UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAUN MCCUTCHEON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 20-2485 (JDB) OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

DEFENDANT FEDERAL ELECTION COMMISSION'S
OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs' motion for a preliminary injunction should be denied because they have failed to establish any of the elements required for that extraordinary relief, which could alter campaign finance rules on the eve of an election in a manner that plaintiffs have contended would be an "egregious" "loophole" with the potential to undermine the Federal Election Campaign Act ("FECA"). Libertarian presidential primary candidate Shaun McCutcheon and his campaign committee, McCutcheon for Freedom ("McCutcheon Committee" or "Committee") (collectively, "plaintiffs"), challenged the legality of the actions of another former candidate by seeking an advisory opinion from the Federal Election Commission ("Commission" or "FEC") about activities they proposed that were similar in some respects to that other candidate's. When the agency could not provide an opinion because of its lack of a quorum, plaintiffs filed this suit. But plaintiffs have not met their burden of showing that the FEC has unlawfully withheld action in this situation, nor that they are likely to succeed on the merits of their claims relied on in the motion. They wrongly argue that it would be unreasonable for the Commission to come to any conclusion other than that McCutcheon must be able to in effect transfer unlimited funds through his Committee to national party committees without regard to FECA's contribution limits, even after the election. Nor have plaintiffs shown that denial of relief here would cause them irreparable harm or be contrary to the public interest.

This case arose out of reports that, earlier this year, former Democratic presidential candidate Michael Bloomberg's self-funded campaign committee transferred $18 million to the Democratic National Committee ("DNC"). While FECA generally permits unlimited transfers from a candidate committee to national party committees, that transfer amount is significantly above the $35,500 contribution limit for contributions from individuals to national party committees. To the extent plaintiffs believe that transfer was unlawful, FECA provides a

mechanism for the filing of an administrative complaint asking the Commission to investigate and pursue enforcement, consistent with a well-established administrative structure with procedural safeguards for respondents, including confidentiality during the pendency of such matters. After news of Bloomberg's transfer appeared, and right before the Libertarian Party's convention selecting its presidential nominee, McCutcheon declared himself a candidate and deposited $65,000 into his candidate committee's account.

After McCutcheon failed to win the nomination, he and the McCutcheon Committee sought an advisory opinion from the FEC regarding whether the Committee could then transfer $50,000 to the Libertarian National Committee ("LNC"), and whether McCutcheon could also convey unlimited additional amounts to the Committee for later transfer to the LNC and the Republic National Committee ("RNC"). In that advisory opinion request, however, plaintiffs advocated that the Commission issue an advisory opinion that their proposed transfers would actually be *unlawful* as part of their explicit effort to call into question the activities of others. FECA provides that FEC advisory opinions require the affirmative vote of four or more Commissioners, and the Commission lost the necessary quorum to meet and vote on a response within the 60-day statutory deadline. Plaintiffs now seek an emergency declaration from this Court that: (a) the Commission violated the law by failing to issue an advisory opinion by the statutory deadline; and (b) the proposed conduct that plaintiffs argued to the Commission was unlawful is in fact *lawful*.

Plaintiffs are not likely to succeed on the merits of any of the three claims that underlie their request for a preliminary injunction. Neither FECA nor the Declaratory Judgment Act provides them with any cause of action. And under the Administrative Procedure Act ("APA"), plaintiffs have failed to meet their burden of showing that the Commission unlawfully withheld a

required action, when the agency lacked the legally required quorum to issue an advisory opinion, nor that the failure to issue that opinion was final agency action subject to judicial review. Further, plaintiffs have not shown that they are likely to succeed on the merits, for many of the same reasons that they themselves argued before the Commission. Some of their proposed activity raises interpretive questions that are not straightforward and that the Commission has not had the opportunity to address. Plaintiffs have themselves pointed out multiple arguments that plaintiffs' proposed transfer of the funds already in the McCutcheon Committee's account to the LNC would circumvent the limit on contributions to party committees and violate FECA, and McCutcheon's proposed transfer of additional funds through the Committee to the LNC and the RNC would clearly violate restrictions on post-election transfers.

Nor can plaintiffs establish the other elements to justify preliminary injunctive relief. Plaintiffs' purported harm is insubstantial and not irreparable. There is no question that the McCutcheon Committee could provide approximately $35,500 to the LNC immediately, and merely having to wait until resolution of this litigation to transfer an additional $14,500 is not harm warranting such extraordinary relief. As the Supreme Court has held, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Finally, the public's interest clearly counsels against the relief plaintiffs seek. Congress has determined that it is in the public's interest to entrust the Commission, rather than the courts, with interpreting and enforcing FECA in the first instance. And what plaintiffs seek would effect a potentially disruptive change in key campaign finance rules on the eve of an election. The Court thus should deny a preliminary injunction.

BACKGROUND

I. LEGAL BACKGROUND

A. The Federal Election Commission and Its Advisory Opinion Process

The FEC is an independent agency of the United States with exclusive jurisdiction to administer, interpret, and civilly enforce FECA, 52 U.S.C. §§ 30101-46 (formerly 2 U.S.C. §§ 431-57).[1] Congress authorized the Commission to "formulate policy" with respect to FECA, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2); and to initiate civil enforcement actions for violations of FECA, *id.* §§ 30106(b)(1), 30109(a)(6). Under FECA, no more than three of the FEC's six Commissioners may be members of the same political party. *Id.* § 30106(a)(1).

At least four affirmative Commissioner votes are required for the Commission to take certain actions, including, *inter alia*, issuing advisory opinions and regulations and advancing enforcement matters. *Id.* §§ 30106(c), 30107(a)(6)-(9). Consistent with these provisions, and pursuant to § 30106(e), the Commission's rules of procedure establish a four-member quorum requirement for the consideration and resolution of those actions. Directive 10, "Rules of Procedure of the Federal Election Commission Pursuant to 2 U.S.C. § 437c(e)," (June 8, 1978 amend. Dec. 20, 2007) ("FEC Directive 10"), https://www.fec.gov/resources/cms-content/documents/directive_10.pdf.

Anyone may request an advisory opinion regarding the application of FECA and Commission regulations to a specific transaction or activity by that person. 52 U.S.C. § 30108(a); 11 C.F.R. § 112.1(a). Within ten days of receipt, the Commission's Office of

[1] In 2014, FECA was moved from Title 2 to Title 52 of the United States Code.

General Counsel determines whether it qualifies as a complete advisory opinion request and, if necessary, notifies the requestor of any deficiencies in the request. 11 C.F.R. § 112.1(b)-(d). Once deemed complete, the request is immediately made public. *Id.* § 112.2. Before the Commission may issue an advisory opinion, it must accept and consider any public comments submitted regarding the request within the 10 days following its publication. 52 U.S.C. § 30108(d); 11 C.F.R. § 112.3(e). In addition, the Commission endeavors to make public and invite comments on at least one draft advisory opinion at least one week prior to the Commission open (public) meeting at which an advisory opinion will be considered (three days for expedited requests). *Advisory Opinion Procedure*, 74 Fed. Reg. 32160, 32160-62 (July 7, 2009). The Commission also generally permits requestors to appear at that open meeting to answer questions. *Id.*

FECA generally provides that the Commission "shall render [an] advisory opinion" within 60 days of receiving a complete request. 52 U.S.C. § 30108(a) (20 days for expedited requests). Congress recognized, however, that the Commission may not be able to issue an advisory opinion in some cases due to the four-vote requirement, so "[a] 3-3 vote by the Commission on the proposed opinion is considered a response for purposes of the time requirements," of which the requestor should be promptly notified. H.R. Rep. No. 96-422 (1979), at 20. Accordingly, the Commission adopted a regulation that it shall either issue an advisory opinion or "a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members" within 60 days of receiving a complete request. 11 C.F.R. § 112.4(a), (c); *see also Explanation & Justification of Regulations Concerning Jan.8, 1980 Amendments to Fed. Election Campaign Act of 1971*, 45 Fed. Reg. 15080, 15090, 15124 (Mar. 7, 1980).

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 prosecution for any person who follows the opinion in good faith and is involved in either the proposed transaction addressed in the opinion or a materially indistinguishable transaction. 52 U.S.C. § 30108(c).

B. Contribution Limits and Self-Funded Candidate Campaigns

In 1974, Congress created the FEC and substantially revised FECA in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure a political quid pro quo." *Buckley*, 424 U.S. at 26-27. With FECA, Congress primarily intended to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 26. And in *Buckley*, the Supreme Court held that Congress could constitutionally limit the dollar amounts of contributions to candidates for federal office. *Id.* at 24; *see also* 52 U.S.C. § 30116(a); *id.* § 30101(8)(A)(i) (defining "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office"). In order to have meaningful limits and disclosure regarding contributors, FECA also provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 52 U.S.C. § 30122; *see also* 11 C.F.R. § 110.4(b). In rejecting the challenge to the contribution limits, the Court explained that, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26-27.

At the same time, however, the Supreme Court determined that a "ceiling on personal expenditures by candidates on their own behalf . . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression" and, accordingly, violated the Constitution. *Buckley*, 424 U.S. at 52. The Court reasoned that the "primary governmental interest served" by FECA was "the prevention of actual and apparent corruption," and that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." *Id.* at 53.

