

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

FEDERAL ELECTION COMMISSION

PLAINTIFF

v.

CIVIL ACTION NO. 3:98CV-549-S

FREEDOM'S HERITAGE FORUM, et al

DEFENDANTS

MEMORANDUM OPINION

This matter is before the Court on the Motion to Dismiss filed by two of the Defendants, Freedom's Heritage Forum ("the Forum") and Dr. Frank G. Simon. The Defendants assert that Count VII of the Second Amended Complaint filed by Plaintiff, the Federal Election Commission ("FEC"), fails to state a claim as a matter of law. Count VII alleges that the Forum and Dr. Simon violated 2 U.S.C. § 441d(a) by failing to include disclaimers required by law on election material distributed by the Forum. For the reasons that follow, the Motion to Dismiss will be granted in part and denied in part by separate order.

The FEC asserts in Count VII that seven flyers distributed by the Forum during the 1994 Republican primary and general election for Kentucky's 3rd Congressional District (attached to the Complaint as Exhibits 1-7) contained "express advocacy" of the election or defeat of a candidate but did not contain the disclaimers required by 2 U.S.C. § 441d(a). Previously, the Forum and Dr. Simon moved to dismiss Count VII as to the first four exhibits. In our Memorandum Opinion and Order of September 29, 1999, this Court dismissed Count VII as to Exhibits 1, 3, and 4 on the ground that they did not contain express advocacy. The FEC made a motion to reconsider, which this Court denied in its Memorandum Opinion and Order of February 4, 2000.

The Forum and Dr. Simon now seek dismissal of Count VII as to Exhibits 5, 6, and 7, which were added in the FEC's Second Amended Complaint, and again requests dismissal of Exhibit 2 as

well. The Court has now twice considered whether Exhibit 2 contains express advocacy, finding both times that it does. Having considered the matter twice, we decline to visit it a third time, as no new law or facts have been raised by the Defendants.

In considering whether Exhibits 5, 6, and 7 contain express advocacy, we will continue to use the analysis we explained in our Memorandum Opinion of September 29, 1999. In that Opinion, we stated: “We believe that, although a communication does not have to contain certain specified ‘magic words’ to constitute express advocacy, it will ordinarily contain some sort of functional equivalent of an exhortation, directive, or imperative for it to expressly advocate the election or defeat of a candidate.”

Exhibit 5 is an invitation to three events, one of which was a banquet at which candidate Richard Lewis, who was supported by the Forum, was to speak. The flyer compares Lewis’ positions with those of his opponents in the general election. It also states, in bold print: “We have the Pro-Abortionists right where we want them, divided and fighting each other. Now Richard Lewis can win with only 40% of the vote!” This statement is no more than a comment on the status of the election as viewed by its writer. It does not contain an exhortation to vote for Lewis, or its functional equivalent. It therefore does not contain express advocacy.

Exhibit 6 is a “Congressional Candidate Report” for the general election of 1994. It contains three articles favorable of Lewis, and a chart comparing his positions on certain issues to those of his opponents. This Exhibit is similar to Exhibit 1, which we have found does not contain express advocacy. However, there is a striking difference between the two. Exhibit 6 also contains in a highlighted box: “IMPORTANT! Registered Democrats and Republicans can vote for Richard Lewis who actively opposes the liberal Clinton agenda. Vote November 8, 1994, 6 a.m. to 6 p.m.” This also falls within the category of exhortations to vote for a particular candidate. The Defendants assert that this is merely a statement of the “legal principal” that in a general election, citizens registered in the major political parties can vote for an independent candidate. We disagree. The

two statements taken together urge the reader to vote for Richard Lewis, and go beyond merely commenting on the suitability of a particular candidate or candidates. We therefore find that Exhibit 6 contains express advocacy.

Exhibit 7 has the same format of Exhibit 2, which we have found contains express advocacy. The only difference between the two is the election each pertains to. Both Exhibits are “sample ballots” identifying the candidates the Forum supports, and both state, “*Please* take this sample ballot to the polls and vote on Tuesday.” The flyers explicitly urge the reader to vote for the “pro-family” candidates identified. Exhibit 7 shows a vote for Lewis, and thereby expressly advocates his election.

Because we find that Exhibits 6 and 7 contain express advocacy but Exhibit 5 does not, the Motion to Dismiss made by the Forum and Dr. Simon will be granted in part and denied in part by separate order. Count VII of the Second Amended Complaint will be dismissed as to Exhibit 5. Exhibits 1, 3, and 4 remain dismissed as well.

This ____ day of _____, 2000.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

Defendants Freedom's Heritage Forum and Dr. Frank Simon having made a Motion to Dismiss in this case, for the reasons set forth in the memorandum opinion entered herein this date, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Dismiss is **GRANTED** in part and **DENIED** in part. Count VII of the Amended Complaint is **DISMISSED** with regard to Exhibit 5 of the Amended Complaint.

IT IS SO ORDERED this ____ day of _____, 2000.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record