UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER
1101 14TH St., NW, Ste. 400
Washington, D.C. 20005

CATHERINE HINCKLEY KELLEY
1101 14TH St., NW, Ste. 400
Washington, D.C. 20005

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463,

Defendant

and

HILLARY FOR AMERICA
P.O. Box 5256
New York, NY 10185-5256

CORRECT THE RECORD
455 Massachusetts Ave., NW
Ste. 600
Washington, D.C. 20001

Proposed
Defendant-Intervenors.

Civil Action No. 1:19-cv-02336-JEB

REPLY IN SUPPORT OF HILLARY FOR AMERICA'S AND CORRECT THE RECORD'S MOTION TO INTERVENE

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CLC	Campaign Legal Center and Catherine Hinckley Kelley
CTR	Correct the Record
FDIC	Federal Deposit Insurance Corporation
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
HFA	Hillary for America
NEPA	National Environmental Policy Act

INTRODUCTION

Proposed Defendant-Intervenors Hillary for America ("HFA") and Correct the Record ("CTR") are plainly entitled to intervene in this action, which threatens their interest in keeping in place the favorable Federal Election Commission ("FEC") dismissal order, and could clear the way for Plaintiffs Campaign Legal Center and Catherine Hinckley Kelley (collectively, "CLC") to bring a civil action directly against HFA and CTR pursuant to 52 U.S.C. § 30109(8)(c) of the Federal Election Campaign Act of 1971, as amended ("Section 30109 of FECA"). CLC has essentially conceded that HFA and CTR have met three of the four requirements for intervention as of right. Response, ECF No. 11, at 11. However, CLC takes the remarkable position that CTR and HFA are not threatened with an injury-in-fact sufficient to confer standing (and by extension, also lack the legally protected interest required by Rule 24) solely because the FEC has so far failed to defend this litigation. *Id*. CLC's position has no basis in law. Neither Federal Rule of Civil Procedure 24 nor Article III standing doctrine contain an exception to the established standards for intervention when a named defendant does not appear or fails to actively mount a defense.

To the contrary, where, as here, an existing party to litigation fails to defend an agency action that threatens the proposed intervenors' interests, the existing defendant is clearly inadequately representing the proposed intervenors, which *supports* intervention under the D.C. Circuit's four-part intervention test. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015) (discussing adequacy of representation factor); *see also Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (noting that the fourth prong of the intervention test was satisfied because "[t]he DOJ has made clear that it will not defend the constitutionality of Section 3 of DOMA in any way, while such a defense is precisely what [the proposed intervenor] wishes to undertake here"). Put differently, the fact that the FEC is not

defending this litigation actually counsels *in favor of* allowing CTR's and HFA's intervention under applicable law, not against it.

Moreover, the idea that CTR and HFA are somehow no longer threatened with an injury-in-fact because the FEC is not defending this litigation and lacks a quorum is illogical. HFA's and CTR's asserted injury-in-fact is both obvious and nearly identical to the injury recognized by the D.C. Circuit in *Crossroads* as more than sufficient to confer standing. Here, as in *Crossroads*, HFA and CTR currently claim a significant benefit from the FEC's dismissal order: as long as it stays in place, HFA and CTR face no further exposure to enforcement proceedings before the FEC, nor are they exposed to civil liability via private lawsuit. *Crossroads*, 788 F.3d at 318. Losing the favorable order would be a significant injury in fact. *See id*. at 317.

To the extent that this case differs from *Crossroads*, as CLC insists, the injury with which HFA and CTR are threatened is even more severe than the injury to the defendant intervenors in *Crossroads.* This is because the FEC's current lack of quorum presents CLC with an unusual opportunity to attempt an end-run around the FEC's established role as a gatekeeper for private enforcement actions brought under FECA. Where, as here, the FEC has dismissed an administrative complaint brought by a private complainant like CLC, that private complainant cannot bring a private enforcement action against the target of their complaint unless a) this Court finds that the FEC's dismissal of the administrative complaint was contrary to law, and b) the FEC fails to conform with the Court's declaration after this Court remands the complaint back to the FEC. *See* 52 U.S.C. § 30109(8)(c). Under normal circumstances, the FEC would have 30 days to conform with a contrary-to-law declaration issued by this Court at the conclusion of this litigation. *Id*. Once remanded, the FEC could—as it did previously in this case—again decline to take enforcement action, at which time CLC could again choose to appeal the FEC's declination

decision under the same "contrary to law" standard applicable to this case. It is only if the FEC decided not to act at all that CLC could bring a private civil suit against the alleged violators. *See* 52 U.S.C. § 30109(8)(c).[1] In so doing, FECA affords the FEC the role of a gatekeeper for private civil enforcement actions.

