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)

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

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INTRODUCTION

Plaintiffs Philip Stark (Stark) and Free Speech for People (FSFP) challenge a particular provision in the Voluntary Voting Systems Guidelines (VVSG) 2.0 prohibiting (for purposes of voluntary certification) wireless *capabilities* in voting systems, but allowing that standard to be satisfied by the *disabling* of any wireless technology that may be physically present within the machines. Their complaint is premised on a number of fundamental misconceptions. Initially, because neither Plaintiff has alleged any concrete harm resulting from, or traceable to, the VVSG 2.0, neither can establish Article III standing to pursue their claims purporting to challenge this provision under the Administrative Procedure Act (APA). Moreover, the *Voluntary* Voting Systems Guidelines are just that—entirely voluntary, and thus neither binding on any entity, nor reviewable under the APA. And to the extent the court were to reach the issue, the proposed version of the challenged provision did not merely provide Plaintiffs with fair notice of its final iteration—the two versions are, indeed, materially identical. All relevant procedures required by Help America Vote Act (HAVA) and/or the APA were thus fully satisfied—and Plaintiffs' arguments to the contrary are, necessarily, either a *post hoc* attempt to excuse their failure to review the Proposed VVSG 2.0 with adequate care in the first instance, or grounded in an idiosyncratic (but incorrect) understanding of the word "disable." But just as a *disabled* bomb is not *capable* of detonating, neither is disabled wireless technology capable of establishing wireless connections—as both the proposed and final versions of the complained-of provisions make clear.

Plaintiffs relatedly attempt to challenge a short-lived series of meetings (for purposes of this memorandum, the "Working Group") that Defendant held, briefly, in the summer of 2020. Defendant held these meetings to informally consult with voting program staff from the National Institute of Standards and Technology (NIST), employees of accredited voting system test laboratories, and employees of certain voting system manufacturers, in an effort to ensure that the

VVSG 2.0 would not suffer from the same implementation issues that had beset a prior version of the guidelines—and that had rendered that prior version wholly ineffectual. Plaintiffs' challenge, asserted under the Federal Advisory Committee Act (FACA) likewise fails for both jurisdictional and merits-related reasons. First, because the Working Group has long since disbanded, and Plaintiffs have now received the same documents they would have been entitled to had the meetings, *arguendo*, been subject to FACA, the claim is moot. And, in any event, because Plaintiffs have not plausibly alleged—and competent evidence submitted by Defendant disproves—that the Working Group was structured to provide collective advice, the FACA claim must necessarily fail on its merits, either under the Rule 12(b)(6) standard or, alternatively, pursuant to Rule 56.[1]

ARGUMENT

I. This Court Lacks Jurisdiction over Plaintiffs' Claims

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

1. FSFP Has Not Satisfied Either Requirement for Organizational Standing

First, FSFP's alleged injury of diversion of resources is self-inflicted—and thus, and not judicially cognizable—because it merely reflects FSFP's own value judgment about how to prioritize its advocacy activities. To plausibly allege an injury in fact, an organizational plaintiff must allege that the defendant's conduct has caused "a concrete and demonstrable injury to its activities." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011). An "abstract interest in a problem . . . no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem" is insufficient. *Id.* (citation omitted). Accordingly, in undertaking the injury-in-fact analysis for an organizational plaintiff, this Court follows a two-part

[1] The undersigned counsel inadvertently failed to attach to Defendant's opening memorandum, as required by Local Rule 7(h)(1), a separate, enumerated Statement of Material Facts as to Which There Is No Issue. Defendant attaches that Statement to this filing, and notes that each of the facts set forth in that document are established by the Harrington Declaration that was attached to Defendant's opening memorandum.

inquiry. First, it asks "whether the [defendant's] action or omission to act injured" the organization's concrete "interest" (as opposed to its abstract "objectives"). *People for the Ethical Treatment of Animals v. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (*PETA*)). If—and only if—the first prong is satisfied, the Court then asks "whether the organization used its resources to counteract that harm." *Id.* FSFP must prevail on both prongs to demonstrate standing, but satisfies neither.

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

The first step tests whether "the defendant's conduct perceptibly impaired the organization's ability to provide services." *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (citation omitted). "Put otherwise, [the challenged action] must 'inhibit[ ]' the organization's 'daily operations' in a concrete way." *Citizens for Resp. & Ethics in Wash. v. U.S. Office of Special Counsel* (*CREW*), 480 F. Supp. 3d 118, 127 (D.D.C. 2020) (quoting *PETA*, 797 F.3d at 1094. At this step, the Court "differentiate[s] between 'organizations that allege that their *activities* have been impeded'—which suffices for standing purposes—'from those that merely allege that their *mission* has been compromised'—which does not." *Id.* at 127-28 (quoting *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006)). Plaintiffs have been able to satisfy this requirement where, for example, they have alleged that the actions they challenge precluded or limited the avenues of legal redress they otherwise would have been able to pursue, or denied them information upon which they relied to provide their programmatic services, as in *PETA*, 797 F.3d at 1094-95. By contrast, however, where "the only 'service' impaired is pure issue-advocacy," or "the organizations' lobbying activities," standing is lacking. *PETA*, 797 F.3d at 1093 (citations omitted).

The type of injury of which FSP complains is pure issue advocacy. Specifically, FSFP asserts that it "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," *inter alia*, "electronic

voting machines," Greenhalgh Decl. ¶ 3, and that the challenged provision of the VVSG 2.0 "makes it more difficult for FSFP" to conduct this work, *id.* ¶ 5, in that it purportedly 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; … research each COTS component and whether an embedded wireless radio is included; …. monitor … changes to COTS configurations … [and] adherence to the wireless connectivity disablement requirement[;] … publicize [any] lack of adherence and resulting vulnerabilities[;] … [and] alert[] and educat[e] state election officials of the security risks resulting from the VVSG 2.0.

