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 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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Order of December 2, 2014 and D.C. Cir. R. 28(a)(1), appellee Federal Election Commission ("Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) *Parties and Amici*. Craig for U.S. Senate and Larry E. Craig, individually and in his official capacity as Treasurer of Craig for U.S. Senate, were the defendants in the district court and are the appellants in this Court. The Commission was the plaintiff in the district court and is the appellee in this Court. No parties intervened or participated as *amici curiae* in the district court, and no parties have requested to intervene or participate as *amici curiae* before this Court.

(B) *Rulings Under Review*. On September 30, 2014, United States District Judge Amy Berman Jackson issued an Order and Memorandum Opinion granting the Commission's motion for summary judgment. The district court's Order and Memorandum Opinion can be found in the Joint Appendix at pages 10-51. The district court's Memorandum Opinion is also available at --- F. Supp. 3d ---, 2014 WL 4823874 (D.D.C. Sept. 30, 2014).

(C) *Related Cases*. The case on review was previously before the United States District Court for the District of Columbia, captioned as *Federal Election Commission v. Craig for U.S. Senate, et al.*, Civ. No. 12-958 (ABJ). The case on

review was not previously before this Court. The Commission knows of no "related cases" as that phrase is defined in D.C. Cir. R. 28(a)(1)(C).

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GLOSSARY

AO	FEC Advisory Opinion
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
JA	Joint Appendix

COUNTERSTATEMENT OF THE ISSUES

(1) Did the district court correctly find that Larry Craig and his campaign committee Craig for U.S. Senate violated FECA, which bars the personal use of campaign funds, when Craig had the committee spend $197,535 to pay his legal expenses in *Minnesota v. Craig*, a criminal case of disorderly conduct in an airport restroom?

(2) Did the district court abuse its discretion by using its broad equitable power to order Craig to disgorge the funds it found were converted to personal use to the United States Treasury, rather than allowing him to retain control over the funds by ordering disgorgement to his campaign committee, which is essentially defunct and of which Craig is treasurer?

(3) Where FECA authorized the district court to penalize each defendant up to the full $197,535 in campaign funds the court found were converted to Craig's personal use, did the court abuse its discretion in fining Craig $45,000 — less than 12 percent of the maximum penalties — despite concluding that no facts weighed against a penalty and declining to find that Craig acted in good faith?

STATUTES AND RULES

The relevant provisions are set forth in the attached addendum.

COUNTERSTATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The U.S. Senate's Ban on the Personal Use of Campaign Funds

In 1967, in the "first modern-era Senate ethics case," the United States Senate censured one of its members for spending funds he had raised from campaign contributors on his personal expenses. *The Censure Case of Thomas J. Dodd of Connecticut (1967)*, U.S. Senate.[1] The Senate concluded that the Senator's misuse of campaign funds was "contrary to accepted morals, derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and disrepute." *Id.* The case spurred the Senate the following year to adopt its first rules of ethical conduct, *id.* — including a rule prohibiting the personal use of campaign funds, *see* Select Comm. on Ethics, U.S. Senate, 108th Cong., 1st Sess., *Senate Ethics Manual* 282 (2003).[2] Today, Senate Rule 38.2 states that "[n]o contribution (as defined in . . . the Federal Election Campaign Act . . .) shall be converted to the personal use of any Member." Standing Rules of the Senate, 113th Cong., 1st Sess., S. Doc. No. 113-18, R. XXXVIII § 2, at 62 (2013).[3]

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[1] *See* https://www.senate.gov/artandhistory/history/common/censure_cases/135ThomasDodd.htm (last visited Apr. 9, 2015).

[2] *See* http://www.ethics.senate.gov/downloads/pdffiles/manual.pdf (last visited Apr. 9, 2015).

[3] *See* http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf (last visited Apr. 9, 2015).

B. FECA's Ban on the Personal Use of Campaign Funds

First enacted in 1971, and substantially amended in 1974, the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46, sought "to limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (*per curiam*) (internal quotation marks omitted). Congress further amended FECA in 1979 to state that no campaign funds "may be converted by any person to personal use." FECA Amendments of 1979, Pub. L. No. 96-187, § 113, 93 Stat. 1339 (1980) (codified as 2 U.S.C. § 439a (1980)).[4] With this provision, Congress sought to apply to all federal candidates the anti-personal-use "position adopted by the Senate on previous occasions and reflected in . . . the Standing Rules of the Senate." S. Rep. No. 96-319, at 5 (1979).

C. The FEC's Regulation Defining Personal Use and Interpretive Guidance

In 1995, the Commission promulgated a regulation defining "personal use." *See* 11 C.F.R. § 113.1(g). It states that the FEC will always consider some expenses, such a home mortgage, to be "personal use." *Id.* § 113.1(g)(1)(i). Other expenses, such as legal expenses, are examined on a case-by-case basis under what has been referred to as the "irrespective test": "Personal use means any use of

[4] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in a new title, Title 52. This brief cites FECA as currently codified.

[campaign funds] . . . to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." *Id.* § 113.1(g); *see also id.* § 113.1(g)(ii).

The FEC also published an Explanation and Justification in the Federal Register providing guidance on how to interpret the irrespective test. *See Personal Use of Campaign Funds*, 60 Fed. Reg. 7862-01 (Feb. 9, 1995) ("Explanation and Justification"). This guidance explains that "[i]f 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." *Id.* at 7867. Applying that principle to legal expenses, the Explanation and Justification warns that legal expenses have not "resulted from" officeholder duties "merely because the underlying legal proceedings have some impact on the campaign or the officeholder's status." *Id.* at 7867-68. For example, "legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related." *Id.* at 7868.

In 2002, Congress rewrote FECA's personal-use statute to codify the FEC's regulation, including the irrespective test. *See* 148 Cong. Rec. S1991-02 (daily ed. Mar. 18, 2002); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 301, 116 Stat. 81 (codified as amended at 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b))).

D. The Commission's Advisory Opinions Stating When Campaign Funds May Be Used For Legal Expenses

In the 20 years since the FEC promulgated the irrespective test, it has issued numerous advisory opinions applying the test to legal expenses. Those opinions have consistently and repeatedly said that whether campaign funds may be spent on legal expenses depends on the allegations of the legal proceeding: Campaign funds may be used for legal expenses "incurred in legal proceedings involving allegations concerning . . . [one's] duties as a Federal officeholder." FEC Advisory Op. 2006-35 (Kolbe), 2007 WL 419188, at *2 (Jan. 26, 2007). Conversely, 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.* at *3; *see also* AO 2013-11 (Miller), 2013 WL 6022101, at *3 (Oct. 31, 2013) (same); AO 2011-07 (Fleischmann), 2011 WL 2163318, at *2 (May 26, 2011) (same); AO 2009-20 (Visclosky for Congress), 2009 WL 2850351, at *2-3 (Aug. 28, 2009) (same); AO 2009-12 (Coleman), 2009 WL 1904617, at *5-6 (June 26, 2009) (same); AO 2009-10 (Visclosky), 2009 WL 1811018, at *3 (June 18, 2009) (same); AO 2005-11 (Cunningham), 2005 WL 2470825, at *3 (Sept. 26, 2005) (same); AO 2003-17 (Treffinger), 2003 WL 21894954, at *3 (July 25, 2003) (same); and AO 1995-23 (Shays), 1995 WL 437686, at *1 (July 20, 1995) (same).[5]

[5] The FEC's advisory opinions can also be found on the FEC's website at http://saos.fec.gov/saos/searchao (last visited Apr. 9, 2015).

II. FACTUAL BACKGROUND

A. The Federal Election Commission

The Federal Election Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. The FEC has the authority to investigate possible violations of FECA and to initiate civil actions in the federal district courts to enforce FECA. *Id.* §§ 30107(e), 30109(a)(1)-(2), (a)(6).

The Commission also has the statutory authority to provide guidance to the public on how to comply with FECA. *See Help with Reporting and Compliance*, FEC.gov.[6] For example, any person may request an advisory opinion from the FEC explaining how FECA applies to a particular factual situation, and the FEC must respond in 60 days or less. 52 U.S.C. § 30108(a)(1)-(2); *see also Advisory Opinions*, FEC.gov.[7] An advisory opinion can provide a safe harbor from prosecution for the proposed activities of the requesting parties, or any person involved in a materially indistinguishable activity, who relied in good faith on the opinion. 52 U.S.C. § 30108(c).

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[6] *See* http://www.fec.gov/info/compliance.shtml (last visited Apr. 9, 2015).

[7] *See* http://www.fec.gov/pages/brochures/ao.shtml (last visited Apr. 9, 2015).

B. Larry Craig and the Craig Committee

Larry Craig was a United States Senator from January 1991 to January 2009. (JA 54, 150.) In 2007, Craig was a candidate for reelection in the 2008 election, and he authorized Craig for U.S. Senate ("Craig Committee") to receive and spend funds on his behalf as his principal campaign committee. *Id.*; *see* 52 U.S.C. §§ 30101(5)-(6), 30102(e)(1)-(2).

Under FECA, every political committee must have a treasurer, who is responsible for authorizing the committee's financial activity. 52 U.S.C. § 30102(a). At the time the FEC filed this suit, the Craig Committee's treasurer was Kaye O'Riordan, and she was named as a defendant in her official capacity. JA 52; *see Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 3, 4-5 (Jan. 3, 2005). O'Riordan later resigned and Craig appointed himself treasurer. (*See* JA 6, 10 n.1.) Craig is therefore now a defendant in both his official and personal capacities. (*Id.*)

Craig has not run for office since resigning from the Senate in 2009, and he has announced no plans to run in the future. (*See* JA 39.) According to the Craig Committee's FEC reports, the Committee had $641 at the end of 2014.[8] It has not

[8] Summarized financial data for the Craig Committee can be found on the FEC's website by searching for committee identification number C00115667 at http://www.fec.gov/finance/disclosure/candcmte_info.shtml (last visited Apr. 9, 2015).

reported receiving a contribution in at least the last six years, and it spent a total of $24 in 2013 and 2014. *See supra* p. 7, n. 8. The Craig Committee may not terminate its registration with the FEC while this litigation is pending. *See* 52 U.S.C. § 30103(d)(1); 11 C.F.R. § 102.3(a)(1).

C. Craig's Arrest for Disorderly Conduct and Guilty Plea

On June 11, 2007, then-Senator Craig was arrested while in a public restroom at the Minneapolis-St. Paul International Airport, where he was awaiting a scheduled flight to Washington, D.C. (JA 55-56, 151.) According to the complaint in *Minnesota v. Craig*, Craig was arrested for engaging in behavior "often used by persons communicating a desire to engage in sexual conduct." (JA 213.) As the Minnesota state district court explained, Craig entered "into an occupied stall with his eyes, hand, and foot" for the purpose of solicitation. *Minnesota v. Craig*, No. 27 CR 07-043231, 2007 WL 2892651, at *13 (Minn. Dist. Ct. Oct. 4, 2007). Craig was charged with one count of interference with privacy and one count of disorderly conduct. (JA 56, 151.) Craig pled guilty to one misdemeanor count of disorderly conduct on August 8, 2007. (*Id.*; JA 217-19.)

D. Craig Admitted to the Senate Ethics Committee That He Was Arrested for Purely Personal Conduct Unrelated to the Performance of His Official Senate Duties

Craig's guilty plea became public on August 27, 2007. (JA 225-26.) The next day, members of the Senate Republican leadership and others urged the

United States Senate Select Committee on Ethics ("Senate Ethics Committee") to investigate whether Craig violated the Senate's Rules of Conduct. (JA 228-33.) Several days later, on September 5, Craig submitted a letter to the Senate Ethics Committee arguing that his arrest fell outside its jurisdiction because he was arrested for "purely personal conduct unrelated to the performance of official Senate duties." (JA 179-80.)

E. Craig Used Campaign Funds to Attempt to Withdraw His Guilty Plea

On September 1, 2007, Craig announced at a press conference that he would resign from the Senate on September 30. (JA 56, 151.) He also said he would nevertheless try to withdraw his guilty plea, explaining: "I have little control over what people choose to believe, but clearly my name is important to me." *Craig Resigns Over Airport Bathroom Sex Sting*, NBC News.com (Sept. 2, 2007).[9]

To handle the effort to withdraw his guilty plea in *Minnesota v. Craig*, Craig hired high-profile attorney Billy Martin, then of Sutherland, Asbill & Brennan ("Sutherland"), and the Minnesota-based law firm Kelly & Jacobson as local counsel. (JA 56, 151.) Nine days after his resignation announcement, Craig filed a motion to withdraw his guilty plea. (*Id.*) That motion was denied a few weeks later on October 4. *See Craig*, 2007 WL 2892651. Later that day, Craig

[9] *See* http://www.nbcnews.com/id/20467347/ns/politics/t/craig-resigns-over-airport-bathroom-sex-sting/.

announced that despite the ruling and his earlier plan to resign, he would serve out the remainder of his Senate term and appeal the court's ruling. (JA 56-57, 151.)

Also on October 4, 2007, Craig was advised by his co-counsel in this litigation, the Brand Law Group, that he could legally spend campaign funds to pay them to represent him before the Senate Ethics Committee. (JA 155.) Craig was also advised that he could use campaign funds to pay Sutherland and Kelly & Jacobson to represent him in *Minnesota v. Craig*, although Craig was told that there were "no directly applicable FEC opinions" that authorized such spending. (*Id.*)

At this time, Craig was aware of the FEC's Kolbe advisory opinion (JA 155, 160), which states that campaign funds may not be used for legal expenses incurred in a proceeding regarding "allegations, if any, that do not concern . . . [one's] duties as a Federal officeholder," Kolbe AO, 2007 WL 419188, *3. Craig did not ask the FEC for an advisory opinion on whether he could spend campaign funds on his legal expenses in *Minnesota v. Craig*. (*See* JA 35.) According to Craig, he did not seek such "prior approval" because "the FEC's business is to censor." (Defs.' Opp'n to FEC's Mem. in Supp. of Mot. for Summ. J. ("Craig SJ Opp'n") at 23 (D.D.C. Docket No. 19) (internal quotation marks omitted).)

A few weeks later, on October 29, 2007, Craig made the first in a series of payments of campaign funds for legal costs in *Minnesota v. Craig*, in an amount of more than $74,000. (*See* JA 56, 151; Craig SJ Opp'n at 9.)

F. Craig Continued Spending Campaign Funds Despite Warnings by the Senate Ethics Committee

Craig appealed the Minnesota trial court's denial of his motion to withdraw his guilty plea. (JA 56, 151.) He also continued to spend campaign funds on that effort. In the three-month period from December 2007 through February 2008, Craig paid hundreds of thousands of dollars in campaign funds to Sutherland and Kelly & Jacobson. *See* 2007 Year-End Report of Receipts and Disbursements, Schedule B at 7-8 (Jan. 31, 2008);[10] 2008 April Quarterly Report of Receipts and Disbursements, Schedule B at 2, 4 (Apr. 16, 2008).[11]

On February 13, 2008, the Senate Ethics Committee issued a "Public Letter of Admonition" to Craig for "improper conduct by [him] reflecting upon the United States Senate." (JA 235-37.) Among other things, the letter warned Craig that his spending of campaign funds in *Minnesota v. Craig* might constitute personal use. It stated that Craig had "used over $213,000 in campaign funds to pay legal . . . fees in connection with your appeal of your criminal conviction" and the ethics inquiry. (JA 236.) The Committee then said:

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[10] *See* http://docquery.fec.gov/pdf/008/28020050008/28020050008.pdf.

[11] *See* http://docquery.fec.gov/pdf/258/28020183258/28020183258.pdf.

> It appears that some portion of these expenses may not be deemed to have been incurred in connection with your official duties, either by the Committee or by the Federal Election Commission (which has concurrent jurisdiction with the Committee on the issue of conversion of a Senator's campaign funds to personal use).

(*Id.*)

Four months later, Craig asked the Senate Ethics Committee to allow him to establish a legal expense trust fund — called the "Fund for Justice" — to collect contributions to help pay his legal expenses. (JA 253.) The Senate Ethics Committee allows Senators to establish such legal expense trust funds "independent of any campaign fund." *Senate Ethics Manual* at 155. On July 25, 2008, the Senate Ethics Committee approved the "Fund for Justice." (JA 253.) But the Committee also warned Craig in a letter that "it ha[d] not approved your use of campaign funds for the payment of legal expenses in connection with" *Minnesota v. Craig*, and it reiterated the warning made in its Public Letter of Admonition, stating that "'[i]t appears that some portion of these expenses may not be deemed to have been incurred in connection with your official duties.'" (JA 254.)

A little over two months later, on October 5, 2008, Craig used campaign funds to pay his lawyers $55,000 for their work in *Minnesota v. Craig*. 2008 Year-

End Report of Receipts and Disbursements, Schedule B at 5 (Jan. 31, 2009);[12] *see also* JA 35 (citing FEC Exh. 1 to FEC's Resp. to Defs.' Pleading Itemizing and Quantifying Legal Expenses ("Craig Invoices") at "Craig 75" (legal invoice from Kelly & Jacobson for legal services provided between Apr. 1, 2008 and Sept. 15, 2008) (D.D.C. Docket No. 25-1)).

G. FEC Administrative Proceedings

On November 10, 2008, the FEC received an administrative complaint alleging that Craig and the Craig Committee had violated FECA's personal-use ban. (JA 58, 152.) Craig was notified and he responded.[13] (*Id.*) The Commission reviewed the then-available information and voted 5-0 (with one Commissioner recused) to find that there was "reason to believe" that the respondents had violated what is now 52 U.S.C. § 30114(b). JA 58-59, 152; *see* 52 U.S.C. § 30109(a)(2).

During the FEC's subsequent investigation, Craig provided the invoices from Sutherland and Kelly & Jacobson that he paid for work on *Minnesota v. Craig*. (*See* Craig Invoices (D.D.C. Docket No. 25-1).) Those invoices included in excess of $100,000 that Craig paid via Sutherland to a public relations firm called Impact Strategies. (*See* FEC Summ. J. Exh. 12 at 5-6 (D.D.C. Docket No. 21-1).) Because the FEC considers public relations fees to be officeholder-duty-

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[12] *See* http://docquery.fec.gov/pdf/020/29020081020/29020081020.pdf.

[13] Unless otherwise noted, the Commission will refer to defendants-appellants collectively as "Craig." *See* Fed. R. App. P. 28(d).

related expenses and not personal use, the FEC excluded this amount from its analysis. (*Id.*) The FEC then asked Craig to identify whether any additional portions of the invoices reflected permissible charges for lawyers performing public relations work. (*See* FEC Summ. J. Exh. 13 at 3 ¶ 5 (D.D.C. Docket No. 21-2).) In response, Craig "decline[d] to respond directly to [the FEC's] questions." (*See* FEC Summ. J. Exh. 14 at 1 (D.D.C. Docket No. 21-3).)

After the investigation, briefing by Craig and the FEC's Office of General Counsel, and a hearing, on February 7, 2012, the Commission voted 5-0 to find probable cause to believe that respondents had violated section 30114(b). JA 59, 152; *see* 52 U.S.C. § 30109(a)(4)(A).

