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UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

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FEDERAL ELECTION COMMISSION,)	
)	
Appellant,)	No. 85-5524
)	
v.)	
)	
HARVEY FURGATCH,)	
)	
Appellee.)	
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HARVEY FURGATCH,)	
)	
Appellant,)	No. 85-5963
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Appellee.)	
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 U.S. COURT OF APPEALS
 9TH CIRCUIT

MOTION TO CONSOLIDATE

Pursuant to Rule 3(b) of the Federal Rules of Appellate Procedure, Harvey Furgatch hereby moves that the two above-captioned actions be consolidated for consideration by the three-judge panel of this court that is reviewing FEC v. Furgatch, No. 85-5524, because, as more fully set forth in the attached Memorandum:

1. Both of the above-captioned cases involve the same two parties: Harvey Furgatch and the Federal Election Commission ("Commission"). In one of these cases, the Commission is the appellant while in the other case, Mr. Furgatch is the appellant.

2. Both of the above-captioned cases contain identical fact situations as well as identical issues of law.

3. The consolidation of both cases will result in the conservation of judicial resources.

4. Consolidation will not delay either of the above-captioned cases except possibly to a de minimis extent.

Respectfully submitted,

DATE: September 25, 1985

H. Richard Mayberry, Jr.
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Appellee.)

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FEDERAL ELECTION COMMISSION,)

Appellee.)

No. 85-5963

MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE

I. Background

A. Commission's Enforcement Suit

In the fall of 1980, Harvey Furgatch placed an advertisement in two newspapers headed "Don't Let Him Do It", which criticized certain specific activities of then-President Carter. In a suit filed on March 25, 1983, the Federal Election Commission ("Commission") alleged that the advertisements expressly advocated the electoral defeat of President Carter and that Mr. Furgatch had consequently violated 2 U.S.C. §§ 434(c) and 441d in not reporting the cost of the advertisements to the Commission

and in not including a required disclaimer in one of the advertisements that the advertisement was not authorized by a candidate. Federal Election Commission v. Furgatch, Civil Action No. 83-0596-GT(M) (S.D. Calif. December 10, 1984) (case dismissed), appeal docketed, No. 85-5524 (9th Cir. January 31, 1985) [hereinafter, "Furgatch I"].

Harvey Furgatch moved to dismiss, contending that his advertisements did not expressly advocate the defeat of President Carter. Mr. Furgatch further argued that if the federal election laws were applicable, the Commission's regulation defining express advocacy, 11 C.F.R. § 109.1(b)(2) was unconstitutionally vague; the Commission's construction of 2 U.S.C. §§ 434(c) and 441d would cause the statute to be unconstitutionally vague; and a statute exempting individuals who publish newspapers from the disclosure and disclaimer provisions denied Mr. Furgatch the equal protection of the law assured by the Fifth Amendment's due process clause.

The district court ruled that the advertisements of Mr. Furgatch did not expressly advocate the defeat of President Carter and held that the phrase "Don't Let Him Do It" meant do not let President Carter hide his record or degrade the electoral process. The district court therefore found it unnecessary to rule on the constitutional defenses raised by Mr. Furgatch and dismissed the Commission's complaint. The Commission appealed to this court. Mr. Furgatch's brief was filed in this court on August 21, 1985, and the Commission's reply brief was filed on September 6, 1985.

B. Harvey Furgatch's Declaratory Judgment Action

After the Commission filed a notice of appeal in Furgatch I, Harvey Furgatch filed a declaratory judgment action on March 6, 1985, setting forth as affirmative claims the undecided constitutional defenses he had previously raised in his motion to dismiss. Furgatch v. Federal Election Commission, Civil Action No. 85-0720-N(M) (June 5, 1985) (case dismissed), appeal docketed No. 85-5963 (9th Cir. June 26, 1985) [hereinafter "Furgatch II"]. This action preserves Mr. Furgatch's rights pursuant to California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981), to an en banc review by the court of appeals of the constitutional issues.

Furgatch II relied on 2 U.S.C. § 437h. Inter alia, this provision provides that constitutional challenges to the Campaign Act initiated by individuals eligible to vote in presidential elections shall be immediately certified by the district court to the court of appeals for en banc consideration by the appellate tribunal.

The district court did not certify Furgatch II to this court because it dismissed the case, holding that Furgatch I had previously determined that Mr. Furgatch's activity was not covered by federal election laws and therefore no case or controversy existed. Harvey Furgatch appealed to this court, and his appellate brief is being filed contemporaneously with the filing of this Motion.

II. Issues For Appellate Consideration In Furgatch I and Furgatch II

A. Furgatch I

In this case, the primary issue is whether the district court correctly concluded that advertisements placed by Mr. Furgatch did not in express terms advocate the electoral defeat of President Carter. In its brief, the Federal Election Commission also raised the issue of whether the constitutional questions had been settled by the Supreme Court. In response, Harvey Furgatch: (a) argued that the relevant constitutional questions had not been settled; (b) reiterated substantially the constitutional arguments raised in the district court; and (c) acquainted this court with the existence of Furgatch II, and argued that if this court were to consider the constitutional questions they should be referred to the court en banc.

B. Furgatch II

There are two types of issues in this case: first, whether a case or controversy exists between Mr. Furgatch and the Commission, and second, the constitutional questions previously discussed. The latter type of issue is relevant to this court's determination of whether a case or controversy indeed exists.

III. Furgatch I and II Should Be Consolidated

Furgatch I and II should be consolidated because they are based on the same factual situation, i.e., the allegations of the Commission's complaint in Furgatch I. These allegations are based entirely on Harvey Furgatch's "Don't Let Him Do It" advertisements in the fall of 1980.

Furgatch I and II should be consolidated because they involve identical legal issues. The constitutional claims set forth in Furgatch II are identical to the defenses raised in Furgatch I.

Most importantly, consolidation of these two matters would result in judicial economy. The panel that considers Furgatch I will necessarily consider the facts and legal issues that a panel reviewing Furgatch II will have to consider.

Conclusion

For the above stated reasons, it is respectfully submitted that Furgatch II should be assigned to the three-judge panel of this court that is reviewing Furgatch I and consolidated for oral argument.

DATE:

September 25, 1985

Respectfully submitted,


H. Richard Mayberry, Jr.

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CERTIFICATE OF SERVICE

I CERTIFY that I have caused to be served by mail postage prepaid a copy of the foregoing Motion to Consolidate, together with supporting Memorandum, this 25th day of September 1985, on the following counsel at the address set forth below:

Carol A. Laham, Esquire
Office of General Counsel
Federal Election Commission
1325 K Street, N.W.
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Jonathan I. Epstein

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