IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD & WATER WATCH, Plaintiff, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants.	Civil Action No. 1:17-1485 (ESH)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

In this action, Plaintiff hypothesizes that the President, almost immediately upon taking office, established a de facto infrastructure advisory committee, which Plaintiff calls "the Infrastructure Council," and that this alleged Council met and operated in violation of the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1–15. As Plaintiff acknowledges, the President did not issue Executive Order 13805, beginning the process of establishing an infrastructure advisory council, until July 2017. In August, the President announced he would not move forward with such a council, and he revoked Executive Order 13805 in September. Yet, while in its Amended Complaint Plaintiff has abandoned some claims asserting an ongoing FACA violation, it continues to assert that the alleged Infrastructure Council had meetings in the past and relayed advice to Defendants the President and the U.S. Department of Transportation ("Defendants"). Plaintiff asserts claims under the Mandamus Act, 28 U.S.C. § 1361; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, seeking a declaration that Defendants failed to ensure that the alleged Infrastructure Council was fairly balanced, and seeking to compel Defendants to provide documents and minutes related to the Council's supposed meetings.

Plaintiff's claims must be dismissed. Plaintiff's Amended Complaint offers nothing but unsupported inferences and speculation regarding the existence of the alleged Infrastructure Council that it describes. Plaintiff identifies no facts that plausibly support the notion that such a council had meetings or provided advice, much less that Defendants relied on such advice in any action that they have taken. Plaintiff therefore fails to identify a cognizable injury sufficient to support standing, and its claims are unripe. Moreover, even if the Court had jurisdiction to consider Plaintiff's claims at the time Plaintiff filed its Complaint, those claims are now moot in

light of the President's decision not to move forward with an infrastructure advisory council. That decision had nothing to do with this case but instead reflects the President's conclusion that such groups had become too politicized and follows on his decisions, in the same period, to end two other initiatives. Plaintiff's claims therefore should be dismissed for lack of subject matter jurisdiction.

The Court also lacks jurisdiction over Plaintiff's Mandamus Act claims because Plaintiff has failed to identify a clear and indisputable right to relief, as would be necessary to invoke this drastic and extraordinary remedy. Plaintiff's APA claims are also barred because it has not identified a final agency action as the object of its challenge. This action therefore should be dismissed in its entirety.

BACKGROUND

I. Statutory Background

FACA, 5 U.S.C. app. 2 §§ 1–15, imposes a variety of requirements on "advisory committees," which are defined to include "any committee . . . which is . . . established or utilized by the President, or . . . by one or more agencies, in the interest of obtaining advice or recommendations." 5 U.S.C. app. 2 § 3(2). The definition excludes committees comprised wholly of Federal Government employees. *Id.* The purpose of FACA, enacted in 1972, "was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 445–46 (1989) (quoting 5 U.S.C. app. 2 § 2(a)) (citation omitted).

FACA places limits on the creation and operation of bodies that fall within the Act's definition of "advisory committee." 5 U.S.C. app. 2 § 3(2). Before an advisory committee "meet[s] or take[s] any action," an advisory committee charter must be filed. *Id.* § 9(c). In addition, advisory committees must announce their upcoming meetings in the Federal Register; hold their meetings in public; allow interested persons to attend; keep detailed minutes of each meeting; and publicly disclose certain documents. *Id.* §§ 10(a)-(c), 11. An advisory committee must also "be fairly balanced in terms of the points of view represented" and may "not be inappropriately influenced by the appointing authority or by any special interest." *Id*. § 5(b)(2), (3) & (c); *see also In re Cheney*, 406 F.3d 723, 727 (D.C. Cir. 2005).

II. Factual and Procedural Background

A. Presidential Advisory Council on Infrastructure

At the time he took office in January 2017, the President was interested in establishing a new infrastructure advisory council. Declaration of Reed S. Cordish ("Cordish Decl.") ¶ 4 [ECF 8-2]. The President anticipated that two businessmen, Richard LeFrak and Steven Roth, would lead the council once it was formed. *Id.* Over the next six months, White House staff and others engaged in some preliminary discussions regarding how such an advisory council would operate and what its mission would be. *Id.* ¶ 5. As a result of these discussions, the President issued an Executive Order on July 19, 2017, authorizing the establishment of a Presidential Advisory Council on Infrastructure in the Department of Commerce. E.O. 13805 § 2, 82 Fed. Reg. 34383 (July 19, 2017); *see* Cordish Decl. ¶ 7.

Pursuant to Executive Order 13805, the Council would have no more than fifteen members representing various infrastructure interests. E.O. 13805 § 3. The Executive Order further states that the Secretary of Commerce "shall, within 60 days of [July 19, 2017], submit questions to the Council for consideration in its work and report." *Id.* § 5(b). Ultimately, the

Council was to submit to the President "a report containing its findings and recommendations" on certain infrastructure-related topics identified in the Executive Order. *Id.* §§ 4, 6. The Council would terminate "on December 31, 2018, unless extended by the President before that date, or within 60 days after submitting its report . . ., whichever occurs first." *Id.* § 7. The Executive Order further provided that, "[i]nsofar as [FACA] may apply to the Council, any functions of the President under [FACA], except for those in section 6 and section 14 of that Act, shall be performed by the Secretary of Commerce." *Id.* § 5(d).

Although the Executive Order formally authorized the establishment of the Council, it was anticipated that a charter, describing the Council's operation in greater detail, would be executed and filed before any members were appointed to the Council and before the Council began to operate. Cordish Decl. ¶ 6. The process of drafting a charter began in April 2017. *Id.* However, before any such charter had been finalized, the President decided not to proceed with an infrastructure advisory council based on his conclusion that such entities had become too politicized. *Id.* ¶ 8. On August 17, 2017, after the President had ended two other initiatives, the White House announced that the Council would not move forward. *Id.* No members were ever appointed to the infrastructure advisory council that the President had anticipated, nor was a charter ever filed. *Id.*; Declaration of James W. Uthmeier ("Uthmeier Decl.") ¶ 8 [ECF 8-3]. The Department of Commerce therefore never carried out any of its obligations under Executive Order 13805. Uthmeier Decl. ¶¶ 8-9.

On September 29, 2017, the President signed Executive Order 13811, which revoked Executive Order 13805. *See* E.O. 13811 § 3, 82 Fed. Reg. 46363 (Sept. 29, 2017).

