ORAL ARGUMENT SCHEDULED FOR JANUARY 20, 2023
Nos. 22-5140, 22-5167

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

HERITAGE ACTION FOR AMERICA,
Movant-Appellant.

On Appeal from the United States District Court
for the District of Columbia (Kelly, J.)

REPLY BRIEF FOR APPELLANT

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GLOSSARY

The Act or FECA	Federal Election Campaign Act of 1971, 52 U.S.C. § 30101 *et seq.*
AT&T	*United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980)
The Center	Campaign Legal Center
FEC or the Commission	Federal Election Commission
FEC Dkt.	District-Court Docket Entries in *Heritage Action for America v. Federal Election Commission*, No. 1:22-cv-1422 (D.D.C.) (Nichols, J.)
FERC	Federal Energy Regulatory Commission
FOIA	Freedom of Information Act, 5 U.S.C. § 552
Heritage Action	Heritage Action for America
New Models	*CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021), *reh'g en banc denied*, No. 19-5161, 2022 WL 17578942 (D.C. Cir. Dec. 12, 2022)
NRSC	*FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992)

INTRODUCTION AND SUMMARY OF ARGUMENT

In its opening brief, Heritage Action explained why it can intervene to challenge the district court's improper authorization of the Center's citizen suit—an authorization based on what four Members of this Court recently called a "concern[ing]" practice by the FEC of "concealing" its "decisions" and refusing "to defend against" challenges to "the perceived inaction." *CREW v. FEC*, No. 19-5161, 2022 WL 17578942, at *3 (D.C. Cir. Dec. 12, 2022) (*New Models*) (Rao, J., concurring in the denial of rehearing en banc). In response, the Center mounts a half-hearted defense of the FEC's misconduct, and its efforts to insulate that deception from further review wilt under scrutiny.

On intervention, the Center never disputes that a motion is timely if it would not cause unfair prejudice to the existing parties. And the Center cannot establish any such prejudice here, as the district court was required to consider whether the Commission's deadlocked vote mooted this failure-to-act case regardless of *whether* Heritage Action intervened, much less *when*.

On citizen-suit authorization, the Center does not seriously dispute this Court should vacate the orders authorizing the citizen suit if the Commission had acted on the Center's administrative complaint before the entry of those orders. Instead, it insists the FEC's deadlocked vote was no action at all. But

that position contradicts the text and structure of the Act, the unbroken precedents of this Court stretching back to the 1980s, and decades of FEC practice, including the April 2021 vote certification here. As these sources confirm, the FEC "engage[d] in final agency action when … it deadlock[ed] about whether … to proceed with an investigation." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016). This Court should therefore reject the Center's spurious theory and relieve Heritage Action from having to defend against a suit that should never have been authorized at all.

ARGUMENT

I. HERITAGE ACTION HAS THE RIGHT TO INTERVENE.

A. Heritage Action's Intervention Motion Was Timely.

1. The Center Will Not Suffer Any Cognizable Prejudice.

Even though "the most important consideration" for timeliness is whether intervention would unfairly "disadvantage the existing parties," *Roane v. Leonhart*, 741 F.3d 147, 152 (D.C. Cir. 2014), the Center waits until the end of its argument on intervention to address it. Center.Br.35. That is understandable, for the Center can show no such prejudice here.

a. As Heritage Action explained in detail (Heritage.Br.31-36), the Center can "assert no prejudice" here in light of the district court's

"independent obligation to assure itself of its own jurisdiction." *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). The Center's only response consists of two flawed arguments confined to a single page. Center.Br.37.

First, the Center dismisses the "jurisdictional" nature of the objection because it still "would require additional argument." *Id.* That defies *Acree* and common sense. If Heritage Action had never sought to intervene, but had filed another *amicus* brief on May 10, the district court still would have had to entertain the "additional argument" here, *i.e.*, that the 2021 deadlock required dismissal of the case as moot. *Id.* The Center has no answer to this point.

Second, the Center claims "Heritage Action's arguments actually go to the *merits*." Center.Br.37. But it never denies that if Heritage Action is right on "the *merits*," *id.*, then the district court lacked jurisdiction and thus had consider the issue regardless of party status. That "the merits and jurisdiction" are "intertwined" here is hardly unusual, and "a court can decide all of the merits issues in resolving a jurisdictional question." *Brownback v. King*, 141 S. Ct. 740, 749 (2021) (cleaned up). And even if the 2021 deadlock did not go to jurisdiction, the court still had to consider it in light of the FEC's concealment, Heritage.Br.35-36—another point the Center fails to address.

b. In any event, intervention here threatens no unfair prejudice because an appeal or reconsideration would not disrupt this case's ordinary progress. Heritage.Br.26-31. Again, the Center's responses come up short.

i. While the Center makes much of Heritage Action's "'preferred aim'" of seeking reconsideration first, Center.Br.39, it never disputes the district court abused its discretion by denying intervention outright rather than limiting intervention to an appeal, Heritage.Br.31. Its claims of prejudice from reconsideration (Center.Br.36-39) are thus beside the point. And when it comes to harm from an appeal-only intervention, the Center has little to say.

