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

FEDERAL ELECTION COMMISSION, Plaintiff, v. JEREMY JOHNSON, et al., Defendants.	Case No. 2:15-cv-00439-DB **MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS AND IN SUPPORT OF CROSS-MOTION** District Judge Dee Benson

PLAINTIFF FEC'S MEMORANDUM IN OPPOSITION TO DEF. JOHN SWALLOW'S MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

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The Court should deny defendant John Swallow's Motion to Dismiss and Motion for Judgment on the Pleadings. (*See* Docket No. 98.) Swallow's motion to dismiss is untimely and barred by this Court's September 20, 2017 stay order. His motion for judgment on the pleadings also fails. Plaintiff Federal Election Commission ("FEC" or "Commission") has pleaded a more-than-plausible cause of action that Swallow violated the Federal Election Campaign Act's ("FECA") ban on making contributions in the name of another. *See* 52 U.S.C. § 30122. As the complaint alleges in detail, Swallow was a campaign fundraiser who recruited wealthy Utah businessman Jeremy Johnson to contribute more than 20 times FECA's $2,400 limit to a U.S. Senate candidate. Swallow convinced Johnson that he might receive political favors in exchange for his money, instructed Johnson on how to illegally use straw donors to evade FECA's contribution limits, and then helped complete some of those illicit contributions. By initiating, instigating, and significantly participating in this scheme, Swallow violated section 30122 under its implementing regulation that prohibits any person from knowingly helping or assisting a contribution in the name of another. *See* 11 C.F.R. § 110.4(b)(1)(iii).

The third affirmative defense of Swallow's answer, which attacks the FEC's regulation under the Constitution and the Administrative Procedure Act ("APA"), lacks merit and is insufficient as a matter of law. The regulation, which the FEC has consistently enforced since its promulgation in 1989, is constitutional. Like the statute it implements, the regulation promotes the important and long-recognized government interests in disclosure of the true sources and amounts of campaign contributions and preventing circumvention of FECA's contribution limits. Even though it is well established that disclosure requirements and contribution limits under FECA are subject to an intermediate level of constitutional scrutiny, Swallow asks this Court to ignore decades of judicial precedent and apply strict scrutiny. Under the correct level of scrutiny

section 110.4(b)(1)(iii) is sufficiently tailored and does not threaten to chill lawful political speech since it applies only to knowing participation in illegal schemes.

The regulation is also within the broad statutory authority Congress has delegated to the Commission. Contrary to Swallow's arguments, the FEC's interpretation of the statute is supported by the plain language of section 30122, the purpose and history of the statute, the judicial deference due to the FEC's regulations, the regulation's background, and the applicable case law. Section 30122 uses broad and undefined language, which several courts have held includes multiple methods of making contributions in the name of another, including conduit schemes. The regulation reasonably fills the statutory gap by prohibiting knowingly helping or assisting in conduit contribution schemes as an additional method of violation. Section 110.4(b)(1)(iii) is thus a reasonable exercise of the FEC's authority on how best to ensure disclosure and fight corruption and its appearance.

Finally, Swallow has failed to meet the heavy burden of establishing that section 110.4(b)(1)(iii) is arbitrary and capricious. Swallow's substantive challenge to the promulgation of the regulation falls short because the Commission provided a sufficient basis for its reasoning, clearly setting out its analytical path in the rulemaking. His procedural challenge to the agency's Notice of Proposed Rulemaking should also be denied. The statute of limitations for that challenge expired more than 20 years ago, and in any event, the FEC's notice was sufficient.

For all these reasons and the reasons discussed below, the Court should deny Swallow's motions. The Court should also grant the FEC's cross-motion for judgment on the pleadings against Swallow's third affirmative defense, because his constitutional and APA challenges to the FEC's regulation are insufficient as a matter of law.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. Plaintiff Federal Election Commission and FECA

Plaintiff FEC is a six-member independent federal agency that is responsible for administering, interpreting, and civilly enforcing FECA, 52 U.S.C. §§ 30101-46. FECA was enacted in significant part to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (*per curiam*). To that end, FECA limits the dollar amounts of contributions to candidates for federal office, political parties, and political committees. *See* 52 U.S.C. § 30116(a). FECA also prohibits contributions from certain sources, including foreign nationals and government contractors. *Id.* §§ 30118-19, 30121. Additionally, FECA requires candidates, political parties, and political committees to disclose publicly the amounts they spend and receive in reports filed with the FEC. *See id.* § 30104.

B. The Prohibition on Making a Contribution in the Name of Another

1. 52 U.S.C. § 30122

For more than four and a half decades, FECA has stated that "[n]o person shall make a contribution in the name of another person[.]" 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f).[1] The statute prohibits at least two types of contributions in the name of another. First, it bans "false name" contributions, which occur when a person contributes to a candidate or committee but falsely attributes another person as the source the contribution. *See United States v.*

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. *See* Editorial Reclassification Table, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. As a result, many of the relevant authorities cited herein refer to 2 U.S.C. § 441f.

O'Donnell, 608 F.3d 546, 553-54 (9th Cir. 2010). Second, and relevant to this case, section 30122 bars concealed "conduit contributions," which occur when a person provides funds to a conduit (also called a "straw donor"), who then contributes those funds to a candidate or committee without disclosing the true source of the contribution. *Id.*

Congress originally enacted the ban on making contributions in the name of another in 1971 as part of the first version of FECA, which sought to improve regulation of campaign finance primarily through enhanced disclosure of contributions and their sources. *See O'Donnell*, 608 F.3d at 553. For instance, the 1971 version of FECA removed some dollar limits on contributions that had not been effectively enforced in the past, but did require campaigns to publicly disclose the identities of their contributors who gave at least minimum amounts. *See* 2 U.S.C. §§ 432(c), 434(b) (1972).

In 1974, Congress significantly revised FECA in response to the Watergate scandal and the "deeply disturbing" reports of excessive contributions made through multiple conduits and *quid pro quo* corruption during the four years preceding the 1972 federal elections,. *See Buckley*, 424 U.S. at 23-24, 26-27 & n.28, 62 (citing *Buckley v. Valeo*, 519 F.2d 821, 821, 839-40 & nn. 36-38 (D.C. Cir. 1975)). The revision retained the ban on making contributions in the name of another, placed new limits on the sources and amounts of contributions, and created the FEC to enforce those limits and FECA's disclosure requirements. *See id.* at 12-13, 109; *see* 18 U.S.C. § 614 (1974). Shortly after Congress revised FECA, the Supreme Court upheld the constitutionality of the Act's contribution limits and disclosure requirements. *See Buckley*, 424 U.S. at 58, 84.

Section 30122 is one of FECA's most frequently violated provisions. *See* Department of

Justice, Federal Prosecution of Election Offenses 166 (7th ed. May 2007).[2] This is because people attempting to violate FECA's limits on the sources and amounts of contributions often attempt to avoid detection by laundering their illegal contributions through straw donors. *Id.*

Reflecting section 30122's importance to FECA's system of disclosure requirements and contributions limits, Congress authorized the courts to impose significantly enhanced civil and criminal penalties for violations of section 30122 than for other FECA provisions. Civil penalties for knowing and willful violations of section 30122 are at least five times greater than the penalties authorized for other FECA violations. *See* 52 U.S.C. § 30109(a)(6)(C). Criminal violations of section 30122 involving more than $10,000 are punishable as felonies, subject to two-to-five years' imprisonment. 52 U.S.C. § 30109(d)(1)(A)(i), (D). Congress increased these penalties in 2002, after conducting an investigation into the 1996 presidential election that revealed serious abuses, including that "millions of dollars in illegal donations from foreign nations were funneled into party and campaign coffers through conduit contributions." 147 Cong. Rec. 3,187-3,188 (2001) (statement of Sen. Bond); Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 108 (2002).

2. 11 C.F.R. § 110.4(b)(1)(iii)

In 1976, the Commission promulgated a regulation implementing FECA's ban on making contributions in the name of another. *See* 11 C.F.R. § 110.4(b); *see also* Establishment of Chapter, 41 Fed. Reg. 35,932, 35,950 (Aug. 25, 1976). That regulation specifies that section 30122's prohibition includes both false-name and conduit contributions, *see* 11 C.F.R. § 110.4(b)(2), and courts have subsequently agreed that the statute's broad language extends at

[2] *See* https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf.

least that far, *see, e.g.*, *O'Donnell*, 608 F.3d at 555.

