IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2227

JON EPSTEIN,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether appellant lacks standing to maintain this lawsuit.

2. Whether the district court properly concluded that the Federal Election Commission's dismissal of Epstein's administrative complaint was not contrary to law.

RULE 8(b) STATEMENT

This case has not previously been before this court or any other court except for the United States District Court for the District of Columbia, the judgment of which is appealed herein. Counsel is not aware of any related cases presently pending in this court or in any other court.

COUNTERSTATEMENT OF THE CASE

This case is before this court on appeal of Jon Epstein from a judgment of the United States District Court for the District of Columbia. On a motion for summary judgment, the district court held that the Federal Election Commission's ("the Commission") dismissal of an administrative complaint filed by Epstein was not contrary to law. The district court's memorandum opinion was issued on September 24, 1981 by Judge Louis F. Oberdorfer. Epstein asserts that this court has jurisdiction of the proceeding under 2 U.S.C. § 437g(a)(8) and (9).

A. The Commission Proceedings

On August 28, 1980, appellant Epstein filed a complaint with the Commission alleging that the Reader's Digest Association, Inc. ("RDA") had violated §441b(a) of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"),1/ by placing an advertisement in The Washington Post on August 27, 1980.2/ The advertisement highlighted several "[e]xclusive,

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1/ The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub.L. No. 93-443, 88 Stat. 1263 (1974); by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977); and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

2/ 2 U.S.C. § 437g(a)(1), provides that any person who believes a violation of the Act has occurred may file a complaint with the Commission.

probing articles" on public affairs which were to be included in the September 1980 issue of Reader's Digest. Under the heading "Which Political Party Should Head the Next Congress?" were excerpts from articles written by two Congressmen: one by Representative Jim Wright (D.Tex.), entitled "Why You Should Vote Democratic", and the other by Represenative Jack Kemp (R.N.Y.), entitled "Why You Should Vote Republican". A third section of the advertisement summarized another article from the same issue under the title "Washington's Year-End Spending Spree". The advertisement concluded by touting the Reader's Digest as "America's biggest town meeting... a forum for ideas that deeply concern the community, at large." Supplementary Appendix ("S.A.") at 88.

In his administrative complaint, Epstein contended that the advertisement constituted an independent expenditure within the meaning of 11 C.F.R. § 109 3/ because it expressly advocated the election of all Republicans in one section of the advertisement and the election of all Democrats in another section. He argued that this was a corporate expenditure by RDA, which violated

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3/ 11 C.F.R § 109.1(a) provides:

> "Independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion, of a candidate or any agent or authorized committee of such candidate.

2 U.S.C. § 441b and 11 C.F.R. § 114.2. 4/ Epstein also charged that if the advertisement, or any part of it, constituted campaign material prepared by a candidate for federal office, his authorized committee or agents, under 11 C.F.R. § 109.1(d)(1),5/ RDA's financing of the distribution of the material would be a contribution to that candidate which violated 2 U.S.C. § 441b(a). S.A. at 2. However, he offered no evidence to indicate that this was the case.6/

4/ 2 U.S.C. § 441b(a) states in pertinent part:

> (a) It is unlawful for....any corporation whatever...to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices...
>
> 11 C.F.R. § 114.2(b) states:
>
> (b) Any corporation whatever...is prohibited from making a contribution or expenditure...in connection with any Federal election.

5/ 11 C.F.R. § 109.1(d)(1) states in relevant part:

> The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered a contribution for the purpose of contribution limitations...

6/ In a supplementary submission to the Commission, Epstein argued that the Commission's debate regulations, 11 C.F.R. §§ 110.13 and 114.4(e)(2), were inapplicable to the advertisement at issue.

Upon receipt of his complaint, the Commission sent Epstein an acknowledgement and notified RDA of its opportunity to demonstrate that no action should be taken.7/ On October 14, 1980, RDA responded that the advertisement was not unlawful since it did "no more than advocate the purchase of Reader's Digest magazine." S.A. at 9.

