UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVE SCHONBERG,	)	
	)	
Plaintiff,	)	No. 1:10-cv-02040-RWR –JWR -CKK
	)	
v.	)	THREE-JUDGE COURT
	)	
FEDERAL ELECTION COMMISSION,	)	Motion
	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISSOLVE THREE-JUDGE COURT

Defendant Federal Election Commission now moves for an order dissolving the three-judge district court previously convened in this case, and returning the case to the single district court judge to whom the case was initially assigned for all further proceedings. In support of this motion, the Commission relies upon the accompanying memorandum of points and authorities. A proposed order also is attached.

Counsel for the Commission contacted plaintiff Steve Schonberg to determine plaintiff's position on this motion. Plaintiff informed the Commission that he opposes this motion.

Respectfully submitted,

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December 23, 2010

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v.	)	THREE-JUDGE COURT
	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISSOLVE THREE-JUDGE COURT

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INTRODUCTION

Plaintiff Steve Schonberg filed this suit against the Federal Election Commission ("Commission" or "FEC") challenging the constitutionality of longstanding provisions of the Federal Election Campaign Act ("FECA"), as amended, 2 U.S.C. §§ 431-57, under which candidates for Congress receive campaign contributions through their principal campaign committees. Plaintiff erroneously frames his challenge as one that also involves the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002) ("BCRA"), which amended FECA, and thus plaintiff seeks consideration of his suit by a three-judge district court in accordance with BCRA § 403. (Doc. 2.) Plaintiff served his application for a three-judge court along with his complaint by mail on December 6, 2010, and on December 9 — before the Commission was able to respond — plaintiff's request was granted and this three-judge court was convened.

The Commission now moves for an order dissolving the three-judge court. BCRA § 403 offers that special option only for actions challenging the constitutionality of BCRA itself, not pre-existing provisions of FECA, which are the real subject of this case. The district court's request for designation of a three-judge court was based on the erroneous ground that any constitutional claim *under FECA* entitles a plaintiff to a three-judge court. (Doc. 4.) Moreover, plaintiff cannot justify the convening of a three-judge federal court because he lacks standing and has failed to present any substantial federal question. The Commission's motion to dissolve the three-judge court should therefore be granted on these grounds as well.

BACKGROUND

This suit is plaintiff Steve Schonberg's second action against the Commission challenging the constitutionality of FECA. In 2009, Schonberg and his wife, Maribeth

Schonberg, filed suit in Florida against the Commission and seven Members of Congress. *Schonberg v. Sanders*, No. 5:09-cv-534-Oc-32-TJC-JRK (M.D. Fla. filed Dec. 3, 2009). Plaintiffs challenged the regulatory scheme established by FECA, which requires each candidate for federal office to designate a political committee to serve as his or her authorized principal campaign committee. *See* 2 U.S.C. § 432(e). Plaintiffs claimed that FECA's designation of Members of Congress as "agents" of their re-election committees confers a governmental "office" and thus violates the Emoluments Clause in Article I of the Constitution. Plaintiffs alleged that campaign contributions subsequently received by Members of Congress from those connected with the health care industry constitute "bribes" which "corrupt" Congress and prevented the passage of health care reform legislation acceptable to plaintiffs, and in particular, prevented plaintiffs from locating more affordable health insurance for Mrs. Schonberg.

The Commission moved to dismiss plaintiffs' complaint in February 2010. (M.D. Fla. Doc. 25.) Plaintiffs subsequently amended their complaint. (M.D. Fla. Doc. 36.) The Commission again moved to dismiss (M.D. Fla. Doc. 43), Schonberg moved for leave to amend his complaint again (M.D. Fla. Doc. 47), the FEC opposed that motion (M.D. Fla. Doc. 48), and on November 10, 2010, Schonberg voluntarily dismissed the case (M.D. Fla. Doc. 49.)

Schonberg was a write-in candidate for the congressional race in Florida's Sixth District, and he was defeated in the November 2010 general election. He later registered with the Commission as a candidate for Congress from the same district in 2012. (*See* Complaint ("Compl.") (Doc. 1) ¶¶ 9-10.).

