IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *Plaintiff*, v. FEDERAL ELECTION COMMISSION, *Defendant*, 45COMMITTEE, INC., *Proposed Intervenor-Defendant*.	Case No. 1:20-cv-0809 (ABJ)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE EXPEDITED MOTION OF 45COMMITTEE, INC. TO INTERVENE FOR THE PURPOSE OF APPEAL

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INTRODUCTION

For over a year, Defendant Federal Election Commission ("FEC") has concealed from the Court, Plaintiff Campaign Legal Center ("CLC"), and proposed intervenor-defendant 45Committee that the Commission voted on CLC's administrative complaint against 45Committee in 2022—and apparently reached a deadlocked vote preventing the bipartisan, six-member FEC from taking enforcement action against 45Committee. This Court never had an opportunity to review the Commission's voting records in this case because some commissioners are willfully obstructing disclosure of the Commission's action on the administrative complaint by failing to authorize release of the file in the otherwise terminated proceeding. *See* Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. Times (June 8, 2021) ("Democrats are declining to formally close some cases after the Republicans vote against enforcement. That leaves investigations officially sealed in secrecy and legal limbo.").

In the face of this gamesmanship, 45Committee requested those voting records through the Freedom of Information Act ("FOIA"), but the FEC inexplicably withheld some of those records and heavily redacted others, even though FOIA itself requires agencies to "make available for public inspection a record of the final votes of each member in every agency proceeding" and "final opinions." 5 U.S.C. § 552(a)(5), (a)(2)(A); 11 C.F.R. § 4.4(a)(3) (requiring the FEC to make available for public inspection "[o]pinions of Commissioners rendered in enforcement cases"); *Aug v. Nat'l R.R. Passenger Corp.*, 425 F. Supp. 946, 950–51 (D.D.C. 1976) (rejecting claim that votes, and any explanations of those votes, are subject to FOIA Exemption 5).

In its April 21, 2022 order, Dkt. No. 32 ("April 21 Order"), the Court believed it would be speculating about what the unredacted voting records might show, but a FOIA lawsuit seeking the disclosure of those records is now pending before this Court. *45Committee, Inc. v. FEC*, No. 22-cv-00502 (D.D.C. Feb. 25, 2022). If the unredacted voting records show that the Commission has

already taken action on CLC's administrative complaint, as 45Committee believes, then this lawsuit was moot at the time the Court issued the April 21 Order—and CLC should not have been authorized to file a direct lawsuit against 45Committee, which is also now pending before this Court. Under the Federal Election Campaign Act ("FECA"), CLC's remedy is to sue the FEC (again), not 45Committee, to challenge the FEC's action on the administrative complaint.

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. The Supreme Court and the D.C. Circuit have expressly authorized intervention for the purpose of appeal when a party chooses not to appeal—particularly where, as here, the intervenor intends to challenge the district court's subject matter jurisdiction to issue the order on appeal. 45Committee asked the FEC whether it will appeal, but the FEC has not provided any assurance that the agency will appeal—and it almost certainly will not, given the ongoing gamesmanship at the agency.

Moreover, 45Committee is moving to intervene promptly—one week after the Court entered the April 21 Order, three days after CLC notified 45Committee that it had filed a direct lawsuit against 45Committee, one day after CLC served the summons and complaint, the same day that the FEC failed to provide assurance that it would appeal the April 21 Order, and well within the 60-day deadline to file a notice of appeal. CLC will not be prejudiced by 45Committee's intervention for the purpose of appeal because CLC has already received the relief it requested from this Court—authorization to file its direct lawsuit against 45Committee. The only reason to deny intervention would be to block the D.C. Circuit from reviewing the Court's subject matter jurisdiction to issue the April 21 Order—a maneuver that the D.C. Circuit has criticized. The

Court should allow the D.C. Circuit to assess this Court's subject matter jurisdiction to issue the April 21 Order with the benefit of the unredacted voting records that were unavailable to this Court.

BACKGROUND

This case arises from the Commission's alleged failure to act on an administrative complaint that CLC filed with the FEC in 2018. 45Committee, an independent, social welfare organization tax exempt under section 501(c)(4) of the Internal Revenue Code, is the respondent to that administrative complaint. The FEC designated the matter as Matter Under Review 7486 ("MUR 7486"). CLC filed this lawsuit against the FEC in March 2020 alleging that the FEC had failed to act on the administrative complaint in MUR 7486, Compl., Dkt. No. 1, and later asked the Court for authorization to file a lawsuit against 45Committee alleging violations of FECA.

