IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *Plaintiff*, v. FEDERAL ELECTION COMMISSION, *Defendant*, HERITAGE ACTION FOR AMERICA, *Proposed Intervenor-Defendant*.	Case No. 1:21-cv-0406 (TJK)

REPLY IN SUPPORT OF EXPEDITED MOTION OF HERITAGE ACTION FOR AMERICA TO INTERVENE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

As Heritage Action has demonstrated, it is entitled to intervene as a matter of right to appeal or seek reconsideration of the Court's May 3 Judgment. Dkt. No. 23 (May 3 Judgment); *see* Heritage Action Mem. 7-19, Dkt. No. 24-1 (Mem.); Fed. R. Civ. P. 24(a); *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). Specifically, Heritage Action satisfies all five requirements for intervention as of right under Article III and Rule 24(a) because it (1) has standing to challenge this Court's May 3 Judgment, Mem. 8-10; (2) its motion to intervene was timely, Mem. 10-16; (3) it has legally protected interests in this case, Mem. 16; (4) those interests would be impeded if it is not allowed to intervene, Mem. 16-17; and (5) those interests cannot be adequately represented by the FEC, Mem. 17-19.

In response, CLC does not—and cannot—dispute that the FEC is unable to adequately represent Heritage Action's interests at this stage. *See* CLC Opp. 15-16, Dkt. No. 30 (Opp.). Nor does CLC deny that if Heritage Action has legally protected interests in this case, those interests would be impeded by a denial of its intervention motion. Instead, CLC advances three arguments against intervention here, none of which withstands scrutiny.

First, CLC contends that this Court lacks jurisdiction to decide this motion in light of Heritage Action's notice of appeal. Opp. 29-31. But CLC wisely abandoned that position at the Status Conference held on May 25, 2022, and it appears that the parties are in agreement that this Court should both rule on the intervention motion and, in an abundance of caution, issue an indicative ruling under Rule 62.1.

Second, CLC insists that Heritage Action lacks both Article III standing and a legally protected interest. Opp. 19-26. But its erroneous argument here, if accepted, would trap parties like Heritage Action in a Catch-22 and insulate erroneous decisions from appellate review.

Third, relying heavily on the denial of a motion to intervene in *CLC v. FEC*, No. 20-cv-809 (D.D.C. May 13, 2022), Dkt. No. 37 (*45Committee*) (Opp. Ex. 1), CLC contends Heritage Action's intervention motion is untimely. Opp. 8-19. In CLC's telling, Heritage Action should have attempted to intervene long ago, even though it had no basis to do so until May 6, 2022—three days *after* this Court's May 3 Judgment—when the FEC revealed that it had in fact taken action on the administrative complaint. But the D.C. Circuit has indicated that post-judgment intervention is appropriate "to bring to the court's attention 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)—which is precisely what Heritage Action seeks to do here. Indeed, the case for intervention has only grown stronger since Heritage filed its intervention motion on May 10. On May 13, the FEC produced heavily redacted voting records providing further proof that it had already voted on CLC's administrative complaint and three Commissioners issued a statement addressing the FEC's policy of concealment of agency action on administrative complaints. Dkt. Nos. 25-1, 25-2.

In all events, CLC likewise fails to rebut Heritage Action's showing that it meets the criteria for permissive intervention under Rule 24(b). *See* Mem. 20. Aside from part of a conclusory sentence, CLC does not dispute that Heritage Action's defense—that CLC cannot bring a direct lawsuit against Heritage Action because the FEC took action on CLC's administrative complaint—"shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). And CLC's assertion that intervention will "unduly delay or prejudice the adjudication of the original parties' rights" rises—and falls—with its misguided arguments on timeliness. *Id.*

