IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DCCC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, NRSC, Intervenor-Defendant.	Civil Action No. 24-cv-2935 **(Hearing: Monday, October 28, 2024)**

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The merits of this case concern a very simple but important question: Does the Federal Election Campaign Act (FECA) permit a political party committee to subsidize the television advertisements of its candidates—to the tune of *tens of millions of dollars*—without having to declare a single penny of such coordinated expenditure as a "contribution" to that candidate? The answer to that question is no, as straightforward application of FECA's text makes clear. Yet neither the FEC nor NRSC ("Defendants") engage with that text at all. The FEC simply ignores the merits question altogether, while NRSC relies on flawed readings of agency rules and opinions to paper over the governing statutory scheme. But it is Congress's chosen text, as interpreted by this Court, that governs—not the agency's own rulemaking. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (explaining in APA context that it is the duty of courts "to independently interpret the statute and effectuate the will of Congress subject to constitutional limits").

With little to say on the merits, Defendants focus overwhelmingly on procedural issues, none of which serve as a barrier to relief. Plaintiff has standing: it is *injured* by FEC's failure to either prohibit an unlawful tactic that its competitors are exploiting or grant safe harbor protection to do the same; that injury is *traceable* to FEC's failure to issue a proper advisory opinion consistent with FECA; and those injuries will be *redressed* by relief here, as NRSC effectively concedes by acknowledging that a favorable ruling here would lead it to stop its own JFC-advertising (*i.e.*, advertising of the sort described in Advisory Opinion Request ("AOR") 2024-13). DCCC also has an actionable APA claim. The FEC issued a "Final Opinion" indicating it had "concluded" consideration of AOR 2024-13. Pl.'s Mot. for Prelim. Inj. ("Mot."), Ex. B at 141, ECF No. 6-2; Mot., Ex. C at 2, ECF No. 6-3. That Final Opinion had both practical and legal

consequences that harmed DCCC, which must continue to compete on uneven terms with its Republican rivals while also deprived of safe harbor protection. That readily satisfies the two requirements to find final agency action. The Court should reject Defendants' attempt to impose a sweeping and categorical rule over what must necessarily be a "pragmatic" and "flexible" inquiry. *Ciba–Geigy Corp. v. EPA,* 801 F.2d 430, 435–36 (D.C. Cir. 1986) (citation omitted). Nor was DCCC required to pursue other administrative remedies before pursuing its APA claim. Defendants' insistence that DCCC should have filed a complaint under 52 U.S.C. § 30109, makes no sense as DCCC readily acknowledges it would engage in the conduct at issue in AOR 2024-13 if permitted. Furthermore, filing a complaint under § 30109 offers no prospect of an "adequate" remedy prior to the election—such a course of action takes months if not years to pursue, as FEC itself stresses here. And § 30108 does not require DCCC to pursue parallel administrative relief.

The equities also strongly support preliminary relief. The flood of JFC-advertising—including by Republican *House* candidates—makes a mockery of FECA's contribution limits and imposes a severe competitive injury to DCCC and its members. In contrast, NRSC has *zero* legal interest in being allowed to continue to violate campaign finance laws. The FEC likewise has little interest in preserving a Final Opinion that fundamentally fails to apply FECA. The public interest also overwhelmingly favors upholding Congress's campaign finance regime and restricting unlawful political advertisements. Finally, Defendants' request to dramatically expand the scope of the so-called *Purcell* doctrine to the FEC context falls flat. They cannot cite a *single* case applying *Purcell* to a dispute over FECA and doing so would run contrary to the statute itself—FECA *expressly* contemplates an expedited advisory opinion process when elections are near, undercutting the idea that federal campaign finance rules must be frozen into place ahead of an election. *See* 52 U.S.C. § 30108(a)(2). And, fundamentally, *Purcell* cautions against confusing

voters with late-breaking changes to election rules that may frustrate their ability to vote; neither Defendant offers any coherent explanation as to how relief here will confuse voters.

At bottom, this case is simple. Congress has imposed strict limits on how much party committees may contribute to their candidates or expend on their behalf. *See generally* 52 U.S.C. § 30116**.** Various Republican committees, including but not limited to Intervenor-Defendant NRSC, are now wantonly violating those limits in a manner that harms DCCC, without any explanation as to how their conduct complies with FECA. The agency tasked with interpreting and applying FECA has issued a Final Opinion that abandons Congress's statutory commands. And DCCC seeks only modest preliminary relief—an order that preliminary sets aside the FEC's Final Opinion as contrary to law, followed in due course by a permanent injunction and declaratory judgment to the same end. Such relief is permitted by the APA, *see* 5 U.S.C § 706(2), and will ameliorate DCCC's ongoing injuries by making clear the agency misapplied its own governing statute. Plaintiff's motion for a preliminary injunction should be granted.

ARGUMENT

I. This Court has subject matter jurisdiction.

This Court has subject matter jurisdiction because DCCC satisfies the three elements of standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

A. DCCC is suffering at least three ongoing injuries.

Competitive injury. Congress enacted FECA to "promote fair practices in the conduct of election campaigns for Federal political offices." Pub. L. No. 92–225, 86 Stat. 3 (1972). It thus "reflect[s] a legislative purpose to protect a competitive interest" in fair elections. *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005) (citation omitted). DCCC's interest in such fair competition has been harmed by an agency that has permitted DCCC's "rival part[y]" to engage in "additional

tactics" that are unlawful and thus create an "illegally structur[ed] competitive environment." *Id.* at 85–86; *see also* Mot., Ex. D ¶¶ 7–9 ("Merz Decl.").

The FEC's and NRSC's efforts to downplay this cognizable injury miss the mark. To start, both the FEC and NRSC try to make hay of the fact that NRSC and Republican *senatorial* candidates blazed the trail in placing unlawful JFC-advertisements. FEC's Opp'n to Pls.'s Mot. for Prelim. Inj. 17–18, ECF No. 17 ("FEC Br."); NRSC's Opp'n to Pl.'s Mot. for Prelim. Inj. 17, ECF No. 16 ("NRSC Br."). That argument fails for at least two reasons. *First*, NRCC and Republican **House** candidates are now imitating Republican Senate candidates, proving DCCC's claim that Republicans are "rapidly expanding" this unlawful tactic to an unfair advantage.[1] *See* Mot. 1, ECF No. 6. One of these ads—sponsored by a joint fundraising committees aligned with a Montana congressional candidate—urges voters to "Defeat Kamala Harris" and to "defeat the liberals," while attacking Democratic congressional candidate Monica Tranel. *See Radical Scheme*, *supra* n.1. Like the proposed ads in AR 2024-13, the ad contains only fleeting fundraising solicitations. *Id.* Defendants' notion that DCCC asserts a "mismatched" competitive injury ignores reality on the ground.

Second, the argument is wrong anyway, resting on an empty formalism that ignores the content of the advertisements at issue. For example, this ad on behalf of Nebraska Senator Deb Fischer attacks Vice President Harris as "radical," and claims that by supporting her opponent—Independent candidate Dan Osborn—"Democrats Win. You Lose."[2] Many of the advertisements

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[1] *E.g.*, *Join the Fight*, Downing Victory Fund, https://host2.adimpact.com/admo/viewer/3a26588f-a1e0-48e5-8bb4-bf368399f51b; *Radical Scheme*, Zinke Victory Fund, https://host2.adimpact.com/admo/viewer/7da8c8f4-548b-45d8-8301-3e2783051517

[2] *Radical Too*, Fischer Victory Fund, https://host2.adimpact.com/admo/viewer/263839c3-6342-494e-8994-70813391f0ef.

at issue attack Democratic candidates for their affiliation with Democratic leaders and promote Republican views on issues like inflation and immigration.[3] Defendants' argument that DCCC and its candidates suffer no competitive harm from these ads rests on the fanciful notion that bombarding the airwaves with *tens of millions of dollars* of ads that expressly attack *Democrats, Democratic leaders, and Democratic policies* has no harmful impact on *Democratic congressional candidates* in those jurisdictions, running on coordinated tickets alongside Democratic Senate candidates.

