ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2015

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)

REPLY BRIEF FOR APPELLANT CROSSROADS GRASSROOTS POLICY STRATEGIES

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GLOSSARY OF ABBREVIATIONS

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix
MUR	Matter Under Review

STATUTES AND REGULATIONS

Federal Rule of Civil Procedure 24 is contained in Appellant's Opening Brief. Appellee Federal Election Commission also reproduced 52 U.S.C. § 30109(a)(8) in an Addendum to Appellee's Brief.

SUMMARY OF ARGUMENT

No one has a greater interest in this controversy than Crossroads Grassroots Policy Strategies ("Crossroads GPS"). For Crossroads GPS, the case is not just a sterile dispute about agency authority. Instead, the issue is whether Crossroads GPS should be stripped of the protection of a concrete dismissal order, won from the Federal Election Commission ("FEC" or "Commission") after more than three years of agency proceedings. Victory for the plaintiffs (collectively, "Public Citizen") will revoke that order, meaning that Crossroads GPS will again be vulnerable to investigation as well as the potential for enforcement and sanctions—all based on its public discourse. Crossroads GPS's interest in defending the challenged order is akin to that of a frontline soldier's in holding onto his helmet.

There are many good reasons to allow Crossroads GPS to appear in its own defense and no good reason why it should be excluded. The FEC is simply not an adequate substitute; under no reasonable interpretation of the Federal Rules can Crossroads GPS's interests in this case be equated with those of its recent—and potentially future—government adversary. As if to drive this point home, the FEC spends more than half of its response argument denying that Crossroads GPS has any interest at all in this case. Under Article III and Rule 24, Crossroads GPS is entitled to defend its exoneration. The district court's ruling to the contrary was reversible error and should be corrected.

ARGUMENT

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

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

1. The doctrine of standing requires a party "to demonstrate 'a personal stake in the outcome of [a] controversy,'" *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1279 (D.C. Cir. 2012) (citation omitted), and Crossroads GPS claims just such a stake in this case. As matters stand, the FEC's December 2013 dismissal order remains in effect. By that order, the Commission "closed its file" on Public Citizen's administrative complaint against Crossroads GPS. FEC Br. 2. Crossroads GPS thus faces no exposure to further enforcement proceedings before the FEC related to that complaint. The order likewise bars Public Citizen from pursuing its grievance via a private lawsuit against Crossroads GPS. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985); 52 U.S.C. § 30109(a)(8)(C). Put most simply, the order acts as an agency judgment shielding Crossroads GPS against coercive action at the hands of the FEC and Public Citizen.

Crossroads GPS's personal stake in preserving this order is self-evident. By the same token, "[t]he threatened loss" of the order "constitute[s] a concrete and imminent injury." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003). The "injury is fairly traceable to the . . . action . . . that [Public Citizen]

seeks in the underlying lawsuit," and a judgment upholding the order would prevent that injury. *Id.* This is not a close question. The FEC's dismissal "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). Or—to borrow from the Supreme Court's foundational standing decision—where a lawsuit challenges the "legality of government action or inaction" "there is ordinarily little question" that the "object of the action (or forgone action) at issue" has standing to be heard. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *see also Fund for Animals, Inc.*, 322 F.3d at 733-34.

2. The FEC disagrees, claiming, foremost, that the prospect of a court's invalidating the dismissal order gives rise to merely "speculative," "hypothetical" harms. FEC Br. 21. Even though an adverse judgment would extinguish the dismissal order, the Commission says, there is no guarantee that the Commission would ultimately file a full-blown civil-enforcement suit against Crossroads GPS. FEC Br. 24-25. Because the agency could conceivably vote to dismiss the proceeding again on other grounds, the FEC asserts that Crossroads GPS will suffer no injury if the agency loses this case.

