IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, HUMANE SOCIETY INTERNATIONAL, and HUMANE SOCIETY OF THE UNITED STATES,

Plaintiffs,

v.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, and AURELIA SKIPWITH, in her official capacity as Director of the U.S. Fish and Wildlife Service,

Defendants.

Case No. 18-cv-6903 (AJN)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(h)(3) AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2663
E-mail: jennifer.jude@usdoj.gov

JENNIFER JUDE
Assistant United States Attorney
– Of Counsel –

Defendants David Bernhardt, Secretary of the Interior (the "Secretary"); the U.S. Department of the Interior ("Interior"); the U.S. Fish and Wildlife Service ("FWS"); and Aurelia Skipwith, Director of FWS (collectively, "Defendants"), respectfully submit this reply memorandum of law in further support of their motion to dismiss pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, Dkt. No. 75, and in opposition to the motion for summary judgment filed by Natural Resources Defense Council, Center for Biological Diversity, Humane Society International, and Humane Society of the United States (collectively, "Plaintiffs"), Dkt. No. 73.

PRELIMINARY STATEMENT

Plaintiffs cannot escape the facts that demonstrate that each of their claims is fully moot—the International Wildlife Conservation Council (the "IWCC" or the "Council") dissolved in December 2019 and cannot be renewed, and Defendants have searched for and disclosed all records of the IWCC and its subcommittees that are covered by Section 10(b) of the Federal Advisory Committee Act ("FACA"). Because of these events, there is no further relief to which Plaintiffs are entitled that this Court is empowered to grant. Accordingly, Defendants' Rule 12(h) motion should be granted and this case should be dismissed for lack of subject-matter jurisdiction.

ARGUMENT

I. Plaintiffs' Records Claim Is Moot Because All Council Records Have Been Disclosed

Plaintiffs acknowledge that if all records covered by FACA Section 10(b) have been disclosed, their records claims is moot. Indeed, in their reply brief, they state that "[t]he only question . . . is whether there may yet be [Section 10(b)] materials that Defendants have not released." Reply Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment

and Opposing Defendants' Motion to Dismiss ("Pl. Reply"), Dkt. No. 79, at 4. The answer to that question is there are no materials that have not been released—all records covered by Section 10(b) with respect to the IWCC and its subcommittees have been disclosed. On that basis alone, Plaintiffs' records claim is moot and must be dismissed.

Much of Plaintiffs' reply brief focuses on the timing of Defendants' disclosure of a handful of Council records. *See* Pl. Reply at 4-5, 9. It is true that a few Section 10(b) materials were posted on the IWCC's website recently. IWCC Chair Bill Brewster's letter attaching a "summary report," which was authored after the deadline for filing the administrative record for this case, was posted to the IWCC's website in January 2020. *Compare* Dkt. No. 79-1 (letter dated December 7, 2019) *with* Dkt. No. 67 (Dec. 3, 2019 deadline to lodge administrative record). And while preparing their motion to dismiss, Defendants located and then disclosed a few subcommittee-related materials, including two sets of subcommittee minutes. *See* Declaration of Eric Alvarez, dated Feb. 7, 2020 ("Alvarez Decl."), Dkt. No. 77, Exs. A, B; *see also* Declaration of Douglas Hobbs, dated Feb. 7, 2020 ("Hobbs Decl."), Dkt. No. 78, Ex. A.[1] Defendants also recently located and are disclosing herewith (and posting to the IWCC's website) two additional documents that were referenced in those minutes. *See* Supplemental Declaration of Douglas Hobbs, dated March 24, 2020 ("Supp. Hobbs Decl.") ¶ 4 & Exs. A, B. Plaintiffs argue that additional documents referenced in those minutes were not previously disclosed, *see* Pl. Reply at 4 (discussing documents related to Mr. John Jackson and Mr. Richard Sowry), but they are mistaken. *See* Declaration of Cade London, dated March 24, 2020

[1] Plaintiffs make much of the fact that those minutes were not posted online "contemporaneously" with the subcommittee meetings. Pl. Reply. at 4. But the minutes' respective meetings took place in June 2018 and March 2019, long before this Court's September 23, 2019 order that the IWCC's subcommittees were subject to FACA Section 10(b). *See* Dkt. No. 60 at 21-22.