Defendants' remaining arguments as to competitive standing are irrelevant. In *Gottlieb v. FEC*, several voters and a multicandidate PAC challenged *presidential candidate* Bill Clinton's transfer of funds from a primary election account to a general election account. *See* 143 F.3d 618, 619 (D.C. Cir. 1998). Those plaintiffs lacked competitor standing because, unlike Bill Clinton, they were "never in a position" to engage in the challenged tactic and "[o]nly another candidate could make such a claim." *Id.* at 621. But DCCC ***is*** in the same position as its competitors here because it can—and would—engage in the JFC-advertising tactic if it had safe harbor to do so. *See* Merz Decl. ¶¶ 6, 9. In other words, it is plain that DCCC "competes in the same arena" as organizations like NRCC and NRSC—which are now engaging in JFC-advertising—and is "disadvantaged" by its rivals' employment of this unlawful tactic. *Gottlieb*, 143 F.3d at 621 (citation omitted).

Defendants' reliance on *AB PAC v. FEC*, No. 22-2139, 2023 WL 4560803, at *4 (D.D.C. July 17, 2023), fails for the same reason. As in *Gottlieb*, the *AB PAC* court found that a ***PAC*** (not a party committee) could not claim competitive standing against Donald Trump, rejecting the idea

[3] *E.g.*, *Time For A Change*, Nev. Victory Comm./Brown, https://host2.adimpact.com/admo/viewer/24b9d9a0-99c7-45ef-a7ca-a491a530a08d.

that "any participant in the political arena" could claim competitor status. *Id.* DCCC's claim is not so far-reaching: it "face[s] genuine rivalry from candidates *and parties* 'in a position,' … to exploit FEC-created loopholes." *Id.* (quoting *Shays*, 414 F.3d at 87) (emphasis added). NRSC's suggestion that only *candidates* may invoke this theory of standing is therefore simply wrong. *See Nat. L. Party of U.S. v. FEC*, 111 F. Supp. 2d 33, 45–46 (D.D.C. 2000) (holding political parties may assert competitive injuries). And DCCC has alleged that the FEC provided an unlawful benefit to rival Republican committees and candidates by looking away from their unlawful conduct. Compl. ¶ 92. Moreover, unlike the PAC in *AB PAC* and the plaintiffs in *Gottlieb*, DCCC stands in the same shoes as its members—Democratic candidates for Congress—and would work *with* such candidates to pursue JFC-advertising towards their shared goal of electing Democrats to Congress. *See* Merz Decl. ¶¶ 3–9.

Finally, NRSC asserts that DCCC suffers no competitive disadvantage because it is subject to "the exact same regulatory playing field." NRSC Br. 18; *see also* FEC Br. 18 (similar). The D.C. Circuit rejected that *exact* argument in *Shays*. The plaintiffs there had standing even though they too could "exploit[] illegal FEC safe harbors themselves." 414 F.3d at 89. But "being put to the choice of either violating [the law] or suffering disadvantage in their campaigns is itself a predicament" that campaign finance law is intended to spare political actors, and "the statute spares them, having to make that choice constitutes Article III injury." *Id.* at 88–89 (observing law was meant to protect plaintiffs "interest in fair reelection contests").

Chill injury. DCCC is also suffering a chill injury because it indisputably *would* engage in JFC-advertising—which is clearly core political speech—if it could do so without risking legal penalties. *See* Merz Decl. ¶ 9. NRSC claims, in effect, that such chill is unreasonable because previous advisory opinions immunize DCCC from possible FECA sanctions. NRSC Br. 15. But

that is nonsensical. The conduct DCCC wishes to engage in is precisely the conduct described in AOR 2024-13. Merz Decl. ¶ 9.[4] And, as to that specific conduct, the FEC just days ago *deadlocked* as to whether it violates FECA, depriving DCCC of any safe harbor and suggesting at least three Commissioners believe the conduct to be illegal. This Court has already held such an outcome "deprive[s]" a party seeking to engage in such conduct "of any protection against subsequent enforcement." *Ready for Ron v. FEC*, No. 22-3282 (RDM), 2023 WL 3539633, at *3 (D.D.C. May 17, 2023) (collecting authority). "As a result, '[n]othing ... prevents the Commission from' instituting an enforcement action 'at any time,' including after, 'perhaps, another change of mind of one of the Commissioners' in the case of a deadlocked non-opinion." *Id.* at *3 n.3 (quoting *Chamber of Com. of the U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995)). No FEC advisory opinion has *ever* blessed the JFC-advertising tactic at issue, which Republicans only began "quietly piloting" this election cycle. Ally Mutnick, *et al.*, *Senate Republicans to save millions of dollars on ads — thanks to the FEC*, Politico (Oct. 10, 2024), https://www.politico.com/news/2024/10/10/fec-joint-fundraising-committee-ads-00183356.

Relatedly, both the FEC and NRSC dispute that placing DCCC in "legal limbo" constitutes an injury. FEC Br. 20–21; NRSC Br. 15. But that misconstrues the nature of Plaintiff's injury. The point is that the FEC has placed DCCC in a position where it is injured whichever way it turns—a competitive injury if it stays the course or, alternatively, running headlong into the prospect of

[4] The FEC disputes this point in a footnote, contending DCCC has provided no support for the idea that it would engage in indistinguishable conduct to that at issue in AOR 2024-13. FEC Br. 16 n.5. That is incorrect: DCCC would "readily mirror the facts proposed in FEC Advisory Opinion Request 2024-13" if it could. Merz Decl. ¶ 9. Such a claim is plainly credible and consistent with DCCC's "mission of electing Democratic candidates and ensuring that [such] candidates can compete on fair terms with Republicans." *Id.* ¶ 6.

enforcement and punishment. Merz Decl. ¶ 7. In either scenario, DCCC suffers a discrete and actionable Article III injury.

Informational Injury. Finally, DCCC is suffering an informational injury. By pretending that their coordinated expenditures are not contributions or coordinated party expenditures under FECA, various Republican committees are avoiding independently reporting such expenditures to the FEC and are instead only reporting them as expenditures made by joint fundraising committees. *See* Compl. ¶ 86; Mot. 25–26; *see also* 52 U.S.C. § 30104 (imposing reporting requirements for contributions). Because this puts Plaintiff in the dark as to how much each expenditure for television advertising raises, it cannot determine how much each Republican committee comprising a single joint fundraising committee is paying for each ad. If these expenses were being reported as contributions or coordinated party expenditures as is required under FECA, DCCC would readily be able to determine how much each Republican committee is paying for the JFC-advertising at issue—including how much in excess of FECA limits. Declaring that the conduct at issue in AOR 2024-13 *is* a contribution will require these committees to "reveal" "expenditure funded coordinated activities" they are currently withholding. *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 790 (D.C. Cir. 2022). That will resolve DCCC's interest "in knowing 'who is funding [] candidates' campaigns,' and 'how much money a candidate spent in an election.'" *Id.* at 790–91(citations omitted).

Only NRSC disputes that this injury is an injury in fact. *See* NRSC Br. 18. It contends that this injury is no different than DCCC's competitive injury. *Id.* But that injury is itself valid for the reasons above. And, in any event, disclosure of the contributions at issue "relate[] to [DCCC's] informed participation in the political process," *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013),

which both the Supreme Court and D.C. Circuit have found suffice to satisfy Article III's injury-in-fact requirement, *id.* (collecting cases).

