ORAL ARGUMENT NOT YET SCHEDULED

NO. 25-5188

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GIFFORDS,

Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee,

NATIONAL RIFLE ASSOCIATION OF AMERICA, et al.

Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-01192-EGS

APPELLANTS' BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellants the National Rifle Association of America and the National Rifle Association Political Victory Fund submit their Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

The appellants in this Court and the movants in the district court are the National Rifle Association of America and the National Rifle Association of America Political Victory Fund (collectively, "NRA"). An appellee in this Court and the plaintiff in the district court is Giffords. An appellee in this Court and the defendant in the district court is the Federal Election Commission. The Institute for Free Speech appeared before this Court as amicus curiae.

B. Rulings Under Review

The ruling under review is the April 22, 2025 memorandum opinion and order (Dkt. 112) denying the NRA's motion for relief from judgment (Dkt. 90), issued by District Judge Emmet G. Sullivan. The memorandum opinion and order is not published in the Federal Supplement 3d, and it is not yet available on Westlaw or any other database of which the NRA is aware.

C. Related Cases

This case has not previously been before this Court. Circuit Rule 28(a)(1)(C) defines "related cases" as "any case involving substantially the same parties and the

same or similar issues." Under that definition, the case captioned as *Giffords v. NRA*, No. 21-cv-02887 (AliKhan, J.) pending in the U.S. District Court for the District of Columbia is potentially a "related case." While there is some overlap in terms of parties (e.g., Giffords is a party there while the FEC is not) and the cases involve different issues (e.g., this appeal raises issues about the subject matter jurisdiction of the district court in this case, which are distinct from the issues raised in *Giffords v. NRA*, No. 21-cv-02887 (AliKhan, J.)), the two cases appear to be "related cases" in the sense that the instant case serves as the predicate for the case captioned as *Giffords v. NRA*, No. 21-cv-02887.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1(d)(2), Appellant National Rifle Association of America makes the following disclosure:

The National Rifle Association of America is a tax-exempt organization under § 501(c)(4) of the Internal Revenue Code focused on, *inter alia*, preserving the right of law-abiding individuals to purchase, possess, and use firearms for legitimate purposes as guaranteed by the Second Amendment to the U.S. Constitution, as well as educating the public on firearm ownership in America. The National Rifle Association of America has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Pursuant to Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1(d)(2), Appellant National Rifle Association of America Political Victory Fund ("NRA-PVF") makes the following disclosure:

The NRA-PVF, which is registered with the Federal Election Commission as a separate segregated fund, is the traditional political action committee of the National Rifle Association of America. The NRA-PVF has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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Citizen Dkt. ..... Docket entries in *Giffords v. NRA*, No. 1:21-cv-02887 (D.D.C., AliKhan, J.)

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FECA ..... Federal Election Campaign Act

FEC ..... Federal Election Commission

FOIA ..... Freedom of Information Act

MUR ..... Matter Under Review

NRA ..... National Rifle Association of America & National Rifle Association of America Political Victory Fund

ADD ..... Addendum

INTRODUCTION

Private lawsuits to enforce the Federal Election Campaign Act (FECA) were rare until a group of Federal Election Commission (FEC) commissioners schemed to withhold from courts the true status of enforcement matters with the intent of tricking courts into authorizing private enforcement lawsuits. This Court has seen that scheme firsthand. *See e.g.*, *CLC v. 45Committee*, 118 F.4th 378 (D.C. Cir. 2024); *CLC v. Heritage Action*, No. 23-7107, 2025 WL 222305 (D.C. Cir. Jan. 15, 2025). The NRA is a victim of this familiar maneuver—indeed, one Commissioner behind the scheme publicly admitted so, and the FEC hasn't denied it.

This appeal is about the validity of a Judgment and Orders authorizing private enforcement of FECA against Appellant NRA, *see Giffords v. NRA*, 21-cv-02887 (D.D.C., AliKhan, J.), even though the FEC—*i.e.*, the agency responsible for regulating this field in the first place—*acted on* and *rejected* the claimant's allegations.

In this case, Giffords sued the FEC claiming it "failed to act" on FECA complaints. Giffords sought summary judgment, arguing the FEC failed to act under FECA because, at the time, it had not yet voted on whether there was reason to believe a violation had occurred. *See* JA151, 156. The court granted Giffords summary judgment in September 2021 even though months earlier—in the midst of

allegations the FEC "failed to act"—the FEC "acted" by deadlocking on reason-to-believe.

There is no doubt the FEC "acted" because, as this Court has held, a deadlocked reason-to-believe vote is an act. *45Committee*, 118 F.4th 378; *Heritage Action*, 2025 WL 222305.

The NRA sought to vacate the Orders and Judgment based on the well-settled principle that this case was mooted when the FEC deadlocked at the reason-to-believe stage, but the lower court denied the NRA's motion on procedural grounds—meaning it never addressed the subject matter jurisdiction challenge, despite binding authority requiring otherwise. That means the jurisdictionally-flawed Orders and Judgment remain as the predicate for Giffords's ongoing suit against the NRA. Because that cannot be the law, the NRA appeals the denial of its motion for relief from judgment.

JURISDICTIONAL STATEMENT

Giffords invoked the district court's jurisdiction under 52 U.S.C. § 30109(a)(8)(A) (failure to act) and 28 U.S.C. § 1331. This case became moot and the court lost jurisdiction when the FEC acted on Giffords's complaints no later than February 23, 2021. From then forward, the district court lacked jurisdiction to do anything except dismiss the case. *See infra* Argument Section I.

Nevertheless, on September 30, 2021, the court declared the FEC had failed to act and ordered it to comply with that declaration within 30 days. JA373. After the Commission appeared to ignore that order, the court entered an order on November 1, 2021, authorizing Giffords to file a citizen suit against the NRA under 52 U.S.C. § 30109(a)(8)(A). JA387-388.

The NRA subsequently moved for relief from the lowers court's Orders and Judgment. *See* JA423-478. The lower court denied that motion on April 22, 2025. JA542-556. The NRA filed a timely notice of appeal of that ruling on May 22, 2025. JA557.

Because this appeal is a timely challenge to a final, appealable decision of the district court, this Court has jurisdiction under 28 U.S.C. § 1291. *See* 28 U.S.C. § 1291 (courts of appeals have "jurisdiction of appeals from all final decisions of the district courts of the United States[.]"); *see also Patten v. D.C.*, 9 F.4th 921, 929 (D.C. Cir. 2021) (denial of Rule 60(b) motion is final and appealable).

STATEMENT OF ISSUES

1. Whether the district court erred by failing to consider its own subject matter jurisdiction.

2. Whether the district court erred by denying the NRA's motion for relief from judgment.

PERTINENT STATUTES

The relevant statutory and regulatory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. The FEC's enforcement authority and procedural framework

A. Public Enforcement of FECA

The FEC is an independent agency with which Congress vested the primary responsibility for enforcing FECA. Uniquely tasked with regulating constitutionally-protected activity, such as when individuals and groups "act, speak and associate for political purposes," the FEC "implicates fundamental rights" with each action it takes. *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). To prevent the FEC from abusing its enforcement powers for political gain, Congress structured the FEC in an "inherently bipartisan" fashion so that "no more than three of its six voting members may be of the same political party." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (*DSCC*) (cleaned up); *see also* 52 U.S.C. § 30106(a)(1). Those bipartisan safeguards—which prohibit the FEC from enforcing FECA without bipartisan agreement to do so—temper its enforcement powers. *Combat Veterans for Cong. v. FEC*, 795 F.3d 151, 153–54 (D.C. Cir. 2015) (citations omitted).

The FEC's enforcement process commences upon the filing of a complaint. *See* § 30109(a)(1) (permitting anyone to file a complaint with the FEC alleging FECA violations). A fundamental legal principle here is that the FEC may *not* begin an investigation until at least four commissioners find "reason to believe" a violation has occurred. *Id*. § 30109(a)(2). If at least four commissioners vote to find reason to believe a violation occurred, then an investigation is authorized and the FEC next votes on whether there is "probable cause to believe" a violation occurred. *Id.* § 30109(a)(1)–(4). If four commissioners agree there is probable cause, then FECA requires the FEC to attempt to rectify the violation through conciliation with the respondent. *Id.* § 30109(a)(4)(A)(i). If conciliation is unsuccessful, then the FEC *may*, with approval of four members, commence a civil suit to enforce FECA. *Id.* § 30109(a)(6)(A).

To be clear, each of those procedural stages—(1) a reason to believe determination, (2) a probable cause determination, and (3) the filing of a civil suit—"requires an affirmative vote of 4 of the FEC's members before the Commission may proceed." *Combat Veterans*, 795 F.3d at 154 (cleaned up). Consequently, where—like here—the FEC musters three or fewer authorizing votes, the FEC may *not* advance to the next procedural stage. § 30109(a)(2); *see also CREW v. FEC*, 993 F.3d 880, 891 (D.C. Cir. 2021) ("A decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners.").

To that end, the FEC frequently splits at the threshold reason-to-believe stage, thereby declining to initiate the next step of enforcement by virtue of lacking the four votes necessary to proceed. These splits, known as "deadlocks," are part of the FECA framework. *See CLC v. FEC*, 312 F. Supp. 3d 153, 164 n.6 (D.D.C. 2018) ("The fact that these deadlocks occur is evidence of the Congressional scheme working."), *aff'd sub nom.*, *CLC & Democracy 21 v. FEC*, 952 F.3d 352 (D.C. Cir. 2020). When, as here, the FEC deadlocks at reason-to-believe, the position of the commissioners voting against reason to believe becomes the "controlling" position of the FEC, and those commissioners issue a "statement of reasons" for judicial review purposes. *CLC*, 31 F.4th at 787 (citing *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988)).

With limited exceptions, FEC enforcement proceedings remain confidential until the FEC "terminates its proceedings." 11 C.F.R. §§ 111.20–21; *see also* §§ 30109(a)(4)(B)(i); 30109(a)(12). The FEC terminates enforcement proceedings by "vot[ing] to close [the] enforcement file," 11 C.F.R. § 5.4(a)(4), at which time the FEC must notify the parties of the terminated action, *id.* § 111.9(b), and release the statements of reasons for potential judicial review.

B. Private Enforcement of FECA

In limited circumstances, FECA permits a party that was "aggrieved by an order of the Commission dismissing [their] complaint . . . or by a failure of the

Commission to act on [their] complaint" to sue the FEC. § 30109(a)(8)(A). Giffords's case here was based on the latter—their predicate being that the FEC had failed to act. In either scenario, the district court's role is limited to correcting legal errors—meaning, the court "may declare that the [FEC's] dismissal of the complaint or [its] failure to act is contrary to law." *Id*. § 30109(a)(8)(C). Upon declaring that the FEC failed to act on a complaint or dismissed it in a manner contrary to law, the court "may direct the Commission to conform with such declaration within 30 days." *Id*.

But the court's powers are otherwise limited. For example, when a court declares the FEC has failed to act on a complaint, this Court has held that FECA "allow[s] nothing more than an order requiring FEC action." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). And while this Court recently overruled *Perot* on other grounds, it confirmed that when a failure-to-act plaintiff "brings suit based on a failure by the Commission to act at all on a pending complaint," which was what Giffords did here, FECA only entitles that plaintiff "to compel the Commission's engagement with the merits of her administrative complaint through such a [reason-to-believe] vote; it does not entitle her to a particular vote outcome." *45Committee*, 118 F.4th at 391-92.

