

No. 11-_____

IN THE
Supreme Court of the United States

BENJAMIN BLUMAN, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

**On Appeal From The United States District Court
For The District Of Columbia**

JURISDICTIONAL STATEMENT

MICHAEL A. CARVIN

Counsel of Record

JACOB M. ROTH

WARREN D. POSTMAN

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

macarvin@jonesday.com

(202) 879-3939

Counsel for Appellants

September 1, 2011

QUESTION PRESENTED

Whether Congress violates the First Amendment by making it a crime for individuals who lawfully reside in the United States, but are neither U.S. citizens nor “permanent residents” under the immigration laws, to make independent expenditures or campaign contributions in connection with any federal, state, or local election; or whether, as the district court held, the ban satisfies strict scrutiny as a “piecemeal” attempt to reduce the “influence” on “how voters will cast their ballots” of aliens whom Congress may suspect of lacking “primary loyalty” to the nation.

PARTIES TO THE PROCEEDINGS

Appellants here, who were Plaintiffs below, are Benjamin Bluman and Dr. Asenath Steiman.

Appellee here, who was Defendant below, is the Federal Election Commission.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT	3
I. The Statute and Its History	3
II. This Litigation	5
III. The District Court’s Decision	6
THE QUESTION PRESENTED IS SUBSTANTIAL	8
I. RESIDENT ALIENS ARE PROTECTED BY THE FIRST AMENDMENT AND THUS MAY SPEND MONEY TO EXPRESS THEIR POLITICAL VIEWS	11
A. Text, History, and Precedent Confirm That Resident Aliens Are Entitled to the Freedom of Speech	11
B. “Freedom of Speech” Embraces the Freedom To Contribute to Candidates and To Spend Money To Advocate for or Against Them	14
C. Section 441e Does Not Remotely Satisfy Strict Scrutiny	16

TABLE OF CONTENTS

(continued)

	Page
1. Diminishing the “influence” of speech is the <i>antithesis</i> of a “compelling interest”	17
2. The Equal Protection Cases upon Which the District Court Relied Are Irrelevant.	21
3. Even if Congress has a “compelling interest” in reducing the “influence” of resident aliens’ speech, § 441e is not narrowly tailored to that end.	25
II. THE DISTRICT COURT’S OPINION SETS DANGEROUS PRECEDENT ON CAMPAIGN FINANCE REGULATION, THE FIRST AMENDMENT, AND THE CONSTITUTIONAL RIGHTS OF RESIDENT ALIENS	29
A. The District Court’s Precedent Undermines the Basic Logic of This Court’s Campaign Finance Jurisprudence	30
B. The District Court’s Precedent Turns Core First Amendment Principles on Their Heads	32
C. The District Court’s Precedent Imperils the Constitutional Rights of Resident Aliens	34
CONCLUSION	37

TABLE OF CONTENTS
(continued)

	Page
APPENDIX A: Opinion of the United States District Court for the District of Columbia	1a
APPENDIX B: Order and Final Judgment of the United States District Court for the District of Columbia	24a
APPENDIX C: Notice of Appeal.....	26a
APPENDIX D: Certificate of Service	28a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ambach v. Norwick</i> , 441 U.S. 68 (1979).....	21
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002).....	36
<i>Austin v. Michigan Chamber of Commerce</i> , 494 U.S. 652 (1990).....	14, 32
<i>Az. Free Enterprise Club’s Freedom Club PAC</i> <i>v. Bennett</i> , 131 S. Ct. 2806 (2011).....	19, 23
<i>Bernal v. Fainter</i> , 467 U.S. 216 (1984).....	16
<i>Bridges v. California</i> , 314 U.S. 252 (1941).....	13
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945).....	13
<i>Brown v. Entm’t Merchs. Ass’n</i> , 131 S. Ct. 2729 (2011).....	25
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) (per curiam)	<i>passim</i>
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	16, 17
<i>Cabell v. Chavez-Salido</i> , 454 U.S. 432 (1982).....	21, 22, 36
<i>Citizens Against Rent Control v. City of</i> <i>Berkeley</i> , 454 U.S. 290 (1981).....	26
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010).....	<i>passim</i>

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993).....	33
<i>FEC v. Beaumont</i> , 539 U.S. 146 (2003).....	15
<i>FEC v. Colo. Republican Fed. Campaign Comm.</i> , 533 U.S. 431 (2001).....	14
<i>FEC v. Wisc. Right to Life, Inc.</i> , 551 U.S. 449 (2007).....	14
<i>First Nat'l Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	19
<i>Foley v. Connelie</i> , 435 U.S. 291 (1978).....	21, 22, 36
<i>Fong Yue Ting v. United States</i> , 149 U.S. 698 (1893).....	13
<i>Hicks v. Miranda</i> , 422 U.S. 332 (1975).....	8, 11, 29
<i>Holder v. Humanitarian Law Project</i> , 130 S. Ct. 2705 (2010).....	16, 17
<i>Katebi v. Ashcroft</i> , 396 F.3d 463 (1st Cir. 2005)	27
<i>Kingsley Int'l Pictures Corp. v. Regents</i> , 360 U.S. 684 (1959).....	19
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944).....	29
<i>Kwong Hai Chew v. Colding</i> , 344 U.S. 590 (1953).....	13
<i>Mathews v. Diaz</i> , 426 U.S. 67 (1976).....	21

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>McAuliffe v. Mayor of New Bedford</i> , 155 Mass. 216 (1892).....	22
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003).....	24, 28
<i>McIntyre v. Ohio Elections Comm'n</i> , 514 U.S. 334 (1995).....	22
<i>Meese v. Keene</i> , 481 U.S. 465 (1987).....	28, 29
<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).....	16, 34
<i>N.Y. State Bd. of Elections v. Lopez Torres</i> , 552 U.S. 196 (2008).....	18
<i>Nevada Commission on Ethics v. Carrigan</i> , 131 S. Ct. 2343 (2011).....	22, 23
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	36
<i>Reno v. Am.-Arab Anti-Discrimination Comm.</i> , 525 U.S. 471 (1999).....	14
<i>Sorrell v. IMS Health Inc.</i> , 131 S. Ct. 2653 (2011).....	19, 32
<i>Sugarman v. Dougall</i> , 413 U.S. 634 (1973).....	21, 36
<i>Tashjian v. Republican Party of Conn.</i> , 479 U.S. 208 (1986).....	27
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940).....	19, 34
<i>United States v. Playboy Entm't Grp., Inc.</i> , 529 U.S. 803 (2000).....	16

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>United States v. Stevens</i> , 130 S. Ct. 1577 (2010).....	35
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990).....	13
<i>Vannatta v. Keisling</i> , 151 F.3d 1215 (9th Cir. 1998).....	24, 31
<i>Whitney v. California</i> , 274 U.S. 357 (1927).....	23
<i>Zauderer v. Office of Disciplinary Counsel</i> , 471 U.S. 626 (1985).....	25
 CONSTITUTIONAL AND STATUTORY AUTHORITIES	
U.S. Const. amend. I	<i>passim</i>
U.S. Const. amend. XV	12
U.S. Const. art. I, § 2, cl. 2	12
U.S. Const. art. I, § 4	27
2 U.S.C. § 441e.....	<i>passim</i>
8 U.S.C. § 1101(a).....	4
22 U.S.C. § 611 <i>et seq.</i>	28
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002)	1, 5, 6
Federal Election Campaign Act, Pub. L. No. 94-283, 90 Stat. 475	5
Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(d), 88 Stat. 1263	4
Foreign Agents Registration Act, Pub. L. No. 89-486, 80 Stat. 244	3, 28

TABLE OF AUTHORITIES

(continued)

	Page(s)
Takoma Park, Md., Town Charter	
Art. VI, § 601.....	27
OTHER AUTHORITIES	
8 C.F.R. § 214.6(h)(1)(iv)	27
8 C.F.R. § 299.1.....	27
42 C.F.R. § 435.408.....	4
120 Cong. Rec. 8782 (Mar. 28, 1974)	4, 17, 26
148 Cong. Rec. H448 (Feb. 13, 2002)	36
Contribution Limitations and Prohibitions,	
67 Fed. Reg. 69,928 (Nov. 19, 2002).....	5
FEC Advisory Op. 1980-95.....	25
FEC Advisory Op. 1984-62.....	25
H. Amdt. 453 to H.R. 417 (106th Cong.).....	36
Richard L. Hasen, <i>Citizens United and the</i>	
<i>Illusion of Coherence</i> , 109 Mich. L. Rev. 581	
(2011).....	17
Brian C. Mooney, <i>Outside Donations Buoyed</i>	
<i>Brown</i> , Boston Globe, Feb. 24, 2010	31
Jamin B. Raskin, <i>Legal Aliens, Local Citizens:</i>	
<i>The Historical, Constitutional and</i>	
<i>Theoretical Meanings of Alien Suffrage</i> ,	
141 U. Pa. L. Rev. 1391 (1993).....	12
Nancy Rytina, <i>Estimates of the Legal</i>	
<i>Permanent Resident Population in 2009</i>	
(Office of Immigration Statistics, Dep't of	
Homeland Security, Nov. 2010)	36
Michael J. Wishnie, <i>Immigrants and the Right</i>	
<i>to Petition</i> , 78 N.Y.U. L. Rev. 667 (2003)	12

OPINION BELOW

The district court's opinion dismissing Appellants' Complaint, while not yet reported in the Federal Supplement, is reprinted at App.1a.

JURISDICTION

The United States District Court for the District of Columbia entered judgment on August 8, 2011. App.24a. Appellants filed their timely notice of appeal on August 12, 2011. App.26a. This Court has appellate jurisdiction under § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 2 U.S.C. § 441e provides:

(a) Prohibition

It shall be unlawful for—

(1) a foreign national, directly or indirectly, to make—

(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;

(B) a contribution or donation to a committee of a political party; or

(C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 434(f)(3) of this title); or

(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.

(b) “Foreign national” defined

As used in this section, the term “foreign national” means—

(1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term “foreign national” shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States or a national of the United States (as defined in section 1101(a)(22) of title 8) and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8.

