IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

This suit concerns "whether an agency has acted [consistent with] its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). In resolving that question, this Court "exercise[s] independent judgment in construing" FECA, *id.* at 406, notwithstanding past agency rules or guidance. After all, "the question that matters" under the APA is: "Does the statute authorize the challenged agency action?" *Id.*

The answer to that question here is "no," for several reasons. *First*, under FECA, the FEC "shall render a written advisory opinion" when asked. 52 U.S.C. §30108(a). The FEC did not do so here. The predictable result is that DCCC and its candidates remain trapped between a rock (its rivals' unlawful use of JFC advertising), and a hard place (the lack of safe harbor to respond in kind). *Second*, the reason the FEC failed to issue an AO is because three commissioners adopted an invalid reading of FECA. The FEC defends that result by suggesting its commissioners relied upon equally permissible readings of the law. But as *Loper Bright* lays plain, it "makes no sense to speak of a 'permissible' interpretation" of a statute. 603 U.S. at 400. There is only a "best" reading of the statute, *id.*, and the FEC failed to apply it here. FECA simply does not permit political party committees to engage in unlimited coordinated spending on TV ads under the guise of joint fundraising. A "joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits" set by FECA. *McCutcheon v. FEC*, 572 U.S. 185, 215 (2014). And even if FECA does somehow permit such an arrangement, FECA also entitles DCCC to that answer, 52 U.S.C. §30108(a), lest the First Amendment rights of DCCC be chilled by the prospect of enforcement.

NRSC's responses to these statutory arguments wither under scrutiny, while the FEC fails to offer any cohesive reading of FECA at all. Defendants instead chiefly rehash arguments about standing, mootness, the APA's requirements concerning final action, and alternative remedies.

Each of these thresholds is readily met. This dispute remains live because DCCC continues to suffer competitive and informational injuries traceable to the FEC's improper closure of AOR 2024-13 ("AOR"), conduct which readily satisfies the requirement for final action. And Defendants' efforts to force DCCC's claim into FECA's enforcement provisions, 52 U.S.C. §30109, fail to grapple with the many ways in which that enforcement scheme fails to offer an *adequate* remedy akin to APA review. Simply put, Defendants cannot evade the statutory interpretation question at the heart of this case simply because they do not like the answer it yields. Plaintiff respectfully requests that this Court grant its motion for summary judgment.

ARGUMENT

I. This Court has subject-matter jurisdiction.

A. DCCC has standing.

1. The FEC's failure to issue an AO finding that JFC advertising is subject to FECA's contribution limits has injured DCCC.

Competitive Injury. As explained, ECF No. 37 ("DCCC Mem.") at 13–15, DCCC is suffering a competitive injury because its competitors have used, and will continue to use, JFCs to backdoor money far exceeding FECA's contribution limits into advertisements promoting Republican candidates and attacking Democratic candidates in congressional elections. When DSCC proposed materially identical advertisements promoting its own candidates in the AOR, FECA required the FEC to issue an opinion on whether such advertisements are lawful. Because it did not, DCCC is suffering a competitive injury because it must either comply with FECA or risk unlawful conduct. That constitutes an injury under Article III: when one party obtains a competitive advantage by engaging in tactics that violate the law, their rival party suffers a competitive injury sufficient for standing. *Shays v. FEC*, 414 F.3d 76, 89 (D.C. Cir. 2005).

Defendants misunderstand the doctrine of competitive standing, suggesting it does not exist where all parties "face the same regulatory burdens." ECF No. 40 ("NRSC Resp.") at 42 (quotation omitted). That argument runs contrary to *Shays*, which held plaintiffs had competitive standing to challenge campaign finance rules that—like here—subjected all regulated parties to the same requirements. *Shays*, 414 F.3d at 95. The plaintiffs—two members of Congress—had competitive standing even though their rivals did not "enjoy 'special benefits' unavailable to" the plaintiffs because they faced "intensified competition" and were forced to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id.* at 86. So too here. *Shays* forecloses the FEC's argument that DCCC's competitive injury is "self-inflicted" because it is not flouting federal law like its rivals. DCCC is not required to match its competitors' tactics when they act unlawfully, and being forced to make that choice is itself injurious. *Id.* at 89.

NRSC argues that (a) DCCC's fear of enforcement is speculative; and (b) that as a party *committee*, DCCC does not compete in the same arena as Republican *candidates*. Neither point is persuasive. On the first, "[n]othing . . . prevents the Commission from enforcing [FECA] at any time with, perhaps, another change of mind of one of the Commissioners." *U.S. Chamber of Com. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995). On the second, "DCCC is alleging competitive harm not just because Republican *candidates* benefit from JFC advertising beyond FECA's limits, but rather because its competitors 'including . . . the Republican *Committees*' are improving their electoral prospects by pouring more resources into their candidates' campaigns 'at the expense of DCCC and its candidates.'" DCCC Mem.14 (citations omitted). NRSC nowhere disagrees.

Informational Injury. The FEC's failure to treat JFC advertising as contributions or coordinated party expenditures inflicts a distinct informational injury on DCCC. If participating committees were required to report expenses for JFC advertising as contributions or coordinated

expenditures as is required under FECA, 52 U.S.C. §§30104(b), 30116(a)(7), then DCCC would know the amounts *each committee* (like NRSC) actually paid toward a given coordinated effort as well as the purpose of the expenditure. Instead, it presently knows only the total of what the JFC paid, which does not include how much of each expense was paid by each participant. *See CLC v. FEC*, 31 F.4th 781, 790 (D.C. Cir. 2022); Merz Decl. ¶¶12–13. That information, "currently unknown, constitute[s] factual information core to [DCCC's] established interests" in knowing how much committees contribute to or expend on candidates and how much the "candidate spent" in a federal election. *CLC*, 31 F.4th at 790–91 (cleaned up). That shows an informational injury.

NRSC is incorrect that the information DCCC "seeks does not correspond to its requested relief about contribution limits." NRSC Resp.42–43. If DCCC is correct that JFC advertising is subject to FECA's contribution limits, then such contributions would be subject to disclosure requirements. *See* 52 U.S.C. §§30104(b), 30116(a)(7). DCCC's informational injury thus flows directly from the FEC's unlawful action, and the relief it seeks would remedy it.

