UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DCCC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 24-2935 (RDM) OPPOSITION TO MOTION

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

Statutes

Rules and Regulations

Miscellaneous

INTRODUCTION

The Democratic Congressional Campaign Committee ("DCCC") claims in its instant Motion for a Preliminary Injunction (Pl.'s Memo. of Law in Supp. of Pl.'s Mot. For Prelim. Inj. (ECF No. 6) (filed Oct. 17, 2024) ("Motion" or "Mot.")) that the Federal Election Commission's ("FEC" or "Commission") non-issuance of an advisory opinion violates the Administrative Procedure Act ("APA"), and it asks that this Court "vacate and set aside" the FEC's October 10, 2024 letter noting this non-issuance, "as arbitrary and capricious and contrary to FECA." (Mot. at 30.) The Advisory Opinion Request ("Request"), filed not by plaintiff but by the Democratic Senatorial Campaign Committee ("DSCC"), Montanans for Tester, and Gallego for Arizona, sought guidance concerning the application of Commission regulations to proposed television advertisements to be run by joint fundraising committees that primarily advocate for the election of either U.S. Senator Jon Tester or Congressman Ruben Gallego but also contain a brief fundraising solicitation at the end of the advertisements. Unable to reach an affirmative vote of four members of the Commission required to render an advisory opinion, the Commission issued a letter informing the requestors of this result. Displeased with this outcome, plaintiff now seeks what would effectively be a new advisory opinion from this Court addressing the merits of the Request. But relief for this claim, particularly in the form of the emergency relief plaintiff now seeks, is unwarranted for multiple reasons.

First, plaintiff lacks standing. Plaintiff does not demonstrate a competitive injury under these circumstances because it faces the same risk of enforcement as any similarly situated entity engaging in identical activity, and the non-issuance of an opinion could not possibly tilt the playing field. Further, even if plaintiff establishes injury, it does not show that the Court could redress that harm. The challenged action of a non-issuance of an advisory opinion has no legal

effect and, again, did not change the rules of the game that existed prior to the Request. With reconsideration by the Commission infeasible because plaintiff was not a party to the advisory opinion, plaintiff appears to seek an advisory opinion from this Court instead—a remedy at odds with the Court's foundational obligation under Article III.

Second, plaintiff is unlikely to succeed on the merits of its claim. Plaintiff's APA claim fails to demonstrate that the FEC was permitted, let alone required, to issue an advisory opinion absent four affirmative votes of agency Commissioners, or that non-issuance was final agency action subject to judicial review. The agency's letter closing the Request, the precise target of plaintiff's APA claim, did not and could not harm plaintiff in the way it alleges. Plaintiff's claim should fail here, because it has "not satisfied the foundational requirement of showing a likelihood of success on the merits to warrant the extraordinary relief of a preliminary injunction." *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 335 (D.D.C. 2020).

Finally, plaintiff fails to demonstrate irreparable harm or that the public interest weighs in favor of granting its requested relief. As this stage of an election cycle, preserving the status quo is paramount and is consistent with the ordinary goal of a preliminary injunction to maintain the legal landscape and positions of the parties until full consideration of the merits can occur. Plaintiff cannot show it is irreparably harmed by the continued operation of the Federal Election Campaign Act ("FECA") and Commission regulations, not the addition of a last-minute, court-ordered advisory opinion. Moreover, because the issuance of the preliminary injunction plaintiff request would neither resolve its alleged injury nor benefits the public by clarifying the law in any meaningful way, it would serve only to insert the Court into the political thicket on a contentious and complex issue in the waning days of a presidential election cycle. Plaintiff's request for a preliminary injunction should be denied.

BACKGROUND

I. LEGAL BACKGROUND

A. The Federal Election Commission and Its Advisory Opinion Process

The FEC is a six-member, independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-46. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (per curiam). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6). At least four affirmative Commissioner votes are required for the Commission to take certain actions, including, *inter alia*, issuing advisory opinions, promulgating regulations, and advancing enforcement matters. *Id.* §§ 30106(c), 30107(a)(6)-(9).

Anyone may request an advisory opinion regarding the application of FECA and Commission regulations to a specific transaction or activity by that person. 52 U.S.C. § 30108(a)(1); 11 C.F.R. § 112.1(a). FECA generally provides that the Commission "shall render [an] advisory opinion" within 60 days of receiving a complete request. 52 U.S.C. § 30108(a); *see* 11 C.F.R. § 112.1(b)-(d). Congress recognized, however, that the Commission may not be able to issue an advisory opinion in some cases due to the four-vote requirement, so "[a] 3-3 vote by the Commission on the proposed opinion is considered a response for purposes of the time requirements," of which the requestor should be promptly notified. H.R. Rep. No.

96-422 (1979), at 20. Accordingly, the Commission adopted a regulation that it shall either issue an advisory opinion or "a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members" within 60 days of receiving a complete request. 11 C.F.R. § 112.4(a), (c); *see also Explanation & Justification of Regulations Concerning Jan.8, 1980 Amendments to Fed. Election Campaign Act of 1971*, 45 Fed. Reg. 15080, 15090, 15124 (Mar. 7, 1980). In the event that an advisory opinion is requested by "a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party," the Commission must treat the request on an expedited basis and "render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request." 52 U.S.C. § 30108(a)(2).

When the Commission issues an advisory opinion finding the proposed transaction or activity lawful under FECA and its regulations, the opinion acts as a safe harbor against sanction provided by FECA for any person involved in any specific transaction or activity which is indistinguishable in all material aspects from the transaction or activity addressed in the advisory opinion. 52 U.S.C. § 30108(c).

B. FECA's Regulation of Joint Fundraising Activities

FECA and Commission regulations allow political committees to engage in joint fundraising activities, the procedures for which are described in 11 C.F.R. § 102.17. *See also* 52 U.S.C. § 30102(e)(3)(A)(ii) ("[C]andidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee."). Section 102.17 is premised on allowing multiple political committees and other entities to work together to raise money, while ensuring that each participant pays its share of the fundraising

costs to avoid receiving an in-kind contribution. The participants in a joint fundraising effort must enter into a written agreement that "shall state a formula for the allocation of fundraising proceeds." 11 C.F.R. § 102.17(c)(1)-(2). Each participant's share of joint fundraising expenses must be calculated based on the percentage of receipts the participant has been allocated under the joint fundraising agreement. *Id*. § 102.17(c)(7)(i)(A). The payment by one participant of another participant's expenses is treated as a contribution subject to contribution limits. *Id.* § 102.17(c)(7)(i)(B). As a result, each participant must pay its proportionate share of joint fundraising expenses, and no participant may subsidize or make a contribution to any other participant in excess of the contribution limits.

Commission regulations also require certain statements in solicitations for contributions. Pursuant to 11 C.F.R. § 110.11, public communications by political committees and other persons that solicit contributions, must state the full name and other identifying information about who is paying for the communication, and if paid for by a person other than a candidate's authorized committee; and whether or not it has been authorized by a candidate or candidate's committee. *See* 11 C.F.R. § 110.11(a)-(b). In addition to the requirements under section 110.11, 11 C.F.R. § 102.17(c) also requires a joint fundraising notice to be included in every solicitation for contributions by a joint fundraising committee. *See id.* The notice must include the names of all committees participating in the joint fundraising activity, the allocation formula, a statement informing contributors that they can designate their contributions for a particular participant, and a statement informing contributors that the allocation formula may change if the contribution exceeds the allowable limit. *Id.* at § 102.17(c)(2)(i)(A)-(D).

C. Coordinated Expenditures and Party Coordinated Communications

FECA defines "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A). FECA also provides that "expenditures made by any person in cooperation, consultation, or concert, with" a federal candidate or their agents "shall be considered to be a contribution to such candidate." *Id.* at § 30116(a)(7)(B); 11 C.F.R. § 109.37.

FECA and Commission regulations require a political party committee to treat a public communication that is coordinated with a candidate or a candidate's authorized committee as either an in-kind contribution to that candidate or a coordinated party expenditure, both of which are subject to amount limitations. 11 C.F.R. § 109.37(b). These types of communications are known as a "party coordinated communications." 11 C.F.R. § 109.37. A communication is deemed to be a party coordinated communication when it is paid for by a political party committee or its agent, satisfies at least one of the content standards in 11 C.F.R. § 109.37(a)(2)(i) through (iii), and satisfies at least one of the conduct standards in 11 C.F.R. § 109.21(d)(1) through (6).

