UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6047

FEDERAL ELECTION COMMISSION,

Plaintiff-Appellee,

v.

HARVEY FURGATCH,

Defendant-Appellant.

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

BRIEF FOR APPELLEE FEDERAL ELECTION COMMISSION

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On Appeal From the United States District Court
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BRIEF FOR THE FEDERAL ELECTION COMMISSION

ISSUES PRESENTED

1. Whether the District Court abused its discretion by enjoining Mr. Furgatch, pursuant to 2 U.S.C. § 437g(a)(6)(B), from repeating his violations of the Act in the future.

2. Whether the District Court abused its discretion by assessing a civil penalty within the limit specified in 2 U.S.C. § 437g(a)(6)(B).

STATEMENT OF THE CASE

In an earlier decision in this litigation, this Court found that Harvey Furgatch violated 2 U.S.C. §§ 434(c) and 441d. FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 108 S.Ct.

151 (1987). Mr. Furgatch now appeals from that part of the district court's order after remand, issued April 26, 1988, which assessed a civil penalty of $25,000 and permanently enjoined him from future similar violations of those provisions (Exc. 2).[1/]

A. Prior Proceedings In This Case

A few days before the November 4, 1980, Presidential election, Mr. Furgatch made expenditures of $25,008 to pay the costs of full page political advertisements in opposition to the reelection campaign of President Carter, which appeared in The New York Times and The Boston Globe. The expenditures were made independently of any candidate or candidate's authorized committee or agent. (Exc. 4)

The Federal Election Commission ("the Commission" or "the FEC") is the independent agency charged with administering the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("FECA" or "the Act").[2/] On March 25, 1983, after

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1/ "Exc. ___" refers to the consecutively numbered pages in the Excerpts of Record filed by Mr. Furgatch. "S.E. ___" refers to the pages in the Supplemental Excerpts of Record submitted with this brief. "C.R.___" refers to the numbered documents in the district court clerk's record.

2/ 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, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1509, 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3335, 3357, and by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 662, 663 (June 27, 1988).

completing an administrative investigation and unsuccessfully attempting to conciliate the matter, the Commission filed a complaint against Mr. Furgatch in the district court.[3/] (C.R. 1). The complaint alleged that Mr. Furgatch had violated 2 U.S.C. § 434(c) by failing to file a report with the Commission of his $25,008 in independent expenditures[4/] and that he had violated 2 U.S.C. § 441d because his Boston Globe advertisement failed to state that the communication was not authorized by any candidate or candidate's committee. (C.R. 1).

The district court initially dismissed the complaint, (C.R. 29) but on January 9, 1987, this Court found that Mr. Furgatch had committed the violations alleged. FEC v. Furgatch, 807 F.2d

3/ The Act vests the Commission with "exclusive jurisdiction" over civil enforcement of the Act. 2 U.S.C. § 437c(b)(1). Section 437g(a)(1)-(a)(4) sets out a detailed administrative procedure by which the Commission investigates possible violations of the Act. Upon completion of those administrative proceedings, if the Commission is unable to resolve a matter through conciliation, it is authorized to bring a civil suit to enforce the law in the appropriate district court. 2 U.S.C. § 437g(a)(6)(A).

4/ The Act defines "independent expenditure" as an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate, which is made independently of any candidate, or any authorized committee or agent of such candidate. 2 U.S.C. § 431(17). See also 11 C.F.R. §§ 100.16 and 109.1(a).

Section 434(c) requires, inter alia, that every person other than a political committee, who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing certain specified information for all such independent expenditures made by such person. See also 11 C.F.R. § 109.2(a). Section 434(c) also requires that independent expenditures aggregating $1,000 or more made by any person after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. See also 11 C.F.R. § 109.2(b).

857 (9th Cir.), cert. denied, 108 S.Ct. 151 (1987). This Court rejected Mr. Furgatch's argument that the advertisements did not constitute independent expenditures because they did not "expressly advocate" President Carter's defeat, and concluded that "Furgatch was obligated to file the statement and make the disclosures required for any 'independent expenditure' under the Federal Election Campaign Act. He is liable for the omission." FEC v. Furgatch, 807 F.2d at 865. The Court also rejected Mr. Furgatch's constitutional arguments, noting that

> the constitutionality of the provisions at issue was reviewed in Buckley v. [Valeo, 424 U.S. 1 (1976)], and the standard set forth by the Supreme Court in that case was incorporated in the Act in its present form. Treatment of those constitutional issues is implicit in our disposition of the statutory question.

FEC v. Furgatch, 807 F.2d at 865. This Court denied Mr. Furgatch's petition for rehearing and suggestion for rehearing en banc on April 23, 1987, and the Supreme Court denied his petition for writ of certiorari on October 5, 1987. FEC v. Furgatch, 108 S.Ct. 151 (1987).[5/]

5/ On March 6, 1985, while this case was pending before this Court, Mr. Furgatch filed a separate action for declaratory relief which sought adjudication of the identical constitutional attacks on sections 434(c) and 441d that were already before this Court as defenses in this case. Furgatch v. FEC, (S.D. Cal. No. 85-0720N(M)). On April 1, 1985, the district court denied Mr. Furgatch's motion to immediately certify those constitutional questions to the en banc court of appeals pursuant to 2 U.S.C. § 437h, and dismissed the case.