In 1989, the Commission added a provision to its regulation providing that no person shall "[k]nowingly help or assist any person in making a contribution in the name of another." 11 C.F.R. § 110.4(b)(1)(iii) (1989); *see* Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,104-05 (Aug. 17, 1989) ("E&J"). The Commission promulgated section 110.4(b)(1)(iii) after a federal district court held the previous year that a defendant had violated section 30122 "by *knowingly assisting* in the making of contributions in the name of another." *See* Exh. A at 1 (Final Order and Default Judgment, *FEC v. Rodriguez*, Case No. 86-687-Civ-T-10 (M.D. Fla. Oct. 28, 1988) (emphasis added)). In *Rodriguez*, the defendant solicited contributions to a federal campaign on behalf of his business associate, Alan Wolfson, and then reimbursed the conduits with funds provided by Wolfson. *Id.* The federal court held that Rodriguez's knowing assistance to Wolfson had violated FECA. *Id.*

Following *Rodriguez*, and after discussing the regulation at multiple hearings between 1988 and 1989, the Commission adopted the judicial interpretation approved by the *Rodriguez* court in 11 C.F.R. 110.4(b)(1)(iii); *see* E&J, 54 Fed. Reg. at 34,104-05. As the Commission explained in its interpretive guidance for the regulation, section 110.4(b)(1)(iii) applies "to those who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another, including those who solicit or act as go-betweens to third parties whose donations are reimbursed." *Id.*[3]

In the nearly three decades since the FEC promulgated section 110.4(b)(1)(iii), the

[3] Before its promulgation, the FEC transmitted the new regulation to Congress, as required under 52 U.S.C. § 30111 (then codified at 2 U.S.C. § 438(c)). *See* 54 Fed. Reg. at 34,098.

agency has consistently and repeatedly enforced section 30122 in administrative enforcement matters against respondents who knowingly helped or assisted conduit contributions. *See, e.g.*, Matter Under Review ("MUR") 6922 (Henke)[4]; MUR 6223 (St. John)[5]; MUR 5948 (Critical Health Systems of N.C., P.C.)[6]; MUR 5849 (Bank of America Corp.)[7]; MUR 5453 (Watts)[8]; MUR 4748 (Moniot)[9]; MUR 4582 (Vinay Wahi, Satish Bahl, and S.V. Ramamurthy)[10]; MUR 4399 (Spice)[11]; MUR 4177 (Davis)[12]; MUR 3056 (Davidson)[13].

For example, in MUR 4748 (Moniot), the Commission concluded that a television station executive violated section 110.4(b)(1)(iii) by knowingly helping and assisting the station in making illegal corporate contributions to five members of Congress using its employees as conduits. *See* Factual & Legal Analysis ("F&LA") (Resp't Moniot) at 4-5, *supra* note 9. Moniot "initiated the entire sequence of events" by convincing the station that it should make conduit contributions to members of Congress in hopes that members would then appear in stories aired by the station. *Id*. at 6. Moniot not only "actively participate[d] in the decision making process," but also asked station staff to serve as conduits, and drafted the letters to members of Congress that accompanied the illicit contributions. *Id*.

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4 https://www.fec.gov/files/legal/murs/current/111957.pdf.

5 https://www.fec.gov/files/legal/murs/current/96982.pdf.

6 https://www.fec.gov/files/legal/murs/current/95874.pdf.

7 https://www.fec.gov/files/legal/murs/current/95225.pdf.

8 https://www.fec.gov/files/legal/murs/current/52806.pdf.

9 https://www.fec.gov/files/legal/murs/current/38714.pdf.

10 https://www.fec.gov/files/legal/murs/4582.pdf.

11 https://www.fec.gov/files/legal/murs/4399.pdf.

12 https://www.fec.gov/files/legal/murs/4177.pdf.

13 https://www.fec.gov/files/legal/murs/3056.pdf.

Similarly, in MUR 5453 (Watts), the Commission concluded that a corporate executive violated section 110.4(b)(1)(iii) by knowingly helping and assisting his company make illegal corporate contributions to a U.S. Senate candidate. F&LA (Resp't Watts) at 1, *supra* note 8. Watts "suggested a corporate reimbursement scheme" to higher-ranking officers of his company, and, after receiving approval, helped "carry[] out the scheme" by collecting the funds to reimburse the employees who served as conduits. *Id.*

Finally, in MUR 4177 (Davis), the Commission found reason to believe that a consultant working for a company, Hourani and Associates, violated section 110.4(b)(1)(iii) by knowingly helping and assisting that company make illegal corporate contributions to a federal candidate. F&LA (Resp't Davis), *supra* note 12. Davis admitted to acting as a conduit herself for two contributions that were reimbursed by the company, but in addition, the evidence showed that Davis "may have solicited other employees to make a contribution and [Davis] may have also been involved in the payment of the reimbursements." *Id.* at 2. Accordingly, the FEC found reason to believe Davis violated section 30122 by "knowingly assisting in the making of contributions in the name of another." *Id.* at 3.

II. FACTUAL BACKGROUND

A. Defendant John Swallow

Defendant John Swallow is a former Chief Deputy Attorney General and former Attorney General of Utah. (*See* FEC's Am. Compl. for Civil Penalty, Declaratory, Injunctive, and Other Appropriate Relief ¶ 12 ("Compl." or "Complaint") (Docket No. 36).) In December 2009, then-Utah Attorney General Mark Shurtleff appointed Swallow to serve as Chief Deputy Attorney General. (*Id.*) Swallow was later elected Attorney General of Utah in November 2012, and served in that office from January 2013 until his resignation less than a year later in December

2013. (*Id.*)

Swallow has experience with campaign fundraising and FECA. In 2002 and 2004 he unsuccessfully ran for United States Congress in Utah's 2nd Congressional district. (Compl. ¶ 12.) Swallow's 2002 campaign was the subject of an FEC matter under review, entitled MUR 5333.[14] In that matter, on June 30, 2004, the Commission found that there was reason to believe that Swallow's campaign had violated section 30122 by knowingly accepting contributions made in the names of others. F&LA (Resp't John Swallow for Congress, et al.) at 8-9 (Aug. 16, 2004).[15] The Commission ultimately concluded that Swallow's campaign had taken excessive contributions[16] and chose to take no further action regarding Swallow in his individual capacity due to conflicting evidence about his personal role in some of the excessive contributions.[17]

Later, Swallow served as a fundraiser for Shurtleff's campaigns for Utah Attorney General in 2008 and United States Senate in 2009. (Compl. ¶ 12.) Swallow then also worked as fundraiser for United States Senator Mike Lee's campaign for Senate in 2010. (*Id.*)

B. Defendant Jeremy Johnson

Defendant Jeremy Johnson was a Utah businessman who at the time relevant to this case had business interests that included companies that made tens of millions of dollars by processing financial transactions for on-line poker companies. (Compl. ¶ 28.) Johnson also owned an internet-marketing company named I Works, Inc. (*Id.* ¶ 11.) In connection with his operation of that multi-million dollar company, Johnson was convicted in federal court in March 2016 of eight counts of making false statements to a bank and is currently serving a more than

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14 https://www.fec.gov/data/legal/matter-under-review/5333/

15 https://www.fec.gov/files/legal/murs/current/59860.pdf.

16 https://www.fec.gov/files/legal/murs/current/59849.pdf.

17 https://www.fec.gov/files/legal/murs/current/59897.pdf.

11-year prison sentence. *See* Dennis Romboy, *Judge Sends Jeremy Johnson to Prison for More Than 11 Years*, Deseret News (July 29, 2016).[18]

C. Swallow Knowingly Helped and Assisted Johnson in Making Approximately $50,000 of Conduit Contributions in 2010

During the 2009-2010 federal election cycle, Swallow knowingly helped and assisted his co-defendant Johnson in making contributions to federal campaigns using straw donors. (Compl. ¶ 1.) In 2009, when Swallow was a fundraiser for Shurtleff's Senate campaign, Swallow asked Johnson to make a large contribution to Shurtleff. (*Id*. ¶ 21.) In response, Johnson offered to write a check for Shurtleff's campaign in a large amount that exceeded FECA's limits, which at the time, capped contributions to a federal candidate at $2,400 per election. (*Id.* ¶¶ 2, 21.) Swallow then told Johnson about FECA's $2,400 limit, but suggested that Johnson contribute amounts in excess of that limit "by giving the funds to straw donors and arranging for those straw donors to pass on the funds to the Shurtleff campaign." (*Id.* ¶ 22.) Johnson subsequently contributed approximately $100,000 to Shurtleff's campaign using straw donors.[19] (*Id.* ¶¶ 23-24.)

In November 2009, Shurtleff ended his campaign. (*Id.* ¶ 29.) In 2010, Mike Lee was a candidate in the 2010 Republican primary election and in the subsequent general election for United States Senate in Utah. (*Id*. ¶¶ 27, 29). As he did for Shurtleff, Swallow raised funds for

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[18] https://www.deseretnews.com/article/865658992/Judge-sends-Jeremy-Johnson-to-prison-for-more-than-11-years.html.

[19] Swallow's recitation of the facts alleged in the Complaint incorrectly omits the details of Swallow's interactions with Johnson in relation to conduit contributions that were made to the Shurtleff campaign in 2009. (Def. John Swallow's Mot. to Dismiss, Mot for J. on the Pleadings, and Mem in Supp. ("Mot.") at v n.3 (Docket No. 98).) Those facts are relevant to the FEC's cause of action against Swallow because they help evidence that Swallow had a knowing and willful state of mind when in 2010 he helped and assisted Johnson in making approximately $50,000 of conduit contributions to Senator Mike Lee's 2010 campaign. (*See* Compl. ¶¶ 77.)

