IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Washington, D.C. 20005

CATHERINE HINCKLEY KELLEY
1101 14th St., NW, Ste. 400
Washington, D.C. 20005

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463

Defendant.

Civil Action No: 1:19-cv-02336-JEB

PLAINTIFFS' OPPOSITION TO CORRECT THE RECORD'S AND HILLARY FOR AMERICA'S MOTION TO INTERVENE

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TABLE OF ABBREVIATIONS

CTR	Correct the Record
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
HFA	Hillary for America
MUR	Matter Under Review
OGC	Office of General Counsel (FEC)
SOR	Statement of Reasons

INTRODUCTION

Plaintiffs Campaign Legal Center and Ms. Catherine Hinckley Kelley (collectively, "CLC") oppose the motion to intervene filed by Correct the Record ("CTR") and Hillary for America ("HFA") at this time because the motion is premature and fails to account for the distinctive circumstances of this case.

On August 2, 2019, CLC filed this lawsuit challenging the Federal Election Commission's dismissal of its administrative complaint against CTR/HFA as contrary to law under 52 U.S.C. § 30109(a)(8)(A). This particular case is unique, however, because the Commission could not muster the statutorily required, four-vote majority necessary to defend its own dismissal of CLC's complaint. *See* Amended Certification at 3, MURs 6940, 7097, 7146, 7160, and 7193 (Correct the Record) (signed June 13, 2019), https://www.fec.gov/files/legal/murs/7146/19044472151.pdf. To CLC's knowledge, this marks the first instance in which the Commission has affirmatively decided not to defend its dismissal of an enforcement complaint in an administrative review action under section 30109(a)(8).

Shortly before the motion to intervene was filed on October 1, counsel for CTR/HFA asked counsel for CLC if they would consent to their motion. Plaintiffs' counsel demurred, noting that the Commission had not yet appeared or filed a responsive pleading. At that time, the FEC's role in this litigation remained uncertain in light of its failed vote to authorize a legal defense and subsequent loss of voting quorum. On October 8, the Commission defaulted by failing to file a responsive pleading to plaintiffs' complaint, and to date, it has not appeared or filed any papers.

Thus, in moving to intervene, CTR and HFA are not merely seeking to *join* the FEC as a defendant in this action, as was the case for the intervenor-movants in *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015), the precedent on which CTR/HFA's

motion principally relies. Instead, CTR and HFA are effectively asking to step into the agency's shoes, and, as private parties, defend its decision even though the agency has affirmatively decided not to stand behind its own action. But their intervention would nullify the carefully balanced statutory scheme in the Federal Election Campaign Act ("FECA"), which precludes a defense of the Commission's dismissal of an administrative complaint unless *four* Commissioners authorize such a defense. 52 U.S.C. §§ 30106(c), 30107(a)(6). Granting the movants' request would undermine this statutory check on the Commission's deliberate intransigence or non-enforcement of the law.

And even if CTR/HFA's participation in the case were appropriate, their motion—which preceded the FEC's default here—does not anticipate the procedural complications caused by this default, failing to take into account, for example, the need for the FEC to nevertheless certify the administrative record before this case can proceed.

CLC respectfully urges the Court to deny CTR/HFA's motion at this time. CLC would not object, however, to CTR/HFA's participation as *amicus curiae*.

FACTUAL AND LEGAL BACKGROUND

A. Statutory framework for FEC administrative complaints

The FEC is the exclusive civil enforcement authority for violations of FECA. 52 U.S.C. §§ 30106(b)(1), 30107(e).

Any person may file an administrative complaint with the Commission alleging a violation of FECA. *Id.* § 30109(a)(1). The Commission, after reviewing the complaint and any responses, may then vote on whether there is sufficient "reason to believe" that a violation has occurred to justify an investigation. FECA requires the Commission to take action through majority votes, and certain decisions—including whether to find "reason to believe" and proceed with an investigation,

id. § 30109(a)(2), initiate civil enforcement proceedings, *id.* § 30107(a)(6), or defend administrative review actions, *id.*—require the affirmative vote of at least four Commissioners. *Id.* § 30106(c).

