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

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

In its memorandum accompanying its Rule 60 motion, Dkt. No. 37-1 (Mem.), Heritage Action for America (Heritage Action) explained that this Court's March 25, 2022 and May 3, 2022 orders must be set aside under multiple provisions of Rule 60, but that this Court should defer consideration of the motion until the D.C. Circuit issues its mandate in the pending appeals. In response, Campaign Legal Center (CLC) agrees "this Court lacks jurisdiction," acknowledges that the issues raised by the motion "will likely be resolved by the pending appeals," and disavows any intent to "address the motion's merits." Dkt. No. 39 (Resp.) at 1–2 & n.1. CLC nevertheless urges this Court to deny the Rule 60 motion now. That argument suffers from at least four flaws.

First, CLC puts the cart before the horse in contending that Heritage Action may not bring a Rule 60 motion because it is not a party. The D.C. Circuit is currently considering whether Heritage Action should have been allowed to intervene and obtain party status, and CLC offers no good reason why this Court should dismiss the Rule 60 motion before the Circuit has had its say.

Second, even if Heritage Action loses its intervention appeal, it would still be able to file a Rule 60 motion as a non-party given that "its interests are strongly affected." *Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 188 (2d Cir. 2006).

Third, while CLC contends that this motion was not filed within a "reasonable time," Fed. R. Civ. P. 60(c)(1), that limit applies to only some of the Rule 60 provisions Heritage Action invokes, and in any event, CLC's argument is meritless. This Court has been without jurisdiction to afford relief from the orders since May 20, 2022, when Heritage Action filed its notice of appeal of those orders. Therefore, whether Heritage Action filed its Rule 60 motion in May 2022 or March 2023 makes no difference—and causes CLC no prejudice—because this Court may not grant relief until the D.C. Circuit relinquishes jurisdiction.

Fourth, even if this Court ultimately were to decide that *Heritage Action* cannot file this Rule 60 motion, CLC has no response to the point that *this Court* can, and should, set aside its March 25 and May 3 orders *sua sponte*.

ARGUMENT

I. THE COURT SHOULD DEFER CONSIDERING THE RULE 60 MOTION UNTIL AFTER THE D.C. CIRCUIT ISSUES ITS MANDATE.

As Heritage Action explained, this Court should defer considering the Rule 60 motion because it lacks jurisdiction to grant relief while the orders are on appeal. Mem. 27. CLC agrees that "this Court lacks jurisdiction" and that deciding the Rule 60 motion is unnecessary at this time because "the issues raised therein will likely be resolved by the pending appeals." Resp. 1–2.

That should be the end of it, but CLC nevertheless argues that the Court should deny the motion now because Heritage Action is "neither a party to th[e] case nor the legal representative of any party to the case." Resp. 3. That argument is premature. If the D.C. Circuit concludes that this Court erred in denying the motion to intervene, then the Court could not deny the Rule 60

motion on the basis that Heritage Action is not currently a party. Likewise, if the D.C. Circuit agrees that the Court erred by authorizing the citizen suit and vacates the orders, then there would be no need for the Court to consider the Rule 60 motion at all. For these reasons, the Court should defer its consideration of the Rule 60 motion until after the D.C. Circuit clarifies the issues that remain to be decided by this Court.

In all events, Heritage Action acted properly in filing its motion now. As a would-be intervenor that has appealed the denial of its intervention motion, Heritage Action may file this Rule 60 motion to protect its right to future relief from the Court's orders if it is allowed to intervene. If Heritage Action had not filed its Rule 60 motion now, it risked losing its right to seek relief under Rule 60(b)(1)–(3) in the future—even if the D.C. Circuit reverses the denial of intervention—because such a motion is subject to a one-year time limit from the date of the challenged order. *See* Mem. 1. And a prospective intervenor must have some way to preserve its right to seek relief under Rule 60(b)(1)–(3) if it prevails on an appeal of a denial of its intervention motion—an appeal that may take longer than a year to resolve. Otherwise, in many cases, the right to appeal a denial of post-judgment intervention would be meaningless. Indeed, as CLC admits, Heritage Action could have preserved its right to seek relief—as a non-party—by filing a Rule 60 motion "as an attachment to its motion to intervene." Resp. 5 n.2 (citing *MGM Glob. Resorts Dev., LLC v. U.S. Dep't of the Interior*, No. 19-cv-2377, 2020 WL 5545496, at *7 (D.D.C. Sept. 16, 2020)). That Heritage Acton filed its Rule 60 motion as a *separate docket entry* rather than as an *attachment* should make no difference.[1]

[1] CLC accuses Heritage Action of "abandon[ing]" its plan to seek reconsideration and "put[ting] all its eggs in the appeal basket." Resp. 5–6. But Heritage Action had to appeal when it did to protect its interests, and it cannot be expected to forgo its right to appeal based on the future possibility of filing a Rule 60 motion, which "is not a substitute for a timely appeal." *Lee Mem'l Hosp. v. Becerra*, 10 F.4th 859, 863 (D.C. Cir. 2021).