As FECA requires, the Commission then attempted to correct the violations through informal methods of conference, conciliation, and persuasion with respondents for at least 30 days. JA 59-60, 152; *see* 52 U.S.C. § 30109(a)(4)(A)(i). Unable to secure acceptable conciliation agreements, and having met each of the jurisdictional prerequisites to bringing suit, the Commission voted 5-0 to authorize this litigation. JA 60, 152; *see* 52 U.S.C. § 30109(a)(6).

H. District Court Proceedings

1. The District Court's Denial of Craig's Motion to Dismiss

The FEC filed this action on June 11, 2012, and Craig then moved to dismiss. (JA 3.) The district court denied Craig's motion. (JA 126-49.)

The district court concluded that Craig's spending of campaign funds fell "squarely within the statutory definition of a personal use." (JA 137.) As the court explained, *Minnesota v. Craig* "did not relate[] to his conduct as a legislator, but only actions undertaken in the privacy and anonymity of a restroom stall." (JA 138.)

Craig argued that his legal expenses were caused by officeholder duties because "at the time of his arrest Senator Craig was engaged in official, Senate-sponsored travel," a claim Craig then described as his "sole, unremarkable claim." (Defs.' Reply to FEC's Mem. in Opp'n to Defs.' Mot. to Dismiss ("Craig MTD Reply") at 2-3 (D.D.C. Docket No. 7).) The district court rejected this argument because, even assuming Craig's travel to Washington, D.C. was an official duty, Craig's "expenses were neither incurred at the time of the travel nor necessitated by the travel." (JA 136.)

Relying upon the FEC's Explanation and Justification of its personal-use regulation, the district court also rejected the notion that any effect Craig's arrest had on his reputation or status could justify his spending of campaign funds. (JA 137-38.) Finally, the district court held that Craig's violation of the personal-use ban was not excused by any FEC advisory opinions. (JA 139-48.) On the contrary, the court found that Craig had "disregard[ed] clear admonitory language"

in the FEC's Kolbe opinion, which indicated that his spending would be improper. (JA 127.)

2. The District Court's Grant of the FEC's Motion for Summary Judgment

Craig filed an Answer admitting the material facts of the Complaint. (JA 150-53.) In particular, he admitted that the Craig Committee had paid at least $216,984 in campaign funds to Sutherland and Kelly & Jacobson for providing "legal services" to Craig in connection with his efforts to withdraw his guilty plea. (JA 57, 151.) In reliance on that admission, the FEC did not seek discovery of facts relating to the precise amount Craig converted to his personal use. (JA 269.) Also, in Craig's discovery responses, he waived any "reliance upon advice of counsel" as a defense in this case. (JA 166.)

The FEC then filed a motion for summary judgment, which the district court granted. (JA 10-51.) First, the court held Craig liable for violating the personal-use ban, in light of the analysis in the court's prior ruling denying Craig's motion to dismiss and the fact that Craig's Answer admitted the material facts alleged in the Complaint. (JA 16-18.) The court evaluated additional facts that Craig submitted regarding his post-arrest consequences and motivations, but determined that they were irrelevant to his violation, even if true. (JA 18.) As the court explained, "[t]hese facts may illuminate *why* Senator Craig did what he did, but they do not change *what* he did" — his "arrest was personal" and that remains true

"even if he either elected to plead guilty or to change course with his public image in mind." (*Id.*)

Second, the court determined that Craig spent $197,535 in violation of the statute. (JA 21-27.) Craig claimed that some portion of the $216,984 he admitted to spending on "legal services" in his Answer was spent on permissible public relations work and not legal services. (JA 21.) The court noted Craig's previous failure to respond to the FEC's request that he identify any amount paid for public relations work. (JA 24 n.8.) The court also noted that Craig had failed to keep "adequate records" on the issue. (JA 24.) Nevertheless, the court gave Craig "one more chance" to identify any permissible expenses in a post-hearing supplemental pleading. (*Id.*) Craig filed that supplemental pleading, but the court found that it "still failed to establish what portion" of the $216,984 was for public relations work; indeed, the court described Craig's response to the "order entered for [his] own benefit" as "maddeningly cavalier." (JA 25-27.) The court then performed its own "line-by-line analysis of defendants' legal invoices" in connection with *Minnesota v. Craig* and excluded $19,449 from the amount Craig admitted in the Answer to reach the final amount in violation of $197,535. (JA 22; *see also id.* 41-50.)

Third, the district court ordered Craig to disgorge the $197,535 to the United States Treasury. (JA 28.) Disgorgement was necessary, the court explained, to

"deprive [Craig] of his ill-gotten gain." (JA 31 (internal quotation marks omitted).) The court ordered Craig to disgorge his funds to the Treasury and not to his co-defendant, the Craig Committee. (JA 38-39.) The court explained that if the disgorged funds went to the Craig Committee, which is "essentially defunct," Craig "would be solely responsible for the proper disposition of the funds" as the Committee's treasurer and "only staff member." (JA 39.) The court also pointed out that it would be an "empty gesture" for Craig to repay the Craig Committee, since the court could then order the Craig Committee to pay a civil penalty to the Treasury, resulting in the same outcome. (*Id.*)

Finally, the district court imposed a civil penalty of $45,000 on Craig, but no penalty on the Craig Committee. (JA 38.) Under FECA, the court could have penalized Craig and the Craig Committee up to $197,535 each, since that is the amount they illegally spent. (JA 29 (citing 52 U.S.C. § 30109(a)(6)(B).) The Commission had requested a civil penalty of $70,000 each against Craig and the Craig Committee, for a total of $140,000. (JA 38.)

Craig filed a notice of appeal on November 24, 2014. (JA 260.)

SUMMARY OF ARGUMENT

This Court should affirm the district court's ruling. For decades, the FEC has made clear to federal officeholders that they may not spend campaign funds on legal representation in proceedings involving allegations that do not relate to their

officeholder duties. The *Minnesota v. Craig* litigation stemmed from allegations about then-Senator Craig's disorderly conduct in an airport restroom, which plainly had nothing to do with his legislative work. The district court was therefore correct to conclude that Craig illegally spent nearly $200,000 in campaign funds on legal representation in that proceeding.

Craig now asserts a series of meritless arguments, some of which this Court should not even consider because he did not assert them below. The main contention Craig now makes regarding his liability — that his spending was legal because his arrest had consequences for his career that motivated him to try to withdraw his guilty plea — simply ignores consistent guidance from the FEC regarding the personal-use prohibition, including in the Explanation and Justification. Craig's subjective motivations and the effects on his career are irrelevant. *Minnesota v. Craig* did not include allegations about such subsequent events, which in any case do not relate to Craig's officeholder duties. Permitting campaign funds to be spent on any legal proceeding that an officeholder subjectively believes will affect his career would completely undermine FECA's personal-use restriction.

This Court should also affirm the district court's order that Craig disgorge his illicit profits to the United States Treasury and pay a $45,000 civil penalty. Craig incorrectly claims the court abused its discretion by not ordering that the

funds he misused be returned to his own control at his essentially defunct campaign committee. But courts commonly order disgorgement to the Treasury, including in situations like this one. Disgorgement does not require that funds end up in a certain place, but restores the *status quo* by ensuring that wrongdoers are deprived of their ill-gotten gains. That is precisely what the district court did here.

The court's $45,000 civil penalty was also well within its discretion. The penalty is less than 12 percent of the maximum penalties FECA authorized the court to impose against Craig and his committee. In fact, it is less than what Craig would have paid in interest had he simply borrowed the funds at an annual interest rate of four percent. The civil penalty punishes Craig's offense while deterring him and others from future personal use of campaign funds. The penalty also reflects that Craig injured his donors, who thought they were supporting a campaign, and injured the public, which should be able to trust the integrity of federal officeholders and the campaign finance system. The penalty reflects the fact that Craig did not try in good faith to comply with the law. In arguing for no penalty, Craig leans heavily on an advice of counsel defense that he waived. In fact, Craig had ample reason to know his spending would be illegal, in particular because of repeated Senate Ethics Committee warnings. Yet he failed to ask the FEC for an advisory opinion, and he continued spending campaign funds on the effort to withdraw his guilty plea.

The district court's ruling should be affirmed in all respects.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT CRAIG CONVERTED CAMPAIGN FUNDS TO HIS PERSONAL USE

A. *Minnesota v. Craig* Involved Allegations Relating to Craig's Personal Misconduct and Not His Officeholder Duties

This Court should affirm the district court holding that Craig violated FECA's personal-use ban. *See* JA 16-21; 137-38; *see also Hampton v. Vilsack*, 685 F.3d 1096, 1099 (D.C. Cir. 2012) ("We review a grant of summary judgment de novo."). In a 20-year-long line of advisory opinions, which Craig admits are "due significant deference" (Br. of Appellants ("Craig Br.") at 29 (Docket No. 1541674)), the Commission has explained that campaign funds may not be spent on legal expenses when the "allegations" of the legal proceeding are "not related" to officeholder duties. *See supra* p. 5. As the district court recognized, the allegations of *Minnesota v. Craig* "did not relate[] to [Craig's] conduct as a legislator, but only actions undertaken in the privacy and anonymity of a restroom stall." JA 138; *see supra* p. 8. Craig himself admitted as much to the Senate Ethics Committee just a month after his arrest. *See supra* pp. 8-9. And he again admits here to the "personal nature of the conduct underlying [his] legal expenditures." (Craig Br. at 25.) That Craig was on an official trip when arrested did not change the personal nature of the allegations against him. *See, e.g., supra*

p. 15. His resulting legal fees were therefore an expense that existed "irrespective" of his "duties as a holder of Federal office." 52 U.S.C. § 30114(b)(2).[14]

B. Craig Has Abandoned the Main Liability Argument He Made to the District Court and Now Improperly Asserts a Meritless New Argument Regarding the Applicable Legal Standard That This Court Should Not Consider

In his opening brief, Craig does not assert, and thus has waived, his primary argument to the district court: That his spending was allegedly legal because he was arrested while on an official trip. *See supra* p. 15; *see Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (*per curiam*) ("[Defendant] never raised this issue in its opening brief before us and therefore waived the argument in this court.").

