UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DCCC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, NRSC, Intervenor-Defendant.	Civ. No. 24-2935 (RDM) COMBINED REPLY IN SUPPORT OF MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

FEDERAL ELECTION COMMISSION'S COMBINED REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The DSCC's request for an advisory opinion in late September last year ended inconclusively, as did DCCC's request for a similar opinion from this Court. On a matter of first impression, the six Commissioners who lead the Federal Election Commission ("FEC" or "Commission") weighed the evidence before them and came to reasonable, though differing conclusions, preventing the Commission from garnering four votes for a particular position. That result was not only reasonable but what the Federal Election Campaign Act ("FECA") requires under these circumstances.

Nonetheless, DSCC's congressional equivalent, DCCC, continues to assert that the FEC was required to issue an advisory opinion adopting its view of the law or, in the alternative, adopt the *opposite* conclusion. Its position is not only meritless, it fails to raise a case or controversy sufficient to invoke this Court's jurisdiction. DCCC's claim to standing rests on the speculative impact that the Commission's consideration of advisory opinion request ("AOR") 2024-13 had or will have on its political rivals. But there is no dispute that AOR 2024-13 concluded without answering DSCC's questions and was therefore without binding legal effect. DCCC's claim to standing therefore rests entirely on the conclusions that DCCC and its rivals draw from the Commissioners' split vote in this proceeding. Such an alleged basis for standing rests on immense speculation and requires dismissal without reaching the merits of plaintiff's claims.

BACKGROUND

This case stems from the FEC's consideration of an advisory opinion request under the statutory process provided in the Federal Election Campaign Act of 1971 ("FECA"). (*See* FEC's Mem. of P. & A. in Supp. of Its Mot. to Dismiss (ECF No. 34-1) ("FEC's MTD") at 3-5 (describing the FEC and FECA's advisory opinion process under 52 U.S.C. § 30108 and 11

C.F.R. §§ 112.1, 112.4).) When the Commission issues an advisory opinion finding the proposed transaction or activity lawful under FECA and its regulations, the opinion acts as a safe harbor against sanctions provided by FECA for both the person requesting the advisory opinion and any other person involved in any specific transaction or activity that is indistinguishable in all material aspects from the transaction or activity addressed in the advisory opinion. *See* 52 U.S.C. § 30108(c). On September 18, 2024, DSCC and Montanans for Tester and Gallego for Arizona ("Requestors") submitted an Advisory Opinion Request regarding the application of FECA and Commission regulations, which sought expedited guidance on how two proposed Joint Fundraising Committees ("JFCs")—one between the DSCC and Montanans for Tester, and one between the DSCC and Gallego for Arizona—could allocate the costs of fundraising expenses for television advertisements soliciting contributions to the JFCs. (*See* Advisory Opinion Request ("Request"), AR000001-02.)

The Request concerned specific joint fundraising committee advertisements ("JFC-advertisements" or "JFC-ads") proposed by the Requestors that implicated the application of the coordinated party expenditures and party coordinated communication provisions under FECA and Commission regulations, *see* 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.37, and joint fundraising committee activities under FECA and Commission regulations, *see* 52 U.S.C. § 30102(e)(3)(A)(ii); 11 C.F.R. § 102.17. (*See generally* FEC's MTD at 5-7.) The JFC-ads proposed by DSCC, Montanans for Tester, and Gallego for Arizona would "primarily advocate" for the election of the associated candidate, either then-Senator Tester or then-Congressman Gallego, but would also include a brief fundraising solicitation for the relevant JFC. (AR000001.) Requestors stated that 26 seconds (approximately 87 percent) of each advertisement would be messaging in support of either then-Senator Tester or then-Congressman

Gallego, that would be "indistinguishable to the viewer from a standard campaign advertisement," and may include express advocacy. (AR000005.) The last four seconds (approximately 13 percent) of each advertisement would contain a brief, spoken fundraising solicitation and a QR code which, when scanned by the person viewing the ad, would link to a fundraising webpage for the JFC distributing the advertisement. (AR000002, AR000005.) The proposed television advertisements would not expressly refer to DSCC. (*Id*.)

The Request posed three questions on which the Requestors sought the Commission's opinion:

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

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

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

(AR000003.)

In a public meeting held on October 10, 2024, the Commission considered but did not adopt either of two alternative draft advisory opinions—Draft A and Draft B—made public prior to the meeting. (*See* FEC's MTD at 9.) The two drafts reflected opposing positions. Draft A proposed to answer "yes" to Requesters' Question 1, "no" to Question 2, and, with respect to Question 3, explained that the inclusion of a QR code directing viewers to the relevant JFC's fundraising information containing the notice, would meet the requirements of 11 C.F.R. § 102.17(c)(2). (*See* FEC's MTD at 9-11; Draft A, AR000051-63.) In contrast, Draft B, which was also considered by the Commission, answered "no" to Question 1 and "yes" to Question 2,

and, with respect to Question 3, that the advertisement must include a disclaimer meeting the requirements of 11 C.F.R. § 102.17(c)(2), in addition to the any disclaimer required by 11 C.F.R. § 110.11. (*See* FEC's MTD at 11-13; Draft B, AR000064-76.)

At the October 10, 2024 public meeting, the Commissioners did not approve either draft because motions to approve Draft A and B both failed to garner the required four votes. (*See* Vote Certification, AR000147.) Then-Chairman Cooksey and Commissioners Dickerson, and Trainor voted affirmatively for the motion to approve Draft A. (*Id*.) Then-Vice Chair Weintraub and Commissioners Broussard and Lindenbaum dissented. (*Id*.) Then-Vice Chair Weintraub and Commissioners Broussard and Lindenbaum voted affirmatively for the motion to approve Draft B. (*Id*.) Then-Chairman Cooksey, and Commissioners Dickerson, and Trainor dissented. (*Id*.) That same day, the Commission provided Requestors a letter informing them that "the Commission has concluded its consideration of your advisory opinion request without issuing an advisory opinion." (*See* Letter re: Advisory Opinion Request 2024-13 (October 10, 2024) ("Closeout Letter"), AR0000148-49.)

On October 17, 2024, plaintiff DCCC filed its original Complaint in this case seeking preliminary and permanent injunctive relief. (*See* FEC's MTD at 13-14; Pl.'s Compl. for Declaratory J. and Injunctive Relief (ECF No. 1) ("Compl.").) The same day, plaintiff filed a motion for a preliminary injunction, accompanied by a memorandum of law in support. (*See generally* Pl.'s Mot. for a Prelim. Inj. (ECF No. 6) ("Pl.'s PI Mot.").) The parties briefed the preliminary injunction motion, the Court heard argument, and this Court issued a Memorandum Opinion and Order denying DCCC's request for a preliminary injunction. (*See* FEC's MTD at

14-16; Mem. Op. and Order (ECF No. 21), 2024 WL 4650907 (D.D.C. Nov. 1, 2024), ("Opinion" or "Op.")[1].)

On December 20, 2024, plaintiff filed its First Amended Complaint. (*See* FEC's MTD at 16-18; *see generally* DCCC's First Am. Compl. for Declaratory J. and Injunctive Relief ("Amended Complaint" or "Am. Compl.") (ECF No. 28).) The Amended Complaint is nearly identical to the original Complaint, except that it projects its injuries into the 2026 election cycle and future elections and seeks an alternative form of relief: that the FEC be permanently enjoined "from pursuing enforcement actions or otherwise prosecuting DCCC for engaging in JFC-advertising in excess of FECA contribution limits." (Am. Compl., Prayer for Relief C, at 31; *see also* FEC's MTD at 16-18.)

This Court set a schedule for dispositive briefing for defendant, intervenor-defendant, and plaintiff's 12(b) motions and/or motions for summary judgment, as applicable. (*See* Min. Order, Jan 16, 2025.) On February 7, 2025, defendant and intervenor-defendant filed separate motions to dismiss. (*See* "FEC's MTD; NRSC's Mem. of P. & A. in Supp. of Mot. to Dismiss (ECF No. 32-1) ("NRSC's MTD").) On March 7, 2025, plaintiff filed its combined response and motion for summary judgment. (*See* Combined Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. and in Opp'n to Defs' Mots. to Dismiss and Pl.'s Mot for Summ. J. (ECF Nos. 36 & 37) ("Pl.'s Mot.").) Finally, the Court granted defendant FEC's motion for an extension of time, providing it until April 18, 2025, to file replies in support of opening motions and oppositions to plaintiff's motion for summary judgment. (*See* Min. Order, Mar. 24, 2025.)

[1] Hereinafter, the Commission cites to the page numbers of the Opinion as reflected in ECF No. 21, not the Westlaw citation.

LEGAL STANDARDS

A plaintiff bears the burden of demonstrating that it has properly invoked this Court's subject matter jurisdiction. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). A motion to dismiss for lack of standing is properly considered under Rule 12(b)(1), because a lack of standing is a "defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987); *M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 7-8 (D.D.C. 2019); *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017).

