UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVE SCHONBERG,	)	
	)	
Plaintiff,	)	No. 1:10-cv-02040-RWR –JWR -CKK
	)	
v.	)	THREE-JUDGE COURT
	)	
FEDERAL ELECTION COMMISSION, *et al.*,	)	FEC MOTION TO DISMISS
	)	
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS THE FECA AND BCRA CLAIMS IN PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant Federal Election Commission now moves pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing the claims in plaintiff's Second Amended Complaint regarding the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 431-57, and the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002), for lack of standing and failure to state a claim upon which relief can be granted.

In support of this motion, the Commission relies upon the accompanying memorandum of points and authorities. A proposed order also is attached.

Respectfully submitted,

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March 15, 2011

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Plaintiff,	)	No. 1:10-cv-02040-RWR-JWR-CKK
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v.	)	THREE-JUDGE COURT
	)	
FEDERAL ELECTION COMMISSION, et al.,	)	MEMORANDUM
	)	
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTIONS TO DISSOLVE THREE-JUDGE COURT AND TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

Plaintiff Steve Schonberg filed this suit last year against the Federal Election Commission ("Commission" or "FEC") challenging the constitutionality of longstanding provisions of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 431-57. Plaintiff alleged generally that FECA provisions that allow federal candidates to receive campaign contributions through designated campaign committees violate the Emoluments Clause and other constitutional provisions, and that campaign contributions lead to poor health care policy and other legislative ills. Plaintiff also alleged that FECA advantages incumbents in violation of equal protection under the Fifth Amendment. Plaintiff framed his challenge as one that involves the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002) ("BCRA"), which amended FECA, and plaintiff sought consideration of his entire suit by a three-judge district court in accordance with the special review provision in BCRA § 403. (Docs. 1, 2.)

Plaintiff then amended his complaint to add challenges to 2 U.S.C. § 57b, which establishes the "Members' Representational Allowance" for the United States House of Representatives, and to the congressional practice of earmarking funds in legislation. (Doc. 13.) The amended complaint also added the United States as a defendant. Later, plaintiff amended his complaint again, adding more allegations that his claims involve BCRA and invoking 2 U.S.C. § 437h, another special review provision, which authorizes district courts to certify questions of the constitutionality of FECA to be decided by the court of appeals sitting en banc. (Doc. 31.) Plaintiff now asserts that his claims involving other statutes are so "inextricably intertwined with Plaintiff's BCRA and FECA claims" that they should be heard by both this three-judge Court and the en banc court of appeals. (Doc. 31 ¶ 8(c).)

The Commission now moves for an order dissolving the three-judge court and dismissing plaintiff's FECA and BCRA claims for lack of standing and failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff's claims must fail because they are based primarily on the flawed premise that all private campaign contributions are "bribes" that violate the Constitution, a notion that is contrary to decades of Supreme Court precedent. Because plaintiff has failed to present any substantial federal question, and because he lacks standing, his claims do not merit review by a three-judge federal court or certification pursuant to 2 U.S.C. § 437h. Moreover, BCRA § 403 offers its special review option only for actions challenging the constitutionality of BCRA itself, not pre-existing provisions of FECA, which are the real subject of plaintiff's claims.

Plaintiff cannot establish any of the three elements of Article III standing to make his FECA and BCRA claims. His alleged electoral injury is not legally cognizable because it amounts to a complaint that he suffers from a lack of resources compared to his campaign opponent, and his alleged health care injury is a generalized one that could be made by millions of other citizens. Moreover, plaintiff's purported electoral injuries do not result from FECA, which treats all candidates equally, but from plaintiff's own choice not to seek campaign contributions and from the electoral decisions of third parties. Similarly, plaintiff's alleged health care injuries are not caused by FECA, but by the actions of many third parties in the health financing system and in Congress. And plaintiff cannot show that the relief he requests will redress his alleged injuries. On the contrary, striking down FECA would not eliminate private campaign contributions, but would instead lift all restrictions on such contributions — a result that, accordingly to plaintiff's own theories, would exacerbate his alleged injuries.

Plaintiff's claims regarding FECA and BCRA should also be dismissed because they fail to state a claim. Plaintiff alleges a violation of equal protection under the Fifth Amendment's Due Process Clause on the ground that incumbents enjoy electoral advantages, but FECA treats incumbents and challengers the same. Plaintiff's claims regarding what he refers to as the Emoluments Clause, as well as his claims about the Appointments and Compensation Clauses, are frivolous. They rely principally on the flawed premises that FECA creates an "Office" of the United States in requiring federal candidates to designate principal campaign committees, *see* 2 U.S.C. § 432e, and that the contributions those committees collect are "bribes" barred by the Constitution. These contentions are incorrect, so plaintiff's claims regarding FECA and BCRA should be dismissed.[1]

BACKGROUND

A. Plaintiff

Plaintiff Steve Schonberg was a candidate for the United States House of Representatives from Florida's Sixth District in the November 2010 general election, but he was defeated. Plaintiff states that he is a candidate for Congress for the same district in the 2012 election. (Second Amended Complaint ("2nd Am. Compl.") (Doc. 31) ¶ 11).

According to the complaint, plaintiff's wife has a pre-existing medical condition. Plaintiff states that he is unwilling to pay the "exorbitant and unaffordable" prices for "major medical" insurance offered to his wife by the only source of high risk pool coverage in Florida. Mrs. Schonberg has no major medical insurance. (2nd Am. Compl. ¶ 93.) Plaintiff further states that his wife's "lack of affordable health insurance coverage" greatly concerns him and has

[1] The Commission's motions filed today only address plaintiff's claims regarding FECA and BCRA. The United States is filing a separate motion regarding the other claims, which involve the interests of the United States, rather than the Commission.

adversely affected his political campaigns. (*Id.* ¶¶ 98-101.) He asserts that much less expensive health insurance coverage would be available to his wife if he were a Member of Congress. (*Id.* ¶¶ 97.) Plaintiff also contends that the cost of private health insurance is higher for his wife because Members of Congress who receive campaign contributions from the health insurance industry protect insurance companies from competition. (*Id.* ¶¶ 92, 102-104.)

B. Defendants

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 authorized the Commission to "formulate policy" under FECA, *see, e.g.*, 2 U.S.C. § 437c(b)(1), and to make rules and issue advisory opinions, 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 FECA, 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 statute, 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e), 437g(a)(6).

The United States, through the Department of Justice, prosecutes criminal violations of FECA, *see* 2 U.S.C. § 437g(d). The United States is also responsible for defending 2 U.S.C. § 57b, which establishes the Members' Representational Allowance for the United States House of Representatives ("MRA").

C. FECA and BCRA

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 (footnote omitted). Congress enacted FECA primarily

"to limit the actuality and appearance of corruption resulting from large individual financial contributions[.]" *Id.* at 26. FECA places dollar limitations on contributions by individuals and political committees to candidates for federal office, 2 U.S.C. § 441a(a),[2] and prohibits campaign contributions by corporations and unions from their treasury funds, 2 U.S.C. § 441b(a). FECA 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 FECA'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). FECA 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).

[2] During the 2011-2012 election cycle, individuals can give no more than $2,500 to each candidate per election, 2 U.S.C. § 441a(a)(1)(A); 76 Fed. Reg. 8368, 8370 (Feb. 14, 2011), and multicandidate political committees can give no more than $5,000 to each candidate and their candidate committees, 2 U.S.C. § 441a(a)(2)(A).