Mr. Furgatch appealed, again requesting immediate en banc consideration, and on January 21, 1987, the same panel that issued the decision in this case remanded Mr. Furgatch's declaratory judgment action to the district court, noting that (Footnote Continued)

B. The Proceedings In The District Court.

On remand, after the district court denied his request for an indefinite extension of time, Mr. Furgatch finally filed his answer to the Commission's complaint on July 28, 1987 (C.R. 57). In his answer, Mr. Furgatch denied that he had committed the violations alleged by the Commission and found by this Court. When the Commission moved for summary judgment Mr. Furgatch filed an opposition urging the district court to find that he had not violated the Act "notwithstanding the decision of the Court of Appeals in this case on January 9, 1987" (S.E. 1-2). At a hearing on October 19, 1987, the district court orally granted summary judgment for the Commission (S.E. 17), and on April 26, 1988, the district court entered its final Order and Judgment (Exc. 1-2) which ordered Mr. Furgatch to pay a civil penalty of $25,000, permanently enjoined him from future similar violations, and ordered him to file the report of his $25,008 in independent expenditures "within 30 days." On June 3, 1988, 38 days later, Mr. Furgatch finally filed his report of independent expenditures

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(Footnote Continued)

"we upheld the constitutionality of the Campaign Act as applied against Furgatch in Federal Election Commission v. Furgatch, [807 F.2d 857 (9th Cir. 1987]" Furgatch v. FEC, No. 85-5963 (9th Cir. Jan. 21, 1987). Nevertheless, on remand, Mr. Furgatch again moved the district court to certify the constitutional questions to the en banc court of appeals. When the district court again refused to certify constitutional questions, Mr. Furgatch petitioned this Court for a Writ of Mandamus. The petition was denied on February 22, 1988, and on May 5, 1988, the case was dismissed.

with the Commission, a copy of which is attached at the back of this brief for the Court's information.

C. Jurisdiction

The Commission agrees with the Statement of Jurisdiction (Br. 3) of Mr. Furgatch, except that the order from which this appeal is taken was entered on April 26, 1988 rather than April 25 (Exc. 1).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING MR. FURGATCH PURSUANT TO 2 U.S.C. § 437g(a)(6)(B) FROM REPEATING THE VIOLATIONS OF THE ACT IT HAD FOUND.

A. Mr. Furgatch Has Not Demonstrated That A Permanent Injunction Was Unwarranted

1. Standard of review

This Court reviews the grant or denial of a permanent injunction for abuse of discretion or application of an erroneous legal principle. United States v. W.T. Grant Co., 345 U.S. 629, 633-34 (1952); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1544 (9th Cir. 1987); Long v. IRS, 693 F.2d 907, 909 (9th Cir. 1982). In deciding whether to issue an injunction, the district judge's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it." United States v. W.T. Grant Co., 345 U.S. at 633. A party seeking to overturn an injunction "has the burden of showing that the court abused that discretion, and the burden necessarily is a heavy one." SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1982).

2. The Act explicitly authorizes injunctive relief upon a showing that the respondent "has committed" a violation of the Act.

Both the district court (Exc. 1-2) and this Court, FEC v. Furgatch, 807 F.2d 857, 865 (9th Cir.), cert. denied, 108 S.Ct. 151 (1987), have found that Mr. Furgatch violated sections 434(c) and 441d of the Act, and 2 U.S.C. § 437g(a)(6)(B) explicitly authorizes a district court to "grant a permanent or temporary injunction ... upon a proper showing that the person involved has committed, or is about to commit" a violation of the Act. No other requirements for injunctive relief are stated in the Act. "When an injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated," United States v. White, 769 F.2d 511, 515 (8th Cir. 1985), quoting United States v. Buttorff, 761 F.2d 1056, 1059 (5th Cir. 1985). Since the sole statutory prerequisite for issuance of an injunction has plainly been met in this case, no other requirements need be satisfied. Trailer Train Co. v. State Board of Equalization, 697 F.2d 860, 869 (9th Cir.), cert. denied, 464 U.S. 846 (1983); United States v. White, 769 F.2d at 516; United States v. Buttorff, 761 F.2d at 1063.

Mr. Furgatch concedes (Br. 9) that prior to 1980, the Act provided for injunctive relief upon a showing that the Act had been violated. However he argues (Br. 9-11), for the first time on appeal, that an amendment to section 437g(a)(6)(B) in 1979 was intended to narrow the Act's remedial provision to authorize

injunctive relief only if the Commission produces evidence that a person is "about to" commit another violation. As Mr. Furgatch notes (Br. 10), the 1979 amendments to the Act retained the prior provision defining the forms of judicial relief available in a civil enforcement suit, but the "concepts of past and future violation were separated by a comma and the parenthetical was added." This change does not help Mr. Furgatch, for the revised provision explicitly authorizes injunctive relief on both sides of the comma, for past as well as contemplated violations.[6/] The effect of the new parenthetical is not to restrict the availability of injunctive relief, but to clarify that only injunctive relief, and not a civil penalty, is available when the court only finds a respondent is "about to" commit a violation of the Act.

This clarification does nothing more than conform the language of this provision to the other provisions of the Act

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6/ The full text of 2 U.S.C. § 437g(a)(6)(B) reads (emphasis added):

> (B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

authorizing civil penalties only for past violations,[7] which was undoubtedly the intent of the original provision as well.[8] Thus, the House Report on the 1979 bill to amend the Act, H.R. Rep. No. 96-422, 96th Cong., 1st Sess. (1979), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1979, at 184 (1983), explained in detail all the substantive changes proposed, but merely stated (id. at 22, 1979 Leg. Hist. at 206) that the provision that is now 2 U.S.C. § 437g(a)(6)(B) "incorporates section 313(a)(5)(C) of the current Act." This explanation plainly indicates that the alterations in the language were considered minor and were not intended to change the intended effect of this provision; indeed, it is unlikely that Congress would substantially alter the Act's remedial scheme in the manner Mr. Furgatch suggests without some discussion in

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7/ See 2 U.S.C. §§ 437g(a)(5)(A), (B); 2 U.S.C. § 437g(a)(6)(C).

