[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 22-5164, 22-5165

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

45COMMITTEE, INC.,
Movant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

APPELLANT'S RESPONSE IN OPPOSITION TO CAMPAIGN LEGAL CENTER'S MOTION FOR SUMMARY AFFIRMANCE AND DISMISSAL

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INTRODUCTION

Campaign Legal Center's summary-disposition motion is its latest attempt to shield an erroneous exercise of jurisdiction from further review. On April 21, 2022, the district court (Jackson, J.) authorized the Center to bring a citizen suit against 45Committee, Inc. on the premise that the Federal Election Commission (FEC) had unlawfully failed to act on the Center's administrative complaint. A week later, 45Committee moved to intervene to appeal that authorization. As it explained, records obtained from the FEC, which had never appeared in the case, revealed that the Commission *had* acted on the administrative complaint in June 2020, thereby rendering authorization of the citizen suit improper. While agreeing that the FEC's conduct was "troubling," the court denied the motion as untimely. Dkt. 37 (Op.) at 8 n.2.

While the Center asks this Court to summarily affirm the intervention denial and dismiss the authorization appeal, it has not come close to carrying its "heavy burden" of showing "the merits … are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). To the contrary, the intervention ruling both raises issues of "first impression … not appropriate for summary disposition," *Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 914 (D.C. Cir. 1996), and rests on a cascade of legal errors.

BACKGROUND

1. The FEC is a bipartisan agency run by six Commissioners—no more than three of whom may be affiliated with the same political party—with "exclusive jurisdiction" over civil enforcement of the Federal Election Campaign Act of 1971 (the Act). 52 U.S.C. § 30106(b)(1). When a private party lodges an administrative complaint alleging a statutory violation, the FEC must vote on whether there is "reason to believe" the respondent has contravened the Act. *Id.* § 30109(a)(2). "If at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint is dismissed." *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022).

That remains true for "'deadlock dismissals'"—those "dismissals resulting from the failure to get four votes to proceed with an enforcement action" because the FEC splits in its vote (typically on a 3-3 basis) on whether "there is 'reason to believe' a violation has occurred." *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 891-92 (D.C. Cir. 2021) (*CREW*). Because "FEC cannot investigate complaints absent majority vote" under the Act, the "statute compels FEC to dismiss complaints in deadlock situations." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016).

When a deadlock dismissal occurs, the FEC must disclose that fact and the underlying basis for the dismissal. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a). Specifically, "the commissioners who voted against enforcement must state their reasons why," which are "then treated as if they were expressing the Commission's rationale for dismissal." *CREW*, 993 F.3d at 883 n.3 (cleaned up). If a deadlock dismissal is "based even in part on prosecutorial discretion," it is "not reviewable" in court. *Id.* at 882 (applying *Heckler v. Chaney*, 470 U.S. 821 (1985)).

If the FEC dismisses an administrative complaint—or fails to act on it within 120 days—the private party may sue the Commission in district court. 52 U.S.C. § 30109(a)(8)(A). If the court declares the FEC's dismissal or failure to act was "contrary to law," the Commission has 30 days "to conform with such declaration." *Id.* § 30109(a)(8)(C). If it fails to conform by that deadline, the private party may bring a citizen suit against the alleged violator. *Id.*

2. On August 23, 2018, the Center and an individual lodged an administrative complaint with the FEC alleging 45Committee had violated the Act. Dkt. 1-1. The Center then sued the FEC on March 24, 2020, claiming that it had unlawfully failed to act on the administrative complaint. Dkt. 1.

After the FEC failed to appear, the clerk entered default on May 28, 2020, Dkt. 10, and the Center moved for default judgment on June 1, 2020. Dkt. 11. As the FEC had generally "lacked the quorum that it needed to take any action, including to defend this case," from the complaint's filing until January 29, 2021, the court denied the motion without prejudice on March 11, 2021. Op. 4; *see* Dkt. 17. It gave the FEC until May 1, 2021 to appear, at which point the Center could renew its default-judgment motion. Dkt. 17 at 4.[1]

When the FEC failed to meet this deadline, the Center renewed its default-judgment motion on May 5, 2021. Dkt. 18. The court granted the motion on November 8, 2021, Dkt. 25, finding that "the FEC has not taken any action on the administrative complaint" and that this "failure to act is contrary to law," Dkt. 24 at 5, 18. It therefore directed the Commission to "act on the complaint within 30 days"—*i.e.*, December 8, 2021. Dkt. 25 at 1.

