UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DCCC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, NRSC, Intervenor-Defendant	Civ. No. 24-2935 (RDM) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

In this action, plaintiff DCCC, formerly known as the Democratic Congressional Campaign Committee, challenges the non-issuance of an advisory opinion by the Federal Election Commission ("FEC" or "Commission") as arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). However, plaintiff's suit fails at the most fundamental level. Because its alleged injuries are not traceable to the Commission, it has not met the irreducible constitutional minimum for maintaining a suit: standing.

The request for an advisory opinion at issue, submitted not by plaintiff but by DSCC, formerly known as the Democratic Senatorial Campaign Committee, Montanans for Tester, and Gallego for Arizona (the "Requestors"), sought guidance concerning the application of Commission regulations to proposed television advertisements run by joint fundraising committees ("JFC-advertising" or "JFC-advertisements") that advocated for the election of either then-U.S. Senator Jon Tester or then-Congressman Ruben Gallego, and contained a brief fundraising solicitation at the end of the advertisements. Because the Commission did not garner the required four votes to issue an advisory opinion, it issued a letter informing Requestors of this result and closing the request.

Plaintiff filed suit and originally sought preliminary injunctive relief, requesting that the Court vacate and set aside the closeout letter and declare that the JFC-advertising in the request is subject to contribution limits. After the Court denied this motion, plaintiff amended its complaint, which now alternatively seeks to permanently enjoin the FEC from pursuing enforcement against it for engaging in joint fundraising advertising in excess of contribution limits. Ultimately, like its original Complaint, plaintiff's Amended Complaint ostensibly seeks from the Court what Requestors were unable to obtain from the Commission: a binding decision

that accords with plaintiff's desired interpretation of the Federal Election Campaign Act of 1971 ("FECA").

Plaintiff alleges three injuries: (1) a chilling effect on running its own joint fundraising advertisements stemming from legal uncertainty about JFC-advertising; (2) a competitive injury because Republican political party committees have run, and will run, JFC-advertisements; and (3) an informational injury because it claims it was denied information that its competitors would disclose had they categorized their JFC-advertising spending in accord with plaintiff's interpretation of FECA. These purported injuries are not traceable to the Commission for several reasons.

First, because the legal landscape has not changed before or after the request, the purported chilling injury is not derived from the non-issuance of an advisory opinion. Because the Commission took no ultimate position on the legality of JFC-advertising, it leaves plaintiff no better or worse off than it was before Requestors submitted their request. If plaintiff has refrained from running advertisements similar to those of Republican committees, it has done so purely by choice as it seeks to gain advantage in a competitive regulatory environment.

Second, plaintiff's alleged competitive and informational injuries began to accrue when Republican committees started to run the disputed JFC-advertisements last July, and not in response to any action by the FEC. Requestors did not submit their advisory opinion request until last September, which is strong evidence that neither their request nor the FEC's consideration of it caused plaintiff any harm.

Third, plaintiff cannot claim it has suffered an informational injury for a simpler reason: the Request did not ask the FEC to address disclosure of the information sought by plaintiff in this action. While DCCC's alleged informational injury turns on purported regulatory

"uncertainty," the Requestors submission to the FEC could not have resolved this uncertainty because it did not present a question regarding reporting requirements.

Fourth, plaintiff's new requests for declaratory and injunctive relief do not change this result, nor do inapposite cases brought pursuant to the First Amendment. Regardless of how it now pleads its claim, plaintiff lacks standing because it has not established an injury traceable to, or caused by, the Commission.

Finally, plaintiff's choice to file the instant suit, rather than avail itself of the established channel for challenging the legality of another person's campaign finance activity, that is, filing an administrative enforcement complaint with the Commission, further undermines its claim to have suffered harm traceable to the Commission, as opposed to its own choices and strategy.

Because plaintiff cannot establish standing, this Court must dismiss its claim for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

I. LEGAL BACKGROUND

A. The Federal Election Commission and Its Advisory Opinion Process

The FEC is a six-member, independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-46. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, *id.* § 30106(b)(1), and make rules and issue advisory opinions, *id.* §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (per curiam). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement

actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6). At least four affirmative Commissioner votes are required for the Commission to take certain actions, including, *inter alia*, issuing advisory opinions, promulgating regulations, and advancing enforcement matters. *Id*. §§ 30106(c), 30107(a)(6)-(9).

Any person may request an advisory opinion regarding the application of FECA and Commission regulations. *Id.* § 30108(a)(1); 11 C.F.R. § 112.1(a)-(b). FECA generally provides that the Commission "shall render [an] advisory opinion" within 60 days of receiving a request. 52 U.S.C. § 30108(a); *see* 11 C.F.R. § 112.1(b)-(d). Congress recognized, however, that the Commission may not be able to issue an advisory opinion in some cases due to the four-vote requirement; consequently, "[a] 3-3 vote by the Commission on a proposed opinion is considered a response for purposes of the time requirements." H.R. Rep. No. 96-422 (1979), at 20. Accordingly, the Commission adopted a regulation that it shall either issue an advisory opinion or "a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members" within 60 days of receiving a request. 11 C.F.R. § 112.4(a); *see also Explanation & Justification of Regulations Concerning Jan. 8, 1980 Amendments to Federal Election Campaign Act of 1971*, 45 Fed. Reg. 15080, 15090, 15124 (Mar. 7, 1980). In the event that an advisory opinion is requested by "a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party," the Commission must treat the request on an expedited basis, and "render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request." 52 U.S.C. § 30108(a)(2).

When the Commission issues an advisory opinion finding the proposed transaction or activity lawful under FECA and its regulations, the opinion acts as a safe harbor against

sanctions provided by FECA for any 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. 52 U.S.C. § 30108(c).

B. FECA's Regulation of Joint Fundraising Activities

FECA and Commission regulations allow political committees to engage in joint fundraising activities, the procedures for which are described in 11 C.F.R. § 102.17. *See also* 52 U.S.C. § 30102(e)(3)(A)(ii) ("[C]andidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee."). Section 102.17 is premised on allowing multiple political committees and other entities to work together to raise money, while ensuring that each participant pays its share of the fundraising costs to avoid receiving an in-kind contribution. The participants in a joint fundraising effort must enter into a written agreement that "shall state a formula for the allocation of fundraising proceeds." 11 C.F.R. § 102.17(c)(1)-(2). Each participant's share of joint fundraising expenses must be calculated based on the percentage of receipts the participant has been allocated under the joint fundraising agreement. *Id.* § 102.17(c)(7)(i)(A). The payment by one participant of another participant's expenses is treated as a contribution subject to contribution limits. *Id.* § 102.17(c)(7)(i)(B). As a result, each participant must pay its proportionate share of joint fundraising expenses, and no participant may subsidize or make a contribution to any other participant in excess of the contribution limits.

