UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL ELECTION COMMISSION,	)	
	)	
Plaintiff,	)	
	)	**Civil Case No. 1:12-CV-00958**
v.	)	
	)	
CRAIG FOR U.S. SENATE, *et. al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY TO COMMISSION'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

On June 11th, 2007, Senator Larry Craig traveled from his home state of Idaho to attend a session of the United States Congress in Washington, D.C. Senator Craig subsequently retained counsel to defend himself in a legal matter that arose during, and *in connection with*, that travel. Like other members of Congress who have previously used campaign funds to pay for similar expenses, Senator Craig's legal matter did not itself strictly concern an official duty, but was nonetheless "in connection with his duties as a holder of Federal office"; in Senator Craig's case, his obligation to attend a session of Congress. *See* 2 U.S.C. § 439a(a)(2); *see* FEC Advisory Opinions ("AOs") 2006-35 (Kolbe), 2005-11 (Cunningham), 2000-40 (McDermott), and 1997-27 (Boehner).[1]

Senator Craig's expenditures are indistinguishable in all material aspects from the expenditures previously sanctioned by those four advisory opinions (most directly in Kolbe). Accordingly, the Defendants did not convert any funds to "personal use" and the

1 The Court may locate these opinions, and related documents in the advisory opinion record, at: http://saos.nictusa.com/saos/searchao.

mere existence of those opinions provides a "safe harbor" which Defendants have relied upon in good faith. *See* 2 U.S.C. §§ 437f(c), 439a.

In contrast to Defendants' cogent rationale, supported by over fifteen years of reasoned agency decision-making, Plaintiff Federal Election Commission ("FEC" or "Commission") seeks to re-interpret the: (1) applicable statute and regulations, (2) controlling advisory opinions, and (3) proceedings before the Senate Ethics Committee – all while demanding deference to its *post hoc* rationalizations for changing settled law.

For three reasons, this Court should grant Defendants' Motion to Dismiss [Dkt. # 3] ("Defs.' Mot'n"). First, the statute is clear and unambiguous. Section 439a(a)(2) does not mandate that the underlying legal matter itself represents an official duty, but, more expansively, requires that the matter arise "*in connection with*" official duties. (Emphasis added). Second, even if the statute were unclear, the Commission, in its advisory opinions, has consistently interpreted § 439a in accord with Defendants' position. *See* AOs 2006-35, 2005-11, 2000-40, & 1997-27. Finally, even if the Court finds that the legal interpretation advanced in these advisory opinions is unreasonable, those opinions nonetheless bar Commission enforcement action and provide a safe haven upon which Defendants may rely. *See* 2 U.S.C. § 437f(c).

II. AS A FEDERAL OFFICEHOLDER, SENATOR CRAIG WAS OBLIGATED TO TRAVEL TO WASHINGTON, D.C. FOR A SESSION OF CONGRESS

The Commission's brief expansively addresses whether Senator Craig's trip was constitutionally required, if he was immune from arrest, and whether Defendants' constitutional nomenclature is correct. *See* FEC Memorandum in Opposition [Dkt. # 5] ("Mem. in Opp'n") at 15-18. The Commission's exegesis on these subjects obscures Defendants' sole, unremarkable claim: that at the time of his arrest Senator Craig was

engaged in official, Senate-sponsored travel.[2] *See* Memorandum in Support of Motion to Dismiss [Dkt. # 3-1] ("Defs.' Mem.") at 4 & n.3 (*citing* Report of the Secretary of the Senate, S. Doc. No. 110-11 at B-826 (Nov. 13, 2007)); *see also*, S. Pub. 108-1 (2003) ("Senate Ethics Manual") 119 ("The term 'official travel' refers to travel paid for with official Senate funds.").

As to the applicability of the "Qualifications Clause" and "Immunity from Arrest Clause" (or, as the FEC prefers, the immunity portion of the "Speech or Debate Clause"), their actual application to this matter is irrelevant. What pertains here is that a Senator's interaction with law enforcement while traveling engenders constitutional implications "in connection with" his or her office.

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. § 493a(a)(2). That he was engaged in official travel pursuant to his official duties at the time of the arrest is, simply put, beyond dispute.[3]

III. THE SENATE ETHICS PROCEEDING REINFORCES DEFENDANTS' ASSERTION THAT THIS MATTER RELATES TO OFFICIAL DUTIES

The Commission invests significant import in Senator Craig's interaction with the Senate Ethics Committee without acknowledging the Committee's conclusion that his conduct reflected on his office. According to the Commission, this counsel's 2007 statement to the Ethics Committee on Senator Craig's behalf that his arrest implicated

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2 Defendants do not presume that the Commission is asserting that Senators should *not* expect recognition of the official nature of their travel to and from their home states.

3 The Commission is not entitled to deference on the official duties of a member of Congress under § 439a(a)(2). *See United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (providing deference only when "plausible case" can be made that Congress delegated such authority) (*quoting* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 872 (2001)). That question is certainly left to Congress itself.

"purely personal conduct" is a fatal concession. Mem. in Opp'n. at 3-4, 11-12.