But CLC apparently believes that this statutorily-imposed gatekeeping function goes out the window when the FEC lacks a quorum. According to CLC, if this Court remands CLC's administrative complaint back to the FEC, the FEC cannot "presently take any other dispositive action" on the remanded complaint because it lacks a quorum. Resp., ECF No. 11, at 8. Accordingly, CLC apparently intends to seek a contrary-to-law declaration by default judgment, wait 30 days after remand to a quorum-less FEC, and then file a lawsuit against CTR and HFA directly. *See id*. at 10, n.1.

Given this context, CLC's eagerness to exclude CTR and HFA from this action is all the more understandable. The sooner that CLC obtains a remand to the FEC, the greater the chance that the remand will come before a quorum-less FEC, providing CLC with an excuse to file a private civil suit directly against HFA and CTR within 30 days of remand. As a result, CLC understandably prefers to sidestep the serious problems with its own standing raised in HFA's and CTR's proposed motion to dismiss, and instead quickly move for a default judgment without being inconvenienced by the procedural rights and protections ordinarily afforded defendants under the Federal Rules of Civil Procedure.

[1] *See also CREW v. Am. Action Network*, No. 18-CV-945 (CRC), 2019 WL 4750248, at *16 (D.D.C. Sept. 30, 2019) (explaining that if the FEC dismissed complaint for a second time, complainant could file another Section 30109(8)(a) suit, but could not sue the alleged violators directly).

As such, HFA and CTR are threatened with at least the same injury as the intervenors in *Crossroads*. *See Crossroads*, 788 F.3d at 317-18. Their injury is made even more imminent and concrete because the FEC lacks a quorum, which under CLC's theory, would significantly increase the likelihood that CLC could bring a lawsuit directly against HFA and CTR. This is more than enough to show an injury-in-fact sufficient to support intervention. *See id*.

As discussed in detail herein, HFA and CTR plainly meet the requirements for intervention as of right. In the alternative, CTR and HFA request permissive intervention pursuant to Rule 24(b).

ARGUMENT

I. HFA and CTR Plainly Meet the Requirements to Intervene As of Right

A. Federal Policy Favors Broad Participation By Those Who May Be Affected By Litigation

As CLC acknowledges, a four-factor test governs the standard for intervention as a matter of right in the D.C. Circuit: (1) whether the intervenor-movant's motion is timely; (2) whether the movant has a "legally protected" interest in the action; (3) whether the action threatens to impair the movant's proffered interest in the action; and (4) whether an existing party to the action will adequately represent the movant's interests. *Crossroads*, 788 F.3d at 320. In addition, the D.C. Circuit requires a movant for intervention as of right to demonstrate standing.[2] "To establish standing under Article III, a prospective intervenor—like any party—must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003). However, injury is the key inquiry: the D.C. Circuit has held that if the party

[2] The Supreme Court has recently cast doubt on the requirement that parties seeking to intervene as defendants demonstrate standing, stating that when intervention occurs in a "defensive posture," the intervenor "d[oes] not need to establish standing" because it is not seeking to invoke the court's jurisdiction. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1952 (2019). In any event, HFA and CTR have both standing and a legally protectible interest in this litigation.

against whom an FEC administrative complaint was dismissed can prove injury, then it can establish causation and redressability. *See Crossroads*, 788 F.3rd at 316 (citation omitted). The D.C. Circuit has also repeatedly held that a proposed intervenor that demonstrates constitutional standing also sufficiently establishes "an interest relating to the property or transaction which is the subject of the action" for purposes of Rule 24. *See Fund for Animals, Inc.*, 322 F.3d at 735 (citation omitted); *Jones v. Prince George's Cty., Md.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003).[3]

Rule 24 has been construed liberally by this Court to advance the federal policy that favors broad participation by interested parties in litigation. *See, e.g.*, *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 157 (D.D.C. 2001) (Rule 24 provides a "liberal and forgiving standard"); *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000) (explaining that "the D.C. Circuit has taken a liberal approach to intervention" and "the purposes of Rule 24 [will be] best served by permitting the prospective intervenors to engage in all aspects of this litigation"). Indeed, this policy requires that all "doubts [be] resolved in favor of the proposed intervenor." *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999); *see also Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1326 (S.D. Ala. 2003) (Rule 24 requires doubts to be resolved in favor of the proposed intervenor); *United States v. Marsten Apartments, Inc.*, 175 F.R.D. 265, 267 (E.D. Mich. 1997) (same).

