IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON

and

ANNE L. WEISMANN

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION

Defendant,

JOHN DOE 1

And

JOHN DOE 2

Proposed Intervenor-Defendants

Civil Action No.: 17-cv-02770 (ABJ)

MOTION TO INTERVENE BY JOHN DOE 1 AND JOHN DOE 2

John Doe 1 and John Doe 2, by and through undersigned counsel, respectfully move pursuant to Fed. R. of Civ. P. 24(a) and 24(b) for leave to intervene in the above-captioned case as intervenor-defendants. A memorandum of points and authorities and a proposed order are attached to this motion. In accordance with Fed. R. Civ. P. 24(c) and LCvR 7(j), John Doe 1 and John Doe 2 enclose a motion to dismiss Plaintiffs' complaint.

Pursuant to LCvR 7(m), on February 22, 2018, counsel for John Doe 1 and John Doe 2 conferred with counsel for Plaintiffs and the defendant Federal Election Commission over the

relief requested in this motion. The FEC does not oppose the motion to intervene; Plaintiffs do oppose this motion.

March 1, 2018

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON	)	
and	)	
ANNE L. WEISMANN	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 17-cv-02770 (ABJ)
FEDERAL ELECTION COMMISSION	)	
Defendant,	)	
JOHN DOE 1	)	
And	)	
JOHN DOE 2	)	
Proposed Intervenor-Defendants	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO INTERVENE BY JOHN DOE 1 AND JOHN DOE 2

John Doe 1, a natural person who serves as the trustee of John Doe 2, a trust (together, "John Does"), through undersigned counsel, together respectfully move the Court to intervene in this action as of right pursuant to Fed. R. Civ. P. 24(a), or, in the alternative, for permission to intervene pursuant to Fed. R. Civ. P. 24(b). A proposed motion to dismiss Plaintiffs' complaints,

setting out "the claim or defense for which intervention is sought," *see* Fed. R. Civ. P. 24(c); LCvR 7(j), is attached.[1]

I. INTRODUCTION

In practical terms, the relief that Citizens for Responsibility and Ethics in Washington and Anne L. Weismann (collectively, "Plaintiffs") seek from this Court is an order that would cause the Federal Election Commission ("FEC" or "Commission") to investigate John Does for an alleged violation of the Federal Election Campaign Act ("FECA"). John Does were not respondents to Plaintiffs' administrative complaint and were not the subject of the attendant FEC investigation, yet the relief Plaintiffs seek risks exposing John Does to liability. It is now well-settled by the D.C. Circuit, as explained in its decision in *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015) (hereinafter, "*Crossroads GPS*"), that, where a plaintiff asks a federal agency to investigate and sanction a party, the party against whom an

[1] Although Fed. R. Civ. P. 24(c) calls for a proposed "pleading" to be attached to a motion to intervene, courts have held that this requirement may be satisfied by a proposed motion to dismiss. *See Ctr. for Biological Diversity v. Jewell*, No. 15-cv-00019, 2015 WL 13037049, at *2 (D. Ariz. May 12, 2015) ("The Court finds that the stricken Motion to Dismiss would have complied with the substantive requirements of Rule 24(c); it puts the existing parties on sufficient notice of the State's claim or defense, such that the procedural requirements of Rule 24(c) would be met."); *New Century Bank v. Open Solutions, Inc.*, No. 10-6537, 2011 WL 1666926, at *3 (E.D. Pa. May 2, 2011) ("other courts have liberally construed the 'pleading' requirement of Rule 24(c) to embrace other filings as long as the documents filed clearly notify the original parties of the position the applicant intervenor will assert"). Indeed, intervention via a proposed motion to dismiss is routinely granted in this district. *See Clean Water Action v. Pruitt*, No. 1:17-cv-00817-DLF, ECF No. 33 (granting motion to intervene and docketing motion to dismiss and opposition to summary judgment); *Macon-Bibb Cty. Econ. Opportunity Council, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:15-cv-01850-RBW, ECF No. 10 (motion to intervene, granted by minute order on the same day as filing); *Knapp Med. Ctr. v. Burwell*, No. 1:15-cv-01663, ECF No. 11; *W. Org. of Res. Councils v. Jewell*, No. 1:14-cv-01993-RBW, ECF Nos. 10, 17, 22, 29, 37 (granting motions to intervene and docketing motions to dismiss); *Alec L. v. Jackson*, No. 1:11-cv-02235, ECF No. 153. John Does stand prepared to answer the complaint, should it survive a motion to dismiss, and to participate as full intervenor-defendants should the Court grant such relief.

enforcement proceeding is sought has the right, pursuant to Fed. R. Civ. P. 24(a), to intervene and set forth the reasons why they should not be subject to that enforcement proceeding. The need for intervention to protect John Does' interest in avoiding enforcement proceedings is all the more acute where the agency (should Plaintiffs prevail) that would be charged with investigating John Does is the very same agency that John Does would be forced to rely on to defend their interests absent intervention.

