UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MARIBETH SCHONBERG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 5:09-cv-534-Oc-32JRK
	)	
BERNIE SANDERS, *et al.*,	)	Dispositive Motion
	)	
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Thomasenia P. Duncan
General Counsel
tduncan@fec.gov

David Kolker
Associate General Counsel
dkolker@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Robert W. Bonham III
Senior Attorney
(Trial Counsel)
rbonham@fec.gov

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FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (fax)

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Pro se plaintiffs Steven and Maribeth Schonberg filed this suit against the Federal Election Commission ("Commission" or "FEC), five United States Senators, and two Members of the U.S. House of Representatives. Complaint (Doc. 1). The Court denied plaintiffs' requests for emergency relief, *see* Orders (Docs. 6, 9, 15, 18), and the Commission now moves to dismiss plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs lack Article III standing to raise their constitutional claims, which are generalized, speculative complaints about the cost of health care that could not be redressed by striking down portions of the nation's principal federal campaign finance statute. In addition, plaintiffs have not stated a claim upon which relief can be granted because the Constitution does not limit the ability of Members of Congress to raise funds for their election campaigns, and because federal candidates' roles as agents of their campaign committees are not "Offices" of the United States within the meaning of the Emoluments Clause of Article I.

BACKGROUND

A. Plaintiffs

Steven Schonberg is a retired attorney with "decades of legal experience" and inactive memberships in the New Mexico and Texas bars. Memorandum in Support of Motion for Admission to CM/ECF System (Doc. 13) at 1. He is also a medical doctor. Letter to the Honorable John Lynch from "Steven E. Schonberg, MD, JD" (Sept. 27, 2009), Exhibit 1 to Memorandum in Support of Plaintiffs' Complaint for Emergency Injunction, Damages, and Motion for Declaratory Judgment (Doc. 2) ("Memo.") at 2.

Maribeth Schonberg is married to Steven Schonberg. Complaint ¶ 2. According to the

complaint, both plaintiffs had been residents of Florida, but Maribeth Schonberg changed her residency to New Hampshire because she was denied health insurance coverage in Florida due to a pre-existing condition. From 2007 until at least 2009, Mrs. Schonberg purchased health insurance from Anthem Blue Cross Blue Shield of New Hampshire. Mr. Schonberg pays for his wife's medical insurance and medical bills. Complaint ¶¶ 2, 7 and n.3. Plaintiffs now split their time between Florida and New Hampshire. Complaint ¶ 14.

B. Defendant Federal Election Commission

The Commission is an 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 ("Act" or "FECA"), codified at 2 U.S.C. §§ 431-55. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Congress authorized the Commission to "formulate policy" under the FECA, *see, e.g.* 2 U.S.C. § 437c(b)(1), and to make rules and issue advisory opinions thereunder. 2 U.S.C. §§ 437d(a)(7), (8); 437f; 438(a)(8). *See also Buckley v. Valeo*, 424 U.S. 1, 110-111 (1976). The Commission is also authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1)-(2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e), 437g(a)(6); *FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795, at *1 (M.D. Fla. 2007). The Commission is authorized to appear in and defend against any action instituted under the Act. 2 U.S.C. §§ 437c(a)(4), 437d(a)(6).

C. Individual Defendants

Plaintiffs named five Senators and two Members of the House of Representatives as individual defendants. All seven Senators and Representatives are declared candidates for re-election to their current seats, and have designated political committees to serve as the principal campaign committees for their re-election effort. 2 U.S.C. § 432(e)(1). Senators Blanche Lincoln (D-Ark) and John McCain (R-Ariz) and Representatives John Boehner (R-Ohio) and Eric Cantor (R-Va) are candidates for re-election in 2010; Senators Joe Lieberman (I-Conn) and Bernie Sanders (I-Vt) are candidates in 2012; and Senator Mitch McConnell (R-Ky) is a candidate in 2014. Each legislator is named as a defendant in his or her capacity as an "Agent" and purported "Civil Officer" of the principal campaign committee for the legislator's upcoming re-election campaign. Complaint ¶ 3; Memo. (Doc. 2) at 2, 6.

