

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JOHN DOE 1, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.: 17-cv-2694 (ABJ)
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
	)	

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**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE BY  
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND  
ANNE WEISMANN**

Plaintiffs, by and through undersigned counsel, respectfully submit this memorandum of points and authorities in opposition to the motion by Citizens for Responsibility and Ethics in Washington and Anne Weismann (collectively, “CREW”) to intervene as defendants in this action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure.

CREW has failed to satisfy the requirements for an intervention of right. CREW submitted its motion on the same day that briefing on the merits of Plaintiffs’ case was initially scheduled to be completed, thereby causing prejudicial delay to the parties in the disposition of a case ready for decision on the merits. Further, CREW has no legally protected interests in the disclosure of the identities of non-respondent, third-party witnesses in a Federal Election Commission (“FEC” or “the Commission”) investigation, under either the Federal Election Campaign Act (“FECA”) or the Freedom of Information Act (“FOIA”). To the extent these interests might exist, CREW has failed to demonstrate any impairment of its ability to protect these interests, and the FEC can adequately represent CREW’s alleged interests, having taken the same position as CREW on the disclosure of Plaintiffs’ identities.

**I. CREW HAS NOT SATISFIED THE REQUIREMENTS FOR INTERVENTION OF RIGHT**

**A. CREW's Motion Is Untimely, and Intervention Will Prejudice Existing Parties by Causing Undue Delay**

CREW's request is untimely because intervention will prejudice the existing parties and cause unnecessary delay to the disposition of this case. The timeliness of a motion to intervene must "be judged in consideration of all the circumstances," and while the time that has elapsed since the inception of the suit is relevant, it is not itself determinative. *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (citation omitted). Courts do not require timeliness for its own sake. *Id.* 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.* Contrary to CREW's cursory treatment of the issue, courts also consider the probability of prejudice to existing parties, the purpose for which intervention is sought, and the need for intervention as a means of preserving the putative intervenor's rights. *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017). Disadvantage to existing parties is "the most important consideration" in assessing timeliness. *Roane*, 741 F.3d at 152. Courts have found that the delay caused by a potential intervenor can be sufficient to constitute prejudice where a decision on the merits is pending. *Amador Cty., Cal. v. U.S. Dep't of Interior*, 772 F.3d 901, 905-06 (D.C. Cir. 2014) (collecting cases). In *Amador County, California*, the D.C. Circuit affirmed a finding of prejudicial delay where the case was "ready for oral argument and decision on the merits," and the motion for intervention both delayed the decision and would cause further delay by necessitating additional briefing by the intervenor, arguments, and a ruling. *Id.* at 906.

Intervention here will cause the FEC and Plaintiffs prejudicial delay. Plaintiffs have filed their reply in support of their motion for preliminary injunction, which this Court has indicated it may likely treat as dispositive. In the interest of expediency, the Court ordered expedited briefing

according to a schedule publicly disclosed in the docket, and thus known to CREW, when this case was unsealed on December 19, 2017. *See* Minute Order, *Doe, et al. v. FEC*, No. 17-cv-2694-ABJ (D.D.C. Dec. 18, 2017). Rather than file its motion promptly, CREW knowingly waited nine days to meet and confer with the parties (on the eve of a holiday weekend) regarding its Motion to Intervene, and an additional six days to file – ultimately filing on the same day Plaintiffs’ Reply Memorandum was due and all briefing on the merits was complete under the schedule in place at the time. The time normally allotted for briefing on the merits has expired. Although the FEC sought and the Court granted leave to file a surreply, briefing on the merits in this action is nearly complete. By moving to intervene concurrent with when the Court had initially scheduled the parties to conclude their briefing on the merits, CREW’s attempted intervention comes only after substantive progress has occurred in the case. *Cf. 100Reporters LLC v. U.S. Dep’t of Justice*, 307 F.R.D. 269, 275 (D.D.C. 2014) (intervention “would not unduly disrupt the litigation or pose an unfair detriment to the existing parties” where “[t]o date, no substantive progress has occurred in this action”). Allowing CREW to intervene now will result in additional briefing, thereby disrupting the case, delaying a final decision on the merits, and disadvantaging the existing parties. CREW’s motion is thus untimely.

**B. CREW Has Failed to Assert a Legally Protected Interest**

CREW has no legally protected interests under FECA or FOIA in the disclosure of the identities of Plaintiffs, who were non-respondent, third-party witnesses in an FEC investigation.

