UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NRSC'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiff Democratic Congressional Campaign Committee ("DCCC") asks this Court to weaponize the Federal Election Commission's ("FEC") advisory-opinion process. FEC advisory opinions are designed for parties to seek clarity. But the DCCC asks the Court for an advisory opinion to circumvent the FEC's enforcement process and attack the DCCC's political opponents.

This matter began when the DCCC's sister committee, the Democratic ***Senatorial*** Campaign Committee ("DSCC"), became frustrated with effective joint-fundraising advertisements disseminated by Republican candidates and political-party committees during the 2024 General Election. The DSCC responded with a sham FEC advisory opinion request. The request—which sought to take advantage of the Federal Election Campaign Act's ("FECA") expedited review procedures for such requests—asked about the legality of hypothetical joint-fundraising advertisements that mirrored the Republican-sponsored advertisements. The DSCC ostensibly wanted to disseminate these ads itself. But in fact, it asked the FEC to limit use of the fundraising ads. When the FEC attempted to render an opinion, it deadlocked, voting 3-3 on two separate draft advisory opinions.

The DSCC responded by disseminating its own joint-fundraising ads. But the D***C***CC then sought to manufacture an emergency in this Court. Days before the 2024 General Election, the DCCC filed a complaint and motion for a preliminary injunction. Of course, if the D***S***CC's advisory-opinion request truly sought clarity about its own fundraising ads, then there would hardly be an emergency—much less one for the D***C***CC—given that the D***S***CC was already disseminating the ads. The DCCC was thus forced to openly admit what was obvious from the start. The request was never about ads that the DSCC wanted to distribute. It was about preventing "Republican candidates" from running highly effective "television advertisements" "before election day." Dkt. 6 at 9 (DCCC PI Mot. 1). This Court rightly denied the DCCC's motion on

redressability grounds. With the passing of the election and the end of the joint-fundraising ad campaign, it appeared that the matter would be concluded.

But the DCCC has decided now to amend its Complaint. And perhaps not surprisingly, the Amended Complaint faces not only the significant threshold issues that plagued its initial filing, but it is also now moot. As an initial matter, the DCCC still cannot establish redressability because, as this Court already held, no judgment from this Court will alleviate the DCCC's alleged injuries. Further, those alleged injuries are illusory because the DCCC cannot plausibly allege a substantial risk of FEC enforcement, cannot show a competitive disadvantage, and it is not entitled to the information of which it has allegedly been deprived. The DCCC also cannot establish traceability because those alleged injuries were not caused by the FEC's failure to issue an advisory opinion. And even if the DCCC had standing, the case is now moot because the DCCC asks for this Court to opine on joint-fundraising ads that were to be disseminated in an election that is now over.

The DCCC also lacks a cause of action under the Administrative Procedure Act ("APA"). For one, the DCCC has not identified a "final agency action." 5 U.S.C. § 704. Binding circuit precedent holds that agency deadlocks like the one at issue here are not agency "'action' of any kind"—much less "final" agency action. *See, e.g.*, *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016). That alone precludes review. So too does FECA. That statute allows parties to seek relief in court to remedy harms caused by third parties' alleged noncompliance with campaign-finance laws—i.e., the exact same relief the DCCC seeks here. 52 U.S.C. § 30109(a)(8). Because the DCCC has access to an "other adequate remedy," 5 U.S.C. § 704, review under the APA is precluded for this reason too.

Even if this Court had jurisdiction and the DCCC had a cause of action, dismissal is still required. The only alleged agency action—the FEC's non-issuance of an advisory opinion—was

not only lawful but legally compelled by FECA because no advisory opinion was able to garner approval from a majority of the FEC Commissioners as required by Congress. That alone warrants dismissal, regardless of whether the underlying ads are lawful. And in all events, dismissal is required because the DCCC forfeited its merits argument before the agency.

Finally, and although the issue is not properly before this Court, the joint-fundraising advertisements proposed in the DSCC's advisory-opinion request were entirely lawful under the statute and the FEC's longstanding regulations and precedents. *See* Dkt. 16 at 35–44 (NRSC PI Opp'n 27–36). The Amended Complaint suggests the DCCC will argue otherwise (i.e., against the legal advice the DCCC's own law firm apparently gave the DSCC before it disseminated substantially similar fundraising advertisements) but does not itself develop the DCCC's grounds for that contention. Because the agency did not address the legality of the proposed fundraising advertisements in the proceeding below and because "[t]he plaintiff bears the burden of establishing that the agency's action is invalid," *Powder River Basin Res. Council v. U.S. Dep't of Interior*, 2024 WL 4188655, at *2 (D.D.C. Sept. 13, 2024) (Chutkan, J.), the NRSC reserves its right to oppose whatever legal arguments the DCCC chooses to advance when it moves for summary judgment. *See also* Fed. R. Civ. P. 56(f) ("the court may … grant summary judgment for a nonmovant").

The Court should dismiss the Amended Complaint with prejudice.

BACKGROUND

A. Longstanding FEC Regulations Clearly Define When An Expenditure May Become A Contribution.

Congress enacted the Federal Election Campaign Act in 1972. Pub. L. No. 92-225, 86 Stat. 3 (1972). Under FECA, one makes a "contribution" to a candidate when he provides something

of value to the candidate or his authorized committee.[1] 52 U.S.C. § 30116(a)(7)(A); *id.* § 30101(8)(A). One also makes a "contribution" when he makes "expenditures … in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." *Id.* § 30116(a)(7)(B)(i).

FECA does not require regulated parties to interpret the "contribution" provisions on a blank slate. It instead provides that the FEC may "make, amend, and repeal such rules … as are necessary to carry out the provisions of this Act." 52 U.S.C. § 30107(a)(8). It also empowers the FEC to "render advisory opinions," *id.* § 30107(a)(7), which create a safe harbor for those who "rel[y]" on such opinions, *id.* § 30108(c)(2).

The FEC has long had rules that govern whether a political communication by a political party is a "contribution." *See Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 448–49 (Jan. 3, 2003) (codified at 11 C.F.R. § 109.37). These rules "detail[ ] standards for party coordinated communications" in order to "give clear guidance" to regulated parties. *Id.* at 448.

A political communication becomes a contribution when three requirements are met. *First*, "[t]he communication is paid for by a political party committee or its agent." 11 C.F.R. § 109.37(a)(1). *Second*, the communication contains certain election-related content. *Id.* § 109.37(a)(2). *Third*, the candidate, his authorized committee, or his agent is involved in certain aspects of the communication. *Id.* § 109.37(a)(3); *see also id.* § 109.21(d). This regulation mirrors a similar test that applies more generally—beyond just political parties—that is codified at 11 C.F.R. § 109.21.

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

B. Under The FEC's Longstanding Regulations, Joint-Fundraising Expenditures Are Not Contributions.

When Congress enacted its contribution limits in 1976, it drew an express distinction between "contributions" and "joint fund raising efforts." Pub. L. No. 94-238, § 112, 90 Stat. 475, 486–90 (1976). Then, in 1977, several Democrat campaign committees inquired about the legal consequences of jointly hosting a "fundraising dinner" in which the funds raised would be distributed by a "Special Committee" pursuant to "an allocation formula." FEC, Advisory Op. 1977-14, at 1 (Apr. 20, 1977), https://tinyurl.com/2p9xucf5 ("Bayh Op."). The FEC explained in an advisory opinion that "the participating presidential campaigns" could "avoid the occurrence of a contribution in-kind" to one another so long as they bore "a pro-rata share of all fundraising or other expenses of the Special Committee." *Id.* at 2. In other words, "if the allocation formula allows [one] campaign 70 percent of the contributions received by the Special Committee, then that campaign must bear 70 percent of the expenses incurred" to avoid a "contribution." *Id.*

Following the FEC's pronouncements on the legal status of joint fundraising, Congress amended FECA. It added an express authorization for candidates to "designate a political committee" for "joint fundraising by such candidates as an authorized committee." Pub. L. No. 96-187, § 102, 93 Stat. 1339, 1346 (1980). In other words, Congress adopted the exact joint-fundraising model endorsed by the FEC in the 1977 Bayh opinion and other advisory opinions.

The FEC formally codified this recognized interpretation of FECA in 1983. *See Transfer of Funds; Collecting Agents, Joint Fundraising*, 48 Fed. Reg. 26,296 (June 7, 1983) (codified at 11 C.F.R. § 102.17). The agency explained that its 1977 advisory opinion had already laid out "the basic rules for conducting joint fundraising activities." *Id.* at 26,298. Central to the rule was the pro-rata allocation of expenses based on funds raised, which is also known as the "funds-received" allocation method. The Commission explained that joint-fundraising participants "must

enter into a written agreement which identifies the fundraising representative and states the formula for allocating the fundraising proceeds and expenses."[2] *Id.* at 26,299 (codified at 11 C.F.R. § 102.17(c)(1)). The Commission specified that "[i]f each participant pays its own share of expenses calculated pursuant to this section, ***no contribution in-kind from one or more of the participants occurs***." *Id.* at 26,300 (emphasis added). Indeed, only when "[a] participant … pay[s] expenses on behalf of another participant" does joint fundraising result in a "contribution" from one participant to another. 11 C.F.R. § 102.17(c)(7)(i)(B).

The FEC has repeatedly reaffirmed this clear rule in subsequent advisory opinions, and it has applied the rule to joint-fundraising activities in the form of television advertisements. For example, in 2007, two campaign committees asked if they could engage in "joint advertising efforts, such as television, radio, and newspaper advertisements … some or all of which may solicit contributions," provided "all contributions" received would be "divided evenly" and they "split the cost" of those "activities equally." FEC, Advisory Op. 2007-24, at 1–2, 5 (Dec. 10, 2007), https://tinyurl.com/yc49pp8z ("Burkee Op."). The FEC answered in the affirmative and explained that any proportionally-split fundraising-advertising expense by one committee "would not constitute an in-kind contribution to the other's committee." *Id.* at 8.

The FEC reached the same conclusion again last year when Senator Lindsey Graham's principal campaign committee inquired whether it could continue to participate in a joint-fundraising committee if the committee added a Super PAC as another participant. FEC, Advisory Op. 2024-07, at 2 (Aug. 29, 2024), https://tinyurl.com/28t4epmh ("Graham Op."). The requestor explained that the joint-fundraising committee would make public communications and that "all

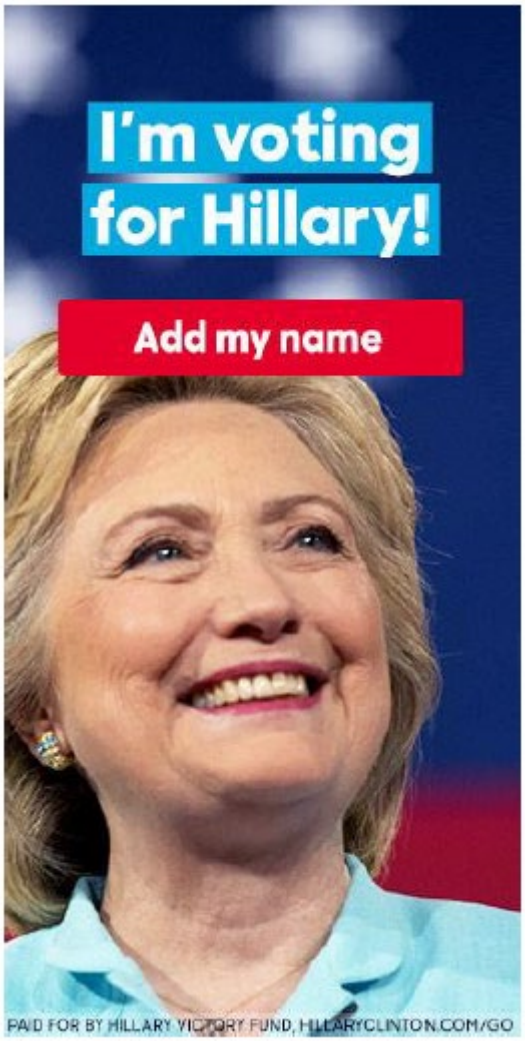
[2] The fundraising representative, which may be a separate joint fundraising committee formed for this purpose, "shall be … an authorized committee of each candidate for federal office participating in the joint fundraising activity." 11 C.F.R. § 102.17(a)(1)(i).

costs associated with the expanded Joint Fundraising Committee [would] be allocated to and paid proportionally by the expanded Joint Fundraising Committee's participants." *Id.* at 7. The FEC explained that its joint-fundraising regulation requires "each participant [to] pay its proportionate share of joint fundraising expenses," and its "coordinated communication" regulation mandates that a communication "must be paid for by a person other than the federal candidate [or] authorized committee" to be coordinated. *Id.* (citing 11 C.F.R. §§ 102.17(c)(7), 109.21(a)(1)). "[B]ecause Team Graham w[ould] pay the full cost of the public communications attributable to Team Graham," the FEC again concluded that such proportionally-divided fundraising-advertising expenses "will not be in-kind contributions to Senator or Team Graham." *Id.*

C. Decades Of Practice Confirm Joint-Fundraising Expenditures Are Not Contributions, Even When They Take The Form Of Advertising That Heavily Features Candidates.

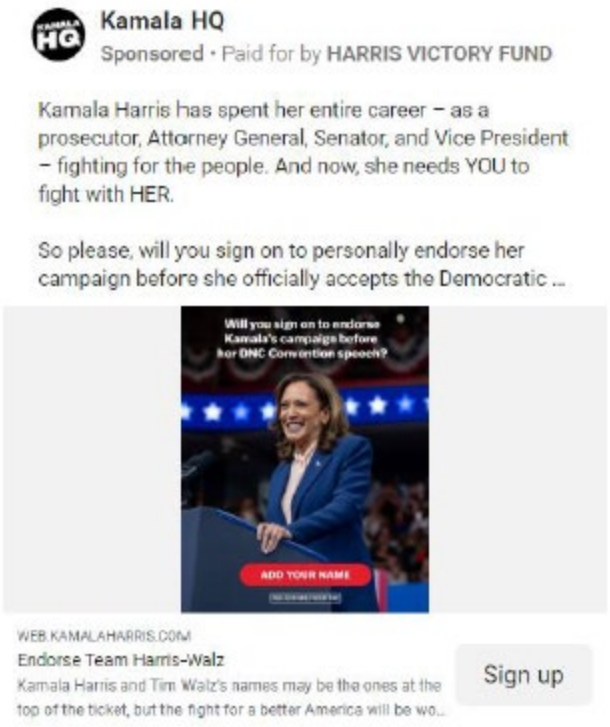
For decades, political parties and candidates have relied on the FEC's regulations and advisory opinions confirming that joint-fundraising-committee advertising expenditures are not in-kind contributions so long as expenses are allocated proportional to funds received. That includes joint-fundraising-committee advertising that heavily features the candidate as part of the fundraising appeal.

For example, in 2016, "Hillary Victory Fund, a [joint-fundraising committee] comprised of Hillary for America, the Democratic National Committee, and numerous Democratic state parties, spent approximately $68.8 million" on ads that "contained a wide variety of political advocacy content." Dkt. 1-2 at 14. Several such ads appear below:



Dkt. 1-2 at 26.

No one believed these were in-kind contributions. And nothing has changed since the Clinton ads. "Harris Victory Fund, a [joint-fundraising committee] comprised of Harris for President, the Democratic National Committee, and numerous Democratic state parties" sponsored "digital fundraising advertisements." *Id.* at 15. These ads too "contain[ed] a variety of electoral content," *id.*, such as the following:



Id. at 34.

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

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

Notwithstanding the clear FEC precedent from 1977 to the August 2024 Graham FEC advisory opinion, Plaintiff and its allies now claim that joint-fundraising advertising is "legally doubtful." Dkt. 28 at 28 (Am. Compl. ¶ 88). The DCCC claims that, beginning in July 2024, Republican joint-fundraising advertising—that appears nowhere in the administrative record—"spurred this controversy." *Id.* at 16 (¶¶ 49–50). Then, two months later, the DSCC and two principal campaign committees for Democrat Senate candidates requested an advisory opinion

from the FEC about the legality of hypothetical joint-fundraising ads for the 2024 election cycle. *Id.* at 22 (¶ 63); *see* Dkt. 1-1.

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

The FEC did not provide the DSCC an answer. On October 10, 2024, the Commissioners voted 3-3 on two draft advisory opinions, falling short of the four-vote threshold required by Congress to issue either one. *Id.* at 141; *see* 52 U.S.C. § 30106(c). The FEC's associate general counsel then issued a letter explaining that the agency "concluded its consideration of [the] advisory opinion request without issuing an advisory opinion." Dkt. 1-3 at 2.