Schonberg filed the case that is before this Court on November 24, 2010. His complaint repeats his prior claim that several provisions of FECA violate the Emoluments Clause and

further alleges that these FECA provisions violate the Appointments and Compensation Clauses of the Constitution. Plaintiff also alleges that FECA violates the Fifth Amendment by denying equal protection to candidates who challenge incumbent Members of Congress. While plaintiff challenges essentially the same FECA provisions at issue in his prior suit, he frames this suit as a challenge to both FECA and BCRA. (Compl. ¶¶ 1-3.)

ARGUMENT

I. A THREE-JUDGE DISTRICT COURT HAS NO AUTHORITY TO ADJUDICATE PLAINTIFF'S CLAIMS BECAUSE THEY ARE CHALLENGES TO FECA, NOT BCRA

Section 403, the special judicial review provision of BCRA, permits plaintiffs to elect a three-judge court only when they bring a constitutional challenge to BCRA, not when their claims focus on elements of FECA that BCRA did not alter. *McConnell v. FEC*, 540 U.S. 93, 229 (2003) ("[C]hallenges to the constitutionality of FECA provisions" are not "subject to direct review" in a "three-judge District Court convened pursuant to BCRA § 403(a)."). BCRA § 403(a), 116 Stat. at 113-14, states in part: "If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply." Because BCRA § 403 did not amend FECA but is a stand-alone judicial review provision, its references to "this Act" mean BCRA, not FECA. Thus, the district court's statement (Doc. 4 at 1) that section 403 authorizes a three-judge court for challenges to "either" FECA or BCRA is incorrect. Because plaintiff's claims challenge longstanding FECA provisions, this three-judge court has no authority to resolve those claims.

Before December 31, 2006, actions challenging the constitutionality of BCRA were *required* to be filed in this district and heard by a three-judge district court convened pursuant to

28 U.S.C. § 2284, which provides that "[a] district court of three judges shall be convened when . . . required by Act of Congress." BCRA § 403 further provides that final decisions of such three-judge courts are reviewable only by direct appeal to the Supreme Court. BCRA § 403(a)(3), 116 Stat. at 114. These special procedural rules do not apply to actions filed after December 31, 2006, "unless the person filing such action elects such provisions to apply to the action." BCRA § 403(d)(2), 116 Stat. at 114. BCRA's legislative history suggests that Congress's primary purpose in enacting section 403 was to ensure that the serious constitutional issues raised by BCRA would be resolved promptly after its passage. *See* 148 Cong. Rec. S2142 (Mar. 20, 2002) (statement of Sen. Feingold) (BCRA's expedited judicial review rules will "assist [in] an orderly transition from the old system to the new system" of campaign finance through a "prompt and efficient resolution of the litigation"); 147 Cong. Rec. S3189 (Mar. 30, 2001) (statement of Sen. Hatch) (BCRA "supporters and opponents alike[] stand go (sic) gain by a prompt and definite determination of the constitutionality of many of the bill's controversial provisions"; "it is imperative that we afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible").

Although Schonberg's complaint cites without explanation numerous provisions of FECA that he alleges are unconstitutional (*see* Compl. ¶ 98), his central allegations are that FECA (a) impermissibly favors incumbents and (b) permits bribes and other wrongs by allowing Members of Congress to establish campaign committees and accept contributions to those committees. The operative FECA provisions that allegedly create such a system appear to be 2 U.S.C. §§ 432, 439a, 441a, and 441b, provisions that, respectively, require a candidate to establish a principal campaign committee, set contribution limits, allow corporations and unions to create separate segregated funds (commonly known as "PACs"), and describe permissible

uses of contributions received. In particular, to centralize responsibility for handling and reporting campaign receipts and disbursements, FECA designates the candidate to be an "agent" of his or her committee, 2 U.S.C. § 432(e)(2), so that financial activity by the candidate is attributed to the committee; the committee and its treasurer are responsible for ensuring that financial activity complies with FECA's requirements (including that all contributions are from permissible sources and within legal limits) and for disclosing receipts and disbursements by the candidate on periodic reports. *See generally* 2 U.S.C. §§ 432-434, 441a, 441b.