First, the Center cites an unpublished summary affirmance of an intervention denial where the record indicates the movant had "sought *only* to appeal." Center.Br.40. But there is no need to trawl through the record underlying a terse, nonprecedential order here, as binding authority already establishes that a prevailing party is "not 'unfairly prejudiced simply because an appeal … was brought by'" an intervenor "'rather than by one of the original' parties." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1013 (2022); *see* Heritage.Br.26-28.

Second, the Center attacks a strawman, claiming Heritage Action thinks no "party could *ever* be prejudiced by a post-judgment intervenor's appeal."

Center.Br.40. But no one denies that intervention to pursue an appeal could be prejudicial if, for instance, it threatened significant "disruption," such as when it has "'the potential for seriously disrupting' … approaching elections." *Cameron*, 142 S. Ct. at 1013 (quoting *NAACP v. New York*, 413 U.S. 345, 368-69 (1973)). But here, "intervention would not have produced anything like the disruption … in *NAACP*." *Id.* To the contrary, the "motion was filed within the … window" for pursuing an appeal, and therefore "did nothing to delay the suit's normal progress." *Id.* at 1019 (Kagan, J., concurring in the judgment).

Third, the Center insists that allowing intervention here would reward "sandbagging" by permitting the presentation of a "new argument" on appeal. Center.Br.41-42. But as the Center admits, Heritage Action is merely seeking to present "'newly-discovered evidence'" bearing on the central issue in this case: Whether the FEC had failed to act. Center.Br.37. In any event, *Cameron* rejected the idea that a movant's desire to pursue an "issue (third-party standing) that had not been raised" by the original defendant "would prejudice" the plaintiffs. 142 S. Ct. at 1013. As it explained, granting intervention "would not have necessitated that the third-party standing issue be entertained" because the relevant court "could have considered whether the third-party standing argument should be considered despite the [original

defendant's] failure to raise the issue at an earlier point." *Id.* This Court likewise has reversed a district court for concluding that a plan "'to inject additional arguments'" in "an appeal" foreclosed intervention, explaining that "[p]olicing the limits upon what the appellants may argue on appeal is properly left to this court." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). And because Heritage Action seeks to advance "'a jurisdictional issue which cannot be waived,'" it should be free to do so notwithstanding the "general 'rule against consideration of issues raised by intervenors and not by petitioners.'" *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013).

ii. In all events, reconsideration would not unfairly prejudice the Center either. Heritage.Br.28-31. The Center does not deny that because it "won" by "default," it never had to actually litigate the authorization issue. Center.Br.1; *see* Heritage.Br.29-30. Nor does it explain why it would be any more burdensome to do so in the district court rather than here. To the contrary, the Center *urges* a "remand" to allow "the district court" to evaluate the "merits" "in the first instance." Center.Br.43.

While the Center suggests reconsideration would require "factfinding," there is no basis for any further "discovery" here. Center.Br.37-38. The Center has not disputed any relevant fact, and the uncontroverted evidence

shows the FEC took "action[]" on the complaint on April 6, 2021. JA300. That undisputed fact leaves solely a question of law, as confirmed by the Center's willingness to engage with the authorization issue on appeal. Center.Br.44-54.

The Center also complains intervention would subject it to "'duplicative litigation,'" Center.Br. 38, but that is a mess of its own making. Had it not urged the court below to rush to judgment before the FEC had responded to the FOIA request, this case could have proceeded in a more orderly fashion. Heritage.Br.30. While the Center notes Heritage Action was "a non-party" when it proposed an abeyance, Center.Br.38, the district court had the "inherent" "power to stay proceedings," and it should have done so given that its jurisdiction was at stake, *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

Nor would intervention "allow Heritage Action to sidestep collateral estoppel." Center.Br.38. Because "none of the issues is actually litigated" in "'the case of a judgment entered by … default,'" "collateral estoppel" by definition cannot apply here. *Arizona v. California*, 530 U.S. 392, 414 (2000). While the Center may not want to lose the windfall it secured from the FEC's efforts to keep "the district court … in the dark," it is hardly undue prejudice to ask it to defend that judgment in a fair fight. *New Models*, 2022 WL 17578942, at *3 (Rao, J., concurring in the denial of rehearing en banc).