Plaintiffs' Opposition, Dkt. No. 19 (Opp.) at 16-17, (citing Greenhalgh Decl. ¶¶ 6-9). But whether considered individually or cumulatively, these activities are all in service of FSFP's *advocacy* for what it deems to be an acceptable level of election security. FSFP has not alleged specific facts that show that the VVSG 2.0 perceptibly impaired its ability to provide any "direct, non-advocacy services," *Int'l Acad. of Oral Med. & Toxicology v. FDA*, 195 F. Supp. 3d 243, 256 (D.D.C. 2016) (citing *Food & Water Watch v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (*FWW*))—nor indeed, even explained what, if any, such services it claims to provide. *See Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (plaintiff must allege "impairment of its ability to provide services"). Simply put, FSFP's efforts to formulate, then "publicize" its views on certain voting systems, and "alert[] and educat[e] state election officials" of the same, are the very type of issue-advocacy harms that Article III precludes. Opp. at 17.

b. <u>FSFP Has Not Used Its Resources to Counteract Any Alleged Harm</u>

FSFP's failure to establish any particular activities impaired by the VVSG 2.0 renders irrelevant its allegations that it "must expend more resources than it ordinarily would" on "monitoring and analysis of voting system security … as well as on educating state election officials," and that "it must divert limited resources from other essential work like its public education initiatives . . ." Opp. at 17. A diversion of resources "is certainly relevant to step two—

whether FSFP has used resources to counteract the alleged harm to its activities. *Ctr. for Responsible Sci. v. Gottblieb*, 346 F. Supp. 3d 29, 41 (D.D.C. 2019), *aff'd*, 809 F. App'x 10 (D.C. Cir. 2020). "But step two is irrelevant unless the organization can show harm to its activities *distinct from* the diversion of resources." *Weingarten v. Devos*, 468 F. Supp. 3d 322, 334 (D.D.C. 2020). "It 'would be hopelessly circular' to hold" that the mere "diversion of resources itself—necessary for establishing step two—also inflicts the harm necessary for establishing step one." *Id.* Here, FSFP fails to show that "something about" the VVSG 2.0—"rather than the organization[s'] response to it—makes the organization[s'] task more difficult." *Ctr. for Responsible Sci.*, 346 F. Supp. 3d at 41. This "mere diversion of resources to advance the advocacy mission of an organization is insufficient to confer standing." *Id.* (citing cases).

Moreover, FSFP's theory as to step two of the organizational standing inquiry ignores the fact that *no version* of the VVSG has *ever* required (for purposes of voluntary certification) the policy favored by Plaintiffs—*i.e.*, that a voting system must be entirely physically devoid of any wireless technology. Thus, in this respect, the VVSG 2.0 simply continue the status quo: neither the VVSG 1.0 nor the VVSG 1.1[2] contained such a standard, and nor does the VVSG 2.0. FSFP has not explained—nor can it—how the EAC's maintenance of the existing state of affairs will cause it to incur "operational costs beyond those" it has previously or "*normally* expended" in advocating for its policy preferences. Opp. at 17 (quoting *FWW*, 808 F.3d at 920) (emphasis added). *See, e.g., Int'l Acad.*, 195 F. Supp. 3d at 260 (where "nothing about" the challenged agency action "changed the game," an organization's choice to allocate resources to continue to advocate for a different policy was, necessarily, "wholly unrelated" to the agency's "decision to maintain the status quo").

[2] As previously explained, because certain standards set forth in the VVSG 1.1 proved impracticable —and the VVSG are entirely voluntary—no voting system was ever certified to VVSG 1.1 standards. Defendant's Memorandum, Dkt. No. 16 (Def. Mem.) at 9 (citing Harrington Decl. ¶ 7).

Thus, FSFP's alleged resource allocations merely fund a *continuation* of the same types of activities—"leverag[ing] election security and legal expertise" to "provid[e] analysis and disseminat[e] information to the public on issues central to our democracy." Compl. ¶ 10—in which it has always engaged, as its very *raison d'etre*. And even if, *arguendo*, FSFP decides to expend *additional* resources to continue the same advocacy work it has always performed to counter a stable status quo, any arguable harm resulting from FSFP's "own budgetary choices" is "self-inflicted" and insufficient for organizational standing. *Fair Emp't Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994); *see also, e.g., Weingarten*, 468 F. Supp. 3d at 334 (no organizational standing where an organization merely "'directed its resources to[ward] mitigating a risk that it thought the government should have exercised more diligence in preventing.'") (citations omitted).

2. Plaintiff Stark Also Lacks Standing

Plaintiff Stark also lacks standing as to the APA claims. In Plaintiffs' Opposition, Stark clarifies that he premises his claim to standing solely on an alleged "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." Opp. at 14. According to Stark, the procedures established by the HAVA for the development and adoption of the VVSG confer on him a statutory right sufficient to establish standing, "'even though,'" concededly, "'no [cognizable] injury would exist without the statute.'" Opp. at 14 (quoting *LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011)). As explained below, Plaintiffs' notice-and-comment claims fail. *See infra* § II.A. But even if they had merit, the Supreme Court has squarely rejected this argument, repeatedly emphasizing that "'Article III standing requires a concrete injury even in the context of a statutory violation.'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (quoting *Spokeo v. Robins*, 578 U.S. 330, 331 (2016)). Indeed, as *Transunion* recently clarified: "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to

independently decide whether a plaintiff has suffered a concrete harm under Article III . . . [U]nder Article III, an injury in law is not an injury in fact." *Id.*

Because Stark does not even attempt to articulate any concrete harm distinct from his purported statutory injury under HAVA, all that remains is his asserted "procedural right *in vacuo*," the deprivation of which is "insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Ctr. for Law & Educ. v. U.S. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005) ("Appellants appear to misunderstand the difference between the 'procedural right' and the 'concrete interest' in a procedural-rights case . . . . The two things are not one and the same."). Thus, and in short, Plaintiff Stark cannot bootstrap his way into federal court merely by alleging that Defendant violated the law—that is the basic premise of the standing doctrine.

B. The FACA Claim Is Moot

This Court likewise lacks jurisdiction over Plaintiffs' FACA claim[3] (Count VI) because it is moot. In cases addressing mootness in the FACA context, courts have distinguished between "claims for document disclosure pursuant to section 10(b)," and "claims based on FACA's other procedural requirements[.]" *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 223 (D.D.C. 2017) (Kollar-Kotelly, J.) While Plaintiffs ignore this well-established distinction, it properly frames the mootness analysis here. And, as set forth in Defendant's opening memorandum and below, both aspects of Plaintiffs' FACA claim are moot, as there is no "actual, ongoing controversy" regarding the challenged meetings, which occurred for a brief period in the summer of 2020 and have long ago ceased. *Clarke v. United States,* 915 F.2d 699, 700-701 (D.C. Cir. 1990) (*en banc*) (citation omitted).

