UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GIFFORDS,

Plaintiff,

Case No. 1:19-cv-01192-EGS

v.

HON. EMMET G. SULLIVAN

FEDERAL ELECTION COMMISSION,

Defendant.
_____/

THE NRA'S RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SURREPLY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The National Rifle Association of America and the National Rifle Association of America Political Victory Fund (collectively, the "NRA"), by and through its counsel, respectfully opposes Giffords's motion for leave to file a surreply. While the NRA appreciates that Giffords seeks an opportunity to address the D.C. Circuit's recent order in *Campaign Legal Ctr. v. Heritage Action for Am.*, No. 23-7107, 2025 WL 222305 (D.C. Cir. Jan. 15, 2025), the appropriate mechanism for doing so would have been a joint motion for all the participants here to supplement the briefing with short, concise papers that solely address the effect of that one (1) paragraph Order on these proceedings. And while the NRA proposed just that, Giffords insisted on proceeding with its motion for leave to file a surreply.

Giffords, however, has not satisfied this Court's clear requirements for filing a surreply. While the NRA did briefly address the *Heritage Action* Order in its reply brief—that order was issued just two days before the reply brief filing deadline—the issue discussed there was not new. Rather, the issue discussed there is the ***key*** issue that has been the premise of the NRA's motion for relief from orders and judgment from the outset—*i.e.*, that a failed reason-to-believe vote is an "act" under the "failure to act" prong of 52 U.S.C. § 30109(a)(8). This is clear from Giffords's proposed surreply—which analyzes the *Heritage Action* district court opinion, *see* Giffords's proposed surreply, ECF No. 107-1, at 1-3,[1]—which the NRA addressed more than year ago in its opening brief, *see* NRA Br., ECF No. 90-1, at 36-38, 40-42, and which Giffords neglected to address last month in its response.

The NRA's reply did not raise new arguments or new issues, and Giffords's proposed surreply does not present any argument or issue that could not have been raised in its response to

[1] When citing electronic filings throughout this response, the NRA cites to the ECF page number, rather than the page number of the filed document.

the NRA's motion for relief from orders and judgment. Making matters worse, Giffords's proposed surreply goes even further by improperly raising issues not even mentioned in the one-paragraph *Heritage Action* Order. Thus, the NRA would be unduly prejudiced if leave were granted here because Giffords's proposed surreply would deprive the NRA—the movant in these proceedings—of a functional reply. As further explained below, the Court should deny Giffords's motion.

BACKGROUND

On January 27, 2025, Giffords's counsel requested consent for leave to file a surreply in opposition to the NRA's pending Rule 60 motion (ECF Nos. 90 & 90-1). Giffords did not provide the NRA with a copy of its proposed surreply, but characterized the scope of its then-forthcoming surreply as addressing *only* the D.C. Circuit's recent order in *Campaign Legal Ctr. v. Heritage Action for America*, No. 23-7107 (D.C. Cir. Jan. 15, 2025) (the "*Heritage Action* Order"), which the D.C. Circuit had issued *after* the NRA filed its motion and Giffords and the FEC filed their respective responses, but just two days before the deadline for the NRA's reply.

The NRA's motion for relief from orders and judgment—which was filed more than a year ago on January 26, 2024—had allocated several pages to analyzing the district court's decision in *Heritage Action*, which supports the relief sought here by the NRA. Simply put, if the FEC's ultimate deadlocked reason-to-believe vote was an "act" under FECA in *Heritage Action*, then the FEC's ultimate deadlocked reason-to-believe votes taken here were likewise "acts" for the purposes of FECA section 30109(a)(8) such that this case became moot when those votes were taken on February 23, 2021. *See* NRA Br., ECF No. 90-1, at 36-38, 40-42 (discussing *Heritage Action for Am. v. Fed. Election Comm'n*, 682 F. Supp. 3d 62 (D.D.C. 2023)).

Giffords, however, elected not to engage with the NRA's analysis when it filed its response nearly a year later. Specifically, while Giffords's response cites to *Heritage Action* in the context of discussing the "deadlock dismissal" theory—which is a legal argument that has arisen in FECA

citizen suits throughout this District but does not apply to the Rule 60 proceedings in this delay suit—Giffords's response did not meaningfully engage with the NRA's arguments as to the district court's decision in *Heritage Action*. *See* Giffords's Br., ECF No. 104, at 14 n 1; 15; 16; 21 n 2; 39 (discussing deadlock dismissals).