B. Procedural History

Plaintiff filed suit on July 25, 2017, less than a week after the President issued Executive Order 13805. Compl. [ECF 1.] Originally naming the President and the Departments of

Transportation and Commerce as defendants, Plaintiff claimed that the President had established an Infrastructure Council in January 2017 and that the Council was continuing to operate in violation of FACA. Despite the White House's August 17 announcement that the plans to establish a Presidential Advisory Council on Infrastructure would not go forward, and the September 29 revocation of Executive Order 13805, Plaintiff did not withdraw or amend its Complaint. However, after Defendants moved to dismiss [ECF 8], Plaintiff filed an Amended Complaint on November 20, 2017, naming the President and the Department of Transportation as Defendants. *See* Am. Compl. [ECF 11.]

In its Amended Complaint, Plaintiff claims that "[i]n January 2017, President Trump established an Infrastructure Council" to "advise himself and DOT on matters related to infrastructure policy." *Id.* ¶ 2. In particular, Plaintiff claims that the alleged Infrastructure Council was established "to advise the White House and DOT on developing and implementing [an] Infrastructure Plan." *Id.* ¶ 20. Plaintiff acknowledges that no Infrastructure Plan has been issued publicly but cites statements by White House adviser Reed Cordish in November 2017—three months after the President announced that he would not move forward with an infrastructure advisory committee—that the Administration has prepared a 70-page memorandum setting forth principles for such a plan. *Id.* ¶ 38.

Plaintiff does not identify any meeting held by the alleged Council, any advice or recommendation that it has provided, or any action that was taken based on such advice or recommendation. Rather, Plaintiff suggests that, "[u]pon information and belief, the Infrastructure Council has met on numerous occasions since January 20, 2017 to provide advice and recommendations on infrastructure policy to Defendants." *Id.* ¶ 32. Plaintiff similarly makes the conclusory assertion that "[t]he Infrastructure Council has provided advice to the President,

the Department of Transportation, and the executive branch, generally." *Id.* ¶ 35. Plaintiff then asserts that certain actions by the Trump Administration "mirror the advice provided by the Infrastructure Council." *Id.* ¶ 36. Specifically, Plaintiff cites a June 7, 2017 Fact Sheet ("June 7 Fact Sheet") released by the White House. *Id.* ¶ 36(a) (citing Press Release, The White House, President Donald J. Trump Works to Rebuild American Infrastructure (June 7, 2017), https://www.whitehouse.gov/the-press-office-2017/06/07/president-donald=j-trump-workds-rebuld-american-infrastructure). Plaintiff also cites Executive Order 13807, 82 Fed. Reg. 40463 (Aug. 15, 2017). Am. Compl. ¶ 36(b)-(e). Finally, Plaintiff cites the alleged unpublished 70-page memorandum that, according to Plaintiff, "detail[s] the Administration's infrastructure plan." *Id.* ¶ 38.

Plaintiff asserts that the alleged "Infrastructure Council" that it describes has been operating in violation of FACA because no charter has been filed. *Id.* ¶ 50. Plaintiff also claims that the membership of this alleged council is not fairly balanced and that it has convened meetings without publishing notice, keeping detailed minutes, or making documents available, in violation of FACA, 5 U.S.C. app. 2 §§ 5, 10. Am. Compl. ¶¶ 51-52. Plaintiff brings claims against the President and the Department under the Mandamus Act, 28 U.S.C. § 1361 and the APA, 5 U.S.C. § 706. Am. Compl. §§ 54-59 (causes of action identified in heading). Plaintiff asks the Court for declaratory and injunctive relief, including the production of "all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Infrastructure Council," and to vacate any (unspecified) actions taken in violation of FACA. *Id.* at 20.

STANDARD OF REVIEW

Defendants move to dismiss this case for lack of jurisdiction under Federal Rule of Civil

Procedure 12(b)(1) and failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). A federal court is presumed to lack subject matter jurisdiction until the plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A plaintiff's claims of jurisdiction should be closely scrutinized because a court has "an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). "Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011).

In evaluating a motion to dismiss, "the Court must 'treat the complaint's factual allegations as true . . . and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Shibeshi v. United States*, 920 F. Supp. 2d 105, 106 (D.D.C. 2013) (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000)). "The Court need not accept as true, however, 'a legal conclusion couched as a factual allegation,' nor an inference unsupported by the facts set forth in the Complaint." *Id*. (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)) (alterations in original).

Further, when evaluating a motion to dismiss for lack of subject matter jurisdiction, the Court may look to matters outside the complaint. *See Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992) ("[W]here necessary, the court may consider the complaint

supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.").

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFF FAILS TO ESTABLISH ITS STANDING TO CHALLENGE AN ALLEGED INFRASTRUCTURE ADVISORY COUNCIL

A. Plaintiff Fails to Satisfy the Requirements of Organizational Standing

This case should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because Plaintiff lacks standing to assert its claims of alleged FACA violations under either the Mandamus Act or the APA. First, Plaintiff fails to meet the requirements for organizational standing. "As an organization, [Plaintiff] can assert standing on its own behalf, on behalf of its members or both." *PETA v. U.S. Dep't of Agric*., 797 F.3d 1087, 1093 (D.C. Cir. 2015) (internal quotation omitted). Here, Plaintiff asserts standing on its own behalf and on behalf of its members. *See* Compl. ¶¶ 14-15.

In regard to Plaintiff's assertion of standing on its own behalf, Plaintiff "must state a plausible claim that [1] [it] has suffered an injury in fact [2] fairly traceable to the actions of the defendant [3] that is likely to be redressed by a favorable decision on the merits." *Humane Soc'y v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). An organizational plaintiff may satisfy the first prong of standing—the injury-in-fact requirement—only if it identifies a "concrete and demonstrable injury to its activities," rather than "merely a setback to its abstract social interests." *PETA*, 707 F.3d at 1094 (internal quotation omitted). In the D.C. Circuit, the organization must also show that the challenged government conduct "'directly conflict[s] with the organization's mission,'" and that the organization "has expended resources to counteract the injury to its ability to achieve its mission and not simply as a product of 'unnecessary alarmism constituting a self-inflicted injury.'" *Chesapeake Climate Action Network v. Exp.-Imp. Bank*, 78 F. Supp. 3d 208, 229

