UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5963

HARVEY FURGATCH,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

BRIEF FOR APPELLEE
FEDERAL ELECTION COMMISSION

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the district court properly dismissed Harvey Furgatch's complaint for lack of a "case or controversy" under Article III of the United States Constitution.

STATEMENT OF THE CASE

A. Jurisdiction

This case is before this court on appeal from a decision of the United States District Court for the Southern District of California dismissing this action for lack of a "case or controversy," as required by Article III of the United States Constitution. The district court's jurisdiction was invoked

under 2 U.S.C. § 437h. The district court entered its final judgment disposing of all claims by dismissing this action on June 5, 1985. Mr. Furgatch filed a timely notice of appeal on June 14, 1985 pursuant to Rule 4 of the Federal Rules of Appellate Procedure. This court has jurisdiction of this appeal under 28 U.S.C. § 1291.

B. Background

On March 25, 1983, the Federal Election Commission (hereafter the "FEC" or "Commission") filed an enforcement suit pursuant to 2 U.S.C. § 437g of the Federal Election Campaign Act of 1971, as amended (hereafter "the Act") alleging that Mr. Furgatch expended $25,008 to pay costs incurred in connection with political advertisements which appeared in the New York Times and Boston Globe on November 1, 1980, three days before the November 4, 1980 Presidential general election. Excerpts of Record ("Exc.") at 12-20. In its complaint in FEC v. Furgatch, ("Furgatch I"), (S.D. Cal. No. 83-0596-GT(M)), the Commission alleged that these expenditures were "independent expenditures" within the meaning of the Act and Commission regulations because the advertisements expressly advocated the defeat of Jimmy Carter, a 1980 presidential candidate clearly identified in each of the advertisements, so that Mr. Furgatch violated 2 U.S.C. §§ 434(c) and 441d by failing to report these independent expenditures to the Commission and by failing to state in one of the advertisements that the communication was not authorized by any candidate or candidate's committee (Exc. 17-19). Mr. Furgatch moved to dismiss the Commission's action pursuant to

Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming that his expenditures were not "independent expenditures" regulated by the Act, and that if his expenditures were subject to the Act's reporting requirements, the Act was unconstitutional. The district court granted the motion to dismiss, finding that the Act did not cover Mr. Furgatch's expenditures. On January 24, 1985, the Commission noticed its appeal from Judge Thompson's decision in Furgatch I (9th Cir. No. 85-5524), which is currently pending before this court.

On March 5, 1985, almost three months after final judgment was entered by the district court in Furgatch I, Mr. Furgatch filed this action in district court, seeking to have the same constitutional issues he had relied upon as defenses in Furgatch I certified to this court for en banc consideration pursuant to 2 U.S.C. § 437h (Exc. 1-10).[1/] Mr. Furgatch contended that 2 U.S.C. §§ 434(c) and 441d violate the first amendment because they are vague and overbroad and violate the due process clause

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1/ 2 U.S.C. § 437h provides

> (a) . . . The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

of the fifth amendment because they apply to individuals but not to the institutional press. He also alleged that 11 C.F.R. § 109.1(b)(2), the Commission's regulation implementing 2 U.S.C. § 431(17)'s definition of "independent expenditure" is unconstitutionally vague and overbroad (Exc. 7-8). Mr. Furgatch has conceded that this action arose out of Furgatch I and that he "raised substantially the same constitutional contentions in his motion to dismiss the Commission's enforcement suit." Supplemental Excerpt at p. 3 .

C. The District Court Proceedings

On March 7, 1985, Mr. Furgatch filed a motion to certify constitutional questions to the United States Court of Appeals for the Ninth Circuit pursuant to 2 U.S.C. § 437h (Exc. 27-29). The Commission opposed this motion (Exc. 57-88), and on April 1, 1985 a hearing was held at which Judge Nielsen concluded that the case should be dismissed (Exc. 164). On June 5, 1985, the district court entered its final order dismissing this case on the ground that, since "Judge Thompson held that Mr. Furgatch's activity was not covered by the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq.," Mr. Furgatch's complaint presented no case or controversy (Exc. 152).