That is incorrect. Even if an adverse judgment would not command the precise enforcement route the Commission must take, such a judgment would immediately extinguish the current barrier to enforcement. It would also limit the

Commission's discretion going forward. (The Commission could not, for example, simply vote to dismiss again on the same grounds.) Whatever the end result of any renewed proceeding, Crossroads GPS thus has a concrete stake in the final agency action now in place.

In fact, the Supreme Court said exactly that in *Clinton v. City of New York*, 524 U.S. 417 (1998). "Even if the outcome of the second trial is speculative," the Court reasoned, the reversal of "a favorable final judgment" "causes a significant immediate injury" to its beneficiary. *Id.* at 430-31. Five days later, this Court echoed that same rationale in *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998), holding that an association had standing to intervene in defense of a challenged agency rule. Because the association's members were "directly subject to the challenged Rule, and they benefit from the [agency's] . . . interpretation," they would "suffer concrete injury if the court grants the relief the petitioners seek." *Id.* at 954; *cf. Alt. Research & Dev. Found. v. Veneman*, 262 F.3d 406, 411 (D.C. Cir. 2001) (per curiam) (holding that applicant's interest would not be impaired when litigation did not overturn beneficial rule but simply obliged agency to start new rulemaking proceeding).

The FEC has no answer to these common-sense applications of Article III. In response to *Clinton*, the Commission offers only that the decision addressed standing for plaintiffs, not defendants. FEC Br. 34. But that point in no way

lessens *Clinton*'s force, for this Court often looks to plaintiff-oriented authority in determining whether intervenor-defendants have standing. *E.g.*, *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003); *Fund for Animals, Inc.*, 322 F.3d at 733; *accord* FEC Br. 22, 23, 36 (same). And the FEC's interpretation of *Military Toxics Project* is simply wrong. The Commission reads that decision's black-letter analysis of associational standing to mean that interested parties cannot intervene "in support of [an] agency," FEC Br. 35, when the Court actually said the opposite, 146 F.3d at 954 (holding that association "has standing to intervene on their [its members'] behalf in support of the EPA").

Moreover, it is no answer to say that Crossroads GPS's injury would not be "traceable" to an adverse judgment because any reopened proceeding might result in another dismissal. *See* FEC Br. 24-25. The Supreme Court rejected that precise theory in *FEC v. Akins*, 524 U.S. 11 (1998), another Section 30109(a)(8) case. Granted, *Akins* addressed standing for "complainant-plaintiffs," FEC Br. 34, but standing for respondent-defendants is simply the reverse side of the same coin. Just as Public Citizen has a cognizable interest in vacating the dismissal order, so Crossroads GPS has a cognizable interest in sustaining it. And the threat to that interest 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'" in this

case. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir 1980) (citation omitted).

3. The FEC's flagship authority, *Deutsche Bank National Trust Co. v. FDIC*, only highlights the immediacy of Crossroads GPS's injury. FEC Br. 25-26. In that case, senior note-holders in a failed bank sought to intervene in litigation brought against the bank's receiver. The note-holders claimed an "economic interest" in the receivership funds, and that interest might have been threatened if the courts were to find, first, that the receiver had retained the underlying liability at issue and, second, that the receiver was actually liable. 717 F.3d at 193. That "conjectural" harm has little in common with the circumstances here. Again, a judgment against the FEC will immediately cancel the order exonerating Crossroads GPS of charges that it violated federal law. There are no other contingencies in play, and Crossroads GPS assuredly has standing to be heard on whether it is to be stripped of its dismissal order. *Cf. Akins*, 524 U.S. at 25 (likening vacatur of dismissal order to "mistrial").

Democratic Senatorial Campaign Committee v. FEC, 918 F. Supp. 1 (D.D.C. 1994), also cited by the Commission, does not counsel otherwise. In the Commission's view, *Democratic Senatorial Campaign Committee* "demonstrates the absence of causation and redressability" in this case. FEC Br. 37-38. But in truth, the decision makes no mention of standing. *See* 918 F. Supp. at 1-5. There,

an administrative respondent sought to intervene in a Section 30109 suit only after the court had "directed the [FEC] to initiate enforcement proceedings . . . ." *Id.* at 4. In a two-sentence coda, the court denied intervention as untimely and also noted that the respondent had sought to inject "the constitutionality of the Federal Election Campaign Act" into the case, a claim that would not have been "ripe." *Id.* at 4-5.