When deciding a motion to dismiss under Rule 12(b)(1), a court must accept all well-pleaded factual allegations in the complaint as true. *See Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). Because the court has "an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority," however, the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of the Fraternal Ord. of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (internal quotation marks omitted); *see also Nat'l Ass'n for Latino Cmty. Asset Builders v. Consumer Fin. Prot. Bureau*, 581 F. Supp. 3d 101, 104 (D.D.C. 2022) (same). At the summary-judgment phase, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. R. Civ. P. 56(e), which for the purposes of the summary judgment motion will be taken to be true." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted).

Evaluating standing is a threshold inquiry, and the Court cannot reach the merits if plaintiffs are without subject-matter jurisdiction. "Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007)

(cleaned up); *see also Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-102 (1998) (clarifying that a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction).

In evaluating a summary-judgment motion in an APA case, "the reviewing court generally . . . reviews the [agency's] decision as an appellate court addressing issues of law." *Pol'y & Rsch., LLC v. HHS*, 313 F. Supp. 3d 62, 74 (D.D.C. 2018) (internal quotation marks and citations omitted). Put differently, summary judgment "serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Ashton v. United States Copyright Off.*, 310 F. Supp. 3d 149, 156 (D.D.C. 2018) (quoting *Charter Operators of Alaska v. Blank*, 844 F. Supp. 2d 122, 127 (D.D.C. 2012).

Under the APA, courts set aside final agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard of review as set forth in the APA is "highly deferential" and "presume[s] the validity of agency action." *Am. Horse Prot. Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). As the D.C. Circuit has explained, the standard for determining whether a Commission determination "was arbitrary or capricious or otherwise an abuse of discretion" entails a "very deferential scope of review that forbids a court from substitut[ing] its judgment for that of the agency." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016) (internal quotation marks omitted). To meet that standard, plaintiffs must establish that "the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs.*

Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regul. Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

ARGUMENT

I. PLAINTIFF LACKS STANDING BECAUSE THE NON-ANSWER OF AN ADVISORY OPINION IN AOR 2024-13 DID NOT CAUSE PLAINTIFF'S ALLEGED INJURIES

Plaintiff argues that its alleged injuries are caused by the non-answer the Commission provided in response to AOR 2024-13, despite the fact that the core of its alleged injuries are that "DCCC's competitors [engage] in the activity that harms DCCC." (Pl.'s Mot. at 18; *see* Am. Compl. ¶ 60 (alleging that "the Republican Committees were able to shovel tens of millions of dollars into television advertisements directly on behalf of, and directly coordinated with, Republican candidates in competitive elections across the country").) As a preliminary matter, *see infra* Part I.A., plaintiff fails to plausibly allege any injuries: the legal landscape has not changed, and plaintiff is in the same position it was before the Commission considered AOR 2024-13. But assuming *arguendo* that plaintiff has sustained any injuries, its injuries are not caused by the FEC or the non-answer the Commission provided in response to AOR 2024-13. The consideration of AOR 2024-13 did not put the DCCC at a disadvantage or otherwise impact plaintiff's competition with its Republican rivals in either the 2024 federal election cycle or future elections. As such, there is also no injury to redress.

Plaintiff's standing fails for a number of reasons. *First*, the legal landscape has not changed since the agency considered AOR 2024-13, and plaintiff cannot transform its subjective risk assessment into an injury. *Second*, the advisory opinion process was never intended to bypass FECA's enforcement process, the proper means to address purported violations of federal

campaign finance law. Rather, the "adequate remedy" under the APA is for plaintiff to bring an enforcement action. *Third*, plaintiff's alleged injuries are traceable to third parties—the Republican Committees—not the FEC's consideration of AOR 2024-13. *Fourth*, plaintiff's mistaken reliance on inapposite pre-enforcement First Amendment challenges following an advisory opinion request does not require a different result.

A. Because AOR 2024-13 Did Not Result in a Change in the Law or a Binding Legal Determination, Plaintiff's Actions Can Only Be a Result of Its Subjective Risk Assessment

As the Court implicitly recognized in its Order denying plaintiff's Motion for Preliminary Injunction, there has been no change in the FEC's position on the legality of JFC-advertisements. Its consideration of DSCC's advisory opinion request left the parties where the Commission found them, and no legal consequences flow from the non-answer of an advisory opinion request. Faced with what it perceives as legal risk, plaintiff has declined so far to run JFC-advertisements. But its decision is merely a reflection of its risk tolerance. It is not an injury incurred as a result of any action of the FEC. As such, it lacks standing.

1. *The Legal Landscape Has Not Changed*

Nowhere in plaintiff's briefing does it acknowledge the reality in which it finds itself: the Commission did not provide answers in response to AOR 2024-13, and the relevant laws governing federal campaign finance, *i.e.*, the "legal landscape," have not changed as a result. (*See* Op. at 13-15.) Consequently, to the extent plaintiff claims to be "chilled" from engaging in JFC-advertising, it has not suffered an injury fairly traceable to the Closeout Letter. As the Court explained, the Closeout Letter "did not take a position on the lawfulness—or unlawfulness—of the conduct at issue . . . [n]or did it provide any party with any legal rights, defenses, or obligations." (*Id*. at 15.). Neither did it "affirmatively authorize any conduct [or] establish a safe harbor permitting DCCC's opponents to violated FECA." (*Id.* at 15-16.) Indeed, after the

Closeout Letter, DCCC and the Republican candidates "are all in an equal position." (Tr. of Prelim. Inj. Hearing ("Tr.") at 15:25-16:08.) Moreover, while the specific relief plaintiff seeks here is to vacate the Closeout Letter, plaintiff's purported injuries were in no way caused by or traceable to the agency's consideration of AOR 2024-13 generally. (*See* FEC's MTD at 23-24 ("For purposes of defining the agency conduct plaintiff challenges . . . the FEC's Closeout Letter and AOR 2024-13 are synonymous.").)

The D.C. Circuit has recognized that there is only a competitive injury "when agencies set the rules of the game in violation of statutory directives." *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005). The challenged behavior here in no way altered "rules of the game," and thus no injury result has resulted. *See id.* In fact, the only arguments plaintiff advance addressing *any* change in any parties' behavior since the consideration of AOR 2024-13 appear to boil down to: (1) "DCCC has no choice but to respond to [Republican Committees'] 'additional tactics,' which have 'fundamentally alter[ed] the environment' in which it competes," (Pl.'s. Mot. at 13 (citing *Shays*, 414 F.3d at 86)); and (2) after the non-answer of an advisory opinion, "additional groups and candidates—including NRCC and its Republican *congressional* candidates—began deploying materially similar JFC advertising that directly harms DCCC[, which] confirms that the [consideration of AOR 2024-13] was at least a motivating factor for DCCC's rivals to begin or increase their mammoth JFC advertising spends."[2] (Pl.'s Mot. at 19-20.)

First, DCCC is incorrect that it has "no choice" in its response to its rivals' tactics. Rather, plaintiff has numerous legal *and* strategic options available, as described *infra* Part I.B. If DCCC seeks to influence its rivals' conduct through legal means, it may take advantage of the

[2] Presumably, the "additional groups" to which plaintiff refers necessarily include the DSCC, which originally requested the advisory opinion, and which, after the advisory opinion did not issue, began running similar ads. (*See* Request, AR000001-07.)

enforcement procedures outlined in FECA by, for example, filing an administrative complaint against political committees or candidates. *See* 52 U.S.C. § 30109(a). Or if DCCC believes the playing field is fundamentally unfair, it may petition for a rulemaking that might influence how JFC advertising is regulated. *See* 11 C.F.R. § 200.2. What it may not do, which it attempts to do here, is circumvent these established procedures in favor of an APA claim that seeks to exploit the advisory opinion process beyond what the law permits.

DCCC may also seek to improve its strategic position vis-à-vis its rivals by engaging in a wide variety of political speech that the Closeout Letter neither endorsed nor condemned. For instance, it may take the tack that its sister committee DSCC did in the final weeks of the 2024 federal election cycle and run advertisements that look much like Republican Committees' JFC-advertisements,[3] albeit advertisements that included a fundraising solicitation on-screen for varying lengths of time or in varying formats. (*See* NRSC's Mem. of P. & A. in Opp'n to Pl.'s Mot. for Prelim. Inj. (ECF No. 16) at 11-13). And the length of time that the fundraising solicitation is on-screen is only one of many variables DCCC can alter in an effort to gain advantage over its rivals. The Commission takes no position here on the legality of any particular approach, and instead merely emphasizes that DCCC has a spectrum of options available to it that may or may not improve its strategic position, which the Closeout Letter in AOR 2024-13 does not speak to much less forbid. Regardless of which of the many options it chooses in crafting its own message and campaign strategy, DCCC will be "exposed to the risk of an administrative proceeding" on an equal footing as Republican Committees. (*See* Tr. at 16:5-8.; *see also infra* Part I.A.2. (describing the subjective risks).) In other words, there are

[3] DSCC's JFC-advertisements do not appear to be the ads it proposed to run in AOR 2024-13, (*see* Request, AR000001-07), and the FEC makes no representation as to whether these ads were materially distinguishable or indistinguishable from the proposed ads.

other strategic decisions that DCCC may make to adapt and respond to Republican Committees' JFC-advertisements, and neither those decisions nor their consequences are traceable to AOR 2024-13.