ARGUMENT

I. THE STANDARD OF REVIEW

This is an appeal from a district court decision dismissing an action for lack of case or controversy; appellate review in

such cases is de novo. See, e.g., EMI Limited v. Bennett, 738 F.2d 994, 996 (9th Cir.), cert. denied, 105 S. Ct. 567 (1984).

II. THE DISTRICT COURT PROPERLY DETERMINED THAT MR. FURGATCH'S COMPLAINT DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY

It is a fundamental principle of constitutional law that courts must not resolve constitutional issues in advance of the necessity of deciding them. See, e.g., United States v. UAW, 352 U.S. 567, 590 (1957); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 772 (1947); Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981). The Supreme Court has found this principle fully applicable in lawsuits under 2 U.S.C. § 437h, concluding that

> § 437h cannot properly be used to compel federal courts to decide constitutional challenges in cases where resolution of unsettled questions of statutory interpretation may remove the need for constitutional adjudication.

California Medical Association v. FEC, 453 U.S. 182, 193 n.14 (1981). Once it is determined that the statutory provisions under constitutional attack do not "apply to defendants' conduct," therefore, the cause of action under 2 U.S.C. § 437h must be dismissed.

> For if they do not, the constitutional counterclaims would not present a "case" or "controversy" ripe for adjudication within the meaning of Art. III, Sec. 2, of the Constitution, a constitutional prerequisite to execise of jurisdiction by federal courts, ... and it would be necessary to dismiss the claim.

FEC v. Central Long Island Tax Reform Immediately Committee ("CLITRIM"), 616 F.2d 45, 51 (2d Cir. 1980) (en banc). The

Supreme Court has thus concluded that the district court has the power "to prevent...abuses of § 437h" by refusing to certify constitutional questions to the en banc court of appeals if, inter alia, it finds that the complaining party lacks "standing to raise the constitutional claim," California Medical Association v. FEC, 453 U.S. at 193-194 n.14.

The district court acted well within its authority under these precedents when it dismissed this case for lack of justiciable constitutional case or controversy. Judge Thompson's final order of December, 1984 in Furgatch I, a case between the identical parties, and upon which Mr. Furgatch relied as the basis of this action, squarely held that the statutory and regulatory provisions now challenged by Mr. Furgatch do not apply to his expenditures. That decision is binding in this case on the basis of collateral estoppel, which "bars relitigation, even in an action on a different claim, of all 'issues of fact or law that were actually litigated and necessarily decided' in the prior proceeding." Americana Fabrics, Inc. v. L&L Textiles, Inc., 754 F.2d 1524, 1529 (9th Cir. 1985). See also, e.g., South Delta Water Agency v. United States Dept. of Interior, 767 F.2d 531, 538 (9th Cir. 1985); In re Duncan, 713 F.2d 538, 541 (9th Cir. 1983); Segal v. American Tel. & Tel. Co., 606 F.2d 842, 845 (9th Cir. 1979). Since the decision in Furgatch I required the district court in this action to find that Harvey Furgatch's

expenditures are not covered by the provisions of the Act he challenges, Mr. Furgatch clearly lacks standing here to challenge the constitutionality of those provisions. CLITRIM, 616 F.2d at 51.

Contrary to Mr. Furgatch's argument (Br. 6, 8) the validity of the district court's dismissal of this case will not be affected if Furgatch I is reversed on appeal.[2/] Even Mr. Furgatch has not seriously disputed that, if the district court's decision in Furgatch I is affirmed on appeal, collateral estoppel would bar this action. If Furgatch I is reversed by this court, however, the district court's dismissal of this action would still have to be affirmed. As Mr. Furgatch acknowledged in his brief in this case (Br. 6), the constitutional issues raised in this action were all raised as defenses in Furgatch I, and have been fully briefed on appeal. Accordingly, in order to reverse the district court's decision to dismiss Furgatch I, this court will have to reject Mr. Furgatch's arguments in that appeal that the provisions of the Act which the Commission has alleged he violated are unconstitutional. In such an eventuality, Mr. Furgatch's constitutional challenges will necessarily have been

