UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GIFFORDS,

Plaintiff,

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

v.

HON. EMMET G. SULLIVAN

FEDERAL ELECTION COMMISSION,

Defendant.
_____/

THE NATIONAL RIFLE ASSOCIATION OF AMERICA &
NATIONAL RIFLE ASSOCIATION OF AMERICA POLITICAL VICTORY FUND'S
REPLY IN SUPPORT OF THEIR
MOTION FOR RELIEF FROM ORDERS AND JUDGMENT

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INTRODUCTION

The NRA respectfully seeks an order vacating this Court's Orders and Judgment,[1] which are based on the false premise that the FEC "failed to act" on Giffords's administrative complaints, which we now know is untrue. In the time since the NRA filed its Motion last year, the D.C. Circuit has confirmed that a failed reason-to-believe vote like the vote held by the FEC here on February 23, 2021, constitutes an "act" in the context of a "failure to act" suit. This being a "delay suit" premised on the FEC's alleged "failure to act" under 52 U.S.C. § 30109(a)(8), this confirms that the issue before the Court was no longer "live" as of the Commission's February 23, 2021, failed reason-to-believe votes, which means the case was moot and the Court lacked subject matter jurisdiction to issue the Orders and Judgment. Likewise, the FEC's silence as to the NRA's alternative grounds for relief—the absence of sufficient adverse interest between Plaintiff Giffords and Defendant FEC—all but confirms there was no controversy before this Court when it entered the Orders and Judgment.

Accordingly, the Court should grant the NRA's motion and vacate the Orders and Judgment, dismiss Giffords's complaint, and enter judgment for the FEC.

ARGUMENT

1. The D.C. Circuit has spoken: a failed reason to believe vote is an "act" in the "failure to act" context of FECA, and that means this case was moot *before* this Court entered its Orders and Judgment.

After considering Giffords's administrative complaints, the FEC voted on February 23, 2021 as to whether Giffords's allegations merited reason to believe that FECA violations had occurred. In a deadlocked vote, the controlling commissioners concluded there was no reason to

[1] Specifically, the Court's orders dated September 30, 2021 (ECF No. 71) and November 1, 2021 (ECF No. 75), and its final judgment entered on November 18, 2021 (ECF Nos. 80 & 81).

believe that a violation occurred. *See* ECF No. 90-1, at 8-9.[2] Those commissioners promptly drafted their statement of reasons, which was then placed in the administrative file. *Id*. at 27. That statement of reasons, which has since become public, clearly references the FEC's February 23, 2021, failed reason-to-believe votes as the *last* reason-to-believe votes taken on these matters. Those February 2021 reason-to-believe votes are, for all purposes, the basis of the FEC's disposition of Giffords's administrative complaints. *See* Ex. I (ECF No. 90-12, at 3 n., 9-11).

The NRA seeks relief on the grounds that those failed reason-to-believe votes were statutorily significant "acts" under FECA section 30109(a)(8) such that Giffords's suit here—a "delay suit" premised on the FEC's alleged "failure to act" on Giffords's administrative complaint under 52 U.S.C. § 30109(a)(8)—became moot when the FEC held those failed reason-to-believe votes on February 23, 2021. The fact that the FEC had "acted" under FECA no later than when it held those votes on February 23, 2021, meant that the issue before this Court was no longer "live." From that point on, the Court could not grant effectual relief because, as the D.C. Circuit affirmed just 3 months ago in *Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378 (D.C. Cir. 2024), a "failure-to-act" plaintiff such as Giffords here is not entitled to any "determination" or "final action"—they may only compel "engagement with the merits of [their] administrative complaint through a [reason-to-believe] vote"—and the FEC had already acted through such a vote here.

Not long after the NRA filed the instant motion, the D.C. Circuit scheduled oral argument in *45Committee, Inc.*, No. 23-7040 (D.C. Cir. Apr. 6, 2023). Plaintiff Giffords moved to stay the NRA's motion on the grounds that the issues before the D.C. Circuit in *45Committee*—most of which hinged on identifying just what constitutes an "act" in the "failure to act" context of 52

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

U.S.C. § 30109(a)(8)—would bear on the issues raised here. *See generally* Giffords's Unopposed Mot. to Stay Deadline to Respond to Mot. for Relief from Judgment, ECF No. 96. The NRA did not oppose the request for stay, and this Court entered an order on February 27, 2024, staying Giffords's deadline to respond to this motion pending the conclusion of the appeal in *Campaign Legal Center v. 45Committee*, D.C. Cir. No. 23-7040.

The D.C. Circuit decided *45Committee* on October 8, 2024, affirming the district court's dismissal of a FECA suit. As explained below, the legal proposition that a failed reason-to-believe vote constitutes an "act" in the "failure to act" scheme was part and parcel to the D.C. Circuit's binding decision there. *45Committee Inc.*, 118 F.4th at 390-392. And, for good measure, the D.C. Circuit affirmed a second district court decision on the same grounds just this week. *Campaign Legal Ctr. v. Heritage Action for Am.*, No. 23-7107 (D.C. Cir. Jan. 15, 2024). Applying those holdings here, the failed reason-to-believe votes taken by the FEC on February 23, 2021, were "acts" under FECA. Those votes were held *before* the Court entered its order authorizing Giffords to file a citizen suit against the NRA, and *before* the Court entered its Judgment against the FEC. That means this case was moot *before* the Court entered the Orders and Judgment, and the Orders and Judgment should be vacated under Rule 60(b)(4) as void for lack of subject matter jurisdiction.

***45Committee*: The District Court Proceedings**

In *45Committee*, plaintiff CLC—the same organization that represents Giffords as plaintiff's counsel in this case—filed an administrative complaint alleging that 45Committee, Inc. "had violated FECA by raising and expending funds in connection with the 2016 presidential election without registering as a political committee." *45Committee, Inc.*, 118 F.4th at 383. CLC filed suit against the FEC roughly two years later, alleging a failure by the FEC to act on its

administrative complaint under 52 U.S.C. § 30109(a)(8)(A). *Id*. That is, of course, precisely the same species of claim that Giffords brought in this case.

