ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5199

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

PUBLIC CITIZEN, ET AL.,
Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

CROSSROADS GRASSROOTS POLICY STRATEGIES,
Proposed-Intervenor-Appellant.

On Appeal from the United States District Court for the District of Columbia
No. 1:14-cv-00148-RJL (Hon. Richard J. Leon)

CORRECTED OPENING BRIEF FOR APPELLANT CROSSROADS GRASSROOTS POLICY STRATEGIES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant Crossroads Grassroots Policy Strategies provides this certificate as to parties, rulings, and related cases, which includes the disclosure required by Circuit Rule 26.1:

A. Parties and Amici

Crossroads Grassroots Policy Strategies sought to intervene as a defendant in the court below and is the Appellant in this Court. Crossroads Grassroots Policy Strategies operates as a Section 501(c)(4) organization, and it works primarily to advance social welfare, including by engaging in public-policy advocacy. (Crossroads Grassroots Policy Strategies has a pending application with the Internal Revenue Service for confirmation of its tax status.) Crossroads Grassroots Policy Strategies has no parent company, and no publicly held company has a 10-percent-or-greater ownership interest in Crossroads Grassroots Policy Strategies.

Public Citizen, Craig Holman, ProtectOurElections.org, and Kevin Zeese are the Plaintiffs in the court below and are nominal Appellees in this Court.

The Federal Election Commission is the Defendant in the court below and is an Appellee in this Court.

The Center for Competitive Politics appeared as amicus curiae at the merits stage before the district court. It is not a party in this Court.

B. Rulings Under Review

The ruling under review is an Order denying the motion of Crossroads Grassroots Policy Strategies to intervene as of right and by permission. The Order was issued on August 11, 2014, by Judge Richard J. Leon and was entered as Docket Number 27 in the district court; it appears at pages 233-237 of the Joint Appendix. The Order has not been published in the Federal Supplement.

C. Related Cases

This case has not been before this or any other court previously. Crossroads Grassroots Policy Strategies is not aware of any other "related case" as that term is defined in Circuit Rule 28.

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[*] Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY OF ABBREVIATIONS

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix
MUR	Matter Under Review
NLRB	National Labor Relations Board

JURISDICTIONAL STATEMENT

The plaintiffs commenced this lawsuit under 28 U.S.C. § 1331 and 52 U.S.C. § 30109(a)(8). Joint Appendix ("J.A.") 171. Section 30109(a)(8) authorizes a complainant "aggrieved" by the Federal Election Commission's dismissal of its administrative complaint to challenge that dismissal through an action brought in the district court of this Circuit.[1]

Appellant Crossroads Grassroots Policy Strategies ("Crossroads GPS")—the respondent in the dismissed administrative proceeding—moved to intervene as of right and by permission under Rules 24(a)(2) and 24(b) respectively. Upon the district court's denying its motion on August 11, 2014, J.A. 233-237, Crossroads GPS timely appealed on August 14, 2014, J.A. 238.

This Court "has jurisdiction over [an] appeal of the denial of intervention as of right," which is a final order subject to immediate review. *In re Endangered Species Act Section 4 Deadline Litig.–MDL No. 2165*, 704 F.3d 972, 976 (D.C. Cir. 2013); *see also* 28 U.S.C. § 1291. The Court also "may exercise supplemental jurisdiction in some instances over the appeal of a denial of permissive

[1] During the administrative proceeding and the first months of this litigation, the Federal Election Campaign Act was classified to 2 U.S.C. § 431, *et seq.* Effective September 1, 2014, the Office of the Law Revision Counsel transferred the Act to Title 52.

intervention." *In re Endangered Species Act Section 4 Deadline Litig.–MDL No. 2165*, 704 F.3d at 976.

STATEMENT OF THE ISSUES

1. Whether the district court committed reversible error in denying Crossroads GPS intervention as of right under Federal Rule of Civil Procedure 24(a)(2).

2. Whether the district court committed reversible error in denying Crossroads GPS permissive intervention under Federal Rule of Civil Procedure 24(b).

RULE INVOLVED

This appeal involves Rules 24(a)(2) and 24(b) of the Federal Rules of Civil Procedure. Rule 24 reads in full:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (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, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. The Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), comprehensively governs the financing of elections for federal office. It is administered by the Federal Election Commission ("FEC" or "Commission"). As relevant here, the Act imposes a range of obligations on certain private groups that

participate in federal elections. Entities that qualify as "political committees" must register with the FEC, file periodic financial-activity reports, maintain a depository and a treasurer, and comply with various other statutory and regulatory requirements. *See, e.g.*, 52 U.S.C. §§ 30102, 30103, 30104.

The FECA establishes a complex process by which the FEC enforces the Act against alleged violators. The enforcement process is triggered whenever a private party lodges a complaint. *Id.* § 30109(a)(1) ("Any person who believes a violation of [the FECA] . . . has occurred, may file a complaint with the Commission."). With the enforcement machinery set in motion, the Commission first must determine whether there is "reason to believe" that the respondent has violated the Act. *Id.* § 30109(a)(2). If at least four of the FEC's six Commissioners agree that there is such reason to believe, the enforcement proceeding advances to the investigative stage. Most matters are settled at this stage through "pre-probable cause conciliation," which results in a settlement agreement. *See* 11 C.F.R. § 111.18(d).

If the respondent does not settle with the FEC at this stage, the Commission conducts an investigation to determine whether there is "probable cause" to conclude that the respondent committed a violation. 52 U.S.C. § 30109(a)(4)(A)(i). Upon an affirmative vote of four Commissioners finding probable cause, the FEC must engage in "informal methods of conference,

conciliation, and persuasion" to attempt to conclude a conciliation agreement with the respondent. *Id.* If the Commission and the respondent still cannot settle the matter, the Commissioners vote again, this time on whether to commence a full-blown civil enforcement suit against the respondent in federal court. *Id.* § 30109(a)(6)(A).

This multi-step enforcement process visits profound burdens on respondents. Thus, it is no surprise that respondents have the right to advocate on their own behalf throughout the administrative proceedings. "Before the Commission conducts any vote on the complaint, other than a vote to dismiss," for example, each respondent must be notified and "shall have the opportunity to demonstrate, in writing, . . . that no action should be taken against such person . . . ." *Id.* § 30109(a)(1); *see also* 11 C.F.R. § 111.6. Likewise, if the case proceeds to the "probable cause" stage, respondents may file a "brief explaining [their] position" and "request a hearing to present oral arguments directly to the Commission." FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 18 (May 2012), *available at* http://www.fec.gov/em/respondent_guide.pdf.

