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)

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

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INTRODUCTION

Plaintiffs Philip Stark and Free Speech for People ("FSFP") bring this action to challenge federal voting system standards issued through a process that flouted basic requirements of administrative law and specific requirements of the Help America Vote Act ("HAVA"). After proposing standards that would prohibit wireless-connection capability in voting systems—an important security measure to prevent hacking and other interference—and publishing them for notice and comment, Defendant U.S. Election Assistance Commission ("EAC") held a series of non-public meetings with voting machine manufacturers about the standards. The EAC then revised the proposed standards to allow wireless-connection capability, and made other significant changes that reduce voting machine manufacturers' costs while weakening the security of voting systems.

The EAC's actions prevented the public from understanding and commenting on significant modifications to the voting system standards before they became final, as required by HAVA. The EAC additionally prevented Plaintiff Philip Stark from fulfilling his statutory responsibilities as a member of the EAC Board of Advisors. HAVA directs Board of Advisors members to review proposed voting system standards and submit comments and recommendations to the Commission at least thirty days before the Commission votes. Because Stark did not learn of the significantly revised proposed standards until one week before the Commission's vote, he could not review and comment as required by HAVA, or have his comments and recommendations taken into consideration by the Commission as HAVA also requires.

Plaintiffs' claims for violation of HAVA, the Administrative Procedure Act ("APA") and the Federal Advisory Act ("FACA") are properly before the Court, contrary to the government's contention. Both Plaintiffs satisfy the criteria for Article III standing, and their FACA claim is not

moot because a declaration that the EAC violated that Act would provide relief and, in any event, the voluntary cessation exception to mootness applies. The government fails to establish that the EAC will not again rely on non-public meetings with voting machine vendors when it develops a future iteration of federal voting system standards.

Plaintiffs also have stated plausible claims under HAVA, the APA and FACA. HAVA provides for federal certification of voting machines through a program administered by the EAC, and the EAC developed the Voluntary Voting System Guidelines ("VVSG") as the basis for certification. The VVSG are voluntary in that they are not binding on states and local governments, but they are mandatory for any voting machine manufacturer that wants its machines to be federally certified. Plaintiffs have alleged facts that, accepted as true, show that the significantly modified VVSG—the "VVSG 2.0"—are not a logical outgrowth of the proposed version that the EAC provided to the Board of Advisors and the public. The alleged facts instead show that the final standards are the result of behind-closed-doors meetings with a working group that was skewed to emphasize the perspective of voting machine manufacturers and their collective interest in easing security requirements to reduce cost and lessen transparency of voting systems.

Defendant's motion to dismiss should be denied. Because Defendant has not demonstrated the absence of material fact as to Plaintiffs' FACA claim, Defendant's alternative summary judgment motion should be denied as well.

BACKGROUND

A. Help America Vote Act, Election Assistance Commission and Voluntary Voting System Guidelines

The Help America Vote Act, 52 U.S.C. § 20901 *et seq.*, created the EAC with the mandate that the Commission develop voluntary voting system guidelines and a federal voting system certification program. 52 U.S.C. §§ 20962, 20971. The VVSG are "a set of specifications and

requirements against which voting systems can be tested to determine if the systems meet required standards." *Voluntary Voting System Guidelines*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines (last accessed Nov. 10, 2021); EAC, VVSG 2.0 (Feb. 10, 2021) ("VVSG 2.0" or "Final Req."), https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf. HAVA prescribes a process for developing guidelines that incorporates recommendations from statutorily created advisory bodies—the Standards Board, the Board of Advisors, and the Technical Guidelines Development Committee ("TGDC") which the National Institute of Standards and Technology ("NIST") chairs and manages—and input from the public. 52 U.S.C. §§ 20921, 20941, 20961, 20962.

Through the "Federal Voting System Testing and Certification Program," the EAC certifies voting systems according to whether they meet the standards set forth in the VVSG, in addition to manufacturer specifications. EAC, Voting System Testing & Certification Program Manual § 3.2 (May 31, 2015), *available at* https://www.eac.gov/sites/default/files/eac_assets/1/28/Cert.Manual.4.1.15.FINAL.pdf (hereinafter "EAC Testing & Certification Program Manual") ("Certification is the process by which the EAC, through testing and evaluation conducted by an accredited Voting System Test Laboratory, validates that a voting system meets the requirements set forth in existing voting system testing standards (VVSG), and performs according to the Manufacturer's specifications for the system."); *id.* § 3.2.2 ("Voting systems certified under this program are tested to a set of voluntary standards providing requirements that voting systems must meet to receive a Federal certification. These standards are referred to as [VVSG]."). EAC certification is "an official recognition that a voting system . . . has been tested by a [Voting System Test Laboratory] to be

in conformance with an identified set of Federal voting standards," *i.e.* the VVSG. *Id.* § 3.2.3; *see also id.* § 3.1 ("Only the EAC can issue a Federal certification.").

Participation in the Federal Voting System Testing and Certification Program is voluntary, but voting systems must adhere to the VVSG in order to receive federal certification. EAC Testing & Certification Program Manual § 1.3 ("Although participation in the program is voluntary, adherence to the Program's procedural requirements is mandatory for participants."). Eleven states require federal certification of voting systems, and the District of Columbia and nine states require testing to federal standards.[1]

B. Proposed VVSG 2.0

The EAC adopted the first version of the VVSG, known as VVSG 1.0, in December 2005. Compl. ¶ 21. In 2015, the EAC began a multi-year effort to develop an updated and strengthened set of voluntary voting system guidelines, to be known as VVSG 2.0. *Id.* ¶ 22. At the EAC's direction, the development process was bifurcated into a high-level set of "principles and guidelines" and a more detailed set of VVSG 2.0 "requirements." *Id.* ¶ 23.

During a public comment period on the proposed "Principles and Guidelines" between February and June 2019, tens of thousands of submitted public comments advocated to "ban wireless." *Id.* ¶ 27. On April 23, 2019, Plaintiff Stark gave testimony at a public hearing in which he recommended that the VVSG 2.0 prohibit wireless communication hardware in equipment used

[1] The eleven states requiring federal certification of voting systems are: Delaware, Georgia, Idaho, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Washington, West Virginia and Wyoming; and the nine jurisdictions requiring testing to federal standards are: Connecticut, District of Columbia, Hawaii, Indiana, Kentucky, Nevada, New York, Tennessee, Texas and Virginia. *See* NAT'L CONF. OF STATE LEGISLATURES, *Voting System Testing & Certification* (2018), *available at* https://aelc.assembly.ca.gov/sites/aelc.assembly.ca.gov/files/hearings/NCSL%20Voting%20System%20Testing%20Certification.pdf (citing statute and D.C. statutes). California law requires adoption of testing standards that meet or exceed the federal voluntary standards established by the EAC. *Id.* (citing California statutes).

to mark ballots, record votes, or tabulate votes. *Id.* ¶ 28. He explained that simply disabling wireless capability in software is not an adequate precaution against hacking, and advised that no system for capturing or tabulating votes should ever be connected to the Internet, to a private network that is connected to the Internet, or to any other public communications infrastructure. *Id.* On October 15, 2019, a coalition of election security non-profit organizations also advocated for a ban on wireless modems and internet connectivity in the VVSG. *Id.* ¶ 30.

During the December 18, 2019 meeting of the TGDC, NIST representative and Co-Chair of the VVSG Election Cybersecurity Working Group Gema Howell, gave a presentation on key cybersecurity provisions in the draft VVSG 2.0 requirements. Howell stated that the draft VVSG 2.0 Requirements included a provision that prohibited approved voting systems from having wireless capability. *Id.* ¶ 31. While presenting a slide with the heading "VVSG 2.0 Requirements," Ms. Howell stated that under the proposed VVSG 2.0, "the voting system itself *would not have any wireless capability built into it* so you wouldn't be able to access … its network capabilities …. We would *remove that wireless capability* from the voting system like I mentioned, so there would be no wireless communication." *Id.* (emphasis added). She explained that modems and/or radios present in voting systems are an access point for remote manipulation of ballots and election results for malicious actors anywhere in the world, or for ransomware attacks to access and hold election systems hostage. *Id.*

On February 7, 2020, the TGDC voted unanimously to recommend the draft VVSG 2.0 that prohibited wireless modems and other wireless capability in voting systems. *Id.* ¶ 33. On March 11, 2020, the Executive Director of the EAC submitted the TGDC-recommended proposed VVSG 2.0 Principles and Guidelines and Requirements (hereinafter "March 2020 proposed VVSG 2.0") to the Board of Advisors and the Standards Board. *Id.* ¶ 34.

As described in the December 18, 2019 TGDC meeting, the March 2020 proposed VVSG 2.0 contained a clear and unambiguous prohibition on wireless connection capability. Requirement 14.2-D stated: "Voting systems must not be capable of establishing wireless connections." Proposed Req. 14.2-D. Additionally, proposed Requirement 14.2-F (not referenced in the government's Memorandum) applied the prohibition specifically to wireless connections with external networks: "A voting system must not be capable of… 1. establishing a connection to an external network [or] 2. connecting to any device that is capable of establishing a connection to an external network." Proposed Req. 14.2-F. It further explained that the prohibition meant "the intended use and installation of voting systems does not involve any connections to the internet." *Id.*, Discussion. The March 2020 proposed requirements also included seven provisions that were removed or materially modified, and thereby significantly weakened, by the EAC in the final version of the VVSG 2.0. Plaintiffs are also challenging the EAC's adoption of these material modifications.

The EAC submitted the proposed VVSG 2.0 for public comment between March 24, 2020 and June 22, 2020, 85 Fed. Reg. 16,621 (Mar. 24, 2020), and held public hearings on March 27, May 6, and May 20, 2020, Compl. ¶¶ 36-37. Plaintiff FSFP submitted written comments expressing support for the proposed provision that banned internet connectivity, as well as other provisions that addressed auditability, interoperability, software independence, and ballot secrecy. *Id.* ¶ 38.

