ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2015

No. 14-5199

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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December 10, 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, et al. Plaintiffs-Appellees, CROSSROADS GRASSROOTS POLICY STRATEGIES, Movant-Appellant, v. FEDERAL ELECTION COMMISSION, Defendant-Appellee.	)	No. 14-5199 CERTIFICATE AS TO PARTIES, RULINGS, & RELATED CASES

APPELLEE FEDERAL ELECTION COMMISSION'S
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Order of August 18, 2014, and D.C. Cir. R. 28(a)(1), appellee Federal Election Commission ("Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici***. Public Citizen, Craig Holman, Protectourelections.org, and Kevin Zeese, are the plaintiffs in the district court. The Commission is the defendant in the district court and is the appellee in this Court. Crossroads Grassroots Policy Strategies was a movant before the district court and is the appellant in this Court.

(B) ***Rulings Under Review***. Crossroads Grassroots Policy Strategies appeals the August 11, 2014, order of the United States District Court for the District of Columbia (Leon, J.) denying its motion to intervene.

(C) ***Related Cases***. The Commission knows of no related cases.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

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

Statutes and Regulations

Miscellaneous

GLOSSARY

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix
APA	Administrative Procedure Act

COUNTERSTATEMENT OF JURISDICTION

The district court has jurisdiction over this action under 52 U.S.C. § 30109(a)(8) and 28 U.S.C. § 1331. It denied Crossroads Grassroots Policy Strategies's ("Crossroads") motion to intervene as a defendant on August 11, 2014. (Joint Appendix ("JA") 233-37.) This Court has jurisdiction to hear Crossroads's appeal of the district court's decision denying its request to intervene as of right. *Alt. Research & Dev. Found. v. Veneman*, 262 F.3d 406, 409 (D.C. Cir. 2001) (per curiam).

As to Crossroads's appeal of the district court's denial of permissive intervention, which "is not normally appealable in itself," this Court "may exercise [its] pendent appellate jurisdiction to reach questions that are inextricably intertwined with ones over which [it has] direct jurisdiction." *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000) (internal quotation marks omitted).

COUNTERSTATEMENT OF THE ISSUES

Whether the district court's denial of Crossroads's motion to intervene should be affirmed because (1) Crossroads lacks Article III and prudential standing, and (2) Crossroads does not meet the requirements for intervention, either permissive or as of right, including for the reason that the FEC adequately

represents any interest Crossroads may have in defending the legality of the FEC's dismissal decision.

STATUTES AND RULES

The relevant provisions are set forth in the Corrected Opening Brief for Appellant Crossroads Grassroots Policy Strategies ("Crossroads Br."), at 2-3, and supplemented herein in the attached addendum.

COUNTERSTATEMENT OF THE CASE

The case before the district court presents the narrow question of whether the Federal Election Commission's ("FEC" or "Commission") reasons for dismissing an administrative complaint that plaintiff Public Citizen and others filed with the FEC concerning Crossroads were contrary to law. The administrative complaint alleged that Crossroads had violated the Federal Election Campaign Act ("FECA" or "Act") by not registering with the FEC as a "political committee" and failing to comply with the reporting obligations that apply to such groups. Because three of the FEC's six Commissioners voted against finding "reason to believe" that Crossroads had violated FECA, the agency closed its file on the matter and thereby dismissed the administrative complaint. The Commission is defending the reasons for the dismissal, which are set forth in a lengthy statement. The case is being resolved by the district court on cross-motions for summary judgment.

Crossroads appeals the district court's denial of its motion to intervene as a defendant, either as of right or permissively. Crossroads seeks to litigate issues beyond the narrow question of whether the FEC's dismissal was contrary to law. In denying Crossroads's intervention motion, the district court concluded that the interest upon which Crossroads had standing to participate was extremely narrow, but that, with respect to that interest, Crossroads lacked any right to intervene because it is adequately represented by the FEC. (JA 233-37.) The district court further denied Crossroads's request to intervene permissively because it failed to establish "an independent ground for subject matter jurisdiction, which ordinarily is required for permissive intervention." (JA 237 n.3.)

COUNTERSTATEMENT OF THE FACTS

I. REGULATORY BACKGROUND

A. The Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA and other federal campaign-finance statutes. Congress authorized the Commission to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1) (formerly 2 U.S.C. § 437c(b)(1)),[1] "to make, amend, and repeal such rules . . . as are necessary

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. To avoid confusion, this submission will indicate in parentheses the former Title 2 citations.

to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8) (§§ 437d(a)(8), 438(a)(8)), and to investigate possible violations of the Act, *id.* §§ 30109(a)(1)-(2) (§§ 437g(a)(1)-(2)). The FEC has exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6) (§§ 437c(b)(1), 437g(a)(6)). By statute, no more than three of the FEC's members "may be affiliated with the same political party." *Id.* § 30106(a)(1) (§ 437c(a)(1)).

B. FECA's Administrative Enforcement Process

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. *Id.* § 30109(a)(1) (§ 437g(a)(1)); *see also* 11 C.F.R. § 111.4. The filing of an administrative complaint with the FEC triggers detailed statutory enforcement "procedures purposely designed to ensure fairness . . . to respondents," *i.e.*, the subjects of such complaints. *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam); *see* 52 U.S.C. § 30109 (2 U.S.C. § 437g). The matter remains confidential until it is resolved. 52 U.S.C. § 30109(a)(12) (2 U.S.C. § 437g(a)(12)). Initially, the Commission notifies the respondent and provides that person with an opportunity to respond in writing to the allegations in the complaint. *Id.* § 30109(a)(1) (§ 437g(a)(1)); 11 C.F.R. § 111.6. The only action the FEC may take before the respondent is given an opportunity to submit a response is to dismiss the complaint. *Id.* Nevertheless,

"[r]espondents are not required to respond to the allegations." FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* at 10 (May 2012) ("FEC *Guidebook*"), http://www.fec.gov/em/respondent_guide.pdf; *see also* H. Rep. No. 96-422, 96th Cong., 1st Sess. at 20 (1979) ("the respondent is under no obligation" to show "that no action should be taken against him or her").

After reviewing the complaint and any response, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2) (2 U.S.C. § 437g(a)(2)). A reason-to-believe determination is a threshold requirement to proceed with an FEC investigation. The FEC may not find such reason to believe (or pursue an investigation) unless at least four of the FEC's six Commissioners vote in favor of such a finding. *Id.* If the agency does not find reason to believe, it closes its file, thus dismissing the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2) (§§ 437c(c), 437g(a)(2)).[2]

If the Commission votes to find reason to believe, it may authorize its staff to investigate the allegations or to pursue a negotiated settlement with the respondent in advance of further briefing, referred to as "pre-probable cause conciliation." FEC *Guidebook* at 12; 11 C.F.R. § 111.18(d). If the matter remains

[2] The FEC found reason to believe a violation had occurred in 42 of 120 enforcement matters closed and placed on the public record in the agency's 2013 fiscal year (which began on October 1). The FEC found reason to believe in 19 of 79 matters closed and made public in the 2014 fiscal year. FEC, *Enforcement Query System, Additional Search Options*, http://eqs.fec.gov/eqs/searcheqs?SUBMIT=advance.

unresolved, the Commission must then determine whether there is "probable cause" to believe that FECA has been violated. 52 U.S.C. § 30109(a)(4)(A)(i) (2 U.S.C. § 437g(a)(4)(A)(i)). Like a reason-to-believe determination, a determination to find probable cause that a violation of FECA has occurred requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i) (§§ 437c(c), 437g(a)(4)(A)(i)). Before the Commission votes on whether there is probable cause, it must provide the respondent with "a brief . . . on the legal and factual issues of the case," and again provide the respondent with an opportunity to submit its own brief. *Id.* § 30109(a)(3) (§ 437g(a)(3)). Again, a respondent is not required to submit anything. The Commission considers these briefs before voting on whether to find probable cause. *Id.*

If the Commission finds that there is probable cause concerning a violation of the Act, it is then statutorily required to attempt to remedy the violation informally by attempting to reach a conciliation agreement with the respondent. *Id.* §§ 30106(c), 30109(a)(4)(A)(i) (§§ 437c(c), 437g(a)(4)(A)(i)). The Commission's assent to a conciliation agreement requires an affirmative vote of at least four Commissioners and such an agreement, unless violated, operates as a bar to any further action by the Commission related to the violation underlying that agreement. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes the agency to institute a de novo civil enforcement action in

federal district court. *Id.* § 30109(a)(6)(A) (§ 437g(a)(6)(A)). The institution of a civil action under section 30109(a)(6)(A), like the other steps in the FEC's administrative enforcement process, requires an affirmative vote of at least four Commissioners. *Id.*; *see also id.* § 30106(c) (§ 437c(c)).

C. Judicial Review and Remedy

If, at any point in the administrative process, the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason, the administrative complainant may file suit against the Commission in the United States District Court for the District of Columbia to obtain review of the Commission's dismissal. *Id.* § 30109(a)(8)(A) (§ 437g(a)(8)(A)). Reviewable matters include instances, as here, in which "the Commission deadlocks 3-3 and so dismisses a complaint." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8)]."). In such split-vote cases, in order "to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Id.* at 1476.

