IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 1:21-cv-00406-TJK

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF HERITAGE ACTION FOR AMERICA FOR RELIEF FROM ORDERS AND JUDGMENT AND MOTION TO DEFER CONSIDERATION

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INTRODUCTION

Heritage Action for America ("Heritage Action") respectfully files this motion for relief from this Court's orders dated March 25, 2022, granting Campaign Legal Center's ("CLC") motion for default judgment against the Federal Election Commission ("FEC" or "Commission"), and May 3, 2022, declaring that the FEC failed to conform to the Court's default-judgment order to take action on CLC's administrative complaint and authorizing CLC to file a citizen suit against Heritage Action. *See* Dkt. Nos. 16 & 23. Those orders, and the Court's denial of Heritage Action's motion to intervene, Dkt. No. 33, are currently on appeal in the D.C. Circuit, *see* Dkt. Nos. 26 & 35. Because a Rule 60 motion seeking relief from an order for certain reasons must be filed within one year, *see* Fed. R. Civ. P. 60(c)(1), and because CLC has previously contended (incorrectly) that only the March 25 order matters, *see* Dkt. No. 30 at 25–30; Dkt. No. 31 at 9–10, Heritage Action is filing this motion now in an abundance of caution.

Relief is warranted under multiple provisions of Rule 60 because the Court's default-judgment and failure-to-conform orders are based on the false premise that the Commission "failed to act" on CLC's administrative complaint. Dkt. No. 16 at 2. In fact, the Commission had acted on the administrative complaint nearly one year earlier, on April 6, 2021, when the Commission, consistent with the Federal Election Campaign Act ("FECA"), held a vote on whether to initiate an enforcement action based on the administrative complaint and deadlocked 3-3 over whether to find reason to believe that Heritage Action had violated FECA. But, due to a scheme by three Commissioners to conceal that fact, the Court lacked that case-dispositive information when it issued the orders. Those three Commissioners intentionally blocked the release of voting records and other case materials in this matter—until just weeks after this Court issued its failure-to-conform order—in order to trigger a citizen suit against Heritage Action by creating the false impression that the FEC had not acted on the administrative complaint.

For the reasons explained below, relief is warranted under Rule 60(b) and Rule 60(d)(3), regardless of the outcome of the pending appeal. The Court should vacate its orders dated March 25, 2022, and May 3, 2022, dismiss CLC's complaint, and enter judgment for the FEC. The Court should also defer consideration of this motion until after the D.C. Circuit issues its mandate in the pending appeal.

BACKGROUND

A. FEC's Enforcement Authority

The FEC is an independent federal agency consisting of six members appointed by the President by and with the advice and consent of the Senate. 52 U.S.C. § 30106(a). Congress "vested the Commission with 'primary and substantial responsibility for administering and enforcing the [FECA],' providing the agency with 'extensive rulemaking and adjudicative powers.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (*DSCC*) (citation omitted). To prevent any one political party from using the FEC's enforcement process for partisan gain, Congress structured the Commission to consist of no more than three members affiliated with the same political party, 52 U.S.C. § 30106(c); *see DSCC*, 454 U.S. at 37, and directed that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers" must be made "by a majority vote of the members of the Commission," 52 U.S.C. § 30106(c).

The FEC has "exclusive jurisdiction with respect to the civil enforcement" of FECA, *id.* § 30106(b)(1). "Any person who believes a violation of [the] Act … has occurred, may file a complaint with the Commission." *Id.* § 30109(a)(1). Before initiating an enforcement action and investigation of allegations in a complaint, the FEC must first "determine[], by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed" a violation of the Act based on the complaint. *Id.* § 30109(a)(2); *see id.* § 30106(c) ("[T]he affirmative vote of 4

members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph … (9) of section 30107(a)"). This vote is the only action Congress authorized the FEC to take in the initial phase of a complaint-generated matter. Absent "an affirmative vote of 4" Commissioners finding "reason to believe," the FEC cannot proceed with an enforcement investigation based on a complaint, *id*. § 30109(a)(2); *see id*. §§ 30106(c), 30107(a)(9), and thus "dismisses the administrative complaint," *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015); *see CLC v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022) ("If at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint is dismissed.").

In exercising this congressionally mandated gatekeeping function, the bipartisan FEC frequently splits on its "reason to believe" vote—typically by a 3-3 breakdown—thus failing to garner the four votes necessary to proceed to enforce the complaint under the statute. *See CLC v. FEC*, 312 F. Supp. 3d 153, 164 n.6 (D.D.C. 2018) (*Democracy 21*) ("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). This deadlocked reason-to-believe vote constitutes an "act" under the statute. 52 U.S.C. § 30109(a)(8)(C). Moreover, such a split constitutes not only "agency action," but the FEC's *decision* of the case, mandating dismissal of the complaint. *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016) ("FEC cannot investigate complaints absent majority vote, meaning the statute compels FEC to dismiss complaints in deadlock situations.") (citation omitted). As former FEC Chairman Brad Smith put it: "If the FEC votes 3-3 not to find a violation, that means the FEC has determined that the conduct does not violate the law." Brad Smith, *What Does It Mean When the Federal Election Commission "Deadlocks*," Institute for Free Speech (Apr. 14, 2009), https://bit.ly/3RhwhkR. "It HAS applied the law to the

facts, and it HAS reached a result," dismissing the matter. *Id*. Thus, the D.C. Circuit has deemed this common scenario to result in so-called "deadlock dismissals." *E.g.*, *Common Cause v. FEC*, 842 F.2d 436, 448–49 (D.C. Cir. 1988); *CREW v. FEC*, 993 F.3d 880, 882–83 (D.C. Cir. 2021) (*New Models*).

On May 13, 2022, the FEC's Chairman Allen Dickerson and Commissioners Sean Cooksey and Trey Trainor issued a statement explaining further that the FEC has "concluded" its "work" if it has voted on the merits of the complaint and failed to garner the four votes FECA requires to proceed with enforcement. *See Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters* 2 (May 13, 2022) (Exhibit A, attached) (Statement Regarding Concluded Enforcement Matters). As they explained, "the Commission has already passed judgment on the entirety of the merits in these matters." *Id*. at 4–5. This situation, the Commissioners noted, is very different from "a matter that the Commission is considering piecemeal over the course of several [meetings] but where it has yet to vote on all the enforcement questions presented." *Id*. at 5. By deadlocking, the FEC has "finished" its work and, "in fact, acted." *Id*. at 2, 5.