Consistent with *Buckley*, Commission regulations recognize the right of candidates to make "unlimited expenditures from personal funds" in support of their campaign. 11 C.F.R. § 110.10. Commission advisory opinions have construed the regulation to permit candidates to not only make direct expenditures from their personal funds, but also to provide unlimited amounts of personal funds to their candidate committees to have those committees make the expenditures instead. *See, e.g.*, Advisory Opinion 2003-31 (Dayton) (2003) at 2, https://www.fec.gov/files/legal/aos/2003-31/2003-31.pdf; Advisory Opinion 1997-10 (Hoke for Congress) (1997) at 3, https://www.fec.gov/files/legal/aos/1997-10/1997-10.pdf.

C. Campaign Committees and Their Receipt of Contributions

FECA requires federal candidates to designate at least one "authorized committee," which may receive contributions and make expenditures on the candidate's behalf, to serve as the candidate's "principal campaign committee." 52 U.S.C. §§ 30101(5)-(6), 30102(e)(1)-(2). The statute also limits the amount individual contributors may give to a campaign committee per

election, currently to an inflation-adjusted $2,800. *Id.* § 30116(a).[2] It also prohibits candidates and their candidate committees from "solicit[ing], receiv[ing], direct[ing], transfer[ing], or spend[ing] funds . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of [FECA]." *Id.* § 30125(e)(1)(A).

A campaign committee may accept a contribution for a *previous* election only to the extent that the contribution does not exceed the committee's "net debts outstanding" from that election. 11 C.F.R. § 110.1(b)(3)(i). In general, a campaign committee's "net debts outstanding" equals its total amount of unpaid debts and obligations for an election, less its total resources from that election available to pay those debts and obligations. *Id.* § 110.1(b)(3)(ii)(A)-(C). Thus, a campaign may accept post-election contributions only to the extent necessary to pay down a net shortfall from that election.

FECA also provides a list of "permitted uses" by the candidate for "[a] contribution accepted by a candidate." 52 U.S.C. § 30114(a). One permitted use is "expenditures in connection with" their campaign. *Id.* § 30114(a)(1). Another is "for transfers, without limitation, to a national, State, or local committee of a political party[.]" *Id.* § 30114(a)(4); *see also* 11 C.F.R. § 113.2(c) (providing that "funds in a campaign account . . . [m]ay be transferred without limitation to any national, State, or local committee of any political party").

However, FECA prohibits any person from converting a contribution to "personal use," which is when a contribution "is used to fulfill any commitment, obligation, or expense . . . that would exist irrespective of the candidate's election campaign[.]" 52 U.S.C. § 30114(b)(1)-(2).

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[2] The contribution limits referenced herein are from the *Price Index Adjustments for Contribution & Expenditure Limitations & Lobbyist Bundling Disclosure Threshold*, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

D. The Limits on Contributions to Committees of National Political Parties

After *Buckley*, Congress established a yearly $20,000 limit on the amount that any person could contribute to a national party committee. *See* FECA Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475 (1976) (codified as amended at 52 U.S.C. § 30116(a)(1)(B)). At that time, FECA's contribution limits applied only to donations that were made "for the purpose of influencing any election for *Federal* office." *See* 52 U.S.C. § 30101(8)(A)(i) (emphasis added); *see also Shays v. FEC*, 414 F.3d 76, 80-81 (D.C. Cir. 2005). Donations to national party committees purportedly "aimed at state and local elections," so-called "soft-money," were not limited in amount and were largely unregulated by FECA. *Shays*, 414 F.3d at 80. "Over time, political parties took increasing advantage of . . . soft money opportunities," *id.* at 81, causing "a 'meltdown' of the campaign finance system," *McConnell v. FEC*, 540 U.S. 93, 129 (2003) (quoting S. Rep. No. 105-167, vol. 4, at 4611 (1998)).

Seeking to close the "soft-money loophole" and prevent circumvention of contribution limits, *McConnell*, 540 U.S. at 133-34, Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). BCRA's most prominent change to FECA was that it prohibited national party committees from "receiv[ing]" any "contribution, donation, or transfer of funds . . ., or spend[ing] any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]." 52 U.S.C. § 30125(a)(1). The Supreme Court upheld this change because it advances the government's important interests in diminishing quid pro quo corruption and its appearance. *McConnell*, 540 U.S. at 142-61.

The Supreme Court has also upheld limits on contributions by individuals and political committees to national party committees' general treasuries, which are currently $35,500 per year, because they serve the government's "permissible objective of combatting corruption."

McCutcheon v. FEC, 572 U.S. 185, 192-93 (2014); *see also* 52 U.S.C. § 30116(a)(1)(B), (c). This limit "applies with equal force to contributions that are 'in any way earmarked or otherwise directed through an intermediary or conduit' to a candidate." *McCutcheon*, 572 U.S. at 194 (quoting (now) 52 U.S.C. § 30116(a)(8)). So if "a donor gives money to a party committee but directs [that it to be given to a particular candidate], then the transaction is treated as a contribution from the original donor to the specified candidate." *Id.*; *see also* 11 C.F.R. § 110.6. While FECA and FEC regulations refer specifically to earmarked contributions to candidate committees, contributions may be earmarked with another political committee as the ultimate recipient. *E.g.*, Advisory Opinion 2014-19 (ActBlue) (2015) at 2, https://www.fec.gov/files/legal/aos/2014-19/AO_2014-19_(ActBlue)_Final_(1.15.15).pdf.

FECA also authorizes national party committees to create three additional "separate, segregated account[s]" for: (1) presidential nominating convention expenses; (2) headquarters expenses; and (3) legal expenses. 52 U.S.C. § 30116(a)(9)(A)-(C). Each account has a contribution limit of "300 percent of the amount otherwise applicable" to contributions to these national committees per year, currently $106,500. *Id.* § 30116(a)(1)(B).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Plaintiffs McCutcheon and McCutcheon for Freedom

McCutcheon was briefly a candidate for the Libertarian Party's 2020 presidential nomination. (Decl. of Shaun McCutcheon in Support of Pls.' Mot. for Prelim. Inj. ¶ 3 (Doc. 2-5) ("McCutcheon Decl.").) On May 6, 2020, more than a month after the last Libertarian Party state presidential preference primary or caucus,[3] McCutcheon filed forms with the FEC stating that he

[3] Although delegates to the Libertarian Party's national convention are not bound by the results of any state presidential preference primaries, state affiliates select those delegates. The

was a Libertarian Party candidate for president and was designating the McCutcheon Committee as his principal campaign committee. Shaun McCutcheon, Statement of Candidacy, FEC Form 2 (May 6, 2020), https://docquery.fec.gov/cgi-bin/fecimg/?_20200506923236955l+0; McCutcheon for Freedom, Statement of Organization, FEC Form 1 (May 6, 2020), https://docquery.fec.gov/cgi-bin/forms/C00745661/1404556/.

His campaign was "entirely self-funded." (Compl. ¶ 10.) The McCutcheon Committee's treasurer, who is also plaintiffs' counsel here, has filed one disclosure report with the Commission ("McCutcheon Committee Report" or "Report"), stating the Committee received $50,000 of McCutcheon's personal funds on May 5, 2020 for the primary election. McCutcheon for Freedom, July Quarterly Report 2020, FEC Form 3P, at Schedule A (July 15, 2020), https://docquery.fec.gov/cgi-bin/forms/C00745661/1423347/. McCutcheon avers that the purpose of the $50,000 was "in support of my campaign." (McCutcheon Decl. ¶ 8.)

McCutcheon alleges that he and his "team" ran a "virtual campaign due to the constraints imposed by COVID-19," which included creating a campaign website, a campaign announcement video therefor, "paid political advertisements targeted directly to . . . Libertarian National Convention delegates on Facebook," and sending "more than 500,000 e-mails and SMS messages" to unidentified persons. (Compl. ¶¶ 11-14; *see also* McCutcheon Decl. ¶¶ 10-14.) The McCutcheon Committee made $11,698.50 in disbursements and received $905.42 in refunds, for a total outlay of $10,793.08. (McCutcheon Committee Report, Schedules A & B.)

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first state primary was on January 11, 2020, and the last on April 4, 2020. "Presidential Candidates 2020," https://lpedia.org/wiki/Presidential_Candidates_2020 (last visited Sept. 28, 2020); *see also* LP Secretary, *LNC Historical Pres. & Convention Voting Process Comms. Seek Applicants* (Aug. 27, 2020), https://www.lp.org/lnc-historical-preservation-and-convention-voting-process-committees-seek-applicants/ (explaining LNC's Historical Preservation Committee maintains LPedia.org) (last visited Sept. 28, 2020).

On May 22, 2020, the McCutcheon Committee received an additional $15,000 of McCutcheon's personal funds for the primary election. (McCutcheon Committee Report, Schedule A.) McCutcheon avers that the purpose of this additional $15,000 was "to further fund my campaign." (McCutcheon Decl. ¶ 9; *see also* Compl. Exh. 3 (email from Dan Backer to Heather Filemyr, FEC Office of the General Counsel (June 9, 2020) ("June 9th Email")).)

McCutcheon did not participate in any of the 22 reported Libertarian Party-sponsored presidential debates, including the nationwide debate for the National Convention on May 21, 2020. "Presidential Candidates 2020," https://lpedia.org/wiki/Presidential_Candidates_2020 (last visited Sept. 28, 2020).

At the convention, McCutcheon did not receive a single vote or "token" for inclusion on a nomination ballot, nor did he receive a single write-in vote on any ballot cast on May 23, 2020. *See* Presidential Debate Tokens Accounting, available at https://lpedia.org/wiki/National_Convention_2020 (last visited Sept. 28, 2020); Libertarian Party National Convention, Minutes of the First Sitting May 22-24, 2020 Online Via Zoom Final Report, at 18-19, 25, 28, 31, 33, http://lpedia.org/wiki/File:CONVENTION-MINUTES_2020_FINAL.pdf(last visited Sept. 28, 2020); Richard Winger, *Jo Jorgenson Wins Libertarian Presidential Nomination on Fourth Vote*, Ballot Access News (May 23, 2020), http://ballot-access.org/2020/05/23/jo-jorgensen-wins-libertarian-presidential-nomination-on-fourth-vote/ (last visited Sept. 28, 2020).

