UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NRSC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

This lawsuit marks the culmination of a coordinated attack by the Democratic Congressional Campaign Committee (DCCC) and the Democratic Senatorial Campaign Committee (DSCC) on lawful, highly effective Republican joint fundraising committee advertisements "on the eve of" an extremely contentious and consequential election. *See Republican National Committee v. Democratic National Committee*, 589 U.S. 423, 424 (2020); *Citizens United v. FEC*, 558 U.S. 310, 333–34 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence.").

Two months after a joint fundraising committee in which the National Republican Senatorial Committee (NRSC) participates began to run television advertisements in Montana, the D***S***CC, wishing to quash its competitor's advertisements but lacking time to do so before the election via the Federal Election Campaign Act's (FECA) complaint procedures, *see* 52 U.S.C. § 30109, sought an advisory opinion from the Federal Election Commission (FEC) pursuant to 52 U.S.C. § 30108. That request ostensibly sought guidance on whether the D***S***CC's own proposed advertisements were lawful under FECA. And by using the advisory-opinion procedure, the D***S***CC sought to ensure itself a response in 20 days rather than the lengthier timelines governing FECA's complaint procedures.

This request was a sham. The point of the advisory-opinion request was not, as the D***S***CC claimed in its initial filing, to obtain guidance regarding its own ads. The point was to obtain a swift decision stopping the NRSC's joint-fundraising ads. And the D***S***CC said as much in its advisory-opinion request reply filing when it asked the FEC to declare ***its own proposed advertisements***—which were designed to mirror the NRSC joint-fundraising ads that the D***S***CC hoped to quash—unlawful. Indeed, the D***S***CC stated publicly that the point of its filing was to

shut down the NRSC joint-fundraising advertisements. A "DSCC aide" told Roll Call that the D***S***CC submitted the advisory-opinion request "because [it] believe[s] the Republican activity is illegal." Dkt. 1-2 at 129.

When the FEC ultimately deadlocked on the advisory-opinion request, the D***S***CC and the D***C***CC decided to divide and conquer. The D***S***CC, because it—unlike the D***C***CC—actually competes with the NRSC, decided to begin airing joint-fundraising advertisements substantially similar to those being used by the NRSC's joint-fundraising committees. The D***S***CC's advertisements are running right now. And after wasting another ***full week***, the D***C***CC decided to take the baton on seeking to shut down the NRSC's joint-fundraising advertisements by filing this collateral attack. It claims—with a single conclusory sentence in a declaration lacking any specifics—that the "DCCC would establish joint fundraising committees with various candidate committees to sponsor television advertisements ahead of the November 5 election," ECF No. 6-4 at 4 (Merz. Decl. ¶ 9). In fact, the D***C***CC—as a surrogate for the D***S***CC—seeks only to disrupt the NRSC's successful joint fundraising committee campaigns at the eleventh hour. The claim that the D***C***CC "would" establish joint fundraising committees is a concession it has not done so, another indicator that this case has nothing to do with running D***C***CC ads prior to Election Day.

The problem for the DCCC is that all of the scheming, machinations, and delays that led it to claim—implausibly—that it requires relief within days after these ads have been airing ***for months*** have created a variety of procedural and equitable roadblocks that render this case improper. *First*, the DCCC lacks standing. Because the allegations in the complaint focus on alleged wrongdoing by the NR***S***C, the D***C***CC lacks competitor standing. Indeed, as the complaint explains, the "D***C***CC's Republican counterpart" is "the NR***C***C." Dkt. 1 at 23 (Compl. ¶ 78) (emphasis added). That makes the NR***S***C joint-fundraising ads that are the subject of the complaint

irrelevant to any supposed injury to the D***C***CC. And the DCCC's other bases for standing—purported confusion and lack of information—fail to support a cognizable injury in fact traceable to the FEC.

Second, there has been no final agency action as required to seek review under the Administrative Procedure Act ("APA"). It is blackletter law in the D.C. Circuit that agency deadlocks do not constitute final agency action unless Congress has expressly provided for review of the deadlock. *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169–70 (D.C. Cir. 2016) (citing *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 428 (E.D. Va. 2012)); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007) ("The deadlocked vote cannot be considered an order of the Commission nor can it constitute agency action."). While FECA's ***complaint*** process expressly provides for such deadlock review, 52 U.S.C. 30109(a)(8)(A), its advisory-opinion process does not. That is the end of the matter. And it is irrelevant that the DCCC purports to face a threat of enforcement if it actually did wish to use joint fundraising committee ads—which is not credible given the 3-3 vote on the advisory opinion and the fact that DOJ can only prosecute a "knowingly and willful" violation of FECA, 52 U.S.C. § 30109(a)(5)(C)—because a party "'having to defend itself … should the agency actually decide to pursue enforcement' [is] insufficient" for finality. *Indep. Equip. Dealers Ass'n v. EPA.*, 372 F.3d 420, 426–28 (D.C. Cir. 2004).

Third, even if the DCCC could pursue a claim under the APA, it would not be entitled to relief. The Court may not "compel" the FEC to issue an advisory opinion under 5 U.S.C. § 706(1) because the agency's inaction is not a failure to take the type of discrete, mandatory action of which the APA may compel issuance. Even if it were, the only relief available would be an order to compel an advisory opinion—not an order to compel a particular legal conclusion. Similarly,

even if the FEC's failure to issue an advisory opinion was reviewable final agency action under 5 U.S.C. § 706(2) (it is not), that failure was compelled by law because the FEC did not garner the four Commissioner votes required to act. 52 U.S.C. § 30106(c).

Fourth, even if it were proper for this Court to reach the DCCC's conception of the merits, the challenged advertising is lawful. Under Commission regulations and advisory opinions from 1977 through August of this year, the FEC has consistently held that joint fundraising does not generate in-kind contributions. That conclusion is entirely consistent with the text, structure, and history of FECA. And, in all events, the only question before this Court is the application of law to the two advertisements proposed in the D***S***CC's advisory-opinion request—not a facial challenge to the FEC's 40-year-old regulation or an omnibus attack on third-party and hypothetical advertisements that appear nowhere in the administrative record.

Fifth, the equities strongly favor denial of the preliminary injunction request. The D***C***CC's delay in bringing this action, coupled with the D***S***CC's months-long delay in challenging ads that have been airing since July, undermines any claim of irreparable harm. And this request to change the campaign finance laws just days before an election violates the Supreme Court's *Purcell* principle, which guards against hasty judicial intervention that would disturb public expectations about the election. *See Purcell v. Gonzalez*, 549 U.S. 1, 8 (2006) (pur curiam).

Finally, the Court should not accept the DCCC's invitation to render an expedited final judgment. Entering a final judgment at this preliminary stage is an extraordinary request that, the Supreme Court has cautioned, "is generally inappropriate." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The DCCC has offered no explanation for why this unusual approach is warranted here. And there are significant considerations that counsel against it, including the complexity of the arguments before the Court, issues in the DCCC's briefing about the scope of

the administrative record, and the need for additional time to consider the important questions of federal election law.

At bottom, this suit should be seen for what it is—an eleventh-hour attempt by the D***C***CC to hamstring the NR***S***C from competing on a level playing field with the D***S***CC under rules established and well understood ***for decades***. The judicially created confusion that would result from an order issued on the eve of the election would irreparably harm the NRSC at this critical juncture. The Court should deny the motion for preliminary injunction.

BACKGROUND

A. FECA Limits Contributions To Candidates.

The Federal Election Campaign Act was enacted in 1972. Pub. L. No. 92-225, 86 Stat. 3 (1972). In 1976, Congress amended FECA to limit contributions to candidates. *See* Pub. L. No. 94-238, § 112 90 Stat. 475, 486–90 (1976) (codified at 52 U.S.C. § 30116). One makes a "contribution" to a candidate when he provides something of value to the candidate or his authorized committee.[1] 52 U.S.C. § 30116(a)(7)(A); *id.* § 30101(8)(A). One also makes a "contribution" when he makes "expenditures … in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." *Id.* § 30116(a)(7)(B)(i).

B. The FEC Has A Decades-Old Framework To Determine Whether An Expenditure Is A Contribution.

FECA does not require regulated parties to interpret the law on a blank slate. It instead provides that the FEC may "make, amend, and repeal such rules … as are necessary to carry out

[1] An "authorized committee" includes not only a candidate's principal campaign committee, but also "any other political committee authorized by a candidate … to receive contributions or make expenditures on behalf of such candidate." 52 U.S.C. § 30101(6). A joint fundraising committee in which a candidate is a participant is an authorized committee of the candidate. *Id.* § 30102(e)(3)(A)(ii).

the provisions of this Act." 52 U.S.C. § 30107(a)(8). It also empowers the FEC to "render advisory opinions," *id.* § 30107(a)(7), which create a safe harbor for those who "rel[y]" on such opinions, *id.* § 30108(c)(2).