Second, DCCC asserts that the NRCC's congressional candidates "began deploying materially similar JFC advertising" following the Closeout Letter, which purportedly "confirms" that AOR 2024-13 "was at least a motivating factor for DCCC's rivals[,]" (Pl.'s Mot. at 19-20,) but this rote recitation of *post hoc ergo propter hoc* does not "confirm[]" anything. (*See id.*) DCCC has presented no evidence demonstrating this causal chain and continues to rely on speculation to link the Closeout Letter to its rivals' actions. Moreover, it remains the case that the same avenues pursued by its rivals are open to plaintiff. Notwithstanding the Republican Committees' choices, nothing has changed with respect to the *legal* landscape: "No one has a safe harbor, because there was no decision." (Tr. at 15-16.) As set forth *infra* Part I.A.2., plaintiff, and indeed the Republican Committees, are employing divergent strategies in an uncertain environment based on their own goals and objectives. The consequences of those decisions are in no way traceable to the Request or Closeout Letter at issue here.

2. *Plaintiff's Actions Are a Result of Its Subjective Risk Assessment*

Plaintiff reiterates its view that JFC-ads, as proposed in DSCC's Request and allegedly run by the NRSC, are unlawful in order to support its claim of injuries caused by the Commission. Plaintiff consistently acknowledges that this is *its* opinion of the law. (*See* Pl.'s Mot. at 13 ("activity appears to be unlawful under FECA"); *id*. at 14 (describing its "assum[ption] DCCC is correct that JFC advertising is unlawful"); Am. Compl. ¶ 88 (the nature of Republican Committees' spending on JFC-advertisements is "legally doubtful[,]" and thus, "DCCC is hesitant to spend funds in a manner that may violate campaign finance laws").) It is certainly entitled to that view and to make an assessment that, as to running such ads, the reward

does not justify the risk. But that assessment is a subjective one based on the organization's goals. There are also risks inherent in pushing the boundaries of what is permissible under federal campaign finance law—namely, a greater risk of enforcement—but the mere fact that DCCC must consider and act on these tradeoffs does not mean it has been harmed by the FEC. In any event, because the legal landscape with respect to the legality of JFC-advertisements like those proposed in the Request did not change as a result of AOR 2024-13, *see supra* Part I.A.1., plaintiff's asserted injuries can only be the result of its risk tolerance and not the advisory opinion request. After all, all parties face some risks. (*See* Tr. at 16:5-8.) DCCC's weighing of those risks, and the consequences that flow therefrom, are not traceable to the FEC's non-answer in response to AOR 2024-13.

Plaintiff faces no greater regulatory risk than any other political committee because "as things [continue to] stand, the DCCC, the DSCC, the NRSC, and the DCCC's direct counterpart, the NRCC, are all on an even playing field." (Op. at 20.) Plaintiff unsurprisingly makes no showing of "illegal under-regulation of [its] competitor[,]" precisely because the relevant committees face the same "regulatory burdens" that they face. *See, e.g.*, *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (finding no competitive injury where competitor faced "greater regulatory burden" (emphasis omitted)). In fact, plaintiff does not—and would be unable—to claim that running such JFC-advertisements will trigger legal penalties *because of AOR 2024-13*. Any competitive disadvantage plaintiff faces are instead "self-inflicted," and not "cognizable" injuries on which the challenged agency action had any bearing. *Animal Legal Def. Fund, Inc. v. Vilsack*, 111 F.4th 1219, 1228 (D.C. Cir. 2024); *see also Clapper v. Amnesty Int'l*

USA, 568 U.S. 398, 417-18, 439 (2013).[4] And even if a self-inflicted injury may give a plaintiff standing in some circumstances, it does not where the agency action it challenges did not clearly speak to the likelihood of enforcement. (*See* Op. at 17 (explaining, conversely, that the Commission's split "might have led the NRSC to conclude that it is *unlikely* that the Commission will authorize an enforcement action anytime soon") (emphasis added).)

Plaintiff's only rebuttal is to assert that AOR 2024-13 is at least "*a* source of the injury" and that it caused its alleged injuries in some way even if it "may not *directly* authorize or permit the third-party action." (Pl.'s Mot. at 19.) Plaintiff mistakenly suggests the agency's action somehow indirectly authorized or permitted the Republican committees' actions — actions that predate the Request and that the forward-looking nature of the advisory opinion process could not address. To support that notion, it alleges that additional Republican committees began running such ads after AOR 2024-13. (*Id*.) But far from "confirm[ing] that the FEC's final action was at least a motivating factor for DCCC's rivals to begin or increase their mammoth JFC advertising spends[,]" (*id*. at 20,) plaintiff instead reemphasizes that each of these committees were "well-equipped to make its best judgment about the risk of a future enforcement action or prosecution." (Op. at 20.) It is far too speculative to assume that the FEC's consideration of AOR 2024-13 was the dispositive factor, or "'gave' the NRSC the 'green light' to continue funding the advertisements as joint fundraising activities," (Op. at 17 (internal transcript citations omitted)), when that proceeding did not result in a binding determination and many other factors surely weighed on DCCC's decisions. Each committee here made its own

[4] And indeed, it is arguable that plaintiff not at a disadvantage at all if its view of the law is correct. Complying with the law—when others may not be and risk exposing themselves to enforcement—is not an Article III injury and certainly not caused by the Commission.

strategic decisions commensurate with its views on the law and appetite for the risk of enforcement on equal footing.

For these reasons, plaintiff's reliance on *Shays* in this context is misplaced. (*See* Pl.'s Mot. at 13-14 (citing *Shays v. FEC*, 414 F.3d 76, 89 (D.C. Cir. 2005) (alleging injury caused by the Commission based on "'being put to the choice of either violating' federal campaign finance law 'or suffering disadvantage in their campaigns'").) Notably, that case involved agency regulations not the non-issuance of an advisory opinion. And there, the plaintiff was able to point to those FEC regulations (which it was challenging) that affirmatively authorized conduct that would otherwise have not been permitted under BCRA. (*See id*. (plaintiff's "asserted injury—having to defend their office in illegally constituted reelection fights—. . . stem[med] from the operation of regulations permitting what BCRA bans.").) This Court previously explained those allegations presented a "close causal connection" between the challenged action and the asserted competitive harm. (Op. at 15.) That "close" causal nexus is markedly absent here, where AOR 2024-13 certainly did not "affirmatively authorize [any] conduct" by plaintiff's competitors — the Closeout Letter expressed no opinion and had no cognizable legal effect regarding JFC-ads so as to serve as the impetus for the committees' ensuing choices. *Accord id*. Accordingly, comparison to *Shays* only exposes the nebulous link between the challenged Commission action and the plaintiff's theory of harm and reinforces that it is plaintiff's own choices predominate in determining its course of action relative to other committees. For similar reasons, neither does attempting to describe AOR 2024-13 as an "upstream failure" by the Commission detract from the reality that the Request had any bearing on the legal landscape, and

thus, that plaintiff's own choices precipitated its harm. *See infra* pp. 23-24 (addressing the FEC's purported "upstream failure").[5]

At bottom, plaintiff is only able to point to its own perspective of the law concerning JFC-ads. DCCC's decision not to engage in certain campaign activity—not the FEC's consideration of AOR 2024-13—is the cause of any purported "chill" or "competitive disadvantage."

B. An Advisory Opinion Is Intended Only to Provide Safe Harbor, Not to Replace Enforcement Proceedings

Plaintiff argues that there is an undisputed causal link between its injuries and the FEC's actions, claiming that "but for the FEC's failure to issue the requested AO—or any AO grounded in FECA's text—DCCC's competitors would be effectively barred from engaging in the activity that harms DCCC." (*See* Pl.'s Mot. at 18; *see also* Pl.'s PI Mot. at 27 (claiming that an order vacating closeout letter will "likely discourage others from exploiting the legal vacuum the FEC has created").) But this framing demonstrates precisely why DCCC has not suffered injuries caused by the FEC: an advisory opinion adopting DCCC's view of the law, *i.e.*, that the activity described is unlawful, would not "bar" DCCC's competitors from running JFC ads. Nor would such an advisory opinion redress plaintiff's alleged injuries.