2. Heritage Action Needs Intervention To Protect Its Rights.

While the lack of prejudice is reason alone to reverse, Heritage.Br.26, the other timeliness factors favor intervention as well. With respect to the need for intervention to protect Heritage Action's rights, the Center never disputes that a successful intervention could end the citizen suit. Heritage.Br. 36-38. Instead, it notes Heritage Action is also "advancing the arguments it seeks to make here" in the citizen suit. Center.Br.33-34. But that is irrelevant, for as the Center never denies, it is doing all it can to prevent the citizen-suit court from considering those arguments in the first place. Heritage.Br.37-38.

The Center also suggests (Center.Br.34) intervention is unnecessary because Heritage Action initially asked this Court to hold these appeals in abeyance pending the resolution of a motion to dismiss the citizen suit. But Heritage Action did so to avoid simultaneous briefing on the authorization issue in two courts. Abeyance.Mot.14-15; Abeyance.Reply.9-10. Now that such duplicative briefing has occurred, it obviously would be more burdensome for this Court to affirm the intervention denial. Heritage.Br.38.

Finally, the Center dismisses the harms to Heritage Action as the "costs of its choice" to seek post-judgment intervention. Center.Br.34. Setting aside that Heritage Action never made a "strategic choice" to be deceived by the

FEC, *id.*, the Center's theory would render "'the need for intervention as a means of preserving the applicant's rights'" parasitic on the "'time elapsed,'" *Smoke*, 252 F.3d at 471. But this Court has held that even when a movant has "permitted significant time to elapse" before "filing for intervention," intervention remains "essential as a means of preserving" its "rights" where the original defendant "has not taken an appeal." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (*AT&T*).

3. Heritage Action Promptly Moved To Intervene As Soon As It Discovered The Commission's Concealment.

Finally, Heritage Action moved to intervene four days after obtaining "newly-discovered evidence that could not have been previously brought before the court." *Paisley v. CIA*, 724 F.2d 201, 202 n.1 (D.C. Cir. 1984); *see* Heritage.Br.39-48. The Center does not maintain that four-day gap was dilatory. Instead, it urges this Court not to use this "'change of circumstances'" to measure timeliness, but to fault Heritage Action for failing to intervene "after it became clear that its interests would not be protected by the Commission." Center.Br.23-25. That response is doubly flawed.

a. To start, logic and authority support using the May 6, 2022 discovery of the FEC's concealed deadlock as the starting point. Heritage.Br.39-44. The Center's four objections to doing so lack merit.

i. The Center first suggests (Center.Br.25) *Cameron* held that changed circumstances can *never* be used to measure timeliness. But not even the Center actually believes this, for it proposes a variety of different starting points from "precedent pre-dating *Cameron*" itself. *Id.*; *see* Center.Br.21. That makes sense. In stating that "*[h]ere*, the most important circumstance relating to timeliness is that the attorney general sought to intervene 'as soon as it became clear' that the Commonwealth's interests 'would no longer be protected,'" *Cameron* did not purport to set the starting point for all cases, much less rule out the relevance of changed circumstances. 142 S. Ct. at 1012 (emphasis added). To the contrary, the key event in *Cameron*—the defendant's abandonment of further appellate efforts—was itself a "change in circumstances." *Id.* at 1018 (Kagan, J., concurring in the judgment).

ii. The Center therefore pivots to claiming (Center.Br.24-26) that by invoking *Cameron* below, Heritage Action forfeited its changed-circumstances argument. That theory is neither factually nor legally defensible. As a *factual* matter, Heritage Action argued below that the need for intervention became apparent after judgment *both* (i) because the FEC had "failed to provide assurance that it would appeal," *and* (ii) because it "had no basis to intervene until after … the FEC confirmed the existence of its voting records in

response to" the "FOIA" request. Dkt. 24-1 at 14-15; *see* Dkt. 31 at 14-15 (similar). And as a *legal* matter, Heritage Action would be free to advance this theory now even if it had not done so below, for "'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (brackets omitted).

iii. The Center further insists the FEC's May 6 FOIA response did not "constitute[] a 'change in circumstances'" on the premise this response was not "'proof' of the Commission's deadlock." Center.Br.32-33. According to the Center, the "responsive documents" acknowledged by the FEC could have "reflected deadlocked enforcement votes or other types of votes, such as on whether to defend the lawsuit or merely to send a letter to the respondent." Center.Br.32. But the FOIA response confirmed that the FEC had "records" on "votes taken … *on the complaint*" itself. JA248 (emphasis added).

