UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

PLAINTIFF FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS COUNTERCLAIMS

For the reasons stated in the brief that accompanies this motion, the Federal Election Commission hereby moves to dismiss all three counterclaims brought by defendants.[1]

Respectfully submitted,

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June 16, 2015

[1] Local Rule 7.1.1 does not apply to this Rule 12(b)(6) dispositive motion. Counsel for the FEC nevertheless discussed this motion with counsel for the defendants by phone on May 20, 2015 as part of the parties' Rule 26(f) conference, but the parties were unable to reach any agreement on the matters set forth in this motion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

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

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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 ("Commission" or "FEC") moves to dismiss defendants' counterclaims. The Commission has alleged that the defendants, Christine O'Donnell as well as her campaign committee and its treasurer, 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. All three counterclaims raise precisely the same issues as the affirmative defenses in defendants' answer. They are redundant and therefore should be dismissed. The latter two counterclaims, which assert that the Federal Election Campaign Act's ("FECA" or "Act") longstanding ban on the personal use of campaign funds and its implementing regulation are unconstitutional, should also be dismissed on the merits. Because the personal use prohibitions are reasonable efforts to protect government integrity and the campaign finance system in an administrable and fair way, they are constitutional under the deferential rational basis standard of review that applies. All three counterclaims should be dismissed for failure to state a claim upon which relief can be granted.

SUMMARY OF ARGUMENT

1. All three of defendants' counterclaims are redundant — they merely duplicate the affirmative defenses made in response to the FEC's complaint.

2. The personal use restrictions at issue in this case do not infringe upon any speech or fundamental rights and are not spending limits. Their constitutionality should therefore be reviewed under the rational basis standard.

3. FECA's personal use restrictions serve legitimate government interests in making *quid pro quo* corruption less likely by making it less attractive to candidates, assuring public confidence in the campaign finance system, and preventing personal enrichment.

4. The decisions of Congress and the FEC to adopt a bright line rule that any payment made by a campaign for the rent or utilities of a candidate's residence constitutes a conversion to personal use easily withstands rational basis review. That rule is more administrable and ultimately less burdensome to candidates than allowing allocation on a case-by-case basis, and it provides greater guidance to help campaigns avoid running afoul of the law.

5. Later reimbursement of payments a candidate's campaign made for her personal residence does not make the statute unconstitutional as applied, because deterring such violations still rationally relates to the legitimate governmental interests served. Moreover, even assuming that interest-free loans did not implicate these governmental interests, generally applicable laws need not be narrowly tailored under rational basis review such that the evils they address are directly implicated in every specific case.

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).

O'Donnell was a candidate for the United States Senate from Delaware in 2010. O'Donnell designated defendant Friends of Christine O'Donnell ("O'Donnell Committee" or "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.

B. The Alleged Violation

FECA provides that a "contribution accepted by a candidate" shall not be "converted by any person to personal use." 52 U.S.C. § 30114(a)-(b). FECA further states that "a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign . . . including . . . a home mortgage, rent, or utility payment." 52 U.S.C. § 30114(b)(2), (b)(2)(A); *see also* 11 C.F.R. § 113.1(g)(1)(i)(E)(1).

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

[1] Effective September 1, 2014, the provisions of FECA that were codified in Title 2 of the United States Code were recodified in Title 52. This brief cites FECA as currently codified.

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 reimbursed 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 1967, in the "first modern-era Senate ethics case," the United States Senate censured one of its members for spending funds he had raised from campaign contributors on his personal expenses. *The Censure Case of Thomas J. Dodd of Connecticut (1967)*, U.S. Senate.[2] The Senate concluded that the misuse of campaign funds was "contrary to accepted morals, derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and disrepute." Select Comm. on Standards and Conduct, U.S. Senate, 90th Cong., 1st Sess., *Report No. 193 on the Investigation of Senator Thomas J. Dodd of Connecticut* at 25 (Apr. 27, 1967).[3] The case spurred the Senate the following year to adopt its first rules of ethical conduct — including a rule prohibiting the personal use of campaign funds, *see* Select Comm. on Ethics, U.S. Senate, 108th Cong., 1st Sess., *Senate Ethics Manual* 282 (2003).[4]

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).

