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)

REPLY BRIEF OF APPELLANTS

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SUMMARY OF ARGUMENT

In this important matter of first impression, the Federal Election Commission ("FEC") or (Commission") elects to prioritize its paltry claim that this Court is precluded from considering Appellants' claims. FEC Opp'n Br. (FEC Opp. Br.) at 22-25, 34-35. Contrary to the FEC's assertions, Appellants' claims are squarely before this Court.

This Court should reverse the district court's ruling ordering disgorgement and imposing a civil penalty. The district court erred because rather than applying the comprehensive fact-specific analysis mandated by law, it adopted the illusory ban on the use of committee funds for legal expenditures offered by the FEC. A plain reading of the statute and regulations, in conjunction with the FEC's own advisory opinions, establishes that no bright-line ban exists. Rather, the FEC has repeatedly sanctioned expenditures similar to Senator Craig's by applying a case-by-case analysis of a candidate's or official's rationale for campaign committee expenditures.

Even if the district court's decision regarding personal use were correct, the order requiring Senator Craig to disgorge campaign funds to the U.S. Treasury is not supported by precedent, contrary to FEC policy, and improperly punitive. In support of disgorgement to the U.S. Treasury, the FEC relies on inapplicable

precedent. Both the Federal Election Campaign Act ("FECA") and long-standing FEC policy support disgorgement to the Craig Committee.

If this Court does uphold the district court's disgorgement order, it should eliminate the $45,000 penalty. Given the lack of consistency and ambiguity in the FEC's application of the personal use statute, it is inappropriate to penalize Appellants' expenditures.

ARGUMENT

I. APPELLANT'S ARGUMENTS ARE PROPERLY BEFORE THIS COURT

The FEC claims that Appellants have waived their arguments relating to the "personal use" standard and to the appropriate outlet for disgorgement. Appellants repeatedly raised both these claims during the proceedings relating to the district court proceedings. *See Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 388 F.3d 337, 339 (D.C. Cir. 2004) (plaintiffs preserve claims by raising them in their briefs or at oral argument before a district court). As such, there is no basis for the FEC's assertions regarding waiver of either meritorious claim.

In its opposition, the FEC first addresses Appellants' supposed "meritless new argument regarding the applicable legal standard that this court should not consider." FEC Opp. Br. at 22-25. Incredibly, the FEC has elected to make this claim despite the copious evidence in the record directly contradicting its assertion that this question was not previously at issue.

The FEC apparently maintains that Appellants have waived their argument that Senator Craig's legal expenses were permissible because they were "ordinary and necessary expenses incurred in connection with official duties" and would not exist "irrespective" of his duties. FEC Opp. Br. at 21-22. These, however are separate arguments. While Appellants' brief does not focus on the former claim, relating to "ordinary and necessary expenses" sanctioned by 52 U.S.C. § 30114(a)(2), it squarely addresses the latter, relating to the "irrespective" standard for personal use set forth in § 30114(a)(6), (b)(1) and (b)(2). Appellants' opening brief (Apps. Br.), at pages 2-5, fully addresses the application of § 30114 to this matter.

The FEC's claim that Appellants have forfeited this argument is contradicted throughout the record. First, the district court noted the following in its memorandum opinion denying the motion to dismiss:

> the Court is being asked to determine whether these legal expenses can properly be characterized as 'ordinary and necessary expenses incurred in connection with the Senator's duties' – that is were they 'permitted' under subsection (a)(2) of the statute? And, if they were not a 'permitted' use of campaign funds under that provision but the legal expenses were 'lawful' under subsection (a)(6), **the court must also decide whether the expenses were "personal": would they have existed irrespective of Senator Craig's duties as a holder of fedreal office**. If so, the use of campaign funds for that purpose was prohibited under subsections b(1)-(2).

JA133-34 (emphasis added).[1] And, indeed, the district court's order expressly denied defendants' claims on the "irrespective" question. JA138.

After the FEC filed its motion for summary judgment, Appellants – while acknowledging that the district court appeared to have already decided this issue – reiterated that Senator Craig's expenditures would not have existed irrespective of his duties as a federal officeholder. ECF No. 19 at 15-16 (citing FEC AO 2013-11 (*Miller*) and arguing "[that] plea would not have leaked nor been publicized were it not for [Craig's] position."). At oral argument, the FEC's counsel engaged in an extended discussion with the district court regarding whether "the lawyers' interaction with media and public relations issues would not have existed irrespective of [Senator Craig's] campaign or officeholder status." JA265. In dismissing this claim and reiterating its holding that Senator Craig's expenditures violated the personal use ban, the district court rejected both Appellants' factual claims and its citation to the *Miller* advisory opinion. JA19. (holding that "defendants violated section 30114(b) [the "irrespective" provision])".

