UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES E. AKINS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 92-01864 (RJL) Civ. No. 00-01478 (RJL) Civ. No. 03-02431 (RJL) MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S
CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant Federal Election Commission ("Commission") hereby moves for summary judgment pursuant to Fed. R. Civ. P. 56 and LCvR 7(h) and 56.1 because the Commission's dismissals of the administrative complaints, designated Matter Under Review 2804R and 5272, were not contrary to law.

A proposed Order and a Memorandum of Points and Authorities in support of this motion (and in opposition to plaintiffs' motion for summary judgment) accompany this motion. Pursuant to LCvR 7(h), the Commission is filing neither a separate statement of material facts, nor a statement of genuine issues.

Respectfully submitted,

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August 28, 2009

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DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This consolidated case focuses on two issues, the resolution of which fully resolves this case:

(1) Was it arbitrary and capricious for the Commission to determine regarding plaintiffs' first administrative complaint that the spending by the American Israel Public Affairs Committee ("AIPAC") was for communications to its members and, therefore, exempt from the definition of "expenditure" under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("the Act")?

(2) Was it arbitrary and capricious for the Commission to dismiss plaintiffs' second administrative complaint as a matter of prosecutorial discretion because, *inter alia*, there was no evidence that AIPAC engaged in express advocacy to its members requiring disclosure under 2 U.S.C. § 431(9)(B)(iii)?

If these questions are resolved in the negative, this case is at an end. In particular, issue one resolves count 1 of the complaint filed in civil action 00-1478, and issue two resolves count 2 in civil action 00-1478 *and* the only count in civil action 03-2431. This consolidated lawsuit is brought by five individual plaintiffs, James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker ("plaintiffs") who ask this Court to review under 2 U.S.C. § 437g(a)(8) the dismissal of two administrative complaints.[1] The first administrative complaint, designated Matter Under Review ("MUR") 2804, alleged that AIPAC was a "political committee" under the Act. *See* First Certified Administrative Record ("F.A.R."), (re-filed Nov. 14, 2005). The Commission's decision in that matter was reviewed by the courts, including by the United States Supreme Court, which remanded the matter to the Commission.

[1] A sixth plaintiff, Robert J. Hanks died on July 8, 2001. The parties agree that Mr. Hanks' death does not affect the legal issues pending in this case.

On remand the Commission determined AIPAC's spending was for communications to its members and, therefore, exempt from the definition of "expenditure" under the Act. The spending for that reason did not count toward the thresholds that trigger the political committee registration and reporting requirements. Accordingly, the Commission found no probable cause to believe AIPAC had violated 2 U.S.C. §§ 433 and 434, which require certain groups that make in excess of $1,000 in "expenditures" during a calendar year to register as a political committee and file reports with the FEC.

The second administrative complaint was filed on May 20, 2002, and designated MUR 5272. *See* Second Certified Administrative Record ("S.A.R."), (filed June 6, 2004). The Commission did not abuse its discretion when it dismissed MUR 5272 as a matter of prosecutorial discretion, and summary judgment should therefore be entered for the Commission. The administrative complaint sought a determination as to whether certain "membership communications" that took place between 1983 and 1990 should have been reported by 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.

The Commission thus opposes plaintiffs' consolidated motion for summary judgment and cross-moves for summary judgment in its favor, on the grounds that the Commission's decisions to dismiss MURs 2804R and 5272 were not "contrary to law," which is the standard of review specified in 2 U.S.C. § 437g(a)(8)(C). Because there are no material facts in dispute, the Commission is entitled to judgment as a matter of law. *Briggs v. Washington Metro. Area*

Transit Auth'y, 481 F.3d 839, 843 (D.C. Cir. 2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. BACKGROUND

A. The Statutory Procedures

The Commission is an independent agency with exclusive jurisdiction to administer, interpret, and civilly enforce the FECA. 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. The Commission is authorized to "formulate policy with respect to" the Act, 2 U.S.C. § 437c(b)(1), and to promulgate "such rules ... as are necessary to carry out the provisions" of the Act, 2 U.S.C. § 437d(a)(8).

The Act permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 2 U.S.C. § 437g(a)(1). Section 437g(a)(1) specifies that "[s]uch complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under the penalty of perjury[.]" After reviewing the complaint and any response filed by the respondent, the Commission may vote on whether there is "reason to believe" that a violation has occurred. 2 U.S.C. § 437g(a)(2). If at least four members of the Commission vote to find "reason to believe," the Commission can institute an investigation. *Id*.

If the Commission dismisses the administrative complaint, the Commission notifies the complainant, *see* 11 C.F.R. § 111.9(b), and the complainant can seek judicial review of that determination pursuant to 2 U.S.C. § 437g(a)(8)(A). If the Court declares that the Commission's dismissal was "contrary to law," it can order the Commission to conform to the Court's declaration within 30 days. 2 U.S.C. § 437g(a)(8)(C). If the Commission fails to conform to the declaration, the complainant can obtain a private right of action against the administrative

respondents. *Id; see FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

B. Statutory & Regulatory Framework

The term "political committee" is defined in the Act to include "any . . . group of persons which . . . makes expenditures aggregating in excess of $1,000 during a calendar year[.]" 2 U.S.C. § 431(4)(A). An "expenditure" is broadly defined in the Act to include "anything of value, made by any person for the purpose of influencing" a federal election, 2 U.S.C. § 431(9), but the definition specifically excludes from its scope "any communication by any membership organization or corporation to its members," as long as the membership organization is "not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office[.]" 2 U.S.C. § 431(9)(B)(iii).

When this case was pending before the Supreme Court, the Commission was considering new membership regulations that included a broader definition of what qualified as a membership organization and who was deemed to be an organization's "member." *FEC v. Akins*, 524 U.S. 11, 28 (1998); First Certified Administrative Record Supplement ("F.A.R. Supp."), at 3944-50 (filed Nov. 2, 2002). The Commission's prior regulation, which had been in effect at the time the Commission dismissed plaintiffs' first administrative complaint, had been invalidated by the D.C. Circuit as having too narrow a definition of "member." *See Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). The Supreme Court explained that the new rules "could significantly affect the interpretive issue presented by [the major purpose/political committee] question." *Akins*, 524 U.S. at 29. The Court ordered that the Commission was to apply the new regulations on remand. *Id.*

On July 23, 1999, the Commission promulgated the new regulations that define a "membership organization" as an organization that:

> (i) Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws, constitution or other formal organizational documents;
>
> (ii) Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;
>
> (iii) Makes its articles, bylaws, constitution, or other formal organizational documents available to its members upon request;
>
> (iv) Expressly solicits persons to become members;
>
> (v) Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and
>
> (vi) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office.

11 C.F.R. § 114.1(e)(1).

"Members" are defined as including:

> all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, and either:
>
> (i) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or
>
> (ii) Pay membership dues at least annually, of a specific amount predetermined by the organization; or
>
> (iii) Have a significant organizational attachment to the membership organization which includes:
>
> affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization.

11 C.F.R. § 114.1(e)(2).

The Act requires, however, that a membership organization report to the Commission the "costs incurred" that are "directly attributable to a communication [to its members] expressly advocating the election or defeat of a clearly identified candidate" if those costs exceed $2,000 for any election. 2 U.S.C. § 431(9)(B)(iii). Even if it contains express advocacy, however, a membership communication is specifically excluded from this reporting requirement if it is "primarily devoted" to subjects other than express advocacy. *Id.* Membership organizations that trigger the reporting requirement of 2 U.S.C. § 431(9)(B)(iii) must file disclosure reports in accordance with 2 U.S.C. § 434(a)(4)(A)(i), (ii).

C. Statement of Facts

1. Plaintiffs' Original Administrative Complaint in 1989

Twenty years ago, the plaintiffs on January 12, 1989, filed an administrative complaint with the Commission, designated as MUR 2804, alleging violations of the Act by AIPAC and twenty-seven political committees. F.A.R. at 3-44; S.A.R. at 341 (describing procedural history). The complaint was signed and sworn to by each of the plaintiffs, as provided in 2 U.S.C. § 437g(a)(1). The complaint alleged, *inter alia*, that AIPAC was a political committee as defined by 2 U.S.C. § 431(4)(A) because it made expenditures in excess of $1,000 annually, and that it was therefore required to register with the Commission and comply with the Act's reporting requirements applicable to political committees. S.A.R. at 341; *see also* 2 U.S.C. §§ 433-434.

The Commission conducted an extensive investigation, compiled a record of several thousand pages and two General Counsel Reports analyzing this body of evidence, and adopted the following conclusions. S.A.R. at 341-42. The Commission found probable cause to believe

that AIPAC had violated 2 U.S.C. § 441b by making corporate contributions, consisting largely of election-related coordinated expenditures for communications to individuals who were not, under the Commission's view at that time, "members" of AIPAC. *Id.* For example, AIPAC prepared and distributed a yearly "campaign update," which explained incumbent officeholders' voting records, policy positions, and election and fundraising prospects. F.A.R. 3866. However, in an exercise of its prosecutorial discretion, the Commission decided to take no further action against AIPAC because the question of whether the individuals receiving this material were "members" of AIPAC presented a "close question." F.A.R. 3866-68. The Commission also found no probable cause to believe that AIPAC was affiliated with any political committee. S.A.R. at 341 n.1. Finally, although the Commission concluded that AIPAC's coordinated expenditures most likely exceeded $1,000, it unanimously voted to find no probable cause to believe that AIPAC had violated the Act by failing to register as a political committee because the relatively small amount of those expenditures did not represent AIPAC's major purpose, which was lobbying to increase aid to Israel. S.A.R. at 341-42.

2. Judicial Review of the Commission's Dismissal of MUR 2804

After the Commission dismissed plaintiffs' original administrative complaint, they sought judicial review under 2 U.S.C. § 437g(a)(8), but challenged only the Commission's dismissal of their allegation that AIPAC had violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee. S.A.R. at 342 (describing *Akins v. FEC*, Civ. No. 92-1864 (D.D.C. filed Aug. 12, 1992)). Plaintiffs did not seek review of the Commission's other findings, including its conclusion that AIPAC did not violate 2 U.S.C. § 441b through its communications to members of its executive board who qualified as "members" of AIPAC. *Id.*

On March 30, 1994, the district court granted summary judgment for the Commission, finding that plaintiffs failed to show that the Commission's disposition of their administrative complaint was arbitrary, capricious and contrary to law. *See FEC v. Akins*, 524 U.S. 11, 16 (1998) (describing procedural history). On September 29, 1995, a panel of the D.C. Circuit affirmed that decision on the merits. *Akins v. FEC*, 66 F.3d 348 (D.C. Cir. 1995). However, upon rehearing the matter *en banc*, the D.C. Circuit reversed the district court decision on the merits. *Akins v. FEC*, 101 F.3d 731, 738-44 (D.C. Cir. 1996) (*en banc*). The court concluded that, because there was "no contention that AIPAC's disbursements were independent expenditures," the Commission should have found that AIPAC was a political committee based solely on the evidence that AIPAC had made at least $1,000 in contributions, thus meeting the statutory definition in 2 U.S.C. § 431(4)(A), without regard to whether AIPAC's "major purpose" was campaign activity. *Id.* (explaining the view that the discussion in *Buckley v. Valeo*, 424 U.S. 1, 78-80 (1976), concerning the "major purpose" of an organization only applies to organizations that make independent expenditures).

The Supreme Court vacated the D.C. Circuit's decision and ordered the case remanded to the Commission. *Akins*, 524 U.S. at 11. The Court found that plaintiffs had standing to seek review of whether AIPAC was a political committee under the Act, but declined to resolve the question presented on the merits: "whether an organization that otherwise satisfies the Act's definition of a 'political committee,' … nonetheless falls outside that definition because 'its major purpose' is 'not the nomination or election of candidates.'" *Id.* at 26. The Court noted that the Commission had proposed "new rules defining 'membership organization'" which, the Court found, "could significantly affect the interpretive issue presented by [the major purpose/political committee] question." *Id.* at 28. The Court remanded the issue to the

Commission, noting that "[i]f the FEC decides that AIPAC's activities fall within the 'membership communications' exception, the matter will become moot." *Id.* at 29.

3. Administrative Proceedings Following Remand From the Supreme Court

On remand to the FEC, the matter was designated MUR 2804R for administrative purposes. Following the instructions of the Supreme Court, the Commission reviewed the extensive information assembled as part of its original investigation into this matter and applied its newly promulgated membership regulations to the specific facts and circumstances of the case. S.A.R. at 343. The Commission decided the single issue that it had been directed by the Supreme Court to address, concluding that AIPAC's disbursements for election-related communications were exempt from the definition of "expenditure" under 2 U.S.C. § 431(9)(B)(iii) because they were made to AIPAC's "members." *Id.*[2]

The Commission first addressed whether the individuals who were considered "members" by AIPAC met the definition of "member" in the new regulation. *See* 11 C.F.R. § 114.1(e)(2). This definition requires, in summary, that the individual: (1) meet the requirements for membership established by the organization; (2) affirmatively accept membership in the organization; and either (a) have a significant financial attachment to the organization; (b) pay dues at least annually in a specific amount, *or* (c) have "a significant organizational attachment" by means of an annual affirmation of membership and "direct participatory rights in the governance of the organization." *Id.*

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[2] This analysis contained in the General Counsel's Report was the basis for the Commission's decision in this matter. F.A.R. Supp. at 3939. 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).

Based on AIPAC's By-Laws and other information obtained during the investigation, the Commission found that during the time at issue AIPAC required members to pay a minimum of $50 in dues annually. F.A.R. Supp. at 3980. The Commission concluded that this made AIPAC's supporters "members" under the new regulations because they also affirmatively accepted membership and had to pay dues at least annually in a specific amount. Plaintiffs have not sought review of these findings.

The Commission next addressed AIPAC's status as a membership organization under the new regulations, and concluded that AIPAC met this test. That regulation defines a "membership organization" to mean an organization that has, in summary: (1) members, some or all of whom are vested with power and authority over the organization; (2) expressly states the qualifications and requirements for membership in its organizational documents; (3) makes its organizational documents available to its members; (4) solicits persons to become members; (5) acknowledges the acceptance of membership; and (6) is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office. *See* 11 C.F.R. § 114.1(e)(1).

The Commission concluded that at least "some" of AIPAC's "members" were vested with the power and authority to operate or administer the organization. F.A.R. Supp. at 3980. The Commission found that the AIPAC Executive Committee, all of whose members had to be members of the organization, "'controlled' the 'policy, affairs and property' of the organization." F.A.R. Supp. at 3981. The Commission also concluded that AIPAC's by-laws expressly set forth requirements for membership, F.A.R. Supp. at 3981, that there was no indication that AIPAC's formal organizational documents were not available to its members upon request, F.A.R. Supp. at 3982, and that when AIPAC solicited new members, they were adequately

informed of the acceptance of their membership, F.A.R. Supp. 3981-82. Plaintiffs have not sought review of these findings.

The sixth requirement to be a membership organization — set out in 2 U.S.C. § 431(9)(B)(iii) as well as in the new version of 11 C.F.R. § 114.1(e)(1) — is that a membership organization is "not organized primarily for the purpose of influencing" federal elections. The Commission concluded that the facts that had originally led it to conclude that election activity was not AIPAC's "major purpose" were enough to establish *a fortiori* that AIPAC was not organized "primarily" for that purpose. F.A.R. Supp. at 3982. The Commission had concluded in its 1992 decision that

> AIPAC's campaign related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and does not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.- Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

F.A.R. at 3772. This is the *only* aspect of the Commission's reasoning for finding AIPAC to be a membership organization that plaintiffs have challenged in this Court.

On the basis of these findings, the Commission decided the single issue that it had been directed by the Supreme Court to address, concluding that AIPAC's disbursements for election-related communications were exempt from the definition of "expenditures" in 2 U.S.C. § 431(9)(B)(iii) because they were made to AIPAC's "members." F.A.R. Supp. 3982-83. Accordingly, the Commission did not have to reach the question of how the "major purpose" test applies to the definition of "political committee" in 2 U.S.C. § 431(4) in order to reaffirm its finding of no probable cause to believe that AIPAC was a political committee.

4. Judicial Proceedings In *Akins v. FEC*, Civ. No. 00-1478 (D.D.C.)

On May 19, 2000, plaintiffs sought judicial review of the March 21, 2000 decision by the Commission to dismiss MUR 2804R. S.A.R. at 344. Plaintiffs' complaint presented two claims.

In count 1, plaintiffs argued that the Commission acted contrary to law by failing to deem AIPAC a political committee based on the evidence in the administrative record, and that the Commission's investigation was inadequate and, therefore, its decision was arbitrary and capricious. *Id.* In count 2, plaintiffs presented for the first time an alternative claim that, even if AIPAC's communications were made to its members as the Commission found, and thus exempt from the definition of expenditure, the Commission should have determined that AIPAC's communications contained express advocacy and exceeded $2,000 for an election and thus were required to be reported under 2 U.S.C. § 431(9)(B)(iii). S.A.R. at 344.

With respect to plaintiffs' primary claim, the Commission contended that its determination that AIPAC was not a political committee was not contrary to law. The alternative claim — arguing that AIPAC's expenditures for membership communications contained express advocacy and must be disclosed in reports filed with the FEC — had never been presented to the Commission in plaintiffs' administrative complaint and thus, the Commission argued, no judicial review was available under 2 U.S.C. § 437g(a)(8)(A) for that claim.

5. MUR 5272: The Second Administrative Matter on Review in This Case

On April 16, 2002, the second administrative complaint was filed with the Commission. S.A.R. at 1-10. The complaint alleged that AIPAC violated the Act by failing to report the cost of membership communications containing express advocacy in accordance with 2 U.S.C. § 431(9)(B)(iii).

After receiving a copy of the administrative complaint pursuant to 2 U.S.C. § 437g(a)(1), AIPAC submitted a response to the complaint on June 24, 2002. AIPAC argued that the Commission should not take any action against it because the applicable statute of limitations had already run and there was no basis for the Commission to conclude that it had violated the reporting requirements in the Act. S.A.R. at 33-55.

On September 30, 2003, the Commission met in executive session and considered MUR 5272, deciding by a vote of six to zero to exercise its prosecutorial discretion and dismiss the matter. S.A.R. at 334. On November 13, 2003, the Commission issued a Statement of Reasons explaining its decision. S.A.R. at 340-46. The Commission noted that the administrative complaint "does not cite any specific instances of communications containing express advocacy made by AIPAC" either during the 1983-1990 timeframe in the prior MUR or since that time. The Commission then reviewed the material from the earlier MUR and the information provided by AIPAC in its response to MUR 5272 and determined that "there does not appear to be a sufficient basis for reason to believe AIPAC's membership communications, as a general matter, met the conditions necessary to trigger the reporting requirements set forth in 2 U.S.C. § 431(9)(b)(iii) because they did not contain express advocacy." S.A.R. at 345 (citing *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999)). The Statement noted that the evidence in MUR 2804 "revealed isolated occasions where AIPAC's communications with its members may have extended beyond issue advocacy to express[] advoca[cy]" but that "there is no indication the costs associated with the communications exceeded the $2,000 reporting threshold … or, more importantly, no information AIPAC continued these communications after 1990." S.A.R. at 345.

The Commission reasoned that "[b]ecause the communications at issue in MUR 2804 occurred between 1983 and 1990, any further investigation and/or enforcement of this activity would be frustrated by problems of proof as well as the expiration of the applicable statute of limitations." *Id.* The Commission concluded "that further investigation into AIPAC's activities based upon the information presented would not be an appropriate use of the Commission's limited resources." *Id.*

6. Judicial Proceedings In *Akins v. FEC*, Civ. No. 03-2431 (D.D.C.)

On November 25, 2003, plaintiffs filed a judicial complaint seeking review of the decision by the Commission to dismiss MUR 5272. Plaintiffs' complaint presented a single count, alleging it was arbitrary and capricious to dismiss their complaint without further investigation into whether AIPAC violated the Act by failing to report the cost of membership communications containing express advocacy under 2 U.S.C. § 431(9)(B)(iii).

III. PLAINTIFFS' CLAIMS REGARDING THE FIRST ISSUE (COUNT 1, 00-1478) ARE BARRED BECAUSE THEY WERE NOT PRESENTED TO THE COMMISSION

A. Plaintiffs Waived Their Challenge To The Commission's Determination That AIPAC Was A Membership Organization

As explained above, the Supreme Court remanded this case to the Commission to determine whether under the Commission's new membership regulations, the people to whom AIPAC had made campaign communications would now be considered "members" of AIPAC, because under 2 U.S.C. § 431(9)(B)(iii) communications to the "members" of a membership organization are not "expenditures" that would count towards the $1,000 statutory threshold in determining whether an organization is a political committee. *See* 2 U.S.C. § 431(4)(A). On remand, the Commission addressed that question at length, explaining in detail why the people

who received AIPAC's communications are "members" under the revised portions of the regulations.

Rather than challenge the Commission's determination that AIPAC had made certain communications to people who were deemed to be AIPAC's "members," plaintiffs' lawsuit in 2000 (Civ. No. 00-1478) challenged only the Commission's determination that AIPAC was not "organized primarily for the purpose of influencing" federal elections. However, because the Commission had made that latter determination in 1992 and plaintiffs had failed to challenge it at that time, plaintiffs had waived the right to challenge it and thus could not do so in their second lawsuit filed in 2000.

In 1992, the Commission had concluded, *inter alia*, that AIPAC had provided Morton Friedman with a sample solicitation letter, a candidate position paper, and a list of Jewish PACs to aid in fundraising for the 1986 Idaho Senate race. F.A.R. at 3864. The Commission concluded, however, that these campaign communications to Friedman did not violate 2 U.S.C. § 441b because Friedman, as a member of AIPAC's Executive Committee, was a member of AIPAC. F.A.R. at 3867. Accordingly, the Commission concluded that the communication to Friedman was not a violation of section 441b, and that section 441b was violated only for communications by AIPAC to individuals who were not on its Executive Committee, and thus not members of AIPAC. F.A.R. at 3867-68. As noted above, plaintiffs did not challenge this portion of the Commission's decision when they sought judicial review in 1992. Neither this Court, nor the D.C. Circuit, nor the Supreme Court, therefore, questioned the Commission's finding in 1992 that AIPAC had made some communications that were permitted under the Act because AIPAC was a membership organization that had made certain communications to its "members." Thus, the only question remanded by the Supreme Court is whether *additional*

individuals to whom AIPAC sent electoral communications, whom the Commission did *not* consider to be among AIPAC's members in 1992, should now be included within AIPAC's membership.

The sole challenge in plaintiffs' 2000 lawsuit relates to the Commission's determination that AIPAC was not "organized primarily for the purpose of influencing" federal elections. This "organized primarily for the purpose" requirement, however, was not a new standard originating in the Commission's revised membership regulations. Rather, it is a requirement that had been set out in the Act for more than 20 years in 2 U.S.C. § 431(9)(b)(iii). In other words, it was already on the books when plaintiffs first brought their original administrative complaint in 1989 and when they sought judicial review in 1989. *See* 11 C.F.R. § 100.8(b)(4) (1989). There is thus no excuse for plaintiffs' eight-year delay is seeking judicial review on this point, and it is too late for them to do so now.

Under FECA, an action challenging the Commission's dismissal of an administrative complaint must be filed within 60 days after the date of the dismissal. 2 U.S.C. § 437g(a)(8). The D. C. Circuit has repeatedly held that the 60-day time limit in 2 U.S.C. § 437g(a)(8) is "jurisdictional and unalterable." *National Rifle Ass'n of Am. v. FEC*, 854 F.2d 1330, 1334 (D.C. Cir. 1988) (quoting *Carter/Mondale Presidential Comm. v. FEC*, 711 F.2d 279, 283 (D.C. Cir. 1983)). *Accord Jordan v. FEC*, 68 F.3d 518, 518-19 (D.C. Cir. 1995); *Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993) (citing cases). Since the Commission concluded in 1992 that AIPAC was entitled to make partisan communications to its members, section 437g(a)(8) does not permit plaintiffs to now seek review of that question for the first time, almost seventeen years later. Accordingly, plaintiffs' first claim should be dismissed on jurisdictional grounds alone.

B. Plaintiffs Did Not Present any of its Legal or Factual Arguments to the Commission Following the Supreme Court Remand (Count 1 & 2, Civ. No. 00-1478)

Even if Plaintiffs had not waived their claim, plaintiffs' post-remand claims are barred for a second, independent reason: none of them was presented to the Commission. In fact, following the Supreme Court's decision to remand the case to the Commission, plaintiffs submitted nothing to the Commission at all. They neither offered new information to the Commission nor suggested that the Commission should conduct further investigation. They did not suggest that AIPAC failed to satisfy the requirements for a membership organization in 2 U.S.C. § 431(9)(B)(iii), made no argument that AIPAC was "organized primarily for the purpose of influencing" federal elections, *id.*, and did not urge the Commission to consider any of the other points made in their brief to this Court.

In short, plaintiffs simply waited for the Commission to respond to the order of the Supreme Court on remand, and then presented all their arguments and criticisms to this Court for the first time, after the Commission's proceedings had been concluded. However, it is well settled that "claims not presented to the agency may not be made for the first time to a reviewing court." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996). Having failed to present *any* argument to the Commission about what should be done on remand from the Supreme Court, plaintiffs have waived all of their arguments that the Commission's decision on remand was erroneous.[3]

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[3] This Court should also reconsider its determination regarding its jurisdiction over Civil Action No. 03-2431. The jurisdictional provision under which plaintiffs are proceeding, 2 U.S.C. § 437g(a)(8), only permits a petition for judicial review to be filed by the same person who filed the administrative complaint. The second administrative complaint which is the basis of Civil Action 03-2431, was filed by plaintiffs' counsel Daniel M. Schember, not by any of the plaintiffs here. S.A.R. at 24. The Act provides that an administrative complaint must be "signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under

IV. EVEN IF PLAINTIFFS' CLAIMS WERE NOT BARRED, THE COMMISSION IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE DISMISSALS OF PLAINTIFFS' ADMINISTRATIVE COMPLAINTS WERE NOT CONTRARY TO LAW

A. The Standard of Review

It is well established that under 2 U.S.C. § 437g(a)(8), "[a] 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 v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)); *accord Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). *See also Democratic Senatorial Campaign Comm. v. FEC*, 745 F. Supp. 742, 745 (D.D.C. 1990). The arbitrary and capricious standard of review is "highly deferential" and "presume[s] the validity of agency action." *American Horse Protection Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

The Supreme Court has held that the Commission, which is authorized to "formulate policy" under the Act and has exclusive jurisdiction over the administration and civil enforcement of the Act, 2 U.S.C. § 437c(b)(1), "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Thus, "in determining whether the Commission's action was 'contrary

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penalty of perjury …." 2 U.S.C. § 437(g)(a)(1). Here the only person who signed and swore to the administrative complaint was Daniel M. Schember. S.A.R. at 24. Thus, he was the only person eligible to sue under Section 437g(a)(8). *See Judicial Watch v. FEC*, 293 F. Supp. 2d 41 (D.D.C. 2003) ("[T]he plain language of [2 U.S.C.] 437g(a)(8) makes clear that [judicial review] is only available to parties to the administrative complaint."); *Akins v. FEC*, Civ. No. 03-2431, FEC's Mem. in Support of Mot. to Dismiss, at 10-14 (D.D.C. filed Sept. 10, 2004, Dkt # 12).

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." *Id*. 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 Resources Defense Council*, 467 U.S. 837, 842-44 (1984); *see also, e.g., FEC v. National Rifle Ass'n.*, 254 F.3d 173, 187 (D.C. Cir. 2001).

This case also involves construction of the Commission's own regulations, and "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). *Accord Buchanan*, 112 F. Supp. 2d at 70. Courts "'look to the administrative construction of the regulation if the meaning of the words used is in doubt.' That construction is given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *FEC v. National Republican Senatorial Comm.*, 966 F.2d 1471, 1475-76 (D.C. Cir. 1992) (citations omitted). *Accord In Re: Sealed Case*, 223 F.3d 775, 779-80 (D.C. Cir. 1988); *Fulani v. FEC*, 147 F.3d 924, 928 (D.C. Cir. 1998) ("But the FEC is, of course, entitled to substantial deference when it interprets its own regulations").

In sum, plaintiffs cannot prevail without satisfying the substantial burden of demonstrating that it was unreasonable for the Commission to conclude that AIPAC was a membership organization, and its expenditures were for membership communications, during the period covered by plaintiffs' administrative complaint. With respect to plaintiffs' express advocacy disclosure claim, plaintiffs similarly must show that the Commission's exercise of prosecutorial discretion in not pursuing this matter from almost twenty years ago was an abuse of discretion.

Summary judgment must be entered against the plaintiffs if there is any "coherent and reasonable explanation of [this] exercise of discretion." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (quoting *MCI Telecomm. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39.

B. The Commission's Application Of The Definition Of Membership Organization Was Not Contrary To Law

The Supreme Court ordered this case remanded to the Commission to address only one issue. It directed the Commission on remand to apply its new regulatory definition of member to determine whether AIPAC's expenditures qualify as "membership communications," and thereby fall outside the scope of "expenditures" that could qualify AIPAC as a "political committee" under the FECA. *Akins*, 524 U.S. at 29. The Court explained that that if "the FEC decides that AIPAC's activities fall within the 'membership communications' exception, the matter will become moot." *Id.* On remand, the Commission applied its new regulatory definition of member and, as directed by the Supreme Court, determined that AIPAC's communications during the period described in the plaintiffs' administrative complaint were, in fact, to its members.

Plaintiffs do not contest most of the Commission's findings on remand, but seek review of only one finding — the Commission's conclusion that AIPAC was "not organized primarily for the purpose of influencing" federal elections. 2 U.S.C. § 431(9)(B)(iii); *see* Pls.' Mem. at 10-14. The Commission's conclusion was firmly rooted in the record before it. As the Commission found in 1992, "[t]he evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel." F.A.R. 3772.

The Commission's conclusion that AIPAC was primarily a lobbying organization was reasonably grounded in an extensive review of AIPAC's by-laws, its history and its organizational structure and activities. In fact, plaintiffs themselves correctly concede before this Court that "AIPAC is an incorporated tax exempt organization that lobbies the Congress and Executive Branch..." Pls.' Mem. at 3; Pls.' Stmt of Material Facts at 1.

Plaintiffs suggest that what AIPAC was engaged in was "*quid pro quo* lobbying" which they believe *should* be covered by the Act. However, what they describe is squarely addressed by criminal bribery statutes, not the FECA. *See, e.g., United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) (explaining bribery and gratuity crimes within 18 U.S.C. § 201). "Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act." *Id.* The *quid pro quo* arrangements plaintiffs' allege, votes for or against legislation in exchange for past or future contributions (Pls.' Mem. at 8), are squarely covered by those other statutes.[4]

As the Commission explained in the Explanation and Justification issued with its new membership regulations, the requirement that a membership organization not be "organized primarily for the purpose" of influencing federal elections (11 C.F.R. § 114.1(e)(1)(vi)) addresses the "concern that an organization not be used as a conduit by a candidate or other outside entity seeking to influence unlawfully a Federal election." 64 Fed. Reg. 41266, 41269-70 (July 30, 1999) (explaining the "organized primarily for the purpose" of influencing federal

[4] Plaintiffs also argue that AIPAC's communications were not membership communications because they were communications "coordinated with candidates and therefore are communications 'by' the candidates." This argument fails because, if the communications at issue were actually a candidate's, the disclosure obligation, if any, would fall on the candidate, not AIPAC. *See* 2 U.S.C. § 434(a)(2) (requiring disclosure of disbursements by candidate committees).

elections requirement was "intended to prevent individuals from establishing 'sham' membership organizations in an effort to circumvent the Act's contribution and expenditure limits."). Plaintiffs try to bootstrap the primacy of AIPAC's lobbying efforts into federal election activity by arguing that AIPAC's "'lobbying efforts' are primarily based on campaign related activities." Pls.' Mem. at 10. Plaintiffs cite no legal authority for this novel and illogical proposition, nor do they come close to explaining how the Commission could have acted contrary to law by following the plain language of the Act, which includes no suggestion that a membership organization's primary purpose should be judged based on a purported connection between lobbying and campaign activity. In sum, plaintiffs fail to show that the only reasonable conclusion to be drawn from the facts is that AIPAC's primary focus on lobbying — which it has actively conducted for more than forty years — has been an extended sham perpetrated to circumvent the Act's contribution and expenditure limits.

C. The Commission's Investigation was Adequate

Plaintiffs do not actually claim that either their administrative complaint or the extensive administrative record compiled by the Commission demonstrates that AIPAC was "organized primarily for the purpose of influencing [federal elections.]" Instead, plaintiffs' claim is based on nothing more than speculation that if the Commission had done additional investigation it *might* have turned up some additional evidence of electoral activities by AIPAC. Pls.' Mem. at 16-17. In challenging the extent and techniques of the Commission's investigation, however, plaintiffs are asking this Court to second-guess the Commission's exercise of prosecutorial discretion, a matter at the core of the agency's expertise. As shown *supra* pp. 19-20, the standard of review of Commission action under 2 U.S.C. § 437g(a)(8) is highly deferential. This standard is even more deferential when, as here, the agency's exercise of prosecutorial discretion

is at issue. The exercise of authority to determine the direction and extent of an investigation "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). These decisions require assessing

> whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. *See also In re Sealed Case*, 838 F.2d 476, 510 (D.C. Cir.1980) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985), *rev'd on other grounds sub. nom., Morrison v. Olson*, 487 U.S. 654 (1988)). Congress has not required the Commission to allocate its investigatory resources in any specific way, and while the Commission's exercise of prosecutorial discretion is not entirely unreviewable, it is still true that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler*, 470 U.S. at 831-32.

Thus, the Commission "clearly has a broad grant of discretionary power in determining whether to investigate a claim or to bring a civil action under the statute." *Common Cause v. FEC*, 655 F. Supp. 619, 623 (D.D.C. 1986), *rev'd on other issues*, 842 F.2d 436 (D.C. Cir. 1988). *See also Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1133-34 (D.C. Cir. 1987) (discussing the Commission's prosecutorial discretion). In *Orloski v. FEC*, 795 F.2d 156, 168 (D.C. Cir. 1986), the D.C. Circuit concluded that the Commission is entitled to decide not even to begin an investigation based on a "subjective evaluation of claims." "It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted. [Courts] are not here to run the

agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986). *See also Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) ("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources").

The Act does not require the Commission to invoke any particular investigatory techniques, nor does it require the Commission to exhaust every last inquiry. Deposition testimony is not required (*see* Pls.' Mem. at 16) for the Commission to decide that an administrative respondent's factual showing is adequate and credible enough to terminate an investigation without further investment of its limited investigatory resources. In *DSCC*, 745 F. Supp. at 746, for example, the Commission relied upon a "sparse" record when it decided to dismiss a complaint. It relied almost entirely upon information submitted by the respondents in affidavits, and the court held that the Commission's action was not contrary to law. *Id*. at 742 . *See also Orloski*, 795 F.2d at 167-69. Plaintiffs here cite no authority for the proposition that the Commission is required to take depositions of all conceivable witnesses or to follow every possible investigative lead, once it has concluded that it has gathered sufficient information on which to exercise its judgment on the relevant issues (*see* Pls.' Mem. at 16).

> [T]he flat denials by [the parties under investigation] when weighed in conjunction with the lack of evidence proving [a violation] supports the final decision. The Court must defer to the [Commission's] discretion to assess the likelihood that further use of resources would not produce new evidence.

Common Cause, 655 F. Supp. at 623 (citation omitted).

Plaintiffs argue that the FEC ought to have investigated more, speculating that a further investigation might have turned up additional communications to people who were not members of AIPAC, or other election activities by AIPAC. Relying on twenty-year-old evidence, plaintiffs list several so-called "leads" they assert the Commission should have pursued, but none

of plaintiffs' speculation about whether additional relevant evidence might have been obtained remotely satisfies plaintiffs' burden of showing an abuse of the Commission's broad prosecutorial discretion. *See Cannon v. Apfel*, 213 F.3d 970, 978 (7th Cir. 2000) ("'Mere conjecture or speculation that additional evidence might have been obtained in the case is insufficient to warrant remand.'") (citation omitted). In particular, plaintiffs argue that the Commission should have investigated further to determine whether some of AIPAC's communications to its members may have been coordinated with a candidate (Mem at 14-16), but that question is irrelevant because the Commission's regulations specify 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).[5]

Plaintiffs' various arguments about further investigation — which were not presented to the Commission when it was considering how to respond to the remand by the Supreme Court or how to proceed on the second administrative complaint — fall far short of plaintiffs' heavy burden to show abuse of the Commission's broad prosecutorial discretion. Perhaps more importantly, plaintiffs offer no reason to think that additional inquiry would show that AIPAC was *primarily* organized for election activity, instead of for lobbying as the Commission found. Thus, plaintiffs have provided no reason why the Court should substitute plaintiffs' judgment on the best use of limited agency investigatory resources for the Commission's.

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[5] In fact, both the Supreme Court and the D.C. Circuit *assumed* the communications in this case 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 that 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 exception. In such circumstances, the Supreme Court's conclusion that resolution of the membership issue with respect to these communications was needed to resolve this case implicitly recognized that these communications resulted from coordination with candidates and that fact would not disqualify them from being exempt membership communications.

The administrative record, which now numbers twelve volumes and was summarized in three lengthy General Counsel's Reports (F.A.R. 3671-78, 3842-69, and F.A.R. Supp. 3964-85), demonstrates that the Commission conducted a detailed investigation into AIPAC's activities. As discussed above, the evidence was ample to support the Commission's conclusion that AIPAC was not organized primarily for the purpose of influencing federal elections. F.A.R. 3772. Indeed, no court has rejected the Commission's factual findings that AIPAC's lobbying efforts were its primary focus and its campaign related expenditures were a relatively small portion of its total activities. *Akins v. FEC*, 92-1864, slip op. at 16 (D.D.C., Mar. 30, 1994). The D.C. Circuit concluded that the major purpose test was inapplicable here because AIPAC's expenditures were coordinated with candidates, rather than independent expenditures, not that the Commission was wrong in concluding that lobbying was AIPAC's primary purpose. 101 F.3d at 744.

As noted *supra* p. 21-22, plaintiffs themselves describe AIPAC as a "lobbying organization" and have not contested the Commission's conclusion that AIPAC's campaign related expenditures "were made as an adjunct to, and in support of, the lobbying efforts that were the organization's primary focus." Slip Op. at 16 (citing F.A.R. at 3772); *see also Real Truth About Obama, Inc. v. FEC*, __ F.3d __, 2009 WL 2408735, at *6-7 (4th Cir. Aug. 5, 2009) (explaining that an organization "with activities that center around something other than electing or defeating candidates will never have *the* major purpose required by the statute" and relying on *Akins*, 101 F.3d at 743) (emphasis in original).

Although plaintiffs now argue that the Commission should have investigated other issues that were not involved in the Supreme Court's remand order, it cannot be contrary to law for the Commission to follow the direction of the Supreme Court on remand. *See St. Mary of Nazareth*

Hosp. v. Heckler, 587 F. Supp. 937, 939 (D.D.C. 1984), *aff'd.*, 760 F.2d 1311 (D.C. Cir 1985).[6] After making the determination ordered by the Supreme Court, the Commission had no legal obligation to engage *sua sponte* in further investigative efforts, particularly since plaintiffs had not even suggested to the Commission at that time that it should do so. The Court directed that the Commission proceed to consider whether AIPAC was a political committee under 2 U.S.C. § 431(4) *only if* the Commission decided that AIPAC's spending did *not* "qualify as 'membership communications,' and thereby fall outside the scope of 'expenditures' that could qualify it as a 'political committee.'" *Akins*, 524 U.S. at 29. This direction made it entirely reasonable, and certainly not contrary to law, for the Commission to end its inquiry after determining that AIPAC's communications were to its members. After all, the Supreme Court itself stated that "[i]f . . . the FEC decides that AIPAC's activities fall within the 'membership communications' exemption, the matter will become moot." *Akins*, 524 U.S. at 29.

V. THE COMMISSION'S DISMISSAL OF MUR 5272, THE SECOND ADMINISTRATIVE COMPLAINT, WAS NOT CONTRARY TO LAW

The Commission is entitled to judgment as a matter of law regarding the second administrative complaint because there is no basis for finding that the Commission's decision to dismiss MUR 5272 was contrary to law: (1) the administrative complaint failed to provide any

[6] *See also Barbour v. Medlantic*, 952 F. Supp. 857, 865 (D.D.C. 1997) (refusing to address or reopen issues beyond scope of remand) *aff'd.*, 132 F.3d 1480 (D.C. Cir. 1997); *Kotler v. American Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992) ("[W]hen the Supreme Court remands in a civil case, the court of appeals should confine its ensuing inquiry to matters coming within the specified scope of the remand[.]"); *Escalera v. Coombe*, 852 F.2d 45, 47 (2nd Cir. 1988) ("Any reconsideration at this juncture of our earlier opinion must be limited to the scope of the Supreme Court's remand."); *Hyatt v. Heckler*, 807 F.2d 376, 381 (4th Cir. 1986) (refusing to reach an issue outside the scope of a remand); *Aladdin's Castle, Inc. v. City of Mesquite*, 713 F.2d 137, 138-39 (5th Cir. 1983) (vacating a prior decision that went outside the scope of Supreme Court remand); *Hayatt v. Shalala*, 6 F.3d 250, 253 n.1 (4th Cir. 1993) (not affirming injunction outside scope of Supreme Court remand); *Herman v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960) (the Supreme Court's "mandate is our compass and our guide").

examples of communications expressly advocating the election or defeat of a clearly identified candidate; (2) there is no evidence of any of the alleged type of activity by AIPAC during the past decade; (3) the administrative complaint made no showing that costs associated with any express advocacy communications made by AIPAC exceeded the $2,000 reporting threshold, 2 U.S.C. § 431(9)(B)(iii); and (4) it was entirely reasonable for the Commission to consider the staleness of the evidence when exercising its prosecutorial discretion.

As we have shown *supra* pp. 19-20, this Court's review of the Commission's dismissal of the underlying administrative complaint is subject to a highly deferential standard of review. Under this standard, when the Commission has adequately explained the governing law and the reasonable basis for its determination (*see* Statement of Reasons, S.A.R. at 340-346), the Commission's dismissal must be upheld.

The Commission identified several different reasons why, as a matter of prosecutorial discretion, it unanimously decided not to pursue the allegations in the second underlying administrative complaint. Plaintiffs have failed to meet their burden of demonstrating that any of these reasons, let alone the combined force of these reasons, constituted decisionmaking that was "contrary to law." 2 U.S.C. § 437g(a)(8).

A. The Administrative Complaint Failed To Cite Any Examples Of Express Advocacy Communications

First, the administrative complaint alleged that AIPAC had paid for communications that expressly advocated the election or defeat of clearly identifiable federal candidates, but it failed to "cite any specific instances of communications containing express advocacy made by AIPAC." S.A.R. at 345. In this Court, plaintiffs do little more than provide general descriptions of AIPAC's activities, not specific communications, and plaintiffs make no attempt to explain how that activity constituted express advocacy communications from AIPAC to its members.

In *Buckley v. Valeo*, 424 U.S. 1, 44 (1976), the Supreme Court first "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *MCFL*, 479 U.S. at 249; *see also FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir.1987) ("[S]peech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning" and "may only be termed 'advocacy' if it presents a clear plea for action" and is not "speech that is merely informative."); *McConnell v. FEC*, 251 F.2d 176, 792-93 (D.D.C. 2003) (explaining "express advocacy test") (Leon, J.); *Christian Coalition*, 52 F. Supp. 2d at 62 (communication must "in effect contain an explicit directive to take electoral action"). *See also* 11 C.F.R. § 100.22 (Commission regulation defining express advocacy). In *Buckley* itself, the Court provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." 424 U.S. at 44 n.52.

The general activities that plaintiffs describe do not come close to being express advocacy communications. For example, plaintiffs cite their administrative complaint and Commission reports in an earlier administrative matter describing how "AIPAC gathers political intelligence regarding the campaigns of federal candidates and where they stand on issues relevant to AIPAC." Pls.' Mem. at 5 n.19 (citing Admin. Record from MUR 2804). Plaintiffs also describe how the information "AIPAC gathers from its meetings with candidates . . . makes it clear to AIPAC's most politically active supporters which candidates rate best on the issues relevant to AIPAC and, thus, are deserving of support, financial or otherwise." *Id.* at n.20. Of course, AIPAC's conversations with candidates are not communications to its members. And even if it were true that AIPAC "ma[de] it clear" to its members which candidates rated best on the issues AIPAC considered important, plaintiffs have not even attempted to explain why it

believes such unidentified communications constituted express advocacy, much less that they were "primarily devoted" to express advocacy. 2 U.S.C. § 431(9)(B)(iii).[7] Likewise, plaintiffs generally describe AIPAC's urging its supporters "to build relationships with candidates that support strong U.S.-Israel relations and to become active in the political process," Pls.' Mem. at 5, but such general exhortations to become involved in politics — even if plaintiffs had specifically identified communications between AIPAC and its members — do not constitute expressly advocating the election of a clearly identified candidate. *See Christian Coaltion*, 52 F. Supp. 2d at 64 (exhortations such as "stand together" and "get organized" are not express advocacy).

Thus, plaintiffs' general examples of AIPAC's lobbying activities and compilations of candidates' voting records fail to identify particular communications, fail to quote or specify any language from an AIPAC communication to its members that constitutes express advocacy, and often do not even involve communications with AIPAC's own members. Indeed, as the Commission noted in its Statement of Reasons (S.A.R. at 345), the administrative complaint does not quote a single communication on any particular date to any particular audience in reference to any particular election. On this basis alone, it was well within the Commission's prosecutorial discretion to decide not to pursue this matter any further.

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[7] Plaintiffs appear to rely most heavily upon AIPAC's "Campaign Updates," which provide detailed information about how certain candidates have voted on issues of importance to AIPAC. *See, e.g.*, S.A.R. at 56-81 ("Election 2002: Congress, Campaigns and Politics," submitted by AIPAC to the Commission in response to the administrative complaint in MUR 5272). Plaintiffs do not, however, argue that the Campaign Updates themselves contain language expressly advocating the election or defeat of clearly identified candidates. *See* Pls.' Mem. at 20; *infra* pp. 34-36. *See also Faucher v. FEC*, 928 F.2d 468, 471-72 (1st Cir. 1991) (voter guide did not constitute express advocacy).

B. The Administrative Complaint Provided No Information Supporting Its Allegation That AIPAC Is Continuing To Engage In The Alleged Activities

The Commission determined that the administrative complaint provided "no information to substantiate its claim 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)." S.A.R. at 345. Plaintiffs point to nothing in the administrative record that is contrary to this determination.

The administrative complaint in this case is based entirely upon information that was gathered in MUR 2804 and reflects investigative material from AIPAC's activities in the 1980s, some of which is now more than 20 years old. S.A.R. at 18-23. For example, the Campaign '88 Political Profiles, published in May of 1987, describes the positions of members of Congress on issues of the day and the electoral prospects of candidates in the 1988 election, but says nothing about AIPAC's present activities. S.A.R. at 110-330; *see, e.g.*, S.A.R. at 123-24 (describing Lawton Chiles' voting record in 1978, 1981, and 1985, and his re-election prospects in 1988, but no information from later than 1987).

The only recent evidence before the Commission was the Campaign Update (entitled "Election 2002") that AIPAC submitted voluntarily in response to the administrative complaint. S.A.R. at 56-81. This recent material from AIPAC includes no express advocacy, and plaintiffs have not argued that it does. In fact, the 2002 version of the Campaign Update explains that AIPAC "do[es] not contribute to campaigns nor do we rate or endorse candidates; however, we do encourage our members to take an active role in politics and campaigns of their choice." S.A.R. at 57. Plaintiffs' assertion that the record supports a finding of recent express advocacy communications by AIPAC and that the Commission's conclusion was "arbitrary and capricious," Pls.' Mem. at 24, relies entirely on its theory of splicing together multiple communications received at different times. As we explain *infra* pp. 34-36, however, that theory

is not tenable. The Commission was entirely reasonable in concluding that the administrative complaint provided no information to substantiate the bare allegation that AIPAC is engaged in ongoing express advocacy communications to its members that are subject to 2 U.S.C. § 431(9)(B)(iii).

C. Plaintiffs Have Provided No Grounds For Concluding That It Was Arbitrary And Capricious For The Commission To Find No Reason To Believe That AIPAC's Communications Fell Within The Reporting Requirements Of 2 U.S.C. § 431(9)(B)(iii)

As discussed *supra* pp. 29-31, despite plaintiffs' claim that AIPAC "routinely and widely communicates with its members, advocating election of clearly identified candidates," Pls.' Mem. at 18, the administrative complaint failed to identify a single communication that met the express advocacy requirement of the statute. Based on the information in the administrative complaint, the Commission thus determined that there did "not appear to be a sufficient basis for reason to believe AIPAC's membership communications . . . trigger the reporting requirements . . . because they did not contain express advocacy." S.A.R. at 345. In fact, the only instance of express advocacy in the administrative record that was discussed in the General Counsel's Report occurred during the 1986 election cycle when an AIPAC staff person contacted a limited number of AIPAC members urging PACs with which the members were associated to make contributions to certain candidates. S.A.R. at 105. The Commission concluded, however, that these contacts were isolated instances that apparently did not continue, and that there was no evidence that the costs directly attributable to such communications exceeded the $2,000 statutory threshold with respect to any election. S.A.R. at 345 (citing 2 U.S.C. § 431(9)(B)(iii)). Thus, the administrative complaint provided no factual basis for concluding that the explicit threshold requirements of 2 U.S.C. § 431(9)(B)(iii) — that a communication contain express

advocacy and that the costs "directly attributable" to that communication exceed $2,000 — were met in this matter.

In their summary judgment memorandum, plaintiffs present for the first time their novel theory that multiple communications occurring at different times, when spliced together afterwards, might constitute express advocacy. Pls.' Mem. at 19-20. This theory was not presented in the administrative complaint, and it is well settled that 2 U.S.C. § 437g(a)(8) does not permit judicial review of the Commission's failure to find a violation based upon a theory that was not alleged in the underlying administrative complaint. *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 Institute 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'") (citations omitted); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996) ("claims not presented to the agency may not be made for the first time to a reviewing court"). The plaintiffs, having failed to present to the Commission in the administrative complaint their novel theory that multiple, separate communications can be aggregated to make out a violation of 2 U.S.C. § 431(9)(B)(iii), have waived this claim.

Furthermore, even if the Court were to consider plaintiffs' theory, it is contrary to the plain language of the 431(9)(B)(iii). The statute requires that for an expenditure to be reportable it must involve costs that exceed $2,000 that are "directly attributable to *a communication* expressly advocating the election or defeat of a clearly identified candidate," not multiple communications. *See* 2 U.S.C. § 431(9)(B)(iii) (emphasis added). Plaintiffs' theory would read the phrase "a communication" out of the statute and radically broaden the scope of the statute.

In any event, even under plaintiffs' mistaken interpretation of 431(9)(B)(iii), they still fail to identify any particular combination of communications that took place at a specific time and were directed to AIPAC's members. The closest plaintiffs come is to argue (Pls. Mem. at 19) that AIPAC's statement — "'We urge you to choose candidates to support and we urge you to support them financially or by working in their campaigns,' combined with the 'delivery of a Campaign Update" constitutes express advocacy. But this argument has several flaws, each of which is fatal. The "we urge …" quotation does not contain any express advocacy; it does not clearly identify any candidates or even identify a *type* of candidate, or a distinctive characteristic, that the recipient should support.[8] Instead, it urges the recipients to make their own choices. Nor does the quotation refer to the Campaign Update, or suggest that it should be used as a basis for choosing a candidate or read in conjunction with any other statement by AIPAC. Similarly, plaintiffs provide no evidence whatsoever that the quotation and the Campaign Update were ever delivered to the same subset of AIPAC members, or even that the separate communications were sent close enough in time to suggest to a recipient that they should be read together. *See Christian Coalition*, 52 F. Supp. 2d at 57-58 (finding no express advocacy in a communication that included both a score card with candidates' voting records and a cover letter explaining that score card "will give America's Christian voters the facts they need to distinguish between GOOD and MISGUIDED congressmen").

Even if plaintiffs had identified membership communications that when combined together might constitute express advocacy, plaintiffs' approach would create a significant allocation problem. Each of the multiple communications that plaintiffs seek to splice together

[8] This statement is therefore entirely different from the exhortation at issue in the newsletter in *MCFL*, 479 U.S. at 243, which urged its members to "vote pro-life" and then, *in the same document*, identified by name and picture candidates who were "pro-life."

could potentially be matched with innumerable other communications. Thus, some portion of an expenditure on a particular date would have to be reported if months or even years later it could be read in combination with some other communication and be deemed in the aggregate to be express advocacy. The regime plaintiffs suggest, therefore, is not only contrary to the statute, but also unworkable because it 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 — not to mention the exceptionally thorny issues of double counting that would inevitably arise.

Plaintiffs' suggested approach also runs contrary to the direction the Supreme Court has taken recently regarding analyzing electoral communications. In *FEC v.Wisconsin Right to Life*, 551 U.S. 449, 468-70 (2007), a case involving the use of corporate funds for electioneering ads appearing during pre-election periods, Chief Justice Roberts' controlling opinion defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-70. The court eschewed any sort of subjective inquiry, instead relying on the four corners of the advertisement, "focusing on the substance of the communication" rather than "amorphous considerations of intent and effect." *Id.* at 469. Under Chief Justice Roberts' reasoning, plaintiffs' approach runs headlong into the chilling of speech that the Constitution does not permit.

In calculating whether any of AIPAC's expenditures reached the $2,000 threshold in section 431(9)(B)(iii), plaintiffs wrongly claim that the cost calculation should include items such as "staff salaries, overhead, travel expenses, policy conference expenses, and publication and distribution costs." Pls.' Mem. at 21. Plaintiffs appear to argue that every dime that went

into developing the ideas that eventually were conveyed as part of the membership communications is required to be reported, but that interpretation is directly at odds with the plain language of the statute. The statute requires that the spending be "*directly* attributable to a communication expressly advocating the election or defeat of a clearly identified candidate[.]" 2 U.S.C. § 431(9)(B)(iii) (emphasis added).[9] Plaintiffs argue that the costs "almost certainly exceed an average of $2,000 for each election" but they fail to explain how the costs of this activity are directly attributable to any single communication. Pls.' Mem at 21.

Finally, even a communication containing express advocacy is not subject to the reporting requirement in 2 U.S.C 431(9)(B)(iii) if it is "primarily devoted to subjects other than . . . express advocacy," yet plaintiffs have made no attempt to address this statutory element. The activities plaintiffs describe (Pls.' Mem. at 21) — such as researching officeholders' policy positions, meeting with Members, and publishing reports — are entirely consistent with AIPAC's lobbying purpose. Again, although plaintiffs have not identified *any* particular communications that supposedly contained express advocacy, they fail in their general descriptions even to argue that any of AIPAC's communications were "primarily devoted" to express advocacy.

In sum, the second administrative complaint failed to provide factual support for its assertion that AIPAC violated 2 U.S.C. § 431(9)(B)(iii), and the Commission's determination

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[9] The legislative history on this point is clear:

> For the same reason [that only communications primarily devoted to express advocacy are covered], the conference substitute requires the reporting only of costs directly attributable to the express advocacy of the election or defeat of a candidate. The paper, stamps, etc., for a mimeographed covered communication would be reportable but not a share of the membership organization's building, mimeograph machine, etc., expenses.

H.R. Conf. Rep. No. 94-1057 at 42 (1976).

that pursuing this complaint would not be a wise allocation of the Commission's limited law enforcement resources was not contrary to law.

D. When Addressing An Administrative Complaint 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

In September of 2003, when the second administrative complaint was before the Commission it found that "[b]ecause the communications at issue in MUR 2804 occurred between 1983 and 1990, any further investigation and/or enforcement of this activity would be frustrated by problems of proof as well as expiration of the applicable statute of limitations." S.A.R. at 345. The Commission also noted (*id.*) that the original complaint in MUR 2804 did not allege any violation of the reporting requirement about which plaintiffs now complain, so the original investigation had no occasion to identify specific express advocacy communications by AIPAC to its members, nor to quantify their costs.

Contrary to plaintiffs' claim, Mem. at 21-23, investigating this matter now would undoubtedly be problematic; memories have faded and records may no longer exist. Congress long ago recognized the need for statutes of limitations because of "[t]he concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared.'" *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). It was entirely reasonable for the Commission to consider this potential problem when deciding how to exercise its prosecutorial discretion.

It was equally reasonable for the Commission to consider the statute of limitations. Plaintiffs argue that the running of the limitations period regarding this activity from the 1980s should not matter to the Commission because, even if it is barred from obtaining civil penalties,

it could still seek equitable relief. Pls.' Mem. at 22-23. It is doubtful that a court would issue an injunction when there is no evidence the defendant has engaged in the activity at issue for more than a decade. In any event, given the significant demands on the Commission's resources, it is not contrary to law to focus its law enforcement resources on claims that are more current and can be fully vindicated. The Act provides for both injunctive relief and civil penalties, 2 U.S.C. § 437g(a)(6)(A), but there is a general five-year statute of limitations regarding civil penalties, 28 U.S.C. § 2462. Further, while the Commission agrees with the plaintiffs that the weight of authority holds that 28 U.S.C. § 2462 does not bar suits brought by the Commission for injunctive or other equitable relief (*see FEC v. Christian Coalition*, 965 F. Supp. 66, 70-72 (D.D.C. 1997)), other courts have taken the view that section 2462 bars all actions after five years. *See FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996). Taking these uncertainties into account in this case — with numerous more recent complaints pending before the Commission — is not arbitrary or capricious agency decisionmaking, especially where the statute of limitations is five years and the activity at issue is three times that old.[10] As the D.C. Circuit has explained:

> we have no basis for reordering agency priorities. The agency is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.

In re Barr Labs., 930 F.2d 72, 76 (D.C. Cir. 1991). In this case, plaintiffs have failed to demonstrate that it was contrary to law for the Commission to exercise its prosecutorial discretion to decline to

[10] Plaintiffs also argue that the statute of limitations was tolled during the pendency of this case and the earlier case involving the same plaintiffs. Pls.' Mem. at 23-24. The availability of such tolling, however, is unclear, and plaintiffs cite no authority to support their argument for tolling. And plaintiffs did not present this argument to the Commission. *See supra* p. 18.

devote its limited resources to the very old allegations in MUR 5272 at the expense of the many matters before it that involve more current activities and elections.

VI. 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.

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