UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN KELSEY and JOSHUA SMITH, Defendants.	No. 3:21-cr-00264

DEFENDANT KELSEY'S MOTION TO WITHDRAW PLEA AND FILE MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION

Defendant Brian Kelsey seeks the Court's approval to withdraw his guilty plea because he pleaded guilty to something that is not a crime and for other factors justifying withdrawal of the plea. With the Court's permission, he would also file the attached Proposed Motion to Dismiss asking the Court to dismiss all five counts in the indictment. *See* Exhibit 1. Though not the norm, it is permissible to withdraw a guilty plea and file a Motion to Dismiss. *See, generally, United States v. Mendez-Santana*, 645 F.3d 822, 829 (6th Cir. 2011).

Federal Rule of Criminal Procedure 11(d) provides a "defendant may withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." The "fair and just" standard is "applied liberally," and a motion to withdraw filed prior to sentencing is to be "liberally construed." *United States v. Davis*, 428 F.3d 802, 805 (9th Cir. 2005); *United States v. Buckles*, 843 F.2d 469, 471 (11th Cir. 1988). It would be unfair and unjust to allow Defendant to be sentenced to a crime which is legally impossible for him to commit, and that is what occurred in this case, as explained below. Therefore, Defendant humbly requests that this Court allow him to withdraw his guilty plea and grant him the opportunity to explain why this case should be dismissed as a matter of law.

"Campaign finance regulation has been termed 'baffling and conflicted.'" *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 296 (4th Cir. 2008) (quoting *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004)). "It is an area in which speakers are now increasingly forced to navigate a maze of rules, sub-rules, and cross-references in

order to do nothing more than project a basic political message. Only those able to hire the best team of lawyers may one day be able to secure the advisory opinions or otherwise figure out the myriad relevant rulings with any degree of assurance that they will escape civil and criminal sanctions[.]" *Id*. (internal citation omitted). In this case, Defendant Brian Kelsey in fact hired an expert team of lawyers before taking the actions at issue in the case. He believed he followed the law and, prior to accepting the plea at issue, he consistently and repeatedly maintained his innocence. Yet, he was criminally indicted for those actions five years later.

Kelsey entered the plea at issue with an unsure heart and confused mind, coming shortly after his twin sons were born and while his father was effectively on his death bed in home hospice care. Such a mental state is exactly what Rule 11(d) was designed for. *See United States v. Walden*, 625 F.3d 961, 965 (6th Cir. 2010). During this incredibly stressful and confusing time, Kelsey was given a mere 48 hours to make a life altering decision – a decision made without fully understanding ancillary consequences that have come to light only after he entered his plea. Furthermore, he moved to withdraw the plea as early as practicable after his father's death.

In light of these unique facts, Kelsey humbly requests that he be permitted to withdraw his guilty plea and have his proposed Motion to Dismiss heard.

ARGUMENT

The Court should grant the Motion to Withdraw Plea under Rule 11(d) because Kelsey pleaded guilty to a set of facts that do not actually constitute a crime and

entered into his plea agreement with unsure heart and confused mind.

The Sixth Circuit has advised that a district court should consider seven factors when considering a motion to withdraw a guilty plea: "(1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted. *United States v. Martin*, 668 F.3d 787, 794 (6th Cir. 2012). "The factors are a general, non-exclusive list and no one factor is controlling." *United States v. Bazzi*, 94 F.3d 1025, 1027 (6th Cir. 1996) (per curiam). "The relevance of each factor will vary according to the circumstances surrounding the original entrance of the plea as well as the motion to withdraw." *United States v. Haygood*, 549 F.3d 1049, 1052 (6th Cir. 2008)).

When it was adopted, Rule 11 abrogated the harsh ten-day time limit in which to withdraw a guilty plea found in the prior Rule II(4) of the Criminal Appeals Rules of 1933. *See* Lester B. Orfield, *Federal Criminal Appeals Rules as Interpreted in the Decisions*, 21 N.C. L. Rev. 28, 39 (1942).[1] Now, this Court faces no time restriction on granting a motion to withdraw plea; the Court has full discretion. *See* Fed. R. Crim.

[1] *Available at* https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1589&context=nclr.

P. 32 Advisory Committee Note to Subdivision (d) (later moved to R. 11). The District Court maintains discretion to grant plea withdrawals well beyond the three to four months at issue in this case. *See United States v. Hall*, No. 15-CR-55-LRR, 2016 U.S. Dist. LEXIS 38280, at *1 (N.D. Iowa Mar. 24, 2016) ("The four-month delay in filing the motion to withdraw did not weigh against permitting defendant to withdraw his plea."). Indeed, this Court granted a motion to withdraw made over eight months after the plea agreement was entered in *United States v. Maxwell*, No. 3:19-cr-00208, 2022 U.S. Dist. LEXIS 65527, at *7 (M.D. Tenn. Apr. 8, 2022).

I. It would be unfair and unjust to allow Defendant to be sentenced to a crime which is legally impossible for him to commit.

A motion that would render a defendant innocent is a fair and just reason to grant a motion to withdraw plea. It is not just a factor this Court should consider, but it is an important factor: "Whether the movant has asserted his legal innocence is an important factor to be weighed." *United States v. Lewis*, 800 F. App'x 353, 358 (6th Cir. 2020). For example, in *Maxwell*, Judge Trauger granted a motion to withdraw a guilty plea when the defendant presented to the Court a motion to suppress evidence that he claimed showed it was impossible for police officers to see the marijuana in his car through its tinted windows, thus rendering the search of his vehicle illegal and making his conviction impossible as a matter of law. 2022 U.S. Dist. LEXIS 65527, at *10-11. Moreover, she did so even though "most of the factors weigh[ed], at least to some degree, *against* granting the defendant's motion," including the eight-month delay between the plea and the motion. *Id.* at *10 (emphasis added). Regardless, the defendant's assertion of "legal innocence" meant that one "factor

weigh[ed] heavily in favor of granting the defendant's motion and that . . . factor outweigh[ed] the others." *Id*. at *7, *10.

As set forth in the proposed Motion to Dismiss attached hereto, Kelsey pleaded guilty to offenses that are not actually crimes; thus, he maintains his legal innocence, and like Maxwell, his motion to withdraw should be granted.[2]

a. The government's theory in Count Five has been foreclosed by the Federal Election Commission.

The government's theory in Count Five that Kelsey "coordinated" communications allegedly paid for by his state committee to benefit his federal campaign has been foreclosed by the Federal Election Commission.

In FEC Advisory Opinion 2007-1 (McCaskill), the FEC concluded that a federal candidate cannot "coordinate" with his or her own state campaign committee for purposes of Federal campaign finance law. The FEC explained why:

> Under the first prong of the "coordinated communication" definition, a communication is only subject to the regulations if it "is paid for by a person other than that candidate, an authorized committee, political party committee, or agent of any of the foregoing." 11 C.F.R. 109.21(a)(1). In these circumstances, the candidate and her agents [the state campaign committee] are paying for these communications, so the payment prong is not met and the "coordinated communication" definition is not applicable.

Id. at 5-6.[3] In other words, the Commission held that a payment from a candidate's own state committee cannot be the source of funding for a coordinated

[2] This portion of this Motion addresses only Counts One and Five of the indictment because those are the only counts that Kelsey pled guilty to in his plea agreement. For the reasons set forth in the proposed Motion to Dismiss, Counts Two, Three, and Four also fail to set forth a series of facts constituting a violation of federal law.
[3] *Available at* https://www.fec.gov/files/legal/aos/2007-01/2007-01.pdf.

communication, and thus an in-kind contribution, to that same candidate's federal committee because the contribution is not "paid for, in whole or in part, by a person *other than that candidate*, authorized committee, or political party committee," or agents thereof, which is a required element of coordination.. 11 C.F.R. § 109.2.1(a)(l) (emphasis added).

This view was reiterated in FEC Advisory Opinion 2009-26 (Coulson).[4] In that opinion, the Commission concluded that a candidate's state committee mailer could not constitute a "coordinated communication" with the same candidate's federal campaign committee.

FEC advisory opinions matter both because of the agency's expertise but also because federal law "create[s] a 'safe harbor' for parties who rely on advisory opinions" issued by the FEC. *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 185–86 (D.C. Cir. 2001). To wit, the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.* ("Election Act"), expressly states so:

> Any advisory opinion rendered by the Commission under subsection (a) may be relied upon by-
>
> (A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and
>
> (B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

52 U.S.C. § 30108(c)(1). It further states, "Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in

[4] *Available at* https://saos.fec.gov/aodocs/AO%202009-26.pdf.

accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act." *Id.* at § 30108(c)(2). Thus, members of the public are entitled to rely on representations made in advisory opinions.