The General Counsel submitted a report to the Commission on March 12, 1981 setting forth his factual and legal analysis of Epstein's complaint.8/ Following prior Commission policy with respect to advertisements by media corporations, the report focused on determining whether the primary purpose of the advertisement was to support a candidate or merely to advertise or promote the periodical. Noting that the advertisement contained introductory and concluding paragraphs promoting Reader's Digest and that the words "Reader's Digest" appeared at the bottom of the advertisement in bold print, the General Counsel observed that "[t]he ad in this matter appears to alert the public to upcoming

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7/ Within five days after receiving a complaint, the Commission is required to notify any person alleged to have committed a violation of the Act and to provide such person 15 days to demonstrate that no action should be taken on the complaint. See 2 U.S.C. § 437g(a)(1) and 11 C.F.R. §§ 111.5, 111.6.

8/ The General Counsel had submitted a report on October 31, 1980, which was not accepted by the Commission. The report was revised and resubmitted on March 12, 1981. S.A. at 42.

articles published in Reader's Digest and to promote Reader's Digest as a magazine." S.A. at 13. Hence, the General Counsel concluded that "the purpose of the advertisement [was] to sell the magazine by enticing potential readers with excerpts from the articles and to promote Reader's Digest as a magazine which deals with issues of political importance." S.A. at 14. Accordingly, the General Counsel recommended that the Commission find no reason to believe that the advertisement was a corporate expenditure prohibited by the Act. S.A. at 14.

On March 24, 1981, the Commission adopted the General Counsel's recommendation, and found no reason to believe that RDA had violated the Act as alleged by Epstein. S.A. at 15. The Commission dismissed the administrative complaint, closed its file in the matter and notified Epstein and RDA of its actions.9/

B. The District Court Proceedings

On May 1, 1981, Epstein requested the United States District Court for the District of Columbia, pursuant to 2 U.S.C.

9/ The Commission may dismiss complaints either by an affirmative vote by four of the six voting members or by failing to provide the four votes necessary to continue an enforcement matter. 2 U.S.C. § 437g(a)(2). Once a matter is dismissed, the Commission is required to notify the parties and to place the file on the public record. 2 U.S.C. § 437g(a)(4)(B)(ii), 11 C.F.R. §§ 111.9, 111.20.

§437g(a)(8), 10/ to declare the Commission's dismissal of his administrative complaint to be contrary to law. 11/ On September 24, 1981, the district court granted the Commission's motion for summary judgment, finding that the Commission's dismissal of Epstein's administrative complaint was not contrary to law. Joint Appendix ("J.A.") at 26.12/ Rejecting Epstein's argument

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10/ 2 U.S.C. § 437g(a)(8) states:

> (8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by failure of the Commission to act on such complaint during the 120 day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.
>
> (B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

11/ Epstein's original petition, filed on February 12, 1981, sought a declaration that the Commission had acted "contrary to law" by failing to take final agency action on his administrative complaint within 120 days. However, this claim was rendered moot when the Commission dismissed his administrative complaint on March 24, 1981. Epstein then filed a supplemental pleading changing the nature of his claim to an action seeking a declaration that the Commission's dismissal of his administrative complaint was arbitrary and capricious and, therefore, contrary to law. J.A. at 1, 6.

12/ By order of July 17, 1981, the district court had denied Epstein's motion for further discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. The court found that he had had sufficient time in which to undertake discovery and had not raised a genuine dispute as to any material fact in the case. J.A. at 51.

that the "major purpose" test utilized by the Commission was inherently arbitrary, the court found that:

> the Commission may reasonably determine that expenditures on publicity that have a purpose other than assistance of political candidates covered by the Act were not intended by Congress to be punished under the Act. Particularly is this so when the "major purpose" of the publicity is self-evidently not to advocate the election of candidates, but to promote the organization paying for the publicity.

J.A. at 79. The court concluded that the Commission's application of this test to the advertisement at issue was reasonable in that "the advertisement tended not to favor either of the arguments advanced in the two excerpts, and merely provided what purported to be a sample of the material available to readers of the magazine's September issue.". J.A. at 80. On November 20, 1981, Epstein filed a notice of appeal to this court.

