UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Ocala Division

MARIBETH SCHONBERG and STEVEN E. SCHONBERG,	)	
Plaintiffs,	)	
v.	)	Case No. 5:09-CV-534-Oc-32-JRK
Civil Officer BERNIE SANDERS, *et al.*,	)	
Defendants.	)	Dispositive Motion

MOTION TO DISMISS ON BEHALF OF DEFENDANT SENATORS LIEBERMAN, LINCOLN, McCAIN, McCONNELL, AND SANDERS

United States Senators Joseph Lieberman, Blanche Lincoln, John McCain, Mitch McConnell, and Bernie Sanders (collectively the "Senate Defendants"), by and through undersigned counsel[1], hereby respectfully move this Court, pursuant to Fed. R. Civ. P. 12(b)(1), (2), (3), and (6), to dismiss plaintiffs' claims against them. As set forth in detail in the following memorandum in support of this motion, plaintiffs' claims against these Members of Congress should be dismissed on the following grounds: (1) Plaintiffs lack

[1] The appearance of undersigned counsel is pursuant to section 288*l*(b) of title 2 of the United States Code, which provides that: "The [Senate Legal] Counsel, the Deputy Counsel, or any designated Assistant Counsel . . . shall be entitled, for the purpose of performing his functions under this chapter, to enter an appearance in any proceeding before any court of the United States or of a State or political subdivision thereof without compliance with any requirement for admission to practice before such court . . . ."

standing; (2) Plaintiffs' claims are barred by the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1; (3) the Court lacks personal jurisdiction over the Senate Defendants and venue is improper; and (4) the complaint fails to state a claim upon which relief can be granted.

For these reasons, the Senate Defendants respectfully request that the Court dismiss plaintiffs' claims against them with prejudice.

MEMORANDUM IN SUPPORT OF SENATE DEFENDANTS' MOTION TO DISMISS

STATEMENT OF THE CASE

A. Introduction

Plaintiffs Maribeth and Steven Schonberg filed this action against the Senate Defendants, two Members of the United States House of Representatives, and the Federal Election Commission, claiming that the Federal Election Campaign Act (FECA) is unconstitutional because it designates Members of Congress as agents of their campaign committees in violation of the Constitution's prohibition on Members of the House and Senate holding any office under the United States during their service in Congress.

At the heart of plaintiffs' case are their allegations that they have incurred substantial medical expenses resulting from high insurance premiums and costly medical care for Ms. Schonberg, and that the financial burden placed on them by these expenses would be alleviated if Congress enacted unspecified health insurance reform legislation. Plaintiffs argue that Congress' failure to enact such legislation results from the opposition of the seven defendant Members of Congress, several of whom allegedly received

campaign contributions from health care or health insurance companies. Plaintiffs assert a single legal claim as a basis for relief for their injuries, namely, that FECA's requirement that Members of Congress be considered agents of their campaign committees violates the Incompatibility Clause of the Constitution, Art. I, § 6, cl. 2, because it gives sitting Members an "Office under the United States." Plaintiffs claim that if those FECA provisions were declared unconstitutional and Members' campaign committees disbanded, "Congress would probably act in the best interests of the Plaintiffs and [public]" and "[r]eal health insurance reform legislation would result." Plaintiffs' Complaint for Emergency Injunction, Damages, and Motion for Declaratory Judgment ¶ 15 [hereinafter "Compl."].

Plaintiffs' claim is without any legal merit, and their suit against the Senate Defendants should be dismissed on threshold grounds and for failure to state a claim as a matter of law. First, plaintiffs lack Article III standing as the complaint fails to plead facts that, if true, could demonstrate that plaintiffs have suffered any concrete injury to a legally protected interest that is fairly traceable to the Senate Defendants and likely to be redressed by a favorable judicial decision. Second, plaintiffs' suit arising from the Senate Defendants alleged attempt to prevent passage of health insurance reform legislation is barred by the Speech or Debate Clause of the Constitution, which protects Members of Congress from suit for actions taken in the legislative sphere.

Third, plaintiffs have not alleged any facts that establish either that this Court has personal jurisdiction over the Senate Defendants or that venue is proper in this District. Finally, plaintiffs fail to state a claim on the face of the complaint because service as an

agent of a campaign committee does not constitute holding an office of the United States, and, consequently, the FECA's provisions that designate Members as agents of their campaign committees do not violate the Constitution's Incompatibility Clause.