B. DCCC's harms are traceable to the FEC's Final Opinion.

NRSC also briefly contests traceability. NRSC Br. 19. The gist of their argument is that DCCC's injuries existed *prior* to AOR 2024-13, and thus cannot be laid at the FEC's feet. *Id.* But that is wrong. The entire purpose of the advisory opinion process is "to allow participants in the political process to operate with substantial certainty regarding their legal obligations." *Ready for Ron*, 2023 WL 3539633, at *3. DCCC therefore reasonably expected to rely on the outcome of the DSCC's AO request, as it faces the same competitive harm and would—if permitted—engage in the conduct at issue in AOR 2024-13 if it could. *See generally* Merz Decl.

By deadlocking, the FEC deprived DCCC and others of an advisory opinion condemning the unlawful tactic that Republican committees are now employing with abandon. *Cf. Shays*, 414 F.3d at 87 (finding injury fairly traceable to FEC-created loopholes in its rules). At the same time, it deprived DCCC and others of safe harbor protections that would let them reliably fight fire with fire. *See Ready for Ron*, 2023 WL 3539633, at *3 & n.3; *accord Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010); *Chamber of Com.*, 69 F.3d at 603–04. If the FEC had reached a majority in *either* direction, these harms would have at least been ameliorated for purposes of the current election.

C. Granting preliminary relief is likely to redress DCCC's ongoing injuries.

The redressability requirement is also satisfied. To establish redressability, DCCC need only show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.,* 528 U.S. 167, 180–81 (2000)). Meeting this standard does not require it to "show to a certainty that a favorable decision will redress [its] injury." *Teton*

Historic Aviation Found. v. U.S. Dep't of Def., 785 F.3d 719, 726 (D.C. Cir. 2015) (citation omitted); *see also Bennett v. Donovan*, 703 F.3d 582, 589 (D.C. Cir. 2013) (similar where plaintiff sought to set aside unlawful agency action and agency could take further steps on remand). The Court's order need not afford *complete* relief—even "partial relief" is "sufficient for redressability." *Swan v. Clinton*, 100 F.3d 973, 980 (D.C. Cir. 1996) (finding redressability satisfied given likelihood executive officials would adhere to court's "authoritative interpretation" of statute in declaratory ruling); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) ("[T]he ability 'to effectuate a partial remedy' satisfies the redressability requirement" (citation omitted)).

Here, there is no doubt that a favorable decision from the Court will afford DCCC at least some relief. Plaintiff seeks to have the FEC's Final Opinion set aside as contrary to law. *See* Compl. 27 (citing 5 U.S.C. § 706(2)). Doing so will at least partially redress Plaintiff's ongoing competitive injury. There is no need to speculate on this score, as NRSC admits that "an adverse judgment here would prevent the NRSC from using any joint fundraising committee arrangements that mirror the facts proposed in FEC Advisory Opinion Request 2024-13." NRSC Mot. for Leave to Intervene 5, ECF No. 14 ("MTI"); *see also* MTI, Ex. A ¶¶ 7, 10–11, ECF No. 14-1 ("Thielman Decl.") (acknowledging NRSC engages in JFC-advertising at issue in AO 2024-13 and admitting it "would have to change" its advertising tactics if Plaintiff is granted relief). Taking NRSC as its word, a favorable ruling here will redress DCCC's injury by causing NRSC to cease its unlawful behavior. *See Teva Pharms. USA, Inc. v. FDA*, 514 F. Supp. 3d 66, 92 (D.D.C. 2020); *see also Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994) (competitive injury likely redressed by court order that would "effectively prohibit" competitor's harmful behavior). This outcome on its own will provide relief to DCCC, which is harmed by the NRSC's activities

as discussed. *See supra* § I.A. But there is also little reason to doubt that DCCC's other Republican Party competitors—including party committees and candidates—would similarly cease such advertisements. *Cf. Uzuegbunam*, 141 S. Ct. at 801 (redressability satisfied where court order is likely to "affect the behavior" of other parties towards plaintiff (citing *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (cleaned up)). Tellingly, NRSC does not dispute redressability.

Similarly, the FEC is likely to adhere to this Court's ruling, including in any future rulemaking and in the advisory opinion process. *See Swan*, 100 F.3d at 980; *cf. Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (assuming it "substantially likely" that coordinate branches of government would respect declaratory ruling). The FEC insists redressability is lacking because it cannot issue a new advisory opinion prior to the election. FEC Br. 20. But Plaintiff does not seek to compel the issuance of any specific advisory opinion. *See infra* § II.C. Plaintiff seeks only to set aside—in effect, vacate—the FEC's "Final Opinion" because it is contrary to FECA and harms DCCC by forcing it to bear either an agency-tolerated competitive injury or the prospect of enforcement. Setting aside such unlawful agency action satisfies redressability. *See Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 657 (D.C. Cir. 2005) (vacating agency action redressing plaintiff's injury by giving it a new opportunity to persuade the agency); *see also Campaign Legal Ctr.*, 31 F.4th at 793 (explaining as to informational injury that setting aside "the agency's action" would "likely redress Appellants' injury in fact").[5] The Court may then in turn issue a declaratory judgment that further redresses DCCC's harm. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). Although the FEC claims it is "hypothetical" that setting

[5] The FEC also briefly contests the redressability of DCCC's informational injury, but in doing so appears to conflate Article III standing and the irreparable harm required for preliminary relief. *See* FEC Br. 20–21.

aside the Final Opinion will discourage Republicans from engaging in JFC-advertising, FEC Br. 22, that assertion is undercut by NRSC's *concession* that relief here would do just that, *supra* § I.C.

Moreover, and in the alternative, Plaintiff has also established that the FEC's failure to grant safe harbor protection in its Final Opinion has chilled DCCC from mirroring the Republicans' tactics. *See* Compl. ¶¶ 82, 86, 93–94; Mot. 18–19; *see also* Merz Decl. ¶¶ 6–7. The Court may at least partially redress this injury by exercising its equitable authority to enjoin the FEC from pursuing enforcement actions against DCCC if the organization seeks to match its rivals' tactics in the waning days of election season. *See Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016) (enjoining FEC enforcement would "undoubtedly" redress injury from organization wishing to engage in political speech). And it can then reach a final adjudication on the merits in due course. *Cf. Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003) (purpose of preliminary relief is to "merely preserve[] the status quo pending final adjudication").

The bottom line is that Plaintiff is suffering because the FEC's failure to issue a lawful Advisory Opinion has deprived it of the opportunity and ability to compete for votes on an even playing field. The Court has several avenues for redressing such harm, and accordingly has subject matter jurisdiction over this dispute.

II. DCCC is likely to prevail on the merits.

A. The FEC's Final Opinion fails to apply FECA's statutory text and is not in accordance with law.

Missing from both the FEC's and NRSC's briefs is any answer to the question at the heart of this case: Does FECA permit a political party committee to subsidize the television advertisements of its candidates—to the tune of *tens of millions of dollars*—without having to declare a single penny of such coordinated expenditure as a "contribution" to that candidate? The answer is no. Any other answer would turn FECA's contribution limits into dust. The FEC does

not even endeavor to answer this merits question, while NRSC rushes to first explain how the FEC's *rules* justify such behavior. *See* NRSC Br. 28. But this Court, of course, must "start with the statutory text" and "enforce the statute that Congress enacted." *Allegheny Def. Project v. FERC*, 964 F.3d 1, 18 (D.C. Cir. 2020) (cleaned up).

Thus, here, the Court must start with the meaning of "contribution," which is a "gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). A committee therefore makes a "contribution" when it provides money or something of value to help one of its candidates win a federal election. Congress has placed strict limits on how much may be contributed to candidates, including by committees. *See id.* § 30116(a), (d); *see also* Compl. ¶¶ 19–20. A committee may not evade making a contribution by simply coordinating with a candidate to spend money on their behalf. Such expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, *shall be considered to be a contribution to such candidate*." 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added). This coordination rule is important because, without it, party committees could "finance campaign activity directly – say, paying for a TV ad or printing and distributing posters" without regard to contribution limits. *Shays*, 414 F.3d at 97. The merits here require no more than application of that basic statutory text.

