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

FEDERAL ELECTION COMMISSION, Plaintiff, v. JEREMY JOHNSON, et al., Defendants.	Case No. 2:15-cv-00439-DB **OPPOSITION TO MOTION FOR PARTIAL FINAL JUDGMENT** District Judge Dee Benson

PLAINTIFF FEDERAL ELECTION COMMISSION'S OPPOSITION TO DEFENDANT JOHN SWALLOW'S MOTION FOR PARTIAL FINAL JUDGMENT

The Court should deny defendant John Swallow's motion for partial final judgment, or in the alternative enter partial final judgment with a modified injunction that only bars plaintiff Federal Election Commission ("FEC" or "Commission") from enforcing 11 C.F.R. § 110.4(b)(1)(iii) against Swallow. (*See* Swallow's Mot. for Partial Final J. (Docket No. 124); Mem. Decision & Order (Apr. 6, 2018) (Docket No. 120) ("April Order").) The April Order dismissed the Commission's claim that Swallow violated section 110.4(b)(1)(iii) and also included a permanent nationwide injunction against enforcement of the regulation, which prohibits knowingly helping or assisting in making a contribution in the name of another pursuant to 52 U.S.C. § 30122. (April Order at 10.) The FEC asserts two additional, still-

outstanding claims in this action against defendant Jeremy Johnson. (*See* FEC's Am. Compl. for Civil Penalty, Declaratory, Injunctive, and Other Appropriate Relief at 17 ("Compl.") (Docket No. 36).) Pursuant to Federal Rule of Civil Procedure 54(b), "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). In making this determination, the Court considers whether the order at issue is final and whether there is any just reason to delay entry of judgment. *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). Swallow's motion for partial final judgment, as currently framed, does not meet either of these standards.

First, the April Order is not final for purposes of Rule 54(b). The claim that the Order resolved was the only one made against Swallow, but it is factually and legally intertwined with the remaining claims against Johnson. In particular, the claims against the two defendants include related legal issues under 52 U.S.C. § 30122 and arise from the same factual predicate involving a conduit contribution scheme during the 2009-2010 federal election cycle. These overlapping issues would require the Tenth Circuit Court of Appeals to revisit the same questions if there are multiple appeals. Moreover, there would be a greater likelihood of redundant appeals if a final judgment entered now included the nationwide injunction granted in the April Order. The Commission has far stronger incentives to seek appellate review of an injunction barring any enforcement of a longstanding agency rule interpreting a key part of the primary statute that Congress directed the agency to enforce. And the deadline to file such an appeal would likely be far in advance of the resolution of the claims against Johnson, which are currently stayed in the midst of discovery. Thus, in light of the historic policy against piecemeal appeals preserved in Rule 54(b), Swallow's motion should be denied on that basis alone.

Second, Swallow's motion should be denied because he has failed to establish the absence of a just reason for delay. The Tenth Circuit has consistently held that "Rule 54(b) entries are not to be made routinely" and that "trial courts should be reluctant to enter Rule 54(b) orders" since the rule has a limited purpose of "provid[ing] recourse for litigants when dismissal of less than all their claims will create undue hardships." *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001) (citations and internal quotation marks omitted). Swallow's motion, however, does not articulate any hardship he would face as a result of a deferral of final judgment, which is unsurprising given that he is the prevailing party and the sole claim against him has already been dismissed. Yet his motion, if successful, would force the FEC to decide whether to seek appellate review before all the claims are final, which would unduly burden the FEC unless at a minimum the injunction is narrowed. Of course, there would be no hardship to Swallow from modifying the injunction to cover him alone; his answer did not even request any injunctive relief. (*See* Swallow's Answer to Amend. Compl. (Docket No. 45).)

In sum, judicial efficiency and equitable interests are better served by awaiting the entry of final judgment addressing all claims in the case, or by narrowing the scope of the nationwide injunction, so as to greatly reduce the risk of redundant appeals.

ARGUMENT

The Tenth Circuit has explained that certification under Rule 54(b) is only appropriate when a district court makes two specific determinations: (1) whether the order it is certifying is a final order, and (2) whether there is no just reason to delay review of the final order until it has conclusively ruled on all claims presented by all the parties to the case. *Okla. Tpk. Auth.*, 259 F.3d at 1242 (citing Fed. R. Civ. P. 54(b); *Curtiss–Wright Corp.*, 446 U.S. at 8). The district court should consider the following factors in making these determinations: "'whether the claims

under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [is] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.'" *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016) (quoting *Curtiss–Wright*, 446 U.S. at 8). In making these determinations, the district court should weigh the historic policy of preventing piecemeal appeals against potential inequities from delaying an appeal. *Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005) (citing *Curtiss–Wright*, 446 U.S. at 8).

