[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 (Kelly, J.)

CORRECTED BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Appellant Heritage Action for America certifies as follows:

A. Parties and Amici

The appellant in this Court and the movant in the district court is Heritage Action for America (Heritage Action).

The appellee in this Court and plaintiff in the district court is Campaign Legal Center. The appellee in this Court and defendant in the district court is the Federal Election Commission.

Both Heritage Action and the Institute for Free Speech appeared as *amici curiae* in the district court.

B. Rulings Under Review

The rulings under review are (1) the June 6, 2022 order (Dkt. 33) and accompanying memorandum opinion (Dkt. 34) denying Heritage Action's motion to intervene, JA306-14; (2) the May 3, 2022 order (Dkt. 23) declaring that the Federal Election Commission has failed to conform to the default-judgment order, JA245-47; and (3) the March 25, 2022 default-judgment order (Dkt. 16), JA198-200, all issued by the District Judge Timothy J. Kelly. The orders and opinion are not published in the Federal Supplement 3d, but the June 6, 2022 memorandum opinion is available at 2022 WL 1978727.

C. Related Cases

This case has not previously been before this Court or any other court. There are several related cases pending before the U.S. District Court for the District of Columbia: (1) Campaign Legal Center's lawsuit against Heritage Action under the Federal Election Campaign Act of 1971, *Campaign Legal Center v. Heritage Action for America*, No. 1:22-cv-1248 (Nichols, J.); (2) Heritage Action's lawsuit against the Federal Election Commission under the Administrative Procedure Act, *Heritage Action for America v. Federal Election Commission*, No. 1:22-cv-1442 (Nichols, J.); and (3) a similar lawsuit by Campaign Legal Center against 45Committee, Inc. under the Federal Election Campaign Act of 1971, *Campaign Legal Center v. 45Committee, Inc.*, No. 1:22-cv-1115 (Mehta, J.).

Similar appeals of both a denial of a motion to intervene filed by 45Committee, Inc. and a declaration of failure to conform were summarily affirmed and dismissed, respectively, by this Court on September 14, 2022, *Campaign Legal Center v. Federal Election Commission*, Nos. 22-5164, 22-5165. In those appeals, the case below was *Campaign Legal Center v. Federal Election Commission*, No. 1:20-cv-809 (D.D.C.) (Jackson, J.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, Appellant Heritage Action for America makes the following disclosure:

Heritage Action for America is a 501(c)(4) nonprofit issue-advocacy organization that promotes the advancement of conservative principles, has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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GLOSSARY

The Act	Federal Election Campaign Act of 1971, 52 U.S.C. § 30101 *et seq.*
AT&T	*United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980)
The Center	Campaign Legal Center
Citizen-Suit Dkt.	District-Court Docket Entries in *Campaign Legal Center v. Heritage Action for America*, No. 1:22-cv-1248 (D.D.C) (Nichols, J.)
Commission on Hope	*CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018)
FEC or the Commission	Federal Election Commission
FEC Dkt.	District-Court Docket Entries in *Heritage Action for America v. Federal Election Commission*, No. 1:22-cv-1422 (D.D.C.) (Nichols, J.)
FOIA	Freedom of Information Act, 5 U.S.C. § 552
New Models	*CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021)
NRSC	*FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992)

INTRODUCTION

This appeal concerns the judicial authorization of a citizen suit against the nonprofit Heritage Action for America based on a false premise. On February 16, 2021, Campaign Legal Center sued the Federal Election Commission (FEC) for failing to act on an administrative complaint alleging that Heritage Action had unlawfully failed to disclose its donors. Less than two months later, the bipartisan, six-member Commission acted on that complaint on April 6, 2021 by voting on whether to initiate enforcement. The Commissioners deadlocked by a 3-3 vote, with the three who voted against enforcement doing so for reasons of prosecutorial discretion.

Under the Federal Election Campaign Act of 1971 (the Act) and this Court's precedents, that deadlock meant the administrative complaint was dismissed and the FEC was to notify the parties that the administrative proceedings were over and to release its voting records along with the Commissioners' statements of reasons. At that point, the district court (Kelly, J.) would have been compelled to dismiss the Center's lawsuit, as the Commission's action made it impossible to award any effective relief. And with the FEC having chosen not to enforce the Act for reasons unreviewable in court, the Center would have been unable to file a citizen suit.

But things took a wrong turn. The three Commissioners who voted in favor of enforcement, but who failed to secure the necessary fourth vote, blocked the FEC from notifying the parties of the vote and from defending against the Center's lawsuit. To the outside world, it therefore appeared that despite the lawsuit, the Commission had taken no action on the Center's administrative complaint for over a year. So on March 25, 2022, the district court issued a default judgment against the FEC and ordered it to act on the administrative complaint within 30 days. When the FEC, which had yet to appear, did not respond by the deadline, the court declared on May 3 that the Center could bring a citizen suit, which the Center filed on May 5.

The next day, May 6, the Commission, prompted by a Freedom of Information Act (FOIA) request, revealed that it had acted on the Center's complaint on April 6, 2021. Four days later, Heritage Action moved to intervene to seek reconsideration or an appeal of the orders authorizing the citizen suit in light of this new evidence. While frustrated by the "procedural mess," the 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." JA308, JA313.

This Court should reverse. While the district court faulted Heritage Action for not uncovering the FEC's concealment sooner, regulated parties need not presume federal agencies are hiding evidence from the Judiciary or else forfeit their intervention rights. More fundamentally, allowing Heritage Action into this case in the wake of the Commission's revelations will cause no unfair prejudice. Because the Center is not entitled to a default judgment insulated from appellate review, allowing Heritage Action to pursue a timely appeal will not produce any cognizable harm. And that is especially so because proof of the FEC's action in April 2021 went to the court's jurisdiction over the Center's failure-to-act claim, meaning it had an independent duty to consider that evidence whether or not Heritage Action moved to intervene.

With that issue resolved, this Court should vacate the March 25 and May 3 orders because the district court lacked jurisdiction to enter them. The only relief the Center sought was an order directing the FEC to act on its administrative complaint, but the agency had done just that by deadlocking on it in April 2021, causing the complaint to be dismissed. Had the court known this before it entered its orders, it would have had to dismiss the case as moot because it could no longer provide the Center with any effectual relief. Now that the FEC's action has come to light, these orders must be set aside.

JURISDICTIONAL STATEMENT

The Center invoked the district court's jurisdiction under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1331. JA08. This case became moot, and the court lost its jurisdiction, when the Commission acted on the administrative complaint on April 6, 2021 via a deadlock dismissal. *See infra* at 50-53.

On March 25, 2022, the court ruled the FEC had unlawfully failed to act and ordered it to take action within 30 days. JA198-200. After the Commission ignored the order, the court declared on May 3, 2022 that the Center could file a citizen suit under 52 U.S.C. § 30109(a)(8)(C). JA245-46. Heritage Action filed a timely notice of appeal of these rulings on May 20, 2022. JA283; *see* Fed. R. App. P. 4(a)(1)(B). On June 6, 2022, the court denied Heritage Action's motion to intervene. JA306-13. Heritage Action filed a timely notice of appeal of that ruling on June 8, 2022. JA314. This Court has jurisdiction over both appeals under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). *See Karsner v. Lothian*, 532 F.3d 876, 884 n.7 (D.C. Cir. 2008); *infra* at 54-57.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying Heritage Action's motion to intervene as untimely even though the FEC had concealed its dismissal of the Center's administrative complaint until the day after entry of final judgment and Heritage Action moved to intervene four days later.

2. Whether the district court erred in authorizing the Center to bring a citizen suit against Heritage Action under 52 U.S.C. § 30109(a)(8) on the basis of an alleged failure to act even though the FEC had in fact acted on the Center's administrative complaint by dismissing it prior to final judgment.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions appear in the Addendum.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Established in 1974, the FEC has "'primary and substantial responsibility for administering and enforcing'" federal election law, including "the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *see* 52 U.S.C. § 30106(b)(1). Because the FEC is tasked with deciding "'issues charged with the dynamics of party politics, often under the pressure of an impending election,'" Congress created "safeguards" to "reduce the risk that the Commission will abuse its powers." *Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). Unlike "the vast majority of agencies with an odd number of members," the FEC is run by "six Commissioners," no more than three of whom "may be affiliated with the same political party." *Pub. Citizen, Inc. v.*

FERC, 839 F.3d 1165, 1171 (D.C. Cir. 2016); *see* 52 U.S.C. § 30106(a)(1). Moreover, "[m]any Commission actions require 'the affirmative vote of 4 members.'" *Combat Veterans*, 795 F.3d at 153; *see* 52 U.S.C. § 30106(c).

Taken together, these safeguards "mean that, unlike other agencies—where deadlocks are rather atypical—FEC will regularly deadlock as part of its *modus operandi*." *Pub. Citizen*, 839 F.3d at 1171. That is by design: Congress sought to "preclude coercive Commission action in a partisan situation, where the Commission, itself statutorily balanced between the major parties, is evenly split." *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000) (internal citation omitted). In short, "Congress uniquely structured the FEC toward maintaining the status quo." *Pub. Citizen*, 839 F.3d at 1171.

2. Such deadlocks often occur at the outset of the enforcement process, which is "triggered when a private party lodges a complaint with the FEC" alleging a statutory violation. *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015); *see* 52 U.S.C. § 30109(a)(1). After reviewing the administrative complaint, along with any response, the FEC must vote on whether there is "reason to believe" the accused party (the respondent) has violated the Act or is about to do so. 52 U.S.C. § 30109(a)(2). Absent an "affirmative vote of 4 of its members," the FEC cannot proceed with

any "investigation" into the matter under the Act. *Id.* And because the agency "cannot investigate complaints absent majority vote," the Act "compels FEC to dismiss complaints in deadlock situations." *Pub. Citizen*, 839 F.3d at 1170.

