UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 17-22643 COOKE/GOODMAN

FEDERAL ELECTION COMMISSION, Plaintiff, v. DAVID RIVERA, Defendant.	OPPOSITION TO MOTION TO ALTER JUDGMENT

PLAINTIFF FEDERAL ELECTION COMMISSION'S OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND OR FOR RELIEF FROM JUDGMENT

Plaintiff Federal Election Commission ("FEC" or "Commission") respectfully submits this Memorandum of Law in Opposition to Defendant David Rivera's Motion to Alter or Amend or for Relief from Judgment (ECF No. 179) (hereinafter, "Motion"), and in support thereof states as follows:

INTRODUCTION

The Court correctly assessed a $456,000 civil penalty against Rivera for knowingly and willfully violating 52 U.S.C. § 30122, upon finding that Rivera secretly provided nearly $76,000 of in-kind contributions to the primary election campaign of Justin Lamar Sternad in Florida's 26th Congressional District, in violation FECA's prohibition on contributions made in the name of another. As the FEC explained in its summary judgment motion filed nearly two years ago, the undisputed evidence proved that a significant civil penalty was warranted for Rivera's campaign finance violations. As that motion established, Rivera purposefully attempted to weaken a likely general-election opponent and trick voters into believing that the advertising had come from another candidate in the opposition party's primary election. The FEC also

established that Rivera's concealed payments harmed the public, that Rivera can pay a substantial civil penalty, and that Rivera's continued unwillingness to take responsibility for his actions demonstrate a likelihood of future violations. As this Court recognized, Rivera's response was "silent" as to any argument about the amount of the fine the FEC sought. (Order Granting FEC's Mot. for Summ. J. (ECF No. 163) ("MSJ Order") at 34.) Indeed, Rivera made no "opposition to the FEC's contentions regarding the Court's issuance of a civil penalty in this case." (*Id.* at n.7.) Because there were no material facts in dispute, this Court granted summary judgment and a civil penalty.

Now, 426 days after this Court granted the FEC's requested penalty and after a separate unsuccessful post-summary judgment motion, Rivera for the first time argues that the civil penalty is constitutionally excessive. Even if Rivera's long-delayed argument had any merit, he waived it by failing to oppose the penalty in his summary judgment papers. Moreover, nothing in Rivera's belated motion establishes clear error in the Court's well-reasoned and thoroughly supported ruling. Nor does Rivera's motion establish that this Court's ruling was affected by an intervening change in controlling law, much less that it would be manifestly unjust to hold Rivera to account for his surreptitious attempt to undermine the primary election of his political opponent. In any event, the civil penalty the Court imposed falls squarely within the range of Congress's discretion. Rivera's Motion is meritless and should be denied.[1]

[1] Attorneys representing defendant once again did not confer with FEC counsel prior to filing the Motion, and did not file a certificate of compliance, in violation of Local Rule 7.1(a)(3). *Kaplan v. Lappin*, No. 10-80227, 2011 WL 13225150, at *1 (S.D. Fla. Feb. 23, 2011) ("The law in this District is well established that if a party fails to confer pursuant to LR 7.1 A3, the Court may deny the motion and impose appropriate sanctions, including reasonable attorney's fees."); *see also Temurian v. Piccolo*, 18-CV-62737, 2019 WL 2491781, at *1 n.1 (S.D. Fla. June 14, 2019) (noting that a motion for reconsideration is not excepted from the Rule 7.1(a)(3) conferral requirement).

BACKGROUND

As this Court held in its MSJ Order, then-U.S. Congressman Rivera directly violated FECA in 2012 by making $75,927.31 of in-kind contributions in the name of another to the primary campaign of Justin Lamar Sternad in violation of 52 U.S.C. § 30122. (MSJ Order at 34.) Rivera made these in-kind contributions to vendors providing services to Sternad's campaign, while taking steps to hide his identity as the source, including using cash to cover his tracks, and directing others to conceal his identity as the true source.[2]

On February 23, 2021, this Court issued its MSJ Order awarding summary judgment to the Commission. (ECF No. 163.) In determining the appropriate penalty, the Court correctly noted that it was authorized to award a civil penalty which did not exceed the greater of $7,500 for each violation or an amount equal to any contribution or expenditure involved in such violation. MSJ Order at 34; *see also* 11 C.F.R. § 111.24(a)(1) (2012) (providing the amount applicable under 52 U.S.C. § 30109(a)(6)(B) as adjusted by inflation pursuant to statute); FEC, Civil Monetary Penalties Inflation Adjustments, 74 Fed. Reg. 31,345 (July 1, 2009). The Court further recognized its authority to award enhanced civil penalties for "knowing and willful" violations. *See* MSJ Order at 34-35; 52 U.S.C. § 30109(a)(6)(C) (providing for penalties not less than 300% of the amount involved and not more than the greater of $50,000 or 1,000% of the amount involved). Examining the factors set forth in *FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989), the Court determined a penalty of $456,000, which is a rounded sum of 600% of the