D. Procedural Background and Plaintiff's Claims

This suit is Steve Schonberg's second action against the Commission challenging the constitutionality of FECA. In 2009, Schonberg and his wife filed suit in the United States District Court for the Middle District of Florida against the Commission and seven Members of Congress. *Schonberg v. Sanders*, No. 5:09-cv-534-Oc-32-JRK (M.D. Fla. filed Dec. 3, 2009). Plaintiffs alleged that FECA's designation of Members of Congress as "agents" of their reelection committees confers a governmental "office" and thus violates Article I, § 6, cl. 2 of the Constitution, which plaintiff referred to as the Emoluments Clause. Plaintiffs alleged that campaign contributions received by Members of Congress from those connected with the health care industry constitute "bribes" which "corrupt" Congress and prevented the passage of health care legislation acceptable to plaintiffs, and in particular, prevented plaintiffs from locating more affordable health insurance for Mrs. Schonberg.

The Commission moved to dismiss plaintiffs' complaint in February 2010. (M.D. Fla. Doc. 25.) Plaintiffs opposed that motion (M.D. Fla. Doc. 29) and subsequently amended their complaint (M.D. Fla. Doc. 36). The Commission again moved to dismiss (M.D. Fla. Doc. 43), Schonberg moved for leave to amend his complaint again (M.D. Fla. Doc. 47), the Commission opposed that motion (M.D. Fla. Doc. 48), and on November 10, 2010, Schonberg voluntarily dismissed the case (M.D. Fla. Doc. 49).

Schonberg filed the case before this Court on November 24, 2010. His complaint repeated his prior claim that several provisions of FECA violate the Emoluments Clause and further alleged that these FECA provisions violate the Appointments and Compensation Clauses of the Constitution. Plaintiff also alleged that FECA violates the Fifth Amendment by denying

equal protection to candidates who challenge incumbent Members of Congress. While plaintiff challenged essentially the same FECA provisions at issue in his prior suit, he framed this suit as a challenge to both FECA and BCRA. (Compl. (Doc. 1) ¶¶ 1-3, 95-109.)

Plaintiff filed a request for a three-judge court with his complaint, invoking BCRA's special judicial review provision. (Doc. 2.) His request was granted and this three-judge Court was convened on December 9, 2010. (Docs. 4, 6.) The Commission subsequently moved to dissolve the three-judge Court because plaintiff had challenged only pre-existing parts of FECA, and because he lacked standing and had failed to raise a substantial question. (Doc. 9.) Plaintiff then amended his complaint to add additional claims regarding 2 U.S.C. § 57(b) and earmarked legislation and to add the United States as a defendant. (Doc. 13.) Plaintiff amended his complaint again on February 15, 2011, to add more allegations that his claims involve BCRA, to "trifurcate" the claims, to request certification of certain claims pursuant to 2 U.S.C. § 437h, and to request that his MRA and earmarked claims be heard both by this three-judge Court and the en banc court of appeals. (2nd Am. Compl. ¶ 8(c); Doc. 24.)

In addition to seeking sweeping declarations that FECA and BCRA are unconstitutional and injunctions to prevent the Commission from enforcing them, plaintiff seeks orders freezing "all the assets of all campaign committees under the authority" of the Commission and ordering the return of those funds to contributors. (2nd Am. Compl. at 65 ¶¶ A-C; *see also id*. ¶ D.) He seeks similarly broad relief regarding the MRA statute and legislative earmarks, including a declaration "[p]rospectively ruling that any earmarked legislation for Florida that is obtained with the assistance of [the incumbent Congressman in plaintiff's district] and signed into law by the President be declared unconstitutional, but only as to the earmarked portion of such bills." (*Id*. ¶¶ E-H.)

ARGUMENT

I. PLAINTIFF'S CHALLENGE TO FECA RESTS UPON THE FALSE PREMISE THAT THE CONSTITUTION BARS CAMPAIGN CONTRIBUTIONS

Plaintiff's allegations against the Commission rely on several provisions of the Constitution, but his claims ultimately rest upon the flawed idea that FECA affirmatively grants federal candidates the power to accept contributions, and that the Constitution prohibits that authorization. (*See* 2nd Am. Compl. ¶¶ 24, 203.) Contrary to Schonberg's central premise, "Congress has no constitutional obligation to limit contributions at all." *Davis v. FEC*, 554 U.S. 724, 737 (2008).

A. The Constitution Does Not Prohibit Campaign Contributions

In its seminal decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court explained that the First Amendment rights of political expression and association generally protect the right to make campaign contributions. *See id*. at 13-23; *accord*, *e.g.*, *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 440 (2001) ("Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association."). Consequently, although the Constitution permits the government to limit the amount that individuals and groups may contribute directly to a federal candidate, *Buckley*, 424 U.S. at 23-39, the government's power to do so is itself limited, *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down under the First Amendment a Vermont law that severely restricted the amount of money that an individual could contribute to a campaign for state office). Thus, far from barring private campaign contributions, the Constitution forbids the government from imposing excessive restrictions on them.

Schonberg implicitly asks this Court to overrule *Buckley* and its progeny and reach a contrary conclusion about the constitutionality of campaign contributions. (2nd Am. Compl. ¶¶ 47, 159-161.) But as the Supreme Court has cautioned, the lower courts must "leav[e] to th[e Supreme] Court the prerogative of overruling its own decisions." *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (internal quotation marks and citation omitted). Schonberg tries to bypass this hurdle by repeatedly equating all campaign contributions with bribery. (2nd Am. Compl., *e.g.*, ¶¶ 24, 33, 90, 193.) But this assertion amounts to a legal conclusion and a normative judgment, not a factual allegation that this Court must accept on a motion to dismiss. As the Supreme Court recently explained in interpreting Federal Rule of Civil Procedure 8(a)(2) in the context of motions to dismiss, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). *Accord*, *In re Interbank Funding Corp. Securities Litigation*, 629 F.3d 213, 218 (D.C. Cir. 2010). *See also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (stating that a court in ruling on a motion to dismiss is "not bound to accept as true a legal conclusion couched as a factual allegation").

The Supreme Court has clearly distinguished bribery from campaign contributions. "[N]either law nor morals equate all political contributions, without more, with bribes." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000). Bribery is specifically prohibited by other statutes, including the Hobbs Act, 18 U.S.C. § 1951, under which campaign contributions are considered bribes only if the payment is made in exchange for an explicit promise to perform or not perform an official act. *See McCormick v. United States*, 500 U.S. 257, 272 (1991). Plaintiff identifies no statute that would generally treat campaign contributions as bribes. On the contrary, *Buckley* itself emphasized that bribery law reaches "only the most blatant and specific attempts of those with money to influence government action." 424 U.S. at 28. *Accord*, *e.g.*,

Colorado Republican, 533 U.S. at 463 n.26 ("[T]he policy supporting contribution limits is the same as for laws against bribery. But we do not throw out the contribution limits for unskillful tailoring; prohibitions on bribery . . . address only the 'most blatant and specific' attempts at corruption" (quoting *Buckley*, 424 U.S. at 28).).

In limiting the amount a contributor can give to a candidate, FECA reflects Congress's judgment that contributions under a particular amount are unlikely to exert an undue influence over candidates. As *Buckley* made clear when it upheld the FECA contribution restrictions, Congress had to balance its anti-corruption aims with the need for contributions in the nation's traditional campaign system. "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." 424 U.S. at 26; *see also id*. at 27 n.28.[3] However, "if Congress concludes that allowing contributions of a certain amount does not create an undue risk of corruption or the appearance of corruption, a candidate who wishes to restrict an opponent's fundraising cannot argue that the Constitution demands that contributions be regulated more strictly." *Davis*, 554 U.S. at 737. In sum, no judicial authority supports the premise that the Constitution requires greater limits on private campaign contributions.