As this Court has explained, judicial review in an action brought pursuant to section 30109(a)(8)(A) is "limited": "[T]he Commission's dismissal of a complaint should be reversed only if contrary to law. Thus, in resolving questions involving the FEC's construction of the Act, our task is . . . [only to determine] whether the Commission's construction [is] sufficiently reasonable to be accepted." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 39 (1981) ("*DSCC*")) (citations and internal quotation marks omitted); 52 U.S.C. § 30109(a)(8)(C) (2 U.S.C. § 437g(a)(8)(C)) (setting "contrary to law" standard of review). The standard is "'extremely deferential,'" and the FEC's dismissal cannot be disturbed unless it was based on an "impermissible interpretation of the Act . . . [or] was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161, 167 (D.C. Cir. 1986).

"[A] reviewing court is 'not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court.'" *Akins v. FEC*, 736 F. Supp. 2d 9, 16-17 (D.D.C. 2010) (quoting *DSCC*, 454 U.S. at 39). "'To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached' on its own." *Id.* (quoting *DSCC*, 454 U.S. at 39). By providing in FECA that it takes

four Commissioner votes to proceed on an enforcement matter, but only three to dismiss, Congress sought to ensure that the "inherently bipartisan" FEC, *DSCC*, 454 U.S. at 37, would not "provide room for partisan misuse." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976).

FECA provides that if a court declares the Commission's dismissal "contrary to law," it can order the Commission to "conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C) (§ 437g(a)(8)(C)). Such an order to does not (and cannot) mandate a different outcome on remand, because the Commission may reach the same outcome based on a different rationale. *FEC v. Akins*, 524 U.S. 11, 25 (1998) (explaining that on remand, the Commission "might later, in the exercise of its lawful discretion, reach the same result for a different reason" (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943))); *see, e.g.*, *La Botz v. FEC*, 889 F. Supp. 2d 51, 63 n.6 (D.D.C. 2012) (noting that a determination that an FEC dismissal was contrary to law does not mean "that the FEC is required to reach a different conclusion on remand").

If a court declares that an FEC administrative complaint dismissal was contrary to law and the agency fails to conform, FECA permits the administrative complainant to bring "a civil action to remedy the violation involved in the original [administrative] complaint." 52 U.S.C. § 30109(a)(8)(C) (§ 437g(a)(8)(C)); *see FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985)

("*NCPAC*") (explaining that administrative complainants may bring a civil action directly against the respondents "[i]f, and only if, the FEC failed to obey . . . an order" to conform with a judicial declaration that an administrative dismissal was contrary to law). Counsel for the FEC are aware of only one attempt to make use of that provision during the 40-year history of FECA and dozens of section 30109(a)(8) cases. There, the proceedings were initially stayed and resulted in stipulated dismissal before substantive briefing. *See Democratic Senatorial Campaign Comm. v. Nat'l Republican Senatorial Comm.*, No. 97-1493 (D.D.C. Feb. 16, 2000) (Docket No. 12); *see also* 23 Record No. 10 at 1-2 (Oct. 1997), http://www.fec.gov/pdf/record/1997/oct97.pdf (summarizing initial stages of direct-action lawsuit); *compare* FEC's Opp'n to Crossroads's Mot. to Intervene at 25 (Dist. Ct. Docket No. 14) ("FEC Intervention Opp'n") (collecting section 30109(a)(8) cases).

II. FACTUAL BACKGROUND

A. The Parties

The FEC is the independent agency with "exclusive jurisdiction with respect to the civil enforcement" of FECA. 52 U.S.C. § 30106(b)(1) (2 U.S.C. §§ 437c(b)(1)); *see supra* pp. 3-4.

Plaintiffs Public Citizen, Craig Holman, ProtectOurElections.org, and Kevin Zeese (collectively "Public Citizen") are entities and individuals that claim an

interest in the information that FECA requires federal political committees and others to disclose to the public. (JA 171-73.)

Crossroads is a nonprofit corporation that was established in June 2010. (JA 060.) Crossroads's Articles of Incorporation and Mission Statement declare its purpose to be "'to further the common good . . . by engaging in research, education, and communication efforts regarding policy issues of national importance'" and to provide "'a road map for action'" by concerned Americans. (*Id.*)

B. Administrative Proceedings

On October 12, 2010, Public Citizen and others (collectively "Public Citizen") filed an administrative complaint alleging that Crossroads had violated FECA by "raising and spending significant amounts of money to influence the 2010 congressional elections" without complying with the organizational and reporting requirements that apply to federal "political committees." (JA 008-09).

Crossroads responded to the administrative complaint in several separate submissions. Crossroads also elected to submit to the FEC two lengthy Form 990 annual returns it had filed with the Internal Revenue Service detailing its financial activities between June 1, 2010, and December 31, 2011. (JA 061 nn.9-10.) On November 21, 2012, the FEC's Office of General Counsel submitted to the Commission its First General Counsel's Report concerning the Crossroads matter.

(JA 030-58.) This staff report recommended that the Commission find reason to believe that Crossroads violated FECA "by failing to organize, register, and report as a political committee, and that the Commission authorize an investigation." (JA 056.)[3]

In December 2013, the Commission, by a vote of 3-3, did not find reason to believe that Crossroads had violated FECA's registration and reporting requirements for political committees. (JA 233.) Vice Chair Ravel and Commissioners Walther and Weintraub voted to find reason to believe and to authorize an investigation. (JA 164.) Chairman Goodman and Commissioners Hunter and Petersen voted against finding reason to believe. (JA 060.) The Commission then voted 6-0 to close the file. (JA 233.)

On January 8, 2014, Chairman Goodman and Commissioners Hunter and Petersen issued a Statement of Reasons explaining their vote against finding reason to believe Crossroads had violated FECA. (JA 059-163.) On January 10, Vice

[3] As Crossroads observes (Crossroads Br. at 33), an earlier staff report, dated June 22, 2011, was submitted to the Commissioners but was withdrawn and replaced by the November 21, 2012 First General Counsel's Report. As explained below, that reconsidered report of staff legal recommendations is a privileged internal memorandum not properly included in an administrative record. *See infra* pp. 53-54. The document has not been "deleted" (Crossroads Br. at 9); because the Commission has not waived applicable privileges, the document has never been part of the public record. The FEC's privilege claims are currently the subject of a separate, unrelated Freedom of Information Act litigation, in which the parties' summary-judgment briefing has been fully submitted to the district court. *See Center for Competitive Politics v. FEC*, No. 14-970 (D.D.C.).

Chair Ravel and Commissioners Walther and Weintraub issued a separate statement explaining their votes to find reason to believe and authorize an investigation. (JA 164-68.) Because Chairman Goodman and Commissioners Hunter and Petersen were the Commissioners voting against a reason-to-believe finding, their "rationale necessarily states the agency's reasons for acting as it did" and they thus constitute the "controlling group" of Commissioners in the underlying judicial-review case. *NRSC*, 966 F.2d at 1476.[4]

C. Judicial Proceedings

Public Citizen and some of its administrative co-plaintiffs commenced the underlying judicial-review action on January 31, 2014. (JA 169-86.) The federal complaint seeks a declaration that the Commission's dismissal of the plaintiffs' administrative complaint was contrary to law and an order requiring the Commission to conform with such a declaration, *i.e.*, relief against the FEC in accordance with the narrow scope of judicial review under 52 U.S.C. § 30109(a)(8). The complaint describes the allegations presented to the Commission in the underlying administrative enforcement proceeding; it does not seek any relief against Crossroads in the judicial-review action.

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[4] On March 25, 2014, Chairman Goodman and Commissioners Hunter and Petersen issued a supplemental statement (JA 187-90) concerning the withdrawn staff report that had been attached to their earlier statement in redacted form (JA 088-163). *See supra* n.3 (noting the Commission's assertion of privileges related to the withdrawn report).

On April 8, 2014, following a vote to authorize defense of the Commission in this action by a bipartisan majority of Commissioners, the FEC timely answered Public Citizen's complaint (JA 222-32); it did not "barely muster[] the votes to avert default" (Crossroads Br. at 9). Public Citizen and the FEC thereafter jointly proposed, and the district court agreed, that the case be resolved on cross-motions for summary judgment, following sequential briefing. (JA 005.) Three of the four scheduled briefs, including all of Public Citizen's briefs, have been filed. (JA 005-07.)

Crossroads moved to intervene on April 4, 2014. (JA 191-211.) Although the Commission opposed the motion, it invited Crossroads to participate as an amicus curiae at that time and on a number of occasions since then. (*E.g.*, FEC Intervention Opp'n at 2; FEC's Opp'n to Crossroads's Emergency Mot. at 3 (Dist. Ct. Docket No. 26).) Crossroads has chosen not to submit an amicus brief, however, even contingently or in the interim while the court below or this Court considers its intervention request. *Compare Akins*, 524 U.S. at 16-17, 29 (remanding case without reaching merits, relying on brief filed by the administrative respondent who participated as amicus curiae). Another non-party, the Center for Competitive Politics, has filed an amicus brief in support of the Commission's dismissal.

