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)

CORRECTED REPLY IN SUPPORT OF EXPEDITED MOTION OF 45COMMITTEE, INC. TO INTERVENE FOR THE PURPOSE OF APPEAL

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ARGUMENT

45Committee, Inc. 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. Dkt. No. 32 ("April 21 Order"). The Supreme Court and D.C. Circuit expressly authorize 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). Under this controlling precedent, 45Committee has standing, *see Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 316, 319–20 (D.C. Cir. 2015), and satisfies the four required elements for intervention as of right, *see* Fed. R. Civ. P. 24(a); *see Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). CLC identifies "no [meaningful] problem with [45Committee] replacing the FEC" for the purpose of appellate litigation. *CLC v. FEC*, 334 F.R.D. 1, 7 (D.D.C. 2019). On the contrary, CLC's positions would contravene Rule 24 and precedent by trapping parties like 45Committee in a Catch-22 and insulating this Court's decisions from appellate review. *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).

In the alternative, 45Committee also meets the criteria for permissive intervention. This Court should 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 because 45Committee satisfies both required elements: its defense (that the FEC took action on CLC's administrative complaint and therefore CLC cannot bring a direct lawsuit against 45Committee) "shares with the main action a common question of law or fact," and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b).

Either way, the possibility—indeed likelihood—that this Court authorized CLC to file a direct lawsuit against 45Committee without subject matter jurisdiction demands that intervention be permitted to make the FEC's arguments in the agency's absence on appeal.

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

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

Because the FEC's decision not to take enforcement action shields 45Committee from administrative enforcement and liability under the Federal Election Campaign Act ("FECA"), 45Committee is injured by the April 21 Order that removes that shield. In other words, the April 21 Order put 45Committee in "the position of a respondent subject to enforcement" via CLC's direct suit. *Crossroads*, 788 F.3d at 317. 45Committee "benefits from [that] agency action" and the "unfavorable [April 21] decision would remove [its] benefit." *Id.* at 317–18. Therefore, 45Committee has "a concrete stake in the favorable agency action currently in place" and a cognizable injury. *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).

CLC's arguments to the contrary, Resp. 20–21, are inapplicable and, in any event, incorrect. *First*, when analyzing standing, "a federal court must assume, *arguendo*, the merits of [the movant's] legal claim." *Est. of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019) (quoting *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007)). For purposes of assessing 45Committee's standing to appeal the April 21 Order, this Court must assume that 45Committee correctly interprets the FEC's voting records to mean that the FEC took action, that the D.C. Circuit has appellate jurisdiction to review the Court's April 21 Order, and that the D.C. Circuit will reverse the Court's April 21 Order. And if the D.C. Circuit reverses that order, 45Committee will no longer be exposed to enforcement in CLC's direct suit. Whether 45Committee is entitled to

this relief is a question for the D.C. Circuit to decide, but 45Committee unquestionably has standing to seek that relief on appeal.

Second, CLC's contention that D.C. Circuit review of the Court's orders "is jurisdictionally barred" is not a basis for this Court to deny intervention. Resp. 20. "When appellate jurisdiction is at stake, what matters is the appellate court's assessment of finality, not the district court's." *Franklin v. District of Columbia*, 163 F.3d 625, 630 (D.C. Cir. 1998). CLC's arguments about the appealability of either Order must be directed to the D.C. Circuit, not this Court, once 45Committee files a notice of appeal. *See Amarin Pharms. Ireland Ltd. v. FDA*, 139 F. Supp. 3d 437, 447 (D.D.C. 2015).

Third, CLC's arguments about redressability are also mistaken. "[H]aving shown this injury"—that is, being subjected to the possibility of future liability by loss of a favorable agency action—45Committee "ha[s] established causation and redressability." *CLC*, 334 F.R.D. at 5 (citing *Crossroads*, 788 F.3d at 316). CLC's argument that "vacatur" of the April 21 Order would not redress 45Committee's injuries, Resp. 20–21, is both incorrect and incomplete. Vacating that Order would remove CLC's authorization for a private suit against 45Committee—both because that Order provided such authorization and because that Order found that the FEC failed to conform to the November 8 Order. Again, the Court must assume 45Committee's legal theory is correct here. *Est. of Boyland*, 913 F.3d at 123. And CLC's contention that "45Committee will continue to be subject to enforcement by the FEC," Resp. 20, is a red herring: Even if 45Committee remains subject to the agency's enforcement, it would not remain subject to direct, private litigation by CLC. That is a distinct, redressable injury, especially since the FEC has decided not to pursue enforcement. And even if "vacatur" of the April 21 Order might not redress 45Committee's injuries, *reversal* of that Order certainly would.