1. Plaintiffs' Non-Records Claims Are Moot and the Voluntary Cessation Doctrine Does Not Apply

In its opening memorandum, Defendant cited a number of cases for the well-established

[3] As previously noted, Defendant uses the term "FACA claim" purely for ease of reference; it is, in fact, brought under the APA. *See* Def. Mem. at 23 n.14.

principle that "claims based on FACA's non-document, procedural requirements are mooted when the relevant advisory committee ceases to exist." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 464 F. Supp. 3d 247, 264 (D.D.C. 2020) (Kollar-Kotelly, J.) (citation omitted) (collecting cases); *see* Def. Mem. at 24 (also collecting cases). Plaintiffs entirely fail to address this rule. Instead, Plaintiffs contend that the doctrine of "voluntary cessation" rescues their FACA claim, on the entirely hypothetical and speculative ground that—at some unspecified and indefinite point in the future—the EAC *might* again informally consult with the same working group consisting partly of private actors. *See* Opp. at 20-21. Plaintiffs are wrong.

The doctrine of voluntary cessation serves to prevent a "defendant from manipulating the judicial process by voluntarily ceasing the complained of activity, and then seeking a dismissal of the case, thus securing freedom to 'return to his old ways.'" *Clarke*, 915 F.2d at 705; *see also, e.g.*, *City of Erie v. Pap's A.M.,* 529 U.S. 277, 288 (2000). However, while courts regard private litigants' voluntary cessation of challenged conduct as generally suspect, cessation by "government officials has been treated with more solicitude." *Ragsdale v. Turnock,* 841 F.2d 1358, 1365 (7th Cir. 1988); *see also, e.g., Tidwell*, 239 F. Supp. 3d at 225 ("'[W]here the defendant is a government actor—and not a private litigant—there is less concern about the recurrence of objectionable behavior.'") (citation omitted); *Alaska v. U.S. Dep't of Agric.*, --- F.4th ---, 2021 WL 5312998, at *2 (D.C. Cir. Nov. 16, 2021) (noting that "'it would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose.'") (quoting *Clarke*, 915 F.2d at 705).[4]

[4] *Accord Miraglia v. Bd. of Supervisors of Louisiana State Museum*, 901 F.3d 565, 572 (5th Cir. 2018) ("[W]e have held that when a government entity assures a court of continued compliance, and the court has no reason to doubt the assurance, then the voluntary cessation doctrine does not apply."); *Am. Cargo Transp. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("The government's change of policy presents a special circumstance in the world of mootness . . . . [U]nlike in the case of a private party, we presume the government is acting in good faith."); *Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, 586 F.3d 908, 916 (11th Cir. 2009) (similar); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (similar).

Thus, an agency's "mere power" to revert to a challenged policy or practice "is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists." *Nat'l Black Police Ass'n v. District of Columbia,* 108 F.3d 346, 349 (D.C. Cir. 1997); *see Larsen v. U.S. Navy,* 525 F.3d 1, 4 (D.C. Cir. 2008). Instead, "there must be evidence" indicating that the agency "likely will" revert. *National Black Police Ass'n,* 108 F.3d at 349; *see also Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1115-18 & 1116 n.15 (10th Cir. 2010) (stressing that evidence of agency intent to revert to prior policy must be clear). Because no such evidence exists here—and indeed, to the contrary, the Harrington Declaration establishes that the EAC has *no* intention of resuming the Working Group meetings, Harrington Dec. ¶ 15 —there is, simply put, "no reasonable expectation that the [alleged] wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *cf. Freedom Watch, Inc. v. Obama*, 859 F. Supp. 2d 169, 173 (D.D.C. 2012) ("The allegations in [plaintiff's] complaint themselves support a finding that the alleged de facto [FACA] committee no longer meets."); *compare* Comp. ¶ 42 (alleging that the challenged meetings occurred "from July through August 2020"); Greenhalgh Decl. ¶ 12 (acknowledging that the meetings ceased in August 2020). As such, "any injunction or [declaratory] order . . . would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits." *Larsen*, 525 F.3d at 4. The procedural portion of the FACA claim should thus be dismissed as moot.

2. Plaintiffs' Records Claim Is at Least Substantially Moot

The records-related aspect of Plaintiffs' FACA claim is also, at minimum, substantially moot, in that Defendant has produced to Plaintiffs the same records that they would, *arguendo*, have been entitled to if the Working Group were an "advisory committee" within the meaning of FACA. *But see infra* § II.B. As explained in Defendant's opening memorandum, *see* Def. Mem. at 26-27, Plaintiff FSFP sought a coincident set of documents through the Freedom of Information Act (FOIA) and related proceedings that are concurrently pending before this Court. *See Free Speech for People v. U.S.*

Election Assistance Comm'n, 1:21-cv-838-APM. Although FSFP complains that it "has not received at least ten [responsive] documents containing communications between the EAC and voting machine manufacturers," Opp. at 41, on November 19, 2021 (*i.e.*, subsequent to the filing of Plaintiffs' Opposition), the EAC made a supplemental production consisting of this referenced set of documents. *See Free Speech for People v. U.S. Election Assistance Comm'n*, 1:21-cv-838-APM, Dkt. No. 20 (Joint Status Report describing the supplemental production), attached hereto as Exhibit H. While the parties to the FOIA action are continuing to confer as to the adequacy of the EAC's search, the only remaining "records" that FSFP specifically complains remain outstanding are audio recordings of three of the Working Group meetings, which the EAC has been unable to locate notwithstanding its best (and certainly reasonable) efforts. *See* Opp. at 41.

Presumably in recognition of the duplicative FOIA litigation, Plaintiffs do not seek through this action any injunctive relief requiring the production of any documents, but rather only a declaratory judgment to the effect that the Working Group meetings violated FACA. *See* Compl., Prayer for Relief ¶¶ a-b. But as with any other type of judicial relief, "'a declaratory judgment may only be issued in the case of an actual controversy.'" *DiMaio v. Democration Nat'l Comm.*, 520 F.3d 1299, 1301 (11th Cir. 2008) (citation omitted). The controversy must be "definite and concrete, touching the legal relations of parties having adverse legal interests" and admitting of "specific relief through a decree of a conclusive character." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, (2007). The jurisdictional inquiry "should concentrate on 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Gibson v. Liberty Mut. Grp. Inc.*, 778 F. Supp. 2d 75, 78 (D.D.C. 2011) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Moreover, "[e]ven if the Court finds a case or controversy exists, it must still consider whether it is appropriate to exercise its discretion to grant declaratory

relief in the instant case." *Id.* (citing 28 U.S.C. § 2201(a)). "There is no absolute right to a declaratory judgment in federal courts, and the factors relevant to a court's determination of the propriety of declaratory relief are numerous." *Glenn v. Fay*, 222 F. Supp. 3d 31, 35 (D.D.C. 2016). "In the D.C. Circuit, two criteria are ordinarily relied upon: 1) whether the judgment will serve a useful purpose in clarifying the legal relations at issue, or 2) whether the judgment will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* at 36.

Here, insofar as Plaintiffs have already obtained the same documents that would be produced pursuant to any claim under Section 10(b) of FACA, the "records" portion of the FACA claim is moot. *See* Def. Mem. at 26-27 (collecting cases). Further, to the extent that *Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999), leaves open the theoretical possibility of a declaratory judgment even after all relevant records have been produced, no such judgment would be "appropriate" here, *Gibson*, 778 F. Supp. 2d at 78. As explained below, Plaintiffs' APA claims challenging the VVSG 2.0 independently fail on their merits, *see infra* §§ II.A.1-2; thus, whatever "ammunition" an entirely backwards-facing declaratory judgment may provide to successful FACA plaintiffs in other contexts, there can be none here. Count VI should, accordingly, be dismissed in its entirety as moot.

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

To the extent, *arguendo*, that the Court were to find it has jurisdiction over one or more of Plaintiffs' claims, all such claims should alternatively be dismissed under Rule 12(b)(6).

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

1. The VVSG 2.0 Are neither "Agency Action" nor "Final Agency Action"

First, each of Plaintiffs' claims asserted under the APA should be dismissed on the grounds that the VVSG 2.0 are neither (1) agency action, nor, independently (2) final agency action.

Plaintiffs argue, first, that the VVSG must constitute a "rule," because they "apply to voting systems generally, have future effect and prescribe federal policy for voting systems." Opp. at 22

(citing 5 U.S.C. § 551(4)). But, initially, this argument ignores the plain text of the EAC's enabling statute, which in a section entitled "Limitation on rulemaking authority," provides that the agency "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, except to the extent permitted under section 20508(a) of this title." 52 U.S.C. § 20929 (emphases added).[5] According to Plaintiff, the limiting phrase "which imposes any requirement on any State or unit of local government" should be read to modify both "any rule" and "any regulation," such that the EAC holds broad rulemaking authority—within the parameters established by its enabling statute—to regulate private entities. *See* Opp. at 23. But Plaintiffs' construction contravenes the well-established "rule of the last antecedent," which instructs that "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows"—here, "any other action." *Lockhart v. United States*, 577 U.S. 347, 351 (2016). Moreover, Plaintiff's proffered interpretation—that the VVSG somehow constitute a "legislative rule," which would, definitionally, legally bind all voting manufactures—flies directly in the face of the entire, undisputed statutorily-prescribed structure of the VVSG, *i.e.*, that no State has any obligation whatsoever to adopt or employ the standards, either in full or in part. Rather, only when a state *voluntarily* decides to avail itself of the VVSG—and a voting machine manufacturer, in turn, *voluntarily* decides to configure its systems so as to take full advantage of its economic opportunities in that state—do the VVSG come into play.

Further, Plaintiffs' arguments also ignore the fact that "[n]ot all 'rules'" "'have the force and effect of law'" that is carried by a *legislative* rule, in particular. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (citation omitted). Rather, and as relevant here, "general statements of policy" (even if

[5] 52 U.S.C. § 20508, which is not implicated by this case, delegates rulemaking authority to the EAC for the specific and limited purpose of creating a uniform federal form to register voters for federal elections by mail. *See generally Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 5-7 (2013).

they match, *arguendo*, the APA's general definition of a "rule") are considered non-final—and, thus, non-reviewable, where, as here, a plaintiff has invoked 5 U.S.C. § 704 in the absence of any more specific judicial review provision. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (where "review is sought . . . only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (explaining that the APA's "finality inquiry is often framed as the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule.") (citation omitted); *Broadgate Inc. v. U.S. Citizenship & Immigr. Servs.*, 730 F. Supp. 2d 240, 244 (D.D.C. 2010) ("Whether a disputed 'rule' is a legislative rule turns on whether it has 'the force of law,' meaning that 'Congress has delegated legislative power to the agency and [] the agency intended to exercise that power in promulgating the rule.'"); *CropLife Am. v. EPA,* 329 F.3d 876, 883 (D.C. Cir. 2003) (in resolving whether an agency's statement of policy is judicially reviewable, the ultimate question is "whether the agency action binds private parties or the agency itself with the 'force of law.'").

Here, as explained in Defendant's opening memorandum, *see* Def. Mem. at 28-31, the VVSG are, at most, an unreviewable general statement of policy. While Plaintiffs contend that they must constitute "final agency action" because "they are binding on any voting system manufacturer *that wants its machines to be federally certified*," Opp. at 24 (emphasis added), such wholly elective participation is a far cry from the "impos[ition of] any obligation . . . , den[ial of] any right . . . , or fixing [of] any legal relationship," as required to establish final agency action. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n,* 324 F.3d 726, 732 (D.C. Cir. 2003); *see also, e.g., Indep. Equip. Dealers Ass'n v. EPA,* 372 F.3d 420, 426 (D.C. Cir. 2004) (to be final, an agency action must "be [an action] from which 'rights or obligations have been determined' or from which 'legal consequences will flow.'") (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Further, unlike the National List

mentioned by—but not actually at issue in—*Center for Food Safety v. Perdue*, 320 F. Supp. 3d 1101, 1108 (N.D. Cal. 2018), cited by Plaintiffs, *see* Opp. at 25, the VVSG only come into play after independent third parties, *i.e.*, state governments, voluntarily elect to employ them—decisions over which the EAC concededly has no control. The VVSG thus neither impose "legal consequences" nor determine "rights or obligations" because, simply put, they do "not require anyone to do anything." *Ca. Communities Against Toxics v. EPA*, 934 F.3d 627, 640 (D.C. Cir. 2019); *see also Valero Energy Corp. v. EPA,* 927 F.3d 532, 536 (D.C. Cir. 2019). As such, the VVSG 2.0 are not reviewable under 5 U.S.C. § 704, and Counts I-V should be dismissed on this ground alone.

