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)

NRSC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN REPLY IN SUPPORT OF NRSC'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page(s)

Cases

* Indicates an authority on which counsel chiefly relies. See LCvR 7(a).

Statutes

Regulatory Authorities

Legislative Materials

INTRODUCTION

Revealing a fundamental misunderstanding of administrative law and the rules of civil procedure, the DCCC's brief reads as if the FEC and the NRSC brought this case seeking the Court's affirmation of the status quo. Repeatedly and wrongly, the DCCC faults the FEC and the NRSC for not preemptively rebutting in their ***motions to dismiss*** meritless merits arguments that appear nowhere in the agency record.

That is not how administrative-law litigation works. Under the Administrative Procedure Act ("APA"), "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc); *see also, e.g.*, *Powder River Basin Res. Council v. U.S. Dep't of Interior*, 749 F. Supp. 3d 151, 160 (D.D.C. 2024) (Chutkan, J.) ("The plaintiff bears the burden of establishing that the agency's action is invalid."). Defendants are thus not obligated to guess preemptively at what arguments a plaintiff might choose to advance, and that is doubly true for intervenor-defendants who must wait for the agency to file the administrative record. LCvR 7(n); *cf. NRDC v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) ("[T]he [district] court proceeded with its review on the basis of a partial and truncated record. We think this was error."). Now that the FEC has filed the record and the DCCC has made its groundless merits arguments, it is clear the DCCC comes up short.

Foremost, the DCCC asserts—contrary to five decades of FEC and congressional understanding—that all Joint Fundraising Committee ("JFC") advertising is a "coordinated expenditure." But FECA expressly exempts JFC-fundraising advertising from its definition of "expenditure," and the DCCC never addresses the clear statutory text which squarely forecloses its merits argument. Next, the DCCC hints that the joint-fundraising cost allocation method specified in the FEC's regulation is somehow inadequate. But its brief never develops that argument and, in any event, continues to overlook that Congress has approved the regulation three

times. The First Amendment also prohibits restriction of a political party committee's speech on behalf of its candidates. Finally, the DCCC never explains why it believes FECA authorizes the FEC to issue an advisory opinion without the votes of four or more Commissioners (in fact the statute prohibits it) or why the APA authorizes ***the Court*** to issue an advisory opinion at all.

But the Court need not reach any of these merits questions because, as the NRSC and the FEC explained in their motions to dismiss, the DCCC does not challenge final agency action, it has another adequate remedy that forecloses APA relief, it lacks standing, and its case is moot. In addition, the DCCC leaves "unaddressed" and therefore has "conceded," *see Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014), two issues raised in the motions to dismiss:

- That the only ***agency*** (as opposed to private) action alleged in this case—the FEC's non-issuance of an advisory opinion—was lawful, foreclosing any relief under the APA. Dkt. 32-1 at 44–46 (pp. 36–38); *see also id.* at 24–25 (pp. 16–17).
- That the DCCC "forfeited its merits argument before the agency" because no party in that proceeding made the broad statutory argument the DCCC advances here. *Id.* at 46–47 (pp. 38–39) (capitalization altered).

Because both conceded arguments are dispositive, either is a sufficient basis to dismiss.

The Court should deny the DCCC's motion for summary judgment, grant Defendants' motions to dismiss the Amended Complaint with prejudice, and enter summary judgment for Defendants, *see* Fed. R. Civ. P. 56(f)(1) (authorizing "summary judgment for a nonmovant").

BACKGROUND[1]

A. Longstanding FEC Regulations Clearly Define When An Expenditure May Become A Contribution.

Congress enacted the Federal Election Campaign Act in 1972. Pub. L. No. 92-225, 86 Stat. 3 (1972). Under FECA, one makes a "contribution" to a candidate when he provides something

[1] The NRSC set out the background of this case in full in its motion to dismiss. *See* Dkt. 32-1 at 11–22 (pp. 3–14). It provides an abridged version here to comply with LCvR 7(h)(2).

of value to the candidate or his authorized committee. 52 U.S.C. § 30116(a)(7)(A); *id.* § 30101(8)(A). One also makes a "contribution" when he makes "expenditures … in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." *Id.* § 30116(a)(7)(B)(i).

FECA does not require regulated parties to interpret the "contribution" provisions on a blank slate. It instead provides that the FEC may "make, amend, and repeal such rules … as are necessary to carry out the provisions of this Act." 52 U.S.C. § 30107(a)(8). It also empowers the FEC to "render advisory opinions," *id.* § 30107(a)(7), which create a safe harbor for those who "rel[y]" on such opinions, *id.* § 30108(c)(2).

The FEC has long had rules that govern whether a political communication by a political party is a "contribution." *See* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 448–49 (Jan. 3, 2003) (codified at 11 C.F.R. § 109.37). These rules "detail[ ] standards for party coordinated communications" in order to "give clear guidance" to regulated parties. *Id.* at 448.

A political communication becomes a contribution when three requirements are met. *First*, "[t]he communication is paid for by a political party committee or its agent." 11 C.F.R. § 109.37(a)(1). *Second*, the communication contains certain election-related content. *Id.* § 109.37(a)(2). *Third*, the candidate, his authorized committee, or his agent is involved in certain aspects of the communication. *Id.* § 109.37(a)(3); *see also id.* § 109.21(d).

B. Under The FEC's Longstanding Regulations, Joint-Fundraising Expenditures Are Not Contributions.

In 1976, Congress amended FECA and drew an express distinction between "contributions" and "joint fund raising efforts." Pub. L. No. 94-238, § 112, 90 Stat. 475, 486–90 (1976). Then, in 1977, several Democrat campaign committees inquired about the legal consequences of jointly hosting a "fundraising dinner" in which the funds raised would be

distributed by a "Special Committee" pursuant to "an allocation formula." FEC, Advisory Op. 1977-14, at 1 (Apr. 20, 1977), https://tinyurl.com/2p9xucf5. The FEC explained in an advisory opinion that "the participating presidential campaigns" could "avoid the occurrence of a contribution in-kind" to one another so long as they bore "a pro-rata share of all fundraising or other expenses of the Special Committee." *Id.* at 2. In other words, "if the allocation formula allows [one] campaign 70 percent of the contributions received by the Special Committee, then that campaign must bear 70 percent of the expenses incurred" to avoid a "contribution." *Id.*

Following the FEC's determinations on the legal status of joint fundraising, Congress amended FECA to affirmatively exempt JFC-fundraising advertising from the statute's definition of "contribution." First, it broadly excluded from the definition of "expenditure"—and thus "coordinated expenditure"—"any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate." Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1343 (1980) (codified at 52 U.S.C. § 30101(9)(B)(vi)). Congress then added an express authorization for candidates to "designate a political committee" for "joint fundraising by such candidates as an authorized committee." *Id.* § 102 (codified at 52 U.S.C. § 30102(e)(3)(A)(ii)). In this latter provision, Congress ratified the exact joint-fundraising rules that the FEC established in the 1977 Bayh opinion and other advisory opinions.

The FEC formally codified its long-recognized interpretation of FECA in 1983. *See* Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26,296 (June 7, 1983) (codified at 11 C.F.R. § 102.17). The agency explained that its 1977 advisory opinion had already laid out "the basic rules for conducting joint fundraising activities." *Id.* at 26,298. Central to the rule was the pro-rata allocation of expenses based on funds raised, which is also known as the

"funds-received" allocation method. The Commission explained that joint-fundraising participants "must enter into a written agreement which identifies the fundraising representative and states the formula for allocating the fundraising proceeds and expenses." *Id.* at 26,299 (codified at 11 C.F.R. § 102.17(c)(1)). The Commission specified that "[i]f each participant pays its own share of expenses calculated pursuant to this section, ***no contribution in-kind from one or more of the participants occurs***." *Id.* at 26,300 (emphasis added). Indeed, only when "[a] participant … pay[s] expenses on behalf of another participant" does joint fundraising result in a "contribution" from one participant to another. 11 C.F.R. § 102.17(c)(7)(i)(B).

The FEC has repeatedly reaffirmed this clear rule in subsequent advisory opinions, and it has applied the rule to joint-fundraising activities in the form of television advertisements. *See* Dkt. 32-1 at 14–15 (pp. 6–7). Regulated entities from both sides of the aisle have, in turn, relied on these clear pronouncements—including as recently as 2024. *See, e.g.*, FEC, Advisory Op. 2024-07 (Aug. 29, 2024), https://tinyurl.com/28t4epmh (explaining that JFC-fundraising advertising expenses would "not be in-kind contributions" between participants); *accord* Dkt. 32-1 at 15–17 (pp. 7–9).

C. Notwithstanding Nearly 50 Years Of FEC Precedent On Joint Fundraising, The DSCC Seeks An Advisory Opinion To Quash Republican Joint-Fundraising Advertisements.

Notwithstanding the clear FEC precedent from 1977 to 2024, Plaintiff and its allies now claim that JFC-fundraising advertising is "legally doubtful." Dkt. 28 at 28 (Am. Compl. ¶ 88). The DCCC claims that, beginning in July 2024, Republican JFC-fundraising advertising—that appears nowhere in the administrative record—"spurred this controversy." *Id.* at 16 (¶¶ 49–50). Then, two months later, the DSCC and two principal campaign committees for Democrat Senate candidates requested an advisory opinion from the FEC about the legality of hypothetical joint-fundraising ads for the 2024 election cycle. *Id.* at 22 (¶ 63); *see* AR000001–7.

But the point of the request was not, as the DSCC claimed in its initial filing, to obtain guidance regarding its own ads. *Contra* AR000002. The point was to shut down NRSC and Republican Senate JFC-fundraising ads using FECA's expedited timeline for advisory opinions. The DSCC designed its proposed ads to mirror the Republican JFC-fundraising ads that the DSCC hoped to quash. And the DSCC's filing offered no defense of those ads and instead sought to distinguish them from the prior on-point FEC advisory opinions. AR000006. Indeed, in comments, the DSCC revealed its true intentions by asking the FEC to declare portions of its own proposed ads "contributions" subject to FECA's contribution limits. *See* AR000078; *see also* AR000145–46. The DSCC stated publicly that its filing was designed to shut down Republican JFC-fundraising ads. AR000136.

The FEC did not provide the DSCC an answer. On October 10, 2024, the Commissioners voted 3-3 on two draft advisory opinions, falling short of the four-vote threshold required by Congress to issue either one. AR000147; *see* 52 U.S.C. § 30106(c). The FEC's associate general counsel then issued a letter explaining that the agency "concluded its consideration of [the] advisory opinion request without issuing an advisory opinion." AR000148.

Following this deadlock, the DSCC began running the exact ads that it claimed were legally doubtful. *See* Dkt. 32-1 at 18–20 (pp. 10–12) (collecting examples).