STATEMENT

This case presents an as-applied constitutional challenge to 2 U.S.C. § 441e, which prohibits—on pain of imprisonment—any individual who is not a citizen, national, or lawful permanent resident of the United States from spending any money to speak about any election in the United States, whether through contributions to candidates or political parties, independent expenditures to advocate for candidates, or even donations to domestic, third-party groups that, in turn, engage in contributions or advocacy expenditures. App.6a. As the court below acknowledged, the case implicates “foundational” questions about the First Amendment, the nature of political spending, and the constitutional rights of resident aliens. App.9a.

I. The Statute and Its History.

The statutory history of § 441e reflects a congressional desire to limit domestic political spending by *overseas* actors. The statutory prohibitions trace back to 1966, when Congress amended the Foreign Agents Registration Act (“FARA”). Pub. L. No. 89-486, 80 Stat. 244. In the amendments, Congress banned any “agent of a foreign principal” from “mak[ing] any contribution of money . . . in connection with an election to any political office.” *Id.* § 8(a), 80 Stat. at 248. The term “foreign principal” was defined to include a host of overseas entities, including “the government of a foreign country,” any “person domiciled abroad,” and “any foreign business . . . or political organization.” 52 Stat. 632-33 (1938). The 1966 amendments thus prohibited overseas entities from employing agents inside the U.S. to make contributions to candidates.

Congress soon discovered a loophole: While *agents* of foreign principals were prohibited from making campaign contributions, overseas entities were free to make contributions *directly*, simply by bypassing use of an agent. *See* 120 Cong. Rec. 8782 (Mar. 28, 1974) (statement of Sen. Bentsen). Congress responded in 1974 by expanding FARA's contribution ban to cover all "foreign nationals." *See id.* (emphasizing need to fix "giant loophole" in FARA); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(d), 88 Stat. 1263, 1267. The amendment defined "foreign nationals" to include any "individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence." Pub. L. No. 93-443, § 101(d)(3), 88 Stat. at 1267.¹

Although the 1974 amendment closed the loophole available to overseas entities, it also had broader effects. By extending the contribution ban from the agents of *overseas* principals to *all* noncitizens except permanent residents, the ban swept in lawful but *nonpermanent* residents of the United States. The legislative history indicates that Congress paid little attention to this particular expansion of the law's applicability. *See* 120 Cong. Rec. 8783-84 (Mar. 28, 1974) (colloquy between Sens. Bentsen and Cannon appearing to contemplate only "permanent residents," on one hand, and "tourists," on the other).

¹ "[P]ermanent residence" is one of several immigration classifications that permit certain aliens to reside in the U.S. indefinitely. *See* 8 U.S.C. § 1101(a)(13)(C); *see also* 42 C.F.R. § 435.408 (listing additional categories of such aliens). The law also recognizes categories of aliens who are authorized to reside in the U.S. for a limited time. *See* 8 U.S.C. § 1101(a)(15).

Congress re-codified the foreign contribution ban at its current location, 2 U.S.C. § 441e, as part of 1976 amendments to the Federal Election Campaign Act (“FECA”), *see* Pub. L. No. 94-283, 90 Stat. 475; and replaced FECA’s version of the ban with the current language as part of BCRA, Pub. L. No. 107-155, 116 Stat. 81, 96 (2002). BCRA expanded the ban beyond contributions, to cover expenditures and even independent expenditures. It also clarified that the ban—unique among campaign-finance restrictions—applies not only to federal campaigns, but also to state and local elections. 2 U.S.C. § 441e(a)(1)(A); *see also* Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,940 (Nov. 19, 2002).

II. This Litigation.

Appellant Bluman is a citizen of Canada who attended Harvard Law School and works as an attorney for a law firm in New York. He has lawfully resided in the United States on a “TN” status since November 2009, and is entitled to remain until November 2012, at which point he anticipates applying for an additional three-year term. Appellant Steiman is a dual citizen of Canada and Israel, who is completing her medical residency at Beth Israel Medical Center in New York. She has lawfully resided in the United States on a “J-1” status since June 2009, and is entitled to remain at least until June 2012; her three-year term is subject to extension to a maximum of seven years.

Appellants want to express their political views by contributing money to certain candidates for federal and state office. They also want to spend money independently to advocate for the election of their preferred candidates—Appellant Bluman by printing

flyers that support the reelection of President Barack Obama and distributing them in Central Park; Appellant Steiman by donating to the independent Club for Growth, which runs advertisements advocating for candidates who promote economic liberty. However, § 441e bars Appellants, on pain of serious criminal penalties, from engaging in these forms of political expression. App.8a.

Appellants filed suit against the Federal Election Commission (“FEC”) in the U.S. District Court for the District of Columbia, challenging § 441e as a violation of the First Amendment. Pursuant to § 403(a)(1) of BCRA, a three-judge panel convened to hear the suit. The FEC moved to dismiss, and Appellants moved for summary judgment.

III. The District Court’s Decision.

On August 8, 2011, the district court granted the FEC’s motion and denied Appellants’. App.24a.

The court upheld both the contribution ban and the expenditure ban of § 441e “under strict scrutiny.” App.9a. Relying on cases that permit the exclusion of noncitizens from “voting, serving as jurors, working as police or probation officers, or working as public school teachers” upon a showing of rational basis, the court inferred that the Government has “a compelling interest” in “limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.” App.13a. The court found this to be an especially compelling interest given aliens’ suspected lack of “primary loyalty” to the country. App.19a.

The court then concluded that political spending—including independent expenditures like printing flyers and donations to *domestic* groups that, in turn, engage in independent expenditures—is “an integral aspect of the process by which Americans elect officials.” App.13a. As such, political spending constitutes “part of the overall process of democratic self-government” from which aliens are excludable. App.14a. In the court’s view, if aliens may be barred “from voting and serving as elected officers,” it “follows” that they may be barred from “seek[ing] to influence how voters will cast their ballots.” *Id.*

With respect to the narrow tailoring requirement of strict scrutiny, the district court held that “Congress may proceed piecemeal” in this area; the law’s failure to prohibit spending on ballot initiatives, or by permanent residents—who are functionally indistinguishable from many nonpermanent residents—was therefore irrelevant. App.19a-20a.

Responding to Appellants’ citation of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and especially the Court’s condemnation of speaker-based restrictions on political speech, the district court invoked the dissenting opinion of Justice Stevens in that case. The court determined “the force of Justice Stevens’s statement to be a telling and accurate indicator of where the Supreme Court’s jurisprudence stands on the question of foreign contributions and expenditures.” App.16a. And, finally, the court noted that foreign nations impose similar restrictions on political spending, highlighting a “common international understanding” on the issue. App.21a.

THE QUESTION PRESENTED IS SUBSTANTIAL

This Court grants plenary review on direct appeal if the question presented is “a substantial one.” *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). This standard is plainly met given that the court below upheld a speaker-based ban on political speech on the theory that Congress may seek to limit the “influence” of constitutionally-protected speakers about whose “loyalty” it harbors doubts. All the more so seeing as the court did so under *strict scrutiny*, all while relying on cases applying *rational-basis review*.

In upholding both § 441e’s complete ban on contributions and its complete ban on independent expenditures, the district court erred. As the FEC and the court below acknowledged, Appellants—as lawful residents of the United States—are entitled to the full protections of the First Amendment. And there can be no doubt that the First Amendment safeguards, above all, the right to political speech, even if the speaker must spend money to transmit his message. These uncontested propositions together establish the unconstitutionality of § 441e.

Neither Congress’s desire to limit Appellants’ “influence” over American voters, nor its judgment that resident aliens lack adequate “loyalty” or sufficient “stake” in the debate, remotely satisfy the demanding standards of strict scrutiny, or any other form of heightened scrutiny. To the contrary, those legislative purposes expose the fundamental inconsistency of § 441e with the First Amendment. To be sure, Congress is free to restrict the speech of those who live overseas and are accordingly not entitled to seek refuge in the Constitution of the United States. But the First Amendment is

specifically designed to preclude the Government from deciding who among “the People” protected by the Constitution holds views worthy of consideration and who must be kept from “influencing” American voters through their speech.

The district court built its analysis on a line of cases that apply rational-basis review to uphold, against Equal Protection challenge, the exclusion of aliens from voting and holding certain public offices. That is, the court inverted Justice Holmes’s famous aphorism and held that, because Appellants have “no constitutional right to be a policeman,” they also lack “a constitutional right to talk politics.” But the permissibility of excluding aliens from the privileges of citizenship in no way justifies censorship of their political *speech*. Aliens have no constitutional right to vote or hold public office, and granting them that right would dilute the sovereign power of the citizenry; resident aliens *do* have a right to political speech, which harms no one and instead enriches the marketplace of ideas. Americans deserve to hear what resident aliens have to say, and are free to consider or ignore it when they exercise their exclusive right to vote. Section 441e paternalistically “protects” them from this choice.

Given that the court invoked rational-basis caselaw to develop a “compelling interest” to support § 441e, it is not surprising that its narrow-tailoring analysis borrows from that caselaw as well. Section 441e protects voters from the influence of aliens’ speech in candidate elections, but fails to protect them from such influence in ballot initiatives; through alien lobbying activity; or if the alien is classified by the immigration code as a “permanent

resident.” Yet the court dismissed this stark underinclusion by claiming that Congress may proceed “piecemeal”—the opposite of the rule under strict scrutiny. Conversely, § 441e bars resident aliens from speaking about even those elections in which they can *vote*; from speaking about purely local elections in which the federal government has no interest; and from donating to *domestic* groups that cannot be said to effect foreign influence. The district court did not even address this substantial overinclusion. And the court further ignored the less restrictive means that were available to Congress to achieve its (impermissible) goal. In particular, disclosure requirements could warn American voters to take resident aliens’ views with a grain of salt.

The decision below is not simply wrong; it is dangerous. In upholding § 441e, the court drafted a road-map for every legislature that wants to take another crack at criminalizing political spending. By recognizing a novel and vague “compelling interest” in preventing the “influence” of speech, and deferring to congressional judgment about which speakers have sufficient “stake” to speak to an issue, the court’s decision subverts both established campaign finance law and First Amendment jurisprudence generally. The court’s decision also threatens the long-established constitutional rights of resident aliens by extending a line of case permitting their exclusion from unprotected activities (like public employment) to uphold a statute that deprives them of *enumerated rights* (like freedom of speech). Indeed, the unavoidable import of the decision is that all resident aliens—including the 12 million permanent residents now living in the U.S.—could be banned from calling Members of Congress or attending a political rally.