The FEC has promulgated a rule to determine whether a political communication by a political party becomes a "contribution." *See Coordinated and Independent Expenditures*, Rule, 68 Fed. Reg. 421, 448–49 (2003) (codified at 11 C.F.R. § 109.37). The FEC explained that it was "appropriate and useful for the Commission to promulgate rules … detailing standards for party coordinated communications" in order to "give clear guidance." *Id.* at 448.

Under the FEC's regulation, a political communication becomes a contribution when three requirements are met. *First*, "[t]he communication is paid for by a political party committee or its agent." 11 C.F.R. § 109.37(a)(1). This first requirement is known as "the payment prong." *Second*, the communication contains certain election-related content. *Id.* § 109.37(a)(2). *Third*, the candidate, his authorized committee, or his agent is involved in certain aspects of the communication. *Id.* § 109.37(a)(3); *see also id.* § 109.21(d). This regulation mirrors a similar test that applies more generally—beyond just political parties—that is codified at 11 C.F.R. § 109.21. Plaintiff does not challenge the validity of these regulations.

C. The FEC Has For Decades Held That Joint Fundraising Does Not Result In A Contribution.

Immediately after Congress enacted contribution limits, campaigns began to inquire about the legal status of joint fundraising. In 1977, several Democrat campaign committees inquired about the legal consequences of jointly hosing a "fundraising dinner" in which the funds raised would be distributed by a "Special Committee" pursuant to "an allocation formula." FEC, Advisory Op. 1977-14, at 1, https://tinyurl.com/2p9xucf5 ("Bayh Op."). The FEC explained in an advisory opinion that "the participating presidential campaigns" could "avoid the occurrence of a

contribution in-kind" to one another so long as they bore "a pro-rata share of all fundraising or other expenses of the Special Committee." *Id.* at 2. In other words, "if the allocation formula allows [one] campaign 70 percent of the contributions received by the Special Committee, then that campaign must bear 70 percent of the expenses incurred" to avoid a "contribution." *Ibid.*

The FEC formally codified this commonsense understanding of FECA in 1983. *See Transfer of Funds; Collecting Agents, Joint Fundraising*, Rule, 48 Fed. Reg. 26,296, 26,303 (1983) (codified at 11 C.F.R. § 102.17). The agency explained that its 1977 advisory opinion had already laid out "the basic rules for conducting joint fundraising activities." *Id.* at 26,298. Central to the rule was the pro rata allocation of expenses and funds raised, which is also known as the "funds-received" allocation method. The Commission explained that joint-fundraising participants "must enter into a written agreement which identifies the fundraising representative and states the formula for allocating the fundraising proceeds and expenses."[2] *Id.* at 26,299 (codified at 11 C.F.R. § 102.17(c)(1)). The Commission specified that "[i]f each participant pays its own share of expenses calculated pursuant to this section, ***no contribution in-kind from one or more of the participants occurs***." *Id.* at 26,300 (emphasis added). Indeed, only when "[a] participant … pay[s] expenses on behalf of another participant" does joint fundraising result in a "contribution" from one participant to another. 11 C.F.R. § 102.17(c)(7)(i)(B).

The FEC has repeatedly reaffirmed this clear rule in subsequent advisory opinions. For example, in 2007, two campaign committees asked if they could engage in "joint advertising efforts, such as television, radio, and newspaper advertisements … some or all of which may solicit contributions," provided "all contributions" received would be "divided evenly" and they "split of

[2] The fundraising representative, which may be a separate joint fundraising committee formed for this purpose, "shall be … an authorized committee of each candidate for federal office participating in the joint fundraising activity." 11 C.F.R. § 102.17(a)(1)(i).

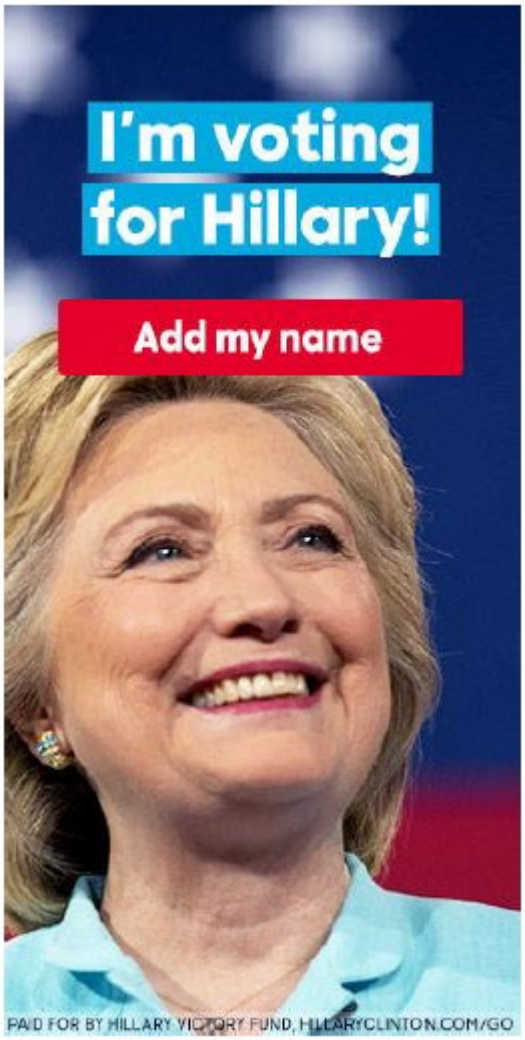
cost" of those "activities equally." FEC, Advisory Op. 2007-24 at 1–2, 5, https://tinyurl.com/yc49pp8z ("Burkee Op."). The FEC answered in the affirmative and explained that any proportionally-split expense by one committee "would not constitute an in-kind contribution to the other's committee." *Id.* at 8.

The FEC reached the same conclusion again earlier this year when Senator Lindsey Graham's principal campaign committee inquired whether it could continue to participate in a joint fundraising committee if the joint fundraising committee added a Super PAC as another participant. FEC, Advisory Op. 2024-07 at 2, https://tinyurl.com/28t4epmh ("Graham Op."). The requestor explained that the Joint Fundraising Committee would make public communications and that "all costs associated with the expanded Joint Fundraising Committee [would] be allocated to and paid proportionally by the expanded Joint Fundraising Committee's participants." *Id.* at 7. The FEC explained that its joint fundraising regulation requires "each participant [to] pay its proportionate share of joint fundraising expenses," and its "coordinated communication" regulation mandates that a communication "must be paid for by a person other than the federal candidate [or] authorized committee" to be coordinated. *Id.* (citing 11 C.F.R. §§ 102.17(c)(7), 109.21(a)(1)). "[B]ecause Team Graham w[ould] pay the full cost of the public communications attributable to Team Graham," the FEC again concluded that such proportionally-divided expenses "will not meet the payment part of the coordinated communications test and, therefore, will not be in-kind contributions to Senator or Team Graham." *Id.*

D. Regulated Parties Have Relied For Decades On The FEC's Conclusion That Joint Fundraising Does Not Result In A Contribution.

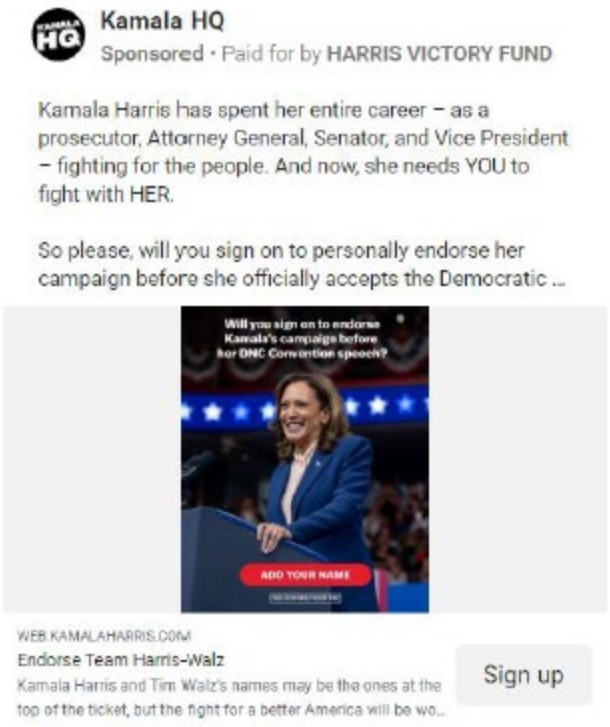
The administrative record shows broad reliance on the FEC's decades-long assurances that joint-fundraising advertising in which expenses are allocated proportional to funds received does not generate in-kind contributions. For example, in 2016, "Hillary Victory Fund, a [joint

fundraising committee] comprised of Hillary for America, the Democratic National Committee, and numerous Democratic state parties, spent approximately $68.8 million" on ads that "contained a wide variety of political advocacy content." Dkt. 1-2 at 14. Several such ads appear below:



Dkt. 1-2 at 26.