8/ Although there is no indication that Congress ever contemplated such an unlikely remedy, the prior wording of the judicial remedy provision, former 2 U.S.C. § 437g(a)(5)(C), could have been read literally to authorize a civil penalty when a person was "about to" violate the Act:

> In any civil action instituted by the Commission under subparagraph (B), the court may grant permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, upon a proper showing that the person involved has engaged or is about to engage in a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

the legislative history. See Common Cause v. FEC, 842 F.2d 436, 477 (D.C. Cir. 1988) ("Remembering Sherlock Holmes' famous clue of the dog that did not bark, we are most impressed by the notion that a major statutory revision ... would likely have spurred some greater debate or controversy"); Finnegan v. Leu, 456 U.S. 431, 441 n. 12 (1982); FEC v. California Medical Assn., 502 F. Supp. 196, 200 n.5 (N.D. Cal. 1980).[9/] In sum, "changes in statutory language need not ipso facto constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakably clear. That is the situation here." United States v. Montgomery County Maryland, 761 F.2d 998, 1003 (4th Cir. 1985). See also, Trailer Train Co. v. State Board of Equalization, 697 F.2d at 869 n.16.

Contrary to Mr. Furgatch's argument (Br. 10-11), the Act's authorization of prospective injunctive relief for past violations is entirely consistent with the usual approach of Congress. More than forty years ago it was already recognized that "substantially all regulatory statutes" authorized courts to issue "an order enjoining any person who has engaged or is about to engage" in actions that violate the statute. Hecht v. Bowles, 321 U.S. 321, 328-329 (1944), quoting S. Rep. No. 931, 77th Cong., 2d Sess. 10 (1942). The Supreme Court has long found it

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9/ Mr. Furgatch's curious argument (Br. 10) that the House Report's "use of the phrase 'incorporates' suggests that a change was intended" is, of course, the opposite of the normal meaning of that word. The House Report utilized the term "incorporates" several times when it retained a prior provision with only minor changes in the wording; when it intended a substantive change, the Report said so.

to be a "salutory principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." NLRB v. Express Publishing Co., 312 U.S. 426, 436 (1941).

> The courts have an obligation, once a violation ... has been established to protect the public from a continuation of the harmful and unlawful activities. A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities ....

United States v. Parke, Davis & Co., 362 U.S. 29, 48 (1960). See also Trailer Train Co. v. State Board of Equalization, 697 F.2d at 869; Donovan v. Brown Equipment and Service Tools, Inc., 666 F.2d 148, 157 (5th Cir. 1982). Indeed, this principle is so well established that the full scope of a court's equitable power to issue appropriate injunctive relief for proven violations of law will be recognized "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity...." Wirtz v. Milton J. Wershow Co., 416 F.2d 1071, 1072-1073 (9th Cir. 1969), quoting Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291 (1959). Mr. Furgatch has fallen far short of this burden to demonstrate that the Act precludes a district court from utilizing this standard remedy for proven violations of law.

3. Mr. Furgatch failed to demonstrate that his violations of the Act are unlikely to recur.

Mr. Furgatch argues (Br. 12-13) that an injunction should have been denied because the Commission produced no evidence that

he intends to violate the Act again. The courts have long recognized, however, that a finding of a statutory violation is itself sufficient to support an injunction because such a finding is "highly suggestive of a likelihood of future violations." SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975); CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir.), cert. denied, 442 U.S. 921 (1979); FEC v. Weinsten, 462 F.Supp. 243, 252 (S.D.N.Y. 1978). Thus, "[o]nce the government establishes the existence of a statutory violation, the burden shifts to the defendants to show that 'there is no reasonable expectation that the wrong will be repeated.'" United States v. Sene X Eleemosymary Corp., 479 F. Supp. 970, 981 (S.D. Fla. 1979), quoting United States v. W.T. Grant Co., 345 U.S. at 633. See also SEC v. Goldfield Deep Mines Co., 758 F.2d 459, 467 (9th Cir. 1985); United States v. White, 769 F.2d at 515.10/

Before the district court, Mr. Furgatch made no attempt to sustain this burden. He submitted no evidence whatever of any action he had undertaken to cure his past violations or to show a pattern of compliance after the violations, and he never submitted anything to the district court to acknowledge the violations found or to assure the court that he would comply with the Act in the future. Obviously, Mr. Furgatch cannot sustain

10/ Courts granting injunctions based on past violations of the Act have not required any additional evidence that the defendant is likely to repeat the violation. See, e.g., FEC v. American International Demographic Services, Inc., 629 F. Supp. 317, 320 (E.D. Va. 1986); FEC v. National Education Assn., 457 F. Supp. 1102, 1112 (D.D.C. 1978).

his burden of proof on this issue by simply asserting that the Commission had not submitted evidence to the contrary, and that assertion is certainly not enough to sustain his "heavy" burden on appeal of showing that "there has been a clear abuse of discretion." SEC v. Manor Nursing Centers, 458 F.2d at 1100.

In any event, the facts in the record clearly preclude any rational argument that the presumption in favor of an injunction against repetition of Mr. Furgatch's proven violations could be successfully rebutted. First, it is not true, as Mr. Furgatch asserts (Br. 13) that his violation "took place in 1980." Mr. Furgatch did not violate 2 U.S.C. § 434(c) by publishing his advertisements, but by failing to file a report of his expenditures, and he continued to refuse to file that report for another seven and one half years. Indeed, even after this Court found that his failure to file the report was unlawful, and the Supreme Court denied his petition for certiorari, Mr. Furgatch neither acknowledged his liability nor acted to cure his continuing violation by filing the report. Instead, on remand, he urged the district court to disregard this Court's decision as being "so clearly erroneous that this Court can only avoid a manifest injustice by declining to follow it" (S.E. 3). Even when the district court orally rejected this argument and granted the Commission's motion for summary judgment during the hearing on October 19, 1987 (S.E. 16-17), Mr. Furgatch did not file the report. Not until June 3, 1988 -- 38 days after entry of the

district court's final order requiring that the report be filed "within 30 days" (Exc. 1) -- did Mr. Furgatch finally file the report which the Act had required to be filed more than seven years before. (A copy of that report is attached at the back of this brief). And at no time has Mr. Furgatch ever undertaken to assure the district court that he would accept this Court's construction of the Act and comply with it in the future.