Because it arises on direct appeal, this Court must issue a decision *on the merits* of this case. *Hicks*, 422 U.S. at 344. And legislatures and the public will watch that decision closely to see whether the Court meant what it said in *Citizens United* or will step back from the principles articulated in that seminal holding. Appellants submit that those principles, which require the as-applied invalidation of § 441e, are consistent with the Constitution and should be reaffirmed. But if the Court intends to retreat from that decision, it should do so only after plenary consideration of the merits.

I. RESIDENT ALIENS ARE PROTECTED BY THE FIRST AMENDMENT AND THUS MAY SPEND MONEY TO EXPRESS THEIR POLITICAL VIEWS.

As applied to resident aliens, § 441e violates the First Amendment. That conclusion follows from three unassailable premises: (1) Resident aliens are protected by the First Amendment (as the FEC and the court below acknowledged). (2) Under the First Amendment, the Government must satisfy strict scrutiny to justify a complete ban on political expenditures and contributions (as the district court properly assumed). (3) Section 441(e) does not remotely satisfy strict scrutiny. To the contrary, it uses the blunderbuss approach of a complete ban to effectuate a purpose fundamentally at odds with central tenets of the First Amendment.

A. Text, History, and Precedent Confirm That Resident Aliens Are Entitled to the Freedom of Speech.

Neither the FEC nor the district court suggested that Appellants, as lawful residents of the United States, fall outside the protections of the First

Amendment. That concession is well-taken. The text and history of the Amendment, along with this Court's precedents, confirm that resident aliens—unlike those who live beyond the territorial reach of the Constitution—are entitled to the same freedom of speech as citizens. Those who live, work, and pay taxes in this country are entitled to *speak freely* here.

“The [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker” *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring). The Constitution elsewhere *does* distinguish between “Persons” generally and “Citizens” in particular, including with respect to the rights to vote and run for office. *See, e.g.*, U.S. Const. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged”); U.S. Const. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have . . . been seven Years a Citizen”). But the First Amendment contains no such caveat.

Nor does the history of the First Amendment cast any doubt on its application to noncitizens. Resident aliens routinely engaged in First Amendment activity at the Founding. *See, e.g.*, Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667, 692-701 (2003). Moreover, resident aliens before and after the Founding were often permitted to *vote*; surely the Framers would not have intended to deny freedom of political speech to persons who were regularly entitled to cast ballots. *See, e.g.*, Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993).

Caselaw is entirely in accord. While aliens have virtually no rights prior to their lawful entry, “aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution.” *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893). Those safeguards include the First Amendment. *See, e.g., Bridges v. California*, 314 U.S. 252 (1941) (applying First Amendment to overturn conviction based on resident alien’s speech). As later explained:

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But *once an alien lawfully enters and resides* in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy J., concurring)) (emphasis added) (internal quotation marks omitted).

More recently, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), this Court reaffirmed that the First Amendment extends beyond citizens to “the People,” *i.e.*, “persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265. Applying that standard, the Court described *Bridges* as holding that “*resident aliens* have First Amendment rights.” *Id.* at 271 (citing *Bridges*, 326 U.S. at 148) (emphasis added).

In short, “[i]t is well settled that ‘freedom of speech and of press is accorded aliens residing in this country.’” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring in part and in judgment). In the eyes of the First Amendment, resident aliens—unlike aliens who live overseas—are not “foreigners,” but members of “the People” protected by the Constitution.

B. “Freedom of Speech” Embraces the Freedom To Contribute to Candidates and To Spend Money To Advocate for or Against Them.

As this Court explained in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the First Amendment protects political contributions and expenditures as core acts of expression and association.

Limitations on political expenditures constitute direct restrictions on the right “to engage in protected political expression, restrictions that the First Amendment cannot tolerate.” *Id.* at 58-59. Expenditure *limits*, not to mention flat *bans*, must therefore “satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression,” *i.e.*, strict scrutiny. *Id.* at 44-45; *see also FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 461 (2007) (plurality opinion). Applying strict scrutiny, this Court has “routinely struck down limitations on independent expenditures by candidates, other individuals, and groups.” *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001). The only line of cases upholding restrictions on independent political expenditures—by corporations, based on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)—was overruled in *Citizens United*, 130 S. Ct. at 913.

Political contributions, too, lie at the core of the First Amendment as an act of political expression and association. *Buckley*, 424 U.S. at 23. While limits on the *amounts* of contributions are subject to less-than-strict (albeit heightened) scrutiny, the logic of the Court’s decisions dictates that *flat bans* must be subject to strict scrutiny. The rationale for *Buckley*’s reduced scrutiny for contribution limits is that, because “[a] contribution serves as a general expression of support for the candidate and his views,” the precise amount of the contribution is not crucial to the message. *Id.* at 21. Thus, “[a] limitation on the *amount* of money a person may give to a candidate . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution.” *Id.* (emphasis added). Such a rationale does not apply, however, to a total ban on contributions, which completely deprives an individual of the “fundamental First Amendment interests” in expressing support for his candidate of choice. *Id.* at 23. Rather, complete bans on political contributions, like restrictions on expenditures, reduce “the quantity of political speech.” *Id.* at 39.²

Accordingly, both elements of § 441e intrude on core First Amendment activity. Since resident aliens are members of the People protected by the First Amendment, § 441e’s ban on such activities is unconstitutional unless it satisfies strict scrutiny. Indeed, the district court so assumed. App.9a.

² Justice Souter, writing for the Court in *FEC v. Beaumont*, did suggest that even a complete ban need only be “closely drawn,” but that suggestion was dicta in light of the conclusion that the plaintiff was “simply wrong in characterizing [the statute] as a complete ban.” 539 U.S. 146, 161-62 (2003).

C. Section 441e Does Not Remotely Satisfy Strict Scrutiny.

As the “most rigorous and exacting standard of constitutional review,” *Miller v. Johnson*, 515 U.S. 900, 920 (1995), strict scrutiny demands a state interest that is truly compelling and, even then, a restriction of speech is not permitted where it is “plausible” that the interest could be furthered by a lesser imposition. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 816 (2000). As a result, “[o]nly rarely are statutes sustained in the face of strict scrutiny.” *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984). Proving that point, this Court has, to Appellants’ knowledge, upheld speech restrictions under strict scrutiny only twice: in *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (holding that statute prohibiting campaigning within 100 feet of polls was “rare case” in which strict scrutiny satisfied), and *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (upholding, by 6-3 vote, proscription of “material support” to terrorists).

The contrast between this case, and *Burson* and *Humanitarian Law Project*, is striking. *Burson* involved a restriction “as venerable a part of the American tradition as the secret ballot,” 504 U.S. at 214 (Scalia, J., concurring in judgment), one that targeted a specific type of speech within a well-defined geographical area and a brief temporal period, in order to protect citizens’ ability to cast ballots “free from the taint of intimidation and fraud,” *id.* at 211 (majority opinion). *Humanitarian Law Project* considered a statute that incidentally embraced “a narrow category of speech,” and incorporated “narrowing definitions” and “limited

exceptions,” in order to prevent conduct that would “facilitate more terrorist attacks”—an undisputed “urgent objective of the highest order.” 130 S. Ct. at 2723-24, 2728. Section 441e imposes a *complete* ban on contributions *and* expenditures by *all* resident aliens in connection with *all* elections, and it does so—admittedly!—as a means to reduce the “influence” of a suspect class of speakers. Far from presenting the “rare case” in which strict scrutiny can be satisfied, *Burson*, 504 U.S. at 211, this law has every hallmark of unconstitutionality.

As commentators have observed, the Government cannot satisfy strict scrutiny in this case. *See, e.g.*, Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 605-610 (2011). Section 441e would obviously be unconstitutional if applied to U.S. citizens, and nothing in the decision below justifies a different conclusion for applications to constitutionally protected noncitizens.

1. Diminishing the “influence” of speech is the *antithesis* of a “compelling interest.”

Accepting the FEC’s argument, the district court concluded that § 441e served the compelling interest of “preventing foreign influence over the U.S. political process.” App.13a. Since § 441e prohibits *speech*, the “influence” to be prevented must be that upon the American voting public, who may find themselves swayed on an issue by views expressed by resident aliens. Such a result must be avoided, in Congress’s view, because aliens’ “loyalties lie elsewhere.” 120 Cong. Rec. 8783 (Mar. 28, 1974) (statement of Sen. Bentsen). Or, as the court put it, Congress reasonably determined that nonpermanent resident aliens “have primary loyalty to other national

political communities, many of which have interests that compete with those of the United States.” App.19a. In short, resident aliens cannot be trusted, and § 441e ensures that gullible American voters will not be led astray by their views.³

Rather, the purportedly compelling interest was the Government’s desire to prevent “influence [on] how voters will cast their ballots.” App.14a. Far from being the *answer* to the constitutional problem with § 441e, however, Congress’s desire to exclude politically disfavored members of the People from the political debate due to concern that their unworthy “foreign” views might “influence” voters *is* the constitutional problem with § 441e. The “compelling interest” asserted by the Government is fundamentally inconsistent with the most central tenets of the First Amendment.

The Constitution “creates an open marketplace where ideas, most especially political ideas, may compete without government interference.” *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). That means that the Government has no right to decide whose views are entitled to be heard, considered, or weighed in the balance. In the realm of political speech, especially, “the legislature is

³ To be clear, in referring to foreign “influence,” the court was *not* talking about *improper* influence—*i.e.*, corruption. Although eliminating that vice *is* a compelling interest, this Court has made clear that such concerns are to be addressed by setting *limits* on contributions (so they are not too large) and mandating disclosure (so the public can see if a candidate is beholden). *See Buckley*, 424 U.S. at 28; *Citizens United*, 130 S. Ct. at 908, 914. This is no doubt why the district court admitted that “the government’s anti-corruption interest” is “not the governmental interest at stake in this case.” App.14a.

constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978). It is *voters* who “are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments,” and it is they who “may consider, in making their judgment, the source and credibility of the advocate.” *Id.* at 791-92. As this Court recently explained, any “intrusion by the government into the debate over who should govern goes to the heart of First Amendment values.” *Az. Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011).