Nothing in FECA exempts payments for television advertisements—including the sort at issue in AOR 2024-13—from contribution limits because of the pretextual addition of a QR code and brief request to "donate now" at the tail end of an ordinary candidate advertisement. And the statutory text cited by NRSC on this score is limited. It points chiefly to the fact that "candidates may designate a political committee established solely for the purpose of joint fundraising by such

candidates as an authorized committee," 52 U.S.C. § 30102(e)(3)(A)(ii), and that, in turn, "transfers between political committees of funds raised through joint fund raising efforts" do not count as contributions. *Id.* § 30116(a)(5). But that text means no more than it says: when political committees jointly work to fundraise—including by designating a committee to perform such joint fundraising—they may "transfer" the "funds raised" between the joint fundraising committee and the participant committees without it counting as a contribution. *Id.* Nothing in that language immunizes *expenditures* made by political committees from counting as contributions, and certainly not *advocacy* made "in cooperation, consultation, or concert" with a candidate to "influenc[e] any election for Federal office"—the heartland concern of Congress's statutory design. *Id.* §§ 30101(9)(A)(i), 30116(a)(7)(B)(i). Those two statutory provisions—neither of which uses the term "contribution" or "expenditure"—are the sum total of NRSC's statutory rationale for why it may obliterate FECA contribution limits and place unlimited television ads on behalf of its candidates in order to "influenc[e] [their] election for Federal office." *Id.* § 30101(8)(A)(i). But this interpretation would erase cornerstone definitions of what a "contribution" is, "creat[ing] a loophole that effectively vitiates the plain language" of FECA. *Campaign Legal Ctr. v. FEC*, 466 F. Supp. 3d 141, 158 (D.D.C. 2020); *accord FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 438 (2001) ("Expenditures coordinated with a candidate … are contributions under the Act.").

The FEC failed to apply Congress's enacted statutory text in issuing its Final Opinion on AOR 2024-13. The AOR asked whether a party committee could coordinate with a candidate and, through the use of a joint fundraising committee, finance the cost of a television ad dedicated almost entirely to "influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); *see also* Mot., Ex. B at 73. Revised Draft B would have rejected the request because FECA and agency

rules "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." Mot., Ex., B at 90. This conclusion was well-grounded in and consistent with the governing statutes, yet it failed to garner a majority because three Commissioners voted for Draft A, which simply ignores this statutory text in reliance on various agency rules. *Id.*, Ex. C.

As a result, the agency's failure to resolve the AOR with a Final Opinion that applies the relevant statutory text was "not in accordance with law" and is arbitrary and capricious. 5 U.S.C. § 706(2)(A). "It is hornbook law that an agency cannot grant itself power via regulation that conflicts with plain statutory text." *Doe, 1 v. FEC*, 920 F.3d 866, 874 (D.C. Cir. 2019) (Henderson, J., concurring); *see also Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009) ("[R]egulation contrary to a statute is void."); *Murphy v. IRS*, 493 F.3d 170, 176 n.* (D.C. Cir. 2007) (if "the regulation conflicts with the plain text . . . the statute clearly controls"). Because the Final Opinion reflects a failure to properly apply FECA's statutory text, it should be "h[e]ld unlawful and set aside." 5 U.S.C. § 706(2).

NRSC's remaining merits arguments are grasping. It first claims that Congress—in 1980—"ratified" joint fundraising rules permitting the sort of JFC-advertising that Republicans first launched this election cycle. NRSC Br. 31. But there is no plausible basis for ratification here. As NRSC admits, the FEC only "codified" its rules around such conduct in 1983—three years after Congress supposedly ratified them. *Id.* at 7. Moreover, as NRSC further acknowledges, the FEC's rules at that time addressed questions like whether costs for a "fundraising dinner"—a fundraising tactic fundamentally different from the conduct at issue here—constituted contributions when the dinner sought to raise joint funds. *See id*. 6–7. It is farcical to suggest that Congress ratified rules

permitting JFC-advertising—which no one had done until Republicans quietly launched their test balloons late into this election cycle—over four decades ago based on a rule addressing fundraising dinner costs. The sort of ratification argument NRSC puts forth requires "abundant evidence that Congress both contemplated and authorized" the agency's view. *CFTC v. Schor*, 478 U.S. 833, 846–47 (1986). None exists here.

Finally, NRSC contends DCCC "assumes the statutory conclusion"—that joint fundraising ads are "contributions"—in arguing that "joint-fundraising committee ads are made 'to promote a candidate.'" NRSC Br. 32. But that is a puzzling claim because AOR 2024-13 expressly states that nearly all of the advertisements at issue "will be devoted to messaging supporting [a candidate] and may include express advocacy." Mot., Ex. A at 5; *see also id.* at 6 (stating "87 percent of the advertising is dedicated to candidate advocacy"). In other words, the only ads that are relevant here are those that promote a candidate. Even so, the FEC failed to deem expenditures supporting such "advocacy" as a contribution. Both the FEC and NRSC have failed to square that conclusion with FECA.

B. The FEC's Final Opinion may not be rationalized by agency rules alone, which do not condone JFC-advertising anyways.

With little to say about the text of FECA, NRSC chiefly relies upon the FEC's rules to justify the conduct at issue in AOR 2024-13, as well as many of its own advertisements. *See* NRSC Br. 27–30. But that puts the cart before the horse. Agency action can only be justified by its own rules when those rules are consistent with statute. *E.g.*, *Orion Reserves Ltd. P'ship*, 553 F.3d at 703. As explained, the plain text of FECA makes clear that the conduct at issue in AOR 2024-13 is the sort of coordinated expenditure the law requires be counted as a contribution. No rule can change that. Instead, as a "reviewing court under the APA," this Court must "independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper*

Bright, 144 S. Ct. at 2263. Indeed, such review is particularly critical where, as here, a regulatory regime established to regulate the costs of "fundraising dinners" has—at least in NRSC's view—been enlarged to permit party committees to subsidize a candidate's television advertisements without limit. *Id.* at 2261 (explaining purpose of APA is to serve as a check on administrators commit "excesses not contemplated in legislation creating their offices" (citation omitted)).

In any event, the FEC's existing rules only *confirm* that the Commission acted contrary to law. JFC-advertising is not at all consistent with the FEC's joint fundraising regulations, which state that "[a] participant may only pay expenses on behalf of another participant subject to the contribution limits" and that no participant may subsidize or make a contribution to any other participant in excess of the contribution limits. 11 C.F.R. § 102.17(c)(7)(ii)(B). Moreover, nothing in the FEC's advisory opinions sanctions JFC-advertising. Although NRSC relies mightily on Advisory Opinion 2007-24 (Burkee/Walz), that AOR did not present the question here. There, the FEC approved allowing a joint fundraising committee to pay for public communications, allocated on a 50/50 split, because that requestor stipulated that on all advertising, the two competing candidates who comprised the joint fundraising committee would be featured equally. That AOR did not ask the Commission to consider the facts presented in AOR 2024-13, where a party committee is subsidizing a candidate's television advertisements.

C. Plaintiff's claim does not seek to compel agency action or extend beyond the scope of AOR 2024-13.

Finally, both the FEC and NRSC misconstrue the scope of DCCC's claim and the relief it seeks, but neither tact defeats Plaintiff's likelihood of success on the merits. First, NRSC argues that any relief is limited by the scope of the AOR under review. *See* NRSC Br. 33–36. Plaintiff does not contend otherwise. In asking the Court to set aside the FEC's Final Opinion, Plaintiff seeks review of whether the FEC failed to apply FECA as to the "specific" advertisement proposed

in the AOR, as well as advertisements that are "indistinguishable in all its material respects" from those at issue in AOR 2024-13. 52 U.S.C. § 30108(c)(1)(B). Those are precisely the sorts of advertisements DCCC wishes to engage in. Merz Decl. ¶ 9. And, by NRSC's own admission, many of its own advertisements "mirror the facts proposed in FEC Advisory Opinion Request 2024-13." Thielman Decl. ¶ 7. So this observation from NRSC is of little consequence, and certainly does not impact the redressability of Plaintiff's claim. And it further means that any line-drawing concerns—such as when a solicitation is pretextual or not—are simply not at issue. The agency may instead address those distinct hypotheticals in future actions.