After the investigation, the FEC's Office of General Counsel ("OGC") can recommend that the Commission vote on whether there is "probable cause" to believe the law has been violated. *Id.* § 30109(a)(3). If the Commission determines, by an affirmative vote of at least four Commissioners, that there is probable cause to believe that a violation of the law has been committed, it attempts to correct such violation and enter a conciliation (*i.e.*, settlement) agreement with the respondent, which may include payment of a civil penalty. *Id.* § 30109(a)(4)(A), (5). If the Commission is unable to correct the violation and enter a conciliation agreement with the respondent, it may, by the affirmative vote of at least four Commissioners, institute a civil action against the respondent in federal district court. *Id*. § 30109(a)(6)(A).

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission may vote to dismiss the complaint and the "controlling" group of Commissioners who voted not to proceed must issue a Statement of Reasons ("SOR") that will serve as the basis for any subsequent judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); *Democratic Cong. Campaign Comm*. *v. FEC*, 831 F.2d 1131, 1135 & n.6 (D.C. Cir. 1987) ("*DCCC*").

FECA provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" in district court within 60 days of the dismissal seeking review of the Commission's action. 52 U.S.C. § 30109(a)(8)(A), (B). The Commission must authorize a defense against any such action by four votes. *Id.* §§ 30106(c), 30107(a)(6). If the court finds the dismissal "contrary to law," it may order the Commission to

conform with such declaration within 30 days, *id.* § 30109(a)(8)(C), failing which the complainant may bring a civil action directly against the respondent to remedy the violation. *Id.*

B. The FEC's dismissal of CLC's administrative complaint alleging a massive coordination scheme by Correct the Record and the Clinton campaign

In the run-up to the 2016 elections, the super PAC CTR declared an ambitious plan to "push back against" critics of then-Democratic presidential nominee Hillary Clinton by coordinating millions of dollars of opposition research and media outreach with the Clinton campaign. Compl. ¶¶ 60-63. CTR's founder and chair, David Brock, announced to the news media that his venture would not violate FECA's contribution restrictions and disclosure requirements applicable to "coordinated expenditures" because, he claimed, FEC rules exempted unpaid Internet posts from the statutory coordination regime, and CTR would focus its expenditures on this exempt online activity. *Id.* ¶¶ 2, 61-62.

On October 6, 2016, CLC filed a complaint with the FEC alleging that CTR had made, and HFA had received, millions of dollars in illegal and excessive in-kind contributions in the form of coordinated expenditures, and had failed to properly disclose this activity to the public as required by FECA. *Id.* ¶¶ 58-59. The FEC designated this proceeding Matter Under Review ("MUR") 7146.

After reviewing the allegations in plaintiffs' administrative complaint, OGC recommended the Commission find reason to believe that CTR and HFA violated FECA by making and accepting, respectively, "unreported excessive and prohibited in-kind contributions" in the form of coordinated expenditures, and authorize an investigation. First General Counsel's Report at 25-26, MURs 6940, 7097, 7146, 7160, and 7193 (Correct the Record) (Oct. 16, 2018), https://www.fec.gov/files/legal/murs/7146/19044472082.pdf.

On June 4, 2019, the Commission voted on OGC's recommendation but failed, by a vote of 2-2, to obtain the four affirmative votes needed to find "reason to believe" and proceed with an

investigation. The Commission subsequently voted 4-0 to close the file. *See* Amended Certification at 4.

Plaintiffs' filed this action on August 2, 2019 to challenge this dismissal as arbitrary, capricious, and contrary to law under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1331, one day before the expiration of the 60-day statutory filing deadline for such an action. 52 U.S.C. § 30109(a)(8)(B). At the time plaintiffs filed their judicial complaint, the two controlling Commissioners who voted against a reason-to-believe finding still had not issued a Statement of Reasons or any explanation for their vote. *See Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

Their Statement would not issue until August 21—19 days after CLC commenced this lawsuit, and 18 days after the expiration of the statutory period for seeking judicial review. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record) (Aug. 21, 2019), https://www.fec.gov/files/legal/murs/7146/7146_1.pdf. On September 20, dissenting Commissioner and current FEC Chair Ellen L. Weintraub issued her own Statement of Reasons explaining her vote to find "reason to believe" and proceed with an investigation. *See* Statement of Reasons of Chair Ellen L. Weintraub, MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record) (Sept. 20, 2019), https://www.fec.gov/files/legal/murs/7146/7146_2.pdf.

