**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| UNITED STATES OF AMERICA | § | |
| v. | § | Criminal Case No. 2:17-cr-00563-JD |
| KENNETH SMUKLER, | § | |
| Defendant. | § | |

**MEMORANDUM IN SUPPORT OF DEFENDANT KENNETH SMUKLER'S MOTION TO DISMISS COUNTS I–VII AND IX–X OF THE SUPERSEDING INDICTMENT FOR FAILURE TO ALLEGE "CONTRIBUTIONS" UNDER FECA**

The Superseding Indictment contains two groups of charges. Counts One through Five charge Kenneth Smukler with a variety of election-law offenses stemming from the 2012 reelection campaign of Congressman Robert Brady ("Brady Charges"). Counts Six through Eleven charge Mr. Smukler with election-law offenses arising from the 2014 congressional campaign of Marjorie Margolies ("Margolies Charges").[1] All of the Brady Charges, and Counts Six, Seven, Nine, and Ten of the Margolies Charges, rely on the premise that certain payments constituted "contributions" within the meaning of the Federal Election Campaign Act ("FECA" or "the Election Act"), 52 U.S.C. §§ 30101–46.

*Brady Charges.* Even taking all of the allegations in the Superseding Indictment as true, the payments at issue in the Brady Charges were not "contributions" as a matter of law because: (1) they were neither received by the Jimmie Moore for Congress campaign ("Moore campaign") nor did they purchase assets or services that belonged to the Moore campaign; and (2) the

[1] Congressman Brady and Ms. Margolies are referenced in the Superseding Indictment as "Candidate A" and "Candidate C," respectively.

payments were not made "for the purpose of influencing any election." 52 U.S.C. § 30101(8)(A)(i) (defining "contribution" under FECA).

*Margolies Charges.* Counts Six, Seven, Nine, and Ten of the Margolies Charges must be dismissed for two separate and independent reasons. First, the payments at issue in those Charges were not "contributions" because it is clear on the face of the Superseding Indictment that they were not made "for the purpose of influencing any election." *Id.* Second, in alleging that the payments at issue in the Margolies Charges constituted "contributions," the government is relying on a broad new interpretation of the definition of a "contribution" that has never been adopted by the Federal Election Commission ("FEC"). Indeed, the FEC has specifically said that the feature of vendor refunds that the government is primarily relying on in this case does not convert such refunds into "contributions." Accordingly, all of the Brady Charges and Counts Six, Seven, Nine, and Ten of the Margolies Charges fail to state an offense and must be dismissed. Fed. R. Crim. P. 12(b)(3)(B)(v).

## I. BACKGROUND

### A. The Brady Charges

The Brady Charges in the Superseding Indictment center on the government's allegation that Democratic Congressman Robert Brady paid $90,000 to Jimmie Moore, his challenger in the 2012 Democratic primary, "in exchange for Moore's agreement to withdraw from the primary election." Superseding Indictment ("Indictment"), ECF 62, Count I ¶ 16(a). Mr. Moore dropped out of the primary on February 29, 2012, *id.* ¶ 16(c), and the primary election took place in April 2012 without him.[2]

[2] The Court may take judicial notice of the fact that the 2012 Democratic congressional primary occurred on April 24, 2012.

According to the Superseding Indictment, the Brady campaign subsequently made three payments in connection with the agreement: two payments purportedly in exchange for a poll, and a third payment purportedly in exchange for consulting services to be performed by Carolyn Cavaness, Mr. Moore's former campaign staffer. *Id.* ¶ 16(f); *see also id.* ¶ 5 (describing Ms. Cavaness's role).[3] Jimmie Moore had purchased the poll in early 2011, before announcing his candidacy, as a means of "testing the waters." Ex. 1 at 23 (Jimmie Moore for Congress, July 2011 Quarterly FEC Report);[4] *see also* 11 C.F.R. § 100.72(a) (describing permissible activities by a prospective candidate who is "testing the waters" for a potential campaign, including "conducting a poll"). Once he formed his campaign committee and began filing reports with the FEC, Mr. Moore reported the money that he had previously spent on the poll as a "loan" from himself to the campaign, rather than as a personal contribution to the campaign. *See* Ex. 1 at 27–29. That designation meant that Mr. Moore continued to hold title to the poll and was entitled to receive it back from the campaign upon the campaign's termination. *See* 11 C.F.R. § 116.12(a).

According to the Superseding Indictment, the Brady campaign made two payments purportedly in exchange for the poll: one on June 11, 2012, and the other on July 10, 2012. Indictment, Count I ¶¶ 16(*l*), (r). The Brady campaign allegedly sent checks on those dates to "VLDS," a company owned by Mr. Smukler, *id.* ¶ 6, and shortly after receiving those two checks from the Brady campaign, VLDS allegedly sent checks for matching amounts to Ms. Cavaness. *Id.* ¶¶ 16(m), (s). The payment for "consulting services" allegedly occurred on August 23, 2012. *Id.* ¶ 16(x). On that date, the Brady campaign allegedly sent a check to "D. Jones & Associates,"

[3] The Superseding Indictment speaks of "consulting services" generally and does not specify that the consulting services were purportedly to be performed by Ms. Cavaness. *See, e.g.*, Indictment, Count I ¶ 15(c). We assume that the government means to allege that the consulting services were purportedly to be performed by Ms. Cavaness because later in the Superseding Indictment, the government alleges that, ultimately, "neither Cavaness nor [her company] did any work of any kind" for the Brady campaign. *Id.* ¶ 16(y).