An advisory opinion operates as a shield for the requestor, not as a sword to enforce certain provisions of FECA against non-requestors. Specifically, an advisory opinion provides

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[5] Plaintiff attempts to obfuscate the reality that AOR 2024-13 did not alter the legal status quo by suggesting the Commission misapprehends the balance of the caselaw on the notion that "standing may rest 'on the predictable effect of Government action on the decisions of third parties.'" (Pl.'s Mot. at 19 n. 7 (citing *Mass. Coal. for Immigr. Reform v. DHS*, 752 F. Supp. 3d. 13, 33 (internal citation omitted)). But no one contests that standing *may* rest on such a theory. As the FEC has consistently maintained, any impact of AOR 2024-13 on DCCC's rivals is *not* "predictable" but rather entirely speculative, and FEC action that neither permits nor condemns certain conduct does not give rise to such a "predictable effect."

safe harbor "protection" against enforcement proceedings for requestors' "good faith reliance" on that opinion regarding a "specific transaction or activity." 52 U.S.C. § 30108(c)(1). Advisory opinions may therefore provide guidance to the requestor and other parties, but the statute provides that advisory opinions' legal operation is to extend safe harbor to a requestor planning to undertake a "specific transaction or activity" or "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects" from the contemplated transaction or activity. *Id.* § 30108(c)(1). So even where the Commission garners at least four votes to issue an advisory opinion that *rejects* protection for requestor's proposed activity, such an opinion does not bind the Commission in future matters, including with regards to enforcement proceedings.

Notwithstanding the limited scope of the advisory opinion process, plaintiff asserts a competitive injury, arguing that "but for FEC's failure to issue the requested AO . . . DCCC's competitors would be effectively barred from engaging in the activity that harms DCCC." (Pl.'s Mot. at 18.) But that assertion runs headlong into the nature of advisory opinions FECA sets out. Even a unanimous 6-0 decision adopting DSCC's view of the law in AOR 2024-13 would have no more than a speculative impact on the NRSC and other committees. (*See* Tr. 10:14-11:06 (explaining that the effect of a judgment from the Court on the behavior of non-parties "is pretty speculative and remote.").) Even assuming AOR 2024-13 resulted in an opinion adopting DCCC's view of the law, its impact would be speculative because it would remain unclear (1) what the precise contours of any AO answering the Request that the ads were unlawful would have looked like; (2) what conclusions DCCC's rivals would draw from that result; (3) whether NRSC or any other committee would have run ads "materially indistinguishable" from those

described in AOR 2024-13; and (4) what risk calculation DCCC's rivals, or any committee, have regarding the forthcoming election cycle. *See supra* Part I.A.2.

In other words, while the advisory opinion process's guidance-serving function can in theory impact an actor's behavior, the impact with regards to any particular actor is speculative irrespective of the particular outcome. That is particularly so here where the Court is asked to imagine the impact of a result that did not in fact occur. And given the fact-specific nature of the advisory opinion process, it is yet more speculative to consider what impact such a result will have on the future activity of DCCC's political rivals, given that such a request can do no more than provide a safe harbor for those engaging in the precise activities described or "materially indistinguishable" conduct. 52 U.S.C. § 30108(c)(1)(B). The existence of any advisory opinions is conceivably one of numerous factors that political actors consider to inform their activities. But because advisory opinions are confined to the facts, were Republican Committees' JFC-advertisements to deviate from the facts advanced in the Request, the theoretical impact of the Request on their behavior is even further diminished.

For the same reasons, plaintiff also fails to demonstrate its harm is redressable by a favorable advisory opinion and thus cannot establish another standing requirement. *See Valley Forge Christian Coll. v. Ams. Utd. for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 41 (1976) (explaining that a plaintiff must show that that its injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision"). Advisory opinions provide safe harbor, they do not prevent other parties from inflicting DCCC's alleged injuries, thus forcing the FEC to issue a favorable advisory opinion in AOR 2024-13 would not redress its injuries. If AOR 2024-13 had concluded in an advisory opinion answered on DCCC's terms, that opinion would not operate to

compel any particular conduct by the Republican campaign committees. In any event, this case presents no occasion to address the lawfulness of NRSC's past conduct, which was not before the agency with respect to AOR 2024-13. *See* Tr. at 8:24-9:2 ("I am pretty sure that I don't have the authority to adjudicate whether the NRCC is violating the law or not, nor is it presented in this case.").

Furthermore, it appears that the outcome that plaintiff seeks is a broadly applicable rule addressing JFC-advertisements. This outcome is not available via the advisory opinion process but may be achieved by other means under FECA. Section 30108(b) provides that "[a]ny rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title." 52 U.S.C. § 30108(b). In other words, FECA explicitly prohibits advisory opinions from straying into the province of rulemaking. Meanwhile, section 30111(d) sets forth a detailed scheme for prescribing "any rule, regulation, or form" requiring, *inter alia*, that new rules be submitted to Congress for consideration. *Id.* § 30111(d). To definitively address the lawfulness of JFC-advertisements, plaintiff is permitted to petition the Commission for "the issuance, amendment, or repeal or a rule implementing [FECA]," *see* 11 C.F.R. § 200.2, which the Commission is obliged to consider. *See id.* § 200.3 (explaining that, when a petition for rulemaking is submitted, the Commission "will—Publish a Notice of Availability in the Federal Register").

Short of submitting a request for rulemaking, if plaintiff is searching for an avenue to hold Republican committees *specifically* accountable for violating FECA via JFC-advertisements, there is a clear remedy: filing an administrative complaint. *See* 52 U.S.C. § 30109(a). Under Section 30109(a), "[a]ny person who believes a violation of [FECA] . . . has occurred, may file a complaint with the Commission." *Id.* The Commission must then consider

the complaint, *see id.*, and complainants are entitled to judicial review of the agency's final resolution. *Id.* § 30109(a)(8). Under the APA, judicial review of agency action is *only* available when "there is no other adequate remedy in a court[.]" 5 U.S.C. § 704; *see also CREW v. DOJ*, 846 F.3d 1235, 1240 (D.C. Cir. 2017) (explaining that plaintiff "must satisfy the APA's predicate requirements for bringing suit, namely, that there is no other adequate remedy available" (internal quotation marks and citations omitted)). Here, there is an adequate remedy by way of the administrative complaint process, which permits judicial review and, if necessary, a private right of action. *See* 52 U.S.C. § 30109(a)(8).

Resolving this type of inquiry is a core function of the FEC, which is set forth in FECA and detailed in FEC regulations. *See* 52 U.S.C. § 30109(a); *see* 11 C.F.R. part 111. Importantly, if plaintiff does not agree with the administrative outcome, it may pursue independent judicial review. 52 U.S.C. § 30109(a)(8). A reviewing court will assess whether the Commission acted contrary to law and may order the Commission to conform with its decision. *Id.* § 30109(a)(8)(C). If the Commission fails to do so, plaintiff may pursue a private right of action against Republican Committees. *See id.* This is an "adequate remedy" because "Congress chos[e] to grant those allegedly aggrieved by agency failure to remedy the wrongs of a regulated third parties a private cause of action against those third parties." *See Garcia v. Vilsack*, 563 F.3d 519, 525 (D.C. Cir. 2009).

Plaintiff argues that Section 30109(a) is an insufficient remedy because it is backwards-looking. (*See* Pl.'s Mot. at 31-35.) But in addition to the speculative nature of what effect a particular advisory opinion will have on any party's conduct, *supra* pp. 16-19, DCCC baselessly discounts the impact of an enforcement proceeding. Such proceedings are brought against particular entities and may result in administrative and civil remedies that play no role in the

advisory opinion process. Thus, while the ultimate impact on a respondent's behavior is always uncertain, there is at least as much reason to believe this process will impact a party's behavior as would any particular outcome in an advisory opinion proceeding. And such a process appears to better match plaintiff's allegations where it makes clear that it believes JFC-advertisements violate FECA. (*See* Am. Compl. ¶ 48 ("These JFC-advertising schemes violate FECA: they allow party committees to subsidize a candidate's advertisements, which is precisely what FECA's coordination laws and contribution limits are designed to prevent.").)

Moreover, nothing prevents plaintiff from simply seeking another advisory opinion pursuant to 52 U.S.C. § 30108. DCCC may, at any point, file *its own* advisory opinion request concerning forward-looking activity *it* proposes. In its request, DCCC could provide specific details about JFC-advertisements it wishes to run in *this* election cycle, including discussion of committees that will be involved, ad messaging, form and length of the fundraising solicitation, and so on. Likewise, the request could pose questions to the Commission regarding the information plaintiff seeks in its complaint—that it alleges is required to be disclosed—which was outside of the scope of DSCC's AOR 2024-13. *See infra* pp. 27-28. Providing clarity and reducing uncertainty as to a specific course of action is precisely the purpose of FECA's advisory opinion process, and one plaintiff is fully able to utilize as an avenue to address the uncertainty allegedly causing it harm.

Plaintiff's citation to *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010) does not support its standing arguments or its argument that there is no adequate remedy except APA review. There, the requestor brought suit after receiving an unfavorable, affirmative advisory opinion. *Id.* at 863. Because the requestor evinced an intent to continue, should it win, the activities for which the advisory opinion would have granted *it* a safe harbor had it had its druthers, the court

concluded that *it* would risk enforcement proceedings. *See id.* at 865. The court did not mention, because it was not asked, about the presumed effects on other parties by the unfavorable outcome of the advisory opinion process for any other parties. *See generally id.* In contrast, there has been no unfavorable advisory opinion issued here, and the Court is left to speculate as to the impact of this non-event on the conduct of third parties which form the basis of DCCC's allegations of harm.

