UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	No. 1:11 cr 161-1
	)	
JOHNNY REID EDWARDS	)	
	)	
Defendant.	)	
	)	

PROPOSED AMICUS CURIAE BRIEF BY CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

Citizens for Responsibility and Ethics in Washington ("CREW") submits this proposed brief as an *amicus curiae* in support of the position of defendant Johnny Reid Edwards ("John Edwards").

STATEMENT OF INTEREST OF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principle activities, CREW monitors the activities of members of Congress and the executive branch and, where appropriate, files complaints with Congress, the Federal Election Commission ("FEC"), and the U.S. Department of Justice. CREW also prepares written

reports, including a yearly report it disseminates publicly about the most unethical members of Congress.

Among CREW's core beliefs are that no public official is above the law and our nation's laws must be applied equally to all. CREW files its brief as an entity that monitors the legislative and executive branches of law to ensure not only that the people are represented by honest officials working for the public interest, but that the laws governing elected officials and candidates for public office are administered fairly and consistent with congressional intent. Toward that end, CREW files a brief to advance a construction and application of the Federal Election Campaign Act that prevents the United States from improperly and unconstitutionally applying the law to seek a criminal conviction of Mr. Edwards.

FACTUAL BACKGROUND

On June 3, 2011, the United States filed a six-count indictment against John Edwards. *United States of America v. Edwards*, No. 11 CR 161-1 (M.D. N.C.), Indictment ("Indictment"). At the heart of the indictment are payments of over $900,000 Rachel "Bunny" Mellon (identified in the indictment as "Person C") and Fred Baron (identified in the indictment as "Person D") allegedly made to other third parties to cover certain living, medical, and other expenses of Mr. Edwards' mistress, Rielle Hunter (identified in the indictment as "Person B")

primarily while she was pregnant with his child. These payments were not intended for or made to either Mr. Edwards or his campaign committee, nor were they used for campaign activities.[1] Instead, Ms. Mellon made a series of payments to a friend, who forwarded the checks to Edwards campaign aide Andrew Young (identified in the indictment as "Person A"), and those checks eventually were deposited and used to cover Ms. Hunter's "rent, furniture, car, living expenses, medical visits and prenatal care." Indictment, ¶¶ 23-24. Similarly, Mr. Baron made a series of payments to Mr. Young and also paid for the transportation and lodging costs of Ms. Hunter while accompanied, at least some of the time, by Mr. Young and his family. *Id.*, ¶¶ 29-30.

Both Mr. Baron and Ms. Mellon had friendships with Mr. Edwards that pre-dated his 2007-2008 candidacy for president. Both stated publicly or through their attorneys they made these payments as gifts in furtherance of their friendships with Mr. Edwards.[2] The indictment contains no facts that dispute their stated intentions. Instead, the indictment focuses exclusively on Mr. Edwards, claiming he sought these payments to conceal his affair with Ms. Hunter and her pregnancy with his child because he "knew that public

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[1] While the indictment charges Mr. Edwards with unlawfully accepting and receiving these contributions, *see* Indictment at ¶¶ 35, 37, 39, 41, it also describes the transactions as payments flowing from Mr. Baron and Ms. Mellon to other third parties, not to Mr. Edwards or his campaign. *Id.* at ¶¶ 23-24, 29-30.

[2] *See infra* at pp. 7-8.

revelation of the affair and pregnancy would destroy his candidacy . . ." Indictment, ¶ 15.

Count One of the indictment alleges Mr. Edwards engaged in a criminal conspiracy (1) to unlawfully solicit and accept contributions from Ms. Mellon and Mr. Baron in excess of the legal limit on individual contributions while a candidate for president, and (2) to create and file campaign finance reports with the FEC that were false and misleading because they failed to disclose the illegal contributions, in violation of 18 U.S.C. § 371.[3] According to the indictment, Mr. Edwards was motivated by a desire to protect his public image as a family man and to prevent his campaign from diverting resources to respond to criticism and public scrutiny of Mr. Edward's extramarital affair with Ms. Hunter and her resulting pregnancy. *Id.*, ¶¶ 1, 15.