Commission regulations also require certain statements in solicitations for contributions. Pursuant to 11 C.F.R. § 110.11, public communications by political committees and other persons that solicit contributions must state the full name and other identifying information about who is paying for the communication, and if paid for by a person other than a candidate's

authorized committee, as well as whether it has been authorized by a candidate or candidate's committee. *See* 11 C.F.R. § 110.11(a)-(b). In addition to the requirements under section 110.11, 11 C.F.R. § 102.17(c) requires a joint fundraising notice to be included in every solicitation for contributions by a joint fundraising committee. *See id*. The notice must include the names of all committees participating in the joint fundraising activity, the allocation formula, a statement informing contributors that they can designate their contributions for a particular participant, and a statement informing contributors that the allocation formula may change if the contribution exceeds the allowable limit. *Id*. § 102.17(c)(2)(i)(A)-(D).

C. Coordinated Expenditures and Party Coordinated Communications

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

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

§ 109.37(a)(2)(i) through (iii); and (3) satisfies at least one of the conduct standards in 11 C.F.R. § 109.21(d)(1) through (6).

II. FACTUAL AND PROCEDURAL HISTORY

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

DSCC is a national party committee of the Democratic Party dedicated to electing Democrats to the U.S. Senate. (*See* Advisory Opinion Request ("Request"), AR000001-02.) Jon Tester is a former United States Senator from Montana who ran for reelection in the 2024 general election for U.S. Senate in Montana, and Montanans for Tester was his principal campaign committee. AR000001; *see also* N.Y. Times, *Sheehy Defeats Tester in Montana, Extending G.O.P.'s Senate Majority*, Nov. 6, 2024, https://www.nytimes.com/2024/11/06/us/elections/montana-senate-tester-sheehy.html. Ruben Gallego is a Senator from Arizona who ran for his seat in the 2024 general election for U.S. Senate in Arizona, and Gallego for Arizona was his principal campaign committee. (AR000001.) On September 18, 2024, DSCC, Montanans for Tester and Gallego for Arizona ("Requestors") submitted an Advisory Opinion Request, 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. (AR000001-02.)

Under the Requestors' proposal, the JFCs' fundraising efforts would include airing 30-second television advertisements. (AR000002, AR000005.) These proposed television advertisements, Requestors explained, 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. (AR000002, AR000005.)

The Request proposed that any contributions received through each television advertisement would be allocated among the participants according to the allocation formula in their joint fundraising agreement, "subject to contribution limits and contributors' ability to designate their contribution for a particular participant." (AR000002.) Expenses would be allocated in the same way. (AR000002.) Requestors stated that the costs of the television advertising, if allocated entirely to DSCC, would "exceed the DSCC's contribution limit or coordinated party spending limit with respect to each candidate." (AR000002.) Requestors provided a sample script of the television advertisements, which included proposed audio and an associated visual element. (AR000002.)

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 contain an on-screen disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2)?

(AR000003.) As to the first question, Requestors stated that they believed that the proposed advertising meets the content and conduct prong of the coordinated communication test. AR000006; *see also* 11 C.F.R. § 109.21(d)(1)-(6). Requestors also opined that the advertisements would likely meet the payment prong of the coordinated communication test, but noted that, if the Commission disagreed, "Requestors would like to use the Joint Fundraising Committees to pay the full cost of the proposed advertising," subject to their allocation formula. AR000006; *see also* 11 C.F.R. § 109.21(d)(1)-(6). Regarding the second question, Requestors noted that, if Commissioners answered no to the first question, they proposed that each JFC "would instead only finance the portion of each advertisement that contains a solicitation for the applicable Joint Fundraising Committee," and thus only pay for the final four seconds of the advertisement. (AR000006.) As to the third question, Requestors stated that they believed the Commission regulations require that the advertisement contain a joint fundraising notice, printed on screen alongside the QR code and asked the Commission to confirm that this was correct. (AR000007.)

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

In a public meeting held on October 10, 2024,[1] 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.[2] Draft A proposed to answer yes to Requesters' Question 1, no to Question 2,

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

[2] An original Draft B was also on the agenda, (*see* AR000064-76), but the Commission only voted on Draft A and a revised Draft B ("Draft B").

and, with respected 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* Draft A, AR000051-62.)

As to Question 1, Draft A held that the Requestors' proposed television advertisement was joint fundraising activity containing a solicitation of contributions, and thus each of the Requestors' JFCs "pay the entire cost of the proposed television advertising, allocating the costs according to the allocation formula in the joint fundraising agreement, because the advertising would be joint fundraising activity containing a solicitation." (AR000052.) Draft A explained that Requestors' "sample script contain[ed] a clear request for funds ('donate now') and facilitate[d] the making of contributions via a QR code linked to the Joint Fundraising Committee's online fundraising page." (AR000058-59.) Explaining that its approach was consistent with the Commission's conclusion in Advisory Opinion 2024-07 (Team Graham), Draft A concluded that the Requestors' proposed communication would "not meet the payment prong of the party coordinated expenditure test, and no in-kind contribution or party coordinated expenditure will result, if each participant pays its share of the cost pursuant to the allocation formula in the joint fundraising agreement." (AR000059.) Because Draft A would have answered Question 1 in the affirmative, it explained that it would not need to address Question 2. (AR000059.)

As to Question 3, Draft A explained that each planned advertisement may satisfy the joint fundraising notice requirement under 11 C.F.R. § 102.17(c)(2) by including, in addition to any disclaimer required by 11 C.F.R. § 110.11, a QR code that directs viewers to a fundraising webpage that displays the complete joint fundraising notice. (AR000060.) The Draft stated that it would be "impracticable" for the JFCs to include both the notice required by the JFC rules in

section 102.17(c)(2), and the disclaimer required for all political committees' public communications in 11 C.F.R. § 110.11. (AR000061.) Draft A noted that Requestors stated that "'[o]nly the final four seconds'" of the proposed advertisement will include a solicitation for the applicable JFC and that each advertisement will display "'a QR code during the final few seconds that, when scanned, links to an online fundraising page for the applicable Joint Fundraising Committee.'" (AR000061.) Similar to permitted disclaimers on internet public communications, the Draft reasoned that the QR Code, standing alone, would provide a mechanism to enable recipients of the advertising to view the full joint fundraising notice "after no more than one step." (AR000061-62.)

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.

As to Question 1, to which it answered no, Draft B would have held that each JFC "may not finance the entire costs of the proposed television advertising and allocate the costs among its participants according to the allocation formula in its joint fundraising agreement." (AR000096.) Draft B held that a public communication like Requestors' proposed television advertisements, which refer to a clearly identified candidate for the U.S. Senate and are publicly disseminated in the candidate's jurisdiction within 90 days before the candidate's general election, would meet the content standard in 11 C.F.R. § 109.37(a)(2)(iii)(A) and that "[t]he material involvement of the candidate or the candidate's agents in decisions regarding the advertisement's content, timing and mode of distribution as posited here would meet the conduct standard in 11 C.F.R. § 109.21(d)(2))." (AR000098.) Draft B also reasoned that the advertisements would meet the

payment prong of the coordination test, and that the proposed advertisements would serve primarily as campaign advertising for the candidate featured in each advertisement. (AR000098-99.)

