IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DCCC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, NRSC, Intervenor-Defendant.	Civil Action No. 24-cv-2935 (RDM) **(Expedited Hearing Requested)**

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), Plaintiff DCCC files this motion for summary judgment against Defendant the Federal Election Commission ("FEC") and Intervenor-Defendant NRSC.

As set forth in the accompanying memorandum, DCCC demonstrates that the FEC's final action closing out Advisory Opinion Request No. 2024-13 ("AOR 2024-13") without issuing an advisory opinion as required by 52 U.S.C. § 30108 was arbitrary and capricious and not in accordance with law, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The television advertising described in AOR 2024-13 plainly results in coordinated expenditures and is thus subject to the contribution and coordinated party expenditure limits and corresponding disclosure requirements set forth in the Federal Election Campaign Act of 1971, as amended ("FECA"). The Court should accordingly issue a final judgment (1) declaring that the TV advertising described in AOR 2024-13 is subject to FECA's contribution and coordinated party expenditure limits and corresponding disclosure requirements, and (2) holding unlawful and setting aside the agency's final action on AOR 2024-13.

In the alternative, assuming the television advertising described in AOR 2024-13 does not result in coordinated expenditures under FECA, DCCC demonstrates that the FEC's final action closing out AOR 2024-13 without issuing an advisory opinion was arbitrary and capricious, not in accordance with law, and contrary to DCCC's constitutional rights because, in that case, the FEC's action deprived DCCC of FECA's statutory safe harbor and chills DCCC from engaging in protected First Amendment activity. *See* 5 U.S.C. § 706(2). The Court should therefore alternatively issue a final judgment (1) declaring that DCCC has a right to engage in planned television advertising that is materially similar to that described in AOR 2024-13, and (2) holding unlawful and setting aside the agency's final action on AOR 2024-13.

A proposed order is attached.

Dated: March 7, 2025

Respectfully submitted,

/s/ Aria C. Branch

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COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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AO	Advisory Opinion
AOR	Advisory Opinion Request
APA	Administrative Procedure Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
JFC	Joint Fundraising Committee

INTRODUCTION

This case asks a simple but important question: does federal law permit a political party to spend *unlimited* amounts of money on television ads in support of its candidates, without treating a single cent as a "contribution" or "coordinated party expenditure"? A plain reading of the Federal Election Campaign Act ("FECA"), makes clear the answer is no. To hold otherwise would make mincemeat of FECA's contribution limits and disclosure rules, permitting political committees to flood the airwaves with advertising immune from FECA limits or the applicable disclosure requirements. Yet, remarkably, Defendants—the Federal Election Commission ("FEC") and National Republican Senatorial Committee ("NRSC")—have nothing to say about FECA's text or purpose. Instead, they present a parade of threshold arguments in an effort to excuse the FEC's failure to adhere to FECA, distract from the flagrant lawlessness of NRSC's advertising tactics, and preclude judicial review. Once those baseless procedural arguments are overcome, there is no real dispute on the merits. The Court should reject each of Defendants' arguments attempting to avoid review, deny the motions to dismiss, and grant DCCC summary judgment.

First, DCCC has standing. It is suffering competitive and informational injuries from the FEC's failure to uphold the contribution rules, permitting rival Republican political committees—like NRSC—to blow past FECA's contribution limits and conceal those contributions from public view. These injuries are traceable to the FEC's unlawful decision to close an advisory opinion request ("AOR") request without issuing an opinion, notwithstanding Congress's requirement that it do so. And those injuries will be redressed by declaratory and APA relief, as NRSC has conceded. The remaining procedural arguments—lodged exclusively by NRSC—are equally meritless. This case is not moot: the parties clearly retain an interest in the underlying dispute about whether FECA permits so-called "JFC advertising"—a campaign tactic NRSC effectively

deployed in 2024, is likely to use again, and which DCCC would mirror, with safe harbor protection. DCCC also has a proper APA claim. The FEC closed out the underlying AOR pursuant to a regulation adopted by a majority of the Commission. 11 C.F.R. § 112.4(a). Legal and practical consequences immediately flowed from that improper conclusion of the agency's decision-making process, satisfying the requirement for final agency action. NRSC's argument that agency deadlocks are *per se* non-reviewable is wrong. Circuit precedent makes clear "a deadlocked vote" may "constitute[] reviewable, final agency action." *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 880 (D.C. Cir. 1999). Further, the agency's final action here was *not* its deadlock alone—it was then consummated with its affirmative decision to close out AOR 2024-13 based on a majority-adopted rule. Finally, DCCC has no adequate form of relief beyond an APA claim; NRSC points only to a fundamentally distinct complaint mechanism under FECA that is easily immunized from judicial review based on the agency's discretionary choices and offers none of the statutory benefits offered by the FEC's AO process.

On the merits, the issues are clear and not seriously contested. FECA states that the FEC "shall render a written advisory opinion," 52 U.S.C. § 30108(a), in response to a request like AOR 2024-13. It did not. Instead, the Commission pointed to its own rules and "concluded its consideration of [the] advisory opinion request without issuing an advisory opinion." AR000148. In neglecting to perform this non-discretionary statutory duty, the FEC also failed to properly apply FECA to the request presented to it. FECA says that "*any*" gift of "money or anything of value" for "the purpose of influencing any election for Federal office" is a contribution on behalf of a candidate, 52 U.S.C. § 30101(8)(A)(i), and that "*any*" purchase meant to influence an election in a candidate's favor is an "expenditure" on behalf of that candidate, *id.* § 30101(9)(A)(i). That plainly includes paying for that candidate's television ads in coordination with the candidate. *E.g.*,

Shays v. FEC, 414 F.3d 76, 97 (D.C. Cir. 2005). A committee may not evade this clear statutory language by pretending that an ordinary television advertisement meant to persuade voters is merely a fundraising appeal to would-be donors. Given the agency's abdication, this Court must now "exercise [its own] independent judgment in deciding whether [the FEC] has acted" consistently with "statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). And DCCC respectfully asks that it does so expeditiously given the continued need to clarify this critical issue as it and House campaigns prepare for the 2026 elections.

BACKGROUND

I. Legal Background

A. FECA and the FEC's Duties Under the Act

Congress enacted FECA in 1971 to "safeguard[] the integrity of the electoral process." *Buckley v. Valeo*, 424 U.S. 1, 58 (1976). The law prescribes limits on the amount of money a person or entity may contribute to candidates for federal office, and requires detailed disclosures by candidates, donors, committees, and others who participate in the electoral process. *See* 52 U.S.C. § 30101 *et seq.* Congress created the FEC in 1974 to ensure proper enforcement and administration of FECA. *See* 52 U.S.C. § 30106; *see also* H.R. Rep. No. 94-917, at 3 (1976).

FECA charges the FEC with a host of statutory duties. Most relevant here, FECA mandates that the agency, upon request by a regulated actor, "shall" issue a legally binding AO concerning "the application of [FECA]" to "a specific transaction or activity." 52 U.S.C. § 30108(a); *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986) (Congress "*requires* [the FEC] to issue advisory opinions" (emphasis added)). The requestor may then "rel[y]" upon the AO in pursuing the transaction or activity at issue, and "any person" may rely upon the same AO as to any other

activity that is materially similar. 52 U.S.C. § 30108(c).[1] "[T]he advisory opinion process is central to the Commission's responsibility to clarify the Act." H.R. Rep. No. 96-422, at 20 (1979).

Notwithstanding FECA's instruction that the FEC "shall render a written advisory opinion," 52 U.S.C. § 30108(a)(1), an FEC regulation states that when four commissioners cannot agree on an AO, the FEC will issue a response indicating it was "unable to approve an advisory opinion." 11 C.F.R. § 112.4(a). The FEC thus "conclude[s] its consideration" of the request and takes no further action. AR000148.

In addition to the AO process, Congress authorized the FEC to pursue enforcement actions and impose civil penalties for FECA violations. *See* 52 U.S.C. § 30109. It also instructs the FEC to "formulate policy," *id.* § 30106(b)(1), and empowers it to issue rules and regulations to implement FECA's statutory provisions, *id.* §§ 30107(a)(8), 30111(d).

B. FECA's Limits on Contributions and Coordinated Party Expenditures

Among FECA's core features is its restriction on how much money individuals and committees may "contribute" to candidates for federal office, which serves Congress's goal of preventing corruption (and its appearance) in U.S. elections. *See* 52 U.S.C. § 30116. FECA defines a "contribution" as a "gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); *see also* ECF No. 28 ("Am. Compl.") ¶ 20 (describing DCCC's 2024 contribution limits); 52 U.S.C. § 30116(a). Relatedly, an "expenditure" is, with certain specified exceptions, "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)(i).

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[1] *See also* U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* at 140 n.59 (8th ed. Dec. 2017), https://www.justice.gov/criminal/file/1029066/dl.

An individual or committee's "expenditures" constitute "contributions" in certain circumstances. In particular, an expenditure "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" is a "contribution." 52 U.S.C. § 30116(a)(7)(B)(i).[2] Thus, when a committee coordinates with a candidate to develop or air a television ad that expressly advocates for the candidate, expenditures made toward the effort are "contributions" subject to the relevant limits. *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1180 (D.C. Cir. 2024) ("*CLC II*"). The "obvious" congressional purpose is that candidates could otherwise "evade" FECA's "restrictions" simply by "coordinat[ing]" an activity with another entity that directly pays for it. *Shays*, 414 F.3d at 97.

Under FECA, the national committee of a political party—such as the Democratic National Committee ("DNC") or the Republican National Committee—and the state committees of political parties are each also afforded distinct, additional limits for expenditures coordinated with candidates of their party in connection with individual races. 52 U.S.C. § 30116(d). The DNC and each state party may assign some or all of their authority in a given district to DCCC for purposes of such expenditures under to FEC regulations. 11 C.F.R. § 109.33(a); *see also* Am. Compl. ¶ 21 (describing applicable 2024 limits). FECA prohibits knowingly accepting or making contributions (including coordinated expenditures) that exceed FECA's limits. 52 U.S.C. § 30116(f).

C. Joint Fundraising Committees

FECA and the FEC's regulations allow political committees, such as national party committees and candidate committees, to coordinate activities through a single committee for the

[2] An FEC regulation defines when a communication paid for by a party committee is made "in cooperation, consultation or concert" with a candidate and thus becomes a "coordinated communication" under FECA. 11 C.F.R. § 109.37.