2. DCCC's injuries are traceable to the FEC's failure to issue an AO.

The causal chain from the FEC's order to DCCC's injury is straightforward. In the run-up to the 2024 general election, NRSC began relying on JFCs to fund TV ads that were indistinguishable from typical candidate ads. Given the apparent unlawfulness of such conduct, Democratic candidates and committees found themselves stuck between a rock (competitive disadvantage) and a hard place (threat of FECA liability), leading DSCC to seek an AO as to whether two proposed JFC advertisements violated FECA. Had the FEC issued an AO concluding that the practice was illegal, that AO would have represented the "authoritative statement of position by the agencies to which Congress has entrusted the full task of administering and interpreting the underlying statutes," and "regulated parties" like DCCC's competitors could face enforcement action "if [they] defied" it. *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010)

(cleaned up) (quoting *Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 753 n.10 (D.C. Cir. 1984) (R.B. Ginsburg, J.)). On the other hand, had the FEC approved the practice, DCCC would have benefitted from a safe harbor, and could have matched its rivals' tactics with its own speech. Because the FEC's final order did neither, DCCC suffers the ongoing injuries described above.

The fact that the "status quo" has not changed does not mean that the FEC did not cause DCCC's injuries. To the contrary, it is precisely because the FEC shirked its duty to issue an AO that would have clarified the "legal landscape" that DCCC's injuries persist. In other contexts, courts have been clear that an agency's failure to change the status quo can cause injury. In *Massachusetts v. EPA*, for example, the status quo—unregulated emissions by the EPA—contributed to Massachusetts' injuries, and it therefore had standing to challenge the EPA's denial of its petition for rulemaking on the issue. 549 U.S. 497, 526 (2007). And the logic of *Shays* is not limited to circumstances where the agency's rules themselves are unlawful; it applies with equal force to cases like this one, where the FEC refuses to police the boundaries of campaign finance laws and regulated parties take advantage of the FEC's inaction to their rivals' disadvantage.

The Supreme Court's decision in *Massachusetts* also forecloses Defendants' view that DCCC's injuries are categorically untraceable to the FEC's action simply because its injuries began before the agency acted unlawfully. In that case, the EPA's denial of the state's petition for rulemaking did not originally cause the pollution Massachusetts asked the agency to regulate. *Id.* at 521–23. But that did not deprive Massachusetts of standing. *Id.*; *see also CREW v. DHS*, 507 F. Supp. 3d 228, 240 (D.D.C. 2020) (agency's "upstream failure" is traceable to predictable third-party conduct); *Ipsen Biopharms, Inc. v. Becerra*, 678 F. Supp. 3d 20, 31 (D.D.C. 2023) (agency's "alleged illegal . . . refusal" or failure that effectively "allow[s]" harmful third-party conduct to continue satisfies traceability). While NRSC's unlawful practices were harmful when they

began—before the FEC declined to issue an AO—DCCC's injury did not become an Article III competitive injury until the FEC's unlawful order put it in the predicament of needing to choose to "either violat[e] [the FECA] or suffer[] disadvantage in their campaigns." *Shays*, 414 F.3d at 89. Had the FEC's response to the AOR complied with FECA, DCCC would not be forced to "compete for office in contests tainted by [FECA]-banned practices." *Id*. at 85. In fact, once the FEC failed to issue an AO, additional groups and candidates—including NRCC and its candidates—began following the NRSC's lead with illegal JFC advertising. *See* Merz Decl. ¶7.

Finally, Defendants argue that the FEC's order did not cause DCCC's injuries because even if it had issued an AO, the AO would not "have stopped Republicans from further JFC-fundraising advertising." NRSC Resp.44; *see also* ECF No. 42 ("FEC Resp.") at 17. That theory assumes NRSC would defy an authoritative FEC opinion that declares their materially identical conduct unlawful. But as courts have repeatedly recognized, standing may rely "on the predictable effect of Government action on the decisions of third parties," *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019), and this Court should not presume that a regulated party like NRSC would refuse to adjust its behavior *at all* in the face of an authoritative opinion finding that the practices proposed in the AOR violate FECA, *see Mass. Coal. for Immigr. Reform v. DHS*, 752 F. Supp. 3d 13, 32 (D.D.C. 2024) (describing precedent holding that foreseeable third-party reactions satisfy traceability). Defendants' hypothesis that NRSC might have "devise[d] [other] JFC-fundraising advertisements that complied with [a] DSCC-specific opinion" *proves* this point. NRSC Resp.44; FEC Resp.17–18 (similar). In that case, the AO would have effectively ended the conduct that was *in fact* harming DCCC—NRSC's posited whack-a-mole behavior notwithstanding—and dissuaded similar conduct by other competitors. *Unity08*, 596 F.3d at 865. The prospect that the NRSC might have to craft a *new* way to evade FECA's limits—which may or may not inflict the

same harm on DCCC—does not defeat DCCC's standing to challenge the FEC action that failed to address activity that is already taking place and that harms DCCC and violates FECA now.

3. Declaratory relief and remand will redress DCCC's injuries.

Defendants' redressability arguments repackage their causation theories, principally contending that a declaratory judgment will not redress DCCC's injuries because it would not directly proscribe NRSC's unlawful conduct. These arguments fail for the reasons below.

First, DCCC has not forfeited any arguments on its request for declaratory relief. *See* NRSC Resp.36. DCCC has stated plainly throughout this litigation that the relief it seeks is a "*judgment against the agency* forcing it to conform its regulatory actions to the law." DCCC Mem.21; *see also infra* §III.A. That lawful agency action would predictably impact regulated third parties like DSCC and NRSC is precisely the point.