As a threshold issue, Defendants stress that they do *not* claim that using a restroom while traveling is strictly "official" conduct. The Commission's discussion of the Senate Ethics Committee proceeding, however, reinforces Defendants' conclusion that Senator Craig's arrest and subsequent litigation directly implicated his federal office.

In this context, Senator Craig's so-called confession to the Ethics Committee must be viewed for what it was: an assertion that the Committee lacked actual and practical jurisdiction to sanction his conduct.[4] Of course, in issuing the letter cited by the Commission, Mem. in Opp'n. at 4, the Ethics Committee nonetheless asserted jurisdiction. The simple fact that Senator Craig's arrest and subsequent defense triggered proceedings with the Senate establishes Defendants' argument that Senator Craig's legal fees were "in connection" with his official duties. Indeed, by asserting jurisdiction the Committee determined that his conduct "reflect[ed] upon the United States Senate." Letter from Sen. Barbara Boxer, Chair, S. Ethics Comm., *et al.*, to Sen. Larry E. Craig at 1 (Feb. 13, 2008) ("Ethics Letter") *available at* http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=ed41d9ea-3e36-4d89-9fac-8caba610d07a).

Further, the Commission relies on the Ethics Committee's ambiguous assertion that "some portions" of Senator Craig's legal expenses "may not be deemed to have been

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4 "The Senate Select Committee on Ethics is authorized to receive and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct and violations of rules and regulations of the Senate; recommend disciplinary action; recommend additional Senate rules or regulations to insure proper standards of conduct; and report violations of law to the proper federal and state authorities." S. Res. 338, 88th Cong. (1964) (enacted), *amending* Senate Standing Rule XXV.

incurred in connection with you official duties." Mem. in Opp'n at 4 (*quoting* Ethics Letter). However, the FEC elides the letter's next sentence which expressly declines to "reach[] the issue of what portion of [Senator Craig's] legal expenses in this matter may be payable with funds of your principal campaign committee." *Id.* Of course, this question is the crux of the Commission's complaint against Defendants.

Finally, the Commission asserts that Senator Craig failed to comply with Senate Rule 38.2, requiring Ethics Committee approval for the use of campaign funds for legal expenses. Compl. ¶ 23 & Mem. in Opp'n at 3-4. This claim is not only irrelevant to an analysis under § 439a but also misapprehends Senate rules. The purported "requirement" is, in fact, not contained in Senate Rule 38.2. *See* Senate Ethics Manual 324. Rather it is precatory language included by the Manual's drafters, unsupported by either Senate rule or precedent. *See* Senate Ethics Manual 116. It has no more force than other staff-generated guidance and, certainly, would not trump federal law on this question.

In sum, the FEC cannot wrest a confession from Defendants out of the politicized and legally irrelevant Senate matter relating to Senator Craig. The Ethics Committee made no legal determination regarding the applicability of § 439a to this matter and its assertion of jurisdiction actually bolsters Defendants' argument relating to the statute.

IV. THE KOLBE ADVISORY OPINION EXPRESSLY PERMITS THE EXPENDITURES IN THIS MATTER AND PROVIDES DEFENDANTS WITH A "SAFE HARBOR" FROM SANCTION

As Defendants set forth in their opening brief, Defs.' Mem. at 6-10, they are entitled to rely on – and to receive immunity from sanction based upon – a Commission advisory opinion that governs materially indistinguishable activity. *See* 2 U.S.C. § 437f(c)(1)(B) & *id.* § 437f(c)(2) ("[Persons] act[ing] in good faith in accordance with the

provisions and findings of such advisory opinion shall not . . . be subject to any sanction . . . .”). The Commission maintains that Defendants’ reliance on the advisory opinions cited in the Complaint, most critically Kolbe, is misplaced. Mem. in Opp’n at 18-21. Yet, the Commission subjects Kolbe to a tortured interpretation unsupported by either that opinion’s content or the record on which the Commission decided that matter.

Defendants’ rely upon Kolbe’s holding that “payments of legal fees to respond to the Justice Department inquiry into the trip were ‘ordinary and necessary expenses incurred in connection with [Kolbe’s] duty as a House member.’” Defs.’ Mem. at 8. Defendants maintain that just as Senator Craig’s arrest while on official travel was not strictly job-related, neither was Rep. Kolbe’s alleged improper contact with former pages while in the Grand Canyon. Yet, in Kolbe the Commission sanctioned the use of privately-raised campaign funds to respond to the criminal investigation into those allegations, while here it seeks to bar the use of such funds.

Extraordinarily, the Commission offers a reading wholly different from Defendant’ view, alleging that in Kolbe “the Commission expressly stated that a Member of Congress may *not* use campaign funds to respond to a criminal investigation into the Member’s personal conduct, even where that conduct occurred on a Congressionally-sponsored trip.” Mem. in Opp’n at 1; *see also id.* at 19. Simply stated, the Commission misstates Kolbe’s plain language and holding, basing its position on a series of assertions that advocate rewriting Kolbe’s legal conclusions and underlying facts.

1. When It Authorized the Expenditures in Kolbe, the Commission Recognized that the Criminal Investigation Involved Allegations of Improper Contact with Former House Pages.

First, the Commission indicates that the "precise nature" of the investigation was "unknown" when it approved the use of campaign funds to defend against the inquiry. Mem. in Opp'n at 20.[5] As the attached correspondence demonstrates, this is patently false. On November 17, 2006, the Commission wrote to the Kolbe for Congress committee asking for "further detail regarding the activities that are the subject of the [Justice Department] inquiry." *See* Letter from Rosemary C. Smith, Assoc. Gen. Counsel, FEC, to Katherine McCarron, WilmerHale (Nov. 17, 2006) *in* Request by Kolbe for Congress, AO 2006-35 (Kolbe) at 30-31 (attached hereto as Exhibit A) ("Request Documents"). In the letter, the Commission requested a description of the "precise nature" of the investigation and how it related to Rep. Kolbe's official duties:

> Please either confirm that the Department of Justice's preliminary inquiry concerns a 1996 trip to the Grand Canyon *involving Representative Kolbe and two former Pages* (among others) or, in the alternative, describe the preliminary inquiry by the Department of Justice *as it pertains to Representative Kolbe's duties as an officeholder*.

Id. at 31 (emphasis added). The Kolbe for Congress treasurer subsequently confirmed that, "The specific details of the Justice Department's preliminary inquiry are largely confidential. *However, it concerns, among other things, the 1996 rafting trip to the*

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5 In lieu of alleged contact with former pages on the rafting trip, the FEC's brief does not provide other "official" conduct by Rep. Kolbe subject to the Justice Department inquiry. Under the reasoning that it now proffers, the Commission ostensibly sanctioned Rep. Kolbe's use of campaign funds for his "official" criminal defense without knowledge of what trip-related activity was subject to scrutiny. In other words, the Commission now maintains that the opinion simply restates the law without actually applying the personal use statute to Rep. Kolbe's specific factual situation.

Grand Canyon that has been mentioned in the media." Letter from William H. Kelley, Treasurer, Kolbe for Congress, to J. Duane Pugh, Acting Ass't Gen. Counsel, FEC (Nov. 27, 2006) *in* Request Documents at 32-33 (emphasis added).

Contrary to the FEC's assertion, but as reflected in the Kolbe opinion record, the media also identified the focus of the inquiry. While the Commission cites an October 17, 2006, *New York Times* article to establish its purported ignorance at the time it issued the opinion, Mem. in Opp'n at 20, it omits a second article also in its record. Just one week later, the *Times* dispelled any shred of ambiguity: "In the last month, the Justice Department has moved forward on inquiries involving two House Republicans: Reps. Mark Foley of Florida and *Jim Kolbe of Arizona, both being investigated for possible improper or illegal sexual contact with teenage congressional pages*." *U.S. Prosecutors Targeting GOP Lawmakers*, N.Y. Times, Oct. 24, 2006 at 2, in Request Documents at 21 (emphasis added). *See also* Jonathan Weisman & James V. Grimaldi, *Kolbe Matter is Referred to Ethics Panel*, Washington Post, Oct. 18, 2006 at 2 *in* Request Documents at 18 (noting Justice Department investigation of "allegations [that] involve Kolbe's behavior toward one of the former pages"). To be clear, these newspaper articles, and many other similar reports, were *part of the official record* on which the Commission decided the Kolbe advisory opinion.

In light of the above, and contrary to its assertion here, when the Commission approved Rep. Kolbe's use of committee funds it was cognizant that the Justice Department was investigating Rep. Kolbe's possible illegal sexual contact with former congressional pages – *i.e., private citizens* – during his "official" trip to the Grand Canyon. No other explanation comports with the official record or language of the

opinion published by the Commission. Indeed, Commission Chairperson Cynthia L. Bauerly, agreed with Defendants' description of Kolbe's focus:

> While I agree with you that the paragraphs you cited focus on the fact that this was an official trip, the facts that were presented to the Commission are all part of the Advisory Opinion and it is very clear what the Department was looking at was this interaction -- certainly interactions between Mr. Kolbe and other members and pages and former pages and obviously pages work for the House of Representative and their interaction is covered by the code of conduct.

Prob. Cause Tr. [Dkt. # 5-2] at 31:18-32:5 (attached to Mem. in Opp'n).

2. The "Critical" Limiting Language Cited by the Commission is Boilerplate that Affects Only Allegations Unknown to the Commission When It Published the Kolbe Advisory Opinion.

The Commission next cites to "critical" language in Kolbe addressing the use of campaign funds for "other allegations . . . that do not concern the candidate's campaign activities or duties as a Federal officeholder." Mem. in Opp'n at 20. This language is not "critical"; it is merely Commission boilerplate that serves as *dicta* to the opinion.

First, because the record reflects that the Commission was aware of the Justice Department's focus when it published Kolbe the Commission cannot now plausibly claim that Rep. Kolbe's alleged contact with pages constituted "other allegations" not included in the opinion's analysis. To the contrary, as confirmed by both Rep. Kolbe's campaign treasurer and numerous media reports, that conduct was the *only* trip-related allegation under criminal investigation at the time. A reading of the paragraph that authorizes expenditures for the trip-related investigation but excludes coverage of the page-related allegations renders the preceding analysis in Kolbe moot and nonsensical.