D. The Court Denies The DCCC's Request For A Preliminary Injunction, And The DCCC Amends Its Complaint.

After the FEC deadlocked on the D***S***CC's advisory-opinion request, Plaintiff D***C***CC filed a complaint and motion for a preliminary injunction a mere 19 days before election day. *See* Dkt. 1; Dkt. 6. This Court denied the DCCC's motion. Dkt. 21 at 4. It found that the DCCC's request to temporarily "set aside" the FEC's "non-decision" would "neither redress the DCCC's asserted

injuries nor avoid any irreparable injury that the DCCC would otherwise suffer." *Id.* at 12 (emphasis omitted).

The DCCC did not appeal this Court's decision, and the 2024 general election is now complete. On December 20, 2024, the DCCC amended its Complaint, but the changes to its original Complaint are minor, and its legal theory appears largely unchanged. *See* Dkt. 28. The NRSC and FEC have moved to dismiss, and the DCCC has moved for summary judgment.

ARGUMENT

I. THE COURT SHOULD DENY THE DCCC'S MOTION FOR SUMMARY JUDGMENT.

A. The FEC's Non-Issuance Of An Advisory Opinion Was Lawful.

The DCCC's motion should be denied because the only ***agency*** action alleged by the DCCC—the FEC's non-issuance of an advisory opinion—was lawful. That is because FECA prohibits the FEC from issuing an advisory opinion absent the affirmative votes of at least four Commissioners. Although the DCCC asks the Court to issue its own advisory opinion about the D***S***CC's proposed advertisements, courts cannot review private action in an APA case.

1. APA Review Considers Agency Action, Not Private Action.

The DCCC brings "an APA claim." Dkt. 36 at 13 (p. 2); Dkt. 28 at 30–31 (Am. Compl. ¶ 97). The APA's cause of action is limited to "***agency*** action." 5 U.S.C. § 702 (emphasis added). Thus, where a party alleges that an agency failed to act, it may use the APA to "compel ***agency*** action." *Id.* § 706(1) (emphasis added). And if the agency has acted unlawfully, the party may sue to "hold unlawful and set aside ***agency*** action." *Id.* § 706(2) (emphasis added). Thus, a "fundamental prerequisite to APA review is that the judicial challenge be to ***agency***—and necessarily government—action." *Ovanova, Inc. v. USDA*, 2025 WL 82308, at *2 (D.D.C. Jan.

13, 2025) (Boasberg, C.J.). Only "[t]o the extent necessary to decision" on such agency-action claims may "the reviewing court … decide all relevant questions of law." 5 U.S.C. § 706.

The DCCC asserts only one agency action: "[t]he FEC's decision to 'conclude its consideration' of [the DSCC's advisory-opinion request] without issuing an AO." Dkt. 36 at 38 (p. 27) (cleaned). Thus, the only question before the Court that is possibly cognizable under the APA is whether that alleged decision of the FEC was lawful.

Despite these clear principles, the DCCC seeks a declaration about the lawfulness of ***private*** conduct—i.e., a declaration "that JFC advertising is subject to FECA's contribution limits and disclosure requirements." Dkt. 36 at 31 (p. 20); *see supra*. The DCCC's papers define "JFC advertising" as hypothetical advertisements proposed by the DSCC, a private party. *Id.* at 18–19 & n.3 (pp. 7–8 & n.3). JFC advertising is thus not "agency action" and not subject to the APA's cause of action.

Nor is a declaration about the legality of that advertising "necessary to [a] decision," 5 U.S.C. § 706, on whether it was lawful for the FEC to "conclude its consideration of [the DSCC's advisory-opinion request] without issuing an AO." Dkt. 36 at 38 (p. 27) (cleaned). Rather, that question turns on whether the FEC has a statutory "obligation to issue an AO." Dkt. 36 at 51 (p. 40). If it did ***not*** have such an obligation, then the FEC's conclusion of its process was lawful. And if it ***did*** have such an obligation—though, to be clear, it did not—then the Court may declare unlawful the FEC's failure to issue an advisory opinion. Neither outcome makes it "necessary" for the Court to issue its own advisory opinion about a private non-party's JFC-fundraising advertising.

In fact, precedent squarely forecloses that relief. Where, as here, the charge is that the agency did ***not*** act—i.e., did not "issu[e] an AO," Dkt. 36 at 38 (p. 27)—the Supreme Court has

held that "a court can compel the agency to act, ***but has no power to specify what the action must be***." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) (emphasis added). For example, a statute that "require[s] the [agency] to establish regulations" may "support[ ] a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations." *Id.* at 65 (cleaned). Applied here, the Court may at most declare unlawful the FEC's failure to issue an advisory opinion because of a supposed "statutory duty," Dkt. 36 at 41 n.10 (p. 30 n.10), but it may not "set[ ] forth the content of," the advisory opinion the FEC purportedly should have issued, *Norton*, 542 U.S. at 65; *see also In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 634 (D.C. Cir. 2014) (declining to afford relief under 5 U.S.C. § 706(2) beyond holding unlawful and setting aside agency action).

Finally, although the NRSC already explained this limit on the APA's cause of action and Article III's limit on judicial advisory opinions in its motion to dismiss, *see* Dkt. 32-1 at 24–25 (pp. 16–17), the DCCC has no answer and has thus forfeited any argument in response, *see Wannall*, 775 F.3d at 428.

2. The Purported Agency Action Was Lawful.

In its motion to dismiss, the NRSC showed that the FEC's non-issuance of an advisory opinion was entirely lawful. Dkt. 32-1 at 44–46 (pp. 36–38). Section 30108 of FECA provides that, upon a written request, the FEC "shall render a written advisory opinion." 52 U.S.C. § 30108(a). Although "the word 'shall' usually connotes a requirement," *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016), "courts in virtually every English-speaking jurisdiction have held … that 'shall' means 'may' in some contexts," *De Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) (cleaned); *see also, e.g.*, *DHS v. MacLean*, 574 U.S. 383, 396 (2015) (holding "shall" in statute "authorize[d]" but did not require agency action). This is such a context.

FECA makes clear that the FEC is not authorized to—much less compelled to—issue an advisory opinion when it deadlocks. It is "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *United States v. Miller*, 145 S.Ct. 839, 853 (2025) (cleaned). "Importantly here, Section 30108 does not stand alone." *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 325 (D.D.C. 2020) (Bates, J.). "Section 30106 provides that 'the affirmative vote of 4 members of the Commission shall be required in order for the Commission to,' inter alia, render an advisory opinion." *Id.* (quoting 52 U.S.C. § 30106(c)). "In part to square the four-vote requirement with the sixty-day window for issuing advisory opinions, the FEC promulgated a rule providing that, in lieu of a requested advisory opinion, it may issue 'a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members' within sixty days of receiving a complete request." *Id.* (quoting 11 C.F.R. § 112.4(a)); *see also* Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15,080, 15,124 (Mar. 7, 1980).

Applying these provisions in 2020, Judge Bates rejected the exact claim leveled by the DCCC in this case. In that case, the Commission could not "secure[ ] affirmative votes from four Commissioners" required to issue an advisory opinion, *McCutcheon*, 496 F. Supp. 3d at 334, and thus "sent plaintiffs a letter indicating that the Commission was unable to render an advisory opinion," *id.* at 328. The plaintiffs argued "that the FEC's failure to issue the requested opinion was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 332–33 (quoting complaint). Judge Bates disagreed. He explained that Section 30106 and Section 30108 "indicate Congress's dual intent that the FEC respond expeditiously to requests for advisory opinions, and that it only issue advisory opinions where a bipartisan majority of its

members agree on the merits of a request." *Id.* at 333. Thus, to give effect to both provisions, he held that the FEC complied with the statute by (i) acting expeditiously in compliance with Section 30106, and (ii) not issuing an advisory opinion without four affirmative votes in compliance with Section 30108. *Id.* at 334. Because that conduct was affirmatively "compelled by law," he explained, the FEC's action was lawful, and, if anything, "the FEC would" have violated the law "by rendering an advisory opinion without the requisite four-vote approval." *Id.* So too here.

The NRSC explained this in a standalone section in its motion to dismiss. *See* Dkt. 32-1 at 44 (p. 36) (heading reading: "The DCCC's Claim Fails Because The FEC Was Legally Compelled To Withhold The Advisory Opinion." (capitalization altered)). In a footnote, the DCCC says only that "[i]t is not clear what authority FEC has to excuse away its statutory duty that it 'shall render a written advisory opinion' with a rule permitting it to simply issue a letter closing the request." Dkt. 36 at 41 n.10 (p. 30 n.10) (citations omitted). That noncommittal, conclusory assertion is forfeiture. *See, e.g.*, *Iowaska Church of Healing v. Werfel*, 105 F.4th 402, 414 (D.C. Cir. 2024) ("we need not consider cursory arguments made only in a footnote" (cleaned)).

Nor is the basis for that assertion persuasive. The DCCC's footnote says Section 30106 "means that when FEC fails to gather a majority vote to provide an AO, yet nonetheless closes an AOR, it also fails [to] act in accordance with § 30108(a)." Dkt. 36 at 41 n.10 (p. 30 n.10). So, under the DCCC's view, the FEC violates the statute unless it issues an advisory opinion—regardless of whether the agency can garner a majority. But, as Judge Bates explained, that interpretation makes no sense because it would "compel the FEC to contravene its statutory requirements and issue an advisory opinion with fewer than four affirmative votes." *McCutcheon*, 496 F. Supp. 3d at 333. That would fail to give effect to Section 30106 and "impermissibly

produce an absurd result which Congress could not have intended." *Ibid.* (cleaned). And indeed, the House Report that accompanied the advisory-opinion provision expressly recognizes that "A 3-3 vote by the Commission on a proposed opinion ***is considered a response for purposes of the time requirements***."[2] H.R. Rep. No. 96-422, at 20 (1979) (emphasis added).

Thus, the text, structure, and history of FECA confirm that the FEC's non-issuance of the advisory opinion was lawful. Because that is the only (alleged) agency action before the Court, that conclusion alone resolves the merits of the case.

B. FECA Authorizes The JFC-Fundraising Advertisements Considered Below.

Even if the Court were to assess whether a private party's JFC-fundraising advertisements are lawful (it should not), the DCCC's arguments on the merits fail. Foremost, the DCCC is wrong to claim that FECA subjects all JFC-fundraising advertising to coordinated expenditure limits: the statute expressly exempts JFC-fundraising costs from its definition of "expenditure," and the DCCC never addresses the relevant statutory text. The DCCC's undeveloped contention that the FEC's JFC-fundraising expense allocation method conflicts with FECA is also wrong and overlooks that Congress has endorsed it three times. Finally, the First Amendment prohibits restriction of political party committee speech on behalf of its candidates, so the DCCC's argument must be rejected for this reason too.