Nor does it matter that the speech might *succeed* in “influencing” the citizenry. “[T]hat advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution ‘protects expression which is eloquent no less than that which is unconvincing.’” *Bellotti*, 435 U.S. at 791 (quoting *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)). As this Court reiterated just last Term, if speech is influential, that is only because listeners find it persuasive. But “the fear that speech might persuade provides no lawful basis for quieting it.” *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011). Whatever Congress may think, “[t]hose who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.” *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

The “compelling interest” affirmed by the district court is thus fundamentally incompatible with the First Amendment. And this Court *said so*, less than

two years ago, in *Citizens United*. There, the Court decried the ban on corporate spending as an attempt “to silence entities whose voices the Government deems to be suspect.” 130 S. Ct. at 898. The same is true here. There, the Court denied to the Government the “means [to] deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.” *Id.* Yet it is just those determinations that § 441e embodies. There, the Court held that “restrictions distinguishing among different speakers, allowing speech by some but not others,” are “[p]rohibited.” *Id.* Section 441e is such a restriction. And there, the Court rejected the suggestion that these principles may be discarded if the disfavored speakers are suspected of having “interests [that] may conflict in fundamental respects with the interests of eligible voters,” *id.* at 930 (Stevens, J., concurring in part and dissenting in part). Yet the district court accepted an analogous argument here.

The district court justified these departures from every proposition of *Citizens United* by relying on dicta from Justice Stevens’s *dissent* in that case, which it found to be a “telling and accurate indicator of whether the Supreme Court’s jurisprudence stands” on the question. App.16a. This is, frankly, mystifying. The *Citizens United* majority *expressly refused* to “reach the question” of § 441e’s constitutionality. 130 S. Ct. at 911 (majority opinion). And even Justice Stevens’s dissent only addressed § 441e in general, without considering the as-applied scenario presented by this case, *i.e.*, the case of *resident* aliens. *No* Justice has so much as hinted that such an application of the statute would be constitutionally defensible.

2. The Equal Protection Cases upon Which the District Court Relied Are Irrelevant.

As should be evident from the above, in finding that § 441e served a compelling state interest, the district court did not rely on any authority applying the First Amendment. Instead, it drew from a series of Equal Protection cases the principle that noncitizens may, upon a showing of *rational basis*, be excluded from “participation” in “activities of democratic self-government,” like voting or holding office. App.13a. It then concluded that the Government must have a compelling interest in limiting that participation and thereby preventing the influence that it effects. *Id.* The Equal Protection cases providing the premise for that logic are inapposite, however, several times over.

The Equal Protection cases cited by the court addressed claims by aliens who were not engaged in *any constitutionally protected activity*, but invoked principles of equal protection in seeking affirmative government support (employment or other benefits) on the same terms as U.S. citizens. *See Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (employment as probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (employment as public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (employment as police officers); *Mathews v. Diaz*, 426 U.S. 67 (1976) (medical insurance); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (state civil-service employment).

The district court read the cases as standing for the broader proposition that “foreign citizens may be denied certain rights and privileges that U.S. citizens possess,” App.11a, but there is an obvious difference between *constitutional* rights (like freedom of speech)

and “rights” *not* protected by the Constitution (like the “right” to a public job). Justice Holmes once famously said that a plaintiff “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892). The district court flipped even that (now-discredited) logic on its head, effectively holding that because Appellants have no constitutional right to be policemen, they have no constitutional right to talk politics. That reasoning is plainly fallacious.

The Government may exclude aliens from activities of “democratic self-government,” meaning (in context) the *exercise of governmental authority*. Aliens have no “right to govern.” *Foley*, 435 U.S. at 297; *see also Cabell*, 454 U.S. at 439. But election-related speech has no direct legal effect; it affects government only indirectly, through its *power to persuade*. It is *voters* and *government officials* who participate in “democratic self-government.” One who engages in election advocacy is no more a participant in self-government than Adam Smith or Karl Marx if those authors’ works convinced a voter to support a candidate. Legally constitutive acts like voting or legislating cannot be compared to speech.

The district court was unable to detect any “clear dichotomy” between *speech* and *participation*. App.17a. But this court has had no trouble distinguishing restrictions on “the mechanics of the electoral process,” from those restricting “pure speech.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995). Indeed, the Court did so last Term, in *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), involving a recusal statute

that prohibited legislators both from voting on certain measures and from participating in debate regarding them. The Court analyzed those two prohibitions differently, because “voting on a bill is not fairly analogized to . . . simply discussing that bill or expressing an opinion for or against it. The former is performing a governmental act . . . the latter is [an exercise of] personal First Amendment rights.” *Id.* at 2351 n.5. For the same reasons, a statute excluding aliens from voting or holding public office is simply not comparable to a statute that forbids aliens to speak about politics.

The “dichotomy” makes good sense. Political power is zero-sum. An alien’s vote dilutes the governing power of citizens, and an alien who holds public office exercises government authority that would otherwise have been vested in a citizen. By contrast, there is no analogous concern that aliens’ speech will drown out citizens’ speech; in the First Amendment arena, the governing constitutional principle is “more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). One may think to distinguish political *spending* from “pure” speech, *see, e.g.*, Oral Arg. Tr. 9 (suggestion by court that aliens’ spending would “dilute the contributions and expenditures of U.S. citizens”), but this Court has repudiated that distinction, “repeatedly reject[ing] the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens” on political spending. *Az. Free Enterprise*, 131 S. Ct. at 2825; *see also Buckley*, 424 U.S. at 56-57.

Hence neither theory nor doctrine support the court's claim that, because the Government "may bar foreign citizens from voting and serving as elected officers," it "follows" that the Government may bar them from "seek[ing] to influence how voters will cast their ballots in the elections." App.14a. The right to *speak* is not dependent on the right to *decide* the matter being debated. Put another way, the right to participate in the marketplace of ideas does not presuppose the right to make the ultimate purchase. That is why minors—who cannot vote or run for office—are constitutionally entitled to contribute to candidates, per a unanimous decision of this Court. *See McConnell v. FEC*, 540 U.S. 93, 231-32 (2003). It is why corporations—who likewise cannot vote or run for office, *see Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part) ("They cannot vote or run for office.")—are constitutionally entitled to spend unlimited sums on express advocacy. *See id.* at 917 (majority opinion). And it is why the only circuit court to have considered the issue concluded that nonresidents of a State—despite their lack of entitlement to vote there—are constitutionally entitled to contribute to candidates running for elective office in the State. *See Vannatta v. Keisling*, 151 F.3d 1215, 1218 (9th Cir. 1998).

The Constitution requires that voters "be free to obtain information from diverse sources in order to determine how to cast their votes," *Citizens United*, 130 S. Ct. at 899—and that includes members of the People, like Appellants and other resident aliens, who cannot themselves "participate" in activities of "democratic self-government."

3. Even if Congress had a “compelling interest” in reducing the “influence” of resident aliens’ speech, § 441e is not narrowly tailored to that end.

While the most obvious deficiency in § 441e is its categorically impermissible purpose, the law does not even have the virtue of being “closely drawn”—let alone “narrowly tailored”—to its illegitimate end. The lines drawn by § 441e are at once underinclusive and overinclusive, and Congress in drawing them did not consider obvious, less-restrictive alternatives.

First, the statute permits resident aliens to engage in lobbying activities, and to spend unlimited sums in connection with ballot initiatives, *see* FEC Advisory Op. 1984-62, 1 n.2; FEC Advisory Op. 1980-95. If anything, such activities—which concern *direct* implementation of policy—are even more vulnerable to “influence” by those who have no direct say on policy. Yet, when *candidates* are out of the picture, § 441e tellingly gives resident aliens a green light. “Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes” *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2740 (2011).

The district court was unconvinced, reasoning that “Congress may proceed piecemeal in an area such as this.” App.20a. But it cited, for that claim, cases applying *rational-basis review* to government *benefit* programs. *Id.* (quoting, *e.g.*, *Buckley’s* analysis of *public financing scheme*). It is black-letter law that “governments are entitled to attack problems piecemeal, *save where their policies implicate rights so fundamental that strict scrutiny must be applied.*” *Zauderer v. Office of Disciplinary*

Counsel, 471 U.S. 626, 651 n.14 (1985) (emphasis added). The court also reasoned that “Congress could reasonably [have] conclude[d] that the risk of undue foreign influence is greater in the context of candidate elections than it is in the case of ballot initiatives.” App.20a. But the case it cited, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), is about the risk of *corrupting candidates*, *id.* at 298. If the Government’s “compelling interest” is preventing resident aliens’ “influence” on *voters*, it does not matter whether those voters are weighing *candidates* or *legislation*.

Second, the statute carves out lawful permanent residents (“LPRs”). Yet LPRs, too, are “foreign” and have “primary loyalty to other national political communities.” App.19a. The legislative history reveals that Congress was aware of this gap between the statute’s purpose and its coverage: Senator Griffin, who supported the law, observed the oddity that the proposed amendment “permits contributions by those who have been admitted for permanent residence,” “even though they do not have the right to vote.” 120 Cong. Rec. 8784 (Mar. 28, 1974). But Congress nonetheless made no attempt to apply its logic consistently.

The district court dismissed this, too, on the ground that “Congress may reasonably conclude” that LPRs “stand in a different relationship to the American political community” than other resident aliens, given their entitlement to reside in the U.S. indefinitely. App.19a. But the distinction evaporates as soon as one looks past statutory labels. Many “nonpermanent” residents *are* permitted to remain in the United States indefinitely, *see supra* n.1; or to

apply for unlimited extensions (such as Canadian professionals like Appellant Bluman, 8 C.F.R. § 214.6(h)(1)(iv)). And “permanent” residents need not live in the country forever; they may forfeit or abandon their LPR status. *See, e.g.*, 8 C.F.R. § 299.1; *Katebi v. Ashcroft*, 396 F.3d 463, 466–67 (1st Cir. 2005). Under rational-basis review, a court could permissibly defer to a legislative line distinguishing LPRs from functionally identical residents; under strict scrutiny, however, such underinclusion is fatal.

