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 REPLY IN SUPPORT OF ITS 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

INTRODUCTION

Nonparty Appellant Heritage Action for America's ("Heritage Action") response confirms that the Court should summarily affirm the district court's denial of Appellant's untimely post-judgment motion to intervene. Appellant admits that the district court applied the correct legal standard, does not claim the district court made any erroneous findings of fact, and challenges only the district court's weighing of the relevant timeliness factors—which is entitled to substantial deference under the abuse-of-discretion standard of review that applies.

The district court acted well within its broad discretion. Appellant does not dispute that, after Defendant Federal Election Commission ("FEC") defaulted, Appellant's alleged interests in the case were left unprotected for a year before it moved to intervene. Nor does Appellant dispute that it attempted to intervene after judgment in part to seek reconsideration of the settled issues in the case, and that reconsideration would only further delay this challenge against unlawful agency delay. Also, Appellant's claim to need to intervene has been further weakened given that Appellant has advanced the same arguments it seeks to make here in Plaintiff-Appellee Campaign Legal Center's ("CLC") citizen suit against Appellant.

Appellant also does not dispute that if the district court correctly denied its motion to intervene, it is not entitled to appeal the merits judgment below. The Court should therefore dismiss appeal No. 22-5140 for lack of appellate jurisdiction.

ARGUMENT

I. Appellant's Response Confirms that the Court Should Summarily Affirm the District Court's Denial of Appellant's Motion to Intervene

In its response, Heritage Action admits that the deferential abuse-of-discretion standard of review applies, admits that the district court applied the correct legal standard, and does not claim the court made any clearly erroneous findings of fact. *See* Appellant's Resp. in Opp'n to CLC's Mot. for Summary Affirmance and Dismissal ("Resp.") at 7 (July 18, 2022), Doc. 1955441. The only question remaining then is whether "the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 596 (D.C. Cir. 1996) (quotation omitted); *contra* Resp. at 7 (incorrectly claiming that the Court should review for "legal errors" in the district court's application of the correct legal standard). Because Appellant is unable to identify any error of judgment (clear or otherwise), the Court should summarily affirm the district court's weighing of the relevant factors.

A. Appellant Failed to Move to Intervene Until Long After It Was Clear the FEC Would Not Protect Appellant's Interests in the Case

The district court correctly found that Appellant's delay of nearly 15 months after the inception of this suit before moving to intervene post-judgment weighed against the timeliness of Heritage Action's motion. *See* Pl.-Appellee CLC's Mot. for Summary Affirmance and Dismissal ("Mot.") at 7-8 (July 8, 2022), Doc. 1954199.

This is especially so given that Heritage Action failed to seek intervention "'as soon as it became clear that its interests would no longer be protected by the parties in the case.'" Mem. at 4 (June 6, 2022), ECF No. 34 (quoting *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022)). That occurred, the district court determined, a year before the intervention motion when the FEC defaulted in May 2021, or at the very least, one-and-a-half months before the motion when the court entered default judgment in March 2022. *See id.*

In response, Appellant effectively concedes that it failed to move as soon as it became clear its interests would no longer be protected (whether that occurred in May 2021 or March 2022). Heritage Action states that its alleged interests "'are obviously implicated'" in this case. Resp. at 13 (quoting Mem. at 5). And Appellant does not claim that the FEC could have protected its interests in May 2021 given the FEC's default. *See id.* 15-16. Although Appellant asserts that "there was always the chance that the Commission would show up to defend itself," *id.* at 18, it does not claim that the FEC could have defended Heritage Action's interests *before* showing up, *see id.*, nor could it, *see 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."). Heritage Action also admits that "it became apparent on March 25, 2022, that the Commission was content to let

[CLC's] suit reach default judgment." Resp. at 18. Yet Appellant failed to move until May 16, 2022.