[2] The DCCC mischaracterizes this legislative history. It cites the House Report for the proposition that Congress "rejected amendments" that would have allowed the Commission to satisfy Section 30108's time requirement with a 3-3 vote. Dkt. 36 at 41 n.10 (p. 30 n.10). That is not true. The report was describing the meaning of the statutory text of Section 30108(a), as enacted—including the "shall render" provisions. H.R. Rep. No. 96-422, at 26, 60 (sec. 308(a)); *accord* H.R. 5010 § 107 (pp. 124–25) (Sept. 7, 1979).

1. FECA Expressly Exempts JFC-Fundraising Advertising From The Coordinated Expenditure Rule.

The law is clear. "FECA permits candidates and political committees to engage in joint fundraising through committees 'established solely for the purpose of joint fundraising.'" *United States v. El-Saadi*, 549 F. Supp. 3d 148, 153 (D.D.C. 2021) (Moss, J.) (quoting 52 U.S.C. § 30102(e)(3)(A)(ii)). Notwithstanding this clear authorization, the DCCC contends that "[t]he plain text of FECA" shows that "JFC advertising is a coordinated expenditure and contribution." Dkt. 36 at 48 (p. 37) (emphasis deleted).

FECA expressly forecloses the DCCC's position. It says: "the term 'expenditure' does not include" (1) "any costs incurred by an authorized committee or candidate" (2) "in connection with the solicitation of contributions on behalf of such candidate." 52 U.S.C. § 30101(9)(B)(vi). The first part is satisfied by JFC-fundraising advertisements because, by definition, a "joint fundraising [committee]" in which a candidate participates is "an authorized committee." *Id.* § 30102(e)(3)(A)(ii); *see also* 11 C.F.R. § 102.17(a)(1)(i). And the second part is too because, as the administrative record shows, the costs for JFC-fundraising advertisements are incurred "in connection with" a solicitation.

The advisory-opinion request itself makes this clear. It seeks an advisory opinion on "joint fundraising committee … television advertisements that primarily advocate for [a candidate] ***but also contain a brief fundraising solicitation***." AR000001 (emphasis added) (DSCC advisory opinion request); *accord* Dkt. 36 at 19 n.3 (p. 8 n.3) ("DCCC will refer to the arrangement described in AOR 2024-13 as 'JFC advertising'"). That the advisory opinion request concerns only advertisements that contain solicitations means that the costs of such advertisements would necessarily be incurred "in connection with" a fundraising solicitation. *See, e.g.*, *Mont v. United States*, 587 U.S. 514, 521 (2019) ("The Court has often recognized that 'in connection with' can

bear a 'broad interpretation.'"); *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 877 (D.C. Cir. 2019) ("We begin by defining 'in connection with.' This phrase … is quite broad."). Therefore, because JFC-fundraising advertisements indisputably are related to solicitations by authorized committees, FECA expressly excludes them from its definition of "expenditure."

This exclusion means JFC-fundraising advertisements cannot be "coordinated expenditures" under FECA as a matter of law. As the DCCC correctly observes, FECA's coordinated expenditure provision says: "expenditures 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, shall be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added); *see* Dkt. 36 at 49 (p. 38). Thus, for something to be a coordinated expenditure, it must first be an "expenditure." Because the proposed JFC-fundraising advertisements are not "expenditures," they also are not "coordinated expenditures."

The DCCC has no explanation for FECA's clear text. It appeals (at 4–5) to Congress's supposed "purpose" in enacting FECA. "But no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987); *see Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 664 (2020) ("it is the provisions of our laws rather than the principal concerns of our legislators by which we are governed" (cleaned)). And that is especially true for campaign finance regulation, which "operate[s] in an area of the most fundamental First Amendment activities" and thus require restraint. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Furthermore, excluding JFC-fundraising costs from FECA's definition of "expenditure" ***does*** advance Congress's purposes. "The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19;

see also Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633 (1980) ("a solicitation to pay or contribute money" is "speech"). Congress was obviously aware of this when it authorized candidates and political party committees to engage in joint fundraising. Given that advertising is both expensive and essential to effective communication, it makes sense that Congress exempted these fundraising advertising costs from the coordinated expenditure rule ***in the very same statute that authorized JFCs***, *see* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1343 (1980) (enacting exemption); *id.* at § 102, 93 Stat. at 1346 (authorizing JFCs), thus ensuring JFCs could function effectively. Although the DCCC prefers an atextual statutory interpretation that neuters joint fundraising, Congress "does not enact useless laws." *Garland v. Cargill*, 602 U.S. 406, 427 (2024); *see also Finnbin, LLC v. CPSC*, 45 F.4th 127, 134 (D.C. Cir. 2022) ("we strongly disfavor any interpretation that would make statutory commands unfulfillable"). Congress wanted JFCs to work and designed them so they would.

The DCCC asserts (at 39) the JFC-fundraising advertising solicitations presented to the FEC below were "pretextual," but its sister committee vigorously protested that contention. The DSCC claimed its request would facilitate a sincere fundraising effort. AR000006. Under questioning from the Commission, its counsel reiterated that position, insisting the DSCC "wants to run this ad." FEC Open Meeting at 18:55–20:50, AOR 2024-13 (Oct. 10, 2024), https://tinyurl.com/bffnnsj2; *see id.* (Commissioner Dickerson: "do they want to run this ad and, if so, subject to what approach to allocation?" Ms. Lopez: "I want to be very direct with the Commission because I think that's an important question. What my client wants to do is run this ad…. We are going to run this ad, and we are here because my client wants to run this ad if the Commission is going to say that it is legal."). After the FEC deadlocked, the DSCC in fact ran JFC-fundraising advertisements materially indistinguishable from its request. If the DCCC

genuinely believes the DSCC's solicitations were "pretextual" and that their inclusion of "a QR code and brief request to 'donate now'" violated FECA, *see* Dkt. 36 at 50 (p. 39), then it should file a complaint under 52 U.S.C. § 30109 and develop the record accordingly.

However, as a statutory matter it is not clear what difference a showing of pretext would make. As explained, FECA exempts "any costs" incurred by a JFC "in connection with the solicitation of contributions." 52 U.S.C. § 30101(9)(B)(vi). The language Congress chose—"in connection with"—"is quite broad," *Azima*, 926 F.3d at 877, and, by its terms, "stop[s] nowhere," *id.* at 879. Therefore, regardless of motive, JFC-fundraising advertisements appear to satisfy the statutory exemption. In any event, review here is limited to the administrative record, and there is no record evidence that any JFC was involved with "pretextual" advertisements, so the Court need not speculate about the potential result on a different record.

2. The FEC's Allocation Method For JFC-Fundraising Advertising Implements FECA And Is Congressionally Approved.

The DCCC recites (at 40) the truism that regulations cannot violate their authorizing statute. No one disputes that but, as explained, FECA does not require JFC-fundraising advertising costs to be treated as coordinated expenditures (to the contrary, it expressly exempts them from its definition of "expenditure"). So, the DCCC's boilerplate statements about the relationship between statutes and regulations do not advance the ball.

Furthermore, the FEC's regulations implement FECA by requiring each JFC participant to pay its share of JFC expenses according to a "funds-received" allocation methodology. Specifically, the regulations require JFC participants to enter into a written agreement that designates a "fundraising representative" and states "a formula for the allocation of fundraising proceeds." 11 C.F.R. § 102.17(c)(1). If the participants are subject to contribution limits (as are federal candidates and federal political party committees), the regulations provide that "the

fundraising representative shall calculate each participant's share of expenses based on the percentage of the total receipts each participant had been allocated" and then "subtract the participant's share of expenses from the amount that participant has been allocated from gross proceeds." *Id.* § 102.17(c)(7)(i)(A); *cf. id.* § 102.17(c)(7)(ii) (specifying participants for which "expenses need not be allocated"). Because "the provision of [a 'thing of value'] for less than its ordinary price constitutes a 'contribution' under FECA," *Ready for Ron v. FEC*, 2023 WL 3539633, *9 (D.D.C. May 17, 2023) (Moss., J.), "no contribution in-kind from one or more of the participants occurs" when "each participant pays its own share of expenses," 48 Fed. Reg. at 26,296-01, 26,300 (transmittal of FEC regulations to Congress).[3]

Congress has three times endorsed the FEC's JFC funds-received method. ***First***, Congress adopted FECA's joint-fundraising provision against the backdrop of FEC advisory opinions that had allowed joint fundraising so long as expenses were allocated based on funds received. *See* Dkt. 32-1 at 13 (p. 5); Dkt. 16 at 39 (p. 31). Because "Congress was well aware" of the FEC's position when it amended FECA to authorize joint fundraising, Congress "intended to give that position its active endorsement." *Hikvision USA, Inc. v. FCC*, 97 F.4th 938, 947 (D.C. Cir. 2024) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

Second, Congress acceded to the FEC's regulation under FECA's "report and wait" provision. FECA requires the Commission to submit its regulations to Congress ***before*** it adopts

[3] The FEC's rulemaking documents explain that this regulation is a codification of the funds-received methodology the agency developed in advisory opinions between 1977 and 1979. *See* 48 Fed. Reg. at 26,298. Because the 1980 amendments to FECA expressly exempted from the definition of "expenditure" any costs incurred by an authorized committee in connection with a solicitation for a candidate, *see* Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980) (specifying that a JFC must be "an authorized committee" of a candidate); *see also* section I.B.1, *supra*, this precaution was unnecessary as applied to a JFC between a political party committee and a candidate. But the regulation was never challenged and remains on the books.

them: "If either House of the Congress does not disapprove by resolution any proposed rule" within 30 legislative days, "the Commission may prescribe such rule." 52 U.S.C. § 30111(d)(2). Accordingly, "when the Commission, as required by law, submit[s] the regulation to Congress, [and] neither House expresse[s] disapproval," that is an "indication that Congress does not look unfavorably upon" "the Commission's regulation." *FEC v. DSCC*, 454 U.S. 27, 34 (1981) (footnote omitted) (affirming the FEC's application of its regulations); *see also, e.g.*, *United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1277, 1280 (D.D.C. 1996) ("The FEC submitted this regulation for Congressional approval and Congress failed to disapprove the regulation thus strongly implying that the regulations accurately reflect congressional intent." (cleaned)); *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1114 (9th Cir. 1988) ("Congress failed to disapprove the regulation which strongly implies that the regulations accurately reflect congressional intent." (cleaned)); *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) ("the statute's meaning may well be that the agency is authorized to exercise a degree of discretion" or "to 'fill up the details' of [the] statutory scheme").

