No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HARVEY FURGATCH, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a district court lacks the discretion to issue a permanent injunction against the repetition of a proven violation of the Federal Election Campaign Act, as explicitly authorized by 2 U.S.C. § 437g(a)(6)(B), unless the defendant has demonstrated "extraordinary intransigence and hostility toward the FEC and the Act"

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The Federal Election Commission ("FEC" or "Commission") respectfully petitions this Court for a writ of *certiorari* to review a portion of the judgment of the United States Court of Appeals for the Ninth Circuit in *Federal Election Commission v. Harvey Furgatch,* 869 F.2d 1256 (9th Cir. 1989).

OPINIONS BELOW

The March 8, 1989 decision of a panel of the court of appeals affirming in part and reversing in part the district court's opinion is published at 869 F.2d 1256 (9th Cir. 1989) and appears at Appendix ("App.") A. The May 17, 1989 order of the court of appeals denying the Commission's petition for rehearing and suggestion for rehearing *en banc* is unreported and appears at App. B. The April 26, 1988 final order of the United States District Court for the Southern District of California granting summary judgment for the Commission is unreported and appears at App. C.

JURISDICTION

The judgment of the court of appeals was entered March 8, 1989. A petition for rehearing and suggestion for rehearing *en banc* was denied on May 17, 1989. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns provisions of the Federal Election Campaign Act of 1971, as amended, ("FECA" or "the Act"), 2 U.S.C. §§ 431-455,[1] specifically 2 U.S.C. § 437g(a)(6)(B). For the Court's convenience, 2 U.S.C. § 437g is set forth in its entirety at App. D.

STATEMENT OF THE CASE

A. The Act

The Commission is the independent agency established by Congress to administer and "formulate policy with respect to" the Act. It is vested with "exclusive jurisdiction" over the civil enforcement of the Act as well as the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. 2 U.S.C. § 437c(b)(1).

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[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 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 (1988).

The Act sets out a detailed administrative procedure by which the Commission investigates possible violations of the Act. *See* 2 U.S.C. §§ 437g(a)(1)-(a)(4). Upon completion of those administrative proceedings, if the Commission is unable to resolve a matter through conciliation, 2 U.S.C. § 437g(a)(4), 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).

The Act provides for two levels of civil remedies for violations of the Act. Section 437g(a)(6)(B) authorizes a district court, upon finding that the Act has been violated, to issue a permanent injunction, temporary injunction, restraining order or other order, including a civil penalty up to the greater of $5,000 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 it to increase the civil penalty to the greater of $10,000 or twice the amount of the contribution or expenditure involved in the violation.

B. Prior Proceedings In The Lower Courts

A few days before the November 4, 1980, Presidential election, Harvey Furgatch ("Furgatch") made independent expenditures totaling $25,008 to pay the costs of two full page newspaper advertisements opposing the re-election campaign of President Carter. *See* 2 U.S.C. § 431(17). After conducting administrative proceedings under 2 U.S.C. §§ 437g(a)(1)-(a)(4), the Commission filed this lawsuit pursuant to 2 U.S.C. § 437g(a)(6)(A), alleging that Furgatch had violated 2 U.S.C. § 434(c) by failing to file a report of his independent expenditures with the Commission, and that he had violated 2 U.S.C. § 441d because one of his advertisements failed to state that the communication was not authorized by any candidate or candidate's committee.

Although the district court initially dismissed the suit, the court of appeals reversed, finding that Furgatch had violated the Act as alleged. *FEC v. Furgatch,* 807 F.2d 857 (9th Cir. 1987). The court of appeals rejected Furgatch's argument that the advertisements did not "expressly advocate" the candidate's defeat, found that they, therefore, constituted independent expenditures 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." *Id.* at 865. The appellate court also rejected Furgatch's constitutional arguments, noting that:

> the constitutionality of the provisions at issue was reviewed in *Buckley [v. Valeo,* 424 U.S. 1 (1986)] 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.

Id. The court of appeals denied Furgatch's petition for rehearing and suggestion for rehearing *en banc* on April 23, 1987, and this Court denied his petition for a writ of *certiorari* on October 5, 1987. *Furgatch v. FEC,* 108 S.Ct. 151 (1987).

C. The Decision And Order Of The District Court

On remand, Furgatch continued to insist that he had not violated the Act "notwithstanding the decision of the Court of Appeals" (App. A at 4a). On April 26, 1988, however, the district court entered a final order complying with the mandate of the court of appeals and granting summary judgment to the Commission (App. C at 20a). The court found that 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" (App. C at 20a-21a). The court then ordered Furgatch to file the independent expenditure report within 30 days and, pursuant to 2 U.S.C. § 437g(a)(6)(B), ordered him to pay a civil penalty of $25,000 and permanently enjoined him from "future similar violations of the Federal Election Campaign Act" (App. C at 21a).