In addition, the FEC has repeated its interpretation that federal candidates cannot coordinate with their state committees as a matter of law in the enforcement process. In *In re Steve Oelrich*, Matter Under Review 6601, (FEC Factual & Legal Analysis, July 16, 2014),[5] the FEC noted that advertisements paid for by a candidate's own state committee could not be coordinated with his federal campaign committee because a "coordinated communication" cannot exist where the state and federal committees exist for the benefit of the *same person*:

> It does not appear that the costs of the radio ad would constitute an in-kind contribution from the State Committee to the Federal Committee by virtue of being a coordinated communication. Commission regulations set forth a three-prong test to determine whether a payment for a communication is an in-kind contribution as a result of coordination between *the person making the payment and the candidate.* Consistent with Commission advisory opinions, the Commission concludes that the advertisement here would not meet the payment prong of the coordination test at 11 C.F.R. § 109.2.1(a)(l).

Oelrich, MUR 6601, at 9 n.10 (citations omitted) (emphasis added).

The Commission's longstanding regulations and interpretations of its regulations bind the Government. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (explaining agency regulations "have the 'force and effect of law'"). The Federal

[5] *Available at* https://www.fec.gov/files/legal/murs/6601/14044362763.pdf.

Election Commission and the Department of Justice are sister agencies of the same Federal Government. The Department of Justice cannot criminally prosecute people for actions the Federal Election Commission has announced are legal, especially considering the "knowing and willful" intent requirement for criminal violations of the Federal Election Campaign Act. *See* 52 U.S.C. § 30109(d). The knowing and willful standard requires that "acts were committed with full knowledge of all of the relevant facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3,1976); *see also AFL-CIO v. FEC*, 628 F.2d 97, 98, 101-02 (D.C. Cir. 1980) (noting that a "willful" violation includes "such reckless disregard of the consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act."). In other words, the defendant must know his conduct was "unauthorized and illegal." *United States v. Hopkins*, 916 F.2d 207, 213 (5th Cir. 1990) (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)).

Because Kelsey acted in *accordance* with the FEC's Advisory opinions and interpretations of the law in its enforcement decisions, he did not violate the law as alleged in Count Five as a matter of law and certainly did not violate the law knowingly and willfully.

b. Count One fails because there can be no conspiracy if there is no underlying crime.

Count One fails because the "conspiracy" it alleges is not unlawful. "[T]here can be no conviction for conspiracy to commit an offense against the United States if the act that the alleged conspirators agree to do has not been made unlawful." *Ventimiglia v. United States,* 242 F.2d 620, 622 (4th Cir. 1957); *see also Parr v. United*

States, 363 U.S. 370, 393 (1960); *accord United States v. Galardi*, 476 F.2d 1072, 1079 (9th Cir. 1973) ("It should require no citation of authority to say that a person cannot conspire to commit a crime against the United States when the facts reveal there could be no violation of the statute under which the conspiracy is charged."). Here, as explained above, the allegation in Count Five, to which Kelsey pleaded guilty, is not a crime.[6] Accordingly, any supposed agreement or agreements between Kelsey and other persons concerned only lawful activity. As the Third Circuit held in the campaign finance context, when a "conviction on [the] substantive count cannot stand, neither can conviction for conspiring to commit that offense" under 18 U.S.C. § 371. *Curran*, 20 F.3d at 562.

In short, it would be unfair and unjust to proceed with sentencing Kelsey for a crime which was legally impossible for him to commit, and Kelsey should therefore be allowed to withdraw his guilty plea in this unique circumstance.

II. Before entering into this plea agreement, Kelsey consistently maintained his innocence.

In addition to "legal innocence," fair and just reasons for withdrawing a guilty plea include a defendant's "actual innocence." *United States v. Bland*, No. 20-3047, 2021 U.S. App. LEXIS 32297, at *2 (7th Cir. Oct. 28, 2021). And "[c]ourts look more hospitably on a motion to withdraw a guilty plea when the motion is coupled with an assertion of innocence." *United States v. Doyle*, 981 F.2d 591, 596 (1st Cir. 1992). In this case, Kelsey repeatedly asserted his innocence prior to entering his guilty plea.

[6] Moreover, each of the other supposedly illegal acts charged in the indictment fail as a matter of law for the reasons explained in the proposed Motion to Dismiss.

As early as May 30, 2017, prior to the beginning of any Department of Justice investigation, Kelsey issued a public statement maintaining his innocence to the *Tennessean*, which first raised the allegation based on a tip from a rival political consultant.[7] Kelsey repeated similar statements to news media reporting on grand jury proceedings against him in 2019.

After the investigation revived in spring 2021, Kelsey continued to maintain his innocence. When the Department of Justice served him with a target letter, Kelsey sat for a "reverse proffer" session to learn of the evidence against him. He then submitted to the Justice Department an 80-page memo with 21 exhibits, refuting the assertions made in the proffer session. His legal team presented a PowerPoint to the prosecutors highlighting the memo in an effort to stave off indictment. Finally, they appealed and were granted a session with the head of the Office of Public Integrity in Washington, D.C.

Nevertheless, Kelsey was indicted, and he continued to maintain his innocence through public statements, telling his state Senate colleagues, "I am totally innocent. . . . And I trust in time the truth will prevail."[8] On November 1, 2021, he initially pleaded "innocent" before this Court. Thus, Defendant asserted or maintained his

---

[7] Dave Boucher and Joel Ebert, "Expert: Money trail shows possible misconduct by state Sen. Brian Kelsey," *Tennessean* (June 1, 2017), available at https://www.tennessean.com/story/news/2017/06/02/expert-money-trail-showspossible-misconduct-state-sen-brian-kelsey/362453001/.

[8] Statement of Sen. Brian Kelsey, Senate Session, 3rd Extraordinary Session, 1st Extraordinary Day, at 21:20 – 25:25 (Oct. 27, 2021), available at https://tnga.granicus.com/player/clip/25542?view_id=611&redirect=true&h=46180500cc6d8f491b9603f2c7f7cf06.

innocence consistently for over five years, with the last 100 days constituting an aberration in an otherwise consistent pattern. Because of these consistent assertions of innocence, this factor, too, weighs in favor of granting the motion to withdraw.

III. Kelsey entered into this plea agreement hastily and with an unsure heart due in large part to the stress of simultaneously dealing with a terminally ill father, newborn twins, and a three-year-old daughter.

The unique circumstances surrounding Kelsey's plea support permitting its withdrawal. Rule 11(d) is designed to allow a hastily entered plea made with unsure heart and confused mind to be undone. *Walden*, 625 F.3d at 965. As the American Bar Association has noted, "[P]lea bargaining induces defendants to plead guilty for various reasons, some of which have little or nothing to do with factual and legal guilt." *2023 Plea Bargain Task Force Report* at 20, American Bar Association, Criminal Justice Section, ("ABA Report").[9] Brian Kelsey was given less than 48 hours to make a decision on his plea agreement at a time when he was contending with his father on his death bed due to pancreatic cancer and newborn twins. Kelsey Decl. ¶¶ 5, 7, 15, attached as Exhibit 2. Under these circumstances, he was in a confused state mentally and unable to fully consider the ramifications of his plea agreement. In short, he had an unsure heart and a confused mind and should be permitted to withdraw his plea.

Kelsey's father, Robert Kelsey, was diagnosed with terminal, inoperable pancreatic cancer in March 2022. *Id*., ¶ 1,. He underwent chemotherapy in an effort

[9] *Available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

to shrink the tumor through August 2022, but he was forced to stop when his body would take no more. *Id*., ¶ 2. In August 2022, he was hospitalized for three weeks with little prognosis for survival. *Id*., ¶ 3. Remarkably, he found the strength to live and was released from the hospital into home hospice care. *Id*., ¶ 4. But for the next six months, death was an imminent possibility each day. *Id*., ¶ 5. Therefore, Brian Kelsey called his father up to three times a day on average, in part just to ensure he was still alive. *Id*. Kelsey's plea agreement was entered November 22, 2022, right in the middle of this excruciating time.

In addition, Kelsey's twin sons were born September 10, 2022. *Id*., ¶ 7. This greatly increased the physical and emotional burden on Kelsey, who, along with his wife, shared the duties of feeding his twin sons approximately every three hours, as well as caring for their three-year old daughter. *Id*., ¶¶ 8-12.