C. Plaintiff's Alleged Injuries Are Caused by Third Parties and Arose Prior to the Consideration of AOR 2024-13

Assuming, *arguendo*, that plaintiff's alleged injuries could be traced to the non-answer of an advisory opinion or redressable by the issuance of a favorable advisory opinion (which, *see supra* Part I.B., they cannot), the chain of causation here is simply too attenuated to attribute plaintiff's injuries to the Commission. *See Ctr. for Biological Diversity v. Dep't of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009). Not only does plaintiff lack any injuries, *supra* Part I.A., if it did, those injuries are caused by third parties, which it appears to concede. (*See* Pl.'s Mot. at 18-20.) Plaintiff's alleged injuries began to accrue well before the Commission considered AOR 2024-13, and the Court has already rejected the theory that the non-answer of an advisory opinion permitted the Republican Committees to run further JFC-advertisements.

First, despite DCCC's attempts to cast blame on the FEC, DCCC itself claims that it is "DCCC's competitors [that are] effectively engaging in the activity that harms DCCC." (*See* Pl.'s Mot. at 18.) It alleges that, because the FEC did not issue an advisory opinion in AOR 2024-13, the "Republican Committees will continue to engage in tens of millions of dollars of JFC-advertising in future elections." (*See* Am. Compl. ¶ 86.)

But where, as here, a plaintiff "reli[es] on the anticipated action of unrelated third parties" it is "considerably harder to show the causation required to support standing." *Arpaio*, 797 F.3d

at 20. Courts require "substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Id.* (cleaned up); *see also Murthy v. Missouri*, 603 U.S. 43, 68 n.8 (2024); *Indigenous People of Biafra v. Blinken*, 639 F. Supp. 3d 79, 86 (D.D.C. 2022) (concluding that plaintiff had no standing to sue the Secretaries of State and Defense for the persecution of indigenous Nigerians where "the alleged injury flow[ed] not directly from the challenged agency action, but rather from independent actions of third parties"—there, the Nigerian government).

In an attempt to meet its burden to provide "substantial evidence[,]" *Arpaio*, 797 F.3d at 20, plaintiff cites to *CREW v. DHS*, 507 F. Supp. 3d 228, 240 (D.D.C. 2020). But that case is of no help to plaintiff. In *CREW v. DHS*, plaintiffs alleged a causal chain between DHS's noncompliant recordkeeping policies, which left DHS and its component agencies without guidance on what records to keep and resulted in inadequate records to allow for timely reunion between migrant children and their adult companions. 507 F. Supp. 3d at 240-42. The connection here is far more diluted. This is not a question of upstream and downstream actions by a parent agency and its components. *See id.* 240 n.3 (explaining that, while true that there is a heightened standard for traceability when an injury flows not directly from the challenged agency action but instead from third parties, "[t]he 'third parties' at issue in the case 'are not independent entities; they are components of DHS'"). The Republican Committees are true third parties, unrelated to and certainly not component agencies of the FEC, and thus the plaintiff must provide "substantial evidence" of a causal relationship between the FEC's non-answer of AOR 2024-13 that "leav[es] little doubt as to causation." *See Arpaio*, 797 F.3d at 20. This they have not done.

Second, the timeline of plaintiff's past alleged injuries poses a near-insurmountable burden for the plaintiff to establish that its forward-looking injuries will be traceable to the non-answer of AOR 2024-13. "Past injuries are relevant . . . for their predictive value," and if the DCCC "cannot trace [its] past injury to" the FEC, "it will be much harder for [it] to make that showing" as to future injuries. *See Murthy,* 603 U.S. at 59. The DCCC, then, must establish traceability "from scratch, showing why [it] has some newfound reason to fear" that the FEC caused its alleged injuries, rather than the prior injuries. *See id.*

Plaintiff alleges that the NRSC began employing JFC-advertising in July of 2024, (*see* Am. Compl. ¶¶ 1, 50), and that the injuries intensified in September, when "Republicans rapidly expanded this advertising tactic." (*Id.* ¶¶ 56-57.) These injuries can hardly be traceable to the consideration of AOR 2024-13, given that the decisions of the third-party Republican Committees "predate[]" the FEC's challenged conduct (the October 10, 2024 Closeout Letter) and thus "undermine[]" the FEC's "culpability for harm that flows from [Republican Committees'] earlier decision." *Gila River Indian Cmty. v. Becerra*, No. 21-CV-1401 (TSC), 2024 WL 2803316, at *5 (D.D.C. May 31, 2024) (citations omitted). Because plaintiff's alleged past injuries cannot be traced to the FEC's non-answer of AOR 2024-13, it is unlikely its future injuries could be either. *See Cherry v. FCC*, 641 F.3d 494, 498 (D.C. Cir. 2011) (explaining that injuries that "occurred before, existed at the time of, and *continued unchanged* after the challenged Commission action . . . cannot be fairly traced" to the challenged agency action (quoting *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998)) (emphasis added).).

Rather than engaging with FEC's caselaw on this point, plaintiff points to *Ipsen Biopharmaceuticals v. Becerra*, 678 F. Supp. 3d 20, 31 (D.D.C. 2023), *aff'd*, 108 F.4th 836

(D.C. Cir. 2024). That case is distinguishable. There, the cause of plaintiff pharmaceutical company's competitive injuries flowed from the FDA's *affirmative approval* of a rival's entrance into the market. *See id.* at 31. (Plaintiff's "injury flowed directly and inextricably from the FDA's decision to regulate Ipsen under the Drug Act.") The court approvingly cited and quoted *Tel. and Data Systems, Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994), which explained that "[i]njurious private conduct is fairly traceable to the administrative action contested in the suit *if that action authorized the conduct or established its legality*." *See Ipsen Biopharmaceuticals*, 678 F. Supp. 3d at 31 (emphasis added). Here, the non-answer of an AO did not "authorize[]" the Republican Committees' "conduct" much less "establish[] its legality." *See Tel. and Data Sys.*, 19 F.3d at 47. As established *supra/infra*, the non-answer of an AO stakes out no legal position at all.

DCCC's reliance on *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 825 (2024) is inapposite and somewhat puzzling. DCCC cites to it for the proposition that "plaintiff's injury first occurs when it is '*injured by the challenged agency action*.'" (Pl.'s Mot. at 19.) But that case concerns when the statute of limitations for APA claims begins to run. *See generally Corner Post*, 603 U.S. 799. There are no such concerns about the statute of limitations here. And to the extent plaintiff intends to demonstrate that its alleged past injuries have no bearing on its forward-looking injuries, it runs headlong into *Murthy*'s teaching that, where the traceability of its alleged prior injuries is in doubt, it is unlikely that future injuries of the same type are themselves traceable to the FEC. *See Murthy,* 603 U.S. at 59.

DCCC last points to *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019) for the proposition that "where there is a 'causal link' between agency action . . . and the harmful actions of others, the injury is traced to the agency even where the agency's action may not

directly authorize or permit the third-party action." (Pl.'s Mot. at 19.) There, respondents, including states and non-governmental organizations working with immigrant and minority communities, argued that the addition of a citizenship question to the census violated the Enumeration Clause and Equal Protection Clause and that adding the question would impair the ability to get a more accurate population count. *See Dep't of Com.*, 588 U.S. at 764. In disputing standing, the government argued that the harm to respondents is not traceable to the government because it depended on the independent action of third parties choosing not to respond to the census. *Id.* at 767. The Court disagreed because respondents' "theory of standing . . . does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decision of third parties." *See id.* at 768. Here, plaintiff has only speculation that the third parties—Republican Committees—will act differently in the future. *See id.* Despite plaintiff's protestations, there is no "predictable effect" from the non-answer of an advisory opinion — and certainly not evidence adduced at trial, as there was in the *Department of Commerce* case. *See id.*

Third, this Court has already rejected the theory that the non-answer of an advisory opinion in AOR 2024-13 "sort of gave" the Republican Committees the "green light" to continue running JFC-advertisements. (*See* Tr. 58:21-59:5.) As the Court noted during the hearing on plaintiff's motion for preliminary injunction, to the extent the non-answer of an advisory opinion is "valuable as a nonaction, it simply signals what the thinking of the [C]ommissioners [is] on the issue." (*Id.* 58:24-59:1.) The non-answer of an advisory opinion:

> "[D]oes not foreclose the Department of Justice from bringing a criminal prosecution, nor does it foreclose a private party from filing a complaint with the FEC," and, even if the Commission were to decline to proceed in response to that complaint, its "decision not to investigate [would be] subject to review by a district court." Moreover, that type of (possible) practical consequence is too speculative and too remote to support a claim of standing or irreparable injury.

(Op. at 17-18 (quoting *Hisp. Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 425 (E.D. Va. 2012)).)

