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

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

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Introduction

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

In the end, this Court must dismiss the Amended Complaint[3] unless the FEC can win on all of the following four points: (1) the plain text of the statute must be ambiguous, despite the FEC's reliance on cases holding that the statute unambiguously reaches only the true sources of financial contributions; (2) the FEC must establish that the Supreme Court's holding in *Central Bank of Denver* does not apply; (3) the FEC's regulation must be a reasonable construction of 52 U.S.C. § 30122; and (4) the FEC must either survive strict scrutiny, or explain why and how its regulation survives a lower standard of scrutiny. As discussed below, the FEC has failed to meet its burden on any of these points, much less all four.

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

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

[3] The FEC argues that a Federal Rule of Civil Procedure 12(b)(6) motion is untimely. FEC Response at 1. Nevertheless, the Parties agree that the standard of review, and the remedy, are the same under 12(b)(6) and 12(c). Swallow Mot. at 1; FEC Response at 1.

Argument

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

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

To establish discretion to prohibit additional conduct, the FEC must demonstrate that the underlying statute is ambiguous. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). But the controlling opinions the FEC cites hold that § 30122 is unambiguous. *See United States v. Boender*, 649 F.3d 650, 661 (7th Cir. 2011) (holding that "the meaning of § [30122 is] unambiguous based on the text itself"); *United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010) (holding that § 30122 "unambiguously applies to straw donor contributions"); *United States v. Suarez*, No. 5:13 CR 420, 2014 U.S. Dist. LEXIS 63681, at *11 (N.D. Ohio May 8, 2014) (holding that "the statutory language at issue is clear and unambiguous"); *United States v. Danielczyk*, 788 F. Supp. 2d 472, 485 (E.D. Va. 2011) (holding statute unambiguous under "traditional canons"), *rev'd in part on other grounds* 683 F.3d 611 (4th Cir. 2012); *see also Fed. Election Comm'n v. Weinsten*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978).[4]

Furthermore, the controlling opinions the FEC cites are either irrelevant or preclude the

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

Commission's arguments. Those cases had nothing to do with liability for speech, or for "helping and assisting" in a conduit scheme. Instead, they concerned whether § 30122 applied to the original source of funds used in conduit schemes. *See Boender*, 649 F.3d at 660; *O'Donnell*, 608 F.3d at 549-50; *Danielczyk*, 788 F. Supp. 2d at 479; *Suarez*, 2014 U.S. Dist. LEXIS 63681, at *3.[5] And, in upholding liability for the limited, true donor class, the Courts of Appeals have held that § 30122 is unambiguous in ways that preclude the FEC's regulation. In *Boender*, for example, the Seventh Circuit looked to the plain meaning of § 30122, stating that "[t]o 'make a contribution' is of course to 'contribute.'" 649 F.3d at 660. And the person making a contribution is "the source of the gift, not any intermediary who simply conveys the gift." *Id.*; *see also United States v. Whittemore*, 776 F.3d 1074, 1079 (9th Cir. 2015) ("To identify the individual who has made the contribution, we must look past the intermediary's essentially ministerial role . . . ."); *O'Donnell*, 608 F.3d at 550 (noting that, based on the gift analogy, a court "must look past" "the person who actually transmits the money[, who] acts merely as a mechanism").[6] If the relevant statutory language unambiguously fails to reach intermediaries who actually touch the contribution, it certainly cannot reach defendants whose conduct involves only advice and other speech.

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

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

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

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

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

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

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994) ("*Central Bank*") (emphasis added).[7] Mr. Swallow's Motion examined both *Central Bank* and the lower courts' applications of that decision to other statutes. Swallow Mot.[8] at 3-8. Contrary to the Commission's assertions, FEC Response at 17-18, *Central Bank* covered both private suits *and* civil claims brought by the Securities and Exchange Commission ("SEC"). 511 U.S. at 182.

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

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

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

This is especially true where the facts of the latter case are so distinguishable. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court . . . appears to rest on reasons rejected in some other line of decisions . . . follow the case which directly controls"). *O'Hagan* was a *criminal* case. 521 U.S. at 648 (noting multiple changes filed). And there is a general criminal statute proscribing aiding and abetting—one explicitly noted by *Central Bank* as irrelevant in the civil context. 511 U.S. at 190 (refusing to use 18 U.S.C. § 2 to create *civil* secondary liability). Furthermore, *O'Hagan* came down in 1997, more than a year after adoption of language now codified at 15 U.S.C. § 78t(e), which provided the SEC with the explicit authority it lacked in *Central Bank*.[9] Thus, at the time of *O'Hagan*, *Central Bank*'s effect on civil claims had been changed, not because of a shift in case law, but by statutory amendment. If Congress wishes, it may similarly amend the federal campaign finance laws.