II. FACTUAL AND PROCEDURAL HISTORY

A. DSCC, Montanans for Tester and Gallego for Arizona's Advisory Opinion Request

DSCC is a national party committee of the Democratic Party, dedicated to electing Democrats to the U.S. Senate. (*See* Pl.'s Compl. for Declaratory J. and Injunctive Relief ("Compl.") Exh. A, Request (ECF No. 1-1) at 1.) Jon Tester is a United States Senator from Montana and a current candidate in the 2024 general election for U.S. Senate in Montana, and Montanans for Tester is his principal campaign committee. (*Id.*) Ruben Gallego is a

Congressman from Arizona and a current candidate in the 2024 general election for U.S. Senate in Arizona, and Gallego for Arizona is his principal campaign committee. (*Id.*) On September 18, 2024, DSCC, Montanans for Tester and Gallego for Arizona ("Requestors") submitted the Request seeking guidance on an expedited basis from the Commission under FECA and Commission regulations as to how two proposed Joint Fundraising Committees ("JFC") – one between the DSCC and Montanans for Tester and one between the DSCC and Gallego for Arizona – and their participating committees could allocate the costs of fundraising expenses for television advertisement soliciting contributions to the joint fundraising committees ("JFC-advertising" or "JFC-advertisements"). (*Id.* at 1-2.)[1]

Under the Requestors' proposal, the Joint Fundraising Committees' fundraising activity would include airing 30-second television advertisements that advocate for the election of the candidates associated with each JFC and solicit donations for that JFC. (*Id.* at 2, 5.) Requestors described the proposed television advertisements as serving to "primarily advocate" for the election of the associated candidate, either Senator Tester or Congressman Gallego, and including a brief fundraising solicitation for the relevant JFC. (*Id.* at 2.) Requestors stated that 26 seconds (approximately 87 percent) of each advertisement would be messaging in support of either Senator Tester or Congressman Gallego that would be "indistinguishable to the viewer from a standard campaign advertisement" and may include express advocacy. (*Id.* at 5.) Requestors stated that the last four seconds (approximately 13 percent) of each advertisement would contain a brief, spoken fundraising solicitation and a QR code which, when scanned by the person viewing the ad, would link to a fundraising webpage for the JFC distributing the

[1] *See* Advisory Opinion 2024-13, https://www.fec.gov/data/legal/advisory-opinions/2024-13/.

advertisement. (*Id.* at 2, 5.) The proposed television advertisements would not expressly refer to DSCC. (*Id.* at 5.).

Under Requestors' proposal, any contributions received through each television advertisement would be allocated among the participants according to the allocation formula in their joint fundraising agreement, "subject to contribution limits and contributors' ability to designate their contribution for a particular participant," and the expenses would be allocated in the same way. (*Id.* at 2-3.) Requestors stated that the costs of the television advertising, if allocated entirely to DSCC, would exceed DSCC's contribution limit or coordinated party spending limit with respect to each participating candidate. (*Id.*) Requestors provided a sample script of the television advertisements, which included proposed audio and an associated visual element. (*Id.* at 2-3.)

The Request posed three questions:

1. May each Joint Fundraising Committee finance the entire costs of the proposed television advertising, allocating the costs according to the Allocation Formula?

2. In the alternative, may each Joint Fundraising Committee finance the portion of the television advertising that includes a solicitation for the Joint Fundraising Committee, calculated on a time/space basis (approximately four seconds in the example provided), allocating the costs according to the Allocation Formula?

3. If the answer to question 1 or 2 is yes, does the Act require that the television advertising contain an on-screen disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2)?

(*Id.* at 3.) As to the first question, Requestors stated that they believed that the proposed advertising meets the content and conduct prong of the coordinated communication test. (*Id.* at 6.) Requestors also expressed the view that the advertisements would likely also meet the payment prong of the coordinated communication test, but noted that if the Commission disagreed, that "Requestors would like to use the Joint Fundraising Committees to pay the full

cost of the proposed advertising," subject to their allocation formula. (*Id.*) Regarding the second question, Requestors noted that if Commissioners answered no to the first question, they proposed that each JFC "would instead only finance the portion of the advertisement that fundraises for the committee," and thus only pay for the final four seconds of the advertisement. (*Id.*) For the third question, Requestors stated that they believed the Commission regulations require that the advertisement contain a joint fundraising notice, printed on screen alongside the QR code, and asked the Commission to confirm that this was correct. (*Id.*)

B. The Commission's Processing of the Advisory Opinion Request

In a public meeting held on October 10, 2024, [2] the Commission considered but did not adopt either of two alternative draft advisory opinions made public prior to the meeting (Drafts A & revised Draft B). An original Draft B was also on the agenda, but the Commission only voted on Draft A and a revised Draft B, hereinafter referred to as "Draft B."[3] Draft A proposed to answer yes to Requesters' first question. (Mot. Exh. B, at 62 (ECF No. 6-2).) Draft A reasoned that the Requestors' proposed television advertisement was joint fundraising activity containing a solicitation of contributions. (*Id.* at 65.) Thus, Draft A concluded that Requestors' joint fundraising committees each "may pay the entire cost of the proposed television advertising, allocating the costs according to the allocation formula in the joint fundraising agreement, because the advertising would be joint fundraising activity containing a solicitation." (*Id.* at 62.)

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[2] Audio of the Commission's consideration of the Request (AOR 2024-13) at its October 10, 2024 Open Meeting is available at https://www.fec.gov/resources/cms-content/documents/2024101002.mp3.

[3] Additionally, the Commission received numerous comments regarding the Request and the two drafts. (*See* Compl. Exh. B.) Notably, plaintiff had an opportunity to comment on the Request and the drafts but did not do so.

Draft A reasoned that Requestors' "sample script contain[ed] a 'clear' request for funds ('donate now') and facilitated the making of contributions via a QR code linked to the Joint Fundraising Committee's online fundraising page." (*Id.* at 65.) Consistent with the Commission's conclusion in Advisory Opinion 2024-07 (Team Graham), Draft A opined that the Requestors' proposed communication would "not meet the payment prong of the party coordinated expenditure test, and no in-kind contribution or party coordinated expenditure would result, if each participant paid its share of the cost pursuant to the allocation formula in the joint fundraising agreement." (*Id.* at 66.)

Because Draft A would have answered Question 1 in the affirmative, it explained that it would not need to address Question 2. (*Id*.) As to Question 3, Draft A proposed that each planned advertisement may satisfy the joint fundraising notice requirement under 11 C.F.R. § 102.17(c)(2) by including, in addition to any disclaimer required by 11 C.F.R. § 110.11, a QR code that directs viewers to a fundraising webpage that displays the complete joint fundraising notice. (*Id.* at 66.) The Draft stated that it would be "impracticable" for the Joint Fundraising Committees to include both the notice required by the JFC rules in section 102.17(c)(2) and the disclaimer required for all political committees' public communications in section 110. (*Id.* at 67.) Draft A pointed out that Requestors stated that "[o]nly the final four seconds [of each 30-second television advertisement] will include a solicitation for the applicable Joint Fundraising Committee," while the rest of the ad will convey "messaging supporting either Senator Tester or Congressman Gallego." (*Id.* at 67.) Additionally, each advertisement will display "a QR code during the final few seconds that, when scanned, links to an online fundraising page for the applicable Joint Fundraising Committee." (*Id.*) Draft A compared the proposed advertisements to disclaimers on internet public communications, and it reasoned that the QR Code would

provide a mechanism to enable recipients of the advertising to view the full joint fundraising notice "after no more than one step." (*Id.* at 67-68.)

Another draft, Draft B, was also considered by the Commission in response to the Request. (Compl. Exh. D, at 84 (ECF No. 6-2.) In contrast to Draft A, Draft B concluded that Requestors' joint fundraising committees may each pay for only the portion of the proposed advertisements that solicit contributions for the joint fundraising committee, with the cost of that portion allocated among the committee's participants according to their agreed allocation formula. (*Id.* at 85.) Draft B would have further held that each proposed advertisement must also include the joint fundraising notice required under 11 C.F.R. § 102.17(c)(2), in addition to any disclaimer required by 11 C.F.R. § 110.11. (*Id*.) As such, Draft B would have answered no to Question 1 and held that each JFC may not finance the entire costs of the proposed television advertising and allocate the costs among its participants according to the allocation formula in its joint fundraising agreement. (*Id*. at 89.) Draft B reasoned that Requestors' proposed television advertisements that refer to a clearly identified candidate for the U.S. Senate and are publicly disseminated in the candidate's jurisdiction within 90 days before the candidate's general election would meet the content standard in 11 C.F.R. § 109.37(a)(2)(iii)(A), and the material involvement of the candidate or the candidate's agents in decisions regarding the advertisement's content, timing and mode of distribution would meet the conduct standard in 11 C.F.R. § 109.21(d)(2). (*Id*. at 91.) Draft B also reasoned that the advertisements would meet the payment prong of the coordination test, and that the proposed advertisements would serve primarily as campaign advertising for the candidate featured in each advertisement. (*Id*. at 91-93.)