Here, the FEC submitted its proposed regulation adopting the funds-received allocation method in 1983, *see* 48 Fed. Reg. at 26,296-01 (transmittal of FEC regulations to Congress), and, when Congress did not disapprove, it adopted the regulation, *see* Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 37,921-02 (Aug. 22, 1983) (final rule). Congress's acquiescence to the FEC's interpretation under FECA's unique report and wait provision strongly implies that the regulation reflects congressional intent.

Third, Congress rejected a legislative proposal that would have prohibited joint fundraising between candidates and political party committees. As proposed, the Bipartisan Campaign Act of 2002 would have stated that "[n]o authorized committee of a candidate for Federal office may

form a joint fundraising committee with any political committee of a political party." Bipartisan Campaign Reform Act of 2002, H.R. 2356, 148th Cong. § 321. But Congress subsequently deleted that provision, *see* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, so the enacted legislation allowed joint fundraising by candidates and political party committees to continue.

In the proceeding below, the D***S***CC argued the FEC should require JFCs to allocate fundraising expenses based on a time/space methodology instead of under its longstanding funds-received regulation. As the D***C***CC does not press that argument in its opening brief, it is forfeited. *See, e.g.*, *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) ("A party forfeits an argument by failing to raise it in his opening brief."; "Mentioning an argument 'in the most skeletal way, leaving the court to do counsel's work'" is "tantamount to failing to raise it.").

It also fails on the merits. In addition to Congress's repeated endorsement of the funds-received allocation method, the FEC's "longstanding regulatory practice" supports it. *See Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165, 177 (2020). In an unbroken line of advisory opinions spanning five decades, the FEC has consistently held that a JFC should allocate all fundraising expenses, including those for television advertising, based on its formula for allocating funds received. *See* Dkt. 32-1 at 13–15 (pp. 5–7). That places the funds-received allocation method head-and-shoulders above the time/space allocation method, which has no history of agency and congressional endorsement for allocating joint-fundraising expenses and is inconsistent with FECA in this context.

That history matters because, as the Supreme Court recently affirmed, agency statutory interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Loper Bright*, 603 U.S. at 394 (quoting *Skidmore v.*

Swift & Co., 323 U.S. 134, 140 (1944)). Applying that standard, the Supreme Court has upheld the FEC where it "consistently ha[d] adhered to its construction" for under five years. *See DSCC*, 454 U.S. at 37 (citing *Skidmore*). Here, the FEC's adherence is ten times as long. *See* 48 Fed. Reg. at 26,298 (collecting advisory opinions beginning in 1977). Because the FEC adopted the funds-received methodology "roughly contemporaneously with enactment of the statute and [has] remained consistent over time," the agency's interpretation of FECA "is entitled to very great respect." *Loper Bright*, 603 U.S. at 386 (cleaned).

3. The First Amendment Prohibits Restriction Of A Political Party Committee's Speech On Behalf Of Its Candidates.

The Court should also reject the DCCC's arguments under the First Amendment. The DCCC's claim, at bottom, is that the FEC's regulations "permit a national party committee to pay for unlimited television advertising on behalf of [party] candidates." Dkt. 28 at 3 (Am. Compl. ¶ 5); *see also* AR000083 ("there is nothing to stop federal candidates from fully offloading their entire advertising budget to national party committees"). Even if that were true, that alleged harm cannot justify a restriction on political speech.

The Supreme "Court has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *FEC v. Cruz*, 596 U.S. 289, 305 (2022). And, as Judge Thapar recently explained, "it doesn't make any sense to think of a party as 'corrupting' its candidates." *NRSC v. FEC*, 117 F.4th 389, 402 (6th Cir. 2024) (concurring opinion). The entire point "of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Id.* (quoting *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in the judgment and dissenting in part)). When a political party succeeds at what it is fundamentally designed to

do, that is not corruption or its appearance. Therefore, the First Amendment does not permit the government to restrict political speech by a political party committee on behalf of its candidates.

Nor could such a restriction be justified as an effort to prevent circumvention of FECA's donor-to-candidate limits through its higher donor-to-party limits. Again, as Judge Thapar explained, that makes little sense because, even if donors ***could*** direct their larger party contributions to a candidate (in fact, FECA restricts such earmarking, *see* 52 U.S.C. § 30116(a)(8)), that would only be "because ***the government*** set party-contribution limits twelve times higher than candidate-contribution limits." *NRSC*, 117 F.4th at 405. "Having created this fundraising disparity, the government can't use it as an excuse to curtail parties' speech." *Id.* That is especially so because the donor-to-party limits and the anti-earmarking rule "are themselves prophylactic measures." *See Cruz*, 596 U.S. at 306. As the Supreme Court has often emphasized, it greets with "skepticism" "prophylaxis-upon-prophylaxis approaches to regulating campaign finance." *Id.* (cleaned).[4]

Because there is no permissible justification for restricting a political party committee's speech on behalf of its own candidates, the First Amendment prohibits the FEC from treating JFC-

[4] The Supreme Court may soon provide additional clarity. The NRSC has asked the Court to decide the constitutionality of 52 U.S.C. § 30116(d), the FECA provision which purports to limit how much a political party committee can spend on campaign advertising in cooperation with its candidates. *See* Cert. Pet. i, *NRSC v. FEC*, No. 24-621 (S. Ct. docketed Dec. 6, 2024); *NRSC*, 117 F.4th at 421 (Bush, J., concurring) ("the case is a strong candidate for certiorari"). There, a 10-judge en banc Sixth Circuit majority suggested section 30116(d) is unconstitutional under the Supreme Court's contemporary First Amendment jurisprudence but concluded it was bound by an outdated decision upholding that provision. *See NRSC*, 117 F.4th at 395 (majority opinion) ("*Colorado II* remains standing…. [I]t remains the Court's job, not ours, to overrule it."). *But see id.* at 454 (Readler, J., dissenting) ("this is the rare instance where opinions already delivered by the Supreme Court … justify" a lower court "revisiting the matter" (cleaned)). This Court is not similarly bound by the outdated *Colorado II* decision because it does not purport to address the constitutionality of Section 31116(a)(7)(B)(i) either on its face or as applied to JFC-fundraising advertisements.

fundraising advertising as a coordinated expenditure under 52 U.S.C. § 31116(a)(7)(B)(i). At minimum, the issue presents a serious constitutional question to be avoided. *See, e.g.*, *Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 226 (D.C. Cir. 2013) ("The Supreme Court has emphasized the importance of 'interpreting statutes to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction.'").

C. The DCCC's Merits Argument Is Doubly Forfeit.

In any event, the DCCC has forfeited its merits argument twice over. First, as the NRSC's motion to dismiss explained, the DCCC forfeited its merits argument before the FEC because neither the DCCC nor any other party claimed there that all JFC-fundraising advertising is *per se* a contribution, contrary to the FEC's rules. Dkt. 32-1 at 46–47 (pp. 38–39) (heading reading: "The DCCC Forfeited Its Merits Argument Before The Agency." (capitalization altered)). Indeed, the parties before the Commission argued only that certain portions of the proposed advertisements were contributions under FECA ***and*** its implementing regulations. *See id.*; *see also* FEC Open Meeting at 31:55–33:10, AOR 2024-13 (Oct. 10, 2024), https://tinyurl.com/bffnnsj2 (conceding same in response to questioning about scope of request); *id.* at 59:01–1:00:30 (characterizing dispute as over how to "interpret the regulation"). But no party argued that the advertisements were contributions in their entirety under a reading of FECA that voided the agency's longstanding regulations. Dkt. 32-1 at 46–47 (pp. 38–39). Because "directly challeng[ing]" "the validity of the" advertisements and the JFC rules under the statute is different than challenging "the manner in which the [FEC] was applying" its regulations, the DCCC's statutory argument "is waived." *Styrene Info. & Rsch. Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 80 (D.D.C. 2013) (Walton, J.).

Second, the NRSC raised the waiver issue in its motion, and the DCCC left it "unaddressed." *Wannall*, 775 F.3d at 428. Therefore, the argument is "conceded." *Id.* Because forfeiture of the DCCC's entire merits argument is dispositive, that concession ends the case.

II. THE COURT SHOULD GRANT THE NRSC'S MOTION TO DISMISS.

A. The DCCC Has Not Identified Final Agency Action.[5]

1. The DCCC Fails To Identify Reviewable Agency Action.

Two on-point D.C. Circuit cases squarely hold that agency deadlocks are not reviewable agency action. *See* Dkt. 32-1 at 36–40 (pp. 28–32); *see also Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007); *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016). The DCCC tries multiple tacks to get around these decisions, but none can escape the binding precedent.

First, the DCCC claims that the Court can ignore these cases and just "appl[y] … the *Bennett* factors." Dkt. 36 at 38–39 (pp. 27–28). But the *Bennett* factors "must be satisfied for agency action to be '***final***.'" *Bennett v. Spear*, 520 U.S. 154, 177 (1997) (emphasis added). That of course assumes ***agency action*** in the first place. And the D.C. Circuit has squarely held that a "deadlocked vote" does not "constitute agency action." *Sprint Nextel*, 508 F.3d at 1131; *Public Citizen*, 839 F.3d at 1169–70 (citing dictionary "definition of 'deadlock'" for the proposition that deadlocked agency did not "engage[ ] in agency action"). Because there is no agency action, there can be no final agency action—regardless of whether the *Bennett* factors are satisfied (they are not).

Second, the DCCC invokes *In re Radio-Television News Directors Association*, 159 F.3d 636 (D.C. Cir. 1998) ("*RTNDA*")—an "unpublished decision on [a] mandamus petition"—for the proposition that deadlocks are agency action. Dkt. 36 at 39–40 (pp. 28–29). "As a threshold matter," *RTNDA* "is not to be cited as precedent" because it "is an unpublished order entered before

[5] "[C]ourts may address the issues of Article III standing and judicial reviewability in either order." *Ineos USA LLC v. FERC*, 940 F.3d 1326, 1330 (D.C. Cir. 2019) (Rogers, J., concurring) (collecting cases).

January 1, 2002."[6] *Head v. Wilson*, 792 F.3d 102, 109 (D.C. Cir. 2015). Were that not enough, the agency "ha[d] no objection to the entry of th[e] [Court's] order" on final agency action in that case. *RTDNA*, 159 F.3d at *1. As this Court explained, final agency action may be "waived" by the Government, Dkt. 20 at 13:2–15, because it "is not jurisdictional," *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012). *RTNDA* also looks nothing like this case, despite the DCCC's conclusory assertion of "analogous circumstances." Dkt. 36 at 40 (p. 29). In *RTNDA*, the agency failed to act for "***fifteen years***," a petition was "pending with the Commission ***for over a decade***," and the Court was fashioning an equitable "***mandamus***" remedy. *RTNDA*, 159 F.3d at *1 (emphasis added). Even if *RTNDA* ***could*** be precedent (it cannot), it is inapposite here.