In the midst of this excruciatingly stressful and emotional time, Kelsey was presented with a plea offer that expired under 48 hours after it was made. *Id*., ¶ 15. As a result of this immense pressure, he entered the plea hastily and with unsure heart and confused mind. *Id*. Because this situation is exactly what Rule 11(d) was designed to undo, *see Walden*, 625 F.3d at 965, this Court should grant the motion.

IV. Kelsey moved to withdraw his plea as early as practicable after his father's death.

Kelsey has a valid reason for not moving to withdraw his plea sooner: he moved to withdraw the plea as early as practicable after his father's death. Kelsey's father died February 2, 2023, and his funeral was held February 6, 2023. Kelsey Decl. ¶ 6. At his request shortly thereafter, this motion was drafted and filed just weeks later.

While Kelsey is still grieving the death of his father, the day-to-day agony of not knowing whether his father will make it through the day is gone. *Id.*, ¶ 16. In addition, his boys are now sleeping through most nights. *Id.*, ¶ 12. This relative emotional respite has finally allowed Kelsey to seek this Court's mercy to be relieved of his hasty decision made with unsure heart and confused mind.

V. Kelsey's inexperience with the criminal justice system contributed to the plea agreement.

Two other factors this Court should consider are the degree to which the defendant has had prior experience with the criminal justice system and the defendant's nature and background. Defendant is a former attorney who has had no prior experience with the criminal justice system. *Id.* ¶¶ 19, 27. Not only did he not practice criminal law, but he lived a life with an unblemished criminal record, *see id.*, ¶ 27, and he maintained among his colleagues a reputation for the highest ethical character. The concepts of plea bargain, sentencing guidelines, and a point system that imposes a "trial penalty" are new to Defendant. *Id.* As a former attorney, the possibility of agreeing to facts which cannot, as a matter of law, constitute a criminal offense causes even more unease than it would for a non-lawyer. *Id.*, ¶¶ 19, 28.

Moreover, as a result of his lack of experience with the criminal justice system, Kelsey did not adequately consider the ancillary consequences of his plea. The ABA Report notes, a "current look at the National Inventory of Collateral consequences reveal[ing] over 40,000 possible collateral consequences that may result from criminal convictions." ABA Report at 26. Moreover, the ABA Task Force on Plea Bargaining was "particularly concerned about the frequent disconnect between the

nature of collateral consequences and the type of crime for which the defendant is convicted." *Id*.

As a result of his plea agreement, Kelsey, who had earlier decided not to seek reelection in large part because of his indictment in this case, also lost his law firm job and his law license, leaving his wife alone to provide financially for their growing family. Kelsey Decl. ¶¶ 17-20.

Under state law, a lawmaker loses his health insurance if convicted of "a felony arising out of that person's official capacity as a member of the general assembly." Tenn. Code Ann. § 8-27-208. Although the alleged federal campaign finance violation in this matter did not depend on Kelsey's membership in the general assembly, the Tennessee Department of Finance and Administration nonetheless made a preliminary determination that the Plea Agreement amounted to such a felony and terminated his family health plan on February 1. *Kelsey Decl*., ¶ 21. Therefore, Kelsey lost health insurance for himself and his entire family as a result of his plea. Moreover, if allowed to stand, this determination also may have implications for Kelsey's state pension for his 18 years of service. *Id*., ¶ 22.

In addition, Kelsey is being shut out from the American banking system. As a result of the Plea Agreement, CitiBank terminated the only credit card Kelsey owned in his name. *Id*., ¶ 23. Also, Regions Bank notified Kelsey's parents that it was closing the checking account that they had held for over forty-five years because Kelsey had been given signing rights on the account last year in an effort to allow him to help his mother with her finances. *Id*., ¶ 24. The bank confirmed that this, too, was a result of

Kelsey's Plea Agreement. *Id*. Only after weeks of wrangling did Kelsey's mother convince the bank to allow the account to remain open as long as Kelsey's name was removed from having signing privileges. *Id*., ¶ 25. But the bank had to obtain signatures from Kelsey's mother and father to accomplish this last-ditch compromise. *Id*. The local branch manager literally came into Robert Kelsey's home while he was on his death bed and forced him to muster the strength to sign some papers – all because of Kelsey's Plea Agreement. *Id*.

Losing the ability utilize the private banking system in the United States is not something Kelsey was informed would occur as a result of his plea agreement. *Id*., ¶ 26. This and the other ancillary effects are byproducts of a decision that was forced upon Kelsey in an unnecessarily hasty fashion and should be undone.

VI. There is no potential prejudice to the government if the motion to withdraw is granted.

The final factor this Court should consider is the potential prejudice to the government if the motion to withdraw is granted. In this case, there is no prejudice to the government. No witnesses are unavailable. "The only prejudice to which [the government can point] is that arising from having to try a case it thought was concluded." *Maxwell*, 2022 U.S. Dist. LEXIS 65527, at *10. That fact, standing alone, is not significant. *See id*.

CONCLUSION

For the reasons stated above, the Plea Agreement in this case was hastily entered with unsure heart and confused mind and should be undone. Kelsey was overwhelmed by the emotional trauma of trying to cope with his dying dad and his

newborn sons. In addition, the Plea Agreement he entered into does not amount to a crime. Together, these factors constitute a fair and just reason under Rule 11(d) to withdraw the plea. Therefore, this Court should grant this Motion to Withdraw Plea and enter an Order directing the Defendant to file his proposed Motion to Dismiss within seven calendar days.

Respectfully submitted,

s/ David A. Warrington
David A. Warrington, *pro hac vice*
Gary M. Lawkowski
Dhillon Law Group, Inc.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
Telephone: 415-520-6593
DWarrington@dhillonlaw.com
GLawkowski@dhillonlaw.com

Michael A. Columbo
Dhillon Law Group, Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
Telephone: 415-944-4996
MColumbo@dhillonlaw.com

Attorneys for Defendant Brian Kelsey

CERTIFICATION OF COUNSEL

Pursuant to LCrR12.01, I hereby certify that I conferred with opposing counsel in a good faith effort to resolve by agreement the subject matter of this motion via e-mail with Amanda Klopf on March 16, 2023.

s/ David A. Warrington
David A. Warrington

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Defendant Kelsey's Motion to Withdraw Plea and File Motion to Dismiss* has been electronically delivered via the Court's electronic filing system on this the 16th day of March 2023 to:

Hal Hardin
Hal D. Hardin
211 Union Street, Suite 200
Nashville, TN 37201

Phillip Georges
Phillip S. Georges, PLLC
501 Union St., Ste. 200d
Nashville, TN 37219

Amanda Klopf
Assistant United States Attorney
110 Ninth Avenue, South, Suite A961
Nashville, TN 37203-3870

David Pritchard
Assistant United States Attorney
167 North Main Street, Suite 800
Memphis, TN 38103

John P. Taddei
U.S. Department of Justice
1301 New York Ave. NW
Washington, DC 20530

Paul J. Bruno
Jerry E. Martin
David A. Rivera
Barrett, Johnston, Martin & Garrison, LLC
414 Union Street, Suite 900
Nashville, TN 37219

s/ David A. Warrington
David A. Warrington

Exhibit

1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN KELSEY and JOSHUA SMITH, Defendants.	No. 3:21-cr-00264

[PROPOSED] DEFENDANT KELSEY'S RULE 12(b) MOTION TO DISMISS INDICTMENT AND MEMORANDUM OF LAW

TABLE OF CONTENTS

INTRODUCTION

The Government has tried to force the square peg of Brian Kelsey's alleged conduct into several different round holes of criminal violations. But they do not fit because there was no crime. The Indictment should be dismissed because each of its counts, taken individually, fail as a matter of law even if the alleged conduct were proved at trial. In addition, the counts, taken together, are multiplicitous and self-contradictory. Finally, the Government's interpretation of the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30101 *et seq.* ("Election Act") in this case would render it a violation of Kelsey's First Amendment right to free speech.

First, the Government's theory in Count Four and Count Five that Kelsey "coordinated" communications paid for by his state committee and benefitting his federal campaign is foreclosed as a matter of law and by the established interpretation of the Federal Election Commission (the "Commission" or "FEC"), the expert regulatory agency charged with interpreting federal campaign finance law and advising the public how to comply with it. A candidate cannot "coordinate" with him or herself. "Coordination" requires that the person making the payment and the person receiving the benefit be *different people*. 11 C.F.R. § 109.21(a)(1) (A coordinated communication must be "paid for, in whole or in part, by a person *other than that candidate, authorized committee, or political party committee*."). The Commission has repeatedly ruled that a payment from a candidate's state committee cannot be a coordinated contribution to that same candidate's federal committee, just as the Indictment alleges here, because both committees are controlled by the same person.

Second, in addition to relying on the same illogical theory that Kelsey coordinated with himself, Count Two and Count Three advance a defective theory of "agency" and are undercut by the Indictment's failure to show that the funds were "soft money."

Third, Count One fails because the "conspiracy" it alleges is not unlawful.

Thus, the Indictment fails to state an offense which is punishable under federal law and should be dismissed. In addition, the Indictment violates the Double Jeopardy clause with multiplicitous counts that are self-contradictory. Finally, the Court should dismiss the Indictment because its use of the Election Act violates the First Amendment as applied to Kelsey.

STATEMENT OF FACTS[1]

According to the Indictment, the Election Act was violated when Kelsey contributed $106,341 in left-over state Senate campaign funds to a state PAC; the state PAC, in turn, contributed $30,000 to a non-profit organization, Political Organization 1; the state PAC also contributed $37,000 to another PAC which, in turn, contributed $36,000 to Political Organization 1; and the Government contends that this series of transactions effected a $66,000 contribution by Kelsey's state Senate campaign committee to Political Organization 1 as well as a $66,000 contribution by Political Organization 1 to Kelsey's federal congressional campaign

[1] Kelsey takes the facts alleged in the Indictment as true for purposes of this Motion only and expressly reserves his right to dispute any and all allegations at trial. *See United States v. Hann*, 574 F. Supp. 2d 827, 830 (M.D. Tenn. 2008) ("On a motion to dismiss indictment, 'the court must view the indictment's factual allegations as true[.]'" (alterations accepted)).

when Political Organization 1 used the funds (and other funds) to pay for radio advertisements supporting Kelsey's federal campaign. Indictment ¶¶ 16–18.

The Government asserts the nonprofit's expenditures supporting Kelsey's federal campaign were "coordinated" and "not independent." Indictment ¶¶ 18q–18s. This resulted, the Government says, in effecting an in-kind contribution worth $66,000 from Kelsey's state Senate campaign committee to his federal campaign committee.

LEGAL STANDARD

Pursuant to Federal Rule of Criminal Procedure 12(b), "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." The Sixth Circuit has held that a motion to dismiss is capable of determination before trial "if it involves questions of law instead of questions of fact on the merits of criminal liability." *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997); *see, e.g.*, *United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1300 (10th Cir. 2022) (affirming dismissal of indictment on First Amendment grounds). The district court may "make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motion as long as the court's findings on the motion do not invade the province of the jury." *Craft*, 105 F.3d at 1126.

ARGUMENT

I. The Indictment fails to state an offense.

The Indictment should be dismissed under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) for "failure to state an offense." Counts Four and Five

allege coordinated campaign communications, but Kelsey cannot coordinate with himself. Counts Two and Three allege Kelsey directed his agent to spend "soft money" on his federal campaign, but Kelsey had no authority over the alleged agent, and the funds at issue do not constitute "soft money." Count One alleges a conspiracy to commit Counts Two, Three, Four, and Five, which are not illegal; therefore, Count One also is not illegal. This Court should dismiss all five counts as a matter of law.

A. Counts Four and Five should be dismissed because a person cannot coordinate campaign communications with himself.

Count Four and Count Five assert that Kelsey "made" "excessive contributions" from "Political Organization 1 [his state committee] to Federal Committee 1" [his federal congressional campaign] and accepted those contributions by "coordinating" certain communications paid for by his state campaign committee. Indictment ¶¶ 24, 26.

Even if these facts were proven, the argument would fail as a matter of law because the FEC has rejected the Government's theory of coordination, and that position is binding on the Government and otherwise precludes a determination that Kelsey knowingly and willfully violated the Election Act, which is required for a violation to be punished criminally.

1. The FEC has rejected the Government's "coordination" theory.

As a matter of law and basic common sense, a candidate cannot illegally "coordinate" with him or herself. FEC regulations make clear that "coordination" must involve a payment for a campaign communication from a third party—not the

candidate whom the communication benefits. FEC advisory opinions—which create a safe harbor for political speakers—going back over 15 years explicitly state that a federal candidate's state and federal campaign committees cannot "coordinate" with one another because they are effectively controlled by the same candidate. Therefore, Counts Four and Five of the Indictment must fail.

Under the Election Act, "no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed" $2,700. 52 U.S.C. §§ 30116(a)(1)(A); *see* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015) (adjusting applicable limit for 2015-2016 election cycle). Furthermore, "[n]o candidate or political committee shall knowingly accept any contribution or make any expenditure . . . in violation of any limitation imposed on contributions and expenditures under this section." 52 U.S.C. §§ 30116(f).

Counts Four and Five assert that Kelsey violated these provisions by making certain contributions from his state campaign committee (State Committee 1) through state political action committees to a national non-profit organization (Political Organization 1) that used Kelsey's funds to pay for radio and digital advertisements that benefitted Kelsey's campaign for federal office (Federal Committee 1). Indictment ¶¶ 24, 26; *see* Indictment ¶¶ 2–3, 7. Specifically, the Indictment states that State Committee 1 contributed $106,341.66 to entities called "PAC 1" and "PAC 2," Indictment ¶¶ 18b, 18d, and that, around that time, PAC 1 and

PAC 2 contributed $66,000 to Political Organization 1. Indictment ¶¶ 18i, 18o. Political Organization 1 then allegedly used the funds originating from State Committee 1 to "ma[k]e contributions" (*i.e.*, to pay for radio and digital advertisements) that Federal Committee 1 allegedly "knowingly and willfully accepted and received." Indictment ¶¶ 24, 26.

The Government further alleges that Kelsey, through his supposed "agent," Joshua Smith, "coordinated" the expenditures by Political Committee 1. Indictment ¶¶ 16, 18q–18s, 24 (alleging "coordinated expenditures by Political Organization 1"), 26 (same). Under federal law, an otherwise unlimited independent expenditure becomes subject to the contribution limits when it is "coordinated" with a candidate. According to the Government, the result of the alleged coordination here was to effect a $66,000 in-kind contribution from Kelsey's state Senate campaign committee (State Committee 1) to his federal campaign committee (Federal Committee 1). Indictment ¶ 16 ("It was a purpose of the conspiracy to unlawfully and secretly funnel soft money from State Committee 1 to Political Organization 1 to support KELSEY'S federal campaign.").[2]

The fatal problem with the Government's theory is that it has been foreclosed by the FEC, the expert federal administrative agency charged with administering and interpreting the Election Act and providing compliance advice to the public. FEC regulations define "coordination" for purposes of making a coordinated

[2] Far from being secret, the transactions described in the Indictment were reported on the internet.

communication as occurring when three "prongs" are satisfied: the payment prong, the content prong, and the conduct prong. 11 C.F.R. § 109.21(a). The payment prong is satisfied when a communication "[i]s paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee." 11 C.F.R. § 109.21(a)(1).

In FEC Advisory Opinion 2007-1 (McCaskill) the FEC concluded that a federal candidate cannot "coordinate" for purposes of Federal election law with his or her own state campaign committee. The FEC explained its reasoning:

> Under the first prong of the "coordinated communication" definition, a communication is only subject to the regulations if it "is paid for by a person other than that candidate, an authorized committee, political party committee, or agent of any of the foregoing." 11 C.F.R. 109.21(a)(1). In these circumstances, *the candidate and her agents [state campaign committee] are paying for these communications, so the payment prong is not met and the "coordinated communication" definition is not applicable.*

Id. at 5-6 (emphasis added).[3] In other words, the Commission held that a payment from a candidate's state committee cannot be a coordinated contribution to that same candidate's federal committee because the contribution is not "paid for, in whole or in part, by a person *other than that candidate*, authorized committee, or political party committee." 11 C.F.R. § 109.2.1(a)(l) (emphasis added).

This view was reiterated in FEC Advisory Opinion 2009-26 (Coulson).[4] In that opinion, the Commission concluded that a state committee mailer could not constitute a "coordinated communication" with the same candidate's federal campaign.

---

[3] *Available at* https://www.fec.gov/files/legal/aos/2007-01/2007-01.pdf.
[4] *Available at* https://saos.fec.gov/aodocs/AO%202009-26.pdf.

In addition, the FEC has repeated its interpretation that federal candidates cannot coordinate with their state committees as a matter of law in the enforcement process. In *In re Steve Oelrich*, Matter Under Review 6601, (FEC Factual & Legal Analysis, July 16, 2014),[5] the FEC noted that advertisements paid for by a candidate's own state committee could not be coordinated with the federal campaign because a "coordinated communication" cannot exist where the state and federal committees exist for the benefit of the *same person*:

> It does not appear that the costs of the radio ad would constitute an in-kind contribution from the State Committee to the Federal Committee by virtue of being a coordinated communication. Commission regulations set forth a three-prong test to determine whether a payment for a communication is an in-kind contribution as a result of coordination between *the person making the payment and the candidate.* Consistent with Commission advisory opinions, the Commission concludes that the advertisement here would not meet the payment prong of the coordination test at 11 C.F.R. § 109.2.1(a)(l).

Oelrich, MUR 6601, at 9 n.10 (citations omitted) (emphasis added).

The plain text of the FEC's regulations, as well as a consistent line of advisory opinions and enforcement matters dating back nearly two decades concerning similarly situated state legislative candidates for establish that a candidate cannot "coordinate" with him or herself, therefore a federal candidate's state committee and federal committee cannot "coordinate" expenditures. But that is what the Government has indicted Kelsey for doing: coordinating the expenditure of $66,000 of Kelsey's state campaign's funds in support of his federal campaign. Count Four contends that he *made* the excessive coordinated expenditures while Count Five

[5] *Available at* https://www.fec.gov/files/legal/murs/6601/14044362763.pdf.

contends that he *received* the same coordinated expenditures. Either way, the Government's theory has been rejected by the FEC.

Moreover, for any such coordination to be a criminal violation, it must have been done with a knowing and willful intent, that is, with knowledge of its illegality. *See* 52 U.S.C. § 30109(d)(1)(A). The FEC's prior decisions concluding that there can be no unlawful coordination in these circumstances preclude Kelsey from having acted with knowing and willful intent.

2. The FEC's construction is binding law.

The Commission's longstanding regulations and interpretation of its regulations binds the Government. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (explaining agency regulations "have the 'force and effect of law'"). The Federal Election Commission and the Department of Justice are sister agencies of the same Federal Government. Because the DOJ can only criminally prosecute Election Act violations that are "knowing and willful," it cannot prosecute a person for conduct the FEC advises is legal.

The binding nature of the Commission's regulations, and its interpretation of them, is established by the Election Act and well-settled principles of administrative law. First, the Election Act "creates a 'safe harbor' for parties who rely on advisory opinions" issued by the FEC, expressly "providing that 'any person who . . . acts in good faith in accordance with the provisions and findings of such . . . opinions shall not . . . be subject to any sanction provided by this Act.'" *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 185–86 (D.C. Cir. 2001) (quoting 52 U.S.C. § 30108(c)(2)). This safe harbor applies to "[a]ny person involved in either the specific transaction or another

materially indistinguishable transaction." *Id.* at 185; *see* 52 U.S.C. § 30108(c)(1)(B). Because the FEC has authoritatively ruled that a candidate for state and federal office does not unlawfully "coordinate" when he uses his state campaign committee to pay for communications that benefit his federal campaign committee, prosecution of Kelsey on that theory would violate the Election Act's advisory opinion safe harbor.

Second, the FEC's regulation at 11 C.F.R. 109.21(a)(1) also provides in relevant part that there can be no "coordination" unless there is payment "*by a person other than th[e] candidate*." 11 C.F.R. § 109.2.1(a)(l) (emphasis added). The Commission regulations are rules of law, 52 U.S.C. § 30111(d)(4), and in the Election Act, Congress provided, "Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act[.]" *Id.*, § 30111(e).

Third, the FEC's regulation is clear and when a regulation is clear, "the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019); *accord Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan*, 32 F.4th 548, 557-558 (6th Cir. 2022) ("If a regulation's meaning is plain, the court must give it effect, as the court would any law, and the court's inquiry into the regulatory meaning is over.") (cleaned up). Even if the regulation were ambiguous, courts must defer to the authoritative agency's interpretation of their own regulations so long as its interpretation is well reasoned and based in the

agency's expertise. *Kisor*, 139 S.Ct. at 2415; *Saginaw Chippewa Indian Tribe*, 32 F.4th at 558.[6] This deference applies in both civil and criminal courts. *Cf. Ehlert v. United States*, 402 U.S. 99, 105 (1971) (upholding criminal conviction based on federal agency's interpretation of its own regulation). Here, even if ambiguity were perceived in 11 C.F.R. § 109.21(a)(1), the Court should defer to the expertise, consistency, and sound reasoning of the Commission's interpretations of its own regulations going back almost twenty years.

Fourth, prosecuting Kelsey would violate due process. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* These constitutional concerns are particularly compelling in the campaign finance context, which involves core First Amendment rights. *See Buckley v. Valeo*, 424 U.S. 1 (1976). "Campaign finance regulation has been termed 'baffling and conflicted.'" *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 296 (4th Cir. 2008) (quoting *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004)). "It is an area in which speakers

[6] *See also Audi v. Barr*, 839 Fed. Appx. 953, 961–62 (6th Cir. 2020) ("Generally, courts should provide substantial deference to an agency's interpretation of its own regulation. Discussing what is commonly referred to as *Auer* deference, the Supreme Court recently clarified in *Kisor v. Wilkie* that courts should provide deference to an agency's interpretation of its regulation when the regulation is genuinely ambiguous, determined after using the tools of statutory construction, and—assuming the interpretation is reasonable—when the character and context of the agency interpretation entitles it to controlling weight.") (cleaned up).

are now increasingly forced to navigate a maze of rules, sub-rules, and cross-references in order to do nothing more than project a basic political message. Only those able to hire the best team of lawyers may one day be able to secure the advisory opinions or otherwise figure out the myriad relevant rulings with any degree of assurance that they will escape civil and criminal sanctions[.]" *Id.* (internal citation omitted). Prosecuting Kelsey for violating a federal statute based upon conduct that has been expressly approved by the federal administrative agency charged with administering that statute disregards any conception of fundamental fairness and violates the Fifth Amendment's Due Process clause.

Fifth, a "junior version of the vagueness doctrine" is the rule of lenity, which requires that any ambiguity in a statute be resolved in favor of the defendant. *United States v. Lanier*, 520 U.S. 259, 266 (1997). "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008). This doctrine also commands that the Government adhere to the well-established rules set by the FEC.

Sixth, the Government must prove that Kelsey's violations set forth in Counts Four and Five were "knowing and willful." It would be absurd for the Government to establish that a citizen knowingly and willfully flouted a legal standard that even the FEC, the expert agency tasked by Congress with administering the Election Act, did not know. *See United States v. Ward*, 2001 WL 1160168 *5 (E.D. Pa. 2001) ("A

defendant should not be penalized for violating a regulation the interpretation of which cannot be agreed upon by those who are responsible for its administration and enforcement.").

Thus, the Indictment fails to state a violation for "making excessive contributions" (Count Four) or "accepting excessive contributions" (Count Five), by Kelsey allegedly coordinating communications with himself.

3. The only allegedly coordinating contact between Kelsey and ACU is exempt from the definition of coordination.

Finally, the allegation in ¶ 18(h) is the only alleged discussion between Kelsey and Political Organization 1, and it regards Kelsey's and other Tennessee legislators' publicly available voting records. Importantly, that one discussion constitutes an explicit exemption from the FEC definition of a coordinated communication, which creates a "safe harbor for responses to inquiries about legislative or policy issues." 11 C.F.R. § 109.21(f).

B. Counts Two and Three should be dismissed because Kelsey cannot give his agent powers that he does not possess and because the funds at issue do not constitute "soft money."

Count Two and Count Three allege that Kelsey's "agent" Joshua Smith directed "soft money" from Kelsey's state campaign committee to benefit his federal campaign committee in violation of 52 U.S.C. § 30125(e) and (f). These counts fail as a matter of law because the Government's theory of agency is flawed, and the facts pleaded in the Indictment undercut the Government's assertion that "soft money" was involved.

1. Smith cannot be Kelsey's "agent."

Counts Two and Three depend on the allegation that Joshua Smith "was an agent of KELSEY," who used funds from Kelsey's state campaign committee to support Kelsey's federal campaign committee. Indictment ¶¶ 20, 22. According to the Indictment, Smith caused State Committee 1 to transfer $66,000 through PAC 1 and PAC 2 to Political Organization 1. Political Organization 1, in turn, allegedly used the funds to pay for radio advertisements to benefit Federal Committee 1. Indictment ¶¶ 16, 18.

The problem with the Government's agency theory is that it exceeds Kelsey's capacity as a principal to direct Smith. As a matter of agency law, it is axiomatic that "[t]he capacity to do a legally consequential act by means of an agent is coextensive with the principal's capacity to do the act in person." Restatement (Third) Of Agency § 3.04, cmt. b (2006); *see id.* ("The principal's capacity is requisite to a relationship of agency because the agent's actions within the scope of the relationship affect the principal's legal position.").[7] Furthermore, "[a]n individual has capacity to act as principal in a relationship of agency . . . if, at the time the agent takes action, the individual would have capacity if acting in person." *Id.* at § 3.04(1). Put another way, a principal cannot grant another person actual authority to act over matters beyond the principal's own authority. Thus, if Kelsey lacked authority to take a particular action himself, he cannot be said to have authorized Smith to take that action.

[7] The FEC draws from the Restatements in defining principles of agency. *See* FEC "Definitions of 'Agent' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures," 71 Fed. Reg. 4975 (Jan. 31, 2006).

Here, the Indictment alleges that Kelsey's state campaign committee contributed $106,341 to a third-party, PAC 1, a state political action committee under the control of Joshua Smith. Indictment ¶ 18(b). From that point forward, Kelsey no longer exercised any control or legal authority over those funds: "When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds." *McCutcheon v. FEC*, 572 U.S. 185, 211 (2014) (plurality opinion) (citing 52 U.S.C. § 30116(a)(8); 11 CFR § 110.6). The funds at that point were controlled by Smith's PAC 1. For "if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial *recipient's* discretion—*not the donor's*." *Id.* (emphasis added). Thus, the Supreme Court has declared that the contributions from Smith's PAC 1 were contributions of funds under his own ownership, control, and authority. Because PAC 1's funds were under Smith's independent control and no longer under Kelsey's legal control or authority, Kelsey had no actual authority to spend PAC 1's funds that he could grant to Smith under agency law. In other words, by law, Kelsey could not make Smith his agent for the purpose of spending PAC 1's funds because Kelsey has no authority over PAC 1. For this reason, the Indictment's reliance on Smith being Kelsey's agent when Smith made the contributions from PAC 1 alleged in ¶ 18(c)-(o) is foreclosed, and Counts Two and Three fail on their face.

2. The Indictment does not allege Kelsey's state committee contributed non-federally compliant funds.

Section 30125(e) and (f) restrict the use of "soft money." This term refers to funds that are not "subject to the limitations, prohibitions, and reporting

requirements" of the Election Act. 52 U.S.C. §§ 30125(e)(1)(A), 30125(f); *see McConnell v. FEC*, 540 U.S. 93, 122 (2003).

The FEC has explained that concurrent state officeholders and federal candidates, like Kelsey, may lawfully contribute state campaign funds to state PACs, as Kelsey did:

> Notwithstanding the prohibitions of 30125(e), the Commission has allowed federal candidates who are state officeholders to donate federally permissible funds in a state account to other state and local political committees if the state committee uses a "reasonable accounting method" to separate permissible from impermissible funds (*i.e.*, those raised consistent with state law but outside the Act's contribution limits and source restrictions), and makes the contributions with permissible funds.

FEC Matter Under Review 7246 (Buddy Carter for Congress, *et al.*), Commission Factual & Legal Analysis (Apr. 25, 2018) at 9; *see also* FEC Advisory Opinion 2007-26 (Schock) at 1, 3-5 ("[S]o long as Mr. Schock's State campaign committee uses a reasonable accounting method to identify the portion of its remaining funds that consists of funds complying with the amount limits and source prohibitions of the Act, the [state] committee may donate such funds to the party committees' non-Federal accounts and to the non-Federal candidates."); FEC Advisory Opinion 2006-38 (Casey) at 4. The FEC has approved multiple reasonable methods to identify the subset of a state committee account that complies with the Election Act's source-and-amount limitations, such as the method described in 11 CFR § 110.3(c)(4), which is known as the "last in, first transferred" method. Advisory Opinions 2007-26 (Schock); 2006-38 (Casey State Committee); 2006-25 (Kyl); 2006-21 (Cantwell); and 2006-06 (Busby). Critically, the Indictment makes no mention of which accounting method

the DOJ used, or even that it used *any* accounting method, to conclude that the $66,000 at issue was impermissible. More importantly, it makes no attempt to rule out any of the possible methods that Kelsey may have used.[8]

According to the Indictment, Kelsey used "soft money" aggregating to $66,000, "namely, funds from State Committee 1, in connection with an election for federal office." Indictment ¶ 20 (Count Two), ¶ 24 (Count Three); *see* ¶¶ 18i, 18o. But the Indictment does not allege that $66,000 of funds held by the state campaign committee were impermissible under federal contribution limits. The Indictment is devoid of any allegation indicating that Kelsey's state campaign committee did not possess $66,000 in federally compliant funds; therefore, the Indictment does not allege the essential element of unlawful spending of "soft money." The failure to allege this critical fact undermines Counts Two and Three.

C. Count One should be dismissed because a person cannot conspire to take actions that are lawful.

Count One alleges a conspiracy "to defraud the United States." Indictment ¶ 15. "[T]he essence of conspiracy is an agreement to commit an illegal act[.]" *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177 (6th Cir. 1992). Accordingly, "there can be no conviction for conspiracy to commit an offense against the United States if the act that the alleged conspirators agree to do has not been

[8] Because records of the contributions to Kelsey's state campaign committee are publicly available on a government website, the Court may take judicial notice of these facts and may use them to make its own legal determination as to whether they are permissible. *See City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 655 n.1 (6th Cir. 2005). In fact, they are.

made unlawful." *Ventimiglia v. United States,* 242 F.2d 620, 622 (4th Cir. 1957); *see also Parr v. United States*, 363 U.S. 370, 393 (1960); *accord United States v. Galardi*, 476 F.2d 1072, 1079 (9th Cir. 1973) ("It should require no citation of authority to say that a person cannot conspire to commit a crime against the United States when the facts reveal there could be no violation of the statute under which the conspiracy is charged.").

Here, the supposedly illegal acts charged in the Indictment each fail as a matter of law for the reasons explained above. Accordingly, any supposed agreement or agreements between Kelsey and other persons concerned only lawful activity. The conspiracy charge must, therefore, be dismissed.[9]

For all the reasons stated above, the Indictment should be dismissed as a matter of law in its entirety for failure to state an offense.

II. In addition, the Indictment is multiplicitous and self-contradictory.

But by multiplying the counts, the Government has unlawfully indicted Kelsey for separate crimes based upon the same conduct and charged him with logically incompatible legal and factual theories.

A. The Indictment is multiplicitous.

The Double Jeopardy Clause protects a defendant against multiple punishments for the same offense. *United States v. Ehle*, 640 F.3d 689, 694 (6th Cir.

[9] Furthermore, it has been argued that the Election Act preempted prosecution of campaign finance violations under 18 U.S.C. § 571, and it is not clear that this Circuit has ever sanctioned the statute's use in regard to the Federal Election Commission. *But see United States v. Curran*, 20 F.3d 560, 565, 571 (3d Cir. 1994).

2011) (citations omitted); *see* U.S. Const. amend. V. "When an indictment charges a single offense in separate counts, it is multiplicitous and implicates the Double Jeopardy clause." *Lemoine v. United States*, 819 F. App'x 358, 363 (6th Cir. 2020) (citing *United States v. Davis*, 306 F.3d 398, 417 (6th Cir. 2002)). "This is because a multiplicitous indictment 'raises the specter of multiple punishment for a single offense, and can prejudice the jury by suggesting that more than one crime was committed.'" *Id.* (quoting *United States v. Gullett*, 713 F.2d 1203, 1211–12 (6th Cir. 1983)).

The Indictment against Kelsey is multiplicitous. In *Ball v. United States*, 470 U.S. 856 (1985), the Supreme Court held that a felon could not be convicted and concurrently sentenced for receiving a firearm under 18 U.S.C. § 922(h)(1) and for possessing the same firearm under 18 U.S.C. § 1202(a)(1). *See id.* at 857. Similarly, in *United States v. Ehle*, 640 F.3d 689 (6th Cir. 2011), the Sixth Circuit held the defendant could not be convicted for "knowingly receiving" child pornography under 18 U.S.C. § 2252A(a)(2)(A), and for "knowingly possessing" the same child pornography under 18 U.S.C. § 2252A(a)(5)(B). *See id.* at 694–95. In both cases, the courts reasoned that "receipt" of the prohibited item necessarily encompassed "possession" of that item. "One is necessarily subsumed by the other." *Id.* at 694 (citation omitted).

The Indictment in this case suffers analogous problems. According to Count Four, Kelsey "made" excessive contributions to his federal campaign committee (in the form of payments to fund "coordinated" political advertisements) in violation of

52 U.S.C. § 30116(a)(1)(A). Indictment ¶ 24. Meanwhile, according to Count Five, Kelsey "accepted" the same excessive contributions (in the form of the same payments to fund the same "coordinated" political advertisements) in violation of 52 U.S.C. § 30116(f). Indictment ¶ 26. There is no additional conduct alleged. Nor could there be since a coordinated expenditure is both made and accepted as a result of the coordinating conduct. In both instances the Government's theory is that Kelsey violated the statute through "coordination" that constituted both making and accepting. Because each count is thus necessarily subsumed by the other, Counts Four and Five are multiplicitous, and the Government cannot move forward on both of them.

So, too, are Count Two and Count Three multiplicitous. According to Count Two, "KELSEY, solicited, received, directed, transferred, and spent funds, . . . namely, funds from State Committee 1, in connection with an election for federal office, namely, the 2016 primary election" in violation of 52 U.S.C. § 30125(e). Indictment ¶ 20. Count Three asserts that "KELSEY spent funds . . . from State Committee 1, in connection with an election for federal office for a public communication that referred to a clearly identified candidate for federal office, namely, KELSEY" in violation of 52 U.S.C. § 30125(f). Indictment ¶ 22.

As alleged, Count Three is subsumed by Count Two. Spending funds "in connection with" a candidate's election for federal office is inclusive of spending money on a public communication that refers to that candidate. And the only potential distinction between the counts—that section 30125(f) applies to *state*

officeholders and candidates, whereas section 30125(e) applies to *federal* officeholders and candidates—makes no difference because Kelsey was both a state officeholder and a candidate for federal office. In any event, the FEC has expressly held that "[t]he restrictions in 2 U.S.C. 441i(f) [52 U.S.C. § 30125(f)] are not applicable in circumstances where the more specific provisions of 2 U.S.C. 441i(e) [52 U.S.C. § 30125(e)] apply." FEC Advisory Op. 2007-1 at 5; *see RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general." (citation omitted)). For the reasons explained in Section I.A.2. *supra*, the FEC's interpretation of its own authorizing statute controls, and Count Three must be dismissed.

B. The Indictment is self-contradictory.

In addition to suffering from multiplicity, the Indictment commits numerous logical errors and contains self-contradictions. This, likewise, is a basis for dismissal because "[a]n indictment is defective if it contains logically inconsistent counts." *United States v. Conde*, 309 F.Supp.2d 510, 511 (S.D.N.Y. 2003) (citing *United States v. Cantrell*, 612 F.2d 509, 511 (10th Cir. 1980); *United States v. Eason*, 434 F.Supp. 1217, 1221 (W.D. La. 1977)).

"[I]nconsistency in a charging instrument fosters confusion for both the defendant and the jury." *United States v. Palo*, 2017 WL 6594196 *6 (W.D. Pa. Dec. 26, 2017) (ordering Government to choose among inconsistent counts). Inconsistency also "presents a real potential for prejudice because a defendant may be confounded or embarrassed in having to present separate defenses, such as wishing to testify in response to one charge but not the other." *Id.* "And such prejudice is only exacerbated

where exculpatory testimony on one count has the real potential to be incriminating as to another count." *Id.*

Here, the Government alleges flatly contradictory facts in Count Three, on the one hand, and Counts Four and Five, on the other. According to Count Three "KELSEY, spent funds, . . . from State Committee 1, in connection with an election for federal office for a public communication." Indictment ¶ 22. That is, the funds for the communication at issue were those of Kelsey's state committee. But Counts Four and Five inconsistently allege "Political Organization 1" spent its funds for that same communication and merely "coordinated" its spending with Kelsey. Indictment ¶¶ 24, 26; *see also* Indictment ¶¶ 17b, 18q–18s. Therefore, Count Three's assertion that Kelsey's state committee used its funds to pay for the communication is contradicted by the allegations of coordination in Counts Four and Five, *i.e.*, that Political Organization 1 used its funds to pay for the communication.

Counts Four and Five are also logically incoherent because Kelsey cannot both make and accept the same gift. That proposition is self-evident and, not surprisingly, is reflected in federal regulations which make clear that it is impossible for a person to give and receive the same funds. *See* Section I.A. *supra.*

Because the Indictment is multiplicitous and logically inconsistent, this prosecution cannot proceed in its current form, and the Court should dismiss the Indictment. *Hernandez-Calvillo*, 39 F.4th at 1313.[10]

[10] Alternatively, the Court should direct the Government to elect a single coherent and constitutional count, *see United States v. York*, 59 F.3d 172, 1995 WL 369319, at *2 (6th Cir. 1995) (unpublished table decision) ("The defendant may move to have the

III. The Indictment violates Kelsey's First Amendment right to free speech because he cannot corrupt himself.

If the Government were permitted to prosecute Kelsey based on the overbroad interpretations and flawed applications of the Election Act, then the Act would be unconstitutional as applied to Kelsey. The Indictment advances interpretations of the Election Act that render it unconstitutional. In the First Amendment context, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Doe #1 v. Lee*, 518 F. Supp. 3d 1157, 1208 (M.D. Tenn. 2021) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)). A law also may be found unconstitutional "'as applied' to a particular set of circumstances." *Id.* at 1179 (quoting *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997)). Both problems are evident in the Indictment.

The Supreme Court "has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *FEC v. Cruz*, 142 S. Ct. 1638, 1652 (2022) (citations omitted). In the campaign finance context, "corruption" means "*quid pro quo* corruption," that is, "a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192 (plurality opinion); *see also Citizens United v. FEC*, 558 U.S. 310, 359 (2010) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors" (citation omitted)). With respect to contribution limits, the Supreme Court has reasoned that "restrictions on direct

---

prosecution elect among the multiplicitous counts, with all but the one elected dismissed.") (quoting *United States v. Reed*, 639 F.2d 896, 904 n.6 (2nd Cir. 1981)).

contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357 (citations omitted). The Court has thus "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption"—that is—to prevent the reality or appearance of the type of conduct that "would be covered by bribery laws." *Id.* at 356–57; *see also McDonnell v. United States*, 579 U.S. 550, 574 (2016) (explaining federal bribery statute "prohibits *quid pro quo* corruption—the exchange of a thing of value for an 'official act.'").

Brian Kelsey cannot corrupt himself. And yet, the Government's theory in this case is that Kelsey used money from his state campaign committee to pay for advertisements that benefitted his federal campaign committee. But even if these facts were proven, they cannot constitute *quid pro quo* corruption because Kelsey cannot bribe himself. "In law one cannot bribe himself. To constitute bribery, the act of at least two persons is essential—that of him who gives and him who receives." *Clews v. People*, 377 P.2d 125, 129 (Colorado 1962); *accord Chadwick v. United States*, 141 F. 225, 236 (6th Cir. 1905) ("Deitrich could not agree to receive a bribe unless some other should agree to give him one."); *United States v. Sager*, 49 F.2d 725, 728 (2d Cir. 1931) ("A person cannot agree with himself, receive from himself, or give to himself" "a bribe"). Here, the Indictment alleges that funds originating from one entity established to benefit Kelsey (State Committee 1) were spent to benefit another entity established to benefit Kelsey (Federal Committee 1). Whether that is analyzed as a contribution from State Committee 1 (as alleged in Counts Three and Four) or

acceptance of a contribution by Federal Committee 1 (as alleged in Counts Two and Five), the activity occurs between Kelsey's campaign committees and thus cannot be corruptive. Thus, the Government's theory of the case does not combat actual or apparent corruption and runs afoul of the Free Speech clause.

If the Government were to claim in response that the alleged potential corruptors in this case are the donors to Kelsey's state committee, then again, the Government's failure to plead that their contributions exceeded the lawful contribution limits is fatal to the Indictment. *See* Section I.B.2. *supra*.

If allowed to stand, the Indictment will chill speech regarding public policy between candidates and supportive organizations under the fear that any future independent expenditures by those organizations will subject candidates to potential criminal liability. The Indictment charges Kelsey with conduct that is protected under the First Amendment and fails to allege conduct that can be restricted consistent with the First Amendment. Specifically, the allegation in ¶ 18(h) -- the only discussion alleged between Kelsey and Political Organization 1 -- regards Kelsey's and other Tennessee legislators' publicly available voting records. *See* Section I.A.3, *supra*. To restrict such a discussion would violate the First Amendment speech and associational rights of candidates like Kelsey. Importantly, that one discussion constitutes an explicit exemption from the FEC definition of a coordinated communication, which creates a "safe harbor for responses to inquiries about legislative or policy issues." 11 C.F.R. § 109.21(f).

Thus, the Indictment presses an unconstitutional interpretation of the Election Act as applied to Kelsey's facts.

CONCLUSION

The Indictment should be dismissed in its entirety because it fails to state an offense. In the addition, it should be dismissed because it violates the Double Jeopardy clause and is self-contradictory. Finally, the Indictment should be dismissed because it violates the Free Speech clause as applied to Kelsey.

Respectfully submitted,

s/ David A. Warrington
David A. Warrington, *pro hac vice*
Gary M. Lawkowski
Dhillon Law Group, Inc.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
Telephone: 415-520-6593
DWarrington@dhillonlaw.com
GLawkowski@dhillonlaw.com

Michael A. Columbo
Dhillon Law Group, Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
Telephone: 415-944-4996
MColumbo@dhillonlaw.com

Attorneys for Defendant Brian Kelsey

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Proposed Defendant Kelsey's Rule 12(b) Motion to Dismiss Indictment* has been electronically delivered via the Court's electronic filing system on this the 16th day of March 2023 to:

Hal Hardin
Hal D. Hardin
211 Union Street, Suite 200
Nashville, TN 37201

Phillip Georges
Phillip S. Georges, PLLC
501 Union St., Ste. 200d
Nashville, TN 37219

Amanda Klopf
Assistant United States Attorney
110 Ninth Avenue, South, Suite A961
Nashville, TN 37203-3870

David Pritchard
Assistant United States Attorney
167 North Main Street, Suite 800
Memphis, TN 38103

John P. Taddei
U.S. Department of Justice
1301 New York Ave. NW
Washington, DC 20530

Paul J. Bruno
Jerry E. Martin
David A. Rivera
Barrett, Johnston, Martin & Garrison, LLC
414 Union Street, Suite 900
Nashville, TN 37219

s/ David A. Warrington
David A. Warrington

Exhibit

2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN KELSEY and JOSHUA SMITH, Defendants.	No. 3:21-cr-00264

DECALARATION OF BRIAN KELSEY

I, Brian Kelsey, the undersigned "Declarant," am over eighteen (18) years of age. I submit this Declaration pursuant to 28 U.S.C. § 1746 and state as follows:

1. My father, Robert C. Kelsey, Sr. ("Bob Kelsey"), was diagnosed with terminal, inoperable pancreatic cancer in and around March 2022.

2. Bob Kelsey underwent chemotherapy in an effort to shrink his pancreatic tumor through August 2022, at which time he was forced to stop because his body could take no more.

3. In August 2022, Bob Kelsey was hospitalized for three weeks, and doctors gave him little prognosis for survival.

4. After being in the hospital roughly three weeks, Bob Kelsey found the will to recover enough to be released from the hospital into home hospice care.

5. Between August 2022 and February 2023, Bob Kelsey was imminently close to death, which could have come any day. During this time, I called my father

on average one to three times a day to check on whether he was still living, and I told him "Goodbye" in person, thinking I would never see him again, on five separate occasions.

6. Bob Kelsey died February 2, 2023. His funeral was February 6, 2023.

7. On September 10, 2022, my wife bore twin sons.

8. Two newborns mean twice the crying, twice the diaper changes, and twice the feedings, and as a twin parent, I feel as if one of these activities is constantly occurring.

9. During their first few months of life, my sons required feedings every three hours, including through the night, and my wife and I shared this duty. We were also forced to hire extra help during the initial months.

10. Many days, I feel like my daughter, who puts her fingers in her ears and yells, "Please make him stop crying!"

11. While my daughter is a sweet girl, she has had difficulty adjusting from being the center of attention to now sharing the limelight with her brothers, and her frustration has made parenting her more difficult and time consuming.

12. I continue to have many nights in which my sleep is interrupted once or multiple times by my newborn sons or by my three-year-old daughter, but thankfully, February 2023 is the first month in which both my sons have slept through the night.

13. When asked how he was surviving longer than his doctors predicted, Bob Kelsey repeatedly told others that he was living for two things: to hold his twin grandsons and to see his son acquitted.

14. On November 18, 2022, I witnessed Bob Kelsey, who was also a twin brother, hold his twin grandsons in his arms for the first time. He cried. He told me it brought him tears of joy to be holding them and tears of sadness to know that he would never see them grow up.

15. The combination of caring for two newborns, caring for a three-year-old, being deprived of sleep, constantly worrying that each day may bring news of my dad's death, sharing in my mom's and my wife's burdens, and being faced with a plea deal with an expiration in less than two days contributed to my hastily accepting the agreement with unsure heart and confused mind.

16. The emotion of losing my father has entered a new stage. I no longer experience the emotional strain of not knowing whether each day will be his last. Now, I miss him and am sad that I will never see him again on this Earth, but I am grateful that he is no longer suffering and hopeful of reuniting with him in heaven.

17. After 18 consecutive years serving honorably in the Tennessee General Assembly, I decided not to run for reelection to the state Senate in 2022 because my wife was expecting twins, and I did not want to subject my family to the negative campaigning that was sure to come from my criminal indictment in this case.

18. Immediately after I entered the notice to change my plea, I lost my second and higher paying occupation and was forced to resign from my position of Managing Attorney at my law firm, Liberty Justice Center.

19. After I entered the plea agreement in this case and reported it to the Tennessee Board of Professional Responsibility, the board suspended my license to practice law, pending a future due process hearing and final determination.

20. Now, my wife is the sole income earner for our family, and I take care of our twin sons full-time.

21. On January 11, 2023, the State of Tennessee Benefits Administration terminated my and my family's health insurance effective February 1, 2023, citing my November 22, 2022 plea agreement.

22. This determination also may cause me to lose the state pension I earned for 18 years of public service in the legislature.

23. In December 2022, Citibank abruptly closed my credit card account, and in a letter dated January 13, 2023, it informed me that the reason for doing so was that I "recently pleaded guilty to charges including conspiracy to defraud the United States."

24. Also in January 2023, I was told that Regions Bank informed my mother that it was closing her and my father's primary checking account, which they had held for over forty-five years, because I was given signing privileges on it last year to help with their finances during my dad's illness and because I had recently entered the plea agreement in this case.

25. During the height of my dad's illness, my mother was forced to make repeated in-person trips to Regions Bank over a period of weeks, and I helped walk her through a process to convince the bank not to close my parents' account but instead to remove my name from having signing privileges. To accomplish this last-ditch compromise, the local branch manager literally came into my parents' home while I listened on the phone. My father was on his death bed and would die only days later. Instead of being surrounded by peaceful, loving family and friends, he had a pen shoved into his hand and was forced to sign a document removing his son's signing privileges from his checking account because he was a felon. I felt tremendous guilt for causing this unpleasant scene to befall my father in his last days and for causing this emotional strife for my mom.

26. No one ever informed me that pleading guilty to 18 U.S.C. § 371 would cause me to lose the ability utilize the private banking system in the United States.

27. Other than speeding tickets, I have had no experience with the criminal justice system as a defendant. As an attorney, I exclusively practiced civil law. Prior to the days leading up to the plea agreement in this case, I was unfamiliar with the federal criminal sentencing guidelines and the process of entering a plea agreement with no agreement as to what the sentence would be and without which the government would claim to seek a vastly enhanced "trial penalty" for a defendant wishing to exercise his constitutional rights.

28. The possibility of hastily agreeing to facts which cannot, as a matter of law, constitute a criminal offense causes me tremendous concern.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 27, 2023.

Brian Kelsey

Respectfully submitted,

s/ David A. Warrington
David A. Warrington, *pro hac vice*
Gary M. Lawkowski
Dhillon Law Group, Inc.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
Telephone: 415-520-6593
DWarrington@dhillonlaw.com
GLawkowski@dhillonlaw.com

Mike Columbo
Dhillon Law Group, Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
Telephone: 415-944-4996
MColumbo@dhillonlaw.com

Attorneys for Defendant Brian Kelsey

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Declaration of Brian Kelsey* has been electronically delivered via the Court's electronic filing system on this the 16th day of March 2023 to:

Hal Hardin
Hal D. Hardin
211 Union Street, Suite 200
Nashville, TN 37201

Phillip Georges
Phillip S. Georges, PLLC
501 Union St., Ste. 200d
Nashville, TN 37219

Amanda Klopf
Assistant United States Attorney
110 Ninth Avenue, South, Suite A961
Nashville, TN 37203-3870

David Pritchard
Assistant United States Attorney
167 North Main Street, Suite 800
Memphis, TN 38103

John P. Taddei
U.S. Department of Justice
1301 New York Ave. NW
Washington, DC 20530

Paul J. Bruno
Jerry E. Martin
David A. Rivera
Barrett, Johnston, Martin & Garrison, LLC
414 Union Street, Suite 900
Nashville, TN 37219

s/ David A. Warrington
David A. Warrington