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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 MOTION TO DISMISS, MOTION FOR JUDGMENT ON THE PLEADINGS, AND MEMORANDUM IN SUPPORT** District Judge Dee Benson

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Pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure, Defendant John Swallow submits this Motion to Dismiss, Motion for Judgment on the Pleadings, and Memorandum in Support. As discussed below, the Federal Election Commission ("FEC" or "Commission") brought its complaint based upon a regulation, 11 C.F.R. § 110.4(b)(1)(iii), which is contrary to law and violates protected First Amendment rights. Consequently, it acts *ultra vires* and dismissal is proper as a matter of law.

Introduction

The FEC claims that Mr. Swallow has violated 52 U.S.C. § 30122, which prohibits contributions made in the name of another. But that is not precisely correct. In fact, the FEC only alleges that Mr. Swallow helped or assisted another, namely Mr. Johnson, to violate 52 U.S.C. § 30122. Its theory, then, is one of secondary liability, and it relies entirely upon 11 C.F.R. § 110.4(b)(1)(iii), a Rule of the Commission's own making.[1] The statute itself is silent on secondary liability, and therein lies the problem. Because the FEC's Rule has no basis in the statute, and because it was improperly promulgated, it has no legal effect and the FEC's attempt to enforce it here is unlawful.

Put simply, 11 C.F.R. § 110.4(b)(1)(iii) fails review under the Administrative Procedure Act ("APA") and fails constitutional scrutiny. The Supreme Court has unambiguously held that administrative agencies may not simply read secondary civil liability into a statute, and that the power to create secondary civil liability lies with Congress alone. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994). Even if Congress had, *arguendo*,

[1] *See* Amend. Compl. at 2, ¶ 1 ("Additionally, no person may '[k]nowingly help or assist' any person contribute in the name of another.") (citing only 11 C.F.R. § 110.4(b)(1)(iii)).

silently delegated authority to the Commission sufficient to conjure expanded civil liability, 11 C.F.R. § 110.4(b)(1)(iii) is not a reasonable interpretation of the statute. It relies almost exclusively, not on the statutory scheme itself, but upon an unpublished judicial opinion not available publicly. Worse, the Commission failed to provide adequate notice to the public before adopting 11 C.F.R. § 110.4(b)(1)(iii). In fact, in the relevant Notice of Proposed Rulemaking ("NPRM"), the FEC specifically foreswore any intention of revising its regulations dealing with contributions made in the name of another. It nevertheless went on to create the secondary liability at issue here.

Any one of these factors is enough, individually, to vacate 11 C.F.R. § 110.4(b)(1)(iii) as contrary to the APA and Supreme Court guidance.

But the FEC's case is further undermined because "[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity." *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). As such, the Commission's regulation in this area is subject to strict scrutiny. Under this heightened constitutional scrutiny, the government bears the burden of proving that the restriction is narrowly tailored to serve a compelling governmental interest.

But there is no compelling governmental interest when a regulation attempts to go beyond fighting "*quid pro quo*" corruption to regulating speech and advice, especially when doing so is a "prophylaxis-upon-prophylaxis" measure layered on top of the ban on contributions in the name of another and contribution limits generally. Even if the government had a compelling interest, the FEC's Rule fails proper tailoring because it uses undefined terms that have vague meanings. This

means speakers like Mr. Swallow must either be silent or edit their speech to avoid tripping over an amorphous line. The First Amendment does not permit such unbounded regulation.

Each of the problems that plague 11 C.F.R. § 110.4(b)(1)(iii) would be enough to dismiss the FEC's claims against Mr. Swallow. The rulemaking is contrary to the plain language of 52 U.S.C. § 30122. Even if the statute were ambiguous, which it is not, the Rule would not be a reasonable interpretation of the statute. And it was created without proper notice. Worse, even without these legal flaws, the Rule itself fails First Amendment scrutiny.

There is no basis in law on which the FEC's requested relief can be granted. Dismissal of the case against Mr. Swallow is therefore proper. Fed. R. Civ. P. 12(b)(6) and 12(c).

Background

This is an action brought by the FEC in 2015 relating to alleged activity in 2009 and 2010. *Compare* Amend. Compl. at 2, ¶ 1 (Feb. 24, 2016), ECF No. 36, *id*. at 6, ¶ 19 *with id*. at 14, ¶ 57. The Commission initially proceeded only against Mr. Johnson, before adding Mr. Swallow in 2016. *Compare* Compl. (June 19, 2015), ECF No. 2, *with* Amend. Compl. (Feb. 24, 2016), ECF No. 36.

Mr. Swallow categorically denies the truth of the FEC's allegations, but for purposes of this motion only, Mr. Swallow "accept[s] as true" the following factual allegations in the FEC's motion. *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011) (citation and quotation marks omitted).[2] Mr. Swallow has been a politically active individual, running for the United States Congress in 2002 and 2004. Amend. Compl. at 4, ¶ 12. He also "served as a fundraising adviser

[2] Because this Court need not accept such allegations as true, this recitation does not include factual claims that are irrelevant, conclusory, 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).

for [Utah Attorney General Mark] Shurtleff's 2008 Utah attorney general and 2009 United States Senate campaigns" and, during Mr. Shurtleff's 2009 campaign, he advised Mr. Johnson about making campaign contributions.[3] *Id*.

After Mr. Shurtleff elected not to pursue the 2010 Republican nomination for the U.S. Senate, Mr. Swallow "engaged in fundraising efforts for Mike Lee's 2010 United States Senate campaign" including certain interactions with Jeremy Johnson, also a defendant here. *Id*.; *see also id*. ¶ 29. Mr. Swallow "promised Johnson that funding the contributions would help protect Johnson's business interests from federal prosecution." *Id*. ¶ 27. In particular, Mr. Swallow told Mr. Johnson, "[W]e've gotta raise this money and we gotta make Mike Lee our guy… [H]e's gonna be choosing the next U.S. Attorney and you gotta have him in your corner and you gotta have the U.S. Attorney in your corner, especially while you're processing poker in this district." *Id*. at 9, ¶ 30 (brackets and ellipses in original). Mr. "Johnson asked Swallow whether he could write a large check to the Lee campaign or if the limits applicable to Shurtleff's [Senate] campaign also applied. Swallow confirmed to Johnson that the same rules applied." *Id*. ¶ 29. Furthermore, on June 21, 2010, Mr. Swallow "e-mailed Johnson to inform him that [Mr. Swallow had been] told that [four] of those checks bounced" and that Mr. Swallow would "forward [Mr. Johnson] the names." *Id*. at 9, ¶ 34, *id*. at 12, 49; *see also id.* at 3, ¶ 5.

[3] The FEC's Amended Complaint alleges other bad acts outside the cause of action. Unlike its case against Mr. Johnson, the FEC's allegations against Mr. Swallow concern only contributions to Senator Lee's campaign. Mr. Swallow has excluded these extraneous allegations both because they are irrelevant to this motion and because such bad acts evidence is generally inadmissible. *Cf. Marvin H. Maurras Revocable Trust v. Bronfman*, 2013 U.S. Dist. LEXIS 136770, at *52 (N.D. Ill. Sept. 24, 2013) (unpublished) (disregarding allegations where a complaint alleged "the contents of inadmissible documents").