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2/ The district court correctly dismissed this action despite the fact that Furgatch I is on appeal, for it is well settled that "the pendency of an appeal does not suspend the operation of an otherwise final judgment as collateral estoppel." California Chamber of Commerce v. Simpson, 601 F. Supp. 104, 107 (C.D. Cal. 1985). See also, Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941); Eichman v. Fotomat Corp., 759 F.2d 1434, 1439 (9th Cir. 1985).

resolved in that appeal, and nothing will remain to be decided between the parties in this case.[3/] Regardless of the outcome in Furgatch I, therefore, the dismissal of this case for lack of case or controversy will remain valid.

As discussed in our Reply Brief in No. 85-5524, pp. 10-11, not all constitutional issues are required to be resolved through the special section 437h procedure. The Supreme Court has expressly noted that the "Act provides two routes by which questions involving its constitutionality may reach this Court," through a section 437g enforcement proceeding or a section 437h declaratory judgment proceeding. California Medical Association v. FEC, 453 U.S. at 187. Two cases involving important constitutional challenges to the Act have in fact reached the Supreme Court through the section 437g procedures. FEC v. National Right to Work Committee, 459 U.S. 197 (1982); FEC v. Massachusetts Citizens for Life, Inc., 769 F.2d 13 (1st Cir. 1985), prob. juris. noted, 106 S. Ct. 783 (U.S. Jan. 13 1986) (No. 85-701). Mr. Furgatch chose to present his constitutional issues to the district court in a section 437g proceeding, and refrained from filing his section 437h countersuit until after those issues had already reached this court in the section 437g case. There is nothing in either the Act or the Supreme Court's decision that gives Mr. Furgatch the right to switch his

3/ "A final judgment on the merits bars a subsequent action between the same parties or their privies over the same cause of action." Davis & Cox v. Summa Corp., 751 F.2d 1507, 1518 (9th Cir. 1985). See also South Delta Water Agency v. United States Dept. of Interior, 767 F.2d at 538.

strategies at this late date and deprive this court of its discretion under Rule 35 of the Federal Rules of Appellate Procedure to decide for itself whether Mr. Furgatch's arguments warrant en banc consideration. He has a forum for his arguments before this panel in No. 85-5524, and like all other litigants, Mr. Furgatch is entitled to only one opportunity to present his claim.

Mr. Furgatch argues (Br. 6) that he faces a continuing threat of prosecution if he decides to engage in the same activity in the future. However, unlike the complaint in Athens Lumber Co. v. FEC, 689 F.2d 1006, 1012-1013 (11th Cir. 1982), upon which Mr. Furgatch relies (Br. at 6-7), Mr. Furgatch's complaint in this case (Exc. 1-10) did not allege that Mr. Furgatch intended to engage in similar conduct in the future.[4/] Of course, a plaintiff "must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." Fifty Associates v. Prudential Insurance Co. of America, 446 F.2d 1187, 1190 (9th Cir. 1970), quoting McNutt v. General Motors Acceptance Corp.,

4/ Appellant's description of Athens Lumber Company v. FEC, 689 F.2d 1006 (11th Cir. 1982), 718 F.2d 363 (1983), (en banc) cert. denied, appeal dismissed, 465 U.S. 1092 (1984) is misleading. The en banc court in that case expressly declined to accept jurisdiction under section 437h, and based its jurisdiction instead on Rule 35 of the Federal Rules of Civil Procedure, just as this court did in California Medical Ass'n v. FEC, 641 F.2d 619, 631-632 (9th Cir. 1980) (en banc), affirmed on other grounds 453 U.S. 182 (1981). Thus, although the en banc Athens court accepted the panel's conclusion that the allegations of the complaint were adequate to establish Article III standing for the president of the corporation, it did not find "standing under 2 U.S.C. § 437h," as asserted by Mr. Furgatch (Br. 6).