[4] The court may take judicial notice of information that, like an FEC report, is "publicly available on government websites." *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017).

*id.*, a company owned by (former co-Defendant) D.A. Jones, *id.* ¶ 7, and D. Jones & Associates sent a check for a matching amount to a company owned by Ms. Cavaness shortly thereafter. *Id.* ¶ 16(y).

There is no allegation in the Superseding Indictment that any of the three payments was ever received by the Moore campaign. To the contrary, the government specifically alleges that Ms. Cavaness used $21,000 of the money to pay third-party vendors, *id.* ¶ 16(bb), paid $19,500 of the money to Mr. Moore directly, *id.* ¶ 16(cc), and kept the remainder in her own personal bank account. *Id.* ¶ 16(dd). The Moore campaign subsequently filed reports with the FEC in which it allegedly continued to report outstanding debts owed to Mr. Moore, Ms. Cavaness, and to various third parties exactly as they had appeared on previous FEC reports. *Id.* ¶¶ 16(ee)–(ff).

The Superseding Indictment charges Mr. Smukler with five offenses related to the Brady campaign, each of which presupposes that the three payments described above were "contributions" to the Moore campaign. Count Two charges Mr. Smukler with willfully causing the Moore campaign to accept excessive campaign contributions. Indictment, Count II ¶ 2. Counts Three, Four, and Five charge Mr. Smukler with willfully causing the Brady and Moore campaigns to file false FEC reports either by mischaracterizing payments "that were in fact contributions" to the Moore campaign, *id.* Count III ¶ 2, *id.* Count V ¶ 2, or by failing to report those "contributions" altogether, *id.* Count IV ¶ 2, *id.* Count V ¶ 2. And Count One charges that Mr. Smukler conspired with others to accomplish each of those unlawful ends. *Id.* Count I ¶¶ 11(a)–(c).

**B. The Margolies Charges**

The Margolies Charges arise from several payments received by Marjorie 2014, the congressional campaign committee of Marjorie Margolies. According to the Superseding Indictment, Mr. Smukler worked as a "political analyst and consultant" for the Margolies

campaign. *Id.* Count I ¶ 6. Two companies that Mr. Smukler owned and operated, InfoVoter Technologies, Inc. ("InfoVoter") and Black and Blue Media, Inc. ("Black and Blue"), received payments totaling $210,750 from the Margolies campaign in exchange for political campaign services related to the 2014 primary election. *Id.*; *see also id.* Count VI ¶ 9(a). Of that amount, InfoVoter and Black and Blue are alleged to have spent $99,951 on expenses associated with the 2014 primary campaign. *Id.* ¶ 9(b).

On April 24, 2014, during the primary campaign, another candidate, Daylin Leach, filed a complaint with the FEC against Marjorie 2014, Mr. Smukler, and others, alleging that it had been spending funds on the primary that had been raised for the general election, as shown by the campaign maintaining less cash on hand than its net general election funds. *See id.* Count VI ¶¶ 3, 7; *see also* Ex. 2 (Leach Complaint). On May 5, 2014, Mr. Smukler repaid $78,750 from Black and Blue to the Margolies campaign and instructed the treasurer to use that money for advertising. Indictment, Count VI ¶ 9(f), (d). According to the Superseding Indictment, significantly more than $78,750 of the money that Mr. Smukler's companies had received from the campaign remained unspent at the time of the payment. *See id.* ¶ 9(a)–(b) (explaining that Mr. Smukler's companies had been paid $210,750 and had spent $99,951 of that amount). Nonetheless, the government contends that the $78,750 was not initially sitting in the Black and Blue bank account, but rather was placed there by Mr. Smukler through a wire from his personal brokerage account shortly before Black and Blue made the payment to the Margolies campaign. *Id.* ¶ 9(e)–(f). Two days after the payment from Black and Blue to the Margolies campaign, the government alleges that Mr. Smukler received a payment of $75,000 in his personal brokerage account from "Person 1." *Id.* ¶ 9(g).