D. Federal Election Campaign Act

As the Supreme Court has explained, "[t]here is, of course, no doubt that Congress has express authority to regulate congressional elections, by virtue of the power conferred in Art. I, § 4." *Buckley*, 424 U.S. at 131-132. Congress enacted the FECA primarily "to limit the actuality and appearance of corruption resulting from large individual financial contributions[.]" *Id.* at 26. The FECA places dollar limitations on contributions by individuals and political committees to candidates for federal office, 2 U.S.C. § 441a(a),[1] and prohibits campaign contributions by corporations and unions from their treasury funds.

[1] For the 2009-2010 election cycle, individuals may give no more than $2,400 to each candidate per election, 2 U.S.C. § 441a(a)(1)(A); 74 Fed. Reg. 7435, 7436 (Feb. 17, 2009), and multicandidate political committees may give no more than $5,000 to each candidate and their candidate committees. 2 U.S.C. § 441a(a)(2)(A).

2 U.S.C. § 441b(a). The Act also requires comprehensive public disclosure of contributions and expenditures in connection with federal election campaigns. 2 U.S.C. §§ 432-434.

All candidates for Congress must designate a political committee to serve as the principal campaign committee for the candidate's campaign. 2 U.S.C. § 432(e)(1). These political committees are responsible for complying with the Act's recordkeeping and reporting requirements, as well as the limitations and prohibitions on contributions. *See generally* 2 U.S.C. §§ 432-434, 441a, 441b. For example, federal candidates' authorized campaign committees must promptly register with the Commission, 2 U.S.C. § 433, and committee treasurers must file periodic reports of the committee's receipts and disbursements. 2 U.S.C §§ 432(g), 434. These reports are placed on the public record within 48 hours of receipt by the Commission. 2 U.S.C. § 438(a).

A committee's funds must be segregated from, and not commingled with, the personal funds of any individual, including the candidate. 2 U.S.C. § 432(b)(3). The Act enumerates permitted uses for contributions accepted by candidates, 2 U.S.C. § 439a(a), and specifically prohibits the conversion of any contribution to "personal use." 2 U.S.C. § 439a(b).

E. Plaintiffs' Claims

Plaintiffs challenge the constitutionality of 2 U.S.C. §§ 432, 434, 439a and 441i. Complaint ¶ 27.[2] Plaintiffs claim that these provisions violate the Emoluments Clause in Article I of the United States Constitution because they permit incumbent Members of Congress to establish political committees for their re-election campaigns which accept

[2] Plaintiffs' filings refer to both 2 U.S.C. § 439 and 2 U.S.C. § 439a, but only discuss the latter provision. *See* Memo. (Doc. 2) at 9-10.

contributions from persons with interests before Congress. 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.

The Emoluments Clause has two subclauses, each containing a separate prohibition. The language before the semicolon, known as the "Ineligibility Clause," prohibits the appointment of Senators or Representatives to "any civil Office" during the terms they are currently serving when the "civil Office" was created or "Emoluments whereof" were increased during that term. The language following the semicolon, known as the "Incompatibility Clause," prohibits a person holding any "Office under the United States" from simultaneously serving as a Member of Congress during his or her continuance in that Office. Both clauses serve to prevent corruption.

> The Framers' experience with post revolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption. The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses, Article I, § 6, cl. 2.

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 904 (1991) (footnote omitted; citing *Buckley*, 424 U.S. at 124). Although plaintiffs use the terms "Ineligibility" and "Incompatibility" interchangeably, *see* Memo. (Doc. 2) at 8 and n.16, plaintiffs' claims here appear to rest primarily on the Ineligibility Clause.

Plaintiffs contend that the defendant lawmakers' positions as "agents" of their re-election committees under 2 U.S.C. § 432(e)(2) constitute a federally-created "civil Office," and that the political contributions received by the committees constitute "emoluments" within the meaning of the Emoluments Clause in Article 1, Section 6. Plaintiffs claim that the Emoluments Clause both prohibits such "appointments" and prevents those legislators from accepting campaign contributions for their re-election campaigns. Complaint ¶ 4. Plaintiffs allege that all individual defendants, except Senator Sanders, have received "enormous campaign contributions from the health insurance industry and the pharmaceutical industry," which plaintiffs characterize as "Big Health." Complaint ¶ 3. Plaintiffs allege that legislative actions by these six lawmakers favorable to "Big Health" in 2009 constitute a *quid pro quo* for those campaign contributions. Complaint ¶ 13. The only purported "members" of "Big Health" plaintiffs identify as contributors to the individual defendants' campaigns are Wellpoint, Inc. and Angela Braly, its Chief Executive Officer. Complaint ¶ 10. According to the Complaint, Wellpoint owns Anthem Blue Cross Blue Shield, which has insured Maribeth Schonberg. Complaint ¶ 7. Wellpoint has a political committee, WellPAC, which can accept voluntary contributions from the corporation's executive and administrative personnel, and then make contributions from those receipts. *See* 2 U.S.C. §§ 441b(b)(2)(C), (b)(4)(C). WellPAC and Ms. Braly have made contributions to federal candidates. *See* Complaint ¶¶ 10-11.[3]