For these reasons, plaintiffs' claims against the Senate Defendants should be dismissed.

B. Plaintiff's Allegations

Plaintiff Maribeth Schonberg, a resident of New Hampshire, and Steven Schonberg, a resident of Florida, are husband and wife. Compl. ¶ 2. Plaintiffs allege that Ms. Schonberg, who has incurred significant medical expenses[2], had to move to New Hampshire to obtain health insurance after being denied health insurance in Florida due to a pre-existing condition. *Id.* ¶ 7. As a resident of New Hampshire, Ms. Schonberg has been able to purchase health insurance from Anthem Blue Cross Blue Shield, which is owned by Wellpoint, Inc., a for-profit company. *Id.* Her insurance premium with Anthem was $5,100 for 2007 and then rose to $8,100 in 2009. *Id.*[3] In addition to those premiums, Ms. Schonberg has had substantial medical expenses from medications and testing for her pre-existing condition, most of which have not been covered by her Anthem insurance. *Id.* ¶ 12. Plaintiffs have also incurred travel costs of approximately $2,000 per year since 2007 splitting their time between Florida and New Hampshire in

[2] Mr. Schonberg, who has separate medical insurance coverage, pays for his wife's medical expenses. Compl. ¶ 2.

[3] Plaintiffs note that Ms. Schonberg has found a "slightly less exorbitant rate for her health insurance" with Coventry Health Systems, though it is unclear whether Ms. Schonberg has switched her insurance coverage to this provider. Compl. ¶ 7, n.3.

order to maintain Ms. Schonberg's access to health insurance as a New Hampshire resident, while simultaneously preserving Mr. Schonberg's Florida residency. *Id.* ¶ 14.

Plaintiffs claim that these health care expenses are the result of Congress' failure to pass "real health insurance reform legislation." *Id.* ¶ 15. Plaintiffs allege that, at the time the complaint was filed, the seven defendant Members of Congress, for various reasons, were obstructing the passage of health care legislation. *Id.* ¶¶ 3, 15.[4] Plaintiffs further allege that Senators Lieberman, Lincoln, McCain, and McConnell, though not Senator Sanders, along with Representatives Boehner and Cantor, have received campaign contributions from the health insurance and pharmaceutical industries, and that such contributions have resulted in those Members of Congress opposing health insurance reform. *Id.* ¶¶ 5, 11, 15, 17.[5] Plaintiffs allege that if no such campaign contributions were received, "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[,] . . . [Ms. Schonberg] would become eligible

[4] Plaintiffs allege that "Defendants McCain, McConnell, Boehner, and Cantor are leaders in their political party in the effort to defeat health care reform," Compl. ¶ 3, that Defendant Lieberman "has threatened to filibuster any health insurance reform bill on the floor of the Senate," *id.*, that Defendant Lincoln "intends to block any 'public option' in health care reform legislation," *id.*, and that Defendant Sanders "plans to vote 'no' to any proposed legislation that fails to contain a robust public option[.]" *Id.* ¶ 5.

[5] Plaintiffs allege that Senator Sanders' intent to vote against legislation that does not contain a robust public option constitutes a "windfall" to health insurance companies, and while not alleging that he received campaign contributions from health insurance and pharmaceutical companies, plaintiffs do allege that Senator Sanders has received campaign contributions from other donors. Compl. ¶ 5.

for major medical health insurance in Florida[,] and [Mr. Schonberg] would pay the reasonable cost [of that insurance]." *Id.* ¶ 15.

Plaintiffs assert one legal claim in their complaint. Plaintiffs claim that the Federal Election Campaign Act (FECA), "requires that members of Congress who form campaign committees . . . be considered as Agents of their campaign committees," *id.* ¶ 19, that serving as an agent of a campaign committee constitutes holding a "civil office" under the United States, and, therefore, that FECA's provision designating Members of Congress as agents of their campaign committees violates the Incompatibility Clause of the Constitution, Art. I, § 6, cl. 2,[6] which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." *See id.* ¶¶ 1, 19. For relief, plaintiffs request that the relevant parts of the FECA, 2 U.S.C. §§ 432, 434, 439, and 441i, be declared unconstitutional, that the Senate Defendants' principal campaign committees be abolished, that funds in those committees' accounts be returned to donors, and that those Members be barred from voting on any health care legislation pending the return of all campaign contributions from large health care firms. Compl. ¶ 27.

C. Procedural Background

Plaintiffs filed this case on December 3, 2009. Along with the complaint, plaintiffs moved for emergency injunctive relief, for a three-judge court to be convened,

[6] Plaintiffs refer to this constitutional provision as the "Emoluments Clause," Compl. ¶ 1, but the courts generally refer to it as the "Incompatibility Clause." *See, e.g.*, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 210-11 (1974).

and for an order shortening the time for defendants to respond to the complaint. The Court denied those motions. *See* Order 12/03/2009, Docket # 6. Plaintiffs renewed their request to shorten the time for defendants to respond, and the Court denied that request. *See* Order 12/14/2009, Docket # 18.

ARGUMENT

I. Plaintiffs Lack Standing to Bring Their Claims Against the Senate Defendants.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Col. v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). A vital part of Article III's case or controversy limitation on the power of federal courts is the requirement that a plaintiff must have standing to invoke federal court jurisdiction. *See Valley Forge*, 454 U.S. at 471-73; *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 974 (11th Cir. 2005) ("Standing is a doctrine that stems directly from Article III's 'case or controversy' requirement") (internal quotation marks and citation omitted). "Standing . . . [is a] threshold jurisdictional question of whether a court may consider the merits of a dispute." *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006).

A party seeking to invoke a federal court's jurisdiction bears the burden of establishing his standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561

(1992); *Bischoff v. Osceola County, Fla.*, 222 F.3d 874, 878 (11th Cir. 2000). To satisfy that burden, a plaintiff must allege facts demonstrating the three elements that form the "irreducible constitutional minimum of standing" under Article III: (1) that he or she "ha[s] suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) that the injury was caused by, or is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks and citations omitted); *accord Bischoff*, 222 F.3d at 883. If a plaintiff fails to satisfy the prerequisites for Article III standing, the Court lacks jurisdiction and must dismiss the complaint. *See Valley Forge*, 454 U.S. at 475-76 ("Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States."). For the following reasons, plaintiffs' allegations fail to demonstrate Article III standing.

A. Plaintiffs Lack an Injury Sufficient to Establish Standing.

"An injury sufficient for standing purposes is 'an invasion of a *legally protected interest* which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted)) (emphasis added). As the Eleventh Circuit has explained, "[n]o legally cognizable injury arises unless an interest is protected by statute or otherwise. . . . That interest must consist of obtaining compensation for, or preventing, the violation of a

legally protected right." *Bochese*, 405 F.3d at 980 (internal quotation marks and citations omitted). The complaint fails to articulate any harm to a concrete and particularized "legally protected interest" from the alleged failure of Congress to pass health insurance reform legislation.

Plaintiffs allege that they have suffered harm from "the lack of availability of health insurance in Florida," "paying exorbitant health insurance premiums and health care costs," and the costs of traveling back and forth from New Hampshire to Florida, Compl. ¶ 14, and that the financial burden imposed by these conditions would be reduced if Congress passed health insurance reform legislation that would assist them. *Id.* ¶¶ 15, 17, 26.

Such allegations are not sufficient to establish standing. Plaintiffs have no legally protected interest (in statute or otherwise) in lower health care expenses. Nor do they have a protected interest in Congress' enacting any particular legislation to benefit them. Rather, plaintiffs' alleged injuries are nothing more than generalized grievances with current government policy. Indeed, plaintiffs are situated similarly to every other citizen who has financial interests which might benefit from congressional legislation. Certainly persons in such situations do not have standing to sue Members, as plaintiffs have done, alleging constitutional violations of campaign finance laws. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (court's exercise of jurisdiction not warranted when "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens"). Plaintiffs' suit here is based on the mistaken notion that plaintiffs have a protected legal interest in a particular legislative outcome that would benefit them – and

therefore they are harmed by the absence of such legislation. Harm to such an interest is not "legally cognizable" and is insufficient for standing.