Lee's campaign. And as he also did for Shurtleff, Swallow "solicited Johnson to reimburse contributions to the Lee campaign." (*Id.* ¶ 27.) At the time, Johnson's lucrative poker processing business interests were potentially threatened since similar businesses were being prosecuted by the Department of Justice. (*Id.* ¶ 28.) To convince Johnson to contribute large amounts again but this time to Lee, Swallow "promised Johnson that funding the contributions would help protect Johnson's business interests from federal prosecution." (*Id.* ¶¶ 27, 29.) Swallow pointed out to Johnson that if Lee were elected to the Senate, Lee would be effectively "choosing the next U.S. Attorney," and Swallow stressed to Johnson: "you gotta have [Lee] in your corner and you gotta have the U.S. Attorney in your corner, especially while you're processing poker in this district." (*Id.* ¶¶ 29, 30.) According to Johnson, Swallow also said to him: "'I'm supporting you, and supporting your processing of poker . . . you don't have to worry about anything on the state level, but if the federal government comes after poker, you wanna head that off and this is how you do it.'" (*Id.*)

Convinced, Johnson then asked Swallow "whether he could write a large check to the Lee campaign or if the limits applicable to Shurtleff's campaign also applied. Swallow confirmed to Johnson that the same rules applied." (Compl. ¶ 29.) Johnson subsequently contributed approximately $50,000 to the Lee campaign using straw donors who he either paid in advance or later reimbursed. (*Id.* ¶ 32.)

Swallow actively participated in the straw donor scheme further by helping Johnson successfully execute some of his conduits' contributions. (Compl. ¶ 33.) At least four of Johnson's straw donors gave contribution checks to the Lee campaign that bounced when the Lee campaign attempted to deposit them. (*Id.* ¶¶ 48-49.) On June 21, 2010, Swallow alerted Johnson by e-mail that "[he] was told that [four] of those checks bounced. I'll forward you the

names. We are working hard and tomorrow is the big day." (*Id.* ¶ 33 (alterations in original).) Johnson responded that he would "fix" the bounced checks immediately. (*Id.* ¶ 49.) The next day, three of the four contributors whose checks had bounced issued new checks to the Lee campaign, at least three of which were successfully deposited by the campaign. (*Id.*)

D. The FEC's Administrative Enforcement Proceedings Against Swallow

On June 30, 2014, a member of the public filed an administrative complaint with the Commission alleging that both Johnson and Swallow had violated FECA. (Compl. ¶¶ 50, 59.) After conducting an investigation, the FEC's Office of General Counsel notified Swallow that it was prepared to recommend that the Commission find probable cause to believe that he had knowingly and willfully violated section 30122. (*Id.* ¶ 63.) Swallow opposed the FEC's recommendation. (*Id.* ¶ 65.)

The Commission nevertheless found probable cause to believe that Swallow knowingly and willfully violated section 30122 and section 110.4(b)(1)(iii). (Compl. ¶ 68.) After the Commission's attempts to conciliate with Swallow failed, the Commission authorized the filing of a lawsuit against Swallow on December 4, 2015. (*Id.* ¶ 70.) By the time the FEC authorized suit against Swallow, this case against Johnson had already begun, on June 19, 2015. (*See* Docket No. 1.) The agency therefore moved on December 10, 2015 to amend and supplement the Complaint against Johnson to permissively join Swallow. (Docket No. 25.) The Court granted that motion (Docket No. 35) and the FEC filed its Amended Complaint on February 24, 2016 (Docket No. 36). Rather than moving to dismiss, Swallow filed an answer largely denying the FEC's allegations and asserting fourteen affirmative defenses. (*See* Def.'s Answer to Am. Compl. ("Answer") (Docket No. 45).) The third of those fourteen affirmative defenses challenges the validity of the "the applicable federal regulations." (*Id.* at 37-38.)

On September 20, 2017, the Court granted the parties' joint stipulation to stay this case pending Johnson's currently pending criminal appeal, with the exception that the Court permitted Swallow to file "a motion for judgment on the pleadings under [Rule] 12(c) based on purely legal arguments." (Joint Stipulation and Order to Stay Proceedings at ¶ 1 (Docket No. 91).) The Court also authorized the Commission to cross-move under Rule 12(c) "on any issues raised by defendant Swallow's Rule 12(c) motion." (*Id.*) On October 23, 2017, Swallow moved under Rules 12(b)(6) and 12(c). (*See* Def. John Swallow's Mot. to Dismiss, Mot. for J. on the Pleadings, and Mem. in Supp. ("Mot.") (Docket No. 98).) Because Swallow has moved in part on the basis of his Answer's third affirmative defense (*id.* at vi), the Commission has cross-moved for judgment on the pleadings against that defense (Docket No. 102).

ARGUMENT

Swallow's motions should be denied and the FEC's cross-motion granted. Swallow's motion to dismiss is untimely under Rule 12(b) and violates this Court's order allowing him to file only a Rule 12(c) motion during the stay of the case. (Docket No. 91.) Swallow's motion for judgment on the pleadings also fails because (1) the Complaint states a plausible claim that Swallow violated 52 U.S.C. § 30122; and (2) Swallow's asserted third affirmative defense lacks merit because 11 C.F.R. § 110.4(b)(1)(iii) is constitutional and valid under the APA. Swallow's third defense should be dismissed under Rule 12(c) as a result.

I. STANDARD OF REVIEW

Motions for judgment on the pleadings "are not favored in the law and are not granted unless the moving party establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law." *F.D.I.C. ex rel. Heritage Bank & Tr. v. Lowe*, 809 F. Supp. 856, 857 (D. Utah 1992). On a Rule 12(c) motion, a court may consider "both the pleadings and any facts of which the Court can take judicial notice." *Mata v. Anderson*, 760 F. Supp. 2d 1068, 1083 (D.N.M. 2009) (citations omitted).

Courts evaluate a Rule 12(c) motion using the same standard as for a Rule 12(b)(6) motion to dismiss. *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000). Under that standard, the "Court must take Plaintiffs' factual allegations as true, consider them as a whole, and view them in the light most favorable to [p]laintiffs." *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1079 (D. Colo. 2016). To survive the motion, the complaint need only contain "enough facts to state a claim to relief that is plausible on its face." *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010) (internal quotation marks omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In addition, judgment against a pleaded affirmative defense is warranted under Rule 12(c) where the "non-moving party can prove no set of facts which would form the basis for relief" and thus the defense is "insufficient as a matter of law." *F.D.I.C. ex rel. Heritage Bank & Tr.*, 809 F. Supp. at 858-59 (dismissing affirmative defenses under Rule 12(c)). An affirmative defense cannot succeed on a Rule 12(c) motion unless "the allegations of the complaint suffice to establish the defense." *Bader v. Air Line Pilots Ass'n*, 113 F. Supp. 3d 990, 997 (N.D. Ill. 2015).

II. THE FEC HAS STATED A PLAUSIBLE CLAIM AGAINST SWALLOW

The Complaint has pleaded sufficient facts upon which the Court may reasonably infer that Swallow violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(iii), despite Swallow's contentions otherwise (Mot. at 21-22, 24-25 & n.26.) The Complaint's facts taken as true establish, first, that Johnson made approximately $50,000 of contributions in the names of others to the Lee campaign (*see, e.g.*, Compl. ¶¶ 27, 31-35, 44-49), which Swallow does not dispute. Second, the Complaint describes how Swallow helped or assisted Johnson by recruiting Johnson, instructing him on how to evade the law by using straw donors, and helping complete some of those contributions, as detailed above. *See supra* pp. xii-xiv (citing Compl. ¶¶ 21-22, 27-30, 33, 49). Third and finally, the Complaint also establishes that Swallow, an experienced fundraiser, acted knowingly and willfully. *See id.*

Even though it is blackletter law these facts must be viewed in a light most favorable to the FEC, *see supra* p. 1, Swallow asserts that the "Court is not required to give the Commission the benefit of the doubt," and insists that the Court should entertain "innocent explanations" for his alleged statements and actions (Mot. at 25 n.26). That is wrong, as explained under the

relevant standard above. There is also no requirement that Swallow's alleged statements must have been "illegal in themselves" to form part of the FEC's plausible claim, as he contends (Mot. at 22, 25 n.26), given that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent," *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

Swallow also challenges the Complaint's allegation that he "solicited Johnson to reimburse contributions to the Lee campaign" as "conclusory" (*see* Mot. at 24-25 & n.26; Compl. ¶ 27), but that allegation is clearly one of fact, not law, and in any event is supported by plenty of contextual detail that Swallow ignores (*see, e.g.*, Compl. ¶¶ 27-30). Swallow even goes so far as to demand that the FEC show "direct proof" of Swallow's liability (Mot. at 21), but he has moved under Rule 12(c) not 56, and so the FEC need only have "placed [Swallow] on notice of his . . . alleged misconduct," *Kan. Penn Gambling, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) (citation omitted), which the Complaint has done.

III. THE REGULATION IS CONSTITUTIONAL

A. Intermediate Scrutiny Applies to the Regulation Not Strict Scrutiny

For the more than four decades since *Buckley v. Valeo*, the Supreme Court has drawn a fundamental distinction between the types of campaign finance restrictions that are evaluated with strict scrutiny and those that are evaluated with less rigorous forms of intermediate scrutiny. On the one hand, "limits on campaign *expenditures*" — caps on the amount a person can independently spend on electoral speech — "are subject to strict scrutiny." *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C.), *aff'd*, 561 U.S. 1040 (2010).