[2] The factual record in this case has been set forth in detail in the FEC's previously filed Motion for Summary Judgment and Memorandum of Law in Support, (ECF No. 142), this Court's MSJ Order (ECF No. 163), and this Court's Order Denying Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. 176). The Commission only repeats the necessary facts here as are relevant to the instant Motion.

amount of violation, was an appropriate penalty for Rivera's knowing and willful violations.[3] (MSJ Order at 37.) That penalty amount was in the lower half of the range the Court could have imposed. In reaching that figure, the Court considered: (1) Rivera's bad faith; (2) the injury to the public caused by Rivera's actions; (3) Rivera's ability to pay; and (4) the necessity of vindicating the authority of the FEC and the penalty's deterrent effect. MSJ Order at 34-39; *see also Furgatch*, 869 F.2d at 1258; *FEC v. O'Donnell*, 15-cv-17, 2017 WL 1404387, at *2 (D. Del. Apr. 19, 2017) (unpublished); *FEC v. Craig for U.S. Senate*, 70 F. Supp. 3d 82, 100 (D.D.C. 2014), *aff'd*, 816 F.3d 829 (D.C. Cir. 2016); *FEC v. Comm. of 100 Democrats*, 844 F. Supp. 1, 7 (D.D.C. 1993). In its MSJ Order, the Court noted that Rivera, "in his astoundingly concise (7-page) opposition brief," failed to "rebut or even address" the evidence the Commission presented, including the penalty the Commission sought. (MSJ Order at 4-5.) Rivera's opposition was in fact "silent on [the penalty] issue." (*Id.* at 34.)

As directed by the Court, the FEC filed its Proposed Order and Final Judgment on February 26, 2021. (ECF No. 167-1.) On March 31, 2021, Rivera filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. (ECF No. 171.) On March 24, 2022, this Court denied defendant's motion and closed the case. (ECF No. 176.) The Court subsequently entered a final judgment in favor of the Commission that ordered defendant to pay a penalty of $456,000 plus

[3] As the FEC has previously made the Court aware, the FEC had erred in noting in its summary judgment brief that $456,000 represented "a civil penalty of 700% of the $75,927.31 in contributions he made." FEC's Mem. in Support of its Mot. for Summ. J. at 1-2 (ECF No. 142); *id.* at 17, 20. A rounded sum of 700% of that amount in violation would have been $531,000. The Commission provided, and the Court entered, a proposed order that required a payment consistent with the requested $456,000 amount (*i.e.*, 600%, not 700%). *See* ECF No. 167; *see also* ECF No. 177.

costs of $927 and permanently enjoined Rivera from making campaign contributions in the name of another in violation of 52 U.S.C. § 30122. (ECF No. 177.)

On April 26, 2022, the defendant filed the instant Motion pursuant to Fed. R. Civ. P. 59(e) or Rule 60(b). (ECF No. 179.)[4] Despite never previously directing any argument to the FEC's proposed fine, Rivera now asserts that the civil penalty is unconstitutionally excessive under the Eighth Amendment.

ARGUMENT

Rivera's Motion should be denied. First, Rivera's decision not to raise any argument against the FEC's proposed fine at the summary judgment stage operates as a waiver of his Eighth Amendment argument. Second, the primary decision on which Rivera relies, *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288 (2021), does not establish new grounds or bring to light any error by this Court to warrant post-judgment relief. Third, even if the Court considers Rivera's constitutional argument, the $456,000 penalty is not excessive under any of the factors outlined in *Yates* and prior precedent, and FECA's penalty provision, as applied here and by prior courts, meets constitutional muster.

Rivera asks this Court to rescind its summary judgment order to the extent it imposed a financial penalty pursuant to Rules 59(e) and 60(b)(1), (6). While Rule 59(e) permits motions for reconsideration, the basis for such motions is necessarily limited. "The only grounds for

[4] On April 28, 2022, after filing the motion under review, Rivera also filed a Notice of Appeal of this Court's Judgment. (ECF No. 181.) This Court retains jurisdiction over the matter, because the notice of appeal does not become effective until the Court disposes of the instant motion. *See* Fed. R. App. P. 4(a)(4)(B)(i); *see also Pin-Pon Corp. v. Landmark Am. Ins. Co.*, 500 F. Supp. 3d 1336, 1341 n.4 (S.D. Fla. 2020) ("While the filing of a notice of appeal generally divests a district court of jurisdiction over all issues involved in the appeal, district courts retain jurisdiction to adjudicate certain post-judgment motions, including those brought pursuant to Rule 59 and Rule 60 of the Federal Rules of Civil Procedure." (citing Fed. R. App. P. 4(a)(4))); *Williams v. Becker*, No. 1:18-CV-05348-SCJ, 2019 WL 11364954, at *1 (N.D. Ga. July 26, 2019) (same).

granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (per curiam) (alteration in original) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). "[T]he decision to alter or amend a judgment is committed to the sound discretion of the district court." *Mitra v. Glob. Fin. Corp.*, No. 08-80914-CIV, 2009 WL 2423104, at *1 (S.D. Fla. Aug. 6, 2009) (citing *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992)). Further, under Rule 59(e), parties cannot use a motion for reconsideration to raise new legal arguments that could have been raised before a judgment was issued. *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)); *see also Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998) (per curiam) ("The purpose of a Rule 59(e) motion is not to raise an argument that was previously available, but not pressed."). Likewise, under Rule 60(b), a court may relieve a party from a judgment due to "mistake, inadvertence, surprise, or excusable neglect," Fed. R. Civ. P. 60(b)(1), or "any other reason that justifies relief," Fed. R. Civ. P. 60(b)(6). The rule encompasses mistakes of facts or law. *Parks v. U.S. Life & Credit Corp*., 677 F.2d 838, 840 (11th Cir. 1982) (per curiam). However, Rule 60(b) does not provide a party relief from "a tactical litigation decision which, in hindsight, has been determined to be a mistake." *McCarthy v. Consulate Health Care*, No. 4:13-cv-132-WS/CAS, 2016 WL 1729604, at *3 (N.D. Fla. Mar. 29, 2016), report and recommendation adopted, 2016 WL 1732743 (N.D. Fla. Apr. 28, 2016). Relief under Rule 60(b)(6) is rare. *See Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir.1996) (Relief from "judgment under Rule 60(b)(6) is an extraordinary remedy." (citation omitted)).

A. Rivera Waived Any Challenge to the Proposed Penalty by Failing to Raise it During Summary Judgment.

Rivera's argument that the Court's financial penalty violates the Excessive Fines Clause fails at an antecedent step: he failed to properly preserve any argument against the civil penalty

during summary judgment briefing. A court may find that a party waived any arguments that were not addressed in its response to a summary judgment motion. *Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1239 (11th Cir. 1985); *Schwarz v. Bd. of Supervisors on behalf of Villages Cmty. Dev. Districts*, 672 F. App'x 981, 983 (11th Cir. 2017) (affirming a district court's finding that plaintiffs had waived any challenge to the defendant's motion for summary judgment on certain grounds which the plaintiffs did not address in their response to the motion for summary judgment); *Carter v. BPCL Mgmt., LLC*, 2021 WL 7502560, at *8 (S.D. Fla. Sept. 28, 2021) (same). Rivera himself acknowledges that "'any arguments [he] failed to raise'" in his earlier motion "'will be deemed waived.'" (Mot. at 8 (quoting *Compania de Elaborados de Cafe v. Cardinal Cap. Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003)).)

Rivera's summary judgment papers were totally "silent" on the issue of the civil penalty. (MSJ Order at 34; *see also id.* at 34 n.7 ("Nor does he address it in his reply brief submitted in support of his summary judgment motion. And it goes without saying that Rivera did not address this issue in his statement of uncontroverted facts submitted in support of his motion for summary judgment." (citations omitted)).) Thus, as the Court noted, "Rivera has not made any opposition to the FEC's contentions regarding the Court's issuance of a civil penalty in this case." (MSJ Order at 34 n.7.) Even assuming there were some merit to Rivera's Eighth Amendment argument, *but see infra* at pp. 12-18, "[t]here is a significant difference between pointing out errors in a court's decision on grounds that have already been urged before the court and raising altogether new arguments on a motion to amend," *Am. Home Assur. Co.*, 763 F.2d at 1239. This Court should not accept Rivera's effort to have "'two bites at the apple.'" *Id.*; *see also McCarthy*, 2016 WL 1729604, at *3 ("[T]he most salient example of behavior that cannot

constitute grounds for Rule 60(b) relief is the purposeful litigation decision of a party." (citation omitted)).

Nothing prevented Rivera from raising an argument on summary judgment that the FEC's proposed civil penalty was too high. The FEC's summary judgment papers squarely argued a civil penalty should be granted on summary judgment, and Rivera was therefore on notice that the Court could grant that relief. At that point, imposition of the requested penalty was "immediately impending," and Rivera failed to address it on the risk of waiver. *Sierra Club v. Khanjee Holding (US) Inc*., 655 F.3d 699, 705 (7th Cir. 2011). While it is true that Rivera could not have relied on *Yates* at summary judgment because that case had not yet been decided, his failure to raise *any* argument as to the civil penalty is sufficient reason to deny him the chance to raise a challenge to that issue now. *Katzoff v. NCL (Bahamas) Ltd*., No. 19-22754-CIV, 2022 WL 820362, at *2 (S.D. Fla. Jan. 24, 2022) (denying motion for reconsideration where "[t]here was no argument" at summary judgment regarding the issue involved in intervening case and thus the motion was "simply an attempt to make an argument that should have been made before the Court's ruling on the motion for summary judgment").