The district court denied Crossroads's intervention motion on August 11, 2014. (JA 233-37.) The district court found that Crossroads's potential "re-exposure to an administrative complaint that previously had been decided in its favor" was a sufficient injury to confer standing, because Public Citizen's success would "likely" cause Crossroads "to expend significant resources before the FEC, again urging it to dismiss the complaint." (JA 235-36.) At the same time, the court rejected Crossroads's asserted concerns about any determination of its political-committee status or future sanctions, because, given the structure of FECA's enforcement provisions, "it does not follow that those interests would be impaired even if plaintiffs are granted the relief they seek." (JA 234 n.1.) Crossroads "does not face an imminent adverse judgment," the district court said, because the FEC would have to vote on whether to investigate and then vote again regarding a civil enforcement action. (*Id.*) The court found that "[t]his sort of potential injury is too speculative to support Article III standing." (*Id.*)

Turning to the question of intervention, the district court then concluded that Crossroads failed to satisfy the requirements of Federal Rule of Civil Procedure 24. It found that Crossroads was not entitled to intervene as of right because "the FEC and Crossroads GPS are aligned" on the single, narrow interest for which the court found that Crossroads could establish standing, and thus that "the FEC *can* adequately represent Crossroads GPS's interest at issue in this litigation." (JA

236.) In response to Crossroads's concerns about suggested conflicts for the FEC's lawyers, because FEC staff had previously recommended investigation, the district court explained that "FEC counsel have defended dismissals numerous times after recommending . . . investigat[ion]." (*Id.*) The district court also rejected Crossroads's request for permissive intervention, noting that it had failed to identify any independent ground for subject matter jurisdiction. (JA 237 n.3.)

Crossroads appealed the district court's denial of intervention and requested that proceedings in the district court be stayed pending its appeal and expedited briefing. On October 28, 2014, this Court stayed the proceedings in the district court, set a briefing schedule, and set oral argument for February 2015. (Order, Document #1519455.)

SUMMARY OF ARGUMENT

The district court's decision denying Crossroads's motion to intervene should be affirmed. Indeed, for the past three decades, no court has permitted an administrative respondent like Crossroads to intervene in an action like this one, where an administrative complainant seeks judicial review of the Commission's dismissal of its administrative complaint.

Crossroads maintains that it must intervene in this case to prevent the district court from requiring an investigation of or enforcement proceeding against it, expanding the FEC's regulatory power, determining that Crossroads broke the law,

or imposing some form of punishment on Crossroads. (Crossroads Br. at 8, 13, 16, 31, 35-36.) But the district court lacks the authority to do any of those things in the underlying judicial-review action. FECA specifies the scope and procedures for judicial review of FEC dismissals. Those agency actions must be affirmed unless the reviewing court determines that the decision was unlawful. And even then, the only available remedy is a declaration that the dismissal decision was "contrary to law" and an order requiring the Commission to "conform" to that declaration. The court cannot mandate or prohibit any conduct by Crossroads and it cannot even require a particular alternative decision by the Commission.

Crossroads thus lacks standing because this section 30109(a)(8) case does not pose any imminent injury to Crossroads, and the speculative interests Crossroads seeks to protect are neither ripe nor redressable here. Even the slight specter of injury the district court thought Crossroads *may* sustain is insufficient because it is not imminent. It is dependent upon post-decision actions that may never occur. Moreover, Congress's design of the statutory cause of action in this case confirms that Crossroads should not be a participant because it lacks prudential standing, and its participation threatens to undermine the FEC's exclusive civil enforcement authority.

Crossroads also cannot intervene because, as the district court correctly found, to the extent Crossroads has any interest here, it is the same narrow interest

that the FEC has in defending its dismissal of Public Citizen's administrative complaint. That factual finding was not clearly erroneous and should not be disturbed. The district court thus correctly held that the FEC can adequately represent that mutual interest, and the court's determination was certainly not an abuse of discretion.

Finally, this Court need not exercise its pendent jurisdiction to consider Crossroads's appeal of the denial of its request for permissive intervention, because Crossroads lacks standing and has failed to show that its participation as amicus curiae would be insufficient to present its views to the district court. But if it does reach the permissive intervention question, it should find that the district court did not abuse its discretion in denying that request, because Crossroads has failed to present the requisite independent basis for subject-matter jurisdiction.

STANDARDS OF REVIEW

I. STANDING

This Court "review[s] standing *de novo*." *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013).

II. INTERVENTION

A denial of intervention of right due to "adequacy of representation issues under Rule 24(a)(2), . . . involve[s] . . . judicial discretion and hence [is] reviewed for abuse of that discretion." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 732

(D.C. Cir. 2003) (citing *Mass. Sch. of Law v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997)). A "denial of a motion for permissive intervention is not normally appealable in itself," but when such a request is "inextricably intertwined" with a movant's arguments for intervention of right, courts generally review a denial for abuse of discretion. *In re Vitamins Antitrust Class Actions*, 215 F.3d at 31. The district court's factual findings are reviewed for clear error. *Fund for Animals*, 322 F.3d at 732.

ARGUMENT

I. CROSSROADS LACKS STANDING TO INTERVENE

"Federal courts are courts of limited subject-matter jurisdiction and every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction . . . ." *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010) (internal quotation marks omitted). "Because Article III limits the constitutional role of the federal judiciary to resolving cases and controversies, a showing of standing 'is an essential and unchanging' predicate to any exercise of our jurisdiction." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (citation omitted). "It is . . . circuit law that intervenors," including intervenors seeking to become defendants, "must demonstrate Article III standing" and

"prudential standing." *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193, 194 (D.C. Cir. 2013).

Crossroads cannot meet its burden. "The 'irreducible constitutional minimum of [Article III] standing contains three elements': (1) injury-in-fact, (2) causation, and (3) redressability." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (quoting *Lujan*, 504 U.S. at 560). Prudential standing requires showing that Crossroads's "interests are 'arguably within the zone of interests to be protected or regulated by the statute'" or that they are "'sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further . . . statutory objectives.'" *In re Vitamins Antitrust Class Actions*, 215 F.3d at 29. Because Crossroads's proffered injury is speculative and not within the zone of interests protected by FECA, lacks a causal nexus to this lawsuit, and is not redressable in this action, Crossroads does not have standing to intervene as a defendant.

A. Crossroads Lacks Injury-in-Fact

1. Crossroads Has No Actual Injury Now and Faces No Imminent, Non-Speculative Injury

To establish injury-in-fact, Crossroads must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 193; *Lujan*, 504 U.S. at 560-61 (same) (quoting *Whitmore v. Arkansas*, 495

U.S. 149, 155 (1990)). Here, there is indisputably no actual invasion of any of Crossroads's interests. As Crossroads acknowledges, it "was certainly not 'aggrieved' by the FEC's dismissal." Crossroads Br. at 23; *accord Am. Orient Exp. Ry. Co., LLC v. Surface Transp. Bd.*, 484 F.3d 554, 557 n.3 (D.C. Cir. 2007) ("A party . . . is not 'aggrieved' if the agency disposition was in its favor.").

Any legally protected interest upon which Crossroads could have standing thus has yet to arise. Crossroads argues that it "would" suffer injury "if Public Citizen were to prevail," characterizing that anticipated injury interchangeably as a deprivation of "property," a mandate "to modify its exercise of First Amendment rights," "re-expos[ure of] the organization to the FEC's enforcement process," or a deprivation of the "'benefit'" or "protection" of the FEC's dismissal. (Crossroads Br. at 11-12, 16-18.) But lost in Crossroads's kitchen-sink approach is any effort to establish the concreteness or imminence of the hypothetical injuries it claims to fear. Far from having "textbook" or "quintessential" injury (*id.* at 12, 16), Crossroads simply imagines what *might* happen *if* the FEC or Public Citizen take a series of hypothetical actions in response to what the court below *might* decide.

This Court has repeatedly recognized that the kinds of speculative, hypothetical injuries Crossroads imagines are insufficient, and standing may be rejected on this basis alone. *Deutsche Bank Nat. Trust Co.*, 717 F.3d at 193 ("[W]here a threshold legal interpretation must come out a specific way before a

party's interests are even at risk, it seems unlikely that the prospect of harm is actual or imminent."); *Defenders of Wildlife v. Perciasepe*, 714 F.3d at 1324-25 ("Article III standing requires more than the possibility of potentially adverse regulation . . . ."); *Sea-Land Service, Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation."); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1515-18 (D.C. Cir. 1994) (per curiam) (denying intervention request by a similarly situated nuclear licensee because precedential effect in possible future proceedings was "unduly remote" to provide standing, but permitting it to participate as amicus curiae). "Allegations of injury based on predictions regarding future legal proceedings are . . . 'too speculative'" for Article III standing where there is no demonstrated "current or even impending injury." *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992); *Northwest Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986) ("Where there is no current injury, and a party relies wholly on the threat of future injury, the fact that the party (and the court) can 'imagine circumstances in which [the party] could be affected by the agency's action' is not enough."); *cf. Conference Group, LLC v. FCC*, 720 F.3d 957, 964 (D.C. Cir. 2013) (finding that an entity lacked standing where it "d[id] not identify any imminent [agency] enforcement action against it"

and where, "if the [agency] decides to apply" a rule of decision from another adjudication to it, the entity would "ha[ve] the option to raise its substantive arguments").