Counts Two and Three allege Mr. Edwards knowingly and willfully accepted and received illegal excessive campaign contributions from Ms. Mellon in 2007 and 2008, in violation of 2 U.S.C. §§ 441a(a)(1)(A), 441a(f), and 437(g)(d)(1)(A)(i), as well as 18 U.S.C. § 2. *Id.*, ¶¶ 34-37. Counts Four and Five allege Mr. Edwards knowingly and willfully accepted and received illegal excessive campaign contributions from Mr. Baron in 2007 and 2008, in violation of 2 U.S.C. §§ 441a(a)(1)(A), 441a(f), and 437g(d)(1)(A)(i), as well as 18 U.S.C. §

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[3] Indictment, ¶¶ 13-33.

2. *Id.*, ¶¶ 38-41. Count Six charges Mr. Edwards with making false statements in violation of 18 U.S.C. § 1001 by knowingly and falsely concealing from the John Edwards for President Committee his receipt of hundreds of thousands of campaign contributions from Ms. Mellon and Mr. Baron, acts that allegedly resulted in the Committee filing false and incomplete campaign finance reports with the FEC. Indictment, ¶¶ 42-43.

Mr. Edwards has now moved to dismiss the indictment for failure to allege a violation of the elections laws and lack of notice as to what the law proscribed.[4]

ARGUMENT

I. THE PAYMENTS MS. MELLON AND MR. BARON MADE TO THIRD PARTIES TO COVER PERSONAL COSTS INCURRED BY MS. HUNTER ARE NOT CAMPAIGN CONTRIBUTIONS WITHIN THE MEANING OF THE FEDERAL ELECTION CAMPAIGN ACT.

A. The Payments Do Not Meet The Statutory Or Regulatory Definition Of A Contribution.

The indictment at issue charges John Edwards with unlawfully soliciting, receiving, and failing to report to the FEC campaign contributions in excess of the maximum amounts authorized by the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("FECA" or the "Act"). Mr. Edwards purportedly was motivated by a desire to maintain his "family man" image –

[4] *See* Motion to Dismiss No. 1. Mr. Edwards also has filed four other motions to dismiss raising issues on which CREW takes no position.

alleged to be the centerpiece of his candidacy for president – notwithstanding his extramarital affair that resulted in the birth of a child.[5] Toward that end, the indictment alleges Mr. Edwards solicited funds from two individuals to hide the affair and pay for the attendant costs of supporting his mistress. The indictment characterizes funds spent for these purposes as "contributions" within the meaning of the FECA.[6]

The FECA defines a "contribution" subject to the Act's reporting requirements and contribution limits as including, *inter alia*,

> any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office . . .

2 U.S.C. § 431(8)(A)(i).[7]

The FECA does not define further the phrase "for the purpose of influencing any election," a phrase the Supreme Court has described as "ambiguous." *See Buckley v. Valeo,* 424 U.S. 1, 77-79 (1976) (per curiam); *Orloski v. Fed. Election Comm'n.*, 795 F.2d 156, 163 (D.C. Cir. 1986). The

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[5] Indictment, ¶ 15.

[6] *See, e.g.*, Indictment, ¶ 14.

[7] Similarly, the Act defines "expenditure" to include: "any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

legislative history is similarly unenlightening,[8] and at most the phrase appears to "encompass[] . . . advocacy of a political result." *Buckley*, 424 U.S. at 79.

The FEC's implementing regulations amplify the meaning of "contribution" by drawing a line between money used for a campaign – which falls within the meaning of "contribution" – and that used for "personal use" – which falls outside the meaning of "contribution." The term "personal use" is defined to include, *inter alia,* "Gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle." 11 C.F.R. § 100.33(a)(6). FEC regulations also clarify third-party payments are considered to be contributions to a candidate or campaign committee, even if not made directly to the candidate or committee, "unless the payment would have been made irrespective of the candidacy." 11 C.F.R. § 113.1(g)(6). *See also* Explanation and Justification for 11 C.F.R. § 113.1(g)(6), 60 Fed. Reg. 7862-01 ("If a third party pays for the candidate's personal expenses, but would not ordinarily have done so if that candidate were not running for office, the third party is effectively making the payment for the purpose of assisting that candidacy.").