[3] According to plaintiffs, campaign contributions received by all seven defendant Members for the current election cycle total about $82,356,081. Complaint ¶ 20. Of this amount, only a tiny fraction, approximately $112,000, was contributed by WellPAC. Complaint ¶ 11. The only individual contribution plaintiffs identify is a $2,000 contribution from Ms. Braly to Senator McConnell's campaign. Complaint ¶ 10; Memo. (Doc. 2) at 4.

In addition to declaratory relief, plaintiffs seek orders dissolving the principal campaign committees connected with all seven individual defendants, requiring those committees to return all remaining funds to the donors, and referring all the legislators (except Senator Sanders) to the Department of Justice. Plaintiffs also seek an order forbidding the lawmakers (except Senator Sanders) from voting on or filibustering health care legislation unless all contributions received from "Big Health" in the past six years have been refunded. If any of the individual defendants fail to disband their committees and return all remaining funds, plaintiffs ask that the Court dismiss them from Congress. Prayer for Relief, Complaint ¶ 27 at A-D, G.

ARGUMENT

This case should be dismissed because plaintiffs lack Article III standing and because they fail to state a cognizable claim. Plaintiffs' alleged injury is no more than a generalized, speculative assertion that they pay too much for health care — an allegation that could be made by millions of other Americans. Moreover, plaintiffs cannot show that this alleged injury was caused by the provisions of FECA governing political committees, nor that striking those provisions down would redress the alleged injury. The chain of events linking those FECA provisions with the alleged injury is far too attenuated and conjectural, and it involves many actors not before the Court. Indeed, striking down those statutory provisions might actually eliminate existing restrictions on campaign contributions.

In any case, plaintiffs fail to state a claim. Plaintiffs provide no support for their contention that the Constitution prohibits the collection of campaign contributions by federal candidates, and there is none. Moreover, there is no support for plaintiffs' claim that the

roles of Members of Congress as agents of their campaign committees constitute an "Office" of the United States under the Emoluments Clause. That Clause has never been applied to a role that (as here) entails no employment or representative relationship to the United States government, and is shared by unsuccessful federal candidates who never become affiliated with the government.

I. LEGAL STANDARDS.

A. Federal Rule of Civil Procedure 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), an action must be dismissed if the Court lacks subject matter jurisdiction. *See Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1157 (5th Cir. 1981). "[A] court must first determine whether it has proper subject matter jurisdiction before addressing the substantive issues." *Taylor v. Appleton*, 30 F.3d 1365, 1366 (11th Cir. 1994). If jurisdiction is found to be lacking, the Court cannot proceed; its sole remaining duty is to state that it lacks jurisdiction and dismiss the case. *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94 (1998). When a defendant properly challenges subject matter jurisdiction under Rule 12(b)(1), the Court may consider matters outside the pleadings to evaluate that challenge. *See Morrison v. Amway Corp.*, 323 F.3d 920, 924-925 (11th Cir. 2003). *See also Vink v. Hendrikus Johannes Schijf Rolkan N.V.*, 839 F.2d 676, 677 (Fed. Cir. 1988) (the court may consider affidavits and exhibits without converting the motion to dismiss into a motion for summary judgment).