Based on these allegations, the FEC claims that Mr. Swallow has violated its interpretation of 52 U.S.C. § 30122 promulgated at 11 C.F.R. § 110.4(b)(1)(iii). Amend. Compl. at 17, ¶ 77; *id.* at 18, ¶ C. Specifically, the FEC does not allege that Mr. Swallow contributed anything in the name of another. Instead, the FEC believes that he "caused, helped, and assisted" *Mr. Johnson's* straw donor scheme by soliciting Mr. Johnson's contributions and otherwise "initiat[ing]" the scheme (although the Amended Complaint is silent on precisely how Mr. Swallow did the initiating). *Id*. at 3, ¶ 5, *id*. at 17, ¶ 77; *see also id*. at 5, ¶ 14. While its complaint focuses on the actions of Mr. Johnson,[4] the FEC argues that Mr. Swallow is liable for advice concerning the solicitation of contributions or advice as to whether a particular candidate would be amenable to a constituent's concerns. *See, e.g.*, *id*. at 8, ¶¶ 29, 30. In this way, at least as concerns Mr. Swallow, the FEC's Amended Complaint focuses solely on speech.

This Motion addresses Mr. Swallow's Third Defense: that the FEC's complaint is based on a regulation improperly promulgated in violation of the Administrative Procedure Act ("APA") and that it violates the First Amendment. Swallow Ans. at 37-38.[5] As discussed below, 11 C.F.R. § 110.4(b)(1)(iii) is contrary to law, and therefore the FEC's claims against Mr. Swallow, based on that regulation, must be dismissed.

[4] *See, e.g.*, *id*. at 8, ¶ 27, *id*. at 9, ¶¶ 31-32, *id*. at 11-12, ¶ 45.
[5] Mr. Swallow filed his answer, responding to the FEC's allegations and asserting affirmative defenses. Def. John Swallow's Answer To Amend. Compl. (May 16, 2016), ECF No. 45, ("Swallow Ans.").

Argument

I. Standard for a Motion to Dismiss and Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(b)(6) provides that this Court may dismiss any claim that "fail[s] to state a claim upon which relief can be granted." Rule 12(c) provides similar relief for judgment on the pleadings when the motion is filed "early enough not to delay trial." Fed. R. Civ. P. 12(c). The Tenth Circuit examines motions under Rules 12(b)(6) and 12(c) using the same standard. *Brown v. Montoya*, 662 F.3d 1152, 1160 n.4 (10th Cir. 2011) ("'We use the same standard when evaluating 12(b)(6) and 12(c) motions.'") (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 n.2 (10th Cir. 2002)).

To survive a motion to dismiss, the FEC "must allege facts that, if true, 'state a claim to relief that is plausible on its face.'" *Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016) (internal citation omitted). A claim is only "facially plausible when the allegations give rise to a reasonable inference that the defendant is liable." *Id.* For purposes of such a motion, the facts alleged are viewed in "the light most favorable to the plaintiff." *Id*.

But the plaintiff must do more than plead "facts that are merely consistent with a defendant's liability, [because that] stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted); *see also Wilson*, 715 F.3d at 852 (applying *Iqbal*). It is the court's duty "to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Swoboda v. Dubach*, 992 F.2d 286, 290 (10th Cir. 1993) (internal citation and quotation marks omitted, emphasis removed).

II. The FEC's regulation fails judicial review under the Administrative Procedure Act.

The FEC brings this action against Mr. Swallow based upon 11 C.F.R. § 110.4(b)(1)(iii), which creates secondary civil liability for violations of the prohibition on making political contributions in the name of another. *See* 52 U.S.C. § 30122. This is improper for three reasons. First, the FEC never had authority to issue 11 C.F.R. § 110.4(b)(1)(iii) because Congress unambiguously declined to create secondary liability. Second, even if the FEC's rulemaking were permissible to clarify the statute, which it is not, the FEC's interpretation is unreasonable. It is based solely on an unreported district court decision, without any examination of the facts or specific holdings of that decision. Third, 11 C.F.R. § 110.4(b)(1)(iii) is arbitrary and capricious because it was promulgated without the notice Congress has required under the Administrative Procedure Act. For all of these reasons, this Court should vacate 11 C.F.R. § 110.4(b)(1)(iii) and dismiss the FEC's claims against Mr. Swallow.[6]

Courts have long limited administrative agencies' authority to tinker with the clear terms of a governing statute. Under the Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, a court first asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. 837, 842-843 (1984). If Congressional intent is not clear, *Chevron*'s second

[6] Even if any statutory limitations period has passed, Mr. Swallow may "challenge [the] regulation[] directly on the ground that the [FEC] acted in excess of its statutory authority in promulgating" it by raising the challenge "by way of defense in an enforcement proceeding." *NLRB Union v. Federal Labor Relations Authority*, 834 F.2d 191, 195 (D.C. Cir. 1987); *see also Overland Express v. ICC*, 996 F.2d 356, 359 n.3 (D.C. Cir. 1993); *Advance Transp. Co. v. United States*, 884 F.2d 303, 305 (7th Cir. 1989).

step asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency must meet step one to the Court's satisfaction before moving to step two. *Id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.") (collecting cases from 1896 to 1981).

a. The FEC's Rule fails *Chevron* Step One: the statute establishes no "helping or assisting" liability.

An administrative agency may promulgate a rule when there is ambiguity in the underlying statute or when Congress has otherwise expressly delegated authority to create substantive law. But the statute prohibiting contributions in the name of another is clear: "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 52 U.S.C. § 30122. The statute does not provide for any secondary liability. There is no room for claims based on "helping or assisting," which would be a different cause of action.

If Congress wishes to create secondary liability, it can do so. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994), held that the government cannot infer secondary liability—aiding, abetting, helping, assisting, and the like—when the statute is silent:

> 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. Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.

In the succinct words of the *en banc* Seventh Circuit, "statutory silence on the subject of secondary liability means there is none." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc) (applying *Central Bank of Denver* to the Anti-Terrorism Act), *cert. denied sub nom. Boim v. Salah*, 558 U.S. 981 (2009).

In *Central Bank of Denver*, the Supreme Court recognized that "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." 511 U.S. at 182. "Congress instead has taken a statute-by-statute approach to civil aiding and abetting liability." *Id*; *see id*. at 182-183 (citing examples from the Internal Revenue Code, Commodity Exchange Act, Packers and Stockyards Act, and Insider Trading Sanctions Act of 1984). The specific issue in the case was whether secondary civil liability could attach to violations of the securities laws. The Bank served as indenture trustee for bond issues surrounding a Colorado Springs, Colorado development. *Id*. at 167. When the real estate did not meet the contractual threshold of value for the bonds and defaulted, the First Interstate Bank of Denver sued the development authority, the underwriters, and the Central Bank of Denver, claiming "violations of § 10(b) of the Securities Exchange Act of 1934." *Id*. at 168.

