

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JOHN DOE 1, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 17-2694 (ABJ)

**MOTION TO INTERVENE BY CITIZENS FOR RESPONSIBILITY AND ETHICS  
IN WASHINGTON AND ANNE WEISMANN**

Citizens for Responsibility and Ethics in Washington (“CREW”) and Anne Weismann — the complainants in the administrative action at issue in this case — respectfully move to intervene as defendants pursuant to Fed. R. Civ. P. 24(a)(2). A memorandum of points and authorities and a proposed order are attached to this motion. Pursuant to LCvR 7(j), an answer to the unsealed version of plaintiffs’ complaint is also attached.

Pursuant to LCvR 7(m), the undersigned counsel has attempted to confer with all counsel of record regarding this motion. John Doe #2 opposes the motion. The Federal Election Commission states as follows: “The Commission will file a written response setting forth its position on the motion.” Counsel for John Doe #1 have not responded to email or telephone inquiries.

Respectfully submitted,

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January 3, 2018

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FEDERAL ELECTION COMMISSION,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO  
INTERVENE BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON  
AND ANNE WEISMANN**

In 2012, one or more unknown donors illegally routed \$1.71 million through several pass-through entities to a super PAC. Citizens for Responsibility and Ethics in Washington and Anne Weismann (collectively, “CREW”) filed a complaint with the Federal Election Commission (“FEC”), seeking to vindicate CREW’s statutory right to know who provided those campaign funds.

In the course of investigating CREW’s complaint, the FEC appears to have discovered the identity of a trust and a trustee who either financed this conspiracy or played a vital role in furthering it. But the FEC’s Commissioners deadlocked on whether to accept its own attorneys’ recommendation to investigate these coconspirators, even while the FEC penalized the pass-through entities and the recipient of the undisclosed funds for effectuating the plot to hide the donors’ identities.

To complete the unlawful concealment of their campaign spending and prevent the FEC from revealing the true source of the campaign funds, the coconspirators have now filed suit in

this Court. If plaintiffs' claim proves successful, CREW will be deprived of three specific statutory rights. First, CREW will be deprived of its right to know who gave \$1.71 million to Now or Never PAC — the very information that CREW's administrative complaint sought to obtain and that is now being withheld. Second, the plaintiffs' claim would significantly impede CREW's exercise of its statutory right to challenge the FEC's baffling decision to close CREW's complaint without even investigating — much less penalizing — those coconspirators. *See CREW v. FEC*, Civ. No. 17-2770 (D.D.C. filed Dec. 22, 2017). Third, intervention is consistent with the practice of courts in this district in “reverse FOIA” cases, which plaintiffs here claim to be bringing. Accordingly, CREW's motion to intervene in this action pursuant to Fed. R. Civ. P. 24(a)(2) should be granted.

#### **I. FACTUAL BACKGROUND<sup>1</sup>**

In the 2012 election cycle, Now or Never PAC, a federal “super PAC,” received a \$1.71 million contribution that Now or Never PAC reported as having been contributed by American Conservative Union (“ACU”), a corporation. In 2014, ACU reported to the Internal Revenue Service that ACU had been merely a pass-through for the \$1.71 million, having received it as “a political contribution [that ACU] promptly and directly delivered to a separate political organization.”

In February 2015, CREW filed an administrative complaint with the FEC alleging that Now or Never PAC, ACU, and the unknown persons who originally provided the \$1.71 million to ACU had each violated the federal prohibition on making or accepting a political contribution

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<sup>1</sup> Except where otherwise noted, the facts in this section are derived from the notification that the FEC sent to CREW upon closing MUR 6920. *See* Letter from Antoinette Fuoto, FEC, to Anne L. Weismann, CREW (Nov. 3, 2017), <https://www.fec.gov/files/legal/murs/current/100487769.pdf>.

in the name of someone other than the true contributor. *See* 52 U.S.C. § 30122. The FEC designated CREW's complaint Matter Under Review ("MUR") 6920.

On November 3, 2017, the FEC notified CREW that on October 24 the FEC had negotiated a \$350,000 civil penalty with Now or Never PAC, ACU, and an entity named Government Integrity, LLC. According to the negotiated agreement, Government Integrity had received \$2.5 million "from another source" and passed \$1.8 million along to ACU; ACU then immediately gave \$1.71 million to Now or Never PAC. Now or Never PAC reported ACU as the donor of the funds on mandatory public disclosure reports, despite knowing that ACU was merely a pass-through.