A prospective intervenor “must demonstrate a legally protected interest in the action.” *100Reporters*, 307 F.R.D. at 275 (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). Courts in the D.C. Circuit “generally treat the standing analysis for intervention as of right as equivalent to determining whether the intervenor has a ‘legally protected’ interest under Rule 24(a).” *Id.* at 276; *cf. Deutsche Bank Nat’l Tr. Co. v. F.D.I.C.*, 717 F.3d 189, 193 (D.C. Cir.

2013) (“It is therefore circuit law that intervenors must demonstrate Article III standing. . . .”). Article III standing requires a showing of injury-in-fact, causation, and redressability. *Deutsche Bank Nat’l Tr. Co.*, 717 F.3d at 193. An asserted injury is too conjectural to constitute a legally protected interest “where a threshold legal interpretation must come out a specific way before a party’s interests are even at risk.” *Id.* That is the case here, where the purported injury to CREW hinges in its entirety on a legal determination that Plaintiffs’ identities must be disclosed under FECA.

**1. CREW Lacks Any Interest Under FECA in Disclosure of Plaintiffs’ Identities**

CREW has no legally protected interest under FECA in the disclosure of the identities of non-respondent, third-party witnesses in an FEC investigation, such as Plaintiffs. CREW appears to base its alleged injury (being denied information about Plaintiffs’ identities, to which CREW believes it is entitled) solely on its belief that Plaintiffs violated FECA. *See* Mem. P. & A. Supp. Mot. to Intervene by CREW and Anne Weismann 5, 8 n.5 [Dkt. 22] (arguing that “what plaintiffs seek to conceal,” i.e., Plaintiffs’ identities, is the same as “the source of the \$1.71 million contribution”). However, Plaintiffs were not respondents in MUR 6920, and the “Unknown Respondent” against whom CREW filed its complaint in 2014 was later identified by the FEC as Government Integrity, LLC, which then became a respondent in MUR 6920. Thus, for CREW to have any interest under FECA in the disclosure of Plaintiffs’ identities, there must first be a threshold legal determination establishing that Plaintiffs’ conduct as related to events under investigation brings Plaintiffs within the purview of FECA’s disclosure requirements. Whether Plaintiffs were required to disclose any information under FECA is not before this Court and cannot be litigated in this action.

CREW has no right to generally enforce FECA in order to vindicate an alleged interest in information required to be disclosed under the statute. *See CREW v. FEC*, 164 F. Supp. 3d 113, 119 (D.D.C. 2015) (holding that “FECA grants the FEC ‘exclusive jurisdiction’ over civil enforcement of campaign finance laws, thereby channeling all complaints of campaign finance violations through the FEC.”). CREW’s purported injury in being denied the identity of an alleged contributor arises only if Plaintiffs in fact violated FECA and the FEC’s enforcement of FECA was contrary to law. Neither question is at issue in this case, which pertains solely to the FEC’s decision to disclose the identities of non-respondents against whom no finding was ever made. Such an injury, which is dependent on resolution of a threshold legal question in a specific way, is too far removed to serve as the basis for a “legally protected interest” in the present action. *See Deutsche Bank Nat’l Tr. Co.*, 717 F.3d at 193. Moreover, as demonstrated below, CREW could not redress any injury to this interest through intervention in this action. *See In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. 1, 5 (D.D.C. 2010) (denying intervention on causation and redressability grounds where relief sought bore “no relation to the present action”). Indeed, the question of whether FECA required Plaintiffs to disclose their identities is wholly irrelevant to this action.

**2. CREW Has No Interest Arising from a Right to Judicial Review of its Administrative Complaint**

CREW also lacks any legally protected interest in this action based on its asserted right under 52 U.S.C. § 30109(a)(8) to judicial review. As an initial matter, it is doubtful that CREW has a “statutory right to seek judicial review of the FEC’s failure to investigate or enforce against the donors” in MUR 6920. *See* Mem. P. & A. Supp. Mot. to Intervene by CREW and Anne Weismann 8 [Dkt. 22]. Review under Subsection (a)(8) is triggered under only two conditions: where an administrative complainant is “aggrieved by an order of the Commission dismissing a

complaint . . . or by failure of the Commission to act on such complaint.” 52 U.S.C. § 30109(a)(8). Contrary to CREW’s assertion, the Commission did not “fail to act,” but rather took action on CREW’s complaint by executing a conciliation agreement with the four respondents in MUR 6920, including the “Unknown Respondent” in CREW’s complaint. Nor did the FEC “dismiss” CREW’s administrative complaint. In fact, it did the opposite: the Commission investigated the allegations in the complaint and resolved them via conciliation. That conciliation agreement marks the definitive end of the matter, as FECA provides that “[a] conciliation agreement, unless violated, is a complete bar to any further action by the Commission.” 52 U.S.C. § 30109(a)(4)(A)(i).

