Lisa J. Stevenson, Acting General Counsel (lstevenson@fec.gov)
Kevin Deeley, Associate General Counsel (kdeeley@fec.gov)
Kevin P. Hancock, Acting Assistant General Counsel (khancock@fec.gov)
Sana Chaudhry, Attorney (schaudhry@fec.gov)
FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

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 **REPLY MEMORANDUM IN IN SUPPORT OF CROSS-MOTION** District Judge Dee Benson

PLAINTIFF FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

Page

Plaintiff Federal Election Commission ("FEC" or "Commission") established in its opening brief in support of its cross-motion for partial judgment on the pleadings that the third affirmative defense of defendant John Swallow's answer is insufficient as a matter of law. (Docket No. 103 ("FEC Mem.").) The Court should grant the FEC's cross-motion because that affirmative defense's challenges to 11 C.F.R. § 110.4(b)(1)(iii) under the Constitution and the Administrative Procedure Act ("APA") lack merit, and Swallow has failed to show otherwise.

In fact, Swallow has now submitted three briefs that each fail to establish that the FEC's regulation is an invalid exercise of the agency's authority under 52 U.S.C. § 30122. As the FEC has explained, 11 C.F.R. § 110.4(b)(1)(iii) satisfies the two-step framework under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). First, the statute, which bars "mak[ing] a contribution in the name of another" does not unambiguously preclude the regulation's interpretation that a person, such as Swallow, who has helped and assisted conduit contributions has violated the statute. Second, because the FEC's interpretation is based on a permissible construction of the statute, it is entitled to deference.

Further, Swallow has failed to demonstrate that section 110.4(b)(1)(iii) is unconstitutional; on the contrary, as the FEC has shown, the regulation is constitutionally valid because it promotes the government's important interests in campaign finance disclosure and preventing circumvention of contribution limits. Moreover, the regulation is appropriately tailored to those interests since it applies only to a person who helped and assisted unlawful contributions and who has done so with a knowing state of mind.

Finally, Swallow's other APA challenges are meritless or time barred, and Swallow has failed to demonstrate that the FEC's well-pleaded claim against Swallow is implausible. Instead, the Complaint's detailed factual allegations amply support the inference that Swallow violated

52 U.S.C. § 30122 when he knowingly helped and assisted his co-defendant Jeremy Johnson in making tens of thousands of dollars in contributions in the names of others.

I. THE COMMISSION'S REGULATION IS A VALID INTERPRETATION OF 52 U.S.C. § 30122 UNDER *CHEVRON*'S DEFERENTIAL STANDARD OF REVIEW

A. The Regulation Passes *Chevron* Step One Because Section 30122 Does Not Unambiguously Preclude the Commission's Interpretation

The sole issue under *Chevron*'s step one is whether the controlling statute, 52 U.S.C. § 30122, *unambiguously forecloses* the Commission's interpretation in 11 C.F.R. § 110.4(b)(1)(iii) that a person may "make" a contribution in the name of another by knowingly helping or assisting that contribution. As the FEC has explained, the statute uses the undefined and broad term "make," which courts have held encompasses multiple ways to contribute in the name of another. (FEC Mem. at 14-17.) Swallow's opposition brief nevertheless asserts that section 30122 unambiguously precludes liability for anyone other than the true source of the funds that were contributed in the name of another. (Opp'n Br. at 2-3 (Docket No. 114).) However, that argument is belied by Swallow's admission in a separate part of his brief that a person who is not the true source, but who has merely "controll[ed] the money," has also "'made a contribution'" under section 30122. (*Id*. at 8 (citing the facts of *FEC v. Rodriguez*, Civ. No. 86-687 (M.D. Fla.)).) Swallow thus concedes the very statutory ambiguity establishing that the regulation passes *Chevron* step one and that the FEC may interpret the law's reasonable scope.

Having made that concession, Swallow then falls back on his unconvincing assertion that the defendant in *Rodriguez* unambiguously "made" a conduit contribution by handling the money used, while Swallow unambiguously did not (*id.*). But the Complaint alleges that Swallow did far more to enable the conduit contributions at issue here: Swallow recruited Johnson, instructed him on making conduit contributions, gave Johnson a motive to make such contributions to then-candidate Mike Lee, and then helped Johnson facilitate some conduit

contributions that had encountered obstacles. (Compl. ¶¶ 21-22, 27-30, 33, 49.)