The *Central Bank of Denver* court held that "the text of the statute controls our decision," *id*. at 173, because the government "cannot… read [statutory liability] more broadly than its language and the statutory scheme reasonably permit." *Id*. at 174 (quoting *Chiarella v. United States*, 445 U.S. 222, 234 (1980)) (internal quotation marks omitted). The statutory language of § 10(b) of the Securities Act did not mention aiding and abetting. *Id*. at 175. Furthermore,

> "[t]he federal courts have not relied on the 'directly or indirectly' language when imposing aiding and abetting liability under § 10(b), and with good reason. There

> is a basic flaw with this interpretation... aiding and abetting liability extends *beyond* persons who engage, even indirectly, in a proscribed activity."

Id. at 176 (emphasis added).

In other words, "aiding and abetting liability reaches persons who do not engage in the proscribed activities at all." *Id*. Since the statute did not impose aiding and abetting liability, "the statute itself resolve[d] the case."[7] *Id*. at 178. As the dissenting justices pointed out, the holding of *Central Bank of Denver* not only applied to *private* civil claims, but to claims by the government as well. *See id*. at 200 (Stevens, J., dissenting) ("The majority leaves little doubt that the Exchange Act does not even permit the *SEC* to pursue aiders and abettors in civil enforcement actions") (emphasis in original).

The Supreme Court also refused to extend the general criminal liability for aiding and abetting—found at 18 U.S.C. § 2—to civil suits. *Id*. at 190 ("[W]hile it is true that an aider and abettor of a criminal violation of any provision of the 1934 Act, including § 10(b), violates 18 U.S.C. § 2, *it does not follow that a private civil aiding and abetting cause of action must also exist*. We have been quite reluctant to infer a private right of action from a criminal prohibition alone….") (emphasis added)). Moreover, the Supreme Court has "refused to infer a private right of action from 'a bare criminal statute'" and have not "suggested that a private right of action exists for all injuries caused by violations of criminal prohibitions." *Id*. (internal citation and quotation marks omitted).The government therefore cannot rely on 18 U.S.C. § 2 as a backstop when the

[7] Congress responded to *Central Bank of Denver* decision and amended the securities laws "to provide for limited coverage of aiders and abettors." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008) (noting 15 U.S.C. § 78t(e)).

applicable statute does not provide for secondary civil liability. An agency simply cannot create new categories of liability when the statute is silent.

Central Bank of Denver's holdings and rationale have been applied to other federal statutes, including cases where the government's interest is inarguably greater than its need to regulate political speech. Even in the national security context, the *en banc* Seventh Circuit in *Boim* applied *Central Bank of Denver*'s rationale to hold that statutory silence cannot imply Congressional acquiescence to secondary liability, there in the context of individuals accused of aiding terrorists. *Boim*, 549 F.3d at 689. The District Court for the District of Columbia, where plaintiff FEC resides, likewise applies *Central Bank of Denver* to the Anti-Terrorism Act. *See, e.g.*, *Owens v. BNP Paribas, S.A.*, 235 F. Supp. 3d 85, 94 (D.D.C. 2017).[8]

Beyond securities law and the fight against terrorism, *Central Bank of Denver*'s holding has been applied to RICO's[9] otherwise-expansive reach. *See, e.g.*, *Pa. Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 840 (3d Cir. 2000); *Dept. of Economic Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 475-476 (S.D.N.Y. 1996). Likewise, the Middle District of Florida applied *Central Bank of Denver* to the Stored Communications Act. *Vista Mktg., LLC v. Park*, 999 F. Supp. 2d 1294, 1296 (M.D. Fla. 2014) (applying *Central Bank of Denver* in context of the Stored Communications Act (18 U.S.C. § 2701 *et seq.*)); *id*. at 1297 (applying *Boim* to the same act). Tax law has also benefited from the Supreme Court's reasoning. *See, e.g.*, *Swartwout v. Edgewater Grill LLC*, No. 12-130, 2013 U.S. Dist. LEXIS 97250, at *7 (W.D. Mich. July 12, 2013)

[8] The Second Circuit does the same. *See, e.g.*, *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) (citing *Central Bank of Denver*, 511 U.S. at 185, and *Boim*).

[9] The Racketeer Influenced and Corrupt Organizations Act, *codified at* 18 U.S.C. §§ 1961–1968.

(unpublished) (applying *Central Bank of Denver* to the Internal Revenue Code prohibition on filing fraudulent W-2 forms); *id*. at *9 (applying *Boim* in same context).

Indeed, even when a court thinks it might be good *policy* to impose secondary liability, *Central Bank of Denver*'s reasoning controls. The courts are not free to "amend the statute to create liability for acts that are not themselves… within the meaning of the statute." *Central Bank of Denver*, 511 U.S. at 177-178. Whether or not it is good policy to allow for secondary liability is irrelevant; the statutory language controls. *Id*. at 188. ("Policy considerations cannot override our interpretation of the text and structure of the Act….") (citing *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991), *Pinter v. Dahl*, 486 U.S. 622, 654 (1988), and *Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977)).

Following the Supreme Court's lead, the district courts have applied this rejection of policy considerations. For example, the Eastern District of New York "recognizes that, from a policy standpoint, state and local governments could enforce the [Contraband Cigarette Trafficking Act] more effectively if they could pursue aiders and abettors in addition to primary violators." *City of New York v. Milhelm Attea & Bros.*, No. 06-CV-3620, 2009 U.S. Dist. LEXIS 19351, at *17 (E.D.N.Y. Mar. 11, 2009) (unpublished). But "policy considerations… cannot override the plain meaning of the statutory text." *Id*. at *17-18 (citing *Central Bank of Denver*, 511 U.S. at 188). Aiding and abetting liability "is for Congress to decide through legislation, not for this Court to determine by a strained interpretation." *Id*. at *18.

Central Bank of Denver applies here. The campaign finance statute is clear and succinct: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made

by one person in the name of another person." 52 U.S.C. § 30122. Nowhere does the statute discuss secondary liability of any kind. Instead, the "help or assist"[10] language the Commission relies upon is entirely its own creation. 11 C.F.R. § 110.4(b)(1)(iii); FEC, Explanation and Justification: Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34098, 34105 (Aug. 17, 1989) ("Explanation and Justification"). The Explanation and Justification for the Rule's creation does not claim any ambiguity in the statute, only that it "implements" the ban on contributions in the name of another. 54 Fed. Reg. at 34014.

Because Congress did not create secondary liability in 52 U.S.C. § 30122, the FEC's regulation fails under *Chevron* Step One and *Central Bank of Denver*. Any civil claim based on 11 C.F.R. § 110.4(b)(1)(iii), therefore, is contrary to law and the claims against Mr. Swallow should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c).

b. The FEC's Rule fails *Chevron* Step Two: assuming, *arguendo*, that the statute is ambiguous, 11 C.F.R. § 110.4(b)(1)(iii) is not a reasonable construction.

