ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5297

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellee

v.

CRAIG FOR U.S. SENATE, LARRY E. CRAIG, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS TREASURER OF CRAIG FOR U.S. SENATE,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Columbia (Judge Amy Berman Jackson)

BRIEF OF APPELLANTS

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March 10, 2015

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

LIST OF PARTIES AND AMICUS CURIAE

The following is a list of all individuals and groups who are known to be parties to this case at this time. There are no known *amici curiae*.

Appellants: The Appellants are Craig for U.S. Senate, a political committee authorized to receive contributions and make expenditures, and Larry E. Craig, both as an individual and in his official capacity as treasurer of Craig for U.S. Senate.

Appellee: The Appellee is the Federal Election Commission.

Kaye L. O'Riordan was a defendant during the district court proceedings. Ms. O'Riordan previously served as treasurer of Craig for U.S. Senate, but resigned her position during those proceedings.

RULINGS UNDER REVIEW

Appellants seek review of Judge Jackson's Memorandum Decision and Order granting Plaintiff-Appellee's Motion for Summary Judgment and awarding disgorgement and a civil penalty. The decision was docketed on September 30, 2014, as docket entry 27; it also appears at 2014 U.S. Dist. LEXIS 139157 (D.D.C. Sept. 30, 2014). The accompanying order (docketed in the District Court as docket entry 26) was also docketed on September 30, 2014. Both documents are found in the Joint Appendix ("JA") at JA10-50 and JA51.

RELATED CASES

There are no related cases.

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JURISDICTIONAL STATEMENT

Under 28 U.S.C. § 1291, this Court has jurisdiction over a final decision of the district courts of the United States. The district court issued a final decision on September 30, 2014. Joint Appendix ("JA") 10-50, JA51. A notice of appeal was timely filed on November 24, 2014. JA260.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court's holding that Senator Craig incurred legal expenses "irrespective" of his duties as an officeholder should be reversed because the district court misapplied both the Federal Election Campaign Act's ("FECA's") "personal use" statute and the Federal Election Commission's ("FEC's") analysis of that law, and ignored facts relevant to the personal use analysis.

2. Whether the district court's order requiring disgorgement to the U.S. Treasury should be reversed because it does not restore the status quo and is contrary to the plain meaning of the statute.

3. Whether the district court's order requiring disgorgement to the U.S. Treasury should be reversed because the FEC's policy for personal use violations is to disgorge to the campaign committee.

4. Whether the district court's order requiring disgorgement to the U.S. Treasury should be reversed because it infringes on the First Amendment rights of both Senator Craig and his donors.

5. Whether the district court's order imposing a civil penalty of $45,000 should be set aside.

RELEVANT STATUTES AND REGULATIONS

A. Statutory and Regulatory Background

1. Statutes at Issue

This case concerns a federal officeholder's broad discretion under FECA to use campaign contributions for expenditures related to his official position. Contributions to campaign committees "serve 'to affiliate a person with a candidate' and 'enabl[e] like-minded persons to pool their resources." *See McConnell v. FEC*, 540 U.S. 93, 135-36 (2003). Congress, in what is now 52 U.S.C. § 30114(a),[1] granted candidates broad discretion to determine how to expend campaign contributions received from supporters. The statute provides,

> (a) Permitted uses
>
> A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual—
>
> (1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;
>
> (2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;
>
> (3) for contributions to an organization described in section 170(c) of Title

[1] Prior to its recodification on September 1, 2014, the relevant statute was located at 2 U.S.C. § 439a(a).

> 26 [non-profits];
>
> (4) for transfers, without limitation, to a national, State, or local committee of a political party;
>
> (5) for donations to State and local candidates subject to the provisions of State law; or
>
> (6) for any other lawful purpose unless prohibited by subsection (b) of this section.

52 U.S.C. § 30114(a).

Before 1979, Congress placed no restrictions on a candidate's use of campaign funds. *See, e.g.*, FEC AO 1976-17 (*Blomen*), 1976 WL 419330, at *1 (1976) ("[A] candidate has discretion to determine what expenditures should be made during his or her campaign, and therefore *any* disbursements made and reported by the campaign committee as expenditures will be deemed to be for the purpose of influencing the candidate's election." (Emphasis added)). In 1979, Congress amended § 30114 to prohibit the "personal use" of campaign funds. The statute describes personal use as an "expense of a person that would exist irrespective of the candidate's election campaign or individual's duties." 52 U.S.C. § 30114(b)(2). The statute does not provide a definition for "irrespective." Rather, it lists examples of expenditures that Congress considered personal. Significantly, legal expenses are not a *per se* personal expense. The statute provides,

> (b) Prohibited use
>
> (1) In general

> A contribution or donation described in subsection (a) shall not be converted by any person to personal use.
>
> (2) Conversion
>
> For the purposes of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including—
>
> > (A) a home mortgage, rent, or utility payment;
> >
> > (B) a clothing purchase;
> >
> > (C) a noncampaign-related automobile expense;
> >
> > (D) a country club membership;
> >
> > (E) a vacation or other noncampaign-related trip;
> >
> > (F) a household food item;
> >
> > (G) a tuition payment;
> >
> > (H) admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and
> >
> > (I) dues, fees, and other payments to a health club or recreational facility.

52 U.S.C. § 30114(b).[2] Currently, no judicial interpretation of the "irrespective" standard exists.

When the FEC suspects that a violation of § 30114 has occurred, it may elect to initiate enforcement proceedings. 52 U.S.C. § 30109(a)(6)(A)[3] authorizes the FEC to "correct or prevent" a violation of FECA, and, in pursuit of this authority,

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[2] Prior to its recodification the relevant statute was located at 2 U.S.C. § 439a(b).
[3] Prior to its recodification the relevant statute was located at 2 U.S.C. § 437g(a)(6)(A).

it may seek equitable relief or civil penalties from the district court. The statute provides,

> (6)(A) If the Commission is unable to correct or prevent any violation of this Act . . . the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of [$7,500] or an amount equal to any contribution or expenditure involved in such violation) . . . .
> (B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of [$7,500] or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

52 U.S.C. § 30109(a)(6).

2. Regulations and Related FEC Advisory Opinions

As noted above, FECA permits the use of campaign funds "to defray any ordinary and necessary expenses incurred in connection with the recipient's duties as a holder of Federal office." 11 C.F.R. § 113.2(a). For example, the FEC has stated that expenditures for legal fees to respond to a Justice Department inquiry into a congressional trip to the Grand Canyon were "ordinary and necessary expenses incurred in connection with [the officeholder's] duty as a House member." FEC AO 2006-35 (*Kolbe*), 2007 WL 419188, at *2 (Jan. 26, 2007) (citing 52 U.S.C. § 30114(a)(2)).

If an expense is not deemed "ordinary and necessary," and falls outside the other categories listed in § 30114(a), the FEC next looks to whether the expense should be classified as personal. The statute defines such personal expenses as occurring "irrespective of a candidate's election campaign or individual's [officeholder] duties." 52 U.S.C. § 30114(b)(2). Thus, personal expenses are "incurred even if the candidate was not a candidate or officeholder." Explanation and Justification, Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7863 (Feb. 9, 1995) (discussing expenses that are *per se* personal use). *See* 11 C.F.R. § 113.1(g)(1)(i). Unlike strictly personal expenses like clothing or a mortgage, the FEC evaluates legal expenses, along with meal, travel, and vehicle expenses, on a case-by-case basis. *See* 11 C.F.R. § 113.1(g)(1)(ii).