2. The Commission's dismissal of a complaint at any stage is a final agency action that disposes of the claim against the respondent. *See, e.g.*, *FEC v. Franklin*, 718 F. Supp. 1272, 1279 (E.D. Va.) ("The FEC's decision not to investigate the allegations contained in those complaints, reflected in their

dismissal, was a final agency action properly subject to judicial review."), *aff'd in relevant part*, 902 F.2d 3 (4th Cir. 1989). Under Section 30109(a)(8), however, the original complainant is empowered to challenge the dismissal in federal court. As a "party aggrieved" by the agency's decision, the complainant can ask the courts to "declare that the dismissal of the complaint . . . is contrary to law" and to "direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(A), (C).

Section 30109(a)(8) does not specially provide for how such an action is to proceed in the district courts; the Federal Rules of Civil Procedure apply in these judicial-review actions just as they do in "all [other] civil actions and proceedings in the United States district courts." *See* Fed. R. Civ. P. 1; *see also* Fed. R. Civ. P. 81 (defining exceptions not relevant here).

B. Public Citizen's Administrative Complaint.

In October 2010, Public Citizen and others (collectively, "Public Citizen") filed an administrative complaint with the FEC against Crossroads GPS, a nonprofit organization operating under 26 U.S.C. § 501(c)(4). J.A. 8-29. The complaint alleged that Crossroads GPS's public communications made it a "political committee" and that the organization violated the FECA by failing to register, report, and comply with other rules. Public Citizen asked that the

Commission "conduct an immediate investigation" and "impose appropriate sanctions" on Crossroads GPS. J.A. 26-27.

The complaint prompted Matter Under Review ("MUR") 6396, an FEC enforcement proceeding that spanned more than three years and involved hundreds of pages of documents, many submitted by Crossroads GPS. After more than two years, the FEC's legal department—the Office of General Counsel—recommended that the Commission "find reason to believe that Crossroads GPS violated [52 U.S.C. §§ 30102, 30103, and 30104] by failing to organize, register, and report as a political committee." J.A. 56. In light of this recommendation, the Office of General Counsel sought authorization to "use . . . compulsory process" against Crossroads GPS, "including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary." J.A. 57.

In December 2013—more than a year after the Office of General Counsel submitted its report—an evenly divided Commission voted to dismiss the matter, with three Commissioners voting to find no reason to believe that Crossroads GPS had violated the Act. J.A. 59-163 (statement of reasons of controlling Commissioners), 164-168 (statement of reasons of dissenting Commissioners). Given the FECA's four-vote requirement to pursue an enforcement matter, this divided vote translated to an affirmative Commission decision to conclude its inquiry and acquit Crossroads GPS of all allegations it had broken federal

campaign finance law. As Crossroads GPS's president later explained in a sworn declaration, "Crossroads GPS has a strong practical interest in the continuing force and validity of [this] dismissal . . . ." J.A. 213. "In addition to protecting Crossroads GPS from possible sanctions for its past activities, the dismissal provides reassurance that continuation of similar activities will not be sanctioned by the FEC." *Id.*

C. Proceedings Below.

1. As the "party aggrieved" by the FEC's dismissal, Public Citizen then initiated this action against the Commission under 52 U.S.C. § 30109(a)(8). J.A. 169-186. Identifying Crossroads GPS by name in almost every paragraph, Public Citizen's complaint seeks a judgment declaring that the FEC's decision to dismiss the administrative complaint was legal error. J.A. 186. It also requests an order requiring the Commission to reinstate the enforcement proceeding against Crossroads GPS. *Id.*

Crossroads GPS acted quickly to protect its interests. Before the FEC had even entered an appearance, Crossroads GPS moved to intervene. J.A. 191-211; *see also* J.A. 215-221 (proposed answer). While Public Citizen did not oppose intervention, the FEC asserted two main objections. Foremost, the FEC maintained that Crossroads GPS lacked standing to intervene. Paradoxically, the FEC also argued that it was fully capable of representing Crossroads GPS's

interests in the case. The FEC did not mention near-uniform authority to the contrary. Nor did the Commission acknowledge that it had barely mustered the votes to avert default in the case weeks before.[2] Or that one of its dissenting Commissioners had recently penned a *New York Times* op-ed piece urging the federal courts not to apply *Chevron* deference in this case.[3] Or that the Office of General Counsel—the attorneys now representing the FEC in this case—had concurred with the dissenting Commissioners in deleting a legal report that the controlling Commissioners sought to include in the administrative record. J.A. 187-190 (Supplemental Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen).

2. More than four months after Crossroads GPS filed its motion—and with summary-judgment briefing well underway—the district court ruled on the request to intervene. The court agreed that Crossroads GPS had standing to appear. Reopening the proceeding would strip Crossroads GPS of its acquittal, the court reasoned. And the resulting "re-exposure to an administrative complaint that

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[2] Statement of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen Regarding the Commission's Vote to Authorize Defense of Suit in *Public Citizen, et al. v. FEC*, Case No. 14-CV-00148 (RJL) (Apr. 10, 2014), http://www.fec.gov/members/goodman/statements/PublicCitizenStatement_LEG_CCH_MSP.pdf.

[3] Ann M. Ravel, *How Not to Enforce Campaign Laws*, N.Y. Times (Apr. 2, 2014).

previously had been decided in its favor" would amount to a "concrete injury," obliging Crossroads GPS to again "expend significant resources before the FEC." J.A. 235. The court also concluded that Crossroads GPS met the second and third elements of Article III standing, causation and redressability. J.A. 235-236. Lastly, the court tacitly agreed that the organization satisfied the first three procedural requirements for intervention as of right. *See id*.

The court nonetheless denied intervention under the final element of Rule 24(a)(2)—adequacy of representation. The court acknowledged that Crossroads GPS's "ultimate interests" might well "diverge" from those of the FEC. J.A. 236 (emphasis omitted). Yet the court held that the FEC automatically "adequately represent[s] Crossroads GPS's interest" for the lone reason that the Commission and Crossroads GPS are "aligned" in their "immediate interest" in "defending the legality of the FEC's dismissal." *Id.* Like the FEC, the court overlooked extensive Circuit precedent voicing "skepticism that United States governmental entities . . . can be found to adequately represent the interests of potential intervenors." *Cal. Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43, 47 (D.D.C. 2012). The court also disregarded the distinctive features of this case that raise concerns about the adequacy of the FEC's representational role.

In a final footnote, the court denied permissive intervention for lack of an independent basis of subject matter jurisdiction. J.A. 237.

3. Crossroads GPS timely noticed this appeal. J.A. 238. Last month, this Court stayed the district-court proceedings pending resolution of the appeal. Order, *Public Citizen v. FEC*, No. 14-5199 (D.C. Cir. entered Oct. 28, 2014).

SUMMARY OF ARGUMENT

Public Citizen brought this action to require the Commission to reinstate MUR 6396, an enforcement proceeding targeting Crossroads GPS. As matters now stand, Crossroads GPS is not exposed to further investigation and enforcement in MUR 6396; the FEC finally dismissed the matter in December 2013, after more than three years of proceedings. But if Public Citizen were to prevail in this action, that would all change. The FEC would be subject to a judicial declaration that its "decision to dismiss [Public Citizen's] administrative complaint" was legal error, and the agency would be bound to "conform" to that declaration by reopening the enforcement proceeding and revisiting its decision. J.A. 186; 52 U.S.C. § 30109(a)(8)(C). Crossroads GPS's unique stake in this case cannot be overstated.

