**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| STEVE SCHONBERG<br><br>Plaintiff,<br>**v.**<br><br>FEDERAL ELECTION COMMISSION and THE UNITED STATES,<br><br>Defendants. | ) | Civil Action No. 10-2040 (RWR-JWR-CKK)<br><br>THREE-JUDGE COURT |

**PLAINTIFF'S RESPONSE IN OPPOSITION**
**TO DEFENDANT FEC'S MOTION TO DISMISS**

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## INTRODUCTION

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

In this, the Preamble to the U.S. Constitution, the Framers set a lofty aspiration for the three branches of government they created. One branch, the legislative branch, is broken, dishonest and out of control. The people's approval rating for members of Congress has plummeted to 13%, an all time low.[1] And spending on federal election campaigns is at an all time high. "We knew this election could make spending history, but the rate of growth is stunning."[2]

As will be shown, Congress first establishes justice and promotes the general welfare of its members and the corporations who have bought them. Congress supports the people of the United States as second class citizens because corporations are the source of the vast majority of wealth given to Congress in the form of campaign contributions. The system of campaign financing enacted with FECA is what makes much of the campaign spending and corruption possible.

"[T]he history of federal campaign finance regulation, having its origins in the Administration of President Theodore Roosevelt, is a long-standing and recurring problem that has challenged our government for nearly half of the life of our Republic." *McConnell v.Federal Election Commission***,** 251 F.Supp.2d 176,188, (D.C. 2003) (per curiam). The following table

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[1] From http://www.gallup.com/poll/145238/congress-job-approval-rating-worst-gallup-history.aspx, accessed on March 21, 2011.

[2] According to Sheila Krumholz, from http://www.opensecrets.org/news/2010/10/election-2010-to-shatter-spending-r.html accessed on March 26, 2011.

was culled primarily from the encyclopedic history of campaign law compiled in *McConnell,* Id.,188-196:

> 1905-6: President Theodore Roosevelt addresses Congress to "enact a law prohibiting political contributions by corporations."
>
> 1907: Congress passes the Tillman Act, "the first concrete manifestation of a continuing congressional concern for elections free from the power of money." It prohibited corporate contributions.
>
> 1911: Amendment to Tillman Act places ceilings on campaign expenditures.
>
> 1918: Amendment to Tillman Act adds criminal penalties "for offering anything of value to influence voting."
>
> 1925: Federal Corrupt Practices Act amalgamates "surviving provisions of the existing campaign finance laws." The Act broadened the definition of "contribution" and extended the ban on corporate contributions.
>
> 1934: Supreme Court upholds Federal Corrupt Practices Act, *Burroughs v. United States*, 290 U.S. 534 (1934).
>
> 1940: Hatch Act amended, placing a $3,000,000 limit on the receipts and expenditures of "any political committee." "[G]ifts to candidates or political committees" limited to $5000 per year.
>
> 1943: Smith-Connally Act extends Federal Corrupt Practices Act to organized labor.
>
> 1947: Taft-Hartley Act amends the Federal Corrupt Practices Act "to proscribe any 'expenditure' as well as 'any contribution' [and] to make permanent [its] application to labor organizations."
>
> 1971: FECA enacted, requiring disclosure of campaign contributions, but "provided corporations and unions with the ability to establish and administer separate, segregated funds for the purpose of making political contributions and expenditures."
>
> 1974: FECA amended, placing "dollar limits on contributions," and limits on amounts third parties could spend "to help federal candidates win elections." FEC was created. One day after the amendments went into effect[3] the law was

[3]This explains why there was no "record evidence of invidious discrimination" in *Buckley v. Valeo,* 424 U.S.1, 31-32, (1976). See ARGUMENT below.

challenged in *Buckley v. Valeo*, 424 U.S. 1(1976).

2002: BCRA limits "soft money" and "issue advocacy" ads.

2010: *Citizens United v. FEC*, 130 U.S. 876 (2010), overturns the FECA § 441b ban on independent corporate expenditures. *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), permits unlimited contributions by individuals to non-profit political organizations dubbed "Super Pacs."[4]

Since 1974, the dollar amounts spent on federal elections have risen exponentially, as have the contributions to the campaign coffers of incumbent members of Congress. "[S]pecial interests spent more money in 2010 than they spent in 2008, which is the first time a midterm election has had more special interest spending than the previous presidential election."[5] Plaintiff contends the cause was FECA which, after the 64 year prohibition on corporate contributions, opened the floodgates of special interest money by allowing corporations to form Political Action Committees (PACs) and spend billions of dollars on their favorite members of Congress in order to influence the outcome of pending legislation. While the disclosure requirements and contribution limits established by FECA are laudatory,[6] these provisions are nullified because of the conflict of interest FECA creates for corporations to give money to the members of Congress who regulate them.

Stopping this ubiquitous corruption is more important than the First Amendment right of free speech and should be foremost on the Court's priorities. "The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests

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[4] See: http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706500.html, accessed on March 27, 2011.

[5] "LEFT AND RIGHT NEWS," http://www.leftandrightnews.com/2011/02/07/campaign-contribution-limits-increased/, accessed April 2, 2011.

[6] 2 U.S.C. § 441a(a) limits the amounts of contributions by individuals and political committees. 2 U.S.C. §§ 432-434 requires disclosure of contributions and expenditures for some aspects of federal campaigns.

implicated by contributions for political speech: preventing corruption or the appearance of corruption." *Speechnow.org v. FEC*, 599 F.3d 686, 692, (D.C. Cir. 2010).

Plaintiff's lawsuit has two primary objectives:

1. To help prevent the corruption created by the federal campaign act statutes.
2. To allow a fair election in 2012 for the U.S. House of Representatives in Florida's District 6.

Defendant FEC now seeks to undermine plaintiff's goals and maintain the status quo with its Motion to Dismiss. Because plaintiff has standing to sue the FEC and his claims are not frivolous, Defendant FEC's motion should be denied.

**BACKGROUND**

A. STATUTORY FRAMEWORK

The Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431 et seq and the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 are the federal election campaign laws that plaintiff asks the Court to partially overturn. Defendant FEC was created by FECA, and defendant FEC erroneously claims to be "an independent agency of the United States government…"[7] 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.[8] And Congress determines the annual budget for the FEC.[9] The FEC is quasi-independent at best and clearly under the thumb of, and accountable to, the U.S. House of Representatives.

[7]See: Doc. 33-1, pg 7.

[8]See: http://cha.house.gov/index.php?option=com_content&view=article&id=291&Itemid=334

[9] See FEC Budget Request at: http://www.fec.gov/pages/budget/fy2012/FY_2012_Cong_Budget_Justification_final.pdf

BCRA was enacted as an amendment to FECA and provided a different avenue of judicial review. Challenges to the constitutionality of "pure" FECA provisions, i.e. those not addressed by BCRA, are to be determined by the Court of Appeals sitting en banc pursuant to 2 U.S.C. § 437h. Challenges to the constitutionality of BCRA are to be determined by a three-judge court pursuant to BCRA § 403, 116 Stat. at 113-14.