The Court should reject Heritage Action's contention that it should not have been expected to move to intervene to defend its unprotected purported interests "without the necessary evidence" from the FEC that it claims was needed to defend those interests successfully. *See* Resp. at 16. The applicable legal standard does not factor whether a would-be intervenor believes it has gathered sufficient evidence first. *See Cameron*, 142 S. Ct. at 1012. Indeed, parties to civil litigation almost never have all of the evidence they need before suit is filed and so they seek such evidence in discovery, which Heritage Action could have done had it timely intervened. Heritage Action itself showed that it was able to appear in the case to defend its alleged interests before obtaining the records it sought from the FEC when, on April 25, 2022, it filed an *amicus* brief doing just that. *See* Mot. of Heritage Action for Leave to File Amicus Brief at 3 (Apr. 25, 2022), ECF No. 17 (requesting an "abeyance until the FEC fully responds to Heritage Action's FOIA request").

In any event, as the district court observed, it is Appellant's own fault that it did not receive the FEC records it sought until May 6, 2022, because it did not ask for those records until March 25, 2022. *See* Mem. at 5 n.2. By then, those records had existed for 11 months. *See id.* Appellant blames its delay in seeking those records on an alleged "agency[] scheme to conceal evidence," Resp. at 17, ignoring

that the FEC is required to keep the agency's ongoing enforcement proceedings confidential absent a waiver from the respondent, *see* 52 U.S.C. § 30109(a)(12), which Heritage Action did not provide until March 31, 2022, *see* ECF No. 17-7 at 2. Next, Heritage Action blames the fact that the records it sought were non-public, Resp. at 17-18, but of course that is true of all records requested through FOIA. Finally, Appellant fares no better when it claims that it had no reason to suspect those FEC voting records existed until the district court entered default judgment in March 2022. *See id.* That judicial decision signaled nothing about any activity at the agency. In contrast, the FEC's decision not to appear in this case 10 months earlier clearly signaled that the agency had potentially deadlocked in the underlying matter. *See* 52 U.S.C. §§ 30106(c), 30107(a)(6) (requiring four of the FEC's six members to authorize the defense of this suit).

The district court made no error of judgment in concluding that Appellant's delay weighed against the motion to intervene's timeliness.

B. Appellant's Desire to Move for Reconsideration of Settled Issues in the Case Would Prejudice CLC with Unnecessary Delay

The district court was also correct when it determined that Heritage Action's primary purpose in moving to intervene—seeking reconsideration of the judgment—would cause further delay that would prejudice CLC, *see* Mot. at 9-12, which "first filed its administrative complaint in 2018," Mem. at 6. Appellant admits, as it must, that it attempted to intervene in part to seek reconsideration and that its motion would

have delayed the district court proceedings. *See* Resp. at 10. Yet Heritage Action claims the resulting delay would not have been "significant[]" enough to cause prejudice. *See* Resp. at 10-12. For three reasons, the Court should reject this attempt to second guess the district court's weighing of the "purpose" and "prejudice" timeliness factors.

First, it is irrelevant that the same evidence and argument Appellant seeks to introduce before the district court on reconsideration would also come before this Court on appeal, as Appellant stresses. Resp. at 11. That is not only true in *every* appeal, but it would also fail to mitigate the delay resulting from reconsideration that Heritage Action does not deny would occur. *See id.* at 10.

Second, Appellant is incorrect when it claims that "the merits here were never even litigated in the first place," Resp. at 11, because "Rule 55(d) requires district courts to reach the merits of a plaintiff's claim before entering a default judgment against the government," *Payne v. Barnhart*, 725 F. Supp. 2d 113, 116 (D.D.C. 2010) (internal quotation marks omitted); *see* Order at 2 (Mar. 25, 2022), ECF No. 16 (granting Rule 55(d) default judgment "on consideration of the motion and supporting declaration and exhibits").

