UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FEDERAL ELECTION COMMISSION, Plaintiff, v. CHRISTINE O'DONNELL, FRIENDS OF CHRISTINE O'DONNELL, and CHRIS MARSTON, in his capacity as Treasurer of Friends of Christine O'Donnell, Defendants.	)	Civil Action No. 15-cv-00017-LPS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN ANSWER TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a) and the Court's December 15, 2015, Scheduling Order, Defendants respectfully move for Summary Judgment and to oppose Plaintiff's Motion for Summary Judgment for the reasons set forth in the accompanying Brief in Support of Defendants' Motion for Summary Judgment and in Answer to FEC's Motion for Summary Judgment.

Respectfully submitted,

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Dated: March 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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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.	)	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN ANSWER TO FEC'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF NATURE AND STAGE OF THE PROCEEDINGS

There being no genuine issue of material fact between the parties—Plaintiff Federal Election Commission ("FEC") and Defendants Christine O'Donnell ("Ms. O'Donnell") and the Friends of Christine O'Donnell Committee ("Campaign Committee")—this case is now before the Court on cross motions for summary judgment. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

SUMMARY OF ARGUMENT

The FEC's *per se* categories of personal use do not apply to the arrangement between the Campaign Committee and Ms. O'Donnell for two reasons: First, the FEC's rulemaking, which was later codified by Congress in the Bipartisan Campaign Act of 2002, continues to interpret the statute. *See* 148 Cong. Rec. S1991-02 (daily ed. Mar. 18, 2002); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 301, 116 Stat. 81 (codified as amended at 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b))). The Explanation and Justification of that rulemaking states, in black letter language, that the statute's *per se* prohibitions on converting mortgage, rent, or utility payments to the personal use of a candidate apply only to payments for property ***owned*** by the candidate or for property ***owned*** by a member of the candidate's family. *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7865 (Feb. 9, 1995) ("Explanation and Justification"). Ms. O'Donnell did not then (and does not now) *own* the townhouse at 1242 Greenville Place, nor does any member of her family.

Second, Ms. O'Donnell declared the Townhouse located at 1242 Greenville Place her legal residence to protect her personal safety and the safety of her family, friends, and campaign staff—as such threats were made known to her in prior campaigns under less

secure living arrangements. She did not really live at the Townhouse, which was a hive of campaign activity during the time period at issue in this case. *See* Deposition of Christine O'Donnell, February 3, 2016, attached as Exhibit A, p. 105. She listed the Campaign Committee headquarters as her legal residence in 2010 to leave an impression with would-be harassers that she slept and showered at a place located behind a guarded gate and watched by an active security service. Ex. A, pp. 27-31. This kept harassers at bay. As such, the obligation to declare a legal residence other than the place she laid her head, to protect her safety, was a commitment or obligation that would *not* have existed irrespective of her campaigns for federal office. 52 U.S.C. § 30114(b); 11 CFR 113.1(g).

The FEC's regulatory interpretation, now codified by Congress in the Bipartisan Campaign Reform Act of 2002, is unconstitutional. The *per se* prohibition—were it to apply to Ms. O'Donnell in this case (but, by the terms of the Explanation and Justification, does not)—would charge the entire set of expenses incurred by the Campaign Committee for campaign purposes to the personal use of Ms. O'Donnell. But preventing a subleasing arrangement by Ms. O'Donnell with her Campaign Committee, and thereby taking away the ability to sublease space using reasonable, market-based allocation formulas, would deny or disparage Ms. O'Donnell's First Amendment right to commit her personal resources to a run for federal office, *Davis v. FEC,* 554 U.S. 724 (2008). And would do so, the FEC readily admits, only to further a putative interest in administrative efficiency.

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 employ his residence in a campaign to federal office, but is burdened in doing so by the *per se* categories on mortgage, rent, and utility payments in the statute.

The *per se* categories impose an expenditure ban on the Campaign Committee, subject to strict scrutiny, not rational basis review, as the FEC suggests. And 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. *Arizona Free Enterprise PAC v. Bennett,* 131 S. Ct. 2806 (2011).

In any event, Ms. O'Donnell and the Campaign Committee acted prudently and in good faith.

I. FACTUAL BACKGROUND

The factual background in this case is long, but undisputed. Its essential elements have yet to be properly presented in one place. Defendants will do so here.