In so doing, the FEC applies a "reasonableness" standard to evaluate whether expenses were incurred "irrespective" of campaign or official obligations. In its "Explanation and Justification" for the personal use rulemaking, the FEC stated that "[C]andidates have wide discretion over the use of campaign funds. If the candidate can *reasonably* show that the expenses at issue resulted from campaign or officeholder activities, the[] Commission will not consider the use to be personal use." *See* 60 Fed. Reg. at 7,867 (emphasis added). The FEC has cautioned that "expenses will not be treated as though they are campaign or

officeholder related merely because the underlying legal proceedings have some impact on the campaign or the officeholder's status." *Id*. at 7,868.

In the 20 years since the personal use rulemaking, the FEC has issued several advisory opinions evaluating the types of expenses that are reasonably related to an officeholder's activities. The FEC uses its advisory opinion process to expand on its interpretation of FECA. *FEC v. Nat'l Rifle Ass'n. of Am.*, 254 F.3d 173, 185-86 (D.C. Cir. 2001). FEC advisory opinions "not only reflect the Commission's considered judgment but also have binding legal effect" on the FEC. *Id*. at 186. A party requesting a written advisory opinion must "set forth a specific transaction or activity" with which the requestor is involved. 11 C.F.R. § 112.1(b). "Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests." *Id.* Four of the six FEC commissioners must endorse a holding before the FEC may issue an advisory opinion. *See* 11 C.F.R. § 112.4(a).

The FEC's advisory opinions have consistently acknowledged that members of Congress are subject to heightened public and media scrutiny and that various expenses resulting from such scrutiny are reasonably related to an officeholder's duties. The FEC has determined that the "need for a candidate to respond to allegations that result from this elevated scrutiny" reasonably relates to their duties because such scrutiny would not exist "irrespective of the candidate's campaign or

officeholder status." *See* FEC AO 1996-24 (*Cooley*), 1996 WL 419823, at *3 (June 27, 1996) (approving use of campaign funds for research regarding state tax issue and receipt of Veterans benefits even though they were expenses that "could be incurred by any person"); *see also* FEC AO 1997-12 (*Costello*), 1997 WL 529598, at *4 (Aug. 15, 1997) (allowing campaign committee to pay legal expenses relating to a private venture because the need for the services "appears to have resulted directly from the political necessity . . . to respond to allegations of wrongful conduct that were reported by the news media and alleged to have happened during periods when he was a Federal officeholder and candidate").

The FEC has even permitted former officials to use campaign funds to address public issues that arose *after* leaving office. *See* FEC AO 2001-09 (*Kerrey*), 2001 WL 844352 (July 17, 2001). In *Kerrey*, the FEC concluded that media scrutiny of Senator Bob Kerrey's war record – which related to events that occurred long-before he was an elected official and emerged as a public issue after his retirement – arose as a consequence of his elected office. The FEC determined that "the recent publicity would not have occurred if Mr. Kerrey had not been a prominent Senator and prominent Federal candidate, particularly one whose campaigns had entailed a discussion of his notable Vietnam War record." *Id*. at *4. As such, it authorized his campaign committee to pay for public relations services even though Senator Kerrey no longer sought, or held, federal office. *Id*. at *1, *4.

Conversely, the FEC has barred a candidate from using campaign funds to pay legal fees and expenses to defend against allegations that were unrelated to officeholder duties or campaign activities. *See* FEC AO 2003-17 (*Treffinger*), 2003 WL 21894954 (July 25, 2003) (barring use of campaign funds to pay for portion of legal representation in Federal criminal trial pertaining to allegations that did not directly relate to Federal campaign activity).

The FEC has attempted to reconcile the interplay between legal proceedings and related media expenses by authorizing the expenditure of campaign funds to pay for some legal expenses generated by the need to address media scrutiny. A candidate may use campaign funds to pay for all legal expenses that either "relate directly and exclusively to dealing with the press" or "relate[] directly to allegations arising from campaign or officeholder activity." FEC AO 1998-1 (*Hilliard*), 1998 WL 108618, at *4 (Feb. 27, 1998). The FEC specifically permits a "campaign committee to pay legal fees incurred in preparing press releases, appearing at press conferences, meeting or talking with reporters, reviewing and monitoring media allegations, responding to media requests for comment, and conferring with the candidate or officeholder regarding media allegations." FEC AO 2008-07 (*Vitter*), 2008 WL 4265321, at *4 n.2 (Sept. 9, 2008).[4] These

[4] In *Hilliard*, the FEC authorized an individual to use committee funds to pay for 50% of press-related legal expenses that are "not directly relate[d] to allegations arising from campaign or officeholder activity . . . because [the person is] a

expenditures are permissible even when the underlying allegations do not relate to campaign or officeholder duties. *Id.*

In response to requests for advisory opinions, the FEC has not always been able to identify whether specific legal allegations emanated from campaign or officeholder activity. In FEC AO 2008-07 (*Vitter*), the FEC authorized Senator David Vitter to use campaign funds for legal expenses related to a Senate Ethics Committee complaint and to media issues, both of which resulted from disclosures in another individual's criminal case. *Id*. However, the FEC deadlocked on whether Senator Vitter could use campaign funds to pay his attorneys to monitor legal proceedings and quash subpoenas in that criminal case. *Id*. at *4.

Three commissioners voted to allow Senator Vitter to use campaign funds for both types of legal expenses because the facts demonstrated that he had been singled-out, both by the defendant in the criminal matter and by the media, because he was a Senator. FEC Draft AO 2008-07, Doc. No. 08-20-A (Aug. 20, 2008) (Addendum Tab C) (noting that the defendant in the criminal matter subpoenaed only six high-profile clients, including Senator Vitter, out of a list of 15,000, and that the media focused on Senator Vitter's involvement far more than other

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candidate . . . and [is] providing responses to the press." FEC AO 1998-1 (*Hilliard*), 1998 WL 108618, at *4 (Feb. 27, 1998). However, FEC guidance and advisory opinions are ambiguous as to when press-related legal expenses are only partially authorized, as opposed to the full coverage detailed in the *Vitter* opinion and elsewhere. *See, e.g.*, FEC AO 2008-07 (*Vitter*), 2008 WL 4265321, at *4 n.2 (Sept. 9, 2008)

subpoenaed witnesses). Citing *Kerrey*, and other FEC Advisory Opinions, the three Commissioners drafted an opinion concluding that Vitter "would not have had to make the expenditures for quashing the subpoenas and related monitoring were he not an officeholder because the expenses would not exist irrespective of Senator Vitter's campaign or duties as a federal officeholder." *Id*. at 8.

In contrast, the three other FEC commissioners cast Vitter's legal fees as personal use. Those commissioners concluded that Vitter's need for legal representation to quash subpoenas to testify in the criminal matter "was not related to information known to or acquired by Senator Vitter during the course of his candidacy or in the performance of his duties as a U.S. Senator." FEC Draft AO 2008-07, Doc. No. 08-20 at 8 (Aug. 19, 2008) (Addendum Tab B). As for legal fees to monitor the criminal proceedings, the Commissioners noted that although they had approved legal fees to monitor a third party's trial in the past, "legal fees and expenses [in this circumstance] would be an impermissible personal use." *Id*. at 8-9, 11 (concluding that counsel "would have monitored the . . . criminal proceeding irrespective of Senator Vitter's campaign or duties as a U.S. Senator"). The resulting stalemate prevented the FEC from forming a consensus on this issue. *See* FEC AO 2008-07 (*Vitter*), 2008 WL 4265321 (Sept. 8, 2008); 11 C.F.R. § 112.4(a) (FEC must approve advisory opinion by "affirmative vote of 4 members").