"When the FEC takes a vote on an administrative complaint, the results are publicly announced." JA212. If the Commission votes to proceed with an investigation, it must "notify" the respondent of "the alleged violation." 52 U.S.C. § 30109(a)(2). Conversely, "[if] the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter," 11 C.F.R. § 111.9(b), and "make public such action and the basis therefor" within 30 days of that letter, *id.* § 111.20(a). So "when fewer than four Commissioners vote" to pursue enforcement at the "reason to believe" stage, the FEC must send "notification letter[s]" to the parties indicating that the "entire case [is] closed." FEC, Office of the General Counsel, *OGC Enforcement Manual* 108 (2013) (capitalization omitted), https://bit.ly/3rww5Tq.

3. The dismissal of a complaint is not the end of the story. While "an agency's decision not to enforce the law" is "generally unreviewable by the courts" in "our system of separated powers," the Act "includes an unusual provision that allows a private party to challenge a nonenforcement decision"

of the FEC "if it is 'contrary to law.'" *CREW v. FEC*, 993 F.3d 880, 882 (D.C. Cir. 2021) (*New Models*). Specifically, it allows a "party aggrieved by an order of the Commission dismissing" an administrative complaint—or "by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed"—to ask the D.C. district court to "declare that the dismissal or the failure to act is contrary to law." 52 U.S.C. § 30109(a)(8)(A).

"[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable" under 52 U.S.C. § 30109(a)(8). *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (*NRSC*). To facilitate such review, this Court has held that the FEC "engages in final agency action" when it "deadlocks" over whether "to proceed with an investigation." *Pub. Citizen*, 839 F.3d at 1170. It has further directed that "[w]hen the Commission lacks four votes to proceed, the commissioners who voted against enforcement must state their reasons why," and the statements of "reasons offered by these so-called controlling Commissioners are then treated as if they were expressing the Commission's rationale for dismissal." *New Models*, 993 F.3d at 891, 883 n.3 (cleaned up).

Under this framework, if the controlling Commissioners' basis for nonenforcement "rests *solely* on legal interpretation," courts may consider whether that final decision is "'contrary to law.'" *Id.* at 884; *see, e.g.*, *NRSC*, 966 F.2d at 1476 (reviewing the controlling Commissioners' "construction of the regulation"). If, however, a deadlock dismissal is "based even in part on prosecutorial discretion," then it "is not reviewable" in court under *Heckler v. Chaney*, 470 U.S. 821 (1985). *New Models*, 993 F.3d at 882; *accord CREW v. FEC*, 892 F.3d 434, 441-42 (D.C. Cir. 2018) (*Commission on Hope*).

4. If a court declares the FEC's dismissal of, or failure to act on, a complaint is contrary to law, it "may direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). Contrary-to-law rulings are thus "not final, appealable orders," but merely "orders remanding the action to" the agency. *CREW v. FEC*, No. 18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018); *see FEC v. Akins*, 524 U.S. 11, 25 (1998) (noting the court may "set aside the agency's action and remand the case—even though the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason").

If the FEC "fails to correct the illegality on remand, the complainant may bring an action in its own name against the alleged violator to remedy the

violation involved in the original administrative complaint." *Commission on Hope*, 892 F.3d at 437 (cleaned up); *see* 52 U.S.C. § 30109(a)(8)(C) (allowing citizen suit if the FEC "fail[s]" to "conform with such declaration within 30 days"). While these suits have been theoretically available since 1976, it took until 2018 for "the first suit to be filed under" the Act's "citizen-suit provision." *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 7 (D.D.C. 2019), *on reconsideration*, No. 18-cv-945, 2022 WL 612655 (Mar. 2, 2022).

B. The Commission's Concealment Strategy

1. Citizen suits have become more common recently due to a strategy adopted by a bloc of Commissioners frustrated with this Court's precedents. In 2021, the New York Times reported the three Democratic Commissioners "are trying to enforce" the Act "by losing on purpose in federal court." Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021), https://nyti.ms/3rDroqF. Based on interviews with Commissioner Weintraub, "[t]he chief architect behind the strategy," the Times observed these three are "declining to formally close some cases after the Republicans vote against enforcement" to "leave[] investigations officially sealed in secrecy and legal limbo." *Id.* They then vote to "block[] the F.E.C. from defending itself in court when advocates sue the

commission for failing to do its job." *Id.* By making courts "believe deadlocked cases are unresolved," these Commissioners—who believe they have a "better shot" at advancing their agenda "in federal court" than in the FEC—"open the door for outside advocacy groups to directly sue" regulated parties. *Id.*

This strategy proceeds through two unprecedented maneuvers. *First*, the bloc refuses to vote "to close" the relevant "enforcement file" under FEC regulations, thereby preventing the parties from being notified of the deadlock dismissals. 11 C.F.R. §§ 4.4(a)(3), 5.4(a)(4). A close-the-file vote is nowhere mentioned in the text of the Act. Instead, it is merely an administrative creation of the FEC serving to authorize the General Counsel to fulfill the agency's non-discretionary notification requirements under the Act and FOIA. *See id.*; *see also* 5 U.S.C. § 552(a)(2); 52 U.S.C. § 30109(a)(4)(B)(ii).

Thus, as the Center's own President has explained elsewhere, the FEC's "votes to close the files after deadlocking" are "non-substantive," "perfunctory," "nominal," and "routine." Trevor Potter, *A Dereliction of Duty: How the FEC Commissioners' Deadlocks Result in a Failed Agency and What Can Be Done*, 27 Geo. Mason L. Rev. 483, 488-89 (2020). For the vast majority of its existence, the FEC therefore unanimously voted to close the file in the wake of a deadlock dismissal. *See, e.g.*, Ernest Gellhorn et al.,

Symposium on Campaign Finance Enforcement: A Comparative View, 11 J.L. & Pol. 1, 12 (1995) ("what happens after a 3-3 vote is that the Commission then votes unanimously to close the file") (quoting the FEC's General Counsel); FEC's Mem. in Support of Mot. to Dismiss at 11, *CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017) (No. 16-cv-259), Dkt. 31 ("As a result of the" "3-3" "split votes, the Commission closed the file"), 2017 WL 5508799; *see also Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (2007) (FEC's statement that "the Commission will dismiss a matter … when the Commission lacks majority support for proceeding").

Second, with the deadlock dismissals hidden from the parties and the courts, complainants sue the FEC on the ground that the agency's apparent "failure to act" is "contrary to law." 52 U.S.C. § 30109(a)(8). At that point, the same bloc votes against authorizing the FEC to defend against the lawsuits. That, too, is unprecedented: As far as Heritage Action is aware, the first time the FEC defaulted in a failure-to-act case so as to trigger a citizen suit was in 2021, as part of this concealment strategy. *See Campaign Legal Ctr. v. Iowa Values*, 573 F. Supp. 3d 243, 250-51 (D.D.C. 2021); Goldmacher, *supra* (discussing "Iowa Values" case). Yet because these "undisclosed cases" are

"confidential" under FEC regulations, the controlling Commissioners are "unable to tell the courts what has happened and why." Goldmacher, *supra*.

2. According to Commissioner Weintraub, this "strategy" was prompted by her belief that many of this Court's precedents are "bad caselaw." FEC Dkt. 34-1 at 2. In her view, this Court's decisions on FEC deadlocks—including recent ones such as *New Models*, 993 F.3d 880, as well as cases stretching back decades such as *NRSC*, 966 F.2d 1471—are "deeply flawed, "off the rails," and "absurd." Citizen-Suit Dkt. 29-6 at 5, 16.

This criticism stems in part from her belief that this "Court's precedent … violates the statute by allowing less than a majority of commissioners to exercise the full authority of the Commission" through "'deadlock dismissal[s].'" *Id.* at 3, 14 n.51. This Court has long rejected the position, taken by Commissioner Weintraub, that when "'four votes are unavailable for any option, *nothing* happens—neither an investigation nor a dismissal—until a bipartisan coalition of four commissioners can come to an agreement.'" *New Models*, 993 F.3d at 891; *see Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (dismissing the idea that a deadlock vote "decides nothing"). Instead, only a "decision to initiate enforcement, but not to decline enforcement, requires the votes of four

commissioners." *New Models*, 993 F.3d at 891. That is because the Act "enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list," thereby indicating "they are not included under the standard construction that *expressio unius est exclusio alterius*." *Id.*

Frustrated with this line of cases, Commissioner Weintraub and her allies have "activat[ed] a previously unused, alternative enforcement path" that "keep[s] … matters alive in the face of obstructionist colleagues and bad caselaw"—*i.e.*, her fellow Commissioners who voted against enforcement and this Court's precedents. FEC Dkt. 34-1 at 2. Current and former Commissioners have described this strategy as "scandalous," JA277, "affirmatively misle[ading]," *id.*, "disingenuous," JA281, "'an abuse of the process,'" "'fundamentally rest[ing] on a dishonesty,'" and "'completely unethical,'" Goldmacher, *supra*. And confirming the wisdom of Congress's decision to "preclude coercive Commission action in a partisan situation, where the Commission … is evenly split" on party lines, *Sealed Case*, 223 F.3d at 780, all but one of the eight known targets of this strategy are conservative: Heritage Action; American Action Network; National Rifle Association of America Political Victory Fund; Greitens for Missouri; Iowa Values; 45Committee, Inc.; and Jeb Bush. FEC Dkt. 29-2 at 2 n.2.