Neither consideration obtains here. The FEC has not contested the timeliness of Crossroads GPS's request to intervene. Nor is ripeness in dispute; at this stage, Crossroads GPS takes no issue with the constitutionality of the relevant laws. Instead, as it has said time and again, Crossroads GPS seeks merely to supplement the defense of the existing dismissal order. *See, e.g.*, J.A. 215-221; Crossroads GPS Reply in Supp. of Intervention 8-9 (Dist. Ct. Dkt. 16); Crossroads GPS Reply in Supp. of Mot. to Stay 7 n.2 (Doc. #1515542). Nothing in the FEC's supporting authority disfavors that intuitively just outcome.[1]

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[1] Nor has the FEC cited any other instructive instances of a court's denying intervention in this type of proceeding. For example, while the Commission claims that "administrative respondents . . . have consistently failed to intervene in these Section 30109(a)(8) actions," FEC Br. 37, each of the denials it cited below involved either mootness or apparent oversight. *See* FEC Opp. to Intervention 7 n.1 (Dist. Ct. Dkt. 14). Likewise, while the FEC may be right that "for the past three decades" there is no record of administrative respondents' intervening in Section 30109 cases, FEC Br. 16, the Commission ignores that this Court allowed just that in 1980—three decades and four years ago. *Democratic Senatorial Campaign Comm. v. FEC,* 660 F.2d 773, 776 & n.19 (D.C. Cir. 1980) (per

4. The Commission's residual arguments are equally unpersuasive. *First*, whatever harms might result from an adverse judgment, the FEC complains that Crossroads GPS has not shown "how likely" it is that Public Citizen will win such a judgment. FEC Br. 23-24, 27. Yet the FEC points to no instance where the courts have required an intervenor-defendant to play devil's advocate as the price of admission. Not surprisingly, Circuit precedent points in the opposite direction. For standing purposes, it is enough that the plaintiff seeks relief that, if granted, would injure the prospective intervenor. In *Fund for Animals, Inc.*, for example, this Court held that a prospective intervenor had standing when "the regulatory action . . . that the [plaintiff] seeks in the underlying lawsuit" would visit "a concrete and imminent injury" on the outsider. 322 F.3d at 733. The Court undertook no analysis of the odds that the plaintiff would actually prevail.

Nor is it even clear how the FEC's "play within a play" would operate in practice. Would a prospective intervenor-defendant submit an affidavit commending the merits of its putative opponent's claims? How likely must an adverse judgment be before the intervenor has standing to be heard? Should the calculus incorporate a sliding scale, with a lower risk of an adverse judgment sufficing when the quantum of potential injury is greater? Most importantly, how

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curiam), *rev'd on other grounds*, 454 U.S. 27 (1981). The FEC does not explain its convenient choice of "three decades" to make its claim.

are the courts to handle this sort of analysis—especially in cases like this one, where Crossroads GPS sought to intervene before the named defendant had even entered an appearance?

The FEC's argument raises all these questions, and more, but without offering any answers. The correct approach is much simpler. "Where a party seeks to intervene as a defendant in order to uphold or defend agency action," it is enough that the applicant establishes "(a) that it would suffer a concrete injury-in-fact if the action were to be set aside, (b) that the injury would be fairly traceable to the setting aside of the agency action, and (c) that the alleged injury would be prevented if the agency action were to be upheld." *Wildearth Guardians*, 272 F.R.D. at 13; *see also Fund for Animals, Inc.*, 322 F.3d at 733; *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001). As discussed, Crossroads GPS easily meets these elements, and Article III requires nothing more.