Although CREW’s standing to bring a Subsection (a)(8) action is suspect at best, the Court need not decide that issue at this juncture, because whether CREW could pursue such a claim does not affect the scope of its legal interest in this action. In a Subsection (a)(8) case, the sole question is whether the Commission’s dismissal decision or failure to act was “contrary to law.” *See* 52 U.S.C. § 30109(a)(8)(C); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (holding that “Congress wisely provided that the Commission’s dismissal of a complaint should be reversed only if ‘contrary to law’”). The issue presented in this case is distinct. The only question here is whether, having concluded its investigation and reached conciliation with all respondents to the complaint, the Commission has the power to release non-respondent Plaintiffs’ identities. There is no opportunity in this action to contest the FEC’s underlying administrative enforcement decision. Whatever right CREW has to challenge the FEC’s decision-making in another forum, that right is not implicated at all in this case.

Because CREW would have no right as a defendant in this action to challenge the FEC’s conduct of its investigation, its reliance on the D.C. Circuit’s decision in *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015), is inapposite. *Crossroads* involved the

intervention by a *respondent* to an FEC complaint in the complainant's *appeal* of the Commission's ruling as to non-enforcement against the respondent, and accordingly involved a significant and identifiable interest. *See Crossroads*, 788 F.3d at 314. The court in *Crossroads* recognized that the intervening respondent claimed a significant benefit from the FEC's dismissal order, in the form of no further exposure to enforcement proceedings before the FEC or to civil liability. *See id.* at 317-19. Thus, losing the favorable order and the significant benefit it conferred through an appeal would be a significant injury-in-fact. *Id.* The reasoning at the heart of *Crossroads* is simple and compelling: a person who has had a complaint against him dismissed should not have to rely on the very agency responsible for investigating him to argue that no further investigation is required by law. *See id.* at 321. *Crossroads* stands for the proposition that, as an intervenor-defendant in a § 30109(a)(8) action, a respondent may fully defend the FEC's decision to dismiss the administrative complaint against him as not contrary to law and thus shield himself from further investigation or liability.

By contrast, even if it successfully intervenes, CREW will not have the opportunity here to advance the sole ground on which it is permitted to challenge the FEC's dismissal or failure to act on its complaint: that the FEC's decision was "contrary to law." *See* 52 U.S.C. § 30109(a)(8)(C). Thus, CREW's position is not the "mirror-image" of a respondent-intervenor. *See* Mem. P. & A. Supp. Mot. to Intervene by CREW and Anne Weismann 7 [Dkt. 22]. *Crossroads* did not involve, as here, an attempt by a complainant to interject itself into a separate legal proceeding between the FEC and a non-respondent, third-party witness in the Commission's investigation, wholly unrelated to the complainant's complaint. If CREW successfully intervenes and prevails, it will have done nothing to demonstrate that the FEC's decision was contrary to law, nor will it have done anything that would cause the Court to remand the matter back to the FEC

for further consideration. In the absence of any interest under FECA for CREW to protect, it is an “intermeddler[] with limited interests beyond the dispute at issue.” *Crossroads*, 788 F.3d at 320.

Plaintiffs here are non-respondent witnesses seeking to prohibit the unlawful disclosure of their identities. This Court’s decision to grant or deny the relief Plaintiffs seek will not implicate future FEC enforcement proceedings or Plaintiffs’ civil liability, a factor that was critical to the result in *Crossroads*. *Cf. id.* CREW lacks a legally protected interest in this action because the outcome of Plaintiffs’ lawsuit will have no detrimental effect (or any effect at all) on CREW’s narrow interests in a Subsection (a)(8) action. Indeed, CREW’s protestations that the redaction of Plaintiffs’ identities has frustrated its ability to obtain judicial review of MUR 6920 pursuant to Subsection (a)(8) are belied by the fact that CREW has done precisely that.<sup>1</sup>

### **3. CREW Lacks Standing Under FOIA Sufficient to Create an Interest in the Instant Case**

Finally, CREW’s status as a FOIA requester is insufficient to serve as the basis for a legally protected interest in this action. A requester has standing to bring an action under FOIA only after its request for specific information has been denied. *See Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017) (“We have said of § 552(a)(3) that “[a]nyone whose request for specific information has been denied has standing to bring an action . . . .””) (citation omitted). The FEC declined on January 12, 2018 to release the unredacted records requested by CREW under FOIA, citing this Court’s December 18, 2017 Order. The Order preventing the release of the unredacted records, however, is temporarily in place until the conclusion of these proceedings, and the Commission is still actively litigating before this Court its right to release such records. Further, CREW has not yet filed an appeal of the FEC’s action. Thus, any alleged injury is not yet