Moreover, Swallow mischaracterizes the relevant authority in two major respects. First, while some cases cited by the FEC (*see* FEC Mem. at 15) held that section 30122 unambiguously applies to the true source of funds in a conduit contribution scheme, none of those cases held that section 30122 unambiguously applies *only* to the true source, as Swallow implies. (Opp'n Br. at 2-3 (citing cases).) The only issue before those courts was whether the true source had violated the statute. At issue here is a separate, unaddressed question: whether a person who helps and assists the true source has *also* made a conduit contribution. Swallow admits as much by conceding that "[these] cases had nothing to do with liability for . . . 'helping and assisting' in a conduit scheme." (*Id*. at 3.) Those opinions are nonetheless relevant because the courts observed that section 30122's text is broad enough to capture multiple methods of making a contribution in the name of another. (*See* FEC Mem. at 15-17.)

Second, Swallow cherry-picks quotes from the FEC's cited authority to claim that courts have found that "the relevant statutory language unambiguously fails to reach intermediaries." (Opp'n Br. at 4.) However, the context Swallow omits is important. The defendants in these cases had argued that only conduits, and not true sources, should be liable for "mak[ing]" a contribution under section 30122. *See, e.g., United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011). The courts rejected these arguments, finding that the true sources had made the contributions, not the conduits. And as explained, given Swallow's alleged actions, he was no mere conduit or intermediary engaging in ministerial tasks in his and Johnson's conduit scheme.

B. Case Law Limiting Secondary Liability in Private Lawsuits Is Inapplicable to the FEC's Enforcement of the Particular Language of 52 U.S.C. § 30122

The FEC has demonstrated that *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), does not foreclose its statutory interpretation. (FEC Mem. at

17-19.) Swallow's response does not address the relevant issues and mischaracterizes the law.

First, in *Central Bank*, the Supreme Court held that "the text of the statute controls" the availability of claims based on secondary liability, 511 U.S. at 173, and as the FEC has explained, the broader statutory language in section 30122 is far different from section 10(b) of the Securities Exchange Act of 1934, which was at issue in *Central Bank*. (FEC Mem. at 17, 19.) Swallow has failed to address this argument. (*See* Opp'n Br. at 5.)

Second, Swallow has also failed to show how *Central Bank*, which involved private litigants, applies to this government action enforcing a regulatory violation. *See Central Bank*, 511 U.S. at 191 (holding that "a private plaintiff may not maintain an aiding and abetting suit" under section 10(b) of the Securities Exchange Act of 1934). Indeed, nothing in *Central Bank* suggests the Supreme Court held that secondary liability has been eliminated in civil enforcement actions. The Supreme Court confirmed as much just three years later in *United States v. O'Hagan*, 521 U.S. 642, 664 (1997), when it stated that "*Central Bank*'s discussion concerned only private civil litigation." Swallow attempts to sidestep *O'Hagan*'s description of what was already clear in *Central Bank* by dismissing it as an "off-hand discussion" (*see* Opp'n Br. at 5), and yet, Swallow inconsistently urges this Court to give precedential authority to a statement in *Central Bank* that is *dicta*. Swallow's argument that *O'Hagan* cannot overrule *Central Bank* "by implication" is a red herring because *Central Bank* did not involve the availability of secondary liability in a government action.[1] Further, the *O'Hagan* Court did not need to "overrule" a case it explicitly distinguished. *See* 521 U.S. at 664.[2]

---

[1] As Swallow notes, the Court should not find that a later case (*i.e.*, *Central Bank*) implicitly overruled a well-established prior precedent (*i.e.*, *Chevron*). (Opp'n Br. at 5.)

[2] Contrary to Swallow's assertion (Opp'n Br. at 5), that *O'Hagan* was a criminal case has no bearing on the Supreme Court's characterization of its own ruling in a previous case.

Third, Swallow has not cited a single case decided in the more than two decades since *Central Bank* where a court applied it to strike a government regulation. And Swallow has failed to show why this Court should be the first to do so. In addition, the case law Swallow cites is inapposite and lacks persuasive force because it involves private litigants and narrower statutes. As explained further below, if there are reasonable disagreements regarding the permissibility of an agency construing its statute to provide for secondary liability, deference should be accorded.