In any event, that the Center believes even the May 6 response was insufficient proof only confirms Heritage Action could not have intervened earlier. While the Center claims Heritage Action could have intervened before judgment "and sought records from the Commission through discovery," Center.Br.30, an intervention motion must "be accompanied by a pleading that

sets out the claim or defense for which intervention is sought," Fed. R. Civ. P. 24(c). And the Center never identifies any defense Heritage Action could have raised to the Center's failure-to-act challenge before it learned, on May 6, that the FEC had taken "action[]" on the administrative complaint in April 2021. JA300; *see* Heritage.Br.41-42. Had Heritage Action tried to intervene before then based on speculation as to what was afoot at the FEC, the Center almost certainly would have made the same argument it raised in response to Heritage Action's *amicus* brief—namely, that "there is no reason to believe that the records sought" in discovery would be "'relevant.'" JA203.

iv. Ultimately, the Center faults Heritage Action for not "resorting to a FOIA request" sooner. Center.Br.30. But intervention has never been conditioned on the timing of FOIA requests, Heritage.Br.42, and even an earlier request here may not "have enabled the district court to avert the alleged errors," *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999); *see* Heritage.Br.41-42. If the FEC had not "produce[d] unredacted copies of the responsive documents [on] June 2," it could have taken years of protracted FOIA litigation to secure enough evidence to convince the Center that a "deadlocked" vote had even taken place. Center.Br.32. It is hard to imagine the Center would have waited that long.

In any event, the Center's FOIA theory fails on its own terms. According to the Center, Heritage Action had "reason to suspect it was necessary to discover" the FEC's concealment long before it filed its FOIA request—while insisting a page later that when Heritage Action "moved to intervene, it did not know" whether the Commission had deadlocked. Center.Br.31-32; *see supra* at 11-12. But while the Center contends the FEC's "failure to appear" and "media reports" indicated an undisclosed "enforcement deadlock," those "signal[s]" evidently were not enough to convince the district court something was wrong. Center.Br.31. Despite being aware of those facts, *see* Dkt. 14 at 16-19, the court believed to the end that "the FEC ha[d] taken no action," JA198. So have other district courts, which have "understandably assumed Commission votes are publicly announced, finding no reason to think a vote that should have been publicly reported was not." *New Models*, 2022 WL 17578942, at *3 (Rao, J., concurring in the denial of rehearing en banc) (cleaned up). The Center never explains why Heritage Action alone must be held to a higher standard of detective work.

Nor is that widespread lack of suspicion surprising. While a failure by the FEC to appear suggests it may not yet have four votes to defend, it does not signal a plot to conceal evidence to accomplish unauthorized enforcement

by other means. Similarly, the 2019 article discussed Commissioner Weintraub's refusal to *defend* against challenges to dismissals triggered by deadlocks, not her *concealment* of the deadlocks themselves. And while the 2021 article did discuss her concealment strategy, it did not indicate whether the FEC would abandon that policy entirely in response to public scrutiny or apply it going forward to Heritage Action specifically.

Put differently, the law did not require Heritage Action to apply a presumption of irregularity and assume the worst. *See* Heritage.Br.43-44. In *Cameron*, the Supreme Court rejected the argument that the movant should have realized "as soon as" a newly-elected governor "took office" that his appointee "would give up the defense" of an abortion law given the governor's history of withdrawing "'from the defense of abortion restrictions.'" 142 S. Ct. at 1012-14. Instead, the relevant event was when the movant learned—over four months later—that the appointee "would not continue to defend" the law at issue. *Id.* at 1012; *see id.* at 1008. Likewise, in *AT&T*, this Court permitted intervention after the movant had "permitted significant time to elapse" even though the government's decision "not to appeal" a discovery order was readily foreseeable, as it "had an interest in expeditious trial of its civil

antitrust suit" and "did not share the strong interest" the movant "had to appeal for protection of its work product privilege." 642 F.2d at 1293, 1295.