2. The Final VVSG 2.0 Are a "Logical Outgrowth" of the Proposed Version

Second, each of Plaintiffs' APA claims should also be dismissed on the independent ground that Plaintiffs were given fair notice of the challenged provision—*i.e.*, the allowance for the physical presence of wireless networking devices in voting machines, provided that these wireless devices are disabled—in the proposed version that was submitted for public comment. Under the APA, a proposed and final rule "need not be identical." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009). Rather, in order to provide "fair notice," *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), a final rule need only be a "logical outgrowth" of the proposed version—a test that is satisfied where "interested parties 'should have anticipated' that the change was possible." *Ne. Md. Waste Disposal Auth. v. EPA,* 358 F.3d 936, 952 (D.C. Cir. 2004) (citations omitted). Here, although the "logical outgrowth" test frames this aspect of Plaintiffs' challenge, it is also inapt, in that the challenged provision of the VVSG 2.0 was, in fact, materially *identical* to the proposed version—thus rendering Plaintiffs' arguments to the contrary a category error. *See Post Acute Med. at Hammond, LLC v. Azar*, 311 F. Supp. 3d 176, 185 (D.D.C. 2018) ("The logical-outgrowth doctrine does not apply here because the proposed rule and final Rule are materially identical."). Nonetheless, at absolute minimum, the "logical outgrowth" test is well-satisfied here.

As Defendant explained in detail in its opening memorandum, the Proposed VVSG 2.0 proposed that, to qualify for certification of compliance with the updated VVSG, a voting system (1) "must not be capable of establishing wireless connections" (Proposed Section 14.2-D), and (2) ***could meet that standard through, inter alia, "configur[ation] to disable wireless networking" capabilities*** (Proposed Section 15.4-C). Proposed VVSG 2.0 §§ 14.2-D, 15.4-C. *See* Def. Mem. at 10-12, 34-35. Thus, the very provision that Plaintiffs object they could not possibly have anticipated was indeed there—in black-and-white—in the proposed version.

To be sure, Plaintiffs are correct that the Proposed VVSG 2.0 "prohibited wireless modems and other wireless capability in voting systems." Opp. at 5. Indeed, *both* the proposed and final versions of the VVSG 2.0 *maintain that prohibition*. *See* Proposed Section 14.2-D ("Voting systems must not be capable of establishing wireless connections."); Final Section 14.2-C (same). But Plaintiffs are simply—and demonstrably—incorrect in their contention that the proposed version included an outright "ban on wireless networking hardware in voting machines." Opp. at 7. To the contrary, both the proposed and the final versions allowed for the prohibition on wireless *capability* to be satisfied by, among other options, "[a] system configuration process that *disables* wireless networking devices." Proposed Section 15.4-C; Final Section 14.2-C (emphasis added). To "disable," of course, is "to make ineffective or inoperative," as in, for example, to "*disable* a bomb," or—to borrow the illustrative, and quite apt, sentence provided by Merriam Webster: "For victims of smartphone theft, the ultimate justice is hitting a button that *disables* the device, turning it into a worthless rectangular paperweight." https://www.merriam-webster.com/dictionary/disable.[6] In

[6] Other dictionaries confirm this common-sense usage. *See, e.g.,* https://www.dictionary.com/browse/disable ("*Digital Technology*. to make (a device, system, or feature) unable to function; turn off: *Some of the car's advanced safety features can be disabled.*"); https://www.oed.com/view/Entry/53384?rskey=pddHpS&result=3&isAdvanced=false#eid ("To incapacitate, render ineffective, put out of action; to overwhelm," as in, for example, "The soldier is taught to consider using a lighter weapon to disable the tank.").

comportment with this everyday (and dictionary-confirmed) usage of "disable," *both* the proposed and final VVSG 2.0 prohibit wireless capabilities, by allowing for (among other available options) any wireless hardware to be disabled, *i.e.*, rendered ineffective or inoperable. Thus, to the extent that Plaintiffs' arguments are not simply a *post hoc* attempt to excuse their failure to review the Proposed VVSG 2.0 with adequate care in the first instance,[7] they thus appear to be grounded in a fundamental misunderstanding of the meaning of "disable." But any such misunderstanding cannot, of course, provide any basis for judicial relief.

Plaintiffs attempt to argue that the "context" of the option for "[a] system configuration process that disables wireless networking devices" that was expressly set forth in Proposed Section 15.4-C "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 system incapable of establishing a wireless connection." Opp. at 9; *see also id.* at 31 (similar). While it is unclear what Plaintiffs mean by "physical disabling," Defendant notes, initially, that both the proposed and final VVSG 2.0 do indeed require that a voting system be "render[ed] . . . incapable of establishing a wireless connection." Further, to the extent that Plaintiffs mean to argue that the proposed version was reasonably interpreted as requiring the physical *removal* of wireless technology, they fail to explain how such a construction is compatible with either (1) Proposed Section 15.4-C's express statement (maintained verbatim by Final Section 14.2-C) that disabling can permissibly be achieved by "[a] system configuration process," or (2) the fact that Proposed Section 15.4-C *separately* provided for the *alternative* option (also maintained verbatim by Final Section 14.2-C) of eliminating

[7] Plaintiff FSFP insists that the comments it submitted on the subject of wireless capabilities during the relevant comment period "were intended to support" what it understood to be "the existing proposal." Opp. at 31; *compare* Dkt. No. 16-8 (Def. Ex. G) p. 8 and Def. Mem. at 35. To the extent that is accurate, Plaintiffs' failure to correctly understand the plain terms of the Proposed VVSG 2.0 is not an error that is chargeable to Defendant. Under the "logical outgrowth" test, what matters is that Plaintiffs had a fair opportunity to provide comments on the proposed VVSG 2.0, *Ne. Md. Waste Disposal Auth.,* 358 F.3d at 952. As explained above, Plaintiffs had this opportunity.

wireless capabilities by "[r]emoving wireless hardware within the voting system." Proposed Section 15.4-C; Final Section 14.2-C. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant."). And, in a similar vein, the addition of the sentence "[t]his requirement does not prohibit wireless hardware within the voting system so long as the hardware cannot be used[,] e.g.[,] no wireless drivers present" to Final Section 14.2-C is—far from the "drastic[] alter[ation]" claimed by Plaintiffs, *see* Opp. at 29-30—merely a reiteration (if a clarifying one) of what was already plain from the proposed version.