("London Decl.") ¶ 4. In any case, the timing of the disclosure of these records does not impact the mootness of Plaintiffs' claim. Because all documents covered by Section 10(b) have been disclosed, there is no remaining relief that could be awarded to redress Plaintiffs' alleged injuries, and thus their records claims are moot. *See Nat'l Nutritional Foods Assoc. v. Califano*, 457 F. Supp. 275, 281 (S.D.N.Y. 1978), *aff'd* 603 F.2d 327 (2d Cir. 1979); *Citizens for Responsibility & Ethics in Washington v. Duncan*, 643 F. Supp. 2d 43, 48-49 (D.D.C. 2009) (FACA Section 10(b) claim mooted where government provided declaration "identify[ing] the scope and method of its search").

Plaintiffs nevertheless request that the Court issue an order "requiring Defendants to search for and release Section 10(b) materials." Pl. Reply at 5. But this is exactly what Defendants have already done, as described in detail in the declarations they have submitted from several of the IWCC's Designated Federal Officers ("DFOs").[2] *See* Alvarez Decl. ¶¶ 6-7, 11; Hobbs Decl. ¶¶ 5-9; London Decl. ¶ 3; Supp. Hobbs Decl. ¶¶ 4-5. Those declarations, which explain the scope and method of Defendants' search for records, are entitled to a presumption of good faith that withstands "purely speculative claims about the existence and discoverability of other documents," like the ones Plaintiffs have made. *Duncan*, 643 F. Supp. 2d at 48 (D.D.C. 2009); *see also Lawyer Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on*

[2] Plaintiffs attempt to foreclose Defendants from submitting additional declarations by arguing that they cannot offer any "new testimony" in their reply memorandum because "[n]ew arguments may not be made in a reply brief." *See* Pl. Reply at 9 n.4. However, the two additional declarations Defendants are submitting with this brief do not contain new arguments but are submitted to provide facts necessary to respond to arguments Plaintiffs made in their opposition brief, the purpose of a reply brief. *See Bigsby v. Barclays Capital Real Estate, Inc.*, 391 F. Supp. 3d 336, 353 (S.D.N.Y. 2019) (denying motion to strike supplemental declaration and "any facts alleged, or arguments made, for the first time in the defendant's reply brief" where "the arguments made in the defendant's reply brief were plainly arguments made in response to the plaintiff's opposition papers, not new arguments.").

Election Integrity, Civil Action No. 17-1354 (CKK) (D.D.C. Aug. 30, 2017) (noting that the government had agreed to provide "[a] declaration detailing the steps that the Commission has taken and will take to identify documents for collection and potential disclosure.").

Plaintiffs' attacks on those declarations are based on speculation alone. Plaintiffs argue that Defendants' declarations are incomplete because they are "silent as to the possibility of additional materials held by Department or Council leadership." Pl. Reply. at 4. Relatedly, Plaintiffs surmise that "the Council opened direct lines of communication with the Office of the Secretary of the Interior and the Office of the Director of [FWS]," and thus there may be records of which the declarants are unaware. *Id.* at 7. But there is no reason to believe that Interior leaders would possess Council records that the DFOs did not have. The DFOs are the government officials with responsibility for maintaining the Council's records and liaising between the Council and the Department. *See* Alvarez Decl. ¶¶ 2, 4; *see also* IWCC Charter, DOI_0023 ("The Council reports to the Secretary through the Designated Federal Officer (DFO)."). And the DFOs attended all of the Council and subcommittee meetings and were thus aware of what materials were created and reviewed by the Council members—not Interior leaders who were not present at those meetings. *Id.*

Nor is there any reason to believe that *the Council's* leaders kept documents secret from the DFOs. Plaintiffs' theory is based on the fact that while Mr. Alvarez's declaration states that he "asked [Cade] London to reach out to [various Council members] to confirm that they did not have any Council or subcommittee documents that they had not already shared with me as DFO," the declaration does not supply the Council members' responses. Pl. Reply at 7 (citing Alvarez Decl. ¶ 6(c)). However, Mr. Alvarez's declaration did not provide the members' responses only because they had not yet responded to Mr. London's inquiry by Defendants'

filing deadline. London Decl. ¶ 3. Mr. London has since spoken with both the IWCC Chair and Vice-chair and has confirmed that they have no additional materials. *Id.* And in response to Plaintiffs' generalized suspicion that the IWCC circumvented the DFOs and communicated directly with Interior or FWS leadership, the Chair also reported that he never had any substantive discussion with any government official about IWCC affairs outside of IWCC or subcommittee meetings. *Id.* Plaintiffs' purely speculative notions about missing IWCC records do not entitle them to any more than what they have already received—all Council and subcommittee records covered by FACA Section 10(b).