ARGUMENT

I. Heritage Action is entitled to intervene as of right.

A. Heritage Action's notice of appeal does not preclude this Court from ruling.

As a threshold matter, this Court can easily dispose of CLC's argument that Heritage Action's May 20, 2022, notice of appeal bars it from ruling on the motion to intervene. Opp. 29-30. While CLC initially contended that the notice of appeal divested this Court of jurisdiction to address the motion to intervene, it abandoned that position at the Status Conference held on May 25, 2022. CLC now maintains that this Court *can* rule on the motion to intervene on the theory that Heritage Action's notice of appeal was ineffective. *See, e.g.*, *WM Cap. Partners 53, LLC v. Barreras, Inc.*, 975 F.3d 77, 83-84 (1st Cir. 2020) ("no divestiture occurs if the notice of appeal is defective in some substantial and easily discernible way") (cleaned up); *United States v. DeFries*, 129 F.3d 1293, 1303 (D.C. Cir. 1997) (observing that a district court does not lose jurisdiction when there has been an appeal "from a non-appealable order"); *see also* 16A Fed. Prac. & Proc. Juris. § 3949.1 (5th ed. 2022 update) ("The weight of authority holds that an appeal from a clearly non-appealable order fails to oust district court authority") (collecting cases). While Heritage Action disputes that its notice of appeal was ineffective, CLC is correct that this action did not divest of this Court of jurisdiction. As the leading treatise on federal procedure explains, although there is "a split of opinion on the question whether the district court loses jurisdiction to grant intervention to appeal after a notice of appeal has been filed," the "better" view is that "the district court can act" because "its action is in support of the appeal process, not in derogation of it." 15A Fed. Prac. & Proc. Juris. § 3902.1 (2d ed. 2022 update); *see Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 131, 134 (3d Cir. 1979) (en banc) (adopting this approach); *see also Wolfe v. Clarke*, 718 F.3d 277, 281 n.3 (4th Cir. 2013) (observing a notice of appeal does not divest a district court of jurisdiction "to proceed as to matters in aid of the appeal" (citation omitted)).

In any event, this Court need not resolve this jurisdictional dispute. *Amarin Pharms. Ireland Ltd. v. FDA*, 139 F. Supp. 3d 437, 439 (D.D.C. 2015) (acknowledging that this remains an open question in the D.C. Circuit); Opp. 30 n.10 (same). All agree that this Court *can* resolve Heritage Action's intervention motion at this juncture; they merely dispute *why*. And to the extent this Court has any lingering concerns about its own jurisdiction, there is a clear path forward. As the Court suggested at the Status Conference, it can issue both an order on the intervention motion and, in the alternative, an indicative ruling on the motion under Rule 62.1 addressing whether this Court "would grant the motion if the court of appeals remands for that purpose." Fed. R. Civ. P. 62.1(a)(3). Out of an abundance of caution, this Court should take that belt-and-suspenders approach. *See Amarin*, 139 F. Supp. 3d at 443 (issuing indicative ruling stating that proposed intervenor would be entitled to intervene under Rule 24(a)). That approach will allow Heritage Action to seek reconsideration of or appeal the May 3 Judgment, which the Court issued at a time when the FEC was still concealing the fact that it had already taken action on CLC's administrative complaint long ago.

B. Heritage Action has both Article III standing and a legally protected interest.

CLC fares no better in contending that Heritage Action lacks standing under Article III and a legally protected interest under Rule 24(a), which are governed by "the same" analysis. *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 316, 320 (D.C. Cir. 2015). CLC does not, and cannot, dispute that this Court has injured Heritage Action by issuing a ruling that facilitated a direct lawsuit against Heritage Action by CLC. Nor does CLC seriously deny that if that ruling is set aside—through either reconsideration or an appeal—that harm to Heritage Action would be rectified. One would think that would be the end of that matter, but CLC advances a convoluted theory that reduces to the following assertion: intervention cannot redress Heritage

Action's injury because only the March 25 Order—and not the May 3 Judgment—is legally operative, and Heritage Action cannot challenge the March 25 Order on appeal. *See* Opp. 19-26. But even accepting for the sake of argument the dubious premise that only the March 25 Order matters—which makes one wonder why CLC ever asked this Court for a declaration that the FEC had failed to conform, *see* Dkt. No. 21—the conclusion does not follow. That is so for at least two reasons.