Craig now improperly asserts a new argument regarding the applicable legal standard, which also lacks merit, *see infra* pp. 24-25, but which this Court should not consider in the first place. Although this Court's "review of the grant of summary judgment is *de novo*, this [C]ourt reviews only those arguments that were made in the district court, absent exceptional circumstances," which Craig does not even claim exist here. *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir.

[14] Because Craig admitted the material facts of the Complaint, the district court's ruling holding Craig liable and granting the FEC's motion for summary judgment essentially incorporates the comprehensive analysis from the court's ruling denying Craig's motion to dismiss. (JA 16-17.) The court's ruling was therefore not "cursory" or "truncated," as Craig alleges. (Craig Br. at 24.)

2009). Even if this Court were to review Craig's forfeited arguments, the district court may be reversed on a forfeited ground only if it committed "plain error." *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 434 (D.C. Cir. 2010). The plain error standard would require Craig to establish that: (1) there was an error; (2) the error was plain; (3) the error affected "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Long v. Howard Univ.*, 550 F.3d 21, 25-26 (D.C. Cir. 2008) (internal quotation marks omitted). However, Craig "hasn't even attempted to show how his new legal theory satisfies the plain error standard," a failure which "surely marks the end of the road for an argument for reversal not first presented to the district court." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130-31 (10th Cir. 2011).

The district court applied the correct legal standard, as articulated in the FEC's Explanation and Justification and advisory opinions. *See supra* pp. 14-17, 21-22. Craig now claims that the district court should have applied what he calls a "reasonableness standard" (Craig Br. at 6, 21, 23, 24, 26-27), which he has never mentioned before in this case. Instead, Craig consistently urged the district court to determine if his spending was a permitted "ordinary and necessary expense[] incurred in connection with official duties" under 52 U.S.C. § 30114(a)(2). (*See, e.g.*, Mem. in Supp. of Defs.' Mot. to Dismiss ("Craig MTD Br.") at 6 ("Because

that official travel is part of [Craig's] official duties, legal proceedings arising out of that travel are necessarily 'in connection with' Senator Craig's official duties . . . . *See* 2 U.S.C. § [30114](a)(2).") (D.D.C. Docket No. 3-1); Craig MTD Reply at 3 ("The question presented here, then, is whether Senator Craig properly used his campaign funds 'in connection with [his] duties as a holder of Federal office.' 2 U.S.C. § [30114](a)(2).") Craig got his wish — the district court applied section 30114(a)(2), but correctly determined that his spending was *not* a permitted "ordinary and necessary" expense, in addition to finding that it was prohibited personal use under section 30114(b). (JA 134-37; *see also id.* 136 n.7 (concluding that defendants "have failed to meet their own test").) But now, in a remarkable about-face, Craig argues that the district court erred by applying the test *he asked it to apply* instead of his newly invented "reasonableness standard." (Craig Br. at 27; *see also id.* at 19, 21, 26.)

In any event, there is no "reasonableness standard." Craig has simply invented it by conflating an officeholder's evidentiary burden with the actual legal standard (*see* Craig Br. at 26-27), based on a line from the FEC's Explanation and Justification: "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," 60 Fed. Reg. at 7867 (emphases added). As the district court correctly concluded, Craig failed to show — reasonably or

otherwise — "any facts that demonstrate that the legal expenses incurred in the effort to reopen the criminal case '*resulted from*' an officeholder activity." (JA 136 n.7 (quoting 60 Fed. Reg. at 7867) (emphasis added).)

C. The District Court Correctly Found That It Is Irrelevant Whether Craig's Personal Offense Resulted in Negative Consequences That Motivated Him to Try to Withdraw His Guilty Plea

While Craig no longer claims that his official travel justified his expenditures, he does now assert a different meritless argument: He claims he did not violate FECA because his personal offense had consequences for his career that motivated him to try to withdraw his guilty plea. (Craig Br. at 28-31.) The district court, however, properly rejected that assertion too. (JA 18, 20, 138.) As it explained in both of its opinions, because the allegations of *Minnesota v. Craig* related to Craig's personal misconduct, it "does not matter" if his "conviction may have done more harm to the Senator's reputation than it would have in the case of some less prominent individual" or if his "decision to withdraw the guilty plea was motivated by political considerations." (JA 138; *see also* JA 18 ("[T]he Senator's arrest was personal . . . even if he either elected to plead guilty or to change course with his public image in mind."), JA 20 (finding it immaterial whether "Senator Craig's challenge to his plea stemmed from his desire to counter allegations that he believed would be damaging to his public stature as a United States Senator and his viability as a future candidate" (internal quotation marks omitted).) In so

holding, the district court accepted the interpretive guidance in the FEC's Explanation and Justification, which warns that "legal expenses will not be treated as though they are . . . officeholder related merely because the underlying legal proceedings have some *impact* on the . . . officeholder's *status*" — such as with "charges of driving under the influence of alcohol." 60 Fed. Reg. at 7868 (emphases added); *see* JA 137-38.[15]

Craig does not contest that the FEC's regulation and Explanation and Justification are "consistent with the statute," as the district court found. (JA 138.) Nor could he do so, given that Congress codified the FEC's regulation in 2002. *See supra* p. 4. Instead Craig argues, in direct contradiction to the Commission's consistent interpretation of the statute, that his spending of campaign funds was legal due to a litany of impacts his offense allegedly had on his officeholder status. Craig asserts that he pled guilty in hopes of hiding his arrest, but that the media discovered it anyway, leading to negative coverage as well as professional and personal consequences that motivated him to try to withdraw the plea. (Craig Br. at 14-16, 18, 28-30.) For two reasons, these alleged facts are all beside the point.

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[15] By properly finding that the facts Craig presented regarding his post-offense consequences and motivations are immaterial, the district court did not "disregard[]" or "refuse to weigh" them, as Craig repeatedly asserts. (*See, e.g.*, Craig Br. at 23-24.)

1. The Post-Offense Consequences and Craig's Subjective Motivations Were Not at Issue in His Legal Proceedings

The consequences that Craig's criminal proceeding had on his professional life are irrelevant because the proceeding did not involve allegations about any of those things. *See supra* pp. 5, 8. Craig contends that the district court focused too much on the "misdemeanor charge," instead of "subsequent events." (Craig Br. at 24.) None of those subsequent events, however, changed the personal nature of the misdemeanor charge — including Craig's decision to attempt to withdraw his guilty plea. In fact, Craig himself has acknowledged in this litigation that such "collateral attacks on criminal convictions are intertwined with both the original criminal proceedings and the underlying incident giving rise to the criminal proceedings." (Craig MTD Reply at 16 (D.D.C. Docket No. 16).)

The allegations of *Minnesota v. Craig* likewise did not concern the media's "public disclosure" of his offense, which Craig claims also justifies his expenditures. (Craig Br. at 21, 24, 28-29.) This is essentially an argument that Craig should have been allowed to use his supporters' money to try to undo his guilty plea because he failed to hide it from them and other members of the public. If adopted, 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 as it was discovered, which would frequently occur given the public's justified scrutiny of its elected officials.

2. The Post-Offense Consequences and Craig's Subjective Motivations Were Not Officeholder "Duties"

The district court was also correct to dismiss the relevance of the "subsequent events" related to Craig's offense because none of those events were Craig's officeholder "duties." As the court pointed out, section 30114(b)(2) "defines an expense as personal if it would exist irrespective of the officeholder's *duties*, not his *status*." (JA 138 (emphases added).)

Craig recognized the importance of this requirement before the district court, where he stressed that his travel on the day of his arrest was a required duty of his office. (*See, e.g.*, Craig MTD Br. at 6 ("Because that official travel is part of his official duties, legal proceedings arising out of that travel are necessarily 'in connection with' Senator Craig's official duties") (D.D.C. Docket No. 3-1).) But now that Craig claims that his expenses relate to the consequences of his arrest — such as his guilty plea and reasons for attempting to withdraw it — he does not even try to argue that any of those things constitute officeholder "duties." Indeed, it is beyond dispute that hiding an arrest and then trying to undo its negative consequences once caught is not a duty of any office.

The statute's "duties" requirement also undermines Craig's contention that his subjective motivations for attempting to withdraw his guilty plea are relevant. He urges the Court to ignore what he admits is the "personal nature of the conduct underlying the legal expenditures" and to focus on "[t]he *impetus* for [his]

expending committee funds." (Craig Br. at 25 (emphasis added).) If the analysis hinged on subjective motivation, however, it would allow officeholders to transform every expense of a "personal nature" into one payable with campaign funds. For example, it would allow members of Congress to use campaign funds to buy homes in Washington, D.C. because they wanted to live near work. *But see* 11 C.F.R. § 113.1(g)(1)(i) (E) (home mortgage payments are always personal use). The correct analysis is therefore an objective one that hinges on the "personal nature" of the allegations. *See supra* p. 5.