Courts have declined to issue injunctions when they have been satisifed of future compliance by respondents' prompt attempts to cure violations voluntarily, Hecht v. Bowles, 321 U.S. at 325, or by their assurances of contrition and future compliance, United States v. W.T. Grant Co., 345 U.S. at 634. But such cases stand in stark contrast to the circumstances here. Mr. Furgatch refused to take any corrective action even after this Court had found him liable, and it is settled in this Circuit that a respondent "that takes curative action only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction." EEOC v. Goodyear Aerospace Corp., 813 F.2d at 1544. Accord, Brock v. Big Bear Market No. 3, 825 F.2d 1381, 1383 (9th Cir. 1987) ("[C]urrent compliance alone, particularly when achieved by direct scrutiny of the government, is not sufficient ground for denying injunctive relief"); Long v. IRS, 693 F.2d at 909; SEC v. Manor Nursing Centers, Inc., 458 F.2d at 1101; CFTC v. Hunt, 591 F.2d at 1220. And while the adequacy of a respondent's

expression of contrition and disclaimer of future intent to repeat the violation is a matter for "the discretion of the trial court," United States v. W.T. Grant Co., 345 U.S. at 634, an injunction is clearly warranted where, as here, "a violator has continued to maintain that his conduct was blameless...." CFTC v. Hunt, 591 F.2d at 1220. Accord, SEC v. Manor Nursing Centers, 458 F.2d at 1101. We do not know whether Mr. Furgatch has failed to report any subsequent expenditures for express election advocacy,[11/] but his intransigence during the course of this litigation plainly precludes any suggestion that the district court abused its discretion in finding an injunction warranted.

B. The Injunction Issued In This Case Did Not Violate Rule 65(d)

1. Standard of review

Mr. Furgatch argues (Br. 13-21) that the injunction issued by the district court violates the specificity requirement of Rule 65(d) of the Federal Rules of Civil Procedure. "Challenges to an injunction pursuant to rule 65(d) are reviewed de novo."

11/ The Commission's records contain no reports of independent expenditures by Mr. Furgatch other than the one he filed pursuant to the district court's order in this case. Thus, he clearly has not taken any affirmative step that would show an intent to comply with the Act's reporting requirements. Whether Mr. Furgatch has published express advocacy that he did not report is unknown to the Commission. It may be that Mr. Furgatch has simply not incurred a reporting obligation because he has not published any express advocacy since 1980. Even if this were true, however, it would not demonstrate an intent to file a report if he does publish express advocacy again. This is particularly true because Mr. Furgatch has admitted (S.E. 42) that he has curtailed his political activities only because of the pendency of this lawsuit. The cases cited on p. 14 clearly establish that such circumstances do not make an injunction unnecessary.

United States v. Holtzman, 762 F.2d 720, 726 (9th Cir. 1985). "The specificity requirement is not unwieldy, however. An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." Meyer v. Brown & Root Construction Co., 661 F.2d 369, 373 (5th Cir. 1981). Thus, "[i]njunctions are not set aside under rule 65(d) ... unless they are so vague that they have no reasonably specific meaning." United States v. Holtzman, 762 F.2d at 726.

2. The injunction issued by the district court is not vague.

The district court's two page Order and Judgement (Exc. 1-2) explicitly found that Mr. Furgatch "violated 2 U.S.C. § 434(c) by failing to report the $25,008 in independent expenditures he made," and "is in violation of 2 U.S.C. § 441d since the November 1, 1980 advertisement ... financed by defendant Furgatch failed to state that the communication was not authorized by any candidate or candidate's committee." It then enjoined him (Exc. 2) from committing "future similar violations." There is nothing mystifying about this straightforward order: it enjoins Mr. Furgatch from repeating his violation of section 434(c) by failing to file a report, and his violation of section 441d by failing to include a complete disclaimer, when he makes any future independent expenditure to finance a communication containing express advocacy. It is well settled that "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to

have been committed...." NLRB v. Express Publishing Company, 312 U.S. at 435. See also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("'[T]he district court has not merely the power but the duty to render a decree which will ... bar like discrimination in the future.'"). Thus, "[t]here can be no abuse of discretion in framing an injunction in terms of the specific statutory provision which the Court concludes has been violated." SEC v. Manor Nursing Centers, Inc., 458 F.2d at 1103. See also, Meyer v. Brown & Root Construction Co., 661 F.2d at 373.

In this case, not only did the district court specify the precise provisions of the Act that Mr. Furgatch is enjoined from violating, but this Court has already issued a lengthy opinion explaining in detail the test for a violation of those provisions. FEC v. Furgatch, 807 F.2d at 857. In these circumstances, Mr. Furgatch's continuing protestations that he cannot understand what the injunction prohibits are difficult to fathom.12/

12/ Mr. Furgatch recites (Br. 14-18) a number of cases in which injunctions were found to be vague, but since each of those cases turns upon its own peculiar circumstances they provide little guidance here. The important point is that none of those cases involved an injunction issued pursuant to statute in a law enforcement suit, prohibiting further violation of a specific statutory provision the court had already found the respondent to have violated. Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985) and Common Cause v. NRC, 674 F.2d 921 (D.C. Cir. 1982) do not, as Mr. Furgatch argues (Br. 16) establish that "[t]he term 'similar' is inherently vague." Injunctions against "similar" behavior were found vague in those cases only because the district courts failed to specify the characteristics of the past behavior that they had found crucial to granting the relief. See Gulf Oil Corp. v. Brock, 728 F.2d at 843. As noted in the text, in this case the test for violation of sections 441d and 434(c) could hardly have been explained in greater detail than this Court already has.