Furthermore, plaintiffs' harm – that they are paying more for health insurance and medical expenses than they would if Congress passed health insurance reform legislation – is "conjectural" and "hypothetical." *Lujan*, 504 U.S. at 560. Whether or not plaintiffs would be paying more or less in health insurance premiums and medical expenses had health insurance reform legislation been enacted by Congress is pure conjecture. Plaintiffs' allegations amount to the *possibility* that plaintiffs *might* be suffering harm – based on their guess as to the effect unspecified legislation *might* have on their health care expenses. Such a conjectural injury does not provide plaintiffs with standing to bring this suit before the federal courts.

B. Plaintiffs Fail to Demonstrate That Their Alleged Harm Was Caused by the Senate Defendants.

Plaintiffs' allegations also fail to demonstrate that the harm they allege was caused by, or traceable to, the actions of the individual Senate Defendants. Plaintiffs' alleged injury, the lack of availability of affordable health insurance and the burden of high medical expenses, is not "fairly traceable" to the Senate Defendants. The Senate Defendants did not cause the plaintiffs' health care concerns, were not involved in the decision of Florida insurers not to insure plaintiff, and did not set plaintiff's insurance premiums or decide what procedures and medications would be covered by plaintiff's policy. All of those matters depended on the "independent action of some third party not

before the court," *Bischoff*, 222 F.3d at 883 (*quoting Lujan*, 504 U.S. at 561), and thus are not fairly traceable to the Senate Defendants.

Furthermore, plaintiffs' premise that the failure to enact health insurance reform legislation is directly traceable to these five Senators and two Representatives disregards the nature of legislative action, which requires bicameral action and presentation to the President, U.S. Const. art. I, § 7, *see I.N.S. v. Chadha*, 462 U.S. 919, 945-49 (1983), and the fact that there are 433 other House Members and 95 other Senators who vote on pending legislation. Any action or inaction by the collective bodies of the House or Senate cannot be attributed to a mere handful of Members from both chambers. Consequently, even if plaintiffs could establish an injury-in-fact, the complaint fails to demonstrate that their alleged injuries are fairly traceable to the actions of the five Senate Defendants.

C. Plaintiffs' Alleged Injuries Are Not Likely to Be Redressed by a Favorable Judicial Decision Against the Senate Defendants.

Plaintiffs also fail the redressability prong of the standing test, as the harm they allege is not likely to be redressed by a favorable decision against the Senate Defendants. First, a federal court has no power to command Congress or its Members to take legislative action or to refrain from taking legislative action, as plaintiffs request. Compl. ¶ 27.D (requesting order that Senate Defendants not vote on or filibuster health insurance reform legislation until they have returned campaign donations from health insurance and pharmaceutical firms). *See Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003) ("[I]n light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the

federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation."), *rev'd on other grounds*, 542 U.S. 1 (2004); *Cf. Trimble v. Johnston*, 173 F. Supp. 651, 653 (D.D.C. 1959) ("[T]he Federal courts may not issue an injunction or a writ of mandamus against the Congress.").

Moreover, even if the Court could grant plaintiffs the relief they request, it is wholly speculative that (a) the Senate and the House would subsequently pass health insurance reform legislation, (b) the President would sign that legislation, and (c) the legislation Congress passes would provide financial relief to plaintiffs.[7] Accordingly, plaintiffs cannot demonstrate that their alleged injury is likely to be redressed by a favorable decision.

In sum, plaintiffs' allegations wholly fail to demonstrate a legally cognizable injury-in-fact fairly traceable to the Senate Defendants that could be redressed by this suit, and, thus, plaintiffs lack standing to bring their claims against the Senate Defendants.

II. Plaintiffs' Suit Against the Senate Defendants Is Barred by the Speech or Debate Clause.

Plaintiffs' claims against the Senate Defendants for allegedly obstructing the passage of health insurance reform legislation are precluded by the Speech or Debate Clause of the Constitution. That Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

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[7] Plaintiffs themselves recognize the speculative nature of redress that depends on subsequent legislative action. Compl. ¶ 15 (alleging that if contributions to the Senate Defendants' campaign committees from the heath insurance and pharmaceutical industries were not permitted, "the rest of Congress would *probably* act in the best interests of the Plaintiffs and the People of the United States.") (emphasis added).

U.S. Const. art. I, § 6, cl. 1. "[T]he central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972). The Clause is designed to ensure that the "legislative function the Constitution allocates to Congress may be performed independently," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975), "without regard to the distractions of private civil litigation," *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415 (D.C. Cir. 1995), thereby "reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966). Because of its importance to the Legislative Branch's constitutional functions, the Supreme Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; *accord United States v. Swindall*, 971 F.2d 1531, 1544 (11th Cir. 1992).

The Clause provides immunity from suit for all actions that "fall within the sphere of legitimate legislative activity," *Eastland*, 421 U.S. at 501; *accord Gravel*, 408 U.S. at 618, which encompasses "anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *Doe v. McMillan*, 412 U.S. 306, 311 (1973) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)); *accord Swindall*, 971 F.2d at 1544. The Clause precludes inquiry into "the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed

legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625.

The Clause's immunity covers all civil actions, "whether for an injunction or damages." *Eastland*, 421 U.S. at 503; *see also Nat'l Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 630 (1st Cir. 1995) (legislative immunity protects legislators "'from suits for either prospective relief or damages'" (quoting *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980)).[8] Furthermore, as the Supreme Court has made clear, the immunity provided by the Clause serves not merely as "a defense on the merits[,] but also protects a legislator from the burden of defending himself." *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). Thus, "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Eastland*, 421 U.S. at 503.

The actions of the Senate Defendants that plaintiffs challenge in this case fall squarely within the protections of the Speech or Debate Clause. Plaintiffs allege that the Senate Defendants are trying to defeat health insurance reform by "voting" against the measure, *see, e.g.*, Compl. ¶¶ 3, 5, "filibuster[ing] . . . the bill on the floor of the Senate," *id.* ¶ 3, and generally opposing the legislation in the Congress. *Id.* Yet, such activities –

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[8] The Clause similarly protects against suits for declaratory judgments. *See Consumers Union*, 446 U.S. at 732 & n.10 (establishing that common-law legislative immunity, like that of the Speech or Debate Clause, "is equally applicable to . . . actions seeking declaratory or injunctive relief"); *see also Eastland*, 421 U.S. at 496, 512 (directing district court to dismiss complaint seeking injunctive and declaratory relief as barred by Speech or Debate Clause).

voting, debating, and other legislative activity on the floor of a House of Congress – are at the very core of the "legitimate legislative sphere" and, thus, constitute matters generally done in a session of the House by one of its members in relation to the business before it. *See Gravel*, 408 U.S. at 617 (Speech or Debate immunity "equally cover[s]" "[c]ommittee reports, resolutions, and the act of voting" as it does actual speech or debate); *Kilbourn v. Thompson*, 103 U.S. at 204; *Nat'l Ass'n of Social Workers*, 69 F.3d at 630 ("the Clause protects not only speech and debate per se, but also voting, . . . circulation of information to other legislators, . . . participation in the work of legislative committees, . . . and a host of kindred activities") (citations omitted).

That plaintiffs allege an improper motivation on the part of the Senate Defendants – that their actions on health insurance reform legislation are the result of their alleged receipt of campaign donations from the health insurance and pharmaceutical industries – does not affect the absolute bar provided by the Speech or Debate Clause. The Supreme Court has made clear that "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process *and into the motivation for those acts*." *Eastland*, 421 U.S. at 508 (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)) (emphasis added).

Accordingly, plaintiffs' claims challenge the legislative actions of the Senate Defendants and are therefore barred by the Speech or Debate Clause and must be dismissed.[9]

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[9] In addition to the immunity provided under the Speech or Debate Clause, the (continued...)

III. The Court Lacks Personal Jurisdiction Over the Senate Defendants and Venue Is Improper in This District.

A. Plaintiffs Have Alleged No Facts That Would Establish Personal Jurisdiction Over the Senate Defendants in This Court.

"A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant," as in this case, "bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). Plaintiffs fail to meet this burden as the complaint does not allege sufficient facts demonstrating that the Court has personal jurisdiction over the Senate Defendants.

A federal court's jurisdiction over a person can be based on either a federal statute or the law of the forum in which the District Court sits. Here, no applicable federal statute expands this Court's jurisdiction, accordingly, personal jurisdiction over the defendants can be obtained only if they are subject to the personal jurisdiction of the Florida courts under Florida law and the exercise of such jurisdiction comports with due

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[9](...continued)
Senate Defendants are also shielded from plaintiffs' suit by sovereign immunity. Plaintiffs' suit challenges the official actions of the Senate Defendants with regard to health insurance reform legislation. Such a suit against individual government officials in their official capacities is equivalent to a suit against the government and is barred by sovereign immunity. *See Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972) (affirming dismissal because Congress "is protected from suit by sovereign immunity"); *Rockefeller v. Bingaman*, 234 Fed. Appx. 852, 855 (10th Cir. 2007) (affirming dismissal of suit against Senator and Representative in their official capacities on sovereign immunity grounds); *State of Florida, Dep't of Bus. Regulation v. U.S. Dep't of the Interior*, 768 F.2d 1248, 1251 (11th Cir. 1985) ("Designation of a government agency or officer as party-defendant does not avoid the sovereign immunity problem."); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

process requirements. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008) ("A federal district court in Florida may exercise personal jurisdiction over a nonresident defendant to the same extent that a Florida court may, so long as the exercise is consistent with federal due process requirements."); *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626-27 (11th Cir. 1996).

"The Florida 'long-arm' statute[, Fla. Stat. § 48.193,] permits the state's courts to exercise jurisdiction over nonresident defendants who commit certain specific acts" enumerated in that statute. *Licciardello*, 544 F.3d at 1283. Plaintiffs have not alleged any actions by the Senate Defendants that would qualify for any of the possible bases for personal jurisdiction over a non-resident provided by Florida's "long arm" statute, Fla. Stat. § 48.193, and the Court therefore cannot exercise jurisdiction over them in this case.

Even if the provisions of the Florida "long arm" statute did reach the actions of the Senate Defendants, the exercise of jurisdiction over them would not comport with due process. To determine whether due process permits the exercise of jurisdiction, a court first "must determine whether [defendants] have established sufficient 'minimum contacts' with the state of Florida. Second, [a court] must decide whether the exercise of this jurisdiction over [the defendant] would offend traditional notions of fair play and substantial justice." *Sculptchair, Inc.*, 94 F.3d at 630-31 (internal quotation marks and citations omitted). None of the Senate Defendants represent Florida, and all of plaintiffs' allegations regarding them involve their legislative actions related to health insurance reform legislation pending in Congress. Those actions took place in Washington, D.C., and plaintiffs have not alleged – and cannot allege – that any of those legislative activities

occurred in Florida. Accordingly, Plaintiffs fail to establish the minimum contacts between the Senate Defendants and Florida necessary to permit the Court to exercise jurisdiction over them consistent with due process. Furthermore, "traditional notions of fair play and justice" would be offended by hauling non-Florida Members of Congress into Florida courts on claims deriving solely from their legislative actions in Washington, D.C. Consequently, even if plaintiffs' allegations established jurisdiction under the Florida "long arm" statute, which they do not, exercising personal jurisdiction over the Senate Defendants would not comport with the requirements of due process.

B. Venue Is Improper in This District.

Dismissal of the complaint is also required because venue is improper in the Middle District of Florida. "On a motion to dismiss based on improper venue, the plaintiff has the burden of showing that venue in the forum is proper." *Wai v. Rainbow Holdings*, 315 F. Supp. 2d 1261, 1268 (S.D. Fla. 2004). The complaint's allegations provide no basis for venue in this District under the general venue statute, 28 U.S.C. § 1391. First, subsection 1391(e), regarding actions against agencies, officers, and employees of the United States, applies only to the executive branch and not to the Senate Defendants. *See Duplantier v. United States*, 606 F.2d 654, 664 (5th Cir. 1979) ("Section 1391(e)'s reach should not be expanded beyond the executive branch. To do so might bring about absurd consequences."); *see also King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992) (28 U.S.C. § 1391(e) "only applies to suits against officers of the executive branch"); *Liberation News Serv. v. Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970).