On or about May 28, 2020, McCutcheon suspended his campaign. (*Compare* McCutcheon Committee Report (all disbursements made and refunds received by May 28, 2020), *with* McCutcheon Decl. ¶ 16.) The Report states that the Committee currently has

$54,206.92 in its bank account and no debts outstanding. (*See generally* McCutcheon Committee Report; *see also* McCutcheon Decl. ¶ 16.)

In 2020, McCutcheon's total contributions directly from his personal accounts to the LNC appear to total $100 or less, and to the RNC $50 or less. (June 9th Email at 1.)

B. Plaintiffs' Advisory Opinion Request

On May 29, 2020, one day after McCutcheon suspended his campaign, plaintiffs submitted an advisory opinion request to the Commission. (Compl. ¶ 7 & Exh. 1 ("Advisory Opinion Request").) The request posited three questions. First, it asked whether McCutcheon could lawfully transfer $50,000 of the remaining funds in the McCutcheon Committee bank account, which committee was funded solely from his personal funds, to LNC's general account.[4] (Adv. Op. Request at 2.) The remaining questions asked whether McCutcheon could deposit unlimited additional personal funds into the Committee account and then transfer those funds to the LNC's (second question) or RNC's (third question) general accounts. (*Id.*)

In explaining the reason for their request, plaintiffs stated that "[f]ormer Democratic candidate Michael Bloomberg recently laundered approximately $18 million of his personal funds by depositing them in his presidential candidate committee's account and then transferring them to the [DNC]," which "appears to have blatantly violated the $35,500 limit on contributions from 'persons' to national political party committees." (*Id.* at 1.)[5] Plaintiffs said that "[u]nlike Bloomberg, however, McCutcheon cannot rely on the pervasively Democratic Deep State federal bureaucracy to shield him from administrative proceedings or criminal prosecution." (*Id.*) Plaintiffs stated that they were seeking an advisory opinion regarding "whether the Commission

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[4] Although recognizing each LNC non-general account has a $106,500 contribution limit, McCutcheon "does not wish to contribute" to those accounts. (Adv. Op. Request at 1 n.1.)

[5] The complaint also discusses this purported Bloomberg transfer. (Compl. Intro at 1-2.)

believes such egregious conduct is, in fact, legally permissible, before engaging in such circumvention of contribution limits himself." (*Id.*; *see also id.* at 8 (stating that McCutcheon is seeking an advisory opinion "before following the apparently illegal example of Bloomberg and the DNC").) Plaintiffs' request then set forth multiple reasons and extensive analysis as to why their own proposed transactions appeared to *violate* federal campaign finance law. (*Id.* at 4-8.)

C. Commission Processing of Plaintiffs' Advisory Opinion Request

When the Advisory Opinion Request was submitted (May 29, 2020), the Commission had not had a quorum since August 31, 2019. A quorum was briefly restored on June 5, 2020, when Commissioner James E. ("Trey") Trainor III was sworn in. When he joined, there was an extensive backlog of advisory opinion, enforcement, rulemaking, and other matters requiring the approval of at least four Commissioners due to the more than 9 months without a quorum.

On June 8, 2020, the Office of the General Counsel contacted the plaintiffs to seek factual information needed to qualify the request. (June 9th Email at 1.) Once supplemented with that information on June 9, 2020, the request was deemed complete and made public for comment. (*See* Compl. Exh. 4 (Letter from Neven Stipanovic, Office of General Counsel, to Dan Backer (dated Aug. 10, 2020) ("Notification Letter")).)

On June 19, 2020, the Campaign Legal Center submitted a comment, arguing that the proposed activity is unlawful. Campaign Legal Center, Comments on Adv. Op. Request 2020-03 ("CLC Comment"), https://www.fec.gov/files/legal/aos/2020-03/202003C_1.pdf.

Subsequently, before a draft advisory opinion was released for comment or taken up at an open meeting, on June 26, 2020, then-Commissioner Caroline Hunter announced her resignation. With Commissioner Hunter's departure on July 3, 2020, the Commission again lost its quorum.

On July 20, 2020, the Commission was told that plaintiffs would not consent to extending the 60-day deadline. (Notification Letter at 1.)

On August 10, 2020, the Commission's Associate General Counsel notified the requestors by letter that "because the Commission currently lacks a quorum of Commissioners, the Commission was unable to render an opinion in this matter." (*Id.*)

D. Plaintiffs' Complaint and Preliminary Injunction Motion

Nearly one month later, on September 4, 2020, plaintiffs filed a complaint against the Commission asking this Court to declare that the transactions originally proposed in their advisory opinion request *are* lawful under FECA and Commission regulations and to enjoin the Commission from pursuing an enforcement matter against plaintiffs for conducting those transactions. (Compl. Prayer ¶¶ 1-2.) Plaintiffs' complaint includes four causes of action: Count 1 (First Amendment); Count 2 (FECA Violation under 52 U.S.C. § 30108(a)); Count 3 (APA Violation under 5 U.S.C. §§ 706(1) & 706(2)(A)); and Count 4 (Declaratory Judgment under 28 U.S.C. § 2201). (Compl. ¶¶ 32-61.)

Also on September 4, 2020, plaintiffs filed a motion for preliminary injunction as to their statutory claims (Counts 2-4).[6] (Pls.' Memo. of Law in Supp. of Pls.' Mot. for Prelim. Inj. (filed Sept. 4, 2020) (Doc. 2-1 ("Motion")) at 11-12.).

[6] As previously explained, plaintiffs filed their motion without conducting the mandatory pre-filing conferral process required under Local Rule 7(m), providing the required notice under Federal Rule of Civil Procedure 65(a), without timely serving a copy as required under Federal Rule of Civil Procedure 5(b)(2), and without a certificate of service as required by Federal Rule of Civil Procedure 5(d)(1) and Local Rule 5.3. (FEC Consent Mot. for Extension of Time to Respond to Pls.' Mot. for Preliminary Injunction (filed Sept. 18, 2020) (Doc. 8) at 2.) Plaintiffs' failures to comply with these rules prejudiced the FEC's ability to timely respond to their motion, even with the extension it received, and the Court may deny plaintiffs' motion based on these failures alone. *See, e.g., Curry v. Cal. Dept. of Corr. & Rehab.*, No. C 09-3408, 2011 WL 855828, at *3 (N.D. Cal. Mar. 9, 2011) (denying preliminary injunction motion where plaintiffs

ARGUMENT

I. PLAINTIFFS CARRY A HEAVY BURDEN TO QUALIFY FOR THE EXTRAORDINARY REMEDY OF A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citations omitted). A plaintiff seeking a preliminary injunction must establish that (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Id*. at 20.

The D.C. Circuit "has suggested, without deciding, that *Winter* should be read to abandon [any] sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson*, 944 F. Supp. 2d 89, 95-96 (D.D.C. 2013) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011)). The ongoing validity of the "sliding scale" approach need not be resolved here, however, because "without a likelihood of success on the merits, [p]laintiffs are not entitled to a preliminary injunction *regardless* of their showing on the other factors." *Brown v. FEC*, 386 F. Supp. 3d 16, 24 (D.D.C. 2019) (emphasis added).

The extraordinary remedy of preliminary injunctive relief is also only available upon a "clear showing" that it is necessary, and not "based only on a possibility of irreparable harm." *Winter*, 555 U.S. at 22. Plaintiffs here shoulder a particularly heavy burden because their request

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had not "established" service due to discrepancy in their proofs of service "because notice is so critical"); *U.S. ex rel. Pogue v. Diabetes Treatment Ctr. of Am., Inc.*, 235 F.R.D. 521, 528-29 (D.D.C. 2006) ("failure to comply with [Local Rule 7(m)'s] conference requirement is sufficient basis to deny a motion to compel").

is at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather than seeking to preserve the status quo, plaintiffs seek to "upend" it by asking this Court, less than two months before the upcoming general election, to issue a legal ruling regarding conduct that plaintiffs contend constitutes circumvention of existing contribution limits by wealthy individuals with existing candidate committees that the FEC has not previously addressed. *See Sherley*, 644 F.3d at 398 (denying preliminary injunction motion that sought to upend the status quo).

Plaintiffs cannot avoid bearing this heavy burden merely because they vaguely allege that their constitutional rights are being infringed. (Mot. at 13.) First, plaintiffs do not base their motion for preliminary injunction on their First Amendment claim (Count 1). Even if they were, simply making such a claim would be insufficient. To be sure, during consideration *on the merits* of a constitutional claim that is subject to heightened scrutiny, the government must prove that the challenged law is valid. *See, e.g.*, *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000) (reviewing a full trial). But here, at the preliminary injunction stage, plaintiffs still bear the burden of proving that it is likely that the FEC would fail to make that showing if the case were to proceed to the merits. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

Plaintiffs seek a preliminary injunction based solely on their statutory claims under FECA, the APA, and the Declaratory Judgment Act.[7] (Mot. at 11-12.) They are highly unlikely

[7] Regardless, plaintiffs' purported First Amendment claim merely recasts their statutory claims. (Compl. ¶¶ 32-35.) Their entire constitutional argument is based on the Commission's supposedly unlawful failure to issue an advisory opinion. (*Id.*) But they do not allege that either the individual limit on contributions to national parties, which was upheld in *McConnell*, or the

to succeed on any of them. There are many reasons why the Court should not even reach the question of whether the proposed transfers are lawful, but if the Court does, plaintiffs have failed to satisfy their burden to show that they are likely to get the answer they seek, *i.e.*, a declaration that the proposed transfers are lawful. And because "[a] foundational requirement for obtaining preliminary injunctive relief is that the plaintiffs demonstrate a likelihood of success on the merits," plaintiffs' motion should be denied for this failure alone. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019).