C. EAC's Non-Public Meetings with Private Voting Machine Vendors and Material Revisions to VVSG 2.0

Following the close of public comments, the EAC conducted a series of meetings with voting machine vendors. Compl. ¶ 41. The EAC gave no public notice of the meetings, but FSFP nevertheless learned of them. *Id.* ¶¶ 42-43. On August 4, 2020, FSFP emailed EAC officials

requesting to participate in the meetings, but received no response. *Id.* ¶ 43. On August 12, 2020, FSFP sent a second email request to join the meetings to the same EAC officials, and again the EAC did not respond. *Id.* ¶ 44. The Declaration of EAC Executive Director Mona Harrington identifies the EAC-vendor group as the VVSG 2.0 Implementation Working Group and states that the EAC created it to provide technical feedback on "feasibility and implementation concerns" regarding the VVSG 2.0. Decl. of M. Harrington ¶ 7 (Ex. B to Gov. Mot. to Dismiss, ECF No. 16-3). The EAC selected the members of the Working Group—voting machine manufacturers, employees of voting system test laboratories, NIST program staff and EAC staff. *Id.* ¶ 8. The EAC Testing and Certification Director led the Working Group's meetings. *Id*. Weekly Working Group meetings were scheduled between June 2020 and October 2020, but the EAC discontinued the meetings in early August 2020. *Id.* ¶¶ 8-9; Decl. of S. Greenhalgh ¶ 12 & Exs. A, B thereto (Ex. 1 hereto).

In the fall of 2020, rumors circulated that the EAC was planning to remove the ban on wireless networking hardware in voting machines in the March 2020 version of the VVSG 2.0 in response to pressure from voting machine manufacturers. Compl. ¶ 45. On January 26, 2021, the EAC published notice in the Federal Register that its vote on the VVSG 2.0 would be on February 10, 2021. 86 Fed. Reg. 7,077 (Jan. 26, 2021). The notice gave no indication that the provision banning wireless capability in the March 2020 version of the VVSG 2.0 had been changed, or that other material modifications had been made. *See id.*

On February 1, 2021, nine days before the scheduled vote, the EAC finally posted on its website the proposed final VVSG 2.0 and a redline showing many significant changes that the Board of Advisors, the Standards Board, and the public had never seen. Compl. ¶ 50. On February

10, 2021, the Commission voted to adopt the materially changed version of the VVSG 2.0 that was posted on its website just nine days earlier. *Id.* ¶ 53.

D. Final VVSG 2.0

Among the changes in the final VVSG 2.0 was language permitting inclusion of wireless networking devices in voting machines and several additional material modifications. Compl. ¶ 52. Those changes benefit voting machine manufacturers, with whom the EAC met privately after the public comment period ended, by reducing their costs while weakening the security of voting systems, and eliminating requirements for public transparency. *Id.* ¶ 4.

Specifically, the final version of the VVSG 2.0 (i) removed the complete prohibition on wireless capability and replaced it with qualified restrictions that permit voting systems to incorporate hardware for establishing wireless connections (e.g., modems) if they are disabled and (ii) added material new provisions.

In order to modify the proposed VVSG 2.0 to permit wireless networking devices, the EAC needed to make several changes to the proposed VVSG 2.0:

Under Principle 14, "System Integrity," the proposed VVSG 2.0 Requirement 14.2-D, "Wireless communication restrictions," had set forth a straightforward prohibition as described at the December 18, 2019 TGDC meeting: voting systems "must not be capable of establishing wireless connections." This was followed by the Discussion section that provided examples of the types of attacks that could be executed if a voting system established a wireless connection, as reasoning for the prohibition requirement. Proposed Req. 14.2-D, Discussion.

The wireless networking prohibition was further expanded and reinforced with proposed Requirement 14.2-F, "External network restrictions," which specified: "a voting system must not be *capable* of" [emphasis added] establishing a connection to an external network or another device with that capability." Proposed Requirement 14.2-F also directed vendors to include in

instructions that "the intended use and installation of voting systems does not involve any connections to the internet." Proposed Req. 14.2-F, Discussion.

With a prohibition on wireless networking devices established in the proposed VVSG 2.0 under Principle 14, in 14.2-D and 14.2-F, a requirement for providing documentation to prove the system adheres to 14.2-D was included in Section 15 under proposed Requirement 15.4-C "Documentation for disabled wireless." Requirement 15.4-C added three "[e]xamples of how wireless can be disabled." *Id.*, Discussion. While those examples were incorporated into the Discussion section of the proposed Requirement 15.4-C "Documentation for disabled wireless," their context indicated to a person reasonably knowledgeable about voting system security that it required documentation of *physical* disabling of wireless capability—so as to render the voting system incapable of establishing a wireless connection, as required in 14.2-D to which it referred. In particular, NIST Representative and Co-Chair of the VVSG Election Cybersecurity Working Group Gema Howell had stated that wireless capability would be categorically prohibited under the VVSG 2.0: "the voting system itself would not have any wireless capability built into it so you wouldn't be able to access … its network capabilities." Compl. ¶ 31; *see also id.* ("[T]he voting system must not be capable of establishing a connection to an external network or connecting to any device that is capable of establishing a connection to an external network."); *id.* ("We would remove that wireless capability from the voting system . . . so there would be no wireless communication."). Ms. Howell's statement gave no indication that the EAC was considering permitting wireless capability. She instead stated plainly that the VVSG 2.0 would not allow it.

The EAC also made several material changes to Proposed Requirements 14.2-D and 14.2-F:

The unequivocal ban on wireless networking capability in Proposed Requirement 14.2-D was altered in the final version (renamed Requirement 14.2-C) to add a consequential qualifier: "[v]oting systems must not be capable of establishing wireless connections *as provided in this section*." Final Req. 14.2-C (emphasis added). The Discussion section was amended to add the examples provided in proposed Requirement 15.4-C and this consequential statement: "*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 Req. 14.2-C, Discussion. This was the first time the VVSG 2.0 discussed allowing inclusion of wireless networking hardware in voting systems. In short, the EAC altered proposed 14.2-D to circumscribe the ban on wireless networking devices (with Final Req. 14.2-C), then added a statement that explicitly allowed them (Final Req. 14.2-C, Discussion).

Proposed Requirement 14.2-F, "External network restrictions," had specified: "a voting system must not be capable of" establishing a connection to an external network or another device with that capability. Proposed Req. 14.2-F. It directed vendors to include in instructions that "the intended use and installation of voting systems does not involve any connections to the internet." *Id.*, Discussion. The final version (renamed Requirement 14.2-E) was modified to: "a voting system must not be *configured to*" establish a connection to an external network or another device with that capability. Final Req. 14.2-E (emphasis added). And it deleted the prohibition on connections to the Internet, and replaced it with a direction to vendors to instruct that use and installation of voting systems must "implement[] an air gap between the voting system and external networks or external devices." *Compare* Proposed VVSG 2.0 Req. 14.2-F, Discussion *with* Final VVSG 2.0 Req. 14.2-E, Discussion. The VVSG define an "air gap" as "[a] physical separation between systems that requires data to be moved by some external, manual procedure," a definition

that does not address wireless networking capabilities and thus does not contemplate or preclude the possibility that wireless networking devices present in a system could be activated, introducing the potential for over-the-air internet-based attacks, as long as data is transferred manually. Final VVSG 2.0 Glossary of Terms.

Additional significant changes between the March 2020 proposed VVSG 2.0 and the version posted on the EAC website on February 1, 2021 included: (i) removal of the requirement for all voting systems to provide data reports that account for all cast ballots and all valid votes at the termination of a given election; (ii) removal of a transparency requirement requiring public access, without an explicit request, to any cryptographic End-to-End protocol submitted for certification, for open review for two years before it enters the voting system certification process; (iii) limitation to voter-facing devices of the logging requirements for backend voting systems to record external connections or disconnections during the activated voting state; (iv) removal of a standard for physical locks installed in voting machines; (v) removal of the requirement that all physical security countermeasures that are reliant on electrical power log incidents of power disruption; (vi) removal of the requirement that systems be expected to have a life span of ten years; and (vii) removal of the ban on printing voting machine vendors' advertisements on the ballot. Compl. ¶ 52. The public was not given notice of the potential for these material changes either. *Id.*

E. This Action

On July 13, 2021, Plaintiffs Philip Stark, a member of the EAC Board of Advisors, and Free Speech For People, a non-profit organization whose mission includes promoting free and fair elections, filed this action for judicial review of the VVSG 2.0. Defendant's failure to submit the proposed VVSG 2.0 to the EAC Board of Advisors as required by HAVA prevented Stark from

fulfilling his responsibility under HAVA as a Board member to review and comment on the proposed VVSG 2.0 and to have his views taken into account. Compl. ¶¶ 49-54. The significantly weakened voting system security provisions in the final VVSG 2.0 also make it more difficult for FSFP to monitor and analyze the security of voting systems and require the organization to expend additional resources to counteract that harm. Compl. ¶ 52; Greenhalgh Decl. ¶¶ 5-10. The Complaint claims that the VVSG 2.0 were issued without the procedure mandated by HAVA and the APA, as a result of the EAC's meetings with private voting machine manufacturers in violation of FACA, and are arbitrary and capricious. ECF No. 1.

On September 30, 2021, the government moved to dismiss or, in the alternative, for summary judgment. ECF No. 16. The government argues that Plaintiffs lack standing, the FACA claim is moot and fails to state a claim, and the APA claims fail to state a claim because the VVSG 2.0 are not agency action or final agency action, and are a logical outgrowth of the proposed standards. None of the government's arguments has merit.

ARGUMENT

I. Legal Standards for Rules 12(b)(1), 12(b)(6) and 56

In deciding a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Court accepts as true the uncontroverted material factual allegations of the complaint and construes them liberally in favor of the plaintiff. *E.g.*, *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016). The Court may also consider materials outside the pleadings. *Id.*

On a Rule 12(b)(6) motion to dismiss, the Court determines whether the complaint contains "'a short and plain statement of the claim' in order to give the defendant fair notice of the claim and the grounds upon which it rests." *Baginski v. Lynch*, 229 F. Supp. 3d 48, 52 (D.D.C. 2017)

(quoting Fed. R. Civ. P. 8(a)(2)). The Court "presumes the complaint's factual allegations are true and [] construes them in the light most favorable to the plaintiff." *Id.* To survive a motion to dismiss, a plaintiff "need not make 'detailed factual allegations'" but only allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *VoteVets Action Fund v. U.S. Dep't of Veterans Affs.*, 992 F.3d 1097, 1104 (D.C. Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

On a motion for summary judgment under Rule 56, the Court "views the evidence in the light most favorable to the party opposing summary judgment, draws all reasonable inferences in that party's favor, and avoids weighing the evidence or making credibility determinations." *Thompson v. Dist. of Columbia*, 967 F.3d 804, 812–13 (D.C. Cir. 2020). "Summary judgment is appropriate only 'if 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.'" *Id.* at 813 (quoting Fed. R. Civ. P. 56(a)).