Ms. Margolies subsequently lost the primary election, *id.* ¶ 9(*i*), and as a result, the campaign was required to refund all general election contributions to the original contributors. *See* 11 C.F.R. § 102.9(e)(3). In early July 2014, the campaign's treasurer, Jennifer May, informed Mr. Smukler that the campaign did not have sufficient funds to refund general election contributions because the campaign had spent money raised for the general election during the primary. *Id.* ¶ 9(*i*). This circumstance allegedly occurred because Mr. Smukler had instructed Ms. May, while the primary campaign was still ongoing, to keep spending money. *Id.* ¶ 9(c). Mr. Smukler replied to Ms. May's email on July 9, 2014, indicating that the campaign's general election funds would be "refunded by [I]nfo[V]oter to the campaign." *Id.* ¶ 9(j) (alterations in original). On July 14, 2014, Mr. Smukler wired $150,000 to the campaign's bank account – $40,000 from Black and Blue and $110,000 from InfoVoter. *Id.* ¶ 9(n)–(*o*). The government alleges that this money was not sitting in the InfoVoter and Black and Blue bank accounts, but rather was placed there by Mr. Smukler around the same time that he received a payment of $150,000 from "Person 2." *Id.* ¶ 9(k)–(m).

On March 4, 2015, the FEC wrote to the Margolies campaign regarding the $110,000 payment from InfoVoter, noting that "[t]he refund(s) exceeded the payments made to the vendor, 'Info Voter Technologies, Inc.' by $18,000." Ex. 3 at 1 (FEC Request for Additional Information); *see also* Indictment, Count VI ¶ 9(t).[5] The FEC noted that if the campaign "received an amount greater than what was paid," the excess might constitute a campaign contribution. Ex. 3 at 1. The FEC instructed the campaign to "take and report corrective action." *Id.* According to the Superseding Indictment, Mr. Smukler instructed Ms. Margolies to transfer $23,750 from her personal bank account to the campaign's bank account in June 2015 so

[5] Mr. Smukler's companies had received $210,750 from the Margolies campaign, *see* Indictment, Count VI ¶ 9(a), and had repaid a total of $228,750 to the campaign across three payments – one of $78,750, one of $40,000, and one of $110,000. *See id. Id.* ¶¶ 9(f), (n)–(*o*).

that the campaign could repay InfoVoter the $18,000 excess refund. Indictment, Count VI ¶¶ 9(t), (v). The government alleges that Mr. Smukler sent a check for $25,000 from Black and Blue to Ms. Margolies in order to fund this transfer. *Id.* ¶¶ 9(u)–(v). The Margolies campaign returned the excess refund to InfoVoter. *Id.* ¶ 9(v); *see also* Ex. 4 (FEC Settlement Agreement) (noting the return of the $18,000 and deeming the matter resolved).

The Superseding Indictment charges Mr. Smukler with six criminal offenses related to the Margolies campaign, of which four – Counts Six, Seven, Nine, and Ten – depend on the premise that the payments to the campaign described above were "contributions." Counts Six, Seven, and Ten invoke liability based on the three repayments from Mr. Smukler's companies to the Margolies campaign – the $78,750 repayment from Black and Blue on May 5, 2014, the $40,000 repayment from Black and Blue on July 14, 2014, and the $110,000 repayment from InfoVoter on July 14, 2014. *See id.* Count VI ¶ 2; Count VII ¶ 2; Count X ¶ 2. Count Six contends that these payments were falsely reported to the FEC because they were actually "contributions," Count Seven contends that these repayments were unlawful "contributions" in violation of 52 U.S.C. § 30116(f), and Count Ten contends that the Margolies campaign reported these repayments to the FEC in a manner that violated the reporting requirements for "contributions" under 52 U.S.C. § 30104. Count Nine contends that the payment of $23,750 from Ms. Margolies to her campaign committee in June 2015 constituted a "contribution" in the name of another in violation of 52 U.S.C. § 30122.[6]

## II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 12, a defendant may move to dismiss an indictment on the grounds that it "fail[s] to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). In

[6] Count Eight likewise charges Mr. Smukler with causing a "contribution" in the name of another, Indictment, Count VIII ¶ 2, but the arguments set forth in this motion do not implicate the payment at issue in Count Eight.

evaluating whether an indictment states an offense, a court "need not blindly accept a recitation in general terms of the elements of the offense." *Huet*, 665 F.3d at 595. Instead, Rule 12 "allows a district court to review the sufficiency of the government's pleadings to ensure that legally deficient charges do not go to a jury." *Id.* (internal quotation marks, citation, and alterations omitted). A court's task in adjudicating a Rule 12 motion is to examine the factual allegations in the indictment and "determin[e] whether, assuming all of those facts as true, a jury could find that the defendant committed the offense for which he was charged." *Id.* at 596. "[I]f the specific facts that are alleged" in an indictment "fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation, the indictment fails to state an offense." *Id.* at 595 (internal quotation marks and citation omitted).

## III. THE BRADY CHARGES MUST BE DISMISSED

Each and every count in the Brady Charges is premised on the misconception that the three payments described in relation to those Charges were "contributions to the Jimmie Moore for Congress campaign." Indictment, Count II ¶ 2; *see also id.* Count I ¶ 11; *id.* Count III ¶ 2; *id.* Count IV ¶ 2; *id.* Count V ¶ 2. In fact, as a matter of law, none of those three payments was a contribution to the Moore campaign. Accordingly, all five counts in the Superseding Indictment relating to the Brady Charges (Counts One through Five) must be dismissed under Rule 12 for failure to state an offense.