Second, NRSC argues declaratory relief would be "powerless" to remedy the harms DCCC alleges because they are caused by private parties, not the FEC. NRSC Resp.36. DCCC has already explained why the NRSC's causation arguments are wrong. *Supra* §I.A.2. Moreover, where there is a "causal relationship" between an agency's regulatory authority "and the third-party conduct" harming the plaintiff, courts recognize that judgment against the agency redresses the plaintiff's injury. *Hecate Energy LLC v. FERC*, 126 F.4th 660, 666 (D.C. Cir. 2025) (quotation omitted); *see also Bennett v. Donovan*, 703 F.3d 582, 590 (D.C. Cir. 2013); *Johnson v. Becerra*, 111 F.4th 1237, 1244 (D.C. Cir. 2024). Again, NRSC's response simply adds a "redressability" gloss to its "traceability" arguments. It protests that there is "*zero* evidence that declaring unlawful the *DSCC's* hypothetical advertising would cause any other party to change their conduct." NRSC Resp.37. But again, *see supra* at 6, it is sufficiently likely for standing purposes that NRSC—bound by this Court's order as an intervenor (*see Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 67 n.1 (D.D.C. 2013))—would not flout this Court's order by continuing practices that are

materially indistinguishable from conduct the Court declares unlawful. Indeed, this Court has already recognized that a declaratory judgment "would likely 'prevent the NRSC from using any joint fundraising committee' to evade FECA's contribution and coordinated expenditure limits." ECF No. 21 ("PI Order") at 18 (quoting ECF No. 19 at 18).

Third, NRSC argues that DCCC's "theory of redress relies on obtaining a remand," which DCCC did not expressly request in its complaint. NRSC Resp.33–34. But remand is "the appropriate course" where the Court finds an APA violation, which is what DCCC alleges here. *Hurry v. Fed. Deposit Ins. Corp.*, 589 F. Supp. 3d 100, 126 (D.D.C. 2022) (quotation omitted). Nothing bars this Court from remanding to the agency in the event it finds DCCC's APA claim has merit. *E.g.*, *Am. Hosp. Ass'n v. Azar*, 385 F. Supp. 3d 1, 11 (D.D.C. 2019). And, in any event, DCCC's redress does not depend upon such a remand or a new AO because declaratory relief from this Court can also supply such redress.

B. NRSC fails to show mootness.

NRSC has now collapsed its mootness arguments into its redressability theories, *see* NRSC Resp.40, and offers *no* response at all to DCCC's mootness arguments, *see* DCCC Mem.23–25. This case is therefore not moot for the same reasons this Court can still grant meaningful relief.

NRSC briefly disputes whether this case is capable of repetition while evading review, insisting that DCCC must file its own AO request—identical to DSCC's—and specifically tie the request to the 2026 election cycle *and* future elections. *See* NRSC Resp.40. As noted, however, there is no guarantee such a process would be complete in time to afford DCCC relief. *See* DCCC Mem.25–26. And as NRSC acknowledges, DCCC has already sworn to its intent to "set up joint fundraising committees to sponsor ads" in future elections. *See id.* (quoting ECF No. 36-1 at 5 (Merz Decl. ¶ 12)). That is enough to preserve the live controversy here.

II. The FEC's failure to issue an AO proscribing JFC advertising is contrary to law.

Defendants' chief argument is that the FEC's action in this case could not have been unlawful because FECA *compelled* the agency to close AOR 2024-13 upon its failed vote. That contention does not withstand scrutiny. Instead, by closing the request based on the commissioners' disagreement about the legality of JFC advertising, the FEC violated its duty under FECA to issue an AO. FECA's four-vote requirement cannot change this conclusion, particularly where, as here, the agency had a quorum and split on the basis of a *legal* error.

A. Under FECA, the Commission "shall render" an AO when asked.

The question of whether the FEC was required to issue an AO is answered by FECA itself: "the Commission *shall* render a written advisory opinion." 52 U.S.C. §30108(a) (emphasis added). When Congress employs "shall," it generally means "must." *De Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). NRSC argues that in certain contexts, "shall" can be permissive rather than mandatory. NRSC Resp.9. But that is only true where "shall" is followed by discretionary language or preconditions that must be satisfied. In those limited circumstances, courts have concluded that "shall" can mean "should" or "may." *Id.* (citing *De Martinez*, 515 U.S. at 432 n.9). In *De Martinez*, for example, the Supreme Court noted that "legal writers sometimes" mean "should," "will," or "may" when they use "shall." 515 U.S. at 432 n.9. But the examples provided by the Court involved "shall" followed by discretionary language. *Id.* (citing Fed. R. Civ. P. 16(e) and Fed. R. Crim. P. 11(b)); *see* Fed. R. Civ. P. 16(e) (1995) ("The order following a final pretrial conference *shall* be modified *only to prevent manifest injustice*."); Fed. R. Crim. P. 11(b) (1995) (A plea "shall be accepted by the court *only after due consideration of the views of the parties*. . . .) (emphases added). And *DHS v. MacLean*—the other case NRSC relies on—expressly rested its holding on this distinction. 574 U.S. 383, 396 (2015) (explaining that "shall prohibit disclosures only if the Under Secretary decides that disclosing the information would . . . be

detrimental" is not mandatory language because it "affords discretion" (quotation omitted)). In contrast, §30108(a) does not contain any such discretionary language or preconditions, and neither the FEC nor NRSC argue otherwise. FECA does not grant the FEC any discretion as to whether it "shall" issue an AO. *See* 52 U.S.C. §30108(a).[1] In this context, "shall" means "must." The FEC was required to issue an AO.

The FEC is not free to ignore its duty whenever commissioners initially "deadlock." NRSC Resp.10. Nor does *McCutcheon v. FEC* say anything to the contrary. In that case, the FEC lacked a quorum and therefore "could not" issue an AO. 496 F. Supp. 3d 318, 333 (D.D.C. 2020). Thus, even though in the normal course the "FEC is *required to render an advisory opinion* in response to a complete request," there was no possibility that it could do so in those circumstances. *Id.* (emphasis added). The "absurd" result the court sought to avoid was a conclusion that the FEC's failure to issue an AO was unlawful when the FEC "*could not possibly*" have done so. *Id.* (emphasis added). By contrast, at the time the FEC failed to issue an AO here, it had a quorum and was capable of acting. *See* AR000147. It simply failed to carry out its statutory mandate.