ARGUMENT

I. EPSTEIN IS NOT AGGRIEVED BY THE COMMISSION'S ORDER AND LACKS STANDING TO MAINTAIN THIS SUIT.

Regardless of the merits of his claim, a litigant cannot maintain a suit in federal court without first demonstrating that he has a sufficient personal stake in the outcome to have Article III standing to litigate the claim in federal court. The Supreme Court has recently reaffirmed that, at the very least, this imposes a burden on a party seeking to invoke federal jurisdiction to:

> "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action and is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., ___ U.S. ___, 102 S.Ct. 752, 758 (Jan. 12, 1982). This requirement is also incorporated into 2 U.S.C. § 437g(a)(8), the jurisdictional statute under which this case was brought. For that provision does not purport to permit an appeal by every party whose administrative complaint has been dismissed by the Commission, but only by those parties who are "aggrieved" by such Commission orders. As this court has held:

> The requirement of aggrievement "serves to distinguish a person with a direct stake in the outcome of a litigation ... from a person with a mere interest in the problem". United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14... (1973). To show aggrievement, a plaintiff must allege facts sufficient to prove the existence of a "concrete, perceptible harm of a real, nonspeculative nature." Public Citizen v. Lockheed Aircraft Corp., 565 F.2d 708, 716 (D.C. Cir. 1977).

North Carolina Utilities Commission v. Federal Energy Regulatory Commission, 653 F. 2d 655, 662 (D.C. Cir. 1981).13/

Epstein has never alleged that he has suffered injury to any personal interest as a result of the Commission's decision not to proceed further against RDA. He fails to identify any injury other than perhaps "the psychological consequence presumably produced by observation of conduct with which one disagrees," which the Supreme Court held to be insufficient to confer standing in Valley Forge, 102 S.Ct. at 765. Epstein does not automatically qualify to be an "aggrieved" party for purposes of judicial review merely because the Act permitted him to participate in the administrative proceedings before the Commission, Options Advisors v. SEC, 668 F.2d 120, 122 (2d Cir. 1981)14/ and "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." Valley Forge, 102 S.Ct. at 765. In the absence of any showing of such

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13/ Of course, even if the Act contained no such limitation, a statute cannot lower the threshold requirements of standing under Article III. See Valley Forge, 102 S.Ct. at 766 n.24; Buckley v. Valeo, 424 U.S. 1, 11-12 (1976).

14/ Since administrative agencies are not bound by Article III, Congress can provide for persons to participate in agency proceedings even without any personal stake in the subject matter. Because of this, the concept of "standing" would be rendered meaningless in administrative review cases if anyone who unsuccessfully litigates before the agency were to be considered sufficiently "aggrieved" by the agency's decision to maintain a suit to review the agency's decision in federal court. While such persons would have standing to seek judicial enforcement of their statutory right to litigate before the agency, they should not be accorded standing to seek review of the merits of the agency's decision, in which they have no personal stake.

a personal stake in the controversy, entertaining Epstein's suit would impermissibly "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Valley Forge, 102 S.Ct. at 759, quoting United States v. SCRAP, 412 U.S. at 687.15/ This court should, therefore, dismiss this case for lack of jurisdiction.16/

15/ Of course, in cases such as Kay v. Federal Election Commission, No. 81-1566 (D.C. Cir., Dec. 1, 1981) (unpublished decision), and Brown v. Federal Election Commission, No. 80-2108 (D.C. Cir., Nov. 20, 1981) (unpublished decision), where the complainant before the Commission does have a personal interest in the outcome, the complainant's standing as an aggrieved party to seek review is unquestioned.

16/ Unlike Epstein's procedual argument discussed infra at 19, n.23, jurisdictional questions like standing cannot be waived by failure to raise them in district court. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). In any event, this issue can be raised on appeal as an alternative ground for the district court's judgment dismissing Epstein's petition. Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970).

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE COMMISSION'S DISMISSAL OF EPSTEIN'S ADMINISTRATIVE COMPLAINT WAS NOT CONTRARY TO LAW.