FECA and BCRA set forth unconstitutional conditions for the use of monetary campaign contributions. Under the FECA-BCRA statutory scheme a candidate who is a member of Congress must register a campaign committee with defendant FEC. The member then collects money from the corporations she/he regulates as a member of Congress. The member can then use that money in a variety ways to augment his/her compensation and the chances of winning re-election. Here are pertinent FECA-BCRA statutes which comprise the scheme:

§441b bans campaign direct contributions by corporations to members of Congress.

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

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

§432(e)(1) requires a candidate for Congress to designate a campaign committee.

§432(e)(2) makes members of Congress become the agents of their campaign committees.

§441a(a)(2) allows corporate PACs to give campaign cash[10] to members of Congress.

§439a(a) allows members of Congress to spend campaign cash for their own benefit.

§439a(b) specifies that members of Congress can spend campaign cash for their own benefit if "associated with an election campaign."

[10] 2 U.S.C.§ 431uses the word "contribution." Plaintiff has substituted the word "cash" because that term is used in Doc.31, ¶¶ 69,70,72 with reference to "cash" in the bank.

While FECA § 441b reinstated the corporate ban on direct campaign contributions, the scheme allowing corporations to form PACs to give money to members of Congress eviscerates the ban and allows for its "wholesale circumvention." *Buckley v. Valeo*, 519 F.2d 821, 837, (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

The Representational Allowance for Members of House of Representatives, a/k/a "MRA," was created by 2 U.S.C. §57b and provides taxpayer money for members of the House that is supposed to be used to run their offices. The MRA allotment for 2010 was between $1.4 million and $2.0 million dollars per house member.[11] The MRA statute, through both proper and improper use, allows an incumbent member of Congress to exploit the taxpayers and pay the expenses of her/his re-election campaign.[12] While FECA requires challengers for a seat in the House of Representatives to report all receipts and distributions used in their campaigns, FECA, by omission, excludes incumbents from reporting the use of MRA funds for campaigning.

Earmarked legislation is not part of a statutory framework because bills with earmarks may come out of the House of Representatives in almost any form. Earmarks provide funding for special projects that generally only benefit the home state of the member of Congress. Earmarks are used by members of Congress to obtain voter support and special favors from the member's constituency.

B. PLAINTIFF

Plaintiff is a resident of Florida's House District 6 and was a No Party Affiliation Candidate for that seat in the 2010 election. He was defeated by the only other candidate on the

[11] See U.S. House of Representatives, 112th Congress, Statement of Disbursements. It is available online at: http://disbursements.house.gov/sod-glance.shtml.

[12] The only "improper use" guideline is contained in the "Member's Congressional Handbook" which has no force of law. Plaintiff compiled a list of permitted uses of MRA from the Member's Handbook in Doc.31. ¶163.

ballot who was referred to throughout the Second Amended Complaint as "Rep.FL6." Plaintiff is also a taxpayer who is eligible to vote in any election for the office of President.
(Doc 31, pgs 4-5, ¶¶ 11, 11(a).)

C. FACTS

The facts pertaining to this response are set out in Doc. 31, ¶¶15-201, and are hereby incorporated by reference.

**ARGUMENT**

"More than a century ago the 'sober-minded Elihu Root' advocated legislation that would prohibit political contributions by corporations in order to prevent 'the great aggregations of wealth, from using their corporate funds, directly or indirectly,' to elect legislators who would 'vote for their protection and the advancement of their interests as against those of the public.' In Root's opinion, such legislation would 'strik[e] at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.'" *McConnell v. FEC*, 540 U.S. 93, 115, (2003), (internal citations omitted.) FECA has not solved or even lessened Mr. Root's concerns. FECA has placed our country into the great jeopardy of becoming the world's first corporate-owned superpower.

**I. FECA IS UNCONSTITUTIONAL**

A. FIFTH AMENDMENT DUE PROCESS VIOLATIONS

In *Bolling v. Sharpe* 347 U.S. 497 (1954), the Supreme Court ruled that due process protection afforded by the Fifth Amendment prohibited invidious discrimination and segregation in the District of Columbia public schools. And *Buckley v. Valeo*, 424 U.S. 1(1976), the seminal case on the constitutionality of FECA, provided that, "Equal protection analysis in the Fifth

Amendment area is the same as that under the Fourteenth Amendment," *Buckley* at 93. It is plaintiff's burden to show that there is invidious discrimination against him of "some substance," *Texas v.White*, 415 U.S. 767,782 (1974).

It is for the U.S. Court of Appeals for the District of Columbia to determine if evidence of invidious discrimination alleged in Doc. 31 supports the conclusion that FECA is unconstitutional on the basis of the Fifth Amendment. See 2 U.S.C. § 437h. "An essential element of an equal protection claim is that the challenged statute treats similarly situated entities differently,"[13] *Calif. Med. Ass'n v. FEC*, 453 U.S. 182, 200, (1981). In ¶ 201(a) of Doc. 31, plaintiff contends that FECA provides a "monetary advantage" to the incumbent which results in invidious discrimination. Congress and their corporate comrades engaged in a symbiotic relationship with the passage of FECA. Congress believed it found a supposedly constitutional way for its members to receive bribes, and Congress gave corporations the means to give bribes.

Plaintiff's opponent, Rep.FL6, sits on House committees that regulate corporations which have contributed hundreds of thousands of dollars to Rep.FL6 pursuant to FECA, 2 U.S.C. §432, §434, §439, § 441a, and §441i. See Doc. 31, ¶¶ 2,45,75,82-88,91, and 147, e.g. Because the challenger does not sit on committees that regulate corporations, this legalized bribery is not available to any challenger. FECA therefore invidiously discriminates in favor of the incumbent.

The *Buckley* court reached a conclusion that there was no invidious discrimination in FECA based on the Fifth Amendment but admitted there was no evidence presented to it. "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 restrictions," *Buckley*, 424 U.S. at 31-32. To insure that this Court had the record evidence that was missing from

[13] Quote is from Doc.33-1, pg 34.

*Buckley*, plaintiff went to great lengths to include evidence of "some substance" in Doc. 31. See Doc. 31, ¶¶ 15-204 which are incorporated by reference. Here is the most important due process question that the *Buckley* court could not and did not answer:

> 1. Do 2 U.S.C. §§441b(2)(C), 441b(2)(D), 432(e)(2) and 441a(a)(2) invidiously discriminate against the challenger in an election for the House of Representatives because these statutes allow the incumbent to raise campaign contributions from the corporations she/he regulates as a member of the House?