The FEC did not appear in court to defend itself in *45Committee* against the allegation that its apparent inaction on CLC's administrative complaint was contrary to law. The district court ultimately entered a default judgment against the FEC, holding that "under the *Common Cause* factors, the Commission's failure to act at all on the complaint was contrary to law, and that the *TRAC* factors weighed in favor of granting mandamus relief." *45Committee, Inc.*, 118 F.4th at 384 (citing *Campaign Legal Ctr. v. FEC*, No. 20-CV-0809, 2021 WL 5178968 (D.D.C. Nov. 8, 2021) (internal citations omitted). That analysis is similar to the analysis applied by the Court in the instant case. *See* generally ECF No. 88 (applying the *Common Cause* and TRAC Factors to the FEC's consideration of Giffords's administrative complaints). Then—further similar to what transpired here in Giffords's suit against the FEC—the district court ordered the FEC "to act on the complaint within thirty days pursuant to 52 U.S.C. § 30109(a)(8)(C)." *Id*. at 384 (D.C. Cir. 2024) (quoting *Campaign Legal Ctr.*, 2021 WL 5178968 at *9).

The FEC did not notify the plaintiff or the court of any action taken during that 30-day conformance period. *Id*. And so—like here—as soon as that 30-day conformance period expired, the plaintiff in *45Committee* asked the district court for an order "finding that the Commission had failed to conform with the contrary-to-law determination," which of course—again, like here—"would pave the way for a citizen suit" under 52 U.S.C. § 30109(a)(8)(C). *Id*.

Plaintiff CLC filed a citizen suit against respondent 45Committee the very next day, which ultimately moved to dismiss that citizen suit for lack of subject matter jurisdiction, among other grounds. *45Committee, Inc.*, 666 F. Supp. 3d at 1-2. The premise of 45Committee's subject matter jurisdiction argument was that because the FEC had held a deadlocked reason-to-believe vote

during the thirty day conformance period and *before* the delay suit court entered its judgment, the citizen suit court lacked jurisdiction because the FEC had acted under FECA when it conducted those failed reason to believe votes. *Id*. at *3–4. Put another way, respondent 45Committee's position was that the FEC could not have failed to act under FECA because the FEC had taken votes at the reason-to-believe stage, and those votes were "acts" under FECA.

Plaintiff disagreed, arguing that a failed reason-to-believe vote does not constitute "action" under FECA because that agency action did not result in the dismissal of plaintiff's administrative complaint. *Id*. at *4. But the *45Committee* district court was unpersuaded, reasoning that plaintiff's argument was "foreclosed by precedent." *Id.* Thus, the district court sided with 45Committee and dismissed the citizen suit complaint on the grounds that the FEC's failed reason to believe vote was indeed an "action" under FECA, which in turn meant the FEC had conformed with the Court's order by taking such action under FECA within 30 days. *Id*. at *4-5.

"More importantly," the court continued, "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." *45Committee, Inc.*, 666 F. Supp. 3d at 6. "As the [D.C.] Circuit has explained, 'recognizing FECA deadlocks as agency action . . . is baked into the very text of the statute,'" and "[b]ecause 'Congress uniquely structured the FEC toward maintaining the status quo,' such a structure 'increas[es] the appropriateness of recognizing deadlocks as agency action.'" *Id*. (quoting *Pub. Citizen, Inc.*, *v. FERC*, 839 F.3d 1165, 1170-71 (D.C. Cir. 2016) (some alterations in original). Therefore, the district court held that "the deadlock [reason to believe] vote taken by the Commission on December 2, 2021, constituted an 'action'—indeed, a final agency action—required by the delay court." *Id*. (quoting *Pub. Citizen,*

Inc., 839 F.3d at 1170, and citing *CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018) (known as "*Commission on Hope*"). Thus, the district court lacked jurisdiction over CLC's citizen suit.

45Committee: The D.C. Circuit's Decision and its Application to the FEC's Action Here

Unwilling to accept the proposition that a failed reason-to-believe vote is an "action" under FECA, the *45Committee* plaintiff took their case to the D.C. Circuit. The plaintiffs fared no better there, as the D.C. Circuit confirmed the key legal consideration at play here in the NRA's motion: a failed reason-to-believe vote is, indeed, an "act" under FECA. As further explained below, the reasoning and the outcome of the D.C. Circuit's decision in *45Committee* solidify the fact that the FEC's February 23, 2021 failed reason-to-believe vote in the instant matters rendered this case moot—unbeknownst to the Court—long before it issued the Orders and Judgment.

Recall that there are "two preconditions to a citizen suit: (i) a [delay suit] court must declare that the Commission's failure to act on a complaint (or its dismissal of a complaint) is contrary to law and must order the Commission to conform with that declaration; and (ii) the Commission must fail to timely conform with that declaration." *45Committee*, *Inc.*, 118 F.4th at 383. In *45Committee*, "the Commission's failure to act on CLC's complaint against 45Committee was deemed contrary to law, but within thirty days of that decision, the Commission held a reason-to-believe vote." *Id*. at 389-390. "That vote failed to garner the four votes necessary to either find reason to believe (and thus initiate an investigation) or find no reason to believe (and thus dismiss the complaint)." *Id*. at 390. "And while the Commission voted later that same day on dismissing the complaint, that vote, too, failed to gain a majority, so the complaint remained pending at the end of the thirty-day period." *Id.* at 390.

Thus, the issue before the D.C. Circuit in *45Commitee* was "whether the Commission's holding the failed reason-to-believe vote constituted conformance with the contrary-to-law

determination." That question turned on the issue currently before this Court, *i.e.*, whether that failed reason-to-believe vote was an "act" under FECA. While the parties in *45Commitee* agreed that in order "to conform with a declaration that its failure to act on an administrative complaint was contrary to law, the Commission must *act* on the complaint," the parties nonetheless disagreed "about what counts as action, much less about what constitutes *conforming* action." *Id*. 118 F.4th at 390 (first emphasis added).