"sole" limited purpose of jointly raising funds for multiple entities, subject to a set of procedures "govern[ing] all [such] activity." 52 U.S.C. § 30102(e)(3)(A)(ii); 11 C.F.R. § 102.17(a)(1), (2). Such committees are commonly known as "joint fundraising committees" or "JFCs."

To form a JFC, the participating committees must establish a separate committee (or designate one of the participating committees) to serve as the joint fundraising representative and enter into an agreement that "state[s] a formula for the allocation of fundraising proceeds." 11 C.F.R. § 102.17(c)(1). A JFC's only permissible purpose is to "collect contributions, pay fundraising costs from gross proceeds and from funds advanced by participants, and disburse net proceeds to each participant." *Id.* § 102.17(b)(1); *see* 52 U.S.C. § 30102(e)(3)(A)(ii).

FECA does not permit JFCs to contribute to candidates, nor does it exempt participating committees from FECA's contribution and disclosure requirements. *See* 52 U.S.C. § 30102(e). Thus, to prevent expenditures made by JFCs from qualifying as contributions to individual participants, the FEC's joint fundraising regulation requires participants to pay for expenses on a funds received basis that are proportional to their percentage of allocated receipts associated with a particular fundraising effort. 11 C.F.R. § 102.17(c)(7). And a participant "may only pay expenses on behalf of another participant subject to [FECA's] contribution limits." *Id.* § 102.17(c)(7)(i)(B).

II. Factual and Procedural Background

A. Late in the 2024 election cycle, Republican committees began using JFCs to pay for advertising that presented like typical candidate ads.

Ahead of the November 2024 election, NRSC and its candidates began using JFCs to fund television ads that present like typical candidate ads. Ex. A ("Merz Decl.") ¶¶ 6–7; Am. Compl. ¶¶ 42–60. The ads followed a simple formula: nearly the entire ad promoted a specific Republican candidate and attacked Democratic candidate(s) and the Democratic Party. Merz Decl. ¶¶ 6–7; AR000110–12 (supplying links to ads). Then, in the ad's very final, waning seconds, the

Republican candidate said "donate now" or similar, while a QR code appears, linking to a donation page for the JFC. *Id*.

Based on this brief plea for funds, NRSC and others claimed that the ads constituted fundraising efforts—not political advertising—and thus can be fully treated as JFC costs, with not a cent counting as a contribution to the candidate who benefits from the ads. Merz Decl. ¶ 8. By recording these costs as fundraising expenses, rather than contributions, NRSC and other participant party committees avoided having to report how much they are spending on television advertising that is plainly coordinated with candidates. *Id.* ¶¶ 13–14; Am. Compl. ¶¶ 89–90.

B. The FEC failed to issue an advisory opinion recognizing that JFC advertising expenditures are "contributions" under FECA.

The explosion in the use of the JFC advertising by Republican committees in the last months of the 2024 election cycle placed Democratic committees in a quandary: they could match the tactic, despite its disregard for FECA's contribution limits and disclosure rules—at risk of being penalized later—or suffer competitive disadvantage. *See* Merz Decl. ¶ 9; Am. Compl. ¶¶ 10, 87–88. To clarify the rules of the road, DSCC—the national party committee supporting Democratic candidates for U.S. Senate, *see* 52 U.S.C. § 30101(14)—submitted a request for an AO under 52 U.S.C. § 30108 on September 18, 2024. AR000001–07. The request asked whether DSCC could lawfully establish a JFC between DSCC and Montanans for Tester, and another with Gallego for Arizona, to help finance television ads that would primarily advocate for each candidate's election. *Id.* The request specified that the proposed JFCs would be established pursuant to 11 C.F.R. § 102.17 and proposed a specific allocation formula. AR000002.

DSCC's request detailed that—like the ads that were being run by NRSC—the proposed ads would be funded by the JFCs but would almost entirely advocate for the candidate, containing only a short fundraising solicitation for the JFC at the end, accompanied by a QR code linking to

the JFC's fundraising page with disclaimers required by 11 C.F.R. § 102.17(c)(2). AR000002. In all other respects, the ads would be "indistinguishable" from "a standard campaign advertisement." AR000005. Any contributions received through the solicitations in the ads would be divided according to the allocation formula, as would expenses for the ad. *Id.* In effect, only a fraction of the costs would be paid by the relevant candidate's committee. AR000079. Costs associated with the proposed ads would therefore quickly exceed DSCC's contribution and coordinated party expenditure limits under FECA. AR000005.[3]

Based on this proposal, DSCC requested an AO from the FEC as to whether the JFCs could (1) "finance the entire costs of the proposed television advertising, allocating the costs according to the Allocation Formula," or alternatively, (2) fund "the portion of the television advertising that includes a solicitation for the [JFC], calculated on a time/space basis" (*i.e.*, divided based on time dedicated to candidate advocacy vs. solicitation). AR000003. Given that the November election was less than 60 days away at that point, DSCC requested that the FEC issue an AO no later than the 20 days allowed by statute. AR000001 (citing 52 U.S.C. § 30108(a)(2)).

The FEC accepted DSCC's request, assigned it No. 2024-13 ("AOR 2024-13"), and set it for hearing on October 10, 2024. *See* AR000008. The FEC's General Counsel then released two draft opinions. AR000051–76, 91–104. The first opinion ("Draft A") found that JFCs could "pay the entire cost of the proposed television advertising, allocating the costs according to the allocation formula in the joint fundraising agreement, because the advertising would be joint fundraising activity containing a solicitation"—effectively concluding that JFC advertising is not subject to FECA's limits *at all* provided that the participating committees adhere to the JFC's

[3] DCCC will refer to the arrangement described in AOR 2024-13 as "JFC advertising."

allocation formula. AR000052. The second opinion ("Revised Draft B") found that JFCs could "pay for only the portion of the proposed advertisements that solicit contributions for the joint fundraising committee, with the cost of that portion allocated among the committee's participants according to their agreed allocation formula." AR000092.

Several groups provided comments for the FEC's consideration. AR000009–146. DSCC suggested it had doubts about the legality of the arrangement because allowing JFCs to finance candidate advocacy without regard to FECA's limits would "swallow" the Act's core statutory restrictions. AR000078–83. Nonpartisan watchdog groups who regularly file enforcement complaints agreed that JFCs are not permitted to finance television ads in this manner. *See* AR000084–90, 109–112. Eight Republican groups argued in favor of the arrangements, asserting that they are consistent with FECA and FEC regulations and largely urged the FEC to adopt Draft A. AR000009–50, 113–143. NRCC (DCCC's counterpart) filed a comment stating that the FEC's joint fundraising regulations *require* the JFCs to "finance the entire cost" simply because the ad contains a JFC solicitation. AR000044 (discussing 11 C.F.R. § 102.17).

On October 10, 2024, the FEC held a hearing on AOR 2024-13. AR000147.[4] The Commissioners held a final vote, resulting in a party-line split, with three in favor of each draft. *Id*. The FEC issued a letter to DSCC the same day to confirm it "concluded its consideration" of AOR 2024-13 and was "unable to render an opinion in this matter." AR000148 (citing 11 C.F.R. § 112.4(a)). The FEC's docket also reflects that this letter is its "Final Opinion."[5]

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[4] A recording of the FEC's hearing on the request is available on the FEC's website. FEC, *Open Meeting* (Oct. 10, 2024), https://www.fec.gov/updates/october-10-2024-open-meeting/.

[5] FEC, AO 2024-13 (Oct. 10, 2024), https://www.fec.gov/data/legal/advisory-opinions/2024-13/ (last accessed Mar. 7, 2025).

Just days after the FEC's failure to issue an AO in response to AOR 2024-13, additional groups—including NRCC and Republican congressional candidate committees—began engaging in JFC Advertising for what appeared to be the first time. Merz Decl. ¶¶ 6, 8.

C. DCCC's Lawsuit

Stuck "between a rock and a hard place on the eve of the November [2024] election," DCCC filed suit on October 17, 2024. ECF No. 1 ("Compl.") at 2. DCCC requested a limited preliminary injunction temporarily setting aside the FEC's Final Opinion because it failed to adopt or apply a proper construction of the FEC's governing statute. ECF No. 6 ("PI Mot.") at 1. NRSC filed an unopposed motion to intervene, ECF No. 14, which was granted. In seeking intervention, NRSC acknowledged that an "adverse judgment" from this Court "would prevent NRSC from using any joint fundraising committee arrangements that mirror the facts" of AOR 2024-13. ECF No. 14 at 5; *see also* ECF No. 14-1 ¶¶ 10–11 (admitting NRSC "would have to change its joint-fundraising efforts" if JFC advertising was declared a coordinated communication).

Following a hearing, the Court denied the PI Motion, recognizing the underlying dispute posed "important issues," but concluding that limited "emergency relief . . . *temporarily*" setting aside the Final Opening was not alone "likely [to] prevent" DCCC from suffering "imminent" harm ahead of the election, which was days away. ECF No. 21 ("PI Order") at 11–13 (emphasis in original). The Court was clear to note that this "vehicle" problem did not extend to DCCC's request for "declaratory relief" or its views on the "merits." *Id.* at 11.

DCCC filed an Amended Complaint on December 20, 2024. DCCC alleges that the FEC's final action closing AOR 2024-13 without issuing an AO was arbitrary and capricious and not in accordance with law because JFC advertising is plainly subject to FECA's contribution and coordinated party expenditure limits and disclosure requirements, and a dispositive number of Commissioners expressly rested their vote on a contrary conclusion. *Id.* ¶ 97. For relief, DCCC

requests that the Court declare that the television advertising described in FEC Advisory Opinion Request 2024-13 is subject to the contribution and coordinated party expenditure limits, and the relevant reporting requirements set forth in FECA. The Court should also declare that the FEC's final action in closing out AOR 2024-13 without issuing an advisory opinion that adheres to FECA was arbitrary and capricious and contrary to law. In the alternative, DCCC asserts that, assuming JFC advertising is *not* subject to FECA's limits, the FEC's decision to close AOR 2024-13 without issuing an AO was arbitrary and capricious, not in accordance with law, and contrary to DCCC's constitutional rights. *Id.* ¶¶ 88, 97.

On February 7, the FEC and NRSC moved to dismiss DCCC's Amended Complaint. ECF Nos. 32-1 ("NRSC Br."), 34-1 ("FEC Br."). DCCC opposes and moves for summary judgment.