Draft B distinguished the Requestors' proposed communications from those addressed in Advisory Opinion 2024-07 (Team Graham), where there was no indication that the public communications at issue would be "'indistinguishable to the viewer from a standard campaign advertisement'" by the participating candidate. (AR000099 (quoting AR000005).) It concluded that, if the JFC paid for the entirety of the advertisement, allocating two-thirds of the cost to DSCC and one-third to the candidate pursuant to the allocation formula, "DSCC's payment of that cost would satisfy the payment prong of the coordinated communication test and therefore result in either an in-kind contribution to the candidate or a coordinated party expenditure." (*See* Draft B, AR000091-104.) To avoid "potential circumvention of the contribution and coordinated party expenditure limits through the joint fundraising framework," Draft B would have concluded that the JFC may not pay the entire cost of the advertisement and allocate it pursuant to the allocation formula in the joint fundraising agreement. (AR000100)

With respect to Question 2, Draft B answered yes, concluding that each JFC "may pay for the portion of the television advertising that includes a solicitation for the Joint Fundraising Committee, calculated on a time/space basis, and allocate the cost of that portion among its participants according to the allocation formula in its joint fundraising agreement." (AR0000100.) Draft B explained that such allocation was a "reasonable method" to ensure that the JFC and the candidate committee each pay for the costs of the proposed advertisements "in proportion to the benefit that each committee receives from them." (AR0000101-102.) Finally, with respect to Question 3, Draft B concluded that because the joint fundraising regulations do

not provide for adaptive disclaimers or other exceptions, the proposed television advertisements must include a disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2) in addition to any disclaimer required by 11 C.F.R. § 110.11. (AR0000102-103.)

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.[3] (*See* Vote Certification, AR000147.) Then-Chairman Cooksey and Commissioners Dickerson, and Trainor voted affirmatively for the motion to approve Draft A. (AR000147.) Then-Vice Chair Weintraub and Commissioners Broussard and Lindenbaum dissented. (AR000147.) Then-Vice Chair Weintraub and Commissioners Broussard and Lindenbaum voted affirmatively for the motion to approve Draft B. (AR000147.) Then-Chairman Cooksey, and Commissioners Dickerson, and Trainor dissented. (AR000147.)

On October 10, 2024, the Commission provided Requestors a letter informing them that "the Commission has concluded its consideration of your advisory opinion request without issuing an advisory opinion." (*See* Letter re: Advisory Opinion Request 2024-13 (October 10, 2024) ("Closeout Letter"), AR0000148-49.)

C. Plaintiff's Original Complaint and Motion for Preliminary Injunction

DCCC is the national congressional campaign committee of the Democratic Party, the mission of which is to elect Democratic candidates to the U.S. House of Representatives. (*See* DCCC's First Amended Complaint for Declaratory Judgment and Injunctive Relief ("Amended

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[3] Prior to the vote, the Commission received numerous comments regarding the Request, as well at the two pertinent drafts. (*See* AR000009-50, 77-90, 105-46 (including comments from the Republican National Committee, NRSC (formerly known as the National Republican Senatorial Campaign), NRCC (formerly known as the National Republican Congressional Committee), Requestors, Campaign Legal Center, Magnus Pearson Media and Dixon/Davis Media Group, End Citizens United, Hogan for Maryland, Holtzman Vogel PLLC, Something Else Strategies).) Notably, plaintiff had an opportunity to comment on the Request and the drafts, but did not do so.

Complaint" or "Am. Compl.") (ECF No. 28) ¶ 15.) On October 17, 2024, plaintiff filed its original Complaint in this case seeking preliminary and permanent injunctive relief. (Pl.'s Compl. for Declaratory J. and Injunctive Relief ("Compl.") (ECF No. 1).) The Complaint alleged that the FEC's non-issuance of an advisory opinion in connection with AOR 2024-13 on the eve of the 2024 election "gravely injure[d]" DCCC by "requiring it, in effect, to compete on uneven terms or potentially transgress the law," (*id.* ¶ 10), depending on whether it chose to run JFC-advertisements—defined as "using the FEC's joint fundraising regulations to permit a national party committee to pay for unlimited television advertising on behalf of Republican candidates without treating those costs as a contribution." (*See id.* ¶ 5.)

The Complaint alleged three distinct injuries: (1) that plaintiff was "chilled" from running JFC-advertisements (*see* Compl. ¶¶ 82-86, 93-94); (2) that plaintiff was placed at a competitive disadvantage (*see id.* ¶¶ 9, 59, 82-84, 87, 94) ; and (3) that plaintiff sustained an informational injury. (*See id.* ¶ 86). Plaintiff sought redress in the form of injunctive relief setting aside the Closeout Letter, and a declaration "that expenditures made by a national party committee in cooperation, consultation, or concert with a candidate for television advertisements with joint fundraising solicitations are 'contributions'" within the meaning of FECA and are "thus subject to FECA's limits." (Compl., Prayer for Relief B, at 27.)

Several hours after filing its Complaint, 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. ("Motion" or "Mot.") (ECF No. 6).) The Motion requested solely that the Court "vacate[] and set[] aside the FEC's October 10 final order as arbitrary and capricious and contrary to FECA." (Mot. at 30.) The FEC opposed the Motion. (*See* FEC Opp'n to Pl.'s Mot. for Preliminary Injunction ("FEC PI Opp.") (ECF No. 17).) The NRSC, formerly known as the

National Republican Senatorial Committee, as Intervenor-Defendant, likewise opposed. (*See* NRSC Mem. of Points and Authorities in Opp'n to Pl.'s Mot. for Preliminary Injunction ("NRSC PI Opp." or "NRSC PI Opposition") (ECF No. 16).) In its opposition, the NRSC alleged, *inter alia*, that DSCC began to run numerous JFC-advertisements, including in Michigan, Pennsylvania, and Wisconsin Senate races shortly after the Commission provided Requestors the Closeout Letter.[4] (*See* NRSC PI Opp. at 11-13.)

The Court heard arguments from the DCCC, FEC, and NRSC on the preliminary injunction motion on October 28, 2024.

D. The Court's Order Denying Plaintiff's Motion for Preliminary Injunction

On November 1, 2024, this Court issued a Memorandum Opinion and Order denying DCCC's request for a preliminary injunction. (*See* Memorandum Opinion and Order ("Opinion" or "Op.") at 4 (ECF No. 21).) The Court found that plaintiff was unable to show that, were the Motion granted, the relief requested would redress its alleged harm. (*Id.* at 12-13 ("[W]hether framed in terms of standing or irreparable injury, it is well settled that the Court may not issue a preliminary injunction absent a showing that the requested, emergency relief is needed to prevent—and will likely prevent—the movant from suffering an imminent injury.").)

The Court explained that the Closeout Letter "did not take a position on the lawfulness—or unlawfulness—of the conduct at issue," "provide any party with any legal rights, defenses, or obligations," or "affirmatively authorize any conduct [or] establish a safe harbor permitting the DCCC's opponents to violate FECA." (*Id.* at 14-15.) Accordingly, the Court reasoned that it was "far from clear what it would mean to set aside a notice indicating that the FEC had split

[4] 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.

three-three in considering the advisory opinion request and was thus unable to issue the requested advisory opinion." (*Id.* at 14-15.) Furthermore, it was "equally unclear what it would mean to set aside that non-decision only temporarily, pending resolution of the case on the merits." (*Id.* at 15.) Because declining to issue an advisory opinion did not "til[t]" or otherwise affect the "even playing field" on which the parties found themselves, (*see id.* at 20), and because the "committees are in precisely the same position today that they were in before" the Closeout Letter and would remain so even were a preliminary injunction issued, (*see id.*), the Court concluded that "granting that relief would neither redress the DCCC's asserted injuries nor avoid any irreparable injury that the DCCC would otherwise suffer." (*Id.* at 12.)

