IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP B. STARK and FREE SPEECH FOR PEOPLE, *Plaintiffs*, v. UNITED STATES ELECTION ASSISTANCE COMMISSION, *Defendant*.	Civil Action No. 1:21-cv-01864 (CKK)

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Enacted in 2002, the Help America Vote Act (HAVA), Pub. L. 107–252 Title III, § 302, 116 Stat. 1706 (codified at 52 U.S.C. § 20901 *et seq.*), made numerous important reforms to the nation's voting processes, including, as relevant here, the creation of the Election Assistance Commission (EAC or Commission) to "serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections[.]" 52 U.S.C. § 20922. Although HAVA expressly specified that the EAC lacks "any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government," *id.* § 20929, it assigned to the EAC several important roles in furtherance of the improvement of the administration of federal elections. Key among these responsibilities—and as pertinent to this suit—HAVA authorized the EAC to establish new Voluntary Voting System Guidelines (VVSG or Guidelines). *Id.* § 20922(1). The VVSG constitute federal specifications and requirements against which manufacturers of voting equipment may—voluntarily—have their products tested for conformance; if a system and all of its corresponding components meet all VVSG standards, it will be so certified. Thus, the purpose of the VVSG is to provide, at the federal level, a uniform set of standards against which voting systems can be tested to determine if they meet specified baseline benchmarks for functionality, accessibility, and security capabilities, all of which are developed by the EAC to ensure the integrity of voting systems. These specifications allow state and local governments—if they choose to do so—to rely on the fact that a particular voting system meets the functional requirements, performance characteristics, documentation requirements, and test evaluation criteria of the federally-developed standards.

In this action, Plaintiffs Philip Stark (Stark), a member of one of the federal advisory committees that the EAC employs to develop the VVSG, and non-profit organization Free Speech for People (FSFP) take issue with one particular aspect of the latest iteration of the VVSG (the VVSG

2.0), which the EAC recently adopted. Specifically, Plaintiffs would prefer that the VVSG 2.0 adopt a standard requiring (as a predicate for certification) the physical removal of all components within a voting system that may be able to connect with a wireless network. While the EAC agrees that it is imperative that certified voting systems "must not be capable of establishing wireless connection," Final VVSG 2.0, attached hereto as Exhibit A, § 14.2-C,[1] the VVSG 2.0 accomplish this end by allowing for, *inter alia*, *either* the physical removal of wireless hardware from the system *or* the disabling of any potential wireless capabilities within the system, *id.*

Although Plaintiffs may be dissatisfied that their policy preference is not reflected in the final VVSG 2.0, they cannot maintain the instant action as a means to achieve a different result, for numerous independent reasons. First, because, *inter alia*, neither FSFP nor Stark has alleged that it has suffered any concrete and particularized *substantive* harm pertaining to the VVSG 2.0, neither has Article III standing to pursue any of the Administrative Procedure Act (APA) claims they purport to assert. Second, although Plaintiffs separately charge that EAC staff improperly met with certain voting systems manufacturers, in violation of the Federal Advisory Committee Act (FACA), the meetings in question have long since ceased and there is no allegation that they will resume; further, Plaintiffs have already obtained documents relevant to those meetings via a separate Freedom of Information Act (FOIA) action. Accordingly, even assuming, wholly *arguendo* (and solely for purposes of the standing analysis), that the meetings strayed afoul of one or more FACA provisions, the FACA claim is moot.

In the event that the Court were to reach the merits of any of Plaintiffs' claims, notwithstanding these jurisdictional hurdles, the claims still fail as a matter of law and should be

[1] The Final VVSG 2.0 are also publicly available at https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf.

dismissed. First, with respect to the asserted APA claims,[2] because the VVSG are entirely voluntary, they do not constitute either "agency action" or "final agency action" within the meaning of the APA. Moreover, because the challenged provisions of the final VVSG 2.0 are, demonstrably, the "logical outgrowth" of the proposed version that went through notice-and-comment procedures, all relevant procedures required by HAVA and/or the APA were fully satisfied. And finally, with respect to the FACA claim, Plaintiffs have not alleged—and in any event, the EAC has submitted competent evidence definitively disproving—that meeting participants even attempted to render any advice or recommendations *as a group*, as is required to qualify as a FACA committee. In addition, the expressly informal meetings in question lacked any organizational structure, the participants did not vote on anything, and there was never any intention or attempt to reach consensus on any issue. The FACA claim therefore fails both under Rule 12(b)(6), or alternatively, under the summary judgment standard.

For these reasons, and the additional ones set forth in detail below, this case should be dismissed in its entirety; alternatively, Counts I though V should be dismissed and summary judgment should be entered in the EAC's favor as to Count VI.

BACKGROUND

I. Statutory and Regulatory Background

A. The Help America Vote Act and the Voluntary Voting System Guidelines

Pursuant to the design established by HAVA, the EAC is an independent, bipartisan commission consisting of four commissioners appointed by the President with the advice and consent

[2] This motion does not implicate the contents of any administrative record. As such, Defendants request that the Court vacate any obligation to file a certified list of contents under Local Civil Rule 7(n) at this point. *See Mdewakanton Sioux Indians of Minnesota v. Zinke*, 264 F. Supp. 3d 116, 123 n.12 (D.D.C. 2017) ("[C]onstruing Defendants' motion to dismiss as incorporating a motion to waive compliance with Local Civil Rule 7(n), the Court grants the motion because the administrative record is not necessary for its decision here.") (citation omitted); *see also Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 294 (D.D.C. 2018) (waiving Local Civil Rule 7(n)'s requirement, "follow[ing] the practice of other courts in this jurisdiction when the administrative record is not necessary for the court's decision regarding a motion to dismiss") (citations omitted).

of the Senate, 52 U.S.C. § 20923, which must obtain the approval of at least three of its members to carry out any of its delegated statutory responsibilities, *id.* § 20928; *see also id.* § 20924 (providing for the additional appointment of an Executive Director of the EAC, as well as other agency staff). As noted above—and importantly for purposes of this action—with limited exceptions not relevant here, the EAC lacks "any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government," *id.* § 20929. However, HAVA nonetheless confers numerous important responsibilities on the EAC, including, *inter alia*, the development and adoption of the VVSG, *id.* § 20922(1),[3] which constitute a set of voluntary "specifications and requirements against which voting systems can be tested to determine if the systems meet required standards." U.S. Election Assistance Comm'n, Voluntary Voting System Guidelines, *available at* https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines; *see* Compl. ¶ 14.[4]

HAVA further concurrently established three unpaid federal advisory committees—the Standards Board, the Board of Advisors, and the Technical Guidelines Development Committee (TGDC)—and prescribed both the composition of these committees, as well the roles for each in the development and adoption of the VVSG. This process begins with the TGDC, which is composed of

[3] In addition to the responsibilities discussed above, HAVA further charges the EAC with the responsibility to, *inter alia*, (1) serve as a clearinghouse of information on the experiences of State and local governments in implementing the VVSG and in operating voting systems in general, and of information relating to the testing, certification, decertification, and recertification of voting system hardware and software; (2) manage certain election assistance grants; (3) develop and maintain a national voter registration form; and (4) conduct studies regarding election administration issues and other activities to promote the effective administration of Federal elections. 52 U.S.C. § 20922; *see also* U.S. Election Assistance Comm'n, Help America Vote Act, *available at* https://www.eac.gov/about_the_eac/help_america_vote_act.aspx.

[4] The Court may take judicial notice of the VVSG, as well as of the other public EAC documents cited throughout this memorandum. *See, e.g.*, *Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016), *aff'd*, 869 F.3d 976 (D.C. Cir. 2017) ("[J]udicial notice may be taken of public records and government documents available from reliable sources.").

the director of the National Institute of Standards and Technology (NIST) and 14 other individuals appointed jointly by the EAC and the NIST director. 52 U.S.C. § 20961(c)(1). These appointments are drawn from certain organizations specified by HAVA, *id.* § 20961(c)(1)(A)-(D), as well as "[o]ther individuals with technical and scientific expertise related to voting systems and voting equipment." *Id.* § 20961(c)(1)(E). The director of NIST serves as the chair of the TGDC, *id.* § 20961(c)(1), and "upon request" from the TGDC, provides technical support and research needed to develop specifications for the VVSG, *id.* § 20961(e)(2).[5] The TGDC forms working groups to utilize the technical research supplied by the NIST director to discuss, review, and propose criteria related to specifications and requirements of the VVSG; this portion of the process culminates in the submission of recommendations by the TGDC for the VVSG to the Executive Director of the EAC. *See generally id.* § 20961; *id.* § 20962(b)(1) (requiring the Executive Director of the EAC to "take into consideration the recommendations provided by the [TGDC] under section 20961").

After the TGDC submits its recommendations for the VVSG to the Executive Director of the EAC, the Executive Director must "submit the guidelines proposed to be adopted" to the remaining two advisory committees (*i.e.* the Standards Board and the Board of Advisors). *Id.* § 20962(b)(2)-(b)(3). The Standards Board is composed of 110 members—55 state election officials

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[5] Specifically, the NIST director supplies technical support and research on the following subjects:

> (A) the security of computers, computer networks, and computer data storage used in voting systems, including the computerized list required under section 21083(a) of this title;
>
> (B) methods to detect and prevent fraud;
>
> (C) the protection of voter privacy;
>
> (D) the role of human factors in the design and application of voting systems, including assistive technologies for individuals with disabilities (including blindness) and varying levels of literacy; and
>
> (E) remote access voting, including voting through the Internet.