Moreover, the limiting paragraph is boilerplate language that the FEC has used

previously when assessing requests relating to an official inquiry into criminal conduct. *See, e.g.*, AO 2005-11 (Cunningham) at 4 ("Because the details of the grand jury investigation are not public at this time, however, it is possible that portions of the investigation could involve allegations not related to . . . Rep. Cunningham's duties as a Federal officeholder. The use of campaign funds to pay for . . . [legal expenses] not related to his . . . duties as a Federal officeholder would constitute an impermissible personal use.") (*citing* AO 2003-17 & AO 1993-15 (determining that counts within an indictment could be severed, depending upon which ones related to campaign activity)).

In sum, Defendants' reliance on Kolbe for "safe harbor" from sanction comports with the clear holding of the opinion: a member of Congress is permitted to use campaign funds to pay for legal expenses relating to a defense of alleged criminal activity that takes place while on official travel. *See* AO 2006-35 at 4 ("Representative Kolbe's legal expenses in responding to this Department of Justice inquiry regarding the rafting trip are ordinary and necessary expenses incurred in connection with his duty as a House member and would not exist irrespective of his duties as a Federal officeholder.").

The Commission can neither rewrite its holding on the fly nor remake the facts on which it relied. In its conclusion, the FEC asserts that: "In no advisory opinion did a requester claim, as defendants do here, that the legal expenses incurred arose from concededly personal conduct unrelated to officeholder duties, but which happened to occur while on an official trip." Mem. in Opp'n at 22-23. But, of course, that is the claim made by Rep. Kolbe's committee and approved by the Commission's advisory opinion. Pursuant to § 437f(c), Defendants are authorized to rely on that holding and as such, this Court should dismiss this matter. *See* Fed. R. Civ. P. 12(b)(6).

V. SECTION 439a PERMITS DEFENDANTS' CAMPAIGN EXPENDITURES FOR LEGAL FEES

The personal use statute's safe harbor provision permits the expenditures at issue, 2 U.S.C. § 439a(a)(2). Similarly, the statute's prohibition section does not reach the expenditures at issue, 2 U.S.C. § 439(b)(2).

Chevron deference to the Commission's interpretation of either provision is unnecessary: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *see, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (refusing to defer to agency interpretation of a statute because agency "is clearly wrong").

Additionally, under the Commissions' own interpretation, the expenditures at issue here are both permissible under § 439a(a)(2) and excluded from prohibition under § 439a(b)(2). Subject to important exceptions, *see* Part VI, *infra*, the Commission is afforded deference to its interpretations of § 439a. *See FEC v. Dem. Sen. Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*")). This Court should uphold the interpretation of § 439a as stated in Commission regulations, *see Fulani v. FEC*, 147 F.3d 924, 926 (D.C. Cir. 1998), advisory opinions, *see FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185-87 (D.C. Cir. 2001), and dismissals of enforcement actions, *see In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000).[6]

6 While this Court need not defer to those Commission interpretations that are unreasonable, *Chevron*, 467 U.S. at 844, Defendants agree that Commission interpretations in the previous advisory opinions and regulations cited here (and now repudiated in the Commission's memorandum in opposition) are reasonable.

A. The Expenditures were "Ordinary and Necessary Expenses In Connection" with Senator Craig's Duties as a Holder of Federal Office

The statute expressly permits expenditures "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." 2 U.S.C. § 439a(a)(2). Senator Craig's legal matter arose in connection with his official travel pursuant to his duty to travel to Washington, D.C. for a session of Congress; expenditures for legal fees to handle that matter are therefore permissible.

1. Section 439a(a)(2) Permits Expenditures Beyond Just the Direct Cost of the Duties of a Federal Officeholder

The Commission insists that § 439a(a)(2) does not cover Senator Craig's legal expenses because he "did not incur any legal expenses . . . for any official business that he conducted while on that trip," and that his need for legal fees "could not have arisen out of Craig's travel, because Craig was not arrested for traveling." Mem. in Opp'n at 10, 13. The FEC ignores the plain text of the statute permitting expenditures "for ordinary and necessary expenses incurred *in connection with* duties of the individual as a holder of Federal office." 2 U.S.C. § 439a(a)(2) (emphasis added). Its argument would rewrite the provision to permit expenditures only "for ordinary and necessary expenses incurred *directly for* duties of the individual as a holder of Federal office."

Because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), the clear result is that the phrase "in connection with" necessarily broadens the reach of permissible expenditures beyond the immediate costs of official duties. The Commission has repeatedly interpreted the statute this way. As detailed, *supra*¸Part IV, in the Kolbe advisory opinion the Commission approved then-Rep.

Kolbe's expenditures for legal fees for a Justice Department investigation "surrounding an official congressional trip to the Grand Canyon attended by Representative Kolbe and two former House Pages, among others." AO 2006-35 at 2, 3-4. Yet, under the Commission's analysis, Rep. Kolbe's need for legal fees "could not have arisen out of [his] travel, because [he] was not [investigated] for traveling." Like Senator Craig, Rep. Kolbe "did not incur any legal expenses . . . for any official business that he conducted while on that trip." *Cf.* Mem. in Opp'n at 10, 13 (countering Defendants' analysis). Yet, the FEC approved Rep. Kolbe's expenditures. AO 2006-35 at 3-4.

The Commission's rationale in Kolbe, interpreting § 439a(a)(2) to permit expenditures relating to conduct beyond the direct costs of official duties, is reasonable and entitled to *Chevron* deference. 467 U.S. at 844. This interpretation protects Senator Craig, who spent campaign funds to pay for legal expenses, not directly for official activity, but nonetheless "in connection with" that activity.

2. Section 439a(a)(2) Contains No "Purely Personal Conduct" Exception to Permissible Expenditures

The Commission claims that expenditures for legal fees relating to "purely personal conduct'" can never qualify for protection under § 439a(a)(2). Mem. in Opp'n at 11 (quoting Compl. ¶ 22), 13-15. The statute does not support that claim.

A matter (and corresponding legal fees) that arises "in connection with" an officeholder's duties may nonetheless involve elements of "purely personal conduct"; the two are not mutually exclusive. The statute's plain language only requires that the need to pay for legal fees arise "in connection with" an official duty. As such, § 439a(a)(2) reaches expenditures for legal fees involving legal matters that involve elements of personal conduct. *See Smith v. United States*, 508 U.S. 223, 228 (1993) ("[Courts]

normally construe [statutory language] in accord with its ordinary or natural meaning.").

In fact, reading a "personal conduct" exception into the statute would directly conflict with the U.S. Senate's understanding of what constitutes activity "in connection with . . . the duties of an individual as a [Senator]." 2 U.S.C. § 439a(a)(2). The Senate explicitly provides that some personal conduct may nonetheless be officially related and eligible for Senate reimbursement. *See* U.S. Senate Travel Regulations, *reprinted in* 152 Cong. Rec. S11473 (daily ed. Dec. 7, 2006) ("Per diem expenses include all charges for . . . personal use of room during daytime . . . .).

Senator Craig's legal matter arose "in connection with . . . [his] duty as a [U.S. Senator]," 2 U.S.C. § 439a(a)(2), to travel to Washington because the legal matter arose during the trip itself. The statute is clear that it is irrelevant whether the Commission views the incident as involving elements of "purely personal conduct."

Moreover, the Commission has approved a wide variety of expenditures for legal fees where the underlying legal matter directly involved personal conduct. *See* AOs 2006-35 (Kolbe) (interactions with House pages), 2005-11 (Cunningham) (taking bribes), 2000-40 (McDermott) (intercepting telephone calls), & 1997-27 (Boehner) (same). The Commission correctly observes that all four opinions involved some connection to the official duties of the Congressmen at issue. Mem. in Opp'n 19-22. That does not change the fact that the underlying conduct itself was, in fact, personal and non-official conduct. The advisory opinions' interpretation of § 439a(b)(2) permitting expenditures for legal fees even where personal conduct underlies the legal matter is reasonable and entitled to deference. *See Chevron*, 467 U.S. at 844.

Senator Craig's conduct was no less and no more personal than a rafting trip with

former House pages and his family (*i.e.*, *private citizens*), receiving bribes, or accessing an intercepted telephone call. But like those four Congressmen, Senator Craig's activity was connected to his officeholder duties.

3. Section 439a(a)(2) Contains No "Temporal Proximity" Requirement

The Commission further suggests that, because Senator Craig's court proceedings occurred after his official travel, expenditures made to handle those legal proceedings are not connected to the travel itself. Mem. in Opp'n at 10. The statute contains no requirement for temporal proximity; it requires only that the legal proceedings arise "in connection with" Senator Craig's official duties. *See* 2 U.S.C. § 439a(a)(2). Such a requirement would exclude nearly every expenditure for legal fees from coverage, because litigation rarely occurs on the same day as the incident relating to the litigation.

Indeed, the Commission has frequently interpreted § 439a(a)(2) to permit expenditures for legal fees even where the expenditures are made, or the legal matter arose, well after the date of the incident. *See, e.g.*, AO 2006-35 (Kolbe) (expenditures in 2006; underlying incident in 1996); 2005-11 (Cunningham) (expenditures in 2005; underlying incident in 2003); 2000-40 (McDermott) (expenditures in 2000; underlying incident in 1996). An interpretation that does not impose such a timing requirement is reasonable and entitled to deference. *See Chevron*, 467 U.S. at 844.

4. Section 439a(a)(2) Contains No "Collateral Litigation" Exception to Permissible Expenditures.

The FEC also argues that the expenditures are impermissible because Senator Craig's post-conviction attempt to vacate his guilty plea was a new proceeding, separate and apart from the criminal conviction itself. Mem. in Opp'n at 10.

Again, the plain language of the statute contains no such exception for collateral litigation; it merely requires that the legal fees be spent on matters "in connection with" an officeholder's duty. Post-conviction collateral attacks on criminal convictions are intertwined with both the original criminal proceedings and the underlying incident giving rise to the criminal proceedings. They are, of course, necessarily made "in connection with" the underlying legal matter.