For its part, the plaintiff argued that "only a majority-supported decision can count as conforming action because, under FECA, the Commission can act only through majority vote." *Id*. Thus, in the plaintiff's view, "only two outcomes can constitute conforming action: a successful reason-to-believe vote (*i.e*., a four-vote decision to pursue an investigation), or a majority decision to dismiss the complaint." *Id*. In other words, as the plaintiffs in *45Committee* would have it, because the Commission's reason-to-believe vote "failed" such that the "Commission did not dismiss the complaint within the thirty-day window, there was no conformance and [plaintiff] can bring its citizen suit." *45Committee, Inc.*, 118 F.4th at 390.

The D.C. Circuit rejected that argument, concluding that "[w]hen 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." *Id*. In other words, all that was required of the FEC during the conformance period was an "act" under FECA; the cause of action is, after all, based on a "failure to *act*"—not on a "failure to render an ultimate *decision*." *Id.* (emphasis in original). The D.C. Circuit cited two key reasons for this outcome—both of which apply here, too. "First, what counts as conforming action depends on what action the contrary-to-law plaintiff was entitled to compel." *Id*. "Second," like here, "when the contrary-to-law suit is based on the Commission's failure to take any action at all on a pending complaint,

the plaintiff seeks to compel the Commission to take at least some cognizable enforcement step under the statute, and holding a reason-to-believe vote counts as such a step." *Id*.

The D.C. Circuit boiled it down to this. When it comes to relief in a "failure-to-act" suit, a plaintiff may only compel "the action whose nonperformance by the Commission 'aggrieved' her." *45Committee, Inc*., 118 F.4th at 390 (citing 52 U.S.C. § 30109(a)(8)(A), (C)). "That is, she can compel the action that, had it been performed, would have left her without the ability to bring (or win) her contrary-to-law suit." *Id*. Answering the question then of just what "action" it is that a failure to act plaintiff such as Giffords in this case can compel from the FEC, the D.C. Circuit held that the mere holding of a reason-to-believe vote—*without any regard for the outcome of the vote itself*—is such an action because if the Commission held such a vote, then it would prevail against a claim that it had failed to act. *Id*.

That brings us to Giffords's first argument here: Giffords claims that 45Committee does not apply here because they sought more than an "act" under FECA—*i.e.*, they sought a "determination." See Giffords's Resp. at 41 (drawing a false distinction between a "successful reason-to-believe vote that *determines* whether there is a reason to believe" and "a *failed* reason-to-believe vote that deadlocked"). *id*. at 46. Giffords, however, is not entitled to any such "determination" as a plaintiff in a "failure to act" suit under 52 U.S.C. § 30109(a)(8)(A)-(C).

In fact, the D.C. Circuit rejected a similar argument in *45Committee*. There, plaintiff CLC urged the panel to "require more of the Commission" than a failed reason-to-believe vote, but the D.C. Circuit held otherwise because "forcing the Commission to engage with the merits of a complaint [through even a failed reason-to-believe vote] is significant in itself: it prods into motion

FECA's judicial-review and enforcement scheme." *45Committee, Inc*., 118 F.4th at 392.[3] *See also Campaign Legal Ctr. v. Iowa Values*, 691 F. Supp. 3d 94, 106 (D.D.C. 2023), motion to certify appeal denied, 710 F. Supp. 3d 35 (D.D.C. 2024) (rejecting a similar argument because "[b]y its plain terms, § 30109(a)(8) authorizes a citizen suit where there is 'a failure of the Commission to act,' 52 U.S.C. § 30109(a)(8)(A), *not where there is a failure of the Commission to take final action*.").

And the panel's reasoning makes sense under FECA. As the D.C. Circuit reasoned, "a failure by the Commission to act at all on a pending complaint means a failure to take some cognizable enforcement step under the statute in response to the complaint. **And holding a reason-to-believe vote *is* such a step**." *Id*. at 391. (emphasis added). The panel's decision is further supported by the "broader enforcement scheme" under FECA. Rejecting the plaintiff's argument that a failed reason-to-believe vote is not sufficient "action" under FECA, the panel reasoned that "[i]f a failure to act on a pending complaint meant a failure to *find* reason to believe—as opposed to a failure to conduct a reason-to-believe vote—then a contrary-to-law suit challenging a failure to act and one challenging a dismissal following a failed reason-to-believe vote would ultimately complain about the same thing: a failure to find a reason to believe." *45Committee, Inc.*, 118 F.4th at 391. Indeed, "collapsing those two kinds of contrary-to-law"—*i.e*., a "failure to act" suit (like Giffords's suit here) and a "contrary to law" challenging the substantive result of the FEC's decision—"would make no sense under the statute, which treats a failure to act and a dismissal as distinct." *45Committee, Inc.*, 118 F.4th at 391 (citing 52 USC § 30109(a)(8)(A) ("Any party

[3] As further discussed below under section 2 of this brief, any frustration of FECA's judicial review scheme here was caused by the FEC's failure to alert the court as to the significance of its February 23, 2021, reason-to-believe votes—not by agency inaction.

aggrieved by an order of the Commission dismissing a complaint . . . *or* by a failure of the Commission to act on such complaint. . . .") (emphasis added).

Nor is it of any significance that the Court's conformance order directed the FEC to make a "determination." As a preliminary matter, the "determination" language in the court's order appears to have originated from the proposed order that Giffords included with its Motion for Summary Judgment. *Compare*, ECF No. 48, at 31 ("It is further **ORDERED** that, pursuant to 52 U.S.C. § 30109(a)(8)(C), Defendant conform to this Court's Order within 30 days of the entry of this order by making the reason-to-believe determination set forth in 52 U.S.C. § 30109(a)(2).") *with* ECF No. 71, at 1 ("**ORDERED** that, pursuant to 52 U.S.C. § 30109(a)(8)(C), Defendant conform to this Order within 30 days of the entry of this order by making the reason-to-believe determination set forth in 52 U.S.C. § 30109(a)(2)."). That aside, a plaintiff in a "failure to act" suit is limited in the relief it can seek. *See 45Committee Inc.*, 118 F.4th at 391 (reasoning that a "failure to act" plaintiff may only seek to compel an "act on a pending complaint," which in turn means "to take some enforcement step recognized by the statute," and that "a reason-to-believe vote is such a step."). In fact, Giffords all but conceded as much when summarizing the judicial review process of FEC delay suits in its response. *See* ECF No. 104, at 16 ("**The district court hearing the suit "may declare that the dismissal of the complaint or the failure to act is contrary to law" and 'direct the Commission to conform with such declaration within 30 days.** *Id.* § 30109(a)(8)(C).'") (emphasis added). As a result, Giffords was only entitled "to compel the Commission's engagement with the merits of [their] administrative complaint through such a vote; it does not entitle [them] to a particular vote outcome." *Id*. at 392.

Giffords's next argument focuses on the timing of the FEC's February 23, 2021 reason-to-believe vote. Giffords questions whether those failed reason-to-believe votes could be "acts" under

FECA given that the FEC held those votes "*before* the FEC was ordered to conform." Giffords's Br. at 43; 46. Put another way, Giffords's argument seems to be that a failed reason-to-believe vote is sufficient to satisfy an order compelling the FEC to "act" (*i.e.*, sufficient to satisfy a conformance order issued *after* the Court finds that the FEC failed to act, see 52 U.S.C § 30109(a)(8)(C), but that the same failed reason-to-believe vote would not have been an 'act" upon the Court's initial review of whether the FEC had failed to act in the first place. Not only does Giffords's argument collapse under its own weight (if an "act" can comply with a conformance order, then it surely could have precluded a "failure to act" finding to begin with), it's also inconsistent with the D.C. Circuit's decision in *45Committee*, which had to determine just what constituted an "act" under 52 U.S.C § 30109(a)(8)(C) so that it could then consider whether such an act had occurred for the sake of confirming conformance within the 30 day period under § 30109(a)(8)(C). *See 45Committee, Inc.*, 118 F.4th at 391. An act that satisfies a conformance order is the same act that, by its very nature, would have precluded a failure to act determination in the first place. To hold otherwise would flip *45Committee* on its head.

As explained in the NRA's opening brief, ECF No. 90-1, at 33-43, the specific deadlocked reason-to-believe vote that constituted statutorily significant acts under FECA section 30109(a)(8) in each of *Campaign Legal Ctr. v. 45Committee, Inc.*, 666 F. Supp. 3d 1 (D.D.C. 2023), *Heritage Action for Am. v. Fed. Election Comm'n*, 682 F. Supp. 3d 62 (D.D.C. 2023), and *Iowa Values*, 691 F. Supp. 3d 94 was the final reason-to-believe vote held by the FEC in each of those matters. Put another way, the statutorily significant deadlocked reason-to-believe vote in each of those cases was *the* reason-to-believe vote that ultimately served as the FEC's decision as to each of the corresponding administrative matters. And that's the case here, too.

In fact, one could easily say that the FEC acted more reasonably here than it did in *45Committee* or *Heritage Action* because here, it acted by holding reason-to-believe votes without having been ordered to do so. The FEC deadlocked on reason to believe on February 23, 2021, when the controlling commissioners voted against the recommendation of the Office of General Counsel to find reason to believe. ECF No. 85, at 1–2. Shortly thereafter, the controlling commissioners drafted their statement of reasons, *see* Ex J. (ECF No. 90-13, at 15–16), which the FEC admitted was placed in the administrative record prior to this Court entering its order authorizing Giffords to file its citizen suit and before the Court entered its Judgment. *See* Ex. F. (ECF No. 90-9, at 6:11 – 16).

Those February 2021 deadlocked reason-to-believe votes are clearly referenced in the controlling commissioner's statement of reasons as *the* reason-to-believe votes that serve as the FEC's decision as to the administrative complaints in this case. See Ex. I (ECF No. 90-12, at 3 n., 9-11). There were no subsequent reason-to-believe votes taken here. The FEC conceded this point in its response to the NRA's motion. *See* ECF No. 94 at 3 (confirming that "no additional vote was taken regarding reason to believe" after February 23, 2021). Thus, as of February 23, 2021—and long before this Court entered the Orders and Judgment—the FEC had "acted" for the purpose of section 30109(a)(8) under *45Committee*, *Heritage Action*, and *Iowa Values*.

Further, 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. Under the deadlock dismissal theory, deadlocked reason-to-believe votes are construed as the equivalent of a dismissal. See *Heritage Action*, 682 F.Supp.3d at 74 (reasoning that because the Commission "cannot investigate complaints absent majority vote . . . the statute compels [the FEC] to dismiss complaints in deadlock situations.")

(quoting *Pub. Citizen, Inc.*, 839 F.3d at 1170 (citing 52 U.S.C. § 30109(a)(2))). The NRA's position here, though, has nothing to do with the dismissal of an administrative complaint; the only "acts" upon which the NRA depends here were the reason-to-believe votes taken on February 23, 2021. And as the D.C. Circuit held in *45Committee*, while FECA treats "a failure to act and a dismissal as distinct," *45Committee, Inc.*, 118 F4th at 391, a failed reason-to-believe is nonetheless an "act" under FECA because such a vote shows "engagement with the merits" of an administrative complaint. *Id*. at 392. The NRA's motion relies on the FEC's acts—not on any "deadlock dismissal theory."

For these reasons, the D.C. Circuit's decision in *45Committee* affirm that the failed reason-to-believe votes taken by the Commission here on February 23, 2021, were "acts" under FECA.

The D.C. Circuit Affirms *Heritage Action*

Just this week, the D.C. Circuit affirmed the District Court's decision in *Heritage Action for Am.*, No. 23-7107 (D.C. Cir. Jan. 15, 2024), which further supports the fact that the FEC's failed reason-to-believe votes here were acts under FECA. In *Heritage Action*, the plaintiff had again obtained an order from a delay suit court holding that the FEC's "failure to act on [CLC's] administrative complaint," which plaintiff had filed against Heritage Action for America, was "contrary to law." *Heritage Action*, 682 F. Supp. 3d at 65. The delay suit court "ordered the Commission to act on [CLC's] complaint within 30 days" under FECA section 30109(a)(8)(C). *Id*. When the FEC failed to appear or otherwise respond to the court's order to act on CLC's complaint within 30 days, the delay suit court "determined that the Commission had failed to conform to [the Court's] earlier order and granted [CLC] permission to bring a civil action against Heritage Action under section 30109(a)(8)(C)." *Id*.

Two days later, CLC filed a citizen suit against Heritage Action. *Id*. at 67. The district court ultimately held that it lacked subject matter jurisdiction because the FEC's deadlocked reason-to-believe votes were agency actions under FECA section 30109(a)(8)(C). *Id.* at 73. And because the FEC had taken those deadlocked reason-to-believe votes within 30 days of the delay suit court's order to act on CLC's complaints, those reason-to-believe votes—*those acts*—"conformed the Commission to [the delay suit court's] order to act on the complaint within 30 days." *Id*. (citing FECA section 30109(a)(8)(C)). Thus, the court lacked jurisdiction. *Id.* (quoting *45Committee, Inc.*, 666 F. Supp. 3d at 5).

While that case had been pending on appeal since the time the NRA filed the instant motion, the D.C. Circuit entered an order on January 15, 2025, summarily affirming the district court's dismissal of the plaintiff's complaint. Relying on its recent decision in 45Committee, the D.C. Circuit held that the FEC's failed reason to believe vote complied with the district court's order "to act" on Plaintiff's administrative complaint. *Heritage Action*, No. 23-7107 (D.C. Cir. Jan. 15, 2024) ("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.") (citing *45Committee, Inc.*, 118 F.4th at 390-92; *see also Heritage Action*, 682 F. Supp. 3d at 77 ("Therefore, at a minimum, the deadlock dismissals that occurred April 7, 2022, conformed the Commission to Judge Kelly's order to *act* on the complaint within 30 days.") (emphasis added) (citations omitted).

The D.C. Circuit's affirmance of *Heritage Action* further supports the case for vacating the Orders and Judgment on mootness grounds. Because the FEC's February 23, 2021 deadlocked reason-to-believe vote was an agency action for the purposes of FECA section 30109(a)(8), *see*

45Committee, Inc., 666 F. Supp. 3d at 4; *Heritage Action*, 682 F. Supp. 3d at 77, this delay suit premised on an alleged failure to act was moot from that failed reason-to-believe vote forward. It would seem absurd for a deadlocked reason-to-believe vote, which is statutorily significant action under both *45Committee* and *Heritage Action*, 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 here, the FEC had already taken such action.

The FEC acts even *more* reasonably when, as here, it takes that statutorily significant action *before* being ordered to do so than when it takes that action for the sake of complying with an order under FECA section 30109(a)(8)(C). Thus, the FEC acted even more reasonably here than it did in *45Committee* or *Heritage Action*, and this case became moot when the FEC deadlocked on February 23, 2021.

This case was moot from February 23, 2021 forward.

The three courts in this District that have considered the question have held that a deadlocked reason-to-believe vote is a significant "action" in the context of an alleged "failure to act" under section 30109(a)(8). *See 45Committee, Inc.*, 666 F. Supp. 3d at 4; *Heritage Action*, 682 F. Supp. 3d at 77; *Iowa Values*, 691 F. Supp. 3d 94, 106. And—more importantly—the two cases that were appealed have both been affirmed the D.C. Circuit. *See* [*45Committee, Inc.*, 118 F4th at 382]; *Heritage Action for Am.*, No. 23-7107 (D.C. Cir. Jan. 15, 2024).

The analysis from those cases applies equally here. The FEC's February 23, 2021 deadlocked reason-to-believe vote was an agency "action" for the purposes of 52 U.S.C. § 30109(a)(8). Here, the Court held that the FEC's conduct leading up to its February 23, 2021 deadlocked reason-to-believe vote was reasonable. ECF No. 88, at 30 ("In view of the above, the

Commission's actions up until February 23, 2021, appear to be substantially justified."). As a result, this being a "delay suit" premised on the FEC's alleged failure to act under 52 U.S.C. § 30109(a)(8), the issue before the Court was no longer "live" as of February 23, 2021, because the Court could no longer grant effectual relief at that time.

From that point on, there was simply no action left to compel under this prong of FECA. See *45Committee, Inc.*, 118 F4th at 392. And because the Court could no longer grant effectual relief at that time, the case was moot and the Court lacked subject matter jurisdiction to issue the Orders and Judgment. *See Spencer v. Kemna*, 523 U.S. 1, 7–8, 18 (1998) ("[M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so."). Thus, the Court need not even consider the alternative grounds for relief below, or whether a non-party has standing to pursue relief under Rule 60(b)(4). *See Jakks Pac., Inc. v. Accasvek, LLC*, 270 F. Supp. 3d 191, 196 n.4 (D.D.C. 2017), *aff'd per curiam*, 727 Fed. Appx. 704 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 596 (2018) (emphasis added) ("A court has an independent obligation to confirm that it has subject-matter jurisdiction; it is *irrelevant* whether a party or a non-party first alerts the court to potential jurisdictional defects."). The Orders and Judgment should be vacated as void for lack of subject matter jurisdiction.

2. The parties lacked sufficient adversity as to both a dispositive legal question and the outcome of this case, and either of those render the Orders and Judgment void.

This Court should vacate the Orders and Judgment under Rule 60(b)(4) because there was no "controversy" as required under Article III of the Constitution due to the lack of sufficient adverse interest between the parties. There are two separate grounds for relief here. **First**, while this Court's ruling that the FEC failed to act was based on the *appearance* of the FEC's failure to take *any* action on the underlying matters during the seven months between the February 23, 2021 deadlocked reason-to-believe votes and the Court's September 30, 2021 Memorandum Opinion,

subsequent FEC disclosures show that it was anything but inactive at that time. And the FEC failed to inform this Court of that dispositive information despite ample opportunity to do so. **Second**, the FEC also failed to raise the legal significance of the February 23, 2021 deadlocked reason-to-believe votes because it never told the Court that those votes were "acts" under FECA such that the FEC could not have violated section 30109(a)(8). Either reason is sufficient for this Court to vacate the Orders and Judgment as void.

Starting with the FEC's failure to inform the Court of dispositive factual information, recall that the Court's September 30, 2021 Memorandum Opinion granting summary judgment for Giffords hinged on the perception that—***specific to the period after the FEC's February 2021 reason-to-believe votes***—the FEC had not "assured the court that it is moving expeditiously to address the claims." ECF No. 88, at 30 (internal citations and quotation marks omitted). The Court held that it "cannot find that the FEC's failure to take any action on the matters during the past 7 months [since the February 23, 2021 deadlocked reason-to-believe votes] is reasonable.") *Id*. at 30–31. We now know, however, that the FEC *did* move expeditiously after the February 2021 reason-to-believe votes and before the Memorandum Opinion issued on September 30, 2021.

The linchpin of the Court's decision, *i.e*., the perception of a complete lack of action at the FEC from February 23, 2021, through September 30, 2021, was—unbeknownst to the Court—completely untrue. Sure, the FEC did give the Court a cursory update as to the status of the matters during the November 1, 2021 status conference. But as the NRA explained in its opening brief, the FEC did *not* disclose during a *pre-judgment* conference the fact that the FEC had been anything but inactive during the seven months between the FEC's February 23, 2021 deadlocked reason-to-believe votes and the Court's September 30, 2021 Memorandum Opinion. And while the FEC filed a response solely "to controvert any insinuation of impropriety by agency counsel and to highlight

certain relevant information in the record," ECF No. 94, at 1, the FEC never directly addresses its failure to stand up during that November 1, 2021 status conference and inform that Court that the basis for its decision—*i.e.*, the FEC's apparent inaction and failure to move expeditiously to address the claims—was simply not the case.

Moving on to the lack of legal adversity, which is a separate and distinct basis to vacate the Orders and Judgment, it turns out that the FEC had thrown in the towel long before the Court issued its Memorandum Opinion. Recall that Giffords had moved for summary judgment on the grounds the FEC had not acted because, at the time, the FEC had not yet voted on reason to believe. *See E.g.*, Pl.'s Mem. Supp. Cross-Mot. Sum. J. & Opp'n, ECF No. 48 at 14; *id*. at 19. Yet while that motion was pending, the FEC held votes on reason to believe—which was exactly what Giffords claimed the FEC hadn't done. And although the FEC informed the Court that it held those votes, *see* ECF Nos. 84 & 85, it *never* raised the dispositive argument that those deadlocked reason-to-believe votes were acts under section 30109(a)(8). And that is because the parties here were functionally aligned as to whether the FEC had "acted" under FECA section 30109(a)(8), which was the dispositive legal question in this case.

The complete absence of that argument had a material effect on the outcome of this case. After all, the three courts in this District that have considered this same question held that a deadlocked reason-to-believe vote is a significant "action" in the context of an alleged "failure to act" under section 30109(a)(8). *See 45Committee, Inc.*, 666 F. Supp. 3d at 4; *Heritage Action*, 682 F. Supp. 3d at 77; *Iowa Values*, 691 F. Supp. 3d 94, 106. And—again—the two of those cases that were appealed have both been affirmed by the D.C. Circuit. *See 45Committee, Inc.*, 118 F4th at 382; *Heritage Action for Am.*, No. 23-7107 (D.C. Cir. Jan. 15, 2024). Thus, the court lacked jurisdiction for want of adverseness because the parties agreed on the *relevant* question before the

court. *See Nat'l Lab. Rels. Bd. v. Constellium Rolled Prods. Ravenswood, LLC*, 43 F.4th 395, 408 (4th Cir. 2022).

Giffords and the FEC respond to this jurisdictional problem with the suggestion that the omitted argument—*i.e.*, the premise that a failed reason-to-believe vote is an "act" under FECA such that the FEC would have prevailed here—did not yet exist because the recent decisions from this District and the D.C. Circuit had not yet been issued. ECF No. 104, at 54; ECF No. 103, at 2, n., 3. The superficial nature of that argument, however, is exposed upon review of any of those decisions. Yes, each of *45Committee*, *Heritage Action*, and *Iowa Values* were decided *after* the parties here briefed their summary judgment motions. But none of those courts created their arguments from whole cloth; each and every one of those decisions was based on the text of FECA, the FEC's regulations and procedures, and case law in which the FEC was a party—all of which existed long before Giffords even filed this suit. The idea that the FEC was unaware of the argument that its holding of a reason-to-believe vote is somehow significant to the analysis of whether the agency had "failed to act" under FECA is not just incredible, it's unbelievable.