Moreover, when it became apparent on March 25, 2022, that the Commission was content to let this case reach default judgment, Heritage Action filed a FOIA request the same day. And when the FEC took an extension on April 18 that threatened to push the FOIA response until after the 30-day deadline to conform, Heritage Action filed an *amicus* brief on April 22 urging the district court to stay its hand. Heritage.Br.44. While the Center suggests Heritage Action should have known that "participating as *amicus*" would have been insufficient, Center.Br.29, Heritage Action reasonably assumed the district court would take the suggestion of mootness in an *amicus* brief seriously given the court's independent obligation to assure itself of its own jurisdiction, *see* Heritage.Br.32-33, 44. The Center offers no good reason why Heritage Action should be penalized for filing an *amicus* brief raising mootness on April 22 rather than an intervention motion after the Commission took an extension responding to its FOIA request. At most, it suggests the district court's April 27 "warning" that *amicus* status was insufficient to seek abeyance is dispositive, Center.Br.24, while never explaining why a motion to intervene a mere 13 days later was inexcusably dilatory.

b. In any event, Heritage Action promptly sought intervention even under the Center's test—*i.e.*, "after it had become clear that its interests were unprotected." Center.Br.17. While the Center claims (Center.Br.23-24) that was apparent at several points before judgment, it misses the mark each time.

i. To start, the Center insists Heritage Action should have intervened at the suit's "inception" on the theory that "the Commission could *never* protect its interests." Center.Br.22-23; *see* JA310. In doing so, it points to Heritage Action's argument below that the FEC's ability '"to regulate and sanction Heritage Action … precludes a finding of adequate representation."' Center.Br.23. But governmental litigants are almost *always* in a position to regulate or sanction prospective intervenors, and that has not stopped them from intervening even after judgment. *See, e.g.*, *Smoke*, 252 F.3d at 471; *Dimond v. District of Columbia*, 792 F.2d 179, 192-94 (D.C. Cir. 1986).[1]

ii. The Center therefore retreats (Center.Br.23-24) to contending Heritage Action should have intervened in May 2021 after the clerk entered

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[1] In a similar vein, the Center asserts Heritage Action "should have known that its rights would be directly affected by this litigation from the day it was filed." Center.Br.22. But again, that is often true for movants allowed to intervene post-judgment. *See, e.g.*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) ("putative class member[]"); *Smoke*, 252 F.3d at 469 (tribal officers in challenge to recognition of tribal constitution).

default. While the Center never denies federal defendants sometimes appear after the entry of default, Heritage.Br.45-46, it suggests (Center.Br.26) *the FEC* is different because only a majority of Commissioners can authorize the defense of a suit. But that fact only *increases* the likelihood of a belated appearance: if "bipartisan consensus" is necessary for a defense, "further deliberation" may convince the necessary Commissioners to change their minds. Center.Br.10. By the same token, "media reports" about refusals to defend against *other* suits did not indicate whether the FEC would take the same approach throughout the entirety of *this* case. Center.Br.26; *see supra* at 13-14. In all events, the Center has no explanation for why, if it were so "'clear'" in May 2021 that the FEC would never show, the district court chose to wait for "ten months" after that point to enter default judgment. Center.Br.23-24; *see* Heritage.Br.46.

iii. Falling back to its last refuge, the Center insists (Center.Br.24) Heritage Action should have intervened immediately after the March 25 default-judgment order. But even if that event indicated the FEC would "'likely never appear to defend,'" it failed to guarantee "the Commission would *not* conform"—a distinction the Center fails to grasp. Center.Br.27; *see* Heritage.Br.46-47. In any event, there is nothing "inexcusable" about

Heritage Action's decision to move for intervention a mere "46 days" later, Center.Br.28—especially when it filed both a FOIA request and *amicus* brief in the meantime. The Center never denies that longer gaps are sufficiently prompt, Heritage.Br.47, and even suggests itself that a period of "just two months" would be acceptable, Center.Br.22. So even under the Center's preferred starting point, Heritage Action's motion was still timely.

B. Heritage Action Meets The Remaining Criteria For Intervention.

The Center has no substantive response to Heritage Action's showing that it meets the other requirements for intervention. Heritage.Br.48-49. Instead, it contends this Court "'*must* remand'" because the district court did not address these criteria first. Center.Br.43. But "[t]here is no question" this Court "may address the question of intervention"—or previously unaddressed criteria—"in the first instance on appeal," and it has frequently done so. *In re Brewer*, 863 F.3d 861, 871 (D.C. Cir. 2017); *see, e.g.*, *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003); *Dimond*, 792 F.2d at 193; Heritage.Br.48 n.3.

In the face of this, the Center invokes (Center.Br.43) a decision holding that under Rule 52(a)(2), this Court could not weigh the discretionary factors underlying a preliminary injunction until the district court had done so.