On the other hand, "limits on *contributions* to candidates and political parties are subject to 'less rigorous scrutiny' and are valid if they are 'closely drawn' to meet a 'sufficiently

important' governmental interest." *Id.* (internal quotation marks omitted); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014) (declining to "revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review"). Similarly, the Supreme Court has applied closely drawn scrutiny to FECA provisions preventing the circumvention of contribution limits, *see, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 133-42 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310, 365 (2010); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) ("*Colorado II*"), and the similarly less rigorous "exacting scrutiny" to provisions requiring disclosure, *see, e.g.*, *Citizens United*, 558 U.S. at 366-67 (requiring only a "substantial relation" between a disclosure requirement and a "sufficiently important" governmental interest); *Buckley*, 424 U.S. at 64 (same); *Indep. Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016) (same).

The Court has applied these differing levels of scrutiny because while expenditure limits "impose direct and substantial restraints" on the quantity of speech, contribution limits only "marginal[ly]" restrict speech, *Buckley*, 424 U.S. at 20, 39, and disclosure requirements "do not prevent anyone from speaking," *Citizens United*, 558 U.S. at 366. The Supreme Court has therefore never applied strict scrutiny to any FECA provision other than an expenditure limit.

FECA's ban on making contributions in the name of another and its implementing regulation are not expenditure limits, and Swallow does not claim otherwise. Instead, they prohibit using straw donors from evading disclosure and circumventing FECA's limits on the amounts and sources of contributions. *See United States v. Whittemore*, 776 F.3d 1074, 1079 (9th Cir.) (stating that section 30122 furthers "the complete and accurate disclosure of the contributors who finance federal elections" (internal quotation marks omitted)), *cert. denied*, 136 S.Ct. 89 (2015); *O'Donnell*, 608 F.3d at 549 (explaining that section 30122 outlaws "attempts by

an individual (or campaign) to thwart disclosure requirements and contribution limits"); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (calling section 30122 a "disclosure requirement"). By implementing section 30122, 11 C.F.R. § 110.4(b)(1)(iii) also operates to enable disclosure and prevent circumvention of contribution limitations.

As a result, no court has ever applied strict scrutiny to section 30122 or section 110.4(b), and Swallow identifies no such case. Instead, courts have applied intermediate scrutiny to section 30122. *See Whittemore*, 776 F.3d at 1081 (explaining that the argument that section 30122 violates the First Amendment "is foreclosed by the Supreme Court's holding in *Buckley* . . . that contributions, as distinct from independent expenditures, may be limited"); *Mariani*, 212 F.3d at 775 (upholding section 30122 based on *Buckley*'s disclosure analysis, which applied exacting scrutiny).

The same intermediate scrutiny therefore should apply to 11 C.F.R. § 110.4(b), and Swallow implicitly recognizes as much. He does not dispute that less rigorous scrutiny applies to FECA contribution limits (Mot. at 20 n.21), and he concedes that section 110.4(b)(1)(iii) enforces FECA's contribution limits (Mot. at 26-27). Yet Swallow does not even attempt to show that section 110.4(b)(1)(iii) would fail the applicable intermediate scrutiny standard. Instead, he implicitly recognizes that intermediate scrutiny would doom his claim by throwing a proverbial Hail Mary for strict scrutiny. (*See, e.g.*, Mot. at 20 n.21.)

It would upend decades of Supreme Court precedent to apply strict scrutiny to a FECA provision that is undisputedly not an expenditure limit. And yet Swallow urges the Court to do just that almost solely on the basis of an inapposite case involving not FECA but the election of state judges. (Mot. at 19 (citing *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015).) In *Williams-Yulee*, the Court *upheld* a state ban on judicial candidates soliciting otherwise legal

campaign contributions. *Id.* at 1662-63. In choosing to apply strict scrutiny, the Court said that its FECA campaign finance case law did *not* control the level of scrutiny in that case, because the solicitation restriction at issue there burdened only speech. *Id.* at 1665. In contrast, the Court explained, the intermediate scrutiny applicable in the FECA context applies to contribution limits (which primarily burden association) and "solicitation restrictions [that] operate [] primarily to prevent circumvention of the contribution limits." *Id.* (citing *McConnell*, 540 U.S. at 138-39). Given that 11 C.F.R. § 110.4(b)(1)(iii) is an anti-circumvention measure, *cf. O'Donnell*, 608 F.3d at 549, as Swallow concedes (Mot. 25), *Williams-Yulee* offers him no help.

Furthermore, Swallow's alleged illegal activity in this case is far different from the burdened speech at issue in *Williams-Yulee*. The law there prevented the plaintiff from soliciting *legal* campaign contributions and from "discuss[ing] candidates and public issues — namely, herself and her qualifications to be a judge." *Williams-Yulee*, 135 S. Ct. at 1665. Here, the FEC's complaint alleges that Swallow solicited Johnson to make *illegal* conduit-contributions, instructed him on how to do so, and then participated in executing the illegal contributions. *See supra* pp. xii-xiv. As Swallow recognizes, such "'[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.'" (Mot. at 20 (quoting *United States v. Williams*, 553 U.S. 285, 297 (2008).) Swallow's arguments for strict scrutiny thus ignore that the Complaint alleges that he violated section 110.4(b)(1)(iii) by doing more than merely having purportedly innocent discussions with Johnson. (*See, e.g.*, Compl. ¶¶ 21, 33.) In addition, the Court should reject Swallow's implication that strict scrutiny should apply to *any* regulated activity not categorically excluded from First Amendment protection. (*See id.* at 20-21.) As explained above, intermediate scrutiny applies to contribution limits and disclosure requirements — even though those laws burden some First Amendment interests. *See supra* pp. 3-4.

B. The Regulation Is Substantially Related and Closely Drawn to the Government's Important Pro-Disclosure and Anti-Circumvention Interests

The regulation at section 110.4(b)(1)(iii) is appropriately tailored to the same important governmental interests that courts have held are served by the statute it implements.

First, the government's interest in the public disclosure of the sources and amounts of campaign contributions is "important" because that information (1) allows voters to make informed decisions at the ballot box; (2) deters corruption and its appearance by publicizing large contributions; and (3) allows the FEC and the Department of Justice to detect violations of FECA's limits on the sources and amounts of contributions. *Buckley*, 424 U.S. at 66-69; *see Citizens United*, 558 U.S. at 366-67; *Indep. Inst.*, 812 F.3d at 792; *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010).

Second, the government's interest in preventing donors from circumventing FECA's source and amount limits on contributions is also important. That is because the "government's interest in preventing corruption can also encompass regulations that prevent circumvention of laws that prevent corruption (such as contribution limits)." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 445 (5th Cir. 2014); *see also, e.g.*, *Colorado II*, 533 U.S. at 456 ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption.").

FECA's ban on making contributions in the name of another furthers both of these interests. Section 30122 bars a prohibited contributor (such as a foreign national) from concealing an illicit contribution by laundering it through a straw donor. The statute also prevents even legal contributors from using conduits to hide that they contributed an excessive amount of money to a campaign or committee. As a result, courts have repeatedly found that section 30122 serves both of these important interests and some of those courts have denied First Amendment challenges on that basis. *See Whittemore*, 776 F.3d at 1079 (denying First

Amendment challenge to section 30122 and explaining that it "ensur[es] the complete and accurate disclosure of the contributors who finance federal elections"); *O'Donnell*, 608 F.3d at 554 (noting that "'[d]ummy contributors' were used both to avoid disclosure as well as to evade contribution limits"); *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) ("The Act prohibits the use of 'conduits' to circumvent restrictions."); *Mariani*, 212 F.3d at 775 (upholding section 30122 and observing that the "[p]roscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to be at the very core of the [*Buckley*] Court's analysis."); *United States v. Curran*, No. 92-558, 1993 WL 137459, at *1 (E.D. Pa. April 28, 1993) ("FECA forbids the use of 'conduits' to circumvent these restrictions by prohibiting campaign contributions in the name of another person.").

Like the statutory provision it implements, section 110.4(b)(1)(iii) is substantially related and closely drawn to the disclosure and anti-circumvention interests. The regulation promotes these interests by specifying that section 30122 also prohibits any person from knowingly helping or assisting a conduit contribution by initiating, instigating, or significantly participating in the scheme. *See* E&J, 54 Fed. Reg. at 34,104-05. If section 30122 did not bar knowingly helping or assisting a conduit-contribution scheme, the government's important interests would suffer, as this case illustrates. Johnson's conduit scheme would likely have never occurred, at least in part, if Swallow had not recruited Johnson to make those contributions, given Johnson a motive to do so, and helped Johnson complete the contributions. *See supra* pp. xii-xiv. As a result of the conduit scheme that Swallow enabled, the disclosure interests suffered: voters in the 2010 federal election did not know that Johnson had contributed approximately $50,000 to Friends of Mike Lee; Johnson was able to make a large, concealed contribution in hopes of evading prosecution for his illicit poker-processing businesses; and Johnson's hidden excessive

contributions went undetected for years. The anti-circumvention and anti-corruption interests also suffered: Swallow's help and assistance to Johnson resulted in a campaign contribution that exceeded FECA's $2,400 limit by approximately $47,600.

