[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 22-5164, 22-5165

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

45COMMITTEE, INC.,
Movant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

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

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INTRODUCTION

45Committee, Inc. asked this Court to place these appeals into abeyance because the disposition of either of its two pending lawsuits against the Federal Election Committee (FEC) may obviate the need to resolve these appeals. Campaign Legal Center's opposition fails to justify its stubborn objection to this modest, commonsense request. *First*, the Center's assertion that resolution of 45Committee's lawsuits against the FEC cannot affect this case is mystifying given that 45Committee has made clear it will drop these appeals if it prevails in either action and the citizen suit is therefore conclusively dismissed. Mot. 13. *Second*, the Center's contention that 45Committee is unlikely to succeed in these appeals is both misplaced and meritless. *Third*, the Center's claim that 45Committee will suffer no prejudice from an ordinary briefing schedule ignores the burdens of litigating matters that may soon become irrelevant due to proceedings elsewhere—a textbook injury justifying abeyance. *Finally*, the Center's insistence that it would be harmed by deferring appellate review of rulings that it seeks to *preserve* reduces to a generalized interest in finality that exists whenever an abeyance motion is filed. In short, the Center has offered no good reason for denying the abeyance motion here.

ARGUMENT

I. THE DISPOSITION OF 45COMMITTEE'S LAWSUITS AGAINST THE FEC MAY AFFECT THE OUTCOME OF THESE APPEALS.

The case for abeyance here is simple. If 45Committee obtains the unredacted voting records and any statement of reasons through its lawsuits against the FEC, it plans to move to dismiss the citizen suit. As the Center concedes, that withheld evidence will "almost certainly reflect" that the FEC could not "muster the votes" necessary to initiate "enforce[ment]." Opp. 18.[1] At that point, the citizen suit will have to be dismissed, especially if, as is likely, the FEC's deadlock dismissal was based in part on prosecutorial discretion. Mot. 13. If that ruling becomes final, 45Committee will no longer need to pursue these appeals. Because a dismissal thus "may entirely, or partially, moot" these appeals, this Court should hold them "in abeyance." *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008); *see* Mot. 12-14.

[1] That concession is wise, as evidence from 45Committee's pending lawsuit under the Freedom of Information Act confirms as much. *See, e.g.*, 1:22-cv-502 Dkt. 12 at 2 (FEC's admission that it "has taken previous votes on the administrative complaint against 45Committee"); 1:22-cv-502 Dkt. 18-2 (FEC's admission that the enforcement file contains a "Statement of Reasons," which is required following a deadlock dismissal); 1:22-cv-502 Dkt. 19-2 at 1 (statement by three Commissioners confirming that the FEC "adjudicated" the "administrative complaint[]" concerning 45Committee).

The Center nevertheless insists that 45Committee "cannot show" that a victory against the FEC "could resolve these appeals." Opp. 15 (capitalization altered). The Center's only argument in support of that implausible claim is that the records withheld by the FEC will not resolve the "threshold question" in this appeal—whether the district court committed legal error in denying the motion to intervene. Opp. 16. That contention fails for two reasons.

To start, the Center's observation cuts *in favor* of abeyance. As the Center acknowledges, victory against the FEC—and consequent dismissal of the citizen suit—will save both this Court and the parties from having to devote further resources to "address[ing] whether 45Committee's post-judgment attempt to intervene was timely." Opp. 2. If the Center acquiesces to the dismissal, 45Committee will dismiss these appeals. And if the Center appeals it, this Court could proceed directly to the merits issue in these appeals—whether the Center may pursue its citizen suit under 52 U.S.C. § 30109(a)(8)(C)—without having to address the threshold question of intervention. Either way, granting abeyance would reduce, if not eliminate, the issues requiring this Court's attention. It therefore makes no sense to address the intervention issue *now*, when that question may never resurface.

In any event, the Center does not deny that a victory against the Commission "'could resolve'" the *merits* "'issue[] presented' in these appeals." Opp. 15-16. Proof that the Center's administrative complaint triggered a deadlock dismissal in 2020 based in part on prosecutorial discretion would "inform"—indeed, "resolve"—whether the citizen suit here was properly authorized under the Federal Election Campaign Act of 1971 (the Act). Opp. 16; *see* Mot. 2-3.

II. TO THE EXTENT IT IS EVEN RELEVANT, 45COMMITTEE IS LIKELY TO SUCCEED IN THESE APPEALS.

The Center next contends that abeyance is inappropriate on the premise that these appeals are so meritless as to warrant summary disposition. Opp. 16-17. That premise is incorrect, and the conclusion does not follow.