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

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

The DSCC ran similar ads in Pennsylvania:

See Ugly, Pennsylvania Senate Victory 2024, https://tinyurl.com/yc72kprk.

And it ran similar ads in Wisconsin:

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

E. The Court Denies The DCCC's Request For A Preliminary Injunction, And The DCCC Amends Its Complaint.

After the FEC deadlocked on the D***S***CC's advisory-opinion request, Plaintiff D***C***CC filed a complaint and motion for a preliminary injunction a mere 19 days before election day. *See* Dkt. 1; Dkt. 6. The Complaint alleged that all joint-fundraising ads are *per se* "coordinated expenditures" that "exceed FECA's limitations on how much a national party committee can contribute to a candidate." Dkt. 1 at 26 (Compl. ¶ 92). It claimed that ads like the ones being run by its sister committee, the DSCC, are unlawful and could trigger "felony criminal prosecutions." *Id.* at 2 (¶ 2). And it asked that the Court "grant a preliminary injunction that vacates and sets aside the FEC's October 10 final order." Dkt. 6 at 38 (DCCC PI Mot. 30). The NRSC intervened, and both it and the FEC opposed the DCCC's request for preliminary relief. *See* Dkt. 16; Dkt. 17.

This Court denied the DCCC's motion. Dkt. 21 at 4. It found that the DCCC's request to temporarily "set aside" the FEC's "non-decision" would "neither redress the DCCC's asserted

injuries nor avoid any irreparable injury that the DCCC would otherwise suffer." *Id.* at 12 (emphasis omitted). The FEC's non-decision, the Court explained, "merely reported that the FEC had split three-three on the advisory opinion request and, thus, was unable to offer the requested advice." *Id.* at 14. The letter "did not take a position on the lawfulness—or unlawfulness—of the conduct at issue." *Id.* at 15. "Nor did it provide any party with any legal rights, defenses, or obligations." *Id.* Thus, the Court held that the DCCC lacked redressability because "[a]n order temporarily vacating the letter would neither give the DCCC a safe harbor nor prevent the NRSC (and others) from continuing to air the allegedly sham joint fundraising ads." *Id.* For the same reason, the Court explained, "vacating the FEC's October 10 letter would not remedy" the DCCC's alleged "informational injury." *Id.* at 19.

The Court rejected the DCCC's attempts to wring redressability from vacating a document with "no operative legal effect." Dkt. 21 at 17. For example, the DCCC claimed that the non-decision caused a competitive injury because it "'sort of gave' the NRSC 'the green light' to continue" airing joint-fundraising advertisements. *Id.* (quoting Dkt. 20, Oct. 28, 2024 Hrg. Tr. 58:21–23). But, this Court explained, "that type of (possible) practical consequence is too speculative and too remote to support a claim of standing." *Id.* at 18. The Court also rejected the DCCC's argument that the NRSC "admit[ted]" it would "cease" its joint-fundraising advertising if the "Court vacates the October 10 letter." *Id.* Rather, the Court recognized, the NRSC might be required to cease its conduct only if the Court issued a broad "declaratory judgment" about the legality of joint-fundraising advertising generally. *Id.* And the Court rejected the DCCC's claim that it had redressability because parties would change their behavior in response to the Court's "reasoning" issued contemporaneously with a vacatur order. *Id.* at 18–19. It explained that "the

Court's reasoning … is no substitute for … a judicial order … that will prevent and redress an alleged injury." *Id.* at 19.

The Court concluded by recognizing that "the DCCC, the DSCC, the NRSC, and the DCCC's direct counterpart, the NRCC, are all on an even playing field." Dkt. 21 at 20. "Each of these committees works with skilled campaign finance counsel and is well-equipped to make its best judgment about the risk of a future enforcement action or prosecution." *Id.* And "[n]othing in the FEC's October 10 letter tilted this playing field, and an order from this Court vacating the October 10 letter would not shift the ground in any legally relevant manner." *Id.* "In short, the campaign committees are in precisely the same position today that they were in before the Commission issued its October 10 letter, and they would remain in that same position even if the Court were to issue a preliminary injunction setting the letter aside." *Id.*

The DCCC did not appeal this Court's decision, and the 2024 general election is now complete. On December 20, 2024, the DCCC amended its Complaint, but the changes to its original Complaint are minor, and its legal theory appears largely unchanged. *See* Dkt. 28. The NRSC now moves to dismiss.

STANDARD OF REVIEW

"When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal." *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1240 (D.C. Cir. 2011) (alterations accepted) (citation omitted). The court reviews "the agency's action directly," and "[t]he entire case on review is a question of law." *Id.* To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the complaint's allegations must "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under Federal Rule of Civil Procedure 12(b)(1), "[i]t is to be presumed that a cause lies outside [a federal court's] limited jurisdiction," *Kokkonen v. Guardian Life Ins.*

Co. of Am., 511 U.S. 375, 377 (1994), and the plaintiff must plausibly allege facts to meet the "burden of establishing" otherwise, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

ARGUMENT

I. THE DCCC LACKS ARTICLE III STANDING.

To establish Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The Amended Complaint establishes none of these elements.

A. The Court Correctly Held That A Favorable Decision Would Not Redress The DCCC's Claimed Injuries.

At the preliminary-injunction phase, the Court squarely held that the DCCC's request to vacate the FEC's non-decision would not "redress any of [its] asserted injuries." Dkt. 21 at 14. Even assuming the DCCC has sufficiently pled an injury-in-fact—and it has not, *see infra*—that redressability determination remains true at this stage of the litigation, and the additional declaratory and injunctive relief the Amended Complaint requests is equally unavailing.

1. Vacating The FEC's Non-Decision Would Not Provide Relief.

"To determine whether an injury is redressable," the Court must "consider the relationship between the judicial relief requested and the injury suffered." *Murthy v. Missouri*, 603 U.S. 43, 73 (2024) (quotations omitted). Just like the preliminary-injunction motion the Court already denied, the Amended Complaint asserts that an order which "[h]old[s] unlawful and set[s] aside the FEC's October 10, 2024 Closeout Letter," Dkt. 28 at 31 (Am. Compl. Prayer for Relief ¶ B), would cure the DCCC's supposed competitive harm, informational injury, and experience of having its expression "chilled," *id.* at 27–28 (¶¶ 84, 86, 89).

The Court already explained why this is wrong. Setting aside "the FEC's October 10 letter" cannot cure the DCCC's claimed injuries because that letter "has no operative legal effect." Dkt. 21 at 17. The letter informs the DCCC about the FEC's deadlocked vote and its intention to close the file, but it does not itself purport to authorize or prohibit any conduct. Thus, as the Court explained, setting aside the letter cannot cure the DCCC's "competitive injury and the alleged chill," *id.*, as that "would neither give the DCCC a safe harbor nor prevent the NRSC (and others) from continuing to air the [ads]," *id.* at 15. Similarly, "vacating the letter would … have no legal bearing on the DCCC's alleged informational injury," because "[t]he letter takes no position on whether the funds at issue constitute contributions that are subject to the disclosure requirements." *Id.* at 19. The DCCC does not allege that any of this has changed—nor could it, as the content of the challenged closeout letter obviously has not changed—so, just like before, the Amended Complaint's request for vacatur cannot redress the DCCC's alleged injuries.

2. Declaring The Ads Unlawful Would Not Provide Relief.

In its opinion denying the preliminary injunction, the Court did not decide (because the motion did not ask) whether a request "for a declaratory judgment authorizing [the DCCC] to run joint fundraising ads without complying with FECA's contribution and consolidated expenditure limits" would redress the DCCC's alleged injuries. Dkt. 21 at 16–17. Now, the Amended Complaint asks the Court to declare the opposite—i.e., to "[d]eclare that [the] JFC-advertising expenditures" proposed by the DSCC "constitute 'contributions.'" Dkt. 28 at 31 (Am. Compl. Prayer for Relief ¶ A). But that request does not solve the DCCC's redressability problem.

First, the request "is not the kind redressable by a federal court" under the APA. *See United States v. Texas*, 599 U.S. 670, 678 (2023). The APA authorizes "judicial review" of "*agency* action." 5 U.S.C. § 702 (emphasis added); *see Ovanova, Inc. v. USDA*, 2025 WL 82308, at *2 (D.D.C. Jan. 13, 2025) (Boasberg, J.) ("A fundamental prerequisite to APA review is that the

judicial challenge be to *agency*—and necessarily government—action."). Therefore, if the FEC had issued an advisory opinion about the DSCC's proposed ads, then this Court could review the opinion and determine whether its conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because the FEC did not, there is no *agency* action to review. Obviously, the Court cannot issue its own advisory opinion assessing the legality of the DSCC's hypothetical conduct. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("The federal courts established pursuant to Article III of the Constitution do not render advisory opinions. … This is as true of declaratory judgments as any other field." (cleaned)). But that is exactly what the Amended Complaint asks for: an opinion about the legality of "JFC-advertising expenditures, as defined and described in" the advisory-opinion request, *not* an opinion about the legality of FEC action. Dkt. 28 at 31 (Am. Compl. Prayer for Relief ¶ A); *see id.* at 5 (¶ 12) ("This Court must now do what the FEC failed to: declare that the proposed JFC-advertising schemes violate FECA").

Second, even if this Court could issue it, the requested "declaratory judgment" would be "powerless to remedy the alleged harm." *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023). Start with the supposed chill: declaring the DSCC's proposed advertisements *unlawful* would not grant the DCCC a safe harbor. It would, as designed, do the exact opposite. That plainly would not alleviate any chill.

Nor could a declaration remedy the DCCC's alleged competitive and informational injuries. Those supposedly stem from actions by Republican committees—the DCCC claims it is "in the dark" about how much "Republican ads" are raising and is "sitting on its hands while Republican committees and candidates reach voters through these schemes." Dkt. 28 at 27–29 (Am. Compl. ¶¶ 86, 89). But even if that were true, a declaration about the legality of the DSCC's

proposed ads under the APA would bind only "the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703. It would not bind anyone else.

To be sure, other parties might, as a practical consequence, choose to modify their conduct based on the Court's *reasoning*. But for redressability analysis, "preclusive effect" is what matters. *Brackeen*, 599 U.S. at 293; *see id.* at 294 ("redressability requires that the court be able to afford relief *through the exercise of its power*" (cleaned)). Therefore, even where an entity affirmatively "state[s] that it would follow the federal court's ruling," the Supreme Court has held there is no redressability unless that party will be formally "bound by the judgment." *Id.* at 293–94. In an APA suit like this one, that cannot be true of non-federal parties.

The Court's previous opinion explained that to hold otherwise—that is, to find it "sufficient … that a court's reasoning might[,] standing alone, and independent of any relief the Court might order[,] affect future decisions from an administrative agency or the behavior of those the agency regulates"—would "vastly expand the contours of standing" and "would open the doors to litigants with only indirect and speculative interests in pending cases." Dkt. 21 at 19. The Supreme Court agrees, as it explained in *Brackeen* and *Lujan*. *See Brackeen*, 599 U.S. at 294 ("It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability."; "Otherwise, redressability would be satisfied whenever a decision might persuade actors who are not before the court—contrary to Article III's strict prohibition on 'issuing advisory opinions.'"); *Lujan*, 504 U.S. at 569 (plurality) (finding no redressability because "there [was] no reason [a nonparty] should be obliged to honor an incidental legal determination the suit produced"); *see also Doe 1 v. Apple Inc.*, 96 F.4th 403, 414 (D.C. Cir. 2024) (finding no redressability where remedy "would not bind the direct perpetrators of the"

injurious conduct). Because the DCCC is seeking to punish others' conduct through a judicial opinion and not a judgment, the requested declaration would not redress its claimed injuries.[3]

3. An Injunction Would Not Provide Relief.

The DCCC requests, in the "[a]lternative[ ]," a court order to "permanently enjoin the FEC from pursuing enforcement actions or otherwise prosecuting DCCC for engaging in JFC-advertising in excess of FECA contribution limits." Dkt. 28 at 31 (Am. Compl. Prayer for Relief ¶ C). But that cannot provide redressability either.

First, the requested remedy would not follow from success on the merits. Redressability requires the DCCC to show that its injury is "likely to be redressed by a ***favorable*** decision." *Finnbin, LLC v. CPSC*, 45 F.4th 127, 136 (D.C. Cir. 2022) (emphasis added). Here, the DCCC's merits argument is that "the proposed JFC-advertising violates FECA," Dkt. 28 at 29 (Am. Compl. ¶ 92), and that parties running those ads are engaged in "illegal campaign spending," *id.* at 30 (¶ 96). Thus, a "favorable decision" for the DCCC, *Finnbin*, 45 F.4th at 136, would mean that joint-fundraising advertising expenditures result in contributions subject to FECA's limits. Plainly, this Court could not enter an injunction that exempts the DCCC from those very contribution limits—blessing allegedly illegal behavior. *See McCutcheon v. FEC*, 496 F. Supp. 3d 318, 337 (D.D.C. 2020) (Bates, J.) (denying injunction where party purportedly seeking advisory opinion "spen[t] more time disparaging the alleged loophole than advocating for it"). At bottom, this request for an injunction is nothing but a thinly-veiled request for an advisory opinion from this Court.

[3] As discussed below, FECA's enforcement process enables one private party to complain about the conduct of another. *See* 52 U.S.C. § 30109(a)(8). The DCCC declined to use that established statutory route.

Second, the DCCC's alleged injuries are not "redressable by a court order," *Texas*, 599 U.S. at 676, because "the district court ha[s] no jurisdiction to order specific relief" when it reviews "agency action," *Palisades Gen. Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005). Rather "because the role of the district court … is to act as an appellate tribunal," *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012), the "ordinary practice is to vacate unlawful agency action," or, "[i]n rare cases," to "remand for the agency to correct its errors," *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). The D.C. Circuit regularly rejects "district court[ ] injunction[s]" as "anomalous" in agency cases. *N. Air Cargo*, 674 F.3d at 861; *see also R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012) (setting aside unlawful agency action and "vacat[ing] the permanent injunction issued by the district court"), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014); *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (explaining that "devis[ing] a specific remedy for the [agency] to follow" "was error"). Here, that jurisdictional bar applies doubly so because FECA contemplates only a safe-harbor remedy from a favorable advisory opinion—not an injunction. *See* 52 U.S.C. § 30108(c); *accord McCutcheon*, 496 F. Supp. at 336 (rejecting "injunction" against FEC that would "displace the process Congress put in place"). Thus, this Court lacks jurisdiction to redress the DCCC's injuries through specific injunctive relief.

Third, to the extent the DCCC believes ***any*** FEC advisory opinion would redress its injuries, then this Court should not entertain the DCCC's conception of the "merits" at all. It is blackletter law that "a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact." *Gill v. Whitford*, 585 U.S. 48, 66 (2018) (alterations accepted) (quotations omitted). If an advisory opinion "[e]ither way" is sufficient to alleviate the DCCC's injuries, *see* Dkt. 28 at 4 (Am. Compl. ¶ 9), then this Court should, at most, order "the FEC" to "issue[ ] ***an advisory opinion***

clarifying FECA's application to JFC-advertising," *id.* (emphasis added). Anything more than that—such as a declaration specifying what the advisory opinion should say—would not be "tailored to redress the plaintiff's particular injury." *Gill*, 585 U.S. at 73; *accord Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004).

B. The DCCC Has Not Alleged An Injury In Fact.

Even if they were redressable, none of the DCCC's alleged injuries suffice for Article III standing.

1. The DCCC Has Not Suffered A Chill Injury.

The DCCC says it "is chilled from engaging in" joint-fundraising advertising in future elections "due to the prospect of … enforcement proceedings and onerous sanctions." Dkt. 28 at 27–28 (Am. Compl. ¶¶ 84, 87–88). But the DCCC has not (and could not) plausibly allege an imminent risk of enforcement.

The DCCC makes the conclusory assertion that an enforcement "prospect" exists, *id.* at 27 (¶ 84), and is a "risk," *id.* (¶¶ 85–86). But those bare allegations—regarding ads that might not even be created until years from now—are "insufficient to show injury in support of standing" because they "at most indicate a fear that the Government … may take action against them in the future." *Saline Parents v. Garland*, 88 F.4th 298, 304 (D.C. Cir. 2023), *cert. denied*, No. 23-1135, 2024 WL 4426566 (U.S. Oct. 7, 2024). Without "factual allegations that support[ ] concrete threats of enforcement," *id.*, the DCCC's chill injury necessarily fails. *See, e.g.*, *California v. Texas*, 593 U.S. 659, 670 (2021) ("a plaintiff claiming standing must show that the likelihood of future enforcement is 'substantial'"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (rejecting standing based on mere "allegations of a subjective chill" (cleaned)); *Racing Enthusiasts*

& Suppliers Coal. v. EPA, 45 F.4th 353, 359 n.3 (D.C. Cir. 2022) (holding "risk of prosecution" based on agency's failure to clarify its legal position could not establish "injury-in-fact").[4]

The conduct of other parties—including the D***S***CC—also confirms that the D***C***CC lacks a plausible chill injury. As explained, Democrats and Republicans alike have, for decades, relied on the FEC's advisory opinions and engaged in joint-fundraising-committee advertising that is indistinguishable from the ads proposed in the DSCC's advisory-opinion request. *See supra*. The D***C***CC cannot seriously contend that it fears "felony criminal prosecutions" for joint-fundraising advertising, Dkt. 28 at 2 (Am. Compl. ¶ 2), while the D***S***CC, ***advised by the same legal counsel***,[5] engages in that exact conduct, *see supra*. Thus, the DCCC cannot plausibly claim a "concrete threat[ ] of enforcement." *Saline Parents*, 88 F.4th at 304.

2. The DCCC Has Not Suffered A Competitive Injury.

Next, the DCCC claims a "competitive harm" because "the prospect of … enforcement proceedings and onerous sanctions" forces the DCCC to "sit[ ] on its hands while Republican committees and candidates reach voters through" joint-fundraising advertising. Dkt. 28 at 27 (Am. Compl. ¶¶ 84–86); *see also id.* at 4–5 (¶¶ 9–10), 21–22 (¶ 61), 29 (¶ 91), 30 (¶ 96). This argument fails for three independent reasons.

First, the DCCC fails to show a "competitive disadvantage." Dkt. 28 at 4 (Am. Compl. ¶ 9). As this Court already recognized:

[4] The claimed chill is also belied by the FEC's existing advisory opinions. As explained, the Commission has for 47 years consistently declared that using a proportional allocation method in joint-fundraising activities "avoid[s] the occurrence of a contribution in-kind," Bayh Op. at 2, for any "advertising efforts that include solicitations," Burkee Op. at 5; *see also* Graham Op. at 7; 48 Fed. Reg. at 26,300. The DCCC seeks to create ambiguity where none currently exists.

[5] Counsel for the DCCC represents "every national Democratic Party organization." *About*, Elias Law Group, https://tinyurl.com/4hds5z37 (last visited Feb. 7, 2025).

> [T]he DCCC, the DSCC, the NRSC, and the DCCC's direct counterpart, the NRCC, are all on an even playing field. Each of these committees works with skilled campaign finance counsel and is well-equipped to make its best judgment about the risk of a future enforcement action or prosecution. Nothing in the FEC's October 10 letter tilted this playing field[.]

Dkt. 21 at 20. The DCCC faces no greater regulatory risk than any other political committee. Thus, it cannot show "illegal under-regulation of [its] competitor" because all political committees face the same "regulatory burdens." *Compare State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (no competitive injury where competitor faced "greater regulatory burden" (emphasis omitted)), *with Shays v. FEC*, 414 F.3d 76, 92 (D.C. Cir. 2005) (finding competitor standing where "affidavits" swore to "distinct risk" of "disadvantage").

Second, the DCCC lacks competitor standing because it has not "show[n] that [it] personally competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit." *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998). Here, that allegedly illegal benefit is the FEC's acquiescence to "Republican ***candidates***" receiving "tens of millions of dollars on television advertisements." Dkt. 28 at 1–2 (Am. Compl. ¶ 1) (emphasis altered). The DCCC has not pled facts to show that it is a "***direct*** … competitor" of a candidate. *Air Excursions LLC v. Yellen*, 66 F.4th 272, 279–80 (D.C. Cir. 2023) (emphasis in original).

Third, the DCCC has no plausible basis to claim a disadvantage out of fear that joint-fundraising advertising will trigger legal penalties. As already explained, the DCCC has proffered no factual allegations to suggest a concrete threat of enforcement; it is already subject to a safe harbor; and every other national political party committee—including the DCCC's sister committee, advised by the same lawyers—engages in joint-fundraising advertising. *See supra*. Thus, any competitive disadvantage to the DCCC is unreasonable, "self-inflicted," and not a "cognizable" injury. *Animal Legal Def. Fund, Inc. v. Vilsack*, 111 F.4th 1219, 1228 (D.C. Cir. 2024); *see also Clapper*, 568 U.S. at 417–18.

3. The DCCC Has Not Suffered An Informational Injury.

Lastly, the DCCC now claims to "suffer[ ] an informational injury" because it "does not know how much each JFC participant committee is paying for each ad." Dkt. 28 at 28–29 (Am. Compl. ¶¶ 89–90). This claim fails for two independent reasons.

First, the DCCC has not shown a concrete interest in the information of which it has allegedly been deprived. "An asserted informational injury that causes no adverse effects," the Supreme Court has explained, "cannot satisfy Article III." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 442 (2021) (quotations omitted). Rather, a plaintiff must show "a concrete interest in the information sought." *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013). Here, the only interest the DCCC asserts is its competitive interest. Dkt. 28 at 29 (Am. Compl. ¶ 90) ("Information about Republicans' and other parties' expenditures is critical to DCCC's understanding of the competitive environment[.]"). Because that competitive injury is illusory, *see supra*, so too is the deprivation of information that would purportedly help alleviate it.

Second, the DCCC's alleged informational injury does not "correspond to [its] requested relief." *AB PAC v. FEC*, 2023 WL 4560803, at *3 (D.D.C. July 17, 2023) (Kelly, J.). As relevant here, FECA imposes "two discrete" requirements. *Id.* The first is that a political party may not contribute to candidates above certain limits. *See* 52 U.S.C. § 30116(a). The second is that contributions to candidates must be disclosed. *See id.* § 30104. Here, any informational injury flows exclusively from the second provision, but the DCCC's requested relief concerns only the first. That is, the Amended Complaint asks only that the Court declare joint-fundraising ads "subject to FECA's limits," Dkt. 28 at 31 (Am. Compl. Prayer for Relief ¶ A), and asks for no relief related to the disclosure requirement. And, as this Court explained, the FEC's non-decision "takes no position on whether the funds at issue … are subject to the disclosure requirements." Dkt. 21 at 19. Thus, even if the DCCC "has an informational injury" from "disclosure" violations,

that cannot "support standing on its excessive-contributions claim." *AB PAC*, 2023 WL 4560803, at *5.

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

The DCCC also independently lacks standing because it cannot trace any injury to the FEC's non-decision. Although the DCCC is "seeking only forward-looking relief, [its] past injuries are relevant … for their predictive value." *Murthy*, 603 U.S. at 59. Specifically, if the DCCC "cannot trace [its] past injury to" the FEC, "it will be much harder for [it] to make that showing" as to future injuries. *Id.* The reason is that the DCCC must "essentially" establish traceability "from scratch, showing why [it] has some newfound reason to fear that" the FEC caused its injury, rather than the prior cause. *Id.*

The bulk of the DCCC's alleged past injuries cannot possibly be traceable to the FEC's non-decision. The reason is obvious from the timeline of events. According to the Amended Complaint, the DCCC began incurring each of its alleged injuries when "Republicans began" using "JFC-advertising … in ***July 2024***." Dkt. 28 at 16 (Am. Compl. ¶ 50) (emphasis added). And the alleged injuries intensified "in ***mid-September***" when "Republicans rapidly expanded this advertising tactic." *Id.* at 19 (¶¶ 56–57) (emphasis added). Thus, the FEC's failure to issue an advisory opinion on "***October 10, 2024***," *id.* at 26 (¶ 81) (emphasis added), could hardly have caused those injuries that occurred "before" the non-decision, *Murthy*, 603 U.S. at 60; *see id.* at 62 ("a causal link is possible only if" injury "occurred ***after***" challenged conduct (emphasis in original)); *accord Clapper*, 568 U.S. at 417 (finding injuries "not fairly traceable to" government action where harm "predated" that action). Thus, right out of the gate, the DCCC's "failure to establish traceability for past harms" "substantially undermines" the DCCC's "standing to seek forward-looking relief." *Murthy*, 603 U.S. at 70.

No allegations in the Amended Complaint come anywhere near overcoming that hurdle to "establish a substantial risk of future injury that is traceable to the Government defendants." *Id.* at 69. The DCCC instead offers only the conclusory assertion that "the FEC acquiesced to the Republicans'" advertising "[b]y failing to issue an advisory opinion." Dkt. 28 at 30 (Am. Compl. ¶ 96). But this Court has already rejected the theory that the FEC's non-decision "'sort of gave' the NRSC 'the green light' to continue funding the advertisements." Dkt. 21 at 17 (quoting Dkt. 20, Oct. 28, 2024 Hrg. Tr. 58:21–23). After all, the FEC's deadlock "does not foreclose the Department of Justice from bringing a criminal prosecution, nor does it foreclose a private party from filing a complaint with the FEC, and even if the Commission were to decline to proceed in response to that complaint, its decision not to investigate would be subject to review by a district court." *Id.* at 17–18 (quotations omitted) (alterations accepted). And as the DCCC concedes, "another change of mind of one of the Commissioners" could still result in an "enforcement action." Dkt. 28 at 13 (Am. Compl. ¶ 41). Thus, the DCCC's attempt to trace a "(possible) practical consequence" to the FEC's non-decision, the Court explained, "is too speculative and too remote to support a claim of standing." Dkt. 21 at 18; *accord Murthy*, 603 U.S. at 72 (rejecting traceability theory that would require court to "speculate about the decisions of third parties" (alterations accepted)). This Court's reasoning holds true now just as it did when it denied the DCCC's motion for a preliminary injunction. The DCCC lacks traceability.

II. THE DCCC'S AMENDED COMPLAINT IS MOOT.

Even if the DCCC originally had standing, the dispute is now moot because the DCCC seeks an advisory opinion on the legality of advertisements to be used in an election that is now over. "A case is moot," the D.C. Circuit has explained, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Louie v. Dickson*, 964 F.3d 50, 55 (D.C. Cir. 2020) (alterations accepted).

That is so here. FECA authorizes the FEC to issue an advisory opinion "with respect to a specific transaction or activity by the person" who "request[s]" the opinion. 52 U.S.C. § 30108(a)(1); *see also id.* § 30108(a)(2) (authorizing advisory opinion "relating to [the] request"). The DSCC asked the FEC whether "Montanans for Tester and Gallego for Arizona" may "use a joint fundraising committee to run television advertisements" during the pendency of the then-"upcoming [2024] general election." Dkt. 1-1 at 2; *see also id.* at 3 (explaining ads would run "through the 2024 general election."). That election is now over. Because the 2024 "election ha[s] already taken place," relief opining as to the legality of conduct "in that election" is "moot." Order (per curiam), *Duran v. U.S. Congress*, 2021 WL 11659452, at *1 (D.C. Cir. July 1, 2021).

It makes no difference that an FEC advisory opinion may be relied upon by similarly situated parties. An advisory opinion issued by the Court cannot provide a safe harbor to the DCCC because it is not "rendered by the Commission." 52 U.S.C. § 30108(c)(1). Nor could the Court direct the FEC to render an advisory opinion now that the election is over. It is a cardinal rule of administrative law that "agencies may not violate their own rules and regulations." *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005); *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The FEC's rules provide that an "advisory opinion request shall set forth a specific transaction or activity that the requesting person plans to undertake" and may not address "a general question of interpretation," "a hypothetical situation," or "the activities of third parties." 11 C.F.R. § 112.1(b). Here, the requestors told the FEC that they planned "to disseminate the advertisements beginning [September 2024] and continuing through the 2024 general election." Dkt. 1-1 at 3. They made no mention of disseminating the advertisements ***after*** the 2024 general election—nor would that have even made sense, as the candidates will change in the next election

cycle. Without an advisory-opinion request addressing present or future plans by any political-party committee, the Commission is unable to afford a safe harbor.

Thus, the DCCC's challenge is moot because "any pronouncement" from this Court "would not presently affect the parties' rights or have a more-than-speculative chance of affecting them in the future." *Shell Energy N. Am. (US), L.P. v. FERC*, 107 F.4th 981, 993 (D.C. Cir. 2024) (quotations omitted).

III. THE DCCC DOES NOT CHALLENGE FINAL AGENCY ACTION.

It is blackletter law that an APA claim requires "final agency action." 5 U.S.C. § 704; *see Delaware Valley Reg'l Ctr., LLC v. DHS*, 106 F.4th 1195, 1203 (D.C. Cir. 2024) ("If there was no final agency action, there is no doubt that appellant would lack a cause of action under the APA." (citation omitted)). At the outset, that requires an "agency action." *See* 5 U.S.C. § 551(13). And such action is "final" only where it satisfies "two conditions." *Bennett v. Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process." *Id.* at 177–78. "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (quotations omitted). Here, the DCCC has not identified an agency action, nor has it established either prong of finality.

A. The FEC's Non-Decision Is Not An "Agency Action."

The DCCC alleges only one agency action: "The FEC's failure to issue an advisory opinion, and subsequent closure of AOR 2024-13." Dkt. 28 at 30 (Am. Compl. ¶ 97). Thus, the DCCC's entire case depends on whether a "deadlocked 3-3" vote by the FEC Commissioners is agency action. *Id.* at 26 (¶¶ 81–83). It is not.

The D.C. Circuit has squarely and repeatedly held that deadlocked agency votes are not agency action under the APA. Start with *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007). There, FCC "Commissioners deadlocked with a 2-2 vote on a draft memorandum opinion

and order that would have granted" in part a forbearance petition. *Id.* at 1131. Because the applicable statute provided that a failure to deny the petition rendered it "deemed granted," the FCC issued a press release announcing that the petition had been "granted by operation of law." *Id.* Several parties aggrieved by this outcome sued, arguing that the Commission's deadlocked vote was "'agency action' subject to judicial review" under the "Administrative Procedure Act." *Id.*; *see also id.* at 1131 n.3 (quoting APA's definition of "agency action"). The D.C. Circuit flatly rejected that argument: "The deadlocked vote cannot be considered an order of the Commission nor can it constitute agency action." *Id.* at 1131. Because the Commission "acts by majority vote," the court explained, "[t]ies … do not result in Commission action." *Id.* at 1132.

Next is *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016). There, FERC's commissioners "deadlocked" 2-2 on objections to automatic increases in certain electricity rates and, as a result, the rates took effect. *Id.* at 1168. The D.C. Circuit rejected a petition to review the result of FERC's deadlock, squarely holding that an agency "deadlock" is not "an 'action' of any kind." *Id.* at 1170; *see id.* at 1171 ("FERC did not engage in agency action at all, let alone final agency action"). It first mirrored the reasoning of *Sprint Nextel*: because FERC requires "a majority vote" to act, its failure to garner a majority meant that the agency "did not engage in collective, institutional action when it deadlocked," and so there was no "reviewable order[ ]." *Id.* at 1169–70. The court also relied on the dictionary "definition of 'deadlock,'" i.e., "a state of inaction resulting from the opposition of equally powerful uncompromising factions." *Id.* at 1170 (alterations accepted) (citing Merriam-Webster's Collegiate Dictionary 319 (11th ed. 2009)). "By its very terms," the court explained, "the nature of a deadlock confirms FERC neither reached a collective decision nor engaged in an 'action' of any kind." *Id.*

Sprint Nextel and *Public Citizen* control this case. Here, as in those cases, a party submitted a request to the agency. Dkt. 28 at 22 (Am. Compl. ¶ 63). Here, as in those cases, the agency required a "majority vote" to act on that request. 52 U.S.C. §§ 30106(c), 30107(a)(7). Here, as in those cases, the agency could not garner a majority vote because its Commissioners "deadlocked." Dkt. 28 at 26 (Am. Compl. ¶ 81). Here, as in those cases, the agency issued a communication informing the party that it deadlocked and "was unable to" act. Dkt. 1-3 at 2. Here, as in those cases, parties were upset at the effect of that inaction—the grant of a forbearance petition in *Sprint Nextel*, the effectuation of electricity rates in *Public Citizen*, and the purported uncertainty in this case. Here, as in those cases, the agency's "deadlocked vote" does not "constitute agency action," *Sprint Nextel*, 508 F.3d at 1131–32, nor does its communication "describing the effects of that deadlock," *Public Citizen*, 839 F.3d at 1170.

Public Citizen confirms that FEC advisory-opinion deadlocks are unreviewable. There, the D.C. Circuit distinguished FEC *enforcement* deadlocks because "FECA's text explicitly permits review of probable-cause deadlocks as agency action." *Public Citizen*, 839 F.3d at 1170; *see id.* ("the treatment of probable cause deadlocks as agency action is baked into the very text of the statute"). But FECA's text makes no similar provision for FEC *advisory-opinion* deadlocks, and *Public Citizen* expressly confirmed that these are "unreviewable" under the general deadlock rule. *Id.* (citing *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 428 (E.D. Va. 2012)). Under binding precedent, the DCCC has not identified an agency action.

The Amended Complaint purports to rely on *Ready for Ron v. FEC*, 2023 WL 3539633 (D.D.C. May 17, 2023) (Moss, J.) and *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012), *see* Dkt. 28 at 5 (Am. Compl. ¶ 11), but both are fully consistent with this binding circuit precedent. In *Ready for Ron*, the FEC actually issued an advisory opinion that

addressed all but one issue, and no party contended that the agency's failure to reach that issue made the advisory opinion nonfinal as to that issue. *See* 2023 WL 3539633, at *5. There was thus no need for this Court to consider final agency action, as the "APA's finality requirement is not jurisdictional" and is therefore "forfeited" when not "raised … with the District Court." *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012); *see also* Dkt. 20 at 13:2–15 (explaining that in *Ready for Ron*, there was a "decision" to "review," and final-agency-action argument was "waived"). But here, where there is no advisory opinion at all, and finality has not been forfeited but is affirmatively raised, D.C. Circuit precedent precludes an APA cause of action.

Hispanic Leadership Fund affirmatively undermines the DCCC's case. As explained, in *Public Citizen*, the D.C. Circuit favorably cited *Hispanic Leadership Fund* for the proposition that an "FEC deadlock" over an advisory-opinion request is "unreviewable." *Public Citizen*, 839 F.3d at 1170. Because the plaintiffs in *Hispanic Leadership Fund* did not bring an APA claim, 897 F. Supp. 2d at 426, the FEC did not make a final-agency-action objection. Nevertheless, the court explained that a deadlock in response to an advisory-opinion request "d[oes] not result in, reviewable agency action." *Id.* at 428.

During preliminary-injunction briefing, the DCCC argued that because a majority-issued advisory opinion that denies a safe harbor is final agency action, so too is a deadlock that does not afford a safe harbor—because the deadlock is "the functional equivalent of" "agency action." Dkt. 19 at 28–31 (DCCC PI Reply 20–23). But that argument simply cannot be squared with *Sprint Nextel* and *Public Citizen*. After all, there was no dispute that an actual grant (or denial) of forbearance in *Sprint Nextel* would have been reviewable, as would have been an actual approval (or rejection) of the electricity rates in *Public Citizen*. That the deadlocks "had the [same] effect" as a majority vote still did not create "Commission action." *Sprint Nextel*, 508 F.3d at 1131–32.

Rather, the D.C. Circuit has explained, "[t]he lack of collective action attributable to the entire Commission distinguishes" agency deadlocks from an agency action that actually "***issued an order***." *Public Citizen*, 839 F.3d at 1172 n.5 (emphasis in original). Under binding precedent, a majority vote creates agency action; a deadlock vote does not, regardless of the end result.

B. The FEC's Non-Decision Is Not Final.

Even if the FEC deadlock were agency action, it is not ***final*** agency action under either prong of *Bennett*.

First, the FEC's deadlock was not "the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178. *Public Citizen* is squarely on point. There, the D.C. Circuit cited the dictionary definition of "consummate" to hold that an agency "deadlock" necessarily lacks "the requisite finality" because it "does not reflect an agency decision that fully resolved the issue or completed the process." 839 F.3d at 1171 (citing *Consummate*, Black's Law Dictionary (10th ed. 2014)). The same is true here. Because of the deadlock, the "Commission was unable to render an opinion." Dkt. 1-3 at 2. Thus, the FEC deadlock, just like the deadlock in *Public Citizen*, is not the consummation of the agency's decisionmaking.

The DCCC previously resisted the straightforward application of *Public Citizen* by arguing "the matter is concluded." Dkt. 19 at 27 (DCCC PI Reply 19) (quotations omitted). But that was true in *Public Citizen* too, and the D.C. Circuit held that an agency "mired in indecision and impasse" had not produced any reviewable action by merely concluding its process. *Public Citizen*, 839 F.3d at 1171–72. For that reason, the FEC's deadlock, even if it is the agency's last act, "lacks the requisite finality" to be reviewable. *Id.* (citing *Consummate*, Black's Law Dictionary (10th ed. 2014)).

Second, the FEC's deadlock carries no "legal consequences." *Bennett*, 520 U.S. at 178. Indeed, this Court has already found that the FEC's non-decision "***has no operative legal effect***."

Dkt. 21 at 17 (emphasis added); *see also id.* (describing "FEC's October 10 letter" as "lacking legal effect"). That is because the deadlock did not opine "on the lawfulness" of the DSCC's proposed advertisements or "provide any party with any legal rights, defenses or obligations." *Id.* at 15. Instead, the DCCC—and other regulated parties—"are in precisely the same position today that they were in before the Commission" deadlock. *Id.* at 20.

This Court's findings accord with binding circuit precedent. In *Racing Enthusiasts & Suppliers Coalition v. EPA*, 45 F.4th 353 (D.C. Cir. 2022), the D.C. Circuit held that the preamble to an agency rule lacked legal consequence because it "***declined*** to adopt a rule that ***would*** have had independent legal force." *Id.* at 359–60 (quotations omitted) (emphasis in original); *accord California By & Through Brown v. EPA*, 940 F.3d 1342, 1353 (D.C. Cir. 2019) (holding that withdrawing a determination that "was itself final action" did not "impose[ ] any legal consequences"). So too here because the FEC's non-decision, like the preamble, merely declined to adopt an advisory opinion that may have had independent legal force. The result is a non-decision that carries all the hallmarks of non-finality. The deadlock "left the world just as it found it," *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004), it did not "compel[ ] action by" the DCCC or "the agency," *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012), and it left regulated parties "free to ignore it," *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

IV. THE DCCC'S APA SUIT IS BARRED BECAUSE IT HAS ANOTHER "ADEQUATE REMEDY IN A COURT" UNDER FECA.

The DCCC also independently lacks an APA cause of action because FECA offers it an "other adequate remedy in a court." 5 U.S.C. § 704. In assessing whether another statutory remedy displaces the APA's cause of action, the D.C. Circuit asks whether there is a "gap between the relief [the other statute] affords and the relief [the plaintiff] seeks under the APA"—though the

remedies need not be "identical." *CREW v. DOJ*, 846 F.3d 1235, 1245–46 (D.C. Cir. 2017). Courts also assess other indicia of "legislative intent" that the "alternative remedy" "bar[s] APA review." *Id.* at 1244–45. Applied here, FECA's private enforcement scheme, *see* 52 U.S.C. § 30109(a), offers an "adequate remedy in a court" that precludes APA review.

First, there is "no yawning gap between the relief [FECA] affords and the relief [the DCCC] seeks under the APA." *CREW*, 846 F.3d at 1246. Here, the DCCC alleges that Republican groups are using "JFC-advertising schemes" to "violate FECA," Dkt. 28 at 16 (Am. Compl. ¶ 48), that those "Republican advertisements … spurred this controversy," *id.* at 16 (¶ 49), and that the FEC has "acquiesced to the Republicans' … illegal campaign spending," *id.* at 30 (¶ 96).[6] Under FECA, the DCCC may make this ***exact argument*** by "fil[ing] a complaint with the Commission" alleging "a violation of [FECA] has occurred." 52 U.S.C. § 30109(a). Then, if the FEC, in the DCCC's view, does "not fulfill its duty to administer" FECA, Dkt. 28 at 30 (Am. Compl. ¶ 97), by dismissing the complaint, the DCCC may seek review of that decision in this Court, 52 U.S.C. § 30109(a)(8). This Court could then offer the DCCC the ***exact remedy*** it seeks: "clarifying that JFC-advertising is unlawful" and "preventing DCCC's competitors … from using JFC-advertising." Dkt. 28 at 27 (Am. Compl. ¶ 84). Specifically, the Court could "declare" joint-fundraising advertising unlawful and "direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(8)(C). If the FEC fails to comply, the DCCC itself could then "bring … a civil action to remedy the violation." *Id.* Here, because "Congress cho[se] to grant those allegedly aggrieved by agency failure to remedy the wrongs of a regulated third parties a

[6] *See also* Dkt. 28 at 1–2 (Am. Compl. ¶ 1) (alleging Republican groups are "exceed[ing] the limits set forth in" FECA), 14 (¶ 43) (alleging Republican groups "are flouting" FECA).

private cause of action" to address those wrongs, there exists "an alternative adequate remedy" that precludes APA review. *Garcia v. Vilsack*, 563 F.3d 519, 525 (D.C. Cir. 2009).