II. Plaintiffs Are Not Entitled to Any Relief with Respect to Their Non-Records Claims, Which Are Also Moot

It is undisputed that the IWCC has dissolved and no longer exists. As such, all of Plaintiffs' other claims are also moot. *See Califano*, 603 F.2d at 336; *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 223 (D.D.C. 2017); *Freedom Watch, Inc. v. Obama*, 859 F.Supp.2d 169, 174 (D.D.C. 2012); *Duncan*, 643 F. Supp. 2d at 51; *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 879 F. Supp. 103, 106 (D.D.C. 1994); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1294 (W.D. Wash. 1994) *aff'd*, 80 F.3d 1401 (9th Cir. 1996). Plaintiffs argue, against the weight of the caselaw, that they are nevertheless entitled to three forms of relief: (a) the release of "deliberative materials," (b) a use injunction barring Defendants from relying on the Council's recommendations, and (c) a declaratory judgment. Pl. Reply at 10-14. Plaintiffs are wrong on each count.

A. Plaintiffs Are Not Entitled to Any Records Not Covered by FACA Section 10(b)

Plaintiffs are not entitled to any records other than those covered by Section 10(b), which, as discussed above, Defendants have already disclosed. Plaintiffs point to no authority to support their creative argument that they should receive unspecified "deliberative materials" not

covered by FACA. Their argument appears to be based entirely on a single case, *Cummock v. Gore*, 180 F.3d 282, 290 (D.C. Cir. 1999). But *Cummock* is inapposite. In that case, the plaintiff was a member of an advisory committee who alleged that she had been excluded from participating in the committee's deliberations. Among other things, she sought copies of materials that had been reviewed by the other committee members, including a "classified annex" that she alleged she had requested but never receive despite having a security clearance. *Id.* at 287. The Court held that she was entitled to such materials—including the classified records—specifically because she was *a member* of the committee:

> Cummock possesses an even greater right than a member of the public, because, as a Commission member, she is entitled to fully participate in its deliberations. Thus, provided that Cummock was granted the requisite security clearance, the Commission could not deny her access to information that it reviewed and relied upon in formulating its recommendations—even if, for instance, that information might have been withheld from the public pursuant to a FOIA exemption.

Cummock, 180 F.3d at 292. Plaintiffs, on the other hand, are not Council members. Nor does their FACA Section 5(b)(2) claim convert them into *de facto* members. Regardless of the balance of the IWCC's membership, Plaintiffs never had any entitlement to have their representative selected for a seat on the Council. *See Sanchez v. Pena*, 17 F. Supp. 2d 1235, 1237-38 (D.N.M. 1998); *see also Microbiological*, 886 F.2d at 427 (Silberman, J., concurring); *Nat'l Anti-Hunger Coal.*, 711 F.2d at 1074 n.2 ("Section 5 [of FACA], to be sure, confers no cognizable personal right to an advisory committee appointment."). Indeed, GSA regulations implementing FACA provide that, absent a relevant legal authority prescribing otherwise, "[m]embership terms are at the sole discretion of the appointing or inviting authority" and "committee members serve at the pleasure of" that authority. 41 C.F.R. § 102-3.130(a). As such, Plaintiffs have no legal basis entitling them to materials not covered by FACA.

B. The Court Should Not Enter a Use Injunction

Nor should this Court enter a use injunction, a remedy of last resort, in response to Plaintiffs' moot claims. Plaintiffs have not endeavored to explain why the circumstances of this case warrant such an extreme remedy. *See Cargill*, 173 F.3d at 342.

Additionally, Plaintiffs' insistence that the IWCC *did* make recommendations to Defendants fundamentally misunderstands how federal advisory committees work. Advisory committees typically convey their findings and recommendations to agencies (or Congress) in the form of a written report. *See, e.g.*, *Cummock*, 180 F.3d at 349 (discussing "the Commission's final report, which was delivered to the President on February 12, 1997"); *Doe v. Shalala*, 862 F. Supp. 1421, 1425 (D. Md. 1994) (plaintiff sought to block committee from issuing a report to the Advisory Committee to the Director of the National Institutes of Health); *NRDC v. Abraham*, 223 F. Supp. 2d 162, 178, 182-83 (D.D.C. 2002) (discussing Congress's authorization of continued funding for construction of nuclear facility in reliance on advisory committee's report). Indeed, there is a formal process in place for conveying committee recommendations to the Secretary. Supp. Hobbs Decl. ¶¶ 6-7; *see also* IWCC Charter ¶ 4(i), DOI_0019 (Council's duties include conveying recommendations through the DFO). As Defendants explained in their opening brief, the IWCC did not issue a report or otherwise make any recommendations on which Defendants could rely. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Rule 12(h)(3) and in Opposition to Plaintiffs' Motion for Summary Judgment ("Def. Mem."), Dkt. No. 76, at 9; Alvarez Decl. ¶ 10; Supp. Hobbs Decl. ¶ 7. As such, there is nothing to enjoin Defendants from doing.