The FEC mistakenly grasped onto *Buckley* language dealing with alleged invidious discrimination based on FECA's "contribution limits."[14] Plaintiff is *NOT* contending that contribution limits create the problem of invidious discrimination! The problem is created because the incumbent sits on committees regulating corporations; and in the case of Rep.FL6, he has taken advantage of that incumbency by accepting huge amounts of contributions from those same corporations. This corruption must not stand. The corporate money advantage given to Rep.FL6 is clearly the result of invidious discrimination.

Rep.FL6 has been in office for eleven election cycles and over the years his principle campaign committee, "Friends of Rep.FL6," has amassed enormous wealth, in the neighborhood of $2.5 Million Dollars, mainly from corporations. Rep.FL6 can use the interest income on that money, which was about $75,000 in 2009, to campaign against the challenger. See Doc 31, ¶¶ 70-71. Any challenger, including plaintiff, would not have amassed a fortune over a twenty-two year time frame by supporting the corporations she/he regulates in Congress. FECA invidiously discriminates against the challenger by providing a monetary advantage to the incumbent who can use interest on bank deposits made years before in each new election cycle.

[14] Id., pgs 34-35.

By allowing the incumbent to amass enormous wealth and invest it in multiple financial institutions who employ constituents, FECA invidiously discriminates in favor of the incumbent. See Doc 31, ¶¶ 69-71. A wealthy banking customer such as "Friends of Rep.FL6" is bound to garner many votes for the incumbent from the financial institutions where it does business.

Because FECA allows the staff of members of Congress to campaign for their bosses without charge, an incumbent is given a sizeable manpower advantage over the challenger. Rep.FL6 used at least six members of his staff in the 2010 campaign against the plaintiff. These staff members are claimed to be "volunteers," but as alleged in Doc. 31, ¶¶ 105-132, they really have no choice. FECA invidiously discriminates in favor of the incumbent by permitting federal employees to campaign for the incumbent.

By enacting FECA, Congress "broadly addressed" the problem of campaign financing. It wished "…to insure both the reality and the appearance of the purity and openness of the federal election process," *Buckley*, 424 U.S. at 78. FECA fails the purity test by invidiously discriminating in favor of members of Congress who both regulate and receive money from their corporate partners in campaign finance malevolence. In spite of the FECA §441b ban on direct corporate contributions, corporate PACs allowed by §441b (2)(C) are a blight on America as wicked as the plague, with pustulent buboes of legislative corruption[15] filling the cherished halls of Capitol Hill.

B. 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,

[15] Prior to the passage of FECA in 1971 there was a "cesspool" of corruption in Congress. "Pustulent buboes" of corruption are far more dangerous.

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 campaign committees. FECA at 2 U.S.C. §432, §434, §439, §439a, and §441i is therefore unconstitutional. See Doc. 31, ¶¶ 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."[16]

Although *Buckley* addressed the Appointments Clause issue with regard to the appointment of FEC members, *Buckley*, 424 U.S.118, et seq., the *Buckley* court never considered whether the appointment of a legislator as an 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 are appointed as agents and civil Officers of their campaign committees?

The Court of Appeals for the District of Columbia, sitting en banc, must decide if FECA violates the Appointments Clause by allowing members of Congress to appoint themselves as agents and Civil officers of their campaign committees.

C. 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

[16] Borrowed from the FEC, Doc. 43, pgs 14-15, MD, Fla, citing, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 904 (1991).

the House of Representatives from raising its members' compensation "until an election of Representatives shall have intervened."

The compensation of members of Congress is codified at 2 U.S.C. ¶¶ 351-364 as a result of the Salary Act of 1967 and its subsequent amendments. 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 Doc. 31, ¶ 209.

Without citing a single case defendant FEC baselessly concluded plaintiff's Compensation Clause claims are frivolous. "…[T]he 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." Doc.33-1 at 42. But FECA campaign committee cash is not just, "from any source;" it is money raised under the statutory law of the United States. When that money is given to members of Congress by corporations and special interest groups, it is given "to influence" an official act. See 18 U.S.C. § 201(b)(1). And FECA permits corporations to give money with the "intent to influence any official" act without fear of reprisal or criminal prosecution. In arguing its defense to the en banc Court of Appeals, defendant FEC may claim that FECA separates a PAC from its corporation. But corporate PACs are agents of their corporations, and the corporation is the beneficiary of the "intent to influence."

Campaign committee cash is real money, but FECA places some restrictions on its use. Being the civil Officer-agent in charge of a $2.5 million dollar campaign account is compensation which probably varies in value from House member to House member, depending on how it is used. And having the final say on how the money will be spent does not mean the

agent-Officer can just put the money in his pocket.[17] But here are some examples of permitted uses of campaign committee cash for a member of the House of Representatives:

1. You can buy a skybox at the Super Bowl as long as you invite some of your favorite lobbyists to join you.[18]

2. For $67,000 of campaign cash you can play a lot of golf at the Naples, Florida, Ritz Carlton, as long as you invite the lobbyists to join you.[19]

3. You can give an unlimited amount of your cash to state and local political candidates in return for special favors and electoral support.[20]

4. You can give money to your favorite charity and expect electoral support and adulation.[21]

5. You can bribe the political party of the Speaker of the House of Representatives to try and buy the chairmanship of a House Committee. A chairmanship would give you the ability to raise more campaign cash, more quickly and more easily.[22]

6. You can buy a Rembrandt to hang on the wall of your private congressional office in Washington, D.C.[23]

7. You can give that Rembrandt[24] on your wall to the local community college with the expectation that the college will then be more inclined to hire your spouse when she/he

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[17] That is, unless your campaign committee cash dates back to 1989, in which case you *can* pocket the cash. See 11 CFR 113.2.

[18] Patterned after claim in Doc.31, ¶¶ 141-142.
[19] Patterned after: http://www.nytimes.com/2010/09/12/us/politics/12boehner.html?pagewanted=2, accessed on March 21, 2011.
[20] See FECA §439a(a)(5).
[21] Id. at §439a(a)(3)
[22] Id. at§439a(a)(4), plus see Doc.31. ¶¶ 62-64.
[23] Patterned after FECA §439a(a)(2)
[24] What happens to the Rembrandt if the member leaves office, and the painting is not donated?

applies for a job.[25] (But be careful, the community college has to be "an organization described in section 170(c) of the Internal Revenue Code of 1986.")

8. You and your spouse can fly to Monaco on a fact-finding mission where you will give a speech at the Monte Carlo Casino.[26]

At first blush, one might think that these examples are exaggerations. But buying and hanging an expensive Rembrandt on the wall of the office of a member of the House of Representatives is specifically allowed by FECA §439a(a)(2) and (6) and not prohibited by FECA §439a(b)(2).

FECA **§** 437g(a)(2) allows for audits and field investigations if a complaint has been lodged for an alleged violation of the Act. There are no random FEC audits. Since oversight of the FEC is done by the U.S. House of Representatives,[27] an audit on a House member poses a conflict of interest to the FEC. And there are so many ways a House member can *legally* spend his/her campaign cash to meet desired entertainment, travel and other extravagances, an audit would be useless if its purpose were merely to uncover a violation of the Act.

