UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FEDERAL ELECTION COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 15-cv-00017-LPS
FRIENDS OF CHRISTINE O'DONNELL CAMPAIGN COMMITTEE, *et al.*	)	
Defendants.	)	

DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS

July 20, 2015

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STATEMENT OF NATURE AND STAGE OF THE PROCEEDINGS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Federal Election Commission ("FEC") moved to dismiss defendants' counterclaims. The FEC alleged that Christine O'Donnell, the Friends of O'Donnell Committee ("Campaign Committee") and its treasurer, Matthew Moran, violated 52 U.S.C. § 30114(b) by using campaign funds to pay for rent and utilities at O'Donnell's residence during her campaign for U.S. Senate in 2010.

In response, defendants have brought three counterclaims asking the Court for declaratory judgments that: I) they did not violate the personal use statute or regulations; II) the FEC's personal use regulation governing the use of campaign funds for a candidate's rent and utilities is facially unconstitutional; and III) the personal use statute is unconstitutional as applied to defendants. The FEC argues the counterclaims are redundant and therefore should be dismissed. But the counterclaims allege that the regulatory interpretation the FEC employs to determine any conversion to personal use does not decide whether the regulatory interpretation is unconstitutional. As such, the counterclaims state claims that are not redundant.

The regulatory interpretation imposes an expenditure restraint on the Campaign Committee and must be subject to strict scrutiny. The FEC fails that scrutiny because its interpretation is not narrowly tailored.

SUMMARY OF ARGUMENT

1. The FEC's regulatory interpretation, whether or not it was codified by Congress in the Bipartisan Campaign Reform Act of 2002, imposes an expenditure limit on the Campaign Committee, subject to strict scrutiny.
2. The FEC crafted its regulatory interpretation as a matter of administrative convenience without due to concern to the right of campaign committees to make campaign expenditures. As such, the FEC's regulatory interpretation is overly broad, and improperly tailored to allow space for the fundamental rights of campaign committees.
3. Defendant O'Donnell, under the substantial overbreadth doctrine of *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) has standing to press the rights of a real property owner who wants to contribute his residence to a campaign to federal office, but is burdened in doing so by the FEC's interpretation and regulation.
4. Adjudicating whether a conversion to personal use occurred under the FEC's regulation does not determine whether the regulation itself is unconstitutional. Therefore, the O'Donnell Defendant's counterclaims pose substantive factual and legal questions, are not redundant and should not be dismissed.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff Federal Election Commission is the independent agency of the United States Government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended, codified at 52 U.S.C. §§ 30101-146.1 *See* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. The Commission is

authorized to institute investigations of possible violations of the Act, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 52 U.S.C. §§ 30107(e), 30109(a)(6).

Christine O'Donnell was a candidate for the United States Senate from Delaware in 2010. O'Donnell designated defendant Friends of Christine O'Donnell ("Campaign Committee") as her authorized principal campaign committee under 52 U.S.C. § 30101(5)-(6) for the 2010 election. As such, Friends of Christine O'Donnell was authorized to receive contributions and make expenditures on behalf of the candidate. 52 U.S.C. § 30102(e)(1)-(2).

Chris Marston is the current treasurer of the Committee and a defendant in that official capacity. Matthew Moran preceded him.

B. The Alleged Violation

In 2010, the O'Donnell Committee entered into a lease for a townhouse at 1242 Presidential Drive, Greenville, Delaware, from Mid-Atlantic Realty Co. (Pl. FEC's Compl. for Civil Penalty, Declaratory, Injunctive, and Other Appropriate Relief ("Compl.") ¶ 13 (D.I. 1); Defs. Answer and Countercls. ("Answer & Countercls.") at 2-3, ¶ 13 (D.I. 9).) The O'Donnell Committee used the Greenville townhouse as its headquarters during O'Donnell's 2010 campaign for Senate and continued to use the townhouse after the November 2010 general election. (Compl. ¶ 14; Answer & Countercls. 3, ¶ 14). The Committee paid rent and utilities for the townhouse, including payments to Comcast for communications services and to Delmarva Power for electricity. (Compl. ¶ 16; Answer & Countercls. at 3, ¶ 16). The complaint alleges that Christine O'Donnell lived on the floors of the Greenville townhouse above the campaign office for at least ten months. (Compl. ¶ 15.)

