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

FEDERAL ELECTION COMMISSION, *Plaintiff*, v. JEREMY JOHNSON and JOHN SWALLOW, *Defendants*.	Case No. 2:15-cv-00439-DB **DEFENDANT JOHN SWALLOW'S OPPOSITION TO THE FEDERAL ELECTION COMMISSION'S CROSS-MOTION** District Judge Dee Benson

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Introduction

The FEC claims that it has "consistently and repeatedly enforced" the "helping and assisting" regulation at issue here. FEC Response[1] at ix. But the Commission did not cite, nor could Mr. Swallow find, any enforcement action before a federal court.[2] The FEC's "consistent and repeated" enforcement is limited to its own internal processes, *id*., and this appears to be the first true contest concerning the legal sufficiency of 11 C.F.R. § 110.4(b)(1)(iii).

In the end, this Court must grant judgment against the Federal Election Commission's Amended Complaint unless the FEC can win on all of the following four points: (1) the plain text of the statute must be ambiguous, despite the FEC's reliance on cases holding that the statute unambiguously reaches only the true sources of financial contributions; (2) the FEC must establish that the Supreme Court's holding in *Central Bank of Denver* does not apply; (3) the FEC's regulation must be a reasonable construction of 52 U.S.C. § 30122; and (4) the FEC must either survive strict scrutiny, or explain why and how its regulation survives a lower standard of scrutiny.

As discussed below, the FEC has failed to meet its burden on any of these points, much less all four, such that judgment in favor of Mr. Swallow is proper and the regulation should be

[1] Pl. FEC Cross-Motion for Partial J. on the Pleadings (Nov. 20, 2017), ECF No. 102; Pl. FEC's Mem. in Opp. to Def. John Swallow's Mots. to Dismiss and for J. on the Pleadings and in Supp. of Cross-Motion for Partial J. on the Pleadings (Nov. 20, 2017), ECF No. 103 ("FEC Response").

[2] The bootstrapping use of Matters Under Review ("MURs") is unpersuasive. MURs are not judicial determinations of liability, but merely the FEC's own determination that it has either "reason to believe" or "probable cause" that a violation occurred. *See* 52 U.S.C. §§ 30109(a)(2) and (a)(3). If the Commission cannot obtain a voluntary settlement (termed "conciliation"), only then may the FEC bring a civil action in district court. 52 U.S.C. § 30109(a)(6)(A). It is the district court that determines civil liability. 52 U.S.C. § 30109(a)(6)(C) ("if the court determines that the Commission has established that the person involved in such civil action has committed a knowing a willful violation of this Act . . . the court may impose a civil penalty").

vacated or held invalid. For the same reasons, the Commission's cross-motion should be denied.[3] Furthermore, the Commission's remaining objections fail to rebut Mr. Swallow's demonstration that the FEC's Amended Complaint did not "'state a claim to relief that is plausible on its face.'" *Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016) (quoting *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013)).

Argument

I. The FEC's regulation fails under *Chevron* Step One.

The FEC's *Chevron* Step One argument overreaches the precedent it cites. Those decisions explicitly hold that 52 U.S.C. § 30122 is *un*ambiguous. And the Courts of Appeals in particular have indicated that the plain language at issue here precludes liability beyond the true sources of financial contributions. Both points are fatal to the FEC's *Chevron* Step One defense.

To establish discretion to prohibit additional conduct, the FEC must demonstrate that the underlying statute is ambiguous. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). But the controlling opinions the FEC cites hold that § 30122 is unambiguous. *See United States v. Boender*, 649 F.3d 650, 661 (7th Cir. 2011) (holding that "the meaning of § [30122 is] unambiguous based on the text itself"); *United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010) (holding that § 30122 "unambiguously applies to straw donor

[3] As the FEC stated, the "Court's order requir[ed] the FEC's cross-motion to address only the issues raised by Swallow's Rule 12(c) motion." Pl. Fed. Election Comm'n's Response to Def. John Swallow's Mot. for Clarification at 6 (Dec. 18, 2017), ECF No. 108. And the only arguments the FEC advanced in favor of its cross-motion were those it made in opposition to Mr. Swallow's Rule 12(c) motion. Accordingly, there is substantial overlap between Mr. Swallow's previously filed reply in favor of his Rule 12(c) motion and his opposition to the Commission's Rule 12(c) cross-motion. In particular, Mr. Swallow begins by largely incorporating the arguments from his reply brief. His memorandum in opposition to the Commission's cross-motion continues by addressing the arguments raised by the FEC.

contributions"); *United States v. Suarez*, No. 5:13 CR 420, 2014 U.S. Dist. LEXIS 63681, at *11 (N.D. Ohio May 8, 2014) (holding that "the statutory language at issue is clear and unambiguous"); *United States v. Danielczyk*, 788 F. Supp. 2d 472, 485 (E.D. Va. 2011) (holding statute unambiguous under "traditional canons"), *rev'd in part on other grounds* 683 F.3d 611 (4th Cir. 2012); *see also Fed. Election Comm'n v. Weinsten*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978) (holding "the court finds no ambiguity in the statutory language" of § 30122).[4]

Furthermore, the controlling opinions the FEC cites are either irrelevant or preclude the Commission's arguments. Those cases had nothing to do with liability for speech, or for "helping and assisting" in a conduit scheme. Instead, they concerned whether § 30122 applied to the original source of funds used in conduit schemes. *See Boender*, 649 F.3d at 660; *O'Donnell*, 608 F.3d at 549-50; *Danielczyk*, 788 F. Supp. 2d at 479; *Suarez*, 2014 U.S. Dist. LEXIS 63681, at *3.[5] And, in upholding liability for the limited, true donor class, the Courts of Appeals held that § 30122 is unambiguous in ways that preclude the FEC's regulation. In *Boender*, for example, the Seventh Circuit looked to the plain meaning of § 30122, stating that "[t]o 'make a contribution' is of course to 'contribute.'" 649 F.3d at 660. And the person making a contribution is "the source of the gift, not any intermediary who simply conveys the gift." *Id.*; *see also United States v. Whittemore*, 776

[4] Indeed, the government has previously argued that the language of § 30122 is so clear that willful violations of the statute merit enhanced criminal penalties. *See United States v. Danielczyk*, 917 F. Supp. 2d 573, 577 (E.D. Va. 2013) (noting the government's argument "that the language of the relevant statutory provision is plain, narrow, and unambiguous"). The government is not bound by its past litigation strategy. Nonetheless, it is disconcerting that the government believes the statute is ambiguous when it wants to pull in more violators, yet clear when it wants to punish those people more severely.