§ 437g(a)(11), and "[in] criminal contempt willful disobediance must be proved beyond a reasonable doubt." Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 782 (9th Cir. 1983). Moreover, "[w]illfulness in this context means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order." Id. In any event, Mr. Furgatch can resolve in advance any remaining doubt he may have about the applicability of sections 441d and 434(c) to his future activities by obtaining an advisory opinion from the Commission pursuant to 2 U.S.C. § 437f. The availability of such a procedure has been found to mitigate perceived ambiguity both in injunctions, United States v. Readers Digest Assn., 662 F.2d 955, 970 n.22 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982), and in the Act itself, Martin Tractor Co. v. FEC, 627 F.2d 375, 384-85 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980).[14/]

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ASSESSING A CIVIL PENALTY WITHIN THE LIMIT SPECIFIED IN 2 U.S.C. § 437g(a)(6)(B)

A. Standard Of Review

This Court reviews a district court's assessment of a civil penalty under the deferential abuse of discretion standard. FEC

14/ Mr. Furgatch asserts (Br. 21) that the district court failed to set forth the reasons for the injunction. However, as we have shown supra, pp. 7-9, the injunction in this case was issued pursuant to a statute, 2 U.S.C. § 434g(a)(6)(B), authorizing injunctive relief when a violation has been found. The district court cited this provision as authority for the injunction it issued, and the specific findings of violations both in the Order and Judgment (Exc. 1-2) and in the accompanying Findings of Fact and Conclusions of Law (Exc. 4-7) provide adequate reasons for the injunction under that provision. See, e.g., Meyer v. Brown & Root Construction Co., 661 F.2d at 373; Hunter v. United States, 388 F.2d 148, 155 n.6 (9th Cir. 1967).

v. Ted Haley Congressional Committee, 852 F.2d 1111 (9th Cir. 1988) (sl. op. 8885); AFL-CIO v. FEC, 628 F.2d 97, 100 (D.C. Cir.), cert. denied, 449 U.S. 982 (1980); United States v. Papercraft Corp., 540 F.2d 131, 135 (3d Cir. 1976) rev'd on other grounds, 540 F.2d 131 (3d Cir. 1976), quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 229 n.5 (1975).

B. The District Court Did Not Abuse Its Discretion By Assessing A Civil Penalty Equal To The Amount Of Mr. Furgatch's Expenditures, As Expressly Authorized By 2 U.S.C. § 437g(a)(6)(B).

Section 437g(a)(6)(B) of the Act explicitly authorizes a district court to assess a civil penalty up to $5000 per violation, and when the violation found involves a contribution or expenditure in excess of $5000 the civil penalty can be increased to the amount of that contribution or expenditure. The independent expenditures involved in Mr. Furgatch's violation of 2 U.S.C. § 434(c) amounted to $25,008, and the district court properly followed the statutory provision by assessing a civil penalty within that amount.15/

Mr. Furgatch does not contend that the civil penalty assessed by the district court exceeds the statutory limit or that it violates any other provision of law. Instead, he argues (Br. 22-29) that there were mitigating circumstances which ought to have induced the district court to reduce the civil penalty. However, we show below that Mr. Furgatch failed to provide any

15/ Under section 437g(a)(6)(B) the Commission could have sought an additional $5,000 for the section 441d violation.

credible support for his claims of mitigation, and has thus fallen short of his burden to show that the district court's assessment of a civil penalty within the limit allowed by the statute was an abuse of discretion. See United States v. Papercraft Corp., 540 F.2d at 135; United States v. J.B. Williams Co., 498 F.2d 414, 438 (2d Cir. 1974).16/

The purpose of a civil penalty is to deter the respondent and others from engaging in the violations at issue. To serve that purpose, a civil penalty must "reflect the seriousness of the violation, must penalize offenders and act as a deterrent to others"; thus, it must be large enough to ensure that it would not be "regarded by potential violators as 'an acceptable cost'" for engaging in the prohibited activities. United States v. Louisiana-Pacific Corp., 554 F. Supp. 504, 507 (D.Ore. 1982) (quoting United States v. ITT Continental Baking Corp., 420 U.S. at 231), vacated on other grounds, 754 F.2d 1445 (9th Cir. 1985). In cases involving regulation of business activities Courts have identified several mitigating factors that reflect these purposes: whether the respondent's violation was committed in good faith, the respondent's ability to pay, the size of the monetary benefits derived by the violation, the injury to the public from the violation, and the need to deter similar behavior by the respondent and others and to vindicate the authority of

16/ As with the injunction see pp. 12-13, supra, Mr. Furgatch submitted no evidence and did not request a hearing on his arguments for reducing the civil penalty. See United States v. J.B. Williams Co., 498 F.2d at 438.

the agency. See, e.g., United States v. Readers Digest Assn., 662 F.2d at 967; United States v. J.B. Williams Co., 498 F.2d at 438; United States v. Danube Carpet Mills, Inc., 737 F.2d 988, 993 (11th Cir. 1984); United States v. Louisiana-Pacific Corp., 554 F. Supp. at 507. Not all of these factors are fully transferrable to the remedial scheme contained in the Act, which is designed to accomplish different purposes than the business regulations involved in the cases cited above.17/ But those factors that are applicable amply support the district court's decision to assess a $25,000 civil penalty.

The Act provides for three levels of penalties. Section 437g(a)(6)(B) authorizes a civil penalty up to the greater of $5000 or the amount of the contribution or expenditure involved in the violation. If the district court concludes that a violation is "knowing and willful," section 437g(a)(6)(C) authorizes the civil penalty to be doubled, to the greater of $10,000 or twice the amount of the contribution or expenditure involved. Finally, a person prosecuted criminally for "knowingly and willfully" violating any provision of the Act involving "reporting of any contribution or expenditure aggregating $2000 or more" can be fined up to the greater of $25,000 or 300 percent

17/ It is noteworthy that the business cases where these factors originated generally involve civil penalties many times the size of the one assessed against Mr. Furgatch. See e.g. United States v. Readers Digest Assn., 662 F.2d at 969 ($1,750,000); United States v. Louisiana Pacific Corp., 554 F. Supp. at 512 ($4,000,000); United States v. Papercraft Corp., 393 F. Supp. at 427 ($3,817,500).

of the contribution or expenditure involved, and imprisoned for up to one year. 2 U.S.C. § 437g(d)(1)(A). Thus, Congress has expressly provided for the measurement of the seriousness of a violation in terms of the amount of money involved and the willfulness of the respondent, and has found the amount of money involved in an expenditure to be an appropriate guide in formulating a civil penalty for a violation that is not willful. With this statutory scheme in mind, we discuss below each of the factors relied upon by Mr. Furgatch.