The Court explained that its denial of plaintiff's preliminary injunction was "limited to the narrow form of relief sought in the pending motion[.]" (*See id*. at 13.) Accordingly, the Court did not decide whether it has subject-matter jurisdiction over plaintiff's claim, but only addressed the narrower issue, concluding that issuance of a preliminary injunction was unnecessary to remedy alleged irreparable harm. (*Id.* at 20.)

E. Plaintiff's Amended Complaint

On December 20, 2024, plaintiff filed its First Amended Complaint. (*See generally* Am. Compl.) In substance, it is nearly identical to the original Complaint, except that it projects its injuries into the future and seeks an alternative form of relief. (*Compare generally* Compl., *with* Am. Compl.) In its Amended Complaint, plaintiff asserts that, in July 2024, the NRSC began airing JFC-advertisements in Montana. (Am. Compl. ¶ 50.) Again, plaintiff defines JFC-advertisements as "using the FEC's joint fundraising regulations to permit a national party committee to pay for unlimited television advertising on behalf of Republican candidates" without complying with coordinated and excessive spending regulations. (*See id.* ¶ 5.) Plaintiff

claims that the advertisements, examples of which include advertisements for Republican Senate candidate Tim Sheehy, comprise "26 seconds" that "look[] exactly like any other candidate ad," and four seconds in which a QR fundraising code appears. (*Id.* ¶ 50.) Plaintiff alleges that the QR Code in the advertisement links to the same donation page for the Sheehy Victory Committee. (*Id.*) Plaintiff further alleges that the NRSC has aired similar advertising in other states as well. (*Id.* ¶¶ 56-60.) The Amended Complaint avers that the NRCC ran similar JFC-advertisements concerning candidates for the House of Representatives. (*Id.* ¶ 59.)

The Amended Complaint alleges that these advertisements "appear to violate FECA's contribution limits and party coordinated expenditure limits." (*Id.* ¶ 61.) As it did in its original Complaint, plaintiff alleges that it has been "chilled" from engaging in joint fundraising activities "due to the prospect of government and/or third-party enforcement proceedings and onerous sanctions." (*Id.* ¶¶ 84, 88.) The Amended Complaint claims that, because of "the FEC's failure to render an AO . . . DCCC may suffer severe competitive harm by sitting on its hands while Republican committees and candidates reach voters through these schemes, or it may engage in the same tactic that plainly runs contrary to the text of 52 U.S.C. 30116(a)(7)(B)(i), but without any safe harbor protections." (*Id.* ¶ 86.) As a result, plaintiff alleges it suffers both a "competitive" harm and an "informational injury" because it is allegedly "in the dark" as to how much Republican advertisements are being paid for by joint fundraising committees." (*Id.* ¶¶ 86, 89.) Further, plaintiff alleges that "[o]n information and belief, "Republican Committees will continue to engage in tens of millions of dollars of JFC-advertising in future elections," (*id.* ¶ 86), and thus that its harm is ongoing. (*Id.* ¶ 11.)

The Amended Complaint asserts a single claim: that the Commission violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, by "fail[ing] to issue . . . an AO

requested by the DSCC and several Democratic candidate committees" regarding proposed advertisements and closed the matter "without rendering any opinion." (*Id.* ¶ 94.) Although it was not a Requestor that submitted the Advisory Opinion Request, plaintiff asserts that, as a political party committee "akin to DSCC," it "stood to benefit equally from any such advisory opinion because it is in the same position as DSCC when it comes to JFC-advertising." (*Id.* ¶ 95.)

In its Amended Complaint, plaintiff expands its prayer for relief. As in its original Complaint, plaintiff first seeks a declaration that "JFC-advertising expenditures, as defined and described in AOR 2024-13, constitute 'contributions'" under FECA, and are thus subject to FECA's limits. (*Id.* at 31.). It also reprises its request that the Closeout Letter be set aside as unlawful "agency action or inaction that is arbitrary and capricious and contrary to law." (*Id.*) Plaintiff also adds a new, 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." (*Id*.) As in its original Complaint, it seeks costs, expenses, and attorneys' fees, as well as any other relief the Court deems proper. (*Id.*)

ARGUMENT

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE DCCC HAS NOT SUFFERED AN INJURY TRACEABLE TO THE COMMISSION'S NON-ISSUANCE OF AN ADVISORY OPINION

Plaintiff fails to meet its burden to establish Article III standing for its claim because it cannot demonstrate that it has suffered injuries caused by the agency action it challenges in this APA case. DCCC's Amended Complaint, like its original complaint, brings only a single APA claim challenging the FEC's non-issuance of an advisory opinion in AOR 2024-13. As this Court reasoned in its Opinion denying plaintiff's motion for a preliminary injunction, the FEC's

Closeout Letter "ha[d] no operative legal effect," (Op. at 17), "[n]or did it provide any party with any legal rights, defenses, or obligations." (*Id.* at 15.) The Letter was a ministerial step that put the requesting party on notice that the Commission was unable to reach any result here, but it did no more than convey that the Commission was unable to issue an advisory opinion endorsed by the required four FEC Commissioners.

And just as the Letter had no effect on any party's rights and obligations, neither did the FEC's consideration of AOR 2024-13 more generally. Because declining to issue an advisory opinion does not "til[t]" or otherwise affect the "even playing field" on which all parties find themselves, (*id.* at 20.), plaintiff's alleged injuries are not fairly traceable to consideration of AOR 2024-13. To the extent plaintiff has suffered an injury, it is due to either: (1) self-imposed limitations based upon its assessment of the risk of enforcement if it engages in JFC-advertising—a risk that all similarly situated entities face—or (2) the actions of its competitors, namely the NRSC and NRCC (the "Republican Committees"). Moreover, the relief plaintiff requests in its Amended Complaint—either declaratory relief or, alternatively, injunctive relief preventing enforcement—does not resolve these traceability concerns and permit this Court to find plaintiff has standing. Accordingly, the Court must dismiss the case for lack of subject matter jurisdiction.

A. Article III Standing Requires that Plaintiff Demonstrate That Its Injury was Caused by Defendant's Challenged Conduct

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). When deciding a

motion 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). As the party bringing suit, DCCC bears the burden of establishing standing. *See Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017).

Three indispensable elements comprise the Article III standing inquiry. First, plaintiff must show it has "suffered an injury in fact," which the Supreme Court defines as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not [merely] conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). Second, plaintiff must show that there is a "causal connection between the injury and the conduct complained of," which requires the injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id*. (internal quotation marks and alterations omitted). And third, plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 561 (internal quotation marks omitted). "Each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id*. Moreover, when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of

someone else," standing is "substantially more difficult" to establish. *Id*. at 562; *accord Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (per curiam). Indeed, a plaintiff's "reliance on the anticipated action of unrelated third parties makes it considerably harder to show the causation required to support standing." *Arpaio*, 797 F.3d at 172.