B. FECA Does Not Authorize Campaign Contributions

Schonberg also assumes that whatever FECA does not ban it authorizes, but that is not how the nation's legal system works. FECA limits the amounts of campaign contributions to

[3] Schonberg disapproves of the balance Congress has struck and advocates an entirely publicly funded campaign finance system. (2nd Am. Compl. ¶ 249.) But his disagreement with Congress's policy decision does not support his assertion that the Constitution forbids private campaign contributions. No federal court has ruled that the Constitution *requires* the government to establish a publicly funded system. *See generally Buckley*, 424 U.S. at 85-108.

candidates for federal office and regulates how candidates must handle and disclose any contributions they receive. But the statute does not — and need not — affirmatively authorize any person to make contributions or any candidate to receive them for money to transfer legally from donor to candidate. As the Ninth Circuit explained in addressing a claim that out-of-state contributions are unconstitutional, FECA "neither prohibits nor authorizes out-of-state campaign contributions. The appellants' premise, that what . . . [FECA] does not prohibit, it authorizes, is foreign to our libertarian tradition." *Whitmore v. FEC*, 68 F.3d 1212, 1215 (9th Cir. 1996). Like the plaintiffs in *Whitmore*, Schonberg wrongly "assumes that conduct is restricted except insofar as a statute permits it. . . . People do not depend on Congressional 'authorization' . . . for their liberty to express their political preferences." *Id.*

The Supreme Court has rejected the argument that constitutional restraints can be applied to "private action by the simple device of characterizing the [government's] inaction as 'authorization' or 'encouragement.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978). *Accord, e.g., Village of Bensenville v. FAA*, 457 F.3d 52, 66 (D.C. Cir. 2006). The government is "responsible for the . . . act of a private party when the . . . [government], by its law, has *compelled* the act." *Flagg Bros.*, 436 U.S. at 164 (internal quotation marks and citation omitted; alterations and emphasis added). Plaintiff points to no provision of FECA that purports to affirmatively require or authorize campaign contributions by private citizens.

Citizens and groups contributed to candidates, and candidates accepted contributions, long before FECA was enacted. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 391-94 (1972) (political committees predate FECA); *Calif. 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 until passage of FECA), *aff'd*, 453 U.S. 182 (1981). *Cf. Buckley*, 424 U.S. at 101

("Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates.").

As explained in more detail below, the factually and legally flawed premises of plaintiff's complaint prove fatal to his claims against the Commission.

II. PLAINTIFF'S CLAIMS SHOULD BE RESOLVED BY A SINGLE DISTRICT COURT JUDGE

Plaintiff has invoked the special judicial review procedures established for certain constitutional challenges to FECA and BCRA. He requests that his purported challenges to BCRA be heard by a three-judge district court pursuant to BCRA § 403 and that his FECA claims be certified for decision by the court of appeals sitting en banc pursuant to 2 U.S.C. § 437h. (2nd Am. Compl. ¶¶ 8(a)-(b).) Plaintiff also argues that his claims regarding the MRA statute and earmarked legislation, which he concedes do not qualify for special treatment and thus ordinarily would be heard by a single district court judge, should be heard by *both* this three-judge district Court and the en banc court of appeals because those claims are allegedly "inextricably intertwined with Plaintiff's BCRA and FECA claims." (*Id.* ¶ 8(c).) But plaintiff's claims do not qualify for either special review provision he invokes because, as explained in Sections III and IV, *infra* pp. 20-38, plaintiff lacks standing and fails to present any substantial constitutional question. In addition, BCRA § 403 offers the special option of a three-judge court only for actions challenging the constitutionality of BCRA itself, not the pre-existing provisions of FECA. Thus, the three-judge Court should be dissolved, and this entire suit should be decided by a single district court judge.

A three-judge court can dissolve itself. "'It has always been clear that the single judge must decide in the first instance whether a case is one in which three judges are required

although that question can be reconsidered by the three-judge court after it is convened and it can dissolve itself and return the case to the single judge if it does not think a three-judge court is required by statute.'" *Pettit v. New Mexico*, 375 F. Supp. 2d 1138, 1139 (D.N.M. 2004) (quoting 17A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4235, at 612 (footnotes omitted)). *See, e.g., Krebs v. Ashbrook*, 275 F. Supp. 111, 116 (D.D.C. 1967) (dissolving three-judge court).[4]

A. Plaintiff Is Not Entitled to a Three-Judge Court Under BCRA § 403 or to Have Any Claims Certified to the En Banc Court of Appeals Under 2 U.S.C. § 437h Because He Lacks Standing and His Claims Are Frivolous

The threshold requirements that plaintiff must meet to have his claims considered by a three-judge district court or certified to the court of appeals pursuant to 2 U.S.C. § 437h are similar. For constitutional challenges to FECA brought under 2 U.S.C. § 437h, courts have adopted a narrow construction to prevent unnecessarily burdening the judiciary. The Supreme Court has explicitly likened a district court's role in a section 437h case to that of a single judge presented with an application to convene a three-judge court. *See, e.g., Calif. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) (citing a three-judge court decision in explaining that the Court "do[es] not construe § 437h to require certification of constitutional claims that are frivolous"); *see also Clark v. Valeo*, 559 F.2d 642, 645-46 (D.C. Cir.) (en banc), *aff'd*, 431 U.S. 950 (1977); *Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980).

Section 437h provides that certain plaintiffs "may institute such actions . . . to construe the constitutionality of any provision of this Act." This extraordinary provision was added to

[4] After dissolution and a decision from a single district judge court, any appeal would be to the court of appeals, not directly to the Supreme Court. *Mengelkoch v. Industrial Welfare Comm'n,* 393 U.S. 83, 84 (1968) (citing *Wilson v. City of Port Lavaca*, 391 U.S. 352 (1968)); *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 101 (1974).

FECA in 1974 to provide expedited consideration of anticipated constitutional challenges to the extensive amendments to the statute that year. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1285-1286 (1974). Section 437h provides:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.[5]

Despite the seemingly mandatory phrasing of section 437h, district courts presented with complaints brought under that section do not automatically certify them to the en banc court of appeals, but instead require the claims to meet threshold jurisdictional and substantive standards. *See*, *e.g.*, *Cao v. FEC*, 688 F. Supp. 2d 498, 549 (E.D. La. 2010) (certifying some claims and dismissing others), *aff'd*, 619 F.3d 410 (5th Cir. 2010), *cert. petition filed*, No. 10-776 **(**Dec. 6, 2010); *Goland v. United States*, 903 F.2d 1247, 1258 (9th Cir. 1990); *Mott*, 494 F. Supp. at 134-37 (refusing to certify questions and granting motion to dismiss where some claims unripe and others already resolved by Supreme Court); *Gifford v. Tiernan*, 670 F.2d 882, 884 (9th Cir. 1982) ("Congress intended to exclude constitutional claims of dubious merit").[6]

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[5] Under the original statutory scheme, certified constitutional questions could be appealed directly from the en banc court of appeals to the Supreme Court, and both courts were required "to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified . . . ." 2 U.S.C. § 437h(b), (c) (1974). In 1984, the expedition requirement and similar provisions in other statutes were repealed because "[t]he courts are, in general, in the best position to determine the need for expedition in the circumstances of any particular case . . . ." H.R. Rep. No. 98-985, at 4 (1984). *See* Pub. L. No. 98-620, § 402, 98 Stat. 335 (1984) (repealing section 437h(c)). The provision for direct appeal was removed in 1988. Pub. L. No. 100-352, § 6(a), 102 Stat. 662 (1988).