On June 3, 1988, 38 days later, Furgatch filed his independent expenditure report with the Commission. He appealed the district court's assessment of the $25,000 civil penalty and issuance of injunctive relief (App. A at 3a).

D. The Decision Of The Court Of Appeals

The court of appeals affirmed the civil penalty imposed by the district court, and held that section 437g(a)(6)(B) authorizes injunctive relief when, as here, a district court finds that a person has committed a violation of the Act (App. A at 10a), as long as there is also "a 'likelihood' of future violations" (App. A at 13a). The court found "ample support in the record for a finding that Furgatch is likely to commit future violations of the Act" (App. A at 13a).

> A defendant's persistence in claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future violations are sufficiently likely to warrant an injunction (citations omitted). Furgatch manifested his belief in the blamelessness of his conduct by rejecting the FEC's attempts at conciliation, by urging the district court to reject this court's opinion in *FEC v. Furgatch,* 807 F.2d 857 (9th Cir. 1987), as a "manifest injustice," and by failing to file a report on his 1980 campaign expenditures until after

> the district court on remand ordered him to do so. Moreover, Furgatch has never given any assurances of future compliance.

(App. A at 13a-14a). Although the court found, therefore, that injunctive relief was warranted, it nevertheless held, *sua sponte,* that the district court could not issue a permanent injunction.[2]

> [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. On remand, the district court must limit the injunction to a reasonable duration.

(App. A at 14a-15a).[3] The Commission's petition for rehearing and suggestion for rehearing *en banc* were denied on May 17, 1989 (App. B at 19a).

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[2] Although Furgatch had opposed injunctive relief on several grounds, he did not contest before either of the lower courts the duration of the permanent injunction sought by the Commission.

[3] The court of appeals also instructed the district court on remand to clarify "the precise conduct prohibited by the injunction" pursuant to Rule 65(d) of the Federal Rules of Civil Procedure (App. A at 18a). The Commission does not seek review of this portion of the court of appeals decision.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED IN HOLDING THAT A DISTRICT COURT LACKS THE DISCRETION TO ISSUE A PERMANENT INJUNCTION AGAINST THE REPETITION OF A PROVEN VIOLATION OF THE FEDERAL ELECTION CAMPAIGN ACT, AS EXPLICITLY AUTHORIZED BY 2 U.S.C. § 437g(a)(6)(B), UNLESS THE DEFENDANT HAS DEMONSTRATED "EXTRAORDINARY INTRANSIGENCE AND HOSTILITY TOWARD THE FEC AND THE ACT"

The Act 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). The court of appeals concluded that this provision was intended to authorize injunctive relief when a court finds that the Act has been violated (App. A at 11a-12a), and also found "ample support in the record for a finding that Furgatch is likely to commit future violations of the Act" (App. A at 13a). It nevertheless held that a "permanent injunction" could not be imposed without an additional showing 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" (App. A at 14a-15a). The court, therefore, remanded to the district court with instructions to "limit the injunction to a reasonable duration" (App. A at 15a).

The new, more stringent test for permanent injunctive relief created by the court of appeals in this case conflicts with the explicit provisions of the Act, as well as with more than forty years of case law construing and applying the many other federal statutes that also rely upon permanent injunctive relief against repetition of proven violations as a primary enforcement tool. If allowed to stand, this new judicially created restriction on the remedial authority

Congress has granted to the district courts will substantially impair the Commission's ability to enforce the Act effectively, and will also limit the ability of district courts to provide the permanent injunctive relief Congress has authorized for the enforcement of many other federal regulatory statutes. Such a bold departure from established principles supporting effective civil law enforcement merits careful review by this Court.

A. The Decision Below Conflicts With The Language And Intent Of The Federal Election Campaign Act, Which Explicitly Authorizes Permanent Injunctive Relief For Nonwillful Violations

The court of appeals' ruling limiting permanent injunctive relief to cases involving "extraordinary intransigence and hostility toward the FEC and the Act" (App. A at 15a) directly conflicts with Congress' explicit decision to authorize district courts to issue permanent injunctions even for nonwillful violations of the Act. Congress designed the Act to provide greater penalties for "knowing and willful" violations of the Act, which are now codified at 2 U.S.C. § 437g(a)(6)(C), than for violations that are not willful, which are currently codified at 2 U.S.C. § 437g(a)(6)(B). Even violations that are unintentional, or result from negligence, were to be subject to the penalties for nonwillful violations.[4]