Draft B distinguished the Requestors' proposed communications from those addressed in Advisory Opinion 2024-07 (Team Graham), where there was no indication that the public communications at issue would be "indistinguishable to the viewer from a standard campaign advertisement" by the participating candidate. (*Id*. at 92 (citing Request at 5).) Thus, if the JFC paid the entire cost of the proposed ad and allocated two-thirds of that cost to DSCC and only one-third to the candidate pursuant to the allocation formula in the joint fundraising agreement, DSCC's payment of that cost would satisfy the payment prong of the coordinated communication test and therefore result in either an in-kind contribution to the candidate or a coordinated party expenditure. (*Id*. at 93.) To avoid potential circumvention of the contribution and coordinated party expenditure limits through the joint fundraising framework, Draft B would have concluded that the JFC may not pay the entire cost of the ad and allocate it according to the formula in the joint fundraising agreement. (*Id*.)

Additionally, Draft B answered yes to Question 2, and concluded that each JFC may pay for the portion of the television advertising that includes a solicitation for the JFC, calculated on a time/space basis, and allocate the cost of that portion among its participants according to the allocation formula in its joint fundraising agreement. (*Id*. at 93-95.) Draft B explained that such allocation was a reasonable method to ensure that the JFC and the respective candidate committee each pays for the costs of the proposed ads in proportion to the benefit that each committee receives from them. (*Id*. at 94.) Finally, Draft B concluded that because the joint fundraising regulations do not provide for adaptive disclaimers or other exceptions, the proposed television advertisements must include a disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2) in addition to any disclaimer required by 11 C.F.R. § 110.11. (*Id.* at 95-96.)

The Commissioners did not approve either draft, as motions to approve Draft A and B both failed to garner the required four votes. *See* Certification at 1, AO 2024-13 (October 10, 2024), https://www.fec.gov/files/legal/aos/2024-13/202413V_1.pdf.

Vice Chair Weintraub, and Commissioners Broussard and Lindenbaum voted affirmatively for the motion to approve Draft B. (*Id*.) Chairman Cooksey, and Commissioners Dickerson, and Trainor dissented. Chairman Cooksey and Commissioners Dickerson, and Trainor voted affirmatively for the motion to approve Draft A. (*Id*.) Vice Chair Weintraub and Commissioners Broussard and Lindenbaum dissented. *Id.* On October 10, 2024, the Commission provided Requestors a letter informing them that "the Commission has concluded its consideration of your advisory opinion request without issuing an advisory opinion." *See* Letter re: Advisory Opinion Request 2024-13 (October 10, 2024), available at https://www.fec.gov/files/legal/aos/2024-13/2024-13.pdf ("Closeout Letter").

C. Plaintiff's Complaint and Motion for Preliminary Injunction

Plaintiff Democratic Congressional Campaign Committee ("DCCC") is the national congressional campaign committee of the Democratic Party, whose mission is to elect Democratic candidates to the U.S. House of Representatives. (Compl. ¶ 14.) Nearly a week after the Commission provided a letter informing the Requestors that the Commission had concluded its consideration of the Request, on October 17, 2024, plaintiff, who was not a party to the Request, filed its Complaint in this case seeking preliminary and permanent injunctive relief. (*Id.* at 1.) In its Complaint, plaintiff asserts that in July 2024, the National Republican Senatorial Committee ("NRSC"), the national committee of the Republican Party for candidates for the U.S. Senate, began airing JFC television advertisements in Montana. (*Id.* ¶ 49.) Plaintiff claims that the advertisements, examples of which regarding Republican Senate candidate Tim Sheehy

are described in the Complaint, include "26 seconds" that "look exactly like any other political ad," and four seconds in which a QR fundraising code appears. (*Id.*; *see also id*. ¶¶ 50-51.) Plaintiff alleges that the QR Code in the advertisement links to the same donation page for the Sheehy Victory Committee. (*Id.*) Plaintiff further alleges that the NRSC has aired similar advertising in other states as well. (*Id.* ¶¶ 55-57.) No advertisement detailed in the Complaint was aired by NRCC, the national committee of the Republican Party for candidates for the U.S. House of Representatives or concerns a candidate for the House of Representatives.

The Complaint alleges that these advertisements "appear to violate FECA's contribution limits and the party coordinated expenditure limits." (*Id.* ¶ 59.) Plaintiff alleges that it has been "chilled" from engaging in joint fundraising activities "due to the prospect of enforcement proceedings and onerous sanctions." (*Id.* ¶ 82.) The Complaint claims that "if JFC-advertising is permissible, the FEC's nondecision unlawfully deprives Plaintiff of safe harbor protections while ensuring it remains at a competitive disadvantage to its Republican opponents." (*Id.* ¶ 84.) As a result, plaintiff alleges it suffers both a "competitive" harm and an "informational injury" because it is allegedly "in the dark" as to how much Republican advertisements are being paid for by joint fundraising committees." (*Id.* ¶ 86.)

The single-count Complaint asserts violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, alleging that the Commission "failed to issue . . . an AO requested by the DSCC and several Democratic candidate committees," regarding proposed advertisements, and closed the matter "without rendering any opinion." (Compl. ¶ 90.) Although not the Requestor of the Advisory Opinion, plaintiff asserts that as a political party committee akin to DSCC it "stood to benefit equally from any such advisory opinion because it stands in the same position as DSCC when it comes to JFC-advertising." (*Id.* ¶ 91.) Plaintiff's Complaint seeks

preliminary and permanent injunctive relief that "sets aside the FEC's October 10, 2024, Closeout Letter as agency action that is contrary to law." (*Id.* at 27, Prayer for Relief.) It further seeks an order from the Court declaring that "expenditures made by a national party committee in cooperation, consultation, or concert with a candidate for television advertisements with joint fundraising solicitations are 'contributions' under 52 U.S.C. § 30116(a)(7)(B)(i) and thus subject to FECA's limits" (*id.*).

Several hours after filing its Complaint, plaintiff filed a motion for a preliminary injunction, accompanied by a memorandum of law in support. (*See generally* Mot.) Unlike the Complaint, plaintiff's Motion does not include a request for declaratory relief. Instead, the Motion solely requests that the Court "vacate[] and set[] aside the FEC's October 10 final order as arbitrary and capricious and contrary to FECA." (Mot. at 30.)[4] The Motion further requests that the Court set an expedited briefing schedule and hearing or alternatively, "consolidate the expedited preliminary injunction hearing with a trial on the merits pursuant to Rule 65(a)(2)." (Mot. at 1-2.) Plaintiff submitted a declaration of the Executive Director of DCCC with its Motion describing many of the same allegations as its Motion. (*See* Mot. Ex. D, Decl. of Julie Merz in Supp. of DCCC's Mot. for a Prelim. Inj. ("Merz Decl. ") (ECF No. 6-4).)

ARGUMENT

I. THE DCCC LACKS ARTICLE III STANDING BECAUSE IT IS NOT BEING HARMED IN A MANNER REDRESSABLE BY THIS COURT

A plaintiff bears the burden of demonstrating that it has properly invoked this Court's subject-matter jurisdiction. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). As the party bringing suit, DCCC bears the burden of establishing standing. *Attias v. Carefirst, Inc.*,

[4] The Motion does not include a proposed order. (*See* ECF No. 6-1– 6-4.)

865 F.3d 620, 625 (D.C. Cir. 2017). To have Article III standing, a plaintiff must establish: (1) it has "suffered an 'injury in fact[,]" which the Supreme Court defines as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not [merely] conjectural or hypothetical," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted); (2) that there is a "causal connection between the injury and the conduct complained of[,]" which requires the injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," *id.* (internal quotation marks and alterations omitted); and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561. Moreover, when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult" to establish.[5] *Lujan,* 504 U.S. 562; *accord Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (per curiam).