(D.D.C. 2015) (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996)). In addition, as with any plaintiff, the asserted injury must be "actual or imminent, not conjectural or hypothetical." *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 810 F.3d 827, 829 (D.C. Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Plaintiff fails to identify a concrete and demonstrable injury to its activities that satisfies this standard. Plaintiff asserts an interest in "infrastructure related to water resources," and in particular alleges that it "works to prevent water privatization" and "encourage[es] and help[s] to arrange public-public partnerships." Am. Compl. ¶ 7. It does this by publishing "evidence-based reports and fact sheets," by "work[ing] closely with local governments" to "encourage[e] public-public partnerships," and by "advocat[ing] at the federal level for laws and policies that support" public control over water systems. *Id.* ¶ 8. According to Plaintiff, the Trump Administration has undertaken "efforts . . . to make it easier for private companies to assert control over water," and has "adopt[ed] policies . . . that pave the way for increased private control of water resources." *Id.* ¶ 14. Plaintiff asserts that these efforts and policies are "consistent with advice from the Infrastructure Council." *Id.* Plaintiff also asserts that, as a result of the Trump Administration's efforts, Plaintiff has diverted resources "away from local community engagement to a more robust effort at the federal level," and has expended resources in an attempt to "obtain information" about what the Trump Administration's infrastructure policies are, "educat[e] its members and local stakeholders" about those policies, and "develop[] strategies to help public entities continue controlling water resources despite" those policies. *Id.*

These assertions do not support Plaintiff's standing. For one thing, Plaintiff's general assertion that its "mission and priorities" have been "frustrate[d]" because the Administration

favors contrary policies, Am. Compl. ¶ 14, is exactly the kind of "'abstract concern that does not impart standing.'" *Chesapeake Climate Action Network*, 78 F. Supp. 3d at 230; *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (holding Plaintiff lacked standing in that case under D.C. Circuit precedent that "ma[de] clear that an organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury").

Beyond that general assertion, Plaintiff's descriptions of supposed injuries are vague and fail to identify any concrete diversion of resources. Moreover, the activities Plaintiff describes—lobbying, seeking and providing information, and encouraging public control of water resources—are the same advocacy activities that Plaintiff describes as its core functions. *Cf.* Am. Compl. ¶ 8. This Circuit recognizes that an advocacy organization's choice to focus its efforts in opposition to a specific government action is not "diversion" but instead amounts to a budgetary decision regarding ordinary program costs. *E.g.*, *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (plaintiff's asserted "expend[iture of] resources to educate its members and others" regarding the law it sought to challenge did not qualify as an injury because such expenditures were "ordinary program costs," in furtherance of the plaintiff's mission to monitor the government's revenue practices); *Fair Emp't Council v. BMC Mktg. Corp*., 28 F.3d 1268, 1276 (D.C. Cir. 1994) (organization's choice to expend resources on "testers" to confirm a suspicion that the defendant engaged in employment discrimination was a "self-inflicted" harm, resulting "not from any actions taken by [the defendant], but rather from [the organization's] own budgetary choices," reflecting a decision "that its money would be better spent by testing [the defendant] than by counseling or researching"); *Chesapeake Climate Action Network*, 78 F. Supp. 3d at 231-32 (plaintiff organization had been advocating to

strengthen the Export-Import Bank's environmental regulations for eighteen years, so alleged expenditure of resources on such efforts as a result of the decision it sought to challenge was merely an "ordinary program cost"); *Humane Soc'y v. Vilsack*, 19 F. Supp. 3d 24, 46 (D.D.C. 2013) ("spending funds to counteract opposition to a legislative agenda is a normal and critical part of the [organization's] mission and operations," so "the fact that they have decided to redirect some of their resources from one legislative agenda to another" as a result of the defendant's actions "is insufficient to give them standing"), *rev'd on other grounds*, 797 F.3d 4 (D.C. Cir. 2015). The expenditures that Plaintiff describes fall well within the realm of its ordinary activities and thus are simply ordinary program costs (*e.g.*, diverting resources to a "more robust effort at the federal level" when "advocat[ing] at the federal level for laws and policies that support" public control over water systems is already part of its mission, Am. Compl. ¶¶ 8, 14). Plaintiff's choice to focus its resources on one aspect of its normal activities rather than another is a normal budgetary decision, not a "diversion" that qualifies as an injury-in-fact.

Critically, Plaintiff fails to allege that its activities have been impeded in any way by any action of Defendants that was based on advice from an alleged Infrastructure Council. *See Chesapeake Climate Action Network*, 78 F. Supp. 3d at 231 (rejecting plaintiff's argument where it failed to "identify a single organizational activity or service" that the challenged action "has impeded," nor explained "why an increase in advocacy resources is necessary to counteract the unidentified impediment"). That failure is not surprising because Plaintiff fails to identify any concrete action by the Administration, much less one that was based on advice from an alleged Infrastructure Council. Rather, it asserts that the Administration has attempted to "make it easier" and "pave the way" for private water companies to increase their control over water

resources. Am. Compl. ¶ 14.

However, Plaintiff fails to identify any concrete impact that the Administration's efforts and policies actually had on private water companies. And even if there were a direct link between unidentified private water companies' success and Plaintiff's failure—a link that Plaintiff fails to allege—Plaintiff cannot establish standing based on the acts of "unknown third parties not before the Court" unless it shows that those acts are fairly traceable to the Administration. *See In re OPM Data Security Breach Litig.*, 266 F. Supp. 3d 1, 36 (D.D.C. 2017) (citing *Food & Water Watch v. U.S. EPA*, 5 F. Supp. 3d 62, 76 (D.D.C. 2013)). In a similar situation, the D.C. Circuit held that a plaintiff lacked organizational standing to challenge Department of Transportation guidance that, according to the plaintiff, "made it easier for states to erect digital billboards" and, as a result, led the plaintiff to spend greater resources opposing such billboards, because the asserted injuries stemmed "from third parties not directly before the court—the Division Offices and the states"—and were not redressable. *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 50-51 (D.C. Cir. 2016) ("Without providing any indication that our vacatur of the Guidance will diminish the number of billboards Scenic has to fight, Scenic has failed to demonstrate that [vacatur] would prevent Scenic from having to expend the same amount of resources fighting these billboards."), *cert. denied* 138 S. Ct. 2 (2017).

Here, Plaintiff has failed to set forth any facts that plausibly allege a connection between any Executive action and any action by private water companies, much less that any action by this Court could impact those companies. Indeed, it is implausible that any of the three Executive actions that Plaintiff identifies—the President's preparation of an infrastructure plan that has not yet been submitted to Congress; statements issued in the White House's June 7 Fact Sheet, setting forth general goals; and the President's issuance of E.O. 13807, setting forth a policy on

environmental review and permitting that agencies would have to implement—could have affected private water companies since they would have to be implemented in some form by other parts of the Government to have any effect at all. Plaintiff also offers nothing other than speculation regarding any input by an alleged Infrastructure Council on such actions.[1] Plaintiff therefore has not satisfied the injury-in-fact requirements specific to organizational standing, and its claims should be dismissed for that reason alone.