Rivera's reliance on *Yates* to support his argument that it is proper to raise an Excessive Fines Clause argument for the first time in a motion for reconsideration is misplaced. (*See* Mot. at 1 (observing that *Yates* reviewed an order on a Rule 59(e) motion).) The monetary award at issue in *Yates* was imposed after a jury trial that established the damages caused by the defendant's False Claims Act violations. *See Yates*, 21 F.4th at 1297. The plaintiff had not moved for summary judgment as to damages. *See* Relator Michele Yates's Mot. for Partial Summ. J., *Yates v. Pinellas Hematology & Oncology, P.A.*, No. 8-15-cv-799 (M.D. Fla. Feb. 11, 2020) (ECF No. 103) (Dec. 14, 2018). There was, therefore, no comparable prior opportunity

for the defendant to have opposed issuance of monetary relief. Here, by contrast, the issue of the proper amount of civil penalty was squarely raised by the FEC's summary judgment papers and Rivera failed to address it. It was certainly not manifest error for the Court to apply the ordinary civil penalty factors rather than an explicit Excessive Fines Clause analysis where Rivera made no constitutional argument in his summary judgment briefing.

B. *Yates* Does Not Represent an Intervening Change in Controlling Law That Would Warrant Reconsideration of the Civil Penalty.

Rivera's motion fails to establish any intervening change in controlling law that would meet the standard for post-judgment reconsideration. Rivera's entire argument on this point relies on the Eleventh Circuit's decision in *Yates*. But nothing in that decision significantly altered the legal landscape regarding the application of the Excessive Fines clause of the Eighth Amendment to civil penalties.

Yates concluded that the Eighth Amendment's prohibition on "excessive fines" applies to a monetary award in a *qui tam* action under the False Claims Act even when the United States has not intervened as a party to the action. 21 F.4th at 1306-14. That holding has no relevance here; the FEC is an agency of the United States and is the plaintiff in this action.

After concluding that the Excessive Fines Clause applied, the *Yates* court proceeded to apply standards developed in prior Eighth Amendment cases to the monetary award imposed in that case. *See Yates*, 21 F.4th at 1314-16. The court identified some "non-exhaustive" factors the Eleventh Circuit had previously "identified" that "guide an Excessive Fines Clause analysis: (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." *Id.* at 1314 (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)).[5]

Rivera takes from this application of precedent a sea change in the relevant standard (Mot. at 10), but the standard applied in *Yates* was not new. Indeed, *Yates* simply applied the factors set forth in prior cases. Rivera suggests that applying this test in the civil context was a new development (Mot. at 6), but it was well established at the time of Rivera's summary judgment opposition that the Eighth Amendment's prohibition of excessive fines applied to civil penalties intended to punish. *See, e.g.*, *Austin v. United States*, 509 U.S. 602 (1993) (holding that Excessive Fines Clause applies to civil forfeiture proceedings). The *Yates* majority did not purport to apply a new test in the civil context. *See Yates*, 21 F.4th at 1314.[6] And courts have previously applied this test in both civil and criminal cases. *See, e.g.*, *United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 (11th Cir. 2011) (applying *Bajakajian* factors in criminal forfeiture case); *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999) (applying *Bajakajian* to civil *in rem* forfeiture); *see also United States v. Mackby*, 339 F.3d 1013, 1017-18 (9th Cir. 2003) (applying *Bajakajian* factors in False Claims Act case). At best, *Yates* simply clarified the application of a preexisting legal standard. It did not, however, change controlling law. *See, e.g.*, *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366,

---

[5] A concurring judge highlighted a circuit split on whether the Excessive Fines Clause requires courts to consider not only proportionality between the misconduct and the fine imposed but also the defendant's ability to pay the fine. *Id.* at 1318 (Newsom, J., concurring). This Court squarely considered Rivera's ability to pay to civil penalty (MSJ Order at 36-37), and so that debate would not affect the outcome here. Moreover, the sanctioned party has "the burden to produce evidence of inability to pay," *FEC v. Toledano*, 317 F.3d 939, 948-49 (9th Cir. 2002), and Rivera submitted no evidence to meet that burden here.

[6] Rivera appears to accept the dissenting judge's assertion that the majority applied a "new test for the Excessive Fines Clause." *Yates*, 21 F.4th at 1324 (Tjoflat, J., concurring in part and dissenting in part). That statement did not sway the majority, and in any event, it is not accurate to say that the test had not been applied in civil cases prior to *Yates*.

1373 (S.D. Fla. 2002) (denying motion for reconsideration where court's prior decision was not inconsistent with intervening case); *MSPA Claims 1, LLC v. Covington Specialty Ins. Co.,* 212 F. Supp. 3d 1250, 1263 (S.D. Fla. 2016) (denying motion for reconsideration where the "Eleventh Circuit did not decide the issue on which this Court based its Dismissal Order, and for that reason [recently decided case] does not constitute an intervening change in controlling law").

C. FECA's Civil Penalty Provision Provides Sufficient Judicial Standards

Even if it were permissible for Rivera to mount an Excessive Fines Clause challenge at this belated juncture, it would fail. "FECA grants district courts broad authority to fashion remedies for violations of the statute," *FEC v. Craig for U.S. Senate*, 816 F.3d 829, 847 (D.C. Cir. 2016), but it is wrong for defendant to assert that it is standardless, (*see* Mot. at 12; 14-16). The civil penalty the Court imposed was pursuant to 52 U.S.C. § 30109(a)(6)(C), which applies to knowing and willful violations of the ban on making contributions in the name of another. That provision permits a court to "impose a civil penalty . . . which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1000 percent of the amount involved in the violation." 52 U.S.C. § 30109(a)(6)(C). In addition to having a statutory range, courts have fashioned additional standards to guide a district court's discretion within the range. Thus, "a district court should consider (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency." *Furgatch*, 869 F.2d at 1258. This Court applied those standards in this case. (MSJ Order at 34-37.)

Rivera cites to Jude Tjoflat's concurrence/dissent in *Yates*, which noted a lack of standards in calculating civil penalties under the False Claim Act. (*See* Mot. at 15). The majority opinion of the Eleventh Circuit explained that this issue was not before the court, however, and that moreover,

> the imposition of the lowest-possible monetary award—though, as the district court noted, "very harsh"—properly balances the need to deter potential fraudsters with the gravity of Pinellas' conduct. This is all the more so when one considers that the size of the award is a direct reflection of Pinellas' repeated and knowing submission of false claims to the United States.

Yates, 21 F.4th at 1316. Judge Tjoflat's concern that the False Claims Act was without standards did not command a majority. With respect to FECA, moreover, *Furgatch* and the other precedent the Court cited in its MSJ Order provide appropriate standards for imposing a civil penalty for the campaign finance violations at issue in this case. This Court's analysis of those standards provides sufficient "reasoning" to permit appellate review. *Id.* at 1324 (Tjoflat, J., concurring in part and dissenting in part). Rivera does not explain why the standards the Court applied are insufficient. Rivera's Motion fails to present any manifest error of law or fact in the Court's Order, nor does it provide any new arguments that could not have been raised prior to the entry of the Court's Order to justify relief under Rule 59 or Rule 60(b).

D. The Court's Standard Used to Determine Rivera's Penalty Amount Does Not Violate the Eighth Amendment

Even if the Court had confronted a timely challenge and applied Rivera's penalty to the strictures of the Eighth Amendment, the penalty is not excessive because it is not grossly disproportional to Rivera's offense.[7] The United States Supreme Court has adopted a "gross disproportionality" test to determine whether a fine is "excessive" for purposes of the Excessive

[7] Much of Rivera's Motion is devoted to propositions that are not in dispute. The FEC does not contend that a civil penalty to remedy violations of FECA are immune from a properly preserved argument for Eighth Amendment review (*but see* Mot. at 13-14), and it is obvious that the Court did not apply *Yates*, which had not been decided at the time of the MSJ Order (Mot. at 16). The FEC also does not dispute that 52 U.S.C. § 30109(d) provides for penalties, which by their nature are at least partly punitive. *See, e.g.*, *FEC v. O'Donnell*, No. 15-17, 2017 WL 1404387, at *5 (D. Del. Apr. 19, 2017) (tailoring the level of punishment while applying the *Furgatch* factors).

Fines Clause. *See Bajakajian*, 524 U.S. at 323. Recognizing that Congress is best suited to determine the monetary value that society places on harmful conduct, courts grant fines falling below a statutory maximum a "strong presumption" of constitutionality. *See id.* at 336 (("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); *see also Yates*, 21 F.4th at 1314 ("Congress, as a representative body, can distill the monetary value society places on harmful conduct," and thus that "[penalties] falling below the maximum statutory fines for a given offense . . . receive a strong presumption of constitutionality." (internal quotation marks and citation omitted)). The fine assessed against Rivera is well within the Congressionally authorized limits of FECA, and therefore there is a "strong presumption" that it is not excessive under the Eighth Amendment.[8]

Applying the factors identified in *Yates* confirms this strong presumption that the penalty is not disproportionate to the offense. The Eleventh Circuit identified "several, non-exhaustive factors that guide an Excessive Fines Clause analysis: (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." *Yates*, 21 F.4th at 1314.