Article III's "Case or Controversy" limitation requiring that a plaintiff show causation for its alleged particularized injury is "self-evident." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996). Indeed, "[n]ot to require that a plaintiff show that its particularized injury resulted from the government action at issue would effectively void the particularized injury requirement," and would permit "any plaintiff," not just the party initiating the instant action, to "allege an injury to its own interests if that injury need not be caused by any act of the defendant." *Id*. Therefore, the causation element ensures that federal courts act only where its decision will redress a plaintiff's injuries "resulting from the putatively illegal action" of defendant or, in other words, those that "can be traced to the challenged action of a defendant." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Merely alleging harm (even if sufficient to constitute injury-in-fact) and asking the court to remedy it (even if the relief it requests might redress that harm) does "not suffice to invoke the federal judicial power." *Id*. at 44. "The Constitution requires an Art. III court to ascertain that both [injury and causation] requirements are met before proceeding to exercise its authority on behalf of any plaintiff," regardless of the relief sought. *Valley Forge Christian Coll. v. Ams. Utd. For Separation of Church & State, Inc.*, 454 U.S. 464, 491 (1982) (Brennan, J., dissenting).

B. Plaintiff's Asserted Injuries Are Not Traceable to the FEC's Consideration of AOR 2024-13

Plaintiff's Amended Complaint must be dismissed because DCCC's alleged injuries were not caused by the specific FEC conduct it challenges through its APA claim: the non-issuance of

an advisory opinion in AOR 2024-13. The Amended Complaint asserts three alleged injuries suffered by DCCC: (1) a chilling effect stemming from alleged legal uncertainty as to whether JFC-advertisements are lawful under FECA; (2) a competitive injury because other political party committees, like the NRSC and NRCC, have run and will run JFC-ads; and (3) an informational injury because it claims it was denied disclosure of JFC-advertisement funding by its purported rivals. (Am. Compl. ¶¶ 61, 84, 86, 88-91). None are fairly traceable to the challenged Commission conduct of a "failure to issue an advisory opinion, and subsequent closure of AOR 2024-13." (*Id.* ¶ 97.)

1. Plaintiff's Alleged Injuries Occurred Independently of, and Were Not Exacerbated by, the Commission's Consideration of AOR 2024-13

About three weeks after the FEC issued the Closeout Letter in AOR 2024-13, this Court observed that "the campaign committees are in precisely the same position today that they were in before the Commission issued its October 10 letter, and they would remain in that same position even if the Court were to issue a preliminary injunction setting the letter aside." (Op. at 20.) This assessment is as true today as it was then, and for that reason alone the DCCC cannot trace any of the alleged harm it has suffered to the Commission's consideration of the Request, nor the Letter that informed it of the Commission's conclusion.

"The more attenuated or indirect the chain of causation between the government's conduct and the plaintiff's injury, the less likely the plaintiff will be able to establish a causal link sufficient for standing." *Ctr. for Bio. Diversity v. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009). Here, there are several broken links in the causal chain DCCC must establish between AOR 2024-13 and its alleged injuries. *First*, plaintiff misapprehends the practical effect of the FEC not issuing an advisory opinion, which does not alter the legal landscape, and finds the plaintiff in the same position as it was before the FEC considered AOR 2024-13. *Second*,

plaintiff's alleged competitive and informational injuries arise out of the conduct of third parties—not the agency. *Third*, plaintiff would not receive the information it seeks regardless of how the Commission resolved AOR 2024-13. *Fourth*, the timing of plaintiff's alleged competitive and informational injuries, which began several months before the Request and allegedly continue, show that these injuries are not traceable to the Commission's consideration of AOR 2024-13 and non-issuance of an advisory opinion.

a. Because the Legal Landscape Has Not Changed, the Alleged Chilling of JFC-Advertisements Is Not Traceable to AOR 2024-13

First, because the consideration of AOR 2024-13 did not change the legal landscape regarding JFC-advertising, to the extent DCCC is purportedly "chilled" from engaging in JFC-advertising, this is not fairly traceable to the FEC's consideration of AOR 2024-13 or the issuance of a Closeout Letter. As the Court explained, the Letter, a pro forma notification to the Requestors and the general public, merely "[e]xplain[ed] that . . . 'the Commission was unable to render an opinion in this matter.'" (Op. at 14-15 (quoting Closeout Letter, ECF No. 1-3 at 2); *see generally* 11 C.F.R. § 112.4).) 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.) It "merely reported that the FEC had split three-three on the advisory opinion request and, thus, was unable to offer the requested advice." (*Id*. at 14.) Therefore, the "letter did not affirmatively authorize any conduct and did not establish a safe harbor permitting the DCCC's opponents to violate FECA." (*Id*. at 15-16.)

This Court's prior assessment of the Closeout Letter is instructive in ascertaining the effect of AOR 2024-13 on the "legal landscape" concerning JFC-advertisements. Where, as here, no advisory opinion can be issued for lack of a four-vote majority, FEC regulations require that the Commission issue a closeout letter that serves to memorialize the result of the FEC's

consideration of the advisory opinion request upon its conclusion. *See* AR000148-49; 11 C.F.R. § 112.4(a) ("[T]he Commission . . . shall issue a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members."). For purposes of defining the agency conduct plaintiff challenges—and to which it attributes its alleged harm—the FEC's Closeout Letter and AOR 2024-13 are synonymous, and so the Letter is not discrete conduct with independent significance, but rather an encapsulation of the Request's outcome. (*See* 11 C.F.R. § 112.4(g) (describing the publicly disclosed closure of an FEC advisory opinion request as either the advisory opinion "or other response under 11 CFR 112.4(a)").)

AOR 2024-13 and the Closeout Letter notwithstanding, Requestor DSCC, plaintiff DCCC, and any other actor seeking to engage in transactions or activities materially indistinguishable from those described in AOR 2024-13 find themselves in the same position as they were prior to the Request. (Closeout Letter, AR000147-48 (informing Requestors that the Commission will not issue an advisory opinion); *see also* Op. at 15 ("[I]t is far from clear that vacating the October 10 letter would have any legal effect at all, let alone any effect that might prevent or redress the DCCC's asserted injuries.").) As such, plaintiff's allegation that its ability to run JFC-advertisements has been "chilled" finds no purchase. Plaintiff complains that because the nature of Republican Committees' spending on JFC-advertisements is "legally doubtful . . . DCCC is hesitant to spend funds in a manner that may violate campaign finance laws," and thus the lack of an advisory opinion has "chilled" DCCC from supporting its candidates. (Am. Compl. ¶ 88; *see id.* ¶ 84 ("Without . . . safe harbor protection . . . Plaintiff is chilled from engaging in [JFC-advertising] due to the prospect of government and/or third-party enforcement proceedings and onerous sanctions."); *see id.* ¶ 91 (referring to "legal

uncertainty").) But, because the status quo remains the same, and the challenged conduct neither permits nor condemns engaging in JFC-advertising, plaintiff cannot have sustained a chilling injury traceable to the consideration of AOR 2024-13. *Cf. Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 40 (D.D.C. 2015) (concluding that an interest group lacked standing to challenge government conduct that merely maintained status quo). After all, plaintiff never elected to run a JFC-advertisement *prior to* AOR 2024-13, either, because the legal state of play was identical to the present.