Gordon v. Holder, 632 F.3d 722, 724-25 (D.C. Cir. 2011). But unlike in the preliminary-injunction context, "there is no requirement that the district court make findings of fact and conclusions of law in ruling on a motion to intervene." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981); *see* Fed. R. Civ. P. 52(a)(3). And the remaining requirements in this case—standing, a threatened interest, and inadequate representation—are not discretionary "factors" to be "weigh[ed]," Center.Br.43, but independent criteria, with the former two being legal questions and the latter never having been disputed, *see Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998); Heritage.Br.49.

While this Court has *discretion* to remand "to address in the first instance the other requirements," *Smoke*, 252 F.3d at 471, there is no reason to do so here. There is "little utility in delaying this case further" given that "[t]he requirements for intervention … were adequately briefed"; the Center had an "opportunity to respond to all of [Heritage Action's] arguments"; and "[t]he merits of [its] motion are clear." *Kalbers v. U.S. Dep't of Just.*, 22 F.4th 816, 827 (9th Cir. 2021); *see Brewer*, 863 F.3d at 871 ("Judicial economy is better served by the Court deciding whether appellants have made a sufficient showing under Rule 24 rather than remanding") (cleaned up); *Dimond*, 792 F.2d at 193 (similar).

II. THE CITIZEN SUIT SHOULD NOT HAVE BEEN AUTHORIZED.

On the authorization issue, the Center offers three arguments for allowing the citizen suit to proceed despite the Commission's action on the administrative complaint. Center.Br.42-54. All fail.[2]

A. The Center's "Contrary to Law" Theory Is A Red Herring.

The Center first serves up a distraction, claiming the only question here is whether "the Commission's failure to act on the complaint by the time" it "filed suit" was "contrary to law" under an 11-factor test. Center.Br.45. But the Center "filed suit seeking to compel the Commission to act," not to punish the FEC for past delay. Center.Br.1. Thus, the question is not whether the FEC's pre-suit delay was contrary to law, but whether its April 2021 action on the administrative complaint mooted the case by making it impossible to award effectual relief. Heritage.Br.50-53; *see All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 42 (D.D.C. 2004) (dismissing failure-to-act challenge as moot after lawsuit "spurr[ed] the FEC into action"); *cf., e.g.*, *United Steelworkers of Am. v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (agency action "mooted" "'unreasonable delay'" claim under 5 U.S.C. § 706(1)).

[2] The Center has abandoned the objection to addressing this issue based on the second notice of appeal. *See* Heritage.Br.54-57.

If the law were otherwise, the FEC could vote 6-0 to dismiss an administrative complaint the day after a failure-to-act suit was filed and courts would be forced to ignore that fact—even though the Act requires a "fail[ure]" by "the Commission to conform" with a failure-to-act declaration before a citizen suit can be authorized. 52 U.S.C. § 30109(a)(8). That cannot be right. This case therefore turns on whether the FEC "act[ed] on" the "complaint" on April 6, 2021, *id.*, not on any pre-suit delay.

B. The Commission "Acted" On The Complaint In April 2021.

The Center accordingly contends the FEC could not have "'acted'" on its complaint through a "deadlocked" reason-to-believe vote. Center.Br.3; *see* Center.Br.44-54. That novel theory runs headlong into the Act's text and structure, this Court's precedents, and the FEC's prior practice, including the vote certification in this case.

1. Text and Structure

Because the "FEC cannot investigate complaints absent majority vote" under 52 U.S.C. § 30109(a)(2), "the statute compels FEC to dismiss complaints in deadlock situations." *Pub. Citizen*, 839 F.3d at 1170. This Court has therefore "held the [FEC] engages in final agency action when, after receiving a complaint alleging certain types of campaign finance violations, it deadlocks

about whether … to proceed with an investigation." *Id.* (citing *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (*NRSC*)) (addressing probable-cause vote). The Center's own President agrees. As he has explained, "under the current structure" of the Act, "merely three of six Commissioners possess the ability to make substantive decisions on behalf of the agency—including, importantly, the decision to … terminate an enforcement matter before it is even investigated," which is why he has proposed that "Congress … amend the statute." Trevor Potter, *A Dereliction of Duty: How the FEC Commissioners' Deadlocks Result in a Failed Agency and What Can Be Done*, 27 GEO. MASON L. REV. 483, 499 (2020).

The Center resists (Center.Br.48) this straightforward reading by invoking § 30106(c), which provides that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote." 52 U.S.C. § 30106(c). But that *general* directive must be read in light of the Act's *specific* command that an investigation cannot proceed absent "an affirmative vote of 4" Commissioners at the reason-to-believe stage. *Id.* § 30109(a)(2); *see NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) ("'It is a commonplace of statutory construction that the specific governs the general.'") (brackets omitted). This Court has

therefore concluded that despite § 30106(c), the requirement in § 30109(a)(2) means the treatment of FEC enforcement-vote "deadlocks as agency action is baked into the very text of the statute." *Pub. Citizen*, 839 F.3d at 1170; *see, e.g.*, *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022) ("If at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint is dismissed.").

