IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:21-cv-0406-TJK

PLAINTIFF CAMPAIGN LEGAL CENTER'S OPPOSITION TO HERITAGE ACTION'S MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

Plaintiff Campaign Legal Center ("CLC") opposes the motion of Heritage Action for America ("Heritage Action"), the respondent in the administrative matter at issue in this case, for leave to intervene for purposes of seeking reconsideration or appeal of this Court's May 3, 2022 Order. The motion should be denied for the following reasons.

The motion to intervene should be denied because it fails to satisfy Rule 24. The motion is untimely, and post-judgment intervention for any purpose at this late date would unduly prejudice Plaintiff. Further, Heritage Action lacks a legally protected interest that justifies intervention. Finally, Heritage Action lacks standing to intervene because its purported injuries are not traceable to Plaintiffs nor redressable by court order. Indeed, under nearly identical circumstances, another court in this District less than two weeks ago denied a similar motion for post-judgment intervention filed by a respondent in an analogous CLC suit challenging delay by the Federal Election Commission ("FEC" or "Commission"). *See Campaign Legal Ctr. v. FEC*, No. 20-cv-0809-ABJ (hereinafter, "*45Committee*"), slip op. at 12 (D.D.C. May 13, 2022), ECF No. 37 (attached as Exhibit 1). The Court should similarly deny Heritage Action's motion for leave to intervene post-judgment here.

In the alternative, the Court should deny the motion to intervene under Rule 62.1(a)(2) because by filing a notice of appeal Heritage Action deprived this Court of jurisdiction to decide the motion.

BACKGROUND

I. Legal Background

The FEC administers the Federal Election Campaign Act ("FECA" or "the Act"), which regulates the financing of federal election campaigns. *See* 52 U.S.C. § 30101 *et seq.* By structuring the FEC to have six Commissioners, no more than three of which may be affiliated with the same

political party, *id.* § 30106(a)(1), "Congress designed the Commission to ensure that every important action it takes is bipartisan," *Combat Veterans for Congress Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015).

Any person may file a complaint with FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). At the initial stage of the enforcement process, the Commission may decide, "by an affirmative vote of 4 of its members," to investigate the allegations of an administrative complaint by finding "reason to believe" that a FECA violation has occurred. *Id.* § 30109(a)(2). The Commission may also hold a "a vote to dismiss" an administrative complaint, *id.* § 30109(a)(1), which succeeds only upon a majority vote, *see id.* § 30106(c). The Commission calls this vote to dismiss a "vote[] to close [the] enforcement file." *E.g.*, 11 C.F.R. § 5.4(a)(4). Absent majority support for a motion to dismiss by closing the file, a matter remains pending before the Commission for possible further action even though, at that moment, there are not four votes to find reason-to-believe a violation occurred. *See, e.g.*, Matters Under Review 7350, 7351, 7357, and 7382 (Cambridge Analytica LLC, *et al.*) (after initially failing to find reason to believe, reversing course more than three months later and finding reason to believe on the same claims);[1] *see also, e.g.*, FEC's Opp'n to Iowa Values' Mot. to Compel at 10, *Campaign Legal Ctr. v. Iowa Values*, No. 21-cv-389-RCL (D.D.C. Apr. 25, 2022), ECF No. 32 (attached as Exhibit 2) (FEC brief explaining that deadlocked votes to find reason to believe "do not automatically result in a dismissal or termination of the administrative matter").

[1] *See* Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (Apr. 12, 2019) (failing, 2-0, to find reason to believe on a series of claims), https://www.fec.gov/files/legal/murs/7350/7350_27.pdf. *See* Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (July 30, 2019) (voting 4-0 to find reason to believe on several of the same clams), https://www.fec.gov/files/legal/murs/7350/7350_29.pdf; Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (Aug. 22, 2019) (same), https://www.fec.gov/files/legal/murs/7350/7350_37.pdf.

Once a Commission majority votes to dismiss a matter by closing the file, the FEC must notify the administrative complainant and respondent of the dismissal under 11 C.F.R. § 111.20(a). *See Doe v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019) ("When the Commission ended its investigation and closed the file, it 'terminate[d] its proceedings' within the meaning of 11 C.F.R. § 111.20(a)."). Although FECA prohibits the Commission from revealing the details of any ongoing enforcement matter absent consent from the respondent, *see* 52 U.S.C. § 30109(a)(12)(A); 11 C.F.R. § 111.21(a)-(b), once the Commission has "voted to close [the] enforcement file," investigatory materials from the enforcement case must be publicly disclosed, 11 C.F.R. § 5.4(a)(4); *see also* 11 C.F.R. § 111.20(a) (providing that if the FEC "terminates its proceedings, it shall make public such action and the basis therefore no later than thirty (30) days from the date on which the required notifications are sent to the complainant and respondent").[2]

Any administrative complainant "aggrieved" by dismissal of its complaint or "by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed" may seek review in this District, 52 U.S.C. § 30109(a)(8)(A), and the court "may declare that the dismissal of the complaint or the failure to act is contrary to law," *id.* § 30109(a)(8)(C). In a suit challenging the FEC's "failure to act," a district court has jurisdiction once 120 days has passed without FEC action on the administrative complaint, and the issue on the merits before the court is whether the agency has "fail[ed] to take timely final action" on the administrative complaint. *Citizens for Percy '84 v. FEC*, No. 84-cv-2653, 1984 WL 6601 at *2-4 (D.D.C. Nov. 19, 1984); *see also Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980) ("Where the issue before the Court is whether the agency's failure to act is contrary to law, the

[2] To date, Plaintiff has not received any notification from the FEC stating that the agency has dismissed its administrative complaint. Heritage Action also does not claim to have received any such notification.

Court must determine whether the Commission has acted 'expeditiously.'"). To make this determination, courts apply a multi-factored analysis that includes the so-called "*TRAC* factors." *See, e.g.*, Order at 2 (Mar. 25, 2022), ECF No. 16 (citing *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 70 (D.C. Cir. 1984)); *see also 45Committee*, No. 20-cv-0809-ABJ, 2021 WL 5178968, at *5 (D.D.C. Nov. 8, 2021) (same).

If the court declares that the Commission's "failure to act is contrary to law, [it] may direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to conform as directed, "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* Congress included this "citizen-suit provision" in FECA to "legislate[] a fix" for the fact that "partisan deadlocks were likely to result" due to the Commission's six-member structure. *Citizens for Responsibility & Ethics in Washington v. Am. Action Network*, 410 F. Supp. 3d 1, 6 (D.D.C. 2019), *reconsidered on other grounds*, No. 18-cv-945-CRC, 2022 WL 612655 (D.D.C. Mar. 2, 2022); *see also Campaign Legal Ctr. v. Iowa Values*, No. 21-CV-389-RCL, 2021 WL 5416635, at *8 (D.D.C. Nov. 19, 2021) ("the citizen suit provision was created in anticipation of FEC's regulatory breakdown or inaction . . . Congress foresaw potential issues with the FEC's process and added a safeguard to protect the First Amendment rights of complainants").