Plaintiff claims that these provisions violate the Due Process Clause of the Fifth Amendment, the Appointments Clause, the Compensation Clause, and the Emoluments Clause. In his claim for relief, he appears to request that all of FECA and BCRA be declared unconstitutional (Compl., Claim for Relief 21 ¶ A), and he alleges that "public-only campaign financing" is the proper solution (*id.* ¶ 93). None of Schonberg's allegations, however, state how any changes enacted in BCRA are the reason for the alleged constitutional flaws in the nation's campaign finance statutes. Indeed, many of his allegations have nothing at all to do with FECA or BCRA, such as his allegation that incumbents have an unfair advantage because they are purportedly provided with a "taxpayer funded website." (Compl. ¶ 95(b).)

Most of plaintiff's constitutional claims rest on his erroneous contention that lawmakers' positions as "agents" of their re-election committees under 2 U.S.C. § 432 constitute federally-created "civil Officers." (*See* Compl. ¶¶ 98, 101(a), 103.) Starting with this false premise, plaintiff then claims, for example, that FECA violates the Emoluments Clause in Article I because it permits incumbents to establish political committees for their re-election campaigns, which may accept contributions from persons with interests before Congress, while

simultaneously serving as Members of Congress. (Compl. ¶¶ 103, 106-08.)[1]

Although frivolous (*see infra* pp. 14-17), plaintiff's challenge is against longstanding elements of FECA, not BCRA. Rather than identify any specific provision of BCRA that changed federal campaign finance law in any way relevant to his constitutional claims, Schonberg appears to argue that BCRA failed to further restrict the use of private contributions by candidates for Congress and their campaigns. While plaintiff's complaint refers to FECA and BCRA together, it does not contend that BCRA altered the general regulatory scheme for private financing of congressional campaigns that existed before BCRA. To the contrary, the only claim in plaintiff's complaint regarding BCRA's effect upon the existing regulatory scheme is the general assertion that BCRA did *not* impose the radical changes plaintiff favors. (*See* Compl. ¶ 30 ("Because Congress generally acts only in its own best interests, BCRA did not address this website inequality either, even though BCRA did create new Internet responsibilities for the Defendant.").)

Plaintiff's complaint discusses only one provision of BCRA that he seeks to have invalidated, BCRA § 301, codified at 2 U.S.C. § 439a, the provision that contains FECA's restrictions on the personal use of campaign funds.[2] Contrary to plaintiff's apparent suggestion

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[1] The Emoluments Clause provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

United States Constitution, Art. I, § 6, cl. 2.

[2] Plaintiff actually cites BCRA § 313, not § 301, but the former amended FECA § 406(a), which contains the statute of limitations for criminal prosecutions of FECA violations. *See* 2 U.S.C. § 455(a). BCRA § 313 extended this limitations period from three years to five years. Pub. L. 107-155, § 313, 116 Stat. at 106. Plaintiff appears to have intended to cite

that this amendment somehow liberalized the use of campaign contributions by candidates and their campaigns, BCRA § 301 merely replaced the existing text of this provision with language providing a more detailed description regarding permissible uses of campaign contributions received by federal candidates and listing several specific situations which would constitute impermissible conversion of such funds to personal use. *See* Pub. L. 107-155, § 301, 116 Stat. at 95-96. Plaintiff complains that this new language permits Members of Congress to use campaign funds for expenses that plaintiff disapproves of (*see* Compl. ¶ 101(f)); plaintiff describes one such use, the funding of "ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." 2 U.S.C. § 439a(a)(2). (*See* Compl. ¶¶ 84, 90, 104 (citing section 439a(a)(2)).) However, plaintiff does not — and cannot — demonstrate that section 439a(a)(2) significantly changed FECA, let alone liberalized it, since prior to BCRA, section 439a already explicitly permitted excess campaign funds and "any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office" to "be used . . . to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office." 2 U.S.C. § 439a (2001).[3] Thus, any quarrel Schonberg has with this provision predates BCRA's amendments to FECA.

Indeed, the legislative history indicates that BCRA § 301's amendment to 2 U.S.C. § 439 was "intended to codify the FEC's current regulations on the use of campaign funds for personal

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BCRA § 301, which amended FECA § 313, resulting in a change to 2 U.S.C. § 439a. (*See, e.g.*, Compl. ¶ 84 (citing "2 U.S.C. § 439a., BCRA §313(a), 116 Stat. at 95"); *see also id*. ¶ 90.)

[3] Section 439a was further amended by the Consolidated Appropriations Act of 2005, Pub. L. 108-477, § 532, 118 Stat. 3272 (Dec. 8, 2004) (adding paragraphs (a)(5) and (a)(6)), and by the Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, § 601(a), 121 Stat. 774 (Sept. 14, 2007) (adding new subsection (c)).

expenses." 148 Cong. Rec. S2143 (Mar. 20, 2002) (Statement of Senator Feingold). *See also* 148 Cong. Rec. S1994 (Mar. 18, 2002) (section-by-section analysis). Those Commission regulations, 11 C.F.R. §§ 113.1, 113.2 (2001), expressly permitted the use of excess campaign funds and other funds donated "to defray any ordinary and necessary expenses incurred in connection with the recipient's duties as a holder of Federal office" and provided specific examples, including the costs of travel by the officeholder and his or her spouse and the costs of winding down the office of a former officeholder. *See* former 11 C.F.R. § 113.2(1)-(2) (2001).

Thus, rather than objecting to any substantive change that BCRA made to FECA, plaintiff appears to be criticizing Congress's failure to adopt *stricter* limitations upon the financing of campaigns for federal office. But that is not a complaint about what a statute says, but about what it doesn't say. Plaintiff objects to *any* use of private campaign contributions, and apparently would not be satisfied until private financing of congressional campaigns is replaced with public funding, and additional measures are adopted to equalize the resources available to incumbents and challengers. (*See, e.g.,* Compl. ¶ 93 ("Public-only financing of federal election campaigns will help reduce bribery and corruption in Congress. Abolishing the FEC is the first step toward public-only campaign financing.").)

In sum, despite Schonberg's nominal citations to BCRA, his challenge is to FECA provisions that existed before BCRA. Because three-judge courts under BCRA § 403(a) cannot be convened to address challenges to FECA, the three-judge court should be dissolved.[4]

[4] Even if plaintiff were to obtain a favorable ruling as to the amendments BCRA made to 2 U.S.C. § 439a, the former section 439a, with its substantially similar personal use restrictions, would remain in place. Under *McConnell*, Schonberg's alleged injuries would therefore not be redressed, and he would lack standing. In *McConnell*, a set of plaintiffs challenged BCRA

II. A THREE-JUDGE COURT IS INAPPROPRIATE HERE BECAUSE PLAINTIFF LACKS STANDING AND HIS CASE IS FRIVOLOUS

A. Three-Judge Courts Should Not Be Convened When a Plaintiff Lacks Standing or When His Claims Are Insubstantial

Schonberg's request for a three-judge court relies on BCRA § 403(a)(1), a provision that invokes 28 U.S.C. § 2284, which in turn establishes three-judge court jurisdiction in limited circumstances. The courts have interpreted section 2284 and its predecessors to grant an application for a three-judge court only if the complaint states a "substantial" constitutional claim. A three-judge court is not required if the plaintiff's constitutional claim is "wholly insubstantial," "frivolous," or "essentially fictitious." *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). A claim is insubstantial if it is obviously without merit or clearly unsound under previous case law. *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Calif. Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938) (same). Applying these criteria, courts of this circuit have denied applications for a three-judge court. *See, e.g.*, *Judd v. FCC*, 723 F. Supp. 2d 221, 222 (D.D.C. 2010) ("A single judge has an obligation to examine the complaint to determine whether it states a substantial claim before burdening two other judges by requesting a three judge court

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§ 307, which increased and indexed for inflation certain FECA contribution limits. On direct appeal from a three-judge court, the Supreme Court observed that BCRA § 307 "merely increased and indexed for inflation certain FECA contribution limits." *McConnell*, 540 U.S. at 229. The Court explained that it had "no power to adjudicate" a challenge to FECA's contribution limits because challenges to FECA were not subject to review under BCRA § 403. *Id*. The Court thus held that it could not redress plaintiffs' alleged injuries: "[I]f the Court were to strike down the increases and indexes established by BCRA § 307," the Court reasoned, it would not remedy the plaintiffs' alleged injury because the limits imposed by FECA "would remain unchanged." *Id*. "A ruling in the . . . plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing." *Id*. For the same reasons, the three-judge court convened here cannot redress plaintiff's alleged injuries from BCRA's amendments to 2 U.S.C. § 439a, since it has no authority to address FECA's pre-BCRA restrictions on the personal use of campaign contributions by federal candidates.

to consider an insubstantial or frivolous claim.") (internal quotation marks and citation omitted); *Adams v. Richardson*, 871 F. Supp. 43, 45 (D.D.C. 1994).

