UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5524

FEDERAL ELECTION COMMISSION,

Appellant,

v.

HARVEY FURGATCH,

Appellee.

On Appeal From the United States District Court
For the Southern District of California

REPLY BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

Charles N. Steele
General Counsel

Richard B. Bader
Assistant General Counsel

Carol A. Laham
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4000

September 6, 1985

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Regulations **Page**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5524

FEDERAL ELECTION COMMISSION,

Appellant,

v.

HARVEY FURGATCH,

Appellee.

REPLY BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

---

1. As shown in our opening brief, pp. 7-10, Mr. Furgatch's exhortation "Don't let him do it" unambiguously referred to President Carter's reelection campaign, for the advertisement warned that if Carter "succeeds" in the campaign tactics that "we" have let him get away with, "the country will be burdened with four more years..." -- an obvious reference to Carter's reelection. Although the district court concluded that "the range of actions expressly recommended by the ad obviously did not include voting the President out of office" (Exc. 154), it suggested no particular actions the ad might be read to advocate. In his brief to this court, Mr. Furgatch asserts only that the ad "does not necessarily call for a defeat at the polls" (Br. 17, emphasis added), and he then offers for the first time an alternative interpretation of the advertisement's admitted call to action. However, as we show below, Mr. Furgatch's new interpretation is so far at odds with both the language and the context of the advertisement that it could only occur to a lawyer

engaged in a "careful parsing of the language" (Br.17) for the purpose of absolving his client. To anyone reading the advertisement for content rather than syntax, its exhortation to defeat Carter in the imminent election was clear and unambiguous.

Focusing exclusively upon the last paragraph of the ad, Mr. Furgatch argues (Br. 16) that, rather than calling for Carter's defeat at the polls, the ad can be read merely to call upon the reader "to stop the President in his 'attempt to hide his own record, or lack of it'" by exposing Carter's record. Mr. Furgatch would not read the advertisement's admonition that if Carter is allowed to succeed "the country will be burdened with four more years of incoherencies, ineptness, and illusion" as a reference to the presidential election that was only a few days away; instead, he suggests that this could be construed as indicating that exposure of his record during the campaign might cause Carter such remorse after his reelection that he would mend his ways and stop burdening the country with the practices criticized in the advertisement.

This alternative reading, however, is entirely implausible. Initially, it makes little sense to suggest that a candidate whose campaign tactics have successfully swept him back into office would feel "shame" and "remorse" because of his opponents' unsuccessful efforts to portray those campaign tactics as rendering him unfit for the presidency. Moreover, nowhere in Mr. Furgatch's advertisement is there any suggestion that the reader act to "expose" Jimmy Carter's record. To the contrary, the

advertisement is devoted to criticizing Jimmy Carter's campaign tactics, admonishing the reader three times that "we" have let him successfully engage in campaign tactics that the advertisement describes as "degrading the electoral process and lessening the prestige of the office." The reference to hiding Carter's record at the end of the ad merely describes the alleged strategic purpose behind the campaign tactics which are the primary subject of the advertisement. Thus, when read in context of the whole advertisement rather than just its last paragraph, the exhortation "Don't let him do it," which is set out at the beginning as well as the end of the advertisement, plainly calls for stopping Carter from successfully conducting his assertedly degrading reelection campaign, which the ad says "we" have let him to do so far.

Finally, the advertisement does not merely exhort the reader to take action to ensure that the country is not burdened by four more years of Jimmy Carter's degrading activities, which could be avoided if a remorseful Carter decided to abandon them. Instead, the advertisement expressly calls for stopping Carter from burdening the country with "four more years of incoherencies, ineptness, and illusion..." If, as the ad suggests, Mr. Carter is incoherent and inept, it would take more than shame and remorse to correct such personal deficiencies. There is only one way in which Carter could be stopped from succeeding in burdening the country with four more years of his ineptness and incoherencies: by defeating his bid for reelection. This plain meaning of the advertisement's words is confirmed by the fact

that it was published only days before the election, when the campaign was virtually over and the only action left for the reader to take was to vote.

Mr. Furgatch apparently recognizes that his interpretation is at odds with the wording of the whole advertisement and is undermined by the ad's publication immediately before the election, for he vehemently argues (Br. 17-18) that the statute requires the court to review the ad's words of exhortation divorced from both their literal and their temporal context. Mr. Furgatch provides no support for his first argument, that the court is without authority to read the advertisement as a whole to determine whether it contains express, unambiguous advocacy of the defeat of Jimmy Carter. Since words usually derive their meaning from the context in which they are used, the courts have never suggested that it is improper to examine an entire communication to determine whether it contains express advocacy. To the contrary, in FEC v. Massachusetts Citizens for Life, Inc., __F.2d__(1st Cir. 1985) (notice of appeal filed, August 28, 1985) (sl. op. 15), the First Circuit recently rejected such an argument, concluding that although the phrase "Vote Pro-Life" standing alone did not constitute express advocacy, the leaflet in which it appeared did expressly advocate an election result since it also identified candidates who supported the pro-life position. 1/

1/ See also cases cited in our opening brief, p. 9 n.3, which examined the communication as a whole when determining that they did not contain express advocacy.