298 U.S. 178, 189 (1936). See also Dozier v. Ford Motor Co., 702 F.2d 1189, 1191 (D.C. Cir. 1983); Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 198 (7th Cir. 1985). Mr. Furgatch's complaint alleged only that "[t]he Commission's interpretation of the Campaign Act with respect to the New York Times and Boston Globe advertisements at issue in its complaint [in Furgatch I] results in a significant threat of civil sanctions being imposed upon Harvey Furgatch" (Exc. 7). We have shown supra, pp. 6-8, that collateral estopppel precludes use of this allegation as a basis for standing in this case, and Mr. Furgatch's complaint contained no other allegations relating to standing (indeed, Mr. Furgatch did not allege that he has engaged in any political activities in any election since 1980).

Even if Mr. Furgatch had alleged that he was going to engage in similar conduct in the future, it is difficult to imagine that he could demonstrate a concrete intention to sponsor another publication containing the precise wording of the ones at issue in Furgatch I. Moreover, if he did engage in that precise activity the Commission might well be bound by this court's ruling in Furgatch I under principles of collateral estoppel. See United States v. Stauffer Chemical Co., 464 U.S. 165, 169 (1984). If Mr. Furgatch engaged in "similar activity", however, the precise wording of the advertisement would have to be examined, as the district court did in Furgatch I, to determine whether the advertisement fell within the statute's reporting requirements. It is by no means clear therefore, that such activity would result in another enforcement proceeding.

"Speculative contingencies afford no basis for finding the existence of a continuing controversy between the litigants as required by article III." Lee v. Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1985).5/

Finally, Mr. Furgatch attempts (Br. 5-6), to undercut the district court's opinion by relying on California Medical Association v. FEC, 453 U.S. 182 (1981), in which the Supreme Court found that Commission enforcement actions and section 437h countersuits "may proceed in the district court at the same time." Id. at 192. However, Furgatch I and this action did not proceed in the district court at the same time. Rather, Mr. Furgatch waited to file his section 437h countersuit for almost two years, until after the Commission's enforcement case had already been resolved on the merits in the district court and was pending on appeal in this court. The Supreme Court never suggested that a section 437h action can be filed after final judgment is entered in the related enforcement proceeding and that judgment has been pending in the court of appeals for some time. To the contrary, as shown supra, pp. 5-6, the Court clearly contemplated a district court's dismissal of a section 437h case

when, as here, a statutory decision has made constitutional

5/ In any event Mr. Furgatch never asserted his possible future conduct as a basis for standing at any time in the district court. Thus, he is precluded from raising this argument for the first time on appeal. See e.g., Youakim v. Miller, 425 U.S. 231, 234 (1976); International Union of Bricklayers, AFL-CIO v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985); Rothman v. Hospital Service of Southern California, 510 F.2d 956, 960 (9th Cir. 1975).

adjudication unnecessary.[6/]

In sum, Mr. Furgatch has failed to sustain his burden of demonstrating that his complaint in this case states a justiciable case or controversy. The district court's decision dismissing this case should, therefore be affirmed.

III. THE COMPLAINT PRESENTED NO UNRESOLVED CONSTITUTIONAL ISSUES FOR CERTIFICATION

Affirmance of the district court's decision dismissing the complaint is proper even if this court were to find that this action presents a case or controversy.[7/] Section 437h does not require a district court to certify questions to this court every time a complaint is filed alleging a constitutional challenge to the Act. Rather, in California Medical Association v. FEC, 453 U.S. at 193-194 n.14, the Supreme Court affirmed that district

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6/ This case is different from California Medical Association v. FEC for several additional reasons as well. First, in CMA the section 437h action seeking certification to the court of appeals was actually filed before the Commission's enforcement action, so that the plaintiffs there, unlike Mr. Furgatch, had acted diligently to obtain early resolution of the constitutional issues. Because of this diligence, there was no question in that case of collateral estoppel on the threshold statutory issues. See also CLITRIM, 616 F.2d at 95. Second, two of the individual plaintiffs in the CMA section 437h case were not respondents in the Commission's enforcement action, so that the Court found no reason why their rights under section 437h should be diminished because of the Commission's enforcement action against another party. 453 U.S. at 190 n.9. Thus, important equitable considerations in California Medical Ass'n v. FEC are not present in this case. Mr. Furgatch's assertions that these two cases are analogous (Br. 6) is therefore erroneous.