That leaves subsection 1391(b) as the only potentially applicable venue provision. Under that provision, venue does not exist in this District because (1) none of the defendants to this action reside in this jurisdiction, nor do they all reside in the same state; (2) a substantial part of the events giving rise to plaintiffs' claims against defendants did not arise or occur in this judicial district, but rather in Washington, D.C., as described previously; and (3) there is another district, the District of Columbia, where (absent the other obstacles to this suit) venue could lie. Thus, the complaint should be dismissed for improper venue.[10]

IV. The Complaint Fails to State a Claim as FECA's Provisions Treating Members of Congress as Agents of Their Campaign Committees Do Not Violate the Incompatibility Clause of the Constitution.

Plaintiffs' sole legal claim, that FECA's provisions designating Members of Congress as agents of their campaign committees violates the Incompatibility Clause of the Constitution, Art. I, § 6, cl. 2, is without merit as a matter of law. The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Plaintiffs argue that by making Members of Congress serve as agents of their campaign committees, FECA has given those Members an "Office under the United States" in violation of the Incompatibility Clause. Plaintiffs' argument fails because serving as an agent of a campaign committee does not constitute holding an office under the United States.

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[10] In addition, Senate Defendants note that plaintiffs sent the summons and complaint to their congressional offices by mail and have not effected proper service. *See* Fed. R. Civ. P. 4(i).

As the Supreme Court explained in discussing the Appointments Clause of the Constitution, "the term 'officers of the United States,'" "include[s] 'all persons who can be said to hold an office under the government,'" and means "any appointee exercising significant authority pursuant to the laws of the United States[.]" *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam) (quoting *United States v. Germain*e, 99 U.S. 508, 510 (1879)); *see also id.* at 131 (term "'Officers of the United States' . . . "embrace[s] all appointed officials exercising responsibility under the public laws of the Nation"); *United States v. Lane*, 64 M.J. 1, 4 (C.A.A.F. 2006).[11] Neither campaign committees nor their officers or agents exercise any governmental authority on behalf of the United States. While campaign committees are regulated by federal law (like many private businesses and organizations), they are not entities of the federal government, but private organizations. Consequently, agents, officers, or directors of those campaign committees, even if federal law requires campaign committees to maintain such designated positions, are not "Officers of the United States" and do not hold an "Office under the United States." Accordingly, FECA's provision designating Members of Congress as agents of their campaign committees does not violate the Incompatibility Clause of the Constitution, and plaintiffs' allegations therefore fail to state a claim as a matter of law and should be dismissed.

[11] The Court in *Buckley* noted the relationship between the Appointments Clause and the Incompatibility and Ineligibility Clauses, and found that these "cognate provisions" provided the context for interpreting the term "Officers of the United States." 424 U.S. at 124-25; *see also Lane*, 64 M.J. at 4.

CONCLUSION

For the foregoing reasons, plaintiffs' claims against the Senate Defendants should be dismissed with prejudice.

Respectfully submitted,

Morgan J. Frankel
Senate Legal Counsel
morgan_frankel@legal.senate.gov

Patricia Mack Bryan
Deputy Senate Legal Counsel

Grant R. Vinik
Assistant Senate Legal Counsel

/s/ Thomas E. Caballero
Thomas E. Caballero
Assistant Senate Legal Counsel
Florida Bar # 0118000
Trial Counsel
thomas_caballero@legal.senate.gov

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250
Tel: (202) 224-4435
Fax: (202) 224-3391

Counsel for Defendant Senators
Joseph Lieberman, Blanche Lincoln,
John McCain, Mitch McConnell, and
Bernie Sanders

February 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010, I electronically filed the foregoing Motion to Dismiss on Behalf of Defendant Senators Lieberman, Lincoln, McCain, McConnell, and Sanders and memorandum in support with the Clerk of the Court by using the CM/ECF system, which will provide notice of electronic filing to Steven E. Schonberg, plaintiff pro se, to counsel for Defendant Federal Election Commission, and to counsel for Defendant Representatives Boehner and Cantor.

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participant:

Maribeth Schonberg
60 Wilson Hill Road
Merrimack, NH 03054

Plaintiff pro se

/s/ Thomas E. Caballero
Thomas E. Caballero
Assistant Senate Legal Counsel
Florida Bar # 0118000
Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250
Tel: (202) 224-4435
Fax: (202) 224-3391
thomas_caballero@legal.senate.gov