UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FEDERAL ELECTION COMMISSION, Plaintiff, v. CHRISTINE O'DONNELL, *et al.*, Defendants.	No. 15-cv-00017-LPS REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIMS

REPLY BRIEF IN SUPPORT OF PLAINTIFF FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS COUNTERCLAIMS

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August 6, 2015

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Regulations

Miscellaneous

Defendants' counterclaims against the Federal Election Commission ("Commission" or "FEC") should be dismissed because they are redundant and the two constitutional counterclaims fail to state a claim. Defendants' opposition to the FEC's opening brief fails to make any response to most of the FEC's arguments in support of why the Court should dismiss the three counterclaims. In particular, defendants fail to address the Commission's threshold showing that the counterclaims and affirmative defenses are redundant. Defendants do assert that the personal use ban at issue here is an unconstitutional speech restriction that must be evaluated under strict scrutiny, but that argument is misconceived and unsupported. This case is about Christine O'Donnell's use of federal campaign funds to pay rent and utilities for her personal residence in violation of the personal use ban. The rule is a reasonable one that deters corruption, promotes ethical behavior by federal candidates, and easily survives the applicable rational basis review. Defendants' counterclaims should be dismissed.

I. THE COUNTERCLAIMS ARE REDUNDANT DUE TO THE AFFIRMATIVE DEFENSES IN DEFENDANTS' ANSWER

All three of the counterclaims should be dismissed because they are redundant in light of the affirmative defenses that defendants pled and they will therefore be rendered moot when the principal case is decided. (Opening Br. in Supp. of Pl. FEC's Mot. to Dismiss Countercls. ("FEC Br.") at 8-10 (D.I. 14).) Indeed, the counterclaims and affirmative defenses are identical, word for word for the most part. (*Id*. at 9 & n.5.) In the course of determining whether defendants should be found to have violated the personal use ban, then, the Court will be required to address defendants' claims that the statute does not apply to their circumstance (their first counterclaim) and that the statute and regulation are invalid facially and as applied (their second and third counterclaims). The FEC explained that the counterclaims and the affirmative defenses were redundant (*id.* at 8-9), but defendants do not address that issue, failing even to mention the

affirmative defenses in their opposition. (Defs.' Answering Br. in Opp'n to Pl.'s Mot. to Dismiss Countercls. ("Defs.' Opp.") at 18 -19 (D.I. 17).) The counterclaims should be dismissed.[1]

II. RATIONAL BASIS IS THE APPROPRIATE STANDARD OF REVIEW FOR THE CONSTITUTIONAL COUNTERCLAIMS

As the Commission demonstrated, constitutional challenges are reviewed under the deferential "rational basis standard" except in limited circumstances inapplicable to this case involving the infringement of a fundamental right or First Amendment burden. (FEC Br. at 10-12). Defendants' opposition does not directly respond to the FEC's showing that the personal use restrictions at issue do not implicate fundamental rights. Rather, defendants' argument rests solely on the view that the Court should apply strict scrutiny because the personal use ban is an "expenditure restriction." (Defs.' Opp. at 9-14.) For example, defendants claim that "any government-imposed restriction on campaign expenditures must meet strict scrutiny," relying on *Citizens United*'s statement that "'[l]aws that burden political speech are' accordingly 'subject to strict scrutiny.'" (Defs.' Opp. at 12 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)).) But not all possible disbursements by a campaign committee constitute "political speech."

"Expenditure limitations" are restrictions on the "amount of money a person or group can spend on political communication during a campaign." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). The personal use restriction at 11 C.F.R. § 113.1(g)(1)(i)(E) is not such an expenditure limit because it does not limit the amount of money a campaign can spend, nor does it infringe on "political communication" or any other fundamental right. (FEC Br. at 11-14.) Defendants do

[1] We believe that the identical constitutional issues presented in defendants' second and third counterclaims and third and fourth affirmative defenses are appropriate for resolution on the merits by preliminary motion. As indicated earlier (FEC Br. at 10 n.6), we intend to move for judgment on the pleadings regarding those affirmative defenses when permitted by Rule 12(c), including in the event the constitutional issues are not resolved in the course of disposition of this motion.

not respond to these points.[2] They do not explain why spending campaign funds for personal uses would constitute a "fundamental right," nor how paying rent for part of a candidate's residence rather than renting other office space as campaign headquarters would constitute "core First Amendment rights of political expression." (FEC Br. at 12 (quoting *Buckley*, 424 at 44-45).) Defendants also fail to explain why, even if political speech were infringed, the restriction would be dissimilar to a constitutional "time, place and manner" restriction. (FEC Br. at 13-14.) Lastly, defendants ignore the Commission's explanation of the functional analysis used in *McConnell v. FEC*, 540 U.S. 93 (2003), to distinguish between spending limits that are subject to strict scrutiny and other limits that are reviewed under a more lenient standard. (FEC Br. at 14 (quoting *McConnell*, 540 U.S. at 138-39).)[3]

Defendants' other assertions are unresponsive to the Commission's arguments. For example, defendants claim that "[t]he argument that a committee is not harmed so long as it may spend all the resources it can collect has been rejected again and again by the Supreme Court." (Defs.' Opp. at 15 (citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2824 (2011); *Davis v. FEC*, 554 U.S. 724, 740 (2008); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986)).) But the FEC's argument was that any "harm" that a campaign

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[2] To the extent defendants make any argument to explain why the personal use restriction is an expenditure limit, they rely on general judicial statements about "speech" or "amount of money." (*See, e.g.*, Defs.' Opp. at 12 (quoting *Citizens United*, 558 U.S. at 340); Defs.' Opp. at 13 ("A 'restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression'" (quoting *Buckley*, 424 U.S. at 28-29)); Defs.' Opp. at 13 ("The First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).) These statements do not apply to the personal use restriction, which does not target political speech or limit the amount of money a campaign can spend.

[3] Defendants characterize these legal questions as "open questions this Court is poised to answer." (Defs.' Opp. at 10.) But the Court is not writing on a clean slate; the precedent cited in both this reply and in the FEC's opening brief dictate the result.

committee may suffer by being unable to rent space to its candidate did not implicate the First Amendment or any fundamental right. For purposes of deciding the appropriate level of scrutiny, the Court must decide whether the personal use restriction constitutes an "expenditure limit" as that term has been used by the Supreme Court. It does not.

III. THE PERSONAL USE RESTRICTION AT ISSUE HERE IS CONSTITUTIONAL

A. The Facts of This Case Demonstrate That the *Per Se* Rule for Rent and Utilities Reasonably Serves Important Government Interests

As an initial matter, under rational basis review an agency rule need not be the best possible rule or even one a court would choose, but merely a rational means to a legitimate governmental end. (FEC Br. at 15.) The rationality of the FEC's *per se* rule for rent and utility payments is evident from the facts of this case. Defendants argue that an allocation system would be superior because it would give greater freedom to the Committee, which "is a separate legal entity from the candidate," and that the Committee is looking out for its own interests when it rents space because "[n]o expenditure by or on behalf of the Campaign Committee can be made without the authorization of the Campaign Committee's treasurer; in this case Matthew Moran, or his agent." (Defs.' Opp. at 11). Candidates and their campaign committees are distinct legal entities, but those committees exist primarily to carry out the candidates' campaign instructions. And in this case, the Committee's own FEC reports show that *Christine O'Donnell herself* was apparently acting as treasurer, signing the Committee's reports from January 2010, when the townhouse lease began, through August 2010 — a period that encompasses much of the time that the Committee leased the property and the period in which O'Donnell made the

majority of her payments to the Committee to reimburse it for paying her rent.[4] Thus, defendants' assertions of independent action are dubious at best.

Defendants also claim that "Friends of Christine O'Donnell would have incurred the costs to lease the campaign headquarters irrespective of Christine O'Donnell's subsequent decision to sublease a portion of the space." (Defs.' Answer & Countercls. at 7 ¶ 9 (D.I. 9).) But that assumes that the Committee would have rented more space than it actually needed: the space that O'Donnell subleased. It also makes the far-fetched assumption that the campaign's utility usage would have been the same without O'Donnell living in the townhouse for many months. And the fact that O'Donnell was apparently acting as treasurer of her committee at the time it entered into the lease strongly suggests that the lease and sublease decisions were intertwined.