A. As an initial matter, the Center's argument, which turns on the *merits* (of both the intervention and authorization issues), does not resolve whether *abeyance* is appropriate. If this Court grants the Center's summary-disposition motion, these appeals will be over and there will be no need to consider whether to defer their resolution. And if this Court denies that motion, the abeyance calculus will be the same as before. Either way, the Center's toe-dipping into the merits here is beside the point.

The Center nevertheless asserts that abeyance "is not warranted" if the movant "is unlikely to succeed on the merits." Opp. 16. But its sole direct support for that claim, *Basardh*, merely stated that in considering an abeyance motion, this Court "*may also* take account of the traditional factors in granting a stay, including the likelihood that the movant will prevail." 545 F.3d at 1069 (emphasis added). In language the Center does not quote, *Basardh* went on to note that this Court "[o]ften" grants abeyance merely because "other pending proceedings … may affect the outcome of the case" before it without ever considering the merits (or the equitable stay factors). *Id.* Tellingly, the Center identifies not a single instance of this Court denying an abeyance motion on the ground the movant was unlikely to succeed on the merits. Opp. 15; *cf. Basardh*, 545 F.3d at 1072 (granting abeyance motion). That is unsurprising, given that *Basardh* further noted that the "standard for issuing a stay or preliminary injunction" is "more exacting" than the one for merely "holding a case in abeyance." 545 F.3d at 1069.

B. In any event, as 45Committee "will explain fully in its forthcoming" opposition, Opp. 16, the Center's summary-disposition motion lacks merit. The same is true for the Center's view on the authorization issue.

1. While the Center contends "the district court did not abuse its discretion" in denying intervention "as untimely," Opp. 16-17, that ruling rests on multiple legal errors. *See Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022) (intervention ruling based on "'erroneous view of the law'" is abuse of discretion). For example, while the Center, like the district court before it, defends the untimeliness ruling on the premise that there was "'a clear opportunity for pre-judgment intervention,'" Opp. 17, a motion is timely if it does not "unfairly disadvantage the original parties," "even where a would-be intervenor could have intervened sooner," *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (cleaned up).

No unfair prejudice exists here. While the court thought the Center would be unjustly prejudiced because an appeal would delay resolution of the case, Dkt. 37 at 10-11, the Supreme Court has made clear that a prevailing party is not "'unfairly prejudiced simply because an appeal'" is pursued by a post-judgment intervenor rather than by the original losing party—even though the appeal delays the case's ultimate disposition, *Cameron*, 142 S. Ct. at 1013. This Court likewise has emphasized 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 is true whether the original defendant had litigated the case from the outset or never appeared at all. *Cf.* Dkt. 37 at 11-12. Notably, this Court held that a set of plaintiffs suffered "no prejudice arising from" post-judgment intervention seeking "appellate review" even when the original defendant had "failed to appear" and the plaintiffs "obtained a nearly-billion dollar default judgment." *Acree v. Republic of Iraq*, 370 F.3d 41, 45, 50, 58 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). The lack of cognizable prejudice alone requires reversal. *Roane*, 741 F.3d at 151-52.

At a minimum, nothing in the Center's opposition (or summary-disposition motion) remotely establishes that the arguments for intervention here are so insubstantial that this Court should summarily dispose of these appeals. The Center has not carried its "heavy burden of establishing that the merits of his case are so clear that expedited action is justified," *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) , especially as the intervention ruling here raises issues of "first impression … not appropriate for summary disposition," *Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 914 (D.C. Cir. 1996). As far as 45Committee is aware, this Court has never confronted the need for post-judgment intervention when an agency has failed to defend

itself while concealing dispositive evidence from the Judiciary. *Cf. Paisley v. CIA*, 724 F.2d 201, 202 n.1 (D.C. Cir. 1984) (indicating such intervention would be warranted "to bring to the court's attention newly-discovered evidence that could not have been previously brought before the court").

2. The Center fares no better in claiming 45Committee is unlikely "to succeed on its appeal of the merits." Opp. 18. As the Center admits, the FEC "almost certainly" could not "muster the votes" necessary "to enforce" the Act—*i.e.*, it deadlocked. Opp. 18; *see supra* at 2 & n.1. And this Court has made clear that "the statute compels FEC to dismiss complaints in deadlock situations" because the "FEC cannot investigate complaints absent majority vote" under § 30109(a)(2). *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016); *see* Mot. 5. The Center does not even mention this precedent on deadlocks, let alone try to explain why it does not foreclose the citizen suit.

