FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 2, 2022

BY ELECTRONIC MAIL ONLY

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RE: MUR 7917
Derrick Van Orden
Van Orden for Congress and
Mary Clancy in her official
capacity as treasurer

Dear Ms. Fort and Ms. Johnson:

On July 30, 2021, the Federal Election Commission notified your clients, Derrick Van Orden and Van Orden for Congress and Mary Clancy in her official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on July 26, 2022, voted to dismiss this matter as an act of prosecutorial discretion. A Statement of Reasons providing a basis for several Commissioners' decision is enclosed. Additional Statement(s) of Reasons explaining other Commissioner's decisions may follow.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). If you have any questions, please contact Nicholas Mueller, the attorney assigned to this matter, at (202) 694-1577 or nmueller@fec.gov.

Sincerely,

Ana J. Peña-Wallace

Ana J. Peña-Wallace
Assistant General Counsel

Enclosure:
Statement of Reasons

FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Derrick Van Orden	)	MUR 7917
Van Orden for Congress	)	
and Mary Clancy in her official capacity as treasurer	)	
	)	

STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III

The Complaint in this Matter alleged that Derrick Van Orden, a candidate for Wisconsin's Third Congressional District, and his principal campaign committee, Van Orden for Congress and Mary Clancy in her official capacity as treasurer (the "Committee"), violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by converting contributions to personal use. Specifically, the Complaint alleged that approximately two months after losing the 2020 general election, Van Orden "appear[ed] to use campaign funds for personal use, including travel to and lodging in Washington, DC at the time of the 'Save America Rally' and subsequent storming of the U.S. Capitol on January 6."[1]

Van Orden and the Committee (collectively, the "Respondents") stated that the purpose of the travel was to attend a series of meetings regarding Van Orden's "political future" that were scheduled for January 5 and 7, 2021, and referenced "the ongoing nature of [Van Orden's] Campaign."[2] Respondents further stated that Van Orden was "briefly present near the [Rally]" but "did not actually attend the Rally" and "did not take part in [the] unlawful events" that occurred afterward.[3]

Because the available information suggested that the majority of the travel expenses paid by the Committee were made so that Van Orden could attend meetings regarding his potential future candidacy, we did not believe that this matter warranted the expenditure of the Commission's limited resources, given the likely small amount in violation. Accordingly, we voted to approve our Office of General Counsel's recommendation that we exercise our prosecutorial discretion pursuant to *Heckler v. Chaney*[4] and dismiss the allegations that Van Orden and the Committee violated 52 U.S.C. § 30114(b) by converting contributions to personal use.

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[1] Compl. at 1 (July 27, 2021), MUR 7917 (Derrick Van Orden, *et al.*).
[2] Resp. at 2 (Oct. 5, 2021), MUR 7917 (Derrick Van Orden, *et al.*).
[3] *Id.* at 1–2, 3 n.1.
[4] 470 U.S. 821 (1985).

I. FACTUAL BACKGROUND

Derrick Van Orden was a candidate for the Third Congressional District of Wisconsin during the 2020 election cycle, but he was defeated in the general election.[5] According to its 2020 Year-End Report, the Committee had $12,507.44 in cash on hand at the end of 2020.[6] On April 8, 2021, Van Orden filed a statement of candidacy to again run for Wisconsin's Third Congressional District in the 2022 election.[7]

According to the Committee's 2021 April Quarterly Report, the Committee made three payments totaling $4,022.72 between January 5, 2021 and February 28, 2021, reporting that the purpose was "travel," "travel reimbursement," or "travel unitemized."[8] The report lists reimbursements made to three individuals, including the candidate and two individuals that appear to have been part of his 2020 campaign staff: (1) Van Orden, in the amount of $2,709.66; (2) Jared Carter, in the amount of $1,057.05; and (3) Mary Krueger, in the amount of $256.01.[9] Additionally, the Committee provided itemization for two of the reimbursements, as detailed in the chart below:[10]

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[5] Derrick Van Orden, Statement of Candidacy (Mar. 12, 2020); *see 2020 Wisconsin Election Results*, WIS. ELECTIONS COMM'N (Nov. 18, 2020), https://elections.wi.gov/sites/elections/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf.

[6] Van Orden for Congress, 2020 Year-End Report at 2 (Jan. 31, 2021).

[7] Derrick Van Orden, Amended Statement of Candidacy (Apr. 8, 2021).

[8] Van Orden for Congress, 2021 April Quarterly Report at 5–7 (Apr. 15, 2021).

[9] *Id*. Based on a review of other reports filed by the Committee with the Commission, Krueger and Carter appear to have been paid staffers of the Committee. *See FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=krueger&two_year_transaction_period=2020 (last visited June 15, 2022) (reflecting nine payroll disbursements by Van Orden for Congress to Mary Krueger in 2020); *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=carter&two_year_transaction_period=2020 (last visited June 15, 2022) (reflecting six payroll disbursements by Van Orden for Congress to Jared Carter in 2020). Indeed, based on the Committee's most recent filings, it appears that Krueger stills work for Van Orden's 2022 campaign. *See FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00742007&recipient_name=carter&recipient_name=krueger&two_year_transaction_period=2022 (last visited June 15, 2022) (reflecting 22 payroll disbursements to Krueger during the 2022 election cycle).

[10] Commission regulations only require itemization of the ultimate payee for reimbursed travel expenses when the total amount reimbursed exceeds $500 and payments to any one vendor used for the expenses total over $200 for the election cycle. 11 C.F.R. § 102.9(b)(2)(i); Notice of Interpretive Rule Regarding Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625, 40,626 (July 6, 2013). Accordingly, it appears that only a portion of the reimbursements made to Van Orden and Carter required itemization.

	RECIPIENT	PURPOSE	DATE OF DISBURSEMENT	AMOUNT
	Derrick Van Orden	**Travel**	**2/28/2021**	**$2,709.66**
Memo Itemization:	Delta	Travel	1/3/2021	$844.20
	Hampton Inn	Travel	1/8/2021	$655.60
	Uber	Travel	1/7/2021	$409.77
	Jared Carter	**Travel Reimbursement**	**1/5/2021**	**$1,057.05**
Memo Itemization:	Expedia	Travel	1/2/2021	$418.20
	Hampton Inn	Travel	1/3/2021	$469.62
	Uber	Travel	1/2/2021	$67.85
	Mary Krueger	**Travel Unitemized**	**1/5/2021**	**$256.01**

The Complaint alleged that these travel expenditures were not for permissible campaign uses but for "personal activity" in connection with "the 'Save America Rally' and subsequent storming of the U.S. Capitol on January 6," which was also the date that the votes of the Electoral College were counted for the 2020 presidential election.[11] Because Van Orden was not a candidate for federal office at the time of the trip,[12] the Complaint alleged that Respondents violated the personal use provisions of the Act and Commission regulations. In support of this claim, the Complaint relied on a January 13, 2021 op-ed that Van Orden authored, wherein he stated, "I recently traveled to Washington, DC for meetings and to stand for the integrity of our electoral system as a citizen and at the behest of my neighbors here in Western Wisconsin."[13] The op-ed identified Van Orden as a "former Republican congressional candidate for Wisconsin's third district."[14] The Complaint added that because the "Save America Rally" (the "Rally") concerned the 2020 presidential general election results, the purpose of Van Orden's travel in January 2021 would have been personal regardless of whether Van Orden had become a federal candidate.[15]

The Response denied that the purpose of Van Orden's trip was personal and asserted that he traveled to Washington, DC on January 3 "for a series of political meetings" scheduled for January 5 and 7 with members of the House Republican Caucus and party staff regarding his "political future."[16] Respondents explained, however, that the meetings scheduled for

[11] Compl. at 1, MUR 7917. *See also* 3 U.S.C. § 15 (providing that the counting of the votes of the Electoral College in Congress be held on the sixth day of January).
[12] Compl. at 5, MUR 7917.
[13] *Id.* at 3. (quoting Derrick Van Orden, *We Need Abraham Lincoln Now More Than Ever*, LA CROSSE TRIB. (Jan. 13, 2021), https://lacrossetribune.com/news/local/derrick-van-orden-we-need-abraham-lincoln-now-more-than-ever/article_f29c4153-a584-54df-9d07-b6092ab38d57.html ("Van Orden Op-Ed")).
[14] *Id.*
[15] *Id.* at 5–6.
[16] Resp. at 1–2, MUR 7917.