Moreover, far from showing that the personal use rule is irrational, defendants fail to show that their preferred alternative would even work as well. Under the allocation scheme defendants favor, the FEC would ordinarily have no way of knowing, without undergoing an investigation into a candidate's living arrangements, whether the amounts reported as reimbursements from the candidate to her campaign represent the actual market value of the portion of the property she was using as her residence. Defendants' own arguments here highlight this difficulty. To determine the value of what O'Donnell actually received from her campaign, the Commission might be required to request information from O'Donnell and others about what parts of the property and utilities she used, during what time periods, and whether for campaign or residential purposes. The Commission might also be required to obtain the services

[4] *See, e.g.*, Jan. 24, 2010 FEC Form 3, http://docquery.fec.gov/cgi-bin/fecimg?_10020033729+0 (signed by Treasurer Christine O'Donnell); July 15, 2010 FEC Form 3, http://docquery.fec.gov/cgi-bin/fecimg?_10020573532+0 (same).

of an expert to determine the value of those benefits at that location during that time period. And after all that, if a candidate like O'Donnell turned out to have underpaid, defendants seem to argue that she should simply be allowed to make up the difference, leaving her no worse off than if she had paid an appropriate amount in the first place. (Defs.' Opp. at 5-6 (suggesting that reimbursing for underpayments should be considered a "step toward cure.").)

Under the schemes made possible by defendants' proposal, there would be little incentive for candidates to avoid converting campaign funds to personal use, the Commission might have to devote considerable resources to investigating personal living arrangements and analyzing real property and utility values, and the public might suspect widespread corruption and self-dealing. Concerns like these led the FEC to change the regulation 20 years ago, superseding at least four Advisory Opinions which had tried to make case-by-case determinations under the allocation rule that previously existed. *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7865 (Feb. 9, 1995) ("Explanation and Justification").

Defendants claim in their brief that the current regulation "hobble[s] boot-strap campaigns to Federal office" and that it "substantially burden[s]" candidates or their campaigns (Defs.' Opp. at 6, 17.) Those allegations do not appear in the counterclaim, however, so the court need not accept them as true. Moreover, defendants cite no evidence supporting the allegations. For example, if in fact O'Donnell was paying market value when she reimbursed the campaign, then she could just as easily have found an equally good property for the same amount of rent and utilities.[5] And if the property did not need to provide a residence for Ms. O'Donnell, the campaign could have rented a smaller space, at a lower cost.

[5] It is unlikely, however, that O'Donnell could have found a residence in which she 1) was not required to sign a written lease; 2) was not required to provide a security deposit; and 3) could make payments at irregular intervals to reimburse for the time she had already been living

Defendants wrongly suggest that FEC rules treat mortgage and rent payments in a unique way, stating that the FEC "permits allocations for nearly everything else [other than rent payments]" and that it "usually handles personal use determinations [] with allocation formulas." (Defs.' Opp. at 7, 10.) Although the FEC does permit allocation of certain mixed expenses (*see id*. at 7-8), many other types of spending are considered personal use and prohibited, with no allocation permitted, because of the reasonable assumption that "these expenses would exist irrespective of the candidate's campaign." Explanation and Justification, 60 Fed. Reg. at 7864.[6]

B. Prophylactic Rules Like This One Serve Important Government Interests

The Commission's decision to treat certain campaign spending as *per se* "personal use" also survives rational basis review because it is a prophylactic measure designed to provide useful guidance to campaigns, to avoid having campaigns engage in behavior that could trigger an agency investigation, and to draw an easily administrable bright line. (FEC Br. at 6-7, 17.) Defendants ignore most of these considerations and characterize the benefits of the *per se* rule as a matter of mere "administrative convenience." (Defs.' Opp. at 14.) Defendants do acknowledge that the statute is an "otherwise constitutional personal-use prohibition," but they

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there. Even without these benefits, and assuming she reimbursed market value rent and utilities, this arrangement would have provided O'Donnell with what amounted to "interest free loans" (FEC Br. at 8, 18) — another FEC point that defendants fail to address.

[6] Commission regulations state that using campaign funds for the following items, among others, are all *per se* violations of the personal use ban: "(A) Household food items or supplies. (B) Funeral, cremation or burial expenses [with limited exceptions]. . . . (C) Clothing, other than items of *de minimis* value that are used in the campaign . . . (D) Tuition payments, other than those associated with training campaign staff. . . . (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. . . . (J) A vacation." 11 C.F.R § 113.1(g)(1)(i). It would seem that under defendants' logic, each of these restrictions would constitute an expenditure restriction subject to strict scrutiny review.

argue that the *per se* rule infringes on the First Amendment by barring the campaign from paying for any of the rent and utilities for the property where Ms. O'Donnell resided. (Defs.' Opp. at 6.) However, the Supreme Court has repeatedly upheld viewpoint-neutral laws that vindicate important government interests while restricting the time, place or manner of political speech. (*See* FEC Br. at 13-14 (citing several cases).) A law's constitutionality does not hinge on whether the government interest is vindicated in every single instance; indeed, it is often the case that a bright-line rule is necessary for a rule to be effective.