7/ Although the district court's decision to dismiss Mr. Furgatch's complaint was based upon the absence of a case or controversy, this court "may affirm the district court's ruling on any basis fairly presented by the record." Olagues v. Russoniello, 770 F.2d 791, 800 (9th Cir. 1985) citing Keniston v. Roberts, 717 F.2d 1295, 1300 n.3 (9th Cir. 1983).

courts should prevent "the potential abuse of § 437h" by, inter alia, refusing to certify constitutional issues that are "insubstantial," "settled," or "involve purely hypothetical applications of the statute." See also Gifford v. Tiernan, 670 F.2d 882 (9th Cir.), appeal dismissed, cert. denied, 459 U.S. 804 (1982). As shown below, this action does not present any questions properly certifiable to the en banc court of appeals and thus was properly dismissed by the district court.[8/]

A. 11 C.F.R. § 109.1(b)(2) Is Not Unconstitutionally Vague

In his brief to this court, Mr. Furgatch has apparently abandoned the allegation in his complaint that 2 U.S.C. §§ 434(c) and 441d violate the first amendment. This concession is unavoidable, for in Buckley v. Valeo, 424 U.S. at 80-82, the Supreme Court held that it is neither a violation of the first amendment nor unconstitutionally vague for Congress to require

8/ Section 437h authorizes only the district court to certify constitutional issues to the en banc court of appeals, and the Supreme Court has noted that the district court has a number of important functions to perform before it can do so, including development of a factual record. California Medical Association v. FEC, 453 U.S. at 193-194 n.14. See also, Bread Political Action Committee v. FEC, 455 U.S. 577, 580 (1982) (district court findings of fact are "required by § 437h"). The importance of such a factual record in adjudicating the constitutionality of provisions of this statute has been emphasized by the Supreme Court. See United States v. UAW, 352 U.S. at 590; See also, Singleton v. Wulff, 428 U.S. 106, 120 (1976). When district courts have certified constitutional issues without compiling a factual record, courts of appeal have usually remanded for factual development. See e.g., CLITRIM, 616 F.2d at 49; Bread Political Action Committee v. FEC, 591 F.2d 29, 36 (7th Cir. 1978); Buckley v. Valeo, 519 F.2d 817, 818 (D.C. Cir.) later decision, 519 F.2d 821 (D.C Cir. 1975), aff'd in part, rev'd in part, 424 U.S. 1 (1976). If this court decides not to affirm the district court's dismissal, it too should remand to permit the district court to address the other issues discussed in California Medical Association, 453 U.S. at 193-194 n.14, and to compile a factual record.

reporting and disclosure of independent expenditures for express advocacy of a particular election result. Mr. Furgatch has also correctly conceded (Br. 9) that "[t]he Supreme Court's 'expressly advocating' language was directly adopted by Congress in drafting the definition of '[independent] expenditure' in the current Federal Election Campaign Act --§ 431(17). In so doing, Congress clearly was attempting to avoid constitutional challenges to the Act based upon vagueness." Since Congress adopted an approach to this area that the Supreme Court has already upheld against a charge of unconstitutional vagueness, it would be entirely frivolous to pursue the challenge to the statute asserted in Mr. Furgatch's complaint.

In this court, therefore, Mr. Furgatch has pursued his first amendment challenge only against the Commission's regulation, 11 C.F.R. § 109.1. Section 437h clearly does not authorize certification to the en banc court of appeals of such a constitutional challenge to a mere regulation.[9/] Even if it

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9/ It is well settled that jurisdictional statutes like section 437h, which provide for direct appeal to the Supreme Court, must be narrowly construed. Heckler v. Edwards, 465 U.S. 870, 885 (1984); Bread Political Action Committee v. FEC, 455 U.S. 577, 578-581 (1982); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974). The language of section 437h is unambiguously limited to lawsuits raising a constitutional challenge to "any provision of this Act," and there is no legislative history indicating a broader intent. In enacting section 437h,

> Congress was concerned with the inhibitory effect of a massive rearrangement of regulations operating upon federal campaigns and elections, and wanted election

(Footnote Continued)

did, however, Mr. Furgatch's challenge to the Commission's regulation would fail for the same reason he could not maintain a colorable constitutional challenge to the statute on which it was based. Thus, the Commission's regulation was promulgated to implement the statutory definition of independent expenditure which Mr. Furgatch concedes was enacted to conform to the Supreme Court's strictures in Buckley. The regulation defines the phrase "expressly advocating" essentially by incorporating the illustrative list of phrases from the Supreme Court's opinion in Buckley. Mr. Furgatch asserts (Br. 10) that the Commission included in its regulation language that was not in the Buckley opinion, which he speculates was included to broaden the definition of express advocacy beyond what was approved in Buckley. This suspicion is belied by the record, however, for in promulgating the regulation the Commission issued an explanation and justification that specified its intention that in the regulation "'[e]xpressly advocating' is defined consistent with

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(Footnote Continued)

> participants to be permitted expeditiously to test the facial validity of limitations and requirements imposed by the challenged Acts.

Buckley v. Valeo, 519 F.2d 821, 850-51 (D.C. Cir. 1975) (en banc) (emphasis added), aff'd in part, rev'd in part, 424 U.S. 1 (1976). Thus, in California Medical Association v. FEC, 453 U.S. at 194 n.14 (emphasis added), the Supreme Court noted that one element of its jurisdiction to hear that case under section 437h was that the plaintiffs there "expressly challenge[d] the statute on its face." Since Mr. Furgatch now attacks the constitutionality only of a regulation, and not of a provision of the Act, section 437h does not authorize certification of this issue to the en banc court of appeals.

the Supreme Court in Buckley v. Valeo." Communication from the Chairman, H. Doc. No. 44, 95th Cong., 1st Sess. 14 (1977).[10/]

Whether or not the Commission is correct in its assessment of whether a particular communication meets the express advocacy standard has no bearing on the regulation's facial constitutionality. Nothing in the regulation suggests that the Commission would find a violation of the Act if it did not believe the communication at issue contained a message meeting the Buckley standard for express advocacy. Thus, as Judge Thompson found (Exc. 23-26), the only real controversy between the parties is whether Mr. Furgatch's advertisement "expressly advocated" the election or defeat of a clearly identified candidate--a question that Judge Thompson found to be "a very close call." (Exc. 23). If it did, Mr. Furgatch violated the Act, and if it did not, the Commission will lose its enforcement action. In either event, "regulations 'are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal [cases] fall within their language.'" Great American Houseboat Co. v. United States, 780 F.2d 741, 747 (9th Cir. 1986) quoting United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963).

10/ Of course, if the Commission had adopted a regulation in conflict with the Buckley standard, as Mr. Furgatch argues, this would clearly be contrary to the expressed congressional intent to conform to Buckley. Accordingly, there would be no occasion for adjudicating such a regulation's constitutionality, for it would be invalid as conflicting with the Act. Such a patently nonconstitutional question could not be certified to the en banc court of appeals under section 437h.