And nothing has changed since the Clinton ads. "Presently, Harris Victory Fund, a [joint fundraising committee] comprised of Harris for President, the Democratic National Committee, and numerous Democratic state parties, is sponsoring digital fundraising advertisements." *Id.* at 15. These ads too "contain a variety of electoral content," *id.*, such as the following:



Id. at 34.

There has never been any suggestion that these ads generated an in-kind contribution or were subject to any requirement other than the funds-received allocation rule in 11 C.F.R. § 102.17(c).

E. Notwithstanding Forty-Seven Years Of FEC Precedent On Joint Fundraising, The DSCC Seeks An Advisory Opinion To Quash NRSC Advertisements.

Notwithstanding the clear FEC precedent from 1977 to the August 2024 Graham opinion, Plaintiff and its allies now claim there is a "legal vacuum." Dkt. 6 at 9 (Mot. p. 1). They claim that beginning in "***July*** of this year," Republicans began to run "joint-fundraising-committee television campaign advertisements in Montana" that are functionally "ordinary candidate ads." *Id.* at 17–18 (Mot. 9–10) (emphasis added). After waiting two months, the D***S***CC and two principal campaign committees for Democrat ***Senate*** candidates—none of which are parties to this

case—requested an advisory opinion from the FEC about the legality of this decades-old practice. *Id.* at 22–24 (Mot. 14–16); *see* Dkt. 1-1.

But the point of the request was not, as the DSCC claimed in its initial filing, to obtain guidance regarding its own ads. *Contra* Dkt. 1-1 at 2. The point was to shut down the NRSC joint-fundraising ads using FECA's expedited timeline for advisory opinions. The DSCC designed its proposed ads to mirror the NRSC joint-fundraising ads that the DSCC hoped to quash. And the DSCC's filing offered no defense of those ads and instead sought to distinguish them from the prior on-point advisory opinions. *Id.* at 6. Indeed, in its reply comments, the DSCC revealed its true intentions by asking the FEC to declare its own proposed ads unlawful. *See* Dkt. 1-2 at 72; *see also id.* at 139–40. The DSCC then stated publicly that its filing was designed to shut down NRSC joint-fundraising ads. *Id.* at 130.

After the DSCC consented to the FEC's request for an extension to issue an advisory opinion, the FEC rejected the Democrats' request to break with decades of precedent and declare unlawful their own proposed advertisements. On October 10, the Commissioners voted 3-3 on two draft advisory opinions, falling short of the four-vote threshold required to issue either one. *Id.* at 141; *see* 52 U.S.C. § 30106(c). The FEC's associate general counsel then issued a letter explaining that the agency "concluded its consideration of [the] advisory opinion request without issuing an advisory opinion." Dkt. 1-3 at 2.

Following this deadlock, the DSCC began running the exact joint-fundraising-committee ads that it claimed were in legal doubt. For example, a joint fundraising committee—Michigan Senate Victory 2024—recently placed a television ad attacking Republican Senate candidate Mike Rogers. The ad is jointly funded by the DSCC and Democrat Senate candidate Elissa Slotkin, and the only reference to fundraising is a QR code in the corner that says "donate today."

See Who Are You, Michigan Senate Victory 2024, https://tinyurl.com/fnb7srav.

The DSCC is running similar ads in Pennsylvania:

See Ugly, Pennsylvania Senate Victory 2024, https://tinyurl.com/yc72kprk. And it is running similar ads in Wisconsin:

See Outrageous, Wisconsin Senate Victory 2024, https://tinyurl.com/3b589jeh

F. The DCCC Asks The Court To Clarify Whether Joint Fundraising Results In A Contribution Less Than Three Weeks Before Election Day.

While the D***S***CC continues to run ads similar to the NRSC's joint-fundraising ads, the D***C***CC filed this suit on October 17—a full week after the FEC declined to issue an advisory opinion to the D***S***CC—and requested action within 10 days. The D***C***CC did not participate in the FEC's advisory-opinion process. But continuing the D***S***CC's abuse of that process, the D***C***CC purports here to lack clarity on whether it can issue its own ads and challenges the FEC's "failure to issue an advisory opinion" under the APA. Dkt. 1 at 26–27 (Compl. ¶¶ 89–94). In fact, the DCCC is simply mounting a collateral attack on effective NRSC political speech in the critical final days of an important election.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The plaintiff "must establish that he is likely

to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. "When an election is close at hand," the Supreme Court's *Purcell* principle "heightens the showing necessary for a plaintiff' to obtain preliminary relief. *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring); *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

ARGUMENT

I. THE DCCC IS UNLIKELY TO SUCCEED ON THE MERITS.

A. The DCCC Lacks Article III Standing.

That the DCCC spends more of its motion on convoluted standing theories than it does on the merits is a strong indication that something is amiss. *Compare* Dkt. 6 at 31–35 (Mot. 23–27), *with id.* at 28–31 (Mot. 20–23). And indeed it is.

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Murthy v. Missouri*, 144 S. Ct. 1972, 1985 (2024). To satisfy Article III's "irreducible constitutional minimum of standing," the plaintiff "bears the burden of establishing" three elements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992). "First, the plaintiff must have suffered an 'injury in fact[.]'" *Id.* at 560. That injury "must be legally and judicially cognizable." *United States v. Texas*, 599 U.S. 670, 676 (2023). And when seeking "forward-looking relief," the plaintiff "must face a real and immediate threat of repeated injury." *Murthy*, 144 S. Ct. at 1986. "Second, there must be a causal connection between the injury and the conduct complained of[.]" *Lujan*, 504 U.S. at 560. And "[t]hird, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotations omitted). "At the preliminary injunction stage … the plaintiff must make a clear showing that she is likely to establish each element of standing." *Murthy*, 144 S. Ct. at 1986 (quotations omitted).

1. The DCCC Has Not Suffered An Injury In Fact.

The DCCC claims to suffer three injuries, but none suffice for Article III standing. *First*, the DCCC says it "is injured because the FEC's inaction has left it in legal limbo." Dkt. 6 at 33 (Mot. 25). But the Court can reject this standing theory because it is blackletter law that legal "confusion alone" is "insufficient to confer Article III standing." *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 47–48 (D.D.C. 2021) (Contreras, J.), *aff'd*, 60 F.4th 704 (D.C. Cir. 2023); *see also Gerber Prod. Co. v. Perdue*, 254 F. Supp. 3d 74, 81 (D.D.C. 2017) (Mehta, J.); *ViroPharma, Inc. v. Hamburg*, 777 F. Supp. 2d 140, 147 (D.D.C. 2011) (Huvelle, J.), *aff'd*, 471 F. App'x 1 (D.C. Cir. 2012); *Mylan Pharms. Inc. v. FDA*, 789 F. Supp. 2d 1, 10 (D.D.C. 2011) (Boasberg, J.). Thus, the DCCC can rely on "alleged confusion" only insofar as that confusion results in a concrete, individualized "injury." *See Abrahams v. Simplify Compliance, LLC*, 2021 WL 1197732, at *4 (D.D.C. Mar. 30, 2021) (Moss, J.).

Next, even if confusion were a cognizable injury (it is not), the safe harbors from the ***existing*** advisory opinions alleviate any such confusion. As explained, the Commission has for 47 years consistently declared in advisory opinions that a proportional allocation of expenses and fundraising proceeds would "avoid the occurrence of a contribution in-kind," Bayh Op. at 2, for any "advertising efforts that include solicitations," Burkee Op. at 5; *see also* Graham Op. at 7; 48 Fed. Reg. at 26,300. These FEC advisory opinions provide a safe harbor for those who rely on them in good faith. 52 U.S.C. § 30108(c)(2). And indeed, Democrats and Republicans alike have, for decades, relied on these advisory opinions and engaged in joint-fundraising-committee advertising that is indistinguishable from the ads proposed in the DSCC's advisory-opinion request—including the D***S***CC itself. *See supra*. Thus, even if the D***C***CC is correct on the merits that such advertising is unlawful under the statute, it cannot credibly claim confusion in light of the advisory opinions' safe harbors.

Second, the DCCC claims to "suffer[ ] a competitive injury" because "Republicans" are engaging in joint-fundraising-committee advertising, while "Plaintiff " is not because it fears "severe penalties." Dkt. 6 at 32 (Mot. 24). This claim of injury fails for multiple independent reasons. For one, as already explained, the FEC advisory-opinion safe harbors mean that the DCCC—like all parties—lacks any reasonable basis to fear that the advertising at issue in this case will result in "severe penalties," which alone forecloses its claim of competitive injury.