B. Federal Rule of Civil Procedure 12(b)(6)

A complaint should be dismissed for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts" which would entitle him or her to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). When considering a motion to dismiss under Rule 12(b)(6), the Court must accept all well-pled factual allegations as true and construe them in the light most favorable to plaintiffs. *Castro v. Secretary of Homeland Security*, 472 F.3d 1334, 1336 (11th Cir. 2006); *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). Courts may make reasonable factual inferences in plaintiff's favor, but "are not required to draw plaintiff's inference.'" *Sinaltrainal v. Coca-Cola. Co*, 598 F.3d 1252, 1260 (11th Cir. 2009) (citation omitted). In addition, courts are not required to accept plaintiffs' legal allegations. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Id.*[4]

II. PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE ACT'S REGULATION OF POLITICAL COMMITTEES

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." One element of the "'bedrock' case-or-

[4] When a plaintiff is preceding *pro se*, his or her pleadings are held to a less stringent standard than pleadings drafted by an attorney, and will be liberally construed. *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (*per curium*); *Koger v. Florida*, 130 Fed. Appx. 327, 332 (11th Cir. 2005) (citing *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998)). However, even with *pro se* litigants, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005) (internal quotation and citation omitted). Moreover, Mr. Schonberg is an experienced attorney. *See* Memorandum in Support of Motion for Admission to CM/ECF System (Doc. 13) at 1.

controversy requirement is that plaintiffs must establish that they have standing to sue." *McConnell v.* FEC, 540 U.S. 93, 225 (2003) (*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 these requirements are met. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *Lujan*, 504 U.S. at 560-561. Plaintiffs meet none of these requirements.

A. Plaintiffs' General Allegations That Their Health Care Is Too Expensive Do Not Constitute a Concrete and Particularized Injury

To satisfy the "injury in fact" requirement, the injury must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). *See McConnell*, 540 U.S. at 227. But plaintiffs' claims about health care costs are extraordinarily generalized assertions that could be made by millions of United States citizens.

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. In fact, the Court has twice rejected suits by citizens challenging appointments under the Emoluments Clause for lack of sufficient injury. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215-

227 (1974) (citizens lacked standing to litigate, under the Incompatibility Clause, the eligibility of Members of Congress to serve in the military reserves); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (*per curium*) (citizen and member of Supreme Court bar lacked standing to challenge, under the Ineligibility Clause, the appointment to the Supreme Court of a Senator who was in Congress when it enacted a new judicial pension plan). More recently, courts have determined that even claimants with apparently more direct interests in the federal appointments at issue lacked standing to challenge them under the Emoluments Clause. *See Rodearmel v. Clinton*, No. 09-171, __ F.Supp.2d __, 2009 WL 3486634, at *2-6 (D.D.C. 2009) (three-judge court) (Foreign Service Officer lacked standing to challenge Senator's appointment to Secretary of State under Ineligibility Clause); *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981) (three-judge court held Senator lacked standing to challenge Representative's appointment to the Court of Appeals under the Ineligibility Clause), *aff'd. sub nom. McClure v. Reagan,* 454 U.S. 1025 (1981).[5]

Plaintiffs and their health care issues have no particularized connection with any of the defendants. Plaintiffs assert that they have standing because they claim to have paid higher insurance premiums and out-of-pocket medical costs due to the alleged failure of Congress to "reform" the nation's health care financing system; in turn, plaintiffs attribute this alleged failure to the six legislators' receipt of campaign contributions from

[5] *Cf. United States v. Lane*, 64 M.J. 1, 2-4 (C.A.A.F. 2006) (claimant had standing to challenge the assignment of a reservist Senator to serve as judge on a military Court of Criminal Appeals hearing the challenger's own case, because the "direct liberty implications for Appellant ma[d]e this case distinct from other abstract circumstances where the Incompatibility Clause might be implicated.")

"Big Health." Complaint ¶¶ 7-18; Memo. (Doc. 2) at 2-6.[6] Plaintiffs claim that their "injuries will continue . . . as long as the six legislators receive bribes and/or illegal gratuities. . . . If there were no bribes or illegal gratuities, these Defendants and the rest of Congress would probably act in the best interests of the Plaintiffs and the People of the United States. Real health insurance reform legislation would result." Complaint ¶ 15.

However, these claims are extraordinarily general and speculative. As the Supreme Court recognized in rejecting the Incompatibility Clause claim in *Schlesinger*:

> The very language of respondents' complaint . . . reveals that it is nothing more than a matter of speculation whether the claimed nonobservance of that Clause deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.

Schlesinger, 418 U.S. at 217 (footnote omitted). The Court held that "standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." 418 U.S. at 220. Plaintiffs' claims here are similarly generalized, conjectural, and abstract. Virtually all members of the public are affected in some way by the health care financing system. In addition, it would seem impossible for a court to measure the extent to which plaintiffs in particular have allegedly been harmed by the lack of a hypothetical health care financing system that would reflect their views of "the best interests of the Plaintiffs and the People of the United States," Complaint ¶ 15. Plaintiffs, therefore, have failed to satisfy the injury-in-fact requirement.

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[6] Plaintiffs link the "high" out-of-pocket medical expenses paid by plaintiffs with "exorbitant" salaries and compensation paid to Wellpoint executives and alleged "bribery" of the six legislators." *See, e.g.*, Complaint ¶ 12.

B. Plaintiffs Cannot Demonstrate a Causal Connection Between Their Alleged Injury and the FECA, Which Actually Restricts the Campaign Fundraising About Which Plaintiffs Complain

To establish standing plaintiffs must also show "'a causal connection between the injury and the conduct complained of — the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court.'" *McConnell*, 540 U.S. at 225 (*quoting Lujan*, 504 U.S. at 560-561). But in this case, plaintiffs' theory of causation — that the Act's alleged authorization of candidate fundraising has made plaintiffs' health care costs too high — is far too attenuated to support standing.

Plaintiffs do not allege that they are directly subject to the FECA provisions they challenge, so their burden to show causation is especially high.

> When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction — and perhaps on the response of others as well.
> The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, . . . and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 562 (emphasis in original; internal quotation marks and citations omitted). "Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to

establish." *Id.*[7]

Here, plaintiffs' constitutional claims are premised on the assumption that the Act authorizes, or otherwise causes, Senators and Representatives to accept campaign contributions. However, the Act is restrictive, not permissive; it does not create a right to receive campaign contributions. Instead, it imposes *restrictions* on the otherwise unfettered ability of federal candidates to accept contributions. As the Ninth Circuit explained in a similar case seeking to outlaw out-of-state federal contributions,

> [t]he Act neither prohibits nor authorizes out-of-state campaign contributions. The appellants' premise, that what the Act does not prohibit, it authorizes, is foreign to our libertarian tradition. * * * The Act restricts certain campaign conduct, but authorizes nothing. Campaign conduct is unrestricted, except to the extent that the law limits it. People do not depend on Congressional "authorization," as plaintiffs assume, for their liberty to express their political preferences.

Whitmore v. FEC, 68 F.3d 1212, 1215 (9th Cir. 1996). Thus, "[s]ince the Act does not 'authorize' the contributions, it cannot be the cause of plaintiffs' claimed injuries." *Id*. The Second Circuit reached a similar result in *Albanese v. FEC*, 78 F.3d 66, 68 (2d Cir. 1996), in which plaintiffs claimed their rights under the Fourteenth Amendment's Equal Protection Clause were violated by the solicitation and use of private funds in elections for federal office. The court explained that "the injury [plaintiffs] assert is not 'fairly traceable' to FECA. FECA does not require that contributions be made to any candidate. Rather, it limits the amounts of contributions that may be made. *See* 2 U.S.C. § 441a. Hence, any injury claimed by these plaintiffs is not attributable to FECA."

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[7] *See also Allen v. Wright*, 468 U.S. 737 (1984); *Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244, 1254 (11th Cir. 2003), *cert. denied*, 128 Sect. 8775 (2008).

Moreover, there are far too many independent actors in plaintiffs' alleged chain of causation — health care providers, health insurers, drug and medical equipment companies, parent companies, corporate officers, and political action committees, none of whom are parties to this litigation — to demonstrate causation with the required level of certainty. And, of course, the lawmakers who form the final link in this chain may vote on or otherwise influence health financing legislation for different reasons, including the views of the voters in their districts and their own political convictions. *Cf. Winpisinger v. Watson*, 628 F.2d 133, 139-141(D.C. Cir. 1980) ("The endless number of diverse factors potentially contributing to [an election result] forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable'").[8] Finally, plaintiffs themselves reveal the fatal uncertainty in their chain of causation in asserting that, in the absence of campaign contributions, Congress would "probably" pass "[r]eal health insurance reform legislation." Complaint ¶ 15.