Plaintiff claims it is being harmed in three ways. First, it alleges it is suffering a competitive injury because it contends the NRSC is allegedly violating campaign finance law to the NRSC's purported advantage. (Mot. at 24-25.) Second, plaintiff claims it is in "legal limbo"

[5] Here, the Request was submitted by the DSCC, not plaintiff. Plaintiff could only rely on an advisory opinion sought by others if it were involved in activity that is "indistinguishable in all its material aspects" from the "transaction or activity" presented in the requested opinion. 52 U.S.C. § 30108(c)(1)(B). But plaintiff has provided no explicit factual support that it directly sought to engage in materially indistinguishable conduct. (Merz Decl ¶ 6.) The closest plaintiff comes to trying to meet its burden is a claim that "[i]n the ordinary course, DCCC would engage in the same kinds of election and advocacy activities undertaken by [their] Republican rivals, including with respect to the use of joint fundraising committees. (*Id.*) The plaintiff's "'someday' intentions," which are "without any description of concrete plans," fails to show a harm sufficient to establish standing, let alone satisfy the demanding requirements for the extraordinary relief it seeks here. *Lujan*, 504 U.S. at 564.

without the safe harbor of an advisory opinion. (*Id*. at 25.) Third, plaintiff alleges it is suffering an informational injury as it is denied the full picture of JFC-advertisement funding by its rivals. (*Id*. at 25-26.) Of these, only its alleged competitive injury could possibly justify injunctive relief. Some amount of legal uncertainty is an inevitable feature of the federal regulatory landscape, particularly in a delicate constitutional area such as campaign finance law, and it is only the potential impact such uncertainty has on plaintiff's electoral prospects that makes this uncertainty pressing. And even assuming that proper reporting of JFC-advertising would lead to disclosure of "the specific amount each committee paid as a contribution or coordinated party expenditure[,]" plaintiff's bald assertion that "access to the withheld information would assist Plaintiff in evaluating the campaign strategy of rival candidates" is entirely unsupported.[6] (Mot. at 26.)

Yet, while plaintiff's standing to claim emergency relief clearly hinges on its competitor standing, its theory makes no sense given that the DCCC and the NRSC are in a literal sense not competitors. The DCCC describes itself as "the national congressional campaign committee" with a "mission to elect Democratic candidates to the U.S. House of Representatives." (Compl. ¶ 14.) Its exclusive focus is on House races, whereas the NRSC exclusively focuses on Senate races. Each organization is organized pursuant to 52 U.S.C. § 30101(14) and each subject to separate contribution limits. *See* 52 U.S.C. § 30125(a)(1); 11 C.F.R. § 110.1(c)(2) ("political committees established and maintained by a national political party means . . . [t]he house campaign committee; and [t]he Senate campaign committee."); 11 C.F.R. § 110.1(c)(3) (each committee subject to its own contribution limit). Here, plaintiff has provided no facts in support

[6] Indeed, the declaration offered by the DCCC's Executive Director, Julie Merz, makes no such claim. (*See* Merz Decl. (ECF No. 6-4).)

of its position that any competitor is airing advertisements for candidates for the House of Representatives using the tactics addressed in the Advisory Opinion requested by the DSCC.

Plaintiff also fails to allege competitor standing because it is operating on the same legal landscape as its rivals, which the instant Advisory Opinion did not alter. The D.C. Circuit has recognized that there is a competitive injury "when agencies set rules of the game in violations of statutory directives." *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005). But here, the action being challenged – a letter informing the Requestors in AO 2024-13 (DSCC *et al.*) that the Commission had concluded its consideration of their advisory opinion request without issuing an advisory opinion – in no way altered the "rules of the game." *See infra*, Part III.A.2. Because the rules remain unchanged, plaintiff's competitors such as the NRCC (which airs advertisements for candidates for the House of Representatives) are currently subject to the same legal risk as is plaintiff if and when they choose to engage in the JFC-advertising this lawsuit describes. And even assuming there is a risk of enforcement based on such advertising, that risk is borne to a greater extent by the hypothetical advertisements of the NRCC, which plaintiff does not address despite detailing at length how NRSC (NRCC's Senate counterpart) has allegedly been participating in JFC-advertising since July of this year. Plaintiff states that it is not employing similar tactics to those of the NRSC because it "takes its duty to comply with such campaign finance laws extremely seriously[,]" (Merz Decl. ¶ 9,) but that is its own choice and not the result of the Commission's split vote regarding Advisory Opinion 2024-13 (DSCC *et al.*). "[S]elf-inflicted injuries are not fairly traceable to the Government[]" and are insufficient to establish standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). Because the FEC has in no way hindered plaintiff's ability "'to compete on an equal footing[,]'" it cannot claim a

competitive injury here. (Mot. at 24-25 (quoting *Nat. L. Party of U.S. v. FEC*, 111 F. Supp. 2d 33, 44 (D.D.C. 2000)).

Even assuming *arguendo* that plaintiff has been injured, there is no possibility that the relief it seeks here could redress its injuries. Plaintiff's Complaint seeks two forms of relief.[7] First, it requests that the Court "[i]ssue preliminary and permanent injunctive relief that sets aside the FEC's October 10, 2024 Closeout Letter as agency action that is contrary to law (5 U.S.C. § 706)[.]" (Compl. at 27.) Second, it asks the Court to "[d]eclare that expenditures made by a national party committee in cooperation, consultation, or concert with a candidate for television advertisements with joint fundraising solicitations are 'contributions' under 52 U.S.C. § 30116(a)(7)(B)(i) and thus subject to FECA's limits (5 U.S.C. § 706; 28 U.S.C. §§ 2201-02)." *Id.* However, plaintiff's Motion requests only that the Court "grant a preliminary injunction" that "vacates and sets aside" the "FEC's October 10 closeout letter as arbitrary and capricious and contrary to FECA[,]" (Mot. at 30,) and seeks no declaratory judgment.

Were the Court to grant the instant Motion and set aside the Commission's Closeout Letter, this could not possibly redress the injuries plaintiff claims. The APA limits plaintiffs to challenging "final agency action[,]" 5 U.S.C. 704, which means action that (a) "mark[s] the consummation of the agency's decisionmaking process," and (b) is such that "rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks omitted). Here, the Closeout Letter is plainly no such action, and plaintiff has therefore failed to state a claim under the APA. *See*

[7] Plaintiff also asks the Court to award its "costs, expenses, and reasonable attorneys' fees[.]" (Compl. at 27.)

infra, Part III.A.2. The Closeout Letter merely informed the DSCC that there was no four-vote-majority for ***any*** advisory opinion in this matter, and the matter was therefore closed without the issuance of a final advisory opinion. (*See* Compl. Ex. C., ECF No. 1-3.) And while the letter is necessary to comply with Commission regulations, *see* 11 C.F.R. § 112.4(a), it is unclear what vacating this letter could even mean given that this letter has been sent and indeed is available to the public.

Even if this Court were to assume that plaintiff sought to have the FEC reopen and reconsider the Request submitted by the DSCC, that still would not address any of plaintiff's claimed injuries, and the DSCC is not a party here and has not sought that relief. Indeed, there is no reason to believe that Commissioners would reach a different conclusion on further reconsideration of the same request they so recently addressed. And even if there were some speculative reason to suspect a different outcome, the Commission could not issue a final Advisory Opinion before election day, November 5, given the mandatory 10-day period for the public to submit comments, which the FEC must subsequently consider prior to a Commissioner vote. 52 U.S.C. 30108(d); 11 C.F.R. § 112.3(e) ("Before it issues an advisory opinion the Commission shall accept and consider all written comments submitted within the 10 day comment period or any extension thereof.").[8]

Because plaintiff's requested relief could not result in a binding and final Advisory Opinion before election day, this Court is unable to redress its alleged competitive injury.[9]

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[8] The Commission has a policy of considering expedited requests within 30 days of receipt of a complete request and by statute the Commission has 60 days to provide an advisory opinion. *See Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures*, 74 Fed. Reg. 32160 (July 7, 2009).

[9] Plaintiff makes no claims against the NRSC and associated committees that plaintiff claims are illegally funding campaign advertisements, and indeed cannot do so under its theory

(Mot. at 24-26.) For this same reason, the Court also cannot redress plaintiff's alleged injury stemming from its being "left in legal limbo[.]" (*Id*. at 25.) Finally, plaintiff's alleged informational injury also fails for lack of redress. (Mot. at 25-26.) Unlike plaintiff's first two claims of injury, which could only be redressed prior to election day on November 5, 2024, plaintiff could in theory obtain post-election relief were the NRSC and its candidates required to update their reports to require additional information regarding how much individual committees paid for certain advertisements. But where, as here, plaintiff is seeking the "extraordinary remedy" of injunctive relief, it must demonstrate that it will suffer "irreparable harm" in the absence of an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Because any relief will necessarily come after election day, this Court cannot redress any harm that a lack of information might cause for purposes of the instant Motion.