II. Both Plaintiffs Have Sufficiently Alleged Standing to Bring Claims

Article III standing consists of three familiar elements: "[t]he plaintiff must have (1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). In assessing standing on a motion to dismiss, courts accept as true the plaintiff's material factual allegations and assume that the plaintiff would prevail on the merits. *See Maloney v. Murphy*, 984 F.3d 50, 58 (D.C. Cir. 2020).

Here, the government challenges only the first standing element: Article III injury. *See* Def.'s Mem. of Points and Authorities in Supp. of its Mot. to Dismiss or, in the Alternative, for Partial Summ. J. ("Gov. Mem.") 17-22 (ECF No. 16-1, Sept. 30, 2021). A party sufficiently alleges an injury-in-fact under Article III when his complaint "establish[es] that he has a 'personal stake'

in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819 (1997); *accord, e.g.*, *Maloney*, 984 F.3d at 59. Both Plaintiffs meet this standard.

A. Stark Has Adequately Alleged an Injury-in-Fact

The government does not dispute that HAVA creates rights for the EAC's Board of Advisors or that Plaintiff Stark as a Board of Advisors member was statutorily entitled to review and comment on the Commission's proposed voting system standards before they were finally adopted. Gov. Mem. 21-22. The government's argument that "mere personal offense to government action does not give rise to standing" misses the mark. *Id.* at 21. Stark does not bring this action based on "his belief that a favorable judgment will make him happier" or "personal policy preferences." *Id.* at 21-22. He alleges informational injury and deprivation of his statutory right to review, comment and make recommendations on the VVSG 2.0 proposed for adoption before the Commission voted on final adoption. Compl. ¶¶ 49-54; *see also id.*, Counts I, II.

Well-established precedent makes clear that deprivation of statutory rights constitutes injury-in-fact sufficient to confer standing where a plaintiff has suffered concrete harm. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."); *Spokeo, Inc.*, 578 U.S. at 341 ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (J. Kennedy, concurring)); *LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011) ("Courts have 'long recognized' that legislatures 'may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.'") (quoting *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 89 (D.C. Cir. 2005));

see also TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (finding concrete injury in the context of a statutory violation sufficient for injury-in-fact).

Following these principles, the D.C. Circuit recognized in *Maloney v. Murphy* that individual legislators suffered concrete injury sufficient to confer standing when the government withheld information to which they were statutorily entitled, thereby impeding their ability to carry out their professional responsibilities. 984 F.3d at 61. In that case, a statute conferred a right to information on members of the House of Representatives' oversight committee, and the agency's violation of the statute by withholding the information "thwarted" the members' ability to perform their duties. *Id.*

Similarly here, HAVA creates a right for members of the EAC Board of Advisors to receive the voting system guidelines that the EAC proposes to adopt ninety days in advance of the EAC's vote, to comment and make recommendations on them, and to have their comments and recommendations taken into consideration by the Commission before it votes on the guidelines. 52 U.S.C. § 20962(b)-(d). The EAC deprived Stark of this statutory right by failing to give him (or his fellow Board of Advisors members) the proposed VVSG 2.0 as significantly revised after the EAC's meetings with private vendors ninety days before the EAC's vote. Compl. ¶¶ 49-54. Stark alleges concrete injury resulting from that statutory violation—inability to use the proposed standards to exercise his statutory authority in the HAVA process—and his injury is therefore substantially different from the injuries alleged in the procedural violation-only cases on which the government relies (at 22-23, citing cases). The EAC's failure to submit the proposed voting system standards to Stark as required by HAVA caused him a statutory informational injury by impeding his ability to carry out his professional responsibilities under HAVA, which is sufficient to confer standing. *See Maloney*, 984 F.3d at 61.

B. FSFP Has Adequately Alleged an Injury-in-Fact

It is well-established that an organization demonstrates an injury for purposes of organizational standing "if the defendant's allegedly wrongful action prompts an organization to increase the resources it must devote to programs independent of its suit." *Equal Rts. Ctr. v. Post Props., Inc*., 633 F.3d 1136, 1140 (D.C. Cir. 2011) (discussing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379) (internal quotation marks and alterations omitted). To determine whether an organization alleges an injury-in-fact, the court considers "first, whether the agency's action or omission to act 'injured the [organization's] interest' and, second, whether the organization 'used its resources to counteract that harm.'" *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093-94 (D.C. Cir. 2015) (quoting *Equal Rights Ctr.*, 633 F.3d at 1140) (alternation in original). Where, as here, an organizational plaintiff alleges a "concrete and demonstrable injury to [its] activities—with the consequent drain on the organization's resources" it alleges "far more than simply a setback to the organization's 'abstract social interests'" and satisfies the injury requirement of standing. *Id.* (quoting *Havens Realty Corp*., 455 U.S. at 379). FSFP satisfies both prongs because it alleges that Defendant's adoption of the VVSG 2.0 hinders FSFP's activities in furtherance of its mission to promote fair elections, and causes it to redirect resources to counteract that harm.

First, the significantly changed version of VVSG 2.0 adopted by the EAC injures FSFP's organizational activities to secure voting systems. Greenhalgh Decl. ¶¶ 5-10. The Declaration of Susan Greenhalgh, FSFP's Senior Advisor on Election Security, explains in detail that the final VVSG 2.0's allowance of wireless capability makes it harder for FSFP monitor and analyze the security of voting systems. *Id.* Specifically, because of that allowance FSFP must: analyze the extent to which networking devices submitted for federal certification are disabled by reviewing

applications for voting machine certification; identify the components of the machines and how wireless capabilities will be disabled; investigate the extent to which commercial off-the-shelf ("COTS") components are included; and research each COTS component and whether an embedded wireless radio is included. *Id.* ¶ 6. Additional and ongoing monitoring will be needed after federal certification to ensure that changes to COTS configurations do not introduce additional wireless capability. *Id.* ¶ 7. FSFP also will monitor adherence to the wireless connectivity disablement requirement and alert state election officials if a voting system is not adhering to the requirement as well as publicize the lack of adherence and resulting vulnerabilities, in addition to alerting and educating state election officials of the security risks resulting from the VVSG 2.0. *Id.* ¶¶ 8-9.

Second, the additional monitoring and analyses of voting system security that FSFP must undertake on an ongoing basis because of the VVSG 2.0 are labor-intensive and require consultation with technical experts. Greenhalgh Decl. ¶¶ 7-8. Consequently, FSFP must expend more resources than it ordinarily would on those activities as well as on educating state election officials, and it must divert limited resources from other essential work like its public education initiatives that include researching and reporting on internet voting, secure election procedures and protocols, and post-election auditing. *Id.* ¶¶ 5, 7. Because these new expenditures are beyond FSFP's normally expended costs they satisfy the second prong of the injury-in-fact analysis for organizational standing. *See Food Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015) (recognizing that an organization suffers an injury-in-fact if it "expend[s] resources to educate its members and others" where "doing so subjects the organization to '*operational costs beyond those normally expended*'") (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)) (emphasis added); *see also Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28-29 (D.C.

Cir. 1990) (finding that expenditures on education and counseling programs designed to counteract the effects of the Defendant's alleged legal violations sufficiently alleged an injury-in-fact).

Thus, FSFP does not suffer only impairment of its advocacy activities, ability to examine and inform the public of important election security concerns, and right to submit comments on the proposed VVSG 2.0, as the government asserts (at 18-19). Nor does FSFP's injury stem from only increased litigation, lobbying, or other advocacy efforts like in the cases on which the government relies. *Contrast Am. Lung Ass'n v. EPA*, 985 F.3d 914, 989 (D.C. Cir 2021) (finding increased legal counseling, referral, and advocacy on behalf of clients affected by the regulation of greenhouse gases insufficient for injury-in-fact); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62 (D.C. Cir. 2005) (finding no standing where "the only 'injury' [arose] from effect of the regulations on the organizations' lobbying activities"); *Tex. Low Income Hous. Info. Serv. v. Carson*, 427 F. Supp. 3d 43, 55 (D.D.C. 2019) (finding the plaintiff's activities to be "advocacy" and insufficient to establish standing); *New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 168 (D.D.C. 2016) (concluding that plaintiff alleged "merely a discrete ideological setback" and did not establish standing) (cited in Gov. Mem. 18-19). Nor is FSFP's injury only to its procedural rights as the government contends (at 22-23). FSFP does not allege that injuries stemming just from the EAC's violation of the procedures required by HAVA, the APA and FACA. Instead, FSFP has demonstrated concrete injury to its activities to monitor and analyze the security of voting systems, Greenhalgh Decl. ¶¶ 5-10, and thereby established an Article III injury-in-fact. *See People for the Ethical Treatment of Animals*, 797 F.3d at 1093.

III. Plaintiffs' FACA Claims Are Not Moot

The crux of the mootness inquiry is whether it is possible "for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (quoting *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). "[E]ven the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot.'" *Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (*Calderon v. Moore*, 518 U.S. 149, 150 (1996)). Because the Court can grant some relief to Plaintiffs by declaring that Defendant violated FACA, the FACA claim is not moot. And even if the FACA claim were moot, it would be properly before the Court under the voluntary cessation doctrine because the government does not meet the heavy burden of establishing that it will not in the future rely on another working group like the VVSG 2.0 Implementation Working Group.

A. The Court Can Grant Relief to Plaintiffs

Even though the VVSG 2.0 Implementation Working Group meetings have ceased and the EAC has produced some relevant records in response to FSFP's FOIA requests, Plaintiffs' FACA claim is not moot because the Court can grant relief.

When an agency has refused to disclose documents until "long after they would have been of any use" in the agency proceedings, declaratory relief can still "afford . . . some relief" by providing "ammunition" for use in future agency proceedings involving work product from the challenged committee. *Byrd*, 174 F.3d at 242, 244. Consequently, a FACA claim is not moot when declaratory relief "would provide the Plaintiffs with ammunition for any future attack on the [committee's] findings *or any action taken in reliance on those findings*." *Nat'l Ass'n of Consumer Advocs. v. Uejio*, 521 F. Supp. 3d 130, 148 (D. Mass. 2021) (emphasis added).