Rule 24(a)(2) implements "the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). By providing a liberal procedure for non-parties to assert their interests in litigation, Rule 24(a) fixes "the

[3] CLC does not contest that the analysis for standing and a legally protectible interest overlap. *See, e.g.*, Resp., ECF No. 11, at 14 (discussing "Article III injury [. . . and] the analogous requirements of Rule 24(a)").

obvious injustice of having [an outsider's] claim erased or impaired by the court's adjudication without ever being heard. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir 1980) (citation omitted).

Against these background principles, it is clear that HFA and CTR, both of which have a vital interest in this case, should be permitted to intervene and participate as parties to this litigation. *See* Mem. in Supp. of Mot. to Intervene, ECF. No. 10-1.

B. HFA and CTR Have Demonstrated an Injury-in-Fact and a Legally Protected Interest in this Litigation

CLC has acknowledged that HFA and CTR "may meet some of the requirements for intervention," but contends without explanation that "the FEC's affirmative decision not to authorize a defense of this action, and its corollary decision to default, deprives them of a legally protectable interest in this case," and means that they lack standing. Resp., ECF No. 11, at 11. Quite the contrary. The FEC's failure to defend this litigation only amplifies HFA's and CTR's threatened injury-in-fact, strengthening their standing and the other arguments in favor of their intervention. HFA's and CTR's ability to intervene in this case is governed by *Crossroads*. Just as the intervenors in *Crossroads*, HFA and CTR currently claim a significant benefit from the FEC's dismissal order: as long as it remains in place, HFA and CTR face no further exposure to enforcement proceedings before the FEC, nor are they exposed to civil liability via private lawsuit. *Crossroads*, 788 F.3d at 318. Under *Crossroads*, the risk of losing the favorable order *alone* is a significant injury in fact sufficient to confer standing upon HFA and CTR because it "would extinguish the current barrier to enforcement," private or otherwise. *Id*. at 319. CLC never explains, because it cannot, how HFA's and CTR's injury—losing the favorable dismissal order—is at all lessened by the FEC's failure to defend this action or lack of quorum.

In fact, given the FEC's lack of quorum and failure to defend this litigation, HFA and CTR will be exposed to an even more imminent injury: a private lawsuit brought against them by CLC pursuant to 52 U.S.C. § 30109(8)(c) just 30 days after remand. As explained *supra* at 2-4, CLC believes that if the Court remands this complaint to a quorum-less FEC, the FEC will necessarily fail to take action to conform to the Court's declaration within 30 days after remand, as required by Section30109(8)(c) of FECA. *See* Resp. at 15, n.1. Accordingly, CLC believes it will have a green light under FECA to sue HFA and CTR directly in federal court 30 days after remand. *Id*. This injury—facing a private lawsuit in which HFA and CTR are the named defendants just 30 days after remand—constitutes an even more concrete and imminent harm to HFA and CTR, further confirming HFA and CTR's Article III standing. *See Crossroads*, 788 F.3d at 318.

C. No Existing Party to the Litigation Adequately Represents HFA's or CTR's Interests

The FEC's failure to enter an appearance to date only strengthens the conclusion that the FEC does not adequately represent HFA's or CTR's interests. The D.C. Circuit has recognized that the fourth requirement for intervention—that the existing parties to the litigation do not adequately represent the intervenors' interest—is "not onerous," and that a movant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation." *See Crossroads GPS*, 788 F.3d at 321 (citing *Fund for Animals*, 322 F.3d at 735); *Am. Tel & Tel. Co.*, 642 F.2d at 1293). In this case, the FEC's interests are apparently so misaligned with HFA and CTR that it could not muster four Commissioner votes to authorize defense of its own dismissal of this action. Yet, CLC oddly contends that this factor favors against intervention because HFA and CTR cannot represent *the FEC's interests*. *See* Resp., ECF No. 11, at 18. But that misconstrues the inquiry before the Court. The inquiry under Rule 24 is whether *the existing*

parties to the litigation can represent *the proposed intervenors' interests*, not the other way around. That the FEC made the decision not to defend its dismissal has no bearing on the Rule 24 analysis.

D. CLC's Specific Arguments Against HFA's and CTR's Standing Fail

CLC flings various arguments against HFA's and CTR's standing upon the wall, hoping that one will stick. But each is meritless. *First*, CLC erroneously argues that CTR and HFA have not identified "any particularized or legally protected interest in continuing this case without the FEC's participation." Resp., ECF No. 11, at 14. But that is clearly not true. CTR and HFA stand to suffer the same injury regardless of whether the FEC participates in this litigation: the loss of a favorable dismissal order, the risk of future FEC enforcement action against them, and the risk of a direct lawsuit brought against them by CLC. As explained above, that injury is only heightened by the FEC's current lack of defense.

Second, CLC contends that because the only remedy available in this action is a declaration that the FEC acted "contrary to law," CTR and HFA will not be "ordered . . . to do or refrain from doing anything" as a result of this action, and therefore can suffer no immediate injury. Resp. ECF No. 11, at 15. But CLC is simply wrong on the law. Taken seriously, CLC's logic would prohibit all administrative respondents from intervening in any section 30109(8)(a) suit, because only the FEC is ordered to do something in these actions; administrative respondents are not directly ordered by a court to do or stop doing anything as a result of a section 30109(8)(a) suit. But as CLC itself recognizes, the remedy in a section 30109(8)(a) suit poses no barrier to intervention by defendants. *See* Resp., ECF No. 11, at 11 (noting that "*Crossroads GPS*, in many circumstances, supports intervention by administrative respondents"). Indeed, the D.C. Circuit in *Crossroads* was clear that "even if the district court cannot command the precise enforcement route the [FEC] must

take on remand, invalidating the dismissal order would extinguish the current barrier to enforcement," which would result in an injury to HFA and CTR. *Crossroads*, 788 F.3d at 319.

Third, CLC appears to argue that because the FEC currently lacks a quorum, there is no "practical threat" that the FEC will seek to regulate HFA and CTR. Resp., ECF No. 11, at 15 n.1. But as discussed *supra* at 2-4, even if the FEC does not regulate HFA and CTR as a result of this action, HFA and CTR would still be at risk of being sued directly by CLC. Further, CLC's argument relies on the unsupported and unjustified assumption that no new appointments to the FEC will made in the near future. The FEC last lacked a quorum in 2008, and that lasted for approximately six months. Upon the appointment of new commissioners, the FEC returned to normal operations, including fulfilling its enforcement responsibilities.[4]

Finally, CLC apparently claims that HFA and CTR lack standing because their injury is too attenuated and depends on the independent action of an absent third party. Resp., ECF No. 11, at 15. But again, the D.C. Circuit in *Crossroads* rejected this exact argument in the specific context of an appeal of a dismissal of an FEC administrative complaint to this Court: "even where the possibility of prevailing on the merits after remand is speculative, a party seeking to uphold a favorable ruling can still suffer a concrete injury in fact." *Crossroads*, 788 F.3d at 318. And as the D.C. Circuit noted, the case that CLC relies upon for this argument—*Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189 (D.C. Cir. 2013) —is readily distinguishable. In that case, holders of notes issued by a failed bank sought to intervene as defendants in litigation between Deutsche Bank and the FDIC, which was acting as the failed bank's receiver. In deciding whether the intervenors had standing, the district court had to first reach and resolve a particular legal conclusion in a particular

[4] *See Congressional Research Serv.*, Federal Election Commission: Membership and Policymaking Quorum, In Brief at 7 (Sept. 5, 2019), https://fas.org/sgp/crs/misc/R45160.pdf.

way—that the receiver retained the underlying liability at issue—before the intervenors' interest would even be at stake. *Crossroads*, 788 F.3d at 318; *see also Deutsche Bank*, 717 F.3d at 193. In this case, just like *Crossroads*, HFA and CTR's interests are already at stake, given that CLC's action is an appeal from *a direct enforcement proceeding already initiated against HFA and CTR*. "Unlike *Deutsche Bank*, there is no threshold legal determination that might obviate [HFA and CTR's] interest in upholding the dismissal order." *Crossroads*, 788 F.3d at 318; *see also id.* (holding that when the agency action at issue involved potential direct regulation of intervenor, threatened injury was "even greater than injuries we found sufficient in our previous cases").

II. CLC's Novel Policy Arguments Cannot Override the Plain Text of Rule 24 and Binding Precedent; FECA's Statutory Framework In No Way Prohibits CTR and HFA From Intervening

Perhaps realizing that Rule 24 and Article III standing doctrine all but compel the conclusion that HFA and CTR are entitled to intervene as a matter of right, CLC advances what amounts to policy arguments—wholly unrelated to the requirements of Rule 24(a)(2)—that it contends counsel against HFA's and CTR's intervention. Indeed, the bulk of CLC's response attempts to convince the Court to create a new exception to the established legal test for intervention that applies only to appeals of a dismissal of an FEC administrative complaint when the FEC does not enter an appearance in the case. This proposed exception is based solely on CLC's beliefs about the "delicate equilibrium of competing objectives" reflected in Congress's design of the overall FECA statutory scheme. Resp., ECF No. 11, at 16. It has absolutely no basis in applicable law or precedent—much less the plain text of Rule 24(a)(2)—and should be rejected out of hand.