[4] *See, e.g.*, 122 Cong. Rec. 6955 (1976), *reprinted in FEC, Legislative History of the Federal Election Campaign Act Amendments of 1976 ("1976 Leg. Hist.")* at 413 (remarks of Sen. Clark) ("[T]he civil penalty provisions now in S. 3065 provide for penalties only in the case of 'knowing and willful' violations of the act. . . . Gross negligence, therefore, would go completely unpunished. . . . The purpose of this amendment is to add language already in the House bill, to provide a civil penalty . . . for any violation of the act."); 122 Cong. Rec. 7288 (1976), *reprinted in 1976 Leg. Hist.* at 470 (remarks of Sen. Cannon) ("S. 3065 would give the Commission expanded civil enforcement powers including the power to ask the court for imposi-

Congress also chose to authorize "permanent" injunctions in the provision applicable to nonwillful violations, 2 U.S.C. § 437g(a)(6)(B), rather than limiting them to cases involving willfulness by placing this authority in what is now section 437g(a)(6)(C). As the Conference Report explained, this was to ensure, *inter alia*, that "[t]he relief sought in *any civil action* may include a permanent . . . injunction," H. R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 47 (April 28, 1976) (emphasis added), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1976* ("*1976 Leg. Hist.*") at 1041 (1977).

The decision of the court below, precluding district courts from issuing permanent injunctions in cases that do not involve a willful hostility to the Act, rewrites the remedial scheme enacted by Congress in a manner that reduces the ability of the Commission and the district courts to prevent repetition of proven violations of the Act. This frustration of remedies explicitly adopted by Congress to protect the integrity of the electoral process is itself a significant enough issue to warrant review by this Court.

B. The Decision Below Conflicts With The Law Developed Under Other Statutes Authorizing Permanent Injunctions Against Repetition Of Proven Violations

The Federal Election Campaign Act is not the only statute that relies upon injunctions as a major enforcement tool. More than 45 years ago this Court noted that most federal regulatory statutes provide for enforcement by injunction. *Hecht Co. v. Bowles*, 321 U.S. 321, 327-329 (1944). Current federal regulatory statutes continue to rely for effective enforcement upon injunctive relief, either

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tion of civil fines for such violations as, for example, the negligent failure to file a particular report, as well as more substantial fines for willful and knowing violations of the act.")

issued initially by a district court,[5] or through judicial enforcement of administrative cease and desist orders.[6]

Innumerable injunctions and enforcement orders have been issued under these statutes over the years, and the courts have apparently been unanimous, until now, in holding that a district court has the discretion to issue a permanent injunction against repetition of proven violations of law so long as there is a "reasonable likelihood" that the wrong will be repeated.[7] The court of appeals ex-

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[5] *See, e.g.,* 7 U.S.C. § 13a-1 (Commodity Exchange Act); 7 U.S.C. § 2305(b) (Agricultural Fair Trade Practices Act); 15 U.S.C. § 78u(d) (Securities and Exchange Act); 15 U.S.C. § 78dd-2(d)(1) (Foreign Corrupt Practices Act); 15 U.S.C. § 797(b)(4) (Electric Consumer Protection Act); 15 U.S.C. § 3414(b)(1) (Natural Gas Policy Act); 16 U.S.C. § 825m(a) (Federal Power Commission Act); 29 U.S.C. § 217 (Fair Labor Standards Act); 42 U.S.C. § 1971(c) (Voting Rights Act); 42 U.S.C. § 6928(a)(1) (Resource Conservation and Recovery Act).

[6] *See, e.g.,* 15 U.S.C. § 45 (Federal Trade Commission Act); 15 U.S.C. § 687a(b) (Small Business Investment Act); 29 U.S.C. § 160(b) (National Labor Relations Act). A court order enforcing an administrative cease and desist order is an injunction, subject to the requirements of Rule 65 of the Federal Rules of Civil Procedure. *See Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 13-14 (1945).

[7] *See, e.g., 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"); *CFTC v. CO Petro Marketing Group, Inc.,* 680 F.2d 573, 582 n.16 (9th Cir. 1982) ("[W]e conclude that the district court correctly issued the permanent injunction on a proper finding that there was a reasonable likelihood of future violations"); *SEC v. Holschuh,* 694 F.2d 130, 145 (7th Cir. 1982) ("[T]he district court was more than justified in concluding that there was a reasonable likelihood of future registration and antifraud violations and in permanently enjoining Mr. Holschuh from committing further violations"); *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 viola-

plicitly found that this test had been satisfied in this case (App. A at 13a-14a), but nevertheless concluded that it was not permissible for the district court to issue a permanent injunction without satisfying the additional requirement that "extraordinary intransigence and hostility toward the FEC and the Act" be shown (App. A at 15a). The court of appeals cited no authority whatever for its new test for a permanent injunction, and we have found no case in which any court has ever before suggested that anything more than the "reasonable likelihood" standard must be met to justify a permanent injunction.[8] To the contrary, one circuit has specifically refused to condition permanent injunctive relief upon a showing, not unlike the one required by the court below, of "a propensity or natural inclination to violate" the statute. *SEC v. Manor*

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tions is whether there is a reasonable likelihood that the wrong will be repeated"). *See also EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987); *SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 903 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1981); *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980).