STANDARD OF REVIEW

Rule 12(b)(6) and Rule 56. In a case challenging agency action or inaction under the APA, "the traditional Rule 12(b)(6) standard of review does not apply." *Lieu v. FEC*, 370 F. Supp. 3d 175, 182 (D.D.C. 2019) (quoting *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)). Instead, the "entire case" on the merits presents "a question of law," and the "standard" merges with the summary judgment standard. *Marshall County*, 988 F.2d at 1226. Thus, a complaint under the APA, "properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *Id.* "As the APA expressly provides in describing the scope of review, 'the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.'" *CREW v. FEC*, 316 F. Supp. 3d 349, 365 (D.D.C. 2018) (quoting 5 U.S.C. § 706)), *aff'd,* 971 F.3d 340 (D.C. Cir. 2020). "Under the APA, it thus remains the responsibility of the court to decide whether the law means what the

agency says." *Loper Bright*, 603 U.S. at 392 (cleaned up). The court must "set aside any such action inconsistent with the law as [the court] interprets it." *Id.*

Rule 12(b)(1). For Rule 12(b)(1) motions, the Court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (citation omitted). And "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citation omitted). Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Richardson v. United States*, 193 F.3d 545, 549 (D.C. Cir. 1999)**.**

ARGUMENT

Eager to avoid addressing the merits, Defendants lodge a series of threshold arguments to avoid adjudication. Each are easily rejected. DCCC has standing, and NRSC fails to meet its heavy burden of demonstrating that the claim is moot. To the contrary, resolution of this case remains urgent as the party committees prepare to compete in the 2026 election cycle. NRSC's procedural attacks under the APA also fail: DCCC challenges final agency action under clear precedent, and FECA's limited right of action challenging FEC enforcement decisions does not provide an adequate alternative to APA review of the FEC's flawed AO process in this case. On the merits, the FEC's final action closing AOR 2024-13 was arbitrary, capricious and not in accordance with law because JFC advertising is plainly subject to FECA's contribution and coordinated expenditure limits, as well as its disclosure requirements. The Court should declare that the television advertising described in FEC Advisory Opinion Request 2024-13 is subject to the

contribution and coordinated party expenditure limits, and the relevant reporting requirements set forth in FECA, and set aside the FEC's final action.

I. The Court has subject matter jurisdiction.

A. DCCC has Article III standing for each form of relief it seeks.

A plaintiff has Article III standing where it demonstrates a cognizable "injury in fact" that "was likely caused by the defendant" and that "would likely be redressed by judicial relief." *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 592 (D.C. Cir. 2023) (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)). This analysis "assume[s] the merits in favor of the plaintiff." *Id.* (quoting *Waterkeeper All. v. EPA*, 853 F.3d 527, 533 (D.C. Cir. 2017)).

1. DCCC is suffering an injury-in-fact.

a. DCCC is suffering a competitive injury.

DCCC is suffering a competitive injury because its competitors have used and will continue to use joint fundraising committees to pour money beyond FECA's contribution limits into ads promoting Republican candidates and attacking Democratic candidates in congressional elections. Merz Decl. ¶¶ 7–11. Because that activity appears to be unlawful under FECA, DCCC has not matched its competitors' efforts. *Id.* Yet DCCC has no choice but to respond to these "additional tactics," which have "fundamentally alter[ed] the environment" in which it competes, satisfying the injury-in-fact requirement. *Shays*, 414 F.3d at 86; *see* Merz Decl. ¶¶ 7–11. Defendants' contrary arguments are easily dismissed.

NRSC first argues that DCCC has not suffered a competitive injury because it operates in the same regulatory environment as its competitors and thus faces "no greater regulatory risk," meaning it is not at a "disadvantage." NRSC Br. 23; *see* FEC Br. 25 (similar). To get there, however, NRSC wrongly assumes that *its* view of the law is correct, not DCCC's. When analyzing

standing, however, the Court must "accept as valid the merits" of the plaintiff's legal claim. *FEC v. Cruz*, 596 U.S. 289, 298 (2022). In other words, a party cannot defeat a plaintiff's standing by arguing that they are wrong on the merits of their claim. Here, that means that the Court must assume that DCCC's view of the law—that JFC advertising constitutes a contribution or coordinated party spending—is correct. DCCC is harmed because it should not be forced to risk breaking the law in order to compete with its rivals. *Shays*, 414 F.3d at 86 (party suffers Article III injury if under its theory it "must anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow").

NRSC's next argument—that DCCC cannot claim a competitive injury based on a disadvantage because there is no reasonable basis for its fear of engaging in JFC advertising, NRSC Br. 21—fails for the same reason: the Article III standing analysis assumes DCCC is correct that JFC advertising is unlawful. *See Shays*, 414 F.3d at 89 ("Because being put to the choice of either violating" federal campaign finance law "or suffering disadvantage in their campaigns is itself a predicament the statute spares them, having to make that choice constitutes Article III injury.").

Finally, NRSC argues DCCC cannot show a competitive injury because it does not "personally compete[] in the same arena" as "candidates" who benefit from JFC advertising. NRSC Br. 23 (quoting *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998)). This argument goes nowhere. DCCC is alleging competitive harm not just because Republican *candidates* benefit from JFC advertising beyond FECA's limits, but rather because its competitors "including . . . the Republican *Committees*" are improving their electoral prospects by pouring more resources into their candidates' campaigns "at the expense of DCCC and its candidates." Am. Compl. ¶ 84 (emphasis added); Merz Decl. ¶¶ 7–8. And there appears to be no dispute that DCCC suffers a cognizable injury if its *committee*-competitors obtain benefits DCCC does not. *Tex. Democratic*

Party v. Benkiser, 459 F.3d 582, 587 (5th Cir. 2006); NRSC Br. 21–25. Furthermore, DCCC brings this case on behalf of itself *and* its members (*i.e.*, Democratic candidates) who are undisputedly in direct competition with Republican candidates. Am. Compl. at 1; *id.* ¶ 15; Merz Decl. ¶ 3.

Gottlieb is inapposite. There, the D.C. Circuit rejected a "multicandidate political action committee['s]" claim to competitive standing when it complained that President Clinton's campaign allegedly received excessive "matching funds" from the Presidential Primary Matching Payment Account, because that committee (AmeriPac) could "never [be] in a position" to receive such funds. *Gottlieb*, 143 F.3d at 621. In contrast, in this case, both DCCC and its candidates are competing in precisely the "same arena," *id.*, as rivals obtaining unlawful benefits obtained through unlimited JFC advertising in excess of FECA's limits.

b. DCCC is deprived of information FECA requires to be disclosed.

DCCC is also suffering an informational injury because rival party committees are failing to disclose the amounts and purposes of expenditures on television advertising that is plainly coordinated with candidates. If expenditures for JFC advertising were properly treated as contributions or coordinated party expenditures, as is required under FECA, each party committee in the JFC would be required to report granular information about such contributions or coordinated expenditures—information that is of critical strategic value to DCCC. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) (a party suffers an informational injury when it is unlawfully denied information that would be useful); *CLC v. FEC*, 31 F.4th 781, 790 (D.C. Cir. 2022) ("*CLC I*") (informational injury redressable where committee "would be required to disaggregate its reporting to show the actual amounts of various expenditures that were in-kind contributions").

A JFC is only required to report its own expenditures, and not the proportional share of that spending by individual participants of the committee. That means DCCC does not have access

to information (amount, purpose, etc.) about the expenditures for which each participant of a JFC is ultimately responsible. Merz Decl. ¶ 13. In contrast, when a party makes a contribution or a coordinated party expenditure under FECA, DCCC can see the identity of the candidate who received the contribution or benefited from the expenditure, and the amount and purpose of the contribution or expenditure. *Id.* Because FECA does not contemplate JFC advertising schemes at all, there is no independent way or "different source" for DCCC to know this information. *CLC I*, 31 F.4th at 790 (citation omitted); *see* Merz Decl. ¶ 13.

If participating committees were to report expenses for JFC advertising as contributions or coordinated expenditures, as is required under FECA, 52 U.S.C. §§ 30104(b), 30116(a)(7), DCCC would know the amounts *each committee* (like NRSC) actually paid toward a given coordinated effort as well as the purpose of the expenditure—rather than just the total of what the JFC paid, which does not include how much of each expense was paid by each participant. *See CLC I*, 31 F.4th at 790; Merz Decl. ¶¶ 12–13. And that information, "currently unknown, constitute[s] factual information core to [DCCC's] established interests" in knowing how much committees contribute to or expend on candidates and how much the "candidate spent" in a federal election. *CLC I*, 31 F.4th at 790–91 (first citing *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008); then citing *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997)).

Neither NRSC nor the FEC refute any of this. *See* NRSC Br. 24; FEC Br. 28. NRSC argues that DCCC "has not shown a concrete interest in the information of which it has allegedly been deprived" because the "only interest" it has in the information is "competitive." NRSC Br. 24. But a party suffers an informational injury when it is denied information to which it is entitled under FECA so long as the party could use that information to its benefit. *Akins*, 524 U.S. at 21. *See id.* Courts need not "conduct an exhaustive consideration of the possible uses of the requested

information"; they need only ask whether there is "reason to doubt the asserted justification." *Kean for Cong. Comm. v. FEC*, 398 F. Supp. 2d 26, 34–35 (D.D.C. 2005) (citation omitted) (committee has informational standing where it alleges it would use information about undisclosed "contributions and expenditures" to assess support for competitors and viability of candidate).

Here, there is no "reason to doubt" that this information would be "useful" to DCCC. *Id*. Among other things, detailed information about how and when committees spend money on coordinated communications like television advertising informs DCCC's understanding of how much money its rivals have determined to invest in any given race, and its efforts to assess how and when resources are being allocated between the various races. Merz Decl. ¶ 14. Additionally, as part of DCCC's budgeting process, DCCC must make decisions about who and how many staffers to hire, what vendors to use, and how much money DCCC needs to raise to support its activities. *Id*. These decisions are all affected by the information DCCC is able to glean from FEC disclosure reports, including disclosures about its rivals' coordinated expenditures.