At bottom, 45Committee seeks to restore "the status quo," *id.* at 21, in which it faced no exposure to "enforcement proceedings" or "civil liability via private lawsuit" by virtue of the FEC's determinations not to take enforcement action. *Crossroads*, 788 F.3d at 385, 387. CLC should not be permitted to upend that status quo based on the incorrect premise that the FEC never acted on the administrative complaint, let alone in such a way as to prevent review of that disruption. 45Committee has standing to appeal the Court's April 21 Order that authorized CLC to file a direct suit against 45Committee.

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

The other timeliness factors courts clearly support 45Committee's intervention here. *See Forest Cnty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 10 (D.D.C. 2016) (considering time since inception of the action, prejudice, purpose of intervention, and need for intervention (citing *Karsner*, 532 F.3d at 886)). And the remaining factor (time since inception) does not support CLC's position under the circumstances here. *See Cameron*, 142 S. Ct. at 1012.

First, CLC does not meaningfully dispute that 45Committee's purpose for intervening—to seek appellate review of this Court's subject matter jurisdiction—supports finding this Motion timely. *See* Resp. 4–13 (arguing time since inception, notice of the need to intervene, and prejudice). Nor could it, since this Circuit and others have found that intervening for this purpose weighs heavily in favor of finding timeliness. *Acree*, 370 F.3d at 43, 49–50 (reversing a district court's denial as untimely of "a motion to intervene for the purpose of contesting the District Court's subject matter jurisdiction"); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1104 (10th Cir. 2005) (allowing intervention by a party to address the "essential" issue of subject-matter jurisdiction) (citing *Duplan v. Harper*, 188 F.3d 1195, 1203 (10th Cir. 1999)); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 (5th Cir. 1992) (finding "the existence of a substantial

question about the district court's jurisdiction" to be a "special factor that supports finding timeliness" for intervention). CLC attacks the merits of the arguments that it thinks 45Committee will make about subject matter jurisdiction, Resp. 5–6, which are irrelevant to the question of intervention, *see supra* Part I.A., but CLC never disputes that such a purpose itself weighs in favor of finding timeliness.[1]

Second, CLC does not meaningfully dispute that 45Committee needs to intervene in this case to preserve its rights now that CLC has filed a direct suit against 45Committee. *See CLC*, 334 F.R.D. at 4–5; Resp. 4–13. CLC argues elsewhere that 45Committee's injury "is *only* redressable by the court in [its direct suit]." Resp. 21. Whatever another court may decide on that subject, the need for 45Committee to seek review *in this case* is without question now that CLC has filed its direct suit.

Third, on prejudice, CLC should not benefit from any order that this Court lacked jurisdiction to enter. Nor would "the loss of default proceedings … 'unduly' prejudice CLC, which brought this suit [ostensibly] anticipating that it would be defended." *CLC*, 334 F.R.D. at 6. 45Committee does not seek to "re-run this case in its entirety," Resp. 12, but rather to appeal the Court's subject matter jurisdiction to enter the April 21 Order. All of the other harms CLC invokes go to the merits of its position directly against 45Committee, *see id.* (invoking alleged "campaign finance activity," "public confidence," "informational interests," and "prosecut[ion]" of 45Committee), which this Court has found are not "common" to and do not "grow out of the same event or transaction" as the merits of this suit challenging the FEC's purported inaction. Order,

[1] Moreover, the November 8 Order states "this Court will retain jurisdiction over this case until the agency acts on plaintiff's administrative complaint." Dkt. No. 25. Thus, this Court has tied the Court's continued jurisdiction to that question. This confirms that the question of whether the FEC has acted is jurisdictional.

CLC v. 45Committee, Inc., No. 22-cv-1115 (D.D.C. May 3, 2022), Dkt. No. 10 (denying relation of CLC's direct lawsuit to this lawsuit and ordering the former to be randomly reassigned); *see also* Resp. 22 (arguing that the two cases are not related on the merits). Any slight prejudice to CLC from having to defend against 45Committee's appeal is insignificant compared to both the likelihood that this Court authorized CLC to file a direct lawsuit against 45Committee without subject matter jurisdiction and the prejudice of effectively insulating those orders from any review whatsoever. *See Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008) (approving of district court's comparative weighing of prejudice to proposed intervenor and other parties).