Here, DCCC cannot plausibly claim that its decisions as to what political advertisements to run in the last election cycle or subsequent ones were dictated by the FEC's consideration of AOR 2024-13. DCCC faces the same legal landscape as its competitors NRSC and NRCC, and that these various committees reached different conclusions on the most advantageous courses of action in 2024 is not evidence that the FEC has harmed plaintiff's prospects. The FEC provides individuals and committees with guidance pursuant to the advisory opinion process; however, Commissioners are sometimes unable to reach the requisite four affirmative votes on some issues. *See* 52 U.S.C. § 30106(c), § 30107(a) (requiring four affirmative votes to issue an advisory opinion). Here, having been unable to garner four votes, the Commission has taken no position on the legality of a particular course of action. As such, plaintiff is merely complaining about a theoretical risk inherent in a competitive regulatory environment.

In addition, plaintiff itself asserts that the current state of the law well predates the Commission's consideration of AOR 2024-13. (*See* Am. Compl. ¶ 88 (casting JFC-advertisements as being "legally doubtful"), ¶ 91 (referring to "legal uncertainty").) The applicable regulations were adopted decades ago, and the statute of limitations for facial challenges to FEC rules is six years. *See* 28 U.S.C. § 2401(a). What has changed, according to

plaintiff, is not the Commission's regulations or policy, but rather the actions of the Republican Committees, beginning in July 2024. (Am. Compl. ¶ 1; *see id.* ¶ 63 (explaining that "[o]n September 18, 2024, after the dramatic increase in the NRSC's use of joint fundraising committees to fund television advertisements" DSCC submitted the Request).) Needless to say, the FEC did not cause the NRSC to pursue the strategy about which plaintiff complains (and regarding which plaintiff determined not to lodge an administrative complaint). *See infra* Parts I.B.1.b, I.C. And plaintiff's contention that the FEC's consideration of AOR 2024-13 created "legal uncertainty" (and chilling resulting therefrom) is considerably undermined by the fact that, according to the allegations in NRSC's opposition to plaintiff's preliminary injunction motion, DCCC is now the *only* one of the four similarly situated major party national committees that has not run some form of JFC-advertisements. (*See* NRSC PI Opp. at 11-13.) The NRSC, NRCC, and DSCC each ran similar advertisements in the leadup to the 2024 election cycle.[5] (*See id.*)

b. Plaintiff's Alleged Competitive and Informational Injuries Were Caused by the Independent Action of Third-Party Republican Committees and Are Not Traceable to the FEC

Further, taking plaintiff's allegations as true, DCCC's alleged competitive and informational injuries flow from the previous, and allegedly future, conduct of third parties: namely, "the Republican Committees" that "shovel tens of millions of dollars into television advertisements . . . coordinated with[] Republican candidates in competitive elections across the country." (Am. Compl. ¶ 60.) To establish standing, a plaintiff must demonstrate that "'in fact, the asserted injury was the consequence of the defendants' actions,' rather than of 'the independent action' of a third party." *Murthy v. Missouri*, 603 U.S. 43, 68 n.8 (2024) (quoting

[5] 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.

Simon, 426 U.S. at 42, 45); *see 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).

Here, plaintiff alleges that it is the Republican Committees' approach to JFC-advertisements, rather than the FEC's consideration of AOR 2024-13, which has allegedly disadvantaged plaintiff, (*see* Am. Compl. ¶ 89), and left it "in the dark as to how much each ad raises." (*See id.*) Indeed, 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 id.* at 15 (explaining that the Closeout Letter did not "provide any party with any legal rights, defenses, or obligations").) On plaintiff's telling, the Republican Committees' means of JFC-advertising allegedly broke from past practice beginning July 2024. (*See* Am. Compl. ¶¶ 50-60; *see also id.* ¶ 63 (explaining that DSCC submitted the advisory opinion request "after the dramatic increase" in JFC-advertising).) 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. v. Becerra*, No. 21-CV-1401 (TSC), 2024 WL 2803316, at *5 (D.D.C. May 31, 2024) (quoting *Black v. LaHood*, 882 F. Supp. 2d 98, 104 (D.D.C. 2012)); *see also Citizens Alert Regarding the Env't v. Leavitt*, 355 F. Supp. 2d 366, 373 (D.D.C. 2005) (explaining that plaintiffs would have sustained their injuries notwithstanding any alleged agency malfeasance).

This reasoning also extends to any future injuries, to the extent they remain non-speculative,[6] 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). Plaintiff's "real plea" appears to be that the agency's consideration did not cause the ongoing injury "to abate." *Cf. Calif. Ass'n of Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 825 (D.C. Cir. 1985). For standing purposes, "[t]his will not suffice." *Id.* Where the only changed variable from previous elections is Republican Committees' actions, as opposed to "unlawful conduct" by the FEC, standing will continue to fail. *See id.* at 826.

c. Plaintiff's Alleged Informational Injury Cannot Be Derived from AOR 2024-13 Because the Information It Alleges It Was Denied Was Outside the Scope of that Request

Plaintiff's alleged informational injury cannot be traced to AOR 2024-13 because the information DCCC claims it is wrongfully denied is outside of the scope of the Request. DCCC alleges that it is "in the dark as to . . . whether or how much money any given donor contributed to an ad," and "whether and how much funding any given ad raised." (Am. Compl. ¶ 89.) But because 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, *see* 52 U.S.C. § 30104, it is not possible for DCCC to obtain the particular information it seeks even if "the Republican advertisements were being reported as contributions or coordinated party expenditures." (Am. Compl. ¶ 89.) Furthermore, even assuming there are ambiguities regarding reporting requirements associated with JFC-advertising, AOR 2024-13 did

[6] Notably, plaintiff has yet to put on the record any details regarding alleged plans to run JFC-advertisements in the 2026 election cycle.

not present a question with respect to reporting requirements, and therefore no draft advisory opinion resolved them. *See supra* pp. 8-9 (listing the questions posed to the Commission in DSCC's Request). Even if the Commission had been able to issue an advisory opinion regarding the proposed JFC-advertisements, it would not have evaluated reporting requirements that lie outside of the scope of the Request. Thus AOR 2024-13 cannot be traced to the DCCC's alleged paucity of information.

d. Because Plaintiff's Alleged Competitive and Informational Injuries Predate AOR 2024-13, They Are Not Traceable to the FEC's Consideration of that Request

Finally, the fact that plaintiff was, by its own admission, suffering alleged competitive and informational injuries prior to the consideration of AOR 2024-13 is yet more evidence that its injuries were not caused by that Request. DCCC avers that the NRSC began employing JFC-advertising in July of 2024, (Am. Compl. ¶¶ 1, 50), well predating AOR 2024-13, which was initiated by DSCC's Request in September 2024. (*See* Am. Compl. ¶ 63.) When an injury occurs "before" the conduct a plaintiff alleges gave rise to its harm, this is strong evidence against causation. *See Murthy*, 603 U.S. at 58-59 (rejecting plaintiff's claim that harm from social media content moderation was caused by the government because such harm was suffered "before any of the Government defendants engaged in the challenged conduct"); *Cherry*, 641 F.3d at 498 (concluding that injuries predating Federal Communications Commission's conduct cannot be traced to the agency). Even more to the point, "[a] decision *by a third party* that predates" a defendant's challenged conduct "undermines the defendant['s] culpability for harm that flows from the third party's earlier decision." *Gila River Indian Cmty.*, 2024 WL 2803316, at *5 (citing *Black*, 882 F. Supp. 2d at 104) (emphasis added). Plaintiff avers that NRSC began running the JFC advertising in July 2024, three months prior to the submission of the Request,

(Am. Compl. ¶¶ 1, 50), and it makes little sense to attribute any alleged injury as stemming from AOR 2024-13, which culminated on October 10, 2024. (*See* AR000147-49.)