II. THE COURT MUST RECONSIDER ITS ORDERS EVEN IF THE DENIAL OF THE MOTION TO INTERVENE IS UPHELD ON APPEAL

In any event, even if the denial of intervention is upheld on appeal, Heritage Action would still be able to seek Rule 60 relief as a non-party because "its interests are strongly affected" by the Court's orders. Mem. 27–28 (quoting *Grace*, 443 F.3d at 188); *see, e.g.*, *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013) (collecting cases holding that a non-party may file a Rule 60 motion where its interests are "strongly affected").

While CLC claims that recognizing this exception would "rewrit[e]" Rule 60(b), Resp. 4, that is not the case. Rule 60(b) provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for" a number of reasons. Fed. R. Civ. P. 60(b). Thus, while Rule 60(b) requires that a court "relieve a party or its legal representative," it does not say that only "a party or its legal representative" can seek that relief. In other words, "a party or its legal representative" is the *object*, not the *subject*, of Rule 60(b). And here, it is indisputable that Heritage Action's motion would "relieve a party"—the FEC—from this Court's March 25 and May 3 orders. Indeed, if Rule 60(b)'s text were as clear as CLC maintains, then presumably the D.C. Circuit would have said so in *Agudas Chasidei Chabad of United States v. Russian Federation*, 19 F.4th 472 (D.C. Cir. 2021), rather than merely holding that "[t]he *Grace* exception … does not apply." *Id.* at 477.

While CLC relies on *Agudas*, it never disputes that the D.C. Circuit declined to apply the *Grace* exception in *Agudas* only because there had been no "fraud or deception of the court." *Id.* Here, by contrast, the FEC's fraud and misconduct has infected this case. *See* Mem. 21–24, 28. CLC therefore attempts to liken Heritage Action to the movant in *Agudas*, which did not participate in the "litigation resulting in the judgments it sought to vacate." Resp. 3 (quoting *Agudas*, 19 F.4th at 477). But the *Grace* exception concerns whether a movant's interests are "strongly affected,"

443 F.3d at 188, not what level of participation the movant had in the case. Indeed, the D.C. Circuit in *Agudas* used the language quoted by CLC to underscore that the movant was not a party to the case for purposes of Rule 60, 19 F.4th at 477, not to suggest it has any relevance to whether the *Grace* exception applies. In any event, Heritage Action did participate in the litigation by filing an amicus brief, seeking to intervene, and appealing to the D.C. Circuit.

III. THERE IS NO BASIS TO DENY THE RULE 60 MOTION AS UNTIMELY.

While CLC concedes that Heritage Action's Rule 60 motion was brought within one year of the Court's orders, it urges this Court to deny the motion on the theory that it was not filed within a "reasonable time." Resp. 4. That argument is meritless for several reasons.

First, certain relief sought in Heritage Action's Rule 60 motion is not subject to the time limitation in Rule 60(c) to begin with. Fed R. Civ. P. 60(c)(1). For example, Heritage Action's request for relief under Rule 60(b)(4)—on the ground that the judgment is void for lack of subject-matter jurisdiction—is "not governed by a reasonable time restriction." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1179 (D.C. Cir. 2013). That request for relief encompasses Heritage Action's arguments that the case was moot at the time the Court entered the orders because the FEC had already acted and/or conformed *and* that this Court never had jurisdiction to review the FEC's dismissal of the administrative complaint for reasons of prosecutorial discretion. *See* Mem. 24–26. Nor is the request under Rule 60(d) to "set aside a judgment for fraud on the court" subject to any time limit. Fed. R. Civ. P. 60(d); *see* Fed. R. Civ. P. 60(c)(1) (applying the "reasonable time" requirement only to "[a] motion under Rule 60(b)"). That is enough to reject CLC's untimeliness argument.

Second, even with respect to the relief subject to the "reasonable time" limitation, Heritage Action's Rule 60 motion was filed within a reasonable amount of time because the May 20, 2022 appeal deprived the Court of jurisdiction to grant relief under Rule 60. The D.C. Circuit has

recognized that a Rule 60(b) motion need not be filed during the pendency of an appeal to be considered timely. In such circumstances, a motion is made within a "reasonable time" even if it is filed *after* a remand from the appellate court—regardless of the length of time that elapsed since the challenged order was issued. *See Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988) (holding that appellants, who appealed the denial of their motion to intervene, would be able to "attack" the district court's judgment by "proper motion" under Rule 60 on remand); *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (holding that would-be intervenor's denial of intervention was not moot because she planned to "file a Rule 60(b) motion to attack the judgment" on remand "if permitted to intervene"); *see also Aczel v. Labonia*, 584 F.3d 52, 62 (2d Cir. 2009) (Rule 60(b) motion "was made within a reasonable time" because it was filed shortly after the case was remanded); *Cooper v. Newsom*, 13 F.4th 857, 864 (9th Cir. 2021) (noting that appellants could seek Rule 60(b) relief if the court reverses the denial of their intervention motion).

Accordingly, none of the time that has passed since the Court entered final judgment counts against the "reasonable time" limit, because this Court has been without jurisdiction to grant relief since May 20, 2022, when Heritage Action appealed the Court's orders. Although Heritage Action could have waited until after the D.C. Circuit decided its appeal before filing a timely Rule 60(b) motion, Heritage Action also needed to protect its right to relief under Rule 60(b)(1)–(3), which imposes a one-year time limit on filing such motions. Fed. R. Civ. P. 60(c)(1). Heritage Action's Rule 60 motion satisfies this one-year time limit and was made within a "reasonable time" in light of the case's appellate status. *Id.*

Third, CLC does not—and cannot—explain how it is "prejudiced" by the timing of Heritage Action's motion, which is the critical factor in determining whether a Rule 60(b) motion

was filed within a reasonable time. *Salazar ex rel. Salazar v. District of Columbia*, 633 F.3d 1110, 1118 (D.C. Cir. 2011); *see id.* at 1119 (explaining that in this case, "it would be an abuse of discretion to rule that a Rule 60(b)(6) motion is not filed within a reasonable time without finding that the movant's delay has prejudiced the non-moving party"). Here, the timing of Heritage Action's motion has caused no prejudice to CLC. Even if Heritage Action had filed its motion last year, as CLC maintains it should have, *see* Resp. 5, the Court could not have granted relief while Heritage Action's appeal remained pending, and the parties would have been in the same position as they are today. The timing of Heritage Action's motion thus has caused no "procedural mess." Resp. 6 (quoting Dkt. No. 34 at 2). Rather, as this Court has explained, the responsibility for the mess here lies with the FEC and its "unseemly failure to appear and defend itself in this Court" and its "scheme to hide its activity and leave regulated parties in legal limbo." Dkt. No. 34 at 7. As Judge Mehta recently confirmed in a similar case, it is "[o]nly because of the FEC's 'dysfunction'" that the target of the citizen suit and the authorizing court were "under the misimpression that the agency had not acted." *CLC v. 45Committee, Inc.*, No. 22-cv-1115, 2023 WL 2825704, at *5 (D.D.C. Mar. 31, 2023); *see* Dkt. No. 38.

Finally, CLC incorrectly asserts that the evidence on which Heritage Action relies "reasonably could have been obtained before judgment was even entered," and at least "in time to seek relief under Rule 59(b)." Resp. 5 (citing Fed. R. Civ. P. 60(b)(2)). But whether the evidence could have "with reasonable diligence" "been discovered in time to move for a new trial under Rule 59(b)" is only relevant to Heritage Action's right to relief under Rule 60(b)(2), not to the timeliness of its motion or its right to relief under other provisions of Rule 60. In any event, this argument fails. Heritage Action "understandably assumed" that there was no reason to think that "'a vote that should have been publicly reported ... was not.'" *CREW v. FEC*, 55 F.4th 918, 921

(D.C. Cir. 2022) (Rao, J., concurring in the denial of rehearing en banc); *see CLC*, 2023 WL 2825704, at *5 (explaining that "the FEC's 'dysfunction'" left the target of a citizen suit "under the misimpression that the agency had not acted"). And CLC offers no authority that "reasonable diligence" imposes an obligation on non-parties to file FOIA requests to assure themselves that a government agency is following the law rather than willfully concealing relevant evidence from the Court. Fed. R. Civ. P. 60(b)(2). Nor does CLC have any response to the fact that evidence irrefutably proving that the FEC had acted on CLC's administrative complaint did not become available until June 2, 2022, more than 28 days after this Court's May 3 order. *See* Mem. 18–19 & n.1. If anything, the suspicious timing of that release of evidence—a mere two days after Rule 59(b)'s deadline—only underscores the extent of the FEC's chicanery here.

IV. IN ANY EVENT, THIS COURT SHOULD VACATE THE ORDERS *SUA SPONTE*.

Finally, even if CLC were somehow right about everything else, it has no response to Heritage Action's point that this Court can—and should—vacate the orders under Rule 60 *sua sponte*. *See* Mem. 28–29.

CONCLUSION

The Court should defer consideration of the Rule 60 motion until the D.C. Circuit issues its mandate in the pending appeals, and then the Court should vacate its orders, dismiss the Complaint, and enter judgment for the FEC.

Dated: April 14, 2023

Respectfully submitted,

s/ Brett A. Shumate

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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:

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