UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER,	)	
Plaintiff,	)	
v.	)	Civil Action No. 20-0809 (ABJ)
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

45Committee, Inc. ("45Committee"), which previously sought and received leave to file a brief in this case as an amicus curiae pursuant to Local Civil Rule 7(o)(2), *see* Mot. of 45Committee for Leave to File Amicus Br. [Dkt. # 28] ("Mot. to File Amicus Br."); Min. Order (Jan. 24, 2022) (granting the motion for leave to file an amicus brief); Amicus Br. of 45Committee [Dkt. # 31] ("Amicus Br."), has moved to intervene as a party now that the case is closed. *See* Expedited Mot. of 45Committee to Intervene for the Purpose of Appeal [Dkt. # 33]; *see also* Mem. of P. & A. in Supp. of the Expedited Mot. of 45Committee to Intervene for the Purpose of Appeal [Dkt. # 33-1] ("Mot. to Intervene"). Plaintiff opposes the motion, *see* Pl. Campaign Legal Center's Opp. to Mot. to Intervene [Dkt. # 34] ("Opp."), and defendant Federal Election Commission ("FEC"), which has failed to defend this action, has not responded to the motion or advised the Court of its position. The motion is now fully briefed. *See* Corrected Reply in Supp. of Mot. to Intervene [Dkt. # 36] ("Reply").

For the following reasons, the motion will be **DENIED**.

LEGAL STANDARD

A party seeking to intervene as of right under Federal Rule of Civil Procedure 24(a) must satisfy four requirements: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian,* 532 F.3d 876, 885 (D.C. Cir. 2008), quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). A movant that seeks to intervene as a defendant must also demonstrate that it has constitutional standing. *Crossroads Grassroots Policy Strategies v. FEC,* 788 F.3d 312, 316 (D.C. Cir. 2015).

A party seeking permissive intervention "may" be permitted to intervene if it is "given a conditional right to intervene by a federal statute" or has "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Proc. 24(b)(1). "As its name would suggest, permissive intervention is an inherently discretionary enterprise." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

ANALYSIS

The first requirement is that the motion to intervene "must" be timely. *Karsner*, 532 F.3d at 885. In order to determine whether a motion is timely, courts must consider "all the circumstances, especially weighing the factors of 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." *Id.* at 886.

"Courts are generally reluctant to permit intervention after a suit has proceeded to final judgment, particularly where the applicant had the opportunity to intervene prior to judgment." *Acree v. Rep. of Iraq,* 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds*

by Rep. of Iraq v. Beaty, 556 U.S. 848 (2009). But "a post-judgment motion to intervene is not untimely if the putative intervenor acts as soon as it is clear that the parties will not represent its interests." *Amarin Pharms. Ir. Ltd. v. Food & Drug Admin.*, 139 F. Supp. 3d 437, 444 (D.D.C. 2015), citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395–96 (1977).

Here, the movant had ample opportunity to seek to intervene before the case came to its conclusion, and one cannot find that 45Committee acted as soon as it was clear that no party would represent its interests.

The complaint in this case was filed on March 24, 2020, more than two years ago, and it was clear from the start that the movant, 45Committee, had a potential interest in the dispute. Compl. [Dkt. # 1] at 1–2, 15.[1] Plaintiff informed the Court that it had filed an administrative complaint with the FEC which alleged that 45Committee "violated the Federal Election Campaign Act ('FECA') by failing to register as a political committee and failing to file reports disclosing its contributors, expenditures, and debts." Compl. at 1. Plaintiff sought an order declaring that the FEC's failure to act on its administrative complaint was contrary to law under 52 U.S.C. § 30109(a)(8)(A). Compl. at 14. The FEC did not answer or otherwise respond to the complaint, which was the movant's first hint that defendant was not going to represent its interests.

