[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

REPLY IN SUPPORT OF APPELLANT'S OPPOSED MOTION TO HOLD APPEALS IN ABEYANCE

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INTRODUCTION

Heritage Action for America asked this Court to place these appeals into abeyance because disposition of its pending motion to dismiss Campaign Legal Center's citizen suit may obviate the need to resolve these appeals. The Center's opposition fails to justify its stubborn objection to this modest, commonsense request. *First*, the Center's assertion that the motion-to-dismiss ruling cannot affect this case is mystifying given that Heritage Action has made clear that it will drop these appeals if the citizen suit is conclusively dismissed. Mot. 15. *Second*, the Center's claim that Heritage Action will suffer no prejudice from an ordinary briefing schedule ignores the burdens of litigating matters that may soon become irrelevant due to proceedings elsewhere—a textbook injury justifying abeyance. *Third*, the Center's insistence that it would be harmed by deferring appellate review of rulings that it seeks to *preserve* reduces to a generalized interest in finality that exists whenever an abeyance motion is filed. In short, the Center has offered no good reason for denying the abeyance motion here.

ARGUMENT

I. THE MOTION-TO-DISMISS RULING MAY EFFECT THE OUTCOME OF THESE APPEALS.

The case for abeyance here is simple. If Judge Nichols grants Heritage Action's pending motion to dismiss the Center's citizen suit, 1:22-cv-1248 Dkt. 20, and that ruling becomes final, Heritage Action will no longer need to pursue these appeals. Because a dismissal thus "may entirely, or partially, moot" these appeals, this Court should hold them "in abeyance." *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008); *see* Mot. 14-15. While the Center nevertheless insists that the motion-to-dismiss ruling cannot "affect the outcome of this case," Opp. 2, it fails to defend that implausible claim.

A. The Center begins by observing that the motion-to-dismiss ruling will not resolve the "threshold" question in this appeal—whether the district court committed legal error in denying Heritage Action's motion to intervene. Opp. 13. But that cuts *in favor* of abeyance. A dismissal of the citizen suit will save both this Court and the parties from having to devote further resources to resolving the threshold issue of intervention here. If the Center acquiesces to that order, Heritage Action will dismiss these appeals. And if the Center appeals it, *see* Opp. 17, this Court could proceed directly to the merits issue in these appeals—whether the Center may pursue its citizen suit under 52 U.S.C.

§ 30109(a)(8)(C)—without having to address the threshold question of intervention. Either way, granting abeyance would reduce, if not eliminate, the issues requiring this Court's attention. It therefore makes no sense to address the intervention issue *now*, when that question may never resurface.[1]

B. The Center next contends that abeyance is inappropriate on the premise that these appeals warrant summary disposition. Opp. 13-15. But that argument, which goes to the *merits* of the intervention issue, does not resolve whether *abeyance* is appropriate. If this Court grants the Center's summary-disposition motion, these appeals will be over and there will be no need to consider whether to defer their resolution. And if this Court denies that motion, the abeyance calculus will be the same as before. Either way, the Center's toe-dipping into the intervention issue here is beside the point.

[1] While the Center raises a second threshold question—"whether this Court has appellate jurisdiction over Heritage Action's attempt to appeal the district court's judgment as a nonparty," Opp. 13—that issue turns entirely on the resolution of the intervention question. If the denial of intervention is reversed, this Court can consider the merits question here without addressing Heritage Action's prior status. *See, e.g.*, *Acree v. Republic of Iraq*, 370 F.3d 41, 51 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). And if the denial is ultimately affirmed, these appeals will be dismissed. *See, e.g.*, *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1328 (D.C. Cir. 2013).

In any event, as Heritage Action "will fully explain in its forthcoming" opposition, Opp. 13, the Center's summary-disposition motion is meritless. While the Center asserts that "the district court did not abuse its discretion" in denying the intervention motion "as untimely," Opp. 14, that ruling rests on multiple legal errors. *See Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022) (holding that the lower court's "assessment of timeliness was mistaken" and noting that "a court fails to exercise its discretion soundly when it bases its ruling on an erroneous view of the law") (cleaned up). For example, while the Center, like the district court, insists that there was "'a clear opportunity for pre-judgment intervention,'" Opp. 14, neither has identified what arguments Heritage Action could have advanced as an intervenor before the FEC released proof—the day after judgment was entered—that it had in fact acted on the Center's administrative complaint over a year earlier. And had Heritage Action sought to intervene without that 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, e.g.*, *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (holding post-judgment intervention motion was timely because "[h]ad the association sought to intervene earlier, its motion would … have been denied").