With that in mind, only when the FEC fails to conform with such a declaration may a court authorize the complainant to file a citizen suit to "remedy" the alleged

FECA violations. § 30109(a)(8)(C). So, these "citizen suits" may only be filed upon the satisfaction of two preconditions under FECA: (1) a court must have declared the FEC's dismissal of or failure to act on a complaint was contrary to law; and (2) assuming the court ordered the FEC to conform with that declaration, the FEC failed to conform within 30 days. *See id*. § 30109(a)(8). Once both preconditions are satisfied, the court may authorize the complainant to file a citizen suit against the respondent to remedy the alleged FECA complaints.

C. The Sudden Proliferation of Citizen Suits

While FECA's enforcement scheme is nearly 50 years old, until recently citizen suits were extremely rare. Indeed, a blitz of citizen suits have been filed since 2019—including Giffords's citizen suit against the NRA as authorized by the lower court here—although nearly all of them have now been dismissed on grounds similar to those explained below. *See, e.g.*, *45Committee*, 118 F.4th 378; *Heritage Action*, 2025 WL 222305. This surge of citizen suits is directly attributed to a bloc of FEC commissioners that weaponized a strategy of "deliberately voting against administratively closing files, appearing in court, or making records public, in order to artificially trigger FECA's citizen-suit provision." *CLC v. Iowa Values*, 691 F. Supp. 3d 94, 99 (D.D.C. 2023) (citation omitted). That's what happened here.

Here's how the scheme works. First, after a deadlocked reason-to-believe vote, some commissioners refuse to provide the votes necessary to close the file,

which precludes FEC staff from notifying the parties that their matter concluded. *See* JA614-617. This departs from decades of practice where the FEC consistently closed files when deadlocked at the reason-to-believe stage. This weaponization of internal FEC practices dishonestly leaves the agency record shielded from public view and from judicial review, even though the FEC has already reached a final disposition of the matter. One court in this Circuit recently held that this exact anti-disclosure practice violates both FECA and the APA, and did so in a ruling the FEC declined to appeal. *Heritage Action for Am. v. FEC*, 682 F. Supp. 3d 62, 75–76 (D.D.C. 2023).

Second, when the FEC is sued for allegedly "failing to act," those same commissioners that shielded the FEC's final disposition from public view then hamstring the FEC's ability to defend itself in court. It takes a vote of at least four commissioners to authorize FEC counsel to defend the agency. *See* §§ 30106(c), 30107(a)(6); *see also* JA614-617. As then-Commissioner Trey Trainor explained, the lack of four authorizing votes leaves the FEC in a position where it "can't even tell the court under seal that we've handled a particular case" such that judges in failure-to-act suits like this one "are getting a one-sided story." JA616.

Third, steps one and two of the scheme combine to "open the door" for private advocacy groups—*like Giffords*—to sue private parties—*like the NRA*—in FECA citizen suits just like the suit the lower court here authorized Giffords to bring against

the NRA. JA614. So, despite a respondent having prevailed at the agency level as a result of the FEC's deadlock at the reason-to-believe stage—which this Court has held is an "act" under FECA, *see 45Committee*, 118 F.4th at 390-392—that respondent suddenly becomes a defendant in a suit brought not by the FEC, but by its political nemesis, and on the false pretense the FEC had failed to act on the complaint.

Apparently, the scheme was some commissioners' idea of a revolt against this Court's decision in *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018)—known as *Commission on Hope*—which held that when the FEC declined to initiate enforcement proceedings on "prosecutorial discretion" grounds, such dismissal is not subject to judicial review. So, the bloc's scheme evades *Commission on Hope* by preventing disclosure of the controlling commissioners' statement of reasons until *after* the respondent is sued directly by a private litigant in a citizen suit, which in turn brings that otherwise unreviewable decision before a court.

Agree or disagree with those commissioners' revolt against *Commission on Hope*, their anti-disclosure scheme is illegal. *Heritage Action*, 682 F. Supp. 3d at 75–76. More troubling, however, is that this unlawful scheme has led to citizen suits like Giffords's suit against the NRA, which, as explained below, rests on complaints that were subject to timely agency action in the form of deadlocked reason-to-believe votes and were otherwise rejected by the FEC for *substantive reasons* rather than

prosecutorial discretion.

There is no doubt this scheme within the FEC affected the lower court's proceedings here and artificially triggered Giffords's citizen suit against the NRA. One of the commissioners admitted it, announcing—unapologetically—that their "efforts" involved "activating a previously unused, alternative enforcement path" that "allows those who file complaints to sue those they allege have violated the law." JA622. (specifically, slide #5, referencing Matters Under Review ("MUR") Nos. 7427, 7497, 7524, 7553—*i.e.*, the MURs upon which Giffords claimed the FEC failed to act here). That same Commissioner admitted they "quite consciously and intentionally cast votes" that put Giffords's citizen suit in motion, and that she makes "zero apologies" for pursuing that outcome. JA599-613 (directly referencing Giffords's citizen suit, *Giffords v. NRA Political Victory Fund*, No. 21-2887 (D.D.C.)).

II. Giffords's FEC Complaints

Giffords filed four complaints against the NRA and others alleging FECA violations. Filed in 2018, the FEC designated those complaints as MUR Nos. 7427, 7497, 7524, 7553.[1] As the NRA explained in its responses before the FEC, each of those complaints lacked evidence of FECA violations. *See* Citizen Dkt. 35-1, at 8-

[1] Giffords filed a supplement to MUR No. 7497, which was designated as MUR No. 7621. A separate complainant later filed two complaints raising identical issues as Giffords's complaints—those were designated as MUR Nos. 7558 and 7560.

16 (summarizing Giffords's failure to meet the "reason to believe" standard).[2]

After considering Giffords's complaints and the NRA's responses, the FEC voted on whether Giffords's allegations merited reason to believe FECA had been violated. *See* JA337-341; Citizen Dkt. 85, at 16-18, 23-24. The controlling commissioners concluded that the allegations did not, and prepared a statement of reasons explaining their decision. As explained below, that happened *before* the lower court unwittingly declared the FEC had failed to act and then, as a result of not knowing the legal significance of the FEC's deadlocked reason-to-believe votes—which, as a matter of law, were "acts," *see 45Committee*, 118 F.4th at 390-392—the court then authorized Giffords's citizen suit against the NRA. *See infra*, Statement of the Case Sections III. D-G; IV.

III. Giffords obtains a "failure-to-act" judgment against the FEC even though the FEC had already "acted" under FECA

A. Giffords sues the FEC for "failing to act"

On April 24, 2019, Giffords filed this suit against the FEC for allegedly failing to act on the complaints under section 30109(a)(8)(A). *See* Dkt. 1.

B. The FEC authorizes only a limited defense of this case

On May 9, 2019, the FEC voted on whether to authorize its General Counsel to defend this suit. *See* JA558-559. The FEC may only authorize its counsel to

[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.

defend a FECA suit "by a majority vote of the members of the Commission." § 30106(c); *see also* § 30107(a)(6). Importantly, the vote to authorize a defense in this suit *failed* by a vote of 3-1, *see* JA558. That same day, however, the FEC again voted on whether to authorize a defense, but, apparently, with a catch, as most of the substance of this second vote to authorize a defense is ***redacted***. Aside from indicating the FEC voted 4-0 to authorize counsel to defend this suit, the remaining description of that vote is redacted. JA558-559.

The relationship between Items No. 1 and 2 on the May 9, 2019 vote certification leads to the simple, inescapable conclusion that the FEC didn't have the votes to authorize a full defense here, so it authorized something *less* than a full defense, the conditions of which remain undisclosed to this day. *See id*.

C. The parties file dispositive motions

Giffords and the FEC each filed dispositive motions in late 2019. For its part, the FEC sought summary judgment on the grounds it had handled Giffords's complaints in reasonable fashion under the factors courts consider when assessing claims of agency delay. *See, e.g., TRAC. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984); *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997); Dkt. 41-1 (arguing the timing of its work on Giffords's complaints was reasonable in light of heavy workload, FECA-mandated processes, a partial government shutdown, and the complexity of the complaints).

Meanwhile, Giffords sought summary judgment on the grounds the FEC had failed to act on its complaints. *E.g.*, JA138. As Giffords put it, "[t]he Commission's *failure to vote* on whether there is reason to believe a violation has occurred—*i.e.*, its failure to even decide whether to *commence* an investigation of the allegations—is not excused by resource constraints, competing priorities, or lack of available information." JA156. (first emphasis added).

D. The FEC deadlocks on reason-to-believe, yet neither party tells the court that those deadlocked votes were "acts"

While those dispositive motions were pending, the FEC did exactly what Giffords claimed it had not done. Indeed, on February 19, 2021, the FEC informed the court that it had held a vote to "find that there was no reason to believe that a violation had occurred in MURs 7427 and 7497," and the "vote failed 2-3 with one recusal." JA338.

Shortly after, the FEC notified the court of several *more* actions it had taken on Giffords's complaints on February 23, 2021, which the FEC described as follows:

> A **motion was made to find reason to believe** that some violations of law had occurred in all four of the MURs at issue here. **That vote failed by a vote of 3-2 with one recusal, short of the four affirmative votes required for the motion to pass. Another motion was then made that the Commission find there was no reason to believe** a violation had occurred with respect to MURs 7524, 7553, and another MUR not at issue in this case. **That motion also failed, by a vote of 2-3 with one recusal.**

JA340-341. (Internal citation omitted. Emphasis added).

While Giffords's summary judgment motion was premised on the notion that the FEC had failed to act because it had not voted on whether there was reason to believe a violation had occurred, JA151, the FEC did not convey to the court that those February 2021 votes were "acts" under FECA. JA337-341. Simply put, the FEC never asked the court to deny Giffords's motion despite the FEC having now done just the thing that Giffords claimed it had failed to do.

The inexplicable absence of that argument from the FEC rings loud in retrospect, and logic suggests the reason for the FEC's failure to make that obviously dispositive argument is related to—if not entirely explained by—the redacted vote certification authorizing only a limited defense of this suit. *See* JA558-559. It appears the FEC had barred its counsel from raising that dispositive argument. *See Supra* Statement of the Case Section III.B.

E. The lower court grants summary judgment for Giffords, but without knowing the FEC had already acted

The lower court granted summary judgment for Giffords seven months later. JA342-372. While the court weighed a host of factors, from the complexity of the complaints to time constraints under FECA, the court's decision finding the FEC had failed to act hinged on what happened *after* the FEC's February 23, 2021 deadlocked reason-to-believe votes. Importantly, up until that time the FEC had largely been without a quorum, meaning it could not have acted during most of the pendency of this suit even if it unanimously wanted to do so. JA370.

In fact, the lower court was quite complimentary of the FEC's actions up to and through the time it held those deadlocked reason-to-believe votes, finding that by holding those votes on February 23, 2021, "the Commissioners have demonstrated that they have a firm grasp on the complex issues at play in the administrative matters." JA362. Thus, the court concluded the FEC had acted reasonably through its deadlocked reason-to-believe votes on February 23, 2021. *See* JA370-371 (recounting the FEC's actions from the time it regained quorum in December 2020 until it deadlocked on reason-to-believe, finding that "the Commission's actions up until February 23, 2021, appear to be substantially justified.").