On May 27, 2020, plaintiff filed an affidavit highlighting the fact that the FEC had not answered and asking the Clerk of Court to enter a default. Affidavit in Supp. of Default [Dkt. # 9]. The Clerk did so on May 28. Entry of Default [Dkt. # 10]. On June 1, 2020, plaintiff filed a motion for default judgment pursuant to Federal Rule of Civil Procedure 55(b), asking the Court

1 The facts underlying this lawsuit are described in the Court's previous Orders and Memorandum Opinion, including particularly its November 8, 2021 opinion. *See* Mem. Op. [Dkt. # 24] at 1–5.

to enter "an order declaring that the FEC's failure to act is contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C), and directing the FEC to conform within 30 days." Pl.'s Mot. for Default J. Against Def. FEC [Dkt. # 11] at 1–2. By that point, 45Committee was plainly on notice that no one was defending the case and that the case could have a direct impact on it.

As of September 1, 2019, the agency lacked the quorum that it needed to take any action, including to defend this case, *see* Pl.'s Notice Regarding the FEC's Quorum [Dkt. # 13] at 1, and the June 2020 motion for default judgment remained pending as the Court awaited further events. On August 11, 2020, plaintiff informed the Court that the agency had briefly gained its full complement of Commissioners, but that another had resigned, and once again there was no quorum. *See id.* The motion for default judgment was held in abeyance for some time, and on January 29, 2021, plaintiff filed a notice informing the Court that the FEC had recently "announced the full restoration of the agency's quorum with the swearing in of three new Commissioners." Pl.'s Second Notice Regarding the FEC's Quorum [Dkt. # 16] at 1.

Since the FEC had been without a quorum for much of the time the motion for default judgment was pending, the Court entered an order on March 11, 2021 denying plaintiff's motion "without prejudice to a renewed motion if defendant does not enter an appearance in this case by May 1, 2021." Order [Dkt. # 17] at 4. The agency did not meet the deadline, and on May 5, 2021, plaintiff renewed its motion for default judgment, requesting again that "the Court enter an order declaring that the FEC's failure to act is contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C), and directing the FEC to conform within 30 days." Pl.'s Renewed Mot. for Default J. Against Def. FEC [Dkt. # 18] ("Pl.'s Renewed Mot.") at 4. Once again, the movant had sufficient information to be well aware that the FEC was not going to defend its own, much less 45Committee's, interests.

The Court granted plaintiff's renewed motion on November 8, 2021. *See* Order [Dkt. # 25] ("Defendant's failure to act on plaintiff's administrative complaint is contrary to law and it is ORDERED that defendant act on the complaint within thirty days pursuant to 52 U.S.C. § 30109(a)(8)(C).").

When the agency did not act on the complaint in accordance with the November 2021 Order, plaintiff came back to the Court with another motion on December 9, 2021, "respectfully request[ing] that the Court issue an order declaring that the FEC has failed to conform to this Court's Default Judgment Order" and authorizing plaintiff to file a civil suit against "45Committee directly." Pl.'s Mot. for an Order Declaring that Def. has Failed to Conform to the Default J. Order [Dkt. # 26] at 2; *see also id.* at 5 ("An order finding that the FEC has failed to conform will enable CLC to move expeditiously – where the FEC has not – to remedy 45Committee's flagrant and continuing FECA violations.").

If the default judgment was not enough to get the movant to sit up and take notice, this unfurled a red flag in its direction. So what did it do?

On January 7, 2022, 45Committee moved to file an amicus brief addressing plaintiff's motion. Mot. to File Amicus Br. An attorney entered an appearance on 45Committee's behalf on the same date. Appearance of Counsel [Dkt. # 29]. The Court granted the motion over plaintiff's objection, Min. Order (Jan. 24, 2022), and the amicus brief was filed. *See* Amicus Br. 45Committee took no further action.