Plaintiff's brief attempts to explain why an order setting aside the Closeout Letter will redress its alleged injuries, (Mot. at 27,) but does not argue that such an order could result in a binding advisory opinion, and indeed does not argue that such an order would have any concrete effect on plaintiff or any other committee or person. Rather, plaintiff suggest that the order it seeks "will provide clarity to Plaintiff and likely discourage others from exploiting the legal vacuum the FEC has created."[10] (*Id.*) Plaintiff characterizes this as "partial relief," but it

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of the case, as the APA governs the actions of federal agencies and not private parties. There is thus no possibility that this Court could order relief that would enjoin the NRSC's conduct in the short term. *See* 52 U.S.C. § 30109 (providing the exclusive process for civil enforcement of FECA).

[10] Plaintiff also briefly observes that "[t]he Court may also 'compel' the Commission to act in accordance with the clear meaning of FECA. [5 U.S.C.] § 706(1)." (Mot. at 27.) However, plaintiff does not in fact ask the Court to compel agency action here. And in any event, the Court may not "require the agency to follow a detailed plan of action" or "prescribe specific tasks for [the agency] to complete[.]" *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C.

is in fact no relief at all. Implicit in this argument is that the Court's decision will either condone or condemn the conduct of the NRSC and affiliated committees that plaintiff claims is illegal under FECA, and that this order will either discourage the NRSC or encourage plaintiff to engage in the same behavior. But the hypothetical rhetorical effect such decision might have is "merely speculative[,]" and far from "likely" to redress any immediately pending injury.[11] *See Friends of the Earth v. Laidlaw Env't Servs. Inc.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan*, 504 U.S. at 560-61). This reasoning instead suggests that what plaintiff actually seeks is an advisory opinion from the Court, which is not the province of the federal judiciary. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("The oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.").

II. INJUNCTIVE RELIEF IS AN EXTRAORDINARY REMEDY, AND IS PARTICULARLY INAPPROPRIATE HERE

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter*, 555 U.S. at 22, 24 (citations omitted). A plaintiff seeking a preliminary injunction must establish that (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his

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Cir. 2006). Rather, the Court should allow the agency "to exercise its discretion and utilize its expertise in complying with broad statutory mandates." *Id.* (citing *Cobell VI*, 240 F.3d at 1099, 1106).

[11] Moreover, even if plaintiff had requested relief in the form of declaratory judgment in the instant Motion, this would not suffice to invoke the Court's jurisdiction, as it is a "well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction. Rather, the availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (internal quotations and citations omitted).

favor," and (4) "an injunction is in the public interest." *Id*. at 20.

The D.C. Circuit "has suggested, without deciding, that *Winter* should be read to abandon [any] sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson*, 944 F. Supp. 2d 89, 95-96 (D.D.C. 2013) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011)). The D.C. Circuit recently declined to resolve this "tension[,]" while at the same time noting that "even under the sliding-scale approach, the movant must raise at least a 'serious legal question on the merits.'" *Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 726 (D.C. Cir. 2022) (quoting *Sherley*, 644 F.3d at 398); *see also Brown v. FEC*, 386 F. Supp. 3d 16, 24 (D.D.C. 2019) ("[W]ithout a likelihood of success on the merits, [p]laintiffs are not entitled to a preliminary injunction *regardless* of their showing on the other factors.") (emphasis added) (citation omitted).

For the reasons detailed herein, plaintiff manifestly cannot establish the elements necessary to secure the extraordinary relief of a preliminary injunction. *See infra*, Parts III-IV. But plaintiff's request for emergency relief here is entirely inappropriate for additional reasons. Plaintiff's Motion and Complaint makes clear that it believes the NRSC's JFC-advertisements violate FECA. (*See* Compl. pp. 3-4, 12-19; Mot at 8-13.) When any person believes that FECA has been or is continuing to be violated, there is a clear and established process for the resolution of that allegation: filing a complaint with the Commission. 52 U.S.C. § 30109(a)(1). That complaint is then reviewed, respondents are given the opportunity to respond, and if a bipartisan majority of Commissioners determine there is reason to believe a violation occurred, the Commission may investigate. *Id.* § 30109(a)(2). This process represents a policy choice by Congress, to ensure that there is bipartisan

consensus for enforcement actions in this unavoidably political space, and prevents the weaponization of campaign finance law for partisan advantage. *See Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) ("Congress designed the Commission to ensure that every important action it takes is bipartisan.").

Plaintiff's choice to file the instant lawsuit based upon the non-issuance of an Advisory Opinion circumvents the process established by Congress for challenging the allegedly illegal conduct of another.[12] Indeed, the fact that plaintiff is seeking relief that would not address its alleged injuries here, *see supra* pp. 18-22, suggests that plaintiff is instead soliciting the Court to opine on the alleged illegality of the conduct of the NRSC and other committees, who are not named as defendants to this lawsuit. (*See* Mot. at 27 (an order vacating the Closeout Letter "will provide clarity to Plaintiff and likely discourage others from exploiting the legal vacuum the FEC has created.").) But such an outcome would constitute a mere advisory opinion which the Court, unlike the FEC, is not permitted to issue.[13] *Flast*, 392 U.S. at 96 ("The oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.").

In addition, an injunction is especially inappropriate in the pre-election context, where "considerations specific to election cases" weigh heavily against the issuance of

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[12] Plaintiff's argument for vacating the non-issuance of an advisory opinion (Mot. at 19-20), also discussed at the status conference on October 21, 2024, suggests that the agency could agree to not enforce coordinated spending limits or the solicitation regulations providing immediate relief in the run-up to the election on November 5, 2024. But plaintiff provides no authority for the proposition that such a voluntary categorical exception is available, immediately or otherwise.

[13] As discussed *infra*, pp. 38-40, this principle also weighs heavily in the Commission's favor with respect to the balance of the equities and the public interest.

injunctions. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) ("Court orders affecting elections . . . can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase."). *Purcell*'s logic is relevant here, where plaintiff seeks an injunction that could impact some of the core functions of federal campaigns with just over a week to go before the election.[14] Plaintiff is seeking a decision from this Court by Sunday, October 27, 2024, which falls nine days before election day on November 5, 2024. (Compl. ¶ 11.) A decision that somehow prohibited the JFC-advertising at the heart of this lawsuit, despite no request for relief that could accomplish such an outcome, could require the recall of millions of dollars-worth of campaign advertising, with no guarantee that new, lawful ads could be produced in time to replace them. Campaigns would also be required to reallocate resources, leading to a lack of clarity as to the resources they have available to them in the election's final week. These consequences, some of which are necessarily unknown, will result in exactly the kind of confusion that *Purcell* is meant to prevent.

Moreover, the risk of campaign and voter confusion is particularly unwarranted given plaintiff's delay in bringing this lawsuit. By plaintiff's own reckoning, the NRSC began running JFC-advertisements in July of this year, but the DSCC did not file its Advisory Opinion Request until September 18. (Compl. ¶¶ 49, 61.) And while the FEC provided the DSCC with the closeout letter on October 10, (*id*. ¶ 81,) plaintiff did not file this lawsuit until October 17. Plaintiff's own delay has reduced the time available for the Court to consider its

[14] As noted *supra* pp. 18-24, the relief plaintiff requests here, declaring the Commission's Closeout Letter declining to issue an advisory opinion in violation of the APA, could not possibly provide plaintiffs with the relief they seek, as it will neither (1) provide plaintiff with legal cover to issue JFC-advertisements similar to those being run by the NRSC and others, nor (2) prevent the NRSC and its candidates from engaging in such conduct. Nonetheless, out of an abundance of caution the Commission seeks to preempt any effort by plaintiff to seek wider relief before the upcoming election.

claims and increased the risk of confusion if the rules are changed so close to an election.

III. PLAINTIFF IS UNLIKELY TO SUCCEED ON THE MERITS

Plaintiff seeks emergency relief in the form of a preliminary injunction, alleging that the Commission's non-issuance of an advisory opinion regarding the legality of JFC-advertising violates the APA. (Mot. at 19-20.) This Motion should be denied because it has "not satisfied the 'foundational requirement' of showing a likelihood of success on the merits to warrant the extraordinary relief of a preliminary injunction." *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 335 (D.D.C. 2020) (citing *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019); *Brown*, 386 F. Supp. 3d at 24). The Court may deny plaintiff's Motion for failure to satisfy this prong of the preliminary injunction standard alone, as "without a likelihood of success on the merits," plaintiff is "not entitled to a preliminary injunction regardless of their showing on the other factors[.]" *Brown*, 386 F. Supp. 3d at 24.