Review of the Commission's dismissal of an administrative complaint is limited by Section 437g(a)(8) to determining whether the Commission's action is "contrary to law." The Supreme Court recently held that under this standard the function of the reviewing court is not to decide whether the Commission's decision was correct,

> but rather the narrower inquiry into whether the Commission's construction [of the Act] was "sufficiently reasonable to be accepted by a reviewing court."...To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Federal Election Commission v. Democratic Senatorial Campaign Committee, ____ U.S. ____, 102 S.Ct. 38, 46 (Nov. 10, 1981). "Only if the agency acted in a manner which was arbitrary or capricious, was an abuse of discretion or otherwise contrary to law, should its actions be set aside by this Court." Hampton v. Federal Election Commission, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50,438-50,439 (D.D.C. 1977), aff'd. No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished).17/

Moreover, in reviewing the Commission's decision, the court should bear in mind that "the Commission is precisely the type of agency to which deference should presumptively be afforded." FEC v. DSCC, 102 S.Ct. at 45. As the Supreme Court explained:

17/ The arbitrary and capricious standard of review "presumes agency action to be valid...and requires affirmance if a rational basis exists for the agency's decision." Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 34 (D.C. Cir.) cert. denied, 426 U.S. 941 (1976).

> Congress has vested the Commission with "primary and substantial responsibility for administering and enforcing the Act," Buckley v. Valeo, 424 U.S. 1, 109...(1976), providing the agency with "extensive rulemaking and adjudicative powers." Ibid. It is authorized to "formulate general policy with respect to the administration of this Act," § 437d(a)(9), and has the "sole discretionary power" to determine in the first instance whether or not a civil violation of the Act has occurred. 424 U.S. at 112, n. 153. Moreover, the Commission is inherently bipartisan in that no more than three of its six voting members may be of the same political party, § 437c(a)(1), and it must decide issues charged with the dynamic of party politics, often under the pressure of an impending election.

Id. at 45.[18/]

The district court correctly applied this standard of review in finding that the Commission decision here was not contrary to law, for the General Counsel's report demonstrates that the Commission's decision was rationally based. Indeed, it is self-evident from reading the advertisement at issue that it is designed to sell magazines, and not to garner support for candidates. As the district court noted (S.A. at 80), the advertisement does not purport to endorse the positions stated in either of the article excerpts, but merely presents these as samples of the interesting articles to be found in the September Reader's Digest. The two article excerpts are presented not to convince readers of the advertisement to accept the views expressed by the authors, but only to convince them to purchase Reader's Digest and read the articles in their entirety.

18/ Epstein has properly abandoned his contention below that the General Counsel's report to the Commission does not provide an adequate basis for judicial review. For the Supreme Court has determined that the General Counsel's report constitutes a sufficient statement of reasons for dismissing a complaint for purposes of judicial review. FEC v. DSCC, 102 S.Ct. at 46 n.19.

Thus, there can be little question that the General Counsel's report was entirely reasonable in concluding that the purpose of the advertisement was to sell Reader's Digest, not to influence a federal election. Indeed, Epstein does not appear seriously to contest the conclusion that the major purpose of the advertisement was commercial rather than political. Rather, his argument is that it is impermissible for the Commission to utilize the "major purpose" test to determine the legality of advertisements by media corporations, since it has not always done so for non-media corporations. However, this test has consistently been applied by both the Commission and the courts to determine whether advertisements by media corporations violate § 441b of the Act, and its application in this context is strongly supported by the constitutional considerations which led Congress to provide special treatment for the publications of media corporations.

While the "major purpose" test has sometimes been utilized in other contexts as well, the Commission has consistently used this test to determine whether advertisements placed by media corporations constitute unlawful contributions or expenditures under the Act.19/ The "major purpose" test is particularly suited for media corporations

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19/ The "major purpose" test was set forth in Matter Under Review ("MUR") 1235, In re The Yes On Proposition 9 Committee, The Friends of Paul Gann, (1980) cited in the General Counsel's report in this case:

> The Commission has made it quite clear that a contribution would not necessarily occur in certain specific circumstances where the major purpose of the advertisement was not to influence a Federal election. This is especially true where there is an absence of any communication expressly advocating the election or defeat of a candidate (continued)

because advertising the sale of a periodical is an integral aspect of distributing the periodical itself. The right to distribute a publication is, of course, a part of the freedom of the press protected by the first amendment. See Griswold v. Connecticut, 381 U.S. 479, 482 (1965). Moreover, unlike non-media corporations, controversial articles are the product which a media corporation has to sell. Congress has specifically recognized this special status of media corporations by providing, in Section 431(9)(B)(i), that the costs of publishing such articles through media facilities do not constitute unlawful expenditures under the Act, unless the facility is owned or controlled by a political party, political committee or candidate.20/

19/ (continued)

> or the solictation of a campaign contribution. (... AO's 1978-15, 1978-4, 1977-54, 1977-42 and MUR No. 1051).

Applying the major purpose test in MUR 1235, the Commission accepted the General Counsel's recommendation that television and radio advertisements placed by a committee organized to support a state initiative did not constitute unlawful corporate expenditures. Rather, the "major purpose" of the advertisements, which favorably mentioned a U.S. Reprsentative, was found to be passage of the initiative not the election of the Congressman. S.A. at 23, 26.

20/ 2 U.S.C. § 431(9)(B)(i) states:

> The term "expenditure" does not include -- (i) 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 committee, or candidate.

Contrary to Epstein's assumption (Br. at 18 n.4), the media exemption also applies to contributions. See 11 C.F.R. § 100.7(b)(2).

In view of these considerations, the Commission has consistently found no reason to believe that a violation of the Act resulted from a media corporation's placement of an advertisement when its major purpose was not to advocate the election or defeat of a candidate, but to promote a publication of the corporation. For example, in MUR 296, In re Penthouse Magazine (1976), the Commission found no reason to believe that a violation of the Act resulted from the placement of a full page ad for Penthouse magazine in various newspapers. S.A. at 16. Although the advertisement appeared to advocate the defeat of Jimmy Carter, the General Counsel's report found that "the ad is most logically construed on its face as an effort, albeit suggestive, to promote a commercial venture -- namely, the selling of a controversial article regarding Mr. Carter." S.A. at 17-18. The report concluded that given the overriding protection of the first amendment in this area, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), further inquiry was unwarranted. S.A. at 18.

In MUR 1051, In re Congressman Les Aspin (1979), the Commission again applied the "major purpose" standard, finding no reason to believe that the Act was violated by an advertisement. The advertisement, placed in The Washington Post, promoted the sale of Scientific American, a commercial magazine, by referring to an article in an upcoming issue written by Congressman Les Aspin. S.A. at 19. The General Counsel determined that "the major purpose of the advertisement was not connected with [the

Congressman's] election but the promotion of a magazine," and thus it did not constitute a contribution to the Congressman. S.A. 21.21/

The courts have also recognized that application of the "major purpose" test to advertising by publishing corporations is justified by the express distinction between media and non-media corporations created by the Act. In Reader's Digest Association, Inc. v. Federal Election Commission, 509 F.Supp. 1210, 1215 (S.D.N.Y. 1981), the court concluded that the dissemination of a videotape re-enactment of the Chappaquiddick incident to television stations would be protected by the Act's media exemption if the purpose was to publicize an upcoming issue of the magazine containing an article on the subject. In Federal Election Commission v. Phillips Publishing, Inc., 517 F.Supp. 1308, 1313 (D.D.C. 1981), the court applied the "major purpose" test to find that a letter mailed by a newsletter publisher to current and potential subscribers was not unlawful because "the purpose of the solicitation letter was to publicize the [newsletter] and obtain new subscribers, both of which are

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21/ Epstein's allegations of Commission inconsistency are unfounded. None of the MURs or advisory opinions he cites involved a media corporation's purchase of advertising space for the purpose of publicizing an upcoming issue. All the court need determine here is that the Commission's application of the "major purpose" test to a media corporation advertisement is not unreasonable; whether the Commission has applied the "major purpose" test correctly in other contexts is not now before the court. Thus, none of the Commission decisions Epstein relies upon are relevant to decision here. Similarly, the court need not determine whether the "major purpose" test could properly be extended to the extreme hypothetical situations postulated by Epstein in order to conclude that the Commission's use of it in this case was reasonable.

normal, legitimate press functions." In Phillips, the court took judicial notice of the fact that "newsletters and other publications solicit subscriptions, and in their advertising doing so, they publicize content and editorial positions." Id.