A. Plaintiffs Have No Cognizable Claim Under FECA Because the Statute Does Not Provide for Judicial Review of the FEC Advisory Opinion Process

Plaintiffs are unlikely to succeed on their Count 2 claim that a failure to receive an advisory opinion under 52 U.S.C. § 30108 entitles them to judicial relief under FECA — and in fact that claim must fail — because FECA provides no such judicial review mechanism. The statute provides for judicial review of Commission conduct in certain limited contexts, notably when an aggrieved party alleges that the Commission has unlawfully failed to act on or dismissed an administrative complaint alleging violations of FECA. 52 U.S.C. § 30109(a)(8); *Unity08 v. FEC*, 596 F.3d 861, 866 (D.C. Cir. 2010). But neither § 30108 nor any other FECA provision authorizes review of an FEC advisory opinion, or lack thereof, and accordingly there is no FECA claim.

The D.C. Circuit has explained why review of the FEC advisory opinion process may be available under the APA but not FECA. FECA does not provide a procedure for judicial review of the Commission's advisory opinions. *Unity08*, 596 F.3d. at 861, 866. But the APA permits

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unlimited transfer provision between a candidate committee and national parties are unconstitutional. Illustrating their real interest and shifting stance on the issues, plaintiffs' First Amendment claim seeks an injunction that protects conduct only until "the Commission issues an advisory opinion deeming such conduct *illegal*." (Compl. at 13 (emphasis added).)

judicial review of agency actions when "'there is no other adequate remedy in a court.'" *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1238 (D.C. Cir. 2017) (quoting 5 U.S.C. § 704). In *Unity08*, the plaintiff sought judicial review of an FEC advisory opinion that determined the plaintiff was subject to political committee regulations. 596 F.3d. at 863. The D.C. Circuit acknowledged that the FECA did not provide for judicial review of the opinion and accordingly undertook review pursuant to the APA. *Id.* at 863, 866.

The D.C. Circuit has likewise held that review is available only under the APA, not FECA, in comparable contexts. In *Perot v. FEC*, the court held that, because FECA does not provide for judicial review of FEC regulations, "an action challenging its implementing regulations should be brought under the judicial review provisions of the Administrative Procedure Act[.]" 97 F.3d 553, 560 (D.C. Cir. 1996) (per curiam); *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 243 F. Supp. 3d 91, 105 (D.D.C. 2017) ("[T]o the extent that [there are] challenges [to] the legal validity of [a regulation], FECA's remedy is not 'adequate,' and review under the APA is proper.").

In seeking a preliminary injunction as to their FECA claim, plaintiffs rely heavily on *Unity08*, but their arguments amount to assertions that the Commission violated § 30108(a) by failing to answer the advisory opinion request in the way plaintiffs wished, and that happened in *Unity08* as well. *Compare* Mot. at 11, *with Unity08*, 596 F.3d. at 863. Plaintiffs offer no support from *Unity08* or elsewhere for the view that FECA actually provides a mechanism for them to challenge such conduct. Indeed, plaintiffs themselves allege in describing their Count 3 claim that, besides the APA, there is "no other adequate remedy in a court" for the alleged harms that they have suffered. (Compl. ¶ 51.)

Because FECA does not provide for judicial review of the FEC advisory opinion process, plaintiffs do not have a cognizable cause of action under FECA. Therefore, the Court should find that plaintiffs are unlikely to succeed on the merits of Count 2.

B. Plaintiffs Are Unlikely to Succeed Under the Administrative Procedure Act

In Count 3, plaintiffs effectively assert two possible causes of action under the APA for the Commission's failure to issue an advisory opinion before the statutory deadline: (1) a failure to act claim under APA § 706(1) (Compl. ¶¶ 52-53), and (2) an arbitrary, capricious, an abuse of discretion, and not in accordance with the law claim under APA § 706(2)(A) (Compl. ¶¶ 50, 54). (*See also* Mot. at 11.) Plaintiffs have failed to meet their burden to show that they are likely to succeed under either avenue of the APA.

1. Plaintiffs Are Unlikely to Succeed Under APA § 706(1) Because the Prohibition on Acting Here Due to FECA's Quorum Requirement Means the Commission's "Failure to Act" Was Not "Unlawful"

Plaintiffs are unlikely to succeed under APA § 706(1) for three reasons.

First, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete *agency action* that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (first emphasis altered). Plaintiffs' argument that FECA § 30108(a) must be interpreted to mean that the Commission was required to take the discrete agency action of issuing them "an advisory opinion" within 60 days of receiving their complete request is unsustainable in the unique context of a lack of quorum. The Court's "duty, after all, is to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal quotation marks omitted). And 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).

Under plaintiffs' interpretation of the statute, the Commission would be required to issue an advisory opinion regardless of the 4-affirmative-vote requirement. But "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted). Due to the 4-affirmative-vote requirement, § 30108(a) should not be construed as requiring the agency to take the discrete agency action of issuing an "advisory opinion." *See* H.R. Rep. No. 96-422, at 20 (recognizing that the Commission may not be able to issue an "advisory opinion" due to the four-vote requirement). Accordingly, plaintiffs have not satisfied even the threshold requirement for establishing a "failure to act" claim under APA § 706(1).[8]

Second, even if, *arguendo*, plaintiffs could establish that the Commission is required to issue an advisory opinion within 60 days in the abstract, plaintiffs are unlikely to establish that the Commission "*unlawfully* withheld" doing so under the particular circumstances here. 5 U.S.C. § 706(1) (emphasis added). The Commission did not act *unlawfully* because it could not lawfully take the purportedly required action due its lack of quorum. 52 U.S.C. §§ 30106(c), 30107(a)(7), 30108(a); FEC Directive 10; *see also Clinton v. New York*, 524 U.S. 417, 429 (1998) (rejecting interpretation of statute that "would produce an absurd . . . result which Congress could not have intended" (internal quotation marks omitted)). As the D.C. Circuit held:

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[8] Contrary to plaintiffs' contentions (*e.g.*, Mot. at 1; Compl. ¶ 46), merely receiving an "advisory opinion" under § 30108(a) does not necessarily mean that the requestor's conforming conduct would fall under FECA's safe harbor provision under § 30108(c). Rather, *only* if an advisory opinion finds that the proposed conduct is lawful is the requestor protected from an enforcement action for conforming conduct under § 30108(c); if an advisory opinion finds that the proposed conduct is unlawful, *i.e.*, a negative advisory opinion, then the requestor cannot rely on § 30108(c) as a defense in a future enforcement action. *See Unity08*, 596 F.3d at 864-65.

"[I]n order for law — man-made or otherwise — to command the performance of an act, that act must be possible to perform." *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 161 (D.C. Cir. 2017).

Despite the effect the delay caused by the Commission's lack of a quorum may have on plaintiffs, and other requesters, Congress' decision to require four affirmative votes for issuance of advisory opinions "must be given practical effect rather than swept aside in the face of admittedly difficult circumstances." *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010).

That the Commission may have had a quorum for the beginning of plaintiffs' 60-day advisory opinion response period, as plaintiffs note (Mot. at 6-7), does not establish that the agency acted unlawfully. The Commission plainly was not "*required*" to take any action on the request on any of those days. *Norton*, 542 U.S. at 64. Indeed, in addition to the later prohibition due to the quorum, FECA prohibited the Commission from issuing plaintiffs an advisory opinion from June 9, 2020 to June 19, 2020, while it accepted public comments on plaintiffs' request. *See* 52 U.S.C. § 30108(d); 11 C.F.R. § 112.3(e). Moreover, the Commission received a comment on June 19, 2020, which it was then statutorily required to consider. *Id.* Just one week later, on June 26, 2020, Commissioner Hunter announced her resignation effective July 3, 2020. The one week between her announcement and the subsequent loss of quorum was not sufficient time to complete the remaining steps in its advisory opinion process, *i.e.*, posting a draft advisory opinion for plaintiffs and the general public's comment prior to an open meeting at which the Commission would make a decision.[9] *See Advisory Opinion Procedure*, 74 Fed. Reg. at 32160-62.

[9] While the Commission held an open meeting on June 18, 2020 at which it considered several already pending advisory opinion requests, *see* https://www.fec.gov/updates/june-18-2020-open-meeting/, plaintiffs' request was not statutorily eligible for consideration at that meeting since the mandated public comment period had not yet closed. 52 U.S.C. § 30108(d).

The lawfulness of the Commission's conduct is further supported by the fact that the agency had not had a quorum between August 31, 2019 and June 5, 2020. Due to this over nine months without a quorum, when Commissioner Trainor joined the FEC on June 5, 2020, there was an extensive backlog of advisory opinion, enforcement, rulemaking, and other matters requiring at least four Commissioners already awaiting consideration when plaintiffs added another item to the agency's docket on June 9, 2020. And there is no allegation of, much less any evidence of, bad faith by the agency.[10]

The D.C. Circuit has repeatedly held that a plaintiff cannot prevail on a failure to act claim where "'a judicial order putting [the plaintiff] at the head of the queue [would] simply move[] all others back one space and produce[] no net gain.'" *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991)); *see also W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1174 (D.C. Cir. 2000). Plaintiffs are similarly not likely to succeed here.