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?

The issues presented on the Compensation Clause, like those on the Appointments Clause above and the Emoluments Clause below, are "neither insubstantial nor settled," *Calif. Med. Ass'n*, 453

[25] Patterned after FECA §439a(a)(3) and "Nepotism by Proxy," Doc.31. ¶¶ 175-179.

[26] See 11 CFR 113.2.

[27] See fn 1, above.

U.S. at 192 n.14. A resolution of the plaintiff's Compensation Clause claims is of paramount importance and a matter of first impression for the Court.

D. 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.[28] 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 goverment? 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."[29]
>
> 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."[30]
>
> "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."[31]
>
> "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."[32]
>
> Gov. John Rutledge: "No person ought to come to the legislature with an eye to his own emolument in any shape."[33]

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[28] The Emoluments Clause and the Appointments Clause are counterparts. The former says a member of Congress can't *be* a civil Officer. and the latter says Congress can't *appoint* a civil Officer.

[29] *"**1787** DRAFTING THE U.S. CONSTITUTION," Wilbourn E. Benton, editor, (1986),* pg. 715.

[30] *Id.* at 717

[31] *Id.* at 718

[32] *Id.* at 721

> Mr. George Mason: "But if we do not provide against corruption, our government will soon be at an end…"[34]
>
> 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…"[35]
>
> Mr. Roger Sherman: "The Constitution should lay as few temptations as possible in the way of those in power."[36]

Defendant FEC correctly referred the Court to the Article I Emoluments Clause discussed in *Buckley v. Valeo*, 424 U.S. at 124-5.[37] 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" has not been decided by the Supreme Court or any other court.

An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. *U.S. v. Hartwell*, 73 U.S.385, 393 (1867). Applying this *Hartwell* definition to incumbent Rep.FL6:

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[33] *Id.* at 723
[34] *Id.*
[35] *Id.*

[36] *Id.*at 732

[37] See Doc.33-1 at pg 39.

A. Appointment: Once "Friends of Rep.FL6" is formed, FECA appoints him as its agent.[38]

B. Tenure: As long as Rep.FL6 is a member of Congress.

C. Duration: The Agency continues as long as the campaign committee exists.

D. Emolument: presently around $2,500,000 dollars.

E. Duties: Meet and entertain lobbyists, provide political favors to large corporate contributors.[39]

Assume that an individual working under the authority of the United States had the following powers in campaigning for re-election:[40]

1. To manage a fund authorized by Congress and worth $2.5 million dollars,

2. To supervise federal employees in election campaign activities,

3. To pay rent for U.S. government offices,

4. To use U.S. government stationary with an elaborate letterhead,

5. To supervise a U.S. government press secretary,

6. To pay the office expenses of a member of the United States House of Representatives,

7. To supervise federal employees at a U.S. government district office,

8. To make campaign video advertisements on the floor of the U.S. House of Representatives,

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[38] 2 U.S.C. §432(e)(2) establishes the agency.

[39] "Those who pay are the masters of those who are paid." Alexander Hamilton, as quoted in Benton, "***1787*** DRAFTING THE U.S. CONSTITUTION," fn 29, supra, pg. 691.

[40] These are some of the examples enumerated in Doc 31, ¶¶ 212-214. For the purposes of a FRCP Rule 12(b) motion to dismiss, the examples must be accepted as true. *Swierkiewicz v.Sorema*, 534 U.S. 506, 508 (2002).

9. To use a U.S. government mailing list,
10. To supervise U.S. government employees when they act as surrogates at campaign events,
11. To use a U.S. government studio to make advertisements,
12. To receive $25,000 and to own stock in a corporation the individual regulates as a government employee.
13. To supervise U.S. government photographers for the preparation of personal photographs,
14. To pay the National Republican Campaign Committee $500,000 to secure a U.S. House of Representatives Committee Chairmanship.
15. To receive hundreds of thousands of dollars from corporations federally regulated by the individual.

Would it be fair to call such an individual, "simply not part of the government," as the FEC claims?[41] "[T]he exercise of 'significant authority pursuant to the laws of the United States' marks . . . the line between officer and non officer." *Edmond v. United States,* 520 U.S. 651, 662 (1997) (quoting *Buckley*, 424 U.S. at 126).[42] Rep.FL6 was acting as a member of Congress and a "public official" in exercising those campaign powers itemized in the list[43] because he was performing many of the same duties as a member of Congress. See *U.S. v. Thomas,* 240 F.3d 445,448 (5th.Cir.2001), cert. denied, 532 U.S.1073, where a guard employed by private company that operated a detention facility under contract with Immigration and Naturalization Service was a "public official" for the purposes of 18 U.S.C. §201 because he performed the same duties as a

[41] See Doc.33-1, pgs 35-36.

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[42]Also cited by FEC at Doc.33-1, pgs 39-40.

[43]The list is part of Doc.31.¶ 213.

federal corrections officer. It is abundantly clear that Rep.FL6 did function as both a member of Congress and a civil Officer in violation of the Emoluments Clause in undertaking his campaign activities. And any other member of Congress could have done the same thing.

Under 2 U.S.C.§439a(a)(2), BCRA §301(a)(2), 116 Stat. at 95, members of Congress are permitted to use campaign funds "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." When Rep.FL6 uses campaign funds for reimbursement of congressional office expenses, he is doing so under the authority of the United States. Rep.FL6 decides what federal office expenses will be paid, how they will be paid, and who will receive them. That cannot be the task of a mere agent who has nothing to do with the U.S. government.

The agency relationship identified in the one-sentence provision of 2 U.S.C. § 432(e)(2) is all that it takes to create a civil Officer. In fact, you could substitute the words "civil Officer" for the word "agent" in the Act, and it would make perfect sense. "A rose by any other name would still be a rose."[44] A civil Officer with the authority to pay the ordinary and necessary expenses of a member of Congress sounds like a job description in the legislative branch of government.

In any case, however, this Court does not have jurisdiction to rule on the merits of plaintiff's Emoluments or Appointments Clause claims challenging the constitutionality of FECA. For the Court to make a finding that incumbent agents of their campaign committees are or are not officers under Article I, Section 6 of the Constitution requires a decision on the merits which must be done by the en banc Court of Appeals.

E. THE MRA

[44] Paraphrasing William Shakespeare from *Romeo and Juliet*

With 2 U.S.C. § 57b, the "Representational Allowance for Members of House of Representatives," a/k/a "MRA," Congress not only pays for the members' to run their offices, but the members also use the allowance to pay for campaign expenses at the expense of the taxpayer. The *Buckley* purity test, 424 U.S. at 78, is further obscured and muddied by this misuse of treasury funds.

