UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5524

FEDERAL ELECTION COMMISSION,

Appellant,

v.

HARVEY FURGATCH,

Appellee.

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

OPPOSITION OF THE FEDERAL ELECTION COMMISSION TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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OPPOSITION OF THE FEDERAL ELECTION COMMISSION TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

The Federal Election Commission opposes the petition for rehearing and suggestion for rehearing in banc in this case. We demonstrate herein that the panel's decision in this case is entirely consistent with relevant precedent and raises no constitutional issues that have not already been disposed of by the Supreme Court.

Two provisions of the Federal Election Campaign Act ("the Act"), 2 U.S.C. §§ 434(c) and 441d, impose reporting and disclosure requirements for expenditures by individuals that "expressly advocate the election or defeat of a clearly

identified candidate." A few days prior to the 1980 presidential election Mr. Furgatch placed full page advertisements in two newspapers which attacked Jimmy Carter's reelection campaign for "degrading the electoral process and lessening the prestige of the office," warned that "[i]f he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion," and repeatedly exhorted readers, "Don't let him do it!" The issue in this case is whether Mr. Furgatch's advertisements expressly advocated the defeat of Jimmy Carter in the imminent election, so that he was required by the Act to report the costs of the advertisements to the Commission and include in the advertisements a statement that he paid for them and they were not authorized by any candidate.

The express advocacy standard was first articulated by the Supreme Court in Buckley v. Valeo, 424 U.S. 1, 80-81 (1976). In that case, the Court upheld against First Amendment challenge the Act's requirement that independent expenditures be reported to the Commission (then codified at 2 U.S.C. § 434(e)). The reporting requirement imposed no restraints on either the amount or content of the political speech of individuals, and the Court found that it served a compelling governmental interest in ensuring an informed electorate. "[T]he informational interest [in independent expenditures] can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidate's constituencies." Id. at 81.[1/]

1/ Thus, Mr. Furgatch errs in asserting (Pet. at 9-10) that "neither Buckley nor any Supreme Court decision has ever said that the interest in full disclosure is superior to, or even (Footnote Continued)

While the Court found the purpose of the provision to be compelling, it also found that the statutory language was vague enough that it could be expanded beyond this objective to require reporting not only of expenditures for campaign advocacy but also expenditures for the discussion of public issues which also happened to be campaign issues. Thus, to ensure that reporting would only be required for expenditures "unambiguously related to the campaign of a particular federal candidate," 424 U.S. at 80, th Court construed the disclosure provisions "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. A few months later Congress incorporated this standard into the statute itself.

The panel properly applied this standard to the facts of this case in a manner designed to "preserve the efficacy of the Act without treading upon the freedom of political expression," (sl. op. at 14), just as the Supreme Court sought to do in

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(Footnote Continued)

equal to, the interest of the freedom of a speaker in the political arena...." This provision of the statute does not interfere with the freedom to speak, but only with the interest in avoiding disclosing one's election expenditures to the public. The Supreme Court plainly found this particular interest to be overcome by the public interest in an informed electorate. Mr. Furgatch, who included his name in both advertisements, has not claimed that disclosure would chill his speech (compare, e.g., FEC v. Hall-Tyner Campaign Committee, 678 F.2d 416 (2d Cir. 1982), cert. denied, 459 U.S. 1145 (1983), and it is well settled that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed...." Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 652 n.14 (1985).