I. Crossroads GPS easily meets the requirements for intervention as of right, and the district court's ruling to the contrary was reversible error. *First*, Crossroads GPS has Article III standing. By dismissing MUR 6396, the FEC fully exonerated Crossroads GPS of charges that it violated federal election law. This case is a direct attack on that decree, the loss of which would re-expose Crossroads

GPS to the FEC's enforcement process—textbook injury-in-fact. And it is no answer to say that an adverse judgment would be harmless because it would not bind the FEC to take any particular action going forward. In fact, the Supreme Court forcefully rejected this same argument when the FEC pressed it in the 1990s. *FEC v. Akins*, 524 U.S. 11 (1998). That the Commission might theoretically reach the same result the second time around "does not destroy Article III 'causation,' for [the courts] cannot know that the FEC would have exercised its prosecutorial discretion in this way." *Id.* at 25.

Second, to the extent prudential-standing principles even apply here, Crossroads GPS's interests are more than "arguably within the zone of interests to be protected or regulated by" the FECA. The whole point of this judicial-review proceeding is to determine whether the FEC reasonably acquitted Crossroads GPS of charges that it violated the Act.

Third, Crossroads GPS meets all four procedural requirements for intervention as of right. Fed. R. Civ. P. 24(a)(2). There is no question that its motion was timely (the first element), and the district court implicitly agreed that Crossroads GPS's interests would be impaired by an adverse judgment (the second and third elements).

As for the final element—adequacy of representation—the district court committed reversible error when it held that Crossroads GPS's past and potentially

future adversary, the FEC, automatically represents Crossroads GPS's interests in this case. The court departed from a half-century of Circuit authority to the contrary as well as a U.S. Supreme Court decision requiring intervention under a nearly identical statutory regime. In addition, the court overlooked the distinctive features of this case that give Crossroads GPS a "legitimate basis for concern over the adequacy of the representation of its interests." *Safari Club Int'l v. Salazar*, 281 F.R.D. 32, 42 (D.D.C. 2012). And the court most clearly erred by entrusting to the FEC exclusive license to defend against a suit aimed at expanding that agency's power.

II. In the alternative, the district court also committed reversible error in denying Crossroads GPS permissive intervention. The district court made no mention of the mandatory considerations that inform permissive intervention. *See* Fed. R. Civ. P. 24(b)(2), (3). Instead, the court held that it simply lacked the subject matter jurisdiction to allow Crossroads GPS to intervene permissively. This was legal error—and one this Court has the power to correct. While prospective intervenors must show subject matter jurisdiction to bring new claims before the courts, merely joining as an added party raises no jurisdictional issues here. As far as Congress's grant of subject matter jurisdiction is concerned, it makes no difference who appears as a co-defendant alongside the FEC. The

district court has jurisdiction to hear the federal-question claim pleaded in Public Citizen's complaint by dint of 28 U.S.C. § 1331 and the FECA.

STANDARD OF REVIEW

I. In evaluating a district court's denial of intervention as of right, the standard of review depends on the lower-court determination at issue. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003). Questions of standing are considered de novo. *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013). As for the Rule 24(a) elements, this Court "review[s] the denial of a motion to intervene *de novo* for issues of law, for clear error as to findings of fact and for abuse of discretion on issues that 'involve a measure of judicial discretion.'" *Id.* at 1322 (quoting *Fund for Animals, Inc.*, 322 F.3d at 732). Even under abuse-of-discretion review, however, this Court "review[s] *de novo* whether the district court applied the correct legal standard." *See McKesson Corp. v. Islamic Republic of Iran*, 753 F.3d 239, 242 (D.C. Cir. 2014).

II. A district court's denial of permissive intervention is subject to discretionary review and is evaluated under the abuse-of-discretion standard. Again, a district court abuses its discretion when it "base[s] its ruling on an erroneous view of the law . . . ," *Fund for Animals, Inc.*, 322 F.3d at 732 n.3, and whether such a reversible legal error has occurred is determined de novo, *McKesson Corp.*, 753 F.3d at 242.

ARGUMENT

I. Crossroads GPS Has a Right to Intervene Under Rule 24(a)(2).

Our justice system embodies a "deep-rooted historic tradition that everyone should have his own day in court." *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (citation omitted). Rule 24(a)(2) serves that principle by securing to non-parties the "right" to intervene in cases when: (1) the motion to intervene is timely; (2) the prospective intervenor demonstrates a legally protected interest in the action; (3) the action may as a practical matter impair that interest; and (4) no existing party to the action adequately represents that interest. *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013).

In this Circuit, the prevalent view is that an intervenor also must show Article III and prudential standing. *Fund for Animals, Inc.*, 322 F.3d at 735. Where the standing requirements are met, this Court applies Rule 24 liberally, to "dispos[e] of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Cook v. Boorstin*, 763 F.2d 1462, 1466 (D.C. Cir. 1985) (citation omitted).

A. Crossroads GPS has Article III standing to contest a suit aimed at reinstating enforcement proceedings against it.

Article III standing requires that a litigant "have such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008) (citation

omitted). To establish standing, "a prospective intervenor—like any party—must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals, Inc.*, 322 F.3d at 732-33.

As the district court rightly held, Crossroads GPS meets these "minimum constitutional requirements." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011); *see* J.A. 235-236. At base, the district-court litigation is but an extension of Public Citizen's direct attack on Crossroads GPS, which began with the administrative complaint filed with the FEC in October 2010. Public Citizen continues to seek a determination that Crossroads GPS broke the law, urging punishment that would deprive Crossroads GPS of its property and force it to modify its exercise of First Amendment rights. No one has a more direct stake in this case than Crossroads GPS.