Examination of the several contingencies that must occur before Crossroads faces any possible adverse FEC enforcement action underscores the hypothetical nature of its nonexistent injury. First, Public Citizen must prevail. While Crossroads repeatedly invokes this possibility throughout its brief, it studiously avoids any evaluation of how likely that outcome is — *i.e.*, how "imminent" it is. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (purpose of imminence requirement is to "'ensure . . . that the injury is *certainly* impending'"). Even a cursory review of the case demonstrates that Public Citizen's success is hardly imminent. Indeed, under the statutory standard, the court below must uphold the Commission's dismissal decision unless Public Citizen establishes that the agency's reasoning was *unlawful*. *Common Cause*, 842 F.2d at 448. Even if Public Citizen could demonstrate that an alternative analysis would have been better — and it has failed even to do that — such a demonstration would be insufficient to prevail under section 30109(a)(8). *See DSCC*, 454 U.S. at 39 ("To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached. . . ."); *supra* pp. 8-9. Public Citizen's already-filed merits briefs do not

come close to making that difficult showing. (District Ct. Docket Nos. 23, 38.) Crossroads's unfounded fear that the district court might find in favor of Public Citizen is not imminent injury.

And still, even if Public Citizen manages to prevail under its heavy burden, the most it could obtain is a ruling that the FEC's reason for dismissing the complaint was "contrary to law" and that the agency must "conform" its decision within 30 days. 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)). That would not (and could not) require the Commission to commence an investigation of Crossroads, nor would it necessarily even require the agency to "reopen" (Crossroads Br. at 26) agency enforcement proceedings in a way that would necessitate any action by Crossroads. The agency, for example, "might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Akins*, 524 U.S. at 25.

Furthermore, any investigation of Crossroads would require at least one of the three Commissioners who previously voted *not* to authorize such investigation to change his or her mind on all potential grounds for finding reason-to-believe a violation had occurred in light of the new court guidance. And even then, the Commission still could not take any actual enforcement action against Crossroads unless and until (1) at least four Commissioners vote to find probable cause to believe that Crossroads violated FECA, (2) statutorily required efforts to conciliate

fail, and (3) at least four Commissioners vote to authorize a civil enforcement action. *See supra* pp. 5-7. And of course throughout such hypothetical proceedings, Crossroads would be able to raise any and all defenses it desires, should it wish to file further briefing. *See Conference Group, LLC*, 720 F.3d at 964; Crossroads Br. at 5.

For these reasons, Crossroads's allegations of injury are even less ripe and more speculative than those recently found inadequate by this Court in *Deutsche Bank*, a case Crossroads does not discuss. In that case, a trustee sought to intervene as a defendant in order to protect its economic interest in a receivership fund. 717 F.3d at 191. This Court rejected the would-be intervenor's injury as too conjectural, identifying "at least two major contingencies [that] must occur before" the would-be intervenor's injury ripened. *Id.* at 193. First, the district court had to reach a particular legal conclusion. Second, the plaintiff had to "prevail on the merits." *Id.* The Court explained that "where a threshold legal interpretation must come out a specific way before a party's interests are even at risk, it seems unlikely that the prospect of harm is actual or imminent." *Id.* Here, Crossroads's hypothesized injury likewise depends not only on (1) a "threshold legal interpretation" about political-committee status that need not be fully resolved to decide the narrow question presented by this section 30109(a)(8) action, and (2) Public Citizen's success on the merits, but it also depends on additional actions by

the Commission (or possibly Public Citizen) that may never be taken. If the threatened injuries at issue in *Deutsche Bank* were "hopelessly conjectural," those imagined by Crossroads are even more so. *Id.*

2. Crossroads's Anticipated Participation in a Hypothetical Future Enforcement Proceeding is Not Injury

Recognizing the numerous events that must occur for Crossroads to face enforcement at the FEC's hands, the district court rightly rejected Crossroads's contention that the possibility of adverse FEC enforcement action constituted injury. (JA 234 n.1.) Crossroads nevertheless represents that if Public Citizen is successful, its injury is assured because that would, according to Crossroads, be akin to undoing the FEC's "exonerat[ion]" of Crossroads "of charges that it violated federal election law." (Crossroads Br. at 17.) Crossroads repeatedly mischaracterizes the threshold, reason-to-believe stage of the FEC's *civil* enforcement process as akin to a criminal jury trial in which it was "acquitted." (*Id.* at 7, 9, 12, 16, 17.) Crossroads exercised its right to participate in that administrative proceeding, but the purpose of that proceeding was for the FEC's Commissioners to evaluate the allegations in Public Citizen's complaint, not to "try" Crossroads. What is under review now is the Commissioners' reasoning in declining to investigate Crossroads, not the ultimate issue of whether Crossroads violated FECA. That is why the district court correctly concluded that

Crossroads's fears of enforcement at the FEC's hands are currently "too speculative to support Article III standing." (JA 234 n.1.)

The district court instead concluded that Crossroads's injury, to the extent it exists at all, is narrow. It assumed that if the administrative complaint were re-opened (which, again, itself is speculative), Crossroads "*likely would have* to expend significant resources" to have the complaint dismissed again. (JA 235 (emphasis added).) The district court's assumption is mistaken. In the first place, the court below, like Crossroads, ignored entirely the unlikeliness of any remand order ever issuing. But even if such a remand order were issued, the district court also overlooked that FECA does not require a respondent in such a situation to do anything at all. It is the *agency* that must "conform with" the judicial decision, 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)), and it must do so under the applicable standard regardless of whether Crossroads submits a response. (*Contra* Crossroads Br. at 18 (claiming that it "defeated" the administrative claim).)

What the agency does in the event of a remand will depend, of course, on the nature of the remand. Although remands to the FEC have been few, the two most recent ones did not require the Commission to do anything other than revise its explanation. *Utility Workers Union of America, Local 369 v. FEC*, 691 F. Supp. 2d 101, 108 (D.D.C. 2010) (remanding section 30109(a)(8) case to FEC for further explanation); FEC, Factual & Legal Analysis, MUR 6100R,

http://eqs.fec.gov/eqsdocsMUR/10044283220.pdf (revised explanation for dismissal provided without further submission from respondent); *La Botz*, 889 F. Supp. 2d at 63 n.6 (remanding to the FEC but noting that "it seems possible that the FEC's decision to dismiss [the] administrative complaint could have been justified entirely by the FEC's prosecutorial discretion"); FEC, Factual & Legal Analysis, MUR 6383R, http://eqs.fec.gov/eqsdocsMUR/13044334378.pdf (revising explanation for dismissal based upon prosecutorial discretion).

3. Crossroads Lacks Prudential Standing Because Its Proffered Injury Is Not Within FECA's "Zone of Interests" and Crossroads Should Not Be Permitted to Interfere With the FEC's Exclusive Civil Enforcement Authority

Crossroads's economic interest in avoiding legal costs — the possible deprivation "of its property" (Crossroads Br. at 16) — in participating in any future agency proceedings also runs afoul of the prudential standing doctrine. While the zone-of-interests analysis is "not meant to be especially demanding," the "Supreme Court has instructed that the breadth of the zone of interests varies according to the provisions of law at issue." *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014) (per curiam) (internal quotation marks omitted), *cert. granted in part*, 83 U.S.L.W. 3089 (U.S. Nov. 25, 2014) (Nos. 14-46, 14-47, 14-49). "Accordingly, this court must be guided by those . . . precedents that have interpreted [the organic statute at issue], and not those applying other statutory provisions, including the APA." *Id.*

Crossroads's economic interests do not remotely fall within the zone of interests that FECA protects. In *Akins*, the Supreme Court explained that an *administrative complainant* in a section 30109(a)(8) case has standing if it can allege an informational injury. 524 U.S. at 20. Crossroads, however, claims no informational interest whatsoever. Instead, Crossroads contends that it is within FECA's zone of interests because "FECA regulates the precise type of activity that Public Citizen imputes to" it. (Crossroads Br. at 24.) The Court should reject this specious argument. Public Citizen's administrative complaint was dismissed because three Commissioners found that Crossroads was *not* subject to regulation by the FEC as a political committee. That is precisely the determination Crossroads would like to see upheld here. And its argument, for purposes of intervention, that it "can hardly be denied" that Crossroads *is* within the zone of FECA's interests (*id.*), so that Crossroads can later argue, on the merits, that it is *not* within the zone of FECA's regulation, is paradoxical and self-defeating.[5] And

[5] Crossroads argues (Crossroads Br. at 23-24) that in *Fund for Animals*, this Court found that the broad citizen-suit language in the Endangered Species Act resolved the prudential standing inquiry. 322 F.3d at 734 n.6. Here, however, section 30109(a)(8) is conversely narrow and limits participation in judicial-review actions only to administrative complainants. *Deutsche Bank Nat. Trust Co.*, 717 F.3d at 195 (explaining that *Fund for Animals*' "broad language" does "not preclud[e] considerations of prudential standing under different statutes"). In *Citizens For Responsibility & Ethics in Washington v. FEC*, upon which Crossroads also relies (Crossroads Br. at 24), the district court found that the organization *lacked* both Article III and prudential standing. 401 F. Supp. 2d 115, 121 n.1 (D.D.C. 2005) ("In any event, for the reasons discussed in this paragraph,

"[i]nsofar as [Crossroads] wish[es] to be heard on the specific question" of the legality of the FEC's application of FECA's political-committee designation, it is "effectively seeking to enforce the rights of third parties (here, the [FEC]), which the doctrine of prudential standing prohibits." *Deutsche Bank Nat. Trust Co.*, 717 F.3d at 194; *cf. Assoc. of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (per curiam) (ruling that a group lacked standing because its interest in "'increasing the regulatory burden on others' falls outside the 'zone of interests'" protected by the statute).

The Act itself underscores that Crossroads's hypothetical injury is outside of the statute's zone of interests. By its terms, FECA authorizes only a "party aggrieved by an order of the Commission dismissing a complaint filed by [that] party" to file a petition for judicial review of the Commission's decision. 52 U.S.C. § 30109(a)(8)(A) (2 U.S.C. § 437g(a)(8)(A)). FECA excludes administrative respondents like Crossroads from such statutory actions for judicial review. Public Citizen thus could not have joined Crossroads as a defendant in this action. Section 30109(a)(8)(C) permits plaintiffs to pursue a private civil action based on the alleged FECA violations "[i]f, and only if," (a) the Court declares that the Commission's dismissal of Public Citizen's administrative complaint was

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it is doubtful that CREW would fall within the zone of interests that Congress intended to protect when it enacted FECA and, accordingly, CREW would not be able to satisfy the requirements of prudential standing.").

contrary to law, *and* (b) the Commission fails to conform with that declaration. *NCPAC*, 470 U.S. at 488. Congress's "failure to provide for [Crossroads's participation] indicates [that] it is foreclosed." *In re Endangered Species Act*, 704 F.3d 972, 977 (D.C. Cir. 2013). Thus, even though Crossroads may have a keen legal interest in this matter, its interest is *not* equivalent to that of Public Citizen (Crossroads Br. at 18), which, unlike Crossroads, has a statutory right to bring this limited action.

Importantly, Crossroads's participation as a party here is foreclosed for good reason. Such intervention threatens to interfere with the FEC's congressionally mandated enforcement process and exclusive civil jurisdiction. In the unlikely event of a remand order, the Commission could decide not to appeal but to dismiss the complaint on other grounds, *see supra* pp. 27-28, or it could take some other action. If Crossroads were permitted to intervene, however, it could seek to override the Commission's decision on how to proceed by pursuing an appeal on its own. Crossroads directly acknowledges that interest — perhaps revealing why it has rejected the parties' suggestion that it present its views to the district court as an amicus curiae, as the American Israel Public Affairs Committee did in *Akins* — by arguing that intervention is necessary because the FEC should not have "exclusive license to defend against a suit aimed at expanding [its] power." (Crossroads Br. at 13; *see also id.* at 31, 36.) But even setting aside the inaccuracy

of Crossroads's characterization of the nature of the underlying litigation, the FEC's enforcement power, whatever its scope, is the *agency's* to exercise and defend. It is the FEC, not Crossroads or any other respondent, which wields FECA's "exclusive" civil enforcement authority. 52 U.S.C. § 30106(b)(1) (2 U.S.C. § 437c(b)(1)).

Crossroads's naked request to be allowed to interfere with the Commission's enforcement authority should be rejected. Critically, a remand to the Commission in this case would not be appealable *by an intervenor* in any event because it would not constitute a "final decision" within the meaning of 28 U.S.C. § 1291. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 331-32 (D.C. Cir. 1989); *see also Democratic Nat'l Comm. v. FEC*, No. 99-5123, 1999 WL 728351, at *1 (D.C. Cir. Aug. 4, 1999) (per curiam) (non-precedential) (dismissing a proposed intervenor's challenge to a remand order because it was "not final"); *Smoke v. Norton*, 252 F.3d 468, 471-73 (D.C. Cir. 2001) (Henderson, J., concurring) ("[A] district court order remanding a case to an agency for significant further proceedings is not final unless the remand to the agency is for solely ministerial action." (citations and internal quotation marks omitted)); *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181 (9th Cir. 2004) (citing Judge Henderson's concurrence in *Smoke* in holding that intervenors had no right to appeal the remand of an agency regulation); *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d

751, 762-63 (8th Cir. 2009) (holding that intervenors had no right to appeal order remanding to agency).

Courts have not been uniform in this regard, however, and Crossroads's intervention request directly attempts to undermine the FEC's authority. In the context of a recent challenge to an FEC regulation, the finality requirement was not presented to this Court during the course of an intervenor's attempted appeal — without the FEC — of a lower-court remand order, and the Court accepted the appeal. *See Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110 (D.C. Cir. 2012) (per curiam) (discussing standing of intervenors without addressing finality of order). The problems with such an appeal were demonstrated in that case, as a remand was necessitated in part because the Commission was not a party. *Id.* at 111 ("The FEC's failure to participate in this appeal makes it impossible for the court to fully understand the agency's position on numerous issues that have been raised by the parties . . . .").

Consistent with FECA's design, the Commission should have the exclusive right to appeal a remand order, and the potential loss of control of the litigation is another reason that the district court's decision denying Crossroads's motion should be affirmed. In the event this Court finds that Crossroads is permitted to intervene, it should expressly limit its participation to reflect its lack of appeal rights.

B. Crossroads Also Fails to Establish Causation and Redressability

It is self-evident that without any concrete, imminent injury, there can be no causation or redressability. But even assuming that imagined future proceedings could qualify as injury, the limited contrary-to-law standard of review in section 30109(a)(8) deprives the district court of authority to direct the FEC to investigate Crossroads, breaking the required causal nexus. *See supra* pp. 7-10.

Crossroads argues (Crossroads Br. at 19-20) that *Akins* undermines the Commission's causation argument. Not so. In *Akins*, the Supreme Court found that the *complainant-plaintiffs*, who were suffering a present, informational injury as voters, were within the zone of interests Congress sought to address in FECA and therefore had prudential standing. 524 U.S. at 19-20. Here, the situation is different. Crossroads is suffering no injury and is not within the zone of interests protected by FECA. *Compare id.* at 25 ("[T]hose *adversely affected* by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." (emphasis added)), *with* Crossroads Br. at 23 ("Crossroads [] was certainly not 'aggrieved' by the FEC's dismissal").

Crossroads's other cases are also inapposite. *Clinton v. City of New York*, 524 U.S. 417 (1998) does not apply here because there, the *plaintiffs* whose standing was questioned had "'suffered an immediate, concrete injury the moment

that the President used the Line Item Veto . . . and deprived them of the benefits of that law.'" *Id.* at 430; *City of New York v. Clinton*, 985 F. Supp. 168, 174 (D.D.C. 1998) ("In the simplest terms, Plaintiffs had a benefit, and the President took that benefit away. That is injury."). The same is true of *Fund for Animals*, 322 F.3d 728. There, the Mongolian agency seeking to intervene had a concrete and imminent injury in the form of a "threatened loss of tourist dollars, and the consequent reduction in funding for Mongolia's conservation program." *Id.* at 733. In *Roeder v. Islamic Republic of Iran*, the United States had standing because it was "in imminent danger of suffering injury in fact" in the form of breach of its accords with Iran, which had failed to appear to defend itself. 333 F.3d 228, 233-34 (D.C. Cir. 2003). And in *Military Toxics Project v. EPA*, where intervenor-standing was not challenged, the Court found that the entity subject to regulation under the rule already in place would have standing to intervene in its "own right," not just in support of the agency. 146 F.3d 948, 954 (D.C. Cir. 1998). Here, there is no similarly concrete threatened loss to Crossroads. Crossroads merely speculates about what *might* happen *if* Public Citizen prevails.[6]

[6] In *Fund for Animals*, this Court stated that a petitioner has standing to participate in an administrative-review action where *both* "the action or inaction has caused him injury, *and . . . a judgment preventing or requiring the action will redress it*." 322 F.3d at 733-34 (emphasis added) (internal quotation marks omitted). The limited scope of judicial review under section 30109(a)(8), however, means that even if the district court finds in favor of Public Citizen, it lacks jurisdiction to prevent or require any particular action by the Commission

Even the lower court's limited view of Crossroads's injury — the potential cost of participating in a possible, future administrative proceeding — overlooked that Crossroads's participation in such a proceeding, like its desire to participate in this case, is voluntary. As Crossroads itself recognizes, the FEC's administrative process provides respondents "the *right* to advocate on their own behalf throughout" (Crossroads Br. at 5 (emphasis added)), but the statute does not require such participation. Unlike regular litigation, the Commission's adjudicative process does not contemplate default for a respondent's failure to participate. *See supra* pp. 4-6. Crossroads's desire to intervene in this case in order to voluntarily sustain *right now* the economic "injury" the district court suggests it *could* face in the future, reveals the self-imposed nature of its injury. *See Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) ("Under our case law, an organization's diversion of resources to litigation or to investigation in anticipation of litigation is considered a 'self-inflicted' budgetary choice that cannot qualify as an injury in fact for purposes of standing."); *see also Clapper*, 133 S. Ct. at 1151 (explaining that individuals "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending");

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concerning Crossroads, let alone the authority to redress Crossroads's prospective concerns about what future action the Commission or Public Citizen *might* take.

Crossroads Br. at 16 (claiming "injury" that court decision for Public Citizen "would . . . force [Crossroads] to modify its exercise of First Amendment rights"). The district court's observation that Crossroads appears intent on preemptively defending itself (JA 235 n.2) does not transform that choice into "injury" that is externally caused.

Crossroads's claim that the FEC "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" (Crossroads Br. at 18) is another inaccuracy. When Crossroads first argued that this Court's unexplained grant of intervention in *DSCC* demonstrated the absence of novelty in its request to intervene (JA 198), the Commission explained that, in fact, administrative respondents like Crossroads have consistently failed to intervene in these section 30109(a)(8) actions. (FEC Intervention Opp'n at 7 & n.1 (citing cases).)

Democratic Senatorial Campaign Committee v. FEC, 918 F. Supp. 1 (D.D.C. 1994), is closely on point, and demonstrates the absence of causation and redressability here. There, a district court in this Circuit denied an FEC respondent's motion to intervene in a section 30109(a)(8) action *even after* holding that the Commission's dismissal of the administrative complaint was contrary to law because, *inter alia*, the proposed intervenor's interest in briefing "the constitutionality of the Federal Election Campaign Act, [was] not ripe as [the FEC]

has not yet determined what specific action it will take against [the proposed intervenor]." *Id.* at 5. That decision applies squarely to Crossroads. *See also In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. 1, 3 (D.D.C. 2010) (explaining rejection of intervention where alleged injury was "'based entirely on the potential substantive outcome of the'" agency's subsequent determination, which was "'not before th[e] Court'"), *aff'd*, 704 F.3d 972 (D.C. Cir. 2013).

Lastly, Crossroads is also incorrect in suggesting that its status as the respondent to the underlying administrative action is sufficient to establish both standing and a right to intervene. (Crossroads Br. at 19.) This Circuit's black-letter law is precisely to the contrary. *See, e.g.*, *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002) ("[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements"); *Competitive Enter. Inst. v. U.S. Dept. of Transp.*, 856 F.2d 1563, 1565 (D.C. Cir. 1988) ("Unlike an agency, our authority to hear a case is limited by the standing requirements of the United States Constitution.").

II. CROSSROADS FAILS TO MEET THE REQUIREMENTS FOR INTERVENTION OF RIGHT

Crossroads also lacks a right to intervene under Federal Rule of Civil Procedure 24(a). That rule requires a court to permit intervention by a party that timely claims an interest in the pending litigation "and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to

protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). In this Circuit, a party seeking to intervene as of right must demonstrate (1) timeliness of the application to intervene, (2) a legally protected interest in the action, (3) that the action threatens to impair that interest, and (4) that no party to the action can be an adequate representative of the applicant's interests. *Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 192; *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). "A legally protectable interest is 'of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.'" *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 6 (D.D.C. 2012) (quoting *Endangered Species Litig.*, 270 F.R.D. at 5), *aff'd in part, appeal dismissed in part sub nom. Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013). A party seeking to intervene as of right must meet each of these requirements. *Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 192. Crossroads fails to do so.

A. Crossroads Lacks Any Legally Cognizable Interest that Will be Directly Impaired by the Underlying Judicial-Review Action

For the same reasons that Crossroads cannot demonstrate an injury-in-fact necessary to establish Article III standing, it cannot establish a legally protected interest sufficient to demonstrate a right to intervene under Rule 24(a)(2). *See Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003) (explaining that Article III injury is equivalent to protected interest under Rule 24).

Crossroads's asserted interests in the underlying section 30109(a)(8) judicial-review action reveal a misunderstanding of the scope of this case. As explained above, even if Public Citizen is able to prevail under its heavy burden and the district court ultimately finds that the Commission's administrative determination was contrary to law, the district court would still lack the authority to mandate any particular outcome on remand. *Akins*, 524 U.S. at 25; *supra* p. 9. Crossroads is thus wrong when it suggests that a decision in favor of Public Citizen here could "require[e] the Commission to reinstate the enforcement proceeding against Crossroads," "expand" or "increase the agency's regulatory power," "determin[e] that Crossroads GPS broke the law," impose any "punishment" on Crossroads, or otherwise "deprive [it] of its property and force it to modify its exercise of First Amendment rights." (Crossroads Br. at 8, 13, 16, 31, 35-36.) The district court's limited authority under section 30109(a)(8) does not permit it to do any of those things. Even the administrative "investigation and enforcement" Crossroads fears (Crossroads Br. at 11) *could not* occur unless a series of contingencies that may never arise both occur and are resolved as Crossroads predicts. *See supra* pp. 20-21; *contra* Crossroads Br. at 11 (acknowledging that Crossroads is currently not exposed to any investigation and erroneously asserting that "if Public Citizen were to prevail . . . , that would all change").

This Court has held that court proceedings with no direct and binding effect on an applicant for intervention are unlikely to impair its interests sufficiently to justify intervention of right. In *Alternative Research and Development Foundation v. Veneman*, 262 F.3d 406 (D.C. Cir. 2001) (per curiam), for example, organizations brought suit challenging an agency's exclusion of certain animals from the protection of a statute proscribing some animal research. After an association engaged in the challenged research moved to intervene, the parties agreed to a stipulated dismissal providing that the government would initiate a rulemaking on the relevant matters, and the district court denied intervention. *See id.* at 407-08. This Court affirmed the district court's finding of insufficient impairment to justify intervention, explaining that the stipulated dismissal did not bind the agency in its rulemaking, and that the putative intervenor could participate in the rulemaking as well as challenge any final rule that resulted. *See id.* at 411.

In *Alternative Research and Development Foundation*, as here, an organization's interest in *possible* agency actions that *might* occur following the court's decision was insufficient to justify intervention. *Id.* at 410-11; *cf. Defenders of Wildlife v. Perciasepe*, 714 F.3d at 1324-26 (requiring "more than the possibility of potentially adverse regulation" for would-be intervenor to establish standing). And there, as here, the organization would not be bound by the court's decision, and would retain its right to make all arguments in any later proceeding

concerning its interests. *Alt. Research & Dev. Found.*, 262 F.3d at 411. Indeed, the lack of binding effect of any ruling in this case on Crossroads would be especially clear if it were not a party to this case, *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 473-74 (D.C. Cir. 1998) (per curiam), and allowing intervention would ironically reduce that clarity.

Rather than identify any legally protected interest that will be directly impaired by the underlying judicial-review action, Crossroads attempts to portray the Rule 24(a) standard as so broad that even Crossroads's speculative, contingency-dependent interests will suffice. But Crossroads's claim (Crossroads Br. at 26) that Rule 24(a)(2) is a "liberal vehicle for interested non-parties to appear" is incomplete and misleading; an interest alone is insufficient. This Court has explained that "'the applicant must demonstrate a legally protected interest [*that the*] *action must threaten to impair*,'" and it has denied intervention where a movant failed to satisfy that requirement. *Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 192 (emphasis added); *id.* at 193 (denying intervention under Rule 24 where "at least two major contingencies must occur before [plaintiff's] suit could result in economic harm" to would-be defendant-intervenors). Crossroads cannot show that the underlying judicial-review action itself will directly impair any legally protected interest of Crossroads. For that reason alone, it plainly lacks the right to intervene.

B. The Commission Adequately Serves the Lone Interest Here of Defending the Commission's Dismissal Decision

The district court properly concluded, and certainly did not abuse its discretion in finding, that the "FEC *can* adequately represent" any interest Crossroads may have in "defending the legality of the FEC's dismissal" decision. (JA 236.) The district court correctly determined that "the FEC and [Crossroads] are aligned" on this issue, which is the only question that court may decide in this case. (*Id.*) Crossroads challenges the district court's conclusion on adequacy of representation by (1) mischaracterizing the nature and scope of the district court's decision, (2) arguing that the court below was required to *presume* that the FEC would not adequately defend the legality of its own decision, and (3) reasserting its baseless concerns about FEC counsel's ability to adequately defend even their own client. (Crossroads Br. at 29-38.) None of these arguments has any merit, let alone demonstrates that the district court abused its discretion, which is the standard that applies here. *See Fund For Animals, Inc.*, 322 F.3d at 732 (noting "'district court discretion over the timeliness and adequacy of representation issues under Rule 24(a)(2)'" (quoting *Mass. Sch. of Law*, 118 F.3d at 779)); *contra* Crossroads Br. at 35 (suggesting incorrectly that district court's adequacy-of-representation determination "involved no 'measure of judicial discretion'").

1. The District Court Properly Decided the Adequacy-of-Representation Issue Here Based on the Facts of This Case

Crossroads suggests that the district court applied the wrong legal standard by supposedly imposing "a categorical rule that the FEC always adequately represents administrative respondents in this class of litigation" and concluding that the Commission thus "automatically" represents any interest Crossroads may have in defending the legality of the Commission's dismissal decision. (Crossroads Br. at 34-35; *id.* at 10, 12-13.) The court did no such thing. Its analysis of the adequacy-of-representation issue was explicitly based on the circumstances of this case: the court determined that the "FEC *can* adequately represent Crossroads's GPS's interest at issue in this litigation." (JA 236.) Indeed, the court went on to recognize that the "*ultimate* interests" of Crossroads and the FEC may diverge, but that any divergence down the road "does not impact the immediate interest here: defending the legality of the FEC's dismissal." (*Id.*) Crossroads's bald mischaracterizations of the district court's legal analysis and conclusions fail to demonstrate any flaw in the court's decision.

2. The District Court Was Not Required to Presume that the FEC's Defense of the Legality of its Dismissal Decision Would Be Inadequate

Ironically, it is Crossroads that improperly attempts to apply a categorical rule regarding the adequacy-of-representation analysis. First, Crossroads attempts to evade its burden entirely by asserting that "intervention is almost a default

presumption" when the court reaches the adequacy-of-representation factor. (Crossroads Br. at 29.)[7] On the contrary, establishing that "'no party to the action can be an adequate representative of the applicant's interests'" is, as this Court recently reiterated, one of "four distinct requirements *that intervenors must demonstrate*." *Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 192 (emphasis added). Second, Crossroads stretches this Court's decisions and other authorities beyond their context to conjure a broad, "baseline rule" that a governmental entity cannot adequately represent the interests of a proposed intervenor. (Crossroads Br. at 30.) But none of the cases Crossroads cites involve a question as narrow as the one at issue here, nor do they involve a district court similarly restricted in the scope of relief it is authorized to award. All of Crossroads's cases are therefore distinguishable.

In any event, there is no such public-private "baseline rule." As this Court's cases make clear, the alignment of a prospective intervenor's interests with the government is a well-established basis for denying intervention. *See Mass. Sch. of Law*, 118 F.3d at 781 (finding interests of proposed intervenor and United States were aligned notwithstanding would-be intervenor's desire to invest further

[7] When the adequacy of representation is apparent, it is appropriate to rule on that basis alone. *See Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 910 (11th Cir. 2007) (declining to "discuss the first three requirements [when a proposed-intervenor] has not met its burden of proof on the fourth requirement"). Thus, Crossroads is mistaken when it repeatedly assumes that it prevailed on all of the other elements "either openly or tacitly." (Crossroads Br. at 28; *id.* at 10, 12, 26.)

resources into lawsuit); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (denying intervention and finding government "adequately represented" trade association's interest); *accord Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 194 (finding prospective intervenor lacked standing and also noting that "it would be virtually impossible to show under Rule 24 that [the FDIC] do[es] not adequately protect [the proposed-intervenor] interests").

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

Even the treatise Crossroads cites (Crossroads Br. at 29) presents this more nuanced view. *See* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1909 (3d ed. 2014) (explaining that where "interest of the absentee is identical with that of one of the existing parties . . . representation will be presumed adequate").

None of the cases Crossroads cites discusses adequacy of representation in the narrow context presented here. Crossroads's cases involve broader disputes, primarily regulatory ones and even issues of international sovereignty and comity; they do not undermine the district court's conclusion that the FEC can adequately represent any interest Crossroads may have in defending the legality of a single Commission dismissal decision regarding the conduct of one respondent.

In *Fund for Animals*, discussed *supra* p. 35, a Mongolian agency sought to intervene because the case concerned the proper application of the Endangered Species Act to certain sheep located within its sovereign territory. 322 F.3d at 730. The plaintiffs had asked the district court to direct the United States Department of the Interior to take certain regulatory actions that would have made unlawful the sport hunting and importation of such sheep from Mongolia. *Id.* at 730. This Court permitted the Mongolian agency to intervene because "[t]he threatened loss of tourist dollars, and the consequent reduction in funding for Mongolia's conservation program" were "fairly traceable to the regulatory action . . . that the

Fund s[ought] in the underlying lawsuit." *Id.* at 733. The Court also found that the quality of Mongolia's conservation program — which was a central issue in the case — may be evaluated differently by Mongolia than by the United States. *Id.* at 736. *Fund for Animals* is thus plainly distinguishable and does not nearly suggest that Crossroads must be permitted to intervene here to help defend the limited question of the legality of an FEC dismissal decision.

California Valley Miwok Tribe v. Salazar is distinguishable as well. In that case, the proposed intervenor did not share the government's interest in "defend[ing] the [agency's] decision as lawful agency action," and instead sought to establish that the matter was an "internal tribal dispute not amenable to resolution in a federal judicial forum." 281 F.R.D. 43, 47-48 (D.D.C. 2012).

The other cases Crossroads cites (Crossroads Br. at 35) are similarly inapposite. In *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), the Court observed that the intervenor-defendant's presence would assist with "questions of very technical detail and data" and found that "special and distinct interests" justified intervention. *Id.* at 913. This case presents no such technical questions or interests. In *Textile Workers v. Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955) (en banc), a divided Court reversed the district court's denial of intervention based on an "other than literal application" of an earlier version of Rule 24. *Id.* at 767. Importantly, in that case, the intervenors' economic interest in

upholding the Secretary of Labor's minimum wage increase was concretely threatened by the lawsuit threatening to undo wage increases. *Id.* at 766 (explaining that intervenor's ability to "compete with the [challengers] for Government business will be effectively destroyed if [they] succeed in their attack"); *compare also id.* at 772-73 (Bastian, J., dissenting) (pointing out that majority's view that mere fact of Secretary of Labor's opposition to intervention bore on adequacy-of-representation issue was, "to say the least, a non sequitur" and "unfair"), *with* Crossroads's Br. at 38 (relying on same non sequitur).[8]

Crossroads also places great weight on the Supreme Court's fifty-year-old decision in *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965) ("*Scofield*"), while ignoring significant differences between the judicial-review processes provided for in FECA and the National Labor Relations Act. For example, the Court in *Scofield* recognized a right to intervene in Labor Board appeals because "*Congress intended to confer intervention rights* upon the successful party to the Labor Board proceedings." *Id.* at 208 (emphasis added). In FECA, however, Congress expressed no such intent. *See* 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)) (describing limited scope of action for judicial review of

[8] Crossroads's reliance on the very old *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967), is also misplaced. "*Nuesse* affords them no help, as there the court found on the specific facts a sufficient interest for standing in the stare decisis effect of a judgment, an analysis that has no parallel here" due to the contingencies discussed above. *In re Vitamins Antitrust Class Actions*, 215 F.3d at 29.

FEC dismissal of administrative complaints). Instead, FECA establishes procedures for court participation by alleged violators in two *different* potential ways at later points, should matters proceed. *Id.* §§ 30109(a)(6), (8)(c) (§§ 437g(a)(6), (8)(c)); *supra* pp. 4-7. In addition, the National Labor Relations Act, unlike FECA, permits a reviewing court to "set aside the Board's decision and direct the entry of a remedial order against [the union]." *Scofield*, 382 U.S. at 207; *see id.* at 209 (quoting Labor Act, which permits an aggrieved party to seek "that the order of the Board be modified or set aside"). FECA, as discussed throughout this brief, permits district courts only to remand and does *not* permit mandating *any* particular outcome on remand; the Commission, even following a contrary-to-law determination, may "exercise . . . its lawful discretion [and] reach the same result for a different reason." *Akins*, 524 U.S. at 25.

Moreover, the Court in *Scofield* emphasized that its analysis of intervention was "limited to Labor Board review proceedings" and recognized that "Federal agencies are not fungibles for intervention purposes — Congress has treated the matter with attention to the particular statutory scheme and agency." 382 U.S. at 210. *Scofield* thus plainly fails to advance Crossroads's argument and underscores the importance of the FEC's "particular statutory scheme." *Id.* Furthermore the Court reached its decision in *Scofield* in part because Labor Board review proceeds directly to the Court of Appeals and proliferation of actions by "circuit shopping"

needed to be prevented. *Id.* Those considerations are not present under the statutory provision operative here because section 30109(a)(8) actions may only be brought in this District. 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)). Thus, to the extent *Scofield* has any relevance here, it underscores the absence of any right on the part of Crossroads to intervene in this case.

3. The Facts of This Case Do Not Demonstrate Any Inadequacy in FEC Counsel's Defense of the Legality of the Commission's Dismissal Decision

The district court correctly concluded, and did not abuse its discretion in finding, that FEC counsel can adequately defend the legality of the Commission's dismissal decision. The district court did not, as Crossroads contends (Crossroads Br. at 32), "summarily discount[ ] Crossroads['s] concern" about FEC counsel's distinct advisory and defensive roles in the administrative and litigation phases of this matter. The district court explicitly considered Crossroads's "concern[] that the FEC Office of General Counsel recommended against dismissal below," and rejected it because "FEC counsel have defended dismissals numerous times after recommending, in their advisory capacity, that the complaint be investigated." (JA 236 (citing FEC's brief, which collected cases from the agency's 40-year history).) Crossroads still has not identified any past representational deficiencies from similar circumstances in the past. The district court's factual determination was not clearly erroneous.

Crossroads ignores the district court's explanation and continues to suggest that lawyers who have previously *recommended* one course of action to their client cannot adequately *defend* the legality of an alternative course of action in a subsequent litigation. But lawyers do this all the time. *See* D.C. Rules of Professional Conduct, Rule 1.3 n.4 (distinguishing between advisor and advocate and concluding that "lawyer may serve simultaneously as both"). The circumstances here are no different from that of any lawyer who continues to represent a client after the client has not followed the lawyer's advice before suit. Moreover, as Commission employees, the Commission's litigation counsel have no separate interest in conducting the Commission's litigation other than to zealously defend the Commission in this case.