Even if the FEC could promulgate a rule to create secondary liability—that is, if *Central Bank of Denver* and its progeny did not exist—11 C.F.R. § 110.4(b)(1)(iii) is not a reasonable construction of the statute. *Chevron* Step Two provides that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based

[10] Worse, in deciding to bring this action against Mr. Swallow, the FEC did not even apply the language of its own regulation. Instead, the FEC's General Counsel's Office relied on *other standards* from the Explanation and Justification: for example, "initiate" or "instigate." 54 Fed. Reg. at 34015; *cf.* Amend. Compl. at 3, ¶ 5, *id*. at 5, ¶ 14. The terms are not defined and their relationship to the terms "help" or "assist" in the rule is not established. "Initiate" or "instigate" are yet another step removed from Congress's enactment, and the further the Commission moves from the statute, the more clearly the regulation fails *Chevron* Step One.

on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Of course, even then the rule may be "arbitrary, capricious, or manifestly contrary to the statute" and therefore, by definition, not a reasonable construction. *Id*. at 844. Because 11 C.F.R. § 110.4(b)(1)(iii) fails both tests, it is invalid.

First, *Chevron* Step Two requires some deference to regulatory agencies, since they must "fill the statutory gap in reasonable fashion" when there are "ambiguities in statutes within an agency's jurisdiction to administer." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("*Brand X*"). But such deference only applies "[*i*]*f a statute is ambiguous*, and *if* the implementing agency's construction is reasonable." *Id*. (applying *Chevron*, 467 U.S. at 843-844) (emphasis added).

And the FEC's interpretation is unreasonable, for the same reason that it is unauthorized under *Chevron* Step One: the statute is clear, and it provides no room for imposing secondary liability. The statute declares that, when dealing with a straw donor scheme, only a "person [who] make[s] a contribution" or who "knowingly permit[s] his name to be used to effect such a contribution" is liable under 52 U.S.C. § 30122. *United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010) (emphasis removed, brackets added). Given that "[a] contribution is statutorily defined as 'any gift… of money,'" and "'giving' connotes the idea of providing from one's own resources rather than simply conveying," *only* the source of funds can make a contribution under 52 U.S.C. § 30122. *Id*. at 550 (citations omitted). Intermediaries, by contrast, are only liable when they "knowingly permit [their] name[s] to be used" as the straw donor. 52 U.S.C. § 30122. The government has not alleged that Mr. Swallow either contributed from his own resources or that he permitted his name to be used as a straw donor. Therefore, the government's attempt to apply 52

U.S.C. § 30122 to Mr. Swallow's alleged conduct, and the regulation it relies upon in doing so, represent an unreasonable interpretation of Congress's chosen language.[11] Consequently, the Commission's regulation flunks *Chevron* Step Two.

Moreover, 11 C.F.R. § 110.4(b)(1)(iii) is invalid because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) ("*State Farm*"); *cf.* 5 U.S.C. § 706(2)(A). Under the APA and *State Farm*:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made…. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43 (internal citations and quotation marks omitted).

In weighing the reasoned analysis of the agency, courts examine "the thoroughness, validity, and consistency of an agency's reasoning." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (citing *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287, n.5 (1978) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Furthermore, the D.C. Circuit has held that "a permissible statutory construction under *Chevron* is not always reasonable under *State Farm:* we might determine that although not barred by statute, an agency's action is arbitrary and capricious because the agency has not considered certain relevant factors or articulated any

[11] Moreover, the government cannot cure these defects by amending the complaint against Mr. Swallow, as its entire case relies upon Mr. Johnson being the source of the contributions and persons other than Mr. Swallow acting as the straw donors. *See, e.g.* Amend. Compl. at 8, ¶ 27, *id.* at 9, ¶¶ 31-32, *id.* at 11, ¶ 45.

rationale for its choice." *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) (internal citations and quotation marks omitted).

To that end, "[i]t is axiomatic that [a court] may uphold agency orders based only on reasoning that is fairly stated by the agency." *Williams Gas Processing - Gulf Coast Co., L.P. v. Fed. Engy. Reg. Comm'n*, 528 F.3d 914, 929 (D.C. Cir. 2004). Later, "*post hoc* rationalizations by agency counsel will not suffice." *Id*. (quoting *Western Union Corp. v. Fed. Communications Comm'n*, 856 F.2d 315, 318 (D.C. Cir. 1988)). While the FEC has "some discretion" in promulgating rules, "it must support its decision with reasoning and evidence." *Shays v. FEC*, 528 F.3d 914, 929 (D.C. Cir. 2008).

Where there is "both lack of substantial evidence and a mistake of law"[12] in the agency's interpretation, the court may find "indicia of arbitrary and capricious actions and thus [the agency's action] may be subsumed under the arbitrary and capricious label." *Sandoval v. Aetna Life & Casualty Ins. Co.*, 967 F.2d 377, 380 n.4 (10th Cir. 1992).[13] As the previously-cited authority demonstrates, the FEC itself has struggled with this standard in the past, having failed to "consider[] certain relevant factors or articulate[] any rationale for its choice" in adopting certain rules. *Republican Nat'l Comm.*, 76 F.3d at 407.

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[12] The mistake of law in this case is that 52 U.S.C. § 30122 supports secondary liability. *See* Section II(a), *supra*, discussing the statute's clear language and the Supreme Court's holding in *Central Bank of Denver*.

[13] Though distinct lines of review under the APA, it stands to reason that an "arbitrary and capricious" regulation is, by definition, not a reasonable interpretation of the statute under *Chevron* Step Two. *WildEarth Guardians v. United States Fish & Wildlife Serv.*, 784 F.3d 677, 685 (10th Cir. 2015) ("[T]he question becomes whether the agency's answer is based on a permissible construction of the statute… An agency interpretation is permissible where it 'is not "arbitrary, capricious, or manifestly contrary to the statute."'") (quoting *Chevron*, 467 U.S. at 843). That is because *State Farm* analysis "overlaps somewhat with [a court's] *Chevron* step-two analysis." *Republican Nat'l Comm.*, 76 F.3d at 407.

The FEC's basis for inventing new, secondary liability is sparse. In its Explanation and Justification for 11 C.F.R. § 110.4(b)(1)(iii), the FEC simply said:

> The rules pertaining to contributions in the name of another follow the current provisions, except that new paragraph [11 C.F.R. § 110.4](b)(1)(iii) has been added to specifically prohibit any person from knowingly helping or assisting any other person in making a contribution in the name of another…. The new language is consistent with a recent judicial interpretation of [52 U.S.C. § 30122] in *FEC* v. *Rodriguez*, No. 86-687 Civ-T-10(B) (M.D. Fla. May 5, 1987) (unpublished order denying motion for summary judgment).

Explanation and Justification, 54 Fed. Reg. at 34105. There were no claims by the FEC that the statute was ambiguous or that it implied secondary liability. The entirety of the Commission's reasoning rested on a lone decision in a district court in Florida, without further clarification, thought, or evidence. This was not the "reasoned analysis" that is necessary when "the Commission change[s] its regulation." *Republican Nat'l Comm.*, 76 F.3d at 407.

The *Rodriquez* opinion on which the FEC purported to rely is not available, seemingly anywhere.[14] Therefore, the public cannot know if the order from the Middle District of Florida considered as-applied or facial relief, considered facts similar to Mr. Swallow's situation, or any other contextually-relevant factor that might shed light on 11 C.F.R. § 110.4(b)(1)(iii). Without clarifying why *Rodriquez* applies to the promulgation of the Rule, this Court is left only with speculation. "But it is not the role of the courts to speculate on reasons that might have supported

[14] Not only is *Rodriguez* an unpublished opinion, it is not available in the databases of LexisNexis, Bloomberg, or Westlaw. Because the case is from 1987, PACER does not have individual case documents from the docket. The FEC, which routinely puts case decisions on its website, provides only a case summary. *Compare* FEC website, "*FEC v. Rodriguez*" *available at* https://transition.fec.gov/law/litigation_CCA_FEC_P.shtml#fec_rodriguez (limited summary); *with* "*Epstein v. FEC*" *available at* https://transition.fec.gov/law/litigation_CCA_Alpha.shtml#E (attaching a 1981 Memorandum Opinion in favor of FEC's Motion for Summary Judgement at district court level and linking to related documents before both district and appellate courts).

an agency's decision." *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1150-1151 (10th Cir. 2016) (internal punctuation omitted) (collecting cases). We are left with what the agency gave us: a reference to an opinion not available to the public-at-large, without further clarification or justification.

This does not demonstrate the "thoroughness, validity, and consistency of [the] agency's reasoning." *Democratic Senatorial Campaign Comm.*, 454 U.S. at 37. There is no attempt to explain any rationale behind the rule. This Court cannot accord *Chevron* deference to reasoning that simply does not exist.

More importantly, the rulemaking and *FEC v. Rodriguez* predated the clarification of the law by the Supreme Court in *Central Bank of Denver*. In light of that binding and intervening precedent, it is not clear how the Middle District of Florida, having been instructed that agencies may not read secondary liability into a statute, would rule today. *See* Section II(a), *supra*.

For all of these reasons, 11 C.F.R. § 110.4(b)(1)(iii) is not a reasonable interpretation of the relevant statute.

c. Without proper notice, the FEC's rulemaking was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Not only is 11 C.F.R. § 110.4(b)(1)(iii) unauthorized by Congress, the FEC further ignored Congressional guidance by failing to provide any relevant notice before its adoption.

The APA mandates that a "[g]eneral notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. § 553(b). This notice allows "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" for the

"consideration" of the agency.[15] 5 U.S.C. § 553(c). Without the proper notice, there is no opportunity for comment, and the rule becomes "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The central question for proper notice is "whether interested parties reasonably could have anticipated the final rulemaking from the draft rule." *Shays v. FEC*, 337 F. Supp. 2d 28, 101 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005) (quoting *Anne Arundel County v. EPA*, 963 F.2d 412, 418 (D.C. Cir. 1992)). Where a rule is a "logical outgrowth" of the NPRM's language, the agency need not reintroduce the rule. *Az. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000). The "logical outgrowth" test asks if a "party, *ex ante*, should have anticipated that such a requirement might be imposed in determining whether adequate notice was given in a notice of proposed rulemaking." *Id.*; *see also Shays*, 337 F. Supp. 2d at 101.

But the "logical outgrowth" doctrine "does not extend to a final rule that finds no roots in the agency's proposal because 'something is not a logical outgrowth of nothing.'" *Envtl. Integrity Project*, 425 F.3d at 996 (quoting *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)). Interested parties are not expected to "divine [the agency's] unspoken thoughts.'" *Id.* (quoting *Arizona Pub. Serv. Co.*, 211 F.3d at 1299 (brackets in *Envtl. Integrity Project*). That is, the courts "refuse[] to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities." *Id.* Where the Commission's "NPRM is almost completely silent on the provision," a

[15] Notice is designed "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1256 (D.C. Cir. 2005)).

court will find "that the Commission violated the APA's notice requirements." *Shays*, 337 F. Supp. 2d at 101.[16]

In this case, 11 C.F.R. § 110.4(b)(1)(iii) is invalid because the FEC failed to provide proper notice before creating and implementing it, as required by the APA. Indeed, not only did the FEC fail to give sufficient notice, the Notice of Proposed Rulemaking went so far as to *explicitly disclaim* any interest in revising the straw donor regulation, much less broadening its scope. *See* FEC, Notice of Proposed Rulemaking: Contribution and Expenditure Limitations and Prohibitions (Notice 1986-4), 51 Fed. Reg. 27183, 27186 (July 30, 1986) ("NPRM") ("The Commission is not proposing any revisions to the text of the regulations [for § 110.4] in this notice.").[17]

The Commission's Explanation and Justification indicates that "[t]he Commission received no public comments on [the] section" covering adoption of 11 C.F.R. § 110.4(b)(1)(iii).[18]

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[16] The D.C. Circuit, home to the FEC and a large portion of the relevant caselaw, has "held for many years that an agency's failure to disclose critical material, on which it relies, deprives commenters of a right under § 553 to 'participate in rulemaking.'" *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (citing *Air Transp. Ass'n of Am. v. Fed. Aviation Admin.*, 169 F.3d 1, 7 (D.C. Cir. 1999) and *Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684-685 (D.C.Cir.1984)) (emphasis removed). Courts have "not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice." *Id.* That is because "an utter failure to comply with notice and comment cannot be considered harmless" when the resulting rules are not the logical outgrowth of what was announced in the NPRM. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. May 10, 2002) (applying *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988)).

[17] In the NPRM, and subsequent Explanation and Justification, the FEC combined discussions of the ban on *foreign* contributions, 52 U.S.C. § 30121, and the ban on contributions in the name of another, 52 U.S.C. § 30122. *See*, *e.g.*, Explanation and Justification, 54 Fed. Reg. at 34105 ("This section implements sections [30121] and [30122] of the [Federal Election Campaign Act] by prohibiting contributions from foreign nationals in connection with any election for local, State or Federal public office, and by prohibiting contributions in the name of another.").

[18] And the Commission received only ten written public comments for the whole rulemaking, and heard the testimony of a mere three witnesses. *Id.* at 34098.

Explanation and Justification, 54 Fed. Reg. at 34104-105. No wonder. The NPRM explicitly stated that the Commission would not make substantive changes to the law governing contributions in the name of another. NPRM, 51 Fed. Reg. at 27186. The public had no notice of the creation of a new class of secondary liability.

In other words, the FEC pulled a switcheroo.