1. Good faith

Mr. Furgatch claims (Br. 25-26) that his violations of the Act "were entirely unintentional" because he purportedly did not know "at the time he placed the advertisements that he should have reported the expenditure." First, as shown above, Mr. Furgatch's purported lack of intent has already been taken into account by Congress in enacting the statutory scheme: it was only because his violations were not found to be willful that the civil penalty was limited by section 437g(a)(6)(B) to an amount equal to his expenditures. The district court clearly cannot be required to reduce the penalty still further on the basis of this same factor.

In any event, the violation in this case was not as innocent and unintentional as Mr. Furgatch suggests. As discussed supra, pp. 13-14, Mr. Furgatch's violation of the Act's reporting requirement was a continuing one, and he refused to comply with

it for many years after he was informed of his statutory obligation, and more than a year after this Court had adjudicated him to be in violation of the statute. Such extreme and lengthy intransigence in the face of administrative and judicial determinations of violation might well have warranted a finding of willfulness that would have authorized doubling the civil penalty pursuant to 2 U.S.C. § 437g(a)(6)(C). See AFL-CIO v. FEC, 628 F.2d at 102 (reversing finding of willfulness because respondent had been willing to "accede to the Commission's position prospectively," but noting that "[h]ad the AFL-CIO been intransigent after learning of the Commission's position ... we might have reached a different result.") At a minimum, it refutes Mr. Furgatch's argument that the district court was required to reduce the civil penalty because of his self serving and unsupported assertions of ignorance and good faith. See e.g., United States v. Danube Carpet Mills, Inc., 737 F.2d at 994.[18/]

2. Ability to pay the civil penalty

It is well established that the size of the "civil penalty must be large enough to deter" unlawful conduct. United States v. Papercraft Corp., 393 F. Supp. at 427; United States v. Readers Digest Assn., 662 F.2d at 995. An amount that might be

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18/ The record casts doubt on Mr. Furgatch's assertion (Br. 26) that he was ignorant of the Act's requirements at the time he placed his advertisements, for both of his advertisements contained at least part of the disclaimer notices required by 2 U.S.C. § 441d.

ample to deter one respondent might amount to little more than a slap on the wrist to a respondent with greater financial resources. See United States v. Papercraft Corp., 393 F. Supp. at 426.

Mr. Furgatch has acknowledged (S.E. 34) that he is a "man of comfortable means" and (Br. 29 n.8) has "the ability to pay the penalty." His ability to satisfy the $25,000 penalty imposed by the district court without undue hardship is indicated by his decision to file a check for the full amount of the penalty with the district court rather than the usual appeal bond (see S.E. 46), by the substantial amount of attorney fees he has been willing to expend to try to avoid having to file the report of his expenditures in this case, and by the fact, reflected in candidate reports on file with the Commission, that during the six year period between 1982 and 1988 Mr. Furgatch has given more than $20,000 to federal candidates. To a man of Mr. Furgatch's financial means and demonstrated determination to resist the requirements of the Act, a less onerous civil penalty would represent "an acceptable cost of violation," rather than an effective deterrent. United States v. Papercraft Corp., 393 F. Supp. at 420, quoting United States v. ITT Continental Baking Company, 420 U.S. at 231.

3. Benefit derived from the violation

This is an important factor in assessing civil penalties in a business context. However, it has no application to a statute

that merely requires disclosure of election expenditures and does not seek to regulate activities involving commercial gain.

4. Injury to the public

In enacting sections 434(c) and 441d Congress established a standard of full disclosure of independent expenditures for electoral advocacy which the Supreme Court found in Buckley v. Valeo, 424 U.S. at 35-36, 64-74, serves compelling governmental purposes. This Court has also emphasized the importance of this provision "in ensuring a fair and representative forum of debate by identifying the financial sources of particular kinds of speech." FEC v. Furgatch, 807 F.2d at 858. In particular, Congress has found it important enough to the public interest that last minute expenditures like Mr. Furgatch's be reported on the public record before the election that it has required that "[a]ny independent expenditure ... aggregating $1000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made." 2 U.S.C. § 434(c)(2)(C) (emphasis added). Congress has also directed the Commission to prepare indices of all such independent expenditures "expeditiously". 2 U.S.C. § 434(c)(3). These requirements are designed not only to provide a centralized public record of information regarding the financing of independent political expenditures, but to ensure that this is done in a timely manner in advance of an election.

Mr. Furgatch's failure to report his expenditures in a timely manner deprived the voters and the press of that complete public record section 434(c) was designed to ensure, and his failure to include the complete disclaimer on his advertisement deprived readers of the full information section 441d was intended to provide. This alone constituted the full public harm these provisions were designed to prevent, and Mr. Furgatch's argument (Br. 27) that some of this information might have been gathered in other ways by persistent members of the public who somehow happened to see both of Mr. Furgatch's advertisements, does nothing to mitigate Mr. Furgatch's failure to fulfill his obligation to comply with the statutory scheme Congress found necessary to fulfill the public interest. As with other statutes regulating the dissemination of information to the public, Mr. Furgatch's failure to comply with the Act's disclosure provision "in and of itself causes harm and injury," so that no evidence of actual harm to the voting public is necessary. United States v. Readers Digest Assn., 662 F.2d at 969 (emphasis added). Accord, United States v. Danube Carpet Mills Inc., 737 F.2d at 994.