52 U.S.C. § 20961(e)(2)(A)-(E).

selected by the chief state election official of each state and territory and 55 local election officials selected from each state and territory in accordance with a process supervised by the chief state election official. *Id.* § 20943. The Board of Advisors is composed of 35 members selected from organizations named in HAVA. *Id.* § 20944.[6] Both advisory committees are afforded a minimum of 90 days to "review and submit comments and recommendations regarding" the proposed VVSG to the EAC. *Id.* § 20962(c). Pursuant to HAVA, the EAC must also publish the proposed VVSG in the Federal Register and provide an opportunity for public comment on the proposed guidelines, and an opportunity for public hearing on the record. *Id.* § 20962(a). After fulfilling the procedural requirements set forth above, and "taking into consideration the comments and recommendations submitted by the Board of Advisors and the Standards Board," *id.* § 20962(d)(1)—as well as those submitted by the public—the EAC votes on the final adoption of the VVSG, *id.* § 20962(d).

Use of the VVSG by state and local governments and industry actors alike is wholly voluntary. *Id.* § 20929. However, in order to facilitate and encourage their use, HAVA further requires that the EAC create a program "for the testing, certification, decertification, and recertification of voting system hardware" against the standards established by the VVSG. *Id.* § 20971(a)(1). As with the VVSG themselves, HAVA instructs that NIST assist the Commisson in this process by "conduct[ing] an evaluation of independent, non-Federal laboratories," and "submit[ting] to the [EAC] a list of . . . laboratories" that NIST "proposes to be accredited to carry out" the program. *Id.* § 20971(b)(1). After the EAC receives the recommendations from NIST,[7] the EAC conducts further review of the recommended laboratories to address non-technical issues such as conflict of interest policies, organizational structure, and recordkeeping protocols, and then votes on the final accreditation of

[6] The statue specifies 37 members; however, this number was reduced when two of the named organizations merged in 2016.

[7] The NIST program that assesses and proposes qualifying laboratories to the EAC is known as the National Voluntary Laboratory Accreditation Program (NVLAP).

qualified laboratories. *Id.* § 20971(b)(2)(A); *see also* U.S. Election Assistance Comm'n, Frequently Asked Questions, *available at* https://www.eac.gov/voting-equipment/frequently-asked-questions (VVSG FAQ). Accredited test laboratories evaluate voting systems and software against the VVSG to determine if they meet the Guidelines' standards for functionality, accessibility, and security capabilities, and provide recommendations to the EAC as to whether a particular voting system of software should be certified as VVSG-compliant. VVSG FAQ. The EAC's Certification Division, working through the Executive Director, makes the determination whether to issue a certification of VVSG compliance. *Id.*

Thus, once the VVSG are adopted, voting manufacturers, in conjunction with accredited laboratories and the EAC, are able to test new systems, modified systems, or components thereof for comportment with VVSG standards. Participation in the certification program is voluntary, but states may formally adopt the VVSG, making them mandatory in their jurisdiction. *Id.*[8]

B. The Federal Advisory Committee Act

Congress enacted the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 §§ 1- 16, to reduce the growing cost of unnecessary blue ribbon commissions, advisory panels, and honorary boards established by the government to advise the President and federal agencies. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 446 (1989) (citing 5 U.S.C. app. 2 § 2(b)); *Am. Oversight v. Biden*, No. 20-00716 (RJL), 2021 WL 4355576, at *1 (D.D.C. Sept. 24, 2021) (noting that FACA's "purpose is to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively

[8] Information about states' use of the VVSG is available at https://www.eac.gov/sites/default/files/TestingCertification/State_Requirements_for_Certification09042020.pdf.

advisory") (citation omitted). Thus, the statute seeks to eliminate advisory committees that have outgrown their usefulness and impose uniform procedures on those that are indispensable, thereby ensuring that Congress and the public remain apprised of their existence, activities, and cost. *Id.* at 903 (citations omitted); *see also* 5 U.S.C. app. 2 § 2.

Groups that meet the definition of an "advisory committee" under FACA must comply with an array of procedural requirements. Among others, they must file a charter prior to commencing their first meeting, 5 U.S.C. app. 2 § 9(c); announce their upcoming meetings in the Federal Register and hold those meetings open to the public unless an exception applies, *id.* § 10(a)(1)-(2); keep detailed minutes of each meeting, *id.* § 10(c); and make their "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents" available for public viewing. *Id.* § 10(b). In addition, FACA requires that membership in each advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee[.]" *Id.* § 5(b)(2).

FACA defines an "advisory committee" as "any committee, board, commission, council, conference, panel, task force, or other similar group . . . which is . . . established or utilized by the President, or . . . by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government[.]" *Id.* § 3(2). However, "[g]iven the serious separation-of-powers concerns inherent in legislation that imposes requirements on executive decision-making, courts interpret FACA narrowly. The executive may, of course, consult with private advisors or stakeholders without triggering FACA." *Food & Water Watch v. Trump*, 357 F. Supp. 3d 1, 10 (D.D.C. 2018). Thus, FACA does not "cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Pub. Citizen*, 491 U.S. at 453. "Executive officials' solicitation of views from independently formed and operated entities—such as nonprofit organizations, associations, or political parties—with relevant insight and

experience does not, without more, implicate the Act." *VoteVets Action Fund v. U.S. Dep't of Veterans' Affairs*, 992 F.3d 1097, 1101 (D.C. Cir. 2021) (citing *Pub. Citizen*, 491 U.S. at 452-53). "Nor does FACA apply to executive consultations on policy issues with *ad hoc* collections of private individuals who are not convened 'to render advice or recommendations, *as a group*.'" *Id.* (quoting *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) (*AAPS*)) (emphasis in original).

II. Factual Background

A. Development and Adoption of the VVSG 2.0

The EAC adopted the first version of the VVSG—known as VVSG 1.0—on December 13, 2005. Compl. ¶ 21. In an effort to update and improve version 1.0 of the VVSG, in 2015 the EAC approved VVSG 1.1; however, because certain standards set forth in that version proved impracticable to the relevant industry—and the VVSG are entirely voluntary—no voting system ever went through testing and certification to VVSG 1.1 standards. Declaration of Mona Harrington (Harrington Decl.) (attached hereto as Exhibit B) ¶ 7.

The EAC began development of the VVSG 2.0 in 2015. *See* Election Assistance Commission, Sunshine Act Meeting Notice, 80 Fed. Reg. 38183-01 (July 2, 2015). For this iteration, the EAC directed the TGDC to use a different structure than had been employed for the VVSG 1.0 and VVSG 1.1—and specifically, to bifurcate (1) a high-level set of "Principles and Guidelines" (*i.e.*, high-level system design goals and a broad description of the functions that make up a voting system) from (2) the more specific VVSG 2.0 "Requirements" (*i.e.*, the requirements to which a voting system is tested to obtain certification). Compl. ¶ 23. The TGDC began its process with the former, and—after obtaining approval from both the Standards Board and Board of Advisors, Compl. ¶ 24—the EAC sought public comments on the VVSG 2.0 Principles and Guidelines from February 28, 2019 to June 7, 2019. Election Assistance Commission, Proposed Voluntary Voting System Guidelines 2.0 Principles and Guidelines, 84 Fed. Reg. 6775-02 (Feb. 28, 2019).

Between September 2019 and February 2020, the TGDC then met to discuss draft VVSG 2.0 Requirements. Compl. ¶ 29. On February 7, 2020, the TGDC voted to recommend a proposed version of the VVSG 2.0 to the EAC's Acting Executive Director. *Id.* ¶ 33. On March 11, 2020, the Executive Director of the EAC submitted the TGDC's proposal (herein, the "Proposed VVSG 2.0") (attached hereto as Exhibit C)[9] to the Board of Advisors and the Standards Board. *Id.* ¶ 34; *see* 52 U.S.C. § 20962(b)(2)-(b)(3) (requiring these submissions). On March 24, 2020, the EAC published a notice of the Proposed VVSG 2.0 in the Federal Register, and concurrently established a 90-day public comment period extending through June 22, 2020. 85 Fed. Reg. 16,621 (Marc. 24, 2020); *see* Compl. ¶ 36. On March 27, May 6, and May 20, 2020, the EAC held public hearings on the Proposed VVSG 2.0. Compl. ¶ 37.

Two sections of the Proposed VVSG 2.0 have particular relevance to this motion. First, Proposed Section 14.2-D, entitled "Wireless Communications Restrictions," provided that "[v]oting systems must not be capable of establishing wireless connections." Proposed VVSG 2.0, attached hereto as Exhibit C, § 14.2-D; *see also* Exhibit D.[10] In the "Discussion" portion of this proposed section, the Proposed VVSG 2.0 explained that:

> Wireless connections can expand the attack surface of the voting system by opening it up to over-the-air attacks. Over-the-air access can allow for adversaries to attack remotely without physical access to the voting system. By disallowing wireless capabilities in the voting system, this limits the attack surface and restricts any network connections to be hardwired.