B. Plaintiff Cannot Rely on Speculative Assertions of Procedural Injury Under FACA to Establish Standing

Absent any concrete and demonstrable harm to its activities, Plaintiff cannot rely on alleged procedural violations of FACA as a source of injury. As the D.C. Circuit has recognized, a plaintiff asserting a procedural injury under FACA "must still demonstrate 'a distinct risk to a particularized interest.'" *R.J. Reynolds Tobacco Co.*, 810 F.3d at 829 (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc)); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). Plaintiff's assertions of procedural FACA violations are insufficient to establish standing, particularly where its assertions regarding an alleged Infrastructure Council are themselves vague and speculative.

In *R.J. Reynolds*, the D.C. Circuit held that the plaintiff lacked standing to challenge the composition of an advisory committee because it had failed to identify a risk of imminent injury sufficient to support standing. *R.J. Reynolds Tobacco Co.*, 810 F.3d. at 832. In that case, the advisory committee had submitted a report to the Food and Drug Administration ("FDA"), but

[1] The speculative nature of Plaintiff's assertions regarding an alleged Infrastructure Council's impact on these actions is discussed in further detail in the next section below.

the FDA had not yet issued a final rule based on that report. *Id.* at 830. As the D.C. Circuit explained, the procedural FACA violation that the plaintiff alleged "by no means rendered the risk of eventual adverse FDA action substantially probable or imminent." *Id.* Indeed, because "[i]t remains unclear whether the FDA will issue a final rule, and what it would say," the court concluded that "the extent to which the FDA would be persuaded by the content of the Committee's report" during any such rulemaking "is quite speculative." *Id.* The court thus held that the plaintiff's alleged injuries were "too remote and uncertain, or, to put the same thing another way, insufficiently imminent," to satisfy the Article III requirements of standing. *Id.* at 829; *see also Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176, 184, 188 (D.C. Cir. 1977) (holding plaintiff lacked standing to challenge the composition of an advisory committee where, among other things, there was "no allegation that [the agency] took action based on" a committee recommendation).

Plaintiff's assertions in this case are even more speculative than those in *R.J. Reynolds* or *Metcalf*. Plaintiff fails to identify not only any agency action based on the advice or recommendation of the "Infrastructure Council" that it posits, but also any plausible basis to conclude that any such "Infrastructure Council" existed in the first place, much less that it provided any advice or recommendation as a council, or that Defendants took any action based on any such advice or recommendation. Although the President's Executive Order stated that the planned Presidential Advisory Council on Infrastructure would at some point issue a report, Plaintiff does not assert that any such report was ever issued, nor does it allege that such a report was considered by the President or the Department of Transportation in connection with any particular decision or final agency action.

Plaintiff does make conclusory assertions that the alleged "Infrastructure Council" had a

membership and held meetings, but its allegations are too speculative to meet the plausibility standard of *Iqbal*/*Twombly*. *Iqbal*, 556 U.S. at 678 (rejecting "'naked assertion[s]' devoid of 'further factual enhancement'" as insufficient). For instance, the Amended Complaint alleges that "[u]pon information and belief, the Infrastructure Council has met on numerous occasions since January 20, 2017 to provide advice and recommendations on infrastructure policy to Defendants." Am. Compl. ¶ 32. In support of this statement, Plaintiff relies solely on newspaper articles and other online reports by third parties, which generally "constitute inadmissible hearsay," *Atkins v. Fischer*, 232 F.R.D. 116, 132 (D.D.C. 2005), and thus are of questionable value in establishing the plausibility of a plaintiff's assertions.

But more fundamentally, the articles show no more than, at most, the President *planning* to set up an infrastructure advisory council while meanwhile continuing to receive input from various individuals about infrastructure issues. The articles do not plausibly identify advice or recommendations of an infrastructure advisory council, nor any meetings of such a council. Indeed, a number of these articles acknowledged that no infrastructure advisory council was in operation. For example, Plaintiff quotes a February 15, 2017 *Bloomberg News* article as repeating a statement by LeFrak regarding his "assignment," but immediately after that statement, the article acknowledges that "LeFrak isn't discussing the [planned] council further because it hasn't been formed yet."[2] Plaintiff also cites an April 11, 2017 *Associated Press* article; that article states that although "Trump has previously suggested that [LeFrak and Roth] would help oversee a new commission[,] . . . . for now, [they] appear to have far more limited

[2] *See* Sarah Mulholland & Mark Niquette, Bloomberg News (Feb. 15, 2017), https://www.bloomberg.com/news/articles/2017-02-15/trump-ties-to-infrastructure-advisers-roth-and-lefrak-run-deep.

roles," involving "consult[ing] from time to time" with another White House initiative.[3]

A *New York Times* article cited by Plaintiff describes a "conversation" (not a meeting) between the President and LeFrak at the Mar-a-Lago resort, where the two reportedly talked about the price the Department of Homeland Security was quoting for the proposed border wall with Mexico. A *Reuters* article cited by Plaintiff describes a March 8, 2017, meeting between the President, private parties, and federal officials, but does not suggest it was a meeting of any infrastructure advisory council. To the contrary, the article explains that "LeFrak and Roth have been tapped to lead an infrastructure council that Trump *plans* to create" (emphasis added).[4]

Plaintiff's allegations of discussions between the President and private individuals about infrastructure are insufficient to allege the establishment of a federal advisory committee. In order for FACA to apply, the Government must receive group, as opposed to individual, advice. 41 C.F.R. § 102-3.40(e) (group of individuals "assembled to provide individual advice" is not a

[3] Associated Press (April 11, 2017), http://abcnews.go.com/amp/Politics/wireStory/trump-regulations-streamlined-infrastructure-bill-46738625 .