Here, information about the VVSG 2.0 Implementation Working Group would give Plaintiffs ammunition for their challenge in this very action to the VVSG 2.0 that were adopted after the Working Group meetings. A declaration that the EAC violated FACA in addition to HAVA and the APA would strengthen Plaintiffs' claim for vacatur of the significant changes to the VVSG 2.0 by further illustrating the EAC's egregious process leading to their issuance. *See Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (recognizing that courts have discretion as to vacatur and that "[t]he decision whether to vacate depends on the seriousness of the [agency's] deficiency," among other things) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

B. The Government Has Not Met its Heavy Burden of Showing That its Voluntarily Ceased Advisory Committee Meetings Will Not Recur

Alternatively, Plaintiffs' FACA claims are not moot under the "voluntary cessation" exception to mootness. Under this exception, "a defendant's voluntary cessation" of a challenged practice does not deprive a federal Court of its power to determine the legality of the practice unless the defendant carries the "'heavy' burden of showing it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000)); *see also Ramirez v. U.S. Immigr. & Customs Enf't*, No. 18-508 (RC), 2021 WL 4284530, at *11 (D.D.C. Sept. 21, 2021) (observing that a defendant's burden is particularly "heavy" in the context of a request for an injunction, where "[o]nce a violation is demonstrated, all that need be shown" is "'some reasonable likelihood of future violations,' [as] past unlawful conduct is 'highly suggestive of the likelihood of future violations'") (quoting *U.S. Dep't of Just. v. Daniel Chapter One*, 89 F. Supp. 3d 132, 143 (D.D.C. 2015)).

The government here does not meet its "heavy" burden of demonstrating with "absolute[] cl[arity]" that it will not repeat its FACA violation with a future voting system standards working group. EAC Executive Director Harrington's conclusory statement that the agency has no intention of using the group or ones like it notwithstanding, Harrington Decl. ¶ 15, her declaration demonstrates why these meetings instead are likely to recur. She states that the EAC consulted with private machine vendors regarding "feasibility and implementation concerns" with the March 2020 proposed VVSG 2.0. *Id.* ¶ 7. It is reasonable to expect that when the EAC drafts the next iteration of the VVSG the agency will again desire input from machine vendors on those issues and arrange a working group similar to the VVSG 2.0 Implementation Working Group. Indeed, it seems clear that the only reason the EAC ended the Working Group meetings after the July 24, 2020 meeting is that FSFP found out about them and began asking questions. *See* Compl. ¶¶ 43-44; Exs. A-C to Greenhalgh Decl. (EAC emails stating that Working Group meetings were originally scheduled through October 2020 and that the EAC cancelled the meetings after "issues" about them were raised). Notably, Ms. Harrington does not state that only five meetings were scheduled.

IV. The VVSG 2.0 Are Both Agency Action and Final Agency Action Under the APA

The government argues that Plaintiffs' APA claims should be dismissed under Rule 12(b)(6) because the VVSG 2.0 do not qualify as agency action or final agency action that is subject to judicial review. Gov. Mem. 27-36. That argument fails because the VVSG 2.0 constitute a rule within the meaning of the APA that satisfies the criteria for both agency action and final agency action.

A. The VVSG 2.0 Constitute Agency Action

The APA defines "agency action" broadly, and the term is "meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001); 5 U.S.C. § 551(13) ("'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). One type of agency action is a "rule" which itself is defined "broadly" to include "'statement[s] of general or particular applicability and future effect' that are designed to 'implement, interpret, or prescribe law or policy.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95-96 (2015) (quoting 5 U.S.C. § 551(4)).

The VVSG 2.0 constitutes a rule under the APA because, as the EAC's set of "specifications and requirements against which voting systems can be tested to determine if the systems meet required standards," the standards apply to voting systems generally, have future effect and prescribe federal policy for voting systems. *Voluntary Voting System Guidelines*; *see also* EAC, VVSG 2.0 at 9 (describing the VVSG 2.0 as "national level voting system standards"). For a voting system to be federally certified, it must meet the VVSG 2.0. EAC Testing & Certification Program Manual § 1.3 (adherence to the EAC Voting System Testing and Certification Program's procedural requirements is "mandatory" for program participants). That the VVSG 2.0 were issued through notice and comment is further evidence that they constitute a rule, since notice-and-comment is the "hallmark of a legislative rule." *Pharm. Rsch. & Mfrs. of Am. v. U.S. Dep't of Health & Hum. Servs.*, 43 F. Supp. 3d 28, 46 (D.D.C. 2014).

The VVSG 2.0's label as "voluntary" and "guidelines" does not affect its qualification as a rule because "the label an agency places on a rule is not dispositive." *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 227 n.6 (D.D.C. 2016) ("Despite being titled 'Guidance,'

and often called 'interpretive guidance' by [the agency] 'the label an agency places on a rule is not dispositive.'") (quoting *Pharm. Rsch. & Mfrs. of Am.*, 43 F. Supp. 3d at 46 n.18). While states and local governments need not adopt the standards (although many states have, *supra* at 4), the standards are mandatory for any voting machine to be federally certified. EAC Testing & Certification Program Manual § 1.3.

Nor does HAVA indicate that the VVSG 2.0 is anything other than a rule. The government misconstrues the Act in asserting that it "expressly *denies* the EAC any rulemaking or regulatory authority." Gov. Mem. 29 (emphasis in original). HAVA only denies the EAC rulemaking or regulatory authority "which imposes any requirement *on any State or unit of local government*." 52 U.S.C. § 20929 (emphasis added).[2] Far from precluding the EAC from exercising all rulemaking authority, HAVA expressly authorizes the Commission to issue the standards that determine federal certification of voting systems. 52 U.S.C. § 20971(a)(1) ("The Commission shall provide for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories."). As the Commission itself states, "[t]he EAC has the sole authority to grant certification or withdraw certification at the Federal level." EAC Testing & Certification Program Manual § 1.2.

B. The VVSG 2.0 Constitute Final Agency Action

For an agency action to be final and subject to judicial review under 5 U.S.C. § 704, it must (1) "mark the consummation of the agency's decision making process [and] not be of a merely tentative or interlocutory nature," and (2) "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes*

[2] Section 20929 states in full: "[T]he EAC] shall not have 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." 52 U.S.C. § 20929.

Co., 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Here, the first prong is plainly satisfied because the VVSG 2.0 were issued after a multi-year process involving review and recommendations from multiple statutory committees and public comment, in addition to the involvement of the VVSG 2.0 Implementation Working Group, as the government does not dispute. The second prong is also satisfied because the VVSG 2.0 govern federal certification of voting machines.

The second prong of the final agency action inquiry "'pragmatic[ally]' focus[es] on 'the concrete consequences [the] action has or does not have as a result of the specific statutes and regulations that govern it.'" *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 405 (D.C. Cir. 2020) (quoting *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019)) (alteration in original). Rather than a "bright-line rule," "[t]he finality inquiry is a pragmatic and flexible one." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (internal quotation marks and citation omitted).

The VVSG 2.0 have significant concrete consequences for voting system manufacturers. The standards determine whether their machines receive federal certification through the EAC Voting System Testing and Certification Program authorized by HAVA. While the VVSG are voluntary in that they are not binding on any "State or unit of local government," 52 U.S.C. § 20929, they are binding on any voting system manufacturer that wants its machines to be federally certified. EAC Testing & Certification Program Manual § 1.3 ("[A]dherence to the [EAC Voting System Testing and Certification P]rogram's procedural requirements is mandatory for participants [in the Program]").

That the EAC describes the VVSG 2.0 throughout the document as a set of "requirements" evidences the EAC's intent for them to be mandatory for the participants in the agency's federal

certification program. *Pharm. Rsch. & Mfrs. of Am.*, 43 F. Supp. 3d at 46 n.18 (agency's description of rule, "[w]hile … not binding on the court, [] does shed light on the agency's intent in engaging in the rulemaking") (citing *Truckers United for Safety v. Fed. Highway Admin.*, 139 F.3d 934, 939 (D.C. Cir. 1998)); *id.* ("Although the label an agency places on a rule is not dispositive, the label, as indicative of intent, does carry some weight in our consideration whether the underlying rule is legislative or interpretative.") (quoting *Truckers United for Safety*, 139 F.3d at 939). According to the EAC, the VVSG 2.0's purpose is "to provide a set of specifications and *requirements* against which voting systems can be tested to determine if they provide all the basic functionality, accessibility, and security capabilities *required* of voting systems." VVSG 2.0 at 5 (emphasis added). The VVSG 2.0 thus specify "[d]etailed technical *requirements* that support [the VVSG 2.0]'s principles and guidelines." VVSG 2.0 at 17, 27-261 (emphasis added); *see also, e.g.*, *id.* at 5 ("[T]he VVSG 2.0 *requirements* represent the latest in both industry and technology best practices, *requiring* significant updates in many aspects of voting systems."); *id.* at 309 (appendix "[l]ist of all [*r*]*equirements*") (emphasis added).

The VVSG 2.0 are like the "National List" that applies to organic food certification and identifies synthetic substances that may be used in organic food without affecting the food's eligibility for organic certification, as well as natural substances that render a food ineligible for organic certification. *Center for Food Safety v. Perdue* held that the National List, developed by the federal National Organic Standards Board (housed within the U.S. Department of Agriculture), constitutes final agency action because it "represents the agency's last word from which binding obligations flow, and that has a direct and immediate effect on the day-to-day business of the relevant stakeholders." 320 F. Supp. 3d 1101, 1108 (N.D. Cal. 2018) (distinguishing National List from change of the process used to prepare it, which the court held was not final agency action)

(internal quotation marks and citation omitted). Specifically, while organic certification of food is not federally mandated and non-organic food may be lawfully sold, the National List is binding on food producers wishing to market their food products as organic. *Id.* By governing substances that those organic food producers may use, the National List directly affects how they produce their food products. *See id.*

Likewise with voting machines, while federal certification is not federally mandated, the VVSG 2.0 are binding on the voting system manufacturers that wish to market their voting machines as federally certified, as well as the manufacturers that market their machines in jurisdictions that require federal certification. By establishing the standards that those voting system manufacturers must meet, the VVSG 2.0 directly affects how they manufacture voting machines.