### A. The payments described in the Brady Charges were not contributions to the Moore campaign because the Moore campaign neither received them nor owned the assets and services that the payments purchased.

Even if all of the factual allegations in the Superseding Indictment were true, those allegations would not support the conclusion that the three payments described in the Brady Charges – two payments for a poll and one payment for consulting services – were contributions to the Moore campaign.

First, there is no allegation that the Moore campaign ever received any of the payments described in the Brady Charges. Indeed, the government has alleged just the opposite: that the payments were routed to Mr. Moore personally, to Ms. Cavaness, and to third-party vendors. *Id.* Count I ¶¶ 16(bb)–(dd). The Moore campaign continued to report debts to Mr. Moore, Ms. Cavaness, and to the vendors, *id.* ¶¶ 16(ee)–(ff), and each continued to have an arguable legal right to have the debt repaid by the campaign. *See, e.g.*, 11 C.F.R. § 116.6(b) (conferring right on a campaign employee to whom the campaign owes a debt for services rendered to be repaid in accordance with that debt). Under these circumstances, the allegations in the Superseding Indictment, even if true, do not support the conclusion that the three payments were contributions to the Moore campaign.[7]

Second, the Moore campaign did not own either the poll or the right to Ms. Cavaness's ongoing services as a consultant. Once the Moore campaign terminated, Ms. Cavaness clearly maintained the right to sell her consulting services to other campaigns without reporting any resulting personal earnings as contributions to the Moore campaign. Indeed, it is commonplace for employees of losing primary campaigns to be hired by the winning campaign, whether as employees or as independent consultants. And the poll belonged to Mr. Moore personally, not to the Moore campaign, as the Superseding Indictment acknowledges. *See* Indictment, Count I ¶ 16(*i*) (noting that "the poll in question was owned by Moore"). Mr. Moore purchased the poll before forming his campaign, *see* Ex. 1 at 23, reported the payments he made for the poll as "loans" to the campaign rather than as contributions, *id.* at 27–29, and retained every right to have the poll returned to him once the campaign terminated. *See* 11 C.F.R. § 116.12(a). The poll was no different from a physical asset—like a car—that a candidate purchases while testing

[7] Even if the payments to the third-party vendors could be characterized as contributions to the Moore campaign, those payments totaled only $21,000, *see* Indictment, Count I ¶ 16(bb), less than the $25,000 threshold for the crimes charged in the Superseding Indictment. *See* 52 U.S.C. § 30109(d)(1)(A)(i).

the waters, loans to the campaign while the campaign is ongoing, and then retrieves once the campaign terminates. Just as with the car example, once the campaign was over, Mr. Moore was free to sell the poll that he "owned," Indictment, Count I ¶ 16(*i*), without the proceeds constituting a "contribution" to his terminated campaign.

Because the Superseding Indictment does not allege that the Moore campaign received the three payments or that the Moore campaign had ownership rights over the poll or Ms. Cavaness's consulting services, the allegations in the Superseding Indictment do not support the conclusion that the payments were contributions to the Moore campaign.

### B. The payments described in the Brady Charges were not "contributions" because they were not "made . . . for the purpose of influencing any election."

Even setting aside the factual problems noted above, the payments described in the Brady Charges cannot support the charged offenses because they do not meet the statutory definition of "contributions." FECA sets forth various caps and other legal limitations that apply to "contributions," and FECA defines the term "contribution" to mean "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). By its terms, that definition only encompasses payments to a campaign *to help the candidate get elected*—not payments to induce a candidate to drop out of a race or payments made after the campaign is over and there is no longer any election to influence.

#### 1. Payments to induce a candidate to withdraw are not "contributions."

The Supreme Court has recognized that, although FECA "does not define the phrase 'for the purpose of influencing' an election" as used in the definition of the term "contribution," "the general understanding of what constitutes a political contribution" works as a "limiting connotation" on the statutory definition of the term. *Buckley v. Valeo*, 424 U.S. 1, 23 n.24

(1976), *superseded by statute in part as recognized by McConnell v. FEC*, 540 U.S. 93 (2003). Political contributions are "general[ly] underst[ood]" to be payments that help the recipient get elected, not payments that induce the recipient to withdraw. *See, e.g.*, *Black's Law Dictionary* (10th ed. 2014) (defining "contribution" as "[s]omething that one gives or does in order to help an endeavor be successful").