Third, the statute is also overinclusive in multiple respects. While noncitizens have no constitutional right to vote, certain municipalities have extended that right to them. *E.g.*, Takoma Park, Md., Town Charter Art. VI, § 601. Consequently, aliens residing in those jurisdictions may vote in local elections but are prohibited from donating to, or even spending money to advocate for, their chosen candidates. No system that permits such a bizarre result could be called “narrowly tailored” or even “closely drawn.”

More generally, while the Constitution grants Congress the power to regulate federal elections, *e.g.*, U.S. Const. art. I, § 4, it preserves “state control over the election process for state offices,” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Section 441e’s blanket ban on speech about state and local elections thus exceeds any federal interest in regulating elections; indeed, it is not clear what enumerated power could justify a federal ban on purely local speech that a state has chosen to permit.

In addition, the Government has conceded that the law bans even a donation to the Club for Growth, a § 501(c)(4) organization that engages occasionally, but not primarily, in political activity. App.6a-8a; *see*

<http://www.clubforgrowth.org/aboutus/?subsec=0&id=17#M10>. The district court apparently assumed that such contributions could be banned because they might indirectly support “advoca[cy] with respect to certain issues and candidates.” App.7a. But it is facially implausible to suggest that Appellant Steiman’s \$100 donation to the Club for Growth (or a similar donation to the ACLU) would somehow cause that domestic organization to exact “foreign” influence on American voters. Section 441e thus bans Appellants from major categories of expressive activity that have no impact on the Government’s purported interest in sheltering federal elections from foreign views. Yet the district court simply ignored these fatal instances of overinclusion.

Fourth, and finally, § 441e cannot survive unless Congress first tried—or at least considered—“more tailored approaches” to solving the alleged problem. *McConnell*, 540 U.S. at 232. Congress had an obvious alternative here: special disclosure requirements for alien donors or advocates. Indeed, FARA itself employs this approach by requiring that “political propaganda” by “foreign agents” carry a statement disclosing its foreign source. 22 U.S.C. § 611 *et seq.* As this Court held, such a requirement is consistent with the First Amendment because it “d[oes] not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit.” *Meese v. Keene*, 481 U.S. 465, 480 (1987). Rather, “[b]y compelling some disclosure of information and permitting more, [disclosure requirements] recognize[] that the best remedy for misleading or inaccurate speech . . . is fair, truthful, and accurate speech.” *Id.* at 481. Yet, while

Congress recognized that disclosure is a sufficient antidote to full-blown foreign propaganda, it ignored this alternative in the context of political *spending* by resident aliens, imposing instead a blanket ban in order to “protect the public from conversion, confusion, or deceit.” *Id.* at 480. The district court simply ignored this failing as well.

Section 441e, and the district court’s opinion upholding it, make a mockery of every aspect of strict scrutiny.

II. THE DISTRICT COURT’S OPINION SETS DANGEROUS PRECEDENT ON CAMPAIGN FINANCE REGULATION, THE FIRST AMENDMENT, AND THE CONSTITUTIONAL RIGHTS OF RESIDENT ALIENS.

That the district court erred is more than enough to warrant this Court’s plenary consideration. After all, any “substantial question” merits such review. *Hicks*, 422 U.S. at 344. There are, however, further reasons why the Court’s full-fledged consideration is needed. As Justice Jackson once wrote about another decision to uphold an infringement of fundamental rights under strict scrutiny, “once a judicial opinion rationalizes” such action “to show that it conforms to the Constitution,” the court “has validated the principle,” which then “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim.” *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). The decision below sanctions not one such principle, but a host of them, with significance well beyond this case and even campaign finance law. Any affirmance by this Court of that decision will “validate[]” those principles.

A. The District Court's Precedent Undermines the Basic Logic of This Court's Campaign Finance Jurisprudence.

The bedrock principles of this Court's campaign finance jurisprudence are that political expenditures constitute core First Amendment activity; that speaker-based restrictions are prohibited; and that independent expenditure bans are presumptively prohibited, and certainly cannot be used to "level the playing field." The district court's precedent undermines each of these, and its reasoning provides a roadmap for recalcitrant legislatures intent on enacting a new generation of campaign finance restrictions. It must be nipped in the bud.

1. At the most fundamental level, the court's suggestion that political *spending* may be uniquely subject to regulation is a direct repudiation of *Buckley*. As this Court there explained, it "ha[d] never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." 424 U.S. at 16. Yet the district court suggested that its reasoning would extended only to restrictions on aliens' political speech involving the expenditure of money, thus treating political speech financed by dollars as constitutionally unique. App.22a; *see also* Oral Arg. Tr. 15 (agreeing that Appellants have "right to speak on a soap box" but asking why "it's critical to hear from the[ir] dollars," *e.g.*, "in an advertisement"). This bifurcation of political speech from political spending is the theoretical launching pad for every future attempt to limit the right to the latter.

2. The district court’s precedent goes further: By holding that there exists a “compelling interest” in preventing the “influence” of disfavored speakers—due to their dubious motives or questionable loyalty—the court constructed a doctrinal hook that could justify nearly any restriction on campaign spending. A State could bar expenditures by teachers’ unions, plaintiffs’ lawyers, or evangelical groups, since the “undue influence” of these special interests has long been decried. And the purity of their motives, too, could “reasonably” be doubted.

3. The district court’s precedent offers another way for legislatures—assisted, no doubt, by the pro-regulatory campaign-finance professoriate—to circumvent *Buckley*. As its opinion held, it “follows” from resident aliens’ inability to vote that Congress may prohibit them from “seek[ing] to influence how voters will cast their ballots.” App.14a. On the strength of that precedent, every State so inclined could now prohibit contributions or expenditures financed by out-of-state entities (including groups like the Sierra Club or the Club for Growth, headquartered elsewhere). The Ninth Circuit invalidated such a restriction in *Vannatta*, 151 F.3d at 1218, but on the premise, rejected by the district court below, that the right to speak does not flow from the right to vote. Given the ubiquity of such cross-jurisdictional speech, a mere handful of these restrictions would fundamentally alter the course of modern American politics. *See, e.g.*, Brian C. Mooney, *Outside Donations Buoyed Brown*, Boston Globe, Feb. 24, 2010 (“In the last 19 days of the race, nearly 70 percent of the 12,773 contributors who gave more than \$200 to the [Scott] Brown campaign were from outside Massachusetts . . .”). The impact

would be particularly potent in the District of Columbia: Because residents of that city have no congressional representation, the right to engage in federal political fundraising or advocacy in the Nation's capital could be effectively eliminated.

4. Perhaps even more significant than the doctrinal hooks provided by the court's opinion would be the signal sent by its unexplained affirmance. Every court—and more importantly, every legislature—in the country would know that, whatever this Court *said* in *Citizens United*, it did not truly *mean* it: Bans on independent expenditures *can* survive strict scrutiny, and are *not* off-limits. Upholding an independent-expenditure restriction for the first time since *Austin* would invite a new open season on political spending rights.

B. The District Court's Precedent Turns Core First Amendment Principles on Their Heads.

The district court's holdings also subvert First Amendment jurisprudence generally.

1. The notion that the Government could have a “compelling interest” in reducing the “influence” of disfavored speech, App.17a, is remarkable. As this Court explained last Term when it rejected an argument that speech could be restricted due to its “strong influence” over doctors' prescribing practices: “That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.” *Sorrell*, 131 S. Ct. at 2671. If “influence-prevention” is a “compelling interest” that justifies content-based restrictions on speech, the Government could presumably shut down talk radio, or require the airing of competing views, as a means

to prevent the “undue influence” over voters exercised by certain prominent pundits; regulate sermons by imams, to limit their “influence” over impressionable young congregants; or prohibit homophobic remarks, to diminish the “influence” of bigots. The court’s recognition of this novel, vague, unbounded “compelling interest” in preventing the “influence” of speech creates a new defense for every State, municipality, school board, or public employer trying to silence disfavored speakers.

2. The problem is only exacerbated by the district court’s holding that the Government may premise its speech restrictions on speculation about the speaker’s “loyalty” to the country or “stake” in the debate. App.19a. That suggestion is equally foreign to the First Amendment, under which “the general rule” is that “the audience, not the government, assess[es] the value of the information presented,” in light of its content and its source. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Can the Government now prohibit Communists from speaking, because they are insufficiently loyal? May commercial speech restrictions be justified based on supposition that advertising merchants have the dubious motive of economic gain? The decision of the court below offers a “loaded weapon” for innumerable attempts to engage in previously-prohibited censorship.

3. Likewise for the district court’s holding that if one cannot “participate” in a decision, one has no right to seek to influence the decision-maker. App.13a. As this Court’s cases have recognized, decision-makers need the benefit of public debate; speech serves “to supply the public need for information and education with respect to the

significant issues of the times.” *Thornhill*, 310 U.S. at 102. Yet, under the district court’s precedent, any State could, among other things, criminalize all lobbying activity. After all, only legislators may “participate” in legislative decision-making; and “it follows” that neither lobbyists nor their constituent-clients may try to influence their votes.

4. The decision below likewise casts into doubt the (until now) well-accepted tailoring requirements of strict First Amendment scrutiny. By importing rational-basis rules into strict-scrutiny analysis—*e.g.*, accepting the dramatic underinclusiveness of § 441e because “Congress may proceed piecemeal,” and uncritically deferring to conclusions Congress could “reasonably” have made, App.19a-20a—the district court loosened the restraints of strict scrutiny beyond recognition. Were this Court to affirm, it would invite any court so inclined to rubber-stamp restrictions on fundamental rights while purporting to apply the “most rigorous and exacting standard of constitutional review.” *Miller*, 515 U.S. at 920.

C. The District Court’s Precedent Imperils the Constitutional Rights of Resident Aliens.

The district court’s opinion also threatens the long-established rights of all resident aliens.