Were there any doubt about the precedential value of *RTNDA*, it was resolved by *Sprint Nextel*. There, several petitioners leaned heavily on *RTNDA* to argue that FCC deadlocks are final agency action. *See* Br. of Carrier Petitioners, *Sprint Nextel v. FCC*, No. 06-1111, 2007 WL 2070879 (filed July 3, 2007). In response, the FCC pointed out that "*RTNDA* is not controlling precedent," involved "an extraordinary set of circumstances," and required the Court "to fashion a creative mandamus remedy." *See* Br. of FCC, *Sprint Nextel v. FCC*, No. 06-1111, 2007 WL 2406685 (filed July 9, 2007). In the face of this briefing, the D.C. Circuit held that the FCC's "deadlocked vote cannot … constitute agency action." *Sprint Nextel*, 508 F.3d at 1131. It did not even bother to cite the non-precedential *RTNDA* order. Thus, the ***only case*** the DCCC has cited for the proposition that deadlocks are reviewable has been squarely rejected by the D.C. Circuit.

[6] The DCCC claims that the D.C. Circuit "reaffirm[ed]" this "conclusion" in *Radio-Television News Directors Association v. FCC*, 184 F.3d 872 (D.C. Cir. 1999). Dkt. 36 at 40 (p. 29). It did no such thing. The D.C. Circuit described the unpublished holding without any endorsement or analysis. *Radio-Television News Directors Association*, 184 F.3d at 880. And the Court went out of its way to note that the prior decision was "law of the case," *id.* at 880 n.6 (citing *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)), meaning that the unpublished agency-action holding could "not be revisited" in the published decision, *LaShawn*, 87 F.3d at 1393.

Third, the DCCC grasps at distinguishing *Sprint Nextel* and *Public Citizen*. As to *Sprint Nextel*, the DCCC claims, "[t]he FCC never issued any order ending its consideration of the petition" at issue there. Dkt. 36 at 40–41 (pp. 29–30). This is incorrect. "After failing to adopt any order before the statutory deadline, the Commission issued a press release announcing that Verizon's petition 'was deemed granted by operation of law.'" *Sprint Nextel*, 508 F.3d at 1131. The Court held that the "press release" was not a final agency action because it was "purely informational" and "imposed no obligations and denied no relief." *Id.* at 1132. *Public Citizen* also held that "Notices describing the effects of the deadlock are not reviewable." 839 F.3d at 1172. The closeout letter here is no different than the *Sprint Nextel* press release or the *Public Citizen* notices. All were issued by the agency, all notify parties of the deadlock, and all are unreviewable. *See* Dkt. 32-1 at 38 (p. 30) (explaining this point).

As to *Public Citizen*, the DCCC claims that this case is different because "a statute dictated a particular result because the agency did not act." Dkt. 36 at 41 (p. 30). But, if anything, that purported distinction makes the FERC deadlock in that case look ***more*** like agency action. After all, the deadlock in that case affirmatively allowed electricity rates to take effect. Under those circumstances, there was ***an*** action, but it was one by "Congress, not the Commission." *Sprint Nextel*, 508 F.3d at 1132. Here, there is ***no*** action—by either Congress or the Commission. The DCCC makes no attempt to explain how that results in ***agency*** action. And, in any event, the statute here ***does*** dictate a particular result: without "the affirmative vote of 4 members of the Commission," no advisory opinion shall issue. 52 U.S.C. § 30106(c).

Finally, the DCCC castigates the NRSC for citing to *Hispanic Leadership Fund v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012)—characterizing the case as "out-of-circuit" and irrelevant to reviewability. Dkt. 36 at 42 (p. 31). Of course, the DCCC omits that it repeatedly cites the same

case throughout its Amended Complaint. *See* Dkt. 28 at 5, 12, 27, 30 (¶¶ 11, 35, 85, 95). But more importantly, the DCCC ignores that ***the D.C. Circuit*** cited *Hispanic Leadership Fund* for the proposition that "an FEC deadlock" in the advisory-opinion context is "unreviewable." *Public Citizen*, 839 F.3d at 1170. The DCCC has nothing to say to this in-Circuit, binding authority on reviewability that directly controls this case.

2. The DCCC Fails To Identify Reviewable Agency Inaction.

Attempting to avoid committing to an argument, the DCCC denigrates as "nomenclature" whether it is challenging the FEC's action or its "failure to act." Dkt. 36 at 38 (p. 27). But this distinction matters. Although both action and inaction are encompassed by the APA, the D.C. Circuit has placed "strict limits" on "judicial review of agency inaction." *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016). So, at the outset, while the DCCC suggests in passing that it seeks review of "inaction," Dkt. 36 at 38 (p. 27), it has failed to develop and thus forfeited any argument on that theory, *see Iowaska Church*, 105 F.4th at 414.

But, in any event, the FEC's failure to issue an advisory opinion is not reviewable inaction. "Inaction is reviewable only where the agency fails to take a 'discrete' action it is legally required to take." *Public Citizen*, 839 F.3d at 1172 (quoting *Norton*, 542 U.S. at 62–63). The D.C. Circuit explained in *Sprint Nextel* that a "deadlocked vote" generally does not involve the type of "circumscribed, discrete" act that satisfies this requirement. 508 F.3d at 1131; *see also Public Citizen*, 839 F.3d at 1173 ("We conclude *Sprint Nextel* controls."). And nothing in FECA upsets this general rule because its authorization to issue an advisory opinion does not leave the FEC with "no discretion whatever." *Public Citizen*, 839 F.3d at 1172. To the contrary, offering advice "relating to" a proposed "transaction," 52 U.S.C. § 30108(a), "leaves [the agency] a great deal of discretion in deciding how to" craft that advice. *Norton*, 542 U.S. at 66; *compare id.* at 64 (explaining review of inaction is limited to "a ministerial or non-discretionary act"), *with* Dkt. 36

at 41 n.10 (p. 30 n.10) (conceding "agency's choice to issue a closeout letter in lieu of an AO was … not a 'ministerial' act").

This discretion is obvious from the statutory text. FECA does not command, for example, that the FEC "definitively resolve" or "conclusively adjudicate" the legality of the proposed transaction. Nor does it "impos[e] an obligation on the [FEC] to affirmatively disapprove any" proposed transaction that is inconsistent with FECA. *Cf. Amador Cnty., California v. Salazar*, 640 F.3d 373, 382 (D.C. Cir. 2011). Rather it calls only for an opinion "***relating to***" that transaction. *See* 52 U.S.C. § 30108(a)(1) (emphasis added). "The ordinary meaning of" "relating to" "is a broad one" meaning "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)).

Thus, an advisory opinion "relating to" a transaction may not necessarily resolve the legality of that transaction—much less do so in any circumscribed manner. An advisory opinion that says, for example, "the FEC concluded that it was unable to reach any … conclusions with respect to [a party]'s … proposed advertisements," *Hispanic Leadership Fund*, 897 F. Supp. 2d at 419 (noting "6:0 vote"), would plainly "relate to" the proposed advertisements. Further, as explained above, Congress's four-affirmative-vote requirement means that the Commission may sometimes deadlock, resulting in no reviewable opinion at all and belying the notion that the Commission must in all cases issue an opinion. *See supra*. That too leaves the Commission with discretion. Thus, because the FEC had no discrete, legal obligation to issue the DCCC's desired advisory opinion, its failure to do so is unreviewable.

3. The DCCC's Alleged Agency Action Is Not Final.

Finally, even if the DCCC had alleged "agency action," that action (or inaction) is not "final" because it fails both *Bennett* prongs. Dkt. 32-1 at 40–41 (pp. 32–33).

First, the FEC's deadlock did not consummate the agency's decisionmaking. As the NRSC explained in its motion to dismiss, the D.C. Circuit squarely held that an agency deadlock is not the consummation of the agency's decisionmaking because it "does not reflect an agency decision that fully resolved the issue or completed the process." *Public Citizen*, 839 F.3d at 1171 (citing *Consummate*, Black's Law Dictionary (10th ed. 2014)); *see* Dkt. 32-1 at 40 (p. 32).

Ignoring this on-point decision, the DCCC instead cites *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010), for the proposition that "the completion of the AO process under § 30108 is final agency action." Dkt. 36 at 38–39 (pp. 27–28). But in *Unity08*, the FEC issued an advisory opinion. 596 F.3d at 864. And the Court explained, "***the issuance of an advisory opinion*** marks the conclusion of FECA's advisory opinion process." *Id.* (emphasis added) (quotations omitted). Here, because there was no "issuance of an advisory opinion," the FEC never reached "the conclusion of FECA's advisory opinion process." *Ibid.*

That is the exact distinction the D.C. Circuit drew in *Public Citizen*. The Court there acknowledged that had the agency "issued an order approving" electricity rates, that would have been final agency action. *Public Citizen*, 839 F.3d at 1172 n.5 (emphasis omitted). But reaching a deadlock that caused the electricity rates to go into effect "d[id] not constitute agency action" because the split left the agency "mired in indecision and impasse."[7] *Id.* at 1171–72; *see also* Dkt. 32-1 at 39–40 (pp. 31–32) (explaining this). Here, had the FEC issued an advisory opinion, it would have concluded its process. Because it did not, however, the process was never completed.

[7] The DCCC cites *Hurry v. FDIC*, 589 F. Supp. 3d 100 (D.D.C. 2022) (Moss, J.), for the proposition that "a decision on the merits is not required for there to be final agency action." Dkt. 36 at 41–42 (pp. 30–31). The NRSC has never argued otherwise. But what is required is ***a decision*** by the agency—something that happened in *Hurry* but that does not happen when an agency deadlocks.

Second, the FEC's non-decision carries no legal consequences. As this Court explained, the FEC's non-decision "has no operative legal effect," Dkt. 21 at 17, and did not "provide any party with any legal rights, defenses or obligations," *id.* at 15. The FEC's non-decision left regulated parties "in precisely the same position today that they were in before" the deadlock. *Id.* at 20. Because the non-decision "left the world just as it found it," *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004), it lacks legal consequence, *see* Dkt. 32-1 at 40–41 (pp. 32–33).

The DCCC ignores the implications of the binding D.C. Circuit precedent cited by the NRSC. It instead makes the claim that the "failure to issue" an advisory opinion carries the same consequences "as an unfavorable" advisory opinion.[8] Dkt. 36 at 39 (p. 28). But the D.C. Circuit has squarely rejected this argument. That is because if an agency adopts a binding regulation, that plainly carries legal consequence. And, on the DCCC's theory, so too would the ***non***-issuance of a regulation because regulated parties would be deprived of the legal effect of that regulation. Yet, in this exact situation, the D.C. Circuit held that an agency's preamble to an agency rule lacked legal consequence where it "***declined*** to adopt a rule that ***would*** have had independent legal force." *Racing Enthusiasts & Suppliers Coal. v. EPA*, 45 F.4th 353, 359–60 (D.C. Cir. 2022) (emphasis in original) (quotations omitted). Although the NRSC already cited this on-point case in its motion to dismiss, *see* Dkt. 32-1 at 41 (p. 33), the DCCC ignores it.