The fallacy of Mr. Furgatch's second argument, that the court must ignore the timing of the ad's publication, is best demonstrated by an obvious example. One of the phrases the Supreme Court identified as an example of express advocacy is "Support Carter." See Buckley v. Valeo, 424 U.S. 1, 44 (1976). Thus, if this simple communication were published a few days before the election, there could be no question but that it constituted express advocacy of Carter's election. However, if the same communication were published a few days after the election it could not be considered to be express advocacy of a result in the already concluded election. It would likely be construed to advocate something else instead, such as support Carter's legislative program (if he had been elected), or contribute money to help pay off his campaign debt (if he had lost). Thus, even the very phrases identified by the Supreme Court as paradigms of express advocacy depend upon temporal context for their meaning.

In sum, Mr. Furgatch's attempt to make the unambiguous advocacy of his advertisement disappear behind a syntactical smokescreen is entirely without merit. Any common citizen viewing this advertisement at the end of the 1980 election campaign would instantly recognize it as an unambiguos call to defeat Jimmy Carter, and there is nothing in Buckley or in the Act that would require this court to be "'"blind"' to what '"[a]ll others can see and understand."'" Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2190 (1985), quoting from United States v. Rumely, 345 U.S. 41, 44 (1953).

2. Mr. Furgatch contends (Br. 20) that 2 U.S.C. § 431(9)(B)(i) denies him equal protection of the law because he is required to abide by the reporting and disclosure provisions of the Act while an individual who owned a newspaper would be exempted from those requirements.[2/] Not only is the premise of the argument incorrect -- that individuals who own newspapers are indiscriminately treated differently under the Act, but such claims of unequal treatment have repeatedly been asserted and have been uniformly rejected by the Supreme Court. Even in cases involving provisions of the Act directly affecting speech, the Supreme Court has held that courts must accept the "judgment by Congress that ... entities having differing structures and purposes ... may require different forms of regulation in order to protect the integrity of the electoral process." California Medical Association v. FEC, 453 U.S. 182, 201 (1981). See also FEC v. National Right to Work Committee, 459 U.S. 197, 210 (1982) (reaffirming the holding in CMA that "differing structures" could be differently regulated); Buckley v. Valeo, 424 U.S. at 95-99 (public financing of major party candidates does not unconstitutionally discriminate against minor party

---

2/ Section 431(9)(B)(i) of the Act exempts from the term "expenditure"

> any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

candidates); Bread Political Action Committee v. FEC, 635 F.2d 621, 630 (7th Cir. 1980) (en banc), rev'd on other grounds, 455 U.S. 577 (1982); International Association of Machinists v. FEC, 678 F.2d 1092, 1108-1109 (D.C. Cir.) (en banc), aff'd mem., 459 U.S. 983 (1982); Athens Lumber Company v. FEC, 718 F.2d 363 (11th Cir. 1983) (en banc), (answering in the negative constitutional questions listed at 689 F.2d 1006, 1015-1016), cert. denied, 104 S. Ct. 1580 (1984).

Thus, it is well established that such claims of discrimination under the Act will fail unless it is demonstrated that two differently regulated entities are so similarly situated that no difference in treatment could rationally be justified. Mr. Furgatch's burden in this case is even greater, however, for the statutory provision he challenges does not limit his speech, but only requires disclosure, and the Supreme Court has consistently held that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed..." Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265, 2282 n.14 (1985). Accord, Lowe v. SEC, 105 S. Ct. 2557, 2581 n.8 (1985) (White, J., concurring).

No such demonstration has been made here. Mr. Furgatch labels the distinction here as one between "amateurs" and "professionals" and claims that the press is not "entitled to greater protection in its exercise of free speech than individuals" (Br. 25). Such a claim turns the issue on its head,

however, for the question presented is whether the statute's distinction denies Mr. Furgatch equal protection, not the extent of his rights under the First Amendment. Indeed, while it is true that "[t]he liberty of the press is not confined to newspapers and periodicals," Lovell v. City of Griffin, 303 U.S. 444, 452 (1938), the Supreme Court noted in Buckley that special protections for the news media, like Section 431(9)(B)(i), are "the rule, not the exception."

> Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media ... and preferential postal rates and antitrust exemptions for newspapers.