Rivera is plainly within the class of persons at whom section 30122 was principally directed. FECA establishes a comprehensive system of disclosure for contributions, which provides "'the electorate with information about the sources of election-related spending'" and

[8] The Court had discretion for each knowing and willful violation of 52 U.S.C. § 30122, to award a civil penalty that is not less than 300% of the amount involved in the violation and is not more than the greater of $60,000 or 1,000% of the amount involved in the violation, *see* 52 U.S.C. § 30109(a)(6)(C), 11 C.F.R. § 111.24(a)(2)(ii) (2010). The Court could have awarded a maximum of approximately $760,000 for Rivera's knowing and willful violations. In its discussion of the penalty and Rivera's ability to pay, the Court noted that the statutory maximum penalty was far higher than the amount the Commission sought. (*See* MSJ Order at 36.)

"minimizes the potential for abuse of the campaign finance system." *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014) (quoting *Citizens United v. FEC*, 558 U.S. 310, 367 (2010)). Section 30122 "is designed to ensure accurate disclosure of contributor information" by prohibiting persons from making contributions in the name of another. *Campaign Legal Center v. FEC*, 952 F.3d 352, 355 (D.C. Cir. 2020) (per curiam). "[S]uch contributions undermine transparency . . . by shielding the identities of true contributors" to a political campaign, *United States v. O'Donnell*, 608 F.3d 546, 554 (9th Cir. 2010), and deprive the electorate of crucial information about the "sources of election-related spending," *Citizens United*, 558 U.S. at 367.

Rivera's actions here fall within the core of prohibited conduct. As this Court explained, "[a]s a U.S. Congressman, at that time, Rivera was well aware of and understood FECA's requirements that campaign contributions must be accurately disclosed to the public. Yet, Rivera still acted in a manner to avoid FECA's disclosure requirements." (MSJ Order at 35.) Moreover, Rivera had "full knowledge of the facts as well as the unlawful nature of his actions." (*Id.*) More than just "depriving the electorate of accurate information," (Mot. at 5), Rivera affirmatively tried to dupe the public into believing that advertising against a likely general-election opponent had been funded by an opponent in the opposition party's primary election. This is exactly the type of conduct that Section 30122 was designed to protect against, and Rivera falls squarely within the class of individuals targeted by the penalty here. *See, e.g.*, *O'Donnell*, 608 F.3d at 554.

Rivera's attempts to downplay his violations of law as a technical violation are unconvincing. (*See* Mot. at 18-19.) Rivera is not an unsophisticated individual who happened, by haphazard and unusual circumstances, to fall within the ambit of the statute while attempting to participate in the political process. Rather, Rivera intentionally provided secret financial

support for a candidate in an opposing party's primary election, the effect of which was to deprive the voting public of essential information that could have affected their votes. If anything, the need for deterrence of stealth funding for sham candidates in elections has only increased in the time since the summary judgment briefing after similar allegations have been made in subsequent elections. *See State of Florida v. Frank Artiles*, No. F21-004768 (B) (Fla. 11th Cir. Ct. 2021) (charging former state senator with felonies for exceeding campaign contribution limits and providing false information to election officials for alleged scheme that involved paying bogus candidate more than $44,000 to siphon votes in state election); *see also* Associated Press and NBC 6, "'Ghost Candidate' Pleads Guilty in Scheme to Siphon Votes in District 37 Race," (published Aug. 24, 2021, updated Aug. 24, 2021, 1:07 p.m.), https://www.nbcmiami.com/news/local/ghost-candidate-pleads-guilty-in-scheme-to-siphon-votes-in-district-37-race/2536139/ (explaining that former candidate allegedly paid by Artiles to run as third-party candidate to siphon votes away from Democratic opponent pleaded guilty to state campaign finance and false statement crimes).

Next, the civil penalty this Court selected compares favorably to other penalties authorized by the legislature. *See Yates*, 21 F.4th at 1314. To assess this factor, courts may consider relevant standards, such as criminal statutes, sentencing guidelines, and trial courts' sentencing decisions, among other standards. *Bajakajian*, 524 U.S. at 339 n.14.

As an initial matter, both proposed comparator fines Rivera cites were the result of pre-litigation negotiated settlement. (Mot. at 1 & n.1.) FECA's enforcement provisions heavily favor resolving civil violations through conciliation. *See, e.g.*, 52 U.S.C. § 30109(a)(4)(A)(i) (proscribing mandatory pre-litigation conciliation period). Rivera is thus not "similarly situated" to his proposed comparators because "they settled and he did not." *United States v. Prochnow*,

No. 07-10273, 2007 WL 3082139, at *5 (11th Cir. Oct. 22, 2007) (per curiam) (affirming imposition of fine and disgorgement for violations of Federal Trade Commission rule).

