UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEVE SCHONBERG,	)	
	)	
Plaintiff-Appellant,	)	No. 11-5199
	)	
v.	)	**MOTION**
	)	
FEDERAL ELECTION COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Defendants-Appellees.	)	

APPELLEE FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY AFFIRMANCE

Appellee Federal Election Commission ("Commission" or "FEC") respectfully moves for summary affirmance of the district court's Memorandum Opinion and Order insofar as it granted the Commission's motion to dismiss. (*See* Mem. Op. and Order ("Op."), Civ. No. 10-2040 (D.D.C. June 23, 2011) (copy attached as Exh. 1)). As the district court held, appellant Steve Schonberg lacks Article III standing to maintain his claims seeking to invalidate the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57, and to abolish the Commission that administers and civilly enforces that statute. Schonberg's claims all rest on the flawed premise that without FECA, other statutes or the Constitution would limit campaign contributions, and the public financing of elections would

inevitably follow. In fact, without FECA, campaign contributions would have no limits, and the defects Schonberg perceives would only worsen.

Schonberg unsuccessfully ran for Congress in 2010, and then brought this suit claiming that FECA gives incumbents like his opponent an unconstitutional election advantage by authorizing them to accept campaign contributions. Schonberg chose not to accept contributions because he contends they are unconstitutional "bribes" that would be illegal but for FECA.

Schonberg lacks standing. As the district court held, Schonberg's alleged injuries are not redressable because FECA does not make campaign contributions lawful as a matter of legislative grace — the statute *limits* contributions, which are otherwise lawful and unrestrained. Indeed, the Constitution does not bar campaign contributions; although Congress may subject them to certain limits, contributions are protected by the First Amendment. Thus, a ruling striking down FECA would allow incumbents to accept *unlimited* contributions, which according to Schonberg's own theories would exacerbate, not remedy, the electoral disadvantages and legislative ills about which he complains. Schonberg has also failed to show that FECA has caused him any cognizable injury-in-fact.

In any event, Schonberg's constitutional challenges to FECA are frivolous. FECA treats all candidates equally and creates no federal "office" that would implicate the various constitutional clauses Schonberg invokes. Thus, because

"the merits . . . are so clear that expedited action is justified" and "no benefit will be gained from further briefing and argument of the issues presented," *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987), summary affirmance is appropriate in this case.

BACKGROUND

A. The Federal Election Commission and FECA

The Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g.

Congress enacted FECA primarily "to limit the actuality and appearance of corruption resulting from large individual financial contributions[.]" *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Congress later amended FECA with the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107, 116 Stat. 81 (Mar. 27, 2002), which was similarly "designed to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *McConnell v. FEC*, 540 U.S. 93, 114-15 (2003) (internal quotation marks omitted). FECA places dollar limitations on contributions by individuals and political committees to candidates for federal office. 2 U.S.C. § 441a(a). Additionally, FECA prohibits corporations from making campaign contributions from their treasury funds, *id.* § 441b(a), and instead requires them to use a "separate

segregated fund" consisting of money donated by their stockholders and employees, *id.* § 441b(b)(2). FECA also limits the ways in which candidates may use contributions they accept, specifically barring "personal use" of such contributions. *Id.* § 439a. FECA requires that candidates for Congress designate a principal campaign committee and serve as an agent of that committee. *Id.* §§ 432(e)(1)-(2). Principal campaign committees are responsible for complying with FECA's recordkeeping and reporting requirements and the statute's contribution restrictions. *See generally id.* § 432.

B. Schonberg and His Claims Regarding FECA

Schonberg was an unaffiliated candidate for the United States House of Representatives in Florida's Sixth District in 2010. (*See* Second Am. Compl. for Declaratory J. and Inj. ("Compl."), Civil No. 10-2040, at ¶ 11 (filed Feb. 15, 2011) (copy attached as Exh. 2)). Schonberg lost to incumbent Representative Cliff Stearns, and Schonberg states that he intends to run again in 2012. (*Id.*)

On February 15, 2011, Schonberg filed a Second Amended Complaint ("Complaint"). The Complaint contains, among other things, wide-ranging allegations against FECA, as amended by BCRA. First, Schonberg claims that FECA grants an unconstitutional advantage in federal election campaigns to incumbents like Representative Stearns, in violation of the Fifth Amendment's guarantee of equal protection. (*See, e.g.*, *id.* ¶¶ 203, 233.) Schonberg chose not to

accept contributions during his campaign because he asserts that they are "unconstitutional bribes," which FECA allegedly authorizes corporations to give to incumbents and their campaign committees (*see, e.g.*, *id.* ¶¶ 24, 33, 62-67, 203, 233). Schonberg contends that this gives incumbents an unconstitutional "monetary campaign advantage" because FECA allows Members to use contributions — and allegedly other benefits, including legislative earmarks and the Members' Representational Allowance — to aid their campaigns. (*See, e.g.*, Compl. ¶¶ 37, 203, 218, 233, 248.) Second, the Complaint alleges that FECA violates the Emoluments Clause, U.S. Const. Art. I, § 6, cl. 2, and the Appointments Clause, *id.* Art. II, § 2, cl. 2, by requiring federal candidates to designate and become agents of a principal campaign committee, which allegedly permits Members of Congress to appoint themselves as "Officers" of a "civil Office under the Authority of the United States." (Compl. ¶¶ 205-08, 211-17, 235-38, 241-47.) Third, the Complaint alleges that FECA violates the Ascertainment Clause, U.S. Const. Art. I, § 6, cl. 1, by allowing incumbents to accept campaign contributions and other benefits Schonberg characterizes as "unconstitutional compensation." (Compl. ¶¶ 3, 209, 239.)

Schonberg contends that these alleged constitutional violations injured him in two ways: (1) by giving incumbent candidates a "monetary campaign advantage" over challengers, which supposedly benefited his opponent in the 2010

election and will benefit him again in 2012 ("election-disadvantage injury") (*id.* ¶¶ 38-44); and (2) by allowing Members of Congress to be "bribed by the health care industry" with contributions, resulting in a failure to pass legislation that would provide the kind of health insurance that Schonberg and his spouse would prefer ("health-care injury") (*id.* ¶¶ 89-104). (*See also* Op. at 5.)

Schonberg seeks, *inter alia*, a sweeping declaration that FECA is unconstitutional and an order "freezing all the assets of all campaign committees under the authority of [the FEC] and ordering the funds returned to donors." (Compl. at 65 ¶¶ A-D.) Schonberg also seeks to "[a]bolish[] the FEC" in order to achieve "public-only campaign financing" which he claims will achieve his goal of "reduc[ing] bribery and corruption in Congress." (*Id.* ¶ 249.)

The Complaint also asserts claims against the United States, challenging the constitutionality of the Members' Representational Allowance ("MRA"), 2 U.S.C. § 57b, and the congressional practice of earmarking funds in legislation. The Department of Justice has defended the government against these claims, and they are therefore not further discussed here.

On March 15, 2011, the Commission moved to dismiss the Complaint's FECA and BCRA claims for lack of standing and failure to state a claim.

C. The District Court's Ruling

On June 23, 2011, the district court granted the FEC's motion to dismiss. (Op. at 16.) The court held that Schonberg lacked standing because a ruling striking down FECA and BCRA in their entirety would not redress his alleged injuries. (*Id.* at 4-6.) Such a ruling, the court observed, "would not further Schonberg's goal of more stringent regulation of the federal campaign finance system and elimination of the alleged competitive advantages for incumbent federal candidates." (*Id.* at 5 (internal quotation marks omitted).) Schonberg failed to show that candidates, "free from the constraints imposed by [FECA or BCRA,] would be more restricted in their use of campaign funds, or that the Constitution itself forbids the pecuniary evils of the federal campaign finance system that he alleges persist. To the contrary, removing these limits would exacerbate, rather than remedy, the perceived ills." (*Id.* (internal quotation marks omitted; alteration in original).) The district court alternatively held that even if a favorable decision might arguably redress Schonberg's alleged competitive injury, the Complaint nevertheless failed to state claims as to the Emoluments Clause, the Appointments Clause, or the Ascertainment Clause. (*Id.* at 6 n.3.)[1]

[1] Even if this portion of the district court's opinion were not considered an alternative holding, on appeal the Commission may defend its victory below on any ground. *See, e.g.*, *U.S. v. Garrett*, 720 F.2d 705, 710 (D.C. Cir. 1983).

Schonberg filed his notice of appeal on August 7, 2011.[2]

D. Standard of Review

This Court reviews the ruling below *de novo*. *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003).

ARGUMENT

I. THIS COURT SHOULD SUMMARILY AFFIRM THE RULING BELOW THAT SCHONBERG LACKS STANDING TO ASSERT HIS CLAIMS AGAINST FECA

Schonberg lacks standing because his FECA claims are not redressable and because he has failed to establish that he suffered an "injury in fact" that was caused by the conduct of which he complains. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[3]

A. Schonberg's Alleged Injuries Are Not Redressable by Any Court

The district court correctly held that a ruling invalidating FECA would not redress either Schonberg's alleged election-disadvantage or health-care injuries.

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[2] The district court also granted the United States' separate motion to dismiss the MRA and earmarking claims (Op. at 16), and Schonberg has appealed that ruling. Schonberg has not sought expedition in this Court as to those claims. The United States has informed the Commission that it intends to address those claims in accord with the briefing schedule this Court sets, but has authorized the Commission to represent that the United States supports the Commission's motion for summary affirmance as to the FECA and BCRA claims.

[3] Because Schonberg lacks standing, the district court also denied his request to trifurcate his various claims into separate proceedings and to certify his FECA claims to this Court sitting en banc pursuant to 2 U.S.C. § 437h. (Op. at 7 n.4.) That ruling should also be summarily affirmed.

(Op. at 4-6.) Schonberg claims that these injuries were caused by FECA's supposed authorization of campaign contributions and other allegedly unconstitutional benefits to incumbent officeholders, and that in the absence of this authorization, contributions would be banned by federal bribery laws or the Constitution. (*See, e.g.*, Compl. ¶¶ 24, 38-44, 89-104, 203, 218, 233, 248.) But as the district court recognized, FECA does not make otherwise illegal contributions lawful — it *limits* contributions, which are otherwise legal and protected, not banned, by the Constitution. (Op. at 5.) As a result, invalidating FECA would, according to Schonberg's theories, *worsen* his alleged injuries by letting incumbents accept unlimited contributions and use them in a far greater number of ways, presumably even for personal use.

Schonberg does not, and cannot, point to any provision of FECA that affirmatively authorizes private citizens or groups to make contributions. He simply assumes that FECA enables what it does not ban. However, this assumption "is foreign to our libertarian tradition," since it "assumes that conduct is restricted except insofar as a statute permits it"; to the contrary, "[c]ampaign conduct is unrestricted, except to the extent that the law limits it." *Whitmore v. FEC*, 68 F.3d 1212, 1215 (9th Cir. 1996). "People do not depend on Congressional 'authorization,' as [Schonberg] assume[s], for their liberty to express their political preferences." *Id*. Indeed, individuals and groups made

contributions long before FECA was enacted. *See, e.g.*, *Cal. Med. Ass'n v. FEC*, 641 F.2d 619, 623 n.2 (9th Cir. 1980) (*en banc*) (contributions by individuals to political committees were not limited before FECA), *aff'd*, 453 U.S. 182 (1981).

Moreover, far from banning contributions, the Constitution protects them: "Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001). And consistent with this protected status, the Supreme Court has made clear that "Congress has no constitutional obligation to limit contributions at all[, and] 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).

Finally, federal bribery laws do not ban campaign contributions — nor would they if FECA were struck down. Schonberg repeatedly characterizes campaign contributions as "bribes," but "neither law nor morals equate all political contributions, without more, with bribes." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000); *see also U.S. v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995) ("Intending to make a campaign contribution does not constitute bribery, even though many contributors hope that the official will act favorably because of their contributions."); *U.S. v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) ("[A]ccepting a

campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act.").

Accordingly, if FECA's contribution limits were stuck down as Schonberg requests, individuals, corporations, and other groups could contribute unlimited amounts of money to incumbents, who could then use the contributions in many more ways.[4] As the district court recognized, "this result would not further Schonberg's goal of more stringent regulation of the federal campaign finance system and elimination of the alleged competitive advantages for incumbent federal candidates." (Op. at 5 (internal quotation marks omitted).) Nor would it lead to health-care legislation that Schonberg finds acceptable. Thus, Schonberg's alleged injuries are not redressable by any court.

B. Schonberg Also Failed To Allege a Valid Injury-In-Fact or Show That His Alleged Injuries Were Caused By FECA

Schonberg also lacks standing because he cannot show (1) that he suffered an injury-in-fact or (2) that his alleged injuries were caused by FECA.

First, Schonberg cannot demonstrate an injury-in-fact. An "injury in fact" is "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. Schonberg

[4] Contrary to Schonberg's claims, even if FECA were invalidated, the MRA and legislative earmarks would still exist and allegedly cause him injury. (*See, e.g.*, Compl. ¶¶ 218, 248.) FECA does not regulate the MRA or earmarks at all, let alone "allow[]" them. (*Id.*) Furthermore, invalidating FECA and "[a]bolish[ing] the FEC" would not lead to the "public-only campaign financing" Schonberg seeks (*id.* ¶ 249), since Congress has no constitutional duty to appropriate funds to finance political campaigns. *See Buckley*, 424 U.S. at 97-98.

does not have a legally protected interest in having financial resources equal to his opponents. *See McConnell*, 540 U.S. at 227 (holding that "an equal ability to participate in the election process based on . . . economic status" is not a legally protected interest); *Sykes v. FEC*, 335 F. Supp. 2d 84, 89-90 (D.D.C. 2004) (following *McConnell* in holding that an alleged "inability to compete equally against opponents with more money" due to FECA is not a valid injury-in-fact). Schonberg also fails to allege a particularized health-care injury because millions of other Americans could also allege that health insurance is expensive and that Congress has failed to enact an optimal health-care program. This alleged injury amounts to no more than a generalized grievance about government, which is not a valid injury-in-fact. *See Lujan*, 504 U.S. at 573-74.

Second, Schonberg cannot show that his claimed injuries were caused by FECA rather than the result of independent action by "third part[ies] not before the court." *Id.* at 560. As explained *supra* Part I.A., FECA did not cause Schonberg's alleged injuries because the statute does not authorize contributions in general or require anyone in particular to give contributions to his opponent or withhold them from him. Instead, Schonberg's alleged electoral disadvantage was caused by his own choice not to accept campaign contributions, and by the independent decisions of individuals and groups to contribute money to his opponent. *Cf. McConnell*, 540 U.S. at 228 (no causation where plaintiffs' "alleged inability to compete stems

not from the operation of [FECA], but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice"). Schonberg's alleged health-care injury similarly results not from FECA, but from the vast number of third parties involved in passing (or not passing) legislation. *See, e.g.*, *Page v. Shelby*, 995 F. Supp. 23, 29 (D.D.C. 1998) ("[A]ny possible injury suffered by [plaintiff] stemming from the failure of unspecified legislation to be enacted is far too remote to satisfy [the causation] element of standing.").

In sum, the Court should summarily affirm the district court's ruling that Schonberg lacks standing because he cannot meet any of the three requirements under Article III: injury-in-fact, causation, or redressability.

II. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST FECA OR BCRA

Although the district court's ruling on standing was sufficient to dispose of the Complaint's claims against FECA (as amended by BCRA), its alternative holding that the Emoluments, Appointments, and Ascertainment Clause allegations fail to state a claim should also be summarily affirmed because Schonberg can "prove no set of facts in support of his claim[s] which would entitle him to relief."

Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002).[5] The Complaint also fails to state a valid Fifth Amendment claim.

A. The District Court Correctly Dismissed the Emoluments and Appointments Clause Claims Against FECA

Schonberg invokes various constitutional clauses to challenge FECA, but his arguments rest largely on the frivolous assertion that federal candidates act as "officers" of the United States when they serve as agents of their own campaign committees.

The Appointments Clause mandates that the President, with the advice and consent of the Senate, shall appoint "Officers of the United States." U.S. Const. Art. II, § 2, cl. 2. What Schonberg refers to as the Emoluments Clause bars sitting Members of Congress from being "appointed to any civil Office under the

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[5] After finding Schonberg lacked standing, the district court considered the merits of the Emoluments, Appointments, and Ascertainment Clause claims because "[a]rguably, a favorable decision might redress any competitive disadvantage Schonberg suffers from the existence of campaign committees, since such committees would not exist absent their authorization in FECA." (Op. at 6 n.3.) However, this is incorrect. First, campaign committees could exist absent FECA, as they existed before FECA. *See Cal. Med. Ass'n*, 641 F.2d at 623 n.2 (political committees existed before FECA). Second, even if campaign committees did not exist, Schonberg's alleged injuries would still not be redressed since they arise not from the existence of campaign committees *per se*, but from their ability to accept and spend contributions and other benefits on behalf of incumbents. (*See, e.g.*, Compl. ¶¶ 213, 243.) Absent committees, incumbent-candidates *themselves* could still accept and spend contributions, allegedly injuring Schonberg. (*See, e.g.*, *id.* ¶ 43.) Finally, even if Schonberg's alleged injuries were redressable, he would still lack standing for failure to show a valid injury-in-fact caused by FECA. *See supra* Part I.B.