C. The Commission's Interpretation of the Statute in 11 C.F.R. § 110.4(b)(1)(iii) Is Reasonable and Entitled to Deference Under *Chevron* Step Two

Section 110.4(b)(1)(iii) satisfies *Chevron*'s step two because it is based on a reasonable construction of FECA, and Swallow has not shown otherwise. (FEC Mem. at 19-23.)[3]

As noted by the FEC previously, the regulation is consistent with several rulings broadly construing the undefined term "make" in section 30122 to encompass multiple types of contributions in the name of another. (*See id*. at 22-23.) Swallow does not address this case law, nor does he respond to the FEC's demonstration that its interpretation is well-supported by the legislative history of the statute and the regulation's background.[4]

Swallow does, however, now concede that the defendant in *FEC v. Rodriguez*, which led

---

[3] Swallow's opposition brief suffers from the same flaw as his opening brief as it again fails to assume the statute's ambiguity in analyzing step two. (*See* Opp'n Br. at 7 (arguing that the FEC's interpretation is unreasonable because to "'make a contribution' has been understood to unambiguously reach the true sources . . . and no further").)

[4] Swallow questions the relevance of the FEC's 30-year history of enforcing section 110.4(b)(1)(iii) administratively. (Opp'n Br. at 1, 19-20.) But courts defer to determinations made in FEC administrative enforcement actions. *See, e.g.*, *In re Sealed Case*, 223 F.3d 775, 779-80 (D.C. Cir. 2000). And the agency's history demonstrates the importance of the regulation to supporting one of FECA's most frequently violated provisions, thereby providing evidence of the regulation's reasonableness. (*See* FEC Mem. at 30.) The lack of actions in court is no surprise given that settlement through required pre-litigation conciliation attempts is the "preferred method of dispute resolution under FECA." *FEC v. NRA*, 553 F. Supp. 1331, 1338 (D.D.C. 1983). Even those alleged to have violated the regulation over the decades have not chosen to question its validity in court.

to the FEC's promulgation of section 110.4(b)(1)(iii), violated the statute simply "by controlling the money," even though he was not the true source of the contributed funds. (Opp'n Br. at 8.) Swallow's concession is fatal to his *Chevron* step two argument since if the statute reasonably bars *Rodriguez*'s handling of money used for conduit contributions, it must also reasonably outlaw Swallow's alleged actions, without which, the conduit contribution scheme alleged in this case almost certainly would have never occurred. (FEC Mem. at x-xiv.) Swallow attempts to distinguish *Rodriguez* by asserting that it concerned principal-agent lability (Opp'n Br. at 8), but this alleged distinction is meritless since the *Rodriguez* court did not rely on agency principles when it held that the defendant there violated section 30122 by "knowingly assisting in the making of contributions in the name of another."[5]

Finally, Swallow incorrectly asserts that the doctrine of *expressio unius est exclusio alterius* precludes the FEC's interpretation of how a person may "make a contribution in the name of another" because section 30122 also prohibits a person from "knowingly permit[ing] his name [from] be[ing] used to effect" a contribution in the name of another. *(Id.)* But this latter clause is a separate and independent basis for liability, and so it cannot represent a method of "mak[ing] a contribution" in violation of the first clause of the statute. As such, the "knowingly permit" clause has no bearing on whether section 110.4(b)(1)(iii) identifies one reasonable method of "mak[ing] a contribution in the name of another."

II. THE REGULATION IS CONSTITUTIONAL

A. The Regulation Is Not Subject to Strict Scrutiny

Swallow's arguments that the Commission's regulation is subject to strict scrutiny (*see*

[5] Final Order & Default Judgment, *FEC v. Rodriguez*, No. 86-687-Civ-T-10 (M.D. Fla. Oct. 28, 1988), *available at* https://transition.fec.gov/law/litigation/rodriguez_dc_final_order.pdf.

Opp'n Br. at 9-11) continue to have no basis in fact or law (*see* FEC Mem. at 3-6).

