> percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

52 U.S.C.S. § 30109(6) (emphasis added). The lower civil penalty in Paragraph (B) applies unless the FEC establishes that the violation was "knowing and willful" in which case the higher civil penalties in Paragraph (C) apply. *See id.*

Paragraph (C) further increases the civil penalty for "knowing and willful violation[s]" of section 30122 (i.e., for contributions in the name of another). For such violations, FECA mandates a fine between 300% and 1000% of "the amount involved in the violation." *See id.* The 300-1000% provision was added to FECA in the 2002 McCain-Feingold amendments a/k/the Bipartisan Campaign Reform Act of 2002 ("BCRA").[5] A review of the Congressional Record surrounding the passage of the BCRA does not indicate how the language of the 300-1000% provision was created or what studies were performed to select these unprecedented percentages. A review of other civil penalties contained in state and federal statutes does not reflect another civil penalty that comes close to the magnitude of the 300-1000% provision. Further, neither the FECA nor its implementing regulations provide any guidance or standards for determining which percentage level to apply when setting a civil penalty for a knowing and willful violation of section 30122. Simply put, the 300%-1000% provision appears to authorize courts to impose the largest multiplier for any civil penalty on the books – and provides no instructions on how to apply it.

---

5. *See* Pub. L. 107-155, 116 Stat. 81, enacted Mar. 27, 2002; *Shays v. FEC*, 528 F.3d 914, 916-17 (DC Cir. 2008) ("Congress passed the McCain-Feingold Act, formally known as the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, in an effort to rid American politics of two perceived evils: the corrupting influence of large, unregulated donations called 'soft money,' and the use of 'issue ads' purportedly aimed at influencing people's policy views but actually directed at swaying their views of candidates. The Federal Election Commission promulgated regulations implementing the Act, but . . . we rejected several of them as either contrary to the Act or arbitrary and capricious, concluding that the Commission had largely disregarded the Act in an effort to preserve the pre-BCRA status quo.").

III. This Case

Before analyzing the amount of the civil penalty imposed in this case, Rivera notes that although he disputes the Court's summary judgment findings of fact and conclusions of law (e.g., whether there was a "knowing and voluntary violation", whether he made any in kind donations to the Sternad campaign, whether he instructed Alliegro to instruct Sternad to misrepresent in his reports, whether the conduct alleged is actually a violation of 52 U.S.C. § 30122, etc.), the analysis in this motion does not reargue these points because it would likely exceed the scope of permissible argument on a 59(e) or 60(b) motion. As the Court previously advised, relief on the underlying liability issues should be sought with the Court's brethren in Atlanta. *See* [DE 49 at 30]. Instead, Rivera confines his arguments to those related to reconsideration and remitting the historically high civil fine imposed upon him at summary judgment. Given the magnitude of the fine, the lack of standards contained in section 30109(6), the lack of an evidentiary hearing, the lack of evidence, and the Eleventh Circuit's recent decision in *Yates*, the Court should exercise its discretion to vacate the final judgment and the civil penalty, conduct an evidentiary hearing, and analyze the evidence under the Excessive Fines factors.

A. The FECA civil fine is at least partially punitive

In its summary judgment order, the Court expressed that "it is necessary for this Court to also bar [Rivera] from violating the statute" and "from engaging in similar unlawful conduct in the future" and that the Court's remedies would "do the trick" in "convincing Rivera" to "stop violating the law." *See* [DE 163 at 38]. The Court also expressed that the civil penalty would "vindicate the FEC's authority and strengthen its ability to enforce 52 U.S.C. § 30122." See [DE 163 at 37]. The Court's justifications reflect that the penalties imposed were at least partly penal in nature because they are grounded in the common law principles of punishment: general

deterrence, specific deterrence, incapacitation, and retribution. *See Yates*, 21 F.4th at 1325 and n.4 ("In the criminal law, district courts impose fines based on a set of statutory standards, located in 18 U.S.C. §§ 3553(a) and 3572.3 These standards are Congress's codification of the traditional purposes of sentencing: general deterrence, specific deterrence or incapacitation, and retribution.").