For example, by permitting Rep.FL6 to use his congressional office spaces in Florida for campaigning, by giving him free advertising at a ".gov" website, and allowing him to use his official stationary to advertise his support for the horse farming industry,[45] the MRA gives campaign advantages to Rep.FL6 that are unavailable to plaintiff. See Doc. 31, ¶ 163. This invidious discrimination is permitted by FECA which unconstitutionally fails to account for all campaign expenditures. Rep.FL6 can find out all of plaintiff's campaign receipts and expenditures by looking on the fec.gov website. Plaintiff has no idea how many tens or hundreds of thousands of dollars Rep.FL6 has used from the MRA for campaign activities. And other than those itemized in Doc.31, there is no record available to the public of when and where MRA funds were used by Rep.FL6 for campaign activities.

Defendant FEC did not refer to a single, specific injury plaintiff alleged regarding the MRA; it merely cited the law and failed to apply any facts. See Doc.33-1 at 10,15,23. Assuming Rep.FL6's misuse of the .gov web site and government stationary for advertising, and his misuse of government offices and federal employees for campaigning, and his failure to

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[45] Both Rep.FL6 and the plaintiff are residents of Marion County, Florida which claims to be the "Horse Capital of the World." See http://www.ocalacc.com/ocala_florida/templates/tourism.aspx?articleid=18. By referring to himself as the Congressional "Horse Caucus, Co-chairman" on his letterhead, Rep.FL6 receives taxpayer funded advertising and Florida District 6 votes. See Doc. 31, ¶58.

report the campaign use of the MRA funds to the FEC, here is the application of these facts to law:

1. The legally protected interest is the right to a fair election in which both the plaintiff and Rep.FL6 are on equal footing. *Calif. Med. Ass'n*, 453 U.S. at 200.

2. The plaintiff's injuries are that Rep.FL6 receives taxpayer funds to campaign with and plaintiff does not; and Rep.FL6 does not report the use of all campaign funds to the FEC. The misused and misreported funds are directly traceable to the MRA.

3. A ruling that FECA and MRA are unconstitutional will redress plaintiff's injuries because Rep.FL6 will no longer have MRA funds to tap into for campaigning. Plaintiff and Rep.FL6 will no longer report anything to the FEC, and they will be on equal footing.

## II. BCRA IS UNCONSTITUTIONAL[46]

### A. FIFTH AMENDMENT DUE PROCESS VIOLATIONS

This Three-Judge Court has jurisdiction of plaintiff's BCRA claims pursuant to 28 U.S.C. § 1331 and BCRA § 403, 116 Stat. at 113-14, because Plaintiff elected "such provisions to apply to the action." BCRA § 403(d)(2), 116 Stat. at 114. See Doc. 31, ¶ 6.

In 2 U.S.C.§439a(a) there is provided a laundry list of permitted uses of campaign contributions, all of which Plaintiff claims are unconstitutional.[47] The list was created by BCRA §301 from what was a paragraph in the older FECA law. BCRA §301 also contained a new section, 2 U.S.C.§439a(b), which perhaps "clarified" permitted uses of campaign cash.

[46] Plaintiff has abandoned the BCRA constitutional challenges contained in Doc.31.,¶¶ 153-162, and 235-238.

[47] See Doc.31, ¶¶ 140-144, 150-152,199-200.

2 U.S.C.§439a(b) (2)(H) codified congressional activities such as golf tournaments and sporting event skyboxes that plaintiff constitutionally challenged in Doc.31, ¶¶ 140,209, and 239. There is some ambiguity as to judicial review, either by this Three-Judge Court or by the Court of Appeals sitting en banc, for § 439a(a)(5) and (a)(6)d which were added in 2004.[48] These two paragraphs state that the following new uses are permitted:

"(5) for donations to State and local candidates subject to the provisions of State law; or

(6) for any other lawful purpose unless prohibited by subsection (b) of this section."

Allowing Plaintiff's opponent in the 2012 election to bribe State and local candidates for their support gives just another unconstitutional windfall of votes available to the incumbent. In effect, Rep.FL6 can take money from the corporations he regulates and give it to state and local politicians in order to gain an election advantage for himself. The financial support of state and local candidates by members of Congress results in voter support by those state and local candidates for the member of Congress. This provides the incumbent member of Congress with an unfair election advantage over the challenger. Therefore, 2 U.S.C.§439a(a)(5) invidiously discriminates against the plaintiff in violation of the Fifth Amendment.

B. COMPENSATION CLAUSE INFRINGEMENTS

By virtue of 2 U.S.C.§439a(a)(5) Rep.FL6 may take the campaign funds he receives from the corporations he regulates and give it to state and local candidates. Campaign gifts are, just like bribes, rewarded if given for a certain purpose. Whatever favors a member of Congress can extract from state and local politicians as the result of the transfer of corporate contributions to them is likely to result in unconstitutional compensation of one sort or another in return.

[48] "…Section 532, Division H, Title V of the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, further amended section 439a to add paragraphs (a)(5) and (a)(6). This amendment was signed into law on December 8, 2004."

By permitting campaign funds to be used "for any other lawful purpose," 2 U.S.C.§439a(a)(6), FECA-BCRA leaves the potential for misapplication of funds limitless. For instance, any member of Congress who loves golf and has the campaign cash can put on a "fund-raising" golf tournament at a fancy golf resort because she/he has been appointed as the campaign committee officer-agent. By virtue of 2 U.S.C.§439a(a)(6) fund-raising golf tournaments are deemed "any other lawful purpose," and this part of the statute should be found unconstitutional.

C. EMOLUMENTS CLAUSE BREACHES

In *Bluman v. FEC*, __ F. Supp. 2d __, 2011 WL 52561 (D.D.C. Jan. 7, 2011), the court explained the jurisdictional problem in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). The *McConnell* court "observed that it 'had no power to adjudicate a challenge to the FECA limits' because the plaintiffs were required to challenge the constitutionality of the FECA provisions 'before an appropriate en banc court of appeals, as provided in 2 U.S.C. § 437h…" *Bluman*, supra. Although the *McConnell* and *Bluman* courts imply that it is always a simple task to decipher the difference between FECA and BRCA claims, it is sometimes bewildering to draw precise distinctions.

For example, all of the powers exercised by Rep.FL6 described above as a FECA violation of the Emoluments Clause are permitted by the "catch all" of 2 U.S.C.§439a(a)(6), which is either a part of FECA, BCRA or both. So while Rep.FL6 uses his $2.5 million dollar campaign fund, "Friends of Rep.FL6," in violation of the Emoluments Clause, 2 U.S.C.§439a(a)(6) permits that use; and it is therefore unconstitutional.