On November 8, 2021, the Court issued an order granting Plaintiff's motion for a default judgment that required the Commission "to act on the administrative complaint" in MUR 7486 within 30 days of the order. Dkt. No. 25. Thirty days passed without any notification of action from the FEC, which has failed to enter an appearance in this case. CLC then filed a Motion for Order Declaring Defendant Has Failed to Conform with the Court's November 8 order, asserting that the FEC has not "provided any evidence that it has acted on the administrative complaint." Pl's Mot. For Order Declaring Failure to Conform to Default J., Dkt. No. 26, at 2.

Since then, multiple revelations have shown that the FEC apparently did take action on the underlying administrative complaint. Through FOIA, 45Committee requested from the FEC "[a]ny vote certifications reflecting votes taken by the [FEC] on … MUR 7486" and "[a]ny Statements of Reasons or other Commissioner opinions concerning … MUR 7486." 45Committee Amicus Br. 4, Dkt. No. 31; *see* Amicus Br. Ex. 1, Dkt. No. 31-1. On January 5, 2022, the FEC responded to that request by expressly acknowledging the existence of documents responsive to the request—indicating that votes have been held on CLC's administrative complaint and that

Statements of Reasons explaining such votes may be in the record. Amicus Br. 3–5. In particular, the FEC produced an amended vote certification that, although heavily redacted, reflects that the Commission met and considered the complaint and cast formal votes on June 23, 2020—and apparently voted to dismiss the complaint, as there has been no further enforcement. Amicus Br. Ex. 2. 45Committee filed an administrative appeal because the FEC had heavily redacted the voting records and withheld five other pages in full.

When the FEC denied the administrative appeal, 45Commitee filed a FOIA lawsuit against the FEC on February 25, 2022. Compl., *45Committee, Inc.*, No. 22-cv-00502 (D.D.C. Feb. 25, 2022), Dkt. No. 1. That case is related to this one. The FEC has inexplicably appeared to defend the FOIA case, even though it did not enter an appearance to defend this case. Notably, in its answer, the FEC "admit[ted] that the Commission 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 …." FEC Answer ¶ 2, *45Committee, Inc.*, No. 22-cv-00502 (D.D.C. Mar. 31, 2022), Dkt. No. 12 (attached as Exhibit 1). The Court ordered the FEC to justify its withholding of the voting records in a dispositive motion or, in the alternative, file a report setting forth the schedule for the completion of its production of documents to 45Committee by May 3, 2022. Minute Order, *45Committee, Inc.*, No. 22-cv-00502 (D.D.C. Apr. 5, 2022).

Nevertheless, on April 21, 2022, this Court granted Plaintiff's Motion, Dkt. No. 32 ("April 21 Order"), reasoning that the produced documents did not necessarily show that action was taken on the underlying administrative complaint. April 21 Order 4–6. The Court also authorized CLC to "bring an action to enforce the FECA against the alleged violator pursuant to 52 U.S.C. § 30109(a)(8)(C)." *Id*. at 6. The next day, Plaintiff filed suit against 45Committee directly. *See* Compl., *CLC v. 45Committee, Inc.*, No 22-cv-01115 (D.D.C. Apr. 22, 2022), Dkt. No. 1. On

April 25, 2022, counsel for CLC notified undersigned counsel of the new suit by email. *See* Exhibit 2, attached. CLC completed service of the summons and complaint on April 27, 2022. *See* Exhibit 3, attached.

45Committee now seeks to intervene for the purpose of appealing the Court's subject matter jurisdiction to issue the April 21 Order. 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, thereby rendering this case moot and precluding this Court's subject matter jurisdiction over this case and the direct lawsuit that CLC filed against 45Committee.