So when Giffords requested the NRA's consent to file a surreply for the sake of addressing the *Heritage Action* Order, it seemed likely that Giffords would be raising new arguments or responding to arguments that the NRA had raised more than a year ago. After all, the substantive portion of the *Heritage Action* Order consists of a lone, single paragraph, so any meaningful discussion of its effect on the instant proceedings would necessarily include both the district court's decision from 2023 and the NRA's opening brief from 2024. With that in mind, the NRA proposed an alternative to surreply practice; specifically, the NRA proposed that it and Giffords file a joint motion to supplement their briefing for the sole purpose of addressing the *Heritage Action* Order. That arrangement would fairly account for the timing of the *Heritage Action* Order, which was issued after Giffords filed its response and just two days before the NRA filed its reply brief. It would have permitted Giffords an opportunity to address the *Heritage Action* Order, while the movant—the NRA—would have had a chance to respond if Giffords raised a new issue or addressed an argument that, although raised in the NRA's opening brief, was never addressed by Giffords's response such that the NRA was functionally deprived of a reply.

Giffords, however, rejected that arrangement and proceeded with its motion for leave to file a surreply. And, as anticipated when the NRA suggested short, supplement briefing rather than surreply practice, Giffords has marshaled its arguments in a manner that deprives the NRA of an effective reply under the Local Rules.

ANALYSIS

The local rules of this District provide "there ordinarily will be at most three memoranda associated with any given motion: (i) the movant's opening memorandum; (ii) the non-movant's opposition; and (iii) the movant's reply." *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187 (D.D.C. 2012) (citing LCvR 7). With that in mind, surreplies are generally "disfavored." *Banner Health*, 905 F. Supp. 2d at 187; *see also Alaron Trading Comm'n v. Commodity Futures Trading Comm'n*, No. 98-1577, 1999 WL 325492, at *1 (D.C. Cir. Apr. 16, 1999).

The question of whether to grant or deny leave to file a surreply is "entrusted to the sound discretion of the district court." *Banner Health*, 905 F. Supp. 2d at 187 (citation omitted). In exercising that discretion, the court should consider (1) "whether the movant's reply in fact raises arguments or issues for the first time," (2) "whether the nonmovant's proposed surreply would be helpful to the resolution of the pending motion," and (3) "whether the movant would be unduly prejudiced were leave to be granted." *Id*. (citing *Glass v. Lahood*, 786 F.Supp.2d 189, 231 (D.D.C. May 20, 2011)). Giffords's motion should be denied under each of those considerations.

First, Giffords has not identified or claimed any need to address matters that were raised for the first time in the NRA's reply. While Giffords claims a surreply is necessary to "allow both Giffords and the NRA equal opportunity to address the significance of the [*Heritage Action*] Order," Giffords's Mot., ECF No. 107, at 1-2, the substance of Giffords's proposed surreply mostly addresses *old* matters. For example, Giffords's proposed surreply attempts to distinguish *Heritage Action* from this case on the bases that the FEC had not appeared there to defend the delay suit and because the FEC's deadlocked reason-to-believe vote there occurred during the 30 day conformance period under FECA. *See* Giffords's Surreply, ECF No. 107-1, at 1-4. But those are facts from the *Heritage Action* district court decision. *See* Giffords's Surreply, ECF No. 107-1 (citing *Heritage Action* district court decision throughout).

Indeed, the NRA devoted several pages of its opening brief to these same facts, explaining there that the key to *Heritage Action* was that the FEC's ultimate deadlocked reason-to-believe vote was an "act" under FECA, which in turn means the FEC's ultimate deadlocked reason-to-believe votes taken in this case were likewise "acts" under section 30109(a)(8) such that this case became moot when those votes were taken on February 23, 2021. *See* NRA Br., ECF No. 90-1, at 36-38, 40-42 (discussing *Heritage Action for Am.*, 682 F. Supp. 3d 62). The NRA further explained that it would make no sense for a deadlocked reason-to-believe vote—which is statutorily significant action under each of *45Committee*, *Heritage Action*, and *Iowa Values*—to satisfy a court order directing the FEC to act by making a reason to believe determination under FECA section 30109(a)(8), but for that same deadlocked vote to not preclude the issuance of such an order where, like in this case, the FEC had already taken such action—and where such action was the *final, ultimate* reason-to-believe vote taken on a matter. *See* NRA Br., ECF No. 90-1, at 38.