ARGUMENT

I. Movants are not entitled to intervention as a matter of right or permissive intervention.

The D.C. Circuit considers a four-factor test when deciding whether to grant intervention as a matter of right: (1) whether the intervenor-movant's motion is timely; (2) whether the movant has a "legally protected" interest in the action; (3) whether the action threatens to impair the movant's proffered interest in the action; and (4) whether an existing party to the action will

adequately represent the movant's interests. *Crossroads*, 788 F.3d at 320. In addition, in this Circuit, any party seeking to intervene as of right, whether as a plaintiff or a defendant, is required to demonstrate standing. "To establish standing under Article III, a prospective intervenor—like any party—must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003).

While CTR/HFA may meet some of the requirements for intervention, the FEC's affirmative decision not to authorize a defense of this action, and its corollary decision to default, deprives them of a legally protectable interest in this case. For the same reason, CTR and HFA lack standing to try to justify the agency's own decision-making, which the FEC itself refuses to defend. To hold otherwise would upset the careful balance prescribed by FECA, which specifically requires four affirmative votes when the Commission decides whether to defend its decision not to pursue the violations alleged in an administrative complaint.

A. The circumstances of this case are unique and confound the rote application of *Crossroads GPS* that movants urge.

CTR and HFA rely principally on the *Crossroads GPS* decision to support their motion to intervene, asserting it was "procedurally identical" to this case and compels granting intervention as of right for any respondent to an FEC complaint who seeks to participate in a challenge to the complaint's dismissal. CTR/HFA Mem. at 4.

Plaintiffs do not dispute that *Crossroads GPS*, in many circumstances, supports intervention by administrative respondents in a case seeking review under 52 U.S.C. § 30109(a)(8). Indeed, CLC attorneys are counsel to the plaintiffs in the litigation that gave rise to that decision, *Public Citizen v. FEC*, No. 1:14-cv-00148-RJL (D.D.C.), and consented to Crossroads' motion to intervene as a defendant there.

But this case is clearly different. On June 4, 2019, the FEC voted on whether to authorize the defense of the controlling Commissioners' dismissal of plaintiffs' administrative complaint, but failed to garner the requisite four votes to defend. As a result, the FEC has defaulted by failing to answer or respond to CLC's complaint.

The FEC Chair who voted against authorizing a legal defense has explained that her vote was based on her longstanding and intensifying concern that the Commission has adopted a de facto policy of non-enforcement, explaining: "If [the Commissioners] are not going to vote to enforce the law, I'm not going to pull any punches and I'm not going to be shy about calling them out." Nihal Krishan, *Elections Commission Chief Uses the "Nuclear Option" to Rescue the Agency From Gridlock*, Mother Jones (Feb. 20, 2019), https://www.motherjones.com/politics/2019/02/elections-commission-chief-uses-the-nuclear-option-to-rescue-the-agency-from-gridlock. She further stated, "[i]f [the Commission] get[s] sued, that requires four votes to defend those kinds of lawsuits . . . I'm not going to authorize the use of agency resources to defend that litigation." *Id*.

The concern about the FEC's failure to enforce the law is particularly acute in the area of illegal coordination between spenders and candidates. When asked by the House Administration Committee in an oversight proceeding, Chair Weintraub stressed that the Commission has not pursued a single violation of the coordination regulations since *Citizens United*. *See* Chair Ellen L. Weintraub's Suppl. Responses to Questions from House Admin. Comm. at 4 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin_Attachment_A_Weintraub.pdf (emphasis added) ("Since the Supreme Court's decision in *Citizens United*, how many times has the Commission found a violation of the coordination regulations?"—"The simple answer is *zero*."). *See also id.* at 5. As the dissenting Chair explained in her SOR here, the problem at the FEC goes beyond episodic gridlock, and verges on near-total abandonment of

the Commission's statutory enforcement responsibilities. Weintraub SOR at 11 (noting that controlling Commissioners agreed "in principle" that "the internet exception does not swallow the coordination rules," but "[i]n practice" they "have never seen a case of coordination that they were willing to pursue").

To CLC's knowledge, the Commission's refusal to defend its dismissal of an administrative complaint against a section 30109(a)(8) suit in district court is unprecedented. Moreover, as Chair Weintraub made clear, her vote against authorizing a defense here was grounded in deep-seated substantive disagreements among the Commissioners about the scope of the coordination rules and the agency's statutory obligation to enforce FECA—so the FEC's absence is not the result of administrative accident or incapacity. Allowing CTR and HFA to step into the agency's shoes at this juncture would nullify the veto that Commissioner Weintraub duly exercised in accordance with FECA's unique structure.

And the FEC's hands are now doubly tied: soon after it dismissed CLC's administrative complaint, the Commission lost its quorum upon the resignation of Commissioner Matthew Petersen, which left three of its six seats vacant. *See, e.g.*, Dartunorro Clark, '*It's going to be a crisis': Turning out the lights at the undermanned FEC*, NBC News (Aug. 30, 2019), https://www.nbcnews.com/politics/2020-election/it-s-going-be-crisis-turning-out-lights-undermanned-fec-n1048376. Since August 31, the FEC thus has not had the four votes necessary to revisit its earlier vote against authorizing a legal defense of the dismissal underlying this case; nor can it presently take any other dispositive action on the administrative complaint were this matter to be remanded back to the Commission.

B. FECA does not entitle respondents to take up the government's role in an administrative review action where the agency has chosen not to participate.

The FEC has taken the extraordinary step of deciding not to defend its dismissal of CLC's administrative complaint. Allowing CTR and HFA to intervene as defendants in the FEC's absence would override this policy choice and effectively allow private respondents to usurp the Commission's "exclusive" civil enforcement authority. 52 U.S.C. §§ 30106(b)(1), 30107(e). Indeed, if movants were permitted to intervene at this juncture—and thereby maintain, in the FEC's name, a case the FEC chose not to litigate—it would countermand the Commission's well-recognized authority to set its policy agenda, decide how to enforce FECA, and direct whether and how to defend its actions in court.

CTR/HFA have not even acknowledged the FEC's decision not to defend, much less established any particularized or "legally protected interest" in continuing this case *without* the FEC's participation. Accordingly, they cannot demonstrate Article III injury or meet the analogous requirements of Rule 24(a). The statutory scheme likewise confirms that HFA and CTR should not be substituted for the Commission because they lack prudential standing; permitting them to litigate in the agency's stead would undermine the FEC's exclusive civil enforcement authority. "[T]hey are effectively seeking to enforce the rights of third parties (here, the [FEC]), which the doctrine of prudential standing prohibits." *Deutsche Bank Nat. Tr. Co. v. FDIC*, 717 F.3d 189, 194 (D.C. Cir. 2013) (citing *Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994) (en banc)). *See Washington Tennis & Educ. Found., Inc. v. Clark Nexsen, Inc.*, 270 F. Supp. 3d 158, 163 n.3 (D.D.C. 2017) (noting that "this court remains bound by the D.C. Circuit's treatment of third-party standing as a threshold, jurisdictional issue").

The "irreducible constitutional minimum" of standing comprises three elements: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560

(1992). To demonstrate a cognizable "injury in fact," the putative intervenor must have suffered "an invasion of a legally protected interest" that is: "(a) concrete and particularized[;]" and "(b) actual or imminent, not conjectural or hypothetical[.]" *Id.* Where standing is rooted in future injury, a party "must demonstrate a realistic danger of sustaining a direct injury" to establish redressability. *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989).

CTR and HFA face no immediate or even conceivably imminent injury as a result of this lawsuit. For one thing, assuming plaintiffs succeed on the merits, neither respondent will be "ordered . . . to do or refrain from doing anything." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2010). The only remedy available in an action under section 30109(a)(8) is a declaration that the FEC acted "contrary to law" in dismissing the complaint, in which case "the *Commission*" may be "direct[ed]" to "conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C) (emphasis added). Moreover, CTR and HFA claim future injuries that depend on the independent action of an absent third party—the FEC, which exercised its prerogative to default—but they make no genuine effort to address the agency's deliberate absence in this litigation.[1] *See Deutsche Bank Nat. Trust Co.*, 717 F.3d at 193 ("[W]here a threshold legal interpretation must come out a specific way before a party's interests are even at risk, it seems unlikely that the prospect of harm is actual or imminent.").

[1] Moreover, given the FEC's current lack of a quorum, CTR/HFA's hypothesized injuries based on "exposure to enforcement proceedings before the FEC," CTR/HFA Mem. at 5, can only possibly occur at the end of an even more speculative and attenuated chain of events, requiring the actions of multiple independent third parties including new appointments to the FEC by the President and their approval by the U.S. Senate. There is no practical threat that "the agency could seek to regulate [CTR/HFA] directly and immediately after the dismissal order is revoked." *Id.* at 8. Barring that, the only possible enforcement action they face would be a private right of action brought by these plaintiffs in this Court—at some future date—following a contrary-to-law finding and remand to the FEC.

The only defendant that can be sued under section 30109(a)(8) is the FEC, and putative intervenors are not an appropriate replacement for the agency. The statute does not contemplate, much less establish, the procedural or substantive rights of any other would-be defendants. And FECA's judicial review provision, 52 U.S.C. § 30109(a)(8), expressly limits participation in administrative review actions to FEC *complainants*.

Nor can CTR or HFA offer any unique legal arguments that might augment or differ from the arguments made by the controlling Commissioners. The only question before the Court is whether the dismissal of CLC's administrative complaint was contrary to law, and its review is limited to considering the controlling Commissioners' stated rationale for the dismissal on the basis of governing law and the administrative record.[2] Any argument CTR or HFA offers that would add to, amplify, or amend the controlling Commissioners' reasoning would not only be legally irrelevant, but would obfuscate the written rationale provided by the Commission. *DCCC*, 831 F.2d at 1135 n.6 ("Intelligent review requires justifications by the *Commission* or *Commissioners* for the FEC's dispositions.") (emphasis added). Their participation as intervenors will not—and cannot—elucidate the FEC's reasoning and thus will simply delay and complicate the resolution of this litigation.

FECA certainly does not support granting CTR/HFA a right to step into the agency's shoes here. Congress's design of the statutory cause of action in this case, as with its design of the statutory scheme as a whole, reflects a delicate equilibrium of competing objectives. This goal is reflected in the balanced partisan composition of the Commission itself, as well as the Act's

[2] Assuming the case proceeds on an eventual motion for default judgment, the inquiry under Rule 55(d) would likely be the same.

administrative enforcement provisions, which are carefully structured to weigh the potential for partisan overreach against the need to secure compliance with the Act's provisions.

For those reasons, Congress required that "[a]ll decisions of the" Commission "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). In the same subsection, it further specified that "the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action" with respect to certain activities, including to "*defend (in the case of any civil action brought under section 30109(a)(8) of this title)*." *Id.* §§ 30106(c); 30107(a)(6) (emphasis added). "To ignore this [4-vote] requirement," as the D.C. Circuit has noted in another context, "would be to undermine the carefully balanced bipartisan structure which Congress has erected." *Common Cause*, 842 F.2d at 449 n.32.

Congress balanced its desire for partisan parity in the composition of the FEC with several limited mechanisms for private involvement to ensure that partisan deadlock does not render FECA meaningless. *See, e.g.*, 52 U.S.C. § 30109(a)(1) (permitting filing of complaints with the FEC); *id.* § 30109(a)(8)(A) (permitting complainant to file civil action challenging FEC dismissal); *id.* § 30109(a)(8)(C) (authorizing complainant to bring civil action against violator if FEC fails to conform to judicial decision arising from (a)(8)(A) suit). The affirmative four-vote requirement for the defense of actions for judicial review under section 30109(a)(8) provides an additional safeguard against partisan gridlock or intransigence.

Efforts to litigate various FECA questions outside the statutory regime, *i.e.*, beyond the sharply delimited bounds of these review mechanisms, have long been rebuffed as "inappropriate interference with the FEC's responsibilities." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 487 (1985). As the Fifth Circuit has opined, "[t]he statute provides a strong basis

for scrupulously respecting the grant by Congress of 'exclusive jurisdiction' to the FEC: the FEC is entrusted with the exclusive power to investigate violations of the Act, and the Act creates a detailed administrative process that the FEC must follow in its investigations." *Stockman v. FEC*, 138 F.3d 144, 152 (5th Cir. 1998).