The Court should also consider the purposes of FECA's contribution limits in evaluating the meaning of the term "contribution," and those purposes do not implicate payments to induce a candidate to withdraw. The "primary purpose" of the contribution limitations in FECA "is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions *on candidates' positions and on their actions if elected to office*." *Buckley*, 424 U.S. at 25–26 (emphasis added). A payment that induces the recipient to no longer be a candidate cannot create the appearance that a candidate or elected official is subject to improper influence. *See United States v. McGregor*, CR. No. 2:10cr186-MHT, 2011 WL 1576950, at *4 (M.D. Ala. Apr. 4, 2011) (describing "payments to opposition legislators to withdraw from races" as "things of value *other than campaign contributions*" (emphasis added)). Accordingly, the term "contribution" does not include payments made for the purpose of inducing a candidate to withdraw—it encompasses only payments made for the purpose of supporting a candidate to help him or her win an election. *See Buckley*, 424 U.S. at 21 ("A contribution serves as a general expression of support for the candidate and his views[.]").[8]

[8] Understanding the term "contributions" to encompass payments to induce a candidate to withdraw from an election would also render nonsensical another provision of FECA's definition section. Just as FECA defines "contributions" to mean payments made "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i), it similarly speaks of certain membership organizations and corporations that are "organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office." *Id.* § 30101(9)(B)(iii). It makes no sense to speak of a corporate entity being organized for the purpose of inducing candidates to withdraw. Instead, that latter provision obviously refers to entities that are organized for the purpose

Payments to induce a candidate to withdraw from a race may appear unseemly, and they may violate statutes other than FECA. But such payments are not "contributions" under FECA, and they consequently do not trigger any of the statutory offenses that serve as the predicates for the Brady Charges in this Superseding Indictment.[9]

**2. Payments made after an election is over are not "contributions."**

Even if the Court determines that payments to induce a candidate to withdraw from a primary election race could be "contributions," the payments that Mr. Smukler is alleged to have willfully caused were not "contributions" for the additional reason that they occurred *after* the primary election was over and there was no longer any "election" to "influenc[e]." 52 U.S.C. § 30101(8)(A)(i). The three payments described in the Brady Charges allegedly occurred in June, July, and August 2012, Indictment, Count I ¶¶ 16(*l*)–(m), (r)–(s), (x)–(y), all well after the primary election had occurred in April 2012 and well after Mr. Moore had dropped out of the race on February 29, 2012, *id.* ¶ 16(c). Because the outcome of the election was a certainty at the time the three payments were made, the payments could not have "influenced" the election. *See* Oxford Living Dictionaries (English), https://en.oxforddictionaries.com/definition/influence (last visited May 24, 2018) (defining "influence" as "to have an effect on the character,

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of *helping candidates get elected*. The nearly identical language in the two definitional provisions should be given the same meaning because Congress presumptively intends to convey a consistent meaning when it uses the same phrase multiple times in the same statute. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016).

[9] The Superseding Indictment cites a provision of FECA that states that, for purposes of the statute's contribution limits, expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" count towards the limits. Indictment, Count I ¶ 9(e); *see also* 52 U.S.C. § 30116(a)(7)(B)(i). But this provision deals with expenditures by a person outside a campaign *to third parties* in coordination with a campaign. *See generally* Coordinated & Independent Expenditures, 11 C.F.R. pt. 109. It does not somehow expand the statutory definition that addresses which payments *to a campaign or candidate* qualify as "contributions." *See* 52 U.S.C. § 30101(8)(A)(i).

development, or behaviour of someone or something"). Accordingly, those payments were not "contributions."[10]

We recognize that various FEC regulations contemplate that post-election payments to a campaign count toward contribution limits, *see* 11 C.F.R. § 110.1(b)(3)(i), and that the FEC's advisory opinions have historically treated post-election payments as contributions. *See* FEC Advisory Op. 1983-2 (Feb. 24, 1983). But the FEC may not define campaign finance rules in a way that conflicts with FECA, and FECA defines the term "contribution" so as to only encompass payments made when the outcome of an election is still uncertain and subject to "influenc[e]." 52 U.S.C. § 30101(8)(A)(i).

Even if the FEC's regulations and advisory opinions do not directly conflict with the statutory definition of "contribution," in a criminal prosecution, the government is not free to rely on the FEC's interpretation as it would in a civil enforcement proceeding. To the extent that courts have approved of the FEC's view that payments after an election can constitute "contributions," they have done so in the *civil* enforcement context where courts typically defer to an agency's view pursuant to *Chevron*. *See FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1113–15 (9th Cir. 1988) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Indeed, in *Ted Haley*, the district court had reached the opposite conclusion—that, contrary to the FEC's view, the post-election payments at issue were *not* "contributions"—by interpreting the statute *de novo* without deferring to the FEC under *Chevron*. *See FEC v. Ted*

[10] In this regard, the language of FECA is notably different from several state and local campaign finance statutes that also define "contributions." For example, the Philadelphia Code, rather than limiting "contributions" to payments "made . . . to influence any election," instead defines the term to include "[m]oney, gifts, *forgiveness of debts*, loans, or things having a monetary value *incurred or received* by a candidate or his/her agent for use in advocating or influencing the election of the candidate." Phila. Code § 20-1001(6) (2006) (emphasis added). The Pennsylvania Supreme Court specifically focused on the reference to "debts" that were "incurred" in the course of influencing an election in holding that post-election payments for the retirement of debts constitute "contributions." *See Cozen O'Connor v. City of Phila. Bd. of Ethics*, 105 A.3d 1217, 1230 (Pa. 2014).