[4] Another *Reuters* article cited by Plaintiff reports that, according to LeFrak, "the group" led by LeFrak and Roth made a suggestion at the March 8 meeting regarding an "arbitration-style pilot program" as a means of speeding up project approvals. *Reuters* (Mar. 14, 2017), https://www.reuters.com/article/us-usa-trump-infrastructure/trump-advisers-see-arbitration-as-way-to-speed-infrastructure-plans-idUSKBN16L2VE. However, although this meeting was widely reported, no other sources, including the contemporaneous *Reuters* report cited above, identified this meeting as a meeting involving an infrastructure advisory council. In addition, the attendees at this March 8 meeting included not only individuals—such as Elon Musk and Nature Conservancy Managing Director Lynn Scarlett—who have never identified themselves as members of an infrastructure advisory committee, but also the President, the Vice President, Secretary Chao, Secretary Perry, and EPA Chief Pruitt, among others. By its nature, a meeting involving the President and other senior officials would not plausibly qualify as a meeting seeking to reach a consensus regarding advice, as would be required to qualify as a meeting where FACA applied. Rather, such a meeting by all appearances was a group of individuals "assembled to provide individual advice" to the Administration. 41 C.F.R. § 102-3.40(e). Moreover, no "arbitration-style pilot program" has been implemented as a result of this reported suggestion, precluding any procedural injury on such a ground.

committee subject to FACA); *see also In re Cheney*, 406 F.3d at 730–31 (holding task force sub-groups were not FACA committees in part because their meetings with individuals who were not federal employees did not "involve deliberations or any effort to achieve consensus on advice or recommendations" but merely "collect[ed] individual views"); *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 34 (D.D.C. 2011) (citing *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913-14 (D.C. Cir. 1993), which held that, when members of a group composed of federal officials held forums with non-federal stakeholders to gather information, the meetings did not violate FACA because no effort was made to reach a consensus or bring a collective judgment to bear); *Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975) (meetings between an Assistant to the President and various executive branch officials and special interest groups, held for the purpose of exchanging views, did not constitute an advisory committee under FACA; alleged committees "were not formally organized and there is little or no continuity").

Plaintiff also fails to assert facts that plausibly link the alleged Infrastructure Council to any action by Defendants that could possibly have caused Plaintiff injury. Plaintiff emphasizes the President's "Infrastructure Plan," but it acknowledges that no such plan has been issued, nor are the contents of any such plan known. *See* Am. Compl. ¶ 38. Given that the infrastructure advisory committee that the President planned to establish was halted almost five months ago, any suggestion that this not-yet-issued Infrastructure Plan will rely on advice by an alleged Infrastructure Council is implausible.

Plaintiff otherwise attempts to establish a link between an alleged Council and Executive action by citing similarities between statements made by LeFrak, one of the would-be co-chairs of the infrastructure advisory council, before its establishment was halted, and statements issued

in the White House's June 7 Fact Sheet and an Executive Order 13807, issued August 15, 2017. *E.g.*, Am. Compl. ¶¶ 28-36. Plaintiff essentially asks the Court to draw a series of inferences to conclude, first, that LeFrak's statements (again, as reported in newspapers) represent advice of the alleged Infrastructure Council, and second, that because the Administration issued policy goals that resembled those statements, it must have been relying on advice from the alleged Council. As explained above, such inferences are unwarranted because statements by individuals are not the same as advisory council advice, and Plaintiff admits that LeFrak had promoted the same ideas before he was ever designated as a future co-chair. *See id.* ¶ 36(d) (asserting LeFrak provided the same recommendation that the LeFrak Organization had previously supported through lobbying efforts).

Plaintiff's theory also fails because the White House statements about infrastructure that Plaintiff identifies—which focus on the need to expedite infrastructure projects, reduce permitting time, and involve private entities as well as State and local governments in funding infrastructure[5]—"mirror" not only individual opinions expressed by Lefrak, as reported in articles cited by Plaintiff, *see* Am. Compl. ¶ 36, but also those of numerous other businessmen and others who have had access to the Administration.[6] Indeed, these are commonplace views

[5] *See* Press Release, The White House, President Donald J. Trump Works to Rebuild American Infrastructure (June 7, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-works-rebuild-american-infrastructure/; E.O. 13807.

[6] For example, an article Plaintiff cites reports that "Dan Slane, an Ohio real estate developer who advised Trump on infrastructure between Election Day and the Inauguration, agrees speed is essential." Tom Scheck, https://www.apmreports.org/story/2017/05/11/trump-infrastructure-projects. The same article reports that the Trump Campaign issued a proposal to provide tax credits to private investors in infrastructure in October 2016. *Id.* In addition, the article reports that Norman Anderson of CG/LA Inc., an infrastructure consulting firm, "met privately with White House officials in April" 2017 and "push[ed] them to first consider private investment." *Id.* The article also reports on a meeting of North Dakota State and local officials with Office of

that many involved in infrastructure policy have espoused. For example, analysts at the Bipartisan Policy Center have published blog posts, including posts that predate any alleged activity of the alleged Infrastructure Council, that urge similar steps. Andy Winkler's February 2, 2017, post—published less than two weeks after the President's Inauguration—described past efforts to expedite permits for infrastructure projects and urged additional steps to speed up environmental reviews and permit approvals, including "a lead agency to shepherd [projects] through multi-agency reviews."[7] Sarah Kline's post of June 16, 2017, urged progress in public-private partnerships involving State and local governments.[8] This Administration's interest in speeding up permits was evident even before the President took office.[9] Only four days after the Inauguration, the President issued Executive Order 13766, which identified the Administration's policy "to streamline and expedite . . . environmental reviews and [permit] approvals for all infrastructure projects" and provided for certain projects to be identified as "high priority." E.O. 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017). Plaintiff's theory that the ideas set forth in the June 7 Fact Sheet and E.O. 13807 derive from alleged Infrastructure Council advice therefore is pure speculation, and not very believable speculation at that.

Management and Budget Director Mick Mulvaney, proposing an infrastructure project with a public/private partnership. *Id.*

[7] Adam Winkler, https://bipartisanpolicy.org/blog/accelerate-the-permitting-process/ .

[8] Sarah Kline, https://bipartisanpolicy.org/blog/the-public-private-partnership-challenge-in-the-us/.

[9] As reported in an article cited by Plaintiff, "[d]uring his 2016 presidential campaign, President Donald Trump made well known his distaste for the time it takes to usher a federally funded transportation project through the environmental review and permitting process" and promised to "get rid of some or even all of the red tape and bureaucracy" involved. Kim Slowey, https://www.constructiondive.com/news/will-trumps-order-to-speed-up-infrastructure-approvals-work/504384/ .

