IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GIFFORDS, *Plaintiff*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	Case No. 1:19-cv-1192 (EGS)

PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO NON-PARTIES THE NATIONAL RIFLE ASSOCIATION OF AMERICA AND NATIONAL RIFLE ASSOCIATION OF AMERICA POLITICAL VICTORY FUND'S MOTION FOR RELIEF FROM ORDERS AND JUDGMENT UNDER RULE 60(b)(4)

Plaintiff Giffords respectfully moves this Court for leave to file a sur-reply solely to address the D.C. Circuit's recent order in *Campaign Legal Center v. Heritage Action for America*, No. 23-7107 (Jan. 15, 2025) (the "Order"). The D.C. Circuit issued the Order after Giffords filed its response to Non-Parties the National Rifle Association of America and National Rifle Association of American Political Victory Fund's (collectively, the "NRA") Rule 60 Motion, ECF No. 104 (filed Jan. 10, 2025). The NRA thoroughly addressed the Order in its reply, *see* ECF No. 106 at 3, 13-15, 18, and designated it one of the decisions on which its argument chiefly relies, *see id.* at ii; D.D.C. LR 47(a).

In light of the Order and the NRA's reliance on it, granting Giffords's motion is appropriate for at least three reasons. First, the sur-reply pertains only to the Order and the NRA's discussion of the same. Because these are arguments the NRA could not have made in support of its original motion, ECF No. 101-2 (filed Dec. 6, 2024), and to which Giffords could not have addressed in its opposition, ECF No. 104, a sur-reply would allow both Giffords and the NRA equal opportunity

to address the significance of the Order. Second, the proposed sur-reply, attached as Exhibit 1, is brief. At under four pages of argument, it is similar in length to the portions of the NRA's reply discussing the Order. *See* ECF No. 106 at 3, 13-15, 18. Third, the instant motion for leave to file, and accompanying sur-reply, were filed expeditiously and within six business days of the NRA's reply. For these reasons, granting leave to file sur-reply, and accepting the attached brief as filed, would avoid prejudice to Giffords, not prejudice the NRA, and benefit this Court's consideration of the NRA's Rule 60 Motion.

Counsel for Plaintiff emailed counsel for the FEC and NRA to inquire whether the instant motion is opposed. Counsel for the Federal Election Commission indicated it does not object. Counsel for non-party movants the NRA indicated they do not consent to the motion.

Dated: January 28, 2025

Respectfully submitted,

/s/ Kevin P. Hancock

Adav Noti
Kevin P. Hancock
Daniel Lenz**
CAMPAIGN LEGAL CENTER ACTION
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
anoti@campaignlegal.org
khancock@campaignlegal.org
dlenz@campaignlegal.org

J. Adam Skaggs*
David Pucino*
GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE
223 West 38th St. #90
New York, NY 10018
(917) 680-3473
askaggs@giffords.org
dpucino@giffords.org

*Admitted *Pro Hac Vice*
***Pro Hac Vice* application forthcoming

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this date, January 28, 2025. I electronically filed the foregoing document with the Clerk of the Court using the Court's CM/ECF system, which will send a notice of electronic filing to counsel of record who are registered with the Court's CM/ECF system.

/s/ *Kevin P. Hancock*
Kevin P. Hancock
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GIFFORDS, *Plaintiff*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	Case No. 1:19-cv-1192 (EGS)

SUR-REPLY IN OPPOSITION TO NON-PARTIES THE NATIONAL RIFLE ASSOCIATION OF AMERICA AND NATIONAL RIFLE ASSOCIATION OF AMERICA POLITICAL VICTORY FUND'S MOTION FOR RELIEF FROM ORDERS AND JUDGMENT UNDER RULE 60(b)(4)

Plaintiff Giffords submits this sur-reply solely to address the D.C. Circuit's recent order in *Campaign Legal Center v. Heritage Action for America*, No. 23-7107 (D.C. Cir. Jan. 15, 2025) (the "Order") (attached as Ex. A). The D.C. Circuit issued the Order after Giffords filed its response to the NRA's pending Motion for Relief from Orders and Judgment Under Rule 60(b)(4), ECF No. 104 ("Giffords Opp'n")—but prior to the NRA's reply, ECF No. 106 ("NRA Reply"). Because the Order undermines, rather than supports, the NRA's mootness argument, and for the reasons described in the accompanying Motion for Leave to File a Sur-Reply, this brief should be accepted for filing and the NRA's Motion should be denied.