Finally, Mr. Furgatch's failure to file the report before the 1980 election deprived the public record of significant information. According to the FEC Index of Independant Expenditures, 1979- 1980 (Nov. 1981), Mr. Furgatch's $25,008 would represent one of the ten largest independent expenditures by any individual during the entire 1980 election cycle, and it was the largest independent expenditure in opposition to a

presidential candidate by any individual in the country in the 1980 election. Mr. Furgatch's continuing refusal for seven more years to file this simple, one page report also resulted in the exclusion of the identity of one of the largest individual spenders in the 1980 election cycle from the FEC Index of Independent Expenditures, 1979-1980, compiled by the Commission pursuant to 2 U.S.C. § 434(c)(3). Mr. Furgatch's continuing attempt (Br. 28) to denigrate the importance of his violations only confirms his continuing disregard for the public interest Congress sought to serve in enacting these provisions of the Act.

5. Vindication of the authority of the Commission and the Act

As discussed above, Mr. Furgatch persistently refused to file his report for more than seven years, even though the statute required it to be filed within 24 hours. He refused to file the report when the Commission attempted to conciliate pursuant to 2 U.S.C. § 437g(a)(4), and even after this Court found him in violation of the Act. Such drawn out intransigence warrants a substantial civil penalty if respect for the Act and the Commission's authority to construe and obtain compliance with it, see 2 U.S.C. § 437c(b)(1), are to be maintained. This is particularly true in the case of a statute, like section 434(c), that is so dependent upon prompt, voluntary compliance to effectuate its important purposes. "Delay in compliance must be discouraged, not encouraged. There must be an incentive to

comply ...." United States v. Louisiana-Pacific Corp., 554 F. Supp. at 512. See also, United States v. Papercraft Corp., 363 F. Supp. at 420. The civil penalty assessed by the district court amounts to only a little more than $3000 per year of delay in complying with a statute that requires compliance within 24 hours. In the circumstances of this case, that cannot be termed excessive.19/

19/ Mr. Furgatch's assertion (Br. 23) that the civil penalty in this case is larger than those awarded by other judges in the circumstances of other reported cases is "simply irrelevant ... given the statutory maximum and [the] scope of review." United States v. Papercraft Corp., 540 F. 2d at 141. In any event, civil penalties of comparable and even greater size than here are not unprecedented: See e.g., FEC v. Barry, Civ. Action No.86-2807-C (D.MA. April 16, 1987) ($20,000); FEC v. Wolfson, No. 85-1617-Civ-T-13 (M.D. Fla. Feb. 7, 1986) ($52,000); FEC v. Californians for Democratic Representation, No. CV 85-2086-JMI (C.D.Cal. Jan. 9, 1986) ($15,000); FEC v. Citizens for LaRouche, 2 Fed. Election Camp. Fin. Guide [CCH] ¶9214 (D.D.C. 1984) ($15,000); In the Matter of Mondale for President Cmte., FEC Matter Under Review ("MUR") 2241 (Dec. 18, 1986) ($68,000); In the Matter of John Glenn Presidential Cmte., MUR 2072 (July 12, 1988) ($30,000).

CONCLUSION

For the reasons given above, the Commission respectfully submits that the Court should affirm the judgment of the district court.

Respectfully submitted,

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

Jacqueline Jones-Smith
Attorney

September 16, 1988

FOR THE PLAINTIFF-APPELLEE
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

STATEMENT OF RELATED CASES

Pursuant to Ninth Cir. R. 28-2.6, the Commission states that it has no knowledge of any related case pending in this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6047

FEDERAL ELECTION COMMISSION,

Plaintiff-Appellee,

v.

HARVEY FURGATCH,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 1988, I caused to be served by first-class mail, postage prepaid, copies of the Plaintiff-Appellee Federal Election Commission's Brief and Supplemental Excerpts of Record in the above-captioned case on the following counsel:

Richard Mayberry, Esquire
Richard Mayberry & Associates
1055 Thomas Jefferson Street, N.W.
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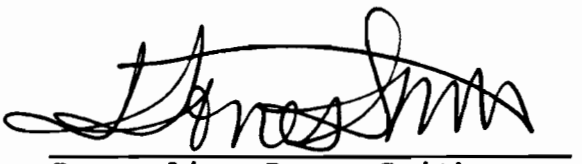
Washington, D.C. 20007



Jacqueline Jones-Smith
Attorney

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WASHINGTON, D. C. 20007
(202) 337-4172

June 3, 1988

Hand Delivered

Mr. Robert Bonham
Federal Election Commission
Office of the General Counsel
999 E Street, NW
Sixth Floor
Washington, D.C. 20463

Re: FEC v. Furgatch, Civil Action
No. 83-0596-GT(M) (S.D. Calif.)

Dear Mr. Bonham:

Pursuant to the Order and Judgment in the above-referenced case, please find enclosed Mr. Furgatch's independent expenditure report.

Sincerely,

Richard Mayberry

RM:rjy:FU/C-4

Enclosure: FEC Form 5

REPORT OF INDEPENDENT EXPENDITURES AND CONTRIBUTIONS RECEIVED

(To Be [illegible] by a Person Other Than a Political Committ[illegible]

(See Instructions on Reverse Side)

1. (a) Name: Harvey Furgatch

(b) Address: 2932 Camino Del Mar

(c) City, State and ZIP Code: Del Mar, CA 92014

(d) Name of Employer: Self-Employed

(e) Occupation: Real Estate Management

2. Identification Number: N/A

3. Is this Report an Amendment? ☐ YES ☒ NO

4. TYPE OF REPORT (check appropriate boxes):

(a) ☐ April 15 Quarterly Report
☐ July 15 Quarterly Report
☐ October 15 Quarterly Report
☐ January 31 Year End Report
☐ July 31 Mid Year Report

☐ Twelfth Day Report preceding _____ election on _____ in the State of _____.