The scope of 11 C.F.R. § 110.4(b)(1)(iii) is proportional to its goals. First, the regulation's restriction on knowing help or assistance does not apply unless a contribution in the name of another has actually occurred. *Id.* The restriction therefore applies only in cases where the government's disclosure and anti-circumvention interests have actually suffered harm. And it does not restrict any person from helping or assisting *lawful* contributions or from engaging in any other lawful political activities.

Second, the regulation extends only to individuals who "knowingly" help or assist making contributions in the name of another. 11 C.F.R. § 110.4(b)(1)(iii). Thus, a person must be more than incidentally or innocently engaged in a conduit-contribution scheme to be liable.

Third, the Commission's interpretive guidance further defines the scope of the regulation as applying "to those who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another, including those who solicit or act as go-betweens to third parties whose donations are reimbursed." 54 Fed. Reg. at 34,105. Accordingly, the regulation typically applies to behavior that is a but-for cause of a conduit-contribution scheme.

Swallow ignores these limitations on the scope of section 110.4(b)(1)(iii) when he claims that the regulation chills "innocent activity," including merely "advising others about which candidate will best represent their interests" and "notifying fundraisers" about failed contributions. (Mot. at 25-26.) Section 110.4(b)(1)(iii) has been in effect for nearly 30 years, however, and so the notion that it has been deterring legitimate fundraising during that time

strains credulity. *See* FEC Press Release, *Statistical Summary of 24-Month Campaign Activity of the 2015-2016 Election Cycle* (Mar. 23, 2017) (indicating that candidates, parties, and political committees raised and spent $8.7 billion during the 2015-16 election cycle).[20]

Swallow does not even contend that section 110.4(b)(1)(iii) fails intermediate scrutiny's "substantial relation" or "closely drawn" tailoring requirements. Instead, Swallow incorrectly demands that the regulation meet strict scrutiny's narrow tailoring requirement and further an interest more directly associated with corruption than courts have ever required in civil FECA cases. Swallow asserts that to sustain the regulation, the FEC must show that applying it to Swallow would have "prevent[ed] the direct exchange of an official act by Senator Lee for money from Mr. Swallow." (Mot. at 24.) This is incorrect. FECA's prophylactic rules, like contribution limits and disclosure requirements, are not valid only when they would have stopped an actual *quid pro quo*. Like speed limits, these laws are *preventive* measures and are designed to remove "*the danger* of actual quid pro quo arrangements" and the "*appearance*" of corruption. *Buckley*, 424 U.S. at 27 (emphases added). *Buckley* upheld the facial validity of contribution limits even though it acknowledged that "most large contributors do not seek improper influence," given that it is "difficult to isolate suspect contributions" and there is "opportunity for abuse" in the fundraising process. *Buckley*, 424 U.S. at 29-30; *Citizens United*, 558 U.S. at 357 ("[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements."). Under intermediate scrutiny, disclosure and anti-circumvention measures, like contribution limits, are valid methods of preventing the danger of *quid pro quo* corruption and its appearance, *see Colorado II*, 533

[20] https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2015-2016-election-cycle/.

U.S. at 431; *Buckley*, 424 U.S. at 67, and the regulation here performs both functions.[21]

While the FEC need not prove an actual *quid pro quo* occurred or would have occurred in this case to sustain its regulation, it is worth underscoring how far Swallow's alleged actions actually went in attempting to facilitate such an arrangement. 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. All of these actions are assumed true for purposes of this motion. The alleged behavior implicates the very core of FECA's reason for being. *See Buckley*, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."). Only section 110.4(b)(1)(iii)'s interpretation of the statute outlaws such facilitation of concealed schemes.

C. The Regulation Is Not Unconstitutionally Vague

Section 110.4(b)(1)(iii)'s use of the plain and common words "help" and "assist" does not render the regulation unconstitutionally vague, as Swallow claims. (Mot. at 26.) Swallow bears the heavy burden of showing that section 110.4(b)(1)(iii) "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. He must also

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[21] Relatedly, Swallow has not met the burden of establishing a facial challenge by showing that the "application [of the challenged rules] to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the … [regulations'] plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (internal citation omitted). Thus, even if the Court were to conclude the regulation is unconstitutional as applied to Swallow, it should not strike the regulation.

show that, "the potential chilling effect on protected expression" is both "real and substantial." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 478-80 (7th Cir. 2012) (internal quotation marks omitted). He has done neither.

First, the terms "help" and "assist" are commonly used and have a plain and clear meaning that do not leave ordinary citizens guessing as to what constitutes unlawful conduct. Other courts have denied claims that the word "assist" is unconstitutionally vague, including in the election context. *See Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1222 (D.N.M. 2010) (upholding regulation of individuals who "assist" persons in completing voter-registration forms because "[t]o 'assist' a voter is a concept of plain import"); *United States v. Reed*, 375 F.3d 340, 344 (5th Cir. 2004) (rejecting vagueness challenge to statute containing the word "assist," because that verb has a "clear and uncontroverted" meaning, which is "to provide supplemental help or support to another in carrying out some task of mutual involvement"); *see also United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) (holding that "assist," which means "giv[ing] support or aid," is not ambiguous). The word "help" is similarly clear.[22]

Second, the regulation applies only to those who "knowingly" help or assist concealed conduit contributions, and thus does not extend to innocent behavior. A "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *Bushco v. Shurtleff*, 729 F.3d 1294, 1302-03 (10th Cir. 2013) (upholding a sexual solicitation ban as not vague because of its intent requirement).

[22] *See, e.g.*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/help (defining the verb "help" as "to give assistance or support to").

Third, the FEC's interpretive guidance for section 110.4(b)(1)(iii) adds further clarity by specifying that the regulation "applies to those who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another." 54 Fed. Reg. at 34,105; *cf. Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1183 (D.C. Cir. 2014) (denying vagueness challenge in part because "OSHA has provided additional guidance on how the [regulation] will be enforced").

Fourth, Swallow could have (but did not) obtain an advisory opinion from the FEC to clarify any alleged uncertainty he had about the scope of section 110.4(b)(1)(iii). *See* 52 U.S.C. § 30108; *cf. U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 738 (D.C. Cir. 2016) ("[T]he advisory-opinion procedure accompanying the General Conduct Rule cures it of any potential lingering constitutional [vagueness] deficiency.").

Finally, the regulation here "has survived without constitutional challenge for almost three decades. Although that fact does not insulate the definition from constitutional scrutiny, it does undermine [Swallow's] claim that the language of [section 110.4(b)(1)(iii)] is intolerably vague." *McConnell*, 540 U.S. at 222-23.

Unable to demonstrate that the regulation is unconstitutionally vague as applied to his actions, Swallow imagines hypothetical applications of the regulation involving a bank teller and innocent conversations about the law.[23] (Mot. at 27 & n.27.) These hypotheticals entirely ignore the regulation's scienter requirement and the requirement that a contribution in the name of another have actually occurred. In any event, this Court need not "invalidate the challenged law

[23] Particularly imaginative is Swallow's suggestion that he was giving Johnson *legal advice* (Mot. at 27 n.27), given that Swallow was a fundraiser for the Lee campaign, and his instructions to Johnson to violate federal law were made in the context of this alleged fundraising activity (Compl. ¶ 12).

merely because [Swallow] can speculate different ways to interpret the term assist." *Herrera*, 690 F. Supp. 2d at 1222-23 ("[A] court need not indulge in speculation on the theoretical ambiguities latent in words when their plain meaning will suffice to apprise those bound by them of the duties they create."); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000) (same).

IV. THE REGULATION IS VALID UNDER *CHEVRON*'S HIGHLY DEFERENTIAL STANDARD OF REVIEW

The helping or assisting regulation is a permissible interpretation of 52 U.S.C. § 30122 under the familiar two-step test of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Under that test, if Congress "has directly spoken to the precise question at issue," a court must give effect to its unambiguously expressed intent. *Id.* If, however, "the statute is silent or ambiguous with respect to the specific issue," the court must defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." *Id*. at 842-43, 844.

Chevron prescribes broad judicial deference to the agency's reasonable construction of the statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1147 (10th Cir. 2011), *as corrected* (Mar. 22, 2011) (internal quotation marks omitted). Thus, a reviewing court's inquiry under *Chevron* must be "focused on discerning the boundaries of Congress' delegation of authority to the agency," and "as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995).

A. The Statute Does Not Unambiguously Foreclose the FEC's Interpretation

1. The Statute Is Broad Enough to Apply to Multiple Ways to "Make" a Contribution in the Name of Another

Section 30122 does not unambiguously foreclose the FEC's interpretation in section

110.4(b)(1)(iii) that a person may "make" a contribution in the name of another by knowingly helping or assisting the execution of that contribution. At *Chevron* step one, "[i]f the statute is silent or ambiguous" on the issue, then the court "proceed[s] to step two and ask[s] whether the agency's answer is based on a permissible construction of the statute." *United Keetoowah Band of Cherokee Indians of Okla. v. HUD*, 567 F.3d 1235, 1239-40 (10th Cir. 2009) (internal quotation marks omitted). To undertake this inquiry, the Court may look to, among other things, "the statutory text, history, and purpose." *Id.*

Here, the words of the statute state that "[n]o person shall *make* a contribution in the name of another person." 52 U.S.C. § 30122 (emphasis added). While FECA includes a definition of "contribution," *id.* § 30101(8), it does not define the word "make," nor does it "specify a number of covered ways to 'make a contribution'" under section 30122, *O'Donnell*, 608 F.3d at 552 (noting that the statute's language is "broad rather than specific"); *see United States v. Boender*, 691 F. Supp. 2d 833, 838-39 (N.D. Ill. 2010) ("*Boender I*") (explaining that the statute uses the "broad" verb "make"), *aff'd*, 649 F.3d 650 (7th Cir. 2011) ("*Boender II*"); *United States v. Danielczyk*, 788 F. Supp. 2d 472, 480-81 (E.D. Va. 2011) (finding that the statutory language is broad), *rev'd in part on other grounds*, 683 F.3d 611 (4th Cir. 2012); *United States v. Suarez*, No. 5:13 CR 420, 2014 WL 1898579, at *3 (N.D. Ohio May 8, 2014) (noting the broad scope of the statute).