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[1] In the Memorandum Order, the district court expressly ratified Appellants' reading of the personal use statute over the FEC's position: "The Court agrees with defendants' assertion that the prohibition on expenditures for 'personal use' under section 439a(b) does not apply to sections 439a(a)(1)-5 and does not act as a limit on expenditures expressly permitted under those provisions." JA133 n.2. The FEC's current claim represents an about-face from its opposition to the motion to dismiss where it claimed that the irrespective standard set forth in "[30114(b)] contains the only relevant statutory standard in this case." ECF No. 5 at 8-9 n.3.

This appeal focuses on Appellants' argument that Senator Craig would not have incurred legal expenses irrespective of his status and duties as an officeholder. As Appellants maintained before the district court, these legal expenses are not personal because the publication and subsequent media scrutiny of the arrest and plea, and the attendant political consequences, arose solely because of Senator Craig's status. ECF No. 19 at 6. Indeed, as the FEC acknowledged in its summary judgment brief, the district court was presented with this exact argument. *See* JA20; ECF No. 19 at 25. Senator Craig's primary argument on appeal was presented to the district court and therefore is appropriately preserved for appeal.

The FEC's assertion that Appellants have forfeited their argument regarding disgorgement is also belied by extensive record materials. The FEC states that Senator Craig "untimely . . . asserts that the court was . . . required to direct . . . funds to the Craig Committee." FEC Opp. Br. at 34. Yet, Senator Craig has consistently maintained throughout this litigation that disgorgement of campaign funds, if ordered, should be made to the Craig Committee. The FEC argued at summary judgment that the appropriate disposition for misspent funds would be disgorgement to the Craig Committee: "[T]he FEC recommends that Craig instead be ordered to refund the converted funds to the Craig Committee." ECF No. 16 at 17 n.12. Contrary to the FEC's assertion on appeal, Appellants echoed the FEC's

position that any disgorgement order should direct funds to the Craig Committee. *See* ECF No. 19 at 24 n.19 (citing FEC Mot. Summ. J. at 17 n.12). At oral argument on summary judgment, Appellants reiterated that, if necessary, funds should be disgorged to the Craig Committee. JA311-13. Indeed, the FEC agreed with this position. JA271-74. ("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."). The FEC's argument that Senator Craig waived his disgorgement argument ignores the record; the issue was adequately preserved.

II. THE DISTRICT COURT'S APPLICATION OF THE PERSONAL USE STANDARD TO THIS CASE IS ERRONEOUS AND CONTRARY TO THE FEC'S REASONABLENESS ANALYSIS

This Court should reverse the district court's finding that Senator Craig's legal expenditures constituted personal use. The FEC's interpretation of the personal use standard, adopted by the district court, is not supported by either the plain language of the statute or the FEC's advisory opinions. Because Senator Craig has reasonably established that his expenses were related to his duties as an officeholder they do not constitute personal use under 52 U.S.C. § 30114.

A. The District Court Misapplied the Personal Use Statute

Under applicable regulations, legal expenses are not deemed *per se* personal use under the FECA; a court must engage in a searching and careful, case-by-case review of the use of campaign funds for legal expenses. *See* 11 C.F.R.

§ 113.1(g)(1)(ii)(A) (application of "irrespective" standard to legal expenses is determined "on a case-by-case basis").

In lieu of conducting this comprehensive analysis, the district court – at the FEC's urging – applied bright-line rules that simply do not exist. The court's error stems from the FEC's confusion about its own standard governing the use of media and legal fees. As Appellants detailed in their opening brief, the FEC permits a campaign committee to pay expenditures relating to media expenses stemming from any type of conduct, including media-related legal fees. Apps. Br. at 9-11.[2] This determination does not derive from any specific statutory or regulatory directive. Instead, it stems from the FEC's assumption that *all* media-related expenditures – whether addressing official or personal conduct – arise by dint of an officeholder's or federal candidate's status. *See* FEC AO 2008-07 (*Vitter)*, 2008 WL 4265321, at *4 (Sept. 9, 2008) ("The Commission has recognized that the activities of candidates and officeholders may receive heightened scrutiny and attention in the news media because of their status . . . .") (internal quotation marks and citation omitted). In essence, the FEC has determined that media-related expenses are *per se* permissible under the "irrespective" standard.