Fourth and finally, the time-since-inception factor is "'not solely dispositive,'" especially here since 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. *Cameron*, 142 S. Ct. at 1012 (quoting *NAACP v. New York*, 413 U.S. 345, 365–66 (1973); *McDonald*, 432 U.S. at 394). "[T]he timeliness of [this] motion should be assessed in relation to that point in time." *Id.* CLC discounts this recent, controlling authority regarding intervention for the purpose of appeal to focus on ordinary cases where intervention came too late. Under that view, intervention for purposes of appeal would never succeed. That view is not the law. *Id.*; *Acree*, 370 F.3d at 50.

Moreover, even on CLC's mistaken view that timeliness here should be measured from an earlier point in time, their arguments fail to grapple with the FEC's unprecedented and unlawful actions to conceal its votes on CLC's administrative complaint: not to defend this suit and not to take enforcement action against 45Committee. *See* 45Committee Mem. 11–12 (citing 5 U.S.C.

§ 552(a)(5), (a)(2)(A)).[2] Nor does CLC's brief confront the fact that 45Committee was entitled to rely on the presumption that the FEC is following the law, especially once this Court affirmatively ordered the FEC to conform. *Id.* at 12 (citing cases). Nor does CLC credit the fact that 45Committee acted promptly to inform the Court through its amicus brief that the Commission had in fact voted on the administrative complaint immediately after receiving redacted copies of the voting records. *Id.* at 12–13. With this context, CLC's arguments about the time since this case began and various points at which 45Committee supposedly received some form of notice or other are unconvincing. Whether, with the benefit of perfect hindsight, 45Committee *may* have tried to intervene (when the FEC was the only party with the information necessary to defend this suit), does not mean that it should—let alone could—have intervened. *See* Resp. 7 (arguing that this case "could" have resulted "in either the FEC being ordered to enforce the law against 45Committee or a CLC lawsuit against 45Committee"); *United States v. Microsoft Corp.*, No. 98-cv-1232, 2002 WL 319784, at *2 (D.D.C. Jan. 28, 2002) ("[I]nasmuch as Proposed Intervenors seek to intervene in anticipation of an actual need for intervention, the Court shall deny the motion as premature.").

Indeed, the D.C. Circuit has indicated post-judgment intervention is appropriate where, as here, an intervenor seeks "to bring to the court's attention newly-discovered evidence." *Paisley v. CIA*, 724 F.2d 201, 202 n.1 (D.C. Cir. 1984); *see also Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) ("necessity of intervention [arose only] after judgment had been entered"). 45Committee should be given that opportunity here.[3]

[2] The FEC also has not announced—publicly or in response to 45Committee's direct inquiry, 45Committee Mem. 13 & Ex. 4—any decision regarding whether it will appeal this Court's Orders.

[3] 45Committee accordingly reserves the right to bring an appropriate motion under Rule 59 or Rule 60 for these purposes.

If accepted, CLC's arguments would effectively insulate this Court's failure-to-act determination from appellate review. The D.C. Circuit has warned against such insulation, *Acree*, 370 F.3d at 50, which also would be contrary to FECA's text, 52 U.S.C. § 30109(a)(9) ("*Any* judgment of a district court under this subsection may be appealed to the court of appeals…." (emphasis added)). And accepting CLC's arguments would place parties like 45Committee in a Catch-22: According to CLC, 45Committee could not appeal the initial failure-to-act determination at the time it was entered because it is not final. Resp. 13, 17–18. Now, again supposedly, 45Committee cannot appeal the failure-to-conform and private-suit-authorization order because that order relies on the initial failure-to-act determination and the time to appeal the former has run. *Id.* at 18–19. Under CLC's logic, the only time a party like 45Committee could even attempt to appeal might be if the failure-to-conform and private-suit-authorization order is entered within the time left to appeal the initial failure-to-act determination (*i.e.*, within 60 days). Of course, that did not happen here. *See* November 8 Order, Dkt. No. 25; April 21 Order (164 days apart). And even if that timing had aligned, CLC's position remains that the November 8 Order is unappealable even *now* because it *was* not final. Resp. 17–18. The Court should reject this circular reasoning, which operates only to preclude appellate review. And, in any event, the D.C. Circuit's jurisdiction to hear an appeal is a question for the D.C. Circuit. *Franklin*, 163 F.3d at 630.