[5] Even if these cases had touched on secondary liability, they involved criminal, grand jury indictments under § 30122, for which secondary liability would be implicit under 18 U.S.C. § 2.

F.3d 1074, 1079 (9th Cir. 2015) ("To identify the individual who has made the contribution, we must look past the intermediary's essentially ministerial role . . . ." (internal quotation marks omitted)); *O'Donnell*, 608 F.3d at 550 (noting, based on the gift analogy, courts "must look past" "the person who actually transmits the money[, who] acts merely as a mechanism").[6] If the relevant statutory language unambiguously fails to reach intermediaries who actually touch a contribution, it certainly cannot reach defendants whose conduct involves only advice and other speech.

Thus, the cases the FEC cites not only fail to support its *Chevron* Step One argument, but foreclose the FEC's regulation altogether.

II. *Central Bank of Denver* controls this case, and the FEC's authority to the contrary is inapposite.

Central Bank of Denver explicitly addresses whether statutory silence authorizes secondary liability. The Supreme Court could not have been more direct:

> More to the point, Congress has not enacted a general civil aiding and abetting statute -- *either for suits by the Government* (when the Government sues for civil penalties or injunctive relief) or for suits by private parties.

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994) ("*Central Bank*") (emphasis added).[7] Mr. Swallow's Motion examined both *Central Bank* and the lower courts' applications of that decision to other statutes. Swallow Mot.[8] at 3-8. Contrary to the

[6] The FEC wishes to extend the *Danielczyk* and *Boender* district courts' broad language regarding primary liability to sustain secondary liability, but there is no indication that the courts foresaw that result, or that such dictum would be persuasive. As noted above, the Seventh Circuit in *Boender* limited liability under the "make a contribution" clause to the sources of the money.

[7] Even assuming the *Central Bank* passage is dicta, however, the lower courts "are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings." *Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013) (internal quotation marks omitted).

[8] Mot. to Dismiss, Mot. for J. on the Pleadings, and Mem. in Supp., ECF No. 98 ("Swallow Mot.").

Commission's assertions, FEC Response at 17-18, *Central Bank* covered both private suits *and* civil claims brought by the Securities and Exchange Commission ("SEC"). 511 U.S. at 182.

The best case the FEC offers in response is *United States v. O'Hagan*, 521 U.S. 642, 664 (1997), in what can—at best—be characterized as an off-hand discussion of *Central Bank*. FEC Response at 18 (quoting *O'Hagan*, 521 U.S. at 664 ("*Central Bank's* discussion concerned only private civil litigation . . . ."). The *O'Hagan* passage's use of the word "only" is the linchpin of the FEC's assertion that *O'Hagan* overruled the holding of *Central Bank of Denver*. But it is a bedrock principle that lower courts are to wait for the explicit command of the Supreme Court that its prior holding is overruled, especially where the earlier case is on point. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[W]e do not hold[] that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

This is especially true where the facts of the latter case are so distinguishable. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions . . . follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). *O'Hagan* was a *criminal* case. 521 U.S. at 648-49 (noting multiple charges filed). And there is a general criminal statute making aiding and abetting liability implicit in all criminal charges—a statute that the Supreme Court in *Central Bank* held was irrelevant in the civil context. 511 U.S. at 190 (refusing to apply 18 U.S.C. § 2 to create *civil* secondary liability); *see also Rothstein v. UBS AG*, 708 F.3d 82, 98 (2d Cir. 2013) ("We doubt that Congress, having included in [a federal statute] several express provisions with respect to aiding and abetting in connection with the criminal provisions, can have intended [that statute] to authorize civil

liability for aiding and abetting through its silence."). Furthermore, *Central Bank* was no longer relevant to the SEC's authority in *O'Hagan*, because Congress had adopted language that provided for the civil liability that the SEC was unable to enforce in *Central Bank*.[9] Thus, as with the SEC, Congress may act to create civil aiding and abetting liability but, absent legislative action, the FEC has no authority to impose liability for aiding and abetting conduit contribution schemes.

And the other cases string-cited by the Commission at page 18 of its Response are of no greater help. Indeed, many of the cases are no longer good law, having been superseded by later authority. For example, contrary to the district court decision in *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005), the Second Circuit, which covers that district, explicitly held that there is no secondary civil liability under the Anti-Terrorism Act ("ATA"). *See Terrorist Attacks on September 11, 2001 v. Al Rajhi Bank* (In re *Terrorist Attacks on September 11, 2001*), 714 F.3d 118, 123 (2d Cir. 2013). And contrary to *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1 (D.D.C. 2010), later courts in the District of Columbia have held that *Central Bank* applies to the ATA. *See Owens v. BNP Paribas, S.A.*, 235 F. Supp. 3d 85, 93-94 (D.D.C. 2017) ("[A]s several courts have recognized, *Central Bank*'s reasoning was not dependent on any unique feature of implied rights of action, or of the securities laws more generally.").[10] Indeed, in *Owens*, the court cited *Wultz* during its recitation of the "arguments in favor of civil aiding and abetting liability," before finding that argument "ultimately unpersuasive." *Id*. at 93.

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[9] *See* Swallow Mot. at 5 n.7 (noting change in the statute). Indeed, the FEC's case, *SEC v. Buntrock*, bolsters Mr. Swallow's reading of *Central Bank* by recognizing that Congress was forced to specifically grant the SEC the power to bring suits for secondary liability. No. 02 C 2180, 2004 U.S. Dist. LEXIS 9495, at *22 (N.D. Ill. May 25, 2004) (unpublished).