ARGUMENT

Heritage Action arose out of a complaint Campaign Legal Center ("CLC") filed with the Federal Election Commission ("FEC") in October 2018, alleging Heritage Action for America had violated the Federal Election Campaign Act ("FECA"). *Heritage Action for Am. v. FEC*, 682 F. Supp. 3d 62, 67 (D.D.C. July 17, 2023). In April 2021, the FEC deadlocked on whether there was

reason to believe a violation of law had occurred and on whether to close the administrative file. *Id.* at 67-68. After 120 days had expired after the filing of their initial complaint, CLC filed a delay suit under 52 U.S.C. § 30109(a)(8)(A). *Id.* at 68. Unlike in this case, but as contemplated by FECA, the FEC did not appear to defend the delay suit, *see* 52 U.S.C. §§ 30106(c), 30107(a)(6), and the district court held that the FEC's "'failure to act on [CLC's] administrative complaint [was] contrary to law' and ordered the Commission to act on [CLC's] complaint within 30 days." *Heritage Action*, 682 F. Supp. 3d at 68 (second alteration in original).

Without informing CLC, Heritage Action, or the district court, the FEC then took a series of additional reason-to-believe votes and votes to close the file within those 30 days, all of which resulted in deadlock. *Id.* Not knowing of these votes, the district court determined the FEC had failed to conform to its order and authorized CLC's citizen suit. *Id.*[1] The FEC thereafter disclosed the votes it had taken, *id.*, and Heritage Action moved to dismiss the citizen suit. *Id.* at 77. The court granted the motion, holding that the preconditions to citizen suits under 52 U.S.C. § 30109(a)(8)(C) were jurisdictional, and that the FEC's "deadlock dismissal" constituted final agency action that amounted to conformance, depriving the court of jurisdiction. *Id.*

CLC appealed and, while the appeal was pending, the D.C. Circuit ordered the case held in abeyance pending a decision in *CLC v. 45 Committee, Inc.* Order, *CLC v. Heritage Action for Am.*, No. 23-7107 (D.C. Cir. Nov. 9, 2023). Following the decision in *45Committee*, the D.C. Circuit entered the Order. Although summary in nature, the Order undermines the NRA's theories of mootness in at least two ways.

[1] Following the disposition of its delay suit, CLC sued Heritage Action pursuant to 52 U.S.C. § 30109(a)(8)(C), and Heritage Action sued the FEC. 682 F. Supp. 3d at 68.

First, the Order confirms that the *Heritage Action* district court's central holding—that deadlocked reason-to-believe votes are final agency actions—was incorrect. *See Heritage Action*, 682 F. Supp. 3d at 77; *see also* Giffords Opp'n at 31-32 (citing *CLC v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024)). While the NRA now attempts to disavow this position, *see* NRA Reply, the NRA extensively relied on the district court's *Heritage Action* opinion, along with similar decisions based on the now-debunked "deadlock dismissal" theory in its initial brief, *see, e.g.*, ECF No. 90-1 at 26-34. The D.C. Circuit's published opinion in *45Committee* established that this theory is contrary to the relevant law, while specifically casting doubt on the *Heritage Action* district court opinion. *See* 118 F.4th at 382. The Order, by affirming on alternative grounds, similarly establishes that the district court opinion, on which the NRA relied, was mistaken.[2]

Second, the Order also confirms that *45Committee*'s reasoning does not "'support[] the premise that this Court lacked subject matter jurisdiction,'" as the NRA claims. Giffords Opp'n at 35-39 (quoting ECF No. 102 ("NRA Supp. Br.") at 1-2). As the Order demonstrates, *Heritage Action* is materially indistinguishable, both factually and legally, from *45Committee*. In both *45Committee* and *Heritage Action*, the FEC did not appear in the case to defend the delay suit, and the court issued an order declaring the FEC's delay contrary to law and ordering the FEC to conform with 30 days accordingly. *45Committee*, 118 F.4th at 384; *Heritage Action*, 682 F. Supp. 3d at 68. In both cases, unlike here, the FEC held a deadlocked reason-to-believe vote both before the court found the FEC's delay contrary to law and subsequently *within the 30-day conformance period*. *45Committee*, 118 F.4th at 384; *Heritage Action*, 682 F. Supp. 3d at 67-68, 76. And in both

[2] Although the NRA seems to acknowledge that the central holding in *Heritage Action*—premised on the "deadlock dismissal" theory—cannot survive, it nonetheless persists in arguing that the FEC's purported failure to predict and adopt the argument from that case "smacks of collusion." NRA Reply at 19-20.

cases, the D.C. Circuit did not hold that the first deadlocked vote mooted the case, but instead, held that the *second* deadlocked vote—during the conformance period—required dismissal *on the merits*. As *45Committee* explains: "When a contrary-to-law decision arises from the Commission's failure to act on a complaint at all, the Commission *conforms* by holding a reason-to-believe vote, regardless of the vote's outcome." 118 F.4th at 390 (emphasis added). The Order follows the same logic: "By holding the votes [during the conformance period], the FEC complied with the district court's March 25, 2022 order." Order (citing *45Committee*, 118 F.4th at 390-92).