C. Plaintiffs Cannot Demonstrate That Their Alleged Injury Would Be Redressed By Striking Down Portions of FECA

Plaintiffs must also show a "'substantial likelihood' that the requested relief will remedy the alleged injury-in-fact." *McConnell*, 540 U.S. at 226, 229 (*quoting United States v. Stevens*, 529 U.S. 765, 771 (2000)). For many of the same reasons that plaintiffs

[8] In *Winpisinger*, the D.C. Circuit denied standing to voters and supporters of Senator Kennedy in the 1980 Democratic presidential primary who sought to challenge the Carter Administration's alleged use of government resources for campaign activity, stating that "whether an appellant is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to appellees. Courts are powerless to confer standing when the causal link is too tenuous." *Id.* at 139 (citations omitted).

cannot show causation (*see supra* Section II.B), plaintiffs cannot demonstrate redressability.[9] Even if the Court were to strike down all of the provisions that plaintiffs challenge, it is extremely speculative that changes in the campaign finance system would lead to the kind of health care reform that plaintiffs favor. Indeed, without the challenged provisions of the Act, there would appear to be no requirement that candidates create authorized campaign committees to accept their campaign contributions and separate such money from their personal funds. Thus, according to plaintiffs' own theories, under that scenario their alleged injury could be even worse and their alleged injury would not be remedied. Plaintiffs are similarly situated to certain plaintiffs in *McConnell*, who claimed that the Constitution barred certain increases in the statutory contribution limits, which plaintiffs claimed put them at a political disadvantage. The Supreme Court found that those plaintiffs lacked standing and explained that striking down the increases would not remedy the plaintiffs' alleged injury because the prior limitations imposed by FECA would remain. *See* 540 U.S. at 229.

In sum, for multiple reasons, plaintiffs have failed to satisfy their burden regarding any of the three requirements for standing, and their complaint should be dismissed.

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[9] *See Freedom Republicans, Inc. v. FEC,* 13 F.3d 412, 418 (D.C. Cir. 1994) ("When plaintiffs' claim hinges on the failure of government to prevent another party's injurious behavior, the "fairly traceable" and redressability inquiries appear to merge. * * * In such cases, both prongs of standing analysis can be said to focus on principles of causation: fair traceability turns on the causal nexus between the agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and judicial relief").

III. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE EMOLUMENTS CLAUSE, WHICH DOES NOT BAR CAMPAIGN CONTRIBUTIONS

A. The Constitution Does Not Prohibit Campaign Committees for Federal Candidates

Plaintiffs challenge the constitutionality of FECA's provisions governing federal re-election campaigns, asserting that campaign contributions to the defendant Senators and Representatives are "unconscionable" contributions, "illegal gratuities," or "outright bribe[s]," *see, e.g.*, Complaint ¶¶ 4, 11-13, 15, 17, and that the Constitution forbids such contributions. But plaintiffs provide no support, and there is none, for the claim that the Constitution prohibits Congress from creating a mechanism for federal candidates to establish campaign committees to accept limited contributions.[10]

Plaintiffs request that certain provisions of the Act applicable to candidates and their political committees be declared unconstitutional, and that the Court require the defendant candidates to disgorge the contributions their campaign committees have received. *See* Prayer for Relief, Complaint at 11-12. However, as we explained *supra* Section II.C, declaring these FECA provisions unconstitutional would merely result in the *removal* of campaign finance restrictions. As the Supreme Court stated in 1976 when it upheld the FECA contribution restrictions:

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-

[10] As discussed *supra*, two circuits have already rejected similar requests for courts to impose new, more restrictive federal regulations on federal campaign contributions, albeit both on standing grounds. *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).

> mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.

Buckley, 424 U.S. at 26-27 and n.28 (citing the court of appeals decision in *Buckley*, 519 F.2d 821, 838-840 and nn.36-38 (D.C. Cir. 1975), which "discussed a number of the abuses uncovered after the 1972 elections").

Contrary to plaintiffs' claims, the Act does not authorize "bribery," which is prohibited by other statutes such as the Hobbs Act, 18 U.S.C. § 1951. Plaintiffs seem 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. The Supreme Court has explained that

> [s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

McCormick v. United States, 500 U.S. 257, 272 (1991). "[T]he Court made clear that only if 'payments are made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act, are they criminal.'" *United States v. Siegelman*,

561 F.3d 1215, 1225 (11th Cir. 2009) (emphasis added) (quoting *McCormick*, 500 U.S. at 273), *petition for cert. filed*, 78 USLW 3083, 3090 (Aug. 10, 2009). Although campaign committees may receive contributions (subject to the Act's limitations and prohibitions), candidates are prohibited from converting those contributions to their personal use. 2 U.S.C. §§ 432(b)(3), 439a. To accept the unprecedented proposition that such contributions constitute "emoluments" within the meaning of the Emoluments Clause would overturn centuries of practice and render the federal campaign finance system unworkable.