Moreover, Plaintiff fails to allege that either the June 7 Fact Sheet or E.O. 13807 has had any impact on Plaintiff, nor would such an allegation be plausible. While both documents set forth policy goals of the Administration, neither establishes any rule or requirement applicable to the public. Rather, both documents contemplate that further steps must be taken in order to implement the stated policies. *See* June 7 Fact Sheet (listing general goals); E.O. 13807 § 5(b)(iv) (directing the Council on Environmental Quality and OMB to implement the policy of having a lead Federal agency for each major infrastructure project). Plaintiff's allegations therefore fail to plausibly establish even a procedural injury, and they fall far short of demonstrating an injury-in-fact under *R.J. Reynolds*. [10]

C. Plaintiff Fails to Establish Standing on Behalf of Its Members

Plaintiff also fails to satisfy the requirements of representational standing on behalf of its members. Representational standing requires an organization to establish that "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Scenic Am., Inc.*, 836 F.3d at 50 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Plaintiff has identified one member, Charlie Kratovil, who is a journalist. Am. Compl. ¶ 9. According to Plaintiff, Kravotil has suffered an injury because his "journalistic efforts are made more difficult" by Defendants' alleged "withholding [of] information about infrastructure policy—

[10] Although the Court need not reach the issue, Plaintiff also fails to satisfy the second and third prongs of standing for similar reasons. Any injury that Plaintiff might identify cannot be deemed fairly traceable to an alleged infrastructure advisory council when the questions of whether the alleged council ever existed, as well as whether it provided any advice or recommendations, are matters of pure speculation on Plaintiff's part, nor is such an injury redressable through injunctive or declaratory relief.

specifically as it relates to water privatization." *Id.* ¶ 15. In particular, Plaintiff asserts that Kravotil has been injured by Defendant's withholding "policy proposals developed by the Infrastructure Council, in addition to any meeting minutes or preparatory documents." *Id.*

These allegations appear aimed at establishing an informational injury based on the FACA violations that Plaintiff alleges. However, given the speculative nature of Plaintiff's assertions regarding an alleged Infrastructure Council, and the generalized nature of Kravotil's alleged injury, Plaintiff fails to establish that Kravotil would have informational standing. In order to establish informational standing, a plaintiff must show that "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *EPIC v. Presidential Advisory Comm'n on Election Integrity*, No. 17-5171, 2017 WL 6564621, at *4 (D.C. Cir. Dec. 26, 2017) (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). However, an assertion of harm "common to 'every citizen's interest in proper application of the Constitution and laws,'" and a request for relief "'that no more directly and tangibly benefits [the plaintiff] than it does the public at large—does not state an Article III case or controversy.'" *Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1116 (D.C. Cir. 2017) (quoting *Lujan*, 504 U.S. at 561).

In *Prisology, Inc.*, the D.C. Circuit held that the plaintiff lacked standing to challenge an agency's failure, under the Freedom of Information Act, 5 U.S.C. § 552(a)(2), to make certain records electronically available to the public because any injury based on such a failure "would not differentiate [the plaintiff] from the public at large." *Prisology, Inc.*, 852 F.3d at 1116-17. Rather, such a harm would be "common to everyone, a harm of the sort *Lujan* described as not stating an Article III case or controversy." *Id.* at 1117. Here as well, Plaintiff fails to identify any

concrete injury, specific to Kravotil, resulting from the alleged failure to disclose records relating to alleged meetings by an alleged Infrastructure Council. Plaintiff's vague reference to Kravotil's "journalistic efforts" is insufficient to distinguish him from any member of the public. Indeed, as a journalist, Kravotil presumably acts as a conduit in passing on information to the public. Thus, the only injury that he could sustain from not receiving information is the inability to transmit that information to the public through his reporting. By Plaintiff's own description, Kravotil's interest in access to any improperly withheld documents is thus identical to the public's interest.

In addition, although a court must "assum[e] [the plaintiff's] view of the law wins the day" for purposes of assessing an informational injury, *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity*, 265 F. Supp. 3d 54, 65 (D.D.C. 2017), the plausibility requirements of *Twombly* and *Iqbal* continue to apply to a plaintiff's factual allegations. Given the lack of any plausible factual allegations that an infrastructure advisory council ever met or operated, this case resembles *Friends of Animals*, where the D.C. Circuit held that the plaintiff lacked informational standing because, under the statutory framework at issue there, no disclosure obligation was then in effect; rather, the prerequisite step under the Endangered Species Act that would trigger such an obligation—the determination that a species would be listed as endangered—had not yet occurred. *Friends of Animals*, 828 F.3d at 993.

Similarly here, Plaintiff's Amended Complaint continues to lack any plausible allegation that the equivalent prerequisite steps under FACA have occurred. FACA does not impose any disclosure requirements on advisory committees until they come into existence, plan and hold a meeting, or provide advice or recommendations, *see* 5 U.S.C. app. 2 §§ 9(c) (identifying the filing of a charter as a prerequisite to an advisory committee "meet[ing] or tak[ing] any action"),

10 (setting forth procedures for advisory committee meetings). Yet, as described above, Plaintiff fails to plausibly allege that any of these events have taken place. Plaintiff thus fails to establish a plausible informational injury of its members sufficient to support representational standing. The Court should thus dismiss all of Plaintiff's claims for lack of standing.

II. PLAINTIFF'S CLAIMS ARE UNRIPE

The speculative nature of Plaintiff's asserted injuries also merits dismissal on the ground that its claims are unripe. Standing and ripeness are related insofar as "[b]oth doctrines address the imminence issue, using the same focus on contingencies that may render the risk of harm too slight." *R.J. Reynolds Tobacco Co.*, 810 F.3d at 830. A claim is not ripe for adjudication "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). As described above, Plaintiff's claim here is doubly, if not triply, speculative: First, Plaintiff speculates about the existence of an "Infrastructure Council" in the first place, and about this alleged council's alleged meetings and alleged advice and recommendations produced during those meetings; and second, Plaintiff speculates about the future actions that the President or the Department of Transportation might, or might not, take based on that advice or those recommendations. Meanwhile, the President has decided not to move forward with the alleged council and has revoked the Executive Order authorizing its establishment, *see* E.O. 13811 § 3 (revoking E.O. 13805), making this speculation especially dubious. *See R.J. Reynolds Tobacco Co.*, 810 F.3d at 830-31 ("Ripeness concerns underscore this point: part of the reason the injury is too remote is that, if the [agency] chooses not to issue a rule, this case 'may not require adjudication at all.'" (quoting *Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 235 (D.C. Cir. 1988))). For the same reasons that Plaintiff fails to assert a plausible injury for standing purposes, Plaintiff's claims also are not ripe for review.