First, Heritage Action *can* challenge the March 25 Order on appeal. CLC does not, and cannot, dispute that this Court's May 3 Judgment was a final appealable order. And it is blackletter law that "an appeal from final judgment opens the record and permits review of all rulings that led up to the judgment." 15A Fed. Prac. & Proc. Juris. § 3905.1 (2d ed. 2022 update); *see, e.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) ("The general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." (cleaned up)). Indeed, CLC's own authority confirms the point: the reason that "as a general rule, a district court order remanding a case to an agency for significant further proceedings"—here, the March 25 Order—"is not final" is that the remand order can be addressed on an appeal "from entry of a district court order reviewing the remanded proceedings"—here, the May 3 Judgment. *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000) (citation omitted). Accordingly, whether the operative ruling here occurred on March 25 or May 3, the D.C. Circuit will be able to review it.

CLC's contrary theory—that Heritage Action can appeal *neither* the March 25 Order (because it was interlocutory) *nor* the May 3 Judgment (because it lacks standing)—would put parties like Heritage Action in a Catch-22 and effectively insulate this Court's failure-to-act determination from appellate review. That cannot be right. Indeed, the D.C. Circuit has warned

against denying motions to intervene that would result in "the effective insulation of the District Court's exercise of jurisdiction from all appellate review," and there is no reason to chart a different course. *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). In any event, "[w]hen appellate jurisdiction is at stake, what matters is the appellate court's assessment." *Franklin v. District of Columbia*, 163 F.3d 625, 630 (D.C. Cir. 1998); *see Amarin*, 139 F. Supp. 3d at 448 (observing that a "question" that "goes to the jurisdiction of the Court of Appeals … is appropriately left for that Court to address"). This Court should not deny the motion to intervene on the basis of what it thinks the D.C. Circuit will do. *See Amarin*, 139 F. Supp. 3d at 447-48.

Second, Heritage Action is not seeking to intervene solely to appeal this Court's May 3 Judgment (and underlying March 25 Order), but also for an opportunity to move for this Court's reconsideration of its prior rulings. CLC identifies no reason why this Court could not reconsider either of these rulings in light of newly obtained evidence. In all events, whether or not a motion for reconsideration would be successful on its merits would be for this Court to decide based on the briefing and argument before it at that time.

CLC's remaining arguments are even less persuasive. For example, CLC devotes pages of its opposition to disputing the merits, *see* Opp. 22-24, but it is blackletter law that when assessing "Article III standing, a federal court must assume, *arguendo*, the merits" of the "legal claim" advanced. *Est. of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019) (citation omitted). The same is true with respect to whether to grant "intervention," which is simply "a question of standing for [the movant] to participate in the case." *United States v. AT&T Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980). Thus, whether viewed through Article III or Rule 24, "a determination of the merits of [the movant's] claim is not appropriate at this threshold stage." *Id.* Whether the FEC

acted on CLC's administrative complaint is something that can and should be debated on a motion for reconsideration, for instance, not at this preliminary juncture. In engaging on the merits, CLC—like the *45Committee* Court before it—loses sight of this fundamental principle. *See* Opp. Ex. 1 at 10.

Moreover, CLC's claim that "Heritage Action will continue to be subject to enforcement by the FEC," Opp. 27, is a red herring: Even if Heritage Action remains subject to the agency's enforcement, it would not remain subject to direct, private litigation by CLC. That is a distinct, redressable injury, especially since the FEC has decided not to pursue enforcement in this case.

C. Heritage Action's motion to intervene for the purpose of appeal is timely.

CLC likewise fails to establish that Heritage Action's intervention motion was untimely. While CLC marches through the four timeliness factors—namely, (1) the "time elapsed since the inception of the suit," (2) "the purpose for which intervention is sought," (3) "the need for intervention as a means of preserving the applicant's rights," and (4) "the probability of prejudice to those already parties in the case," *Karsner*, 532 F.3d at 886 (citation omitted)—the D.C. Circuit has emphasized that the "most important consideration" 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) (citation omitted). As the D.C. Circuit has explained, "we do not require timeliness for its own sake;" rather, "the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id.* And here, CLC has failed to show that Heritage Action's decision to intervene now has caused CLC any unfair prejudice, let alone enough to justify foreclosing intervention.