The personal use ban is comparable in this respect to the statute upheld in *Burson v. Freeman*, 504 U.S. 191 (1992). In that case, an individual challenged Tennessee's law that prohibits the display of campaign material within 100 feet of a polling place. *Id.* at 193-94. The state asserted interests in "protecting the right of its citizens to vote freely for the candidates of their choice [and] protect[ing] the right to vote in an election conducted with integrity and reliability." *Id.* at 198-99. The Supreme Court upheld the law, applying "exacting scrutiny" because the areas around polling places were public forums, and it rejected the argument that the law was overinclusive because the state could achieve the same goals more narrowly by enforcing laws for interference with an election or intimidation to prevent voting. *Id.* at 198, 206-07, 211. The Court held that such solutions may be insufficient because they "'deal with only the most blatant and specific attempts' to impede elections" and "many acts of interference would go undetected" that could "drive the voter away before remedial action could be taken." *Id.* at 206-07 (quoting *Buckley*, 424 U.S. at 28). The state did not need to show that every sign near a polling place leads to voter intimidation or confusion. Rather, the law was a prophylactic measure that could be more easily administered and provide greater guidance to the public, diminishing the likelihood of improper behavior and the need to investigate such behavior.

Similarly, the government has important interests in banning the personal use of campaign funds. For rent and utilities of a candidate's personal residence, the FEC has chosen a bright-line rule that is more administrable, provides greater guidance, and deters wrongdoing. Setting aside appearances, it is possible that a particular candidate could reside in a property that is paid for in part with campaign money without leading to a *quid pro quo* or compromised candidate ethics. However, making such determinations on a case-by-case basis would insufficiently achieve the objectives of the law, potentially leading to regulatory confusion and unnecessary enforcement activity. As a result, the regulation is constitutional, and it would be even if examined under a higher level of scrutiny, as the law in *Burson* was.

Defendants primarily rely on *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), for the proposition that the "'First Amendment does not permit the State to sacrifice speech for efficiency.'" (Defs.' Opp. at 15 (quoting *Ariz. Free Enter.*, 131 S. Ct. at 2824 (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).) But the "efficiency" described in that case bears no relationship to the rationales applicable to this case. *Arizona Free Enterprise* struck down a state public funding scheme that disbursed additional money to a candidate when his privately-financed opponent (or independent groups supporting the opponent) spent money over a certain threshold. *Ariz. Free Enter.*, 131 S. Ct. at 2813. The Court held that providing funding to candidates in direct response to their opponent's actions was a "substantial burden on the speech of privately financed candidates and independent expenditure groups," and the fact that the scheme may have been designed to efficiently give appropriately-sized subsidies did not overcome that substantial burden. *Id.* at 2824. The restriction at issue in this case suffers from none of the constitutional infirmities of the law in *Arizona Free Enterprise*—it does not impose a particular burden on any defined group of

candidates or on any "speech," but merely bars the conversion of campaign funds to non-campaign uses and, as the FEC noted in another point to which defendants do not respond, the regulation was not passed for any improper purpose. (FEC Br. at 16-17.)

C. The Personal Use Ban Does Not Prevent a Candidate From Using Her Home in a Campaign

Defendants claim that O'Donnell has standing to bring constitutional counterclaims that "may not apply specifically" to her (Defs.' Opp. at 16, citing *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)), but the claims they wish to pursue are misconceived and hypothetical. In particular, defendants suggest that a candidate who owns one home is "substantially burden[ed]" by 11 C.F.R. § 113.1(g)(1)(i)(E) because she purportedly cannot contribute the use of that home to her campaign for federal office, while a candidate with two homes can. (Defs.' Opp. at 17.) But the regulation does not prohibit a candidate from giving anything to his campaign; it prohibits a *campaign* from giving things to the *candidate*. As the defendants themselves point out, the Explanation and Justification makes clear that the regulation "does not prohibit the campaign from using a portion of the candidate's personal residence for campaign purposes," but "merely [bans] the committee's ability to pay rent for such a use." (Defs.' Opp. at 12 (quoting Explanation and Justification, 60 Fed. Reg. at 7865).) And of course, O'Donnell did not own the townhouse or try to give her campaign any such benefit, so such a contention is hypothetical and irrelevant to this enforcement action.

CONCLUSION

For the foregoing reasons, defendants' counterclaims should be dismissed.

Respectfully submitted,

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