Defendants have denied that specific allegation, but admitted that O'Donnell did at a minimum sublease space in the townhouse for at least some of the relevant period. (Answer & Countercls. at 3, ¶ 15; at 7, ¶ 9; at 10, ¶ 19.)

According to the O'Donnell Committee's FEC reports, O'Donnell made sublease rental payments to the Committee for a portion of the costs for the townhouse rent and utilities. (Compl. ¶ 17; Answer & Countercls. at 3, ¶ 17.)

C. FEC Administrative Proceedings

In September 2010, the Commission received an administrative complaint alleging that Christine O'Donnell and the Committee had violated FECA's personal use provision by using campaign funds to pay for O'Donnell's rent and utility costs at the townhouse. (Compl. ¶ 18).

The Commission notified defendants, and both O'Donnell and the Committee provided responses to the administrative complaint. (Compl. ¶ 19). The Commission voted 6-0 in May 2012 to open an investigation into violations of 52 U.S.C. § 30114(b) by defendants and, in November 2014, to find probable cause to believe that defendants had violated that personal use provision. (Compl. ¶¶ 20, 22-23.) The Commission attempted to engage in conciliation with defendants, but those efforts were unsuccessful, and the Commission thereafter voted 6-0 to authorize this suit. (Compl. ¶¶ 23-24.).

II. LEGAL BACKGROUND

In 1995, the Commission promulgated a regulation defining "personal use." *See* 11 C.F.R. § 113.1(g). The regulation divides the prohibited uses of campaign funds into two different categories. Some types of spending, such as rent and utility payments, are designated as *per se* "personal use." *Id.* § 113.1(g)(1)(i). Other spending is examined on a

case-by-case basis under what has been referred to as the "irrespective test": "Personal use means any use of [campaign funds] . . . to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." *Id.* § 113.1(g); *see also id.* § 113.1(g)(1)(ii).

A purpose of the personal use regulation was for administrative convenience. *See Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7864 (Feb. 9, 1995) ("Explanation and Justification").

The FEC also explained the scope of the ban on the use of campaign funds for non-campaign household expenses: "Under paragraph (g)(1)(i)(E)(1), the use of campaign funds for mortgage, rent or utility payments *on any part of a personal residence of the candidate or a member of the candidate's family is personal use, even if part of the personal residence is being used in the campaign.*" *Id.* at 7865 (emphasis added). This easily identifiable line drawn by the *per se* regulation for rent and utility payments "avoids the need to allocate expenses associated with the residence between campaign and personal use." *Id.* The rule is intended to avoid FEC investigations into whether campaigns have properly allocated expenses between personal and campaign-related activities. *Id.* at 7864.

But it sweeps in too much speech to be constitutional. *See Citizens United v. FEC,* 558 U.S. 310 (2010) (campaign expenditures are core political speech).

III. ARGUMENT

A. INTRODUCTION

Plaintiff Federal Election Commission ("FEC") does not view Ms. Christine O'Donnell's sublease rental payments to the Friends of Christine O'Donnell campaign committee as an attempt to comply with the personal-use prohibition, nor even as a step

toward cure. This is because the FEC's regulation seeks to tell committees how they may spend campaign funds; to ban certain categories of campaign committee expenditures. 11 CFR 113.1(g)(1)(i)(E)(*1*). It is a regulation intended to ease the FEC's administrative burden at the expense of core First Amendment rights; and a regulation that tends, in its effect, to hobble boot-strap campaigns to Federal office.