To start, while CLC "may have hoped" that the FEC "would give up the defense of" this lawsuit on appeal, it "had no legally cognizable expectation" that the Commission, much less

Heritage Action, "would do so before all available forms of review ha[ve] been exhausted." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1014 (2022). "The loss of this sort of claimed expectation does not amount to unfair prejudice in the sense relevant here." *Id.*; *see United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) ("United can hardly contend that its ability to litigate the issue was unfairly prejudiced simply because an appeal on behalf of putative class members was brought by one of their own, rather than by one of the original named plaintiff."); *Ross v. Marshall*, 426 F.3d 745, 755 (5th Cir. 2005) ("This factor is concerned only with the prejudice caused by the applicants' delay, not that prejudice which may result if intervention is allowed." (citation omitted)). While CLC obviously does not want to have to continue litigating a case it won by default—and with the help of FEC's policy of concealment—that inconvenience is not a cognizable prejudice.

Nor can CLC claim that it will be prejudiced by devoting "'further time and resources relitigating' the merits of the case." Opp. 18 (quoting *Paisley*, 724 F.2d at 203). Here, the merits of this case never were never litigated in the first place, because the FEC never appeared. Accordingly, "the burden to the parties of reopening the litigation … would have been the same" had Heritage Action moved to intervene earlier. *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 390 (7th Cir. 2019). In any event, Heritage Action does not seek to "re-run this case in its entirety," Opp. 18, but rather to challenge the Court's subject-matter jurisdiction to enter the May 3 Judgment based on the simple fact that the FEC acted on the administrative complaint. *See AT&T*, 642 F.2d at 1295 ("While [movant] permitted significant time to elapse" before "its filing for intervention, the limited purpose for which intervention is granted strongly mitigates this defect.").

In all events, any slight prejudice to CLC from intervention cannot outweigh the likelihood that this Court authorized CLC to file a direct lawsuit against Heritage Action without subject-matter jurisdiction, the prejudice of effectively insulating those orders from any review whatsoever, and the prejudice suffered by Heritage Action, other similarly situated parties, and the public from the ongoing abuse by certain FEC Commissioners. *See* Notice of FEC Actions, Dkt. No. 25; *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008) (approving of weighing comparative prejudices); *Lopez-Aguilar*, 950 F.3d at 390 ("We also must consider 'the prejudice to the intervenor if the motion is denied.'").

While the lack of unfair prejudice here is sufficient to dispose of the timeliness inquiry, *Roane*, 741 F.3d at 151-52, the remaining factors collectively cut strongly in favor of intervention. *First*, CLC does not meaningfully dispute that Heritage Action's purpose for intervening—to challenge this Court's subject-matter jurisdiction based on previously concealed facts—supports intervention. Nor could it, since the D.C. Circuit and others have concluded that intervening for this purpose weighs heavily in favor of finding timeliness. *See, e.g.*, *Acree*, 370 F.3d at 43, 49-50 (reversing a district court's denial of "a motion to intervene for the purpose of contesting the District Court's subject-matter jurisdiction"); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1104 (10th Cir. 2005) (allowing intervention to address the "essential" issue of subject-matter jurisdiction); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 (5th Cir. 1992) (finding the purpose of raising a substantial question regarding jurisdiction to be a "special factor that supports finding timeliness" for intervention). CLC attacks the merits of the arguments that it thinks Heritage Action will make about subject-matter jurisdiction, Opp. 10-11—which are irrelevant to the question of intervention, *see supra* Part I.B.—but CLC never disputes that such a purpose itself weighs in favor of finding timeliness.

Second, CLC does not meaningfully dispute that Heritage Action needs to intervene in this case to preserve its rights now that CLC has filed a direct suit against it. *See CLC v. Heritage Action for Am.*, No. 22-cv-01248 (D.D.C. May 5, 2022). At most, CLC argues that Heritage Action's injury "is *only* redressable by the court" in its direct suit. Opp. 27. But whatever another court may decide on that subject, the need for Heritage Action to seek review *in this case* is without question now that CLC has filed its direct suit. *See NRDC v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977) ("It is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation.").