C. The Present Controversy

1. This case is one instance of the FEC's concealment strategy. 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. JA06. From September 1, 2019 until December 18, 2020, the FEC lacked a quorum of Commissioners, with the exception of a brief period between June 5, 2020 and July 3, 2020. JA126. While it lacked a quorum, the FEC could not render any enforcement decisions on the Center's administrative complaint. JA126, 154.

2. On February 16, 2021, less than two months after the FEC regained its quorum, the Center sued the agency in district court under 52 U.S.C. § 30109(a)(8)(A), alleging that the Commission had unlawfully failed to act on the administrative complaint. JA06-16. The only relief sought was a declaration that the Commission's failure to act was unlawful and an order to the FEC to conform by acting on the complaint within 30 days. JA06-07, 16.

On April 6, 2021, the FEC, in the words of its voting records, "took the following actions" on the Center's administrative complaint. JA300. *First*, it "[f]ailed by a vote of 3-3" to "[f]ind reason to believe that Heritage Action" had violated the Act, with the three Commissioners who voted against enforcement

doing so on the basis of prosecutorial discretion "under *Heckler v. Chaney*." *Id.*; *see* Citizen-Suit Dkt. 20-7 (controlling Commissioners' statement of reasons). *Second*, the same three Commissioners voted to "[c]lose the file" so that the FEC could "[s]end the appropriate letters" to the parties. JA301. The remaining three Commissioners, however, refused to do so, thereby concealing the FEC's action from the parties and the courts. *Id.*

3. After the Commission failed to enter an appearance or file an answer by the April 23, 2021 deadline, the clerk entered default against the FEC on May 10, 2021. JA03, 121; *see* Fed. R. Civ. P. 55(a). The Center then moved for default judgment on May 24, 2021. JA122; *see* Fed. R. Civ. P. 55(b).

When a Republican Commissioner became Chair on January 1, 2022—and thus was able to place the Center's administrative complaint back on the executive agenda—the FEC again voted on whether to close the file on January 11, 2022. JA280, 302. Commissioner Weintraub and her two allies again refused to do so. JA302. The matter was then placed on the executive agenda for January 13, February 15 and 17, March 8, 10, 22, and 24, and April 5, 7, and 26 of 2022, but was held over in each instance by a Democratic Commissioner. JA280; Citizen-Suit Dkt. 20-7 at 5 n.9.

4. On March 25, 2022, the district court granted default judgment because the FEC had never appeared in the case. JA198-200. The court found "the FEC has taken no action on" the Center's administrative complaint and that this "failure to act … is contrary to law." JA198-99. It thus directed the Commission to "conform to" the order "within 30 days by acting on" the Center's "administrative complaint." JA199.

The same day, March 25, Heritage Action submitted a FOIA request to the FEC seeking vote certifications and any Commissioner statements of reasons related to the administrative complaint. JA235-36. The FEC's response date for the request was initially set for April 22. *See* 11 C.F.R. § 4.7(c). On April 18, however, the FEC invoked an extension until May 6 to respond to allow for consultation with multiple components. JA241-42.

A week later, on April 25, Heritage Action moved to file an *amicus* brief urging the court to refrain from disposing the case until the Commission had responded to its FOIA request. Dkt. 17-3. As it explained, the FEC's request for a FOIA extension suggested that some responsive documents existed. *Id.* at 6-7. And if the FEC released records showing that it had already acted on the Center's administrative complaint, the court could not order any effectual relief under 52 U.S.C. § 30109(a)(8), meaning the case had been moot ever

since that action. *Id.* at 15. Reminding the court of its independent obligation to determine whether it had subject-matter jurisdiction over the case, Heritage Action urged the court to wait until the Commission responded to its FOIA request on May 6. *Id.* at 6, 14-17.

In response, the Center urged the court to deny the request and to not "delay resolution" of the case, asserting "there is no reason to believe that the records sought" would support Heritage Action. JA202-203. While the court allowed Heritage Action to file an *amicus* brief on April 27, it stated the nonprofit could not request "affirmative relief" such as an "'abeyance.'" JA04.

On May 3, the court granted the Center's motion for a declaration that the FEC had "failed to conform" to the March 25 order by not "acting on" the administrative complaint by the 30-day deadline and that the Center could therefore "bring 'a civil action'" against Heritage Action. JA245-46. Two days later, on May 5, the Center filed its citizen suit. Citizen-Suit Dkt. 1.

5. The next day, May 6, the Commission responded to the FOIA request by stating that it would produce responsive records, thereby indicating it had acted on the administrative complaint. JA248-49. The agency subsequently released vote certifications revealing it had taken "action[]" on the complaint on April 6, 2021, in the form of a deadlock dismissal. JA300-301.

In response, Heritage Action sought to intervene on an expedited basis on May 10 to seek reconsideration or an appeal, as it was now clear that the court lacked subject-matter jurisdiction at the time it entered its March 25 and May 3 orders. Dkt. 24. After the court failed to order expedited briefing, Heritage Action filed a notice of appeal on May 20. JA283.

On June 6, the court "[r]egrettably" denied the motion as untimely. JA308. Concluding it had jurisdiction to deny the motion while the appeal was pending, JA308 n.1, the court acknowledged that "the Commission's unusual failure to appear and defend itself … is partially responsible for how the case wound up in this posture," JA310. It nevertheless faulted Heritage Action for not moving "until about a month and a half" after the March 25, 2022 order. *Id.* While conceding "Heritage Action did not have the Commission's response to its FOIA request until then," the court blamed the nonprofit for "not fil[ing] a FOIA request until" March 25. *Id.*

The next day, June 7, the FEC voted to close the file. Citizen-Suit Dkt. 20-8. Heritage Action noticed an appeal of the intervention ruling on June 8, JA314, and this Court consolidated the appeals.

6. Heritage Action asked this Court to hold the appeals in abeyance pending the disposition of its motion to dismiss the Center's citizen suit, which

was fully briefed on August 12, 2022. Citizen-Suit Dkt. 24. The Center opposed that request and filed its own motion urging this Court to summarily affirm the intervention ruling and summarily dismiss the merits appeal.

This Court denied the Center's motion for summary affirmance and referred the motion to dismiss to the Merits Panel. Order (Sept. 14, 2022). It also denied Heritage Action's abeyance motion "without prejudice to a determination by the merits panel that abeyance is warranted." *Id.*

* * *

For this Court's convenience, the following timeline captures the key dates in this litigation.

Date	Event
Feb. 16, 2021	The Center sues the FEC for failing to act.
Apr. 6, 2021	The FEC votes 3-3 on whether to proceed with enforcement. The FEC votes 3-3 on whether to close the file.
Apr. 23, 2021	The FEC allows the deadline to file an answer to lapse.
May 10, 2021	The district-court clerk enters default.
May 24, 2021	The Center moves for default judgment.
Jan. 11, 2022	The FEC again votes 3-3 on whether to close the file.
Mar. 25, 2022	The district court grants default judgment. Heritage Action files its FOIA request.
Apr. 18, 2022	The FEC extends its FOIA response date to May 6.
Apr. 22, 2022	The FEC's original FOIA response date.
Apr. 25, 2022	Heritage Action moves for leave to file an *amicus* brief. The 30-day deadline to conform has lapsed.
Apr. 27, 2022	The district court allows the filing of an *amicus* brief.
May 3, 2022	The district court authorizes the Center's citizen suit.
May 5, 2022	The Center files a citizen suit against Heritage Action.
May 6, 2022	The FEC responds to Heritage Action's FOIA request.
May 10, 2022	Heritage Action moves to intervene.
May 20, 2022	Heritage Action appeals the citizen-suit authorization.
June 6, 2022	The district court denies the motion to intervene.
June 7, 2022	The FEC closes the file.
June 8, 2022	Heritage Action appeals the denial of intervention.

SUMMARY OF THE ARGUMENT

I. By any metric, Heritage Action's motion to intervene four days after the Commission revealed that it had acted on the Center's administrative complaint was timely. Because the timeliness requirement is not an end in itself, but merely a means of preventing unfair prejudice to the existing parties, an intervention motion cannot be deemed untimely in the absence of such harm. And here, Heritage Action's intervention would not unjustly disadvantage the Center in the wake of the FEC's default, both because a timely appeal or reconsideration motion would not delay the normal progress of this litigation, and because the district court had an independent obligation to reassess its subject-matter jurisdiction following the FEC's revelations. Upholding the denial of intervention, by contrast, would prejudice Heritage Action, which would be forced to defend against a citizen suit that would never have been authorized but for the Commission's fraudulent concealment.

While the district court thought Heritage Action should have intervened once it became clear the FEC would not show up—which the court pegged at either May 2021 (the clerk's entry of default) or March 2022 (the court's entry of default judgment)—that is the wrong starting point. Requiring intervention *before* the Commission had revealed that it had acted on the administrative

complaint would merely invite unnecessary spectators to litigation and force regulated parties to assume federal officers are acting in bad faith. In any event, it was far from apparent by May 2021 that the FEC would never appear, as evidenced by the fact that the court itself waited until March 2022 for the agency to show up. Nor was Heritage Action obligated to assume the Commission would defy the court's March 25, 2022 order to conform, and in any event the 46 days between that order and the motion to intervene is well within the range of periods this Court has found acceptable. And for the sake of completeness, the district court correctly did not question that Heritage Action met the remaining requirements for intervention.