Without giving the regulated community proper notice, the FEC failed to give campaign finance practitioners (and their clients) the opportunity to consider the far reaches of a new rule imposing secondary liability. The FEC claimed the adoption of secondary liability was based on a recent judicial decision, but without noticing the Commission's intent to rely on that decision, the regulated community could not respond. A single district court's unreported opinion, based upon unknown facts and claims, cannot support a *general rulemaking*, especially when the public cannot review the language of the district court's order to see if 11 C.F.R. § 110.4(b)(1)(iii) is a faithful implementation of the opinion, or whether the facts were cabined to the circumstances of the case.

These flaws are fatal. The NPRM failed to disclose that the Commission was looking to create secondary liability—that is, regulate the activity of an entirely new class of people—and therefore 11 C.F.R. § 110.4(b)(1)(iii) is *ultra vires* and violates *Chevron* Steps One and Two, *State Farm*, and the basic tenants of APA notice and comment requirements. The rulemaking was therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

d. Because 11 C.F.R. § 110.4(b)(1)(iii) was promulgated in violation of the APA and applicable case law, this Court should vacate the Rule and dismiss the FEC's claims against Mr. Swallow.

The discussion above leaves the question of remedy. Given the sheer number of errors committed by the FEC, and the constitutionally sensitive area in which it operates, 11 C.F.R. § 110.4(b)(1)(iii) should be vacated.

While not the automatic solution, vacatur is appropriate when "'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)'" outweighs "'the disruptive consequences of an interim change that may itself be changed.'" *Sugar Cane Growers*, 289 F.3d at 98 (quoting *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146, 150-151 D.C. Cir. 1993)). In short, "deficient notice is a fundamental flaw that almost always requires vacatur" of the non-compliant regulation. *Allina Health Services*, 746 F.3d at 1110-1111 (internal citation and quotation marks omitted).[19]

Here, vacatur is warranted. The promulgation of 11 C.F.R. § 110.4(b)(1)(iii) was *ultra vires*. The Rule fails *Chevron* Step One, because the Supreme Court has made clear in *Central Bank of Denver* that secondary liability cannot be created without clear statutory authority, and no such authority lies in 52 U.S.C. § 30122. Even then, the Rule is not a reasonable interpretation of the statute (indeed, it lacks any rationale to which this court may defer) and is based on an unreported case without further explanation, failing *Chevron* Step Two. *See, e.g.*, *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) ("[W]hen an agency's explanation of

[19] It is only in "rare circumstances," such as the ministerial calculating of thresholds based upon known, quantifiable data and formulae, when a court will not vacate the rule, preferring "established administrative practice," such as using a previously-used formula. *See, e.g.*, *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999) (swapping a 1985 formula for a 1984 formula, as-applied to the litigant's facts, rather than vacating 1985 formula in its entirety).

the basis and purpose of its rule is so inadequate that the reviewing court cannot evaluate it, the regulation is subject to vacatur…."). The lack of notice for the Rule only compounds these errors.

On the other hand, vacating the Rule will not damage the Commission's ability to stop *quid pro quo* corruption. Section § 30122 and the rest of 11 C.F.R. 110.4(b) will still be in effect and available to police people contributing in the name of another. *See, e.g.*, *United States v. Whittemore*, 776 F.3d 1074, 1077 (9th Cir. 2015) (discussing criminal prosecution under 52 U.S.C. § 30122); *FEC v. Williams*, 104 F.3d 237, 239 (9th Cir. 1996) (detailing civil claims from FEC regarding alleged contribution in the name of another in context of statute-of-limitations claim).

Moreover, the Commission will suffer no prejudice. In contrast to numerous successful resolutions, both criminal and civil, of the ban on contributions in the name of another, the FEC has used 11 C.F.R. § 110.4(b)(1)(iii) sparingly since its promulgation in the 1980s. Vacating a little-used regulation, especially one so plainly in violation of established APA procedure and judicial guidance, will do little harm to the Commission's ability to regulate contributions.

Consequently, this Court should vacate 11 C.F.R. § 110.4(b)(1)(iii) and dismiss the FEC's claims against Mr. Swallow.[20]

[20] If this Court does not vacate 11 C.F.R. § 110.4(b)(1)(iii) generally, as-applied relief is available for Mr. Swallow in the form of a judicially-created exception. *See, e.g.*, *Allied-Signal*, 988 F.2d at 154 (directing an as-applied exception for the entity that highlighted the agency's notice deficiency).

III. The FEC's regulation interposes substantial burdens on the core of protected First Amendment liberties.

a. Strict scrutiny's closely drawn test applies to the FEC's attempts to regulate the speech of political supporters of candidates and campaigns.

Because it chills political speech at the core of the First Amendment, the FEC's regulation must meet strict scrutiny's closely drawn test. The Supreme Court has noted that "'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,'" which "of course includ[es] discussions of candidates." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Mills v. Ala.*, 384 U.S. 214, 218 (1966)). That is because "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. ___, ___, 134 S. Ct. 1434, 1440-1441 (2014). Therefore, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). To that end, the Supreme Court has long held that speech surrounding candidates for elected office and the speech and association rights implicated by political contributions "command[] the highest level of First Amendment protection." *Williams-Yulee v. Fla. Bar*, 575 U.S. ___, ___, 135 S. Ct. 1656, 1665 (2015).

Therefore, the Court must apply strict scrutiny's "closely drawn" test to restrictions on speech in connection with the solicitation of campaign funds. *Id.*; *cf. McConnell v. FEC*, 540 U.S. 93, 136 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). Under this robust test, the government may restrict and burden speech for soliciting contributions "only if the restriction is narrowly tailored to serve a compelling interest." *Williams-*

Yulee, 135 S. Ct. at 1665. Of course, "it is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Id*. at 1665-1666 (internal citation and quotation marks omitted).[21]

It is true that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection," *United States v. Williams*, 553 U.S. 285, 297 (2008), and regulations prohibiting contributions in the name of another have been upheld under heightened scrutiny, *McConnell*, 540 U.S. at 121-122 (Stevens, J. and O'Connor, J. for the Court) (noting prohibitions discussed in *Buckley*, 424 U.S. at 10-19). But the FEC's regulation inhibits far more speech than the prohibitions upheld by the Supreme Court. And it cannot avoid constitutional scrutiny of the full range of speech it seeks to prohibit simply because some of that speech might be unprotected.

The Commission's use of 11 C.F.R. § 110.4(b)(1)(iii) goes far beyond solicitation of criminal conduct. Even reading the complaint in the light most favorable to the Commission, the FEC's regulation will make discussing which candidates have more favorable policies, or passing on information about a bounced check, a basis for punishment, when such speech is neither

[21] Even viewing the facts of this case as one implicating only the right of association via political contributions, heightened scrutiny still applies. *Buckley*, 424 U.S. at 22. Contribution limits are subject to "a lesser but still 'rigorous standard of review,'" also called closely drawn scrutiny. *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 29). Under such closely drawn scrutiny, the government must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id*. (quoting *Buckley*, 424 U.S. at 25). The government bears the burden of proving it has such a sufficiently important interest, and that the regulation is properly tailored to that interest. *Elrod v. Burns*, 427 U.S. 347, 362 (1963) (to survive exacting scrutiny "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest… it is not enough that the means chosen in furtherance of the interest be rationally related to that end.") (emphasis added).

contemplated by the plain language of 52 U.S.C. § 30122[22] nor supported by relevant precedent. Because it thus burdens speech about public issues and candidates, speech that "commands the highest level of First Amendment protection," *Williams-Yulee*, 135 S. Ct. at 1665, the FEC's regulation must meet closely drawn scrutiny. *Id.*; *cf. McConnell*, 540 U.S. at 136. As discussed below, it fails to meet that standard.