Next, the DCCC claims its "competitive harm and an informational injury" are legal consequences. Dkt. 36 at 39 (p. 28). But these supposed harms are—at most—"***practical***

[8] The DCCC cites *Ready for Ron v. FEC*, 2023 WL 3539633 (D.D.C. May 17, 2023) (Moss, J.), for this proposition, but the agency issued an advisory opinion in that case, and the Court made no ruling on finality because the agency waived the argument. *See* Dkt. 32-1 at 38–39 (pp. 30–31); *accord* Dkt. 20 at 13:2–15.

consequences" of the agency's non-decision. *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir. 2003) (emphasis added). Thus, even if the Court accepts those consequences as true, *but see infra*, the FEC's non-decision still "clearly has no ***legally binding effect***"—the focal point for the second *Bennett* prong. *Id.* (emphasis added); *see also ForUsAll, Inc. v. DOL*, 691 F. Supp. 3d 14, 28–29 (D.D.C. 2023) (Cooper, J.).

B. The DCCC Has Another Adequate Remedy.

The NRSC explained in its motion to dismiss that the DCCC may not proceed with its APA claim because it has an "other adequate remedy in a court." 5 U.S.C. § 704. Namely, the DCCC may use FECA's private enforcement scheme, 52 U.S.C. § 30109(a), to prevent its competitors from engaging in purportedly unlawful JFC-fundraising advertising, Dkt. 32-1 at 41–44 (pp. 33–36). The DCCC offers three arguments in response, but none defeat the adequate-remedy bar.

First, the DCCC says that FECA's complaint mechanism offers a "different genre of relief" than the APA because advisory opinions and private-enforcement suits serve different "statutory purposes." Dkt. 36 at 43–44 (pp. 32–33). The argument is a non-sequitur. The question is about ***relief***, not ***purpose***. *See CREW v. DOJ*, 846 F.3d 1235, 1246 (D.C. Cir. 2017) (finding remedy adequate where there was "no yawning gap between the relief [the other statute] affords and the relief [the plaintiff] seeks under the APA"); *cf. Ineos*, 940 F.3d at 1331 (Rogers, J., concurring) (explaining statutory "complaint process was available" and therefore provided an alternative means "for a judicial remedy"). The DCCC seeks declaratory relief about the legality of a third party's advertisements that the FEC failed to opine on, Dkt. 37-2 at 1, and an order that the FEC conform to "the Court's judgment," *id.* at 2. FECA allows this Court to "declare that the [FEC's] dismissal of [a] complaint [against a third party] or the [FEC's] failure to act [against a third party] is contrary to law" and to "direct the Commission to conform with such declaration." 52 U.S.C. § 30109(a)(8)(C). If the FEC does not comply, the DCCC can initiate its own "civil action to

remedy the violation involved in the original complaint." *Id.* This declaratory and injunctive relief would bind both the FEC and the enforcement target.[9] This relief is plainly of the same genre that the DCCC seeks, and the DCCC's extended discussion of statutory purpose goes nowhere.[10]

Second, the DCCC says a FECA complaint would be insufficient because the FEC might dismiss it in an exercise of prosecutorial discretion. Dkt. 36 at 44–45 (pp. 33–34). The DCCC says that could make its complaint unreviewable, but whether the FEC would dismiss its complaint (let alone dismiss it in an exercise of enforcement discretion rather than for clearly reviewable legal reasons) is entirely speculative. In any event, the en banc D.C. Circuit is currently considering whether even an FEC dismissal based on prosecutorial discretion is nevertheless subject to review, *see End Citizens United PAC v. FEC*, No. 22-5277 (D.C. Cir. oral argument Feb. 25, 2025), so the DCCC's premise is at best disputed.

Further, whether the FEC might exercise its prosecutorial discretion is beside the point because the question is whether Congress has offered an "adequate ***remedy***." 5 U.S.C. § 704 (emphasis added). The cases the DCCC cites are thus irrelevant because they involve statutory schemes under which would-be plaintiffs "may lose ***any opportunity to challenge***" a purportedly unlawful act. *See, e.g.*, *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. HHS*, 396 F.3d 1265, 1274 (D.C. Cir. 2005) (emphasis added). The DCCC indisputably has such an "opportunity to

[9] The DCCC says that the FECA enforcement process does not "bind the agency moving forward," Dkt. 36 at 43 (p. 32), or offer "forward-looking guidance," *id.* at 47 (p. 36). That bald assertion simply ignores that Section 30109 authorizes declaratory relief and orders "direct[ing] the Commission to conform with such declaration." 52 U.S.C. § 30109(a)(8)(C). That is the exact relief the DCCC wants in this case.

[10] The DCCC also claims that it "wants the safe harbor protection" from an advisory opinion. Dkt. 36 at 47 (p. 36). But it ignores that the relevant inquiry is "the relief [the plaintiff] seeks under ***the APA***," *CREW*, 846 F.3d at 1246 (emphasis added), and the APA does not offer a safe harbor remedy, Dkt. 32-1 at 43–44 (pp. 35–36) (explaining this). And in any event, that argument would only preserve the DCCC's "[a]lternative[ ]" request for "relief authorizing it to run its planned ads." Dkt. 36 at 51 (p. 40).

challenge" JFC-fundraising advertising under FECA. Its gripe over the odds of ***winning*** such a challenge has nothing to do with remedy. That is why, for example, the Freedom of Information Act ("FOIA") provides "an 'adequate remedy' within the meaning of section 704," *CREW*, 846 F.3d at 1246, even though FOIA offers statutory defenses that do not appear in the APA's cause of action for challenging unlawful agency action, *see* 5 U.S.C. § 552(b).

Third, the DCCC says FECA's enforcement provision is inadequate because it "imposes 'arduous' and 'long' procedures." Dkt. 36 at 46 (p. 35). That is simply not true. Just like the advisory opinion process, the enforcement process specifies deadlines by which the Commission must act, *see* 52 U.S.C. § 30109(a)(1)–(4) (establishing 5, 15, 30, and 90-day deadlines), and provides a dedicated judicial remedy should "the Commission [fail] to act on [a] complaint during the 120-day period beginning on the date the complaint is filed," *id.* § 30109(a)(8)(A).

The case the DCCC cites—*U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016)—involves an entirely different review scheme that looks nothing like this one. In *Hawkes*, the supposed alternative remedies required the challenger to (i) "expose themselves to civil penalties of up to $37,500 for each day they violated the Act" as well as "potential criminal liability," or (ii) undergo detailed scientific analyses that were irrelevant to the underlying legal question and that "would cost more than $100,000" to prepare. *Id.* at 600–01. Here, by contrast, the DCCC complains that it would have to comply with the "two-step process" of filing an enforcement complaint and subsequent judicial enforcement suit instead of the very similar two-step process of filing an advisory-opinion request and subsequent judicial review. Dkt. 36 at 46 (p. 35). In much more analogous circumstances than *Hawkes*, the D.C. Circuit has held that "private lawsuits against [a] third-party wrongdoer … are an adequate remedy for the alleged

victims of statutory violations" even though such suits are "more arduous" and, in some respects, "less effective" than APA review. *Garcia v. Vilsack*, 563 F.3d 519, 525 (D.C. Cir. 2009).

At bottom, Congress's "independent cause of action" and "alternative review procedure" to challenge regulated parties' noncompliance with FECA are "clear markers of legislative intent to preclude" APA review where the alleged injury is premised on regulated parties' noncompliance with FECA.[11] *See CREW*, 846 F.3d at 1245. None of the DCCC's arguments rebut this decisive evidence of preclusion.

C. The DCCC Lacks Article III Standing.

1. The DCCC Confirms It Lacks Redressability And That Its Case Is Moot.

The DCCC does not appear to dispute this Court's conclusion that "setting aside the FEC's non-response response" would not "prevent or redress any of [the DCCC's] asserted injuries." Dkt. 21 at 14; *see also* Dkt. 32-1 at 23–24 (pp. 15–16). Nor does the DCCC dispute the NRSC's point that specific injunctive relief is unavailable and would not offer redress. *See* Dkt. 32-1 at 27–29 (pp. 19–21). Instead, the DCCC hinges its entire case on declaratory relief and a remand. *See* Dkt. 36 at 31–33 (pp. 20–22). However, neither a remand nor declaratory relief cures the defects identified in the NRSC's motion to dismiss. *See* Dkt. 32-1 at 24–27 (pp. 16–19).

i. A Remand Cannot Redress The DCCC's Alleged Injuries.

The DCCC stumbles at the outset because its theory of redress relies on obtaining a remand—a remedy it does not seek. *See generally* Dkt. 28 (Am. Compl.); Dkt. 37-2 (proposed

[11] For this reason, the DCCC's reliance on *Unity08* is misplaced. In that case, unlike here, there was no allegation that Unity08's competitors were injuring it by engaging in the activity described in the advisory-opinion request. *Unity08*, 596 F.3d at 864. In fact, the D.C. Circuit agreed that "Congress" enacted the enforcement process to afford such cases "special sensitivity" through "detailed procedures." *Id.* at 866. The DCCC's resort to *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) is even further afield. There, the Court was considering "an FEC regulation," not an advisory opinion—or, here, the absence of an advisory opinion. *See id.* at 96.

order); *see also* Dkt. 36 at 31 (p. 20) (describing the "final judgment" that "DCCC seeks" and listing only declaratory relief and vacatur); Dkt. 37 at 1 (similar in cover motion). Because redressability turns on the "relationship between '***the judicial relief requested***' and the 'injury' suffered," *Murthy v. Missouri*, 603 U.S. 43, 73 (2024) (emphasis added), the DCCC cannot establish redressability through an unrequested remedy.

But even if the DCCC had sought a remand, its injuries still would not be redressable because, on remand, the FEC would not be "likely to issue an AO" that remedied the DCCC's injuries. *Contra* Dkt. 36 at 31 (p. 20). In fact, it would be foreclosed from issuing such an advisory opinion. As the NRSC already explained, the FEC cannot issue an advisory opinion as to the advertisements proposed below because (i) the requesters explained that they would only run their ads through the 2024 General Election cycle, and (ii) the FEC's rules do not allow the agency to issue an advisory opinion unless "***the requesting person*** plans to undertake or is presently undertaking and intends to undertake in the future" the proposed activity, *see* 11 C.F.R. § 112.1(b) (emphasis added); Dkt. 32-1 at 35 (p. 27). Absent authority to render an advisory opinion as to the JFC-fundraising advertising at issue in this case, a remand on that issue to the FEC would do nothing.