45Committee then submitted a Freedom of Information Act (FOIA) request to the FEC on November 19, seeking vote certifications and any statements of reasons related to the administrative complaint. Dkt. 31-1 at 2-3. On January 5, 2022, the FEC responded by producing a heavily-redacted

[1] The FEC "briefly" regained a quorum from June 5, 2020 until July 3, 2020. Op. 4; *see* Dkt. 13 at 1-2.

vote certification confirming it "took action[]" on the complaint by voting on it on June 23, 2020. Dkt. 31-1 at 7. Two days later, 45Committee filed an administrative FOIA appeal to obtain the withheld evidence. *Id.* at 10-13.

The same day, January 7, 45Committee moved to file an *amicus* brief with the district court suggesting the Center's challenge had become moot because the court could no longer issue any relief in light of the FEC's June 2020 action. Dkt. 28 at 4-5. 45Committee also recommended the court at least hold the case in abeyance until it obtained the unredacted records. *Id.* at 3, 5.

While the court allowed an *amicus* brief, 1/24/22 Minute Order, it refused to dismiss the case. Instead, on April 21, it authorized the Center to bring a citizen suit. Dkt. 32. According to the court, the vote certification "provide[d] no evidence that the FEC ever 'took action' on the initial administrative complaint" because "[w]hen the FEC takes a vote on an administrative complaint, the results are publicly announced." *Id.* at 5. The Center filed its citizen suit the next day. No. 1:22-cv-1115 (D.D.C.) (Mehta, J.).

On April 28, 45Committee moved to intervene to appeal the citizen-suit authorization. Dkt. 33. The court denied the motion as untimely on May 13. Op. 12. On June 6, 45Committee appealed the authorization judgment and the intervention denial, Dkts. 39-40, and this Court consolidated the appeals.

ARGUMENT

Because all agree this Court can address the citizen-suit authorization if it reverses the intervention denial, summary disposition turns on whether the Center has carried its "heavy burden" of showing the intervention ruling was "so clear[ly]" correct "that no benefit will be gained from further briefing and argument." *Taxpayers Watchdog*, 819 F.2d at 298; *see* Center Mot. 16-17; *see also, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (*AT&T*) ("We reverse on the issue of intervention … and therefore proceed to consider the substantive merits"). The Center has not done so.

Rule 24(a)(2) mandates that courts "permit anyone to intervene who" (1) "[o]n timely motion" (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," (3) "unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The district court did not deny the latter two factors were satisfied, and the Center declines to address them in its motion. *See* Center Mot. 15 n.3. Thus, the only question here is whether the intervention motion was timely.

This Court reviews "the denial of a motion to intervene *de novo* for issues of law, for clear error as to findings of fact and for abuse of discretion on issues that 'involve a measure of judicial discretion.'" *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1322 (D.C. Cir. 2013). Thus, when a lower court is legally "mistaken" in deeming an intervention motion "untimely," it must be reversed. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1013 (2022); *see id.* at 1011-12 (even when "[r]esolution of" intervention issue "is committed to the discretion of the court," a court abuses its discretion "when it bases its ruling on an erroneous view of the law") (cleaned up). Here, the district court made multiple legal errors in applying this Court's timeliness factors: the "'time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.'" *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008).

I. THE DISTRICT COURT LEGALLY ERRED IN RULING THAT THE CENTER WILL SUFFER COGNIZABLE PREJUDICE.

To start, the lack of any cognizable prejudice to the Center compels reversal as a matter of law. "'The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties.'" *Roane v. Leonhart*, 741

F.3d 147, 151 (D.C. Cir. 2014). After all, Rule 24 does "not require timeliness for its own sake," but to "prevent[] potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id.* Because the "timeliness requirement is not intended as a punishment for the dilatory," a motion is timely if it does not "unfairly disadvantage the original parties," "even where a would-be intervener could have intervened sooner." *Id.* (cleaned up). No such prejudice exists here for two independent reasons.