1. A judgment for Public Citizen would directly invade Crossroads GPS's interest in not being subject to a federal enforcement proceeding.

a. On the first element of standing, stripping Crossroads GPS of its acquittal before the FEC would re-expose the organization to the FEC's enforcement process—quintessential injury-in-fact. A decision vacating the FEC's dismissal of MUR 6396 would reopen the administrative proceeding, returning Crossroads GPS to the position of a respondent before a federal agency. This would decidedly work "an invasion of a legally protected interest" Crossroads GPS

has in the FEC order currently in force. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). By dismissing the enforcement matter, the Commission fully exonerated Crossroads GPS of charges that it violated federal election law. To state the obvious, that order "was favorable to [Crossroads GPS], and the present action is a direct attack on that decision." *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 14 (D.D.C. 2010). If successful, Public Citizen's suit would "t[ake] that benefit away," and "[t]hat is injury" for Article III purposes. *City of New York v. Clinton*, 985 F. Supp. 168, 174 (D.D.C.), *aff'd sub nom. Clinton v. City of New York*, 524 U.S. 417 (1998); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233-34 (D.C. Cir. 2003) (holding that the "imminent danger" of an adverse judgment supports intervenor standing); *Fund for Animals, Inc.*, 322 F.3d at 733 (holding that the consequences of a potential adverse judgment "constitute a concrete and imminent injury" to prospective intervenor); *Military Toxics Project v. EPA*, 146 F.3d 948, 953-54 (D.C. Cir. 1998) (similar).

b. "This injury is fairly traceable to the . . . action . . . that [Public Citizen] seeks in the underlying lawsuit," *Fund for Animals, Inc.*, 322 F.3d at 733, meaning that the second standing element, causation, is also met. *See* J.A. 235 (district-court ruling). Nullifying Crossroads GPS's acquittal is the whole point of this case; success for Public Citizen means the FEC would be ordered to reinstate the enforcement proceeding against Crossroads GPS. This is the precise injury

Crossroads GPS seeks to avoid, and it would follow directly from an adverse judgment.

c. Below (and during motion practice before this Court), the FEC claimed that Crossroads GPS's injury is "hypothetical" and "speculative" because any reopened proceeding before the agency might ultimately result in a second dismissal. *E.g.*, FEC Opposition to Stay, *Public Citizen v. FEC*, No. 14-5199, at 16 (D.C. Cir. filed Sept. 25, 2014) ("FEC Opp. to Stay"). This is not correct. Whatever the end result of any renewed agency proceeding, Crossroads GPS has a concrete stake in maintaining the FEC dismissal order currently in force. The organization will suffer injury if it loses the protection that dismissal order provides. This harm is not remote; it is "'of such a direct and immediate character that [Crossroads GPS] will either gain or lose by the direct legal operation and effect of the judgment'" below. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir 1980) (quoting *Smith v. Gale*, 144 U.S. 509, 518 (1892)). Indeed, if the FEC's position were valid, Public Citizen too would lack standing, since its success in the district court still could result in dismissal of its administrative complaint before the Commission.

Not surprisingly, the Commission has yet to cite a case in which a party that defeated an administrative claim has been denied standing to defend that outcome in the courts. In fact, on at least one occasion, this Court has granted intervention

to the beneficiary of an FEC dismissal, without noting any standing issue. *Democratic Senatorial Campaign Comm. v. FEC*, 660 F.2d 773, 776 & n.19 (D.C. Cir. 1980) (per curiam), *rev'd other grounds*, 454 U.S. 27 (1981). In like vein, the Supreme Court saw no standing concerns when it held that a respondent that prevailed before the National Labor Relations Board could intervene to defend that victory in follow-on judicial-review proceedings. *Int'l Union v. Scofield*, 382 U.S. 205 (1965). Instead, the Court in *Scofield* grounded its holding in the simple fairness of ensuring that administrative respondents—"interested private parties"—have the opportunity to defend their position in the courts. *Id.* at 213, 217.[4]

Moreover, the FEC's narrow view of Article III standing is nothing new; the Commission pressed this same theory before the Supreme Court years ago—and lost. In *FEC v. Akins*, 524 U.S. 11 (1998), the Commission argued that a private party (there, the "aggrieved" complainant) lacked standing to litigate the agency's dismissal of an enforcement matter. The complainant could claim no redressable

[4] Of course, opinions that do not squarely address jurisdictional issues are not "binding precedent" as to jurisdiction. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1325 n.8 (D.C. Cir. 2013). Even so, it would be anomalous if so many courts, focused squarely on the existence and nature of prospective intervenors' interests, simply overlooked a substantial question of Article III standing. Moreover, it would be difficult to understand why the interests that gave rise to a right to intervene in those cases do not also establish standing. *See Roeder v. Islamic Republic of Iran*, 33 F.3d 228, 233 (D.C. Cir. 2003) ("[A]ny person who satisfies Rule 24(a) will also meet Article III's standing requirement.").

injury, the Commission posited, because even if courts were to vacate the dismissal "[t]he Commission is not required to institute a civil enforcement action in every instance in which it concludes that a violation has occurred." Br. for FEC, *FEC v. Akins*, No. 96-1590, 1997 WL 523890, at *29 (U.S. filed Aug. 21, 1997); *compare* FEC Opp. to Stay at 16-17 ("[E]ven if plaintiffs could obtain a decision in their favor, such an outcome would not guarantee that Crossroads would ever be subject to any investigation or enforcement action.").

The Supreme Court roundly rejected this theory. Akins's "'injury in fact' [wa]s 'fairly traceable' to the FEC's decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully." 524 U.S. at 25. That the Commission might theoretically reach the same result the second time around "does not destroy Article III 'causation,' for [the courts] cannot know that the FEC would have exercised its prosecutorial discretion in this way." *Id.* This case is no different. Regardless of the outcome of a revived enforcement proceeding, Crossroads GPS has an interest in not being exposed to renewed proceedings in the first place. Indeed, its interest in intervention arises precisely because "[i]t is impossible to predict whether the same outcome would be reached" a second time. *Wildearth Guardians*, 272 F.R.D. at 14-15.

More broadly, the Supreme Court has left no doubt that private parties can have a "personal stake" in decrees that protect them from coercive governmental action. *Clinton*, 524 U.S. at 430. *Clinton* illustrates the point. There, New York City challenged the President's line-item veto of a provision that would have shielded the city from liability for certain tax payments. *Id.* at 422-23; Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251, 515, § 4722(c). The government objected to standing, arguing that the city's "contingent liability" might never materialize. *Clinton*, 524 U.S. at 430. The Supreme Court again rejected this theory. Whatever the city's ultimate liability might be, it "'suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law,'" *id.* (quoting *City of New York*, 985 F. Supp. at 174):

> [The President's] action was comparable to the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial . . . . Even if the outcome of the second trial is speculative, the reversal, like the President's cancellation, causes a significant immediate injury by depriving the defendant of the benefit of a favorable final judgment.

Id. at 430-31 (emphasis added).

Crossroads GPS is in the same position here. The FEC's dismissal order is akin to a judicial dismissal with prejudice; Public Citizen's complaint approximates an appeal or a petition for further review. *See id.*; *see also Akins*,

524 U.S. at 25 (likening a judgment invalidating an FEC dismissal to a declaration of "mistrial"). To continue the analogy, no one would argue that a judicial defendant lacks standing to defend a dismissal in her favor merely because she might later prevail again on some other ground. Yet that, in a nutshell, is the case against standing here. A judgment for Public Citizen would "depriv[e] [Crossroads GPS] of the benefit of a favorable final judgment" before the FEC, *Clinton*, 524 U.S. at 430, and that is enough to jeopardize Crossroads GPS's interests.