The FEC's most recent advisory opinion addressing the use of campaign funds to pay for legal fees addressed a suit filed by a newspaper to obtain the personal employment records of a former federal candidate. FEC AO 2013-11 (*Miller*), 2013 WL 6022101 (Oct. 31, 2013). In that matter, the former candidate sought permission to use campaign funds to post a bond pending appeal of a lower court's decision releasing personnel records relating to his previous public employment. *Id*. at *1. The FEC approved the use of campaign funds to post bond and to satisfy the judgment if his appeal was unsuccessful. *Id.* at *4. ("Once that deposit is posted, the Commission recognizes . . . [the] Alaska Dispatch would have the right to apply deposited funds in satisfaction of the judgment."). In authorizing the use of committee funds for these purposes, the FEC reasoned that the lawsuit to obtain personnel records was directly related to Miller's campaign because it was filed during the campaign, as a result of the media and public's interest in the then-candidate. *Id*.

3. The FEC's Disgorgement and Penalty Regulations and Guidance

As discussed *infra*, at 35-37, the FEC relies on 52 U.S.C. § 30109(a)(6)(A) for its authority to compel disgorgement to a campaign committee. Neither FECA nor the FEC's regulations authorize disgorgement to the U.S. Treasury.

When the FEC discovers a violation of FECA, it is authorized to "correct or prevent the violation by informal methods." *See* 11 C.F.R. § 111.18(a). If it

cannot reach an informal agreement, the FEC is authorized to pursue civil action in federal court. Where the federal court decides that FECA has been violated it may issue a civil penalty that "shall not exceed the greater of $7,500 or an amount equal to any contribution or expenditure involved in the violation." *See* 11 C.F.R. § 111.24(a)(1).

STATEMENT OF THE CASE

A. Facts and Procedural History

This case involves appellate review of a district court order declaring that the defendants violated 52 U.S.C. § 30114(b), and requiring Senator Craig to 1) disgorge funds to the U.S Treasury that he ostensibly converted to personal use and 2) pay a penalty to the U.S. Treasury. The expenditures at issue are legal fees relating to an incident that occurred while Senator Craig was engaged in official travel. JA134-25 and n.4.

On June 11, 2007, United States Senator Larry Craig flew from his home state of Idaho to Washington, D.C., to attend a session of the Senate. *Id.* Before boarding a connecting flight at the Minneapolis – St. Paul International Airport Senator Craig stopped to use a restroom. JA199. While he was in a restroom stall an undercover police officer with the Minneapolis Airport Police arrested Senator Craig as part of a sting operation focused on sexual activity. JA203.

The arresting officer escorted Senator Craig to the department's Police Operations Center and conducted an interview. JA204. During the interview, Senator Craig displayed his business card and identified himself as a United States Senator. *Id.* Apparently acknowledging Senator Craig's position, the police officer informed him that he would "have to pay a fine and that will be it. Okay. I don't call media. I don't do any of that type of crap." JA209. The officer also commented twice about Senator Craig's status as a Member of Congress. First, saying, "I guess I'm gonna say I'm just disappointed in you sir. I'm [sic] just really am. I expect this from the guy that we get out of the hood. I mean, people vote for you." JA212. As the interview concluded, he again commented, "Embarrassing, embarrassing. No wonder why we're going down the tubes." *Id.*

The state of Minnesota charged Senator Craig with two misdemeanor counts: interference with privacy and disorderly conduct. JA214. In the wake of his arrest, Senator Craig's concerns about public disclosure of the misdemeanor charges extended beyond the immediate personal and political ramifications of a single incident. In 2006, well before his arrest in Minnesota, Senator Craig learned that the *Idaho Statesman* newspaper was "investigating allegations related to alleged homosexual activity by him." JA182;JA221-22.. "The *Statesman's* investigation included such tactics as contacting scores of the Senator's friends and

family, demanding the Senator's FBI files, and patrolling bars and restrooms with the Senator's picture." JA182.

At that time, Senator Craig retained both legal counsel and media consulting services to address the political ramifications of the *Statesman's* investigation. *See* JA221-22. Legal services provided by Sutherland, Asbill & Brennan ("Sutherland") included examining whether Senator Craig possessed a viable defamation case against the newspaper if it continued to pursue the matter or published an article about his personal activity. Senator Craig used funds from his campaign committee, Craig for U.S. Senate, to pay for these legal services, without evident complaint from the FEC or the Senate Ethics Committee. *Id*. In June 2007, days before his arrest at the airport, Senator Craig and his counsel met with reporters for the *Statesman* and requested that the newspaper cease its harassment and other activities relating to its investigation. *See* JA182-83.

Mindful of the *Statesman's* pending inquiry and the public attention that news of his arrest would trigger, on August 1, 2007, Senator Craig signed and mailed a "Petition to Enter Plea of Guilty-Misdemeanor" to the Minnesota court. JA217-19. Senator Craig pled guilty to one count of disorderly conduct and paid a fine and costs totaling $575. JA218. The court marked the plea filed on August 8, 2007. JA217.

Senator Craig later stated that he entered the plea, in part, because he was concerned that the allegations would be made public and that this would provide the *Statesman* with an excuse to publish the article that it had been threatening to run. JA183. As he explained during his attempt to withdraw his guilty plea later that year,

> Deeply panicked about the events, and based on [the officer's] representations to me regarding the potential outcome, my interest in handling the matter expeditiously, and the risk that protracting the issue could lead to unnecessary publicity, I did not seek the advice of an attorney on the date of my arrest, and I made the decision on that date to seek a guilty plea to whatever charges would be lodged against me.

JA200-01. In Senator Craig's view, "the terms of the plea included the promise made by [the officer] that the alleged incident would not be released to the media." JA187; *see also* JA200-01.

Of course, despite the arresting officer's statements to the contrary and Senator Craig's fervent hopes, the details relating to Senator Craig's arrest and misdemeanor plea soon became public. *See* JA225. Within a day of the apparent leak of the plea and ensuing national coverage of the story, a group of Senator Craig's Republican colleagues and a good government organization separately filed complaints relating to the Minnesota incident with the Senate Select Committee on Ethics ("Ethics Committee"). *See* JA232-33; *see also* JA228-30. At the request of Senate Republican leadership, Senator Craig also stepped down from his positions as the "top Republican on the [Senate] Veterans' Affairs

Committee, [the] Appropriations Subcommittee on the Interior, and [the] Energy and Natural Resources Subcommittee on Public Lands and Forests." Josh Kraushaar, *Craig steps down from top committee posts*, http://www.politico.com/blogs/thecrypt/0807/CNN_Craig_stepping_down_from_committee_assignments.html (Aug. 29, 2007).

On August 30, the *Idaho Statesman* called for Senator Craig to resign from the United States Senate. Idaho Statesman, *Our View: Craig Must Resign*, http://www.idahostatesman.com/2007/08/30/145494_our-view-craig-must-resign.html?rh=1 (Aug. 30, 2007). In response to questions about the arrest, the Minneapolis-St. Paul Airport Police Department released an audiotape of Senator Craig's interview with the arresting officer. FOX News, *Transcript: Audio Interview of Sen. Larry Craig*, http://www.foxnews.com/story/2007/08/30/transcript-audio-interview-sen-larry-craig/ (Aug. 30, 2007) (Transcript located at JA207-12).