ARGUMENT

45Committee is entitled to intervene as a matter of right in this case for the purpose of appealing the Court's subject matter jurisdiction to issue the April 21 order. Although post-judgment intervention is rare, the Supreme Court and D.C. Circuit expressly allow post-judgment intervention for the purpose of appeal. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977); *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001). Indeed, the D.C. Circuit has held that post-judgment intervention for the purpose of appeal is appropriate where, as here, the proposed intervenor seeks to appeal the district court's subject matter jurisdiction to issue the order on appeal. *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

The D.C. Circuit and courts in this District have also allowed intervention in cases challenging the Commission's treatment of a plaintiff's administrative complaint against a proposed intervenor-defendant. In particular, this case is controlled by the D.C. Circuit's decision in *Crossroads Grassroots Policy Strategies v. FEC*, which reversed a district court decision

denying intervention of a proposed intervenor against whom an administrative complaint had been dismissed by the FEC. 788 F.3d 312, 316 (D.C. Cir. 2015). This case is also analogous to Judge Boasberg's decision in *CLC v. FEC*, 334 F.R.D. 1 (D.D.C. 2019), which permitted intervention where this case's Plaintiff similarly sought to take advantage of the FEC's default. As in *Crossroads* and *CLC*, the proposed intervenor in this case, 45Committee, meets all the criteria to intervene as of right because it has standing, its motion to intervene was timely filed after the Court issued the April 21 Order authorizing CLC's direct lawsuit against 45Committee, its interests are directly at stake and would be impaired by its inability to appeal the April 21 Order, and the FEC cannot adequately represent 45Committee's interests.

In the alternative, 45Committee also meets the criteria for permissive intervention. 45Committee respectfully requests that the Court exercise its discretion to allow 45Committee 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. CLC will not be prejudiced by 45Committee's intervention for the purpose of appeal because proceedings have already concluded in this Court, and CLC has already filed its direct lawsuit against 45Committee. Any slight prejudice to CLC from having to defend against 45Committee's appeal is insignificant compared to the likelihood that this Court authorized CLC to file a direct lawsuit against 45Committee without subject matter jurisdiction.

I. 45Committee is entitled to intervene as of right.

45Committee has the right to intervene to defend its interests on appeal because the Court's April 21 Order recently authorized (and CLC has now filed) a direct lawsuit against 45Committee alleging violations of FECA. Under Federal Rule of Civil Procedure 24(a), "[o]n timely motion, the court must permit anyone to intervene who … 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, unless existing parties adequately represent that interest." This means that a proposed intervenor 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). Further, a proposed intervenor-defendant must establish that it has Article III (though not prudential) standing. *Crossroads*, 788 F. 3d at 316, 319–20. Because 45Committee satisfies each of these requirements, there is "no problem with the intervenor[] replacing the FEC" for the purpose of appellate litigation. *CLC*, 334 F.R.D. at 7.

A. 45Committee has standing to appeal the Court's April 21 Order.

A party seeking to intervene as a defendant must satisfy the same standing inquiry as would a plaintiff in any other case: "injury in fact, causation, and redressability." *Crossroads*, 788 F.3d at 316. Addressing the proposed intervention of a defendant in a similar case challenging Commission action, the D.C. Circuit reasoned that the standing inquiry hinged on the presence of injury in fact: if the party against whom plaintiff filed an underlying administrative complaint could prove injury, then it could also establish causation and redressability. *Id.* And in that case the proposed intervenor proved injury because if the plaintiff there prevailed in its action against the Commission, the proposed intervenor would be in "the position of a respondent subject to enforcement proceedings." *Id.* at 317.

45Committee has a significant and direct interest in the FEC's purported failure to act on CLC's administrative complaint because the FEC's inaction shields 45Committee from administrative enforcement and liability under FECA. The same would be true if the FEC's

unredacted voting records show that the FEC has in fact acted on the complaint with a deadlocked vote because four Commissioners did not vote to take enforcement action against 45Committee. The D.C. Circuit has "generally found a sufficient injury in fact where"—as here—"a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Id.* at 317–18; *see id.* at 319 (Proposed defendant-intervenor had "a concrete stake in the favorable agency action currently in place."). Here, the threatened loss of that favorable action constitutes a concrete and imminent injury sufficient to establish standing. *Id.* at 319; *see CLC*, 334 F.R.D. at 4–5 (finding loss of beneficial decision that "would subject [intervenor] to the possibility of future liability" demonstrated injury in fact).