For decades leading up to the year 1995, the Federal Election Commission had a constitutional, workable system for enforcing Congress' prohibition on converting campaign funds to the personal use of any person. "[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." Explanation and Justification, 60 Fed. Reg. 7862, 7865. With regard to office space inside a candidate's home, the FEC required payments to be allocated according to use, putting the burden on committees and candidates to be ready to defend their allocations with evidence of square footage and fair-market rental rates. *Id.*

In 1995, the FEC rewrote its regulations on personal use. *See* Explanation and Justification at 7862. This included its approach to enforcing the prohibition on converting

campaign funds to the personal use of candidates. The FEC noted, in its rulemaking that "Paragraph (g)(1)(i)(E)"—the *per se* prohibition at issue in this case—"addresses the use of campaign funds for mortgage, rent or utility payments on **real** or personal **property *owned* by the candidate or a member of the candidate's family**." Explanation and Justification at 7865 (emphasis added). The FEC stated that its switch from a personal-use enforcement system that reviews allocation formulas based upon market rates, to an enforcement system based on *per se* categories of personal use, was to further the Commission's need for administrative convenience. *Id.* at 7865.

In 2002, Congress poured the FEC's personal-use regulation, *in toto*, into the many provisions of the Bipartisan Campaign Reform Act of 2002. *See* 148 Cong. Rec. S1991-02 (daily ed. Mar. 18, 2002); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 301, 116 Stat. 81 (codified as amended at 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b))).

In 2006, Ms. O'Donnell was a write-in candidate for U.S. Senator for the State of Delaware. Ex. A, p. 6. She received a fair amount of hate mail, but no harassers showed up at her premises.

In 2008, the Supreme Court of the United States handed down *Davis v. FEC*, 554 U.S. 724 (2008); holding that a candidate has a fundamental right to commit personal resources to a campaign to federal office.

That same year, 2008, Ms. Christine O'Donnell was a candidate for United States Senate for the State of Delaware for the 2008 election cycle. Ex. A, p. 6; Affidavit of Christine O'Donnell, Ex. B, ¶ 3. In July of 2008, Ms. O'Donnell's home—her personal residence—was broken into, vandalized, and vulgar names and graffiti were scrawled onto her porch wall and windows. Ex. B, ¶ 7. On or about November of 2008, Ms. O'Donnell's Senate campaign

office, located in Wilmington, DE, was broken into. Whole file cabinets were stolen. Ex. B, ¶ 8. Throughout the 2008 Senate run, during the primary and general elections of that year, threats were made against Ms. O'Donnell and many were made known to her *via* family members working on the campaign or by other campaign staff. Ex. B, ¶ 9; Affidavit of Jennie O'Donnell, Ex. C, ¶ 6.

In 2009, when Ms. O'Donnell was weighing another run for U.S. Senator for the 2010 cycle, she had already decided, based on the nature and frequency of the threats she had experienced during the 2008 campaign, that she would have to take better precautions to preserve her safety in any future campaign. She decided *never again* to list as a legal residence, for public and press consumption, the locale at which she actually lays her head. The entire decision-making process is provided in Ms. O'Donnell's testimony:

Q: At what point in this process did you decide that you were going to live in the townhouse?

A: Well, in the 2008 campaign and in the 2006 campaign there were a lot of threats. Someone vandalized my home. Someone broke in. I had death threats. It was a security issue.

So I had decided that because my address was public record that if I chose to run again I wouldn't do that. And I was actually looking at things like right across the street there is a UPS store. I was going to have that. I talked to my lawyer to see if it's legal to make that a residency. Residency requirements are, according to my former lawyer, are very ambiguous. And they are not really defined until they are challenged in Delaware.

So I didn't want where I was laying my head to be my legal address anymore for security reasons. And that was a decision I made as, you know – I would have liked it to be that way in 2008.

Q: When did you decide that you were going to use the campaign office as a residence?

A: After we decided to get that place, I was going use either the, either a P.O. Box type that's a street address or use a friend of mine's grandmother's address as my legal residence. But I was very hesitant to do that as well because someone would be

> showing up at my friend's grandmother's house. It must have helped me, but the point was to keep people safe. And considering the amount of death threats … considering that safety was a factor, I didn't want anyone involved with me, I didn't want to put a target on anyone else's back.
>
> When we realized that where [staffer] David [Hust] was going to be living [after moving North from Houston, TX to work on the campaign and live in the campaign's townhouse], there was a guardhouse out front, they kept the place secured, then that's when, you know, … we realized it would have been smarter to do it this way [declare the campaign headquarters my legal residence to ensure my safety].