With regards to its purported informational injury, plaintiff appears to have subtly shifted the goalposts regarding what information it seeks, and now seeks information that it is not entitled to receive even under its view of the law. In its Motion, DCCC suggests that the Commission "misunderstands" its requested information, and that "FECA requires committees to report how much money and the purpose of expenditures coordinated with candidates, and that information has not been reported with respect to ads paid for by JFCs." (*See* Pl.'s Mot. at 18 n. 6.) This materially differs from the Complaint's allegations seeking disclosure of "whether and how much funding any given ad raised." (Am. Compl. ¶ 89.) As the Commission explained in its opening motion, "whether and how much funding any given ad raised" is not information that must be publicly reported, and any such reporting obligation certainly did not turn on the outcome of AOR 2024-13. (*See* FEC's MTD at 28 ("FECA reporting requirements do not require disclosure of how much money a given donor contributed specifically for a particular advertisement, or how much money a particular advertisement raises[.]").)

To the extent DCCC is now seeking additional information, this cannot support DCCC's standing because it has not linked this supposed dearth of information to AOR 2024-13. As the Court recognized in its Opinion, the FEC has not authorized—either explicitly or implicitly—NRSC's JFC-advertisements. (*See* Op. at 17-18; *see also id.* at 15 (explaining that the Closeout Letter did not "provide any party with any legal rights, defenses, or obligations").) Because the agency was "not involved" in the Republican Committees' decision, plaintiff's injuries "'clearly fail[] the causation requirement'" because the causal links are so attenuated as to not exist. *See Gila River Indian Cmty.*, 2024 WL 2803316, at *5 (quoting *Black v. LaHood*, 882 F. Supp. 2d 98,

104 (D.D.C. 2012)). This reasoning also extends to any future injuries, to the extent they remain nonspeculative, since it is only the continued use of JFC-advertising by the Republican Committees that could continue to put the DCCC at an alleged competitive disadvantage. *Cf. Cherry v. FCC*, 641 F.3d 494, 498 (D.C. Cir. 2011) (explaining that injuries caused by third parties persisting beyond the challenged agency conduct are still insufficient to establish standing against the agency). Thus, even assuming *arguendo* that DCCC has been deprived of information to its detriment resulting from the Commission's non-answer, the Court cannot redress it through a ruling related to AOR 2024-13, which posed no questions regarding any committee's disclosure obligations, and necessarily could not answer them. (*See* FEC's MTD at 28-29.)

In sum, a non-answer in response to the Request has no bearing on the actions of Republican Committees, which, in any event, may be held to account by alternate means. *See id.*; *see also supra* Part I.B. Because plaintiff's alleged injuries are traceable to third parties, plaintiff lacks standing to bring its claim against the FEC.

D. Prior Cases Presenting Pre-Enforcement First Amendment Challenges Following an Advisory Opinion Request Are Inapposite and Do Not Support DCCC's Standing

Neither can plaintiff rely on the reasoning in prior cases finding plaintiffs had standing following the Commission's non-answer of an advisory opinion. In its Amended Complaint, plaintiff relies on a selection of cases to support its assertion of standing arising out of an FEC advisory opinion request resulting in a non-answer. (*See* Am. Compl. ¶¶ 11, 85, 95 (citing *Hisp. Leadership Fund*, 897 F. Supp. 2d 407; *Ready for Ron v. FEC*, Civ. No. 22-3282 (RDM), 2023 WL 3539633 (D.D.C. May 17, 2023)); *see also* Pl.'s Mot. at 41 (citing *Chamber of Com. of U.S.*, 69 F.3d 600).) But in those and other similar cases, plaintiffs challenged the FEC's non-answer via pre-enforcement constitutional challenges. As the Commission argued in its motion to

dismiss, the standing inquiry turns on the specific "claim that is being pressed" by plaintiff because that cause of action must specify and connect the government action alleged to have caused it harm. *See Jibril v. Mayorkas*, 20 F.4th 804, 813 (D.C. Cir. 2021), *aff'd*, 101 F.4th 857 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 550 (2024). Because of the nature of the APA claim plaintiff brings here, its theory on each element of standing is notably distinct and far more suspect.

In *Hispanic Leadership Fund* ("*HLF*"), *Stop This Insanity, Inc. v. FEC*, *Carey v. FEC*, and *Ready for Ron*, plaintiffs brought *First Amendment* claims to vindicate their rights to political speech that they argued was constitutionally protected.[6] In each of those cases, the plaintiffs' theories were that they were wrongfully denied FECA's safe harbor protections, they desired to undertake the other activity proposed in the relevant advisory opinion request, they believed their proposed speech was lawful, and they sought to have a court permit speech — not declare it unlawful for them and their competitors. These were highly personal claims that presented fundamentally different theories of alleged wrongdoing from an APA claim that alleges that the Commission's issuing of an advisory opinion is necessary to level an uneven playing field between DCCC and competitor committees. Rather than protecting its own speech rights, DCCC's primary goal appears to be seeking a declaration from either the FEC or the Court that its competitors' actions were unlawful. In other words, these First Amendment claims

[6] *Chamber of Commerce*, 69 F.3d 600, was slightly distinct from these cases but still an inapt comparison to this case. Plaintiff mistakenly suggests it stands for the proposition that a non-answered advisory opinion gives rise to a justiciable controversy. (Pl.'s Mot. at 41.) That case involved a challenge to an FEC rule itself, which that court found justiciable, but says nothing about whether challenging the Commission's split over an AOR under a theory like plaintiff's confers standing. *See Chamber of Com.*, 69 F.3d at 603-04.

did not depend on speculation about the impact of an FEC advisory opinion *on third parties*, but on the tangible impact of an advisory opinion *on themselves*.

First, consider those plaintiffs' asserted injuries. In each case, plaintiff alleged it was harmed by the prospect of enforcement without safe harbor protection for specific, planned activity. *See HLF*, 897 F. Supp. 2d at 414-26 (plaintiff presented "concrete plans" to run five specific advertisements); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23 (D.D.C. 2012) (plaintiff sought to solicit and accept contributions to independent expenditure accounts in excess of certain FECA limits); *Carey v. FEC*, 791 F. Supp. 2d 121, 125 (D.D.C. 2011) (emphasis omitted) (plaintiff "planned solicitation and acceptance of unlimited contributions . . . for use in making independent expenditures"); *Ready for Ron* 2023 WL 3539633, at *5 (providing a specific "petition [with over 200,000 signatures] to Governor DeSantis *before* he begins testing the waters"). Each of those plaintiffs asserted unequivocally that their injury was their inability to engage in the activity proposed. But here, plaintiff's asserted "chill" only has significance insofar as it is at a perceived competitive disadvantage — where *other* entities are running JFC-ads like those in the Request and it is not. DCCC implicitly admits its "chill" would be entirely unproblematic if NRSC (and potentially others) were similarly not running the advertisements. By the same token, DCCC does not argue that it would be "chilled" or in any way harmed by an advisory opinion finding that the conduct detailed in AOR 2024-13 was unlawful, even though this result could only have the effect of *discouraging* this avenue for DCCC's political speech. This posture cannot help but undermine the sincerity of its claim of harm to its constitutional rights when those rights do not appear to be its first priority. *See McCutcheon v. FEC*, 496 F. Supp. 3d 318, 337 (D.D.C. 2020) (denying injunction

where plaintiff appeared to "spend more time disparaging the alleged loophole than advocating for it").

Second, consider the government conduct these plaintiffs' challenge. In the series of First Amendment cases above, the harm of being deprived an opportunity to undertake the proposed activity more clearly creates a "sufficient causal nexus" between the onset of its injuries and the subject of its claim. *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 418 (D.C. Cir. 1994). In those cases, plaintiffs challenged the Commission's impending enforcement if it were to undertake the activity without safe harbor protections. Fair enough, there likely is a "causal connection between . . . FECA's enforcement" or "fear[ed] prosecution" and "engaging in what HLF believes to be constitutionally protected activity[.]" *HLF*, 897 F. Supp. 2d at 423-24. In *Chamber of Commerce*, plaintiffs "filed a challenge to the final [FEC] rule" after the "Commissioners split three-three over whether to adopt" advisory opinion drafts — not challenging the AOR consideration itself. *See* 69 F.3d at 603. But plaintiff here links its harm not to the prospect of enforcement or prosecution for running JFC-ads or a Commission regulation, but to the non-issued advisory opinion in AOR 2024-13. As explained, *supra* Part I.A.1., that non-answer had no effect on the legal landscape and in no way heightened the risk of enforcement or prosecution so as to prevent plaintiff from running JFC-ads indistinguishable from those in AOR 2024-13.

Third, consider what the plaintiffs asked the court to do. In its alternative request for relief, plaintiff seeks a permanent injunction against enforcement for an entire category of broadly defined "JFC-advertising[.]" (Am. Compl., Prayer for Relief A, C, at 31.) But that extraordinary relief presents a complete mismatch to its theory that the ads are unlawful. *Finnbin, LLC v. CPSC*, 45 F.4th 127, 136 (D.C. Cir. 2022) (plaintiff needs to show redress

ensues from a "favorable decision"). In the litany of First Amendment cases above, plaintiffs alleged harm by way of potential enforcement in the absence of safe harbor protections, linked that harm to potential Commission enforcement, and asked a court to grant it the finely-contoured shield the FEC's advisory opinion process could have yielded in the first instance. That is not plaintiff's ask. Indeed, any conceivable injunction would be entirely untethered to any specific proposed activity. (*See* Am. Compl. ¶ 87 (saying only that "[s]pecifically, DCCC would establish joint fundraising committees with various candidate committees to sponsor television advertisements ahead of 2026 and future elections.").) This Court lacks the requisite facts animating the advertisements for the court to craft a well-tailored national injunction.[7] *Cf. HLF*, 897 F. Supp. 2d at 414. Plaintiff continues to keep the Court and the Commission guessing as to all of these key features that would ordinarily predominate in genuine disputes over grants of safe harbor. Notably, this absence of specific facts has been present since the outset of this case, where, even before plaintiff requested injunctive relief, it sought a broad advisory opinion from this Court declaring the NRSC's advertisements unlawful in the hope that this rhetoric would discourage NRSC's use of this tactic.