January 7 were canceled in the wake of the events following the Rally on January 6, and that Van Orden returned home to Wisconsin on January 7.[17] Respondents also maintained that Van Orden did not actually attend the Rally, but arrived late and "remained on the periphery of the event."[18]

Given that the meetings that were scheduled for January 5 and 7 were regarding Van Orden's "political future," Respondents contended that the travel expenses for the trip were permissible, and that "the ongoing nature of [Van Orden's] [c]ampaign at the time of the meetings is just one more fact to justify the necessity and purpose of the trip."[19] While also acknowledging that Van Orden's travel was "not in connection with any particular election," Respondents nevertheless asserted that the trip constituted "political travel" that would be permitted under the Act as being for "any other lawful purposes,"[20] and that regardless of whether Van Orden was a candidate at the time, the Committee was "registered with the Commission, properly functioning, and filing timely reports" and therefore it could "raise and spend funds in accordance with federal law, just as the Campaign did in this instance."[21] Respondents further claimed that even if attending the Rally had been the only purpose of the trip, such a use of campaign funds would nonetheless be permissible because the Rally was "inherently political, akin to any other [p]arty event or committee fundraiser" and the expense would not have existed irrespective of Van Orden's candidacy.[22]

II. LEGAL ANALYSIS

Under the Act, a contribution accepted by a candidate may be used for, *inter alia*, "otherwise authorized expenditures in connection with the campaign for Federal office of the candidate."[23] The Commission has long recognized that "candidates have wide discretion over the use of campaign funds,"[24] but a contribution to a candidate shall not be converted by any person to "personal use."[25] "Personal use" means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation, or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.[26] The Commission evaluates certain expenses, such as travel, meal, and legal expenses, on a case-by-case basis by applying the "irrespective test" to determine whether a personal use violation has occurred.[27] If a candidate "can reasonably show that the expenses at issue

[17] *Id.*
[18] *Id.*
[19] *Id.* at 2.
[20] *Id.* at 3.
[21] *Id.*
[22] *Id.* Respondents do not assert that Van Orden participated in purportedly campaign-related activities on January 6 aside from the Rally.
[23] 52 U.S.C. § 30114(a).
[24] Explanation and Justification for Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7,862, 7,867 (Feb. 9, 1995) ("Personal Use E&J").
[25] 52 U.S.C. § 30114(b)(1).
[26] *Id.* § 30114(b)(2); 11 C.F.R. § 113.1(g); Personal Use E&J at 7,863.
[27] *See* 11 C.F.R. § 113.1(g)(1)(ii).

resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use."[28]

Here, Van Orden asserted that the purpose of the $4,022.72 in travel expenses was to facilitate his attendance at meetings with Members of Congress and party staff about his "political future" and noted the "ongoing nature of his [c]ampaign."[29] Respondents' assertions about the existence of these meetings appear to be corroborated in part by Van Orden's reference to "meetings" in his op-ed, which was published just days after the trip and more than six months before the date of the Complaint.[30]

In the context of an Advisory Opinion, the Commission has determined that "the use of excess campaign funds for future Federal and local or state races would not violate the personal use prohibition."[31] Considering: (1) Respondents' references to Van Orden's "ongoing campaign"; (2) that the travel expenses relating to these meetings included travel for two aides from Van Orden's 2020 campaign; and (3) that Van Orden filed his statement of candidacy to run for Congress in 2022 prior to the end of the reporting period covering the expenses at issue in this Matter, an inference can be drawn that at least one purpose of these meetings was discussion regarding Van Orden running for Congress in 2022.[32] Given these facts, there is an insufficient basis to conclude that the travel expenses here would have existed irrespective of Van Orden's future candidacy.[33]

Under Commission precedent, even if January 6 was an extra day of the trip involving only personal activity, because the cost of the airfare is a defined expense that would have been incurred regardless of the extra day, the use of campaign funds to pay for the flight does not constitute personal use.[34] There is a question as to whether the hotel costs for the evening of the 6th could be considered an incremental expense because this personal day was in the middle of two travel days that were campaign-related, unlike the circumstances the

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[28] *Id.*

[29] Resp. at 1–2, MUR 7917. Neither the Complaint nor Response separately address the contemporaneous travel expenses reimbursed by the Committee to Mary Kreuger or Jared Carter; *supra* n.9. Because both the Complaint and Response address these travel expenses and their purpose collectively with Van Orden's travel expenses, and there is no conflicting information in the record, we also address them collectively.

[30] Van Orden Op-Ed.

[31] Advisory Opinion 1993-10 at 2-3 (Colorado) (advising that the requestor's proposal to use excess campaign funds for future non-Federal campaigns, including a Gubernatorial campaign and a campaign to seek office in a political party organization, would not be personal use) (citing Advisory Opinion 1986-5 (Barnes for Congress) and Advisory Opinion 1980-113 (Zell Miller for U.S. Senate)); *see* Advisory Opinion 1993-06 at 4 (Panetta) ("Latitude has been given to use campaign funds for what could be termed operating expenditures such as: . . . establishing a fund for a possible future campaign for Federal or non-Federal office").

[32] *Supra* pages 3, 2–4.

[33] Cancellation of the January 7 meeting(s) after the travel had commenced does not change the purpose of the payment of those travel expenses.

[34] *See* Personal Use E&J at 7,869; *but see* Factual & Legal Analysis at 8, MUR 6127 (Obama for America, *et al.*) (stating that it appears the candidate should have used personal funds to pay for a flight where "the undisputed purpose of [the travel] was meeting a personal obligation" and there was no information suggesting that the campaign activity, phone calls and meetings, required the candidate to travel to that destination).

Commission has previously considered where personal travel expenses were added to the end of a campaign-related trip.[35] But even if the expenses relating to January 6 were personal in nature, the amount of that payment appears to be at most only a few hundred dollars—a small amount that does not merit the expenditure of further Commission resources to pursue.[36]

Accordingly, as a matter of prosecutorial discretion, we voted to dismiss the allegations that Van Orden and the Committee violated the Act by converting contributions to personal use.

July 28, 2022
Date

Allen J. Dickerson
Chairman

July 28, 2022
Date

Sean J. Cooksey
Commissioner

July 28, 2022
Date

James E. "Trey" Trainor, III
Commissioner

[35] *See* Personal Use E&J at 7,869; *see also* AO 2002-05 at 3–5 (treating expenses including "subsistence and lodging" as incremental expenses when two consecutive days in the middle of an eight-day trip were campaign related and the other six days were personal or related to the candidate's duties of a non-federal office).

[36] Without additional information on other potential incremental expenses attributable to January 6, the total sum of potential personal use expenses at issue here remains a small amount that does not merit the expenditure of further Commission resources to pursue. *See* Factual & Legal Analysis at 10, MUR 7850 (Freedom First PAC) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation ($2,655)); Factual & Legal Analysis at 3–5, MUR 7127 (Sean Braddy for US Senate, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation ($111.56)); Factual & Legal Analysis at 14–16, MUR 7293 (Zinke for Congress, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation ($1,250)); Factual & Legal Analysis at 7, MUR 6127 (Obama for America, *et al.*) (dismissing pursuant to prosecutorial discretion apparent personal use violations based on the amount in violation ($1,248–$1,338) and the "novel facts and issues" presented in the matter); *cf.* First Gen. Counsel's Rpt. at 8–9 & Cert. ¶ 2 (Feb. 7, 2005), MUR 5424 (Virginia Foxx for Congress, *et al.*) (finding reason to believe a violation occurred, taking no further action, and sending an admonishment letter regarding personal use of $100 of campaign funds to pay for Chamber of Commerce membership).