1. Although § 441e forbids only political *spending*, the district court’s reasoning necessarily encompasses ordinary soapbox advocacy. *Buckley*’s core holding is that political expenditures and non-monetary advocacy stand on the same constitutional footing. *See* 424 U.S. at 16. Thus, resident aliens could—in light of the district court’s decision—be prohibited from writing editorials criticizing a

candidate for office; from making phone calls to support a campaign; or even from expressing their views about political candidates with co-workers. All of those forms of advocacy are, like expenditures, intended “to influence how voters will cast their ballots,” App.14a, and therefore may be criminalized.

2. The implications go yet further. Even if a resident alien’s speech does not relate specifically to an election, or attempt to influence how voters cast their ballots, the district court’s precedent permits that speech to be proscribed if it constitutes “participation” in “activities of American democratic self-government.” App.13a. The court never defined that vague phrase, and its scope remains somewhat mysterious. But if it includes advocacy about an election, then it surely also includes engaging in issue advocacy, lobbying government officials, attending a protest outside the White House, calling a Senator’s office to object to legislation, or signing a petition condemning government action. Those activities, which *directly* advocate regarding the output of democratic government, are at least as much a “part of the overall process of democratic self-government,” App.14a, as *indirect* attempts to affect policy decisions via the election of representatives who eventually make them. And, if so, noncitizens can apparently be barred from those activities, too, without offending the Constitution.

So, although the court purported to accept the long-established proposition that resident aliens have full rights under the First Amendment, its reasoning carves out the core from those rights, affirming aliens’ freedom to create fetish videos, *United States v. Stevens*, 130 S. Ct. 1577 (2010), engage in hate

speech, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and distribute virtual child pornography, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), while allowing censorship of political speech.

3. Although § 441e does not currently apply to LPRs, the court's rationale would equally validate such a prohibition (or, as explained above, any restriction on political speech) as applied to them. Indeed, the very cases on which the court relied in constructing its (flawed) holding *involved* LPRs. *See Cabell*, 454 U.S. at 434; *Foley*, 435 U.S. at 292; *Sugarman*, 413 U.S. at 645. And so, on the court's interpretation of those cases, because LPRs may be barred from acts of "democratic self-government," their political speech may constitutionally be criminalized. This is hardly a hypothetical worry. The House of Representatives has in the past gone so far as to *adopt* proposals to extend § 441e to LPRs. *See* H. Amdt. 453 to H.R. 417 (106th Cong.); 148 Cong. Rec. H448 (Feb. 13, 2002). Those proposals are liable to resurface at any time.

While the district court protested that its decision should not be read as addressing the constitutionality of a ban on LPRs' campaign speech, App.22a, there is no principled way to read the opinion as doing anything else. Its precedent thus threatens the constitutional rights not only of refugees, asylees, and other nonpermanent residents like Appellants, but also of the more than 12 million LPRs currently residing in the United States. *See* Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2009* (Office of Immigration Statistics, Dep't of Homeland Security, Nov. 2010).

CONCLUSION

The Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

MICHAEL A. CARVIN
Counsel of Record
JACOB M. ROTH
WARREN D. POSTMAN
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Appellants

September 1, 2011

APPENDIX

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Benjamin Bluman and
Asenath Steiman,

Plaintiffs,

v.

Federal Election
Commission,

Defendant.

Civil No. 10-1766
(BMK)(RMU)(RMC)

(Three Judge Court)

[Filed: August 8, 2011]

Before: KAVANAUGH, Circuit Judge; URBINA,
District Judge; and COLLYER, District Judge.

MEMORANDUM OPINION

KAVANAUGH, Circuit Judge:

Plaintiffs are foreign citizens who temporarily live and work in the United States. They are neither U.S. citizens nor lawful permanent residents; rather, they are lawfully in the United States on temporary work visas. Although they are not U.S. citizens and are in this country only temporarily, plaintiffs want to participate in the U.S. campaign process. They seek to donate money to candidates in U.S. federal and

state elections, to contribute to national political parties and outside political groups, and to make expenditures expressly advocating for and against the election of candidates in U.S. elections. Plaintiffs are barred from doing so, however, by federal statute. See 2 U.S.C. § 441e(a).

In this suit, plaintiffs argue that the federal ban on their proposed activities is unconstitutional. Plaintiffs contend, in particular, that foreign citizens lawfully resident in the United States have a right under the First Amendment to the United States Constitution to contribute to candidates and political parties and to make express-advocacy expenditures. We respect the force of plaintiffs' arguments, as ably advanced by plaintiffs' counsel. Under the relevant Supreme Court precedents, however, we must disagree with plaintiffs' submission. The Supreme Court has long held that the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government in the United States. For example, the Supreme Court has ruled that the government may bar aliens from voting, serving as jurors, working as police or probation officers, or teaching at public schools. Under those precedents, the federal ban at issue here readily passes constitutional muster. We therefore grant the FEC's motion to dismiss plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6), and we deny plaintiffs' motion for summary judgment.¹

¹ In this opinion, we follow Supreme Court practice and use the terms "foreign citizen" and "alien" interchangeably to refer to individuals who are not citizens of the United States. As we use them here, those terms do not include individuals who are

LEGAL BACKGROUND

As political campaigns grew more expensive in the latter half of the 20th Century, especially with the advent of costly television advertising, money became more important to the campaign process - in terms of both contributions to candidates and political parties and expenditures advocating for or against candidates. As money became more important to the election process, concern grew that foreign entities and citizens might try to influence the outcome of U.S. elections. In 1966, Congress sought to limit foreign influence over American elections by prohibiting agents of foreign governments and entities from making contributions to candidates. See Pub. L. No. 89-486, § 8, 80 Stat. 244, 248-49 (1966). In 1974, Congress expanded that ban and barred contributions to candidates from all “foreign nationals,” defined as all foreign citizens except lawful permanent residents of the United States. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101 (d), 88 Stat. 1263, 1267.

But those restrictions did not eliminate the possibility of foreign citizens influencing American elections by, for example, soft-money donations to political parties as opposed to direct contributions to

(continued...)

dual citizens of a foreign country and the United States. The term “foreign national” is a statutory term of art and has a narrower scope: It covers foreign citizens except for lawful permanent residents of the United States. *See* 2 U.S.C. § 441e(b).

candidates. Activities by foreign citizens in the 1996 election cycle sparked public controversy and an extensive investigation by the Senate Committee on Governmental Affairs. The Committee found that foreign citizens had used soft-money contributions to political parties to essentially buy access to American political officials. *See* S. REP. No. 105-167, at 781-2710, 4619-5925 (1998). It also found that the Chinese government had made an effort to “influence U.S. policies and elections through, among other means, financing election campaigns.” *Id.* at 47; *see also id.* at 2501-12.

In response, Congress eventually passed and President George W. Bush signed legislation that, among many other things, strengthened the prohibition on foreign financial involvement in American elections. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96. This new Act expanded the ban on foreign nationals’ financial influence on elections by banning foreign nationals both from making expenditures and from making contributions to political parties, thus supplementing the pre-existing ban on foreign nationals making contributions to candidates.

The relevant provision of the statute as amended in 2002 reads:

(a) Prohibition

It shall be unlawful for-

- (1) a foreign national, directly or indirectly, to make-

(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;

(B) a contribution or donation to a committee of a political party; or

(C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 434(1)(3) of this title); or

(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.

2 U.S.C. § 441 e(a).² The statute continues to define “foreign national” to include all foreign citizens

² The statute as amended defines “contribution” as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office” or “the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.” 2 U.S.C. § 431 (8)(A). The statute as amended defines “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office” or any “written contract, promise, or agreement to make an expenditure.” *Id.* § 431(9)(A). An “independent expenditure” is “an expenditure by a person ... expressly advocating the election or defeat of a clearly identified candidate” that is not made in coordination with that candidate. *Id.* § 431(17).

except those who have been admitted as lawful permanent residents. *Id.* § 441e(b).

As relevant here, we interpret the statute to bar foreign nationals - that is, all foreign citizens except those who have been admitted as lawful permanent residents of the United States - from contributing to candidates or political parties; from making expenditures to expressly advocate the election or defeat of a political candidate; and from making donations to outside groups when those donations in turn would be used to make contributions to candidates or parties or to finance express-advocacy expenditures. *See generally FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). This statute, as we interpret it, does not bar foreign nationals from issue advocacy - that is, speech that does not expressly advocate the election or defeat of a specific candidate. The line between prohibited express-advocacy expenditures and permitted issue-advocacy expenditures for purposes of this statute is the line drawn by the Supreme Court in *Wisconsin Right to Life*: An express-advocacy expenditure is one that funds “express campaign speech” or its “functional equivalent.” 551 U.S. at 456 (controlling opinion of Roberts, C.J.). An advertisement is the “functional equivalent” of express advocacy if it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 469-70.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs in this suit - Benjamin Bluman and Asenath Steiman - are foreign citizens who live and work in the United States on temporary visas. Bluman is a Canadian citizen who has lawfully resided in the United States since November 2009 on a temporary work visa. From September 2006 to June 2009, he lawfully resided in the United States on a temporary student visa while attending law school. His current visa will allow him to stay in the country until November 2012, at which time he plans to apply for a second three-year term. He is an associate at a law firm in New York City.

Bluman wants to contribute to three candidates: Representative Jay Inslee of Washington; Diane Savino, a New York state senator; and President Obama. He also wants to print flyers supporting President Obama's reelection and to distribute them in Central Park.

Steiman is a dual citizen of Canada and Israel. She has a temporary visa authorizing her to live and work in the United States for a period of three years, through June 2012, but that term could be extended for up to seven years. She is a medical resident at a hospital in New York.

Steiman wants to contribute money to Senator Tom Coburn; a yet-to-be-determined candidate for the Republican nomination for President in 2012; the National Republican Senatorial Committee; and the Club for Growth, an independent organization that advocates with respect to certain issues and candidates.

All of plaintiffs' desired activities are barred by 2 U.S.C. § 441e(a) as amended in 2002.

Plaintiffs filed this complaint alleging that the statutory bar on their proposed activities violates the First Amendment to the United States Constitution. The Federal Election Commission moved to dismiss the suit for failure to state a claim. See FED. R. CIY. P. 12(b)(6). Plaintiffs moved for summary judgment.

DISCUSSION

I. Standard of Scrutiny

Political contributions and expenditures are acts of political expression and association protected by the First Amendment. According to plaintiffs, regulation of those activities therefore must meet First Amendment strict scrutiny standards. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The FEC counters that § 441e(a) manifests a congressional judgment on a matter of foreign affairs and national security, and is thus subject to deferential rational basis review. We think the question is somewhat more complex than either side suggests, not only because the statute implicates both the First Amendment and national security, but also because it includes both a limit on contributions and a limit on expenditures, which have traditionally been subject to different levels of First Amendment scrutiny. *See McConnell v. FEC*, 540 U.S. 93, 134-37 (2003); *Buckley*, 424 U.S. at 20-23, 44-45. But the debate over the level of scrutiny is ultimately not decisive here because we conclude that § 441e(a) passes muster even under strict scrutiny. Therefore,

we may assume for the sake of argument that § 441e(a)'s ban on political contributions and expenditures by foreign nationals is subject to strict scrutiny.

In order to pass muster under strict scrutiny, a statute must be narrowly tailored to advance a compelling government interest. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (controlling opinion of Roberts, C.J.). Plaintiffs contend that § 441e(a) cannot satisfy that exacting standard. We disagree.

II. The Merits

Over the last four decades, the First Amendment issues raised by campaign finance laws have been the subject of great debates involving all three branches of the national government. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976). This case does not implicate those debates. Rather, this case raises a preliminary and foundational question about the definition of the American political community and, in particular, the role of foreign citizens in the U.S. electoral process.

We know from more than a century of Supreme Court case law that foreign citizens in the United States enjoy many of the same constitutional rights that U.S. citizens do. For example, aliens are generally entitled to the same rights as U.S. citizens in the criminal process, among several other areas. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (aliens protected by the Constitution “when they have come within the territory of the United States and developed

substantial connections with this country”); *Plyler v. Doe*, 457 U.S. 202, 210-12 (1982) (illegal aliens protected by Equal Protection Clause in the context of public education); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (Fifth and Fourteenth Amendments protect all aliens within the jurisdiction of the United States, even those “whose presence in this country is unlawful, involuntary, or transitory,” from “deprivation of life, liberty, or property without due process of law”); *Sugarman v. Dougall*, 413 U.S. 634, 64 1-42 (1973) (aliens protected by Equal Protection Clause from exclusion from the state civil service); *In re Griffiths*, 413 U.S. 717, 719-20, 722 (1973) (resident alien protected by the Fourteenth Amendment in the context of admission to the bar); *Graham v. Richardson*, 403 U.S. 365, 371-77 (1971) (lawfully admitted resident aliens protected by Equal Protection Clause in the context of state welfare laws); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (illegal aliens already in the United States entitled to due process before deportation); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953) (lawful permanent resident alien protected by the Fifth Amendment in the context of expulsion and deportation); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens protected by the First Amendment in the context of deportation); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (.Just Compensation Clause of Fifth Amendment applies to foreign corporation); *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930) (protection of the Fourteenth Amendment extends to aliens in the context of contract dispute); *Truax v. Raich*, 239 U.S. 33, 39-40 (1915) (Equal Protection Clause protects resident aliens in the “conduct of ordinary

private enterprise”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (illegal alien protected by the Fifth and Sixth Amendments from “imprisonment at hard labor” without trial by jury before deportation); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (resident aliens protected by the Constitution “in regard to their rights of person and of property, and to their civil and criminal responsibility”); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-74 (1886) (resident aliens protected by the Fourteenth Amendment from discriminatory enforcement of public safety ordinances).

But we also know from Supreme Court case law that foreign citizens may be denied certain rights and privileges that U.S. citizens possess. For example, the Court has ruled that government may bar foreign citizens from voting, serving as jurors, working as police or probation officers, or working as public school teachers. *See Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a law barring foreign citizens from working as probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a law barring foreign citizens from teaching in public schools unless they intend to apply for citizenship); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding a law barring foreign citizens from serving as police officers); *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff’d* 426 U.S. 913 (1976) (upholding a law barring foreign citizens from serving as jurors); *Sugarman*, 413 U.S. at 648-49 (“citizenship is a permissible criterion for limiting” the “right to vote or to hold high public office”). The Court has further indicated that aliens’ First Amendment rights might be less robust than those of citizens in certain discrete areas. *See Harisiades v. Shaughnessy*, 342

U.S. 580, 591-92 (1952) (First Amendment does not protect aliens from deportation because of membership in the Communist Party). Beyond that, the Constitution itself of course bars foreign citizens from holding certain offices. See U.S. CONST. art. I, §§ 2, 3; U.S. CONST. art. II, § I.

In those many decisions, the Supreme Court has drawn a fairly clear line: The government may exclude foreign citizens from activities “intimately related to the process of democratic self-government.” *Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *see also Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991); *Cabell*, 454 U.S. at 439-40. As the Court has written, “a State’s historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign’s obligation to preserve the basic conception of a political community.” *Foley*, 435 U.S. at 295-96 (internal quotation marks and citation omitted). In other words, the government may reserve “participation in its democratic political institutions” for citizens of this country. *Id.* When reviewing a statute barring foreign citizens from serving as probation officers, the Court explained that the “exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but *a necessary consequence of the community’s process of political self-definition.*” *Cabell*, 454 U.S. at 439 (emphasis added). Upholding a statute barring aliens from teaching in public schools, the Court reasoned that the “distinction between citizens and aliens, though ordinarily irrelevant to private activity, is *fundamental to the definition and government of a State.* . . . It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have

wider latitude in limiting the participation of noncitizens.” *Ambach*, 441 U.S. at 75 (emphasis added). And in upholding a ban on aliens serving as police officers, the Court stated that, “although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.” *Foley*, 435 U.S. at 297.

We read these cases to set forth a straightforward principle: It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.

Applying the Supreme Court’s precedents, the question here is whether political contributions and express-advocacy expenditures - including donations to outside groups that in turn make contributions or express-advocacy expenditures, *see Emily’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) - constitute part of the process of democratic self-government. In our view, the answer to that question is straightforward: Political contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices. Political contributions and express-advocacy expenditures finance advertisements, get-out-the-vote drives, rallies, candidate speeches, and the myriad other activities

by which candidates appeal to potential voters. *See generally Buckley*, 424 U.S. at 14. We think it evident that those campaign activities are part of the overall process of democratic self-government. Moreover, it is undisputed that the government may bar foreign citizens from voting and serving as elected officers. *See Sugarman*, 413 U.S. at 647-49. It follows that the government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections. Those limitations on the activities of foreign citizens are of a piece and are all “part of the sovereign’s obligation to preserve the basic conception of a political community.” *Foley*, 435 U.S. at 295-96 (internal quotation marks omitted).³

Our task here is made simpler because the Supreme Court has deemed the activities of democratic self-government to include functions as unrelated to the electoral process as teaching in public schools and serving as police and probation officers. *See Cabell*, 454 U.S. at 444-47; *Ambach*, 441 U.S. at 75-81; *Foley*, 435 U.S. at 297-300. In our view, spending money to influence voters and finance campaigns is at least as (and probably far more)

³ We note that plaintiffs have not attempted to argue as a backup that they may have a right to make expenditures even if they do not have a right to make contributions. We think that a wise approach. The constitutional distinction between contributions and expenditures is based on the government’s anticorruption interest. *See Buckley*, 424 U.S. at 45-47. But that is not the governmental interest at stake in this case. Here, the government’s interest is in preventing foreign influence over U.S. elections.

closely related to democratic self-government than serving as a probation officer or public schoolteacher. Thus, our conclusion here follows almost *a fortiori* from those cases.

For their part, plaintiffs concede that the government may bar foreign citizens abroad from making contributions or express-advocacy expenditures in U.S. elections. They thus concede that the government may make distinctions based on the foreign identity of the speaker when the speaker is abroad. Plaintiffs contend, however, that the government may not impose the same restrictions on foreign citizens who are lawfully present in the United States on a temporary visa. We disagree.

Although the Supreme Court has never squarely addressed the issue presented in this case, the only four justices who spoke to the question in *Citizens United* indicated that the government obviously has the power to bar foreign nationals from making campaign contributions and expenditures. Justice Stevens wrote for those four justices:

The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.... Although we have not reviewed them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals. *See, e.g.*, 2 U.S.C. § 441 e(a)(1).... The Court all but confesses that a categorical approach to speaker identity is untenable when it acknowledges that Congress might be allowed to take measures aimed at “preventing foreign individuals or associations from

influencing our Nation's political process." *Ante*, at 911. Such measures have been a part of U.S. campaign finance law for many years. The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.

Citizens United, 130 S. Ct. at 945, 947, 948 n.51 (Stevens, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., concurring in part and dissenting in part) (internal quotation marks and footnotes omitted). For Justices Stevens, Ginsburg, Breyer, and Sotomayor, it was plain - indeed, beyond rational debate - that the government may bar foreign contributions and expenditures. To be sure, the other five Justices did not have occasion to expressly address this issue in *Citizens United*, but the majority's analysis in *Citizens United* certainly was not in conflict with Justice Stevens's conclusion on this particular question about foreign influence. Indeed, in our view, the majority opinion in *Citizens United* is entirely consistent with a ban on foreign contributions and expenditures. And we find the force of Justice Stevens's statement to be a telling and accurate indicator of where the Supreme Court's jurisprudence stands on the question of foreign contributions and expenditures.

Plaintiffs try in various ways to overcome the relevant Supreme Court precedents. First, they acknowledge that they do not have the right to vote in U.S. elections, but they contend that the right to

Speak about elections is different from the right to *participate* in elections. But in this case, that is not a clear dichotomy. When an expressive act is directly targeted at influencing the outcome of an election, it is both speech and participation in democratic self-government. Spending money to contribute to a candidate or party or to expressly advocate for or against the election of a political candidate is participating in the process of democratic self-government. Notably, § 441 e(a) as we interpret it, *see supra* pp. 4-5, does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues. It restrains them only from a certain form of expressive activity closely tied to the voting process providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (“speak[ing] on issues of general public interest” is a “quite different context” from “participation in a political campaign for election to public office”).