424 U.S. at 93 n. 127.

Moreover, most if not all of the institutional press, including the New York Times and the Boston Globe where Mr. Furgatch published his advertisements, are corporations which, as the Supreme Court noted in California Medical Association v. FEC, 453 U.S. at 200-201, are subject to other, more stringent restrictions on their political activities than the mere reporting requirements of which Mr. Furgatch complains. And section 431(9)(B)(i) does not exempt members of the institutional press from any of the Act's restrictions when they finance activities which are outside the press entities' "legitimate press function." FEC v. Massachusetts Citizens for Life, Inc., __ F.2d at __ (sl.op at 18); Readers Digest Association, Inc. v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y.

1981). It was undoubtedly for these reasons that the en banc Eleventh Circuit unanimously rejected the similar argument that "the provisions of 2 U.S.C. § 441b(a), together with the provisions of 2 U.S.C. § 431(9)(B)(i), discriminate abitrarily and unreasonably in violation of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other ..." Athens Lumber Company v. FEC, 689 F.2d 1006, 1015 (11th Cir. 1982) (certifying issues to the Eleventh Circuit Court of Appeals en banc), 718 F.2d 363 (11th Cir. 1983) (en banc) (answering certified questions in the negative), cert. denied, 104 S. Ct. 1580 (1984).

In sum, Mr. Furgatch's comparison between the Act's treatment of individuals and its treatment of the institutional press "is inapt"; accordingly, "no constitutional discrimination or first amendment burden or injury can be demonstrated from the differential treatment." California Medical Association v. FEC, 641 F.2d 619, 631 (9th Cir. 1980), aff'd 453 U.S. 182 (1981).

3. Mr. Furgatch's request (Br. 3-4, 27) that this court refer all constitutional questions for en banc review pursuant to 2 U.S.C. § 437h is an improper attempt to obtain relief that is the subject of a separate appeal pending in this court, which has not yet been briefed. Mr. Furgatch never requested certification pursuant to 2 U.S.C. § 437h from the district court in this

case.3/ His separate section 437h lawsuit seeking certification of these issues, filed in district court when this case was already pending on appeal, was dismissed by another district judge. Mr. Furgatch's appeal from that decision is pending before this court in No. 85-5963.

We will brief the merits of the section 437h issue in No. 85-5963, where that issue is properly presented. For the purposes of this case, it is sufficient to note that the Act does not require all constitutional issues to be resolved through the section 437h procedure. To the contrary, in California Medical Association v. FEC, 453 U.S. at 187, the Supreme Court specifically noted that "[t]he Act provides two routes by which questions involving its constitutionality may reach this Court. First, such questions may arise in the course of an enforcement proceeding brought by the Commission under 2 U.S.C. § 437g." In such cases as FEC v. National Right to Work Committee, 459 U.S. 197 (1982) and FEC v. Massachusetts Citizens for Life, Inc., __ F.2d __ (1st Cir. 1985), important constitutional issues were resolved through the normal section 437g procedures without convening an en banc court of appeals under 2 U.S.C. § 437h.

3/ Section 437h provides only for the district court to certify questions of the Act's constitutionality to the en banc court of appeals. It does not provide for a court of appeals panel to do so, and two en banc circuits have expressly declined to find jurisdiction on the basis of purported panel certification under section 437h. See FEC v. Lance, 635 F.2d 1132 (5th Cir.) (en banc), appeal dismissed, cert. denied, 453 U.S. 917 (1981); Athens Lumber Company v. FEC, 718 F.2d 363 (11th Cir. 1983) (en banc), appeal dismissed, cert. denied, 104 S. Ct. 1580 (1984).

In sum, there is no reason why a regular panel of the court cannot resolve Mr. Furgatch's constitutional arguments. If Mr. Furgatch is dissatisfied with the panel decision, he can petition for en banc reconsideration pursuant to Rule 35 of the Federal Rules of Appellate Procedure, just like any other litigant. But certification of constitutional issues to the en banc court for initial decision pursuant to 2 U.S.C. § 437h is unneccessary and improper.

CONCLUSION

For the reasons set forth above, as well as those stated in our opening brief, the court should reverse the district court's judgment and hold that Harvey Furgatch violated 2 U.S.C. §§ 434(c) and 441d, as alleged by the Commission.

Respectfully submitted,

Charles N. Steele
General Counsel

Richard B. Bader
Assistant General Counsel

Carol A. Laham
Attorney

FOR THE APPELLANT
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

September 6, 1985

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL ELECTION COMMISSION, Defendant,	)	
v.	)	Civil Action No. 85-5524
HARVEY FURGATCH, Plaintiff.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served, by first class mail, postage prepaid, a copy of the Reply Brief for Appellant Federal Election Commission on this 6th day of September 1985, on the following counsel:

H. Richard Mayberry, Jr.
Law Office of H. Richard Mayberry, Jr.
Ninth Floor
1667 K Street, N.W.
Washington, D.C. 20006

Carol A. Laham
Attorney