The FEC's regulations provide that it will make the relevant portions of an enforcement file public 30 days after the enforcement matter is concluded, *see* 11 C.F.R. § 111.20(a), and federal law provides that an administrative complainant must file any challenge to the FEC's failure to take lawful action on its complaint within 60 days of the matter's conclusion, 52 U.S.C. § 30109(a)(8)(B). CREW therefore contacted the FEC on December 5, 2017, to inquire as to why the file in MUR 6920 had not yet been made public. CREW contacted the FEC again on December 15 with the same inquiry.

On December 19, the FEC made public certain limited documents from the file of MUR 6920. Contrary to the FEC's own policy and longstanding procedure,<sup>2</sup> those documents were altered to redact the names of the coconspirators over whose activity the FEC's Commissioners had deadlocked. Also on December 19, CREW became aware of the instant lawsuit.

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<sup>2</sup> *See* FEC, *Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702 (Aug. 2, 2016) (tracing history of FEC's disclosure policies); *see also* 52 U.S.C. § 30109(a)(4)(B)(ii) ("If the Commission makes a determination that a person has not violated this Act . . . , the Commission shall make public such determination.").

On December 20, CREW filed with the FEC a Freedom of Information Act (“FOIA”) request for the unredacted administrative record of MUR 6920.<sup>3</sup> On December 22, CREW filed suit in this Court to challenge the FEC’s failure to take lawful action on CREW’s administrative complaint. *CREW v. FEC*, Civ. No. 17-2770 (D.D.C. filed Dec. 22, 2017).

## **II. STANDARD OF REVIEW FOR MOTIONS TO INTERVENE**

The D.C. Circuit employs a four-factor test for motions to intervene under Fed. R. Civ. P. 24(a): “1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor’s interest.” *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015).<sup>4</sup>

## **III. CREW SATISFIES THE REQUIREMENTS FOR INTERVENTION**

### **A. CREW’s Motion Is Timely**

CREW files this motion only 15 days (9 business days) after the case was unsealed and the public complaint was filed. CREW’s motion is timely. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (approving motion to intervene filed “less than two months after the plaintiffs filed their complaint and before the defendants filed an answer”); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017) (finding intervention timely “approximately sixteen weeks after the initial complaint was filed, and approximately four weeks after the amended complaint . . . was filed”).

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<sup>3</sup> The FOIA request is available at <https://www.citizensforethics.org/foia/expedited-foia-request-federal-election-commission-american-conservative-union-mur-6920/>.

<sup>4</sup> An intervenor who meets the four-factor test necessarily also has Article III standing to intervene because “the standards for constitutional standing and the second factor of the test for intervention as of right are the same.” *Crossroads*, 788 F.3d at 320 (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)).

**B. CREW Holds Statutory Interests in the Information at Issue Here, and Those Interests Would Be Impaired and Impeded If Plaintiffs Were to Prevail**

**1. CREW Holds a Statutory Right to Know Who Provided \$1.71 Million to Now or Never PAC, as Uncovered by the FEC's Investigation of CREW's Administrative Complaint**

CREW has a legally protected interest potentially impaired by this suit because federal law grants CREW a statutory right to know precisely what plaintiffs seek to conceal — the source of the \$1.71 million contribution.

Federal law requires political committees to disclose their contributors, 52 U.S.C. § 30104(b)(3)(A), and prohibits any person from contributing in the name of another, *id.* § 30122. The Supreme Court has long upheld these disclosure requirements as important to “the free functioning of our national institutions.” *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (quotation marks omitted). Disclosure laws “deter actual corruption and avoid the appearance of corruption . . . , discourag[ing] those who would use money for improper purposes either before or after the election.” *Id.* at 67. Such laws also inform the public and aid voters in making decisions at the ballot box: “This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

Congress authorized individuals and groups to file administrative complaints with the FEC regarding violations of the Federal Election Campaign Act (“FECA”), 52 U.S.C. § 30101-46, including violations of its disclosure provisions. 52 U.S.C. § 30109(a)(1). In *FEC v. Akins*, 524 U.S. 11 (1998), the Supreme Court explained that Congress intended, with these provisions, to give voters a statutory right to the specified information. The Court held that Congress “intend[ed] to protect voters” from political committees that violated FECA’s disclosure requirements and that an administrative complainant was an intended beneficiary of the law. *Id.* at 20. In upholding an administrative complainant’s standing to sue in federal court, the

Supreme Court explained that violations of FECA’s disclosure requirements create a “concrete and particular” injury because the statute ‘seek[s] to protect individuals . . . [who] fail[] to receive particular information about campaign-related activities.’ *Id.* at 21-22.

The plain text of FECA, together with the Supreme Court’s precedent, confirm that CREW has a legally protected interest at stake in this suit. FECA requires disclosure and prohibits contributing in the name of another. These provisions benefit the public as a whole, but the legally protected interest is particularly acute with respect to CREW, because CREW exercised its statutory right to file an administrative complaint. As the Court confirmed in *Akins*, CREW is an intended beneficiary of the disclosure provision and has a legal right to seek and obtain that information. *See CREW v. FEC*, 243 F. Supp. 3d 91, 101-02 (D.D.C. 2017) (holding CREW suffered injury-in-fact where it was “deni[ed] . . . information [CREW] believes the law entitle[d] . . . [it] to,” specifically, the identity of a contributor). CREW thus easily satisfies the second factor for intervention because it has a protected statutory right to the information plaintiffs seek to conceal with this lawsuit.

The third intervention factor — that the suit potentially impair or impede CREW’s legally protected interest — is also satisfied here. Plaintiffs seek a court order precluding the FEC from releasing the identity of the person who financed or effectuated the \$1.71 million contribution — the very information FECA entitles CREW to obtain. The lawsuit thus plainly impairs or impedes CREW’s legally protected interest because it could eviscerate that interest. Because CREW filed its administrative action, it was poised to benefit by learning the identities of persons responsible for the \$1.71 million contribution. With this action, plaintiffs seek to remove that benefit to CREW. “[W]here a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party’s benefit,” the party has

“a sufficient injury in fact” to warrant intervention in that court challenge. *Crossroads*, 788 F.3d at 317.

**2. CREW Holds a Statutory Right to Seek Judicial Review of the FEC’s Failure to Act Against the Plaintiffs**

CREW holds a second, independent statutory right implicated by plaintiffs’ lawsuit: The right to seek judicial review of the FEC’s failure to take enforcement action against the funders of the \$1.71 million contribution to Now or Never PAC.

Unlike most law enforcement agencies, the FEC’s decision not to take action on a complaint is subject to judicial review; the complainant can file suit in this Court to challenge such a decision. 52 U.S.C. § 30109(a)(8). If the challenge is successful, the FEC must take additional action to conform to the law. *Id.* § 30109(a)(8)(C).

Because of this unusual ability to obtain judicial review of FEC inaction, the D.C. Circuit has held that the respondent to an FEC administrative complaint has a right to intervene in cases where the administrative complainant brings suit to force the FEC to take enforcement action. *See Crossroads*, 788 F.3d 312. The court in *Crossroads* identified a number of reasons that such intervention falls within Rule 24(a), most notably that the respondent’s rights and interests would be affected by the actions that the FEC would be required to take if the plaintiff prevailed. *See Crossroads*, 788 F.3d at 316-19.

*Crossroads* controls here, as the instant case is merely its mirror-image. In *Crossroads*, administrative complainants sued the FEC to force FEC action (*i.e.*, reconsidering an enforcement decision) that would have been detrimental to the interests of the respondent in the administrative matter. The respondent therefore intervened as of right to protect its statutory

interests. Here, administrative respondents<sup>5</sup> have sued the FEC to force FEC action (*i.e.*, redacting the documentation regarding the FEC’s enforcement decision) that would be detrimental to the interests of the complainant in the administrative matter. The reasoning of *Crossroads* requires that the complainant be permitted to intervene to protect its statutory interests against the action that plaintiffs are trying to compel.<sup>6</sup>

In addition to seeking information through FOIA (*see infra* Part II.B.3), CREW is already exercising its statutory right to seek judicial review of the FEC’s failure to investigate or enforce against the donors. *See CREW v. FEC*, Civ. No. 17-2770 (D.D.C. filed Dec. 22, 2017). If plaintiffs here achieve the concealment they seek, CREW’s exercise of its right will be significantly impeded. To win its suit, CREW will need to show that the FEC’s failure to enforce — as explained by the statement of two of the three FEC Commissioners who voted not to take action on plaintiffs’ illegal conduct<sup>7</sup> — was contrary to law. *See* 52 U.S.C. § 30109(a)(8)(C). As part of that showing, CREW will need to demonstrate that the factual record before the Commission regarding the donors did not support the legal conclusions reached in the Commissioners’ statement. *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 209

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<sup>5</sup> Although it is unclear whether the FEC technically designated plaintiffs as respondents in MUR 6920, CREW’s administrative complaint specifically stated that it was filed against the “Unknown Respondent” who was “the true source of funds ACU transferred to Now or Never PAC.” Compl. ¶¶ 1, 12, MUR 6920 (American Conservative Union *et al.*) (Dec. 20, 2017), <https://www.fec.gov/files/legal/murs/current/100487727.pdf>.

<sup>6</sup> *Crossroads* analyzed this question primarily within the framework of the intervenor’s Article III standing, but the analysis applies indistinguishably here because the test for standing is the same as the “legally protected interest” prong of the D.C. Circuit’s intervention test. *See supra* n.4.

<sup>7</sup> Statement of Reasons of Vice Chair Caroline C. Hunter & Comm’r Lee E. Goodman, MUR 6920 (American Conservative Union *et al.*), <https://www.fec.gov/files/legal/murs/current/100487859.pdf>. The third Commissioner who voted not to enforce, Commissioner Matthew S. Petersen, did not issue a statement in the matter.

F. Supp. 3d 77, 88 (D.D.C. 2016) (noting standard of review in challenges to FEC’s failure to enforce).

If plaintiffs prevail here, it will be exceedingly difficult for CREW to make the necessary showing. Indeed, CREW will not know who the donors were, much less be able to effectively litigate the case that the FEC’s inaction against them was contrary to law. Even the Commissioners’ explanatory statement — the very document that CREW will be challenging — would remain redacted. This would reduce CREW’s arguments to a series of guesses and hypotheticals about the concealed material, with briefing along the lines of: “Assuming the redaction in Document A refers to Secret Respondent B . . . .” To force CREW to litigate in the dark like this would severely impair its statutory right to challenge the FEC’s inaction under section 30109(a)(8).

### **3. CREW’s Intervention Would Be Consistent with Cases Granting FOIA Requesters Intervention in Reverse FOIA Suits**

CREW’s intervention in this case would be consistent with cases granting FOIA requesters intervention in reverse FOIA suits. Plaintiffs cast this case as a reverse FOIA action, contending that FOIA Exemption 7(C) entitles them to an order precluding the FEC from releasing their identities. *See* Pls.’ Emerg. Mot. for Temp. Restraining Order & Prelim. Inj. at 7. Courts regularly grant intervention motions by the FOIA requester in such actions (and indeed, CREW submitted a FOIA request to the FEC promptly upon learning of this case). For example, in *National Business Aviation Ass’n, Inc. v. FAA* (“NBAA”), a reverse FOIA action, the court granted intervention to ProPublica, the FOIA requester, reasoning that having filed the FOIA request sought to be blocked, “it follows that, should the Court find in NBAA’s favor, ProPublica will have lost its opportunity to protect its interests.” Order at 2, NBAA, No. 1:09-cv-1089-RMC (D.D.C. Sept. 21, 2009), ECF No. 28. Moreover, the court explained that “neither of

the current parties represents [ProPublica's] interests fully — NBAA's interests are directly opposed, the Government's interest is merely to adhere to FOIA, and ProPublica has a positive desire to obtain the contested documents." *Id.*; *see also Chiquita Brands Int'l, Inc. v. U.S. SEC*, 10 F. Supp. 3d 1, 2 (D.D.C. 2013) (considering arguments of intervenor-defendant in "reverse FOIA" action); *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378, 1380 (D.C. Cir. 1977) (same).

The same is true here. CREW has sought the identity of the \$1.71 million contributor both via the FEC's regulations requiring disclosure and through FOIA. Plaintiffs' interests are directly opposed to CREW's. And should plaintiffs prevail here, the FEC likely would be obligated to deny CREW's pending FOIA request pursuant to this Court's order. Absent intervention now, CREW's only recourse would be a collateral attack on this Court's order through a suit challenging its FOIA denial, where CREW would already have the deck stacked against it by virtue of the result in this case. *See Crossroads*, 788 F.3d at 320 (noting that "persuasive weight" of plaintiff's victory in first case would harm intervenor's interests in subsequent litigation).