NRSC next argues that DCCC's claim and requested relief only concern whether parties can "contribute to candidates above certain limits," and does not concern required disclosure requirements at all. NRSC Br. 24. This argument is wrong. DCCC expressly alleges it is harmed by the failure to report spending on JFC advertising as is required under FECA. Am. Compl. ¶¶ 89–90; *see also* Merz Decl. ¶ 14. If DCCC is right that JFC advertising results in coordinated expenditures, then such expenditures would be subject to *both* FECA's contribution limits *and* its

disclosure requirements. *See* 52 U.S.C. §§ 30104(b), 30116(a)(7). DCCC's informational injury independently satisfies the injury prong.[6]

2. DCCC's injuries are traceable to the FEC's action.

DCCC also satisfies the causation prong: but for the FEC's failure to issue the requested AO—or any AO grounded in FECA's text—DCCC's competitors would be effectively barred from engaging in the activity that harms DCCC. Such an AO would represent the "authoritative statement of position by the agency to which Congress has entrusted the full task of administering and interpreting the underlying statutes," and "regulated parties" like DCCC's competitors would likely face "civil and criminal penalties if [they] defied" it. *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (cleaned up) (quoting *Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 753 n.10 (D.C. Cir. 1984) (R.B. Ginsburg, J.)). That alone is sufficient to satisfy traceability because such an authoritative pronouncement would have, in effect, blocked the direct source of DCCC's injuries. *See Ipsen Biopharmaceuticals v. Becerra*, 678 F. Supp. 3d 20, 31–32 (D.D.C. 2023) (citing *Int'l Ladies' Garment Works' Union v. Donovan*, 722 F.2d 795, 810–11 (D.C. Cir. 1983)).

The FEC's and NRSC's contrary arguments fail. First, they argue that DCCC's competitive and informational injuries cannot be traced to the FEC's failure to issue an AO because DCCC's competitors are themselves the most direct source of the injuries. FEC Br. 26–28; NRSC Br. 25–

[6] The FEC suggests in passing that "it is not possible for DCCC to obtain the particular information it seeks" because FECA does "not require disclosure of how much money a given donor contributed specifically for a particular advertisement, or how much money a particular advertisement raises." FEC Br. 28 (citing Am. Compl. ¶ 89). That suggestion misunderstands DCCC's argument. FECA requires committees to report how much money and the purpose of expenditures coordinated with candidates, and that information has not been reported with respect to ads paid for by JFCs. If the Court determines that JFC advertising results in coordinated expenditures, the participating party committee would need to report how much it is spending on the advertisements on behalf of the candidate as either a contribution or coordinated party expenditure. That information would provide redress for DCCC's informational injury.

26. But there can be multiple sources of injury, and traceability is satisfied so long as the agency's action is *a* source of the injury. In other words, "just because" the third parties' "downstream" decisions "contribute to [plaintiff's] injuries does not mean that" that the agency's "upstream failure" cannot "do so as well." *CREW v. DHS*, 507 F. Supp. 3d 228, 240 (D.D.C. 2020). Where, as here, there is a "causal link" between agency action (or inaction) and the harmful actions of others, the injury is traced to the agency even where the agency's action may not *directly* authorize or permit the third-party action. *See Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019).[7]

The FEC and NRSC both emphasize that NRSC began its JFC advertising prior to the agency action at issue, so they contend that the FEC's action cannot be the cause of DCCC's injury. NRSC Br. 25–26; FEC Br. 29. That argument overlooks that an agency's "alleged illegal . . . refusal" or failure that effectively "allow[s]" harmful third-party conduct *to continue* satisfies traceability. *Ipsen Biopharmaceuticals*, 678 F. Supp. 3d at 31. This argument follows from the basic principle—reaffirmed by the Supreme Court last term—that an APA plaintiff's injury first occurs when it is *injured by the challenged agency action. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 825 (2024). The impact of the agency's final action here is clear: after the FEC failed to issue an AO, additional groups and candidates—including NRCC and its Republican *congressional* candidates—began deploying materially similar JFC advertising that

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[7] *See also Mass. Coal. for Immigr. Reform v. DHS*, No. 1:20-CV-03438, -- F. Supp. 3d. --, 2024 WL 4332121, at *13–15 (D.D.C. Sept. 27, 2024) (surveying "thirty years of D.C. Circuit caselaw illustrat[ing] how standing may rest 'on the predictable effect of Government action on the decisions of third parties'" (citation omitted)). Despite this well-established case law, the FEC points to a single case holding that plaintiffs claiming an injury based on an alleged increase in timber harvesting lacked standing because the rule in fact maintained the "status quo" on harvesting. *See* FEC Br. 25 (citing *Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 40 (D.D.C. 2015)). In other words, as a *factual* matter, nothing would have changed as to their alleged injury even if they got their way before the agency. *See Fed. Forest Res. Coal.*, 100 F. Supp. 3d at 40. That is not the case here.

directly harms DCCC. Merz Decl. ¶ 7; Am. Compl. ¶ 60. That fact confirms that the FEC's final action was at least a motivating factor for DCCC's rivals to begin or increase their mammoth JFC advertising spends. *Massachusetts Coal. for Immigr. Reform*, 2024 WL 4332121, at *13.

3. DCCC's injuries are redressable.

DCCC seeks a final judgment (1) declaring that JFC advertising is subject to FECA's contribution limits and disclosure requirements, 5 U.S.C. § 703; and (2) holding unlawful and setting aside (*i.e.*, vacating) the agency's final action on AOR 2024-13, *id.* § 706; *see* Am. Compl. at 31 (Prayer for Relief). These are typical APA remedies. *See, e.g.*, *Russell-Murray Hospice, Inc. v. Sebelius*, 724 F. Supp. 2d 43, 60 (D.D.C. 2010); *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022); *see generally Corner Post, Inc.*, 603 U.S. at 829–31 (Kavanaugh, J., concurring). At their core, they each require little more than for this Court to "identify a legal error and then remand to the agency," which is the "appropriate course" when a court "determines that [an] agency acted unlawfully." *Hurry v. FDIC*, 589 F. Supp. 3d 100, 126 (D.D.C. 2022) (citing *N. Air Cargo v. USPS*, 674 F.3d 852, 861 (D.C. Cir. 2012)).

These remedies provide at least partial redress to DCCC, which is all that is required. On remand, the FEC is likely to issue an AO that properly concludes that JFC advertising is subject to FECA's limits and requirements. *See Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 148 (D.D.C. 2017). Such an "authoritative statement" would cause at least some—if not all—of DCCC's competitors to conform accordingly. *Unity08*, 596 F.3d at 865 (quoting *Am. Fed'n of Gov't Emps.*, 747 F.2d at 753 n.10); *see also Johnson v. Becerra*, 111 F.4th 1237, 1244 (D.C. Cir. 2024); *supra* Argument § I.A.2. Even if remand did not result in a new AO, the FEC would still be bound by the Court's declaration of FECA's proper interpretation in subsequent proceedings. *See Scenic Am., Inc. v. U.S. Dep't of Transportation*, 836 F.3d 42, 55 (D.C. Cir. 2016) (declaratory relief satisfied redressability where it would "prohibit the agency from relying on that

interpretation" and "also require the agency" to conform future decisions); *Motor & Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (redressability also satisfied where declaration that agency rule was unlawful would "ease[]" plaintiff's "task before the agency" of obtaining future action stopping allegedly harmful "third party" conduct).

Only NRSC disputes redressability, leaning heavily on the Court's prior determination that an emergency injunction "*temporarily*" setting aside the FEC's Final Opinion may not alone supply redress. PI Order at 12 (emphasis in original); NRSC Br. 12–13, 15–16, 18. But NRSC fails to appreciate that the Court's prior analysis was expressly limited to the "narrow" form of injunctive relief requested and does not apply to the final relief requested here, particularly as to declaratory relief—which was not available at the PI stage. *See* PI Order at 13. Separately, when a plaintiff wins on an APA claim like this one, courts typically presume "relief is likely" because the agency has the "tools . . . [to] provide relief." *Bennett v. Donovan*, 703 F.3d 582, 590 (D.C. Cir. 2013); *see also Scenic Am., Inc.*, 836 F.3d at 55.

NRSC also argues that DCCC cannot show redressability because the Court is "powerless" to directly halt "actions by Republican Committees," as it can only issue a judgment against the FEC. NRSC Br. 17. The argument fails for at least two independent reasons. First, where there is a "causal relationship" between an agency's regulatory authority "and the third-party conduct" harming the plaintiff, courts recognize that *judgment against the agency* redresses the plaintiff's injury. *Hecate Energy LLC v. FERC*, 126 F.4th 660, 666 (D.C. Cir. 2025); *see also Bennett*, 703 F.3d at 590; *Johnson*, 111 F.4th at 1244. So, too, here. It is not merely the Court's "reasoning" that would cause the parties to "modify their conduct," NRSC Br. 18, but *the judgment against the agency* forcing it to conform its regulatory actions to the law. *Hecate Energy*, 126 F.4th at 666.

Finally, NRSC is flatly wrong that FEC is the only defendant bound by a final judgment. NRSC Br. 17–18. NRSC would be, too. Intervenors are "bound by th[e] Court's judgment," including in APA cases. *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 67 n.1 (D.D.C. 2013) (citing *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985)). NRSC has even conceded that it would be bound by a final judgment here. *See* PI Order at 18. And that concession makes sense, given that NRSC has every opportunity to make its views on JFC advertising heard in this case, and voluntarily subjected itself to the Court's jurisdiction. *See* ECF No. 14. Consistent with that understanding, the Court recognized that a declaratory judgment will "likely prevent the NRSC from using any joint fundraising committee to evade FECA's contribution and coordinated expenditure limits." PI Order at 18; *see also Haaland v. Brackeen*, 599 U.S. 255, 293 (2023) (explaining that declaratory relief "resolves the legal rights *of the parties*" (emphasis in original) (cleaned up)). And, as the record shows, NRSC engages in JFC advertising that criticizes Democrats writ large, harming DCCC. *Supra* Background § II.A.

B. DCCC's claim is not moot.

This dispute is also not moot, as NRSC alone contends. *See* NRSC Br. 27. For a case to be moot, it must be "*impossible* for a court to grant *any* effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphases added). "'[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Id.* (quoting *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). This is a "demanding standard," *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 377 (2019), and NRSC, as "the party raising the issue," bears the "heavy burden" of "establishing mootness." *In re Navy Chaplaincy*, 850 F. Supp. 2d 86, 107 (D.D.C. 2012) (collecting cases); *see also Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 459.