In any event, the $456,000 civil penalty the Court imposed here is not disproportionate to others that have been imposed under FECA and was actually in the lower half of the permissible range. As noted above, the Court could have imposed a civil penalty as high as approximately $760,000 within the range set by Congress. (*See supra* at n.8.) Moreover, the FEC has reached negotiated settlements of FECA violations that are significantly higher than the penalty awarded by this Court. In MUR 5666, Mitchell Wade and MZM, Inc., the company Wade principally owned, were jointly liable for a civil penalty of $1,000,000 under a conciliation agreement with the Commission for FECA violations that included making contributions in the name of another. *See* Selected Cases in which the Civil Penalties are $50,000 or Greater Made Public Between 1980 and Present (Updated May 2022) ("Selected Cases"), at 1, https://www.fec.gov/resources/cms-content/documents/civilpenalties50k.pdf; *see also* FEC, Conciliation Agreement for MZM, Inc. and Mitchell J. Wade, MUR 5666 (Oct. 30, 2007), https://www.fec.gov/files/legal/murs/5666/000065ED.pdf. In MUR 5279, Charles Kushner and his associated partnerships entered into a conciliation agreement with the FEC on June 24, 2004, which included a civil penalty of $508,900. *See id.* at 2. In today's dollars, the civil penalty in MUR 5279 would be $775,580, a substantially larger penalty than that imposed on Mr. Rivera.[9] Likewise, even the example Rivera cites, Thomas Kramer, MUR 4398 (July 18, 1997) (Mot. at

[9] Present value of past civil penalties was calculated using the U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. Consideration of inflation-adjusted penalties is appropriate here. In the Federal Civil Penalties Inflation Adjustment Act, Congress requires the FEC to annually adjust civil monetary penalties for inflation. *See, e.g.,* Civil Monetary Penalties Annual Inflation Adjustments, 85 Fed. Reg. 47891 (Aug. 7, 2020) (inflation adjustment applies to "penalties that are either negotiated by the Commission or imposed by a court for violations of FECA").

1), included a civil penalty in the amount of $426,000, which would be $767,354 today. Furthermore, Rivera presents no reason the relevant comparison is to other individuals, and there is a range of additional cases with far higher penalties against entities that violated the FECA. (*See, e.g.*, Selected Cases at 1, (MUR 5390, Freddie Mac, $3.8 million penalty; MUR 7613 Zekelman Industries, $975,000 penalty).)

Further reflecting the seriousness of violations of 52 U.S.C. § 30122, such violations are often criminally prosecuted. Criminal violations of section 30122 involving more than $25,000 are punishable as felonies, subject to up to five years' imprisonment. 52 U.S.C. § 30109(d)(1)(A)(i), (D); *see United States v. Smukler*, No. CR 17-563-02 (E.D. Pa. May 6, 2019) (Doc. No. 187) (sentence of 18 months for violations including contribution in the name of another in violation of 52 U.S.C. § 30122); Judgment, *United States v. Smukler*, No. CR 17-563-02 (E.D. Pa. Dec. 7, 2018) (Docket No. 176) (jury verdict finding the defendant guilty of section 30122 violation); *United States v. Boender*, 649 F.3d 650, 659-61 (7th Cir. 2011) (sustaining contributor's section 30122 liability for contribution in the name of anther scheme and other violations where district court sentenced the defendant to 46 months of imprisonment). Indeed, participants in Rivera's scheme here pleaded guilty and served terms of imprisonment. Judgment in a Criminal Case, *United States v. Alliegro*, No. 14-20102 (S.D. Fla. Sept. 10, 2014) (Docket No. 118); Judgment at 1, *United States v. Sternad*, No. 13-CR-20108 (S.D. Fla. July 11, 2014) (Docket No. 43).

Even if the increased penalty provision for section 30122 violations is higher than other federal offenses, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336. Reflecting section 30122's importance to FECA's system of disclosure requirements and contributions limits, Congress authorized the

courts to impose significantly enhanced civil and criminal penalties for violations of section 30122 than for other FECA provisions. Civil penalties for knowing and willful violations of section 30122 are at least five times greater than the penalties authorized for other FECA violations. *See* 52 U.S.C. § 30109(a)(6)(C). This is not a congressional oversight. Congress increased these penalties in 2002, after conducting an investigation into the 1996 presidential election that revealed serious abuses, including that "millions of dollars in illegal donations from foreign nations were funneled into party and campaign coffers through conduit contributions." 147 Cong. Rec. 3,187-88 (2001) (statement of Sen. Bond), Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 108 (2002). Congress intended to send "a clear message that it considers the funneling of illegal campaign contributions a serious offense to be punished accordingly." *Id.* at 3,188. The Court should give substantial deference to the legislature since it is in a far better position to take all relevant considerations into account when crafting an appropriate collection, deterrence, and enforcement mechanism in this area, and it is this expertise that the Supreme Court recognized in *Bajakajian*. 524 U.S. at 336 (internal citations omitted).