[2] Notably, unlike legal expenses, the FEC has adopted a blanket approval for media-related expenditures even though the regulations do not expressly sanction such expenditures. *See* 11 C.F.R. § 113.1(g)(1)(ii).

Appellants do not question the FEC's blanket approval of media-related expenditures stemming from conduct unrelated to official duties. However, the district court erred in holding that this application of the irrespective standard to media-related expenditures forecloses a similar analysis for legal costs that are created by a similar "heightened scrutiny" of officeholders. *See* JA18-19 (declining to assess the rationale for Senator Craig's expenditures). Simply stated, the FEC is required to conduct an identical analysis for legal expenses in similar circumstances. *See* 11 C.F.R. § 113.1(g)(1)(ii)(A) (mandating "case-by-case" assessment of legal expenditures).

The district court eschewed the requisite fact-specific analysis. Instead, it accepted the FEC's artificial, bright-line ban on the use of committee funds for legal expenditures. *See* JA18 (rejecting defendants' request to consider facts relevant to legal expenditures because "the facts may illuminate *why* Senator Craig did what he did, but they do not change *what* he did") (emphasis in original). Historically, however, the FEC commissioners have broadly determined that a variety of media and legal expenses related to non-official conduct constituted permissible campaign expenses. Apps. Br. at 9-11. Contrary to the FEC's and district court's interpretation, proper application of the law, as set forth in the FEC's advisory opinions, *see infra* at 12-18, permit Senator Craig to use campaign funds for all of the expenses at issues in this matter.

B. The FEC's Brief Misstates the Commission's Own Application of the Personal Use Standard

At the outset of its brief, the FEC traces the legal history of the "personal use" provision at issue in this matter. FEC Opp. Br. at 2-5. While the parties are largely in accord regarding which statute and regulations apply to expenditures from a campaign committee, they, of course, diverge substantially in the application of that law to the specific facts at issue.[3]

Because this case presents a question of first impression for a United States court of appeals, the "numerous advisory opinions" issued by the FEC provide the only practical applications of the "irrespective" test established by 52 U.S.C. § 30114; *see also* 11 C.F.R. § 113.1(g). By regulation, an advisory opinion request must not pose "a hypothetical situation" and must include "a complete description of all facts relevant." 11 C.F.R. § 112.1(b), (c). The FEC places great weight on its opinions and, indeed, utilizes Appellant's knowledge of them to criticize his

[3] For example, the FEC's emphasis on the 1967 Senate Ethics Committee action against Senator Thomas Dodd is inapt. FEC Opp. Br. at 2. According to the source cited by the FEC, Senator Dodd's case involved, *inter alia,* seven fundraisers which provided funds to Senator Dodd's personal bank account. Senator Dodd subsequently used these funds to pay for "income taxes, home improvements, and payments to family members." He also "received $8,000 in cash . . . allegedly in exchange for an ambassadorship." *Id.* at 2 n.1; The Censure Case of Thomas J. Dodd of Connecticut (1967) http://www.senate.gov/artandhistory/history/common/censure_cases/135ThomasDodd.htm (last visited Apr. 23, 2015). In contrast, this matter concerns a dispute over the disposition of funds that were properly raised and reported to the FEC.

decision to expend committee funds in this matter. *See, e.g.,* FEC Opp. Br. at 10 ("Craig was aware of the FEC's *Kolbe* advisory opinion").

Listing nine decisions, the FEC emphasizes that these "opinions have consistently and repeatedly said that whether campaign funds may be spent on legal expenses depends on the allegations of the legal proceeding . . . ." *Id.* at 5. While the FEC may endeavor to achieve consistency in rendering advice, the first two opinions it lists belie the FEC's assertion of regularity in application of the law to specific factual circumstances.

As it has done throughout this matter, the FEC cites its *Kolbe* opinion as the touchstone for the principal that "campaign funds may not be used for legal expenses incurred in an 'inquiry regarding other allegations, if any, that do not concern . . . [one's] duties as a Federal officeholder.'" *Id.* (quoting FEC Advisory Opinion ("AO") 2006-35 (*Kolbe*), 2007 WL 419188, at *3 (Jan. 26, 2007)). Yet, neither the FEC nor the district court has ever been able to articulate the specific allegations justifying the FEC's sanction of committee funds in that matter. As the district court noted, "the FEC went out of its way to hedge its opinion given the uncertainties and confidentiality involved." JA146. Given *Kolbe's* amorphous holding – issued in violation of the requirement that such opinions provide a complete description of all relevant facts – the FEC simply cannot maintain that

Kolbe establishes a consistent interpretation of the law or that Appellants should be penalized because they failed to decipher it when making their own assessment.