Q: Were you concerned that having your address at the campaign office where other staffers and people were living posed a security threat to those people?

A: Well, that's one of the reasons why we chose it. Like I said, there was a guardhouse there and they patrol it. And that turned out wonderful during the campaign because, you know, if … people showed up or started congregating out front, we didn't have to worry about it. Barbara from the leasing office sent security out and chased them away. So, of course, it was a factor that they provided security.

Q: To your knowledge, were there any such incidents at the 2010 campaign office?

A: Yes.

Q: Can you describe what happened?

A: Oh, there were several…. People showed up on the, on my aunt's porch thinking it was my house and tried to break in, my little aunt. It was hell. Of course I didn't want people knowing where I was. And I felt horrible that other people had to pay the price so I could be safe….

> I'm sorry. Like it's infuriating. I took every measure I could to keep people safe and they still weren't. But I was safe and I'm grateful. And the reason I was kept safe is the reason I am here [in this lawsuit; in this deposition]. It's nuts. I'm sorry. This is nuts.

Q: If you need to take a break at any time --

Ex. A, pp. 27-31.

Ms. O'Donnell has consistently testified that she "wasn't even technically living there [in the Townhouse]," Ex. A, p. 105, but also maintained that she listed the Campaign Committee headquarters (the Townhouse) as her legal residence to ensure her safety:

> So it was a security measure, getting a physical barrier as to how stalkers and harassers and people would make threats against me, people who jeopardized my safety: We had to quickly put up a physical barrier, which is your physical address.

Ex. A, pp. 105-06.

Ms. O'Donnell took every precaution to ensure it was legal to declare the Campaign Townhouse as her legal residence:

> Q: Can you tell me everything you did at that time to assure yourself that what you were doing was legal?
>
> A: Well, I called the FEC.
>
> Q: Right. Other than that, did you take any other steps?
>
> A: I checked with an attorney about Delaware residency laws.
>
> Q: When you checked with the attorney about Delaware residency laws, was that a question about the legalities that –
>
> A: Well, would I have to stay there, you know, sleep overnight 75 percent of the time to make that what was on my driver's license, things like that. For the address that I put on my driver's license, what does it have to be? Can it be a street address that's actually a UPS store? You know, things like that. What am I allowed to do to shelter the public from knowing where I actually live.
>
> Q: But those questions were directed to whether you were breaking any state laws, for example.
>
> A: When it came to my residency. The [federal] campaign laws are what we checked with [FEC employee] Vicki Davis directly explaining to her what we were going to do.

Ex A., pp. 41-42.

Ms. O'Donnell also testified that her campaign manager, Matt Moran, had consulted with a New York lawyer about the arrangement and the firm retained blue-chip lawyer, Cleta Mitchell. Ex. A, pp. 45, 77.

In 2010, the Campaign 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 Campaign Committee used the Greenville Townhouse as its headquarters during Ms. O'Donnell's 2010 campaign for Senate and continued to use the Townhouse after the November 2010 general election. (Compl. ¶ 14; Answer & Countercls. at 3, ¶ 14). The Campaign 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 Ms. 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 Ms. O'Donnell did, at a minimum, sublease space in the Townhouse during the relevant period. (Answer & Countercls. at 3, ¶ 15; at 7, ¶ 9; at 10, ¶ 19.)

According to the O'Donnell Committee's FEC reports, Ms. O'Donnell did make 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.)

Ms. O'Donnell "wasn't even technically living there." Ex. A, p. 105. And Ms. O'Donnell was "usually" at the Campaign Townhouse "for campaign reasons." Ex. A, p. 130. Choosing the Townhouse as her legal residence "was a security measure." Ex. A, pp. 105-106. The Campaign Committee, later in the campaign, paid to bring in beds for campaign staffers. Ex. A, p. 95. At no time was a bed ever put into the bedroom (for which Ms. O'Donnell was making sublease payments) for Ms. O'Donnell's use. She rarely slept in the Townhouse. The only piece of furniture put in the room for Ms. O'Donnell was a desk, for campaign use, used by Ms. O'Donnell mostly for media and fundraising phone calls. Ex. A, 95, 158.

At one point, the Townhouse had ten people living in it. Ex. A, p. 26. The bedroom listed as Ms. O'Donnell's (for purposes of calculating the fair value of the sublease payments) housed five female interns, but not Ms. O'Donnell herself. *Id.* As the number of staff began to increase, and the Campaign Townhouse was "bursting at the seams," Ms. O'Donnell no longer used the Campaign Townhouse even as her office. Ex. A, pp. 122, 159. But she continued to list it to the public as her legal residence and to make sublease payments. Ex. A, pp. 122, 159.

The downstairs of the Campaign Committee Townhouse had no living room furniture, only four desks, computers, campaign televisions, etc. Ex. A, p. 97. There was an additional desk in the dining room, which was used as a conference room for meetings. It had filing cabinets and bookcases and "the big campaign schedule above the table." Ex. A, p. 128. The kitchen was partly used as a break room, the same as in any office setting. Ex. A, p. 97. But the kitchen also had a little table in it and was more often used by volunteers to work on whatever projects they had. Ex. A, p. 128. The garage was not used for Ms. O'Donnell's vehicle, but rather to store campaign signs, boxes of campaign T-shirts, and boxes of push cards. Ex. A, p. 142. Indeed, such items were already overflowing the basement, which was never used to store personal items for Ms. O'Donnell. Ex. A, p. 142.

On no night during the campaign were the occupants of the Campaign Committee Townhouse ever limited solely to the people who lived there, Ex. A, p. 126, and it was common to find campaign volunteers and staff working there at all hours, certainly as late (or as early) as 3 a.m. Ex. A, p. 126. What also increased were the threats: the campaign had consulted security expert Dr. Shawn Greener to ensure the safety of Ms. O'Donnell and her staff. Ex. C, ¶ 9.

In 2011, the Supreme Court of the United States handed down *Arizona Free Enterprise,* 131 S. Ct. 2806. In that opinion, the High Court held that neither administrative efficiency nor administrative convenience are governmental interests sufficient to deny or disparage the First Amendment right to political association and speech.

After the campaign wound down in 2011, Ms. O'Donnell continued to list the Townhouse as her legal residence, for security reasons (though still she did not actually live there). Ex. A, p. 105. She changed her address in 2014. She has testified that she still receives unwanted harassment whenever the press writes a story about the 2010 campaign, including the status of the instant case. Ex. A, p. 166.

II. LEGAL BACKGROUND

The Federal Election Campaign Act, 52 U.S.C. §§ 30101-46, was first enacted in 1971 without a "personal use" provision. Congress amended FECA in 1979 to state that no campaign funds "may be converted by any person to personal use." FECA Amendments of 1979, Pub. L. No. 96-187, § 113, 93 Stat. 1339 (1980) (originally codified as 2 U.S.C. § 439a (1980)). Congress thus sought to apply to all federal candidates the "position [against personal use] adopted by the Senate on previous occasions and reflected in . . . the Standing Rules of the Senate." S. Rep. No. 96-319, at 5 (1979).

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 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).

The purpose of enacting the *per se* categories was administrative convenience, s*ee Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7864 (Feb. 9, 1995) ("Explanation and Justification"); 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 activity to be constitutional. *See Citizens United v. FEC,* 558 U.S. 310 (2010) (campaign expenditures are core political speech subject to strict scrutiny).

In 2002, Congress codified the Commission's regulation in statute, including both the irrespective test and the list of *per se* violations. *See* 148 Cong. Rec. S1991-02 (daily ed. Mar. 18, 2002); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 301, 116 Stat. 81 (codified as amended at 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b))).

III. ARGUMENT

A. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986).

B. THE STATUTE'S PERSONAL USE PROHIBITION DOES NOT APPLY TO THE ARRANGEMENTS BETWEEN MS. O'DONNELL AND THE CAMPAIGN COMMITTEE

In this section, Defendants will demonstrate that the personal use prohibition does not apply to the decision of Ms. O'Donnell and the Campaign Committee to list, with the

general public, the Greenville Place Townhouse (aka the Campaign Committee) as Ms. O'Donnell's legal residence. This is demonstrable for two reasons. First, the regulatory Explanation and Justification interpreting the statutory prohibition on personal use states, in black letter, that the *per se* prohibition for mortgages, rent, and utilities applies *only* where a candidate (or a member of the candidate's family) *owns* the real property in question. Ms. O'Donnell did not then (and does not now) own 1242 Greenville Place, nor does any member of Ms. O'Donnell's family. Second, while the expenses associated with having a personal space to rest one's head to sleep (other than while on a business trip), having a space to entertain family and friends, to spend evenings watching TV, to shower, dress, or even to park one's vehicle in a garage, generally are commitments or obligations that would exist *irrespective* of any decision to run for federal office. 11 CFR 113.1(g). But Ms. O'Donnell did *none* of these things at 1242 Greenville Place. To the contrary, Ms. O'Donnell rested her head elsewhere. Ex. A, p 105. Ms. O'Donnell listed the Townhouse as her legal residence not to actually live there, but rather to distract would-be harassers. Any expense associated with declaring, legally and to the general public, Ms. O'Donnell's legal residence as the Campaign-Committee Townhouse, was a commitment or obligation that would *not have existed irrespective of* her campaign for United States Senator from the State of Delaware. 11 CFR 113.1(g).

1. The *per se* categories in the statute do not apply to this type of sublease arrangement because Ms. O'Donnell did not *own* 1242 Greenville Place, nor did any member of her family.

In our American system of law, administrative agencies enforcing statutes are bound to follow the interpretations they put forth in their rulemakings. *See Chevron USA, Inc. v. Nat. Resources Defense Council*, 467 U.S. 837, 844 (1984) ("If Congress has explicitly left a gap for

the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations *are given controlling weight* unless they are arbitrary, capricious, or manifestly contrary to the statute). That goes double for the *per se* categories against personal use now codified in section 30114(b), as Congress merely codified the FEC's 1995 rulemaking on the matter. So, the question is, what does the *per se* prohibition on mortgages, rent, and utilities address? The Explanation and Justification could not be more clear: "Paragraph (g)(1)(i)(E) … addresses the use of campaign funds for mortgage, rent or utility payments on **real** or personal **property *owned* by the candidate or a member of the candidate's family**. Explanation and Justification at 7865 (emphasis added).

That property *owned* by candidates or their families is what was being addressed is only made more clear by the discussion of property that is not a personal residence: "In contrast, paragraph (g)(1)(i)(E)(2) continues the Commission's current policy in situations where the property being rented is not part of a personal residence of the candidate or a member of the candidate's family. Thus, a campaign committee can continue to rent part of an office building ***owned*** by the candidate for use in the campaign, so long as the committee pays no more than fair market value." *Id.* (emphasis added).

The same construction, the construction of candidate ownership, is apparent when we look at another section of the Explanation and Justification ("E&J") from yet another perspective—the perspective of practical application. Another section of the E&J explains that the personal use statute allows a campaign committee to "*use"* the personal residence of the candidate so long as the campaign committee does not "*pay rent"* to use it. *Id.* ("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. It merely limits the committee's ability to pay rent for such a use.") But Ms. O'Donnell did not *own* 1242 Greenville Place; nor was she the *tenant* on the lease—making it nearly impossible for the campaign committee to "use" 1242 Greenville Place while being prohibited from "paying rent" to use it. Indeed, it is nearly impossible to imagine a scenario in which any campaign committee "may use" space a) it does not own, b) that the candidate (or candidate's family) does not own, and c) for which neither the candidate nor the campaign committee "pays rent" to "use." *See* Explanation and Justification at 7865. Indeed, how long would a commercial landlord, like Greenville Place, allow a campaign committee to "use" space for which the campaign committee is prohibited from "pay[ing] rent"? The answer to the question is obvious. And so is the construction of the prohibition: Practically speaking, the statute only can *permit* the *use* of a property, while at the same time *prohibiting* campaign committees from making *rental payments,* only for those properties a candidate (or a member of the candidate's family) *owns*—or, perhaps, for property on which the *candidate* (or his family) is the first leaseholder. Any other scenario contemplating "use" without "payment" is unimaginable. Therefore, any broader construction of the statute's rental payment prohibition is nonsense—especially a rental payment prohibition triggered solely by a sublease to the candidate.