Id.

[9] The Proposed VVSG 2.0 are also publicly available at https://www.regulations.gov/document/EAC-2020-0002-0001. Defendant notes that the date on this document (Feb. 29, 2020) reflects the date on which the Proposed VVSG 2.0 was reformatted to a format suitable for publication.

[10] Exhibit D is a demonstrative exhibit, prepared for the Court's convenience, collecting the proposed and final versions of the portions of the VVSG 2.0 at issue in this suit.

Proposed Section 14.2-D further specified that "[r]elated requirements" were set forth in, *inter alia*, the second section that has particular relevance here, Section 15.4-C: "Documentation for disabled wireless." *Id.* Proposed Section 15.4-C, in turn, provided that "[t]he voting system documentation must include information about how wireless is disabled within the voting system." Proposed VVSG 2.0 § 15.4-C; *see also* Exhibit D. The "Discussion" of Proposed Section 15.4-C elaborated upon this provision as follows:

> Documentation for how the voting system is configured to disable wireless networking is important to meet requirement 14.2-D, which disallows the use of any wireless connections. Example information for how wireless can be disabled may include the following:
>
> - A system configuration process that disables wireless networking devices
> - Disconnecting/unplugging wireless device antennas
> - Removing wireless hardware within the voting system
>
> A variety of documentation providing secure configurations for network devices is publicly available from the US government.
>
> If outside manufacturers provide guidance and best practices exist, these need to be documented and used to the extent practical.

Id. Lastly, Proposed Section 15.4-C reciprocally cross-referenced Proposed Section 14.2-D as a "[r]elated requirement." *Id.*

Thus, as relevant to this suit, the Proposed VVSG 2.0 proposed that, to qualify for certification of compliance with the updated VVSG, a voting system (1) "must not be capable of establishing wireless connections" (Proposed Section 14.2-D), and (2) could meet that standard through "configur[ation] to disable wireless networking" capabilities (Proposed Section 15.4-C).

Both the Standards Board and the Board of Advisors reviewed the Proposed VVSG 2.0. The Board of Advisors provided comments on the same, and on July 31, 2020 the Standards Board voted

to approve them. Compl. ¶¶ 39-40.[11] On February 10, 2021, the EAC voted unanimously to adopt the final version of the VVSG 2.0. Compl. ¶ 53; *see* Final VVSG 2.0. As relevant to this suit, the final VVSG 2.0 reflected three changes to Proposed Section 14.2-D:

- (1) a renumbering of Proposed Section 14.2-D to (Final) Section 14.2-C;
- (2) the essentially verbatim copying and pasting of the "Discussion" from Proposed Section 15.4-C into the Discussion for (Final) Section 14.2-C;[12] and
- (3) the addition of one new sentence to this Discussion.

Thus, after incorporating these three edits (and as relevant to this suit), the Discussion for the final version of Section 14.2-C provides as below; for ease of cross-reference, the language from Proposed Section 15.4-C that was carried over is **bolded,** and the wholly new sentence is underlined.

> Wireless connections can expand the attack surface of the voting system by opening it up to over-the-air attacks. Over-the-air access can allow for adversaries to attack remotely without physical access to the voting system. By disallowing wireless capabilities in the voting system, this limits the attack surface and restricts any network connections to be hardwired. **Examples of how wireless can be disabled may include the following:**
>
> - **A system configuration process that disables wireless networking devices**
> - **Disconnecting/unplugging wireless device antennas**
> - **Removing wireless hardware within the voting system**
>
> This requirement does not prohibit wireless hardware within the voting system so long as the hardware cannot be used[,] e.g.[,] no wireless drivers present.

Final VVSG 2.0 § 14.2-C; *see* Exhibit D.

[11] As part of its review, the Board of Advisors met on June 16, 2020 to discuss, *inter alia*, the terms of the VVSG 2.0. *See* https://www.eac.gov/events/2020/06/16/public-hearing-eac-board-advisors-annual-meeting-june-16-2020.

[12] While the Discussion for Proposed Section 15.4-C stated "Example information for how wireless …," the Discussion for Final Section 14.2-C states "Examples of how wireless …" This minor edit is the only distinction between the material portions of the respective Discussion sections.

B. The EAC's Brief and Informal Consultation with, *Inter Alia*, Certain Industry Actors

As noted above, notwithstanding a considerable investment of time and resources into the development and adoption of the VVSG 1.1, due to certain impracticalities in this iteration, no voting system ever went through testing and certification to VVSG 1.1 standards. *See* Harrington Decl. ¶ 7. Because such certification is entirely voluntary—and in order to avoid a similar result with the VVSG 2.0—after witnesses raised certain feasibility and implementation concerns at the May 20, 2020 public hearing, EAC staff decided to coordinate a series of further informal meetings. *Id.* ¶¶ 7-8; *see* Compl. ¶ 37. Specifically, the EAC conducted five such meetings, all of which were held via teleconference, on June 12, June 26, July 10, July 17, and July 24, 2020, with the purpose of obtaining individual technical feedback from voting system manufacturers. *Id.* ¶¶ 9, 11. EAC staff determined who to invite to these sessions. *Id.* ¶ 8. Specifically, because of the need to understand feasibility concerns with implementing VVSG 2.0, EAC invited voting program staff from NIST, employees of the EAC accredited voting system test laboratories, and employees of certain voting system manufacturers. *Id.* The meetings were led by the EAC Testing and Certification Director and attended by approximately 30 to 35 people consisting of approximately 10 from EAC, 3 from test laboratories, 5 from NIST, and 15 from the voting system and technology industry. *Id.* Each meeting lasted approximately one hour. *Id.* During the brief period in which it conducted these meetings, the EAC informally referred to this group as the "VVSG 2.0 Implementation Working Group" (Working Group). *Id.* ¶ 7.

During these meetings, EAC staff solicited individual input from attendees of the Working Group on any concerns they held related to future implementation challenges that could arise once VVSG 2.0 was approved including based on their prior experience with VVSG 1.0 and 1.1 implementation. *Id.* ¶ 11. However, at the second meeting, the EAC made clear to attendees that the meetings would only be an "informal discussion," *id.* ¶ 10, and no formal organization or leadership structure—including any use of subgroups—was ever employed, *id.* ¶ 12. Nor did the EAC create,

approve, or utilize any process through which the attendees of the Working Group could either vote on or veto any collective advice or recommendations concerning VVSG 2.0, and at no time during any Working Group meeting did a vote on any issue occur. *Id.* ¶¶ 13-14. Rather, attendees shared only their individual views on all issues discussed at the meetings. *Id.* ¶ 12.

III. Procedural Background

Plaintiffs initiated this action on July 13, 2021. Dkt. No. 1. Their Complaint purports to assert six claims. Counts I, II, and III each allege a procedural violation of HAVA in the development of the VVSG 2.0—specifically, the requirements that the EAC "submit the guidelines proposed to be adopted" to the Standards Board and the Board of Advisors, 52 U.S.C. § 20962(b)(2)-(b)(3), *see* Compl. ¶¶ 64-69 (Count I); afford both committees a minimum of 90 days to "review and submit comments and recommendations regarding" the proposed guidelines, 52 U.S.C. § 20962(c), *see* Compl. ¶¶ 70-73 (Count II); and publish the proposed VVSG in the Federal Register and provide an opportunity for public comment on the proposed guidelines, and as well as an opportunity for public hearing on the record, 52 U.S.C. § 20962(a); *see* Compl. ¶¶ 74-78 (Count III).

Count IV, in turn, essentially reproduces Count III by asserting that the adoption of the VVSG 2.0 constituted a "rule making" within the meaning of the APA, and did not comport with the APA's coterminous procedural requirements for the same. *See* Compl. ¶¶ 79-84; 5 U.S.C. § 553. Count V alleges that certain particular provisions in the final VVSG 2.0 are substantively arbitrary and capricious. *See* Compl. ¶¶ 85-90. Finally, Count VI alleges the VVSG 2.0 Working Group meetings were convened in violation of FAC. *See id.* ¶¶ 91-98.

As set forth below, each of the asserted claims is brought pursuant to the APA. However, for ease of reference, Defendant will refer to Count I through V as Plaintiffs' "APA claims," and Count VI as the "FACA claim."

STANDARDS OF REVIEW

The plaintiff bears the burden of demonstrating subject-matter jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). "Although a court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007), *aff'd* No. 07-5328, 2008 WL 4068606 (D.C. Cir. Mar. 17, 2008) (citations omitted). The Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Twombly*, 550 U.S. at 555. The plaintiff must, accordingly, plead facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged" and offer "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. In deciding a Rule 12(b)(6) motion, a court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," or "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss[.]" *Ward v. Dist. of Columbia Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011) (citation omitted). The court may also consider documents in the public record of

which the court may take judicial notice. *Abbe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007).