None of the Commission's other string-cited cases are helpful, and many are no longer good law.[10] This Court is thus left with two choices: either apply the on-point language from *Central Bank,* or accept the FEC's invitation to substitute an *implicit* statement about the scope of that holding in a later case in a distinguishable context. The former is the correct path.

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

[10] At page 18, the FEC's brief cites cases that have been superseded by later authority. For example, the Second Circuit, which covers the Eastern District of New York, explicitly denied secondary civil liability in the Anti-Terrorism Act ("ATA"). *Terrorist Attacks on September 11, 2001 v. Al Rajhi Bank* (In re *Terrorist Attacks on September 11, 2001*), 714 F.3d 118, 123 (2d Cir. 2013). So *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005), decided eight years earlier, is not good law. Similarly, two recent cases—*Owens v. BNP Paribas, S.A.*, 235 F. Supp. 3d 85, 93-94 (D.D.C. 2017) and *Shatsky v. PLO*, No. 02-2280, 2017 U.S. Dist. LEXIS 94946, *22, 103 Fed. R. Evid. Serv. (Callaghan) 923 (D.D.C. 2017)—were decided years after *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1 (D.D.C. 2010). Those later cases apply *Central Bank* to the ATA.

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

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

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

Even the unpublished, default judgment in *Federal Election Commission v. Rodriguez*, upon which 11 C.F.R. § 110.4(b)(1)(iii) relied, involved Mr. Rodriguez "approach[ing] various individuals and solicit[ing] contribution[s] to the Carter/Mondale Presidential Committee. [Mr. Rodriguez] promised each individual that he would be reimbursed for the contribution. [Mr. Rodriguez] subsequently reimbursed each individual for his contribution." Amend. Cmplt at 5, ¶ 15, *Fed. Election Comm'n v. Rodriguez*, Case No. 86-687 (M.D. Fla. May 9, 1988).[11]

[11] Kindly made available by the Commission at:
https://transition.fec.gov/law/litigation/rodriguez_fec_mot_reopen.pdf

Mr. Rodriguez "made a contribution" by controlling the money. A principal can "make" a contribution through an agent precisely because of such control. But, crucially, that is because the statutory language in unambiguous in that context. By contrast, in what sense would a principal be merely "helping and assisting" the agent to do what he or she was *instructed* to do? Such a reading is unreasonable, and *Rodriguez* cuts against the Commission, not for it.[12] As Mr. Swallow never had agency or control over illegally contributed funds, he did not "make a contribution" within a reasonable construction of 52 U.S.C. § 30122.[13]

Moreover, 52 U.S.C. § 30122 establishes liability for one and only one category of people "helping and assisting" others to make illegal conduit contributions. Those who "knowingly permit [their] name[s] to be used to effect such a contribution" are also liable. Congress's decision to specifically state which individuals, beyond the unambiguous class of contributors, were covered, further demonstrates that the FEC's decision to go further is an unreasonable reading of the statute.

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[12] Because the Commission's Explanation and Justification regarding 11 C.F.R. § 110.4(b)(1)(iii) merely relied upon the easily-distinguished *Rodriguez,* it adds nothing, and certainly provides no evidence that the underlying regulation is a reasonable interpretation of the statute.

[13] The FEC suggests that Mr. Swallow's additional argument, that § 110.4(b)(1)(iii) violated "the notice procedures required by the APA," is barred by the general statute of limitations, FEC Response at 25, and that this limitation is jurisdictional, cherry picking out-of-circuit or unpublished authority. FEC Response at 26 n.26. But courts in the Tenth Circuit have held "that [§ 2401(a)] is not" jurisdictional. *Rocky Mt. Wild v. Walsh*, 216 F. Supp. 3d 1234, 1246 n.7 (D. Colo. 2016) (collecting cases). And equitable tolling is even more appropriate here: Mr. Swallow has not attempted to bring a claim against the FEC when all its evidence is spoiled, but is instead defending himself, not even from a continuing injury, but from a new claim by the FEC so obscure and unexpected that it can point to no other instance of similar civil enforcement. *Cf. Ford Motor Co. v. United States Dep't of Homeland Sec.*, No. 05-73860, 2006 U.S. Dist. LEXIS 59465, at *15 (E.D. Mich. Aug. 23, 2006) (unpublished) (permitting challenge to notice). Thus, it is appropriate to follow the general practice of equitable tolling. *See Rotella v. Wood*, 528 U.S. 549, 560 (2000); *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 826 (10th Cir. 2014). But, even if equitable tolling did not apply to the regulation's procedural invalidity under the APA, the FEC does not dispute that it would apply to the regulation's substantive infirmities addressed here.

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

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

The Commission posits that this enforcement action is about "contribution limits . . . and disclosure requirements," which necessitate the application of a lower standard of scrutiny. FEC Response at 4.[14] That may be true as regards Mr. Johnson, but the FEC fails to allege that any of *Mr. Swallow*'s money was inaccurately reported, was contributed to a candidate in excess of limits, or was used to reimburse a contribution to complete a straw donor scheme. So the FEC has failed to show how its pursuit of Mr. Swallow advances any disclosure interest.

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

If the FEC went after Mr. Swallow for merely encouraging Mr. Johnson to "raise the

[14] The Commission is correct: contribution limits, standing alone, are reviewed under "closely drawn" scrutiny. But that is not synonymous with intermediate scrutiny. FEC Response at 3, 5, 6. Closely drawn scrutiny requires "a means narrowly tailored to achieve the [government's] desired objective," and is stricter than intermediate scrutiny. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1457 (2014); *cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (noting that the Supreme Court "explicitly rejected . . . intermediate scrutiny for communicative action" and therefore contribution limits (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) and *United States v. O'Brien*, 391 U.S. 367 (1968)). Even if closely drawn scrutiny applies, however, the government still carries the burden of showing both interest and tailoring, a burden it has failed to carry. Swallow Mot. at 20, n.21

money" to help elect Mike Lee to the Senate because "he's gonna be choosing the next U.S. Attorney," no one would doubt that strict scrutiny would apply. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (applying strict scrutiny to ban on speech opposing presidential candidate); *Eu v. San Francisco Democratic Campaign Comm.*, 489 U.S. 214, 223 (1989) ("'[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office" (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))). Indeed, the effect of political appointments is typical of political speech aired during an election campaign.[15]

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

But the FEC must do more than marry specificity about undoubtedly legal, protected

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

political speech with vaguely pleaded accusations in order to evade the burdens of strict scrutiny.[16] *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations"); *see also United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013) (cautioning against "piling inference upon inference"). As it has not done so, strict scrutiny applies, and the Commission's effort to regulate Mr. Swallow's speech cannot withstand it. Swallow Mot. at 22-23.[17]

Conclusion

For the reasons given here and in Mr. Swallow's Motion, this Court should deny the FEC's cross-motion, grant judgment on the pleadings, and vacate[18] 11 C.F.R. § 110.4(b)(1)(iii).

Respectfully submitted,

/s/ Allen Dickerson
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[16] Even the quotes from a putative email sent by Mr. Swallow in 2010 regarding bounced checks, Amend Cmplt. at 9, ¶ 33, which has never been provided to Mr. Swallow despite an administrative enforcement proceeding and criminal trial, comes from nothing more than hearsay, and can nevertheless easily be read as innocent, protected speech concerning the everyday mechanics of a campaign.

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

[18] The FEC argues that Mr. "Swallow is not entitled to vacatur." FEC Response at 29. Mr. Swallow is entitled to dismissal of the FEC's claims against him, which are based on a regulation that is *ultra vires* and contrary to statute. As this case demonstrates, the FEC does not require this regulation in cases involving actual conduit contribution schemes, and cannot be trusted to avoid using this regulation to chill speech. Moreover, there is little reason to believe a remand would be fruitful. *See Shays v. Fed. Election Comm'n*, 528 F.3d 914, 931 (D.C. Cir. 2008) (detailing repeated judicial remands to the agency where the Commission failed to substantively correct administrative law errors noted in the *Shays* line of cases). Accordingly, vacatur, while discretionary, is warranted.

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