B. Mandatory Disclosure Of The FEC's Decisions In Enforcement Matters

Federal law compels the FEC to notify the parties and disclose a decision to dismiss an administrative complaint. Under FECA, "[i]f the Commission makes a determination that a person has not violated [FECA], the Commission shall make public such determination." 52 U.S.C. § 30109(a)(4)(B)(ii). The FEC must first "advise both complainant and respondent by letter" "[i]f the Commission finds no reason to believe, or otherwise terminates its proceedings." 11 C.F.R. § 111.9(b). Then, "[i]f the Commission makes a finding of no reason to believe … or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than

thirty (30) days from the date on which the required notifications are sent to complainant and respondent." *Id.* § 111.20(a).

In cases where the "the Commission lacks four votes to proceed" with enforcement—including in deadlock dismissals—"the [C]ommissioners who voted against enforcement must state their reasons why," and "[t]he reasons offered by these so-called controlling Commissioners are then treated as if they were expressing the Commission's rationale for dismissal." *New Models*, 993 F.3d at 883 n.3 (cleaned up); *see also DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (similar); *Common Cause*, 842 F.2d at 448 (similar). "In the event of a deadlock, the 'declining-to-go-ahead' Commissioners must issue a Statement of Reasons to serve as the basis for judicial review." *CLC*, 31 F.4th at 785 (citing *Common Cause*, 842 F.2d at 449).

In every terminated enforcement matter, the FEC holds a vote to "[c]lose the file" on the administrative matter. *See, e.g.*, Matter Under Review (MUR) 7137, Certification (July 22, 2021) (voting to "[c]lose the file" in a matter resulting in a signed conciliation agreement, which must be publicly released under 52 U.S.C. § 30109(a)(4)(B)). Unlike the "reason to believe" vote, this vote to close the file is not congressionally mandated under FECA. Rather, it is an administrative creation of the Commission that merely serves as the FEC's authorization to the Office of General Counsel to fulfill the non-discretionary notification requirements under FECA and FEC regulations. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a).

For decades, the FEC consistently adhered to a policy and practice of administratively closing an enforcement matter file after fewer than four Commissioners voted to find reason to believe a violation had occurred and initiate an enforcement action based on the complaint. *See, e.g.*, MUR 5024, Certification (Nov. 4, 2003) (voting 6-0 to close the file and send the appropriate notices after splitting 3-3 on whether there was reason to believe a violation had occurred); FEC's

Partial Mot. to Dismiss at 12, *CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017) (No. 16-cv-259), Dkt. No. 12 (explaining that "[a]s a result of" a "three-to-three" "split vote, the Commission closed the file"); FEC's Motion to Dismiss at 11, *CREW v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015) (No. 14-cv-1419), Dkt. No. 5 ("If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint."). After closing the file, the General Counsel would then notify the parties of the FEC's terminating action on the merits of the complaint and release the voting records and any statements of reasons, as required by FECA and the FEC's regulations.

C. The Administrative Complaint Against Heritage Action And The FEC's Concealment Of Terminating Actions

On October 16, 2018, CLC filed an administrative complaint with the FEC against Heritage Action, a 501(c)(4) not generally regulated by the FEC, in an effort by CLC to learn the identities of Heritage Action donors, who are not publicly disclosed. The FEC designated the complaint as MUR 7516. MUR 7516, Compl. (Oct. 16, 2018); MUR 7516, Notification of Compl. to Heritage Action for Am. (Oct. 22, 2018), *available at* https://bit.ly/3lDotPw. On April 6, 2021, the FEC took "action[]" on CLC's complaint against Heritage Action. *See* MUR 7516, Certification (Apr. 23, 2021) (Exhibit B, attached). In that meeting, the FEC voted on whether there was reason to believe that Heritage Action had violated FECA based on the allegations in the administrative complaint, but there were not four votes to enforce the complaint. *Id.* The three Commissioners who voted against enforcement—Commissioners Cooksey, Dickerson, and Trainor—supported dismissal as a matter of agency enforcement discretion "under *Heckler v. Chaney*." *Id.* These Commissioners wrote a "controlling" Statement of Reasons explaining their votes, including that their decision was based on "prosecutorial discretion." *Statement of Reasons of Chairman Allen*

J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III 1 (May 13, 2022) (Exhibit C, attached).

Although the FEC failed to garner the requisite four votes to proceed with enforcement, the FEC concealed that terminating action in MUR 7516 for over a year. The Commissioners took a vote on April 6, 2021, whether to close the administrative file so that CLC and Heritage Action could be notified of the FEC's action. *See* Ex. B; Ex. C at 3 n.9. Commissioners Broussard, Walther, and Weintraub, however, took the unprecedented step of voting not to close the file, thereby concealing the FEC's action from the parties and the courts. *See* Ex. A at 1. The FEC took another vote to close the administrative file on January 11, 2022, but the same three Commissioners voted against closing the administrative file. MUR 7516, Certification (Jan. 14, 2022) (Exhibit D, attached). And after this Court issued its default-judgment order on March 25, 2022, the Commission took another vote on whether to proceed with enforcement on April 7, 2022, again deadlocking. *See* MUR 7516, Certification (Apr. 8, 2022) (Exhibit E, attached). Because the FEC did not vote to close the file after these meetings, the General Counsel did not notify CLC or Heritage Action of the FEC's action on the complaint until after this Court issued its failure-to-conform order on May 3, 2022.

In this case and in seven other enforcement matters, the FEC—at the behest of Commissioners Walther, Broussard, and Weintraub—departed from its longstanding policy and practice of closing the file after the FEC has failed to initiate an enforcement action on a complaint. As the *New York Times* reported in June 2021, based in part on interviews with Commissioner Weintraub, these three Commissioners were "declining to formally close some cases after the Republicans vote[d] against enforcement" in order to "leave[] investigations officially sealed in secrecy and legal limbo"—primarily in protest to the D.C. Circuit's interpretation of *Chaney*.

Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. Times (June 8, 2021), https://nyti.ms/3ynO2qb. The same three Commissioners were then "blocking the F.E.C. from defending itself in court when advocates sue the commission for failing to do its job." *Id*. By making federal courts "believe" that "deadlocked cases are unresolved," these three Commissioners were intentionally trying to "open the door for outside advocacy groups to directly sue … in federal court." *Id*. In fact, Commissioner Ellen Weintraub has since issued a series of tweets confirming that she, Commissioner Walther, and Commissioner Broussard willfully implemented this "strategy" to cause the Commission to conceal its action for the purpose of triggering citizen suits. FEC Commissioner Ellen L. Weintraub Verified Tweets (Sept. 30, 2022) (Exhibit F, attached). The stated purpose of this concealment strategy, according to Commissioner Weintraub, is to avoid and undermine binding D.C. Circuit case law requiring deference to dismissals based on the exercise of prosecutorial discretion. *See Statement of Commissioner Ellen L. Weintraub On the Opportunities Before the D.C. Circuit in the* New Models *Case To Re-Examine* En Banc *Its Precedents Regarding 'Deadlock Deference'* (Mar. 2, 2022) (Exhibit G, attached); *Statement of Commissioner Ellen L. Weintraub On the Voting Decisions of FEC Commissioners* (Oct. 4, 2022) (Exhibit H, attached).

This scheme was also confirmed earlier by Chairman Dickerson and Commissioners Cooksey and Trainor in their public Statement Regarding Concluded Enforcement Matters. That statement announced that Commissioners Weintraub, Walther, and Broussard had refused to vote to administratively close the files in eight enforcement matters before the FEC, even though the Commission had taken final votes on the merits of those complaints well more than a year prior at that time. Ex. A at 1. In each of the matters, the statement explained, "votes ha[d] been taken as to all parties and statements of reasons ha[d] been included in the file by the commissioners

declining to move forward," and thus "there [was] no basis for claiming that the Commission is continuing to deliberate." *Id*. at 2–3. In other words, acting with a lawful quorum, the FEC had considered each of those matters, acted on the administrative complaints, and taken votes fully resolving their substance. Yet, because the FEC's Office of General Counsel will not notify the complainant or respondent of the results of any Commission votes taken in an enforcement matter or publish the relevant materials until the matter file has been closed, the Weintraub, Walther, and Broussard, scheme caused the FEC to create the false impression that the Commission had not taken action on these eight administrative complaints when it had. *Id.* at 4.

D. The Present Case

On February 16, 2021, CLC filed this case against the FEC under 52 U.S.C. § 30109(a)(8)(A), alleging that the Commission had failed to act on CLC's administrative complaint in MUR 7516 and that the FEC's inaction was contrary to law under § 30109(a)(8). *See* Dkt. No. 1. The FEC did not enter an appearance or otherwise defend the action. The Court entered default judgment against the FEC on March 25, 2022, holding that the "FEC's failure to act on CLC's administrative complaint is contrary to law." Dkt. No. 16 at 2. The Court ordered that "the FEC conform to this Court's Order within 30 days by acting on CLC's administrative complaint." *Id.*

That same day, Heritage Action submitted a FOIA request to the FEC seeking vote certifications and any Commissioner statements of reasons related to the administrative complaint. *See* Dkt. No. 17 at 2. The FEC's response date was initially set for April 22, but, on April 18, the FEC invoked an extension until May 6. *See* Dkt. No. 17-3 at 8. On April 25, Heritage Action moved to file an amicus brief urging the court to refrain from disposing the case until the Commission had responded to its FOIA request. *See* Dkt. No. 17. As it explained, the FEC's request for a FOIA extension suggested that some responsive documents existed. *See* Dkt. No.

17-3 at 6–7. And if the FEC released records showing that it had already acted on the Center's administrative complaint, the court could not order any effectual relief under 52 U.S.C. § 30109(a)(8), meaning the case had been moot ever since that action. *Id.* at 9.

On May 3, 2022, the Court found that "the FEC has not appeared, responded to [CLC]'s email inquiries, or otherwise indicated that it has conformed with the Court's order." Dkt. No. 23 at 1. The Court thus found that the FEC "failed to conform to this Court's order entered on March 25, 2022," and authorized CLC to bring "a civil action to remedy the violations involved in the original complaint" against Heritage Action. *Id.* at 2. Two days later, on May 5, CLC filed its citizen suit against Heritage Action in No. 1:22-cv-01248-CJN (D.D.C.).

The next day, May 6, the FEC responded to the FOIA request by stating that it would produce responsive records. On May 10, Heritage Action sought to intervene on an expedited basis to seek reconsideration or an appeal. *See* Dkt. No. 24. On June 2, the FEC produced vote certifications revealing it had taken "action[]" on the complaint on April 6, 2021, in the form of a deadlock dismissal. *See* Dkt. No. 32-1. On June 6, the Court "[r]egrettably" denied the motion on the premise that it was untimely. Dkt. No. 34 at 2. Heritage Action appealed the denial of its motion to intervene as well as the Court's order authorizing CLC's citizen suit. *See* Dkt. Nos. 26 & 35. The D.C. Circuit denied CLC's motion to summarily dispose of the appeals and held oral argument on January 20, 2023. *See* Nos. 22-5140, 22-5167.

LEGAL STANDARD

Rule 60(b) authorizes a district court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for six enumerated 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.

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)(1). Subsection (d) clarifies that Rule 60 "does not limit a court's power to … set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3).

Although the Court currently lacks jurisdiction to grant relief from the orders, Rule 62.1 allows a court to "defer consideration" of a Rule 60 motion if "a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1(a)(1).

ARGUMENT

I. THE COURT SHOULD GRANT RELIEF FROM ITS ORDERS AUTHORIZING CLC'S CITIZEN SUIT AGAINST HERITAGE ACTION.

The Court should vacate its default-judgment and failure-to-conform orders because the FEC concealed from this Court that the Commission had in fact acted on CLC's administrative complaint. *See* Dkt. Nos. 16 & 23. Relief from the Court's orders is warranted under Rule 60(b) and Rule 60(d)(3) for five independent reasons because Heritage Action should not have to defend itself against a citizen suit authorized on the false premise that the FEC failed to act.

A. The Orders Are Based On A Mistake Of Fact That The FEC Failed To Act.

Rule 60(b)(1) authorizes relief from an order or judgment based on "mistake, inadvertence, surprise, or excusable neglect." This rule covers both "mistake[s] of fact" and "mistake[s] of law" made by a court. *Kemp v. United States*, 142 S. Ct. 1856, 1862 (2022). The rule "affords a party relief from a material mistake that changed the outcome of the court's judgment." *Matura v.*

United States, 189 F.R.D. 86, 89 (S.D.N.Y. 1999). The Court's orders were the result of a mistake of fact because the Commission concealed its deadlocked votes on CLC's administrative complaint. This mistake was "material" and "changed the outcome" of the case because, had the Court known about this information, the Court could not have found that the FEC "failed to act" on CLC's administrative complaint or that the FEC "failed to conform" to its default-judgment order. *Id.*; Dkt No. 16 at 2; Dkt. No. 23 at 2. Nor could the Court have authorized CLC to file a citizen suit against Heritage Action on the basis of these findings. Dkt. No. 23 at 2.