Plaintiffs also attempt to spin the changes between Proposed Section 14.2-F and Final Section 14.2-E as a weakening of security standards that somehow supports their claim to have lacked fair notice as to contents of Final Sections 14.2-C and 15.4-C. *See* Opp. at 29-30. Initially, neither the proposed (Section 14.2-F) nor the final (Section 14.2-E) version of this provision was so much as mentioned in passing in Plaintiffs' Complaint; thus, it is not properly a part of this suit, and the Court need not consider these arguments at all. *See, e.g., White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 F. App'x 556, 560 (4th Cir. 2008) ("Notice pleading rests on the principle that the defendant should have fair notice of what a plaintiff's claim is and the grounds upon which it rests.") (citation omitted); *Gaines v. Dist. of Columbia*, 961 F. Supp. 2d 218, 225 (D.D.C. 2013) ("A plaintiff cannot amend his Complaint via an opposition brief to a motion to dismiss."). In any event, the direct opposite is true: the final version of this provision *strengthened* the relevant security standard—and also has nothing to do with whether the Proposed VVSG 2.0 properly put Plaintiffs on notice that wireless components would be permitted, if (among other options) they are disabled.

Section 14.2-E sweeps more broadly than Section 14.2-C, and prohibits not just a *wireless* connection to any external network or device, but *any* connection (including, *e.g.*, through an

Ethernet cable, VPN, or satellite connection) to an external network or device. *See* Exhibit I,[8] attached hereto. Plaintiffs complain that the "discussion" portion of this provision changed from the proposed version (providing that the voting system must "not involve any connections to the internet") to the final version (providing that the voting system must "implement[] an air gap between the voting system and external networks or external devices"). *See* Opp. at 30. But this criticism makes little, if any sense, as this edit *strengthened* the relevant security requirement by clarifying that Section 14.2-E prohibits any connection (wireless or otherwise) to any external network or device, not only via the internet, but also via also any other means—e.g., a VPN or satellite connection. Plaintiffs assert that "[t]he final version … 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." Opp. at 30. But this contention—once again—fails to integrate the plain meaning of "disable." Thus, insofar as Plaintiffs' complaint regarding Section 14.2-E is intelligible at all, it merely replicates the exact same misusage or misunderstanding of the meanings of "capability" and "disable" explained at length above.

Plaintiffs' attempt to use the comments of NIST representative Gema Howell (Howell) to bolster their case likewise falls flat. As an initial matter, Howell is not an EAC employee, and Plaintiffs cite no authority for the proposition that her comments have any legal bearing on the relevant question here, *i.e.*, whether the Proposed VVSG 2.0—that is, the print version that was published in the Federal Register—put them fairly on notice of the challenged terms in the Final VVSG 2.0. But in any event, Plaintiffs distort and misrepresent Howell's statements during the presentation in question: her explanations in fact confirm that the proposed version contemplated an allowance for disabled wireless technology all along. First, in the portion of Howell's presentation

[8] Exhibit I is a demonstrative exhibit, prepared for the Court's convenience, setting forth Proposed Section 14.2-F and Final Section 14.2-E.

that Plaintiffs highlight, Howell is discussing how a jurisdiction could transmit its final election results to a central office without having to physically drive them there; in that context, she explains that the cellular modem would not be in the tabulator, but rather in an external device. *See* Compl. ¶ 31; Opp. at 5, 9; https://www.youtube.com/watch?v=ycPX5yt0N-k&t=1745s, at 37:17. Thus, Plaintiffs mischaracterize these statements, which did not address the independent question presented by this suit—as, indeed, is expressly confirmed by Howell's statements at a later point in the presentation. Specifically, at 56:00 of the same session, Howell explains what removing wireless capability means: "As you saw in those diagrams, the components of the voting system did not have any wireless capability. So that means that any wireless capability in the voting system *would have to be disabled*, removed, however the voting system vendor decides to go about it." (emphasis added); *see also id.* at 51:25 (addressing wireless concerns and using the term "disabling" in regard to removing wireless capability).

Finally, Plaintiffs insist that—simply by listing seven other provisions of the VVSG 2.0 that do not align with their policy preferences—they have adequately stated a claim that each such provision also, purportedly, fails to satisfy the "logical outgrowth" test. Opp. at 34-35; *see* Compl. ¶ 52(i)-(vii). But Plaintiffs cite no legal authority—nor is Defendant aware of any—for the proposition that a party may satisfy Rule 8 merely by the act of naming something they dislike, without one iota of explanation as to why they believe that "something" is illegal. Having failed to assert more than "an unadorned, the-defendant-unlawfully-harmed-me" allegation as to any of these additional provisions of the VVSG 2.0, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), Plaintiffs have, plainly and facially, failed to state any additional claims.[9]

[9] To the extent the Court were to permit Plaintiffs an opportunity to amend their pleading to set forth actual legal theories regarding these additional provisions of the VVSG 2.0, Defendants reserve the right to move to dismiss any such amended claims. Alternatively, to the extent the Court were to somehow find that Plaintiffs' mere listing of these additional provisions satisfies their obligations under Rule 8, Defendants respectfully

