

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

AMERICAN ACTION NETWORK
1747 Pennsylvania Ave., NW, 5th Floor
Washington, DC 20006

Proposed Intervenor-
Defendant.

Civil Action No. 1:22-cv-03281 (CRC)

**AMERICAN ACTION NETWORK'S
UNOPPOSED MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT**

American Action Network (“AAN”) respectfully files this unopposed motion pursuant to Fed. R. Civ. P. 24(a) and (b) for leave to intervene as a defendant and file the attached motion to dismiss the complaint.¹ A proposed order is attached.

INTRODUCTION AND BACKGROUND

AAN’s right to intervene follows directly from the Court having granted AAN leave to intervene in the prior cases involving the FEC’s dismissal of CREW’s administrative complaint against AAN. *See CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (“*CREW I*”), *appeal dismissed*, Nos. 16-5300, 16-5343, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017); *CREW v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) (“*CREW II*”), *appeal dismissed*, No. 18-5136, 2018 WL

¹ Pursuant to Local Civil Rule 7(m), AAN conferred with counsel for the above-captioned parties. The Federal Election Commission (“FEC” or “Commission”) consents to AAN’s intervention. Citizens for Responsibility and Ethics in Washington (“CREW”) does not oppose.

5115542 (D.C. Cir. Sept. 19, 2018). AAN's right also follows from this Court's dismissal of CREW's citizen suit against AAN. *See CREW v. AAN*, 590 F. Supp. 3d 164 (D.D.C. 2022) ("*AAN III*"), *appeal pending* No. 22-7038 (D.C. Cir.).

The Court is well acquainted with the history of this litigation. In 2012, CREW filed an administrative complaint with the FEC alleging that AAN should have registered as a political committee from mid-2009 to mid-2011 pursuant to the Federal Election Campaign Act ("FECA"). CREW sought an FEC "investigation into these allegations," a declaration that AAN "violated the FECA and applicable FEC regulations," and "sanctions appropriate to these violations." Original Admin. Compl. at 8, *In re Am. Action Network*, MUR No. 6589 (filed June 7, 2012), <https://www.fec.gov/files/legal/murs/6589/14044361739.pdf>.

In 2014, the FEC dismissed CREW's complaint in an "exercise of [the Commission's] prosecutorial discretion." *AAN III*, 590 F. Supp. 3d at 167. CREW challenged the dismissal as "contrary to law" and, on remand from this Court, "the Commission again dismissed CREW's complaint." *CREW II*, 299 F. Supp. 3d at 86. CREW again sought judicial review. This Court again concluded the agency had acted contrary to law and again remanded the complaint to the agency, ordering it to act within thirty days. *See id.*

The FEC did not "dismiss[] again." *CREW v. AAN*, 410 F. Supp. 3d 1, 25 (D.D.C. 2019) ("*AAN I*"). "[H]ad the complaint been dismissed again," CREW would have sued the FEC again, and "the saga would have continued." *Ibid.* Instead, "[t]he agency failed to act" and CREW "invoked FECA's citizen-suit provision to sue AAN directly." *Id.* at 7, 25; *see* 52 U.S.C. § 30109(a)(8)(C).

Meanwhile, the D.C. Circuit squarely "held that an FEC dismissal of an administrative complaint 'that rests even in part on prosecutorial discretion cannot be subject to judicial review.'"

AAN III, 590 F. Supp. 3d at 173; *see CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) (“*New Models*”), *en banc reh’g denied*, No. 19-5161, 2022 WL 17578942 (D.C. Cir. Dec. 12, 2022). Because the Commission’s initial dismissal of CREW’s allegations against AAN had invoked its prosecutorial discretion, the Court dismissed CREW’s citizen suit.

CREW appealed. Rather than pursue its appeal immediately, however, CREW obtained an abeyance while it sought to overturn the D.C. Circuit’s decision. Compl. ¶ 52. And ultimately, the D.C. Circuit denied rehearing, confirming *New Models* as the law of this Circuit. Although CREW’s appeal remains pending, CREW filed this parallel action again seeking this Court’s review of the allegations the FEC has declined to pursue.