2. A judgment upholding the dismissal of MUR 6396 would prevent injury to Crossroads GPS.

"For similar reasons, the courts in this case can 'redress' [Crossroads GPS's] 'injury in fact'" by upholding the FEC's decision to close the enforcement proceeding against it. *See Akins*, 524 U.S. at 25; *see also* J.A. 235-236 (district-court ruling). By defeating Public Citizen's attack, Crossroads GPS will avert all the threatened injuries described above. *Lujan* itself put the point most simply: Where the "legality of government action or inaction" is in controversy, "there is ordinarily little question" that the "object of the action (or forgone action) at issue" has standing to take part. 504 U.S. at 561-62; *see also Fund for Animals, Inc.*, 322 F.3d at 733-34. That should begin and end the Article III analysis here.

B. Crossroads GPS has prudential standing.

The prudential-standing doctrine calls for an intervenor to "show that [its] interests are 'arguably within the zone of interests to be protected or regulated by the statute' in question." *In re: Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C. Cir. 2000) (citation omitted).[5] This "test 'is not meant to be especially demanding,'" *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014) (per curiam) (citation omitted), and it is easily met here.

As an initial matter, the Supreme Court has indicated that the FECA may negate—at least to a degree—the prudential-standing limitations that would otherwise apply. In interpreting Section 30109, the Court in *Akins* stressed that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Akins*, 524 U.S. at 19. And while Crossroads GPS was certainly not "aggrieved" by the FEC's dismissal, this Court has said that similarly "broad . . . citizen-suit provision[s]" may cancel prudential-standing barriers for both plaintiffs and intervenor-defendants alike. *Fund for Animals, Inc.*, 322 F.3d at 734 n.6 (interpreting

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[5] "The Supreme Court recently clarified that '"prudential standing is a misnomer" as applied to the zone-of-interests analysis.'" *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014) (per curiam) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)).

Endangered Species Act, 16 U.S.C. § 1531 *et seq.*); *see also Citizens for Responsibility and Ethics in Washington v. FEC*, 401 F. Supp. 2d 115, 121 n.1 (D.D.C. 2005) (reading *Akins* to do away with prudential standing in suits under Section 30109), *aff'd* 475 F.3d 337 (D.C. Cir. 2007).

In any event, Crossroads GPS's interests are more than "arguably within the zone of interests to be protected or regulated by the statute." *Fund for Animals, Inc.*, 322 F.3d at 734 n.6 (citation omitted). The FECA regulates the precise type of activity that Public Citizen imputes to Crossroads GPS. The Act sets the standards by which such conduct is subjected to regulation and punishment. And it provides that private speakers, like Crossroads GPS, can face sanctions for violations only when the Commission complies with the prescribed enforcement procedure, laid out in Section 30109. Section 30109(a)(8), the judicial-review provision, is simply one piece of the federal regulation of spending and speech that may affect elections. That Crossroads GPS is in "the zone of interests to be protected or regulated by" Section 30109 can hardly be denied.

Nor does the FECA's silence on intervention counsel differently. Intervention under Rule 24(a)(2) and 24(b)(1)(B) presupposes that the U.S. Code does not otherwise provide for the nonparty's involvement; these rules apply only when the nonparty has no independent "right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1); *see also* Fed. R. Civ. P. 24(b)(1)(B). Put differently,

intervention under Rule 24 is the benchmark presumption whenever a case is in federal district court, and the FECA does not purport to override the Rule in cases brought under Section 30109. (The Act says nothing at all about intervention.)

Instead, Section 30109 simply "creates the right of action which brings the case into court." *See 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's. *Id*. Thus—and as this Court concluded in strikingly similar circumstances—it would be "untenable" to say that "the absence of any reference to intervention" in a judicial-review provision "must be construed to preclude intervention in such review by persons who would be commensurately aggrieved if the [agency] determinations were set aside." *Id.* (allowing intervention in review proceeding brought under similar provision of the Walsh-Healey Act, 66 Stat. 308 (1952)); *cf. Scofield*, 382 U.S. at 209, 217 n.10 (drawing on "the policies underlying intervention" in light of the National Labor Relations Act's "silen[ce] on the intervention problem").

C. Crossroads GPS has a right to intervene.

Rule 24(a)(2) gives force to "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 vehicle for interested non-parties to appear, the Rule addresses "the obvious injustice of having [an outsider's] claim erased or impaired by the court's adjudication without ever being heard." *Am. Tel. & Tel. Co.*, 642 F.2d at 1292 (citation omitted). These foundational principles point the way here: Crossroads GPS has a uniquely "vital interest" in this case, *see Allendale Co.*, 226 F.2d at 770 (citation omitted), and the district court committed reversible error by denying the organization party status.

1. Crossroads GPS has an interest in this action.

The interest element of Rule 24(a)(2) parallels the standing analysis above. *Perciasepe*, 714 F.3d at 1325 n.8. For the reasons discussed in Sections I.A and B, therefore, Crossroads GPS has established both its standing and "an interest relating to the property or transaction that is the subject of th[is] action." Fed. R. Civ. P. 24(a)(2).[6]

2. An adverse judgment would impair Crossroads GPS's interests.

As discussed, a judgment in Public Citizen's favor would require the FEC to reopen MUR 6396 against Crossroads GPS—an outcome that prejudices Crossroads GPS's firm interest in not being the target of a renewed federal agency enforcement proceeding. *See supra* 15-22. The district court tacitly agreed,

[6] The FEC has not challenged the timeliness of Crossroads GPS's request to intervene, and the district court likewise appears to have accepted that Crossroads GPS filed a timely motion. J.A. 234 ("After the complaint was filed, but before the FEC filed an answer, Crossroads GPS moved to intervene.").

reasoning that "re-exposure to an administrative complaint that previously had been decided in [Crossroads GPS's] favor" would work a "concrete injury" on the organization. J.A. 235.

An adverse judgment would also impair Crossroads GPS's defense in any renewed enforcement proceeding. At the administrative level, a judicial pronouncement that the Commission's dismissal was "contrary to law" would mold the legal framework for the rest of the proceeding before the agency. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (remarking that, upon district court's invalidating dismissal, Commissioners who had favored dismissal "vot[ed] to institute the enforcement action solely because they believed they 'were obligated to follow the court's order,' and it would be 'indefensible for the agency' not to do so") (citation omitted). And in any subsequent civil enforcement suit, Crossroads GPS would be hard-pressed to successfully relitigate issues that the district court had already disposed of in this case. Even if, as the FEC has insisted, the district court's judgment below would be "merely . . . preliminary," FEC Opp. to Stay at 16 (citation omitted), the ruling would assuredly have persuasive weight for a peer judge considering identical issues framed by identical facts involving identical parties.