To the extent that the Court does consider CLC's policy arguments, HFA and CTR address why each is inapposite below.

A. Rule 24 Presumptively Allows Intervention When a Judicial Review Statute is Otherwise Silent on the Right to Intervene, and Intervention by the Target of an FEC Complaint is Hardly Unprecedented

CLC posits that the overall design and structure of FECA provides limited mechanisms for private involvement, and that intervening defendants are not specifically included in any role in FECA's judicial review provision under 52 U.S.C. § 30109(8)(a). This, CLC contends, counsels against intervention here. Resp, ECF No. 11, at 16. But FECA's silence on intervention does not have nearly the significance CLC assigns to it. Intervention under Rule 24(a)(2) *assumes* that the relevant statute underlying the cause of action does not otherwise provide for the intervenor's involvement; indeed, Rule 24(a)(2) applies only when the intervenor has no independent "right to intervene by a federal statute." *See* Fed. R. Civ. P. 24(a)(1). In other words, intervention under Rule 24 applies whenever a case is in federal district court, and FECA does not somehow displace Rule 24 in cases brought pursuant to Section 30109 of FECA. Section 30109 merely "creates the right of action which brings the case into court." *Textile Workers Union of Am. v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955) (en banc). "Once there, the case is governed by the principles which control the course of all litigation in the District Court," including Rule 24. *Id*. Accordingly, it would be "untenable" to conclude that "the absence of any reference to intervention" in FECA "must be construed to preclude intervention in such review by persons who would be commensurately aggrieved if the [FEC] determinations were set aside." *Id*.

Against this background principle, courts have routinely allowed the targets of private FEC complaints to intervene in judicial review litigation. *See DSCC v. FEC*, 660 F.2d 773 (D.C. Cir. 1980) *rev'd on other grounds*, 454 U.S. 27, 42 (1981); *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 541 (D.C. Cir. 1980) (per curiam); *see also* Minute Order, *Van Hollen v. FEC*, 1:11-cv-00766 (D.D.C. entered Aug. 1, 2011). This Circuit has not construed intervention as an

effort "to litigate . . . outside the statutory regime" or as "inappropriate interference with the FEC's responsibilities." Resp., ECF No. 11, at 17 (citations omitted). The same result should obtain here.

B. Courts Have Permitted Intervention When the Named Defendant Fails to Defend And the Intervening Defendant Can Demonstrate Standing

Defendant-intervenors who meet Article III standing requirements are commonly permitted to intervene in lawsuits filed against a named defendant who has either never appeared in the action, or who has effectively abandoned any defense of the action. For example, courts grant intervention motions filed by proposed defendant-intervenors seeking to oppose default judgment motions against absent named defendants. *See, e.g.*, *Davis v. Zhou Liang*, No. C17-849-MJP, 2018 WL 6082903, at *2 (W.D. Wash. Nov. 21, 2018); *Dave Drilling Envtl. Eng'g, Inc. v. Gamblin*, No. 14-CV-02851-WHO, 2015 WL 4051968, at *5 (N.D. Cal. July 2, 2015). Similarly, courts grant intervention motions filed by proposed defendant-intervenors when named defendants have stopped actively litigating a case. *Cont'l Transfert Technique, Ltd. v. Fed. Gov't of Nigeria*, No. CV 08-2026 (PLF), 2019 WL 3562069, at *5 (D.D.C. Aug. 6, 2019) (holding that defendants' inadequate representation of proposed defendant-intervenor was "manifest" when "defendants have all but disappeared from this litigation and are not protecting [defendant-intervenor's] interest in the" assets at issue). Indeed, courts have squarely held that defendant intervenors who \ demonstrate Article III standing can continue to litigate actions even after the named defendant has reached a negotiated settlement with the plaintiff and has been dismissed from the case. *See Indus. Commc'ns & Elecs., Inc. v. Town of Alton, N.H.*, 646 F.3d 76, 79 (1st Cir. 2011).

CLC apparently takes the position that this case is distinguishable from other cases such as those enumerated above because it involves a federal agency in which the agency decided not to defend its own agency action. According to CLC, allowing intervention in such circumstances would interfere with the agency's statutorily delegated responsibilities and override its ability to

set its policy agenda and enforcement priorities. *See* Resp., ECF No. 11, at 9, 11-14. But CLC's position cannot be squared with ample precedent permitting defendant-intervenors from continuing to litigate challenges to government action, even when the government declined to do so.[5] Nor can CLC's position be squared with the D.C. Circuit's decision in *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110 (D.C. Cir. 2012), which allowed the defendant-intervenors in that case to appeal an unfavorable district court decision against the FEC even though the FEC failed to garner the four Commissioner votes necessary to authorize an appeal, and was thus absent from the appellate proceedings. *Id*. at 110; *see also* Opening Br. of Ctr. For Individual Freedom, *Ctr. For Individual Freedom v. Van Hollen*, No. 12-5118 (D.C. Cir. June 20, 2012), Doc. No. 1379891, at 2-3 (noting failure to appeal due to 3-3 vote).