Three months later, on April 21, 2022, the Court entered an order granting plaintiff's motion. *See* Order [Dkt. # 32] ("Apr. 2022 Order") at 6 ("As the agency has not complied with the Court's November 8, 2021 Order within the time specified, it is hereby ORDERED that plaintiff may bring an action to enforce the FECA against the alleged violator pursuant to 52 U.S.C.

§ 30109(a)(8)(C).”). In its Order, the Court fully considered the arguments the would-be intervenor had advanced in its amicus brief, and it concluded that “the objections contained in the brief submitted by 45Committee are not convincing and do not justify further delay.” *Id.* at 3–6.

With the issuance of the order granting plaintiff’s motion for a declaration that the FEC had failed to conform to the Court’s order and authorizing plaintiff to sue 45Committee directly, the case was terminated. Civil Case Terminated (Apr. 21, 2022).

One week later, 45Committee filed the pending motion to intervene, stating for the first time that “45Committee now seeks to intervene for the purpose of appealing the Court’s subject matter jurisdiction to issue the April 21 Order authorizing CLC’s direct lawsuit against 45Committee.” Mot. to Intervene at 2.

Under all of those circumstances, the motion to join a terminated case that had been pending for two years without any sign that defendant would take steps to protect movant’s interests can hardly be found to be timely.

The Supreme Court recently discussed the first *Karsner* factor, the amount of time that has passed during which the movant could have sought intervention, in *Cameron v. EMW Women’s Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022). 45Committee cites *Cameron* for the proposition that the test to be applied is whether motions are filed “soon after the movant learned that the [defendant] would not appeal.” Mot. to Intervene at 9, quoting *Cameron*, 142 S. Ct. at 1012. But that is not what the Supreme Court said in *Cameron*; it explained that “the most important circumstance relating to timeliness is that the [movant] sought to intervene as soon as it became clear that the [movant’s] interests *would no longer be protected* by the parties in the case.” *Cameron*, 142 S. Ct. at 1012 (internal quotation marks omitted, emphasis added). “Timeliness is

an important consideration in deciding whether intervention should be allowed," and "[t]imeliness is to be determined from all the circumstances." *Id.*

Here, 45Committee did not act with alacrity once it became clear that its interests would not be protected by the agency. While it suggests in its reply brief that there has been "newly-discovered evidence," *see* Reply at 7, its own filings in this case establish that it has known the factual information it now claims justifies intervention for four months. *See* Mot. to File Amicus Br. at 1 ("Two days ago, on January 5, 2022, in response to a Freedom of Information Act ('FOIA') request, 45Committee for the first time obtained from the FEC a previously undisclosed official, stamped vote certification showing that the FEC long ago – on June 23, 2020 – 'took . . . actions' on the underlying administrative complaint at issue in this case, by holding votes on the complaint.") (emphasis omitted).

Further, the January 2022 amicus brief specifically pointed out that the agency was not defending the action, *see* Amicus Br. at 1 (noting the agency's lack of appearance), so the movant cannot contend that it was not well aware by that time that the agency would not represent its interests. And 45Committee has known full well for some time what plaintiff's proposed course of action would be. Yet the movant offers no explanation for its failure to seek intervention in January and its decision to file an amicus brief instead – and the difference was made clear by the Court at that time. *See* Min. Order (Jan. 24, 2022) ("The amicus is not a party to this case, so to the extent the brief goes beyond offering its position on whether the pending motion for an order [Dkt. # 26] should be granted or denied, and it seeks affirmative relief . . . it is improper.").

Although 45Committee correctly points out that other entities in its position have been granted intervention,[2] Mot. to Intervene at 5–6, those cases establish precisely why this particular

2 While the movant is aware of prior cases involving default, *see* Mot. to Intervene at 6, citing *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 1 (D.D.C. 2019) (permitting a third party to intervene to defend an election-related suit in which the FEC had defaulted), it also argues that its untimely motion should be granted because the FEC has taken "unprecedented and unlawful actions" in this case. Reply at 6. As troubling as the failure of a federal agency to appear might be, it is unfortunately far from unprecedented. In fact, as pointed out by another amicus in this case, the FEC has often failed to take action on administrative complaints or to defend itself in court over the past several years. *See* Institute for Free Speech Amicus Curiae Br. [Dkt. # 23] at 5–11 (characterizing the situation as a "scheme to overcome deadlocks and delegate the FEC's enforcement authority to private actors").