I. THE APRIL ORDER IS NOT FINAL FOR THE PURPOSES OF RULE 54(B)

A. The Claim Resolved in the April Order Is Not Sufficiently Distinct and Separable from the FEC's Remaining Claims Against Johnson

The Court's April Order is not final for purposes of Rule 54(b) unless the claim it resolved is "distinct and separable" from the claims left unresolved. *Okla. Tpk. Auth.*, 259 F.3d at 1243. In determining whether claims are separable, the Court should consider "whether the allegedly separate claims turn on the same factual questions, whether they involve common legal issues, and whether separate recovery is possible." *Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005) (citing James Wm. Moore, et al., Moore's Fed. Prac. 3d § 202.06[2] (3d ed. 1999)).

Here, the claim resolved in the April Order is not sufficiently distinct and separable. First, both the resolved and pending claims in this case are based on the same core factual predicate: the conduit contribution scheme in which both Swallow and Johnson participated during the 2009-2010 election cycle. (*See* Compl. (Docket No. 36).) The FEC alleges that Swallow "caused, helped, and assisted Johnson to advance or reimburse the contributions of straw donors to a candidate for United States Senate." (*Id.* ¶ 1.) Swallow argues there is no overlap because the allegations against him are purportedly based on his political speech,

whereas the allegations against Johnson are purportedly based on financial transactions. (*See* Swallow's Mot. for Partial Final J. at 3 n.2 (Docket No. 124).) But Swallow's characterization ignores the common set of facts underlying all of the claims.

Indeed, many of the Commission's factual allegations regarding Swallow remain relevant in the unresolved claims against Johnson, from the initiation to the execution of the conduit contribution scheme. (*See, e.g.*, Compl. ¶¶ 48-49 (alleging that Swallow alerted Johnson when some contribution checks from his straw donors to Mike Lee's Senate campaign bounced); *see also* Pl. FEC's Mem. in Opp'n to Def. John Swallow's Mots. to Dismiss and for J. on the Pleadings and in Supp. of Cross-Mot. for Partial J. on the Pleadings at x-xiv (Docket No. 103) (summarizing the complaint's common factual allegations against both defendants).) The existence of such intertwined factual issues counsels against entering final judgment to avoid the possibility of redundant appeals. *See Diaz v. King*, No. CV 14-1086 KG/SCY, 2016 WL 8925344, at *4 (D.N.M. Jan. 13, 2016); *Albright v. Attorney's Title Ins. Fund*, No. 2:03CV00517, 2008 WL 376251, at *2–3 (D. Utah Feb. 11, 2008) (Benson, J.); 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 3d § 2656 (2005) (a close relationship between the fact patterns supporting claims "means that the policy against piecemeal review with the attendant risk of repeated inquiry into the same basic facts should take precedence over the desirability of permitting an immediate appeal upon termination of a separable unit of the case"). Moreover, entering partial final judgment is also inappropriate where, as here, factual overlap exists in a dismissed secondary liability claim and a still-pending primary liability claim. *Medved v. DeAtley*, No. 12-CV-03034-PAB-MEH, 2014 WL 4437272,

at *2–3 (D. Colo. Sept. 9, 2014).[1]

Second, the resolved claim is not final because the FEC's pending claims against Johnson are legally intertwined with that claim. The Commission's claims against both defendants arise from violation of the same statute, 52 U.S.C. § 30122, although Johnson also faces liability under another provision of the statute. Moreover, the Commission's claim against Swallow is a claim for secondary liability, which by its nature depends on the primary liability of Johnson. *Medved*, 2014 WL 4437272, at *2–3 (denying 54(b) motion because disposal of the claims against defendants alleged to have provided substantial assistance to a defendant with outstanding claims did not "make the [dismissed] claims themselves any less factually or legally connected to the claims that remain").

Such legal and factual overlap would undermine judicial efficiency by requiring the appellate court to familiarize itself with the same issues in a later appeal. Thus, the Rule 54(b) certification requested here would contravene the historic policy against piecemeal appeals.