Requiring the FEC to issue an AO is consistent with the agency's function as the regulatory authority on federal campaign finance laws, and does not "fail to give effect" to §30106's four-vote requirement. *Contra* FEC Resp.38; NRSC Resp.11. Congress, of course, knew of that requirement "when it enact[ed]" the unqualified, mandatory language of §30108. *Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 202 (D.D.C. 2006), *aff'd*, 515 F.3d 1262 (D.C. Cir. 2008) (citing *Garrett v. United States*, 471 U.S. 773, 793–94 (1985)). But Congress intended

[1] The FEC and NRSC do point out that the FEC retains some discretion as to the particular *contents* of an AO, NRSC Mem.26; FEC Resp.38, but DCCC has never claimed otherwise. In any event, such discretion does not render the agency's unlawful conclusion of a completed request and the legal errors behind it unreviewable. *Infra* §III.A; *Loper Bright*, 603 U.S. at 400.

for the commissioners, in the face of disagreement, to exercise their "experience, integrity, impartiality, and good judgment" to reach bipartisan agreement and provide regulated parties with the answer to which they are entitled. 52 U.S.C. §30106(a)(3); *see also* H.R. Rep. No. 93-1239 at 9, 93d Cong. 2d Sess. (July 30, 1974) (Comm. on H. Admin. Rep. on FECA Amendments of 1974) ("[I]t is wholly appropriate that all persons affected by [FECA] be given every opportunity to so comply. . . . Accordingly, it is desirable that those having doubts as to their legal obligations be afforded the means of having these doubts resolved.").[2] And when the FEC's failure to comply with its duty is the result of a legal error, as here, it is the province of this Court under the APA to declare the law and order the agency to comply with the statute. *Loper Bright*, 603 U.S. at 400; *infra* §II.B. The Court therefore *can* harmonize the FEC's four-vote requirement with the AO provision without depriving either of "effect." *Contra* NRSC Resp.11. And even if §30108's mandatory language is in "conflict" with the four-vote requirement, the "specific section" of the statute (the AO provision) should control over the "general section" (the four-vote provision). *Cal. Valley*, 424 F. Supp. 2d at 202 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

Finally, NRSC's suggestion that DCCC forfeited any argument that the FEC was not compelled to close the request is nonsensical. NRSC Resp.11. DCCC has repeatedly made the argument that the FEC had a duty to issue an AO, notwithstanding the four-vote requirement, and that it did not do so here because of an erroneous interpretation of FECA. Am. Compl. ¶¶1, 3, 16, 36–38, 93, 97; DCCC Mem.2–4, 11, 29 & n.10, 33. The footnote referenced by NRSC, *see* NRSC

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[2] The 1979 report stating that a "3-3 vote by the Commission on a proposed opinion is considered a response for purposes of the time requirements," H.R. Rep. No. 96-422 at 20 (1979), was not describing the "meaning" of the text "as enacted," NRSC Br. at 12 & n.2; *see* 52 U.S.C. §30108(a). It was suggesting a meaning that never made its way into the text. *See Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) ("Congress . . . knows how to adopt omitted language" if it wishes).

Resp.11 (citing DCCC Mem.29 n.10), explained that the FEC and NRSC have utterly failed to explain how the agency could avoid its duty based on its own *regulation*.

B. FECA prohibits JFC advertising, as the FEC was obliged to conclude.

AOR 2024-13 asked whether a joint fundraising committee could "finance the entire cost[] of [a] proposed television advertis[ement]" that, in all material respects, resembles an ordinary political advertisement that advocates for (or against) a candidate, save for a fleeting fundraising solicitation. AR000001–7. Specifically, the AOR required the commissioners to grapple with how such activity—called "JFC advertising" here—can be squared with the coordinated expenditure rule in FECA. *See* AR000004 & n.12 (citing 52 U.S.C. §30116(a)(7)(B)(i)).

The Commission failed to do so, notwithstanding the straightforward statutory answer before it. Under FECA, "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). The AOR *presumed* the underlying advertisement would be "coordinated" between candidates and a party committee, and that the "cost of the advertising would exceed the [committee's] contribution limit or coordinated party spending limit with respect to each candidate." AOR000002. Because coordinated expenditures *are* "contributions" under FECA, *see Buckley v. Valeo*, 424 U.S. 1, 47 (1976), a political committee can only pay for such advertising up to the relevant contribution limits, *see* 52 U.S.C. §§30101(8)(A)(i), 30116(a), (d). Any other reading would eradicate FECA's contribution limits, permitting party committees to supply unlimited funding to candidates, effectively "evad[ing] contribution limits and other restrictions by . . . finance[ing] campaign activity directly—say, paying for a TV ad or printing and distributing posters." *Shays*, 414 F.3d at 97.

Commissioners were presented with one draft opinion (Revised Draft B) which reflected this straightforward statutory analysis, and another (Draft A) which did not. DCCC Mem.8–9. Specifically, Revised Draft B recognized that JFCs could "pay for only the portion of the proposed advertisements that solicit contributions for the joint fundraising committee"—the brief solicitation at the tail end of the ads—and even then only "with the cost of that portion allocated among the committee's participants according to their agreed allocation formula" for fundraising proceeds. AR000092. Draft A, in contrast, somehow concluded that JFCs could "pay the entire cost of the proposed television advertising," AR000052—precisely what FECA was designed to avoid. *Shays*, 414 F.3d at 97. Only one of these drafts—Revised Draft B—is plausibly consistent with "the meaning of [FECA's] statutory provisions," *Loper Bright*, 603 U.S. at 394, yet it failed to garner a majority before the FEC closed out the AOR without issuing an opinion.

The FEC's only response is to repeat its refrain that both camps of commissioners held "reasonable view[s]" that were each "[c]onsistent with [b]oth FECA and FEC [r]egulations." FEC Resp.34. But it "makes no sense to speak of a 'permissible' interpretation" of a statute. *Loper Bright*, 603 U.S. at 400. Rather, after "applying all relevant interpretive tools," courts and agencies alike must discern the single "best" statutory meaning. *Id.* "[I]n an agency case as in any other . . . there is a best reading all the same." *Id*. The FEC cannot hide behind inconsistent readings of FECA on the basis that "each draft answer is reasonable." FEC Resp.35. "In the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright*, 603 U.S. at 400.