Third and finally, even if, *arguendo*, plaintiffs could establish that they were likely to succeed on their failure to act claim, it would not establish their entitlement to the full, specific preliminary injunction they seek, *i.e.*, a judicial decree granting them the right to undertake their proposed conduct free from concern about agency enforcement. "[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Norton*, 542 U.S. at 65. The Supreme Court used this illustration:

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[10] "A presumption of regularity attaches to the actions of Government agencies[.]" *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001).

> For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations.

Id.

By extension, even if plaintiffs prevailed on their APA § 706(1) claim because the court determined that FECA § 30108(a) required the Commission to issue an advisory opinion within 60 days regardless of its lack of a quorum, the best plaintiffs could hope for would be an order remanding their Advisory Opinion Request to the Commission for an advisory opinion, "not a judicial decree setting forth the content of [that advisory opinion]." *Norton*, 542 U.S. at 65. On remand, the Commission would retain the discretion to issue an advisory opinion that: either (a) finds the plaintiffs' proposed conduct lawful and thus exempt from a possible enforcement action under FECA's safe harbor provision for conforming activity, 52 U.S.C. § 30108(c); or (b) finds the conduct to be unlawful, whereby plaintiffs could not rely on FECA's safe harbor provision as a defense in any future enforcement action. And of course any remand order would have to permit the Commission to regain a quorum before requiring the agency to act. *See Price*, 867 F.3d at 168 ("[I]t is not appropriate for a court — contemplating the equities — to order a party to jump higher, run faster, or lift more than she is physically capable.").

2. Plaintiffs Are Unlikely to Succeed Under APA § 706(2)(A) Because There Was No "Final Agency Action"

It is well-established that APA § 704 "limits causes of action under the APA to final agency action." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 188 (D.C. Cir. 2006); *see also Norton*, 542 U.S. at 61-62. Plaintiffs, however, have not established "final agency action" here.

When "a failure to act is the basis for an APA claim [under § 706(2)], a plaintiff must show that it is the functional equivalent of final agency action." *Hi-Tech Parmacal Co. v. U.S.*

Food & Drug Admin., 587 F. Supp. 2d 1, 10 (D.D.C. 2008). Agency action is generally deemed "final" where it: (a) "mark[s] the consummation of the agency's decisionmaking process," and (b) is such that "rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks omitted). If there is no "final agency action," the claim must be dismissed for failure to state a claim. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 & n.4 (D.C. Cir. 2006).

The D.C. Circuit has found no reviewable final agency action in similar situations where an agency was unable to take a requested action. In *Sprint Nextel Corp. v. FCC*, the court considered a statute providing a right for companies to file a petition asking the FCC to refrain from applying certain regulatory requirements; and if the petition was not granted within a certain time, the petition would be deemed granted. 508 F.3d 1129, 1131 (D.C. Cir. 2007). The agency commissioners deadlocked on the vote, so they were not able to issue an order on the petition, and after the statutory deadline ran, the agency "issued a press release announcing that [the] petition was deemed granted by operation of law." *Id.* (internal quotation marks omitted). Several other companies challenged the decision in court. *Id.* The court found that the agency "did not engage in any 'circumscribed, discrete' act." *Id.* (quoting *Norton*, 542 U.S. at 62). Instead, "[the agency] did nothing, which is why the 'deemed granted' provision kicked in." *Id.* The court rejected the argument that "the deadlock had the effect of denying the [petition]." *Id.* Rather, "[w]hen the [agency] failed to deny [the petition] within the statutory period, Congress's decision—not the agency's—took effect." *Id.* at 1132; *see also Public Citizen, Inc. v. FERC*, 839

F.3d 1165, 1170-71 (D.C. Cir. 2016) (similar); *AT&T Corp. v. FCC*, 369 F.3d 554, 559 (D.C. Cir. 2004) (similar).[11]

Similarly, plaintiffs here sought an advisory opinion, but the lack of a quorum resulted in the Commission being unable to issue one within the statutory deadline, at which point regulations implementing § 30108 required sending a notice so stating. Notification Letter at 1; 11 C.F.R. § 112.4(a). As in *Sprint Nextel*, "Congress's decision — not the agency's — took effect." 508 F.3d at 1132; *see also Public Citizen*, 839 F.2d at 1170-71; *AT&T Corp*, 369 F.3d at 559. The Commission thus similarly did not take "final agency action" on plaintiffs' Advisory Opinion Request, and they have failed to state a cause of action under APA § 706(2)(A).

Plaintiffs' reliance on *Unity08* to argue otherwise (Mot. at 9-11) is misplaced. In *Unity08*, the D.C. Circuit concluded that the agency's *advisory opinion* issued with the requisite number of Commissioners constituted "final agency action." 596 F.3d at 864-65. The entire advisory opinion procedure was complete, and the opinion that issued had "binding legal effect on the Commission." *Id.* at 864; *id.* (quoting *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001)); Advisory Opinion 2006-20 (Unity 08), https://www.fec.gov/data/legal/advisory-opinions/2006-20/. The Commission had determined that the *Unity08* requestor's proposed conduct would be subject to certain FECA requirements and thus affirmatively denied the requestor a legal right to a safe harbor defense. *Unity08*, 596 F.3d at 864-65.

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[11] While *Public Citizen* noted that FECA's judicial review provision for administrative complaints, 52 U.S.C. § 30109(a)(8)(A), provided an exception to this general rule, 839 F.3d at 1170-71, FECA does not contain a comparable judicial review provision for advisory opinion requests. *Cf. Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 414 (E.D. Va. 2012) (holding — in the context of determining whether agency deference was applicable — that a deadlock vote on an advisory opinion request is not final, even though the dismissal of an administrative complaint would be deemed final under § 30109(a)(8)(A)).

Here, no advisory opinion has issued, so there has been no comparable determination regarding the scope of the parties' rights by the Commission. To the contrary, plaintiffs assert that the failure to act has led to "uncertainty as to the parties' rights." *Hi-Tech Pharmacal Co.*, 587 F. Supp. 2d at 10 (internal quotation marks omitted); *compare* Compl. ¶¶ 20, 27.

Lastly and importantly, the *Unity08* court held that "agency advisory opinions are final agency action where they constitute[] final and authoritative statements of position by the agencies to which Congress ha[s] entrusted the full task of administering and interpreting the underlying statutes," and found an FEC advisory opinion to be such a statement. 596 F.3d at 865 (internal quotation marks omitted). Here, however, there is no statement, much less an authoritative statement, from the Commission on the merits of plaintiffs' request. *See Hispanic Leadership Fund*, 897 F. Supp. 2d at 428 (holding that the agency's 3-3 vote on an advisory opinion request "result[s] only in the FEC concluding that it was unable to reach a determination on the proposed advertisements"; and that "[t]his conclusion is in no sense final, reviewable agency action").

Because plaintiffs have not established that the FEC took "final agency action," they have not stated a cause of action, and thus are unlikely to succeed based on APA § 706(2)(A).

3. Plaintiffs Are Unlikely to Succeed Under APA § 706(2)(A) Because They Have Failed to Show That Their Proposed Activity Is Likely to Be Found Lawful

Even if, *arguendo*, plaintiffs could establish final agency action by the Commission, they are unlikely to succeed in establishing that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). There is significant evidence that the purported McCutcheon candidacy and proposed transactions are merely a means to seek a public ruling on the conduct of third parties, not bona fide campaign activity. As to the underlying merits, plaintiffs must show that it is likely they will prevail in

their claim that they are entitled to a judicial decree that their proposed activity is lawful. Not only have they failed to do so, but in their advisory opinion request, plaintiffs argued extensively as to why their own proposed transfers are ***not*** lawful. In fact, they describe such transfers as "blatant[]" and "egregious" violations of campaign finance law. (Adv. Op. Request at 1.) Plaintiffs' contention to this Court now that they are likely to succeed in obtaining an order declaring that those same proposed transfers ***are*** lawful therefore lacks credibility.

a. Unlike the Commission, This Court Cannot Issue an Advisory Opinion

As a preliminary matter, unlike the Commission, this Court cannot issue advisory opinions: "The oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). Thus, unlike the Commission which was required to assume the veracity of plaintiffs' assertions when reviewing their advisory opinion request for completeness, *see* 11 C.F.R. § 112.1(b)-(d), in this Court evidence is required. While the party seeking a preliminary injunction "may rely on evidence that is less complete than in a trial on the merits, [plaintiffs] nevertheless bear the burden of produc[ing] . . . credible evidence sufficient to demonstrate [their] entitlement to injunctive relief." *Jones v. Hurwitz*, 324 F. Supp. 3d 97, 99-100 (D.D.C. 2018) (internal citations and quotation marks omitted).

Plaintiffs, however, have failed to adduce credible evidence central to all their claims before this Court: that McCutcheon's original deposits into the McCutcheon Committee's account were, as a factual matter, "contributions" made with respect to and for the purpose of influencing his candidacy in the LNC primary election. Plaintiffs' failure to establish this fundamental fact calls into question whether the remaining legal questions they present are more than an academic exercise.