[10] *See also Shatsky v. PLO*, No. 02-2280, 2017 U.S. Dist. LEXIS 94946, at *22, 103 Fed. R. Evid. Serv. (Callaghan) 923 (D.D.C. 2017) (unpublished) (applying *Central Bank* to ATA).

The Commission asserts the power to impose secondary *civil* liability over protected speech and association rights, a power that courts have denied under securities and anti-terrorism law. Rather than accepting the FEC's invitation to follow questionable precedent and dicta from easily distinguishable cases, this Court should apply the on-point language from *Central Bank*.

III. The Commission's imposition of secondary liability for providing advice is not a "reasonable" construction of the statute.

Even presuming, *arguendo*, that the Commission is correct that "make a contribution" is ambiguous, 11 C.F.R. § 110.4(b)(1)(iii) still fails under *Chevron*'s Second Step. While "a court may not substitute its own construction," *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984), this deference is contingent upon the Commission selecting a "reasonable" reading of an ambiguous statute. *Brand X*, 545 U.S. at 980. So even if, *arguendo*, the phrase "make a contribution" creates some ambiguity in the statutory scheme, the FEC nevertheless does not have *carte blanche* to give the ambiguous language any meaning it chooses.

The FEC has a history of failing Step Two by providing unreasonable definitions for plain words. *See, e.g., Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, 76 (D.D.C. 2004) (striking FEC regulation under *Chevron* Step Two because "the FEC's definition of the term 'direct' as meaning 'to ask' is a definition foreign to every dictionary brought before this Court"). The same is true here, which is why "make a contribution" has been understood to unambiguously reach the true sources of financial contributions, and no further. *See supra* at Section I.

Even the unpublished, default judgment in *Federal Election Commission v. Rodriguez*, upon which 11 C.F.R. § 110.4(b)(1)(iii) relied, involved Mr. Rodriguez "approach[ing] various individuals and solicit[ing] contribution[s] to the Carter/Mondale Presidential Committee. [Mr. Rodriguez] promised each individual that he would be reimbursed for the contribution. [Mr.

Rodriguez] subsequently reimbursed each individual for his contribution." Amended Compl. at 5, ¶ 15, *Fed. Election Comm'n v. Rodriguez*, Case No. 86-687 (M.D. Fla. May 9, 1988).[11]

Mr. Rodriguez "made a contribution" by controlling the money. A principal can "make" a contribution through an agent precisely because of such control. But, crucially, that is because the statutory language is unambiguous in that context. By contrast, in what sense would a principal be merely "helping and assisting" the agent to do what he or she was *instructed* to do? Such a reading is unreasonable, and *Rodriguez* cuts against the Commission, not for it.[12] As Mr. Swallow never had agency or control over illegally contributed funds, he did not "make a contribution" within a reasonable construction of 52 U.S.C. § 30122.

Moreover, 52 U.S.C. § 30122 establishes one and only one form of liability for "helping and assisting" donors in making illegal conduit contributions. That is, Congress created liability for those who "knowingly permit [their] name[s] to be used to effect such a contribution." 52 U.S.C. § 30122. Congress's decision to expressly create liability for one and only one class of individuals who have "help[ed] and assist[ed]" conduit contributions, further demonstrates that the FEC's decision to go further is an unreasonable reading of the statute. *Cf. United States v. Brown*, 529 F.3d 1260, 1265 (10th Cir. 2008) (noting that "the doctrine of *expressio unius est exclusio*

[11] The Commission recently made the opinion available at https://transition.fec.gov/law/litigation/rodriguez_fec_mot_reopen.pdf.

[12] Because the Commission's Explanation and Justification regarding 11 C.F.R. § 110.4(b)(1)(iii) merely relied upon the easily-distinguished *Rodriguez*, it adds nothing, and certainly provides no evidence that the underlying regulation is a reasonable interpretation of the statute. *See Shays*, 337 F. Supp. 2d at 92 ("The Court is therefore not satisfied, based on the FEC's E&J and briefing in this case, that the Commission has 'articulated an explanation for its decision that demonstrates its reliance on a variety of relevant factors and represents a reasonable accommodation in light of the facts before the agency.'" (quoting *Arent v. Shalala* 70 F.3d 610, 617 (D.C. Cir. 1995)).

alterius . . . suggests that the legislature had no intent of including things not listed or embraced." (citation omitted) (internal quotation marks omitted)).

IV. The regulation of Mr. Swallow's speech violates the First Amendment.

a. The proper standard of review for Mr. Swallow's constitutional claim is strict scrutiny.

Even assuming a valid regulation, the Constitution requires that the FEC's efforts to regulate Mr. Swallow's speech survive strict scrutiny, which they cannot do.

The Commission posits that this enforcement action is about "contribution limits . . . and disclosure requirements," which necessitate the application of a lower standard of scrutiny. FEC Response at 4. That may be true as regards Mr. Johnson, but the FEC fails to allege that any of *Mr. Swallow*'s money was inaccurately reported, was contributed to a candidate in excess of limits, or was used to reimburse a contribution to complete a straw donor scheme. So the FEC has failed to show how its pursuit of Mr. Swallow advances any disclosure interest.

Instead of following Mr. Swallow's money, the Commission has targeted his *speech*—political information he is alleged to have spoken. And the distinction between political speech and political association is the distinction between the application of strict scrutiny and the application of a lower standard of review. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) ("The 'closely drawn' standard is a poor fit . . . [where a defendant] does not claim that" the law "violates her right to free association," but instead "argues that it violates her right to free speech." (citation omitted)).