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<sup>1</sup> In fact, CREW manages to state its position without any great difficulty by referring to Plaintiffs as “John Doe Trust” and “John Doe Trustee” in that action, and they offer no reason here as to why or how the actual identities of Plaintiffs might possibly enhance their claim.

sufficiently concrete or imminent because a final order preventing disclosure under FOIA has not yet been issued. While CREW may ultimately have a separate cause of action under FOIA, it must first exhaust its administrative remedies before seeking judicial review. *See Wilbur v. C.I.A.*, 355 F.3d 675, 677 (D.C. Cir. 2004).

**C. CREW's Alleged Interests Will Not Be Impaired in the Absence of Intervention**

Even assuming CREW has a legally protected interest in the FEC's publication of Plaintiffs' names, CREW still has failed to demonstrate that its interest will be "impaired or impeded as a practical matter absent intervention." *See In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). Rule 24(a)(2) requires a practical impairment of a movant's "ability to protect its interest." *See Fed. R. Civ. P. 24(a)(2)*. In evaluating the impairment of a prospective intervenor's interests, "courts look to the practical consequences of denying intervention." *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 13 (D.D.C. 2010) (citation omitted).

**1. Non-Intervention Will Not Impair CREW's Ability to Protect Its Purported Interest Under FECA**

CREW's ability to protect a purported interest under FECA in the disclosure of Plaintiffs' identities will not be impaired or affected by CREW's non-intervention. Intervention as of right under Rule 24(a)(2) requires an impairment to CREW's ability to protect an interest. *See Fed. R. Civ. P. 24(a)(2)*. With respect to its alleged interests under FECA, however, any impairment caused by non-intervention would be limited to CREW's ability to assert, not protect, an interest in the disclosure of the identities of non-respondent witnesses whom CREW believes the FEC should have treated as respondents. If there is any venue for asserting this alleged interest (and there is not), it is CREW's action for injunctive and declaratory relief filed with this Court against the Commission. *See Compl., CREW v. FEC*, No. 17-cv-2770-ABJ (D.D.C. Dec. 22, 2017).

**2. Non-Intervention Will Not Impair or Impede CREW's Ability to Challenge the FEC's Actions Regarding CREW's Administrative Complaint**

As to CREW's purported interest in seeking judicial review of the FEC's "failure to act" against Plaintiffs, denying intervention will have no bearing whatsoever on CREW's ability to appeal the FEC's actions related to MUR 6920. Indeed, CREW already has done so. The redaction of names and contact information does not impede an individual's ability to challenge an agency's basis for a decision or a court's ability to meaningfully review it where "the context of a . . . document is often quite clear from reading the documents." *See Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 210-211 (D.C. Cir. 2015). The impediment is even smaller where the individual has in fact relied on the documents in formulating its challenge. *Id.* at 211 (emphasizing from appellee's brief that "[n]ot only is the [redacted] database publicly available, but [appellant] itself actually used it in formulating its comments on the Rule.>").

Plaintiffs in this action seek only redaction of their identities. They do not seek redaction of any other factual information contained in the investigatory materials related to CREW's administrative complaint. In the event Plaintiffs win on the merits and their identities are withheld, all other facts disclosed by the Commission regarding MUR 6920 will remain public, including all facts that were used and relied upon by the FEC to support its legal conclusions. CREW's assertion that its arguments will be reduced "to a series of guesses and hypotheticals," *see* Mem. P. & A. Supp. Mot. to Intervene by CREW and Anne Weismann 9 [Dkt. 22], is meritless. The redaction of Plaintiffs' identities will not impair CREW's ability to challenge the FEC's decision, as evidenced by the fact that CREW has already relied on this redacted factual record in filing its complaint. *See generally* Compl., *CREW v. FEC*, No. 17-cv-2770-ABJ (D.D.C. Dec. 22, 2017). The factual record without Plaintiffs' names and identifying information is sufficiently clear to

allow CREW to protect its right to seek judicial review under FECA. *See Pharm. Research & Mfrs.*, 790 F.3d at 210-211.

**3. Issue Preclusion Will Not Necessarily Prevent CREW from Asserting Interests Under FOIA**

Finally, denying intervention will not impose a practical impairment or impediment to CREW's ability to protect any interest created by FOIA. Precedent suggests that issue preclusion does not apply here; a reverse FOIA action defended by an agency does not necessarily bar a later FOIA action brought by a requester. *Consumers Union of U. S., Inc. v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209, 1217-18 (D.C. Cir. 1978) ("If the FOIA applicant has neither been a party nor otherwise represented in a prior successful reverse-FOIA suit, he will not be blocked from taking his controversy to the courts."), *rev'd on other grounds sub nom. GTE Sylvania, Inc. v. Consumers Union of U. S., Inc.*, 445 U.S. 375 (1980). Because CREW will not automatically be foreclosed from challenging under FOIA a final denial of its request, it suffers no impairment to its interest here if prevented from intervening.

**D. As a Party to this Action with a Position Identical to that of CREW, the FEC Adequately Represents the Intervenors' Alleged Interests**

CREW's interests – assuming they exist – are adequately represented by the FEC. To intervene as of right, CREW must demonstrate that its interest will not be adequately represented by any other party. *See In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). A divergence in interests is relevant only insofar as the disagreement concerns a question at issue in the instant case. *See Alfa Int'l Seafood v. Ross*, 321 F.R.D. 5, 9 (D.D.C. 2017) ("no obvious divergence [of interests] in the course of litigation" where disagreement between agency and intervenor were not questions at issue in the case), *appeal docketed*, No. 17-5138 (D.C. Cir. Jun. 7, 2017). Although courts often find that government agencies do not adequately represent the interests of aspiring intervenors, this result is "primarily because the government entity's overarching obligation is to represent the

interests of the American people, while the intervenor's obligation is to represent its own interests." *See 100Reporters*, 307 F.R.D. at 279 (citation omitted). This case, however, presents an unusual situation in which the proposed intervenor and existing federal agency party have – and will continue to have – identically aligned interests. Indeed, this is not the typical FOIA litigation in which the “plaintiff’s interest lies in disclosure [and] the government entity’s interest lies in responding appropriately to the plaintiff’s request,” *id.* at 279-80 (citation omitted), but instead one in which both the FEC and CREW seek disclosure of the information. Although CREW argues its interests are not represented by the FEC, the Commission advocates for CREW’s exact position in its Response, asserting that in order to decide whether to initiate an action challenging the Commission’s handling of MUR 6920, “[CREW] is entitled to the information from the Commission’s deliberations that is ordinarily made public.” *See* Def. FEC’s Resp. to Mot. TRO and Mot. to Seal 7 [Dkt. 16].

The FEC and CREW have taken identical positions seeking the release of unredacted investigative records for MUR 6920. As explained above, the information at issue (Plaintiffs’ identities) will have no effect whatsoever on CREW’s ability “to effectively litigate and win its lawsuit against the FEC,” *see* Mem. P. & A. Supp. Mot. to Intervene by CREW and Anne Weismann 11 [Dkt. 22], because all facts known and relied upon by the Commission in formulating its legal conclusions will remain public, regardless of the outcome of this action. Indeed, by litigating for disclosure of Plaintiffs’ identities even in light of CREW’s pending appeal of the FEC’s enforcement actions, the Commission has indicated it does not view this information as helpful to CREW’s lawsuit, making CREW’s assertion that “the FEC almost certainly will not appeal” (*id.* at 12) highly speculative. The issues upon which the Commission’s and CREW’s interests might diverge and as to which the FEC might not adequately be able to represent CREW

– e.g., the proper enforcement of FECA as applied to MUR 6920 – are not at issue in this action and are instead the subject of CREW’s separate complaint against the FEC. *See Alfa Int’l Seafood*, 321 F.R.D. at 9, *appeal docketed*, No. 17-5138 (D.C. Cir. Jun. 7, 2017). Thus, CREW’s interests are and will remain adequately represented by the FEC.

## II. CONCLUSION

CREW has failed to timely assert legally protected interests relating to the subject of this action or any impairment of its alleged interests. To the extent CREW’s interests in this action exist at all, they are and will continue to be adequately represented by the FEC. Accordingly, for the reasons stated above, CREW’s Motion to Intervene should be denied.

January 17, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of January, 2018, I served the foregoing papers, that were filed with the Court, by sending these materials by e-mail to the following counsel, who have consented to receive service by e-mail:

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I hereby certify that on this 17th day of January, 2018, I served the foregoing papers, that were filed with the Court, on the following counsel through the Court's electronic case filing system:

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