A. The Delay Associated With An Appeal Is Not Unfair Prejudice.

1. The prejudice claimed by the Center and the district court here reduces to the assertion that an appeal of the citizen-suit authorization "'would delay resolution of the merits.'" Center Mot. 15; *see* Op. 10-11 (concluding the Center "deserve[d] some level of finality" and "cannot be expected to litigate cases indefinitely"). But the Supreme Court has made clear that a prevailing party is not "'unfairly prejudiced simply because an appeal'" is pursued by a post-judgment intervenor rather than by the original losing party—even though the appeal delays the case's ultimate disposition. *Cameron*, 142 S. Ct. at 1013. This Court has likewise held that when a movant "seeks to intervene only to participate at the appellate stage and in any further trial proceedings, its intervention will not prejudice any existing party," *Dimond v. District of*

Columbia, 792 F.2d 179, 193 (D.C. Cir. 1986), and that when intervention is sought for the "purpose of appeal," that "strongly mitigates" a movant's decision to "permit[] significant time to elapse," *AT&T*, 642 F.2d at 1295.[2]

Thus, while the Center "hoped" that the FEC would not appeal and that no one else would take up the baton, it "had no legally cognizable expectation" of either occurring. *Cameron*, 142 S. Ct. at 1014. An "unrealized gain of that kind does not count as a legally cognizable harm," as 45Committee "sought to pursue only" what the FEC "would have done had" it "defend[ed]" itself, and hence it "did nothing to delay the suit's normal progress." *Id.* at 1019 (Kagan, J., concurring in the judgment). In concluding otherwise, the district court committed the precise error the Supreme Court and this Court condemned.

2. In the face of all this, the district court suggested this prejudice rule applies only when "the defendant made a strategic decision not to appeal that could not have been predicted in advance." Op. 11; *see* Center Mot. 13-14 (advancing similar theory). That predictability theory is meritless.

a. As a conceptual matter, the *predictability* of the FEC's "decision not to appeal" has nothing to do with *prejudice* here. Op. 11. Had the FEC

[2] Because "'the purpose for which intervention is sought'" here bears heavily on "'the probability of prejudice to those already parties,'" *Karsner*, 532 F.3d at 886, 45Committee discusses these considerations in tandem.

suddenly appeared after the citizen suit was authorized to pursue a timely appeal, no one could reasonably think the Center had suffered unfair prejudice—even if that development caught it off guard. In our legal system, no party has the right to "assume[] that, if it won in the district court, there would be no appeal." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009). That 45Committee showed up to pursue an appeal instead should make no difference insofar as prejudice is concerned.

Put differently, that 45Committee moved to intervene "now, rather than earlier in the proceedings," cannot prejudice the Center, "since the practical result of its intervention"—an appeal—"would have occurred whenever" it "joined" the case. *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). Had 45Committee intervened "at the outset," Center Mot. 2, and done nothing until the citizen suit was authorized, the Center would be in the same position as it is now. The Center thus will "suffer no prejudice" from a purported "failure to seek intervention at an earlier time," as "[t]he inconveniences cited … are those commonly associated with defending a ruling or judgment on appeal, and would have arisen regardless of whether" 45Committee "sought to intervene before … judgment." *Ross v. Marshall*, 426 F.3d 745, 756 (5th Cir. 2005).

The lack of prejudice is particularly glaring here because it is not as if intervention would deprive the Center of a hard-won victory. Due to the FEC's refusal to appear, none of the merits issues were actually litigated. *See Arizona v. California*, 530 U.S. 392, 414 (2000) ("'In the case of a judgment entered by … default, none of the issues is actually litigated.'"). Thus, the fact that the FEC "has been completely consistent in failing to defend this action" from its inception only means that any purported prejudice here is *less* than in cases where "the defendant's approach to the litigation changed." Op. 11.

b. Binding precedent likewise confirms that the predictability theory is dead on arrival. In *Cameron*, for instance, the Supreme Court thought it irrelevant that the plaintiffs may have had a "'reasonable expectation'" that a newly-elected governor and his appointee "would give up the defense" of an abortion law in light of the governor's "'history of refusing to defend abortion restrictions.'" 142 S. Ct. at 1013-14. Even if that expectation was completely "'reasonable,'" the Court observed, it not "legally cognizable." *Id.*

This Court has taken the same approach. In *AT&T*, the government's decision "not to appeal" a discovery order was readily foreseeable, as it "naturally had an interest in expeditious trial of its civil antitrust suit" and "did not share the strong interest" the prospective intervenor "had to appeal for

protection of its work product privilege." 642 F.2d at 1293. Yet that did not stop this Court from allowing the would-be intervenor to pursue an appeal, even though it had "permitted significant time to elapse between the inception of the discovery controversy and its filing for intervention." *Id.* at 1295.