1. NRSC has failed to carry the heavy burden to show mootness.

NRSC fails to establish mootness under this rigorous standard. The gist of its theory is that, because DSCC sought an AO about specific proposed JFC ads relating to the 2024 Senate races in Montana and Arizona, the parties somehow now lack *any* interest in determining the lawfulness of the FEC's failure to properly regulate JFC advertising, including in future elections. But that cannot be right—NRSC *admits* that an "an adverse judgment here would prevent the NRSC from using any joint fundraising committee arrangements that mirror the facts proposed in" in the underlying AO request. ECF No. 14 at 5; *see also* ECF 14-1 ¶ 10 (similar). NRSC simply ignores its own past concessions that meaningful relief remains available here, notwithstanding passage of the 2024 election. *Cf. Calderon v. Moore*, 518 U.S. 149, 150 (1996) (holding "a partial remedy" is sufficient to prevent a claim from being dismissed as moot).

NRSC's argument also fundamentally misapprehends the purpose of the AO process. Contrary to its suggestion that the AO procedure only concerns "a specific transaction or activity" identified in the request, NRSC Br. 27 (quoting 52 U.S.C. § 30108(a)(1)), FECA makes clear the process is also meant to provide clarity on any future activity "indistinguishable in all its material aspects." 52 U.S.C. § 30108(c). Indeed, AOs both "have binding legal effect on the Commission," *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001), and provide safe harbor to those who act in reliance on them prospectively, *see id.*; 52 U.S.C. § 30108(c). Thus, the AO procedure is intended to "allow participants in the political process," like DCCC, to "operate with substantial certainty regarding their legal obligations" by providing prospective effect and guidance. *Ready for Ron v. FEC*, No. CV 22-3282 (RDM), 2023 WL 3539633, at *3 (D.D.C. May 17, 2023). DCCC retains a "concrete interest" in proper disposition of AOR 2024-13 because it

could either prospectively redress its competitive and informational injuries or provide safe harbor for JFC advertising. *Chafin*, 568 U.S. at 172.

The D.C. Circuit rejected a similar mootness argument in *Unity08* for just these reasons. There, an aspiring "post-partisan political party" sought an AO on whether it was required to register as a political committee under FECA ahead of the 2008 general election and sued the FEC under the APA after receiving an unfavorable AO finding that it needed to register. 596 F.3d at 863–64. The FEC argued that the case was moot because the AO request concerned Unity08's intent to participate in the 2008 race. *Id.* The Court rejected this argument, holding that "the controversy" remained "alive" because Unity08 expressed in a declaration a "conditional intent to resume activities in *a future election cycle* if the group wins its lawsuit." *Id.* (emphasis added). The same is true here. *See* Am. Compl. ¶¶ 2, 10, 60, 87; Merz Decl. ¶¶ 9, 15.[8]

NRSC's last gasp on mootness is to note that this Court's judgment alone cannot provide any safe harbor akin to § 30108(c), and that the Court cannot compel the FEC to adopt an AO favorable to DCCC. NRSC Br. 27. But neither point establishes mootness, particularly in view of the NRSC's own concession that an unfavorable judgment here will change its behavior prospectively. Instead, these arguments "regarding the legal availability of a certain kind of relief go to the merits of a case, not mootness." *Sandpiper Residents Ass'n v. U.S. Dep't of Hous. & Urb. Dev.*, 106 F.4th 1134, 1142 (D.C. Cir. 2024) (cleaned up). DCCC "need not demonstrate that judicial review of the FEC's [final order] will lead to the ultimate relief sought" from the agency. *Unity08 v. FEC*, 583 F. Supp. 2d 50, 58 (D.D.C. 2008) (quoting *Nat'l Law Party of the U.S. v.*

[8] *Duran v. U.S. Congress* is inapposite because the plaintiff, who complained only about the loss of his right to vote in the 2020 election, did not seek prospective relief. NRSC Br. 27 (citing *Duran v. U.S. Congress,* No. 20-5380, 2021 WL 11659452, at *1 (D.C. Cir. July 1, 2021) (unpublished)).

FEC, 111 F. Supp. 2d 33, 50 (D.D.C. 2000)), *rev'd on other grounds*, 596 F.3d 861 (D.C. Cir. 2010). Even absent NRSC's concessions, setting aside the FEC's errant final action "could lead to agency action that would redress petitioner['s] injury, even if it were to require initiation" of a new AO process. *Competitive Enter. Inst. v. Nat'l Highway Traffic Admin.*, 901 F.2d 107, 118 (D.C. Cir. 1990); *accord Chafin*, 568 U.S. at 175–76 (observing that courts "often adjudicate disputes where the practical impact of any decision is not assured," provided the party has a "concrete interest" in favorable judgment, "however small").[9]

2. Even if the underlying dispute is moot, an exception applies.

Even if the underlying dispute were moot, this case presents a model example of the well-established exception for disputes capable of repetition yet evading review. That exception applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007) (citation omitted); *see also La Botz v. FEC*, 889 F. Supp. 2d 51, 59 (D.D.C. 2012) (recognizing second element encompasses "similarly situated" entities) (collecting authority); *accord Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974).

Both elements are satisfied here. "Controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.'" *Branch v. FCC*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987) (citation omitted). Given the condensed two-year timeframe between federal elections—and the time

[9] NRSC's reference to the FEC's rules for seeking an AO is thus irrelevant. NRSC Br. 27. Even apart from any declaratory relief from this Court, nothing in that rule prevents the FEC on remand from reevaluating the underlying AO request here—or applying a proper interpretation in a fresh AO request concerning a future election. *See Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 457–58.

needed to recruit candidates and develop campaign strategies—courts have routinely hold that election disputes lack time to be fully litigated. *E.g.*, *Holmes v. FEC*, 823 F.3d 69, 71 n.3 (D.C. Cir. 2016) (affirming rejection of mootness argument); *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998) (recognizing that election-related cases are the "archetypal cases for application of this exception") (citing *Stewart v. Taylor*, 104 F.3d 965, 969 (7th Cir. 1997)); *Johnson v. FCC*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987) (similar); *La Botz*, 889 F. Supp. 2d at 59 (quoting *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009)) ("Electoral disputes are [the] 'paradigmatic' examples of cases that cannot be fully litigated before the particular controversy expires.").

Applying the exception here is also consistent with the D.C. Circuit's "rule of thumb" that issues "of less than two years' duration" ordinarily evade review. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 321 (D.C. Cir. 2014) (citation omitted). That is the case here, where any fresh AO request would first require the emergence of a party's candidate, an event that typically occurs well into the two-year election cycle and often after a competitive party primary election. *See LaRoque v. Holder*, 650 F.3d 777, 788 (D.C. Cir. 2011) (agreeing that "most political campaigns do not begin two years before the election" and finding dispute subject to repetition but evading review); *see also* Merz Decl. ¶¶ 15–16.

It is also reasonably likely that the same complaining party—and certainly a similarly situated party—will find itself in the same circumstances during the 2026 election cycle (and beyond). If this controversy is deemed moot, DCCC or another similarly situated entity will have to file a new request for an AO on JFC advertising. Merz Decl. ¶ 15. That is near certain given the importance of the issue and the incentive NRSC and its peers have to continue JFC advertising in

future elections. *See* AR000110 (watchdog group emphasizing issue has "enormous implications on the integrity – or lack thereof – of our democracy"); *see also* ECF 14-1 ¶ 10.

II. DCCC challenges final agency action.

The FEC's decision to "conclude[] its consideration" of AOR 2024-13 without issuing an AO constitutes "final agency action" under the APA. AR000148. Only NRSC argues otherwise. NRSC Br. 28–32. But the two "core" inquiries courts make when determining whether an agency has taken a final action—"whether the agency has completed its decisionmaking process," and (2) "whether the result of that process is one that will directly affect the parties"—are both satisfied here. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (discussing the "*Bennett* factors").

A. The *Bennett* factors are satisfied.

As an initial matter, the nomenclature used to describe the FEC's action—"Final Opinion," "failure to act," "deadlock," "letter," or "notice"—is irrelevant. The APA broadly defines "[f]inal agency actions [to] include 'the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Fort Still Apache Tribe v. Nat'l Indian Gaming Comm'n*, 103 F. Supp. 3d 113, 121 (D.D.C. 2015) (quoting 5 U.S.C. § 551(13)). The relevant question is simply whether the action (or inaction) satisfies the *Bennett* factors. *See All. To Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (APA review under Section 706(2) applies to a "consummated agency action that APA views as final, notwithstanding the fact that the agency did nothing") (cleaned up); *Fort Still Apache Tribe*, 103 F. Supp. 3d at 121 (citing *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)) (similar); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (similar).

The D.C. Circuit has already held that the completion of the AO process under § 30108 is final agency action that satisfies the *Bennett* factors. *Unity08*, 596 F.3d at 864–65. The Court's

decision in *Unity08* did not turn on the FEC's issuance of an AO, but rather that (1) "the advisory opinion procedure [was] complete" and (2) affected the plaintiff's rights. *Id.* at 865. The same is true here. The first *Bennett* factor is satisfied because the FEC expressly stated that it completed its process: it "concluded its consideration" of AOR 2024-13, AR000147–49 (certification of Commissioner votes and letter confirming its closure of request (citing 11 C.F.R. § 112.4(a)), and it is undisputed that it will take no further action on AOR 2024-13 absent an order of this Court.

The second factor is also satisfied. "[L]egal consequences will flow" from the FEC's closure of AOR 2024-13, directly affecting DCCC. *Bennett*, 520 U.S. at 178. The FEC's failure to issue an AO denies a statutory "safe harbor," and has further chilled DCCC's ability to support its candidates and communicate its message to voters. *See infra* Argument § IV; PI Order at 16; *Ready for Ron*, 2023 WL 3539633, at *3 & n.3 ("failure to issue" AO "deprive[s]" plaintiff of this right every bit as much as an unfavorable AO). And, even beyond this precedent, the record shows that the FEC's action on AOR 2024-13 has other significant legal and practical implications for DCCC, including suffering competitive harm and an informational injury. *E.g.*, *Doctors for Am. v. OPM*, No. CV 25-322 (JDB), --- F. Supp. 3d ----, 2025 WL 452707, at *6 (D.D.C. Feb. 11, 2025) (finding second factor satisfied where "statute creates a right to information" and agency in effect "fails to provide Plaintiffs with access to" it. (citation omitted)); *supra* Argument § I.A. NRSC fails to address any of these "consequences" that "flow" from the FEC's action. *See* NRSC Br. 32–33.