II. FACTUAL BACKGROUND

John Does' right to intervene is demonstrated by the factual allegations set forth in Plaintiffs' complaint. On February 27, 2015, Plaintiffs filed an administrative complaint with the FEC alleging that three parties and an "Unknown Respondent" violated FECA in connection with a $1.7 million contribution to a Super PAC. Compl. ¶ 24. Thereafter, the FEC opened Matter Under Review ("MUR") 6920. *Id.* On July 11, 2017, the FEC, by a 5-0 vote, substituted Government Integrity, LLC ("Government Integrity") in the place of the "Unknown Respondent" in the investigation triggered by Plaintiffs' complaint. Compl. Ex. 6. On September 20, 2017, the FEC failed, by a vote of 2-3, to find reason to believe that John Does violated § 30122. Compl. Ex. 4. As two Commissioners later noted, it is the Commission's regular practice for its Office of General Counsel ("OGC") to first recommend that a new respondent be added as a party to a complaint, as was done with Government Integrity, before the Commission votes whether to find "reason to believe" that a person or entity violated FECA. *See* Compl. Ex. 5 at 1 n.2. That did not happen here, and, accordingly, John Does were never added as respondents to MUR 6920.

The FEC resolved Plaintiffs' complaint and MUR 6920 through conciliation via an agreement executed on October 31, 2017. Compl. ¶ 30. Four respondents, the three identified in

Plaintiffs' administrative complaint and Government Integrity, were parties to the agreement. John Does were not. On December 15, 2017, John Does filed suit against the FEC, seeking to prevent the Commission from disclosing their names in connection with the release of the investigative file in MUR 6920. Thereafter, on December 19, 2017, an FEC Commissioner issued a statement of reasons that, rather than explaining the reason for any particular vote, lamented the FEC's enforcement process and provided a narrative of that Commissioner's view of the facts. *See* Compl. Ex. 1. On the following day, December 20, 2017, two of the Commissioners who voted against finding reason to believe that John Does violated FECA, issued a statement of reasons explaining their votes. *See* Compl. Ex. 5. They explained that their decision was, in essence, an exercise of the Commission's prosecutorial discretion, based on the uncertain legal theory of John Does' liability, the impending expiration of the statute of limitations, and the public interest in pursuing enforcement against the four respondents. *Id.*

On December 22, 2017, Plaintiffs filed the instant complaint, alleging that the FEC's failure to find reason to believe that John Does violated FECA, the dismissal of Plaintiffs' administrative complaint, and the FEC's vote not to enforce a subpoena issued against John Does were "contrary to law" within the meaning of 52 U.S.C. § 30109(a)(8) and arbitrary, capricious, and an abuse of discretion pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. Compl. ¶¶ 36-46. John Does now respectfully request that the Court grant them leave to intervene in this action, before the FEC's answer is due, and to file the attached proposed motion to dismiss.

III. ARGUMENT

John Does' intervention in this matter is appropriate as a matter of right. Federal Rule of Civil Procedure 24(a)(2) provides that a non-party may intervene as a matter of right where the

non-party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The D.C. Circuit has held that the adoption of this rule was intended to "liberalize the right to intervene in federal actions." *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967). Thus, when determining whether to grant intervention as of right, the D.C. Circuit has identified four factors:

> In deciding whether a party may intervene as of right, we employ a four-factor test requiring: 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest.

Crossroads GPS, 788 F.3d at 320; *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). While an intervenor must demonstrate standing, "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

A. John Does Are Entitled To Intervene as a Matter of Right

John Does have met the four requirements for intervention as of right. The instant motion is timely, because the time has not yet elapsed for the FEC to file its responsive pleading. John Does have a legally cognizable interest in the outcome of this action, which threatens to subject them to investigation and potential sanction by the FEC. Lastly, the FEC, the very agency that would be tasked with investigating and sanctioning Plaintiffs, and where at least one Commissioner thereof has already prejudged John Does' guilt, cannot adequately represent Plaintiffs' interests.

1. This motion is timely

The D.C. Circuit's decision in *Crossroads GPS* suggests that a motion to intervene that is filed before the defendant's responsive pleading is due is timely. *See Crossroads GPS*, 788 F.3d at 320. The FEC's responsive pleading is not due until March 9, 2018. Thus, there can be no prejudice to the existing parties were John Does to be added to this action as defendants. Moreover, no current or scheduled proceedings will be disrupted or delayed if John Does are permitted to intervene as defendants. Accordingly, intervention at this point in the litigation is timely.