B. Entering Partial Final Judgment on the Nationwide Injunction Would Increase the Possibility of Redundant Appeals

The April Order includes a broad injunction against the Commission's enforcement of 11 C.F.R. § 110.4(b)(1)(iii) that is not limited to enforcement against Swallow or to a specified

[1] Contrary to Swallow's argument, the appellate court's review would not be limited to applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). (Swallow's Mot. for Partial Final J. at 4.) On appeal the Tenth Circuit would have jurisdiction to affirm the lower court's decision on "any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1149–50 (10th Cir. 2001) (citation omitted). Here, the Tenth Circuit may review Swallow's unresolved constitutional and legal sufficiency challenges. (*See* Swallow's Mot. to Dismiss, Mot. for J. on the Pleadings, and Mem. in Support (Docket No. 98).) The court's analysis of these issues would include consideration of the allegations regarding statements by Swallow, which are plainly involved in the FEC's case against Johnson. *See supra* pp. 4-5.

jurisdiction. (*See* April Order at 4.) Entering partial final judgment on this order would substantially increase the possibility of multiple appeals involving many of the same issues, as explained above, because the Commission has stronger incentives to seek appellate review of a nationwide injunction.[2] Therefore, the Court should not enter final judgment on the April Order, or alternatively should enter judgment but narrow the injunction's scope solely to this litigation to greatly reduce the need for appeal of the judgment.

Equitable principles support narrowing the scope of the injunctive relief to enforcement against Swallow.[3] The extraordinary relief of an injunction "should be no more burdensome . . . than necessary to provide complete relief" to the prevailing party. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Guided by this principle, in *Virginia Society for Human Life, Inc. v. FEC*, the Fourth Circuit held that the district court abused its discretion when it issued a nationwide injunction against the FEC's enforcement of a regulation. 263 F.3d 379, 393 (4th Cir. 2001). The court explained that the nationwide injunction was "broader than necessary to afford full relief" to the prevailing party and "encroache[d] on the ability of other circuits to consider the constitutionality" of the regulation. *Id.*; *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring) (doubting the authority of district courts to enter "universal

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[2] The Commission notes that it has not yet decided whether it will take an appeal on this issue, but that a nationwide injunction presents immediate and substantial burdens because it constrains the FEC's enforcement of the regulation in pending and future cases outside of this jurisdiction. *See FEC v. Rivera*, No. 17-22643 (S.D. Fla. filed July 14, 2017) (alleging claims based in part on defendant's violation of section 110.4(b)(1)(iii)). As explained herein, the Commission's objections are greatly reduced by entry of a partial final judgment with a modified injunction that bars it from enforcing 11 C.F.R.§ 110.4(b)(1)(iii) against Swallow alone.

[3] Under Rule 54(b), the Court's interlocutory order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Whether to revise an interlocutory order falls within the Court's sound discretion. *See Trujillo v. Bd. of Educ. of Albuquerque Pub. Schls.*, 212 F. App'x 760, 765 (10th Cir. 2007) (unpublished) ("A district court has discretion to revise interlocutory orders prior to entry of final judgment.") (citing *Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005)).

injunctions" against an Executive Branch law or policy); *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) (limiting scope of preliminary injunction against regulation alleged to be without statutory authority to cover "only the named plaintiffs"). The injunction here is similarly broader than necessary, for three reasons.

First, enjoining the Commission from enforcing 11 C.F.R. § 110.4(b)(1)(iii) against Swallow alone would provide him with complete relief. Swallow's answer did not request any injunction or assert any counterclaim, and he would not be prejudiced should the Court narrow the geographic reach of the injunction. Swallow raised his argument regarding the invalidity of the Commission's regulation only in defense to an enforcement action. This situation is thus akin to that of a criminal defendant who successfully claims that the statute he is charged under is facially unconstitutional. That criminal defendant's ability to obtain a reversal of his conviction is sufficient to afford him complete relief, and he is generally ineligible to obtain an order preventing the government from prosecuting others. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (reversing conviction); *cf. Younger v. Harris*, 401 U.S. 37, 46 (1971) (holding that the ability of criminal defendant to raise claim of unconstitutionality in state court prosecution precludes finding of irreparable injury necessary to support federal injunction). However, barring the FEC's pending and future enforcement of a regulation on the basis of a single party asserting a defense in an enforcement action is unwarranted, particularly where that party did not request injunctive relief. While the FEC's statutory authority to civilly enforce the Federal Election Campaign Act is not geographically limited, this case does not involve the typical circumstances where concerns of nationwide uniformity support nationwide relief. *Compare Hospice of N.M., LLC v. Sebelius*, 691 F. Supp. 2d 1275, 1295 (D.N.M. 2010) (declining to impose a nationwide injunction to address a "clearly" nationwide problem because

a broad injunction would have been inappropriate where plaintiffs before the court were not nationwide), *aff'd*, 435 F. App'x 749 (10th Cir. 2011) (unpublished), *with Richmond Tenants Org. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992) (finding that a nationwide injunction prohibiting eviction of public housing tenants was appropriate because plaintiffs were tenants from across the country).