To the extent that plaintiff alleges future injuries, standing remains foreclosed. Injuries that "'occurred before, existed at the time of, *and continued unchanged* after the challenged Commission action' . . . 'cannot be fairly traced'" to agency conduct. *See Cherry*, 641 F.3d at 498 (quoting *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998)) (emphasis added).

2. DCCC's Requests for Declaratory and Injunctive Relief Are Immaterial to Whether the Commission is the Cause of DCCC's Purported Injuries

At the preliminary injunction phase, the parties briefed—and this Court considered—whether this case was on all fours with pre-enforcement First Amendment challenges which sought relief from prospective enforcement by the Commission following an advisory opinion request. (*See* Op. at 14-17.) At that time, this Court rightly concluded that "those requests for relief had immediate, real-world consequences for" those plaintiffs, as they "would, if granted relief, have been able to run its proposed ads without fear of facing an enforcement action." (*Id*. at 16.) The Court further observed that "[h]ere, in contrast, the DCCC has not asked—at least at this stage—for a declaratory judgment authorizing it to run joint fundraising ads without complying with FECA's contribution and consolidated expenditure limits[,]" and that instead DCCC "merely seeks to set aside the FEC's October 10 letter, which itself has no operative legal effect." (*Id*. at 16-17.)

Recognizing its mistake, DCCC's Amended Complaint requests that the Court, as an alternative to setting aside the Commission's Closeout Letter, "permanently enjoin the FEC 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.). The Amended

Complaint also retains plaintiff's request that the Court "[d]eclare that JFC-advertising expenditures, as defined and described in AOR 2024-13, constitute 'contributions' under 52 U.S.C. § 30116(a)(7)(B)(i) and are thus subject to FECA's limits[.]" (*Id.*, Prayer for Relief A, at 31.) Despite plaintiff's efforts, however, its requests for declaratory and injunctive relief do not change the result here. Plaintiff lacks standing because it has not established an injury traceable to, or caused by, the Commission's consideration of AOR 2024-13.

Causation and redressability are distinct inquiries, both of which must be satisfied for a plaintiff to establish standing. *See Valley Forge Christian Coll.*, 454 U.S. at 472 (citing *Simon*, 426 U.S. at 38, 41) (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"). Even where plaintiff pleads an injury the court can redress by granting its requested relief, it "must still show that the agency action was the cause of [that] redressable injury to the plaintiff." *Arpaio*, 797 F.3d at 21; *Renal Physicians Ass'n v. U.S. Dep't of Health and Hum. Servs.*, 489 F.3d 1267, 1279 (D.C. Cir. 2007). Therefore, even assuming arguendo that either declaratory relief establishing the ads as "contributions" and subject to FECA's limits and/or an injunction against enforcement would redress DCCC's alleged injuries, this is immaterial because DCCC cannot plausibly allege that its injuries stem from the Commission's consideration of AOR 2024-13 or the Closeout Letter.

Moreover, none of the cases in which courts have permitted pre-enforcement challenges following an FEC advisory opinion suggest a different result. Each of these cases are materially distinguishable from the APA challenge at bar because those plaintiffs brought First Amendment claims that their rights to engage in political speech were plausibly chilled by the prospect of FEC enforcement. 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*, No. 24-293, 2024 WL 4743104 (S. Ct. Nov. 12, 2024). Plaintiff lacks standing where there is no "causal connection between the FEC['s]" conduct placed at issue in its selected cause of action "and its asserted injury." *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 418 (D.C. Cir. 1994); *see also Allen v. Wright*, 468 U.S. 737, 759 (1984) ("The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing."). The conduct a plaintiff challenges in order to vindicate its statutory or constitutional right is therefore central to the Court's standing inquiry. Because it has chosen to bring this action pursuant to the APA, DCCC cannot align itself with past plaintiffs who have brought First Amendment claims that sought to preserve their rights to political speech.

For instance, *Hispanic Leadership Fund* ("*HLF*") was in many ways in a very similar posture to the instant matter, but HLF's First Amendment claim supported standing in a way that DCCC's APA challenge does not.[7] There, HLF wanted to run eight advertisements, but was concerned that doing so would trigger FECA's disclosure requirements if the ads constituted "electioneering communications" under the Act, and sought to rely on an advisory opinion request submitted by a different organization, only to be stymied by an FEC deadlock as to five of those advertisements. 897 F. Supp. 2d at 414-18. HLF met the standing criteria because it

[7] *HLF* highlights a further defect in plaintiff's pleadings, as the court there emphasized the requirement that a plaintiff present evidence of "*concrete* plans to engage in future activity" before courts can act to enjoin the government. *HLF*, 897 F. Supp. 2d at 423 (emphasis added); *compare id.* at 414 ("HLF plans to run a series of [specific] advertisements") *with* Am. Compl. ¶ 87 ("Specifically, DCCC would establish joint fundraising committees with various candidate committees to sponsor television advertisements ahead of 2026 and future elections.").

"alleged an intent to engage in a course of conduct—the publication of the advertisements—that is protected by the Constitution, but potentially impermissibly burdened by FECA's disclosure requirements," demonstrating that "there is a causal connection between the potential injury *and FECA's enforcement*." *Id*. at 423 (emphasis added). HLF had standing because it "fear[ed] prosecution for engaging in what HLF believes to be constitutionally protected activity[.]" *Id*. at 424. Yet here, DCCC at no point plausibly argues that it has been deprived a right, constitutional or otherwise, to engage in JFC-advertising by AOR 2024-13. Indeed, it plainly believes that the Republican Committees do *not* have such a right. (*See* Am. Compl. ¶ 12 ("JFC-advertising schemes violate FECA,"; *id.* ¶ 96 ("unlawful tactics").) Accordingly, its alleged injury is a seemingly unfair regulatory environment. But that injury is a mismatch for the extraordinary relief it seeks, a permanent injunction against enforcement for an entire category of broadly defined "JFC-advertising[.]"[8] (Am. Compl., Prayer for Relief A, C, at 31.)