Contrary to Swallow's assertions, the FEC's action does not implicate pure political speech triggering strict scrutiny under *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015). For example, Swallow incorrectly alleges that the FEC has brought claims against him for merely encouraging Johnson to fundraise for candidates thought to be good for Johnson's business interests. (*See* Opp'n Br. at 9-10.) But the FEC's actual allegations — which Swallow recognizes must be accepted as true for purposes of the parties' motions (*see* Swallow's Mem. at iv (Docket No. 98)) — state that Swallow in fact recruited Johnson, chose Senator Lee as the candidate who would receive the illegal contributions, instructed Johnson on how to evade the law using straw donors, and participated in carrying out the straw donations scheme. (*See* Compl. ¶¶ 21-22, 27-30, 33, 49.) Further, unlike in *Williams-Yulee*, at issue here is Swallow's solicitation of *illegal*, not lawful, contributions. (*See also* FEC Mem. at 5-6 (distinguishing the "solicitation" conduct at issue in *Williams-Yulee*, which Swallow fails to address).) Thus, Swallow's alleged speech is not protected by the First Amendment, which categorically excludes "[o]ffers to engage in illegal transactions." *United States v. Williams*, 553 U.S. 285, 297 (2008).

Moreover, Swallow's strict scrutiny arguments also fail because as the FEC previously explained, the *Williams-Yulee* Court explicitly recognized that contribution limits are subject to less rigorous scrutiny because they burden freedom of association, and not speech. *Williams-Yulee*, 135 S. Ct. at 1665. Swallow tries to evade this on-point authority by alleging that this case is not about campaign contributions because it does not concern his money, and it is not about disclosure limits because the Commission does not allege that Swallow misreported his contributions. (*See* Opp'n Br. at 9-10.) However, the conduct at issue does involve inaccurate disclosures and campaign contributions — the contributions Swallow helped and assisted

Johnson in making in the names of others. As a result of Swallow's alleged actions, tens of thousands of dollars in excessive campaign contributions were made and misreported, denying voters valuable information before an election.

B. The Regulation Satisfies the Applicable Standard of Intermediate Scrutiny

In its opening brief, the FEC demonstrated that 11 C.F.R. § 110.4(b)(1)(iii) satisfies the applicable intermediate scrutiny standards of review. (*See* FEC Mem. at 7-11.) Swallow's arguments misapply the relevant law and fail to address the FEC's arguments.

First, the FEC showed that section 110.4(b)(1)(iii) is substantially related to the important government interest in disclosure. Similar to the statutory provision it implements, section 110.4(b)(1)(iii) underpins important disclosure interests by prohibiting conduct used to undermine the transparency Congress sought to achieve with FECA's disclosure requirements. *See Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (*per curiam*). Contrary to Swallow's claim that disclosure is irrelevant here, this case illustrates precisely why disclosure is important. (Opp'n Br. at 14.) When Swallow knowingly helped and assisted Johnson with his straw donor scheme, he deprived the public of important information about who is influencing a federal election.

Second, the FEC has established that section 110.4(b)(1)(iii) is closely drawn to serve important anti-circumvention interests. As the FEC showed, the Supreme Court has repeatedly said that preventing the circumvention of FECA's contribution limits is an important government interest. (*See* FEC Mem. at 8-9.) Indeed, Swallow acknowledges this interest. (*See* Opp'n Br. at 13.) He argues, however, that the Commission has not shown that its regulation is closely drawn to serve that interest here. But as the FEC explained in its Memorandum, the regulation is appropriately tailored because it applies only when an illegal contribution in the name of another is actually made, the defendant must have had a knowing state of mind, and the regulation does

not restrict any person from helping or assisting lawful contributions.[6]

III. SWALLOW'S APA CLAIMS ARE MERITLESS OR TIME-BARRED

Swallow sets forth a new theory for challenging the regulation as arbitrary and capricious — that the FEC conflated principal-agent liability with secondary liability when it adopted the judicially approved interpretation of 52 U.S.C. § 30122 in *Rodriguez*. (*See* Opp'n Br. at 22.) However, Swallow's proposed understanding is inconsistent with both the express wording of the default judgment entered in *Rodriguez* and the "very deferential scope of review" applicable here.[7] *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016).

Further, Swallow's procedural claims are time-barred under 28 U.S.C. § 2401(a). (*See* FEC Mem. at 25-26.) Swallow does not dispute that the limitations period has lapsed. He argues that the limitations period is not jurisdictional and that equitable tolling applies, but the Tenth Circuit has concluded otherwise. *See Urabazo v. United States*, 947 F.2d 955 (10th Cir. 1991) (unpublished).[8] Moreover, equitable tolling would undermine the concern underlying the limitations period regarding "the agency's interest in prompt review and the public's settled

---

[6] Additionally, Swallow's arguments fall far short of the requirements to establish vagueness even under the heightened standard for laws implicating the First Amendment. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 478-80 (7th Cir. 2012) (holding that a law will not be invalidated under this standard unless "the potential chilling effect on protected expression" is both "'real and substantial'"). In fact, Swallow has not shown how the regulation, which requires a knowing violation, would chill lawful speech. *Cf. Bushco v. Shurtleff*, 729 F.3d 1294, 1302-03 (10th Cir. 2013) (holding that a sexual solicitation statute was not unconstitutionally vague because it did not criminalize the enumerated conduct "when done without the intent to participate in statutorily defined sexual activity").