Plaintiff nonetheless is adamant that neither it nor any other party has the right to engage in the activity it allegedly seeks to shield. (*See* Pl.'s Mot. at 1 (JFC-ads present "flagrant

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[7] Not only would the Court face inordinate difficulty in crafting a well-tailored injunction pursuant to plaintiff's vague request, such generality would also seriously inhibit the Commission's ability to decipher how it would need to comply. What JFC-ads could DCCC run that the FEC could not enforce? How would the FEC sort out what is materially indistinguishable to advertisements that DCCC has never proposed and what falls within the scope of the injunction? Would this extend safe harbor to D*S*CC to run the advertisements proposed in AOR 2024-13? But surely, in the case of the D*S*CC, the issue of the legality of those proposed JFC-ads is moot given that the election has passed, that committees affiliated with former-Senator Tester and now-Senator Gallego may not be operating currently, and likely not intending to run ads proposed in the now-concluded 2024 election cycle.

lawlessness").) DCCC's in-the-alternative theory of harm to its constitutional rights—seeking an abstract injunction against enforcement—does not alter the standing analysis when the essence of plaintiff's argument is that no party, including DCCC, is entitled to engage in JFC-advertising.

II. THE FEC'S NON-ANSWER TO THE REQUEST REFLECTS A REASONABLE DISAGREEMENT AMONG COMMISSIONERS AND IS IN NO WAY ARBITRARY OR CAPRICIOUS

Assuming jurisdiction, DCCC's APA claim fails because the Commission's inability to reach a four-vote consensus regarding AOR 2024-13 reflected reasonable disagreement on a question of first impression. FECA requires the affirmative votes of four or more Commissioners in order to render an advisory opinion, and DCCC's attempt to have this Court pick a side in what is a principled disagreement is contrary to FECA and outside the scope of remedies available under the APA.

A. The APA Sets a High Bar for Challenging Agency Action

Review of FEC action under the APA is a deferential inquiry where the court asks only if the Commission's decision was "sufficiently reasonable to be accepted." *Campaign Legal Ctr. & Democracy 21*, 952 F.3d 352, 357 (D.C. Cir. 2020) (per curiam) (internal quotation marks and citation omitted). When determining whether an FEC decision was arbitrary, capricious, or otherwise an abuse of discretion, the Court must be "extremely deferential" to the agency's decision, which "requires affirmance if a rational basis . . . is shown." *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (internal quotation marks omitted). Courts must defer to the FEC unless the agency fails to meet the "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (internal quotation marks omitted).

Under the APA, "'practical consequences,' such as the threat of 'having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement,' are

insufficient to bring an agency's conduct under [a court's] purview." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (citing *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003)). Additionally, an agency action where "[n]o legal consequences flow from the agency's conduct" and "there has been no order compelling [the regulated entity] to do anything" is not reviewable. *Reliable Automatic Sprinkler Co.*, 324 F.3d at 732.

B. The Positions Taken by the Commissioners Were Reasonable and Consistent with Both FECA and FEC Regulations

DCCC accuses the FEC of having "little to say on the merits[,]" (Pl.'s Mot. at 36,) but it is in fact DCCC that offers the court remarkably little analysis of FECA and its implementing regulations to meet its burden to demonstrate arbitrary decision-making. DCCC portrays the question presented to the Commission as "requir[ing] nothing more than straightforward application of the coordination rule and the statutory definitions of 'contribution' and 'expenditure.'" (*Id.* at 38.) In plaintiff's view, the JFC-advertising at issue here clearly met the definition of a coordinated expenditure and therefore a contribution, subjecting it to FECA's prohibitions and limitations. (*Id.* at 38-39.) DCCC makes no attempt to address the FEC's regulations and prior decisions interpreting FECA, other than to insist that they may not even be considered because "[t]he meaning of FECA here is clear" and the FEC is therefore "'not in accordance' with these clear statutory commands[.]" (*Id.* at 40 ("FECA's plain text cannot be evaded by the agency's rules.").)

DCCC's claim fails because it does not seriously engage in the nuances of the questions before the Commissioners and assumes that its own view is the only possible correct one. But while DCCC's view may be reasonable, it is not the only reasonable view. A close examination of the questions posed by AOR 2024-13 and the competing draft opinions, each endorsed by

three Commissioners, demonstrates that under the Act and Commission regulations, each draft advisory opinion is reasonable. While Commissioner votes differed, they were not arbitrary, and DCCC's APA claim therefore fails. *See Orloski*, 795 F.2d at 167.

First, the questions posed by AOR 2024-13 were issues of first impression for the Commission[8] and are not specifically addressed in the Act or Commission regulations. Indeed, DCCC concedes that the actions by NRSC that apparently prompted AOR 2024-13 reflected a "novel tactic[.]" (Pl.'s PI Mot. at 1.) In response to DSCC's expedited request, the Commission promptly considered AOR 2024-13, including holding an open meeting, drafting two potential responses to DSCC's questions, and holding a vote regarding each of the drafts. Draft A and Draft B, each endorsed by three Commissioners, provide alternative responses to the question of whether the DSCC's proposed television advertisements should be treated as joint fundraising solicitations in their entirety, or as campaign ads with a small portion allocated to soliciting funds for the joint fundraising committees. Under the Act and Commission regulations, each draft answer is reasonable.

Draft A considered DSCC's proposed television ads as a whole under the framework established by the joint fundraising regulations at 11 C.F.R. § 102.17. (Pl.'s PI Mot., Exh. B, at 62 (ECF No. 6-2).) These regulations apply specifically to joint fundraising committees and govern their activities generally. Under the joint fundraising regulations, the costs of a joint fundraising committee's activities must be allocated among the entities participating in the joint

[8] The matter most analogous to AOR 2024-13, cited and analyzed in both Draft A and Draft B, is Advisory Opinion 2024-07 (Team Graham). *See* FEC, AO 2024-07, https://www.fec.gov/data/legal/advisory-opinions/2024-07/. There, the Commission concluded that a joint fundraising committee's public communications did not meet the payment prong of the coordinated communication test where a candidate committee pays its allocable share of the costs of a proposed joint fundraising communication, without discussing what constitutes a joint fundraising communication.

fundraising committee according to a formula set out in the joint fundraising agreement. Accordingly, Draft A concluded that each joint fundraising committee should pay the entire cost of its ads and allocate the costs among the participants according to the allocation formula in the respective joint fundraising agreement. (Draft A at 8, AR000059.)

Draft B, by contrast, considered the proposed television ads in light of their apparent functions, stating that "most viewers would simply see what appears to be a campaign ad for the featured candidate" with a brief joint fundraising solicitation at the end. (Draft B at 8-9, AR000072-73.) Under the Commission's allocation regulations at 11 C.F.R. part 106, expenses for activities attributable to more than one purpose are generally allocated among participants in proportion to the benefit they receive. (Draft B at 9-10, AR000073-74.) Because Draft B viewed the proposed ads as "serv[ing] primarily as campaign advertising for the candidate featured in each ad," (Draft B at 9, AR000073), it concluded that each joint fundraising committee could pay only for the portion of the advertisement that solicited joint fundraising contributions, with the cost of that portion allocated among the joint fundraising participants according to their agreed allocation formula. (Draft B at 10-11, AR000074-75.)

DCCC would have this Court substitute its judgment for the reasonable opinion of three Commissioners and hold that Draft A is fundamentally at odds with FECA's statutory scheme, foreclosing the application of the FEC's joint fundraising regulations, *e.g.*, 11 C.F.R. § 102.17. But that conclusion rests on the assumption that the ads the Commission considered are not in fact fundraising solicitations and are instead campaign advertisements. DCCC's entire argument hinges on the unsupported assumption that there is only one reasonable answer to this question of first impression carefully examined in the limited context of the "facts relevant to the specific transaction or activity" of the Request, 11 C.F.R. § 112.1(c), which requires careful consideration

of aspects of the DSCC's specific proposed JFC-ads such as the length of time an advertisement displays a request for donations and how prominent that solicitation is to qualify as a fundraising solicitation subject to the joint fundraising allocation formula. The Commissioners who supported Draft A reasonably concluded that the ad's fundraising solicitation put the ad within the scope of joint fundraising activities described in 11 C.F.R. § 102.17. And while DCCC ignores the significance of that regulation, the regulation has withstood the test of time, having first been promulgated in 1983, and is itself grounded in FECA, including at 52 U.S.C. § 30102(e)(3)(A)(ii) ("[C]andidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee."). Thus, while DCCC claims that FECA mandates the outcome it prefers, it elides a close question that is not *dictated by* FECA but rather *dictates which part of FECA applies*.