Stop This Insanity, Inc. Employee Leadership Fund v. FEC, 902 F. Supp. 2d 23 (D.D.C. 2012), is distinguishable for the same reason. That case was brought after the Commission voted 3-3 in separate votes to approve two draft advisory opinions that reached opposite conclusions. *See id*. at 29. There, the "[plaintiff] allege[d] that it 'will face a credible threat of prosecution if it solicits or accepts contributions to a[n] [independent expenditure-only] account in excess of

[8] Further underscoring the insufficiency of plaintiff's pleadings, DCCC seeks to "enjoin the FEC from pursuing enforcement actions or otherwise prosecuting DCCC for engaging in JFC-advertising[,]" (Am. Compl., Prayer for Relief,) but that term is defined both so broadly and so narrowly that it fails to offer any meaningful boundaries. Indeed, as literally defined in the Amended Complaint, "JFC-advertising" applies only to ads on behalf of Republican candidates. (Am. Compl. ¶ 5 ("They are using the FEC's joint fundraising regulations to permit a national party committee to pay for unlimited television advertising on behalf of Republican candidates without treating those costs as a contribution, even though these advertisements are both coordinated with candidates and are focused almost entirely on advocating for the candidate's election ('JFC-advertising').")

the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)' or 'in derogation of the restriction at 2 U.S.C. § 441b(b)(4)(A)(i).'" *Id*. (citing plaintiff's complaint). The Commission did not contest plaintiff STI's standing there, since STI's alleged injury of "'mut[ing] itself and curtail[ing] its activities[,]'" *id*., had a clear nexus to potential enforcement of FECA's limitations against it. STI sought to vindicate its own rights to political speech, as opposed to DCCC, because plaintiff here encourages the Commission to enforce its interpretation of the law against its rivals. Indeed, STI's advisory opinion request played no part in the *Stop This Insanity* court's substantive reasoning.

Moreover, cases such as *Unity08* and *Ready for Ron* are also distinguishable because those plaintiffs brought First Amendment claims, *and* for the additional reason that in both cases the FEC was able to issue an advisory opinion supported by the required four Commissioner votes. For instance, *Unity08 v. FEC* found only that the plaintiff has standing where plaintiff's alleged injury arose from an "unfavorable advisory opinion" that disapproved of the proposed activity. 596 F.3d 861, 866 (D.C. Cir. 2010). And in *Ready for Ron v. FEC*, while this Court did conclude that "[b]oth the issuance of an unfavorable advisory opinion and the non-issuance of an opinion create a justiciable controversy for Article III purposes[,]" standing was neither contested nor briefed in that case, given that the FEC Commissioners reached a unanimous 6-0 decision in the underlying advisory opinion regarding that plaintiff's core questions, and there were strong alternative grounds for denying the requested relief as to the question that split the Commissioners 3-3. Civ. No. 22-3282, 2023 WL 3539633, at *3 n.3 (D.D.C. May 17, 2023).

These precedents are inapposite to the case at bar, where instead of vindicating its constitutional rights by challenging agency conduct plausibly tethered to the deprivation of those rights, DCCC poses a seemingly novel question: whether it can seek declaratory and injunctive

relief against enforcement based on only an APA claim concerning an unissued advisory opinion. Unlike prior plaintiffs that have brought pre-enforcement challenges, DCCC plainly believes that neither it nor any other party should have the right to engage in the activity it seeks to shield. But before it may reach the merits of this claim, the Court must assess how "attenuated or indirect" is "the chain of causation between the government's [challenged] conduct and the plaintiff's injury[.]" *Indigenous People*, 639 F. Supp. 3d at 86. For the reasons articulated *supra* pp. 22-30, plaintiff fails to identify a "sufficient causal nexus" between the onset of its injuries and the subject of its APA claim. *Freedom Republicans, Inc.*, 13 F.3d at 418. That it has amended its complaint to request an injunction against enforcement is immaterial: it must nevertheless draw a link between its harm and the conduct it deems unlawful that gives rise to its APA claim. *See Young v. EPA*, 106 F.4th 56, 61 (D.C. Cir. 2024) (plaintiff must identify what underlies its APA claim "as an independent cause of an injury" to establish standing). DCCC has not done so.

C. Plaintiff's Failure to Avail Itself of Alternatives to Ameliorate Its Alleged Injuries Further Demonstrates It Lacks Standing

As the Commission noted in its opposition to DCCC's request for a preliminary injunction, (*see* FEC PI Opp. at 23-24), DCCC believes that the NRSC's JFC-advertisements from the 2024 election cycle violate FECA. Fortunately, FECA provides a process by which any person who believes that FECA has been, or is continuing to be, violated may alert the Commission to this activity: by filing a complaint with the Commission. 52 U.S.C. § 30109(a)(1). That complaint is then reviewed, respondents are given the opportunity to respond, and, if four or more Commissioners determine there is reason to believe a violation occurred, the Commission may investigate. *Id.* § 30109(a)(2). This process represents a policy choice by Congress to ensure that there is bipartisan consensus for enforcement actions, and to

prevent gamesmanship of campaign finance law for partisan advantage. *See Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) ("Congress designed the Commission to ensure that every important action it takes is bipartisan.").

Plaintiff's choice to file the instant lawsuit based upon the non-issuance of an advisory opinion circumvents the administrative complaint process established by Congress for challenging the allegedly illegal conduct of another. That process allows the Commission to hear from the complainant and the respondent, and to attempt to reach a bipartisan consensus on further action informed by the agency's expertise in federal campaign finance law. DCCC's failure to avail itself of this option is further evidence that the alleged injuries it suffers here are self-imposed. *See supra*, pp. 19, 23-26.

Moreover, the length of time until the next federal election, to be held November 3, 2026, provides DCCC with ample time to file its own advisory opinion request seeking clarity it claims it needs on the state of the law.[9] Such requests must be resolved, or the requestor notified of a non-result, within 60 days of receiving a request. 52 U.S.C. § 30108(a); *see* 11 C.F.R. § 112.1(b)-(d). And despite the Commissioners failing to reach a consensus as to AOR 2024-13, a request from DCCC at this stage would not be futile. If DCCC were to submit an AOR today, the Commission would have more time to assess the request—60 days, rather than the expedited 20-day deadline. *See* 52 U.S.C. § 30108(a)(2). DCCC also would be able to tailor its request to the particular advertising it allegedly seeks to engage in in the coming election cycle, rather than being limited to ads materially indistinguishable from those proposed by the DSCC for the prior cycle. *See* 11 C.F.R. § 112.1(b), (c) (requests "shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake

[9] The DSCC, the DCCC's Senate counterpart, submitted AOR 2024-13 to the Commission.

in the future[,]" and "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made").

With multiple viable options available that may fully mitigate DCCC's alleged injuries and future injuries—options authorized by Congress when it empowered the FEC to interpret and enforce federal campaign finance law—DCCC's claims as to speculative future injury ring particularly hollow. Even taking as true DCCC's dubious assertion that it was "between a rock and a hard place on the eve of the November [2024] election[,]" (Compl. ¶ 2), that is certainly not the case now. This Court should properly dismiss plaintiff's complaint so that DCCC may utilize the proper avenue(s) to obtain redress if it so chooses.

CONCLUSION

Plaintiff lacks standing as to its APA claim. It cannot show that its alleged injuries are traceable to the FEC's non-issuance of an advisory opinion in AOR 2024-13 rather than the product of a self-imposed response to third parties' JFC-advertisements. Its requests for declaratory and injunctive relief do not change this result, nor do distinguishable cases brought pursuant to the First Amendment. Accordingly, the Court should grant the Commission's motion to dismiss for lack of jurisdiction.

Respectfully submitted,

/s/ Sophia H. Golvach

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 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/ *Sophia H. Golvach*