II. Because the Commission had acted on the Center's administrative complaint on April 6, 2021 through a deadlock dismissal, the district court could not provide the Center with any effective relief at the time it entered its March 25 or May 3, 2022 orders. Given that this case was therefore moot by then, this Court should vacate those orders and remand with instructions to dismiss. And even if this defect were not jurisdictional, it would still require setting aside those orders on the merits. Finally, binding precedent forecloses the Center's objection that this Court cannot consider this issue because those orders were not designated in the notice of appeal from the intervention denial.

STANDARDS OF REVIEW

In considering the denial of intervention, this Court reviews "questions of law *de novo*, findings of fact for clear error, and discretionary issues such as timeliness for abuse of discretion." *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). A "court, by definition, 'abuses its discretion when it makes an error of law.'" *Crossroads*, 788 F.3d at 321. A "question of mootness" is "reviewed de novo," *Gul v. Obama*, 652 F.3d 12, 15 (D.C. Cir. 2011), as is a judgment under 52 U.S.C. § 30109(a)(8), *New Models*, 993 F.3d at 884.

ARGUMENT

I. HERITAGE ACTION HAS THE RIGHT TO INTERVENE.

Rule 24(a)(2) mandates courts to "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). This Court also requires anyone trying "to intervene as another defendant" to show "Article III standing." *Crossroads*, 788 F.3d at 316. Heritage Action meets each requirement.

A. Heritage Action's Intervention Motion Was Timely.

The district court denied Heritage Action's motion to intervene under Rule 24(a)(2) solely on the premise it was untimely, even though courts "should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right" that is pursued. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (*AT&T*). In doing so, the court committed multiple legal errors, and thus failed to "properly take account of the considerations" this Court has identified—namely, 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.'" *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001).[1]

1. The Center Will Not Suffer Any Cognizable Prejudice.

To start, the lack of any cognizable prejudice to the Center compels reversal as a matter of law. "'The timeliness requirement is not intended as a punishment for the dilatory,'" but rather as a means of "preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the

[1] Because "'the purpose for which intervention is sought'" here bears heavily on "'the probability of prejudice to those already parties,'" *Smoke*, 252 F.3d at 471, Heritage Action discusses those considerations in tandem.

existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). Because Rule 24 does "not require timeliness for its own sake," the "'most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties.'" *Id.* A motion is timely if the "delay in seeking intervention" would not "'unfairly disadvantage the original parties'"—"even where a would-be intervenor could have intervened sooner." *Id.* (alteration omitted).

Here, the only prejudice the district court identified was "further delay" in the resolution of the Center's allegations. JA312. But "every motion to intervene will complicate or delay a case to some degree"; "[t]hat is not a sufficient reason to deny intervention" by itself. *Kalbers v. U.S. Dep't of Just.*, 22 F.4th 816, 825 (9th Cir. 2021). Rather, the relevant question is whether the delay would "unfairly" prejudice the existing parties. *Roane*, 741 F.3d at 151. No such prejudice exists here for two independent reasons.

a. A timely appeal or reconsideration motion would not delay the ordinary progress of this litigation.

i. To start, the Supreme Court has made clear a prevailing party is not "'unfairly prejudiced simply because an appeal'" is pursued by a post-judgment intervenor as opposed to the original losing party—even though the appeal delays the case's ultimate disposition. *Cameron v. EMW Women's*

Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1013 (2022). 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," *AT&T*, 642 F.2d at 1295. So while the Center "hoped" that the FEC would not appeal and that no one else would take up the baton, it "had no legally cognizable expectation" of either event 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).

Put differently, had *the FEC* suddenly appeared after the district court authorized a citizen suit to pursue a timely appeal, no one could reasonably think the Center had suffered unfair prejudice. In our legal system, no party has the right to "assume[] 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). The fact that *Heritage Action* showed up instead should make no difference.

Thus, that Heritage Action moved to intervene "now, rather than earlier," cannot prejudice the Center, "since the practical result of its intervention"—an appeal—"would have occurred whenever" it joined the fray. *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). Had the nonprofit intervened at the outset of this case, and done nothing until the citizen suit was authorized, the Center would be in the same position as it is now. The Center accordingly will "suffer no prejudice" from a purported "failure to seek intervention at an earlier time," as "[t]he inconveniences cited … are those commonly associated with defending a ruling or judgment on appeal, and would have arisen regardless of whether" Heritage Action "sought to intervene before … judgment." *Ross v. Marshall*, 426 F.3d 745, 756 (5th Cir. 2005). So to the extent this Court's "review of the district court's decision could be characterized as 're-litigation of issues already decided,' that is part of the ordinary course of litigation rather than legally cognizable 'prejudice.'" *Cawthorn v. Amalfi*, 35 F.4th 245, 255 (4th Cir. 2022).

ii. The district court did not deny that if Heritage Action had sought intervention *solely* to take the FEC's place in pursuing *an appeal*, the Center would suffer no unfair harm. Instead, the court thought it dispositive that Heritage Action planned to seek "reconsideration" first. JA311. But whether

the citizen-suit authorization was reconsidered by the district court or reviewed by this Court, the "'settled issues'" would be "'reopen[ed]'" and "'revisit[ed].'" JA311-12. The only difference is *which court* would confront that question in the first instance. And given 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, JA311.

While the court suggested that resolving a reconsideration motion would require "'discovery'" and "factfinding," JA312, that is not true here. All the relevant materials here are publicly available, the facts are undisputed, there is no need for further discovery in this litigation, and the only merits issue is a purely legal question—and not a difficult one at that. *See infra* Pt. II. Thus, any timely reconsideration motion, whether filed by the FEC or Heritage Action, would involve the exact same "'evidence or argument'" as presented in this appeal. JA311. It is therefore hard to see why further district-court litigation here would be any less fair to the Center than this appeal.

Indeed, the lack of prejudice here is particularly glaring because it is not as if intervention would deprive the Center of a hard-won victory. Due to the FEC's refusal to appear, none of the merits were actually litigated in an

adversarial context. *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.'"). Thus, the Commission's "failure to appear and defend itself" from "long before an appeal was even an option," JA310, only means any prejudice here is *less* than in cases where the defendant's litigation approach changed.

On top of that, the Center cannot cry prejudice from "reopen[ing]" this case when it was the one that urged the district court to quickly slam it closed. JA312. After Heritage Action asked the court to hold proceedings in abeyance until the FEC responded to its FOIA request, the Center told the court not "to delay resolution" of the case on the premise that "there is no reason to believe that the records sought" would make a difference. JA202-203. The court agreed, refusing to withhold judgment "until Defendant FEC responds to [the] FOIA request." JA245 n.1. Had the Center instead acquiesced to a modest abeyance until the FEC's concealment came to light, the court could have set things straight before final judgment. Any prejudice from reopening that judgment was therefore invited by the Center itself, and it is well-settled that "existing parties cannot complain about delay or prejudice caused by their own efforts." *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 858 (9th Cir. 2016).

In all events, the court's concern that "reconsideration"—as opposed to "'an appeal'"—would prejudice the Center could have been easily addressed through a far less drastic response than denying intervention outright. When presented with an intervention motion, "courts are not faced with an all-or-nothing choice between grant or denial: Rule 24 also provides for limited-in-scope intervention." *United States v. City of Detroit*, 712 F.3d 925, 931 (6th Cir. 2013). Specifically, "'intervention of right'" under Rule 24(a) "'may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.'" *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 737 n.11 (D.C. Cir. 2003). The court therefore could have "addressed" its "concerns" simply "by limiting the scope of intervention" to an appeal—especially as Heritage Action "sought to intervene before the time for appealing" the citizen-suit authorization had "expired." *City of Detroit*, 712 F.3d at 932. Accordingly, the court at a minimum "abused its discretion in denying intervention outright." *Id.*

b. The district court's independent duty to assess its own jurisdiction eliminates any possibility of prejudice.

i. In any event, the district court's ongoing obligation to consider its own jurisdiction means any delay from "reopen[ing]" the case should have occurred whether or not Heritage Action moved to intervene. JA312. This

Court's decision in *Acree* confirms as much. There, the United States moved to intervene to challenge the district court's subject-matter jurisdiction two weeks after the plaintiffs had "obtained a nearly-billion dollar default judgment" against Iraqi defendants who had "failed to appear." 370 F.3d at 43, 58. The court denied the motion as untimely, observing, like the court here, that allowing intervention "would cause undue delay and prejudice to the existing parties by prolonging litigation that is now over." 276 F. Supp. 2d 95, 102 (D.D.C. 2003). This Court reversed, noting the plaintiffs could "assert no prejudice" in light of the district court's "independent obligation to assure itself of its own jurisdiction." 370 F.3d at 50; *see id.* at 60 (Roberts, J., concurring in part and concurring in the judgment) ("agree[ing]" that "the district court erred in denying the … motion to intervene").

The same analysis applies here. Given the district court's "independent obligation to assure itself of its own jurisdiction," the timing of Heritage Action's motion made no difference insofar as prejudice is concerned. *Id.* at 50 (majority opinion). Had the court learned before judgment that the FEC had acted on the Center's complaint, it would have been unable to issue effectual relief and would have had to dismiss the case as moot. *See* 52 U.S.C. § 30109(a)(8)(A); *supra* Pt. II; *see, e.g.*, *Genesis Healthcare Corp. v. Symczyk*,

569 U.S. 66, 78-79 (2013) (assuming the "claim became moot," it was "appropriately dismissed for lack of subject-matter jurisdiction"). And because the "objection that a federal court lacks subject-matter jurisdiction … may be raised" *sua sponte* even "after … entry of judgment," the court should have "vacated its prior judgment" once the evidence came to light, even if Heritage Action had never moved to intervene. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 509 (2006). As the Center noted in opposing intervention in another case where the FEC defaulted, "the court must consider its own subject-matter jurisdiction … whether or not intervenors put [it] at issue." Pltf.'s Opp. to Mot. to Intervene at 19, *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1 (D.D.C. 2019) (No. 19-cv-2336), Dkt. 11, 2019 WL 8161648.

