[ORAL ARGUMENT NOT YET SCHEDULED]
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

APPELLANT'S RESPONSE IN OPPOSITION TO CAMPAIGN LEGAL CENTER'S MOTION FOR SUMMARY AFFIRMANCE AND DISMISSAL

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INTRODUCTION

Campaign Legal Center's summary-disposition motion is merely its latest attempt to shield an erroneous exercise of jurisdiction from further review. On May 3, 2022, the district court (Kelly, J.) authorized the Center to bring a citizen suit against Heritage Action for America on the premise that the Federal Election Commission (FEC) had unlawfully failed to act on the Center's administrative complaint. Three days later, the FEC, which had failed to appear before the court, revealed that it *had* acted on the administrative complaint in April 2021. Had the Commission disclosed this evidence earlier, the court could not have authorized the Center's citizen suit.

Four days after the FEC's revelations, on May 10, Heritage Action moved to intervene to seek reconsideration of or appeal the citizen-suit authorization. While frustrated by the "procedural mess," the district court "[r]egrettably" denied the motion as untimely, while emphasizing that it did not "condone the Commission's unseemly failure to appear and defend itself" or "what Heritage Action casts as a scheme to hide its activity and leave regulated parties in legal limbo." Dkt. 34 (Op.) at 2, 7.

While the Center urges this Court to summarily affirm the intervention ruling and summarily dismiss the appeal of the citizen-suit authorization, it

has not come close to carrying its "heavy burden of establishing that the merits of [its] case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). To the contrary, the denial of intervention here implicates issues of "first impression," which are "not appropriate for summary disposition," and rests on a cascade of legal errors. *Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 914 (D.C. Cir. 1996). And nothing in the Center's motion remotely establishes that the arguments for intervention in this case are so insubstantial that this Court should summarily dispose of these appeals.

BACKGROUND

1. The FEC is a bipartisan agency run by six Commissioners—no more than three of whom may be affiliated with the same political party—with "exclusive jurisdiction" over civil enforcement of the Federal Election Campaign Act of 1971 (the Act). 52 U.S.C. § 30106(b)(1). When a private party lodges an administrative complaint alleging a statutory violation, the FEC must vote on whether there is "reason to believe" the respondent has contravened the Act. *Id.* § 30109(a)(2). "If at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint is dismissed." *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022).

If the FEC dismisses an administrative complaint—or fails to act on it within 120 days after it has been filed—the private party that sought enforcement may sue the Commission in district court. 52 U.S.C. § 30109(a)(8)(A). If the court declares that the FEC's dismissal or failure to act was "contrary to law," then the Commission has 30 days "to conform with such declaration." *Id.* § 30109(a)(8)(C). And if the FEC fails to conform by that deadline, the private party may bring a citizen suit against the alleged violator under the Act. *Id.*

All this remains true for "'deadlock dismissals'"—*i.e.*, those "dismissals resulting from the failure to get four votes to proceed with an enforcement action" because the FEC splits in its vote (typically on a 3-3 basis) on whether "there is 'reason to believe' a violation has occurred." *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 891-92 (D.C. Cir. 2021) (*CREW*). When a deadlock dismissal occurs, the FEC must disclose that fact and the underlying basis for the dismissal. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a). Specifically, "the commissioners who voted against enforcement must state their reasons why," which are "then treated as if they were expressing the Commission's rationale for dismissal." *CREW*, 993 F.3d at 883 n.3 (cleaned up). If a deadlock dismissal is "based even in part on

prosecutorial discretion," it is "not reviewable" in court. *Id.* at 882 (applying *Heckler v. Chaney*, 470 U.S. 821 (1985)).

2.a. On October 16, 2018, the Center and an individual lodged an administrative complaint with the FEC alleging that Heritage Action had violated the Act by failing to disclose the identities of certain contributors. Dkt. 1-1. On February 16, 2021, the Center then sued the Commission in district court, alleging that the FEC had unlawfully failed to act on the administrative complaint. Dkt. 1. After the Commission failed to enter an appearance, the clerk entered default against the FEC on May 10, 2021. Dkt. 9. The Center then moved for default judgment on May 24, 2021. Dkt. 10.

