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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Pursuant to Federal Rules of Appellate Procedure 35 and 40 and Ninth Circuit Rule 35-1, the Federal Election Commission ("FEC" or "Commission") hereby petitions this Court for rehearing, and suggests rehearing en banc, of that portion of the decision of a panel of this Court on March 8, 1989, which reverses the permanent injunction issued by the district court and remands with instructions to limit the injunction to a "reasonable duration." (sl. op. 1941.)[1]

REASONS FOR REHEARING EN BANC

The issue presented for rehearing is whether a district court can issue a permanent injunction against the repetition of proven violations of the Federal Election Campaign Act of 1971, as

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1. The Commission does not seek review of those portions of the decision which affirm the district court's assessment of a $25,000 civil penalty and remand for the district court to state the reasons for the injunction and specify more precisely the conduct prohibited by the injunction.

amended, 2 U.S.C. §§ 431-455 ("FECA" or "the Act"), as authorized by 2 U.S.C. § 437g(a)(6)(B), upon a showing of a reasonable likelihood that the defendant will violate the Act in the future, or whether such an injunction must be limited in duration absent a showing of "extraordinary intransigence and hostility toward the FEC and the Act" (sl. op. at 1941).

In the opinion of the undersigned counsel, this issue is of exceptional importance because it involves a novel construction of section 437g(a)(6)(B) which represents a significant departure from the accepted caselaw and would severely restrict the statutory remedies provided by Congress. Moreover, the panel's decision is in conflict with, inter alia, SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980), so that consideration by the full Court is necessary to maintain uniformity of its decisions.

SUMMARY OF THE CASE

In FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 108 S.Ct. 151 (1987) this Court found that Mr. Furgatch had violated sections 434(c) and 441d of the Act. On remand, the district court, inter alia, permanently enjoined Mr. Furgatch from future similar violations of the Act. Mr. Furgatch appealed the permanent injunction, arguing that 2 U.S.C. § 437g(a)(6)(B) did not authorize prospective injunctive relief, that the injunction was impermissibly vague, and that the district court had failed to provide adequate reasons for injunctive relief under Rule 65(d) of the Federal Rules of Civil Procedure. Mr. Furgatch never requested the district court to limit the duration of injunctive relief, and he made no argument to this Court that

the duration of the injunction fashioned by the district court amounted to an abuse of discretion.[2]

The panel explained that under statutes authorizing injunctions "on the basis of past violations, the Federal courts have consistently held that the party moving for the injunction must show only that there is a 'likelihood' of future violations," and it found that "[t]here is ample support in the record for a finding that Furgatch is likely to commit future violations of the Act" (sl. op. at 1940). However, it concluded:

> [W]hile the record would support a finding that Furgatch is likely to commit future violations of the Act, the record does not justify the imposition of a permanent injunction. Furgatch has not demonstrated the sort of extraordinary intransigence and hostility toward the FEC and the Act which would support the inference that he will remain likely to violate the Act for the rest of his life.

Slip op. at 1941.

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2. Because Mr. Furgatch failed to raise the issue of the duration of the injunction either before the district court or this Court, the Commission has had no previous opportunity to brief this issue. Indeed, it is this Court's usual rule to refuse to consider issues not raised in the district court (See e.g., International Union of Bricklayers, AFL-CIO v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985) and cases cited therein), and this should be particularly true with a district court's exercise of discretion in fashioning an injunction. This Court also "will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief (Id.). Since Mr. Furgatch has never made any showing of "exceptional circumstances why the issue was not raised below" (Id.), we submit the Court should have declined to review the duration of the injunction issued by the district court for this reason alone.

ARGUMENT

THE DISTRICT COURT'S GRANT OF A PERMANENT INJUNCTION UNDER 2 U.S.C. § 437g(a)(6)(B) CANNOT BE AN ABUSE OF DISCRETION, SINCE THE COURT OF APPEALS FOUND THAT THE RECORD SUPPORTS THE CONCLUSION THAT FURGATCH "IS LIKELY TO COMMIT FUTURE VIOLATIONS OF THE ACT."