Claims based on the purported existence of a committee subject to FACA are routinely resolved based on the adequacy of the pleadings or on declarations attached to motions, *i.e.*, without discovery, and in particular at the motion to dismiss stage. *See, e.g.*, *In re Cheney*, 406 F.3d 723, 730 (D.C. Cir. 2005) (en banc) (judgment for defendant appropriate based on declaration attached to papers; and reversing district court order directing discovery); *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, No. 17-2361, 2020 WL 2800673 (D.D.C. May 29, 2020) (granting motion to dismiss and dismissing mandamus claim against presidential advisory commission); *Food & Water Watch v. Trump*, 357 F. Supp. 3d 1 (D.D.C. 2018) (granting motion to dismiss and denying motion to compel discovery); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24 (D.D.C. 2010) (granting motion to dismiss on basis that FACA did not apply to council in question).[13]

Alternatively, summary judgment is appropriate when, viewing the facts in a light most favorable to the non-moving party, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[13] Courts will sometimes resolve these claims in a motion for summary judgment posture, although even there, they often resolve such claims on the basis of declaration evidence, rather than formal discovery. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. Leavitt*, 577 F. Supp. 2d 427, 434 (D.D.C. 2008) (*CREW*) (summary judgment appropriate when declaration "disclose[d] enough facts to establish that the experts who attended the meetings were not asked to render collective advice," and rejecting Rule [56(d)] motion); *Freedom Watch, Inc. v. Obama*, 930 F. Supp. 2d 98, 100, 102 (D.D.C. 2013) (summary judgment based on appropriate White House declaration and rejecting Rule 56(d) motion).

ARGUMENT

I. This Court Lacks Jurisdiction over Plaintiffs' Claims

A. Both Plaintiffs Lack Standing to Bring the Asserted APA Claims

A showing of standing is a "threshold question in every federal case[.]" *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The "irreducible constitutional minimum" of standing requires a plaintiff to demonstrate an injury-in-fact that is: (1) concrete and particularized, and actual or imminent, not conjectural or hypothetical, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 560-61. "[S]tanding is not dispensed in gross," and must, "[t]o the contrary," be demonstrated "for each claim [a plaintiff] seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Ests., Inc.,* 137 S. Ct. 1645, 1650 (2017) (citations omitted). Thus, because "the standing inquiry requires careful judicial examination of . . . whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted," *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis added), standing must be assessed as to each plaintiff and each "plaintiff must demonstrate standing separately for each form of relief sought," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). At the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1540, 1547 (2016) (citing *Warth*, 422 U.S. at 518). And where, as here, "the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge," "standing is 'substantially more difficult to establish.'" *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (Kavanaugh, J.) (quoting *Lujan*, 504 U.S. at 562). Because neither Plaintiff has established standing as to the APA claims asserted in Counts I through V, these claims must be dismissed.

1. FSFP Lacks Organizational Standing

First, Plaintiff FSFP lacks organizational standing to bring the asserted APA claims. "As an organization," FSFP "can assert standing in one of two ways." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Commerce*, 928 F.3d 95, 100 (D.C. Cir. 2019). "It can assert standing on its own behalf, as an organization [(organizational standing)], or on behalf of its members, as associational standing." *Id.* FSFP does not assert standing on behalf of its members; accordingly, its standing depends on whether FSFP has adequately alleged standing on its own behalf—*i.e.*, whether, "like an individual plaintiff," FSFP has "show[n] actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). The D.C. Circuit has, in turn, outlined a two-part inquiry to assess whether an organization has pled a concrete injury sufficient to confer standing. First, the courts ask whether an agency's "action or omission to act 'injured the [organization's] interest." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (*PETA*). Second, courts must assess whether the organization "used its resources to counteract that harm." *Id.* FSFP fails to satisfy either element.

a. FSFP Has Not Alleged Any Cognizable Injury to Its Interests

First, FSFP has not alleged any concrete injury to its organizational interests. The D.C. Circuit has made clear that, to satisfy this first element of this Circuit's two-part test, "injury to an organization's advocacy activities does not [suffice]." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 989 (D.C. Cir. 2021), *petition for cert. filed*, No. 20–1530 (U.S. May 4, 2021); *see also Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159-62 (D.C. Cir. 2005) (no standing where "the only 'service' impaired is pure issue-advocacy"). Thus, an organization cannot rely on "a mere setback to [its] abstract social interests," but rather must allege a "concrete and demonstrable injury to [its] *activities*[.]" *PETA*, 797 F.3d at 1093 (emphasis added, citations omitted). Stated otherwise, the organization may not rest on

an alleged impairment of its policy goals but must show that the defendant's actions demonstrably harmed its "daily operations" or its "ability to provide services." *Food & Water Watch*, 808 F.3d at 919 (citations omitted); *see also Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) ("[A]n organization must allege that the defendant's conduct 'perceptibly impaired' [its] ability to provide services."); *Env'tl Working Grp. v. FDA*, No. 1:16-CV-2435-TNM, 2018 WL 1384125, at *4 & n.4 (D.D.C. Mar. 19, 2018) (organization must establish "'inhibition of [its] daily operations" or "ongoing work").

FSFP's allegations are wholly insufficient to meet this standard. With respect to the APA claims "[in] particular," *Allen*, 468 U.S. at 752, FSFP alleges only that it "was deprived of its rights to examine and inform the public of important election security concerns …. and to submit comments to the EAC Commissioners" prior to the EAC's February 10, 2021 vote to adopt the VVSG 2.0, Compl. ¶ 56. But these allegations merely describe FSFP's *issue advocacy* on the subject of election security. *Compare* Compl. ¶ 10 (asserting that FSFP has "a fundamental interest" in "ensuring that elections are managed by means of a transparent regulatory process that does not permit regulatory capture," and that its "mission" includes "ensuring that the EAC and the public are provided with an unbiased perspective on proposed elections regulation and policy"). They do not demonstrate, or even suggest, that FSFP's organizational *activities* are impaired by either the process the EAC followed in developing and adopting the VVSG 2.0 (as pertinent to Counts I, II, III, and IV), or by the substantive contents of the VVSG 2.0 (as pertinent to Count V).

At most, FSFP has "alleged that it has more work to do because of" the EAC's challenged actions, but that does not translate into "an injury in fact sufficient for organizational standing." *Tex. Low Income Hous. Info. Serv. v. Carson*, 427 F. Supp. 3d 43, 55 (D.D.C. 2019). But simply put, "having a concrete injury to an organization's interests means that the challenged activity must hamper the organization's ability to do what it does," and "complaining that the organization's ultimate goal has

been made more difficult is not sufficient." *New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 166 (D.D.C. 2016); *see id.* at 168 ("[T]he frustration that NEAVS has encountered with respect to its efforts to advocate for the release of these particular chimpanzees is merely a discrete ideological setback that cannot be deemed to rise to the level of impairment of its services or daily operations, as the D.C. Circuit has required.").

b. FSFP Has Not Used Its Resources to Counteract Any Alleged Harm

Because FSFP "has not sufficiently alleged an injury to its interest," the Court "need not address the second prong of [the organizational-injury] inquiry." *Food & Water Watch, Inc.*, 808 F.3d at 919. But in any event, FSFP has not adequately alleged that it has used its resources to counteract any harm.

FSFP alleges that the EAC's adoption of the VVSG 2.0 requires it to "expend extraordinary resources to educate state election officials about the materiality of the revisions to the VVSG 2.0 and the significance of the EAC's abdication of responsibility to regulate modem technology in voting systems," and further that it "has been and will continue to be forced to divert its limited resources from other essential work" in order to conduct such educational work. Compl. ¶ 57. But "an organization's use of resources for . . . advocacy is not sufficient to give rise to an Article III injury." *Food & Water Watch, Inc.*, 808 F.3d at 919 (citation omitted). And "an organization does not suffer an injury in fact where it expends resources to educate its members and others unless doing so subjects the organization to 'operational costs beyond those normally expended.'" *Id.* at 920 (quoting *Nat'l Taxpayer Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)). Indeed, an organizational plaintiff's "self-serving observation that it has expended resources to educate its members and others regarding" a disfavored agency action "does not present an injury in fact." *Nat'l Taxpayers Union*, 68 F.3d at 1434.

In short, organizational plaintiffs "cannot convert [their] ordinary program costs into an injury in fact." *Id.* And the EAC's adoption of the VVSG 2.0 have "not forced" FSFP "to expend resources in a manner that keeps [it] from pursuing its true purpose." *Id.* To the contrary, FSFP's supposed "injury"—that it is required to expend resources in advocacy and educational activities, *see* Compl. ¶ 57—is part and parcel of its stated "true purpose." *See Nat'l Taxpayers Union*, 68 F.3d at 1434. After all, by its own characterization, FSFP is an advocacy non-profit that focuses on "leverag[ing] election security and legal expertise"' to "provid[e] analysis and disseminat[e] information to the public on issues central to our democracy." Compl. ¶ 10. Simply put, FSFP cannot reframe its very *raison d'être* as an Article III injury. *See, e.g.*, *Ctr. for Democracy & Tech. v. Trump*, 507 F. Supp. 3d 213, 221 (D.D.C. 2020) ("CDT cannot assert Article III standing by claiming the activities that it would otherwise engage in now injure it."), *appeal docketed*, No. 21–5062 (D.C. Cir. Mar. 15, 2021). If the converse were true, anyone could obtain review of most agency actions merely by incorporating a relevant advocacy non-profit, thus reducing Article III to a mere paper tiger. That is not the law.