Finally, while CLC emphasizes that nearly "15 months" elapsed between "the inception of this suit" and Heritage Action's intervention motion, Opp. 10, "that factor is not dispositive," *Cameron*, 142 S. Ct. at 1012 (addressing intervention motion where "the litigation by that time had proceeded for years"); *see, e.g.*, *Acree*, 370 F.3d at 50 (fact that proposed intervenor "could have filed its motion" for "months" before the entry of judgment was not determinative). Instead, the "most important circumstance relating to timeliness" here, *Cameron*, 142 S. Ct. at 1012, is that Heritage Action had no basis to intervene until after May 6, 2022, when the FEC confirmed the existence of its voting records in response to Heritage Action's FOIA request. At that point, Heritage Action promptly moved to intervene on May 10 in order "to bring to the court's attention newly-discovered evidence that could not have been previously brought before the court." *Paisley*, 724 F.2d at 202 n.1.

While CLC insists that Heritage Action could have sought to intervene at various points throughout this litigation, CLC never identifies what arguments Heritage Action could have advanced as an intervenor at those times in a lawsuit alleging only agency delay. The FEC holds its votes on administrative complaints in closed-door executive sessions. Without proof that the

FEC had in fact acted on CLC's administrative complaint—proof that the Commission shielded from public scrutiny until May 6, 2022—Heritage Action could not have pursued the defense it seeks to raise now. And CLC does not identify any other arguments Heritage Action could have raised before now. Of course, Heritage Action—like many other readers of the *New York Times* 2021 exposé—was aware that the FEC had adopted a policy of concealment to manipulate the courts into authorizing private enforcement of FECA before May 6, 2022. But Heritage Action did not have proof until then that the Commission had applied its concealment policy to the administrative complaint against *Heritage Action specifically*. Heritage Action therefore did what it could by bringing the issue to this Court's attention through an *amicus* brief, Dkt. No. 17-1, which contrary to CLC's assertions, *see* Opp. 12-14, supports intervention, as that filing 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 had filed an *amicus* brief). And no doubt had Heritage Action tried to intervene without that evidence, CLC would have been the first to urge this Court to "deny the motion as premature." *United States v. Microsoft Corp.*, Nos. 98-cv-1232, 98-cv-1233, 2002 WL 319784, at *2 (D.D.C. Jan. 28, 2002); *cf. Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) ("Had the [movant] sought to intervene earlier, its motion would doubtless … have been denied."). The timeliness requirement of Rule 24(a) does not mandate an exercise in futility.

II. Alternatively, the Court should grant Heritage Action discretionary intervention.

Permissive intervention is also appropriate, because Heritage Action's defense—that the FEC took action on CLC's administrative complaint and therefore CLC cannot bring a direct lawsuit against Heritage Action—"shares with the main action a common question of law or fact," and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights."

Fed. R. Civ. P. 24(b). CLC primarily resists this conclusion by referencing its arguments about timeliness and prejudice, but those arguments are incorrect for the reasons already discussed. Opp. 29; *see supra* Part I.C. And CLC's argument about common questions or law or fact is limited to part of a single, conclusory sentence. Opp. 29. In any event, that conclusory argument is incorrect. The fundamental question of this action is whether the FEC acted on the administrative complaint—although it is not so much a question anymore as a likelihood (as CLC admits) or fact (as Heritage Action and the FEC have stated). That is precisely the gravamen of Heritage Action's defense, averred facts, and legal arguments as set forth in its Proposed Answer. *See* Dkt. No. 24-5. This Court should exercise its discretion to permit intervention for the purpose of seeking reconsideration of or appealing the Court's May 3 Judgment.

CONCLUSION

Heritage Action respectfully requests that the Court grant (and, in the alternative, indicate that it would grant under Rule 62.1) intervention as a matter of right under Rule 24(a)(2) or, in the alternative, allow intervention under Rule 24(b), for the purpose of seeking reconsideration of or appealing the Court's May 3 Judgment.

Respectfully submitted, on May 27, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and distribution to all registered participants of the CM/ECF System. Attorneys for Plaintiff are registered users of the CM/ECF System of this Court. Defendant was served a paper copy of this filing via regular United States mail at its address:

Federal Election Commission
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/s/ *Brett A. Shumate*
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