Likewise, in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), this Court held the plaintiffs suffered "no prejudice arising from" post-judgment intervention seeking "appellate review," even when the defendant had "failed to appear" and the plaintiffs had "obtained a nearly-billion dollar default judgment." *Id.* at 45, 50, 58 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *see id.* at 60 (Roberts, J., concurring in part and concurring in the judgment) ("I agree … that the district court erred in denying the … motion to intervene."). While the Center claims *Acree* held intervention to pursue an appeal is "permitted only 'where the prospective intervenor's interest did not arise until the appellate stage,'" Center Mot. 13, that is an outright misrepresentation. Shorn of the Center's selective editing, *Acree* actually stated: "Post-judgment intervention is often permitted, therefore, where the prospective intervenor's interest did not arise until the appellate stage *or where intervention would not unduly prejudice the*

existing parties." 370 F.3d at 50 (emphasis added). Given the absence of undue prejudice here, the Center understandably omits that key language.[3]

B. The District Court's Independent Obligation To Consider Its Own Jurisdiction Eliminates Any Possibility Of Prejudice Here.

1. In any event, the district court's ongoing obligation to assess its subject-matter jurisdiction independently confirms there is no cognizable prejudice here. Regardless of whether 45Committee intervened, the court had to consider the FEC's revelations because they bore on its subject-matter jurisdiction. Had the court concluded before judgment that the FEC had in fact "act[ed]" on the administrative complaint, it would have been unable to issue any relief and hence would have had to dismiss the case as moot. 52 U.S.C. § 30109(a)(8)(A). And because "[t]he objection that a federal court lacks subject-matter jurisdiction … may be raised" *sua sponte* even "after … entry of judgment," the court could and should have "vacated its prior judgment"

[3] The Center is similarly misleading in claiming *Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001), and *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248 (D.C. Cir. 1999), held that post-judgment intervention is allowed "only" when the need for intervention arose after judgment. Center Mot. 9, 13; *see Smoke*, 252 F.3d at 471 ("In these circumstances a post-judgment motion to intervene in order to prosecute an appeal is timely … because 'the potential inadequacy of representation came into existence only at the appellate stage.'"); *Herman*, 166 F.3d at 1257 ("In those cases, however, the necessity of intervention did not arise until after judgment had been entered.").

upon learning that the FEC acted on the administrative complaint—even if intervention had never been sought. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 509 (2006). It is thus hard to see how 45Committee's intervention could prejudice the Center when the court was obligated to reassess the issue it raised anyway. Rather, "[t]he only result achieved by denial of the motion to intervene in this case is the effective insulation of the District Court's exercise of jurisdiction from all appellate review." *Acree*, 370 F.3d at 50.

Confirming the point, *Acree* reversed a denial of intervention where the movant raised a "challenge to the District Court's subject matter jurisdiction" after entry of a roughly billion-dollar default judgment. *Id.* As this Court explained, the plaintiffs could "assert no prejudice" given the district court's "independent obligation to assure itself of its own jurisdiction." *Id.* And that was so even though the district court had denied intervention on the theory that it "would cause undue delay and prejudice to the existing parties by prolonging litigation." 276 F. Supp. 2d 95, 102 (D.D.C. 2003).

2. While the district court dismissed *Acree* for two reasons, neither passes muster. *First*, the court asserted 45Committee's challenge went to "the *merits*" rather than "jurisdiction" because the court had "subject matter jurisdiction to hear a *claim* that the FEC has failed to act on an administrative

complaint" under § 30109(a)(8)(A). Op. 10. But the relevant question was not whether the court had jurisdiction to entertain the Center's claim when it filed its lawsuit in March 2020, but whether that "claim became moot" due to the FEC's June 2020 action, and therefore need to be "dismissed for lack of subject-matter jurisdiction." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78-79 (2013). And on that question, the court had nothing to say.

Second, the court brushed off the notion that the FEC had taken action on the administrative complaint as "far-fetched." Op. 10. As a threshold matter, that decision to wade into the merits constitutes another legal error warranting reversal. Because "the threshold question of intervention" is "in essence a question of standing" for 45Committee "to participate in the case," "a determination of the merits" "is not appropriate at this threshold stage." *AT&T*, 642 F.2d at 1291. In any event, the court's conclusion that the redacted vote certification "provide[d] no evidence that the FEC ever 'took action' on the initial administrative complaint" cannot be squared with the record below. Op. 10 (quoting Dkt. 32 at 5). In its answer to 45Committee's FOIA complaint—a document that was before the court when it denied intervention—the FEC admitted it "has taken previous votes on the administrative complaint against 45Committee as is evident despite the

redactions from the certification of actions taken on June 23, 2020." Dkt. 33-2 at 3. Indeed, the Center itself now concedes "the redacted vote certifications almost certainly reflect" that the FEC could not "muster the votes to enforce" the Act. Abeyance Opp. 18. The court's clearly erroneous factual finding to the contrary offers yet another reason to reverse.[4]

II. THE DISTRICT COURT MADE ADDITIONAL LEGAL ERRORS.

While the lack of cognizable prejudice here is reason alone to reverse, *see Roane*, 741 F.3d at 151-52, the district court committed additional reversible errors in considering other timeliness factors.