[6] Likewise, another statute that the Commission administers, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), includes a provision for a three-

The Supreme Court has made clear that district courts play an important gatekeeper role in determining whether to certify questions to the circuit courts. District courts should only certify questions under section 437h when the issues presented are "neither insubstantial nor settled." *Calif. Med. Ass'n*, 453 U.S. at 192 n.14; *see also Mott*, 494 F. Supp. at 134 (section 437h available "only where a 'serious' constitutional question was presented" (quoting Senator James L. Buckley, the sponsor of the amendment that became section 437h, 120 Cong. Rec. 10562 (1974))); *Buckley v. Valeo*, 387 F. Supp. 135, 138 (D.D.C. 1975) (section 437h certification appropriate where "a substantial constitutional question is raised by a complaint"), *remanded on other grounds*, 519 F.2d 817 (D.C. Cir. 1975). Like a single judge who is asked to convene a three-judge court to hear a constitutional challenge, a district court may decline to certify a question under section 437h. *See Goland*, 903 F.2d at 1257; *Mott*, 494 F. Supp. at 131. Thus, if this Court determines that the questions should not be certified, it reduces the substantial disruption to the court of appeals that en banc consideration involves. As the Ninth Circuit observed, "if mandatory *en banc* hearings were multiplied, the effect on the calendars of this court as to such matters and as to all other business might be severe and disruptive." *Calif. Med. Ass'n*, 641 F.2d at 632.

Plaintiff has also sought to have certain claims heard by a three-judge district court pursuant to BCRA § 403, but even when a genuine BCRA claim is made, the plaintiff must still have standing and raise a substantial constitutional question to avail herself of that review option.

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

Schonberg's request relies on BCRA § 403(a)(1), a provision that invokes 28 U.S.C. § 2284, which in turn establishes three-judge court jurisdiction in limited circumstances. The Supreme Court has held that "the three-judge court legislation is not 'a measure of broad social policy to be construed with great liberality,' but is rather 'an enactment technical in the strict sense of the term and to be applied as such.'" *Mitchell v. Donovan*, 398 U.S. 427, 431 (1970) (quoting *Phillips v. United States*, 312 U.S. 246, 251 (1941)).

Thus, the courts have interpreted section 2284 and its predecessors to grant an application for a three-judge court only if the complaint states a "substantial" constitutional claim. A three-judge court is not required if the claim is "wholly insubstantial," "frivolous," or "essentially fictitious." *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). Applying these criteria, courts of this circuit have denied applications for a three-judge court. *See, e.g., Judd v. FCC*, 723 F. Supp. 2d 221, 223 (D.D.C. 2010) ("A single judge has an obligation to examine the complaint to determine whether it states a substantial claim before burdening two other judges by requesting a three judge court to consider an insubstantial or frivolous claim.") (internal quotation marks and citation omitted); *Adams v. Richardson*, 871 F. Supp. 43, 45 (D.D.C. 1994).

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

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

> court could have dissolved itself, leaving final disposition of the complaint to a single judge.

Gonzalez, 419 U.S. at 100. *See also Rostker v. Goldberg*, 453 U.S. 57, 61 n.2 (1981).

In this case, plaintiff's constitutional challenges are inappropriate for special treatment under either special review provision because, as explained *infra* pp. 20-38, plaintiff lacks standing and his claims are not substantial. Thus, his requests that his constitutional claims be heard by this three-judge Court or the court of appeals sitting en banc should be denied.

B. Plaintiff Has Presented No BCRA Claim

Plaintiff's request that his claims be decided by a three-judge district court under BCRA § 403 must also fail because plaintiff does not actually challenge any change to FECA that BCRA made. Section 403 permits plaintiffs to elect a three-judge court only when they bring a constitutional challenge to BCRA, not when their claims focus on elements of FECA that BCRA did not alter. *McConnell v. FEC*, 540 U.S. 93, 229 (2003) ("[C]hallenges to the constitutionality of FECA provisions" are not "subject to direct review" in a "three-judge District Court convened pursuant to BCRA § 403(a)."), *overruled in part on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 376 (2010); BCRA § 403(a), 116 Stat. at 113-14. Because BCRA § 403 did not amend FECA but is a stand-alone judicial review provision, its references to "this Act" mean BCRA, not FECA. Thus, the district court's statement (Doc. 4, at 1) that section 403 authorizes a three-judge court for challenges to "either" FECA or BCRA is incorrect. Because plaintiff challenges longstanding FECA provisions, rather than any substantive changes made by BCRA, this three-judge Court has no authority to resolve those claims.

Schonberg's latest complaint cites several provisions of BCRA that he alleges are unconstitutional: BCRA §§ 101, 202-204, 211, 214, 301. (2nd Am. Compl. ¶¶ 5(b), 232.) But

with one exception discussed below, plaintiff does not address how these provisions made any change relevant to his claims, and his central allegations appear to remain the same — that FECA impermissibly favors incumbents and permits bribes and other wrongs by allowing Members of Congress to establish campaign committees and accept contributions to those committees. The operative FECA provisions that allegedly create such a system appear to be 2 U.S.C. §§ 432, 441a, 441b, 439a. They require a candidate to establish a principal campaign committee, set contribution limits, allow corporations and unions to create separate segregated funds (commonly known as "PACs"), and describe permissible uses of contributions received by candidates and their committees. The BCRA provisions plaintiff cites made no substantive change to this longstanding statutory structure that relates to plaintiff's claims.

Plaintiff's complaint discusses only one provision of BCRA that he seeks to have invalidated, BCRA § 301, codified at 2 U.S.C. § 439a, which contains FECA's restrictions on the personal use of campaign funds.[7] Contrary to plaintiff's apparent suggestion that this amendment somehow liberalized the use of campaign contributions by candidates and their campaigns, BCRA § 301 merely replaced the existing text of this provision with language providing a more detailed description regarding permissible and impermissible uses of campaign contributions received by federal candidates. *See* Pub. L. 107-155, § 301, 116 Stat. at 95-96. Plaintiff complains that this new language permits Members of Congress to use campaign funds for expenses that plaintiff disapproves of (2nd Am. Compl., *e.g.*, ¶¶ 140-142, 150-152, 199-200), including the funding of "ordinary and necessary expenses incurred in connection with duties of

[7] In several instances, plaintiff cites BCRA § 313, not § 301. (2nd Am. Compl. ¶¶ 140, 150, 239(f).) But section 313 amended FECA § 406(a), which established the statute of limitations for criminal prosecutions of FECA violations. *See* 2 U.S.C. § 455(a). Plaintiff presumably intended to cite BCRA § 301, which amended FECA § 313, resulting in a change to 2 U.S.C. § 439a.

the individual as a holder of Federal office." 2 U.S.C. § 439a(a)(2). But prior to BCRA, section 439a explicitly permitted excess campaign funds to "be used . . . to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office." 2 U.S.C. § 439a (2002).[8] Thus, any quarrel Schonberg has with this provision predates BCRA's amendments to FECA. Indeed, the legislative history indicates that BCRA § 301's amendment to 2 U.S.C. § 439 was "intended to codify the FEC's current regulations on the use of campaign funds for personal expenses." 148 Cong. Rec. S2143 (Mar. 20, 2002) (Statement of Senator Feingold). *See* 11 C.F.R. §§ 113.1, 113.2 (2002). *See also* 148 Cong. Rec. S1994 (Mar. 18, 2002) (section-by-section analysis).

In any event, rather than objecting to any substantive change that BCRA made to FECA, plaintiff appears to be criticizing Congress's failure to adopt *stricter* limitations upon the financing of campaigns for federal office and to provide for public financing of campaigns. (2nd Am. Compl., *e.g.*, ¶ 239(f).)[9] However, that is not a complaint about what any statute says, but about what it does not say. Because three-judge courts cannot be convened under BCRA

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

[9] In *Bluman v. FEC*, __ F. Supp. 2d __, 2011 WL 52561 (D.D.C. Jan. 7, 2011), another member of this district court distinguished *McConnell* on the grounds that BCRA § 303, the provision of BCRA challenged there, repealed and replaced the prior provision of FECA. The *Bluman* decision is inapposite, however, because the plaintiffs there challenged BCRA as *restricting* their First Amendment rights. Here, in contrast, even if BCRA's amendments to 2 U.S.C. § 439a could be interpreted as doing more than simply codifying existing regulatory limits, Schonberg is making the opposite argument of the *Bluman* plaintiffs. Since he complains that section 439a still regulates *too little*, he is not challenging any restrictions that BCRA may have created when it amended FECA. (*See* 2nd Am. Compl. ¶¶ 140, 150, 209(f), 239(f).)

§ 403(a) to address challenges to FECA, the three-judge Court should be dissolved, and the case decided by a single district judge.

Finally, plaintiff's claims regarding the MRA statute and the legislative practice of earmarking should not be decided by this three-judge Court or certified to the court of appeals, even if any of plaintiff's FECA or BCRA claims were found to merit a special review procedure. As plaintiff admits (2nd Am. Compl. ¶ 8(c)), a single-judge district court could hear the MRA and earmarks claims. BCRA § 403 and 2 U.S.C. § 437h confer jurisdiction only over constitutional challenges to BCRA and FECA respectively. And those claims can be resolved without also resolving plaintiff's MRA and earmarking claims. *See Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000) (three-judge court) (declining to exercise supplemental jurisdiction); *Turner Broadcasting System, Inc. v. FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (three-judge court) (same).

III. PLAINTIFF LACKS STANDING TO MAKE HIS FECA CLAIMS

Under Article III of the Constitution, one element of the "'bedrock' case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *McConnell*, 540 U.S. at 225 (other internal quotation marks and citation omitted). Article III standing has three required elements: (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 redress plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "The party invoking federal jurisdiction bears the burden of establishing" each of these elements. *Id*. at 561; *accord, e.g., Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997). Consequently, a failure to satisfy any one of the elements means that the plaintiff lacks standing and the court lacks subject-matter jurisdiction.

Plaintiff cannot establish any of the three elements of standing. His alleged injuries are not legally cognizable and rest upon his dissatisfaction with certain public policy decisions made by Congress. His purported injuries were not caused by FECA but by his refusal to seek campaign contributions from others to increase his competitiveness with a better known candidate, and by the independent actions of a multitude of donors, voters, and other persons who are not parties to this suit. In these circumstances, the Court would be unable to redress his alleged injuries even if it had the power to issue the kind of sweeping order plaintiff requests.

A. Plaintiff Has Failed to Demonstrate the Requisite Injury in Fact

An "injury in fact" is "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. For standing to exist, the injury alleged must be "concrete and particularized" and "actual or imminent." *Id*. (internal quotation marks and citation omitted). "Particularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id*. at 560 n.1. The injuries that Schonberg alleges here fall into two general categories. First, he claims that FECA (including BCRA) gives his prospective general election Republican opponent an unfair monetary advantage. (2nd Am. Compl., *e.g.*, ¶¶ 17, 29, 203, 233.) Second, he claims that FECA inflates his health care costs because campaign contributions have led Congress to enact allegedly inadequate health care legislation. (*Id.* ¶¶ 89-104, 203(e).)

Plaintiff alleges that he refuses to accept campaign contributions, but that his Republican rival does accept them and thus can afford advertising and other campaign measures that plaintiff cannot. (2nd Am. Compl. ¶¶ 24-29, 32.) Plaintiff relies upon this financial disparity between his campaign resources and those of his rival to demonstrate the necessary injury in fact. (*Id.*; *see also id*. ¶¶ 41, 43.)

The Supreme Court has never held that the kind of electoral resource disparity of which Schonberg complains constitutes a legally cognizable injury. "[P]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *McConnell*, 540 U.S. at 227 (internal quotation marks and citation omitted). Schonberg apparently alleges that his electoral injury arises from a candidate's supposed constitutional right to run for office without having to face a competitor who receives voluntary campaign contributions. But as explained *supra* pp. 8-10, the Constitution does not prohibit campaign contributions and thus provides no right to Schonberg to run against candidates who are starved for funds. Rather, potential contributors' freedom of association "is diluted if it does not include the right to pool money through contributions." *Buckley*, 424 U.S. at 65. And "[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56. *Cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) ("*Buckley* also made clear that contributors cannot be protected from the possibility that others will make larger contributions.").

Courts have repeatedly found no cognizable injury where plaintiffs have relied on an alleged disparity in electoral resources. In the *McConnell* consolidated litigation, the *Adams* plaintiffs complained that FECA (through a new provision in BCRA increasing certain contribution limits) deprived them of an equal ability to participate in the election process, including as candidates, based on their economic status and desire not to accept large contributions. The Supreme Court held that the plaintiffs' claim of injury was "not to a legally cognizable right." 540 U.S. at 227. The Court has "never recognized a legal right comparable to the broad and diffuse injury asserted by the *Adams* plaintiffs." *Id.* Schonberg's claimed injury fails for the same reason.

Plaintiff's complaint especially resembles that of the minor party senatorial candidate in *Sykes v. FEC*, 335 F. Supp. 2d 84 (D.D.C. 2004). The plaintiff-candidate there alleged that FECA violated his First and Fifth Amendment rights by allowing or authorizing out-of-state campaign contributions that prevented him from competing equally. *Id*. at 85, 88-89. The plaintiff had opted not to accept any out-of-state contributions. *Id*. at 87. The district court declined the candidate's request to convene a three-judge court under BCRA or to certify constitutional questions under FECA, *id*. at 85, and instead dismissed the case because the plaintiff had failed to satisfy any of the three requirements of Article III standing. The court rejected the "argument that any candidate for election automatically has standing to challenge FECA." *Id*. at 89. Sykes's "only alleged injury is his inability to compete equally against opponents with more money (some of which was obtained from out-of-state contributions)." *Id.* This alleged disparity was insufficient to meet the injury-in-fact requirement under Supreme Court precedent, *id*. at 89-90, and the same is true of Schonberg's similar allegations.[10]

Plaintiff here also cannot demonstrate that he suffers the injury in fact necessary for his claim concerning the cost of health care insurance. He asserts that health insurance under current legislation is expensive because FECA has authorized or allowed Members of Congress to solicit and accept campaign contributions, which he terms "bribes." (2nd Am. Compl. ¶¶ 89-91, 102-104.) But millions of other Americans could also allege that they find health insurance expensive and that Congress has failed to enact what they consider to be an optimal health care program. These allegations are no more than a generalized grievance about a public policy

[10] *Compare Shays v. FEC*, 414 F.3d 76, 85-87 (D.C. Cir. 2005) (sufficient injury alleged where Commission regulations unlawfully required the plaintiffs, Members of Congress, to change their campaign practices and thus altered the environment in which they had to compete).

matter. 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.

For example, in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215-227 (1974), the plaintiffs lacked the requisite injury to bring their claim that service in the military reserves by Members of Congress violated Article I, § 6, Cl. 2 of the Constitution, which Schonberg refers to as the Emoluments Clause. "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." *Id.* at 217. The alleged injury, the Court concluded, was a speculative and abstract generalized grievance shared by all citizens interested in constitutional governance.[11]

Schonberg's claims are neither legally cognizable nor sufficiently concrete or particularized. He has thus failed to satisfy the injury-in-fact requirement.

B. Plaintiff Cannot Show that FECA Caused His Alleged Injuries or that Eliminating FECA Provisions Would Redress Those Injuries

A plaintiff lacks standing unless he alleges sufficient facts to show a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. That is, the injury

[11] For this same reason, Schonberg also lacks prudential standing, the courts' self-imposed limit on the exercise of federal jurisdiction. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing the fusion of prudential and constitutional standing). The prudential rule barring adjudication of generalized grievances rests in part on the view that this kind of grievance is more appropriately addressed by the legislative branch. *Id. Accord, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004); *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

must be "fairly . . . trace[able] to the challenged action of the defendant" and not the result of independent action by some "third party not before the court." *Id.* (internal quotation marks and citation omitted). "When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," as here, "much more is needed." *Id.* at 562 (emphasis in original). In a related requirement, a plaintiff must also show that a "favorable decision" will "likely . . . redress[ ]" the injury. *Id.* at 561 (internal quotation marks and citation omitted). "[M]erely speculative" allegations of redress will not suffice. *Id.* (internal quotation marks and citation omitted). *Accord, e.g., McConnell*, 540 U.S. at 225.

Schonberg cannot satisfy these requirements. In particular, he cannot show that either of his alleged injuries was caused by FECA, as opposed to his own decisions and the independent actions of numerous voters, campaign contributors, legislators, and other persons. Moreover, the relief plaintiff seeks regarding FECA will not redress his alleged injuries. On the contrary, removing FECA's restrictions would seem likely to exacerbate the perceived ills in the campaign finance system that plaintiff identifies.

FECA (including BCRA) did not cause plaintiff's first alleged injury — a lack of enough campaign funds to successfully compete with the incumbent Congressman. As explained *supra* pp. 10-12, plaintiff's case against the Commission ultimately rests on the false premise that FECA authorizes campaign contributions, but without FECA there would be no limits on campaign contributions. Moreover, FECA contains no provision that distinguishes among congressional candidates based on their ability to garner contributions. It imposes no greater restrictions on Schonberg's campaign than his opponent's; it applies equally to all candidates, without regard to whether they choose to accept or reject contributions. *See Buckley*, 424 U.S. at 31. In essence, plaintiff complains that he suffers because FECA *fails to regulate third parties* as

strictly as he believes it should. But causation is very difficult to establish in that situation, *see* *Lujan*, 504 U.S. at 562, and plaintiff cannot do so here.

Plaintiff's lower level of campaign funds in 2010 and the disparity he anticipates in the 2012 campaign result from his own choices and the independent decisions of other citizens. Like any other congressional candidate, Schonberg was free in the 2010 congressional election, as he will be the 2012 election, to seek contributions from any citizen or political committee that is willing to contribute to him, within the limits and subject to the prohibitions applicable to all candidates and contributors. Thus, any relative lack of funds is due in part to plaintiff's own decision not to compete for contributions from other persons. Any disparity also results from the independent decisions of other citizens to contribute money to Schonberg's electoral rival. Causation here thus depends in part on "the unfettered choices made by independent actors not before the court[ ]," and this Court "cannot presume either to control or to predict" their exercise of discretion. *Lujan*, 504 U.S. at 562 (internal quotations marks and citation omitted).

In three cases strikingly similar to this one, courts held that plaintiffs lacked standing because they had failed to show that FECA caused their alleged injuries. In the *McConnell* litigation, the *Adams* plaintiffs contended that a BCRA provision increasing and indexing for inflation certain FECA contribution limits caused them a competitive injury. Because they did "'not wish to solicit or accept large campaign contributions as permitted by BCRA,'" the new provision allegedly put them at a fundraising and competitive disadvantage. 540 U.S. at 228 (quoting *Adams* plaintiffs' brief). The Supreme Court concluded that the plaintiffs could not show that their alleged injury was "fairly traceable" to the BCRA provision: "Their alleged inability to compete stems not from the operation of . . . [the statutory provision], but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice." *Id.*

In *Whitmore*, a third-party candidate for Congress alleged that FECA is unconstitutional because it does not prohibit out-of-state campaign contributions. 68 F.3d 1212. As the Ninth Circuit described the complaint, "[t]he claim of injury is basically that out-of-state money helps the Republican and Democratic candidates drown out the campaign of a third party candidate such as Ms. Whitmore." *Id*. at 1214. The court concluded that FECA could not be the cause of the claimed injuries because it "neither prohibits nor authorizes out-of-state campaign contributions." *Id*. at 1215. Instead, the alleged harms "derive[d] from the acts of other citizens," who chose to contribute to plaintiff's electoral rivals. *Id*. *Accord Sykes*, 335 F. Supp. 2d at 87-89 (FECA did not cause harm allegedly resulting from the giving of out-of-state contributions to a plaintiff's electoral opponent).

And in *Albanese v. FEC*, 78 F.3d. 66 (2d Cir. 1996), would-be congressional candidates and their supporters sought, *inter alia*, a declaration that FECA violated their right to equal protection because the statute allegedly authorized the solicitation and use of campaign contributions. They claimed that they did not have sufficient money to influence the electoral process. Affirming the district court's decision, the Second Circuit held that the asserted injury was "not 'fairly traceable' to FECA." *Id*. at 68. "FECA does not require that contributions be made to any candidate. Rather, it limits the amounts of contributions that may be made." *Id*.

Schonberg also incorrectly assumes that the candidate who spends more money receives more votes. (2nd Am. Compl. ¶¶ 28-29.) But publicly available campaign financial data demonstrate that candidates receiving less in contributions are sometimes successful.[12] The

[12] For example, in the 2010 senatorial election in Arkansas, incumbent Blanche Lincoln outraised and outspent her challenger by millions of dollars, yet the challenger, John Boozman, won handily. For the financial data, *see* www.fec.gov. (Click on Arkansas on the map on the opening page and choose the 2009-2010 election cycle; then insert the candidate's name in the

relationship between money and votes is complex and speculative. As the D.C. Circuit has noted, "[t]he endless number of diverse factors potentially contributing to the outcome of . . . elections . . . forecloses any reliable conclusion that voter support of a candidate" is attributable to any one factor. *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

Concerning the redressability of his alleged competitive injury, Schonberg cannot show that declaring FECA unconstitutional would prevent a disparity in congressional campaign resources. His complaint erroneously assumes that, in the absence of FECA, the Constitution would automatically impose *greater* restrictions on the financing of federal elections. However, as explained *supra* pp. 8-10, the Constitution neither prohibits Congress from establishing a mechanism for federal candidates to accept limited campaign contributions, nor requires stricter — or any — limits on campaign contributions. Striking down FECA would leave no restrictions on contributions to federal candidates.

The Supreme Court used a comparable analysis in addressing an issue raised by the *Paul* plaintiffs in the *McConnell* litigation. The Court observed that the provision challenged there, BCRA § 307, "merely increased and indexed for inflation certain FECA contribution limits." 540 U.S. at 229. The Court reasoned that striking down the provision would not remedy the plaintiffs' alleged injury because the limits imposed by FECA "would remain unchanged." *Id*. "A ruling in the . . . plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing." *Id*. *See also Albanese*, 78 F.3d at 69 ("[S]ince FECA limits the amounts of contributions that are permissible, the elimination of those ceilings could well place

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blank candidate box.) *See also* Press Release, Boozman Sworn in as Arkansas' Newest Senator (Jan. 5, 2011), http://boozman.senate.gov (last visited March 11, 2011). For some historical data, *see*, *e.g.*, *Buckley*, 424 U.S. at 31-35; Profile of the Defeated, 53 Cong. Q. 1079 (April 15, 1995) (reporting that of the 34 Democratic House incumbents who were defeated for re-election in November 1994, only 9 were outspent by their successful Republican challengers).

candidates whose constituencies do not include a plethora of wealthy supporters at an even greater disadvantage.").[13]

Plaintiff also cannot meet the causation or redressability requirements for his second claimed injury — that campaign contributions allegedly led Congress to enact inadequate health care reform. Once again, his burden is especially high because the injury arises from "the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," that is, not the plaintiff. *Lujan*, 504 U.S. at 562 (emphasis in original). Here, that "someone else" would include health care providers, drug companies, grassroots activists, political committees, and Congress. The courts "cannot presume either to control or to predict" the choices made by these "independent actors not before the courts," *id.* (internal quotation marks and citation omitted) — particularly the lawmakers who create legislation and the President, who decides whether to sign it. The sheer number and variety of independent actors in the alleged causal chain and its attenuated and speculative nature precludes plaintiff from satisfying Article III's causation requirement.

Again, plaintiff's incorrect assumption that FECA authorizes campaign contributions is fatal to any effort to show causation and redressability as to his alleged health care injury. That alleged injury is not "fairly traceable" to FECA because the statute does not *cause* the legality of the campaign contributions that he believes led to the current health care system. And plaintiff cannot show a substantial likelihood that the relief he seeks would redress his alleged injuries.

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[13] Plaintiff cannot show that Congress has a constitutional duty to appropriate public funds to finance the political campaigns of congressional candidates. *See supra* p. 10 n.3; *Buckley*, 424 U.S. at 97-98 (Constitution does not demand that the government subsidize all candidates to the point that all are equal in terms of financial strength). Therefore, even if FECA were invalidated, Schonberg has no basis for assuming that Congress would enact a public financing scheme for that purpose, much less any particular system he espouses.

His complaint assumes that the changes he wants in the campaign finance system would lead to the kind of health care reform he favors, but that assumption rests on mere speculation. Indeed, dismantling FECA would likely lead to an increase in large campaign contributions, which, under plaintiff's theory, have led to corruption and misguided public policy choices.[14]

In sum, because plaintiff's complaint fails to meet any of the requirements for standing, the three-judge court should be dissolved and this case should be dismissed.

IV. PLAINTIFF'S FECA CHALLENGES SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE THE CONSTITUTION DOES NOT BAR CAMPAIGN CONTRIBUTIONS

Plaintiff's claims that involve FECA and BCRA can be roughly divided into an equal protection claim brought under the Fifth Amendment, and the claims brought under the Emoluments, Appointments, and Compensation Clauses. This second group of claims appears to depend upon the idea that FECA creates an "Office" of the United States in requiring federal candidates to designate principal campaign committees, *see* 2 U.S.C. § 432e, and that the contributions collected by those committees therefore violate the Constitution. None of these claims are substantial enough to merit hearing by a three-judge court or certification pursuant to 2 U.S.C. § 437h, so this three-judge Court should be dissolved and the case dismissed.[15]

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[14] Some of plaintiff's claims for relief also appear to be beyond the power of the courts, such as his request that the Court "[i]mmediately freez[e] all the assets of all campaign committees under the authority of Defendant Federal Election Commission and order[] the funds returned to donors." (2nd Am. Compl. at 65 ¶ C.)

[15] Plaintiff's claims that FECA and BCRA are unconstitutional because they "allow[]" the MRA statute and earmarked legislation (2nd Am. Compl. ¶¶ 218, 248) are plainly frivolous as well. The campaign finance statutes do not "allow" or authorize unrelated legislation.

A. Plaintiff's Fifth Amendment Claim as to FECA and BCRA Is Frivolous Because Those Statutes Treat Incumbents and Challengers the Same

Plaintiff claims that FECA and BCRA are unconstitutional because they violate the Due Process Clause of the Fifth Amendment by failing to provide equal protection to candidates challenging incumbent Members of Congress. (2nd Am. Compl. ¶¶ 1, 203-04, 233-34.) An essential element of an equal protection claim is that the challenged statute treats similarly situated entities differently. *Calif. Med. Ass'n*, 453 U.S. at 200. However, plaintiff cannot meet this requirement because FECA treats challengers and incumbents the same. Plaintiff's complaint lists many ways in which he is purportedly disadvantaged in his efforts to compete against his electoral opponent (2nd Am. Compl., *e.g.*, ¶¶ 46-81), but none of these alleged disadvantages are caused by FECA.

The Supreme Court long ago rejected the argument that FECA's contribution limits "work . . . an invidious discrimination between incumbents and challengers," and explained "that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations." *Buckley*, 424 U.S. at 30-31. As the Court reiterated in *Shrink Missouri*, 528 U.S. at 389 n.4, "[t]his is essentially an equal protection claim, which *Buckley* squarely faced. We found no support for the proposition that an incumbent's advantages were leveraged into something significantly more powerful by contribution limitations applicable to all candidates, whether veterans or upstarts." *Id.* (citing *Buckley*, 424 U.S. at 31-35). Indeed, in *Buckley* the Court recognized that each candidate is unique and may benefit or suffer from contribution limits regardless of incumbency status; the Court concluded,

> To be sure, the limitations may have a significant effect on particular challengers or incumbents, but the record provides no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class. Since the danger of corruption and the appearance of corruption apply with equal force to challengers and incumbents, Congress had ample justification for imposing the same fundraising constraints on both.

424 U.S at 33 (footnote omitted). Schonberg provides no basis for revisiting that conclusion.

In addition, contrary to plaintiff's claims, FECA does not authorize or allow incumbents to accept "bribes" (2nd Am. Compl., *e.g.*, ¶¶ 203(e), (h)), which are prohibited by other statutes. Plaintiff equates campaign contributions and bribes, but as explained *supra* pp. 9-10, under the Hobbs Act, 18 U.S.C. § 1951, campaign contributions are considered bribes only if the payment is made in exchange for an explicit promise to perform or not perform an official act. *See McCormick*, 500 U.S. at 272. Although campaign committees may receive contributions (subject to FECA's limitations and prohibitions), candidates are prohibited from converting those contributions to their personal use. 2 U.S.C. §§ 432(b)(3), 439a(b).

In sum, since plaintiff cannot demonstrate that FECA or BCRA treats him or other challengers differently from incumbents, plaintiff's equal protection claim regarding those statutes fails and must be dismissed.

B. Plaintiff's Emoluments, Appointments, and Compensation Clause Claims as to FECA and BCRA Are Frivolous

Schonberg's claims under the Appointments, Compensation, and Emoluments Clauses of the Constitution appear to rest on the mistaken contention that FECA creates an "Office" of the United States when it requires federal candidates to designate a principal campaign committee to receive their campaign contributions and make disbursements. *See* 2 U.S.C. § 432(e); 2nd Am. Compl., *e.g.*, ¶¶ 87, 205-216. Candidates' campaign committees, however, are simply not part of the government; indeed, most of the committees support unsuccessful challengers who

never become Members of Congress. The plain language of section 432(e) states that the candidate acts as an agent of the *committee*, not the United States. And the committee itself exercises no governmental power, but merely operates on behalf of the candidate running for office.[16]

1. The Constitution Does Not Prohibit Campaign Committees or Contributions

Plaintiff challenges the constitutionality of FECA's provisions governing federal re-election campaigns, asserting that campaign contributions are "emoluments" or "bribes" (*see* 2nd Am. Compl., *e.g.*, ¶¶ 24, 33, 35), and that the Constitution forbids such contributions. However, as explained in Section I, *supra* pp. 8-10, no judicial authority supports the claim that the Constitution prohibits Congress from creating a mechanism for federal candidates to establish campaign committees to accept limited contributions. Moreover, declaring these FECA provisions unconstitutional would merely result in the *removal* of campaign finance restrictions, which serve to deter corruption in a system of private financing of elections. *See Buckley,* 424 U.S. at 26-27 & n.28. And as explained above, FECA does not authorize "bribery," which is prohibited by statutes such as the Hobbs 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

[16] Plaintiff also appears to allege (2nd Am. Compl. ¶¶ 19, 21) that he and other congressional candidates, by acting as agents of their *campaigns*, are "public officials" under 18 U.S.C. § 201, a non-FECA provision. That suggestion is frivolous, however, because agents of congressional campaign committees are not employees or officials of the United States as defined by section 201; that provision prohibits bribes to public officials — persons "acting for or on behalf of the *United States*" — who are in a position to influence "official act[s]." *Id.* § 201(a)(1), (b)(1)(A) (emphasis added).

> 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, 500 U.S. at 272.

Thus, plaintiff has provided no justification for his claim that the Constitution bars campaign contributions, and "bribery" — the apparent focus of his court complaint — is barred by other statutes. If plaintiff is dissatisfied with the extent of current federal restrictions on campaign financing, the proper recourse is with Congress, not the courts. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952).

2. Candidates' Agency Relationships with Their Campaign Committees Do Not Constitute Offices of the United States Under the Emoluments or Appointments Clauses

Plaintiff's claims under the Emoluments Clause in Article I and the Appointments Clause of Article II also have no merit because federal candidates' roles in their campaign committees are not "offices" of the United States. 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.[17] The Appointments Clause vests the power to appoint "Officers of the United States" primarily in the President, but it also provides that

[17] The Framers' experience with post revolutionary self-government had taught them that combining the power to create offices with the power to appoint

> 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.

United States Constitution, Art. II, § 2, cl. 2. Plaintiff appears to contend that a lawmaker's position as "agent" of her re-election committee under 2 U.S.C. § 432(e)(2) constitutes a federally created "Office" under the Emoluments Clause and that she thereby acts as an "Officer" under the Appointments Clause. Plaintiff claims that each of these Clauses prohibits legislators from acting as agents of their committees and from accepting campaign contributions for their re-election campaigns. (2nd Am. Compl. ¶¶ 235-37, 241-46.)

Plaintiff cannot show that FECA violates these Clauses because they apply only when a position entails an employment or representative relationship with the United States government. Candidates' campaign committees, however, are not part of the government, and campaign committee treasurers and other employees do not hold "offices" of the United States, represent the government, or conduct government business. 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). Thus, the provision merely provides that the candidate acts as an agent of the *committee*, not of the United States or

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> 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).

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.[18]

Buckley also forecloses plaintiff's Emoluments and Appointments Clause claims. In that case, the Court considered the language of the Emoluments Clause in the context of interpreting similar language regarding government offices in the Appointments Clause, and it recognized the close relationship between the two Clauses. *Buckley*, 424 U.S. at 124-125. The Court held that the appointment of four members of the six-member FEC by the Senate and House, as provided in the original FECA, was unconstitutional under the Appointments Clause. *Buckley* emphasized that an essential element for qualifying as "Officers of the United States" under the Appointments Clause is that individuals exercise "*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 nonofficer." *Edmond v. United States*, 520 U.S. 651, 662 (1997) (quoting

[18] From 1971 until 1979, federal candidates and their campaign committees had independent reporting obligations under FECA. Federal Election Campaign Act of 1971, Pub. L. No. 92-255 § 304; Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187 § 104. The 1979 FECA Amendments (which became effective on January 8, 1980) consolidated all financial reporting obligations with the principal campaign committee and its treasurer. *See* Pub. L. 96-187 § 104 (deleting phrase "and each candidate for election to such office" from 2 U.S.C. § 434(a)). The legislative history of these amendments demonstrates that section 432(e)(2) was designed to "simplify[ ] the recordkeeping and reporting provisions." H.R. Rep. No. 96-422, at 1 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2860, 2861. The practical effect, 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).

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" and thereby 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.

By contrast, in their roles as agents of their campaign committees, federal candidates plainly exercise no governmental authority at all, let alone any "significant authority pursuant to the laws of the United States" comparable to the powers of FEC Commissioners at issue in *Buckley*. Indeed, plaintiff fails to identify even one governmental power that campaign committee roles afford to candidates for federal office.[19]

Thus, candidates who serve as "agents" for their political committees under section 432(e)(2) cannot be considered "Officers" under the Appointments Clause or to hold "Office" under the Emoluments Clause.

3. Candidates' Agency Relationships with Their Campaign Committees Do Not Violate the Compensation Clause

Plaintiff's Compensation Clause claims are equally frivolous. The Compensation Clause states that "[t]he Senators and Representatives shall receive a Compensation for their Services, to

[19] Even those who serve as "agents" of the United States are not necessarily "officers" of the United States. As the Supreme Court recently explained, one "'may be an agent or employee working for the government and paid by it . . . without thereby becoming an office[r].'" *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3160 n.9 (2010) (quoting *United States v. Germaine*, 99 U.S. 508, 509 (1879)). Plaintiff cannot show why becoming an agent of a campaign committee would cause anyone to be even an "agent" of the United States, let alone an "officer" of the United States.

be ascertained by Law, and paid out of the Treasury of the United States." United States Constitution, Article I, § 6, cl. 1. Plaintiff contends that FECA and BCRA violate this provision because they permit Members of Congress to accept "unconstitutional compensation" both as candidates and incumbent Members of Congress. (2nd Am. Compl. ¶¶ 3, 239.) In plaintiff's view, the statutes are unconstitutional because Members of Congress can serve as "Agents" and "Officers" of their political committees and thereby accept campaign contributions which they can use for purposes set forth in section 439a, and because they can benefit in other ways. (*See generally id.* ¶¶ 209, 224-226, 230, 239.)

By its own terms, however, the Compensation Clause does not forbid Members of Congress to receive other funds from any source; it merely requires that they receive compensation for their services to the United States. Plaintiff provides no authority to support the idea that contributions to campaign committees constitute prohibited "compensation" within the meaning of the Compensation Clause. FECA prohibits candidates from converting campaign contributions for personal use, *see* 2 U.S.C. § 439a(b), and there is no basis to characterize the uses that are permitted, *see* 2 U.S.C. § 439a(a), as "compensation" to the candidates within the meaning of the Compensation Clause. Moreover, as demonstrated *supra* pp. 34-37, candidates' roles with their campaign committees are not government "offices," and the right to make political contributions is constitutionally protected, subject to certain limitations on the dollar amount and prohibitions on contributions from certain sources. *See* 2 U.S.C. §§ 441a(a). Thus, plaintiff's Compensation Clause claims are frivolous.

CONCLUSION

For the foregoing reasons, defendant Federal Election Commission's motions to dissolve the three-judge Court and to dismiss plaintiff's claims regarding FECA and BCRA should be granted.

Respectfully submitted,

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March 15, 2011

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

Upon full consideration of the Defendant Federal Election Commission's motion to dismiss the claims in plaintiff's Second Amended Complaint regarding the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 431-57, and the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002), pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim upon which relief can be granted, plaintiff's opposition thereto and the Commission's reply,

IT IS HEREBY ORDERED that the Commission's motion to dismiss plaintiff's FECA and BCRA claims is GRANTED.

Dated: _____

_____
UNITED STATES DISTRICT JUDGE