The agency does not even try to explain how Draft A reflects a view that is "logical, reasonable, and consistent with the overall statutory framework." *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986). Instead, it parrots back the content of Draft A, without so much as a suggestion as to how it accords with FECA. FEC Resp.35–36. It then chastises DCCC for asking

this Court whether Draft A "is fundamentally at odds with FECA's statutory scheme." *Id.* at 36. But determining whether agency action comports with the statute is the heart of the "judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." *Loper Bright*, 603 U.S. at 392. And the APA expressly "incorporates th[is] traditional understanding of the judicial function." *Id.* at 394. Hence why DCCC brings this APA challenge, where the agency has failed to offer a coherent statutory construction altogether.

The NRSC does not fare any better. It starts by pointing out that, under FECA, "candidates may designate a political committee established *solely for the purpose of joint fundraising* by such candidates as an authorized committee." 52 U.S.C. §30102(e)(3)(A)(ii) (emphasis added); *see* NRSC Resp.13. Thus, NRSC reasons, "FECA permits candidates and political committees to engage in joint fundraising through committees 'established solely for the purpose of joint fundraising.'" NRSC Resp.13 (quoting *United States v. El-Saadi*, 549 F. Supp. 3d 148, 153 (D.D.C. 2021) (Moss, J.)).[3] NRSC then abandons the statutory text it offered up. Nowhere does it explain how committees established to facilitate JFC advertising—the primary function of which is candidate advocacy—can be fairly characterized as existing "solely for the purpose of joint fundraising." Such an argument demands that this Court close its eyes and plug its ears.

Desperate for a textual hook, NRSC's next tack is to offer a novel reading of the term "expenditure"—found nowhere in its past briefs or AOR comments—suggesting that term does not include "[1] any costs incurred by an authorized committee or candidate [2] in connection with

[3] To the extent *El-Saadi* is relevant, it supports DCCC. This Court noted in that a "joint fundraising committee . . . functions principally to reduce transaction costs by allowing donors to write one check that is divided up among multiple participants" and that "the only reason to give money to a joint fundraising effort is to effect a contribution to the participating committees." 549 F. Supp. 3d at 165. Those observations rightfully note that JFCs exist to facilitate fundraising on behalf of the JFC's members—not unlimited television advertising on behalf of candidates.

the solicitation of contributions on behalf of such candidate." 52 U.S.C. §30101(9)(B)(vi) (cited at NRSC Resp.13). But NRSC did not, in fact, late in this case discover a galaxy-sized loophole to FECA that carves *all* solicitation expenses out of the law's limits. As the remaining text of that provision—conveniently omitted by NRSC—makes clear, this fundraising exception functionally applies only to *publicly-financed presidential candidates. See* 52 U.S.C. §30101(9)(B)(vi) (citing §30116(b), which governs expenditure limits on publicly financed presidential campaigns); *see also* FEC, AO 1988-6, 1988 WL 170404, at *2 (Mar. 1, 1988) (recognizing this statutory reading). The provision merely exempts certain fundraising costs from candidates subject to congressionally-imposed expenditure limits which, after *Buckley*, *see* 424 U.S. at 54–57, 97–107, apply only to publicly financed presidential candidates. Indeed, Congress did not add the "authorized committee" language upon which NRSC relies until *after Buckley*, at which point it could only make sense for such limits (and the reciprocal fundraising exception) to apply to presidential candidates.[4]

NRSC also cannot square this newfound argument with the view of FECA it has pressed throughout this case. Under FECA, JFCs exist *solely* to "raise funds" and solicit contributions. *McCutcheon*, 572 U.S. at 215. Yet NRSC now claims, in effect, that *all* funds spent in service of that purpose are categorically carved out of the definition of "expenditure," essentially immunizing JFCs from FECA *entirely*. In other words, according to NRSC, a political party can create a JFC with a candidate to spend unlimited funds in coordination with that candidate because the JFC is

[4] *Compare* Pub. L. No. 93–443, Title I, §102, 88 Stat 1263 (1974) (original language), *with* Pub. L. No. 96-187, Title I, §101, 93 Stat. 1339 (1980) (revising provision post-*Buckley* to reference only limits for publicly funded presidential candidates). Against this backdrop, the exception can only be read to apply in that context. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 700–01 (2022) (courts assume Congress is aware of "relevant" Supreme Court "precedents").

treated as an "authorized committee." If that were true though, there would be no need for the joint fundraising rules in the first place, which carefully delineate how joint funds can be raised and expenses can be allocated without violating FECA or its contribution limits. Until this point, NRSC pinned its view on the merits on that regulatory scheme, *see generally* NRSC Mot.3-7, ECF No. 32-1; but now it advances a novel statutory reading that suggests they should not even exist.

NRSC's argument also stretches the term "in connection with" past its breaking point, in effect arguing that slapping a pretextual solicitation on clear campaign advocacy can erase FECA's limits. But the "single statutory phrase 'in connection with'" cannot "bear the weight [NRSC] would place upon it." *BP Am., Inc. v. FERC*, 52 F.4th 204, 215–16 (5th Cir. 2022). "To hold otherwise would be to hold that Congress intended for a subtle gloss of these three words to entirely upend its carefully defined limitations" on coordinated expenditures. *Id.* That reading "is not plausible," as Congress does not "hide elephants in mouseholes." *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). NRSC nevertheless suggests the phrase "in connection with" has no limit and "stop[s] nowhere." NRSC Resp.16 (quoting *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 877 (D.C. Cir. 2019)). But the underlying cases it cites in fact say the exact *opposite*, stressing such language does have "limits," *Azima*, 926 F.3d at 877–78, and "marks a boundary." *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011). At the end of the day, "a joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits." *McCutcheon*, 572 U.S. at 215. NRSC's effort to morph them into something else entirely runs into statutory dead ends at every turn.[5]

[5] Even accepting NRSC's reading of "expenditure," that argument says nothing about the meaning of *contribution*, for which there is no "parallel exemption for fundraising expenses." FEC AO 1975-33, 1975 WL 411079, at *1 (Jan. 1, 1975); *see also* 52 U.S.C. §30116(a)(7)(C).