These are just the sort of "practical consequences" that give non-parties the right to intervene in cases affecting their interests. *Fund for Animals, Inc.*, 322

F.3d at 735. As this Court has consistently held for more than a half-century, "it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Id.* (citation omitted); *see also Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 781 (D.C. Cir. 1997); *Cook*, 763 F.2d at 1467; *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) ("[A] decision by the District Court here, the first judicial treatment of th[e] question [at issue], would receive great weight"); *Allendale Co.*, 226 F.2d at 767. In the Supreme Court's words, the prospect of "subsequent litigation serves little practical value to the potential intervenor," since a later court "would almost invariably defer to the initial decision as a matter of stare decisis or of comity." *Scofield*, 382 U.S. at 213. Only by intervening in the present action can Crossroads GPS make its case on a level playing field with Public Citizen and the FEC.

3. The FEC does not adequately represent Crossroads GPS's interests.

The district court accepted—either openly or tacitly—everything up to this point. The court agreed that an adverse judgment would "re-expos[e]" Crossroads GPS to Public Citizen's administrative complaint. This "concrete injury"

supported Article III standing, the court held. J.A. 235. It also satisfied the "interest" element of Rule 24 and, reasonably read, the "practical impairment" element as well.

a. The district court committed reversible error, however, on the final Rule 24 consideration: whether Crossroads GPS's interests are adequately represented by existing parties. This last "requirement [i]s 'not onerous'"; an applicant need only show that "representation of his interest 'may be' inadequate." *Fund for Animals, Inc.*, 322 F.3d at 735 (citation omitted). In fact, intervention is almost a default presumption when a prospective intervenor meets Rule 24's first three factors. As this Court has put it, an applicant "'ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee.'" *Id.* (quoting 7A Charles Alan Wright et al., Federal Practice and Procedure § 1909 (1st ed. 1972)); *see also Cal. Valley Miwok Tribe*, 281 F.R.D. at 47 ("The D.C. Circuit has emphasized repeatedly that the standard to demonstrate inadequacy of representation is lenient."). This accords fully with the Circuit's liberal view of Rule 24 as serving "litigative economy, reduced risks of inconsistency, and increased information . . . ." *Mass. Sch. of Law at Andover, Inc.*, 118 F.3d at 782. Indeed, the Rule's language ("unless") suggests that it is the party opposing intervention who may bear the burden. *Fund for Animals, Inc.*, 322 F.3d at 736 n.7.

Crossroads GPS more than met its "minimal" burden on this score. *Id.* at 735. As a starting point, the baseline rule in this Circuit is that "governmental entities do not adequately represent the interests of aspiring intervenors." *Id.* at 736 (remarking that this Court has "often concluded" as much); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (remarking on "the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances"). "[T]he Circuit has expressed skepticism that United States governmental entities, with their unique obligations to serve the general public, can be found to adequately represent the interests of potential intervenors." *Cal. Valley Miwok Tribe*, 281 F.R.D. at 47. For example, when a case implicates an outsider's "distinct and weighty interest[s] in protecting its governance structure," there is ordinarily little question that federal agencies are inadequate placeholders when they "do not share these concerns." *Id.* at 47-48. Likewise, this Court "has frequently found 'inadequacy of governmental representation' when the government has no financial stake in the outcome of the suit." *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (collecting authority).

This "skepticism" has special purchase in actions that challenge a government agency's alleged under-enforcement of federal law. Like many plaintiffs suing under Section 30109, Public Citizen challenges the controlling

Commissioners' reading of the FECA as unduly narrow. If Public Citizen were to succeed, a judgment against the Commission could actually increase the agency's regulatory power, giving judicial imprimatur to a broader interpretation of federal campaign finance law. To hold that the FEC adequately represents Crossroads GPS in these circumstances is thus to ignore "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

b. The facts of this case give proof positive to these principles; in no universe can the FEC be seen as Crossroads GPS's advocate. Foremost, the Office of General Counsel, the Commission's legal team, is quite literally arguing with itself in this case. At the administrative level, the Office of General Counsel prepared at least one detailed report recommending that the FEC "find reason to believe that Crossroads GPS violated [federal law]." J.A. 56. Now before the district court, the Office of General Counsel is tasked with defending the opposite position. At the same time, however, it has made clear on the record that its original position remains unchanged. *See* J.A. 223 ("[T]he OGC's representational role in this matter does not change OGC's recommendation to find RTB [reason to believe] or any of the reasons supporting it."). And not only does the Office of General Counsel's administrative report remain a key part of the record, it forms the backbone of Public Citizen's theory of the case. *See* Public Citizen Mot. for

Summ. J., at 25 (Dist. Ct. Dkt. 23) (arguing that the Office of General Counsel "correctly concluded that there is reason to believe that Crossroads GPS is a political committee"); *see also id.* at 6, 7-10, 26, 27, 29, 32, 37, 39.

The district court summarily discounted Crossroads GPS's concern about the Office of General Counsel's inconsistent positions and roles in this case. J.A. 236. Yet it is black-letter law that an "absentee cannot be required to look for adequate representation to an opponent." 7C Charles Alan Wright et al., Federal Practice & Procedure § 1909, at 398 (3d ed. 2007). Here, if Public Citizen were to prevail, the FEC would once again revert to being Crossroads GPS's direct adversary. In turn, the Office of General Counsel would be able to resume prosecuting the case according to its earlier views.

A raft of other factors also contribute to Crossroads GPS's "legitimate basis for concern over the adequacy of the representation of [its] interests." *Safari Club Int'l*, 281 F.R.D. at 42. To begin with, the six Commissioners evenly split on whether to proceed against Crossroads GPS, and the FEC barely marshaled the votes to avoid default in this suit. *Supra* 8-9. In a highly unusual development, two Commissioners abstained from the vote to authorize a defense in this case. *Supra* 9 n.2. Then, before Commission counsel had even entered their appearances below, one of the dissenting Commissioners took to the *New York Times* to deplore the prospect that the district court might honor precedent in this action. It is

"[u]nfortunate," the Commissioner wrote, that "the courts traditionally have given great deference to commission decisions and, in cases like this, to the analysis of the three commissioners who vote not to pursue cases." Ann M. Ravel, *How Not to Enforce Campaign Laws*, N.Y. Times (Apr. 2, 2014). *Contra FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded.").

Just as troubling, the Office of General Counsel—with the support of the Commission's dissenting members—"deviate[d] from past practice and from current policy" by successfully withholding from the administrative record an earlier Office of General Counsel report issued in this matter. J.A. 188; *see also* J.A. 88-163 (redacted materials). This last tactic directly affects this case; as the controlling group of Commissioners protested, the redacted report "should have been publicly released so that it could be available to a reviewing court and litigants as part of the administrative record in this matter." J.A. 188; *see also id.* ("[T]he withdrawn First General Counsel's Report in this matter informed our decision in this matter."). Yet despite the controlling Commissioners' misgivings, no existing party will even attempt to complete the record before the district court unless Crossroads GPS intervenes. Nor will any existing party offer the sort of

full-throated defense of the FEC's dismissal that Crossroads GPS believes is warranted.

c. Combined with the background presumption favoring intervention, this state of affairs leaves little doubt that the FEC's "representation of [Crossroads GPS's] interest 'may be' inadequate." *Fund for Animals, Inc.*, 322 F.3d at 735. In ruling to the contrary, the district court "did not apply the correct legal standard," "misapprehended the underlying substantive law," *McKesson Corp.*, 753 F.3d at 242, and all but ignored the distinctive features of this case that give Crossroads GPS a "legitimate basis for concern . . . ." *Safari Club Int'l*, 281 F.R.D. at 42.