Buckley, 424 U.S. at 78.[2/] The panel found reliance upon the purpose of an expenditure to be inappropriate, and concluded that to be considered express advocacy within the meaning of the Act a communication must "when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate ...." (sl. op. at 15). This formulation properly implements the Buckley Court's intention to limit the reach of the statute to communications that are "unambiguously related to the campaign of a particular federal candidate" (424 U.S. at 80) and to exclude from its reach issue discussion that does not include clear election advocacy. As we

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2/ Contrary to Mr. Furgatch's suggestion (Pet. at 11), the express advocacy standard was not intended to "make it easy for unscrupulous persons to avoid the regulatory impact of the Act." As shown above, the provision was intended to require reporting of expenditures for campaign advocacy, and the Supreme Court's construction was intended to ensure that only campaign advocacy, but no other speech, was included in its reach. Mr. Furgatch's argument is based upon quotations (Pet. at 8-9) from the Buckley Court's discussion of an expenditure limitation applying only to express advocacy (424 U.S. at 42-45) rather than the Court's discussion of the disclosure provisions at issue here (424 U.S. at 80-81). The Court's observation that influence over candidates could be obtained by devising expenditures that promoted candidates or their views without advocating their election is simply inapplicable to the informational purpose of the disclosure provisions, and the Buckley Court did not suggest that the express advocacy standard would make the reporting provisions ineffective in accomplishing disclosure of the sources of campaign advocacy. To the contrary, the Court's finding that the disclosure provision served a compelling purpose was based upon its conclusion that the statute would "shed the light of publicity on spending that is unambiguously campaign related...." Buckley v. Valeo, 424 U.S. at 81.

show below, Mr. Furgatch has entirely failed to present any legitimate reason for reconsideration of this decision.[3/]

Mr. Furgatch's petition utilizes a scattershot approach, attacking seriatum isolated phrases divorced from their context in a lengthy opinion. At bottom, however, his primary argument is that the "express advocacy" standard must be applied in a strictly grammatical manner. It is impermissible, he argues (Pet. at 4), to consider the advertisement as a whole, to consider any facts outside the four corners of the advertisement, or to recognize ideas that are communicated by unambiguous reference rather than by explicit words. Unless the court can find a single sentence that advocates in so many words the election or defeat of a particular candidate, the Act is inapplicable.

The primary problem with this extreme argument is that it cannot be reconciled with the Supreme Court's own application of the express advocacy standard, which is based upon a substantive rather than a grammatical approach. Just three months ago, in FEC v. Massachusetts Citizens For Life, Inc. ("MCFL"), 107 S. Ct. 616, 623 (1986), the Supreme Court found express advocacy by

3/ On January 21, 1987, the panel remanded No. 85-5963, Furgatch v. FEC, to the district court for further consideration. Thus, Mr. Furgatch's argument (Pet. at 4-5) that the pendency of that appeal somehow provided additional grounds for rehearing this case in banc is now moot. We note, however, that at the same time that this Court is considering Mr. Furgatch's request that this case be reheard in banc under Fed. R. App. P. 35, he has asked the district court in No. 85-5963 to effectively preempt this Court's discretion under Rule 35 by filing a motion with that court to certify to the in banc Court, pursuant to 2 U.S.C. § 437h, the question of the constitutionality of the statutory provisions at issue here.

reading the several pages of a pamphlet as a whole. On the first page, the pamphlet urged readers to "Vote Pro-Life," and it was argued that this exhortation amounted only to issue advocacy. However, other pages of the pamphlet listed candidates for office and reported their positions on several issues important to the pro-life movement. Although the pamphlet did not contain the grammatically explicit sort of exhortation to vote for or against a particular candidate that Mr. Furgatch argues is required, the Supreme Court found that the pamphlet as a whole "provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." 107 S. Ct. at 623 (emphasis added).

The MCFL decision (which is ignored by Mr. Furgatch) utilizes most of the accepted techniques for construction of language that Mr. Furgatch argues are prohibited. Like the panel in this case, the Supreme Court found express advocacy by reading the pamphlet as a whole, even though no discrete statement of advocacy for any particular candidate was to be found. Like the panel in this case, the Supreme Court filled in blanks in the pamphlet's advocacy, construing "Vote Pro-Life" to mean, in reality, "vote for these (named) candidates." Finally, the Court confirmed that whether a communication contains express advocacy is to be determined on the basis of the "essential nature" of the communication's "message," even if it is stated somewhat less directly than the examples of express advocacy set forth in

Buckley v. Valeo, 424 U.S. at 44 n.52. After MCFL, it is plain that Mr. Furgatch's strict grammatical approach to express advocacy cannot prevail.