Thus, the court should have examined its jurisdiction in response to the suggestion of mootness in Heritage Action's *amicus* brief. *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997) (addressing "suggestion of mootness" raised by "*amicus curiae*"); *cf. Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 90 (2014) (considering potential "jurisdictional impediment" raised in "*amicus* brief"). And even if no *amicus* brief had been filed, the existing parties' "counsel, as officers of the court, ha[d] a professional obligation to assist" the court in its ongoing evaluation of its "jurisdiction" once

they learned of the FEC's deceit. *Minority Police Officers Ass'n of South Bend v. City of South Bend*, 721 F.2d 197, 199 (7th Cir. 1983). That is especially so because a "lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal"—such as here—must "promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted." D.C. R. Prof. Cond. 3.3(d). Given all this, it is difficult to see how the timing of Heritage Action's motion could have prejudiced the Center. 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.

ii. The district court never denied the FEC's revelations bore on its "subject-matter jurisdiction." JA308, 311-12. Instead, it read *Amador County v. Department of the Interior*, 772 F.3d 901 (D.C. Cir. 2014), to have rejected the idea "that seeking to make a jurisdictional argument should be a sort of thumb on the scale." JA311. But *Amador County* merely dismissed a theory that a "court had a heightened duty to weigh heavily" a plan to press a "jurisdictional, or at least quasi-jurisdictional," "sovereign immunity" argument. 772 F.3d at 904 (cleaned up). It did not call into question the *prejudice* analysis in *Acree*—an analysis the district court never addressed.

In any event, the district court would have been obligated to consider the FEC's disclosed records even if they did not go to jurisdiction. Regardless of Heritage Action's intervention, the court had the inherent "power"—and "duty"—"to vacate its own judgment" in light of the FEC's "fraud" on the court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-50 (1944); *see* 11 Wright & Miller, Fed. Prac. & Proc. Civ. § 2870 (3d ed. 2022) ("Although a party may bring the matter [of fraud] to the attention of the court, this is not essential, and the court may proceed on its own motion.") (citing *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946)).

Even if the FEC's conduct did not rise to the level of fraud, the court still should have reconsidered its judgment under Rule 60(b)(6), which permits vacatur for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). As this Court has held, "reconsideration under Rule 60(b)(6) is proper" when "a previously undisclosed fact so central to the litigation … shows the initial judgment to have been manifestly unjust." *PETA v. HHS*, 901 F.3d 343, 355 (D.C. Cir. 2018) (cleaned up). While such reconsideration is usually prompted by a party's request, "a majority of circuits to have considered the power of a district court to vacate a judgment under Rule 60(b) have concluded that district courts have the discretion to grant such relief *sua sponte*," *Judson*

Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 385 (7th Cir. 2008) (collecting cases in circuit split), and this Court's decision in *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), suggests agreement with that consensus. There, this Court affirmed a ruling allowing the United States to intervene to seek the vacatur of a default judgment under Rule 60(b)(6) based on an "impediment to plaintiffs' action" to which the "plaintiffs had not alerted the [district] court." *Id.* at 232. In doing so, the Court observed there was "no basis for assuming that the [district] court, having become aware of this impediment to plaintiffs' action, would have reached a different result if it had denied the government's motion to intervene." *Id.* at 232-33. Put differently, "even if" the movant "had appeared only in the capacity of *amicus curiae*, the outcome would not have changed." *Id.* at 233. So too here.

2. Heritage Action Needs Intervention To Protect Its Rights.

The prejudice to Heritage Action from a denial of intervention, by contrast, is undeniable. Even the district court acknowledged that "Heritage Action's rights … are obviously implicated," as due to the court's "orders, [the Center] could file—and now has filed suit directly against it." JA311. If Heritage Action were allowed to intervene to challenge those orders, the nonprofit could avoid that significant injury.

While that should be enough to show "'the need for intervention as a means of preserving the applicant's rights'" here, *Smoke*, 252 F.3d at 471, the court questioned Heritage Action's "need to intervene to protect [its] interests" because it "can advance the same jurisdictional arguments" in the citizen suit "that it wants to make here." JA311-12. But as the court conceded, "Heritage Action's ability to raise its arguments in some later litigation 'is not in itself a sufficient reason to deny intervention.'" JA312 n.3. Wisely so, given this Court's warning that "it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *NRDC v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977).

And while *Heritage Action* agrees the citizen-suit court "will have to consider … whether the Commission's failure to act was contrary to law and whether it conformed with [the] order to act," JA312, *the Center* does not. In the citizen suit, the Center has insisted Heritage Action cannot "relitigate" whether the "citizen-suit prerequisites" were "satisfied." Citizen-Suit Dkt. 23 at 6; *see id.* at 17-20. And there is no guarantee that the citizen-suit court will see things Heritage Action's way. If that court rules Heritage Action cannot "relitigate" the authorization issue, that question could forever escape judicial review. That Heritage Action's "right[]" to challenge the authorization of the

citizen suit therefore "could be lost irretrievably were intervention not permitted" further supports treating its motion as timely. *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 129 (D.C. Cir. 1972); *see id.* (noting that "intervention may be allowed even after a final decree where it is necessary to preserve some right which cannot otherwise be protected") (cleaned up).

In any event, as the district court recognized, its ruling that the FEC's delay "was contrary to law" could "have persuasive weight" with the citizen-suit court. *Crossroads*, 788 F.3d at 320; *see* JA312 (noting its "orders" could carry "'persuasive weight' in the direct citizen suit"). In fact, the Center has relied on the court's reasoning in this case in prosecuting its citizen suit. *See* Citizen-Suit Dkt. 23 at 5-6, 28-30. Because the court's orders at least threaten to "impair" Heritage Action's "defense" in the citizen suit, intervention is necessary to preserve the nonprofit's rights. *Crossroads*, 788 F.3d at 320.

At a minimum, litigating this issue in the citizen suit will be "more burdensome" for Heritage Action than it would be in the context of this case. *Costle*, 561 F.2d at 910. Unless the intervention denial is reversed on appeal, Heritage Action will be forced to both litigate its authorization arguments in the citizen suit *and* respond to the Center's theory that it cannot do so. That is enough to support the need for intervention here. *See id.*

3. Heritage Action Promptly Moved To Intervene As Soon As It Discovered The Commission's Concealment.

Finally, with respect to the time elapsed, Heritage Action moved to intervene a mere four days after learning that the FEC had acted on the Center's administrative complaint back in April 2021. *See supra* at 18-19. The district court nevertheless deemed the motion untimely on the premise that Heritage Action did not file it "as soon as it became clear that its interests would no longer be protected by the parties in the case." JA310 (cleaned up). The court's premise is incorrect, and its conclusion does not follow.[2]

a. The time elapsed should be measured from the discovery of the Commission's concealment.

i. As a threshold matter, the district court used the wrong starting point in measuring the time elapsed. While in many cases "the most important circumstance relating to timeliness is that the [movant] sought to intervene 'as soon as it became clear' that [its] interests 'would no longer be protected' by the parties in the case," that is not always true. *Cameron*, 142 S. Ct. at 1012

[2] While the district court also briefly noted "Heritage Action did not move to intervene until more than a year after" the Center "filed suit," it correctly did not treat the beginning of litigation as the relevant starting point. JA309. "[M]easuring the length of time passed" "since the inception of the suit" is "not in itself the determinative test." *Roane*, 741 F.3d at 151 (cleaned up); *see, e.g.*, *Cameron*, 142 S. Ct. at 1012 ("Although the litigation by that time had proceeded for years, that factor is not dispositive.").

(qualifying that statement with the prefatory "Here,"). When a "change of circumstances occurs, and that change is the 'major reason' for the motion to intervene, the stage of proceedings factor should be analyzed by reference to the change in circumstances." *Smith*, 830 F.3d at 854. In such situations, it is a legal "error" (and hence an abuse of discretion) "to measure the timeliness" of an intervention motion "by reference to stages of litigation pre-dating the change in circumstances that motivated [the] motion to intervene." *Id.* at 856.

That makes sense. Courts should not adopt a "rule requiring" litigants "to move to intervene" when intervention "would serve no purpose" and render the movant "a superfluous spectator in the litigation." *United Airlines v. McDonald*, 432 U.S. 385, 394 n.15 (1977). Nor should they "induce" potential intervenors "to file protective motions to intervene to guard against" future harms. *Id.* Instead, "'courts should discourage premature intervention that wastes judicial resources,'" and not insist on motions when intervention "would have been pointless," even if a movant "was aware that its interests were at stake long before it sought to intervene." *Ross*, 426 F.3d at 755 & n.39 (cleaned up). For example, movants may "wait[] to file their motion to intervene until resolution of [a] dispositive motion in order to ascertain whether there would

ultimately be a case in which to intervene." *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1251 n.2 (10th Cir. 2001).