Furthermore, the FEC could not avoid constitutional scrutiny here even if the speech at issue in fact only related to alleged illegal conduct. That is, even if there were a statutory basis for secondary liability, the FEC lacks any direct proof for such liability. Instead, it must try to make its case by stacking inference on inference based on circumstantial evidence. *Cf. United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013) (directing caution in "*piling inference upon inference*" to the point that "speculation and conjecture… render[a] finding a guess or mere possibility" in arriving at the standard of proof in a given case) (internal citations and quotation marks omitted, emphasis added). The result is a case where presumptively protected speech, including statements that are legally harmless on their face, must be recast as circumstantial evidence of an offense. That process does not change the fact that the speech on which the FEC would prove its case is not, on its face, in any way unlawful. Nor does it change the First Amendment's protections for those statements.

[22] Indeed, the prohibition on contributions in the name of another is a longstanding component of campaign finance law, but it is not without exception. For example, Congress specifically allowed for bundled contributions. 52 U.S.C. § 30104(i)(8) (disclosure of lobbyist bundled contributions); *cf.* 11 C.F.R. § 104.22 (disclosure of bundling by lobbyist/registrants and lobbyist/registrant PACs). And a single large check resulting from such bundling is both permissible and protected. *McCutcheon*, 134 S. Ct. at 1450 ("Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption."). Of course, the true source of the bundled money is still disclosed. *See, e.g.*, 11 C.F.R. § 104.22(b) (reporting requirements).

The FEC can only suggest that Mr. Swallow's speech is in furtherance of illegal conduct by begging the question. Because the statements the FEC quotes are not illegal in themselves, the Court must *assume* Mr. Swallow's ultimate guilt in order to cast them as part of a nefarious plot. Such tortured reasoning is inconsistent with the FEC's pleading burdens, much less the First Amendment's protections.

Finally, the messiness of the FEC's inferential, circumstantial case—because of the mixed findings of fact and First Amendment conclusions necessary to find Mr. Swallow liable—implicates the doctrine of constitutional facts. And, because of the special nature of such facts, they will be subject to independent review by every court looking at this case. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995) (noting that courts have an "obligation" to independently review constitutional facts "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace").[23]

b. The FEC has not shown a governmental interest in expanding liability.

It is the government's burden to show a compelling interest in regulating speech. *McCutcheon*, 134 S. Ct. at 1452 ("When the Government restricts speech, the Government bears

[23] *See, e.g.*, *Lund v. Rowan Cty.*, 837 F.3d 407, 413 (4th Cir. 2016), *aff'd* 863 F.3d 268 (4th Cir. 2017) (en banc) (reviewing "de novo a district court's findings of constitutional fact and its ultimate conclusions regarding a First Amendment challenge") (internal citation and quotation marks omitted); *Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015) (noting that "factual findings, as well as the conclusions of law, are reviewed without deference") (internal quotation marks omitted); *Flanigan's Enters. v. Fulton Cty.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (noting that review of "findings of constitutional facts… is *de novo*.") (internal citation and quotation marks omitted); *Sullivan v. City of Augusta*, 511 F.3d 16, 24 (1st Cir. 2007) (requiring "plenary" review where "mixed law/fact matters… implicate core First Amendment concerns") (internal quotation marks omitted); *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1056 (9th Cir. 2007), *overruled on other grounds by Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009) (reviewing *de novo* "[m]ixed questions of law and fact").

the burden of proving the constitutionality of its actions."). The FEC has not articulated an interest in expanding the scope of 52 U.S.C. § 30122 to include those whose speech about candidates might be inferred as "helping" or "assisting" an actual lawbreaker. As discussed at length in Section II, *supra*, the Commission's justifications for doing so were sparse at best and did not articulate a compelling governmental interest in regulating the speech that Mr. Swallow is accused of making.[24] *See* 54 Fed Reg. 34098. Furthermore, the FEC nowhere invokes the only interest the Supreme Court has permitted in the contribution limit context: "target[ing] what [the Supreme Court] ha[s] called '*quid pro quo*' corruption or its appearance." *McCutcheon*, 134 S. Ct. at 1441 (internal citation omitted).[25]

c. The FEC has failed to show that secondary liability is sufficiently tailored to a compelling governmental interest.

Because the FEC has failed to articulate a compelling governmental interest in expanding liability, the regulation necessarily fails scrutiny. The FEC's action here implicates political speech—efforts to urge others to support or oppose a candidate—that "command[] the highest level of First Amendment protection." *Williams-Yulee*, 135 S. Ct. at 1665. And, given the strength of the speech issues at stake versus the FEC's failure to articulate an interest, "something… outweighs nothing every time." *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)).

[24] Indeed, and, as discussed in Section II(a) above, it cannot do so under *Central Bank of Denver*.
[25] Any campaign finance law that "pursue other objectives… impermissibly inject the Government "into the debate over who should govern…. And those who govern should be the *last* people to help decide who *should* govern." *Id.* at 1441-1442 (emphasis in original).

But, even assuming the FEC had in fact articulated an interest in controlling "'*quid pro quo*' corruption or its appearance," *McCutcheon*, 134 S. Ct. at 1441 (internal citation omitted), the regulation would still fail scrutiny. The government's interest in regulating actual or apparent corruption "captures the notion of a direct exchange of an official act for money." *Id*. The FEC has not explained how Mr. Swallow's speech to a third party creates the appearance that he was trading money for an official act by Senator Lee, nor alleged facts supporting such an inference. Similarly, the Commission has failed to explain how prohibiting Mr. Swallow's speech would prevent the direct exchange of an official act by Senator Lee for money from Mr. Swallow.

Rather, the FEC's entire theory is that Mr. Swallow "helped" a violation of 52 U.S.C. § 30122. In particular, the FEC alleges that Mr. Swallow urged Mr. Johnson to support Senator Lee to "help protect Johnson's business interests from federal prosecution." Amend. Compl. at 8 ¶ 27. According to the FEC, Mr. Swallow said that Senator Lee would be "choosing the next U.S. Attorney," and that "hav[ing both the Senator and the U.S. Attorney] in [Mr. Johnson's] corner" would be helpful "if the federal government comes after [the online] poker" industry, whose transactions were processed by Mr. Johnson's companies. Amend. Compl. at 4 ¶ 11, 9 ¶ 30. But urging others to support candidates who will support their interests is not illegal. *See McCutcheon*, 134 S. Ct. at 1451 (noting that "spend[ing] large sums [to] garner 'influence over or access to' elected officials" does not constitute *quid pro quo* corruption, and that "the Government may not seek to limit the appearance of mere influence or access").