As plaintiffs' Advisory Opinion Request forthrightly acknowledges, in late March 2020, Bloomberg's self-funded campaign committee made a large transfer of money to the DNC, which plaintiffs believed to be unlawful. (*E.g.*, Adv. Op. Request at 1, 3; Compl. Intro at 1-3.) FECA permits plaintiffs to file an enforcement complaint with the Commission.[12] 52 U.S.C. § 30109(a). But plaintiffs have stated that, even if the Commission agreed with them that the Bloomberg transfer was unlawful, "the pervasively Democratic Deep State federal bureaucracy" would nonetheless "shield [Bloomberg] from administrative proceedings." (Adv. Op. Request at 1; *see also* Compl. Intro at 2-3.) Although plaintiffs could have availed themselves of FECA's judicial review provision if they believed that administrative proceedings had proceeded unlawfully,[13] FECA administrative enforcement proceedings take time, provide respondents with procedural rights, and must be kept confidential while ongoing. 52 U.S.C. § 30109(a).[14]

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[12] Indeed, plaintiffs' counsel, in his capacity as Treasurer and counsel to another political committee, reportedly announced having filed such a complaint alleging that Bloomberg and the DNC violated FECA with this transfer. Chris White, *Pro-Trump Super PAC Files FEC Complaint Alleging Bloomberg's $18 million DNC Donation Was Illegal*, Daily Caller (Mar. 30, 2020 5:29 PM), https://dailycaller.com/2020/03/30/bloomberg-fec-complaint-trump/ (providing link to alleged administrative complaint) (last visited Sept. 28, 2020).

[13] FECA provides a cause of action for administrative complainants to challenge dismissal of their complaint as "contrary to law." 52 U.S.C. §30109(a)(8)(A). If a court determines that the Commission unlawfully dismissed the administrative complaint, the court may "direct the Commission to conform with such declaration within 30 days." *Id.* § 30109(a)(8)(C). If the agency fails to act within the required 30-day period, plaintiffs obtain a private right of action to sue the respondents directly. *Id.*

[14] The Commission has also received, on April 8, 2020, a petition for rulemaking prompted by the reported Bloomberg transfer. REG 2020-02 Transfers from Candidate's Authorized Committee, Citizens United, *et al.*, Pet'n for Rulemaking (Apr. 8, 2020), available at https://sers.fec.gov/fosers/. Consistent with its regulation, 11 C.F.R. § 200.3, the Commission published a notice of availability to seek public comment on that petition. *Rulemaking Petition: Transfers From Candidate's Authorized Comm.*, 85 Fed. Reg. 39098 (June 18, 2020).

Plaintiffs' own filings with the Commission and the Court, along with publicly available information which this Court may consider for a preliminary injunction motion or take judicial notice,[15] provide evidence that McCutcheon's last-minute candidacy in the LNC's presidential primary was undertaken at least in part for the purpose of indirectly challenging the Bloomberg transfer through plaintiffs' advisory opinion request (and now lawsuit) or making a contribution to the LNC in excess of individual limits. That matters because *Buckley v. Valeo* only permitted unlimited spending on a candidate's own campaign, 424 U.S. at 52-53, *i.e.*, expenditures "for the purpose of influencing" their election for Federal office, 52 U.S.C. § 30101(9)(A)(i). But here there is evidence that the funds now in the McCutcheon Committee account were never, in fact, bona fide disbursements from McCutcheon to the Committee for the purpose of propelling McCutcheon to the Libertarian Party nomination.

There is substantial evidence that McCutcheon provided the funds to the Committee to support the Advisory Opinion Request and this lawsuit, not to influence McCutcheon's election. McCutcheon announced his candidacy not long after news of the Bloomberg transfer broke. (Compl. Intro at 1 (citing March 20, 2020 news article); Compl. ¶ 9 (campaign began on May 1, 2020).) By the time he announced his candidacy for the LNC nomination, the convention was less than a month away. All of the state preference primaries and caucuses had already occurred. (*See supra* Background § II(A).) And while McCutcheon expended some funds on his campaign, he does not allege a single direct contact by him to any of the delegates to the Libertarian National Convention. (*See* McCutcheon Decl. ¶¶ 10, 13 (describing campaign as being through advertisements conducted by third parties).) He did not participate in any of the 22 party-

[15] Records related to the spending that plaintiffs have placed in issue in this litigation are required to be preserved, and discovery prior to summary judgment may shed additional light on the veracity of plaintiffs' allegations.

sponsored debates. (*See supra* Background Section II(A).) And despite purportedly sending 500,000 communications, the campaign did not persuade a single delegate to vote for or write-in his name on the nomination ballots. (*Id.*)

It strains credulity to believe that on May 22, 2020 – the day before that election – McCutcheon deposited $15,000 of never-spent funds into the Committee account "for the purpose of" his candidacy in that election. The $50,000 originally deposited into the campaign account was more than enough to easily cover all of the disbursements made for the primary. (McCutcheon Committee Report, Schedules A & B ($11,698.50 in disbursements; received $905.42 in refunds; total $10,793.08).)

b. Question One: Current Remaining Committee Funds

But even if, *arguendo*, plaintiffs could establish that McCutcheon's conveyances to the committee were bona fide, they have still not shown that they are likely to succeed in establishing that the answer to the first question they posed in their Advisory Opinion Request is yes, and that McCutcheon can lawfully transfer $50,000 of the currently remaining funds in the McCutcheon Committee account to the LNC's general treasury. This first question presents a challenging and apparently novel interpretive question that the Commission lacks a quorum to address.

Plaintiffs thus have not demonstrated that their proposed conduct is lawful clearly enough to justify the preliminary relief they seek here, particularly since plaintiffs set forth many reasons in their own advisory opinion request and in their complaint why FECA arguably does not permit such conduct and that doing so would allow circumvention of vital contribution limits. (*E.g.*, Adv. Op. Request at 8 ("The Bloomberg Billionaire Loophole appears to violate federal campaign finance law in numerous ways."); *id.* at 8 (describing Bloomberg transfer as

"apparently illegal"); *id.* at 4-8; Compl. Intro at 2-3 (stating "substantial likelihood" that proposed transfers would be deemed unlawful, and "[u]nlike Democrats such as Bloomberg . . ., McCutcheon cannot count on the Democratic Deep State bureaucracy to turn a blind eye to his activities"); *id.* at ¶ 19 (setting forth multiple reasons why there is a "substantial risk" that his proposed transfers would be deemed unlawful).)

i. Whether Funds From a Candidate That Are Not Spent by the Campaign Are Subject to the Ordinary Limit When a Person Contributes to a Candidate Committee

Candidates may generally make expenditures on their own behalf without limit because of their strong First Amendment interests and a reduced danger of corruption in that context. *Buckley*, 424 U.S. at 52-53. The Commission's regulations thus permit such "unlimited expenditures from personal funds." 11 C.F.R. § 110.10. Commission advisory opinions have construed the regulation to permit candidates to not only make direct expenditures from their personal funds, but also provide unlimited amounts of personal funds to their candidate committees to have those committees make the expenditures instead. *E.g.*, Advisory Opinion 2003-31 (Dayton) at 2. This has been permitted despite FECA's general limit that a person may not contribute more than $2,800 per election to a candidate committee. 52 U.S.C. § 30116(a)(1)(A). Plaintiffs explain the Commission's approach as an "efficient and practical work-around . . . so candidates can disclose [expenditures from their personal funds for their own campaign] on their campaign committees' periodic FEC reports." (Adv. Op. Request at 6.)

But once the election is over and the campaign committee's debts paid, there are no further "expenditures" that can be made that would be for the purpose of the candidate's campaign. *See* Adv. Op. Request at 7; *cf. Contribution & Expenditure Limitations and Prohibitions; Contributions by Persons & Multicandidate Political Committees*, 52 Fed. Reg.

760, 761 (Jan. 9, 1987) ("*Explanation of Contribution Limitations & Prohibitions*") (explaining that, since "contributions [must] be made with respect to and for the purpose of influencing [particular] election[s]," once the election is over and post-election debts paid, any new contributions would not "be made with respect to and for the purpose of influencing that [now over] election").)

The underlying rationales for *Buckley*'s holding and for the Commission's interpretation of 11 C.F.R. § 110.10 thus arguably do not apply to the remaining post-election funds in the candidate committee account that had been deposited pre-election from the candidate's personal funds. (*See* Adv. Op. Request at 7; Compl. ¶ 19(c).) Accordingly, the Advisory Opinion Request contends that those post-election funds should arguably be treated as any other contribution to a candidate committee, *i.e.*, subject to the $2,800 per election limit under 52 U.S.C. § 30116(a)(1)(A), and any excess must be refunded, *see id.*; 11 C.F.R. § 110.1(b)(3)(i), (5). *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) ("*[c]essante ratione legis cessat ipse lex* (the rationale of a legal rule no longer being applicable, that rule itself no longer applies)" (internal quotation marks omitted)). Under this approach, since the remaining funds would be considered excess contributions from McCutcheon and required to be refunded by the McCutcheon Committee to McCutcheon, the McCutcheon Committee could not lawfully transfer those funds to the LNC instead.

ii. Whether Funds From a Candidate That Are Not Spent by the Campaign Are Subject to the Ordinary Limit on Individual Contributions to National Party Committees

The Advisory Opinion Request also contends that funds that a candidate provides to his or her own candidate committee are also different in kind from a non-candidate's contributions to a candidate committee. Not only are the constitutional interests different, the argument goes,

but a candidate obviously has the ability to influence and direct the activities of that committee in a way an outside individual simply does not. The candidate may "relinquish[] control" over the funds provided in the sense that the candidate relinquishes the ability to use those funds in any manner that they wish, as those funds are now subject to, among other things, FECA's personal use restrictions. *See* 11 C.F.R. § 110.1(b)(6). But unlike an outside individual contributing to a candidate's campaign committee, a candidate continues to exercise significant "control" over how, amongst the various permissible uses, those funds are deployed.