AAN has a clear and legally protected interest in defending the FEC’s and this Court’s dismissal decisions. Specifically, an adverse decision here would be used by CREW to justify further administrative or judicial proceedings against AAN. As before, no other party to this litigation can adequately represent AAN’s interests. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015). AAN’s timely motion—filed prior to the deadline for responsive pleadings—should be granted.

STANDARD

Federal Rule of Civil Procedure 24(a) requires the Court to allow intervention by anyone with standing who “claims an interest relating to the . . . 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.” Fed. R. Civ. P. 24(a)(2).

Federal Rule of Civil Procedure 24(b) permits the Court to grant intervention on a timely motion where the proposed intervenor with standing “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B); *see Cook v. Boorstin*,

763 F.2d 1462, 1464 (D.C. Cir. 1985). In permitting intervention under Rule 24(b), the Court “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

In either case, “[t]he motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.” Fed. R. Civ. P. 24(c). For purposes of the “pleading” requirement, courts in this Circuit will accept a motion to dismiss. *Washington All. of Tech. Workers v. DHS*, 395 F. Supp. 3d 1, 21 n.4 (D.D.C. 2019); *see, e.g., Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 787 (D.C. Cir. 2022) (“At the start of the proceedings in District Court, the Intervenors filed a motion to dismiss.”); *MGM Glob. Resorts Dev., LLC v. U.S. Dep’t of Interior*, No. 19-cv-2377 (RC), 2020 WL 5545496, at *1 (D.D.C. Sept. 16, 2020) (“[T]he Court grants Movants’ motion to intervene and will allow the filing of the Movants’ proposed Motion to Dismiss.”).

ARGUMENT

The Court should grant intervention because AAN has standing and satisfies the elements of Federal Rule of Civil Procedure 24(a). Alternatively, the Court should permit AAN to intervene and defend the FEC’s dismissal of CREW’s allegations against AAN.

I. AAN HAS STANDING TO INTERVENE

An intervening defendant “must show injury in fact, causation, and redressability.” *Crossroads*, 788 F.3d at 316; *see Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732–33 (D.C. Cir. 2003). AAN has standing in this case for the same reasons it had standing in the prior litigation.

As before, CREW’s Complaint seeks to deprive AAN of the benefit of an FEC dismissal decision and to “return [AAN] to the position of a respondent subject to enforcement proceedings before a federal agency.” *Crossroads*, 788 F.3d at 317. Accordingly, AAN “has a significant and

direct interest in the favorable action shielding it from further litigation and liability.” *Id.* at 318. The D.C. Circuit has held that the “threatened loss” of a favorable FEC dismissal decision “constitutes a ‘concrete and imminent injury’” sufficient for standing. *Ibid.* (quoting *Fund for Animals*, 322 F.3d at 733). Because that “relief, . . . if granted, would injure [AAN][,]” *ibid.*, AAN has also shown causation and redressability.

II. THE COURT SHOULD GRANT INTERVENTION AS OF RIGHT

AAN has the right to intervene to defend the FEC’s dismissal decision because it satisfies the elements of Rule 24(a)(2). “In deciding whether a party may intervene as of right, [this Court] employ[s] a four-factor test requiring: 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor’s interest.” *Crossroads*, 788 F.3d at 320 (citing *Deutsche Bank Nat’l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013)).

First, this intervention is timely because it is filed the same day that the FEC’s responsive pleading is due. *See Fund for Animals*, 322 F.3d at 735 (intervention timely “two months after the plaintiffs filed their complaint”); *MGM Glob. Resorts Dev.*, 2020 WL 5545496, at *4 (intervention timely “two weeks after the Government Defendants filed their motion to dismiss”). AAN’s intervention, therefore, cannot delay this litigation or prejudice the parties.