Even before the MCFL decision, however, the examples of express advocacy listed in Buckley made clear that the strict grammatical approach was incorrect. Thus, one of the examples of express advocacy in Buckley is "Support Smith." Yet, this statement can only be construed as express advocacy if one takes into consideration the external facts that an election is to be held and that Smith is running for office. Moreover, the exhortation is incomplete -- to construe it as election advocacy one must infer that it means "Support Smith for Congress."[4/] Finally, the statement's temporal context is also crucial, for this statement can only be construed as express advocacy of an election result if it is published before the election; if published after the election, it would have to mean something else, such as support Smith in his legislative program or his efforts to retire his campaign debt.

In short, the Supreme Court's decisions confirm the panel's conclusion that it is the substance of a communication that determines whether it is express advocacy. The courts have never countenanced the type of simplistic and immutable rules for construing words in a vacuum that Mr. Furgatch proposes. In the election law context as in others words must be treated as

4/ Another example from Buckley, "Smith for Congress," can only be considered express advocacy by inferring the words of exhortation "Vote for Smith for Congress."

symbols for the communication of ideas, which are necessarily dependent upon context for determining even their clear meaning. The express advocacy standard was adopted by the Supreme Court to ensure that the reach of the Act be limited to unambiguous advocacy of an election result, and that discussion of public issues be excluded. The panel's substantive approach properly serves this purpose by limiting the statute's reach to communications that can reasonably be construed only as calling for a particular election result. Far from endorsing the rigid and mechanical test advocated by Mr. Furgatch, the Supreme Court itself has identified examples of express advocacy that could only be reached by the substantive approach to the construction of words utilized by the panel in this case, and which would not qualify under Mr. Furgatch's test. In these circumstances, Mr. Furgatch's argument provides no basis for reconsideration of the panel's decision.[5/]

Mr. Furgatch argues (Pet. at 3-4, 9-11, 14) that the panel's decision conflicts with decisions of the Supreme Court and the Second Circuit's decision in FEC v. Central Long Island Tax Reform Immediately Committee ("CLITRIM"), 616 F.2d 45 (2d Cir. 1980) (en banc). We have shown above that the panel's decision is fully consistent with the Supreme Court's decisions in Buckley v. Valeo, 424 U.S. 1 (1976) and FEC v. Massachusetts Citizens

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5/ The Supreme Court's recent reaffirmation in MCFL that the substantive approach to express advocacy satisfies First Amendment vagueness requirements precludes Mr. Furgatch's argument (Pet. at 2-3) that this standard is unconstitutionally vague.

for Life, Inc, 107 S. Ct. 616 (1986), while Mr. Furgatch's arguments are not.[6/] Thus, even if the panel's decision were in conflict with the earlier decision of the Second Circuit in CLITRIM, the Supreme Court's decision would prevail. But there actually is no conflict between the panel's decision in this case and the decision in CLITRIM. The leaflet at issue in CLITRIM was, as the panel found (sl. op. at 18), "issue-oriented speech" which contained none of the crucial features of Mr. Furgatch's advertisement. As the Second Circuit explained, the leaflet advocated lower taxes and listed a local congressman's votes on a certain tax bill, but it contained "no reference anywhere ... to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman

6/ Mr. Furgatch's reliance (Pet. at 14) upon Thomas v. Collins, 323 U.S. 516 (1945) is equally unavailing. The Supreme Court itself found Thomas inapplicable to the Act's disclosure requirement because "Thomas held unconstitutional a prior restraint in the form of a registration requirement for labor organizers" while "[t]he burden imposed by [the Act] is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." Buckley v. Valeo, 424 U.S. at 81-82. In addition, the problem with the statute in Thomas v. Collins was that its "distinction between discussion, laudation, general advocacy, and solicitation puts the speaker ... wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." 323 U.S. at 535. The panel's substantive test for express advocacy presents no such problem, for if there is any reasonable construction of a communication other than as advocacy of a particular election result, it is not covered by the Act.