While that should have been the end of the inquiry given that a failed reason-to-believe vote is an "act" under FECA, especially where, like here, that vote is the FEC's *final* reason-to-believe vote, the court nonetheless continued. From there, the lower court focused on the time *after* the February 23, 2021 deadlocked reason-to-believe votes, and ruled as follows:

> On the other hand, however, ***there is no evidence before the Court indicating that the FEC has taken any actions to discuss or to vote on the matters again during any subsequent executive session since February 23, 2021.*** *Id*. (noting that the Commission had met in executive session on March 9 and 11, 2021, and that the administrative complaints were not on the agenda). ***Neither has the FEC assured the Court "that it is moving expeditiously" to address the claims***. *TRAC*, 750 F.2d at 80. Particularly in view of the fact that the Commissioners have already conducted one vote on all MURs at issue and two votes on two of the MURs—thereby demonstrating that the Commissioners

> have carefully considered and understand the facts, legal issues, and interests at stake—***the Court cannot find that the FEC's failure to take any action on the matters during the past 7 months is reasonable***.

JA371-372. As a result of this apparent inaction—and without knowing the FEC's failed reason-to-believe votes were "acts" under FECA—the lower court granted judgment for Giffords and ordered the FEC to conform with the Court's failure-to-act declaration within 30 days. JA372-373.

F. The lower court authorizes Giffords's citizen suit against the NRA—again, without knowledge of the FEC's "acts"

The court held a status conference on November 1, 2021—just as the 30 day period by which it had ordered the FEC to comply with its failure-to-act declaration expired. At that point, Giffords claimed there was "no indication on the record that the FEC has taken any action in response to the Court's order" and requested authorization to sue the NRA. JA375-376, (Tr. 2:24-3:9).

The court invited FEC counsel to provide a status update regarding the MURs. The FEC's counsel reported that after the court had directed it to conform within 30 days, the FEC "took the matters up in the next executive session on October 26th." JA378, (Tr. 5:19-24). During that executive session, which was held within the 30 day conformance period, the commissioners confirmed they had not changed their positions since the February 23, 2021 deadlocked reason-to-believe votes. JA378-379, (Tr. 5:25-6:10). The February 23, 2021 failed reason-to-believe votes truly represented an impasse, as no further reason-to-believe votes would be taken. FEC

counsel also reported that "the two commissioners who had voted [in February 2021] to find no reason to believe violations were committed [have] submitted to the administrative record their statement of reasons; that statement will be released publicly when the files . . . are closed." JA379, (Tr. 6:11-16).

Clearly, the court was skeptical about authorizing a citizen suit, and in fact proceeded under the caution that the targets of the citizen suit could, at some point, challenge whether the citizen suit preconditions were satisfied. This is clear from the following exchange with FEC counsel:

> THE COURT: When do you anticipate closure? And the second part of that question is, is it the government's position that closure [of the MUR files] is the condition preceding to the filing of a private action?
>
> FEC COUNSEL: I don't have any information, Your Honor, on when the file may be closed. Exactly what constitutes the –
>
> THE COURT: Let me get you off the hot seat. Maybe that should be an issue to be litigated on the public record.
>
> In other words, based on what the Court's heard, if the Court hypothetically today were to say to the plaintiff, proceed with your private action, then that would be a legitimate issue to be raised by defense counsel, that [authorizing the citizen suit] was premature at that point. I don't want to put you in an awkward position and I don't want to rule on any substantive affidavits.

JA381-382, (Tr. 8:15-9:6).

Despite letting the FEC off the hook during the status conference, it appears the court *still* had doubts about authorizing a citizen suit. Later that same day, the court directed the parties through a minute order "to show cause by no later than

November 15, 2021 why the Court should not issue a Final Judgment." JA18. While Giffords filed a response stating it had "no objection" to entry of a final judgment, Dkt. 79, the FEC never responded—despite having acted on the complaints and its work on the matters having long been concluded.

G. Giffords sues the NRA, which immediately challenges the court's subject matter jurisdiction

That same day, the court authorized Giffords to file a citizen suit against the NRA under section 30109(a)(8)(C). JA387-388. Giffords sued the NRA the very next day.

The NRA timely moved to dismiss Giffords's citizen suit for, *inter alia*, lack of subject matter jurisdiction. *See generally* Citizen Dkt. 35 (arguing the court lacked jurisdiction under section 30109(a)(8) because the FEC had *not* failed to act on Giffords's complaints).

Though the NRA challenged the citizen suit court's jurisdiction way back on January 28, 2022, that court never addressed its jurisdiction because it never decided that motion. Meanwhile, this Court issued its decision in *45Committee* two years later which, in addition to confirming that a failed reason-to-believe vote is an "act" under FECA, also held that the FECA suit preconditions were non-jurisdictional when considered through the lens of a citizen suit court. *45Committee*, 118 F.4th at 388. Thus, the parties in Giffords's citizen suit filed *new* motions to dismiss early last year, but the jurisdictional questions raised here are no longer before that court.

IV. The FEC's non-disclosure scheme continues to crumble

While the lower court authorized Giffords's citizen suit based in part on the *appearance* that the complaints sat idle with the FEC after the February 23, 2021 reason-to-believe votes, things were clearly not as they then appeared. As it turns out, from the time the FEC deadlocked on reason-to-believe in February 2021 to the time the lower court issued its Opinion in September 2021—*i.e.*, the 7 month period upon which the court based its "failure to act" decision—the FEC was ***not*** inactive. And as this Court would later affirm, those February 23, 2021 failed reason-to-believe votes were acts under FECA such that the FEC *did not* fail to act here. *See 45Committee*, 118 F.4th at 390-392.

The NRA submitted a FOIA request to the FEC seeking its concealed administrative files. When that request was denied, the NRA sued the FEC for violating FOIA. *See NRA v. FEC*, No. 22-cv-01017 (D.D.C.) (the "*FOIA Suit*").[3] Meanwhile, on September 7, 2022—presumably due to the FEC's increasingly indefensible position that it could hold MURs hostage despite having "acted" through reason-to-believe votes—the FEC informed the NRA that it had closed the files giving rise to this suit. *See* JA597-598.

[3] Shortly after Giffords filed the citizen suit, the NRA intervened below for the limited purpose of unsealing the record, most of which had been sealed. JA389-420; Dkt. 82, 83. While the court unsealed the docket, public access to the FEC's records remained significantly limited due to the FEC's weaponization of its internal procedures. *See supra* Section I.C.

Shortly thereafter, the files for the underlying MURs—including the commissioner statements of reasons—were made public. *See generally*, FEC Record re: MUR 7427, *at* https://www.fec.gov/data/legal/matter-under-review/7427/; FEC Record re: MUR 7497, *at* https://www.fec.gov/data/legal/matter-under-review/7497/; FEC Public Record re: MUR 7524, *at* https://www.fec.gov/data/legal/matter-under-review/7524/; FEC Record re: MUR, *at* 7553: https://www.fec.gov/data/legal/matter-under-review/7553/.

The controlling statement of reasons authored by the two commissioners who voted against enforcement at the reason-to-believe stage in February 2021—Commissioners Dickerson and Trainor—was among the disclosed files. *See* JA562-572. "After a thorough review of the record," they explained, "including responses from counsel for the respondents and sworn statements by individuals implicated in the complaints, we could not support OGC's [reason-to-believe] recommendations because purely speculative charges . . . accompanied by . . . direct refutations cannot form an adequate basis to find a reason to believe." JA571-572.

Remarkably, Giffords never challenged the controlling commissioners' statement of reasons under 52 U.S.C. § 30109(a)(8). Giffords could have challenged the statement of reasons by alleging their complaints were dismissed in a manner "contrary to law"—thus obtaining judicial review of the statement of reasons—but Giffords elected not to do so.

Meanwhile, although the statement of reasons and vote certifications became public when the files were closed, the FEC withheld thousands of documents in the *FOIA Suit*. After much negotiation, the FEC ultimately disclosed a sample index of the 3,681 items withheld under FOIA. *See* JA623-639. The Sample Index—which represents a fraction of the withheld documents—shows the FEC remained engaged with Giffords's complaints after the FEC's February 23, 2021, deadlocked reason-to-believe votes but before the lower court issued its Orders and Judgment authorizing Giffords's citizen suit.

The FEC's belated disclosures show the controlling commissioners began drafting their statement of reasons no later than March 15, 2021—less than a month after they cast their final deadlocked reason-to-believe votes on February 23, 2021, *see* JA637 (RS Number 3102 (3103)), and continued working on their statement of reasons through April and May 2021, *see* JA638 (RS Numbers 752 (751); 1202 (1201)). And that makes sense, given that FEC counsel told the court during the November 1, 2021 status conference that those commissioners had placed their statement of reasons in the administrative record well within the 30 day conformance period under FECA § 30109(a)(8)(C). *See* JA379, (Tr. 6:11 – 16).

V. The NRA moves to vacate the Orders and Judgment as void, but the lower court refuses to consider the jurisdictional objections raised below.

Given the circumstances, the NRA moved for relief from the lower court's Orders and Judgment under Fed. R. Civ. P. 60(b)(4) because the court lacked

jurisdiction over this case when it authorized Giffords to sue the NRA. *See generally* JA423-478. The Orders and Judgment are based on the false legal premise that the FEC had "failed to act" on Giffords's complaints, which is untrue as a matter of law. JA456-468. There is no question that this suit became moot when the FEC held its deadlocked reason-to-believe votes on February 23, 2021. Those votes constitute "acts" in this FECA "failure to act" suit, which means this suit became moot when those votes were taken and the court then lacked jurisdiction to issue the Orders and Judgment resulting in Giffords's citizen suit.

Separately, the NRA also sought relief under Rule 60(b)(4) where there was no controversy before the court because, *inter alia*, Plaintiff Giffords and Defendant FEC were aligned on the dispositive legal question before the court (*i.e.*, whether the FEC failed to act) and were otherwise aligned as to the outcome sought here. JA468-474.

While Giffords opposed the NRA's motion, the FEC took no position on the relief sought. *See* JA479-485. The FEC's refusal to take a position was curious, to say the least, given that the NRA sought to vacate orders and a judgment that had been entered *against* the FEC.

The lower court, however, refused to even consider those jurisdictional shortcomings when it denied the NRA's motion for lack of standing. JA542-556. Thus, the same court that never considered the jurisdictional objections raised by the

NRA in the citizen suit nearly 4 years ago has likewise declined to address the jurisdictional objections here, despite binding caselaw requiring it to do so.

For the reasons explained below, this court should reverse the lower court's decision, remand the case for vacatur of the Orders and Judgment as void, and direct that this case be dismissed with prejudice.

SUMMARY OF THE ARGUMENT

This Court should reverse the denial of the NRA's Rule 60 motion and remand the case for dismissal as void for lack of subject matter jurisdiction.

I. Giffords sued the FEC for "failing to act" on Giffords's FECA complaints. During the pendency of the case, the FEC acted on the complaints by deadlocking on reason-to-believe votes. The FEC's deadlocked votes are unequivocally "acts" under FECA. *See e.g.*, *45Committee*, 118 F.4th 378; *Heritage Action*, No. 23-7107. Despite acting and mooting Giffords's suit, thereby robbing the lower court of subject matter jurisdiction, the FEC never brought that argument. Instead, it appears the FEC instructed its lawyers not to inform the lower court of the significance of the deadlocked reason-to-believe votes or the resulting mootness of Giffords's suit against the FEC. Thus, despite lacking subject matter jurisdiction because the case was moot and there was no case or controversy between the parties, the lower court entered Orders and Judgment authorizing Giffords to enforce FECA against the NRA.