Second, AAN has a direct and legally protected interest in this action. Because AAN has shown that it has an injury sufficient for “constitutional standing, it *a fortiori* has ‘an interest relating to the property or transaction which is the subject of the action.’” *Crossroads*, 788 F.3d at 320 (quoting *Fund For Animals*, 322 F.3d at 735).

Third, this action may impair or impede AAN’s legally protected interest. Specifically, an adverse judgment here “would impair [AAN’s] defense in a new [FEC] proceeding because a

judicial pronouncement that the FEC's dismissal was contrary to law would make the 'task of reestablishing the status quo . . . [more] difficult and burdensome.'" *Id.* (quoting *Fund for Animals*, 322 F.3d at 735). An adverse judgment would likewise deprive AAN of the benefit it obtained when this Court dismissed CREW's citizen suit pursuing the same allegations. *See AAN III*, 590 F. Supp. 3d at 175.

Fourth, D.C. Circuit precedent establishes that AAN's interests are not adequately represented by the FEC. As a general matter, the law of this Circuit holds that "governmental entities do not adequately represent the interests of aspiring intervenors." *Fund For Animals*, 322 F.3d at 736; *see Second Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977). And the FEC, in particular, may be "a doubtful friend" because the agency "could seek to regulate [AAN] directly and immediately" if "its dismissal order is revoked." *Crossroads*, 788 F.3d at 321. That is obviously a significant risk here given that a single Commissioner purports to "control" the agency and has unequivocally stated that she believes the FEC's decision to "dismiss[] the complaint in this matter was *absolutely* contrary to the law." Compl. Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, at 8 (Sept. 30, 2022)). Although the Commissioner is wrong, her statement underscores that the FEC cannot represent AAN here. Because AAN easily meets "the minimal burden of showing inadequacy of representation," AAN "should be allowed to intervene as of right." *Crossroads*, 788 F.3d at 321.

III. THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

AAN also qualifies for permissive intervention under Rule 24(b)(2). "That subsection states that a court 'may' grant a timely motion to intervene if 'an applicant's claim or defense and the main action have a question of law or fact in common.'" *Cook*, 763 F.2d at 1464; *see also, e.g., Peters v. District of Columbia*, 873 F. Supp. 2d 158, 211-12 (D.D.C. 2012). The district court

should grant discretionary intervention if intervention would not “unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

AAN easily satisfies the standard. As explained above, AAN’s motion is timely and cannot prejudice the existing parties because it is being filed on the same day that the Commission is filing its motion to dismiss. *Fund for Animals*, 322 F.3d at 735; *see also Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 (D.C. Cir. 2004) (finding no prejudice where proposed intervenors had “already participated extensively in the proceedings”).

Furthermore, AAN’s proposed motion to dismiss demonstrates that its defenses share common questions of law and fact with the main case. “Clearly, [AAN’s] defense here shares a common question of law with the main action: the legality of the FEC’s dismissal order.” *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 6 (D.D.C. 2019) (granting intervention where proposed motion to dismiss showed commonality); *see also, e.g., Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 9–10 (D.D.C. 2007); *Duke Energy Field Servs. Assets, LLC v. FERC*, 150 F. Supp. 2d 150, 153 (D.D.C. 2001). And the three prior cases CREW filed involving the FEC’s dismissal of its allegations against AAN likewise demonstrate commonality. The Court should grant AAN’s intervention as it did in CREW’s previous cases against the FEC.

CONCLUSION

Fort these reasons, AAN should be granted leave to intervene as a party defendant and to file the attached motion to dismiss.

Respectfully submitted,

By: s/ Stephen J. Obermeier
Stephen J. Obermeier (D.C. Bar No. 979667)
Caleb P. Burns (D.C. Bar No. 474923)
Jeremy J. Broggi (D.C. Bar No. 1191522)
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036

(202) 719-7000
sobermeier@wiley.law

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Counsel for American Action Network