Next, the DCCC is not a "competitor" at all. The DCCC's "'competitor standing' argument … challenges a government benefit granted to a third party," *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998), i.e., the allegedly unlawful contribution of "tens of millions of dollars" in in-kind contributions to Republican candidates. Dkt. 6 at 32 (Mot. 24). But the DCCC "cannot claim standing as a 'competitor'" of these Republican candidates "because it was never in a position to receive [allegedly unlawful contributions] itself." *Gottlieb*, 143 F.3d at 621. Indeed, the precedent it cites, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), specifically held "that *candidates* could establish such standing to protect their own concrete interests in election or reelection," *AB PAC v. FEC*, 2023 WL 4560803, at *4 (D.D.C. July 17, 2023) (Kelly, J.) (emphasis in original). "Thus, that the candidate[s] whom [the DCCC] plans to support … may suffer a fundraising disadvantage … because of the FEC's inaction … is of no moment; [the DCCC] has not shown that *it* has been disadvantaged." *Id.* (emphasis in original).

Further, the DCCC's suggestion that "it competes with [entities] that support" rival candidates is "[g]rasping at straws." *Id.* at 5. "These rival [supporters] are not parties to which [the DCCC] alleges the government supposedly provided an unlawful benefit, which is required for competitor standing." *Id.* Simply put, the DCCC and rival organizations do not "compete …

directly against candidates" or "directly against each other in the same way candidates do." *Id.* The DCCC is thus not a "competitor" for purposes of establishing competitor standing.

And even if the D***C***CC could establish that it were ***a*** competitor, it has not shown that it currently competes, or will imminently compete, with any candidate or organization that engages in allegedly unlawful joint-fundraising-committee advertising. It instead relies exclusively on such practices by "the National Republican ***Senatorial*** Committee" and "Republican ***Senate*** candidate[s]." Dkt. 1 at 1, 13–19 (Compl. ¶¶ 1, 42–58) (emphases added); Dkt. 6 at 17–21 (Mot. 9–13). But the D***C***CC's "mission is to elect Democratic candidates to the ***U.S. House of Representatives***." Dkt. 1 at 5 (Compl. ¶ 14) (emphasis added). Because the D***C***CC has made no claim that Republican ***House*** candidates with which it competes engage in—or are imminently about to engage in—such unlawful practices, the D***C***CC has failed to "show that [it] personally competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit." *Gottlieb*, 143 F.3d at 621; *Common Cause v. FEC*, 108 F.3d 413, 419 n.1 (D.C. Cir. 1997) (denying "political competitor standing" because organization was "likely not a political competitor of" the "NRSC"); *see also Air Excursions LLC v. Yellen*, 66 F.4th 272, 279-80 (D.C. Cir. 2023) (explaining that "[t]o invoke competitor standing," plaintiff must "show that it is in fact a *direct* and *current* competitor") (quotations omitted; emphasis in original); *PSSI Glob. Servs., L.L.C. v. FCC*, 983 F.3d 1, 11–12 (D.C. Cir. 2020) ("competitor standing requires actual participation in the relevant market."); *compare with Shays*, 414 F.3d at 84 (finding competitor standing only where candidates submitted sworn affidavit that attested to "strong risk" of "unregulated … contributions" in "federal elections in which [plaintiff was] a candidate").

Finally, even if the DCCC could show it competed in the relevant political arena, it independently fails to show a competitive "disadvantage." Dkt. 6 at 32 (Mot. 24). The reason is

simple: the DCCC's competitors are subject to the exact same purported legal ambiguity and thus the exact same regulatory playing field. Accordingly, the DCCC cannot show "illegal under-regulation of [its] competitor" because all political committees face the same "regulatory burdens." *Compare State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (no competitive injury where competitor faced "*greater* regulatory burden"), *with Shays*, 414 F.3d at 92 (finding competitor standing where "affidavits" swore to "distinct risk" of "disadvantage").

Third, the DCCC claims to "suffer[ ] an informational injury" because it "does not know how much each committee is paying for each advertisement." Dkt. 6 at 33–34 (Mot. 25–26). But "[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 442 (2021) (quotations omitted). Rather, a plaintiff must show "a concrete interest in the information sought." *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013). Here, the only interest the DCCC asserts is its competitive interest. Dkt. 6 at 34 (Mot. 26) ("access to the withheld information would assist Plaintiff in evaluating the campaign strategy of rival candidates"). Because that competitive injury is illusory, so too is the deprivation of information that would purportedly help alleviate it. And although the DCCC's lawyers claim an informational injury, its declarant does not. *See generally* Dkt. 6-4. Bare assertions by counsel unsupported by evidence cannot substantiate the "clear showing" of "standing" the DCCC must make to obtain an injunction. *See Murthy*, 144 S. Ct. at 1986. Finally, the DCCC challenges unlawful contributions to candidates—not reporting violations. However, Republican candidates' "purported receipt of excessive contributions" does not create an "informational injury." *AB PAC*, 2023 WL 4560803, at *5.

2. The DCCC's Alleged Injuries Are Not Traceable To The Challenged Conduct.

The DCCC independently lacks standing because its alleged injuries are not traceable to the FEC's "failure to issue an advisory opinion." Dkt. 1 at 27 (Compl. ¶ 93); *see also* Dkt. 6 at 38 (Mot. 30) (challenging "the FEC's October 10 final order"). That is because all three of the DCCC's alleged injuries—legal confusion, a competitive disadvantage, and a lack of information—occurred "before" the FEC failed to issue an advisory opinion. *Murthy*, 144 S. Ct. at 1992. As to legal confusion, the D***C***CC does not—and could not—claim that it is any more confused about the law now than it was before the FEC deadlocked on the D***S***CC's advisory-opinion request. And on competitive and information injury, the DCCC claims that Republicans were running allegedly unlawful joint-fundraising-committee ads "[i]n July of this year." Dkt. 6 at 17 (Mot. 9). Even if that ***July*** conduct created a cognizable injury, it could not have been caused by the FEC's ***October*** inaction. Thus, the DCCC cannot show traceability.

B. The DCCC Does Not Challenge Final Agency Action.

The DCCC purports to frame its lawsuit under section 706(2) of the APA. Specifically, it alleges that the deadlocked votes leading to the "FEC's October 10, 2024 Closeout Letter" is an "agency action that is contrary to law." Dkt. 1 at 27 (Compl. Prayer For Relief ¶ A); Dkt. 6 at 27 (Mot. 19). Citing APA section 706(2), the DCCC asks the Court to "vacate[ ] and set aside the FEC's final order that unlawfully refused an advisory opinion." Dkt. 6 at 27–28, 30–31, 35 (Mot. 19–20, 22–23, 27) (cleaned); *see id.* at 38 (Mot. 30) (asking Court to "vacate[ ] and set[ ] aside the FEC's October 10 final order as arbitrary and capricious and contrary to FECA"); Dkt. 6 at 1 (cover motion requesting same).

It is blackletter law that a section 706(2) claim requires "final agency action." 5 U.S.C. § 704; *see Delaware Valley Reg'l Ctr., LLC v. DHS*, 106 F.4th 1195, 1203 (D.C. Cir. 2024) ("If

there was no final agency action, there is no doubt that appellant would lack a cause of action under the APA." (citation omitted)). To satisfy this requirement, a plaintiff must show the satisfaction of "two conditions." *Bennett v. Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process." *Id.* at 177–78. "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Ibid.* (quotations omitted). Agency action is nonfinal where it "tread[s] no new ground," and instead leaves "the world just as it found it." *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428.

Contrary to the DCCC's contention (Dkt. 6 at 31 (Mot. 23)), the FEC's "deadlocked decision" is not final agency action. The D.C. Circuit has squarely held that, in general, a "deadlock" is not an agency "'action' of any kind." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169–70 (D.C. Cir. 2016); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007) ("The deadlocked vote cannot be considered an order of the Commission nor can it constitute agency action."). That is because a deadlock "does not reflect an agency decision that fully resolved the issue or completed the process." *Pub. Citizen*, 839 F.3d at 1171. It in fact does "quite the opposite, leaving [the agency] mired in indecision and impasse." *Ibid.* Thus, under binding circuit precedent, the FEC's "deadlock does not constitute agency action." *Id.* at 1172.

FECA creates a limited exception for enforcement deadlocks, but that exception does not apply here. As the D.C. Circuit has explained, the reason FEC enforcement deadlocks are judicially reviewable is that FECA expressly allows "'[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party ... or by a failure of the Commission to act on such complaint' to seek judicial review." *Pub. Citizen*, 839 F.3d at 1170 (quoting 52 U.S.C. § 30109(a)(8)(A)) (emphasis omitted); *see also Common Cause v. FEC*, 108 F.3d 413, 415 (D.C.

Cir. 1997) ("when the Commission deadlocks and consequently dismisses a complaint, the 'declining-to-go-ahead Commissioners are a 'controlling group' for purposes of" "judicial review"). In that narrow situation, "the treatment of probable cause deadlocks as agency action is baked into the very text of the statute." *Pub. Citizen*, 839 F.3d at 1170; *accord* 5 U.S.C. § 704 (allowing review of "action made reviewable by statute").