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[2] *See* http://www.senate.gov/artandhistory/history/common/censure_cases/135ThomasDodd.htm (last visited June 15, 2015).

[3] *See* http://www.senate.gov/artandhistory/history/common/censure_cases/pdf/135DoddApril27_1967report.pdf (last visited June 15, 2015).

[4] *See* http://www.ethics.senate.gov/downloads/pdffiles/manual.pdf (last visited June 15, 2015).

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 to provide guidance so committees and candidates can easily ascertain whether their intended conduct is lawful. *See Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7864 (Feb. 9, 1995) ("Explanation and Justification") ("A committee or a candidate can examine the rules and be much more certain about what constitutes personal use."); *id.* ("The Commission initiated this rulemaking in order to reduce piecemeal resolution of personal use issues, and to provide more prospective guidance to the regulated community as to the kinds of uses that will be considered personal use.") The FEC also explained the designation of certain spending as a *per se* violation:

> Paragraph (g)(1)(i) of the final rules contains a list of expenses that are considered personal use. The list includes household food items, funeral expenses, clothing, tuition payments, mortgage, rent and utility payments, entertainment expenses, club dues, and salary payments to family members. The rule assumes that, in the indicated circumstances, these expenses would exist irrespective of the candidate's campaign or duties as a Federal officerholder [sic]. Therefore, the rule treats the use of campaign funds for these expenses as per se personal use.

Id. at 7864; *see also id.* (noting that a majority of commenters preferred the *per se* rules so as to avoid "a return to case by case review that would not provide any useful guidance to the regulated community and would not make it any easier to enforce the personal use prohibition.").

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 (noting that if the regulations did not include a list of *per se* violations, "the Commission would have to examine the facts and circumstances of each situation" and it "would require more Commission involvement in the resolution of personal use issues.").

In 2002, Congress rewrote FECA's personal-use statute to codify the Commission's regulation, 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))).

ARGUMENT

Defendants' counterclaims are redundant because they present the same issues raised by the FEC's complaint and they are mirror images of the affirmative defenses in the answer.

Counts II and III of the counterclaims also fail as a matter of law — the personal use restrictions are constitutional because they satisfy the applicable rational basis review. The restrictions serve important interests in deterring *quid pro quo* corruption and protecting government integrity and confidence in the campaign finance system through a bright-line ban on the use of campaign funds for personal rent and utilities, which promotes administrability and reduces the need for agency investigations. And there is no merit to defendants' claim that the statute is unconstitutional as applied because of O'Donnell's reimbursements of the Committee. Preventing interest-free loans rationally relates to the legitimate governmental interests served and in any event, the validity of general rules under rational basis review does not depend on a showing of harm in each individual application. Thus, all the counterclaims should be dismissed.

I. ALL THREE COUNTERCLAIMS SHOULD BE DISMISSED AS REDUNDANT

The Court should dismiss all three counterclaims because there is "no doubt that [the counterclaims would] be rendered moot by adjudication of the main action." *PHL Variable Ins. Co. v. Helene Small Ins. Trust*, No. 12-cv-312-RGA, 2012 WL 5382905, at *1 (D. Del. Nov. 1, 2012) (quoting *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, 674 F. Supp. 2d 562, 566 (D. Del. 2009)). Declaratory judgment counterclaims are appropriately dismissed "where it is clear that there is a complete identity of factual and legal issues between the complaint and the counterclaim," and where "the prayer for declaratory relief is redundant and [would] bec[o]me moot upon disposition of the [counterclaim]." *Aldens, Inc. v. Packel*, 524 F.2d 38, 51–52 (3d Cir. 1975) (citing 6 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1406 (1971)); *see, e.g.*, *PHL Variable Ins. Co.*, 2012 WL 5382905 (dismissing counterclaims);

Penn Mut. Life Ins. Co. v. Norma Espinosa 2007-1 Ins. Trust, No. C.A. 09-300-JJF, 2010 WL 3023402, at *5-6 (D. Del. July 30, 2010) (same).

In this case, defendants have merely taken their affirmative defenses and reconstituted them as identical counterclaims. For example, counterclaim Count I asks for a declaratory judgment that defendants' actions did not violate 52 U.S.C. § 30114(b), or if they did violate the law, they did so in good faith reliance upon FEC regulations, and therefore they fall within the "safe harbor" provision of 52 U.S.C. § 30111(e). This counterclaim is identical to the first two affirmative defenses listed in the answer, which assert that the complaint fails to state a claim for relief and that the claims are barred by the "safe harbor" provision. (Answer & Countercls. at 4-5, ¶¶ 33-34.)

The remaining counterclaims are similarly duplicative. Count II seeks a declaration that "the expenditure limitations specified in 11 C.F.R. § 113.1(g)(1)(i)(E) are facially unconstitutional." (Answer & Countercls. at 9, ¶ 17.) Counterclaim Count III asks for a declaration that "the expenditure limits specified in 52 U.S.C. § [30114(b)] are unconstitutional as applied to Defendants." (Answer & Countercls. at 10, ¶ 21.) The third and fourth affirmative defenses use identical language.[5]

A court could not find in favor of the defendants on any of their counterclaims without also finding in favor of the defendants, for the same reasons, in the adjudication of the main action. Conversely, there is no circumstance in which a court could reject the defendants'

[5] In fact, the same typographical errors even appear in the affirmative defenses and the counterclaims. (*See* Answer & Countercls. at 5, ¶ 36; *id*. at 6, ¶ 3; *id*. at 10, ¶ 21; *id*. at 10 Prayer for Relief C (each incorrectly citing 52 U.S.C. § 30111(e) rather than the correct 52 U.S.C. § 30114(b)); *id*. at 5 Prayer A; *id*. at 10 Prayer for Relief A (each incorrectly citing 52 U.S.C. § 50114(b) rather than the correct 52 U.S.C. § 30114(b)).) The Commission has substituted the correct citations when referring to that language in this memorandum.

affirmative defenses yet find in favor of defendants on their counterclaims. The Court may thus dismiss the counterclaims for this reason.[6]

II. DISMISSAL IS ALSO APPROPRIATE FOR COUNTERCLAIMS THAT PRESENT NO PLAUSIBLE CLAIM FOR RELIEF

"To survive a [Rule 12(b)(6)] motion to dismiss, a [pleading] must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In reviewing a motion to dismiss, the Court must accept the non-moving party's allegations as true and construe those allegations in a light most favorable to the non-moving party. *Dykes v. Southeastern Penn. Transp. Auth.*, 68 F.3d 1564, 1566 n. 1 (3d Cir. 1995). However, "the tenet that a court must accept as true all of the allegations contained in a [pleading] is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. Dismissal is appropriate "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

III. FECA'S PERSONAL USE RESTRICTIONS ARE SUBJECT ONLY TO DEFERENTIAL RATIONAL BASIS REVIEW

Deferential rational basis review should apply to defendants' two constitutional counterclaims. There is no authority suggesting that converting campaign funds to personal use is a fundamental right protected by the Constitution or that the First Amendment is even implicated by a law prohibiting such conduct. In the absence of any fundamental right or First

[6] Because of the identical nature of the claims, the FEC intends to move after pleadings have closed for partial judgment on the pleadings, pursuant to Federal Rule 12(c), with respect to defendants' affirmative defenses 3 and 4 for the reasons articulated in the rest of this brief.

Amendment burden, courts use the "rational basis" standard in reviewing claims that legislation violates the Constitution.

A. Conversion of a Committee's Campaign Funds to Personal Use Does Not Involve the Exercise of a Fundamental Right

There is no authority suggesting that converting campaign funds to personal use is a fundamental right protected by the Constitution or that the First Amendment is even implicated by a law prohibiting such conduct. The restrictions abridge no speech — instead, they simply bar the "personal use" of campaign funds for the ordinary living expenses of rent and utilities, *not* for campaign speech. And, unlike some limits on contributions, they involve no limits on the degree of association between a contributor and the committee supported by that contributor. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976). They instead enhance the association between contributors and candidate committees by ensuring that funds will be spent for campaign efforts rather than personal enrichment, consistent with the expectations of most contributors.

Defendants' second and third counterclaims appear to contend that the challenged restrictions abridge freedom of speech in violation of the First Amendment. (Answer & Countercls. at 8-10, ¶¶ 13-21.) But the personal use restrictions involve money that is *not* being used to influence elections or to engage in political communication because the funds have been "converted by any person to personal use." 52 U.S.C. § 30114(b)(1). "Personal use" by definition distinguishes such spending from campaign-related expenses, as the FEC's Explanation and Justification to the regulation makes apparent. Explanation and Justification, 60 Fed. Reg. at 7863–64 ("If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use.") To be sure, campaigns may spend funds on expenses unrelated to communications that are nevertheless in

furtherance of election efforts and implicate constitutional concerns.[7] Diversion of funds away from campaign efforts for personal enrichment, however, is qualitatively different and prohibition of such diversion raises no First Amendment issues.

The distinction between the spending activity encompassed by the personal use statute and the expenditure limits discussed in *Buckley* is illustrated in the very quote that defendants chose to include in their counterclaims: "[Expenditure limits receive] the exacting scrutiny applicable to limitations *on core First Amendment rights of political expression*." *Buckley,* 424 at 44-45 (emphasis added). Defendants were not engaged in core political expression when they paid rent and utilities on O'Donnell's residence. *Donatelli v. Mitchell*, 2 F.3d 508, 515 n.10 (3d Cir. 1993) (applying rational basis scrutiny because "[n]o such restriction on plaintiffs' First Amendment rights is involved here").

B. Section 30114(b) Is a Use Restriction, Not a Spending Limit

The personal use restrictions are not expenditure limits triggering strict scrutiny, like provisions at issue in *Buckley* and *Citizens United v. FEC*, 558 U.S. 310 (2010), because campaigns are free to spend all of the money they can raise on expressive election activity. *Buckley* took care to point out that the expenditure limits in that case were unconstitutional because they restricted "the *amount* of money a person or group can spend on political communication during a campaign." *Buckley*, 424 U.S. at 19 (emphasis added). Such restrictions on the amount of money that could be spent had two constitutional problems. The first was that "[t]he expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* ("A restriction on the amount of money a person or group can spend on political communication during a

[7] An example would be payment for drivers to take people to the polls.

campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). The second was that these limits are "'simultaneously an interference with the freedom of (their) adherents.'" *Id.* at 22 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality)). The Court emphasized that the "interests served by the [expenditure limit] include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." *Id.* at 17.

But *Buckley* distinguished unconstitutional expenditure limits from constitutional restrictions that merely limited the specific conduct or manner of political expression. For example, the Court noted that it had previously found a prohibition on burning draft cards constitutional, despite the fact that it infringed on some symbolic speech, because it merely prohibited a specific type of conduct that the government had an interest in regulating "'unrelated to the suppression of free expression.'" *Buckley*, 424 U.S. at 16 (quoting *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)). The Court also distinguished expenditure limitations from "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication." *Id.* at 17-18 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); and *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

The personal use restrictions at issue in this case are more akin to the conduct and "time, place, and manner" cases distinguished in the *Buckley* opinion than to the expenditure limits the Court struck down. Campaigns remain free to spend as much money as they can raise from contributors, so there is no infringement on "the amount of money" the committee "can spend on

political communication during a campaign." *Buckley*, 424 U.S. at 18-19; *see also id.* at 18 ("The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.").