Other decisions applying the FECA civil penalties have referred to them as punitive in nature. *See e.g., FEC v. Craig for U.S. Senate*, 70 F. Supp. 3d 82, 88, 99 (D.D.C. 2014) (imposing a "penalty of $45,000, which the Court finds necessary and appropriate to **punish** defendants' misconduct and to **deter** future misconduct by others") ("[T]he FEC argues that a penalty is necessary to **deter** similar violations and to **punish** defendants, noting that the purpose of a civil penalty is to **punish** culpable individuals, not just to restore the status quo. FEC Reply at 13") (emphasis added); *Fed. Election Com. v. Furgatch*, 869 F.2d 1256, 1259 (9th Cir. 1989) ("The district court was free to conclude that the absence of good faith efforts by Furgatch to undo or cure his violations is indicative of the need for a large penalty to **deter** future wrongdoing.") (emphasis added); *FEC v. Latpac*, No. 1:21-cv-06095 (ALC) (SDA), 2022 U.S. Dist. LEXIS 61125, at *11 (S.D.N.Y. Mar. 31, 2022) ("[T]he Court finds that a civil penalty in the amount of $56,400 achieves the purposes of **punishment** and **deterrence**.") (emphasis added) (citing *New York v. United Parcel Serv., Inc*., 942 F.3d 554, 599 (2d Cir. 2019) (In general, civil penalties are designed to punish culpable individuals, deter future violations, and prevent the conduct's recurrence.")); *FEC v. O'Donnell*, No. 15-17-LPS, 2017 U.S. Dist. LEXIS 59524, at *5-6 (D. Del. Apr. 19, 2017) ("Civil penalties are generally intended to **punish culpable individuals**, not simply extract compensation or restore the status quo.") (quoting *Tull v. United States*, 481 U.S. 412, 422, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987)) ("FECA explicitly authorizes courts to impose civil

penalties" and the Court considers "the penalty's **deterrent** effect") (emphasis added); *FEC v. Am. Fed'n of State, Cty. & Mun. Empls.-P.E.O.P.L.E. Qualified*, Civil Action No. 88-3208 (RCL), 1991 U.S. Dist. LEXIS 15654, at *5 (D.D.C. Oct. 31, 1991) ("[D]efendants shall pay a civil penalty of $ 2,000 ($ 1,000 for each violation) because the public's interest will be served by **punishing** a violation of the plain language of the statute.") (emphasis added).

Because the civil penalties are at least partially punitive in nature, the Court must apply the Excessive Fines analysis of *Yates* to determine if the amount of the fine violates the Eighth Amendment. *See Yates*.

B. Section 30109(6) is unconstitutionally standardless

In *Yates*, Judge Tjoflat (concurring in part) contrasted the lack of standards for calculating civil penalties under the FCA with the specific standards created to calculate criminal fines under the sentencing guidelines. *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."). However, the "Opinion of the Court" did not decide that the FCA was facially unconstitutional for this reason because: (1) the appellant did not "base its Eighth Amendment challenge on the procedural claim that the FCA lacks standards"; and (2) the district court imposed the statutory minimum penalty and lacked authority to go below it absent a constitutional violation. Since the district court did not choose a penalty somewhere above the minimum, its discretion did not come into play. *See Yates*, 21 F.4th at 1316 at n.9.

Unlike the civil penalty at issue in *Yates*, this Court did not select the minimum penalty allowed under the FECA – it exercised its discretion to choose 700% which is closer to the maximum penalty. Accordingly, FECA's lack of standards is squarely at issue in this case. The

civil penalty provisions of section 30109(6) are facially unconstitutional because they provide no standards to guide the Court in selecting from 300-1000% as the correct percentage. In this case, neither the FEC nor the Court provide any specific explanation for why 700% was selected as the magic number for the record-breaking civil penalty imposed on Rivera.

C. The Court did not apply the *Yates* analysis

Obviously, the Court did not have the benefit of *Yates* at the time it imposed the civil penalty in this case because the Court's order was entered about ten months before the Eleventh Circuit published its decision in *Yates*. Accordingly, the Court relied on the *Furgatch* factors which, as shown above, can be traced back to the Eleventh Circuit's prior holding in *Danube Carpet* which no longer applies to punitive civil penalties after *Yates*. *See FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989); *United States v. Danube Carpet Mills, Inc.*, 737 F.2d 988, 993 (11th Cir. 1984)). Accordingly, the Court should reconsider its ruling under *Yates* and consider whether amount of the fine is "grossly disproportional to the gravity of a defendant's offense" based on: "(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." *See Yates*, 21 F.4th 1288 (citing *United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 (11th Cir. 2011)).