Crossroads is controlling here. Here, as in *Crossroads*, the Commission was not administratively prosecuting a proposed intervenor-defendant for alleged violations of FECA. In both cases, a lawsuit sought to force such a prosecution. Here, as in *Crossroads*, the Plaintiff seeks "potential direct regulation of" 45Committee under FECA. 788 F.3d at 318. Accordingly, just like the intervenor in *Crossroads*, 45Committee "has a significant and direct interest in the favorable action [lack of administrative prosecution for an alleged violation of FECA] shielding it from further litigation and liability." *Id.* The "'threatened loss' of that favorable action constitutes a 'concrete and imminent injury.'" *Id.*

45Committee's injury is even clearer here because CLC has already filed a direct lawsuit against 45Committee pursuant to this Court's April 21 Order. Being "exposed to civil liability via private lawsuit . . . would be a significant injury in fact." *Id.* Until the Court issued the April 21 Order, 45Committee "face[d] no exposure to" civil liability because the FEC had not acted on the administrative complaint (or the FEC had reached a deadlocked vote). *Id.* at 316. But the Court's April 21 Order allows CLC to "pursu[e] the same grievance against" 45Committee in a direct

lawsuit. *Id*. at 317. "[S]hould [CLC's] suit succeed" against 45Committee, *id*. at 316, 45Committee would have to register as a political committee with the FEC and disclose its contributors. If the D.C. Circuit reverses the Court's April 21 Order authorizing a direct lawsuit against 45Committee, however, that ruling would provide 45Committee "with a significant benefit" because it would "preclude[] exposure to civil liability." *Id*. at 317. Accordingly, because 45Committee faces concrete and significant injury from CLC's lawsuit and the Court's April 21 Order, it has standing to intervene here.

B. 45Committee's motion to intervene for the purpose of appeal is timely.

"[T]imeliness is to be determined from all the circumstances," and "the point to which [a] suit has progressed is . . . not solely dispositive." *Cameron*, 142 S. Ct. at 1012 (quoting *NAACP v. New York*, 413 U.S. 345, 365–66 (1973)). "Here, the most important circumstance relating to timeliness is that [45Committee] sought to intervene 'as soon as it became clear'" that the Commission would not appeal the Court's April 21 order authorizing CLC to file a direct lawsuit against 45Committee. *Id.* (quoting *McDonald*, 432 U.S. at 394). In *Cameron*, the Supreme Court recently permitted intervention where a non-party intervened two days after learning that a government official would not appeal an adverse decision, within a week after that adverse decision, and within the time limit for seeking appellate review. *Id.*

Cameron's "logic applies here": 45Committee's motion is timely "because it was filed soon after the movant learned that the [Commission] would not appeal." *Id.* 45Committee seeks to intervene the same day that the Commission failed to provide assurance that it would appeal, one week after this Court's April 21 Order, three days after CLC notified 45Committee of filing its direct lawsuit, one day after CLC served the summons and complaint on 45Committee, and well within the 60-day time limit for appeal under Federal Rule of Appellate Procedure 4(a)(1)(B),

which provides that, in cases involving agencies of the United States, a notice of appeal may be filed by any party "within 60 days after entry of the judgment or order appealed from" is entered."

"Although the litigation [has] proceeded for [just over a year], that factor is not dispositive." *Cameron*, 142 S. Ct. at 1012 (authorizing intervention even after litigation had proceeded "for years" before intervention was sought). 45Committee's "need to seek intervention did not arise" until the Court's April 21 Order authorizing CLC's direct lawsuit against 45Committee—which CLC promptly filed—and the Commission's failure to provide assurance that it would appeal. *Id.* 45Committee could not have intervened for the purpose of appeal until the Court issued a final appealable order—the April 21 order authorizing CLC to sue 45Committee. "[T]he timeliness of [this] motion should be assessed in relation to that point in time." *Id.*

Cameron reaffirms the approach following *McDonald* whereby "courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court." *Acree*, 370 F.3d at 50; *see Cameron*, 142 S. Ct. at 1012; *CLC*, 334 F.R.D. at 4 (finding intervention timely where it came one month after FEC publicized decision not to defend suit). That is precisely what 45Committee has done here. *See Amarin Pharms. Ireland Ltd. v. FDA*, 139 F. Supp. 3d 437, 444 (D.D.C. 2015).