To read the statute as excluding collateral litigation would also lead to absurd results. *Cf. Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982). For instance, suppose an official House report revealed embarrassing details about particular elementary school students, who then sued the members who authored the report for invasion of privacy in state court. *Cf. Doe v. McMillan*, 412 U.S. 306 (1973) (holding that House members were immune from such a suit). Under the Commission's view, the Member-Defendants could use campaign funds to defend the state court suit itself, but not to pay for a collateral proceeding in federal court to enjoin the state court suit on *McMillan* grounds.[7] Such a distinction is arbitrary and unsupported by the statute.

B. Because These Expenditures Were Permissible, They Cannot Be a Prohibited "Personal Use" Under Section 439a(b)

Congress wrote the statue so that any use listed by § 439a(a)(1)–(5) is permissible, even if § 439a(b) would otherwise prohibit it as a "personal use." The statute permits officeholders to spend campaign funds for a host of specific activity, *see* 2 U.S.C. § 439a(a)(1)–(5), as well as "for any other lawful purpose, *unless prohibited by subsection (b) of this section*." *Id.* § 439a(a)(6) (emphasis added). Because "unless prohibited by [§

7 This is not to say that the members of Congress would necessarily prevail in their collateral litigation in federal court. The point is that the Commission's test would prevent them from using their campaign funds to even *try* to litigate.

439(b)]" appears in paragraph (a)(6) but *not* in paragraphs (a)(1)–(5), the *expressio unius* canon compels the conclusion that Congress intentionally omitted "except personal use" in the first five paragraphs. *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997). Thus, Congress intended to prohibit expenditures for "personal use" under § 439(b) only when an officeholder spends campaign funds pursuant to its authority under paragraph (a)(6) to spend for "any other lawful purpose," *id.* § 439a(a)(6). It did *not* prohibit such expenditure when an officeholder uses campaign funds pursuant to paragraphs (a)(1) to (a)(5). *See NRA*, 254 F.3d at 194 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The Commission's alternative construction notably directs this Court to ignore § 439a(a)(2) entirely, arguing that it "adds nothing" to the statutory analysis, Mem. in Opp'n at 8-9 n.3. That reading contradicts the principle of statutory construction that courts "must give effect to every word of a statute wherever possible," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004). Because "the cannons [sic] of avoiding surplusage and *expressio unius* are at their zenith when they apply in tandem," *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 645 (D.C. Cir. 2000), the argument for rejection of the Commission's construction has even greater force.

The result is clear and unambiguous: conduct permitted under § 439a(a)(2) removes it from § 439a(b)'s prohibitions.

Further, the FEC's suggestion that § 439a(a)(2) "adds nothing" to the statutory analysis, Mem. in Opp'n at 8-9 n.3, is simply not credible. The Commission itself cites

that provision repeatedly in its regulations and advisory opinions – something the Commission would not do if the provision were simply redundant with § 439a(a)(6). *See, e.g.*, 11 C.F.R. § 113.2(a); AOs 2006-35 (Kolbe) at 2, 4; 2005-11 (Cunningham) at 2-3; 2000-40 (McDermott) at 4.

Far from "adding nothing," the Commission itself has described § 439a(a)(2) as "[a] specific exemption to the ban on personal use," AO 1997-27 (Boehner) at 2. This Court owes this interpretation *Chevron* deference. *See DSCC*, 454 U.S. at 37.

C. The Expenditures are Not a Prohibited "Personal Use" under Section 439a(b)(2)

Even if the statute contained no carve-out for permitted uses, the personal use statute clearly and unambiguously excludes this expenditure from that prohibition. The statute defines "personal use" as conduct that would "fulfill any commitment, obligation, or expense of a person that would exist irrespective of the . . . individual's duties as a holder of Federal office . . . ." 2 U.S.C. § 439a(b)(2). Senator Craig simply would not have expended any legal fees "irrespective" of his position as a member of Congress.

1. The Limiting Principle of the "Irrespective" Test Coincides with the Principle of Tort Law, *Respondeat Superior*

The Commission contends that Defendants' reading of the irrespective test "has no logical stopping point." Mem. in Opp'n at 14. The Commission complains that the irrespective test would even allow a member of Congress to pay for legal fees to defend a charge of driving under the influence if the incident occurred while the member was driving to a session of Congress. *Id.* Defendants need not establish the statute's boundaries, nor does this case resemble a drunk driving matter. Moreover, the Constitution confers numerous privileges on members of Congress simply by dint of their

office, some of which provide expansive privileges available to no other United States citizens. *See, e.g.,* U.S. Const., Art. I, § 6, cl. 1 (immunities provided by Speech or Debate Clause).

But rather than accepting the test that Congress has enacted, the FEC proposes its own arbitrary limiting principle focusing on the conduct underlying the incident giving rise to the legal fees. Mem. in Opp'n at 11-12. Such a result is at odds with the plain language of the "irrespective" test. *See Watson v. United States*, 552 U.S. 74, 79 (2007) ("With no statutory definition or definitive clue, the meaning of the [a statutory term] has to turn on the language as we normally speak it. . . .").