On March 25, 2022, the district court granted the Center's motion. Dkt. 16. The court found that "the FEC has taken no action on" the Center's administrative complaint and that this "failure to act … is contrary to law." *Id.* at 1-2. It therefore directed the Commission to "conform to" the order "within 30 days"—*i.e.*, April 25, as April 24 fell on a Sunday—"by acting on" the Center's "administrative complaint." *Id.* at 2.

The same day, March 25, Heritage Action submitted a request under the Freedom of Information Act (FOIA) to the FEC seeking vote certifications and any statements of reasons related to the administrative complaint. Dkt.

17-5. Although the FEC's response date was set for April 22, the Commission invoked a 10-working-day extension on April 18 until May 6. Dkt. 17-6. On April 25, Heritage Action filed an *amicus* brief urging the district court to refrain from disposing the case until the FEC had responded. Dkt. 17-3.

The court declined to do so. Instead, on May 3, it granted the Center's request for a declaration that the Commission had "failed to conform" to the default-judgment order by not "acting on" the administrative complaint" by the 30-day deadline and that the Center may therefore "bring 'a civil action'" against Heritage Action under the Act. Dkt. 23 at 1-2. Two days later, the Center filed its citizen suit. No. 1:22-cv-1248 (D.D.C.) (Nichols, J.).

b. The next day, May 6, the FEC responded to the FOIA request by stating that it would produce responsive records, thereby indicating that it had acted on the administrative complaint. Dkt. 24-2. The Commission subsequently released vote certifications recording that it had taken "action[]" on the administrative complaint on April 6, 2021—over a year before the April 25, 2022 deadline. Dkt. 32-1 at 4. On that day, the FEC had deadlocked by a 3-3 vote over whether there was reason to believe that Heritage Action had violated the Act in a manner warranting enforcement, with the three Commissioners who voted against enforcement doing so as a matter of

prosecutorial discretion "under *Heckler v. Chaney*." *Id.* The same three Commissioners also voted on April 6, 2021 to close the administrative file so that the parties could be notified of the FEC's action. Dkt. 32-1 at 5. The remaining three Commissioners, however, refused to do so, thereby concealing the FEC's action from the parties and the courts. *Id.*

In response to these revelations, Heritage Action sought to intervene on an expedited basis on May 10 to seek reconsideration of the final judgment authorizing the citizen suit or to appeal it. Dkt. 24. After the district court failed to order expedited briefing, Heritage Action filed a notice of appeal on May 20. Dkt. 26. On June 6, the court "[r]egrettably" denied the intervention motion as untimely. Op. 2. Heritage Action filed a second notice of appeal of that ruling on June 8, Dkt. 35, and this Court consolidated the appeals.

ARGUMENT

I. THE DENIAL OF INTERVENTION MUST BE REVERSED, NOT SUMMARILY AFFIRMED.

Rule 24(a)(2) mandates that courts "permit anyone to intervene who" (1) "[o]n timely motion" (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," (3) "unless existing parties adequately represent that

interest." Fed. R. Civ. P. 24(a)(2). The district court did not deny that the latter two factors were satisfied, and the Center does not do so now. Center Mot. 12 n.8. Rather, the only question here is whether the motion was timely.

While an untimeliness ruling is reviewed for an abuse of discretion, "a court fails to exercise its discretion soundly when it bases its ruling on an erroneous view of the law." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022) (cleaned up); *see id.* at 1012-13. Here, the district court made multiple legal errors in applying this Court's timeliness factors—*i.e.*, the "'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).

A. The Center Will Not Suffer Any Cognizable Prejudice Here.

"'The most important consideration'" for timeliness "'is whether the delay in moving for intervention will prejudice the existing parties.'" *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). That is because Rule 24 does "not require timeliness for its own sake," but to "prevent[] potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id.* Because the "timeliness requirement is not intended as

a punishment for the dilatory," a motion is timely if it does not "unfairly disadvantage the original parties," "even where a would-be intervener could have intervened sooner." *Id.* (cleaned up). No such prejudice exists here.