The legal premise that the FEC's ultimate failed reason-to-believe vote on a matter is an "act" under FECA is ***the*** key premise for each of the two grounds upon which the NRA seeks relief in this case. The fact that Giffords elected not to engage with the NRA's corresponding analysis as to the *Heritage Action* district court decision when it responded to the NRA's opening brief does not make the issue a new one in the context of seeking leave to file a surreply. This is especially true where Giffords's response cites to *Heritage Action* in the context of discussing the "deadlock dismissal" theory—which, as further explained below, has no bearing here—but did not meaningfully engage with the NRA's arguments as to the district court's decision in *Heritage Action*. *See* Giffords's Br., ECF No. 104, at 14 n 1; 15; 16; 21 n 2; 39 (discussing deadlock dismissals). Thus, the matters to which Giffords seeks to respond through a surreply are not "new," and its motion should be denied. *See Kiewit Power Constructors Co. v. Sec'y of Lab., U.S. Dep't*

of Lab., 959 F.3d 381, 393 (D.C. Cir. 2020) (denying motion for surreply where the arguments complained of appeared in the movant's "principal brief, in substantially similar form.").

The same goes for Giffords's suggestion that this case is different from *45Committee* and *Heritage Action* because, as Giffords would have it, those courts had only ordered the FEC to act on the administrative complaints, while here Giffords sought a *determination*. *See* Surreply, ECF No. 107-1, at 4. That's not a *new* matter, either; Giffords's argument is based on the factual background set out in the *Heritage Action* district court decision, and Giffords has already made this legal argument in its response. In fact, the proposed surreply cites Giffords's own brief in opposition to the NRA's motion several times, *see id.*, at 3-4 (citing Giffords Opp'n, ECF No. 104, at 31-32, 35-39, 32-33, 37-39, and 35-37)—clear proof that Giffords has already responded to the legal arguments raised in the *Heritage Action* Order. And the NRA responded to Giffords's argument in its reply. ECF No. 106, at 12-14 (explaining that courts in the D.C. Circuit have already rejected the argument that a "failure to act" plaintiff like Giffords can compel a particular vote outcome, which Giffords claims to have sought here in the form of a determination); *see also Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378, 392 (D.C. Cir. 2024). Thus, the arguments Giffords raises in its surreply do not respond to "new" matters from the NRA's reply, so Giffords is not entitled to a surreply. *See Kiewit Power Constructors Co.*, 959 F.3d at 393; *see also U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 238 F. Supp. 2d 270, 277 (D.D.C. 2002) ("The matter [to which a surreply seeks to respond] must be truly new."); *Alaron Trading Comm'n*, 1999 WL 325492, at *1 (rejecting surreply where argument "could have been included in [the] opposition to the motion to dismiss.").

The NRA did not raise any new arguments or introduce new evidence in its reply brief—it merely addressed an order from the D.C. Circuit that had been issued just two days before the

deadline for the NRA's reply, and did so through the lens of its arguments in its opening brief. Giffords's motion should be denied.

***Second**, Giffords's proposed surreply would not help the Court resolve the NRA's motion for relief from judgment.* To the contrary, Giffords's discussion of the "deadlock dismissal" theory is irrelevant to the NRA's motion because the key legal consideration here is the presence of an "act" under FECA—*not a dismissal*. Under the deadlock dismissal theory, deadlocked reason-to-believe votes are construed as the equivalent of a dismissal. *See, e.g., CREW v. Fed. Election Comm'n (New Models)*, 993 F.3d 880, 894 (D.C. Cir. 2021). The NRA's position here, though, has nothing to do with the dismissal of an administrative complaint; rather, the only "acts" upon which the NRA depends here were the reason-to-believe votes taken on February 23, 2021, and FECA treats "a failure to act and a dismissal as distinct." *45Committee, Inc.*, 118 F.4th at 391. That reason alone is sufficient to deny Giffords's motion. *See DCFS USA, LLC v. Dist. of Columbia*, No. 12-7073, 2013 WL 500820, at *1 (D.C. Cir. Jan. 17, 2013) (denying motion for leave to file surreply where the "arguments have no bearing on the outcome").

