UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 17-cv-22643 COOKE/GOODMAN

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

DAVID RIVERA,

Defendant.
_____/

REPLY TO RESPONSE TO MOTION TO ALTER OR AMEND OR FOR RELIEF FROM JUDGMENT

Rivera timely[1] files this reply ("Reply") to FEC's response [DE 186] ("Response") to Rivera's motion to alter or amend the judgment pursuant to Rule 59(e) or to grant relief from the judgment pursuant to Rule 60(b) [DE 179] ("Motion"). As explained herein, the Court should reject FEC's arguments and grant Rivera's motion because controlling law governing statutory civil penalties significantly changed after the Court granted summary judgment. In *Yates*, the Eleventh Circuit held **for the first time** that the criminal forfeiture factored analysis governs the court's discretion in setting the amount of a statutory civil penalty.

This Court did not have the benefit of *Yates* at the time of summary judgment. As a result, the Court applied a different legal analysis than the one required by *Yates*. Under these circumstances, the Court should grant this Motion and: (1) vacate the final judgment and the civil penalty; (2) strike the 300-1000% penalty enhancement provision of 52 U.S.C. § 30109(6) as

1. *See* [DE 188]. "**Rivera**" refers to Defendant David Rivera. "**FEC**" refers to Federal Election Commission. "**FECA**" refers to Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457); *see also* 11 C.F.R. §§ 1.1-9039.3. "***Yates***" refers to *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288 (11th Cir. Dec. 29, 2021).

unconstitutionally vague, arbitrary, capricious, and excessive on its face; (3) schedule an evidentiary hearing and reconsider its analysis under the *Yates* test and determine that the amount of the fine requested by FEC is unconstitutionally excessive under the *Yates* factors; and (4) grant general relief consistent with the foregoing.

ANALYSIS

I. 52 U.S.C. § 30109(6) is facially unconstitutional.

In his Motion, Rivera asserted a facial challenge to the 300-1000% penalty enhancement provision of 52 U.S.C. § 30109(6) as unconstitutionally vague, arbitrary, capricious, and excessive on its face because it lacks standards to guide its application. *See* [DE 179 at 2, 4, 15-16, 20]. FEC doesn't dispute that the statute is silent on standards for selecting a percentage within the 300-1000% range. Instead, FEC invokes "broad authority" of courts to fashion remedies for statutory violations. *See* [Response at 11]. Citing the *Furgatch*[2] factors, FEC claims that courts supplied the standard. *See id.*

However, the Ninth Circuit issued its decision in *Furgatch* in 1989, thirteen years before Congress enacted the 300-1000% penalty multiplier. *See* [Motion at 17-18]; Pub. L. 107-155, 116 Stat. 81, enacted Mar. 27, 2002. *Furgatch* obtained the factors from the Eleventh Circuit's decision in *Danube Carpet*[3] which predated *Yates* and did not involve FECA or the 300-1000% penalty multiplier. Moreover, FEC cites no other statutory provision that provides a range of penalties that has a mandatory minimum of treble damages and allows up to maximum of ten times the amount at issue. FEC mentions that the statute also provides for criminal penalties, but as Judge Tjoflat noted in *Yates*, at least the criminal sentencing guidelines provide a standardized system for

2. *FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989).

3. *United States v. Danube Carpet Mills, Inc*., 737 F.2d 988, 993 (11th Cir. 1984).

calculating the severity of the penalty based on research. *See Yates*, 21 F.4th at 1325-26 ("[W]ithout a set of standards, the district court has unfettered discretion to impose any fine within the statutory range. And that makes imposition of such fines essentially unreviewable for us, except under the Eighth Amendment."). By contrast, the most FEC can say for the 2002 McCain-Feingold amendments (including § 30109(6)) is that they were a reaction to perceived threats of foreign influence in U.S. elections – factors not present in this case. *See* [Response at 18].

FEC also advocates for a "strong presumption" in favor of the range selected by Congress. *See* [Response at 13]. However, as Judge Newsom notes in his *Yates* concurrence the Eighth Amendment was passed to limit Congress' authority to punish, and simply deferring to Congress "[s]eems a bit like letting the driver set the speed limit." *See Yates*, 21 F.4th at 1318 (Newsom, J. concurring).

FEC claims it is significant that this Court did not choose the **maximum** penalty. However, choosing the maximum penalty is fully exercising discretion to punish. By contrast, the *Yates* found it significant that the trial court selected the **minimum** statutory penalty. Because the trial court in *Yates* did not exercise its discretion to punish above the minimum, its discretion did not come into play and the facial invalidity of the statute was not at issue.

II. *Yates* significantly changed the law.

FEC claims that *Yates* was not a change in the law justifying a Rule 59(e) or 60(b) motion. In support of its argument, FEC misplaces reliance on this Court's inapplicable order in *Katzoff v. NCL Bahamas*, No. 19-22754-Civ, 2022 U.S. Dist. LEXIS 56438, at *2 (S.D. Fla. Jan. 21, 2022). In *Katzoff*, the plaintiff moved for reconsideration of a partial summary judgment based on *Torres v. Wal-Mart Stores*, 2021 U.S. Dist. LEXIS 154516, *1 (S.D. Fla. Aug. 17, 2021), another district court order issued by Judge Altman five days after the *Katzoff* court granted summary judgment

for the defendant. Obviously, Judge Altman's order in *Torres* was not "controlling" on this Court in *Katzoff*, and there was no indication that *Torres* "changed" the law in any meaningful way. Rather, *Torres* was merely supplemental authority that came out five days too late for plaintiff to use at summary judgment and did not provide a legitimate basis for a motion for reconsideration. In short, *Katzoff* doesn't apply here because it did not involve an intervening controlling decision of the Eleventh Circuit that significantly altered the applicable legal analysis governing the issues decided at summary judgment.

Unlike Judge Altman's order in *Torres*, the Eleventh Circuit's decision in *Yates* "generally or substantively alter[ed] existing law" by overruling or "creating a significant shift in the court's analysis[.]"[4] Specifically, in *Yates*, the Eleventh Circuit shifted: (1) away from the *Furgatch* (i.e., *Danube Carpet*) analysis that this Court employed at summary judgment;[5] and (2) in favor of the "factors in the criminal forfeiture context[.]" *See Robson 200, Ltd. Liab. Co. v. City of Lakeland*, No. 8:20-cv-0161-KKM-JSS, 2022 U.S. Dist. LEXIS 53746, at *12 (M.D. Fla. Mar. 24, 2022) (i.e., "(i) whether the defendant is in the class of persons at whom the statute was principally directed; (ii) how the imposed penalties compare to other penalties authorized by the legislature; and (iii) the harm caused by the defendant.") (citing *Yates*, 21 F.4th at 1314; *United States v. Bajakajian*, 524 U.S. 321, 338-39, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)).

4. *See Dr. Seuss Enters., Ltd. P'ship v. ComicMix Ltd. Liab. Co.*, 553 F. Supp. 3d 803, 810 (S.D. Cal. 2021) ("[C]ases which generally or substantively alter existing law, such as by overruling it, or creating a significant shift in a court's analysis," are intervening changes in law warranting relief, whereas "cases which merely confirm, clarify or explain existing case law do not provide a basis for relief.") (quoting *Teamsters Loc. 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 224 (D. Ariz. 2012)).

5. *See* [DE 163 at 35] (citing *Furgatch*, 869 F.2d at 1258 (citing *Danube Carpet*, 737 F.2d at 993)).

FEC claims that the *Yates* standard is not new because it was applied in criminal cases and forfeiture cases before *Yates*. [Response at 10] (citing United States v. Chaplin's, Inc., 646 F .3d 846, 851 (11th Cir. 2011); *United States v. 817 NE. 29th Drive, Wilton Manors, Fla*., 175 F.3d 1304, 1309 (11th Cir. 1999).) FEC also relies on the Ninth Circuit's decision in *United States v. Mackby*, 339 F.3d 1013, 1017-18 (9th Cir. 2003) but the first Eleventh Circuit decision to cite *Mackby* is *Yates*.

Contrary to FEC's argument, the Eleventh Circuit found it a significant change when the factors were first adopted in the forfeiture context:

> On appeal of the Rule 60(b) denial, this Court rejected all of Estella's claims except her claim that the forfeiture of her home violates the Excessive Fines Clause. Estella had not raised this claim in district court. In the period between the district court's decision and the appeal, however, the Supreme Court ruled that the Excessive Fines Clause applied to civil forfeiture proceedings, *see Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), and this Court determined that analysis of Excessive Fines claims is a pure question of law, see United States v. One Single Family Residence, 13 F.3d 1493, 1497 (11th Cir.1994). The court vacated and remanded this case to allow further development of the factual record in light of these decisions. *See United States v. One Parcel of Real Estate*, 28 F.3d 115, No. 92-5142 (11th Cir.1994) (unpublished).

United States v. 10380 S.W. 28th St., 214 F.3d 1291, 1293 (11th Cir. 2000).

And prior to *Yates* district courts were unsure whether to apply the forfeiture factors to statutory civil penalties because of the distinctions between the two types of penalties:

> Given the obvious distinctions between the facts of this case [(i.e., an excessive fines challenge to section 162.09)] and a forfeiture, the Court is not persuaded that this test is applicable when examining fines imposed by a code enforcement board. Nonetheless, in an abundance of caution, the Court will apply the test. Application demonstrates that summary judgment is warranted for Defendants.

Ficken v. City of Dunedin, No. 8:19-cv-1210-CEH-SPF, 2021 U.S. Dist. LEXIS 78930, at *70 (M.D. Fla. Apr. 26, 2021); *Robson 200, Ltd. Liab. Co. v. City of Lakeland*, No. 8:20-cv-0161-KKM-JSS, 2022 U.S. Dist. LEXIS 53746, at *22-23 (M.D. Fla. Mar. 24, 2022) ("Although this

tripart test initially arose in the criminal forfeiture context, the Court follows the lead of other district courts and applies them in this context.") (citing *Ficken*, 2021 U.S. Dist. LEXIS 78930, 2021 WL 1610408, at *24; *Gordon v. State*, 139 So. 3d at 960-64 (Fla. 2d DCA 2014) (applying the factors to an excessive fine analysis of a Florida criminal law)).

Yates was the first Eleventh Circuit case to apply the forfeiture factors to statutory civil penalties. FEC admits that it "squarely raised" the issue of the amount of fines at summary judgment. In deciding that issue, this Court applied a test that is no longer applicable under *Yates*. Accordingly, the Court should vacate and reconsider under *Yates*.

Because Yates did not exist at the time of summary judgment, Rivera could not have raised the argument it makes post-judgment. Therefore, FEC cannot establish a waiver. Rivera opposed the imposition of a fine at summary judgment. He could not dispute the standard until the Eleventh Circuit changed the law in *Yates*. Moreover, regardless of any response by River on the issue, the Court still must apply the correct test under controlling law. Lastly, FEC's waiver argument is inapplicable because the summary judgment order was interlocutory.[6]

6. *See Photographic Illustrators Corp. v. Orgill, Inc.*, 370 F. Supp. 3d 232, 245 n.3 (D. Mass. 2019) ("Orgill claims that PIC waived this argument by not raising it in its opposition to Orgill's prior motion for summary judgment. Orgill relies on the proposition that parties cannot raise new arguments on a motion for reconsideration under Federal Rule of Civil Procedure 59(e). Rule 59(e) deals with motions to alter or amend a final judgment, and the Court's 2015 summary judgment order was interlocutory. Accordingly, PIC has not waived this argument.") (citation omitted). In a footnote, FEC claims that Rivera was required to confer before filing its motion. However, FEC does not cite any cases denying motions on this basis. Other cases have declined to do so. See it is clear that a conference would not have resolved the issues raised in the Plaintiff's Motion. *See Eitzen Chem. A/S v. Carib Petroleum*, No. 10-23512-CIV-SIMONTON, 2017 U.S. Dist. LEXIS 228380, at *5-6 (S.D. Fla. Sep. 20, 2017); *Phillips v. M.I. Quality Lawn Maint.*, No. 13-20854-CIV-SIMONTON, 2016 U.S. Dist. LEXIS 203788, at *5 (S.D. Fla. Sep. 30, 2016).

CONCLUSION

For the foregoing reasons, Rivera asks this Court to grant this Motion and: (1) vacate the final judgment and the civil penalty; (2) strike the 300-1000% penalty enhancement provision of 52 U.S.C. § 30109(6) as unconstitutionally vague, arbitrary, capricious, and excessive on its face; (3) reconsider its analysis under the *Yates* test and determine that the amount of the fine requested by FEC is unconstitutionally excessive under the *Yates* factors; and (4) for general relief consistent with the foregoing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **June 10, 2022**, a copy of this document as refiled was furnished by electronic filing with the Clerk of the Court via CM/ECF, to:

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Respectfully submitted,

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