**C. The FEC Cannot Be Relied Upon to Adequately Represent CREW's Interest**

An intervenor "ordinarily should be allowed to intervene unless it is clear that the [preexisting] party will provide adequate representation." *Crossroads*, 788 F.3d at 321 (emphasis added) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980)); *accord Fund for Animals*, 322 F.3d at 735 ("[T]his 'requirement of [Rule 24(a)(2)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate . . . ." (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972))). The intervenor's burden on this prong is "not onerous," *Crossroads*, 788 F.3d at 321 (internal quotation marks omitted), and "should be treated as minimal," *Fund for Animals*, 728 at 735; *see also Forest Cty.*

*Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 11 (D.D.C. 2016) (describing burden on this prong as “*de minimis*”).

The intervenor’s burden is particularly minimal when the intervenor is a private party and the original party is a government agency: The D.C. Circuit has instructed courts to “look skeptically on government entities serving as adequate advocates for private parties.”

*Crossroads*, 788 F.3d at 321; *Fund for Animals*, 322 F.3d at 736 (“[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.”);

*Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (noting “the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances”).

The FEC cannot be relied upon to represent CREW’s interests here for two reasons. First, as explained above, CREW requires the information at issue to effectively prosecute its action challenging the FEC’s unlawful failure to act against the underlying donors of the \$1.71 million. In other words, CREW intends to use the information to effectively litigate and win its lawsuit against the FEC. The FEC, of course, does not want CREW to win that lawsuit; to the contrary, the FEC’s attorneys are obligated to zealously defend against it. There is therefore a fundamental disparity between the incentives that CREW and the FEC face to make the information available. *See Crossroads*, 788 F.3d at 321 (reversing denial of intervention where result of suit might have been to place intervenor and government in adversarial posture in subsequent action); *see also Fund for Animals*, 322 F.3d at 737 (noting that government party “would be shirking its duty were it to advance [intervenor’s] . . . interest”); *Am. Great Lakes Ports Ass’n v. Zukunft*, Civ. No. 16-1019, 2016 WL 8608457, at \*4 (D.D.C. Aug. 26, 2016)

(noting inadequacy of government party's representation of private intervenor's interests); *Forest Cty*, 317 F.R.D. at 15 (same).

The second reason the FEC cannot be assumed to represent CREW's interests involves appellate review: If plaintiffs prevail in this Court, the FEC almost certainly will not appeal. Under FECA, the affirmative votes of four FEC Commissioners are required to appeal a case. 52 U.S.C. §§ 30106(c), 30107(a)(6). Because no more than three of those Commissioners may be affiliated with one political party, *id.* § 30106(a)(1), mustering the necessary four votes for an appeal of an adverse judicial decision has historically proven to be exceedingly difficult for the FEC. Indeed, it appears that the FEC has not appealed a district court judgment — nor sought certiorari on an adverse circuit court judgment — in more than ten years. Movant's intervention in this case is therefore critical to preserving the opportunity for further review in the event of an adverse judgment in this Court or in the court of appeals. *See In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017) (holding intervention as plaintiff appropriate where preexisting plaintiffs “decided not to pursue an appeal from an unfavorable decision”); *Crossroads*, 788 F.3d at 321 (noting that inadequacy of representation prong was met where intervenor and FEC disagreed about “post-judgment strategy”); *Eagle Pharm., Inc. v. Price*, Civ. No. 16-790, 2017 WL 3822725, at \*2 (D.D.C. Aug. 30, 2017) (granting motion to intervene as defendant in part because “if [plaintiff] prevails on the merits in the case and the Federal Defendants elect not to appeal, [intervenor] would have no appeal in which to intervene at a later date”).

#### **IV. CONCLUSION**

CREW has concrete legal rights to the information at issue in this case — rights that would be severely impeded or foreclosed if plaintiffs were to prevail and that the FEC might not

adequately represent. Accordingly, for the reasons stated above, CREW's motion to intervene should be granted.

Respectfully submitted,

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January 3, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on January 3, 2018, I caused the foregoing Motion to Intervene by Citizens for Responsibility and Ethics in Washington and Anne Weismann, including attachments, to be served on the following through the Court's electronic case filing system:

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