The Commissioners who supported Draft B reached a different, though also reasonable, conclusion. Again viewing the facts before them and considering a matter of first impression, these three Commissioners determined that the proposed ads were functionally campaign advertisements, with only the short portion that included the fundraising solicitation falling within ambit of joint fundraising activities per 11 C.F.R. § 102.17, and the remainder subject to allocation regulations at 11 C.F.R. part 106. Notably, however, even this group of Commissioners did not suggest that the question required "nothing more than straightforward application of the coordination rule and the statutory definitions of 'contribution' and 'expenditure.'" (Pl.' Mot. at 38.) Rather, this group put greater weight on the experience the average viewer would have in viewing the advertisement, and reached a different factual conclusion that weighed in favor of an allocation formula emphasizing the relative benefit the candidate(s) and committee(s) received from the ad. This conclusion was reasonable, and

certainly meets the APA's "highly deferential" standard of review. *Am. Horse Prot. Ass'n*, 917 F.2d at 596.

C. Absent Four Votes, the Commission May Not Substantively Answer the Questions Posed in an Advisory Opinion Request

Although DCCC plainly believes that the NRSC's JFC advertising is unlawful, it goes beyond merely arguing that the Commission should have adopted its view in the course of deciding AOR 2024-13, and contends that, in the alternative, the Commission should have reached the *opposite* conclusion. Specifically, DCCC argues that, "[a]ssuming [Draft A] is right, and JFC advertising is not subject to FECA, the FEC's failure to issue an AO violates the APA[.]" (Pl.'s Mot. at 43.) In effect, DCCC argues that the Commission should have reached some decision, *any* decision, and the FEC's failure to clarify the law was itself arbitrary and capricious. (*See id.* at 35 (emphasizing "DCCC's need to obtain clarity well ahead of the 2026 elections").) DCCC's argument fails because, for the foregoing reasons, both Draft A and Draft B were reasonable, and the Commissioners' decision to favor one draft over another was therefore not arbitrary and capricious. *See Campaign Legal Ctr. & Democracy 21*, 952 F.3d at 357 (explaining that the court asks whether the FEC's decision was "sufficiently reasonable to be accepted" (internal quotation marks and citation omitted)).

DCCC's in-the-alternative claim fails for the additional reason that FECA *does not permit* the FEC to answer Requestor's questions absent four votes, and the Court is unable to provide the relief sought. *Van Hollen, Jr.*, 811 F.3d at 495 (explaining that, where "the agency action is . . . a product of reasoned decisionmaking," a court may not "substitut[e] its judgment for that of the agency") (internal quotation marks omitted). Plaintiff seeks an order from this Court that "vacates and sets aside" the "FEC's October 10 closeout letter as arbitrary and capricious and contrary to FECA[.]" (Pl.'s PI Mot. at 27, 30; *see also* Am. Compl., Prayer for Relief B, at 31.)

To the extent plaintiff seeks to compel Commissioners to vote in favor of a particular advisory opinion, or seeks for the Court to proscribe the content of that opinion, such relief is unavailable and its claim must fail. *See Van Hollen, Jr.*, 811 F.3d at 495. FECA expressly *forbids* the Commission from "*tak[ing] any action*," 52 U.S.C. § 30106(c) (emphasis added), "to render advisory opinions under section 30108," *id.* § 30107(a)(7), "*except* [upon] the affirmative vote of 4 members of the Commission," *id.* § 30106(c) (emphasis added).

There is thus no basis for an order that would "set aside the FEC's October 10, 2024 Closeout Letter." (Am. Compl., Prayer for Relief B, at 31; *see* 5 U.S.C. § 701(a)(2) (excluding from APA agency action that is "committed to agency discretion by law.").) Such an outcome would also conflict with the bedrock principle of administrative law that the Court may not "require the agency to follow a detailed plan of action" or "prescribe specific tasks for [the agency] to complete[.]" *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006). Rather, "it must allow [the agency] to exercise its discretion and utilize its expertise in complying with broad statutory mandates." *Id.* (citing *Cobell v. Norton*, 240 F.3d 1081, 1099, 1106 (D.C. Cir. 2001)). Here, there is no basis for the Court to vacate the Commission's close out letter or issue declaratory relief merely because the Commission did not issue an advisory opinion answering Requestor's questions.

Finally, DCCC's "in-the-alternative" argument is premised upon this Court determining that Draft A was not only a reasonable interpretation of the law but the *only* permissible interpretation, and that the Commissioners who voted in favor of Draft B acted arbitrarily in their decision-making. But it is unclear how the Court could reach that conclusion given that DCCC does not argue that such a result was required. Indeed, DCCC is poorly positioned to argue that

the Commissioners' failure to issue an advisory opinion consistent with Draft A is arbitrary while it forcefully argues that Draft A is inconsistent with the law.

D. The Commission Did Not Harm DCCC's Constitutional Rights by Declining to Adopt Draft A

DCCC attempts to fortify its in-the-alternative claim that the Commission should have adopted Draft A by arguing that the failure to issue an advisory opinion consistent with Draft A "unconstitutionally chilled DCCC's constitutionally protected activity[.]" (Pl.'s Mot. at 43.) This particular claim fails because DCCC's posture in this case significantly undermines the sincerity of its claims to constitutional harm. Unlike prior plaintiffs who unequivocally sought to protect their own preferred avenue for political speech by bringing First Amendment claims to vindicate their rights, DCCC's convoluted position undermines this effort, and its APA claim is a poor vehicle for vindicating this interest.

As detailed *supra* Part I.D., DCCC's allegations are materially distinguishable from prior plaintiffs who insulate their conduct from law enforcement and maximize their political speech. Rather than unequivocally asserting that it is injured by its inability to engage in JFC Advertising, DCCC's asserted "chill" has significance only insofar as it is at what it perceives as a competitive disadvantage — where *other* entities are running JFC-ads like those in the Request and it is not. Similarly, DCCC does not argue that it would be "chilled" or in any way harmed by an advisory opinion finding that the conduct detailed in AOR 2024-13 was unlawful, even though this result could only have the effect of *discouraging* this avenue for DCCC's political speech. As a result, protecting its constitutional rights does not appear to be DCCC's first priority. *See McCutcheon*, 496 F. Supp. 3d at 337 (denying injunction where plaintiff appeared to "spend more time disparaging the alleged loophole than advocating for it").

In addition, DCCC's in-the-alternative claim seeks a permanent injunction against enforcement for an entire category of broadly defined "JFC-advertising," (Am. Compl., Prayer for Relief A, C, at 31), but this conduct is so ill-defined that any conceivable injunction would be entirely untethered to any specific proposed activity. *See supra* pp. 31-33. The most DCCC offers is that "DCCC would establish joint fundraising committees with various candidate committees to sponsor television advertisements ahead of 2026 and future elections[,]" (Am. Compl. ¶ 87), but this is a far cry from the level of specificity that courts have required in other cases where plaintiffs sought to vindicate their rights to political speech, which both (1) undermines the credibility of DCCC's claim that it plans to engage in this activity and (2) does not provide the Court with the tools it needs to craft an injunction protecting DCCC's rights without unduly hamstringing future law enforcement. *See, e.g.*, *HLF*, 897 F. Supp. 2d at 414-26 (plaintiff presented "concrete plans" to run five specific advertisements).

Finally, DCCC's perceived "chill" by the prospect of FEC enforcement is severely undermined by the several pages it devotes to describing the inadequacy of the Commission's enforcement process. (*See* Pl's Mot. at 33 ("***Section 30109 offers 'doubtful' and 'limited' relief.***") (emphasis in original); *id*. at 35 ("***Section 30109 imposes 'arduous' and 'long' procedures.***") (emphasis in original).) Irrespective of whether these characterizations of FECA's enforcement procedures are accurate, DCCC apparently believes they are. This contention fatally undermines the credibility of its claim that it has a subjective and credible fear of enforcement if it engages in the conduct described in AOR 2024-13.

CONCLUSION

The Commissioners charged with the interpretation and enforcement of FECA came to differing, though reasonable conclusions on the merits of AOR 2024-13, requiring the closeout of that Request without answering the questions posed. DCCC's allegation that this was the result of arbitrary and capricious decision-making is therefore meritless. The Court should not reach this question, however, because plaintiff fails to raise a case or controversy sufficient to invoke this Court's jurisdiction. The Closeout Letter DCCC challenges was indisputably without binding legal effect, and DCCC's unfounded speculation about the impact this outcome had or will have on it and its political rivals requires immense speculation. For the foregoing reasons, this Court should grant the FEC's Motion to Dismiss, deny plaintiff's Motion for Summary Judgment, and dismiss the Complaint.

Respectfully submitted,

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April 18, 2025

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2025, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

/s/ Blake L. Weiman