II. Procedural History

More than three and a half years ago, on October 16, 2018, CLC filed an administrative complaint with the FEC alleging that Heritage Action violated FECA by failing to disclose its contributors after spending significant sums to influence the 2018 midterm federal elections. *See* Compl., Ex. 1 (Feb. 16, 2021), ECF No. 1-1. On February 16, 2021, more than two years after filing its administrative complaint (and more than 15 months ago), CLC filed this lawsuit against

the FEC due to the agency's failure to act on CLC's administrative complaint. *See* Compl. (Feb. 16, 2021), ECF No. 1.

Two months later, and more than one year ago, on May 10, 2021, the Clerk entered default against the FEC due to its failure to answer the complaint or otherwise appear in this lawsuit. *See* Default (May 10, 2021), ECF No. 9. On May 24, 2021, CLC moved for default judgment against the FEC, demonstrating that the FEC's failure to act on CLC's complaint was contrary to law under 52 U.S.C. § 30109(a)(8). *See* Pl.'s Mot. for Default J. Against Def. FEC (May 24, 2021), ECF No. 10.

On March 25, 2022, the Court granted CLC's motion for default judgment. *See* Order (Mar. 25, 2022), ECF No. 16 ("March 25 Order"). The Court found that the FEC's delay was contrary to law; ordered "that, pursuant to 52 U.S.C. § 30109(a)(8)(C), the FEC conform to this Court's Order within 30 days by acting on CLC's administrative complaint"; and said that it "shall retain jurisdiction over this matter until the FEC takes final agency action with respect to CLC's administrative complaint." *Id.* at 2-3. The FEC failed to conform to the Court's order within 30 days (or by any other date). On April 26, 2022, CLC filed a motion requesting an order declaring that the FEC had failed to conform. *See* Pl.'s Mot. for Order Declaring Def. Has Failed to Conform to Default J. Order (Apr. 26, 2022), ECF No. 21.

The day before CLC filed its motion, on April 25, 2022, Heritage Action moved for leave to file an *amicus curiae* brief requesting that the Court (1) hold the case in abeyance pending Heritage Action's FOIA request to the FEC for any voting records relating to CLC's complaint; (2) order the FEC to produce any such voting records for *in camera* review; and (3) if any such voting records exist, to vacate the March 25 Order and dismiss the case as moot. *See* [Proposed] *Amicus Curiae* Br. of Heritage Action Requesting Abeyance in Light of Pending Request for

Material Information from FEC at 2, 6-10, 12 (Apr. 25, 2022), ECF No. 17-3. Heritage Action asserted that this relief was appropriate because even if the FEC had merely deadlocked on an enforcement vote, it would allegedly show that the "FEC has not acted 'contrary to law.'" *Id.* at 2. Although the Court allowed Heritage Action to file its *amicus* brief, the Court ordered that Heritage Action "is not a party to this case, so to the extent the brief . . . seeks affirmative relief, it is improper." *See* Minute Order (Apr. 27, 2022). The Court further noted that "it has already decided the issue the brief addresses—whether the FEC acted 'contrary to law' under FECA." *Id*.

On May 3, 2022, the Court granted CLC's motion for an order declaring that the FEC had failed to conform to the March 25 Order. Order at 1 (May 3, 2022), ECF No. 23 ("May 3 Order"). The Court noted that Heritage Action argued that "documents responsive to its FOIA request may show that Defendant acted contrary to law," but explained that "[i]n granting default judgment against the FEC, the Court already decided that the FEC acted contrary to law" on March 25. *Id.* at 1 n.1. In addition, the Court reiterated that "Heritage Action is not a party to the case" and had not "sought to intervene and move for reconsideration of the Court's [March 25] decision to grant default judgment." *Id.* The Court further found that "the motion at issue [in the May 3 Order] presents only the question of whether the FEC conformed with the Court's March 25, 2022 order, and as explained above, it did not." *Id*. The court then confirmed CLC's right to sue Heritage Action under section 30109(a)(8)(C) given the FEC's failure to conform within 30 days. *Id.* at 6. On May 4, 2022, the Court ordered that this case be terminated. *See* Minute Order (May 4, 2022). The next day, May 5, 2022, CLC filed suit against Heritage Action. *See* Compl., *Campaign Legal Ctr. v. Heritage Action for Am*., No. 22-cv-1248-CJN (D.D.C. May 5, 2022), ECF No. 1.

Five days later, on May 10, 2022, Heritage Action moved to intervene in this case for purposes of seeking reconsideration of, or appealing, the May 3 Order. *See* Expedited Mot. of

Heritage Action to Intervene (May 10, 2022), ECF No. 24. In its motion, Heritage Action requested "an expedited ruling on this motion because the Court may lose jurisdiction to rule on the motion to intervene when Heritage Action files a notice of appeal." *Id.* at 2. On May 16, 2022, Heritage Action filed a notice attaching "three pages of heavily redacted vote certifications" released by the FEC in response to Heritage Action's FOIA request, and a May 13, 2022, public statement issued by three of the FEC's six Commissioners. *See* Notice of FEC Actions (May 16, 2022), ECF No. 25 (hereinafter, "Notice"). Four days later, on May 20, 2022, Heritage Action filed a notice of appeal of the May 3 Order to the U.S. Court of Appeals for the D.C. Circuit. ECF No. 26. The Court then transmitted the notice of appeal, the order appealed, and the docket sheet to the D.C. Circuit. ECF No. 27. Immediately after filing its notice of appeal in this case, Heritage Action appeared in *CLC v. Heritage Action* and filed a motion to stay the proceedings pending its appeal in this case. *See CLC v. Heritage Action*, No. 22-cv-1248-CJN (D.D.C. May 20, 2022), ECF No. 10.

ARGUMENT

Heritage Action's motion to intervene should be denied. First, the motion fails to satisfy Rule 24. Second, the Court lacks jurisdiction to decide the motion due to Heritage Action's notice of appeal, and thus should deny under Rule 62.1(a)(2).

I. Heritage Action's Motion to Intervene Fails to Satisfy Rule 24

A party seeking to intervene as of right under Federal Rule of Civil Procedure 24(a) must satisfy four requirements: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian,* 532 F.3d 876, 885 (D.C. Cir. 2008) (citation omitted). A movant

that seeks to intervene as a defendant must also demonstrate that it has constitutional standing. *Crossroads Grassroots Policy Strategies v. FEC,* 788 F.3d 312, 316 (D.C. Cir. 2015).

A party seeking permissive intervention "may" be permitted to intervene if it is "given a conditional right to intervene by a federal statute" or has "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Proc. 24(b)(1).

A. Heritage Action's Motion to Intervene Is Untimely

Intervention requires a "timely motion." Fed. R. Civ. P. 24(a)-(b). The D.C. Circuit has instructed that, in determining whether a motion to intervene is timely, courts must consider "all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Karsner*, 532 F.3d at 886 (citation omitted). Furthermore, "[c]ourts are generally reluctant to permit intervention after a suit has proceeded to final judgment, particularly where the applicant had the opportunity to intervene prior to judgment." *Acree v. 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).