Plaintiffs attempt to construe two documents as containing recommendations—the July 2018 letter (which Plaintiffs call the "Zinke Letter"), Hobbs Decl. Ex. A, and the December 2019 summary report, Dkt. No. 79-1. *See* Pl. Reply at 8, 12. But as Defendants have explained, the

so-called "recommendations" in the July 2018 letter were never finalized, and were deemed inappropriate for forwarding to the Secretary. *See* Hobbs Decl. ¶¶ 4-9; Supp. Hobbs Decl. ¶¶ 6-7. Thus, consistent with Interior's standard practice, the internal summary of the June 2018 IWCC meeting reflects that no recommendations resulted from that meeting. *See* Hobbs Decl. ¶ 8 & Ex. B. And the December 2019 summary report describes itself as simply a "summary of the information submitted to the Council to date." Dkt. No. 79-1 at 2; *see also id.* at 4 ("The following sections provide a more detailed overview of the salient points and highlights of each council meeting.") A close review of it shows that it contains no policy recommendations. *See* Dkt. No. 79-1. Thus, in the absence of any recommendations, an injunction barring Defendants from relying on recommendations would serve no legitimate remedial purpose. *see also Akzo-Nobel, Inc. v. United States*, No. 00-30834, 2001 WL 34772206, at *3 (injunctive relief may not serve a punitive purpose).

C. A Declaratory Judgment Is Not Warranted in This Case

The Court should not grant declaratory relief either. *See* Def. Mem. at 10. Plaintiffs rely on cases that do not support their request for declaratory relief, either because the court declined to grant such relief, *see Califano*, 603 F.2d at 336; *Tidwell*, 239 F. Supp. 3d at 227; or because the relief was granted for reasons that do not apply in this case, such as that declaratory relief would assist the plaintiffs "in subsequent agency proceedings that make use of [committee] . . . recommendations," *see Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999). The Court should not grant declaratory relief here, which would constitute an impermissible advisory opinion.

III. The Voluntary Cessation Doctrine Does Not Apply in This Case

Finally, Plaintiffs attempt to shoehorn this case into the voluntary cessation exception to mootness by arguing that Defendants "have invoked mootness based upon their own voluntary

measures, such as releasing Council materials and allowing the Council's charter to lapse." Pl. Reply at 2. But neither of these actions were "voluntary" measures that Defendants took in order to preclude judicial review. Defendants disclosed IWCC records because they were required to do so by FACA. And Defendants did not *cause* the Council's charter to lapse—rather, the Council was designed at its outset (and before this litigation began) to last only two years, with the option to be renewed, and it dissolved as scheduled. *See* Def. Mem. at 2.

Regardless, even if Defendants had taken these steps voluntarily, the voluntary cessation doctrine does not apply here because there is no reasonable expectation that the alleged FACA violations will recur and interim events have completely and irrevocably eradicated the effects of these alleged violations. *See id.* at 12. Defendants are not "strategically pausing their wrongdoing, getting [this] case dismissed as moot, and then beginning it again after the suit ends." Pl. Reply at 2 (quoting *Klein on behalf of Qlik Techs., Inc. v. Qlik Techs. Inc.*, 906 F.3d 215, 224 (2d Cir. 2018)). Indeed, Defendants cannot resume what they were previously doing because the IWCC has already fully dissolved and the time to renew it has passed. *See* Def. Mem. at 2-3. And it is entirely unreasonable to expect that Defendants declined to renew the IWCC yet plan to charter another advisory committee with an identical mission in the future—a labor-intensive process that would require the agency to start again from the very beginning. Instead, intervening events—the IWCC's termination and Defendants' disclosure of all records covered by FACA Section 10(b)—have completely and irrevocably eradicated the effects of all of the violations that Plaintiffs have alleged. As such, the voluntary cessation doctrine does not apply in this case.

CONCLUSION

For the foregoing reasons and those stated in Defendants' opening memorandum of law, Defendants respectfully request that the Court grant their motion to dismiss and deny Plaintiffs' motion for summary judgment.

Dated: March 24, 2020

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: */s/ Jennifer Jude*
JENNIFER JUDE
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2663
Email: jennifer.jude@usdoj.gov