Second, the FEC claims that Crossroads GPS would suffer no injury from losing the dismissal order because the organization's participation in the renewed enforcement proceeding would be "voluntary." FEC Br. 36; *see also id.* 27. Even looking past the faulty premise that targets of federal regulators voluntarily enter into the enforcement system, the FEC's argument again misapprehends the relevant harm. An adverse judgment would immediately strip Crossroads GPS of an agency decree that protects it from any further investigation, enforcement, or

litigation at the hands of the FEC and Public Citizen. That is cognizable injury under Article III—just as the reversal of a favorable judgment would be injury to any civil or criminal defendant.

B. Crossroads GPS has prudential standing.

As interpreted by the Supreme Court, the Federal Election Campaign Act ("FECA" or "Act") appears to embody Congress's "inten[t] to authorize standing to the full limits of Article III," meaning that the Act contains no added prudential hurdle. *Citizens for Responsibility & Ethics in Washington v. FEC*, 401 F. Supp. 2d 115, 121 n.1 (D.D.C. 2005) (citing *Akins*, 524 U.S. at 19-21), *aff'd*, 475 F.3d 337 (D.C. Cir. 2007) (per curiam). In any event, as an administrative respondent, Crossroads GPS is clearly within the zone of interests to be protected or regulated by the Act's enforcement provisions. The FEC all but agrees, remarking that Section 30109 is "purposely designed to ensure fairness . . . to respondents," like Crossroads GPS. FEC Br. 4 (quoting *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam)).

The Commission nonetheless says that Crossroads GPS's interests "do not remotely fall within the zone of interests that FECA protects." FEC Br. 29. The agency's objections boil down to two points, both flawed. The FEC first contends that the Act's silence on intervention somehow "excludes" administrative

respondents from intervening in cases that affect their interests. FEC Br. 30.[2] But this presumption against Rule 24 gets the analysis backwards. "[W]hen Congress enacts legislation, it does so against a backdrop of existing law," and the courts do "not lightly presume an intent to alter a Federal Rule of Civil Procedure where such an intent is not explicit." *B.L. Through Lax v. District of Columbia*, 517 F. Supp. 2d 57, 62-63 (D.D.C. 2007); *see also Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 127-29 (D.C. Cir. 1972) (applying Rule 24 when there is "no evidence reflecting a legislative purpose inimical to intervention"); *Textile Workers Union of Am., CIO v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955) (en banc); *accord SEC v. Flight Transp. Corp.*, 699 F.2d 943, 950 (8th Cir. 1983). Indeed, as Crossroads GPS has already explained, the relevant provisions of Rule 24 attach only when the substantive statute does not otherwise address intervention. Crossroads GPS Br. 24; Fed. R. Civ. P. 24(a)(2), (b)(1)(B).

The FEC's real complaint appears to be that Crossroads GPS might "pursu[e] an appeal" from an adverse judgment while the agency would fail to muster the votes to do so in its own right. FEC Br. 31. Such an appeal, the Commission fears, would outstrip this Court's jurisdiction under 28 U.S.C. § 1291.

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[2] The FECA, as amended by the Bipartisan Campaign Reform Act of 2002, provides a special rule for "[i]ntervention by Members of Congress" in cases involving the Act's constitutionality. Pub. L. 107-155, 116 Stat. 114 (52 U.S.C. § 30110 note). That provision is not relevant here.

FEC Br. 32 ("[A] remand to the Commission in this case would not be appealable by the intervenor . . . because it would not constitute a 'final decision.'" (emphasis omitted)).

The Commission's view on appeal-rights is suspect at best; for example, Section 30109(a)(9) provides broadly that "[a]ny judgment of a district court under this subsection may be appealed to the court of appeals . . . ." 52 U.S.C. § 30109(a)(9). More importantly, the issue is beside the point here. A district court cannot deny intervention under Rule 24 simply because the applicant would be unable to invoke appellate jurisdiction at a later stage in the case.[3] Rather, it is the "federal appellate court" that has the "special obligation to satisfy itself . . . of its own jurisdiction," *Sherrod v. Breitbart*, 720 F.3d 932, 938 (D.C. Cir. 2013) (emphasis added)—and then only when the question is properly before it. Thus, in *Smoke v. Norton*, this Court reversed a denial of intervention while consciously declining to address whether the merits judgment would ultimately be appealable. 252 F.3d 468, 470 n.* (D.C. Cir. 2001). The same reasoning applies here. Whether or not Crossroads GPS could appeal a later judgment, it certainly has a right to be heard in the district court.