But FECA's review provision for deadlocked enforcement actions under section 30109 does not apply to deadlocked advisory-opinion requests under section 30108, so the default APA rule applies. Indeed, there is no parallel provision under section 30108 authorizing "judicial review of … the FEC's failure to issue" "advisory opinions." *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 332 (D.D.C. 2020) (Bates, J.); *compare* 52 U.S.C. § 30108, *with id.* § 30109(a)(8)(A). That is, after all, the reason the DCCC seeks review under the APA, not FECA. And while *Public Citizen* acknowledged that the FEC's "structural design" makes deadlocks more common, the Circuit made clear that only this design "together" with FECA's express statutory "requirement to dismiss complaints in deadlock situations" created an "exception to the rule" that deadlocks are not reviewable. *Pub. Citizen*, 839 F.3d at 1171.

It makes no difference that actual advisory opinions and FEC rules are reviewable under the APA. *See, e.g.*, *Unity08 v. FEC*, 596 F.3d 861, 864–65 (D.C. Cir. 2010) (reviewing advisory opinion); *Chamber of Com. of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (reviewing "challenge to [a] final rule" after "no Advisory Opinion issued"). In those circumstances, an affirmative vote by at least four FEC Commissioners establishes the reviewable final agency action. And in *Public Citizen*, the D.C. Circuit explained that "[t]he lack of collective action attributable to the entire Commission distinguishes" agency deadlocks from an agency action that actually "*issued an order*." *Pub. Citizen*, 839 F.3d at 1172 n.5 (emphasis in original).

Nor does the purported threat of enforcement from a lack of safe harbor make the deadlock final agency action. In *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004), the D.C. Circuit held that an EPA letter stating the agency's interpretation of its regulations was not final agency action because it "d[id] not reflect any change in EPA's … regulations or its interpretation of those regulations." *Id.* at 426. Although EPA there had actually "announc[ed] its intention to increase enforcement," *id.* at 423, the D.C. Circuit still found the challenged letter nonfinal because it did not "relate to a specific enforcement action or case pending before the Agency," *id.* at 427; *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 449 (D.C. Cir. 2004) (holding letter from an agency enforcement official nonfinal where it "reflect[ed] neither a new interpretation nor a new policy"). If the threat of stepped-up agency enforcement combined with the issuance of a letter to a potential target of such enforcement was not enough to support finality, then plainly the circumstances here cannot either.

This Court's decision in *Ready for Ron v. FEC*, 2023 WL 3539633 (D.D.C. May 17, 2023) (Moss, J.) does not conflict with these binding circuit precedents. There, the FEC actually issued an advisory opinion that addressed all but one issue, and no party contended that the agency's failure to reach that issue made the advisory opinion nonfinal as to that issue. *See id.* at *5. There was thus no need for this Court to consider finality, as the "APA's finality requirement is not jurisdictional" and is therefore "forfeited" when not "raised … with the District Court." *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012). As a result, while the Court independently assured itself of its "Article III" jurisdiction, *Ready for Ron*, 2023 WL 3539633, at *3 n.3, and determined the "standard of review," *id.* at *17, it did not and was not required to consider whether that the FEC deadlock on one issue made the advisory opinion nonfinal. But here, where there is no

advisory opinion at all, and finality has not been forfeited but is affirmatively raised, D.C. Circuit precedent precludes an APA cause of action.

Judge Ellis's opinion in *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012), confirms as much. In fact, the D.C. Circuit favorably cited *Hispanic Leadership Fund* for the proposition that an "FEC deadlock" over an advisory-opinion request is "unreviewable." *Public Citizen*, 839 F.3d at 1170; *see also id.* at 1171. To be sure, like this Court in *Ready for Ron*, Judge Ellis did not have before him a finality objection and thus did not need to dismiss the case on that issue. Nevertheless, contrary to the DCCC's assertions, Judge Ellis there explained that a deadlock in response to an advisory-opinion request "d[oes] not result in, reviewable agency action." *Hisp. Leadership Fund*, 897 F. Supp. 2d at 428. Thus, *Hispanic Leadership Fund*—which the DCCC cited twice during this Court's status conference—further confirms that the deadlock here is not final agency action.

That the limited exception for judicial review of certain FECA enforcement deadlocks cannot apply here is confirmed by the fact that there is no explanation to review. When the D.C. Circuit held that an FEC "dismissal due to a deadlock is reviewable," it required the Commissioners who rejected the General Counsel's recommendation "to state their reasons why." *DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987). "Absent an explanation by the Commissioners for the FEC's stance," then-Judge Ruth Bader Ginsburg explained, the reviewing court "cannot intelligently determine whether the Commission is acting 'contrary to law.'" *Ibid.*; *see also id.* at 1135 ("Because we have no explanation why three Commissioners rejected or failed to follow the General Counsel's recommendation, we are unable to say whether reason or caprice determined the dismissal of DCCC's complaint."); *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (similar). But the D.C. Circuit has never required an analogous explanation for

deadlocks on advisory opinions, and here the record contains neither a Commissioner-level opinion nor a Commission-endorsed staff recommendation that could enable meaningful review under FECA or the APA.

The DCCC cannot escape these reviewability hurdles by tacking on a Declaratory Judgment Act claim. *See* Dkt. 1 at 5 (Compl. ¶ 12). That is because the "Declaratory Judgment Act" does not "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). Thus, the D***C***CC can "seek declaratory relief" only if it independently "allege[s] a cognizable cause of action." *Ibid.*; *see also Jones v. U.S. Secret Serv.*, 701 F. Supp. 3d 4, 14 n.1, 16–17 (D.D.C. 2023) (Chutkan, J.) (rejecting Declaratory Judgment Act claim after finding no final agency action under the APA).

Lastly, these finality issues do not leave the DCCC without any avenue to judicial relief. Where, as here, a party (the DCCC) believes that action undertaken by a third party (the NRSC) violates FECA, the normal procedural route is to "file a complaint with the Commission." 52 U.S.C. § 30109(a)(1). Then, as explained, FECA authorizes the party to appeal the Commission's deadlock on such a complaint. *Id.* § 30109(a)(8). Thus, if the DCCC wants to challenge "potential violations of campaign finance law," Dkt. 6 at 32 (Mot. 24), it can file a complaint with the FEC and seek judicial review under the established statutory process. Indeed, the availability of this "other adequate remedy in a court" independently precludes an APA cause of action in this case. *See* 5 U.S.C. § 704; *see CREW v. DOJ*, 846 F.3d 1235, 1244–46 (D.C. Cir. 2017).

C. The DCCC Cannot Prevail By Compelling Action.

Although the DCCC frames this lawsuit under the 706(2) arbitrary-and-capricious standard, it at times uses language that appears more appropriate for a failure to act claim under 706(1). *See* Dkt. 1 at 26 (Compl. ¶ 90) ("The FEC failed to issue … an AO requested by the DSCC"); Dkt. 6 at 31 (Mot. 23) (the "FEC deadlocked in the face of its obligation"), 35 (Mot. 27)

(citing 5 U.S.C. § 706(1)). But even if the DCCC had fully committed itself to a failure to act claim, it would necessarily fail because FECA prohibits the Commission from issuing an advisory opinion absent four affirmative votes.

The Supreme Court has made clear that "a claim under 706(1) 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 (2004) (emphasis in original); *see Elec. Priv. Info. Ctr. v. Internal Revenue Serv.*, 910 F.3d 1232, 1244 (D.C. Cir. 2018). "If such a claim is found meritorious, the proper remedy is for the court to compel the withheld or delayed agency action." *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 333 (D.D.C. 2020) (Bates, J.) (citing 5 U.S.C. § 706(1)). The court "has no power to specify what the action must be." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1098 (D.C. Cir. 2015) (quoting *Norton*, 542 U.S. at 65).

Here, the DCCC argues 52 U.S.C. § 30108 required the FEC to issue an advisory opinion. But FECA expressly prohibits the FEC from issuing an advisory opinion without the affirmative votes of four Commissioners. *Compare* 52 U.S.C. § 30106(c) ("the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph … (7) … of section 30107(a)") *with* § 30107(a)(7) (authorizing the FEC "to render advisory opinions under section 30108 of this title"). Furthermore, there is no FECA provision that authorizes the Commission to circumvent the four-vote requirement upon a deadlocked advisory opinion vote. *See McCutcheon*, 496 F. Supp. 3d at 333. Rather, "FEC regulations permit the issuance of 'a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members' in lieu of a requested advisory opinion." *Ibid.* (quoting 11 C.F.R. § 112.4(a)).