The NRA moved for relief from the Orders and Judgment, arguing, *inter alia*, the court lacked subject matter jurisdiction because the case was moot. The court erred by refusing to consider the NRA's mootness argument, holding that precedent from this Court permitted it to ignore a jurisdictional challenge. But that is not true. The district court is *required* to consider jurisdictional challenges, even when brought by a non-party, and its failure to do so is reversible, especially when the FEC so clearly acted, thereby mooting Giffords's case.

II. Giffords sought dismissal of this appeal based on the incredible notion that the lower court's denial of the NRA's Rule 60 motion did not harm the NRA. It is well-settled, however, that an appeal of a Rule 60 motion such as the NRA's appeal here is exclusive of an appeal of any underlying judgment, and the NRA clearly has been injured by denial of its Rule 60 motion. The NRA has standing to proceed with this appeal. Besides, even if this Court has "grave doubts" as to the NRA's standing, it must still assume, *arguendo*, that the NRA has standing so that it may resolve challenges to the lower court's jurisdiction on mootness grounds. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 66 (1997) (citation omitted).

III. The lower court erred by finding this Court foreclosed application of the *Grace* exception, which allows a non-party to bring a Rule 60 motion when they are "strongly affected" by an Order or Judgment, despite this Court's explicit refusal to so hold. Indeed, the *Grace* exception applies here because the NRA is strongly

affected by the lower court's Orders and Judgment, which authorized a private FECA enforcement suit seeking a $35 million penalty against the NRA to go forward. Thus, the NRA is a proper party to seek Rule 60 relief from the lower court's Orders and Judgment, and the lower court erred by concluding otherwise.

STANDARD OF REVIEW

As for the first issue, questions of subject matter jurisdiction are reviewed *de novo*. *See Doe v. Taliban*, 101 F.4th 1, 8 (D.C. Cir. 2024). Under *de novo* review, this court gives no deference to the trial court's ruling or rationale but resolves the matter anew. *See In re Sealed Case*, 932 F.3d 915, 927 (D.C. Cir. 2019) (according no deference to lower court's legal conclusions under *de novo* review).

As for the second issue, while this Court typically reviews rulings on Rule 60(b) motions for an abuse of discretion, it nonetheless reviews decisions on Rule 60(b)(4) motions *de novo* because the judgments themselves are—by definition—either legal nullities or not. *See Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1179 (D.C. Cir. 2013) (reviewing decision on Rule 60(b)(4) motion *de novo* because "if the judgment is void, relief is mandatory."); *Combs v. Nick Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987) ("[T]here is no question of discretion on the part of the court when a motion is under Rule 60(b)(4)." (internal quotation marks and citation omitted).

ARGUMENT

I. The lower court erred by declining to assess its own jurisdiction, and the Orders and Judgment are void because the case was moot when issued.

The NRA sought to vacate the lower court's Orders and Judgment on the grounds that it lacked jurisdiction when it authorized Giffords to sue the NRA. Specifically, the Orders and Judgment are based on the false legal premise that the FEC had "failed to act" on Giffords's complaints, which is untrue as a matter of law. As this Court confirmed just over a year ago, a failed reason-to-believe vote like the votes held by the FEC here on February 23, 2021, constitutes an "act" in a "failure to act" suit. So, this case became moot when those votes were taken in February 2021 because the court could no longer grant effectual relief, which means it lacked subject matter jurisdiction to issue the Orders and Judgment. *See generally 45Committee*, 118 F.4th 378; *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.").

And while the NRA sought relief below both on mootness grounds and because there was no controversy before that court where, *inter alia*, Plaintiff Giffords and Defendant FEC were aligned on the dispositive legal question before the court, *see infra* Argument Section III, the lower court did not even need to consider whether a non-party has standing under Rule 60(b)(4) because it was obligated to address these jurisdictional problems regardless of how they were raised

or who raised them. *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.").

Despite acknowledging that both issues raised by the NRA challenged the lower court's subject matter jurisdiction, JA551, the court nevertheless concluded that it need not confirm its own jurisdiction when questioned by a non-party. JA555-556. That, however, is not the law—courts cannot ignore defects in subject matter jurisdiction—and the lower court erred by failing to abide by binding authorities requiring courts to address jurisdictional problems when they arise.

A. *Chabad* does not license district courts to ignore jurisdictional challenges.

Rather than abide by the foundational rule requiring courts to "ask and answer" the "first and fundamental question" of whether the court has jurisdiction in the first place, "even when not otherwise suggested, and without respect to the relation of the parties to it," *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900), the lower court interpreted this Court's decision in *Agudas Chasidei Chabad v. Russian Fed'n*, 19 F.4th 472, 477 (D.C. Cir. 2021) ("*Chabad II*") as a license to ignore jurisdictional defects.

Applying *Chabad II*, the lower court acknowledged that "the district court in *Chabad* addressed the non-party's jurisdictional arguments even after concluding that it could not seek vacatur under Rule 60(b)," but then it mistakenly concluded that this Court "ended its analysis [of the *Chabad* district court's opinion] after concluding that the non-party was not a proper Rule 60(b) movant, *Chabad II*, 19 F.4th at 477 (dismissing appeal for lack of jurisdiction)." JA555. Setting aside the fact that the district court in *Chabad* did assess its own jurisdiction (meaning the lower court here should have assessed its jurisdiction, too), the lower court otherwise mischaracterized what happened in *Chabad*.

This Court's decision in *Chabad II* did not—as the lower court concluded—"dismiss[] [the Rule 60 motion] appeal for lack of jurisdiction." *Id*. Rather, this Court *affirmed* the district court's judgment in appeal no. 20-7080, *see Chabad II*, 19 F.4th at 477, which had concluded the court had jurisdiction only after addressing the non-party's jurisdictional objections. *See* Chabad Dkt. 221, at 3 (ADD024) (incorporating court's analysis of non-party's jurisdictional challenge from corresponding order resolving non-party's companion motion); Chabad Dkt. 220, at 2-4 (ADD019-020) (considering non-party's jurisdictional challenge). Clearly, *Chabad II* never held that a district court may ignore a jurisdictional challenge merely because a non-party raised it.

The lower court was likewise mistaken when it concluded this Court "doubled down [in *Chabad III*] . . . that 'regardless of the district court's jurisdiction . . . [a non-party] could not invoke Rule 60(b)[.]" JA555-556. *Chabad III* does not support the notion that a jurisdictional flaw can be ignored just because a nonparty raised it. Rather, that aspect of *Chabad* merely held that a jurisdictional challenge does not, in itself, grant Rule 60 standing. *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 110 F.4th 242, 247 (D.C. Cir. 2024) ("*Chabad III*").

Standing to bring a Rule 60 motion is an entirely different issue from the court's continuing obligation to confirm its own jurisdiction. To that end, the Supreme Court has held that a court should *assume* standing when doing so is necessary to address whether a case is moot. *See Arizonans*, 520 U.S. 43 (court assumed standing to analyze jurisdictional issue and found that case was moot). Thus, the lower court should have addressed the jurisdictional problems raised by the NRA's mootness argument and its failure to do so was reversible error.

B. The Orders and Judgment are void because this case became moot no later than February 2021.

Article III courts are guided by the "fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Under FECA, Congress allowed for narrow judicial review of whether the FEC's "failure

to act" on a complaint is "contrary to law." *See* 52 U.S.C. § 50108(a)(8)(A). And when a court declares the FEC has failed to act on a complaint under section 50108(a)(8)(A), FECA permits "nothing more" from the court "than an order requiring FEC action." *Perot*, 97 F.3d at 559.

Giffords brought this suit against the FEC under the "failure to act" prong of FECA, seeking "injunctive and declaratory relief to compel [the FEC] to act" on Giffords's complaints. JA025 (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."). Meanwhile, where's no question that the failed reason-to-believe votes taken by the FEC on February 23, 2021, were "acts" under FECA. Nor is there any question that those FEC acts occurred *before* the lower court entered its order authorizing Giffords to sue the NRA, *compare* JA337-341 *with* JA387-388, and *before* the lower court entered its Judgment against the FEC. JA421. So, this case was moot before the lower court entered the Orders and Judgment, and the Orders and Judgment should be vacated as void for lack of subject matter jurisdiction.

The three courts in the D.C. District that considered the question of whether a deadlocked reason-to-believe vote like those taken here constitutes an "act" under section 30109(a)(8) have each held that yes, it does. *See 45Committee*, 666 F. Supp. 3d at 4; *Heritage Action for Am. v. FEC*, 682 F. Supp. 3d 62, 77 (D.C.C. 2023); *Iowa*

Values, 691 F. Supp. 3d at 106. And the two cases that were appealed have both been affirmed by this Court. *See 45Committee*, 118 F4th at 382; *Heritage Action for Am.*, No. 23-7107 (D.C. Cir. Jan. 15, 2025). The final deadlocked reason-to-believe votes taken by the FEC here are no less of an "act" under FECA than the deadlocked reason-to-believe votes in those cases—all of which, like this suit, were premised on an alleged failure to act.

Giffords claimed below that those cases are different because there the FEC took the deadlocked reason-to-believe votes *after* the lower courts had declared the FEC failed to act, while here the FEC's February 23, 2021 reason-to-believe votes occurred before the lower court declared the FEC had failed to act. *See* JA524, 526. Put differently, Giffords's argument was that a failed reason-to-believe vote is apparently sufficient to satisfy an order compelling the FEC to "act" (*i.e.*, sufficient to satisfy a conformance order issued *after* a court declares 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.

That argument collapses under its own weight; if an "act" complies with a conformance order, then surely the same act precludes a "failure to act" finding to begin with. It's also inconsistent with this Court'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 conforming within the 30 day period under section 30109(a)(8)(C). *See 45Committee*, 118 F.4th at 391. An act that satisfies a conformance order under FECA is the same act that, by its very nature, would have precluded a failure to act declaration in the first place. To hold otherwise would flip *45Committee* on its head.

Giffords's argument also fails because the February 23, 2021 deadlocked reason-to-believe votes here were the *final* reason-to-believe votes taken by the FEC, just like the other cases addressing this same question. Indeed, the specific deadlocked reason-to-believe vote that constituted an "act" under FECA section 30109(a)(8) in each of *45Committee*, 666 F. Supp. 3d 1, *Heritage Action*, 682 F. Supp. 3d 62, and *Iowa Values*, 691 F. Supp. 3d 94, were 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 in each of the corresponding administrative matters. So too here.

The February 23, 2021 deadlocked reason-to-believe votes taken here are expressly referenced in the controlling commissioners' statement of reasons as *the* reason-to-believe votes serving as the FEC's decision on Giffords's complaints. *See* JA563. Shortly after taking those votes, the controlling commissioners drafted their statement of reasons, *see* JA637 (RS Number 3102 (3103)), which the FEC admitted

was placed in the administrative record before the lower court entered its order authorizing Giffords to sue the NRA and before entering its Judgment. *See* JA379, (Tr. 6:11-16).