As Defendants explained in the administrative proceedings below, *see* Prob. Cause Tr. [Dkt. # 5-2] at 16:2–18:16, 26:8–28:5, the proper limiting principle is akin to the *respondeat superior* principle of tort law. Under *respondeat superior*, "[a] principal is not liable for his agent's tort unless it is within the scope of the agent's employment." *Park Transfer Co. v. Lumbermens Mut. Cas. Co.*, 142 F.2d 100, 100 (D.C. Cir. 1944) (internal quotation marks omitted). This is nearly synonymous with the irrespective test: conduct that would not "exist irrespective of . . . an individual's duties as a holder of Federal office," would also fall "within the scope of the agent's employment" as an officeholder; conversely, activity that would "exist irrespective of" an officeholder's official duties would not fall "within the scope of the agent's employment" as an officeholder. 2 U.S.C. § 439a(b)(2); *cf. Park Transfer*, 142 F.2d at 100.

It is not unheard of for courts to interpret statutes as adopting common law principles.[8] *See Neder v. United States*, 527 U.S. 1, 21-22 (1999). Using *respondeat*

8 This canon is mandatory only where Congress uses a term with an established

superior as an analogous principle avoids the absurd results of the Commission's under-inclusive test, *see Griffin*, 458 U.S. at 575 (prohibiting absurd results), and is consistent with the actual statutory test enacted by Congress. Such a test creates no tension with the *per se* personal uses listed in § 439a(b)(2)(A)–(I), *cf.* Mem. in Opp'n at 14. Likewise, Senator Craig's use of the restroom while traveling was related to the contemplated scope of his duties as Senator. *See* U.S. Senate Travel Regulations, *reprinted in* 152 Cong. Rec. S11473 (daily ed. Dec. 7, 2006) (authorizing reimbursement for, *inter alia*, a Senator's use of a bathroom while on official travel).

Accordingly, the statute is clear and unambiguous: Senator Craig's legal expenditures were not a prohibited personal use because the legal fees did not arise irrespective of his duties as a holder of Federal office. Moreover, the Commission's prior, official interpretations of § 439a(b) sanction Senator Craig's expenditures. Those interpretations are reasonable and entitled to deference. *Chevron*, 467 U.S. at 844.

VI. THE COMMISSION'S *POST HOC* RATIONALIZATIONS FOR CHANGING SETTLED LAW ARE NOT ENTITLED TO DEFERENCE

The FEC asserts that it is "entitled to deference" both for application of the "personal use" statute and to Defendants' ability to rely on the Commission's precedent. Mem. in Opp'n at 7-8. While the Commission's reading of its governing area is afforded a degree of deference, precedent does not mandate that this Court defer to its tortured and novel reading of those provisions.

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meaning at common law. *See Carter v. United States*, 530 U.S. 255, 264-66 (2000). "Irrespective" has no such established common law meaning. However, nothing prevents this Court from using the common law to inform its interpretation.

A. The Commission's Interpretations in Affirmative Decisions to Institute an Enforcement Action are Not Entitled to Deference

"[A]gencies' legal views are deferred to only when they make a determination (either quasi-legislative or quasi-judicial) that has independent legal significance –as opposed to when they act in a prosecutorial role." *United States v. Western Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir. 1990). When the Commission brings an enforcement action it "act[s] in a prosecutorial role." *Id.* Unlike a regulation, advisory opinion, or even a decision *to dismiss* an enforcement action, the Factual & Legal Analysis ("F&LA") explaining the reasoning for instituting this enforcement action has no "independent legal significance," *id.*, because the F&LA alone cannot force a respondent to pay any civil penalty or obey a Commission demand. *See* 2 U.S.C. § 437g(a)(6) (requiring court judgment). Consequently, Commission interpretations supporting a decision to bring an enforcement action warrant no deference. *Western Elec. Co.*, 900 F.2d at 297.

FEC v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 185 (D.C. Cir. 2001) ("*NRA*"), which the FEC cites, Mem. in Opp'n at 7-8, confirms this. *NRA* held only that the contents of existing *advisory opinions*, not enforcement decisions, were entitled to deference. *Id.* at 185-86. *NRA*'s statement that "the probable cause determination and its underlying statutory interpretation . . . warrant *Chevron* deference," *id.* at 185, is entirely *dicta*. In fact, the D.C. Circuit does not defer to Commission interpretations used to institute an enforcement action. *FEC v. Nat'l Republican Sen. Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Other cases defer only to Commission interpretations supporting the Commission's decision *to dismiss* a complaint, not to affirmatively institute an enforcement action. *See, e.g., FEC v. Dem. Sen. Campaign Comm.*, 454 U.S. 27, 37 (1981); *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000).

1. The FEC's Novel Interpretation in this Case is Particularly Unworthy of Deference.

Courts do not defer to agency interpretations made, as here, for the first time in litigation or where, as here, the interpretation contradicts prior agency interpretations. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-68 (2012).

Until now, not a single Commission advisory opinion or enforcement action has ever utilized a "necessary nexus" test. *See* F&LA at 10:16–20, MUR 6128 (Craig) [Dkt. # 5-1] (establishing, but citing no authority, for the "necessary nexus" test). Because it is unacceptable "to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference," *Christopher*, 132 S. Ct. at 2168, the Commission's action here counsels against deference.

Additionally, "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *see also DSCC*, 454 U.S. at 37-38. The "necessary nexus" test is inconsistent with prior Commission interpretations. *Compare* AO 1998-01 (Hilliard) at 6 (approving expenditures for some legal expenses "for responding to [a] review or investigation of activities *arising before [the requestor's] candidacy*") (emphasis added) *and* AO 1997-12 (Costello) at 6 (approving expenditures for certain legal fees that "*do not directly relate to allegations arising from [the requestor's] . . . officeholder activity*" [sic]) (emphasis added)[9] *with* Mem. in Opp'n at 14 (authorizing expenditures for legal fees "when the actual conduct giving rise to the allegations occurred *as a direct result of officeholder*

9 Though these opinions are not precisely on point, they illustrate that the Commission did not always follow the rule that it purports to follow today.

status or duties, but not when the specific conduct was unrelated to such status or duties") (emphasis in original) (citations omitted).

Because the "necessary nexus" test makes its first appearance in this enforcement action and is inconsistent with prior Commission interpretations, the FEC's FL&A deserves no deference. *See Christopher*, 132 S. Ct. 2166-68.

B. The FEC's Interpretations of Its Advisory Opinions Receive No Deference in a "Good Faith Reliance" Analysis under § 437f(c)

The Commission demands deference to its interpretations of its advisory opinions, even when determining whether prior opinions protect Defendants under § 437f(c). Mem. in Opp'n at 19 n.5. Such deference is generally appropriate, *cf. Auer v. Robbins*, 519 U.S. 452, 461-63 (1997), but not in a § 437f(c) analysis.

1. Congress Did Not Authorize the Commission to be the Sole Arbiter of Whether Existing Advisory Opinions Protect Individuals.

Granting *Auer* deference to Commission interpretations of advisory opinions in a § 437f(c) analysis would nullify subparagraph (c)(1)(B), which extends that protection to persons other than the requestor. If *Auer* applied even under § 437f(c) only the requestor could obtain the protection of an existing advisory opinion unless the Commission consented. In any other enforcement proceeding, courts would simply defer under *Auer* to the Commission's determination that the existing opinion did not apply. Such an individual's only remedy would be to request his or her own opinion on the same subject.

If Congress desired such a result, it would have preserved the old statute in which an opinion protected only the requestor. *See* 2 U.S.C. § 437f(b) (Supp. V 1975). Instead, Congress amended the statute to ensure that persons other than the requestor also qualified for protection. Pub. L. No. 94-283 § 108(a), 90 Stat. 475, 481-82 (1976)

(codified as amended at 2 U.S.C. § 437f(c)(1)(B) (2006)). Because deference only applies when Congress would want it to apply, *see United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001), and courts "must give effect to every word of a statute wherever possible," the Commission may not use *Auer* to nullify § 437f(c)(1)(B). *Auer* should not apply in a § 437f(c) analysis.

2. The *Auer* Rationale Does Not Support Deference in Context of a "Good Faith Reliance" Analysis under § 437f(c).

Auer deference rests on the freedom of an agency to change or rewrite its regulations at will, even in the face of an unfavorable judicial construction. *See Auer*, 519 U.S. at 463. By contrast, the Commission may only issue opinions at the request of a third party. 2 U.S.C. § 437f(a)(1); *see also id.* § 437f(b) ("No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with [§ 437f]."). Because the Commission could not *sua sponte* rewrite an advisory opinion in the face of an unfavorable judicial construction, *Auer* should not apply to Commission interpretations of its opinions in a § 437f(c) analysis.

C. *Post Hoc* Rationalizations by Counsel Are Not Entitled to Deference

The opposition brief suggests a host of legal interpretations never before ratified by the Commission itself. *See generally*, Mem. in Opp'n. Any such interpretations not contained within the four corners of a document endorsed by at least four of the six Commissioners, *see* 2 U.S.C. § 437c(c), are not entitled to any deference. *See Dem. Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 n.6 (D.C. Cir. 1987); *Util. Workers Union of Am., Local 369 v. FEC*, 691 F. Supp. 2d 101, 106 (D.D.C. 2010).

Accordingly, the following statutory interpretations in the FEC's brief are not Commission-wide interpretations, and are not entitled to any deference:

- that traveling to Washington, D.C. for a meeting of Congress is not one of "the duties of an individual as a holder of Federal office" under § 439a;

- that the statutory structure renders § 439a(a)(2) redundant and irrelevant;

- that there is an implicit "collateral litigation" exception from the permissible use of campaign funds for "ordinary and necessary expenses in connection with . . . the duties of an individual as a holder of Federal office" under § 439a(a)(2);

- that there is an implicit "temporal proximity" exception from the permissible use of campaign funds for "ordinary and necessary expenses in connection with . . . the duties of an individual as a holder of Federal office" under § 439a(a)(2).

VII. CONCLUSION

The statute does not prohibit these expenditures, either by its clear and unambiguous language, or as-interpreted in those Commission documents entitled to deference. Additionally, the Commission's Kolbe advisory opinion directly bars this action and grants Defendants a safe haven. Accordingly, this Court should grant Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

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Respectfully Submitted,

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