Plaintiff's Motion appears to assert two possible causes of action under the APA, citing to both 5 U.S.C. §§ 706(1) and 706(2)(A). (Mot. at 27.) Yet, plaintiff's allegations principally sound under APA § 706(2)(A), as it argues that the Commission's lack of a majority vote to approve any draft advisory opinion constitutes agency action that is "arbitrary, capricious, an abuse of discretion, and not in accordance with the law". (Compl. ¶¶ 89-94; Mot. at 19-20, 23, 27.) In this case, those standards are practically similar: arguing that the Commission's "issu[ing] a closeout letter indicating it had closed the request for an AO without rendering any opinion" is contrary to law, (Compl. ¶ 90), is seemingly indistinguishable from arguing the

opinion was "unlawfully withheld" under 5 U.S.C. § 706(1). Plaintiff has failed to meet its burden showing likely success under any conceivable theory of APA relief.[15]

A. Plaintiff Is Unlikely to Succeed Under the Administrative Procedure Act Because the FEC Complied with all of FECA's Mandatory Processes and There is no Advisory Opinion Addressing the Merits of the DSCC's Request for this Court to Review.

1. The Court may not Order the FEC to Issue an Advisory Opinion, nor Proscribe the Content of Such an Opinion

Plaintiff here seeks an order from this Court that "vacates and sets aside" the "FEC's October 10 closeout letter as arbitrary and capricious and contrary to FECA[.]" (Mot. at 27.) While it is unclear how such an order could address plaintiff's purported injuries, *supra* pp. 18-22, to the extent plaintiff seeks to compel Commissioners to vote in favor of a particular advisory opinion, or seeks for the Court to proscribe the content of that opinion, such relief is unavailable and its claim must fail. FECA expressly *forbids* the Commission from "*tak[ing] any action*," 52 U.S.C. § 30106(c) (emphasis added), "to render advisory opinions under section 30108," *id.* § 30107(a)(7), "*except* [upon] the affirmative vote of 4 members of the Commission," *id.* § 30106(c) (emphasis added). There is thus no basis for an order that would "compel" the agency to do so. Mot. at 27; *see* 5 U.S.C. § 701(a)(2) (excluding from APA

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[15] Although plaintiff makes references that a failure to receive an advisory opinion under 52 U.S.C. § 30108 is "contrary to law," (Mot. at 3, 20, 23), arguably suggesting that FECA prompts judicial review of the challenged agency action and warrants the issuance of relief by this Court, plaintiff does not bring a FECA claim, nor could it. (*See* Compl. ¶¶ 89-94). Importantly, neither section 30108 nor any other FECA provision authorizes review of an FEC advisory opinion or the lack of an FEC advisory opinion. *Cf.* 52 U.S.C. § 30109(a)(8) (permitting challenges by aggrieved parties alleging that the Commission has failed to act on or dismissed an administrative complaint alleging violations of FECA in a manner that is "contrary to law.") This Court has reiterated that "no statutory cause of action exists under FECA to challenge its advisory opinion process." *McCutcheon*, 496 F. Supp. 3d at 332); *see also id.* (explaining that no "mechanisms for judicial review, nor other statutory causes of action, exist under FECA—including for judicial review of advisory opinions or the FEC's failure to issue them."); *Unity08 v. FEC*, 596 F.3d 861, 866 (D.C. Cir. 2010) (same).

agency action that is "committed to agency discretion by law[.]"). Such an outcome would also conflict with the bedrock principle of administrative law that the Court may not "require the agency to follow a detailed plan of action" or "prescribe specific tasks for [the agency] to complete[.]" *Cobell*, 455 F.3d at 307. Rather, "it must allow [the agency] to exercise its discretion and utilize its expertise in complying with broad statutory mandates." *Id.* (citing *Cobell VI*, 240 F.3d at 1099, 1106). Here, there is no basis for the Court to compel the FEC to issue a particular advisory opinion.

2. Plaintiff Is Unlikely to Succeed Under 52 U.S.C. § 706(2) Because There is No "Final Agency Action" for this Court to Review

The Commission's non-issuance of an advisory opinion likewise does not constitute "final agency action" under the APA, and is therefore unreviewable. An APA claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete agency action* that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (first emphasis added). And it is well-established that 5 U.S.C. § 704 "limits causes of action under the APA to final agency action." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 188 (D.C. Cir. 2006) (citation omitted).

When "a failure to act is the basis for an APA claim, pursuant to Section 706(2), a plaintiff must show that it is the functional equivalent of final agency action." *Hi-Tech Pharmacal Co. v. U.S. Food & Drug Admin.*, 587 F. Supp. 2d 1, 10 (D.D.C. 2008). Agency action may be considered "final" where it: (a) "mark[s] the consummation of the agency's decisionmaking process," and (b) is such that "rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted). If there is no "final agency action," the claim must be

dismissed for failure to state a claim. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 & n.4 (D.C. Cir. 2006).

In *Hispanic Leadership Fund v. FEC* ("*HLF*"), a court was confronted with a third party's suit to enjoin enforcement against it for engaging in proposed activity presented in an advisory opinion request that had been considered by the FEC. The Commission answered some advisory opinion request questions and failed, by a 3-3 vote, to answer other advisory opinion request questions. The court held that the agency's 3-3 vote on a draft advisory opinion "results only in the FEC concluding that it was unable to reach a determination" on the underlying issue in the advisory opinion request. 897 F. Supp. 2d 407, 428 (E.D. Va. 2012). That court noted that such a "conclusion is in no sense final, reviewable agency action." *Id*. Advisory opinions issued by the Commission are final agency action "where they constitute[] final and authoritative statements of position by the agencies to which Congress ha[s] entrusted the full task of administering and interpreting the underlying statutes" that ultimately "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Unity08*, 596 F.3d at 865 (citation omitted).[16] Where the Commission is unable to reach four votes to authorize an advisory opinion, there is no statement, much less a final agency action, from the Commission on the merits of the DSCC's request that can be reviewed.[17]

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[16] Moreover, the *HLF* Court reviewed the questions at issue solely under the Declaratory Judgment Act, *see* 28 U.S.C. § 2201, not the APA, 5 U.S.C. § 706. *Cf. McCutcheon*, 496 F. Supp. 3d at 334-35 (D.D.C. not granting relief for claims under the DJA in conjunction with the APA). Here, without final agency action there is nothing for the Court to review under the APA.

[17] The *HLF* court distinguished the effect of a 3-3 vote on an advisory opinion request from such a vote in the FEC enforcement context. 897 F. Supp. 2d at 428 (citing *FEC v. Nat'l Republican Senatorial Comm.,* 966 F.2d 1471 (D.C.Cir.1992)). The court explained, "[p]ut simply, the deadlock in National Republican Senatorial Committee resulted in the dismissal of a private complaint, whereas the deadlock in the present case results only in the FEC concluding

Courts in this circuit have likewise found no reviewable final agency action in similar situations where an agency was unable to take a requested action. In *Sprint Nextel Corp. v. FCC*, the court considered a statute providing a right for companies to file a petition asking the FCC to refrain from applying certain regulatory requirements, and further providing that if the petition was not granted within a certain time, the petition would be deemed granted. 508 F.3d 1129, 1131 (D.C. Cir. 2007). The agency commissioners deadlocked on the vote and were not able to issue an order on the petition; after the statutory deadline ran, the agency "issued a press release announcing that [the] petition was deemed granted by operation of law." *Id.* (internal quotations omitted). Several other companies challenged the decision in court. *Id.* The court found that the agency "did not engage in any 'circumscribed, discrete' act." *Id.* (quoting *Norton*, 542 U.S. at 62). Instead, "[the agency] did nothing, which is why the 'deemed granted' provision kicked in." *Id.* The court rejected the argument that "the deadlock had the effect of denying the [petition]," and rather, "[w]hen the [agency] failed to deny [the] petition within the statutory period, Congress's decision—not the agency's—took effect." *Id.* at 1131-32; *see also Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170-71 (D.C. Cir. 2016); *AT&T Corp. v. FCC*, 369 F.3d 554, 559 (D.C. Cir. 2004).