Finally, even if the nature of Craig's motivations could determine whether his use of campaign funds was legal, Craig would fail that test too. Craig now claims that he moved to withdraw his guilty plea so that he could stay in office. (Craig Br. at 30.) However, Craig *announced his resignation* only nine days before filing that motion, and at that time he said that he was challenging his conviction anyway because "his name is important[.]" *See supra* p. 9. Craig's personal motivations seem to be confirmed by his chief of staff, who submitted testimony in this case stating that Craig had sought to withdraw his plea for the purpose of "vindicating him[self] personally and professionally." (JA 223.)[16] And

[16] The FEC challenged the admissibility of this testimony since it contains hearsay (FEC's Resp. to Defs.' Statement of Alleged Material Facts in Dispute at 5-6, ¶¶ 15, 18 (D.D.C. Docket No. 21)), but the district court did not address that challenge because the alleged facts are immaterial (*see* JA 18).

during administrative proceedings before the FEC, Craig's attorney candidly admitted that Craig "pled guilty to that [charge] for his own personal reasons." (FEC Exh. B to Opp'n to Mot. to Dismiss at 17 (D.D.C. Docket No. 5-2).) Of course, the difficulties involved in such a subjective analysis show why it is not the correct standard here.

D. The District Court's Ruling Is Consistent with the FEC Advisory Opinions on Which Craig Now Relies

The district court correctly found that five FEC advisory opinions Craig cited below did not give him safe harbor from prosecution under 52 U.S.C. § 30108(c), since each was materially distinguishable and Craig did not actually rely upon them at the time his campaign funds were spent. (JA 20-21, 139-48.) Here, Craig has given up on the safe harbor. (Craig Br. at 29 n.8.) He also no longer cites three of the five advisory opinions that he urged were materially indistinguishable to the district court. (*See* JA 146-48 (dismissing Craig's argument that the McDermott, Boehner, and Cunningham advisory opinions are relevant to this case).) And one advisory opinion upon which Craig still relies is distinguishable because it involves a legal proceeding caused by a person's candidacy, not his personal behavior. (Craig Br. at 12 (citing AO 2013-11 (Miller), 2013 WL 6022101).) In Miller, which the district court found "has no bearing on defendants' case," media entities sued a candidate to obtain and publicize his employment records because he was a candidate. (JA 20.) As a

result, "'the lawsuit would not have existed irrespective of Miller's campaign.'" (*Id.* (quoting Miller, 2013 WL 6022101, at *2).)

Craig now relies primarily upon two advisory opinions he has never cited before in this litigation (*see* Craig Br. at 8 (citing AO 1996-24 (Cooley), 1996 WL 419823 (June 27, 1996); AO 2001-09 (Kerrey), 2001 WL 844352 (July 17, 2001)) and another that he admitted to the district court is "not precisely on point" (Craig MTD Reply at 22 n.9 (citing AO 1997-12 (Costello), 1997 WL 529598 (Aug. 15, 1997) (D.D.C. Docket No. 7))). Nevertheless, Craig newly asserts that these advisory opinions show that his use of campaign funds "falls squarely within the bounds of the personal use standard established by the FEC." (Craig Br. at 29 n.8.) They do not. The advisory opinions that Craig cites are distinguishable because they involve expenses not for legal proceedings, but for *public relations work*, whether performed by public relations professionals or attorneys. *See* Costello, 1997 WL 529598, at *3; AO 1998-01 (Hilliard), 1998 WL 108618, at *3-4 (Feb. 27, 1998); Kerrey, 2001 WL 844352, at *2-4; AO 2008-07 (Vitter), 2008 WL 4265321, at *4 (Sept. 9, 2008). As these opinions explain, officeholders "may receive heightened scrutiny and attention in the news media" because they are officeholders. Vitter, 2008 WL 4265321, at *4 (internal quotation marks omitted). They may therefore use campaign funds "to respond to media allegations that result from this elevated scrutiny," regardless of what the media's scrutiny is

about. (*Id.*) Craig calls the distinction between these permissible expenses and his impermissible legal expenses "arbitrary" (Craig Br. at 26 n.6), but the facts of this case illustrate the simple principle involved: Craig's elevated media scrutiny was caused by his being an officeholder. His arrest for disorderly conduct was not.

As a result, the Commission has allowed campaign funds to be used for, among other things, "legal expenses for preparing press releases and conducting press conferences," Costello, 1997 WL 529598, at *5; "legal expenses for dealing with, and responding to, the press," Hilliard, 1998 WL 108618, at *4; "media consulting expenses incurred as a result of media inquiries," Kerrey, 2001 WL 844352, at *1; and expenses for when "[c]ounsel consulted with . . . [a] public relations professional regarding press management and press statements," Vitter, 2008 WL 4265321, at *4.[17]

In this case, the $197,535 that the district court found was spent in violation of FECA does not include money that Craig directed be paid to public relations professionals or attorneys for the purpose of responding to the media, as a result of efforts to exclude such expenses by the FEC at the administrative stage and by the

[17] Craig protests that the expenses approved in Kerrey and Miller involved individuals who were no longer in office or candidates. (Craig Br. at 30.) The statute, however, does not require a person to be a candidate or officeholder at the time expenses are incurred for those expenses to be related to officeholder duties.

district court at the summary judgment stage of this case. *See supra* pp. 13-14, 17. The advisory opinions Craig cites therefore offer him no help.

* * *

Because Craig's legal expenses existed irrespective of his officeholder duties, this Court should affirm the district court's holding that appellants violated 52 U.S.C. § 30114(b).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING CRAIG TO DISGORGE THE PROCEEDS OF HIS WRONGDOING TO THE UNITED STATES TREASURY AND PAY A CIVIL PENALTY

This Court should also affirm the district court's order of remedies for Craig's violation. District courts have the "inherent equitable power[]" to order disgorgement to remedy unjust enrichment, unless "otherwise provided by statute." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (internal quotation marks omitted). FECA provides that district courts 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 the violation. 52 U.S.C. § 30109(a)(6)(B); *see* 11 C.F.R. § 111.24(a)(1).

Exercising its discretion under this broad authority, the district court ordered Craig to disgorge the $197,535 it determined he illegally spent, to "deprive the wrongdoer of his ill-gotten gain." (JA 31 (internal quotation marks omitted).) The

court then imposed a $45,000 civil penalty against Craig in part to punish his offense and to "deter not only future misconduct by these defendants, but also the misappropriation of campaign funds by others." (JA 36.) In selecting these remedies, the district court did not abuse its discretion. *See SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011) ("[F]ashioning a disgorgement remedy" is reviewed for "abuse of discretion."); *FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989) ("The district court's assessment of a civil penalty is reviewed for an abuse of discretion.").

A. The District Court Did Not Abuse Its Discretion by Ordering Craig to Disgorge the Funds He Converted to the U.S. Treasury

Craig does not contest that the district court had the authority to require him to disgorge the funds he converted. Yet he untimely and incorrectly asserts that the court was then required to direct those funds to the Craig Committee, which he controls, instead of to the U.S. Treasury. (Craig Br. at 31-42.)

1. Craig Has Forfeited His Objection to the Destination of His Disgorged Funds by Failing to Raise It in the District Court

This Court should disregard Craig's meritless contention because he failed to raise it before the district court. *See supra* pp. 22-23 (arguments not made to the district court are generally forfeited). If reviewed, a forfeited argument cannot be a ground for reversal unless the district court committed plain error. *See id.* Craig had ample opportunity before the district court to object to any disgorgement going

to the Treasury. The FEC argued in its opening summary judgment brief that the district court should order any disgorged funds to the Craig Committee, or "[a]lternatively, the Court could order that the converted funds be disgorged to the United States Treasury." (FEC Mem. in Supp. of Its Mot. for Summ. J. at 17 & n.12 (pointing out that there were "substantial reasons for doing so") (D.D.C. Docket No. 16); *see also* JA 38 n.23 ("[T]he FEC proposed in the alternative that the funds be paid to the U.S. Department of the Treasury.").[18] In response, Craig did not object to any disgorged funds going to the Treasury, either in his responsive brief (*see generally* Craig SJ Opp'n (D.D.C. Docket No. 19)) or during the court's summary judgment hearing, despite defense counsel's extended discussion with the court about disgorgement (JA 291-313).

2. The District Court Reasonably Chose Not to Order Craig to Disgorge Funds to the Essentially Defunct Craig Committee, Which Craig Controls

Once a district court has ordered disgorgement, "it remains within the court's discretion to determine how and to whom the money will be distributed, and the district court's distribution plan will not be disturbed on appeal unless that discretion has been abused." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). Craig acknowledges that "courts have ordered disgorgement of illegal

[18] The court's disgorgement order therefore was not "issued counter to the FEC's request," as Craig claims. (Craig Br. at 31.)

profits to the U.S. Treasury." (Craig Br. at 35 n.10.) Indeed, they have. *See, e.g.*, *United States v. Sussman*, 709 F.3d 155, 164 (3d Cir. 2013) (affirming order that excess funds the Federal Trade Commission ("FTC") recovered from defendants "shall be deposited to the U.S. Treasury as equitable disgorgement"); *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) ("[I]f the district court determines that no party is entitled to receive the disgorged profits, they will be paid to the United States Treasury."); *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) ("Upon awarding disgorgement, a district court may exercise its discretion to direct the money toward victim compensation or to the United States Treasury."); *Fischbach Corp.*, 133 F.3d at 171, 175-77 (affirming order directing $4 million in disgorged funds "to the United States Treasury"); *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997) ("To ensure that defendants are not unjustly enriched by retaining some of their unlawful proceeds . . . the FTC often requests orders directing equitable disgorgement of the excess money to the United States Treasury."); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) (rejecting constitutional challenge to court's order to disgorge funds to the Treasury as "based on the misguided belief that disgorgement is a form of restitution"); *see also SEC v. Credit Suisse First Boston Corp.*, No. 02-0090, 2002 WL 479836, at *2 (D.D.C. Jan. 29, 2002) ("[P]ayment of the disgorgement shall be made to the U.S. Treasury."); *SEC v. Brody*, No. 99-2579,

1999 WL 1425401, at *2 (D.D.C. Oct. 1, 1999) (ordering defendant to "pay a total of $87,558.06, representing disgorgement of his gains . . . to the United States Treasury"); *SEC v. Stern*, No. 91-2459, 1993 WL 13380, at *1 (D.D.C. Jan. 11, 1993) ("Stern shall disgorge $7,000, including prejudgment interest, into the Treasury of the United States.").[19]

As some of the cited cases also state, a district court may in the alternative order that disgorged funds be paid as restitution to injured parties. But "restoration is not required," and in certain cases it may be impracticable or otherwise inappropriate. James M. Fischer, *Understanding Remedies* § 51 (2d ed. 2006) (citing *SEC v. Lorin*, 869 F. Supp. 1117, 1129 (S.D.N.Y. 1994)); *see also, e.g.*, *Fischbach Corp.*, 133 F.3d at 174-77.

In this case, the district court had valid reasons for exercising its discretion to direct Craig's disgorgement to the Treasury instead of the Craig Committee. First, giving the disgorged funds to the Craig Committee would have essentially returned them to Craig's control. Craig is the "only staff member" for the "essentially defunct" Craig Committee, which is now "little more than [his] alter-ego." (JA 39.) The FEC requires that the Craig Committee continue to exist for purposes of this litigation, but it has virtually no funds, Craig has not run for office

[19] In neither *Fischbach* nor any other cited case did the court's decision to order disgorgement to the Treasury turn on the severity of the offense, as Craig incorrectly suggests. (Craig Br. at 35 n.10.)

since his resignation in 2009, and he has no stated plans to run in the future. *See supra* pp. 7-8. The Craig Committee had a treasurer, but she resigned during this litigation, and Craig then appointed himself treasurer. *Id.* at 7. As a result, if the disgorged funds went to the Craig Committee, Craig "would be solely responsible for the proper disposition of the funds," which he already misused, at a defunct campaign committee without a campaign to spend the money on. (JA 39.)

Second, ordering Craig's disgorgement to the Craig Committee would have been nothing more than 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. (JA 39.) Craig does not contest this. But rather than do that, the court eliminated the intermediary by ordering Craig's disgorgement directly to the Treasury, as the court was permitted to do.[20]

These factors distinguish this case from the FEC administrative enforcement matters that Craig cites. (Craig Br. at 38-39.) Those matters all involved refunds to committees that unlike the Craig Committee (1) had a current treasurer who was not also the person who had spent campaign funds on his or her personal use; and (2) were tied to candidates who could have spent refunded amounts on later

[20] Accordingly, the passage from oral argument that Craig cites (Craig Br. at 33) does not show that the court sought to punish Craig. It shows the court's recognition that disgorgement to the Craig Committee would needlessly treat it as "just a pass through" since the Court could then penalize the otherwise broke Craig Committee.

campaigns, because they either did run again and remained in office, later won office, or had some likelihood of mounting campaigns in the future.[21] In any event, the FEC's choices in the context of administrative conciliation negotiations do not constrain the district court's authority. The court had broad discretion to choose among reasonable remedies.

3. The Remedy of Disgorgement Required Craig to Give Up His Ill-Gotten Gains, But It Did Not Require That Those Funds Be Returned to the Craig Committee

Craig incorrectly claims that the district court failed to "actually effect disgorgement" by not directing Craig's misused funds to the Craig Committee. (Craig Br. at 33.) On the contrary, the remedy of disgorgement in and of itself does not control where the misused funds go once forfeited. Disgorgement is simply the "act of giving up something (such as profits illegally obtained) on

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[21] *See In re Durkee* Conciliation Agreement at ¶¶ IV.6-8, VI.3 (Dec. 12, 2014), http://eqs.fec.gov/eqsdocsMUR/15044365117.pdf; *In re McCrosson, Jr.* Conciliation Agreement at ¶¶ IV.2, 6, 9, VI.2 (Nov. 8, 2012), http://eqs.fec.gov/eqsdocsMUR/14044362854.pdf; *In re Sohn* Conciliation Agreement at ¶¶ IV.4, VI.3 (July 21, 2010), http://eqs.fec.gov/eqsdocsMUR/10044274264.pdf; *In re Istook* Conciliation Agreement at ¶¶ IV.3, VI (Sept. 25, 2008), http://eqs.fec.gov/eqsdocsMUR/28044212385.pdf; *In re Free* Conciliation Agreement at ¶¶ IV.2, V.1 (Sept. 23, 2008), http://eqs.fec.gov/eqsdocsMUR/28044212013.pdf; *In re Meeks* Conciliation Agreement at ¶¶ IV.2, V.5 (Feb. 4, 2008), http://eqs.fec.gov/eqsdocsMUR/000EC959.pdf; *see also FEC Candidate and Committee Viewer*, http://www.fec.gov/finance/disclosure/candcmte_info.shtml (summarized financial data for the committees involved in the preceding matters can be found at this URL by searching for the committee's name).

demand or by legal compulsion." *Black's Law Dictionary* 209 (2d Pocket Ed. 2001). It is designed "to make sure that wrongdoers will not profit from their wrongdoing." *Whittemore*, 691 F. Supp. 2d at 204 (internal quotation marks omitted). And it achieves that goal by restoring "the defendant to the status quo by stripping him of the gains he unjustly obtained by his misconduct." *See* Fischer, *Understanding Remedies* § 51.

Where disgorged funds go is a "distinctly secondary" question. *Fischbach Corp.*, 133 F.3d at 175. Disgorgement "does not aim to compensate the victims of the wrongful acts, as restitution does." Fischer, *Understanding Remedies* § 51 (internal quotation marks omitted). Instead, it is usually sought by "public enforcement agencies," like the FEC, to obtain "public redress" for statutory violations. *Id.* A district court therefore may order disgorgement regardless of whether the funds will then return to their original source. *See, e.g.*, *Fischbach Corp.*, 133 F.3d at 176 ("[A] district court may order disgorgement regardless of whether the disgorged funds will be paid to [defrauded] investors as restitution."); *Blavin*, 760 F.2d at 713 ("Once the [SEC] has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private

parties have been damaged by [defendant's] fraud.").[22] Thus, solely through taking funds from Craig, the district court here properly restored the *status quo* to the extent the remedy of disgorgement requires.

4. The District Court's Disgorgement Order Was Not Punitive, But FECA Would Authorize It Even if It Was

The district court's disgorgement order merely restored the *status quo*, placing Craig in a position that was certainly no worse than if he had never violated the law in the first place. But even if the disgorgement order had been punitive, it would not have violated FECA, as Craig argues. (Craig Br. at 35-36.)

FECA allows a district court to impose punitive remedies. To remedy a violation, a court may, among other things, issue any "other order, including a civil penalty." 52 U.S.C. § 30109(a)(6)(B). A civil penalty is, of course, punitive. *Tull v. United States*, 481 U.S. 412, 422 (1987). Craig gives no reason why, if an "other order" that is a civil penalty can be punitive, an "other order" that sends his disgorged funds to the Treasury cannot. Craig relies instead on language from a separate provision of FECA that is irrelevant because it does not govern the district court's authority: 52 U.S.C. § 30109(a)(6)(A). (*See* Craig Br. at 36.) That section

[22] Consistent with these principles, the FEC stressed to the district court at oral argument that "the importance of disgorgement is just that Mr. Craig does not have [the funds] as a result of his violation. Where it goes subsequent to that is important, but slightly less important than the fact that Mr. Craig should not profit from his violation." (JA 274).

states that if the FEC is "unable to correct or prevent" a FECA violation during its administrative process, it may then sue the respondent. 52 U.S.C. § 30109(a)(6)(A). Craig contends that the word "correct" limits the district court to only equitable remedies. (Craig Br. at 35-36.) That word, however, does not even limit the FEC to equitable remedies, let alone the district court. The same subsection of FECA that Craig cites explicitly authorizes the FEC to "correct" FECA violations by requiring punitive civil penalties. *See* 52 U.S.C. § 30109(a)(4)(A)(i) (FEC may "correct or prevent" FECA violations by entering into a conciliation agreement); *id.* § 30109(a)(5)(A) (a conciliation agreement may require respondent to "pay a civil penalty").

5. The Disgorgement Order Did Not Violate the First Amendment

Finally, Craig wrongly claims that the First Amendment interests of the donors whose funds he converted to his personal use now require that the funds be sent back to the Craig Committee, where he would again control them. (Craig Br. at 39-42.) However, any injury — First Amendment or otherwise — that Craig's donors have suffered is Craig's fault. As the district court recognized, Craig's illegal use of their donations harmed them because they "presumably intended that their donations be used for lawful, campaign-related purposes." (JA 36.) In light of that illegal use, there is no reason to believe that any of those donors would now

want Craig to remain in control of their money. The record contains no such evidence.

Contrary to Craig's claim, the disgorgement order also does not violate Craig's or the Craig Committee's First Amendment rights. The order is not a "*de facto* expenditure limitation." (Craig Br. at 22). An actual expenditure limitation is an "outright ban on . . . political speech." *Citizens United v. FEC*, 558 U.S. 310, 361 (2010). The court's order is a permissible remedy for the illegal conversion of money. It bans no speech; Craig and his committee are free to raise contributions and to (legally) spend those contributions without limit.

In fact, Craig's First Amendment argument proves far too much: If disgorgement orders violate the First Amendment simply by depriving law-breaking campaign committees of funds, then so must all civil penalties, since they do the same thing. In fact, under Craig's theory, every civil penalty that the FEC and the courts have imposed on candidates and political committees for violating FECA in the last four decades would be unconstitutional. The First Amendment, however, does not bar the enforcement of FECA. *Cf. Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978) (explaining that although "an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices," the First Amendment does not make it impossible to enforce the antitrust laws).

B. The District Court Did Not Abuse Its Discretion by Ordering Craig to Pay a Civil Penalty That Was Less Than 12 Percent of the Amount the Court Could Have Ordered Defendants to Pay

FECA authorized the district court to impose a civil penalty on each defendant of up to the amount in violation, or a total of $395,070. *See supra* p. 18. The FEC requested a total of $140,000 in penalties. *Id.* Although the district court did not find that any of the civil penalty factors it evaluated weighed against a penalty, the court ultimately decided not to fine the Craig Committee and to fine Craig only $45,000 — less than 12 percent of the overall statutory maximum. (JA 37-38.) Yet Craig claims that *any* civil penalty would have been an abuse of the court's discretion. (Craig Br. at 42.) However, that would have failed to promote any of the important civil penalty interests the district court identified and it would have essentially given Craig the benefit of a long-term interest free loan, rather than an incentive to comply with the law.[23]

1. The Civil Penalty Is Necessary to Punish Craig's Offense

The district court appropriately assessed its civil penalty in part to punish Craig's offense. (JA 36.) *See Gabelli v. SEC*, --- U.S. ---, 133 S. Ct. 1216, 1223

[23] The district court properly found that several factors are relevant to a court's decision to impose a FECA civil penalty: (1) punishment; (2) deterrence; (3) good or bad faith; (4) ability to pay; (5) injury to the public; (6) injury to private individuals; and (7) vindicating the authority of the responsible agency. (JA 32-37.) The court, therefore, did not simply "adopt[] a four-factor test used" in *Furgatch*, as Craig claims. (Craig Br. at 43.) Craig does not challenge the relevance of any of the district court's factors.

(2013) (explaining that civil penalties "punish, and label defendants wrongdoers"). Absent a civil penalty, Craig's offense would go unpunished, since disgorgement requires only that he return the funds he misused. *See Tull*, 481 U.S. at 422 (explaining that penalties are "intended to punish culpable individuals," not to "restore the status quo"). Even worse, disgorgement and no civil penalty could allow Craig to *profit* from his offense, since in effect he would have had the benefit of an interest-free loan of $197,535 in campaign funds.

2. The Civil Penalty Is Necessary to Deter Craig and Others from Future Offenses

The district court also recognized that it was necessary to impose a significant civil penalty to deter future personal-use violations. *See SEC v. One or More Unknown Traders*, 825 F. Supp. 2d 26, 33 (D.D.C. 2010) ("The purpose of a civil penalty is to . . . deter future violations."). The need for deterrence here is particularly great given the vast amounts of money that are contributed to campaign committees. In the 2012 election cycle alone, presidential and congressional candidates received more than $3.25 billion. Press Release, FEC, FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle (Mar. 27, 2014).[24] More than $216 million of those funds remained unspent after the

[24] *See* http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml.

election, *see id.*, creating significant opportunity and temptation for those in control of campaign funds to misuse them.

A civil penalty lower than $45,000 would not act as a sufficient deterrent. To be effective, a civil penalty must be large enough so that potential offenders will not regard it as "nothing more than an acceptable cost of violation." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 231 (1975). If too low, Craig's penalty would become functionally equivalent to low interest on a loan of campaign funds. (*See* JA 38.) As it is, since $45,000 is 22.8% of $197,535, the district court imposed a penalty that is lower than the interest on a loan of the amount in violation taken at an annual rate of four percent over the relevant time period.

The need for a civil penalty was not obviated by the "severe professional and personal consequences" Craig states he suffered as a result of his arrest for disorderly conduct. (Craig Br. at 22, 42.) The district court's civil penalty serves to deter not that offense, but his personal use of campaign funds. Additionally, as the district court explained, a penalty is needed here not only to deter future misconduct by Craig, but also by others. (JA 36.) If courts declined to impose sanctions on this ground, as Craig urges, it would essentially give free rein to scandal-plagued officeholders to raid their campaign accounts for legal fees on their way out of office.

The need for a civil penalty has also not been eliminated because Craig allegedly "continues to incur legal costs in this matter." (Craig Br. at 42.) Craig provides no citation to the record for that claim. Even if true, if paying legal fees in one case to contest liability for failing to pay them in another were the only "penalty," it would fail to deter personal use and encourage litigation over conciliation, since a roll-of-the-dice in court would never result in a civil penalty.[25]

3. The Civil Penalty Is Necessary to Reflect Craig's Lack of Good Faith Effort to Avoid a Clear Violation of FECA

The district court correctly found that Craig's contentions that he attempted to comply with FECA in good faith were "largely unavailing." (JA 33.) At the time Craig started to spend campaign funds on *Minnesota v. Craig* on October 29, 2007, there should have been *no question* in his mind that his spending would be illegal. He was aware of the FEC's Kolbe advisory opinion, which contains "clear admonitory language" stating that campaign funds may not be used for legal expenses in proceedings regarding allegations not relating to officeholder duties.

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[25] In both of the cases that Craig cites (Craig Br. at 42), the district court imposed a civil penalty on the defendant despite its legal costs. In *FEC v. Gus Savage for Congress '82 Committee*, the court ordered the defendant to pay a $5,000 civil penalty even though he had hired an attorney and accountant. 606 F. Supp. 541, 542, 545 & n.8 (N.D. Ill. 1985). In *FEC v. National Education Association*, the district court penalized the NEA by requiring it to pay for a court-approved plan to refund contributions to its members, despite the fact that the NEA presumably also incurred legal fees in the case. 457 F. Supp. 1102, 1108, 1112 (D.D.C. 1978).

See supra pp. 5, 10, 15-16. And Craig had just told the Senate Ethics Committee one month earlier that he was arrested for "purely personal conduct unrelated to the performance of official Senate duties." *Id*. pp. 8-9.

Craig argues that the Vitter advisory opinion shows that the personal-use standard was "ambiguous" and thus makes it "unreasonable" to punish him. (Craig Br. at 43.) However, the FEC did not issue Vitter until 11 months *after* Craig started to illegally spend campaign funds in October 2007, and so it could not have affected his decision making. *See* Vitter, 2008 WL 4265321. In any event, in the Vitter opinion, the FEC did not approve Senator Vitter's request to use campaign funds to pay his legal expenses arising out of a proceeding that related to an alleged personal indiscretion, *see* 2008 WL 4265321, at *4, ¶ 3, and so the routine debate among the FEC's Commissioners leading up to that opinion (*see* Craig Br. at 10-11) could not have created any ambiguity for Craig, especially in light of his knowledge of Kolbe.

If Craig still had any doubt, he could have asked the FEC for an advisory opinion and received a written response in 60 days or less. *See supra* p. 6. But Craig did not — "forgo[ing] what would have been a significant demonstration of good faith." (JA 35.) Even worse, Craig admitted to the district court that he did not seek an advisory opinion because *he suspected that the FEC would say no* to his spending, *see supra* p. 10, an understandable fear given the Commission's

consistent application of section 30114(b) to legal expenses for allegations of personal wrongdoing, *see supra* p. 5. Instead, Craig proceeded to spend approximately $200,000 in campaign funds. In effect, he appears to have gambled that he would not be pursued for his violation, or if he were, that he would manage to prevail in court. This conduct may reflect hope in Grace Hopper's famous observation that it is often easier to seek forgiveness than permission. But it does not reflect much effort to comply with federal law.

Craig continued to spend an additional $55,000 in campaign funds after being warned twice by the Senate Ethics Committee that some portion of his *Minnesota v. Craig* expenses "may not be deemed to have been incurred in connection with your official duties, either by the Committee or by the Federal Election Commission." *See supra* pp. 11-13. These warnings should have, at the very least, given someone with concern for following the law some pause — especially given that the Senate's personal-use ban was the inspiration for FECA's, *see supra* pp. 2-3, and given that the Senate Ethics Committee is a "bipartisan" entity, as Craig points out (Craig Br. at 44 n.20). Craig's quibbles about the specificity of the Senate Ethics Committee's warnings and the separate trust fund (*id.*) are not the complaints of someone who was eager to comply with the law.

All these facts showing Craig's lack of good faith cannot be overcome by the advice from counsel Craig received. (Craig Br. at 44.) Not only that, but Craig

explicitly disavowed (and thus waived) any reliance upon an advice of counsel defense in this case. JA 166; *see supra* p. 16. Craig contends that the advice he received shows that he did not "deliberately" violate FECA. (Craig Br. at 45.) But the FEC has not accused Craig of a deliberate violation, and so the range of civil penalties he faced already reflects that fact. Had Craig knowingly and willfully violated the personal-use ban, the district court would have had the authority to impose a civil penalty twice as large. *See* 52 U.S.C. § 30109(a)(6)(C) (authorizing a civil penalty of "an amount equal to *200 percent* of any . . . expenditure involved" (emphasis added)).

Finally, Craig's reporting of his illegal spending to the FEC also fails to demonstrate good faith (Craig Br. at 45), since not reporting those expenditures would have been a separate violation of FECA, *see* 52 U.S.C. § 30104. Craig's personal-use violation is no less blameworthy because he did not also illegally hide his conversion of campaign funds.

4. The Civil Penalty Reflects That Craig Profited

Craig's civil penalty is also justified since Craig profited from his FECA violation. *See Furgatch*, 869 F.2d at 1258 n.1 (stating that a district court may consider "the desire to eliminate the benefit derived from the [FECA] violation" (internal quotation marks omitted)). Because Craig was able to spend nearly $200,000 in campaign funds for his legal expenses, his own funds remained

available for other personal purchases and expenses. (*See* FEC's Statement of Material Facts at 9-10, ¶¶ 35.b., 35.d.ii (reflecting that in 2010 Craig bought a 5,000-square-foot home on two acres of land and a boat) (D.D.C. Docket No. 16).)

5. The Civil Penalty Reflects Craig's Ability to Pay

The district court also properly took into account Craig's ability to pay. *See, e.g.*, *Furgatch*, 869 F.2d at 1258. Craig admitted to the district court that he had the ability to pay the $70,000 civil penalty the FEC requested (in addition to making a full disgorgement), and so "there is no question" that Craig could pay the $45,000 "reduced total" the court imposed. (JA 37.)

6. The Civil Penalty Reflects That Craig Injured Public Confidence in Government and the Campaign Finance System

Craig's civil penalty is also justified since the misuse of campaign funds injures the public's confidence in federal officeholders and the campaign finance system. *See Furgatch*, 869 F.2d at 1258 (courts may consider the "injury to the public"). "'[T]here is always harm to the public when FECA is violated.'" (JA 36 (quoting *FEC v. Am. Fed'n of State, Cnty., & Mun. Employees–P.E.O.P.L.E. Qualified*, No. 88-3208, 1991 WL 241892, at *2 (D.D.C. Oct. 31, 1991)).) Violations of the personal-use ban are particularly harmful. When elected officials misappropriate contributions, it deters citizens from supporting candidates and leads to greater distrust of elected officials. *See, e.g.*, *supra* p. 2 (describing the

Senate's censure of Senator Thomas Dodd, which found his personal use of campaign funds "contrary to accepted morals . . . [and] the public trust expected of a Senator").

7. The Civil Penalty Reflects That Craig Injured His Contributors

As discussed above, and as the district court found, Craig's illegal use of his contributors' funds harmed those contributors because they "presumably intended that their donations be used for lawful, campaign-related purposes." JA 36; *see supra* p. 42.

8. The Civil Penalty Is Necessary to Vindicate the Authority of the FEC and to Promote Conciliation over Litigation

Finally, Craig's civil penalty promotes the FEC's authority and the pre-litigation settlement of FECA violations. *See* JA 36; *Furgatch*, 869 F.2d at 1258 (stating that a district court may consider "the necessity of vindicating the authority of the responsible federal agency"). Voluntary conciliation during the FEC's administrative process is the "preferred method of dispute resolution under FECA." *See FEC v. NRA*, 553 F. Supp. 1331, 1338 (D.D.C. 1983). If district courts do not impose civil penalties for violating FECA that are generally higher than those that would be arrived at through conciliation, it would create an incentive for respondents to forego meaningful efforts at conciliation in favor of litigation to delay liability and achieve a lesser civil penalty. *Cf. FEC v. Comm. of*

100 Democrats, 844 F. Supp. 1, 7 (D.D.C. 1993) ("Individuals must be deterred from using the [FECA] conciliation process as a ruse and from using the courts as a mechanism for delay."). That would undermine the FEC's ability to enforce the law through conciliation. And such an outcome would increase the workload of courts, which benefit from FECA's policy of encouraging pre-litigation settlement.

III. THE DISTRICT COURT'S CALCULATION OF THE AMOUNT CRAIG SPENT IN VIOLATION OF THE STATUTE WAS NOT CLEAR ERROR

In the course of incorrectly claiming that disgorged funds cannot go to the Treasury, Craig asserts that the court's calculation of the disgorgement amount "illustrates its punitive intent." (Craig Br. at 34-35.) It is unclear whether Craig is actually attempting to challenge that calculation, particularly given that Craig does not mention the calculation in his "Statement of Issues Presented for Review" (*id.* at 1-2), as required by Federal Rule of Appellate Procedure 28(a)(5). As a result, this Court should decline to address the issue. *See Shirey v. Devine*, 670 F.2d 1188, 1191 n.7 (D.C. Cir. 1982) (stating that "[a]lthough we shall seldom consider arguments not clearly presented in the statement of issues" required by Rule 28(a), the Court has the discretion to do so).

In any event, the district court's calculation of the $197,535 amount Craig spent in violation of FECA was not clearly erroneous. *See Whittemore*, 659 F.3d at 7 ("Our review of the district court's disgorgement calculation is for clear error.").

The disgorgement amount need only be a "reasonable approximation of profits causally connected to the violation." *Id.* (internal quotation marks omitted). That is because "separating legal from illegal profits exactly may at times be a near impossible task." *Id.* (internal quotation marks omitted).

Craig himself did much to obstruct completion of this already challenging task. Craig admitted in his Answer that he spent $216,984 on "legal services" for *Minnesota v. Craig*, as the FEC had alleged based on its own review of Craig's somewhat opaque law firm bills. *See supra* pp. 13-14, 16. He later contradicted his Answer by arguing at summary judgment that he spent some portion of that $216,984 on permissible public relations services. *Id.* at 17. Despite his Answer, and even though Craig had turned down an opportunity to further segregate his public relations costs in the FEC's administrative proceeding, the district court gave Craig "one more chance." *Id.* It permitted him to file a post-hearing pleading, which Craig filed, but which again failed sufficiently to evidence his public relations costs. *Id.* The district court described Craig's responses as "maddeningly cavalier." *Id.* There was no requirement that Craig be rescued from any error resulting from these repeated failures, or that any ambiguity be resolved in his favor. Quite the contrary. *See SEC v. Levine*, 517 F. Supp. 2d 121, 128 (D.D.C. 2007) ("Any risk of uncertainty in calculating disgorgement should fall on the wrongdoer[] whose illegal conduct created that uncertainty." (internal

quotation marks omitted)), *aff'd*, 279 F. App'x 6 (D.C. Cir. 2008). Nevertheless, the district court engaged in its own exhaustive "line-by-line analysis" of Craig's invoices (detailed in the opinion's appendix) to determine the disgorgement amount. *See supra* p. 17. This resulted in a reduction in Craig's disgorgement figure of nearly $20,000. *Id.*

Despite the district court's extraordinary efforts to determine a fair disgorgement amount, Craig argues here that its "aim was to punish" him (Craig Br. at 35), and he nit-picks over the judgment calls the court had to make due to his own conduct (*id.* at 34 (complaining about the categorization of time spent with "office staff" and on an "ACLU brief").) None of that makes the district court's "reasonable approximation" of the amount Craig converted to personal use clearly erroneous.

CONCLUSION

For the foregoing reasons, the district court's ruling should be affirmed in all respects.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 13,326 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2015, I electronically filed the brief for appellee Federal Election Commission with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

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I further certify that I also will cause the required number of paper copies of the brief to be filed with the Clerk.

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52 U.S.C. § 30114, Use of contributed amounts for certain purposes

(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 26;

(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.

(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.

11 C.F.R. § 113.1(g)(1), Definitions; Personal Use

(g) Personal use. Personal use means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

(1)(i) Personal use includes but is not limited to the use of funds in a campaign account for any item listed in paragraphs (g)(1)(i)(A) through (J) of this section:

(A) Household food items or supplies.

(B) Funeral, cremation or burial expenses except those incurred for a candidate (as defined in 11 CFR 100.3) or an employee or volunteer of an authorized committee whose death arises out of, or in the course of, campaign activity.

(C) Clothing, other than items of de minimis value that are used in the campaign, such as campaign "T-shirts" or caps with campaign slogans.

(D) Tuition payments, other than those associated with training campaign staff.

(E) Mortgage, rent or utility payments—

(1) For any part of any personal residence of the candidate or a member of the candidate's family; or

(2) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage.

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity.

(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the

costs of a specific fundraising event that takes place on the organization's premises.

(H) Salary payments to a member of the candidate's family, unless the family member is providing bona fide services to the campaign. If a family member provides bona fide services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use.

(I) Salary payments by a candidate's principal campaign to a candidate in excess of the lesser of: the minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks; or the earned income that the candidate received during the year prior to becoming a candidate. Any earned income that a candidate receives from salaries or wages from any other source shall count against the foregoing limit of the minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks. The candidate must provide income tax records from the relevant years and other evidence of earned income upon the request of the Commission. Salary shall not be paid to a candidate before the filing deadline for access to the primary election ballot for the Federal office that the candidate seeks, as determined by State law, or in those states that do not conduct primaries, on January 1 of each even-numbered year. See 11 CFR 100.24(a)(1)(i). If the candidate wins the primary election, his or her principal campaign committee may pay him or her a salary from campaign funds through the date of the general election, up to and including the date of any general election runoff. If the candidate loses the primary, withdraws from the race, or otherwise ceases to be a candidate, no salary payments may be paid beyond the date he or she is no longer a candidate. In odd-numbered years in which a special election for a Federal office occurs, the principal campaign committee of a candidate for that office may pay him or her a salary from campaign funds starting on the date the special election is set and ending on the day of the special election. See 11 CFR 100.24(a)(1)(ii). During the time period in which a principal campaign committee may pay a salary to a candidate under this paragraph, such payment must be computed on a pro-rata basis. A Federal officeholder, as defined in 11 CFR 100.5(f)(1), must not receive salary payments as a candidate from campaign funds.

(J) A vacation.

(ii) The Commission will determine, on a case-by-case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are personal use. Examples of such other uses include:

(A) Legal expenses;

(B) Meal expenses;

(C) Travel expenses, including subsistence expenses incurred during travel. If a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder-related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign account within thirty days for the amount of the incremental expenses, and

(D) Vehicle expenses, unless they are a de minimis amount. If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a de minimis amount and campaign or officeholder-related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.