UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

APPELLEE FEDERAL ELECTION COMMISSION'S
REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR SUMMARY AFFIRMANCE

Appellant Steve Schonberg's response to appellee Federal Election Commission's ("FEC" or "Commission") motion for summary affirmance confirms why the district court correctly ruled that Schonberg lacks standing. Schonberg again fails to show that the ruling he seeks — invalidating the limits and restrictions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57 — would redress the financial disadvantage he allegedly suffered due to his incumbent-opponent's ability to accept limited contributions from corporate political action committees ("PACs").[1]

[1] Schonberg has apparently disavowed his alleged health-care injury. (*See* Appellant's Resp. to the FEC's Mot. for Summ. Affirmance ("Resp.") at 9 (Doc. No. 1333748).)

Without FECA's limits, Schonberg's opponent could accept unlimited contributions directly from corporate treasury funds, which, according to Schonberg's own theories, would only aggravate, and not redress, his alleged financial disadvantage. Schonberg's claim that in the absence of FECA, bribery laws would outlaw all campaign contributions is frivolous. Schonberg also fails to show that his alleged financial disadvantage in elections is a valid injury-in-fact in light of the Supreme Court's holding to the contrary in *McConnell v. FEC*; Schonberg's alleged injury was not caused by FECA but by his own refusal to accept contributions. *See* 540 U.S. 93 (2003). And finally, while Schonberg quibbles extensively with the Commission's descriptions of his shifting claims, he cannot show that he has stated valid constitutional claims. This Court should summarily affirm the district court's grant of the Commission's motion to dismiss.[2]

I. Schonberg Lacks Standing

Schonberg's response fails to demonstrate that he satisfies any of the three required elements of Article III standing: (1) redressability; (2) injury-in-fact, and (3) causation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In fact, Schonberg appears to contend that he does not need to demonstrate standing for his Emoluments, Appointments, and Compensation Clause claims. (Resp.

[2] Summary affirmance is appropriate where, as here, the merits are so clear that "plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [this Court's] decision." *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985).

at 10.) Of course, that is incorrect: A plaintiff "must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted). Contrary to Schonberg's argument, nothing in *Buckley v. Valeo*, 424 U.S. 1 (1976), says otherwise.

As the district court held, Schonberg's alleged injury is not redressable since he would only suffer greater financial disadvantage if FECA's restrictions were struck down. FECA does not authorize campaign contributions, as Schonberg contends. (*See, e.g.*, Resp. at 4-6.) Without the ban on direct corporate contributions in 2 U.S.C. § 441b, corporations could contribute directly from their treasury funds (rather than only through PACs with funds collected from shareholders and employees). Without section 441a's "[d]ollar limits on contributions," *id.* § 441a(a), corporations could contribute unlimited funds. And without section 432(e)'s requirement that candidates designate campaign committees, candidates could accept contributions themselves.

Nor does FECA immunize bribery from prosecution. These limits and restrictions do not prevent the federal government from prosecuting bribes, which are plainly different from contributions.[3] A contribution is not a bribe "unless the

[3] Contrary to Schonberg's claim (Resp. at 4), the district court was not required to accept, for purposes of the FEC's motion to dismiss, Schonberg's legal claim that all contributions are bribes. A court need only "accept as true all of the

payment is made in exchange for an explicit promise to perform or not perform an official act." *U.S. v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993). If a corporation made such a *quid pro quo* payment to a federal officeholder, the federal government could prosecute that bribe regardless of whether it would also constitute a campaign contribution limited by FECA.[4] Thus, corporations are not currently "allowed to bribe members of [C]ongress," as Schonberg claims (Resp. at 1), and a ruling invalidating FECA would have no effect on bribery prosecutions.[5]

Schonberg has also failed to allege a valid injury-in-fact or an injury that was caused by FECA. In his response, Schonberg does not even attempt to address the Supreme Court's holdings in *McConnell v. FEC* that a candidate (1) has no legally protected interest in having "an equal ability to participate in the election process based on . . . economic status"; and (2) cannot claim that his fundraising

---

factual allegations contained in the complaint," *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002), and is "not bound to accept as true a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

[4] *See Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010) (explaining that a contribution "given to secure a political *quid pro quo* . . . would be covered by bribery laws, *see, e.g.*, 18 U.S.C. § 201, if a *quid pro quo* arrangement were proved" despite FECA's "preventative" contribution limits) (internal quotation marks omitted).

[5] Schonberg claims (Resp. at 3, 7) that the FEC "admitted" that contributions are "'otherwise illegal'" but for FECA, relying on a sentence from the FEC's opposition to his motion to expedite. But the FEC has admitted no such thing and has consistently argued just the opposite. Indeed, the very sentence Schonberg distorts states that "a ruling striking down FECA would allow incumbents to accept *unlimited* contributions." (Appellee FEC's Opp'n to Appellant's Mot. to Bifurcate and to Expedite FECA Issues at 5 (Doc. No. 1331133).)

disadvantage is caused by FECA where it stems from the candidate's own personal choice not to accept contributions. *See* 540 U.S. at 227-28.

In short, Schonberg utterly fails to establish that he has Article III standing. And on that basis, the district court's decision should be summarily affirmed.

II. Schonberg Fails to State a Claim upon Which Relief Can Be Granted

Schonberg's response also fails to seriously contest the Commission's showing that he has failed to state a claim upon which relief can be granted.[6] (*See* Appellee FEC's Mot. for Summ. Affirmance at 13-18 (Doc. No. 1331127).)

For example, in an attempt to save his Ascertainment Clause claim, Schonberg invents a meritless Twenty-Seventh Amendment claim (Resp. at 14-15), which does not appear in his Complaint and thus cannot be considered. As for his Fifth Amendment claim, Schonberg contends (*see, e.g.*, Resp. at 5, 9) that FECA disadvantages challengers because corporations seek to bribe only incumbents, not challengers, but this assertion describes how third parties (*i.e.*, corporations) purportedly seeking to make bribes allegedly treat challengers differently — not how FECA treats challengers differently. FECA treats

[6] Contrary to Schonberg's assertion (Resp. at 13), 2 U.S.C. § 437h does not deny any court jurisdiction to determine whether he has stated a claim. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) (section 437h certification not required when plaintiff lacks standing or fails to state a non-frivolous constitutional claim); *Goland v. U.S.*, 903 F.2d 1247, 1257-62 (9th Cir. 1990) (affirming denial of section 437h certification and Rule 12(b)(6) dismissal).

incumbents and challengers the same way, so Schonberg's Fifth Amendment claim also fails. *See Buckley*, 424 U.S. at 30-31.

Thus, Schonberg's frivolous claims fail as a matter of law.

CONCLUSION

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

Respectfully submitted,

Anthony Herman
General Counsel

David Kolker
Associate General Counsel

Harry J. Summers
Assistant General Counsel

Robert W. Bonham III
Senior Attorney

/s/ Kevin P. Hancock
Kevin P. Hancock
Attorney

October 17, 2011

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011, I will file the foregoing electronically via the Court's ECF system pursuant to D.C. Cir. R. 25(a), I will cause four paper copies to be sent to the Court by first-class mail pursuant to D.C. Cir. R. 27(b), and I will serve a copy on the following by e-mail pursuant to Fed. R. App. P. 25(c)(1)(D):

Steve Schonberg, Sschonberg@aol.com

/s/ Kevin P. Hancock
Kevin P. Hancock
Attorney
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463