[7] Swallow argues that the FEC's reliance on *Rodriguez* was insufficient to "give a reviewing court 'a satisfactory explanation for its action'" because the FEC relied on the allegedly "stray 'assisting'" language in the case. (Opp'n Br. at 22 (citing *Van Hollen*, 811 F.3d at 497).) However, the word "assisting" is the linchpin of the defendant's liability in *Rodriguez*, since the court had previously rejected the FEC's initial theory that the defendant was primarily liable for violating the statute. (*See* FEC Mem. at 25 n.25 (citing *Rodriguez*).)

[8] Though unpublished, the Tenth Circuit's decision is more persuasive than the out-of-jurisdiction district court opinion Swallow cites, which lacks analysis. (*See* Opp'n Br. at 22-23.)

expectations." *See Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006).

Finally, Swallow's procedural challenge also fails on its merits. The FEC's Memorandum showed in detail that the agency provided sufficient notice to interested parties regarding section 110.4(b)(1)(iii). (*See* FEC Mem. at 26-29.) In response, Swallow rehashes his previous arguments, which fail to overcome the FEC's showing. (*See* Opp'n Br. at 23-24.)

IV. THE FEC HAS STATED A PLAUSIBLE CLAIM FOR RELIEF

The Complaint's detailed factual allegations establish a plausible claim that Swallow knowingly helped and assisted Johnson in making contributions in the names of others. (*See* FEC Mem. at 2-3.) Swallow cannot establish implausibility by simply labeling FEC allegations as "conclusory," and claiming that some allegations do not count because they concern his speech or would constitute inadmissible evidence. (*See* Opp'n Br. at 16-17.) First, it is elementary that the Complaint's allegations must be viewed as a whole and accepted as true and in a light most favorable to the FEC. *See Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1079 (D. Colo. 2016). Second, as the FEC previously noted, the First Amendment does not prohibit considering factual allegations that implicate speech. *See Wisc. v. Mitchell*, 508 U.S. 476, 489 (1993). Third, and similarly, there is no support for disregarding purported "bad acts" allegations, and the case Swallow cites is inapposite. (*See* Opp'n Br. at 16-17 n.19.) In any event, the FEC allegations to which Swallow objects do not bear on propensity — the acts alleged are directly relevant to the FEC's claim and evidence of such acts would be admissible under Federal Rule of Evidence 404(b)(2) as bearing on Swallow's state of mind.

CONCLUSION

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

Respectfully submitted,

Lisa J. Stevenson (lstevenson@fec.gov)
Acting General Counsel

Kevin Deeley (kdeeley@fec.gov)
Associate General Counsel

Kevin P. Hancock (khancock@fec.gov)
Acting Assistant General Counsel

January 29, 2018

/s/ Sana Chaudhry
Sana Chaudhry (schaudhry@fec.gov)
Attorney

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2018, I electronically filed plaintiff Federal Election Commission's Reply In Support of Its Cross-Motion for Partial 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:

Allen Dickerson, Esq. (adickerson@ifs.org)
Tyler L. Martinez, Esq. (tmartinez@ifs.org)
Owen D. Yeates, Esq. (oyeates@ifs.org)
INSTITUTE FOR FREE SPEECH
124 S. West Street, Suite 201
Alexandria, VA 22314

Scott C. Williams, Esq. (scwlegal@gmail.com)
SCOTT C. WILLIAMS, LLC
43 East 400 South
Salt Lake City, Utah 84111

Attorneys for Defendant John Swallow

Karra J. Porter, Esq. (Karra.Porter@chrisjen.com)
John D. Lauritzen, Esq. (jd.lauritzen@chrisjen.com)
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, UT 84111

Attorneys for Defendant Jeremy Johnson

/s/ *Sana Chaudhry*
Sana Chaudhry
Attorney
Federal Election Commission