IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:21-cv-0406-TJK

PLAINTIFF CAMPAIGN LEGAL CENTER'S RESPONSE TO NON-PARTY HERITAGE ACTION FOR AMERICA'S REQUEST TO DEFER CONSIDERATION OF ITS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60

Adav Noti (DC Bar No. 490714)
Kevin P. Hancock (DC Bar No. 90000011)
Molly E. Danahy (DC Bar No. 1643411)
Mark P. Gaber (DC Bar No. 988077)
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200
anoti@campaignlegal.org
khancock@campaignlegal.org
mdanahy@campaignlegal.org
mgaber@campaignlegal.org

Counsel for Plaintiff

BACKGROUND

On March 24, 2023, non-party Heritage Action for America ("Heritage Action" or "Movant") filed what it described as a "protective" motion for relief from the judgment under Rule 60(b). Heritage Action's motion asks this Court to vacate its final judgment in this action, which found that the Federal Election Commission ("FEC" or "Commission") failed to act on Plaintiff Campaign Legal Center's ("CLC") administrative complaint within 120 days, that its failure to act was contrary to law, and that the FEC failed to conform its actions within the deadline set forth by the Court as required by statute. *See* Mot. of Heritage Action for Relief from Orders and J. and Mot. to Defer Consideration (Mar. 24, 2023), ECF 37 ("Mot.").

Prior to filing its motion, Heritage Action requested CLC's position on a proposed motion to hold the Rule 60 motion in abeyance pending resolution of Heritage Action's pending appeals of this Court's orders, and to impose a fourteen-day deadline for CLC to respond to the Rule 60 motion once the D.C. Circuit issues its mandate. Ex. 1 (Mar. 22 Email to S. Kenny). CLC responded that it opposed Heritage Action's proposed Rule 60 motion and opposed the proposed motion for an abeyance and request for a briefing schedule. *Id*.

Heritage Action subsequently filed its proposed Rule 60 motion and requested therein that this Court defer consideration of that motion under Rule 62.1(a)(1) and require CLC to respond to the Rule 60 motion within 14 days of the D.C. Circuit's ruling—even in the event the Circuit *affirms* the denial of Heritage Action's motion for intervention. *See* Mem. of Points and Authorities in Supp't of the Mot. of Heritage Action for Relief from Orders and Judgment and Mot. to Defer Consideration at 27 (Mar. 24, 2023), ECF 37-1 ("Mem."). CLC agrees that briefing on the merits of the Rule 60 motion at this time is unnecessary given that the issues raised therein will likely be resolved by the pending appeals. Nonetheless, CLC opposes Heritage Action's request that the

Court defer consideration of its motion to the extent that request would preclude this Court from exercising its jurisdiction to deny the motion immediately under Rule 62.1(a)(2) due to Heritage Action's non-party status or the motion's untimeliness. Moreover, CLC opposes Heritage Action's attempt to set a briefing schedule on its proposed Rule 60 motion before the D.C. Circuit clarifies what controversies, if any, remain live after resolution of the pending appeals.[1]

ARGUMENT

As Heritage Action concedes, this Court lacks jurisdiction to grant its Rule 60 motion while Heritage Action's appeals are pending. Mem. at 27. But the Court retains jurisdiction to deny the motion outright. Fed. R. Civ. P. 62.1(a)(2). Because a non-party cannot bring a motion under Rule 60, and, regardless, Heritage Action's motion is plainly untimely, the Court should exercise its jurisdiction to deny the motion pursuant to Rule 62.1(a)(2). Should the Court defer ruling on the motion pursuant to Rule 62.1(a)(1), it should nonetheless deny Movant's request to set a briefing schedule on the motion until after the D.C. Circuit rules on the pending appeals, which will clarify for the Movant, the parties, and this Court whether any live controversy exists.

I. The Court Should Deny the Motion Pursuant to Rule 62.1(a)(2).

The Court should deny Heritage Action's motion immediately under Rule 62.1(a)(2) because as a non-party Heritage Action is not entitled to seek reconsideration under Rule 60, and because the motion is plainly untimely.

[1] Given the parties' agreement that the merits of the Rule 60 motion should not be considered until after the D.C. Circuit rules (if at all), CLC does not address the motion's merits herein. To the extent the Court prefers to consider the Rule 60 motion's merits now pursuant to its authority to do so under Rule 62.1(a)(2)-(3), CLC respectfully requests that the Court set a deadline for CLC's response for 14 days after issuance of any order denying Movant's request to defer consideration of the motion.