The district court's conclusion that FEC counsel can adequately defend the agency's dismissal decision despite having recommended a different course of action was not an abuse of discretion. None of the "raft of . . . factors" Crossroads lists (Crossroads Br. at 32-34) establishes any legitimate basis for concern about FEC counsel's ability to defend the legality of the Commission's dismissal decision.

First, it is not true that the FEC "barely marshaled the votes to avoid default in this suit." (*Id.* at 32.) The Commission obtained the bipartisan majority of votes required by FECA and timely answered Public Citizen's complaint. Regardless, a

lack of unanimity in the Commission's defense authorization vote does not have any bearing on FEC counsel's ability to defend this lawsuit, just as the evenly divided nature of the dismissal decision does not preclude the district court from reviewing that decision. *See NRSC*, 966 F.2d at 1476 (outlining procedure for judicial review of FEC dismissal decisions resulting from a 3-3 vote).

Second, Crossroads fails to explain how a single Commissioner's publication of an op-ed expressing personal disagreement with certain court decisions on agency deference undermines counsel's defense of the agency on such issues. It does not. Crossroads's focus on the op-ed is curious, given the extensive arguments in favor of such deference set forth in the Commission's opening summary-judgment brief filed in the proceedings below, which Crossroads simply ignores. (*Compare* Crossroads Br. at 32-33, *with* JA 267-72 (discussion of deference in FEC's summary judgment brief).)

Third, Crossroads attempts to make hay out of the exclusion from the administrative record in this case of a privileged legal recommendation that was withdrawn and superseded by a subsequent recommendation. (Crossroads Br. at 33.) It is unclear why Crossroads finds this "troubling." (*Id.* at 33.) This Court has explicitly held that "internal memoranda made during the decisional process . . . are *never* included in a[n administrative] record." *Norris & Hirshberg, Inc. v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947) (emphasis added); *see id.* ("An

administrative agency . . . may utilize the services of subordinates to sift and analyze the evidence received . . . and subsequent use by the agency of a written resume of that sifting and analyzing is a part of its internal decisional process which may not be probed on appeal."). Crossroads's purported need to "complete the record" (Crossroads Br. at 33) in this case thus appears to be premised on a misunderstanding of the proper contents of the record.

And finally, Crossroads fails to explain what "sort of full-throated defense of the FEC's dismissal" decision it believes Commission counsel are unable to provide — or why it cannot present its arguments as an amicus curiae. (*Id.* at 33-34.) Even if Crossroads would pursue different "litigation tactics," such differences do not demonstrate that the Commission's representation of its dismissal decision is inadequate under Rule 24. *See, e.g.*, *Jones*, 348 F.3d at 1020 (differences regarding "'tactics with which litigation should be handled'" do not render representation inadequate for purposes of intervention); *Mass. Sch. of Law*, 118 F.3d at 781 ("[W]e do not think [the government's] representation is inadequate just because a would-be intervenor is unable to free-ride as far as it might wish — a well-nigh universal complaint."); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("A mere disagreement over litigation strategy . . . does not, in and of itself, establish inadequacy of representation.").

In short, there is only one issue in this limited action and one objective in its defense: defending the legality of the Commission's dismissal of an administrative complaint. The district court properly concluded that Commission counsel can adequately advocate for Crossroads's and the FEC's shared interest in that outcome.

III. CROSSROADS SHOULD NOT BE GRANTED PERMISSIVE INTERVENTION

A. This Court Should Decline to Consider Crossroads's Permissive Intervention Claim

"[T]he denial of a motion for permissive intervention is not normally appealable in itself, . . . [but 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 Vitamins Antitrust Class Actions*, 215 F.3d at 31 (quoting *Twelve John Does v. District of Columbia*, 117 F.3d 571, 574-75 (D.C. Cir. 1997)). Crossroads lacks standing for the reasons we have explained, and it has failed to show that its participation as amicus curiae would not be sufficient to present its views to the district court. The Court should thus decline to exercise pendent jurisdiction, just as it did in *In re Vitamins Antitrust Class Actions*. *Id.* at 31-32 (declining jurisdiction even where basis for permissive intervention was same as basis for intervention of right and "in that respect inextricably intertwined").

B. Crossroads Fails to Meet the Requirements for Permissive Intervention

Even if the Court entertains Crossroads's permissive intervention claim, it should find that the district court did not abuse its wide latitude under Rule 24(b) in rejecting that request. The court below correctly concluded that Crossroads failed to demonstrate the requisite independent ground for subject matter jurisdiction. (JA 237 n.3).

It is well established that a "putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Crossroads failed to satisfy the first of these requirements. *Id.* Crossroads itself embraced its duty to identify an "independent ground for subject matter jurisdiction in its motion for intervention filed in the district court. (JA 209 (Crossroads's motion to intervene, quoting *Peters v. D.C.*, 873 F. Supp. 2d 158, 211-12 (D.D.C. 2012).) Now, however, Crossroads dismisses "the general requirement of an independent jurisdictional basis" by misleadingly quoting this Court's discussion of a "narrow exception [for when a] third party seeks to intervene for the limited purpose of obtaining access to documents." *Compare Nat'l Children's Ctr., Inc.*, 146 F.3d at 1047 ("An independent jurisdictional basis is simply unnecessary *when the movant seeks to intervene only for the limited*

purpose of obtaining access to documents covered by seal or by a protective order . . . ." (emphasis added)), *with* Crossroads Br. at 42 (quoting *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1047, but omitting italicized language). Crossroads does not fit within that exception. Nor does the basis for the exception — the Court's inherent authority to "modify a previously entered confidentiality order," *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1047 — have any application here.

FECA permits *administrative complainants* to sue *the Commission* in section 30109(a)(8) judicial-review actions. 52 U.S.C. § 30109(a)(8) (2 U.S.C. § 437g(a)(8)); *see Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (per curiam) (explaining that in order to bring an action under section 30109(a)(8), a plaintiff must show a "legally cognizable injury as a result of the FEC's dismissal of *its* complaint" (emphasis added)); *Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998) (section 30109(a)(8) "is the only provision in the Campaign Act that provides for judicial review at behest of private parties . . . it does so only in the District of Columbia and *only for people who have filed an administrative complaint*" (emphasis added)); *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 45 (D.D.C. 2003) (judicial review only available for complainant). Crossroads cannot avail itself of a narrow cause of action that is available only to a specific class of persons, of which it does not belong. *See Nat'l Children's Ctr., Inc.*, 146 F.3d at 1046-47 (explaining that a proposed intervenor, "[n]o less than the original

claimants . . . must demonstrate that [its] claim falls within the court's limited jurisdiction").

The district court correctly concluded that the absence of an independent basis for subject matter jurisdiction justifies denying permissive intervention. (JA 237 n.3.) It was not an abuse of discretion to reach that decision, nor did the court err in concluding its analysis at that point.

In any event, Crossroads also does not meet the additional requirement for permissive intervention: it does not present a claim or defense in common with the ongoing case brought by Public Citizen against the Commission, as required under Rule 24(b)(1). Instead, Crossroads attempts to sidestep the common "claim or defense" requirement in Rule 24(b)(1) by announcing its intention to defend the Commission's dismissal (Crossroads Br. at 43), but that derivative role is not a basis for permissive intervention. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (explaining that the common claim requirement "'manifestly refer[s] to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit'"). Crossroads itself has no actual claim or defense in this case.

If the Court were, however, to reach the question of whether the "intervention will unduly delay or prejudice the adjudication of the original parties' rights" Crossroads would not fare favorably. Fed. R. Civ. P. 24(b)(3). As this

Court has observed, "[t]he 'delay or prejudice' standard presumably captures all the possible drawbacks of piling on parties; the concomitant issue proliferation and confusion will result in delay as parties and court expend resources trying to overcome the centrifugal forces springing from intervention." *Mass. Sch. of Law*, 118 F.3d at 782. "[P]rejudice" in such circumstances "will take the form not only of the extra cost but also of an increased risk of error." *Id.*

This is particularly concerning here, where Crossroads intends to raise issues beyond the narrow question of whether the Commission's dismissal decision was contrary to law and beyond the arguments the Commission will make. *E.g.*, Crossroads Br. at 42 ("Crossroads [] may certainly press additional arguments . . . ."); JA 192-93 (Crossroads's intervention motion, raising its "broader public interests in free speech and assembly" and need "to preserve the flow of donations from donors who value their privacy"); JA 203 (citing need to preserve Crossroads's tax status); *see Peters*, 873 F. Supp. 2d at 221 (denying permissive intervention when movant would "expand the scope of the issues" (citations omitted)); *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 319139, at *2 (D.D.C. Feb. 28, 2002) (denying intervention when it "would unduly delay proceedings and cause prejudice to the parties"); *cf. Monroe Energy, LLC v. EPA*, 750 F.3d 909, 916 (D.C. Cir. 2014) (rejecting argument "beyond the scope of the issues raised by petitioners" challenging agency action because it was "not

properly before the court"). Intervention here is unnecessary and would likely delay and complicate this case.

CONCLUSION

For the foregoing reasons, the Court should reject Crossroads's appeal and affirm the district court's denial of Crossroads's motion to intervene.

Respectfully submitted,

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ADDENDUM

52 U.S.C. § 30109(a)(8), states in full:

> (8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.
>
> (B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also 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 the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December 2014, I electronically filed the Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system.

Service was made on the following through CM/ECF:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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