The DCCC cannot overcome this fundamental remedial issue. First, it says that the advisory-opinion process "is meant to provide clarity on any future activity" and that advisory opinions "have binding legal effect on the Commission." Dkt. 36 at 34 (p. 23) (cleaned). True enough. But those effects are only possible if the FEC can issue an advisory opinion. Here, it cannot. The DCCC cannot wring redressability out of an advisory opinion that the FEC is forbidden from issuing.

The DCCC cites *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010), but that case only crystalizes the defect. There, the D.C. Circuit rejected a jurisdictional challenge to an advisory opinion where the plaintiff swore that it would "resume" the challenged "activities in a future election cycle." *Id.* at 864. But the plaintiff in *Unity08* did not need a remand because there, unlike here, the FEC had already issued an advisory opinion. *See id.* at 863. A decision from the Court vacating that unfavorable opinion would have made the plaintiff whole, so the authority of the FEC to issue an advisory opinion on remand was irrelevant. Further, the plaintiff in *Unity08* was the requestor of the advisory opinion. *Id.* Thus, even if a remand had been required, the FEC still had authority to issue the advisory opinion because "***the requesting person*** plan[ned] to undertake" the challenged activity. 11 C.F.R. § 112.1(b) (emphasis added). Because the DCCC requires a remand and is not the requesting person, *Unity08* offers it no help.

Next, the DCCC baldly asserts in a footnote that "nothing in [the FEC's] rule prevents the FEC on remand from reevaluating the underlying AO request here." Dkt. 36 at 36 n.9 (p. 25 n.9). That conclusory statement runs headlong into the text of the rule quoted above—which the DCCC does not even cite, much less substantively address.

Finally, the DCCC argues that this Court cannot assess "the legal availability of a certain kind of relief" when assessing jurisdiction. Dkt. 36 at 35 (p. 24) (cleaned). While a court "must assume that Plaintiffs will prevail on the merits of their claims" in assessing standing, *see Sandpiper Residents Ass'n v. HUD*, 106 F.4th 1134, 1141 (D.C. Cir. 2024), the question of the relief available not in the judicial proceeding itself but from the ***agency on remand*** is not a merits question and is thus proper to consider in assessing redressability, *see, e.g.*, *Hecate Energy LLC v. FERC*, 126 F.4th 660, 668 (D.C. Cir. 2025) (finding no standing where agency's likely conduct "on remand" "would not redress [the plaintiff]'s injury"); *INS v. Chadha*, 462 U.S. 919, 931 (1983)

(first assessing severability to determine whether plaintiff "could receive … relief" from the agency on remand that would establish "standing"). And even if the Court considered the scope of the FEC's authority on remand to be a "merits" issue, *but see id.*, the FEC's rules squarely foreclose an advisory opinion, rendering any (as-yet unarticulated) contrary argument "so implausible that it is insufficient to preserve jurisdiction." *Sandpiper*, 106 F.4th at 1141.

At bottom, an unrequested and ineffectual remand cannot supply the DCCC with redress.

ii. Declaratory Relief Cannot Redress The DCCC's Alleged Injuries.

The DCCC's request for declaratory relief fares no better. *See* Dkt. 32-1 at 24–27 (pp. 16–19). At the threshold, and as already explained, the DCCC's request for declaratory relief is non-cognizable because it does not concern ***agency*** action but instead the hypothetical actions of the DSCC. *See supra*; *see also* Dkt. 32-1 at 24–25 (pp. 16–17). The DCCC offers no response whatsoever and thus forfeits the issue.[12]

Next, the DCCC's requested declaration would be "powerless to remedy the alleged harm," *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023), because the DCCC's alleged harms are not caused by the FEC but by private parties that would not be bound by this Court's judgment. *See* Dkt. 32-1 at 25–27 (pp. 17–19). The DCCC offers two arguments in response, neither of which escape this fundamental limit on Article III.

First, the DCCC says private parties not bound by the Court's judgment would change their conduct because their regulator would be bound by the Court's judgment. Dkt. 36 at 31–32 (pp. 20–21). But as the DCCC's own authority explains, that theory only works where the plaintiff

[12] To the extent the Court considers this threshold issue a merits question, *but see Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (explaining that prohibition on advisory opinions stems from "Article III"), the NRSC has moved under Rule 12(b)(1) and Rule 12(b)(6) and requested summary judgment under Rule 56(f)(1). Regardless of how it conceives of the issue, the DCCC is barred from a judicial declaration about a private non-party's JFC-fundraising advertisements. *See supra*.

"present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to the likelihood of redress." *Hecate*, 126 F.4th at 666 (rejecting standing); *see also id.* at 665 ("Where, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of ***someone else*** … [it is] substantially more difficult to establish redressability" (emphasis in original) (quotations omitted)). Here, the DCCC has presented ***zero*** evidence that declaring unlawful the ***DSCC's*** hypothetical advertising would cause any other party to change their conduct. That alone forecloses redressability.

Indeed, the fact-specific nature of the DCCC's challenge belies its unadorned speculation about redressability. The DCCC agrees "that any relief" by this Court "is limited by the scope of the [advisory-opinion request] under review." Dkt. 19 at 25 (p. 17); *see Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Fed. R.R. Admin.*, 10 F.4th 869, 878 (D.C. Cir. 2021) ("As a general rule, the APA limits judicial review to the administrative record." (cleaned)). Here, the advertisements under review "primarily advocate for Senator Tester's" and "Congressman Gallego's election," "include a QR code during the final few seconds," and "will also include a brief oral solicitation." AR000002. Even if this highly specific factual permutation were declared unlawful, that would not prevent Republican committees from running JFC-fundraising advertisements that, under the DCCC's Article III theories, would still result in injury.

For example, Republicans could run JFC-fundraising advertisements that spend less time on candidate "advoca[cy]," AR000002, and more time generically "attacking Democratic" causes, *see* Dkt. 36 at 24 (p.13). Similarly, Republican committees could simply run ads with a longer QR code or oral solicitation, inflicting the exact same alleged competitive and informational injury. Indeed, the Commissioners below indicated that such fact-bound changes would likely have

caused them to find the advertisements lawful. *See* FEC Open Meeting at 50:50–51:03, AOR 2024-13 (Oct. 10, 2024), https://tinyurl.com/bffnnsj2 (Commissioner Dickerson opining that "if [the DSCC] were willing to put that QR code on for a more material portion of the ad, you'd be getting a 'yes'"); *id.* at 51:21–37 (Commissioner Lindenbaum agreeing "that is something that I would be considering" in a subsequent advisory-opinion request because legal outcome "depend[s]" on "the facts").

In fact, the DCCC's competitors "have … independent reasons and means" to run such advertisements. *Hecate*, 126 F.4th at 669. After all, the DCCC's competitors are just that—competitors—and they would surely seek to continue running effective fundraising advertisements. It is thus "not only just as plausible, but in fact more plausible" that private parties will "respond to [the DCCC's] victory in this suit with" conduct "that would not provide" the DCCC the relief "it seeks." *Id.* (cleaned); *see* FEC Open Meeting at 28:35–46, AOR 2024-13 (Oct. 10, 2024), https://tinyurl.com/bffnnsj2 (Commissioner Lindenbaum explaining "the way people practice law … is to analyze the advisory opinions and try to see … where their facts [fit] and ***how far they can push it***" (emphasis added)); *see id.* at 29:59–30:16 (Commissioner Dickerson explaining "the advisory opinion process is not intended to make rules of general applicability"). Thus, a ruling on the D***S***CC's advisory opinion request would redress none of the D***C***CC's injuries.

The DCCC fares no better with its claim that the "NRSC would be" bound by this Court's judgment. Dkt. 36 at 33 (p. 22). For one, the DCCC does not dispute that its action under the APA is limited to challenging "agency action," 5 U.S.C. §§ 702, 706, in proceedings "against the United States, the agency by its official title, or the appropriate officer," *id.* § 703. Because the DCCC does not allege that the NRSC has engaged in agency action or is a government actor subject to the APA's cause of action, the DCCC has not offered a legal theory that could bind the

NRSC. And although the DCCC cites a case for the proposition that an intervenor is "vulnerable to complete adjudication by the federal district court of the issues in litigation ***between the intervenor and the adverse party***," *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 67 n.1 (D.D.C. 2013) (Contreras, J.) (emphasis added), it has not identified such an issue in this case. After all, if the NRSC is bound by a judgment that JFC-fundraising advertisements from the last election cycle advocating for Jon Tester and Reuben Gallego are contributions under FECA, that would have no effect on the NRSC because the NRSC obviously never intends (or intended) to run such ads.

The DCCC's final gambit is to mischaracterize the NRSC's intervention papers as "conced[ing] that it would be bound by a final judgment." Dkt. 36 at 33 (p. 22). The NRSC made no such concession. In reality, the DCCC's original complaint asked the Court to "[d]eclare that expenditures made by ***a national party committee***" for JFC-fundraising advertising "are 'contributions.'" Dkt. 1 at 27 (Prayer for Relief ¶ B) (emphasis added). Plainly, a judgment that would apply to every "national party committee" would have bound the NRSC—as it said in its intervention papers. *See* Dkt. 14 at 3 ("the DCCC seeks a declaration or an injunction that it says would make NRSC's current arrangements under current FEC precedent and regulations unlawful"). But after the NRSC pointed out that this request for relief was improper because the DCCC could seek review of only the advertisements in the administrative record, *see* Dkt. 16 at 41–44 (pp. 33–36), the DCCC amended its complaint to remove the request for relief that would have applied to every national party committee. *Compare* Dkt. 1 at 27–28, *with* Dkt. 28 at 31. The NRSC would plainly not be bound by the judgment the DCCC now seeks.[13]

[13] Indeed, the DCCC's operative complaint now limits its request for declaratory relief to "JFC-advertising expenditures, as defined and described in AOR 2024-13." Dkt. 28 at 31 (Prayer for Relief ¶ A) (emphasis added). Because the NRSC does not—and will never—run JFC-fundraising advertisements as defined and described in the DSCC's advisory-opinion request, it will not be bound by such declaratory relief and has never said otherwise.

For these reasons, the DCCC's request for declaratory relief will do nothing to redress its supposed injuries.

iii. The DCCC's Remedial Issues Also Render The Case Moot.

As the NRSC explained in its opening motion, the inability of this Court to offer the DCCC effectual relief also renders the case moot. *See* Dkt. 32-1 at 34–36 (pp. 26–28). Indeed, whether analyzed under mootness or redressability, the bottom line is the same: the DCCC can obtain no relief from this Court that would resolve its purported injuries. *See supra*.