Although FECA's text resolves the matter, NRSC further contends that its reading of the statute is consistent with FECA's purpose. *See* NRSC Resp.14-16. But that unsupported claim does not pass muster. Consider that just a paragraph beforehand, NRSC asserts that "advertisements that contain solicitations" are "exclude[d] . . . from [FECA's] definition of 'expenditure.'" *Id.* at 13–14. In other words, NRSC claims that Congress's purpose in enacting FECA was to permit political committees to expend *unlimited sums* on "advertisements" provided they also tack on a "solicitation" of some kind. That is a distorted view of FECA that courts have categorically rejected. *E.g.*, *McConnell v. FEC*, 540 U.S. 93, 221 (2003) ("Congress has always treated expenditures made after a wink or nod as coordinated."); *Shays*, 414 F.3d at 97. Congress did not "create[] a loophole that effectively vitiates the plain language" of FECA's spending limits. *CLC v. FEC*, 466 F. Supp. 3d 141, 158 (D.D.C. 2020).

Finally, NRSC falls back on circular arguments about existing FEC regulations and congressional acquiescence. It claims that the FEC's "funds-received" allocation rule solves any problem here because it makes clear that contributing to a JFC results in "no contribution in-kind from one or more of the participants" when "each participant pays its own share of expenses." NRSC Resp.17 (quoting 48 Fed. Reg. at 26,296-01, 26,300). But that argument presupposes the JFC is complying with FECA's statutory requirement that such a committee exist "*solely* for the purpose of joint fundraising." 52 U.S.C. §30102(e)(3)(A)(ii). Where that is in fact the case, the allocation formula works as intended—all participants share proportionally in both the costs and proceeds of the JFC and thus no participant makes any in-kind contributions to another. But where, as here, the JFC does *not* exist "solely" for the purpose of joint fundraising—and in reality exists chiefly for candidate advocacy—the result is an in-kind contribution from the committee to the candidate in the form of subsidized television advertisements. The NRSC's rule-based argument

is no answer at all to the *statutory* question at the core of this case.

NRSC's acquiescence theories are equally flawed. To advance the theory, NRSC "bears the burden of showing 'abundant evidence that Congress both contemplated and authorized' the previous [agency] interpretation in which it now acquiesces." *Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1438 (10th Cir. 1996) (quoting *Schor v. CFTC*, 478 U.S. 833, 847 (1986)). Nothing short of "overwhelming evidence of acquiescence" suffices. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 n.5 (2001).

NRSC plainly cannot meet that burden because, as the deadlock here shows, the FEC has not even put forward a definitive statutory reading for Congress to acquiescence to. Instead, NRSC once more points only to the agency's *rules*, *see* NRSC Resp.17–18, but those rules are not the operative legal text at issue—the text of FECA is. Nowhere has NRSC shown any indication, never mind "abundant" or "overwhelming" evidence, that Congress believes JFC advertising is consistent with the text of FECA. *See Institutional S'holder Servs. Inc. v. SEC*, 718 F. Supp. 3d 7, 29 (D.D.C. 2024) (finding no acquiescence where no agency or court "ha[d] ever been confronted with the question presented here"). And, despite its repeated insistence to the contrary, NRSC has wholly failed to show that Congress has "endorsed" the FEC's past rules. The cases NRSC relies on show why. In *Hikvision USA, Inc. v. FCC*, Congress "incorporated" a list of covered entities created by the FCC "into the [Secure Equipment Act], and thereby ratified the composition of the list." 97 F.4th 938, 946 (D.C. Cir. 2024). Given that direct incorporation, Congress "plainly was aware" of the agency's past actions and "affirmatively ratified" them by incorporating them into law. *Id.* But NRSC *nowhere* shows that Congress built the agency's past rulemakings into statute, never mind as to JFC advertising. The most it shows is that Congress failed to prescribe past FEC rules—precisely the sort of inaction that says *nothing* about what Congress believes FECA means.

E.g., *Telesat Canada v. FCC*, 999 F.3d 707, 712 (D.C. Cir. 2021) ("Congressional silence does not imply acquiescence absent additional indications of ratification."); *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 214 (D.C. Cir. 2011) (similar).[6]

Nor did DCCC somehow "forfeit" any argument as to how actual solicitation costs should be allocated. *Contra* NRSC Resp.19. DCCC's claim necessarily incorporated the arrangement as presented in AOR 2024-13, and the particularities of how JFCs must allocate JFC advertising costs is an issue for the agency to reconsider on remand. *See* DCCC Mem.20, 25 n.9. The point for now is that FEC may not engage in agency action that runs contrary to FECA.

At bottom, the "best" (and thus only "permissible") reading of FECA makes clear the law does not countenance treating all JFC advertising as an exception to FECA's contribution limits. *Loper Bright*, 603 U.S. at 401. The FEC's failure to apply that reading in response to AOR 2024-13 was thus "contrary to" law. 5 U.S.C. §706(2).

III. DCCC satisfies the requirements of the APA and seeks proper APA relief.

A. DCCC's APA claim targets the FEC's legal errors.

Defendants' efforts to undermine the procedural viability of DCCC's APA claim fail. First, DCCC's APA claim does not improperly seek an order "compelling" issuance of a "specific" AO. NRSC Resp. 9 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) ("*SUWA*")); *see* FEC Mem.38. NRSC's reliance on *SUWA* for this argument is telling, as that case deals with claims under §706(1), where an agency fails to take any action pursuant to a statutory mandate; in that context of course, there is nothing for the Court to review other than whether the agency failed to

[6] NRSC's argument as to the Bipartisan Campaign Act of 2002 is even further afield. NRSC Resp.18-19. No party disputes in this case that, under FECA, candidates and party committees may form JFCs. The issue here is whether they may establish JFCs that plainly do not exist "solely" for the purpose of joint fundraising and fail to treat coordinated expenditures as such. *Supra* §II.B.

take a "discrete action that it [was] required to take." 542 U.S. at 64. Here, in contrast, DCCC brings a claim under §706(2) because the FEC considered, voted on, and then finally closed AOR 2024-13—and the administrative record displays the legal error underlying that final outcome. AR000147. DCCC's claim targets that final action, *see infra* §III.B, and declaring *why* the agency erred is not tantamount to compelling it to issue a "specif[ic]" AO. *SUWA*, 542 U.S. at 64. It is precisely what the APA requires. *Hurry*, 589 F. Supp. 3d at 117 (explaining "the appropriate course" under Section 706(2) is "to identify a legal error," including any error in "intermediate actions leading up to th[e] final action," and then remand (citations omitted)); 5 U.S.C. §§704, 706. The same distinction undermines the FEC's reliance on *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006) (citing *SUWA*, 542 U.S. at 66–67); *see* FEC Resp.39.