Similarly, here, the DSCC sought an advisory opinion, but the Commission's inability to obtain the affirmative vote of four members prevented it from issuing any opinion. *See* 52 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a); *see also* Closeout Letter. This is an eventuality explicitly contemplated by Congress when it passed FECA, which provides for an even number of six Commissioners with no more than three from any one political party, along with a

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that it was unable to reach a determination on the proposed advertisements. This conclusion is in no sense final, reviewable agency action." *Id.*

majority vote requirement for the agency's most consequential actions. Thus, like *Sprint Nextel*, when the FEC did not issue an advisory opinion "Congress's decision . . . took effect." 508 F.3d at 1132; *see also Pub. Citizen*, 839 F.2d at 1170-71; *AT&T Corp*, 369 F.3d at 559. Because the Commission here took no "final agency action" with respect to AOR 2024-13, plaintiff has failed to state a cause of action under 52 U.S.C. § 706(2)(A).

3. Even If Not Issuing an Advisory Opinion Was Contrary to Law, This Court May Not Address the Question Posed in the Advisory Opinion Request

Even assuming plaintiff could establish that it was likely to succeed on its APA claim, it would not establish any entitlement to the full, specific relief it seeks in its Complaint, *i.e.*, a judicial order finding that the JFC-advertising at issue is not permitted under FECA. "[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Norton*, 542 U.S. at 65. The Supreme Court explained:

> For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, would have supported 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. As explained *supra* p. 27, ordering the Commission to act is not an appropriate remedy here because FECA prevents the Commission from issuing an advisory opinion without four affirmative votes.

Plaintiff cannot seek a "judicial decree setting forth the content of [an advisory opinion]." *Norton*, 542 U.S. at 65. Plaintiff mistakenly argues "this Court must assess whether the proposed JFC-advertising scheme is lawful under FECA, a question of law that this Court reviews de novo, as it is a legal question upon which 'the FEC failed to issue an opinion.'"

(Mot. at 20 (citing *Ready for Ron v. FEC*, No. CV 22-3282, 2023 WL 3539633 at *18 (D.D.C. May 17, 2023).) But in that case, this Court was determining the proper standard of review where the "FEC issues decisions contrary to a requester's position." *Ready for Ron*, 2023 WL 3539633 at *17. Indeed, although the Commission there had split 3-3 on one question presented by the request, the Commission otherwise garnered a majority and issued an advisory opinion adopting positions to which that plaintiff objected, and that court was primarily concerned with an advisory opinion adopted by all six FEC Commissioners. Here there is simply no legal reasoning representing the position of the agency that the Court can review, and thus no possibility that this Court could "provide clarity as to whether JFC-advertising is lawful or not." (Mot. at 28.) And while plaintiff portrays such "clarity" as the precise remedy the Court can offer for its injuries, (*id*. at 27), plaintiff's Motion does not seek the declaratory relief that might provide the Court the opportunity to do so. Instead, plaintiff asks only that the Court set aside the Closeout Letter explaining an advisory opinion was not issued. (*See id.* at 30 (only requesting that the Court "grant a preliminary injunction that vacates and sets aside the FEC's October 10 final order as arbitrary and capricious and contrary to FECA.")). For present purposes, the Court need not decide whether it can consider the question posed by DSCC's advisory opinion request *de novo*—and declare the proposed activity lawful or unlawful—because that question is not before it at this preliminary stage.[18]

Finally, even if plaintiff had requested declaratory relief in the instant Motion, the relief it seeks is inappropriate and varies materially from other cases where courts have reached the underlying merits of an advisory opinion request following the Commission's inability to render

[18] The Commission reiterates that there are multiple reasons why the Court should not reach this question, *supra* Parts I & III.A.1-2, in addition to grave prudential concerns with doing so on an expedited basis so close to an election, *supra* pp. 24-25.

an opinion on a given issue. In each of those cases, the plaintiffs sought relief to enjoin the FEC from enforcing relevant FECA provisions if "*its* proposed course of action," *Ready for Ron*, 2023 WL 3539633, at *27 (emphasis added), reflected the proposed activity presented in the advisory opinion request. *See id.* at *6 (RFR "moved for a preliminary injunction" and "asks the Court to enjoin the FEC from instituting enforcements proceedings against it related to its plan" to engage in the activity described in the advisory opinion request); *HLF*, 897 F. Supp. 2d at 419 ("HLF . . . sought a preliminary injunction, to enjoin the FEC from enforcing the FECA disclosure provisions with regard to these advertisements" it argued to be identical activity to advertisements presented in an advisory opinion request submitted by American Future Fund); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 27 (D.D.C. 2012), *aff'd,* 761 F.3d 10 (D.C. Cir. 2014) ("plaintiffs . . . seek preliminary and permanent injunctive relief that would prohibit the defendant [FEC] from enforcing" provisions of FECA against the plaintiff Leadership Fund, soliciting contributions for independent expenditures as proposed in an advisory opinion request over which the Commission split). Put differently, those challengers asked the courts to declare that they should be able to engage in the proposed activity if, in fact, the activity did not violate the statute despite an advisory opinion to the contrary or non-issuance of an advisory opinion. And so, those courts reached the underlying merits of the request itself.

But that is not what plaintiff seeks here. It instead asks this Court to find the proposed activity *unlawful*, "[d]eclar[ing] that expenditures made by a national party committee in cooperation, consultation, or concert with a candidate for television advertisements with joint fundraising solicitations are "contributions" under 52 U.S.C. § 30116(a)(7)(B)(i) and thus subject to FECA's limits (5 U.S.C. § 706; 28 U.S.C. §§ 2201-02)." (Compl. at 27, Prayer for Relief, B.) This requested relief is best understood as asking the Court to declare NRSC's JFC-

advertisement activity unlawful, not to declare that plaintiff may engage in it. Indeed, their requested relief goes well beyond what the DSCC could have obtained from the Commission pursuant to their Request, *i.e.* a safe harbor to engage in a clearly defined course of conduct or conduct that is "materially indistinguishable." Instead, plaintiff asks this court to offer a general opinion on all hypothetical transactions involving broadly defined JFC-advertising. (*Id.*) This broad request, seeking a general declaration that JFC-advertising is *illegal*, materially distinguishes this case from others where what plaintiffs sought what would be in effect a safe harbor from prosecution for a particular course of conduct, *i.e.* the relief they requested (and the Commission could have conceivably provided) from the agency in the first instance.

B. The Commission's Inability to Adopt any Draft Advisory Opinion Was Reasonable Under the Circumstances

Assuming *arguendo* that plaintiff could establish that the non-issuance of an advisory opinion was a final, reviewable agency action not committed to the agency's discretion by law, and that the Commission were required to issue an advisory opinion despite FECA's majority vote requirement, it still cannot establish that the positions taken by the various Commissioners here were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

Plaintiff proffers two reasons why the "failure to issue an advisory opinion" was contrary to law. (Compl. ¶ 93.) First, it argues the "Commission has failed to administer and uphold FECA's contribution and party coordinated expenditure limits, *see, e.g.*, 52 U.S.C. § 30116(a)(7)(B)(i), by failing to issue an AO making clear that expenditures to pay for a candidate's television advertisements are 'contributions' under FECA that are subject to the statute's limits." (*Id.*) Second, plaintiff alleges that "the Commission has deprived it and similarly situated organizations of safe harbor protection for such excess expenditures to support

JFC-advertising, chilling Plaintiff from engaging in what would otherwise be protected speech (if consistent with FECA), while nonetheless tolerating and acquiescing to similar behavior from Plaintiff's competitors." (*Id*.)

First, plaintiff's argument that the non-issuance of an advisory opinion "failed to administer and uphold FECA's contribution and party coordinated expenditure limits" is inapposite because the advisory opinion process is not the means by which the Commission upholds the Act's prohibitions and limitations. That is accomplished primarily through FECA's enforcement process and, as noted *supra* pp. 23-24, an administrative complaint filed with the FEC would have been (and remains) the appropriate vehicle for plaintiff to bring potentially unlawful conduct to the Commission's attention. Moreover, the contribution limits contained in 52 U.S.C. § 30116 remain in effect, and plaintiff has offered no evidence to suggest the FEC will not enforce those limits if and when they are violated. The agency's non-issuance of an advisory opinion here has no bearing on the applicability of FECA's contribution and party coordinated expenditure limits, which operate currently just as they did prior to advisory opinion request.