Moreover, for a three-judge court to be convened, a plaintiff must meet other jurisdictional requirements, most notably, standing. *See, e.g.*, *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 262 (D.D.C. 2002) (convening three-judge court unwarranted since plaintiff lacked standing to bring his constitutional claims). As the Supreme Court explained when it reviewed a case in which a three-judge court had dismissed a complaint for lack of standing:

> This ground for decision, that the complaint was nonjusticiable, was not merely short of the ultimate merits; it was also, like an absence of statutory subject-matter jurisdiction, a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge.

Gonzalez v. Automatic Emps. Credit Union, 419 U.S. 90, 100 (1974). *See also Rostker v. Goldberg*, 453 U.S. 57, 61 n.2 (1981).

In the analogous context of constitutional challenges to FECA that can be brought under 2 U.S.C. § 437h and decided on the merits in the first instance by an en banc court of appeals, the courts have adopted a similarly narrow construction to prevent unnecessarily burdening the judiciary.[5] Indeed, the Supreme Court has explicitly likened a district court's role in a section 437h case to that of a single judge presented with an application to convene a three-judge court. *See, e.g.*, *Calif. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) (citing a three-judge court decision in explaining that the Court "do[es] not construe § 437h to require certification of constitutional claims that are frivolous"); *see also Clark v. Valeo*, 559 F.2d 642, 645-46 (D.C.

[5] Section 437h provides that certain plaintiffs "may institute such actions . . . to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc."

Cir.) (en banc), *aff'd*, 431 U.S. 950 (1977); *Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980). Despite the seemingly mandatory phrasing of section 437h, district courts presented with complaints brought under that section do not automatically certify them to the en banc court of appeals. *See, e.g.*, *Cao v. FEC*, 688 F. Supp. 2d 498, 501, 503-504, 549 (E.D. La. 2010) (certifying some claims and dismissing others), *aff'd*, *In re Cao*, 619 F.3d 410 (5th Cir. 2010), *petition for cert. filed* (U.S. Dec. 6, 2010) (No. 10-776); *Goland v. United States*, 903 F.2d 1247, 1258 (9th Cir. 1990); *Mott*, 494 F. Supp. at 134-37 (refusing to certify questions and granting motion to dismiss where some claims unripe and others already resolved by Supreme Court); *Gifford v. Tiernan*, 670 F.2d 882, 883-84 (9th Cir. 1982) ("Congress intended to exclude constitutional claims of dubious merit").[6]

B. Plaintiff Lacks Standing

Under Article III of the Constitution, one element of the "'bedrock' case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *McConnell*, 540 U.S. at 225 (*quoting Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Article III standing has three requirements: (1) the plaintiff has suffered an "injury in fact," (2) that injury bears a causal connection to the defendant's challenged conduct, and (3) a favorable judicial decision will likely provide the plaintiff with redress from that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The party bringing the claim bears the burden of showing that

[6] Likewise, another statute that the Commission administers, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), includes a provision for convening a three-judge court in accordance with 28 U.S.C. § 2284 and has been interpreted narrowly. "[A]s with FECA, the district court may dismiss frivolous or non-justiciable claims [under the Fund Act]." *Nat'l Comm. of the Reform Party of the United States v. Democratic Nat'l Comm.*, 168 F.3d 360, 367 (9th Cir. 1999). *See also Wertheimer v. FEC*, 268 F.3d 1070, 1072 (D.C. Cir. 2001) ("[A]n individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel [under 26 U.S.C. § 9011(b)].").

these requirements are met. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *Lujan,* 504 U.S. at 560-561. Plaintiff meets none of these requirements.

Schonberg's alleged injuries fall into two general categories: First, he alleges that FECA, by allowing candidates to establish political committees to accept campaign contributions, gives his congressional campaign opponents an unfair monetary advantage. (*See, e.g.*, Compl. ¶¶ 19-50.) Second, he alleges that FECA has inflated his health care costs because so-called "bribes" in the form of campaign contributions have led Congress to enact allegedly inadequate health care legislation. (*See, e.g.*, Compl. ¶¶ 60-71.)

Regarding his first alleged harm, plaintiff cannot demonstrate an injury-in-fact. His complaint is based on the false premise that in the absence of FECA, the Constitution would automatically impose *greater* restrictions on the financing of federal elections. However, the Constitution neither prohibits Congress from establishing a mechanism for federal candidates to accept limited campaign contributions, nor does it require stricter — or any — limits on campaign contributions. Two circuits have rejected, both times on standing grounds, similar requests for courts to impose new, more restrictive regulation of federal campaign contributions. *Albanese v. FEC,* 78 F.3d. 66 (2d Cir. 1996) (denying, on standing grounds, request to prohibit private contributions); *Whitmore v. FEC,* 68 F.3d 1212 (9th Cir. 1996) (same; out-of-state contributions). As the Supreme Court recently explained, there is "no constitutional basis for attacking contribution limits on the ground that they are too high. Congress has no constitutional obligation to limit contributions at all; and if Congress concludes that allowing contributions of a certain amount does not create an undue risk of corruption or the appearance of corruption, a candidate who wishes to restrict an opponent's fundraising cannot argue that the Constitution demands that contributions be regulated more strictly." *Davis v. FEC,* 554 U.S. 724, 737 (2008).

Similarly, Schonberg cannot demonstrate an injury-in-fact regarding his alleged health care injury. His assertion that he and his wife pay too much for health care — an allegation that could be made by millions of other Americans — is no more than a generalized, speculative grievance. The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-574.

Schonberg also cannot meet the causation or redressability requirements for standing. Plaintiff's first alleged injury — a purported disadvantage as a congressional candidate — is clearly not caused by FECA, which imposes no greater restrictions on Schonberg's campaign than on his opponent's. Plaintiff's lower level of campaign funds was the result of his own choices and actions. Likewise, Schonberg's second alleged injury — that campaign contributions allegedly led Congress to enact inadequate health care reform — relies on a chain of events that is far too attenuated and conjectural. Plaintiff cannot show that either alleged injury was caused by provisions of FECA as opposed to the independent actions of numerous voters, campaign contributors, and legislators. *See Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

Moreover, even if the Court were to strike down all of the provisions that plaintiff challenges, it is extremely speculative that changes in the campaign finance system would either make him more competitive in his next (if any) congressional campaign or lead to the kind of

health care reform that plaintiff favors.[7] Of course, striking down FECA would *eliminate* most campaign finance restrictions, seemingly exacerbating the alleged flaws in the campaign finance system that plaintiff attempts to identify. For example, without FECA, there would no longer appear to be any requirement that candidates limit the source and amount of contributions they receive, or separate such money from their personal funds. Thus, under plaintiff's own theory that campaign contributions constitute "bribes" and lead to corruption, plaintiff's alleged competitive and health care injuries would likely worsen.

In sum, because plaintiff fails to meet any of the requirements for constitutional standing under Article III, the three-judge court should be dissolved.

C. Plaintiff's Claims Are Frivolous

None of Schonberg's four constitutional claims (Compl. ¶¶ 94-109) merit review by a three-judge court because they are insubstantial and fail to state a claim upon which relief can be granted.

Plaintiff's Fifth Amendment claim appears to be based on his contention that FECA treats incumbents more favorably than challengers, but in fact FECA's provisions apply evenhandedly to all candidates. The Supreme Court long ago rejected the argument that FECA's contribution limits "work . . . an invidious discrimination between incumbents and challengers," noting "that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations." *Buckley v. Valeo,* 424 U.S. 1, 30-31 (1976). In addition, contrary to plaintiff's claims, FECA does not authorize "bribery,"

[7] Some of plaintiff's claims for relief also appear to be beyond the power of the courts, such as his request that the Court "[i]mmediately freez[e] all the assets of all campaign committees under the authority of Defendant Federal Election Commission and order[] the funds returned to donors." (Compl., Claim for Relief ¶ C.)

which is prohibited by other statutes such as the Hobbs Act, 18 U.S.C. § 1951. Plaintiff seems to equate campaign contributions and bribes, but under the Hobbs Act, campaign contributions are considered bribes only if the payment is made in exchange for an explicit promise to perform or not perform an official act. *See McCormick v. United States*, 500 U.S. 257, 272 (1991). Although campaign committees may receive contributions (subject to FECA's limitations and prohibitions), candidates are prohibited from converting those contributions to their personal use. 2 U.S.C. §§ 432(b)(3), 439a(b).

Schonberg's claims under the Appointments, Compensation, and Emoluments Clauses of the Constitution all appear to rest on the mistaken contention that FECA creates an "Office" of the United States when it requires federal candidates to designate a principal campaign committee to receive their campaign contributions and make disbursements. *See* 2 U.S.C. § 432(e); Compl. ¶ 98. Candidates' campaign committees and the people who work for them, however, are simply not part of the government; indeed, most candidate committees are created to support unsuccessful challengers who never become federal employees at all. The plain language of section 432(e) merely states that the candidate acts as an agent of the *committee*, not the United States or any office of the United States. And the committee itself exercises no governmental power, but merely acts as the entity that receives and spends money, and that reports financial activity to the Commission, on behalf of a candidate running for office.[8]

The history of 2 U.S.C. § 432(e), like its plain language, shows that the provision creates

[8] Plaintiff also appears to allege (Compl. ¶¶ 14, 15) that he and other congressional candidates, by acting as agents of their *campaigns*, are "public officials" under 18 U.S.C. § 201, a non-FECA provision. That suggestion is frivolous, however, because agents of congressional campaign committees are not employees or officials agents of the United States as defined by section 201; that provision prohibits bribes to public officials — persons "acting for or on behalf of the *United States*" — who are in a position to influence "official act[s]." *Id.* § 201(a)(1), (b)(1)(A) (emphasis added).

no public office. From 1971 until 1979, both federal candidates and their campaign committees had independent reporting obligations under FECA. Federal Election Campaign Act of 1971, Pub. L. 92-255 § 304; Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187 § 104. The 1979 Amendments to FECA consolidated all financial reporting obligations with the principal campaign committee and its treasurer. *See* Pub. L. 96-187 § 104 (deleting phrase "and each candidate for election to such office" from 2 U.S.C. § 434(a)). The legislative history of these amendments explains that section 432(e)(2) was designed to "simplify the recordkeeping and reporting provisions." H.R. Rep. No. 96-422 at 1 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2860, 2861. The practical effect of the amendments was simply to ensure that financial activity conducted by the candidate (other than expenditures from the candidate's personal funds, *see* 11 C.F.R. § 110.10) was attributable to and controlled by the committee, and reported by the committee treasurer. *See United States v. Goland,* 959 F.2d 1449, 1453 (9th Cir. 1992) ("Federal election law treats the candidate and his committees as a single unit for the purpose of accepting contributions"; citing 2 U.S.C. § 432(e)(2) and former § 441a(a)(7)(A) (1992) (now § 441a(a)(8)); *Kean for Congress Committee v. FEC,* 398 F. Supp. 2d 26, 38-39 (D.D.C. 2005). Nothing in this history remotely suggests that when candidates act as agents for their own campaigns they are acting as agents of the United States.

When the Supreme Court in *Buckley* reviewed the appointment process for FEC Commissioners, it concluded that they were "Officer[s] of the United States" under the Appointments Clause because they exercised "*significant authority* pursuant to the laws of the United States." 424 U.S. at 126 (emphasis added). As the Court later reiterated, "[t]he exercise of 'significant authority pursuant to the laws of the United States' marks . . . the line between officer and non-officer." *Edmond v. United States*, 520 U.S. 651, 662 (1997) (*quoting Buckley,*

424 U.S. at 126). The powers of FEC Commissioners included core governmental authority: "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" and "administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself." *Buckley*, 424 U.S. at 140. Schonberg has not alleged that agents of candidates' campaign committees possess any remotely similar governmental authority.

Because each of plaintiff's claims under the Appointments, Compensation, and Emoluments Clauses rests on the false premise that FECA creates a governmental "Office" when it requires federal candidates to act as agents of their campaign committees, each of these claims lacks merit.

CONCLUSION

For the foregoing reasons, the defendant Federal Election Commission's motion to dissolve the three-judge court should be granted.

Respectfully submitted,

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