Meanwhile, Giffords's and the FEC's response that merely disclosing the occurrence of the reason-to-believe votes somehow satisfied the adversity requirement is also unpersuasive. ECF No. 104, at 53; ECF No. 103, at 1-2. Merely stating that a vote had been taken *without explaining the legal significance of the vote* is proof positive of a lack of adverse interests between the parties here. It is not the Court's job to assemble raw facts into a legal framework and apply it to a case. This is precisely why courts reject parties' attempts to make the Court do the advocacy work for them. *See e.g.*, *Thompson v. Trump*, 590 F. Supp. 3d 46, 120 (D.D.C. 2022), *aff'd sub nom*. *Blassingame v. Trump*, 87 F.4th 1 (D.C. Cir. 2023) ("Ultimately, notwithstanding the court's expressed doubts about the validity of the negligence per se claims, **it is not the court's job to**

raise arguments that a party has not.") (emphasis added); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 192 F. Supp. 3d 54, 75 (D.D.C. 2016), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017), *opinion amended and superseded*, 883 F.3d 895 (D.C. Cir. 2018), *as amended on denial of reh'g* (Mar. 6, 2018) (quotation omitted). ("**It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.")** (cleaned up) (emphasis added).

And while it is true that the FEC contested ancillary questions of law here, such as discovery disputes and even *some* issues on summary judgment, the record clearly reflects that the core of this case (and the key to whether this Court's failure-to-act ruling is moot)—*i.e.*, whether the FEC's February 23, 2021 RTB vote was an act—was never raised or addressed by the FEC. That smacks of collusion, not concrete adverseness.

This is also why Giffords's attempts to rely on both *Windsor* and *Chadha* are misplaced. Giffords's theory is that "Article III does not require a party to raise or dispute particular arguments or facts." ECF No. 104, PgID 50. Rather, they claim that "[a] controversy between such present or possible adverse parties may exist even when the parties agree on legal principles and arguments." *Id*. at 48 (quotation omitted) (citing *U.S. v. Windsor*, 570 U.S. 744, 757 (2013)). But this case differs from *Windsor* and *Chadha* in a key respect: while the parties in those cases were aligned as to a dispositive legal question, there was nonetheless adversarial briefing from amicus or third parties on the dispositive issues in those cases.

In *U.S. v. Windsor*, the parties agreed that a law was unconstitutional, but disagreed on whether its unconstitutionality entitled the plaintiff to money. The Supreme Court ultimately concluded that "[t]he Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties"

because "[t]he judgment orders the United States to pay money that it would not disburse but for the court's order." *Windsor*, 570 U.S. at 756, 758. Nevertheless, the Court appointed an *amicus curiae* "to argue the position that the Court lacks jurisdiction to hear the dispute" and to defend the underlying statute—otherwise, there would not have been adversity between the parties as the dispositive legal question. *Windsor*, 570 U.S. at 755. So *Windsor* leaves us with two notions: (a) parties can agree on *some* issues as long as they disagree on other, core issues, and (b) the court still needs adversarial briefing before it can rule on the agreed-on issues.

The same goes for *INS v Chadha*, 462 U.S. 919 (1983). There, the parties agreed on the legal merits of the case, disagreeing on only the remedy. The Supreme Court held there was subject matter jurisdiction only because two intervening parties disagreed with the parties' singular legal position, which in turn provided the Court with both a controversy over the core dispute about remedy ***and*** adequate briefing and adversity on the overarching legal question. *Id*. at 939.

That brings us back to the redacted vote certification authorizing what appears to be a limited defense in this case. *See* Ex. E (ECF No. 90-8). Had the FEC just come right out and informed the Court that it had precluded its counsel from arguing that the failed reason-to-believe votes were "acts" under FECA, then the Court could have taken measures to ensure that there was sufficient adversity between the parties as to the dispositive legal question here. For example, it could have appointed an amicus curiae to assist the Court's deliberation, as that would have ensured that the applicable legal premises were brought to the court's attention. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 441 n.7, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) ("Because no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court, we invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below."); *Pepper v. United States*, 562 U.S. 476, 487, 131 S.Ct. 1229, 179 L.Ed.2d 196

(2011) ("Because the United States has confessed error in the Court of Appeals' ruling on the first question, we appointed an amicus curiae to defend the Court of Appeals' judgment.").

Instead, the FEC apparently authorized its counsel to fight the case, but only to the extent that it not raise the key, dispositive argument. ECF No. 90-1, at 18-19. And while Giffords unconvincingly contests the notion that the redacted vote certification says what all the circumstances here strongly suggest it says—*i.e.*, that the FEC would not permit its counsel to raise that dispositive argument—the reality is that Giffords cannot contest the NRA's argument here because Giffords has no idea what lies beneath those redactions.

To that end, the FEC's silence here as to that redacted vote certification is deafening. *See generally* ECF 103. To the extent there is any question as to just what lies beneath those redactions, then the Court would certainly be within its bounds to order the disclosure of an unredacted version of that vote certification authorizing a limited defense here—even if only for *in camera* review. *See e.g.*, *Lopes v. Jetsetdc, LLC*, 4 F. Supp. 3d 238, 241 (D.D.C. 2014) ("Should the defendant challenge the factual basis for the Court's jurisdiction, the Court may not deny the defendants' motion simply by 'assuming the truth of the facts alleged by the plaintiff and disputed by the defendant.' Rather the Court "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.") (quoting *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)).

Finally, Giffords's attempts to distinguish this case from *Lord v. Veazie* are also unpersuasive. *See* ECF No. 104, at 51, 54. While Giffords claims that the parties' interests here were not aligned because the "FEC had not given Giffords the relief it requested," *id*. at 54, the reality is that both parties sought the same outcome. Giffords clearly sought the Court's authorization to file a citizen suit against the NRA—that was the *only* relief Giffords sought at the

November 1, 2021 status conference. Ex. F 7:9–10 (ECF No. 90-9) ("So our request, Your Honor, would be that the Court authorize that private action.").

Likewise, there is no doubt that a coordinated scheme within the FEC artificially triggered a citizen suit against the NRA. *One of the Commissioners admitted it*, and publicly announced—unapologetically—that her "efforts" involved "activating a previously unused, alternative enforcement path" that "allows those who file complaints to sue those they allege have violated the law . . . ." Ex. B at 2 (ECF No. 90-5) (specifically, slide #5, referencing MURs 7427, 7497, 7524, 7553—which are the MURs referenced at pages 5 and 9 of this Court's Memorandum Opinion). Indeed, that same Commissioner admitted that she "quite consciously and intentionally cast votes" that put ***this case*** and the resulting citizen suit, among others, "on their current paths," and that she makes "zero apologies" for her actions in pursuit of that outcome. Ex. D, at 2-4 (ECF No. 90-6, at 2-4) (directly referencing *Giffords v. NRA Political Victory Fund*, No. 21-2887 (D.D.C.)—**which is *this* case**).

There is no question that the parties here sought the same outcome: authorization for Giffords to file a citizen suit against the NRA. The NRA filed its motion nearly a year ago, yet neither the FEC's responses to this motion nor the Commissioners behind the scheme have denied as much. While Giffords protests the notion that those in control of this process at the FEC shared Giffords's goal of securing authorization for a citizen suit against the NRA, Giffords is unable to deny so on the FEC's behalf. The FEC and the pertinent Commissioners have had a chance to step forward and clear the air—they are clearly aware of this litigation—but have chosen not to do so.

That silence should not be ignored here. Like the non-party movants in *Lord v. Veazie*, the NRA is a non-party that has been and continues to be prejudiced by the lack of adverse interests among the parties in this case. Thus, this Court should vacate the Orders and Judgment as void.

3. A ruling on this Court's subject matter jurisdiction is both necessary and of the highest priority.

While the FEC takes no position as to the merits of the NRA's motion, *see* ECF 103, the gist of Giffords's procedural objection is that the NRA should not be permitted to bring its motion under Rule 60(b)(4) because—according to plaintiffs here—the D.C. Circuit has barred non-party motions for relief from judgment.[4] While the panel in *Agudas Chasidei Chabad of United States v. Russian Fed'n* did decline to extend the "exception in *Grace*" to facts in <u>*that*</u> case, the D.C. Circuit did not set a blanket rule against such motions in this Circuit. Rather, the D.C. Circuit distinguished the facts there, reasoning that unlike *Grace*, where the parties had "attempt[ed] to use the judgment as a predicate for a fraudulent conveyance action against the [non-party movant]," there was no such predicate judgment or resulting strong effect on the non-party movants in *Agudas*. 19 F.4th 472, 477 (D.C. Cir. 2021).

The NRA maintains that the *Grace* exception applies here because the NRA is "strongly affected" by the Orders and Judgment, which authorized Giffords to file a citizen suit against the NRA. *Grace*, 443 F.3d at 188. *See* ECF No. 90-1, Sections II.A.3; II.B.1.b; II.C; and IV.A.2. To that end, and in light the FEC's silence here, the record shows that this case is nearly identical to *Lord v. Veazie*, which was based on the motion of non-parties that, like here, were victims of a judgment obtained through collusive litigation. *See Lord*, 49 U.S. at 256.

While Giffords attempts to minimize the prejudice of the NRA having to defend itself in

[4] Giffords also suggests that the motion is not timely. But while the NRA submits that it was diligent in gathering the evidence supporting its motion here, timeliness is not a requirement. The D.C. Circuit has definitively held that there are no time restrictions for filing motions for relief from judgment where an order or judgment is void under Rule 60(b)(4). *See Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962) ("[Rule 60(b)(4)] places no time limit on an attack upon a void judgment, nor can such a judgment acquire validity because of laches on the part of him who applies for relief from it.") (citation omitted).

the citizen suit stemming from the Orders and Judgment, *See* ECF No. 104, at 35, the consequences are actually quite severe. A citizen suit under FECA essentially delegates the enforcement function of a bipartisan administrative agency to a private entity (Giffords) that, here especially, is ideologically averse to the complainant (NRA). So while the FEC's structure requires bipartisan agreement before investigating or prosecuting alleged violations of the law, no such check against biased or overzealous enforcement exists in the truly extraordinary context of a FECA citizen suit.

Of course, the Court need not even determine whether to apply the *Grace* exception here. "[B]ecause the Court has an independent obligation to ensure jurisdiction, the exact method of informing the court of a lack of subject-matter jurisdiction—whether through motion under Rule 60(b)(4) or a notification under Rule 12(h)(3)—is not pertinent." *Jakks Pac., Inc. v. Accasvek, LLC*, 270 F. Supp. 3d 191, 196 n.4 (D.D.C. 2017) , *aff'd per curiam*, 727 Fed. Appx. 704 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 596 (2018). In light of the Court's obligation to ensure subject-matter jurisdiction, "it is irrelevant whether a party *or a non-party* first alerts the court to potential jurisdictional defects." *Id.* (emphasis added). "And if the Court finds subject-matter jurisdiction lacking, it gets no further say; it must dismiss the action." *United States v. Mejia*, 502 F. Supp. 3d 387, 392 (D.D.C. 2020) citing *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

For reasons previously unknown to the Court, this case was moot from February 23, 2021, forward. As a result, the Court lacked subject matter jurisdiction over the case when it issued the Orders and Judgment, each of which should be vacated.

CONCLUSION

The NRA respectfully requests that the Court vacate its orders dated September 30, 2021 (ECF No. 71) and November 1, 2021 (ECF No. 75) and its final judgment entered on November 18, 2021 (ECF Nos. 80 & 81), that it dismiss Plaintiff's Complaint with prejudice, and that it enter judgment for Defendant FEC.

Dated: January 17, 2025

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ Charles R. Spies
Charles R. Spies, Bar ID: 989020
Robert L. Avers (MI0083)
1825 Eye Street, N.W., Ste 900
Washington, D.C. 20006
(202) 466-9654
Facsimile: (844) 670-6009
cspies@dickinsonwright.com
ravers@dickinsonwright.com

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

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 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