1. The Court Made A Mistake Of Fact Because The FEC Concealed Its Deadlocked Votes On The Administrative Complaint.

On March 25, 2022, the Court found that the Commission had "failed to act" on CLC's administrative complaint. Dkt. No. 16 at 2. The Court then ordered the FEC to conform to the judgment within 30 days "by acting on CLC's administrative complaint." *Id.* The Court later found that the FEC "failed to conform" to this order. Dkt. No. 23 at 2.

These findings were mistaken due to the Commission's concealment. Unbeknownst to the Court, the FEC had in fact taken "action[]" on CLC's administrative complaint on April 6, 2021, as the Commission's own voting records confirm. Ex. B. On that date, the FEC voted on whether there was reason to believe that Heritage Action had violated FECA in a manner warranting enforcement of the complaint. *Id.* That enforcement vote failed by a 3-3 breakdown. *Id.* The Court's conclusion that the FEC had "failed to act" on CLC's complaint was therefore mistaken. Dkt. No. 16 at 2.

Nor did the FEC "fail[] to conform" to the Court's default-judgment order. Dkt. No. 23 at 2. In its default-judgment order, dated March 25, 2022, the Court ordered that "the FEC conform to this Court's Order within 30 days [April 25, 2022] by acting on CLC's administrative complaint." Dkt. No. 16 at 2. But by acting on CLC's administrative complaint in April 2021,

the FEC did not fail to conform with a judicial order to act on the complaint before April 25, 2022. Moreover, the Commission again acted on the complaint within 30 days of the default-judgment order—and thereby conformed to this Court's order—by again deadlocking on CLC's administrative complaint on April 7, 2022. *See* Ex. E. The Court's conclusion that the FEC "failed to conform" to its default-judgment order was therefore also mistaken. Dkt. No. 23 at 2.

2. The FEC Concealed Material Information That Changed The Outcome Of The Case.

The evidence that the Commission concealed from the Court is "material" and "changed the outcome" of the case. *Matura*, 189 F.R.D. at 89. This evidence is material because it shows that the FEC "act[ed]" on CLC's administrative complaint when it failed to find reason to believe a violation of FECA occurred. 52 U.S.C. § 30109(a)(8)(C). The Court thus could not have found that the FEC "failed to act" on CLC's administrative complaint or that the FEC "failed to conform" to its default-judgment order. Dkt. No. 16 at 2; Dkt. No. 23 at 2. Nor could the Court have authorized CLC to file a citizen suit against Heritage Action on the basis of these mistaken findings. Dkt. No. 23 at 2.

(a) The FEC Took Action On The Administrative Complaint.

A failed reason-to-believe vote—like those votes which occurred on April 6, 2021 and April 7, 2022—is unquestionably "act[ion]" on an administrative complaint, which is all that § 30109(a)(8) requires. 52 U.S.C. § 30109(a)(8)(C). Section 30109(a)(8)(C)'s "failure to act" language is meant to respond to the FEC's "total failure to address a complaint." *DCCC*, 831 F.2d at 1134 (citation omitted). By its terms, it is not meant to respond to alleged deficiencies in *how* the FEC chooses to handle an administrative complaint, such as a deadlocked vote that declines to authorize enforcement. By way of analogy, if Congress votes on a proposal to amend FECA, but the House (with one Representative absent) divides evenly, no one would say Congress had not

"acted" on the bill, even if its supporters were disappointed that the bill failed to pass. And that would remain true even if the bill could be brought to the floor for another vote. So too here: the FEC's vote on CLC's administrative complaint constituted an "act[ion]" on the administrative complaint, 52 U.S.C. § 30109(a)(8)(C), even if the vote did not authorize enforcement and even if the FEC could have taken another vote on the matter.

Statutory context confirms that outright dismissal of a complaint is not required to avoid a failure-to-act suit. Section 30109 treats "act[ing]" and "dismissal[s]" differently and requires only an "act[ion]" on an administrative complaint to avoid a citizen suit. *See id.* § 30109(a)(1), (a)(4)(B)(i), (a)(8), (b), (d)(3)(A). Had Congress wished to authorize citizen suits based on a "failure to dismiss" an administrative complaint, it could have easily written such a law. It did not do so. And the FEC's vote certifications here describe the agency as having taken "action[]" on CLC's complaint in April 2021 and April 2022. *See* Exs. B & E. Indeed, to hold that a deadlocked reason-to-believe vote is a "failure to act" under § 30109(a)(8) "would be inconsistent with—in fact, would overthrow—the Act's structure and design." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014). There is no evident reason why Congress would require *four* votes to proceed with any enforcement, 52 U.S.C. § 30109(a)(2), yet allow merely *three* Commissioners to nullify that requirement through the concealment scheme adopted by Commissioner Weintraub and her allies here.

In addition, § 30109(a)(8) does not require *final* action by the FEC to avoid triggering a citizen suit; that word is absent from the text. And Congress knows how to demand "final agency action," 5 U.S.C. § 704, or a "final disposition" when it wants to do so, including in § 30109 itself. 52 U.S.C. § 30109(c) (requiring the Attorney General to submit reports "until the *final* disposition of the apparent violation" under certain circumstances (emphasis added)); *see, e.g.*, 29 U.S.C.

§ 794a(a)(1) (requiring a "failure to take final action on [a] complaint"); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another ... it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Indeed, the Administrative Procedure Act directs "the 'agency action' complained of must be 'final agency action'" only "[w]here no other statute provides a private right of action," which is the case here. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004). Because the FEC "act[ed]" on CLC's administrative complaint, the Court's contrary findings were "material mistake[s] that changed the outcome" of the case. *Matura*, 189 F.R.D. at 89.

(b) The FEC Took Final Action On The Administrative Complaint.