Further, while Giffords's surreply alleges that the NRA "disavows" a position as to deadlock dismissals, ECF No. 107-1, at 3, the NRA has been clear from the outset about the distinction between those two legal doctrines, as well its reliance on "acts" under FECA rather than any "dismissal." *See, e.g.*, NRA's Opening Br, ECF No. 90-1, at 35 ("regardless of whether a deadlocked vote itself—absent an administrative closure—constitutes a formal dismissal, the [D.C] Circuit has squarely held that such a vote constitutes agency 'action' as required by FECA.") (quoting *Campaign Legal Ctr. v. 45Committee Inc.*, 666 F. Supp. 3d 1, 6 (D.D.C. 2023)); *id*. at 40 (relying on *Campaign Legal Ctr. v. Iowa Values*, 691 F. Supp. 3d 94 (D.D.C. 2023), which rejected many of the arguments that Giffords persists with here, and held, *inter alia*, that "[w]hether or not

a deadlocked reason-to-believe vote is formally a 'dismissal,' it is still a statutorily significant action [under FECA section 30109(a)(8).]"). And the NRA reiterated this position when—upon the agreement of all participants here—it supplemented its opening brief to address the D.C. Circuit's then-recent decision in *45Committee*. *See* NRA's Supp'l Br., ECF No. 102, at 4 ("Affirming the district court's dismissal of the *45Commitee* citizen suit, the D.C. Circuit confirmed that even a failed reason-to-believe vote that—like the reason-to-believe vote taken by the FEC in February 2021 in this case—did *not* result in the dismissal of the administrative complaint, was still an 'act' in the context of a 'failure to act' claim under FECA.") (citing *45Committee*, 118 F.4th at 390-92).

To that end, Giffords has already had an opportunity to address this—*and did so*. *See, e.g.*, ECF No. 104, at 10, 14 n 1, 21 n 2, 28 n 4, 39-40. In turn, the NRA reiterated in its reply brief that "while the district courts in *45Committee* and *Heritage Action* relied, in part, on what Giffords and the FEC refer to as the 'deadlock dismissal' theory, the NRA's grounds for relief here do not rely on that theory whatsoever." ECF No. 106, at 16. Rather, the key legal premise here is the presence of an "act" under FECA in the form of the FEC's final deadlocked reason-to-believe votes that were taken on February 23, 2021; those votes were acts, and acts in this context are distinct from dismissals. *Id*. at 16-17.

So this matter is not *new*; it's already been briefed here. While Giffords clearly wants these proceedings to hinge on the deadlock dismissal theory and is apparently persistent in making that argument, requiring an "act" in FECA's "failure to act" context is not the same as a dismissal or a final agency action. Giffords's disagreement on this point does not mean it gets the last word. *See Kiewit Power Constructors Co.*, 959 F.3d at 393 (denying request for surreply where "[a]llowing

rebuttal argument on these facts risks opening the door to any litigant that disagrees with the opposing party's arguments to evade the standard briefing requirements and gain the last word.").

Further, while the deadlock dismissal theory has no bearing on the NRA's motion for relief from orders and judgment, Giffords's proposed surreply drastically overstates the effect of the D.C. Circuit's holdings in *45Committee* and *Heritage Action* as to deadlock dismissals. First, Giffords's surreply inaccurately claims that the D.C. Circuit's *45Committee* decision "established" that the deadlock dismissal theory is "contrary to the relevant law." ECF No. 107-1, at 3 (citing *45Committee*, 118 F.4th at 382). Not so. While the D.C. Circuit held in *45Committee* that the term "deadlock dismissal" "should not be misunderstood to mean a deadlocked vote constitutes or automatically occasions a dismissal," 118 F.4th at 382, the panel did *not* hold that a deadlocked reason-to-believe vote alone may *never* constitute a dismissal.

Indeed, explaining why a deadlocked reason-to-believe vote does not necessarily constitute a dismissal, the panel reasoned that "[i]f the Commission does not dismiss the complaint after a failed reason-to-believe vote, the case remains open. In that circumstance, the Commission may hold further reason-to-believe votes, and there may be no public disclosure of those votes or any other actions taken by the Commission with respect to the complaint." 118 F.4th at 382. And that's what had happened in *45Committee*; there were failed reason-to-believe votes followed by another failed reason-to-believe vote, the latter of which was the ultimate, final reason to believe vote that just happened to occur during the 30-day conformance period. So the policy concern noted in *45Committee—i.e.*, the idea that a deadlocked reason-to-believe vote does not necessarily constitute a dismissal because the FEC might take further reason-to-believe votes thereafter—had occurred in *45Committee*. *Id*. But the same cannot be said about the February 23, 2021 deadlocked reason-to-believe votes here because those were the FEC's ultimate, final reason-to-believe votes

on these matters and are cited in the statement of reasons as the basis for the FEC's decision. NRA Br., ECF No. 90-1, at 42. So while the issue of whether such a vote constitutes a "deadlock dismissal" here is irrelevant to whether the FEC "acted"—it would not be inconsistent with *45Committee* to construe those votes as deadlock dismissals in another procedural context.