Second, both the FEC and NRSC raise arguments explaining that DCCC may not ask this Court to compel FEC Commissioners to vote a certain way or to adopt a specific advisory opinion. *See* FEC Br. 27–28; NRSC Br. 24–27. But that is clearly not the relief Plaintiff seeks. In the first instance, Plaintiff seeks a preliminary injunction that preliminarily sets aside the Final Opinion that has caused both its competitive and chill injuries. Compl. 27; Mot. 30. And it further seeks declaratory relief stating that that the Final Opinion is not in accordance with law and thus must be set aside on a permanent basis. Compl. 27. Neither requires compelling individual Commissioners to vote a certain way.[6]

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[6] Courts, in various agency contexts, routinely grant preliminary injunctions in § 706(2) actions seeking to set aside agency action, and in doing so fashion appropriate preliminary relief based on the nature of the particular challenged agency action. *See, e.g.*, *Luokung Tech. Corp. v. Dep't of Defense*, 538 F. Supp. 3d 174, 178 (D.D.C. 2021) (granting preliminary injunction preventing effectiveness of agency designation during pendency of suit); *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 235, 247 (D.D.C. 2014) (granting preliminary injunction enjoining application of published answer to FAQ); *District of Columbia v. Dep't of Agriculture*, 444 F. Supp. 3d 1, 55 (D.D.C. 2020) (granting preliminary injunction to stay effectiveness of agency rule); *cf. Richardson v. Trump*, 496 F. Supp. 3d 165, 189 (D.D.C. 2020) (noting that once preliminary injunction factors are satisfied, the court "has the authority to adjust the requested relief as it deems fit").

III. DCCC has an actionable APA claim.

A. The October 10 Final Opinion is final agency action.

There is no question that the FEC's closeout letter—which the FEC labels its "Final Opinion"—constitutes a final agency action for purposes of judicial review under the APA. "Administrative orders are final when they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Unity08*, 596 F.3d at 865 (cleaned up). The "core question" courts consider in determining whether an agency's action is final is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin*, 505 U.S. at 797; *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). The FEC's Final Opinion satisfies both elements of final agency action.

First, as to the finality requirement, the FEC acknowledges that it has completed its decision-making process with respect to AO 2024-13: its Final Opinion states the matter is "concluded." Mot. 18 (citing Mot., Ex. C). This conclusion is not a case where the agency issued "informal" guidance that does not reflect the "consummation of the agency's decisionmaking." *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (cleaned up). Indeed, D.C. Circuit precedent already recognizes that the FEC's final vote on a request for an advisory opinion "marks the conclusion of FECA's advisory opinion process." *Unity08*, 596 F.3d at 864–65 (quoting FEC's brief). As the Court explained, the "fact that the advisory opinion procedure is complete" sufficed for purposes of *finality*. *Id.* at 865. That the Commission deadlocked here does not change the finality of its vote—the matter is "concluded." Simply put, the FEC has "spoken its 'last word'" on the advisory opinion request at issue, *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 483 (2004) (citation omitted), and there is no dispute the Final Opinion "mark[s] the

'consummation' of the agency's decisionmaking process," *Bennett*, 520 U.S. at 177–78 (citation omitted); *see also Franklin*, 505 U.S. at 797 (recognizing action is final when "the agency has completed its decisionmaking process").

The second requirement for final agency action is also met here. "[L]egal consequences will flow" from the FEC's Final Opinion, *Bennett*, 520 U.S. at 178, and the agency's conduct "will directly affect" DCCC, *Franklin*, 505 U.S. at 797. The FEC's acquiescence to the expenditure of *tens of millions of dollars* by Republicans to air unlawful JFC-advertisements has placed Plaintiff and its candidates at a severe competitive disadvantage. Mot. 24. And, as explained above, this competitive injury stems from the FEC's failure to apply the clear text of FECA.

Further, the FEC's failure to afford safe harbor regarding the JFC-advertising tactic at issue in AO 2024-13 has chilled DCCC and its candidates from responding in kind to the Republicans. Merz Decl. ¶¶ 6–9. "The fact that the advisory opinion procedure is complete and deprives the plaintiff of a legal right—[52 U.S.C. § 30108(c)'s] reliance defense, which it would enjoy if it had obtained a favorable resolution in the advisory opinion process—'denies a right with consequences sufficient to warrant review.'" *Unity08*, 596 F.3d at 865 (quoting *Env't Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589 n.8 (D.C. Cir. 1971)). The "failure to issue an opinion because of disagreement amongst commissioners deprive[s]" Plaintiff of this right every bit as much as an opinion issued by a majority of commissioners. *Ready for Ron*, 2023 WL 3539633, at *3 & n.3 (collecting authority).

Defendants' counter-arguments rely chiefly on the notion that when the FEC *deadlocks* on an AOR, there is no final agency action. *See* FEC Br. 2, 28–31; NRSC Br. 3, 19–24. But in doing so they cite cases addressing deadlocked votes in *other* agency contexts, such as votes of the Federal Energy Regulatory Commission and the Federal Communications Commission. But

whether final agency action exists is a "pragmatic" and "flexible" inquiry that must turn on specific facts. *Ciba–Geigy Corp.*, 801 F.2d at 435–36. What matters here is that FEC's conduct ***has*** "directly affected" DCCC, in part because legal consequences "flow" from its deadlock and the ensuing loss of safe harbor rights. *See Ready for Ron*, 2023 WL 3539633, at *3 & n.3. Indeed, the Supreme Court held in *United States Army Corps of Engineers v. Hawkes Co.* that agency action that denied "safe harbor" protections constituted final agency action because "legal consequences … flow" from such conduct. 578 U.S. 590, 599 (2016) (citing *Bennett*, 520 U.S. at 177–78). Accordingly, the FEC's conduct here does not "retain[] the status quo." *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007). Nor does it merely "restate[] in an abstract setting—for the umpteenth time—[FEC's] longstanding interpretation" of JFC-advertising. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). It instead addressed a novel issue and, unlike in *Independent Equipment Dealers*, effectively "denied … relief" by refusing safe harbor protections. *Id.*; *see also Ready for Ron*, 2023 WL 3539633, at *3 n.3. Because of the FEC's conduct, DCCC can neither rely on safe harbor protections, nor on the expectation that the FEC will hold its competitors to FECA's contribution limits and disclosure requirements.

For similar reasons, NRSC and the FEC's heavy reliance on *Public Citizen v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016), is misplaced. There, the D.C. Circuit held that certain notices issued by FERC showing that the agency had deadlocked on changing disputed electricity rates were not final agency action for purposes of APA review. *See id*. But, unlike here, no consequence to the plaintiffs' *legal rights* ensued. The appellants there attempted to resist that conclusion by analogizing their circumstances to a third-party complaint under FECA's enforcement statute. *See id.* at 1170–71 (discussing 52 U.S.C. § 30109). The Court distinguished *that* statutory regime from the FERC regime before it, observing that FECA expressly permits judicial review in deadlock

cases. *Id.* But in doing so, it did not conclude that the APA *precludes* review of deadlocked votes, so long as the requirements for final agency action are otherwise satisfied. *Id.* It in fact emphasized the structural differences between the FEC and FERC that warranted "recognizing deadlocks as agency action in [the FEC] context," including the presence of an even number of Commissioners who would frequently deadlock. *Id.* at 1171. That observation was prescient, as the facts here illustrate how such deadlocks may result in final agency action that has legal consequences and harms for regulated parties, particularly given that the advisory opinion process may grant or deny safe harbor rights.

The FEC and NRSC each ultimately recognize, as they must, that the D.C. Circuit in *Unity08* held that advisory opinions issued under Section 30108 are reviewable final agency actions under the APA, but they claim that this holding "makes no difference" because such opinions garnered four Commissioner votes. NRSC Br. 21; *see* FEC Br. 29–30 (arguing that the FEC "did nothing" in this case). Tellingly, *neither opposition brief* actually cites to *Unity08* for that proposition. NRSC Br. 21 (stating without citation that "in those circumstances, an affirmative vote by at least four FEC Commissioners establishes the reviewable final agency"); *see* FEC Br. 29 (similar). And that is for good reason: it was not the basis for *Unity08*'s holding. There, the Court explained that "the issuance of an advisory opinion" was a final action because it "mark[ed] the conclusion of FECA's advisory opinion process" as to a specific request, resulting in the refusal to issue a favorable advisory opinion that deprived the organization of a legal right—i.e., the "legal reliance defense" prescribed by § 30108, "which it could otherwise" invoke. *Unity08*, 596 F.3d at 864. In other words, FEC's action under § 30108 is final agency action if *those* conditions are met and, here, they are. The FEC "conclude[d]" FECA's advisory opinion process as to AOR 2024-13, harming DCCC by, among other things, depriving it of this legal right.

More fundamentally, and consistent with *Unity08*'s analysis, even if the FEC and NRSC were right that the Commission "did nothing" in form, FEC Br. 30, that observation would be of no moment. *Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 10 (D.D.C. 2008). That is because the D.C. Circuit has held that even an "agency's failure to act may be the basis for an APA claim pursuant to Section 706(2) when it is the *functional equivalent* of a final agency action." *Fort Still Apache Tribe v. Nat'l Indian Gaming Comm'n*, 103 F. Supp. 3d 113, 121 (D.D.C. 2015) (emphasis added) (citing *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)); *see also Sierra Club*, 828 F.2d at 793 (holding that judicial review of an agency's failure to act under Section 706(2) is authorized "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief"). The reason is that the APA itself defines "final agency actions [to] include 'the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Fort Sill Apache Tribe*, 103 F. Supp. 3d at 121 (quoting 5 U.S.C. § 551(13)). And, as just explained, the FEC's final closure of AOR 2024-13 without an advisory opinion that would have conferred a legal right is final agency action in all of the relevant senses. *See, e.g.*, *All. To Save the Mattaponi v. U.S. Corps of Army Eng'rs*, 515 F. Supp. 2d 1, 3, 9, 10 (D.D.C. 2007) (holding that "EPA's failure to veto [a] permit issued by the Army Corps of Engineers for "construction of a reservoir" was functional equivalent of final agency action and thus reviewable); *Am. Oversight v. Dep't of Veterans Affs.*, 498 F. Supp. 3d 145, 157 (D.D.C. 2020) (Moss, J.) (recognizing that courts must treat claims that an agency failed to act "as though it were final agency action" if it is the functional equivalent). Thus, while the FEC and NRSC quibble as to whether the Final Opinion is agency action or *in*action, the distinction is irrelevant: the Final Opinion is final "agency action" within the meaning of the APA. 5 U.S.C. § 551(13).

Judge Ellis's *dicta* in *Hispanic Leadership Fund v. FEC*, which the D.C. Circuit passingly cited in *Public Citizen*, does not change the analysis. *Hispanic Leadership Fund* did not involve any claim under the APA—each of the Plaintiff's claims arose under FECA and the First Amendment. 897 F. Supp. 2d 407, 419–20 (E.D. Va. 2012). That court's limited discussion of final agency action—bereft of any legal citation and without any briefing from the parties—simply concerned whether the agency was entitled to *deference*. *Id.* at 428. The court concluded no deference was owed in the case of deadlock for those plaintiff's *FECA* claims, *id.*, consistent with this Court's own conclusion that *de novo* review applies to *APA* claims like the one here, *Ready for Ron*, 2023 WL 3539633, at *18. Neither *Public Citizen* nor *Hispanic Leadership Fund* made holdings as to the final agency action at issue here.

Contrary to the FEC and NRSC's position, the FEC's "explanation" for its decision, or lack thereof, does not control the issue of finality. NRSC Br. 23–24. The D.C. Circuit's decision in *DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987), is not to the contrary. The court determined there that "in the circumstances presented," a deadlocked vote on a General Counsel recommendation to pursue a complaint required commissioners voting against the recommendation to "state their reasons why." *Id.* That decision stemmed from *FECA's* text granting judicial review of FEC enforcement decisions that are "contrary to law." *Id.* (citing 52 U.S.C. § 30109(a)(8)(C)). NRSC cites no case suggesting an agency may immunize itself from APA review by simply failing to explain the basis for its final agency action.

Moreover, this case is nothing like *DCCC*, where the reviewing court lacked any basis to review the agency's conduct. The Court here has a full administrative record presenting the issue to the agency, including competing comments from interested parties. And the Court also *does* have an "explanation" for the agency's conduct—three commissioners voted for Draft A

(approving JFC-advertising under the agency's rules) and three commissioners voted for revised Draft B (disapproving oof JFC-advertising under FECA and the agency's rules). These drafts provide the Court with the legal reasoning the various commissioners relied upon in ultimately issuing the Final Opinion. *See* Mot., Ex. B at 57–69, 84–97.

In sum, the Final Opinion satisfies the two prongs for final agency action, and neither the FEC nor NRSC cite any case holding that a deadlocked AOR under § 30108 cannot constitute final agency action. And, if anything, the facts of this case stress the importance of making APA review available: the law "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Loper Bright*, 144 S. Ct. at 2261. The FEC may not evade review of its misapplication of statutory law—in its final word on a question of law and in a manner that concretely harms Plaintiff—simply by pointing to its own deadlock. "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

B. DCCC is not required to seek relief through other administrative procedures.

The FEC and NRSC each insist that DCCC was required to seek a different administrative remedy—namely, filing a complaint under FECA's "[e]nforcement provision," 52 U.S.C. § 30109, which they claim could provide DCCC with an adequate judicial remedy, precluding APA review. NRSC Br. 24 (citing 5 U.S.C. § 704); *see also* FEC Br. 23–24. They are wrong: Nothing required DCCC to exhaust any other administrative remedy before bringing its APA claim. Nor was DCCC required to file an administrative complaint and pursue relief under § 30109.

1. Neither FECA nor FEC regulations required DCCC to seek a different remedy from the FEC.

It is black-letter administrative law that the APA provides a cause of action to any person who is "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, and that the APA "limit[s] the availability of the doctrine of exhaustion of administrative remedies" for such claims, *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (construing 5 U.S.C. §§ 702 and 704). Under § 704, courts may require parties to exhaust administrative remedies *only* where (1) "expressly required by statute" or (2) regulations require "an appeal to [a] superior agency authority," with the challenged action "inoperative" during the pendency of the agency appeal. *Darby*, 509 U.S. at 153–54; *see also, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. FDA*, 539 F. Supp. 2d 4, 22 (D.D.C. 2008) (explaining "the exhaustion doctrine continues to exist under the APA to the extent that it is required by statute or by agency rule as a prerequisite to judicial review"), *aff'd sub nom. Ass'n of Am. Physicians v. Food & Drug Admin.*, 358 F. App'x 179 (D.C. Cir. 2009).