If the FEC went after Mr. Swallow for merely encouraging Mr. Johnson to "raise [the] money" to help elect Mike Lee to the Senate because "[h]e's gonna be choosing the next U.S. Attorney," Amended Compl. at 9, ¶ 30, no one would doubt that strict scrutiny would apply.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (applying strict scrutiny to ban on speech opposing presidential candidate); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("'[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))). Indeed, the effect of political appointments is typical of political speech aired during an election campaign.[13]

Nevertheless, such speech is the core of the FEC's complaint against Mr. Swallow, the remainder of which is little more than "labels and conclusions," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and "entirely conclusory" claims "not entitled to the assumption of truth." *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012). The amended complaint repeatedly avers little more than that "Swallow solicited Johnson" to conduct illegal activity during the Shurtleff and Lee campaigns. Amended Compl. at 6, ¶ 20; *id*. at 8 ¶ 27. The specifics given, by contrast, specifically concern persuasive speech about why electing Mike Lee would help Mr. Johnson's business interests. Amended Compl. at 8-9, ¶ 30. The Commission contends that by merely proffering window dressing about the alleged initiation of a conspiracy, Mr. Swallow's political speech loses its constitutional protection.

But the FEC must do more than marry specificity about undoubtedly legal, protected political speech with vaguely pleaded accusations in order to evade the burdens of strict scrutiny. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (noting that "legal conclusions . . . must be

[13] The National Rifle Association, for example, ran ads against Hillary Clinton claiming that her replacement pick for the Supreme Court seat vacated by Justice Antonin Scalia's passing would undermine the Second Amendment. *See Presidential Campaign Ads* at 1:31, C-SPAN, https://www.c-span.org/video/?417644-1/presidential-campaign-ads (Reproducing NRA-ILA "Four Justices" Ad ("What's at stake in this election? . . . The Supreme Court . . . ")).

supported by factual allegations"); *see also United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013) (cautioning against "piling inference upon inference"). And even the quotes from an email sent by Mr. Swallow in 2010 regarding bounced checks, Amended Compl. at 9, ¶ 33, still lack indicia of a straw contribution scheme from Mr. Swallow. Moreover, the alleged quotes can easily be read as innocent, protected speech concerning the everyday mechanics of a campaign. As the only specific allegations here regard constitutionally protected speech, strict scrutiny applies to the Commission's attempt to regulate that speech, and the Commission's attempt to do so fails under that standard. *See* Swallow Mot. at 22-23.[14]

b. The regulation fails even under closely drawn scrutiny.

While the Commission is correct that contribution limits, standing alone, are reviewed under "closely drawn" scrutiny, strict scrutiny applies here because the specific allegations against Mr. Swallow target his speech, not any contribution he has made or money he has touched. But, the FEC's complaint would fail even under the closely drawn scrutiny applied to campaign contributions. That standard requires that "the State demonstrate[(1) that it hopes to further] a sufficiently important interest," and (2) that the regulation is a "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). And since "fit matters" when looking at whether a regulation is closely drawn, a regulation's "scope

[14] Even if 11 C.F.R. § 110.4(b)(1)(iii) remains in effect for true conduit contribution schemes, the First Amendment requires a narrowing construction limiting its scope to the contexts the FEC has relied upon: situations where money changes multiple hands on its way to the relevant candidate, and not where speech or advice is the only connection to that scheme. *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld.").

[must be] 'in proportion to the interest served,'" with "a means narrowly tailored to achieve the [government's] desired objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (Roberts, C.J., controlling op.).[15]

The Supreme Court has held "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136 (2003) (noting that the "the interests that underlie contribution limits[are] interests in preventing 'both the actual [and apparent] corruption threatened by large financial contributions'"). But, the anti-corruption interest is about money—it is tied to the concern that "large direct contributions . . . could be given 'to secure a political *quid pro quo*.'" *Citizens United*, 558 U.S. at 356. And the Supreme Court has emphasized that actual and apparent *quid pro quo* corruption requires that a "public official receive[] a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return." *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016); *see also McCutcheon*, 134 S. Ct. at 1441 (noting that the "Latin phrase [*quid pro quo*] captures the notion of a direct exchange of an official act for money").

Mr. Swallow does not dispute that the government has an anti-corruption interest in enforcing 52 U.S.C. § 30122 against the parties unambiguously liable under the statute—the true

[15] The FEC invokes "intermediate scrutiny," *see* FEC Response at 3, 5, and 6, but the Supreme Court has repeatedly rejected applying that standard's "limited measure of protection" for commercial speech to political speech and association. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989); *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (noting that the Supreme Court "explicitly rejected . . . intermediate scrutiny for communicative action" and therefore for contribution limits); *see also Buckley*, 424 U.S. at 25 (adopting "closely drawn" scrutiny); *accord Randall v. Sorrell*, 548 U.S. 230, 247 (2006).

sources and the false names who are actually involved with the money in false name and conduit contribution schemes. The Commission, however, has not demonstrated that there is a reasonable fit between the regulation and what Mr. Swallow is alleged to have done. In particular, it has not demonstrated that there is a reasonable fit between actual or apparent "corruption threatened by large financial contributions," *McConnell*, 540 U.S. at 136, and liability for someone who did not donate any money, who did not even touch another's donations, and whose only conduct under the specific, admissible allegations made by the FEC was speech.[16]

Furthermore, the Commission cannot justify the regulation under the anti-circumvention interest. The anti-circumvention interest is merely a corollary to the anti-corruption interest. *See McCutcheon*, 134 S. Ct. at 1446. This corollary sometimes allows additional regulations, where they would serve to prevent the circumvention of the base limits. *See id*. (noting that *Buckley* allowed aggregate limits to prevent circumvention of the base limits); *Republican Party v. King*, 741 F.3d 1089, 1098 (10th Cir. 2013) (noting limits on contributions to multicandidate committees). A regulation justified under this interest is, however, "a 'prophylaxis-upon-prophylaxis,'" and a court "must 'be particularly diligent in scrutinizing the law's fit' to make sure

[16] As discussed previously, the FEC's attempt to expand liability beyond the statute reaches to "political speech—efforts to urge others to support or oppose a candidate—that 'command[] the highest level of First Amendment protection.'" Swallow Mot. at 23 (quoting *Williams-Yulee*, 135 S. Ct. at 1665). The FEC's response to this is a straw man, stating that Mr. Swallow somehow implied that the anti-corruption interest applies only to actual and not apparent *quid pro quo* corruption. FEC Response at 10. In fact, however, Mr. Swallow argued that the Commission had failed to "explain[] how Mr. Swallow's speech to a third party *creates the appearance* that he was trading money for an official act." Swallow Mot. at 24 (emphasis added). As this point was raised in Mr. Swallow's opening brief, the opportunity for the FEC to respond has come and gone, and it has failed to do so.

that the government 'avoid[s] "unnecessary abridgment" of First Amendment rights.'" Swallow Mot. at 25 (quoting *McCutcheon*, 134 S. Ct. at 1458).