At the outset, the district court made no mention of the baseline rule that the adequacy-of-representation "requirement [i]s 'not onerous.'" *Fund for Animals, Inc.*, 322 F.3d at 735 (citation omitted). Nor did the court even acknowledge this Court's entrenched "skepticism" of federal agencies' acting as proxies for private litigants. *Cf. Roane*, 741 F.3d at 152 (reversing denial of intervention where "the district court overlooked what the relevant caselaw says is the most important consideration"). Quite the opposite; the district court adopted a categorical rule that the FEC always adequately represents administrative respondents in this class of litigation. In a ruling that would bar defendant-intervenors in all but the rarest administrative cases, the district court accepted that the "ultimate interests" of Crossroads GPS and the FEC "may diverge." J.A. 236 (emphasis omitted).

Nonetheless, the court held, the Commission automatically "can adequately represent Crossroads GPS's interest" for the lone reason that the two entities are "aligned" in their "immediate interest" in "defending the legality of the FEC's dismissal." *Id.* (emphasis omitted)

This ruling involved no "measure of judicial discretion," *Fund for Animals, Inc.*, 322 F.3d at 732, and it departed from this Court's precedent at a fundamental level. As the full Court held more than 50 years ago, "[t]he right of [outsiders] to intervene is not affected by the fact that the general position they assert is already represented in the action by the [federal government]." *Allendale Co.*, 226 F.2d at 768 (emphasis added).[7] "Even when the interests of [a federal agency] and [non-parties] can be expected to coincide, . . . that does not necessarily mean that adequacy of representation is ensured for purposes of Rule 24(a)(2)." *Costle*, 561 F.2d at 912. Thus, courts in this Circuit grant intervention even where "defendant-intervenors are clearly aligned with the Federal Defendants." *Safari Club Int'l*, 281 F.R.D. at 42; *see also Fund for Animals, Inc.*, 322 F.3d at 736; *Nuesse*, 385 F.2d at 703 (remarking on "the greater impetus to intervention that inheres in administrative cases"). Put most simply, general alignment does not mean that the

[7] Rule 24 was substantially revised in 1966, but "cases on what is or is not adequate representation decided under the former rule are equally authoritative on that aspect of the question under the amended rule." Wright, *supra* p. 32, § 1909, at 387.

government automatically represents uniquely interested private actors. And this is particularly true here, where the FEC is defending against a suit aimed at expanding its power to regulate.

In fact, the Supreme Court itself has been down this road before. In *International Union v. Scofield*, the Court considered whether "parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board [('NLRB')] have a right to intervene in [subsequent] . . . review proceedings," 382 U.S. at 207—answering the question in the affirmative. The analogy is compelling, for the review process under the National Labor Relations Act closely resembles the process under the FECA. Like FECA complainants, labor complainants can file complaints with the NLRB and, if "aggrieved" by the NLRB's dismissal, they can seek review in the federal courts. *Compare* 29 U.S.C. § 160(f) (1964) *with* 52 U.S.C. § 30109(a)(8).

Scofield confirmed that charged parties "have a right to intervene" in these types of review proceedings, 382 U.S. at 205, noting that "the vast majority" of courts of appeals had already concluded as much, *id.* at 211 (citing, inter alia, *Local 1441, Retail Clerks Int'l Ass'n v. NLRB*, 326 F.2d 663 (D.C. Cir. 1963)). Allowing a charged party to intervene "insures fairness," the Court reasoned, by allowing all interested actors "to present their arguments on the issues to a reviewing court which has not crystallized its views." *Id.* at 213. "Participation in

defining the issues before the court guarantees that all relevant material is brought to its attention and makes the briefs on the merits more meaningful." *Id.* at 214. Indeed, even the federal government advocated this result in *Scofield*:

> If intervention by the successful respondent were not allowed, then in the event that the Board's order dismissing the complaint was set aside and the Board decided not to contest the court's action further, he would have to overcome a substantial obstacle in any subsequent review proceeding.

Br. for NLRB, *Scofield*, Nos. 18, 53, 1965 WL 115679, at *24 (U.S. filed Aug. 23, 1965); *see also* Pet'r Br., *Scofield*, No. 18, 1965 WL 115678, at *22 (U.S. filed Aug. 30, 1965) (explaining that the NLRB "is not the representative of the Union; nor does it seek to vindicate or defend the parochial interests of the Union which lie at the heart of this appeal").

This case is similar. While the Court in *Scofield* noted that its holding addressed federal labor law, 382 U.S. at 210, it made clear that its reasoning would command the same result under Rule 24 more broadly; "[u]nder Rule 24(a)(2) or Rule 24(b)(2)," the Court stressed, "we think the charged party would be entitled to intervene." *Id.* at 217; *see also id.* at 216 (deeming Rule 24 a "helpful analog[y]"). And the same considerations that dictated intervention in *Scofield* apply with full force here. Like the NLRB, the FEC is charged with a public-interest mandate—administering, obtaining compliance with, and formulating policy with respect to

the FECA—that bears little relation to the unique interests of regulated actors like Crossroads GPS. *See* 52 U.S.C. § 30106(b)(1).

The FEC's opposition to intervention only confirms this point. During motion practice and before the district court, the Commission insisted that "an adverse decision in this case" would not "pose 'an imminent, threatened invasion' of [Crossroads GPS's] interests." *See, e.g.*, FEC Opp. to Stay at 16 (emphasis and citation omitted). As this Court has noted, "[t]his is hardly an assurance of adequate representation for [excluded non-parties]." *Allendale Co.*, 226 F.2d at 768; *see also id.* (voicing concern about representation by Secretary of Labor when "[t]he Secretary's response to the motions to intervene declares that neither the appellants nor the appellees can show themselves to be directly affected by the determinations"). Under any standard of review, the district court's legal error and failure to address the relevant facts calls for reversal.

II. The District Court Also Committed Reversible Error in Denying Crossroads GPS Permissive Intervention Under Rule 24(b).

The district court's order is equally susceptible to reversal on the permissive-intervention side, governed by Rule 24(b). While the courts have latitude under this Rule, the district court's single reason for denying permissive intervention here "misapprehend[ed] the underlying substantive law"—an abuse of discretion subject to de novo review. *McKesson Corp.*, 753 F.3d at 242; *see also Nuesse*, 385

F.2d at 704 (reversing denial of permissive intervention when the district court did not "follow[] the appropriate standard or approach in exercising its discretion").