The panel decision in this case relied upon this Court's decision in SEC v. Murphy, 626 F.2d 633, 655 (9th Cir. 1980) for the proposition that "in cases involving statutes which give the courts the discretion to issue injunctions on the basis of past violations" the moving party "must show only that there is a 'likelihood' of future violations." (sl. op. at 1940, emphasis added.) The panel then concluded that this test had been met in this case, finding that "[t]here is ample support in the record for a finding that Furgatch is likely to commit future violations of the Act." (sl. op. at 1940.) However, the sentence of SEC v. Murphy relied upon by the panel does not merely refer to injunctions in general, but explicitly states that an enforcement agency can obtain a "permanent injunction" by "showing there was a reasonable likelihood of future violations" of the statute.[3] Thus, the panel is in clear conflict with the law of this Circuit

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3. See also, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972) ("The critical question for a district court in deciding whether to issue a permanent injunction in view of past violations is whether there is a reasonable likelihood that the wrong will be repeated."); United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) ("The necessary determination is that there exists some cognizable danger of recurrent violation"); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1544 (9th Cir. 1987) (reversing district court's decision "denying the EEOC a permanent injunction," on the ground that "a person subjected to employment discrimination is entitled to an injunction against future discrimination...unless the employer proves it is unlikely to repeat the practice.").

in ruling that a permanent injunction is beyond the district court's discretion even though the Murphy test is satisfied, unless there is also a showing of "extraordinary intransigence and hostility toward the [agency] and the Act" (sl. op. at 1941).[4]

The panel's new test for a permanent injunction is not consistent with the terms of the Act, which explicitly authorizes the district court to grant a "permanent" injunction "upon a proper showing that the person involved has committed ... a violation of this Act," 2 U.S.C. § 437g(a)(6)(B). Furthermore, we have found no other case in which any court has required any showing beyond the Murphy test before a district court can issue a permanent injunction against the repetition of proven violations of any law. To the contrary, at least one court has specifically rejected the similar argument that a permanent injunction is impermissible without a showing that the defendants "have a propensity or natural inclination to violate" the law at issue. SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101

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4. An injunction fashioned by a district court is reviewed for abuse of discretion. See, e.g. United States v. W.T. Grant Company, 345 U.S. at 633 (The district judge's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it"); EEOC v. Goodyear Aerospace Corp., 813 F.2d at 1544; SEC v. Manor Nursing Centers, Inc., 458 F.2d at 1100. In particular, the duration of a permanent injunction issued by a district court cannot be reversed absent an abuse of discretion. See Molex Inc. v. Nolen, 759 F.2d 474, 477 (5th Cir. 1985).

(2d Cir. 1972).[5]

The panel's opinion appears to be based upon the assumption that a permanent injunction against Mr. Furgatch would last for the "rest of his life." (sl. op. at 1941.) is not the case, however, for "[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." United States v. Swift & Co., 286 U.S. 106, 114 (1932). Accord, United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968). Rule 60(b) of the Federal Rules of Civil Procedure authorizes a district court to modify or vacate an injunction on the basis of "changes in fact or in law" or a "better appreciation of the facts in light of experience". SEC v. Warren, 583 F.2d 115, 120 (3rd Cir. 1978), quoting from King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d 31, 35 (2nd Cir. 1969).[6] Thus, a permanent injunction in this case will not necessarily last for the rest of Mr. Furgatch's life, but only until the district court is presented with a proper showing that it is no longer warranted. At the present time, however, there is no basis in the record for determining when, if ever, Mr. Furgatch's reformed behavior will make the injunction

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5. In fact, under some statutory schemes, the courts have found the sort of extraordinary showing specified by the panel to justify broader relief than an injunction against repetition of the violations found. See, e.g., NLRB v. Selvin, 527 F.2d 1273, 1277 (9th Cir. 1975) ("[W]e have consistently held that where there is substantial evidence of a proclivity to violate the Act, the Board may properly enter broad remedial orders.")

