

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: FEDERAL ELECTION COMMISSION, Petitioner v.  
JAMES E. AKINS, RICHARD CURTISS, PAUL  
FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE,  
AND ORIN PARKER.

CASE NO: No. 96-1590

PLACE: Washington, D.C.

DATE: Wednesday, January 14, 1998

PAGES: 1-50

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

**LIBRARY**

JAN 15 1998

**Supreme Court U.S.**

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 FEDERAL ELECTION COMMISSION, :

4 Petitioner :

5 v. : No. 96-1590

6 JAMES E. AKINS, RICHARD :

7 CURTISS, PAUL FINDLEY, :

8 ROBERT J. HANKS, ANDREW :

9 KILLGORE, AND ORIN PARKER :

10 - - - - -X

11 Washington, D.C.

12 Wednesday, January 14, 1998

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 11:08 a.m.

16 APPEARANCES:

17 SETH P. WAXMAN, ESQ., Solicitor General, Department of  
18 Justice, Washington, D.C.; on behalf of the  
19 Petitioner.

20 DANIEL M. SCHEMBER, ESQ., Washington, D.C.; on behalf of  
21 the Respondents.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	SETH P. WAXMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	DANIEL M. SCHEMBER, ESQ.	
7	On behalf of the Respondents	27
8	REBUTTAL ARGUMENT OF	
9	SETH P. WAXMAN, ESQ.	
10	On behalf of the Petitioner	49
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-1590, the Federal Election Commission v.  
5 James E. Akins.

6 General Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 GENERAL WAXMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 In holding that the American Israel Public  
12 Affairs Committee, or AIPAC, was a political committee  
13 within the meaning of the Federal Election Campaign Act,  
14 the court of appeals misinterpreted this Court's  
15 decisions, and it did so in a case it should not have  
16 reviewed on the merits, for the respondents do not have  
17 standing.

18 AIPAC is an association engaged in issue  
19 advocacy and lobbying. The FEC investigated a complaint  
20 filed by individuals who disagree with AIPAC's policies,  
21 and the FEC concluded that AIPAC had, quote, likely made  
22 in-kind contributions aggregating over \$1,000 in a  
23 calendar year.

24 The commission then considered whether thereby  
25 AIPAC was a political committee under the act, in which

1 case it would be required to disclose all receipts and  
2 disbursements over \$200, whether or not they were related  
3 in any way to a campaign, and it would be limited in how  
4 much money it could receive, and from whom.

5 The commission, interpreting the statute in  
6 light of this Court's decisions in Buckley and  
7 Massachusetts Citizens for Life, concluded that, because  
8 campaign-related activity was not a major purpose of  
9 AIPAC, its incidental campaign spending did not require it  
10 to comply with the act's restrictions on political  
11 committees.

12 In concluding that the FEC acted, quote,  
13 contrary to law, the court of appeals erred in two ways.  
14 Let me just say a few words about the merits and then  
15 address the standing issues.

16 In Massachusetts Citizens for Life, this Court  
17 deemed it, quote, undisputed that an organization making  
18 nearly \$10,000 in campaign-related spending was not a  
19 political committee because its major purpose was issue  
20 advocacy, not election activity.

21 In so holding, this Court relied on its earlier  
22 conclusion in Buckley that, quote, to fulfill the purposes  
23 of the FECA, the term political committee need only  
24 encompass organizations that under -- that are under the  
25 control of a candidate, or the major purpose of which is

1 the nomination or election of a candidate.

2 QUESTION: General Waxman, I -- you're  
3 addressing the merits, and do you mind if I raise a  
4 preliminary question before we really wade into the merits  
5 of the major purpose test?

6 GENERAL WAXMAN: I'd be grateful, Justice  
7 O'Connor.

8 QUESTION: Has the FEC changed its notion of who  
9 are members within the meaning of the statute so that the  
10 expenditures that were made here might be ones that were  
11 for publications that went to members, in which case the  
12 statute wouldn't be involved at all?

13 GENERAL WAXMAN: Justice O'Connor, a great deal  
14 has happened with respect to the membership issue and the  
15 law relating to who consti -- what -- who is or is not a  
16 member since the FEC made its decision in this case, and  
17 let me --

18 QUESTION: Under the FEC's current  
19 interpretation and application of who's a member, would  
20 the mailings here have gone to members?

21 GENERAL WAXMAN: The FEC has recently within the  
22 last 3 weeks issued a proposed -- a notice of proposed  
23 regulation in which it has set out for public notice and  
24 comment an alternative set of definitions of membership,  
25 and what constitutes a member, and under one of the

1 alternative definitions that the FEC is proposing, the  
2 AIPAC members, insofar as the record existed in this case  
3 at the time, would not qualify as members, but as --

4 QUESTION: In that case the statute wouldn't be  
5 invoked at all, if that were --

6 GENERAL WAXMAN: Well, no, what -- I guess what  
7 I -- what I meant to say is, the FEC has not yet settled  
8 on a firm definition of membership. It did after the  
9 decision in this case, but that regulation was struck down  
10 by the court of appeals in a case that it decided a few  
11 years after the FEC made a decision in this case. In  
12 response, the FEC --

13 QUESTION: Well, in that case I thought that  
14 the -- I thought that the Chamber of Commerce case  
15 intervened between the three-judge panel in this case and  
16 the en banc in this case, is that not --

17 GENERAL WAXMAN: That is correct, and --

18 QUESTION: So at the time you were arguing  
19 political committee at the en banc, the D.C. Circuit had  
20 already decided the membership question in the Chamber of  
21 Commerce case, and to me it was just a total mystery how  
22 come these two never met from the same court.

23 GENERAL WAXMAN: Well, I -- I agree that it is,  
24 like many other things in this case, somewhat mysterious,  
25 but I think what the en banc court of appeals concluded,

1 and I think correctly, is that for purposes of deciding  
2 this case, the FEC's determination was that the people  
3 that AIPAC considered members were not, in fact, members,  
4 and that the FEC is now in the process of determining --  
5 of fixing on a definition of membership which it has not  
6 yet done, but still takes the position that membership can  
7 be defined in a way to exclude all people who pay \$50 a  
8 year in dues to AIPAC.

9 QUESTION: But wasn't AIPAC itself always taking  
10 the position that it was a membership organization  
11 communicating with its members? I mean, it was not --

12 GENERAL WAXMAN: Oh --

13 QUESTION: It was not in this litigation. It  
14 was --

15 GENERAL WAXMAN: Absolutely AIPAC took that  
16 position, and in fact the joint -- the general counsel's  
17 brief and report that are reprinted in the joint appendix  
18 devote a very substantial portion of time addressing  
19 AIPAC's contention that these papers -- these people were  
20 just its members, and therefore these weren't expenditures  
21 or contributions in any regard.

22 The commission concluded otherwise, and the  
23 commission is now propounding a rule which, if adopted --

24 QUESTION: General Waxman, isn't it --

25 GENERAL WAXMAN: -- would permit them to adhere



1 to that insofar as AIPAC still has the same rules with  
2 respect to membership as it did at the time.

3 QUESTION: But isn't it true that, if they  
4 follow the definition of membership that the D.C. Circuit  
5 has followed in the case Justice Ginsburg referred to,  
6 then these people would be members?

7 GENERAL WAXMAN: Well, I don't -- I don't think  
8 that the -- my problem with answering the question,  
9 Justice Stevens, is that the D.C. Circuit did not apply,  
10 as we understand it, a rule with respect to who was a  
11 member. The D.C. Circuit simply struck down the  
12 commission's prior rule, which required, as a bright line  
13 test, that no matter how many dues anybody paid, and no  
14 matter how affirmatively they tried to be a member --

15 QUESTION: They had to vote.

16 GENERAL WAXMAN: -- there was a bright line  
17 requirement that you had to be able to vote for at least  
18 one member of the governing body. That was, in many ways,  
19 the ratio decidendi of the commission in this particular  
20 case, and that was struck down.

21 But in Chamber of Commerce, the D.C. Circuit  
22 left open the possibility that an organization like AIPAC,  
23 which requires only \$50 to establish oneself as a member,  
24 might properly be deemed to be not a member by the FEC,  
25 and in fact in the petition for -- in its -- in its

1 opinion denying rehearing in Chamber of Commerce the court  
2 of appeals emphasized that it is open, still open to the  
3 commission to define membership in a way -- I mean, it  
4 wasn't addressing this particular case, but to define  
5 membership in a way that would or wouldn't include AIPAC  
6 members.

7 QUESTION: So --

8 GENERAL WAXMAN: Particularly tricky here is  
9 that --

10 QUESTION: Well, so jurisprudentially, what do  
11 we do, faced with this question, or uncertainty?

12 GENERAL WAXMAN: Well, we --

13 QUESTION: Is there some way we can safely reach  
14 the merits, and if so, how?

15 GENERAL WAXMAN: I think you can and should  
16 reach the merits. No one in this case, even AIPAC in  
17 response to the disposition at the administrative level,  
18 has challenged the membership issue. It's not been  
19 briefed anywhere.

20 It's a fact-sensitive question, and it may very  
21 well be true, Justice O'Connor, that if the court of  
22 appeals opinion is sustained, or you otherwise dispose of  
23 this case in a way in which the commission will have to  
24 reevaluate it, that antecedent question will have to be  
25 litigated again. But right now, it seems to me the law of

1 the case, as it comes up, and it's not a question  
2 presented --

3 QUESTION: Well, but the organization --

4 GENERAL WAXMAN: -- is that AIPAC -- these  
5 people were members.

6 QUESTION: But the organization is not a party,  
7 but they did file an amicus brief in which they do  
8 challenge the point.

9 GENERAL WAXMAN: They -- well, they file an  
10 amicus brief in which they say they're not members --

11 QUESTION: Right.

12 GENERAL WAXMAN: -- in any sense in which the  
13 Federal Election Campaign Act could constitutionally be  
14 interpreted.

15 QUESTION: I thought you --

16 QUESTION: Also, they --

17 QUESTION: -- wanted us to reach the merits.

18 GENERAL WAXMAN: Well --

19 QUESTION: You just said that we should reach  
20 the merits. I --

21 GENERAL WAXMAN: We think that this -- we think  
22 that this, that the lower courts should not have reached  
23 the merits of this case because these respondents don't  
24 have either Article III or statutory standing, but if you  
25 do reach the merits, we think that the commission's

1 interpretation of this Court's opinions in Buckley and  
2 Massachusetts Citizens for Life is, quote, sufficiently  
3 reasonable to -- to uphold it.

4 The one thing that --

5 QUESTION: General Waxman, just -- I don't  
6 understand. First you're saying, don't reach the merits  
7 because there's a standing hurdle, but if you should find  
8 there's no standing hurdle, skip over another possible  
9 hurdles -- this is my concern.

10 This question, political question, is not easy,  
11 and it could be a really important thing to a lot of  
12 organizations that just have mailing lists, that don't  
13 have dues-paying members. Why should we decide that  
14 question in a case where it may well be that this  
15 particular organization qualifies as a membership  
16 organization, so the question is really academic for  
17 AIPAC?

18 Why shouldn't we hold off on such a question  
19 until we're sure we have the kind of entity that would be  
20 affected by it?

21 GENERAL WAXMAN: Well, it is, of course, open to  
22 this Court either, a) to address the membership issue, and  
23 announce a determination as to who -- whether these people  
24 were or weren't members based on the administrative  
25 record, or to --

1 QUESTION: Send it back.

2 GENERAL WAXMAN: -- hold that there was not --  
3 vacate the court of appeals decision and send it back.  
4 What is intolerable --

5 QUESTION: I don't see why we have that choice,  
6 because the membership issue as such is not what has come  
7 to us.

8 GENERAL WAXMAN: The membership issue certainly  
9 is not one that has come to you. What --

10 QUESTION: It seems to me the only thing we  
11 could do, if we are going to advert to that issue at all,  
12 is to say, it is in a state of ferment, and the one thing  
13 that seems clear is that there is going to be a  
14 redetermination, whatever the result may be, of what  
15 membership means at the commission level, and we ought to  
16 send this case back so that -- so that if it ultimately  
17 comes to us it will come to us on a concept of membership,  
18 which is -- which for the foreseeable future will be the  
19 permanent one and will give us a good reason to go the  
20 length of the adjudication that you want.

21 GENERAL WAXMAN: Well, I do acknowledge that  
22 there is some appeal to that approach, but I would just  
23 ask the Court to look at this from the perspective of the  
24 commission.

25 The commission is now in the position of having

1 been told by the en banc court of appeals that virtually  
2 any voter in the country can haul it into court whenever  
3 it makes a determination that a group, whether it's a  
4 civic or religious, or my family, or any other group has  
5 made more than \$1,000 in political spending, and therefore  
6 is required to file with the courts as a political  
7 committee, and -- so in other words, that -- virtually any  
8 voter can bring the FEC into court, because that's the  
9 standing rule they've applied, and that this -- that the  
10 commission's efforts to apply the major purpose test that  
11 this Court enunciated is wrong, and in fact any group,  
12 incorporated or otherwise, that makes more than \$1,000 of  
13 what the commission would deem to be in-kind, coordinated  
14 or independent expenditures is a political --

15 QUESTION: So you say in just --

16 GENERAL WAXMAN: We're in an impossible  
17 position.

18 QUESTION: And you say in deciding those  
19 questions we wouldn't have to express any definitive view  
20 on the membership question.

21 GENERAL WAXMAN: Absolutely right. It is a  
22 question -- for purposes of the law of the case, there has  
23 been a determination by the commission in this case that  
24 AIPAC's, the people that AIPAC was communicating with were  
25 not members.

1           If we are wrong and, in fact, the major purpose  
2 test doesn't apply, on remand the FEC will have to  
3 consider and take AIPAC's views whether or not, in light  
4 of the court of appeals decision in Chamber of Commerce  
5 AIPAC's members are, in fact members under the act. It is  
6 a very tricky --

7           QUESTION: General Waxman, I understand your  
8 anxiety about standing, and that sounds perfectly  
9 sensible, but I -- what I don't understand is why you  
10 don't have a second step and say, if you should decide  
11 standing, then send it back to the commission.

12           The commission doesn't know yet what its  
13 membership thing is, but when it gets its act together  
14 this case may well be moot as far as a political committee  
15 is concerned, so I certainly understand why you want to  
16 urge standing first.

17           What I don't understand is why you're not  
18 telling us, but if we're wrong about standing, this case  
19 should not be -- the ultimate question in this case should  
20 not be reached because it might fold at the commission  
21 level on what Justice O'Connor said at the very first is a  
22 threshold question, a preliminary question.

23           GENERAL WAXMAN: I guess the reason is that if  
24 you hold -- if you conclude that there's no standing in  
25 this case, the decision in the court below is vacated and,

1 in fact, the commission is back on its own.

2 QUESTION: That I understand, but what I don't  
3 understand --

4 GENERAL WAXMAN: But if you don't --

5 QUESTION: -- is the political committee --

6 GENERAL WAXMAN: If you don't, we are left with  
7 a decision on the merits of a critically important issue  
8 of law, which is, are groups that are organized for any  
9 number of hundreds of different reasons political  
10 committees?

11 QUESTION: But the thing would be vacated,  
12 because the -- just as we would not reach political  
13 committee, neither should the D.C. Circuit, so I'm still  
14 puzzled why you don't say, standing is our first argument,  
15 but if we lose on that, vacate the district court's -- the  
16 D.C. Circuit's decision, send it -- have them send it back  
17 to the commission so the membership issue can be  
18 determined.

19 GENERAL WAXMAN: The FEC is in an extremely  
20 unusual posture in this case vis-a-vis the substantive law  
21 of the Federal Election Commission Act, mainly because in  
22 this dance with Congress and the Supreme Court the FEC is  
23 very much following -- we're -- the commission is trying  
24 very hard to determine --

25 QUESTION: But isn't it true that no matter what



1 happens we're going to have to decide standing?

2 GENERAL WAXMAN: -- the extent to which groups  
3 are political -- excuse me?

4 QUESTION: Isn't it true -- no matter what --  
5 with all these alternatives, we're going to have to decide  
6 standing anyway, aren't we?

7 GENERAL WAXMAN: I -- you certainly are going to  
8 have to decide standing.

9 QUESTION: Why don't you argue standing?

10 QUESTION: Yes.

11 QUESTION: You --

12 GENERAL WAXMAN: Why don't I argue standing.

13 QUESTION: Yes. It's not your fault, but you've  
14 used up 15 minutes discussing an issue that isn't even  
15 considered in the briefs. Why don't you go to the issues  
16 that are considered in the briefs.

17 GENERAL WAXMAN: We think -- we believe that the  
18 Court erred in holding that respondents held standing in  
19 this case, either under the statute or the Constitution,  
20 to challenge the commission's decision.

21 In cases like Heckler v. Chaney and Linda R. S.  
22 v. Richard D., this Court has reiterated a fundamental  
23 background principle that ordinarily complaints that an  
24 agency has failed to take enforcement action are not  
25 subject to judicial review, but under the court of

1 appeals' interpretation, as I said, it's now open to  
2 almost any voter to bring the FEC into court whenever it  
3 decides not to file an enforcement action against a  
4 religious, civic, issue advocacy, or any other group that  
5 may have made incidental election expenditures.

6 We believe that Congress did not intend that  
7 result, but even if it did, for Article III purposes we  
8 believe that respondents have not carried their heavy  
9 burden to establish either that they have suffered  
10 particularized concrete injury in fact, or that they will  
11 likely obtain the single remedy that they allege will  
12 redress them. That is, a retrospective order of  
13 disclosure, and nothing else.

14 The FEC -- and this is -- I think the court of  
15 appeals erred in assuming to the contrary. Unlike most  
16 other agencies the FEC has no authority, no matter what  
17 the court of appeals or this Courts decide, to order AIPAC  
18 to produce anything. In fact, Congress' preferred remedy  
19 for a violation of the act, a conciliation agreement,  
20 certainly need not require this disclosure and is exempt  
21 from judicial review.

22 QUESTION: But isn't there this difference,  
23 General Waxman -- and maybe I'm wrong on this and I just  
24 don't remember it that well -- but if the FEC decides not  
25 to do anything, can't the litigants then proceed

1 independently?

2 GENERAL WAXMAN: In other words, if the FEC  
3 decides not to do anything, could the respondents sue  
4 AIPAC?

5 QUESTION: Yes.

6 GENERAL WAXMAN: Absolutely not. Under  
7 437g(a)(8), which is the judicial review provision that's  
8 at issue in this case, a third party -- there is no third  
9 party right of action. There is no private Attorneys  
10 General provision here similar to what there is in so many  
11 other cases.

12 Here, what happens is, the act provides that any  
13 person can make a complaint with the commission alleging  
14 that the FECA has been violated. If the commission  
15 dismisses the complaint, and now I'm referring to the  
16 judicial review provision here, a party aggrieved by an  
17 order of the commission dismissing a complaint may file a  
18 petition against the commission in the District of  
19 Columbia, and under subsection (C) of that provision, in  
20 the event that such a complaint is filed, the authority of  
21 the Federal District Court and the court of appeals is  
22 simply to declare whether or not the FEC has, quote,  
23 conformed, acted in conformity with the law, or contrary  
24 to the law.

25 If the Court concludes that the FEC has acted

1 contrary to the law, the case goes back to the FEC to  
2 allow the commission to conform itself to the law. Only  
3 if it fails to do that may an individual bring a cause of  
4 action against the party that he or it alleges was  
5 violating the act.

6 This is a very, very unusual and limited review  
7 provision that reflects, we think, Congress' recognition  
8 of the fact that while it's important to regulate, for the  
9 benefit of the public, campaign expenditures, campaign  
10 spending, and disclosures, there are very, very First --  
11 important First Amendment --

12 QUESTION: Did these plaintiffs comply with all  
13 of those steps?

14 GENERAL WAXMAN: These plaintiffs filed an  
15 administrative complaint with the commission under  
16 437g(a)(1), and when the commission voted, 6 to nothing,  
17 not to proceed further on their complaint that the -- that  
18 AIPAC should be required to file these reports and  
19 register as a political committee, they brought a suit in  
20 the district court against the Federal Election Commission  
21 under these provisions.

22 And I think -- one of the things that  
23 demonstrates why there is so little standing in this case  
24 is reflected by the fact that in their original complaint,  
25 filed in the district court, these respondents alleged,

1 among other things, that they were voters, and that they  
2 had been injured in the fact that they had been deprived  
3 of certain information they might have wanted to have as  
4 voters. Their amended complaint deleted that allegation,  
5 and alleges standing on the grounds that they are  
6 political competitors in the court of public opinion.

7 QUESTION: If Congress, instead of using the  
8 word aggrieved, had said, any person who suffers the  
9 following injury, and then just listed the things that  
10 you'd said, can do whatever it says there, would that have  
11 violated the Federal Constitution? That is, would we have  
12 lacked standing under the Constitution?

13 GENERAL WAXMAN: Yes.. I mean, I think a point  
14 here --

15 QUESTION: Yes because -- so it's  
16 constitutional, do -- because I thought person aggrieved  
17 in a statute, the word aggrieved traditionally traces  
18 back -- though that isn't clear, it traces back to  
19 Sanders Brothers, and cases that did use that to refer to  
20 a private Attorney General, at least arguably so, and then  
21 that's why I wonder if it's constitutional.

22 GENERAL WAXMAN: Well, I think there are -- I  
23 think there are cases that -- there are cases going both  
24 ways.

25 QUESTION: There are. There are.

1           GENERAL WAXMAN: But the question here is, we  
2 think that even if the Court were to construe this review  
3 provision as extending prudential standing to the limits  
4 of Article III, as in Trafficante and Hardin and cases  
5 like that, there still would be no constitutional standing  
6 here because they haven't demonstrated injury in fact.

7           QUESTION: Well, they say that what they would  
8 like is, they want information, and they think that if the  
9 FEC enforces the law, in their view of what it is, that  
10 they will get information that Congress by statute has  
11 given them an entitlement to.

12           Now, why isn't that a real injury --

13           GENERAL WAXMAN: It's --

14           QUESTION: -- assuming they really want it?

15           GENERAL WAXMAN: Well --

16           QUESTION: I assume they do.

17           GENERAL WAXMAN: It's not injury in fact if  
18 we're talking about them in their capacity as voters who,  
19 after all, are -- the electorate is certainly within the  
20 zone of interest of the disclosure provisions of the  
21 Federal Election Campaign Act.

22           They have not made any allegations that they are  
23 any different than any other voters who allege --

24           QUESTION: If we took the voter away -- if we  
25 took the vote, if we closed every voting booth in the

1 United States, every voter in the United States would be  
2 affected. I assume they'd have standing.

3 GENERAL WAXMAN: Of course.

4 QUESTION: All right. So the simple fact that  
5 everybody is affected doesn't always show they don't have  
6 standing.

7 GENERAL WAXMAN: I -- it -- it certainly does  
8 not always show they don't have standing, but I think it's  
9 instructive to compare this statute or their claim of  
10 standing here with a claim of standing under the FOIA, for  
11 example.

12 FOIA provides a personal right in an individual  
13 to ask the Government, to have that individual ask the  
14 Government for information, and if the Government doesn't  
15 provide that person information, that person is injured  
16 within the meaning of the statute and can bring a lawsuit,  
17 and there's no issue of redressability, because if the  
18 Court agrees with the individual he gets the document that  
19 exists.

20 The Federal Election Campaign Act doesn't create  
21 rights in particular individuals to get particular  
22 information. It creates an obligation on certain persons  
23 and parties that are regulated by the act to provide kinds  
24 of information to the Government which the Government then  
25 makes available to the public generally, so --

1 QUESTION: But the public, each member of the  
2 public may not have a right in the sense of having a means  
3 by which necessarily it can compel the disclosure of the  
4 information, but each member of the public has an interest  
5 in getting that information.

6 GENERAL WAXMAN: Well --

7 QUESTION: And I understand your redressability  
8 point as a separate point, but simply with respect to the  
9 particularized injury, why isn't the interest, the  
10 statutorily provided interest in getting information  
11 sufficient on that first point?

12 GENERAL WAXMAN: Because I don't think -- and we  
13 do think that the stronger argument, the clearer argument  
14 against Article III standing is redressability both  
15 because of the discretionary nature of the decision, the  
16 particular aft powers and lack thereof of the commission,  
17 and particular facts in this case, but with respect to  
18 Article III injury in fact, these -- even the court below  
19 acknowledged that there would not be sufficient  
20 particularized injury in all voters.

21 The court of appeals concluded that these were,  
22 quote, affected voters, but its definition of the term  
23 affected was, because they are alleging that -- assuming  
24 that they are, in fact, suing as voters, that AIPAC may  
25 have participated in an election that they may have voted



1 in they might have been deprived of information that they  
2 could have used, therefore, they -- these individuals --

3 QUESTION: No, but isn't the argument stronger  
4 than that? They are being deprived of information by  
5 virtue of the fact that they don't know whether there was,  
6 in fact, a contribution made.

7 The deprivation of the information is not  
8 contingent. That's actual. They don't know something,  
9 and that something that they don't know, it seems to me,  
10 is what the statute has given them an interest in finding  
11 out.

12 GENERAL WAXMAN: Well, they -- I think another  
13 way to put it, Justice Souter, is that these individuals  
14 are not asking the commission to do something because they  
15 were harmed. They're asking the commission to do  
16 something so that they can determine if they have been  
17 harmed.

18 QUESTION: No. They're saying, I have been  
19 harmed because I have an interest in knowing this. That  
20 interest has been -- has been infringed because they  
21 haven't filed, et cetera, so they are claiming a present  
22 injury, not a contingent one.

23 GENERAL WAXMAN: Well --

24 QUESTION: They're saying the harm is the  
25 ignorance.

1           GENERAL WAXMAN: Justice Souter, there are many,  
2 many decisions of this Court under Article III that have  
3 indicated that just because an individual plaintiff has an  
4 interest in having the Government do something and can  
5 demonstrate why they have that interest, nonetheless that  
6 has been held not to satisfy the particular --

7           QUESTION: Right, but what --

8           GENERAL WAXMAN: And I think if the statute had  
9 been written --

10          QUESTION: Yes, but what --

11          QUESTION: Or even information in particular.  
12 Why don't --

13          QUESTION: Yes, but what's different here is  
14 that there's the statute that says you are, subject to  
15 certain discretion in the commission, entitled to have it.  
16 That's what differentiates them just from the mass of  
17 individuals who might walk into a court and say, I think  
18 it would be nice if I were to know the following, or to  
19 have the following relief, or to have Government officials  
20 do what they ought to do.

21          GENERAL WAXMAN: Well, I --

22          QUESTION: The statute goes the step further.

23          GENERAL WAXMAN: I don't -- we may just disagree  
24 about the statute. This statute, unlike FOIA, does not,  
25 we understand, give individuals any particular right to

1 obtain any particular information, particularly  
2 information that the commission doesn't have, in light of,  
3 as I said, the -- a general background principle that's  
4 reflected in Linda R. S. and lots of other cases.

5 This -- we're talking about who has standing to  
6 haul an agency into court and demand that the agency go  
7 and get information from particular individuals, even if  
8 the agency otherwise might conclude that they should --  
9 they are a political committee and they probably ought to  
10 report, but it just chooses not to exercise its  
11 prosecutorial discretion that way, and --

12 QUESTION: And do I understand the reason the  
13 agency didn't -- it says, this membership question really  
14 was in doubt. The agency rejected it in this case and  
15 said that's why we're not going to go forward with any  
16 enforcement.

17 GENERAL WAXMAN: That's right. That's what  
18 makes this case particularly nonredressable. That is,  
19 there were two related questions before the commission,  
20 both having to do with the allegation, and the  
21 commission's conclusion that there were, in fact,  
22 expenditures, in-kind, coordinated expenditures over  
23 \$1,000.

24 There were two possible legal conclusions that  
25 the commission could reach. One is, AIPAC is a

1 corporation, and corporations can't make expenditures, and  
2 therefore AIPAC has violated 441b. The commission voted 4  
3 to 2 to conclude that they had, but decided not to proceed  
4 with any sanction at all, even a civil fine, because a)  
5 the law was so unclear, and b) it was a very close  
6 question on the facts, and those two --

7 QUESTION: If you -- if we decided the  
8 redressability on the basis of the membership question,  
9 you're no better off if we related that to standing than  
10 if we decided it first.

11 GENERAL WAXMAN: If I understand --

12 QUESTION: If we decided no standing because of  
13 the special problem related to membership affecting  
14 redressability, you haven't gotten anywhere, I guess.

15 GENERAL WAXMAN: We haven't gotten anywhere near  
16 as far as we'd like to be at the end of this argument.

17 QUESTION: All right.

18 GENERAL WAXMAN: If I may just reserve the  
19 balance of my time, Justice --

20 QUESTION: Very well, General Waxman.

21 Mr. Schember, we'll hear from you.

22 ORAL ARGUMENT OF DANIEL M. SCHEMBER

23 ON BEHALF OF THE RESPONDENTS

24 MR. SCHEMBER: Mr. Chief Justice, and may it  
25 please the Court:

1 First of all, our amended complaint certainly  
2 pleaded information standing and information injury. Joint  
3 appendix 11, paragraph 6, the FEC's improper action has  
4 deprived plaintiffs of their legal right to learn the  
5 amounts and beneficiaries of AIPAC's unreported campaign  
6 expenditures in their capacity as voters and members of  
7 the public.

8 The only difference between standing in this  
9 case and standing in a FOIA case concerns the issue of  
10 redressability. We certainly have a -- within the zone of  
11 interests of this statute an interest as voters and  
12 members of the public in obtaining information concerning  
13 campaign contributions. The Government admits in its reply  
14 brief that voters and, we would add, members of the  
15 public, are primary intended beneficiaries of this --

16 QUESTION: What about cases such as Heckler v.  
17 Chaney and Linda R. S., where we've said that citizens  
18 don't have -- or perhaps someone more than -- you don't  
19 ordinarily have standing to require that a person, an  
20 agency or a prosecutor commence a prosecution?

21 MR. SCHEMBER: Well, Linda R. S. certainly is a  
22 standing case. Now, Heckler v. Chaney, that's an APA  
23 reviewability case, but Linda R. S. concerns --

24 QUESTION: Linda R. S.

25 MR. SCHEMBER: What happened there, of course,

1 the interest at stake was one spouse's or ex-spouse's  
2 interest in child support, and what the spouse wanted to  
3 have happen, or the ex-spouse, is have the Government take  
4 some sort of criminal action against the father, I guess,  
5 that was obliged to make child support payments, and  
6 hopefully the coercive power of the prosecution would  
7 somehow result in the payment of child support.

8 The Court said, that's speculative. That's not  
9 the case here.

10 QUESTION: But the Court's reasoning was  
11 considerably broader than that, just that traditionally  
12 private individuals do not have any claim to have a  
13 prosecutor commence something that is discretionary.

14 MR. SCHEMBER: Well, that issue was involved  
15 with that case, too, but here, under the statutory scheme,  
16 we have a right to go to court. When our complaint is  
17 dismissed the --

18 QUESTION: You have a statutory right that is  
19 shared by everybody in the country, right?

20 MR. SCHEMBER: Well, we have a stat -- no, no.  
21 You have to file an administrative claim. Not everyone in  
22 the country can simply go to court. You have to go  
23 through the administrative process.

24 QUESTION: But everybody can follow that  
25 administrative process.

1 MR. SCHEMBER: Yes, but only if they --

2 QUESTION: To vindicate the right to the  
3 information.

4 MR. SCHEMBER: Correct.

5 QUESTION: Which everyone has.

6 MR. SCHEMBER: Correct.

7 QUESTION: But we've decided a case where there  
8 was not only a statutory right to information on the part  
9 of the public at large, but a constitutional right to  
10 information in a case involving the Statements and  
11 Accounts Clause, where plaintiffs came in here and said,  
12 the CIA is not publishing its precise expenditures. It's  
13 all buried under the Defense Department or other agencies.  
14 We want a statement. And we said, no standing. Why is  
15 that any different from your case? These people say --

16 MR. SCHEMBER: Well, because we have a statute.

17 QUESTION: -- we have a right to this -- a  
18 statute is more important than the Constitution?

19 MR. SCHEMBER: Well, if the Court -- I'm not  
20 familiar with that case, but if that case held that a  
21 constitutional right to information is a generalized  
22 grievance, then --

23 QUESTION: Then it was wrong.

24 MR. SCHEMBER: No.

25 QUESTION: No?

1 MR. SCHEMBER: Then that is to -- then how --  
2 then to reconcile that holding with cases saying that  
3 Freedom of Information Act requestors have standing to  
4 seek information under the act is accomplished by saying  
5 we have a statute that grants a right of review for that  
6 injury in fact, and we have a statute here that grants a  
7 right to judicial review.

8 QUESTION: The FOIA grants it to particular  
9 individuals.

10 MR. SCHEMBER: Yes, those who --

11 QUESTION: You may request -- you may request  
12 information.

13 MR. SCHEMBER: That's right.

14 QUESTION: This statute does not say particular  
15 individuals may come to private organizations and request  
16 the information, does it?

17 MR. SCHEMBER: No. It says something different.

18 QUESTION: It doesn't purport to --

19 MR. SCHEMBER: The only difference, though, goes  
20 to the question of redressability. What the statute says  
21 is that the plaintiffs may file an administrative  
22 complaint seeking disclosure, and if that complaint is  
23 dismissed, they may go to court and say that's contrary to  
24 law, just what the respondents did, and then the question  
25 is, well, if there is a favorable ruling on the merits for



1 the respondents, is it likely -- Bennett v. Spear -- that  
2 the ruling on the merits will, in fact, result in the  
3 disclosure that they seek.

4 That is the case here, for five reasons that are  
5 very different from the circumstances in Linda R. S.  
6 Number 1, a favorable ruling on the merits for the  
7 respondents would result in -- would essentially mean that  
8 AIPAC is under a statutory duty to disclose the  
9 information that the respondents seek. Second, the  
10 commission has power to order that --

11 QUESTION: Are you saying that in that situation  
12 the FEC would have no discretion to decline prosecution?

13 MR. SCHEMBER: I'm not saying no discretion.  
14 That's not our burden. All we need show to establish  
15 redressability is that it is likely that enforcement  
16 action would be taken that is likely to result in the  
17 producing of that information, and for four additional  
18 reasons that is the case here.

19 The second reason is that under the statute,  
20 437d(a), the commission does have power to order AIPAC to  
21 disclose this information. 437d(a) states the commission  
22 has the power to require any person to submit such written  
23 reports and answers to questions as the commission may  
24 prescribe. Now --

25 QUESTION: Mr. Schember, can we just go back a

1 step, because --

2 MR. SCHEMBER: Mm-hmm.

3 QUESTION: -- there are many cases, are there  
4 not, where anyone can come to an agency and say, agency, I  
5 want you to consider this, like, I want you to make a rule  
6 on that, and the agency statute is broad enough to say  
7 yes, we have to take petitions from anybody.

8 But when the agency says no, then there's an  
9 effort to get to an Article III court that does have  
10 constitutional limitations on what it can hear.

11 MR. SCHEMBER: Mm-hmm.

12 QUESTION: So I think there's a whole category  
13 of cases, are there not, where you have a right to go to  
14 the agency, but you don't have a right to go further.

15 MR. SCHEMBER: Absolutely correct, but we do  
16 have the right here, because we have injury in fact. We  
17 have -- that falls within the zone of interests of the  
18 statute. Voters and members of the public are primary  
19 intended beneficiaries of the disclosure provisions of  
20 this act. That is undisputed.

21 They have a right to make an administrative  
22 request seeking disclosure, and if their complaint is  
23 dismissed, go to court, as they did, and it is likely to  
24 result in disclosure in this case for the two reasons that  
25 I've said so far, and for a third reason, that when --

1 QUESTION: Would there be a likelihood of  
2 disclosure if the FEC takes the position that the mailings  
3 here went to members?

4 MR. SCHEMBER: The answer is no.

5 QUESTION: No.

6 MR. SCHEMBER: Because then -- yes, if you -- if  
7 the membership --

8 QUESTION: So I'm not sure it is so likely that  
9 there would be redressability.

10 MR. SCHEMBER: Well, but we have standing to  
11 contest the issue of whether or not the AIPAC contributors  
12 are members, and we most vigorously maintain that they are  
13 not. The ruling below on that question was correct.

14 QUESTION: Yes, but on standing we have to see  
15 if it's redressable, and I guess the FEC has some leeway  
16 in determining who are members and who aren't under that  
17 statute.

18 MR. SCHEMBER: Well, but under the -- yes, but  
19 under the law of this case the ruling that's been made,  
20 the AIPAC contributors were found not to be members, and  
21 we would maintain that Chamber of Commerce does not  
22 require a change in that conclusion.

23 QUESTION: But General Waxman said that if we go  
24 all the way in this case they would still request at the  
25 end of the line a remand on that question.

1 MR. SCHEMBER: Yes, well, of course shifting off  
2 of standing to the question of whether or not what's  
3 appropriate to do --

4 QUESTION: Well, it impacts standing, I think.  
5 I mean, it's linked somehow with redressability, I think.

6 MR. SCHEMBER: Well, it's another legal issue in  
7 the case. We maintain as a matter of law on the facts  
8 present in this case that, under Chamber of Commerce or  
9 the prior authority, that the AIPAC contributors are not  
10 members.

11 We also maintain, on the record of this case,  
12 that there is additional indication of contributions by  
13 AIPAC going beyond merely communication to the persons  
14 that these -- that AIPAC calls its members. We maintain  
15 that what happens after AIPAC makes these communications  
16 to its contributors, that these contributors then not only  
17 go out in their individual capacities to make campaign  
18 contributions involving themselves in campaigns, but that  
19 they then report back to AIPAC that they have done so.

20 QUESTION: But there's nothing like that --  
21 there's nothing like that in this record.

22 MR. SCHEMBER: Oh, yes, there is, Your Honor.  
23 There was evidence submitted to that. No findings by the  
24 FEC on that question.

25

1 QUESTION: Yes.

2 MR. SCHEMBER: But that's another issue to be  
3 addressed on remand.

4 QUESTION: -- on membership, there's one little  
5 thing that's bothering me. Is there a rule in their  
6 proposed rulemaking that would make members nonmembers of  
7 those who both contribute \$50 and have the right to affect  
8 agency policy?

9 MR. SCHEMBER: I haven't seen the proposed  
10 rules. I'm relying on General Waxman's --

11 QUESTION: Are they published?

12 MR. SCHEMBER: I haven't seen them if they are,  
13 but I'm not saying they're not. I'm just saying I'm  
14 ignorant. I'm relying on General Waxman's representation.

15 QUESTION: Do we know, though, that AIPAC has  
16 conceded or not conceded that they both get the \$50 and  
17 the member has a right to affect policy?

18 MR. SCHEMBER: Well, that's far from established  
19 on the record. No. They contribute \$50. The precise --  
20 AIPAC, from the record that we have, which is not complete  
21 on this question, is a top-down organization. Power  
22 vests -- is at the top, and the \$50 contributor does not  
23 have much right to determine a policy of that -- of the  
24 organization.

25 That's what the record shows so far, and based

1 upon that, and if we have to litigate it further, yes, we  
2 have to litigate it further, but we staunchly maintain  
3 that these contributors are not members, but even if they  
4 were, there would be another basis for finding, upon  
5 further investigation, that AIPAC is engaged in political  
6 campaign contributions of a different sort, which I just  
7 mentioned.

8 QUESTION: Mr. Schember, may I go to a different  
9 point on this redressability issue? Isn't it also --  
10 maybe this is not the case. Isn't it also your position  
11 that redressability should be judged on the assumption  
12 that there is a body of law of certain content, and the  
13 question of redressability should not turn on whether  
14 there might be a change in the law? Is that your  
15 position, ultimately?

16 MR. SCHEMBER: Yes. I --

17 QUESTION: You're saying even if that's not so  
18 there are other grounds --

19 MR. SCHEMBER: It --

20 QUESTION: -- to say that it would be  
21 redressable, but at the base, isn't it your position that  
22 you don't -- you shouldn't consider a change of law in  
23 determining the redressability point?

24 MR. SCHEMBER: Well, I certainly would say that  
25 a plaintiff cannot be denied standing on -- to sue under a

1 law on the assumption, well, there might be a change of  
2 the law in the future.

3 One has -- that kind of speculation doesn't  
4 defeat redressability. All the --

5 QUESTION: What about the -- oh, I'm sorry.

6 QUESTION: We're not talking about a change in  
7 the law. The question is whether the agency interpreted  
8 the law correctly, and the D.C. Circuit said it didn't,  
9 that it -- that its rule that was applied in this very  
10 case, whatever the right rule is, that was the wrong rule.

11 MR. SCHEMBER: Well, whether the membership  
12 question was decided correctly by the FEC or not is not  
13 pertinent to standing. It would only be pertinent to  
14 standing if Chamber of Commerce decided the issue, and we  
15 had no -- we had no ability to contend that AIPAC's  
16 contributors are not members.

17 Certainly then, if we had no hope of being able  
18 to maintain our claim that those contributors aren't  
19 members, then perhaps that would be linked to standing.  
20 We would have no possibility of redress, that would be  
21 true. But that's not the case here. We maintain,  
22 notwithstanding Chamber of Commerce, that AIPAC's  
23 contributors are not members, and they are not -- and that  
24 these communications are campaign contributions.

25 QUESTION: Do you plan to give us your other

1 three reasons?

2 MR. SCHEMBER: Yes, Your Honor.

3 (Laughter.)

4 MR. SCHEMBER: Well, the -- to review, we've had  
5 the first -- the first one is, determine a favorable --

6 QUESTION: We've learned the first two. I'm  
7 afraid you won't get to the others if you --

8 (Laughter.)

9 MR. SCHEMBER: The commission has -- when the  
10 commission finds a violation it is under a mandatory legal  
11 duty under section 437g(4) (A) to attempt to correct such  
12 violation. Now, the likely way to correct a disclosure  
13 violation, by which I mean a failure to disclose  
14 information that should be disclosed, particularly where  
15 the information to be disclosed is readily available, is  
16 to demand that the information be disclosed.

17 Certainly, to maintain that it is not even  
18 likely that a good faith attempt to in -- to correct a  
19 disclosure violation will not in any way involve a demand  
20 for disclosure of readily available information is absurd.  
21 It is likely that a good faith enforcement of this statute  
22 under this provision to correct a disclosure violation  
23 will result in disclosure where the information is readily  
24 available.

25 Point 4, the record here shows that the



1 information sought by the respondents includes types of  
2 information that is readily available. What we're seeking  
3 essentially is, to which candidates did AIPAC contribute,  
4 and since the manner of contribution was in-kind,  
5 essentially having the paid staff of AIPAC drum up support  
6 in the field for those candidates, how much time did the  
7 AIPAC staffers devote to those particular campaigns. How  
8 much effort did they put into it?

9 This kind of information doesn't require  
10 elaborate reconstruction of records and broad disclosure  
11 this is simple information that is the core information  
12 that we're entitled to get and that we want to know. We  
13 want to know this simple type of information. AIPAC  
14 cannot plausibly claim that it doesn't know who its paid  
15 staffers were who engaged in these activities. The paid  
16 staffers can't plausibly claim that they can't remember  
17 what candidates they supported, or what they did. This is  
18 readily available information that can be disclosed.

19 The last point is that, on the record before the  
20 Court, when the FEC, during the investigation of this  
21 case, asked AIPAC for information, there wasn't  
22 recalcitrance and nondisclosure by AIPAC. AIPAC complied  
23 with the FEC's requests for information.

24 What we have in the totality of circumstances,  
25 the record here and this legal framework, which gives the

1 commission power to order disclosure, a likelihood that  
2 disclosure will result if AIPAC is found to be a political  
3 committee because the major purpose test is invalid.

4 Now, when we get to the merits, we face a  
5 fundamental question which Justice Ginsburg has been  
6 pressing: what question should be decided first, the  
7 membership question, or the major -- or whether -- or the  
8 validity of the major purpose test.

9 I suppose -- we put a lot of energy into  
10 briefing the major purpose test, and we're convinced that  
11 it's wrong, and then the Court -- and we would like the  
12 Court to decide that question, but if the Court is  
13 troubled by the question and thinks the D.C. Circuit  
14 should not have reached it, it would be a permissible  
15 disposition of this case to say that the membership  
16 question ought to be addressed first. I can't raise an  
17 argument against that.

18 QUESTION: What about the major purpose  
19 question? The Attorney -- if the Attorney General had  
20 more than a minute, which he doesn't, why would he say the  
21 major purpose test is incorrect -- or is correct?

22 MR. SCHEMBER: Is correct?

23 QUESTION: Is correct.

24 MR. SCHEMBER: I don't -- the bottom line  
25 argument they say that I find in their reply brief as

1 well, that's what the dicta in Buckley said. The court of  
2 appeals properly held that this dicta in Buckley literally  
3 construed and applied in the way that the FEC has applied  
4 it here -- for the first time, I might add. This is the  
5 first time that the FEC has applied the major purpose test  
6 in this way -- is contrary to law because it would  
7 eviscerate the statute.

8 It simply makes no sense to exempt from  
9 political committee status an organization that makes a  
10 million dollars in campaign contributions simply because  
11 they're rich and have got \$9 million to spend on something  
12 else.

13 QUESTION: Mr. Schember, could your clients have  
14 brought this action as an APA review procedure against the  
15 FEC?

16 MR. SCHEMBER: That's a very difficult question.  
17 I think General Waxman would say no under 437d(e), which  
18 says that this section shall be the exclusive civil remedy  
19 for enforcement.

20 QUESTION: It's ironic in a way, if you had an  
21 APA remedy and you would have been barred by Heckler v.  
22 Chaney, to say that by taking this other remedy you solve  
23 that problem.

24 MR. SCHEMBER: Well, but we would say under  
25 Heckler that we would -- if Heckler applied, if the APA

1 applied, that there would not be total denial of judicial  
2 review here. There is law to apply.

3 Under 437g(4) (A) a conciliation agreement by the  
4 FEC must be one that corrects the violation. That's law  
5 to apply, and if they -- the court of appeals correctly  
6 determined, if the FEC's gave mere lip service to AIPAC's  
7 disclosure obligation and dismissed our complaint saying,  
8 well, we agree with AIPAC that they don't have to do it,  
9 we have a right of judicial review, and there is law to  
10 apply.

11 This statutory framework contemplates active  
12 judicial involvement in the determination of appropriate  
13 remedies for violations.

14 QUESTION: If you foresee the Court going  
15 through the standing question and then deciding in your  
16 favor, which is what you want, and then you'd say, well,  
17 then the membership issue perhaps comes up first, in which  
18 case I guess we'd have to remand it --

19 MR. SCHEMBER: This --

20 QUESTION: -- why not remand it first? I mean,  
21 why go through this standing question? Do we have to?  
22 Why do we have to --

23 MR. SCHEMBER: No. I think the standing  
24 question could be pretermitted as well --

25 QUESTION: -- since the standing question may

1 well turn on the special point here, on -- the standing  
2 question could well turn on the special membership point,  
3 you see, making it more difficult for the -- for us to  
4 predict that you could obtain the relief you want because  
5 of that issue being in the case, so why not do that first,  
6 and send it back?

7 MR. SCHEMBER: I suppose that would be  
8 permissible. What I'm saying is that we certainly have  
9 standing to contend that the AIPAC contributors aren't  
10 members, and that -- in that sense I don't think it --  
11 that issue pertains to standing.

12 What I did concede is that if Chamber of  
13 Commerce destroyed our contention that the AIPAC  
14 contributors are members, that certainly might say that we  
15 don't have standing, but it remains an open question.  
16 It's just another legal issue in -- to be decided in the  
17 case, and so I guess I'm moving a bit in your favor on --  
18 in the direction that you're going on that, Your Honor,  
19 because we have a collection of legal issues that need to  
20 be decided, the membership question, the major purpose  
21 test question, and in the way that's been discussed  
22 possibly that's linked to standing.

23 Presum -- yes, remand for consideration of the  
24 issues in a different order I would think would be a  
25 permissible disposition. We have raised the arguments as

1 to why we have standing to bring this case and why it's  
2 likely that a ruling on the merits will result in the  
3 disclosure that we seek, and --

4 QUESTION: Isn't the major purpose test  
5 necessary to prevent this statute from being applied to  
6 many, many entities and transactions that were far from  
7 the contemplation of the Congress?

8 MR. SCHEMBER: No, Your Honor. What we're  
9 dealing with is a dual purpose organization. The test is  
10 not necessary to protect dual purpose organizations from  
11 having their noncampaign-related activities disclosed.

12 Dual purpose organizations can avoid that kind  
13 of disclosure through the simple expedient of setting up a  
14 separate organization or a special segregated fund.  
15 Section 441b(b) expressly provides for that contingency,  
16 and then section 431 says that, well, when a corporation  
17 has set up a special segregated fund for purposes of  
18 campaign activity, only the activities of the special  
19 segregated fund constitute a political committee, and only  
20 those activities are subject to disclosure.

21 QUESTION: Well, is that so easy? That is, what  
22 worries me about your position on the merits is that vast  
23 numbers of organizations who suddenly send a letter to  
24 their members once, who they think are members, the -- you  
25 know, Congressman Jones helped save the Brazilian

1 cardinal, and the -- the bird --

2 (Laughter.)

3 QUESTION: -- and we think that he's a wonderful  
4 thing, and really nice, and that's it, and all of a sudden  
5 they have to disclose everybody under the sun, and -- you  
6 know, for all kinds of other things that really had  
7 nothing to do with that particular letter that somebody  
8 thought was a nice idea to send.

9 MR. SCHEMBER: Well, two points about that.  
10 First of all, it sounds to me like the organization that  
11 you're describing would be -- may likely be  
12 constitutionally exempt under the Massachusetts Citizens  
13 for Life exemption.

14 Now, if you've got a small issue advocacy  
15 organization that only makes an occasional independent  
16 expenditure and that would be burdened by the  
17 administrative requirements of setting up a special  
18 segregated fund, then clearly under MCFL they're entitled  
19 to a constitutional exemption. They have that safeguard.

20 AIPAC's not that kind of an organization, a  
21 large, sophisticated organization, able to meet many  
22 administrative requirements. They haven't claimed that --

23 QUESTION: By the way, the person, before he  
24 wrote the letter, talked to Congressman Jones and said,  
25 what do you think of that? Oh, a great idea, he said. I

1 like --

2 MR. SCHEMBER: So you're saying it's a  
3 contribution, and -- well, I think I have to say two  
4 things about that. Number 1, you know, every person is  
5 presumed to know the law, and if you run afoul of the law  
6 inadvertently, but in the manner that you've described,  
7 certainly there is enforcement discretion that the FEC  
8 has, can exercise and say, now, this one time thing you  
9 did, you made a mistake, it wasn't a wilful violation, you  
10 didn't know what you were doing, you can't do that kind of  
11 thing, don't do it again, and that would be an appropriate  
12 disposition of that case.

13 What we have here with respect to AIPAC is years  
14 and years and campaign after campaign of extensive  
15 contributions to candidates, and the public needs to know  
16 which current officeholders were the recipients of AIPAC  
17 campaign contributions so they can know in the next  
18 election cycle who they should vote for, considering that  
19 factor.

20 But your hypothetical might be one that could  
21 both -- that might fall either within the constitutional  
22 exemption, or that might be appropriately subject to  
23 disposition by the FEC's enforcement discretion, in that  
24 manner.

25 But on the facts of this case, based upon the



1 voluminous investigation that we have here, there are very  
2 substantial campaign contributions over an extended period  
3 of time here, and I think that distinguishes this case  
4 from that hypothetical.

5 All we need show to establish redressability is  
6 a likelihood that a ruling on the merits will result in  
7 disclosure. We've shown the likelihood. The Court -- not  
8 only is the major purpose test not necessary to protect  
9 against what -- the danger that the FEC hypothesizes, it's  
10 not sufficient to do so, either.

11 Under the test that the FEC has clarified it to  
12 be, a dual purpose organization that has as a major  
13 purpose campaign contributions will be a political  
14 committee even if another major purpose of the  
15 organization is pure issue advocacy, yet under their own  
16 test, as they apply it, that organization as a whole would  
17 be a political committee and be subject to all -- full  
18 disclosure.

19 For this reason, of all its activities,  
20 including the noncampaign activity, the test is neither  
21 necessary nor sufficient to accomplish the goal that's put  
22 forward for it, and it eviscerates the statute, because  
23 the problem is, it exempts from disclosure campaign  
24 contributions, not just noncampaign activities.

25 If there are no further questions, I have

1 presented the argument that I intended to present.

2 QUESTION: That's all we can ask of you,  
3 Mr. Schembler.

4 (Laughter.)

5 QUESTION: Thank you. You're luckier than most.

6 (Laughter.)

7 QUESTION: General Waxman.

8 REBUTTAL ARGUMENT OF SETH P. WAXMAN

9 ON BEHALF OF THE PETITIONER

10 GENERAL WAXMAN: I'm hoping against hope I have  
11 more than 1 minute, but let me just say that the  
12 consequences of allowing -- on the merits of allowing the  
13 court of appeals opinion to stand is that every group in  
14 this country, including my family, and any association,  
15 whether it's incorporated or not, is now -- has to live  
16 under the very real chill of knowing that if they -- in  
17 the course of a year, a group like the Catholic Conference  
18 of the United States, in the course of a year, makes more  
19 than a thousand dollars in either contributions,  
20 independent expenditures, coordinated expenditures, or in-  
21 kind contributions, all of its other disbursements and  
22 receipts have to be disclosed and --

23 QUESTION: Well, can they set up a special  
24 segregated fund to do that?

25 GENERAL WAXMAN: Only corporations can set up

1 segregated funds, so it -- but for the fact that AIPAC  
2 happens to be incorporated it could not, but even if it  
3 could, that really doesn't get at the chilling effect that  
4 I think this Court was addressing in Buckley and  
5 Massachusetts Citizens for Life.

6 CHIEF JUSTICE REHNQUIST: Thank you, General  
7 Waxman.

8 GENERAL WAXMAN: Thank you.

9 CHIEF JUSTICE REHNQUIST: The case is submitted.

10 (Whereupon, at 12:03 p.m., the case in the  
11 above-entitled matter was submitted.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

FEDERAL ELECTION COMMISSION, Petitioner v. JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

CASE NO: 96-1590

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Federico-----

(REPORTER)