[3] A narrow exception may apply when a non-party seeks to intervene solely for purposes of appeal, a question that is not at issue here. *See Smoke v. Norton*, 252 F.3d 468, 472 (D.C. Cir. 2001) (Henderson, J., concurring).

The FEC's related request that the Court preemptively "limit [Crossroads GPS's] participation to reflect its lack of appeal rights" is equally misconceived. FEC Br. 33. In effect, the FEC seeks an advisory opinion on whether this Court would have appellate jurisdiction over future district-court rulings. There is no warrant for such an anticipatory decision, which itself would break faith with the limited role of the federal courts under Article III. *See Chamber of Commerce of United States v. EPA*, 642 F.3d 192, 211 (D.C. Cir. 2011) (citation omitted) (federal courts must "avoid advisory opinions on abstract questions of law").

C. Under this Court's interpretation of Rule 24, the FEC does not adequately represent Crossroads GPS's interests.[4]

Having discounted Crossroads GPS's interests as "hypothetical," "speculative," and "imagine[d]," FEC Br. 17, 20, 21, 23, 25, 26, 27, 30, 42, the FEC devotes the rest of its brief to pledging that it will adequately represent those interests. This discrepancy is grounds enough for concern, as a majority of the full Court remarked in *Allendale Co.*, 226 F.2d at 768; *see also Fund for Animals, Inc.*, 322 F.3d at 735 (an applicant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee")

[4] The FEC suggests that the other three elements in Rule 24(a) are still up for grabs. FEC Opp. 45 n.7. But timeliness has never been disputed, and an outsider with standing necessarily has "an interest relating to the property or transaction that is the subject of the action." *See* Crossroads GPS Br. 26. As to the third element—that the interest be "impaired" by an adverse judgment—the FEC's arguments are simply a rehash of its objections to standing. FEC Opp. 39-42.

(emphasis added; citation omitted). The district court's ruling to the contrary amounted to reversible error, and the FEC's three supporting arguments do not rehabilitate that decision.

1. As a starting point, the Commission insists that this Court does not look skeptically on governments' serving as advocates for private outsiders. FEC Br. 45. But the FEC is swimming upstream. In all cases, the burden of showing inadequacy of representation "should be treated as minimal." *Fund for Animals, Inc.*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). And this Court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors," *id.* at 736, including in cases, like this one, that involve "narrow" review of agency actions, FEC Br. 45; *see Fund for Animals, Inc.*, 322 F.3d at 730 (ordering intervention in judicial review of the Fish and Wildlife Service's designation of argali sheep); *cf. Military Toxics Project*, 146 F.3d at 954 (granting intervention on an appeal challenging an agency rule as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

2. The Commission next tries to insulate the district-court decision by framing it as a fact-bound exercise. FEC Br. 44. This understates the breadth of the court's ruling. According to the district court, it is enough that the FEC and Crossroads GPS are "aligned" in their high-level desire to dismiss the

complainants' suit. J.A. 236. Far from being "explicitly based on the circumstances of this case," FEC Br. 44, this analysis would bar intervention in every Section 30109 case. Tellingly, the Commission fails to identify a single Section 30109 proceeding where the district court's decision would allow for a different result.