Second, other indicia of "legislative intent" confirm that FECA's enforcement procedure "bar[s] APA review" in cases like this one. *CREW*, 846 F.3d at 1244. Under FECA's enforcement procedure, those accused of violating FECA are afforded notice and an opportunity to respond to the allegation. *See* 52 U.S.C. § 30109(a)(1)–(4). But if parties were allowed to proceed under the APA to adjudicate alleged campaign-finance violations, those accused of violating FECA would ***not*** be afforded the notice and opportunity to respond guaranteed by Congress. This outcome would upset Congress's "carefully balanced scheme" and thus further "signif[ies] Congressional intent" to preclude "duplicative APA review." *CREW*, 846 F.3d at 1245–46 (alterations accepted) (quotations omitted). Confirming the point, FECA's enforcement scheme creates "both agency obligations and a mechanism for judicial enforcement in the same legislation," indicating that FECA "itself strikes the balance itself strikes the balance between statutory duties and judicial enforcement that Congress desired." *Id.* at 1245. And FECA's remedy is neither "uncertain" or "doubtful." *Id.* A "plaintiff in [the DCCC's] position," *id.*, may obtain relief where the FEC relies on an interpretation that is allegedly "contrary to law," *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1190 (D.C. Cir. 2024).

Finally, it is no answer to claim that FECA's enforcement procedure is inadequate because it does not offer the DCCC a "safe harbor."[7] *Contra* Dkt. 19 at 35 (DCCC PI Reply 27). For one, neither does "the APA," which is the focal point to assess adequacy. *CREW*, 846 F.3d at 1245. Further, the adequacy of an alternative remedy turns on its sufficiency as to the "relief" the plaintiff

[7] It is also no answer to claim that the enforcement process does not offer "time-sensitive relief," Dkt. 19 at 38 (DCCC PI Reply 28), given that the DCCC now seeks relief for "the 2026 election cycle and beyond," Dkt. 28 at 2 (Am. Compl. ¶ 2).

"seeks." *Id.* at 1241. And as already explained, the Amended Complaint ***nowhere*** seeks an order compelling an "advisory opinion rendered by the Commission," as would be required for FECA's statutory safe harbor. 52 U.S.C. § 30108(c)(1). And it is understandable why the DCCC has not sought that relief: its theory is that joint-fundraising advertisements are "contributions" under FECA and thus that ***no party***—including itself—is entitled to a safe harbor. The DCCC can hardly evade the adequate-remedy bar through the prospect of a remedy that it does not seek—and is, in fact, on a "crusade against." *See McCutcheon*, 496 F. Supp. 3d at 332; *see also id.* at 331–32 (holding plaintiff not "entitled to … safe harbor protection" where plaintiff "focuse[d] on developing counterarguments against the legality of the Proposed Transactions").[8]

V. THE DCCC'S CLAIM FAILS BECAUSE THE FEC WAS LEGALLY COMPELLED TO WITHHOLD THE ADVISORY OPINION.

Even if the DCCC had standing, even if its case were not moot, and even if it had a cause of action, its Amended Complaint still must be dismissed. That is because FECA expressly compelled the "FEC's failure to issue an advisory opinion," and thus the only "final agency action" alleged to have occurred in this suit, Dkt. 28 at 30 (Am. Compl. ¶ 97), was entirely lawful.

FECA's text is dispositive. The statute imposes two commands on the agency. First, "the Commission shall render a written advisory opinion" when requested by a regulated party. 52 U.S.C. § 30108(a)(2). Second, "the affirmative vote of 4 members of the Commission shall be required in order for the Commission" to issue advisory opinions. *Id.* § 30106(c); *see id.*

[8] The DCCC cannot escape these reviewability hurdles by tacking on a Declaratory Judgment Act claim. *See* Dkt. 28 at 6 (Am. Compl. ¶ 13). That is because the "Declaratory Judgment Act" does not "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). Thus, the DCCC can "seek declaratory relief" only if it independently "allege[s] a cognizable cause of action." *Id.*; *see also Jones v. U.S. Secret Serv.*, 701 F. Supp. 3d 4, 14 n.1, 16–17 (D.D.C. 2023) (Chutkan, J.) (rejecting Declaratory Judgment Act claim after finding no final agency action under the APA).

§ 30107(a)(7). This Court must "give effect, if possible, to every clause and word of the statute," while also considering the "context" of the statute. *Fischer v. United States*, 603 U.S. 480, 486 (2024) (cleaned). As Judge Bates explained in a similar case, "[t]he provisions at issue indicate Congress's dual intent that the FEC respond expeditiously to requests for advisory opinions, and that it only issue advisory opinions where a bipartisan majority of its members agree on the merits of a request." *McCutcheon*, 496 F. Supp. 3d at 333. Any contrary interpretation requiring the FEC to "issue an advisory opinion with fewer than four affirmative votes" would "contravene [the agency's] statutory requirements" and "produce an absurd result which Congress could not have intended." *Id.* (cleaned).

The FEC plainly complied with FECA here. After the DSCC requested an advisory opinion, the FEC promptly opened a docket and took public comment on the request. Dkt. 1-2 at 3–44, 71–84, 99–140. With the comment deadline still open, the Commission published two draft advisory opinions. *See id.* at 45–70, 85–98. The Commissioners then voted on each draft advisory opinion, deadlocking on both. *See id.* at 141. The agency then informed the DSCC that it was "unable to render an opinion" because it could not garner the "affirmative vote of four members of the Commission." Dkt. 1-3 at 2. Thus, the FEC "respond[ed] expeditiously to [the] request[ ]" and correctly declined to "issue an advisory opinion with fewer than four affirmative votes." *McCutcheon*, 496 F. Supp. 3d at 333.

The DCCC is thus wrong to argue that the FEC's actions were unlawful. Dkt. 28 at 30–31 (Am. Compl. ¶ 97). As explained, the FEC could not have issued the opinion because it did not have the four votes required by Congress. *See FEC v. Cruz*, 596 U.S. 289, 301 (2022) (explaining agency "literally has no power to act … unless and until Congress authorizes it to do so by statute."). Thus, another court in this district has found that the Commission's failure to issue an

advisory opinion under similar circumstances "was compelled by law and could not have been arbitrary, capricious, or an abuse of discretion." *McCutcheon*, 496 F. Supp. 3d at 334. "If anything," the court explained, "the FEC would abuse its discretion by rendering an advisory opinion without the requisite four-vote approval." *Id.*

Thus, the DCCC fails to state a claim against the FEC.

VI. THE DCCC FORFEITED ITS MERITS ARGUMENT BEFORE THE AGENCY.

Finally, even if the Court were to excuse all of the previous procedural hurdles, a final one would bar review of the DCCC's merits theory: it is forfeited. "A party must first raise an issue with an agency before seeking judicial review." *Tesoro Refin. & Mktg. Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009). Failure to do so "will normally forfeit" the argument. *Advocs. for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1150 (D.C. Cir. 2005).

That is exactly what happened here. The D***C***CC's argument in this case is that the proposed D***S***CC advertisements are, in their entirety, "contributions" that are "subject to FECA's limits" because FECA's statutory language "prevails over" the purportedly "conflicting" joint-fundraising "regulation." Dkt. 28 at 31 (Am. Compl. Prayer for Relief ¶ A), 4 (¶ 8), 30 (¶ 97) (alleging "plainly incorrect … understanding of FECA"). But the D***S***CC made no such argument below. Rather, the D***S***CC argued that only certain "portion[s]" of the advertisements were "contributions" under both FECA and the FEC's implementing regulations. Dkt. 1-2 at 75–77. ***No party*** argued that the ads in their entirety were "contributions" or that the FEC's regulations violated FECA. And indeed, the draft advisory opinions prepared by the agency did not consider such an argument. *See* Dkt. 1-2 at 65–66 (concluding in Draft A that funds-received allocation of costs would avoid "contribution"), 94 (concluding in Draft B that a time-space allocation of costs would avoid "contribution"). Because "directly challeng[ing]" "the validity of the" advertisements and the joint-fundraising rules under the statute is different than challenging "the manner in which the

[FEC] was applying" its regulations, the DCCC's argument "is waived." *Styrene Info. & Rsch. Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 80 (D.D.C. 2013) (Walton, J.).

CONCLUSION

The Court should dismiss the Amended Complaint with prejudice.

Dated: February 7, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2025, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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