Like *45Committee*, the Order in *Heritage Action* thus confirms that the NRA's mootness claims are misplaced. First, this Court's contrary-to-law order did not merely require the FEC to act on Giffords's complaints in any way (like those in *45Committee* and *Heritage Action*); instead, it ordered the FEC to make the reason-to-believe determination Giffords sought. Giffords Opp'n at 32-33, 37-39. Second, in any event, the FEC in this case did not hold a reason-to-believe vote after this Court directed the agency to conform, *id.* at 37-38, as the FEC did in both *45Committee* and *Heritage Action*. Third, like *45Committee*, the *Heritage Action* Order undermines the NRA's proposition that a reason-to-believe vote taken *prior* to this Court's determination that the FEC acted contrary to law renders the case moot. *See* Giffords Opp'n at 35-37. If the D.C. Circuit believed—as the NRA claims—that the reasoning in *45Committee* requires a court to hold that a pre-conformance period reason-to-believe deadlock moots a delay case, the D.C. Circuit itself could have resolved *Heritage Action* by holding CLC received the relief to which it was entitled when the FEC held its first reason-to-believe vote. But it did not. The Order contains nothing to suggest the district court lacked jurisdiction to enter judgment in the delay case. To the contrary, by affirming on alternative grounds, the D.C. Circuit conspicuously disapproved of the jurisdictional basis of the district court's holding below.

CONCLUSION

Giffords respectfully requests that the NRA's Rule 60(b)(4) Motion be denied.

Dated: January 28, 2025

Respectfully submitted,

/s/ Kevin P. Hancock

Adav Noti
Kevin P. Hancock
Daniel Lenz**
CAMPAIGN LEGAL CENTER ACTION
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
khancock@campaignlegal.org
anoti@campaignlegal.org
dlenz@campaignlegal.org

Counsel for Plaintiff

J. Adam Skaggs*
David Pucino*
GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE
223 West 38th St. #90
New York, NY 10018
(917) 680-3473
askaggs@giffords.org
dpucino@giffords.org

*Admitted *Pro Hac Vice*
***Pro Hac Vice* application forthcoming

CERTIFICATE OF SERVICE

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/s/ *Kevin P. Hancock*
Kevin P. Hancock
Counsel for Plaintiff

EXHIBIT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7107 **September Term, 2024**

1:22-cv-01248-CJN

Filed On: January 15, 2025

Campaign Legal Center,

Appellant

v.

Heritage Action for America,

Appellee

BEFORE: Millett, Wilkins, and Rao, Circuit Judges

O R D E R

Upon consideration of the motions to govern, the responses thereto, and the reply, it is

ORDERED that the case be returned to the court's active docket. It is

FURTHER ORDERED that the district court's July 17, 2023 order dismissing Campaign Legal Center's complaint be summarily affirmed on the alternate ground that Campaign Legal Center failed to state a claim for relief. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Campaign Legal Center could bring a "citizen suit" against Heritage Action for America only if the Federal Election Commission ("FEC") had failed to timely conform to a district court's order to act on Campaign Legal Center's administrative complaint. See 52 U.S.C. § 30109(a)(8)(C). On March 25, 2022, the district court ordered the FEC to act on Campaign Legal Center's administrative complaint within 30 days. On April 7, 2022, the FEC voted on whether there was reason to believe the administrative complaint's allegations that a violation of the Federal Election Campaign Act had been committed. By holding the votes, the FEC complied with the district court's March 25, 2022 order. See Campaign Legal Ctr. v. 45Committee, Inc., 118 F.4th 378, 390-92 (D.C. Cir. 2024). Accordingly, the preconditions to filing a citizen suit were not satisfied. Because those preconditions are not jurisdictional, the district court's order is affirmed on the ground that Campaign Legal Center failed to state a claim, rather than for lack of jurisdiction. See id. at 386-88, 392 & n*.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7107 **September Term, 2024**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam