UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES E. AKINS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 92-1864 (RJL)
	)	Civ. A. No. 00-1478 (RJL)
FEDERAL ELECTION COMMISSION,	)	Civ. A. No. 03-2431 (RJL)
	)	
Defendant.	)	
	)	

PLAINTIFFS' REPLY SUPPORTING SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION

Plaintiffs first three arguments are not barred, and defendant's counter-arguments on the merits are invalid. The Court has jurisdiction in No. 03-2431, and defendant's position on the merits in that case also is erroneous.

Whether the "Membership Organization" is "Organized Primarily for the Purpose of Influencing" Elections was Not Waived in 1992 Because the "Membership Organization" on Remand from the Supreme Court is a Different Organization

Defendant's argument under heading III.A., Dfdt's Mem. at 15-17, is erroneous.[1] In 1992, the Commission found that only the *Executive Committee* of the American Israel Public Affairs Committee (AIPAC) was a "membership organization" and that communications to the Executive Committee were not election expenditures. Dfdt's Mem. at 16. This meant that the Commission did not deem the Executive Committee to be "organized primarily for the purpose of influencing" elections. 2 U.S.C. § 431(9)(B)(iii). On remand from the Supreme Court, the Commission changed course and held that all 50,000 AIPAC supporters are a "membership organization."

[1] Argument A. also does not fit under heading III. Heading III. says claims were not presented to the Commission, but argument A. says that plaintiffs waived any "organized primarily" claim by not presenting it to the *Court* in 1992.

Whether the 50,000-person "membership organization" is "organized primarily for the purpose of influencing" elections is a different question from whether the AIPAC Executive Committee is organized primarily for this purpose.[2] That plaintiffs in the 1992 court proceedings did not argue the "organized primarily" issue with respect to the Executive Committee cannot properly be deemed to waive the different issue of whether the 50,000-person membership organization is primarily organized to influence elections.

Contrary to defendant's memorandum at 16-17, whether the 50,000 people are a membership organization is not "the only question remanded by the Supreme Court." Rather, as defendant's memorandum acknowledges at 10, the Supreme Court ordered the Commission to decide whether "AIPAC's *activities* fall within the 'membership communications' *exception*." Dfdt's Mem. at 10, *quoting FEC v. Akins*, 524 U.S. 11, 29 (1998). Whether the activities fall within the exception depends not only on whether the 50,000 persons are members, but also on whether (1) the 50,000 are "organized primarily for the purpose of influencing" elections and (2) the organization's communications are "by" the organization "to its members," within the meaning of § 431(9)(B)(iii). All of these questions are within the scope of the Supreme Court's remand.[3]

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[2] Even if the Executive Committee is primarily organized to direct the lobbying of the paid staff, the evidence indicates that the 50,000 members are organized primarily to influence elections and that election influencing by them is the primary basis of the lobbying.

[3] Footnote 5 on page 26 of defendant's memorandum incorrectly argues that the scope of the remand excludes the issue of whether membership communications soliciting campaign contributions are not "by" the organization if they are coordinated with candidates. Defendant reasons that if coordination with candidates disqualified communications from the statutory exception, the Supreme Court could have so held without remanding the case and that the Court therefore implicitly must have recognized that such coordination was not disqualifying. This is not acceptable. The issue was not briefed to the Court, and the Court's opinion did not address it.

Plaintiffs Had No Duty to Submit Arguments to the Commission on Remand; the Regulations Allow No Such Submissions and, on Their Face, They Prohibit Them

Defendant's memorandum at 18 erroneously argues that plaintiffs waived their first three arguments by not presenting them to the Commission after the Supreme Court's remand. Defendant cites no Federal Election Commission case to support its argument and defendant ignores the Commission's regulations.

The regulations authorize no submissions by complainants besides their complaints. The regulations, moreover, totally exclude complainants from the administrative proceedings, deny complainants knowledge of who represents the respondents, and prohibit ex parte communication by complainants to the Commission. As we previously argued, without contradiction by defendant,

> [u]pon completion of the investigation, the Commission's General Counsel must "prepare a brief . . . containing a recommendation on whether or not the Commission should find probable cause to believe that a violation has occurred." [11 CFR] § 111.16(a). . . .
>
> The General Counsel serves the brief on the respondents, but not the complainants. § 111.16(c). The respondents, but not the complainants, have a right to file a brief responding to the General Counsel's brief. § 111.16(d). The General Counsel then advises the Commission . . . in light of the respondent's brief, and the Commission determines . . . whether to . . . dismiss the complaint, or to commence enforcement proceedings . . . . § 111.17 and 111.18. If the Commission dismisses the complaint, the complainants' only recourse is to seek a judicial determination that the dismissal was contrary to law. 2 U.S.C. § 437g(a)(8).
>
> Under [this] legal framework, . . . complainants have no opportunity to "litigate" before the Commission. The only document the regulations allow complainants to file is their complaint, accompanied by any supporting documentation available to the complainants at the time the complaint is filed. § 111.4(d). Thereafter, complainants are excluded from all proceedings. Complainants receive no papers filed by respondents. The Commission's investigation is confidential; complainants receive no information about, or access to, the evidence obtained. § 111.21. As noted, they do not receive briefs filed by the

> General Counsel. The rules provide complainants no right to know who represents the respondents. Complainants unaware of respondents' representatives are precluded from any substantive post-complaint communication with Commission personnel, since any such communication would be an ex parte communication prohibited by § 111.22(c). Attorneys for respondents, but not those for complainants, are exempted from the ex parte communication ban. § 111.22(c). In these ways, the Commission's rules exclude complainants from participation, as parties, in post-complaint administrative proceedings.

Pltffs' Opp. and Reply (Doc 71, Nos. 92-1864 and 00-1478) at 2-3.

In light of these regulations, it cannot properly be said that complainants waive arguments by failing to make post-complaint submissions to the Commission. Plaintiffs reasonably believed that any such submission to the Commission was not only unauthorized, but prohibited—that it would be an unethical ex parte communication jeopardizing their complaint and potentially subjecting counsel to discipline by Bar Counsel. Given the regulations, it is unreasonable to claim that plaintiffs should have known they had a right to submit post-complaint briefs to the Commission and that failure to do so waived any argument plaintiffs might have made against the General Counsel's legal position—a position of which they had no knowledge.

Whether the "Membership Organization" is "Organized Primarily for the Purpose of Influencing" Elections Must be Remanded for Redetermination

Defendant does not dispute our point that the "Commission based its 'organized primarily' finding solely on its 1992 'major purpose' finding, CAR 3982." Pltffs' Sum. J. Mem. at 14, n. 26. Nor does defendant deny that "[w]hat the Commission means by "major purpose" . . . is not clear." *Id.* The Commission in 1992 referred both to "a major purpose" and "its major purpose," never clarifying whether an organization can have more than one "major purpose." Stmt Facts at ¶¶ 11, 7. Consequently, the Commission has not clarified whether, under its interpretation of the statute, an organization can be

"organized primarily" for more than one purpose.[4] The Commission should be ordered to determine whether AIPAC is "organized primarily" for both the purpose of lobbying and the purpose of influencing elections and, if so, whether the latter purpose disqualifies AIPAC for the membership communication exception.

Even if the Commission's decision could be construed to say that an organization can be "organized primarily" only for one purpose, defendant does not dispute that the Commission never made a finding whether AIPAC is "organized primarily to influence" elections because "AIPAC's 'lobbying efforts' are primarily based on 'campaign-related activities and communications' that influence elections." Pltffs' Sum. J. Mem. at 10. Instead, defendant argues, erroneously, that a finding on this question is irrelevant because "the plain language of the Act . . . includes no suggestion that . . . primary purpose should be based on a . . . connection between lobbying and campaign activity." Dfdt's Mem. at 23.

Defendant's argument overlooks the plain meaning of "primary." "Primary" means not only "[f]irst in degree, rank, or importance; chief," but also "[c]onstituting the fundamental or original elements of which a whole is composed; basic; elemental." Funk & Wagnalls Standard College Dictionary (Text Ed. 1966). The evidence indicates that AIPAC's campaign activities are "basic" to the organization—that they are the "fundamental . . . elements" and the "chief" basis of AIPAC's lobbying.[5]

[4] Court papers cannot cure this problem. *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-69 (1962) (court must ignore post hoc rationalizations by agency counsel). The Commission itself must clarify its interpretation of the statute.

[5] See our opening memorandum at 10-11 and sources cited there.

Defendant's argument rests on the erroneous premise that influencing election to Congress is a separate purpose from influencing Congress. Defendant overlooks that these purposes are inherently connected. Political organizations that seek to influence congressional elections do so *because* they seek to influence congressional actions. The former is a means of accomplishing, not a separate purpose from, the latter. A lobbying organization that, as its primary means of lobbying, seeks to influence congressional elections is "organized primarily for the purpose of influencing" elections.[6]

This construction of the statute applies the plain meaning of "primarily" and achieves the purpose of the Act. Defendant does not dispute that the purpose of the Act, including its disclosure provisions, is to combat the danger and appearance of *quid pro quo* corruption. Defendant does not dispute that lobbying based on campaign activity presents the danger and appearance of *quid pro quo* corruption. Defendant also does not dispute that the statute must be construed to achieve the purpose of the Act and that courts "must reject administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

Defendant's interpretation of the Act is "inconsistent with the statutory mandate" and "frustrate[s] the policy that Congress sought to implement" because it exempts from

[6] Contrary to defendant's memorandum at 22, this does not mean that lobbying is "covered by the Act." It does not mean that the Act restricts or requires the filing of reports about lobbying. Rather, it means that if an organization's lobbying is based primarily on influencing elections, organizational communication that is coordinated with candidates and that urges members of the organization to contribute to election campaigns is not exempt from the Act's provisions limiting and requiring disclosure of campaign contributions.

coverage the campaign activities of a large, wealthy political organization that in coordination with hundreds of candidates urges tens of thousands of people to make monetary and in-kind campaign contributions—for the purpose of electing a Congress that will do the organization's bidding. To implement the policy that Congress enacted, such campaign activity must be disclosed to the voters.

The case must be remanded to Commission for determination whether AIPAC is "organized primarily for the purpose of influencing" elections because, as the evidence indicates, AIPAC's lobbying is primarily based on influencing elections.

Whether AIPAC's Communications are Disentitled to the Membership Communication Exception Because They are Coordinated with Candidates, and Therefore not "By" the Organization, Also Must be Remanded to the Commission

Defendant does not dispute that the purpose of the membership communication exception, 2 U.S.C. § 431(9)(B)(iii), is to prevent infringement of the constitutional right to associational privacy of membership organizations that are not "primarily organized for the purpose of influencing" elections. The statute accomplishes this purpose by exempting such organizations from disclosure of their intra-organizational communication—unless the "communication expressly advocate[es] the election or defeat of a clearly identified candidate" and is not "primarily devoted" to other subjects, and the costs "directly attributable" to it "exceed $2,000 for any election."

Defendant does not argue that a membership organization's right to associational privacy extends to communication that is coordinated with a candidate who is not a member of the organization. Nor does defendant dispute that organizational campaign communications coordinated with candidates present a danger and appearance of *quid pro quo* corruption. Defendant articulates no reason why § 431(9)(B)(iii)

"communication by any membership organization . . . to its members" is not limited to organizational communication that is solely intra-organizational—and not coordinated with candidates. This limitation does not infringe the right to associational privacy, and it serves the purpose of the Act by eliminating a danger and appearance of *quid pro quo* corruption.

Defendant's contrary interpretation "frustrate[s] the policy that Congress sought to implement." *Democratic Senatorial Campaign Committee,* 454 U.S. at 32. Defendant says the membership communication exception should be available to an organization unless it is not really an organization at all and, instead, is a "sham" created solely as a conduit for campaign communications by a candidate or other outside entity. Dfdt's Mem. at 22-23. While defendant's interpretation properly recognizes that communication coordinated with a candidate should not qualify for the exception, its limited focus on whether a membership organization is a "sham" is insufficient to achieve the purpose of the Act. Indeed, if an organization does not really exist, because it is a "sham," there is no danger or appearance of a *quid pro quo* arrangement between the candidate and the organization. The danger and appearance of an arrangement exist, however, when the organization is real—particularly when it's a lobbying organization.

To serve the purpose of the Act, the membership communication exception must be inapplicable to candidate-coordinated organizational communications—not just when the organization is a sham, but also when it is real. The exception must apply only to communications that are genuinely intra-organizational—communications that are solely

from the membership organization, solely to its members.[7] The Court should reject the Commission's "sham organization" interpretation as too limited and remand the case for determination of whether AIPAC's organizational communications are disentitled to the membership communication exception because they are coordinated with candidates.

The Commission Should be Ordered to Investigate whether AIPAC Continues to Make Campaign Contributions Other Than Membership Communications

Defendant does not dispute that the Court of Appeals noted the likely inadequacy of the Commission's investigation of AIPAC campaign activity other than membership communications. Nor does defendant assert that the adequacy of its investigation has been finally adjudicated. That the Supreme Court did not expressly mention the issue does not mean that it has evaporated.

As we have shown, the Commission's investigation was inadequate due to failure to pursue evidentiary leads. Due to passage of time, however, it is no longer appropriate to require investigation of these specific, old matters. Instead, the Commission should be required to investigate whether AIPAC recently has engaged in activities similar to those that were inadequately investigated in the past.[8] The investigation should start with interrogatories and document requests, with follow-up inquiries to the extent the initial

[7] Footnote 4 on page 22 of defendant's memorandum is off the mark. Communications coordinated with candidates are "by" the candidates, but not solely by them. Also, because of the coordination, the communications are not solely from the organization, solely to its members—they are not "by [the] membership organization . . . to its members," within the meaning of § 431(9)(B)(iii). Consequently, the communications are contributions to the candidates' campaigns. The organization must disclose these contributions, because it pays for them.

[8] This is true unless on remand the Commission finds that AIPAC's membership communications, by themselves, are campaign contributions that make AIPAC a "political committee" required to file disclosure reports. Other types of contributions then would have to be reported as well. The adequacy of the disclosure reports would become the focus of any further investigation.

responses are insufficient. In light of the significant, but inadequately investigated, indications of past AIPAC campaign contributions other than membership communications, it is unacceptable for the Commission to maintain that it should do *nothing* to find out whether AIPAC recently has made such contributions.

Under the statute, 2 U.S.C. § 431(4)(A), AIPAC is a "political committee" required to disclose its campaign contributions if those contributions exceed $1,000 during any calendar year. This is a low threshold. The evidence from the past indicates that, unless AIPAC has changed course completely, it is likely to have crossed it.

There never has been a final determination whether AIPAC is exempt from designation as a "political committee" under the Commission-made "major purpose" test, which was rejected by the en banc appellate decision. If the Commission finds that AIPAC recently has made campaign contributions exceeding the $1,000 limit, but the Commission again invokes its "major purpose" test to exempt AIPAC from the obligations of political committees, the legality of that exemption again will be ripe for review.

Plaintiffs' Second Administrative Complaint also Must Be Remanded for Reconsideration

Defendant's arguments in support of the dismissal of plaintiffs' second administrative complaint also lack merit.[9]

Defendant ignores that plaintiffs' second administrative complaint is based on the *findings* of the Commission, not alleged "general descriptions of AIPAC's activities"

[9] Defendant's memorandum, at 18 n. 3, repeats and urges reconsideration of its jurisdictional challenge to the Court's consideration of plaintiffs' second administrative complaint. Nothing in defendant's footnote, however, overcomes our previous demonstration that defendant's jurisdictional argument lacks merit. We incorporate here our previous opposition to defendant's motion to dismiss.

provided by the plaintiffs. Dfdt's Mem. at 29. The Commission based its findings on evidence of "specific instances" of "specific communications" that the Commission itself obtained during its investigation. Defendant cannot now be heard to say that this evidence does not support the Commission's own findings as to the character of those communications.

The Commission's findings, stated in the complaint, establish that AIPAC's membership communications "expressly advocate[e] the election or defeat of . . . clearly identified candidate[s]," within the meaning of § 431(9)(B)(iii). Stmt Facts at ¶ 43. The Commission found that these communications include membership conferences and individual communications "urging support, financial or otherwise, for . . . federal candidates" and publication and dissemination of detailed and comprehensive Campaign Update reports that make it clear "which candidates . . . are deserving of support, financial or otherwise." *Id.*

The Commission found that these membership communications are regular, ongoing functions of the 50,000-member organization, which has an annual budget of about $10 million. *Id.* The cost of these communications—indeed, the costs of preparing, printing, and disseminating just the Campaign Updates—almost certainly exceed "$2,000 for any election." § 431(9)(B)(iii). Defendant's memorandum, at 32, acknowledges that AIPAC's response to plaintiff's second complaint expressly said that AIPAC continues to make these membership communications.

Defendant's memorandum, at 34-36, however, argues that membership communications urging support for candidates and membership communications identifying the candidates who are deserving of support must occur in the same document

or close in time, or the communications do not constitute "a communication expressly advocating the election or defeat of a clearly identified candidate." § 431(9)(B)(iii). Even if this were correct, though, it would not justify dismissal of plaintiffs' second administrative complaint. Defendant overlooks the evidence that dissemination of the Campaign Updates identifying candidates deserving of support occurred at membership conferences where members were repeatedly urged to support candidates. Stmt Facts at ¶¶ 21, 43. The conferences and the Updates certainly cost more than "$2,000 for any election." § 431(9)(B)(iii).

The Court, moreover, should reject defendant's theory that, "for any election," *id*., a membership organization can escape its obligation to disclose "a [membership] communication expressly advocating the election or defeat of a clearly identified candidate," *id*., simply by dividing the communication into two parts—one that expressly urges members to support or defeat candidates, and a second that identifies the candidates to be supported or defeated. This theory defeats the purpose of the statute and is no more acceptable than the idea that, for any election, an organization can escape the disclosure obligation by repeatedly sending separate membership communications expressly urging support or defeat of an identified candidate—provided each communication costs $2,000 or less, though the total cost of all of them, for that election, is $1 million.

Defendant's theory overlooks that membership communications are a stream that flows to the same audience—one that has an established receptivity to the messages, an expectation of their continuation, and an orientation toward considering them as a whole.

This is different from billboards and newspaper advertisements directed to the unorganized public.[10]

To 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. If the cost of the communications "not primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate" exceed $2,000 for that election, the communications must be reported under § 431(9)(B)(iii).

The Court should reject defendant's theory, which creates a loophole that defeats the purpose of the statute, and remand plaintiffs' second administrative complaint for reconsideration.

Conclusion

Plaintiffs' motion for summary judgment should be granted. Defendant's cross-motion should be denied.

Respectfully submitted,

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[10] Defendant's argument, Dfdts' Mem. at 35-36, that organizations spending large sums of money should not be obligated to keep track of what they do—in order to ensure that their ongoing, organized activities proceed in accordance with policies enacted by Congress—also is unacceptable. It is reasonable to require organizations to keep records enabling them to comply with the law.