Here, the helping and assisting regulation is too distant to pass such diligent scrutiny. Where "the *base limits* themselves are a prophylactic measure," the prosecution of true donors and false names under § 30122 is already a "prophylaxis-upon-prophylaxis." *McCutcheon*, 134 S. Ct. at 1458 (emphasis in original) (internal quotation marks omitted). Thus, the Commission's helping and assisting regulation acts as a third preventative layer, and at that level of attenuation the "scope [of the regulation cannot be] 'in proportion to the interest served.'" *Id*. at 1456. That is especially true here, where the FEC's specific allegations are that Mr. Swallow urged a person to support a candidate who would be likely to help him, not that he made any contributions or controlled any conduit funds. In fact, we know that only speech is at issue, in part, because the Commission has no mechanism for reporting what Mr. Swallow did as a contribution.

Finally, the Commission attempts to justify the regulation based on the informational interest used for disclosure requirements. *See* FEC Response at 4-5. But there is no information to be gleaned from contribution limits—they serve a different campaign finance principle. Thus, the Supreme Court has never held that the informational interest is a sufficiently important interest to justify contribution limits. But, even assuming that the informational interest applied to § 30122, the regulation is not closely drawn to that interest. The point of the informational interest is to illuminate "[t]he sources of a candidate's financial support," thus "increas[ing] the fund of information concerning those who support the candidates." *Buckley*, 424 U.S. at 67, 81. But, there is no allegation that Mr. Swallow touched any money, much less that he made any contribution

himself. Thus, nothing he is alleged to have done would ever have been reported publicly, and consequently his alleged behavior has nothing to do with the informational interest.[17]

Consequently, the regulation also fails closely drawn scrutiny.

V. The FEC's other arguments fail.

The Commission argues a number of other points. For the following reasons, they all fail.

a. The FEC's timeliness issue is irrelevant.

The Commission leads its summary of argument and its argument with a distraction, claiming that Mr. Swallow's Motion to Dismiss and for Judgment on the Pleadings was untimely as a motion to dismiss. *See* FEC Response at iii, 1. This Court's stay order expressly permitted a motion for judgment on the pleadings. *See* ECF No. 91 at 1. Mr. Swallow's motion was filed as a motion for judgment on the pleadings. *See* docket entry for ECF No. 98. And the standard of review is the same for both rules 12(b)(6) and 12(c). *See* Swallow Mot. at 1; FEC Response at 1. Thus, given that Mr. Swallow's motion for judgment on the pleadings was properly filed—as even the FEC does not dispute—the timeliness issue the Commission raises is irrelevant.

b. The FEC fails to address the Amended Complaint's reliance on conclusory allegations.

Even under the standard applicable under Rules 12(b)(6) and 12(c), it is a mistake to rely on a complaint that "consists largely of conclusory assertions for which the underlying facts are never stated." *Kaplan v. GMAC Mortg. Corp.*, Civil Action No. 11-cv-00100-MSK-MEH, 2011

[17] Indeed, it is important to note that the Amended Complaint accuses Mr. Swallow of "making contributions in the name of another," Amended Compl. at 17, ¶¶ 76-77, not failure to disclose contributions. And that makes sense, as he did not make any contribution to be reported.

U.S. Dist. LEXIS 95205, at *2 (D. Colo. Aug. 24, 2011) (unpublished).[18] Notwithstanding an investigation by the state legislature, an investigation and hearings as part of the FEC's own enforcement process, and the discovery and evidence presented in a criminal trial, the Commission still fails to allege specific facts against Mr. Swallow, much less map its specific, admissible allegations of fact against the elements of the cause of action.[19] Rather, other than specific

[18] The Commission relies on a 1992 case to argue that motions for judgment on the pleadings are not favored and require a "no set of facts" standard. *See* FEC Response at 1-2 (citing *F.D.I.C. ex rel. Heritage Bank & Tr. v. Lowe*, 809 F. Supp. 856, 857 (D. Utah 1992)). As noted, however, the standard under Rules 12(b)(6) and 12(c) are the same, and the Supreme Court rejected such limits on Rule 12(b)(6), and thus on Rule 12(c), challenges in *Iqbal*, 556 U.S. at 669-70 and *Twombly*, 550 U.S. at 562-63.

[19] Mr. Swallow excluded from the background section of his opening brief many allegations from the Amended Complaint, as either conclusory or inadmissible. For example, he excluded the following allegations as conclusory and/or a mere "'recitation of the elements'" of the cause of action, *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555):