Second, plaintiff has not presented evidence sufficient to establish that it will engage in any "specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity" at issue in DSCC's advisory opinion request, a necessary condition to rely on FECA's safe harbor position. 52 U.S.C. 30108(c)(1)(B). The Merz Declaration only argues that "DCCC would establish joint fundraising committees with various candidate committees to sponsor television advertisements ahead of the November 5 election." (Merz Decl. ¶ 9.) "Like the Republican ads, these advertisements would primarily advocate for each respective candidate's election but would contain a brief solicitation for funds along the lines of those included in similar Republican advertising to date" and continues, "[e]xpenses for these

advertisements would then be distributed between DCCC and the campaigns of its candidates in a manner consistent with the allocation formula for each joint fundraising committee." (*Id.*) Plaintiff has provided no evidence, and therefore this Court has no way of ascertaining if any such ads would be "indistinguishable" from ads run by Republican candidates and committees or proposed by the DSCC in the Request. Plaintiff presents no evidence of these potential ads' content, scripts, and/or how the potential ads would craft a solicitation by QR code, voice-over, or otherwise. As such, the scant support offered by plaintiff far from establishes likely success on its claim it was denied safe harbor under FECA, when part and parcel of that inquiry is whether its proposed activity is nearly identical to that in the Request.

Moreover, the Commissioners' differing positions on the merits of the DSCC's Request, which prevented the consolidation of a four-vote majority on the content of either of the drafts considered by the Commissioners with respect to AOR 2024-13, was reasonable under the circumstances. The question addressed in the drafts concerned a complex issue involving the interplay of FECA and FEC regulations with respect to joint fundraising activities, the procedures for which are described in 11 C.F.R. § 102.17, and coordinated party expenditure limits in 52 U.S.C. 30116(d) and 11 C.F.R. § 109.37(a)(2)(i)-(iii) and 11 C.F.R. § 109.21(d)(1)-(6). (*See supra* pp. 9-13 (Background on Drafts A/B.) In other advisory opinions, the Commission has "concluded that a joint fundraising committee's solicitations and other public communications would not meet the payment prong of the coordinated communication test." (*Id*. at 10 (referencing Advisory Opinion 2024-07 (Team Graham).) Considering this, Commissioners differed on whether the advertisements described by the DSCC's Request were joint fundraising activity containing a solicitation of contributions, including a QR code linking to the Joint Fundraising Committee's online fundraising page. (*Id*.) The Commissioners

disagreed over whether the proposed communication would meet the payment prong of the party coordinated expenditure test, and thus whether an in-kind contribution or party coordinated expenditure would result. Plaintiff plainly disagrees with the position taken by some Commissioners, and agrees with the position taken by others. But the Commissioners' inability to reach consensus on an expedited request that put at issue what plaintiff describes as a "novel tactic[,]" (Mot. at 1), is hardly evidence that Commissioner positions were arbitrary.

Moreover, split decisions such as this one are the product of Congress's design. "[T]he Commission is inherently bipartisan in that no more than three of its six voting members may be of the same political party," and yet its most important decisions require the affirmative vote of at least four Commissioners under 52 U.S.C. § 30106(c), necessarily constituting a bipartisan majority. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Such split votes are contemplated by FECA's scheme precisely because the Commission "must decide issues charged with the dynamics of party politics, often under the pressure of an impending election." *Id*. The instant Request was submitted in the weeks preceding the upcoming election. Given the novelty and complexity of the issue presented, and the timeframe in which it was presented by advisory opinion request, plaintiff is far from establishing it would succeed on its claim alleging that the non-issuance of an advisory opinion was arbitrary and capricious.

When a fundamental component to the "Court's conclusion [is] . . . that the FEC's conduct in processing and disposing of plaintiff['s] advisory opinion request was not only legal, it was statutorily mandated[,] . . . the concrete question of whether the FEC violated plaintiff['s] rights—whether statutory or constitutional—by failing to issue a favorable advisory opinion, the answer is a firm no, and no suit based on such an allegation can possibly succeed." *McCutcheon*,

496 F. Supp. 3d at 330. Accordingly, "the Court's preliminary injunction analysis need not . . . reach a dispositive conclusion on the ultimate legality of the [JFC-advertising activity]." *Id*.

IV. PLAINTIFF FAILS TO DEMONSTRATE IRREPARABLE HARM

Plaintiff has failed to meet its burden to show that it will suffer irreparable harm without the extraordinary remedy it seeks. *Winter*, 555 U.S. at 22. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). The D.C. Circuit has set a high standard for irreparable injury, underscoring that the injury "must be certain and great . . . actual and not theoretical." *United States v. Facebook, Inc.*, No. 23-5280, 2024 WL 1128083, at *1 (D.C. Cir. Mar. 12, 2024) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

Plaintiff identifies what it calls an uneven playing field, legal uncertainty, and a loss of opportunity to compete as irreparable harm. (Mot. at 27-28.) But in support of these claims, it presents a declaration from its executive director that only presents a generalized theoretical harm. (Mertz Decl. ¶¶ 9-11.) The declaration is notable for what it does not allege: it does not say the committee lacks resources for the advertising it wishes to run; it does not say that it would be expending more resources than it is currently if there was greater clarity on the legal requirements. The declaration describes "competing on fair terms" and on an "uneven playing field." (*Id.* at ¶¶ 6-7.) Plaintiff's goal is exactly the theoretical harm that is insufficient for an injunction; based on the declaration it is not clear anything would be different in the election campaign in the few days leading up to the election after entry of the order the DCCC seeks. Perhaps even more important is the fact that both the DCCC and the NRSC are competing under the same legal requirements and not against each other. These allegations are

insufficient even to establish an injury for jurisdictional purposes, *supra* pp. 17-18, and certainly do not demonstrate irreparable harm.

Furthermore, the precise relief plaintiff seeks is unclear; there is no proposed order included with its Motion. The Motion asks the Court to "set aside the FEC's close out order and issue a declaratory judgment requiring the FEC to either uphold "the coordinated expenditure law and relevant FECA limits, or . . . refrain from enforcing or seeking to prosecute any complaint against DCCC for engaging in JFC-advertising." (Mot. at 30.) But even if the Court immediately issued such an order, it is not at all clear what its effect would be in the days leading up to the election. Indeed, given the few days between when such an order could be issued and the election and the near impossibility of agency action before the election, such an order is more likely to cause confusion than to alleviate it. *See supra*, pp. 24-25. Regardless of whether plaintiff has an interest in resolving this issue for future elections, that interest does not justify the extraordinary process and extraordinary relief sought here.

Plaintiff also wrongly assumes that irreparable harm flows from its contentions of First Amendment infringement, as the D.C. Circuit "require[s] movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction frame-work." *Chaplaincy of Full Gospel Churches*, 454 F.3d 290, 301 (D.C. Cir. 2006); *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990).

The absence of harm here "'alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)). As one

court in this District concluded in rejecting a motion to preliminarily enjoin limits on contributions to political parties, "[p]laintiffs will not 'suffer irreparable harm in the absence of preliminary relief;' they will simply be required to adhere to the regulatory regime that has governed campaign finance for decades." *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014).

Finally, plaintiff's request here is at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Here, the "status quo" is plainly the continued operation of the statute and regulations, not adding the addition of a court-ordered advisory opinion. Rather than seeking to preserve the status quo, plaintiff seeks to "upend" it by asking this Court to issue a legal ruling of uncertain effect in the days leading up to election day, while voting is already under way. *See Sherley*, 644 F.3d at 398-99 (denying preliminary injunction motion that sought to upend the status quo).

V. THE RELIEF THAT PLAINTIFF REQUESTS WOULD HARM THE GOVERNMENT AND UNDERCUT THE PUBLIC INTEREST

The balance of harms and the public interest also weigh heavily in favor of preserving the status quo and denying plaintiffs' request for extraordinary injunctive relief. The third and fourth preliminary injunction factors, harm to the opposing party and weighing the public interest, respectively, "merge when the Government is the opposing party[.]" *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

As a practical matter, there is not a showing that within the very limited amount of time before the election an order here would be clarifying in any meaningful way. Rather, if this Court were to deny the plaintiff's motion, that would preserve the status quo, as preliminary injunctions are intended. *Camenisch*, 451 U.S. at 395. Granting relief here

"would do precisely the opposite" because it would interject the Court into the time-period immediately before the election. *Rufer*, 64 F. Supp. 3d at 206. "Permitting that to happen would be imprudent, to say the least, and certainly not in the public interest." *Id.*

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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October 24, 2024

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2024, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

/s/ Greg J. Mueller