To understand the FEC's position in this case—a position that flows ineluctably from an impermissibly broad regulatory interpretation—this Court must understand that the *entire* $20,000 the Campaign Committee expended for office space for campaign staff engaged in a bootstrap campaign for U.S. Senate looks, to the FEC, not like campaign expenditures (not even in part). Rather, it looks, to the FEC, like $20,000 *converted* to the *personal use* of Ms. Christine O'Donnell. In a First Amendment context, the FEC's position is for nothing less than an expenditure restriction on the Campaign Committee. And it is unconstitutional.

Defendants Christine O'Donnell and the Campaign Committee (collectively "O'Donnell Defendants"), will demonstrate that the FEC's interpretation of an otherwise constitutional personal-use prohibition is an outright expenditure prohibition *on the Campaign Committee*, in violation of the First Amendment to the United States Constitution. As such, review of the agency's interpretation is required to survive strict scrutiny. *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010) (internal quotation marks omitted) ("Laws that burden political speech are" accordingly "subject to strict scrutiny.") This "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.*

It is the second prong of this scrutiny on which the FEC fails, virtually by its own admission. Late in its Brief, the FEC states, "As the Commission plans to demonstrate later in this matter, it is far from clear that O'Donnell paid the full market value for what she received." FEC's Brief in Support at 19. O'Donnell Defendants respectfully suggest that these are the grounds on which this inquiry should proceed because they are within the FEC's interest to pursue: Did Ms. O'Donnell's sublease rental payments properly prevent a conversion of campaign funds to her personal use? Should she have paid more? Or should she have paid less?

But the FEC's position is outrageous. Arguing that all monies spent by the Campaign Committee to secure work space for campaign staff are not "campaign expenditures" under the rules, but are a conversion of funds to personal use—and arguing the Campaign Committee may not expend funds in such a manner—is an expenditure restriction on the Campaign Committee that must survive strict scrutiny, but cannot.

The FEC issued its rule in the name of administrative efficiency. But the Supreme Court has been clear: 'the First Amendment does not permit the State to sacrifice speech for efficiency.'" *Arizona Free Enterprise Club's Freedom Club PAC, et al. v. Bennett,* 131 S. Ct. 2806, 2824 (2011), quoting *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988).

To meet narrow tailoring, the FEC should again recognize the right of candidates and their campaign committees to allocate between campaign office space and personal use of a residence, much as the Internal Revenue Service insists be done for home office deductions. 26 U.S.C. § 280(A). The FEC still permits allocations for nearly everything else. *See* 11 CFR 113.1(g)(1)(i)(E)(*2*) (renting to the campaign committee any part of a second

home); 11 CFR 113.1(g)(ii)(D) (use of a campaign vehicle for personal and campaign use); 11 CFR 100.77 (food and beverages used an in-home campaign event); 11 CFR 113.1g(ii)(B) (expenses for personal and campaign meals); 113.1g(ii)(C) (expenses for personal and campaign travel).

What's more, the FEC's overly broad interpretation permits Ms. O'Donnell, under *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), to press the claim of property owners who may want to finance a campaign to Federal office by deploying real assets.

Finally, this Court's adjudicating whether Ms. O'Donnell converted funds to her personal use under the rule, will not moot O'Donnell Defendants' claims that the rule is unconstitutional.

These are among the many reasons the FEC's motion to dismiss the O'Donnell Defendants' counterclaims should be denied.

B. STANDARD OF REVIEW

To survive a 12(b)(6) motion to dismiss, a plaintiff need not plead sufficient facts such that it is "probable" that a defendant violated the law. Rather, a plaintiff is only required to plead sufficient facts "to raise a reasonable expectation that discovery will reveal evidence" of the alleged illegal activity. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Furthermore, while mere conclusory statements are insufficient to survive a motion to dismiss, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Court must not weigh each allegation in isolation. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). Instead, the Court must examine the counterclaims as a whole and decide whether

each gives a "strong inference of scienter" when all of the stated allegations are accepted as true. *Id* at 323.