B. The FACA Claim Also Fails

1. The Working Group Was Not an Advisory Committee under FACA

To the extent the Court were to find it has jurisdiction over Plaintiffs' FACA claim, the Court should dismiss this claim under Rule 12(b)(6). As relevant here, although Defendant acknowledges that it "established" this group by inviting its participants,[10] in order to satisfy their pleading obligation, Plaintiffs must allege *facts* that plausibly—and independently—establish that the group had the requisite level of "formality and structure" to qualify as an advisory committee. *Food & Water Watch v. Trump*, 357 F. Supp. 3d 1, 11 (D.D.C. 2018). FACA does not "cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453 (1989). To the contrary, a group is a FACA advisory committee only "when it is asked to render advice or recommendations, as a *group*, and not as a collection of individuals." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) (*AAPS*). The group's activities must be "expected to, and appear to, benefit from the interaction among the members both internally and externally[.]" *Id.* at 913. Relatedly, then, "for an individual to be considered a FACA committee member, he or she must have a 'vote in, or if the committee acts by consensus, a veto over the committee's decisions.'" *Food & Water Watch*, 357 F. Supp. 3d at 11; *see also In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) ("Neither Judicial Watch nor the Sierra Club explicitly claimed that any non-federal individual had a vote on the [committee]

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request an opportunity to defend the provisions on their merits prior to any decision by this Court.

[10] Plaintiffs incorrectly assert that "[b]y controlling membership, scheduling and running the meetings … the EAC also utilized the Working Group." Opp. at 37 (citation omitted). Because the EAC has conceded that it "established" the Working Group, the Court need not reach this issue. *See* 5 U.S.C. app. 2 § 3(2)(c) (an "advisory committee" must, *inter alia*, be "established *or* utilized by one or more agencies) (emphasis added). In any event, the "utilization" prong of this disjunctive definition does not, as Plaintiffs suggest, merely replicate the test for agency "establishment" of an advisory committee, but instead refers to a narrow class of *privately formed* committees. *See Pub. Citizen*, 491 U.S. at 462. As there is no allegation that the EAC engaged a private entity to organize or conduct the challenged meetings, the alternative "utilization" test has no relevance here.

or had a veto over its decisions. . . And there is nothing to indicate that non-federal employees had a right to vote on committee matters or exercise a veto over committee proposals. Therefore, the [challenged group] was not a FACA advisory committee."); *Citizens for Resp. and Ethics in Washington v. Leavitt*, 577 F. Supp. 2d 427, 431-33 (D.D.C. 2008) (FACA not implicated where attendees providing individual, as opposed to collective, advice). Thus, although—as Plaintiffs note—a "consensus" structure is not strictly required, *see* Opp. at 37, the rule remains that, in order to qualify as a FACA committee, members must have *either* "a 'vote' or 'veto' in committee recommendations or decisions." *Food & Water Watch*, 357 F. Supp. 3d at 12. This principle "is premised on the notion that the committee is expected to make substantive group recommendations or decisions, and that it does so at the behest of the executive. Absent any indication that such a structure exists, there can be no FACA obligation." *Id.*

Against the backdrop of these pleading requirements, Plaintiffs' Complaint merely makes the "naked assertion," entirely "devoid of further factual enhancement," *Iqbal,* 556 U.S. at 678 (citation omitted), that—"on information and belief"—the Working Group "was called upon by Defendant to render advice about the VVSG 2.0, and rendered such advice as a group rather than a collection of individuals." Compl. ¶ 95. This bare allegation is, quintessentially, "a formulaic recitation of the elements of a cause of action," offering nothing more than "labels and conclusions," that simply "will not do." *Iqbal*, 556 U.S. at 678 (citation omitted); *see Am. Oversight v. Biden*, Civ. A. No. 20-00716 (RJL), 2021 WL 4355576, at *8 (D.D.C. Sept. 24, 2021) (dismissing FACA claim under Rule 12(b)(6), where the complaint was bereft of any "supporting factual allegations with respect to the nature of the alleged membership, including if and how members engaged with the committee and whether they possessed a vote or veto over committee recommendations").

In their Opposition, Plaintiffs assert that they have satisfied their pleading obligation because Defendant "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," Opp. at 37, and that their Complaint alleges that the group "met weekly" for a brief period in the summer of 2020, *id.* at 37-38. But Plaintiffs fail to explain how these facts have any relevance to the separate issue of whether—as required to state a FACA claim—they have plausibly alleged that the Working Group was "asked to render advice or recommendations, as a *group*[.]" *AAPS*, 997 F.2d at 913. As explained in Defendant's opening memorandum and above, Plaintiffs have not.

Finally, Plaintiffs' citation to *see also, e.g., VoteVets Action Fund v. U.S. Dep't of Veterans' Affairs*, 992 F.3d 1097, 1104 (D.C. Cir. 2021), does not rescue their woefully deficient pleading. As another jurist on this Court recently explained in distinguishing similarly inadequate allegations from those at issue in *VoteVets*:

> Our Circuit Court's decision in *VoteVets* does not dictate a different result . . . . [There,] the complaint alleged that the purported committee members referred to themselves as a 'group' and a 'team,' and that this viewpoint was shared by those in the federal agency with which the purported committee worked. . . . Plaintiffs there also detailed how members of the committee worked together to consult with each other, kept each other apprised of events that others missed, and offered their recommendations jointly . . . . –detailed allegations indicating collaboration and the provision of collective advice that are conspicuously absent here.

Am. Oversight, 2021 WL 4355576, at *8 (citing *VoteVets*, 992 F.3d at 1104-05). So, too, here. The FACA claim should be dismissed.

2. Alternatively, Defendant Is Entitled to Summary Judgment

Alternatively, to the extent the Court does not dismiss the FACA, it should grant summary judgment in Defendant's favor on the basis of the undisputed, material facts set forth in the Harrington Declaration. Plaintiffs claim that "genuine" fact issues exists as to (1) "[w]hether the . . . Working Group "provided collective advice or recommendations to the EAC," Pls. Statement of Genuine Issues of Material Fact, Dtk. No. 19-2, ¶ 1, and (2) "whether individual members of the . . . Working Group in effect had votes or vetoes," *id.* ¶ 2. But, crucially, Plaintiffs do not dispute any of the following, specific facts established by the Harrington Declaration:

- That Ms. Harrington, the EAC's Executive Director, expressly informed the Working Group at its outset that "[t]his is an informal discussion in the sense that we are not an official FACA board that is going to be advising the agency." Harrington Decl. ¶ 10.
- That during the Working Group meetings, the EAC solicited *individual* input from attendees of the Working Group on any concerns they held related to future implementation challenges that could arise if VVSG 2.0 was approved, including based on their prior experience with VVSG 1.0 and 1.1 implementation. *Id.* ¶ 11.
- That the EAC did not create, approve, or utilize either any organization or leadership structure for the Working Group, or any subgroups of the Working Group based on subject matter expertise or any other organizing principle. Rather, attendees shared only their individual views on all issues discussed at the meetings. *Id.* ¶ 12.
- That the EAC did not create, approve, or utilize any process through which the attendees of the Working Group could either vote on or veto any collective advice or recommendations concerning VVSG 2.0. At no time during any Working Group meeting did a vote on any issue occur. *Id.* ¶ 13.
- That the EAC did not create, approve, or utilize any process through which the attendees of the Working Group could arrive at collective recommendations concerning VVSG 2.0. *Id.* ¶ 14.