B. The FEC's "deadlock" does not render its action non-final.

NRSC is wrong to suggest that "deadlocked" agency votes are categorically non-final. NRSC Br. 29–31. To the contrary, it is well established that assessing finality for APA purposes turns on the application of the *Bennett* factors and is a "pragmatic" and "flexible" inquiry that considers the specific facts and circumstances at play. *Ciba–Geigy Corp. v. EPA*, 801 F.2d 430, 435–36 (D.C. Cir. 1986) (citation omitted). Indeed, the D.C. Circuit affirmatively held—in

analogous circumstances in *In re Radio-Television News Directors Ass'n*, 159 F.3d 636 (D.C. Cir. 1998) (unpublished decision on mandamus petition); 184 F.3d at 878 (reaffirming conclusion in published decision)—that a "deadlock" by an agency on a request submitted to it for decision *is* final action. The same result is required here.

In *Radio-Television*, a party challenged FCC's deadlock on a petition for rulemaking that—like here—concluded the agency action and adversely impacted the plaintiff. 184 F.3d at 878. The D.C. Circuit explained the "denial of [such a petition] due to a deadlocked vote by members of a governing body constitutes final agency action." *Radio-Television*, 159 F.3d at 636 (citing *DCCC v. FEC,* 831 F.2d 1131 (D.C. Cir. 1987)); *Radio-Television*, 184 F.3d at 878. Thus, NRSC's suggestion that the D.C. Circuit has set forth a categorical rule of APA non-finality for all deadlocks, NRSC Br. 30, is simply wrong. Instead, as *Radio-Television* underscores, the question depends on application of the *Bennett* factors to the specific circumstances at issue.

The cases that NRSC relies on to attempt to evade review here involved deadlocks in distinct statutory contexts—none of which involve the FEC, all of which are readily distinguishable from the FEC AO process, and each of which turned on statutory regimes confirming the agency's own process was not complete. For example, *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007), involved an FCC "deadlock" on a forbearance petition that triggered a special provision of law that rendered the petition "deemed granted." *Id.* at 1132 (quoting 47 U.S.C. § 160(c)). The FCC never issued any order ending its consideration of the petition, and the action that was challenged in the case stemmed from the effects of the statutory provision. *Id.* By contrast, § 30108(a) mandates that the FEC "shall" issue an AO, 52 U.S.C. § 30108(a), and when the FEC failed to do so here, the FEC itself affirmatively closed the request. AR000148. Nor was there a "collective action" problem among the FEC Commissioners regarding

the closure of the request, NRSC Br. 32 (quotation omitted), because "*the Commission* [itself] concluded its consideration" of AOR 2024-13. AR000148 (citing 11 C.F.R. § 102.17(a)(2)). The FEC engaged in collective, institutional action when it decided to close the request.[10]

NRSC also relies on *Public Citizen v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016), but that case supports DCCC's argument. There, notices issued by FERC showing the agency had deadlocked on a decision about changing electricity rates announced by energy providers did not constitute final action for purposes of APA review. *Public Citizen*, 839 F.3d at 1170. But the agency never formally concluded any decision-making process, in part because (unlike here) it did not have to. *Id.* at 1168 & 1170 n.3. Instead—as in *Sprint Nextel*—a statute dictated a particular result because the agency did not act. *Id.* at 1170; *see* Joint App'x at 112, Case No. 14-1244 (D.C. Cir. Dec. 16, 2015) ("*in the absence of Commission action* on or before September 15, 2014, ISO-NE's filing . . . became effective by operation of law" (emphasis added)).

The NRSC claims that the FEC did not "resolve" the merits of the request by "*issu[ing] an order*," NRSC Br. 32 (citing *Public Citizen*, 839 F.3d at 1171 n.5 (emphasis in original)), but case law establishes that a decision on the merits is not required for there to be final agency action, *see, e.g.*, *Hurry*, 589 F. Supp. 3d at 126 (decision by agency "closing" request to agency was final

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[10] It is not clear what authority FEC has to excuse away its statutory duty that it "shall render a written advisory opinion," 52 U.S.C. § 30108(a), with a rule permitting it to simply issue a letter closing the request, *see Orloski*, 795 F.2d at 164; 11 C.F.R. § 112.4(a). NRSC points to § 30106(c), NRSC Br. 4, but nothing in that provision *excuses* FEC from issuing an AO. That section simply means that when FEC fails to gather a majority vote to provide an AO, yet nonetheless closes an AOR, it also fails act in accordance with § 30108(a). Indeed, Congress rejected amendments that would have made 3-3 deadlocks a formal response under § 30108, leaving in place the requirement that FEC "shall" issue an actual AO. H.R. Rep. No. 96-422, at 20 (1979). The agency's choice to issue a closeout letter in lieu of an AO was also not a "ministerial" act, FEC Br. 18, because that "step" taken by "the Commission" expressly relied on a rule promulgated by majority vote under the FEC's own rulemaking authority. *See* 52 U.S.C. § 30107(a)(8).

action subject to APA review). What matters is whether the agency concluded its own decision-making process, and the FEC's letter closing AOR 2024-13 is undisputable evidence that it did. *Bennett*, 520 U.S. at 177–78; *Radio-Television*, 184 F.3d at 878.

Finally, *Public Citizen*'s citation to *Hispanic Leadership Fund*'s dicta that an FEC deadlock on a request for an AO might not constitute final action does not change the analysis. NRSC Br. 33. That out-of-circuit First Amendment case did not even involve a claim under the APA. *Hisp. Leadership Fund v. FEC*, 897 F. Supp. 2d 407, 419–20 (E.D. Va. 2012). Its offhanded reference to agency action—bereft of any legal citation and without any briefing from the parties—simply concerned whether deference to a particular reading of FECA was warranted under *Chevron*'s (now-overruled) regime. *Id.* at 428 (opining that no deference was owed "the group of commissioners who voted against granting a safe harbor" because it did not represent a controlling bloc, contrasting *FEC v. NRSC*, 966 F.2d 1471 (D.C. Cir. 1992)).

C. FECA does not provide an adequate alternative remedy.

In its final effort to stave off discussion of the merits, NRSC wrongly asserts that AOR 2024-13 is effectively unreviewable under the APA because § 30109 provides DCCC with an "adequate remedy in a court." 5 U.S.C. § 704; NRSC Br. 33–35. That argument fails for a host of reasons. For one, there is a "general presumption in favor of reviewability" that NRSC fails to overcome. *Unity08*, 596 F.3d at 866 (rejecting theory that § 30109 precludes APA review of AO). Consistent with this presumption, "[t]he Supreme Court has long construed the 'adequate remedy' limitation on APA review narrowly," *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 185 (D.D.C. 2015), so as to not disrupt the APA's "generous review provisions," *Bennett*, 520 U.S. at 163 (citation omitted). Thus, while agency actions are reviewable under the APA if there is no "adequate remedy in a court," *CREW v. DOJ*, 846 F.3d 1235, 1244 (D.C. Cir. 2017), that language must not be

"construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

In addition, § 30109—as a backwards-looking prosecutorial mechanism—serves a fundamentally different purpose than the AO process, which is meant to provide clarity on the application of FECA to a regulated party's *planned* activities. To that end, AOs issued under § 30108 bind the agency moving forward and provide safe harbor to regulated parties. Section 30109 does no such thing. *See U.S. Chamber of Com. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995). Further still, § 30109 complaints are easily and frequently immunized from judicial review, casting doubt on DCCC's ability to obtain any relief through that process, never mind "adequate" relief.

To establish the existence of an alternative remedy that bars APA review, the Court "look[s] for clear and convincing evidence of congressional intent to create a special, alternative remedy and thereby bar APA review." *CREW*, 846 F.3d at 1244 (quotation omitted). Courts consider several factors as part of that analysis. *First*, the alternative remedy must be of the "same genre" as APA review, even if it need not necessarily be "identical." *Ramirez v. ICE*, 310 F. Supp. 3d 7, 24 (D.D.C. 2018). *Second*, "doubtful" or "limited" relief compared to APA review does not suffice. *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (quotation omitted). *Third*, an alternative cannot be held adequate where it requires undergoing "arduous, expensive, and long" processes compared to APA review. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 601 (2016). Each factor weighs against NRSC's theory.

Section 30109 provides a different genre of relief. Here, the enforcement scheme in § 30109 is not of the "same genre" as APA review of the AO process. Section 30109 concerns "the Commission's discretionary enforcement of the substantive provisions of the Act." *Heritage Action for Am. v. FEC*, 682 F. Supp. 3d 62, 72 (D.D.C. 2023) (citing 52 U.S.C. §§ 30107(e),

30109(a)(8)). It grants the FEC "exclusive authority to bring civil enforcement actions against respondents," which private parties may only sometimes bring "in certain limited circumstances." *Id.* (holding § 30109 did not bar APA challenge to regulations). Contrary to NRSC's suggestion, *see* NRSC Br. 34, DCCC does not seek civil enforcement to punish its rivals for their past acts. Instead, it seeks prospective clarity regarding application of FECA, including as to possible safe harbor protections. *See* Am. Compl. at 31 (Prayer for Relief). That is *precisely* what § 30108 is meant to provide "participants in the political process" so that they can "operate with substantial certainty regarding their legal obligations." *Ready for Ron*, 2023 WL 3539633, at *3. Congress made this clear when enacting FECA, explaining that:

> While it may be presumed that all candidates and political committees desire to comply fully with the law, the necessarily complex nature of the legislation may make compliance most difficult even with the most conscientious effort in this regard. Accordingly, it is desirable that those having doubts as to their legal obligations be afforded the means of having these doubts resolved.

H.R. Rep. No. 93-1239, at 9 (1974). Accordingly, "the advisory opinion process is central to the Commission's responsibility to clarify the Act." *Nat'l Rifle Ass'n of Am.*, 254 F.3d at 185 (quoting H.R. Rep. No. 96-422, at 20 (1979)). These distinct statutory purposes—a prosecutorial process to punish specific past conduct and an advisory process meant to clarify rules for regulated parties—are plainly not of the same genre. And, as explained *supra* Argument § I.A., only APA review of the FEC's final action under § 30108 affords the prospect of safe harbor protection.