This state of affairs is no secret, and the D.C. Circuit has taken note of it as well:

> The Federal Election Campaign Act (FECA) requires that "[a]ll decisions of the" Federal Election Commission (FEC) "with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission." 52 U.S.C. § 30106(c). Because the FEC is comprised of three Democratic appointees and three Republican appointees, *see id.* § 30106(a)(1), FECA thus requires that all actions by the Commission occur on a bipartisan basis. The statute does not instruct how to handle a "deadlock vote," that is, a vote in which three members wish to proceed on a given enforcement action and three oppose such action. This situation, as one might expect, occurs with some frequency.

Citizens for Resp. & Ethics in Washington v. FEC, 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring). So while 45Committee may be appropriately chagrined, the agency's failure to defend this litigation was not "unprecedented," and it grew out of the FEC's unique structure and enacting legislation.

This leaves not only 45Committee but the plaintiff, Campaign Legal Center, and countless others in a dire situation. The Supreme Court has explained that the disclosure provisions added to the FECA in the Bipartisan Campaign Reform Act were intended to prevent independent groups from running advertisements "'while hiding behind dubious and misleading names,'" so that "citizens [could] 'make informed choices in the political marketplace.'" *Citizens United v. FEC*, 558 U.S. 310, 367 (2010), quoting *McConnell v. FEC,* 540 U.S. 93, 197 (2003), and emphasized that it is this transparency that is supposed to ensure the integrity of the electoral process. *See id.* at 371 ("transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages"). Yet the country has endured election cycle after election cycle with no one home at the FEC to oversee and enforce compliance with the FECA and the laws

request is untimely, as they involve motions to intervene at much earlier stages of litigation. *See, e.g.*, *Crossroads*, 788 F.3d at 320 (FEC defended the action but intervention was nonetheless justified; "[t]he Commission has never questioned timeliness, most likely because Crossroads filed an intervention motion before the FEC had even entered an appearance"); *Campaign Legal Ctr.*, 334 F.R.D. at 3–6 (FEC declined to defend a civil suit regarding its failure to prosecute an administrative complaint, and the entities who were respondents to the administrative complaint moved to intervene; "[t]he application [was] certainly timely, since Intervenors moved to intervene less than two months after the plaintiffs filed their complaint and before the defendant filed an answer or was required to do so") (internal quotation marks and brackets omitted). Movants who act before an answer was due or an appearance had even been entered by a defendant can hardly be compared to movants who wait for more than two years – until after default judgment has been granted *and* the order to conform has been issued – to attempt to intervene.

The second and third factors, the purpose of intervention and the need for intervention to protect the movant's interests, merge in this case. 45Committee asserts that this Court must consider that its intended purpose in seeking to intervene includes challenging the existence of subject matter jurisdiction. And it is true that the D.C. Circuit has emphasized that "a highly

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governing the financing of political campaigns. The stalemate is not a partisan problem – politicians on both sides have decried the flow of cash from vaguely identified organizations to their opponents. It is an American problem, and it is inconsistent with the foundational principles of democracy that were supposed to be left standing after *Citizens United*. *See* 558 U.S. at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

It is beyond the power of this Court or the scope of this case to address the ongoing paralysis at the agency, as it is inherent in FEC's structure, but the Court will add its voice to those suggesting that it may well be time for Congress to act. *See Citizens for Resp.*, 923 F.3d at 1143 (Griffith, J., concurring) ("[P]erhaps this is just a hole in the statutory scheme that only Congress can fill.").

tenable challenge to the District Court's subject matter jurisdiction" is a weighty interest, "given the District Court's independent obligation to assure itself of its own jurisdiction." *Acree*, 370 F.3d at 50.

The problem is that there is no question that the district court has subject matter jurisdiction to hear a *claim* that the FEC has failed to act on an administrative complaint. *See* 52 U.S.C. § 30109(a)(8)(A) ("Any party aggrieved by . . . a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia."). 45Committee's argument – that a June 2020 vote recorded in agency records before the Court ever entered its order constituted the statutorily required "action" on the complaint – goes to the *merits* of plaintiff's complaint. *See* Mot. to Intervene at 5 ("If granted party status, 45Committee intends to argue on appeal that the FEC's voting records show that the Commission has acted on CLC's administrative complaint in compliance with the Court's November 8 order.").

Furthermore, 45Committee's claimed jurisdictional argument is based on a theory that is better characterized as far-fetched than "highly tenable." *See* Apr. 2022 Order at 5 ("The documents 45Committee received in response to its request provide no evidence that the FEC ever 'took action' on the initial administrative complaint, much less that it voted to dismiss the complaint."). And it is hard to say that intervention is *needed* to protect this theory when 45Committee is the entity that chose not to try to intervene and raise the issue until now.

Finally, while any potential lack of subject matter jurisdiction warrants close attention, the belated challenge must be balanced against the fourth factor: prejudice to the parties (in this case, just the plaintiff). *See Karsner*, 532 F.3d at 886 (timeliness inquiry includes "the probability of prejudice to those already parties in the case"). Parties deserve some level of finality and cannot

be expected to litigate cases indefinitely, and this plaintiff would be seriously prejudiced by the belated intervention given how long this relatively simple case has been pending; the amount of time that has gone by while plaintiff's motions for default judgment were pending; and the length of time that has elapsed since the actions that led to the underlying administrative complaint. 45Committee's activities were centered around the 2016 election, but plaintiff has endured the failure to act on its administrative complaint, filed in 2018, until now. *See* Compl. ¶¶ 15–29. None of these delays have been due to plaintiff's lack of diligence or effort, and plaintiff has expressed its understandable frustration with the slow pace of these proceedings several times already. *See, e.g.*, Pl. Campaign Legal Center's Status Report [Dkt. # 27] at 2 ("Plaintiff respectfully requests that the Court grant its pending motion for the reasons stated therein, ECF No. 26, and in light of the FEC's continued failure to conform to the Default Judgment Order. If a status conference would be of assistance to the Court, counsel for Plaintiff could be available for such a conference notwithstanding the upcoming holidays."). In the time that 45Committee declined to move to intervene, plaintiff consistently pushed for resolution of this case.

This is not a case in which the defendant's approach to the litigation changed and interested parties were forced to address changed circumstances. *See Cameron*, 142 S. Ct. at 1012 ("The attorney general's need to seek intervention did not arise until the secretary ceased defending the state law, and the timeliness of his motion should be assessed in relation to that point in time."). Nor is this a situation in which the defendant made a strategic decision not to appeal that could not have been predicted in advance. *See McDonald*, 432 U.S. at 393–94 ("[T]here was no reason for the [movant] to suppose that [plaintiffs] would not later take an appeal until [movant] was advised to the contrary after the trial court had entered its final judgment."). The agency has been completely consistent in failing to defend this action every day for the last two years and two

months, and plaintiff has sought the same relief throughout the entire life of the case. Because 45Committee failed to file a timely motion, the motion for intervention as of right is **DENIED**. The motion to intervene permissively is **DENIED** for the same reason; Federal Rule of Civil Procedure 24(b) requires a "timely motion," just as Rule 24(a) does, and the Court finds in its discretion that the motion should be denied.

AMY BERMAN JACKSON
United States District Judge

DATE: May 13, 2022