Indeed, construing § 30106(c) to treat a deadlocked enforcement vote as an irrelevant nonaction "would overthrow … the Act's structure and design." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014). The Center does not, and cannot, explain why Congress would have insisted on *four* votes to start the enforcement process under § 30109(a)(2), while simultaneously allowing only *three* Commissioners to nullify that requirement by using § 30106(c) to initiate citizen suits through concealment and default.

The Center's remaining textual arguments fare even worse. The Center insists § 30109(a)(8)(C) shows Congress knows how to "specify[] consequence for inaction," Center.Br.48, but that wrongly assumes a deadlocked vote is "inaction" in the first place. And the mention of "a vote to dismiss" in § 30109(a)(1) at most confirms Congress knows how to distinguish between an *action* and a *dismissal*, and requires only the former to avoid a citizen suit.

2. Precedent

This Court's precedents confirm what the Act says. Heritage.Br.6-9, 13-14, 51-52. While the Center dismisses this wall of authority as "only *dicta*," Center.Br.52, this Court has repeatedly rejected the argument the Center trots out today. In *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) (*New Models*), the plaintiff, like the Center here, urged that "where four votes are unavailable for any option, *nothing* happens—neither an investigation nor a dismissal—until a bipartisan coalition of four commissioners can come to an agreement." *Id.* at 891 (cleaned up). This Court held that position was "unsupported by the text of FECA" and inconsistent "with our previous cases." *Id.* Writing for this Court over 30 years earlier, then-Judge Ruth Bader Ginsburg likewise rejected the idea that "a 3-2-1 vote decides nothing." *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987); *see, e.g.*, *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (discussing the "no-action decision by three commissioners" and "negative probable cause determination that prevails on a 3-3 deadlock"). The premise of the Center's argument—that "after a deadlocked vote, an administrative matter remains pending … until bipartisan consensus … is achieved"—is therefore at war with decades of this Court's holdings. Center.Br.10.

The Center also ignores the relevant analysis in *Public Citizen*. In holding that a "FERC" "deadlock, on its own, does not constitute action," Center.Br.53, this Court rejected the petitioners' request "to apply [its] treatment of deadlocks under the Federal Election Campaign Act" in the FERC context, 839 F.3d at 1170. As this Court explained, the "FEC's structural design and FECA's legal requirement to dismiss complaints in deadlock situations mark FECA as an exception to the rule," and hence "the FEC approach should not be imported here." *Id.* at 1171.

Finally, the Center cannot reconcile its theory with this Court's longstanding position that "when the Commission deadlocks 3-3 and so dismisses a complaint," the "rationale" of "the three Commissioners who voted to dismiss … necessarily states the agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476. At most, it brushes this off as a "legal fiction" allowing courts "to review the agency's decision to dismiss after an intractable Commission deadlock." Center.Br.53. But under the Center's theory, the "only" relevant action by the FEC is a "successful, majority vote[] to close the enforcement matter's file." Center.Br.3. And if that were true, it would "make[] no … sense," in the words of Commissioner Weintraub, for the Judiciary to consider "only the rationales of the three commissioners who

voted 'No' on that previous … motion," which is why she thinks *NRSC* is "deeply flawed." FEC Dkt. 29-6 at 14, 16. Her position, while foreclosed, is at least internally consistent; the Center's halfway-house theory is built on sand.

3. Past Agency Practice

When it comes to prior FEC practice, the Center does not seriously dispute that the concealment strategy marks a sharp break from tradition. Heritage.Br.11-12. Nor could it, given Commissioner Weintraub's concession that this strategy "is indeed departing from past Commission practice." *Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners* 4 (Oct. 4, 2022), https://bit.ly/3FyU9g1. Indeed, just three years ago, the FEC told this Court "it takes four Commissioner votes to proceed on an enforcement matter, but only three to cause a file to be closed." FEC Br. at 47, *New Models*, 993 F.3d 880 (No. 19-5161), 2019 WL 6341135.

Instead, the Center largely relies on *recent* FEC statements and conduct related to, or in defense of, this concealment strategy to justify its application here. *See* Center.Br.8-10, 47-50. But that question-begging defense of the Commission's current misconduct is no defense at all. And even taken on their own terms, these self-interested statements fail to establish deadlocks are not agency "actions" at all. Indeed, that position would be hard

to square with the vote certification here, which states that in April 2021, "the Commission took the following action[]" on the Center's complaint: a "3-3" vote on whether there was "reason to believe" a violation had occurred. JA300.