*Haley Cong. Comm.*, 654 F. Supp. 1120, 1125–27 (W.D. Wash. 1987). It was only because the district court had failed to apply *Chevron* deference, which courts typically accord to agency interpretations in the civil context, that the Ninth Circuit reversed. *See Ted Haley*, 852 F.2d at 1115 ("The district court erred when it substituted its interpretation of the statute and regulations rather than giving deference to the FEC's interpretation of its enabling statute and its own promulgated regulations and advisory opinions."). If a federal district court judge found that the language of the statute did not apply to a payment made after a candidate had withdrawn from a campaign, how can it comport with due process and fair notice to prosecute an individual criminally for that conduct?

Indeed, *Chevron* deference is inappropriate in criminal cases like this one, and so in this case, it is the *district court's* ruling in *Ted Haley*, not the Ninth Circuit's, that provides the proper analysis. In criminal cases, courts must resolve statutory ambiguities on their own, using the rule of lenity if necessary; agencies are entitled to no deference when interpreting criminal statutes. *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006); *United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2004) ("[B]oth parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under [*Chevron*] even if the statute were ambiguous."); *United States v. McGoff*, 831 F.2d 1071, 1080 n.17 (D.C. Cir. 1987) ("Needless to say, in this criminal context, we owe no deference to the Government's interpretation of the statute."). The same principle applies in cases implicating statutes like FECA with both criminal and civil applications: a court must resolve any ambiguity on its own, by reference to the rule of lenity if needed in a criminal matter, rather than by deferring to an agency's view. *See Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1228-29 (3d Cir. 1992) (explaining that agency interpretations of statutes that are "penal in nature," even when applied outside the criminal context, do not receive *Chevron* deference); *see also*

*Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("Allowing housing inspectors and immigration officers and tax collectors to fill gaps in hybrid criminal laws, no less than allowing prosecutors to fill them in pure criminal laws, offends the rule of lenity."); *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003).[11]

Accordingly, in this criminal case, the Court must come to its own conclusions about the meaning of the term "contribution," just as the district court did in *Ted Haley*. And the plain text of that term indicates that it does not encompass payments made after the outcome of an election has been decided and is no longer subject to "influencing." 52 U.S.C. § 30101(8)(A)(i). Even if the Court finds that the language is ambiguous, Mr. Smukler cannot be prosecuted criminally in the face of such ambiguity. The payments described in the Brady Charges are therefore not "contributions," and those counts must be dismissed.[12]

## IV. COUNTS SIX, SEVEN, NINE, AND TEN OF THE MARGOLIES CHARGES MUST BE DISMISSED.

As described above, Counts Six, Seven, Nine, and Ten of the Margolies Charges depend on the premise that several payments to the Margolies campaign were "contributions" within the meaning of FECA. Count Nine depends on the premise that the payment of $23,750 from Ms. Margolies to her campaign was a "contribution," and Counts Six, Seven, and Ten depend on the premise that the three repayments from Mr. Smukler's consulting companies to the Margolies

[11] We are aware of one criminal case, involving a corporate criminal prosecution, in which the court deferred under *Chevron* to the FEC's view that post-election payments count as contributions. *See United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1277, 1279–80 (D.D.C. 1996). We submit that such reliance on *Chevron* in a criminal case, particularly here in the context of an individual criminal prosecution, conflicts with the Third Circuit's *Conoco* decision cited above. *See* 970 F.2d at 1229. And relying on *Chevron* in a criminal case is also at odds with the recent trend in the case law illustrated above, which suggests that such reliance is improper even when hybrid criminal statutes are implicated in civil cases. Notably, the Supreme Court has expressly declined to answer whether ambiguities in hybrid civil-criminal statutes should be resolved using *Chevron* or the rule of lenity when those ambiguities arise in civil cases. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017).

[12] It makes no difference that the agreement between Congressman Brady and Mr. Moore that allegedly formed the basis for the payments was hatched before Mr. Moore withdrew. The statutory definition of "contribution" focuses on when payments were "made." 52 U.S.C. § 30101(8)(A)(i). And in any event, the government has not alleged any involvement by Mr. Smukler until after Mr. Moore had already withdrawn from the election.

campaign were "contributions."[13] But first, even accepting all of the allegations in the Superseding Indictment as true, none of the payments at issue in those Counts were "contributions" as a matter of law because it is clear from the face of the complaint that none of them was "made . . . for the purpose of influencing any election." 52 U.S.C. § 30101(8)(A)(i). And second, the government's novel theory that the repayments from Mr. Smukler's companies at issue in Counts Six, Seven, and Ten constituted "contributions" – with sufficient clarity to support criminal liability – is especially unprecedented; that theory has absolutely no basis in any FEC regulation, guidance, or civil enforcement precedent, and it flies in the face of the only guidance that the FEC has provided on the subject of vendor repayments. For these two independent reasons, Counts Six, Seven, Nine, and Ten fail to state an offense and must be dismissed.