III. PLAINTIFF'S CLAIMS ARE MOOT BECAUSE THE PRESIDENT HAS DECIDED NOT TO ESTABLISH AN INFRASTRUCTURE COUNCIL

Not only are Plaintiff's asserted injuries too speculative to support standing or ripeness, but the President's decisions not to move forward with the establishment of a Presidential Advisory Council on Infrastructure, and to revoke the Executive Order authorizing its establishment, also render Plaintiff's claims moot. Cases are moot when "events outrun the controversy such that the court can grant no meaningful relief." *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001). Claims that an advisory committee is operating in violation of FACA—including a claim that the committee is not "fairly balanced," as Plaintiff continues to assert here, Am. Compl. ¶ 55—become moot when the advisory committee ceases to exist, or exists or operates differently than it had in the past. *See Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 223 (D.D.C. 2017) ("courts in the D.C. Circuit have routinely held that claims based on FACA's . . . procedural requirements [other than the document disclosure provision of § 10(b)] are mooted when the relevant advisory committee ceases to exist"); *Freedom Watch, Inc. v. Obama*, 859 F. Supp. 2d 169, 174 (D.D.C. 2012) (holding FACA claims moot "[b]ecause there are no grounds to find that the alleged committee, even if it did at some point exist exists at present"); *Citizens for Responsibility & Ethics in Washington v. Duncan*, 643 F. Supp. 2d 43, 51 (D.D.C. 2009) (dismissing FACA case as moot because the convening of a new panel in compliance with FACA "eliminate[s] the need for this Court to grant declaratory and injunctive relief").

Here, Plaintiff's Amended Complaint has withdrawn any claim to injunctive relief seeking to compel an alleged Infrastructure Council to comply with FACA. However, Plaintiff continues to seek a declaration that such an Infrastructure Council operated in violation of FACA

in the past. Such a request for declaratory relief is also moot when there is no ongoing case or controversy: "Where an intervening event renders the underlying case moot, a declaratory judgment can no longer 'affect[ ] the behavior of the defendant towards the plaintiff,' and thus 'afford[s] the plaintiffs no relief whatsoever.'" *NBC-USA Housing, Inc., Twenty-Six v. Donovan*, 674 F.3d 869, 873 (D.C. Cir. 2012) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), and *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988)); *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) ("any injunction or order declaring [the challenged practice] illegal would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits."). While Plaintiff asks the Court to "[v]acate and set aside as unlawful" "any action" that the Infrastructure Council that it alleges existed actually took, as well as any action taken by Defendants in reliance on the advice of such an Infrastructure Council, it fails to plausibly identify any such action or support the notion that any such action was ever taken. Such a request therefore does not save Plaintiff's claims from mootness.

This Court has recognized that, where the plaintiff's FACA claim seeks to compel the provision of documents that were made available to or prepared for or by an advisory council, as required under 5 U.S.C. app. 2 § 10(b), such a claim may survive the dissolution of the advisory council. *Ctr. for Biological Diversity*, 239 F. Supp. 3d at 228-29. In *Ctr. for Biological Diversity*, however, a strategy team for spotted owl conservation had been in existence and had held meetings, so the obligations of § 10(b) indisputably had been triggered if FACA were held to apply. *See id.* at 228; *see also Byrd v. EPA*, 174 F.3d 239, 244 (1999) (FACA § 10(b) claim for declaratory relief not moot where a peer review panel had provided documents but only significantly after disclosure would have been required under FACA).

Here, on the other hand, the President decided not to move forward with an infrastructure

advisory council while the process of preparing a charter for the council was still underway. Cordish Decl. ¶ 8; Uthmeier Decl. ¶ 8. While Plaintiff asserts that an Infrastructure Council existed even before the Executive Order 13805 was issued, and that it held meetings, those assertions amount to nothing more than speculation, as explained above. Thus, Plaintiff can point to no obligations that arose under § 10(b) as surviving the President's decision not to move forward with the council. Plaintiff's claims to compel documents pursuant to § 10(b) therefore are moot for the same reasons that its other claims are moot.

Further, no exception to mootness is applicable here. The "voluntary cessation" exception to mootness "does not apply when the challenged activity stops for reasons unrelated to litigation." *Wyo. Outdoor Council v. Dombeck*, 148 F. Supp. 2d 1, 8 n. 1 (D.D.C. 2001). Moreover, as the D.C. Circuit has recognized, the government is entitled to particular deference in connection with this exception. "At least in the absence of overwhelming evidence (and perhaps not then), 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." *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (en banc) (challenge to federal statute mooted by expiration of statute); *Citizens for Responsibility & Ethics in Wash. v. SEC*, 858 F. Supp. 2d 51, 61, 62 (D.D.C. 2012) ("[W]here the defendant is a government actor—and not a private litigant—there is less concern about the recurrence of objectionable behavior.").

The circumstances here do not support the application of the voluntary cessation exception. The President's decision not to move forward with an infrastructure advisory council was a result of his view that such councils had become too politicized, and coincided with his similar decisions to end other initiatives that were already in existence. Cordish Decl. ¶ 8. The

decision therefore had nothing to do with this pending action, nor is there any reason to think that the President would change his mind about moving forward with the council if this case were dismissed. In short, because this is a case in which "there is no reasonable expectation that the [alleged] wrong will be repeated," *United States v. W.T. Grant & Co.*, 345 U.S. 629, 632-33 (1953), Plaintiff's request for declaratory and injunctive relief related to Defendants' alleged non-compliance with FACA should be dismissed as moot.[11]

IV. PLAINTIFF FAILS TO ESTABLISH THE COURT'S JURISDICTION UNDER THE MANDAMUS ACT

Plaintiff's claim for relief asserts a single claim under both the Mandamus Act and the APA. However, Plaintiff's Mandamus Act claim should be dismissed because it fails to establish jurisdiction under the Act. Plaintiff asserts claims under the Mandamus Act and the APA because FACA does not contain a private right of action. *See Freedom Watch, Inc.*, 807 F. Supp. 2d at 33-34. In addition, Plaintiff's Mandamus Act claim is presumably aimed at the President because no APA claim could be asserted against the President, *Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 98–99 (D.D.C. 2016) ("The President of the United States is not