Similarly, the FEC's *Miller* advisory opinion, FEC AO 2013-11, 2013 WL 6022101, at *3 (Oct. 31, 2013) – cited by the FEC as a primary example of its personal use policy – contradicts the FEC's assertion that in a "20-year-long line of advisory opinions . . . the [FEC] has explained that campaign funds may not be spent on legal expenses when the 'allegations' of the legal proceedings are 'not related' to officeholder duties." FEC Opp. Br. at 21. Although the allegations of the legal proceeding in *Miller* were decidedly personal and occurred prior to his candidacy, the FEC authorized campaign committee expenditures without hesitation. *See* Apps. Br. at 12 (detailing facts and holding in *Miller* opinion).

As these two opinions demonstrate, the FEC's application of the personal use standard is far from clear and consistent. This is not an entirely unexpected result for a regulation which instructs a changing, partisan roster of evenly-divided commissioners to make "irrespective" determinations on a "case-by-case basis" where personal use concerns arise. 11 C.F.R. § 113.1(g)(1)(ii).

And herein lies the FEC's fatal error: in derogation of its own regulations and policy the FEC has steadfastly refused to weigh the factual circumstances prompting Senator Craig's expenditures. In its opposition brief, the FEC cites the district court's holding: "because the allegations of *Minnesota v. Craig* related to

Craig's personal misconduct," Senator Craig's motivations relating to the publication of that plea and the political repercussions are "immaterial." FEC Opp. Br. at 25 (citing JA18, 20, 138). This position, adopted by the district court at the urging of the FEC, is simply incorrect.

In previous opinions sanctioning committee expenditures similar to Senator Craig's, the FEC has willingly assessed an individual's motivation for such committee expenditures. *See, e.g.,* FEC AO 1997-12 (*Costello*), 1997 WL 529598, at * 4 (Aug. 15, 1997) (sanctioning legal expenditures due to the "obvious need for a candidate to respond to allegations [about 'private business ventures'] carried in the news media which result from . . . elevated scrutiny would not exist irrespective of the candidate's campaign or officeholder status"); FEC AO 2013-11 (*Miller*) (same); FEC AO 2001-09 (*Kerrey*), 2001 WL 844352 (July 17, 2001) (same; sanctioning media expenditures).

Indeed, as Appellants detailed in their opening brief, in a draft advisory opinion responding to a Senator's request to use campaign committee funds to address a personal matter relating to a criminal case, three FEC commissioners voted to sanction the requested legal expenditures. *See* Apps. Br. at 10-12. The FEC's response wholly misses Appellants' point. Rather than addressing the substance and implication of the draft opinion sanctioning Senator David Vitter's expenditures, the FEC contends that Senator Craig could not have relied on the

three commissioners' rationale because it occurred after his expenditures. FEC Opp. Br. at 48. Appellants' reliance on this and other FEC materials is immaterial. Instead, these citations illuminate the FEC's own legal analyses and must inform any principled analysis of the correct application of the statute and regulations to the question of personal use. *See FEC v. NRA*, 254 F.3d 173 (D.C. Cir. 2001) (FEC advisory opinions entitled to *Chevron* deference). Although the FEC is loath to acknowledge this fact, its commissioners have repeatedly voted to authorize the type of expenditures that the FEC so strenuously seeks to block in this matter.

C. The FEC Has Consistently Applied a Reasonableness Standard When Evaluating Legal and Media Expenses

In its opposition brief, the FEC is unwilling to articulate a clear standard for assessing personal use or demonstrate how Senator Craig's expenditures violate the standard. This demurral demonstrates, as persuasively as any argument offered by appellant, the FEC's confusion surrounding application of the irrespective standard to legal expenditures.