Plaintiffs further contend that § 441e(a)'s restrictions on contributions and expenditures cannot be justified by the longstanding ban on foreign citizens voting in U.S. elections because the statutory restrictions here are not tied to the right to vote. But that argument misunderstands the compelling interest that is at stake. The statute does not serve a compelling interest in limiting the participation of non-voters in the activities of democratic self-government; it serves the compelling interest of limiting the participation of non-Americans in the activities of democratic self-government. A statute that excludes foreign nationals from political

spending is therefore tailored to achieve that compelling interest.

Plaintiffs also point out that many groups of people who are not entitled to vote may nonetheless make contributions and expenditures related to elections - for example, minors, American corporations, and citizens of states or municipalities other than the state or municipality of the elective office. But minors, American corporations, and citizens of other states and municipalities are all members of the American political community. By contrast, the Supreme Court has said that “[a]liens are by definition those outside of this community.” *Cabell*, 454 U.S. at 439-40. The compelling interest that justifies Congress in restraining foreign nationals’ participation in American elections - namely, preventing foreign influence over the U.S. government - does not apply equally to minors, corporations, and citizens of other states and municipalities. It is long established that the government’s legislative and regulatory prerogatives are at their apex in matters pertaining to alienage. *See Mathews*, 426 U.S. at 79-80; *Harisiades*, 342 U.S. at 588-89. It is hardly surprising, therefore, that a law that is justified as applied to aliens may not be justified as applied to citizens of the United States, or entities made up of such citizens. Thus, the fact that those other non-voting groups of U.S. citizens are free to contribute and make expenditures does not mean that foreign nationals are similarly entitled.

Plaintiffs argue that the statute, as a measure designed to limit foreign influence over American self-government, is underinclusive and not narrowly tailored because it does not prohibit contributions

and expenditures by lawful permanent residents. But as Members of Congress stated when rejecting a proposal to include lawful permanent residents in § 441e(a)'s prohibition, *see, e.g.*, 148 Cong. Rec. H448-H450 (Feb. 13, 2002) (statements of Reps. Mink, Menendez, Reyes, Morella, and Solis), Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do. Lawful permanent residents have a long-term stake in the flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community. Indeed, at oral argument in this case, plaintiffs' counsel could not say that the two plaintiffs here ever want to become U.S. citizens, or to apply for lawful permanent residency. *See* Tr. of Oral Arg. at 19. Temporary resident foreign citizens by definition have primary loyalty to other national political communities, many of which have interests that compete with those of the United States. Apart from that, lawful permanent residents share important rights and obligations with citizens; for example, lawful permanent residents may - and do, in large numbers - serve in the United States military. In those two ways - their indefinite residence in the United States and their eligibility for military service - lawful permanent residents can be viewed as more similar to citizens than they are to temporary visitors, and thus Congress's decision to exclude them from the ban on foreign nationals' contributions and expenditures does not render the statute underinclusive. In fact, one might argue that Congress's carve-out for lawful permanent residents makes the statute more narrowly tailored to the

precise interest that it is designed to serve - namely, minimizing *foreign* participation in and influence over American self-government.

Plaintiffs further contend that the statute is underinclusive and not narrowly tailored because it permits foreign nationals to make contributions and expenditures related to ballot initiatives. But as the Supreme Court has stated, Congress may proceed piecemeal in an area such as this involving distinctions between citizens and aliens. *See Buckley*, 424 U.S. at 105 (noting the “familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind”) (internal quotations marks and citations omitted); *Mathews*, 426 U.S. at 82-84 (“Since it is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others.... When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment.”). Moreover, Congress could reasonably conclude that the risk of undue foreign influence is greater in the context of candidate elections than it is in the case of ballot initiatives. *Cf. Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299 (1981). Congress’s determination that foreign contributions and

expenditures pose a greater risk in relation to candidate elections than such activities pose in relation to ballot initiatives is a sensible one and, in our view, does not undermine the validity of the statutory ban on contributions and expenditures.

Plaintiffs also suggest that Congress's ban on foreign participation in the campaign process is the product of jingoistic sentiment in the United States Congress and thus should not be accepted by the courts. To begin with, Congress's most recent legislation on this issue was based on a factual record collected in the aftermath of the 1996 elections and Congress's genuine concern about foreign influences on U.S. elections. It bears mentioning, moreover, that plaintiffs' home countries - Israel and Canada - and many other democratic countries impose similar restraints on political spending by foreign citizens. *See, e.g.*, Canada Elections Act, 2000 S.C., c. 9 §§ 358, 404(1); Knesset Election Law (Consolidated Version), 5729-1969, 23 LSI 110 (5729- 1968/69), as amended; *see also* Tr. of Oral Arg. at 56-57. To be sure, the United States protects speech and expression more than most (perhaps more than all) foreign countries do, and U.S. courts should not be bound by foreign nations' practices when analyzing constitutional issues such as this. But as the examples of Canada and Israel help show, distinguishing citizens from non-citizens in this context is hardly unusual or deserving of scorn; rather, it is part of a common international understanding of the meaning of sovereignty and shared concern about foreign influence over elections.

For all of those reasons, we are ultimately unpersuaded by plaintiffs' submission.⁴ That said, we note three important limits to our holding in this case. First, we do not here decide whether Congress could constitutionally extend the current statutory ban to lawful permanent residents who have a more significant attachment to the United States than the temporary resident plaintiffs in this case. Any such extension would raise substantial questions not raised by this case. Second, we do not decide whether Congress could prohibit foreign nationals from engaging in speech other than contributions to candidates and parties, express-advocacy expenditures, and donations to outside groups to be used for contributions to candidates and parties and express-advocacy expenditures. Plaintiffs express concern, for example, that a ruling against them here would green-light Congress to impose bans on lobbying by aliens temporarily in this country. They similarly express concern that Congress might bar them from issue advocacy and speaking out on issues of public policy. Our holding does not address such questions, and our holding should not be read to support such bans. Third, we caution the government that seeking criminal penalties for violations of this provision - which requires that the defendant act "willfully," *see* 2 U.S.C. §§ 437g(a)(5)(C), 437g(d)(I)(A) - will require proof of the defendant's knowledge of the law. *See United States v. Moore*, 612 F.3d 698,

⁴ Our holding means, of course, that foreign corporations are likewise barred from making contributions and expenditures prohibited by 2 U.S.C. § 441e(a). Because this case concerns individuals, we have no occasion to analyze the circumstances under which a corporation may be considered a *foreign* corporation for purposes of First Amendment analysis.

702-04 (D.C. Cir. 2010) (Kavanaugh, J., concurring); *see also Staples v. United States*, 511 U.S. 600 (1994). There are many aliens in this country who no doubt are unaware of the statutory ban on foreign expenditures, in particular.

CONCLUSION

We grant the FEC's motion to dismiss, and we deny plaintiffs' motion for summary judgment.

This the 8th day of August, 2011.

/s/ BRETT M. KAVANAUGH
United States Circuit Judge

/s/ RICARDO M. URBINA
United States District Judge

/s/ ROSEMARY M. COLLYER
United States District Judge

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Benjamin Bluman and
Asenath Steiman,

Plaintiffs,

v.

Federal Election
Commission,

Defendant.

Civil No. 10-1766
(BMK)(RMU)(RMC)

(Three Judge Court)

[Filed: August 8, 2011]

ORDER AND FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion, it is this 8th day of August, 2011, hereby

ORDERED that Defendant Federal Election Commission's Motion To Dismiss [#15] is **GRANTED**; it is further

ORDERED that Plaintiffs' Motion for Summary Judgment [#19] is **DENIED**; and it is further

ORDERED that final judgment be entered for the defendant.

SO ORDERED.

/s/ BRETT M. KAVANAUGH
United States Circuit Judge

/s/ RICARDO M. URBINA
United States District Judge

/s/ ROSEMARY M. COLLYER
United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Benjamin Bluman, et al.,
Plaintiffs,

v.

Federal Election
Commission,

Civil Action
No. 10-1766
RMU-BMK-RMC

Defendant.

(Three Judge Court)

NOTICE OF APPEAL

[Filed: August 12, 2011]

NOTICE OF APPEAL

Pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 114 (“BCRA”), notice is given that Plaintiffs, Benjamin Bluman and Dr. Asenath Steiman, hereby appeal to the Supreme Court of the United States from the Order of the three-judge Court entered in this action on August 8, 2011, dismissing Plaintiffs’ Complaint and entering final judgment against them [Dkt. 36]. This notice is timely submitted within ten days of entry of the aforementioned Order. *See* BCRA § 403(a)(3).

27a

Dated: August 12, 2011

Respectfully submitted,

/s/ Jacob M. Roth

Jacob M. Roth (D.C. Bar No. 995090)

JONES DAY
51 Louisiana Avenue N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
yroth@jonesday.com

Counsel for Plaintiffs

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Benjamin Bluman, et al.,
Plaintiffs,

v.

Federal Election
Commission,

Civil Action
No. 10-1766
RMU-BMK-RMC

Defendant.

(Three Judge Court)

**CERTIFICATE OF
SERVICE**

[Filed: August 15, 2011]

CERTIFICATE OF SERVICE

This is to certify that on August 12, 2011, I caused a copy of Plaintiffs' Notice of Appeal [Dkt. No. 38] to be served by e-mail through this Court's Electronic Filing System, as well as by first-class mail, on the following persons:

Adav Noti (anoti@fec.gov)
David Brett Kolker (dkolker@fec.gov)
Kevin Deeley (kdeeley@fec.gov)
Steve Nicholas Hajjar (shajjar@fec.gov)
Federal Election Commission

999 E Street NW
Washington, DC 20436

I further certify that on August 12, 2011, I caused a copy of Plaintiffs' Notice of Appeal to be served by first-class mail on the following:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Dated: August 15, 2011

/s/ Jacob M. Roth

Jacob M. Roth (D.C. Bar No. 995090)

JONES DAY
51 Louisiana Avenue N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
yroth@jonesday.com

Counsel for Plaintiff