Section 30109 offers "doubtful" and "limited" relief. Further, there is good reason to find it "doubtful" that § 30109 affords DCCC relief akin to the APA. Because § 30109 is rooted in the FEC's prosecutorial authority, an FEC dismissal order based even *in part* on prosecutorial discretion insulates the complaint from judicial review entirely, even at the urging of a private complainant. *CREW v. FEC*, 993 F.3d 880, 884 (D.C. Cir. 2021). That is true even if the FEC's

dismissal "feature[s] only a brief mention of prosecutorial discretion alongside a robust statutory analysis." *Id.* Thus, the FEC enjoys "unlimited latitude to decline to bring an enforcement action" in response to a § 30109 complaint, *CLC v. FEC*, No. CV 19-2336 (JEB), 2025 WL 315143, at *4 (D.D.C. Jan. 28, 2025), and it is "commonplace" for the FEC to deploy this "Get Out of Judicial Review Free card," *CREW v. FEC*, 55 F.4th 918, 927, 929 (D.C. Cir. 2022) (Millet, J., dissenting). Given the FEC's unilateral ability avoid review under § 30109, it is a nonstarter to suggest the provision provides an "adequate" alternative. "[T]here is scant basis to displace APA review" where "the very existence of an alternative remedy is" so doubtful. *CREW*, 846 F.3d at 1245.

This automatic deference to the FEC's discretion is *nothing* like APA review, under which "'the reviewing court'—not the agency whose action it reviews—is to 'decide all relevant questions of law' and 'interpret . . . statutory provisions.'" *Loper Bright*, 603 U.S. at 398 (quoting 5 U.S.C. § 706). In contrast, even cursory assertions of prosecutorial discretion under § 30109 bar review entirely. *See CREW*, 993 F.3d at 884; *CREW v. FEC*, 892 F.3d 434, 441 (D.C. Cir. 2018) (explaining even "abuse of discretion" review is often unavailable under § 30109). Even where judicial review *is* available under § 30109, it is subject to "an extremely deferential standard which requires affirmance if a rational basis for the agency's decision is shown." *Orloski,* 795 F.2d at 167 (cleaned up), unlike the *de novo* review available under the APA as to the meaning of FECA. *But see CREW*, 846 F.3d at 1245 (explaining only something like "*de novo* district-court review of the challenged agency action" constitutes evidence of an alternative adequate remedy).[11]

[11] For this reason, it does not matter that the D.C. Circuit is currently reviewing *en banc* the non-reviewability of FEC dismissal orders based on prosecutorial discretion. *See End Citizens United PAC v. FEC*, No. 22-5277, Per Curiam Order (D.C. Circ. Oct. 15, 2024) (granting en banc review). Even if the court modifies that non-reviewability rule, it will still be the case that FEC receives significant deference in its heavily fact-bound prosecutorial choices, *see Orloski*, 795 F.2d at 167—deference it is not entitled to as to a general question of statutory interpretation.

Section 30109 imposes "arduous" and "long" procedures. Lastly, § 30109 also imposes an "arduous" and "long" procedure on complainants, *Hawkes Co.*, 578 U.S. at 601, requiring them first to file a complaint and then wait at least 120 days before learning if the FEC will dismiss (or ignore) it. 52 U.S.C. § 30109(a)(8)(A). Assuming the agency does not dismiss based on its discretion—which would foreclose any judicial review—the complainant must then file a petition for review in federal court. *Id*. If the court finds the FEC's dismissal or failure to act "contrary to law," and not otherwise immunized by the FEC's discretion, it may order the FEC to conform to the court's decision within 30 days. *Id.* § 30109(a)(8)(C). If the agency does not do so, the complainant must return once more to federal court by bringing a "civil action to remedy the violation involved in the original complaint." *Id.*

In other words, § 30109 imposes a "two-step process of filing a delay suit and then, if the FEC fails to conform with the court's order, filing a citizen suit." *CLC v. Iowa Values*, 691 F. Supp. 3d 94, 104 (D.D.C. 2023). This shuttling back-and-forth between the agency and federal court, interspersed by lengthy statutory periods of delay, provides none of the convenience of § 30108's swift AO process and subsequent APA review, particularly given DCCC's need to obtain clarity well ahead of the 2026 elections. Merz Decl. ¶ 15. Thus, each of the relevant factors weighs clearly against finding that § 30109 is an adequate alternative.

The NRSC's remaining arguments are briefly dispatched. It implies that, if an AO request could harm the requestor's competitor, it must necessarily be channeled into the enforcement process. *See* NRSC Br. 34. Nothing in the text of FECA supports that view. And the D.C. Circuit has previously found parties with competitive injuries can raise APA challenges to FEC action, notwithstanding availability of § 30109. *See Shays*, 414 F.3d at 96. NRSC insists that DCCC *could* file a complaint about JFC advertising through the § 30109 process if it wished. *See* NRSC Br.

33–34. That argument misses the point. DCCC has been clear from the start of this case that it wants the safe harbor protection to engage in JFC advertising as described in AOR 2024-13 . Merz Decl. ¶ 10; ECF No. 1. And it has been equally clear that it seeks forward-looking guidance on this issue so that the competitive playing field is fair and level moving forward. Merz Decl. ¶¶ 10–12; ECF No. 1. Section 30109 does not offer that kind of relief, nor was it designed to. *See* H.R. Rep. No. 93-1239 (1974).

The fact that § 30109 contains procedural "mechanisms" for filing a complaint does not imply that Congress meant it to provide an exclusive remedy or displace the APA. The D.C. Circuit rejected that exact argument in *Unity08*, disagreeing with the FEC that § 30109 "implicitly precludes direct judicial review of Commission advisory opinions [because it] contains detailed procedural provisions but fails to provide any private right of action against the Commission." 596 F.3d at 866. Indeed, courts are typically skeptical that "permissive" schemes just like § 30109 are intended to preclude APA review, notwithstanding their statutory procedures. *Gonzalez Boisson v. Pompeo*, 459 F. Supp. 3d 7, 14 (D.D.C. 2020) (citing *Rusk v. Cort*, 369 U.S. 367, 372 (1962)). Similarly, NRSC notes that § 30109 affords those charged with violating FECA "notice and an opportunity to respond." NRSC Br. 35 (citing 52 U.S.C. § 30109(a)(1)–(4)). But so too does § 30108, which invites "any interested party" to submit comments—a right NRSC availed itself of here. 52 U.S.C. § 30108(d); AR000009–50, 113–143. And it would of course enjoy § 30109's full suite of procedural protections *if* any subsequent enforcement action was ever filed against it.

III. The Court should grant summary judgment and declare that the FEC's final action on AOR 2024-13 is arbitrary, capricious, and not in accordance with law.

The FEC and NRSC have little to say on the merits. Neither grapples with the relevant statutory provisions—the definitions of "coordination" and "coordinated expenditures," *see* 52 U.S.C. §§ 30101(8)(A)(i), 30116(a)(7)(B)(i)—never mind explains how FECA might permit

spending *unlimited sums* on admittedly coordinated advertisements without a single dollar counting as a contribution. The reason why is clear: no plausible reading of FECA permits such a fanciful interpretation, as the FEC was required to conclude in AOR 2024-13.

The FEC's failure to do so violates the APA, requiring the Court to "declare agency action unlawful if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Ass'n of Mortg. Brokers, Inc. v. Donovan*, 641 F. Supp. 2d 8, 13 (D.D.C. 2009) (quoting 5 U.S.C. § 706(2)). Where an "agency's interpretation of its governing statute is contrary to law," courts must "hold unlawful and set aside" such agency action. *Env't Def. Fund v. EPA*, 124 F.4th 1, 11 (D.C. Cir. 2024). In reviewing the FEC's final action on AOR 2024-13, the Court must "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. "[T]he role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 603 U.S. at 395.

A. The plain text of FECA required the FEC to issue an advisory opinion concluding JFC advertising is a coordinated expenditure and contribution.

In assessing DCCC's § 706(2) claim, the Court must "look first to the statute" as "agency action contrary thereto is necessarily 'not in accordance with law.'" *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1013 (D.C. Cir. 1982) (quoting 5 U.S.C. § 706(2)). Under FECA, "contribution" is "broadly defin[ed] to include 'any gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office.'" *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 323 (D.D.C. 2020) (quoting 52 U.S.C. § 30101(8)(A)(i)). A committee therefore makes a "contribution" when it provides money or *anything* of value to help one of its candidates win a federal election. Congress has set strict limits on how much may be contributed to candidates, including by party committees. *See* 52 U.S.C. § 30116(a), (d).

FECA similarly defines "expenditure," with certain specified exceptions, to mean "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9). A committee may not evade making a contribution by simply coordinating with a candidate to make an expenditure on their behalf. Expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, *shall* be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added). Absent this rule, party committees could "finance campaign activity directly—say, paying for a TV ad or printing and distributing posters" without regard to contribution limits. *Shays*, 414 F.3d at 97. In other words, "[w]ithout a coordination rule, politicians could evade contribution limits and other restrictions" on donations to candidates by simply coordinating their expenditures with the candidate. *Id.*; *Buckley*, 424 U.S. at 47 (explaining the rule is critical to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions").

The merits here—and proper resolution of AOR 2024-13—require nothing more than straightforward application of the coordination rule and the statutory definitions of "contribution" and "expenditure." When a party committee gives a federal candidate money to pay for a television ad to promote that candidate's election—or to attack that candidate's electoral rival—it makes a "gift . . . of money" to that candidate "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8); *see also Shays*, 414 F.3d at 97. Similarly, if a committee pays directly for such an ad on the candidate's behalf, it makes a "payment . . . of money . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9). If such an expenditure is coordinated with the candidate, it "shall be considered to be a contribution to such

candidate." 52 U.S.C. § 30116(a)(7)(B)(i). These three basic statutory points yield an obvious and common sense reading of FECA:

> [T]he money an individual (or committee) spends creating a political advertisement in consultation with the candidate and airing it on television ***is a regulated campaign contribution***, just like the money given directly to a candidate to enable her to produce and air the advertisement herself.

CLC II, 106 F.4th at 1180 (emphasis added); *see also McConnell v. FEC*, 540 U.S. 93, 221 (2003) (recognizing that "expenditures made after a wink or nod," or even with more explicit coordination, "often will be as useful to the candidate as cash").