The appellate proceedings in *Heritage Action* make this even more clear. There, appellant CLC (Giffords's counsel here) had requested that the D.C. Circuit not only affirm the district court for the reasons stated in *45Committee*, but it also requested that the panel vacate the district court's judgment to clarify that *45Committee* had rejected the notion that a deadlocked reason to believe vote is a final agency action (that being the deadlock dismissal theory in application). *See Campaign Legal Ctr. v Heritage Action for Am.*, No. 23-7107 (D.C. Cir.) Doc. 2086717 (CLC's Reply) at 1-5 (Nov. 25, 2024). And here's the thing: appellant CLC justified its request for vacatur out of the "concern" that the defendants in the FECA citizen suit stemming from *this* case—*i.e.*, *Giffords v. NRA, et al*., No. 21-cv-2887 (D.D.C.)—would continue to take the position there that the citizen suit should be dismissed on the grounds the FEC's February 23, 2021 deadlocked reason-to-believe votes are final agency action. *Campaign Legal Center v. Heritage Action*, No. 23-7107 (D.C. Cir.) Doc. 2086717 (CLC's Reply) at 2-3 (Nov. 25, 2024).

The D.C. Circuit, however, declined to do so; the *Heritage Action* Order contains no language vacating the district court's opinion and instead summarily affirms the lower court's decision on 12(b)(6) grounds rather than 12(b)(1), which is consistent with the outcome of *45Committee*. These types of arguments are precisely why the NRA proposed short, supplemental briefs addressing the *Heritage Action* Order rather than surreply practice. And they're precisely why Giffords's surreply will not assist the Court's consideration of the NRA's motion for relief from orders and judgment. Giffords's motion for leave should be denied.

***Third*, the NRA would be unduly prejudiced were leave to be granted**. Giffords had its opportunity to distinguish *Heritage Action* or to reject the now well-settled notion that there's a distinction between a "dismissal" under the deadlock dismissal theory and an "act" in a "failure to act" suit like this one—and to make its other, unrelated arguments contained in its surreply—through its response in opposition to the NRA's motion. While Giffords attempts to characterize their request for surreply as achieving fairness where the NRA already addressed the *Heritage Action* Order in its reply, Giffords is at no such disadvantage here. The *Heritage Action* Order was issued near the end of an aggressive reply brief turnaround—the NRA had 7 days to respond to Giffords's 47 page response brief. And while the NRA's reply does address the *Heritage Action* Order, it does so through the lens of the arguments raised in its opening brief, *compare* ECF No. 90-1, at 36-38, 40-42, *with* ECF No. 106, at 17-19, so any suggestion that the NRA somehow had a leg up because the D.C. Circuit issued its Order at the conclusion of the briefing here is both untrue *and* insufficient to permit Giffords to get another crack at the movants' premises.

Following this District's local rules for motion practice will not put Giffords at an unfair disadvantage. Permitting short, concise supplemental briefs addressing solely the *Heritage Action* Order and in a manner permitting the NRA to respond to Giffords would have been one thing, but allowing Giffords to sow confusion by reiterating irrelevant "deadlock dismissal" arguments from their opposition brief, and to advance arguments they should have advanced earlier when the NRA would have had a fair opportunity to respond by way of their reply brief, would unduly prejudice the NRA. Giffords's motion should be denied.

CONCLUSION

For these reasons, the NRA respectfully requests that the Court deny Giffords's motion for leave to file a surreply in opposition to the NRA's fully-briefed motion for relief from orders and judgment. To that end, a Proposed Order denying Giffords's motion for leave to file a surreply is

attached to this response. Alternatively, if the Court were to grant Giffords leave to file their proposed additional brief, the NRA respectfully requests the opportunity to respond to that additional brief in full.

Dated: February 11, 2025

Respectfully submitted,

/s/ Charles R. Spies
Charles R. Spies (Bar ID: 989020)
Robert L. Avers (MI0083)
DICKINSON WRIGHT PLLC
1825 Eye Street NW, Suite 900
Washington, DC 20006
(202) 466-5964
cspies@dickinsonwright.com
ravers@dickinsonwright.com

Attorneys for the National Rifle Association of America and the National Rifle Association of America Political Victory Fund

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2025, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

/s/ Charles R. Spies
Charles R. Spies, Bar ID: 989020