Second, a nationwide injunction is a disfavored remedy where, as here, a court is deciding a regulatory challenge that raises important legal questions, including the meaning of an Act of Congress, that may benefit from development in multiple decisions by other courts of appeals. The Court's issuance of a nationwide injunction here largely forecloses opportunities for judicial evaluation in other fora and for the potential adoption of different judicial perspectives on the issues this Court decided. *See Va. Soc'y for Human Life, Inc.*, 263 F.3d at 394 (overturning a district court's imposition of a nationwide injunction that would impose the court's "view of the law on all the other circuits"). Indeed, for this very reason, the Supreme Court has instructed that estopping the government from challenging an adverse decision in other circuits "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). The Court noted that "[a]llowing only one final adjudication would deprive [the] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before [the] Court grants certiorari." *Id.*

The April Order decided two important legal questions beyond the validity of 11 C.F.R. § 110.4(b)(1)(iii): whether statutory language in 52 U.S.C. § 30122 unambiguously forecloses secondary liability and whether the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) controls the availability of secondary

liability in the regulatory enforcement setting. The Court answered both questions in the affirmative, and its ruling on the second question applied a decades-old judicial precedent in a context not yet considered by most courts. Granting a nationwide injunction, however, greatly reduced the possibility of circuit disagreements that could lead to Supreme Court review on these questions, as encouraged in *Mendoza*.

Third, the principle of comity dictates narrowing the scope of the nationwide injunction in this particular case. *See United States v. AMC Ent., Inc.*, 549 F.3d 760, 770 (9th Cir. 2008) (noting that "when exercising its equitable powers to issue an injunction, a court must be mindful of any effect its decision might have outside its jurisdiction"). The Commission has pending claims in the Southern District of Florida that are based in part on a violation of 11 C.F.R. § 110.4(b)(1)(iii). *See FEC v. Rivera*, No. 17-22643 (S.D. Fla.). The injunctive relief in the April Order implicates the sovereignty of the Southern District of Florida by inhibiting the Commission from pursuing liability based on the regulation, including in connection with a pending motion to dismiss that was fully briefed before the April Order was entered. The interest in comity thus further weighs against the nationwide injunction.

The foregoing considerations underline the importance of the FEC's interest in seeking appellate review if a final judgment is entered on the nationwide injunction. To avoid the accompanying heightened possibility of redundant appeals, the Court should deny Swallow's motion or narrow the injunction's scope to enforcement against Swallow alone.

II. THERE IS JUST REASON FOR DELAYING ENTRY OF THE FINAL JUDGMENT THAT SWALLOW NOW REQUESTS

Swallow's motion should also be denied because he has failed to show that there is no just reason to delay appellate review as things stand now. While there is no precise test for determining whether just cause exists, courts generally weigh "Rule 54(b)'s policy of preventing

piecemeal appeals against the hardship or injustice that might be inflicted on a litigant because of the delay." *United Bank of Pueblo v. Hartford Acc. & Indem. Co.*, 529 F.2d 490, 492 (10th Cir. 1976). Just cause for delay exists here for the following three reasons.

First, Swallow has not identified any hardship he faces from remaining in the case. Notably, even where a court determines that there is "final judgment," the party moving for certification "must at least make a showing that delay of appellate review would create a hardship." *R. M-G for A.R. v. Las Vegas City Sch.*, No. CV 13-0350 KBM/KK, 2016 WL 10592142, at *4 (D.N.M. Feb. 25, 2016); *see also Diaz*, 2016 WL 8925344, at *4 (finding just cause for delay because plaintiff did not identify undue hardship or special circumstances justifying an immediate appeal). Swallow has failed to articulate a hardship. And his generalized assertions that this case "gone on quite long enough" and that remaining claims "may not be resolved for some time" are insufficient. (Swallow's Mot. for Partial Final J. at 5-6.) In fact, courts have rejected claims of purported hardship in multi-party cases where all claims against a defendant seeking Rule 54(b) certification are dismissed. *See, e.g., U.S. ex rel. Fent v. L-3 Commc'ns Aero Tech LLC*, No. 05-CV-0265-CVE-SAJ, 2008 WL 697302, at *2–3 (N.D. Okla. Mar. 12, 2008) (finding no basis for defendant's speculation that it would face hardship from the "expense and distraction" of participating in discovery where it had been formally terminated as a party). Swallow has been dismissed as a party and the docket reflects his dismissal. He thus faces no hardship from awaiting final resolution of the remaining claims. *See id.*