As a result, several courts have held that the plain meaning of the term "make" in section 30122 captures multiple ways to accomplish a contribution in the name of another. For example, in *Danielczyk*, the court examined the language of 30122 and noted two different dictionary definitions of "make": "[t]o cause to exist or happen; bring about; create," and "[t]o cause (something) to exist." 788 F. Supp. 2d at 481 (internal quotation marks omitted). On that basis,

the court concluded that the statute outlaws not only "false name" contributions (where a person contributes using someone else name), but also conduit-contribution schemes. *Id.* at 479. As the court explained, "[t]o cause to exist or happen; bring about; create . . . is broad enough to encompass a number of means, including 'indirect' or 'conduit' means." *Id.* at 481; *see also Boender I*, 691 F. Supp. 2d at 838 (explaining that "make" in section 30122 "means to cause (something) to exist or come about; bring about . . . carry out, perform, or produce") (internal quotation marks omitted) (alteration in original). Similarly, in *Suarez*, the court found that the common meaning of the phrase "make a contribution" in section 30122 encompasses more than one method of contributing in the name of another, including concealed conduit donations. 2014 WL 1898579, at *3. For similar reasons, other courts have implicitly or explicitly found that section 30122 prohibits conduit schemes in addition to false-name contributions. *See, e.g.*, *O'Donnell*, 608 F.3d 552-53; *Boender II*, 649 F.3d at 660.

Given the broad definition of "make," section 30122 does not unambiguously foreclose that someone can make a contribution in the name of another by initiating, instigating, or significantly participating in a conduit-contribution scheme, even where that person was not the source of the contributed funds. "In many areas of law and life, a person can 'make' something happen though various forms of action." *Boender I*, 691 F. Supp. 2d at 838. For example, "a head of state 'makes war' through soldiers." *Id.* at 839. "In common usage, one who causes something to happen or brings it about . . . 'made' it happen just the same as the person who executed the action." *Danielczyk*, 788 F. Supp. 2d at 480 (finding that the term "make" in section 30122 permits the Court to consider [a defendant's] alleged role within the totality of the transaction"). Similarly, conduit-contribution schemes are often complex and achieved with multiple "soldiers" who are essential to the making of the contribution even though not the

source of the funds. *See supra* pp. viii-x.

Swallow's motion does not address the word "make" in section 30122 or the case law interpreting that term broadly. Swallow points out that FECA's definition of "contribution" contemplates someone giving a "gift . . . of money" (Mot. at 9), but this definition does not preclude the undefined term "make" from including not only the source of that money but also a person like Swallow whose involvement was critical to accomplishing a conduit scheme.

2. The FEC's Reasonable Implementation of Section 30122's Broad Language Is Distinguishable from Past Efforts to Obtain Private Rights of Action Under Narrower Statutes

Because he does not address the courts' broad interpretation of the word "make" in section 30122, Swallow's step one argument proceeds on the incorrect assumption that the statute clearly excludes section 110.4(b)(1)(iii)'s interpretation. He then compounds his error by relying upon a distinguishable line of cases involving aiding and abetting liability in the completely different context of seeking to obtain a private right of action under less ambiguous statutes. (*See* Mot. at 3-8.)

The case upon which Swallow principally relies is inapplicable here. (*See* Mot. at 3 (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994).) First, in *Central Bank*, the Court determined that the particular language of the statute at issue there, section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), did not reach persons who aided and abetted section 10(b) violations. *Id.* at 175-76. In contrast, the language of 30122 is broad and ambiguous enough to permit the helping and assisting liability provided for in the FEC's regulation. *See supra* pp. 15-17.

Second, the issue in *Central Bank* concerned only whether there was an *implied private* right of action for aiding and abetting liability under section 10(b). 511 U.S. at 170-71, 191.

Central Bank concluded that there was no liability available and made clear that its holding was restricted to private litigants: "Congress has not enacted a general civil aiding and abetting statute" and so "when Congress enacts a statute under which a *person* may sue and recover . . . there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* at 182 (emphasis added). In so holding, the Supreme Court was particularly concerned that allowing a private right of action for aiding and abetting liability would remove the requirement that a private plaintiff in a securities lawsuit must show reliance on a defendant's misstatements or omissions. *Id.* at 180.

Central Bank's concerns are therefore inapplicable in a case, such as this, involving an agency's enforcement of its implementing regulation using an express cause of action. Indeed, *Central Bank* itself recognized that Congress has "taken a statute-by-statute approach" to whether secondary liability exists, and that the inquiry ultimately is guided by "whether aiding and abetting is covered by the statute" in question. 511 U.S. at 177, 182. On this basis, many courts have distinguished *Central Bank* and declined to apply it outside of the context of cases involving implied private rights of action. *See United States v. O'Hagan*, 521 U.S. 642, 664 (1997) (noting that "*Central Bank's* discussion concerned only private civil litigation under § 10(b) and Rule 10b-5"); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 55-56 (D.D.C. 2010) (concluding that implied aiding and abetting liability is available under the Anti-Terrorism Act, which provides for an *express* cause of action); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005) (same); *SEC v. Buntrock*, No. 02 C 2180, 2004 WL 1179423, at *8 (N.D. Ill. May 25, 2004) (holding that *Central Bank* "does not, by analogy, extend to the SEC's authority to bring aiding and abetting claims" under other statutes), *aff'd sub nom. SEC v.*

Koenig, 557 F.3d 736 (7th Cir. 2009).[24]

As even Swallow acknowledges, *Central Bank* did not foreclose aiding and abetting liability from all civil statutes, and instead held that "the text of the statute controls" the availability of such claims. (Mot. at 4 (citing *Central Bank*, 511 U.S. at 173).) In contrast to the restrictive language at issue in *Central Bank*, the language of section 30122 extends to any person who "make[s]" a contribution in the name of another, and courts have interpreted that term quite broadly.

Because the language of 30122 is ambiguous and does not foreclose that a person may make a conduit contribution by knowingly helping and assisting that contribution, 11 C.F.R. § 110.4(b)(1)(iii) passes *Chevron* step one.

B. The Commission's Interpretation Is Reasonable and Warrants Judicial Deference

Under Chevron step two, the Court must defer to the FEC's regulation if its interpretation of the statute is reasonable. *Padilla-Caldera*, 637 F.3d at 1147. In fact, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the [Commission]," even if the Commission's "reading differs from what the court believes is the best statutory interpretation.'" *Id*. at 1147; *Chevron*, 467 U.S. at 844. As one court in this Circuit has noted, if the agency survives step one, its action is "upheld almost without exception" given the level of deference due in this step. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 285 (D.N.M. 2015), *adhered to on reconsideration*, No. CIV. 12-0069, 2015 WL 5138286 (D.N.M. Aug. 26, 2015).

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[24] It is also noteworthy that *Chevron* was decided almost a decade before *Central Bank*. It strains logic to conclude that the Court in *Central Bank* intended to silently supersede the applicability of the well-established *Chevron* framework in certain cases where it would otherwise analyze whether it should defer to a government agency.

Under this deferential standard, the FEC's regulation was a proper exercise of its broad statutory gap-filling authority. 52 U.S.C. § 30107(a)(8) (authorizing the FEC to "make, amend, and repeal such rules . . . as are necessary to carry out [FECA]"). Moreover, the Supreme Court has held that the FEC "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

Applying *Chevron* step two, one court has already concluded that "the FEC regulation that interprets Section [30122] is reasonable." *See Boender I*, 691 F. Supp. 2d at 839-40 (concluding that 11 C.F.R. § 110.4(b)(1)(i) "is entitled to Chevron-type deference"). Specifically, the *Boender* court concluded that the FEC's interpretation in section 110.4(b)(1)(i), that a conduit-contribution was a valid way to "make a contribution," was reasonable and entitled to deference. *Id.* at 839-41. Like section 110.4(b)(1)(i), section 110.4(b)(1)(iii) also specifies a reasonable method of making a contribution in the name of another.