As this Court has suggested, another relevant change in circumstances for intervention purposes is the post-judgment appearance of "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). This case shows the wisdom of that approach. Until the FEC released proof on May 6, 2022—three days after judgment—that it had acted on the Center's complaint in April 2021, Heritage Action could not have defended the agency's alleged failure to act. 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 told both Heritage Action and the district court that the Commission had neither "taken" any "action on" the Center's "complaint," JA198, nor "conformed with the Court's order," JA245. Thus, given this concealment, it is not as if an intervention motion before May 6, 2022 "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). Rather, it "would only have made" Heritage Action "a superfluous spectator." *McDonald*, 432 U.S.

at 325 n.15. Heritage Action should therefore be commended for not cluttering the court's docket with an extra defendant that could not mount a defense.

ii. While the district court admitted that "intervening 'to bring the court's attention newly-discovered evidence that could not have been previously brought before the court' is a sort of special circumstance," it faulted Heritage Action for filing a FOIA request "only recently." JA311 n.2; *see* JA310 (emphasizing that Heritage Action "did not file a FOIA request until *after*" the March 25, 2022 order). In doing so, the court identified no support for the rule that a regulated party must promptly secure evidence of an agency's scheme to conceal evidence 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 6-7. That is not surprising, as Rule 24(a)(2)'s various criteria for intervention do not include a prompt FOIA request to ferret out agency misconduct. Indeed, such a requirement only "would induce" parties "to file protective motions to intervene" (and protective FOIA requests) "to guard against the possibility" that federal officers might be hiding evidence from the courts. *McDonald*, 432 U.S. at 394 n.15.

Nor did the court explain *why* Heritage Action should have suspected a FOIA request was necessary before March 25, 2022. As a district court in another failure-to-act case explained: "When the FEC takes a vote on an administrative complaint, the results are publicly announced; it does not take a FOIA request to learn what transpired." JA212; *see supra* at 6-8. While the district court noted the "records are dated April 23, 2021," JA311 n.2, those records of closed-door votes were *hidden* from the court (and Heritage Action) until after the entry of judgment. Heritage Action, like the court, did not know 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 the nonprofit from acting any sooner than it did.

In other words, the court refused to apply the intervention equivalent of 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.'" *Gabelli v. SEC*, 568 U.S. 442, 449 (2013). But because Rule 24(a)'s "timeliness requirement is an elemental form of laches or estoppel," it "should not prevent intervention where an existing party induces the applicant to refrain from intervening." *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182-83 (3d Cir. 1994) (cleaned up). And contrary to the

court's view of Heritage Action's duties to uncover the FEC's plot under FOIA, "[m]ost of us do not live in a state of constant investigation" or "spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so." *Gabelli*, 568 U.S. at 450-51.

In fact, Heritage Action's efforts to uncover the fraud here were ultimately hamstrung by the FEC's delay. Had the Commission not taken an extension in responding to the FOIA request, Heritage Action could have notified the court of the FEC's concealment as early as April 22, 2022—days before the 30-day deadline to conform had run. *See supra* at 17. 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 on April 25 and urging the court to stay its hand until the Commission responded to the FOIA request. *See supra* at 17-18. It is therefore not as if Heritage Action "ignored the litigation or held back from participation to gain tactical advantage." *Day*, 505 F.3d at 966 (fact that movant had previously "sought amicus status" supported timeliness of subsequent intervention motion). To deny Heritage Action its rights under Rule 24(a) merely because the Commission took an extension responding to a FOIA request would be inconsistent with the "equitable" nature of the intervention inquiry. 7C Fed. Prac. & Proc. Civ. § 1904 n.2.

b. Heritage Action promptly intervened once it became clear the FEC would not protect its interests.

In any event, the district court's analysis fails on its own terms. Even if the relevant point of measurement here was the date when it was "clear … that no party would be protecting Heritage Action's interests," JA310, the nonprofit's motion to intervene would still be timely.

i. While the district court initially suggested Heritage Action should have intervened in "May 2021" following "the Clerk's entry of default" and the Center's "motion for default judgment," not even the court put much stock in that theory. *Id.* And for good reason: At that point, there was still a chance the FEC would show up to defend itself—another decision it makes behind closed doors. It is no secret that federal defendants occasionally appear to mount a defense after the clerk enters default or the plaintiff moves for default judgment. *See, e.g.*, *Handle v. Postmaster Gen.*, 806 F. App'x 95, 98 (3d Cir. 2020); *Krueger v. Saiki*, 19 F.3d 1285, 1286 (8th Cir. 1994); *see also Williams v. King*, No. 91-cv-4526, 1992 WL 368069, at *1-2 (E.D.N.Y. Oct. 27, 1992) (government did not move to dismiss the complaint until "150 days after service of the summons"). In fact, Rule 55(d) provides "special protection" for the "federal government" against default judgments because "'the government is sometimes slow to respond'" to a complaint in light of

bureaucratic realities. *Jerez v. Republic of Cuba*, 775 F.3d 419, 423 (D.C. Cir. 2014); *see* Fed. R. Civ. P. 55(d) ("A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.").

The FEC is no exception. In another recent failure-to-act case brought by the Center, for example, the Commission filed a response over two months after the clerk had entered default. FEC's Response to Order to Show Cause, *Campaign Legal Ctr. v. FEC*, 1:20-cv-588 Dkt. 19 (July 20, 2020). It was therefore far from certain in May 2021 that the FEC would never join the fray.

Indeed, if it were truly "'clear'" in May 2021 that the FEC had washed its hands of this case, JA310, it is mystifying why the district court chose to wait for "[t]en months" to grant default judgment, which it finally did in "March 2022" because "the Commission still had not appeared," JA307. If the court thought it worthwhile to wait to see whether the FEC would eventually show up, there is no reason why Heritage Action should have done otherwise.

ii. The court therefore pivoted to insisting Heritage Action should have intervened after the entry of default judgment on March 25, 2022. JA310. But even then, it was reasonable to presume the FEC would comply with a court order and respond within the 30-day deadline to conform. It is one thing

to blow the deadline for responding to a complaint; it is quite another for "an agent of the United States" to act in "defiance" of a judicial order without explanation, a spectacle that is "particularly irresponsible and ill-becoming." *Campbell v. Eastland*, 307 F.2d 478, 490 (5th Cir. 1962) (Wisdom, J.). In fact, even Commissioner Weintraub recognized the difference between forbidding "FEC lawyers to defend" against a lawsuit under 52 U.S.C. § 30109(a)(8) and "refus[ing] to comply with a court order." Nihal Krishan, *Elections Commission Chief Uses the "Nuclear Option" To Rescue the Agency From Gridlock*, MOTHER JONES (Feb. 20, 2019), https://bit.ly/3EE3y68.

In any event, the 46 days (or "month and a half," JA310) between the March 25 order and the May 10 motion cannot qualify as an egregious delay. To the contrary, this Court has treated longer gaps as sufficiently prompt. *See, e.g.*, *Acree*, 370 F.3d at 450 ("approximately two months"); *Fund for Animals*, 322 F.3d at 735 ("less than two months"); *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 434 (D.C. Cir. 1989) ("only 73 days"), *rev'd on other grounds sub nom. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

The court therefore took Heritage Action to task for not moving to intervene until "after the case had closed." JA310. But there is nothing talismanic about the entry of judgment *per se*. Rather, the judicial

"reluctance" against post-judgment intervention rests on the premise that doing so "'will either (1) prejudice the rights of the existing parties to the litigation or (2) substantially interfere with the orderly processes of the court.'" 7C Fed. Prac. & Proc. Civ. § 1916. "If neither of these results would occur," however, "the mere fact that judgment already has been entered should not by itself require a motion for intervention to be denied." *Id.* And intervention here would produce neither harm. *See supra* Pt. I.A.1.

B. Heritage Action Meets The Remaining Criteria For Intervention.

Heritage Action easily satisfies the other requirements for intervention, and the district court never suggested otherwise.[3]

First, Heritage Action has standing to intervene as a defendant. As the district court explained, "Heritage Action's rights … are obviously implicated" here: "Because of" the court's March 25 and May 3 "orders," the Center "could file—and now has filed—suit directly against it." JA311; *see supra* Pt. I.A.2. Being "exposed to civil liability via private lawsuit" is unquestionably "a significant injury in fact," and that exposure is "directly traceable" to the two orders. *Crossroads*, 788 F.3d at 316, 319 (holding respondent had standing to

[3] To the extent the court made "'no factual findings'" on these issues, this Court must consider any relevant factual issues "*de novo*." *Karsner*, 532 F.3d at 885.

intervene as defendant in a suit against the FEC challenging a deadlock dismissal). If the orders are set aside, that harm would be rectified, as the Center could no longer pursue its citizen suit against Heritage Action. *See id. at* 316; 52 U.S.C. §§ 30107(e), 30109(a)(8).

Second, because Heritage Action "has constitutional standing, it *a fortiori* has 'an interest relating to the property or transaction which is the subject of the action'" under Rule 24(a). *Crossroads*, 788 F.3d at 320. And the court's orders threaten to "impair" its "defense in a new proceeding because a judicial pronouncement that the FEC's [inaction] was contrary to law"—and a subsequent declaration that it failed to conform—will "make the task of reestablishing the status quo more difficult and burdensome." *Id.* (cleaned up) (addressing dismissals); *see supra* Pt. I.A.2. Indeed, the court did not deny that "without intervention," Heritage Action "will suffer" *some* "harm"; it only questioned the "degree" of injury. JA312 n.3.

Third, in light of the Commission's default and fraudulent concealment, Heritage Action "easily" satisfies "the minimal burden of showing inadequacy of representation." *Crossroads*, 788 F.3d at 321. Not even the Center disputed that Heritage Action met this requirement below. *See* Dkt. 30.