6. See, e.g., SEC v. Warren, 853 F.2d at 121 (change in facts and in regulations); Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207, 215 (2nd Cir. 1973) (report which was the object of the injunction had been filed); King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d at 35 (recognizing injunction no longer served proper purpose).

unnecessary. Such a determination must be left to the future judgment of the district court under Rule 60(b).

In United States v. Holtzman, 762 F.2d 720, 725-726 (9th Cir. 1985), this Court found that in "the unique setting involved when lawful conduct is enjoined" an injunction "against otherwise lawful conduct must be carefully limited in time and scope to avoid an unreasonably punitive or nonremedial effect." The Court thereupon vacated, under Rule 60(b)(5), an injunction against otherwise lawful conduct which had already been in effect for more than six years. The Holtzman court's concerns are inapplicable here, for the only conduct sought to be enjoined is unlawful conduct. Even if the injunction in this case were vacated at some time in the future, it would still be unlawful for Mr. Furgatch to fail to report his expenditures and include disclaimers when he finances express electoral advocacy. Unlike in Holtzman, this injunction does not preclude Mr. Furgatch from doing anything he would otherwise be free to do, and it thus "subjects [Mr. Furgatch] to no penalty, to no hardship." Marshall v. Chala Enterprise, Inc., 645 F.2d 799, 804 (9th Cir. 1981) (quoting Mitchell v. Pidcock, 299 F.2d 281, 287 (5th Cir. 1962)).[7]

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7. In particular, neither the Act nor the injunction purports to restrict Mr. Furgatch's freedom to publish his political views; they only require that he report his expenditures and include the required disclaimer when he finances express electoral advocacy. This Court has already found, in its decision on the merits of this case, that this statutory requirement is not unconstitutionally vague and does not violate Mr. Furgatch's First Amendment rights. Since the injunction adds no additional limitation on Mr. Furgatch's actions, it cannot be found to violate Mr. Furgatch's First Amendment rights any more than the statute itself.

But even with respect to the six year old injunction against lawful activity at issue in Holtzman Judge Fletcher explained why the proper duration of such a law enforcement injunction usually cannot be determined in advance.

> I agree that an injunction against otherwise legal activity should not be continued indefinitely. However, it should continue until its original purpose of preventing the legal activity from contributing to the illegal activity has been served. The record is a vacuum . . . Because the termination of the injunction at this time may be premature, I would remand to allow the district court to determine whether Alonim's post-injunction behavior warrants the continuance or discontinuance of the injunction.

762 F.2d at 727(Fletcher, J., dissenting). Here even more than in Holtzman it is too early to tell when, if ever, the injunction will have adequately served its purpose and Mr. Furgatch will no longer be likely to violate the Act. So far, Mr. Furgatch has refused to concede that he would ever be willing to abide by this Court's declaration of his obligations under the Act, and his actions to date, as the panel has noted, reflect only obstinate resistance. It is impossible to determine at this time when, if ever, Mr. Furgatch's attitude might change. But if the time comes when he can satisfy the district court, perhaps by a solid record of compliance for a substantial period of time with the Act's and the injunction's requirements, that the injunction is no longer necessary, relief can then be granted on a proper record under Rule 60(b). At this time, however, the Court cannot even speculate when, if ever, such circumstances might arise. Requiring the district court to determine now the "reasonable

period" after which the injunction will have outlined its purpose is, therefore, a practical impossibility as well as being contrary to long established caselaw.

CONCLUSION

For the reasons given above, the Commission respectfully requests that the Court grant this petition for rehearing, and suggests that it grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 1989, I caused to be served by first-class mail, postage prepaid, a copy of the Federal Election Commission's Petition for Rehearing and Suggestion for Rehearing En Banc in the above-captioned case on the following counsel:

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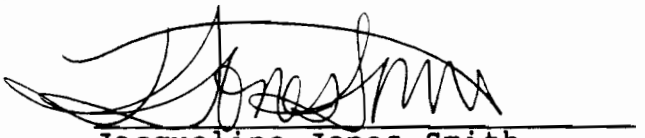

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