Even assuming, contrary to the text, that § 30109(a)(8) requires a failure to take *final* agency action, a failed reason-to-believe vote constitutes final agency "act[ion]" on CLC's administrative complaint. The D.C. Circuit has "held the [FEC] engages in *final* agency action when, after receiving a complaint alleging certain types of campaign finance violations, it deadlocks about whether … to proceed with an investigation." *Pub. Citizen*, 839 F.3d at 1170 (emphasis added). Because "the statute compels FEC to dismiss complaints in deadlock situations," *id.*, such a vote both "determine[s] rights or obligations" and "marks the consummation of the Agency's decisionmaking process," *Sackett v. EPA*, 566 U.S. 120, 126–27 (2012) (cleaned up). By deadlocking over whether to find reason to believe Heritage Action had violated FECA in a manner warranting enforcement, the FEC "concluded" its consideration of the complaint on that date because that is when the agency took "final votes on the merits of the[] complaint[]." Ex. A at 1; *see also Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding FOIA Litigation* 3 (Exhibit I, attached). And that analysis would not change even if further deliberation were theoretically possible following a deadlocked

vote. "The mere possibility that an agency might reconsider … does not suffice to make an otherwise final agency action nonfinal." *Sackett*, 566 U.S. at 127.

(c) The FEC Dismissed The Administrative Complaint.

In all events, statutory text and structure, regulatory text and practice, and judicial precedent all confirm that a "deadlock dismissal[]" is also a dismissal. *New Models*, 993 F.3d at 891. Start with the statute. Because the FEC's reason-to-believe-vote here failed to garner "an affirmative vote of 4 of its members," that vote ended the matter on the merits. 52 U.S.C. § 30109(a)(2); *see* Ex. I at 1–3 (explaining that the Commission has "adjudicated" a MUR when it fails to find reason to believe). While CLC has argued elsewhere that a majority vote to "close the file" is necessary to end an enforcement matter, *see* Mem. in Opp'n to Mot. to Dismiss 19, *CLC v. Heritage Action for Am.*, No. 1:22-cv-01248-CJN (D.D.C. Aug. 5, 2022), Dkt. No. 23, that requirement would conflict with FECA's structure by allowing *three* Commissioners to subvert the Act's requirement of four votes to proceed with any enforcement, 52 U.S.C. § 30109(a)(2), *see supra* at 14. Unlike the "reason to believe" vote, which again requires "an affirmative vote of 4" Commissioners, 52 U.S.C. § 30109(a)(2), a vote to close the file is nowhere mentioned in the Act. Rather, that vote is merely an administrative creation of the FEC—as further evidenced by the fact that the FEC holds a close-the-file vote to close out *all* enforcement matters before it—that cannot take precedence over the statute Congress enacted. 11 C.F.R. § 5.4(a)(4). To require such a close-the-file vote also would impermissibly add language to the statutory text.

Further, the FEC's regulations provide that "[i]f the Commission *makes a finding of no reason to believe* or no probable cause to believe *or* ***otherwise*** *terminates its proceedings*, it shall make public such action and the basis therefor." *Id.* § 111.20(a) (emphasis added). This provision confirms the FEC considers a failed reason-to-believe vote one way of "terminat[ing]" its proceedings. *Id.* And the FEC's own procedures require Commissioners to prepare a statement

of reasons after a deadlock dismissal, which they did here. FEC, *OGC Enforcement Manual* 111 (June 2013), https://bit.ly/3AU3cGJ. Indeed, the FEC, at least until recently, has taken the position that it "will dismiss a matter … when the Commission lacks majority support for proceeding." FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007). Indeed, in 2019, the FEC told the D.C. Circuit that "it takes four Commissioner votes to proceed on an enforcement matter, but only three to cause a file to be closed." FEC Br. at 47, *New Models*, 993 F.3d 880 (No. 19-5161), 2019 WL 6341135.

Finally, D.C. Circuit precedent points in the same direction by establishing that where, as here, an administrative complaint fails to garner the requisite four votes on whether there is reason to believe a FECA violation occurred, 52 U.S.C. § 30109(a)(2), "the complaint is dismissed." *CLC*, 31 F.4th at 785. The D.C. Circuit has described these 3-3 votes on whether to find reason to believe as "deadlock dismissals," *e.g.*, *Common Cause*, 842 F.2d at 448–49; meaning the FEC has acted on the administrative complaint despite the appearance of deadlock, *see Pub. Citizen*, 839 F.3d at 1170 (explaining that "the treatment of [FEC] deadlocks as agency action is baked into the very text of the statute"). Because "there [were] fewer than four votes" to proceed with enforcement, the FEC "dismisse[d] the administrative complaint." *Crossroads Grassroots Pol'y Strategies*, 788 F.3d at 315. The inclusion of a Statement of Reasons in the enforcement file here underscores this point, because the D.C. Circuit requires Commissioners to prepare such a statement following a deadlock dismissal. *CLC*, 31 F.4th at 785; Ex. I at 3. The FEC's vote and statement of reasons must be considered final, because otherwise a deadlock dismissal would not qualify as final agency action subject to judicial review, which is not the law. *See CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018) ("*Commission on Hope*") (explaining that the deadlock

"dismissal … constituted the 'agency action' supporting the district court's jurisdiction," and that the "statements of … the so-called 'controlling Commissioners' … will be treated as if they were expressing the Commission's rationale for dismissal" "for purposes of judicial review").

* * *

In sum, the FEC "act[ed]" on CLC's administrative complaint, and "conform[ed] with" this Court's "order," when it deadlocked on whether to find reason to believe a violation occurred. 52 U.S.C. § 30109(a)(8)(C). Because the Court's findings that the FEC "failed to act" and "failed to conform" were premised on a "material mistake" of fact that the FEC never acted on CLC's administrative complaint, *Matura*, 189 F.R.D. at 89, relief is warranted under Rule 60(b)(1).

B. The FEC Released Newly Discovered Evidence After The Court Issued The Orders.

Rule 60(b)(2) authorizes relief based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." To qualify for relief, the moving party must demonstrate that "(1) the newly discovered evidence is of facts that existed at the time of the trial or merits proceeding; (2) the party seeking relief was justifiably ignorant of the evidence despite due diligence; (3) the evidence is admissible and is of such importance that it probably would have changed the outcome; and (4) the evidence is not merely cumulative or impeaching." *Almerfedi v. Obama*, 904 F. Supp. 2d 1, 3 (D.D.C. 2012) (quotation marks omitted).

Evidence irrefutably establishing that the FEC had acted on CLC's administrative complaint did not become available until June 2, 2022, when the FEC released records in response to Heritage Action's FOIA request revealing that the FEC had acted on CLC's administrative

complaint on April 6, 2021. *See* Dkt. No. 32-1.[1] This was more than two months after the Court's default-judgment order and 30 days after the Court authorized the filing of CLC's civil lawsuit, which is outside Rule 59(b)'s 28-day period. This evidence—disclosed on June 2, 2022, mere weeks after the Court authorized CLC's civil suit—satisfies each of the four conditions of relief under Rule 60(b)(2).

First, the evidence concerns a "fact[] that existed" at the time of the Court's orders, *id.*, because the FEC acted on CLC's administrative complaint nearly a year earlier, on April 6, 2021.

Second, Heritage Action was "justifiably ignorant of the evidence despite due diligence," *id.*, because the FEC deliberately concealed these records until just weeks after the Court authorized CLC's direct civil suit. Despite the Commissioners taking a vote on CLC's administrative complaint—and failing to find reason to believe a violation occurred—the FEC did not make the records of such vote available to Heritage Action or the public, as required by law and longstanding practice. *See supra* at 4–6. Several D.C. Circuit judges have remarked that, because of the FEC's recent concealment of its voting records, "the party complaining to the Commission, the target of the complaint, and the district court are all left in the dark about whether and how the Commission has acted." *CREW v. FEC*, 55 F.4th 918, 921 (D.C. Cir. 2022) (Rao, J., concurring in the denial of rehearing en banc). The parties and the courts "understandably assumed" that, because "Commission votes 'are publicly announced,'" there was no reason to

[1] To be clear, Heritage Action maintains that the FEC's May 6, 2022 response to the FOIA request indicated that that Commission had acted on the administrative complaint, which is why Heritage Action promptly moved to intervene on May 10, 2022. *See* Dkt No. 24-1 at 11. CLC, however, contends that because "the Commission did not produce unredacted copies of the responsive documents until June 2," the "May 6 FOIA response" did not constitute "'proof' of the Commission's deadlock." CLC Br. at 32, *CLC v. FEC*, No. 22-5140 (D.C. Cir. Nov. 30, 2022). Given CLC's insistence that the May 6 response would have been irrelevant, this Court may use the June 2 unredacted documents as the dispositive evidence for purposes of Rule 60(b)(2).

think that "'a vote that should have been publicly reported ... was not.'" *Id.* (quoting *CLC v. FEC*, No. 1:20-cv-0809-ABJ, 2022 WL 2111542, at *3 (D.D.C. Apr. 21, 2022)). Thus, Heritage Action was "justifiably ignorant" of the evidence that the FEC had taken action on CLC's administrative complaint. *Almerfedi*, 904 F. Supp. 2d at 3. Moreover, Heritage Action exercised "reasonable diligence" under the circumstances, Fed. R. Civ. P. 60(b)(2), by filing a FOIA request for voting records, notwithstanding its reasonable assumption—and the reasonable assumption of district court judges—that the FEC would continue to follow the law and its longstanding practice regarding timely publication of vote certifications.

Third, "the evidence is admissible and is 'of such importance that it probably would have changed the outcome.'" *Almerfedi*, 904 F. Supp. 2d at 3. These records are judicially noticeable as official government records. *See Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016) ("[J]udicial notice may be taken of public records and government documents available from reliable sources."), *aff'd*, 869 F.3d 976 (D.C. Cir. 2017). These records are also important because they undermine the validity of the Court's judgment. *See supra* Part I.A. The Court could not have found that the FEC "failed to act" on CLC's administrative complaint, or had "failed to conform" to the Court's order, if it had known about this evidence demonstrating that the FEC did in fact act on the complaint nearly one year earlier, and that a controlling block of Commissioners had voted against taking enforcement action for reasons of prosecutorial discretion. Dkt. No. 16 at 2. This evidence unquestionably "would have changed the outcome" of this case. *Almerfedi*, 904 F. Supp. 2d at 3; *see also End Citizens United PAC v. FEC*, No. 1:21-cv-01665-TJK, 2022 WL 1136062, at *3 (D.D.C. Apr. 18, 2022) (Kelly, J.) (dismissing for lack of subject matter jurisdiction because three Commissioners voted against enforcement on grounds of prosecutorial discretion).

Fourth, the evidence is "not merely cumulative or impeaching." *Almerfedi*, 904 F. Supp. 2d at 3. It is not cumulative of any evidence in the record, because the FEC's concealment of the vote certification meant there was no such evidence before the Court at the time of its orders.

All of this applies *a fortiori* to the records of the April 7, 2022 vote, which was not released by the FEC until after it closed the file on June 7, 2022. *See* MUR 7516, Certification (June 8, 2022) (Exhibit J, attached); 11 C.F.R. § 111.20(a) (requiring public notice within 30 days of notifying parties of finding no reason to believe). Relief is therefore warranted pursuant to Rule 60(b)(2).

C. The Orders Were The Result Of The FEC's Fraud And Misconduct.

Rule 60(b)(3) authorizes relief where there was "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Relief is warranted where the fraud or misconduct causes "actual prejudice," that is, it "foreclosed full and fair preparation or presentation" of the case. *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004). A party's concealment of evidence is one example of misconduct that justifies relief under Rule 60(b)(3). *See Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1205 (Fed. Cir. 2005).

In addition, Rule 60(d)(3) authorizes a court to "set aside a judgment for fraud on the court." Such relief is appropriate in "egregious cases," "in which the integrity of the court and its ability to function impartially is directly impinged." *Jordan v. U.S. Dep't of Lab.*, 331 F.R.D. 444, 451 (D.D.C. 2019), *aff'd*, No. 19-5201, 2020 WL 283003 (D.C. Cir. Jan. 16, 2020). Fraud on the court occurs when a "party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). It occurs "where the

impartial functions of the court have been directly corrupted." *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995).

Relief is warranted here under both 60(b)(3) and 60(d)(3), because the FEC intentionally concealed case-dispositive voting records as part of a broader scheme to thwart judicial review of agency enforcement decisions. Through these actions, the FEC falsely "create[d] the public impression" that it had not acted on the complaints at all, even though it had taken final votes on the merits of these complaints. *See* Ex. A at 4. Current and former Commissioners have criticized the FEC's concealment of its action on these complaints as "affirmatively misle[ading]," *see id.* at 2, "completely unethical," "an abuse of the process," "dishonest[]," and "'sandbagging federal judges' by making them believe deadlocked cases are unresolved," Goldmacher, *supra*; *see also* MUR 7486, *Statement of Reasons of Vice Chair Allen Dickerson* 2 (Dec. 9, 2021) (Exhibit K, attached) ("cynical opportunity for gamesmanship"); MUR 7486, *Statement of Reasons of Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III* 2, 7 (Aug. 30, 2022) (Exhibit L, attached) ("egregious," "indefensibl[e]," and "scandalous"). Commissioner Weintraub has made no secret of the fact that she and her colleagues deliberately caused the Commission to conceal its actions for the purpose of triggering citizen suits. *See* Ex. F. Commissioner Weintraub has also admitted that the purpose of this concealment scheme was to circumvent binding D.C. Circuit authority requiring deference to dismissals based on the exercise of prosecutorial discretion. *See* Ex. G.

The FEC advanced this scheme by intentionally defaulting in lawsuits alleging that the FEC had failed to act on administrative complaints. *See, e.g.*, Dkt. No. 16 at 2 (ordering that "default judgment be entered in favor of CLC and against the FEC"); *CLC v. FEC*, No. 1:20-cv-0809-ABJ, 2021 WL 5178968, at *9 (D.D.C. Nov. 8, 2021) (45Committee) (granting "plaintiff's

motion for default judgment" against the FEC). According to the *New York Times*, "the Democrats are blocking the F.E.C. from defending itself in court when advocates sue the commission for failing to do its job." Goldmacher, *supra*. "Some judges appear confused, and less than amused, by the unusual absences." *Id.* For example, this Court admonished "the Commission's unseemly failure to appear and defend itself." *See* Dkt. No. 34 at 7. And Judge Jackson criticized the "failure of the agency to appear" in another suit as "disturbing." *CLC*, 2021 WL 5178968, at *9.

On top of its defaults, the FEC has entirely ignored clear court orders to act on administrative complaints, including this Court's. *See, e.g.*, Dkt. No. 16 at 2; Dkt. No. 23 at 2; *CLC*, 2021 WL 5178968, at *9 (45Committee) (ordering "the FEC to act on the complaint within thirty days"); *CLC*, 2022 WL 2111542, at *3 (finding that "the agency has not complied with the Court's November 8, 2021 Order") (45Committee). The FEC easily could have informed this Court that it had preemptively complied with its order by revealing its prior action on the administrative complaint (including under seal if it thought it was necessary to do so), yet it remained silent—continuing to conceal the fact that it had previously acted, including by dismissing CLC's administrative complaint against Heritage Action in April 2021.

The unusual timing of the FEC's vote to close the file further supports the conclusion that the FEC intentionally concealed records in an effort thwart judicial review of agency action. After delaying more than a year in closing the file, the FEC inexplicably waited until June 7, 2022—two days after CLC had filed the citizen suit against Heritage Action on June 5 (and one day after the Court denied Heritage Action's motion to intervene to appeal that authorization on June 6)—to close the file in MUR 7516. *See* Ex. J. That suspicious timing suggests that the Commission intentionally concealed its votes and reasons just long enough to allow CLC to file its citizen suit against Heritage Action.

The FEC's fraud and misconduct has caused "actual prejudice" to Heritage Action. *Summers*, 374 F.3d at 1193. The FEC has intentionally triggered a citizen suit against Heritage Action on the false premise that the FEC has not acted on CLC's complaint, "even though [the FEC has], in fact, acted." Ex. A at 1; *see CLC v. Heritage Action for Am.*, No. 1:22-cv-01248-CJN (D.D.C.); *CLC v. Iowa Values*, No. 1:21-cv-00389 (D.D.C.); *CLC v. 45Committee Inc.*, No. 1:22-cv-01115 (D.D.C.). Heritage Action has thus been forced to spend time and resources defending itself against CLC's citizen suit—and the threats to Heritage Action and the confidentiality of its donors that it entails—that was filed on a false premise.

The FEC's fraud and misconduct warrants relief under Rule 60(b)(3) and 60(d)(3).

D. The Judgment Is Void For Lack Of Subject Matter Jurisdiction.

Rule 60(b)(4) authorizes relief where the judgment is void. This rule applies "where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). The D.C. Circuit has adopted a "broad[] interpretation of 'void' where a judgment is 'void' whenever the issuing court lacked jurisdiction." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1180 (D.C. Cir. 2013). A judgment entered by a court without "subject matter jurisdiction over a case" is void because the court lacked "the power to proceed with a case at all." *United States v. Philip Morris USA Inc.*, 840 F.3d 844, 850 (D.C. Cir. 2016). Here, the Court lacked subject-matter jurisdiction over the case when it issued default-judgment and failure-to-conform orders for two independent reasons.

First, the case was moot at the time the Court issued its orders. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (quoting *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983)). "[A] case is moot when the issues presented are no

longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Mootness occurs "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (quotation marks omitted).

In this case, CLC requested two forms of relief from this Court: (1) a declaration that the FEC had not acted on its administrative complaint and (2) an order compelling FEC to act. *See* Dkt. No. 1 at 11. But, at the time the Court issued its orders granting such relief, the FEC had already acted on CLC's administrative complaint, so the Court's orders amounted to "nothing more than an order directing the FEC to do what it has already done." *All. For Democracy v. FEC*, 335 F. Supp. 2d 39, 43 (D.D.C. 2004). Because the Court could not grant effectual relief, the case was moot and the Court lacked subject-matter jurisdiction to issue its orders. *Id.* at 42–43; *cf., e.g.*, *United Steelworkers of Am., AFL-CIO-CLC v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (agency action "mooted" "'unreasonable delay'" claim under 5 U.S.C. § 706(1)). The orders are therefore void. *See, e.g.*, *Madison v. Johnson*, No. 09-cv-00008, 2011 WL 4502801, at *2 (E.D. Va. Sept. 28, 2011) (granting relief under Rule 60(b)(4) where judgment was entered when case was moot).

Second, the Court never had jurisdiction to review the FEC's deadlock dismissal of CLC's administrative complaint because the dismissal was based on prosecutorial discretion. *See* Ex. B (three Commissioners voted to dismiss the matter under *Heckler v. Chaney*). An "FEC nonenforcement decision is not reviewable if the nonenforcement is 'based even in part on prosecutorial discretion.'" *End Citizens United PAC*, 2022 WL 1136062, at *1 (Kelly, J.) (quoting *New Models*, 993 F.3d at 882). Where a decision not to enforce against an administrative respondent "is grounded in enforcement discretion, it is necessarily unreviewable under the APA

and the reasoning of *Chaney*." *New Models*, 993 F.3d at 885. And because "courts lack subject-matter jurisdiction to review a decision committed to agency discretion by law," they lack subject-matter jurisdiction to review FEC non-enforcement decisions grounded in prosecutorial discretion. *End Citizens United PAC*, 2022 WL 1136062, at *3 (cleaned up). Accordingly, because the FEC here declined to proceed on CLC's administrative complaint on grounds of prosecutorial discretion, the Court lacked subject-matter jurisdiction to review the FEC's decision.

E. Authorizing A Citizen Suit On A False Premise Is Manifestly Unjust.

Rule 60(b)(6) is a catch-all provision allowing for relief from judgment for "any other reason that justifies relief." "When a party timely presents a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust, reconsideration under rule 60(b)(6) is proper." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). "[R]elief under Rule 60(b)(6) is all the more appropriate when 'it involves not only the interests of the [agency], but that of a third party.'" *People for the Ethical Treatment of Animals v. U.S. Dep't of Health & Hum. Servs.*, 901 F.3d 343, 355 (D.C. Cir. 2018) (quoting *Comput. Pros. for Soc. Resp. v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996)).

Here, the fact that the FEC acted on CLC's administrative complaint in April 2021 constitutes a "previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust." *Good Luck Nursing Home*, 636 F.2d at 577. This Court could not have found in March 2022 that the FEC failed to act on CLC's administrative complaint in light of the previously undisclosed fact that the FEC acted on the complaint nearly one year earlier. Moreover, relief under Rule 60(b)(6) is especially appropriate, because the Court's orders have had a direct and detrimental impact on "third party" Heritage Action, which, as a result of the Court's orders, has had to spend its time and resources defending a citizen suit that should never have been authorized in the first place. *Comput. Pros. for Soc. Resp.*, 72 F.3d at 903.

II. THE COURT SHOULD GRANT RELIEF FROM ITS ORDERS EVEN IF THE D.C. CIRCUIT AFFIRMS THE DENIAL OF THE MOTION TO INTERVENE.

The Court should "defer considering the motion" until after the D.C. Circuit issues its mandate in the pending appeals. Fed. R. Civ. P. 62.1(a)(1). The Court currently lacks jurisdiction to grant relief from its March 25 and May 3 orders because those orders are on appeal. *See Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991). If the D.C. Circuit reverses the denial of Heritage Action's motion to intervene and remands for this Court to reconsider those orders, the Court should order CLC and the FEC to respond to this motion within 14 days. Even if the D.C. Circuit affirms the denial of Heritage Action's motion to intervene, this Court should still vacate its orders for two reasons.

A. Nonparty Heritage Action Is Entitled To Seek Relief Because It Is Strongly Affected By Orders Obtained By Fraud.

Although Rule 60(b) authorizes a court to "relieve a party or its legal representative" from a judgment or order, Fed. R. Civ. P. 60(b), "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 (2d Cir. 2006) (carving 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)" where "there is a strong possibility that the predicate judgment that forms the basis of this fraudulent conveyance action is the result of a settlement process devoid of due process protections and marred by serious procedural shortcomings"); *see also Binker v. Com. of Pa.*, 977 F.2d 738, 745 (3d Cir. 1992); *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980) (per curiam). The D.C. Circuit recently recognized this "narrow exception in *Grace*," but the court concluded that the "*Grace* exception" did "not apply" because "no such fraud or deception of the occurred" in that case. *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 19 F.4th 472, 477 (D.C. Cir. 2021).

The *Grace* exception applies here for two reasons. First, Heritage Action is "strongly affected" by the Court's orders because they authorized CLC to file a citizen suit against Heritage Action. *Grace*, 443 F.3d at 188. Second, the Court's orders were entered on the basis of the FEC's fraud on the court. *See supra* Part I.C. Therefore, even if the D.C. Circuit affirms the denial of Heritage Action's motion to intervene, this Court must still consider this Rule 60 motion.

B. The Court Should Vacate The Orders *Sua Sponte*.

This Court should also vacate the orders on its own initiative in the event Heritage Action's appeal proves unsuccessful. As a general matter, "a majority of circuits to have considered the power of a district court to vacate a judgment under Rule 60(b) have concluded that district courts have the discretion to grant such relief *sua sponte*." *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 385 (7th Cir. 2008) (collecting cases in circuit split). The D.C. Circuit's decision in *Roeder v. Islamic Republic of Iran* suggests agreement with that consensus. *See* 333 F.3d 228, 332–33 (D.C. Cir. 2003) (noting that the district court could have vacated its judgment even absent a Rule 60 motion).

Sua sponte vacatur is particularly warranted here, for two reasons. *First*, because the "objection that a federal court lacks subject-matter jurisdiction" may be raised" *sua sponte* even "after … entry of judgment," this Court should "vacate[] its prior judgment" now that the evidence of mootness has come to light, even if Heritage Action is never allowed to intervene. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 509 (2006); *see supra* Pt. I.D. *Second*, this Court has the inherent "power"—and "duty"—"to vacate its own judgment" in light of the FEC's "fraud" on the Court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-50 (1944); *see* 11 Wright & Miller, Fed. Prac. & Proc. Civ. § 2870 (3d ed. 2022) ("Although a party may bring the matter [of fraud] to the attention of the court, this is not essential, and the court may proceed on its own motion.") (citing *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946)); *supra* Pt.

I.C. Because the orders are currently on appeal, however, this Court must wait until it regains jurisdiction over these orders to take *sua sponte* action.

CONCLUSION

Heritage Action respectfully requests that the Court vacate its orders dated March 25, 2022, and May 3, 2022, dismiss the Complaint, and enter judgment for the FEC. The Court should also defer consideration of this motion until the D.C. Circuit issues its mandate in the pending appeals.

Dated: March 24, 2023

Respectfully submitted,

s/ Brett A. Shumate

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and distribution to all registered participants of the CM/ECF System. Attorneys for Plaintiff are registered users of the CM/ECF System of this Court. Defendant was served a paper copy of this filing via regular United States mail at its address:

Federal Election Commission
1050 First Street NE
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/s/ *Brett A. Shumate*
Brett A. Shumate