Instead, the Center contends that unless four Commissioners have voted to "close[] the file," a deadlock dismissal is insufficient to dismiss an administrative complaint. Opp. 18; *see* Opp. 4-7. But such a theory "would be inconsistent with—in fact, would overthrow—the Act's structure and design." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014). There is no evident reason why Congress would require *four* votes to proceed with any FEC

enforcement, 52 U.S.C. § 30109(a)(2), yet allow merely *three* Commissioners to nullify a deadlock dismissal and keep the threat of enforcement dangling over an alleged violator in perpetuity. And in fact, Congress did no such thing. Unlike the "reason to believe" vote, which again requires "an affirmative vote of 4" Commissioners, *id.*, a "'vote to close the file'" is nowhere mentioned in the Act. Opp. 5. Rather, that vote is an administrative creation of the FEC that cannot take precedence over the statute Congress enacted. 11 C.F.R. § 5.4(a)(4). Consistent with that background, the FEC, at least until recently, has taken the position that it "will dismiss a matter … when the Commission lacks majority support for proceeding." *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007).

Finally, while the Center makes much of the district court's statement in its intervention ruling that 45Committee's authorization theory is "far-fetched," that only confirms why that ruling must be reversed. Dkt. 37 at 10; *see* Opp. 2, 13, 18. Because "the threshold question of intervention" is "in essence a question of standing" for 45Committee "to participate in the case," "a determination of the merits" "is not appropriate at this threshold stage." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980).

III. DENYING ABEYANCE WILL PREJUDICE 45COMMITTEE.

The Center is no more persuasive in claiming "45Committee has not identified any harm … it would suffer" from litigating these "appeals in the usual course." Opp. 15; *see* Opp. 18-19. As explained, plowing ahead here would waste "judicial and party resources" in addressing appeals that "may never need to" be resolved and "burden" 45Committee with "having to needlessly litigate issues on appeal that may ultimately be mooted by events elsewhere." Mot. 4, 13-14 (cleaned up). That commonsense point is a paradigmatic basis for abeyance, Mot. 14, and the Center never explains why it is insufficient here.

Rather than deny that an abeyance "would be 'efficient,'" the Center urges this Court to ignore that fact because some of the efficiency would come from a "voluntar[y]" dismissal of the appeals. Opp. 18-19. As an initial matter, that is incorrect: If the FEC releases the concealed evidence, this Court will be better positioned to address the merits question in these appeals. Mot. 2-3; *supra* at 4. In any event, the voluntary nature of the efficiency generated here is beside the point. Unlike vacatur or habeas corpus, which are equitable remedies, *see* Opp. 19, abeyance ultimately involves "the power inherent in every court to control the disposition of the causes on its docket with economy

of time and effort for itself, for counsel, and for litigants," *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). And it is hard to see why it should make any difference whether that judicial economy results from a party's voluntary dismissal in light of another court's ruling or the ruling itself.

IV. ABEYANCE WILL NOT PREJUDICE THE CENTER.

On the other side of the ledger, the Center never identifies any material prejudice it (or the public) would suffer from abeyance. Given that the decisions below *benefit* the Center, and that the Center has already filed a citizen suit, one would have thought it would have been content to leave the district court's rulings undisturbed for as long as possible. The Center nevertheless makes the head-scratching claim that an abeyance here would harm its "ability to successfully prosecute" the citizen suit "given the risk that evidence will spoil and witness recollections will fade" as time passes. Opp. 20. But the whole point of 45Committee's motion is to permit the resolution of the citizen suit *before* these appeals are resolved. Thus, in contrast to a stay of the citizen suit itself, *cf.* Opp. 21, holding these appeals in abeyance will not prevent Judge Mehta from promptly assessing evidence or hearing from witnesses (to the extent that doing so is even necessary).

Ultimately, the Center's real fear appears to be that these appeals could reverse the authorization for its citizen suit, and hence it wants a definitive answer from this Court on that issue as soon as possible. *See* Opp. 19-21. But that generalized interest in finality is present *whenever* this Court considers whether to grant an abeyance motion. It thus cannot justify allowing an appeal to proceed in the normal course when every other consideration counsels otherwise. Tellingly, the Center identifies no abeyance decision where this finality interest was even mentioned, let alone one where it proved dispositive. Nor does it explain why this case should be the one to break new ground.

CONCLUSION

This Court should grant 45Committee's abeyance motion.

Dated: July 28, 2022

Respectfully submitted,

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 28th day of July 2022, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate