UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1, *et al.*,	
Plaintiffs,	Civ. No. 17-2694 (ABJ)
v.	
FEDERAL ELECTION COMMISSION,	OPPOSITION TO MOTION TO INTERVENE
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO THE MOTION TO INTERVENE BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND ANNE WEISMANN

Defendant Federal Election Commission ("Commission" or "FEC") opposes the motion of proposed intervenors Citizens for Responsibility and Ethics and Anne Weismann (collectively, "CREW"). CREW does not satisfy the requirements for intervention under Federal Rule of Civil Procedure 24(a)(2). Even if CREW has an adequate interest in this case, the Court's resolution of the merits in the Commission's favor will entirely moot CREW's request and, in any event, its legal interest in public disclosure of plaintiffs' identities will be adequately represented by the FEC. CREW relies heavily on *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015) ("*Crossroads*"), a case involving intervention by an administrative respondent potentially subject to regulation by the FEC. However, given the very narrow issue presented in this case and differences between those encouraging or potentially subject to governmental regulation, *Crossroads* does not dictate the outcome here and the Court should decline to extend it. Should CREW seek to present its views as an amicus curiae prior to the Court ruling on the merits, however, the FEC would not oppose such a request.

BACKGROUND

This case concerns the Commission's planned release of plaintiffs' identities in documents contained in its administrative file in FEC Matter Under Review ("MUR") 6920. The Federal Election Campaign Act ("FECA") and Commission regulations require specified narrow categories of documents from such closed enforcement files to be placed on the Commission's public record. 52 U.S.C. § 30109(a)(4)(B); 11 C.F.R. § 111.20(a); FEC, *Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702 (Aug. 2, 2016), *available at* https://transition.fec.gov/law/cfr/ej_compilation/2016/notice2016-06.pdf ("FEC Disclosure Policy"). As the Commission prepared to make the necessary MUR 6920 documents public, plaintiffs John Doe 2 and John Doe 1, a trust and its trustee referenced in those documents, objected to disclosure of their identities. When the Commission did not agree to redact plaintiffs' identities, plaintiffs filed this suit. (*See* FEC's Resp. to Mot. for TRO and Mot. to Seal at 1-4 (Docket No. 16) (unsealed redacted version) ("FEC's Resp.").)

On December 18, 2017, the Court held a hearing following the parties' expedited briefing on plaintiffs' motions for provisional injunctive relief and to seal the case. (Dec. 18, 2017 Hearing Transcript ("Hearing Tr.") (sealed).[1]) As memorialized in the Court's minute order, in that hearing it was established that the FEC would temporarily redact plaintiffs' names and other identifying information from its public administrative case file during the pendency of this case, plaintiffs' motion for a temporary restraining order was denied as moot, plaintiffs' preliminary injunction motion would be consolidated with the merits, and plaintiffs would file a merits reply

[1] The relevant pages of the transcript are attached hereto, under seal, as Exhibit 1. The Commission notes that although CREW does not have permission to review the transcript or the FEC's exhibit, the FEC would not oppose CREW's request to be given access to the FEC's exhibit, which does not disclose identifying information regarding plaintiffs.

brief on January 3, 2018. (Minute Order Dec. 18, 2017.) In accordance with the Court's instructions, redacted documents from the Commission's file in MUR 6920 were published on December 22, 2017. *See* FEC Notice (Dec. 22, 2017) (Docket No. 20). Plaintiffs filed their reply brief on January 3, 2018, and the Court has granted leave for the Commission to file a surreply by January 18, 2108. (Minute Order Jan. 10, 2018.) Accordingly, merits briefing of the case will conclude the day following the submission of this opposition.

Since the December 18, 2017 hearing, CREW has submitted a Freedom of Information Act ("FOIA") request to the FEC seeking an unredacted copy of the public record in MUR 6920, which would include plaintiffs' identities. On January 12, 2018, the FEC denied CREW's FOIA request in light of this pending litigation and notified CREW that it may administratively appeal. CREW has also filed a lawsuit pursuant to 52 U.S.C § 30109(a)(8) alleging the Commission unlawfully dismissed CREW's administrative complaint in MUR 6920. *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 17-2770 (D.D.C. filed Dec. 22, 2017) (Docket No. 1). CREW noticed this dismissal suit as a related case, and it has been assigned to this Court. And on January 3, 2018, CREW filed the present motion to intervene here.

ARGUMENT

CREW's motion to intervene should be denied because it fails to meet the requirements for intervention of right. CREW overstates its interest in this case and its participation is unnecessary to preserve its rights. Even if CREW has an adequate interest in this case, the case will be fully briefed on the merits well before CREW's intervention motion is fully briefed, and the Court may thus deny CREW's intervention motion as moot at that point. Furthermore, because the issues in this case are exceedingly narrow and without any daylight between the interests of the defendant and proposed intervenor-defendant, the FEC adequately represents

CREW's interests here and it is unnecessary for the Court to make new law regarding intervention in cases involving review of FEC administrative actions.

I. INTERVENTION-OF-RIGHT STANDARD

Intervention is permitted for a party that files a timely motion and claims an interest in the pending litigation "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, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). In deciding whether a party may intervene as of right, courts employ "a four-factor test requiring: 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest." *Crossroads*, 788 F.3d at 320 (citing *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013)). A party seeking to intervene as of right must meet each of these requirements. *Id.* at 320. CREW fails to do so here.[2]

[2] CREW has not sought permissive intervention under Rule 24(b)(1) and has waived doing so. In any event, it would fare no better under that provision because it does not present a claim or defense in common with the ongoing case. It is well established that a "putative intervenor must ordinarily present . . . an independent ground for subject matter jurisdiction . . . [and] a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). CREW does not satisfy either of these requirements. Furthermore, if the Court were to reach the question, required under Rule 24(b), of whether the "intervention will unduly delay or prejudice the adjudication of the original parties' rights" CREW should be denied intervention on that basis as well. Fed. R. Civ. P. 24(b)(3). As the D.C. Circuit has observed, "[t]he 'delay or prejudice' standard presumably captures all the possible drawbacks of piling on parties; the concomitant issue proliferation and confusion will result in delay as parties and court[s] expend resources trying to overcome the centrifugal forces springing from intervention." *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 782 (D.C. Cir. 1997). "[P]rejudice" in such circumstances "will take the form not only of the extra cost but also of an increased risk of error." *Id.*

II. CREW OVERSTATES ITS INTERESTS AND THIS ACTION WILL NOT IMPAIR CREW'S ABILITY TO PROTECT ITS INTEREST

CREW's motion alleges that it has three interests at stake: (1) deprivation "of its right to know who gave $1.71 million to Now or Never PAC"; (2) impedance of "CREW's exercise of its statutory right" to challenge the FEC's actions on MUR 6920 under 52 U.S.C. § 30109(a)(8); and (3) that the allowance of intervention by CREW would be "consistent" with the practice of courts in this District in "'reverse-FOIA'" cases. (Mem. of P. & A. in Supp. of Mot. to Intervene by Citizens for Responsibility and Ethics in Wash. and Anne Weismann at 2, 5-10 (Docket No. 22) ("Mot.").) CREW errs in claiming such broad interests.

The Commission has already identified the only interest in this case that is unique to CREW, namely, CREW's entitlement "to the information from the Commission's deliberations that is ordinarily made public" in order to make its decision whether to challenge the Commission's actions under section 30109(a)(8). (FEC's Resp. at 7.) But that interest was contingent and temporally limited. CREW has already evaluated whether it wishes to challenge the legal basis for the Commission's decision on MUR 6920 and has filed a civil action doing so. *See supra* p. 3 (discussing CREW's section 30109(a)(8) lawsuit pending before this Court). CREW's ability to do so without the limited information temporarily redacted as a result of this case was consistent with the Court's expectations. (Hearing Tr. at 24:25-25:2 (concluding with respect to CREW's choice whether to file a dismissal suit that the administrative "complainant will be on sufficient notice of what's going on to reserve its rights, as I'm sure it will under the circumstances").) CREW is not in need of the information it seeks in order to evaluate doing what it has already done.