The unique circumstances of this case and the "unusual" features of FECA's statutory scheme thus weigh heavily against allowing a private litigant to override the Commission's prerogatives in this area. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("This statute is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce."). *Cf. Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1368 (D.C. Cir. 1988) ("Part of the design of FECA . . . is to place responsibility for the civil enforcement of matters specifically covered by the Act exclusively in the hands of the FEC in the first instance.").

To be sure, circuit precedent "look[s] skeptically on government entities serving as adequate advocates for private parties," *Crossroads*, 788 F.3d at 321—but that concern is not presently implicated in this case, because the government defendant has refused to participate. And although the *Crossroads* decision recognized that certain respondents can participate in administrative review actions as intervenor-defendants *alongside* the FEC, it does not confer a right to *usurp* the FEC's statutory role to decide whether this action should be defended at all.

Indeed, the very reasons that intervention was held appropriate in *Crossroads GPS* counsel against granting it to HFA/CTR here. In *Crossroads*, the D.C. Circuit found it "apparent [that] the Commission and Crossroads hold different interests." 788 F.3d at 321 (noting that FEC and Crossroads "disagree[d] about the extent of the Commission's regulatory power, the scope of the administrative record, and post-judgment strategy"). By the same token, CTR and HFA obviously cannot represent the Commission's interests, because they seek to commandeer its "exclusive

jurisdiction" over civil enforcement matters and override its decision *not* to defend here. Allowing intervention at this juncture would permit administrative respondents—who are specifically excluded from any role in actions brought under FECA's judicial review provision—to countermand the Commission's decision to forgo a defense in this case. *See Stockman*, 138 F.3d at 153 (noting that "Section [30109](a)(8) is the only provision of the Campaign Act that provides for judicial review at behest of private parties"—but "only for people who have filed an administrative complaint").

Nor is intervention necessary to secure "a full, adversarial presentation on the issues by parties with a concrete sta[k]e in the outcome." CTR/HFA Mem. at 10. It is not clear what arguments prospective intervenors hope to make as parties that they could not present just as "full[y]" as *amici curiae*. Instead, what they evidently hope to gain is the right to file dispositive motions and delay resolution on the merits. But plaintiffs must meet their burdens under Article III and the court must consider its own subject-matter jurisdiction regardless, whether or not intervenors put either at issue through dispositive motions. Granting intervention will only obfuscate the issues and needlessly prolong this case. The motion should be denied.

II. At a minimum, the motion to intervene is premature and fails to address the practical significance of the Commission's default.

In the alternative, the Court should decline to admit any intervenor-defendant into this lawsuit until the FEC certifies and transmits the administrative record upon which the lawsuit must proceed. The Commission's decision not to defend the dismissal does not relieve its obligation to certify the contents of the administrative record under the local rules "within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first." LCvR 7(n)(1). That will likely require court action, given that the agency has not appeared—and cannot participate substantively—in this case.

Moreover, because the controlling Commissioners failed to release their SOR within the 60-day statutory period for seeking judicial review of its dismissal here, *see* 52 U.S.C. § 30109(a)(8)(B), plaintiffs will have to file an amended complaint addressing the SOR. As intervenor-movants highlight, the two controlling Commissioners who voted against finding "reason to believe" did not release their SOR until 78 days after the Commission closed the file, 19 days after Plaintiffs commenced this lawsuit, and 18 days *after* the expiration of the statutory period for seeking judicial review. Now that the deadline for the FEC's responsive pleading has come and gone, clarifying the FEC's role in this litigation, plaintiffs intend to file an amended complaint addressing the SOR within 21 days of the FEC's default. If this Court does indeed admit CTR and HFA as intervenors, their motion to dismiss should be held in abeyance pending the filing of CLC's amended complaint.

CONCLUSION

The motion to intervene should be denied at this time. In the alternative, if this motion is granted, this Court should hold CTR/HFA's motion to dismiss in abeyance until such time as the FEC certifies and transmits the administrative record and plaintiffs file their amended complaint.

Dated: October 15, 2019

Respectfully submitted,

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