Second, because Swallow is the prevailing party, his motion is at odds with the purpose of the Federal Rules of Civil Procedure 54(b). *See, e.g., Onyx Properties LLC v. Bd. of Cty. Comm'rs of Elbert Cty.*, 916 F. Supp. 2d 1191, 1210 (D. Colo. 2012). "Rule 54(b) orders are the

exception, usually entered at the request of the losing party" and should not be entered "unless the losing party requests it." *Exchange Nat'l Bank of Chicago v. Daniels*, 763 F.2d 286, 291 (7th Cir. 1985). In *Onyx Properties*, the prevailing party sought "to force the losing party to seek (or not seek) appellate relief," arguing that it should not have to wait until the final resolution of all remaining claims, which could be several years, to find out if the losing party intended to appeal the pertinent decision. 916 F. Supp. 2d at 1211. The district court denied the Rule 54(b) motion, finding that the prevailing party would not endure any hardship from the delay and that in any event, such equitable interest "does not outweigh Rule 54(b)'s policy of preventing piecemeal appeals." *Id.*; *see also Patriot Mfg. LLC v. Hartwig, Inc.*, No. 10-1206-EFM-KGG, 2014 WL 4538059, at *2 (D. Kan. Sept. 11, 2014) (denying Rule 54(b) certification where the losing party was not seeking immediate appeal and expressed a willingness to wait). This Court should similarly reject Swallow's attempt to invert the purpose of Rule 54(b) "from one of enhancing the appellate rights of a losing party . . . to one in which a prevailing party could prematurely force an appeal of part of a case by a losing party, who must comply with timeliness requirements for exercising appellate rights." *Stewart v. Gates*, 277 F.R.D. 33, 36 (D.D.C. 2011).

Finally, the FEC faces a substantial burden if the Court grants Swallow's motion as it is framed. As discussed *supra*, the inclusion of the nationwide injunction significantly increases the incentives for the Commission to appeal. An appeal at this stage would require the Commission to devote its limited resources to both the appellate proceedings and to litigating the

unresolved claims in this Court.[4] Therefore, the Court should narrow the scope of the injunction to alleviate the burden on the FEC — the losing party on the relevant issue whose interests Rule 54(b) is generally intended to protect.

CONCLUSION

For the foregoing reasons, the Court should deny defendant John Swallow's motion for partial final judgment, or in the alternative enter final judgment with a modified injunction limited to enjoining the FEC from enforcing 11 C.F.R. § 110.4(b)(1)(iii) against Swallow alone.[5]

Respectfully submitted,

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[4] Swallow argues that the Commission's recent submission of a joint stipulation to stay the proceedings on the remaining claims without consulting Swallow's counsel and without including Swallow in the case caption shows that "Commission acts as though the case against Mr. Swallow is complete." (Swallow's Mot. for Partial Final J. at 5-6.) As an initial matter, the FEC's actions are entirely consistent with the court's dismissal of Swallow as a party, as reflected on the docket sheet. Moreover, the fact that counsel for the remaining parties did not contact Swallow's counsel to discuss the joint stipulation actually demonstrates that Swallow faces no burden from remaining in the case. And in any event, the filing of the joint stipulation has no bearing on Swallow's burden to establish hardship.

[5] To the extent that a motion for reconsideration would be an appropriate mechanism for the latter course, the standards for such reconsideration pursuant to Federal Rule 60(b) are met in this case, and in any event the Court has authority to modify its April Order at any time prior to judgment under Rule 54(b), as explained *supra* p. 7 n.3.

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2018, I electronically filed plaintiff Federal Election Commission's Opposition to Defendant John Swallow's Motion for Partial Final Judgment with the Clerk of the United States District Court for the District of Utah by using the Court's CM/ECF system, which sent notification of such filing to the following:

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