The FEC conceded there were no subsequent reason-to-believe votes taken here. *See* JA481 (confirming that "no additional vote was taken regarding reason to believe" after February 23, 2021). Thus, as of February 23, 2021—long before the 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*. In fact, the FEC acted *more* reasonably here than it did in *45Committee* or *Heritage Action* because unlike there, the FEC acted here by holding its final reason-to-believe votes without being ordered to do so. After all, the lower court concluded the FEC's actions through and including its February 23, 2021 deadlocked reason-to-believe votes were "substantially justified." JA371.

Nor does FECA provide a failure-to-act plaintiff like Giffords a remedy for anything more than an order compelling the FEC to "act" on its complaint. *45Committee*, 118 F.4th at 391 (a "failure to act" plaintiff may only compel an "act on a pending complaint," which means "to take some enforcement step recognized by the statute," and "a reason-to-believe vote is such a step."). So while Giffords claimed below that it was entitled to a reason-to-believe *determination*, JA531-532, this Court rejected that argument in *45Committee* 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*, 118 F.4th at 392.

The FEC engaged with the merits of Giffords's complaints, and it did so *before* the lower court issued its Orders and Judgment. Indeed, the lower court acknowledged that the February 23, 2021 reason-to-believe votes "demonstrate[ed] that the commissioners have carefully considered and understand the facts, legal issues, and interests at stake" in Giffords's complaints. JA371-372. From that point forward, there was no action left to compel under FECA. *See 45Committee*, 118 F.4th at 392. And because the court could no longer grant effectual relief, the case was moot and the court lacked jurisdiction to issue the Orders and Judgment. *See Spencer*, 523 U.S. at 7–8 (mootness deprives federal courts of power to act, no matter how it comes about).

While the absence below of a mootness argument from the FEC is likewise jurisdictionally problematic—albeit for different reasons, *see infra* Section III—this Court need not even consider whether a nonparty has standing under Rule 60(b)(4). "[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) (citation omitted). The lower

court's decision denying the NRA's motion should be reversed and the case remanded for vacatur of the Orders and Judgment as void for lack of jurisdiction.

II. The NRA has appellate standing, and the Supreme Court nevertheless mandates that standing be assumed when jurisdiction is challenged.

A. The NRA appeals the denial of its Rule 60 motion—*not the underlying judgment.*

Giffords's claim that the NRA's appeal is procedurally barred ignores the well-settled proposition that an appeal of a Rule 60 motion is exclusive of an appeal of any underlying judgment. Indeed, Giffords's authorities do not even discuss appeals from a Rule 60(b) denial. Giffords's Mot. at 13-18. The NRA is *not* appealing the underlying judgment—it appeals the denial of its Rule 60(b)(4) motion, which "is independent of the appeal of the original petition" and "does not bring up the underlying judgment for review." *Banister v. Davis*, 590 U.S. 504, 520 (2020).

Nor is there any question that the NRA may appeal an order *subsequent* to the judgment (*i.e.*, the lower court's denial of the NRA's Rule 60 motion) to which the NRA is bound. *See e.g., U.S. Catholic Conf. v. Abortion Rts. Mobilization*, 487 U.S. 72, 76 (1988) (allowing non-party to appeal civil contempt holding); *Hinckley v. Gilman, C. & S.R. Co.*, 94 U.S. 467, 469 (1876) (allowing non-party to appeal decree directing payment). Indeed, neither *U.S. Catholic Conference* nor *Hinckley* support

Giffords here because the appellants there were bound by the decision they appealed just like the NRA is here.

There's no question the NRA is bound by the denial of its Rule 60 motion. The jurisdictional arguments raised by the NRA may only be raised here in *this* case. While the NRA diligently raised similar jurisdictional arguments in Giffords's citizen suit just weeks after the lower court authorized that suit, *see* Citizen Dkt. 35, those arguments were never addressed by that court. And because this Court recently held that those subject matter jurisdiction arguments could not be raised in a citizen suit, *see 45Committee*, 118 F.4th at 385-389 (concluding that "FECA's judicial-review requirements—including the citizen-suit preconditions—are nonjurisdictional" and may be challenged in a citizen suit under Rule 12(b)(6) but *not* on jurisdictional grounds under Rule 12(b)(1)), this case is the only forum left to address those arguments. The lower court declined to do so, despite its obligation to confirm its own jurisdiction as explained above.

So, the NRA *is* bound by the denial of its Rule 60 motion because, absent relief here, the jurisdictional arguments raised by the NRA for years now otherwise lack a forum. Giffords conceded this point. Giffords's Mot. at 16, n. 3. That means Giffords's reliance on *Broidy Cap. Mgmt. LLC v. Muzin* actually cuts against its own argument because the appellant there could not appeal a decision where that

appellant—unlike the NRA here—was "not bound by the underlying order." 61 F.4th 984, 994 (D.C. Cir. 2023).

Moreover, Giffords currently argues in the citizen suit that the lower court's grant of summary judgment here precludes the NRA from bringing even its 12(b)(6) arguments there. Citizen Dkt. 88, at 58-61 (claiming the NRA is precluded from challenging the delay suit court's underlying decision). Giffords can't have it both ways. A jurisdictional ruling here would dismiss the citizen suit, too, and that would serve the interests of judicial economy where that suit remains in its infancy (at the pleadings stage) after it was stayed pending this Court's decision in *45Committee*.

B. The NRA has Article III appellate standing.

Giffords next seeks dismissal based on the incredible notion that the denial of the NRA's Rule 60 motion did not harm the NRA. There's no question the NRA has been injured as a direct result of the denial of its Rule 60 motion and that the resulting injury would be redressed by a favorable ruling from this Court.

To establish standing, an appellant must show "injury caused by the [order on appeal,] rather than injury caused by the underlying facts." *NRDC v. Pena*, 147 F.3d 1012, 1018 (D.C. Cir. 1998). The lower court's denial of the NRA's motion injured the NRA in at least two ways.

First, and as a direct result of the denial of its Rule 60 motion, the NRA continues to be forced to defend itself against Giffords's citizen suit. *See Giffords v. NRA*. That constitutes sufficient injury for Article III standing.

While Giffords relies on *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13 (D.C. Cir. 2011), *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024), and *Diamond v. Charles*, 476 U.S. 54 (1986) for the notion that "unrecovered litigation costs" are insufficient Article III injuries, those cases are inapplicable because the movants there each claimed appellate standing based on *self-inflicted* litigation costs. *See American Society*, 659 F.3d at 25 (diverting resources to litigation is "a 'self-inflicted' budgetary choice"); *FDA*, 602 U.S. at 370 ("an organization . . . cannot spend its way into standing simply by expending money[.]"); *Diamond*, 476 U.S. at 70 (rejecting self-inflicted litigation costs).

The NRA's litigation costs in Giffords's citizen suit are not self-inflicted. While the lower court's jurisdictionally-flawed Orders and Judgment opened the door for Giffords to sue the NRA, the relief sought below by the NRA—*i.e.*, vacatur of the Orders and Judgment as void for lack of jurisdiction—would end Giffords's suit against the NRA. So, the lower court's denial of the NRA's motion means the NRA remains an unwilling participant in the citizen suit. Thus, the NRA continues to incur litigation costs there, *see* Declaration of Matthew H. Bower (ADD26-29), and those costs and burdens satisfy the injury part of Article III standing. *See e.g.*,

Raytheon Co. v. Ashborn Agencies, Ltd., 372 F.3d 451 (D.C. Cir. 2004) ("[the defendant] having to incur these costs and burdens [of litigating] certainly satisfies the injury requirement of Article III."); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("The concrete cost of an additional proceeding is a cognizable Article III injury.").

Like the appellants in *Raytheon* and *Sea-Land*, the NRA did not manufacture its defense costs in Giffords's citizen suit—those costs were thrust on the NRA. And had the lower court granted the NRA's motion, the citizen suit would have stopped and the NRA's corresponding defense costs would have ceased. An order from this Court righting the lower court's error would stop the citizen suit and the NRA's corresponding injury.

Second, the fact that Giffords seeks a judgment against the NRA in the citizen suit, which is based on the Orders and Judgment for which the NRA seeks vacatur, is also a sufficient Article III injury.

While the NRA vehemently denies Giffords's citizen-suit claims alleging violations of FECA, the reality is Giffords is asking that court to assess a "civil penalty against [the NRA] in accordance with 11 C.F.R. § 111.24 . . . for each violation [the NRA is] found to have committed." Citizen Dkt. 81, at 47. By law, the citizen suit court could assess a civil penalty not to exceed "an amount equal to any contribution or expenditure involved in the violation." 11 C.F.R. § 111.24(a)(1).

Giffords's amended complaint alleges the NRA "made up to $35 million" in violations, Citizen Dkt. 81, at 1, so Giffords seeks a civil penalty of up to $35 million against the NRA.

This contingent liability clearly constitutes an Article III injury. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 430-431 (1998) (holding that potential loss of funding due to President's line item veto—though akin to a speculative litigation outcome—was a "contingent liability" constituting "an immediate, concrete injury" for Article III standing); *In re TransCare Corp.*, 592 B.R. 272, 285 (Bankr. S.D.N.Y. 2018) (contingent liability constitutes a concrete injury-in-fact).

The denial of the NRA's Rule 60 motion allows Giffords's citizen suit to continue *notwithstanding* the jurisdictional flaws with the Orders and Judgment, which serve as *the* predicate for Giffords's attempt to seek a $35 million contingent liability from the NRA. Had the lower court granted the NRA's motion, that contingent liability would no longer exist. But it didn't, and the continuing existence of that contingent liability constitutes an Article III injury.

C. Courts must "assume standing" where necessary to address jurisdictional flaws.

Even if Giffords' Motion to Dismiss had merit, Supreme Court precedent mandates that courts assume standing where necessary to address mootness problems like those raised here.

In *Arizonans for Official English*, the Supreme Court held that a case was moot based on the mere suggestion of mootness submitted by a non-party. There, the state attorney general, which had lost party status in the litigation, filed a "Suggestion of Mootness" while on appeal before the Ninth Circuit Court of Appeals. That Suggestion of Mootness was met with objection by the appellants there and was in fact rejected by the Ninth Circuit. *Yniguez v. State*, 975 F.2d 646, 647 (9th Cir. 1992).

The Supreme Court disagreed, unanimously holding that "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Arizonans*, 520 U.S. at 73 (quoting *Bender v. Williamsport Area School Dist.,* 475 U.S. 534 (1986). The Supreme Court reasoned that "when the lower court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id*.

So despite the Supreme Court's "grave doubts" as to the appellants' Article III appellate standing, it nevertheless assumed, *arguendo*, that appellants had standing so that it could resolve challenges to the lower court's jurisdiction on mootness grounds. *Arizonans*, 520 U.S. at 66 (citation omitted) (resolving "the question whether there remains a live case or controversy . . . without first

determining whether [appellants had] standing to appeal because the former question, like the latter, goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case.")

That same analytical framework applies here. Even if there's any doubt that the NRA has appellate standing, this Court must exercise appellate jurisdiction to correct the lower court's error in continuing to entertain this suit after it became moot in February 2021. *See Arizonans*, 520 U.S. at 73.

III. The NRA has Rule 60 standing under the *Grace* exception and the lower court erred by refusing to consider the evidence of collusive litigation.