Agency action need not determine civil or criminal liability to be reviewable, contrary to the government's assertion (at 31). That the action governs the imprimatur of federal certification is sufficient. *See Ctr. for Food Safety*, 320 F. Supp. 3d at 1108. The VVSG 2.0 determine whether voting systems may carry the imprimatur of federal certification, in addition to whether they can be used in the District of Columbia and several states. Hardly a mere "general statement of policy," as the government improperly downplays the standards (at 31), the VVSG 2.0 have direct, concrete and binding impact on voting system manufacturers. Consequently, they constitute final agency action and are reviewable under the APA. *See U.S. Army Corps of Eng'rs*, 136 S. Ct. at 1813; *Ctr. for Food Safety*, 320 F. Supp. 3d at 1108.

V. Plaintiffs State a Claim That Defendant Violated Notice-and-Comment Requirements of HAVA and the APA in Issuing the Final VVSG 2.0

Both HAVA and the APA required the EAC to give the public fair notice of the VVSG 2.0 requirements it proposed and an opportunity to comment. Specifically, HAVA required a public

notice-and-comment process, including publication of the proposed guidelines in the Federal Register, opportunity for public comment, and a public hearing on the record. 52 U.S.C. § 20962(a)(1)-(3). The APA similarly required publication in the Federal Register and opportunity for public comment. 5 U.S.C. § 553(b). HAVA additionally required the EAC to submit "the guidelines proposed to be adopted" or "any modifications to such guidelines" to the EAC Board of Advisors and Standards Board ninety days before the Commission voted on final adoption, and to take into consideration comments and recommendations from those boards before voting on final adoption of the VVSG 2.0. 52 U.S.C. § 20962(b); *id* § 20962(d)(2).

A well-established requirement of notice-and-comment rulemaking is that "an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Env't Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). The logical outgrowth rule reflects the fundamental principle of "fair notice" and guards against "unfair surprise." *Teva Pharms. USA, Inc. v. U.S. Food & Drug Admin.*, 514 F. Supp. 3d 66, 95 (D.D.C. 2020) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)). Fair notice (1) ensures that agency regulations are tested through exposure to diverse public comment, (2) ensures fairness to affected parties, and (3) gives affected parties an opportunity to develop evidence in the record to support their objections to the proposed rule and thereby enhance the quality of judicial review. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005).

"[A] final rule is a 'logical outgrowth' of a proposed rule only 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." *Id.* at 1259 (quoting *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)); *see also id.* at 1260 ("[T]he

premise of the logical outgrowth doctrine is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed.") (internal quotation marks and citation omitted). Thus, to "satisf[y] the logical outgrowth test," an agency's notice must "expressly ask for comments on a particular issue or otherwise ma[ke] clear that the agency [is] contemplating a particular change." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009)) (alternation in original). "In other words, an agency cannot 'pull a surprise switcheroo' and adopt a final rule that differs in an unforeseeable way from the proposed one." *Env't Integrity Project*, 425 F.3d at 996.

Plaintiffs allege that Defendant violated HAVA's and the APA's notice-and-comment requirements because, after proposing a clear prohibition on wireless capability in voting systems with no indication that the EAC was contemplating allowing wireless capability, the Commission issued final VVSG 2.0 requirements that allow wireless capability and made several other significant changes. These allegations satisfy Plaintiffs' burden of presenting "a short and plain statement of the claim" and providing sufficient factual matter to state a plausible claim for violation of the HAVA and APA notice requirements.

A. The Complaint Adequately Alleges That the EAC Failed to Provide Adequate Notice That It Was Contemplating Allowance of Wireless-Connection Capability in the VVSG 2.0

The government's characterization of the March 2020 proposed VVSG 2.0 as incorporating the same allowance of wireless capability that the EAC adopted in the February 2021 final version (at 34) is belied by the plain language of the proposed VVSG 2.0 and the description of the proposed version by the Co-Chair of the NIST Representative and VVSG Election Cybersecurity Working Group.

Comparison of the version of the VVSG 2.0 proposed to the public and Board of Advisors in March 2020 and the final version show that the EAC "pull[ed] a surprise switcheroo" when it abandoned the proposed prohibition on wireless connection-capability in voting systems and issued final VVSG 2.0 that explicitly allow such capability. *Env't Integrity Project*, 425 F.3d at 996.

As proposed, the VVSG 2.0 requirement of "Wireless communication restrictions" (proposed Requirement 14.2-D) plainly stated that "[v]oting systems must not be capable of establishing wireless connections." Proposed Req. 14.2-D. The final version of that requirement (final Requirement 14.2-C) qualified that prohibition to *explicitly permit* inclusion of wireless networking devices if they can be disabled. The final version qualified the requirement that "[v]oting systems must not be capable of establishing wireless connections," by adding: "*as provided in this requirement*," and specifying: "*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 Req. 14.2-C (emphasis added). The EAC's modification of the proposed VVSG 2.0 to add this statement plainly and specifically changed the meaning of the Requirement in the final version of the VVSG 2.0, effectively "pull[ing] a surprise switcheroo." *Env't Integrity Project*, 425 F.3d at 996.

The change in the "External network restrictions" requirement between the proposed and the final VVSG 2.0 (proposed Requirement 14.2-F and final Requirement 14.2-E)—notably not discussed in the government's brief—is even starker. Under the final "External network restrictions" requirement of the VVSG 2.0, a voting system may be capable of accessing the Internet. As proposed in March 2020, the "External network restrictions" requirement prohibited any external network connection capability and made clear that voting systems could not involve

any connections to the Internet. Proposed Req. 14.2-F ("A voting system must not be capable of . . . 1. Establishing a connection to an external network [or] 2. Connecting to any device that is capable of establishing a connection to an external network."); *id.*, Discussion ("The basic instructions provided by a vendor should clearly indicate that the intended use and installation of voting systems does not involve any connections to the internet."). The final version, in contrast, allows voting systems to be capable of establishing external network connections, and thus connections to the Internet, if they can be configured to disable the wireless device. Final Req. 14.2-E ("A voting system must not be *configured to*: 1. Establish a connection to an external network, or 2. Connect to any device external to the voting system."). The final version also replaced the requirement of vendor instructions specifying disallowance of connections to the Internet with a requirement of vendor instructions to implement an "air gap." *Id.*, Discussion. The VVSG 2.0's definition of air gap does not contemplate or preclude the possibility that a wireless modem present in a device could be activated, thereby introducing a security risk, as long as data is transferred manually. *See* Final VVSG 2.0 Glossary of Terms (defining "air gap" as "[a] physical separation between systems that requires data to be moved by some external, manual procedure").

To be sure, as the government emphasizes in its motion, the proposed Requirement 15.4-C included in its "Discussion" section the three examples of disabling that appear in the final Requirement 14.2-C. However, the examples were not in the proposed version of the final Requirement 14.2-C. *See* Proposed Req. 14.2-D. More important, the "Discussion" section of proposed Requirement 15.4-C notably does *not* include the important statement that appears in the final Requirement 14.2-C: "*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 Req. 14.2-C (emphasis added). This statement was added in the final version Requirement 14.2-C, drastically

altering the context and meaning of proposed Requirement 14.2-D. The context of the "Discussion" section of proposed Requirement 15.4-C indicated to interested parties that the disabling contemplated and described in the examples was physical alteration of a voting system so as to render it incapable of establishing wireless connections. Specifically, the context of the examples in the Discussion of proposed Requirement 15.4-C was (i) the clear wording of proposed Requirement 14.2-D that voting systems would not be capable of establishing wireless connection, (ii) proposed Requirement 14.2-F's clear prohibition on capability of external network connections, and (iii) the Co-Chair of the VVSG Election Cybersecurity Working Group's description of the proposed VVSG 2.0 as categorically prohibiting built-in wireless capability, Compl. ¶ 31. Against that backdrop, to interested persons—in particular persons knowledgeable about voting system security like Plaintiffs FSFP and Stark—the Discussion section of Requirement 15.4-C could reasonably be interpreted (and indeed was interpreted) as an explanation of the ways in which wireless capability could be physically rendered inoperable.

The government emphasizes that Plaintiffs' comments on the proposed VVSG 2.0 referenced wireless capability. Gov. Mem. 35. But the government ignores that those comments were intended to *support* the *existing* proposal, not to advocate for change or support one side of a debate. Ex. G to Gov. Mot. (ECF No. 16-8). Given the existing proposal, there was no apparent question about this issue, so neither Plaintiffs nor the public were on notice that their stance required further advocacy. The limited discussion of the wireless-capability prohibition in FSFP's comments on the proposed VVSG 2.0 that the government attached to its motion reflects the lack of notice the organization had that the EAC would contemplate allowing wireless capability. *Id.* FSFP, Stark and other interested parties advocated forcefully for a complete prohibition of wireless-connection capability during the development of the proposed VVSG 2.0. Compl. ¶¶ 9,

10, 27, 28. Their strong advocacy on the subject indicates that, had they been on notice that the EAC was contemplating eliminating the prohibition, they would have responded forcefully and in additional detail on the importance of banning wireless connectivity.[3]

The public thus could not have foreseen elimination of the prohibition because neither the development of the proposed VVSG 2.0 nor the published March 2020 proposed VVSG 2.0 indicated that the EAC would contemplate allowing wireless-connection capability. Indeed "it was the business of the [EAC], and not the public, to foresee th[e] possibility [that the wireless capability prohibition would change] and to address it in its proposed regulations." *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (internal quotation marks, alterations and citations omitted); *Env't Integrity Project*, 425 F.3d at 998 ("[A] reasonable commenter must be able to trust an agency's representations about which particular aspects of its proposal are open for consideration.").