Moreover, CREW's future efforts in pursuing the section 30109(a)(8) litigation will also not be impeded because, even if the Court were to grant plaintiffs' ultimate request to keep their

names out of the public record (incorrectly, in the FEC's and CREW's shared view), that relief would not preclude the Court from allowing CREW to have access to the administrative record containing plaintiffs' names pursuant to a protective order to permit an evaluation of the basis of the Commission's decision in CREW's section 30109(a)(8) lawsuit. *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (establishing that courts must have "'neither more nor less information than did the agency when it made its decision'"). In instances in which courts have had to evaluate the FEC's actions on administrative complaints in which the record contains material that cannot be made public in accordance with 52 U.S.C. § 30109(a)(12), courts have entered protective orders allowing parties, including administrative complainants, access to such materials. *E.g.*, *CREW v. FEC*, No. 16-2255 (D.D.C. July 6, 2017) (Docket No. 26); *CREW v. FEC*, No. 14-1419 (D.D.C. Dec. 12, 2016) (Docket No. 63); *Alliance for Democracy v. FEC*, No. 02-527 (D.D.C. Oct. 18, 2002) (Docket No. 19) (order granting motion for entry of a protective order in part); *Democratic Senatorial Campaign Comm. v. FEC*, No. 95-0349 (D.D.C. May 26, 1995) (order setting forth procedures for handling confidential material under protective order); *Common Cause v. FEC*, No. 87-2224 (D.D.C. Oct. 2, 1987) (order setting forth instructions for filing documents under seal pertaining to FEC Matter Under Review 2282); *Furgatch v. FEC*, No. 87-0798 (D.D.C. June 25, 1987) (order directing plaintiff's counsel not to disclose documents or information released by defendant).

In addition, CREW's argument that it has a right to know "the source of the $1.71 million contribution" (Mot. at 5) appears to conflate the different issues being litigated in this case and CREW's section 30109(a)(8) lawsuit. CREW itself has alleged in its dismissal law suit that it is not clear that the disclosure of the information at issue here (*id.* at 5-7) is the information required under FECA's reporting regime that it sought in its administrative complaint. Compl.

¶ 3, *CREW v. FEC*, No. 17-2770 (alleging that whether the "John Doe Trust" was "merely a pass-through itself or was the true source" of a contribution to a political committee that should have been reported is undetermined). The identities of the John Does is required by the Commission's reasonable implementation of FECA's requirements for making public the results of administrative enforcement matters as set forth in the FEC's Disclosure Policy, but that is a different context and not one where there is any demonstrated disagreement between the Commission and CREW. As discussed above, to the extent CREW's informational interest gives it standing in the section 30109(a)(8) suit, its interest would be preserved even in the event of a ruling in plaintiffs' favor.

CREW also exaggerates its interests with respect to a potential FOIA suit. (Mot. at 9-10.) Strictly speaking, this is not a reverse FOIA case. Hearing Tr. at 11:14-16; *AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) (emphasizing interests under 52 U.S.C. § 30109(a)(4) over FOIA considerations). CREW requests information that the FEC had already determined to release and has only withheld pursuant to the Court's instructions while primarily non-FOIA issues are litigated. There is thus no difference in position on the FOIA request between the Commission and CREW and CREW's pending decision whether to administratively appeal the temporary denial of the information at issue here does not materially enhance CREW's interest in this litigation. Thus, the considerations that motivated the court to grant intervention in the cases brought under FOIA cited by CREW are not present here. (*See, e.g.*, Mot. at 9 (citing Order at 2, *National Business Aviation Ass'n Inc. v. FAA*, No. 09-1089 (D.D.C. Sept. 21, 2009) (a two-page order granting an unopposed motion based on intervenor's FOIA rights)).)

Any interests CREW has in this case are also likely to be vindicated before it even files a brief. The Commission has indicated that it will make the information sought public absent a

court order preventing it from doing so. The Court has consolidated the preliminary injunction with the merits and the parties' briefing is nearly complete. *Supra* pp. 2-3. The Court has expressed skepticism of plaintiffs' initial arguments (Hearing Tr. at 11:5-19; 12:6-11) and the FEC has shown why those were without merit (FEC's Resp. at 4-9). Accordingly, it is unnecessary for CREW to intervene in a lawsuit where the plaintiffs have so little likelihood of success and CREW's interests only arise in the event of such a ruling. *Cf. Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 193 (denying intervention under Rule 24 where "at least two major contingencies must occur before [plaintiff's] suit could result in economic harm" to would-be defendant-intervenors). The information CREW seeks should and likely will be made public in short order. Accordingly, the Court may simply deny CREW's motion as moot once it resolves the merits. *Peters v. D.C.*, 873 F. Supp. 2d 158, 210 (D.D.C. 2012).

III. THE COMMISSION WILL ADEQUATELY SERVE THE ONLY GOAL IN DEFENDING THIS CASE: PUBLIC RELEASE OF THE BASIS OF THE COMMISSION'S DECISION IN MUR 6920

Even assuming CREW meets all of the other intervention factors, its motion should be denied because the FEC is an adequate representative here. Unlike *Crossroads* and other cases relied upon by CREW, here there is only one issue in this limited action and one objective: defense of the public release of the administrative case file for MUR 6920 that would ordinarily be released pursuant to the FEC's Disclosure Policy, which includes the identities of plaintiffs.

CREW advances "two reasons" that its interests diverge with the FEC: (1) it plans to use the identities of the plaintiffs in its lawsuit challenging the Commission's decision in the underlying administrative matter and (2) the FEC cannot be relied upon to appeal in this case if it does not prevail. (Mot. at 11-13.) Neither argument is persuasive.

Initially, the record in this case belies any claim that the Commission has failed to present a defense any less full-throated or different from CREW's intended defense. (Hearing Tr. at 20:6-7 (noting that the FEC filed its response to plaintiffs' motion for a restraining order in less than one business day).) While CREW and the FEC dispute the merits of CREW's section 30109(a)(8) suit, CREW and the FEC agree that CREW can and should have access to the identities of plaintiffs in connection with that case. The Commission is not aware of any arguments it would present in defense of the section 30109(a)(8) case that would be based upon preserving the anonymity of plaintiffs. Because of the limited nature of this action, the adversity of CREW and the FEC in the section 30109(a)(8) case is not a reason for finding the FEC to be an inadequate representative here.

As for CREW's other point, the Commission is capable of appealing adverse judgments and CREW misapprehends the frequency and import of any FEC determinations not to appeal. *See* 52 U.S.C. § 30107(a)(6) (providing for the Commission's authority to defend section 30109(a)(8) suits and appeal civil actions upon the vote of four Commissioners). Without citation, CREW notes a lack of appeals by the FEC in the last decade. But CREW fails to note that adverse rulings have been exceedingly rare in that time period and typically could be addressed on remand consistent with the common practice of government-agency defendants. *See, e.g.*, Mem. Op. & Order at 4-6, *CREW v. FEC*, No.14-1419 (CRC) (D.D.C. Apr. 6, 2017) (Docket No. 74) (declining to find the Commission had violated an adverse ruling in a dismissal suit on remand); *La Botz v. FEC*, 61 F. Supp. 3d 21, 27 & 33-34 (D.D.C. 2014) (concluding that the Commission had acted consistently with law on remand following an adverse ruling in a dismissal suit); FEC, Factual & Legal Analysis, MUR 6100R, https://www.fec.gov/files/legal/murs/current/96378.pdf (issuing a new explanation on remand).

CREW's argument fails to take into account the appropriateness of agencies accepting remands, and improper appeal attempts by intervenors of nonfinal judgments can waste party and judicial resources. *See, e.g.*, *CREW v. FEC*, Nos. 16-5300, 16-5343, 2017 WL 4957233, at *1 (D.C. Cir. Apr. 4, 2017) (per curiam) (dismissing intervenor-defendant's appeal for lack of jurisdiction). In the rare circumstances where the agency has not appealed court decisions as a result of a split Commission vote, that course of conduct is consistent with Congressional design and the Commission's exclusive civil authority and provides no reason to grant intervention here. *See also Public Citizen v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1170-71 (D.C. Cir. 2016) (discussing FEC split votes as part of the "FEC's structural design and FECA's legal requirement[s]" and observing that the FEC's "voting and membership requirements mean that, unlike other agencies — where deadlocks are rather atypical — FEC will regularly deadlock as part of its *modus operandi*"); H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976) (explaining that the FEC's "four-vote requirement serves to assure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment."). And unlike some dismissal lawsuits that follow split votes, the Commission's disclosure policy at issue in this case was unanimously approved by the Commissioners. Even as a theoretical matter, allowing CREW to exercise the FEC's right of appeal would be contrary to the agency's ability to exercise its own discretion regarding whether to appeal an adverse judgment regarding its disclosure practices. That situation should be avoided.

CREW's motion relies heavily on *Crossroads*. There, the Court of Appeals found that the FEC could not adequately represent the interests of Crossroads GPS, an administrative respondent in that matter, in part because it had disagreed in the administrative phase as to the scope of the administrative record and other legal arguments. 788 F.3d at 314. The D.C. Circuit

also relied on the fact that the FEC "could seek to regulate Crossroads directly and immediately" if "its dismissal order [were] revoked." *Id.* at 321. Based on this the Court of Appeals concluded that intervention was appropriate. It found that it was "apparent the Commission and Crossroads hold different interests," because "they disagree about the extent of the Commission's regulatory power, the scope of the administrative record, and post-judgment strategy." *Id.*

This case is distinct in many respects, however, and an extension of *Crossroads* is thus unwarranted. Rather than being a "doubtful friend[]," *id.* at 314, here the FEC agrees with CREW that plaintiffs' identities should be released. CREW's and the FEC's interests are aligned. CREW has identified no potential disagreements over the scope of the administrative record in MUR 6920, and the Commission has already identified key documents from the administrative case file for that MUR. (FEC's Notice (Docket No. 20).) Regulation of CREW is not at issue. Furthermore, CREW has not identified any differences between the position the FEC took in its response to plaintiffs' arguments on the merits and the positions CREW would take in the case.

CREW argues that the Court should look skeptically at whether the government adequately represents a non-governmental entities interest. But as this Circuit's authority makes clear, the alignment of a prospective intervenor's interests with the government is a well-established basis for denying intervention. *See Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 781 (D.C. Cir. 1997) (finding interests of proposed intervenor and United States were aligned notwithstanding would-be intervenor's desire to invest further resources into lawsuit); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (denying intervention and finding government "adequately represented" trade association's

interest); *Alfa Int'l Seafood v. Ross*, 321 F.R.D. 5, 8 (D.D.C. 2017) (distinguishing *Crossroads* and explaining that "[a]pplicants, however, have not offered any valid reason for the court to find that the Federal Defendants in this case may not adequately represent their interests"*), appeal filed* (D.C. Cir. June 7, 2017); *accord Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 194 (finding prospective intervenor lacked standing and also noting that "it would be virtually impossible to show under Rule 24 that [the FDIC] do[es] not adequately protect [the proposed-intervenor] interests").[3] Because the FEC and CREW share the same limited interest in this case, the FEC is an adequate representative.

CONCLUSION

For the foregoing reasons, the Court should deny CREW's motion to intervene.

Respectfully submitted,

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[3] Courts in other jurisdictions have similarly denied motions to intervene where, as here, the would-be litigants' interests are aligned with the government's. *See, e.g.*, *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 910 (11th Cir. 2007) (holding EPA adequately represented state's interests and denying intervention); *Kane Cnty. v. United States*, 597 F.3d 1129, 1134 (10th Cir. 2010) (finding government adequately represented interest of environmental group); *Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs*, 493 F.3d 570, 579-80 (5th Cir. 2007) (explaining that even when prospective intervenor's overall objective "is more expansive," when parties share same "objective in this case" the "'existing [governmental entity] is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance'"); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (explaining that when parties share same objective, "'a presumption of adequacy of representation applies'"); *see also* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1909 (3d ed. 2014) (explaining that where "interest of the absentee is identical with that of one of the existing parties . . . representation will be presumed adequate").

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January 17, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2018, I served Exhibit 1 to the foregoing opposition that was filed with the Court under seal, by sending it by email to the following counsel, who have consented to receive service by email and who are permitted to receive the document pursuant to the Court's protective order:

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