In the face of these developments and the resulting intense public scrutiny of his actions, Senator Craig treated the matter as a continuation of the *Statesman* investigation. *See* JA222. As such, he sought assistance from the same legal and media consulting team that he had formed to address the *Statesman* inquiry, including the Sutherland law firm. *Id.*

Senator Craig announced on September 1, 2007, that he would resign from the U.S. Senate, effective September 30. JA56-57, JA151. However, on October 4, Senator Craig announced that "'I will continue my effort to clear my name in the Senate Ethics Committee – something that is not possible if I am not serving in the Senate.'" *Id.* (citation omitted). Hoping that a successful appeal would enable him to remain in the Senate and seek election in Idaho for another six-year term, Senator Craig filed a motion with the Minnesota District Court to withdraw his misdemeanor guilty plea on September 10. JA182-219; JA223. After the district court rejected Senator Craig's motion, he appealed to the Minnesota Court of Appeals. In December 2008, the state appellate court rejected his appeal. *Craig v. Minnesota*, No. A07-1949, 2008 WL 5136170 (Minn. Ct. App. Dec. 09, 2008).

Although he continued to serve in the Senate until the conclusion of his term, Senator Craig ultimately chose not to run for reelection and retired from the Senate in January 2009. JA57, JA151.

B. District Court Proceedings

On June 11, 2012, the FEC filed suit against defendants Senator Craig, the Craig for U.S. Senate campaign committee ("Craig Committee") and Kaye L. O'Riordan, the former Craig Committee treasurer.[5] JA52-62. The FEC charged

[5] Senator Craig has since been substituted for Ms. O'Riordan as treasurer. *See* JA6 (May 1, 2013 Minute Order).

that the defendants had used campaign funds to pay for personal expenses in violation of FECA. *See* 52 U.S.C. § 30114(b). The FEC requested that the district court 1) declare that defendants violated the statute's ban on personal use; 2) order Senator Craig to disgorge all improper disbursements back to the Craig Committee; 3) enjoin defendants from further converting campaign funds to personal use; and 4) assess civil penalties. JA61

Defendants moved to dismiss the complaint on August 2, 2012. ECF No. 3. After oral argument (JA76-125), the district court denied the motion on March 28, 2013. JA126-49. Applying a narrow interpretation of the personal use statute, the court held that the Craig Committee's legal expenditures were not "ordinary and necessary expenses incurred in connection" with his official duties and would have been incurred "irrespective" of Senator Craig's official duties. JA134-36. The district court also rejected the contention that defendants had relied upon advisory opinions published by the FEC that authorized similar types of expenditures. JA139-49.

The FEC moved for summary judgment on September 30, 2013, seeking a court order directing Senator Craig to disgorge back to the Craig Committee unlawful expenditures totaling $216,984. JA10-11, JA38. The FEC also sought $70,000 in civil penalties against Senator Craig and the Craig Committee,

respectively. JA10-11. Finally the FEC requested that the district court order declaratory and injunctive relief. *Id.*

After hearing argument on July 17, 2014, the district court ordered defendants to "file a pleading itemizing and quantifying all of the legal expenses" that defendants "contend were permissible" under FEC guidance. JA7 (July 17, 2014 Minute Order). On September 30, 2014, after the parties had each filed pleadings addressing the permissibility of the itemized expenses (ECF Nos. 24 and 25 (JA8)), the district court granted the FEC's motion for summary judgment. The court issued an order (JA51) and memorandum opinion (JA10-50) holding that defendants had violated FECA's ban on personal use. The district court issued declaratory relief and ordered Senator Craig to disgorge the $197,535 that it found had been spent improperly. JA40, JA51. However, despite the FEC's request that the money be disgorged to the Craig Committee, the district court ordered Senator Craig to pay the funds to the U.S. Treasury. JA38 n.23. The court also imposed a $45,000 penalty on Senator Craig, also payable to the U.S. Treasury. *Id.* The court did not issue injunctive relief. JA40

On November 24, 2014, defendants timely filed an appeal of the district court's summary judgment order with this Court. JA260.

SUMMARY OF ARGUMENT

The district court's order directing Senator Craig to disgorge $197,535 to the U.S. Treasury and pay a $45,000 civil penalty is not in accordance with the law.

In deciding that Senator Craig's legal expenses were personal use the district court applied a narrower standard than the reasonableness standard the FEC has applied in its guidance and advisory opinions. Senator Craig's legal expenses are reasonably related to his position because, absent the publication of his plea and the resulting media coverage, Senator Craig would never have filed an appeal of that plea. Senator Craig's use of campaign funds are comparable to *Kerrey*, *Miller*, and *Vitter* opinions, all matters where the FEC sanctioned the use of committee funds for expenses relating to personal conduct.

Even if the district court's decision regarding personal use were correct, the order requiring Senator Craig to disgorge $197,535 to the U.S. Treasury is contrary to the plain meaning of the statute, inconsistent with FEC guidance, and constitutionally infirm. Under 52 U.S.C. § 30109(a)(6), the district court has limited equitable authority to correct and prevent violations of the act. Disgorgement is an equitable remedy that aims to restore the status quo and cannot be used as a proxy for a penalty.

The district court's order requiring disgorgement to the U.S. Treasury does not restore the status quo because Senator Craig is unable to use the funds

consistent with donor intent. The district court's disgorgement order is also inconsistent with FEC conciliation agreements, in which the Commission has repeatedly directed individuals to disgorge improperly spent funds back to their campaign committees. Individuals and committees donated to the Craig Committee so that Senator Craig could use the funds for political purposes in accordance with 52 U.S.C. § 30114. No record evidence exists of any committee donor requesting a refund. In such circumstances, ordering disgorgement to the U.S. Treasury is contrary to donor intent and is a *de facto* expenditure limitation. Because statutory, regulatory, and constitutional authorities compel disgorgement to the campaign committee and not the U.S. Treasury, this Court must set aside the district court's order.

Even if this Court upholds the district court's disgorgement order, it should waive the $45,000 civil penalty. Senator Craig expended campaign funds for legal expenses in good faith and on the advice of counsel. Senator Craig has endured severe professional and personal consequences. He continues to incur legal costs in this matter, which has also prolonged public focus on the events in Minnesota. The professional and personal consequences, in tandem with disgorgement to the U.S. Treasury, would constitute a sufficient penalty.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 184 (D.C. Cir. 2013). Summary judgment is appropriate if, viewing the evidence in the light most favorable to the party opposing the motion, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER BECAUSE SENATOR CRAIG'S LEGAL EXPENSES ARE RELATED TO HIS DUTIES AS A FEDERAL OFFICEHOLDER AND DID NOT CONSTITUTE PERSONAL USE UNDER THE STATUTE AND FEC OPINIONS

The legal fees at issue in this matter are reasonably related to Senator Craig's status as an officeholder and, thus, were lawfully paid with committee funds in accordance with 52 U.S.C. § 30114(a)(6). The district court erred by 1) disregarding the circumstances unique to his official position that necessitated Senator Craig's appeal; and 2) failing to apply properly the applicable "reasonableness" standard to determine that the expenditures would not have occurred irrespective of his official duties.

A. The District Court Erred in Disregarding Facts Relevant to a Personal Use Analysis Under FECA

In ruling that Senator Craig's expenses would have existed irrespective of his position and, thus, were personal, the district court erred in its application of both the personal use statute and the "reasonableness" analysis applied by the FEC in its guidance and advisory opinions. *Supra* at 2-13. *See* Explanation and Justification, Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995); *see, e.g.,* FEC AO 2001-09 (*Kerrey*), 2001 WL 844352 (July 17, 2001); FEC AO 2013-11 (*Miller*), 2013 WL 6022101 (Oct. 31, 2013).