Nothing required DCCC to exhaust remedies through § 30109 with the FEC before or instead of bringing its APA claim. Indeed, no party has identified any provision of FECA or FEC regulations that "mandates" that a party aggrieved by FEC's action on an AOR seek another remedy, *Darby*, 509 U.S. at 146, because there is none. *See* NRSC Br. 4, 24; FEC Br. 23–24. And § 30108 does not require a party suffering from an adverse outcome to seek reconsideration, an administrative appeal, or other form of redress before seeking judicial review. 52 U.S.C. § 30108.

2. Section 30109 does not provide an adequate alternative remedy.

The administrative complaint process also does not provide an adequate alternative remedy. The APA limits judicial review to agency actions "for which there is no other adequate remedy in a court." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1238 (D.C. Cir. 2017) (quoting 5 U.S.C. § 704). This limitation "reflects Congress' judgment that

'the general grant of review in the APA' ought not 'duplicate existing procedures for review of agency action' or 'provide additional judicial remedies in situations where Congress has provided special and adequate review procedures.'" *Id.* at 1244 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). "Courts must, however, avoid lightly 'construing § 704 to defeat the APA's central purpose of providing a broad spectrum of judicial review of agency action.'" *Norwich Pharms., Inc. v. Becerra*, 703 F. Supp. 3d 1, 16 (D.D.C. 2023) (cleaned up) (quoting *Bowen*, 487 U.S.at 903).

Here, § 30108 and § 30109 are distinct statutory provisions that prescribe different remedies for fundamentally different circumstances. As to the former, § 30108 authorizes individual parties to seek and obtain advisory opinions regarding the permissibility of specific activities that they and similarly situated entities may rely upon for safe harbor protection. *Supra* § I.A. In contrast, under § 30109, FECA permits a party to file a complaint requesting that the FEC take enforcement action against particular alleged violation(s) of FECA. *See generally* 52 U.S.C. § 30109. It would make little sense for DCCC to file a complaint alleging that Republican committees are violating FECA by running JFC-advertisements when it would engage in similar advertising tactics if they were deemed consistent with FECA in a legal opinion that carries the force of law. *See* Merz Decl. ¶ 9. This case demonstrates why Congress determined that it was necessary to prescribe a separate procedure under which parties could obtain this safe harbor protection on an expedited base in the heat of an election, 52 U.S.C. § 30108(a)(2). The complaint process under § 30109 does not provide this distinct remedy.

3. Any exhaustion requirement is excusable in any event.

Even if DCCC could theoretically pursue a complaint under § 30109 in a manner that would—at some future time—provide clarity as to the lawfulness of the JFC-advertising, this Court should not require DCCC to pursue that course. As the Supreme Court has explained, district

courts have discretion to excuse exhaustion of administrative remedies where the litigant's interest in an immediate judicial forum outweighs the institutional interests underlying the exhaustion requirement. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). This includes in cases where, "'delaying judicial review would cause irreparable injury, if the agency is not competent to address the issue or to grant effective relief, or if further pursuit of an administrative remedy would be futile.'" *Adamski v. McHugh*, 304 F. Supp. 3d 227, 238–39 (D.D.C. 2015) (Jackson, J.) (quoting *Ass'n of Flight Attendants–CWA v. Chao*, 493 F.3d 155, 159 (D.C. Cir. 2007)). At least two of these recognized exceptions would excuse any exhaustion requirement in this case.

Futility. Filing a § 30109 complaint or seeking some other remedy before the FEC would be entirely futile. *See Madigan*, 503 U.S. at 145. First, DCCC seeks time-sensitive relief. Even if the Court would otherwise require DCCC to pursue some other administrative recourse, "time does not permit" it to do so in the circumstances presented. *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 10 (D. Me.), *aff'd* 98 F.3d 1 (1st Cir. 1996) (holding that, even if party was required to exhaust administrative remedies by seeking its own advisory opinion, requirement would be excused because the presidential primary election of 1996 was days away). Indeed, as the FEC freely admits, FECA itself prescribes a timeline for such procedures that would take months or even years to resolve. *See* 52 U.S.C. § 30109; *see* FEC Br. 24. Further, as the agency record shows, and as the FEC does not dispute, the agency's six Commissioners are for now deadlocked 3-3 on the merits of the issue presented in this matter.

Irreparable harm. Withholding judicial review would also irreparably harm DCCC in these circumstances. *McHugh*, 304 F. Supp. 3d at 238. Section 30108 itself recognizes the heightened need for legal certainty in the time leading up to an election by prescribing an expedited 20-day review within 60 days of an election. DSCC availed itself of the right to an expedited AO,

see Mot., Ex. A at 1 & n.1, ECF No. 6-1, and DCCC reasonably planned to rely upon that request. DCCC suffers multiple forms of irreparable harm with each day there is a lack of clarity on the legality of JFC-advertising as a result of the FEC's failure to apply FECA.

IV. The equities weigh strongly in favor of granting preliminary relief.

A. DCCC is suffering ongoing irreparable harm.

As explained, DCCC has suffered and will continue to suffer irreparable injury absent the requested relief in three ways: through competitive injury, chilled speech, and informational injury. *Supra* § I.A. By declining to both clarify the legal landscape and offer safe harbor protections, DCCC is forced to compete at a disadvantage to Republicans in the November 2024 election; once the election is over "there can be no do over and no redress" to this competitive injury. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (holding obstacles to allowing organization to register voters "is irreparable [harm] because after the registration deadlines for the November election pass, there can be no do over and no redress." (internal quotation marks omitted)). Moreover, DCCC suffers irreparable harm because it is self-censoring rather than promoting its messages to voters through JFC-advertising. This chill to its political speech constitutes irreparable harm. *See Pursuing Am.'s Greatness*, 831 F.3d at 512. Finally, there is no question that "non-disclosure of information to which [DCCC] is entitled . . . constitutes an irreparable harm." *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 319 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017).

FEC argues that DCCC alleges only a "generalized theoretical harm." FEC Resp. at 38. Not so. The D.C. Circuit has expressly held that "having to make th[e] choice" between exploiting a campaign-finance loophole and abiding by the law constitutes harm. *Shays*, 414 F.3d at 89; *see also supra* § I.A. And there is nothing "theoretical" about the disadvantage of having to contest elections subject to contribution limits a competitor fails to honor. Permitting Republican

committees to unlawfully subsidize candidate advertising, in turn, frees up the candidate's own funds for other campaign activities. DCCC enjoys no such advantage, straining its resources. Merz Decl. ¶ 7. And, as explained, *supra* n.4, FEC is also flatly wrong in claiming DCCC has not averred that it wishes to engage in the sort of JFC-advertising tactic at issue, but that it is chilled from doing so.

Finally, melding redressability and irreparable harm, the FEC attacks Plaintiff's informational injury because any ensuing disclosure of the coordinated expenditures that Republicans are making to support JFC-advertising will only come after election day. FEC Br. 21. But if Plaintiff is correct that such expenditures are contributions, Republicans would be required to amend their *past* disclosures, providing DCCC information about their strategic choices. 52 U.S.C. §§ 30104, 30116(d).[7]

B. DCCC did not unreasonably delay bringing its claim.

The FEC and NRSC suggest that preliminary relief is inappropriate because DCCC delayed bringing its claim, NRSC Br. 36–37; FEC Br. 25, but their arguments are unpersuasive and obscure the true sequence of events that led to this action.