The "purpose for which intervention is sought" also weighs heavily in favor of granting intervention here. *Acree*, 370 F.3d at 49. Subject matter jurisdiction is "the first and fundamental question" that a Court must decide in every case, *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884), and a district court has an "independent obligation to assure itself of its own jurisdiction," *Acree*, 370 F.3d at 50. In *Acree*, the D.C. Circuit reversed a district court's denial of "a motion to intervene for the purpose of contesting the District Court's subject matter

jurisdiction" as untimely, noting that "the District Court failed to weigh … the purposes for which the Government sought to intervene" because it was not "simply seeking to weigh in on the merits" but its "sole purpose in intervening was to raise a highly tenable challenge to the District Court's subject matter jurisdiction … and to preserve that issue for appellate review." *Id*. at 43, 50. Likewise here, 45Committee's purpose for intervening is to appeal the Court's April 21 order for lack of subject matter jurisdiction in light of FEC voting records showing that the Commission has acted on the administrative complaint. "The only result achieved by denial of the motion to intervene in this case" would be "the effective insulation of the District Court's exercise of jurisdiction from all appellate review." *Id.* at 50. It is hard to imagine a more important purpose for intervening than to ensure that a district court had subject matter jurisdiction to issue the underlying order, particularly in this case where the Court's April 21 Order authorized a direct lawsuit against 45Committee.

Consideration of the other factors courts consider to determine timeliness leads to the same conclusion: 45Committee's motion is timely. *See Forest Cnty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 10 (D.D.C. 2016) (considering "(a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights" (citing *Karsner*, 532 F.3d at 886)).

As explained by the Supreme Court, the time-since-inception factor is "not dispositive." *Cameron*, 142 S. Ct. at 1012. That is especially true here because the FEC never announced—and has unlawfully concealed—its decision not to defend this suit, which was made in a closed-door executive session. *See* 5 U.S.C. § 552(a)(5), (a)(2)(A) (requiring the FEC to "make available for public inspection a record of the final votes of each member in every agency proceeding" and

"final opinions"). It took a FOIA request for 45Committee to learn, in January 2022, that the FEC had taken agency action—resulting from a split vote—to not defend itself in this lawsuit. Amicus Br. 2–7. While the FEC never appeared in this case, it could have done so at any point, and there was no way for 45Committee to predict what the agency would do in light of its gamesmanship—especially after an Article III Court granted a motion for default judgment in November 2021 and *ordered* the FEC to take action on the administrative complaint. Dkt. No. 26 (ordering the FEC to "act on the [administrative] complaint within thirty days"). Indeed, 45Committee could not have predicted that a federal agency—whose officers "are accorded a good-faith presumption that they are following the law"—would choose to flout the Court's November 8 order and continue to conceal its voting records without any lawful basis. *Swope v. DOJ*, No. 12-cv-1439, 2012 WL 12874490, at *1 (D.D.C. Dec. 13, 2012); *see also Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770–71 (D.C. Cir. 2012) (citing cases addressing the long-settled "presumption of administrative regularity"); *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (noting that courts "have long presumed that officials of the Executive Branch will adhere to the law as declared by the court"); *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008) ("We must presume an agency acts in good faith[.]").

Since learning of the official agency action not to defend, 45Committee promptly informed the Court through its amicus brief that the Commission had in fact voted on the administrative complaint. Yet at any point prior to the entry of the Court's April 21 Order, the FEC could have entered an appearance and informed the Court of its action on the administrative complaint—and disclosed the outcome of that vote (likely a deadlocked 3-3 vote). For example, even after the Court issued the November 8 order granting Plaintiff's motion for a default judgment and ordering the FEC to act within 30 days, the FEC still could have disclosed its vote before the Court granted

CLC's motion for an order that the FEC had failed to conform to the November 8 order—and, indeed, one would reasonably expect the FEC to do so in the face of a court order. That disclosure would have complied with the Court's November 8 order and mooted this lawsuit. Once the Court entered the April 21 Order, 45Committee promptly asked the FEC if it would appeal—and without receiving any assurance of an appeal from the FEC, 45Committee moved to intervene later the same day. *See* Exhibit 4, attached.