Applying these factors, a court in this District recently denied a nearly identical post-judgment motion to intervene for being untimely. *See 45Committee*, No. 20-cv-0809-ABJ, slip op. at 8-9 (D.D.C. May 13, 2022). There, as here, CLC sued the FEC for failing to act on CLC's allegations of campaign finance violations against an administrative respondent, 45Committee, Inc. *See* CLC's Opp'n to 45Committee's Mot. for Leave to Intervene at 3, *45Committee*, No. 20-cv-0809-ABJ (D.D.C. May 6, 2022), ECF No. 34. After the FEC failed to appear in the case, the Clerk entered default against the agency, and CLC moved for default judgment. *Id.* at 3. The district court granted that motion, declared the FEC's delay contrary to law, and 31 days later CLC

moved for an order affirming that the agency failed to conform with the court's declaration. *Id.* at 3-4. 45Committee then first appeared in the case to file an *amicus* brief asserting the same flawed mootness argument asserted by Heritage Action in this case. *See id.* at 4. Later, the district court declared that the FEC had failed to conform to the court's default judgment order, while adding that 45Committee's mootness arguments were "not convincing and do not justify further delay." *Id.* (citation omitted). Only then did 45Committee move to intervene for purposes of appeal, claiming that its motion was timely because it allegedly could not have known sooner that the FEC would fail to appear and file an appeal. *See id.*

The district court denied 45Committee's motion, explaining that under the above circumstances—which are nearly identical to those in this case—"the motion to join a terminated case that had been pending for two years without any sign that defendant [FEC] would take steps to protect movant's interests can hardly be found to be timely." *45Committee*, No. 20-cv-0809-ABJ, slip op. at 6. Applying the *Karsner* factors, the court found that (1) the respondent unjustifiably waited "until after default judgment ha[d] been granted *and* the order to conform ha[d] been issued – to attempt to intervene," *id*. at 9; (2) "it is hard to say that intervention is *needed*" for the respondent to assert its "far-fetched" mootness argument that it belatedly asserted when "there is no question that the district court has subject-matter jurisdiction" over CLC's suit, *id.* at 10; and (3) CLC "would be seriously prejudiced by the belated intervention given how long this relatively simple case has been pending," and "the length of time that has elapsed since the actions that led to the underlying administrative complaint," *id.* at 11.

For substantially identical reasons, as explained below, Heritage Action's motion to intervene is also untimely under Rule 24.

1. Heritage Action's 15 Month Delay in Seeking Intervention Renders Its Motion Untimely

Heritage Action's motion is egregiously untimely. More than 15 months have elapsed since the inception of this suit on February 16, 2021. *See* ECF No. 1. Courts have denied motions to intervene due to delays of far less time. *See, e.g.*, *Defs. of Wildlife v. Salazar*, No. 12-cv-1833 (ABJ), 2013 WL 12316848, at *2 (D.D.C. July 17, 2013) (citing *Karsner* and finding motion to intervene filed "nearly eight months after the case was filed" to be "untimely"). In contrast, the FEC cases allowing intervention upon which Heritage Action relies, *see* Mem. of Points and Authorities in Supp. of Expedited Mot. of Heritage Action to Intervene at 6 (May 10, 2022), ECF No. 24-1 (hereinafter, "Mem."), all involve respondents who "quickly filed a motion to intervene" after the start of a suit challenging FEC non-enforcement. *Crossroads*, 788 F.3d at 316 (motion filed two months after complaint, *see Public Citizen v. FEC*, No. 14-cv-145-RJL (D.D.C.), ECF Nos. 1, 8)); *see also Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 6 (D.D.C. 2019) ("The application is certainly timely, since Intervenors moved to intervene less than two months after the plaintiffs filed their complaint.") (citation omitted); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (holding that intervention motion filed less than two months after the plaintiffs filed their complaint was timely); *45Committee*, No. 20-cv-0809-ABJ, slip op. at 9 (D.D.C. May 13, 2022) (noting that all of these cases "involve motions to intervene at much earlier stages of litigation.").

Heritage Action's attempt to intervene is especially untimely when considering the purpose for which intervention is sought. If allowed to intervene, Heritage Action intends to claim on reconsideration or appeal (as it did in its *amicus* brief) that this case is moot because it suspects "that [FEC] votes have been held on CLC's administrative complaint" against Heritage Action and that such votes "result[ed] in a so-called 'deadlock dismissal' of the complaint." Mem. at 3-5; *see*

also id. at 12-13. But Heritage Action could have attempted to intervene to assert that incorrect attack on this Court's jurisdiction at any time since the outset of this litigation 15 months ago. If Heritage Action's mootness theory were correct (it is not), this case would have been mooted by *any* FEC vote during the more than three-and-a-half years that have elapsed since CLC filed its FEC administrative complaint on October 16, 2018. *See, e.g.*, Mem. at 18 (incorrectly claiming that even a "deadlocked vote" would show "that this lawsuit is moot"). Further, "it is hard to say that intervention is *needed* to protect this theory when [Respondent] is the entity that chose not to try to intervene and raise the issue until now." *45Committee*, No. 20-cv-0809-ABJ, slip op. at 10 (finding that the purpose asserted by respondent did not weigh in favor of intervention because the "claimed jurisdictional argument is based on a theory that is better characterized as far-fetched than 'highly tenable'").

Indeed, Heritage Action claims that the FEC "acted" on the administrative complaint as early as April 6, 2021—less than two months after this case was filed. *See* Notice at 1, ECF 25. Yet since the case was filed more than a year ago, Heritage Action has remained on the sidelines while:

- the Clerk entered default against the Commission on May 10, 2021, *see* ECF No. 9;
- CLC moved for default judgment on May 24, 2021, demonstrating that the FEC's failure to act was contrary to law, *see* ECF No. 10; and
- this Court held, on March 25, 2022, that the FEC's "failure to act" was contrary to law and ordered "that defendant act" within 30 days, *see* ECF No. 16.

Only a month later, on April 25, 2022, did Heritage Action finally attempt to assert its mootness theory in this case, but even then it did so only as an *amicus curiae* and made no effort to intervene. *See* ECF No. 17. Indeed, in allowing Heritage Action to file an *amicus* brief, the Court emphasized that Heritage Action "is not a party to this case, so to the extent the brief . . .

seeks affirmative relief . . . it is improper." *See* Minute Order (Apr. 27, 2022). Even after the Court specifically highlighted Heritage Action's non-party status, Heritage Action still waited an additional two weeks—until after the Court issued its May 3 Order declaring the FEC failed to conform—to attempt to intervene. And when Heritage Action did eventually move for intervention, it did so to assert the same argument it had asserted weeks earlier in its *amicus* brief, and which it could have asserted 15 months ago. Heritage Action's motion to intervene is untimely. *Cf. 45Committee*, No. 20-cv-0809-ABJ, slip op. at 3, 7 (denying motion where "movant had ample opportunity to seek to intervene before the case came to its conclusion," and "movant offer[ed] no explanation for its failure to seek intervention [previously] and its decision to file an amicus brief instead"); *Salazar*, 2013 WL 12316848, at *2 ("Given the coalition's stated long-standing interest in [the litigation], the Court considers the fact that it waited nearly eight months to move to intervene in the case as a factor making the motion untimely.").

2. Heritage Action Was on Notice that Its Interests Were Threatened and the FEC Was Not Defending This Action Long Before Heritage Action Sought to Intervene

The Court should reject Heritage Action's claims that it could not have intervened earlier because it was unaware of the need "to defend its interests" because "the FEC has been unlawfully concealing its votes." Mem. at 18.

First, as Heritage Action readily concedes, the entire point of this lawsuit is that "the Plaintiff seeks potential direct regulation of Heritage Action under FECA." Mem. at 9 (citation omitted). Heritage Action's interest in avoiding liability did not arise only after the Court affirmed the FEC's failure to conform on May 3, 2022, as Heritage Action asserts, *see, e.g.*, Mem. at 11, since it has always been true under FECA that the FEC's failure to act on CLC's administrative

complaint could result in either the FEC being ordered to enforce the law against Heritage Action or a CLC lawsuit against Heritage Action, *see* 52 U.S.C. § 30109(a)(8).

Second, from the start of this case, Heritage Action had multiple reasons to suspect the Commission had deadlocked or likely would deadlock on a vote to proceed with enforcement action in this matter. To say the least, the FEC deadlocking on enforcement votes is not new or rare, and indeed, the risk of deadlock is inherent in the agency's structure. *See Citizens for Responsibility & Ethics in Washington*, 410 F. Supp. 3d at 6 ("[W]hen Congress mandated that the six-member Commission be split down party lines, it anticipated that partisan deadlocks were likely to result."); *see also 45Committee*, No. 20-cv-0809-ABJ, slip op. at 8 n.2 ("the agency's failure to defend this litigation was not 'unprecedented,' and it grew out of the FEC's unique structure and enacting legislation"). True to form, the FEC failed to appear in this case, and accordingly, the Clerk entered default against the agency in May 2021, just three months after the case was filed. ECF No. 9. This failure clearly signaled a potential deadlock, given that FECA requires four of its six Commissioners to authorize the defense of this suit, 52 U.S.C. §§ 30106(c), 30107(a)(6), just as FECA requires four Commissioners to agree to pursue enforcement action, *id.* § 30109(a)(2). *Cf. Campaign Legal Ctr.*, 334 F.R.D. at 6 (in case where FEC defaulted, respondent timely moved to intervene just "two months after the plaintiffs filed their complaint"). In addition, Heritage Action admits it was aware of a June 8, 2021 *New York Times* article, *see* Mem. at 1, 18, reporting that after "3-3 split decisions" some FEC Commissioners were "blocking the F.E.C. from defending itself in court when advocates sue the commission for failing to do its job," Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. Times (June 8, 2021).[3] Yet Heritage Action waited until after the Court entered default judgment

[3] *See* https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html.

against the FEC on March 25 2022, to submit a FOIA request seeking vote certifications, *see* ECF No. 17-4.

Despite apparently having reason to suspect that the vote certifications it sought existed at that time, Heritage Action nonetheless declined to intervene and instead sought leave to file an *amicus* brief. *See* ECF No. 17. Even after the Court reminded Heritage Action that it was not a party and had not sought reconsideration of the decision finding the FEC's failure to act contrary to law, Heritage Action waited another two weeks to seek to intervene. *Cf. 45Committee*, No. 20-cv-0809-ABJ, slip op. at 7 (finding that where prior amicus brief indicated awareness that agency was not defending the action, "movant cannot contend that it was not well aware by that time that the agency would not represent its interests").

In sum, Heritage Action's alleged unawareness of any possible FEC votes is implausible and thus does not justify its delay.

The Court should also reject Heritage Action's claim that its intervention motion is timely because it "sought to intervene as soon as it became clear that the Commission would not appeal the Court's May 3 order authorizing CLC to file a direct lawsuit against Heritage Action." Mem. at 10 (quotation marks omitted). This assertion is flawed in at least three respects.

First, Heritage Action offers no valid reason why it had to wait for an appeal at all to argue this Court lacks subject-matter jurisdiction. As Heritage Action acknowledges, "post-judgment intervention is rare," Mem. at 5, and indeed, it is usually permitted only "where the prospective intervenor's interest did not arise until the appellate stage," *Acree*, 370 F.3d at 50. For example, the cases allowing post-judgment intervention on which Heritage Action relies, *see* Mem. at 5-6, involve situations where the intervenor's interests were initially protected by a party who appeared and litigated the case before the trial court, but who then decided not to appeal, at which point it

became "clear" that the intervenor's interests "would no longer be protected." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022);[4] *see United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) (same); *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (same); *Acree*, 370 F.3d at 49-50 (same); *Amarin Pharm. Ireland Ltd. v. Food & Drug Admin.*, 139 F. Supp. 3d 437, 444 (D.D.C. 2015) (same). The situation is different in this case, where the FEC's failure to appear before the Court should have made it clear to Heritage Action as early as May 2020 that the FEC would not be representing any interests—its own or Heritage Action's—whether at trial or on appeal. *See, e.g.*, *Campaign Legal Ctr.*, 334 F.R.D. at 6 ("[T]here can be no question that a defaulting defendant [FEC] will not adequately represent [the respondents'] interests.").[5]

Second, Heritage Action also offers no valid reason why it had to wait for a potential appeal *by the FEC* before attempting to intervene to protect its interests. Heritage Action dedicates an entire section of its motion to the proposition that "the FEC cannot adequately represent Heritage Action's interests, either for purposes of seeking reconsideration or on appeal." Mem. at 17.

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[4] Like the respondent in *45Committee*, Heritage Action misrepresents *Cameron* when it "cites *Cameron* for the proposition that the test to be applied is whether motions are filed 'soon after the movant learned that the [defendant] would not appeal'"; instead, the test is whether "the movant sought to intervene as soon as it became clear the movant's interests *would no longer be protected* by the parties in the case." *45Committee*, No. 20-cv-0809-ABJ, slip op. at 6 (emphasis in original). *Cameron*'s ruling also rested heavily on "[r]espect for state sovereignty" and the "importance of ensuring that States have a fair opportunity to defend their laws in federal court," 142 S. Ct. at 1011, which are interests not present here.

[5] The other cases on which Heritage Action relies, *see* ECF No. 6, also do not support post-judgment intervention in a case where the defendant has never appeared and defaulted. *See Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (denying post-judgment intervention because movant merely "wished to advance a particular argument on appeal that DOL had not explicitly advanced in the District Court"); *Paisley v. CIA*, 724 F.2d 201, 203-04 (D.C. Cir. 1984) (allowing the Senate Select Committee on Intelligence, "a representative of a coordinate branch of government," to intervene in a FOIA case against the CIA, while warning of "the evils of permitting post-judgment intervention").

Heritage Action contends that the FEC is "ill-suited to represent Heritage Action's interests" because "the Commission is a regulatory agency in a position to regulate and sanction Heritage Action—a dynamic that precludes a finding of adequate representation under Rule 24(a)." *Id.* at 18-19; *accord Crossroads*, 788 F.3d at 321 (describing the FEC as a "doubtful friend to represent [a respondent's] interests"). In addition, Heritage Action admits that in light of the FEC's alleged "gamesmanship" in concealing voting records, "the FEC is not representing Heritage Action's interests—it is actively opposed to Heritage Action's interests."[6] Mem. at 18-19. This alleged "dynamic" was clear at the outset of this case, and not, as Heritage Action claims, only seven days after the Court issued its May 3 Order when the FEC failed to provide assurance that it would appeal, *see* Mem. at 7, 19. *Cf. Smoke*, 252 F.3d at 471 (finding intervention motion for purposes of appeal timely where "the potential inadequacy of representation came into existence only at the appellate stage"). Heritage Action cannot simultaneously claim that the FEC is unable to represent Heritage Action's interests while also attempting to excuse Heritage Action's delay in seeking intervention on the grounds that it expected the FEC—who failed to appear and defend this case more than a year ago—to protect its interests. *See, e.g.*, *45Committee*, No. 20-cv-0809-ABJ, slip op. at 3 ("The movant had ample opportunity to seek to intervene before the case came to its conclusion, and one cannot find that [movant] acted as soon as it was clear that no party would represent its interests.")

Finally, even if there were some valid reason for Heritage Action to wait for a potential FEC appeal before moving to intervene, it should have been clear as early as May 2021, when the FEC defaulted, that the agency was not going to appear or appeal in this case. Heritage Action

[6] Indeed, the FEC has recently stated in a brief filed with another court in this District a position that is directly contrary to the argument Heritage Action proposes to assert on appeal here. *See* Ex. 2 at 10.

claims that it waited until days ago to move to intervene because the FEC "never announced—and has unlawfully concealed"—its decision not to defend this suit. Mem. at 13. But the FEC was required by law to keep such enforcement decisions confidential absent a waiver from the respondent, 52 U.S.C. § 30109(a)(12), which Heritage Action did not provide to the FEC until March 31, 2022, *see* ECF No. 17-7 at 2. Even without an FEC "announcement," Heritage Action had more than enough reason to believe that the FEC had decided not to defend this suit given that the agency (1) defaulted in May 2021, (2) was the subject of a June 2021 *New York Times* article about its refusing to defend lawsuits like this case, and (3) failed to comply with the Court's March 25 Order requiring the agency to act within 30 days.

While Heritage Action claims that it "could not have predicted" the FEC would fail to conform to the Court's March 25 Order, Mem. at 13, that claim is inconsistent with Heritage Action's previously stated view that "March 25, 2022 [is] when it became clear that the FEC would likely never appear to defend this case," [Proposed] *Amicus* Br. at 1, ECF No. 17-3, and indeed, that is the date Heritage Action submitted its FOIA request to the FEC, *see* ECF No. 17-4. It is also inconsistent with Heritage Action's stated view, elsewhere in its intervention motion, that the FEC's failure to appear in the case was "gamesmanship" intended to allow CLC to sue Heritage Action. Mem. at 18. Moreover, by March 25, 2022, two other courts in this District had recently declared that the FEC failed to conform to nearly identical "contrary to law" orders issued in analogous FEC delay cases. *See* Order, *Giffords v. FEC*, No. 19-cv-1192-EGS (D.D.C. Nov. 1, 2021), ECF No. 75 ("Defendant FEC has failed to conform to this Court's Order entered September 30, 2021."); Order, *Campaign Legal Ctr. v. FEC*, No. 20-cv-1778-RCL (D.D.C. Feb. 11, 2021), ECF No. 24 ("Defendant [FEC] has failed to conform to this Court's Order entered on October 14, 2020."). Yet Heritage Action waited more than six weeks to seek leave to intervene.

In sum, Heritage Action provides no valid reason why it could not have attempted to intervene to protect its alleged interests long before the termination of this case.

3. Allowing Heritage Action to Intervene at this Late Date Would Be Highly Prejudicial to Plaintiff

If Heritage Action were permitted to intervene at this late date, it would cause a high "probability of prejudice to those already parties in the case." *Karsner*, 532 F.3d at 886 (citation omitted). The probability of prejudice is further heightened given that Heritage Action seeks post-judgment intervention. Indeed, the D.C. Circuit has specifically warned of "the evils of permitting post-judgment intervention," which effectively allows the intervenor to "reap[] the benefits of waiting to see whether [the Court's] judgment would be adverse, while imposing serious costs upon the parties and upon the courts," including spending "further time and resources relitigating" the merits of the case. *Paisley v. CIA*, 724 F.2d 201, 203 (D.C. Cir. 1984).

CLC has been litigating this matter for more than a year in an effort to hold Heritage Action accountable for campaign finance violations that began four years and two congressional election cycles ago. CLC has been diligent in seeking to protect its rights in this matter during that time. *See 45Committee*, No. 20-cv-0809-ABJ, slip op. at 11 (finding "belated intervention" by administrative respondent would prejudice CLC, who had "endured the failure to act on its administrative complaint, filed in 2018, until now" and where "[n]one of these delays have been due to plaintiff's lack of diligence or effort"). And CLC has already prevailed in this case and filed its private action, as Heritage Action points out. Mem. at 7. As such, Heritage Action's belated intervention here seeks both to re-run this case in its entirety and delay the private action.

Such duplications and delays would exacerbate the harms already ongoing because of Heritage Action's continuing failure to fully disclose its 2018 federal campaign finance activity, including (1) the "legitimate threat to the health of our electoral process" posed by the violations

alleged in CLC's administrative complaint, *see* March 25 Order at 2, ECF No. 16 (cleaned up); (2) harm to CLC's informational interests as an election watchdog that relies on full and accurate FEC reporting, *see id.* at 1 (finding that CLC has standing "because it seeks the information it claims Heritage Action has unlawfully withheld"); and (3) harm to CLC's ability to successfully prosecute its suit against Heritage Action given the risk that, with the passage of yet more time, evidence will spoil and witness recollections will fade, *see Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982) (explaining that "delay in filing suit may have resulted in a loss of evidence or witnesses"). As the *45Committee* court explained in nearly the identical context, "[CLC] would be seriously prejudiced by the belated intervention given how long this relatively simple case has been pending," and "the length of time that has elapsed since the actions that led to the underlying administrative complaint." *45Committee*, No. 1:20-cv-0809-ABJ, slip op. at 11.

This prejudice significantly outweighs any potential value in allowing Heritage Action to belatedly intervene to assert arguments the Court has already found are irrelevant to the May 3 Order that Heritage Action claims to want to challenge. *See* May 3 Order at 1 n.1 (explaining that while Heritage Action claims the FEC "did not act contrary to law," the Court's March 23 Order "already decided that the FEC acted contrary to law") *see also infra* Part I.B.1.

B. Heritage Action Lacks a Legally Protected Interest That Will Be Impaired Absent Intervention

Heritage Action lacks a legally protected interest that will be impaired absent intervention, and as such, it is not entitled to intervene as of right. *See Karsner*, 532 F.3d at 885.

First, while Heritage Action has framed its challenge as one to the Court's *jurisdiction* to issue the May 3 Order confirming that the FEC failed to conform, in substance, its arguments actually are pertinent only to the *merits* of this Court's March 25, 2022 ruling that the FEC's delay

was contrary to law. Second, Heritage Action lacks any protected interest in intervening to appeal the March 25 Order because it is not an appealable final order. Finally, and in any event, Heritage Action also lacks any legally protected interest in challenging the May 3 Order because that order was not a prerequisite to CLC filing its citizen suit against Heritage Action.

1. Heritage Action's Arguments Relate to the Merits of the Court's March 25, 2022 Order, Not Its Jurisdiction to Issue the May 3, 2022 Order

Heritage Action purports to seek leave to intervene to challenge the Court's subject-matter jurisdiction to issue the May 3 Order, arguing that the FEC's alleged deadlocked votes in either April 2021 or January 2022 are sufficient to show that the Commission acted on CLC's administrative complaint within 120 days, and that the FEC's delay in acting was not contrary to law. *See* Mem. at 1-5; Notice at 1, 3, ECF 25-1. But this argument has nothing to do with the Court's May 3 Order declaring that the FEC failed to conform within 30 days to its March 25 Order. Heritage Action does not contend the FEC took any action after January 14, 2022, let alone during the 30-day period following the Court's March 25 Order. *See* Notice at 1, ECF No. 25. Instead, Heritage Action relies on the nonsensical assertion that the FEC complied with the Court's March 25 Order retroactively in either April 2021 or January 2022. *See id.*; Mem. at 14. That Heritage Action relies on actions purportedly taken by the FEC that predate the March 25 Order to conform demonstrates that Heritage Action is actually arguing—or seeking to argue on reconsideration or appeal—that because the FEC allegedly did something months prior, this Court's March 25 Order ruling that the FEC had unlawfully delayed action on CLC's administrative complaint was in error. *See 45Committee*, No. 20-cv-0809-ABJ, slip op. at 10 ("[Respondent's] argument – that a . . . vote recorded in agency records before the Court ever entered its order constituted the statutorily required 'action' on the complaint – goes to the *merits* of plaintiff's complaint.").

Nonetheless, in an attempt to avoid the jurisdictional hurdles outlined below, Heritage Action styles its challenge as one to the Court's subject-matter jurisdiction to enter the May 3 Order. *E.g.*, Mem. at 2. As such, Heritage Action contends that if the FEC acted on Plaintiff's administrative complaint prior to May 3, then Plaintiff's claim that the FEC unlawfully delayed was automatically rendered moot. Mem. at 1-2, 5. But the argument that the alleged prior votes mooted Plaintiff's delay claim ignores both the statutory requirements and the relevant case law governing FEC delay suits and private rights of action under 52 U.S.C. § 30109(a)(8).

FECA provides a right of action against the FEC not simply when it fails to act on an administrative complaint, but more specifically when it fails to act on an administrative complaint *within 120 days*. 52 U.S.C. § 30109(a)(8)(A); *Citizens for Percy '84*, 1984 WL 6601, at *2 ("We hold that the 120 day period is jurisdictional and does not impose a deadline for final action."); *see also* FEC Br. at 15, *Giffords v. FEC*, No. 19-cv-1192-EGS (D.D.C. Jul. 25, 2019), ECF 26 (describing the 120-day provision as "a basic jurisdictional threshold"). As such, FECA "allows the Commission a maximum of 120 days, beginning from the date the complaint is filed, in which to conduct its investigation without judicial intrusion." *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 543 (D.C. Cir. 1980); *see also Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (finding that courts lack jurisdiction over delay suits under § 30109(a)(8)(A) *until* the 120-day period elapses). Here, Heritage Action does not dispute (nor could it) that the FEC failed to act on CLC's administrative complaint within 120 days: the first alleged "action" that Heritage Action claims the FEC took on CLC's October 16, 2018 administrative complaint occurred 904 days after that complaint was filed. *See* Notice at 1, ECF 25-1 (alleging that the FEC's FOIA response shows "the FEC voted (*i.e.*, acted) on CLC's administrative complaint on

April 6, 2021, and January 14, 2022"). Heritage Action thus does not and cannot challenge the Court's subject-matter jurisdiction to determine if the FEC's failure to act was contrary to law.

Once the 120-day jurisdictional threshold is met, a court is tasked with determining whether the FEC's failure to act is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). As this Court has recognized, this determination is made by applying "the factors set forth in *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), and *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*")." March 25 Order at 2, ECF No. 16. At issue is not simply whether the FEC has taken any conceivable action, but "whether the FEC has acted expeditiously" on the administrative complaint. *Common Cause*, 489 F. Supp. at 744. As such, a delay suit is not mooted simply because the FEC takes "some action" while it is pending. *45Committee*, No. 20-cv-0809-ABJ, 2021 WL 5178968 at *7 (D.D.C. Nov. 8, 2021); *see e.g.*, *Citizens for Percy '84*, 1984 WL 6601, at *4 (finding FEC's delay contrary to law even though just two months after the delay suit was filed the FEC voted to find reason to believe a violation occurred). Rather, when confronted by alleged agency action during the pendency of the delay litigation, courts simply consider whether those alleged actions indicate that the Commission is acting expeditiously under the relevant factors. *See, e.g.*, *DSCC*, 1996 WL 34301203 at *4, *9 (applying *TRAC* and *Common Cause* factors in finding FEC's delay contrary to law even though six months after suit was filed the FEC voted to find reason to believe and began an investigation).

Here, Heritage Action does not claim the FEC voted to pursue enforcement action against it in April 2021 and January 2022 or at any other time. *See* Mem. at 18. And so its claim that those alleged votes ended the FEC's delay hinge solely on its assertion that if the agency deadlocked on whether to find reason to believe Heritage Action broke the law, that deadlock automatically dismissed CLC's administrative complaint. *See* Mem. at 1. The court in *45Committee* has called

this identical assertion "not convincing," Order at 5-6, *45Committee*, No. 20-cv-0809-ABJ, ECF No. 32, and "better characterized as far-fetched than 'highly tenable,'" *45Committee*, slip op. at 9. As that court recognized, the FEC could not have dismissed an administrative complaint where (as is true in this case) the agency has neither publicly disclosed any dismissal, nor notified the administrative parties of any dismissal, which the agency would be required by law to do. *See, e.g.*, Order at 5, *45Committee*, No. 20-cv-0809-ABJ, ECF No. 32. (D.D.C. Apr. 21, 2022).[7] Further, even assuming Heritage Action is correct that the FEC deadlocked on finding reason to believe, a deadlock does not result in automatic dismissal, as the FEC itself has stated. *See* Ex. 2 at 10 (FEC stating its position that deadlocked votes to find reason to believe "do not automatically result in a dismissal or termination of the administrative matter"; instead, dismissal occurs only after "accepted motions that explicitly close MUR files," and confirming that "other votes have not historically functioned as dismissals or automatically terminated agency proceedings.").

Heritage Action points to a recent statement by a non-majority of Commissioners asserting Heritage Action's automatic dismissal theory, *see* Ex. B to Notice, ECF 25-2 at 6, but last year, a controlling bloc of Commissioners rejected a proposal to adopt this theory as Commission policy.[8]

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[7] Indeed, Heritage Action admits that the current practice of the Commission appears to be to hold matters open indefinitely when the Commissioners cannot agree on the disposition of a complaint. *See* Mem. at 1. And while Heritage Action expends considerable energy speculating about the various Commissioners' motives and arguing against this practice on policy grounds, it offers no statutory or other authority to show that a controlling bloc of Commissioners cannot block dismissal of an administrative complaint, including if they believe the failure to enforce would be contrary to law. Indeed, by creating a private right of action in instances where the FEC fails to act, Congress anticipated that the FEC's bipartisan structure would lead to agency gridlock and ensured that FEC dysfunction did not spell the end of enforcement of the campaign finance laws.

[8] *See* Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process at 1, https://www.fec.gov/resources/cms-content/documents/mtgdoc-21-21-A.pdf (Apr. 1, 2021) (proposing that, upon a failed reason-to-believe vote, the "file will be closed unless the Commission votes to keep the file open"); Certification, Agenda Doc. No. 21-21-A,

And the Commission has publicly explained the basis for its position that a deadlocked vote does not result in dismissal. *See* Exhibit A.

At bottom, Heritage Action's sole complaint is that the Court did not take into account the fact that the FEC allegedly took a series of votes (the substance of which is unknown) in April 2021 and January 2022 when it decided in March 2022 that the Commission's failure to act was contrary to law. For the reasons described below, an appeal on that basis is jurisdictionally barred and thus Heritage Action lacks any legally protected interest in intervening.

2. Heritage Action Is Not Entitled to Appeal the Court's March 25 Order Because It Is Not a Final Appealable Order

Heritage Action's interests would not be impaired if the Court denied its motion to intervene for purposes of appeal, because the March 25 Order is not a final appealable order. *See* Mem. at 11 (admitting that it "could not have intervened for the purpose of appeal until the Court issued a final appealable order"). Federal courts of appeals ordinarily have jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. § 1291. "It is well settled that, as a general rule, a district court remanding a case to an agency for significant further proceedings is not final." *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000) (internal quotation marks omitted). This rule "promotes judicial economy and efficiency by avoiding the inconvenience and cost of two appeals: one from the remand order and one from a later district court decision reviewing the proceedings on remand." *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013). Accordingly, the D.C. Circuit has repeatedly held that district court orders issued under 52 U.S.C. § 30109(a)(8)(C) finding that the FEC acted contrary to law and remanding to the agency to conform to its order within 30 days are not final. *See Citizens for*

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https://www.fec.gov/resources/cms-content/documents/Vote-Draft-Statement-of-Policy-Initial-Stage-in-the-Enforcement-Process-4-22-21.pdf (Apr. 22, 2021) (noting proposal was not adopted).

Responsibility & Ethics in Washington v. FEC, No. 18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018) (dismissing intervenor-respondent's appeal of district court's ruling that dismissal of administrative complaint was "contrary to law" order because "[t]he district court orders remanding the action to the Federal Election Commission are not final, appealable orders"); *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 16-5300, 2017 WL 4957233, at *1 (D.C. Cir. Apr. 4, 2017) (same); *Democratic Nat'l Comm. v. FEC*, No. 99-5123, 1999 WL 728351, at *1 (D.C. Cir. Aug. 4, 1999) (*per curiam*) (same).

Here, the Court's March 25 Order is just such an order. It ordered that the FEC's failure to act was contrary to law, that "the FEC conform to this Court's Order within 30 days by acting on CLC's administrative complaint,"' and "that this Court shall retain jurisdiction over this matter until the FEC takes final agency action with respect to CLC's administrative complaint." March 25 Order at 3, ECF No. 16. Under the binding precedent cited above, that ruling is not appealable.[9]

3. Heritage Action's Attempt to Tie its Appeal to the May 3 Order Is Unavailing

Finally, even if Heritage Action in fact sought to challenge the Court's May 3 Order declaring that the FEC failed to conform within 30 days, its proposed appeal would not impact CLC's right to bring a direct action against Heritage Action. *Cf.* Mem. at 5 (suggesting Heritage Action could challenge the *CLC v. Heritage Action* court's subject-matter jurisdiction on appeal in this case). The preconditions to a private right of action under FECA are that the Court "declare

[9] Further, the time to appeal the March 25 judgment elapses today, May 24, and thus any forthcoming appeal of the same would be untimely. Fed. R. App. P. 4(a)(1)(B). The time to alter or amend the March 25 judgment has also lapsed, Fed. R. Civ. P. 59(e). And the filing of a motion for reconsideration under Rule 60 would not toll either the time to appeal the March 25 judgment, or the effective date of the notice of appeal of the May 3 Order. *See id*. Fed. R. App. P. 4(a)(4)(A)(iv); 4(a)(4)(B)(i) (motion for reconsideration under Rule 60 only tolls notice of appeal when filed within 28 days of judgment).

. . . the failure to act is contrary to law" and that the FEC failed to conform with the declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). The private right triggers automatically upon the FEC's failure to conform. *Id.* ("*failing which* the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.") (emphasis added). There is no statutory requirement that a plaintiff-complainant obtain an order declaring the FEC failed to conform, or that the complainant has a right to sue. *See id.*; *see also, e.g.*, Compl. ¶¶ 5-6, *Citizens for Responsibility & Ethics in Washington v. American Action Network*, No. 1:18-cv-00945-CRC (D.D.C. Apr. 23, 2018), ECF No. 1 (private right of action under § 30109(a)(8)(C) in which FEC's deadline to act expired on April 19, 2018 and complainant filed private right of action on April 23, 2018); Docket Report, *Citizens for Responsibility & Ethics in Washington v. FEC*, 1:16-cv-02255-CRC (D.D.C.) (precursor suit to case 1:18-cv-00945 against the FEC, showing no order sought or obtained regarding the FEC's failure to conform). Thus, Heritage Action lacks any interest in challenging the May 3 Order. Mem. at 9, 16.

C. Heritage Action Lacks Standing to Intervene

"[A]ny person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). "The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads*, 788 F.3d at 316.

Heritage Action's alleged injury stems from the Court's determination that the FEC's failure to act was contrary to law, *see* Mem. at 8 ("Heritage Action has a significant and direct interest in the FEC's purported failure to act on CLC's administrative complaint because the FEC's refusal to enforce may shield Heritage Action from administrative enforcement and liability under

FECA"). But Heritage Action purports not to challenge that finding, and regardless it is not appealable. *See supra*.

Furthermore, the injury asserted is not redressable by vacatur of the May 3 Order, which simply declared that the FEC failed to conform within 30 days by acting on CLC's complaint—a fact that Heritage Action similarly does not challenge. And vacatur of the May 3 Order due to lack of subject-matter jurisdiction would similarly fail to redress Heritage Action's asserted injuries because Heritage Action will continue to be subject to enforcement by the FEC until the agency takes final action on Plaintiff's administrative complaint. *See* March 25 Order, ECF No. 16 (retaining jurisdiction until "until the FEC takes final agency action with respect to CLC's administrative complaint"). And to the extent Heritage Action's alleged injury is that its "interests would be seriously impaired if the Court issues an adverse judgment in CLC's direct lawsuit requiring Heritage Action to disclose its donors," Mem. at 17, that claimed injury is not at issue in this case at all; it is *only* redressable by the court in *CLC v. Heritage Action*. Because a successful challenge of the May 3 Order would not redress any of the injuries Heritage Action claims, Heritage Action has failed to show that it has standing to intervene.

Heritage Action seems to contend that if—as it asserts—this case is moot and the Court lacked subject-matter jurisdiction to enter the May 3 Order, it would be entitled to reversal of the declaration that the FEC failed to conform and that CLC was entitled to file suit directly. *See, e.g.,* Mem. at 9. But even if Heritage Action were correct on the merits of its jurisdictional argument with respect to the May 3 Order—it is not, *see supra* Part I.B.1—the only relief available would be vacatur, not reversal. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950) ("The established practice . . . in dealing with a civil case from a court in the federal system which has become moot while on its way" to final judgment is to vacate the preliminary rulings "and remand

with a direction to dismiss."). Because CLC's right to bring a private action triggered automatically upon the FEC's failure to conform, *see supra* Part I.B.3, vacatur of the May 3 Order would have no effect on the direct action, and thus the harms alleged by Heritage Action are not redressable.

Heritage Action's reliance on *Crossroads* for its position to the contrary is inapposite. There, the administrative respondent moved to intervene immediately after the complainant filed suit challenging the FEC's *dismissal* of the administrative complaint, and before the complainant obtained a private right of action. *Crossroads*, 788 F.3d at 385. Because the FEC had already dismissed the administrative complaint, the respondent in *Crossroads* would not face any civil liability for its alleged campaign finance violations *unless* the plaintiff was successful in showing that the FEC's dismissal was contrary to law. *Id*. As such, the Court found that "the injury is directly traceable to [complainant's] challenge" to the dismissal order. *Id.* Unlike in *Crossroads*, however, the FEC has *not* dismissed the administrative complaint against Heritage Action. Heritage Action therefore does not have a favorable determination from the FEC that is at risk should CLC prevail. Thus, contrary to Heritage Action's assertion, the Commission's inaction does not "shield Heritage Action from administrative enforcement and liability under FECA," Mem. at 8; rather, it exposes Heritage Action to CLC's private right of action under 52 U.S.C. § 30109(a)(8)(C).

Furthermore, in *Crossroad*s, the intervenor sought to preserve the *status quo* in which it faced "no exposure to further enforcement proceedings" and was not "exposed to civil liability via private lawsuit." *Crossroads*, 788 F.3d at 385, 387. Unlike in *Crossroads*, however, the FEC has not dismissed CLC's administrative complaint against Heritage Action and so Heritage Action has received no ruling from the FEC that it might have an interest in seeking to preserve. The rationale

of *Crossroads*—that intervention may be warranted to defend an FEC dismissal—is therefore inapplicable to this case involving the FEC's failure to act.

D. The Court Should Decline to Grant Heritage Action Permissive Intervention

Rule 24(b) allows a party to intervene upon "timely motion" when its claim or defense "shares with the main action a common question of law or fact," and when intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). Heritage Action has failed to bring a timely motion or to establish either of these prongs. And as discussed above, allowing Heritage Action to intervene at this late date would cause significant delay and would unduly prejudice Plaintiff. *See supra* Part I. As such, the court should decline to grant Heritage Action permissive intervention. *See 45Committee*, No. 20-cv-0809-ABJ, ECF 37 at 12 (denying permissive intervention motion under similar circumstances as untimely).

II. In the Alternative, the Court Lacks Jurisdiction to Decide the Motion to Intervene Due to Heritage Action's Notice of Appeal

To the extent Heritage Action's May 20, 2022 notice of appeal was valid and effective, it divested this Court of jurisdiction to decide Heritage Action's pending motion to intervene. As such, the Court should deny the motion under Rule 62.1(a)(2).

To prevent situations where a district court and court of appeals could have "the power to modify the same judgment," as a general rule, "[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58-60 (1982) (*per curiam*); *see also In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) (explaining that the rule is intended "to keep the district court and the court of appeals out of each other's hair"). Although this rule is subject to certain exceptions, none of those exceptions include a pending motion to intervene. *See, e.g.*, Fed. R. App. P. 4(a)(4) (delaying the

effectiveness of a notice of appeal until after the district court decides certain post-judgment motions, but not for a motion to intervene). As a result, at least one court in this district has found that "the filing of a notice of appeal deprives a district court of jurisdiction over a motion to intervene." *Amarin Pharm.*, 139 F. Supp. 3d at 439-40.[10]

Here, Heritage Action filed its motion to intervene on May 10. *See* ECF No. 24. In that motion, Heritage Action itself acknowledged that "the Court may lose jurisdiction to rule on the motion to intervene when Heritage Action files a notice of appeal." Mot. at 2 (citing *Amarin Pharm.*, 139 F. Supp. 3d at 443). Just 10 days later, on May 20, Heritage Action filed its notice of appeal, *see* ECF No. 26, even though the time to appeal the May 3 Order does not elapse until July 2, 2022. While Heritage Action's purported appeal may ultimately be dismissed by the D.C. Circuit because as a non-party Heritage Action had no right or power to file it, *see Marino v. Ortiz*, 484 U.S. 301, 303-04 (1988), until such dismissal this Court appears to lack jurisdiction to rule on the motion to intervene.

The Court should reject any argument by Heritage Action this jurisdictional bar should yield because Heritage Action allegedly had to file a notice of appeal when it did to preserve its ability to appeal in the event the Court allowed it to intervene. *See* Mot. at 2. First, federal courts lack the "authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Second, any time pressure Heritage Action may claim required it to notice an appeal before resolution of its intervention motion was a problem of its own creation, given that it could have attempted to intervene at any time since the outset of this case 15 months ago. *See supra* Part I.A. Third, Heritage Action chose not to give the Court time to rule on the

[10] Although the D.C. Circuit has never addressed the issue, "the courts of appeals in most of the circuits have concluded that an effective notice of appeal divests a district court of jurisdiction to entertain an intervention motion." *Amarin Pharm.*, 139 F. Supp. 3d at 440 (collecting cases).

intervention motion before noticing its appeal of the May 3 Order despite having until July 2 to file the notice. *See* Fed. R. App. P. 4(a)(1)(B) (allowing for 60 days to file a notice of appeal when a U.S. agency is a party). Finally, if Heritage Action thought 60 days was not enough time to wait for a ruling on its intervention motion before filing its notice of appeal, it could have filed a motion for an extension of time in which to take an appeal, *see* Fed. R. App. P. 4(a)(5), but chose not to.

The federal rules authorize this Court to deny a motion that it lacks authority to grant due to the docketing of an appeal. Fed. R. 62.1(a)(2). Accordingly, if the Court finds that it lacks jurisdiction over Heritage Action's motion, it should deny the motion.

CONCLUSION

For the foregoing reasons, the Court should deny Heritage Action's motion for leave to intervene.

Dated: May 24, 2022

Respectfully submitted,

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