Congress's decision to couple the advisory opinion process with the four-vote requirement shows "Congress's dual intent that the FEC respond expeditiously to requests for advisory opinions, and that it only issue advisory opinions where a bipartisan majority of its members agree on the merits of a request." *McCutcheon*, 496 F. Supp. 3d at 333. Thus, as Judge Bates recently explained, to compel the FEC to "issue an advisory opinion with fewer than four affirmative votes" would violate the overall statutory design to "impermissibly produce an absurd result which Congress could not have intended." *Ibid.* (quoting *Clinton v. New York*, 524 U.S. 417, 429 (1998) (citation omitted)); *see Fischer v. United States*, 144 S. Ct. 2176, 2183 (2024) ("we must give effect, if possible, to every clause and word of the statute" (cleaned)). Construing FECA as a whole, Judge Bates concluded that plaintiffs challenging a deadlocked FEC vote were "unlikely to succeed on the merits of their claim that the FEC unlawfully withheld the requested advisory opinion." *McCutcheon*, 496 F. Supp. 3d at 333.

The same is true here. As the complaint and motion both explain and the administrative record confirms, the Commission took votes on two draft advisory opinions with two different proposed answers about the DSCC's proposed ads and deadlocked 3-3 both times. Dkt. 1-2 at 141. Because FECA prohibits the FEC from issuing an advisory opinion on a deadlocked vote, *see* 52 U.S.C. § 30106(c), the FEC did all that was required by section 30108. Therefore, the DCCC is unlikely to succeed on the merits of a claim that the FEC unlawfully withheld the requested advisory opinion.

Regardless, a failure to act claim could not entitle the DCCC to the merits relief it seeks. As explained, a court that compels agency action withheld or delayed "has no power to specify what the action must be." *Norton*, 542 U.S. at 65. For example, if a statute tells an agency to issue regulations, the court can enter "a judicial decree … requiring the prompt issuance of regulations,

but not a judicial decree setting forth the content of those regulations." *Ibid.* Therefore, even if FECA required the Commission to issue an advisory opinion regardless of the deadlock, this Court could only direct the FEC to issue that opinion. It could not, as the DCCC contends, specify what that opinion ought to say.

For the same reasons, the DCCC's failure to act claim would also fail if it was reconceptualized under section 706(2) (and if this Court was to look past the finality issue). *But see Skalka v. Kelly*, 246 F. Supp. 3d 147, 152 n.6 (D.D.C. 2017) (Leon, J.) (explaining "order compelling action … is available under § 706(1) but not § 706(2)"). Section 706(2) allows this Court to "hold unlawful and set aside *agency action, findings and conclusions*." 5 U.S.C. § 706(2) (emphasis added). The only agency action the DCCC has purported to identify is "[t]he FEC's failure to issue an advisory opinion." Dkt. 1 at 27 (Compl. ¶ 93); Dkt. 6 at 30–31, 38 (Mot. 22–23, 30). But, as explained, the FEC could not have issued the opinion because it did not have the four votes required by Congress. *See FEC v. Cruz*, 596 U.S. 289, 301 (2022) (explaining agency "literally has no power to act … unless and until Congress authorizes it to do so by statute."). Thus, the Commission's failure to issue an advisory opinion "was compelled by law and could not have been arbitrary, capricious, or an abuse of discretion." *McCutcheon*, 496 F. Supp. 3d at 334. "If anything, the FEC would abuse its discretion by rendering an advisory opinion without the requisite four-vote approval[.]" *Ibid.*

Thus, regardless of whether the DCCC's claim for relief is considered under section 706(1) or 706(2), it cannot show that the FEC acted unlawfully.

D. The Joint Fundraising Committee Advertisements Presented To The FEC Are Lawful.

For each of the threshold reasons outlined above, this Court may not answer the legal question the FEC declined to address about whether the DSCC's purported proposed

advertisements are lawful. But if it does, it should hold that the challenged joint-fundraising advertisements are lawful under the "relevant regulations," the FEC's "prior advisory opinions," and FECA itself. *See Ready for Ron*, 2023 WL 3539633, at *18. And because review in this APA case is limited to the hypothetical advertisements presented in the advisory-opinion request and thus contained in the agency record, the Court should not render its own advisory opinion by reaching out to decide questions about potential advertisements that were not before the agency.

1. The Joint Fundraising Committee Advertisements Are Permitted Under FEC Regulations And Advisory Opinions.

The Commission's longstanding regulation is clear. "Political committees may engage in joint fundraising with" one another. 11 C.F.R. § 102.17(a)(1)(i). When funds are jointly raised, they are distributed to the participants under "a formula … stated as the amount or percentage of each contribution received to be allocated to each participant." *Id.* § 102.17(c)(1). Expenses for the joint fundraising are then allocated proportionally to "the percentage of the total receipts each participant had been allocated" under that formula. *Id.* § 102.17(c)(7)(i). Use of this proportionality formula does not result in in-kind contributions. Rather, a participant is "subject to the contribution limits" of FECA only when it "pay[s] expenses on behalf of another participant." *Id.* § 102.17(c)(7)(i)(B). If "each participant pays its own share of expenses … no contribution in-kind from one or more of the participants occurs." 48 Fed. Reg. at 26,300.

That understanding of the regulation is clear on its face and so the regulation "just means what it means—and the court must give it effect, as the court would any law." *See Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). But even if the regulation were unclear, the FEC would be entitled to deference because it has consistently reaffirmed that reasonable interpretation of its own regulation in advisory opinions for 47 years. *See* Bayh Op. at 2; Burkee Op. at 8; Graham Op. at 7; *see also Kisor*, 588 U.S. at 568. And, as explained above, Republicans and Democrats alike have for years

engaged in joint-fundraising-committee solicitations using the Commission's funds-received allocation rule.

In its 203-page submission, the DCCC offers only two sentences on why it thinks the FEC's decades-long interpretation of the joint-fundraising-committee regulation is incorrect. It claims that the "regulation only permits fundraising expenses to be excepted from FECA's limits where solicitation is actually taking place," so "at most only the portions of the advertisements that directly solicit funds could fall within the so-called solicitation exception." Dkt. 6 at 30 (Mot. 22). However, that supposed limitation the DCCC seeks to impose does not appear "in the rule's text," *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 53 n.4 (2023), and, therefore, does not exist.

In fact, the rule says the opposite. It provides that "[t]he procedures in 11 CFR 102.17(c)"—i.e., the proportional funds-received allocation of expenses—"will govern *all* joint fundraising activity conducted under this section." 11 C.F.R. § 102.17(a)(1)(i) (emphasis added). That approach is categorical. And "[a]s other regulations make clear, the [FEC] knows how to use language that" allocates expenses non-categorically and in the DCCC's preferred manner. *Stand Up for California! v. United States Dep't of the Interior*, 994 F.3d 616, 623 (D.C. Cir. 2021). For example, another regulation allocates expenses "by the proportion of space or time devoted to" a given candidate. 11 C.F.R. § 106.1(a)(1). No such language appears in the joint-fundraising-committee regulation. Courts "presume" that such "omission[s]" are "intentional." *Am. Forest Res. Council v. United States*, 77 F.4th 787, 800 (D.C. Cir. 2023).

The FEC's advisory opinions confirm this understanding. The 2007 Burkee Advisory Opinion holds that "[e]xpenses for joint advertising efforts that *include solicitations must be allocated*" pursuant to the proportional-allocation formula in 11 C.F.R. § 102.17(c). Burkee Op. at 5 (emphasis added). And participants must allocate expenses "according to the benefit

reasonably expected to be derived" only for "advertising *activities* that *do not include solicitations*." *Ibid.* (emphasis added). Because "include" means "to 'contain' or 'comprise as part of a whole,'" *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001), the regulation functions as a bright line rule. If the communication "includes" a solicitation, section 102.17(c)'s proportionality formula kicks in. If it does not "include" a solicitation, a different rule kicks in. But there is no inquiry into which *parts* of each communication constitute a solicitation.

Thus, the challenged advertisements comply with the FEC's regulations and advisory opinions.

2. The Joint Fundraising Committee Advertisements Are Consistent With FECA.

FECA provides a technical definition of "contribution." As relevant here, a "contribution" includes "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." 52 U.S.C. § 30116(a)(7)(B)(i). However, FECA expressly distinguishes "contributions" from "transfers between political committees of funds raised through joint fund raising efforts" and seeks to not "limit" the latter. *Id.* § 30116(a)(5). And it authorizes "candidates" to "designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee." *Id.* § 30102(e)(3)(A)(ii). Thus, FECA recognizes that joint fundraising is both permissible and distinct from contributions.

The Commission's joint-fundraising regulation elucidates the line between "contributions" and "joint fundraising." Using its rulemaking authority, *see* 52 U.S.C. § 30107(a)(8), the FEC has drawn a bright line rule: if a communication contains a solicitation and is jointly funded pursuant to a funds-received allocation formula, its purpose is for raising funds, and thus each participant's

payment of its own proportional share of expenses does not result in any contributions among the joint-fundraising participants. *See supra*.