D. The fine is unconstitutionally excessive under *Yates*

Under the *Yates* test, the amount of the fine is grossly disproportionate to the alleged offense. First, it is not clear that Rivera is within the class of persons that sections 30109 and 30122 were principally directed. As the Supreme Court recently explained:

> The right to participate in democracy **through political contributions** is **protected** by the **First Amendment**, but that right is **not absolute**. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1,

> 26-27, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (*per curiam*). At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. *See*, *e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 749-750, 131 S. Ct. 2806, 2827, 180 L. Ed. 2d 664, 686 (2011).
>
> Many people might find those latter objectives attractive: They would be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition. See *Texas* v. *Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); *Snyder* v. *Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); *National Socialist Party of America* v. *Skokie*, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) (*per curiam*). Indeed, as we have emphasized, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971).

McCutcheon v. FEC, 572 U.S. 185, 191-92, 134 S. Ct. 1434, 1441 (2014). Thus, the analysis should start with a recognition of the basic premise that spending money in elections is generally a protected constitutional right under the First Amendment. Further, on the motion to dismiss FEC's amended complaint, the parties hotly debated whether the alleged conduct constituted a direct violation of 52 U.S.C. § 30122's prohibition on making contributions in the name of another. The FEC claimed that Rivera "made" contributions "in the name of" the candidate Lamar Sternad when Lamar Sternad falsely reported that some of the in-kind printing and shipping services his campaign received were paid for with a personal loan from Sternad to his own campaign. There was no allegation that Rivera falsely ascribed Sternad's or anyone else's name to his donations. Instead, the FEC claims that Rivera told Alliegro to instruct Sternad to make the false report and Sternad followed Rivera's orders. However, as the hearing transcript reflects, it is debatable whether these allegations state a violation of section 30122 which only prohibits "making" a donation in the name of another, "accepting" a donation in the name of another, or "allowing"

another person to make a donation in your name. *See* 52 U.S.C. § 30122. As the Court noted in its order dismissing the original complaint, FEC lacks authority under section 30122 to pursue claims against individuals who "help" or "aid and abet" violations of section 30122. See [DE 31] (citing *Federal Election Comm'n v. Swallow*, 304 F. Supp. 3d 1113, 1115 (D. Utah 2018). That's why FEC abandoned its original "participant" theory alleged in its original complaint and changed its factual allegations to claim that Rivera directly made a contribution in the name of another. *Compare* [DE 1] *with* [DE 41]. Because it is not obvious that Rivera is within the class of persons section 30122 is directed at, the first *Yates* factor weighs against applying 700% penalty multiplier based on the 300-1000% penalty enhancement for violations of 30122. *See* 52 U.S.C. § 30901(6).

Second, the Court did not consider compare any other statutory civil penalty regimes to the 300%-1000% provision at issue here. However, a review of federal and state statutes reveals that there is apparently no statute that provides an enhancement that requires anywhere near the minimum range required (300%) and the maximum range permitted (1000%) under section 30901(6). It appears to be an anomaly on the books and yet another arbitrary, capricious, and unconstitutional product of the 2002 McCain-Feingold amendments. Although misrepresenting the source of a campaign donation is arguably detrimental because it restricts information that would otherwise be public, it is hard to understand why Congress would impose civil penalties for such violations that far exceed those available for other offenses that actually enable the violator to profit by causing tangible harm to particular individuals and the government (e.g., insider trading, submitting fraudulent Medicare claims, violating FDA or EPA standards, etc.).

Lastly, other than generalized harm that is caused by violation of any law, the alleged violations at issue here were low on the harm scale. FEC doesn't allege that Rivera donated to the Sternad campaign as *quid pro quo* to obtain political favors from Sternad should he get elected.

Therefore, the traditional purpose of laws requiring public disclosure of campaign donations is not part of FEC's claim. Rather, FEC claims Rivera paid for print ads and campaign publications for Sternad (i.e., political junk mail). Other than cluttering the electorate's mailboxes, this is hardly the kind of in-kind donation that would severely harm the public. Also, Rivera did not win the election after all, and Joe Garcia – the opponent Rivera allegedly feared losing to – did win. So, Rivera did not benefit, and Garcia was not harmed by the alleged violations. "Admittedly, there is always harm to the public when [the Act] is violated." *FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 U.S. Dist. LEXIS 88139, at *20 (M.D. Fla. Nov. 30, 2007) (quoting *FEC v. American Fed'n of State, County and Municipal Employees- P.E.O.P.L.E. Qualified*, 1991 U.S. Dist. LEXIS 15654, 1991 WL 241892 (D.D.C. Oct. 31, 1991)). "Nonetheless, in this instance any injury to the public is remote and circumscribed." *Id.* (imposing civil penalties on defendants for "making, consenting to, and accepting in-kind corporate contributions; and for falsely reporting the sources of two of the loans and the dates of repayment of two others").