☒ Thirtieth Day Report following the General Election on 11/4/80 in the State of _____.

5. This Report covers the period — FROM: 10/16/80 THROUGH: 11/24/80

6. CONTRIBUTION(S) RECEIVED

Full Name, Mailing Address and ZIP Code of Contributor	Name of Employer	Occupation	Date (Month, Day, Year)	Amount
None				

7. EXPENDITURE(S) MADE

Full Name, Mailing Address and ZIP Code of Payee	Purpose of Expenditure	Date (Month, Day, Year)	Amount	Check One: Support	Check One: Oppose	Name and Office Sought (District, State) of Federal Candidate
Jack Canaan Building #3 Apt. #313 1552 La Payla San Diego, CA 92109	Payment of production and placement costs for ad in NY Times (on 10/28/80) and Boston Globe (on 11/1/80)	10/17/80 10/27/80	$16,800 $ 8,208		x	President Carter

Republic of Italy
Province of Milan
C[illegible] of Milan } SS
Consulate General of [illegible]
United States of America

8. Total Contributions ..... $ 0

9. Total Expenditures ..... $ 25,008

Under penalty of perjury I certify that the independent expenditures reported herein were 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 agent or authorized committee of such candidate. Furthermore, these expenditures did not involve the financing of, the dissemination, distribution or republication, in whole or in part, of any campaign materials prepared by the candidate or an agent or authorized committee of the candidate.

H Furgatch
SIGNATURE

- 1 JUN 1988
Date

Subscribed and sworn to before me this - 1 JUN. 1988 day of _____, 19____

My Commission Expires: ✓

Marilyn F. JACKSON (Notary Public)
Consul of the United States of America

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this report to the penalties of 2 U.S.C. 437g.

For further information contact:
Federal Election Commission
Toll Free 800-424-9530
Local 202-[illegible]
376-3120

Any information reported herein may not be copied for sale or use by any person for the purposes of soliciting contributions or for any other commercial purpose except that the name and address of any political committee may be used to solicit contributions from such committee.

ADDENDUM
OF STATUTORY AND REGULATORY PROVISIONS

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TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchapter 1—Disclosure of Federal Campaign Funds

§ 431. Definitions

When used in this Act:

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

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§ 434. Reporting requirements

(c) *Statements by other than political committees; filing; contents; indices of expenditures.*

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include—

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b)(6)(B)(iii) of ths section) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) of this section indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

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§ 437f. Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any requests made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

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§ 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such

complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about

to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount

equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a 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.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the

judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) *Repealed.*[1]

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the

[1] *Expedited Judicial Review.* Section 402(1)(A) of Pub. L. No. 98-620, effective November 11, 1984, repealed subparagraph (a)(10). The repealed provision had required that actions brought under this subsection be advanced on the docket of the court in which filed and put ahead of all other actions.

Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of this title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into be-

tween the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

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§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

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PART 109—INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c))

Sec.

109.1 Definitions (2 U.S.C. 431(17)).
109.2 Reporting of independent expenditures by persons other than a political committee (2 U.S.C. 434(c)).
109.3 Non-authorization notice (2 U.S.C. 441d).

AUTHORITY: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441d.

SOURCE: 45 FR 15118, Mar. 7, 1980, unless otherwise noted.

§ 109.1 Definitions (2 U.S.C. 431(17)).

(a) "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.

(b) For purposes of this definition—

(1) "Person" means an individual, partnership, committee, association, or any organization or group of persons, including a separate segregated fund established by a labor organization, corporation, or national bank (see Part 114) but does not mean a labor organization, corporation, or national bank.

(2) "Expressly advocating" means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Con-

gress," or "vote against," "defeat," or "reject."

(3) "Clearly identified candidate" means that the name of the candidate appears, a photograph or drawing of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

(4) "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 the candidate" means—

(i) Any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is—

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made;

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent;

(ii) But does not include providing to the expending person upon request Commission guidelines on independent expenditures.

(5) "Agent" means any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate, or means any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

(c) An expenditure not qualifying under this section as an independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted.

(d)(1) 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 and reporting responsibilities by the person making the expenditure but shall not be considered an expenditure by the candidate or his authorized committees unless 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 authorized agent or committee thereof.

(2) This paragraph does not affect the right of a State or subordinate party committee to engage in such dissemination, distribution, or republication as agents designated by the national committee pursuant to § 110.7(a)(4).

(e) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

§ 109.2 Reporting of independent expenditures by persons other than a political committee (2 U.S.C. 434(c)).

(a) Every person other than a political committee, who makes independent expenditures aggregating in excess of $250 during a calendar year shall file a signed statement or report on FEC Form 5 with the Commission, the Clerk of the House or Secretary of the Senate in accordance with 11 CFR 104.4(c).

(1) If a signed statement is submitted, the statement shall include:

(i) The reporting person's name mailing address, occupation and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date and purpose of each expenditure;

(iv) A statement which indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A notarized certification under penalty of perjury as to whether such expenditure was made in cooperation,

consultation or concert with, or at the request or suggestion of any candidate or any authorized committee or agent thereof; and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) Reports or statements filed under this section shall be filed at the end of the reporting period (quarterly pre-election post-election semi-annual annual) (See 11 CFR 104.5)) during which any independent expenditure which aggregrates in excess of $250 is made and in any reporting period thereafter in which additional independent expenditures are made.

(b) Independent expenditures aggregating $1,000 or more made by any person after the twentieth day, but more than 24 hours before 12:01 A.M of the day of an election shall be reported within 24 hours after such independent expenditure is made. Such report or statement shall contain the information required by 11 CFR 109.2(a) indicating whether the independent expenditure is made in support of, or in opposition to, a particular candidate and shall be filed with the appropriate officers in accordance with 11 CFR 104.4(c).

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