Ambro." 616 F.2d at 53. The only exhortation in the leaflet in that case called for communication with the congressman on the issue of taxes,[7/] not for action against him. Mr. Furgatch's advertisement, by contrast, talked of nothing other than President Carter's reelection campaign, warned the reader that "if he succeeds the country will be burdened by four more years of incoherencies, ineptness and illusion" and exhorted the reader "Don't let him do it." It is these contrasting facts that lead to the differing results in the two cases. In fact, the test articulated by the panel in this case would have resulted in precisely the same conclusion reached by the Second Circuit, that the CLITRIM pamphlet called for communication with the congressman on issues rather than advocating that he be defeated at the polls. Thus, there is no conflict between these two decisions.

Mr. Furgatch's final contention (Pet. at 5) is that the panel erroneously assessed the undisputed facts of this case. However, rehearing in banc is not warranted merely to review the result in this particular case, particularly since Mr. Furgatch has only complained of the burdens of filing reports and has not alleged that disclosure of his identity would deter him from engaging in speech (see n.1, pp. 2-3, supra). In any event, Mr. Furgatch's assertion that his advertisement should be construed only to call for readers to expose Mr. Carter's record is not

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7/ "If your Representative consistently votes for measures that increase taxes, let him know how you feel. And thank him when he votes for lower taxes and less government." 616 F.2d at 53.

only fanciful, given the advertisement's appearance only three days before the election, but inconsistent with the words of the advertisement itself. Thus, Mr. Furgatch's advertisement did not merely criticize Mr. Carter's campaign tactics, accusing him of attempting to hide his own record and of "cultivating the fears, not the hopes, of the voting public." Rather, the advertisement went on to warn explicitly that "[i]f he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion," an unambiguous reference to Carter's reelection to another four year term. Merely publicizing Carter's record could not stop Carter from "burden[ing]" the country "with four more years of incoherencies, ineptness and illusion." If, as the advertisement suggests, Mr. Carter was incoherent and inept, the only way in which he could be stopped from succeeding in burdening the country with four more years of his ineptness and incoherencies would be to defeat his bid for reelection. In this context, the advertisement's exhortation "Don't let him do it" unmistakably calls upon the reader not to let Carter "succeed" in burdening the country with "four more years" of his ineptness and incoherencies -- an explicit call for defeating Carter's reelection bid. Thus, if the advertisement is viewed as a whole, without ignoring its crucial advertisement as Mr. Furgatch does, the panel's conclusion that this advertisement amounted to express advocacy of Carter's defeat at the polls is inescapable.

In sum, the panel's decision properly implements the Supreme Court's decisions on express advocacy in Buckley and MCFL by

utilizing a substantive test that limits the statute's reach to communications that unambiguously call for the election or defeat of particular candidates. Moreover, the court properly construed Mr. Furgatch's advertisement as an unambiguous call for the defeat of President Carter in the election three days hence. This decision raises no constitutional issues that have not already been disposed of by the Supreme Court, and does not conflict with the holding of any decision in any other court. Accordingly, there is no ground for rehearing this case in banc.

CONCLUSION

For the reasons set forth above, the Commission submits that Harvey Furgatch's Petition for Rehearing and Suggestion for Rehearing In Banc should be denied.

Respectfully submitted,

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	)	
Defendant-Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served by first class mail, postage prepaid, a copy of the Opposition of the Federal Election Commission to Petition for Rehearing and Suggestion for Rehearing In Banc in the above-captioned case on this 18th day of March 1987, on the following counsel:

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