[8] A finding of a violation of law is itself "highly suggestive of the 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 the 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 Eleemosynary 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 NLRB v. Raytheon Co.*, 398 U.S. 25, 27-28 (1970). Where violations have been found and the defendant has not introduced evidence that puts the likelihood of repetition at issue, courts have issued permanent injunctions without discussing that question. *See, e.g., FEC v. American International Demographics 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). *See also Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th

Nursing Centers, Inc., 458 F.2d 1082, 1101 (2d Cir. 1972).[9]

There is no legal justification for requiring the district court to limit the duration of its injunction. "The courts have an obligation, once a violation has been established, to protect the public from a continuation of the harmful and unlawful activities." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48 (1960). The court of appeals has found that Furgatch violated the Act, and that there is a reasonable likelihood that he will repeat his violations if not enjoined. Thus, it is clear, as the court of appeals concluded, that injunctive relief is warranted at this time.

If a time comes when the district court is satisfied that the injunction is no longer necessary to protect the public, it can modify or vacate it at that time pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 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). *See also United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968); *SEC v. Warren*, 583 F.2d 115, 120 (3d Cir. 1978). At such time the court would have a record on which it could determine that the injunction is

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Cir. 1988), *cert. denied*, 109 S.Ct. 865 (1989); *NLRB v. Imperial House Condominium, Inc.*, 831 F.2d 999 (11th Cir. 1987); *NLRB v. International Brotherhood of Electrical Workers*, 828 F.2d 936 (2d Cir. 1987); *Amrep Corp. v. FTC*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986) all of which enforce cease and desist orders.

[9] This sort of extraordinary showing has, in fact, been held to justify an injunction broader than one merely prohibiting the repetition of violations already committed. *See, e.g., NLRB v. Express Publishing Co.*, 312 U.S. 426, 436-438 (1941); *Coil-A.C.C. v. NLRB*, 712 F.2d 1074, 1076 (6th Cir. 1983); *NLRB v. Blake Construction Co.*, 663 F.2d 272, 284-286 (D.C. Cir. 1981).

no longer required, and could be sure that termination of the injunction would not endanger the public interest. In contrast, the ruling of the court of appeals that the injunction must be limited *in advance* to "a reasonable duration" (App. A at 15a) is not adequate to fulfill the obligation to protect the public from repetition of the violations found, for there is no basis at this time for the district court even to speculate when, if ever, Furgatch will no longer be likely to violate the Act if not enjoined.

While it is clear that the public interest can only be adequately protected at this time by a permanent injunction, subject to future modification if appropriate, it is also clear that the imposition of such an injunction would cause no harm to Furgatch. The injunction issued by the district court only prohibits Furgatch from engaging in additional violations of the Act; nothing is enjoined that would not have been unlawful in any event. Such an injunction, narrowly directed toward restraining future unlawful actions, "subjects [Furgatch] to no penalty, to no hardship. It requires [him] to do what the Act requires anyway—to comply with the law." *Marshall v. Chala Enterprises, Inc.*, 645 F.2d 799, 804 (9th Cir. 1981), *quoting Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962). *See also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15-16 (1945) ("little by way of obligation could be passed on to a successor or assign by the order that is not in any event imposed by statute"). In these circumstances, there is no cognizable private interest to weigh against the established public interest in permanent injunctive relief.[10]

[10] In particular, neither the Act nor the injunction issued by the district court purports to restrict 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. It was determined in the merits phase of this case that, under this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), these

In sum, the decision of the court of appeals directly conflicts with the terms and the intent of the Act and also with a sizable body of law developed over many years of applying the comparable provisions for law enforcement injunctions in most federal regulatory statutes. If allowed to stand, this decision will not only impair the ability of the Commission to obtain compliance with the Act, but will also place new limits on the heretofore established authority of the district courts to issue permanent injunctive relief against the repetition of violations of a broad array of federal statutes. This significant inroad into the remedial authority that Congress has explicitly granted to the district courts to ensure that the law is effectively enforced clearly warrants full review by this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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statutory disclosure requirements are not unconstitutionally vague and do not violate the First Amendment. Since the injunction adds no additional limitation on Furgatch's activities, it cannot be found to violate the First Amendment any more than the statute itself.