No party would be "unfairly prejudiced" by 45Committee's intervention for the purpose of appealing the Court's order. *McDonald*, 432 U.S. at 394. Certainly the FEC would not be prejudiced by 45Committee vindicating its decision not to take enforcement action against 45Committee based on CLC's administrative complaint. As for CLC, it should not benefit from an order that this Court lacked jurisdiction to enter. If the FEC has acted on CLC's administrative complaint, then CLC's proper remedy is against the FEC, not 45Committee. In this case, 45Committee simply seeks to stand in the shoes of the FEC on appeal, which has inexplicably appeared to defend its interests in the related FOIA litigation, but not in this litigation. 45Committee does not seek to conduct discovery or otherwise delay the proceedings in this Court, which have already concluded.[2] And CLC has already received the benefit of the Court's April 21 Order because it has already filed its direct lawsuit against 45Committee. *CLC*, No 22-cv-01115 (D.D.C. Apr. 22, 2022). To the extent CLC complains about the additional costs of having to defend 45Committee's appeal, "the litigation expenses rationale already has been rejected in this Circuit." *Crossroads*, 788 F.3d at 317.

[2] If the D.C. Circuit remands this case, 45Committee reserves the right to participate as a party in any further proceedings in this Court.

Finally, the need for intervention to preserve 45Committee's rights is without question now that it is apparent that the Commission will not appeal the April 21 Order and CLC has already filed direct suit against 45Committee. *See CLC*, 334 F.R.D. at 4–5. Nothing more is required for 45Committee to timely assert its right to intervene here.

C. 45Committee has a legally protected interest in this case.

For the same reasons 45Committee has standing, it also has a legally protected interest in this litigation for purposes of intervention under Rule 24(a). The D.C. Circuit has consistently held that a finding of constitutional standing for a proposed intervenor-defendant alone establishes that the proposed intervenor has "an interest relating to the property or transaction which is the subject of the action." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)); *accord Crossroads*, 788 F.3d at 320; *Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003). CLC's direct lawsuit confirms that 45Committee has an interest in appealing the Court's April 21 Order authorizing CLC to file that lawsuit.

D. 45Committee's interests would be impeded if it is not allowed to intervene.

If 45Committee is not allowed to intervene, its ability to protect the concrete and substantial interests identified above would be seriously impeded. Under the impediment inquiry, courts ask "as a practical matter" what are the "practical consequences" of denying intervention that may impair the putative intervenor's interest. *See* Fed. R. Civ. P. 24(a)(2); *Forest Cnty. Potawatomi Cmty*, 317 F.R.D. at 10–11 (quoting *Fund for Animals, Inc.*, 322 F.3d at 735).

Now that CLC has obtained a declaration that the Commission's actions were contrary to law and authorization to file a separate action, that relief makes 45Committee's task of reestablishing the status quo—non-prosecution for alleged violations of the FECA—more difficult and burdensome to achieve. That fact alone satisfies this factor under Rule 24(a). *Fund for*

Animals, Inc., 322 F.3d at 735 ("there is no question that the task of reestablishing the status quo if the [plaintiff] succeeds in this case will be difficult and burdensome."); *see CLC*, 334 F.R.D. at 4–5.

Moreover, 45Committee's interests will be impaired if it is unable to appeal the Court's April 21 order authorizing CLC's direct lawsuit against 45Committee. If 45Committee is not allowed to intervene, the April 2021 Order will not be appealed. CLC's direct lawsuit against 45Committee will proceed after the Court issued an order without subject matter jurisdiction on the incorrect premise that the FEC never acted on the administrative complaint. 45Committee's interests would be seriously impaired if the Court issues an adverse judgment in CLC's direct lawsuit requiring 45Committee to register as a political committee. 45Committee will never have a better opportunity than now to protect the substantial benefits afforded by the status quo—the legal protection afforded by the Commission's failure to obtain four affirmative votes to take enforcement action against 45Committee, the resulting lack of lawful authorization for a separate civil action against 45Committee, and the functional equivalent of dismissal of the administrative complaint. Because the April 21 Order impedes 45Committee's ability to protect its interests, this Court should grant leave to intervene as a matter of right.

E. The FEC cannot adequately represent 45Committee's interests on appeal.

There is no question that the FEC cannot adequately represent 45Committee's interests on appeal. The D.C. Circuit characterized the requirement that no party to the action be an adequate representative of the movant's interests as "not onerous," and reasoned "a movant 'ordinarily should be allowed to intervene unless it is clear that the [original] party will provide adequate representation.'" *Crossroads*, 788 F.3d at 321; *see CLC*, 334 F.R.D. at 6 ("[T]here can be no question that a defaulting defendant will not adequately represent [intervenor's] interests.").

Accord Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (proposed intervenor "need only show that representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate."). Commission representation is inadequate for at least three reasons: (1) the FEC has been unlawfully concealing its voting records from the Plaintiff, the Court, and 45Committee in a ruse to prompt a court to enforce FECA against 45Committee; (2) the Commission is not likely to appeal the April 21 Order; and (3) the Commission is a regulatory agency in a position to regulate and sanction 45Committee—a dynamic that precludes a finding of adequate representation under Rule 24(a).

To begin, the FEC has been unlawfully concealing its votes on CLC's administrative complaint against 45Committee to frustrate 45Committee's ability to defend its interests. As a defendant in 45Committee's FOIA lawsuit, the FEC is now actively seeking to withhold its voting records without any lawful basis. If the FEC would reveal those voting records, they would likely show that the Commission deadlocked—*i.e.*, that four Commissioners did not vote to initiate an enforcement action against 45Committee. Such action on CLC's administrative complaint would mean that this lawsuit is moot. But some commissioners have chosen to conceal those records so that CLC can proceed directly against 45Committee so a court can enforce FECA even though a majority of Commissioners did not choose to enforce. Goldmacher, *Democrats' Improbable New F.E.C. Strategy*, *supra*. Under these circumstances, the FEC is not representing 45Committee's interests—it is actively opposed to 45Committee's interests.

Moreover, the FEC is unlikely to appeal the Court's April 21 Order unless the composition of the Commission changes and another vote is held. Because the FEC is currently the only party with standing to appeal the Court's April 21 Order, but is unlikely to do so, 45Committee is the only other interested party with standing to appeal. The FEC, of course, cannot adequately

represent 45Committee on appeal if the Commission continues not to appear or defend this lawsuit in any way. Allowing 45Committee to intervene for the purpose of appeal enables it to defend its own interests and ensures a full and adversarial presentation of the jurisdictional issues before the D.C. Circuit by parties with a real stake in this litigation. Indeed, Judge Boasberg permitted intervention in similar circumstances in a case involving the same Plaintiff and the Defendant. *CLC*, 334 F.R.D. at 6 (discussing the effect of the Commission's default in action commenced by Plaintiff against the Commission and granting intervention). This Court should allow intervention as well.

Finally, the Commission is ill-suited to represent 45Committee's interests because 45Committee remains subject to FEC regulation. The D.C. Circuit has expressed skepticism of "government entities serving as adequate advocates for private parties," and, in particular, of the Commission serving as an adequate advocate for entities such as 45Committee, which fall under the regulatory umbrella of the Commission. *Crossroads*, 788 F.3d at 321. That dynamic alone satisfies 45Committee's burden to show that the Commission will not adequately represent its interests at the appellate stage of this suit.

II. Alternatively, the Court should grant 45Committee discretionary intervention.

Under Rule 24(b), a district court has broad discretion to allow intervention if (1) the proposed intervenor's claim or defense "shares with the main action a common question of law or fact," and (2) intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). 45Committee easily meets these criteria.

45Committee's proposed defenses, set forth in the corresponding proposed answer, include questions of law and fact in common with the claims set forth in CLC's complaint. And for the reasons described above, 45Committee's intervention will not unduly delay or prejudice the

adjudication of the rights of the CLC or the FEC. *See CLC*, 334 F.R.D. at 6 (alternatively granting permissive intervention for similar reasons). In these circumstances, it would be an abuse of the Court's discretion to deny 45Committee the ability to defend its interests on appeal when the FEC almost certainly will not.

CONCLUSION

45Committee respectfully requests that the Court grant its motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, allow intervention under Rule 24(b), for the purpose of appealing the Court's subject matter jurisdiction to issue the April 21 Order.

Respectfully submitted, on April 28, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and distribution to all registered participants of the CM/ECF System. Attorneys for Plaintiff are registered users of the CM/ECF System of this Court. Defendant was served a paper copy of this filing via regular United States mail at its address:

Federal Election Commission
1050 First Street NE
Washington, DC 20463

/s/ *Brett A. Shumate*
Brett A. Shumate