A. Intervention Is Needed To Preserve 45Committee's Rights.

To start, the district court concluded "it is hard to say that intervention is *needed* to protect" 45Committee's jurisdictional argument when it "chose not to try to intervene and raise the issue until now." Op. 10. But that analysis renders "'the need for intervention as a means of preserving the applicant's rights'" parasitic on the "'time elapsed since the inception of the suit,'" even

[4] Additional evidence from 45Committee's pending FOIA lawsuit only further confirms that the FEC acted on the administrative complaint. *See* 1:22-cv-502 Dkt. 18-2 (FEC's admission that the enforcement file contains a "Statement of Reasons," which is required following a deadlock dismissal); 1:22-cv-502 Dkt. 19-2 at 2 (statement by three Commissioners that the "vote certifications and statements of reasons" in 45Committee's matter "reflect final agency action").

though these considerations are distinct. *Karsner*, 532 F.3d at 886. That is presumably why this Court has concluded that "intervention is essential as a means of preserving" a movant's "rights" when the original defendant "has not taken an appeal," even when that movant "permitted significant time to elapse between the inception of the [relevant] controversy and its filing for intervention." *AT&T*, 642 F.2d at 1295. Tellingly, not even the Center tries to defend this aspect of the district court's reasoning.

B. The Supposed Pre-Judgment Opportunities To Intervene Are Not Dispositive.

The district court fared no better in its analysis of the "'time elapsed since the inception of the suit.'" Op. 2. On this issue, the court thought it fatal that 45Committee had supposedly passed up the "opportunity to seek to intervene before" judgment "as soon as it was clear that no party would represent its interests." Op. 3; *see* Op. 2-9. But this Court has allowed post-judgment intervention even when "two months had intervened between" an event warranting intervention "and the entry of final judgment"—"during which time" the would-be intervenor "could have filed its motion"—and even when it was obvious the movant's interests would not be represented by the original defendants. *Acree*, 370 F.3d at 50; *see supra* at 11-12 (discussing similar cases). In any event, the court's analysis fails on its own terms.

1. The court first suggested 45Committee should have moved for intervention after June 1, 2020, when the Center filed its default-judgment motion, because "[b]y that point, 45 Committee was plainly on notice that no one was defending the case." Op. 4; *see* Op. 3-4. And the Center goes so far as to claim that 45Committee should "have raised" its arguments "at the outset of the case." Center Mot. 1. But as the court admitted, the FEC generally "lacked the quorum that it needed to take any action, including to defend this case," until January 29, 2021—which is why the court denied the Center's default-judgment motion without prejudice in March 2021. Op. 4; *see supra* at 4. With the FEC's quorum restored in 2021, the court reasoned, it could now "vote[] to defend" against the lawsuit. Dkt. 17 at 3. The court never explained why *45Committee* should have concluded in June 2020 the FEC would never "defend[]" when the *court itself* thought (as late as March 2021) that the Commission previously had lacked the quorum necessary to do so. Op. 4.

2. The court therefore pivoted to insisting that 45Committee should have intervened when the FEC "did not meet" the May 1, 2021 "deadline" and the Center renewed its default-judgment motion. Op. 4. But at least until a default judgment was entered, there was always a chance the FEC would show up to defend itself—a decision it makes behind closed doors. *Cf.* FEC's

Response to Order to Show Cause, *Campaign Legal Ctr. v. FEC*, 1:20-cv-588 Dkt. 19 (July 20, 2020) (filing a response after clerk had entered default). In any event, neither the court nor the Center has ever identified *how* 45Committee could have defended the FEC's alleged failure to act before the FEC released proof on January 5, 2022 that it had acted on the administrative complaint on June 23, 2020. The FEC holds its votes on administrative complaints in closed-door executive sessions, and until January 5, 2022, all of its public acts and omissions indicated to the Center, the court, and 45Committee that it had "not taken any action on the administrative complaint." Dkt. 24 at 5. Thus, in light of the FEC's concealment, it is not as if intervention before January 2022 "would have enabled the district court to avert the alleged errors." *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999).