Thus, all three *Yates* factors weigh against imposing a substantial fine under the allegations and evidence in this case. Certainly, imposing the largest fine in FEC history on a non-corporate individual is not sustainable applying *Yates* to the allegations and evidence in this case.

E. Procedural problems with the fine

Furthermore, the Court imposed the massive fine on Rivera as a matter of law at summary judgment despite conflicting and inconclusive evidence without conducting a trial on liability or evidentiary hearing on the amount of the fine. *See Tull v. United States*, 481 U.S. 412, 422, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). And the amount FEC claimed at summary judgment was based on new allegations of additional FECA violations that were not alleged in its original or amended complaints and caused the fine to exceed the amounts alleged in FEC's complaints. *See Moore v.*

Shands Jacksonville Med. Ctr., No. 3:09-cv-298-J-34TEM, 2013 U.S. Dist. LEXIS 190745, at *83 n.43 (M.D. Fla. Oct. 18, 2013) ("A plaintiff may not amend [its] complaint through argument for or against summary judgment."). Also, in determining whether Rivera and the "ability to pay" a $465,000 civil penalty, the Court relied on stale information about Rivera's past net worth 7-years ago and unsubstantiated allegations about revenue allegedly paid to Rivera's business in the past.

Lastly, the Court took issue with Rivera's defense against FEC's charges and improperly used it against him as its primary consideration in its analysis of the severity of the penalty. *See* [DE 163 at 37-38] "First and foremost, as his filings in this case demonstrate, Rivera continues to refuse to take responsibility for his illegal conduct [and] continues to run for office."). Rivera was never charged or convicted of a crime related to the FEC's allegations and was entitled to exercise his constitutional right to run for office. He was also "entitled to have the complicated statutory and regulatory issues in this case determined by a court." *FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 U.S. Dist. LEXIS 88139, at *19-20 (M.D. Fla. Nov. 30, 2007) (citing *FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1059 (C.D. Cal. 1999) (denying the Commission's contention that the defendants' "determined resistance to conciliation" should result in a significant financial penalty).

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 **April 26, 2022**, a copy of this document as refiled was furnished by electronic filing with the Clerk of the Court via CM/ECF, to:

Greg J. Mueller FEDERAL ELECTION COMMISSION 1050 First Street, NE Washington, DC 20463 202-694-1650 gmueller@fec.gov *Counsel for Plaintiff FEC*	**Kevin Deeley** FEDERAL ELECTION COMMISSION 999 E. Street NW Washington, DC 20463 202-694-1650 kdeeley@fec.gov *Counsel for Plaintiff FEC*
Lisa J. Stevenson FEDERAL ELECTION COMMISSION 999 E. Street NW Washington, DC 20463 202-694-1650 lstevenson@fec.gov *Counsel for Plaintiff FEC*	**Harry J. Summers** FEDERAL ELECTION COMMISSION 999 E Street, NW Washington, DC 20463 202-694-1553 hsummers@fec.gov *Counsel for Plaintiff FEC*
Shaina Ward FEDERAL ELECTION COMMISSION 1050 First Street NE Washington, DC 20463 202-694-1566 sward@fec.gov *Counsel for Plaintiff FEC*	**Jeffrey David Feldman** TRAILBLAZER 1200 Brickell Avenue Penthouse 1900 Miami, FL 33131 305-222-7851 jfeldman@trailblazerlaw.com *Counsel for Defendant David Rivera*

Respectfully submitted,

/s/ Thomas L. Hunker
Thomas L. Hunker
Fla. Bar No. 38325
Sarah Hafeez
Fla. Bar No. 111518
HUNKER APPEALS
110 SE 6th Street, Suite 2330
Fort Lauderdale, FL 33301
877-841-8808
thomas.hunker@hunkerappeals.com
stefanie.eiermann@hunkerappeals.com
cyndy.wald@hunkerappeals.com
Counsel for Defendant David Rivera