[11] Nor does Plaintiff's claim fit into the "narrow exception" to mootness for claims "capable of repetition, yet evading review." *See, e.g.*, *Bois v. Marsh*, 801 F.2d 462, 466 (D.C. Cir. 1986); *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). To qualify for this exception to mootness, a plaintiff must demonstrate that "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Clarke*, 915 F.2d at 704. Plaintiff cannot demonstrate that any future infrastructure advisory committee, in the unlikely event it were to be established, would be "by *its very nature short in duration*, so that it could not, or probably would not, be able to be adjudicated while fully live." *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir.1998) (quoting *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985)) (internal quotation omitted). Indeed, under Executive Order 13805, the anticipated infrastructure advisory council would have continued its operations at least until sixty days after submitting its report or December 31, 2018, whichever was earliest, and might have been extended beyond that date. E.O. 13805 § 7. Nor is there any reasonable expectation that any future infrastructure advisory council would operate in violation of FACA. *See id.* § 5(d).

an 'agency' under the APA." (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992))). The Mandamus Act grants original jurisdiction to district courts "of any action in the nature of mandamus to compel an officer or employee of the United States . . . to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. However, such jurisdiction is "strictly confined." *In re Cheney*, 406 F.3d at 729. Indeed, "mandamus is 'drastic'; it is available only in 'extraordinary situations'; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." *Id.*

Under the Mandamus Act, a plaintiff must show that the defendant "has a clear obligation to perform a duty," that "the plaintiff has a clear right to relief," and that "there is no other adequate remedy available." *Freedom Watch*, 807 F. Supp. 2d at 34. The D.C. Circuit has recognized that, "[i]f there is no clear and compelling duty under the statute as interpreted, the district court must dismiss the action. To this extent, mandamus jurisdiction under § 1361 merges with the merits[.]" *Id.* (quoting *In re Cheney*, 406 F.3d at 729). In *In re Cheney*, the plaintiffs sought to obtain documents relating to the National Energy Policy Development Group ("NEPDG") established by President Bush on the basis that NEPDG was an advisory committee subject to FACA, but the government submitted a declaration explaining that the NEPDG was composed solely of federal employees and thus fell outside FACA's definition of "advisory committee." *See In re Cheney*, 406 F.3d at 730. In light of this evidence, the court held that the plaintiffs failed to show "a clear and indisputable right" under FACA "to have the government perform a duty owed to them" and accordingly held that the plaintiffs' claims should be dismissed. *Id.*

Here, Plaintiff similarly fails to establish a clear and indisputable right to mandamus

relief from the President. Plaintiff's Amended Complaint alleges that the President has failed to require the alleged Infrastructure Council to be "fairly balanced" pursuant to 5 U.S.C. app. 2 § 5(b)(2), Am. Compl. ¶ 55; failed to carry out the "openness" requirements for meetings pursuant to 5 U.S.C. app. 2 § 10(a)(1)-(3), Am. Compl. ¶ 56; failed to create minutes of Infrastructure Council meetings pursuant to 5 U.S.C. app. 2 § 10(c), Am. Compl. ¶ 57; and failed to make Infrastructure Council records available pursuant to 5 U.S.C. app. 2 § 10(b), Am. Compl. ¶ 58. However, Plaintiff does not plausibly allege a clear and indisputable right to any of these supposed requirements vis-a-vis the President. Under Executive Order 13805, even if an obligation under FACA had arisen, and Plaintiff had claimed that it was owed such a duty, this obligation would not belong to the President because the Executive Order delegated such duties to the Secretary of Commerce. *See* E.O. 13805 § 5(d). Moreover, any efforts to establish a Presidential Advisory Council on Infrastructure ceased as of August 17, 2017, Cordish Decl. ¶ 8; no such council ever was established prior to August 17, 2017, *id.*; Uthmeier Decl. ¶¶ 8-9, and the Executive Order authorizing the establishment of such a council has now been revoked, E.O. 13811 § 3. Plaintiff again fails to establish a clear and indisputable right to mandamus relief from the President. Plaintiff's Mandamus Act claim therefore should be dismissed for lack of jurisdiction.

V. PLAINTIFF FAILS TO IDENTIFY A FINAL AGENCY ACTION THAT COULD GIVE RISE TO ITS APA CLAIMS

Plaintiff's identical claims under the APA are presumably aimed at the Department of Transportation, the only Defendant to whom the APA applies. *See* Am. Compl. ¶¶ 54-59. However, Plaintiff fails to state a claim under the APA upon which relief can be granted. The cause of action set forth in the APA allows a court to "hold unlawful and set aside" agency action that is "not in accordance with law." 5 U.S.C. § 706(2)(A). But this cause of action is only

available against a federal agency when the plaintiff has identified a "final agency action for which there is no other adequate remedy in a court." *Id.* § 704.

Here, Plaintiff invokes the APA for its claims against the Department because FACA contains no private right of action. Yet Plaintiff fails to identify a predicate "final agency action" that it asks the Court to hold unlawful or set aside. The Supreme Court has explained that the term "agency action" in § 704 is limited to the administrative activities specified in 5 U.S.C. § 551(13), which defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton v. SUWA*, 542 U.S. 55, 62 (2004); *see also La Jolla Friends of the Seals v. NOAA*, 630 F. Supp. 2d 1222, 1229-30 (S.D. Cal. 2009). Moreover, in order for an agency action to be "final," it "must mark the 'consummation' of the agency's decision-making process" and must also be an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Food & Water Watch*, 5 F. Supp. 3d at 81 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

Plaintiff's Amended Complaint fails to identify, much less challenge, any action by the Department of Transportation. Nor does Plaintiff's claim for relief seek to set aside any identified action of the Department. Indeed, any claims against the Department of Transportation are particularly implausible because, even while Executive Order 13805 was in effect, the Department of Transportation had no role in the administration of an infrastructure advisory council. *See* E.O. 13805 §§ 2, 5 (indicating that the anticipated council would be in the Department of Commerce). While Plaintiff cites alleged statements by Secretary Chao, and alleges that Secretary Chao attended a meeting with President Trump and members of the alleged Infrastructure Council, Am. Compl. ¶¶ 29, 33, the only actions that it identifies—the June 7 Fact

Sheet, E.O. 13807, and an infrastructure plan that has not yet been issued, Am. Compl. ¶ 36—are actions of the White House, not the Department of Transportation. Nor would these documents qualify as final agency actions under the APA even if they had been issued by the Department. Plaintiff's APA claims against the Department of Transportation therefore are subject to dismissal for failure to state a claim.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss this action with prejudice.

Dated: January 17, 2018

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