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[7] For its part, NRSC's attack on DCCC's irreparable harm largely reincorporates its earlier standing arguments. NRSC Br. 36. Its claim that DCCC does not face any substantial risk of enforcement where the FEC deprives regulated parties of safe harbor protection is also flatly contrary Circuit precedent. *Supra* § I.A. Moreover, its assertion that DOJ may not prosecute FECA violations where the agency has deadlocked is wrong. DOJ can prosecute FECA violations on its own initiative and even where it *disagrees* with the FEC about the law and even where FEC's enforcement mechanism are not exhausted. *See Federal Prosecution of Election Offenses, 8th Ed.* at 150–51, U.S. Dep't of Justice (Dec. 2017), https://www.justice.gov/criminal/file/1029066/dl ("DOJ Prosecution Manual") (collecting authority); *see also* 52 U.S.C. §§ 30109(a)(5)(B), (C), (D). The DOJ may pursue *felony* convictions for such FECA violations. *See* DOJ Prosecution Manual at 156-157; *see also* U.S.S.G. § 2C1.8 (sentencing guidelines for FECA violations). And although DOJ's enforcement manual suggests it is unlikely to prosecute where FEC has provided safe harbor protection, *see* DOJ Prosecution Manual at 140 n.59, DCCC has been deprived of such protection here.

To start, the claim that "DCCC waited ***months*** to pursue relief" is flatly incorrect. NRSC Br. 26 (emphasis in original); *see also* FEC Br. 25. DCCC's claim did not accrue until October 10, when the FEC took the final action challenged in this lawsuit. *See* Mot., Ex. C. As the record shows, notice of Republicans' "rapid[] expan[sion]" of "their use of [JFC advertising] in the weeks running up to the November 5 election" crystalized the growing harm to DCCC and its candidates. *See* Merz Decl. ¶¶ 5, 8–9. It was only in September that Republicans began ramping up their use of the JFC-advertising tactic outside of Montana. Compl. ¶ 55. At that time, DSCC—a similarly situated entity to DCCC—properly sought an advisory opinion on an expedited basis given the impending election. *See* Mot., Ex. A. Once that administrative process "concluded" on October 10 in a manner that deprived DCCC of substantial certainty as to its legal obligations with respect to JFC-advertising or "safe harbor" to match their political opponents' tactics without fear of later prosecution, DCCC sought redress from this Court—just one week later.

NRSC's reliance on *Fund for Animals v. Frizzell*, 530 F.2d 982, 987–88 (D.C. Cir. 1975), is simply misplaced.[8] Here, DCCC could not have filed its APA claim until the FEC issued its Final Opinion in AR 2024-13 on October 10, and this Court can grant effective relief that will have an impact on campaign spending—which only increases as the elections grows near—in the coming days. *Supra* § I.A. Those circumstances do not plausibly give rise to the "inference that

[8] The same is true of the other cases cited by NRSC. *See Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 88 (D.D.C. 2014) (delay of 36 days after "breaches the severance agreements"); *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) (delay of "more than a month" after accruing First Amendment and RFRA claims against impending event); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (delay of "eight months after [Mylan] believed that it had a right to launch its drug"); *see also Fund for Animals*, 530 F.2d at 987 (delay of 44 days after alleged due process violation). The FEC cites no authority in support of its argument that DCCC's one week "delay" was unreasonable. *See* FEC Br. 25.

[DCCC] was sleeping on its rights," and therefore cannot undermine DCCC's claim of irreparable harm. *Texas Children's Hospital*, 76 F. Supp. 3d at 245 (quotation omitted).[9]

C. The balance of equities and public interest weigh overwhelmingly towards fair elections contested on even terms.

The balance of equities and public interest weigh in favor of DCCC because Defendants will suffer no harm if the Court grants DCCC's requested relief, and because the public has a strong interest in FECA's enforcement and the fair elections that result from it.

Although NRSC claims it will be harmed because relief would bar its continued use of JFC-advertising, NRSC Br. 38, it has no legitimate interest in engaging in conduct that violates campaign finance rules and floods the airwaves with unlawful advertisements. *Cf. M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 123 (D.D.C. 2018) ("Defendants 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" (quoting *Open Commc'ns All. v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017)). Moreover, NRSC claims only that it will incur monetary costs if it needs to stop running JFC-advertisements. *See* Thielman Decl. ¶ 11. But NRSC does not claim that relief here would bar its ability, or the ability of its candidates, to reach voters through lawfully-placed television advertisements subject to FECA's contribution limits. Nor could it. Likewise, its claim that it is entitled to the statutory protections of § 30109(a)(1) is nonsensical. If the FEC had obtained a majority for revised Draft B, NRSC would have been effectively barred from JFC-advertising—notwithstanding the lack of any § 30109(a)(1). Moreover, NRSC has had ample opportunity to be heard both here and before the Commission.

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[9] Nor can DSCC be faulted for seeking an advisory opinion shortly after Republicans began rapidly expanding their use of the tactic in September. *Cf. Texas Children's Hospital*, 76 F. Supp. 3d at 245 ("Tardiness is not particularly probative" in the context of "worsening injuries because the magnitude of the potential harm becomes apparent gradually, undermining any inference that the plaintiff was sleeping on its rights." (cleaned up)).

The FEC itself does not argue that it will suffer harm; instead, it argues only that granting DCCC's requested relief will result in upsetting the status quo in a manner inapposite to the public interest, but this assertion is not credible. FEC Br. 40. DCCC's requested relief upholds foundational FECA contribution limits that Republicans are presently flaunting. "The public is owed a campaign finance system whose contours reflect the democratic will as outlined in the expressed intent and explicit legislation enacted by their elected representatives—the Congress." *Shays*, 340 F. Supp. 2d at 53. Because Congress enacted FECA, the public interest weighs in favor of ensuring parties abide by its deliberate limits, including those prohibiting JFC-advertising. And the public interest weighs in favor of the "fair elections" that result from enforcing FECA and ensuring fair competition among parties. *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012).

D. The *Purcell* Doctrine does not bar relief.

Finally, the Court should reject Defendants' efforts to inject the so-called *Purcell* doctrine here as a barrier to relief. That doctrine concerns last minute changes to election administration rules that could "result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Defendants offer no explanation as to how granting DCCC relief will confuse voters or discourage them from voting, so *Purcell* has no purchase here. Indeed, "it is difficult to imagine" that "if relief is granted, then voters will be confused about whether, how, where, when, or for whom they can vote." *Chancey v. Ill. State Bd. of Elections*, 635 F. Supp. 3d 627, 644–45 (N.D. Ill. 2022) (rejecting application of *Purcell* to campaign finance context). Moreover, this Court will buoy, not erode, public confidence by upholding Congress's campaign finance scheme where the agency has failed to do so. And this Court will buoy, not erode, public confidence by upholding the integrity of FECA.

Both the FEC and NRSC suggest this Court should apply *Purcell* to avoid last-minute changes that impact *campaign* activity. FEC Br. 25; NRSC Br. 39. But FECA *itself* contemplates

last minute changes to campaign finance law, providing for an expedited advisory opinion process when an election is near, 52 U.S.C. § 30108(a)(2), and circuit precedent is clear that such opinions are reviewable by courts, *Unity08*, 596 F.3d at 864. It makes little sense to suggest campaign finance rules must be locked into place when an election is nigh when FECA itself contemplates the opposite. For that reason, it is unsurprising that Defendants cannot cite a *single* case applying *Purcell* to FEC rules or opinions.[10]

CONCLUSION

The Court should set aside the FEC's Final Opinion as not in accordance with law and issue any other relief it deems proper following the hearing scheduled for Monday, October 28, 2024. A proposed order is attached.[11]

Dated: October 25, 2024

Respectfully submitted,

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[10] Both decisions cited by NRSC on this point concerned *state* statutes rather than FECA. *See OPAWL - Bldg. AAPI Feminist Leadership v. Yost*, No. 24-3768, 2024 WL 4441458, at *1 (6th Cir. Oct. 8, 2024) (non-precedential motions panel decision); *Lair*, 697 F.3d at 1201–02. Neither decision suggests that the Ohio and Montana statutes at issue included the sort of expedited pre-election review process embedded in FECA, which undercuts any notion that *federal* campaign finance laws should be frozen before an election.

[11] Plaintiff's original motion intended to include a proposed order, *see* Mot. 30, but inadvertently omitted it. It is attached here.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 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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