Taken as a whole, these provisions focus largely on the intent of the donor in making a particular monetary payment to determine whether that payment

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[8] *Orloski*, 795 F.2d at 163 (citation omitted).

constitutes a "contribution" within the scope of the FECA. Additional objective factors considered by the FEC in assessing whether third-party payments are contributions[9] include "whether receipt of funds for living expenses would free-up other funds of the candidate for campaign purposes . . . [and] whether the candidate would have more time to spend on the campaign instead of pursuing his or her usual employment . . ." MUR 5141 (Moran), Statement of Reasons of Chairman David M. Mason, Vice Chairman Karl J. Sandstrom, Commissioner Danny L. McDonald, Commissioner Bradley A. Smith, Commissioner Scott E. Thomas, and Commissioner Darryl R. Wold (April 17, 2002) ("MUR 5141 Statement of Reasons") (attached as Exhibit A). *See also* Advisory Opinion 1982-64 (Hein); Advisory Opinion 1978-40 (Kogovsek), Advisory Opinion 1976-70 (National Republican Congressional Committee); Advisory Opinion 1976-84 (Schluter).[10] These interpretations by the agency charged with administering the FECA are entitled to "considerable weight" and deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 476 U.S. 837, 843 (1984).

As applied here, the prerequisites for qualifying as a "contribution" have not been met. Most critically, there is no indication the third-party payments

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[9] *See Orloski*, 795 F.2d at 162 (explaining the FEC applies an objective test in determining whether a payment constitutes a "contribution" that considers "the state of mind of the donor" by looking to "underlying circumstances.").

[10] These advisory opinions are attached as Exhibit B).

by Mr. Baron and Ms. Mellon to other third-parties to cover certain personal costs of Ms. Hunter would not have been made but for Mr. Edwards' candidacy for president. None of the other factors considered by the FEC identifies the payments as contributions subject to the FECA.

1. Given Their Pre-Existing Friendships With Mr. Edwards, Both Mr. Baron And Ms. Mellon Would Have Made Payments To Cover Ms. Hunter's Expenses Regardless Of Mr. Edwards' Candidacy.

It is beyond dispute both Ms. Mellon and Mr. Baron had friendships with Mr. Edwards that predate his 2007-2008 candidacy for president. Fred Baron was viewed widely as almost a father-figure to John Edwards, and has been described as "deeply integrated into Edwards' life."[11] The two men shared much in common; like John Edwards, Mr. Baron had earned a personal fortune as a trial attorney. Beyond their personal friendship, Mr. Baron had served as chairman of Mr. Edwards' 2004 campaign finance committee. *Id.* Mr. Baron also had befriended Rielle Hunter, the woman with whom Mr. Edwards was having an affair, while the two worked on Mr. Edwards' campaign. Mr. Baron

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[11] Bryan Curtis, The Mystery Man of the Edwards Affair, *The Daily Beast*, May 20, 2009, available at http://www.thedailybeast.com/articles/2009/05/20/the-mystery-man-of-the-edwards-affair.html.

stated publicly he made a number of payments to third parties to cover some of Ms. Hunter's personal expenses on his own initiative.[12]

Similarly, Ms. Mellon has enjoyed what has been described as "a beautiful friendship" with John Edwards since they first met in 2006.[13] Aside from substantial contributions she made to Mr. Edwards's issues organization and to PACs supporting Mr. Edwards' candidacy for president, Ms. Mellon made a series of payments to Edwards aide Andrew Young that were used to pay both Ms. Hunter's and Mr. Young's personal expenses.[14] Ms. Mellon's attorney has stated publicly she paid both gift and generation-skipping taxes on these payments,[15] actions consonant with their status as gifts. *See* 26 U.S.C. § 2501(a)(4) (gift tax not applicable to transfers of money to a political organization).

All of this evidence points to one unmistakable conclusion: Mr. Baron and Ms. Mellon made a series of third-party payments to private individuals based

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[12] *See* Baron: I Provided Assistance, *News & Observer* (Raleigh), Aug. 8, 2008, available at http://projects.newsobserver.com/under_the_dome/baron_i_provided_assistance.

[13] *See* Lloyd Grove, John Edwards' Sugar Mama, *The Daily Beast*, Jan. 29, 2010, p. 2, available at http://www.thedailybeast.com/articles/2010/01/29/john-edwards-sugar-mama.html. *See also* Meryl Gordon, The Secret-Keeper, *Newsweek*, July 25, 2011, available at http://www.newsweek.com/2011/07/24/bunny-mellon-the-secret-keeper.html (quoting Ms. Mellon as saying about John Edwards "'He and I were great friends.'").

[14] Gordon, *Newsweek*, July 25, 2011, pp. 5-6.

[15] Laura Saunders, Surprising Tax Lessons From John Edwards's Indictment, *The Wall Street Journal*, July 9, 2011 (attached as Exhibit C).

on their pre-existing friendships with Mr. Edwards and completely independent of his candidacy for president. The payments were used for non-campaign related expenses, specifically the personal living expenses of Rielle Hunter, as well as Andrew Young and his family when they accompanied her, that would have been incurred irrespective of Mr. Edwards' candidacy. Moreover, the payments continued *after* Mr. Edwards ended his campaign in January 2008, reinforcing the conclusion they were made in furtherance of Mr. Baron's and Ms. Mellon's friendships with Mr. Edwards. With none of the hallmarks of campaign contributions, these third-party payments are properly considered to be personal gifts outside the scope of the FECA.

Ignoring this evidence, the government apparently has anchored its indictment to a recent FEC advisory opinion, Advisory Opinion 2000-08 (Harvey) ("Harvey AO") (attached as Exhibit D), where the FEC concluded a third-party's proposed personal gift to a candidate would have constituted a contribution. Unlike here, the proposed donor was "neither a personal friend nor a relative" of the candidate and had never before made a financial contribution to the candidate. Harvey AO at 1. Instead, the would-be-donor sought to make a $10,000 payment expressly "in recognition and support of that person's desire to run for office." *Id.* at 3. Because the proposed gift was tied to the candidate's decision to seek federal office and was motivated by a desire to "reward the

candidate for his decision to run," *id.*, it would not have been given but for the candidate's candidacy. Accordingly, the proposed gift met the FECA's definition of a contribution.

Here, by contrast, both Mr. Baron and Ms. Mellon had friendships with Mr. Edwards that predated and were independent of his 2008 candidacy for president. Contrary to the facts in the Harvey AO, both made their gifts in furtherance of those friendships, and their payments continued after Mr. Edwards ended his candidacy for president. Moreover, they made the payments to third-parties, not the candidate or his campaign, to cover certain costs and living expenses of another third party, Rielle Hunter. As such, this case presents facts critically different than those at issue in the Harvey AO.

Further, by law only those individuals "involved in the specific transaction or activity" at issue in a particular advisory opinion or "involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity" in a particular advisory opinion are entitled to rely on that opinion. 2 U.S.C. § 437f(c). Given the critical factual distinctions between the payments Mr. Baron and Ms. Mellon made and the payment Mr. Harvey sought to make, the Harvey AO has absolutely no legal bearing on Mr.

Edwards' situation, and therefore the government cannot rely on it to support its indictment.[16]

Not only do the facts underlying the Edwards indictment bear no similarity to the Harvey AO, but they closely resemble those in an FEC enforcement action where the FEC concluded unanimously a payment by a friend to a candidate did not constitute a contribution. *See* MUR 5141 (Moran). There, Terry Lierman made a loan to Rep. James P. Moran, a friend of over 25 years, to help Rep. Moran pay his divorce attorney. MUR 5141 Statement of Reasons. The FEC concluded the payment was not a campaign contribution because it "was not made for use in connection with the candidate's campaign." *Id.* at 3. Critically, the personal friendship between the two demonstrated Mr. Lierman would have made the payment irrespective of Rep. Moran's candidacy. *Id.* at 4.[17] Here, too, the personal friendships both Mr. Baron and Ms. Mellon had with Mr. Edwards demonstrate their payments to other third parties would have been made irrespective of Mr. Edwards' candidacy.

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[16] For these same reasons, as discussed *supra*, the government cannot claim the Harvey AO provided Mr. Edwards with fair notice his conduct violated the law.