1. The district court thought the Center would be prejudiced because reconsideration or appeal of the judgment would "delay" the resolution of the case. Op. 6. But the Supreme Court has made clear that a prevailing party is not "unfairly prejudiced simply because an appeal" is pursued by a post-judgment intervenor rather than by the original losing party, even though the appeal delays the case's ultimate disposition. *Cameron*, 142 S. Ct. at 1013 (quoting *United Airlines v. McDonald*, 432 U.S. 385, 394 (1977)). This Court has likewise held that when a movant "seeks to intervene only to participate at the appellate stage and in any further trial proceedings, its intervention will not prejudice any existing party," *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986), and that when intervention is sought for the "purpose of appeal," that "strongly mitigates" a movant's decision to "permit[] significant time to elapse," *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (*AT&T*).[1]

[1] Because "'the purpose for which intervention is sought'" here bears heavily on "'the probability of prejudice to those already parties,'" *Karsner*, 532 F.3d at 886, Heritage Action discusses these considerations in tandem.

Thus, while the Center plainly "hoped" that the FEC would not appeal the default judgment and that no one else would take up the baton, it "had no legally cognizable expectation" of either occurring. *Cameron*, 142 S. Ct. at 1014. An "unrealized gain of that kind does not count as a legally cognizable harm," as Heritage Action "sought to pursue only" what the FEC "would have done had" it "defend[ed]" itself, and hence it "did nothing to delay the suit's normal progress." *Id.* at 1019 (Kagan, J., concurring in the judgment). Accordingly, "[t]here is no prejudice" to the Center here "because it could not have assumed that, if it won in the district court, there would be no appeal." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009).

All this would be true whether the FEC had defended this case from the outset or "never appeared at all." Center Mot. 10 n.6. Indeed, this Court held that a set of plaintiffs suffered "no prejudice arising from" post-judgment intervention seeking "appellate review" even when the original defendant had "failed to appear" and the court had entered "default" judgment. *Acree v. Republic of Iraq*, 370 F.3d 41, 45, 50 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *see id.* at 60 (Roberts, J., concurring in part and concurring in the judgment) ("I agree … that the district court erred in denying the … motion to intervene.").

2. The district court did not deny that if Heritage Action had intervened solely for the purposes of appeal, the Center would not suffer any cognizable prejudice. Instead, the court thought it dispositive that Heritage Action planned to seek "reconsideration" first. Op. 5. But whether the judgment here was reconsidered by the district court or reviewed by this Court, the "'settled issues in the case'" would be "'reopen[ed]'" and "'revisit[ed].'" Op. 5-6. The only difference is *which court* would do so in the first instance. And given this Court's admonition that a "district court" should ordinarily "have the first opportunity to address the matter," *United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014), it is unclear why Heritage Action should be penalized for "prefer[ring]" that approach here. Op. 5.

To be sure, in some instances, intervention "for the purpose of presenting evidence or argument" before a district court may cause unfair prejudice bearing on the timeliness inquiry if it threatens to significantly delay the normal progression of a lawsuit. *AT&T*, 642 F.2d at 1294. For example, a movant may be able to intervene to pursue an "interlocutory" appeal but not to introduce "further evidence before the district court" as the case proceeds. *Id.* at 1287, 1294. But no such harm is threatened here for at least three reasons.

First, any reconsideration motion in this case would involve the exact same "'evidence and argument'" as presented in this appeal. Op. 5. All the relevant materials here are publicly available, the facts are undisputed, there is no need for further discovery, and the only merits issue is a purely legal question—and not a difficult one at that.[2] Under these circumstances, the distinction between reconsideration and appeal is an entirely formalistic one.

Second, it is not as if intervention would deprive the Center of a hard-won victory. Given the FEC's refusal to appear or defend itself, the merits here were never even litigated in the first place. *See Arizona v. California*, 530 U.S. 392, 414 (2000) ("'In the case of a judgment entered by … default, none of the issues is actually litigated.'"). Consequently, "the burden to the parties of reopening the litigation … would have been the same" if Heritage Action had moved to intervene earlier. *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 390 (7th Cir. 2019).

Third, whether or not Heritage Action intervened, the court had to consider the revelations because they bore on its "subject-matter jurisdiction."

[2] To the extent the Center is seeking to litigate the merits in its motion, *see* Center Mot. 2 n.1; Abeyance Opp. 3-8, 6 n.15, it will have to wait. Because "the threshold question of intervention" is "in essence a question of standing" for Heritage Action "to participate in the case," "a determination of the merits" "is not appropriate at this threshold stage." *AT&T*, 642 F.2d at 1291.