II. THE CITIZEN SUIT SHOULD NOT HAVE BEEN AUTHORIZED.

A. The Orders Authorizing The Citizen Suit Must Be Set Aside.

While this Court could reverse the denial of the intervention motion and remand for the district court to reconsider the authorization of the citizen suit in the first instance, it should go further. This Court has repeatedly "proceed[ed] to consider the substantive merits" of a movant's argument after reversing a denial of intervention, and there is no reason for a different approach here. *AT&T*, 642 F.2d at 1295; *accord Acree*, 370 F.3d at 51. To the contrary, because "'the first and fundamental question'" in every appeal "'is that of jurisdiction, first, of this court, and then of the court from which the record comes,'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998), this Court should not hesitate to address the district court's jurisdiction to enter the March 25 and May 3 orders now.

And that jurisdictional question is not a difficult one. The court lacked subject-matter jurisdiction to enter these orders because the case had become moot long before then. Generally, "when an administrative agency has performed the action sought by a plaintiff in litigation, a federal court 'lacks the ability to grant effective relief,' and the claim is moot." *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009); *see, e.g.*,

Saavedra Bruno v. Albright, 197 F.3d 1153, 1156, 1164-65 (D.C. Cir. 1999) (affirming dismissal of claim challenging the "State Department's failure to act on the request for a waiver of inadmissibility" as "moot" after the Department denied the request).

That is what happened here. Consistent with this Court's precedent, the only substantive relief sought by the Center in its February 2021 complaint was that the district court "declare that the FEC's failure to act is contrary to law, and order the FEC to conform within thirty days by acting on Plaintiff's administrative complaint." JA06-07; *see* JA123; *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("When the FEC's failure to act is contrary to law, we have interpreted [52 U.S.C. § 30109(a)(8)] to allow nothing more than an order requiring FEC action.").

By April 6, 2021, however, the FEC had "act[ed] on Plaintiff's administrative complaint" by disposing of it through a deadlock dismissal. JA06-07. As its voting records confirm, on that day, the FEC "took the following action[]" on the Center's complaint—a "3-3" vote on whether there was "reason to believe that Heritage Action for America violated" the Act. JA300. That deadlock did not mean that "'nothing happen[ed]'" and that the FEC had to wait "until a bipartisan coalition of four commissioners'" could

"'come to an agreement'" before "'a dismissal'" could occur. *New Models*, 993 F.3d at 891. Instead, the "result[]" of "the failure to get four votes to proceed with an enforcement action" here was a "'deadlock dismissal[].'" *Id.*; *see supra* at 6-8, 13-14.

Had the court known of this fact before it issued its March 25 and May 3 orders, it could not have entered an "order requiring FEC action." *Perot*, 97 F.3d at 559. Such a directive "would be nothing more than an order directing the FEC to do what it has already done." *All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 43 (D.D.C. 2004). Because the deadlock dismissal "foreclose[d] any possible relief under [52 U.S.C. § 30109(a)(8)] based on the FEC's failure to act," the court would have been required to dismiss the case as "moot." *Id.* at 42-43; *see, e.g.*, *Gordon v. Lynch*, 817 F.3d 804, 806 (D.C. Cir. 2016) ("A case is moot if 'it is impossible for a court to grant any effectual relief whatever to the prevailing party.'").

While the Center could try to challenge the FEC's *deadlock dismissal* as contrary to law under 52 U.S.C. § 30109(a)(8), it would need to do so in a new case. And that challenge would be doomed to fail as well, as courts lack "the authority to second guess" a deadlock dismissal "based even in part on enforcement discretion." *New Models*, 993 F.3d at 882; *see supra* at 9.

Although the FEC's concealment prevented the district court from learning of this jurisdictional defect before the March 25 and May 3 orders, this Court's duty following that revelation is clear. Whatever "questions arise when a case becomes moot after decision by the trial court," "[n]o difficulty is encountered if an action is moot at the time of the lower court's decision—any decision on the merits is vacated." 13C Fed. Prac. & Proc. Juris. § 3533.10. "If mootness occurred prior to the rendering of final judgment by the district court, *vacatur* and dismissal is automatic," as "[t]he district court would not have had Article III jurisdiction to render the judgment, and [appellate courts] cannot leave undisturbed a decision that lacked jurisdiction." *Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999); *see, e.g.*, *United States v. Juv. Male*, 564 U.S. 932, 937 (2011) (vacating and remanding with instructions to dismiss when, unbeknownst to the Ninth Circuit, the "challenge was moot" "[a]t the time of the Ninth Circuit's decision").

Alternatively, even if the FEC's concealment did not go to the district court's jurisdiction, it would still require setting the orders aside on the merits. The court's March 25 conclusion that "[t]he FEC's failure to act on [the Center's] administrative complaint is contrary to law," is erroneous by definition, as the FEC's records reveal that there was "no failure to act" in the

first place. JA199. The same is true of the court's May 3 conclusion that the FEC had "failed to conform" to the March 25 order "by acting on Campaign Legal Center's administrative complaint." JA245-46. Again, the Commission had "conform[ed]" to that order "by acting on" the Center's administrative complaint in April 2021. *Id.* Because the Center failed to satisfy the prerequisites for a citizen suit under 52 U.S.C. § 30109(a)(8), the district court's orders must be set aside.

B. The Center's Objection To Review Of This Issue Is Baseless.

That would be the end of it, but for a cursory argument in the Center's motion to dismiss that Heritage Action cannot appeal the March 25 and May 3 orders "regardless of its right to intervene." Center Mot. 14 n.9. According to the Center, Heritage Action's May 20 notice appealing the merits rulings was "ineffective" because the district court had not yet "denied intervention," and its June 8 "notice appealing the denial of intervention" did not include the "merits rulings." *Id.* This hyper-technical objection is doubly flawed.[4]

[4] As the Center did not deny in its motion, the May 20 appeal did not preclude the district court from acting on the intervention motion. While the circuits are 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 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.

First, far from a premature misstep, Heritage Action's appeal of the merits orders before the court had ruled on intervention was a necessary action to protect its rights. By May 20, the court had not ordered expedited briefing on the intervention motion and Heritage Action feared (presciently) that the Center would contend (wrongly) 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 no choice but 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").

Second, even if the May 20 appeal were premature, that would not justify a refusal to consider the merits here. "[I]mperfections 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). That includes situations "when the record as a whole—including a timely but incomplete notice of appeal and a

premature but complete notice—reveal[s] the orders" the relevant party "sought to appeal." *Id.* at 768 (citing *Foman v. Davis*, 371 U.S. 178, 181 (1962)).

In *Foman*, for instance, the petitioner (i) appealed the dismissal of her complaint while her motions to vacate the judgment and amend the complaint were pending, and (ii) then appealed the denial of those latter motions through a notice that "failed to specify that the appeal was being taken from" the dismissal "as well." 371 U.S. at 180-81. The Supreme Court held that "[e]ven if … the first notice of appeal [was] premature," the court of appeals erred in refusing to consider the underlying dismissal. *Id.* at 181. As the Court explained, "[t]aking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest," and "decisions on the merits [cannot] be avoided on the basis of such mere technicalities." *Id.*

This case is materially indistinguishable from *Foman*. Even if the May 20 notice were "premature" and "ineffective[]," "the two notices and the appeal papers together" made clear Heritage Action's "intention to seek review of both" the orders authorizing the citizen suit and "the denial of the motion[]" to intervene. *Id.*; *compare id.* (noting that "petitioner's statements of points on which she intended to rely on appeal … similarly demonstrated the intent to

challenge the dismissal"), *with* Statement of Issues To Be Raised (June 23, 2022) (identifying the intervention and authorization questions). Accordingly, the Center cannot claim there is any "genuine doubt" as to what rulings were being appealed here. *Becker*, 532 U.S. at 767; *see, e.g.*, *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 593 (D.C. Cir. 2001) (observing that "without a showing of prejudice by the appellee, technical errors in the notice of appeal are considered harmless" when the appellant's "intention … is clear").

Finally, even if taken seriously, the Center's quibble would only net it a short-term victory. If this Court agrees with the Center that it cannot address the authorization of the citizen suit at this time, it would have to dispose of this case by reversing the intervention denial and remanding so that the district court can consider the authorization issue with Heritage Action as a party. And regardless of how that court ruled, the authorization issue would likely resurface before this Court in another appeal. That is yet another reason to reject the Center's cavil and put an end to the FEC's mischief for good.

CONCLUSION

This Court should reverse the district court's denial of Heritage Action's motion to intervene, vacate the district court's March 25, 2022 and May 3, 2022 orders, and remand the case with instructions to dismiss for lack of subject-matter jurisdiction. In the alternative, this Court should reverse the denial of the motion to intervene and remand for further proceedings.

Dated: November 3, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7) because, excluding the portions of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this document contains 12,895 words.

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 3rd day of November 2022, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate

STATUTORY ADDENDUM

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52 U.S.C. § 30106
Federal Election Commission

(a) Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2)(A) Members of the Commission shall serve for a single term of 6 years, except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging

in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of Title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) Voting requirements; delegation of authorities

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title or with chapter 95 or chapter 96 of Title 26.

(d) Meetings

The Commission shall meet at least once each month and also at the call of any member.

(e) Rules for conduct of activities; judicial notice of seal; principal office

The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) Staff director and general counsel; appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments; counsel for defense of actions

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable without regard to the provisions of Title 5 governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either (A) by attorneys employed in its office, or (B) by counsel whom it may

appoint, on a temporary basis as may be necessary for such purpose, without regard to the provisions of Title 5 governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

52 U.S.C. § 30107
Powers of Commission

(a) Specific authorities

The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 30109(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of Title 26, through its general counsel;

(7) to render advisory opinions under section 30108 of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of Title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) Judicial orders for compliance with subpenas and orders of Commission; contempt of court

Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpena or order of the Commission issued under subsection (a), issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) Civil liability for disclosure of information

No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) Concurrent transmissions to Congress or Member of budget estimates, etc.; prior submission of legislative recommendations, testimony, or comments on legislation

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendation, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) Exclusive civil remedy for enforcement

Except as provided in section 30109(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

52 U.S.C. § 30109
Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clauses[5] (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

(C)(i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may—

> **(I)** find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and
>
> **(II)** based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, under a schedule of penalties which is established and

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[5] So in original. Probably should be "clause".

published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of—

(I) subsections[6] (a), (c), (e), (f), (g), or (i) of section 30104 of this title; or

(II) section 30105 of this title.