When it comes to FEC practice *predating* the concealment strategy, the Center identifies only a regulation that "reference[s]" a vote to close the file, and a 2007 "formal statement of enforcement policy." Center.Br.48-50. The former is beside the point: No one disputes the *existence* of close-the-file votes, only their *relevance*. *See* Heritage.Br.11-12. And while the latter contains a general remark that "[a]s with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners," it never specifically concludes that deadlocked enforcement votes were non-actions or legally irrelevant. *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (2007). To the contrary, it provides that "the Commission will dismiss a matter … when the Commission lacks majority support for proceeding." *Id.*; *see* Heritage.Br.12.

C. The Center's "Final Action" Theory Is Misplaced.

The Center thus retreats to the claim that "taking 'some action' on an administrative complaint" is insufficient to avoid a citizen suit and that only "*final* action" qualifies. Center.Br.46. This fallback theory fails twice over.

First, as a threshold matter, nothing in § 30109(a)(8) requires "final" agency action; that word is absent from the text. And Congress knows how to demand "final agency action," 5 U.S.C. § 704, or a "final disposition" when it wants to do so, including in § 30109 itself, 52 U.S.C. § 30109(c); *see, e.g.*, 29 U.S.C. § 794a(a)(1) (requiring a "failure to take final action on [a] complaint"). Indeed, the Administrative Procedure Act directs "the 'agency action" complained of must be '*final* agency action'" only "[w]here no other statute provides a private right of action," which is the case here. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61-62 (2004). While the Center looks to (Center.Br.46-47) a trio of unpublished district-court decisions for support, none of them tried to reconcile a finality requirement with the text, much less held that a deadlocked vote by the FEC was a failure to act.

Second, and in any event, this Court has "held the [FEC] engages in *final* agency action when, after receiving a complaint alleging certain types of campaign finance violations, it deadlocks about whether … to proceed with an

investigation." *Pub. Citizen*, 839 F.3d at 1170 (emphasis added). That makes sense. Because "the statute compels FEC to dismiss complaints in deadlock situations," *id.*, such a vote both "determine[s] rights or obligations" and "marks the consummation of the Agency's decisionmaking process," *Sackett v. EPA*, 566 U.S. 120, 126-27 (2012) (cleaned up).

While the Center suggests deadlocked reason-to-believe votes are not "*final*" in light of the FEC's practice of holding a subsequent "vote to close the file," Center.Br.46, "'final orders are not limited to the last order issued in a proceeding,'" *Reuters Ltd. v. FCC*, 781 F.2d 946, 947 n.1 (D.C. Cir. 1986) (brackets omitted). Where, as here, an "agency action indicat[es] the FEC had completed its process," that determination is "*final*" even if a "ministerial task" will follow, just as a judicial decision "is a final, appealable order even" if "a later ministerial act is required." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279, 287 n.14, 288 (D.C. Cir. 1983); *see, e.g.*, *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 881 (D.C. Cir. 2000) ("remand orders" to an agency "may be considered final where a court remands for solely 'ministerial' proceedings"). And as the Center's President has rightly observed, "votes to close the files after deadlocking" are "nominal, non-substantive[,]" and "perfunctory" actions rather than "votes … on the substantive legal

questions"—a statement the Center never addresses. Potter, *supra*, at 488-89; *see* Heritage.Br.11-12.[3]

Given all this, the Center's criticism of an "automatic-dismissal theory" is beside the point. Center.Br.47. Whether a "deadlock[] about whether … to proceed with an investigation … *compels* FEC to dismiss complaints" or constitutes a *dismissal* itself, it is "final agency action." *Pub. Citizen*, 839 F.3d at 1170 (emphasis added). And that is all that is required to avoid a citizen suit, even under the Center's atextual understanding of § 30109(a)(8).

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[3] This analysis would not change even if "further deliberation" were theoretically possible following a deadlocked vote. Center.Br.10. "The mere possibility that an agency might reconsider … does not suffice to make an otherwise final agency action nonfinal." *Sackett*, 566 U.S. at 127.

CONCLUSION

This Court should reverse the denial of intervention, vacate the orders authorizing the citizen suit, and remand with instructions to dismiss or, in the alternative, to reconsider the authorization issue.

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Respectfully submitted,

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The undersigned certifies that, on this 21st day of December 2022, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate