UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| JAMES E. AKINS, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civ. No. 92-01864 (RJL)<br>Civ. No. 00-01478 (RJL)<br>Civ. No. 03-02431 (RJL)<br><br>REPLY |

**DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs fail to meet their burden of demonstrating that the Federal Election Commission ("FEC" or "Commission") acted contrary to law when it dismissed the two administrative complaints underlying this action, and plaintiffs' opposition to the Commission's cross-motion for summary judgment does not contest many of the Commission's arguments.

Plaintiffs' claims regarding their first administrative complaint — that the American Israel Public Affairs Committee ("AIPAC") failed to disclose express advocacy communications under 2 U.S.C. § 431(9)(B)(iii) and that the Commission did not fully investigate AIPAC's communications — are barred because they were never presented to the Commission. Plaintiffs also had the opportunity in 1992 to challenge in court the Commission's determination that AIPAC was a "membership organization" under the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), but they did not make such a claim within the 60-day statutory jurisdictional time period under 2 U.S.C. § 437g(a)(8). Even if those claims had been preserved, plaintiffs have failed to demonstrate that the Commission's action on remand was contrary to law. They do not contest that: (1) a highly deferential standard of review is required when courts

review the Commission's determinations; (2) the Commission determined in 1992 that AIPAC was a membership organization; and (3) the Commission properly followed the Supreme Court's directions on remand. Plaintiffs assert that the Commission should have continued its investigation, but fail to show that the Commission's decision to conclude its investigation based on the exculpatory evidence before it was unreasonable.

Plaintiffs' second administrative complaint sought a determination that certain "membership communications" that allegedly took place between 1983 and 1990 should have been reported by the AIPAC in disclosure reports to the Commission under 2 U.S.C. § 431(9)(B)(iii). Because the Commission found that there were several reasons not to pursue this matter from almost 20 years ago any further, it reasonably exercised its prosecutorial discretion and dismissed the administrative complaint. Regarding the second administrative complaint, the plaintiffs have tacitly conceded all but one argument in support of the Commission's Motion for Summary Judgment. They argue (*see* Pl. Opp. at 10-12, Dkt # 30) that the only issue this Court should decide is whether two entirely distinct communications — one which generally urges political involvement and a second which plaintiffs describe as identifying candidates deserving support — must be treated as a single communication that "expressly advocat[es] the election or defeat of a clearly identified candidate" under 2 U.S.C. § 431(9)(B)(iii). Plaintiffs cite no legal authority — no statutory language, regulation, legislative history, or precedent — for their novel theory, and we show below that plaintiffs' position on this issue is foreclosed by the plain language of the Act and counter to recent Supreme Court precedent. We also identify three independently dispositive arguments from our opening brief that demonstrate that the Court should enter summary judgment in the Commission's favor and which plaintiffs do not contest.

This consolidated action is based on two judicial complaints, with a total of three counts. The chart below summarizes the operative complaints and the arguments presented by the Commission:

| **Complaints in this consolidated action:** | **FEC's Arguments:** |
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| **Civ. No. 92-1864 and 00-1478**<br><br>**Count 1 (Political Committee Status)** | • Plaintiffs waived their challenge to the Commission's determination that AIPAC was a membership organization because the Commission decided that question in 1992 and plaintiffs did not challenge it at that time. (Money spent by AIPAC on membership communications are not "expenditures" under the Act and therefore do not count towards the threshold for political committee status.)<br>• Plaintiffs' claims are also waived because following the remand from the Supreme Court, they were not presented to the Commission when this matter was back before the Commission.<br>• The Commission's application of its membership regulations is not contrary to law. |
| **Civ. No. 92-1864 and 00-1478**<br><br>**Count 2 (Express Advocacy Disclosure)** | • This claim was not presented to the Commission in the first administrative complaint. Plaintiffs filed a second administrative complaint and are now pressing this claim as part of their civil action 03-2431. The arguments in civil action 03-2431 below apply equally here. |
| **03-2431**<br>**Count 1 (Express Advocacy Disclosure)** | • Plaintiffs' theory is directly contrary to the plain language of 2 U.S.C. § 431(9)(B)(iii), which requires disclosure of certain single communications.<br>• Plaintiffs fail to cite any examples of AIPAC's alleged express advocacy.<br>• Plaintiffs provide no evidence of a continuing violation.<br>• The administrative complaint contained allegations dating from 1983 through 1990. It was reasonable for the Commission to consider the staleness of the evidence and the statute of limitations. |

## I. PLAINTIFFS' CLAIMS ARE BARRED

### A. In 1992, Plaintiffs Waived Their Challenge to the Commission's Determination that AIPAC was a Membership Organization

Plaintiffs do not dispute that they failed to challenge the Commission's determination in 1992 that AIPAC was a "membership organization" under the Act. In 2000, on remand from the Supreme Court, the Commission applied its new regulations as directed by the Court and redetermined the scope of AIPAC's membership, but it did not reexamine the underlying threshold determination that AIPAC was a membership organization. FEC Mem. at 15-17, Dkt # 28. Plaintiffs argue that because the Commission determined in 2000 that AIPAC's membership was larger than the Commission had earlier determined in 1992, they are entitled to revisit that threshold determination. However, any challenge plaintiffs may have been able to bring regarding the Commission's 1992 determination that AIPAC was a membership organization has long been barred by the 60-day jurisdictional period for seeking review under section 437g(a)(8).

Plaintiffs attempt to address this jurisdictional bar by claiming that the Commission's analyses in 1992 and 2000 were fundamentally different. Pl. Op. at 1-2. In particular, plaintiffs wrongly suggest that in 1992 the Commission found only that AIPAC's Executive Committee, by itself, was a membership organization. *Id.* However, the Commission's analysis did not divide AIPAC into pieces; rather, the Commission concluded in 1992 that AIPAC as a whole was a membership organization. *See* FEC Mem. at 10-12. While the Commission also found that only persons on AIPAC's Executive Committee qualified as "members" under the Commission's then-existing regulation, it never suggested that it was treating that committee as a separate entity. After remand, the Commission changed only its conclusion about the scope of AIPAC's membership, not about its status as a membership organization. Because plaintiffs had

the opportunity to challenge the Commission's determination that AIPAC was a membership organization in 1992 and chose not to do so, that claim is now time barred.

### B. Plaintiffs' Legal and Factual Arguments Were Not Presented to the Commission

The Commission demonstrated in its opening memorandum that none of plaintiffs' legal or factual arguments about violations of 2 U.S.C. § 431(9)(B)(iii) were presented to the Commission — in their original administrative complaint, their supplement to that complaint, or after remand — and that they have been presented for the first time to this Court. FEC Mem. at 18. Plaintiffs do not contest this showing. Instead, they discuss at length the statutory and regulatory administrative requirements for filing a complaint with the Commission. Pl. Opp. at 3-4. The question here, however, is not whether plaintiffs satisfied the minimum requirements for filing an administrative complaint, but whether they are entitled to judicial review of the fact that the Commission did not *sua sponte* address issues and arguments that had not been presented to it. Plaintiffs cite no regulations that would have prevented them from submitting additional factual or legal arguments to the Commission on remand, and do not even claim to have *inquired* of the Commission whether such a filing would be permitted. In fact, plaintiffs had previously supplemented their administrative complaint with additional information on July 19, 1990 (F.A.R. 3247-3250), and the Commission did not reject that filing but instead included it as part of the administrative record. Plaintiffs thus had no basis for assuming that they could not submit additional information on remand for the Commission's consideration.[1]

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[1] The regulation cited by plaintiffs (Pl. Opp. at 4) for the proposition that they were precluded from submitting any substantive post-complaint communication says no such thing. That regulation prohibits persons outside the agency from making ex parte communications on an enforcement action "to any Commissioner or any member of any Commissioner's staff[.]" 11 C.F.R. § 111.22. The regulation says nothing about communication with the General Counsel's staff or about a complainant filing a formal supplement to a complaint with the

Moreover, plaintiffs were fully aware of the administrative respondents' arguments, the contents of the investigatory record, and the Supreme Court's instructions while the remand proceedings were occurring at the Commission; plaintiffs were provided with the complete administrative record the first time their complaint was dismissed and were aware of the Supreme Court's instructions in remanding this case to the Commission. Accordingly, plaintiffs were in a position to present the Commission with any facts or legal or procedural arguments they thought the Commission should consider on remand. *Cf. Orloski v. FEC*, 795 F.2d 156, 168 (D.C. Cir. 1986) (administrative complainant had "the opportunity to respond" to the respondents' allegation in a "supplemental complaint" filed after first complaint was dismissed). Plaintiffs' abstract recitation of their interpretation of the Commission's procedural regulations fails to explain their failure to present *any* arguments to the Commission after the remand in this case, or even to ask whether such a filing could be made.

As shown in our opening memorandum, a party cannot seek reversal of an agency action based on arguments and issues it never presented to the agency. The burden is on the private party to submit its arguments to the agency in order to preserve them for judicial review, not on the agency to seek them out. *See, e.g., Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 870 (D.C. Cir. 1996) ("It is the duty of a party seeking agency action to press its claim"). Having failed to submit any argument to the Commission about this case on remand, plaintiffs failed to preserve issues about the Commission's action on remand for judicial review.

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Commission (as opposed to communicating with individual Commissioners). Plaintiffs are simply mistaken when they suggest that a post-remand submission to the Commission or its General Counsel would have been an improper or unethical ex parte communication.

## II. EVEN IF PLAINTIFFS' CLAIMS ARE NOT BARRED, THE COMMISSION IS ENTITLED TO SUMMARY JUDGMENT

### A. The Commission Reasonably Concluded that AIPAC was not Organized Primarily for the Purpose of Influencing Federal Elections

Plaintiffs do not contest the highly deferential standard of review for this case brought under 2 U.S.C. § 437g(a)(8), where the "court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (quoting *Orloski*, 795 F.2d at 161); *accord Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir 2005); *see* FEC Mem. at 19-21. This standard is "highly deferential" and "presume[s] the validity of agency action" and that "the party challenging the agency's action . . . bears the burden of proof." *American Horse Prot. Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). *See also San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

Plaintiffs continue to argue (Pl. Opp. at 4-5) that the Commission "has not clarified whether, under its interpretation of the statute, an organization can be 'organized primarily' for more than one purpose," but this legal argument is irrelevant in this case. When the Commission originally dismissed plaintiffs' administrative complaint, the General Counsel's Report explained that "AIPAC's political activities did not rise to such a level as to make them *a major purpose* of the organization." First Certified Administrative Record, at 3672 (re-filed Nov. 14, 2005) (emphasis added).[2] In other words, even if an organization could be organized primarily

[2] Contrary to plaintiffs' suggestion (Pl. Opp. at 5 n.4), this decisionmaking cannot be described as post hoc rationalization of counsel. When the Commission does not issue its own statement of reasons, the reports of the General Counsel provide the substantive basis for a Commission determination to dismiss a complaint on the General Counsel's recommendation. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38-39 n.19 (1981).

for more than one purpose, it would make no difference here because the Commission has already determined that AIPAC did not have even "a" major purpose to influence elections. Although the Commission may not have explicitly addressed the question of multiple primary purposes at that time, as plaintiffs now request, it fully resolved the question of whether AIPAC was organized primarily for the purpose of influencing federal elections and concluded it was not.

Plaintiffs also argue (Pl. Opp. at 4-7) that lobbying linked with election-influencing is of special concern and that an organization primarily devoted to lobbying should be treated under section 431(9)(B)(iii) as if it were organized primarily to influence elections. However, the proper forum to present plaintiffs' policy argument to elide the distinction between lobbying and electioneering is Congress, not the courts. Plaintiffs' argument is that 2 U.S.C. § 431(9)(B)(iii) should be construed as if it said "organized primarily for the purpose *of lobbying or* of influencing [federal elections]." But when it is argued that a statute should be construed in a manner that effectively adds words to its language, "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979). Plaintiffs argue that their expanded construction would more fully serve the Act's goal of reducing *quid pro quo* corruption, but "no legislation pursues its purposes at all costs . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Albany Eng'g Corp v. FERC*, 548 F.3d 1071, 1076 (D.C. Cir. 2008) (emphasis in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)).

Congress chose to exclude the internal communications of a class of membership organizations from some of the Act's requirements, and defined that class based on whether such

entities were primarily organized to influence federal elections. Plaintiffs' view that this statutory provision does not go far enough provides no basis for this Court to expand it.

In any event, even if plaintiffs' alternative construction of the Act were plausible, Congress has authorized the Commission, not the plaintiffs, to administer and to "formulate policy" with respect to the Act. 2 U.S.C. § 437c(b)(1). The Supreme Court has concluded that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Committee* ("DSCC"), 454 U.S. 27, 37 (1981). *See also, e.g., Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) ("Deference is particularly appropriate in the context of the FECA"). Thus, "in determining whether the Commission's action was 'contrary to law,' the task for the Court [is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court." *DSCC*, 454 U.S. at 39 (citations omitted). Unless "Congress has directly spoken to the precise question at issue," the Court must defer to a reasonable construction by the Commission. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-844 (1984).

Plaintiffs' policy arguments fall far short of what is required to overcome deference to the Commission's construction of the Act under *Chevron*.

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

*Chevron*, 467 U.S. at 864-66 (citations omitted). Accordingly, even if plaintiffs' expansive construction of the Act were a plausible reading of the statutory language, their policy arguments are inadequate, as a matter of law, to sustain their burden under *Chevron* to overcome deference to the Commission's application of the Act in accord with its plain terms.

### B. Membership Communications May Be Coordinated With Candidates Under the Commission's Regulations

The Commission demonstrated in its opening memorandum (FEC Mem. at 22 n.4) that the question of whether membership communications have been coordinated with candidates is irrelevant, because the Commission's regulations explicitly provide that partisan communications to members are within the statutory exemption even if they "involve election-related coordination with candidates," 11 C.F.R. § 114.3(a)(1). Plaintiffs are effectively asking this Court to invalidate that regulation. First, because this requested relief is not in plaintiffs' Complaint and was not sought in plaintiffs' summary judgment motion, it is not properly before this Court. Second, the Supreme Court and D.C. Circuit adjudicated this case based upon the assumption that AIPAC's communications to its supporters *had been* coordinated with candidates. *See Akins*, 524 U.S. at 28; *Akins*, 101 F.3d at 744 ("[t]here is no contention that AIPAC's disbursements were independent expenditures"). Thus, if coordination were enough to disqualify AIPAC's communications from the statutory exception for membership communications, the Supreme Court would have had no reason to remand for further consideration of the scope of the membership exception; the Court's holding implicitly recognized that coordination with candidates would not alone disqualify communications from the exception.

In any event, plaintiffs present no colorable reason why this Court should not defer to the Commission's construction of the Act. *See* p. 7, *supra*. Plaintiffs again rely upon nothing more

than their own policy views, unsupported by any language in the Act or even legislative history, which falls far short of their burden under *Chevron* to show why the Commission's construction of the Act in a formally promulgated regulation was unreasonable. For all these reasons, plaintiffs' implicit request that 11 C.F.R. § 114.3(a)(1) be invalidated should be summarily rejected by this Court.

## III. THE PLAIN LANGUAGE OF THE STATUTE FORECLOSES THE SINGLE ARGUMENT PLAINTIFFS ADVANCE REGARDING THEIR SECOND ADMINISTRATIVE COMPLAINT

The plain language of 2 U.S.C. § 431(9)(B)(iii) forecloses plaintiffs' argument that the statute requires that two separate communications be interpreted in combination to determine whether or not they constitute "express advocacy." For an expenditure to be reportable, it must be "directly attributable to *a communication* expressly advocating the election or defeat of a clearly identified candidate," not multiple communications that if construed together might convey such a message. 2 U.S.C. § 431(9)(B)(iii) (emphasis added). Given this explicit statutory language, the Commission did not act contrary to law when it declined to find reason to believe that AIPAC's membership communications were subject to the reporting requirements of section 431(9)(B)(iii).[3]

Plaintiffs essentially concede that they cannot point to any facts demonstrating that AIPAC made "a communication" that contains express advocacy. Instead, they argue "[t]o accomplish the purpose of the membership communication statute, the phrase 'a communication . . . for an election' must be construed to embrace all organizational communications to a member regarding that election." Pl. Opp. at 13. First, this novel theory was never presented to

[3] In its opening brief, the Commission requested that Court reconsider its determination regarding its jurisdiction over Civil Action 03-2431. FEC Mem. at 18 n.3. Plaintiffs do not contend that reconsideration is inappropriate, and instead simply incorporate by reference their earlier briefing on the merits of the jurisdictional issue. Pl. Op. at 10 n.9.

the Commission in the administrative complaint, so it cannot be raised now in the first instance before this Court during its review of the Commission's decisionmaking. *See supra* pp. 5-6.

Second, even under their own theory, plaintiffs have not identified a single example of two communications that, when read together, could constitute express advocacy that was made by AIPAC to any of its members. Instead, plaintiffs only generally identify *types* of communications that would supposedly indicate, if read together, which candidates are deserving of support. Pl. Opp. at 11-12. Plaintiffs also point to no evidence indicating that any relevant combination of specific communications even reached the same audience within a short time, but instead generally argue that "membership communications are a stream that flows to the same audience." *Id.* at 12.

Plaintiffs rely heavily upon AIPAC's Campaign Update, *see* S.A.R. at 110-197, as one of the component parts of their express advocacy theory, but the record suggests that AIPAC limited the distribution of this document to a few hundred people who attended particular policy conferences each year. *See* Admin. Record in *Akins v. FEC*, 92-1864 (D.D.C.) at 3699-3700. Plaintiffs point to nothing in the record indicating that this limited group of recipients also received another specific communication that, read in tandem with the Campaign Update, could constitute an express advocacy communication. There is simply no basis for assuming that every AIPAC communication is received by each of AIPAC's approximately 65,000 members, *see* S.A.R. at 85, and plaintiffs have provided no examples of multiple, identifiable communications to the same members that it believes must be viewed as one. As we have also explained (*see* FEC Mem. at 36), plaintiffs' argument fails to address *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-70 (2007), in which the controlling opinion focused on the four corners of the

advertisements and the "substance of the communication" rather than "amorphous considerations of intent and effect." *WRTL*, 551 U.S. 469-70.

Third, the plain language of 2 U.S.C. § 431(9)(B)(iii) forecloses plaintiffs' argument because the kind of communications they have generally identified would be covered by the exception within section 431(9)(B)(iii) for communications "primarily devoted to subjects other than the express advocacy[.]" 2 U.S.C. § 431(9)(B)(iii). Under this exception, even if plaintiffs had identified expenditures for particular membership communications that contain express advocacy, they would not be covered by section 431(9)(B)(iii) if they were "primarily devoted" to other subjects. Plaintiffs rely upon AIPAC's Campaign Update for that portion of a supposedly combined communication that allegedly "identifies the candidate to be supported ...." Pl. Opp. at 12. This publication, however, consists primarily of descriptions of voting records and electoral prospects of candidates. *See* S.A.R. at 110-330; *see, e.g.*, S.A.R. at 123-24 (describing Lawton Chiles' voting record and his re-election prospects). Indeed, since no portion of this document contains *any* express advocacy, there is no possibility that it is "primarily devoted" to express advocacy.

The legislative history of 2 U.S.C. § 431(9)(B)(iii) confirms the plain meaning of this provision. The relevant conference committee explained:

> With respect to determining whether a communication is covered by this provision, the conferees intend that communications dealing primarily with subjects other than the express advocacy of the election or defeat of a candidate would not be covered. An editorial advocating the election or defeat of a candidate which appears in a regularly published newsletter which deals primarily with other subjects would not be a covered communication. This exclusion is designed to eliminate the difficult allocation problems that would otherwise have been presented.

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 94-1057, at 42 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 978-79, and in FEC, *Legislative History of*

*FECA Amendments of 1976*, at 1036 (1977). The conferees' explanation that section 431(9)(B)(iii) does not cover "a communication" that "deal[s] primarily with subjects other than the express advocacy" further casts doubt upon plaintiffs' novel theory that separate communications must be aggregated for analysis under section 431(9)(B)(iii): If a communication must be joined with some other communication for it to constitute express advocacy at all, then it cannot in itself be primarily devoted to express advocacy.

Finally, plaintiffs fail to address the Commission's argument (FEC Mem. 35-36) that their approach would create an even more extreme version of the allocation problem that the conference committee specifically tried to avoid. *See* H.R. Conf. Rep. No. 94-1057, at 42. In particular, plaintiffs do not deny that splicing together multiple communications would require organizations to speculate about future communications months or years in the future in order to meet their reporting obligations, or to review all of their past communications when making new ones.

In sum, the only argument plaintiffs present in support of their second administrative complaint can only be resolved in the Commission's favor because their interpretation is contrary to the explicit statutory language and because, in any event, they have not demonstrated any specific facts that would support their own theory. The Commission's decision not to pursue this matter further is consistent with both the statute and the factual record, and there is therefore no basis whatsoever to conclude that the Commission acted contrary to law under 2 U.S.C. § 437g(a)(8).

## IV. PLAINTIFFS HAVE NOT CONTESTED THREE OTHER ARGUMENTS ADVANCED BY THE COMMISSION THAT ARE INDEPENDENTLY DISPOSITIVE OF THEIR LAWSUIT REGARDING THE SECOND ADMINISTRATIVE COMPLAINT

As discussed above, the plaintiffs now rest the entirety of their lawsuit regarding their second administrative complaint on a single argument, and they have failed entirely to address three independently dispositive bases presented in our opening memorandum for resolving this case in the Commission's favor.

First, the Commission showed that the administrative complaint provided "no information to substantiate its claim that AIPAC 'has continued and is continuing' to engage in membership communications subject to the reporting requirements of 2 U.S.C. § 431(9)(B)(iii)." FEC Mem. at 32-22 (quoting S.A.R. at 345). Plaintiffs conclusorily assert (Pl. Opp. 11) that AIPAC is engaging in ongoing communications covered by section 431(9)(B)(iii), but they have pointed to nothing in the record beyond their bald assertion to substantiate it.

Second, the Commission showed that plaintiffs presented their novel theory — that multiple communications occurring at different times might constitute express advocacy — for the first time in this Court, not before the Commission. FEC Mem. at 33-38. The Commission demonstrated that 2 U.S.C. § 437g(a)(8), the provision under which plaintiffs are proceeding in this case, does not permit judicial review of the Commission's failure to find a violation based on a theory that was not alleged in the administrative complaint. *See Judicial Watch v. FEC*, 180 F.3d 277, 278 (D.C. Cir. 1999) (holding that an allegation not presented to the Commission could not be considered on review under 2 U.S.C. § 437g(a)(8)); *see also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1298 (D.C. Cir. 2004) ("'[T]here is a near absolute bar against raising new issues — factual or legal — on appeal in the administrative context.' ") (citation omitted).

Third, the Commission explained that since the administrative complaint was based on evidence from 1983 through 1990, it was reasonable for the Commission to consider the staleness of the evidence and the statute of limitations. FEC Mem. at 38-40. The Commission explained that problems created by stale evidence and the expiration of the statute of limitations were reasonable considerations in exercising its prosecutorial discretion. *Id.* Plaintiffs have presented no argument to dispute the propriety of the Commission's relying upon these factors in exercising its discretion.

## V. CONCLUSION

For the reasons stated above this Court should enter judgment in the Commission's favor on both counts in Civil Action No. 00-1478 as well as judgment in the Commission's favor on the single count in Civil Action No. 03-2431.

Respectfully submitted,

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