-334, at 809. Congress used negotiated rulemaking by an equitably balanced committee as a means of harmonizing these competing interests. Thus, negotiated rulemaking in the context of the NCLBA is a substantive constraint on the Department. The Department flouted this congressional directive when it composed an inequitably balanced committee, and thus promulgated rules "without observance of procedure required by law." 5 U.S.C. §§706(2)(A), (D).

The savings clause of the NRA §570, and indeed the detailed procedures for negoti-

ated rulemaking outlined in NCLBA §6571, would be rendered meaningless if the first sentence of NRA's §570, the judicial review prohibition, is read as preventing the Plaintiffs from challenging a substantive agency action. Defendant cannot contest that the equitable balance requirement serves as both a substantive and procedural constraint on The Department's authority. Nor has Defendant offered any explanation for why Congress would mandate negotiated rulemaking, specific procedures for soliciting and evaluating nominations to the Committee, and specific guidance as to how the Committee should be balanced, only to render such provisions meaningless by stripping the courts of jurisdiction.

***30** 5. Even Assuming *Arguendo* That the NRA's Jurisdictional Review Restrictions Applied, Those Restrictions Ended with the Promulgation of Final Rules

Even under the NRA's judicial review restrictions, judicial review is only precluded until final rules are promulgated. Although restricting judicial review in some circumstances, Section 570 also provides that "[n]othing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law." 5 U.S.C. §570. Congress intended section 570 "merely [to] preclude[] judicial intervention in the earlier stages of the regulatory process, when a negotiated rulemaking is underway," not to preclude judicial review indefinitely. Negotiated Rulemaking Act of 1989; Report of the Committee on Governmental Affairs to accompany S. 303, August 1, 1989 at 28-29.

Defendant asks the Court to ignore this legislative history in favor of an interpretation that section 570 preserves jurisdiction to review a final rule only on grounds other than agency action establishing, assisting, or terminating a negotiated rulemaking committee.^[FN6] Any ambiguity in the statutory language or legislative history, however, does not work in *31 Defendant's favor. Indeed, "preclusion [of judicial review] is the rare exception and certainly not the norm. Section 701 [of the APA] creates a strong presumption of reviewability that can be rebutted only by a *clear showing* that judicial review would be inappropriate." *Casey*, 796 F.2d at 1513-14 (internal citations omitted) (emphasis added). In the instant case, it is anything but "clear" that Congress intended to preclude judicial review of Plaintiffs' action after promulgation of the rules. To the contrary, the statutory language and legislative history indicate that section 570 bars judicial review only prior to the issuance of a final rule.

FN6. In support of this contention, Defendant relies on dicta in *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996). *Riley*, a Seventh Circuit decision, is not binding on this Court. Moreover, *Riley* did not consider §570's preclusion of judicial review, or engage in any statutory analysis of the NRA or NCLBA, but instead evaluated whether the NRA specified a remedy for bargaining in bad faith.

The goal of the NRA, reducing litigation and the time needed to issue final rules, would not be furthered by denying access to the courts. Congress intended that the

NRA would reduce litigation not by blocking access to the courts, but by encouraging parties to use negotiation as a means of resolving their differences prior to promulgation of rules, thus obviating the need to resort to litigation. This policy goal is not realized where, as here, the Department stacks a committee with representatives of the institutions being regulated and includes only a couple token representatives of the beneficiaries.

CONCLUSION

For all of the reasons stated above and in their initial memorandum, Plaintiffs ask that this Court reverse the district court's decisions dismissing Plaintiffs' first and second complaints and *remand* to the district court for further proceedings.

CENTER FOR LAW AND EDUCATION; Designs for Change; Rachelle Lindsey, Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF EDUCATION, Defendant-Appellee.

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