Finally, as the district court found, introducing new evidence and argument in service of an alleged *jurisdictional* argument (which Appellant had already made to

the district court in its April 2022 *amicus* brief) does not mitigate the prejudicial delay that would result from a belated motion for reconsideration. *See* Mem. at 5.[1]

C. Appellant Lacks a Clear Need to Intervene Since It Has Made Its Jurisdictional Arguments in CLC's Citizen Suit Against Appellant

As the district court found, Appellant does not have a clear need to intervene because "Heritage Action can advance the same jurisdictional arguments in the [citizen] suit against it that it wants to make here." Mem. at 6. In fact, Heritage Action has now done just that: on July 8, 2022, it filed a motion to dismiss the citizen suit asserting the same jurisdictional arguments. *See* Def.'s Mem. of Points and Authorities in Supp. of Mot. to Dismiss at 21-30, *CLC v. Heritage Action*, No. 1:22-cv-1248-CJN (July 8, 2022), ECF No. 20-1.

Even though that motion is currently pending, and even though Appellant has previously asserted its jurisdictional argument in this case as an *amicus*, ECF No. 17, Appellant insists that it is entitled to yet another bite at the apple via intervention. *See* Resp. at 13-15. Heritage Action objects that CLC "has signaled" that CLC will oppose its motion to dismiss in the citizen suit, Resp. at 14, but cites no authority stating that intervention must be allowed if the intervenor is not guaranteed success

[1] Heritage Action also claims that CLC would have suffered no prejudice if it had attempted to intervene solely for the purpose of taking an appeal. *See* Resp. at 8-10. That claim is incorrect and, in any event, irrelevant, since Heritage Action does not dispute that "reconsideration [was] its preferred aim" for intervening, Mem. at 5; *see* Resp. at 10, and that established fact formed the basis for the district court's determination that the resulting delay would prejudice CLC, *see* Mem. at 5-6.

in advancing its interests elsewhere. Appellant also insists that it has "a concrete legal interest in intervening" in this case, *id.* at 15, but, even if true, that does not mean that Appellant also has a sufficient "need to intervene to protect those interests," which the district court rightly found lacking, *see* Mem. at 5-6.

* * *

In sum, the district court applied the correct legal factors and acted well within its broad discretion in deciding that Appellant's intervention motion was untimely.[2]

II. Appellant's Response Also Confirms that the Court Should Dismiss Appellant's Purported Merits Appeal for Lack of Appellate Jurisdiction

In its response, Resp. at 20-22, Heritage Action does not dispute that if the district court correctly denied the 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* Mot. at 13-14.

Instead, Heritage Action responds only to CLC's alternative argument, *see* Mot. at 14 n.9, that Appellant's May 20 notice of appeal was ineffective because it preceded a ruling on the motion to intervene. *See* Resp. at 20-22. In that response,

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[2] A couple of misleading statements in Appellant's brief require correction. First, the district court did not rest its decision solely on any one timeliness factor, *see, e.g.*, Mem. at 7 ("Given all of the above [factors], the Court must find that Heritage Action's motion is not timely."), despite Appellant's incorrect suggestions otherwise, *see* Resp. at 10, 14-15. Second, contrary to Appellant's claim, *see id.* at 7, CLC does in fact "now" deny that Heritage Action satisfied Rule 24's other elements, as CLC explained in its motion, *see* Mot. at 12 n.8.

Heritage Action is unable to cite any binding authority stating that a nonparty may file a protective notice of appeal before its motion to intervene has been decided. And to the extent Heritage Action claims it "had to file a notice of appeal" before an intervention ruling due to a looming appeal deadline, Resp. at 21, that was, again, a quandary of its own making. *See supra* pp. 2-5.

CONCLUSION

For the foregoing reasons, the district court's denial of the motion to intervene should be summarily affirmed, and the remaining appeal dismissed.

Date: July 25, 2022

Respectfully submitted,

/s/ *Molly E. Danahy*

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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 25, 2022.

/s/ *Molly E. Danahy*
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