2. John Does have a legally protected interest in this litigation

The essence of the relief sought by Plaintiffs' complaint is an order from this Court declaring that the FEC is obligated to conduct an investigation into John Does' conduct, thus exposing them to potential civil liability. As the case now stands, there is no prospect that the FEC will investigate John Does. MUR 6920 was concluded via conciliation, and the statute of limitations has run with respect to any conduct in connection with the subject matter of that MUR. As such, John Does currently face no prospect that the FEC will investigate them, a status quo that Plaintiffs seek to overturn with this lawsuit. Moreover, if Plaintiffs are successful here, John Does are threatened not only with a burdensome and intrusive investigation, but also face the risk of a civil action against them, either by the FEC, pursuant to 52 U.S.C. § 30109(a)(6)(A), or a civil suit by Plaintiffs themselves should the FEC fail to act, pursuant to 52 U.S.C. § 30109(a)(8)(C).

The D.C. Circuit has recognized in a nearly identical case that intervention is appropriate in these circumstances. In *Crossroads GPS*, which involved a more typical Subsection (a)(8) action, the administrative complainant challenged the FEC's decision to dismiss a complaint

against the respondent named in the complaint. 788 F.3d at 315. The respondent then sought intervention in the Subsection (a)(8) action as a defendant in order to protect the benefit it obtained from the FEC's dismissal. *Id.*

In the *Crossroads GPS* case, the D.C. Circuit recognized that a party receives "a significant benefit, similar to a favorable civil judgment," sufficient to confer standing to intervene, where it "faces no further enforcement proceedings" from the FEC. *Id.* at 317. John Does are not precisely analogous to the proposed intervenor in *Crossroads GPS*, given that the proposed intervenor in that case was an actual respondent to an administrative complaint that had actually been dismissed, but the practical effect of the relief Plaintiffs seek is the same as that faced by the proposed intervenor in *Crossroads GPS*. As in that case, John Does received a benefit from the FEC's failure to name them as respondents to Plaintiffs' complaint, in that John Does are not subject to investigation and potential enforcement proceedings by the FEC. Should Plaintiffs prevail in the instant lawsuit, John Does stand to be "subject to enforcement proceedings before a federal agency," and "an unfavorable decision" from this Court would thus "remove the party's benefit." *Id.* Such a decision "would extinguish the current barrier to enforcement and would limit the Commission's discretion in the future." *Id.* at 319. Accordingly, the D.C. Circuit recognized in *Crossroads GPS* that this direct harm could serve as an "injury in fact" for standing purposes, confirming that John Does have a legally protected interest in the outcome of this case. *See id.* at 317-19.

In addition to the interest identified in *Crossroads GPS*, John Does have an interest as non-respondent, third-party witnesses to an FEC enforcement proceeding, in maintaining their

anonymity. That interest is presently being litigated in a related case before this Court.[2] Based on the position the FEC has taken in the related case, causing the Commission to conduct an investigation into John Does could result in the disclosure of their identities, even without a finding of wrongdoing. Moreover, the FEC has taken the position in that litigation that this case cannot be conducted without revealing John Does' identities to Plaintiffs. *See* FEC Opp'n to the Mot. to Intervene by Citizens for Responsibility and Ethics in Washington and Anne Weismann at 5-6, 9, *Doe v. FEC*, No. 17-2694 (ABJ), Dkt. No. 35. Plaintiffs are also actively seeking to use this litigation as a basis for obtaining John Does' identities. *See* Plaintiffs' Motion for Clarification or In the Alternative, for a Protective Order, Dkt. No. 10. Therefore, John Does also have a legal interest in defending the present action in order to prevent what amounts to a collateral attack on the relief they may obtain in their action against the FEC.

3. John Does' interest would be impeded as a practical matter were Plaintiffs to prevail

If Plaintiffs prevail, and thereby succeed in extinguishing the present barrier to enforcement, John Does will be practically impeded in their attempts to protect their interest in avoiding investigation and potential civil litigation against them by the FEC or Plaintiffs. The D.C. Circuit held in *Crossroads GPS* that "[a]n adverse judgment in the district court would impair [proposed intervenor's] defense in a new proceeding because a judicial pronouncement that the FEC's dismissal was contrary to law would make the 'task of reestablishing the status quo . . . [more] difficult and burdensome.'" 788 F.3d at 320 (quoting *Fund for Animals*, 322 F.3d at 735). Plaintiffs seek an order from this Court declaring, among other things, that it was "contrary to law" under FECA and prohibited by the APA for the FEC to (1) exercise its

[2] *See Doe et al. v. FEC*, No. 17-2694 (ABJ).

prosecutorial discretion based on the expiration of the statute of limitations; and (2) "refus[e] to vote to find reason to believe" that John Does violated FECA. Compl. ¶ 38. Such findings would, pursuant to *Crossroads GPS*, undoubtedly prejudice John Does' efforts to resist further investigation or any subsequent civil action.