According to the complaint, all of the funds currently in the McCutcheon committee's account were deposited from his personal funds and the committee does not have any debts outstanding, so it would be lawful for the committee to refund him the entirety of its funds for his own personal use (Compl. ¶¶ 15, 17, 19(a)), and McCutcheon avers that he has "complete direction and control over [the McCutcheon committee]'s funds and expenditures." (McCutcheon Decl. ¶ 18.)

In these circumstances, the Advisory Opinion Request argues that McCutcheon's decision to direct the McCutcheon Committee to transfer its funds should be viewed as a contribution from McCutcheon himself to the LNC. (Adv. Op. Request at 5; Compl. ¶ 19(a); CLC Comment at 2.) Under this view, the transfer of $50,000 would violate the $35,500 limit on an individual's contribution to a national party committee under 52 U.S.C. § 30116(a)(1)(B).

An interpretation of FECA and its regulations that would permit candidate committees to make the type of unlimited transfers plaintiffs propose here would arguably lead to the purposes behind *Buckley* not being served. (Adv. Op. Request at 4-8.) Instead, plaintiffs argue, there is a danger of circumvention of FECA's base contribution limits. (*Id.*) Application of the ordinary limit of $35,500 on contributions from individuals and non-multicandidate political action

committees, 52 U.S.C. § 30116(a)(1)(B), they contend, would be more consistent with the underlying purposes of FECA. (Adv. Op. Request at 4-8.) Such an approach would balance a candidates' First Amendment rights to make unlimited expenditures on their own behalf, *Buckley*, 424 U.S. at 52-53, with the important government interest in preventing quid pro quo corruption or the appearance thereof by limiting large individual contributions to national party committees, *McConnell*, 540 U.S. at 143-54.

Similarly, the transfer could be viewed as operating in a manner similar to an earmarked contribution from McCutcheon to the LNC, such that the transfer must be treated both as a transfer by the McCutcheon Committee to the LNC and as a contribution by McCutcheon personally to the LNC. (*See* Adv. Op. at 4.) FECA's contribution limits apply "with equal force" to contributions "in any way earmarked or otherwise directed through an intermediary or conduit." *McCutcheon*, 572 U.S. at 194; *see also* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a). Even if there is no limit to the amount of transfers from a candidate committee to a national party generally under 11 C.F.R. § 113.2(c), plaintiffs argue that the specific transaction they propose is subject to the $35,500 limit under 52 U.S.C. § 30116(a)(1)(B) because it *also* constitutes a contribution from McCutcheon personally. (Adv. Op. at 4.) If so construed, it thus too would violate the $35,500 limit. (*Id.*)

iii. Whether a Transfer of Funds From a Candidate That Are Not Spent by the Campaign Would Constitute a "Contribution in the Name of Another"

For similar reasons, the advisory opinion request argues that such a transfer may also violate FECA's prohibition on contributions in the name of another. (Adv. Op. Request at 5; Compl. ¶ 19(a)); *see supra* Background § (I)(B) (quoting 52 U.S.C. § 30122).) Under the view just discussed, if a transfer from the McCutcheon Committee would be viewed as a contribution from McCutcheon personally, then the McCutcheon Committee would run afoul of § 30122

because it would be making a contribution under its own name that would in fact be a contribution from McCutcheon.

iv. Whether Funds a Candidate Provides to a Candidate Committee Constitute a Contribution Within the Meaning of the Party Transfer Provision

In addition, FECA prohibits the disbursement of funds in a candidate committee account for purposes that are not lawful. 52 U.S.C. § 30114(a); 11 C.F.R. § 113.1(g) (applying prohibition to all "funds in a campaign account"). While Congress did provide an exception for transfers from a candidate committee to a national political party committee, 52 U.S.C. § 30114(a)(4), this exception appears to apply only to "contribution[s] accepted by [that] candidate," *id.* § 30114(a). The statute, however, does not define that phrase. "When a term goes undefined in a statute, [courts] give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Thus, when determining the ordinary meaning of a word in a statute, courts often look to dictionaries as a guide. *See id.* at 566-72. While precise dictionary definitions may vary, to "accept" something is "to receive (something offered) willingly," Merriam Webster, https://www.merriam-webster.com/dictionary/accept" (last visited Sept. 28, 2020), or "to agree to take something," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/accept (last visited Sept. 28, 2020).

Applying this concept to § 30114(a), the advisory opinion request argues that the statute should not consider funds from a candidate as being "contributions accepted" by that candidate's own committee, in that there has arguably been no agreement to an arms-length conveyance in the ordinary sense, and it may thus limit the national party transfer exception to contributions that a candidate receives from someone else. (Adv. Op. Request at 5; *see also* Compl. ¶ 19(b); CLC Comment at 1-2.)

Since McCutcheon's candidacy was self-funded, and he did not accept contributions from any other person, under the view in the request, the funds remaining in the McCutcheon Committee account would then not be eligible for transfers to other political committees. The implementing regulation refers merely to "funds in a campaign account," and the funds at issue are literally funds in the McCutcheon Committee's account, but the regulation also states: "Nothing in this section modifies or supersedes other Federal statutory restrictions . . . that may apply to the use of campaign or donated funds by candidates[.]" 11 C.F.R. § 113.2(f).

The request contends that the existing McCutcheon Committee funds are not eligible to be transferred to the LNC in an unlimited amount. (Adv. Op. at 5.) Rather, the transfer would constitute a "contribution," 52 U.S.C. § 30101(8)(A)(i), and thus the McCutcheon Committee would be, just like any other single-candidate political committee, subject to a $35,500 limit, *id.* § 30116.

v. Whether a National Party Committee Could Lawfully Accept a Transfer of Funds From a Candidate That Were Provided by the Candidate and Not Spent by the Campaign

The sole comment on the advisory opinion request put forward another reason that the proposed transaction may not be lawful. Congress's intent when enacting BCRA was to ensure that all funds contributed to national party committees are "subject to the limitations, prohibits, and reporting requirements" of FECA. 52 U.S.C. § 30125; *see also McConnell*, 540 U.S. at 143-54. BCRA accordingly prohibits national party committees from "receiv[ing" funds that are "not subject to the limitations, prohibits, and reporting requirements." 52 U.S.C. § 30125(a)(1). While a candidate may be able to contribute more to their own candidate committee than an individual otherwise could due to constitutional and reporting convenience considerations (*see supra* Background § I(B)), the comment contends that those contributions are

"not subject to [FECA's] limitations" (CLC Comment at 2-3). Under that view, BCRA would prohibit the LNC from accepting the proposed $50,000 from the McCutcheon Committee. (*Id.* at 3 ("[A] party committee violates 52 U.S.C § 30125(a) by receiving transfers of a candidate's personal funds that were deposited into a campaign committee outside of FECA's limits.").)

The request, public comment thereto, and plaintiffs' complaint thus yielded many interpretive questions of the Commission's organic statute the Commission would need to resolve when it regains a quorum that are obstacles to the legal ruling that plaintiffs seek from the Court, almost all of them previously advanced by plaintiffs themselves.

c. Questions 2 & 3: Additional Proposed Funds From McCutcheon

Although the Commission has also not had the opportunity to make a determination as to the second and third questions in the Advisory Opinion Request, those questions have more straightforward answers under existing authorities, and plaintiffs are unlikely to succeed in establishing that McCutcheon may now lawfully deposit additional personal funds into the McCutcheon Committee's account and then transfer those funds to the LNC's or RNC's general treasury.

Commission regulations generally prohibit a candidate or their authorized committee from accepting contributions after the date of the election unless "[s]uch contributions do not exceed the adjusted amount of net debts outstanding on the date the contribution is received." 11 C.F.R. 11 § 110.1(b)(3)(iii)(B); *see also* Advisory Opinion 2007-07 (Craig for U.S. Congress) (2007) at 3 (candidate committee may raise contributions after an election "only in amounts sufficient to retire any remaining debt"), https://www.fec.gov/files/legal/aos/2007-07/2007-07.pdf. In adopting this regulation, the Commission explained that "funds given to a candidate after an election is over cannot meet the Act's requirements that contributions be made with

respect to and for the purpose of influencing that election unless they could be used to retire outstanding debts from that election." *Explanation of Contribution Limitations & Prohibitions*, 52 Fed. Reg. at 761. As a result, the Commission has found reason to believe that a political committee without net debts outstanding violated FECA by accepting contributions designated for an election after the election and then transferring those funds to a national political party committee. Matter Under Review 4947 (Kemp for Vice President), Factual & Legal Analysis at 3, 5-7 (Dec. 6, 1999), https://www.fec.gov/files/legal/murs/4947/00000D1C.pdf, & Vote Certification (Nov. 10, 1999) at 2 (approving this Factual & Legal Analysis), https://www.fec.gov/files/legal/murs/4947/00000D1B.pdf.

The Libertarian National Convention is an "election" for purposes of the Act because the Libertarian Party nominates its candidates for president and vice president at the convention. 52 U.S.C. § 30101(1)(B); 11 C.F.R. § 100.2(e); Advisory Opinion 1979-43 (Grayson) (1979) at 2, https://www.fec.gov/files/legal/aos/1979-43/1979-43.pdf. In that election, held on May 23, 2020, McCutcheon was not selected as the Libertarian Presidential nominee, and McCutcheon promptly suspended his campaign. And because McCutcheon Committee did not report any debts outstanding, the Committee cannot accept any new contributions from McCutcheon or anyone else.