Moreover, by treating general "align[ment]" as dispositive, the district court broke with more than a half-century of Circuit and Supreme Court precedent. In *International Union v. Scofield*, for example, the Supreme Court reversed a denial of intervention under a similar judicial-review regime, noting that the result would be the same "[u]nder Rule 24(a)(2) or Rule 24(b)(2)" more broadly. 382 U.S. 205, 217 n.10 (1965). Before that, in *Allendale Co.*, this Court held that "[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]." 226 F.2d at 768. In *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), this Court again stressed that "[e]ven 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)," *id.* at 912. More recently, in *Fund for Animals, Inc.*, the Court reversed a denial of intervention even though the defendant federal agency and the prospective intervenor undisputedly "agree[d] that the [agency's] current rules and practices

are lawful." 322 F.3d at 736; *see also Am. Tel. & Tel. Co.*, 642 F.2d at 1293; *Cal. Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43, 47 (D.D.C. 2012); *Wildearth Guardians*, 272 F.R.D. at 13; *Am. Horse Prot. Ass'n*, 200 F.R.D. at 156.

Under the district court's analysis, *Scofield*, *Allendale Co.*, *Costle*, and *Fund for Animals, Inc.* would have been affirmances, not reversals. And notwithstanding its exhaustive recitation of the facts of these cases, FEC Br. 47-51, the FEC fails to reconcile those decisions with the district court's ruling here. Most notably, the Commission dismisses *Scofield* by saying that "'Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings'" whereas "Congress expressed no such intent" in the FECA. FEC Br. 49 (quoting *Scofield*, 382 U.S. at 208; emphasis omitted). But this is hardly a fair account. Just like the FECA, the National Labor Relations Act "is silent on the intervention problem," *Scofield*, 382 U.S. at 209, meaning that the FEC's supposed distinction is more a striking similarity.

Not only that, intervention in Section 30109 proceedings follows almost *a fortiori* from *Scofield*. Because *Scofield* involved intervention at the appellate level, no procedural rule offered a default framework to guide intervention. *See id.*[5] "Lacking a clear directive on the subject," the Supreme Court was thus

[5] *Scofield* predated the Federal Rules of Appellate Procedure (1967), which, in any event, do not contain any comprehensive standard for intervention in the courts

obliged to draw on "the statutory design of the [Labor] Act" and "helpful analogies" to Rule 24. *Id.* at 210, 217-18 & n.11. Here, by contrast, the Court can—and should—presume that Congress enacted Section 30109(a)(8) intending that the Federal Rules of Civil Procedure would control the litigation. *See supra* 10-11.

At base, the district court's reason for denying intervention—Crossroads GPS's general "align[ment]" with the FEC—departed from nearly sixty years of precedent. And the rare cases in which this Court has allowed the government to speak for private interests do not suggest otherwise. The FEC cites a grand total of three intra-Circuit decisions. In two, the government was akin to a *parens patriae* litigant, and the interests of the prospective intervenors were subsumed within those of the government. *See Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 194 (government as FDIC receiver) (dictum); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 781, 781 (D.C. Cir. 1997) (government as antitrust plaintiff). In the third decision, the Court denied intervention only after affirming the underlying final judgment on the merits—an outcome seemingly based on the Court's after-the-fact review of the cumulative arguments pressed by the applicant as amicus curiae. *Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275,

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of appeals. *See, e.g.*, *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985); Fed. R. App. P. 15(d).

1282 (D.C. Cir. 1994). However the FEC slices it, the district court's decision does not fit with Circuit law, and disregarding controlling authority is not a permissible exercise of discretion. *See McKesson Corp. v. Islamic Republic of Iran*, 753 F.3d 239, 242 (D.C. Cir. 2014).