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2023.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater

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[6] So in original. Probably should be "subsection".

of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of

$10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(10) Repealed. Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent

of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports

Before taking any action under subsection (a) against any person who has failed to file a report required under section 30104(a) (2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 30104(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 30111(a) (7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 30118(b)(3) of this

title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 30118(b)(3) of this title may incorporate a violation of section 30119(b), 30122, or 30123 of this title.

(C) In the case of a knowing and willful violation of section 30124 of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 30122 of this title involving an amount aggregating more than $10,000 during a calendar year shall be—

(i)imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

11 C.F.R. § 4.4
Availability of records.

(a) In accordance with 5 U.S.C. 552(a)(2), the Commission shall make the following materials available for public inspection and copying:

(1) Statements of policy and interpretation which have been adopted by the Commission;

(2) Administrative staff manuals and instructions to staff that affect a member of the public;

(3) Opinions of Commissioners rendered in enforcement cases, General Counsel's Reports and non-exempt 52 U.S.C. 30109 investigatory materials shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file;

(4) Copies of all records, regardless of form or format, which have been released to any person under this paragraph (a) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(5) A general index of the records referred to in paragraph (a)(4) of this section.

(b) In accordance with 5 U.S.C. 552(a)(3), the Commission shall make available, upon proper request, all non-exempt Agency records, or portions of records, not previously made public pursuant to 5 U.S.C. 552(a)(1) and (a)(2).

(c) The Commission shall maintain and make available current indexes and supplements providing identifying information regarding any matter issued, adopted or promulgated after April 15, 1975 as required by 5 U.S.C. 552(a)(2)(C) and (E). These indexes and supplements shall be published and made available on at least a quarterly basis for public distribution unless the Commission determines by Notice in the Federal Register that publication would be unnecessary, impracticable, or not feasible due to budgetary considerations. Nevertheless, copies of any index or supplement shall be made available upon request at a cost not to exceed the direct cost of duplication.

(d) The Freedom of Information Act and the provisions of this part apply only to existing records; they do not require the creation of new records.

(e) If documents or files contain both disclosable and nondisclosable information, the nondisclosable information will be deleted and the disclosable information released unless the disclosable portions cannot be reasonably segregated from the other portions in a manner which will allow meaningful information to be disclosed.

(f) All records created in the process of implementing provisions of 5 U.S.C. 552 will be maintained by the Commission in accordance with the authority granted by General Records Schedule 14, approved by the National Archives and Records Service of the General Services Administration.

(g) The Commission encourages the public to explore the information available on the Commission's World Wide Web site, located at http://www.fec.gov. The site includes a Commission publication, Availability of FEC Information, which provides a detailed listing of the types of documents available from the FEC, including those available under FOIA, and directions on how to locate and obtain them.

11 C.F.R. § 4.7
Requests for records.

(a) [Reserved]

(b)(1) Requests for copies of records pursuant to the Freedom of Information Act shall be addressed to Chief FOIA Officer, Federal Election Commission, at the street address identified in the definition of "Commission" in § 1.2. The request shall reasonably describe the records sought with sufficient specificity with respect to names, dates, and subject matter, to permit the records to be located. A requester will be promptly advised if the records cannot be located on the basis of the description given and that further identifying information must be provided before the request can be satisfied.

(2) Requests for Commission records and copies thereof shall specify the preferred form or format (including electronic formats) of the response. The Commission shall accommodate requesters as to form or format if the record is readily available in that form or format. When requesters do not specify the form or format of the response, the Commission shall respond in the form or format in which the document is most accessible to the Commission.

(c) The Commission shall determine within twenty working days after receipt of a request, or twenty working days after an appeal is granted, whether to comply with such request, unless in unusual circumstances the time is extended or subject to § 4.9(f)(3), which governs advance payments. In the event the time is extended, the requestor shall be notified of the reasons for the extension and the date on which a determination is expected to be made, but in no case shall the extended time exceed ten working days. An extension may be made if it is—

(1) Necessary to locate records or transfer them from physically separate facilities; or

(2) Necessary to search for, collect, and appropriately examine a large quantity of separate and distinct records which are the subject of a single request; or

(3) Necessary for consultation with another agency which has a substantial interest in the determination of the request, or with two or more components of the Commission which have a substantial subject matter interest therein.

(d) If the Commission determines that an extension of time greater than ten working days is necessary to respond to a request satisfying the "unusual circumstances" specified in paragraph (c) of this section, the Commission shall so notify the requester and give the requester an opportunity to limit the scope of the request so that it may be processed within the time limit prescribed in paragraph (c) of this section, or arrange with the Commission an alternative time frame for processing the request or a modified request.

(e) The Commission may aggregate and process as a single request requests by the same requester, or a group of requesters acting in concert, if the Commission reasonably believes that the requests actually constitute a single request that would otherwise satisfy the unusual circumstances specified in paragraph (c) of this section, and the requests involve clearly related matters.

(f) The Commission uses a multitrack system to process requests under the Freedom of Information Act that is based on the amount of work and/or time involved in processing requests. Requests for records are processed in the order they are received within each track. Upon receipt of a request for records, the Commission shall determine which track is appropriate for the request. The Commission may contact requesters whose requests do not appear to qualify for the fastest tracks and provide such requesters the opportunity to limit their requests so as to qualify for a faster track. Requesters who believe that their requests qualify for the fastest tracks and who wish to be notified if the Commission disagrees may so indicate in the request and, where appropriate and feasible, shall also be given an opportunity to limit their requests.

(g) The Commission shall consider requests for the expedited processing of requests in cases where the requester demonstrates a compelling need for such processing.

(1) The term compelling need means:

(i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal government activity.

(2) Requesters for expedited processing must include in their requests a

statement setting forth the basis for the claim that a "compelling need" exists for the requested information, certified by the requester to be true and correct to the best of his or her knowledge and belief.

(3) The Commission shall determine whether to grant a request for expedited processing and notify the requester of such determination within ten days of receipt of the request. Denials of requests for expedited processing may be appealed as set forth in § 4.8. The Commission shall expeditiously determine any such appeal. As soon as practicable, the Commission shall process the documents responsive to a request for which expedited processing is granted.

(h) Any person denied access to records by the Commission shall be notified immediately giving reasons therefore, and notified of the right of such person to appeal such adverse determination to the Commission.

(i) The date of receipt of a request under this part shall be the date on which the FOIA Officer actually receives the request.

11 C.F.R. § 5.4
Availability of records.

(a) In accordance with 52 U.S.C. 30111(a), the Commission shall make the following material available for public inspection and copying through the Commission's Public Disclosure and Media Relations Division:

(1) Reports of receipts and expenditures, designations of campaign depositories, statements of organization, candidate designations of campaign committees and the indices compiled from the filings therein.

(2) Requests for advisory opinions, written comments submitted in connection therewith, and responses issued by the Commission.

(3) With respect to enforcement matters, any conciliation agreement entered into between the Commission and any respondent.

(4) Opinions of Commissioners rendered in enforcement cases and General Counsel's Reports and non-exempt 52 U.S.C. 30109 investigatory materials shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file.

(5) Letter requests for guidance and responses thereto.

(6) The minutes of Commission meetings.

(7) Material routinely prepared for public distribution, e.g. campaign guidelines, FEC Record, press releases, speeches, notices to candidates and committees.

(8) Audit reports (if discussed in open session).

(9) Agendas for Commission meetings.

(b) The provisions of this part apply only to existing records; nothing herein shall be construed as requiring the creation of new records.

(c) In order to ensure the integrity of the Commission records subject to the Act and the maximum availability of such records to the public, nothing herein shall be construed as permitting the physical removal of any Commission records from the public facilities maintained by the Public Disclosure and Media Relations Division other than copies of such records obtained in accordance with the provisions of this part.

(d) Release of records under this section is subject to the provisions of 5 U.S.C. 552a.

11 C.F.R. § 111.9

The reason to believe finding; notification (52 U.S.C. 30109(a)(2)).

(a) If the Commission, either after reviewing a complaint-generated recommendation as described in 11 CFR 111.7 and any response of a respondent submitted pursuant to 11 CFR 111.6, or after reviewing an internally-generated recommendation as described in 11 CFR 111.8, determines by an affirmative vote of four (4) of its members that it has reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction, its Chairman or Vice Chairman shall notify such respondent of the Commission's finding by letter, setting forth the sections of the statute or regulations alleged to have been violated and the alleged factual basis supporting the finding.

(b) If the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter.

11 C.F.R. § 111.20

Public disclosure of Commission action (52 U.S.C. 30109(a)(4)).

(a) If the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent.

(b) If a conciliation agreement is finalized, the Commission shall make public such conciliation agreement forthwith.

(c) For any compliance matter in which a civil action is commenced, the Commission will make public the non-exempt 52 U.S.C. 30109 investigatory materials in the enforcement and litigation files no later than thirty (30) days from the date on which the Commission sends the complainant and the respondent(s) the required notification of the final disposition of the civil action. The final disposition may consist of a judicial decision which is not reviewed by a higher court.