Thus, plaintiffs have provided no justification for their claim that the Constitution bars campaign contributions, and "bribery" – the apparent focus of their court complaint – is barred by other statutes. If plaintiffs are dissatisfied with current federal statutes, the proper recourse is with Congress, not the courts. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952).

B. Candidates' Agency Relationships with Their Campaign Committees Do Not Constitute "Offices" of the United States under the Emoluments Clause

Plaintiffs' claims under the Emoluments Clause in Article I also have no merit because federal candidates' roles in their campaign committees are not "offices" of the United States. As discussed *supra* pp. 4-5, the Emoluments Clause contains two separate prohibitions, known as the Ineligibility Clause and the Incompatibility Clause. The former applies to "any civil Office under the Authority of the United States" and the latter applies to "any Office under the United States." U.S. Constitution, Art. I, § 6, cl. 2. Plaintiffs cannot demonstrate that the challenged provisions of the Act violate either part of the Emoluments Clause because, as discussed below, the relevant precedent plainly interprets the Clause's use

of "office" to require some employment or representative relationship with the United States government. Candidates' campaign committees are simply not part of the government; indeed, most candidate committees are created to support unsuccessful challengers who never become federal employees at all. Likewise, campaign committee treasurers and other employees obviously do not hold "offices" of the United States, since they do not represent the government or conduct government business.

Plaintiffs specifically assert (Complaint ¶ 19) that the "agency relationship" between federal candidates and their principal campaign committees established under 2 U.S.C. § 432(e) "creates a civil office under the Authority of the United States and the Defendant Agents are the civil officers in charge of the committees." Section 432(e) provides:

> Any candidate described in [2 U.S.C. 432(e)(1)] who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, *as an agent of the authorized committee or committees of such candidate*.

2 U.S.C. § 432(e)(2) (emphasis added). *See also* 11 C.F.R. § 101.2(a). Plaintiffs contend that this one-sentence provision creates a "civil office" of the United States, but the text and history of section 432(e)(2) show otherwise. The plain language of the provision merely states that the candidate acts as an agent of the *committee*, not of 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.

From 1971 until 1979, both federal candidates and their campaign committees had independent reporting obligations under the Act. Pub. L. 92-255 § 304; Pub. L. 96-187 § 104. The 1979 Amendments to the Act (which became effective on January 8, 1980) consolidated all financial reporting obligations with the principal campaign committee and its treasurer. *See* Pub. L. 96-197 § 104 (deleting phrase "and each candidate for election to such office" from 2 U.S.C. § 434(a)). The legislative history of these amendments demonstrates that section 432(e)(2) was designed to "simplify recordkeeping and reporting provisions." 1979 U.S. Code. Cong. & Ad. News. 2860, 2861. The practical effect, however, was 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 section 441a(a)(8)); *Kean for Congress Committee v. FEC,* 398 F. Supp. 2d 26, 38-39 (D.D.C. 2005).

Plaintiffs provide no support for their claim (Complaint ¶ 19) that the relationship between a candidate and his or her campaign committee constitutes a "'civil office' in the Emoluments Clause." Plaintiffs admit that "civil office" is not defined in the Constitution, and has been "rarely interpreted" by the Courts. Memo. (Doc. 2) at 8. Indeed, the only case plaintiffs cite for the interpretation of "civil office" is *United States v. Hartwell,* 73 U.S. 385 (1867). In that case, the Supreme Court held that a clerk in the office of an assistant treasurer of the United States was an "officer of the United States" within the meaning of a federal

statute enacted pursuant to the Appointments Clause that required "safe-keeping of the public money." 73 U.S. at 392-394. The Court's opinion emphasized that the "employment of the defendant was in the public service of the United States," and that he was appointed by an assistant treasurer of the United States with the approval of the Secretary of the Treasury, pursuant to a statute authorizing the appointment of a specified number of clerks who were to received salaries fixed by law. Thus, rather than support plaintiffs' expansive interpretation, *Hartwell* suggests that the term "civil office" should be interpreted more narrowly. And as explained above, more recent cases addressing Emoluments Clause claims have involved formal positions in the United States government, such as judgeships, Cabinet positions, and military service.