### A. The payments that form the basis for Counts Six, Seven, Nine, and Ten, were not contributions because they were not made "for the purpose of influencing any election."

#### 1. Payments made after an election is over are not "contributions."

As detailed above with respect to the Brady Charges, a payment made after an election is over cannot constitute a "contribution" because there is no longer any election whose outcome is subject to "influencing." 52 U.S.C. § 30101(8)(A)(i); *see supra* Part III.A.4. The Court can take judicial notice that the 2014 Pennsylvania congressional primary elections took place on May 20, 2014. *See supra* note 2. Accordingly, all payments to the Marjorie 2014 campaign made after May 20, 2014 were not "contributions" within the meaning of FECA.

[13] Count Ten, in addition to referencing repayments from Mr. Smukler's consulting companies to the FEC, also charges Mr. Smukler with "causing [Marjorie] 2014 to report contributions from SMUKLER in the name of others," Indictment, Count X ¶ 2, but as explained in further detail in Mr. Smukler's Motion to Dismiss Counts III, IV, V, VI, X, and XI for Failure to Allege that Mr. Smukler Willfully Caused Any False FEC Filings, that portion of Count Ten fails to state an offense because there is no allegation of any report to the FEC regarding the payment at issue.

The election had already passed by the time of the $23,750 payment that forms the basis for Count Nine and two of the three repayments from Mr. Smukler's consulting companies that form the basis for Counts Six, Seven and Ten. In Count Nine (contribution in the name of another), the government alleges that the $23,750 payment was made "in calendar year 2015," Indictment, Count IX ¶ 2 – clearly after the May 2014 primary.[14] Similarly, two of the three repayments that form the basis for Counts Six (false statements about contributions), Seven (excess contributions), and Ten (falsely reported contributions) were also made after the primary was over: the $40,000 repayment from Black and Blue and the $110,000 repayment from InfoVoter were both made on July 14, 2014. *Id.* Count VI ¶ 9(n)–(*o*). The third repayment – a $78,750 payment from Black and Blue alleged to have been made before the primary on May 5, 2014, *see id.* ¶ 9(f) – also was not a "contribution" for reasons set forth below. *See infra* Parts IV.A.2, IV.B.

With the one exception just described, all of the payments that form the basis for Counts Six, Seven, Nine, and Ten of the Margolies Charges were made after the primary election was over and thus cannot have been "contributions" as a matter of law. *See supra* Part IV.A.1.

**2. Payments made for purposes other than "influencing any election" are not contributions.**

As noted above, the Election Act defines "contribution" to mean any payment "made . . . for the purpose of influencing any election." 52 U.S.C. § 30101(8)(A)(i). The Superseding

[14] If Count Nine is not dismissed, then it should be treated as a misdemeanor. Count Nine charges Mr. Smukler with causing a conduit contribution in violation of 52 U.S.C. § 30122, and reflects the allegation that he instructed Ms. Margolies to loan $23,750 to her campaign from her personal bank account after receiving that money from one of Mr. Smukler's companies. *See* Indictment, Count VI ¶ 9(u)–(w). But FECA envisions that contributions to a campaign through the candidate will be charged under the general prohibition on illegal contributions, not under the conduit contribution provision; the general prohibition provides that "[n]o *candidate* or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section." 52 U.S.C. § 30116(f) (emphasis added). That distinction is important because the amount at issue, $23,750, falls above the special $10,000 felony threshold for conduit contributions, which the government has invoked in Count Nine, *see* 52 U.S.C. § 30109(d)(1)(D), but *below* the $25,000 felony threshold that applies to campaign contributions more generally, *see id.* § 30109(d)(1)(A)(i). The allegations related to Count Nine fall below the applicable felony threshold, and so Count Nine should have been charged as a misdemeanor.

Indictment contains specific allegations about the purposes of the payments related to Counts Six, Seven, Nine, and Ten, and those purposes were *not* to influence any election. Instead, the government alleges that the purpose of all of those payments – including the $23,750 payment that forms the basis for Count Nine and all three repayments that form the basis for Counts Six, Seven and Ten – was "to conceal the fact that [Marjorie] 2014 had impermissibly spent contributions raised for the general election on primary election expenses" in order "to procure the dismissal of a complaint filed with the FEC against [Marjorie 2014]." Indictment, Count VI ¶¶ 3, 7. Similarly, the government specifically alleges that the purpose of the $23,750 payment was to enable the campaign to return the $18,000 excess refund from InfoVoter, which it needed to do in response to an FEC inquiry. *Id.* ¶ 9(t). Whatever ill can be said of these purposes, they have nothing to do with "influencing any election." 52 U.S.C. § 30101(8)(A)(i).

By alleging that the payments at issue in Counts Six, Seven, Nine, and Ten were made for a purpose other than influencing any election, the government has made clear on the face of the Superseding Indictment that those payments were not "contributions."