The D.C. Circuit's decision in *International Union, United Mine Workers of America* further illustrates why the final VVSG 2.0's allowance of wireless-connection capability is not a logical outgrowth of the proposed VVSG 2.0. In that case, the D.C. Circuit held that the agency violated the APA's notice requirement when it proposed a rule setting a minimum air velocity for ventilating underground coal mines without setting a maximum air velocity cap, but issued a final rule that set a maximum air velocity cap. *Int'l Union*, 407 F.3d at 1259-60. The Circuit reasoned that by proposing a rule that included a minimum air velocity but no maximum air velocity cap,

[3] Indeed, it is reasonable to conclude had FSFP been aware of that possibility, the organization would have submitted much more specific and detailed comments addressing the significant security risks introduced by including devices capable of wireless connectivity in voting systems, as it did in the 6-page single-spaced letter it sent to the EAC after being alerted that the wireless restrictions had been deleted from the proposed VVSG 2.0. *See* Letter from FSFP to EAC (Feb. 3, 2021), https://freespeechforpeople.org/wp-content/uploads/2021/02/eac.letter.wireless.vvsg2_.0.2.3.21.r.pdf (last accessed Nov. 10, 2021).

the agency did not indicate that a maximum cap was a possibility. *Id.* Consequently, interested parties could not have been expected to realize that the agency would consider abandoning its proposal of no maximum velocity cap, and the maximum velocity cap in the final rule was not a logical outgrowth of the proposed rule. *Id.* at 1260-61. The D.C. Circuit contrasted *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988), where the agency followed the APA's notice requirement when, after the close of the public comment period on a proposed rule, the agency issued notice that it was considering a new regulatory approach similar to what had been suggested in comments, and afforded interested parties an opportunity to file objections. *Int'l Union*, 407 F.3d at 1261 (discussing *NRDC*, 838 F.3d at 1243).

This case is like *International Union* since the EAC proposed a rule that prohibited wireless-connection capability and did not indicate that allowing wireless capability was a possibility. Consequently, interested parties could not have been expected to realize that the EAC would consider abandoning its proposal of a ban on wireless-connection capability. *See Int'l Union*, 407 F.3d at 1259-61.

In fact, the agency's failure to comply with the notice requirement of rulemaking is even more egregious than in *International Union.* The EAC gave no notice that it was meeting privately with voting machine vendors to discuss the proposed VVSG 2.0, and no notice after those meetings that it was contemplating changing the VVSG 2.0 to allow wireless-connection capability. *See* Compl. ¶¶ 4, 41-42, 45-46, 52. Like in *International Union*, then, the EAC's removal of the prohibition on wireless-connection capability in the final VVSG 2.0 is not a logical outgrowth of the proposed rule. Defendant therefore violated HAVA's and the APA's notice-and-comment requirements as well as HAVA's requirement for the Board of Advisors and Standards Board to receive the proposed guidelines 90 days before the Commission's vote and have their comments

and recommendations taken into consideration before that vote. 5 U.S.C. § 553(b); 52 U.S.C. § 20962(a), (d).

B. The Complaint Adequately Alleges That the EAC Failed to Provide Adequate Notice That It Was Contemplating the Seven Additional Changes That Plaintiffs Challenge

The government does not argue that the EAC provided sufficient notice of the seven additional changes described in the Complaint that appeared in the final VVSG 2.0, unlike its argument as to the wireless-connection capability change. The government instead argues only that the Complaint's allegations do not state a claim regarding the additional changes. Gov. Mem. 35-36. That argument fails because the Complaint describes each of those seven changes in sufficient detail to notify Defendant of the grounds for Plaintiffs' claim that those changes also violate the HAVA and APA notice-and comment requirements.

The Complaint plainly alleges that seven material provisions in the final VVSG 2.0 were not in the March 2020 proposed version and that the public was not given notice of and an opportunity to comment on those provisions as contemplated by HAVA and the APA. Specifically, the Complaint alleges that the proposed VVSG 2.0 gave no public notice that the EAC was considering: (i) removing the requirement for all voting systems to provide data reports that account for all cast ballots and all valid votes at the termination of a given election; (ii) removing a transparency requirement requiring public access, without an explicit request, to any cryptographic End-to-End protocol submitted for certification, for open review for two years before it enters the voting system certification process; (iii) limiting to voter-facing devices the logging requirements for backend voting systems to record external connections or disconnections during the activated voting state; (iv) removing a standard for physical locks installed in voting machines; (v) removing the requirement that all physical security countermeasures that are reliant

on electrical power log incidents of power disruption; (vi) removing the requirement that systems be expected to have a life span of ten years; or (vii) removing the ban on printing voting machine vendors' advertisements on the ballot. Compl. ¶ 52. Instead, the first time the EAC made those provisions available to the public and the Board of Advisors and Standards Board was a mere nine days before the Commission's scheduled vote on the final VVSG 2.0. *Id.* ¶¶ 50-51. The government's statement that the Complaint is "bereft of any allegation regarding—or even any passing reference to—any of these other provisions in the VVSG 2.0," Gov. Mem. 36, is simply incorrect. *See* Compl. ¶¶ 50-52.

HAVA required the EAC to first provide a public notice-and-comment process that included publication of the proposed guidelines in the Federal Register, opportunity for public comment, and opportunity for a public hearing. 52 U.S.C. § 20962(a)(1)-(3). The APA also required Federal Register publication and opportunity for public comment. 5 U.S.C. § 553(b). And HAVA required the EAC to submit the proposed guidelines to the Board of Advisors and Standards Board ninety days before the Commission's vote on, and to take into consideration those boards' comments and recommendations before the vote. 52 U.S.C. § 20962(b); *id* § 20962(d)(2). The EAC did not comply with any of those requirements before adopting the seven above-listed materially changed provisions that appeared in the final VVSG 2.0.

"[T]he premise of the logical outgrowth doctrine is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed." *Int'l Union*, 407 F.3d at 1260 (internal quotation marks and citation omitted). By identifying the specific additional changes that Plaintiffs challenge and explaining how the EAC failed to provide notice of and opportunity to comment on them as required by HAVA and the APA, the Complaint provides sufficient factual matter to state a claim with regard those changes and under those Acts.

See, e.g., *Baginski*, 229 F. Supp. 3d at 52. That this claim is straightforward does not mean Plaintiffs failed to plead it with enough detail. Defendant's Rule 12(b)(6) motion as to Plaintiffs' challenge to the seven additional changed requirements should be denied. *See id.*[4]

VI. The Government's Motion to Dismiss and Alternative Partial Summary Judgment Motion on Plaintiffs' FACA Claim Should Be Denied

Congress enacted FACA in 1972 to ensure that "the public [is] informed with respect to the number, purpose, membership, activities, and cost of advisory committees." 5 U.S.C. app. 2 § 2(b)(5). Particularly pertinent to this case is Congress' recognition that "[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972), U.S.C.C.A.N. 3491, 3496.

A. The Complaint States a Plausible Claim for Violation of FACA

The EAC ran afoul of FACA's requirement of transparency by utilizing the VVSG 2.0 Implementation Working Group to advise it on the contents of the standards without opening its meetings to other interested parties such as Plaintiff FSFP or complying with FACA's additional requirements, like making the meetings' minutes available to the public. *See* Compl., Count VI. Because the Complaint sufficiently alleges and the undisputed facts strongly indicate that the EAC's VVSG 2.0 Implementation Workgroup meets FACA's definition of "advisory committee," the government's motion to dismiss and alternative request for summary judgment on the FACA claim should be denied.

"To count as an advisory committee [under FACA], a group must have 'in large measure, an organized structure, a fixed membership, and a specific purpose.'" *VoteVets Action Fund*, 992

[4] To the extent the Court disagrees, Plaintiffs respectfully request leave to amend their complaint to add allegations about the additional material changes to the VVSG 2.0.

F.3d at 1103 (quoting *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993)); *accord, e.g., Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 34 (D.D.C. 2011). "[S]uch a committee must also 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)). "[T]he group must also 'render advice or recommendations, as a group, and not as a collection of individuals.'" *Id.* at 1104 (quoting *Ass'n of Am. Physicians & Surgeons, Inc.*, 997 F.2d at 914). However, consensus among all members of the group is not required, as "it would be passing strange if FACA only applied to those committees that would offer consensus recommendations" since "one of the purposes of FACA is to achieve some balance, and thereby diverse views on advisory committees." *Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 913.

The government acknowledges that the EAC established the VVSG 2.0 Implementation Working Group to provide advice to the EAC. Gov. Mem. 36-37. By controlling membership, scheduling and running the meetings, Harrington Decl. ¶¶ 7-8, the EAC also utilized the Working Group. *VoteVets Action Fund*, 992 F.3d at 1103-04 ("To be 'utilized,' it must be subject to the federal government's 'actual management or control.'") (quoting *Wash. Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994)).

The Complaint sufficiently alleges that the Working Group likewise meets the additional elements of an advisory committee under FACA. The government does not dispute that the Working Group's membership was fixed and had a specific purpose—advising the EAC on the feasibility and implementation of the proposed VVSG 2.0. *See* Harrington Decl. ¶¶ 7-8.

The Complaint alleges that the VVSG 2.0 Implementation Working Group also had an organized structure because it had a fixed purpose, was exclusive to invitees, and met weekly

during two months. Compl. ¶¶ 41-44; *see also Verbatim Transcript: Standards Board Annual Meeting*, U.S. ELECTION ASSISTANCE COMM'N, at 54, 64–65 (July 31, 2020), https://www.eac.gov/sites/default/files/2020-08/EAC_073120_Verbatim_StandardsBoard.pdf) (public statements by EAC staff members that "there [wa]s a group of folks that [we]re meeting weekly" including "the manufacturers" that was "working methodically through the [VVSG] requirements" to "work[] through any issues [the manufacturers] may have") (cited in Compl. ¶ 41 n.12). Those allegations are confirmed by Ms. Harrington's Declaration, which describes the Working Group as having met approximately once per week over a six-week period, led by the EAC Testing and Certification Director, and having a specific purpose and fixed membership. Harrington Decl. ¶¶ 3, 7-9. These undisputed facts are sufficient to defeat the government's motion to dismiss. *See VoteVets Action Fund*, 992 F.3d at 1104, 1107 (holding that allegations that group had a fixed membership, specific purpose and leader indicated the formality and structure of an advisory committee under FACA, and were sufficient to allow the issues of whether group was structured as an advisory committee and established or utilized by the government to "play themselves out in the district court through discovery and summary judgment or trial"); *Freedom Watch, Inc.*, 807 F. Supp. 2d at 35((recognizing that "Rule 8 does not require a plaintiff to plead in the complaint all facts that are needed to prove its claims," and concluding that plaintiff plausibly alleged an advisory committee under FACA where the complaint alleged facts suggesting that committee had a specific purpose and fixed membership).