The background of section 110.4(b)(1)(iii)'s promulgation also supports the reasonableness of FEC's interpretation. The Commission promulgated the regulation after a district court concluded that a defendant who "knowingly assisted" the making of a contribution in the name of another violated section 30122. (*See* Exh. A (Final Order and Default Judgment, *FEC v. Rodriguez*, Case No. 86-687-Civ-T-10 (M.D. Fla. Oct. 28, 1988).) Subsequently, in 1989, the FEC adopted the *Rodriguez* court's interpretation of section 30122 and its language by promulgating section 110.4(b)(1)(iii). *See* E&J, 54 Fed. Reg. 34,104-05. Since then, the Commission has consistently enforced the provision for the last 28 years, *see supra* pp. viii-x, and until now, the regulation's validity has never before been challenged in court.

Not only that, but during those 28 years, Congress has had at least three opportunities to alter or undo section 110.4(b)(i)(iii)'s interpretation of the statute and has declined to do so each

time, strongly suggesting that the FEC's interpretation is not just reasonable but the one Congress intends.

First, before its promulgation, the FEC transmitted the regulation to Congress, as required under 52 U.S.C. § 30111 (then codified at 2 U.S.C. § 438(c)), and Congress did not disapprove it. *See FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1114 (9th Cir. 1988) (failure to disapprove "strongly implies that the regulations accurately reflect congressional intent") (citation and internal quotations omitted); *see also Democratic Senatorial Campaign Comm.*, 454 U.S. at 34 & n.8 (observing Congress' failure to disapprove FEC regulation and suggesting it was "indication that Congress does not look unfavorably" on it).

Second, years later, Congress did not alter or undo section 110.4(b)(1)(iii) despite significantly amending FECA — including its penalties for section 30122 violations. *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (citation omitted). In the late 1990s, Congress investigated alleged conduit contribution schemes that took place during the 1995-1996 election cycle. *See, e.g.*, Investigation of Political Fundraising Improprieties and Possible Violations of Law Interim Report, H.R. Rep. No. 105-829 (1998) ("The Committee has tracked hundreds of thousands of dollars in conduit contributions and learned that many illegal conduit funds have yet to be returned by the DNC and other Democratic entities."). Thereafter, in 2002, in response to abuses in the 1996 election, Congress amended FECA and, among other things, enhanced the Act's penalties for making contributions in the names of others. BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002). At that time, Congress is deemed to have been aware of the *Rodriguez* ruling

and section 110.4(b)(1)(iii). *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (Congress is presumed "knowledgeable about existing law pertinent to the legislation it enacts."). And yet Congress chose not to also narrow section 30122's scope to exclude those who knowingly help or assist conduit schemes. *See FMC Wyo. Corp. v. Hodel*, 816 F.2d 496, 501 (10th Cir. 1987) ("Congress' failure to alter this interpretation while amending the statute in other respects indicates that legislative intent has been correctly discerned.").

Finally, the FEC's interpretation of section 30122 is consistent with how the agency has long interpreted other similarly broad FECA provisions to effectuate their key purposes. For example, the FEC has interpreted its ban on the knowing acceptance of contributions from foreign nationals to also prohibit knowingly providing substantial assistance to such contributions. *See* 11 C.F.R. § 110.20(h). The FEC's interpretive guidance for section 110.20(h) explains that while the statute "does not explicitly address those who assist others to violate its prohibition," the regulation's prohibition includes such activities, including serving as a conduit or intermediary, in light of the Congressional intent to strengthen the foreign money ban. *See* Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,940, 69,945-46 (Nov. 19, 2002); *cf.* 11 C.F.R. § 9008.12(b)(7) (authorizing agency action against a convention committee that "knowingly helps, assists or participates" in certain other violations).

Swallow's *Chevron* step two arguments are flawed because they simply conclude that the regulation fails "for the same reason that it is unauthorized under *Chevron* Step One: the statute is clear." (Mot. at 9.) But of course *Chevron* step two applies only where the statute is *not* clear or silent on an issue, and so the real question here is whether the agency's interpretation of the statute's unclear or silent language is *reasonable*. On that point, all Swallow offers is his incorrect assertion that "*only* the source of the funds can make a contribution under" section

30122. (*Id.*) Swallow's certainty on this point misconstrues *O'Donnell*, which held that in a conduit-contribution scheme, the source of the funds has made a contribution — not that *only* the source has made a contribution. *See* 608 F.3d at 550. And Swallow's certainty also flies in the face of the several rulings (which he never mentions) construing the undefined term "make" broadly to encompass multiple types of contributions in the name of another. *See supra* pp. 15-17.

Section 110.4(b)(1)(iii) is a reasonable interpretation of section 30122's unclear language.

V. THE REGULATION IS NOT ARBITRARY AND CAPRICIOUS

A. The Regulation Satisfies the "Reasoned Decisionmaking" Requirement of *State Farm*

Swallow has failed to satisfy his "heavy burden" of showing that the FEC's promulgation of section 110.4(a)(1)(iii) was not a product of reasoned decisionmaking and is thus arbitrary and capricious. *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016).

The arbitrary and capricious standard entails a 'very deferential scope of review' that forbids a court from "substitut[ing] its judgment for that of the agency." *Id.* (quoting *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000)); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency's decision is presumed valid. *Kobach v. Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015). An agency's explanation of its action need not "be a model of analytical precision." *Van Hollen*, 811 F.3d at 496 (internal quotation marks omitted). "It is enough that a reviewing court can reasonably discern the agency's analytical path." *Id*. at 497. That "low hurdle" is cleared where the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including

a rational connection between the facts found and the choice made." *Id*. (quoting *State Farm*, 463 U.S. at 43) (alterations in original).

The FEC's rulemaking clears this low hurdle for a few reasons. First, the FEC's Explanation and Justification was published in the Federal Register along with the final rule, *see supra* p. viii, and provides reasoning showing its readily discernable analytical path. That reasoning is fairly intuitive: the agency adopted a judicially approved interpretation of 52 U.S.C. § 30122 to apprise the regulated community of the statute's reasonable scope. *Cf. Van Hollen*, 811 F.3d at 497-98 (explaining that the FEC's "fairly intuitive" rationale was enough to pass the very deferential review under *State Farm*).

Second, for the same reason, the FEC's Explanation and Justification for the regulation demonstrates a common sense approach to fulfilling the agency's mandate of enforcing section 30122. *See Van Hollen*, 811 F.3d at 497-98 (noting that it is enough under *State Farm* when an agency's reasoning is "at the very least, speculation based firmly in common sense and economic reality"); *see also San Louis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44 (D.C. Cir. 1986) ("[T]he Commission is not required to hold a hearing to prove what common sense shows.").

Third, it is evident from the Explanation and Justification that the FEC "examined" the relevant data — namely, the *Rodriguez* ruling. In fact, the FEC discussed the ruling and proposed regulation at three separate hearings. *See infra* p. 28.

Fourth, the Explanation and Justification explains how the regulation would apply, demonstrating the agency's consideration of the important aspects of the rulemaking. And even if the FEC's explanation was not one of ideal clarity, "ideal clarity is not the standard." *Van Hollen*, 811 F.3d at 497.

Swallow disregards these factors and the deferential standard of review. Instead, he asks

the Court to invalidate a presumptively valid agency action, at least in part, because he was unable to obtain a public record: the cited judicial decision in the *Rodriguez* case.[25] Moreover, Swallow does not cite any authority precluding the FEC from adopting a judicially approved interpretation of a statute. Instead, he attempts to discredit the ruling for being "a lone decision in a district court in Florida." (Mot. at 12.) Nor has Swallow shown that the FEC explanation is contrary to any evidence that was before it. *Van Hollen*, 811 F.3d at 497-98. Lastly, Swallow also attempts to cast his procedural challenge to the regulation's validity as a substantive attack. (Mot. at 12-13.) But as explained *infra*, Swallow's procedural challenge is time-barred.

In sum, the Explanation and Justification adequately supports the Commission's adoption of 11 C.F.R. § 110.4(b)(1)(iii).

B. Swallow's Procedural Challenge Should Be Rejected

The Court should reject Swallow's untimely and meritless claim that the regulation is arbitrary and capricious because it was allegedly promulgated without the notice procedures required by the APA. (Mot. at 13-16.)

1. The Applicable Statute of Limitations Has Expired

Procedural challenges to an agency's adoption of a regulation under the APA are subject to the general six-year limitations period provided in 28 U.S.C. § 2401(a). *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245-46 (10th Cir. 2012), *cert. denied*, 134 S.Ct. 67 (2013). The

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[25] Swallow makes a mountain out of the molehill of the *Rodriguez* opinion's alleged unavailability. (*See* Mot. at 12 & 12 n.14.) That opinion, like all judicial decisions, is a public record, which Swallow could have obtained by following the instructions provided on the website for the District Court for the Middle District of Florida: https://www.flmd.uscourts.gov/FAQs/documents.htm ("FAQ: How do I obtain copies of documents from old cases?").

It is not the FEC's practice to put all filings from older cases on its website, but for the convenience of the defendants and the Court, the FEC has made relevant court documents from *Rodriguez* available at https://transition.fec.gov/law/litigation_CCA_FEC_P.shtml#fec_rodriguez.

limitations period "accrues on the date of the final agency action." *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). Courts have held that the six-year limitations period is not a mere claim-processing rule but is jurisdictional,[26] and so Swallow cannot escape its effect just because he has raised his APA challenge in an affirmative defense, as he claims. *See* Mot. at 2 n.6; *but see Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006) ("[C]hallenges to the procedural lineage of agency regulations, . . . [raised] *as a defense to an agency enforcement proceeding*, will not be entertained outside the [time] period provided by statute.") (emphasis added) (internal quotation marks and citation omitted).