C. Plaintiffs Cannot Show They Are Likely to Succeed on Count 4 Because the Declaratory Judgment Act Provides No Distinct Cause of Action, Merely a Remedy If Plaintiffs Demonstrate a Legal Entitlement to Relief

In Count 4 of their Complaint, plaintiffs ask this Court to declare under the Declaratory Judgment Act, 28 U.S.C. § 2201, that that their proposed conduct is legally permissible, but they have identified no distinct, viable cause of action under that Act. Because there is no such cause of action, plaintiffs cannot demonstrate that they are likely to succeed on Count 4.

The Court of Appeals has made clear that the Declaratory Judgment Act does not provide a distinct cause of action. Even if plaintiffs can establish Article III standing sufficient to "get[them] through the courthouse door, it does not keep them there"; "[t]hey also need a cause of action to prosecute." *Make the Rd. New York v. Wolf*, 962 F.3d 612, 631 (D.C. Cir. 2020). And as the D.C. Circuit recently reiterated: "The Declaratory Judgment Act does not itself provide a cause of action, as the availability of declaratory relief presupposes the existence of a judicially remediable right." *Comm. on the Judiciary of U.S. House of Representatives v. McGahn*, No. 19-5331, 2020 WL 5104869, at *2 (D.C. Cir. Aug. 31, 2020) (internal quotation marks omitted); *see also Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014). In other words, contrary to plaintiffs' assertions (Mot. at 11; Compl. ¶¶ 55-61), the Declaratory Judgment Act does not imbue this Court with the authority to simply declare that plaintiffs' proposed transfers are lawful, separate and apart from any statutory or constitutional claim. While the Act may provide a *remedy* for causes of action upon which plaintiffs prevail (if any), they "cannot use the Declaratory Judgment Act to bootstrap [their] way into federal court." *McGahn*, 2020 WL 5104869, at *2.

A court in this district recently re-affirmed the lack of a distinct claim under the Declaratory Judgment Act in a context similar to the present one. In *Brown*, one count in plaintiffs' complaint sought a declaration that certain proposed advertisements were not "electioneering communications" under FECA, but plaintiffs did not allege an "underlying legal right that would entitle [p]laintiffs to a judgment reflecting a freestanding determination that that is so." 386 F. Supp. 3d at 28. Because there was "no cognizable cause of action on which [p]laintiffs could succeed in [that count]," the court concluded that "[p]laintiffs have not demonstrated that they are likely to succeed on it." *Id.* at 29.

For the same reason, this Court should similarly conclude that plaintiffs are unlikely to succeed under Count 4. *See also McGahn*, 2020 WL 5104869, at *3 (holding that the "lawsuit must be dismissed" because plaintiffs lack a cause of action under, *inter alia*, the Declaratory Judgment Act itself).[16]

III. PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM

Plaintiffs fail to meet their burden to show that they will suffer irreparable harm without the extraordinary remedy they seek. *Winter*, 555 U.S. at 22. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). The D.C. Circuit "has set a high standard for irreparable injury," underscoring that the injury "must be both certain and great . . . actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted).

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[16] In addition, even as a remedy for plaintiffs' other causes of action, the issuance of declaratory judgments is discretionary. *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 78 (D.D.C. 2009) (holding that "even when a suit otherwise satisfies subject matter jurisdictional prerequisites, the [Declaratory Judgment] Act gives courts discretion to determine 'whether and when to entertain an action.'" (quoting *Wilton v. Seven Falls*, 515 U.S. 277, 282 (1995)). Because plaintiffs are primarily concerned with a legal ruling to affect the rights of third parties (*supra* Argument § II(B)(3)(a)), the Court should decline to exercise that discretion. As this Court has recognized, "[t]he Declaratory Judgment Act is not a tactical device." *Id.* (internal quotation marks omitted); *see also id.* (citing 10B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2759 (3d ed. 1998) ("The courts properly decline relief if the declaratory-judgment procedure, and the federal forum, is being used for 'procedural fencing' or 'in a race for res judicata.'").

The Court should also exercise its discretion and decline to issue a declaration because Congress has decided that the Commission, the regulatory agency responsible for interpreting, administering, and enforcing the statute, should be the first to answer interpretive questions of FECA. 52 U.S.C. §§ 30106-09; *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (holding that the FEC is "precisely the type of agency to which deference should presumptively be afforded"). Because the Commission has not yet had that opportunity, adjudication is premature.

Plaintiffs have failed to show substantial or irreparable harm. They ask the Court to bar the FEC from taking enforcement action with regard to their proposed transfers of funds (Mot. at 1), assert that they are chilled from taking such actions due to the lack of an FEC advisory opinion (*id.*), and argue that it is irreparable harm whenever "the plaintiff 'cease[s]' First Amendment activities due to the chilling effects of government restrictions" (*id*. at 13 (quoting *Nat'l Treas. Emps. Union v. United States*, 927 F.2d 1253, 1255 (D.C. Cir. 1991)).

As an initial matter, plaintiffs have not sought preliminary relief on their constitutional claim and so they do not establish irreparable harm on that basis. Even if they had done so, plaintiffs wrongly assume that irreparable harm flows automatically from their contentions of First Amendment infringement. (Mot. at 12-14.) *Elrod v. Burns*, 427 U.S. 347, 373 (1976), does not stand for that principle, as plaintiffs claim (Mot. at 13), because the D.C. Circuit "has construed *Elrod* to require movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction framework." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 301; *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990).

Furthermore, the harm plaintiffs describe is not irreparable. The speech value of a contribution, or a transfer of funds, is that it "serves as a general expression of support" and "serves to affiliate a person with a candidate [or in this instance, a party]." *See Buckley*, 424 U.S. at 21-22. First, plaintiffs already have shown support and are affiliated with the national political parties. McCutcheon has made many prior contributions to the RNC, as well as to Republican candidates and state parties. https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=shaun%20mccutcheon. In addition, he has just run to be the

presidential nominee for the Libertarian Party, and the Committee was his authorized campaign committee. At the same time, plaintiffs have failed to pursue options that would allow them to both make contributions and help "ensure the defeat of . . . Joe Biden." (Compl. at 8.) McCutcheon has not made a substantial individual contribution to any Libertarian or Republican national committees this year, although he is permitted to make direct contributions of up to $35,500 to the general accounts of those parties each year. He is not irreparably harmed by having to do so directly. *Cf. Stop This Insanity Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10, 14 (D.C. Cir. 2014) (denying relief to parties who had passed up a "*less* burdensome" campaign spending option because there is no "constitutional right to do things the hard way"). Or his Committee could immediately contribute to the LNC and/or RNC within the contribution limit of $35,500,[17] and thereby associate with the party committee. Having to wait until this case ends to transfer an additional $14,500 is not harm warranting extraordinary relief. "The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Buckley*, 424 U.S. at 21.

Furthermore, to the extent McCutcheon proposes to make additional deposits to his own campaign committee, his inability to do so would not be irreparable harm. When a contribution is made by an individual, that contribution is an expression of support and affiliation for the entity that receives the contribution, not for whatever that entity spends the money on. *See Buckley*, 424 U.S. at 21 ("While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions

[17] Any contributions directly from McCutcheon's personal accounts to the LNC or RNC would have to be accounted for in the $35,500, which he alleges has been $100 or less and $50 or less, respectively, in 2020. (June 9th Email at 1.)

into political debate involves speech by someone other than the contributor."). McCutcheon is not irreparably harmed by being denied the ability to make an expression of support or of affiliation with his own Committee created for the purpose of an election that he lost.

"This court has set a high standard for irreparable injury," and plaintiffs must "articulate a tangible injury that is either 'certain and great' or irreparable." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297-98. Plaintiffs have failed to do so and "'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)). As one court in this District concluded in rejecting a motion to preliminarily enjoin limits on contributions to political parties, "[p]laintiffs will not 'suffer irreparable harm in the absence of preliminary relief'; they will simply be required to adhere to the regulatory regime that has governed campaign finance for decades." *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014).

IV. THE RELIEF THAT PLAINTIFFS REQUEST WOULD HARM THE GOVERNMENT AND UNDERCUT THE PUBLIC INTEREST

The balance of harms and the public interest also weigh heavily in favor of preserving the status quo and denying plaintiffs' request for extraordinary injunctive relief.[18] Indeed, "any time [the FEC] is enjoined by a court from effectuating statutes enacted by representatives of [the] people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Worse still, Plaintiffs are asking this Court to disrupt the nation's campaign finance system less than two months before an election by issuing a legal

[18] The third and fourth preliminary injunction factors, harm to the opposing party and weighing the public interest, respectively, "merge when the Government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

ruling permitting an individual (and thus potentially others) with the resources and an active campaign committee to make unlimited contributions to national committees and arguably circumvent long-standing limits designed to deter corruption. *See Buckley*, 424 U.S. at 24. But plaintiffs themselves have argued strongly that the public interest is in fact *harmed* by what they have termed the "Bloomberg Billionaire Loophole" allowing circumvention of FECA's limits. (Compl. Intro at 2; Adv. Op. Request at 4-8.) They thus have failed to show that clarifying the existence of what they perceive to be an illegal "loophole" right before a hard-fought presidential election would serve the public interest.

Rather than preserving the status quo, as preliminary injunctions are intended, *Camenish*, 451 U.S. at 395, granting relief here "would do precisely the opposite," because it would alter the "federal campaign finance framework only months prior to the next federal election[.]" *Rufer*, 64 F. Supp. 3d at 206. "Permitting that to happen would be imprudent, to say the least, and certainly not in the public interest." *Id.*

CONCLUSION

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

Respectfully submitted,

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