ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-5140, 22-5167

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

HERITAGE ACTION FOR AMERICA,
Movant-Appellant.

On Appeal from the United States District Court
for the District of Columbia, No. 1:21-cv-406-TJK
Before the Honorable Timothy J. Kelly

PLAINTIFF-APPELLEE CAMPAIGN LEGAL CENTER'S MOTION FOR SUMMARY AFFIRMANCE AND DISMISSAL FOR LACK OF APPELLATE JURISDICTION

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GLOSSARY OF ABBREVIATIONS

CLC	Campaign Legal Center
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

INTRODUCTION

The Court should summarily dispose of these consolidated appeals because the district court did not abuse its discretion when it determined that non-party-Appellant Heritage Action for America's ("Heritage Action") post-judgment motion to intervene was untimely, and because, as a non-party, Heritage Action has no right to appeal the merits determination below.

For nearly four years, Plaintiff-Appellee Campaign Legal Center ("CLC") has sought to hold Heritage Action accountable for violating federal campaign finance laws when it spent hundreds of thousands of dollars supporting congressional candidates in 2018 without disclosing the sources of its funding. After years of inaction by Defendant Federal Election Commission ("FEC" or "Commission"), which is tasked with enforcing the federal campaign finance laws, CLC filed suit against the Commission for unlawful delay on February 16, 2021. Over a year later, after the FEC failed to appear and defend the lawsuit, CLC won default judgment against the agency. Six weeks later, the case was terminated and CLC exercised its right under the Federal Election Campaign Act ("FECA") to file a citizen suit against Heritage Action to enforce the law.

Only then did Heritage Action belatedly move to intervene in this matter, for the sole purpose of raising arguments it could have raised at the outset of the case, and which it had already unsuccessfully advanced a month earlier as *amicus curiae*,

in an attempt to re-litigate the merits of the settled judgment below. Before the district court denied its motion to intervene, Heritage Action filed a purported notice of appeal seeking to challenge the judgment below despite not being a party.

Because the district court did not abuse its discretion in denying the motion to intervene as untimely, that ruling should be summarily affirmed. And because the Court lacks appellate jurisdiction over a nonparty's attempt to appeal, the remainder of this case should be summarily dismissed.

BACKGROUND[1]

Nearly four years ago, CLC filed an administrative complaint with the FEC alleging that Heritage Action violated FECA by failing to disclose its donors despite spending hundreds of thousands of dollars on election advertising in support of congressional candidates in 2018. ECF 1-1. Nearly two-and-a-half years later, with no indication the FEC had acted on its complaint, CLC filed suit against the Commission alleging unlawful delay. ECF 1. The FEC failed to appear and defend the suit. ECF 9. Another year passed. Then, on March 25, 2022, the district court, finding that CLC's allegations against Heritage Action were credible and outlined a

[1] The applicable statutory and regulatory background is set forth in CLC's Opposition to Heritage Action's pending motion for an abeyance. *See* Pl.-Appellee CLC's Response in Opp'n to Mot. to Hold Appeals in Abeyance at 3-8 ("Opp. to Abeyance"). Citations to the record below are designated by ECF number.

legitimate threat to the health of our electoral process, entered default judgment against the FEC and ordered the Commission to take action within 30 days. ECF 16.

On the final day for the FEC to comply with the court's order, and after taking no action to defend its alleged interests during the fourteen months that CLC's lawsuit against the FEC was pending, Heritage Action sought leave to appear as *amicus curiae*. ECF 17. As *amicus*, Heritage Action submitted a brief advancing the same arguments it now seeks to raise on appeal. ECF 22.[2] The next day, CLC filed a motion seeking an order declaring that the FEC had failed to conform with the Court's order within 30 days and confirming CLC's right to file a citizen suit against Heritage Action under FECA. ECF 21; *see also* 52 U.S.C. § 30109(a)(8)(C). The Court granted CLC's motion on May 3, 2022 and terminated the lawsuit the next day. ECF 23; May 4, 2022 Minute Order. Pursuant to 52 U.S.C. § 30109(a)(8)(C), CLC filed its FECA citizen suit against Heritage Action on May 5, 2022. *See Campaign Legal Ctr. v. Heritage Action*, No. 1:22-cv-1248 (D.D.C. May 5, 2022).

Five days later, Heritage Action moved for post-judgment intervention in the closed case below for purposes of seeking reconsideration or appealing the Court's May 3 Order. ECF 24. Ten days after that, while the motion to intervene was still

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[2] In granting leave for Heritage Action to appear as amicus, the district court noted that Heritage Action "is not a party to this case, so to the extent the brief . . . seeks affirmative relief, it is improper." *See* Apr. 27, 2022 Minute Order. The district court further noted that "it has already decided the issue the brief addresses—whether the FEC acted 'contrary to law' under FECA." *Id*.

pending, Heritage Action filed a notice of appeal of the district court's May 3 Order declaring the FEC had failed to conform and acknowledging CLC's right to sue Heritage Action. ECF 26. The appeal was docketed as Case No. 22-5140.

After holding a status conference at which CLC and Heritage Action were both heard on the intervention motion, the district court denied the motion as untimely. ECF 34.[3] The court found that Heritage Action did not move to intervene "as soon as it became clear that its interests would no longer be protected by the parties in this case." *Id.* at 3-4. Thus, the court saw "no reason to depart from what usually happens when a party moves to intervene after passing on a clear opportunity for pre-judgment intervention." *Id*. at 3 (internal quotation marks and citations omitted). The court noted that "the Clerk's entry of default and CLC's motion for default judgment made clear by May 2021 . . . that no party would be protecting Heritage Action's interests." *Id*. at 4. Because Heritage Action waited "until more than a year after CLC filed suit, almost a year after CLC moved for default judgment, and more than a month after the Court entered default judgment," the court found the motion untimely. *Id*. The district court further found that Heritage Action's primary purpose for intervening—reconsideration of settled issues in the case—also weighed against the timeliness of its motion. *Id.* at 4-5. Moreover, the court noted

[3] The underlying ruling denying Heritage Action's motion to intervene, ECF 34, can be found in Case No. 22-5167, where it was filed by Heritage Action on June 23, 2022.

that Heritage Action could assert its alleged interests elsewhere, including in CLC's ongoing FECA citizen suit against Heritage Action. *Id*. at 5. Finally, the district court found that allowing Heritage Action to intervene post-judgment would prejudice CLC with further unjustified delay. *Id.* at 6-7.

Two days later, Heritage Action noticed its appeal of the denial of intervention, ECF 35, which was docketed as Case No. 22-5167 and consolidated with the earlier appeal.

LEGAL STANDARDS

"[M]otions for summary disposition will be granted where the merits of the appeal or petition for review are so clear that plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Cascade Broad. Grp. Ltd. v. F.C.C.*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (citation and quotations omitted). "Parties are encouraged to file such motions where a sound basis exists for summary disposition." D.C. Circuit Handbook of Practice & Internal Procedures, § VIII.G.

The Court reviews a motion to dismiss for lack of appellate jurisdiction *de novo* pursuant to its "special obligation to satisfy itself . . . of its own jurisdiction." *United States v. Scantlebury*, 921 F.3d 241, 246 (D.C. Cir. 2019).

ARGUMENT

The Court should summarily dispose of Heritage Action's consolidated appeals. First, the Court should summarily affirm the district court's denial of Heritage Action's motion to intervene because the court did not abuse its discretion in finding that the post-judgment motion was untimely. Second, the Court should dismiss the remainder of this appeal for lack of appellate jurisdiction because Heritage Action is not a party to this case.

I. The Court Should Summarily Affirm the District Court's Denial of the Motion to Intervene for Untimeliness.

Intervention requires, among other things, a "timely motion." Fed. R. Civ. P. 24(a)-(b). Whether a motion to intervene is timely "is to be determined by the [district] court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP v. New York*, 413 U.S. 345, 366 (1973); *see also United States v. Brit. Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006) ("We review the District Court's denial of intervention for untimeliness under the abuse of discretion standard.").

Applying this lenient standard of review, this Court has summarily affirmed district court denials of motions to intervene for untimeliness on numerous occasions. *See, e.g.*, *SEC v. Sec. Inv. Prot. Corp.*, No. 12-5304, 2013 WL 1164306, at *1 (D.C. Cir. Mar. 12, 2013) (granting summary affirmance where "[a]ppellant has not shown that the district court erred in denying his untimely motion to

intervene"); *Stewart v. Rubin*, 124 F.3d 1309 (D.C. Cir. 1997) (Table Op.) (granting summary affirmance because "the district court did not abuse its discretion in finding that the motion to intervene . . . was untimely").

The Court should do the same here. In determining whether a motion to intervene is timely, district 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 v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008) (citations omitted). Moreover, as the Supreme Court has recently recognized, "[t]he 'most important circumstance relating to timeliness is' whether [the movant] 'sought to intervene as soon as it became clear that [its] interests would no longer be protected by the parties in the case." ECF 34 at 4 (quoting *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022)). Where, as here, the movant first seeks intervention after judgment, there is a "presumption that post-judgment motions to intervene will be denied." *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999).

Applying this standard, the district court acted well within its discretion to deny intervention. *First*, as the district court observed, Heritage Action passed on clear opportunities for pre-judgment intervention, as it "did not move to intervene

until more than a year after CLC filed suit, almost a year after CLC moved for default judgment, and more than a month after the Court entered default judgment." ECF 34 at 3-4. Far shorter delays between the filing of suit and a motion to intervene have been deemed untimely in this Circuit. *See, e.g.*, *Brit. Am. Tobacco*, 437 F.3d at 1239 (six months); *Defs. Of Wildlife v. Salazar*, No. 12-cv-1833 (ABJ), 2013 WL 12316848, at *2 (D.D.C. July 17, 2013) (eight months).

Second, the district court explained that Heritage Action's lengthy delay was unjustified since it failed to seek intervention "'as soon as it became clear that [its] interests would no longer be protected by'" the FEC, which never appeared in the case. ECF 34 at 4 (quoting *Cameron*, 142 S. Ct. at 1012) (alteration in original; internal quotation marks omitted). As the district court explained, while Heritage Action waited until May 2022 to move to intervene,

> both the Clerk's entry of default and CLC's motion for default judgment made clear by May 2021—long before an appeal was even an option—that no party would be protecting Heritage Action's interests. At the very least, the vulnerability of Heritage Action's interests would have been clear in March 2022, when the Court found that the Commission's failure to act was contrary to law and entered default judgment.

Id. (citation omitted). For this reason, the district court concluded, Heritage Action was unjustified in waiting until May 2022 to see if the FEC would finally appear in the case and appeal before attempting to intervene. *See id.*[4]

The district court was correct and did not abuse its discretion in rejecting Heritage Action's claim that its delay was justified based on purportedly new information it had only recently obtained through FOIA, because Heritage Action "did not file a FOIA request until *after* the Court granted default judgment" on March 25, 2022.[5] ECF 34 at 4. By that point, "the vulnerability of Heritage Action's interests would have been clear." *Id.* And yet, Heritage Action waited another month before first seeking to appear in the case, and it did so not as an intervenor, but as an *amicus curiae*. *See supra* p. 2.

Third, the district court was correct and did not abuse its discretion in finding that Heritage Action's purpose for intervention further supported denying the motion as untimely. As the district court explained, Heritage Action's primary goal in

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[4] This conclusion is correct especially considering Heritage Action's categorical admission to the district court that "the FEC cannot adequately represent Heritage Action's interests" in litigation because it "is a regulatory agency in a position to regulate and sanction Heritage Action." ECF 24-1 at 17-19.

[5] The court found that there was "no reason to believe Heritage Action *could not* have brought [the relevant information] to the Court before it entered judgment." ECF 34 at 5 n.2 (emphasis in original). That "Heritage Action received [the requested records] only recently" is "because it asked for them only recently." *Id*.

attempting to intervene was "to reopen the settled issues in the case" by seeking reconsideration of the Court's May 3, 2022 judgment. ECF 34 at 5. Relitigating a case, even under an alleged jurisdictional theory, weighs against finding a post-judgment motion timely. *See id*. (citing *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1294 (D.C. Cir. 1980); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977)). As the district court noted, Heritage Action "could have moved to intervene long ago" for this purpose given that the FEC records upon which Heritage Action bases its alleged jurisdictional argument have existed since April 2021. *See id.* at 5 n.2.

Heritage Action's alternative purpose of intervening to appeal also did not render its motion timely. As the district court found, the FEC's May 2021 default made it clear, long before Heritage Action attempted to intervene, that the agency would not be representing any interests—its own or Heritage Action's—whether at trial or on appeal. *See* ECF 34 at 4 (citing *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 6 (D.D.C. 2019) ("[T]here can be no question that a defaulting defendant [FEC] will not adequately represent [the respondents'] interests.")).[6]

[6] Courts generally allow post-judgment intervention to appeal only where "the potential inadequacy of representation came into existence *only* at the appellate stage," *Dimond v. D.C.*, 792 F.2d 179, 193 (D.C. Cir. 1986) (emphasis added), such as where a party who appeared and litigated the case before the trial court decides post-judgment not to appeal, *see, e.g.*, *Cameron*, 142 S. Ct. at 1012; *Am. Tel. & Tel. Co.*, 642 F.2d at 1295. Here, the FEC never appeared at all.

Fourth, the district court determined that denying intervention would not deprive Heritage Action of its opportunity to assert its purported interests. ECF 24 at 5-6. The court suggested that "Heritage Action can advance the same jurisdictional arguments in [CLC's citizen suit] that it wants to make here." *Id.* at 6. Indeed, Heritage Action has already informed this Court that it plans to do just that. *See* Appellant's Mot. to Hold Appeals in Abeyance at 14 (asking this Court to hold these appeals in abeyance while it attempts to relitigate the "common issue[]" of whether the FEC's delay was contrary to law in *Campaign Legal Ctr. v. Heritage Action*) (hereafter, "Abeyance Mot.");[7] *but see* Opp. to Abeyance Mot. at 13-15 (opposing abeyance *inter alia* on grounds that these appeals are ripe for summary disposition).

Finally, the district court found that Heritage Action's "delay in moving for intervention will prejudice CLC." ECF 34 at 6 (internal quotation marks omitted). This Court has 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

[7] Heritage Action's motion for an abeyance further undermines its own arguments in favor of intervention here. In its motion to intervene, Heritage Action claimed it had standing and a concrete legal interest in intervening in this action to *avoid* being forced to defend itself in the citizen suit brought by CLC. ECF 24-1 at 9-10, 16-17. But now, Heritage Action seeks to postpone this Court's review of the denial of its motion to intervene so that it can defend itself in that same citizen suit. Abeyance Mot. at 14.

upon the parties and upon the courts," including spending "further time and resources relitigating" the merits of the case. *Paisley v. C.I.A.*, 724 F.2d 201, 203 (D.C. Cir. 1984). Here, as the district court recognized, reopening the settled issues in this case would "likely require factfinding and argument," and "would mean further delay on the adjudication of claims that have been pending since CLC first filed its administrative complaint in 2018 and are now the subject of the new lawsuit." ECF 34 at 6; *cf. Amador Cnty., Cal. v. U.S. Dep't of the Interior*, 772 F.3d 901, 905 (D.C. Cir. 2014) (denying intervention where it "would delay resolution of the merits," require "reopening discovery," and "revisit[ing] issues that ha[ve] already been decided"). Not only that, but further delay would exacerbate the harms already arising from what the district court described as the "legitimate threat to the health of our electoral process" posed by the campaign finance violations alleged against Heritage Action. ECF 16 at 2.

In sum, the district court applied each of the timeliness factors, examined all of the relevant circumstances, and did not abuse its discretion in correctly concluding that Heritage Action's post-judgment motion to intervene was untimely. The Court should summarily affirm.[8]

[8] As CLC argued before the district court, Heritage Action's motion to intervene failed to satisfy Rule 24 on numerous grounds, including untimeliness. *See* ECF 30 at 7-29. Because the District Court denied Heritage Action's motion as

II. The Court Should Dismiss Heritage Action's Purported Merits Appeal for Lack of Appellate Jurisdiction.

"The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (citations omitted). This well-settled rule is codified in the Federal Rules of Appellate Procedure, which specify that only a "party or parties" are entitled to timely appeal certain district court orders. Fed. R. App. P. 3(b)-(c), 4(a)(4)-(6). The Supreme Court has interpreted these requirements as a "jurisdictional threshold." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). Accordingly, "a nonparty," such as Heritage Action, "[can]not notice an appeal under Rules 3 and 4" but must instead "pursue intervention—the requisite method for a nonparty to become a party to a lawsuit." *Cameron*, 142 S. Ct. at 1015 (Thomas, J., concurring) (internal citations and quotations omitted).

Because the district court correctly denied its motion to intervene, Heritage Action is not entitled to an appeal of the merits judgment below, and the appeal docketed as No. 22-5140 should be dismissed for lack of appellate jurisdiction. *See Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1328 (D.C. Cir. 2013) ("Because a party *unsuccessfully* appealing a denial of intervention is not a 'party,' it may not obtain review of any district court holding other than the denial of intervention.");

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untimely, CLC seeks summary affirmance on that ground only, without waiver of its arguments that Heritage Action failed to satisfy other requirements of Rule 24.

see also Brit. Am. Tobacco, 437 F.3d at 1240 (same); *Blumenthal v. FERC*, No. 03-1066, 2004 WL 1946450, at *1 (D.C. Cir. Sept. 1, 2004) (same); *Alternative Rsch. & Dev. Found. v. Veneman*, 262 F.3d 406, 411 (D.C. Cir. 2001) (same); *Smoke v. Norton*, 252 F.3d 468, 471 n.* (D.C. Cir. 2001) (same).[9]

CONCLUSION

In sum, the Court should summarily affirm the district court's denial of Heritage Action's post-judgment motion to intervene for untimeliness since the district court's ruling was correct and clearly not an abuse of discretion. Because Heritage Action is a non-party, the Court should also dismiss its attempted appeal of the district court's May 3, 2022 order for lack of appellate jurisdiction.[10]

Date: July 8, 2022

Respectfully submitted,

/s/ *Molly E. Danahy*

[9] Notably, Heritage Action's attempt to appeal the district court's merits rulings is ineffective regardless of its right to intervene. Heritage Action did not have any right to appeal until the court denied intervention, rendering its May 20 notice of appeal ineffective, and it failed to include the merits rulings in its notice appealing the denial of intervention. ECF 35; *see Marino*, 484 U.S. at 304 ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."); *but see Alternative Rsch. Dev. Found.*, 262 F.3d at 411 (holding that appellate courts have jurisdiction over appeals of denial of intervention as of right).

[10] Even assuming *arguendo* that this Court had appellate jurisdiction over the appeal in case No. 22-5140, that appeal would lack merit, for the reasons CLC would demonstrate in full briefing on the merits if such briefing were deemed necessary.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1), this document contains 3554 words.

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/s/ *Molly E. Danahy*
Molly E. Danahy

CERTIFICATE OF SERVICE

The undersigned certifies that I filed the foregoing document using this Court's CM/ECF system, which effected service on all parties, on July 8, 2022.

/s/ *Molly E. Danahy*
Molly E. Danahy

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Campaign Legal Center, *Plaintiff-Appellee*, v. Federal Election Commission, *Defendant*, Heritage Action for America, *Movant-Appellant*.	Nos. 22-5140, 22-5167

CAMPAIGN LEGAL CENTER'S CERTIFICATE OF PARTIES AND RULE 26.1 DISCLOSURE STATEMENT

(A) Parties and Amici. Campaign Legal Center ("CLC") is the plaintiff in the district court and appellee in this Court. CLC is a nonpartisan, nonprofit corporation that works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.

The Federal Election Commission ("FEC") is the defendant in the district court but defaulted and has not appeared in the district court or in this Court. Heritage Action for America ("Heritage Action"), which was not a party in the district court,

was a movant in the district court and is the appellant in this Court. Heritage Action and the Institute for Free Speech appeared as *amici curiae* in the district court.

(B) Disclosure Statement. Pursuant to D.C. Circuit Rule 26.1, Appellee CLC makes the following disclosure: CLC is a 501(c)(3) nonpartisan, nonprofit organization, that has no parent corporation, does not issue stock, and in which no publicly held corporation has any form of ownership interest.

Date: July 8, 2022

Respectfully submitted,

/s/ *Molly E. Danahy*

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