4. The FEC does not adequately represent John Does' interests

John Does cannot entrust the defense of their interests to the very agency that would be tasked with investigating and, potentially, seeking sanctions against them. Although John Does bear the burden of demonstrating that the FEC does not represent their interests, this burden is "not onerous" and has been described as "minimal." *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). The FEC is the agency that would "directly and immediately" investigate and regulate John Does in the event that Plaintiffs prevail, and as the *Crossroads GPS* Court held, "[i]n such circumstances, [a proposed intervenor] should not need to rely on a doubtful friend to represent its interests, when it can represent itself." *Crossroads GPS*, 788 F.3d at 321.

There could be no more doubtful "friend" of the John Does than the FEC in this case. OGC, the very group that will be responsible for litigating this Subsection (a)(8) action, articulated a position to the FEC (which failed to garner the support of a majority of Commissioners) that mirrors Plaintiffs' position in their Complaint. *See* Compl. ¶ 31. John Does are presently litigating against the FEC in another case arising out of MUR 6920, and the FEC has affirmatively stated it will not seek to preserve John Does' anonymity from Plaintiffs in this case. Moreover, one Commissioner already has, in the words of her fellow Commissioners, "publicly prejudged" John Does' guilt (Compl., Ex. 5 at 3 n.8), accusing them of having participated in a money laundering scheme. Given that the Commission is currently

understaffed, having only four of its six members, John Does have a legitimate concern that this Commissioner, who believes they "got away with it," might refuse not only to appeal any adverse decision but may refuse to defend against this lawsuit at all. *See* 52 U.S.C. § 30106(c) (imposing four-vote requirement for "[a]ll decisions of the Commission with respect to the exercise of its duties and powers"). This lone Commissioner, who has already prejudged Plaintiffs' guilt, has the power to prevent the FEC from defending this case. This concern is not hypothetical; in the *Crossroads GPS* case, two Commissioners (one of whom no longer sits on the Commission) voted against allowing their own agency to defend a lawsuit filed by an activist group. Statement of Reasons of Chairman Lee E. Goodman, and Commissioners Caroline C. Hunter and Matthew S. Petersen Regarding the Commission's Vote to Authorize Defense of Suit in *Public Citizen, et al. v. FEC*, Case No. 14-cv-00148 (RJL) (Apr. 10, 2014), https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/ PublicCitizenStatement_LEG_CCH_MSP.pdf. John Does therefore have a firm basis for doubting whether the FEC will be willing or able to adequately defend their interests, which clearly are at stake in this litigation.

Accordingly, John Does are entitled to intervene in this action by right.

B. In the Alternative, John Does Request Permission To Intervene

If the Court concludes that John Does are not entitled to intervene as of right, John Does respectfully request that the Court grant them permission to intervene pursuant to Fed. R. Civ. P. 24(b). Rule 24(b) permits the Court to allow a non-party to intervene, on a timely motion, where they have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The "claim or defense" language in Rule 24(b) is flexible and nontechnical. *See Ctr. for Biological Diversity v. EPA*, 274 F.R.D. 305, 312 (D.D.C. 2011).

When weighing whether to grant permissive intervention, the rules provide that the Court should "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998). The Court "may also consider 'whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal question presented.'" *Ctr. for Biological Diversity*, 274 F.R.D. at 313 (quoting *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.D.C. 2010)).

The same reasons that support intervention as of right support permissive intervention. As discussed above, John Does have a significant legal interest in this case: preventing the initiation and pursuit of an administrative enforcement proceeding against them. As set out in the attached motion to dismiss, John Does have defenses to raise against Plaintiffs, and are prepared to fully participate in this action as defendants beyond the motion to dismiss, if necessary. John Does intend to raise arguments contesting Plaintiffs' right to bring this action, and the FEC, hamstrung as it is by the requirement that *all* of its current members vote to approve any action, may not provide a full defense of a decision that divided its Commissioners. The perspective of John Does, who are as much a party in interest in this litigation as the Plaintiffs and the FEC, can thus be expected to significantly contribute to the just and equitable adjudication of this case.

CONCLUSION

For the reasons stated above, John Does respectfully request that the Court grant them leave to intervene as party defendants and file the attached motion to dismiss.

March 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2018, I served the foregoing papers on all counsel of record in this case by filing them in the Court's electronic filing system, which served these same papers on counsel of record.

/s/ William W. Taylor, III
William W. Taylor, III