FSFP therefore has demonstrated neither a concrete injury resulting from the HAVA and APA violations it alleges, nor that it expended resources to counteract any such injury, as required to make out a claim of organizational standing in this Circuit.

2. Plaintiff Stark Also Lacks Standing

Plaintiff Stark also lacks standing as to the APA claims. Although Stark may disagree with the VVSG 2.0's allowance for the disabling (as opposed to the physical removal) of wireless capabilities in voting systems, it is well-established that mere personal offense to government action does not give rise to standing to sue. *Allen*, 468 U.S. at 752-54; *see also Lujan v. Defenders of Wildlife,* 504 U.S. at 575-76 (1992). "By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy" from seeing his preferred policy preferences enacted, "that psychic satisfaction is not an acceptable Article III

remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998). "Recognition of standing in such circumstances would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Allen,* 468 U.S. at 756 (citation omitted). Here, Plaintiff Stark has no entitlement to terms for the VVSG that reflect his personal policy preferences (nor does he contended otherwise). Accordingly, as he has not identified any concrete injury—much less one that was caused by final, substantive (but voluntary) terms of the VVSG 2.0, or that could be redressed through the relief he seeks—he, too, lacks Article III standing as to the APA claims.

3. Plaintiffs' Assertions of Procedural Violations Do Not Relieve Them of Demonstrating a Concrete Injury

The standing analysis is not different simply because several of Plaintiffs' asserted APA claims (Counts I through IV) are premised on alleged violations of procedural provisions of HAVA and the APA. The D.C. Circuit has made clear that alleged procedural injuries do not themselves suffice for standing; rather, plaintiffs must demonstrate that the procedural violation "has resulted in an invasion of their concrete and particularized interest." *Ctr. for Law & Educ.*, 396 F.3d at 1159; *see also id.* ("Appellants appear to misunderstand the difference between the 'procedural right' and the 'concrete interest' in a procedural-rights case . . . . The two things are not one and the same."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in *vacuo*—is insufficient to create Article III standing."); *Spokeo*, 136 S. Ct. at 1549 ("a bare procedural violation, divorced from any concrete harm," cannot establish an injury-in-fact). Thus, a court "must ensure that there is some connection between the alleged procedural injury and a substantive injury that would otherwise confer Article III standing." *United Transp. Union v. Interstate Com. Comm'n,* 891 F.2d 908, 918 (D.C. Cir. 1989); *accord WildEarth Guardians v. Jewell,* 738 F.3d 298, 316 (D.C. Cir. 2013). Thus, insofar as alleged procedural deficiencies in Defendant's process of developing and adopting the VVSG 2.0 constitute the

gravamen of Counts I through IV, such allegations cannot constitute an Article III injury, absent a demonstration that either Plaintiff faces some *other* cognizable injury-in-fact that would be protected by that procedural right. Because neither Plaintiff has even attempted to identify any *substantive* injury to a specific concrete and particularized interest that they hold, neither has established standing as to the APA claims asserted in this action.

B. The FACA Claim is Moot

This Court likewise lacks jurisdiction over Plaintiffs' FACA claim[14] (Count VI) because is it moot. Under Article III of the Constitution, federal courts are limited to "the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). In comportment with this principle, "[i]t has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Sierra Club v. Jackson,* 648 F.3d 848, 852 (D.C. Cir. 2011) (citation omitted). Therefore, a claim should be dismissed as moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *accord United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1135 (D.C. Cir. 2009) ("A case is moot … where it [is] impossible for the court to grant any effectual relief whatever to the prevailing party.") (citation omitted).

In cases addressing mootness in the FACA context, courts have distinguished between "claims for document disclosure pursuant to section 10(b), which survive the termination of a FACA advisory committee," and "claims based on FACA's other procedural requirements, [which] are mooted when the relevant advisory committee ceases to exist." *Tidwell*, 239 F. Supp. 3d at

[14] Defendants note that—as this Court has recently recognized—FACA does not itself confer a private cause of action. *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 220-21 (D.D.C. 2017) (Kollar-Kotelly, J.). Accordingly, although, for ease of reference, Defendant refers to Count VI throughout this brief as Plaintiffs' "FACA claim," it is in fact brought under the APA. *Id.*; *see* Compl. ¶ 90 (invoking 5 U.S.C. § 706(2)(A).

223; *see Freedom Watch, Inc. v. Obama*, 859 F. Supp. 2d 169, 174 (D.D.C. 2012). Here, all aspects of Plaintiffs' FACA claim—which, although pled as a single count, encompasses both types of claims—are moot, but for different reasons, as discussed below.

1. Plaintiffs' Non-Records Claims Are Moot Because the Challenged Meetings Have Ceased

FACA claims, other than those related to recordkeeping under Section 10(b), "are mooted when the relevant advisory committee ceases to exist." *Tidwell*, 239 F. Supp. 3d at 223; *see Am. Oversight*, 2021 WL 4355576, at *1 (dismissing non-document-related FACA claims as moot, and specifically noting that "[b]ecause the purported committee is no longer operating, there is no relief this Court may provide as to its alleged failure to file a charter or its failure to provide public notice and access to its meetings"); *Freedom Watch*, 859 F. Supp. 2d at 171, 174 (FACA claims related to committee's composition and meetings moot because committee no longer existed); *Citizens for Responsibility & Ethics in Wash. v. Duncan*, 643 F. Supp. 2d 43, 51 (D.D.C. 2009) (dissolution of committee moots claims alleging violation of FACA's open meetings and charter rules); *Nat'l Res. Def. Council v. Zinke*, No. 18-CV-6903 (AJN), 2020 WL 5766323, at *4 (S.D.N.Y. Sept. 28, 2020) (similar). Where a committee has been disbanded, "there will simply be no continuing case or controversy for judicial resolution. Nor will there be any basis for injunctive or other equitable relief. The case will in fact be moot, and defendants will be legally entitled to dismissal." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 879 F. Supp. 103, 106 (D.D.C. 1994); *see also Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994) ("[O]nce a committee has served its purpose, courts generally have not invalidated the agency action even if there were earlier FACA violations."), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

Here, even assuming, wholly *arguendo*, that the EAC's meetings with (among other attendees) certain voting machine vendors in the summer of 2020 constituted an advisory committee within the meaning of FACA—*but see* § II.B, *infra*—the last such meeting was held on July 24, 2020, Harrington

Decl. ¶ 15, and there is no allegation or reason to believe that these meetings are continuing or will resume in the future. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (the doctrine of mootness requires dismissal when "there is no reasonable expectation that the [alleged] wrong will be repeated"); *see also* Harrington Decl. ¶ 15 (averring that the EAC has no intention to convene similar or additional meetings in the future). Accordingly, insofar as Count VI alleges FACA violations pertaining to the meetings' formation, the composition of the meetings' attendees (including the viewpoints represented by the attendees), and/or the EAC's failure to file a committee charter, *see* Compl. ¶ 96, these claims are moot. Simply put, the Court cannot grant any meaningful relief to Plaintiffs, such as ordering that Plaintiffs' representative be allowed to participate in the meetings or ordering the EAC to institute new procedures, now that the challenged meetings have ceased—and indeed, Plaintiffs' Complaint does not even seek any such relief.

Likewise, Plaintiffs' request for declaratory relief related to their FACA claims, *see* Compl. Prayer for Relief ¶¶ (a), (b) is also moot. "Where an intervening event renders the underlying case moot, a declaratory judgment can no longer 'affect[ ] the behavior of the defendant towards the plaintiff,' and thus 'afford[s] the plaintiffs no relief whatsoever[.]'" *NBC-USA Hous., Inc., Twenty-Six v. Donovan*, 674 F.3d 869, 873 (D.C. Cir. 2012) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) and *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988)); *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) ("any injunction or order declaring [the challenged practice] illegal would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits.").

The aspects of Count VI that do not pertain to document disclosures should, accordingly, be dismissed as moot.[15]

[15] Although mootness does have a notable exception, namely that "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice[,]" *Friends of the Earth v. Laidlaw Env'tl Servs. (TOC)*, 528 U.S. 167, 189 (2000) (citation omitted), the exception does not apply here. It is well settled that the voluntary cessation exception is inapplicable where "subsequent events made it absolutely clear that the allegedly wrongful behavior

2. Plaintiffs' Records Claim Is at Least Substantially Moot Because Relevant Documents Have Been Disclosed

Insofar as Count VI also alleges that "Defendant failed to ensure [that] detailed records of the meetings, including meeting minutes, were available to the public," this aspect of the FACA claim is also, at minimum, substantially moot as well. Under FACA Section 10(b), "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection . . . ." 5 U.S.C. app. 2 § 10(b). But where such records have already been disclosed, courts have found document-related FACA claims to be moot. *See Tidwell*, 239 F. Supp. 3d at 228-29 (Section 10(b) claim moot after materials covered by that section are disclosed); *See also Duncan*, 643 F. Supp. 2d at 48-50 (dismissing Section 10(b) claim where agency provided declaration attesting that it had already produced committee records); *Nat'l Nutritional Foods Ass'n v. Califano*, 457 F. Supp. 275, 281 (S.D.N.Y. 1978), *aff'd* 603 F.2d 327 (2d Cir. 1979) ("Thus, the FDA having made available all existing relevant and material documents and all documents upon which it relied, Count II of plaintiffs' complaint has indeed become moot."); *compare Assoc. of Am. Physicians*, 879 F. Supp. at 104-05 ("[B]efore the court can find that this case is in fact moot, defendants will have to produce [all] documents" subject to Section 10(b)); *see also Cummock v. Gore*, 180 F.3d 282, 290 (D.C. Cir. 1999) (plaintiff's "injury is redressable by the relief she seeks—namely, access to documents to which she is entitled under FACA").