Op. 2. Had the court learned before judgment that the FEC had acted on the Center's complaint, it would have been unable to issue relief and hence would have had to dismiss the case as moot. And because "[t]he objection that a federal court lacks subject-matter jurisdiction … may be raised" *sua sponte* even "after … entry of judgment," the court could and should have "vacated its prior judgment" upon learning of the FEC's deadlock dismissal—even if intervention had never been sought. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 509 (2006). It is thus hard to see how a reconsideration motion could prejudice the Center here when the court was obligated to reassess the matter anyway. Rather, "[t]he only result achieved by denial of the motion to intervene in this case is the effective insulation of the District Court's exercise of jurisdiction from all appellate review." *Acree*, 370 F.3d at 50.

Confirming the point, this Court in *Acree* reversed a denial of intervention as untimely where, as here, the movant raised a "challenge to the District Court's subject matter jurisdiction" after the entry of "a nearly-billion dollar default judgment." *Id.* at 50, 58. As the Court explained, the plaintiffs could "assert no prejudice" given the district court's "independent obligation to assure itself of its own jurisdiction." *Id.* at 50. And that was so even though the district court there, as here, had denied intervention on the theory that it

"would cause undue delay and prejudice to the existing parties by prolonging litigation." 276 F. Supp. 2d 95, 102 (D.D.C. 2003).

While the district court dismissed *Acree* on the premise that *Amador County v. Department of the Interior*, 772 F.3d 901 (D.C. Cir. 2014), had rejected the notion "that seeking to make a jurisdictional argument should be a sort of thumb on the scale of intervention," that is incorrect. Op. 5. *Amador County* merely dismissed a theory that a "court had a heightened duty to weigh heavily" the movant's plan to press a "jurisdictional, or at least quasi-jurisdictional," "sovereign immunity" argument. 772 F.3d at 904. In doing so, *Amador County* did not remotely call into question the *prejudice* analysis in *Acree*—an analysis the district court here never addressed.

B. Intervention Is Necessary To Preserve Heritage Action's Rights.

While the lack of cognizable prejudice here is reason alone to reverse, *see Roane*, 741 F.3d at 151-52, the district court committed further errors in addressing the other timeliness factors. To start, the prejudice to Heritage Action from the denial of intervention is indisputable. As the court observed, "Heritage Action's rights … are obviously implicated" because due to its authorization, the Center "could file—and now has filed—suit directly against it." Op. 5.

The court nevertheless questioned Heritage Action's "need to intervene" on the premise that it "can advance the same jurisdictional arguments" in the citizen suit "that it wants to make here." Op. 5-6. While that premise is correct, Abeyance Reply 7-8, the suggestion that intervention is unnecessary does not follow. The Center has signaled it will argue that Heritage Action cannot "relitigate" the court's "contrary to law finding against the FEC" in its "the citizen suit." 1:22-cv-1248 Dkt. 14 at 23. And while the Center notes Judge Kelly "suggested that Heritage Action can advance the same jurisdictional arguments in CLC's citizen suit," it has never disavowed its own plans to contend otherwise. Center Mot. 11 (cleaned up). Heritage Action thus had to intervene to protect its right to press the argument that the citizen suit was improperly authorized. Abeyance Mot. 15; Abeyance Reply 7-8. The denial of intervention forecloses that ability.

In any event, as the district court ultimately acknowledged, "Heritage Action's ability to raise its arguments in some later litigation 'is not in itself a sufficient reason to deny intervention.'" Dkt. 34 at 6 n.3; *see NRDC v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977) ("[I]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation."). By the same token, that Heritage

Action is willing "to defend itself in the citizen suit" does not mean that it lacks "standing and a concrete legal interest in intervening" here. Center Mot. 11 n.7. Being "exposed to civil liability via private lawsuit" plainly constitutes "a significant injury in fact," and the authorization of the citizen suit triggers that harm. *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 318 (D.C. Cir. 2015). That Heritage Action is willing to resist that liability in multiple jurisdictions does not make that injury any less real or a reversal of that authorization any less effective in redressing it.

C. The Time Elapsed Since The Suit's Inception Is Not Dispositive.

The district court's real basis for its ruling was that "Heritage Action 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." Op. 3-4. But "the point to which a suit has progressed is not solely dispositive," even when a case has gone on for "five years" before intervention is sought. *Cameron*, 142 S. Ct. at 1012 (cleaned up).