Although Plaintiffs assert that there is "reason to believe that, during the course of the members' discussions as a group over the course of five meetings … the group coalesced around particular points such that their communications to the EAC took the form of collective advice or recommendations," Opp. at 39, this contention is both conclusory, and foreclosed by the undisputed facts established by the Harrington Declaration. *See, e.g., Fischer v. U.S. Dep't of Justice*, 723 F. Supp. 2d 104, 108 (D.D.C. 2010) (government officials' declarations are entitled to a presumption of good faith).

Moreover, to the extent that the thrust of Plaintiffs' assertion is that certain participants may have—of their own individual accord—coincidentally offered similar comments during the course of Working Group discussions, any such contention is legally irrelevant, even if true. Rather, as explained above, the dispositive inquiry is whether the group in question was organized with the purpose of, and was thus "*expected to* make substantive group recommendations or decisions . . . at the behest of the executive. Absent any indication that such a *structure* exists, there can be no FACA obligation." *Food & Water Watch*, 357 F. Supp. 3d at 12 (emphases added); *see also AAPS*, 997 F.2d at

914 (noting that FACA advisory committees bestow political legitimacy on the executive decisions they support "only insofar as their members act as a group. The whole, in other words, must be greater than the sum of the parts."); *Am. Soc'y of Dermatology v. Shalala*, 962 F. Supp. 141, 148 (D.D.C. 1996) (no FACA committee in the absence of an "*attempt to* achieve a consensus among the panelists") (emphasis added), *aff'd*, 116 F.3d 941 (D.C. Cir. 1997).

In sum, the Harrington Declaration conclusively establishes that the Working Group was *structured* to solicit only the individual views of its participants, and therefore did not fall within the ambit of FACA. To the extent the Court does not dismiss the claim, it should thus grant partial summary judgment in Defendants' favor.

3. Plaintiffs Are Not Entitled to Discovery under Rule 56(d)

Plaintiffs' request for discovery pursuant to Federal Rule of Civil Procedure 56(d) should also be denied. To forestall the entry of summary judgment under Rule 56(d), Plaintiffs bear the burden of demonstrating "with 'sufficient particularity . . . why discovery [is] necessary.'" *Ikossi v. Dep't of Navy*, 516 F.3d 1037, 1045 (D.C. Cir. 2008). Rule 56(d) requires Plaintiffs to submit an affidavit that satisfies three criteria: (1) "it must outline the particular facts [they] intend[] to discover and describe why those facts are necessary to the litigation"; (2) "it must explain 'why [they] could not produce [the facts] in opposition to the motion [for summary judgment];'" and (3) "it must show the information is in fact discoverable." *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99–100 (D.C. Cir. 2012). "The information identified must offer a 'reasonable basis to suggest that discovery' will bear out its claims." *Ramos v. Lynch*, 267 F. Supp. 3d 39, 45 (D.D.C. 2017) (quoting *Carpenter v. Fed. Nat'l Mortg. Ass'n*, 174 F.3d 231, 237-38 (D.C. Cir. 1999)). Thus, in order to demonstrate entitlement to relief, the affidavit must "be factually supported and may not rely on conclusory assertions." *Hinds v. Mulvaney*, 296 F. Supp. 3d 220, 244 (D.D.C. 2018). The D.C. Circuit has cautioned, moreover, that "[i]t is . . . incorrect to conclude" that Rule 56(d) requests should be

granted "more often than not;" rather, each request must be resolved "based on [the] application of the *Convertino* criteria to the specific facts and circumstances presented in the request." *United States ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 26-27 (D.C. Cir. 2014).

Plaintiffs fail to establish any entitlement to discovery under these standards. Rule 56(d) requires the plaintiff to show, via affidavit, what facts it intends to discover, why those facts are necessary to the ligation, and why they could not be presented earlier. But Plaintiffs only identify what facts they seek. *See* Greenhalgh Decl. ¶ 11 (asserting a need for discovery to determine "definitively whether the participants in [the Working Group] gave advice or made recommendations to the EAC as a group"). They do not say *why* those facts are necessary to the litigation, as they must do under *Convertino*. *See* 684 F.3d at 99. And, as discussed in the preceding section, to the extent that Plaintiffs' theory is that certain members have have—individually—offered similar input during the Working Group meetings, any such facts would, even if (*arguendo*) proved true, be legally irrelevant, where the group was not *structured* to provide collective advice. Plaintiffs thus fail satisfy their burden to "offer a reasonable basis to suggest that discovery will bear out [their] claims." *Ramos*, 267 F. Supp. 3d at 45; *see also Moseley v. King*, 197 F. Supp. 3d 210, 219 (D.D.C. 2016) (plaintiff must demonstrate that its requested discovery "would alter the court's determination" regarding summary judgment); *Graham v. Mukasey*, 608 F. Supp. 2d 50, 54 (D.D.C. 2009) ("A Rule 56[(d)] motion for additional discovery is not designed to allow 'fishing expeditions,' and plaintiffs must specifically explain what their proposed discovery would likely reveal and why that revelation would advance the plaintiffs' case.").

Plaintiffs' request for Rule 56(d) discovery should, accordingly, be denied.

CONCLUSION

The Court should dismiss this action for lack of subject matter jurisdiction and failure to state a claim; or, in the alternative, enter partial entry of summary judgment as to the FACA claim.

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Respectfully submitted,

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