Here, although Count VI asserts that "[t]he minutes and other documents from [the] meetings [at issue] should be made public," Compl. ¶ 98, Plaintiffs do not actually seek any related

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could not reasonably be expected to recur." *Id.* (citation omitted). The meetings in question occurred only five times, over a limited period in the summer of 2020, and there is no allegation that they are continuing or that there is any possibility that they will resume following the final adoption of VVSG 2.0 in February 2021. In short, because "there is no reasonable expectation that the [alleged] wrong will be repeated," *W.T. Grant Co.*, 345 U.S. at 632-33 (footnote omitted), plaintiffs' claims under FACA sections 5(b)(2)-(3), 9(c), and 10(a)(1)-(3) must be dismissed as moot.

relief in their Complaint—presumably because they have sought and already obtained such records through related FOIA proceedings that are concurrently pending before this Court. *See Free Speech for People v. U.S. Election Assistance Comm'n*, 1:21-cv-838-APM, Dkt. No. 1 (Complaint, detailing four FOIA requests submitted by FSFP to the EAC for records pertaining to the meetings in question) (attached hereto as Exhibit E); Dkt. No. 17 (Joint Status Report dated Sept. 13, 2021, representing that "[a]s of August 31, 2021, Defendant has made productions for all four requests. Plaintiff has posed questions regarding the completeness of Defendant's productions, and the parties are working in good faith to address those questions to their mutual satisfaction.") (attached hereto as Exhibit F).

Thus, insofar as Plaintiffs have already obtained the same documents that would be produced pursuant to any claim under Section 10(b) of FACA, this aspect of Count VI is likewise moot—and, in any event, even were Plaintiffs to litigate the completeness of the EAC's productions in their FOIA suit, there is no need for this Court entertain duplicative proceedings under FACA. Count VI should, accordingly, be dismissed for lack of subject matter jurisdiction.

II. All Claims Should Also Be Dismissed under Rule 12(b)(6)

A. Counts I through V Fail to State a Claim under the APA

Even assuming, *arguendo*, that Plaintiffs have established standing to pursue their APA claims, each such claim fails on its merits, for at least three independent reasons. First and second, the VVSG 2.0 are neither "agency action" nor "final agency action" within the meaning of the APA. And third, because the challenged provisions of the final VVSG 2.0 are, demonstrably, the "logical outgrowth" of the proposed Guidelines, all relevant procedures required by HAVA and/or the APA were fully satisfied. Accordingly, and as further explained below, each of Counts I through V should be dismissed under Rule 12(b)(6).

1. The VVSG 2.0 Are neither "Agency Action" nor "Final Agency Action" within the Meaning of the APA

The APA, 5 U.S.C. §§ 701-06, establishes a waiver of sovereign immunity and a cause of action for injunctive or declaratory relief for parties "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute[.]" *Id.* § 702; *see also Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Thus, a threshold requirement for any claim asserted under the APA is that it challenge a qualifying "agency action." 5 U.S.C. § 702. Further, when—as here—"review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *see* 5 U.S.C. § 704 ("Agency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court are subject to judicial review") (emphasis added). As Plaintiffs appear to recognize, HAVA does not provide for judicial review of the VVSG under its own auspices. Accordingly, the generic cause of action afforded by the APA applies, and to invoke it Plaintiffs must allege both "agency action" and "final agency action." Moreover, the APA specifically provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review *on the review of the final agency action*." 5 U.S.C. § 704 (emphasis added). Accordingly, Plaintiffs' procedural claims (Counts I through IV) must be dismissed in the absence of an identifiable final agency action with which they have merged. And because the sole purported "final agency action" identified by Plaintiffs—the VVSG 2.0—is neither "agency action" nor "final agency action," all of their APA claims should be dismissed. *See Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable.").

With respect to the first of these requirements, as the Supreme Court has stressed, "agency action" reviewable under the APA is strictly limited to the set of "circumscribed, discrete agency actions" delineated by the APA. *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004). Specifically, the APA defines "agency action" to mean "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *see* 5 U.S.C. § 701(b)(2) ("For the purpose of this chapter . . . 'agency action' ha[s] the meanin[g] given . . . by section 551 of this title"). In turn, the APA further defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . " *Id.* § 551(4).

Independently, "agency actions" are only "final" where two conditions are met. "First, the action must mark the consummation of the agency's decisionmaking process"—that is, "it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). "An order must satisfy both prongs of the *Bennett* test to be considered final." *Sw. Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016).

Plaintiffs stake their APA claims to their assertion that the VVSG 2.0 constitute a final agency action within the meaning of the APA, Compl. ¶ 63—specifically, a "rule," *id.* ¶ 81.[16] This contention is—fatally—incorrect, for several reasons. First, and most straightforwardly, the plain language of HAVA flatly precludes any such assessment. As noted above, in a section entitled "Limitation on rulemaking authority," HAVA expressly *denies* the EAC any rulemaking or regulatory authority, providing that "[t]he Commission shall *not* have *any authority to issue any rule, promulgate any regulation,* or

[16] More specifically, Plaintiffs allege that "[t]he adoption of the VVSG 2.0 constituted 'rule making' within the meaning of the APA." Compl. ¶ 80 (citing 5 U.S.C. § 551(5)). However, as the APA defines a "rule making" as "agency process for formulating, amending, or repealing a rule"—and thus, there can be no "rule making" in the absence of a "rule"—this distinction is immaterial.

take any other action which imposes any requirement on any State or unit of local government." 52 U.S.C. § 20929 (emphasis added). This express statutory limitation—delineating the authority that the EAC *lacks*—decisively precludes each of Plaintiffs' APA claims, and this Court need go no further in dispatching of them. *See*, *e.g.*, *Physicians Comm. for Responsible Med. v. Vilsack*, 867 F. Supp. 2d 24, 30 (D.D.C. 2011) (dismissing APA claims purporting to challenge USDA guidance on the ground that the Nutrition Act "makes clear" that the guidance "does not include any rule or regulation issued by a Federal agency," and thus, the challenged guidance could "not constitute an 'agency action.'") (citing 7 U.S.C. § 5341(b)(3)); *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395-96 (D.C. Cir. 2013) (similarly dismissing APA claims on the ground that the agency "has no authority to promulgate a rule with the force of law").

Moreover, to the extent, *arguendo*, that the Court were to somehow look past Section 20929's decisive preclusion of any "rule making" authority for the EAC, well-established case law further confirms that the VVSG 2.0 constitute—at most—an unreviewable general statement of policy. As the D.C. Circuit has explained, the APA's "finality inquiry is often framed as the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (citing *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.,* 452 F.3d 798, 806 (D.C. Cir. 2006)). Only the latter—*i.e.*, agency actions that "impose legally binding obligations or prohibitions on regulated parties," *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014), are final, and thus reviewable. *See also, e.g., Broadgate Inc. v. U.S. Citizenship & Immigr. Servs.*, 730 F. Supp. 2d 240, 244 (D.D.C. 2010) ("Whether a disputed 'rule' is a legislative rule turns on whether it has 'the force of law,' meaning that 'Congress has delegated legislative power to the agency and [ ] the agency intended to exercise that power in promulgating the rule.'" (quoting *Am. Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1109 (D.C. Cir. 1993)); *Nat. Res. Def. Council v.*

Wheeler, 955 F.3d 68, 90–91 (D.C. Cir. 2020) (similar); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n,* 324 F.3d 726, 731 (D.C. Cir. 2003) (in order to satisfy the second prong of the *Bennett* finality analysis, the challenged action must "impose[] an obligation, den[y] a right, or fix[] some legal relationship").

Here, although the VVSG 2.0 concededly constitute the consummation of an EAC decisionmaking process and thus satisfy the first *Bennett* prong, they do not and cannot satisfy the second prong, for the straightforward reason that they are, indisputably, entirely voluntary. As such, the VVSG 2.0 neither "establish [any] binding norms" or "occasion legal consequences." *Ctr. for Auto Safety*, 452 F.3d at 807. As it is well-established that agency guidelines—such as the VVSG 2.0—that "do[] not tell regulated parties what they must do or may not do in order to avoid liability" are unreviewable statements of policy, each of Counts I through V must be dismissed. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Fed. Deposit Ins. Corp.*, 132 F. Supp. 3d 98, 120 (D.D.C. 2015) (citing *Nat'l Mining Ass'n.,* 758 F.3d at 252); *see also*, *Holistic Candlers & Consumers Ass'n v. FDA,* 664 F.3d 940, 944-45 (D.C. Cir. 2012) ("[A]gency actions of an informal and advisory nature that request voluntary compliance do not impose legal consequences or determine rights or obligations," and thus fail to satisfy *Bennett*'s second prong) (citations omitted); 5 U.S.C. § 553(b)(A) (providing that notice-and-comment rulemaking procedures "[do] not apply . . . to . . . general statements of policy").

2. <u>The Final VVSG 2.0 Are a "Logical Outgrowth" of the Version Originally Proposed and, Thus, All Procedural Requirements Were Satisfied</u>

Although the Court need go no further in resolving Plaintiffs' APA claims, Counts I through IV also fail for the independent reason that the final VVSG 2.0 are a "logical outgrowth" of the version originally proposed by the EAC—and, thus, all procedures required by HAVA and/or the APA were fully satisfied.[17]

[17] Count V, which alleges that the VVSG 2.0 are substantively "arbitrary and capricious," is also unavailing, but would require the submission of a certified administrative record prior to judicial

As noted above, Counts I, II, and III each purport to allege a procedural violation of HAVA in the development of the VVSG 2.0—respectively, the requirements that the EAC "submit the guidelines proposed to be adopted" to the Standards Board and the Board of Advisors, 52 U.S.C. § 20962(b)(2)-(b)(3) (Count I); afford both committees a minimum of 90 days to "review and submit comments and recommendations regarding" the proposed guidelines, *id.* § 20962(c) (Count II); and publish the proposed VVSG in the Federal Register and provide an opportunity for public comment on the proposed guidelines, and as well as an opportunity for public hearing on the record, *id.* § 20962(a) (Count III). Count IV, in turn, essentially reproduces Count III by asserting that the EAC failed to comply with the procedural requirements for notice-and-comment rule-making under the APA, 5 U.S.C. § 553. However, there is no dispute that the EAC did, in fact, (1) submit the proposed version of the VVSG 2.0 to both the Standards Board and the Board of Advisors on March 11, 2020, *see* Compl. ¶ 34; (2) afford both committees well over 90 days to provide their comments and recommendations on the same, *id.* ¶ 53 (correctly alleging that the EAC voted to approve the final VVSG 2.0 on February 10, 2021—eleven months after the agency's submission of its proposal to the committees); (3) publish the proposed VVSG 2.0 in the Federal Register on March 24, 2020, *id.* ¶ 36; 85 Fed. Reg. 16,621; and (4) hold three public meetings regarding the Proposed VVSG 2.0, on March 27, May 6, and May 20, 2020, respectively, Compl. ¶ 37.

Thus, although each of Counts I through IV is framed in procedural terms, Plaintiffs themselves acknowledge (as they must) that all of the procedural requirements they invoke were, at least as a formal matter, satisfied. Rather, the substance of each of these claims is that, notwithstanding such concededly "formal" adherence to the relevant procedural requirements, the

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resolution it on its merits. *See* 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Because the instant motion sets forth purely legal grounds for the dismissal of this claim, Defendants have not yet made this submission. *See supra* fn. 2. However, Defendants preserve all relevant arguments on the merits of Count V for a later stage in these proceedings, should they be necessary.

EAC failed to follow the requisite procedures because the Final VVSG 2.0 differed improperly from the original proposed version. *See* Compl. ¶ 66 (alleging that the final version "was so different from the [proposed] version [the EAC] submitted [to the committees] that the modifications could not have been reasonably anticipated"); *id.* ¶¶ 72, 76, 82 (similar).

Under the APA, it is well-established that the proposed and final versions of a rule "need not be identical." *CSX Transp. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009). Rather, the final rule need only be a "logical outgrowth" of the original notice of proposed rulemaking. *See Agape Church v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). An agency's "final rule qualifies as a logical outgrowth of the proposed rule if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *CSX Transp.*, 584 F.3d at 1079-80 (quoting *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)). "By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where 'interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.'" *Id.* at 1080 (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.,* 407 F.3d 1250, 1259-60 (D.C. Cir. 2005)); *see also id.* at 1081 (noting that "cases finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position."). Thus, in assessing whether a final rule is the "logical outgrowth" of the proposed rule set forth but the agency, courts consider "whether the party, *ex ante*, should have anticipated" the changes to be made in the course of the rulemaking. *Ariz. Pub. Serv. Co. v. EPA,* 211 F.3d 1280, 1299 (D.C.Cir.2000) (citation omitted). Stated differently, this inquiry assesses "whether a new round of notice and comment would provide the *first* opportunity for interested parties to offer

comments that could persuade the agency to modify its rule." *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (citation omitted).

Here, Plaintiffs' primary complaint about the VVSG 2.0 is their allowance for "wireless networking devices in voting machines if they are disabled by software." Compl. ¶ 52; *see id.* ¶¶ 69, 73, 78, 84; *see also id.* ¶¶ 27-28; 86-88. According to Plaintiffs, the proposed version of the VVSG 2.0 provided no notice that the final version might contain such a provision, such that they were deprived of an opportunity to comment on this subject and advocate for a different result. This contention is flatly belied by the record, as well as Plaintiffs' own actions—through which they expressed the very views they now claim they were deprived of any opportunity to state.

As explained above, the Proposed VVSG 2.0 proposed that, to qualify for certification of compliance with the updated VVSG, a voting system (1) "must not be capable of establishing wireless connections" (Proposed Section 14.2-D), and (2) could meet that standard through "configur[ation] to disable wireless networking" capabilities (Proposed Section 15.4-C). Proposed VVSG 2.0 §§ 14.2-D, 15.4-C. Thus, Proposed Section 15.4-C plainly put Plaintiffs (and the public) on notice that the Proposed VVSG 2.0 contemplated allowing voting systems to demonstrate a lack of "capability" for wireless networking *through the "disabl[ing]"* of any such potential capabilities in their hardware—including via, among other non-exclusive options, "a system configuration process that disables wireless networking devices." Proposed VVSG 2.0 §§ 14.2-D, 15.4-C. In other words, the textual additions to Final Section 14.2-C to which Plaintiffs object were not *substantive* additions to the Final VVSG 2.0. Rather, they were there all along, in Proposed Section 15.4-C. *See also* Proposed Section 14.2-C (expressly flagging that Proposed Section 15.4-C set forth "[r]elated requirements"). As such, Plaintiffs did not even need to "anticipate" any purported "modification" of the VVSG 2.0; rather, the Proposed VVSG 2.0 itself *already contained* a provision allowing for the disabling of wireless capabilities.

Moreover, Plaintiff FSFP's own actions further belie its contentions. Specifically, on June 22, 2020 , FSFP submitted comments via letter to the EAC. Compl. ¶ 38; *see* Exhibit G, attached hereto (June 22 FSFP Letter).[18] Among other comments, FSFP recommended the following addition to Proposed Section 14.2-D (to be inserted after "[v]oting systems must not be capable of establishing wireless connections"): "and should not contain hardware and software capable of establishing a wireless connection." Exhibit G p. 8. FSFP further explained its rationale for its recommended amendment as follows

> Voting system vendors have marketed voting systems that contain wireless radios to customers that do not want to use them with the reasoning that they can be disabled. Disabling is insufficient. In order to ensure the system is not "capable of establishing wireless connections" as 14.2-D requires, the system must also not include elements with that capacity.

Id. Thus, far from being blindsided by the Final VVSG 2.0's allowance for the disabling of wireless capabilities, FSFP in fact affirmatively *availed* itself of the opportunity to provide the very comments it now seeks to provide anew. A final rule qualifies as a logical outgrowth "if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA,* 358 F.3d 936, 952 (D.C. Cir. 2004) (citations omitted). Where FSFP not only "should have anticipated" that the Final VVSG 2.0 might allow for wireless disabling, but in point of fact did so anticipate—and submitted comments advocating for a different result—any contention that they were deprived of fair notice must necessarily fail.

Finally, Defendant notes that in paragraph 52 of their Complaint, Plaintiffs further list seven other provisions of the VVSG 2.0 (in addition to the "wireless disabling" standards set forth in Sections 14.2-C and 15.4-C, discussed at length above) that purportedly fail to satisfy the "logical

[18] FSFPS's letter is referenced by the Complaint, and the Court may therefore rely on its contents in assessing a Rule 12(b)(6) motion. *Ward*, 768 F. Supp. 2d at 119.

outgrowth" test and which they contend should be set aside on that ground. Compl. ¶ 52(i)-(vii). However, Plaintiffs' Complaint is bereft of any allegation regarding—or even any passing reference to—any of these other provisions in the VVSG 2.0. Accordingly, any purported claims premised on any of the VVSG 2.0 provisions listed in parts (i)-(vii) of paragraph 52 fail, on their face, to state any claim up on which relief may be granted. *See Iqbal*, 556 U.S. at 663 ("threadbare" allegations, "supported by mere conclusory statements," do not satisfy pleading standards); *Frost v. Cath. Univ. of Am.*, 960 F. Supp. 2d 226, 230 (D.D.C. 2013), *aff'd,* 555 F. App'x 6 (D.C. Cir. 2014) ("Rule 8 'demands more than an unadorned, the-defendant-harmed-me accusation.'") (quoting *Iqbal,* 556 U.S. at 678). Simply put, to state any claim under the APA, Plaintiffs must do more than simply list the provisions of the VVSG 2.0 that they dislike; having failed do so, they cannot pursue any claims that may be premised on these provisions.