3. Because it saw high-level "align[ment]" as enough to deny intervention, the district court all but ignored the features of this case that give a "legitimate basis for concern over the adequacy of the representation of [Crossroads GPS's] interests." *Safari Club Int'l v. Salazar*, 281 F.R.D. 32, 42 (D.D.C. 2012). For its part, the FEC tries to wish away these concerns. For example, the Commission minimizes the significance of the agency's near-miss vote to even appear in this case, FEC Br. 52-53, even though three Commissioners saw this effort to "derail longstanding Commission practice" as momentous enough to merit a formal statement.[6]

In similar vein, the FEC simply dismisses Crossroads GPS's concern about the arguably incomplete administrative record, saying, "[i]t is unclear why Crossroads finds this 'troubling.'" FEC Br. 53. But the grounds for concern are obvious and have been articulated by the very Commissioners whose views are

[6] 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

supposed to embody the FEC's position in this case. J.A. 187-190. If, as the controlling Commissioners say, the redacted report "should have been publicly released . . . as part of the administrative record . . . ," J.A. 188, that is all the more reason for Crossroads GPS to intervene and put the issue before the district court.

Like the district court, J.A. 236, the FEC falls back on its history of defending Section 30109 suits as promise enough that it will adequately represent Crossroads GPS. FEC Br. 51. Unless Crossroads GPS can point to a breach of the Rules of Professional Conduct or other "representational deficiencies . . . in the past," the Commission argues, adequacy of representation should be taken for granted. FEC Br. 51-52.

Once again, this raises the bar too high. This Court has never required a prospective intervenor to attack the integrity of existing parties. In fact, the Court expressly disclaimed such a requirement in an analogous labor case. "Even if the Secretary [of Labor] is performing his duties, broadly conceived, as well as can be expected, the union member [seeking to intervene] may have a valid complaint about the performance of 'his lawyer.'" *Hodgson*, 473 F.2d at 130; *see also Wilderness Soc'y v. Morton*, 463 F.2d 1261, 1262 (D.C. Cir. 1972) (similar); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (en banc) ("It is not necessary to accuse the board of bad faith . . . .").

This case is similar. Public Citizen urges an interpretation of the FEC's organic statute that, if accepted by the courts, would expand the universe of private actors subject to FEC jurisdiction. "Without calling the good faith of [the Commission] into question in any way," Crossroads GPS "may well have honest disagreements with [the FEC] on legal and factual matters" related to such an intrinsically government-friendly claim. *See Costle*, 561 F.2d at 912. The parties clearly disagree on the scope of the administrative record, for instance, and the FEC already seems to anticipate fundamental differences in post-judgment strategy, FEC Br. 31; *see also* Crossroads GPS Reply in Supp. of Mot. to Stay 7 n.2 (Doc. #1515542) (noting Crossroads GPS's interest in developing arguments based on constitutional-avoidance principles). The added fact that Public Citizen's theory of the case builds on Commission counsel's own legal interpretations only compounds the problem. *See generally* Daniel A. Lyons, *Tethering the Administrative State: The Case Against* Chevron *Deference for FCC Jurisdictional Claims*, 36 J. Corp. L. 823, 845 (2011) ("The hydraulic pressure of each branch of government to exceed the outer limits of its power is no less strong within agencies than in other areas of government and must be patrolled just as carefully.").

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

The district court committed a second reversible error when it concluded that permissive intervention would have deprived it of subject-matter jurisdiction. If it does not reverse the district court's denial of intervention as of right, this Court should exercise its power to review and correct the denial of permissive intervention.

A. As discussed in Crossroads GPS's opening brief (at 41-43), permissive intervention would not have divested the district court of jurisdiction. For intervention purposes, the requirement of an independent basis of jurisdiction arises almost exclusively in diversity cases, not federal-question cases. It follows from a "concern that intervention might be used to enlarge inappropriately the jurisdiction of the district courts," which naturally "manifests itself most concretely in diversity cases." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). Thus, it is black-letter law that "[i]n federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant . . . ." 7C Charles Alan Wright et al., Federal Practice and Procedure § 1917, at 601 (3d ed. 2007); *see also EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) ("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."); *Geithner*, 644 F.3d at 844 ("We . . . clarify that the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.").[7]

The FEC addresses none of this. It notes that *National Children's Center* involved intervention for purposes of obtaining confidential documents. FEC Br. 56-57. But it does not explain why this fact undercuts the broader jurisdictional point. Equally puzzling, the Commission ascribes great weight to the fact that the "FECA permits administrative complainants to sue the Commission." FEC Br. 57 (emphasis omitted). Again, though, it fails to explain why this statutory right translates to a jurisdictional bar against intervention by respondents. *See supra* 10-11. Crossroads GPS obviously does not seek to "avail itself" of a cause of action against the FEC. FEC Br. 57. But "[a]s [a] defendant[]," Crossroads GPS "would be subject to claims . . . 'arising under' the laws of the United States." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007). Nothing more is needed.