Knowing this, the FEC further alleges that Mr. Swallow told Mr. Johnson that the latter "could [not] write a large check to the Lee campaign," but then nevertheless "solicited Johnson to

reimburse [others'] contributions to the Lee campaign."[26] Amend. Compl. at 8, ¶¶27, 29. Finally, the FEC alleges that, after Mr. Johnson allegedly solicited others to make contributions to Senator Lee and promised to repay them, Mr. Swallow e-mailed Mr. Johnson that he had been "told that [four] of those checks [from the donors Mr. Johnson contacted] bounced," and that Mr. Swallow would "forward… the names" of those donors. Amend. Compl. at 9, ¶ 33.

The relationship between these statements and the anti-corruption interest, however, is too attenuated to survive scrutiny. The Supreme Court has warned that contribution limits "themselves are a prophylactic measure." *McCutcheon*, 134 S. Ct. at 1458. That is "because few if any contributions to candidates will involve *quid pro quo* arrangements." *Id*. And laws punishing bribery further deter actual and apparent corruption. Thus, contribution limits are just a "prophylactic measure" protecting against actual and apparent corruption, and the FEC's regulation at issue here goes even further as a "prophylaxis-upon-prophylaxis." *Id*. (internal citation and quotation marks omitted). In that context, courts must "be particularly diligent in scrutinizing the law's fit" to make sure that the government "avoid[s] 'unnecessary abridgment' of First Amendment rights." *Id*. (citation omitted).

Here, we are dealing with a "prophylaxis-upon-prophylaxis" regulation, one whose scope will always—even in situations where there is no false donor scheme—treat as suspicious, and thus chill, advocacy. The innocent activity the FEC would chill includes advising others about

[26] This allegation is entirely conclusory. The FEC has alleged no specific facts in connection with Mr. Swallow's supposed "solicitation," and this Court is not required to give the Commission the benefit of the doubt where it has failed to meet its pleading burden. In that context, the contrast between the FEC's specific quotation concerning bounced checks—again, speech that is not unlawful and carries an innocent explanation—and its complete silence as to the content and context of any solicitation is telling.

which candidate will best represent their interests, and notifying fundraisers that supporters with whom they were working had fallen through with their promises. Against this obvious First Amendment harm, the FEC can only suggest that by muzzling Mr. Swallow, Mr. Johnson would not have gone forward with an unlawful scheme. That connection is too attenuated, and the balance of harms too severe.

Consequently, as with the aggregate limits at issue in *McCutcheon*, the FEC's regulation here "intrude[s] without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities,'" while failing to significantly "further the only governmental interest [the Supreme] Court" has accepted. *Id*. at 1462 (citation omitted).

d. The terms "help" and "assist" in 11 C.F.R. § 110.4(b)(1)(iii) are unconstitutionally vague.

In addition to failing scrutiny under the closely drawn test, the FEC's regulation is unconstitutionally vague. Government action unconstitutionally chills speech when it "blanket[s] with uncertainty whatever may be said[, compelling a] speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). To give "First Amendment freedoms [the] breathing space [they need] to survive, government may regulate… only with *narrow specificity*." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (citations omitted, emphasis added). In particular, statutes and regulations restricting advice must be narrowly interpreted to avoid unconstitutional restrictions on speech. *See, e.g.*, *Hersh v. United States*, 553 F.3d 743, 756 (5th Cir. 2008) (narrowing scope of advice to which regulation could apply "[t]o avoid potential constitutional questions regarding… restrictions on speech"); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 247 (2010) (upholding statute because "the prohibited advice" was narrowly defined).

Here, the FEC's regulation is infected with ambiguity. Section 110.4(b)(1)(iii) makes it an offense to "[k]nowingly help or assist any person in making a contribution in the name of another." Lacking anything to narrow the scope of "help or assist," even a bank teller might be afraid to make out a certified check when he is told that a candidate is the payee and a third person the payor. And the FEC's attempt to pursue Mr. Swallow have not only failed to narrow the regulation's terms and give them specificity, but has made those terms even less clear. *See, e.g.*, Pl. FEC Mot. to Amend and Supp. Compl. and for Permissive Joinder at 3 (Dec. 10, 2015), ECF No. 25 (using still other undefined terms, like "initiate[]" and "effect[]," in averring liability under 11 C.F.R. § 110.4(b)(1)(iii)); *cf.* Amend. Compl. at 10, ¶ 36 (using an undefined standard of "caused, helped, and assisted" to allege liability against Mr. Swallow).

As discussed above, the FEC has relied on statements by Mr. Swallow simply urging Mr. Johnson to support someone who would support Mr. Johnson's interests. Thus, anyone supporting or opposing a given candidate might abstain altogether from urging friends to go out and encourage others to make contributions, for fear that one of the people she spoke with might then reimburse the others' contributions.[27] Consequently, as a direct result of the FEC's failure to define terms like "help" or "assist," speakers will "inevitably… steer far wider of the unlawful zone," cutting into protected speech, "than if the boundaries… were clearly marked." *Grayned v. City of*

[27] Worse, the FEC's reading of 11 C.F.R. § 110.4(b)(1)(iii) could extend to nearly any conversation concerning the prohibition on giving in the name of another, including legal advice regarding its scope. Mr. Swallow is an attorney, and the complaint is unclear as to whether the FEC believes he was conveying legal advice when he made the alleged statements. Amend. Compl. at 4, ¶ 12. Legal advice is when "one… acts in a representative capacity… in counseling, advising and assisting" a client. *Newman v. Ed Bozarth Chevrolet Co.*, 714 F. Supp. 2d 1114, 1118 (D. Colo. 2009); *cf. Nelson v. Smith*, 154 P.2d 634, 389 (Utah. 1944) ("The practice of law… consists of giving advice….").

Rockford, 408 U.S. 104, 109 (1972) (internal quotation marks omitted). The FEC's regulation is thus unconstitutionally vague.

Conclusion

The FEC has badly overreached its authority. It bases its complaint against Mr. Swallow on its interpretation of 11 C.F.R. § 110.4(b)(1)(iii), which is purportedly based on 52 U.S.C. § 30122. But because the FEC's rulemaking for 11 C.F.R. § 110.4(b)(1)(iii) was contrary to the plain language of the statute, the Administrative Procedure Act, and the First Amendment, there is no basis in law on which the FEC's requested relief can be granted. Dismissal of the case against Mr. Swallow, and vacatur of the misguided regulation upon which he is brought before this Court, is therefore proper at this stage as a matter of law.

Request for Oral Argument

Mr. Swallow requests oral argument. This motion involves important issues arising under multiple Supreme Court interpretations of the APA and the First Amendment. The importance of the issues and complexity of the pertinent case law suggest that oral argument will be helpful to the Court.

Respectfully submitted,

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