UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GIFFORDS,

Plaintiff,

Case No. 1:19-cv-01192

v.

HON. EMMET G. SULLIVAN

FEDERAL ELECTION COMMISSION,

Defendant.
_____/

THE NRA's SUPPLEMENTAL STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR RELIEF FROM ORDERS AND JUDGMENT

On January 26, 2024, the National Rifle Association Political Victory Fund and National Rifle Association of America (collectively, the "NRA") moved for relief under Rule 60(b)(4) of the Federal Rules of Civil Procedure because this Court's Orders and Judgment serving as the predicate for Plaintiff Giffords's ongoing citizen suit against the NRA, *see Giffords v. National Rifle Ass'n of American Political Victory Fund*, *et. al*., No. 1:21-cv-02887-EGS (D.D.C.), are based on the false premise that the FEC "failed to act" on Giffords's administrative complaints, which we now know is untrue. *See generally* ECF No. 90 & 90-1. While unbeknownst to the Court when it entered the Orders and Judgment, it is now clear that the FEC *did* act on those administrative complaints nearly eight months before this Court authorized that citizen suit when, on February 23, 2021, the FEC deadlocked on a series of votes as to whether to find reason to believe Giffords's allegations claiming that the NRA had violated the Federal Election Campaign Act ("FECA"). ECF No. 90-1 at 31-43.[1]

The basis for the relief sought here by the NRA is consistent with decisions from several courts in this District that have concluded that a deadlocked reason-to-believe vote is a statutorily significant "action" in the "failure to act" context of FECA section 30109(a)(8). *See id*. at 32-43 (analyzing *Campaign Legal Ctr. v. 45Committee, Inc.*, 666 F.Supp.3d 1 (D.D.C. Mar. 31, 2023); *Heritage Action for Am. v. Fed. Election Comm'n*, 682 F.Supp.3d 62 (D.D.C. July 17, 2023), *appeal docketed*, No. 23-7107 (D.C. Cir. Aug. 15, 2023); *Campaign Legal Ctr. v. Iowa Values*, 691 F.Supp.3d 94 (D.D.C. Aug. 31, 2023)). The reasoning in those cases supports the premise that this Court lacked subject matter jurisdiction when it entered the Orders and Judgment because the

[1] When citing electronic filings throughout its portion of this Joint Status Report, the NRA cites to the ECF page number, rather than the page number of the filed document.

case was moot as a result of the FEC having taken those failed reason-to-believe votes back on February 23, 2021—long before entry of the Orders and Judgment. *See* ECF No. 90-1 at 31-43.

One of those decisions—*45Committee*—was recently affirmed by the U.S. Court of Appeals for the D.C. Circuit. *See Campaign Legal Ctr. v. 45Committee, Inc*., 118 F.4th 378 (D.C. Cir. 2024). The heart of the D.C. Circuit's decision there is the proposition that even a failed reason-to-believe vote—like the votes the FEC held in this case on February 23, 2021—is indeed an "act" under 52 U.S.C. § 30109(a)(8)(A), (C), which in turn serves as a legal bar to finding that the FEC failed to act in a case like this. *See id.*, 118 F.4th at 390-92.

As the D.C. Circuit summarized, "recall that a contrary-to-law decision can arise either from the Commission's 'dismiss[al] [of] a complaint' or from its 'failure . . . to act on such [a] complaint.'" *45Committee*, 118 F.4th at 389 (quoting 52 U.S.C. § 30109(a)(8)(A)). "And recall further that the citizen-suit preconditions are unmet if the Commission 'conform[s] with' a contrary-to-law decision within thirty days of having been 'direct[ed]' to do so by the contrary-to-law court." *Id*. (quoting 52 U.S.C. § 30109(a)(8)(C)). The district court in *45Committee* had deemed the FEC's "failure to act" on the plaintiff's administrative complaint was contrary to law, but the FEC then held a reason-to-believe vote within thirty days of the district court's decision. *Id*. at 389–90 (citation omitted). And like the reason-to-believe votes taken by the FEC on February 23, 2021 in this case, the reason-to-believe vote taken by the FEC in *45Committee* "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—again like the reason-to-believe vote at issue in this case—while the FEC "voted later that same day on dismissing the complaint, that vote, too, failed to gain a majority," which meant the administrative complaint remained pending despite the FEC's failed reason-to-believe vote. *Id*.

The dispositive issue in *45Committee* was whether the FEC's holding of a failed reason-to-believe vote during the 30 day conformance period was an "act" on the administrative complaint under FECA such that the district court had correctly dismissed the citizen suit for failure to meet the above-described citizen suit preconditions. *Id*. The parties there agreed "that, 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." *45Committee*, 118 F.4th at 390. The parties "disagree[d], however, about what counts as action, much less about what constitutes conforming action." *Id*.

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. *Id*. at 390-92. In arriving at this holding, the D.C. Circuit reasoned:

> The Commission's need to conform followed a determination that its "failure to *act*" on an administrative complaint was contrary to law, see 52 U.S.C. § 30109(a)(8) (emphasis added), not that its failure to render an ultimate decision on the complaint was contrary to law. 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. That conclusion follows from two propositions derived from FECA's text and structure. First, what counts as conforming action depends on what action the contrary-to-law plaintiff was entitled to compel. Second, 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.
>
> With regard to the first of those propositions, the parties agree that what counts as conforming action depends on the type of contrary-to-law determination with which the Commission must conform. What constitutes conformance, in other words, necessarily turns on the kind of Commission action the contrary-to-law plaintiff was entitled to compel by bringing her contrary-to-law suit. And what

> the plaintiff can compel is the action whose nonperformance by the Commission "aggrieved" her. See 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.
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> So what is that action? In the case of a contrary-to-law suit alleging that the Commission has failed to take any action at all on a pending complaint, we think that holding a reason-to-believe vote is an action that would enable the Commission to prevent (or prevail in) the suit. [*45Committee*, 118 F.4th at 390].

The D.C. Circuit's *45Committee* decision significantly bolsters the basis for vacating the Orders and Judgments here, *i.e.*, the premise that the February 23, 2021 failed reason-to-believe votes taken by the FEC were, as a matter of law, "acts" under FECA section 30109(a)(8). *See* ECF No. 90-1 at 31-43. Here, Giffords sought "injunctive and declaratory relief to compel [the FEC] to act" on Giffords's administrative complaints. ECF No. 1 at ¶(1). *See also id.* at 2 (alleging "the Commission has taken no action on Plaintiff's complaints" and "Plaintiff files this action to compel the FEC to comply with its statutory duty to act."). Under *45Committee*, however, the D.C. Circuit has now affirmed that a failed reason-to-believe vote is indeed an "act" in the context of the preconditions for a FECA citizen suit and that a plaintiff in a "failure to act" suit such as Giffords in this case is not entitled to any relief beyond "the Commission's engagement with the merits of [their] administrative complaint through such a vote." *45Committee*, 118 F.4th at 391-92; *see also id.* ("Moreover, 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"—no matter the outcome of that vote—"is such a step.")

Viewed through the lens of *45Committee*, there is no question that the FEC had indeed acted on Giffords's complaints when it held those failed reason-to-believe votes on February 23, 2021—many months before the Court issued its Orders and Judgment—which means the Court's

judgment and corresponding orders amounted to "nothing more than an order directing the FEC to do what it has already done." *All. For Democracy v. FEC*, 335 F. Supp. 2d 39, 43 (D.D.C. 2004). And that is consistent with this Court's findings in its Memorandum Opinion that the FEC's conduct leading up to its February 23, 2021 failed reason-to-believe votes appeared to be "substantially justified." ECF No. 88, at 30; *see also id*. at 30-31 (relying on the FEC's February 2021 failed reason-to-believe votes as evidence demonstrating the FEC had "carefully considered and underst[ood] the facts, legal issues, and interests at stake" in the underlying matters.)

Meanwhile, the Court found the FEC's conduct to be unreasonable because of the period *after* the failed reason-to-believe votes. *Id*. at 30–31. Under *45Committee*, however, this Court could no longer grant effectual relief after the FEC had "acted" through those failed reason-to-believe votes; this case was therefore moot *before* the Orders and Judgment were entered, and the Court lacked subject matter jurisdiction to issue the Orders and Judgment. ECF No. 90-1 at 32-43. The orders dated September 30, 2021 (ECF No. 71) and November 1, 2021 (ECF No. 75) and the judgment entered on November 18, 2021 (ECF Nos. 80 & 81) are therefore void and must be vacated under Rule 60(b)(4).

Dated: December 6, 2024

Respectfully submitted,

/s/ Charles R. Spies

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