The court is required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and to view them in the light most favorable to the non-moving party. *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1384 (3d Cir. 1994). A complaint should be dismissed only if the alleged facts, taken as true, fail to state a claim. *See In re Warfarin Sodium Antitrust Litig.,* 214 F.3d 395, 397–98 (3d Cir. 2000). The question is whether the claimant can prove any set of facts consistent with his or her allegations that will entitle him or her to relief, not whether that person will ultimately prevail, *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Semerenko v. Cendant Corp.,* 223 F.3d 165, 173 (3d Cir. 2000), and the court will accept well-pled allegations as true for the purposes of the motion." *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir. 1997).

Finally, 12(b)(6) motions to dismiss are generally not favored and "granted sparingly." *See* 5A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE, CIVIL 2D § 1349 at 192-93 (1990) (motions to dismiss are "granted sparingly and with caution to ensure that defendant is not improperly denied a right to have his [counter]claim adjudicated on the merits").

B. THE FEC'S REGULATION IS AN EXPENDITURE RESTRICTION ON THE CAMPAIGN COMMITTEE

The FEC asserts "[t]here is no authority suggesting that converting campaign funds to personal use is a fundamental right." FEC Brief in Support at 10. It asserts that the "personal use restrictions involve money that is *not* being used to influence elections." *Id.* at

11 (emphasis in original). It argues that a "candidate hasn't any right to "interest free loans." *Id.* at 18. And argues that, in the "absence of any fundamental right[,] courts use the 'rational basis' standard in reviewing claims that legislation violates the Constitution." *Id.* at 10-11.

In short, the FEC asserts as conclusions the open questions this Court is poised to answer: Was the Campaign Committee's use of campaign funds to acquire the office space "caused by campaign activity"? Explanation and Justification, 60 Fed. Reg. at 7863-64. And does the ban on campaign committees expending funds for this purpose implicate a fundamental right? For all its focus on Ms. O'Donnell and "interest-free loans," the Commission misses the fundamental inquiry in this case: Does the regulation impinge upon the Campaign Committee's fundamental right to expend funds "for the purpose of influencing an election to Federal office?" As will be seen below, the regulation plainly does so, and is unconstitutional, because the regulations are not narrowly tailored to achieving the government's interest. The way the Commission usually handles personal use determinations, with allocation formulas, is narrowly tailored.

The Commission uses allocation formulas for multiple other categories of property when determining the existence or absence of personal use, and employed allocation formulas to residences rented by campaign committees prior to issuing its rule.

There is no dispute that the Campaign Committee, "Friends for Christine O'Donnell[,] paid rent and utilities for a Greenville, Delaware townhouse *that the Committee* leased from January 2010 to March 2011 and *used as its headquarters.*" Complaint at 1 (emphases added). The Campaign Committee was and is a political committee of Christine O'Donnell under 52 U.S.C. § 30101(4). Complaint, ¶ 7. A candidate

committee, though authorized by the candidate, is a separate legal entity from the candidate. 52 U.S.C. § 30101(6). It has its own bank accounts, 52 U.S.C. § 30102(h), pools of funds, 52 U.S.C. § 30102(b)(3), reporting schedules, 52 U.S.C. § 30104, and often stays in existence years after a campaign ceases—until such time as the campaign committee is either "wound down" by its treasurer, 11 CFR 102.3, or is administratively terminated by the FEC. 11 CFR 102.4. No 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. *See* 52 U.S.C. §§ 30102(a), 30103(b)(4). Complaint, ¶ 7.

The candidate is not the campaign committee. They are separate legal entities, each retaining rights to expend funds "for the purpose of influencing an election." 52 U.S.C. § 30101 (9) (A). It is against the background right of any political committee to expend funds for the purpose of influencing an election to Federal office that the overbreadth of the Commission's regulation on personal use becomes apparent.

What the Commission gets right in its rulemaking is the understanding of its role in administering the statute: The Commission "must determine whether a disbursement of campaign funds is *either* [i] a campaign *expenditure*, [ii] a permissible expense connected to the duties of a holder of Federal office, *or* [iii] a conversion to *personal use*." 60 Fed. Reg. 7862 (Feb. 9, 1995) (emphases added). The categories are *mutually exclusive*—what is not a protected expenditure is a prohibited personal use—and the Commission *must make a determination as to which category applies to any given disbursement.*

Rather than make this determination for residences on a case-by-case basis, through the guidance of appropriate allocation formulas, the Commission painted with an overly

broad brush, sacrificing core campaign expenditures to the efficient administration of the personal-use prohibition:

> The new rule changes the Commission's policy with regard to rental of *all or part of* a candidate or family member's personal residence. [Under the new rule, t]he use of campaign funds for mortgage, rent or utility payments on *any part* of a personal residence of the candidate ... *is* personal use [in full], *even if* part of the personal residence is being used in the campaign.

Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7865 (Feb. 9, 1995) (emphases added). In previous years, the FEC permitted campaign committees to rent all or part of a candidate's residence for campaign purposes so long as fair-market rates were paid. 60 Fed. Reg. at 7865. ("This [rule] supercedes Advisory Opinions 1988-13, 1985-42, 1983-1 and 1976-53, since they allow the use of campaign funds for these purposes.").

If it isn't clear already that the rule is an expenditure prohibition on the Campaign Committee, the FEC removes all doubt: "It is important to note that paragraph (g)(1)(i)(E)(*1*) does not *prohibit* the campaign from using a portion of the candidate's personal residence for campaign purposes." The paragraph "*merely [bans] the committee's ability to pay rent for such a use.* The candidate retains the option of using his or her personal residence in the campaign, so long as it is done at *no expense* to the committee." 60 Fed. Reg. at 7865. (emphases added). This is an expenditure restriction on campaign committees—a speech-vehicle integral to American Democracy.

But any government-imposed restriction on campaign expenditures must meet strict scrutiny. *Citizens United*, 558 U.S. at 340 ("Laws that burden political speech are" accordingly "subject to strict scrutiny."). It doesn't matter that there are other locales the Campaign Committee could have rented for office space. Whether alternate avenues of

activity are available to a political actor challenging a campaign-finance regulation are questions to be asked in the context of contribution limits, not expenditure restrictions. *Buckley v. Valeo,* 424 U.S. 1, 28-29 (1976) (*per curiam*). 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." *Id.* at 19. The government's interest ends at ensuring that the Campaign Committee's funds are not converted to the personal use of Christine O'Donnell. Because the inquiry is binary, and the choices in the inquiry reside flush-against constitutionally protected speech—that is, because any disbursement not deemed a constitutionally protected campaign expenditure *is* deemed a prohibited personal use—the FEC's regulation must be "narrowly tailored" and deploy "the least restrictive means" of furthering the interest. *Citizens United,* 558 U.S. at 340.

The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)). "Laws that burden political speech are" accordingly "subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (internal quotation marks omitted); *see Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 256 (1986).

Applying these principles, the Supreme Court has acknowledged it has, in its opinions:

> invalidated government-imposed restrictions on campaign expenditures, *Buckley, supra,* at 52–54, restraints on independent expenditures applied to express advocacy groups, *Massachusetts Citizens for Life, supra,* at 256–265, limits on uncoordinated political party expenditures, *Colorado Republican*

> *Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 608 (1996) (opinion of Breyer, J.) (*Colorado I*), and regulations barring unions, nonprofit and other associations, and corporations from making independent expenditures for electioneering communication, *Citizens United,* [558 U.S. 310 (2010)].

Arizona Free Enterprise, 131 S. Ct. at 2817. Jurisprudence does not permit the FEC to prohibit campaign committees from making expenditures for office space for light and transient causes, and the only way this Court can adjudicate the constitutionality of the regulation is to preserve the O'Donnell Defendants' counterclaims for declaratory judgment and injunctive relief.