Nothing in FECA exempts payments for television ads—including the sort at issue in AOR 2024-13—from contribution limits or disclosure rules because of the pretextual addition of a QR code and brief request to "donate now" at the tail end of an ordinary candidate advertisement. As the AOR 2024-13 requestor emphasized, "a passing solicitation for funds" at the end of an advertisement does *not* mean "the entire advertisement can be paid for out of a joint fundraising committee without regard to the contribution limits." AR000083. The FEC was presented with a draft opinion (Revised Draft B) that plainly stated as much: "No, each Joint Fundraising Committee may not finance the entire costs of the proposed television advertising" without regard to contribution limits because FECA "require[s] a political party committee to treat a public communication that is coordinated with a candidate or a candidate's authorized committee as either an in-kind contribution to that candidate or a coordinated party expenditure, both of which are subject to amount limitations." AR000097. No other proposed draft opinion adopted this statutorily grounded conclusion. The FEC nonetheless eschewed this sole acceptable interpretation of FECA and closed AOR 2024-13. AR000148. As a matter of plain statutory reading, that is "not in accordance with law." 5 U.S.C. § 706(2). Neither the FEC nor NRSC argue otherwise.

B. FECA's plain text cannot be evaded by the agency's rules.

Unable to offer a coherent statutory construction, NRSC spends much of the *background* section of its brief poring over various rules, regulations, and prior AOs that purportedly condone unlimited JFC advertising beyond FECA limits. *See* NRSC Br. 3–9. But there is a reason this effort does not appear in NRSC's *argument* section: all parties recognize this Court must "enforce the statute that Congress enacted." *Allegheny Def. Project v. FERC*, 964 F.3d 1, 18 (D.C. Cir. 2020) (quotation omitted); *see also Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 184 (2020) ("We must enforce plain and unambiguous statutory language . . . according to its terms." (quotation omitted)). Indeed, it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). The agency's past rules shed little light here because, at bottom, "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," is "exclusively a judicial function." *Loper Bright*, 603 U.S. at 387 (quoting *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 544 (1940)). The meaning of FECA here is clear—both as to the law's contribution and disclosure rules, and the FEC's obligation to issue an AO. The FEC's final action, however, is "not in accordance" with these clear statutory commands from Congress and thus must be declared unlawful and set aside.

IV. Alternatively, assuming JFC advertising is not subject to FECA's limits, DCCC is entitled to relief authorizing it to run its planned ads.

Although DCCC believes FECA's text is clear, three Commissioners (supported by Republican commenters, including NRSC) concluded that JFC advertising is not subject to FECA's limits and requirements. *See* AR000051–63 (Draft A); AR000147; *see also* NRSC Br. 4–7. If this is right—and JFC advertising is free from FECA's contribution limits and disclosure requirements—the FEC's failure to issue an AO granting safe harbor was not only arbitrary and

capricious and not in accordance with law, it was also contrary to DCCC's constitutional rights. In that case, DCCC is entitled to a judgment setting aside the FEC's final action on AOR 2024-13 and declaring that DCCC has a right to run its planned JFC advertising.

A. DCCC has standing to pursue its alternative APA theory.

As for its injury, DCCC would readily mirror the JFC advertising proposed in AOR 2024-13, but it is chilled from doing so because of the FEC's failure to issue an AO in this case. Merz Decl. ¶¶ 9–10. Because of the FEC's "non-issuance" of an AO, DCCC has been deprived of statutory "safe harbor," *Ready for Ron*, 2023 WL 3539633, at *3 n.3 (citing *Chamber of Com.*, 69 F.3d at 603), a deprivation that "create[s] a justiciable controversy for Article III purposes," *id.* Nothing now "prevents the [FEC] from" instituting an enforcement action "at any time," including after, "perhaps, another change of mind of one of the Commissioners" in the case of a deadlock. *Chamber of Com.*, 69 F.3d at 603. Indeed, the FEC concedes a different set of Commissioners in the future could reach a different conclusion on the issue of JFC advertising, FEC Br. 36, and the current President has ordered the Commissioners to follow his legal views, rather than their own, *see generally* E.O. 14215, *Ensuring Accountability for All Agencies* (Feb. 25, 2025).

FECA also permits private parties to challenge decisions by the FEC not to enforce alleged violations. *Chamber of Com.*, 69 F.3d at 603. That threat carries particular force here because the record shows that watchdog groups who regularly challenge such FEC decisions believe JFC advertising is unlawful. AR000084–90, 109–112. To the extent NRSC insists DCCC's fear is unreasonable because it can rely on existing FEC regulations or opinions, NRSC Br. 22 & n.4, the assertion rings hollow given that in this very proceeding, *three Commissioners found the precise conduct DCCC wishes to engage in unlawful*, even though NRSC cited the same authorities at the FEC that it cites its brief to this Court. AR000018-42, 135.

DCCC's chill injury is plainly traceable to the FEC's failure to issue an AO in response to AOR 2024-13 and redressable by the relief DCCC requests. The record shows that, but for the FEC's failure, DCCC would have "safe harbor" to proceed with planned JFC advertising. 52 U.S.C. § 30108(c); AR000147 (showing 3-3 Commissioner vote); AR000051–63 (Draft A, concluding JFC advertising in excess of FECA's limits is lawful); *see* Merz Decl. ¶ 10 (explaining that a "safe harbor" or Court order would allow DCCC to proceed with JFC advertising plans for the 2026 election cycle); *see also Ready for Ron*, 2023 WL 3539633, at *3 & n.3. Finally, DCCC's chill injury would be redressed by declaratory relief—which would authorize DCCC to engage in JFC advertising—as well as APA relief setting aside the FEC's final action on AOR 2024-13. *See* Merz Decl. ¶¶ 9–10; *see supra* Argument § I.A.3.

The FEC and NRSC each suggest DCCC cannot show redressability because its alternative claim is a "mismatch" or "would not follow from success on the merits," given that DCCC views the proposed JFC advertising as unlawful. FEC Br. 32–34; NRSC Br. 19. These arguments ignore that DCCC is free to press alternative theories—even inconsistent ones, *see* Fed. R. Civ. P. 8(d)—and that standing is assessed independently as to each claim and form of requested relief, *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citing *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Thus, although DCCC's primary argument is that the JFC advertising is subject to FECA limits, DCCC's view on that "question of law" does not bar it from pressing alternative legal theories. *McNamara v. Picken*, 950 F. Supp. 2d 125, 129 (D.D.C. 2013); *cf. Wright v. FBI*, 598 F. Supp. 2d 76, 78 (D.D.C. 2009) (noting that "[w]hen a court denies APA claims under the 'arbitrary and capricious' prong, it does not automatically deny APA claims based on the 'contrary to constitutional right' prong").

B. The FEC has unconstitutionally chilled DCCC's constitutionally protected activity, if JFC advertising is not subject to FECA limits and requirements.

On the merits, the legal theory pressed by Republican commenters and adopted by three Commissioners holds that JFC advertising does not result in "contributions," as defined by FECA, thus is not subject to the law's limits and requirements at all. *See* AR000051–63 (Draft A); NRSC Br. 4–7. The theory can be boiled down to the following.

FECA provides that "candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee." 52 U.S.C. § 30102(e)(3)(A)(ii). FECA also distinguishes "contributions" from "transfers between political committees of funds raised through joint fund raising efforts" and does not impose any limits on such fundraising activity. *Id.* § 30116(a)(5). The FEC thus could promulgate rules to "govern all joint fundraising activity." 11 C.F.R. § 102.17(a)(2). And under those rules, only when a participant "pay[s] expenses on behalf of another participant" does a joint fundraising activity result in a "contribution" from one participant to another. *Id.* § 102.17(c)(7)(i)(B).

Accepting that framing, any JFC activity that amounts only to "fundraising" cannot result in a contribution at all under FECA, and thus also need not be disclosed. *See* AR000002; AR000054 (Draft A). The proposed ads paid for by the JFCs contain a brief fundraising solicitation for the JFC, Merz Decl. ¶ 7, and the JFC's expenses are allocated based on funds received that are distributed pursuant to a pre-arranged agreement. AR000002. As a result, and even though the ads contain what otherwise amounts to candidate advocacy, these ads are not "coordinated party expenditure[s]" and thus not subject to FECA's applicable limits or disclosure requirements for such expenditures. AR000052–57.

Assuming all that is right, and JFC advertising is not subject to FECA, the FEC's failure to issue an AO violates the APA not only because it is not in accordance with law, *supra* Argument

§ III, but also because it is contrary to DCCC's constitutional rights, 5 U.S.C. § 706(2)(b). In that case, (1) JFC advertising is protected speech, and (2) the FEC's action unconstitutionally chills it.

First, television ads to raise money for political committees and candidates constitute fundamental First Amendment activities. *Emily's List v. FEC*, 581 F.3d 1, 16 (D.C. Cir. 2009); *Buckley*, 424 U.S. at 14; *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 539 (D.C. Cir. 2019) (citations omitted). If FECA places no limits on JFC advertising, there is no question that DCCC has a protected right to engage in it and would do so. *Cf. Davis*, 554 U.S. at 734 (while FECA restrictions must satisfy First Amendment scrutiny, Congress has no obligation to regulate otherwise protected activity); Merz Decl. ¶ 10.

Second, it is well-established that even "[g]overnmental action that falls short of a direct prohibition on speech may violate . . . the First Amendment by 'chilling' the free exercise" of protected activity. *Fraternal Order of Police v. Rubin*, 26 F. Supp. 2d 133, 141 (D.D.C. 1998). "As the Supreme Court has recognized, the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions." *Id.* (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972), and *NAACP v. Button*, 371 U.S. 415, 433 (1963)). So long as the chill on protected activity is "reasonable," the government's action violates the First Amendment. *See id.* And here, as already explained, in the unique context of FECA's looming enforcement scheme, a party suffers a reasonable chill when the FEC fails to issue an AO as to protected conduct in which it would otherwise engage. *Chamber of Com.*, 69 F.3d at 603; *accord Unity08*, 596 F.3d at 865; *Ready for Ron*, 2023 WL 3539633, at *3 & n.3.

Accordingly, if the Court does not adopt DCCC's primary merits theory, it should instead declare DCCC has a right to engage in its planned JFC Advertising, Merz Decl. ¶ 10, hold unlawful the FEC's final action on AOR 2024-13, and set that action aside, *supra* Argument § I.A.3.

CONCLUSION

For the reasons stated above, the Court should deny the motions to dismiss and grant DCCC's motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.4(d), I hereby certify that on March 7, 2025, I caused a true and correct copy of the foregoing to be served on all counsel of record by electronic service through the Court's ECF system.

/s/ Aria C. Branch