The NRA sought relief below under Federal Rule of Civil Procedure 60(b)(4), which permits relief from void orders and judgments. This Court has broadly interpreted the term "void" under Rule 60 to mean that "a judgment is 'void' whenever the issuing court lacked jurisdiction." *Bell Helicopter*, 734 F.3d at 1180. There are no time restrictions on Rule 60(b)(4) motions, as void judgments cannot acquire validity with the passage of time. *See Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962).

The Orders and Judgment are void for two separate reasons: (1) this case became moot when the FEC "acted" on Giffords's complaints on February 23, 2021—before entry of the Orders and Judgment, *see supra* Argument Section I; and (2) there was no "controversy" under Article III of the Constitution because the parties here were aligned as to the dispositive legal question before the court as well

as their preferred outcome, each taking the necessary actions to ensure that a citizen suit would be authorized against the non-party NRA.

Under our Constitution, the "judicial power" extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2. The hallmark of a case or controversy has long been "the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." *Muskrat v. United States*, 219 U.S. 346, 357 (1911). So, there is a fundamental rule against collusive litigation where the parties, although formally independent, cooperate to achieve the same outcome with the intent of affecting the interests of nonparties. Wright, Miller & Kane, Fed. Prac. & Proc. § 3530 *Adversary, Feigned, And Collusive Cases* (3d ed.).

That is exactly what happened here. The FEC shielded the true status of Giffords's complaints from public view and then refused to authorize a full defense when it was sued here for failing to act. *See supra* Statement of the Case Section III.B. As a result, the FEC never raised the dispositive argument that its February 23, 2021 deadlocked reason-to-believe votes were "acts" under FECA, presumably because it had barred its lawyers from doing so. *See infra*, Argument Section III.A. Likewise, the FEC never informed the lower court that it was indeed "moving expeditiously" on Giffords's complaints in the months after those reason-to-believe votes, which caused the court to issue its Orders and Judgment authorizing Giffords to sue the NRA. *See infra*, Argument Section III.B.

This collusion "open[ed] the door" for Giffords's citizen suit against the NRA. JA614-616. One Commissioner behind that scheme unapologetically admitted that she intentionally took actions that led to the authorization of Giffords's suit against the NRA. *See* JA622; JA599-613. This is classic collusive litigation where supposedly-adverse parties collectively pursue a decree to affect the interests of a non-party. *See Lord v. Veazie*, 49 U.S. 251-255 (1850) (vacating judgment as void at request of non-party where the parties' interests were not adverse, as both wanted judgment on a legal question that adversely affected the non-party movant's interests).

Fortunately, while Rule 60(b) references only "a party or its legal representative," "several circuit courts have permitted a non-party to bring a Rule 60(b) motion or a direct appeal when its interests are strongly affected." *Grace v. Bank Leumi Tr. Co. of NY*, 443 F.3d 180, 188-89 (2d Cir. 2006) (permitting non-parties to seek relief under Rule 60 where "there is a strong possibility that the predicate judgment [resulted from processes] devoid of due process protections and marred by serious procedural shortcomings").

While this Court declined to apply the *Grace* exception to the facts in *Chabad II*, it did not prospectively reject the application of *Grace*. *See* 19 F.4th at 477 (distinguishing facts from those in *Grace* where the parties had used a judgment as a predicate for a fraudulent conveyance action against a non-party movant). Thus,

the NRA sought relief under the *Grace* exception because it continues to be "strongly affected" by the Orders and Judgment authorizing Giffords's citizen suit, which were entered only because the parties never told the lower court that the February 23, 2021 failure-to-act votes were "acts" under FECA, or that the FEC had continued expeditiously processing Giffords's complaints after taking those votes.

The lower court, however, passed over the notion that its Orders and Judgment were entered without knowledge of the legal significance of the FEC's deadlocked reason-to-believe votes and its continued engagement thereafter, finding instead that "the record indicates that the FEC kept the Court, and the Plaintiff, informed on the voting and status of the MURs at issue at all relevant times." JA554. The court also distinguished *Grace* on the grounds that, from its perspective, the Orders and Judgment "have no effect on the NRA other than the end-result of it having to defend itself in a citizen suit." JA554-555. This was error.

Beginning with the latter, the NRA has been significantly prejudiced by the Orders and Judgment, which serve as the predicate for Giffords's citizen suit seeking a $35 million dollar liability against the NRA. *See infra* Argument Section II.B. As for the former, the lower court's statement that the "record" shows the FEC kept the court informed of the voting and status of the MURs highlights its error. The key here was not that the votes occurred—*it's that the FEC never explained what the votes meant, from a legal perspective.* Had the lower court addressed this key

issue—and the factual record showing that the FEC stacked the deck against its own lawyers raising this argument with the court—there's no outcome other than to apply *Grace* based on what happened between the parties below.

This Court should reverse the lower court's denial of the NRA's motion and remand the case for vacatur of the Orders and Judgment.

A. The parties were aligned as to both the key legal question before the court and the outcome sought, so there was no Article III controversy here.

The lack of adverse legal interests between the parties here is clear from the FEC's failure to make the basic, yet dispositive, argument that its February 23, 2021 deadlocked reason-to-believe votes were "acts" under FECA. Recall that Giffords sought 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* JA151, 156. Yet while that motion was pending, the FEC voted on reason to believe—thus doing exactly what Giffords claimed the FEC hadn't done.

While the FEC informed the court of those votes, *see* JA337-341, it <u>*never*</u> raised the dispositive argument that those 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)—*i.e.*, the dispositive legal question in this case.

The complete absence of that argument altered the outcome here. Those February 23, 2021, reason-to-believe votes are clearly "acts" under FECA. *See supra* Argument Section I.B. Had someone—anyone—pointed out after February 23, 2021, but before the lower court issued its decision on September 30, 2021, that those reason-to-believe votes were "acts" under FECA, then there may have been a case or controversy here (not to mention a different outcome). But the FEC never raised that argument, presumably because it precluded its counsel from doing so. *See* JA558-559 (redacted vote certification authorizing what appears to be a limited defense in this case). Thus, this case lacked the requisite adverseness when the lower court issued the Orders and Judgment because the parties here agreed on the only relevant question before the Court. *Nat'l Lab. Rels. Bd. v. Constellium Rolled Prods. Ravenswood, LLC*, 43 F.4th 395, 408 (4th Cir. 2022) (insufficient adverseness where parties agreed on every *relevant* question before the court).

In the Rule 60 proceedings, the FEC suggested that its failure to raise this dispositive argument was because the decisions in *45Committee*, *Heritage Action*, and *Iowa Values* did not yet exist. JA484; Dkt. 103, at 2, n., 3. Setting aside the fact that *even if* that argument had weight, then a truly adversarial FEC would have moved to vacate the Orders and Judgment *on its own* once those decisions were issued, or it would have supported the NRA's Rule 60 motion rather than declining

to take a position on it, the reality is this mootness argument pre-existed each of *45Committee*, *Heritage Action*, and *Iowa Values.*

Indeed, while those decisions were issued after the parties here briefed their summary judgment motions, none of those courts crafted their decisions from whole cloth; each of those decisions is based on the text of FECA, FEC regulations, and case law in which the FEC was a party—all of which existed long before Giffords even filed this suit. *See, e.g.*, *45Committee*, 666 F. Supp. 3d at 4 (relying on the text of FECA and this Court's decisions in *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016) and *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) to conclude that a failed reason-to-believe vote is an "act" under FECA) (*aff'd on other grounds*, 118 F.4th 378 (D.C. Cir. 2024)); *Iowa Values*, 691 F. Supp. 3d at 102 (relying on *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) to conclude that a failed reason-to-believe vote is an "act" under FECA).

The idea that the FEC was unaware that its reason-to-believe votes were significant to the analysis of whether it had "failed to act" is incredible. The FEC could have raised that argument when it informed the lower court of the reason-to-believe votes, *see* JA337-341, or in a supplemental response in opposition to summary judgment. Yet the FEC inexplicably never argued that it had "acted" under section 30109(a)(8) despite defeating the premise of Giffords's motion for summary judgment by doing just what Giffords said it had failed to do.

Turning back to the redacted vote certification authorizing what appears to be a limited defense, *see* JA558-559, the FEC apparently authorized its counsel to fight this case but only if it did not raise this key, dispositive argument. The FEC's silence as to that redacted vote certification is deafening. *See generally* JA479-485 & Dkt. 103. Indeed, while the FEC still has not provided an unredacted copy of that document, it has never disputed what the circumstantial evidence shows: that vote authorizing the FEC's counsel to defend this case prevented its lawyers from raising this argument.

Nor is there any question that Giffords and the FEC sought the same outcome here: a citizen suit against the NRA. Giffords clearly sought authorization to file a citizen suit against the NRA—that was the *only* relief Giffords sought at the November 1, 2021 status conference. JA380, (Tr. 7:9–10 ("So our request, Your Honor, would be that the Court authorize that private action.")). Meanwhile, one of the commissioners behind the scheme publicly admitted that she had every intention of triggering a citizen suit against the NRA.

Indeed, FEC Commissioner Weintraub publicly bragged that she "quite consciously and intentionally cast votes" that put Giffords's citizen suit against the NRA, among others, "on their current paths." *See* JA601-602; JA573-588. Neither the FEC nor the commissioners behind the scheme have ever controverted those public statements.

While the lower court merely concluded that the FEC kept the court "informed on the voting and status of the MURs," JA554, it never addressed the FEC's failure to raise the *legal significance* of those votes. This was error.

The Orders and Judgment are void because the parties below were aligned as to the relevant legal question before the court and the outcome sought. *United States v. Windsor*, 570 U.S. 744 (2013) (finding an Article III controversy despite the parties' agreement that a disputed tax provision was unenforceable because unlike here, the parties there disagreed on the outcome—the U.S. refused to give Windsor the refund she demanded). Under these collusive circumstances, the NRA clearly fits within the *Grace* exception because it has been "strongly affected" by the Orders and Judgment leading to the citizen suit in which the NRA remains a defendant to this day. *See Grace*, 443 F.3d at 188; *see also Veazie*, 49 U.S. at 256 (vacating judgment as void at request of non-party that was prejudiced by the lack of adverse interests among the parties). The Orders and Judgment should be vacated as void for lack of jurisdiction.

B. The FEC continued expeditiously processing the complaints after its February 23, 2021 reason-to-believe votes.

While the absence of legal adverseness is, alone, sufficient to vacate the Orders and Judgment, the FEC's failure to inform the court of dispositive factual information independently supports vacatur.

The lower court's decision granting summary judgment hinged on the perception that—specific to the period after the FEC's February 23, 2021 reason-to-believe votes—the FEC had not "assured the court that it is moving expeditiously to address the claims." JA371. The court concluded it "cannot find that the FEC's failure to take any action on the matters [since the February 23, 2021 reason-to-believe votes] is reasonable." JA371-372. Things, however, were not as they then seemed.

Belated disclosures from the FEC blow the doors off the mistaken proposition that it had not continued "moving expeditiously" immediately after its February 23, 2021 reason-to-believe votes. Indeed, the FEC's FOIA disclosures clearly show the controlling commissioners began drafting their statement of reasons no later than March 15, 2021—less than a month after the final reason-to-believe votes. *See* JA637 (RS Number 3102 (3103)). Those disclosures likewise show the commissioners continued working on that statement of reasons through April and May 2021, *see* JA638 (RS Numbers 752 (751); 1202 (1201)). This, of course, is consistent with the FEC's earlier representation to the court that the statement of reasons had been placed in the administrative record prior to authorization of Giffords's citizen suit. *See* JA379, (Tr. 6:11 – 16).