First, "[r]ule 60(b) by its own terms is available only to 'a party or [its] legal representative.'" *Ratner v. Bakery & Confectionery Workers International Union*, 394 F.2d 780, 782 (D.C. Cir. 1968) (quoting Fed. R. Civ. P. 60(b)); *see also Agudas Chasidei Chabad of United States v. Russian Federation*, 19 F.4th 472, 477 (D.C. Cir. 2021) (affirming district court ruling that non-party was not entitled to Rule 60 relief "[b]ecause the Federal Rules of Civil Procedure are to be accorded 'their plain meaning'") (quoting *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989)). This is true, even where a non-party's Rule 60(b) motion claims that the district court lacks subject-matter jurisdiction. *See Agudas*, 19 F.4th at 477; *Agudas Chasidei Chabad of United States v. Russian Federation*, No. 1:05-cv-1548-RCL, 2020 WL 13611456, at *7 (D.D.C. Nov. 6, 2020).

Heritage Action is neither a party to this case nor the legal representative of any party to the case, and thus is not entitled to relief under Rule 60(b). *See Agudas*, 19 F.4th at 477. This is particularly so given that Heritage Action declined to attempt to intervene in this litigation until after the orders from which it seeks relief were entered. *See id.* (affirming that the subject of a third-party subpoena was not entitled to seek vacatur of an underlying default judgment because it was not party and had not participated in the "litigation resulting in the judgments it sought to vacate."); *see also Agudas*, 2020 WL 13611456 at *10 (finding that Rule 60(b) "plainly does not allow non-parties with 'highly attenuated . . . connection[s],' to a case to disturb the finality of its judgment upon a Rule 60 motion.").

Even though the Supreme Court has stated that "Congress . . . has ultimate authority over the Federal Rules of Civil Procedure" and so "we cannot contort its text," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400, 406 (2010), Heritage Action appeals to an alleged exception to Rule 60(b)'s party requirement for nonparties whose "interests are strongly

affected" by the judgment. But Heritage Action cites no Supreme Court or D.C. Circuit precedent adopting this alleged exception or, more generally, approving of rewriting the Federal Rules in such a manner. *Cf. McKeever v. Barr*, 920 F.3d 842, 844-845 (D.C. Cir. 2019) (finding courts lack authority to create exceptions to the federal rules beyond those specifically enumerated therein). Heritage Action's reliance on this Court's ruling in *Agudas* further undermines its claim, given the *Agudas* court merely rejected the movant's argument that the supposed exception applied. *See* 19 F.4th at 477; *see also Agudas*, 2020 WL 13611456 at *10 (expressly "declin[ing] to recognize such an innovation").

Second, even if Heritage Action were entitled to seek relief under Rule 60, its motion is untimely. "A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c). To the extent a Rule 60(b) motion seeks to put forth new evidence, the movant must show that such evidence "with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." *Id*. 60(b)(2). With respect to motions under Rule 60(b)(1), (2), or (3), "[a] movant must offer sufficient justification for delaying a Rule 60(b) motion almost until the one-year deadline." *Bowie v. Maddox*, 677 F. Supp. 2d 276, 279 (D.D.C. 2010) (citing *White v. Am. Airlines, Inc*., 915 F.2d 1414, 1425 (10th Cir.1990)). Finally, "in this Circuit courts almost uniformly deny Rule 60(b)(6) motions as untimely when made more than three months after judgment." *Ahuruonye v. United States Dep't of Interior*, No. CV 16-1767 (RBW), 2019 WL 13111774, at *3 (D.D.C. Jan. 28, 2019) (citing cases).

Heritage Action makes no attempt to justify its decision to delay submitting its motion for reconsideration for a full year after the challenged order was issued. Its motion merely repeats the same arguments regarding this Court's supposed "mistakes" and the FEC's supposed "fraud" that

movant first raised with this Court nearly a year ago in its motion for leave to file an amicus brief on April 25, 2022, *see* ECF No. 17, and which it raised again in support of its belated motion to intervene on May 10, 2022, *see* ECF No. 24. This Court has already determined that the purportedly "new" evidence upon which Heritage Action relies—namely alleged "evidence" that the FEC "acted" on CLC's complaint and then "concealed" this fact from the Court—reasonably could have been obtained before judgment was even entered, *see* Order Denying Mot. to Intervene, ECF No. 34 at 4, much less in time to seek relief under Rule 59(b), *see* Fed. R. Civ. P. 60(b)(2).[2] Further, Heritage Action admits it has had actual possession of this alleged evidence for nearly ten months. *See* Mem. at 21 (admitting the FEC released the allegedly concealed records within 30 days of when "it closed the file on June 7, 2022"); *see also* Ex. G to Def.'s Mem. of Points and Authorities in Supp't of Mot. to Dismiss, *Campaign Legal Ctr. v. Heritage Action for Am.*, No. 22-cv-1248-CJN (D.D.C. July 8, 2022), ECF No. 20-8 (letter dated June 9, 2022 from FEC to Heritage Action stating that "[d]ocuments related to the case will be placed on the public record within 30 days"). Yet Heritage Action waited until the eve of Rule 60(c)'s one-year deadline before seeking relief. Such delay certainly cannot be termed "reasonable" under Rule 60(c).

Indeed, despite representing to this Court that its "preferred aim" for intervening was to seek reconsideration of the Court's order, *see* ECF No. 34 at 5, Heritage Action abandoned this plan once its motion to intervene was denied, and simply appealed the merits of this Court's default judgment rulings alongside the denial of its motion to intervene. The apparently strategic choice

---

[2] As such, although Heritage Action is not a party and thus not entitled to seek relief under Rule 60, it nonetheless could have submitted its proposed motion for reconsideration as an attachment to its motion to intervene and requested that the Court deem it timely filed if intervention was granted. *See, e.g.*, *MGM Global Resorts Development LLC v. United States Dep't of the Interior*, No. 1:19-cv-2377, 2020 WL 5545496 at * 7 (D.D.C. Sept. 16, 2020) (granting motion to intervene and directing that intervenors' proposed motion to dismiss submitted as an attachment thereto be filed and docketed).

to put all its eggs in the appeal basket does not justify Heritage Action's delay in seeking reconsideration. Indeed, the Federal Rules provide an explicit procedural mechanism by which a party may seek reconsideration by a district court notwithstanding a pending appeal, *see* Fed. R. Civ. P. 62.1(a)(3), (b)-(c); Fed. R. App. P. 12.1. These mechanisms promote judicial efficiency and protect against undue prejudice to the parties in two ways: first, by ensuring that the district court can address meritorious issues—which these are not—raised on a motion for reconsideration in the first instance, and second, by ensuring that the appellate court has the benefit of the district court's opinion in making its own rulings. Instead of attempting to avail itself of these procedural mechanisms *before* the appeal was briefed, argued, and submitted, *see* Oral Argument Held, *Campaign Legal Ctr. v. Fed. Elec. Comm'n*, No. 22-5140 (D.C. Cir. Jan. 20, 2023), Heritage Action ran out the clock on its deadline to file and now asks this Court to take up its motion only *after* the appeal is resolved, including in the event that the D.C. Circuit rules against Heritage Action.[3] The D.C. Circuit has rejected this sort of transparent attempt to leverage Rule 60(b) to hedge against unwelcome outcomes. *See, e.g.*, *Salazar ex rel. Salazar v. D.C.*, 633 F.3d 1110, 1120 (D.C. Cir. 2011) (emphasizing that Rule 60(b)(6) 'should be only sparingly used' and may not 'be employed simply to rescue a litigant from strategic choices that later turn out to be improvident'") (quoting *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007). This Court should do the same.

Once again, Heritage Action's delay has created a "procedural mess," *cf.* Order at 2, ECF 34. The Court should decline to sanction Movant's belated attempt to reverse course on

[3] Indeed, Heritage Action describes this motion as merely "protective" in nature, *see* Ex. 1, *see also* Mem. at 1 (describing the motion as filed "out of an abundance of caution" in light of the approaching one-year deadline), indicating that the sole purpose in filing this motion is to hedge against an unfavorable determination on appeal. *See also* Mem. at 34 (asking this Court to take up its motion even in the event of a loss on appeal).

reconsideration as a hedge against an unfavorable decision from the D.C. Circuit and should deny the motion as untimely pursuant to its authority under Rule 62.1(a)(2).

II. The Court Should Defer Setting a Briefing Schedule.

If the Court defers ruling on the Rule 60 motion pursuant to Rule 62.1(a)(1), the Court should also deny Movant's request to set a 14-day deadline for CLC to respond to the motion once the mandate issues. Should it prove necessary once the mandate issues, CLC and Movant could meet and confer in good faith to determine what issues raised in the Rule 60 motion remain, if any, and to propose any discovery and briefing deadlines necessary to resolve the same. There is no need to pre-emptively set a deadline to respond to a motion that may be rendered entirely or partially moot by the resolution of the appeals.

CONCLUSION

The Court should deny Heritage Action's motion for reconsideration pursuant to Rule 62.1(a)(2). Should the Court decide to defer consideration of the motion until after the pending appeals are resolved, it should direct the parties to meet and confer within a reasonable time after the mandate issues to discuss any remaining issues to be briefed and to propose a briefing schedule, if necessary, regarding the same.

Dated: April 7, 2023

Respectfully submitted,

/s/ Molly E. Danahy
Adav Noti (DC Bar No. 490714)
Kevin P. Hancock (DC Bar No. 90000011)
Molly E. Danahy (DC Bar No. 1643411)
Mark P. Gaber (DC Bar No. 988077)
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200
anoti@campaignlegal.org

khancock@campaignlegal.org
mdanahy@campaignlegal.org
mgaber@campaignlegal.org