D. THE FIRST AMENDMENT DOES NOT PERMIT THE FEC TO SACRIFICE SPEECH FOR EFFICIENCY

The FEC does not argue that any candidate's receipt of campaign funds for the rental of the candidate's personal property creates a personal benefit to the candidate. Rather, the FEC explains in its rulemaking that, "[i]n the past, the Commission has generally allowed campaigns to rent property owned by the candidate ... for use in the campaign, so long as the campaign did not pay rent in excess of the usual and normal charge for the kind of property being rented." 60 Fed. Reg. 7862, 7865. To this day, the FEC allows campaign committees to rent space from their authorizing candidates so long as it is not the candidate's residence. *Id.* That the only potential candidates likely to own non-residential real estate are drawn almost exclusively from one socio-economic stratum is not addressed by the FEC in its rulemaking. *Cf. Arizona Free Enterprise*, 131 S. Ct. at 2826. ("[B]asic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values.") The point, for purposes of this Brief, however, is that the FEC claims to have created its rule as a matter of administrative convenience.

> The Commission has adopted what is essentially a middle ground. The rule prohibits payments for use of a *personal* residence because the expenses of maintaining a personal residence would exist irrespective of the candidacy. Thus, the rule draws a clear line, and *avoids the need to allocate* expenses associated with the residence between campaign and personal use.

60 Fed. Reg. 7862, 7865 (Feb. 9, 1995) (emphasis added). In other words, the regulation prevents the FEC from having to determine whether the expenditure "is a campaign expenditure," 60 Fed. Reg. at 7862, something it is required to do to implement the statute because, again, all disbursements by the campaign committee that are not personal use to the candidate are constitutionally protected expenditures for the purpose of influencing an election to Federal office.

But the government's putative interest in efficient regulatory administration where speech rights are concerned was again rejected by the Supreme Court just three years ago. "[T]he fact that the State's [public] matching [funds] mechanism may be more efficient than other alternatives...is of no moment; 'the First Amendment does not permit the State to sacrifice speech for efficiency.'" *Arizona Free Enterprise,* 131 S. Ct. at 2824, quoting *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). As stated by the Chief Justice, "How the State chooses to encourage participation in its public funding system matters."

The 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. "Because the Arizona matching funds provision imposes a substantial burden on the speech of privately financed candidate[campaigns], "that provision cannot stand unless it is 'justified by a compelling state interest,'" *id.*, at 740 (quoting *Massachusetts Citizens for Life*, 479 U. S., at 256), and is narrowly tailored to the furtherance of that interest. The same applies to the

FEC's outright ban on campaign committees expending funds for office space in townhomes because the candidate chooses to reside on an upper floor.

There is another scenario implicated by the regulation in light of the Court's recent opinions in *Davis v. FEC,* 554 U.S. 724 (2008) and *Arizona Free Enterprise.* This scenario may not apply specifically to Ms. O'Donnell. But under the ruling in *Broadrick,* 413 U.S. 601, Ms. O'Donnell has standing to press a claim or counterclaim against an overly broad regulation that sweeps up protected First Amendment activity. The Supreme Court in *Davis v. FEC,* 554 U.S. 724 (2008), and again in *Arizona Free Enterprise,* 131 S. Ct. 2806, has reaffirmed an individual's right to contribute personal resources to a campaign for public office. "Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest." *Arizona Free Enterprise.* In *Davis,* the Supreme Court struck down a statutory lifting of contribution limits otherwise applicable to the opponent of a self-financing candidate when the self-financing candidate used personal resources to further his own campaign. *Davis v. FEC,* 554 U.S. 724 (2008). The Court held that, even though the challenger was not obstructed in spending all the funds he could raise, he was nonetheless unconstitutionally burdened by a law that aided his competitor whenever he sought to spend his own funds on his own campaign. *Id.* A related Arizona law was struck down by the Court for virtually the same reasons. *Arizona Free Enterprise,* 131 S. Ct. 2806 (2011).

The scenario Ms. O'Donnell may press under *Broadrick* relates to individuals who have homes as their only real assets, and who want to use those real assets to launch campaigns to federal office. Under the personal-use regulations as currently written, a candidate who owned one home is at a disadvantage relative to a person who owns two

homes. But the second individual has a second option the first individual does not have. He may *live in one house, rent the second home to the campaign committee,* and begin *collecting proceeds from the campaign committee* at a fair market rates for the use of the office space.

The point is not that campaigns should be run on fairly equal resources. To the contrary, that putative interest is "wholly foreign to the First Amendment." *Buckley,* 424 U.S. at 49. The point is made by posing a rhetorical question: After *Davis* and *Arizona Free Enterprise, supra,* what interest is furthered by the FEC substantially burdening the ability of the first individual to contribute real assets to his campaign for federal office in a way that will not burden nearly as greatly the second asset owner? And how are the FEC's means of administering the statute—a ban on campaign committees reimbursing candidates at fair market value for office space in a residence—narrowly tailored to furthering that interest, especially when reasonable allocation formulas are available for the second home as they should be available for the first home—as they are used in other classes of property the FEC monitors for personal use, and as used to be true for residences prior to the FEC's regulation?

These are precisely the kinds of questions this Court should preserve for review by retaining Defendants' counterclaims.

E. ADJUDICATING FEC'S CLAIM FOR PERSONAL USE UNDER ITS REGULATION DOES NOT MOOT COUNTERCLAIMS THAT THE REGULATION IS UNCONSTITUTIONAL

It is well-established that, "[t]o survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *PHL Variable Ins. Co., v. Helene Small Ins. Trust,* 2012 WL

5382905, *1 (D. Del. 2012), quoting *Bell Atl. Corp.*, 550 U.S. at 570. As stated in the case cited by the FEC, "The Court should exercise restraint in dismissing counterclaims." *PHL Variable Ins. Co.*, 2012 WL 5382905, *1 (D. Del. 2012). "Considering the difficulty in determining whether a declaratory judgment counterclaim is in fact redundant prior to trial, ... a court should dismiss such counterclaims *only when there is no doubt that they will be rendered moot by adjudication of the main action.*" *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, 674 F.Supp.2d 562, 566 (D. Del. 2009). (emphasis added). In *PHL*, dismissal of the Defendant's counterclaim made sense because, "[t]he resolution of PHL's declaratory judgment claim will decide whether the [insurance] policy in dispute is null and void. In the event the policy is not found to be null and void, it will be deemed valid." *PHL Variable Ins. Co.*, 2012 WL 5382905, *1 (D. Del. 2012). Indeed, the reasoning of *PHL* commands an opposite outcome here. After this Court adjudicates the claim that Ms. O'Donnell must personally disgorge $20,000 she didn't personally use (by rote application of the FEC's regulation, the counterclaim that the regulation itself is unconstitutional will remain open—and leave, if the counterclaim is dismissed, the offending regulation intact and untouched, against the interests of justice. In short, there is no chance the Defendants' counterclaims "will be rendered moot by adjudication of the main action." *Principal Life*, 674 F.Supp.2d at 566.

And *Aldens, Inc. v. Packel*, 524 F.2d 38 (3rd Cir. 1975) is equally unavailing for Plaintiff FEC:

> The second ground, that the prayer for declaratory relief is redundant and became moot upon the disposition of the complaint, has more to recommend it, where it is clear that there is a *complete identity of factual and legal issues between the complaint and the counterclaim. See* 6 C. Wright & A. Miller, Federal Practice & Procedure s 1406 (1971). Thus had the Attorney General sought only declaratory relief on the identical issue tendered by Aldens, we

> could justify dismissal of the complaint on this ground. But even a favorable ruling on the declaratory judgment *could not render moot* the request for injunctive relief.

Aldens, Inc. v. Packel, 524 F.2d 38, 51-52 (3rd Cir. 1975). Here, as in *Aldens*, any ruling favorable to the FEC's claim under its regulation—that the Campaign Committee's renting a headquarters for $20,000 somehow converted the full $20,000 to Ms. O'Donnell's personal use—"could not render moot" the Defendants' counterclaim that the regulation is unconstitutional nor render moot Defendants' counterclaim "for injunctive relief." *Aldens,* 524 F.2d at 51-52 (3rd Cir. 1975).

CONCLUSION

Plaintiff FEC's Motion to Dismiss the Defendants' counterclaims should be denied.

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