The Explanation and Justification comes right out and states the outer and upper limit of the statute and the regulation that construes it, and it is binding on the FEC: "Paragraph (g)(1)(i)(E) … addresses the use of campaign funds for mortgage, rent or utility payments on **real** or personal **property *owned* by the candidate or a member of the candidate's family**. Explanation and Justification at 7865 (emphasis added). Ms. O'Donnell did not own

1242 Greenville Place. No member of Ms. O'Donnell's family owned (or owns) Greenville Place.

From every perspective, it is clear that the regulatory interpretation of this part of the statute *does not prohibit* a campaign committee from leasing campaign office space from a commercial landlord (or, in FEC nomenclature, does not contemplate charging lease payments to a commercial landlord *to the candidate* as "personal use") just because the campaign committee later subleases to the candidate a portion of the space for a legal residence. It is clear from the E&J that the statutory prohibition was never intended to apply and, in fact, does not apply, to candidates subleasing residential space from a campaign committee. And because the 2002 statute derives from the 1995 rulemaking, and because administrative agencies are permitted to construe statutes, interstitially and within the bounds of the Constitution, (*see Chevron*) this Court must conclude that the FEC, and later Congress, *never intended* to reach arrangements like this one with its *per se* rule.

So, the *per se* rule does not apply here. With regard to the remaining "irrespective test," Defendants would make two points: First, that an obligation for a safety measure would not have existed irrespective of Ms. O'Donnell's campaigns to federal office and, second, even if this Court were to find that the obligation somehow would have existed irrespective of the campaign, allocation formulas apply (because the *per se* categories do not apply). And under those applicable allocation formulas, Ms. O'Donnell made market-rate sublease payments to prevent any personal use from transpiring.

However, when one considers the true import of the irrespective test, Ms. O'Donnell was not under any obligation to make sublease payments *at all*.

2. Listing the townhouse as Ms. O'Donnell's legal residence was a financial "commitment or obligation" that "would [not] have exist[ed] irrespective of the candidacy."

Establishing a legal residence in a place *other than* the place one lays one's head to sleep—to avoid physical threats, vandalism, and repeated harassment by stalkers disturbed by the fact of one's candidacy for federal office—is a *campaign* safety measure. Instituting a campaign safety measure—including incurring financial obligations to institute the measure—*is* a commitment or obligation that would *not* "exist irrespective of the candidacy." 52 U.S.C. § 30114(b); 11 CFR 113.1(g). As such, the statutory prohibition does not apply to her activity—the activity was a qualified campaign expense—and Ms. O'Donnell was under no legal obligation to make sublease payments to the Campaign Committee *at all*.

Ms. O'Donnell considered multiple other alternatives. She considered listing as a legal residence a property owned and occupied by a friend of a friend, Ex. A, p. 27, but realized that option was untenable because it would "paint a target" on the friends' back. Ex. A, pp. 27-31. She considered listing her personal residence as a Post Office Box at a UPS Store. Ex. A, pp. 27-31. She even consulted a Delaware attorney to explain the legal parameters of residency under Delaware property law. However, she was uncertain a P.O. Box would qualify as a legal residence under Delaware law and knew, most assuredly, that listing a P.O. Box could not call-off the search for her true residence by those wanting to harass her. After all, it is common knowledge that no human being sleeps within the four walls of a P.O. Box. The FEC may suggest that Ms. O'Donnell might have done something else. But there is no Platonic ideal in circumstances such as this; no perfect alternative in a parallel universe. And Ms. O'Donnell chose the best real-world option she could, given multiple considerations to preserve her safety, the safety of her family, the safety of her campaign staff, and others. The

reality was this: Ms. O'Donnell had to list a public residence or else egg-on would-be harassers to search for her further. She made the best real-world choice she could make. She listed to the public, as her official and legal residence, a locale that was plausible (after all she was campaigning from that base eighteen or more hours per day, Ex. A, p. 165); a place that had a guard tower, a gate, and a security service. Any other place but the Campaign Committee Townhouse selected by Ms. O'Donnell would either have been a lie—the kind of lie that can destroy a federal campaign—or a physical locale vulnerable to would-be attackers; attackers of either herself or the collateral attacks against persons actually living at the place listed. This is not mere speculation on Ms. O'Donnell's part. She testified to the example of attackers visiting her aunt, "[her] little aunt," and trying to break into her aunt's home during the 2008 campaign. Ex. A, pp. 27-31.

To maintain the integrity of her campaign, as well as the security of herself and her staff, Ms. O'Donnell 1) listed the campaign address on her driver's license (data accessible to the press and public), 2) never disputed, to this day, that the campaign headquarters *was* her "legal residence," and 3) swore, in this lawsuit, consistently, that she *never* lived there. She has repeatedly testified—and events bear her out—that she listed the Townhouse as a "legal residence" for "security reasons." Ex. A, p. 105; Ex. B, ¶14. Listing the campaign headquarters with the public as her legal residence *was a security measure;* a security measure *necessitated* by her run for Senator for the State of Delaware—a lesson she had learned the hard way during her 2008 bid for the same office. It was a security obligation that did *not* "exist irrespective" of her run for federal office.