The court therefore pivoted to insisting that Heritage Action should have sought to "intervene as soon as it became clear that its interests would no longer be protected by the parties in the case"—which the court pegged at either May 2021 (when the clerk entered default) or March 2022 (when the

court entered default judgment). Op. 4 (cleaned up). And the Center goes so far as to claim that Heritage Action "could have raised" its arguments "at the outset of the case." Center Mot. 1. But neither nor the court nor the Center has ever identified *how* Heritage Action could have defended the FEC's alleged failure to act before the Commission released proof on May 6, 2022—three days after judgment—that it had acted on the administrative complaint over a year earlier. The FEC holds its votes on administrative complaints in closed-door executive sessions, and until May 6, 2022, all of its public acts and omissions indicated to the Center, the court, and Heritage Action that the FEC had neither "taken on action on CLC's complaint," Dkt. 16 at 1, nor "conformed with the Court's order," Dkt. 23 at 1. Thus, in light of the FEC's concealment, it is not as if prejudgment intervention here "would 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). And had Heritage Action tried to intervene without the necessary evidence, the Center would have been the first to oppose the request as premature. The timeliness requirement does not mandate an exercise in futility. *See Flying J*, 578 F.3d at 572 (deeming post-judgment intervention motion timely because "[h]ad the association sought to intervene earlier, its motion would … have been denied").

Rather than dispute any of this, the district court faulted Heritage Action for not filing "a FOIA request until" March 25, 2022—the day the court entered default judgment. Op. 6; *see* Op. 5 n.2. But the court identified no support for the proposition that a regulated party must promptly secure evidence of an agency's scheme to conceal evidence from the Judiciary or risk losing its right to intervene forever—especially when the agency's "duty to disclose" that evidence was "independent of FOIA." *NRDC v. Johnson*, 488 F.3d 1002, 1003 (D.C. Cir. 2007); *see supra* at 3-4. Indeed, such a rule "would induce" parties "to file protective motions to intervene"—and protective FOIA requests—"to guard against the possibility" that the FEC might be hiding evidence and willfully throwing a case in order to trigger a citizen suit. *McDonald*, 432 U.S. at 394 n.15. And that goes double for the suggestion that any party that could be "'regulate[d]'" by the Commission must promptly seek to intervene whenever the FEC is sued. Center Mot. 9 n.4.

Nor did the district court explain *why* Heritage Action should have suspected that a FOIA request was necessary before default judgment was entered. While the court noted that the "records are dated April 23, 2021—which was before CLC even moved for default judgment," Op. 5 n.2—those records of closed-door votes were *hidden* from the court until after it entered

judgment. Heritage Action—like the Center and the court—had no idea a vote had taken place in April 2021 because the FEC concealed that fact. Heritage Action cannot be faulted for a lack of diligence because the FEC's concealment prevented Heritage Action from acting any sooner than it did. *Cf. Gabelli v. SEC*, 568 U.S. 442, 449 (2013) (discussing the "'discovery rule,'" which tolls a limitations period "'where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded'").

When it became apparent on March 25, 2022, that the Commission was content to let the Center's suit reach default judgment, Heritage Action feared that the FEC was seeking to trigger a citizen suit in this case and preemptively filed a FOIA request the same day. Before then, there was always the chance that the Commission would show up to defend itself—yet another decision the FEC makes behind closed doors. *Cf.* FEC's Response to Order to Show Cause, *Campaign Legal Ctr. v. FEC*, 1:20-cv-588 Dkt. 19 (July 20, 2020) (filing a response after clerk had entered default). And had the FEC not taken an extension in responding to the FOIA request, Heritage Action could have notified the court of the Commission's concealment as early as April 22, 2022—three days before the court's April 25 deadline. *See supra* at 5. In the face of that delay, Heritage Action did what it could by bringing the issue to the

court's attention through an *amicus* brief and urging the court to stay its hand until the FEC responded to the FOIA request. *See supra* at 5. Yet the court plowed ahead anyway.[3]

* * *

At a minimum, the Center cannot carry its "heavy burden of establishing" that the district court was "so clear[ly]" correct that summary affirmance is warranted. *Taxpayers Watchdog*, 819 F.2d at 297; *see supra* at 2. As far as Heritage Action is aware, this Court has never confronted the need for post-judgment intervention where an agency has failed to defend itself while concealing dispositive evidence from the Judiciary—a situation even the district court deemed "unusual" and "unseemly." Op. 4, 6; *cf. Paisley v. CIA*, 724 F.2d 201, 202 n.1 (D.C. Cir. 1984) (indicating that post-judgment intervention may be warranted "to bring to the court's attention newly-discovered evidence that could not have been previously brought before the court"). This Court should at least have the benefit of plenary briefing and argument before it issues a ruling condoning such tactics.

[3] Contrary to the Center's suggestion that Heritage Action should be penalized for filing an *amicus* brief, Center Mot. 9, that action means "it cannot be said that" Heritage Action "ignored the litigation or held back from participation to gain tactical advantage." *Day v. Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007) (granting intervention after movant "sought amicus status").

II. THERE IS NO BASIS FOR SUMMARY DISMISSAL.

If this Court reverses the intervention denial, it can address the merits without considering Heritage Action's prior status. *See, e.g.*, *Acree*, 370 F.4d at 51; *AT&T*, 642 F.2d at 1295. The Center nevertheless asserts that Heritage Action cannot appeal the judgment here "regardless of its right to intervene," Center Mot. 19 n.4, but neither of its arguments for that claim holds water.

First, the Center offers neither reason nor authority to support its view that Heritage Action could not "appeal until the court denied intervention, rendering its May 20 notice of appeal ineffective." *Id.* If Heritage Action had waited until the denial of intervention to appeal both rulings and this Court reversed the denial, it would become a party and its appeal of the judgment would become effective. There is no evident reason why filing two notices of appeals a few weeks apart should make a difference—especially when this sequencing was necessary to protect Heritage Action's rights. By May 20, the district court had not ordered expedited briefing on the intervention motion and Heritage Action feared (presciently) that the Center would contend (incorrectly) that only the March 25 order mattered. *See* Dkt. 30 at 25-30; Dkt. 31 at 9-10. With a looming May 24 deadline to file a notice of appeal measured from the March 25 order, *see* Dkt. 30 at 40 n.25, and no intervention ruling on

the horizon, Heritage had to file a notice of appeal. *See Roe v. Town of Highland*, 909 F.2d 1097, 1099-1100 (7th Cir. 1990) (noting that "if the motion to intervene has not been acted upon within the time to appeal," a movant should "file a timely notice of appeal" to "preserv[e] the right of appeal").[4]

Second, that the June 8 notice "appealing the denial of intervention" did not include the May 3 "merits ruling" is beside the point. Center Mot. 14 n.9. A "notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order," and it "is not necessary to designate those orders" as well. Fed. R. App. P. 3(c)(4). Moreover, an "appeal must not be dismissed … if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment." *Id.* 3(c)(7). Here, the denial of Heritage Action's intervention motion—a motion resting on the premise that the underlying judgment was incorrect—is akin to a "denial of a Rule 59(e) motion" that merges into, and should be "treated as

[4] As the Center does not deny, the May 20 appeal did not preclude the district court from acting on the intervention motion. While there is a split over whether an appeal "divest[s]" a district court "of jurisdiction to grant" a "motion to intervene"—an issue this Court has "decline[d]" to resolve, *Herman*, 166 F.3d at 1257—the leading treatise in this area explains that the "better" view is "that the district court can act" because its ruling "is in support of the appeal process." 15A Fed. Prac. & Proc. Juris. § 3902.1 (2d ed. 2022) (Wright & Miller).

an appeal from," "the underlying judgment itself." *Ciralsky v. CIA*, 355 F.3d 661, 668 (D.C. Cir. 2004); *see Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (noting a "ruling on the Rule 59(e) motion merges with the prior" judgment).

In any event, even if Heritage Action should have designated the May 3 judgment in its June 8 notice, "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Becker v. Montgomery*, 532 U.S. 757, 767 (2001). Given Heritage Action's two notices of appeal, the Center cannot claim there is any "genuine doubt" as to what rulings were being appealed here.

CONCLUSION

This Court should deny the Center's summary-disposition motion.

Dated: July 18, 2022

Respectfully submitted,

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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. Circuit Rule 32(e)(1), this document contains 5049 words.

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 18th day of July 2022, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate