[ORAL ARGUMENT NOT YET SCHEDULED]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

STEVE SCHONBERG, PRO SE, Plaintiff-Appellant, v. FEDERAL ELECTION COMMISSION, ET AL., Defendants-Appellees	No. 11-5199 RESPONSE TO DISPOSITIVE MOTION

APPELLANT'S REPONSE TO THE FEC'S MOTION FOR SUMMARY AFFIRMANCE

Introduction

Just prior to the creation of the FEC in 1974, there was no internet, there were no commercially available computers, and corporations were not allowed to bribe members of congress.

> "I am not an advocate for frequent changes in laws and Constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still

> the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."

Thomas Jefferson quote, inscribed on panel 4 of the Jefferson Memorial, Washington, D.C.

"New truths" *have* been discovered since 1974. Because much of the "law of the land" with respect to first impressions on the constitutionality of FECA is now contained on two pages of an error-riddled opinion of a district court,[1] the FEC's motion for summary affirmance should be denied.

ARGUMENT

A. SUMMARY AFFIRMANCE IS IMPROPER

"A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *TaxpayersWatchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987), (internal citations, omitted). "To summarily affirm an order of the district court, this court must conclude that no benefit will be gained from further briefing and argument of the issues presented." *Id* at 298. This Court is "obligated to view the record and the inferences to be drawn therefrom 'in the light most favorable to [appellant].'" *United States v. Diebold, Inc.*, 369 U.S. 654, 655, (1962).

In its motion or summary affirmance, the FEC relied only on

[1] Mot. Exh 1 at 5-6

TaxpayersWatchdog, Inc., supra. See Mot. at 3. This is perhaps because it is the sole reported case in which summary affirmance was discussed. And in *TaxpayersWatchdog, Inc.*, 819 F.2d at 299, the record was "barren, however, of any facts that would suggest" a delay created by a full review would be beneficial. Unlike appellant *TaxpayersWatchdog, Inc.*, appellant Schonberg is not appealing for the purpose of delay.

Appellant has already extensively challenged the district court's opinion and ruling; summary affirmance is improper. See appellant's motion to expedite, Doc. 1328567 at 2-18, which is attached as Exhibit 1, and the reply, Doc. 1331980, attached as Exhibit 2. The exhibits are incorporated by reference and relied upon in this response. The Court is invited to note that the FEC essentially admitted appellant's 5th Amendment and Compensation Clause claims. See Reply, Exh 2 at 1-2. And the FEC was unable to respond to several of the district court's mistaken conclusions outlined in appellant's motion. See Reply, Exh 2 at 3-6.

B. FEC MISREPRESENTATIONS

"To be persuasive we must be believable; to be believable we must be credible; to be credible we must be truthful."~ Edward R. Murrow quotes (American Journalist, 1908-1965.) The FEC has lost credibility. Even if the Court could properly grant summary affirmance, which it cannot, the following misrepresentations by the FEC belie truthfulness.

1. "Schonberg"s claims all rest on the flawed premise that without FECA, other statutes or the Constitution would limit campaign contributions…"[2]

Flawed or not, appellant's Second Amended Complaint, Mot. Exh 2, is replete with the claim that campaign contributions are bribes. E.g., ¶33: "All corporate donations to the campaign committees of members of Congress are emoluments or bribes, given in an attempt to influence or induce the member's conduct as a legislator." That claim must be accepted as true for the purposes of a motion to dismiss. *Swierkiewicz v.Sorema,* 534 U.S. 506, 508 (2002). It can't be twisted by the FEC and the district court into the incredible error that statutes preventing "bribery and the like" would fail to stop bribery if FECA was ruled unconstitutional.