The final factor the *Yates* court identified is the harm that has been caused by Rivera's actions. *Yates*, 21 F.4th 1314. As this Court has already explained, "it is hard to imagine a scenario in which Rivera's brazen violations of FECA would not have injured the public." (MSJ Order at 36.) Rivera's violations of FECA harmed the public by depriving the electorate of accurate information regarding the source of funding for a campaign's direct mail flyers and increased the risk and appearance of corruption. Rivera cannot now complain of constitutional infirmity when, by his own actions, he intentionally deceived voters and implicated other third parties, requiring those third parties to cover for his fraud. All factors confirm that the penalty

imposed against Rivera does not violate the Excessive Fines Clause and present no basis for relief under Rule 59 or Rule 60(b).

E. This Court Did Not Err in Declining to Hold an Evidentiary Hearing That Rivera Did Not Request.

Rivera takes issue with what he describes as "[p]rocedural problems with the fine," arguing that an evidentiary hearing was needed before the Court should have imposed the penalty. Mot. at 19. But Rivera can hardly fault this Court for failing to hold an evidentiary hearing as to the penalty because he did not ask for one. Again, Rivera did not make "any opposition to the FEC's contentions regarding the Court's issuance of a civil penalty in this case." (MSJ Order at 34 n.7.) Even assuming Rivera had preserved his objection to the lack of an evidentiary hearing, however, his only authority that one was required comes from the *dissenting* opinion in *Yates*. (*See* Mot. at 4 (citing *Yates*, 21 F.4th at 1334-35 (Tjoflat, concurring in part and dissenting in part).)[10] The Court was not obligated to conduct an evidentiary hearing in the face of the undisputed evidence showing that Rivera has the ability to pay the penalty, which included Rivera's previously filed disclosure reports and other public record documents of which the Court took judicial notice. (MSJ Order at 37.)

Furthermore, the Commission's Amended Complaint properly placed Rivera on notice of its demand for monetary relief, in compliance with the "minimal requirements of Rule 8(a)(3)." *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir. 1993). The FEC's Amended

[10] The only other authority Rivera cites in support of the argument that a hearing was required is *Tull v. United States*, 481 U.S. 412, 422 (1987). (Mot. at 19.) That case, however, held that Congress may assign the determination of civil penalties to a trial judge without violating the Seventh Amendment right to trial by jury. *Tull*, 481 U.S. at 426-27. While a defendant has a Seventh Amendment right to trial by jury on liability questions, granting summary judgment to the government against a civil defendant when there are no disputes of material fact does not violate that right. *Garvie v. City of Ft. Walton Beach, Fla.*, 366 F.3d 1186, 1190 (11th Cir. 2004).

Complaint stated that Rivera made payments between July 2012 and August 2012, which totaled "more than $55,601 in contributions in the names of another." (Am. Compl. at 9.) That was sufficient to comply with the Rule 8 requirement of a "demand for the relief sought." Fed. R. Civ. P. 8(a)(3). Indeed, "any concise statement identifying the remedies and the parties against whom relief is sought will be sufficient." 5 Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1255 (4th ed.). Rivera offers no authority to support his suggestion that a complainant is limited to a dollar figure included in a complaint, much less one that specifically pleads that the true figure is "more than" a certain sum.[11] In fact, the Court is not "limited by the demand for judgment" and on summary judgment may "grant any relief to which the evidence shows a party is entitled." *Id.* The evidence adduced at summary judgment showed that those contributions during that July to August period alleged in the Amended Complaint totaled $75,927.31. And again, Rivera did not dispute this evidence. Rivera cannot attempt to use Rule 59 or Rule 60 to reargue this evidentiary point.

CONCLUSION

Rivera has not met his burden for alteration of the Court's well-reasoned Order granting summary judgment in favor of the Commission. For the foregoing reasons, the Court should deny Rivera's Motion to Alter or Amend or Relief from Judgment.

Respectfully submitted,

Lisa J. Stevenson (Special Bar No. A5502354)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley (Special Bar No. A5502355)

/s/ Shaina Ward
Shaina Ward (Special Bar No. A5502563)
Attorney
sward@fec.gov

[11] The authority that Rivera cites holds only that a plaintiff may not add a new *claim for relief* through summary judgment argument. (Mot. at 19-20 (citing *Moore v. Shands Jacksonville Med. Ctr.*, No. 3:09-cv-298, 2013 WL 11327134, at *24 n.43 (M.D. Fla. Oct. 18, 2013).) It does not suggest that the Court is limited to a damages amount specified in a plaintiff's complaint for a properly asserted claim.

Associate General Counsel
kdeeley@fec.gov

Greg J. Mueller (Special Bar No. A5502376)
Attorney
gmueller@fec.gov

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
1050 First Street, NE
Washington, D.C. 20463
(202) 694-1650

May 23, 2022

CERTIFICATE OF SERVICE

I, Shaina Ward, certify that on May 23, 2022, I electronically filed plaintiff Federal Election Commission's Opposition to Defendant's Motion to Alter or Amend or Relief from Judgment with the Clerk of the United States District Court for the Southern District of Florida by using the Court's CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Shaina Ward
Shaina Ward (Special Bar No. A5502563)
Attorney
sward@fec.gov