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[7] The Ninth Circuit's reasoning in *Geithner* is particularly instructive because this Court's primary analysis of the requirement for "an independent basis for jurisdiction" drew on Ninth Circuit authority. *Compare Nat'l Children's Ctr., Inc.*, 146 F.3d at 1046 (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)), *with Geithner*, 644 F.3d 844 (citing *Beckman Industries* for the proposition that "[t]he jurisdictional requirement . . . prevents the enlargement of federal jurisdiction . . . only where a proposed intervenor seeks to bring new state-law claims").

The district court's contrary decision "misapprehended the underlying substantive law," "did not apply the correct legal standard," and calls for correction. *McKesson Corp.*, 753 F.3d at 242.

B. Because it decided the matter on jurisdictional grounds, the district court failed to address the added considerations in Rule 24(b)—whether Crossroads GPS asserts "a claim or defense that shares with the main action a common question of law or fact" and whether intervention would "unduly delay or prejudice" the proceedings. Fed. R. Civ. P. 24(b)(1)(B), (b)(3). Since these factors clearly point toward intervention here, efficiency favors simply ordering intervention now. *See Fund for Animals, Inc.*, 322 F.3d at 737; *see also* Crossroads GPS Br. 43-44 n.10 (collecting authority).

Circuit precedent confirms that Crossroads GPS has a defense "that shares with the main action a common question of law or fact." Crossroads GPS Br. 40. The lone decision invoked by the FEC only underscores this point. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), makes clear that Rule 24(b) covers those defenses "that can be raised in courts of law as part of an actual or impending lawsuit," *id.* at 623 n.18 (citation omitted), and Crossroads GPS seeks to do just that. *See, e.g.*, *Van Antwerp*, 523 F. Supp. 2d at 10.

In addition, permissive intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The FEC

complains that Crossroads GPS would press arguments "beyond the arguments the Commission will make." FEC Br. 59. But the whole point of intervention is to allow interested non-parties to present their distinct perspectives. *See, e.g.*, *Usery v. Int'l Bhd. of Teamsters*, 543 F.2d 369, 384 n.38 (D.C. Cir. 1976). Equally unfounded is the Commission's concern that Crossroads GPS would expand the case beyond the claims now before the district court. FEC Br. 59 (suggesting that Crossroads GPS will try to litigate its tax status). As Crossroads GPS has made clear before, it "wants to defend and preserve the Commission's dismissal of MUR 6396─nothing less, nothing more." Crossroads GPS Reply Br. in Supp. of Intervention 17 (Dist. Ct. Dkt. 16).

Finally, amicus participation is not the answer. FEC Br. 54, 55. This Court has made clear that "relegat[ion] to the status of amicus curiae" is "not an adequate substitute for participation as a party." *Nuesse v. Camp*, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967); *see also Reich*, 40 F.3d at 1282 (denying intervention seemingly because applicant had appeared as amicus). Crossroads GPS will be uniquely and tangibly affected by the outcome of this case—more so than even the plaintiffs themselves. *Cf. Akins*, 524 U.S. at 24. Basic principles of fairness favor giving Crossroads GPS the opportunity to make its case as a full party litigant.

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.

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December 19, 2014

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)(ii) because it contains 6,006 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: December 19, 2014

/s/ Thomas W. Kirby
Thomas W. Kirby

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 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.

/s/ Thomas W. Kirby
Thomas W. Kirby