After the FEC was created in 1974, the "majority of the voting members" of the Commission were "appointed by the President pro tempore of the Senate and the Speaker of the House." *Buckley v. Valeo*, 424 U.S. 1,5 (1976). In overturning the original FECA appointment process, the *Buckley* court said, "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by 2, cl. 2, of that Article." 424 U.S.at 126. Members of that same Congress, who unconstitutionally tried to reserve for themselves the right to control the membership of the FEC, also devised a plan to appoint themselves as

[2]Mot. at 1.

agents of their campaign committees to legally receive bribes from the corporations they regulated. That plan was enacted in FECA, 2 U.S.C. § 431 et seq., by:

1. §441b (2)(C), allowing corporations to form political committees known as "PACs,"

2. §441b(2)(D), allowing PACs to solicit funds from shareholders and employees,

3. §432(e)(1), requiring a candidate for Congress to designate a campaign committee,

4. §432(e)(2), causing members of Congress to become the agents of their campaign committees, and

5. §441a(a)(2) authorizing corporate PACs to give campaign money to members of Congress.

One of the adverse side-effects of this incestuous arrangement is that complicit incumbent members of congress are treated differently than their challengers. The incumbent receives an enormous election advantage because the corporations that are enabled by FECA to bribe the complicit members do so to the detriment of a challenger who is devoid of the congressional power to advocate or help enact a *quid pro quo* for the corporation. "An essential element of an equal protection claim is that the challenged statute treats similarly situated entities

differently," *Calif. Med. Ass'n v. FEC*, 453 U.S. 182, 200, (1981).

Without FECA, corporations would be subject to the bribery statute, 18 U.S.C. § 201(b)(1), which would prevent the extensive purchase of congressional votes by wealthy corporate donors. Congress is so inundated with corporate cash that it no longer seems to have the general welfare of the people as the top congressional priority.

In addition, the Gift Rule, 5 U.S.C. § 7353, and the House Ethics Manual, (2008 Edition) at 23-85, properly restrict what the FEC erroneously claims would result in "unlimited" contributions if there were no FECA. FECA is unconstitutional, but that doesn't mean the constitution prohibits campaign contributions; and appellant never claimed it did, despite the misstatements propounded by the FEC. Appellant's complaint is not flawed. This FEC motion is.

2. "Schonberg's claims all rest on the flawed premise that without FECA…the public financing of elections would inevitably follow."[3]

The FEC had no good faith basis to make this statement concerning public financing of campaigns. It provided no citation from which this alleged assertion arose. It is certainly not in Plaintiff's Second Amended Complaint, Mot. Exh 2.

[3]Mot. at 1-2.

3. "Schonberg… brought this suit claiming that FECA gives incumbents like his opponent an unconstitutional election advantage by authorizing them to accept campaign contributions."[4]

As above, this is simply not part of the Plaintiff's Second Amended Complaint, and the FEC has not provided a reference as to the origin of the alleged claim. Perhaps the FEC meant to say that appellant avers that "FECA gives incumbents an unconstitutional election advantage by authorizing them to be bribed by the corporations they regulate."

4. "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."[5]

The statute limits contributions, but it allows corporations to influence the legislators who control and regulate them by virtue of what the FEC calls "contributions" and what appellant calls "corruption." And the FEC has admitted that the contributions would be "otherwise illegal," but for FECA.[6] Because corporations have no interest in influencing a challenger like appellant, but they have an enormous thirst to influence his incumbent opponent, appellant is injured by FECA's invidious discrimination. His opponent, Representative Cliff Stearns, receives hundreds of thousands of dollars of campaign donations from the corporations he regulates each year, and has a war chest of $2.4 million dollars as a

[4] Mot. at 2
[5] Id
[6] FEC Opposition Doc. 1331133 at 5

result.[7]

In 1974 the Federal Election Commission and campaign committees were created in amendments to FECA. The first business day after the new law took effect, *Buckley v. Valeo*, 424 U.S. 1(1976) was filed. ((See *McConnell v.Federal Election Commission,* 251 F.Supp.2d 176,194, (D.C. 2003) (per curiam)). Although the *Buckley* court considered Fifth Amendment invidious discrimination, it concluded:

> Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions. Cf. James v. Valtierra, 402 U.S. 137 (1971).