Nor is DCCC's APA claim a request for an advisory opinion on "private" conduct merely because the FEC did not issue an AO. Whether JFC advertising—as defined—is subject to FECA's contribution limits was the question presented to the FEC, AR000001–7, and DCCC's claim asserts that the FEC's decision to close the request on that straightforward legal question was arbitrary, capricious, and contrary to FECA, Am. Compl. ¶97. The Court must necessarily resolve those "questions of law" to decide DCCC's claim, 5 U.S.C. §706; *contra* NRSC Resp.8.

NRSC's contention that the only question before the Court is whether the FEC had to issue an AO at all therefore fails. In fact, the reasoning of the only other case NRSC cites—which dealt with APA claims under both §706(1) and §706(2)—supports DCCC's position. *See In re Long-Distance Telephone Service*, 751 F.3d 629, 634 (D.C. Cir. 2014). There, neither claim provided reason for the court to resolve any "substantive" question involving the underlying statute. *Id.* The D.C. Circuit resolved the §706(1) claim by rejecting the plaintiffs' request to "compel" promulgation of a "specific" rule because the statute did not require a specific rule. *Id.* And as for

the §706(2) claim, the only legal error was a failure to provide notice and comment—which, as the Court explained, was a "procedural" violation that did not require addressing "substantive" statutory questions. *Id.* In this case, DCCC's claim involves such a "substantive" issue because it claims that the FEC failed to adhere to FECA. *E.g.*, *NAACP v. Trump*, 298 F. Supp. 3d 209, 232 (D.D.C. 2020) (resolving statutory issue). Accordingly, the Court must resolve the question of whether JFC advertising is subject to FECA's contribution limits to resolve DCCC's claim.

B. DCCC challenges final agency action.

The FEC's closure of AOR 2024-13 was final agency action because (1) the FEC concluded its decision-making process pursuant to its own regulation and (2) that action has legal and practical consequences for DCCC. *Bennett v. Spear*, 520 U.S. 154, 177 (1997); *Unity08*, 596 F.3d at 865; *see* DCCC Mem.27–31. NRSC's arguments, which focus myopically on the existence of a "deadlock," rather than on a proper pragmatic inquiry, fail to undermine that conclusion.

To start, the FEC's action satisfies the first *Bennett* factor. NRSC focuses exclusively on the FEC's deadlock, which does not comport with the Supreme Court's mandate that the final agency action inquiry must be "pragmatic," not rigid. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967); *see also, e.g.*, *Seeger v. United States Dep't of Defense*, 306 F. Supp. 3d 265, 285 (D.D.C. 2018). But even taking at face value NRSC's assertion that a "deadlock" is not itself a cognizable "action," NRSC Resp.23, that does not address the FEC's subsequent closure of the request before the agency. AR000148 (citing 11 C.F.R. §112.4(a)). The FEC did not, for instance, merely pause or hold open its consideration of AOR 2024-13. *See id.* In that case, DCCC might have brought a claim to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706(1). Instead, the FEC "concluded" its consideration and in doing so indicated it would take no further action. AR000148. NRSC offers no response to DCCC's argument that the decision to "close" the

request supplies the final action necessary. As this Court has recognized, such an "act" is final action and properly challenged under §706(2). *Hurry*, 589 F. Supp. 3d at 117.

The second *Bennett* factor is also satisfied. NRSC characterizes the inquiry as a rigid question of whether the action has a "***legally binding effect***," NRSC Mem.29–30 (quoting *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir. 2003)) (emphasis by NRSC), but that badly misstates the test. The D.C. Circuit "recently clarified" that the inquiry is "pragmatic" in that it focuses on the "concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern" the agency. *Ipsen Biopharms., Inc. v. Azar*, 943 F.3d 953, 956 (D.C. Cir. 2019) (citation omitted). *Ipsen* rejects NRSC's suggestion that the "consequences" must be directly "binding" on plaintiff. *Id.* There, the D.C. Circuit held that "letters" suggesting an "increased risk of prosecution and penalties" in the "future" were sufficient to satisfy *Bennett*'s second factor. *Id.* And DCCC has already explained why that is precisely the case when the FEC fails to issue an AO because FECA would otherwise offer a safe harbor or, alternatively, supply DCCC with information to which it is legally entitled. *See* DCCC Mem.28.

NRSC argues that *Sprint Nextel* and *Public Citizen* control because the agencies in those cases each issued an "order" ending their respective decision-making processes on the petitions at issue. NRSC Resp.25. But the very passages cited by NRSC show this is wrong: the "press release" in *Sprint Nextel* and the "notice" in *Public Citizen* each announce that the "operation of law"—not agency action—brought about the complained-of changes. *Compare Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007), *and Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1172 (D.C. Cir. 2016), *with* NRSC Resp.25. That is not what happened here: after the commissioners deadlocked, the FEC affirmatively and unanimously closed AOR 2024-13 under its own regulation. *See* AR000147–48; DCCC Mem.29–30. No third party or statute made that decision

for the FEC; the FEC invented that rule and made the decision to close the matter itself.