- The FEC alleges that, "[a]fter Shurtleff ended his campaign, Swallow solicited another large contribution from Johnson." Amended Compl. at 2-3, ¶ 4; *see also id.* at 8, ¶ 27 ("Swallow solicited Johnson to reimburse contributions to the Lee campaign"); *id.* at 8, ¶ 29 ("solicited Johnson to make a large contribution to the campaign"). Such statements are merely the "'formulaic recitation of the elements of a cause of action'" against Mr. Swallow. *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 F. App'x 778, 783 (10th Cir. 2016) (unpublished) (quoting *McDonald v. Wise*, 769 F.3d 1202, 1219 (10th Cir. 2014); *accord Robbins*, 519 F.3d at 1247. Furthermore, this allegation fails "to state with any specificity what" the FEC means by solicit, what Mr. Swallow may have done to solicit, or what position Mr. Swallow was in to solicit for Mr. Lee. *Carbajal v. Morrissey*, No. 12-cv-03231-REB-KLM, 2014 U.S. Dist. LEXIS 43664, at *52 (D. Colo. Feb. 20, 2014) (unpublished). For example, the FEC has not alleged that Mr. Swallow was an agent of the Lee campaign, or otherwise empowered to solicit on its behalf. *Cf. Savannah v. Collins*, 547 F. App'x 874, 876 (10th Cir. 2013) (unpublished) (remanding to dismiss where plaintiff alleged that officer could have intervened in excessive force case without asserting that officer had ability to control dog). Indeed, at other times, the FEC alleges that Mr. "Swallow made contributions in the name of another," Amended Compl. at 10, ¶ 36, such that the FEC alleges that Mr. Swallow was a contributor, not an agent of the campaign "accept[ing] a contribution." 52 U.S.C. § 30122.
- When the FEC alleges that Mr. Swallow "initiated the scheme" as to Lee, Amended Compl. at 3, ¶ 5, it fails "to state with any specificity what" Mr. Swallow may have done to initiate it.

allegations regarding constitutionally protected speech and bad acts evidence inadmissible except as to *mens rea*, the Amended Complaint relies on a conclusory recitation of the elements of the cause of action. *See* Swallow Mot. at 25 n.26. And, as already discussed, the FEC's opposition brief makes even wilder accusations, unmoored from a dock that has itself washed out to sea. *See*,

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Carbajal, 2014 U.S. Dist. LEXIS 43664, at *50-52 (dismissing where plaintiff "failed to make anything other than conclusory allegations that [the defendant] misrepresented or concealed facts," "fail[ing] to state with any specificity what [the defendant] misrepresented or concealed").

- The FEC makes the conclusory allegation, or draws the legal conclusion, that Mr. Swallow alerted Mr. Johnson as to bounced checks "in order to effect the scheme." Amended Compl. at 3, ¶ 5.
- Similarly, throughout the Complaint, the FEC makes formulaic recitations as to secondary liability, namely that Mr. "Swallow caused, helped, and assisted Johnson" in a straw donor scheme. Amended Compl. at 3, ¶ 5; *see id*. at 2, ¶ 1; *id*. at 6, ¶ 19; *id*. at 10, ¶ 36; *id*. at 17, ¶ 77.

The FEC's allegations against Mr. Swallow concern only contributions to Senator Lee's campaign. Mr. Swallow also excluded the following allegations as inadmissible bad acts evidence—to the extent the Commission offers them to prove the *actus reus*, that Mr. Swallow participated in Mr. Johnson's conduit scheme regarding Senator Lee. *Cf. Marvin H. Maurras Revocable Trust v. Bronfman*, 2013 U.S. Dist. LEXIS 136770 (N.D. Ill. Sept. 24, 2013) (unpublished) (disregarding allegations where a complaint alleged "the contents of inadmissible documents"):

- that Mr. Swallow "solicited a large contribution from Johnson to Shurtleff's campaign, and Swallow instructed Johnson to make the contribution by giving money to others for them to contribute in their own names," Amended Compl. at 2, ¶ 4;
- that Mr. Swallow "served as a fundraising adviser for Shurtleff's 2008 Utah attorney general and 2009 United States Senate campaigns," *id*. at 4, ¶ 12;
- that Mr. Swallow "solicited Johnson to" "contribute approximately $100,000 to Mark Shurtleff" using "the names of others," "and instructed Johnson on how to do so without running afoul of FECA's limits," *id*. at 6, ¶ 20; *see also id*. at 7, ¶ 21, and,
- that Mr. Swallow informed Mr. Johnson about the statutory limit when soliciting a contribution for Mr. Shurtleff's campaign and discussed giving through straw donors, *id*. at 7, ¶¶ 21-22.

Of course large contributions are not inherently corrupting, *McCutcheon*, 134 S. Ct. at 1451, nor is it illegal to engage in fundraising to support one's preferred candidate. Such allegations show the lack of specificity in the Amended Complaint.

e.g., FEC Response at 11 (alleging, without citation to the record, that Mr. Swallow was a "fundraiser," that he "had great power," that "he lured Johnson," etc.).[20]

While it is true that specific allegations of "fact[] must be viewed in a light most favorable to the FEC," FEC Response at 2, that deference does not apply to factual allegations that are irrelevant, conclusory, or a mere "'recitation of the elements'" of the cause of action, *Robbins*, 519 F.3d at 1247 (quoting *Twombly*, 550 U.S. at 555). As noted in Mr. Swallow's opening brief, however, the specific facts actually alleged by the FEC regard potentially innocent, constitutionally protected speech. *See* Swallow Mot. at iv-vi, 20-21. Thus, in an attempt to demonstrate an *actus reus* in a cause of action against Mr. Swallow, the FEC relies on conclusory allegations and allegations of fact relating to causes of action not raised against Mr. Swallow. That is—with regard to the contributions to Senator Lee—despite all the investigations, hearings, and trials, the FEC still fails to allege anything other than the threadbare elements of the cause of

[20] In responding to Mr. Swallow's argument that it had failed to show that the regulation was closely drawn to the anti-corruption interest, the Commission illustrates its pattern of conclusory allegations. The Commission states,

> Swallow had great power as the deputy attorney general of the state and a fundraiser for a Senate candidate. He needed money for his candidate. And so he lured Johnson, a businessman with deep pockets, to make an illegally large contribution to his candidate with implied promises that this money would buy Johnson's imperiled businesses legal protection from a future officeholder.

FEC Response at 11. But, the FEC here is deliberately vague, with no citations to the already conclusory allegations of its complaint. In particular, there is no specificity about the "candidate" involved in all these allegations, in part because the Commission has to combine alleged facts about the charged conduct regarding Senator Lee with uncharged conduct regarding Mr. Shurtleff to make a complete, non-conclusory cause of action. The Commission also continues to skip over its failure to allege anywhere that the Lee campaign designated or hired Mr. Swallow as a "fundraiser." Furthermore, one must wonder what "great power" to grant wishes Mr. Swallow held, where it came from, and how it "lured" Mr. Johnson—a person already involved in a conduit contribution scheme.

action: that Mr. Swallow somehow solicited Mr. Johnson to contribute to Senator Lee. *See* FEC Response at 2; Amended Compl. at 8, ¶¶ 27, 29; *id*. at 9, ¶ 33.

To make up for the conclusory allegations as to Senator Lee, the FEC alleges specific facts regarding contributions *to Mr. Shurtleff*. *See* FEC Response at 2; Amended Compl. at 7, ¶¶ 21-22. But, no cause of action has been asserted against Mr. Swallow regarding Mr. Johnson's contributions to Mr. Shurtleff. Rather, as the FEC acknowledges, those alleged facts are inadmissible here except to establish whether Mr. Swallow had the requisite state of mind, not whether he actually committed the actions alleged. *See* FEC Response at xii n.19; *see also* Swallow Mot. at v n.3.

The only remaining, specific allegations, as stated in Mr. Swallow's opening brief, regard potentially innocent conduct at the core of the First Amendment—namely, political speech. And any inferences built on that circumstantial evidence are suspect and subject to special scrutiny. *See* Swallow Mot. at 21. The FEC nowhere refutes this. It just continues to rely on this combination of conclusory recitations of the cause of action, bad act evidence inadmissible to show that Mr. Swallow solicited for Senator Lee, and potentially innocent speech.

c. The FEC's enforcement argument is irrelevant.

The assertion that the regulation should be upheld because the Commission has "consistently and repeatedly enforced" it is dubious. FEC Response at ix. The FEC conceded that "until now, the regulation's validity has never before been challenged in court." FEC Response at 20. So, the only "consistent and repeated" enforcement of the regulation is the FEC's internal processes, under which a party must strike a plea to avoid being subject—like Mr. Swallow—to

years of protracted and costly litigation.[21] Thus, that the FEC has repeatedly disregarded the regulation's invalidity, and potentially applied it to constitutionally protected speech as it has here, does nothing to support the legal sufficiency of 11 C.F.R. § 110.4(b)(1)(iii).

d. The terms "help" and "assist" are unconstitutionally vague here.

The FEC argues that, because terms like "help" and "assist" have been upheld as unambiguous in other contexts, they cannot be unconstitutionally vague here. But words that may survive a test for unconstitutional vagueness in one context may fail in another, in part because of the level of protection the Supreme Court has found necessary. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (noting that "perhaps the most important factor" requiring specificity "is whether it threatens to inhibit the exercise of constitutionally protected rights. If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."). As Mr. Swallow already noted, "To give 'First Amendment freedoms [the] breathing space [they need] to survive, government may regulate in the area only with *narrow specificity*.'" Swallow Mot. at 26 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (emphasis added)). And such protection is particularly strong for advice and matters of political speech. *See Buckley*, 424 U.S. at 40-41 (requiring "[c]lose examination of the specificity . . . in an area permeated by First Amendment interest); *Hersh v. United States*, 553 F.3d 743, 756 (5th Cir. 2008) (requiring narrow scope to regulate advice).

Thus, for example, the *Buckley* Court concluded that the term "relative to" raised vagueness issues, not because the term lacked a dictionary definition, but because it allowed the regulation

[21] *See supra*, n.2.

of protected conduct. 424 U.S. at 41-44. Accordingly, the Court allowed the term only with a limiting definition that reduced the dangers to constitutionally protected speech. *Id*. at 43-44.

Thus, it does not help the FEC that courts have found the terms "help" and "assist" sufficiently precise in other contexts, or even that courts have sometimes held "that a scienter requirement may mitigate a law's vagueness," *Hoffman Estates*, 455 U.S. at 499, because the Commission has used the terms to attach liability to advising others to support candidates. Thus, for example, this case differs from *American Association of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183 (D.N.M. 2010), where the term "assist" required "something more substantial," "taking possession . . . and ensuring that [things were] handled properly." *Id*. at 1223. Unlike the *Herrera* plaintiffs, Mr. Swallow is not "speculat[ing about] different ways to interpret the term assist." *Id*. at 1223. Rather, Mr. Swallow has needed only to point to the Commission's willingness to give the term "assist" whatever meaning is necessary to create liability.[22]

[22] Furthermore, the possibility of seeking an advisory opinion does not cure the regulation's deficiencies here. Indeed, even though the Commission had the authority to issue advisory opinions, the *Buckley* Court still required limiting constructions to save several terms from being void for vagueness. *See Buckley*, 424 U.S. at 41-44 (limiting term "relative to"), 76-81 (limiting term "for the purpose of . . . influencing"), 110-11 (render advisory opinions), 114 (same), 137 (same), 140 (same). There are times when the ability to seek advisory opinions may save a vague regulation or statute. But, consonant with opinions like *Buckley*, that can only be where parties would have sufficient notice that intended action or speech might be proscribed. *Cf. United States Telecomms. Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 738 (D.C. Cir. 2016) (noting public record that agency had previously discussed precise conduct at issue, but not come to a decision).

In addition, the *Buckley* Court noted that one of the phrases "pos[ing] constitutional problems" there had "been adopted without comment from earlier disclosure Acts." 424 U.S. at 77. Thus, the Commission's argument that the regulation went almost three decades without being challenged in federal Court is unavailing. As the *Buckley* Court showed, an unconstitutionally ambiguous law must be held invalid or fixed, regardless of prior use.

e. The FEC's rulemaking violated the APA.

For the reasons discussed in Mr. Swallow's Opening Brief, Swallow Mot. at 13-16, the FEC's rulemaking was arbitrary and capricious. Nevertheless, the Commission argues that its citation to and reliance on the *Rodriguez* opinion saves the rulemaking. *See* FEC Response at 23-25. It is true that the terse default judgment in *Rodriguez*, unlike the Commission's notice of rulemaking, at least mentioned some form of secondary liability in relation to the statute. But, for the reasons given above, that court conflated the language of secondary liability and that of principal/agent liability. Following the direction of the true donor, Mr. Rodriguez approached and solicited all the false donors, took their contributions, and then reimbursed them all. Acting as the true donor's agent, he executed and controlled the scheme.