Accordingly, the Court should dismiss each of Counts I through IV on these independent grounds as well.

B. <u>The FACA Claim Also Fails</u>

To the extent the Court were to reach the issue, *but see* § I.B, *supra*, Count VI (the FACA claim) also fails on its merits. As explained above, it is well-established that FACA "does not extend to 'every formal and informal consultation" between federal agencies "and a group rendering advice." *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 34 (D.D.C. 2011) (quoting *Pub. Citizen*, 491 U.S. at 453). Rather, to qualify as an advisory committee within the meaning of FACA, a group must, first, be "'established or utilized' by the federal government to provide 'advice or recommendations for the President or one or more agencies or officers of the Federal Government.'" *VoteVets Action Fund*, 992 F.3d at 1103 (quoting 5 U.S.C. app. 2 § 3(2)). Because EAC staff determined who to invite to the Working Group, Harrington Decl. ¶ 8, Defendant acknowledges that the first element of this test is satisfied. *See id. at* 1105 (to be "established" within the meaning of FACA, "the committee must be

'actually formed by the agency' or the President … In particular, the federal government must select the committee's members.") (quoting *Byrd v. EAP*, 174 F.3d 239, 245 (D.C. Cir. 1999)); *see also id.* at 1107 ("[T]here is no requirement that government officials act with any particular formality to 'establish' an advisory committee as a source of advice.").[19]

Of course, the mere fact that Defendant determined the composition of the Working Group does not transform it into an "advisory committee" within the meaning of FACA. Rather, in order to pursue this claim, Plaintiffs must further establish that the Working Group had "'in large measure, an organized structure, a fixed membership, and a specific purpose.'" *VoteVets Action Fund*, 992 F.3d at 1103 (quoting *AAPS*, 997 F.2d at 914); *see also, e.g.*, *Food & Water Watch*, 357 F. Supp. 3d at 11 (courts must assess the "formality and structure of the group"). In particular, in order to pursue their FACA claim, Plaintiffs must establish that the Working Group "'render[ed] advice or recommendations, *as a group*, and not as a collection of individuals,'" *VoteVets Action Fund*, 992 F.3d at 1104 (quoting *AAPS*, 997 F.2d at 913). This Plaintiffs cannot do.

This Circuit has recognized the degree of formality as a "continuum." *AAPS*, 997 F.2d at 915. "At one end one can visualize a formal group of a limited number of private citizens who are brought together to give publicized advice as a group." *Id.* These "would seem to be covered by the statute." *Id.* "At the other end of the continuum is an unstructured arrangement in which the government seeks advice from what is only a collection of individuals who do not significantly interact with each other." *Id.* That group "does not trigger FACA." *Id.* Accordingly, groups with limited meetings and

[19] Because Defendant acknowledges that it "established" the Working Group, there is no need for the Court to reach the question, in the alternative, as to whether it "utilized" this group. *See VoteVets Action Fund*, 992 F.3d at 1107. However, in any event, "utiliz[ation]" within the meaning of FACA refers to a narrow class of privately formed committees, *see Pub. Citizen*, 491 U.S. at 462, and thus has no relevance here. *See also VoteVets Action Fund*, 992 F.3d at 1103-04 ("To be 'utilized,' [a committee] must be subject to the federal government's 'actual management or control,' even if it is not created by the government.") (citation omitted).

without formal organizational structure, and where no collaborative work product was created, are not subject to FACA. *See CREW*, 577 F. Supp. 2d at 432. Further, as this Court recently explained:

> [t]he collective judgment of the group is essential to the inquiry: 'The group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally. Advisory committees not only provide ideas to the government, they also often bestow political legitimacy on that advice . . . . Advisory committees are not just mechanisms for transmitting policy advice on a particular subject matter to the government. These committees also possess a kind of political legitimacy as representative bodies.'

Food & Water Watch, 357 F. Supp. 3d at 11 (quoting *AAPS*, 997 F.3d at 913-14); *see also AAPS*, 997 F.3d at 914 (noting that "committees bestow these various benefits *only insofar as their members act as a group*. The whole, in other words, must be greater than the sum of the parts") (emphasis added).

Further, "for an individual to be considered a FACA committee member, he or she must have a 'vote in, or if the committee acts by consensus, a veto over the committee's decisions.'" *Food & Water Watch*, 357 F. Supp. 3d at 11 (quoting *In re Cheney*, 406 F.3d at 728). "This principle of a 'vote' or 'veto' in committee recommendations or decisions is premised on the notion that the committee is expected to make substantive group recommendations or decisions, and that it does so at the behest of the executive. Absent any indication that such a structure exists, there can be no FACA obligation." *Id.* at 12. Given these requirements, "the government has a good deal of control over whether a group constitutes a FACA advisory committee. Perhaps, for that reason, it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch." *AAPS*, 997 F.2d at 914.

Plaintiffs fail to plead any of the requisites of formality and structure, instead baldly asserting that, "on information and belief," the Working Group "convened on a weekly basis with Defendant, consisted of a core group of private voting machine vendors, was called upon Defendant to render advice about the VVSG 2.0, and rendered such advice as a group rather than as a collection of individuals." Compl. ¶ 95; *cf. Twombly*, 550 U.S. at 555 (to state a claim, a complaint must contain

"more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"); *see, e.g.*, *Am. Oversight*, 2021 WL 4355576, at *9 (dismissing FACA claim under Rule 12(b)(6), where Plaintiff made only "threadbare" and "generalized" allegations—bereft of any relevant detail about "operations, structure, membership[,] [or] attendance"—regarding the purported committee' form and structure).

In any event, the Harrington Declaration makes clear that the Working Group, in point of fact, lacked the requisite formality or structure to qualify as an advisory committee under FACA. As explained above, the Working Group met on only five discrete occasions, for approximately one hour per meeting, to informally discuss certain technical feasibility and implementation concerns that industry actors had raised in their written comments on the Proposed VVSG 2.0, as well as at the May 20, 2020 public hearing. Harrington Decl. ¶¶ 7-8, 11; *see also id.* ¶ 7 (explaining that due to such issues in VVSG 1.1, no voting system ever went through testing and certification to VVSG 1.1 standards—a result that the EAC, for obvious reasons, sought to avoid repeating with the VVSG 2.0).

At the second meeting, the EAC Executive Director expressly informed all attendees that these meetings were "informal," and had been convened solely for the EAC to better understand the "technical" issues underlying certain comments that voting manufacturers had made in regard to the Proposed VVSG 2.0. *Id.* ¶ 10. No formal organization or leadership structure—including any use of subgroups—was ever employed in the brief course of the meetings, *id.* ¶ 12. Nor did the EAC create, approve, or utilize any process through which the attendees of the Working Group could either vote on or veto any collective advice or recommendations concerning VVSG 2.0, and at no time during any Working Group meeting did a vote on any issue occur. *Id.* ¶¶ 13. Rather, attendees shared only their individual views on all issues discussed at the meetings. *Id.* ¶ 12.

Under the well-established case law discussed above, such mere informal "exchanging [of] views" does not trigger FACA. *See CREW*, 577 F. Supp. 2d at 432 (group was not a FACA committee

when it "had no formal organizational structure," and "[a]ttendees conveyed their own opinions regarding their individual areas of expertise"); *Grigsby Brandford & Co. v. United States*, 869 F. Supp. 984, 1002 (D.D.C. 1994) ("ad hoc, unstructured meeting[s] [are] specifically exempted from FACA's ambit"); *NRDC v. Herrington,* 637 F. Supp. 116, 119-20 (D.D.C. 1986) (finding FACA did not apply to group of experts who briefed the Secretary of Energy where experts functioned as individuals rather than a group; suggesting "conclaves for the edification of government officials on the basis of some relative quantum of indicia of formality" are likely not subject to FACA). In short, and as the D.C. Circuit recently confirmed, FACA simply does not "'apply to executive consultations on policy issues with *ad hoc* collections of private individuals who are not convened 'to render advice or recommendations, *as a group*.'" *VoteVets Action Fund*, 992 F.3d at 1101 (quoting *AAPS*, 997 F.2d at 913). Thus, where, as here, the group in question lacked any organizational structure, did not ever vote on anything, and neither intended nor attempted to reach consensus on any issue, FACA does not apply. To the extent the Court does not dismiss this claim for insufficiently pleading the requisite elements of a FACA claim, it should therefore grant summary judgment in the EAC's favor on the basis of the uncontroverted facts set forth in the Harrington Declaration.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action, in its entirety, for lack of subject matter jurisdiction and failure to state a claim; in in the alternative, the EAC respectfully requests the partial entry of summary judgment in its favor as to the FACA claim.

Dated: September 30, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

LESLEY FARBY
Assistant Branch Director

/s/ *Antonia Konkoly* .
Antonia Konkoly
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW, Room 11110
Washington, DC 20005
(202) 514-2395 (direct)
(202) 616-8470
antonia.konkoly@usdoj.gov

Counsel for Defendants