The DCCC claims (at 25) this dispute is capable of repetition while evading review but fails to "bear[ ] the burden" of establishing that mootness exception. *J. T. v. District of Columbia*, 983 F.3d 516, 523 (D.C. Cir. 2020). "Indeed, decisions reviewing" FEC advisory opinions "show that such relief is not foreclosed." *Askan Holdings, Ltd. v. U.S. Dep't of Treasury*, 2021 WL 4318114, at *4 n.6 (D.D.C. Sept. 23, 2021) (Leon J.); *see, e.g.*, *Ready for Ron*, 2023 WL 3539633, at *14 (reviewing "FEC's advisory opinion"); *Unity08*, 596 F.3d at 863–64 (adjudicating "challenge [to] advisory opinion … on the merits"). Indeed, the DCCC does not explain why it cannot submit a new advisory-opinion request that informs the FEC about its plans to "set up joint fundraising committees to sponsor ads." *See* Dkt. 36-1 at 5 (Merz Decl. ¶ 12) (making this representation before the Court). So long as that request concerns both the "2026 election cycle ***and … future elections***," *id.* (emphasis added), the DCCC's advisory-opinion request could guard against mootness, *see Unity08*, 596 F.3d at 864 (finding no mootness where ***requestor*** "filed a sworn declaration unambiguously stating a conditional intent to resume activities in a future election").

Thus, not only does the DCCC lack standing, but its case is moot.

2. The DCCC Confirms It Lacks A Cognizable Injury.

i. The DCCC Confirms It Lacks A Chill Injury.

The DCCC claims its activities are chilled by the threat of FEC enforcement action. As the NRSC already explained, that subjective fear cannot support standing without any showing of a "concrete threat[ ]" of enforcement. *Saline Parents v. Garland*, 88 F.4th 298, 304 (D.C. Cir. 2023); *see* Dkt. 32-1 at 29–30 (pp. 21–22).

Ignoring controlling caselaw, the DCCC asserts that "a different set of Commissioners in the future" might enforce FECA against it. Dkt. 36 at 52 (p. 41). Maybe. But the Commission might also maintain the status quo or even issue a favorable advisory opinion. With nothing more than speculation, the DCCC has not shown that injury from enforcement is "imminent" and "not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned).

In all events, enforcement is unlikely. Every other major political-party committee—including the DSCC—has run JFC-fundraising advertisements in confident reliance on five decades of FEC precedent blessing the practice and thus showing that enforcement is unlikely. *See* Dkt. 32-1 at 29–30 & n.4–5 (pp. 21–22 & n.4–5). The burden is on to the DCCC to "show that the likelihood of future enforcement is substantial," *California v. Texas*, 593 U.S. 659, 670 (2021) (quotations omitted), and the mere possibility of a future enforcement action does not clear this hurdle.

ii. The DCCC Confirms It Lacks A Competitive Injury.

The NRSC's motion to dismiss showed that the DCCC lacks a competitive injury because it (i) faces no competitive disadvantage, (ii) has no reason to fear enforcement, and (iii) has not adequately pleaded that as a ***party***, it competes with ***candidates***. Dkt. 32-1 at 30–31 (pp. 22–23). The DCCC has no answer to any of these defects.

On the first two points, the DCCC accuses the NRSC of "wrongly assum[ing] that ***its*** view of the law is correct, not DCCC's." Dkt. 36 at 24–25 (pp. 13–14) (competitive disadvantage); *see id.* at 25 (p. 14) (reasonable fear). Not so. Even assuming "that JFC advertising constitutes a contribution or coordinated party spending," *id.*, the DCCC does not suffer a competitive harm. The reason is simple: regardless of the proper meaning of FECA, all parties are currently subject to it and thus face the same "regulatory burdens." *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015). So, as this Court explained, merits aside, the DCCC and its competitors "are all on an even playing field" and are "well-equipped to make [their] best judgment about the risk of a future enforcement action or prosecution." Dkt. 21 at 20. Furthermore, as already explained, the DCCC's alleged fear of enforcement is entirely speculative.

With respect to the nature of the alleged competition, the DCCC claims that "its committee-competitors obtain benefits DCCC does not." Dkt. 36 at 25 (p. 14). But the only benefits the DCCC has alleged are "television advertisements" run to "advocate for the election of Republican ***candidates***"—not ***committees***. Dkt. 28 at 1–2 (Am. Compl. ¶ 1) (emphasis added). Because the DCCC is not a "candidate," it has failed to plead that it "***personally*** competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit." *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (emphasis added). And the DCCC's conclusory assertion that it "brings this case on behalf of … its members," Dkt. 36 at 26 (p. 15), falls short as it has not pleaded any element of associational standing nor has it "identif[ied] individual members," *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 613 (D.C. Cir. 2019).

iii. The DCCC Confirms It Lacks An Informational Injury.

As the NRSC explained in its motion to dismiss, the DCCC has not suffered an informational injury because (i) as a non-competitor, it has no concrete interest in the information it seeks for competitive purposes, and (ii) the information it seeks does not correspond to its

requested relief about contribution limits. Dkt. 32-1 at 32–33 (pp. 24–25). As to the former, the DCCC simply reiterates how it would use the information for competitive purposes, Dkt. 36 at 27–328 (pp. 16–17), confirming that, because the DCCC lacks a competitive injury, it also lacks "the type of concrete injury needed for standing," *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013). As to the latter, the DCCC argues that even though it requests declaratory relief only as to whether JFC-fundraising advertisements are contributions, it can nevertheless claim an informational injury to support standing. Dkt. 36 at 28–29 (pp. 17–18). As another court in this Circuit said in considering this exact argument: "Not even close." *AB PAC v. FEC*, 2023 WL 4560803, at *5 (D.D.C. July 17, 2023) (Kelly, J.). The DCCC cannot "repackage[ ] [a purported] informational injury … to support standing on its excessive-contributions claim." *Id.*

3. The DCCC Confirms It Lacks Traceability.

The DCCC's traceability theory is fatally flawed. Because its alleged injuries began months before the FEC declined to issue an advisory opinion, that non-decision cannot be the cause of those injuries. Dkt. 32-1 at 33–34 (pp. 25–26). According to the Complaint, the DCCC's injuries began in "July 2024" and were exacerbated when "Republicans rapidly expanded" JFC-fundraising advertising "in mid-September." Dkt. 28 at 16, 19, 26 (Am. Compl. ¶¶ 50, 56–57, 81). But those events all predate the FEC's October 10, 2024 announcement that it would not issue an advisory opinion. Thus, the FEC's non-decision could not have caused the DCCC's injuries.

The DCCC says this break in its supposed causal chain does not matter because Republicans ran ***two*** additional JFC-fundraising advertisements after the FEC declined to issue an advisory opinion. Dkt. 37-1 at 2–3 (Merz Decl. ¶¶ 7–8). In the DCCC's telling, these two ads show "that the FEC's" non-decision caused its "rivals to begin or increase their mammoth JFC advertising spends." Dkt. 36 at 31 (p. 20). But that "conclusory allegation" does not pass the smell test, let alone show a "causal link between" the FEC's non-decision and the Republicans

committees' "actions." *Ass'n of Am. Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028, 1034 (D.C. Cir. 2022). "Indeed, it is far less plausible that the [Republican committees'] actions were a response to" the FEC's non-decision than they were the natural spending increase that occurs in the final weeks of an election, and a continuation of the campaign that the complaint alleges began months earlier. *Id.* at 1034–35. That is why this Court has already squarely rejected as "too speculative and too remote to support a claim of standing" the notion that the FEC's non-decision "'sort of gave' the NRSC 'the green light' to continue funding the advertisements." Dkt. 21 at 17–18.

The DCCC next claims that the FEC is the cause of its injuries because had it issued a negative advisory opinion, that "authoritative pronouncement" would have stopped Republicans from further JFC-fundraising advertising because they might have feared "civil and criminal penalties if they defied" the agency's (hypothetical) decree. Dkt. 36 at 29 (p. 18) (cleaned). But that theory of inaction is "premised on a speculative chain of possibilities," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), such as (i) how broadly the FEC's advisory opinion about the DSCC would have reached, (ii) whether parties could devise JFC-fundraising advertisements that complied with that DSCC-specific opinion, *see supra*, (iii) whether parties would nevertheless take their chances and fight an enforcement action in court—and more. At bottom, an agency does not "cause" an Article III injury where it does not indirectly issue threats to a regulated party's competitors via adverse advice solicited by the regulated party's ally.

Further, the DCCC's theory runs headlong into the Supreme Court's Article III teaching that federal courts may not "order the [Government] to alter" a "policy" so that "more" parties are at risk of enforcement. *United States v. Texas*, 599 U.S. 670, 678 (2023) (emphasis in original).

Here, the DCCC's theory of traceability inappropriately rests on the threat of government enforcement as a means to remedy its injuries.[14]

CONCLUSION

The Court should deny the DCCC's motion for summary judgment, grant summary judgment for the FEC and the NRSC, *see* Fed. R. Civ. P. 56(f)(1), and dismiss the Amended Complaint with prejudice.

Dated: April 18, 2025

Respectfully submitted,

By: /s/ Stephen J. Obermeier
Michael E. Toner (D.C. Bar No. 439707)
Brandis L. Zehr (D.C. Bar No. 996202)
Stephen J. Obermeier (D.C. Bar No. 979667)
Jeremy J. Broggi (D.C. Bar No. 1191522)
Boyd Garriott (D.C. Bar No. 1617468)
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
sobermeier@wiley.law

Counsel for the NRSC

[14] The "standing analysis might differ" for FECA's statutory enforcement process because Congress "specifically authorize[d] suits against the Executive branch by a defined set of plaintiffs." *Texas*, 599 U.S. at 681–82.

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2025, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

Christopher D. Dodge
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW Suite 400
Washington, DC 20001
202-987-4928
Cdodge@elias.Law

Tyler Bishop
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW Suite 400
Washington, DC 20001
202-985-0628
Tbishop@elias.Law

Aria C. Branch
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW Suite 400
Washington, DC 20001
202-968-4518
Abranch@elias.Law

Blake Ledford Weiman
FEDERAL ELECTION COMMISSION
1050 First Street, NE
Washington, DC 20463
202-694-1464
Bweiman@fec.Gov

Christopher H Bell
FEDERAL ELECTION COMMISSION
1050 1st Street NE Suite 1111
Washington, DC 20002
202-694-1330
Chbell@fec.Gov

Gregory John Mueller
FEDERAL ELECTION COMMISSION
1050 First Street NE

Washington, DC 20463
(202) 694-1650
Gmueller@fec.Gov

Shaina J Ward
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
202-694-1566
Sward@fec.Gov

Sophia Golvach
FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
202-694-1644
Sgolvach@fec.Gov

/s/ Stephen J. Obermeier
Stephen J. Obermeier (D.C. Bar No. 919667)