A. This Court has the power to review the district court's denial of permissive intervention.

This Court has power to review the lower court's ruling on permissive intervention. While "[t]he denial of a Rule 24(b) motion is not usually appealable in itself," this Court "may exercise its pendent appellate jurisdiction to reach questions that are inextricably intertwined with ones over which [it] ha[s] direct jurisdiction." *In re Endangered Species Act Section 4 Deadline Litig.–MDL No. 2165*, 704 F.3d at 979 (citations and internal quotation marks omitted). Here, the basis for Crossroads GPS's request for permissive intervention echoes its claim to intervention as of right: Regardless of the procedural avenue used, Crossroads GPS seeks to appear as a full party litigant before the district court to defend the FEC decision in its favor. If it does not reverse the district court's denial of intervention as of right, this Court should thus exercise its power to address the denial of permissive intervention.[8]

[8] This Court has remarked on "uncertainty about whether standing is required for permissive intervention." *In re Endangered Species Act Section 4 Deadline Litig.–MDL No. 2165*, 704 F.3d 972, 980 (D.C. Cir. 2013). Because Crossroads GPS clearly has standing to appear as a party in this case, *supra* 15-25, the Court would not need to resolve the "open question" of permissive-intervenor standing if it were to exercise discretionary jurisdiction over this part of the appeal. *Id.*

B. The district court's denial of permissive intervention amounted to an abuse of discretion.

Rule 24(b)(1)(B) provides that the district court "may" allow intervention upon timely motion if the applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The Rule also requires the court, "[i]n exercising its discretion," to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

1. The district court addressed neither of these standards. First, the court did not consider whether Crossroads GPS has a defense common to the case, even though the existence of such a defense is undeniable. "[T]his circuit avoids strict readings of the phrase 'claim or defense,' allowing intervention 'even in situations where the existence of any nominate "claim" or "defense" is difficult to find.'" *In re Endangered Species Act Section 4 Deadline Litig.–MDL No. 2165*, 704 F.3d at 980 (citation omitted); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) ("[W]e have eschewed strict readings of the phrase 'claim or defense.'"). Here, Crossroads GPS asks to intervene to defend an agency dismissal order won by Crossroads GPS itself. The case for intervention could not be clearer.

Second, the district court failed to consider whether intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). And there is no reason to think that Crossroads GPS's participation would cause any such harm. Crossroads GPS does not seek to unduly delay the district-court proceedings; it simply asks to "participate on an equal footing with the original parties to the suit." *Roeder*, 333 F.3d at 234. Likewise, there is no threat of prejudice to "the original parties' rights." Notably, the litigants most clearly trying to vindicate their rights—Public Citizen and its co-plaintiffs—have voiced no objection to Crossroads GPS's participation.

2. Instead of addressing these considerations, the district court summarily denied permissive intervention on the theory that Crossroads GPS did not "demonstrate[] an independent ground for subject matter jurisdiction." J.A. 237. But in truth, there is no jurisdictional bar to Crossroads GPS's participating in this case. To be sure, if a prospective intervenor seeks to add a new claim, the district court is obliged to satisfy itself of its jurisdiction over that claim. *See El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 874 (D.C. Cir. 2014); *Nat'l Children's Ctr.*, 146 F.3d at 1046 ("Requiring an independent basis for jurisdiction makes sense in cases involving permissive intervention, because the typical movant asks the district court to adjudicate an additional claim on the merits."

(emphasis added)). But merely adding a new party to the litigation of a preexisting federal question presents no issue of subject matter jurisdiction.[9]

In fact, the lone decision cited by the district court makes this point explicitly. In *EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, this Court left no doubt that "[a]n independent jurisdictional basis is simply unnecessary" when the intervenor "do[es] not ask the district court to exercise jurisdiction over an additional claim on the merits, but rather to exercise a power that it already has," *id.* at 1047 (allowing permissive intervention for access to confidential documents). And as it stressed in its papers below, Crossroads GPS "does not purport to add any 'additional claim[s]' to the case; it simply seeks to supplement the defense of claims over which [the district court] already has jurisdiction." Crossroads GPS Reply in Supp. of Intervention, at 17 (Dist. Ct. Dkt. 16). While Crossroads GPS may certainly press additional arguments in connection with the

[9] By contrast, the identity of intervening parties could affect the federal court's subject matter jurisdiction in a diversity case. *See* 28 U.S.C. § 1367(b); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) ("Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction. The last sentence of § 1367(a) makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties."); *Karsner v. Lothian*, 532 F.3d 876, 884 (D.C. Cir. 2008) (discussing application of Section 1367 to intervenors).

existing claims, it will not present new causes of action requiring independent jurisdictional support.

More fundamentally, the jurisdictional bar perceived by the district court raises red flags as a matter of common sense. There is no question that the district court would have continued to have subject matter jurisdiction over the case if it had granted Crossroads GPS intervention as of right under Rule 24(a)(2). Nor is there any reason why the court would lose that power by allowing Crossroads GPS to intervene permissively via Rule 24(b)(1)(B). Permissive intervention is simply a procedural vehicle; choosing between Rule 24(a)(2) and Rule 24(b)(1)(B) does not implicate Congress's grant of subject matter jurisdiction. *Cf. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987) (rejecting appeal from denial of intervention as of right when petitioner "is now a party to the suit by virtue of its permissive intervention"). Whoever appears alongside the FEC, "the subject matter of the suit is fixed" under 28 U.S.C. § 1331 and 52 U.S.C. § 30109. *See Foster*, 655 F.2d at 1325 n.4. The district court's ruling to the contrary followed from "an erroneous view of the law" and "necessarily" amounted to an abuse of its discretion. *Fund for Animals, Inc.*, 322 F.3d at 732 n.3.[10]

[10] On at least one occasion, this Court has vacated a denial of permissive intervention and remanded for further consideration when "[t]he district court did not consider . . . delay or prejudice in the context of appellant's motion for permissive intervention." *Roane v. Tandy*, No. 12-5020, 2012 WL 3068444, at *1

CONCLUSION

This Court should reverse the order of the district court and remand with directions to grant Crossroads GPS's motion to intervene either as of right or by permission.

Respectfully submitted,

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(D.C. Cir. July 6, 2012). But where this Court "cannot envision a contrary determination that would withstand further appeal," it "ha[s] not hesitated to direct that intervention be allowed where [it] found denial to constitute error." *Fund for Animals, Inc.*, 322 F.3d at 737. If the Court decides to reach the permissive-intervention issue here, Crossroads GPS submits that reversal, rather than vacatur, would be the most appropriate course. *See Nuesse*, 385 F.2d at 704; *Foster*, 655 F.2d at 1324 ("[J]udicial economy is better served by this Court deciding whether appellants have made a sufficient showing under Rule 24 to be entitled to intervene than by remanding to the district court for that decision.").

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,364 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: November 20, 2014

/s/ Thomas W. Kirby
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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

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