Nonetheless, the Commission took the stray "assisting" language from the *Rodriguez* default judgment, ECF No. 103-1 at 2, as license to create liability for anyone allegedly related to a conduit contribution scheme. Thus, even if the Commission had given notice that it intended to create secondary liability through the rulemaking, it cannot claim that the *Rodriguez* case was sufficient to give a reviewing court "a satisfactory explanation for its action." *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 497 (D.C. Cir. 2016) (internal quotation marks omitted).

Furthermore, the Commission suggests that Mr. Swallow's additional argument, that § 110.4(b)(1)(iii) violated "the notice procedures required by the APA," is barred by the general statute of limitations, FEC Response at 25, and that this limitation is jurisdictional, cherry picking out-of-circuit or unpublished authority. FEC Response at 26 n.26. But courts in the Tenth Circuit have held "that [§ 2401(a)] is not" jurisdictional. *Rocky Mt. Wild v. Walsh*, 216 F. Supp. 3d 1234, 1246 n.7 (D. Colo. 2016) (collecting cases). And equitable tolling is even more appropriate here:

Mr. Swallow has not attempted to bring a claim against the FEC when all its evidence is spoiled, but is instead defending himself, not even from a continuing injury, but from a new claim by the FEC so obscure and unexpected that it can point to no other instance of similar civil enforcement. *Cf. Ford Motor Co. v. United States Dep't of Homeland Sec.*, No. 05-73860, 2006 U.S. Dist. LEXIS 59465, at *15 (E.D. Mich. Aug. 23, 2006) (unpublished) (permitting challenge to notice). Thus, it is appropriate to follow the general practice of equitable tolling. *See Rotella v. Wood*, 528 U.S. 549, 560 (2000); *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 826 (10th Cir. 2014). But, even if equitable tolling did not apply to the regulation's procedural invalidity, the FEC does not dispute that it would apply to the challenged substantive infirmities.

Finally, the Commission argues that including § 110.4 in the Notice while assuring the public "that the agency was 'not proposing any revisions to the text of the regulations'" was sufficient to "alert[] anyone with a particular interest . . . that their interests were potentially 'at stake.'" FEC Response at 28-29 (citations omitted). And, according to the Commission, its rulemaking in response to the *Rodriguez* opinion also provided "interested parties [with] sufficient notice regarding [the new] section 110.4(b)(1)(iii)." *Id.* at 29. But, as discussed above, the *Rodriguez* opinion could not have alerted the public as to the secondary liability the FEC planned to create, just as a Notice assuring the public that the Commission would make no changes could not. Indeed, the Explanation and Justification cites to the summary judgment motion that the Commission lost, not to the default judgment to which the Commission now cites as the rationale for its regulation. *See* FEC, Explanation and Justification: Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34098 (Aug. 17, 1989). Only now, in response to Mr. Swallow's motion, has the Commission

publicly acknowledged the context of that decision. FEC Response at 20. Thus, the FEC cannot save its rulemaking as "a 'logical outgrowth' of the proposal." *Id*. at 28.

f. Vacatur is warranted.

The Commission's arguments that Mr. Swallow "is not entitled to vacatur," FEC Response at 29, also fail. "Failure to provide the required notice and to invite public comment . . . is a fundamental flaw that 'normally' requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009). An agency must prove that vacatur should not apply, for example, by showing that a change would be serious and disruptive. *See, e.g.*, *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 267 (D.D.C. Sept. 21, 2015). Even accepting that the regulation has been in place "[f]or nearly 30 years" and is related to "one of FECA's most important and yet frequently violated provisions," FEC Response at 30, the Commission has not met its burden here. As Mr. Swallow has shown, the regulation does not enforce Congress's intent.[23] And this case demonstrates that, even without the regulation, the FEC can prosecute the offences Congress did intend: conduit contributions like Mr. Johnson's.

Moreover, there is little reason to believe a remand would be fruitful here. *See Shays v. Fed. Election Comm'n*, 528 F.3d 914, 931 (D.C. Cir. 2008) (detailing judicial remands to the FEC for failure to substantively correct administrative law errors in the *Shays* line of cases); *see also Citizens United*, 558 U.S. at 334-35 ("In fact, after this Court in [an earlier case] adopted an

[23] The Commission also argues that, should this Court vacate the regulation, the Court should not address Mr. Swallow's substantive arguments. Some courts have followed this logic, but only where the agency's "rule is not obviously precluded by the plain meaning of" the statute. *Iowa League of Cities v. Envt'l Protection Agency*, 711 F.3d 844, 877 (8th Cir. 2013). Here, however, Mr. Swallow has shown that the rule is contrary to the statute's plain meaning. That is, as in one of the cases the FEC cites, the "rule clearly exceeds the [agency's] statutory authority and little would be gained by postponing a decision on the merits." *Id*.

objective 'appeal to vote' test for determining whether a communication was the functional equivalent of express advocacy, the FEC adopted a two-part, 11-factor balancing test to implement [that] ruling" (citation omitted)).

Thus, the Court should grant vacatur, as the claims against Mr. Swallow are grounded in an *ultra vires* regulation that is contrary to statute.[24]

Conclusion

For the reasons given here and in Mr. Swallow's Motion, this Court should grant judgment on the pleadings and vacate 11 C.F.R. § 110.4(b)(1)(iii). For the same reasons, the Court should deny the Commission's cross-motion.

Respectfully submitted,

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[24] At a minimum, in the instant circumstances, "when the breach of an agency's duty to provide a reasoned explanation [for its rule] is used defensively, such as in an enforcement action," the Court should "hold [the] rule invalid and dismiss the complaint." *United States v. Garner*, 767 F.2d 104, 118 n.20 (5th Cir. 1985); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) ("We hold in this enforcement proceeding, . . . that the regulation . . . was promulgated in an arbitrary manner and is invalid.").

Counsel for Defendant John Swallow
Dated: January 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

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