Congress subsequently "ratified" that contemporaneous interpretation. *See Hikvision USA, Inc. v. FCC*, 97 F.4th 938, 946–47 (D.C. Cir. 2024). After Congress enacted FECA's contribution limits in 1976 with an express distinction between "contributions" and "joint fund raising efforts," Pub. L. No. 94-238, § 112 90 Stat. 475, 486–90 (1976), the Commission issued advisory opinions that blessed the creation of "a 'Special Committee'" to serve as a "depository for receiving [joint-fundraising] contributions and making distributions to the participating campaigns" without triggering "the occurrence of a contribution in-kind." Bayh Op. at 1–2. Then, in 1980, Congress amended FECA to add an express authorization for candidates to "designate a political committee" for "joint fundraising by such candidates as an authorized committee." Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980). In other words, Congress adopted the exact joint-fundraising model endorsed by the FEC advisory opinions issued between 1976 and 1980. Thus, "all indications are here that Congress was well aware of the legal and administrative landscape when it" amended FECA, making it proper to "infer that Congress intended" to codify the FEC's categorical division between contributions and joint fundraising. *Hikvision*, 97 F.4th at 947.

At minimum, the FEC's regulation is entitled to *Skidmore* respect. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2259 (2024). The FEC held that joint-fundraising activities did not generate in-kind contributions as early as 1977, *see* Bayh Op. at 2, the year after Congress added contribution limits to FECA. The FEC formally codified that understanding four years later in 1983, and it has maintained it for decades, even as FECA has been repeatedly amended. Respect under *Skidmore* is thus "especially warranted" because the "Executive Branch

interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright*, 144 S. Ct. at 2258.

The DCCC's argument ignores this text, structure, and history. It claims that "any payment" for "television advertisements to promote a candidate is a contribution to that candidate." Dkt. 6 at 29 (Mot. 21). But that argument assumes the statutory conclusion: that joint-fundraising committee ads are made "to promote a candidate." As explained, that is not the line drawn by Congress and the agency. The DCCC simply ignores FECA's distinction between "contributions" and "joint fundraising," as well as the decades of agency practice ratified by Congress.

Next, the DCCC relies on a policy argument: it claims that joint-fundraising advertisements that do not appear in the administrative record are "indistinguishable from candidate advertisements" and thus exploit "a loophole." Dkt. 6 at 29–30 (Mot. 21–22). However, calling joint-advertising advertisements a "loophole" is a concession that the practice is legal. *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 462 (2014) (Scalia, J., dissenting) ("It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes."). And an anticircumvention rationale does not justify "[a]bandoning the text" unless a contrary interpretation would render the law "useless." *Garland v. Cargill*, 602 U.S. 406, 427 (2024). A "law is not useless merely because it draws a line more narrowly than one of its conceivable statutory purposes might suggest." *Ibid.* Applied here, FECA treats as contributions coordinated communications *without* a joint-fundraising solicitation. "The fact that it does not capture" communications *with* joint-fundraising solicitations "plainly does not render the law useless." *Id.* at 427–28.

Finally, the DCCC claims that its interpretation is necessary to avoid "absurd results." Dkt. 6 at 30 (Mot. 22). Not so. The 47-year-old bright-line rule distinguishing between contributions and joint fundraising ensures that "speakers" need not "retain a campaign finance attorney … or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324. Indeed, the Supreme Court has repeatedly explained that FECA requires statutory "specificity" because "the legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley v. Valeo*, 424 U.S. 1, 41 (1976). That the longstanding rule is clear does not make it absurd. To the contrary, it is the DCCC's fuzzy position—which apparently turns on whether a solicitation is "bona fide" or "pretextual," Dkt. 6 at 21, 30 (Mot. 13, 22), and would require ad-by-ad review—that would produce serious vagueness and workability issues.

Thus, the challenged advertising comports with FECA.

3. Relief Is Limited By The Advisory-Opinion Request.

The DCCC asks this Court to reach out and determine that all "JFC-advertising falls squarely within FECA's definition of 'coordinated expenditure,'" Dkt. 6 at 29 (Mot. 21), or, alternatively, that "only the portions of the advertisements that directly solicit funds" are excepted, *Id.* at 30 (Mot. 22). But those questions are far broader and admit far more variation than the questions the D***S***CC presented to the Commission about specific, proposed joint-fundraising advertisements featuring Democratic candidates in Montana and Arizona. *See* Dkt. 1-1 at 4. And it would be improper for the Court to reach beyond the questions actually presented by the agency action that is supposedly under review.

The D***C***CC's presentation of materials outside the administrative record proves this point. For one thing, it betrays the DCCC's fundamental misperception of this Court's role in an APA action. "[W]hen a party seeks review of agency action under the APA, the district judge sits as an

appellate tribunal." *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1240 (D.C. Cir. 2011); *see Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009). "Challengers to agency action are not," therefore, "ordinarily entitled to augment the agency's record." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Review in an agency case is limited to determining whether an agency acted lawfully based on the reasons it gave to justify its actions. *See Rempfer*, 583 F.3d at 865. It is not a license to reach out and decide every additional question the DCCC would like answered. Indeed, to the extent the DCCC asks this Court to assess extra-record, hypothetical ad variations it has expressed no interest in running, a decision by this Court would violate "the rule against advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see ibid.* ("the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions").

The advisory-opinion request presented to the FEC below asks about the proper allocation method under a very specific scenario: "television advertisements that primarily advocate for the election of either Senator Tester or Congressman Gallego but also contain a brief fundraising solicitation at the end of the advertisements." Dkt. 1-1 at 2. These proposed ads, the request explains, would include a script that claims that "Senator Tester" (or Congressman Gallego) "gets it" and then close with an audio appeal where the candidate says "Join my team and donate now," while "a QR code" is presented "on screen" for "four seconds" that links to a fundraising page for the joint fundraising committee. *Id.* at 4.

Despite this highly specific factual scenario, the motion for preliminary injunction focuses on joint fundraising committee ads featuring Republican senatorial candidates that appear neither in the administrative record nor in the Complaint. *See* Dkt. 6 at 17–21 (Mot. 9–13). Some of these ads in the motion differ from the ads proposed by the D*S*CC. For example, in the ad for Larry

Hogan cited on page 11 (Dkt. 6 at 19), a QR code and the words "Donate Now" are visible for nearly the entire length of the ad, not "four seconds" as in the administrative record, Dkt. 1-1 at 4. Meanwhile, and though the motion neglects to mention it, joint fundraising committee ads featuring Democratic senatorial candidates in Michigan, Wisconsin, and Pennsylvania contain QR codes of varying sizes and no audio solicitations. *Supra*. This Court cannot parse these and all other possible permutations that were not presented to the FEC—especially in this emergency posture.

Nor can this Court hold in this posture that all joint fundraising committee advertisements are coordinated expenditures. The applicable regulations were adopted decades ago, while the statute of limitations for facial challenges to FEC rules is six years. *See* 28 U.S.C. § 2401(a). The DCCC has not explained why the exception for "'those affected' when an agency 'seeks to apply a rule'" should apply here. *See CREW v. FEC*, 971 F.3d 340, 348 (D.C. Cir. 2020). After all, the DCCC was not the requestor below, and its failure to assert the as-applied exception "in its opening brief" means it is waived. *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 128 n.10 (D.C. Cir. 2008). And even if this Court were inclined to excuse the DCCC's waiver, an as-applied exception merits only as-applied relief. *See Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014) ("The distinction between facial and as-applied challenges goes to the breadth of the remedy employed by the Court" (cleaned)). For this reason too, this suit is limited to the advertisements presented to the Commission, and the DCCC cannot use it to declare all joint fundraising committee advertisements coordinated expenditures.

Finally, the DCCC's reliance on extra-record materials is an independent basis for denial. As explained, the DCCC's merits theory relies entirely on an anticircumvention rationale that it tries to substantiate based on extra-record evidence about "Republican" advertisements. *Compare*

Dkt. 6 at 28–31 (Mot. 20–23) (repeatedly citing "Background § B" in merits argument), *with id.* at 15–21 (Mot. 7–13) (relying in background on screenshots and Internet materials that are not cited in administrative record). The Court should reject the DCCC's invitation to commit reversible error by considering "an overinclusive record on review." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984); *see also CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014).

II. THE EQUITIES STRONGLY DISFAVOR RELIEF.

A. The Balance Of Harms Disfavors The DCCC.

The DCCC lacks any irreparable harm. As explained above, the DCCC has not suffered and will not imminently suffer any judicially cognizable harm. Because "demonstrating irreparable injury" is an even "more demanding burden" than "establish[ing] standing," the lack of injury in that context precludes a finding of irreparable harm here. *California Ass'n of Priv. Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, 170 (D.D.C. 2018) (Moss, J.).