[17] Unlike FEC advisory opinions, FEC enforcement actions have broad precedential effect that is not limited to cases presenting materially indistinguishable facts. *See, e.g.*, Pre-MUR 395 (College Republican National Committee), Statement of Reasons of Chairman David M. Mason, Commissioner Darryl R. Wold, and Commissioner Bradley A. Smith (referring to prior FEC opinions as "Commission precedent") (attached as Exhibit E).

2. *Any Incidental Benefit Mr. Edwards Received Cannot Support A Criminal Indictment.*

All objective evidence points to the conclusion neither Mr. Baron nor Ms. Mellon made payments to third parties to influence the presidential election. Nevertheless, the government has proceeded with an indictment that appears to rest on an incidental benefit Mr. Edwards may have received from these payments, regardless of the intent of the donors. Specifically, the indictment claims Mr. Edwards sought to secure payments from Mr. Baron and Ms. Mellon to cover expenses incurred by Ms. Hunter in an effort to keep Mr. Edwards' affair secret from the public. This, in turn, would keep intact his image as a "family man" – an image the indictment suggests was critical to his electoral prospects.

But even if Mr. Edwards did seek to secure funds from Mr. Baron and Ms. Mellon to cover the personal costs of his mistress, his most likely motivation was preventing his cancer-stricken and dying wife and his family from learning of his affair. Mr. Edwards certainly would not be the first individual to spend significant sums of money to keep his affair hidden from his wife and children.[18]

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[18] *See, e.g.*, Alice Gomstyn, Can You Afford a Sexual Affair?, *ABC News*, July 10, 2008, *available at* http://abcnews.go.com/Business/PersonalFinance/story?id=5334891&page=1. Studies confirm married people who have affairs conceal their infidelity from their spouses, irrespective of their status as a candidate for federal office. *See, e.g.*, Tom W. Smith, *American Sexual Behavior: Trends, Socio-Demographic Differences and Risk Behavior*, National Opinion Research Center General Social Survey Topical Report No. 25, Version 6.0 8 6FFBF288E183/0/AmericanSexualBehavior2006.pdf.

Reinforcing this conclusion is the fact the payments continued after Mr. Edwards had abandoned his presidential campaign, when his only motivation would have been concealing his affair from his wife and family. Moreover, given Mr. Edwards' personal wealth, he easily could have afforded to pay Ms. Hunter's expenses himself.[19] But doing so likely would have revealed the existence of his affair to his wife, an outcome he clearly sought to avoid by instead allowing friends to pay Ms. Hunter's expenses.

At bottom, the indictment proceeds on a theory that ignores the most logical explanation for Mr. Edwards' behavior and rests on a subsidiary effect resulting indirectly from the actions of third-party donors. The government's illogical speculations about Mr. Edwards' motives cannot substitute for the direct evidence of a donor's intent to influence an election the FECA requires before criminal liability will lie under the Act.

Indeed, taken to its logical conclusion, the government's near boundless theory of criminal liability would sweep in anything of value given directly or indirectly to a candidate for federal office during his or her candidacy. For example, under the government's novel theory, had Mr. Baron chosen to provide

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[19] Had he done so, however, under the government's theory of liability such payments still would be treated as campaign contributions. This is just one of the absurd results flowing from a theory that ties criminal liability to any benefit the campaign may receive, no matter how unintended or remote. *See infra* at 15-16.

funds for a sick campaign aide, this too could be viewed as a campaign contribution, simply because restoring the aide's health incidentally would benefit the campaign. Resting on the mere possibility a campaign ultimately could benefit from a chain of events set off by a monetary payment, no matter how indirectly and regardless of the donor's intent, the government's theory does not even approach the statutory definition of "contribution."

3. The Payments By Mr. Baron And Ms. Mellon Neither Freed Up Mr. Edwards' Time Nor His Money For Campaign Purposes.

In evaluating whether third-party monetary payments constitute campaign contributions, the FEC has looked to whether the payments substitute for income and accordingly free up the candidate from regular employment. If so, they constitute a "contribution" subject to the FECA. *See, e.g.,* Advisory Opinion 1982-64 (Hein), MUR 5141 (Moran) (describing this factor as generally used only when an employer continues paying an employee while the employee is running for office). This factor has no bearing here, as Mr. Edwards – a very wealthy individual in his own right – was not employed during the course of his presidential campaign. As a result, he received no economic benefit from the payments Mr. Baron and Ms. Mellon made for Ms. Hunter's expenses that afforded him more time to spend on his campaign.

Nor did the payments by Mr. Baron and Ms. Mellon free up other funds for campaign purposes. Even if Mr. Edwards had received an incidental economic benefit from these payments – which were used for non-campaign related personal expenses of Ms. Hunter he might otherwise have covered (although he had no legal obligation to do so) – the payments had no effect on his campaign funding as Mr. Edwards did not contribute any of his personal funds to his campaign committee during his 2007-2008 candidacy. *See* FEC Form 2, Statement of Candidacy, John Edwards, Jan. 2, 2007 (attached as Exhibit F). Further, at the time Ms. Mellon and Mr. Baron are alleged to have made their first payments for Ms. Hunter's expenses (June 2007 and December 2007 respectively),[20] both already had contributed the maximum allowed under law to Mr. Edwards' campaign.[21] Accordingly, had neither Mr. Baron nor Ms. Mellon made any of the payments for Ms. Hunter's expenses, the campaign still would not have had any additional funds for campaign purposes.

The limits the FECA places on the use of campaign funds for personal expenses reinforce this conclusion. *See* 2 U.S.C. § 439a(b)(1); 11 C.F.R. §

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[20] *See* Indictment, ¶¶ 23, 29.

[21] *See* John Edwards for President, FEC Form 3P, April Quarterly 2007, April 15, 2007 (revealing both Ms. Mellon and Mr. Baron had reached the limit on permissible donations to Mr. Edwards' presidential campaign by March 2007); John Edwards for President, FEC Form 3P, April Monthly 2008, April 20, 2008 (revealing both Mr. Baron and Ms. Mellon were each reimbursed $2,300 by Mr. Edwards' campaign in March 2008) (all attached as Exhibit G).

113.2(e). For example, Mr. Edwards could not have used campaign funds to pay for the cost of any mortgage, rent, or utilities incurred by his mistress, as these are all expenses she would have incurred exclusive of the campaign.[22] As a result, any third-party payments by Mr. Baron to cover the travel and living expenses of Ms. Hunter, Mr. Young, or Mr. Young's family,[23] or by Ms. Mellon to cover Ms. Hunter's rent, furniture, car, living expenses, medical visits and prenatal care[24] did not eliminate expenses the campaign otherwise would have borne. *See, e.g.,* 11 C.F.R. § 113.1(g)(1)(i)(A). Accordingly, the payments Mr. Baron and Ms. Mellon are alleged to have made to cover such costs are not expenses that otherwise could have been paid by campaign funds. Nor could Mr. Edwards have used any campaign funds to provide a vacation for Ms. Hunter. 11 C.F.R. § 113.1(g)(1)(i)(J). Similarly, any payments Mr. Baron is alleged to have made for Ms. Hunter and others to stay in luxury hotels in three separate locations during the cold winter months[25] did not relieve the campaign from expenses it otherwise would have incurred. Because the payments provided by

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[22] *See* 11 C.F.R. § 113.1(g)(1)(i)(E).

[23] *See* Indictment, ¶ 29.

[24] *Id.* at ¶ 24.

[25] Indictment, ¶ 29.

Mr. Baron and Ms. Mellon were used to cover Ms. Hunter's personal expenses, they do not qualify as contributions under the FECA.

4. The Government's Interpretation Of What Constitutes A Contribution Under The FECA Would Lead To Absurd Results.

Beyond lacking any support in law or regulation, the government's interpretation of what constitutes a "contribution" would lead to absurd results. As set forth in the indictment, Mr. Edwards' criminal liability springs from his "family man" image; this is the lynchpin for treating the third-party payments by Mr. Baron and Ms. Mellon as contributions under the FECA. Consequently, had Mr. Edward been a known philanderer, like presidential candidates before him, any payments by his friends to support his mistress would not have been characterized as "contributions."

The bizarre consequences of the government's interpretation of what constitutes a "contribution" do not end there. Under the government's logic, third-party payments for outstanding child care allegedly owed by a candidate who portrays himself as strong on "family issues," as well as payments by the candidate himself, would be characterized as campaign contributions made to maintain the candidate's family values image.[26] Similarly, payments to or by a

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[26] This is far from a hypothetical situation. *See Family Issues*, Joe Walsh for Congress (July 28, 2011), http://walshforcongress.com/issues/family-issues ("The core unit which determines the strength of any society is the family; therefore the government should foster and

candidate to pay off any personal debts where the candidate makes personal fiscal responsibility a key part of his campaign would be treated as contributions under the government's theory of liability.

The Government's interpretation also would allow candidates to use campaign funds for a variety of personal expenses now barred by 2 U.S.C. § 439a(b). If funds used for the expenses of a candidate's mistress are intended to influence the outcome of an election (and therefore campaign-related), then the Edwards campaign legitimately could have – and perhaps should have – paid such costs. Under this construction, candidates would be free to spend their campaign funds on a host of other personal expenses, such as health club dues and clothing purchases, that currently fall within the ban on converting campaign funds for personal use. As these examples illustrate, the government's interpretation defies logic, reason, and governing law.

5. The Government's Interpretation Of What Constitutes A Contribution Under The FECA Rests Impermissibly On Character, Not Conduct.

Resting as it does on Mr. Edwards' "family man" image, the indictment at issue seeks to criminalize character, not conduct. But it is an "underlying premise of our criminal justice system" that a defendant "must be tried for what

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protect its integrity."); Abdon M. Pallasch, Tea Party Rep. Joe Walsh Sued for $100,000 in Child Support, *Chicago Sun-Times*, July 27, 2011, *available at* http://www.suntimes.com/6720892-417/tea-party-rep.-joe-walsh-sued-for-100000-in-child-support.

he did, not for who he is." *United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993) (citation omitted).

Following this principle, the Supreme Court struck down as inflicting cruel and unusual punishment a state statute that made it a misdemeanor for a person "to be addicted to the use of narcotics." *Robinson v. California*, 379 U.S. 660, 662 (1962). As the Court explained, the statute did not punish a person for using narcotics, but rather made "the '*status*' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'" *Id.* at 666 (emphasis added). Relatedly, the Court also struck down on vagueness grounds certain vagrancy ordinances that afforded police unbounded discretion. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Their effect was to require "poor people, nonconformists, dissenters, idlers . . . to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts." *Id.* at 170.

Here, too, the government is pursuing a theory of liability that flows from Mr. Edwards' status. Because he did not comport himself in a manner consistent with that of a "family man" – or, stated differently, consistent with public perceptions of how a presidential candidate should act – Mr. Edwards now faces criminal prosecution. But however odious or flawed Mr. Edwards' character may be, it cannot form the foundation for criminal liability.

II. THE GOVERNMENT'S PROSECUTION OF MR. EDWARDS USING A NOVEL AND INDEFENSIBLE CONSTRUCTION OF THE LAW VIOLATES CONSTITUTIONAL PRINCIPLES.

Even if the payments Mr. Edwards allegedly solicited and received qualify as contributions under the FECA, constitutional considerations compel dismissal of the indictment at issue. The government's theory of criminal liability rests on a novel and indefensible construction of the FECA that contravenes the statute as written, as applied by the courts, and as interpreted by the FEC. Accordingly, because Mr. Edwards lacked any notice his conduct fell within the FECA's scope, the Court must dismiss the indictment to protect his due process right of fair warning.

Embodied within the Due Process Clause of the Constitution[27] is the fundamental principle of American criminal law that people have a right to fair warning of what conduct will give rise to criminal penalties. *Marks v. United States*, 430 U.S. 188, 191 (1977). In this way, they can conduct themselves in ways to avoid actions the law prohibits. *See Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam).

To assess fair warning, courts look to whether the statute, either standing alone or as construed by the courts, made it reasonably clear at the relevant time

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[27] That clause guarantees no person will "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, cl. 3.

the defendant's conduct violated the law. *United States v. Lanier*, 520 U.S. 259, 267 (1997). Deprivation of the right of fair warning can result from vague statutes that cause people of common intelligence to guess at the law's meaning and differ on the law's application,[28] as well as from the "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. When courts give retroactive effect to "unexpected and indefensible" judicial constructions of criminal statutes, they violate the due process rights of defendants. *Id.* at 354 (by unexpectedly broadening a trespass statute the court violated the defendant's right of fair notice).[29] On the other hand, a court's previous application of a particular statute to one set of facts, even if that court is in another jurisdiction, can foreclose lack-of-fair-warning challenges to subsequent prosecution of factually identical conduct. *Rose v. Locke*, 423 U.S. at 53.[30]

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[28] *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964); *Lanier*, 520 U.S. at 267.

[29] *Cf. Rogers v. Tennessee*, 532 U.S. 451, 466 (2001) (a court's decision to abolish the common law "year and a day rule" was not "unexpected and indefensible" because the rule was viewed widely as outdated).

[30] *See also United States v. Rainey*, No. 90-4494, slip op. at 1 (4th Cir. Jan. 31, 1999) (per curiam (where circuits are split on the proper construction of a statute, there is notice of possible Supreme Court review resulting in a foreseeable change in law).

A. Neither FECA Itself, Any FEC Enforcement Actions, Nor Any Prior Judicial Decisions Interpreting The FECA Provided Notice Mr. Edwards' Conduct Fell Within The Scope Of The Statute.

As discussed *supra*, the FECA is a precise statute that, on its face and as construed by the courts, did not provide Mr. Edwards notice his conduct was criminal. Statutes like this one "lull potential defendants into a false sense of security, giving [them] no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." *Bouie*, 378 U.S. at 352. Under this component of the fair warning requirement, courts may not apply a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *See Lanier*, 520 U.S. at 266; *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (holding due process clause and the lack of decisional law treating a traffic citation as an arrest precluded the court from treating the defendant's traffic citation as an arrest).

The question here is whether the government constitutionally can broaden the meaning of "contribution" to prosecute Mr. Edwards for receiving and failing to report payments that were made by two personal friends to his mistress to cover certain of her personal expenses. The answer unmistakably is no. The FECA defines "contribution" as money paid to influence an election, a definition not availing here. *See supra* at 5. Not only does the FECA not include within

its definition of "contribution" third-party payments made to other third parties to cover the expenses of a candidate's mistress and child, it makes clear such payments cannot legally be made with campaign funds. As discussed, the FECA, 2 U.S.C. § 439a(b), expressly prohibits a candidate from converting campaign funds to personal use for the payment of rent, mortgage, vacations, other non-campaign-related trips, or household expenses. Because no aspect of the statute even suggests the conduct at issue is within its scope, Mr. Edwards had no fair notice acceptance of and his failure to report the third-party payments at issue would violate the law.

Judicial interpretations of the FECA likewise provided Mr. Edwards no notice his conduct fell within the scope of the statute. While there are myriad decisions addressing the FECA, none is on point and, accordingly, none provided Mr. Edwards with the requisite notice. No court in the Middle District of North Carolina – nor any other court in the United States – has ever applied the FECA to identical, or even remotely similar, conduct so as to provide Mr. Edwards with fair notice. Nor is there a common law practice that should have put Mr. Edwards on notice his conduct was contrary to law.

There is not even any administrative action that would provided Mr. Edwards with notice the payments at issue constitute "contributions" within the scope of the statute. To the contrary, the existing FEC interpretations compel

the conclusion such payments fall outside the FECA's scope and therefore Mr. Edwards violated no law. As discussed, there is at least one FEC enforcement action concluding payments by a friend to help pay for the candidate's divorce lawyer were not contributions as they were not made in connection with the campaign. *See* MUR 5141 Statement of Reasons.

In the complete absence of any statutory language, administrative actions, or case law even suggesting the payments at issue constitute "contributions," Mr. Edwards lacked fair notice the receipt of these payments by third parties fell within the scope of the FECA.

CONCLUSION

For the foregoing reasons, the Court should dismiss the indictment against Johnny Reid Edwards.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2011, I electronically filed the foregoing Proposed Amicus Curiae Brief by Citizens For Responsibility and Ethics in Washington with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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