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). For this element, standing equals "an interest relating to the property or transaction that 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)). As CLC

admits, it has "prevailed" in this Court and therefore "filed its private action" against 45Committee. Resp. 12. That action removes any doubt that 45Committee has an interest in this case.

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 its concrete and substantial interests would be seriously impeded. As explained, 45Committee has an interest in preserving the status quo whereby the FEC has decided not to take enforcement action. *Supra* Parts I.A., I.C. "Regardless of whether [45Committee] could reverse [this] unfavorable ruling by bringing a separate lawsuit [or collaterally attacking it in CLC's direct suit], there is no question that the task of reestablishing the status quo if [CLC] succeeds in this case will be difficult and burdensome." *Fund for Animals, Inc.*, 322 F.3d at 735.

CLC's contrary arguments incorrectly focus on the appealability and merits of "appealing this Court's April 2022 Order." Resp. 13–20. CLC does not dispute that if 45Committee is not allowed to intervene, the April 21 Order will not be appealed. "[A]s a practical matter," then, 45Committee is "so situated that the disposition of [this] action may … impair or impede [its] ability to protect [its] interest." *Fund For Animals, Inc.*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)). Whether or not that appeal would be successful is for the D.C. Circuit alone to decide. *Franklin*, 163 F.3d at 630; *Amarin*, 139 F. Supp. 3d at 447. What matters for purposes of intervention is whether that disposition *may* impair or impede 45Committee's ability to protect its interest. Clearly that is not only possible but true, in light of CLC's direct lawsuit.

In any event, CLC's arguments on the appealability and merits of appealing the April 21 Order are mistaken and misguided. The FEC acted on CLC's administrative complaint—indeed, even CLC now admits the Commission "likely" voted and declined to pursue enforcement. Resp.

8; *see* 45Committee Mem. 3–4 (citing FEC documents and admission showing "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" (emphasis added)). The argument that the FEC's self-described "actions taken" on the administrative complaint somehow do not constitute taking action on the complaint defies logic and plain English. Dkt. No. 33-2 (FEC Answer ¶ 2, *45Committee, Inc. v. FEC*, No. 22-cv-00502 (D.D.C. Mar. 31, 2022), Dkt. No. 12); *see* Resp. 14–17. CLC pleaded only one cause of action: that the FEC's "failure to act on Plaintiff's administrative complaint is contrary to law." Compl. ¶ 34, Dkt. No. 1. That claim is moot if, as all evidence suggests and all parties now agree, the FEC did in fact act.

The argument that CLC's private right of action "trigger[ed] automatically upon the FEC's failure to conform," Resp. 19, is defied by CLC's Motion for Order Declaring Defendant Has Failed to Conform, Dkt. No. 26, CLC's then four-month delay in filing its private suit, *see* Compl., *CLC v. 45Committee, Inc.*, No. 22-cv-1115 (D.D.C. April 22, 2022), Dkt. No. 1, and CLC's arguments that the November 8 Order was not final and therefore not appealable, Resp. 17–18. As explained, the upshot of what CLC would have this Court hold is that this Court's failure-to-act determination and its failure-to-conform and private-suit-authorization order are wholly insulated from appellate review. *Supra* Part I.B. That simply cannot be. *Acree*, 370 F.3d at 50.

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

CLC does not dispute that the FEC cannot adequately represent 45Committee's interests at this stage. Nor could it, for the reasons 45Committee has explained. 45Committee Mem. 15–17 (citing *Crossroads*, 788 F.3d at 321; *CLC*, 334 F.R.D. at 6).

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

Permissive intervention is also appropriate, because 45Committee's defense—that the FEC took action on CLC's administrative complaint and therefore CLC cannot bring a direct lawsuit against 45Committee—"shares with the main action a common question of law or fact," and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). CLC resists this conclusion by arguing that "this action does not share common issues of fact with CLC's *private right of action*." Resp. 22. That is not the inquiry under Rule 24(b). As set forth in its Proposed Answer, 45Committee's defense, averred facts, and legal arguments go to the heart of *this* action, not CLC's private claims against 45Committee. *See* Dkt. No. 33-6. And for the reasons 45Committee has given, 45Committee Mem. 9–13; *supra* Part I.B., intervention will not unduly delay or prejudice the adjudication of CLC or the FEC's rights in this case. *See CLC*, 334 F.R.D. at 6.

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 May 12, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 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:

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/s/ *Brett A. Shumate*
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