Finally, NRSC attacks the D.C. Circuit's holding in *Radio Television* that a deadlock vote on a rulemaking petition constitutes final agency action, *see Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 880 (D.C. Cir. 1999) (citing *In re Radio-Television News Dirs. Ass'n*, 159 F.3d 636 (D.C. Cir. 1998)), as "unpublished" and, subsequently, "law of the case." NRSC Resp. 23 (quoting 184 F.3d at 880). Of course, none of that deprives the holding of its persuasive value. *E.g.*, *United States v. Bikundi*, 73 F. Supp. 3d 51, 55 (D.D.C. 2014). And NRSC's argument that the Court *only* reached that holding because FCC had "no objection" to it is misguided: as the D.C. Circuit has itself recognized, its decisions up until 2005 (several years after *Radio Television*) repeatedly held that final agency action was a jurisdictional requirement, *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 184 & n.6 (D.C. Cir. 2006) (collecting cases), which means that Court had an "independent obligation" to assess the question, *Floyd v. District of Columbia*, 129 F.3d 152, 155 (D.C. Cir. 1997), as its *sua sponte* discussion reflects.

C. FECA does not provide an adequate alternative remedy.

Defendants also wrongly insist that 52 U.S.C. § 30109(a) provides an adequate alternative remedy that bars APA review. *See* FEC Resp.20–21; NRSC Resp.30–33. But neither Defendant meaningfully grapples with the reasons why that is not the case. *See* DCCC Mem.31–36.

The FEC, for example, simply ignores that its decisions about whether to prosecute under §30109(a) are often effectively unreviewable in court. *See id.* at 33–34 (collecting authority). NRSC's scant response is to note this *could* change in the future, a point DCCC acknowledged in its opening brief (*id.* at 34 n.11), but which plainly does nothing to afford it an adequate remedy *now*. NRSC insists that §30109(a) still offers a "remedy" of sorts, even where no judicial review is available. *See* NRSC Resp.31. But that argument erases the term "adequate" from the APA and ignores well-established Circuit law making clear that availability of *de novo* judicial review is the

touchstone to finding a remedy sufficiently "adequate" to displace the APA. *See CREW v. U.S. Dep't of Just.*, 846 F.3d 1235, 1245 (D.C. Cir. 2017) (collecting authority and discussing importance of "adequacy" of alternative review scheme); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (similar). In contrast, NRSC cannot point to a single instance where a court barred APA review absent an alternative review scheme that offered *de novo* judicial review. The one statute NRSC *does* point to—FOIA—simply confirms the point. *See CREW*, 846 F.3d at 1246 (concluding FOIA offers adequate alternative to APA because it "contains an express private right of action and provides that review in such cases shall be '*de novo*'" (quoting 5 U.S.C. §552(a)(4)(B)).

The D.C. Circuit has already rejected the theory that §30109 bars APA review of advisory opinions. *Unity08*, 596 F.3d at 866. Defendants try to distinguish *Unity08* on the facts, but the holding applies here, too: §30109 reflects "no congressional intention to foreclose judicial review" elsewhere; it merely prescribes "specific provision for review" for proceedings under §30109. 596 F.3d at 866. Moreover, like the appellant in *Unity08*, DCCC seeks judicial review because it seeks a determination about how "to operate in the future," specifically as to JFC advertising. *Id.* at 864. That is DCCC's right and, as *Unity08* shows, Defendants cannot force DCCC's claim into §30109.

IV. Alternatively, even if JFC advertising is not subject to FECA's contribution limits, DCCC is still entitled to relief.

DCCC has shown that, even if JFC advertising is not subject to FECA's coordinated expenditure and contribution limits, the FEC's failure to issue an AO was contrary to law and impaired DCCC's constitutional rights. DCCC Mem.40–44; *see* 5 U.S.C 706(2)(B). NRSC does not seriously contest this, and the FEC's objections are unpersuasive.

If JFC advertising is permissible, then the FEC has unconstitutionally chilled DCCC's protected speech by failing to issue an AO that would afford it a safe harbor. *See Ready for Ron v.*

FEC, No. CV 22-3282 (RDM), 2023 WL 3539633, at *3 & n.3 (D.D.C. May 17, 2023) (citing *Chamber of Com.*, 69 F.3d at 603, and *Unity08*, 596 F.3d at 865). No party disputes that JFC advertising is protected speech or that the FEC's failure to issue an AO deprived the DCCC of a safe harbor. Instead, Defendants fault DCCC for pursuing this alternative APA theory and argue that DCCC's advocacy for its primary theory undermines its ability to "unequivocally" press its alternative theory. FEC Mem.40. Not so. The Federal Rules of Civil Procedure are clear that a litigant is free to advance alternative claims, even if they conflict with one another. Fed. R. Civ. P. 8(d)(2). And nothing about DCCC's advocacy for one can be read to preclude or weaken its commitment to the other. *E.g.*, *McNamara v. Picken*, 950 F. Supp. 2d 125, 129 (D.D.C. 2013) (explaining that a plaintiff's legal position in one claim is "not susceptible to judicial admission" and thus has no "legal effect" on an alternative claim (citations omitted)) (collecting cases).[7]

The FEC's suggestion that DCCC's "chill" allegations are not substantiated fails; the FEC cites only to DCCC's pleadings but ignores the detailed affidavit submitted by DCCC in support of this claim. *Compare* FEC Resp.41, *with* DCCC Mem.40–44; *see also* Merz Decl. ¶¶ 9–12.

For all these reasons and those stated in DCCC's motion for summary judgment, DCCC Mem.40–44, the FEC fails to show that this claim is unlike prior cases in which Courts found First Amendment violations where the FEC's action or inaction chills speech. *Id.* (citing cases).

CONCLUSION

The Court should grant DCCC's motion for summary judgment.

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[7] Defendants also make much of the fact that DCCC does not bring a distinct First Amendment claim. That is irrelevant. A "case does not cease to involve review of agency action simply because the underlying claim is constitutional in nature." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.19 (D.C. Cir. 1989). The APA is clear that "judicial review of agency action extends to the consideration of claims that the agency has behaved in a manner 'contrary to constitutional right, power, privilege, or immunity.'" *Id.* (quoting 5 U.S.C. §706(2)(B)).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.4(d), I hereby certify that on May 6, 2025, I caused a true and correct copy of the foregoing to be served on all counsel of record by electronic service through the Court's ECF system.

/s/ Aria C. Branch