[5] *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 139 (E.D. Va. 2018) ("Since [the time intervenors were granted intervention], the intervenors have borne the primary responsibility of defending the 2011 plan, with the state defendants joining the intervenors' defense but declining to present an independent substantive defense"); *Windsor*, 797 F. Supp. 2d at 324. In addition, courts have routinely held that a defendant-intervenor has the right to appeal, even where a federal agency defendant chooses not to, so long as the intervenor can demonstrate standing. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the [standing] requirements of Art. III."); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (intervenor defendants permitted to appeal district court decision that the Forest Service's Roadless Rule violated NEPA although Forest Service chose not to appeal); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1399 (9th Cir. 1995) (ruling that intervenor defendants had standing to appeal order setting aside listing of species under the Endangered Species Act although the United States Fish and Wildlife Service did not appeal); *Didrickson v. U.S. Dep't of the Interior*, 982 F.2d 1332, 1340-41 (9th Cir. 1992) (ruling that intervenor defendants had standing to appeal district court order invalidating federal regulations concerning sea otters although the federal agency that promulgated the regulations did not appeal); *Yniguez v. State of Ariz.*, 939 F.2d 727, 731-32 (9th Cir. 1991) (ruling that intervenor defendants who sponsored state legislation had standing to appeal order ruling legislation unconstitutional although the state acquiesced in the order and did not appeal); *NL Industries, Inc. v. Sec'y of the Interior*, 777 F.2d 433, 437 (9th Cir. 1985) (ruling that intervenor defendant had standing to appeal order setting aside mining claim decision of Secretary of the Interior although the Secretary of the Interior did not appeal).

The defendant-intervenors in *Van Hollen*, who were motivated to intervene because they anticipated that the FEC would not appeal,[6] were permitted to appeal in the absence of the FEC because the D.C. Circuit found that they demonstrated a cognizable interest, and ultimately, had standing. *Van Hollen*, 694 F.3d at 110. Thus, contrary to CLC's contention, it is not "unprecedented" for a defendant-intervenor to continue litigation in the absence of the FEC's participation due to its failure to garner four Commissioner votes to defend. HFA and CTR are not parties with some remote, tangential interest looking in on this litigation from the outside. By contrast, they have standing on their own—regardless of whether the FEC participates in the defense—and thus they should be permitted to intervene.

C. By Intervening, HFA and CTR Are Not Stepping Into the Shoes of the FEC

CLC incorrectly argues that if HFA and CTR are allowed to defend the appeal of a dismissal of an FEC administrative complaint in the absence of the FEC's participation, HFA and CTR would step into the agency's shoes by "usurp[ing] the [FEC's] 'exclusive' civil enforcement authority," and improperly override FEC's policy choice not to defend its dismissal. Resp., ECF No. 11, at 14. CLC's arguments are at odds with established precedent and do not provide any basis for this Court to deny intervention to HFA and CTR.[7]

CLC's argument proceeds as though the FEC had spoken with a clear voice when it decided not to defend this action, such that HFA and CTR are overriding the Commission's wishes and commandeering its authority by attempting to defend. In reality, the FEC's position has been

[6] *See* Reply Br. of Ctr. For Individual Freedom Mot. to Intervene, *Van Hollen v. FEC*, No. 11-766 (D.D.C. July 11, 2011), ECF No. 22, at 8 n.3.

[7] Conveniently, CLC appears not to harbor similar concerns regarding its apparent plan to sidestep the FEC's gatekeeping role and pursue private enforcement action against HFA and CTR if the dismissal order is invalidated and the quorum-less FEC is incapable of following a court order to act.

anything but clear: the FEC could not secure four votes to investigate CLC's administrative complaint, unanimously voted to close the file, and then—due to a single holdout among the four commissioners—could not secure four votes to defend CLC's appeal of the Commission's dismissal of the administrative complaint. Under these circumstances, allowing intervention permits HFA and CTR to protect their interests and defend the legality of their actions—actions that a controlling group of FEC commissioners declined to investigate further—while simultaneously respecting the single dissenting commissioner's right to veto the use of agency resources and agency imprimatur on a defense of the controlling commissioners' decision.

Furthermore, CLC repeatedly misstates FECA's limitations on those who may participate in judicial review actions, and draws the unsupported conclusion that defendant-intervenors may not participate in administrative review actions if the FEC is absent. CLC states that "52 U.S.C. § 30109(a)(8) expressly limits participation in administrative review actions to *complainants*." Resp., ECF No. 11, at 16. But that section only limits those persons who may *bring* an action for judicial review; it does not preclude intervenors from participating in the action after a complaint has been filed. 52 U.S.C. § 30109 ("[T]he complainant may bring . . . a civil action to remedy the violation involved in the original complaint.").

Similarly, FECA's requirement that four Commissioners vote to authorize the FEC's defense of a dismissal decision does not preclude intervention, contrary to CLC's contention. Resp., ECF No. 11, at 17. CLC cites to *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) for this proposition, but that case provides no support for CLC's argument. *Common Cause* holds that Commissioners who decline to find reasons to believe are required to issue a statement of reasons. In so holding, the court mentioned the four-vote requirement in the context of noting that a statements of reasons issued by fewer than four Commissioners would not be considered an

"*official* Commission decision." *Id.* However, *Common Cause* provides no basis whatsoever for CLC's arguments that the four-vote requirement precludes HFA and CTR from intervening in this matter. While it may be true that the four-vote requirement prevents *the FEC* from defending *itself* in certain litigation without the requisite votes, *id.* §§ 30106(c), 30107(a)(6), the requirement does not prohibit parties from intervening under Rule 24 to defend their own interests.

Finally, the other authorities that CLC cites offer no support for its contention that FECA's "delicate" design prohibits HFA and CTR from intervening in this matter. Resp., ECF No. 11, at 16-18. Neither *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995) nor *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362 (D.C. 1988) address a situation as here, where the FEC failed to defend its actions and a party sought to protect its interests by intervening.

D. The Doctrine of Prudential Standing Has No Bearing on HFA and CTR's Standing

CLC's incomplete argument that HFA and CTR lack prudential standing, see Resp., ECF No. 11, at 9, should also be disregarded. The D.C. Circuit has considered and rejected analogous arguments that respondents to an FEC administrative complaint are foreclosed from intervening as defendants in an appeal of the dismissal by the doctrine of prudential standing. In *Crossroads*, the FEC argued that the prudential standing doctrine foreclosed the respondents from intervening as defendants, because the respondents' interests "do not fall within the zone of interests FECA protects." 788 F.3d at 319. The FEC's arguments in *Crossroads* track closely to CLC's arguments here: that the FEC is the only defendant expressly permitted to be sued in FECA's judicial review provision; that the only private parties expressly permitted to participate are administrative complainants; and that the respondent's interests were not among the broader interests FECA seeks

to protect.[8] But the D.C. Circuit squarely rejected the FEC's argument, holding that "where an intervenor-defendant establishes Article III standing and meets the dictates of [Rule 24], there is no need for another layer of judge-made prudential considerations to deny intervention." *Crossroads*, 788 F.3d at 320. CLC does not mention—let alone distinguish—*Crossroads* in its brief discussion of prudential standing, and it offers no authority for the application of this doctrine to prevent HFA and CTR from intervening here.

E. Potential Merits Arguments that HFA and CTR May Offer at Later Stages of the Litigation Provide No Reason to Deny Intervention

CLC's contention that HFA and CTR should not be allowed to intervene because they may raise "irrelevant" legal arguments is also meritless. CLC argues that this Court's review is limited to the controlling Commissioners' stated rationale for the dismissal, and concludes that HFA and CTR should not be permitted to intervene because they may offer arguments that "add to, amplify, or amend" the Commissioners' rationale, and that that any such arguments offered would be "legally irrelevant." Resp., ECF No. 11, at 16. CLC's argument is highly suspect as a matter of law, and its suggested prohibition of arguments that "add to, amplify, or amend" the Commissioners' stated rationale appears to be invented out of whole cloth.[9] But at this stage, the Court is not required to decide what arguments may or may not be considered in deciding whether

[8] *Compare, e.g.*, Resp., ECF No. 11, at 11-12 *with* Suppl. Br. of FEC, at 7-9, No. 1536889, *Public Citizen et al v. Fed. Elec. Comm'n*, No. 14-5199 (D.C. Cir. Feb. 10, 2015).

[9] HFA and CTR note that the D.C. Circuit in *Crossroads* cited the fact that the defendant intervenor had a different legal strategy and would raise different arguments than the FEC in a section 30109(8)(a) action as a reason supporting intervention. 788 F.3d at 321. The D.C. Circuit's decision cannot be reconciled with CLC's suggestion that any distinct legal arguments and strategies used by proposed Defendant Intervenors HFA and CTR are legally irrelevant to the issues before the Court. The sole contrary authority cited by CLC involved a judicial review action that lacked any stated rationale by the controlling Commissioners, which is not the case presented here. *See Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1135, 1135 n.6 (D.C. Cir. 1987).

the FEC's dismissal was contrary to law. Instead, the Court must simply determine whether HFA and CTR's motion was timely; whether HFA and CTR have legal interests in the case; and the adequacy of current representation of those interests. *See* Fed. R. Civ. P. 24(a)(2). Given the limited procedural question before the Court, it need not evaluate the strength or relevance of the potential legal arguments that HFA and CTR may make during later stages of this litigation.

III. In the Alternative, the Court Should Grant HFA's and CTR's Request for Permissive Intervention

Even if HFA and CTR do not meet the requirements to intervene as a matter of right, they are undoubtedly entitled to permissive intervention, as asserted in the Motion to Intervene. *See* Fed. R. Civ. P. 24(b)(1)(B) (requiring proposed intervenors to show that their claim or defense and the main action have a question of law or fact in common, and that intervention will not unduly delay or prejudice the adjudication of the original parties' rights); *see also* Mem. in Supp. of Mot. to Intervene, ECF. No. 10-1, at 10. And CLC provides no substantive objection to such intervention.

At most, CLC argues that permitting HFA and CTR to intervene will delay the proceedings merely because they have filed a dispositive motion challenging CLC's standing and the sufficiency of the complaint. Resp. ECF. No. 11, at 16, 19. However, nothing in Rule 24 nor the relevant case law precludes intervenors from filing a dispositive motion. *See Hallmark Cards, Inc. v. Lehman*, 959 F. Supp. 539, 541 n.1 (D.D.C.1997) (finding that "an intervenor may move to dismiss a proceeding"). Indeed, this Court has granted intervention and welcomed the intervenor's dispositive motions in similar cases. *See, e.g.*, *CREW v. FEC*, 243 F. Supp. 3d 91, 103 (D.D.C. 2017) (modifying schedule to allow then intervenor to file a motion to dismiss, granting intervenor's motion in part, and dismissing a portion of the complaint). In the alternative to intervention as of right, HFA and CTR should be permitted to intervene pursuant to Rule 24(b).

IV. Amicus Status is No Substitute for Full Participation as Intervening Defendants, and Cannot Be Justified when the Requirements of Rule 24 Are Otherwise Satisfied

As set forth above, HFA and CTR have met the requirements to intervene under Rule 24 and should not be limited to being *amici curiae*. Relegation to amicus status would likely deny HFA and CTR the procedural rights and protections ordinarily afforded defendants under the Federal Rules of Civil Procedure, such as the ability to make motions to dismiss or to appeal decisions adverse to HFA's and CTR's interests. Moreover, amicus status would be inappropriate where, as here, HFA and CTR meet Rule 24's requirements for intervention as of right; as the Rule makes clear, intervention is mandatory when its requirements are met. *See* Fed. R. Civ. P. 24(a) ("On timely motion, the court *must permit* anyone to intervene who [satisfies Rule 24(a)(2).]") (emphasis added).

V. The FEC's Failure to Certify the Administrative Record Has No Bearing on HFA's and CTR's Ability to Intervene

CLC's assertion that obtaining a copy of the certified administrative record from the FEC in compliance with Local Rule 7(n)(1) will likely require court action, has no effect on the Court's ability to evaluate whether HFA and CTR meet the requirements to intervene under Rule 24. CLC has not pointed to any authority even suggesting that certification of the administrative record will shed light on the pending Motion. Moreover, because the FEC has defaulted, the need to obtain a copy of the administrative record would likely require court action regardless of whether HFA and CTR are granted intervention. Finally, in the past, this Court has granted a party's request to intervene prior to the FEC certifying the record.[10]

[10] *See, e.g.*, Minute Order, *Citizens for Responsibility & Ethics in Washington v. FEC*, No. 16-259 (D.D.C. Apr. 29, 2016); Notice of Filing of Certified List of Administrative Record Documents, *id.*, ECF No. 25 (FEC filing certified administrative record in May 2017); Minute Order, *Campaign Legal Ctr. v. FEC*, No. 16-752 (D.D.C. June 30, 2016) (granting motions to intervene);

CONCLUSION

For the reasons stated herein, and in the Motion to Intervene, HFA and CTR respectfully request that the Court grant their Motion and issue an order permitting them to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, under Rule 24(b).

October 29, 2019

Respectfully submitted,

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Notice of Filing of Certified List of Administrative Record Documents, *id.*, ECF No. 28 (FEC filing administrative record in May 2017).

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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