In 2002, Congress codified portions of the FEC's personal use regulation. In its opposition the FEC implies that Congress rubber-stamped the FEC's standard and interpretation on personal use. *See* FEC Opp. Br. at 4, 26. Instead of approving the FEC's regulations wholesale, however, Congress codified only certain items as *per se* personal use. *See generally* 11 C.F.R. § 113.1. The codified examples classify two categories of expenses as *per se* personal use: 1)

costs attendant to daily life (*e.g*. residential costs and clothing) and 2) costs for luxury or discretionary personal items (*e.g*., country club membership and vacations). *See* 52 U.S.C. § 30114(b). Beyond this list of categories and the irrespective standard, Congress did not codify any other parts of the FEC's regulations. *See* 148 Cong. Rec. S2096, S2143 (daily ed. Mar. 20, 2002) (clarifying that Congress did not "intend to codify any advisory opinion or other current interpretation of [the] regulations"). *Compare* 52 U.S.C. § 30114(b) *with* 11 C.F.R. § 113.1(g)(1)(ii).

Because Congress purposely did not create a list that anticipates every situation, the FEC reviews items that are not *per se* personal use on a case-by-case basis. Under this analysis, where an officeholder can "reasonably" show that his expenses were related to his duties as an officeholder, the FEC will not consider the use to be personal use. Explanation and Justification*, Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) (in Addendum Tab A); *see, e.g*., FEC AO 2013-11 (*Miller*), 2013 WL 6022101 (Oct. 31, 2013) ("The Commission has long provided that if a 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.'") (citation omitted); FEC AO 2001-09 (*Kerrey*), 2001 WL 844352, at *3 (July 17, 2001) (explaining that the FEC's case-by-case approach under the

irrespective standard gives candidates wide discretion over campaign funds as long as the candidate can reasonably show that the expenses resulted from campaign or officeholder activities); FEC AO 2008-07 (*Vitter*), 2008 WL 4265321 (Sept. 9, 2008) (same). In its opposition, the FEC puzzlingly describes this standard as "newly invented" by Appellants. FEC Opp. Br. at 24.

Senator Craig's expenses mirror the expenses at issue in *Kerrey*, *Costello*, *Miller*, and the *Vitter* Draft Opinion. (*See* Apps. Br. at 8-12; *see also supra* at 11-13). Like the circumstances addressed by *Kerrey*, *Miller,* and *Vitter*, the underlying allegations in this matter did not directly involve Senator Craig's official duties, but the heightened media scrutiny and the resulting political ramifications compelled Senator Craig to make expenditures challenging his plea. But for Senator Craig's position as a Senator, his plea would not have been leaked and publicized by national print and television media. Nor would the Minneapolis-St. Paul Airport Police Department have released an audiotape of the interview to national news outlets. *See* JA225. Nor would Senator Craig's professional and political viability have been affected. *See* JA228-30; *see also* JA232-33.

Indeed, Senator Craig has stated that he considered the terms of his plea to include the interviewing officer's promise not to leak the plea to the media. JA187; *see also* JA200-01. Contrary to the FEC's characterization that he was attempting to hide the plea, Senator Craig simply hoped that, like nearly any

private citizen charged with a misdemeanor, his guilty plea would be unremarkable and unnoticed. In fact, Senator Craig utilized no campaign committee funds before the publication of his plea and resulting political repercussions.

Senator Craig ultimately suffered an onslaught of political ramifications, including national media scrutiny, a congressional ethics investigation, and the loss of professional stature and authority. *See* JA232-33; *see also* JA228-30. In an effort to remain in office and make his reelection viable, Senator Craig eventually decided to challenge the plea. JA223 ("Every decision that we made, and every cost that was incurred by Senator Craig, was done with the sole purpose of defending the Senator's reputation and vindicating him personally and professionally.").[4] The FEC describes Senator Craig's intentions for appealing his plea, stating that he did it to clear his name and "'vindicate him[self] personally and professionally.'" FEC Opp. Br. at 29 (quoting JA223). Yet, this claim undermines the FEC's position that Senator Craig's expenditures were strictly personal in nature.

Senator Craig appealed his misdemeanor plea hoping that he could "seek election in Idaho for an additional six-year term in the United States Senate."

[4] These statements were made by Michael O. Ware, Senator Craig's Chief of Staff, who served as Senator Craig's principal political advisor and who was also involved with Senator Craig's legal defense in Minnesota. *See* JA41-43; JA221. Mr. Ware is certainly entitled to speak about his own view of Senator Craig's political status.

JA223. Although he continued to serve in the Senate until the conclusion of his term, because of the resulting political ramifications, Senator Craig ultimately chose not to run for reelection and retired from the Senate in January 2009. *See* JA11.

The FEC argues that considering whether an official's status as an officeholder served as the catalyst for certain expenditures could lead to members of Congress "using campaign funds to buy homes in Washington, D.C. because they wanted to live near work." *See* FEC Opp. at 29. This argument is untenable. First, by law, home mortgage payments are *per se* personal use and are not examined on a case-by-case basis under the reasonableness standard. *See* 52 U.S.C. § 30114(b)(2)(a). Nor is this case one in which Senator Craig simply opted to spend campaign funds on legal fees. Like *Kerrey* and *Miller* – where the FEC held that media scrutiny of the personal conduct of a former member and a former candidate, respectively, resulted in political consequences that justified discretionary campaign committee expenditures – the publication of Senator Craig's plea and the resulting political ramifications served as the sole impetus for Senator Craig's legal expenditures. Under the reasonableness standard applied in the FEC's advisory opinions, Senator Craig's expenses are permissible campaign expenditures.

The FEC further contends that if Senator Craig is allowed to use campaign funds for his legal expenses "such a broad standard would permit an officeholder to use campaign funds to defend against *any* criminal allegation of personal wrongdoing – no matter how serious – so long it was discovered . . . ." FEC Opp. Br. at 27 (emphasis in original). The FEC's position ignores the regulatory directive to assess legal fees on a "case-by-case basis." 11 C.F.R. § 113.1(g)(1)(ii)(A). Cases, like this matter, will arise where an elected official's status prompts increased legal costs for what would normally be a personal matter. No impediment prevents the FEC from determining that an elected official's status has increased the costs relating to a personal matter in a manner that justifies paying for those increased costs with campaign committee funds. Indeed, the FEC's advisory opinions already acknowledge that such increased scrutiny will necessitate campaign committee expenditures. *See supra* at 12-18 (discussing applicable advisory opinions).

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY ORDERING SENATOR CRAIG TO DISGORGE HIS CAMPAIGN FUNDS TO THE U.S. TREASURY

The district court erroneously ordered Senator Craig to disgorge funds to the U.S. Treasury. This decision, endorsed by the FEC, is not supported by precedent, ignores the FEC's own policies relating to the return of funds to a campaign

committee, and improperly transforms an equitable remedy into a punitive measure.

A. Disgorgement to the Craig Committee Will Restore the Status Quo While Respecting Donor Intent Consistent With the First Amendment

Citing to cases involving securities fraud, criminal fraud, theft, and deceptive practices, the FEC endorses the district court's order that Senator Craig's campaign funds should be disgorged to the U.S. Treasury. FEC Opp. Br. at 33. Unlike the cases cited by the FEC, here, 1) the campaign funds are not ill-gotten gains; 2) the goals of FECA differ from statutes governing commercial conduct; and 3) contrary to the commercial cases, restoring the status quo in this case is easily achievable.[5]

[5] *United States v. Sussman*, 709 F.3d 155 (3d Cir. 2013) (defendant engaged in abusive debt collection activities and FTC obtained a civil judgment of $10,204,445 against him; defendant was found guilty for theft of government property and obstruction of justice); *SEC v. Cavanagh*, 445 F.3d 105 (2d Cir. 2006) ("These . . . cases concern a 'pump-and-dump' securities fraud scheme whereby certain defendants artificially inflated a company's stock price, sold high, and left investors holding nearly worthless shares when the price plummeted to a realistic value."); *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73 (2d Cir. 2006) (SEC sued WorldCom for violating securities laws because it overstated its income by $9 billion); *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997) (FTC sued defendants for using unfair and deceptive practices in advertising, promoting, and selling work-at-home opportunities and financial services and obtained a $16,096,345 judgment); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (defendant violated anti-fraud provisions of the Securities Exchange Act of 1934).

The funds at issue here cannot be described as "ill-gotten" or wrongfully acquired. "Ill-gotten" describes funds "obtained in an evil or dishonest way."[6] Here, donors legally contributed money as a constitutionally-sanctioned expression of support for Senator Craig. Senator Craig believed that he was permitted to use his funds for legal expenses. JA154; JA222-23 ("At every instance of the process we believed that the use of campaign committee funds for these legal expenses was legal and customary. . . . The Craig Committee would not have made the expenditures if we had not believed that they were legal and proper."). After making the expenditures, Appellants complied with all applicable reporting requirements and disclosed Senator Craig's expenses to the FEC. *See* ECF Nos. 16-1, -2, and -3. The record reflects that no donor has requested a refund of her contribution. If this Court were to determine that a violation has occurred, the funds at issue would be more accurately described as unknowingly "misspent." Because no theft, criminal fraud, or deceptive practices occurred in this matter, any comparison to securities fraud cases or similar cases involving deceptive practices is misplaced.

When deciding whether to order disgorgement to the U.S. Treasury, courts have examined the objectives of the underlying statute involved. *Cf.* James M. Fischer, *Understanding Remedies* § 51 at 362 (3d ed. 2014) ("the court must be

[6] Webster's II New College Dictionary 564 (3d ed. 2005).

satisfied that the remedy is consistent with the goals and purpose of the statute"); *Febre*, 128 F.3d at 536 (considering that the "purpose of the Federal Trade Commission Act is to protect consumers from economic injuries" when fashioning an equitable remedy). FECA aims to facilitate the collection of funds to use for political purposes. "[C]ontributions [to campaign committees] serve 'to affiliate a person with a candidate' and 'enabl[e] like-minded persons to pool their resources." *McConnell v. FEC*, 540 U.S. 93, 135-36 (2003) (citation omitted); 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). Here, donors who contributed to the Craig Committee intended to support Senator Craig's political efforts. The record reflects that no donor has asked for a refund of his contribution. In such circumstances, disgorging the money to the Craig Committee protects all parties' interests in a manner consistent with FECA.

Certainly, in cases that truly involve deceptive practices funds are often disgorged to the U.S. Treasury because restoring the status quo is impossible. *See, e.g.*, *SEC v. Fischbach Corp.*, 133 F.3d 170 (2d Cir. 1997) (affirming district court's order disgorging to the U.S. Treasury because no party before the court was entitled to the funds); *Febre*, 128 F.3d at 537 ("To ensure that defendants are not unjustly enriched by retaining some of their unlawful proceeds by virtue of the fact

that they cannot identify all the consumers entitled to restitution and cannot distribute all the equitable relief ordered to be paid, the FTC often requests orders directing equitable disgorgement of the excess money to the United States Treasury."); Fischer, *Understanding Remedies* § 51 at 361 ("When restoration is too costly . . . it is proper to remit the disgorged funds to the public treasury.").

Significantly, even the FEC has acknowledged that returning the funds to the Craig Committee would restore the status quo. *See* JA271, JA274 ("[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."). Because the status quo is easily attainable, disgorging to the U.S. Treasury is unnecessary and improper.

B. Disgorgement to the Craig Committee Is Consistent With Long-Standing FEC Policy

The FEC has consistently authorized candidates and officeholders who have violated the personal use statute to return funds to the committee for future use. In an about-face, the FEC now suggests, without citation to statutory or regulatory authority and contrary to its own administrative policy, that the district court possessed authority to order disgorgement to the U.S. Treasury. In its brief, the

FEC argues that this Court should overlook its practice of allowing disgorgement to the campaign committee because the underlying facts of Senator Craig's circumstances are somehow unique. The FEC argues that Senator Craig should disgorge funds to the U.S. Treasury because 1) Senator Craig is the treasurer of the Craig Committee; 2) disgorgement to the Craig committee is an "empty gesture," 3) the Craig Committee is "essentially defunct" because Senator Craig is not currently in office; and 4) Senator Craig cannot spend refunded amounts. FEC Opp. Br. at 37-39. As the FEC's own policy and guidance demonstrate, these distinctions are inaccurate or irrelevant.

The FEC indicates that because Senator Craig is the treasurer of the Craig Committee he will be in a position to misuse funds if they are disgorged to his Committee. This baseless assertion ignores the FEC's own guidance relating to the operations of a campaign committee; a treasurer has no independent authority to designate the use of funds.[7] A treasurer's role is merely ministerial and limited to filing, recordkeeping, and signing FEC forms and other documents. *See* 11 C.F.R. § 102.9. Designating the use of funds is always the officeholder's responsibility. In this way an officeholder is always the "alter-ego" of the committee. Nothing in the FEC's regulations prevents Senator Craig from serving as treasurer of the

[7] *See also* Committee Treasurers, http://www.fec.gov/pages/brochures/treas.shtml#fn1 (Feb. 2005).

campaign committee.[8] Further, the committee is subject to the same expenditure and reporting requirements that it would be if Senator Craig were not the treasurer. Senator Craig's position as treasurer has no bearing on the question of disgorgement.

The FEC contends that "disgorgement to the Craig Committee would have been nothing but an 'empty gesture,' because the district court could have then ordered the Craig Committee to pay those funds as a civil penalty to the Treasury anyway." FEC Opp. Br. at 38. Even if the court could properly have ordered this result, it did not do so. Contrary to the FEC's previous position, the FEC now endorses the district court's erroneous finding that disgorgement to the Craig Committee would be "just a pass through." Read in context, however, the district court's comment does not support this claim. During the summary judgment hearing, the FEC challenged the district court's assessment that disgorgement to the Craig Committee would serve no purpose:

> MR. HANCOCK: . . . It would come close to restoring the pre-violation status quo if the Craig Committee had the $216,000 back and then spent it consistent with FECA, with the permitted uses listed in FECA. That would come closest, I think, to being consistent --
>
> THE COURT: What are they going to spend it on now that's permitted, really?

[8] In fact, volunteers are permitted to perform many of the duties of the treasurer. *See* Committee Treasurers, http://www.fec.gov/pages/brochures/treas.shtml#fn1 (Feb. 2005).

> 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. Let's say some of that money --
>
> 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.

The only reasonable interpretation of the district court's comments is that it was dissatisfied with the FEC's practice of directing disgorgement back to a committee and instead, chose to use the equitable remedy of disgorgement punitively.

As for the purportedly "defunct" nature of the Craig Committee, as the FEC has repeatedly stated, the Craig Committee is "free to raise contributions" and continue functioning as a campaign committee. In order for the Committee to be truly defunct, Senator Craig would be required to file a termination report with the FEC. Of course, disgorgement to the Craig Committee would provide it with significant funds to continue operating. Although the FEC asserts that Senator Craig does not have a campaign to spend the money on if the money is disgorged to the Craig Committee, 11 C.F.R. § 113.2 authorizes a former official to provide monetary support to other political organizations, state or local political parties, state and local candidates, or to use the money for other lawful purposes consistent

with FECA.[9] Applicable regulations do not require Senator Craig to spend committee funds on his own campaign; his committee is no different from the many other committees currently maintained by former federal candidates.[10]

C. Disgorgement Cannot Be Punitive

The FEC claims that FECA permits the district court to use disgorgement as a punitive remedy. (FEC Opp. at 41-42) ("[E]ven if the disgorgement order had been punitive, it would not have violated FECA"). To that end, by ordering disgorgement to the U.S. Treasury, the district court's purpose was to punish Senator Craig and deprive him from using his donor's funds. Disgorgement cannot be punitive. *SEC v. First City Fin. Corp.,* 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("disgorgement may not be used punitively"); *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997) ("This court has held that disgorgement is designed to be remedial and not punitive."). Nothing in FECA changes the definition of disgorgement as an equitable remedy.

IV. THE DISTRICT COURT'S IMPOSITION OF A CIVIL PENALTY IS INAPPROPRIATE IN THIS MATTER

The FEC endorses the district court's imposition of a civil penalty because it maintains that "there should have been *no question* in [Senator Craig's] mind that

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[9] *See* Federal Election Commission, Winding Down Your Federal Campaign, http://www.fec.gov/info/articles/windingdown09.pdf (last visited Apr. 23, 2015).

[10] *Id*.

his spending would be illegal." (FEC Opp. Br. at 47) (emphasis in original). The FEC assails Senator Craig as deliberately ignoring FEC guidance and asks the Court to punish Senator Craig for failing to not only discern the FEC's ambiguous standards but also for not entering into a conciliation agreement or requesting an advisory opinion. However, as detailed above, *supra* at 9-12, the FEC's personal use standards are inconsistent and ambiguous at best. While the FEC may endeavor to achieve consistency in rendering advice, the FEC's personal use advisory opinions fail to show regularity in application of the law to specific factual circumstances. To impose a civil penalty where Senator Craig was not on adequate notice of the FEC's standard is unwarranted.

With regard to entering into a conciliation agreement or requesting an advisory opinion, as demonstrated by the *Vitter* draft opinion, the FEC is unable to reach consensus on this issue. (Addendum Tab B). Under such circumstances, Senator Craig is entitled to have this matter of first impression decided by a court. Because Senator Craig reasonably interpreted the FEC's personal use standards as allowing him to use his campaign funds to pay his legal fees the Court should reverse the district court's decision as to the $45,000 civil penalty. *Cf. Citizens United v. FEC*, 558 U.S. 310, 336 (2010) ("Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and

criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question.").

CONCLUSION

For the reasons stated above, 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.

Dated: April 23, 2015

Respectfully submitted,

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I hereby certify that on April 23, 2015, I electronically filed the foregoing **REPLY BRIEF OF APPELLANTS** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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/s/ Andrew D. Herman