B. The Government Is Not Entitled to Summary Judgment on the FACA Claim

When viewed in the light most favorable to Plaintiffs, the undisputed allegations of the Complaint and additional facts from Ms. Harrington's Declaration indicate that, contrary to the government's argument, the VVSG 2.0 Implementation Working Group operated as a FACA

committee, precluding summary judgment. *See* Fed. R. Civ. P. 56(a); *Thompson*, 967 F.3d at 812. That the Working Group members were hand-picked by EAC staff, that group was skewed to the perspective of the voting system manufacturing industry, and that the members met regularly as a group over a six-week period to discuss a "critically important" issue, suggests that the output of those meetings was in the form of collective advice or recommendations. Pls.' Statement of Genuine Issues of Material Fact ¶ 1 (attached hereto).[5] That the Working Group did not formally vote and was not asked to provide advice or recommendations as a group, as Ms. Harrington states, Harrington Decl. ¶¶ 13-14, does not mean that the group in fact did not provide collective advice or that individual members did not in effect have votes or vetoes. Notably, Ms. Harrington's conclusory statement that Working Group members shared only individual views, *id.* ¶ 12, sheds no light on the Working Group members' interactions with one another.

Contrary to the government's contention, the structure of the VVSG 2.0 Implementation Working Group and frequency with which it met gives reason to believe that, during the course of the members' discussions as a group over the course of five meetings (and any other meetings the members may have had without EAC staff), the group coalesced around particular points such that their communications to the EAC took the form of collective advice or recommendations, unlike in the cases on which the government relies. Pls.' Statement of Genuine Issues of Material Fact ¶ 2. *Contrast Citizens for Resp. & Ethics in Wash. v. Leavitt*, 577 F. Supp. 2d 427, 432 (D.D.C. 2008) (two meetings between agency staff and outside experts, where it was unclear whether the attendees were the same between the meetings, did not establish a FACA advisory committee); *Grigsby Brandford & Co. v. United States*, 869 F. Supp. 984, 1002 (D.D.C. 1994) (single meeting

[5] The government did not submit a LCvR 7(h)(1) statement of material facts with its motion.

between agency officials and single outside person did not establish FACA advisory committee); *NRDC v. Herrington*, 637 F. Supp. 116, 118-20 (D.D.C. 1986) (six outside experts invited to assist agency in safety examination of nuclear reactor, working independently and where government imparted information during meetings, and not the other way around, did not constitute FACA advisory committee) (cited in Gov. Mem. 39-40).

Consequently, Ms. Harrington's Declaration at most reveals issues of material fact as to whether the VVSG 2.0 Implementation Working Group was structured and operated as an advisory committee "that call[s] for record development" through discovery and precludes summary judgment. *See VoteVets Action Fund*, 992 F.3d at 1107 (allowing issues, including whether group was structured as an advisory committee within the meaning of FACA, to proceed discovery); *Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 914-15 (same).

C. Alternatively, The Court Should Deny or Defer Defendant's Partial Summary Judgment Motion as Premature Under Rule 56(d)

In the event the Court does not deny the government's partial summary judgment motion for lack of merit, it should deny the motion as premature prior to discovery or at least defer ruling until Plaintiffs have had an opportunity to conduct discovery, pursuant to Rule 56(d). *See* Fed. R. Civ. P. 56(d).[6] "[S]ummary judgment is premature unless all parties have 'had a full opportunity to conduct discovery.'" *Convertino v. U.S. Dep't of Just.*, 684 F.3d 93, 99 (D.C. Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)). Rule 56(d) requests for additional

[6] Rule 56(d), formerly Rule 56(f), provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

time for discovery "should be granted 'almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence.'" *Id.* (quoting *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995)). To obtain relief under Rule 56(b), a party must submit an affidavit or declaration "outlin[ing] the particular facts the movant intends to discover and describ[ing] why such facts are necessary, explain[ing] why the facts could not be produced in opposition to summary judgment, and show[ing] that the information is discoverable." *Walker v. District of Columbia*, 279 F. Supp. 3d 246, 261 (D.D.C. 2017) (citing *Convertino*).

Plaintiffs need discovery to determine whether the VVSG 2.0 Implementation Working Group in fact rendered advice or recommendations as a group, as explained above and in the Declaration of Susan Greenhalgh. Whether the Working Group gave collective advice or recommendations to the EAC is relevant to whether it was an advisory committee under FACA, as discussed above. *See, e.g.*, *VoteVets Action Fund*, 992 F.3d at 1104. While FSFP has received some documents regarding the VVSG 2.0 Implementation Working Group in response to its FOIA requests, it does not have records of all of the Working Group's meetings. Greenhalgh Decl. ¶ 13; *see also* Ex. F to Gov. Mot. (Joint Status Report of Sept. 13, 2021, noting FSFP's questions about the completeness of the EAC's FOIA productions). For example, the EAC produced recordings from only two of the five meetings. Greenhalgh Decl. ¶ 13. FSFP also has not received at least ten documents containing communications between the EAC and voting machine manufacturers that are responsive to the FOIA requests. *Id.* And Plaintiffs have not had an opportunity to depose EAC staff and other members of the VVSG 2.0 Implementation Working Group regarding Working Group members' interactions with one another, including their discussions during the five meetings identified in Ms. Harrington's Declaration and any other meetings members may have had without EAC staff.

Depositions of EAC staff and others who participated in the VVSG 2.0 Implementation Working Group regarding the interactions of the Working Group members would be discoverable as they would be targeted to eliciting information relevant to Plaintiffs' FACA claim. *See* Fed. R. Civ. P. 26(b) (permitting discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case"). Documents reflecting the Working Group's communications that the EAC has not produced in response to FSFP's FOIA requests would be discoverable for the same reason. *See id.*

CONCLUSION

Plaintiffs' claims are properly before the Court and sufficiently allege that Defendant's issuance of the VVSG 2.0 violated HAVA, the APA and FACA. Defendant has not demonstrated entitlement to summary judgment on Plaintiffs' FACA claim, and prior to discovery summary judgment on that claim would be premature in any event. Accordingly, Defendant's motion should be denied.

Date: November 10, 2021

Respectfully submitted,

/s/ Caroline L. Wolverton

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Counsel for Plaintiffs

Exhibit 1

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)

DECLARATION OF SUSAN GREENHALGH

I, Susan Greenhalgh, declare:

1. I am a Senior Advisor on Election Security for Free Speech For People ("FSFP").

2. This declaration is based on personal knowledge and information provided to me in my official capacity.

3. FSFP is a national non-partisan, non-profit 501(c)(3) organization incorporated and with its primary place of business in Massachusetts that works to renew our democracy and defend the United States Constitution by challenging corporate financial influence in politics, confronting corruption in government, and fighting for free and fair elections. As part of this work, FSFP monitors and analyzes the security of voting systems across the country and educates state election officials and legislators on measures to strengthen the security of electronic voting machines as well as on other topics such as secure election procedures, remote accessible ballot marking, and

dangers of internet voting. FSFP also performs public education initiatives such as reporting on election technology and conducting educational webinars on electronic voting machines.

4. In March of 2020, the U.S. Election Assistance Commission ("EAC") published a proposed version of the Voluntary Voting System Guidelines ("VVSG") 2.0. The proposed VVSG 2.0 disallowed any wireless networking capabilities in voting systems. On February 10, 2021, the EAC voted to adopt a revised version of the VVSG 2.0 that contained language permitting inclusion of wireless networking devices in voting machines if the devices are disabled by software. The adopted VVSG 2.0 significantly weakened the security requirements for voting systems, as compared to the version of the VVSG 2.0 that the EAC proposed in March 2020, by allowing for federal certification of voting systems that include wireless networking devices, and other provisions that make voting systems less secure.

5. The allowance of wireless networking devices makes it more difficult for FSFP to monitor and analyze the security of voting systems, and thus causes us to expend more resources than we would otherwise on monitoring, analysis, and education of state election officials, as explained below. To do this, FSFP must divert time and money from our other essential work like our public education initiatives that include research and reporting on the dangers of internet voting, secure election procedures and protocols, and post-election auditing.

6. To counteract the impact of the weakened security provisions of the VVSG 2.0, FSFP will analyze the extent to which wireless networking devices in voting machines submitted for federal certification are disabled and then notify state election officials of the remaining vulnerabilities. We will conduct that analysis by reviewing voting machine manufacturers' applications for federal certification under the VVSG 2.0 to identify the components of the voting

machines and how wireless capabilities will be disabled. To identify the components of a given voting machine, we must first investigate to what extent commercial off-the-shelf ("COTS") components are included in the machine. FSFP must then research each COTS component and determine whether it includes an embedded wireless radio. FSFP will also have to determine whether the COTS components are sold in other configurations, such as other versions or models.

7. The process of determining whether the components of a voting system, including any COTS, contain wireless networking devices is labor-intensive and requires additional resources such as consultation with technical experts. Voting machine manufacturers' applications to the EAC often include technical descriptions that do not enumerate whether the listed components contain wireless networking devices. For this reason, we must consult with technical experts to determine the components that contain or may contain wireless networking devices and how those wireless capabilities can be disabled in order to notify state election officials of remaining vulnerabilities.

8. Even after a system is certified with a wireless radio that is disabled by software, FSFP will continuously monitor changes to the COTS configuration to ensure that any changes do not introduce additional wireless connectivity. This will require FSFP to review publicly available technical specifications of the COTS devices and to research their configurations in the voting systems. For example, FSFP will need to monitor the version and model number of each COTS device utilized to ensure components are not exchanged so as to introduce additional wireless capabilities that have not been tested for disablement.

9. In order to monitor the ongoing risk of hacking and other security risks in certified voting machines that contain wireless-connection components, FSFP will track ongoing adherence

to the disablement requirement by gathering and analyzing the contracts between states or counties and voting machine manufacturers for the purchase of voting machines as well as both the EAC-accredited and state-level testing reports. With this information, FSFP will determine the voting systems purchased, the configuration of those voting machines, and how the individual state or county administers the voting machines, including any usage specific to the state or county. If FSFP determines that a voting system is not adhering to the wireless connectivity disablement requirement, we will notify the impacted state officials and publicize the vulnerabilities in effort to reduce the threat of compromised security.