The Center also suggests that the abeyance motion shows Heritage Action lacks "standing and a concrete legal interest in intervening" because it is willing to "defend itself in the citizen suit." Opp. 14 n.5. Not even the district court went that far, as it recognized that "Heritage Action's rights … are obviously implicated" in this case. Dkt. 34 at 5. Being "exposed to civil liability via private lawsuit" unquestionably constitutes "a significant injury in fact," and the authorization of the Center's citizen suit triggers that injury. *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 318 (D.C. Cir. 2015); *see* Dkt. 34 at 5. That Heritage Action is willing to defend itself against 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.

At a bare minimum, nothing in the Center's opposition (or its summary-disposition motion) remotely establishes that the arguments for intervention here are so insubstantial that this Court should summarily dispose of these appeals. "A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified," *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). The Center has not carried that burden, especially as this Court has never confronted the issues here, including whether post-judgment

intervention is warranted when an agency has failed to defend itself while deliberately hiding critical evidence from the courts. *See Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 914 (D.C. Cir. 1996) (noting that an issue of "first impression" is "not appropriate for summary disposition"); *cf. Paisley v. CIA*, 724 F.2d 201, 202 n.1 (D.C. Cir. 1984) (indicating post-judgment intervention would be warranted "to bring to the court's attention newly-discovered evidence that could not have been previously brought before the court").

C. Turning to the merits question here, the Center notes that this Court "would not be bound" by a dismissal of the citizen suit. Opp. 16. That is both correct and irrelevant. The point is not that a district-court dismissal of the citizen suit would have any precedential or preclusive effect on this Court—of course it would not—but that it would eliminate the need for these appeals. Indeed, in *Basardh*, this Court held the "case in abeyance pending the conclusion of" parallel "proceedings in the *district court*," simply because a district-court ruling in the petitioner's "favor may entirely, or partially, moot" the proceedings before this Court. 545 F.3d at 1069, 1072 (emphasis added). The same may be true here, too.

The Center fares no better in asserting (without explanation) that Heritage Action is not "likely to succeed on the merits of its motion to dismiss."

Opp. 15 n.6. To the contrary, "it is difficult to imagine [it] losing." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021). As this Court has repeatedly held, "a court may not authorize a citizen suit unless it first determines that the Commission acted 'contrary to law,'" "which it cannot do" if the "three naysayers on the Commission placed their judgment squarely on the ground of prosecutorial discretion." *Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 439-40 (D.C. Cir. 2018); *accord Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 885 891 (D.C. Cir. 2021). And it is undisputed that is exactly what happened here. *See* Mot. 11-12; Opp. 10-11. The Center does not even mention this precedent, let alone try to explain why these cases do not foreclose its citizen suit.

In a similar vein, the Center contends that Heritage Action cannot "relitigate the merits" of whether the citizen suit was properly authorized before Judge Nichols on the premise that Heritage Action "failed to timely intervene below," Opp. 17—although it appears to take the opposite position in its summary-disposition motion (at 11). Even if that erroneous premise were somehow correct, the conclusion would not follow. As Judge Kelly recognized, Judge Nichols "will have to consider" the authorization question because it implicates "subject-matter jurisdiction." Dkt. 34 at 6; *see Perot v.*

FEC, 97 F.3d 553, 557 (D.C. Cir. 1996) ("Congress could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA."); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction … may be raised … at any stage in the litigation, even after … entry of judgment."). In addition, Judge Kelly observed that his conclusions in authorizing the citizen suit "are not preclusive" on Judge Nichols, Dkt. 34 at 6, as default judgments lack issue-preclusive effect. *See Arizona v. California*, 530 U.S. 392, 414 (2000); *see also Crossroads*, 788 F.3d at 320 (describing district-court orders in the suit against the FEC as having only "persuasive weight" in subsequent citizen suit). That the Center presses this meritless argument, however, confirms that Heritage Action must maintain these appeals to protect its right to challenge the authorization of the citizen suit, Mot. 15, even if it can "ultimately" appeal a denial of its motion to dismiss after sustaining the burdens needed to reach final judgment, Opp. 17.

In all events, the Center never demonstrates how these meritless arguments resolve whether these appeals should be held in abeyance. While the Center notes (Opp. 12-13) that in considering an abeyance motion, this Court "*may also* take account of the traditional factors in granting a stay,

including the likelihood that the movant will prevail," this Court "[o]ften" grants abeyance merely because "other pending proceedings … may affect the outcome of the case" before it without ever considering the merits (or the equitable stay factors). *Basardh*, 545 F.3d at 1069 (emphasis added); *see, e.g.*, *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 553 (D.C. Cir. 2012).

II. DENYING ABEYANCE WILL PREJUDICE HERITAGE ACTION.

The Center is no more persuasive in claiming Heritage Action has not identified "any harm … it will suffer should the appeals proceed in the normal course." Opp. 18. As explained, plowing ahead with these appeals would waste the "resources" of the parties and this Court in addressing appeals that "'may never need to'" be resolved and "burden" Heritage Action with "having to litigate the same issues in two different jurisdictions simultaneously." Mot. 4, 15. That commonsense point is a paradigmatic basis for abeyance, and the Center never explains why it is insufficient here. *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87, 390 (D.C. Cir. 2012); *Devia v. Nuclear Regul. Comm'n*, 492 F.3d 421, 426 (D.C. Cir. 2007); *United States v. Quinn*, 475 F.3d 1289, 1291 (D.C. Cir. 2007).

Rather than deny that "abeyance would 'conserve resources,'" the Center urges this Court to ignore that fact because Heritage Action initially

sought to stay proceedings in the citizen suit to allow "these appeals to proceed." Opp. 18-19. But Heritage Action withdrew that stay motion because the Commission finally released conclusive evidence that it had dismissed the administrative complaint on the basis of prosecutorial discretion back in April 2021 only after Judge Kelly had authorized the citizen suit. 1:22-cv-1248 Dkt. 17 at 1. With these documents in hand—and with Judge Kelly's observation that the merits issue here could and should be litigated in the citizen suit, Dkt. 34 at 6—Heritage Action moved to dismiss the citizen suit in the hope that this Court would never need to address the intervention question in these appeals.

So while the Center repeatedly faults Heritage Action for changing positions from its "motion to intervene," Opp. 14 n.5, and citizen-suit "motion to stay," Opp. 17; *see* Opp. 16, those shifts reacted to the FEC's belated release of its voting records and statement of reasons after the citizen suit had been authorized. Heritage Action would obviously prefer a more streamlined approach, but as Judge Kelly observed, it has been left with "a procedural mess" caused by "the Commission's unseemly failure to appear and defend itself" and "what Heritage Action casts as a scheme to hide its activity and leave regulated parties in legal limbo." Dkt. 34 at 2, 7. That new concealment policy is the only "abrupt reversal" here. Opp. 17; *see* Mot. 7-9.

III. ABEYANCE WILL NOT PREJUDICE THE CENTER.

On the other side of the ledger, the Center never identifies any material prejudice it (or the public) would suffer from abeyance. Given that the decisions below *benefit* the Center, and that the Center has already filed a citizen suit, one would have thought it would have been content to leave Judge Kelly's rulings undisturbed for as long as possible. The Center nevertheless makes the head-scratching claim that that "an abeyance here would further delay the adjudication of CLC's claims in the citizen suit," Opp. 18—even though the point of Heritage Action's motion is to permit the resolution of the citizen suit *before* these appeals are resolved.

Ultimately, the Center's real fear appears to be that these appeals could reverse the authorization for its citizen suit, and hence it wants a definitive answer from this Court on that issue as soon as possible. But that generalized "interest in finality," Opp. 18, is present *whenever* this Court considers whether to grant an abeyance motion. It thus cannot justify allowing an appeal to proceed in the normal course when every other consideration counsels otherwise. Tellingly, the Center identifies no abeyance decision where this finality interest was even mentioned, let alone one where it proved dispositive. Nor does it explain why this case should be the one to break new ground.

CONCLUSION

This Court should grant Heritage Action's abeyance motion.

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Respectfully submitted,

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 12th 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