Examined against this background, as the district court found, the Commission's application of the "major purpose" test in this case cannot be found to be unreasonable.22/ The advertisement contains excerpts from articles which appeared, in full, in the September 1980 issue of Reader's Digest, it expressly states that the excerpts written by the two congressmen were from articles appearing in that issue of Reader's Digest, and it indicates no intent, express or implied, to advocate either political viewpoint. Contrary to Epstein's assertions (Br. at 16), there is no express advocacy for any particular candidate and there is no solicitation for contributions in the advertisement. Congressmen Kemp and Wright are identified only as the authors of the articles, and not as desirable candidates for office. Thus, since the advertisement appears on its face only to promote

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22/ The district court did not err in denying Epstein's motion for discovery of General Counsel reports in other uncompleted MURs, which are not on the public record. See supra, p. 7, n.12. The Commission is prohibited from releasing such information by 2 U.S.C. § 437g(a)(12), which explicitly precludes all disclosure of information from open MURs without the consent of the respondent. It is well established that such a statute precludes discovery of information even if relevant to a lawsuit and essential to the establishment of the plaintiff's claim. See Baldrige v. Shapiro, ____ U.S. ____, 50 U.S.L.W. 4227, 4231 (Feb. 24, 1982).

(footnote continued)

the sale of Reader's Digest magazine by publicizing the contents of an upcoming issue, Epstein's administrative complaint was properly dismissed by the Commission.23/

(footnote continued)

> The sole exception to this confidentiality requirement, 11 C.F.R. § 111.21(c), only authorizes the production of information from open MURs in a civil suit concerning that particular MUR, and even then a protective order may be required to introduce information from an open MUR. See Common Cause v. Federal Election Commission, 83 F.R.D. 410, 412 (D.D.C.1979). That provision does not authorize the release of information from open MURs for use in unrelated litigation, as Epstein desired.
>
> In any event, as the court below found, Epstein has failed to raise a genuine issue as to any material fact involved in this case. A General Counsel report in an uncompleted case would not reflect a final agency determination, and thus could not show that the agency's decisions have been inconsistent. Moreover, Epstein has shown no reason to believe that he would have found any inconsistent reports if the discovery he sought had been permitted. The district court thus properly refused to permit Epstein to conduct a fishing expedition through the Commission's sensitive and confidential investigatory files.

23/ As Epstein concedes, the technical procedural argument he raises on pages 22-23 of his brief to this court was never presented to the district court. Accordingly, this court

> need not even consider this contention,... for whatever merit there might be in this argument, if any, the appellant[] now raise[s] it for the first time on appeal; [he] did not put this issue before the trial court. As we have said, "a claimant ordinarily cannot expect to lose in the trial court on one theory but win on appeal under another."

Farrow v. Cahill, 663 F.2d 201, 206 (D.C. Cir. 1980), quoting Browzin v. Catholic University of America, 527 F.2d 843, 850 n.15 (D.C. Cir. 1975). Epstein's argument would not warrant reversal here in any event, since even if he were correct, he was not prejudiced in any way by the alleged technical error. See Administrative Procedure Act, 5 U.S.C. § 706; Doe v. Hampton, 566 F.2d 265, 277 n.29 (D.C. Cir. 1977). The result of the Commission's consideration of the General Counsel's first report was exactly what Epstein says it should have been: the General Counsel gave the matter further study, revised his report and resubmitted it to the Commission, which adopted his recommendation on March 24, 1980.

CONCLUSION

For the reasons set forth herein, the Commission submits that this court should dismiss this action for lack of jurisdiction. If the court determines that it has jurisdiction, it should affirm the district court's decision that the Commission's dismissal of Epstein's administrative complaint was not contrary to law.

Respectfully submitted,

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