10. FSFP will also alert state election officials of the security risks resulting from the VVSG 2.0's allowance of wireless networking devices in voting systems. To this end, we will educate the state election officials about the dangers of the presence of wireless networking devices in voting systems and actions they can take to strengthen security in voting systems used in their states, e.g., the measures state election officials can take to avoid unwanted modems and monitor adherence to the disablement requirement in specific systems.

11. Lastly, as relates to Defendants' alternative partial motion for summary judgment on Plaintiffs' FACA claim, FSFP does not have enough information about the meetings the EAC had with private machine vendors to know definitively whether the participants in those meetings gave advice or made recommendations to the EAC as a group. Documents we received from the EAC in response to our FOIA requests indicate that the Working Group may well have been providing collective advice or recommendations.

12. The original calendar invitation for the "VVSG 2.0 Implementation Working Group Weekly Meeting" scheduled meetings through October 16, 2020. Ex. A. On August 6, 2020, an

EAC staff member emailed Working Group members stating that the August 7 meeting was canceled, referring to "issues that have been raised," and stating that the EAC was "re-evaluating the format of the discussion group." Ex. B. On August 13, 2020, the same EAC staff member emailed Working Group members that the remaining meetings were canceled and that "[f]uture collaborative sessions will be announced at a later time." Ex. C.

13. Although FSFP has received documents from the EAC relating to the meetings in response to our Freedom of Information Act requests, we have not received all records of all of the meetings. For example, the EAC's documents indicate that its practice was to record those meetings, but to date the EAC has produced recordings from only two of the meetings. In addition, we have not received at least ten documents captured by the EAC's searches and identified by the EAC as including communications between the EAC and voting machine manufacturers. As a consequence, FSFP does not have sufficient information to understand what occurred at the other meetings the EAC had with voting machine vendors or during other interactions between the EAC and the vendors.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 10th day of November 2021, in Amityville, NY

Susan Greenhalgh

Exhibit A

Accepted: VVSG 2.0 Implementation Working Group Weekly Meeting @ Weekly from 1pm to 2pm on Friday from Fri Jul 31 to Fri Oct 16 (EDT) (mturner@eac.gov)

email: "russ.dawson@clearballot.com" **Tuesday, August 4, 2020 at 9:49:17 AM Eastern Daylight Time**
To: email: "mturner@eac.gov"

russ.dawson@clearballot.com has accepted this invitation.

VVSG 2.0 Implementation Working Group Weekly Meeting

When Weekly from 1pm to 2pm on Friday from Fri Jul 31 to Fri Oct 16 Eastern Time - New York

Calendar mturner@eac.gov

Who
- mturner@eac.gov - organizer
- mcoutts@unisynvoting.com
- eburton@eac.gov
- jlovato@eac.gov
- ajoiner@eac.gov
- gwenyth.winship@clearballot.com
- zshaw@eac.gov
- mharrington@eac.gov
- jack.cobb@provandv.com
- russ.dawson@clearballot.com
- jfranklin@eac.gov
- ginnyb@microsoft.com
- matt@voting.works
- bhirsch@microvote.com
- jbowers@eac.gov
- paumayr@eac.gov
- ben@voting.works
- oletts@eac.gov
- dmunoz@eac.gov
- smpearson@essvote.com
- mary.brady@nist.gov
- jfleming@eac.gov
- Laskowski, Sharon J. Dr. (Fed)
- Wack, John P. (Ctr)
- aregenscheid@gmail.com
- Howell, Gema E. (Fed)
- Carnahan, Lisa J. (Fed)
- michael.walker@provandv.com
- msantos@slicompliance.com
- edwin.smith@smartmatic.com
- ian.piper@dominionvoting.com
- cortiz@unisynvoting.com
- kathy.rogers@essvote.com
- wendy.owens@provandv.com
- aaron.wilson@cisecurity.org
- tmapps@slicompliance.com
- kay.stimson@dominionvoting.com
- sderheimer@hartic.com
- jcanter@hartic.com
- Edwin Smith
- Wilburg, Patricia (Fed)
- Hallett, Tim
- Richbourg, Paige

Join Zoom Meeting

https://eac-gov.zoom.us/j/30619058547pwd=UVY4bjAwN3A0SnZlb09jV1BLSERxZz09

Meeting ID: 306 190 5854

Passcode: 04092020

One tap mobile

+13126266799,,3061905854# US (Chicago)

+19292056099,,3061905854# US (New York)

Dial by your location

+1 312 626 6799 US (Chicago)

+1 929 205 6099 US (New York)

+1 669 900 6833 US (San Jose)

877 853 5247 US Toll-free

888 788 0099 US Toll-free

Meeting ID: 306 190 5854

Find your local number: https://eac-gov.zoom.us/u/kdZogWnSjg

Attachments:

invite.ics 2.2k

invite.ics 2.2k

Exhibit B

From: Maurice Turner<mturner@eac.gov>

Sent on: Thursday, August 6, 2020 8:18:20 PM

To: aaron.wilson@cisecurity.org; ajoiner@eac.gov; aregenscheid@gmail.com; ben@voting.works; bhirsch@microvote.com; cortiz@unisynvoting.com; dmunoz@eac.gov; eburton@eac.gov; edwin.smith@smartmatic.com; ginnyb@microsoft.com; gwenyth.winship@clearballot.com; ian.piper@dominionvoting.com; jack.cobb@provandv.com; jbowers@eac.gov; jcanter@hartic.com; jfleming@eac.gov; jfranklin@eac.gov; john.wack@nist.gov; kathy.rogers@essvote.com; kay.stimson@dominionvoting.com; mary.brady@nist.gov; matt@voting.works; mcoutts@unisynvoting.com; mharrington@eac.gov; michael.walker@provandv.com; msantos@slicompliance.com; mturner@eac.gov; oletts@eac.gov; patricia.wilburg@nist.gov; paumayr@eac.gov; russ.dawson@clearballot.com; sderheimer@hartic.com; sharon.laskowski@nist.gov; smpearson@essvote.com; tjhallett@essvote.com; tmapps@slicompliance.com; wendy.owens@provandv.com; Jerome Lovato<jlovato@eac.gov>

Subject: Canceled: VVSG 2.0 Implementation Working Group Meeting for 8/7

Unfortunately, tomorrow's meeting is canceled. We are considering some of the issues that have been raised and re-evaluating the format of the discussion group. Thank you for your contributions thus far.

Maurice Turner
Senior Advisor
U.S. Election Assistance Commission
mturner@eac.gov | www.eac.gov

Exhibit C

From: Maurice Turner<mturner@eac.gov>
Sent on: Thursday, August 13, 2020 8:29:15 PM
To: aaron.wilson@cisecurity.org; ajoiner@eac.gov; aregenscheid@gmail.com; ben@voting.works; bhirsch@microvote.com; cortiz@unisynvoting.com; dmunoz@eac.gov; eburton@eac.gov; edwin.smith@smartmatic.com; ginnyb@microsoft.com; gwenyth.winship@clearballot.com; ian.piper@dominionvoting.com; jack.cobb@provandv.com; jbowers@eac.gov; jcanter@hartic.com; jfleming@eac.gov; jfranklin@eac.gov; john.wack@nist.gov; kathy.rogers@essvote.com; kay.stimson@dominionvoting.com; mary.brady@nist.gov; matt@voting.works; mcoutts@unisynvoting.com; mharrington@eac.gov; michael.walker@provandv.com; msantos@slicompliance.com; mturner@eac.gov; oletts@eac.gov; patricia.wilburg@nist.gov; paumayr@eac.gov; russ.dawson@clearballot.com; sderheimer@hartic.com; sharon.laskowski@nist.gov; smpearson@essvote.com; tjhallett@essvote.com; tmapps@slicompliance.com; wendy.owens@provandv.com; Jerome Lovato<jlovato@eac.gov>
Subject: Canceled: VVSG 2.0 Implementation Working Group Meetings

We are moving forward with a different format to achieve the same goal of evaluating, developing, and refining the requirements, test assertions and program manuals in order to bring the complete VVSG 2.0 to the Commissioners by the end of the year. Future collaborative sessions will be announced at a later time. Please continue to send your feedback and ideas directly to Jerome. Thank you for your commitment to the VVSG 2.0 process.

Maurice Turner
Senior Advisor
U.S. Election Assistance Commission
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£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)

PLAINTIFFS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACT

Pursuant to Local Civil Rule 7(h)(1), Plaintiffs respectfully submit the following statement of material facts as to which there exists a genuine issue necessary to be litigated.

1. Whether the VVSG 2.0 Implementation Working Group provided collective advice or recommendations to the EAC. *See* Decl. of M. Harrington ¶¶ 7-9 (Ex. B to Def.'s Mot., ECF No. 16-3) (indicating the Working Group members were hand-picked by EAC staff, that group was skewed to the perspective of the voting system manufacturing industry, and that the members met regularly as a group over a six-week period to discuss a "critically important" issue); Decl. of S. Greenhalgh ¶ 12 & Exs. A-C (Ex. 1 to Pls.' Opp'n Mem.) (showing that Working Group meetings were scheduled to run from June 2020 until October 2020 and that the EAC canceled them in early August 2020, referring to "issues that have been raised" and stating that the EAC was "re-evaluating the format of the discussion group").

2. Whether individual members of the VVSG 2.0 Implementation Working Group in effect had votes or vetoes. *See* Harrington Decl. ¶¶ 8-9 (describing Working Group as having met almost weekly over a six-week period and with membership skewed to the perspective of the

voting system manufacturing industry); Greenhalgh Decl.¶ 12 & Ex. B (EAC email stating that the agency was "re-evaluating the format of the discussion group").

Date: November 10, 2021

Respectfully submitted,

/s/ Caroline L. Wolverton

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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)

[Proposed] ORDER

This matter comes before the Court on Defendant's Motion to Dismiss or, in the Alternative, for Partial Summary Judgment. Upon consideration of the Motion, the briefing thereon, and the record to date in this case, it is hereby

ORDERED that the Motion is DENIED.

Dated: _____

_____
The Honorable Colleen Kollar-Kotelly
United States District Judge