Authority of the United States." U.S. Const. Art. I, § 6, cl. 2. Schonberg contends that FECA's requirement that a candidate act as an agent of his or her principal campaign committee, *see* 2 U.S.C. § 432(e)(2), violates these Clauses because it allows Members of Congress to appoint themselves as "Officers of the United States," and to a "civil Office under the Authority of the United States." (Compl. ¶¶ 205-08, 211-17, 235-38, 241-47.)

However, as the Supreme Court has explained while interpreting the Emoluments and Appointments Clauses, to qualify as an officer of the United States an appointee must "exercis[e] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 124-26; *see id*. at 140-41 (holding that FEC Commissioners are "Officers" since they perform a "significant governmental duty exercised pursuant to a public law"). As the district court explained, Schonberg cannot demonstrate that "incumbents exercise any, yet alone significant, authority of the United States as agents of their campaign committees." (Op. at 6 n.3.) Political committees are private entities, which FECA regulates. *Cf. Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997) ("[C]ommittees of political parties are private actors, not public agencies, even though they are regulated by the state."). They perform no governmental duties, but merely receive and spend campaign money and report that activity to the Commission on behalf of a candidate for office. *See* 2 U.S.C. § 432. Thus, candidates who serve as agents

for their campaign committees under section 432(e)(2) are not "Officers" under the Appointments Clause nor do they hold an "Office" under the Emoluments Clause.

B. The District Court Correctly Dismissed the Ascertainment Clause Claim Against FECA

The district court also correctly dismissed Schonberg's claim that FECA violates the Ascertainment Clause because it allegedly allows Members of Congress to accept "unconstitutional compensation" in the form of campaign contributions and other benefits as candidates and officeholders. (Op. at 6 n.3; Compl. ¶¶ 3, 209, 239.) The Ascertainment Clause states that "[t]he Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." Art. I, § 6, cl. 1. But as the district court observed, the Clause "does not provide a substantive limit on the amount or Congressional source of members' compensation." (Op. at 6 n.3.) The Clause merely serves "to affix political responsibility for the level of Members' pay ultimately with Congress itself." *Humphrey v. Baker*, 848 F.2d 211, 215 (D.C. Cir. 1988). Thus, even if FECA authorized candidates and their committees to accept contributions — which it does not, *see supra* Part I.A — and even if campaign contributions were "compensation" to a Member — which they are not, *see* 2 U.S.C. § 439a(b) (prohibiting candidates from using contributions for personal use) — Schonberg's Ascertainment Clause claim would still fail because the Clause does not limit the receipt of compensation by Members of Congress.

C. The Complaint Fails to State a Fifth Amendment Claim

Although the district court properly dismissed Schonberg's Fifth Amendment claim for lack of standing, the allegation also fails to state a valid equal protection claim, since FECA treats incumbents and challengers the same. *See Cal. Med. Ass'n*, 453 U.S. at 200 (an essential element of an equal protection claim is that the challenged statute treats similarly situated entities differently); *Buckley*, 424 U.S. at 30-33 (rejecting the argument that FECA's contribution limits "work . . . an invidious discrimination between incumbents and challengers"; explaining that "the Act applies the same limitations on contributions to all candidates").

CONCLUSION

For the foregoing reasons, this Court should summarily affirm the district court's grant of the Commission's motion to dismiss.

Respectfully submitted,

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September 22, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2011, I will file the foregoing electronically via the Court's ECF system pursuant to D.C. Cir. R. 25(a), I will cause four paper copies to be hand-delivered to the Court pursuant to D.C. Cir. R. 27(b), and I will serve a copy on the following by e-mail pursuant to Fed. R. App. P. 25(c)(1)(D):

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