**B. Vendor repayments to a campaign are not "contributions" as a matter of law.**

The government's theory behind Counts Six, Seven, and Ten – that vendor repayments of funds previously received from a campaign constituted "contributions" – flies in the face of explicit FEC guidance on the subject. The FEC has issued express guidance dictating that vendor repayments of funds to a campaign "are not considered contributions." Ex. 5 at 1 (FEC, "How to Report"); *see also* Attachment A ¶ 15 (Decl. of Scott E. Thomas).[15] The government's theory in this case appears to be that a vendor refund becomes a "contribution" if the vendor has already spent the money or if the vendor finances the refund by obtaining a loan from a third

[15] In support of this Motion, Mr. Smukler submits the declaration of Scott E. Thomas, who served as an FEC Commissioner from 1986 to 2006. *See* Attachment A (Decl. of Scott E. Thomas).

party, *see* Indictment, Count VI, ¶ 9(e)–(q), but the FEC's guidance gives no indication that those scenarios change the general rule that vendor repayments of funds to a campaign "are not considered contributions." Ex. 5 at 1; *see also* Attachment A ¶¶ 15, 17, 21, 25. The guidance does suggest that a vendor refund could constitute a "contribution" if the vendor does not provide such refunds in the ordinary course of business, *see* Ex. 5 at 1; Attachment A ¶ 23, but there is no allegation to that effect in the Superseding Indictment. And with that lone exception, there is absolutely no authority in any FEC regulation, guidance, or enforcement action for the proposition that vendor refunds can constitute "contributions." Attachment A ¶¶ 17–18, 21–25. The FEC's position, plain and simple, is that vendor repayments of money received from a campaign "are not considered contributions." Ex. 5 at 1.[16]

The FEC has even squarely rejected the government's theory that a vendor refund becomes a "contribution" by virtue of the fact that the vendor has already spent the money or otherwise provided a service to the campaign. In a 1996 advisory opinion, the FEC considered a scenario involving a law firm that had performed legal services for a campaign, and had been paid for those services, but wanted to provide a partial refund to the campaign after the campaign switched to a different law firm. *See* Ex. 6 (FEC Advisory Op. 1995-43 – Packwood); *see also* Attachment A ¶ 24. The law firm sought to return some of its fees – notwithstanding the fact that it had actually provided services to the campaign and already been paid for them – on the theory that the services were no longer as valuable to the campaign. *See* Ex. 6 at 2. The FEC held that such a repayment was *not a contribution* and was permissible. *See id.* at 3. Thus the

[16] Indeed, in this very case, when the FEC requested additional information from the Margolies campaign regarding the $18,000 excessive refund, it noted that "an excessive/prohibited contribution" might have occurred if the campaign "received an amount *greater* than what was paid" – a possibility that the campaign later remedied by returning the excess $18,000. Ex. 3 at 1 (emphasis added). But the FEC never suggested that a contribution might have occurred based on the amount that was actually refunded. *See id.*

FEC has squarely held that a vendor repayment to a campaign does not become a "contribution" merely by virtue of the fact that the vendor has already used the money. *See* Attachment A ¶ 24.

It is frankly astonishing for the government to seek *criminal* penalties in this case based on such an unprecedented legal theory, particularly in circumstances where the primary regulator has never even found *civil* liability. *See id.* ¶ 17, 21. The government's approach is especially suspect in the election-law context, where in the Third Circuit, a defendant is only criminally liable if he knew of the specific rule that his conduct violated and acted with the intent to violate that specific rule. *See United States v. Starnes*, 583 F.3d 196, 211 (3d Cir. 2009); *United States v. Curran*, 20 F.3d 560, 569 (3d Cir. 1994). Due process and fundamental fairness require that an individual should not be subject to criminal prosecution in such circumstances.

Finally, even if the government was correct that a vendor repayment to a campaign becomes a "contribution" if the vendor has already spent the money – and, again, there is no support for that position in any FEC authority – the government's theory is contradicted by its brazen attempt to prosecute Mr. Smukler for the repayment of $78,750 from Black and Blue to the Margolies campaign in May 2014. That repayment reflected funds that Black and Blue had received *but not yet spent*. *See* Indictment, Count VI ¶ 9(f). The allegations in the Superseding Indictment, accepted as true, establish that at the time of that repayment, Mr. Smukler's companies had been paid $210,750 from the Margolies campaign and had spent $99,951, leaving more than $78,750 unspent. *Id.* ¶¶ 9(a)–(b). Even assuming *arguendo* that vendor repayments to a campaign can sometimes constitute contributions, as the government now contends, the $78,750 that Black and Blue repaid to the Margolies campaign was not a "contribution." And yet the government still sees fit to prosecute Mr. Smukler for returning campaign funds that he legitimately received and is not alleged to have spent. If the Court does not dismiss Counts Six,

Seven, and Ten, it should at least rule that the $78,750 payment was not a contribution as a matter of law.

## II. CONCLUSION

Because all of the Brady Charges and Counts Six, Seven, Nine, and Ten of the Margolies Charges arise out of payments that are not "contributions" under the Election Act as a matter of law, those Counts of the Superseding Indictment must be dismissed.

Dated: May 25, 2018

Respectfully submitted,

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