Moreover, had 45Committee tried to intervene without the evidence, the Center would have been the first to oppose the request as premature. Indeed, even when 45Committee brought the evidence to the court's attention by seeking to file an *amicus* brief, the Center opposed the motion as involving "baseless" "speculation." Dkt. 30 at 7. The timeliness requirement does not mandate an exercise in futility. *See Flying J*, 578 F.3d at 572 (deeming motion

timely because "[h]ad the association sought to intervene earlier, its motion would … have been denied").

3. Rather than dispute this, the district court took 45Committee to task for filing an "amicus brief" in January 2022 "instead" of an "intervention" motion. Op. 7. But 45Committee's decision to seek "amicus status" means "it cannot be said" that it "ignored the litigation or held back from participation to gain tactical advantage." *Day*, 505 F.3d at 966. And that decision made eminent sense under the circumstances. By January 2022, the court could have authorized the citizen suit at any time, meaning 45Committee needed to quickly get the new evidence before the court without having litigating the question of intervention. *See supra* at 4-5. And because this evidence went to subject-matter jurisdiction—meaning the court had to consider it, *see supra* at 13-16—45Committee followed the well-established practice of moving to file an "*amicus curiae* brief suggesting mootness." Dkt. 28 at 1 (capitalization omitted); *see, e.g.*, *Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997) (addressing "suggest[ion]" of "*amicus*" that "this case may have become moot"); *cf. Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 90 (2014) (addressing potential "jurisdictional impediment" raised in an "*amicus* brief").

4. That leaves the Center's assertion that 45Committee should be punished for "fail[ing] to file its FOIA request until the district court granted default judgment." Center Mot. 11. But not even the district court went that far. And for good reason: The Center offers no justification for the rule that a regulated party must promptly secure evidence of an agency's scheme to conceal evidence or risk losing its right to intervene forever—especially when the agency's "duty to disclose" that evidence was "independent of FOIA." *NRDC v. Johnson*, 488 F.3d 1002, 1003 (D.C. Cir. 2007); *see supra* at 3. As the district court put it, because the FEC is legally mandated to "publicly announce[]" the results of "a vote on an administrative complaint," it should "not take a FOIA request to learn what transpired." Dkt. 32 at 5. 45Committee cannot be faulted for a lack of diligence because the FEC's concealment prevented 45Committee from acting any sooner than it did. *Cf. Gabelli v. SEC*, 568 U.S. 442, 449 (2013) (discussing the "'discovery rule,'" which tolls a limitations period "'where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded'").

Indeed, adopting the Center's theory "would induce" parties "to file protective motions to intervene"—and protective FOIA requests—"to guard against the possibility" that the FEC might be hiding evidence and willfully

throwing a case in order to trigger a citizen suit. *United Airlines v. McDonald*, 432 U.S. 385, 394 n.15 (1977). And that goes double for the suggestion that any party that could be "'regulate[d]'" by the Commission must promptly seek to intervene whenever the FEC is sued. Center Mot. 14.

Nor does the Center ever explain *why* 45Committee should have suspected a FOIA request was necessary before default judgment was entered. Faced with the FEC's concealment, 45Committee did what it could by promptly filing a FOIA request when it became apparent on November 8, 2021 that the Commission was content to let the case reach default judgment. And two days after the FEC finally responded, 45Committee brought the issue to the court's attention through a motion to file an *amicus* brief and urged the court to at least wait until the Commission produced the unredacted records. *See supra* at 4-5. Yet the court plowed ahead anyway.

* * *

At a minimum, nothing in the Center's motion remotely establishes that the arguments for intervention in this case are "so clear[ly]" insubstantial that this Court should summarily dispose of these appeals. *Taxpayers Watchdog*, 819 F.2d at 297; *see supra* at 1. As far as 45Committee is aware, this Court has never confronted the need for post-judgment intervention where an

agency has failed to defend itself while concealing dispositive evidence from the Judiciary—a situation even the district court deemed "troubling." Op. 8 n.2; *cf. Paisley v. CIA*, 724 F.2d 201, 202 n.1 (D.C. Cir. 1984) (indicating that post-judgment intervention may be warranted "to bring to the court's attention newly-discovered evidence that could not have been previously brought before the court"). Especially given the presumption that "a court should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right," *AT&T*, 642 F.2d at 1295, this Court should at least have the benefit of plenary briefing and argument before it issues a ruling condoning such tactics.

CONCLUSION

This Court should deny the Center's summary-disposition motion.

Dated: July 29, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 5133 words.

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 29th day of July 2022, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate