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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

FEDERAL ELECTION COMMISSION, *Plaintiff*, v. JEREMY JOHNSON and JOHN SWALLOW, *Defendants*.	Case No. 2:15-cv-00439-DB **DEFENDANT JOHN SWALLOW'S REPLY MEMORANDUM IN SUPPORT OF PARTIAL FINAL JUDGMENT** District Judge Dee Benson

This Court has granted Defendant John Swallow's Motion to Dismiss and vacated the *ultra vires* regulation that is the sole basis of the Federal Election Commission's case. Mem. Decision and Order at 10 (April 6, 2018), ECF No. 120 ("Order"). The only question now is one of timing: should this Court's Order be made permanent now, or years from now, once the FEC's claims against Mr. Johnson resolve. There is no just reason for delay, and the FEC's Opposition cites no relevant legal authority for tarrying. Partial Final Judgment is appropriate.

I. The FEC has not shown a common set of facts entwining Mr. Swallow's case with Mr. Johnson's.

The Commission's argument depends upon showing that the facts of Mr. Swallow's and Mr. Johnson's cases are intertwined. They are not. The FEC brought only a single claim against Mr. Swallow, and that claim failed as a purely legal matter. There is no factual controversy—intertwined or otherwise.

The FEC relies upon its allegation that Mr. "Swallow 'caused, helped, and assisted Johnson.'" Pl. FEC Opp. to Def. John Swallow's Mot. for Partial Final J. at 4 (Aug. 8, 2018), ECF. No. 125 ("FEC Opp.") (quoting Amend. Compl. ¶ 1 (Feb. 24, 2016), ECF No. 36); *id*. at 5 (relying upon only two paragraphs of Amended Complaint to show factual nexus). This merely begs the question. The Commission's claim has been dismissed because even if these allegations were true, the FEC has no valid authority to prohibit them pursuant to its unlawful regulation. Order at 10.

In opposing Mr. Swallow's motion, the Commission primarily relies upon an unpublished opinion[1] from the District of Colorado. FEC Opp. at 5-6. But *Medved v. DeAtley* concerned

[1] The Commission frequently relies on unpublished opinions, but often fails to follow this Court's local rules requiring them to be labeled as such. DUCivR 7-2(b). This deprives this Court and those before it of the chance to properly assess those rulings' precedential value. DUCivR 7-2(a).

conspiracy and racketeering under Colorado's version of RICO, explicitly based on the "same facts and legal theories" for each party. No. 12-cv-03034-PAB-MEH, 2014 U.S. Dist. LEXIS 125792, at *4 (D. Colo. Sep. 9, 2014) (unpublished). Such is not the case here. Order at 2 ("The case against Defendant Swallow rests entirely on 11 C.F.R. §110.4(b)(1)(iii) . . . ."). The remaining *Medved* claims were based on aiding and abetting liability, 2014 U.S. Dist. LEXIS 125792, at *5, a theory already rejected by this Court under *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Order at 8-10.

The Commission's remaining unpublished authority is no more helpful. FEC Opp. at 5. *Albright v. Attorney's Title Insurance Fund*, for example, was another RICO conspiracy case. No. 2:03CV00517, 2008 U.S. Dist. LEXIS 10879, at *1 (D. Utah Feb. 11, 2008) (Benson, J.) (unpublished). Thus, unsurprisingly, this Court found "that the remaining claims are not distinct and separable from the resolved claims" because "the facts that form the basis of Plaintiffs' [civil] claims are, in many instances, the same facts that give rise to the predicate acts of the now dismissed . . . claims." *Id*. at *5-6. Furthermore, the 54(b) motion addressed in that opinion was one of several partial summary judgment motions that were "fully briefed and ready for oral argument and/or this Court's ruling" and granting 54(b) would "potentially prolong the litigation between the parties" rather than reduce delay. *Id*. at *7. There are no such concerns here.

Diaz v. King involved a *pro se* litigant who filed a flurry of claims against several state judicial officers in New Mexico and, when the federal district court held that some of the claims were subject to judicial immunity, immediately filed for Tenth Circuit review before the district court could rule on a pending motion for interlocutory review. Slip op. at 2, No. 14-1086 KG/SCY (Jan. 13, 2016), ECF No. 81 (unpublished). The *pro se* plaintiff later filed a Rule 54(b) motion,

but the court ruled that the dismissed defendants were relevant to the common issue of judicial immunity for all defendants. *Id*. at 7-8. That is not the case here, where the vacated regulation has no bearing on the Commission's pursuit of Mr. Johnson for principal liability.

The Commission's asserted legal authority over Mr. Swallow is invalid, and its claims against Mr. Johnson are wholly distinct. No factual question is relevant, let alone intertwined.

II. The FEC fails to show that granting Mr. Swallow's motion will create any appellate burden.

The Commission has not said whether it will appeal this Court's ruling if the Motion is granted. But such an appeal will not unduly inconvenience the Commission or courts. FEC Opp. at 6-7. The narrow appellate question has no bearing on any future appeal in Mr. Johnson's case.[2]

The FEC suggests that the validity of Mr. Swallow's *secondary* liability somehow impacts a hypothetical future appeal of Mr. Johnson's *primary* liability. *Id*. at 7. But the Commission has things precisely backwards. Secondary liability relies upon the fact patterns required to find *primary* liability, not the other way around. *See, e.g.*, *Central Bank*, 511 U.S. at 167 (describing secondary liability as applying to "those who do not engage . . . but who aid and abet" those who do). Put simply, even if its regulation were valid, the FEC has accused Mr. Johnson and Mr.

[2] The FEC believes that the Tenth Circuit may broaden any resulting appeal, ignoring doctrines such as constitutional avoidance. FEC Opp. at 6 n.1. In *Wells v. City & County of Denver*, the Tenth Circuit indeed held that, on constitutional claims under *de novo* review, it may rule on different grounds from the district court. 257 F.3d 1132, 1149-50 (10th Cir. 2001). But *Wells* centered on constitutional claims involving holiday displays on public property; there was no means of avoiding constitutional issues. *Id*. at 1138. By contrast, this Court ruled on *Chevron* Step I, and "at the first step of *Chevron*, [the Tenth Circuit] examine[s] solely 'whether Congress has directly spoken to the precise question at issue.'" *Olmos v. Holder*, 780 F.3d 1313, 1321 (10th Cir. 2015) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) and applying *Warger v. Shauers*, 574 U.S. ___, 135 S. Ct. 521, 529 (2014)). That would be the question on appeal. *Cf. Collard v. United States*, 10 F.3d 718, 719 n.1 (10th Cir. 1993) ("Courts do not decide what is not before them.") (internal citation and quotation marks omitted).

Swallow of different legal violations. In any eventual appeal, the scope of Mr. Swallow's case will remain limited to the order he now seeks to make permanent. That is because the FEC has declined to pursue an interlocutory appeal of this Court's order, and treats Mr. Swallow as dismissed from the case, so further developments involving Mr. Johnson will necessarily proceed independently.

Moreover, there is no just cause of delay, and the equities tilt in Mr. Swallow's favor. His liability remains uncertain, which the FEC's filings only compound. The Commission has taken contradictory positions on this harm, even in its Opposition to this Motion. The FEC claims that Mr. Swallow has been dismissed, and he need not be informed of future developments. FEC Opp. at 11. But the Commission does not release Mr. Swallow. It still claims a right to appeal. *Id*. at 12. That appeal would drag Mr. Swallow back into this litigation, potentially years from now. In the interim, his legal team will not have been involved in the case.[3]

By contrast, the FEC, a federal agency, points to no harm other than the potential appeal itself, a burden that would be shared by both parties. FEC Opp. at 12. In fact, the Commission takes the peculiar position that granting this Motion would create "stronger incentives to seek appellate review," *id*. at 7,[4] even though this Court's injunction already exists, and the FEC

[3] The FEC insists that that Mr. Swallow show hardship from a delay while continuing to seek stays without his consent. Of course, the resolution of Mr. Swallow's motion to dismiss was explicitly excluded from the larger stay in this case—precisely because it is a separate question. Joint Stipulation and [Proposed Order] to Extend or Clarify Stay at 1 n.1 (June 4, 2018), ECF No. 122. Neither *R. M-G for A.R. v. Las Vegas City Sch.*, No. CV 13-0350 KBM/KK, 2016 WL 10592142 (D.N.M. Feb. 25, 2016), nor *Diaz*, No. 14-1086 KG/SCY, are applicable where a losing party seeks delay of final judgment, not because it is justified in the context of a particular case, but rather because it wishes to continue using an unlawful regulation without hazarding an appeal.

[4] It takes four affirmative votes for the Commission to authorize an appeal. 52 U.S.C. §§ 30106(c) and 30107(a)(6). Currently, there are precisely four commissioners. FEC, Leadership and Structure: Commissioners https://www.fec.gov/about/leadership-and-structure/. It is of course possible that the FEC did not seek interlocutory review of the Order because at least some

declined to exercise its right to an interlocutory appeal.

The FEC invokes case law, but none applies, because each case would have created redundant appeals. *Stewart v. Gates* centered on the dismissal of *individual* defendants in a sexual harassment lawsuit, leaving the other *institutional* employer defendants, creating "the possibility of multiple appeals in this same case." 277 F.R.D. 33, 34, 37 (D.D.C. 2011). A Rule 54(b) motion failed in *U.S. ex rel. Fent v. L-3 Communications Aero Tech LLC* because it "would [have] required plaintiff to appeal the same claim for the same reasons in two separate appeals." Slip Op. at 4-5, No. 05-cv-0265-CVE-SAJ (N.D. Ok. Mar. 12, 2008) (unpublished). *Patriot Manufacturing, LLC v. Hartwig, Inc.*, No. 10-1206-EFM-KGG, 2014 U.S. Dist. LEXIS 127229, at *2-3 (D. Kan. Sept. 11, 2014) (unpublished), does not apply because Mr. Swallow is not seeking to preserve any future merits claims. He wants this ordeal to be over.[5]

The Commission relies on *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286, 288 (7th Cir. 1985), dealing with the entry of attorneys' fees pursuant to a promissory note. FEC Opp. at 11-12. The trial court decision in *Daniels* did not mention Rule 54(b); instead, the losing party sought reconsideration under FRCP 59(e). 763 F.2d at 288. The appeal centered on the finality of the attorneys' fees order. *Id*. at 289. The Seventh Circuit found that "when a district court enters a judgment on the merits and reserves questions about fees, the aggrieved party must appeal at once or lose the right to an appeal on the merits." *Id*. at 291. This is nothing like Mr.

commissioners agreed with this Court's reasoning. Regardless, if the FEC's Opposition is intended to accommodate the FEC's internal dynamics, it provides no authority that this would be a "just reason for delay" within the meaning of Rule 54(b).

[5] Mr. Swallow is unsure of the reason for the FEC's citation to *Onyx Properties, LLC v. Board of County Commissioners*, but that case centered on the legality of a zoning decision challenged by multiple parties. 916 F. Supp. 2d 1191, 1210 (D. Colo. 2013).

Swallow winning dismissal, and then waiting years for that victory to have any meaning.

III. The FEC's belated attempt to modify this Court's order is procedurally improper and legally mistaken.

Rather than limiting its opposition to Mr. Swallow's Rule 54(b) motion, the Commission asks for reconsideration and/or modification of this Court's Order, without offering any new facts or legal authority for reconsideration. FEC Opp. at 7 n.3; *id*. at 13 n.5 (asking to treat its response as a Fed. R. Civ. P. 60(b) motion for reconsideration). This attempt violates this Court's rules and sheds no light on the questions here: whether an "appellate court would have to decide the same issues more than once even if there were subsequent appeals," and "whether there is any just reasons to delay." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

A motion for either reconsideration or modification violates this Court's rules. DUCivR 7-1(b)(1)(A) ("No motion, including but not limited to cross-motions . . . may be included in a response or reply memorandum."). This tactic puts "moving targets in the papers" and complicates the consideration of claims under different Rules of Civil Procedure. *Braun v. Medtronic Sofamor Danek, Inc.*, 141 F. Supp. 3d 1177, 1192 (D. Utah 2015). This Court should not consider the parts of the FEC Opposition that ought to have been a separate motion, nor should there be any sur-reply. *Roundy v. Wells Fargo Bank*, No. 2:12-cv-01032-DN-DBP, 2013 U.S. Dist. LEXIS 114070, at *4 (D. Utah June 27, 2013) (unpublished) ("Given these procedural errors [under DUCivR 7-1(b)(1)(A)], the Court **CANNOT CONSIDER** the relief Plaintiffs request in their response memorandum.") (all emphasis in original).

But even on the merits, the arguments fail. The Commission is regularly subject to vacatur of its regulations. *See, e.g.*, *Shays v. FEC*, 337 F. Supp. 2d 28, 130 (D.D.C. 2004) (striking *fifteen* regulations under *Chevron* or other APA review) *aff'd* 414 F.3d 76 (D.C. Cir. 2005). *Just this*

month, the Commission had a regulation vacated under *Chevron* Step I. *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 16-259 (BAH), 2018 U.S. Dist. LEXIS 130774 at *156 (D.D.C. Aug. 3, 2018) ("In particular, the FEC regulation . . .is declared invalid and is vacated").[6]

This Court properly ordered 11 C.F.R. § 110.4(b)(1)(iii) vacated because it failed at every level of Administrative Procedure Act ("APA") analysis. This Court clearly ruled that the regulation failed *Chevron* Step I, in part because the Supreme Court made clear in *Central Bank* that secondary liability cannot be created without clear statutory authority, which 52 U.S.C. § 30122 lacks. Order at 7-10. The regulation is simply bad law. Vacatur was warranted here, just as it has been in many other cases.

But the FEC does not even oppose vacatur. Instead, it makes much of the effect of an injunction against use of its *ultra vires* rule. FEC Opp. at 7-10.[7] It is important to note, however, that "the District Court in exercising its equity powers may command persons properly before it

[6] The *CREW* court stayed its ruling "for 45 days to provide time for the FEC to issue interim regulations that comport with the statut[e]." *Id*. That was because the FEC had failed to carry out an explicit Congressional command. Here the FEC acted *without* authority. There is no statute with which the FEC must comport, and nothing for it to do if there were a remand.

[7] The Commission claims that Mr. Swallow "did not request any injunction," *id*. at 8, which is not accurate. Mr. Swallow's argument centered on the *ultra vires* nature of 11 C.F.R. § 110.4(b)(1)(iii)—as an affirmative defense—and sought vacatur of the regulation and any "such other relief as this Court deems appropriate." Def. John Swallow's Ans. to Amend. Compl. at 37-38, 40 (May 16, 2016), ECF No. 45; Def. Swallow's Opp. to FEC Cross-Motion at 25 (Jan. 12, 2018), ECF No. 114 ("[T]his Court should grant judgment on the pleadings and vacate 11 C.F.R. § 110.4(b)(1)(iii)"). Of course, this Court has plenary authority to enforce its rulings. *See* 28 U.S.C. § 2202. Vacatur without an injunction to enforce it is a somewhat empty declaration, especially where the FEC has shown that it will not voluntarily cease enforcement of the vacated regulation. In any event, the parties adequately litigated this question in connection with Mr. Swallow's motion to dismiss. Def. John Swallow's Mot. to Dismiss, J. on the Pleadings and Mem. in Supp. at 17-18 (Oct. 23, 2017), ECF No. 98; Pl. FEC's Mem. in Opp. to Def. John Swallow's Mots. to Dismiss and for J. on the Pleadings and in Supp. of Cross-Motion for Partial J. on the Pleadings at 29-30 (Nov. 20, 2017), ECF No. 103; Def. Swallow's Opp. to FEC Cross-Mot. at 24-25.

to cease or perform acts outside its territorial jurisdiction." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (collecting cases). Indeed, this doctrine is recognized by the FEC's own case of *United States v. AMC Entertainment, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008). FEC Opp. at 10 (quoting case).[8] *AMC* explicitly recognizes the validity of universal injunctions. 549 F.3d at 770 ("[T]he court has the power to enforce the terms of the injunction outside the territorial jurisdiction of the court, including issuing a nationwide injunction.") (citing *Steele*, 344 U.S. at 289).[9]

But even assuming, *arguendo*, that the FEC is correct that general injunctions are disfavored as a matter of policy, such an injunction is proper here. Much of the Commission's legal authority is devoid of context or taken from unpublished opinions. Emblematic of this misuse of case law, the FEC relies upon *Lawrence v. Texas*, 539 U.S. 558 (2003), dealing with the constitutionality of criminal bans on homosexual activity, and *Younger v. Harris*, 401 U.S. 37 (1971), the landmark case on federal abstention in favor of state judicial proceedings. FEC Opp. at 8. But the Commission's *ultra vires* rule does not possess the dignity of a legislative act (which it, in fact, violates), and these cases have nothing to do with the FEC's civil claims.

Moreover, while *Califano v. Yamasaki*, 442 U.S. 682, 684 (1979), did address nationwide class actions and related remedies, the FEC's quote is not the holding of the Supreme Court. FEC Opp. at 7. It is a synopsis of a *party*'s view. *Califano*, 442 U.S. at 702 ("*the Secretary* . . . argues

[8] *AMC* dealt with an injunction enforcing disability-access construction laws that compelled, at great cost, a chain to change movie theater accessibility features to comply with conflicting rulings. *Id*. at 767. By contrast, all the FEC must do here is delete, and cease using, an unlawful regulation.
[9] *Cf. City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 146 n.30 (2d Cir. 2011) (a "federal court sitting as a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere") (collecting cases); *United States v. Oregon*, 657 F.2d 1009, 1016 n.17 (9th Cir. 1981) (Kennedy, then-Circuit Judge) ("When a district court has jurisdiction over all parties involved, it may enjoin the commission of acts outside of its district.").

that nationwide class relief is inconsistent with the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs") (emphasis added). The Court *rejected* that argument in the very next paragraph. *Id*. ("[T]he fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties."); *id*. (holding that "the scope of injunctive relief is dictated by the extent of the violation established").[10] The Secretary lost.

In any event, Mr. Swallow is not a plaintiff aggressively pursuing the FEC and seeking to hamstring its enforcement of campaign finance law. *The Commission* initiated this suit, and the Commission continues to insist that it be permitted to use its improper regulation. For that reason, *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), and *Hospice of New Mexico, LLC v. Sebelius*, 691 F. Supp. 2d 1275 (D.N.M. 2010), are inapposite.[11] Instead, this case is much more like *Richmond Tenants Organization, Inc. v. Kemp*, where the government was overstepping its authority and an injunction was needed to protect potential defendants. 956 F.2d 1300, 1308 (4th Cir. 1992) (collecting cases).

[10] The FEC also uses a "*see*" cite to Justice Thomas' concurrence in *Trump v. Hawaii*, 585 U.S. ___, 138 S.Ct. 2392, 2424-29 (2018). FEC Opp. at 7. Justice Thomas wrote only for himself and does not speak for the Court on that point. This Court should issue an injunction of sufficient scope to prevent the FEC from continuing to act contrary to law.

[11] And contrary to the quote supplied at FEC Opp. at 9, the Commission is not in the position of the Solicitor General, carefully weighing which cases to bring before the Supreme Court on immigration due process issues. *See United States v. Mendoza*, 464 U.S. 154, 160-61 (1984) (rejecting collateral estoppel). As already explained, Defendant John Swallow's Opposition to FEC Cross-Motion at 1, the Commission makes very little use of the relevant regulation and will not be unduly inconvenienced by ceasing those minimal efforts. *See also* Order at 8 ("The six enforcement efforts the Commission cites are all internal to the FEC itself.").

IV. The FEC's desire to use 11 C.F.R. § 110.4(b)(1)(iii) in another forum is insufficient justification for delay or modification of this Court's order.

Clarity surrounding this regulation is paramount, both here and, apparently, in the Southern District of Florida. Indeed, the FEC specifically invited the Florida court to apply 11 C.F.R. § 110.4(b)(1)(iii) "absent further developments in *Swallow*." Notice of Supp. Auth. at 5, *FEC v. Rivera*, No. 1:17-cv-22643-MCG (S.D. Fla. May 4, 2018), ECF No. 30 (attached as Exhibit A). The FEC suggested that "the Court may wish to do so without a motion from the Commission" because the FEC is subject to this Court's injunction. *Id.*[12]

But this is beside the point. The FEC seldom invokes 11 C.F.R. § 110.4(b)(1)(iii), and even when it has done so in an ongoing case, it can easily abide by this Court's injunction. Its actions in *Rivera* prove as much. There, 11 C.F.R. § 110.4(b)(1)(iii) is a side show; Mr. Rivera is being accused of *principal* liability as well. All an injunction will do is prevent the FEC from using its unlawful regulation against Mr. Swallow, and those like him, engaged in core First Amendment-protected political activity in the future. It will not disrupt ongoing, valid enforcement activities.

* * *

The FEC is welcome to defend its regulation before the Court of Appeals. But it should not be allowed to put off that question for years until Mr. Johnson's fate is determined on separate facts and legal claims. The Commission has identified no just reason to delay Mr. Swallow's successful defense in this Court. Partial Final Judgment is warranted.

[12] Before the Florida court, the FEC acknowledged that the Commission could have sought review of this Court's decision "within 60 days of the April 5 order" or "when final judgment is entered, Fed. R. Civ. P. 54(b)." *Id.* at 4. The FEC told the Florida district court, however, that such activity "will not occur for some time," *id.*, without disclosing its intent to actively delay resolution of *this* proceeding by fighting Mr. Swallow's 54(b) Motion and seeking stays.

Respectfully submitted,

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