Moreover, a "less strict vagueness analysis is appropriate" for the Commission's regulations since Mr. Furgatch has "'the ability to clarify the meaning of the regulation by [his] own inquiry, or by resort to an administrative process.'" Id. The Act, in 2 U.S.C. § 437f, provides any person the right to request an advisory opinion from the Commission concerning the application of the Act to any specific activity in which he wants to engage. The Commission is required to respond to such a request within 60 days, and a favorable advisory opinion is a bar to any subsequent enforcement action on the same facts. By "offer[ing] a prompt means of resolving doubts with respect to the statute's reach," the advisory opinion procedure "mitigates whatever chill may be induced by the statute. . . ." Martin Tractor Co. v. FEC, 627 F.2d 375, 384-85 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980). See also., e.g., Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 49 (1966); Anderson v. FEC, 634 F.2d 3, 5 (1st Cir. 1980).

In sum, Mr. Furgatch's assertion that the Commission's regulation is unconstitutionally vague is not properly resolved under the special procedures of 2 U.S.C. § 437h. In addition, the validity of the express advocacy requirement which the Commission stated it was incorporating into the regulation has long been settled, and any remaining uncertainty can be cleared up in advance through the Act's advisory opinion process. Thus this allegation of Mr. Furgatch's complaint presented no substantial unresolved constitutional issue that could be certified to the en banc court under 2 U.S.C. § 437h.

B. The Act's Media Exemption, 2 U.S.C. § 431(9)(B)(i), Does Not Deny Mr. Furgatch Equal Protection Of The Law

Mr. Furgatch contends (Br. 11) that 2 U.S.C. § 431(9)(B)(i) denies him equal protection of the law because individuals are required to abide by the reporting and disclosure provisions of the Act while those who own a newspaper would be exempt from these requirements.[11/] This issue also fails to meet the standards required for district court certification. Not only is the premise of the argument incorrect -- that individals who own newspapers are indiscriminately treated differently under the Act -- but such claims of unequal treatment under the Act have repeatedly been rejected by the courts. Even in cases involving provisions of the Act directly limiting speech, the Supreme Court has accepted the "judgment by Congress that ... entities having differing structures and purposes ... may require different forms of regulation in order to protect the integrity of the electoral process." California Medical Association v. FEC, 453 U.S. at 201. See also FEC v. National Right to Work Committee, 459 U.S. 197, 210 (1982) (same); Buckley v. Valeo, 424 U.S. at 95-99 (public financing of major party candidates does not unconstitutionally discriminate against minor party candidates);

11/ Section 431(9)(B)(i) of the Act exempts from the term "expenditure"

> any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate. . . .

Bread Political Action Committee v. FEC, 635 F.2d 621, 630 (7th Cir. 1980) (en banc), rev'd on other grounds, 455 U.S. 577 (1982); International Association of Machinists v. FEC, 678 F.2d 1092, 1108-1109 (D.C. Cir.) (en banc), aff'd mem., 459 U.S. 983 (1982); Athens Lumber Company v. FEC, 718 F.2d 363 (11th Cir. 1983) (en banc), (answering in the negative constitutional questions listed at 689 F.2d 1006, 1015-1016), appeal dsimissed, cert. denied, 465 U.S. 1092 (1984).

Thus, it is well established that such claims of discrimination under the Act will fail unless it is demonstrated that two differently regulated entities are so similarly situated that no difference in treatment could rationally be justified. Mr. Furgatch's burden in this case is even greater, however, for the statutory provision he challenges does not limit his speech, but only requires disclosure, and the Supreme Court has consistently held 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, 105 S. Ct. 2265, 2282 n.14 (1985). Accord, Lowe v. SEC, 105 S. Ct. 2557, 2581 n.8 (1985) (White, J., concurring).

No such demonstration has been made here. Mr. Furgatch labels the distinction here as one between "amateurs" and "professionals" and claims that the press is not "entitled to greater protection in its exercise of free speech than individuals" (Br. 25). Such a claim turns the issue on its head,

however, for the question presented in this case is not whether Mr. Furgatch enjoys the same rights as newspapers under the first amendment, but whether the fifth amendment invalidates the statute's special accomodation for the press. While it is true that "[t]he liberty of the press is not confined to newspapers and periodicals," Lovell v. City of Griffin, 303 U.S. 444, 452 (1938), the Supreme Court noted in Buckley that special protections for the news media, like Section 431(9)(B)(i), are "the rule, not the exception."

> Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media ... and preferential postal rates and antitrust exemptions for newspapers.

424 U.S. at 93 n.127. See also FCC v. League of Women Voters of California, 104 S. Ct. 3106, 3128 (1984); Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 482-483 (9th Cir.), cert. denied, 464 U.S. 892 (1983) (rejecting first amendment challenge to the Newspaper Preservation Act, 15 U.S.C. § 1801 et seq., which the court described as "an economic regulation which has the intent of promoting and aiding the press.") In sum, it has long been recognized that special congressional solicitousness for the independence and stability of the press is entirely appropriate.

The activities of the news media that are protected by section 431(9)(B)(i) are not, in fact, comparable to Mr. Furgatch's purchase of an advertisement for political advocacy.

First, most if not all of the institutional press are corporations which, as the Supreme Court noted in California Medical Association v. FEC, 453 U.S. at 200-201, are subject to other, more stringent restrictions on their political activities than the mere reporting requirements of which Mr. Furgatch complains. Moreover, unlike an individual publishing an advertisement, when a newspaper publishes an editorial the newspaper's financial sponsorship of the editorial is well understood, and requiring a newspaper to report the portion of its daily operating costs allocable to editorial comments on federal elections would be far more burdensome than requiring an individual to report a discrete payment of an amount certain to purchase an advertisement. Finally, section 431(9)(B)(i) does not free the press from all the Act's requirements; only expenditures falling within the news media's "legitimate press function" are exempt. See FEC v. Massachusetts Citizens for Life, Inc., 769 F.2d 13, 21 (1st Cir. 1985) prob. juris. noted, 106 S. Ct. 783 (U.S. Jan. 13, 1986) (No. 85-701,); Readers Digest Association, Inc. v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981); FEC v. Phillips Publishing, Inc. 517 F. Supp. 1308, 1313 (D.D.C. 1981). In short, Mr. Furgatch's comparison between the Act's treatment of individuals and its treatment of the institutional press "is inapt"; accordingly "no constitutional discrimination or first amendment burden or injury can be demonstrated from the differential treatment." California Medical Association v. FEC, 641 F.2d at 631.

It was undoubtedly for these reasons that the en banc Eleventh Circuit unanimously rejected the similar argument that "the provisions of 2 U.S.C. § 441b(a), together with the provisions of 2 U.S.C. § 431(9)(B)(i), discriminate arbitrarily and unreasonably in violation of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other." Athens Lumber Company v. FEC, 689 F.2d at 1015 (11th Cir. 1982) (certifying issues to the Eleventh Circuit Court of Appeals en banc), 718 F.2d 363 (11th Cir. 1983) (en banc) (answering certified questions in the negative), cert. denied, 465 U.S. 1092 (1984). Like the Eleventh Circuit, this court should conclude that, far from an unconstitutional discrimination between similar entities, the Act's news media exemption is a proper congressional effort to accomplish the important governmental interest served by the Act without unduly burdening the press in its daily coverage of federal election campaigns.

CONCLUSION

For the reasons set forth above, the Commission submits that this court should affirm the district court's judgment and dismiss this action.

Respectfully submitted,

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April 14, 1986

STATEMENT OF RELATED CASES

1. Furgatch v. FEC, (No. 85-5963) and FEC v. Furgatch, (No. 85-5524) are related cases in that these two actions involve the same parties and arise out of the same facts.

2. Furgatch v. FEC, (No. 85-5963) and FEC v. Dominelli, (No. 85-5525) are related cases in that FEC v. Dominelli involves a violation of the provisions of the Act, the constitutionality of which has been challenged in this action.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEY FURGATCH,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 85-5963
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served, by first-class mail, postage prepaid, a copy of the Brief for Appellee Federal Election Commission as well as the Supplemental Excerpts of Record in the above-captioned case on this 14th day of April 1986, on the following counsel:

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