The district court's decision contains a cursory and truncated reading of FECA's personal use standard. The court's analysis essentially begins and ends with this passage: "the Senator's arrest was personal and the attendant legal expenditures were not incurred in connection with his official duties, even if he either elected to plead guilty or to change course with his public image in mind." JA18. The court refused to weigh the possibility that the unique circumstances leading to publication of Senator Craig's guilty plea – and the attendant media furor and political consequences – could provide a basis for approval of the campaign expenditures. *Id.*

In the court's view, regardless of subsequent events, from the moment of the arrest until perpetuity *all* legal expenses relating to the misdemeanor charge were

categorically personal. *Id.* ("These facts may illuminate *why* Senator Craig did what he did, but they do not change *what* he did: the Senator's arrest was personal and the attendant legal costs were not incurred in connection with his official duties, even if he either elected to plead guilty or to change course with his public image in mind.") (emphasis in original).

However, the personal nature of the conduct underlying the legal expenditures is not the beginning and the end of the personal use analysis contemplated by the statute and regulations, and employed by the FEC. The impetus for expending committee funds is integral to the analysis. If Congress had not been willing to consider an elected official's rationale for her expenditures, it would not have mandated a case-by-case approach for assessing personal use; it simply would have stated categorically that *all* legal expenditures stemming from personal conduct were, by law, personal use. *See* 52 U.S.C. § 30114(b)(2).

Without a standard that is contingent on underlying facts, the FEC would not have permitted either Senator Kerrey or candidate Miller to use committee funds to make media and legal expenditures related to purely personal conduct. *See supra* at 8,12. Indeed, the categories of media and related legal expenses expressly sanctioned by the FEC in *Vitter, Hilliard,* and other advisory opinions stem

directly from the recognition that distinctly personal conduct can engender official and political consequences.[6]

As such, the district court's refusal to consider the underlying impetus for Senator's Craig's decision to move to withdraw his plea constitutes reversible error.

B. The District Court Erroneously Applied the Standard for "Necessary and Official" Expenditures Rather than the More Expansive "Irrespective" Analysis

The FEC has defined § 30114(b)(2)'s "irrespective" standard as addressing "expenses that would be incurred even if the candidate was not a candidate or officeholder." 60 Fed. Reg. at 7,863. Especially with regard to legal expenses, which receive a case-by-case analysis, the FEC maintains that candidates have "wide discretion over use of campaign funds" and where there is a dispute "[i]f the candidate can reasonably show that expenses at issue" pertain to officeholder duties "the Commission will not consider them to be personal use." *Id*. at 7,867.

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[6] The FEC offers no statutory or regulatory foundation for its arbitrary distinction between media-related expenses, which can nearly always be paid for with committee funds, and legal expenses, for which payment is significantly more constrained. *See* FEC AO 2008-07 (*Vitter*), 2008 WL 4265321, at *4 n.2 (Sept. 9, 2008). The district court did not question this general distinction in its opinion. JA22-26. It also failed to recognize that Senator Craig's legal costs were more closely akin to the media-related expenditures stemming from personal conduct authorized in *Kerrey* and other opinions than the traditional legal expenses addressed, *inter alia,* in the *Treffinger* opinion. *See* FEC AO 2001-09 (*Kerrey*), 2001 WL 844352 (July 17, 2001); FEC AO 2003-17 (*Treffinger*), 2003 WL 21894954 (July 25, 2003).

This language is significantly more expansive than § 30114(a)(2)'s requirement that "ordinary and necessary expenses [be] incurred *in connection* with [official] duties." (Emphasis added.)

In both of its opinions in this case, the district court essentially confined its personal use assessment to whether defendants' legal expenditures constituted "ordinary and necessary expenses," the statute's more stringent standard. JA134-36; JA17.[7] Rather than considering whether Senator Craig's legal expenses were "reasonably related" to his duties, the district court based its personal use determination on the "ordinary and necessary" standard requiring that expenses be incurred "in connection" with official duties. JA18.

The district court's erroneous application of the stricter standard is especially apparent when Senator Craig's expenses are compared to the categories of *per se* personal use listed in 52 U.S.C. § 30114(b). These examples reflect the narrow scope of the "irrespective" restriction. Congress classified two categories of expenses as always occurring "irrespective" of a candidate's duties: 1) costs attendant to daily life (*e.g.*, residential costs and clothing) and 2) costs for luxury or

[7] In their motion to dismiss, defendants maintained that, like the expenditures the FEC approved in the *Kolbe* opinion, Senator Craig's costs were "ordinary and necessary." JA133-35. While the district court rejected that claim, Senator Craig continues to assert that the *Kolbe* opinion, which appears to authorize expenditures for legal fees relating to personal conduct, supports Senator Craig's position that his expenditures were not personal use. *See* FEC AO 2006-35 (*Kolbe*), 2007 WL 419188, at *2 (Jan. 26, 2007).

discretionary personal items (*e.g.*, country club membership and vacations). Senator Craig's legal expenses – which arose as a direct result of the publication and media coverage of his conduct – are unlike these enumerated items contemplated by Congress as personal use, which may be incurred by any individual.

Consistent with the statute, proper application of the "irrespective" standard demands an examination of the circumstances giving rise to the expenditures. Yet, the district court eschewed any such analysis. Specifically, prior to the publication of his arrest and plea, Senator Craig claimed no expenses related to the matter. Had he not been a sitting U.S Senator at the time (and not already subjected to media scrutiny of his personal conduct), the Minnesota incident and plea would not have been a national media event. JA225-26;JA182. Certainly, the national media does not generally publish stories when a private individual pleads guilty to a misdemeanor disorderly conduct charge. Nor would the Minneapolis-St. Paul Airport Police Department, in response to public attention focused on its conduct, have released an audiotape of the interview to national news outlets. *See* FOX News article, *supra* at 17. Nor would the publication of such a plea have normally engendered immediate professional repercussions – including congressional investigations and loss of professional stature and authority – for a private individual. JA56; JA57-58; JA155-57; JA154.

A principled personal use analysis must examine whether the relevant events reasonably relate to a campaign or official duties. Had Senator Craig opted to challenge his plea initially, or taken steps to publicize the incident for political purposes or to create a rationale for the use of committee funds, this legal calculus might be different. It is clear, however, that Senator Craig assiduously tried to avoid public disclosure and the attendant political ramifications. JA200-01. The district court refused to consider Senator Craig's initial decision to plead guilty to a misdemeanor, the public disclosure of that plea, the preexisting legal and media efforts to address the *Idaho Statesman* inquiry, and the intense media scrutiny and subsequent political repercussions. JA18. That Senator Craig elected to use committee funds only after his plea had become public cements the connection between the expenditures and his federal office.

Senator Craig's use of campaign funds for legal expenses is analogous to the expenditures sanctioned by the FEC in, *inter alia, Kerrey* and *Miller*.[8] As this Court has held, FEC advisory opinions are due significant deference. *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) (stating that "advisory

[8] Defendants do not rely on FECA's safe harbor provision for reliance or an advisory opinion. 52 U.S.C. § 30108(c)(1)(B) (party involved in a "specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which [an] advisory opinion is rendered" may rely on that opinion). Rather, these opinions establish that Senator Craig's use of campaign funds falls squarely within the bounds of the personal use standard established by the FEC.

opinions have binding legal effect on the Commission" and are due *Chevron* deference). Indeed, Senator Craig's use of campaign funds is far more closely related to his status as a federal officeholder than other expenditures previously sanctioned by the FEC. Neither the *Kerrey* nor *Miller* opinions involved individuals who occupied public office or were federal candidates at the time that they incurred the costs at issue. In contrast, Senator Craig remained in office during the pendency of the proceedings and utilized those proceedings to attempt to remain in office and potentially seek reelection. JA56-57, JA151. Neither Miller nor Kerrey suffered comparable political consequences, yet the FEC deemed their expenses reasonably related to their former candidacy or office. Conversely, the disclosure of Senator Craig's plea opened a Pandora's box of negative publicity and consequences that derailed Senator Craig's career as a legislator and ultimately lead to his decision to resign rather than seek reelection. *Id.*; JA223.

As the FEC's guidance indicates, the appropriate analysis of the irrespective standard for personal use is significantly more expansive than the approach utilized by the district court in this matter. Rather than simply asking whether the underlying conduct is connected to professional duties, a court must examine whether the federal official's status as an officeholder served as the catalyst for, or otherwise related to, the subsequent expenditures. Because the expenditures at

issue occurred in relation to Senator Craig's status as a Senator, they did not constitute personal use.

III. THIS COURT SHOULD SET ASIDE THE DISTRICT COURT'S ORDER REQUIRING SENATOR CRAIG TO "DISGORGE" TO THE U.S. TREASURY BECAUSE SUCH ACTION IS CONTRARY TO THE PLAIN MEANING OF THE STATUTE, INCONSISTENT WITH THE LANGUAGE OF FECA AND FEC PRACTICE, AND VIOLATES THE U.S. CONSTITUTION

Even if this Court determines that Senator Craig's expenditures constituted personal use, it should still reject the district court's order that defendants disgorge $197,535 to the U.S. Treasury. JA28. The court's order, issued counter to the FEC's request that defendant disgorge improperly spent funds back to the Craig Committee, is contrary to the statute, inconsistent with FECA and FEC policy and practice, and violates the First Amendment.

The district court offered several reasons for ordering disgorgement to the U.S. Treasury, rather than to the Craig Committee. First, it held that the "Craig Committee is essentially defunct" and that "Senator Craig has no plans to run for office again." JA38-39. Although the record contains no evidence of donors requesting refunds from the Craig Committee, the court also cited to the FEC's statement during the summary judgment hearing that it was "'not sure' whether it was possible to identify and repay any of the donors" to the committee. *Id.*[9] Thus,

[9] The court also apparently rejected ordering disgorgement to the committee while imposing a concomitant penalty on that entity. JA38-39.

the Court concluded that "any disgorgement of funds to the Committee would be little more than an empty gesture and logistical headache." *Id.*

While the court may label its order as one of equitable disgorgement, its mandate functions as an improper and excessive penalty, ignores the continued viability of the Craig Committee, and violates the constitutional interests of Senator Craig and his donors.

A. The District Court's Punitive Order to Disgorge to the U.S. Treasury Violates FECA

In rejecting the FEC's recommendation that defendants disgorge back to the Craig Committee, the district court interpreted 52 U.S.C. § 30109(a)(6)(B) as granting it plenary authority to act. This reading is incorrect: the statute grants the district court limited equitable jurisdiction and authority to enter a civil penalty not exceeding the amount of purportedly improper expenditures. 52 U.S.C. § 30109(a)(6)(B). The district court's equitable order exceeds its statutory authority because it punishes Senator Craig in lieu of restoring the status quo, and is contrary to the letter and spirit of the statute.

1. The Order Functions as a Penalty Rather than Disgorgement

Disgorgement is an equitable remedy akin to restitution and functions to remedy past conduct and restore the status quo. *United States v. Philip Morris USA, Inc.,* 396 F.3d 1190, 1197-98 (D.C. Cir. 2005) ("Disgorgement . . . is a quintessentially backward-looking remedy . . . ."); *SEC v. First City Fin. Corp.*,

890 F.2d 1215, 1231 (D.C. Cir. 1989) ("[D]isgorgement may not be used punitively.").

If this Court does find that a violation of the personal use statute has occurred, permitting Senator Craig to use his campaign contributions in a lawful manner would restore the status quo. The court's order requiring Senator Craig to pay funds to the U.S. Treasury does not actually effect disgorgement because it fails to return the funds to the committee. Instead, the order seeks to punish Senator Craig for his conduct by preventing him from using these funds for a permissible purpose. *See* 52 U.S.C. § 30114(a) (listing permissible purposes).

When the FEC advocated during the summary judgment hearing that the funds be disgorged to the Craig Committee for Senator Craig's lawful use, the district court expressed its dissatisfaction with the solution. Instead, the court appeared to evince interest in imposing a penalty:

> THE COURT: What are they going to spend it on now that's permitted, really?
>
> MR. HANCOCK: Well, the Act permits a number of proper uses, including the money can be given to charity, it can be transferred to other political parties, it can be given to other candidates.
>
> * * *
>
> THE COURT: Well, if the money goes to charities or goes to their candidates, doesn't it then start to become indistinguishable from a penalty? . . . At that point it's just a pass through, isn't it? What's the point? Why not just have a penalty?

JA272-73.

Consistent with its remarks at the hearing, the district court ordered Senator Craig to pay the funds to the U.S. Treasury. JA39 ("[I]f the Senator repaid the Committee and it was ordered to pay a penalty, the outcome would be the same as under the terms of the Court's order.").

The district court's calculation of the amount of purportedly improper expenditures illustrates its punitive intent. Disgorgement should be "limited to 'property causally related to the wrongdoing' at issue." *Allstate Ins. Co. v. Receivable Fin. Co*., 501 F.3d 398, 413 (5th Cir. 2007). In calculating that expenditures totaling $197,535 constituted personal use, the district court employed a broad standard that included numerous expenditures that were clearly related to official duties. For example, the court deemed legal expenditures for a meeting with a U.S. Senator and time spent with Senator Craig's office staff to be personal use. *See, e.g.,* JA43-45. It also rejected defendant's claim that legal work relating to FEC reporting obligations qualified as official. JA48. The court's calculations also included expenditures that even the FEC conceded were official. Specifically, the FEC did not contest expenses related to American Civil Liberties Union ("ACLU") briefs filed as *amicus curiae* in support of Senator Craig's efforts to withdraw his plea. JA42 n.2 (holding that because the ACLU briefs addressed only the underlying charges against Senator Craig it constituted "pure[] legal work" not incurred in connection with officeholder duties). As the district court's

apparent aim was to punish Senator Craig and deter him from using donations for their intended purpose, it exceeded its equitable authority when it ordered Senator Craig to pay funds to the U.S. Treasury.

2. The Disgorgement Order Is Inconsistent with FECA

The district court's order not only impermissibly penalizes defendant, it also violates the letter and spirit of 52 U.S.C. § 30109(a)(6). When read in the context of that provision, a disgorgement order must "correct" a violation of FECA. As discussed above, disgorgement corrects a statutory violation by returning the donated funds to the Craig Committee so that Senator Craig may make expenditures in compliance with § 30114.[10] In this case, disgorgement to the U.S. Treasury is not an equitable remedy because the campaign funds will not be used for the purpose intended – political activity consistent with donor intent – and

[10] This case is unlike securities fraud matters where courts have ordered disgorgement of illegal profits to the U.S. Treasury. For example, in *SEC v. Fischbach Corp*., 133 F.3d 170 (2d Cir.1997), defendants pled guilty to criminal fraud relating to control of a corporation. *Id*. at 172. The Court concluded that while the illegal profits should be disgorged to the company's minority shareholders, because it was impossible to locate those shareholders disgorgement should be made to the U.S. Treasury.

This case is distinct from *Fischbach* and similar SEC cases. Senator Craig relied on legal advice that he was permitted to use the funds for legal expenses. JA154. He did not defraud his donors and complied with applicable reporting requirements. *See* ECF. Nos. 16-1, -2, and -3. Returning the funds to the Craig Committee would fulfill the purpose of disgorgement by restoring the status quo and preventing any purported unjust enrichment.

instead, would result in a windfall to the U.S. Treasury. If "Congress desired to make such abrupt departure from traditional equity practice . . . it would have made its desire plain." *Bowles v. Skaggs*, 151 F.2d 817, 820 (6th Cir. 1945) (internal quotation marks omitted).

FECA's legislative history also supports this reading of the statute. The House Conference report shows that, in enforcing FECA, the FEC is charged with correcting or preventing violations; the district court's purpose is coextensive with that of the FEC's. It states in pertinent part,

> [T]he Commission may institute a civil action for relief if the Commission is unable to *correct or prevent* a violation by informal methods . . . . The relief sought in any civil action may include a permanent or temporary injunction, restraining order, or any other appropriate order including a civil penalty . . . . The civil action may be brought in the district court . . . . *The Court involved shall grant the relief sought by the Commission* in a civil action brought by the Commission upon a proper showing that the person involved has engaged or is about to engage in a violation of the Act . . . .
>
> H.R. Rep. No. 94-1057, at 47-48 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 946, 963 (emphasis added).

In accordance with the congressional directive to the FEC to "correct" violations of FECA, here, the FEC sought an order from the district court to disgorge the "converted funds to the Craig Committee" which would "come[] closer to restoring the status quo." ECF No. 16 at 17 n. 12.[11] Ignoring the FEC's

[11] At the summary judgment hearing, the FEC argued,

preference, the district court ordered Senator Craig to pay the funds to the U.S. Department of Treasury.

The district court's order must be set aside, and this Court should order Senator Craig to disgorge funds to the Craig Committee. This remedy serves the purpose of disgorgement by restoring the status quo and remedying past conduct, and is in accordance with the plain language of FECA and its legislative history.

3. The FEC's Regulations and Previous Agreements Concerning Personal Use Violations Support Disgorgement to the Craig Committee

As noted above, consistent with Commission practice, the FEC requested that the district court order the funds at issue to be disgorged back to the Craig Committee. Although the FEC suggested in a footnote that the district court had authority to order disgorgement to the U.S. Treasury, it did not cite regulatory authority for such relief.[12]

> [T]he case law is clear that the purpose of the disgorgement is just to get back to the pre-violation status quo. . . . I think it also would be a just result if it went to the Committee, and then the Committee spent it consistent with what FECA allows it to spend its money on. In other words, not Mr. Craig's personal use. That would still be consistent with the expectations of the donors to the Craig Committee.

JA271; JA274

[12] If the FEC prefers to have funds disgorged to the U.S. Treasury, it should do so through regulatory reform. *Cf. NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) ("The rule-making provisions of [the APA] . . . may not be avoided by the process of making rules in the course of adjudicatory proceedings.").

Indeed, any assertion that funds can be disgorged to the U.S. Treasury contradicts FEC practice and is not entitled to deference. *See Am. Airlines, Inc. v. United States*, 551 F.3d 1294, 1302 (2008) ("[A]n agency interpretation that conflicts with any earlier agency interpretation is entitled to considerably less deference than a consistently held agency view" (internal quotation marks and citation omitted)). The FEC's conciliation agreements, cited by the district court in its opinion, demonstrate that the FEC customarily requires disgorgement of funds to the campaign committee for personal use violations.[13]

For example, the FEC entered into a conciliation agreement with two individuals for, *inter alia*, violations of 52 U.S.C. § 30114. The agreement mandated that campaign funds used for personal purposes be refunded to the campaign committee. *See In re Istook* Conciliation Agreement at 6-7 (Sept. 25, 2008).[14] The FEC entered into a similar agreement with a Member of Congress relating to a variety of violations and required the Member to refund campaign funds used in violation of § 30114 to the committee. *See In re Meeks* Conciliation Agreement at 7 (Feb. 4, 2008)[15] (agreeing to return $9,812 in vehicle lease

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[13] Acknowledging that the FEC regularly requires disgorgement to a campaign committee, the district court's opinion cited to these conciliation agreements. JA30-31.

[14] *Available at* http://eqs.fec.gov/eqsdocsMUR/28044212385.pdf.

[15] *Available at* http://eqs.fec.gov/eqsdocsMUR/000EC959.pdf.

payments and repairs to the committee); *see also In re Free* Conciliation Agreement at 4, 7 (Sept. 23, 2008)[16] (agreeing to refund $6,906 to the campaign committee). Even where defendants have pled guilty to criminal personal use charges, the FEC consented to the reimbursement of funds to the campaign committee. *See In re Durkee* Conciliation Agreement at 5 (Dec. 12, 2014)[17]; *In re McCrosson* Conciliation Agreement at 3 (Nov. 8, 2012)[18]; *In re Sohn* Conciliation Agreement at 4 (July 21, 2010).[19] Certainly, the FEC's consistent practice when remedying personal use violations is to mandate the return of contributions to the campaign committee, not to the U.S. Treasury.

B. The Disgorgement Order Violates the First Amendment

Both FECA and the FEC contemplate disgorgement after a finding of personal use for a very good reason: campaign contributions and committee expenditures constitute political expression protected by the First Amendment. By mandating disgorgement to the U.S. Treasury, and not to the Craig Committee, the district court's order fails to consider the constitutional implications of the decision, violates donor intent, and impedes Senator Craig's expenditure rights.

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[16] *Available at* http://eqs.fec.gov/eqsdocsMUR/28044212013.pdf.

[17] *Available at* http://eqs.fec.gov/eqsdocsMUR/15044365117.pdf.

[18] *Available at* http://eqs.fec.gov/eqsdocsMUR/14044362854.pdf.

[19] *Available at* http://eqs.fec.gov/eqsdocsMUR/10044274264.pdf.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, the Supreme Court determined that campaign contributions are an exercise of political expression and political association protected by the First Amendment. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) ("[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. . . . When an individual contributes money to a candidate, he exercises both of those rights." (citing *Buckley,* 424 U.S. at 15, 21-22). In this matter, contributions to the Craig Committee are "a general expression of support for [Senator Craig] and his views" and "serve[] to affiliate" Senator Craig with his supporters. *McCutcheon*, 134 S. Ct. at 1448. Donors contributed funds to the Craig Committee for Senator Craig to use for any political purposes consistent with 52 U.S.C. § 30114(a). *See* ECF No. 16 at 1 (FEC's motion for summary judgment stating that by contributing funds to the Craig Committee donors exercised their First Amendment right to support Craig's candidacy). The court's conclusion that ordering disgorgement to the Craig Committee would serve no purpose, JA38-39, ignores this constitutional imperative.

Moreover, the record contains no evidence that any donors to the Craig Committee rescinded their support of Senator Craig by asking for a refund of their contributions. As such, there is no basis for the district court's inquiry requiring identifying and repaying donors. *Id.*. Because donors have evinced no opposition

to Senator Craig's use of their contributions, disgorgement to the U.S. Treasury would prevent Senator Craig from accessing campaign funds which he is presumptively entitled to use. *Cf. Buckley*, 424 U.S. at 39 ("expenditure ceilings impose direct and substantial restraints on the quantity of political speech"); *Id*. at 22 ("The Act's constraints on the ability of . . . candidate campaign organizations to expend resources on political expression is simultaneously an interference with the freedom of [their] adherents." (internal quotation marks and citation omitted; alternation in original)).

Ultimately, unlike payment to the U.S. Treasury, ordering disgorgement to the Craig Committee would effect the equitable purpose of disgorgement – preventing unjust enrichment and restoring the status quo – while honoring the First Amendment interests of Senator Craig and his donors. *Clark v. Suarez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court."); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("Because the judiciary must rightly presume that Congress acts consistent with its duty to uphold the Constitution, courts make

every effort to construe statutes so as to find their constitutional foundations and thus avoid needless constitutional confrontations.").

IV. IF THE COURT DECIDES DISGORGEMENT IS PROPER, IT SHOULD REVERSE THE DISTRICT COURT'S ORDER REQUIRING SENATOR CRAIG TO PAY A CIVIL PENALTY

"The assessment of [a] civil penalt[y] is discretionary." *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1116 (9th Cir. 1988) (citing [52 U.S.C. § 30109](a)(6)(B)). If this Court concludes that disgorgement of campaign funds to the U.S. Treasury is appropriate, it should reverse the district court's assessment of a $45,000 civil penalty. In waiving a civil penalty, courts have considered the personal and professional costs to the defendant and whether refunding monies would be a sufficient. *See FEC v. Nat'l Educ. Ass'n*, 457 F. Supp. 1102, 1112 (D.D.C. 1978) (finding civil penalty unwarranted where expenses defendant would incur from refunding monies illegally collected would be sufficient penalty); *FEC v. Gus Savage for Congress '82 Comm.*, 606 F. Supp. 541, 548 (N.D. Ill. 1985) (declining to impose civil penalties because the defendant had already incurred great personal cost by having to hire a lawyer and an accountant).

In this matter, disgorging $197,535 would constitute a harsh penalty in itself. Senator Craig has suffered severe professional and personal consequences. *See supra* at 16-18. He continues to incur legal costs in this matter, which has also prolonged public focus on the events in Minnesota.

Vitally, as detailed above, *supra* at 9-11, 25 n.6, the personal use standards developed by the FEC are ambiguous at best. The Commission was unable to satisfy Senator Vitter's request for guidance on this subject and has concocted, without any statutory or regulatory foundation, an arbitrary distinction between legal and media expenses. If this Court finds that personal use occurred in this matter, it is unreasonable to punish Senator Craig for failing to accurately discern the appropriate standards. For these reasons alone, the court's $45,000 penalty assessment is inappropriate.

The D.C. Circuit has not articulated a test to evaluate when a civil penalty is warranted under FECA. The district court adopted a four-factor test used by the Ninth Circuit, which considered (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency. *FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989). Applying this analysis, the Court should reverse the $45,000 civil penalty imposed by the district court.

When evaluating the above factors, the defendant's state of mind is a key consideration. *See FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1058-60 (W.D. Cal. 1999). In *Harman*, the court found that the defendant's reliance on the advice of counsel militated against imposition of a penalty. *Id*. at 1059 (noting that the Harman campaign's indirect reliance on donor counsel's advice, although a

third-party, was sufficient to demonstrate good faith reliance). In this case, Senator Craig relied in good faith on the advice of counsel and would not have made the committee expenditure had he not received authorization from counsel. JA222; JA155; JA154. Senator Craig has maintained throughout this litigation that he relied on advice of counsel in using those funds for legal fees. *See* JA154 (stating that no action should be taken against him because he relied on advice of counsel). In a letter dated October 4, 2007, Senator Craig's counsel advised him that he could "utilize campaign funds to pay for all of your legal expenses relating to this matter in both" the Minnesota case and the Senate Ethics Committee inquiry. JA155; JA257 ("After reviewing the relevant law and FEC Opinions . . . it is clear that Senator Craig's legal expenses for the Minnesota state court proceedings resulted directly from his official Senate duties . . . . Our legal analysis has not changed since . . . October 2007).[20] Like the defendants in *Harman*, 59 F. Supp.

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[20] The district court determined that Senator Craig lacked good faith because he did not heed the Senate Ethics Committee's warning not to expend committee funds. On February 13, 2008, the Committee issued a "Public Letter of Admonition" stating that some portion of fees spent on legal and public relations in connection with the withdrawal filings and the preliminary inquiry before the Committee "may not be deemed to have been incurred in connection" with his official duties, either by the Committee or by the FEC. JA235.

The Committee's letter did not serve to put Senator Craig on notice that the fees constituted personal use. Although bipartisan, the Committee is a political entity, not an impartial tribunal. The Committee, which maintains rules separate and distinct from FECA, failed to specify which expenses were impermissible. Indeed, contrary to the Committee's statements, the FEC subsequently ratified

2d at 1058-60, Senator Craig's belief that he was complying with federal election law is relevant in determining good faith and mitigates the imposition of a civil penalty.

With regard to public injury, "deliberate or serious violations of the federal election laws may lead to a finding of public harm." *Harman*, 59 F. Supp. 2d at 1059. In *Harman*, the defendants accepted improper contributions. The court noted that because the defendants' violations were not in bad faith or deliberate, a civil penalty was not warranted. The court further held that defendants' resistance to conciliation was immaterial, because they "were entitled to have the complicated statutory and regulatory issues in [the] case determined by a court." *Id*.; *see also FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795 (M.D. Fla. Nov. 30, 2007). Like the *Harman* defendants, Senator Craig did not deliberately violate FECA when he used campaign funds to pay his legal fees. He did so in good faith, after consulting counsel and reported all relevant expenditures to the FEC.[21] Further, similar to *Harman*, Senator Craig's failure to enter into a conciliation agreement is irrelevant. As discussed *supra*, at 4, prior to this matter,

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Senator Craig's use of campaign funds to pay both legal fees related to the Committee investigation and his public relations costs. *See* ECF No. 21-1 at 8 (General Counsel's Br., MUR 6128 ; JA267-68. Adding to the ambiguity, the Senate Ethics Committee permitted Senator Craig to establish a legal defense fund and trust, which it could not have done had it not determined that some aspect of his legal spending related to his official duties. JA239-51.

[21] *See* ECF Nos. 16-1, -2, and -3 (FEC Summ. J. Exs. 1-3).

no federal court had addressed the boundaries of "personal use." Senator Craig was certainly entitled to have the question of personal use examined by an impartial tribunal.[22]

CONCLUSION

The Court should set aside the district court's order requiring Senator Craig to both disgorge $197,535 and pay a $45,000 penalty to the U.S. Treasury.

[22] The FEC has argued that Senator Craig's failure to request an advisory opinion indicates bad faith. Nothing in FECA or the FEC regulations requires an official to request an advisory opinion before making committee expenditures. *See FEC v. Nat'l Rifle Ass'n. of Am*, 254 F.3d at 185 ("Any candidate, person, or authorized committee may request an opinion concerning the statute's application to a 'specific transaction.'"). Given the First Amendment interests inherent in political activity, inferring bad faith from a failure to obtain an advisory opinion is simply inappropriate.

Moreover, as discussed *supra* at 9-11, the FEC had previously deadlocked on Senator Vitter's request concerning his use of campaign funds for legal expenses. As such, there is no guarantee that the FEC would have come to an instructive decision on this issue had Senator Craig requested an advisory opinion.

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Respectfully submitted,

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