Accordingly, this Court lacks jurisdiction to address Swallow's procedural challenge to the regulation's validity, since that challenge has come more than 20 years after the expiration of the limitations period. *See* Contributions and Expenditures; Prohibited Contributions, 54 Fed. Reg. 48,580 (Nov. 24, 1989) (date of final agency action).

2. Swallow's Procedural Challenge Lacks Merit

In any event, the procedural challenge fails on the merits because the FEC provided sufficient notice and sought comments on the regulation. The APA's highly deferential review under the arbitrary and capricious standard requires only that agencies provide a notice of proposed rulemaking that contains "either the terms or substance of the proposed rule *or description of the subjects and issues involved*." 5 U.S.C. § 553(b) (emphasis added).

Here, on July 30, 1986, the FEC published a detailed notice proposing a variety of possible amendments to regulations at 11 CFR §§ 110.3, 110.4, 110.5, and 110.6 regarding

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[26] *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013) ("The court lacks subject matter jurisdiction to hear a claim barred by section 2401(a)."); *Urabazo v. United States*, 947 F.2d 955 (10th Cir. 1991) (unpublished) ("'§ 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed.'") (quoting *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987)).

"limitations and prohibitions on contributions made to candidates and political committees with respect to Federal elections." Proposed Rules, Contribution and Expenditure Limitations and Prohibitions, 51 Fed. Reg. 27,183 (July 30, 1986) ("Notice"). The Commission also notified the public of a hearing scheduled on the issues in the Notice. *Id*.

The FEC also explicitly invited public comments on section 110.4, both in the introductory summary and the supplementary information on "Section 110.4 Prohibited Contributions." *See id*. (requesting comments on the "regulations at 11 CFR 110.3, 110.4, 110.5, and 110.6"); *id*. at 27,186-87 ("The Commission requests comments on the provisions of § 110.4."). And while the FEC did not propose specific language for revising section 110.4, it noted that "the draft rules that follow do not represent a final decision by the Commission on the amendment of §§ 110.3 through 110.6 of its regulations." *Id*. at 27,183.

On October 28, 1988, the *Rodriguez* court held that a defendant violated section 30122 by "knowingly assisting in the making of contributions in the name of another." *See* Exh. A. In light of the new judicial interpretation of the statute in *Rodriguez*, the FEC decided to promulgate a new regulation adopting that interpretation. Thereafter, at three separate hearings on January 28, 1988, May 11, 1989 and August 3, 1989, the Commission discussed the regulation's implementation, as well as the Explanation and Justification that would accompany its publication to provide guidance to the regulated community.[27]

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[27] Swallow overlooks these steps in the Commission's process of promulgating section 110.4(b)(1)(iii) even though one of his own lawyers was an FEC Commissioner at the time who participated in each of the three hearings and was even on the "Regulations Committee" that oversaw drafting of the regulation. *See* Federal Election Commission, Annual Report 1989 at 21 (June 1, 1990) ("A new Regulations Committee, formed by 1989 Chairman Danny L. McDonald, contributed to the revision process. Commissioners Thomas J. Josefiak and Scott E. Thomas comprised the committee, which oversaw the agency's goals in the redrafting of regulations."), *available at* http://classic.fec.gov/pdf/ar89.pdf; Federal Election Commission,

The final regulation was published in the Federal Register on August 17, 1989. *See* E&J, 54 Fed. Reg. 34,098. The accompanying Explanation and Justification explained that the regulations implement the governing FECA statutes, including the prohibition on conduit contributions in what was then 2 U.S.C. § 441f. The Commission noted that it did not receive any comments on 11 C.F.R. § 110.4,[28] provided guidance on how the new provision would be enforced, and explained that "new language is consistent with a recent judicial interpretation of 2 U.S.C. 441f in *FEC v. Rodriguez*." *Id*. at 34,105.

Although the Commission's Notice requesting "comments on the provisions of 110.4" also stated that the agency was "not proposing any revisions to the text of the regulations," 51 Fed. Reg. 27,186-87, the FEC was permitted under the APA to deviate from the Notice. *See City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003) (finding that the agency "undoubtedly has authority to promulgate a final rule that differs in some particulars from its proposed rule"). A final rule that was not clearly presaged in the notice may satisfy the APA requirements without an additional round of public comments where the final rule represents a "logical outgrowth" of the proposal. *See, e.g., Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). Under the logical outgrowth test, the inquiry is whether the notice was "sufficient to fairly apprise interested parties of the subjects and issues [of the rulemaking]" so they know whether their interests are at stake. *Id*. (internal quotation marks omitted); *see, e.g.*, *American Iron and Steel Inst. v. EPA*, 568 F.2d 284, 295 (3rd Cir. 1977) (holding that challenged

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New FEC Chairman focuses on Agency's Direction in 1989 (Jan. 12, 1989), *available at* http://classic.fec.gov/press/archive/1989/19890112_AgencyDirection.pdf.

[28] As Swallow notes, the Commission received ten public comments and heard testimony from three witnesses at the public hearing on September 17, 1986. (Mot. at 15 n.18 (citing 54 Fed. Reg. at 34,098).) Swallow apparently believes those numbers are too low (*id.*), but the APA does not specify a minimum level of public response that is necessary before a court can uphold an agency's rulemaking.

notice, while "hardly a model of clarity," was sufficient under the APA).

The inclusion of section 110.4 in the Notice and the invitation for public comments sufficiently alerted anyone with a particular interest in the agency's regulation of contributions in the name of another "that their interests were potentially 'at stake.'" *Green v. Nat'l Archives & Records Admin.*, 992 F. Supp. 811, 820 (E.D. Va. 1998) (quoting *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321-22 (4th Cir. 1980). Moreover, the Notice states with reasonable clarity that the draft is not intended to represent the final rules. *Cf. California Citizens Band Ass'n v. United States*, 375 F.2d 43, 48 (9th Cir. 1967) (holding that agency was not required "to publish in advance every precise proposal which it may ultimately adopt as a rule").

Finally, the FEC's adoption of the regulation was also reasonable under the circumstances because it was in direct response to a court ruling interpreting a statute that was then the subject of the agency's Notice.[29] The rulemaking in response to this public development did not deprive interested parties of sufficient notice regarding section 110.4(b)(1)(iii).

VI. SWALLOW IS NOT ENTITLED TO VACATUR

Section 110.4(b)(1)(iii) is valid under the APA, but even if it were not, Swallow would not be entitled to the remedy of vacatur, which he requests. (*See* Mot. at 17-18.) His APA arguments are raised as an affirmative defense, not a counterclaim. *See* Mot. at vi; 61 Am. Jur.

[29] None of the cases Swallow relies upon (Mot. at 14, 15 & n.16) involved an agency promulgating a regulation adopting a judicial interpretation of its statutory authority. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014) (agency adopted an interpretation opposite to the existing policy); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (same); *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 92 (D.C. Cir. 2002) (agency indicated to interested persons that it would not implement the program it was considering without notice and comment, and then implemented the same program without using APA rulemaking).

2d Pleading 276 (an affirmative defense only "defeats the plaintiff's cause of action").

Moreover, even had Swallow pleaded his APA challenges as counterclaims, Swallow would still not be entitled to vacatur (which he recognizes is not "automatic," *see* Mot. at 17), but instead, remand to the FEC to remedy any deficiencies in the regulation would be more appropriate. *See, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (holding that a defective regulation "need not necessarily be vacated" and may be remanded); *Quest Corp. v. FCC*, 258 F.3d 1191, 1201 (10th Cir. 2001) ("[W]hen the agency has failed to provide a reasoned explanation for its action it is appropriate to remand to the agency for further proceedings") (citation omitted). For nearly 30 years, section 110.4(b)(1)(iii) has reinforced one of FECA's most important and yet frequently violated provisions. By doing so, the regulation promotes multiple important government interests in protecting the integrity of federal elections. In the absence of the regulation, the FEC would no longer be able to enforce section 30122 against violators like Swallow who orchestrate damaging conduit-contribution schemes. Remand is appropriate since these considerations outweigh the seriousness of any alleged deficiencies in the regulation. *Cf. Allied-Signal*, 988 F.2d at 150.

Lastly, if the Court does deem vacatur appropriate on *procedural* grounds, it should decline to address Swallow's *substantive* challenges, since doing so would "short-circuit the APA's notice and comment procedures and preclude interested parties from participating in the agency's analytic process." *Iowa League of Cities v. EPA*, 711 F.3d 844, 877 (8th Cir. 2013).

CONCLUSION

For the foregoing reasons, the Court should deny Swallow's motion to dismiss and motion for judgment on the pleadings, and grant the FEC's cross-motion for judgment on the pleadings against Swallow's legally insufficient third affirmative defense.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, I electronically filed plaintiff Federal Election Commission's Memorandum in Opposition to defendant John Swallow's Motions to Dismiss and for Judgment on the Pleadings and in Support of Cross-Motion for Judgment on the Pleadings with the Clerk of the United States District Court for the District of Utah by using the Court's CM/ECF system, which sent notification of such filing to the following:

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