The supposed threat of enforcement also cannot establish irreparable harm. The DCCC did not participate at all in the advisory-opinion proceedings below, undermining the claim that it genuinely perceives a real enforcement threat. Furthermore, the FEC deadlock shows there are not four votes to enforce against the ads the DCCC says it wants to run. And the DCCC cannot cite a single instance where the Justice Department initiated enforcement after an FEC deadlock—indeed, FECA does not even allow the Commission to "refer" a matter "to the Attorney General" absent "a knowing and willful violation" and the "affirmative vote of 4 of its members." 52 U.S.C. § 30109(a)(5)(C).

That the DCCC waited ***months*** to pursue relief also confirms that it lacks irreparable harm. By the DCCC's telling, the NRSC's joint-fundraising committees "began" running the allegedly unlawful ads in "July." Dkt. 1 at 1 (Compl. ¶ 1). As explained, the D***C***CC never asked the FEC

for an advisory opinion, and the D***S***CC waited until September 18. *Id.* at 19 (¶ 61). The D***C***CC never even bothered to file comments. Then, after the FEC deadlocked and closed the file, the D***C***CC waited another full week to file this challenge. *Id.* at 23 (¶ 79). Now, the DCCC wants emergency judicial relief with Election Day in just 12 days.

The DCCC's delay is sufficient to reject its claim of irreparable injury. The D.C. Circuit has rejected claims of irreparable harm where a plaintiff waited "44 days" to remedy its rights. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975). And other courts in this Circuit have repeatedly rejected irreparable harm for similar delays. *See, e.g*, *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (Howell, J.); *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) (Bates, J.); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (Roberts, J.) (finding that delay of two months in bringing action negated any showing of irreparable harm).

The reason why is plain. Such delay "implies a lack of urgency" and "stands in stark contrast to the high bar the plaintiffs must clear to show irreparable harm." *Open Top Sightseeing USA*, 48 F. Supp. at 90 (cleaned). This lack of urgency is particularly inexcusable where the party seeking preliminary relief has "knowledge of the pending nature of the alleged irreparable harm." *Id.* (cleaned); *see Newdow,* 355 F. Supp. 2d at 292 (denying preliminary injunction of presidential inauguration prayers where plaintiff had notice of the event more than one month prior to filing). Thus, a party may not craft its own emergency through inaction. The DCCC's three-month delay in seeking extraordinary relief—with full knowledge that each passing day brings the election nearer—is "inexcusable," and "bolster[s]" the "conclusion that an injunction should not issue." *Frizzell*, 530 F.2d at 987.

Weighed against the lack of harm to the DCCC is the substantial harm that an injunction would place on the other national political party committees, including the NRSC. "The NRSC would be injured if it is forced to change its joint-fundraising ads" by an injunction because, among other things, "[t]he NRSC and its nominees' campaigns would need to make changes to their strategy at a late stage in the election" causing them to "incur substantial costs." Dkt. 14-1 at 2 (Thielman Decl. ¶ 11). It would take time to make these changes, hampering their "joint-fundraising efforts in the critical final weeks and days before the election, when the public is most engaged and most likely to donate to political causes." *Id.* at 2 (¶ 10). Presumably, the DSCC would also be injured, as the DSCC is running joint fundraising committee ads in Michigan, Wisconsin, and Pennsylvania, *supra*, and potentially other States as well.

The NRSC will be further injured through the bypass of the statutory protections to which it is entitled. The DCCC alleges the NRSC violated FECA (it did not). FECA directs "[a]ny person who believes a violation" has occurred to "file a complaint with the Commission." 52 U.S.C. § 30109(a)(1). The administrative process for Commission investigation of such complaints contains important procedural protections for the respondent, including timely notification of the allegations in writing and an opportunity to oppose. *See id.* § 30109(a)(1)–(3). Recognizing that the potential for abuse of the complaint process rises near an election, the statute contains additional protections for respondents "during the 45-day period immediately preceding any election." *Id.* § 30109(a)(4). That the DCCC is attempting to stop the NRSC's lawful joint-fundraising ads outside the statutory process established by Congress is further evidence that the equities disfavor preliminary relief.

B. The *Purcell* Principle Independently Forecloses Relief.

While the DCCC faces no irreparable harm, its request to alter the election rules mere weeks before Election Day promises chaos in violation of the *Purcell* principle. That principle

guards the critical days leading up to election day from hasty judicial intervention that would disturb public expectations. *See Purcell*, 549 U.S. at 8. The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *RNC*, 589 U.S. at 424.

Purcell applies to campaign-finance rules just like other election laws. *See Lair v. Bullock*, 697 F.3d 1200, 1202, 1214 (9th Cir. 2012) (granting stay and citing *Purcell* where injunction of contribution limits would threaten the fairness of imminent election). Indeed, "[c]ampaign finance rules are key to the legal landscape that shapes our political contests." *OPAWL - Bldg. AAPI Feminist Leadership v. Yost*, 2024 WL 4441458, at *2 (6th Cir. Oct. 8, 2024). It "affects who can speak, how much they can speak, and what they can speak about." *Ibid.* And as election day draws nearer, that speech gains substantial influence as more and more voters participate in the public discussion. *Citizens United*, 558 U.S. at 333–34 ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."). Eleventh-hour changes to campaign-finance rules thus threaten to disrupt the "delicate campaign contribution equilibrium leading up to [an] imminent election." *Yost*, 2024 WL 4441458, at *2.

Purcell thus forecloses the DCCC's requested relief. Here, the DCCC filed its suit to change the election-rule status quo less than three weeks before election day even though it claims the complained-of advertising began in ***July***. Setting aside the merits, the time has long passed for the DCCC to seek extraordinary emergency relief with nationwide impact. *See DNC v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (denying application to vacate stay where district court injunction was issued 43 days before election). As discussed, if the DCCC wanted to seek preliminary relief, it had ample time to do so. The Court should not entertain its belated efforts now.

"When an election is close at hand, the rules of the road must be clear and settled." *See Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring). Accordingly, the *Purcell* principle is a sufficient and independent reason to deny the injunction. *See RNC*, 589 U.S. at 425; *see also Merrill*, 142 S.Ct. at 879 (staying injunction even though legislative districts at issue were later held unlawful in *Allen v. Milligan*, 599 U.S. 1 (2023)).

III. THE COURT SHOULD NOT ISSUE A FINAL JUDGMENT.

The DCCC also perfunctorily asks "the Court [to] consolidate the expedited preliminary injunction hearing with a trial on the merits pursuant to Rule 65(a)(2)." Dkt. 6 at 1–2 (cover motion); *see also* Dkt. 6 at 35 (Mot. 27) (briefly mentioning in standing section). The Court should deny this extraordinary request.

Consolidation is not "granted automatically in any case in which plaintiff seeks a preliminary injunction." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2950 (3d ed. June 2024 Update). To the contrary, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

This case is a poor candidate for consolidation. For one, this case involves multiple "complex issue[s] of statutory interpretation," regulatory interpretation, and threshold jurisdictional and APA issues, such as finality. *W. Virginia Ass'n of Cmty. Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1579 (D.C. Cir. 1984). These complexities counsel in favor of "considerable pause" before issuing a final judgment at this preliminary stage. *Ibid.*

So too does the lack of an "administrative record." *Physicians for Soc. Resp. v. Buttigieg*, 2024 WL 4119384, at *5 n.6 (D.D.C. Sept. 8, 2024) (Kelly, J.) (denying consolidation). As explained, the DCCC relies on extra-record materials for its merits argument, but it has not moved to supplement the record or taken steps to authenticate its extra-record evidence. Some materials

also appear to be lacking from the administrative record—for example, a transcript of the FEC hearing. *See* Dkt. 6 at 26 (Mot. 18) (quoting Commissioner via citation to a YouTube video). These issues are why this Court requires appropriate references to the administrative record before proceeding to a final judgment in agency-action cases. *See* Sample Standing Order In Civil Cases at 4 (¶ 10.c.i) (updated 2019), https://tinyurl.com/bdhnbch4. Final judgment is thus inappropriate.

The "haste" of the current matter also counsels strongly against a final judgment. *See Camenisch*, 451 U.S. at 395. A non-emergency schedule is necessary to ensure that the NRSC has "a reasonable time … to prepare a showing upon which the final outcome of the case may depend." Wright & Miller § 2950. Indeed, the DCCC seeks to invalidate—or, at minimum, significantly reinterpret—a 40-year-old regulation on the eve of an election. An issue of such importance deserves full merits briefing on a reasonable timeline.

At minimum, additional notice would be required before proceeding to a final judgment. Parties "should normally receive clear and unambiguous notice of the court's intent to consolidate the trial and the hearing either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Camenisch*, 451 U.S. at 395 (alterations omitted). At present, the Court has set a "Hearing On Motion for Preliminary Injunction." *See* Minute Entry, 10/21/2024. Absent clear notice, consolidation at this preliminary-injunction hearing would be "reversible error." Wright & Miller § 2950.

CONCLUSION

The Court should deny the motion for a preliminary injunction and reject Plaintiff's request for consolidation.

Dated: October 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2024, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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