"The rule prohibits payments for use of a personal residence because the expenses of maintaining a personal residence would exist irrespective of the candidacy." Explanation and

Justification at 7865. But expenses associated with this arrangement would not have existed irrespective of Ms. O'Donnell's candidacy.

The Campaign Committee leased a townhouse for a campaign headquarters from a commercial landlord, by dint of written contract, in an arm's length bargained-for exchange at market rates. Campaign Committees across America engage in such leases every day; and they have a First Amendment right to do so. There is no reason those lease payments should be charged to Ms. O'Donnell as personal use. That some of the threats driving her decision were in the past is of no moment. *See* Federal Election Commission Advisory Opinion 2001-09, Bob Kerrey (former Senator's use of remaindered campaign funds to burnish his image post-incumbency was not a conversion of campaign funds to his personal use).

C. IF, DESPITE THE CLEAR INTENT OF THE EXPLANATION & JUSTIFICATION, THE PER SE PROHIBITIONS ARE APPLIED TO THE ARRANGEMENT BETWEEN MS. O'DONNELL AND THE CAMPAIGN COMMITTEE, THEY ARE UNCONSTITUTIONAL

The FEC's interpretation—not the interpretation in its Explanation and Justification but its position in this case—seeks to ban certain categories of campaign committee expenditures. 11 CFR 113.1(g)(1)(i)(E)*(1)*. It is intended to ease the FEC's administrative burden, but at the expense of core First Amendment rights.

The FEC's interpretation of an otherwise constitutional personal-use prohibition is unconstitutional in four respects.

First, the FEC's interpretation in this case would frustrate Ms. O'Donnell's right to commit personal resources towards a candidacy for federal office in contravention of *Davis v. FEC*, 554 U.S. 724 (2008). The *Davis* Court made no distinction between government restrictions on funds the candidate's campaign committee would need to make expressive expenditures in furtherance of the candidacy, on the one hand, and restrictions on funds the

candidate's campaign would need to make non-expressive expenditures in furtherance of the candidacy, on the other. At no point did the *Davis* Court subject restrictions on either expressive or non-expressive campaign expenditures to rational basis review. *Id.*

Second, the FEC's interpretation is an expenditure prohibition *on the Campaign Committee*, in violation of the First Amendment. As such, review of the agency's interpretation is required to survive strict scrutiny. *Citizens United,* 558 U. S. at 310 (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.*

But the FEC issued its rule in the name of administrative efficiency. And this is the third ground on which on the FEC's interpretation in this case is unconstitutional. 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.,* 131 S. Ct. at 2824 (quoting *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988)).

Fourth, the *per se* prohibition on mortgages, rent, and utilities (no matter the FEC's overly broad interpretation) permit Ms. O'Donnell, under *Broadrick,* 413 U.S. 601, to press the claim of property owners who may want to finance a campaign to Federal office by deploying real assets.

To meet narrow tailoring and cure the constitutional deficiencies with this rule, 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*) (second

home); 11 CFR 113.1(g)(ii)(D) (campaign vehicles); 11 CFR 100.77 (food and beverage); 11 CFR 113.1g(ii)(B) (meals); 113.1g(ii)(C) (travel).

D. MS. O'DONNELL AND THE CAMPAIGN COMMITTEE HAVE ACTED PRUDENTLY AND IN GOOD FAITH

Defendants will have more to say in their Sur Reply. For now, it suffices to say Ms. O'Donnell acted prudently in making her decision. She contacted a Delaware lawyer about residency law and consulted Vicki Davis about FEC rules. Her treasurer contacted a New York lawyer on the same matter, the Campaign Committee retained blue-chip counsel, Cleta Mitchel, and used a square-footage measure to apportion, against a fair-market rate charged by a commercial leasing company (Greenville Place), an appropriate allocation of rent and utilities for Ms. O'Donnell. Ex. A, *passim*. The O'Donnell Defendants can even address the competing testimony of Vicki Davis and Nataliya Ioffe (transcripts not appended), in their Sur Reply.

IV. CONCLUSION

Defendants' Motion for Summary Judgment should be granted. Plaintiff FEC's Motion for Summary Judgment should be denied.

Respectfully submitted this 30th day of March, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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