Buckley, 424 U.S. at 31. A record of invidious discrimination was impossible in *Buckley* because it was filed so soon after the law went into effect. Appellant made an extensive record of invidious discrimination in his Second Amended Complaint.[8] The district court neglected to address the claim of corporate bribery of incumbents and instead generally concluded:

> With respect to Schonberg's FECA and BCRA claims, the injuries of which he complains are that the campaign finance regime as currently enacted unfairly advantages incumbents in federal elections and has prevented the United States from enacting universal, affordable health care.

[7]See, e.g., Second Amended Complaint, Mot. Exh 2, ¶¶37,63,65,69-75
[8] See Mot. Exh 2, ¶¶ 1,31,33,35,37,41,43,63,66,82-92,94,102,155,196,199,201,203,213(e),243(d).

Mot. Exh 1 at 5. And although appellant did describe personal disappointment with health insurance availability, it was not part of any claim for relief. See Mot. Exh 2, at 46-66.

7. "In any event, Schonberg's constitutional challenges to FECA are frivolous."[9]

The district court never said appellant's constitutional challenges were frivolous. See Mot. Exh 1. How can the FEC ask for summary affirmance based on a conclusion that was not part of the underlying decision?

8. "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."

Unlimited contributions for incumbents and challengers would be fair and constitutional, as long as they do not run afoul of the bribery statute, the Gift Rule and the House Ethics Manual referenced above. Bribes, which only incumbents can receive, are what FECA allows. Those bribes are unconstitutional and invidiously discriminate against the challenger. "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley*, 424 U.S. at 93. Appellant has shown that there is invidious discrimination against him of "some substance," *Texas v.White*, 415 U.S. 767,782 (1974).

[9]Mot. at 2

9. "Schonberg has also failed to show that FECA has caused him any cognizable injury-in-fact."[10]

With respect to the Emoluments, Appointments and Compensation Clauses, no court, nor the FEC, has contended that an injury need be shown. The *Buckley* court determined these would be questions "of ripeness, rather than lack of case or controversy under Art. III…," 424 U.S. 117-18. The courts can decide whether FECA is or is not unconstitutional based solely on the arguments advanced on these clauses. In contrast, however, the Fifth Amendment invidious discrimination claim does require the showing of an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992).

Appellant must show that he, (1) suffered an injury in fact, (2) which is fairly traceable to the challenged act, and (3) is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The following injuries are described in appellant's Second Amended Complaint, Mot. Exh 2, and their existence was ignored by the district court and the FEC.

1. Monetary Advantage

In the 2010 election cycle Representative Stearns sat on several committees of the House of Representatives that regulate corporations. He has received

[10]Mot. at 9

hundreds of thousands of dollars from the corporations he regulates.[11] Corporations are in the business of making money and their Political Action Committees (PACs) do not make political contributions to candidates unless they are in a position to help the corporations be profitable. "A corporation is set up to provide legal and economic benefits to those who invest in it...," 18 CJS 1, (1990).

An incumbent member of Congress who regulates a corporation is in a position to help the corporation be profitable. A challenger who does not regulate the corporation is not in a position to help the corporation be profitable. By allowing members of Congress to receive campaign contributions from corporate PACs, FECA gives the incumbent a monetary advantage. Appellant was injured because his opponent received a monetary advantage simply by carrying out his congressional duty of regulating corporations.

(1) The injury in fact: Unjust Campaign Money to Rep. Stearns.

(2) Traceability: Yes, from corporate contributions which would be bribes, but for FECA.

(3) Redressability: Yes, if there were no FECA, the contributions would be treated as bribes by the U.S. Department of Justice, 18 U.S.C. § 201(b)(1) , and they would violate the Gift Rule, 5 U.S.C. § 7353.

[11]Mot. Exh 2 at ¶¶ 45,87,94,147,155.

2. Campaign Cash in Financial Institutions[12]

"Friends of Cliff Stearns" is the multi-million dollar principal campaign committee fund which Representative Stearns oversees in his duty as Agent and civil Officer. FECA allows incumbents to amass enormous amounts of corporate money in their campaign accounts as the incumbent is re-elected, election cycle after cycle.

"Friends of Cliff Stearns" earned over $75,000 from various financial institutions in Florida District 6 in 2009. In the two year campaign cycle, Representative Stearns could use far in excess of $100,000 from these earnings for any campaign purpose. The cash came largely from corporations regulated by Representative Stearns; and it's availability to assist his re-election campaign invidiously discriminates against appellant. Having millions of dollars in several banks in Florida District 6 also provides Representative Stearns with election advantages because of support for him by the banks' employees and customers. This is another campaign injury appellant suffered because of the invidious discrimination.

(1) The injury in fact: Unjust election votes and campaign cash for Representative Stearns.

(2) Traceability: Yes, FECA allowed Representative Stearns to amass

[12] Mot. Exh 2 at ¶¶ 62-81.

enormous wealth in "Friends of Cliff Stearns" and to deposit the cash in local financial institutions.

(3) Redressability: Yes, If no FECA, then no "Friends of Cliff Stearns."

10. "FECA treats all candidates equally and creates no federal 'office' that would implicate the various constitutional clauses Schonberg invokes."[13]

FECA at 2 U.S.C. § 437h requires the district court to immediately "certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." Neither this 3-Judge Court nor the district court has jurisdiction to decide whether FECA creates a federal office by requiring members of congress to be appointed as agents of their campaign committees. If the Court ignores § 437h to deliberate on the conclusion sought by the FEC, then appellant asks it to consider the following.

A. APPOINTMENTS CLAUSE INFRACTION

Article II, § 2, Clause 2 of the U.S. Constitution provides that, "… the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Because Congress does not have appointment power, it cannot appoint its members to act as Agents and civil Officers of their respective

[13] Mot. at 2

campaign committees. FECA at 2 U.S.C. §432, §434, §439, §439a, and §441i is therefore unconstitutional. See Mot, Exh 2, ¶¶ 205-06.

> "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."

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 904 (1991).

Although *Buckley* addressed the Appointments Clause issue with regard to the appointment of FEC members, *Buckley*, 424 U.S.117-137, the *Buckley* court never considered whether the appointment of a legislator as the agent of his/her campaign committee violated the Appointments Clause. Here is the Appointments Clause question that the *Buckley* court failed to answer:

1. Does 2 U.S.C. §432(e)(2) violate the Appointments Clause because members of Congress have appointed themselves as agents and civil Officers of their campaign committees?

B. COMPENSATION CLAUSE INFRINGEMENTS

Article I, Section 6, Clause 1 of the Constitution states, "The 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." This clause has been labeled the Compensation Clause. Amendment XXVII to the Constitution limited increases to this compensation to prevent congress from raising its members'

compensation "until an election of Representatives shall have intervened."

The clear intent of the Constitution and Amendment XXVII is to prohibit members of Congress from receiving any government compensation over and above that contained in the Compensation Clause. FECA infringes on the Compensation Clause in numerous ways. Multiple examples are contained in Mot. Exh 2, ¶ 209. Because members of congress receive extra compensation from corporate bribes during the election cycle, FECA violates Amendment XXVII, which was not ratified until 1992, eighteen years after the FEC was created. Here is the Compensation Clause question that was not presented to the Supreme Court in *Buckley*:

1. Do 2 U.S.C.§§432(e)(1), 432(e)(2), 439a(a), and 439a(b) violate the Compensation Clause of the Constitution because these statutes provide members of Congress compensation in addition to that allowed by Art. I., Sec. 6 of the Constitution and Amendment XXVII?

C. EMOLUMENTS CLAUSE BREACHES

The Emoluments Clause, United States Constitution, Art. I, § 6, cl. 2, states that members of Congress cannot be appointed to any "civil Office under the Authority of the United States", and that, "no Person holding any Office under the United States" shall be a member of Congress.

The Emoluments Clause was made a part of the United States Constitution

to help prevent corruption in Congress.[14] Here are some of the notes of the framers:

> Mr. Pierce Butler: "Look at the history of the government of Great Britain, where there is a very flimsy exclusion—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends or both; and this is the great source from which flows its great venality and corruption."[15]
>
> Mr. Alexander Hamilton: "I am, therefore, against all exclusions and refinements, except only in this case; that when a member takes his seat, he should vacate every other office."[16]
>
> "Mr. Rutledge, was for preserving the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of corruption."[17]
>
> "Mr. Jenifer remarked that in Maryland, the Senators chosen for five years, could hold no other office and that this circumstance gained them the greatest confidence of the people."[18]
>
> Gov. John Rutledge: "No person ought to come to the legislature with an eye to his own emolument in any shape."[19]
>
> Mr. George Mason: "But if we do not provide against corruption, our government will soon be at an end…"[20]

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[14] The Emoluments Clause and the Appointments Clause are counterparts. The former says a member of Congress cannot *be* a civil Officer and the latter says Congress cannot *appoint* a civil Officer.

[15] *"**1787** DRAFTING THE U.S. CONSTITUTION," Wilbourn E. Benton, editor, (1986),* pg. 715.

[16] *Id.* at 717

[17] *Id.* at 718

[18] *Id.* at 721

[19] *Id.* at 723

> Mr. James Madison: "I believe all public bodies are inclined, from various motives, to support its members; but it is not always done from the base motives of venality…"[21]
>
> Mr. Roger Sherman: "The Constitution should lay as few temptations as possible in the way of those in power."[22]

The Article I Emoluments Clause was discussed in *Buckley*, 424 U.S. at 124-5.[23] Here are two Emoluments Clause issues that the *Buckley* court did not analyze:

1. Is a member of Congress, acting as the agent of his/her campaign committee, a civil Officer under the Art. I Emoluments Clause?

2. Does 2 U.S.C.§439a(a)(2) create an Art. I, § 6, cl. 2 civil Office if campaign funds are used to pay the office expenses of a member of Congress?

The Emoluments Clause in the context of FECA creating a "civil Office" had not been decided by the Supreme Court or any other court before the district court put its erroneous holding in footnote 3 of Mot. Exh 1, at 6.

11. "Schonberg does not, and cannot, point to any provision of FECA that affirmatively authorizes private citizens or groups to make contributions."[24]

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[20] *Id.*
[21] *Id.*
[22] *Id.*at 732
[23] See Doc.33-1 at pg 39.
[24] Mot. at 9

This quote is untrue, irrelevant, and not part of the Second Amended Complaint. FECA, 2 U.S.C. § 441a, provides the details of how contributions (and bribes, though not defined as such) are authorized by private citizens and groups.

12. "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."[25]

The FEC is not independent because the Subcommittee on Elections of the Committee on House Administration has oversight responsibility on the activities of the FEC.[26] And Congress determines the annual budget for the FEC.[27] The FEC is quasi-independent at best and clearly under the thumb of, and accountable to, the U.S. House of Representatives. And if the FEC has "exclusive jurisdiction over the…interpretation…of FECA," it should have moved to dismiss appellant's original complaint in the district court for want of jurisdiction.

[25]Mot. at 3
[26] See: http://cha.house.gov/subcommittees/elections
[27]See: http://www.fec.gov/pages/budget/fy2012/FY_2012_Cong_Budget_Justification_final.pdf

CONCLUSION

Congress enacted FECA and allowed incumbent congressmen/women to corruptly enrich themselves while it invidiously discriminates against challengers. The FEC ought to be made to show that FECA furthers "a compelling interest and is *narrowly tailored* to achieve that interest," (emphasis added). *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449,464 (2007). The unconstitutional congressional corruption created by FECA could be effectively reduced by "narrow tailoring" if the en banc Court of Appeals is permitted to address the merits of appellant's complaint.

Respectfully submitted,

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Certification of Service

I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Appellate CM/ECF system on October 6, 2011. For participants in the case who are registered CM/ECF users, service will be accomplished by the Appellate CM/ECF system.

__/s/Steve Schonberg
Steve Schonberg, *pro se*