**III. THE CONSTITUTION STATES NOTHING ABOUT CAMPAIGN CONTRIBUTIONS**

Defendant FEC's first point of argument is that plaintiff's challenge to FECA "rests on

the false assumption that the Constitution bars campaign contributions."[49] The Constitution states nothing about campaign contributions, while it does make a reference to "Bribery" in Article II, Section 4. So the framers were well-aware of the problem of bribery of public officials in 1787. 18 U.S.C. § 201 is the statute under which the crime of bribery of a public official is prosecuted. While campaign contributions might still be proper in certain circumstances if FECA didn't exist, when a corporation gives a member of Congress a big financial donation because the member regulates the corporation, such a gift would be nothing more than a bribe but for the existence of FECA. So for the FEC to argue that plaintiff's FECA challenge "rests upon the false premise that the Constitution bars campaign contributions" is just nonsense. A major piece of plaintiff's constitutional challenge rests upon the true premise that the conflict of interest Congress created by allowing its members to receive money from the corporations they regulate is unconstitutional for the reasons set forth in sections **I-II** above.

Plaintiff contends that without FECA, the bribery statutes could be enforced in the simple instance of a lobbyist giving a campaign contribution to an incumbent, e.g. to help raise the reimbursement rates provided to drug companies by the VA. FECA carves out a huge exception to the bribery laws. If FECA were gone, it doesn't matter if the drug lobbyist's campaign "contribution" were $5000 or $50,000,000,[50] it would still be a bribe.

The FEC relies upon the circular argument that because a Supreme Court decision interprets the Constitution, the interpretation is therefore part of the Constitution. Citing *Randall v. Sorrell*, 548 U.S. 230 (2006), the FEC concludes, "…far from barring private contributions,

[49] Doc.33-1, pg 11.
[50] See Doc. 31 ¶¶ 145-149. 18 U.S.C. § 201 is the statute under which the crime would be prosecuted.

the Constitution forbids the government from imposing excessive restrictions on them."[51] The Constitution itself takes no position on campaign contributions, neither limiting nor authorizing them. The word "contribution" is not even used in the Constitution.

Although *Tenet v. Doe*, 544 U.S. 1, 11 (2005)[52] is instructive on the lower courts generally avoiding the prerogative to overturn the Supreme Court, plaintiff's claims have not been ruled upon by the Supreme Court, and await initial decisions by lower courts. See, e.g., *McConnell v. Federal Election Commission***,** 251 F.Supp.2d 176, (D.C. 2003) (per curiam), where this court made extensive interpretations on the constitutionality of BCRA which were of novel determination.

## IV. PLAINTIFF HAS STANDING AND HIS CLAIMS ARE NOT FRIVOLOUS.

### A. THE FEC IS "IN DENIAL"

"The Constitution Does Not Prohibit Campaign Contributions." Doc.33-1 at 11. The Constitution also does not prohibit murder, rape, or bestiality. And plaintiff's Second Amended Complaint, Doc.31, sought no relief regarding campaign contributions in general. Plaintiff's constitutional claims regarding campaign contributions focused mainly on members of Congress receiving campaign contributions from corporations and companies whom the members regulate. See Doc.31, ¶¶ 35,37,41,43,63,66,82-104,153-162,199,203(h)(i)(ff-hh),209,213, for example. Amazingly, defendant FEC did not mention plaintiff's corporate contentions in those dozens of paragraphs a single time in Doc.33-1. One manifestation of denial is, "leaving out certain details to tailor a story (omission)."[53]

"Schonberg apparently alleges that his electoral injury arises from a candidate's supposed

[51] Doc.33-1, pg 11.

[52] Cited by FEC, Doc.33-1 at 12.

[53] From http://en.wikipedia.org/wiki/Denial, accessed on March 20, 2011.

constitutional right to run for office without having to face a competitor who receives voluntary campaign contributions." Doc.33-1 at 25. One type of denial is called, "denial of fact," where "someone avoids a fact by lying."[54] Perhaps, in its reply brief, defendant FEC can explain the basis for plaintiff "apparently alleging" something that is not contained anywhere in the Second Amended Complaint.

Defendant FEC's statement that "FECA Does Not Authorize Campaign Contributions" denies the existence of 18 U.S.C. § 201, "Bribery of Public Officials and Witnesses."[55] Without FECA, the conflict of interest in which a corporation gives money to a congressman who regulates the corporation would be a bribe under 18 U.S.C. § 201. *Whitmore v. FEC*, 68 F.3d 1212, (9th Cir. 1996 ), *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, (1978), et al, cited by the FEC at Doc.33-1, pg 14, are all off the mark. None of those cases involved a statute, which if found unconstitutional, was backed up by another statute turning the "authorized" conduct into a crime.

The FEC points out that plaintiff's injuries must be "concrete and particularized," and then mischaracterizes plaintiff's injuries as falling "into two general categories." Doc.33-1 at 24. The FEC then pretends that plaintiff's pleading contains no concrete or particularized injuries. The FEC's arguments here represent a mix of denial both by lying and omission, demonstrating that the FEC finds reality intolerable.

B. INJURIES IN FACT

Without referring to *any* specific injury plaintiff detailed in his Second Amended Complaint, the FEC tries to cloak itself in the threshold security blanket set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992). "Plaintiff is unable to show his alleged injury 'is

[54] Id.

[55] "…removing FECA's restrictions would seem likely to exacerbate the perceived ills in the campaign finance system that plaintiff identifies." Doc.33-1, pg 25.

fairly ... trace[able] to the challenged action of the defendant[s], and not ... th[e] result [of] independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560. [56]

Here are some of plaintiff's injuries which 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. All of these injuries are described in plaintiff's Second Amended Complaint, and their existence was denied by defendant FEC in doc.33-1.

**1. Monetary Advantage**

In the 2010 election cycle Rep.FL6 sat on several committees of the House of Representatives that regulate corporations. He has received hundreds of thousands of dollars from the corporations he regulates.[57] 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. Plaintiff 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.FL6.

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

[56] Defendant FEC cited *Lujan* extensively, Doc.33-1, pages 23-32.

[57] Doc.31. ¶¶ 45,87,94,147,155.

for FECA.

(3) Redressability: Yes, if there were no FECA, the contributions would be treated as bribes by the U.S. Department of Justice.

**2. Campaign Cash in Financial Institutions**[58]

"Friends of Rep.FL6" is a multi-million dollar principal campaign committee fund which Rep.FL6 oversees in his duty as Agent and civil Officer. FECA and BCRA allow incumbents to amass enormous amounts of money in their campaign accounts as the incumbent is re-elected, election cycle after cycle.

"Friends of Rep.FL6" earned over $75,000 from various financial institutions in Florida District 6 in 2009. In the two year campaign cycle, Rep.FL6 could use far in excess of $100,000 from these earnings for any campaign purpose. The cash came largely from corporations regulated by Rep.FL6; and it's availability to assist his re-election campaign invidiously discriminates against plaintiff. Having millions of dollars in several banks in Florida District 6 also provides Rep.FL6 with election advantages because of support for him by the banks' employees and customers. This is another campaign injury plaintiff suffered because of the invidious discrimination.

(1) The injury in fact: Unjust election votes and campaign cash for Rep.FL6.

(2) Traceability: Yes, FECA allowed Rep.FL6 to amass enormous wealth in "Friends of Rep.FL6" and to deposit the cash in local financial institutions.

(3) Redressability: Yes, If no FECA, then no "Friends of Rep.FL6."

[58] Doc.31, ¶¶ 62-81.

### 3. The MRA[59]

It is incomprehensible that the United States would allow its members of Congress to use money from the treasury for campaign activities. But that unfortunately is the position our government is taking in the Motions to Dismiss of both defendants, who ignore plaintiff's MRA grievances. Incumbent members of Congress are given the taxpayers' money to run their offices pursuant to the MRA. Although there may be some congressional rules that restrict the use of these funds for campaign purposes, there is nothing in FECA or any other statute which regulates the use of this money. Nowhere in its memorandum, Doc.33-1, does the FEC explain why, how or whether the members of the House can use MRA funds for campaigning without violating the law.

While plaintiff and other challengers are required to account for all of their campaign receipts and spending because of FECA, incumbents can use the hidden campaign war chest of the MRA, which is excluded from accountability by FECA.[60] Because FECA- BCRA are the only federal laws that apply to federal election campaign financing, those are the laws which unconstitutionally allow the misuse of MRA money.[61] And there is no public accounting of the use of this money. The MRA funds are being used surreptitiously by Rep.FL6 for campaigning because FECA-BCRA are defective and unconstitutional. The MRA is invidiously discriminatory and violative of the Fifth Amendment because it provides the incumbent with

[59] Doc.31. ¶ 203 (b),(c),(f),(k),(l),(m),(n),(o),(p),(q),(r),(s),(t),(u),(v),(w),(x),(y),(z), (aa),(bb),(ii),and (jj) contains a compilation of the MRA injuries plaintiff has suffered.

[60] This is the anchor that "inextricably" intertwines plaintiff's MRA and FECA-BCRA claims. Doc. 31 ¶ 8(c).

[61] Note that Defendant United States posits that MRA is not unconstitutional, Doc.34 at 12,16-19. Rep.FL6 has used thousands of dollars in MRA funds for campaign purposes. The use of those funds has invidiously discriminated in favor of Rep.FL6.

campaign money, goods, and services paid for by the government which are unavailable to the challenger. The incumbents' use of the MRA for campaigning is in violation of the Compensation Clause since it represents the use of treasury funds for personal expenditures, thus adding to the compensation of each member of Congress. Plaintiff has been injured because Rep.FL6 uses the taxpayers' money for campaign purposes.

Plaintiff is a taxpayer.[62] Plaintiff is and was a candidate challenging an incumbent for a seat in the U.S. House of Representatives. As a challenger and taxpayer, FECA and the MRA force plaintiff into paying a share of incumbent Rep.FL6's campaign expenses because the taxpayer funds the MRA, and Rep.FL6 uses the MRA for campaign activities. This is a taxpayer injury plaintiff has suffered as a candidate for federal office. The injury is "concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative." *Center for Law and Education v. Dept. of Education*, 396 F.3d 1152, 1157 (D.C. Cir. 2005), (internal citations omitted).

Rep.FL6 has a master-servant relationship with all of the federal employees who campaign for him. Rep.FL6 controls what his federal employees do. "Control must extend not only to ordering the work to be done or the result to be accomplished, but also to the manner and details of performance." CJS EMPLOYER § 212. Rep.FL6's campaigning employees are paid out of the MRA. The unconstitutional FECA loophole at 2 U.S.C. §431(8)(B) excludes "volunteers" from inclusion as a campaign "contribution," even if the volunteer is forced to provide services at the risk of losing his/her federal employment. The FEC does not explain why it is permissible for Rep.FL6 to have plaintiff's taxes pay for Rep.FL6 to have his federal employees campaign against plaintiff. Challengers, like plaintiff, never have the opportunity to

[62] Doc.31, ¶ 11(a).

force federal employees to "volunteer" their services for campaigning. See Doc.31, ¶¶ 105-132. The lack of a volunteer staff of federal employees who plaintiff can hire and fire is an injury because Rep.FL6 has and uses such federal employees for campaigning.

(1) The injury in fact: Free, unreported campaign funds for use by Rep.FL6.

(2) Traceability: Yes, permitted by FECA to come directly from the MRA.

(3) Redressability: Yes. If both FECA and MRA are unconstitutional, no free, taxpayer funds available to Rep.FL6 to use for campaigning.

**4. The Insurance Tithe**[63]

FECA forces plaintiff to pay a tithe to Rep.FL6 if plaintiff wants to obtain major medical insurance for his wife. Rep.FL6 has been the recipient of thousands of dollars of campaign donations from the Blue Cross Blue Shield of Florida PAC. Blue Cross Blue Shield of Florida is the only provider of high risk pool major medical insurance coverage in the State of Florida. Plaintiff's wife has a pre-existing condition which makes her ineligible for insurance from other companies. If plaintiff wanted to obtain this insurance for his wife in the 2010 election cycle, he would have had to pay a tithe to his opponent that would flow from plaintiff's insurance premium to Blue Cross Blue Shield of Florida, to its stockholders and employees, to the Blue Cross Blue Shield of Florida PAC, and then to Rep.FL6. By paying the premium, plaintiff would be a victim of invidious discrimination. By not paying the premium, plaintiff is still a victim of invidious discrimination because the decision not to purchase was and will be made to avoid helping his opponent's campaign.

(1) The injury in fact: Rep.FL6 receives campaign funds from insurance company, leaving plaintiff to either pay a portion of those funds or to

[63] See Doc.31, ¶¶ 89-104.

forgo insurance coverage.

(2) Traceability: Yes. Funds go directly to Rep.FL6 because of FECA.

(3) Redressability: Yes. If no FECA, there would be no Blue Cross Blue Shield PAC. Contributions would become illegal bribes.

**5. VA Drug Costs**[64]

Plaintiff receives medical and prescription drug benefits from the Veterans Affairs outpatient clinic in Ocala, Florida. In 2010, the copayment costs to plaintiff for his medications rose 12.5%. Rep.FL6 is a member of the Subcommittee on Health to the House Committee on Veterans Affairs (VA). This subcommittee has oversight jurisdiction on the costs of plaintiff's VA medications.

Pursuant to FECA, Rep.FL6 received several thousand dollars in the 2010 election cycle from drug companies who sell drugs to the VA.[65],[66] So on the one hand, Rep.FL6 was padding "Friends of Rep.FL6" with drug company money. On the other hand Rep.FL6' VA oversight helped the profit margin of the same drug companies at the expense of low priority veterans, e.g. the plaintiff. Plaintiff suffered a personal injury because of Rep.FL6's conflict of interest which was created by FECA.

Plaintiff's campaign suffered a financial injury because his opponent received campaign contributions from drug companies who benefited from Rep.FL6' regulation of Veterans Affairs. But for FECA, the drug companies' payments to Rep.FL6 to influence his conduct in the Health

[64] Doc.31, ¶¶ 145-149.

[65]The drug companies that gave money to Rep.FL6 in the 2010 election cycle are listed in Doc.31, ¶91. The tens of thousands of dollars Rep.FL6 received from the drug companies in the 2010 election cycle is available on the fec.gov website.

[66] Rep. Mike Michaud was the Chairman of the committee. He received about $8000 from drug companies in the 2010 election cycle. See: http://query.nictusa.com/cgi-bin/com_rcvd/C00367821/.

Subcommittee would be a bribe.

(1) The injuries in fact: Plaintiff's increased drug costs. Rep.FL6's receipt of campaign contributions from drug companies.

(2) Traceability: Yes, directly to FECA.

(3) Redressability: Yes, if no FECA, drug company payoffs to Rep.FL6 would be illegal bribes.

C. STANDING VERSUS "PRUDENTIAL STANDING"

The courts have drawn a distinction between standing at the pleading stage and standing at the summary judgment stage of challenges to the election laws. As a candidate, plaintiff has a concrete, direct, and personal stake "in the outcome of a constitutional challenge to a law regulating the processes" by which he may attain office, *Shays v. FEC*, 337 F.Supp.2d 28, 39, (D.D.C. 2004), (internal citations omitted.) At this, the pleading stage, plaintiff surely has standing based on his candidacy for a seat in the House of Representatives. Any attempt to portray plaintiff's lawsuit in the same light as *Sykes v. FEC*, 335 F. Supp. 2d 84 (D.D.C. 2004) should be met with enormous skepticism.[67] In *Sykes*, plaintiff's only equal protection claim was that FECA allowed out of state contributions. The court noted , "[It] does not have the power to create new laws," which would have been required to grant Sykes his requested relief. *Sykes*, 335 F. Supp. 2d at 93.

Prudential standing refers to a very low, subjective bar that the Supreme Court has reserved for cases involving a constitutional question.[68] It embodies "judicially self-imposed limits on the exercise of federal jurisdiction," *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S.

[67]Defendant FEC does a *Sykes* analogy at Doc.33-1, pg 26.

[68] Prudential standing discussed by the FEC at Doc.33-1, pg 27, fn 11.

1, 11-12 (2004), citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). Basically, where a claim is made that anyone can make, the courts are sometimes reluctant to find that standing exists. Prudential standing is inapplicable to the matter before the Court.

Defendant FEC relies on plaintiff's lack of willingness to accept donations to blame him for causing what FECA has actually caused. Doc.33-1, pg 29. Plaintiff's claims are not dependent on how much money he has or does not have to spend on his campaign. His claims are not about how much campaign cash he could or could not obtain if he accepted contributions. Even if plaintiff had ten times the cash Rep.FL6 has to spend in the 2012 cycle, via self-financing or contributions, the invidious discrimination would still exist.

Irrespective of plaintiff's campaign financial well-being, FECA still allows Rep.FL6 to sit on committees that he regulates and then take money from them. Overturning FECA would change influence peddlers' gifts to Rep.FL6 from "contributions" to bribery under 18 U.S.C. § 201. Regardless of how many corporations and individuals would contribute to plaintiff's campaign, Rep.FL6 would still take MRA funds and use them for campaigning. The cause of plaintiff's injuries has absolutely nothing to do with "unfettered choices made by independent actors not before the court."[69] Whatever his level of competitiveness and no matter what campaign choices he makes, plaintiff's injuries are from FECA, BCRA, the MRA and earmarks. Plaintiff has no self-inflicted wounds.

The FEC cited *McConnell*, 540 U.S. 93, 227, (2003) claiming plaintiff lacks standing because, "[P]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."[70] That quote was in reference to the *Adams* and *Paul* plaintiffs who challenged inflation indexing for <u>all</u> candidates in the

[69] From Doc.33-1, pg 29, citing *Lujan*, 504 U.S. at 562.

[70] Doc.33-1, pg 25.

contribution limits allowed by BCRA §307. Unlike *Adams* and *Paul*, plaintiff alleges injuries to himself which are an "invasion of a concrete and particularized legally protected interest," *McConnell*, 540 U.S., 227.

The Judicial Review section of FECA, 2 U.S.C. §437h, states, "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… to construe the constitutionality of any provision of this Act." And just as the plaintiffs in *Speechnow.org* "availed themselves of 2 U.S.C. § 437h, under which an individual may seek declaratory judgment to construe the constitutionality of any provision of FECA," plaintiff herein seeks to do the same. *Speechnow.org*, 599 F.3d at 689. Plaintiff is a taxpayer, and he is eligible to vote in any election for the office of President.[71] 2 U.S.C. § 437h gives plaintiff standing to constitutionally challenge FECA for all the reasons set forth in the Second Amended Complaint, inclusive of all claims. And with respect to the Appointments, Compensation, and Emoluments Clause contentions, any reasonable taxpayer and citizen would take legal action if it could stem the tide of the rising corruption in Congress. Those clauses are anti-corruption clauses; plaintiff has § 437h standing to bring the FECA constitutional defects to the Court's attention even if the injuries are suffered by all citizens, and not just the plaintiff.

Plaintiff does not accept campaign contributions because to do so would be hypocritical. Even though campaign contributions are permitted in form as defendant FEC has extensively described in Doc. 33-1, plaintiff has standing to challenge the constitutionality of those contributions whether or not he accepts them. In the 2010 election, plaintiff's sole source of

[71] See Doc.31,¶ 11(a).

funds came from a personal loan.[72] It is commonplace for those federal candidates who have the means to "self-finance" their campaigns, as in *Davis v. FEC*, 554 U.S. 724, (2008). Plaintiff intends to self-finance his 2012 campaign; he need not receive campaign contributions in order to have standing to challenge the specific constitutional deficiencies set forth in his Second Amended Complaint. Even if plaintiff receives no campaign contributions, he is still the victim of invidious discrimination. The federal government should neither provide Rep.FL6 free campaign services nor allow him to collect campaign funds from the corporations he regulates as a member of Congress.

## CONCLUSION

"It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is the most adaptable to change." [73] This Court should find that adaptation has been the beacon of liberty instilled by our Constitution. The corruption which permeates Congress must end. The FEC's Motion to Dismiss should be denied. This Court, the Court of Appeals for the District of Columbia, and Judge Roberts sitting as an individual District Court Judge, should rule on the merits of Plaintiff's Second Amended Complaint.[74]

[72] See Doc.31,¶¶ 24-26, http://query.nictusa.com/pdf/163/11030581163/11030581163.pdf#navpanes=0.

[73] Quote attributed to Charles Darwin.

[74]See Plaintiff's April 5, 2011 Response to FEC's Motion to Dissolve, and Doc.24, Plaintiff's Motion to Trifurcate.

Respectfully submitted,

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