In the context of provisions implementing contribution limits, the Supreme Court has undertaken a functional analysis to determine whether a provision acts as a spending limit and should be subject to strict scrutiny. The relevant inquiry, the Court found, is "whether the mechanism adopted to implement the contribution limit . . . burdens speech in a way that a direct restriction on the contribution itself would not." *McConnell v. FEC*, 540 U.S. 93, 138-39 (2003). Provisions that prevented political party committees from raising and *spending* funds outside of federal source and amount limits did not impose such a burden. *Id.* at 139. "That they do so by prohibiting the spending of [money outside the limits]," the Court concluded, "does not render them expenditure limitations." *Id.*

Compared to the provisions at issue in *McConnell*, it is even easier to see that the personal use provisions at issue here do not constitute a spending limit. Section 30114's title refers to the "use of contributed amounts," and the prohibition in 30114(b) is against the conversion of a "contribution or donation." 52 U.S.C. § 30114. The prohibition is "a direct restriction on the contribution itself," and plainly does not "burden[ ] speech in a way" beyond that restriction. *McConnell*, 540 U.S. at 139. That the restrictions also have the effect of preventing committees from spending funds for a candidate's personal use "does not render them expenditure limitations." *Id.*

IV. THE PERSONAL USE RULES RATIONALLY RELATE TO LEGITIMATE GOVERNMENT INTERESTS, SO DEFENDANTS' CONSTITUTIONAL COUNTERCLAIMS FAIL TO STATE A PLAUSIBLE CLAIM FOR RELIEF

A. Rational Basis Review is Highly Deferential

Under rational basis review, laws are upheld so long as they are "rationally related" to a "legitimate" government interest. *Parker v. Conway*, 581 F.3d 198, 202 (3d Cir. 2009) (citing *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165 n.24 (3d Cir. 2002)). A court is not to judge the "wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Instead, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). Claimants attacking a legislative classification on rational-basis review have the burden "to negative every conceivable basis which might support it." *Beach Commc'ns*, 508 U.S. at 315 (citation and quotation marks omitted). "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321 (1993) ("A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'"(quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970))).

B. The Personal Use Restrictions Promote Legitimate Government Interests, Including Deterring Corruption and Promoting Public Confidence in the Campaign Finance System

The personal use ban deters *quid pro quo* corruption, protects government integrity and public confidence in the campaign finance system by preventing self-dealing, and prevents improper enrichment of candidates. The personal use of campaign contributions increases the

danger of *quid pro quo* corruption by enabling personal gain as part of a *quid*, and the ban counteracts that by reducing candidates' own financial incentive.

As discussed earlier in the context of Senator Thomas Dodd's censure hearing, the Senate restricted the personal use of campaign funds because it is "contrary to accepted morals, derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and disrepute." *See supra* p. 5. Congress thereafter amended FECA to include the personal-use ban, consistent with the "position adopted by the Senate on previous occasions and reflected in . . . the Standing Rules of the Senate." S. Rep. No. 96-319, at 5 (1979).

Because the personal use of candidate campaign funds has been clearly prohibited for decades, contributors to committees like the O'Donnell Committee reasonably expect that their contributions will not be subject to personal use. In addition, as articulated in the FEC's 1995 Explanation and Justification, the regulation was designed to be easy to administer and to provide clear guidance to campaigns. *See supra* pp. 6-7. The government has an interest in assuring that the public can understand and follow the law, without the risk of an investigation. *Cf. FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (cautioning that a test without an easily administrable line can "typically lead to a burdensome, expert-driven inquiry" that "will unquestionably chill a substantial amount of political speech").

In contrast with actual spending limits that the Supreme Court has struck down, the personal use prohibition was not animated by any improper purpose. It is not designed to equalize the opportunity for political expression or suppress expression. *See Buckley*, 424 U.S. at 48-49 (rejecting equalization); *Citizens United*, 558 U.S. at 339-40 (rejecting suppression). Lessening the danger of corruption and its appearance, promoting confidence in government and

the system of campaign contributions, and preventing personal enrichment with funds contributed for campaign purposes are legitimate government interests.

C. The Personal Use Regulation Rationally Relates to These Legitimate Government Interests

The Commission's personal use regulation easily satisfies the applicable level of review because there is plainly a rational basis to ban the use of campaign funds to pay the rent and utilities of a candidate's residence. Barring the use of campaign funds for personal living expenses is a rational way to protect government integrity and confidence in the campaign finance system. *See supra* pp. 5-7. Moreover, the Commission adopted the *per se* rules to promote important interests in efficient administration of the law, providing guidance to campaigns while avoiding unnecessary enforcement activity. *See supra* pp. 6-7. Because the personal use regulation satisfies rational basis review, the counterclaim challenging the regulation should be dismissed for failure to state a claim to relief that is plausible on its face. *See supra* p. 10.

Counterclaim Count II alleges that 11 C.F.R. § 113.1(g)(1)(i)(E), which prohibits use of campaign funds to pay a candidate's residential rate and utilities, is facially unconstitutional. Defendants argue that there is a less restrictive means by which the FEC could promote the government's interests. (Answer & Countercls. at 9, ¶¶ 16-17.) According to defendants, the FEC could instead allow campaigns to allocate expenses of a residence, with the committee paying campaign-related expenses and the candidate paying personal expenses. Under the rational-basis standard, however, the government need not choose the least restrictive means of achieving its goals; its regulation merely has to rationally relate to a legitimate government interest. *See supra* p. 15.

In any event, even if the Commission were required to narrowly tailor its regulation and choose the least restrictive means, the FEC Advisory Opinions upon which defendants rely are easily distinguished because both involved the rental of office space *from the candidate to his campaign*. The Commission has a rational basis for treating such rentals of office space to the campaign differently, because as stated in the 1995 Explanation and Justification, "[t]hese arrangements more closely resemble arms length transactions in that the property in question is available on the open market" and they "generally do not raise the same kinds of allocation issues." Explanation and Justification at 7865.

These advisory opinions thus involved situations that are the reverse of defendants' situation here, in which the candidate subleased space from her campaign. But if defendants had any doubt about whether their arrangement was lawful, they could have sought an advisory opinion from the Commission and explained any special circumstances that in their view made the *per se* rule inapplicable. *See* 52 U.S.C. § 30108(b). They did not ask for any such opinion.

D. The Personal Use Statute Is Constitutional As Applied to Defendants

Counterclaim Count III appears to assert that 52 U.S.C. § 30114(b) is unconstitutional as applied to defendants because O'Donnell later reimbursed the campaign for an amount that she claims reflects the market value of the space she used and therefore she allegedly did not convert any campaign funds to personal use. But interest-free loans of funds can raise *quid pro quo* and appearance of enrichment concerns. *See, e.g.*, *United States v. Taff*, 400 F. Supp. 2d 1270, 1273 (D. Kan. 2005) (denying motion to dismiss indictment for campaign funds that were used temporarily to induce a loan). Most citizens do not have access to such funds and would be concerned about any whiff of what one court has referred to as "the rather odious practice of converting campaign funds to personal use." *United States v. Given*, 164 F.3d 389, 393 n.1 (7th

Cir. 1999). Because O'Donnell's alleged reimbursement to the Committee does not bring the personal use statute's constitutionality into question, the counterclaim challenging the statute as applied should be dismissed for failure to state a claim to relief that is plausible on its face. *See supra* p. 10.

In any event, violations of law cannot simply be undone by efforts to restore the status quo. Courts have applied the prohibition to temporally limited personal uses in the past without any hesitation regarding the constitutionality of doing so. *See. e.g.*, *Taff*, 400 F. Supp. 2d at 1273.

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. For present purposes, although the allegations in the counterclaim that O'Donnell paid a proportionate amount for the fair market value of her space are taken as true for purposes of this motion, the inherent public uncertainty about such allocations illustrates one of the important interests the *per se* rule serves.

In any case, even assuming O'Donnell received no tangible benefit from her violation of law, that would not make the statute unconstitutional under the applicable standard of review. Indeed, the Supreme Court has upheld the constitutionality of contribution limits for everyone, even family members, with the assumption that most large contributors do not wish to engage in corruption. *See Buckley*, 424 U.S. at 29-30 (upholding contribution limits even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action"). So long as they rationally relate to legitimate government purposes, generally applicable laws are not unconstitutional simply because the evils they address are not directly presented in each individual case, and so Count III must fail.

CONCLUSION

For the foregoing reasons, the counterclaims should be dismissed.

Respectfully submitted,

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