These FEC disclosures remove any doubt that there was action at the FEC during that pivotal time between the final reason-to-believe votes and issuance of

the Orders and Judgment. Why, then, was the lower court not apprised of these actions during the November 1, 2021 status conference when the FEC had known for weeks that the court's decision granting summary judgment for Giffords was based on the lack of any indication that the FEC had continued working on the complaints? *See* JA378-379.

In truly adversarial litigation, the FEC would have raised these dispositive discrepancies with the court. It had all the tools necessary to fulfill its duty of candor to a tribunal, such as by filing documents under seal (essentially the default in this case), submitting documents for *in camera* review, or even disclosing these outcome-determinative facts when the court asked the FEC for a status update during its prejudgment status conference on November 1, 2021. JA376-379, (Tr. 3:10 – 6:23).

Yet this information was only disclosed after the NRA sued the FEC for violating FOIA. Even now, the FEC has never explained the incredible absence of these disclosures during the six weeks between the issuance of the lower court's failure-to-act declaration and its Judgment against the FEC. And while that, too, is presumably explained by the redacted vote certification authorizing what appears to be a limited defense, *see* JA558-559, the failure to disclose those facts proves this litigation was not adversarial when it mattered most.

The lower court never even acknowledged this evidence when it denied the NRA's motion, and these facts show this case is just like *Grace* and *Veazie*. Of course, this Court need not even address the application of *Grace*—as explained above, the bases for reversal on mootness grounds under Argument Section I are exclusive from this issue of non-party standing under Rule 60(b)(4). As for *Grace*, however, the record here permits only one resolution of that issue—*i.e.*, vacatur because the lower court clearly lost its jurisdiction due to the lack of adverseness between the parties. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291–92 (1982). This Court should reverse the lower court and remand for vacatur of the Orders and Judgment and dismissal of the case.

CONCLUSION

This Court should reverse the denial of the NRA's Rule 60 motion and remand the case for vacatur of the lower court's Orders dated September 30, 2021 (Dkt. 71) and November 1, 2021 (Dkt. 75) and its Judgment entered on November 18, 2021 (Dkt. 80 & 81), and for entry of an order dismissing the case with prejudice.

Dated: January 13, 2026

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 12,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word in Times New Roman 14-point font.

/s/ Charles R. Spies
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CERTIFICATE OF SERVICE

I certify that on January 13, 2026, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Charles R. Spies
Charles R. Spies

ADDENDUM

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Statutes and Regulations

Unpublished Cases

Other

28 U.S.C. § 1291
Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331
Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

52 U.S.C. § 30106(a)(1), (c)
Federal Election Commission

(a) Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(c) Voting requirements; delegation of authorities

All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title or with chapter 95 or chapter 96 of title 26.

52 U.S.C. § 30107(a)
Powers of Commission

(a) Specific authorities

The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 30109(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 30108 of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

52 U.S.C. § 30109
Enforcement

(a) ADMINISTRATIVE AND JUDICIAL PRACTICE AND PROCEDURE

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)

(A)

(i) Except as provided in clauses [1] (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)

(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(C)

(i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may—

(I)

find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II)

based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure

requirement, under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of—

(I) subsections [2] (a), (c), (e), (f), (g), or (i) of section 30104 of this title; or

(II) section 30105 of this title.

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2033.

(5)

(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).
(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)

(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.
(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.
(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title,

which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8)

(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) Repealed. Pub. L. 98–620, title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357.

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)

(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent

of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) NOTICE TO PERSONS NOT FILING REQUIRED REPORTS PRIOR TO INSTITUTION OF ENFORCEMENT ACTION; PUBLICATION OF IDENTITY OF PERSONS AND UNFILED REPORTS

Before taking any action under subsection (a) against any person who has failed to file a report required under section 30104(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 30104(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 30111(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) REPORTS BY ATTORNEY GENERAL OF APPARENT VIOLATIONS

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) PENALTIES; DEFENSES; MITIGATION OF OFFENSES

(1)

(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 30118(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a

calendar year. Such violation of section 30118(b)(3) of this title may incorporate a violation of section 30119(b), 30122, or 30123 of this title.
(C) In the case of a knowing and willful violation of section 30124 of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.
(D) Any person who knowingly and willfully commits a violation of section 30122 of this title involving an amount aggregating more than $10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);
(ii)fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $50,000; or
(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.
(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);
(B) the conciliation agreement is in effect; and
(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

11 C.F.R. § 5.4
Availability of records.

(a) In accordance with 52 U.S.C. 30111(a), the Commission shall make the following material available for public inspection and copying through the Commission's Public Disclosure and Media Relations Division:

(1) Reports of receipts and expenditures, designations of campaign depositories, statements of organization, candidate designations of campaign committees and the indices compiled from the filings therein.

(2) Requests for advisory opinions, written comments submitted in connection therewith, and responses issued by the Commission.

(3) With respect to enforcement matters, any conciliation agreement entered into between the Commission and any respondent.

(4) Opinions of Commissioners rendered in enforcement cases and General Counsel's Reports and non-exempt 52 U.S.C. 30109 investigatory materials shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file.

(5) Requests for guidance and responses thereto.

(6) The minutes of Commission meetings.

(7) Material routinely prepared for public distribution, e.g. campaign guidelines, FEC Record, press releases, speeches, notices to candidates and committees.

(8) Audit reports (if discussed in open session).

(9) Agendas for Commission meetings.

(b) The provisions of this part apply only to existing records; nothing herein shall be construed as requiring the creation of new records.

(c) In order to ensure the integrity of the Commission records subject to the Act and the maximum availability of such records to the public, nothing herein shall be

construed as permitting the physical removal of any Commission records from the public facilities maintained by the Public Disclosure and Media Relations Division other than copies of such records obtained in accordance with the provisions of this part.

(d) Release of records under this section is subject to the provisions of 5 U.S.C. 552a.

11 C.F.R. § 111.21
Confidentiality

(a) Except as provided in 11 CFR 111.20, no complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any findings made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

(b) Except as provided in 11 CFR 111.20(b), no action by the Commission or by any person, and no information derived in connection with conciliation efforts pursuant to 11 CFR 111.18, may be made public by the Commission except upon a written request by respondent and approval thereof by the Commission.
(c) Nothing in these regulations shall be construed to prevent the introduction of evidence in the courts of the United States which could properly be introduced pursuant to the Federal Rules of Evidence or Federal Rules of Civil Procedure.

11 C.F.R. § 111.24
Civil Penalties

(a) Except as provided in 11 CFR part 111, subpart B and in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall be as follows:

(1) Except as provided in paragraph (a)(2) of this section, in the case of a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $24,885 or an amount equal to any contribution or expenditure involved in the violation.

(2) ***Knowing and willful violations.***

(i) In the case of a knowing and willful violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $53,088

or an amount equal to 200% of any contribution or expenditure involved in the violation.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, in the case of a knowing and willful violation of 52 U.S.C. 30122,the civil penalty shall not be less than 300% of the amount of any contribution involved in the violation and shall not exceed the greater of $84,852 or 1,000% of the amount of any contribution involved in the violation.

(b) Any Commission member or employee, or any other person, who in violation of 52 U.S.C. 30109(a)(12)(A) makes public any notification or investigation under 52 U.S.C. 30109 without receiving the written consent of the person receiving such notification, or the person with respect to whom such investigation is made, shall be fined not more than $7,455. Any such member, employee, or other person who knowingly and willfully violates this provision shall be fined not more than $18,610.

Fed. R. Civ. P. 60(b)(4)
Relief from a Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUDAS CHASIDEI CHABAD OF UNITED STATES, **Plaintiff,**	
v.	**No. 1:05-cv-1548 (RCL)**
RUSSIAN FEDERATION; RUSSIAN MINSTRY OF CULTURE AND MASS COMMUNICATION; RUSSIAN STATE LIBRARY; and RUSSIAN STATE MILITARY ARCHIVE **Defendants.**	

MEMORANDUM ORDER

Before the Court is non-party Tenex-USA's ("Tenam") Motion to Certify the Court's Memorandum Order of December 20, 2019 for Interlocutory Appeal under 28 U.S.C. § 1292(b) and to Stay Discovery Pending Appeal. ECF No. 204. Plaintiff Agudas Chasidei Chabad of United States ("Chabad") subpoenaed Tenam seeking to discover information that would lead to collection on its judgment against defendant Russia. Tenam moved to quash the subpoena, which this Court denied in December 2019. ECF No. 198. In response, Tenam filed this motion, arguing that interlocutory appeal is appropriate because the D.C. Circuit needs to resolve three issues relating to Chabad's subpoena: (1) whether jurisdiction over Russia was established; (2) whether an order of specific performance is contrary to the Foreign Sovereign Immunities Act ("FSIA") and U.S. foreign policy; and (3) whether the subpoena falls outside the scope of the FSIA. ECF No. 204. Chabad argues that jurisdiction has been established, that an order of specific performance is not contrary to the FSIA and U.S. foreign policy, and that Tenam has failed to meet the requirements for interlocutory appeal. ECF No. 208.

A district court may grant an interlocutory appeal of an otherwise unappealable order if (1) there exists a controlling question of law; (2) there is substantial ground for difference of opinion on the controlling question of law; and (3) an immediate appeal from the order may materially advance the termination of the litigation. 28 U.S.C. § 1292(b). Controlling questions of law are those "that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90, 95–96 (D.D.C. 2003). A movant may not establish a substantial ground for difference of opinion through "[a] mere claim that the district court's ruling was incorrect." *Singh v. George Wash. Univ.*, 383 F. Supp. 2d 99, 104 (D.D.C. 2005) (citation omitted). The § 1292(b) movant bears the burden of satisfying the certification elements and of demonstrating the exceptional circumstances that warrant a departure from the general rule of awaiting final judgment. *Azima v. RAK Inv. Auth.*, 325 F. Supp. 3d 30, 34 (D.D.C. 2018) (internal quotation marks and citation omitted)); *see also Kennedy v. District of Columbia*, 145 F. Supp. 3d 46, 51 (D.D.C. 2015) ("Interlocutory appeals are infrequently allowed.") (internal quotation omitted).

Two of Tenam's arguments do not pass first muster—that an order of specific performance is contrary to the FSIA and U.S. foreign policy and that the subpoena falls outside the scope of the FSIA. Both arguments have already been considered and rejected by this Court, and Tenam offers no compelling reasons to revisit them. *See Agudas Chasidei Chabad of United States v. Russian Fed'n*, 128 F. Supp. 3d 242, 246–49 (D.D.C. 2015); Mem. Order, ECF No. 198.

Tenam's jurisdictional argument requires more attention. The theory that this Court does not have jurisdiction over Russia—despite the fact that the Circuit considered and upheld such

jurisdiction—is a bold argument. But Tenam is able to craft a thesis out of the Circuit's recent convoluted jurisprudence surrounding the FSIA's expropriation exception. *See* 28 U.S.C. § 1605(a)(3).

This Court reads 28 U.S.C. § 1605(a)(3) as it is written: "A ***foreign state*** shall not be immune from the jurisdiction of courts of the United States or of the States in any case [1] in which rights in property taken in violation of international law are in issue and . . . [2B] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3) (emphasis and designations added). Here, rights in property taken in violation of international law are at issue, and that property is owned or operated by a commercially engaged agency or instrumentality of the foreign state, thus exempting the ***foreign state*** from immunity.

Jurisdictional challenges as to these defendants have been litigated, appealed, and upheld. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 955 (D.C. Cir. 2008). In 2006, this Court held that the FSIA expropriation exception applied to one part of the Chabad collection—the "Archive"—but not to another part of the collection—the "Library." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 466 F. Supp. 2d 6, 16–20 (D.D.C. 2006). On appeal, the D.C. Circuit held that the exception applied to both the Archive *and* the Library. *Chabad*, 528 F.3d at 938. The Circuit spoke clearly: "[W]e reverse [the] finding of Russia's immunity as to the Library." *Id.* This statement apparently needs clarification: reversing a finding of immunity means that there is no immunity.

The Circuit's holding rejecting Russian immunity has not been overturned, but it has been the subject of much hand-wringing. *See Schubarth v. Fed. Republic of Ger.*, 891 F.3d 392,

401 (D.C. Cir. 2018)); *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406, 414–18 (D.C. Cir. 2018); *De Csepel v. Republic of Hung.*, 859 F.3d 1094, 1105–07 (D.C. Cir. 2017); *Simon v. Republic of Hung.*, 812 F.3d 127, 146–47 (D.C. Cir. 2016). Despite *Chabad*'s clear holding (and the plain language of the statute), the Circuit has recently pursued a new interpretation—that the [2B] prong of § 1605(a)(3) cannot except a foreign state from immunity. *Id.*

The Circuit "is bound to follow [its own] precedent until it is overruled either by an *en banc* court or the Supreme Court." *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005). "Therefore, when a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail." *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). *Chabad* has not been overturned. In accordance with the protocols described above, this Court will not consider binding any Circuit precedent that runs afoul of *Chabad* until it is overturned by the Circuit *en banc* or by the Supreme Court.

Jurisdiction over Russia remains established. Materially advancing the termination of this fifteen-year-old litigation does not involve sending up on appeal a post-judgment discovery dispute.

Non-party Tenam's Motion is accordingly **DENIED**.

It is **SO ORDERED**.

SIGNED this 28th day of July, 2020.

Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUDAS CHASIDEI CHABAD OF UNITED STATES, **Plaintiff,**	
v.	**No. 1:05-cv-01548**
RUSSIAN FEDERATION; RUSSIAN MINSTRY OF CULTURE AND MASS COMMUNICATION; RUSSIAN STATE LIBRARY; and RUSSIAN STATE MILITARY ARCHIVE **Defendants.**	

MEMORANDUM ORDER

Non-party Tenex-USA ("Tenam") seeks to partially vacate this Court's Default Judgment [80] and Interim Judgment [144] pursuant to Rule 60(b)(4)–(6) in order to avoid having to comply with plaintiff Agudas Chasidei Chabad's ("Chabad") subpoena. ECF No. 203. Rule 60(b)(4) allows a court to grant relief from a final judgment that is void. Fed. R. Civ. P. 60(b)(4). Rule 60(b)(5) authorizes a court to vacate or amend a judgment when "applying [the judgment] prospectively is no longer equitable." *Id.* (b)(5). Rule 60(b)(6) is a catch-all provision that authorizes the court to amend a judgment for "any other reason that justifies relief." *Id.* (b)(6).

To obtain relief under Rule 60(b), the moving party must demonstrate "extraordinary circumstances." *Marino v. Drug Enf't Admin.*, 685 F.3d 1076, 1079 (D.C Cir. 2012). Courts should deny motions for reconsideration when it appears that "the losing party is using the motion as an instrumentality for arguing the same theory or asserting new arguments that could have been raised prior to final judgment." *Lightfoot v. Dist. of Columbia*, 355 F. Supp. 2d 414, 420 (D.D.C. 2005). Motions for reconsideration are generally disfavored and are considered an

"unusual measure." *Cornish v. Dudas*, 813 F. Supp. 2d 147, 148 (D.D.C. 2011) (citing *Kittner v. Gates*, 783 F. Supp. 2d 170, 172 (D.D.C. 2011)). "[T]he movant must provide the district court with reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *Murray v. Dist. of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995). Ultimately, "the decision to grant or deny a rule 60(b) motion is committed to the discretion of the District Court." *United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469, 476 (D.C. Cir. 1993).

Motions under Rule 60(b) may only be filed by "a party or its legal representative." Fed. R. Civ. P. 60(b). In *Grace v. Bank Leumi Tr. Co.*, the Second Circuit held that when a "third party is 'strongly affected' by the judgment [they are] entitled to standing to bring a Rule 60(b) motion." 443 F.3d 180, 188 (2d Cir. 2006); *see also Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1052 (2d Cir. 1982) (noting that non-party plaintiffs had standing to invoke Rule 60(b)(6) when they were "sufficiently connected and identified with the . . . suit").

The D.C. Circuit has not taken a position on the scope of third parties' standing under Rule 60(b). A sister court in this district has emphasized the narrowness of the *Grace* court's holding. *Empagran, S.A. v. F. Hoffman-La Roche Ltd.*, 453 F. Supp. 2d 1, 7 n.6 (D.D.C. 2006). *Empagran* points out that the *Grace* court "considered its holding to be limited to the particular circumstances of that case," *id.*, which involved plaintiffs entering "into a settlement agreement with a judgment-proof, pro se defendant with the intent at the time of the settlement to collect from a third party that allegedly received fraudulent conveyances[.]" *Id.* (quoting *Grace*, 443 F.3d at 188). By its own terms, *Grace* "carve[d] out an exceedingly narrow exception to the well-established rule that litigants, who were neither a party, nor a party's legal representative to a judgment, lack standing to question a judgment under Rule 60(b)." *Grace*, 443 F.3d at 189.

Tenam clings to *Grace*. Tenam Mem. (Rule 60(b)) 17–18, ECF No. 203-1. It also argues that an order to comply with a subpoena is enough to confer Rule 60(b) standing on non-parties, citing two district court cases. *See Jakks Pac., Inc. v. Accasvek, LLC*, 270 F. Supp. 3d 191, 196 n.4 (D.D.C. 2017) (finding standing because questions of subject-matter jurisdiction may be raised by parties or non-parties); *Nationwide Life Ins. Co. v. Keene*, Case No. 11-12422 (AC), 2013 U.S. Dist. LEXIS 51311, at *3, 6 (E.D. Mich. Apr. 10, 2013) (providing no further explanation beyond stating that the named party had standing). Chabad argues the opposite. *See SEC v. Neto*, 27 F. Supp. 3d 434, 447 (S.D.N.Y. 2014) (Rule 60(b) movant lacked standing because it was "only tangentially related to the [] case through its involvement with [assets] that the Court ordered could be used to satisfy the [judgment]").

A court may only grant relief to "a party or its legal representative." Fed. R. Civ. P. 60(b). Tenam is neither. Given the absence of binding precedent and the narrowness of *Grace*'s holding, this Court will follow the plain language. Tenam's privacy concerns of complying with a subpoena do not affect it so strongly as to imbue standing.

Tenam addressed its concerns regarding this Court's jurisdiction in a companion motion seeking certification to pursue an interlocutory appeal. ECF No. 204. This Court has denied that motion. Tenam's Rule 60 motion is likewise **DENIED**.

It is **SO ORDERED**.

SIGNED this 28th day of July, 2020.

Royce C. Lamberth
United States District Judge

ORAL ARGUMENT NOT YET SCHEDULED

NO. 25-5188

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GIFFORDS,

Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee,

NATIONAL RIFLE ASSOCIATION OF AMERICA, et al.

Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-01192-EGS

DECLARATION OF MATTHEW H. BOWER

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Counsel for Appellants National Rifle Association of America & National Rifle Association of America Political Victory Fund

DECLARATION OF MATTHEW H. BOWER

I, Matthew H. Bower, declare under penalty of perjury and to the best of my knowledge as follows:

1. I am an Assistant General Counsel to the National Rifle Association of America, and in that capacity I also represent the National Rifle Association of America Political Victory Fund (collectively, "NRA").

2. The National Rifle Association of America is a tax-exempt organization under § 501(c)(4) of the Internal Revenue Code focused on, *inter alia*, preserving the right of law-abiding individuals to purchase, possess, and use firearms for legitimate purposes as guaranteed by the Second Amendment to the U.S. Constitution, as well as educating the public on firearm ownership in America.

3. The National Rifle Association of America Political Victory Fund, which is registered with the Federal Election Commission as a separate segregated fund, is the traditional political action committee of the National Rifle Association of America.

4. In my capacity as Assistant General Counsel to the NRA, I oversee the NRA's involvement in the case captioned as *Giffords v. NRA*, 21-cv-02887 (LLA), which is currently pending in the U.S. District Court for the District of Columbia.

5. The NRA has spent significant time, funds, and resources defending the case *Giffords v. NRA*, 21-cv-02887 (LLA).

6. As of January 13, 2026, the NRA has spent more than four years defending itself in *Giffords v. NRA*, 21-cv-02887 (LLA).

7. As of January 13, 2026, the NRA has spent hundreds of thousands of dollars in attorneys' fees and litigation costs defending itself from Giffords's claims in *Giffords v. NRA*, 21-cv-02887 (LLA).

8. The NRA will continue to accrue attorneys' fees and litigation costs every day that *Giffords v. NRA*, 21-cv-02887 (LLA) remains pending.

9. Those attorneys' fees and litigation costs that the NRA has incurred from defending itself in *Giffords v. NRA*, 21-cv-02887 (LLA) are irrecoverable.

10. The NRA has thus been injured by the district court's refusal to grant the NRA's meritorious Rule 60 motion and by its simultaneous refusal to even consider its own jurisdiction in the case *Giffords v. FEC*, 19-cv-01192 (EGS), which is in the U.S. District Court for the District of Columbia. The NRA is injured by the Court's denial of the NRA's Rule 60 motion and by its refusal to even consider its own jurisdiction because the district court could have ended the NRA's ongoing litigation costs in *Giffords v. NRA*, 21-cv-02887 (LLA), but it chose not to. Indeed, and for example only, when that Court denied the NRA relief, the NRA was in the midst of briefing a motion to dismiss in the citizen suit court. The costs of that briefing were necessitated by the Court's denial of the NRA's Rule 60 motion—had

the motion been granted, the briefing presumably would have been unnecessary, or at least substantially simpler.

11. The district court's refusal to grant the NRA's meritorious Rule 60 motion and its refusal to consider its own jurisdiction in the case *Giffords v. FEC*, 19-cv-01192 (EGS) has caused the NRA to incur attorneys' fees, litigation costs, and wasted time in *Giffords v. NRA*, 21-cv-02887 (LLA), which will continue to accrue so long as that case remains pending.

12. The NRA will continue to incur injuries in the form of attorneys' fees, litigation costs, and wasted time in *Giffords v. NRA*, 21-cv-02887 because of the district court's refusal to grant the NRA's meritorious Rule 60 motion and/or refusal to consider its own jurisdiction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2026

/s/ Matthew H. Bower

Matthew H. Bower
Assistant General Counsel to the NRA