Plaintiffs acknowledge that the Supreme Court's landmark 1976 decision in *Buckley* generally upheld the constitutionality of the Act, but plaintiffs "respectfully ask this Court to overrule *Buckley*." Memo. (Doc. 2) at 1-2, 5.[11] Plaintiffs also claim that the *Buckley* "Court never addressed the Emoluments Clause," Memo. (Doc. 2) at 1, but this is incorrect; in fact, *Buckley* clearly undermines plaintiffs' position here. In *Buckley*, the Court considered the language of the Clause in the context of interpreting similar language regarding government offices in the Appointments Clause. The Court recognized the close relationship between the Appointments Clause and the Ineligibility and Incompatibility Clauses, and observed that these "cognate provisions" provided the context for interpreting the Appointments Clause of the Constitution. *Buckley*, 424 U.S. at 124-125. The Court held that the appointment of four

[11] This court should reject this suggestion, since it is well established that "unless and until the Supreme Court specifically overrules" a decision, lower courts must follow it. *United States v. Greer*, 440 F.3d 1267, 1273 (11th Cir. 2006) (citing cases).

members of the six-member FEC by the Senate and House, as provided in the original Act, was unconstitutional under the Appointments Clause.

In its analysis of this issue, *Buckley* emphasized that an essential element for qualifying as an "Officer of the United States" under the Appointments Clause is that the individual exercises "*significant authority* pursuant to the laws of the United States." 424 U.S. at 125-126 (emphasis added). As the Court reiterated later, "[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). *Buckley* concluded that many of the Commission's statutory powers involved "the performance of a significant governmental duty exercised pursuant to a public law" which rendered the six voting members of the Commission subject to the Appointments Clause. 424 U.S. at 141. These powers included "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." *Id.* at 140.[12]

By contrast, in their roles as agents of their campaign committees, the individual defendants in this case plainly exercise no governmental authority at all, let alone any "significant authority pursuant to the laws of the United States" comparable to the powers at

[12] *See generally* Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel (April 16, 2007) (collecting authorities), *available at*, http://www.justice.gov/olc/opinions.htm. *Cf.* Application of the Emoluments Clause to a Member of the President's Council on Bioethics (March 9, 2005), ("A position that carried with it no governmental authority (significant or otherwise) would not be an office for purposes of the Appointments Clause, and therefore, under [prior OLC opinions], would not be an office under the [Article I, Section 9] Emoluments Clause either").

issue in *Buckley*. Indeed, plaintiffs fail to identify even one governmental power that such campaign committee roles afford to the individual defendants. Thus, as a matter of law, incumbent Senators and Representatives who serve as "agents" for their political committees under section 432(e)(2) cannot be considered to hold "civil office" within the meaning of the Emoluments Clause.[13]

CONCLUSION

For the foregoing reasons, the Commission's motion to dismiss plaintiffs' complaint should be granted, and plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted,

/s/ Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel
tduncan@fec.gov

/s/ David Kolker
David Kolker
Associate General Counsel
dkolker@fec.gov

/s/ Harry J. Summers
Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

[13] Plaintiffs also fail to meet their burden, in invoking the Ineligibility Clause, to show that the "civil office" "shall have been created, or the Emoluments whereof shall have been encreased during" "the Time for which [the Member] was elected." U.S. Const, Art. I, § 6, cl. 2. Even if there was any such "office" in this context, it would obviously have been created prior to a candidate's election, and there is no showing that candidates receive any "emoluments" within the meaning of the Clause under 2 U.S.C. § 432(e). *See supra* p. 18-19.

/s/ Robert W. Bonham III
Robert W. Bonham III
Senior Attorney
(Trial Counsel)
rbonham@fec.gov

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FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2010, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system, which will send a notice of electronic filing to *pro se* plaintiff Steven E. Schonberg, and to Christine Davenport, Assistant Counsel, Office of General Counsel, U.S. House of Representatives (counsel for defendants John Boehner and Eric Cantor).

I hereby certify that I have caused identical copies of the foregoing to be served by first class mail, postage prepaid, on the following additional parties and counsel:

Maribeth Schonberg
60 Wilson Hill Road
Merrimack, NH 03054
(*pro se* plaintiff),

and

Thomas W. Caballero
Assistant Senate Legal Counsel
Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7252
(Counsel for defendants Bernie Sanders, Joe Lieberman, Blanche Lincoln, John McCain and Mitch McConnell).

/s/ Robert W. Bonham III
Robert W. Bonham III
Senior Attorney
rbonham@fec.gov
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (fax)